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Two Hundred Years For Kiddie Porn

Susan Estrich *Wed Feb 28, 3:00 AM ET*

Lots of people who know about such things have been waiting to see what the Supreme Court would do about the case of Morton Berger. Mr. Berger was sentenced to 200 years in prison, with no possibility of probation or early release, for possessing 20 pornographic images of children.

I'm not defending kiddie porn or pornographers, thank you, Bill O'Reilly, but we're not dealing with the person who made the pornography or even sold it. We're dealing with a viewer who got caught by the use of his credit card number on a Texas website.

Ten years is the minimum sentence in Arizona for any crime involving "sexual exploitation of a minor," and the rule is that sentences for multiple counts must be served consecutively. So the sentence for 20 counts automatically becomes 200 years.

Mr. Berger's lawyers argued in the papers filed with the Court that had their client been prosecuted in federal court, as he could have been, for possessing the same images, the sentence would have been five years, as it would have been in most of the states — most having no prohibition on early release or good-time credits. Arizona's law, as applied to the facts of this case, produces the harshest sentence in the country, according to the dissent in the Arizona Supreme Court. That court upheld Mr. Berger's sentence in an opinion that focused on the legality of the 10-year minimum term, standing alone, rather than the accumulated impact of 20 of them, served consecutively.

The petition to the Supreme Court focused on the total term. Surely a differential of 195 years between what the feds think the conduct is "worth" and what Arizona thinks might suggest that the Arizona scheme is fundamentally out of whack, which is essentially what's required for a conclusion that a punishment is "cruel and unusual" within the Constitution's prohibition of such treatment.

It's easy to understand legislators voting for a law setting tough minimum sentences for those who are in any way involved in "sexual exploitation of a minor," including those who pay to view it. After all, it's just such demand that creates the market for the product. And who wants to be the one to argue for different levels of criminality for the viewer, the purveyor and the manufacturer, when doing so may lead to the label of being "soft" on crime, especially kiddie porn, a label that requires no further explanation, and invites none, from voters? When it comes to crime, and this kind of crime in particular, the conventional wisdom, at least for those seeking office, is that you can't be too tough.

The problem is that when you apply the results to real cases, especially when rules combine to multiply mandatory minimum sentences, as they do here, you can be too tough. The justices of the Supreme Court have been increasingly willing to examine the extent to which judges have been denied the ability to judge due to federal sentencing guidelines that have limited their discretion to individualize sentences. The tendency of such laws to shift rather than limit discretion, effectively increasing the power of the prosecutor to set sentences by deciding what to charge, comes at the expense of the person who is most likely the oldest and smartest in the room, and the one chosen for that function. This shift is increasingly well-recognized.

But the Court has been much less willing to look at the sentences themselves, lest they be required to start drawing lines for which there is no particular basis. If not 200 years, then what? A hundred? Fifty? Twenty? Short of death, what is too much, and how do you define it, given that there is no necessarily "right" answer to the question of what constitutes just punishment?

Interestingly enough, no similar reluctance affects the Court when confronted with corporate punishment viewed as unduly harsh. As Ohio State University law professor Doug Berman has pointed out, both in his blog and in press interviews, this Court has repeatedly shown its willingness to limit "extreme corporate punishment" by reducing or throwing out excessive punitive damage awards, most recently vacating an order against Phillip Morris just last week. But "extreme individual punishment" by the criminal justice system has produced no similar solicitude.

Unfortunately for Mr. Berman, that didn't change this week. The Court turned down his petition for review. The 57-year-old former high-school teacher will die in prison for the images he bought online.

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