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STRONG MEDICINE: TOWARD EFFECTIVE SENTENCING OF CHILD PORNOGRAPHY OFFENDERS

Kristin Carlson^{*†}

In recent years, possessors of child pornography have entered the federal criminal justice at an alarming rate. In 2006, child pornography cases accounted for sixty-nine percent of the child exploitation cases that were prosecuted federally. Average federal sentences for these offenses also rose sharply, by about 300 percent over the past fourteen years. The mean sentence imposed for child pornography offenses increased from thirty-six months in 1994 to 109 months by 2008.

The severe sentences imposed on possessors of child pornography in federal courts have inspired an ongoing debate. Critics feel the U.S. Sentencing Guidelines are too harsh on first time offenders. In addition, calculation of an offender's Guidelines range can seem arbitrary, as his sentence is partially dependent on the number of depictions he possessed, and whether or not a computer was used.

On the other hand, psychological studies suggest a strong correlation between those who seek out child pornography and those who would be diagnosed as pedophiles. Studies also suggest that most pedophiles are unable to control their strong sexual urges. They are likely to seek out sexual relationships with children if they are not incapacitated in some way. Yet, research has shown that incarceration and social shame are unlikely to rehabilitate sex offenders. Therefore, the lengthy prison terms imposed by the Sentencing Guidelines are only a temporary solution to the bigger problem that criminal pedophiles pose. Some studies have shown that medical treatment, such as castration, provides the only effective means of changing pedophilic behavior. Sentencing for possession of child pornography should involve a more comprehensive approach that incorporates treatment through medical and pharmacological means in addition to temporary incapacitation through prison sentences.

I. POSSESSION OF CHILD PORNOGRAPHY AND HANDS-ON ABUSE

Recent research has suggested that child pornography offenses have brought child molesters into the criminal justice system that otherwise would have gone undetected. In 2000, Andres E. Hernandez, director of the Sex Offender Treatment Program ("SOTP") at the Federal Correctional

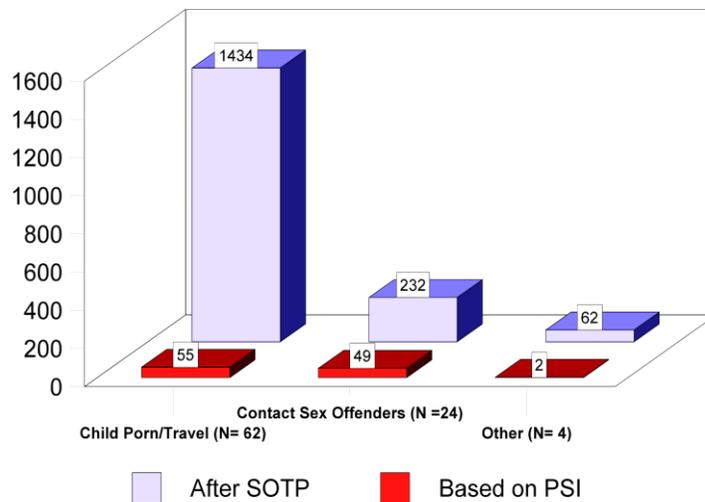
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Institution in Butner, North Carolina presented an eye-opening study.¹ Hernandez studied clinical charts of former participants in the SOTP, hoping to discover the incidence of sexual contact crimes committed by program participants, including those who had only been convicted of noncontact crimes—such as possession of child pornography. The subjects in the study were ninety imprisoned males divided into three groups: (1) those convicted of sexual crimes not involving actual contact with children; (2) those convicted of crimes involving sexual abuse, molestation, or assault; and (3) those convicted of other federal, nonsexual offenses.

During their participation in the SOTP, subjects across all three of the groups reported additional sexual crimes that had not been detected by law enforcement. Sixty-two percent of the men convicted of noncontact sexual offenses (such as possession of child pornography) admitted to having committed undetected contact offenses in the past. The presentencing reports of these men revealed fifty-five prior sex offenses involving contact, but this study revealed an additional 1,379 sex crimes that had never been detected by the criminal justice system

Figure 1
Number of Offenders Disclosing Hands-On
Offenses Before and After Treatment²



1. Andres E. Hernandez, Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders (Nov. 2000) (unpublished manuscript, on file with author).

2. *Id.* at 4.

Hernandez and Michael L. Bourke recently expanded on the 2000 Butner study findings in a subsequent study with results similar to the first. In this study, 155 men who had been convicted of child pornography offenses were analyzed. Before the study, seventy-four percent of the subjects had no documented history of sexual abuse, but at the end of treatment, eighty-five percent admitted to having committed at least one hands-on sexual offense. The subjects who had no known history of hands-on crimes ultimately disclosed an average of 8.7 victims each. Hernandez and Bourke argued that the “dramatic increase (2,369%) in the number of contact sexual offenses acknowledged by the treatment participants challenges the often-repeated assertion that child pornography offenders are ‘only’ involved with ‘pictures.’” Instead, these studies suggest that pedophilia and an interest in child pornography can be valid indicators of more serious offenses that may go undetected by the criminal justice system.

II. PROBLEMS WITH THE GUIDELINES’ CURRENT APPROACH

High rates of recidivism among child molesters have shown that the threat of incarceration is not a significant deterrent in itself. The relatively low detection rate of child exploitation offenses (as shown in the number of hands-on crimes that were not reported in the Butner study pre-sentencing reports) contributes to the insufficiency of the current sentencing regime. Additionally, incarceration alone will not deter criminal pedophiles because they “are not economically rational actors who weigh the cost of their actions—incarceration—against their benefits, the realization of their sexual fantasies. These individuals are compelled to commit sex offenses in order to fulfill their incessant sexual fantasies.”³ Imprisonment utterly fails to rehabilitate pedophilic offenders, because incarceration does nothing to reduce the pedophile’s sexual attraction toward children nor to increase the ability of an offender to control his impulses.

The Sentencing Guidelines for child pornography offenses often seem disconcertingly arbitrary. The Sentencing Commission did not use empirical evidence in fashioning the Guidelines. Instead, the recently heightened sentences resulted from politically driven legislation, like the Sex Crimes Against Children Prevention Act of 1995 and the PROTECT Act of 2003. Moreover, random elements of the offense, such as whether or not a computer was used in the offense, may dramatically affect the sentencing range. Use of a computer typically increases an offender’s sentencing range by about twenty-five percent. However, because today nearly all child pornography cases involve a defendant who used a computer in committing the offense, the enhancement has little value. Sentences also increase depending on the number of images the offender possessed, with no rationale in the Guidelines for the values used as the cut-offs. Because the internet makes it easy for an offender to acquire hundreds of images, the number of images

³ Edward A. Fitzgerald, *Chemical Castration*, 18 AM. J. CRIM. L. 1, 55 (1991).

possessed is not always a reliable way to distinguish between more and less dangerous offenders.

III. PROPOSED TREATMENT OF CRIMINAL PEDOPHILES

When crafting a sentence, district court judges are instructed to consider the factors set forth in 18 U.S.C. § 3553(a), which allow for the creation of an appropriate individualized sentence, one that might vary from the recommended Guidelines range. Courts are directed to consider whether the sentence will: (1) reflect the seriousness of the offense; (2) promote respect for the law; (3) provide just punishment for the offense; (4) afford adequate deterrence to criminal conduct; (5) protect the public from further crimes of the defendant; and (6) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. Merely incarcerating a child pornography offender for the length of his Guidelines recommendation does not serve all the purposes outlined in the statute. While a harsh prison sentence will reflect the seriousness of the offense, it will not adequately deter future conduct or provide the defendant with much needed treatment. A lengthy sentence may provide just punishment for the offense, but it will not protect the public from further crimes or promote respect for the law.

To effectively deter future crimes, possessors of child pornography should routinely be given more comprehensive sentences imposing both punishment and treatment. The severity of punishment and the intrusiveness of treatment should depend on the offender's criminal history and likelihood to reoffend. In the case of a first time offender, whether or not his prison sentence is within the Guidelines range should depend on the defendant's likelihood of recidivism compared with his ability for rehabilitation. This can be shown through psychological tests, like the Screening Scale for Pedophilic Interests, which has been shown to reliably predict the likelihood that child molesters will reoffend.⁴ In addition, I would recommend several conditions of probation following the first time offender's prison sentence. Conditions found reasonable by courts include: sex-offender treatment, a prohibition on accessing the Internet, and a term of supervised release.

If the offender is a repeat child pornography offender, or has other sex offenses on his record, courts should impose harsher punishment and a more intrusive treatment method. After a term of imprisonment, the repeat sex offender should be subject to a lifetime of supervised probation with hormonal treatments administered weekly as a condition of probation. Anti-androgen treatments, such as the administration of hormones that reduce an offender's testosterone levels and diminish his sex drive, have been shown to be the most effective means of preventing recidivism of repeat offenders upon release.

4. Michael C. Seto et al., *The Screening Scale for Pedophilic Interests Predicts Recidivism Among Sex Offenders With Child Victims*, 33 ARCHIVES SEXUAL BEHAV. 455 (2004).

European countries have had success in treating sex offenders through surgical castration. Surgical castration involves removal of the testes, which produce testosterone, resulting in a diminished ability to respond to sexual stimuli. In Denmark, Georg Sturup studied a group of 900 castrated sex offenders over thirty years. He found less than a three percent recidivism rate among castrated offenders. Studies in Holland, Sweden, and Switzerland have resulted in similar findings. A Swiss study documented a 5.8 percent recidivism rate among castrated men and a fifty-two percent recidivism rate in the non-castrated control group.⁵

In the United States, state court cases suggest that a sentence imposing surgical castration would likely violate the Eighth Amendment prohibition against cruel and unusual punishment. For example, a Nevada statute providing for vasectomy of rapists was deemed “cruel and unusual punishment.” In *State v. Brown*, the Supreme Court of South Carolina held that surgical castration is a form of mutilation, and is therefore an unconstitutional punishment.⁶ Yet some American states, including California and Florida, have successfully imposed chemical castration as an element of repeat sex offenders’ sentences. Although the issue of chemical castration has yet to reach the Supreme Court, it would likely withstand constitutional scrutiny.

“Chemical castration” is a bit of a misnomer, as the procedure does not involve “castration” at all, and is completely reversible. The procedure involves the administration of weekly intramuscular injections of Depo-Provera (a type of birth control). The drug binds to the recipient’s muscle and reduces testosterone levels by curbing the release of luteinizing hormones from the pituitary gland. The drug reduces the subject’s sex drive by reducing the production of testosterone. The dosage can be adjusted so that the offender is not completely impotent, but does not experience intrusive deviant impulses. Patients undergoing chemical castration do not have spontaneous erections, but are able to have an erection when stimulated by a partner. Additionally, Depo-Provera is not feminizing, and while it does cause decreased sperm production, it does not cause sterilization.

While Depo-Provera treatment has proven to be effective in treating pedophilia, administration of the drug may also result in adverse side effects. The most common side effects that have been observed include weight gain, headaches, insomnia, nightmares, reduction in the size of the testes, reduction in sperm count, and nausea. While these side effects are not insignificant, the demonstrated efficacy of chemical castration in curbing deviant sexual urges seems to outweigh its drawbacks, especially because most of these side effects are exceptionally rare. Moreover, the majority of these side effects disappear after treatment.

Administration of Depo-Provera for sex offenders has been controversial. In 1984, a Michigan judge sentenced a convicted rapist, Roger

5. Linda E. Weinberger et al., *The Impact of Surgical Castration on Sexual Recidivism Risk Among Sexually Violent Predatory Offenders*, 33 J. AM. ACAD. PSYCHIATRY & L. 16 (2005).

⁶ 236 S.E.2d 410 (S.C. 1985).

Gauntlett, to one year in prison and five years probation conditional on his receipt of weekly injections of Depo-Provera. Gauntlett appealed his sentence, and the court of appeals found the trial court had imposed an illegal condition of probation.⁷ The court emphasized that Depo-Provera was not widely accepted in the medical field for treatment of sex offenders, and that it was still considered an experimental drug. These concerns carry little weight today. The FDA approved Depo-Provera in 1992 (after the *Gauntlett* case was decided) for use as a birth control. It is no longer considered an experimental drug, and it can be prescribed by any physician under the Food and Drug Administration Guidelines relating to the “use of approved drugs for unlabeled indications.” In addition, subsequent to this decision, a number of studies have indicated that chemical castration is an effective treatment for pedophilia, and the procedure has been incorporated into sentencing statutes in a number of states, including Georgia, Oregon, Montana, Wisconsin, California, Florida, Iowa, and Louisiana.

The ACLU has opposed chemical castration as a punishment, calling it cruel and unusual. In determining whether a punishment violates the Eighth Amendment, courts ask three questions: (1) whether the punishment is inherently cruel or excessive; (2) whether the punishment is proportional to the crime; and (3) whether the state could achieve its goal through less intrusive means. Based on this analysis, the imposition of chemical castration should not be considered an Eighth Amendment violation. First, the use of anti-androgens is not inherently cruel, but actually benefits the offender by freeing him from intrusive deviant urges that may lead him to commit future crimes. Second, a treatment regimen of chemical injections is not excessive when balanced against the harm the repeat child pornography offender has committed against children and society. Lastly, studies have revealed that chemical castration is the most effective and least intrusive method of treating criminal pedophiles. It is clearly less intrusive than surgical castration or a lifetime of incarceration. In addition, when the safety of children is at stake, the Supreme Court is more likely to allow government regulation that would otherwise be considered unconstitutional. For these reasons, a sentence imposing chemical castration on a repeat child pornography offender should pass constitutional muster.

CONCLUSION

The threat that possessors of child pornography pose to society is a large and still growing problem. While some argue that the harsh sentences recommended by U.S. Sentencing Commission are unduly harsh, they seem at least partially justified by research showing that most possessors of child pornography are not passive onlookers. Instead, most are sexually deviant pedophiles, highly likely to commit a hands-on act of child abuse. Yet, incarceration of these offenders may not be the most effective means of punishment. Simply incarcerating criminal pedophiles for a lengthy period

7. *People v. Gauntlett*, 352 N.W.2d 310 (Mich. Ct. App. 1984).

of time before letting them back into society will not alleviate the danger they pose upon release. Instead, the sentences imposed upon criminal pedophiles that possess child pornography should incorporate a longer treatment regimen. For first time offenders, this may involve a period of supervised release along with conditions of probation, including mandatory psychological treatment. Repeat offenders who have been diagnosed as pedophiles should be required to undergo chemical castration therapy as a condition of probation, coupled with psychotherapy. This comprehensive approach, which will eliminate the criminal pedophile's deviant urges, can allow offenders to return to society sooner, and with less likelihood of committing further crimes.