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Getting to Proportionality: The Trouble with Sentencing for Possession of Child Pornography in Ontario

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Résumé de l'article

In this article we examine sentencing in 14 Ontario cases of possession of child pornography between 2007 and 2017 with the purpose of understanding the sentencing process in relation to the fundamental principle of proportionality and other principles employed to arrive at a fair, individualizing process as set out in Canadian sentencing law. In all cases the offenders are charged with possession only and have no prior offences. We situate these cases within the context of sentencing reform in general and child pornography law specifically, including the evolution of mandatory minimums, as they have evolved in both legislation and case law. Our cases cover two periods of mandatory minimums, 45 days and six months. Although we consider numerical sentences, probation and ancillary conditions awarded when examining our cases, we are interested in the process of determining the sentencing components. We analyse this process in two ways: by observing the judicial reasoning in calculating the seriousness of the crime and the blameworthiness of the offender and the balancing of other purposes and principles, particularly rehabilitation and parity; and, by considering three pairings of cases, each with similar quantity and quality of images, to compare the calculation of risk and its effect on determining the blameworthiness of the particular offender. Our findings reveal a polarization in judicial reasoning between a punitive process in which overemphasis of denunciation and deterrence and extreme versions of the reasoned apprehension of harm add weight to the seriousness of the crime on a par with contact abuse, and a more tempered and restrained one in which possession is considered on its own and other purposes and principles are weighed, such as rehabilitation and parity, to arrive at a more individualizing process. Mandatory minimums are no constraint as sentencing is much lengthier, especially under the 45-day mandatory minimum. In pairing like cases in terms of collections of images and videos we find a very subjective process in the calculating of risk in which like offenders are treated differently in terms of assessments of blameworthiness, based on questionable forensic methods and assumptions. Finally, we note the resources involved in investigative time, incarceration and the supervising of probation as well as lengthy ancillary conditions that may last decades after sentencing.

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I. INTRODUCTION: THE SENTENCING PROCESS IN CHILD PORNOGRAPHY POSSESSION IN ONTARIO

In the sentencing process in Canada, proportionality, the seriousness of the crime balanced with the blameworthiness of the offender in their particular circumstances, is the fundamental principle, while other principles and purposes including rehabilitation, alternatives to incarceration and parity also need to be considered within this balance. Since sentencing judges are closest to a particular case, they are afforded a wide degree of discretion, a practice which is supported in case law and defended by Supreme Court rulings. In this way, a fair, individualizing of sentencing is supposed to take place. However, there are a number of reasons to question how individualizing this process is in the sentencing of possession for child pornography, as well as to question whether increasing incarceration, now the norm, is necessary for simple possession.

To examine how the process works we first consider the context by situating the sentencing of possession for child pornography within sentencing law and practice in Canada, and more specifically, in Ontario. Although there is considerable discretion left to judges, we highlight that in cases involving offences against children, legislation requires priority to be given to denunciation and deterrence, and offenders are excluded from the option of a conditional sentence. We then consider how, over the last two and a half decades, these cases have taken place within a context of concern for the proliferation of child pornography on the Internet, with its burgeoning innovation in online technology such as file-sharing platforms, and the danger it poses for children. Like possession of small amounts of illegal drugs,

possession of child pornography is viewed as feeding a market, and so there is a strong focus on blaming offenders of private possession for this proliferation, resulting in increased measures of punishment in both legislation and case law.[1] We then consider the dizzying array of measures in legislation and in case law including new offences, rising mandatory minimums and maximums, additional ancillary orders, and the use of forensic calculation of quantity and quality of images. We observe that criminal prosecution of private possession of child pornography has been portrayed as an important element for curtailing contact child sexual abuse even though most contact child sexual abuse involves intimate and hierarchical close family or close social relations. As a result, calculation of risk of perpetration of future crimes, including contact abuse, has also become an important part of the sentencing process in defining the deserving and undeserving offender through mitigating and aggravating factors used to calculate proportionality. This occurs even though private possession is the least of the child pornography offences in legislation and the farthest removed from contact abuse as defined by the Supreme Court of Canada, and despite substantial criticism of forensic tools for calculating risk. However, as with other sexual assault crimes, this fits well into the violent stranger trope popular in both the public and judicial imaginations. We then examine how the calculation of proportionality, taking into consideration the seriousness of the crime and the blameworthiness of the offender, takes place in the sentencing of specific possession cases and how other purposes and principles are factored in.

To do this we examine the sentencing process in 14 Ontario cases between 2007 and 2017 that fall under two different mandatory minimums and in which offenders are charged with possession only and have no prior offenses. Although we take into consideration the actual numerical sentence and number of ancillary orders, we are more interested in the *process* of sentencing. We first group the cases in relation to the process of calculating the seriousness of the crime and the blameworthiness of the offender and the balancing of other purposes and principles, particularly rehabilitation and parity, and then consider three pairings of cases to compare the calculation of risk and its effect on determining the blameworthiness of the particular offender. Overall, we find starkly different assessments of how to fulfill denunciation and deterrence in balance with other principles and purposes, and how to calculate proportionality. We also find disparate and subjective assessment of risk and questionable use of less than reliable forensic tools. Rarely is simple possession treated as such.

Focusing on the process of the calculation of proportionality, we find a polarization in sentencing between a punitive process and a more tempered and restrained one. Most of our cases fall towards the punitive process although there are intermediary cases. In the punitive process extreme versions of the reasoned apprehension of harm and an overemphasis on denunciation and deterrence add weight to the seriousness of the crime, associating possession with other child pornography offences and actual contact abuse; cases cited often include more serious offences and/or different circumstances. Moreover, judicial notice in the form of high rhetoric about the burgeoning of the Internet, and file-sharing applications in particular, often adds to the blameworthiness of the individual. This rhetoric often travels from case to case, indicating a status quo bias. In the tempered process there is consideration of possession on its own and other purposes and principles are weighed such as rehabilitation and parity. In these cases, calculating blameworthiness focuses on the specific individual and their circumstances and similar cases are cited. Although collections of images and videos are used both as evidence and for calculating mitigating and

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[1] Although regulations require responsibility for screening content, only recently have the policies and practices of these platforms such as Pornhub and YesUp Media come under serious scrutiny. Criminal charges have led to fines and probation but no incarceration. See Christopher Reynolds, "Pornhub policies reveal legal gaps and lack of enforcement", 28 February 2021, *The National Post*, online: <https://nationalpost.com/pmn/news-pmn/canada-news-pmn/pornhub-policies-reveal-legal-gaps-and-lack-of-enforcement-around-exploitive-videos>.

aggravating factors, how the quantity and quality of this material is used is haphazard since interpretations are caught up in this polarization. Mandatory minimums are no constraint with most judges demanding much longer incarceration, especially under the 45-day minimum. As we move to the six month mandatory minimum we see an evening out but an upward trend towards longer incarceration overall. In the calculation of risk, we find a subjective process in which very like offenders in terms of quantity and quality of images are treated differently in terms of assessments of blameworthiness, based on questionable forensic methods and assumptions. It must be noted that apart from investigative time, all of the cases demand considerable resources including two to three years of bail conditions, incarceration, and lengthy probation with ancillary conditions that may last for decades after probation. Since all of the sentences are under two years, it is mainly provincial resources that are affected.

II THE POSSESSION OF CHILD PORNOGRAPHY WITHIN SENTENCING LAW AND PRACTICE IN CANADA

A. Calculating Proportionality in Legislation and Case Law

Possession of child pornography is among the offences given a special place in Canada's sentencing guidelines set out in the *Criminal Code* that partially limit the wide discretion exercised by sentencing judges. Before the Liberal government passed Bill C-41 in 1995, establishing sentencing principles and/or purposes, including the alternative option of a conditional sentence, there had been almost three decades of calls for guidance to remedy disparity in sentencing, overuse of incarceration, unrealistic maximums and equity trampling minimums as well as haphazard parole and early release practices.[2] Bill C-41 fell short of establishing a sentencing commission that would have organized research, provided information and caught problem areas in sentencing, but it did establish the purposes and principles of sentencing in Section 718.[3] The purpose is to maintain respect for the law and a safe society and this is contingent upon the purposes of denunciation, deterrence, confinement, rehabilitation, reparation for harm and responsibility and acknowledgement of the harm done. While there was no preference given to one or the other purpose at the time, both Liberal and Conservative governments have provided further direction in advising judges to give primary consideration for denunciation and deterrence for certain offences including offences against children.[4] In 2015 the Conservative government also reinforced the protection of society in the introductory statement and qualified denunciation with a specific reference to harm done to the victim and the community, the emphasis of which is important in the sentencing of possession as discussed below.[5] Section 718.1 identifies proportionality as the fundamental principle stating that, "A

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2 Canada, Department of Justice Canada, *A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code* by Gerry Ferguson, (Ottawa: Research and Statistics Division, 2016) [Ferguson].

3 In the bill, Section 718 reads: "The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives: (a) to denounce unlawful conduct; (b) to deter the offender and other persons from committing offences; (c) to separate offenders from society, where necessary; (d) to assist in rehabilitating offenders; (e) to provide reparations for harm done to victims or to the community; and (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community".

4 The Liberal government in 2005 and 2019 respectively in s. 718.01 for offences against children and in s. 718.04 for offences against persons made vulnerable because of circumstances, including Indigenous and female persons; and, the Conservative government in 2009 and 2015 respectively in s. 718.02 for offences against police officers and justice officials and in s. 718.03 for offences against certain animals.

5 Ferguson, *supra* note 1. In 2015 the first line of s. 718 was amended to read, "[T]he fundamental purpose of sentencing is to protect society and to contribute...", an addition that is seen as explicitly articulating what was already implicit. In the

sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". Section 718.2 (a) directs judges to consider increasing a sentence if the case is dominated by any outlined aggravating factors, the most pertinent for the possession of child pornography being if it involves the abuse of someone under the age of eighteen and evidence that there was a significant impact on the victim.[6] Alternatively, it directs judges to consider reducing a sentence when the aggravating factors are outweighed by 'mitigating' factors that lessen blameworthiness. Thus, a judge, taking into consideration the seriousness of the crime and the blameworthiness of the individual offender based on a balance of these factors, maintains proportionality. Additional consideration must be given to parity, where the sentence should be in line with like cases in like circumstances, and for alternatives to incarceration for all offenders, depending on the circumstances, especially the circumstances of Indigenous offenders.[7] Berger points out that these guidelines are highly flexible and that this individualizing process fits well within a system of case law that privileges judicial discretion in sentencing.[8] However, in a system that proposes moving towards alternatives to incarceration, we see that possession already is weighted in relation to the seriousness of the crime and the privileging of denunciation and deterrence over other purposes.

Both legislative constraints and judges' wide discretion have a role to play in the continued tendency towards incarceration rather than alternative measures; possession of child pornography being a good example. Roberts and Bebbington point out that the Conservative government led by Stephen Harper created the main legislative constraints including removing conditional sentences and increasing the use of mandatory minimums for more offences, bringing increased costs for the justice system.[9] However, the Liberal government was the first to introduce a mandatory minimum of 45 days on indictment with a

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same vein, 718 a) was amended in 2015 to reinforce harm already referred to in s. 718 (f): (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct.

6 Section 718.2 (a) reads: A court that imposes a sentence shall also take into consideration the following principles: (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor, (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner, (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years, (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation, (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, (v) evidence that the offence was a terrorism offence, or (vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the Corrections and Conditional Release Act shall be deemed to be aggravating circumstances.

7 Section 718.2 (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh; (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders (Section 718.2).

8 Benjamin L Berger, "Judicial Discretion and the Rise of Individualization: The Canadian Sentencing Approach" (2020) 38 Göttingen Stud Crim L & Crim Just 249.

9 Julien V Roberts & Howard H Bebbington, "Sentencing Reform in Canada: Promoting a Return to Principles and Evidenced-based Policy" (2013) 17:3 Can Crim L Rev 327; also see, Anthony Doob & Cheryl Webster, "Weathering the Storm? Testing Long-Standing Canadian Sentencing Policy in the Twenty-First Century" (2016) 45:1 Crime & Justice 359.

maximum of five years for possession in 2005 and at the same time added s. 163.1 (4.3), which advises judges to consider as an aggravating factor for all child pornography offences that the person "committed the offence with an intent to make a profit", further adding to the seriousness of the crime as part of the market nexus.[10] Conservatives raised the mandatory minimum to six months with a maximum of five years in 2012 and again in 2015 to one year with a maximum of 10 years.[11] While indictable making and distributing child pornography, s. 163.1 (2) (a) and (3) (a), received a lengthier mandatory minimum (one year) than indictable possession, s. 163.1(4), and/or accessing, s. 163.1 (4.1) (45 days) in 2005, mandatory minimums were made uniform for all indictable offences in both the 2012 and 2015 legislation and this remains so currently.[12] Conditional sentencing, initially having an impact on possession cases, was precluded when Conservatives eliminated it as an option for offences with mandatory minimums in 2007.[13] Berger argues that burgeoning mandatory minimums have resulted in Section 12 appeals of cruel and unusual punishment, not just for particular cases but also for hypotheticals; among Court decisions, *R v Lloyd* in particular has "sounded the death knell for most mandatory minimum cases".[14] This has not been the case for child pornography nationally although provincial courts, effective within the province only, have declared minimum penalties for possession unconstitutional, including Ontario.[15] The recent

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10 *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act* SC 2005, c 32, assented to 20 July 2005 [*Act to Amend*].

11 Under the *Safe Streets and Communities Act*, SC 2012, c. 1, assented to 13 March 2012 [*Safe Streets*] and the *Tougher Penalties for Child Predators Act*, SC 2015, c 23, assented to 18 June 2018 [*Tougher Penalties*], respectively.

12 The current section reads:

> 163.1 (2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.
>
> (3) Every person who transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission, making available, distribution, sale, advertising or exportation any child pornography is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.
>
> (4) Every person who possesses any child pornography is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or
>
> (b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.
>
> (4.1) Every person who accesses any child pornography is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or
>
> (b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.
>
> (4.2) For the purposes of subsection (4.1), a person accesses child pornography who knowingly causes child pornography to be viewed by, or transmitted to, himself or herself.
>
> (4.3) If a person is convicted of an offence under this section, the court that imposes the sentence shall consider as an aggravating factor the fact that the person committed the offence with intent to make a profit.

13 *An Act to amend the Criminal Code (conditional sentence of imprisonment)*, SC 2007, c 12, was assented to May 31st, 2007 and came into effect six months from that date; also see: Andrew A Reid & Julian V Roberts, "Revisiting the Conditional Sentence of Imprisonment After 20 Years: Is Community Custody Now an Endangered Species?" (2019) 24:1 Can Crim L Rev 1.

14 *R v Lloyd* (2016) 1 SCR 130 SCC 13; Berger, s*upra* note 6, 260. Berger cites under 15 mandatory minimums in the 1980s to more than 75 by the 2000s.

15 *R v John* (2018) ONCA 702 [*John*, ONCA]; *R v Zhang* (2018) ONCJ 646; *R v Joseph* (2018) ONSC 4646. In the first two cases hypotheticals were accepted to determine that the mandatory minimum for possession was contrary to the

Bill C-22 repealing some mandatory penalties for possession of controlled substances cites evidence-based diversion measures that treat addiction as a health and social issue rather than seeing possession as creating a market in illegal drugs, but this has not happened for possession of child pornography.[16]

Broad discretion in the determination of proportionality has resulted in acceptance of wide ranges of sentences for particular crimes in case law, but questions remain. Supreme Court decisions have limited appellate interference to an error in principle, or if a sentence is demonstrably unfit.[17] The wide discretion to set priority among sentencing principles means that even a sentence outside of the range is not considered an error in principle since the sentencing judge is the closest to the particular circumstances of the case. Berger cites one such case, *R v Lacasse*, in which the Supreme Court disagreed with the appellate court and supported the sentencing judge's comment that there was a need for a longer retributive sentence, uncommon for a first time offender with strong mitigating circumstances. Arguing that drunk driving cases were higher in that community, the judge proposed that this may be an indication of the community's taking the offence lightly. Berger points out that in this case the Court explicitly privileged proportionality over parity.[18]

While the prosecution must establish evidence beyond a reasonable doubt (s. 724 (3) (e)) for aggravating factors, judges have latitude in judicial notice where a judge may state well known and accepted facts without established proof. In the *Lacasse* judgment, Justice Wagner pointed out that the Court had long established that such judicial notice needs substantiation when it pertains to the specific principle at issue but argued that in this case, the judge had experience in the community, the cases of drunk driving could easily be verified, and the defence asked for no verification.[19] On judicial notice, Burns cautions that such observations may be subject to hindsight bias, the use of later events to comment on a case, and/or status quo bias where in case law "potentially inaccurate common sense judicial assumptions [move] from one case to another".[20] Given the average of two to three years before a sentence is rendered, there is room for this hindsight bias in possession judgements and judicial notice regarding rapid technological change in relation to the seriousness of the crime also travels in case law as we see in the cases below. On dissent in *Lacasse*, Justice Gascon points to a debate over the manner in which proportionality is handled by sentencing judges and argues that making an example of the offender overemphasizes harm to society and the victims (the gravity of the offence) which is separate from assessing blameworthiness, where other purposes and principles need to be taken into consideration, including rehabilitation and alternatives to incarceration, the latter of which the Supreme Court has established as serving both denunciation and deterrence.[21] Berger observes that the lack of progress in reducing incarceration of Indigenous offenders may be the result of the wide discretion judges have for prioritizing purposes and principles. However, he cites important Supreme Court decisions that signal a conceptual turn away from the strictly quantitative approach to proportionality "toward serious regard of punishment", how the demand of society, as represented in the sentence, is experienced by the offender

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Charter although both sentences were upheld. In the third mandatory minimums for both possession and making, 163.1 (2) and (4), were found contrary to the Charter in the case before the bar. See mms watch by Rangfindr <https://mms.watch/> for other provinces.

16 Bill C-22 An Act to amend the Criminal Code and the Controlled Drugs and Substances Act <https://parl.ca/DocumentViewer/en/43-2/bill/C-22/first-reading>.

17 Berger, s*upra* note 8.

18 *R v Lacasse*, [2015] 3 SCR 1089, SCC 64; Berger, supra note 8 at 261.

19 *Lacasse*, *supra* note 18 at paras 94, 95.

20 Kylie Burns, "Judges, 'common sense' and judicial cognition" (2016) 25:3 Griffith L Rev 319 at 333.

21 *Lacasse*, *supra* note 18 at para 131-134.

in their particular circumstances.[22] Although overincarceration of Indigenous people is of primary concern, Berger reminds us that the legislation on rehabilitation and reducing incarceration pertains to all offenders. Finally, he points out that even if there is a more balanced consideration in getting to proportionality, there is no such consideration for offenders once they are incarcerated, as correctional authorities and institutions are governed by different practices that group offenders according to how dangerous they are, not according to intervention and treatment needs.[23]

The judgement of *R v Sharpe*, which established the criminalization of private possession as a justifiable limit to freedom of expression under s. 1 of the Charter, paved the way for the overemphasis of societal harm referred to by Gascon, both legislatively and in case law where it is cited widely.[24] Using the reasoned apprehension of harm principle, Chief Justice McLachlin, writing for the majority, weighed in heavily on denunciation and deterrence because of the extreme harm to children both as victims and in society's valuing of them. Although there are varying uses of the reasoned apprehension of harm principle, our point in this case is not that McLachlin's use of the principle is questionable or moralistic but that it has been taken to some questionable limits by sentencing judges, resulting in distortion of the seriousness of the crime and the dangerousness of the offender.[25] First, the judgement privileges denunciation and deterrence even though their efficacy as sentencing principles is often questioned.[26] Denunciation as a purpose of sentencing focuses on the offender's conduct and is used to publicly reinforce society's condemnation as well as demonstrate the value system as represented by the courts. However, as Ruby et al. point out, gauging a sentence on society's condemnation not only gives little direction to the court on the limit of sentencing or for individual sentencing based on individual circumstances.[27] Deterrence,

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22 Berger, s*upra* note 8 at 263.

23 *Ibid* at 275.

24 *R v Sharpe*, [2001] 1 SCR 45, 2001 SCC 2. In this case the accused, charged with two counts of simple possession of child pornography as well as two counts of possession for distribution or sale, challenged the constitutionality of simple possession on the grounds of preventing freedom of expression as protected by s. 2(b) of the Charter and the challenge was upheld. The judge agreed, arguing that a blanket provision for possession was overbroad and there was not enough scientific evidence of its risks to children to justify such a limit on freedom of expression. The appeal was dismissed in a 2-1 decision of the Court of Appeal. Two judges maintained that private possession can never justify limits on free expression, the benefit does not outweigh the negative effects on freedom of expression and privacy, and the provision is "unjustifiably overbroad", while the dissenting judge argued that, although overbreadth was an issue, the provision itself is justified (para 17). The Crown appealed to the Supreme Court.

25 Writing for the majority in another SCC decision*, R v Labaye*, 2005 SCC 80, and overturning a conviction of indecency, McLachlin affirms that, far from being arbitrary, the apprehension of harm principle helps to move away from the subjective community standards test in limiting individual behaviour on moral grounds. She argues that this test emphasizes, "the need for objective criteria based on harm... crimes should be defined in a way that affords citizens, police and the courts a clear idea of what acts are prohibited. Crimes relating to public indecency are no exception" (para 2). She argues that the harm must be significant, that is, "grounded in norms which our society has formally recognized in its Constitution or similar fundamental laws", and to a degree that, "is incompatible with the proper functioning of society" (para 30). Craig argues that Chief Justice McLachlin's decision in *Labaye* may have opened a new era in regulation of sexuality and the law through a positive association of sexuality with desire although there are also caveats when it comes to the complexities of prostitution, sado-masochism and sexual assault. See Elaine Craig, "Laws of Desire: The Political Morality of Public Sex" 54 McGill L J 355. Sculthorpe also points out that in *R v Malmo-Levine* 2003 SCC 74 the court rejected the harm principle as being too arbitrary, whereas Justice Louise Arbour's dissent in that case established a minimal level of harm such that the harm must outweigh the harm caused by enforcement of the law. He suggests a sub-test where the risk of harm must be 'non-trivial' for imprisonment to be imposed. This would be McLachlin's case for possession of child pornography. See Andrew Sculthorpe, "A Second Chance for the Harm Principle in Section 7? Gross Disproportionality Post-*Bedford*" (2015) 20 *Appeal* 71.

26 Clayton Ruby, Gerald J Chan & Nader R Hasan, *Sentencing*, 8th ed (Markham: LexisNexis Canada 2012) at 6-16.

27 *Ibid*.

focused on the general level to warn individuals of consequences and on the individual level to discourage repeat offending, can often be counterproductive, from an objective point of view, where a longer sentence may confound both deterrence and rehabilitation in certain circumstances.[28] Nevertheless, in the *Sharpe* judgement the symbolic importance of both denunciation and deterrence, and their intricate association with the broadened parameters of the reasoned apprehension of harm, are overriding when children are involved because this, sends a clear message to all Canadians that the degradation and dehumanization of children, and their use as sexual objects for the gratification of adults is unacceptable. This benefits society by deterring the development of antisocial attitudes and complements the legislation's positive effect on children's rights.[29]

Second, possession is portrayed as an important part of a nexus much as drug possession in small amounts has been portrayed as driving the illegal drug trade:

> The links between possession of child pornography and harm to children are arguably more attenuated than are the links between the manufacture and distribution of child pornography and harm to children. However, possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children. [30]

Third, citing *R v Butler* (1992) on pornography and censorship in which it was found that scientific proof based on concrete evidence "sets the bar too high" and a reasoned apprehension of harm test is sufficient,[31] McLachlin argues that, even if there is lack of scientific agreement on the connections between possession and contact child abuse, using the broadest assessment of the risk of harm is paramount:

> Possession of child pornography increases the risk of child abuse. It introduces risk, moreover, that cannot be entirely targeted by laws prohibiting the manufacture, publication and distribution of child pornography. Laws against publication and distribution of child pornography cannot catch the private viewing of child pornography, yet private viewing may induce attitudes and arousals that increase the risk of offence. Nor do such laws catch the use of pornography to groom and seduce children. Only by extending the law to private possession can these harms be squarely attacked.[32]

Here we see associated with the offence what *might* take place rather than possession alone; calculating the risk of harm, discussed below, is another element weighing in on the blameworthiness of the offender in the calculation of proportionality in possession cases. However, although the *Sharpe* judgement clearly links criminalizing possession with reducing child abuse, it does not judge it as tantamount to contact abuse:

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28 *Ibid*. This overemphasis and its effect on proportionality in terrorist cases is noted. See Michael Nesbitt, Robert Oxoby & Meagan Potier, "Terrorism Sentencing Decisions in Canada Since 2001: Shifting Away from the Fundamental Principal and Towards Cognitive Biases" (2019) 52:2 UBC L Rev 553.

29 *Sharpe*, *supra* note 24 at para 236.

30 *Sharpe*, *supra* note 24 at para 28.

31 *R v Butler*, [1992] 1 S.C.R. 452; Sharpe, *supra* note 24 at para 85

32 *Sharpe*, *supra* note 24 at para 94.

> Criminalizing possession may reduce the market for child pornography and the abuse of children it often involves. The link between the production of child pornography and harm to children is very strong. The abuse is broad in extent and devastating in impact. The child is traumatized by being used as a sexual object in the course of making the pornography… the child must live in the years that follow with the knowledge that the degrading photo or film may still exist, and may at any moment be being watched and enjoyed by someone.[33]

As we see below, this separation of possession from the production of child pornography and contact abuse is misconstrued both in legislative measures and in the calculation of proportionality in sentencing for possession where judges declare it tantamount to contact abuse.

B. Technological Change, Child Pornography Legislation and Sentencing

Rapid technological change, especially advances in online facilitation, has heightened concern about online child sexual abuse, particularly child pornography. Concern, as articulated by Deibert, involves the Internet's rapid development and expansion which has transformed cyberspace into a "totally immersive environment," something that is increasingly embedded in society, introducing conveniences for people to access information and to connect with others but also presenting new opportunities for deviancy.[34] The producing, transmitting and sharing of child pornography represents the worst of this deviancy but also exposes in graphic images the betrayal of children in intimate family or close social relations. Predominantly a crime involving intimate family or close associates, and hidden and silenced within these hierarchical relationships, child sexual abuse has not been easily navigated socially or in common law adversarial systems; as in the case of rape, violent attacks by a sexually 'deviant' stranger are more believable both in the public and legal imagination where deviance historically is equated with non-heterosexual activity.[35] While child pornography laws were established in 1993, by the late 1990s, before the *Sharpe* decision, there was mounting political pressure, based on the dangers of the Internet, from both the socially conservative Reform/Alliance politicians and provincial attorneys general to enhance the protection of children from deviant strangers/predators on the Internet.[36] Although there have been some high-profile cases that highlight the opportunity provided by this technology for detecting and bringing to trial contact child abusers with close familial ties to the child victims of child pornography,[37] the prevailing assumption remains that the burgeoning complexity of the Internet makes it ever more dangerous for children in relation to deviant strangers; possession fits well into this narrative which is also privileged in

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33 *Ibid* at para 92.

34 Ronald J Deibert, *Black Code: Surveillance, Privacy and the Dark Side of the Internet* (Toronto: McClelland & Stewart, 2013).

35 See e.g. Holly Johnson, "Limits of a Criminal Justice Response: Trends in Police and Court Proceedings" in Sexual Assault in Elizabeth A. Sheehy, ed, *Canada: Law, Legal Practice and Women's Activism*, (Ottawa: University of Ottawa Press, 2012) 613; Elise Chenier, *Strangers in Our Midst: Sexual Deviancy in Postwar Ontario* (Toronto: University of Toronto Press, 2008); Clare MacMartin, "(Un)reasonable doubt? The invocation of children's consent in sexual abuse trial judgments" (2002) 13:1 Discourse & Society 9; Caroline S Taylor, *Court Licensed Abuse* (New York: Peter Lang Publishing, 2004); Mark D Everson &, Jose Miguel Sandoval, "Forensic child sexual abuse evaluations: Accessing subjectivity and bias in professional judgements." (2011) 35:4 Child Abuse & Neglect 287; Emily Hansen "Who is Harmed by fantasy - A Deliberative Democratic and Charter Analysis of Canada's Child Pornography Law" (2016) 25 Dalhousie J Leg Stud 25.

36 Yaman Akendiz, *Internet Child Pornography and the Law* (Aldershot: Ashgate Publishing Limited, 2008); Carol L Dauda, "Sex, Gender and Generation: Age of Consent and Moral Regulation in Canada" (2010) 38:6 Politics & Policy 1159.

37 For example: Julian Sher, *Caught in the Web* (New York: Carroll and Graf, 2007).

the *UN Convention of Rights of the Child's Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, championed by Canada and mentioned in *Sharpe*.[38] Because there is concrete evidence in the stored images, possession is easily prosecuted with evidence organized in relation to the COPINE scale that police, prosecutors and psychologists use for assessing blameworthiness as well as risk.[39] Nevertheless, the labour involved in determining the quantity and quality for laying charges and determining the Crown position on sentence is intensive and expensive.[40]

This preoccupation, along with the *Sharpe* decision, has had a significant role to play in recalculating the legislative treatment of child sexual abuse that perpetuates the trope of the violent stranger and complicates the sentencing of possession. Beyond periodic raising of mandatory minimums mentioned above, legislation in 2002 added distribution and accessing offences to the child pornography law.[41] In 2005, the Liberals broadened child pornography to include written material and audio recording.[42] The criminalization of access to catch those who viewed child pornography online without evidence of keeping it on a computer, led to confusion and a Supreme Court case, *R v Morelli* (2010), in which possession was differentiated from accessing and clearly defined as pertaining to material for which there was an underlying data file.[43] With the onset of Internet file sharing applications, comparable confusion between distribution (actively and purposefully sharing) and making available (passively leaving files in a file-sharing application folder) also led to a Supreme Court case, *R v Spencer* (2014), which found both

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38 The preamble emphasizes the need for instituting the "worldwide criminalization of the production, distribution, exportation, transmission, importation, intentional possession and advertising of child pornography, and stressing the importance of closer cooperation and partnership between Governments and the Internet industry". GA Res, UNGA, 54th Sess, A/RES/54/263, 16 March 2001. For signing and ratifying dates see <https://indicators.ohchr.org/>. See also: Michael J Dennis, "Newly Adopted Protocols to the Convention of the Rights of the Child" (2000) 94:4 AJIL 789; *Akendiz,* supra note 36. This is also mentioned in Sharpe, *supra* note 24 at para 171.

39 In 1997 the Combating Paedophile Information Networks in Europe (COPINE) Project produced this scale which is the instrument of measurement most widely used to rationalize the assessment of material gathered as evidence in child pornography cases. First used through common law cases in the UK in 2003, it has also been referenced in Canada and it is used by police and prosecutors in assessing evidence and making cases in all three countries. See Akendiz, *supra* note 36; Alisdair Gillespie, *Child Pornography Law and Policy* (New York: Routledge, 2011); Tony Krone "Does Thinking Make It So? Defining Online Child Pornography Possession Offences" (2005) 299 Trends and Issues in Crime and Criminal Justice 1.

40 Melissa Wells *et al*, "Defining Child Pornography: Law Enforcement Dilemmas in Investigation of Internet Child Pornography Possession" (2007) 8:3 Police Practice &. Res 269. The original scale has twelve levels indicating increasing level of severity in sexual content and harm with the last five getting the most attention. The levels are: indicative, meaning non-erotic clothed children (usually underwear, bathing suits) in daily-life situations; nudist, meaning naked or semi-naked children from legitimate sources (catalogues, family pictures); erotica, meaning surreptitiously taken photographs in situations where it is normal for children to be naked or in underwear or swimwear (beach, bathtub); posing, meaning deliberately posed where the picture is not necessarily sexual but amount, context and organization of pictures suggests sexual interest; erotic posing, meaning pictures deliberately posed to be sexual or provocative; explicit erotic posing, meaning pictures focusing on genital areas whether clothed or naked; explicit sexual activity meaning touching, mutual self-masturbating, oral sex and intercourse by child, no adult involved; assault, meaning sexual assault of child including digital touching by an adult; gross assault meaning grossly obscene involving penetrative sex, masturbation or oral sex; and, sadistic/bestiality, meaning child tied, beaten or experiencing other pain or child engaged in sexual activity with an animal. See Virginia NL Franqueira *et al*, "Investigation of Indecent Images of Children Cases: Challenges and suggestions collected from the trenches." (2018) 24 Digital Investigation 95; Hannah L Merdian, et al, "Assessing the internal structure of the COPINE." (2013) 19:1 Psychology, Crime & L 21 [Merdian et al, "COPINE"].

41 *Criminal Law Amendment Act*, 2001, SC 2002, c 13, assented to 4 June 2002.

42 An Act to Amend , *supra* note 10.

43 *R v Morelli* [2010] SCC 8, 1 SCR 253 at paras 9-19.

culpable.[44] The same 2002 legislation added child pornography to those offences subject to further conditions (ancillary orders) in Section 161 (1) a), a.1) and b) of the *Criminal Code*, if so ordered by the sentencing judge as a condition of probation; Section 161 (1) c) and d) were added in 2012.[45] Section 161 c) and d) were made retroactive for the protection of society and challenged under Section 11 (*i*) resulting in a Supreme Court decision that found c) to be a punishment and protected by 11 (*i*) as well as unconstitutional under Section 1 of the Charter.[46] The duration may be for life or shorter periods at the judge's discretion.[47] Any offender assigned probation is also subject to an ancillary order restricting firearms in s. 109 and/or s. 110 if they have committed sexual assault with a weapon; as we see below, several of our cases include those orders confirming that possession is considered a contact offence at least by some judges. In 2004 the *Sex Offender Information Registration Act* [SOIRA] stipulated compliance with the *Act* as another ancillary order to a sentence for possession with a duration of ten years for offences with maximums of two to five years, s. 490.013 (2) a); this increased to 20 years in 2015 as the maximum for possession rose to ten years, s. 490.013 (2) b).[48] A duration of SOIRA for life can only be given if it is a second offence requiring SOIRA compliance, s. 490.013 (4).

This dizzying mix of offences and escalating penalties has resulted in confusion of terms and different interpretations in calculating proportionality and in considering parity in sentencing for possession. For example, in *R v Machulec* (2016), an appeal against the mandatory minimum, the judge comments that finding "the appropriate range of sentencing for simple possession of child pornography is not a simple task… I have found no Ontario Court of Appeal case directly addressing the appropriate sentencing range for possession of child pornography".[49] Citing historical cases, the judge in *R v Inksetter* (2017), a case of possession and making available where mitigating factors for the accused were predominant, demonstrated that privileging denunciation and deterrence did not mean ignoring the importance of

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44 R v Spencer [2014] SCC 2, SCR 212 at paras 82-87. J. Fish argued that distribution was defined as active file sharing while making available was defined as passive keeping of files in a shared folder ("wilful blindness"); both indicate culpability but in this case, Fish ordered a new trial as the proper charge had not been laid.

45 *Criminal Law Amendment Act*, *supra* note 41; *Safe Streets*, *supra* note 11. Section 161 (1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under section 730, of an offence referred to in subsection (1.1) in respect of a person who is under the age of 16 years, the court that sentences the offender or directs that the accused be discharged, as the case may be, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from (a) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre; (a.1) being within two kilometres, or any other distance specified in the order, of any dwelling-house where the victim identified in the order ordinarily resides or of any other place specified in the order; (b) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years; (c) having any contact — including communicating by any means — with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate; or (d) using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.";

46 *R v KRJ*, [2016] SCC 31, 1 SCR 906.

47 Section 161 (2) The prohibition may be for life or for any shorter duration that the court considers desirable and, in the case of a prohibition that is not for life, the prohibition begins on the later of (a) the date on which the order is made; and (b) where the offender is sentenced to a term of imprisonment, the date on which the offender is released from imprisonment for the offence, including release on parole, mandatory supervision or statutory release.

48 SOIRA: see <http://criminalnotebook.ca/index.php/SOIRA_Notice_Convictions_Pre-December_15,_2004>; *Tougher Penalties*, *supra* note 11.

49 *R v Machulec* [2016] ONSC 8219 at para 10. This case was not among our cases because the offender did not plead guilty.

rehabilitation and gave a sentence of two years less a day so that there could be probation with rehabilitation.[50] On appeal, this sentence was changed to a penitentiary sentence of three and a half years, the appellate court cited a sentencing error because there was too much emphasis on rehabilitation in the calculation of proportionality.[51] In *R v Courtois* (2016), a case of possession and distribution, the judge threw out the charge of distribution when the Crown tried to amend the indictment from distribution to making available after the defence was completed.[52] In *R v Rytell* (2019), a case of possession and accessing, the judge threw out the accessing since possessing in this case required accessing.[53] Although our cases involve possession only, we can see evidence of these confusions in some judgements.

C. Calculating Risk, Proportionality and Sentencing for Possession

These conditions have intensified the evaluation of risk of perpetrating offences in the future, further complicating the calculation of proportionality in sentencing for possession. In calculating risk, judges rely on several sources such as past criminal history, psychological or other medical assessments and the pre-sentence report, amongst other actuarial evaluations.[54] While this approach may appear objective, there are serious limitations.[55] Risk assessments such as phallometric testing, are not empirically tested or appropriately validated, limiting their capability to reliably predict risk and recidivism.[56] The quantity and quality of the collection is used to indicate both the seriousness of the crime and the blameworthiness of the offender but also is used as an indication of paraphilic disorders, often paedophilic disorder, and a risk of contact abuse. However, psychologists have rejected efforts to include forensic indicators such as quantity or quality of child pornography material in the diagnosis of a pathology.[57] Making inferences about direct association between a disorder and contact abuse ignores complex but identifiable differences between offenders solely convicted of possessing child pornography, online child abusers and contact abusers.[58] Notwithstanding these overlooked limitations, the sentencing of offenders is reliant upon their classification in this process, based on the judge's subjective determination of the future risk they pose. Either an offender is classified as so intransigent that they are beyond help and thus deserving of exclusion and segregation or identified as malleable for reform and deserving of rehabilitative efforts. The focus for

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50 *R v Inksetter* [2017] ONCJ 574.

51 *R v Inksetter* [2018] ONCA 474.

52 *R v Courtois* [2016] ONCJ 190.

53 *R v Rytel* [2019] ONSC 5541.

54 Kelly Hannah-Moffat & Paula Maurutto, "Re-contextualizing pre-sentence reports: Risk and race" (2010) 12:3 Punishment & Society 262.

55 Kelly Hannah-Moffat, "Actuarial Sentencing: An "Unsettled" Proposition" (2013) 30:2 Justice Quarterly 270.

56 Christopher Baird, *A question of evidence: A critique of models used in the justice system* (Madison WI: National Council on Crime and Delinquency, 2009); See also: Jennifer Skeem, "Risk Technology in Sentencing: Testing the Promises and Perils" (2012) 30:2 Justice Q 1.

57 Michael B First "DSM-5 and Paraphilic Disorders." (2014) 42:2 J Am Academy Psychiatry L 191. First chronicles the rejection of efforts to include forensic indicators such as quantity or quality of child pornography material in the Diagnostic and Statistical Manual of Mental Disorder. While the scale has been found valid for descriptive use and gauging the impact on the victim that is not the case for gauging risk of contact abuse. See Merdian et al. *supra* note 40; Hansen *supra* note 35.

58 See e.g. Hannah L Merdian et al, "The three dimensions of online child pornography offending" (2013) 19:1 J Sexual Aggression 121; Hannah L Merdian et al, "The endorsement of cognitive distortions: comparing child pornography offenders and contact sex offenders" (2014) 20:10 Psychology, Crime & L 971; Michael C Seto "Research on online sexual offending: what have we learned and where are we going?" (2017) 23:1 J Sexual Aggression 104. Seto points out that online child pornography-only offenders with no prior criminality are also the least likely to reoffend.

this latter type is to "remoralise" or "responsibilise" them through the criminal justice process into a self-regulating citizen.[59]

The effect is most visible in the consideration of aggravating and mitigating factors that establish the blameworthiness of the offender, in which risk is assigned a central role. The subjective classification of the "responsible" offender who exhibits an ability to reform and self-regulate, and the 'risky' offender who fails to demonstrate individual rationality and the capacity to control their impulses, impacts the process and outcome of sentencing in substantive ways. Our earliest case, *R. v. Kwok* (2007), is a landmark one because it set out specific aggravating and mitigating factors for possession that have been used ever since. Of our other 13 cases, nine cite *Kwok* directly and the remaining four use the same mitigating and aggravating factors even though the case is not cited. Aggravating factors include:

> (i) a criminal record for similar or related offences; (ii) whether there was also production or distribution of the pornography; (iii) the size of the pornography collection; (iv) the nature of the collection (including the age of the children involved and the relative depravity and violence depicted); (v) the extent to which the offender is seen as a danger to children (including whether he is a diagnosed pedophile who has acted on his impulses in the past by assaulting children); and (vi) whether the offender has purchased child pornography thereby contributing to the sexual victimization of children for profit as opposed to merely collecting it by free downloads from the Internet.[60]

While these aggravating factors delineate blameworthiness in a practical manner, they also serve a normative purpose, offering insight into the qualities the court considers when implicitly identifying and classifying the 'risky' and 'undeserving' offender. Mitigating factors include:

> (i) the youthful age of the offender; (ii) the otherwise good character of the offender; (iii) the extent to which the offender has shown insight into his problem; (iv) whether he has demonstrated genuine remorse; (v) whether the offender is willing to submit to treatment and counseling or has already undertaken such treatment; (vi) the existence of a guilty plea; and (vii) the extent to which the offender has already suffered for his crime (for example, in his family, career or community).[61]

These factors display in a practical sense what the Court will consider when determining if the offender before them is eligible for a lighter sentence, as well as a sentence which has a rehabilitative element. However, mitigating factors, too, serve a normative function outlining redeemable traits, qualities and actions that constitute the 'deserving' offender.

Taken together, aggravating and mitigating factors serve to delineate a typology of offenders premised on subjective notions about risk. If a judge determines that the aggravating factors outweigh the mitigating factors in a particular case, then the individual fits within the construct of the 'undeserving' offender and is deemed most risky. As per the aggravating factors in *Kwok*, this usually consists of the offenders who are judicially labelled as a paedophile and exhibit cognitive distortions as demonstrated by their lack of insight and remorse for the harm they have caused, alongside the fact that they are not of otherwise good

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59 Hazel Kemshall, "Effective Practice in Probation: An Example of 'Advanced Liberal' Responsibilisation?" (2002) 41:4 How J Crim Justice 41 at 44.

60 *R v Kwok* [2007] ONSC 671 at para 7.

61 *Ibid*.

character. In contrast, if the mitigating factors overshadow the aggravating factors, the offender conforms to the 'deserving' offender who is of overall good character and can reform. Typically, they have been 'clinically' determined to not be a paedophile and, demonstrating remorse and insight, are willing to be treated. It is within this context that actuarial methods of risk assessment are relied upon in a manner which implicitly and *subjectively* classify an offender in one of two ways: either as fitting within the archetypal profile of the "sexually deviant monster" who has an uncontrollable predilection towards harming children (or at the very least feels indifference towards the victimization of children) and who is *undeserving* of certain legal outcomes[62]; or, as a temporarily troubled person who is of otherwise good character with a sudden lapse of judgement.[63] This latter offender appreciates the harms their offence has caused and demonstrates that they are *deserving* of special legal outcomes. For our study, this typology of offenders offers an analytical tool to categorize and unpack how assumptions of risk and worth affect proportionality in the sentencing of offenders for the possession of child pornography in substantive ways.

III THE SENTENCING PROCESS IN ONTARIO: CHILD PORNOGRAPHY POSSESSION CASES 2007-2017

A. Our Case Selection

Since we are interested in disentangling the manner in which subjective (and often implicit) lines of judicial reasoning premised on assumptions about risk and harm permeate the process of arriving at proportionality, we first engaged in a process of collecting cases involving possession in Ontario. We utilized WestlawNext Canada, an online database which compiles a large number of written decisions across Canadian courts. Since we were specifically interested in sentencing decisions, we conducted our search using WestLawNext's Canadian Sentencing Digest, which organizes and classifies federal and provincial sentencing decisions based on offence. This yielded 62 cases between 2007 and 2019 which involve a conviction of child pornography possession in Ontario. We then isolated cases that involved a conviction solely for the possession of child pornography, and where the offender had no history of criminal activity, including violation of bail conditions. This was deliberate in order to observe the reasoning behind the calculation of proportionality as well as the consideration of parity to establish a sentencing range for possession. It also allowed us to assess the manner and extent to which judges were classifying those offenders who have not directly come into contact with children as child predators, based on subjective and flexible interpretations of risk and harm, and in turn, penalizing them for offences that fall outside the scope of their conviction of possession. Our final sample of sentencing judgements includes 14 cases in Ontario between the years of 2007 and 2017. First, we present a comparative analysis of cases which exhibit a range of judicial reasoning in the process of calculating proportionality, in relation to other purposes and principles, as well as differences in the rhetoric used in judicial notice to characterize harm and the burgeoning Internet. This part reveals a sharp divide between a punitive approach to the process and a tempered one. Then, through a process of pairing similar cases, we examine how judges subjectively classify offenders as undeserving or deserving of rehabilitation and leniency. This part of the

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62 John Douard, "Sex Offender as Scapegoat: The Monstrous Other Within" (2008) 5 NYU L Rev 31.

63 Steven Angelides, "Paedophilia and the Misrecognition of Desire" (2004) 8 Tranformations, online: <http://www.transformationsjournal.org/journal/issue_08/article_01.shtml>. Angelides demonstrates that married heterosexual men's transgressions are judged as a lapse compared to a pathology for non-heterosexuals. Also, Chenier notes the similarities in characterization of 'paedophiles' and that of homosexuals historically. Elise Chenier "The Natural Order of Disorder: Pedophilia, Stranger Danger and the Normalizing Family" (2012) 16:2 Sexuality& Culture 172.

analysis reveals great disparity in both the process and outcome of sentencing based on subjective, judicial classification of offender type.

B. The Calculation of Proportionality and the Range of Judicial Reasoning

Figure 1: Spectrum of Judicial Reasoning in cases of Child Pornography Possession

	Tempered	Low Punitive	High Punitive	
Mandatory Minimum Regime	Proportionality balanced; parity strong	Seriousness of crime dominant, less rhetoric Proportionality distorted and parity weak	Seriousness of crime dominant, predominant in rhetoric Proportionality distorted and parity abandoned	Contradictory
45 Days	R. v. Heffernan (2012) R. v. Labre (2013) R. v. Lane (2013)	R. v. Twigg (2013) R. v. Wang (2016)	R. v. Kwok (2007) R. v. Dumais (2011) R. v. Fiaoni (2012) R. v. Dansereau (2014)	R. v. Brunton (2011)
6 Months	R. v. Lysenchuk (2016) R. v. Garcia (2016)		R. v. Robertson (2015) R. v. John (2017)	

To establish a range of judicial reasoning in the process of sentencing we consider the characterization of the seriousness of the crime and the blameworthiness of the offender in relation to *Sharpe's* reasoned apprehension of harm approach and the burgeoning of the Internet (see Figure 1). Regarding the seriousness of the crime in the tempered case the reasoning treats possession as a single offence characterized by having images/videos of child pornography. In the punitive approach possession is considered as representative of all child pornography offences, including contact abuse. Regarding the blameworthiness of the offender judicial reasoning in the tempered approach acknowledges harm and observes the duty to give precedence to denunciation and deterrence while considering other purposes and principles that pertain to the actual circumstances of the case. In the punitive approach, the case is made a *cause* for denunciation and deterrence so as to make an example of the offender as blameworthy for all that is abhorrent in child sexual abuse. Parity, in like cases cited, is observed when the process is more tempered while it is sacrificed in a punitive process. As seen in Figure 1, we divide the cases into those under the 45-day mandatory minimum and those under a six-month mandatory minimum and find that in both groups this divide exists. However, we also observe an outlier contradictory case, *R v Brunton*, which is cited in both punitive and tempered processes as discussed below.[64] There is also an interim approach that is slightly less punitive in two of the cases where there is still punitive distortion, both in the seriousness of the crime and the blameworthiness of the offender, but without the heightened rhetoric; parity remains weak. Overall, the more punitive process predominates in 8 out of 13 cases (leaving out *Brunton*).

Before we consider individual cases, there are some general comments that can be made in relation to overall sentencing outcomes (see Figures 2 and 3 below). The average period between being charged and sentenced was three years for which conditions of bail existed for all offenders, none of whom were found to breach them. For a majority of our cases, mandatory minimums do not present a constraint on judicial discretion as there is an emphasis on incarceration and longer sentences. Under a 45-day

[64] *R v Brunton* [2011] ONSC 285.

mandatory minimum, there are only three cases in which the judges consider 90-day intermittent sentences to be sufficient for denunciation and deterrence (twice the mandatory minimum). Of the remaining cases, one is four times, one is five times, two are six times, and two are eight times the mandatory minimum. Once the six-month minimum is in effect, of the four cases, three are a bit above six months, while one is three times the six-month minimum. This suggests, despite a clear divide in the *process* of sentencing, a leveling out to a more stable numerical range within this small sample of cases before the minimum was raised to one year. There is little sense that incarceration and rehabilitation are connected as only three of the fourteen cases call for a secure treatment facility; most cases rely on probation for rehabilitation. One case encourages rehabilitation but there is no condition in the sentencing document. Three cases, all of which fall into the punitive process category have no consideration of rehabilitation recorded in the sentencing document. All have probation, seven cases designating the maximum of three years, four two years, one a year and a half, and two a year. Orders for some version of s. 161 (1) generally have a limit of 10 years although in a couple of cases a five-year limit is designated. Life is given in a punitive process for only one case. Cases after 161 (1) c) is declared unconstitutional designate probationary conditions instead. In all cases using a computer for work only is allowed. In four of the cases where the process of calculating proportionality is more punitive, the SOIRA duration is double the legislated limit of 10 years and in one case it is for life even though the offender did not have a previous order. In three of the punitive process cases, an ancillary order prohibiting weapons is given, suggesting that the judges equate possession of more extreme images with actual assault with a weapon. We can conclude that ancillary orders in these 14 cases require considerable provincial resources.

Figure 2: Sentence and Ancillary Terms: Cases Under Mandatory Minimum of 45 days

Case(s)	Sentence	Probation	Ancillary Orders*	Rehabilitation
R v Brunton (2011)	6 mo	2 yrs	SOIRA 10 yrs 161 (1) 2yrs s. 110 10 yrs***	Incarceration in secure treatment facility and condition of probation.
R v Kwok (2007)	12 mo	3 yrs	SOIRA 10 yrs 161 (1) a) 5 yrs; b) 10yrs	Incarceration in secure treatment facility.
R v Dumais (2011)	9 mo	1 yrs	SOIRA 20 yrs** 161 (1) 10 yrs	No consideration.
R v Fiaoni (2012)	12 mo	3 yrs	SOIRA 10 yrs 161 (1) b) c) 5 yrs s. 109 10 yrs***	No consideration.
R v Dansereau (2014)	15 mo	2 yrs	SOIRA 20 yrs** 161 (1) a) b) c) 10yrs	Assessment and treatment as directed by probation officer.
R v Twigg (2013)	8 mo	1.5 yrs	SOIRA 20 yrs** s. 161 (1) a) b) c) 10 yrs	Assessment and treatment as directed by probation officer.
R v Wang (2016)	9 mo	3 yrs	SOIRA 20 yrs** s. 161 (1) a) b) 5 yrs	Assessment and treatment as directed by probation officer.
R v Heffernan (2012)	90 days intermittent	3 yrs	SOIRA 10 yrs s. 161 (1) 10 yrs	*Encourage* rehabilitation during sentence and after.

R v Labre (2013)	90 days intermittent	3 yrs	SOIRA 10 yrs s. 161 (1) 10 yrs	Assessment and treatment as directed by probation officer.
R v Lane (2013)	90 days intermittent	1 yr	SOIRA 10 yrs s. 161 (1) a) b) c) 5 yrs	Assessment and treatment as directed by probation officer.

* DNA required in all cases; ** Requirement 10 years only; *** Weapons prohibition.

Figure 3: Sentence and Ancillary Terms: Cases Under Mandatory Minimum of Six Months

Case(s)	Sentence	Probation	Ancillary Orders*	Rehabilitation
R v Robertson (2015)	18 mo	3 yrs	SOIRA for life** s. 161 (1) a), c), d) for life s. 109 for life***	During incarceration in secure treatment facility and condition of probation.
R v John (2017)	10 mo	2 yrs	SOIRA 10 yrs 161 (1) a), b), c) 10 yrs	No consideration.
R v Lysenchuk (2016)	9 mo	3 yrs	SOIRA 10 yrs s. 161 (1) not ordered (probation conditions instead)	Assessment and treatment as directed by probation officer.
R v Garcia (2016)	8 mo	2 yrs	SOIRA 10yrs s. 161 (1) not ordered (probation conditions instead)	Assessment and treatment as directed by probation officer.

* Sample of DNA required in all cases; ** Requirement 10 years only; *** Weapons prohibition

C. Cases With 45-Day Mandatory Minimum

We now turn to an examination of judicial reasoning in the individual cases to illustrate the punitive, slightly less punitive and tempered approaches. Kwok, 29, (see Figure 4) is eligible for a conditional sentence but the judge takes a turn away from conditional sentencing for possession even though the legislation prohibiting conditional sentences was yet to be passed and become law at the time of sentencing.[65] Through cases cited, the judge illustrates that conditional sentences had been the norm for possession either directly[66] or on appeal (*R v Schan* (1995); *R v Cohen* (2001)).[67] The judge also highlights two cases where incarceration is required because of serious risk to children or for the purpose of denunciation and deterrence (R v Stroempl (1995); R v Lisk (1997)).[68] These and other cases cited reveal the propensity towards conditional sentencing but already a tendency to disparity in sentencing in these earlier days. For example, the judgement on appeal in *R v Stroempl* (1995) reduces what is considered an excessive 18 months of incarceration for possession to 10 months. In *R v Schan* (2002) a sentence of incarceration for possession is changed to a conditional 18-month sentence on appeal, while a conditional sentence of six months in the community for possession is handed down in *R v Parise* (2002). In *R v*

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65 *Act to Amend*, *supra* note 13. The sentencing was in February 2007.
66 *R v Parise* [2002] OJ No 2513 (ONCJ); *R v. Mallett*, [2005] OJ No 3868 (ONSCJ)
67 *R v Schan*, [2002] OJ No 600 (ONCA); *R v Cohen*, [2001] OJ No 1606 (ONCA).
68 *R v Stroempl* [1995] 105 CCC (3d) 187 (ONCA); *R v Lisk*, [1998] OJ No 1456 (ONCA)

Mallett possession results in a one-year conditional sentence as "[E]fforts toward rehabilitation would be entirely retarded by an incarceration option".[69] In *R v Cohen* (2001) the sentence of 14 months incarceration for several counts of possession and distribution is found excessive on appeal and changed to a conditional sentence of 14 months, the judge citing *R v Proulx* (2000), a Supreme Court judgement that defines a conditional sentence as satisfying the principles of denunciation and deterrence.[70] Kwok had no prior offences and no breaches of bail conditions since 2004. The defence did not dispute the duration suggested by the Crown of between 8 and 18 months but, for the same reasons cited in the *Mallett* judgement, asked for a conditional sentence. The judge imposed 12 months of incarceration and argued that the facts of the case demonstrate why conditional sentences should be precluded in a case of possession but demurred on making this a general claim.

In defending incarceration, the judge adds weight to the seriousness of the crime, and this reflects upon the blameworthiness of the offender throughout the process. Criticizing the *Mallett* judgement in its consideration of mitigating and aggravating factors, the judge states that "I prefer to think of the absence of an aggravating factor (absence of further offences of distribution and production) as being neutral, rather than mitigating".[71] This interpretation of the judgement in *Mallet* is confusing as the judge in that case does not count the lack of distribution or production as a mitigating factor. Instead, the *Mallet* judge cites *Parise* for an assessment of aggravating factors. If we look at *Parise*, at no time does the judge consider the absence of further offences as a mitigating factor but sets out the aggravating factors that are not pertinent in cases of possession only, acknowledging that possession, distribution, and production are different offences, where distribution is worse than possession and production is even worse. The judge in *Kwok*, despite no charge of distribution, dwells upon it stating that, "I am satisfied he did not produce any pornography himself; I am not satisfied that he did not distribute. Therefore, while distribution of pornography is not an aggravating factor, the absence of distribution is also not a mitigating factor".[72]

There is also a heightened rhetoric of harm in relation to apprehension about the Internet in judicial notice in Kwok (2007) that may reflect hindsight bias, since file-sharing applications had only begun in the early 2000s. Citing the increasing market through the Internet's rapidly evolving capacity and the difficulties in policing this activity, the judge argues that, "[I]t would be very unlikely for a person to have amassed a collection of the nature and size Mr. Kwok had without ever having distributed child pornography to another collector".[73] The judge doubles down on possessors arguing that, "[A]dvances in technology and the Internet have made it all too easy for these monsters to spread their filth to *equally* depraved 'collectors' all over the world".[74] Finally, rather than understanding the Internet as a forensic breakthrough that has made visible what had always been hidden through the fraught close, yet hierarchical, relationships between children and their abusers, the judge uses the evidence of police online forensic success in apprehending child abusers to overemphasize the seriousness of the crime and, thus, the blameworthiness of the offender. Quoting the victim in a famous police rescue (although the judge "cannot be confident that these are her [the victim's] exact words as opposed to a paraphrase of her feelings on the subject written by someone else") the judge emphasizes the depravity of possession: "The absolute worse (sic) thing about everything that happened to me was that Matthew [her abuser] put my pictures on

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69 *Mallett*, *supra* note 66 at para 10.

70 *R v Proulx* [2000] SCC 5. The judgement concludes that being confined, for example under house arrest, with restrictive conditions satisfies the principles of denunciation and deterrence.

71 Kwok, *supra* note 60, at para 8.

72 *Ibid* at para 45.

73 *Ibid*.

74 *Ibid* at para 50, our emphasis.

the internet".[75] As Hessick (2011) has argued, this complicates the conceptualization of contact child abuse..[76] Here we see additional weight given to the seriousness of the crime and a compounding of the blameworthiness of the offender in a distortion of proportionality that runs through subsequent cases.

In *R v Brunton* (2011), we see some of the tensions for judges grappling with the bewildering context of sentencing in possession cases. At the time of his arrest in 2008 the offender was 25 with what is described as a mid-range collection of 4,084 images and seven videos which portrayed, "young male adolescents between the ages of 11 to 13 in various sexual acts".[77] University educated, full-time employed and with a supportive family the accused was found to suffer from Asperger's Syndrome and social anxiety, limiting relationships. A diagnostic test demonstrated that he intellectually knew sex between adults and children was illegal but on an emotional level did not see that it was completely wrong. Nevertheless, he was considered a very low risk for contact abuse because "contact with children would put him at a very high anxiety level and consequently, he would not think of it".[78] He had been on bail conditions for three years with no breaches. In heightened rhetoric the judge comments that, "If no one was viewing these pictures or videos of sexual acts between children or between children and adults then there would be no reason to produce it. Consequently, children would not be victims of horrendous sexual acts to satisfy the perverse sexual gratification of adults".[79] Whether we believe that the judge thinks that child pornography is the 'cause' of child sexual abuse or not, the remark overemphasizes the seriousness of the crime while effectively masking the relationships and differentials of power involved in actual contact abuse. Citing no cases, the judge argues that the 45-day minimum is not working and needs to be more "mediatized" so denunciation and deterrence is served.[80] While the judge argues for a balance with rehabilitation, finding the Crown's call for nine months too harsh but 45 days, or even 90 days, too lenient, the accused is sentenced to six months with the recommendation for a secure treatment facility and a two-year probation, including ancillary order s. 110 which equates possession with actual physical abuse with a weapon. Here we see an overemphasis of the seriousness of the crime in the rhetoric but also an explicit concern for rehabilitation suggesting attention to the particular offender and their circumstances. As a result, the case has been cited in the sentencing processes on both ends of the range of sentencing.

Of the remaining eight cases under the 45-day mandatory minimum, three take the much more punitive approach, where proportionality is distorted through the weighting of the seriousness of the crime and abandoning parity which, in turn, compounds the blameworthiness of the offender. In the first case, *R v Dumais* (2011), the accused, a teacher aged 36, was arrested in front of his students, lost his job and his girlfriend, and suffered media exposure.[81] His collection of 170 images and 44 videos was comparatively small but hardcore and mixed in with his photography and videography collection in general. Given these circumstances, strong support among his friends and family and a glowing report of normal heterosexuality and ongoing treatment, the judge accepts that it was 'curiosity' but, in a distortion of proportionality, states that "factors serving to aggravate the sentence stem from the *nature of the offence* itself and not Mr. Dumais' personal circumstances".[82] Abandoning parity and over emphasizing the seriousness of the crime, the judge cites two cases that involve actual children in making or viewing child

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75 *Ibid* at para 51.
76 Carissa Byrne Hessick, "Disentangling Child Pornography from Child Sex Abuse" (2011) 88:4 Wash UL Rev. 853.
77 *Brunton*, *supra* note 64 at para 7.
78 *Ibid* at para 10.
79 *Ibid* at para 12.
80 *Ibid* at para 13.
81 *R v Dumais* [2011] ONSC 276
82 *Ibid* at para 12, our emphasis.

pornography and a peer-to-peer file-sharing case and refers to not only the challenge of the Internet but also evidence of a "link between his [Dumais'] possession and the sexual abuse of children beyond those depicted in the images on his computer".[83] Finding 12 months unfair but a 90-day intermittent sentence too lenient for denunciation and deterrence the judge settles on nine months with one-year probation. In the second case, *R v Fiaoni* (2012), the offender, 38, charged with possession of 895 images and 114 videos among which are hardcore materials, is well educated, employed, and has a supportive family as well as a positive sentencing report.[84] Abandoning parity, the judge cites the same cases as in *Dumais* (*R v F (D G)* and *R v Bock*) despite Fiaoni's being charged with possession only and having no criminal record. Quoting *Kwok* at length and adding weight to the seriousness of the crime, the judge argues that possession is "best described as a never-ending virtual rape. These children can never recover their innocence as the internet is never ending".[85] Citing *R v Brunton* on the ineffectiveness of the minimum for deterrence the judge questions whether six months is enough and sentences Fiaoni to 12 months with a three-year probation including, as in *Brunton*, an ancillary order for possession of firearms indicating possession translates to actual sexual assault with a weapon. Likewise, in the third case, *R v Dansereau* (2014) (see Figure 5 and discussion below), the judge weighs the seriousness of the crime remarking that "each time the perpetrator views the same pornographic photos or movies they [the children] become further victimized" and rejects the defence's suggestion for a 45-day intermittent sentence, opting for 15 months and a two-year probation.[86] Abandoning parity, the judge cites two other cases with additional and different offences or circumstances from the case at bar.[87]

Two of the cases, *R v Twigg* (2013) and *R v Wang* (2016), tend slightly towards the middle of the spectrum as we observe that the judges are inured to longer incarceration but are somewhat inclined to proportionality based on the particular case and taking parity into some, if weak, consideration.[88] Twigg, 20, was charged with a collection of 1064 images and 206 videos with degrading sex acts and 2,173 child nudity images. Diagnosed with ADD/ADHD with risk-seeking behaviours but no paraphilias, the accused is otherwise seen as an upstanding, educated and working individual who has shown great remorse. A change in prosecutors led to quashing an initial plea bargain for a 90-day intermittent sentence. Quoting *R v Sharpe* at length on the inherent harm of child pornography, the judge overemphasizes the seriousness of the crime and argues that rather than comparing cases, *general principles* must be used to bring a "custodial sentence far beyond the prescribed minimum penalty of 45 days jail".[89] Citing a case with offences beyond possession (*R v Cuttell* (2010)) but also cases of possession, the judge notes that Twigg's case is much worse than *Dumais* because Twigg used the collection for sexual purpose (masturbation).[90] Acknowledging that incarceration is not useful for deterrence and only useful for "separating a dangerous person from society" the judge acknowledges that Twigg does not fit that profile but argues that a

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83 *Ibid* at para 13; cases include, *R v E* (*W.A.*) [2009] NJ No 218 is a case of contact abuse by a father of his 4-year-old daughter that was recorded and uploaded; and, *R v F.* (*D.G.*) [2010] ONCA 27 is a case of a father watching child pornography while a child is in the room and in which the presiding judge articulates the immense learning curve for the court in the ever-changing Internet; *R v Bock*, [2010] ONSC 3117, file sharing.

84 *R v Fiaoni* [2012] OSC 7535

85 *Ibid* at para 4.

86 *R v Dansereau* [2014] ONCJ 250 at para 15.

87 *R v Hopps*, [2010] BCJ No. 2698 a possession case with prior contact abuse; and, *R v Johansen* [2009] ONCJ 305, a peer-to-peer file sharing possession and making available case in which the difficulty of policing the internet is emphasized by the judge.

88 *R v Twigg,* [2013] ONCJ 96; *R v Wang,* [2016] ONSC 5610

89 *Ibid* at para 17.

90 *R v Cuttell* [2010] ONCJ 139. This is a peer-to-peer file sharing possession and making child pornography case.

statement must be made.[91] In sentencing Twigg to eight months with 18 months of probation, the judge refers to the maximum of five years stating that "[I]n falling short of what could have been a sentence well into the mid to upper reformatory range, I have essentially exercised my discretion to give considerable weight to the mitigating factors and have placed some importance in the unusual circumstances surrounding these plea negotiations… [which] did prejudice Mr. Twigg to some extent".[92] Thus, there is some begrudged consideration of Twigg's experiences and a partial consideration of parity but also a propensity towards more lengthy incarceration for general purposes. In the second case Wang, arrested and charged at age 20 in 2010, had a relatively small collection of 38 images and 5 videos of children 7 to 14 that were relatively hardcore (one video of bondage). Having joined the military and achieving a college-level education, he was subsequently employed in the military and committed the offence while living away from his family who showed strong support for him. Highly praised by his employer, Wang had been under bail conditions for more than six years with no breach. He was charged with two counts of possession (the only one in our cases) as the images were on two different computers. He also did not plead guilty (the only one in our cases) so went to trial. The defence suggests a 90-day intermittent sentence and probation of three years while the Crown demands nine to 12 months and three years of probation, citing possession cases with lengthy sentences (*R v Kwok*, *R v Stroempl*, *R v Dumais*). The judge takes into consideration the strong mitigating factors including the fact that Wang would lose his job but also the strong aggravating factor that he did not plead guilty. Arguing that denunciation and deterrence must take precedence, the judge notes that legislation has increased sentencing twice in mandatory minimums since Wang was arrested and emphasizes the harm done to the children depicted who are "revictimized every time the images and videos are shown".[93] Wang is sentenced to nine months less time served (seven days) and three years of probation. Here we can see the effect of the changing landscape and the unquestioned need for longer incarceration.

In contrast, three cases, *R v Heffernan* (2012), *R v Labre* (2013) and *R v Lane* (2013), are at the tempered end of the spectrum in which the judges do not ignore the need for denunciation and deterrence but clearly differentiate possession from other offences and keep the mandatory minimum at the time of arrest in full view.[94] In *Heffernan* (see Figure 4) the judge uses both *Kwok* and *Sharpe* to establish denunciation and deterrence but tempers these considerations by using *Dumais* to criticize the quest for a punitive sentence through citing cases with heavy penalties and argues that, "I would prefer to consider the range of sentence as a check on disparate sentences".[95] Noting judgements, including *R v Brunton*, where rehabilitation is also identified as important "while giving primacy to denunciation and deterrence", the judge then presents three cases under the regime of 45-day mandatory minimum, ranging from 90 days and 60 days intermittent to 45 days, from which he settles on a 90-day intermittent sentence that satisfies denunciation and deterrence.[96] Likewise, in *Labre* (see Figure 3), the judge avoids any direct rhetoric of denunciation and deterrence or harm and merely cites the Crown as referring "to excerpts from several key cases... [in which the] primary consideration must be given to the principles of denunciation and deterrence because by accessing or possessing ... Mr. Labre was... repeatedly victimizing the children made to participate".[97]

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91 *Twigg*, *supra* note 88 at para 13.
92 *Ibid* at para 20.
93 *Wang supra* note 88 at para 25.
94 *R v Heffernan* [2012] ONCJ 796; *R v Labre* [2013] ONCJ 116; *R v Lane* [2013] ONCJ 111.
95 *Ibid* at para 32.
96 *Ibid* at para 37; See also: *R v Kostas*, [2008] OJ No 1856; *R v W(L.)*, [2008] BCPC 281; and *R v Lamb*, [2011] BCSC 349.
97 *Ibid* at para 24.

However, the judge very deliberately separates possession from other offences by suggesting four key things that this case is not, contrary to the Crown's cases: not a large and organized collection, not contact abuse, not production, and not file sharing or distribution.[98] The judge cites *R v Kostas*, a case that is, "a bit dated in view of a number of more current decisions calling for stiffer penalties. On the other hand, the date of the decision is not inconsistent with the time that this offence occurred" and delivers a 90-day intermittent sentence.[99] Finally, in *R v Lane*, the accused, 68, had a collection of 3610 images and 191 videos that included sexual acts between children and between children and adults. Coping with skin cancer and looking after a brother recovering from a stroke, Lane, the judge acknowledges, has led an otherwise exemplary life. This judge also clearly recognizes the difference between offences arguing that, "the making or distribution of child pornography gives rise to a greater need for denunciation and deterrence than does simple possession" but directly cites cases (*R v Sharpe* and *R v Stroempl*) to illustrate the inherent harm, the contribution to the market and the requirements of denunciation and deterrence.[100] Using three cases in which the offenders were of good character, pled guilty, sought treatment and were of low risk and all of whom received 90-days intermittent, the judge argues that Lane's is, "one of those cases where I believe that the principles of denunciation and general deterrence can be fully addressed through a 90-day intermittent sentence".[101] Although it is not expressed, we would argue that in these three cases an intermittent sentence is the closest alternative to a conditional sentence which is no longer available.

D. Cases With a Six-Month Mandatory Minimum

In the first two (Figure 2), *R v Robertson* (2014) and *R v John* (2017) we find the familiar punitive process in the calculating of proportionality with overemphasis of the seriousness of the crime in heightened rhetoric on harm and the burgeoning Internet that, given the reiteration of judicial notice through case law, we see as status quo bias.[102] In *Robertson* (see Figure 4) the judge works through the cases cited by the Crown including *Sharpe* for denunciation and deterrence. Abandoning parity, the judge cites cases of sentencing between 15 and 36 months (a penitentiary sentence), some with contact abuse and/or hardcore contents which are described in graphic detail even though it is not the collection in question.[103] The sentence of 18 months plus three years of probation is three months less than the Crown requested but three times the mandatory minimum and ancillary orders for life, including s. 109 for possession of firearms indicating actual sexual assault with a weapon, and SOIRA which can only be given for life if there is a previous order; there was no previous order. In *R v John* (2017), the offender, 29, has the smallest collection, 55 images and 89 videos, in our cases except for *R v Wang*, yet the judge comments in exasperation that, "[t]his was not the possession of a single image or video".[104] Coming from a dysfunctional family and diagnosed with ADD, the accused had a close, supportive relationship with his mother and intermittent periods of employment complicated by restrictive bail conditions over three years, including a 15-month house arrest after a breach charge that was later withdrawn. Similarly, treatment

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98 *Ibid* at para 34.

99 *Ibid* at para 36.

100 *Lane*, *supra* note 94*,* at paras 18-20.

101 *Ibid* at paras 30-31. See also, Heffernan*, supra* note 94; *R v Young* [2012] OJ No 5449; *R v Bennett* [2006] OJ No 29.

102 *R v Robertson* [2015] ONCJ 48; *R v John* [2017] ONSC 810 [*John* ONSC].

103 Robertson *supra* note 102 at para 41; cases cited include *Fiaoni*, *supra* note 84; *R v Kroeker,* [2014] SKQB 137, a case of possession and making available (including letting his own children watch); *R v Saliba* [2013] ONCA 660, a case of online communication, exchange of photos and contact abuse with minors; and, *R v Dean*, [2010] OJ No 5305, a possession case with 288,472 images and 1,061 videos, all very hard-core.

104 *John* ONSC, *supra* note 102 at para 61.

was interrupted during house arrest and when his therapist left for another position, however, the report found him responsive to treatment and cooperative. Nevertheless, the interruption of treatment is seen by the judge as lack of effort on the offender's part and an aggravating factor. In this sentence hearing the defence challenged the mandatory minimum of six months under section 12 of the Charter citing cases of conditional sentences upheld and asked for 30 days intermittent sentence; the Crown asked for 12-15 months.[105] The judge notes that the mandatory minimum had been raised to one year in 2015 and reiterates the problem of the steep learning curve of the court when it comes to the burgeoning Internet. Citing *Kwok* and *Sharpe* the judge argues that, even if available, conditional sentences would be rejected, "given the changed technological climate of 2017 where the prevalence of child pornography is growing, the manners of sharing it are advancing, and the recognition of the harms that it causes to children are better understood than they were fifteen years ago."[106] Abandoning parity, the judge cites several cases with charges beyond possession with sentences up to three years in a penitentiary.[107] Without consideration of what the offender has experienced at the hands of the justice system, the accused is sentenced to 10 months less 60 days for the house arrest and two years of probation. Citing *R. v Lloyd* (2016) the judge argues that the minimum is not unusual punishment for this case and rejects hypotheticals put forward under s. 12.[108] In both cases, we see the punitive mix of the equation of possession with other offences, the heightened rhetoric of harm and anxiety over the burgeoning of the internet, compounding the seriousness of the crime and the blameworthiness of the offender.

In the last two cases, *R v Lysenchuk* (2016) and *R v Garcia* (2016), we observe a tempered process in calculating proportionality.[109] Charged in 2013, Lysenchuk is a blue-collar worker aged 65 with a high school education and steadily employed. Married twice with two children, one stepchild and several grandchildren, he has always provided child support. Though separated from his second wife, he still has close relations with both wives and children who support him whole heartedly and has supportive friends. He was found with a substantial collection of 5920 images and 588 videos of "pre-pubescent and early pubescent children" and is diagnosed with pedohebephilia with little risk of contact abuse.[110] The judge concurs with the judge in *R v Hopps* who argues that, "the person possessing child pornography images is in equal partnership with the producers".[111] However, he also argues that it is, "essential for the sentencing court to consider and blend all of the relevant sentencing principles" and rejects the Crown suggestion of 18 mo nths.[112] Finding six months too lenient because of the size of the collection, the judge sentences Lysenchuk to eight months with three years of probation.

In *Garcia* (see Figure 6) we have a larger collection but less offensive content. The Crown asks for 12 months citing cases of similar large collections and the defence suggest eight months and all agree on using *Kwok* for mitigating and aggravating factors. The judge uses no rhetoric and comments that "the objectives of denunciation and general deterrence are not limitless... [the] fundamental principle of sentencing must always be remembered, that being: the sentence imposed must be proportionate to the

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105 *Cohen*, *supra* note 67; *R v Weber* [2003] OJ No. 3306; *Schan*, *supra* note 67.

106 *John* ONSC, *supra note* 102 at para 31.

107 *R v Natal Carlos* [2015] ONSC 8085, a possession and making available file-sharing case with three years for each served consecutively; *Saliba*, *supra* note 107, contact offence mentioned above; and, *Bock*, *supra* note 83 the file-sharing case already mentioned.

108 *Lloyd*, s*upra* note 14. On appeal the minimum was struck down based upon a hypothetical but the sentence was not altered. See *John* ONCA, s*upra* note 15.

109 *R v Lysenchuk* [2016] ONSC 1009; *R v Garcia,* [2016] ONCJ 550.

110 *Ibid* at para 51.

111 *Hopps*, *supra* note 87.

112 *Ibid* at para 50.

gravity of the offence and the degree of responsibility of the offender".[113] The judge argues that of the cases of vast collections presented by the Crown all with sentences 11-18 months and all with the most hardcore content, are "not entirely analogous" to Garcia's case.[114] Arguing that, "the case law also makes clear that the level of depravity involved can vary considerably", the judge decides on eight months with two years of probation.[115] In both cases the offence of possession is not embellished and the focus is on the circumstances of the individual case in calculating proportionality and observing parity.

E. Classifying the Deserving and Undeserving

In addition to the wide range of judicial reasoning displayed in our sample of 14 cases, we closely examined a sub-set of our sample though a process of pairing 6 similar cases. As this analysis will reveal, there are also disparities in classifying offenders based on subjective and unreliable notions of risk and worth. By utilizing our typology of the deserving and undeserving offender, we will demonstrate how subjective risk analyses in the *process* of sentencing produce substantive effects in the ultimate outcome of sentencing.

1. *R v Labre* (2013) and *R v Kwok*

Figure 4

R. v. Kwok (2007)	*R. v. Labre* (2013)
• Age 29 • "Hardcore" collection depicting explicit sexual violence against children • 2000 still images • 60 videos • Proceeded by indictment • No criminal record • No operative mandatory minimum *Sentence:* 12 months in prison Three-year probation	• Age 49 • "Hardcore" collection depicting explicit sexual violence against children • 1500 still images • 50 videos • Proceeded by indictment • No criminal record • 45-day mandatory minimum *Sentence:* 90 days in prison Three-year probation

As displayed in Figure 4, there are several similarities of fact between Kwok and Labre, yet there is a disparity of nine months of imprisonment in their sentencing outcomes. This can be explained by the dissimilarity in how they were treated in the *process* of sentencing. Labre is characterized as less risky and, as such, deserving of certain legal outcomes. In contrast, Kwok is assumed to pose a heightened risk of harm, and consequently, treated punitively in the process in sentencing.

During the sentencing of Labre, the testimony provided to the court, and the judge's accompanying commentary, noticeably framed Labre as an individual who is both worthy and capable of reformation, despite describing his possession as a "gross affront to the human dignity of the children who were made to participate".[116] The trial judge determined that there were substantially more mitigating factors than aggravating ones, concluding that Labre is less risky. The judge described Labre as a "family man and

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113 *Garcia*, *supra* note 109 at para 25.

114 *Ibid* at para 40.

115 *Ibid* at para 45. Cites cases: *Kwok*, *supra* note 60; *R v Strohmeier,* [2007] ONCJ 141; *R v Neilly* [2005] OJ No 5973; *R v Ward* [2012] ONCA 660; *R v O'Shea* [2014] ONSC 840 and *R v Merrick* [2013] ONCJ 232.

116 Labre, s*upra* note 94 at para 5.

productive citizen", highlighting his 23-year-long common-law relationship, his extensive involvement in his son's life,[117] as well as his "meaningful employment" and philanthropic endeavours.[118] In this way, Labre's offence is framed as being "out of character" and the result of being in a "dark place", behaviour that could be situated within the larger context of coping with emotional difficulties, instead of being indicative of intrinsic deviance.[119] The judge also describes Labre's case as "relatively unique", highlighting that the police investigation revealed that Labre stopped accessing child pornography on his own will three years prior to the laying of any charges instead of simply doing so as a result of being detected by law enforcement.[120] The judge accepts this as a genuine desire and ability on the part of Labre to change his own behaviour, reducing his future risk of harm.

The judge additionally accepts the following testimony from Dr. Valliant, a psychiatrist who assessed Labre and the risk he poses:

> Overall, Mr. Labre is aware of the wrongfulness of downloading child pornography. Mr. Labre appreciated the gravity of his actions and he expressed remorse. Mr. Labre expressed that he was motivated to participate in counselling to correct his past actions. This client's results would indicate that he is not a sexual psychopath, nor does he show a high probability toward re-offending. Mr. Labre would benefit from remaining in the community so that he can care for his family and receive treatment/counselling.[121]

Accepting this evaluation, the judge states that all of these factors "militate against imposing a sentence at the high end of the range" and necessitate a "more measured approach [to sentencing]".[122] In assessing Labre as a low risk and as capable of reform, the judge delineates Labre as worthy and deserving of leniency, warranting a 90-day term of imprisonment to be served intermittently on weekends.

In contrast, during the sentencing of Kwok for a similar collection of child pornography, his personal circumstances and the factors surrounding his offence, were framed in such a manner to suggest that Kwok's viewing of child pornography was symptomatic of Kwok's deviance and indifference towards the harm of children. Kwok admitted that he began viewing child pornography when he was only 14 years of age, in which he says it was to "re-enact the sexual poses in the pornographic images" for the older men he was engaging in prostitution with.[123] Instead of simply taking judicial notice of Kwok's unfortunate circumstances in his teenage years, the judge relied on this fact throughout the decision to "demonstrate" Kwok's depravity, articulating that 13 years spent collecting this material unequivocally shows that he was "driven to do what he did".[124]

The trial judge found very little mitigation in his favour, and of the few factors that should have lessened Kwok's sentence, there was often a caveat or subjective justification for why it should not be fully applicable. First, Kwok pled guilty, a mitigating factor applicable in virtually all criminal cases, but the judge articulated that the mitigation is "lessened" in this case because Kwok failed to plead guilty until

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117 *Ibid* at para 6-7.
118 *Ibid* at paras 10-12.
119 *Ibid* at para 11.
120 *Ibid* at para 43.
121 *Ibid* at paras 16-17.
122 *Ibid* at para 46.
123 *Kwok*, s*upra* note 60 at para 19.
124 *Ibid* at para 47.

late in the trial and after "incriminating testimony" was made against the defence.[125] The judge insisted that Kwok was more "upset about the prospect of going to jail," rather than pleading guilty and taking responsibility for his actions and for the "plight of any of the victims in his disgusting portfolio of pornography".[126] Similarly, the judge disparages Kwok's efforts to get treatment. After being charged, Kwok began regularly meeting with Dr. Thornton, a psychiatrist, which typically would mitigate the sentence because of a demonstration to the court that the offender is willing to "submit to treatment and counselling".[127] He offered testimony in trial that Kwok is not a "pedophile",[128] does not pose a "risk to children at all"[129] and has demonstrated "insight into his problem"[130], all mitigating factors. Nonetheless, the judge discredited these because of a subjective evaluation of the doctor's credentials, arguing that,

> Dr. Thornton testified that in his opinion Mr. Kwok is not a pedophile and is not sexually attracted to children. However, I am not prepared to rely on this as a definitive diagnosis in light of Dr. Thornton's relative lack of expertise in this field and his ready acceptance of the information provided to him by Mr. Kwok, some of which was inaccurate and some of which involved self-denial and minimization of his own behaviour. Dr. Thornton was only vaguely aware of the role of child pornography in diagnosing pedophilia.[131]

In fact, notwithstanding Kwok's absence of any contact charges (or any past criminal record for that matter) in addition to the psychiatrist's evaluation based on 24 sessions, the judge reasoned that the Court must still assume the possibility that Kwok poses a danger to children in the future, even in light of no evidence or testimony to support this.[132] The judge did accept "expert testimony" that collectors of child pornography build their collection through the trading of images in chat rooms, made up of networks of pedophiles. Thus, as mentioned above, the judge assumes Kwok's responsibility for the distribution of child pornography, despite only a charge of its viewing.

2. *R v Heffernan* (2012) and *R v Dansereau* (2014)

Figure 5

R. v. Dansereau (2014)	*R. v. Heffernan* (2012)
• Age 56 • "Hardcore" collection depicting explicit sexual violence against children. • 535 still images • 31 videos • Proceeded by indictment • No criminal record • 45-day mandatory minimum *Sentence:* 15 months imprisonment Two-year probation	• Age 31 • "Hardcore" collection depicting explicit sexual violence against children. • 500 still images • 0 videos • Proceeded by indictment • No criminal record • 45-day mandatory minimum *Sentence:* 90 days imprisonment Three-year probation

125 *Ibid* at paras 4-5.
126 *Ibid* at para 39.
127 *Ibid* at para 7.
128 *Ibid* at para 41.
129 *Ibid* at para 33.
130 *Ibid* at para 38.
131 *Ibid* at para 47.
132 *Ibid* at para 34.

As displayed in Figure 5, there are several similarities between the offence and offender circumstances of Dansereau and Heffernan, yet there is a discrepancy of one-year imprisonment and one-year probation between their received sentences. The differences in the punitiveness of the sentencing process is explicit, where Heffernan is characterized as less risky than Dansereau, and consequently afforded differential treatment.

Heffernan's sentencing trial commenced with the judge describing in explicit and gruesome detail the nature of his child pornography collection. This was immediately juxtaposed against lengthy description by the trial judge about Heffernan's "otherwise good character". His steady employment in the security field in which his supervisor testified to his "good moral character and pleasant nature", his studying of the culinary arts, his serious long-term relationships with women in the past, and his parents' statements attesting to the harmless nature of their son, were all factors brought to the forefront of the judge's decision.[133] The judge summarized and accepted that these facts unquestionably indicate that Heffernan is a "productive member of the community... [whose]... involvement with possession of child pornography was short-lived".[134]

By framing Heffernan in this manner, his possession is established as not that of a monster who is irredeemably deviant but as one component of broader emotional difficulties. The judge accepted testimony from the counsellor who treated Heffernan post-arrest, asserting that Heffernan has "suffered from depression for most of his life, characterized… through various addictive behaviours. He has burned himself or succumbed to excessive consumption of alcohol and adult pornography and more recently to child pornography".[135] The characterization of Heffernan as someone who does not pose future risk of harm was bolstered by the testimony of the forensic psychiatrist who found that Heffernan's phallometric testing revealed a "robust response" to adult females and did not indicate pedophilic interest.[136] The judge described this finding as "encouraging", highlighting that Heffernan poses a low-risk to re-offend, has remorse and is in therapy, all of which points to a lower sentence of 90 days imprisonment to be served intermittently on weekends, to "encourage his continuing rehabilitation".[137]

In contrast, Dansereau, whose collection also contained materials which display sexual violence perpetrated by adult men against young female children, was treated by the judge overseeing his trial in a dramatically different manner. Unlike in the case of Heffernan, Dansereau's sentencing decision began with the judge outlining in explicit detail the specific content of the child pornography, and then characterizing Dansereau as someone who is "more concerned about his own situation and his job… than taking responsibility for his criminal behaviour".[138] The judge did not draw attention to any of Dansereau's particular responsibilities or relationships, beyond highlighting that "he took steps to hide his illegal activity from his wife",[139] and that "he has not been sexually active with his wife in over a decade, [suggesting] a paraphilia".[140] In this way, Dansereau does not benefit from being framed as someone whose possession is a circumstantial component of broader emotional or temporary difficulties but, rather, he is depicted as someone who is sexually deviant, risky, and undeserving of leniency.

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133 *Heffernan*, *supra* note 94 at paras 5-6.
134 *Ibid* at para 50.
135 *Ibid* at para 16.
136 *Ibid* at para 10.
137 *Ibid* at para 52.
138 *Dansereau*, *supra* note 86 at para 8.
139 *Ibid* at para 9.
140 *Ibid* at para 11.

The judge additionally highlights that Dansereau's risk can be assumed because he has not undergone phallometric testing, warranting an automatic assumption that he is potentially a pedophile who poses a future risk of harm to children, necessitating a lengthy separation from society.[141] The framing is bolstered by the judge making statements about his seemingly lack of remorse or insight:

> Mr. Dansereau has no inkling of how serious these types of charges are, doesn't know why he has engaged in this criminal activity and has undergone no therapeutic counselling…He remains a risk… Although there are no named victims in these pornographic images and movies, the children are nonetheless victimized each time the perpetrator views the same pornographic photos or movies.[142]

Characterized as an individual who is indifferent towards the victimization of children, this framing makes Dansereau not only responsible for the indirect harm caused by viewing the material, but directly responsible for the contact violence it contains. The judge additionally adopts a broad approach to defining "distributing child pornography" by asserting that because Dansereau made personal copies of the digital files, this constitutes "distribution".[143] Thus, although only convicted of possession, he was framed in such a manner to make him more liable than Heffernan, despite committing analogous crimes.

3. *R v Garcia* (2016) and *R v Robertson* (2015)

Figure 6

R. v. Garcia (2016)	*R. v. Robertson* (2015)
• Age 29 • Not "Hardcore" collection depicting very little explicit sexual violence against children. • Collection size characterized as "massive" • Proceeded by indictment • No criminal record • 6 months mandatory minimum *Sentence:* 8 months imprisonment Two-year probation	• Age 32 • Not "Hardcore" collection depicting very little explicit sexual violence against children. • Collection size characterized as "massive" • Proceeded by indictment • No criminal record • 6 months mandatory minimum *Sentence:* 18 months imprisonment Three-year probation

As displayed in Figure 6, there are several resemblances between the offence and offender circumstances of Garcia and Robertson, yet there exists a sentencing discrepancy of 10 months' imprisonment and 1-year probation. This outcome is reflected in how they are regarded in the process of the sentencing trial, in which Garcia is framed as deserving, and Robertson as undeserving of legal leniency.

In the sentencing of Garcia, despite amassing the second largest collection of child pornography in our sample of cases, he is framed by the sentencing judge as an individual whose offence is not indicative of any intrinsic deviancy and who is deserving and capable of reform. In fact, the judge recognizes Garcia's size of collection as the single aggravating factor in his case, emphasizing that it is a relevant factor by virtue that it indicates to the Court the following information:

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141 *Ibid*.
142 *Ibid* at para 14.
143 *Ibid* at para 9.

> First, the larger the collection of materials, the greater the number of children victimized in the creation of the images and videos that an offender exploited to satisfy his deviant interests. And, second, the size of the collection provides insight into the offender's behavior. It speaks to whether or not the offender's possession was a momentary surrender to a deviant curiosity or the result of a sustained and deliberate effort with plenty of time for reflection and reconsideration.[144]

This rhetoric of harm is immediately tempered by the judge emphasizing that in the case of Garcia, "it is difficult to discern how many children were actually exploited in creating the material in his collection" since many of the images appear to depict the same individual children, implying that this, in turn, makes Garcia less culpable.[145] In the same vein, the judge underlines that the children victimized in Garcia's collection were "older", making his collection on the "less horrendous end of the spectrum" when compared to other cases which include even younger children.[146]

In addition to framing the collection of child pornography itself as more forgivable than other collections, the judge highlights the redeemable, personal characteristics of Garcia, including his family support, demonstrated by their attendance at every court appearance, his employment as a chef at the local golf and country club, as well as his aspiration to open up his own restaurant, all factors which implicitly identify Garcia as "deserving".[147] In the prior analyzed cases of 'deserving' offenders, the judges described the individuals in such a manner to situate and dilute their viewing of child pornography within the broader context of emotional or mental health challenges but in this case, the judge interestingly engages in opposite framing. It is emphasized that Garcia "had an ordinary childhood, free from [abuse]" and that "he has no history of mental illness or other developmental problems" nor any "alcohol or drug abuse in the past".[148] This normalizing of Garcia is bolstered by expert testimony provided by the psychiatrist who evaluated him post-arrest and who testified that while Garcia has demonstrated an interest in post-pubescent adolescent pornography, he is free of any "other operative paraphilias [like] sadism, masochism or other types of deviant behaviour" nor does he "suffer from a major mood disorder or other psychiatric disorder".[149] This, in addition to his exclusive past relationships with adult women, leads the Court to accept that Garcia poses a low risk for re-offence, that he does not pose a threat to children or teens, and that he is capable of "controlling his impulses".[150]

In contrast, during the sentencing of Robertson for a similar collection of child pornography, his personal circumstances are framed to suggest that his offence is indicative of inherent deviancy and a predilection towards the harming of children, making his behaviour irremediable. Any mitigating factors in his favour are quickly glossed over in the tail end of the judgement,[151] and the aggravating factors and unsavoury personal characteristics of Robertson are excessively emphasized. His poor work performance

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144 *Garcia*, *supra* note 109 at para 41.
145 *Ibid* at para 42.
146 *Ibid* at para 46.
147 *Ibid* at para 9.
148 *Ibid* at para 10.
149 *Ibid* at para 11.
150 *Ibid*.
151 *Robertson*, *supra* note 102 at para 43.

resulting in his termination,[152] his prior marijuana usage,[153] his bankruptcy exceeding $40,000,[154] as well as skipping "more than half of grade 11" resulting in his being kicked out of high school,[155] were all considered relevant. The judge also accentuated that Robertson began viewing child pornography as early as age 15, accrediting this to the fact that he was a "loner from grade 7 onwards".[156] By drawing attention to these circumstances and neglecting any positive characteristics, the judge marks Robertson as a risky individual, whose deviance is made obvious through the child pornography conviction yet is present in numerous other elements of his life.

The characterization of Robertson as someone who is undeserving of legal leniency or restraint is exacerbated by the expert testimony of the psychiatrist who conducted Robertson's phallometric testing:

> The offender is substantially more aroused to pubescent and prepubescent females than to adult females. Test results were indicative of pedohebephilia (sexual arousal to prepubescent and pubescent children). Such individuals can engage in other forms of sexual activity, but this proclivity for sexual contact with children is a condition that is not expected to remit.[157]

Despite Robertson's conviction being solely for the possession of child pornography, the psychiatrist's testimony assumes and makes Robertson directly responsible for contact offences against children as well. The judge accepts the characterization of Robertson as having a "proclivity for sexual contact with children", far extending beyond the actual offence that he has been found guilty of. The psychiatrist asserts that Robertson's condition is "not expected to remit" and recommends that he have "no unsupervised contact with children under the age of 18 in perpetuity".[158] He then goes on to recommend that Robertson be compelled to use sex-drive reducing medication if psychological treatment on its own is not effective in "controlling his urges".[159] Thus, even in absence of any evidence of prior contact offences against children, the judge justifies the imposition of a punitive sentence by framing Robertson as a sexually deviant monster, who poses a future risk.

IV CONCLUSION: THE TROUBLE WITH SENTENCING POSSESSION OF CHILD PORNOGRAPHY

While we do not question the criminal sanctioning of child pornography, we find there are some troubling issues in how simple possession is treated in the Canadian justice system and in Ontario in particular. We find this by situating our cases within the context of legislation and case law on child pornography possession that has developed over the past two and a half decades. The *Sharpe* decision, with its strong focus on the reasoned apprehension of harm and denunciation and deterrence, increasing dependence on risk technologies and a wider context of increasing legislated offences and penalties, in tandem with concern for a burgeoning Internet have complicated how proportionality is calculated in significant ways. Although there are legislated limits for judges, they have wide discretion in case law

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152 *Ibid* at para 20.
153 *Ibid* at para 23.
154 *Ibid* at para 24.
155 *Ibid* at para 19.
156 *Ibid* at para 18.
157 *Ibid* at paras 29-30.
158 *Ibid* at para 35.
159 *Ibid* at para 34.

leading to a number of questions about calculating the seriousness of the crime and the blameworthiness of the offenders which, in turn, leads to difficulties in establishing a range of sentencing for the offence of possession alone. In fact, in the majority of our cases mandatory minimums pose no threat to unconstrained judicial discretion as many judges call for ever increasing incarceration.

At the minimum, our findings have demonstrated judicial reasoning that is polarized between a punitive process that distorts the calculation of proportionality and a tempered one that concentrates on the particular case. We find a stark difference in how the seriousness of the crime is portrayed ranging from a punitive process in which possession is seen as instigating and representing all other child pornography offences, including contact abuse, to a tempered process in which simple possession is not weighted with other offences. This also affects the calculation of the blameworthiness of the offender. In many of our cases judges, enabled by subjective and flexible interpretations of the reasoned apprehension of harm, demonstrated a punitive tendency to heap the blame for other child pornography offences such as distribution, and production, and even the direct contact abuse of children, onto the offenders, despite their being convicted of possession only. An overemphasis on denunciation and deterrence leads to downplaying the purpose of rehabilitation and the principle of parity is abandoned. Here we see a perpetuation of the familiar trope of the violent stranger which is anchored historically and currently in both the public and judicial imaginations which continues to divert our attention away from the betrayal of intimate familial or close social relations that is present in most child sexual abuse. In a minority of our cases there is a tempered approach in which judges maintained a focus on the circumstances of the offender in the particular case before them and denunciation and deterrence were balanced with concern for other purposes such as rehabilitation and principles such as parity. Perhaps most explicitly what wove our cases together was a notable fixation on the burgeoning Internet; while most judges appeared united in concerns over harm in an increasingly digitized context, there were significant disparities in gauging offenders' culpability in relation to this rapid change. In the more punitive process, judicial notice of the burgeoning internet travelled from case to case in a status quo bias that increased both the seriousness of the crime and the blameworthiness of the offender. In the more tempered process, judges took a more balanced approach, keeping the particular offender and circumstances in focus. Finally, this small number of 14 cases in Ontario highlights the considerable resources taken up by the least offence for child pornography. This includes in each case, between two or three years of bail conditions, sometimes more, months of incarceration, years of probation and monitoring of ancillary conditions beyond the term of probation.

In light of the development of the risk society, and accompanying concerns over the burgeoning Internet, we saw the courts relying on what we describe as a "typology of offenders," where the balancing of aggravating and mitigating factors has allowed judges to engage in a subjective determination of risk to classify offenders and their relative worth for rehabilitation. Through the pairing of three sets of cases, it was evident that subjective assumptions of risk and worth in the *process* of sentencing have affected the punitiveness in the sentencing outcome of possession cases in substantive ways, including ancillary orders that continue well beyond probation.

While the importance of prosecuting possession cases is not questioned, the disparities we have identified warrant closer scrutiny of the ambiguities the courts are maintaining in the sentencing of these offenders. First, our cases have demonstrated methodological ambiguity, particularly in how evidence is used to evaluate risk and to classify offenders. Risk was often measured through several sources of information about an individual's propensity for deviancy, but primarily through psychological evaluations and assessments like the phallometric test. This is despite serious underlying methodological limitations of these tools in reliably and accurately predicting risk. In these evaluations we encounter

contradictory expert testimony from forensic psychiatrists specializing in sexual deviancy (and, in some cases, unrelated qualifications) about the relationship between possession and future risk of contact offences, often premised on subjective notions of the deserving and undeserving typology.

Second, our cases establish theoretical ambiguity with respect to the application of the reasoned apprehension of harm test, and the conceptualization and prioritization of the sentencing principles of deterrence and denunciation. For example, punitive judges who made possession a 'cause' for denunciation and deterrence used heightened rhetoric that precludes reasoned judgements for the offence being considered while those with a temperate process took a more balanced approach. The efficacy of both denunciation and deterrence as sentencing principles is widely debated; denunciation because it does not provide the court practical direction for sentencing individuals and general and specific deterrence because they are in tension with one another where general deterrence is often counterproductive to the specific case of an individual. Notwithstanding these limitations, deterrence and denunciation were at the centre of all 14 of our cases. Although there was consistency in assigning primacy based upon the requirements of the *Criminal Code*, these principles were given disparate interpretations and weight depending on the sentencing judge.

Third, our cases exhibit empirical ambiguity in the way that judges gauge the extent to which the evolution of the Internet should be considered in characterizing possession and determining an appropriate sentence. In many of the cases, we observed heightened anxiety over a burgeoning Internet market that is out of control and difficult to police. The *Kwok* judgement, an important precedent after 2007 in cases of possession in Ontario, incorporates strong rhetoric in judicial notice that technological advancements have heightened the risk of increasing the market for child abuse, making possession an even more serious crime that must be treated with incarceration. Yet, it is not empirically demonstrated that technological innovation has *increased* child abuse. Rather, the Internet has offered a forensic window into the child sexual abuse that is, and has always, taken place. Nonetheless, through judicial notice we can detect a status quo bias running through many cases where common sense assumptions about the burgeoning Internet in relation to the seriousness of the crime that, in turn, enhance the blameworthiness of the offender, travel through case law. We also detect hindsight bias where the current evolution of the Internet may be cited for an offence that occurred several years before. An overreliance on these biases leads to more punitive reasoning accompanied by subjective and simplistic notions of the relationship between the burgeoning Internet, possession and child abuse that perpetuates the trope of the violent stranger and obscures the hierarchical and intimate relations in which child abuse takes place.

Perhaps most fundamentally, our cases expose ethical ambiguity by forwarding an interpretation of the possession of child pornography as a compound offence: the offence, possession, that *has* occurred encompasses other child pornography offences as well as offences that *might* occur in the future. Our cases were deliberately selected for offenders with no criminal record, and without any evidence of communication or physical contact with children for sexual purposes. Yet, judicial reasoning in these cases ranged from treating possession as a single offence, to a significantly more punitive approach in which the judge treats possession as representing all child pornography offences, including contact abuse. Considering that sentencing, including extensive ancillary orders, has direct consequences on individuals' liberties, it raises ethical challenges to characterize an offender as more dangerous or risky than the facts of the case warrant. Consideration of how offenders experience punishment is rarely considered. This extension of the offence of possession often had a substantive effect on the calculation of mitigating and aggravating factors, justifying longer periods of incarceration.

Overall, through an empirical assessment of the sentencing of those convicted of child pornography possession in Ontario, we have argued that significant ambiguities and disparities exist that run counter to the fundamental principle of proportionality and the principle of parity and fairness in sentencing;

lengthier incarceration has become the norm. We also observe that the offence of possession is subject to familiar tropes that have plagued cases involving sexual abuse historically perpetuating narratives of violent strangers. With such a small sample of cases we acknowledge that we must resist generalization. However, with this study we hope to raise questions that may be taken up in future studies.