

An Introduction to Child Pornography Sentencing

Possessing, receiving, and trafficking child pornography are serious federal crimes that deserve punishment. But federal penalties for child pornography have risen ever higher, driven by politics and revulsion rather than justice and empirical evidence. According to the U.S. Sentencing Commission, “Congress has been particularly active over the last decade creating new offenses, increasing penalties, and issuing directives to the Commission regarding child pornography offenses.”¹ In a critical article in *The Champion* magazine, former senator Arlen Specter and Linda Dale Hoffa noted that between 1987 and 2009 Congress prompted revisions of the guidelines nine times and each time the changes resulted in longer sentences.²

Increasingly long sentences are designed to make us feel better rather than make us safer or promote rehabilitation. A review of the sentencing guidelines by Troy Stabenow, an Assistant Federal Public Defender in the Western District of Missouri, “reveals absurd differences – lower punishments for people who attempt to engage children in sex acts than for those who only possessed and swapped pictures.”³

In 1997, federal child pornography offenders received a mean sentence of 20.59 months.⁴ By 2010, the mean sentence had jumped 500 percent to 118 months.⁵ The number of federal convictions has increased dramatically as well, rising from a few dozen each year in the 1990s⁶ to 1,886 cases in fiscal year 2010.⁷ The vast majority of federal child pornography offenders in 2010 had no prior criminal record at the time they were sentenced.⁸

Child pornography: An introduction to the offenses and the sentences

Child pornography is defined by federal statute as any 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 a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
- (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.⁹

A minor is anyone under age 18.¹⁰

Various acts relating to the distribution, transportation, importation, receipt and possession of child pornography are prohibited by federal law. Many of these offenses carry mandatory minimum sentences. Others, including simple possession of child pornography, do not.¹¹

Receipt v. possession: What’s the difference and why does it matter?

Simple possession of child pornography does not carry a mandatory minimum for first-time offenders; however, receipt of child pornography does. Given that everyone who possesses child pornography (aside from those who produced it) received it in some fashion, and because conviction for receipt of child pornography triggers a mandatory minimum and possession does not, prosecutors have vast discretion in what to charge a defendant.¹² According to the U.S. Sentencing Commission, most federal prosecutors recently interviewed in 13 judicial districts charge defendants with receiving child pornography, but the Commission did identify “some inconsistencies in charging practices and plea negotiations relating to child pornography.”¹³ For example, some prosecutors will drop the receipt charge and forego the mandatory minimum if the defendant agrees to plead guilty to possessing child pornography.¹⁴

Mandatory minimum penalties for acts relating to possession, transportation, receipt, distribution and possession with intent to distribute child pornography:¹⁵

Offense	Mandatory Minimum	Statutory Maximum	Statute(s)
Possession of child pornography -First offense -With prior sex offense conviction	None 10 years	10 years 20 years	18 U.S.C. §§ 2252, 2252A
Transportation, receipt, distribution, possession with intent to distribute or sell child pornography -First offense -With prior sex offense conviction	5 years 15 years	20 years 40 years	18 U.S.C. §§ 2252, 2252A
Possession of obscene visual representations of the sexual abuse of children -First offense -With prior sex offense conviction	None 10 years	10 years 20 years	18 U.S.C. § 1466A
Receipt, distribution or production of obscene visual representations of the sexual abuse of children -First offense -With prior sex offense conviction	5 years 15 years	20 years 40 years	

One-size-fits-all sentencing doesn’t work

Over the past few years, FAMM has heard from a growing number of people who have been devastated by child pornography sentences. For example, we heard from the sister of a man who is serving a fifteen-year mandatory sentence for manufacturing pornography. The defendant was in relationships with two young women, ages 16 and 17. Using their camera, he took pictures of

his girlfriends and later one video. The young women sent the defendant the digital pictures which he then downloaded to his computer. He was later convicted of producing child pornography.¹⁶

His behavior might be questionable, or even deplorable, but whatever your thoughts on his behavior, his girlfriends had reached the legal age of consent to a sexual relationship or marriage in the state of Indiana where the conduct took place. They were adults under state law, but under federal law the young women were considered minors. The sentencing judge pointed out the absurdity of the sentence, noting that the defendant received the same sentence someone convicted of hijacking an airplane or committing second-degree murder would receive. The judge was frustrated that he had no discretion to lessen the sentence.¹⁷

How many people are sentenced for child pornography and for how long?

In 2010, just over 50 percent of federal child pornography offenders were convicted of offenses that carried a mandatory minimum sentence.¹⁸ The vast majority of them were ultimately subject to the mandatory sentence; only 4.3 percent received a departure from the mandatory sentence due to their assistance to the government in the investigation or prosecution of other offenses.¹⁹ Defendants subject to mandatory minimums at sentencing received the longest sentences – 132 months compared to 121 months for defendants who received relief from the mandatory sentence, and 54 months for those convicted of an offense not carrying a mandatory minimum.²⁰

Even first-time offenders who do not receive a mandatory minimum can receive “substantially identical sentences as hardcore offenders.”²¹ In addition to increasing the base offense level, enhancements within the guidelines are frequently applied and can significantly increase the sentence. For example, one guideline enhancement is triggered if the defendant used a computer to receive or possess the material.²² The saturation of computer technology assures that nearly all child pornography offenders sentenced under this section receive this enhancement.²³ As a result, a possession offender can easily receive a sentence longer than someone who sexually abuses a child.²⁴

What do the courts think?

According to a survey conducted by the U.S. Sentencing Commission, federal judges believe that many child pornography sentences are too long – 71 percent of respondents believed that the mandatory minimum for receipt of child pornography was too high.²⁵ The same holds true for guideline sentences, with 70 percent of the judges surveyed responding that the guideline ranges for possession were too high. Additionally, 69 percent believed that sentences for receipt of child pornography were excessive.²⁶

Unsurprisingly, federal judges are responding to this excess by handing down sentences below the guideline range when they are able and when they believe it is appropriate. In 2010, less than 55 percent of child pornography sentences fell within the guideline range or below it pursuant to

a government-sponsored departure, while nearly 43 percent of offenders received non-government-sponsored below-range sentences.²⁷

In 2008, Robert W. Pratt, a U.S. district judge in Des Moines, Iowa, wrote that the sentencing guidelines for child pornography crimes “do not appear to be based on any sort of [science] and the Court has been unable to locate any particular rationale for them beyond the general revulsion that is associated with child exploitation-related offenses.”²⁸ Since then, other judges have spoken out, including Judge Jack Weinstein, of the Federal District Court for the Southern District of New York. In an interview with *The New York Times*, Judge Weinstein said of child pornography sentences, “We’re destroying lives unnecessarily.”²⁹

The U.S. Supreme Court has stated that departures from particular guideline sentences should be treated as feedback on those guidelines, information the Commission can use to improve guidelines.³⁰ The Commission published *The History of the Child Pornography Guidelines* in 2009 and is undertaking a broader coding project of all 1,669 child pornography cases from FY 2010. It anticipates issuing a report on the findings in 2012.³¹

Child pornography is different than sex offenses against minors

Part of the rationale for increased child pornography penalties is driven by the concern that child pornography offenders are more likely to commit sexual abuse against children.³² Much of this stems from a 2000 Federal Bureau of Prisons study (also called “the Butner study”) and a 2009 report by the study’s author, Andres E. Hernandez.³³

The reports suffer from significant drawbacks that call their conclusions into question. Additionally, the 2000 study was, according to Hernandez, misused. He writes:

Some individuals have misused the results of Hernandez (2000) and Bourke and Hernandez (2009) to fuel the argument that the majority of child pornography offenders are indeed contact sexual offenders and, therefore, dangerous predators. This simply is not supported by the scientific evidence.

The incidence of contact sexual crimes among [child pornography] offenders, as we reported in our studies, is important and worthy of considerable empirical examination. However, it is not a conclusive finding that can be generalized to all child pornography offenders.³⁴

Several have questioned the validity of the Butner studies, including Judge Robert Pratt, who has expressed concerns with methodological flaws. Judge Pratt argues, in part, that the study is unsound because the study’s respondents were participating in a “highly coercive” sexual offender treatment program and were threatened with expulsion from the program unless they confessed to having engaged in sex acts.³⁵ Additionally, Judge Pratt points out that subjects were not ran-

domly drawn from the population, the study was not peer reviewed, and the study relied on inherently suspect polygraph exams.³⁶

There have not been any conclusive studies that demonstrate a causative link between viewing or possessing child pornography and offenses against children.³⁷ Therefore, sentencing child pornography offenders as harshly, or, in many cases, more harshly than those who have actually committed contact offenses against children is neither based in sound evidence nor an effective tool in promoting public safety.

Additionally, child pornography offenders have low recidivism rates – lower than contact offenders and significantly lower than the average recidivism rate – meaning it is unlikely that they will go on to commit additional offenses.³⁸ One “meta-analysis” reviewing 21 studies and 4,464 online offenders found that just 2.1 percent of offenders were rearrested, recharged or reconvicted for a new contact sexual offense and 3.4 percent for a new child pornography offense.³⁹

Some proponents of harsh sentences for child pornography argue that simple possession or receipt of child pornography contribute to the sexual abuse of children by increasing the demand for such images.⁴⁰ However, there is lack of empirical evidence to support this claim and the production of child pornography may not be commercially motivated.⁴¹ While calling for more research, the United Nations Office on Drugs and Crimes found that “in most cases, the images are generated as a result of the abuse, rather than the abuse being perpetuated for the purpose of selling images.”⁴²

A call for reform

Child pornography is a crime that causes people to cringe, and understandably so. But building a justice system on emotion rather than evidence — where sentences are getting longer and longer even where no purpose of punishment is served by the increases — fails all members of society. Sentences should be individualized, fair, and proportionate while advancing the purposes of sentencing: deterrence, public safety, just punishment, and rehabilitation.

The current sentencing scheme is plagued with problems and has led to extraordinary injustice. In the interest of proportionate sentencing and public safety, child pornography sentences need to be reviewed and revised.

Read a summary of the U.S. Sentencing Commission’s February 15, 2012 public hearing on federal child pornography crimes here:

<http://famm.org/federal/USSentencingGuidelines/USSentencingGuidelinesUpdates/USSentencingCommissionChildPornHearing.aspx>

¹ U.S. SENTENCING COMMISSION, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 1 (Oct. 2009) [hereinafter HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES], *available at*

http://www.uscc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf.

² Senator Arlen Specter & Linda Dale Hoffa, *A Quiet but Growing Judicial Rebellion Against Harsh Sentences for Child Pornography Offenses – Should the laws be changed?*, THE CHAMPION MAGAZINE, Oct. 2011, at 12; *see also generally* THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (describing the nine guideline alterations).

³ Letter from Troy Stabenow, Assistant Federal Public Defender, to Edward A. Adams, Editor and Publisher, ABA Journal 2 (July 13, 2009), *available at* http://www.fd.org/pdf_lib/Stabenow%20Response%20to%20DOJ.pdf.

⁴ This number includes offenders convicted of possessing, receiving or distributing child pornography, but not involved in the production of child pornography. Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines 2* (2009) *available at* http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf.

⁵ This number includes the “sale, distribution, transportation, shipment, receipt, or possession of materials involving the sexual exploitation of minors.” U.S. SENTENCING COMMISSION, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 29 (2011) [hereinafter 2010 SOURCEBOOK].

⁶ U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: SEX OFFENSES AGAINST CHILDREN, FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES 4 (June 1996), *available at* http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/199606_RtC_Sex_Crimes_Against_Children/199606_RtC_SCAC.PDF.

⁷ 2010 SOURCEBOOK, at Table 3.

⁸ U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 320 (2011) [hereinafter MANDATORY MINIMUM REPORT], *available at* http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

⁹ 18 U.S.C. § 2256 (2011).

¹⁰ 18 U.S.C. § 2256(1).

¹¹ Simple possession of child pornography does not carry a mandatory minimum for first time offenders; however, people convicted of a previous sex offense face a mandatory minimum of 10 years. 18 U.S.C. §§ 2252, 2252A (2011).

¹² A defendant who is found to have knowingly possessed child pornography did not necessarily *knowingly* receive it. *See* MANDATORY MINIMUM REPORT, at 298. However, the U.S. Sentencing Commission has found that “receipt is a logical predicate to possession” and expressed its “belief that receipt and possession were similar offenses.” HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, at 19, 43.

¹³ MANDATORY MINIMUM REPORT, at 114.

¹⁴ *Id.*

¹⁵ 18 U.S.C. §§ 2252, 2252A, 1466A (2011).

¹⁶ Radley Balko, *You Can Have Sex With Them; Just Don’t Photograph Them*, REASON (Feb. 28, 2011), *available at* <http://reason.com/archives/2011/02/28/you-can-have-sex-with-them-jus>.

¹⁷ *Id.*

¹⁸ MANDATORY MINIMUM REPORT, at 301.

¹⁹ *Id.* at 309.

²⁰ *Id.* at 310.

²¹ Specter & Hoffa, *supra* note 2, at 2.

²² U.S.S.G. § 2G2.2(b)(6) (2009).

²³ *See, e.g.,* United States v. Durvee, 604 F.3d 84, 96 (2d Cir. 2010).

²⁴ *See* SpearIt, *Child Pornography Sentencing and Demographic Data: Reforming Through Research*, 24 FED. SENT. REP. 102, 103 (2011).

²⁵ U.S. SENTENCING COMMISSION, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES, JANUARY 2010 THROUGH MARCH 2010 Question 1 (June 2010), *available at*

http://www.uscc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf.

²⁶ *Id.* at Question 8.

- ²⁷ 2010 SOURCEBOOK, at Table 27 (41.5 percent of sentences were within the guideline range, 2.4 percent were above it, 13.3 percent of offenders received government sponsored below range sentences, and 42.7 percent received other (non-government sponsored) below range sentences).
- ²⁸ Amir Efrati, *Making Punishments Fit the Most Offensive Crimes*, WALL STREET J., Oct. 23, 2008, available at <http://online.wsj.com/article/SB122471925786760689.html>.
- ²⁹ Colin Moynihan, *Judge Defies Prosecutors on Pornography Sentence*, NEW YORK TIMES, January 13, 2011, available at http://www.nytimes.com/2011/01/14/nyregion/14weinstein.html?_r=1&scp=2&sq=Weinstein+%22child+pornography%22&st=nyt.
- ³⁰ *Rita v. United States*, 551 U.S. 338, 349-50 (2007).
- ³¹ MANDATORY MINIMUM REPORT at 316.
- ³² See, e.g., Alexandra Gelber, *A Response to "A Reluctant Rebellion,"* July 1, 2009, at 6, available at <http://www.justice.gov/criminal/ceos/ReluctantRebellionResponse.pdf>.
- ³³ Andres E. Hernandez, *Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prison's Sex Offender Treatment Program: Implications for Internet Sex Offenders*, presented at the 19th Annual Conference Research and Treatment Conference of the Ass'n for the Treatment of Sexual Abusers, San Diego, CA, Nov. 2000, available at <http://www.kardasz.org/HernandezPrisonStudy.pdf>; Michael L. Bourke & Andres E. Hernandez, *The "Butner Study" Redux: A Report on the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 J. OF FAM. VIOLENCE 183 (2009).
- ³⁴ Andres E. Hernandez, *Psychological and Behavior Characteristics of Child Pornography Offenders in Treatment*, presented at the Global Symposium on Examining the Relationship Between Online and Offline Offenses and Preventing the Sexual Exploitation of Children, at The Injury Prevention Research Center, the University of North Carolina, Chapel Hill, April 5-7, 2009, at 5, available at http://www.iprc.unc.edu/G8/Hernandez_position_paper_Global_Symposium.pdf.
- ³⁵ *United States v. Johnson*, 588 F. Supp.2d 997, 1005-1007 (S.D. Iowa 2008)
- ³⁶ *Id.*
- ³⁷ See Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STANFORD L. & POL'Y REV. 545, 580, 584 (2011).
- ³⁸ See, e.g., Public Hearing Before the U.S. SENTENCING COMMISSION on Federal Child Pornography Crimes 14 (February 15, 2012) (written testimony of Richard Wollert, Psychology Department, Washington State University Vancouver), available at http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_15_Wollert_2.pdf; Public Hearing Before the U.S. SENTENCING COMMISSION on Federal Child Pornography Crimes 3 (February 15, 2012) (written testimony of Michael C. Seto, Royal Ottawa Health Care Group) available at http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_15_Seto.pdf.
- ³⁹ Public Hearing Before the U.S. SENTENCING COMMISSION on Federal Child Pornography Crimes 3 (February 15, 2012) (written testimony of Michael C. Seto, Royal Ottawa Health Care Group) available at http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_15_Seto.pdf.
- ⁴⁰ See, e.g., Public Hearing Before the U.S. SENTENCING COMMISSION on Federal Child Pornography Crimes 1 (February 15, 2012) (written testimony of Susan Howley, Chair, the Victims Advisory Group), available at http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_15_Howley.pdf.
- ⁴¹ United Nations Office on Drugs and Crime, *The Globalization of Crime: A Transnational Organized Crime Threat Assessment* 214 (2010); Letter from David Debold, Chair and Eric A. Tirschwell, Vice Chair, Practitioners Advisory Group, to Honorable Patti B. Saris, Chair, United States Sentencing Commission 8 (February 13, 2012), available at http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_15_PAG.pdf.
- ⁴² United Nations Office on Drugs and Crime, *The Globalization of Crime: A Transnational Organized Crime Threat Assessment* 214 (2010).