2003

Who Are the Real Victims of Child Pornography - After United States v. Sherman, the Answer Is Becoming Clear

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WHO ARE THE REAL VICTIMS OF CHILD PORNOGRAPHY?
AFTER UNITED STATES V. SHERMAN, THE ANSWER IS BECOMING CLEAR

I. INTRODUCTION

With the absence of any comprehensive federal sentencing guidelines prior to 1984, “unwarranted disparity” and “uncertainty” regarding the length of an offender’s imprisonment characterized sentencing in federal court. This disparity in sentencing was apparent both among and within different districts and circuits. As a result, in 1984 Congress created the United States Sentencing Commission to “promulgate and distribute to all courts of the United States[,] . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case . . . .” Thus, the United States Sentencing Guidelines (“Sentencing Guidelines”) went into effect in 1987 to “provide certainty and fairness in sentencing” and to “reduce unwarranted sentence disparities.”

One characteristic of the Sentencing Guidelines is “grouping,” which applies in certain cases for sentencing purposes. For example, a person convicted of multiple counts of a crime may receive an increased sentence unless the counts are grouped for sentencing purposes because they involve the same victim and harm. If shown that the multiple counts involve the same primary victim, then the counts may be grouped accordingly to prevent the sentence from increasing. Therefore, when determining if multiple-count convictions of related offenses should be grouped for sentencing pur-

2. See id. at 41 (describing varying results of Second Circuit study on judges’ proposed sentences under identical circumstances as “astounding”).
5. See U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 (2002) (describing circumstances in which multiple counts should be grouped as one).
7. See U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 cmt. 3 (listing examples of grouping which can prevent sentence from inappropriate increase).
poses, courts must first identify the primary victim of the particular crime.\(^8\) If the court cannot identify clearly the primary victim of the multiple counts, the primary victim is deemed to be society in general.\(^9\)

Circuit courts are split in determining the primary victim in crimes involving possessing, receiving, transporting, distributing, shipping, and reproducing child pornography under 18 U.S.C. §§ 2252 and 2252A.\(^10\) This Note examines the Seventh Circuit's decision in *United States v. Sherman*,\(^11\) which held that children portrayed in pornography are the direct victims of such offenses for sentencing purposes.\(^12\) Before *Sherman*, the Third, Fifth, Sixth,

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8. See id. § 3D1.2 cmt. 2 (providing there is generally "one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim").

9. See id. (listing drug and immigration offenses as examples of how society in general is primary victim).

10. See *United States v. Sherman*, 268 F.3d 539, 547 (7th Cir. 2001) (finding child depicted as primary victim of possessing, receiving, and distributing child pornography); *United States v. Tillmon*, 195 F.3d 640, 645 (11th Cir. 1999) (per curiam) (holding primary victim of transporting child pornography was child portrayed); *United States v. Norris*, 159 F.3d 926, 930 (5th Cir. 1998) (determining primary victim of receiving child pornography to be child portrayed); *United States v. Hibbler*, 159 F.3d 233, 237 (6th Cir. 1998) (ruling child portrayed as primary victim of possessing and distributing child pornography); *United States v. Boos*, 127 F.3d 1207, 1213 (9th Cir. 1997) (holding primary victim of distributing child pornography was child depicted); *United States v. Ketcham*, 80 F.3d 789, 793 (3d Cir. 1996) (finding child portrayed as primary victim of receiving, transporting, distributing, and recording child pornography); *United States v. Rugh*, 968 F.2d 750, 756 (8th Cir. 1992) (determining primary victim of receiving child pornography to be child depicted). But see *United States v. Toler*, 901 F.2d 399, 403 (4th Cir. 1990) (holding primary victim of transporting child pornography was society in general). Sections 2252 and 2252A are very similar statutes, and thus courts have made no distinction between them when determining the primary victims under these statutes. See 18 U.S.C. §§ 2252, 2252A (2000). Section 2252 criminalizes possessing, receiving, transporting, distributing, and shipping any visual depiction that was *produced* using a minor engaged in sexually explicit activity. See 18 U.S.C. § 2252. Section 2252A criminalizes possessing, receiving, transporting, distributing, shipping, and reproducing any *child pornography*. See 18 U.S.C. § 2252A. The definition of child pornography for purposes of § 2252A includes any visual depiction that "appears to be" or "conveys the impression" of a minor engaged in sexually explicit activity. See 18 U.S.C. § 2256(8)(B)-(D) (2000). Therefore, § 2252A includes computer-generated child pornography as well as sexually explicit depictions of adults made to look like children, and § 2252 does not. See id. For the full text of § 2256(8) and its definition of child pornography, see infra note 150 and accompanying text.

The Supreme Court, however, recently held that § 2256(8)(B) and § 2256(8)(D) were unconstitutionally overbroad because the definitions included speech, which was neither actual child pornography nor obscene, thus restricting lawful speech in violation of the First Amendment. See Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002).

11. 268 F.3d 539 (7th Cir. 2001).

12. See id. at 547-48.
Eighth, Ninth, and Eleventh Circuits also found that the children portrayed in pornography are the primary victims of such offenses, while the Fourth Circuit found that the primary victim is society in general.\(^\text{13}\)

Section II of this Note lays out the specific facts surrounding the *Sherman* case.\(^\text{14}\) Section III discusses the Sentencing Guidelines and the split in these seven judicial decisions leading up to *Sherman*.\(^\text{15}\) Section IV presents the majority and dissenting views in the *Sherman* opinion.\(^\text{16}\) Section V analyzes the reasoning of these majority and dissenting opinions.\(^\text{17}\) Finally, Section VI explores the likely impact of the Seventh Circuit's decision in *Sherman* and the dissent's possible ramifications.\(^\text{18}\)

## II. FACTS

In September of 1988, George Sherman mailed a videotape of minors engaged in sexually explicit activity to an individual in Ontario, Canada, with whom he had been corresponding.\(^\text{19}\) A letter accompanied the videotape stating: "Here's your tape. Hope you enjoy it[; w]here's the TAPE that you are sending me??"\(^\text{20}\) Canadian postal inspectors seized the letter and the tape, the subjects of Count One of the indictment against Sherman, charging him with knowingly mailing, transporting, and shipping child pornography in interstate or foreign commerce in violation of 18 U.S.C.

\(^{13}\) See Tillmon, 195 F.3d at 645 (finding primary victim of transporting child pornography was child portrayed); Norris, 159 F.3d at 930 (determining primary victim of receiving child pornography to be child portrayed); Hibbler, 159 F.3d at 237 (ruling child portrayed as primary victim of possessing and distributing child pornography); Boos, 127 F.3d at 1213 (holding primary victim of distributing child pornography was child depicted); Ketcham, 80 F.3d at 793 (finding child portrayed as primary victim of receiving, transporting, distributing, and recording child pornography); Rugh, 968 F.2d at 756 (determining primary victim of receiving child pornography to be child depicted); Toler, 901 F.2d at 403 (holding primary victim of transporting child pornography was society in general).

\(^{14}\) For a discussion of the relevant facts in *Sherman*, see infra notes 19-32 and accompanying text.

\(^{15}\) For a discussion of the Sentencing Guidelines and the split in judicial authority leading up to *Sherman*, see infra notes 33-130 and accompanying text.

\(^{16}\) For a discussion of the majority and dissenting opinions in *Sherman*, see infra notes 131-59 and accompanying text.

\(^{17}\) For a discussion of criticisms of the *Sherman* court's analysis, see infra notes 160-93 and accompanying text.

\(^{18}\) For a discussion of the likely impact of the *Sherman* court's decision, see infra notes 194-204 and accompanying text.

\(^{19}\) See United States v. Sherman, 268 F.3d 539, 540 (7th Cir. 2001). Approximately seventy percent of the six-hour videotape depicted minors involved in "sexually explicit activity." See id.

\(^{20}\) Id.
§ 2252A(a)(1). 21 Canadian postal inspectors further alerted the United States Customs Service, which conducted a search of Sherman's Chicago apartment in 1998 and recovered eight more videotapes containing "sexually explicit" images of children. 22 This seizure eventually resulted in Count Two of the indictment against Sherman, charging him with knowingly possessing pornographic materials that had been mailed, transported, and shipped in interstate or foreign commerce in violation of 18 U.S.C. § 2252A(a)(5)(B). 23

The Federal Bureau of Investigation (FBI), also apprised of Sherman's conduct, asked the United States Postal Service to investigate Sherman's involvement in child pornography. 24 At the FBI's request, an agent of the Postal Inspection Service mailed a letter to Sherman as being from "Lou and Ann," the fictitious owners of an adult film business, "Foreign Films Etcetera," specializing in visual materials "very much outside the norm." 25 The postal agent's contact initiated a series of letters back and forth until Sherman received a brochure from the fictitious business. 26 From the descriptions given in the brochure, Sherman ordered a video containing sexually explicit activity of two boys between the ages of twelve and fifteen and a photo set of boys between the ages of eight and fifteen engaged in sexually explicit activity. 27 Sherman also filled out a survey marking as his sexual interests "chickenhawk" and "incest," and writing "young underage" on a blank line for special requests. 28 Sherman further indicated an interest in buying and trading materials, and he was warned expressly by the fictitious

21. See id. at 540-41 (describing search eventually leading to Count One of indictment against Sherman).

22. See id. at 541 (identifying evidence recovered by United States authorities).

23. See id.

24. See Sherman, 268 F.3d at 541. The origin of the FBI's suspicion of Sherman's activity is unknown except that it was independent of the investigations by either the United States Customs Service or Canadian officials. See id.

25. See id. (describing postal agent's introduction to Sherman).

26. See id.

27. See id. The videotape Sherman ordered was titled "Boys-3," and the photo set was titled "Chicken for Hire." See id.

28. See id. According to the court, "chickenhawk" is "a category of pornography involving older adult males who have a sexual interest in very young or underage males. The young or underage males are referred to as 'chickens,' while the older men are 'hawks.'" Id. n.1; see also Steve Baldwin, Child Molestation and the Homosexual Movement, 14 REGENT U. L. REV. 267, 277 (2002) (noting boys are known as "chickens" and customers as "chickenhawks").
"Lou and Ann" that some of the material that they sold was "very illegal."29

In March 1999, the postal agent delivered the materials that Sherman ordered, at which time Sherman signed a receipt and accepted the package containing the materials.30 When authorities later conducted a search of Sherman's apartment, they found the videotape and the photo set that Sherman had ordered, a duplicate that Sherman had made of the videotape, and numerous other videotapes containing images of underage males engaged in sexually explicit activity.31 As a result, the authorities arrested Sherman, leading to Count Three of the indictment, charging him with knowingly receiving child pornography that had been mailed, shipped, and transported in interstate or foreign commerce in violation of 18 U.S.C. § 2252A(a)(2)(A).32

III. BACKGROUND

A. The United States Sentencing Guidelines

The Sentencing Guidelines provide a base offense level for each particular crime.33 This level can increase or decrease with the presence of specific characteristics of the offense or because of circumstances related to the particular defendant.34 This base of-

29. See Sherman, 268 F.3d at 541.
30. See id. (describing exchange between defendant and agent leading to search of Sherman's apartment).
31. See id. The opened photo set was found under the cushion of Sherman's living room chair, and the videotape and its duplicate were found in Sherman's oven. See id.
32. See id. Sherman pleaded guilty to Count Three and stipulated to the conduct in Counts One and Two. See id. at 541-42.
33. See U.S. SENTENCING GUIDELINES MANUAL (2002); see also United States Sentencing Commission, supra note 6. The Sentencing Guidelines provide forty-three base offense levels depending on the seriousness of the crime. See U.S. SENTENCING GUIDELINES MANUAL (2002); see also United States Sentencing Commission, supra note 6. The more serious the crime committed, the higher the base offense level. See U.S. SENTENCING GUIDELINES MANUAL (2002); see also United States Sentencing Commission, supra note 6.
34. See United States Sentencing Commission, supra note 6. The base level for robbery, for example, can increase from five to seven levels depending on whether a gun was used and whether it was displayed or discharged during the robbery. See id. Similarly, the base level for crimes involving possessing, receiving, transporting, distributing, or shipping child pornography will increase by four levels "if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence." United States v. Walton, 255 F.3d 437, 438 (7th Cir. 2001) (quoting U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(3)). Furthermore, the following factors specific to the individual defendant are considered: age, education, vocational skills, mental and emotional condition, physical condition, previous employment record, family and community ties, role in the offense, criminal
fense level also can be affected if the defendant has been convicted of multiple counts of an offense. Further, this level can be modified depending on whether the offender accepts responsibility for the crime. Moreover, each offender is assigned a criminal history category number between one and six based on his or her past criminal record. The final determination of the offense level corresponds to the criminal history category on a sentencing chart that provides a range of possible sentences a judge may impose at his or her discretion.

As previously noted, multiple counts can increase the base offense level and thus the severity of the sentence. The defendant may prevent this multi-count enhancement only when the multiple counts can be grouped as one under section 3D1.2 of the Sentencing Guidelines. Section 3D1.2 provides that multiple “counts involving substantially the same harm shall be grouped together into a single Group.” Counts are considered substantially the same when they “involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.” The commentary to this
guideline states that in most offenses "there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim." For offenses without an identifiable victim, the primary victim for purposes of grouping under section 3D1.2(b) of the Sentencing Guidelines is society in general. "In such cases, the counts are grouped together" for sentencing purposes "when the societal interests that are harmed are closely related." Therefore, in determining whether multiple offenses should be grouped, courts must decide if society in general is the primary victim of the defendant's offenses or if there are certain identifiable victims of the defendant's offenses. More specifically, in cases involving defendants convicted of multiple counts under 18 U.S.C. §§ 2252 and 2252A, which make it a crime to possess, receive, transport, distribute, ship, or reproduce child pornography, courts must decide whether society is the primary victim of the defendant's offenses or whether the minors depicted in the pornography are the primary victims.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Id. § 3D1.2(a), (c), (d).

43.  Id. § 3D1.2 cmt. 2.

44. See id. (listing drug and immigration offenses as examples of offenses with society as victim).

45. U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 cmt. 2 (offering examples of closely related societal interests). "Where one count . . . involves unlawfully entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the societal interest harmed (the interests protected by laws governing immigration) are closely related." Id.

46. See United States v. Butler, 92 F.3d 960, 963-64 (9th Cir. 1996) (holding grouping not appropriate when crime involved fictitious victims because those victims were identifiable); United States v. Rugh, 968 F.2d 750, 755 (8th Cir. 1992) (finding grouping appropriate when multiple counts involve same victim and same act or transaction).

47. See United States v. Tillmon, 195 F.3d 640, 643 (11th Cir. 1999) (per curiam) (noting court's task to determine whether society in general or minor depicted was primary victim of defendant's crime).
B. Judicial Decisions

Circuits have split on the issue of identifying the primary victim in cases involving violations of 18 U.S.C. §§ 2252 and 2252A. Of those confronting this issue, only one circuit has held that society in general is the primary victim; the other circuits that have heard the issue have determined the primary victim was the child depicted.

The Fourth Circuit was the first to consider this issue in United States v. Toler, holding that society in general was the primary victim of a violation of 18 U.S.C. § 2252A. Toler, the defendant, was charged and convicted on three counts: Count One, transporting child pornography from Florida to West Virginia; Count Two, transporting a minor from Florida to West Virginia with the intent to engage in sexual conduct; and Count Three, transporting a minor from West Virginia to Ohio with the intent to engage in sexual conduct. The child involved in each count was Toler's twelve-year-old stepdaughter. Toler contended that because both Counts One and Two occurred on the interstate trip from Florida to West Virginia and because his stepdaughter was the victim of both counts, his offenses should be grouped under section 3D1.2(a) of the Sentencing Guidelines as involving the same victim and thus the same harm. The court found that the primary interest to be protected


49. See Tillmon, 195 F.3d at 645 (finding that primary victim of transporting child pornography was child portrayed); United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1998) (determining primary victim of receiving child pornography to be child portrayed); United States v. Hibbler, 159 F.3d 233, 237 (6th Cir. 1998) (ruling child portrayed as primary victim of possessing and distributing child pornography); United States v. Boos, 127 F.3d 1207, 1213 (9th Cir. 1997) (holding that primary victim of distributing child pornography was child depicted); United States v. Ketcham, 80 F.3d 789, 793 (3d Cir. 1996) (finding child portrayed as primary victim of receiving, transporting, distributing, and recording child pornography); United States v. Rugh, 968 F.2d 750, 756 (8th Cir. 1992) (determining primary victim of receiving child pornography to be child depicted); United States v. Toler, 901 F.2d 399, 403 (4th Cir. 1990) (holding that primary victim of transporting child pornography was society in general).

50. 901 F.2d 399 (4th Cir. 1990).

51. See id. at 403.

52. See id. at 400. Count One was a violation of 18 U.S.C. § 2252A, and Counts Two and Three were violations of 18 U.S.C. § 2423. See id.

53. See id. A search of Toler's car turned up twelve pornographic photos of his stepdaughter. See id.

54. See id. at 403. Toler did not argue that Count Three should be grouped as well because Count Three, involving Toler's trip from West Virginia to Ohio, did not involve "the same act or transaction" as Counts One and Two. See id. at 403 n.4 (quoting U.S. SENTENCING GUIDELINES MANUAL § 3D1.2(a) (1987)). For a discus-
under Count Two was the individual victimized minor, Toler's step-daughter.\textsuperscript{55} In contrast, the court found that the primary interest protected under Count One was society in general, and the child depicted in the pornography was a secondary victim.\textsuperscript{56} Therefore, Toler's offenses were not grouped and his resulting sentence was longer than it would have been had the court grouped the offenses.\textsuperscript{57} Since \textit{Toler}, every other circuit to consider the issue has held to the contrary and has found the primary victim under 18 U.S.C. §§ 2252 and 2252A to be the individual child depicted, not society in general.\textsuperscript{58}

In \textit{United States v. Rugh},\textsuperscript{59} the Eighth Circuit also weighed in on the issue and departed from \textit{Toler} in holding that the primary victim of an 18 U.S.C. § 2252 violation was the child depicted in the pornographic material.\textsuperscript{60} Rugh was charged and convicted on two counts of receiving child pornography through the mail in violation of 18 U.S.C. § 2252(a)(2).\textsuperscript{61} Rugh contended that his two counts

\begin{footnotesize}
\begin{enumerate}
\item[55.] See \textit{Toler}, 901 F.2d at 403.
\item[56.] See \textit{id.} In its reasoning, the court relied primarily on the report that "expresses the fear that unless the dissemination of child pornography is checked, it could contribute to a continuing cycle of child abuse." \textit{Id.} at 403 n.5 (citing S. Rep. No. 95-438, at 5-9 (1977), \textit{reprinted in} 1978 U.S.C.C.A.N. 40, 43-46). Further, the court noted, "[t]he use of children as prostitutes or as the subjects of pornographic materials is very harmful to both the children and the society as a whole." \textit{Id.} (quoting S. Rep. No. 95-438, at 5).
\item[57.] See \textit{id.} at 403. Because Counts One and Two were not grouped, Toler's offenses fell within the sentencing guideline range of thirty-seven to forty-six months, and Toler received a sentence of forty-six months. \textit{See id.} Had Counts One and Two been grouped, the sentencing range would have been reduced to a range of thirty-three to forty-one months. \textit{See id.}
\item[58.] See United States v. Tillmon, 195 F.3d 640, 645 (11th Cir. 1999) (per curiam) (finding that primary victim of transporting child pornography was child portrayed); United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1998) (determining primary victim of receiving child pornography to be child portrayed); United States v. Hibbler, 159 F.3d 233, 237 (6th Cir. 1998) (ruling child portrayed as primary victim of possessing and distributing child pornography); United States v. Boos, 127 F.3d 1207, 1213 (9th Cir. 1997) (holding that primary victim of distributing child pornography was child depicted); United States v. Ketcham, 80 F.3d 789, 793 (3d Cir. 1996) (finding child portrayed as primary victim of receiving, transporting, distributing, and recording child pornography); United States v. Rugh, 968 F.2d 750, 756 (8th Cir. 1992) (determining primary victim of receiving child pornography to be child depicted).
\item[59.] 968 F.2d 750 (8th Cir. 1992).
\item[60.] See \textit{id.} at 756.
\item[61.] See \textit{id.} at 753 (reviewing charges and procedural posture of case). The two counts were the result of Rugh's receipt of pornographic pictures of children on two separate occasions, each depicting different children. \textit{See id.} at 755. The first picture was received on February 22, 1990, and the second was received on March 10, 1990. \textit{See id.}
\end{enumerate}
\end{footnotesize}
should be grouped together for sentencing purposes under section 3D1.2 of the Sentencing Guidelines because each count involved the same primary victim. Relying on the Fourth Circuit in *Toler*, Rugh argued that although different children were depicted in these pictures, the primary victim of his offense was society in general and the individual children were only secondary victims.

The Eighth Circuit rejected the Fourth Circuit's analysis in *Toler*. Instead, the court noted that although Congress expressed concerns on the societal effects of child pornography in enacting 18 U.S.C. § 2252, its primary concern was for the children depicted in the pornography. In particular, the court cited the Senate Report on 18 U.S.C. § 2252, which detailed the harms to the individual children involved in child pornography. The court noted:

>[S]uch encounters cannot help but have a deep psychological, humiliating impact on these youngsters and jeopardize the possibility of healthy, affectionate relationships in the future. Indeed, such children often grow up in an adult life of drugs and prostitution . . . [and] tend to become child molesters themselves, thus continuing the vicious cycle.

Thus, the court concluded that the children depicted were the primary victims of Rugh's crime under the statute. Accordingly, the court refused to group Rugh's counts, and the district court's sentence of a fifteen-month imprisonment was affirmed.

62. See id. For a discussion of section 3D1.2 of the Sentencing Guidelines, see supra notes 33-45 and accompanying text.

63. See Rugh, 968 F.2d at 755 (citing *Toler*, 901 F.2d at 403). For a discussion of the Fourth Circuit's analysis in *Toler*, see supra notes 50-57 and accompanying text.

64. See Rugh, 968 F.2d at 755-56 (explaining how secondary effect on society at large does not diminish child's depiction as primary victim).

65. See id. at 755 (noting child as primary victim and society as secondary victim).

66. See id.


68. See id.

69. See Rugh, 968 F.2d at 756. Because the offenses were not grouped, Rugh's sentencing range was fifteen to twenty-one months. See id. at 755. Had the offenses been grouped, Rugh's sentencing range would have been ten to sixteen months. See id. The district court found that the dispute over identifying the primary victim of such offenses was not significant and imposed a fifteen-month sentence that corresponded to both guideline ranges. See id. The Eighth Circuit, however, found that the dispute was not "moot" because the district court did not state if it would have imposed the same sentence whether the offenses were
In *United States v. Ketcham*, the Third Circuit was also "not persuaded by the Fourth Circuit's . . . conclusion in [Toler]" and held that the primary victim of an 18 U.S.C. § 2252 offense was the child depicted. Ketcham was charged and pleaded guilty to four counts in violation of 18 U.S.C. § 2252 involving possessing, receiving, transporting, distributing, shipping, and reproducing child pornography. The child pornography in each count depicted different children. Like Rugh, Ketcham asserted that the four counts should be grouped for sentencing purposes under section 3D1.1 of the Sentencing Guidelines because they all involved the same victim—society in general.

Citing the legislative history of 18 U.S.C. § 2252, the court rejected Ketcham's grouping argument, noting that in enacting the statute, Congress had "a deep and abiding concern for the health and welfare of the children and youth of the United States." The court further stated, "[t]his is not a statute where there is no identifiable victim. The fact that a criminal statute in a general sense protects society as a whole cannot suffice to make society the primary victim. Were this the case, society would be the primary victim of nearly every criminal statute." Ultimately, the court concluded that the primary victims of an 18 U.S.C. § 2252 offense are the children depicted in the pornography and upheld the district court's ruling that grouping Ketcham's offenses was inappropriate.

70. See id. (citing United States v. Khang, 904 F.2d 1219, 1225 (8th Cir. 1990)).
71. Id. at 793 n.9. For a discussion of the Fourth Circuit's analysis in Toler, see supra notes 50-57 and accompanying text.
72. See Ketcham, 80 F.3d at 791. Ketcham pleaded guilty to the following specific violations: § 2252(a)(1), transporting child pornography in interstate commerce (Count Three); § 2252(a)(2), receiving, distributing, and reproducing child pornography that had been shipped in interstate commerce (Counts Four and Five); and § 2252(a)(4)(B), possessing child pornography that had been shipped in interstate commerce (Count Six). See id. Ketcham denied any involvement in the production of child pornography. See id.
73. See id. at 792. The pornographic materials included both pictures and film. See id.
74. See id. at 790. Ketcham did concede that if the children depicted were the victims of his offenses, then grouping was not appropriate. See id. at 792. For a discussion of the Eighth Circuit's decision in Rugh, see supra notes 59-69 and accompanying text. For a discussion of section 3D1.2 of the Sentencing Guidelines, see supra notes 33-45 and accompanying text.
76. Id. (inferring certain crimes have both primary and secondary victims).
77. See id. Ketcham acknowledged that the primary victims of producing child pornography under § 2251 are the children depicted and argued that the victims of his crimes under § 2252 were distinguishable. See id. The court noted,
The Ninth Circuit was next to hear the issue in United States v. Boos, determining that the primary victim of the 18 U.S.C. § 2252 violation was the child depicted. In November 1995, Boos pleaded guilty to seven counts of distributing child pornography in violation of 18 U.S.C. § 2252(a)(1). The seven counts each involved separate pictures of different children. On appeal, Boos contended that the seven counts should be grouped for sentencing purposes under section 3D1.2 of the Sentencing Guidelines because they involved the same victim, society in general. Moreover, Boos argued that society has an interest in preserving its "moral fabric" and in protecting future generations of children from the abuses of child pornography.

In its decision, the court relied on the definition of the word "victim" provided for in Application Note 2 to section 3D1.2 of the Sentencing Guidelines. The court concluded that "a common-sense reading of the Note strongly suggests" those most affected by child pornography, and thus the identifiable victims, are the children depicted. The court drew a distinction from "victimless" offenses mentioned in the Note, such as drug and immigration offenses, in which the harm produced is spread evenly throughout.

however, that by enacting § 2252, Congress was seeking to discourage production by depriving would-be producers of a market. See id. Thus, "[t]he primary objective of both § 2251 and § 2252 is . . . the same—to protect children from exploitation by producers of child pornography—and the victims of both sections are, accordingly, the same." Id.; see also Vincent Lodato, Note, Computer-Generated Child Pornography—Exposing Prejudice in Our First Amendment Jurisprudence?, 28 SETON HALL L. REV. 1328, 1363-64 n.184 (1998) (discussing Ketcham court’s conclusion that purpose of criminalizing child pornography is to protect children, not society).

78. 127 F.3d 1207 (9th Cir. 1997).
79. See id. at 1213 (affirming district court’s decision not to group Boos’s counts).
80. See id. at 1209. Before entering a guilty plea, Boos was indicted on one count of conspiring to distribute or to receive child pornography in violation of 18 U.S.C. § 371, twenty-one counts of distributing child pornography in violation of § 2252(a)(1), and three counts of receiving child pornography in violation of § 2252(a)(2). See id. at 1208.
81. See id. at 1209.
82. See id. The district court concluded that grouping should not apply because the seven counts involved different children and therefore different offenses. See id. The decision not to group the seven counts resulted in Boos's offense level being raised to a sentencing range of thirty to thirty-seven months. See id. Boos was sentenced to thirty months. See id.
83. See Boos, 127 F.3d at 1209 (setting forth Boos’s argument that society is harmed due to "proliferation" of child pornography).
84. See id. For a discussion of Application Note 2 to section 3D1.2 of the Sentencing Guidelines and its definition of "victim," see supra notes 33-45 and accompanying text.
85. Boos, 127 F.3d at 1210.
society. In contrast, the court noted that "distribution of child pornography . . . is visited upon a single individual or discrete group of individuals, namely, the child or children used in the production of the pornographic material." The court also used the Webster's dictionary definition of "victim" to show that it is the children depicted who are both physically and psychologically injured as a result of the pornographer's conduct.

The court further concluded that when Congress enacted 18 U.S.C. § 2252, it considered the children depicted to be the primary victims of the offense. The court stated that "[a]ccording to the Senate Report, the statute was born out of 'a deep and abiding concern for the health and welfare of the children and youth of the United States,' and was enacted in order 'to protect and benefit such children.' Further, the court noted that the Senate Report referred to "child pornography as a 'form of child abuse'" and "the children involved as 'child victims' and 'boy victims.'" The Ninth Circuit became the first circuit to cite to related Supreme Court precedent for the proposition that the distribution of child pornog-

86. See id. For a discussion of Application Note 2 to section 3D1.2 of the Sentencing Guidelines and its treatment of "victimless" offenses, see supra notes 43-45 and accompanying text.

87. Boos, 127 F.3d at 1210; see also Lodato, supra note 77, at 1363 (explaining Congress's primary purpose in criminalizing child pornography "is, and should be," to protect children linked to pornography's production, and not to protect society in general).

88. See Boos, 127 F.3d at 1210. The dictionary definition of "victim" referred to by the court was "one that is acted on and usually adversely affected by a force or agent . . . [;] one that is injured, destroyed, or sacrificed under any of various conditions . . . [;] one that is subjected to oppression, hardship, or mistreatment . . . [;] one that is tricked or duped . . . " Id. (emphasis added) (quoting Webster's Ninth New Collegiate Dictionary 1314 (1986)). Applying this definition, the court found:

1) It was the children depicted—and not society at large—who were "acted on" and "adversely affected," who oftentimes were "forced" to participate in the production of the pornography in which Boos traded, who were "injured" (both physically and psychologically) as a result of Boos's patronage of the porn industry, who were "sacrificed" to satisfy Boos's curiosities, who were "subjected" to the cruelest form of "oppression, hardship, [and] mistreatment" at the hands of pornography producers and photographers, and whose lives were quite possibly "destroyed" in the process.

Id.

89. See id.

90. Id. at 1211 (quoting S. Rep. No. 95-438, at 41 (1977), reprinted in 1978 U.S.C.C.A.N. 40, 43). Boos made only a single cite to the Senate Report in support of his argument, stating that the use of children in child pornography "is very harmful to both children and society as a whole." Id. (quoting S. Rep. No. 95-438, at 40). The court noted, however, that this statement undermined Boos's argument rather than supported it because it simply recognized a dual harm to society and to the child depicted. See id.

ography was “intrinsically related to the sexual abuse of children. . . . [T]he materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”92 The Commentary to the Application Notes, the ordinary definition of the term “victim,” the legislative history behind 18 U.S.C. § 2252, and related Supreme Court precedent all led the court to “hold that it is the children depicted—not society at large—who are the primary ‘victims’ of the crime of distributing child pornography.”93

In United States v. Hibbler,94 the Sixth Circuit sided with the growing number of circuits disagreeing with Toler to hold that the children depicted are the primary victims under 18 U.S.C. § 2252.95 Hibbler was found guilty on seven counts of shipping child pornography in violation of 18 U.S.C. § 2252(a)(1) and one count of possessing child pornography in violation of 18 U.S.C. § 2252(a)(4).96 Each of the seven counts of the shipping charge involved sexually


93. Boos, 127 F.3d at 1213.

94. 159 F.3d 233 (6th Cir. 1998).

95. See id. at 237.

96. See id. at 236. Hibbler was charged in a seventeen-count indictment that included:


Id. at 235-36. Hibbler was convicted on eight counts—seven counts of shipping and one count of possessing—but was acquitted of the other nine counts. See id. at 236.
explicit images depicting different children. See id. at 237.

87. See id. at 237.

88. See id. (noting society in general as primary victim only when no identifiable victim). For a discussion of the Third Circuit’s analysis in Ketcham, see supra notes 70-77 and accompanying text. For a discussion of the Ninth Circuit’s analysis in Boos, see supra notes 78-93 and accompanying text.

89. See Hibbler, 159 F.3d at 237 (citing United States v. Ketcham, 80 F.3d 789, 792-93 (3d Cir. 1996)). For a discussion of Application Note 2 to section 3D1.2 of the Sentencing Guidelines and its definition of “victim,” see supra notes 43-45 and accompanying text.

90. See Hibbler, 159 F.3d at 237 (citing Boos, 127 F.3d at 1210).

91. Id. (quoting Boos, 127 F.3d at 1210).

92. See id. (citing Boos, 127 F.3d at 1211). In determining that the legislative history of § 2252 “clearly considered” the children depicted to be the primary victims of the offense, the Boos court relied on the report to § 2252, which stated that “of deep concern to the Committee is the effect of child pornography . . . on the children who become involved . . . . Such encounters cannot help but have a deep psychological, humiliating impact on these youngsters and jeopardize the possibility of healthy, affectionate relationships in the future.” Boos, 127 F.3d at 1211 (quoting S. Rep. No. 95-438, at 46 (1977), reprinted in 1978 U.S.C.C.A.N. 40, 44).

93. See Hibbler, 159 F.3d at 237 (refusing to group Hibbler’s counts).

94. 159 F.3d 926 (5th Cir. 1998).

95. See id. at 931 (affirming district court’s determination that children depicted were primary victims).
§ 2252(a)(2). As a result, the district court sentenced Norris to a seventy-eight-month imprisonment. On appeal, Norris contended that the district court erred by refusing to group his offenses under section 3D1.2 of the Sentencing Guidelines. Norris argued that when he committed the crime of receiving child pornography, the children depicted were not victimized during that specific act, but rather when the pornographic material was produced. According to Norris, the crime of receiving child pornography is a victimless crime in which the children depicted can be only secondary or indirect victims.

The Fifth Circuit rejected Norris's view, noting that "the 'victimization' of the children involved does not end when the pornographer's camera is put away." The court then outlined three ways in which the consumer or end-recipient of child pornography can cause the children depicted in such pornography to suffer harm as a result of that person's actions. First, the court noted that "[t]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." Therefore, "[t]he consumer who 'merely' or 'passively' receives or possesses child pornography directly contributes to this continuing victimization." Second, the court noted that "the mere existence of child pornography represents an invasion of the...

106. See id. at 927. In addition to the ten counts of receiving child pornography, Norris was indicted on one count of possessing child pornography in violation of § 2252(a)(4)(B). See id. Pursuant to a plea agreement, Norris pleaded guilty to the ten counts of receiving, and the one count of possessing was dropped. See id.

107. See id. at 928.

108. See id. The United States probation officer originally recommended grouping the ten counts and imposing a total offense level of eighteen and a criminal history category of I, which would have carried an imprisonment range of twenty-one to thirty-three months. See id. In response to a request by the district court, however, the probation office prepared a new report rescinding the grouping analysis, and a five level increase was added to Norris's total offense level to account for his multiple convictions. See id. at 928. Further, a four-level increase was added to Norris's total offense level because the pornographic items he received depicted acts of violence. See id. As a result, Norris's total offense level increased nine levels to twenty-seven, resulting in an imprisonment range of seventy to eighty-seven months. See id.

109. See Norris, 159 F.3d at 929.

110. See id. (discussing defendant's argument that no children were victimized by act of receiving child pornography).

111. Id.; see also Shouvlin, supra note 92, at 545 (noting child must live with knowledge that depiction is circulating throughout public).

112. Norris, 159 F.3d at 929 (emphasis added) (quoting New York v. Ferber, 458 U.S. 747, 759 (1982)). For further authority supporting this proposition, see supra note 92.

113. Norris, 159 F.3d at 930.
privacy of the child depicted."

Citing the Supreme Court and the Congressional Record, the court explained that the distribution of child pornography violates "the [child's] individual interests in . . . disclosure of personal matters" and "invades the child's privacy and reputational interests." Third, the recipients or consumers of child pornography victimize the children depicted by enabling and supporting the continued production of child pornography, which entails continuous direct abuse and victimization of child subjects. The court found no sense in distinguishing between the producers and consumers of child pornography because neither could exist without the other. The court concluded, therefore, that the victims of the crime of receiving child pornography are the children depicted.

In United States v. Tillmon, the Eleventh Circuit joined the other circuits that rejected Toler to hold that the primary victims under 18 U.S.C. §§ 2252 and 2252A are the individual children depicted, not society in general. The defendant, Tillmon, pleaded guilty to three counts of transporting child pornography in violation of 18 U.S.C. § 2252(a)(1). The district court refused to group Tillmon's three counts of child pornography, each of which depicted a different child, and sentenced him to an eighty-seven-month imprisonment. On appeal, Tillmon relied on the Fourth Circuit's interpretation of the legislative history of 18 U.S.C. § 2252 in Toler to argue that the primary victim of his three counts was
society in general and not the individual children depicted. \(^{124}\) Tillmon also attempted to distinguish his crime of transportation of child pornography from the crime of producing child pornography. \(^{125}\) In so doing, Tillmon contended that although the minors depicted were victimized when the pornography was produced, the minors were not harmed further when the pornography was transported across state lines. \(^{126}\) In response, the court sided with the other circuits that rejected \(Toler\) to conclude that the legislative history of 18 U.S.C. § 2252 makes it clear that the statute's purpose is to lessen the harm suffered by children. \(^{127}\) The court also sided with the other circuits that rejected the defendant's attempts to distinguish between the victims of the production of child pornography and the victims of the dissemination of child pornography. \(^{128}\) The court acknowledged that the child may be more "immediately" harmed by the child pornography's production, yet the court concluded that "the dissemination of that material certainly exacerbates that harm, not only by constituting a continuing invasion of privacy but by providing the very market that led to the creation of the images in the first place." \(^{129}\) As a result, the court held that the primary identifiable victim of the crime of transporting child pornography was the child depicted in the image. \(^{130}\)

IV. Narrative Analysis

George Sherman's conviction on charges of possessing, receiving, and shipping child pornography in interstate commerce gave the Seventh Circuit its first opportunity to determine whether the

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124. See id. at 643. For a discussion of the Fourth Circuit's interpretation of the legislative history of § 2252 in \(Toler\), see supra note 56 and accompanying text.

125. See \(Tillmon\), 195 F.3d at 644 (discussing defendant's argument that "dissemination" of child pornography primarily offends society).

126. See id. (noting defendant's argument that child depicted was not affected most directly or seriously).

127. See id. at 643-44 (citing United States v. Boos, 127 F.3d 1207, 1213 (9th Cir. 1997); United States v. Ketcham, 80 F.3d 789, 793 (3d Cir. 1996); United States v. Rugh, 968 F.2d 750, 755 (8th Cir. 1992)); see also \(Lodato\), supra note 77, at 1347 n.87 ("[C]ongress' [sic] primary and sole objective in prohibiting child pornography is to protect the children who are victimized when the material is created ... .")

128. See \(Tillmon\), 195 F.3d at 644.

129. Id. (citing United States v. Norris, 159 F.3d 926, 929 (5th Cir. 1998); Boos, 127 F.3d at 1211 n.1; \(Ketcham\), 80 F.3d at 793); see also Child Pornography Prevention Act of 1996, Pub. L. 104-208, § 121, 110 Stat. 3009-26 (1996) (providing creation or distribution of child pornography invades child's privacy and reputational interests); Whalen v. Roe, 429 U.S. 589, 599 (1977) (noting child's "individual interest in avoiding disclosure of personal matters").

130. See \(Tillmon\), 195 F.3d at 645.
primary victims of such crimes are the children depicted or society in general. With its decision, the majority aligned itself with the six other circuits that held that the primary victims of such crimes were the children depicted. In his dissent, however, Judge Posner aligned himself with the Fourth Circuit, the only circuit to hold that the primary victim of such crimes was society in general.

At trial, Sherman contended that his three counts should be grouped because "victim" under section 3D1.2 of the Sentencing Guidelines "does not include secondary or indirect victims . . . and that for the crimes of shipping, possessing, and receiving child pornography, the main victim is society" at large and the children depicted are only secondary victims. Although Sherman conceded that the children depicted in his case were the primary victims of crimes involving the production of child pornography, he contended that his "passive viewing" caused the depicted children no additional harm. At trial, the district court rejected Sherman's argument that his counts should be grouped and imposed a thirty-month sentence.

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131. See United States v. Sherman, 268 F.3d 539, 542 (7th Cir. 2001) (noting case of first impression and responsibility to identify primary victim of possessing, receiving, and shipping child pornography).

132. See id. at 550.

133. See id. at 550-52 (Posner, J., dissenting).

134. Id. at 541.

135. See id.

136. See Sherman, 268 F.3d at 541. In refusing to group Sherman's counts, the district court "focused on the so-called market[-]maker theory of victimization . . . [,] believ[ing that] Sherman [indirectly] harmed these children by creating a market demand for the production of child pornography." Id. at 546. The district court concluded that no one would produce child pornography if no one would buy it. See id. Sherman contended that the district court's focus on the indirect harm caused by the market-maker theory of victimization gave insufficient evidence for refusing to group his counts because the government failed to show "that Sherman's desire to watch [child] pornography encouraged the production of" the specific material that he possessed. See id. The Seventh Circuit took issue with the district court's reliance on the market-maker theory in that it "provides only an indirect link between a particular child used in the production of [the child] pornography and a later purchaser or possessor of the material" when section 3D1.2 of the Sentencing Guidelines requires the identification of a "primary" or "direct" victim. See id. The court noted that "the market[-]maker theory is a thin reed on which to rest the grouping decision" because it "precludes the consideration of indirect harm," and therefore the court did not rest its decision on this theory. See id.
A. The Seventh Favors the Six, Not the One

On appeal, the Seventh Circuit affirmed the district court’s refusal to group Sherman’s counts for sentencing purposes. In doing so, the Seventh Circuit joined the six other circuits to hold the primary victims of crimes under 18 U.S.C. §§ 2252 and 2252A involving possessing, receiving, transporting, distributing, shipping, and reproducing child pornography are the children depicted. Relying on the rationale expressed by related Supreme Court precedent in *New York v. Ferber*, the court premised its holding on the theory that “[t]he possession, receipt and shipping of child pornography directly victimizes the children portrayed by violating their right to privacy, and in particular violating their individual interest in avoiding the disclosure of personal matters.” In support of its theory, the court noted:

Because the child’s actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.

Also, the court found that children suffer severe emotional problems “from a fear of exposure and the tension of keeping the abuse secret.”

137. See id. at 550 (holding child depicted as primary victim of possessing, receiving, and distributing child pornography).

138. See United States v. Tillmon, 195 F.3d 640, 645 (11th Cir. 1999) (per curiam) (finding that primary victim of transporting child pornography was child portrayed); United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1998) (determining primary victim of receiving child pornography to be child portrayed); United States v. Hibbler, 159 F.3d 233, 237 (6th Cir. 1998) (ruling child portrayed as primary victim of possessing and distributing child pornography); United States v. Boos, 127 F.3d 1207, 1215 (9th Cir. 1997) (holding that primary victim of distributing child pornography was child depicted); United States v. Ketcham, 80 F.3d 789, 793 (3d Cir. 1996) (finding child portrayed as primary victim of receiving, transporting, distributing, and recording child pornography); United States v. Rugh, 968 F.2d 750, 756 (8th Cir. 1992) (determining primary victim of receiving child pornography to be child depicted). But see United States v. Toler, 901 F.2d 399, 403 (4th Cir. 1990) (holding that primary victim of transporting child pornography was society in general).


140. Sherman, 268 F.3d at 547 (citing Ferber, 458 U.S. at 759 n.10).

141. Id. (quoting Ferber, 458 U.S. at 759 n.10). For additional authority supporting this proposition, see supra note 92 and accompanying text.

142. Sherman, 268 F.3d at 547 (citing Ferber, 458 U.S. at 759 n.10).
Further, the court noted that "one of the main reasons for criminalizing the 'mere' possession of child pornography is to create an incentive for the possessor to destroy the material and alleviate some of these harms to the children depicted." As a result, the Seventh Circuit concluded that although "society at large is also a victim of these crimes, the primary, identifiable victim is the child portrayed, who must live with the knowledge that adults . . . can pull out a picture or watch a video that has recorded the abuse of that child at any time."

**B. Judge Posner Agrees with the One, Not the Six**

In his dissent, Judge Posner voiced the only judicial objection since *Toler* to the conclusion that the primary victim under an 18 U.S.C. § 2252A offense is the child depicted. In doing so, Judge Posner explained three reasons to support his contention that the primary victim of an 18 U.S.C. § 2252A violation is society in general. First, he concluded "that the offense in [18 U.S.C.] § 2252 is more like a drug offense than it is like such offenses as murder and robbery," which clearly have an identifiable primary victim.

143. *Id.* (citing Osborne v. Ohio, 495 U.S. 103, 111 (1990); United States v. Richardson, 238 F.3d 837, 839 (7th Cir. 2001)). The court relied on the Supreme Court's statement in *Osborne* that "[t]he State's ban on possession and viewing encourages the possessors of these materials to destroy them." *Id.* (quoting *Osborne*, 495 U.S. at 111). The court also relied on the *Richardson* court's statement that "[c]oncern with the welfare of the children who are used to create pornography is part of the public concern over child pornography, . . . and this makes the receiver a greater malefactor than the possessor." *Id.* (quoting *Richardson*, 238 F.3d at 839); *see also* Child Pornography Prevention Act of 1996, Pub. L. 104-208, § 121, 110 Stat. 3009-26 (1996) (describing how punishing end-recipient of child pornography lessens harm to child by encouraging possessor to destroy material and eliminates market for material).


145. *See id.* at 550-52 (Posner, J., dissenting); *see also* United States v. Tillmon, 195 F.3d 640, 645 (11th Cir. 1999) (per curiam) (lacking dissenting opinion); United States v. Norris, 159 F.3d 926, 931 (5th Cir. 1998) (showing no dissent); United States v. Hibbler, 159 F.3d 233, 238 (6th Cir. 1998) (Merritt, J., concurring in part, dissenting in part) (dissenting from different part of holding); United States v. Boos, 127 F.3d 1207, 1211 (9th Cir. 1997) (showing no dissenting opinion); United States v. Ketcham, 80 F.3d 789, 796 (3d Cir. 1996) (lacking dissent); United States v. Rugh, 968 F.2d 750, 756 (8th Cir. 1992) (indicating no dissent from holdings that children depicted are primary victims of § 2252 violations).

Judge Posner believed it was important that the whole court hear the case because it "consider[ed] why child pornography, [which has been] a growing subject of federal criminal prosecution, has been criminalized." *Sherman*, 268 F.3d at 550 (Posner, J., dissenting).


147. *Id.* at 551 (Posner, J., dissenting). The Sentencing Guidelines list drug and immigration offenses as examples of crimes having society in general as the primary victim. *See U.S. SENTENCING GUIDELINES MANUAL* § 3D1.2 cmt. 2 (2002).
According to Judge Posner, although society in general is the primary concern of drug and immigration offenses, identifiable secondary victims are involved often in these offenses and are not to be considered in deciding whether the offenses should be grouped. Thus, even though children "may be degraded, exploited, and therefore victimized" by being depicted in child pornography, "they are not the primary victims."

Second, Judge Posner noted that Congress amended the definition of child pornography under 18 U.S.C. § 2252A clearly to include pornography created by realistic computer simulations or with adult models made to look like children. With this amendment, Congress did not proscribe a lighter sentence for crimes that do not involve children. In fact, "the sentencing provisions are

148. See Sherman, 268 F.3d at 551 (Posner, J., dissenting). Judge Posner noted that drug offenses have identifiable secondary victims such as "the 'mules' who die when the bags of cocaine that they've swallowed burst, the wives and girlfriends who are roped into assisting their husbands or boyfriends in the drug trade, the drug dealers killed in gang wars, and the addicts who turn to selling drugs to support their habit." Id. (Posner, J., dissenting). Judge Posner pointed out, however, that the primary concern in criminalizing drug offenses is not with these victims, "but with the consumption of the drugs and with the entire range of consequences thought to flow from that consumption." Id. (Posner, J., dissenting). Judge Posner noted:

Similarly many illegal immigrants are abused, sometimes even enslaved, by employers or by the traffickers in illegal immigrants, but the chief concern behind the restrictions on immigration is not with those unfortunate but with the effect of unrestricted immigration on citizen employment, on crime, and on welfare and other government programs.

149. Id. (Posner, J., dissenting).

150. See id. (Posner, J., dissenting) (describing Congress's clear intent to include pornography without child victims). The statute defines "child pornography" for purposes of § 2252A 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

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct;

or

(D) such visual depiction is 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[.]


the same regardless of whether children were used.”

Further, Posner pointed out that the Senate Report states that “computer-generated child pornography poses the same threat to the well-being of children as photographic child pornography” because they both incite child molestation. He believed that this statement would be meaningless if the victims of child pornography were the children depicted in the explicit images. Based on the parallel concerns expressed by the statute and the report regarding computer-generated and actual pornography, Judge Posner concluded that the primary concern of child pornography is that it “incites child molestation.” Therefore, he felt that it could be inferred that the primary victim is not the child depicted, but “the child seduced or molested by a pedophile stimulated by such pornography” as well as “the adult population.”

The final point of the dissent was that grouping multiple counts of child pornography under section 3D1.2 of the Sentencing Guidelines is necessary to prevent “absurd” results. Referring to United States v. Richardson, a case involving 70,000 separate sexually explicit images of minors that were downloaded by the defendant, Judge Posner questioned whether there would be 70,000 victims if a different child were depicted in each image. If so, he


The effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetites [and] the danger to children who are seduced and molested with the aid of child sex pictures [are] just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of un-retouched photographic images of actual children engaging in sexually explicit conduct.


156. Id. (Posner, J., dissenting).


158. 238 F.3d 837 (7th Cir. 2001).

159. See Sherman, 268 F.3d at 552 (Posner, J., dissenting) (citing Richardson, 238 F.3d at 839). Posner’s question is only hypothetical because in Richardson, the 70,000 images did not depict different children. See Richardson, 238 F.3d at 839.
believed "[t]he result would be the imposition in many and perhaps most cases of the maximum statutory penalty[.]")

V. CRITICAL ANALYSIS

Eight circuits have addressed the issue of identifying the primary victim of child pornography. With its decision, the Seventh Circuit became the seventh court of appeals that has determined the primary victims of crimes under 18 U.S.C. §§ 2252 and 2252A to be the children depicted. The majority, citing related Supreme Court precedent, premised its holding solely on the "main rationale" that "[t]he possession, receipt and shipping of child pornography directly victimizes the children portrayed by violating their right to privacy, and in particular violating their individual interest.

160. Sherman, 268 F.3d at 552 (Posner, J., dissenting). The maximum penalty for a violation of § 2252A(a) (1)-(4) is fifteen years if the defendant is not a recidivist and thirty years if the defendant is a recidivist. See 18 U.S.C. § 2252A(b)(1) (2000). Posner conceded that "extra counts can never require the addition of more than five additional offense levels." Sherman, 268 F.3d at 552 (Posner, J., dissenting). Posner based his reasoning on the fact that the background notes to the guidelines indicate that when a crime involves additional victims, the sentencing judge may impose a longer sentence than the one provided for by the guidelines. See id. (Posner, J., dissenting).

161. See Sherman, 268 F.3d at 539, 547 (holding child depicted as primary victim of possessing, receiving, and distributing child pornography); United States v. Tillmon, 195 F.3d 640, 645 (11th Cir. 1999) (per curiam) (finding that primary victim of transporting child pornography was child portrayed); United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1998) (determining primary victim of receiving child pornography to be child portrayed); United States v. Hibbler, 159 F.3d 233, 237 (6th Cir. 1998) (ruling child portrayed as primary victim of possessing and distributing child pornography); United States v. Boos, 127 F.3d 1207, 1215 (9th Cir. 1997) (holding that primary victim of distributing child pornography was child depicted); United States v. Ketcham, 80 F.3d 789, 793 (3d Cir. 1996) (finding child portrayed as primary victim of receiving, transporting, distributing, and recording child pornography); United States v. Rugh, 968 F.2d 750, 756 (8th Cir. 1992) (determining primary victim of receiving child pornography to be child depicted); United States v. Toler, 901 F.2d 399, 403 (4th Cir. 1990) (holding that primary victim of transporting child pornography was society in general).

162. See Sherman, 268 F.3d at 539, 547 (holding child depicted as primary victim of possessing, receiving, and distributing child pornography); United States v. Tillmon, 195 F.3d 640, 645 (11th Cir. 1999) (per curiam) (finding that primary victim of transporting child pornography was child portrayed); United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1998) (determining primary victim of receiving child pornography to be child portrayed); United States v. Hibbler, 159 F.3d 233, 237 (6th Cir. 1998) (ruling child portrayed as primary victim of possessing and distributing child pornography); United States v. Boos, 127 F.3d 1207, 1215 (9th Cir. 1997) (holding that primary victim of distributing child pornography was child depicted); United States v. Ketcham, 80 F.3d 789, 793 (3d Cir. 1996) (finding child portrayed as primary victim of receiving, transporting, distributing, and recording child pornography); United States v. Rugh, 968 F.2d 750, 756 (8th Cir. 1992) (determining primary victim of receiving child pornography to be child depicted).
in avoiding the disclosure of personal matters."163 Given Judge Posner's strong dissent, the majority should have gone further.164

In his dissent, Judge Posner articulated three main rationales for concluding that the primary victim of such crimes is society in general.165 In fact, his opinion is the only judicial analysis since the Fourth Circuit in Toler to conclude this way.166 Moreover, the Fourth Circuit in Toler failed to articulate fully the reasons that led to its conclusion, thus making Judge Posner's dissent the sole voice expounding this interpretation of the primary victim of child pornography.167 In spite of this, the majority never addressed directly any of the dissent's three rationales. Because the overwhelming weight of the court favored the position that the primary victim was the child depicted, the majority should have addressed and rebutted Posner's dissent.168

The majority should have addressed the dissent's argument that child pornography offenses are similar to the drug and immigration offenses listed in the Application Note 2 to section 3D1.2 of the Sentencing Guidelines, which states that the primary victim of such offenses is society in general.169 Although the Sherman majority never directly addressed this argument, the Ninth and Sixth Circuits did make a distinction.170 The Ninth Circuit categorized the drug and immigration offenses of the Application Note as "victimless" crimes because the harm they produce is spread evenly

163. Sherman, 268 F.3d at 547 (citing New York v. Ferber, 458 U.S. 747, 759 n.10 (1982)). In its opinion, the court did outline the different reasoning relied on by the other circuits to decide the issue, but it presented only the "right to privacy" argument, which it called the "main rationale." See id. at 542-45 (discussing other circuits' holdings and reasoning). Three other circuits also incorporated this "right to privacy" argument into their reasoning. See Tillmon, 195 F.3d at 644; Norris, 159 F.3d at 929-30; Boos, 127 F.3d at 1211.

164. For a discussion of Judge Posner's dissent, see supra notes 145-60 and accompanying text.


166. See Anglin, supra note 48, at 1104 n.79 (describing Judge Posner's dissent as lone objection since Toler).

167. See id. at 1105 ("[O]ne wishes the [Toler] court had explained more clearly the process by which it reached . . . [its] conclusion.").

168. See Sherman, 268 F.3d at 542 (noting circuit split heavily favors child depicted as primary victim). Although the majority did not directly discuss the three main rationales expressed by the dissent, it did indirectly discuss one of them when detailing the Ninth Circuit's analysis in Boos. See id. at 544. This rationale indirectly discussed and rebuffed the dissent's view that drug and immigration offenses are similar to child pornography offenses. See id.

169. For a discussion of the dissent's argument that such offenses are similar, see supra notes 147-49 and accompanying text.

170. See United States v. Hibbler, 159 F.3d 233, 237 (6th Cir. 1998); United States v. Boos, 127 F.3d 1207, 1210 (9th Cir. 1997).
throughout society. The Ninth Circuit described the harm caused by child pornography as concentrated in that it “is visited upon a single individual or discrete group of individuals, namely the child or children used in the production of the pornographic material.” The Ninth Circuit also noted that child pornographers cannot be analogized to drug users, who are their own victims, because child pornographers victimize children, not themselves. The Sixth Circuit adopted this reasoning, stating that the “child pornographer, quite simply, directly victimizes the children pictured in such material. One need not know the child’s name to verify this fact.” Therefore, although the Seventh Circuit did not address the dissent’s argument directly on this point, at least two other circuits addressed it previously.

The majority also should have addressed the dissent’s contention that failing to group crimes involving child pornography would often produce absurd results. While Sherman did not address this contention directly either, it is unlikely that scenarios like the one described by the Richardson dissent, which involved downloading over 70,000 separate images of child pornography, would produce absurd results because under section 3D1.4 of the Sentencing Guidelines, extra counts can never require the addition of more than five additional offense levels. According to the Background Note of this section, the sentencing judge can depart upward from the guideline if there are additional victims. For the dissent to say, however, that the result would be in “many and perhaps most cases” the imposition of the statutory maximum penalty is an overstatement. In actuality, situations in which the sentencing range is inadequate are rare. Further, numerous amendments over the

171. See Boos, 127 F.3d at 1210.
172. Id.
173. See id.
174. Hibbler, 159 F.3d at 237.
175. See id. (discussing how drug and immigration offenses differ from child pornography offenses); Boos, 127 F.3d at 1210 (addressing differences from drug and immigration offenses).
176. For a discussion of the dissent’s argument that failing to group such offenses would often lead to absurd results, see supra notes 157-60 and accompanying text.
180. See U.S. Sentencing Guidelines Manual § 3D1.4 (“Situations in which there will be inadequate scope for ensuring appropriate additional punishment . . . are likely to be unusual and can be handled by departure from the guidelines.”);
years reflect the growing national concern regarding crimes involving child pornography as well as Congress's desire to inflict harsh sentences upon these pornographers. The only reference the majority made to these parallel concerns was to Boos and its determination that children are the direct victims of crimes under 18 U.S.C. § 2423(b), which criminalizes “interstate travel” for the purpose of engaging in sexual activity with a child even if the child involved is not real.

In Boos, however, Boos's appeal cited to United States v. Butler, a Ninth Circuit case that involved fictional characters that were created by the police as part of a sting operation. The defendant in Butler attempted to engage in sexual acts with specific juvenile victims and would have done so had the victims been available. The Butler court noted that “attempts are treated the same as completed criminal acts” and concluded that violating section 2423 is a crime against specific individuals, not society in general. In contrast, the dissent in Sherman spoke of computer-simulated child pornography as opposed to fictional children created by police. Therefore, under the Ninth Circuit's analysis in Butler, to victimize children directly using computer-simulated child pornography under 18 U.S.C. § 2252A, the defendant

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see also Sherman, 268 F.3d at 552 (Posner, J., dissenting) (citing no authority imposing such "absurd" sentences).


183. See Sherman, 268 F.3d at 545 (citing United States v. Boos, 127 F.3d 1207, 1212 (9th Cir. 1997)).

184. 92 F.3d 960 (9th Cir. 1996).

185. See Boos, 127 F.3d at 1212 (citing Butler, 92 F.3d at 964).

186. See Butler, 92 F.3d at 963-64.

187. Id. at 964 (holding grouping not appropriate in instant case).

188. See Sherman, 268 F.3d at 552-53 (Posner, J., dissenting) (describing report's assessment that computer-simulated and actual child pornography pose identical "threat" to child).
would have to attempt to possess, receive, transport, distribute, or ship actual child pornography, but fail by instead possessing, receiving, transporting, distributing, or shipping computer-simulated material the defendant thought contained actual child pornography.\textsuperscript{189} It seems that this would occur in limited situations.

Although it appears that the dissent made a strong argument that was never dealt with directly by the majority or any other circuit, the Supreme Court seemed to weaken this argument in the recent decision of Ashcroft v. Free Speech Coalition.\textsuperscript{190} In Free Speech Coalition, the Court determined that the prohibitions of 18 U.S.C. § 2256(8)(B) and (D) were overbroad and unconstitutional.\textsuperscript{191} Further, the Court rejected the government's contention that the provisions of the statute should be upheld because computer-simulated child pornography and pornography depicting adults made to look like children incites illegal conduct.\textsuperscript{192} Therefore, Judge Posner's argument regarding the parallel concerns expressed by the statute and by Congress is undermined by the Supreme Court's recent decision.\textsuperscript{193}

VI. IMPACT

With the decision in Sherman, seven of eight circuits have sided with the government to hold that the primary victims of possessing, receiving, transporting, distributing, shipping, and reproducing child pornography are the children depicted.\textsuperscript{194} The only judicial

\textsuperscript{189}. See Butler, 92 F.3d at 964 (noting attempts are treated identical to completed crimes).

\textsuperscript{190}. 535 U.S. 234 (2002).

\textsuperscript{191}. See id. at 258 (describing how provisions restrict substantial amount of permitted speech). For the full text of § 2256(8), including the unconstitutional provisions, see \textit{supra} note 150.

\textsuperscript{192}. See Free Speech Coalition, 535 U.S. at 253 ("[M]ere tendency of speech to encourage unlawful acts is not sufficient reason for banning it.").

\textsuperscript{193}. For a discussion of the dissent's parallel concerns argument, see \textit{supra} notes 150-56 and accompanying text. Without resolving the primary victim issue, the Supreme Court effectively distinguished actual child pornography from computer-simulated child pornography and pornography involving adults made to look like children. See Free Speech Coalition, 535 U.S. at 239-58.

\textsuperscript{194}. See United States v. Sherman, 268 F.3d 539, 547 (7th Cir. 2001) (holding child depicted as primary victim of possessing, receiving, and distributing child pornography); United States v. Tillmon, 195 F.3d 640, 645 (11th Cir. 1999) (per curiam) (finding that primary victim of transporting child pornography was child portrayed); United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1998) (determining primary victim of receiving child pornography to be child portrayed); United States v. Hibbler, 159 F.3d 233, 237 (6th Cir. 1998) (ruling child portrayed as primary victim of possessing and distributing child pornography); United States v. Boos, 127 F.3d 1207, 1213 (9th Cir. 1997) (holding that primary victim of distribut-
In light of this lopsided split to which Sherman contributed, the Toler court’s unique decision, holding society in general to be the primary victim, becomes even less persuasive. In light of this lopsided split to which Sherman contributed, the Toler court’s unique decision, holding society in general to be the primary victim, becomes even less persuasive. The Fourth Circuit was the first to weigh in on the issue and thus had no guidance from the other circuits. Further, as previously noted, the Fourth Circuit did not articulate its reasoning for holding the way that it did. Moreover, while no other circuits have addressed the issue since Sherman, the Seventh Circuit has reaffirmed its holding in at least one other decision. As a result, this all bodes well for the

ing child pornography was child depicted); United States v. Ketcham, 80 F.3d 789, 793 (3d Cir. 1996) (finding child portrayed as primary victim of receiving, transporting, distributing, and recording child pornography); United States v. Rugh, 968 F.2d 750, 756 (8th Cir. 1992) (determining primary victim of receiving child pornography to be child depicted); United States v. Toler, 901 F.2d 399, 403 (4th Cir. 1990) (holding that primary victim of transporting child pornography was society in general).

195. For a discussion of the decision in Toler, see supra notes 50-57 and accompanying text. For a discussion of Judge Posner’s dissent in Sherman, see supra notes 145-60 and accompanying text.

196. See United States v. Walton, 255 F.3d 437, 443 (7th Cir. 2001) (declaring compelling reasons needed to overturn circuit precedent).

197. See Sherman, 268 F.3d at 542 (noting Fourth Circuit as first to address issue).

198. See Toler, 901 F.2d at 403 (relying on small portion of report to conclude society in general to be primary victim); see also Anglin, supra note 48, at 1105 (“[O]ne wishes the [Toler] court had explained more clearly the process by which it reached . . . [its] conclusion.”). Note that if the Fourth Circuit had concluded the other way (that the child depicted was the primary victim), then Toler’s counts would have been grouped resulting in a lesser sentence. See id.

Recall that in Toler, the defendant attempted to have one count of transportation of a minor with the intent to engage in prohibited sexual conduct in violation of 18 U.S.C. § 2423, grouped with one count of transporting child pornography in violation of 18 U.S.C. § 2252A, and both involving the same victim, his twelve-year-old stepdaughter. See id. The stepdaughter was arguably the primary victim of a § 2423 violation, but because the court found that the primary victim of the § 2252A violation was society in general, Toler’s counts were not grouped. See id. Given the desire to impose harsh sentences upon child pornographers, it is possible that the Fourth Circuit ruled the way it did to avoid grouping and sentenced Toler within the thirty-seven to forty-six month guideline range, as opposed to the thirty-three to forty-one month range. See id.

199. See United States v. Shutic, 274 F.3d 1123, 1126 (7th Cir. 2001) (indicating agreement “with the holding in Sherman that the primary victims in child pornography are the children depicted”). In Shutic, the defendant attempted to have his two counts of transporting and shipping child pornography in interstate commerce via computer, in violation of § 2252A(a)(1), grouped as involving society in general as the primary victim. See id. at 1124. In its decision, the court noted “[w]e need not spend much time discussing Shutic’s argument because we recently addressed precisely [this] issue . . . [in Sherman].” Id. at 1126.
government's position that the children portrayed are the primary victims of child pornography.200

The dissent, however, did articulate three reasons for concluding that society in general should be the primary victim under 18 U.S.C. §§ 2252 and 2252A that the majority never directly addressed.201 One of the arguments that the dissent made was not very compelling.202 A second argument was addressed directly by the Ninth and Sixth Circuits.203 The dissent's other argument, which seemed to make a valid point that was not addressed directly by the majority in Sherman or any other circuit, appears undermined by the Supreme Court's recent ruling in Free Speech Coalition.204 As a result, the arguments for grouping are becoming slim for child pornographers.

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200. See Walton, 255 F.3d at 443 (declaring compelling reasons needed to overturn circuit precedent).

201. For a discussion of Judge Posner's dissent, see supra notes 145-60 and accompanying text.

202. For a discussion of this argument, see supra notes 157-60 and accompanying text.

203. For a discussion of this rationale addressed by the Ninth and Sixth Circuits, see supra notes 147-49 and accompanying text.

204. For a discussion of this rationale, see supra notes 150-56 and accompanying text.