Objectives

After this session, you will be able to:

- Describe how child pornography cases are treated under various sentencing schemes
- Identify factors considered in child pornography sentencing decisions regarding incarceration
- Describe debates regarding the prescribed penalties for child pornography offenses
- Discuss basic procedural considerations for sentencing decision making in such cases

Key Questions in Sentencing

- Why do we punish?
- Who has the power and discretion?
- What factors into decisions?
- How are sentencing and punishment decisions made?
Sentencing Schemes
- Determinate vs. Indeterminate sentencing
- Structured sentencing vs. Broad discretion

Sentencing Issues
- In or Out decision
  - Incarceration justified? Mandated?
- Length of incarceration
  - How much is enough?
- Concurrent or consecutive sentences
- Multiplicity
- Restitution
- Victim impact statements

Sentencing Interests in Tension
- Fit the crime
- Fit the offender
- Individualize justice
  - Discretion
- Avoid disparity; achieve uniformity & consistency
  - Structured sentencing / limits on discretion
Selected Sentencing Factors

- Offense conduct – Seriousness
  - Victim ages, other characteristics
  - Use of computer technology
  - Number of images
  - All “relevant conduct”?

Selected Sentencing Factors

- Offender characteristics
  - Criminal history
  - Acceptance of responsibility
  - Showing or lack of remorse
  - Cooperation with government
  - Immutable characteristics? (age, intelligence, physique, mental condition, etc.)
  - Social context?
  - Post-crime actions, conduct?

Purposes?

- Deterrence? – prevention
  - General? – promote respect for the law
  - Specific? – deter the individual
- Rehabilitation? – needed treatment or care
- Incapacitation? – protect the public
- Retribution? – just punishment
- Restoration? – make victims whole, etc.
- Education? – reflect seriousness
Stated purposes

- Statutes
  - ABA Standards for Criminal Justice (1994)
    - Legislature should consider, among purposes
      - Foster respect for law and deter criminal conduct
      - Incapacitate offenders
      - Punish offenders
      - Provide restitution or reparation to victims
      - Rehabilitate offenders
    - Determination is basically a legislative function

Stated purposes

- Federal
  - 18 United States Code 3553

- States
  - Ex: Tennessee Code 40-35-102

  Note the "parsimony provision" in the federal statute. What does it mean?

18 U.S.C. 3553(a)

- Factors to be considered in imposing a sentence
- "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth"
- Shall consider
  - Nature and circumstances of offense
  - History and characteristics of defendant
18 U.S.C. 3553(a)(2)

- Shall consider
  - Need for sentence to
    - Reflect seriousness of offense, promote respect for law, and provide just punishment
    - Afford adequate deterrence
    - Protect public from further crimes by defendant
    - Provide def. needed training, medical care, or other correctional treatment in most effective manner

18 U.S.C. 3553(a)

- Shall consider
  - Kinds of sentences available
  - Kinds of sentence and the sentencing ranges in the U.S. sentencing guidelines
  - Any pertinent policy statements
  - Need to avoid unwarranted sentencing disparities
  - Need to provide restitution to victims

Practical considerations; Barriers to effectiveness

- Requisites for achieving deterrence
- Amenability of offenders to treatment
- Resources
- Other?
How the Guidelines Work

- Offense level & Criminal history category
  - Seriousness of present crime
  - Disposition to criminality
- Grid to identify ranges of prison time (in months)
- "Advisory" rather than binding –
  - post-Booker/Rita/Kimbrough/Gall/et al.
- Relevant conduct ("real offense")
- Grouping

Steps

- Select offense guideline.
- Determine offense level for crime.
- Apply adjustments up or down.
- Determine criminal history category.
- Find sentencing range from table.
- Consider whether departure is appropriate.

CP Sentencing Guidelines

- 2G2.2 – Trafficking, Receipt, Possession
- Revised 9 times since 1987 original in response to multiple acts by Congress creating new offenses, increasing penalties, and requiring guideline reviews and modifications.
- Commission has noted sentencing court comments and are again reviewing the guidelines in 2010.
2G2.2

- Base offense levels
- Specific offense characteristics
  - Age of minor involved
  - Target of and Intent behind distribution
  - Nature of portrayal (e.g., if sadistic or violent)
  - Pattern of sexual abuse or exploitation of minor by defendant
  - Use of computer or interactive service
  - Number of images

Sentencing

- Sentencing and the Sixth Amendment
  - Apprendi/Blakely rule
    - Any fact (other than a prior conviction) that is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.
  - Impact your State sentencing practices and procedures?
    - Bifurcated trials?
    - Special verdict forms?
    - Other?

Proportionality Review

- Threshold comparison
  - Comparing the gravity of the offense and the harshness of the penalty, is there an inference of gross disproportionality?
- If so, is this borne out or refuted by comparing
  - Sentences imposed on other criminals in the same jurisdiction
  - Sentences imposed for the same crime in other jurisdictions
Debate is Growing

“Sentences for Possession of Child Porn May Be Too High, Judges Say”

– Law.com, 09-10-2009
Federal Judges’ Concerns

- Sentencing for possession, as opposed to manufacture or commercial distribution, may need to be changed.
- Many convicted are not threats to community but socially awkward first-time offenders.
- Unfair to treat person sitting in his basement receiving videos over the Internet same as a commercial purveyor.
- In some cases, person who has watched one video can get max sentence higher than a bank robber or person who repeatedly raped child.

Trends since Booker

![Judicial Rebellion](image)

NCMEC et al: Judges already give sentences lighter than the guidelines; sometimes minimize crimes by not examining the images involved; and are too often swayed by defendants who do not match society's stereotypes of people who look at child porn.

Prescribed penalties are needed as deterrents to crime.

Possible sentence reductions can give incentives for cooperation in investigations.
Changing Terminology

“Child Pornography”
“Child Sex Abuse Images”

Crime scene photos
- Images of a crimes in progress

Photographs of child sexual abuse/assault

Permanent visual record of a child’s sexual victimization

Myth: CP is Just Naked Photos

2005 Study funded by Congress

80% Had images of penetration.

21% Had images of “bondage, rape or torture.”

1% Limited collections to images that researchers termed “softcore” (“nude or semi-nude minors”).
Prosecution Approaches

- Humanize
  - No such thing as “Kiddie Porn”
  - Child depicted is a “victim”
- Themes for number of images and movies
  - 50 = American Flag
  - 30 = school room
  - 10,000 = a small town
- Type of acts
- Not a one time abuse/assault

Not ‘Computer’ Crimes

- Crimes Against Children
- Computer simply the weapon of choice
  - Means to an end
  - Method of communication and transmission
  - Facilitation device
  - Grooming device

Seto Study
Seto: Connection between Possession of CP and Victimization

- "Our results indicate that child pornography offending is a valid diagnostic indicator of pedophilia."
- "Our results suggest that child pornography offending might be a stronger indicator of pedophilia than is sexually offending against a child."

— Seto, p. 613

Butner Study I

Dr. Andres E. Hernandez, Self-Reported Contact Sexual Offenses..., Presented at the 19th Annual CRTC of the ATSA, San Diego, California, November 2000

Butner Study II
Butner II

- “Results of this study suggest … that many Internet child pornography offenders may be undetected child molesters, and that their use of child pornography is indicative of their paraphilic orientation.”
- Relationship between viewing CP and contact sexual criminality is complex.
- Further studies are recommended.

A Related Prosecution Move

- Requests for evaluations of defendants before sentencing, to include polygraph exams asking if there were live victims.

Resources

Questions?

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