For this mini-paper I thought I would write on a topic relating to the punishment for possession of child pornography. I find this topic quite interesting as oftentimes one hears the argument that mere possession is more of a victimless crime as the possessor is not actually molesting or touching the children involved. I cannot agree with this statement and could never purport to understand the emotional toll it takes on a victim knowing that individuals are continuing to look at pictures of the victim being abused and molested. That individual may have been a victim at the time the pictures were taken, but they continued to be a victim each and every time they were the subject of inappropriate viewing by downloaders/sharers of the pictures. Indeed, Congress said as much in 1994 when it stated that every viewing of child pornography "represents a renewed violation of the privacy of the victims and repetition of their abuse."

As such, the court system often seeks to "make victims whole" again. For cases of child abuse and molestation, however, the victim may well never be "whole" again. Therefore, courts have provided victims with the opportunity to get financial restitution from individuals who look at, or share pictures depicting their abuse in addition to serving time in prison. Although the Supreme Court has given an imperfect standard for determining the proper restitution perpetrators owe to victims, it appears that restitution to victims is here to stay. However, as the Houston Chronicle article featured on the blog unfortunately reported, the tough sentencing and costs that offenders are receiving is doing little to deter child porn offenses. It is noted that there is far less than a 1% chance an offender will get caught for looking at child porn. The blog post ended with the idea of economic sanctions on tech facilitators who allow these pictures to be spread with such ease across the globe.

This idea of putting economic sanctions on tech facilitators I think is an interesting idea to quell the immense flow of child pornography through the internet. I think it would be interesting to attempt to have these tech facilitators pay a portion of the restitution money offenders owe to the victims. The cumulative effect of having to continuously pay out money each time a new offender is caught using your technology to download or share inappropriate pictures, could result in a greater incentive to put up protections that inhibit this type of black market dealing. Creating a market incentive to increasingly monitor your resources to ensure that child pornography is not being transmitted, perhaps, will result in the deterrent effect that courts hope to gain by imposing harsh sentencing punishments.

Interestingly, a few of the articles I read noted that offenders used peer-to-peer sharing websites such as LimeWire to share these pictures. Although I do not pretend to know how these websites work, I do imagine that most of the activity within this website is illicit. In 2010 a U.S. federal court judge issued an injunction forcing LimeWire to essentially cease activity of its software and to compensate record labels for damages arising from copyright infringement and inducing others to engage in copyright infringement. There, however, was no mention of damages for child victims who have had pictures of their abuse circulated through LimeWire.

Although the LimeWire case did not yield any damages for victims, I do think that there could be a strong case made that similar tech facilitators could be sanctioned for “inducing” child pornography and should be required to pay damages as they would be for issues arising from copyright infringement. Notably, the RIAA announced it would sue LimeWire for damages ($72 trillion), claiming that there were 11,000 copyright infringed songs on LimeWire and each of those had been downloaded thousands of times. LimeWire ended up settleing and paying $105 million in an out-of-court settlement. This case seems as if it could be easily altered to include the term child pornography rather than copyright infringement. As such, I think following patterns implemented by illegal music downloading cases and paying out restitution to victims rather than damages to record labels could have an interesting effect on the black market for child porn.

As noted on the class blog, the U.S. Sentencing Commission published a report in 2012 regarding federal child pornography offenses. The Commission concluded that "the non-production child pornography sentencing scheme should be revised to account for recent technological changes in offense conduct and emerging social science research about offenders' behaviors and histories, and also to better promote the purposes of punishment by accounting for the variations in offenders' culpability and sexual dangerousness." I agree.

Last week in class we discussed the penological justifications surrounding child porn sentencing, perhaps the most important of which is retribution. In my view, there is a parallel between the culpability of child porn possessors and drunk drivers. In both cases society worries most about the potential deleterious consequences of the offense: we worry possessors of child porn will eventually become involved in contact offenses and that drunk drivers will eventually kill someone. It makes sense from a retributivist standpoint to hand down more severe sentences to drunk drivers who actually kill someone than those who simply swerve outside the yellow lines—those who kill are more culpable. The same rationale applies to child porn.

Child porn possessors deserve to be punished harshly because of the age of the victims and nature of the criminal acts portrayed in the materials. But the current sentencing guidelines disregard the culpability distinction between offenders guilty of viewing child porn and those involved in contact offenses against children. In fact, contact offenders often receive more lenient sentences than the 20-year minimums recommended for child porn possession. As one judge observed, "the resulting punishment [for possessors of child pornography] under the Guidelines may be more a reflection of our visceral reaction to these images than a considered judgment." *United States v. Cruikshank*, 667 F. Supp. 2d 697, 703 (S.D. W.Va. 2009).

Presumably, the penalty is so stiff because the consequences can be so devastating; society considers sexual crimes against children to be especially heinous. But does that justify treating *potential* contact offenders more harshly than *actual* contact offenders? Certainly there is no retributivist argument that potential offenders are more culpable, and thus more deserving of harsher penalties, than actual offenders.

One assumption that may underlie punishing child porn possessors so harshly is that they are so likely to engage in contact offenses that harsh punishments are justified. There is no empirical evidence to support that assumption. In a recent article, one commentator reviewed the social scientific evidence on the nexus between child pornography and child molestation. Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 Stan. L. & Pol'y Rev. 545 (2011). She concluded that "[o]verall, empirical research fails to establish a correlation, much less a causative link, between viewing child pornography and contact offenses against children." *Id.* at 584.

The Commission should revise the guidelines to reflect the lack of an empirical connection between child porn possession and contact offenses, as well as the indisputable proposition that actual offenders are more culpable than potential ones. Possession of child porn should be punished harshly, but there is simply no penological justification—especially on retributivist grounds—for punishing it more harshly than child rape.