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Possession, Child Pornography, and Proportionality: Criminal Liability for Aggregate Harm Offenses

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POSSESSION, CHILD PORNOGRAPHY, AND PROPORTIONALITY: CRIMINAL LIABILITY FOR AGGREGATE HARM OFFENSES

ANTHONY M. DILLOF*

ABSTRACT

Federal prosecutions of individuals for possessing child pornography have risen steadily and dramatically over the last twenty years. As the number of prosecutions have increased, so have the penalties. Today a typical defendant charged with possessing child pornography can expect a seven-year prison sentence. This Article considers the question of whether such sentences are just, fair, and proportionate. To answer this question, this Article adopts a retributivist perspective on punishment. Retributivism, in turn, requires evaluating the wrongfulness of the conduct to be punished. This Article argues that while the possession of child pornography by a large group of persons in aggregate creates significant social harm—for example, a robust market for the production of child pornography—individual acts of possession, considered at the margin, have only a trivial impact. This raises a serious problem of disproportionality in punishment for retributivists. This Article attempts to solve this problem by developing a theory of aggregate harm offenses. According to this theory, even acts that have little marginal impact may constitute serious moral wrongs insofar as they violate the principle of rule consequentialism. Rule consequentialism requires acting pursuant to a rule with desirable social consequences. This Article develops a rationale for rule consequentialism and explores how rule consequentialist norms may be used to justify and explain not only child pornography possession laws but also a group of superficially unrelated offenses found in diverse areas of the criminal law.

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I. INTRODUCTION

A young man, sitting at his computer, bored with his work assignment and looking for distraction, idly types “teen sex” into his Internet browser’s search engine and, as expected, is rewarded by the appearance of a dozen images of naked under-aged women in a variety of explicit poses. In so doing, he has committed a form of possession of child pornography that the law decrees may be punished by up to twenty years’ imprisonment.¹ How can such substantial criminal penalties be justified for such seemingly innocuous, likely commonplace, and easily accomplished conduct? What has the young man done that is so wrong?

The question above is a question about child pornography possession. Child pornography possession is a type of possessory offense. Possessory offenses are a highly significant part of the criminal law.² Yet they are a generally undertheorized part.³ Most criminal offenses—rape, robbery, theft, and murder—involve harmful conduct. The mere possession of an item, however, is rarely a harmful state of affairs.⁴ Because possession itself is rarely harmful, possessory offenses are sometimes grouped with other criminal offenses that do not entail harm to others, such as solicitation, conspiracy, and attempt.⁵ Solicita-

1. Child pornography includes images of a minor engaged in “simulated lascivious exhibition of the . . . pubic area” 18 U.S.C. § 2256(2)(B)(iii) (2012). Under 18 U.S.C. § 2252A(a)(2), (b)(1) (2012), a person who views child pornography on the Internet may be liable for receiving child pornography and subject to twenty years’ imprisonment. *See United States v. Romm*, 455 F.3d 990, 998 (9th Cir. 2006) (holding capacity to control images stored in computer cache supports conviction for receiving child pornography). At the very least, he would be liable under 18 U.S.C. § 2252A(a)(5)(A) for “knowingly access[ing] with intent to view” child pornography, which carries a sentence of up to ten years. *Id.* § 2252A(b)(2). The penalties can be twice as high for persons who have been convicted of a prior child pornography or sexual offense. *Id.* § 2252A(b)(1)-(2).

2. New York State, for example, has enacted over 150 possessory offenses. *See* Markus Dirk Dubber, *The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process*, in *DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW* 91, 96 (R A Duff & Stuart P. Green eds., 2005). In state prisons alone, as of 2011, there were approximately 49,000 persons serving sentences for drug possession. *See* E. ANN CARSON & DANIELA GOLINELLI, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991-2012* (2013), <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf> [<https://perma.cc/8DDR-XFPF>].

3. Some important work has been done. *See, e.g.*, Dubber, *supra* note 2. *See generally* Gideon Yaffe, *In Defense of Possession*, 10 *CRIM. L. & PHIL.* 441 (2016).

4. The most obvious exception is the possessing of another’s property without their consent; that is theft. Ironically, theft is not regarded as a possessory offense.

5. *See* JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 9.03[C], at 97 (7th ed. 2015) (“Crimes of possession are ‘inchoate,’ or incomplete, offenses.”); GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* § 3.4, at 198 (1978) (describing possessory offenses as legislative responses to the vagueness of the actus reus requirement for attempts). The Model Penal Code includes the offense of possessing instruments of crime and weapons in its article on inchoate offenses. MODEL PENAL CODE § 5.06 (AM. LAW INST. 1985).

tion, conspiracy, and attempt are frequently described as inchoate offenses.⁶ Even if not themselves harmful, they are the beginning of a harmful course of conduct. Solicitations lead to conspiracies; conspiracies lead to attempts; attempts lead to offense conduct, which usually results in actual harm. The offense of possession of burglary tools is a good example of a possessory offense that conforms to the inchoate model of criminal offenses. The possession of unlawful burglary tools by an actor all too often leads to that actor's committing a burglary.

This Article, however, argues that not all possessory offenses conform to the inchoate offense model. In particular, possession of child pornography should not be understood along these lines. Indeed, this Article contends that the criminalization of possession of child pornography should not be understood based on analogy to the possession of burglary tools, illegal narcotics, firearms, or stolen property—the major categories of possessory offenses.

If distinct from other possessory offenses, how then should the offense of possession of child pornography be understood? To what extent are the substantial criminal penalties associated with it fair and just? To return to the question opening this Article, what is so wrong about possessing child pornography? To answer these questions, this Article develops a theory of “aggregate harm offenses” and argues that the offense of possession of child pornography—and the substantial penalties associated with it—are best understood in light of this theory. In brief, the theory of aggregate harm offenses proposes that there is a range of offenses—including the possession of child pornography—where wide-spread commission of the offense actually or potentially causes, in aggregate, great individual or social harm, even though individual instances of the offense, considered at the margin, have no or trivial adverse effects on anyone. Actors who commit such offenses violate the principle of rule consequentialism and thus are deserving, or at least amenable to, punishment proportionate with the aggregate harms associated with the offense.

This Article proceeds as follows: In Part II, an introduction and overview of federal child pornography statutes is offered. In Part III, an effort is made to distill the sort of sentences that are imposed upon typical violators of such laws, and the norm of proportionality is introduced and argued to be *prima facie* inconsistent with the penalties for child pornography possession. In Part IV, a range of harms associated with possession are considered as potential grounds for child pornography possession penalties and are found wanting. In Part V, a variety of forms of harmless wrongdoing are examined as potential grounds for child pornography possession penalties; rule

6. See MODEL PENAL CODE §§ 5.01-03 (AM. LAW INST. 1985).

consequentialism is introduced and argued to supply a cogent explanation of the wrongfulness of child pornography possession; and the general relevance of rule consequentialism to the criminal law is shown through examining a range of disparate offenses, all of which involve a violation of the principle of rule consequentialism. Part VI briefly summarizes the Article and concludes.

II. A BRIEF HISTORY OF THE CRIMINALIZATION OF CHILD PORNOGRAPHY

The sexual abuse of children has long been a crime.⁷ Hence, the production of child pornography involving the sexual abuse of children has, as a derivative matter, also been criminal. In contrast, the mere possession of child pornography has not always been a crime.⁸ Indeed, the sexualized depiction of children was tolerated well into the nineteenth century.⁹ The law has journeyed far from the nineteenth to the twenty-first century. This Part recounts that journey. In a nutshell, the history of the criminalization of the possession of child pornography is one of increasing scope of criminalized conduct, increasing number of prosecutions, and increasing severity of penalties.

The possession and distribution of child pornography was first criminalized through the general common law prohibition of obscene materials.¹⁰ Although early prosecutions were primarily focused on pornographic literature, images considered obscene and corrupting of morals could also trigger criminal sanctions.¹¹ Constitutional concerns, however, inhibited prosecutions. Due to a slew of First Amendment decisions by the Supreme Court in the 1950s,¹² the constitutional standard of obscenity was difficult to meet. Many images, even hard-core depic-

7. See generally Barry M. Coldrey, *The Sexual Abuse of Children: The Historical Perspective*, 85 *STUDIES* 370, 370 (1996) (noting that “sexual abuse of young people by persons in positions of trust and responsibility has existed for a long time; and . . . that sexual abuse has been considered a serious fault or crime for centuries”); John E. B. Myers, *A Short History of Child Protection in America*, 42 *FAM. L. Q.* 449, 450 n.7 (2008) (noting that child protective cases for sexual abuse have been documented in the United States as early as 1735 and that the criminal prosecution for sexual assault of a minor in the nineteenth and early twentieth century commonly proceeded under rape statutes).

8. N.Y. PENAL LAW § 263.15 (McKinney 1977) (illustrating a common formulation of sexual abuse laws prior to the push to criminalize child pornography).

9. See PHILIP JENKINS, *BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET* 26 (2001).

10. See generally, Donna I. Dennis, *Obscenity Law and Its Consequences in Mid-Nineteenth-Century America*, 16 *COLUM. J. GENDER & L.* 43 (2007) (describing early prohibitions of obscene material).

11. *Id.* at 50-52.

12. See, e.g., *Butler v. Michigan*, 352 U.S. 380, 381-82 (1957); *People v. Wepplo*, 178 P.2d 853, 855 (Cal. App. Dep’t Super. Ct. 1947).

tions, were defined as merely indecent in the 1960s.¹³ Due to the heavy burden of proof that prosecutors were required to carry, child pornography and other cases involving pornography were rarely pursued.¹⁴

In 1973, the Supreme Court in *Miller v. California*,¹⁵ established the modern definition of obscenity. According to the Court, material is “obscene” if, “taken as a whole” and “applying contemporary community standards,” it “lacks serious literary, artistic, political, or scientific value,” is “patently offensive,” and is aimed at “prurient interest[s].”¹⁶ *Miller*, combined with the prevailing relatively relaxed attitudes toward child pornography in the United States, further limited enforcement of child pornography laws.¹⁷

Starting in 1976, feminist groups and decency campaigners led the charge to combat these relaxed attitudes.¹⁸ Attracting the attention of the national media, the movement against child pornography stepped into the limelight.¹⁹ As a result of a media blitz in 1976 and 1977, Congress passed the Protection of Children Against Sexual Exploitation Act of 1977.²⁰ This Act targeted the commercial production of obscene materials that involved children under the age of sixteen.²¹ Congress drafted the Act with the intention of outlawing only such obscene material as outlined by the *Miller* test.²² Penalties for possession ranged between a ten-year statutory maximum for first-time offenders with a two-year mandatory minimum, and a fifteen-year statutory maximum for subsequent offenders. This Act was not replicated on the state level and only one person was convicted under the act.²³

The barrier of obscenity was partly lifted in 1982 by the Supreme Court’s decision in *New York v. Ferber*.²⁴ In *Ferber*, the Supreme Court determined the constitutionality of a New York law that pro-

13. *Memoirs v. Massachusetts*, 383 U.S. 413, 455 (1966) (Harlan, J., dissenting); *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

14. JENKINS, *supra* note 9, at 36.

15. 413 U.S. 15 (1973).

16. *Id.* at 23-24.

17. See Michael J. Henzey, *Going on the Offensive: A Comprehensive Overview of Internet Child Pornography Distribution and Aggressive Legal Action*, 11 APPALACHIAN J.L. 1, 4-5 (2011).

18. *Id.* at 5.

19. *Id.* at 11-12.

20. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978).

21. Henzey, *supra* note 17, at 12.

22. Rosalind E. Bell, Note, *Reconciling the Protect Act with the First Amendment*, 87 N.Y.U. L. REV. 1878, 1886 (2012).

23. See Sarah Sternberg, *The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antitheses*, 69 FORDHAM L. REV. 2783, 2795 (2001).

24. 458 U.S. 747, 764 (1982).

hibited the promotion and distribution of material that depicted a child under the age of sixteen engaging in a sexual performance.²⁵ According to the Court, while some material may not be deemed “obscene” under the *Miller* test, “the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child” and so may be banned.²⁶

Following *Ferber*, Congress passed a series of acts increasing the regulations and penalties associated with the possession and distribution of child pornography. The first of these statutes was the Child Protection Act of 1984.²⁷ This Act broadened the definition of child pornography by (1) extending penalties to manufacturers and traffickers of child pornography who did not receive financial compensation for the images produced and distributed and (2) increasing to eighteen the age of persons whose images qualify as child pornography.²⁸ Congress then acted in 1986 by passing the Child Sexual Abuse and Pornography Act and the Child Abuse Victims’ Rights Act.²⁹ These acts outlawed the advertisement of child pornography and increased liability for pornographers if a child model was injured during the production.³⁰

In 1988, Congress passed the Child Protection and Obscenity Enforcement Act (CPOEA).³¹ In this act, Congress, realizing the potential for technology in the creation of pornography, prohibited the use of computers to distribute child pornography.³² The regulations pursuant to CPOEA also required producers of sexually explicit material to obtain proof of age for every actor, regardless of sexual activity, in their productions.³³

Congress’s efforts to fight child pornography intensified in the 1990s. Congress passed the Child Protection Restoration and Penalties Enhancement Act in 1990.³⁴ This Act addressed two important areas. First, the Act increased and strengthened penalties for the distribution of child pornography. Sentences were increased from be-

25. *Id.* at 774.

26. *See id.* at 758.

27. Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984).

28. *See* JENKINS, *supra* note 9, at 36.

29. Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510 (1986).

30. *Id.*

31. Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4486 (1988).

32. *Id.*

33. 28 C.F.R. §§ 75.2, 75.5 (2016).

34. Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4816 (1990).

tween four months to a year, depending on the defendant's criminal history. Second, this Act made simple possession of child pornography illegal for the first time.³⁵ The initial sentencing guidelines for the possession of child pornography established no minimum penalty and a maximum of five years' imprisonment.³⁶

That same year, the Supreme Court clarified the constitutional restrictions on the criminalization of child pornography possession. In *Osborne v. Ohio*, the Supreme Court upheld an Ohio law that banned the possession of child pornography in the interest of preventing child sexual abuse.³⁷ Following its earlier reasoning in *Ferber*, the Court granted that people have an interest in possessing child pornography, but reasoned that states have the ability to enact legislation to further their interests in protecting the "physical and psychological well-being of . . . minor[s]."³⁸

In 1996, Congress passed the Child Pornography Prevention Act (CPPA).³⁹ The CPPA expanded the definition of child pornography to include pornographic images that did not utilize actual children in their production. "Virtual" pornography, as defined in the CPPA, included scanned pictures of a real child manipulated by a computer to create a sexually explicit photograph.⁴⁰ The CPPA also increased the minimum sentence for trafficking and possessing child pornography by eight to twelve months, with another increase in sentencing if the defendant used a computer to produce, transfer, or obtain child pornography.⁴¹ In 2002, however, the Supreme Court in *Ashcroft v. Free Speech Coalition* held that certain provisions of the CPPA were overly broad and were not related to the prevention of sexual abuse associated with real child pornography.⁴² The Court explained that virtual pornography "is not 'intrinsically related' to the sexual abuse of children," and "the causal link" to harm is "contingent and indirect," depending upon "some unquantified potential for subsequent criminal acts."⁴³ Accordingly, it held the CPPA partly unconstitutional.⁴⁴

35. *Id.* § 323(a), (b), 104 Stat. 4818, 4819 (amending 18 U.S.C. § 2252).

36. *Id.*

37. *Osborne v. Ohio*, 495 U.S. 103, 103 (1990).

38. *Id.* at 109.

39. Child Pornography Protection Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

40. *Id.*

41. U.S. SENTENCING GUIDELINES MANUAL §§ 2G2.2, 2G2.4 (U.S. SENTENCING COMM'N 1995) (amended 1996).

42. 535 U.S. 234, 256 (2002).

43. *Id.* at 250.

44. *Id.* at 258.

In response to *Ashcroft*, Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act).⁴⁵ This Act narrowed the criminalization of virtual child pornography to only those computer-generated images that an ordinary person would conclude depicted an actual minor engaged in sexually explicit conduct.⁴⁶ The PROTECT Act also changed the sentencing guidelines for the trafficking and possession of child pornography.⁴⁷ Minimum sentences were increased depending on the number of computer images of children engaged in sexually explicit conduct that a defendant produced, sold, transferred, or possessed.⁴⁸ The maximum penalty was increased from fifteen to twenty years for receiving child pornography, and the maximum penalty for possession was increased from five to ten years.⁴⁹ Moreover a minimum penalty of five years' imprisonment was introduced for receipt.⁵⁰

The most recent change to child pornography law occurred in 2008. That year, Congress passed the PROTECT Our Children Act,⁵¹ which created a new offense, 18 U.S.C. § 2252A(a)(7). This new offense made it unlawful to knowingly produce with intent to distribute, or to knowingly distribute, "child pornography that is an adapted or modified depiction of an identifiable minor."⁵² This new offense also carried with it a statutory maximum of fifteen years.⁵³

Currently, federal criminal prohibitions of child pornography are contained in chapters 71 and 110 of title 18 of the *United States Code*. Section 2256A prohibits and penalizes the production of child pornography.⁵⁴ Section 2252A concerns nonproduction offenses.⁵⁵ A

45. PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003).

46. The Act provided that child pornography includes any "digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct." *Id.* § 502(a)(1) (amending 18 U.S.C. § 2256(8)(B)). "Indistinguishable" in turn was defined as "virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct." *Id.* § 502(c) (amending 18 U.S.C. § 2256). An interesting question is what grounds an ordinary person would have for concluding that a depiction was of an actual minor, rather than a computer-generated image of an actual minor, in cases where it was possible to produce, by computer, images that were indistinguishable from depictions of actual minors.

47. *See id.* § 504(a) (adding 18 U.S.C. § 1466A).

48. *See id.* § 504(c) (directing that violations of 18 U.S.C. § 1466A be sentenced pursuant to U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (U.S. SENTENCING COMM'N 2015)).

49. *Id.* § 103(a)(1)(B)(i), (C)(ii).

50. *Id.* § 103(b)(1)(C)(i).

51. PROTECT Our Children Act of 2008, Pub. L. No. 110-401, 122 Stat. 4229 (2008).

52. *Id.* § 304(a)(3) (adding 18 U.S.C. § 2252A(a)(7)).

53. *Id.* § 304(b) (amending 18 U.S.C. § 2252A(b)).

54. 18 U.S.C. § 2256A (2012).

55. *Id.* § 2252A.

person who, under section (a)(2), “knowingly receives or distributes” any child pornography faces a minimum penalty of five years and a maximum penalty of twenty years.⁵⁶ If that violator has a prior conviction for a sex offense involving a minor, the penalty range increases to a fifteen-year minimum and a forty-year maximum.⁵⁷ Furthermore, any person who, under subsection (a)(5), “knowingly possesses, or knowingly accesses with intent to view” child pornography may be imprisoned for up to ten years with the maximum raised to twenty years in cases involving the depiction of a child under twelve.⁵⁸ If the person has a prior sex-abuse-related conviction, he faces a minimum term of ten years’ imprisonment and maximum of twenty years.⁵⁹ For purposes of this Article, I shall refer to both forms of nonproduction offenses under subsections (a)(2) and (a)(5) as child pornography possessory offenses.⁶⁰

All told, these statutory changes have led to substantial increases in incarceration for child pornography offenders. In 1996, 77% of child pornography offenders received a prison sentence; in 2006, 97% did.⁶¹ The mean sentence for production offenders has risen from 63.5 months in 1992 to 269.1 months in 2010.⁶² In addition, paralleling this rise in severity of punishment, the number of offenders sen-

56. *Id.* § 2252A(a)(2), (b)(1).

57. *Id.*

58. *Id.* § 225A(a)(5)(A), (b)(2).

59. *Id.*

60. In addition to increasing the statutory penalty ranges for child pornography offenses, Congress has directed the U.S. Sentencing Commission on numerous occasions to increase the penalties for pornography offenders under the Federal Sentencing Guidelines. See Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN L. & POLY REV. 545, 545 (2011) (“Congress has repeatedly forced increases in the federal sentencing guidelines using unconventional means for child pornography offenses, notwithstanding opposition from the United States Sentencing Commission.”); Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, LIBRARY OF THE U.S. COURTS OF THE SEVENTH CIRCUIT (2009), <http://www.lb7.uscourts.gov/documents/INND/110CR40.pdf> [<https://perma.cc/2MKJ-AJNT>] (detailing changes in the Guidelines and their effect). See generally U.S. SENTENCING COMM’N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (2009) [hereinafter THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES]. Indeed, the only time in the history of the Guidelines that Congress itself has directly modified the Guidelines, rather than leaving the ultimate decision to the Commission, was when it increased child pornography sentencing levels in the PROTECT Act. *Id.* at 38.

61. MARK MOTIVANS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS, 2006, at 5 (2007), <https://www.bjs.gov/content/pub/pdf/fpcseo06.pdf> [<https://perma.cc/9NEM-CF35>].

62. U.S. SENTENCING COMM’N, FEDERAL CHILD PORNOGRAPHY OFFENSES 268 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf [<https://perma.cc/EU8N-3V6U>].

tenced has increased steadily on the federal level. In 1991, there were fewer than 100 prosecutions for all forms of child pornography offenses.⁶³ In 2010, there were approximately 1700.⁶⁴

III. PENALTIES AND PROPORTIONALITY

In assessing whether the penalties associated with child pornography possession laws are just, it is important to have a sense of how and to whom they are applied. It is unclear how many persons have violated federal laws on child pornography possession. Given that the crime is just a few clicks away on any Internet-connected device, and that, at least in young men, interest in sexual images of minors is common,⁶⁵ undoubtedly only a small portion of offenders are actually apprehended and prosecuted. Due to detection limits and prosecutorial priorities, persons such as the hypothetical child pornography Internet viewer described at the very beginning of this Article are rarely, if ever, prosecuted. Based on overbreadth, a serious attack on child pornography possession laws might be mounted.⁶⁶ But that is not what this Article explores. This Article is interested in examining actual practice under the law rather than the theoretical overbreadth of it.

In studying actual practice, some degree of idealization and generalization is unavoidable. For the sake of concreteness, this Article focuses on defendants, statutes, and penalties within the federal criminal justice system.⁶⁷ Section A of this Part examines what sort of penalties are typically meted out for child pornography possession and related offenses. Section B compares these penalties to those of other federal offenses.

63. *Id.* at 248 fig.9-1.

64. *Id.*

65. See JENKINS, *supra* note 9, at 28-30 (discussing social and psychological theories that those interested in child pornography might not be far from the “normal” population).

66. Under federal law, for example, an eighteen-year-old, with no criminal history, who sends to his seventeen-year-old girlfriend a photo of the two of them engaged in sex would be subject to a mandatory sentence of five years’ imprisonment. See 18 U.S.C. § 2252A(b)(1). Accordingly, some commentators have argued for “Romeo and Juliet”-type limits for child pornography laws. See, e.g., JoAnne Sweeny, *Do Sexting Prosecutions Violate Teenagers’ Constitutional Rights?*, 48 SAN DIEGO L. REV. 951 (2011).

67. While not the focus of this Article, states have also significantly increased the penalties for possession of child pornography since 2000. See Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 857-60 (2011). For example, in 2003, Georgia increased the penalty for child pornography possession from a one-year maximum to a twenty-year maximum with a five-year minimum. 2003 Ga. Laws 573 (codified at GA. CODE ANN. § 16-12-100 (2003)). In Nevada, repeated convictions of child pornography possession can result in life imprisonment. NEV. REV. STAT. § 200.730(2) (2005).

A. Typical Defendants and Penalties

As noted, the number of prosecutions for possession of child pornography at the federal level has increased dramatically over the last twenty years. In 1991, there were a de minimis number of prosecutions for child pornography possessory offenses.⁶⁸ In 2010, there were approximately 900.⁶⁹ Undoubtedly, there is wide variation among these 900 cases. As a result of a recent report by the United States Sentencing Commission,⁷⁰ valuable information has been gained about prosecution practice.

In the United States, the typical child pornography possessor defendant is white, male, in his early forties, employed, and a United States citizen.⁷¹ It is unclear whether he is a pedophile.⁷² He has a very limited criminal history.⁷³ Formerly, law enforcement made substantial arrests of those who purchased child pornography from commercial Internet sites. Sting operations against sellers produced credit card transaction information that, in turn, allowed the identification of buyers. With the proliferation of peer-to-peer (P2P) file-sharing sites, however, the commercial market for child pornography dramatically contracted.⁷⁴ As a result, the typical defendant today has probably been apprehended because of his involvement in a P2P file sharing network or an Internet forum, such as a bulletin board, newsgroup, or chat room.⁷⁵ Federal investigators troll such networks using specialized software to determine IP addresses of those sharing child pornographic images. With an IP address, investigators can obtain a search warrant for the individual's computer, leading to an arrest for receiving child pornography.⁷⁶ The evidence obtained will

68. U.S. SENTENCING COMM'N, *supra* note 62, at 248 fig. 9-1.

69. *Id.*

70. U.S. SENTENCING COMM'N, *supra* note 62.

71. *Id.* at 141-43, 162.

72. *See id.* at 75 (some social research finds 61% of possessors of child pornography are pedophiles; some finds such possessors typically are not pedophiles).

73. *See id.* at 143.

74. *See* U.S. DEPT OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 11-16 (2010) (noting that "it is evident that technological advances have contributed significantly to the overall increase in the child pornography threat"); *accord* United States v. C.R., 792 F. Supp. 2d 343, 367 (E.D.N.Y. 2011) (noting the view of law enforcement and prosecutors that "child pornography was a dying industry until the Internet and peer-to-peer networks developed." (quoting Neil MacBride, United States Attorney for the Eastern District of Virginia)). *See generally* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 912, 920 (2005) (describing mechanics of peer-to-peer programs).

75. U.S. SENTENCING COMM'N, *supra* note 62, at 149 tbl.6-9. In 2010, 56.1% of defendants received child pornography through noncommercial P2P file sharing or internet forums; 22.9% received it through email, instant messaging, texting or other means. *Id.*

76. *Id.* at 145.

likely support a conviction for both possession and receipt of child pornography.⁷⁷ The typical federal defendant will thus be exposed to a potential sentence of twenty years' imprisonment if he does not have any prior sex convictions and forty years' imprisonment if he does.⁷⁸

Of course, the maximum available statutory penalty is not always imposed. Judges have the power to impose a lower sentence within a statutorily prescribed sentencing range. In the federal criminal justice system, the Federal Sentencing Guidelines (Guidelines) play a significant role in guiding the exercise of a judge's discretion. The Guidelines establish a relatively complicated, multi-step process for determining an offender's recommended sentence.⁷⁹

The Guidelines might apply to the typical possessor of child pornography defendant in the following way: An actor's downloading images on his computer would support a charge of either receiving child pornography under 18 U.S.C. § 2252A(a)(2), or possessing it under § 2252A(a)(5), resulting in a base offense level under the Guidelines of eighteen or twenty-two, respectively.⁸⁰ In fact, it is about twice as likely the offender will be convicted for possessing as for receiving.⁸¹ Whether a defendant is sentenced for receipt or possession is determined by the prosecutor's charging decision. This decision correlates strongly with the United States Attorney's office that happens to handle the case.⁸²

Sentencing enhancements are added to the base sentencing level. Because our typical defendant is using a computer, his offense level is increased by two.⁸³ Because his P2P software is probably making images available to others, his level is increased by another two.⁸⁴ Because he probably has an image of a minor under twelve, his level is increased by another two.⁸⁵ Because he probably has an image that involves penetration or bondage, his offense level is increased by four.⁸⁶ Assuming he has at least two images—a fairly safe assump-

77. Except for a relatively small percentage of offenders who fabricate their own child pornography or accidentally come into possession of it, all those who knowingly possess child pornography under 18 U.S.C. § 2252A(a)(5) also knowingly receive child pornography under 18 U.S.C. § 2252A(a)(2). *Id.* at 147.

78. 18 U.S.C. § 2252A(b)(1) (2012).

79. *See* U.S. SENTENCING GUIDELINES MANUAL §2G2 (U.S. SENTENCING COMM'N 2015).

80. *Id.* § 2G2.2(a).

81. U.S. SENTENCING COMM'N, *supra* note 62, at 146 fig.6-14.

82. *Id.* at 237.

83. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(6) (U.S. SENTENCING COMM'N 2015).

84. *Id.* § 2G2.2(b)(3)(F).

85. *Id.* § 2G2.2(b)(2).

86. *Id.* § 2G2.2(b)(4).

tion—his offense level is increased by another two.⁸⁷ In sum, the typical offender probably qualifies for an offense level of thirty. Assuming, as is very likely the case, he has no criminal history,⁸⁸ he is looking at a penalty under the Guidelines of approximately nine years.⁸⁹

Of course, the Guidelines are not always followed. In about 17% of the cases, prosecutors enter into plea stipulations that do not support potential sentencing enhancements.⁹⁰ Additionally, in about 10% of the cases, the government seeks a downward variance or departure.⁹¹ And beyond this, in almost half of the cases, judges *sua sponte* impose sentences below that recommended by the Guidelines, with an average downward departure of about four years.⁹²

So where does that leave our typical child porn possessor defendant? The greatest difficulty in predicting a sentence of a given offender is accounting for variation in charging practices in different areas of the country.⁹³ While there is significant room for variation depending on geography, based on 2010 data, the bottom-line average sentence of a person engaged in possession of child porn, typically through P2P file sharing, was approximately seven years—the median sentence being approximately 6.5 years.⁹⁴ Less than 2% of defendants receive a probationary sentence.⁹⁵ Seven years' imprisonment is clearly a whole lot better than twenty years. Yet there remain significant questions about whether such penalties for child pornography possession are consistent with the principle of proportional punishment.

87. *Id.* § 2G2.2(b)(7)(A).

88. In 2010, “81.1 percent of R/T/D offenders and 82.2 percent of possession offenders were in Criminal History Category I.” U.S. SENTENCING COMM’N *supra* note 62, at 143.

89. U.S. SENTENCING GUIDELINES MANUAL § 5A (U.S. SENTENCING COMM’N 2015).

90. U.S. SENTENCING COMM’N *supra* note 62, at 223.

91. *Id.*

92. *Id.* at 224, 224 n.53.

93. *See id.* at 245. Offenders involved in P2P file sharing are likely to receive a 4.5 year greater sentence if they were charged and convicted of receipt rather than possession. *Id.* at 215. Because facts supporting a conviction of possession will virtually always support a conviction of receipt, prosecutorial discretion significantly affects sentencing outcome.

94. *Id.* at 226 fig.8-13. Among those whose sentences were limited by undercharging, plea agreements, and downward departures, the median sentence was 63 months, or 5.25 years. Among those whose sentences were not so limited, the median sentence was 135 months, or 11.25 years. The former category was 3.7 times as large as the latter. *Id.*

95. *See id.* at 130.

B. Proportionality

Proportionality of punishments is commonly accepted as a desirable feature of criminal justice systems.⁹⁶ The popularity of proportionality can be explained by its appeal to punishment theorists of many stripes. Those advocating deterrence-based and incapacitation-based theories of punishment have favored proportionality in punishment.⁹⁷ Likewise, the idea that wrongdoers morally deserve to suffer a proportionate punishment is one of the key elements of retributive justice.⁹⁸

Retributive justice is a moral principle with two components: one negative, one positive. According to the negative component, it would be unjust to subject a person to punishment greater than deserved, where desert is a function of the person's wrongdoing and culpability for that wrongdoing.⁹⁹ Desert supplies a presumptive ceiling for punishment. According to the positive component, the facts underlying desert supply an affirmative noninstrumental reason to punish the person as much as the person deserves.¹⁰⁰ Desert supplies a presumptive floor for punishment. In combination, negative and positive retributivism determine an amount, or at least a range, of punishment that is deserved. The negative component most likely has greater and broader intuitive appeal, and frequently finds its way into mixed or pluralistic theories of punishment. This Article will be examining whether the penalties for child pornography possession are disproportionate from the perspective of negative retributivism, i.e., whether they are greater than deserved.

Proportionality itself is an ambiguous term. It can refer to either cardinal or ordinal proportionality.¹⁰¹ Cardinal proportionality is a principle of punishment that sets absolute values of punishment, with greater punishments being assigned to offenses of greater gravity (however gravity might be defined). For example, *lex talionis*, as-

96. See, e.g., MODEL PENAL CODE § 1.02(2)(c) (AM. LAW INST. 1985) (including among the general goals of sentencing "to safeguard offenders against excessive, disproportionate or arbitrary punishment").

97. See generally Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41 (2000) (arguing that symmetric proportionality is a valid and superior incarnation of the proportionality principle).

98. See Alec Walen, *Retributive Justice*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2015).

99. See MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 270 (2009); Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Laws*, 91 NW. U. L. REV. 1015, 1027-29 (1997).

100. MOORE, *supra* note 99, at 270; Walen, *supra* note 98.

101. ALEC, WALEN, *Retributive Justice*, STAN. ENCYC. OF PHIL. (2014), <https://plato.stanford.edu/entries/justice-retributive/> [<https://perma.cc/FSQ6-8S32>].

serts a form of cardinal proportionality. According to *lex talionis*, the severity of punishment a person should receive is equal to the gravity of wrongdoing for which he is culpable.¹⁰² If a criminal code only contained one offense, it would still make sense to ask whether the punishment for that offense was proportional given the gravity of the wrongdoing and the sanction. In contrast, ordinal proportionality merely requires that greater punishments be assigned to offenses of greater gravity, leaving open what the absolute values of any punishment may be.¹⁰³ As a conceptual matter, ordinal proportionality can be assessed only within a punishment regime having multiple offenses and associated sanctions because order is relative. The offense comprising a single offense regime cannot be either in or out of order. Inconsistency with ordinal proportionality logically implies inconsistency with cardinal proportionality for at least one wrongdoing-punishment assignment within the punishment regime because at least one offense must have a sanction that, in absolute terms, is too high or low. Finally, ordinal proportionality underdetermines punishment levels compared to cardinal proportionality. For example, if there are two offenses, A and B, A being the offense of greater gravity and B the offense with a harsher sanction, there is ordinal disproportionality. Whether the disproportionality should be cured by raising the punishment for A or lowering the punishment for B (or both), however, depends on considerations of cardinal proportionality.

Prima facie, the penalties for possessing child pornography appear ordinally disproportionate. The average federal sentence for a person convicted of abusive sexual contact with a minor (e.g., fondling), is about four years.¹⁰⁴ The average sentence for nonforcible sexual intercourse with a minor—commonly referred to as “statutory rape”—is about three years.¹⁰⁵ That is less than half of the average penalty for possession of child pornography.¹⁰⁶ A more detailed analysis is provided by Troy Stabenow.¹⁰⁷ Stabenow considers one defendant convicted of distributing child pornography who possesses an image of a child under twelve, possesses a picture involving bondage, used a computer, emailed five photos to another, and possessed four short movie clips. If he had pleaded guilty in 1987, Stabenow calculates,

102. See Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25, 26 (1992) (arguing for a more abstract interpretation of the basic *lex talionis* rule that punishment “should be the same as the act which constituted the offense”).

103. See *id.* at 43-44.

104. U.S. SENTENCING COMM’N *supra* note 62, at 137 (averaging the sentence lengths for possession-only offenders and other classes of sexual offenders).

105. *Id.*

106. *Id.*

107. See Stabenow, *supra* note 60.

the Guidelines would have recommended a sentence of twelve to eighteen months. In 2004, they would have recommended a sentence of 188-235 months. Stabenow considers another defendant who is convicted of possessing child pornography and who has a picture of a child under twelve, used a computer to obtain the image, had two movies and ten pictures. In 1991, the Guidelines would recommend a sentence of six to twelve months; in 2004, they would recommend a sentence of forty-one to fifty-one months. In contrast, a man who contacted a twelve-year-old girl over the Internet and had repeated sex with her, under the 2006 Guidelines, would face only seventy to eighty-seven months in prison—a length of time comparable to that recommended for the possession defendant and approximately one-third of the time recommended for the distribution defendant.¹⁰⁸ Indeed, the penalty recommended for the distribution defendant is significantly greater than received by an actual defendant found guilty of forcibly raping a nine-year-old girl twice a week for two years, sometimes causing so much trauma she passed out.¹⁰⁹ It is therefore hardly an exaggeration to say that under federal law, greater punishments are meted out for possessing images of wrongful acts with children than actually engaging in the acts themselves.¹¹⁰ Likewise, if violent crimes are used as a benchmark, the penalties for child pornography possession may also appear disproportionate. As one court has observed, under the Guidelines, a defendant convicted of possessing on his computer two nonviolent videos of seventeen-year-olds engaging in consensual sex and a person with some criminal history who was convicted of aggravated assault with a firearm that resulted in bodily injury would receive the same sentence.¹¹¹

Furthermore, the penalties for possessing child pornography may appear cardinaly disproportionate. Whether they are so, however, requires assessing the degree of wrongfulness of the offense. Wrongfulness is generally understood to be a matter of the harm inflicted or risked and the culpability of the wrongdoer for the harm inflicted or risked.¹¹² An inquiry thus must be made regarding the harms inflict-

108. *See id.* at 27-29.

109. *Compare id.* at 26 with *United States v. Kane*, 470 F.3d 1277 (8th Cir. 2006) (resulting in a sentence of 210 months which was ultimately reduced to 120 months).

110. Disparities on the state level can be even greater. In Arizona, a defendant was sentenced to 200 years for possessing twenty child pornography images while a defendant who kidnaped and sexually assaulted a fourteen-year-old girl selling candy door-to-door received a one-year sentence. *See Hessick, supra* note 67, at 862 (discussing *State v. Berger*, 134 P.3d 378 (Ariz. 2006)). Six states punish the possession of child pornography as severely as its production or distribution. *Id.* at 863.

111. *United States v. Dorvee*, 604 F.3d 84, 97 (2d Cir. 2010) (calculating a range of forty-six to fifty-seven months for both).

112. *See MOORE, supra* note 99, at 81.

ed or risked by a possessor of child pornography. The harms associated with acts of sexual abuse of minors are well known. What are the harms associated with child pornography possession?

IV. THE HARMS OF CHILD PORNOGRAPHY POSSESSION

There is a range of harms associated with possessing child pornography. These harms are, to varying degrees, analogous to harms associated with other possessory offenses. This Part surveys the harms associated with possession of child pornography in an effort to systematically compare them with the harms associated with other possessory offenses.

A. *Enabling Harms*

The primary harms associated with some types of possessory offenses may be called “enabling harms.” Firearms may be employed by ex-felons to commit crimes of violence. Burglary tools may facilitate the commission of property crimes. Counterfeiting equipment may be used to produce false currency. The possession of certain contraband items enables the possessor to engage in nonpossession crimes of various sorts. Likewise, possession of child pornography, it may be argued, facilitates instances of child sexual abuse. There is anecdotal evidence of images of children engaging in sexual acts being shown to would-be victims to “groom” them to engage in sex acts.¹¹³

The difficulties with justifying the punishments associated with child pornography possession along these lines are theoretical and empirical. On the theoretical side, scholars have expressed discomfort at the practice of criminalizing conduct that enables further harm in the absence of proof that the further harm was intended. Antony Duff, for example, has argued that:

[T]he law should not prohibit intrinsically harmless conduct on the mere grounds that the agent might go on to create a risk of harm, since this fails to treat citizens as responsible agents who can be expected to recogni[z]e and respond to the good reasons that the law anyway offers for not going on to create such risk.¹¹⁴

113. See U.S. SENTENCING COMM’N, *supra* note 62, at 110 (“Some perpetrators use such images that depict victims enjoying themselves to groom other child victims.”); *Id.* at n.26 (citing Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(1)(3), 110 Stat. 3009); see also *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (identifying possibility of child seduction as a ground for upholding constitutionality of child pornography possession criminalization).

114. R.A. Duff, *Criminalizing Endangerment*, in *DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW* 43, 63 (R.A. Duff & Stuart P. Green eds., 2005); see also R.A. DUFF, *CRIMINAL ATTEMPTS* 391 (1996) (arguing if the law is to treat citizens as responsible agents, criminalizing possession of firearms and drugs is unjustified).

Duff allows an exception in cases of persons who cannot be responsive to reason. Thus, he does not object to criminal liability for intoxicated persons in charge of a motor vehicle who have not yet chosen or attempted to drive.¹¹⁵ Persons in possession of child pornography, however, retain their full autonomy regarding whether they will utilize the images now at their disposal to entice children into unlawful sexual conduct.

On the empirical side, the connection between possessing child pornography and its use in child sexual abuse is speculative. There is no data on how frequently child pornography is used in the commission of child sexual abuse or how frequently it is a critical element to the commission of the offense. For example, there is anecdotal evidence of grooming children through the use of adult pornography.¹¹⁶ Other means, such as enticements,¹¹⁷ are of course available to influence children. In contrast, absent counterfeiting equipment, many would-be counterfeiters would be thwarted, and without firearms, many felons would be appreciably hamstrung when it came to committing robberies and other offenses. Furthermore, there is a relatively weak correlation between the possession of child pornography and the use of it to commit child sexual abuse. This is because many who possess child pornography do not use it to commit child sexual abuse but simply possess for interest, pleasure, or curiosity.¹¹⁸ In contrast, there is likely a limited number of persons who would possess categorically prohibited weapons, such as rocket launchers¹¹⁹ or molds for United States coins¹²⁰ for benign reasons. Finally, many possession offenses ensure that there is a strong correlation between the possession of contraband and the commission of a further crime by requiring, as an element of the offense, that the possessor intend to use the contraband item for a wrongful purposes.¹²¹ Possession of child pornography lacks any such element. It is hard to imagine that

115. See R.A. Duff, *Criminalizing Endangerment*, *supra* note 114, at 63.

116. *How Do Predators Groom Kids?*, INTERNET SAFETY 101, <http://www.internetsafety101.org/grooming.htm> [<https://perma.cc/PMC3-MKV2>] (“Predators often use pornography and child pornography to lower a child’s inhibitions and use their adult status to influence and control a child’s behavior.”).

117. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 251 (2002) (noting in the context of pedophiles that “cartoons, video games, and candy . . . might be used for immoral purposes”).

118. Frequently, sentencing opinions in child pornography sentencing cases blame the defendant’s obsession with child pornography on depression or compulsive behavior. See Hamilton, *supra* note 60, at 563 (collecting cases).

119. 18 U.S.C. § 921 (1968).

120. 18 U.S.C. § 487 (2012) (making or possessing of counterfeit dies for coins).

121. See, e.g., MODEL PENAL CODE § 5.06(1) (AM. LAW INST. 1985) (Under the Model Penal Code, where implemented, it is a misdemeanor to possess tool specially made for criminal use if there is a “purpose to employ it criminally.”).

concern about the use of child pornography as an enabler for child sexual abuse justifies the substantial penalties described above.

B. Gateway Harms

The justification for the penalties for some possessory offenses likely rests on what I shall refer to as “gateway harms.” Many justifications have been advanced for the criminalization of narcotics possession. The most common explanation likely runs along these lines: (1) drug use increases an individual’s predilection for more drugs and harder drugs, (2) the repeated use of hard drugs leads to addiction, and (3) addiction both harms the user and society, which bears the cost of the user’s trying to support his habit through crimes against persons and property.¹²² Being “most common,” however, does not mean universally accepted. Growing doubt as to whether such a causal chain is initiated by the recreational use of marijuana may well account for the generally low penalties for marijuana possession¹²³ and the recent dramatic movement toward marijuana decriminalization.¹²⁴

In a manner analogous to the use of narcotics, child pornography, it has been suggested, may (1) whet the appetite of the possessor, or otherwise lower his inhibitions to engage in child sexual abuse, and (2) lead him to commit acts of child sexual abuse he otherwise would not have committed.¹²⁵ Possession, in other words, is a gateway to abuse. The social science data concerning the existence of this gateway effect, however, is inconclusive—similar to the claim that there is a causal relation between the viewing of adult pornography and the commission of rape.¹²⁶

122. See Jeffrey DeSimone, *Is Marijuana a Gateway Drug?*, 24 EASTERN ECON. J. 149 (1998); see also DENISE B. KANDEL, STAGES AND PATHWAYS OF DRUG INVOLVEMENT: EXAMINING THE GATEWAY HYPOTHESIS (2002).

123. See generally *Fate by Weight: Examining Marijuana Felonies Across the United States*, DRUG TREATMENT, <http://www.drugtreatment.com/expose/marijuana-felony-amounts-by-state/> [<https://perma.cc/VZ88-5YYE>] (documenting penalties for marijuana possession across the U.S.).

124. Brianna Gurciullo et al., *Weed Rush: The Marijuana Legalization Movement Begins in the States*, CENTER FOR PUBLIC INTEGRITY (Aug. 16, 2015), <http://www.publicintegrity.org/2015/08/16/17827/marijuana-legalization-movement-begins-states> [<https://perma.cc/7CDE-ALZN>].

125. A prominent member of Congress, for example, has asserted a causal relation between child pornography and child sexual abuse. According to Senator Jesse Helms, “[t]here have been dozens of studies by respected experts who come to the same conclusion—child pornography is indeed a cause of child molestations.” 137 CONG. REC. S10, 322 (daily ed. July 18, 1991). Senator Helms, however, did not identify any such study.

126. See generally, Hamilton, *supra* note 60, at 577 (citing aggregate statistic studies finding inverse correlations between consumption of pornography and rape rates); Hessick, *supra* note 67, at 878 (reviewing literature regarding the “long . . . contested issue” and concluding that “adult pornography [does] not appear to cause violence against women”).

According to most current social science research, viewing child pornography does not cause persons to commit sex offenses in the absence of risk factors.¹²⁷ While research supports the proposition that child molesters consume child pornography, less is known about whether possessors of child pornography are child molesters.¹²⁸ One study of over 200 individuals suspected of viewing child pornography, however, found that only 0.8% were investigated for child molestation in a six-year follow-up period.¹²⁹ Furthermore, as one commentator has noted, “[c]orrelation does not prove causation.”¹³⁰ Undoubtedly, for some persons, child pornography exposure may strengthen “existing tendencies in ways that may create tipping-point effects on behaviors if other risk factors are also present.”¹³¹ The relevant—and unanswered—question is how large this group is compared to the universe of persons exposed to child pornography.¹³²

127. See Drew A. Kingston et al., *Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography Use on Recidivism Among Sexual Offenders*, 34 AGGRESSIVE BEHAV. 341, 347-48 (2008) (finding that child sex abusers who viewed pornography prior to committing contact offenses viewed adult pornography rather than child pornography); Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE 201, 201 (2005) (“[T]here are no published data on the future offending of child pornography offenders.”); Jesse P. Basbaum, Note, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*, 61 HASTINGS L.J. 1281, 1305 (2010) (“On the critical question of whether possession of child pornography will lead an offender to ‘cross over’ to contact offenses, many studies have found no causal connection between the two.”).

128. See Neil Malamuth & Mark Huppín, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 790 (2007) (“There have been a few relevant studies with non-pedophiles or non-child molesters, but these have examined only a very small subset of the relevant issues. More common are studies with pedophiles and child molesters that survey their usage of child pornography.” (footnote omitted)).

129. See Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 BMC PSYCHIATRY 43, 43 (2009); see also Michael C. Seto et al., *Contact Sexual Offending by Men with Online Sexual Offenses*, 23 SEXUAL ABUSE 124, 136 (2011) (meta analysis finding that “online offenders rarely go on to commit detected contact sexual offenses”).

130. Hessick, *supra* note 67, at 876.

131. Malamuth & Huppín, *supra* note 128, at 817.

132. Dennis Howitt, *Pornography and the Pedophile: Is It Criminogenic?*, 68 BRIT. J. MED. PSYCHOL. 15 (1995) (concluding after interviews with a small sample of contact child sex offenders that pornography has no simple direct causal effect on offending; some offenders had no contact with pornography before first offense, and were as likely, or more likely, to be aroused by everyday images of children); see also L. Webb, J. Craissati & S. Keen, *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters*, 19 SEX ABUSE 449, 451 (2007) (reviewing research on the links between contacting offending and viewing child pornography and concluding that “as yet, there is no empirical support for a direct causal link between internet sex offending and the commission of contact offenses”).

C. Correlation Harms

There is an additional set of harms caused by the possessor of child pornography that arguably grounds the penalties associated with child pornography possession. These are harms not causally connected to the possession of child pornography. If these harms in fact justify such penalties, then child pornography possession would differ significantly from other possessory offenses.

According to one potential justification of the penalties for child pornography possession, possession of child pornography, rather than causing child sexual abuse, is evidence that the offender previously engaged in undetected acts of child sexual abuse. The relatively high penalties for possession of child pornography would be justified on the grounds that they are deserved for past, unpunished wrongs. Thus, past instances of child sexual abuse, although they are harms caused by the possessor of child pornography, are not caused by the possession itself; they are merely correlated with it.

This theory, sometimes obliquely expressed,¹³³ is an unusual one. The theory has not been adopted in other areas where it might work comfortably. Consider drug use. Most drug addicts, in the course of their drug history, have committed numerous violations of narcotics possession laws for which they have not been punished. Nevertheless, the Supreme Court has held that offenses that criminalize status, such as being a drug addict, violate the due process principle that criminal sanctions may only be imposed for voluntary acts.¹³⁴ The Court thus implicitly rejected the idea that past unpunished voluntary acts could constitutionally be the basis for punishment. Such a theory, if accepted, would have provided a shield for the challenged laws.¹³⁵

Admittedly, criminal law sometimes employs proxies for wrongdoing. For example, there are criminal penalties for failure to comply with environmental recordkeeping and reporting requirements.¹³⁶ One justification for these penalties may be that these reporting and recordkeeping requirements are part of an enforcement scheme to prevent an underlying offense and that the best explanation for failure to meet the requirements is to conceal the occurrence of the un-

133. See Hessick, *supra* note 67, at 882 (collecting statements suggesting support of theory); see also Hamilton, *supra* note 60, at 548 (“[T]hose who seek harsh sentencing for child pornography are really using a child pornography charge as a proxy for punishing child molestation.”).

134. *Robinson v. California*, 370 U.S. 660, 684 (1962).

135. See *id.*

136. See, e.g., 42 U.S.C. § 6928(d)(4) (2006) (It is a crime under the Resource Conservation and Recovery Act to fail to file any record, application, manifest, report, or other document required to be maintained or filed by the Environmental Protection Agency).

derlying offense. Failure to comply with the reporting and record-keeping requirements acts as a proxy for engaging in some underlying offense. Criminal penalties for failures to comply with record-keeping and reporting requirements, however, are distinguishable from criminal penalties for child pornography possession. The unlawful possession of child pornography does not frustrate efforts to enforce underlying laws against child sexual abuse. Child sexual abuse does not create an incentive to possess child pornography in the way discharging pollutants creates an incentive to falsely report the amount of pollutant discharged. Thus, there is not the same causal connection between the earlier wrongdoing and the later offense that might ground a correlation.

Nevertheless, punishing based on uncharged offenses is not alien to our criminal justice system. Under the Federal Sentencing Guidelines, offenders may be sentenced within the sentencing range of the offense they were convicted of based on the commission of uncharged offenses where those offenses are established by a preponderance of the evidence.¹³⁷ The notion of using established offenses as proxies for unproven ones may strike some as contrary to notions of due process.¹³⁸ Using proxies that are imperfect, likewise, may strike some as pernicious.¹³⁹ Nevertheless, if the correlation between possessing child pornography and committing past unpunished acts of child sexual abuse is strong enough—establishing past wrongdoing beyond a reasonable doubt or perhaps by a preponderance of evidence—the penalties for child pornography possession could likely be justified from a retributivist perspective as proportional, at least under certain forms of retributivism.¹⁴⁰

Existing evidence, however, supports only a weak correlation.¹⁴¹ A review of the existing social science research by the United States Sentencing Commission (U.S.S.C.) found that studies have shown

137. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (U.S. SENTENCING COMM'N 2015). For a thorough explanation of the relevant conduct guideline, see generally William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990).

138. See Hessick, *supra* note 67, at 884 (faulting proxy punishment on ground that it permits criminal punishment without the constitutional protections generally afforded to criminal defendants).

139. See *id.* at 885.

140. The correlative harm theory might not satisfy a holder of communicative retributivism. Under communicative retributivism, an essential feature of justified punishment is the communication to the offender and the polity of the wrongness of the offender's act. Such communication is impeded in cases where there is only a correlation between the criminalized conduct and the offender's wrongful act. See R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 80-81 (2001); Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 38-39, 41-42 (2012).

141. See Hamilton, *supra* note 60, at 577-85.

substantially different prevalence rates of prior sexual contact offenses among child pornography offenders.¹⁴² To rectify this, the U.S.S.C. performed its own study.¹⁴³ It reviewed 1,654 possession cases filed in 2010.¹⁴⁴ It found that 31.4% of offenders had prior convictions for sex offenses or a finding of a criminally sexually dangerous behavior (CSDB) in their presentencing report.¹⁴⁵ Offenders with CSDB history receive sentences that are approximately twice as long as those without such a history.¹⁴⁶ Only 26% of this subgroup, however, or 8% in total, had prior sexual contacts for which there was no conviction.¹⁴⁷ The known rate of unpunished past acts is thus small. The study acknowledged that the actual rate of CSDB must be higher because incidents are systematically underreported.¹⁴⁸ The U.S.S.C., however, offered no suggestion regarding the magnitude of the underreporting. Furthermore, even if there are a very large number of unreported cases of child sexual abuse,¹⁴⁹ it is unknown whether such acts are generally engaged in by a relatively small pool of individuals with a documented history of CSDB or a wider pool of individuals who have no such documented history. Thus, even when underreporting is taken into account, it seems unlikely that high sentences are being systematically meted out to those offenders who have likely committed unpunished acts of child sexual abuse in the past.¹⁵⁰

142. U.S. SENTENCING COMM'N, *supra* note 62, at 169, 171-73.

143. *Id.*

144. *Id.* at 169.

145. *Id.* at 181.

146. *Id.* at 206.

147. *Id.* at 183 fig.7-2.

148. *Id.* at 179-80; *see also* PEGGY HEIL & KIM ENGLISH, CAL. DEPT OF CORR. & REHAB., PRISON SEX OFFENDER TREATMENT: RECOMMENDATIONS FOR PROGRAM IMPLEMENTATION 40 (2007) ("Official record data are woefully inadequate when it comes to reflecting an offender's sex crime history . . ." (citing Peggy Heil et al., *Integration of Polygraph Testing with Sexual Offenders in the Colorado Department of Corrections*, 29 POLYGRAPH 26-35 (2002)).

149. *See* Ryan C.W. Hall & Richard C.W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 MAYO CLINIC PROC. 457, 460-61 (2007) (noting that studies show that only an estimated one in twenty cases of child sexual abuse is reported or identified and that an arrest was made in only 29% of reported juvenile sexual assaults).

150. *See* JANIS WOLAK ET AL., NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY 17 (2005), <http://www.unh.edu/ccrc/pdf/jvq/CV81.pdf> [<https://perma.cc/YXF7-X4A9>] (finding in 84% of child pornography possession cases investigators did not detect concurrent child sexual victimization).

D. Market-Based Harms

The fourth theory of harm underlying child pornography offenses is the theory of market-based harms. Consider the offense of possessing or receiving stolen property. Buying an item that has been stolen obviously does not cause the owner to be deprived of the item—the item has already been appropriated. If, however, nobody bought stolen goods, undoubtedly far fewer items would be stolen. Receiving stolen goods, it is said, creates a market for them.¹⁵¹ Likewise, it seems safe to say, if there were no demand to possess child pornography, the production of child pornography would be substantially curtailed.¹⁵²

Receiving a child pornographic image through a noncommercial P2P file serving network, however, is not like purchasing a stolen car part. A stolen car part might be acquired directly from either a thief or a fence. Thieves and fences are repeat players in the market for stolen goods. In order to stay in business, they must replace items they have sold or transferred. Buying a stolen car part thus directly stimulates the “production” of stolen car parts. In contrast, because digital images can be reproduced endlessly and costlessly, stock is never depleted. Acquiring an image does not create the demand for a new pornographic image to be produced. The usual rules of supply and demand that undergird markets and drive production do not apply to child pornography.

Nor does a person, by downloading a child pornographic image through a P2P file sharing network, in any meaningful sense, signal the existence of a demand for the production of new child pornography. As any user of Napster or LimeWire knows, individuals in file-sharing databases may be wholly unaware when their data is being accessed. To the extent they are aware, they have little incentive to meet this perceived demand through the production of new child pornography. The supply of child pornography is already great enough to satisfy the demands of most offenders. There are already over five million unique child pornographic images on the Internet.¹⁵³ Even the largest collectors possess only a fraction of the existing supply.¹⁵⁴ Furthermore, in the context of the enormous online trade in child pornography, the marginal impact of one person downloading child

151. See Stuart P. Green, *Thieving and Receiving: Overcriminalizing the Possession of Stolen Property*, 14 NEW CRIM. L. REV. 35, 46 (2011) (discussing the forward-looking aspects of receiving stolen property).

152. Two-thirds of federal production cases involve production for possession of the producer only. U.S. SENTENCING COMM'N, *supra* note 62, at 265 fig.9-11. It may be supposed that the average volume in such cases is less than that in cases of production for distribution.

153. *Id.* at 107.

154. *Id.* (“[S]ome offenders possess over one million images of child pornography.”).

pornography on the overall demand for child pornography cannot be thought to be significant. As one court critical of the market-based harms theory has recognized, “[t]he worldwide market for child pornography is so vast that the relative market impact of 600 additional images [possessed by the defendant] is minuscule.”¹⁵⁵

E. Norm-Undermining Harms

Here is what may be a more plausible theory of how possessing child pornography causes harm. According to the norm-undermining theory, by participating in Internet communities in which members share child pornography, possessors normalize and validate the sexual exploitation of children, and this validation leads to child abuse. The U.S.S.C. Report explains:

Child pornography communities seek to make the viewing of sexualized images of children acceptable and implicitly or explicitly condone sexual contact with children. Typical cognitive distortions include denying that children suffer harm from sexual contact, suggesting that children receive a benefit, condemning those who condemn, and “appealing to higher loyalties,” for example, by likening the struggle for pedophile acceptance to a socially acceptable cause such as the advancement of civil rights.

Child pornography communities can be social and supportive environments. In these communities, a child pornography offender can develop relationships with others who share his interests. One child pornography offender posted on a child pornography community bulletin board, “[f]or many of us, this is our social life. We can discuss our feelings here and feel a part of something without fear of being condemned by society for our feelings and beliefs.” Relationships in child pornography communities can be emotionally gratifying and may escalate the level of offending. Offenders receive reinforcement and support by finding that others are trading images depicting sexual activity with children. Research also suggests that online communities help child pornography offenders to develop positive feelings about their own deviant online sexual identities. As their online sexual identities become dominant, willingness to comply with cultural and societal norms may erode.¹⁵⁶

155. *United States v. Manke*, No. 09-CR-172, 2010 WL 307937, at *4, *6, *8 (E.D. Wis. Jan. 19, 2010) (sentencing defendant to one day despite range of forty-one to fifty-one months’ imprisonment available); *see also* *United States v. Raby*, No. 2:05-CR-00003, 2009 WL 5173964, at *7 (S.D. W. Va. Dec. 30, 2009) (“The de minimis market effect of a few hundred images simply does not justify sentencing a man to [an] additional decade in prison.”); *United States v. Goldberg*, No. 05 CR 0922, 2008 WL 4542957, at *5 (N.D. Ill. Apr. 30, 2008) (noting that downloading of child pornography “does sustain a market for child pornography, . . . but that market is unfortunately there regardless of what may happen to” the defendant).

156. U.S. SENTENCING COMM’N, *supra* note 62, at 97 (footnotes omitted).

Condoning, it is implied, leads to committing. But undoubtedly, one person's downloading of child pornographic images through a P2P network can have no appreciable effect on another's propensity to transgress the societal norm against sexually abusing children. One person cannot make a community, nor can one act establish or disestablish a norm. Whatever effect the sharing of child pornography has must be based on the cumulative acts of many, rather than on the conduct of an individual defendant.

F. Perpetuation Harms

The possession of contraband in some cases perpetuates an existing harm. The receiving of stolen property is criminalized, at least in part, because a person who has purchased stolen property perpetuates the owner's original deprivation of property.¹⁵⁷ If the stolen item were not purchased, it might be abandoned by the seller and eventually find its way home. More importantly, by possessing the stolen property, the receiver makes it harder for the owner to regain the stolen item. In many instances, the receiver of stolen property is a person without a criminal background.¹⁵⁸ He is less likely to come under the scrutiny of the police than the initial thief or, in some cases, subsequent fence.¹⁵⁹ With the stolen property in the hands of the receiver, it is less likely that it will be recovered by the police and returned to its rightful owner.¹⁶⁰ Also, the receiver arguably breaches a moral duty to notify the owner or police of the location of the property so that it might be recovered. The law often places affirmative duties on those who have a unique relationship to the victim or to the initial injury.¹⁶¹ Once he gains control of the item, the receiver is in a unique position to return the item to its owner. A moral duty to return the item might be hypothesized.

The possession of child pornography, it has been contended, likewise perpetuates the original wrong done to the child-victim by the

157. See STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE 187-88 (2012).

158. See Michael Sutton, *Stolen Goods Markets*, CTR. FOR PROBLEM-ORIENTED POLICING, UNIV. OF N.Y. AT ALBANY (2010), http://www.popcenter.org/problems/pdfs/stolen_goods.pdf [<https://perma.cc/JYX7-9N4W>].

159. See *Id.*

160. See *Id.*

161. Parents, for example, have affirmative duties to their children, the violation of which may subject them to criminal sanctions. See Mark Theoharis, *Child Abuse: Laws & Criminal Penalties*, CRIM. DEF. LAW., <http://www.criminaldefenselawyer.com/crime-penalties/federal/Child-Abuse.htm> [<https://perma.cc/7QFY-VG7R>]. Those who cause an injury have an affirmative duty to prevent its aggravation. Vincent R. Johnson & Claire G. Hargrove, *The Tort Duty of Parents to Protect Minor Children*, 51 VILL. L. REV. 311, 317-18 (2006).

producer of the pornographic image.¹⁶² The primary harm to the child-subject of child pornography is caused directly by the sexual abuse accompanying the production of the pornographic image. The possession and viewing of the pornographic image may be conceived of as a secondary injury inextricably connected with the first. This secondary injury is a privacy violation.¹⁶³ It has two aspects—one subjective and one objective.

1. Subjective Aspect

The first aspect is the subjective aspect. I refer to it as “subjective” because actual knowledge by the victim is involved. A common means by which subjects of child pornography learn that their image has been widely distributed is through notification by a federal prosecutor that a pornographic image of them has been found in the possession of a member of a P2P file-sharing network. Such notification is provided for by statute, as is an opt-out provision.¹⁶⁴ There is a well-documented psychological harm suffered by the victim as a result of their “grow[ing] up knowing that there are images of [themselves] being sexually abused which are available in perpetuity.”¹⁶⁵ Victims believe the images of their abuse are being used for sexual gratification; that those images may be used to groom other child victims; that they may be recognized by acquaintances or strangers as the subject of the abusive images; and that they may be stalked.¹⁶⁶ As a result, victims experience poor self-esteem, depression, shame, guilt, humiliation, delinquency, suicidal thoughts, and post-traumatic

162. See, e.g., Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847, 862 (2008).

163. In many cases, this privacy violation is the only injury suffered by the child-subject of the pornography. Approximately 25% of the child-subjects of child pornography are unharmed in the production of the pornography because they are either aware that their image is being captured or are not being sexually abused. U.S. SENTENCING COMM'N, *supra* note 63, at 110-11; see also Janis Wolak et al., *Arrests for Child Pornography Production: Data at Two Time Points from a National Sample of U.S. Law Enforcement Agencies*, 16 CHILD MALTREATMENT 184, 190 (2011).

164. The Crime Victims' Rights Act provides that federal crime victims are entitled to reasonable notice of public court proceedings. 18 U.S.C. § 3771(a)(2) (2012). In cases of minor victims, a representative may enforce the victim's rights. *Id.* § 3771(e). After being notified, a victim may opt in or opt out of notifications in future cases. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CHILD PORNOGRAPHY VICTIM ASSISTANCE (CPVA): A REFERENCE FOR VICTIMS AND PARENT/GUARDIAN OF VICTIMS, <https://www.fbi.gov/file-repository/cpva.pdf/view> [https://perma.cc/2BMM-HJYG].

165. Tink Palmer, *Behind the Screen: Children Who Are the Subjects of Abusive Images*, in VIEWING CHILD PORNOGRAPHY ON THE INTERNET: UNDERSTANDING THE OFFENCE, MANAGING THE OFFENDER, HELPING THE VICTIMS 71 (Ethel Quayle & Max Taylor eds., 2005).

166. U.S. SENTENCING COMM'N, *supra* note 62, at 113-14.

stress disorder.¹⁶⁷ The Supreme Court has recognized that harms of this sort are a major reason why child pornography is outlawed.¹⁶⁸

The producer of child pornography is obviously responsible for the psychological harm suffered by the victim as a result of learning that images of his abuse are in wide circulation. Like the psychological harms suffered by the victim as a result of being sexually abused in the course of the production of the images, the psychological harms suffered as a result of learning the images are in wide circulation are easily foreseeable. The responsibility of a typical possessor of child pornography, however, is another matter. There is no reason to believe that the typical possessor of child pornography desires to inflict psychological harm upon the subject of the images. Responsibility there is a matter of foreseeability. As discussed below, there are many reasons why, for the typical possessor, there is a low degree of foreseeability that his possession will cause significant unjustified psychological harm.

First, the possession of child pornography is wide-spread and, despite the increased number of prosecutions, the likelihood of any individual user being apprehended is low.¹⁶⁹ Individual possessors of child pornography can be expected to know this. Therefore, they would likely not foresee their possession of child pornography leading to the notification of a victim.

Second, pornographic images are widely circulated. It is not unusual for child pornography victims to receive multiple court notifications each week.¹⁷⁰ An individual possessor may reasonably think that if he is apprehended and a subject of a pornographic image he possesses is identified, it is unlikely that he is the first person apprehended with the image. He might reasonably believe that notification

167. *Id.* at 113. Describing one instance, the Supreme Court stated:

The full extent of this victim's suffering is hard to grasp. Her abuser took away her childhood, her self-conception of her innocence, and her freedom from the kind of nightmares and memories that most others will never know. These crimes were compounded by the distribution of images of her abuser's horrific acts, which meant the wrongs inflicted upon her were in effect repeated; for she knew her humiliation and hurt were and would be renewed into the future as an ever-increasing number of wrongdoers witnessed the crimes committed against her.

Paroline v. United States, 134 S. Ct. 1710, 1717 (2014).

168. *See New York v. Ferber*, 458 U.S. 747, 758-59 (1982).

169. Approximately 250,000 individuals in the United States may be possessors of child pornography. Janis Wolak et al., *Measuring a Year of Child Pornography Trafficking by U.S. Computers on a Peer-to-Peer Network*, 38 CHILD ABUSE & NEGLECT 347, 354 (2014). In 2006, there were under 4,000 arrests for child pornography possession. *See Janis Wolak, David Finkelhor & Kimberly Mitchell, Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 SEXUAL ABUSE 22, 22 (2011). Even if the number of arrests has doubled, the odds of apprehension would only be 3 out of 100.

170. U.S. SENTENCING COMM'N, *supra* note 62, at 116.

of his possession will not significantly change the victim's knowledge about their image being possessed by many through the Internet; at most, it will confirm what the victim already knows.

Third, a possessor of an image of child pornography might reasonably believe that even if his possession causes or confirms a victim's knowledge that an image is in wide circulation, the moral significance of this is diminished because the victim would likely have gained such knowledge eventually based on notification that another in the P2P network was apprehended with the image in his possession.

Fourth, even in cases where a notification produced or confirmed knowledge that would not otherwise have been occurred, the producing or confirming of that knowledge does not appear unjustified. People may reasonably be presumed to want to know that their image is in circulation, despite the pain that this knowledge may cause. Congress's recognition of this presumption explains its providing for victim notification in the Crime Victim's Rights Act.¹⁷¹ Though the choice might be difficult, one can easily imagine a case where a third-party discovers a pornographic image of an identifiable child and chooses to inform the subject or their guardian. The psychological harm produced is more than offset by the valued knowledge.

Fifth, it will more frequently be the case that a notification will only remind a subject of child pornography of the known fact that the image is in circulation. The marginal impact of every additional notification might be compared to being reminded of the recent death of a loved one. The reminder may be painful, but it is not the sort of injury that generally warrants criminalization of the conduct producing such pain. Much less do such reminders warrant the significant penalties meted out for child pornography possession.

Finally, a possessor of child pornography might reasonably believe that if notification had the potential for creating substantial psychological harm, the victim would opt out of the notification scheme rather than suffer its effects.¹⁷²

171. See *supra* note 164 and accompanying text.

172. The Supreme Court recently considered a case raising the question to what extent a possessor of child pornography is legally responsible for privacy-violation injuries. The Violence Against Women Act of 1994, § 2259, requires district courts to award restitution for certain federal criminal offenses, including child-pornography possession. In *Paroline v. United States*, the Supreme Court interpreted the Act to limit restitution to those losses proximately caused by the conduct for which the defendant was convicted. 134 S. Ct. 1710, 1721-22 (2014). The Court concluded that the defendant should be required to pay the victim a "reasonable and circumscribed award[.]" more than a "token or nominal amount[.]" but less than a "severe" amount, to be determined by a court employing "discretion and sound judgment." *Id.* at 1727-28. While the Court engaged in an analysis of the causal connection between the defendant's conduct and victim's loss, its conclusion ultimately rested on evaluations of Congressional intent regarding various

2. *Objective Aspect*

It may also be argued that subjects of child pornography have an “objective interest” in not having the image of their abuse viewed and that the wrongful violation of that interest provides the basis for the penalties for child pornography possession. An “objective interest” in not having an image viewed is one that is violated by a viewing even if the subject of the image never becomes subjectively aware of the viewing. Certainly, victims of child pornography would not want the images of their abuse viewed even if they were never to learn of it. The interests the criminal law most commonly protect are interests which, when violated, affect the victim subjectively. Paradigm crimes such as assault, robbery, rape, theft, and kidnapping involve acts of the perpetrator of which the victim almost always subjectively aware. When these crimes occur, the victim generally experiences pain, fear, loss, confinement, etc. Of course, there are exceptions. An unconscious person may be raped and be unaware of the violation of his or her sexual autonomy. Theft occurs even if the stolen property’s owner never notices the item is missing. Criminal trespass can occur without the landowner’s knowledge. While these examples may be explained as unavoidable overbreadth, it seems equally plausible that they repre-

policy goals relevant to restitution. *Id.* at 1724. With respect to the underlying moral question of whether a possessor of child pornography should be held responsible for the privacy violation harms suffered by a child-victim, the Court merely opined, “[T]here is a real question whether holding a single possessor liable for millions of dollars in losses collectively caused by thousands of independent actors might be excessive and disproportionate in these circumstances.” *Id.* at 1726.

The Court in *Paroline* offered a range of factors that it believed district courts should take into account when attempting to determine an appropriate restitution award. *Id.* at 1728. Those factors were (1) “the amount of the victim’s losses caused by the continuing traffic in the victim’s images,” (2) “the number of past criminal defendants found to have contributed to the victim’s general losses,” (3) “the number of future offenders likely to be caught and convicted for crimes contributing to the victim’s general losses,” (4) the broader number of offenders involved in possessing pornographic materials of the victim, (5) “whether the defendant reproduced or distributed images of the victim,” (6) “whether the defendant had any connection to the initial production of the images,” (7) “how many images of the victim the defendant possessed,” and (8) “other facts relevant to the defendant’s relative causal role.” *Id.* Interestingly, although the Court identified as a factor “the number of past criminal defendants found to have contributed to the victim’s general losses,” the Court did not specifically identify as factors either (a) when the defendant acquired the images, or (b) when the victim learned that the defendant acquired the images, relative to the time that the victim suffered losses or incurred expenses. *Id.* at 1728. Thus, it is not clear whether the Supreme Court believed that, as a bright-line rule, a defendant should pay no restitution for losses occurring before the victim learned of the defendant’s possession. If not, the Court’s interpretation of the Act’s causation requirement would be exceedingly loose and open-ended. As the term “cause” is generally used, conduct cannot have caused harm that was suffered before the conduct occurred.

sent the criminal law's recognition of objective interests as worthy of protection.¹⁷³

Assuming that individuals have legally protectable objective interests in not having child pornographic images of them viewed, the question is how strong this interest is. The strength of an objective interest might be determined by asking how strongly a person would object if he knew of the violation. A person would likely object as much to being raped while unconscious as to being raped while conscious. To engage in a broad generalization, it seems plausible that the victim of child pornography would object as much to the subsequent circulation and viewing of the images as to their initial production.

The harder question concerns the gravity of the violation caused by a particular possessor. Child pornography is typically circulated widely through P2P file sharing networks. An image may be viewed by hundreds or thousands of persons. A person might be relatively indifferent to having an image viewed by N or $N+1$ persons, where N is a large number. It is the fact that the number is large, rather than the number itself that is disturbing. The marginal viewing of an image by any particular possessor would not significantly impinge on the objective interest of the subject of the image. In such a case, viewing by a particular possessor would not significantly violate the objective interest in not having an image viewed.

If nothing else, the analysis above demonstrates that justifying punishment based on the objective aspect of the harm perpetuation theory is like justifying punishment based on the market-based harm theory, the norm-undermining theory, and the subjective aspect of the harm perpetuation theory: The justifications falter because the marginal impact of an individual defendant's acts are *de minimis*. Lacking significant consequences in themselves, individual acts of possession seem to provide little basis for punishment.

V. HARMLESS WRONGDOING AND CHILD PORNOGRAPHY POSSESSION

The previous Part considered whether there are harms, either caused or risked by the possessor of child pornography, that might render the penalties inflicted upon the possessor proportional from the perspective of negative retributivism. No such harms were identified. Does that mean that the penalties for child pornography possession are justified, if at all, only from a strictly utilitarian perspective? There is little doubt that, simply as a statistical matter, a person who possesses child pornography is at least somewhat more likely to en-

173. See generally JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW VOL. 1: HARM TO OTHERS* 79-89 (1984) (discussing whether persons can have interests that are harmed after they die).

gage in child sexual abuse than a randomly chosen person.¹⁷⁴ Perhaps the strategy behind the criminalization of child pornography is simply to “cast the net wide,” and haul in and imprison as many potential child sexual abusers as possible. To be sure, many offenders would be imprisoned who would never have sexually abused children. The theory, however, would be that the cost of such unnecessary imprisonment is outweighed by the cost of the child sexual abuse that would have occurred absent the imprisonment.¹⁷⁵

Before conceding that the penalties for child pornography possession are proportionate only when viewed from a utilitarian perspective, I would like to consider an alternative retributive justification—one that does not rest on the proposition that the possessor of child pornography has caused or risked substantial harms either by possessing child pornography or by having sexually abused children in the past. Since retributivists are committed to the idea that punishment is deserved only for wrongdoing, the challenge is to identify wrongdoing by the possessor of child pornography that is not a matter of causing or risking harm. Such wrongdoing might be referred to as harmless, or nonconsequential, wrongdoing.

A. *Contribution as Wrongdoing*

This Section examines one theory of nonconsequential wrongdoing according to which possessors of child pornography may deserve to be punished. The theory is that those who possess child pornography typically have contributed to the sexual abuse of children and that such contribution is a form of wrongdoing justifying their punishment. As I shall use the term, an act “contributes” to a harm when (1) the act is not a but-for cause of the harm, (2) absent one or more other contributing factors, the act would have been a but-for cause of the harm, and (3) the presence of other causal factors does not preempt the act. Thus, for example, if two individuals simultaneously shoot a victim in the heart, each shot contributes to the death of the victim because (1) neither is a but-for cause—the other shot by itself would have been fatal; (2) absent the other shot, each shot would have been a but-for cause of the death; and, (3) since the shots were simultaneous and one bullet did not kill the victim first, neither shot was preempted. Acts that contribute to harms are also known as “concurrent causes” of the harm.

174. As discussed, *supra* in Section IV.B., there is considerable controversy regarding the extent and strength of the correlation between possession of child pornography and sexual abuse of children. Common sense, however, would expect some positive, nonzero correlation.

175. There is, of course, a serious question whether such a strategy can in fact be justified from a utilitarian perspective. *See supra* Part III (discussing the dangerousness of child pornography possessors, both relative to population in general and in absolute terms).

A further bit of terminology is needed. There are two types of contributing causes: sufficient and insufficient contributing causes. A sufficient contributing cause (also known as a “duplicative cause”) is one which would have been sufficient to cause the result even without the contribution of the other factors.¹⁷⁶ Each shot in the example above would be a sufficient contributing cause because each shot alone was enough to have killed the victim. In contrast, an insufficient contributing cause is a contributing cause that would not by itself be sufficient to cause the harm.¹⁷⁷ For example, A, B, and C each independently add twenty-five units of a poison to a person’s drink; forty units of poison are needed to cause death. The adding of each dose is a contributing cause pursuant to the earlier definition and an insufficient contributing cause because twenty-five units alone would not kill. The intuitive idea of an insufficient contributing cause is that it is one among many small factors that together—in aggregate—bring about some harm.

Typical individual instances of possession of child pornography arguably contribute to social harm in three ways. First, they contribute to the perception that there is an economic demand for child pornography that leads to the actual production of child pornography. Second, they contribute to the perception that pedophilia is a wide-spread and socially acceptable phenomenon, which in turn leads to child sexual abuse. Third, they contribute to the privacy violations that lead to the psychological harms experienced by the subjects of child pornography. Individual instances of possession of child pornography, however, are insufficient contributing causes of the production of child pornography, child sexual abuse, and privacy violations. This is so because individual instances of such acts, absent the contributing effects of other instances of possession, will rarely be but-for causes. Market demand is not increased by a single act of acquisition of child pornography; societal norms against child sexual abuse are not undermined by individual acts; and psychological harms do not accrue based on individual acts. All of these harms are aggregate ones.¹⁷⁸

Ascribing responsibility for harms based on an actor’s insufficient contribution is familiar from tort law. The tort of negligence requires unreasonably risky conduct that causes harm.¹⁷⁹ Torts cases have recognized that the causation requirement can be satisfied by conduct that is an insufficient contribution to harm.¹⁸⁰ Likewise, the *Re-*

176. David A. Fischer, *Successive Causes and the Enigma of Duplicated Harm*, 66 TENN. L. REV. 1127, 1134, 1145 (1999).

177. David A. Fischer, *Insufficient Causes*, 94 KY. L.J. 277, 278 (2005-06).

178. See discussion *supra* in Part IV.

179. DAN B. DOBBS ET AL., THE LAW OF TORTS 499 (2011).

180. See, e.g., *Landers v. E. Tex. Salt Water Disposal Co.*, 248 S.W.2d 731 (Tex. 1952).

statement of Torts creates liability for actors whose tortious conduct contributes to harm.¹⁸¹ Thus, for example, where multiple defendants tortiously discharge toxic chemicals into a river, each might be at least partially liable for downstream crop failure, even if none of the discharges were but-for causes of the crop failure.¹⁸²

In contrast, the criminal law has not clearly accepted a notion of causation that includes insufficient contributory causes. The Model Penal Code appears to define causation solely in terms of but-for causation. According to section 2.03(1), “Conduct is the cause of a result when . . . it is an antecedent but for which the result in question would not have occurred.”¹⁸³ The Model Penal Code Commentaries, however, instruct that this section is to be interpreted to permit sufficient concurrent causes to qualify as the cause of a result.¹⁸⁴ The Commentaries are silent regarding insufficient concurrent causes. At an annual meeting, the American Law Institute declined to extend causation to insufficient concurrent causes.¹⁸⁵ In contrast, a handful of states’ courts have adopted “substantial factor” or “contributing factor” tests for causation in the context of the criminal law.¹⁸⁶ Under

181. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 (AM. LAW INST. 2005) (“If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.”). While it is uncontroversial that insufficient contributing causes may sometimes be subject to tort liability, liability is less clear in those cases where the other contributing causes are nontortious. See Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1798 (1985) (“Courts generally absolve the defendant from liability if he proves that the injury would have occurred anyway as a result of independent nontortious conditions.”).

182. See generally *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986) (defendants were sued for contaminating the city’s water supply, resulting in serious injury and death to individuals).

183. MODEL PENAL CODE § 2.03(1) (AM. LAW INST. 1985).

184. *Id.* § 2.03 cmt. 2.

185. See AM. LAW INST., *39th Annual Meeting Proceedings*, 39 A.L.I. PROC. 135, 135-141 (1962).

186. See *People v. Jennings*, 237 P.3d 474, 496 (Cal. 2010); *Eversley v. State*, 748 So. 2d 963, 967 (Fla. 1999) (dictum); *People v. Bailey*, 549 N.W.2d 325, 334 (Mich. 1996); *State v. Christman*, 249 P.3d 600, 687 (Wash. Ct. App. 2011); *Commonwealth v. Osachuk*, 681 N.E.2d 292, 294 (Mass. App. Ct. 1997); see also *Bailey*, 549 N.W.2d at 334 (“If a certain act was a substantial factor in bringing about the loss of human life, it is not prevented from being a proximate cause of this result by proof of the fact that it alone would not have resulted in death, nor by proof that another contributory cause would have been fatal even without the aid of this act.” (quoting PERKINS & BAILEY, CRIMINAL LAW 783 (3d ed.)). Cf. *Burrage v. United States*, 134 S. Ct. 881, 890-91 (2014) (rejecting the government’s argument that the result from penalty enhancement under the Controlled Substances Act, 21 U.S.C. § 841(b)(1)(C), applied to conduct that was an insufficient concurrent cause of death).

such tests, at least some conduct that was an insufficient concurrent cause would support criminal liability for result offenses.¹⁸⁷

Existing tort and criminal law aside, should one be held criminally responsible for harms in which one's conduct is merely an insufficient concurrent cause? Desert is a matter of culpability for wrongful conduct. Thus, the strongest case for criminal responsibility for a harm that one merely contributed to would be where an actor engaged in the conduct that was an insufficient contributory cause of harm with greatest moral fault. For example, A, B, and C each independently, and without knowledge of the other, add twenty-five units of poison to V's drink, mistakenly believing twenty-five units is sufficient to kill V. In fact, forty units are needed. A, B, and C act with the purpose of killing V. Having a purpose to kill establishes a high degree of moral fault. Should each be liable for murder based on V's death? This question is analogous to the question of whether there should be liability for so-called "unknowingly justified" acts, such as maliciously burning the field of a neighbor without knowing that the burning of the field creates a firebreak that saves a town, or arresting a dangerous person without probable cause.¹⁸⁸ In both cases of contributory causation and unknowingly justified conduct, there is an occurrence of harm. There is also conduct which, if its nature were fully appreciated, would not make the actor morally blameworthy. It is not morally blameworthy to knowingly engage in justified conduct, nor is it morally blameworthy to knowingly engage in conduct that is merely a contributory cause of harm. Contributory conduct by definition is not a but-for cause of harm. If you know you are not making the situation worse for anyone by your conduct, and there are no other relevant moral considerations, how can you be morally blameworthy? Because there are some good arguments in the literature that unknowingly justified conduct should at most be punished as an attempt,¹⁸⁹ the same would go for conduct that is merely a contributory cause. In the example above, A, B, and C should merely be liable for

187. See also *Burrage*, 134 S. Ct. at 890-91 (rejecting the government's argument that the "result from" penalty enhancement under the Controlled Substances Act, 21 U.S.C. § 841(b)(1)(C), applied to conduct that was an insufficient concurrent cause of death).

188. Larry Alexander, *Unknowingly Justified Actors and the Attempt/Success Distinction*, 39 TULSA L. REV. 851, 854 (2004).

189. See MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* (1993); GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 23-27 (2d ed. 1961); Andrew Ashworth, *Belief, Intent and Criminal Liability*, in *OXFORD ESSAYS IN JURISPRUDENCE*, 1, 28 (Eekelaar & Bell eds. 1987); Paul H. Robinson, *Competing Theories of Justification: Deeds v. Reasons*, in *HARM AND CULPABILITY* 45 (A.P. Simester & A.T.H. Smith eds., 1996); Robert F. Schopp, *Justification Defenses and Just Convictions*, 24 PAC. L.J. 1233, 1267-82 (1993); B. Sharon Byrd, *Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction*, 33 WAYNE L. REV. 1289, 1314-16 (1987).

attempted murder. There would be criminal responsibility for the trying to kill, not for the death itself.

The case for holding those who possess child pornography criminally responsible for the harms that their conduct merely contributes to is considerably weaker than the case for holding A, B, and C in the example above liable for murder. This is so because the moral fault of those who possess child pornography is considerably less. As discussed, tort recognizes liability based on causal contribution. Yet, a predicate for such liability is negligence. In cases of multiple actors, such as factories that discharge pollutants into a river, it is usually assumed that each actor is unaware of the others' jointly causally sufficient contributions and believes, or should believe, that his conduct creates an unreasonable risk of being a but-for cause of harm. In contrast, in the case of possession of child pornography, there is no culpability based on an unreasonable risk creation. A reasonable person in the possessor's situation would be aware that he is just one among a multitude of possessors whose conduct overdetermines the existing harmful (1) levels of demand for child pornography, (2) levels of the sexualization of children, and (3) scope of distribution of a particular image of child pornography. A reasonable person would not believe that his conduct creates a substantial risk of being the but-for cause of these things.¹⁹⁰ To this, it may be responded that no risk, however small, is justified. While sometimes risk creation can be justified by the utility of the conduct creating the risk,¹⁹¹ the ostensible pleasure derived by the possessor of child pornography can have no justificatory weight as it either reflects bad character or is a form of unjust enrichment; and therefore the possessor is morally culpable for the creation of even a small risk of being a but-for cause of harm. Even assuming the validity of this response, however, the low level of moral culpability of the possessor, coupled with the small degree of causal contribution associated with his conduct, seem inconsistent with the sizeable penalties associated with child pornography.

B. Intrinsic Wrongdoing

The previous Section explored the theory that by virtue of contributing to a certain type of harm, the actor should be held criminally responsible for the harm to some degree. In contrast, this Section explores theories according to which certain types of acts are

190. Cf. Alastair Norcross, *Puppies, Pigs, and People: Eating Meat and Marginal Cases*, 18 PHIL. PERSP.: ETHICS 229, 231 (2004) (arguing that an individual's personal conduct in eating meat has a sufficient probability of causing animal suffering to render it morally unacceptable).

191. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 cmt. j (AM. LAW INST. 2009).

wrongful even in the absence of an actual harm to which they may be causally connected.

1. *Law-Breaking*

While consensus is not universal, many scholars support the view that there is a prima facie moral duty to obey the law.¹⁹² This duty may be referred to as “political obligation.” Political obligation has been argued to rest on considerations of consent, gratitude, fair play, association, and natural law.¹⁹³ The breach of an obligation normally establishes moral culpability. Accordingly, if the existence of political obligation is assumed, it would be permissible from a retributivism perspective to punish a person who runs a red light, even when such conduct does not cause or risk harm.¹⁹⁴ The possessor of child pornography has breached his obligation to obey the law.¹⁹⁵ Can the penalties established by child pornography possession law be found proportional due to the moral culpability intrinsic in their breach and without reference to any of the consequential (or correlated) harms generally associated with the possession of child pornography?

I am aware of, and I advance, no general theory regarding what sort of punishments might be justified based on the breach of one’s political obligation.¹⁹⁶ I am skeptical, however, that the penalties

192. A recent and articulate defense of this position is advanced by Dan Markel. Markel, *supra* note 140 (limiting its defense to laws that are neither illiberal or spectacularly dumb); see also THOMAS CHRISTIANO, *THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS* 244 (2008); H.L.A HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 145 (1982); Scott J. Shapiro, *Authority*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW* 382, 434-39 (Jules Coleman & Scott Shapiro eds., 2002); J.D. Mabbott, *Punishment*, 48 *MIND* 152, 155 (1939); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 *YALE L.J.* 950 (1973); Jeremy Waldron, *Kant’s Legal Positivism*, 109 *HARV. L. REV.* 1535 (1996).

193. See Richard Dagger & David Lefkowitz, *Political Obligation*, in *STAN. ENCYC. OF PHIL.* §4, <https://plato.stanford.edu/entries/political-obligation/> [<https://perma.cc/BZ8Z-3JSE>].

194. Here, I assume that punishment is deserved for moral culpability that does not involve harm causing or risking and that criminal penalties may be an appropriate form of punishment. This, I think, is a fair assumption. Joel Feinberg, who in general would limit the criminal law to penalizing acts harmful to others, allows for the punishment of free-riders as a “mediating maxim for the application of the harm principle.” FEINBERG, *supra* note 173, at 244. There is a close relationship between free-riding and breaching the duty of fair play, which many believe political obligation is grounded on.

195. In exceptional cases where the law violator neither knew nor should have known that the sort of conduct he was engaged in was unlawful, no moral culpability accompanies the violation. The typical child pornography possession defendant, however, was aware that he possessed child pornography unlawfully. P2P file sharing networks and Internet sites selling child pornography, one would assume, are generally configured in a manner to assure the user that their use will not be detectable by the authorities.

196. Concerning the severity of punishment appropriate for breaking a law not entailing moral culpability, Dan Markel writes, “the wrong of unreasonably flouting democratic authority has to be measured against the social significance of the project involved and the

meted out to possessors of child pornography can be justified as proportionate based on the breach of the duty to obey the law. To my mind, the primary difficulty with such an approach is that the approach seems premised on a duty to obey the law that is general, rather than one that is a function of the content of the law.¹⁹⁷ Such a duty would be equally breached in the case of running a red light when it clearly appeared safe to do so (a paradigmatic example of a harmless breach of political obligation) and the case of grievously assaulting a person. Yet comparable penalties for running a red light and assault would be unjust. Momentarily putting aside the culpability based on breach of political obligation in both cases, the culpability for running a red light when it appears clearly safe to do so is much less than the culpability for grievously assaulting another. Now taking into account the culpability based on political obligation, the total moral culpability of the traffic light runner is much less than the total culpability of the assaulter. Therefore her penalty should be less. Likewise, even when culpability for breaching a political obligation is taken into account, it appears disproportionate to impose criminal penalties on the possessor of child pornography that are comparable to those imposed in cases of criminal acts that directly cause or risk harm.¹⁹⁸

Some have proposed that the strength of political obligation need not be uniform across all laws.¹⁹⁹ The strength of one's obligation with respect to any particular law, one might contend, varies with the degree to which considerations of consent, gratitude, fair play, association, and/or natural law, which support political obligation generally, apply to that law. Viewed from this perspective, child pornography possession laws appear to generate a relatively weak duty to obey. Consider the fair play theory of political obligation. According to this theory, "when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefitted by their submission."²⁰⁰ Applying this theory to specific laws such as stop sign requirements or prohibitions of theft, a clear obligation exists because

degree of unreasonableness manifested by the defendant's offense," but concedes, "a political retributivist account will tend to focus less on the amount of punishment in the abstract and more on whether the procedure for the determination of punishment was appropriate." Markel, *supra* note 140, at 106-07.

197. See STUART P. GREEN, LYING, CHEATING AND STEALING 247 (2006) (arguing along similar lines that the disobedience theory fails to explain the penalties for tax evasion).

198. See *supra* text accompanying footnotes 104-11 *supra* (comparing penalties for child pornography possession and child sex abuse).

199. See JOSEPH RAZ, THE MORALITY OF FREEDOM 101-02 (1986).

200. H.L.A. Hart, *Are There Any Natural Rights?* 64 PHIL. REV. 175, 185 (1955).

most persons benefit from others complying with these laws. In contrast, those who typically violate child pornography possession laws—white males in their 40s²⁰¹—derive no benefit from the operation of those laws. Few would seek to justify child pornography possession laws on paternalistic grounds.²⁰² Children, not adults, are the class intended to be protected by such laws. Indeed, because child pornography possession laws were not enacted on the federal level until the late 1970s,²⁰³ and opportunities to possess child pornography before the Internet era were considerably limited, defendants today have derived limited protection from the laws they are now charged with violating. Furthermore, the strongest case for a fair play obligation to comply with a particular law would be when others comply with it out of a sense of fair play. (“Because others are stopping at red lights based on the expectation that I and others will share in their respect for traffic laws, I should also.”) Although empirical data is not available, it seems unlikely that there is a significant population of individuals who refrain from possessing child pornography out of a sense of fair play.

2. Rule Consequentialism

(a) Generally

A better model for understanding child-pornography possession laws, I suggest, is to think of them in terms of rule consequentialism. According to rule consequentialism, acts are right insofar as they conform to rules that, if generally followed, would lead to desirable states of affairs.²⁰⁴ Acts thus can be obligatory even if in specific cases they produce no social benefits due the fact that they are not generally followed. For example, telling the truth may be the right thing to do in a particular situation even if it would seem unjustified based on its consequences because truth-telling is, as a general matter, a desirable social practice, or rule that should be followed. Conversely, wrongful acts might be thought of as acts that conform to rules that, if followed generally, would result in social harms, even if, in specific

201. U.S. SENTENCING COMM’N, *supra* note 62, at 143.

202. Cf. Liam Stack, *Utah’s War on Pornography Finds Skeptics*, N.Y. TIMES (April 21, 2016), <http://www.nytimes.com/2016/04/22/us/utah-declares-pornography-public-health-crisis.html> [<https://perma.cc/J9RN-FYSD>] (describing legislation intended to “raise awareness and understanding about the addictive nature of pornography”).

203. See THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES *supra* note 60, at 8-9.

204. Brad Hooker, *Rule Consequentialism*, in STAN. ENCYC. OF PHIL. (Edward N. Zalta ed. 2011), <http://plato.stanford.edu/entries/consequentialism-rule/> [<https://perma.cc/ZZ7L-J3BT>] (“[R]ule-consequentialism evaluates rules on the basis of the expected value of their acceptance by the overwhelming majority.”).

instances, no social harm is caused. Acts that, if aggregated with other like acts, would produce social ills are thus identified as immoral.

The moral intuition being appealed to here is not the usual one invoked in support of rule consequentialism. Rule consequentialism is usually defended as a decision procedure on the following ground: attempting to evaluate options in terms of their consequences on a case-by-case basis will inevitably result in relatively high rates of erroneous decisions and undesirable outcomes; in contrast, evaluating options as conforming or not to a generally consequentially justified rule will, over the long run, lead to superior outcomes.²⁰⁵

In contrast, I suggest that it is intrinsically wrong to act in ways that, if generally followed, would result in significant harm. The intuition, appealing to a counterfactual generalization,²⁰⁶ is intended to have a Kantian flavor.²⁰⁷ A person acting inconsistently with the requirements of rule consequentialism makes one of two moral errors. On one hand, she may fail to appreciate the morally objectionable consequences of others acting as she does. She may not appreciate, for example, how small impacts in aggregate may result in significant consequences to innocent actors or appreciate that those consequences are harmful ones that should not occur. On the other hand, she may believe without justification that she is entitled to act in ways that others are not—that she is in a privileged position and may violate a rule-consequentialist norm to which others should adhere. The belief that among one's fellows, one may claim a morally superior position to pursue one's self-interest is perhaps the fundamental moral error.

205. RICHARD. B. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* 180 (1979).

206. Obviously, care must be taken when it comes to formulating the type of act that is to be generalized. It could not be contended that going to grocery store G at hour H is wrongdoing on the ground that if everyone went to grocery store G at hour H, there would be mass stampeding. Rather, the proper generalization would be along the lines of everyone going to a grocery store at hour H (or some more broadly specified time period), which would not produce ill consequences. The problem of describing events at the proper level of generality is a common one in law. For example, whether a harm is "foreseeable" may turn on how specifically the event is described. The lack of a theory of act description for applying rule-consequentialism should be no more fatal for it than for the doctrine of proximate causation, which turns on the notion of foreseeability.

207. Kant famously stated: "Act only according to that maxim whereby you can at the same time will that it should become a universal law." IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 30 (1993) (trans. James W. Ellington 1993). Thus, Kant urged that in determining the content of our moral obligations, it is critical to consider what would happen if a maxim were universal. Where a maxim cannot coherently be universalized, there is a perfect duty not to act accordingly to it. Where it can be universalized, but not rationally willed, there is an imperfect duty. Thus, it might be argued that there is an imperfect duty not to possess child pornography in light of what would happen if the maxim to possess it were universalized. Cf. 1 DEREK PARFIT, *ON WHAT MATTERS*, ch. 16 (2011) (arguing that rule consequentialism can be derived from Kantian contractualism).

Rule consequentialism, as I have characterized it, may be compared to the moral objection to free-riding. Free-riders take advantage of the public goods generated by group activity without contributing to the activity.²⁰⁸ Some have argued that free riding is immoral.²⁰⁹ In contrast, in order to act immorally from the perspective of rule consequentialism, it is not necessary that the actor derive a personal benefit from the public activity in which he does not participate. Rule consequentialism thus supports more extensive moral obligations than a free-rider moral theory. For example, imagine a village bordering a lake. All members of the village depend on the lake for fish. It is determined that, in order to avoid ruinous overfishing, fishing must be curtailed for a year. On this ground, virtually all members of the village voluntarily abstain. To fish when others abstain, and then to enjoy the benefits of a well-stocked lake, may be thought immoral as it amounts to free-riding on the restraint of others. In contrast, imagine that continued fishing of the lake would cause the fishing stock of only future generations to be depleted and that only if present villagers generally limit their fishing to a quota can this dire result be avoided. Here, individuals obtain no personal benefit from others limiting their fishing. Nevertheless, pursuant to my version of rule consequentialism, a present member of the village would be under a duty to limit her fishing even if her personal failure to abide by the quota had no effect because others were generally abiding by their quota. This is so because the rule “do not exceed the fishing quota” is a rule that (a) all should recognize ought to generally be complied with by virtue of the adverse consequences to future generations that would ensue if it were widely disregarded, and (b) applies to all with equal force since no one person could claim that she, in contrast to others, should be exempt. Likewise, even if a villager’s failing to abide by the quota would have no actual effect on future generations because others were not adhering to their quota, she would still be obliged to follow the rule for the same reasons.²¹⁰

208. See Garret Cullity, *Moral Free Riding*, 24 PHIL. & PUB. AFFAIRS 3 (1995); see also FEINBERG, *supra* note 173, at 244.

209. See Hart, *supra* note 200, at 186; JOHN RAWLS, A THEORY OF JUSTICE 96 (1999).

210. The theory of rule consequentialism present here is closely related to Jason Brennan’s position that one has a duty to refrain from collective harms. See JASON BRENNON, THE ETHICS OF VOTING (2011). According to Brennan, a collective harmful activity is harmful activity caused by a group where individual inputs into the harmful activity are negligible. *Id.* at 71. Brennan argues that there is such a duty (at least where cost to the individual of refraining is not significant) by appealing to a thought experiment: It would be wrongful to join a firing squad of ten who are about to execute an innocent child. *Id.* at 72. Brennan argues that this duty is a freestanding idea implied by sophisticated rule consequentialism, Kant’s moral theory, and eudaimonistic virtue theory. *Id.* at 73-74. Brennan applies his theory to voting and argues that it is unethical to vote in ways that do not meet certain standards because, in aggregate, such substandard voting produces policies harm-

(b) *Rule Consequentialism and Child Pornography*

The application of rule consequentialism to child pornography is straightforward. Because the general practice of trading or purchasing child porn images over the Internet would undermine the social norms against child sexual contact, leading to increased incidences of sexual child abuse, under rule consequentialism, it would be wrong to engage in typical acts of child pornography possession, regardless of the actual consequences of those acts at the margin. Likewise, because the general proliferation of an image of sexual abuse leads to feelings of humiliation, helplessness, and fear of recognition on the part of the image's subject, the practice of trading child porn over the Internet may be considered, from a rule consequentialist perspective, wrongful and deserving of punishment.

If this is correct, the possession of child pornography seems, at bottom, unlike other possessory offenses. As discussed in Part IV, the possession of narcotics is criminalized primarily because possessing narcotics is highly correlated with using narcotics, which leads to addiction and to crime. The possession of firearms is criminalized because we do not want the wrong people to get them and commit crimes using them. Drug possession and gun possession seem best understood as primarily concerned with the harms that individual instances of violations may produce. As discussed below, child pornography possession seems more akin to offenses like tax evasion, insider trading, prostitution, environmental crimes, and looting.

(c) *Rule Consequentialism and Other Crimes*

I have argued that the wrongfulness of child pornography possession may be profitably understood from the perspective of rule consequentialism. In this regard, child pornography possession is not unique. Rather, a disparate set of criminal offenses share the structural features of child pornography that invite rule consequentialism condemnation: acts that are innocent in themselves but are harmful in the aggregate. That rule consequentialism is useful in explaining a wide range of superficially dissimilar offenses supports the claim that it is an underlying operative principle of criminal culpability.

Consider tax evasion. Like child sexual abuse, tax evasion is a serious offense, with penalties per instance ranging up to five years' imprisonment.²¹¹ The explanation of the moral wrongdoing of tax evasion, however, is a matter of dispute. As Stuart Green explains,

ful to the community. *Id.* at 74-77. As will be clear in the following Section, substandard voting and possession of child pornography are analogous in the manner in which they violate moral norms.

211. See 26 U.S.C. § 7201 (2012).

tax evasion is not accurately described as a matter of stealing.²¹² A paradigm case of stealing might be taking goods from a store without paying for them. The normal tie between payment and enjoyment is broken. In contrast, Green argues, when it comes to taxes, there is only an exceedingly attenuated connection between the governmental benefits enjoyed and the taxes owed.²¹³ Taxes paid in one part of the country might go to fund projects in another; those owing the highest amount of taxes may receive the least return; taxes may be used in ways directly contrary to the wishes of the taxpayer.²¹⁴ Tax evasion is not a matter of getting something without the normal payment for it.

Instead, Green proposes that tax evasion is best understood as a form of cheating, where cheating is conduct engaged in “with the intent to obtain an advantage over some party with whom the rule-breaker is in a cooperative, rule-governed relationship.”²¹⁵ A paradigm case of cheating might be using a marked deck in a poker game. But tax evasion rarely entails obtaining an advantage over some other party. Unlike cheating in poker, the advantage of the tax cheat disadvantages no one. One person’s failure to pay taxes owed will not result in the tax rates for others being increased, at least not in a system the size of the federal or any state government. Indeed, even if advantage over some other party is simply understood as advantage that the other party does not enjoy, the gaining of an advantage does not seem to be the moral wrong underlying tax evasion. Imagine that Tex and Max each develop schemes to underpay their taxes by \$10,000, but that Tex’s scheme involves an accounting ruse that requires \$9,000 to implement, while Max’s scheme requires no expenditure. Despite the fact that Max’s advantage is less than Ted’s, their acts seem equally worthy of punishment and indeed would be sanctioned equally under our current legal regime.²¹⁶

The moral culpability of the tax evaders is not grounded in the governmental benefits they enjoy without payment, nor the financial advantage they enjoy as a result. Rather, I suggest, moral culpability rests on the harms associated with tax evasion. Tax evasion is a significant social problem.²¹⁷ However, tax evasion is only harmful on

212. Stuart P. Green, *What Is Wrong with Tax Evasion?*, 9 Hous. Bus. & Tax L.J. 221, 233 (2009).

213. *Id.*

214. *Id.*

215. *Id.* at 235.

216. Under the Federal Sentencing Guidelines, sentences for tax fraud are based on the loss to the government, not profit of the offender. U.S. SENTENCING GUIDELINES MANUAL §2B1.1 (U.S. SENTENCING COMM’N 2015).

217. The total amount of illegally withheld taxes is in the range of half a trillion dollars. This amount includes taxes not paid by corporations and well as individuals. See INTERNAL

the aggregate level. Individual acts of the typical federal tax fraud defendant have no significant harmful effect on anyone. In the case of the typical federal tax evader, the taxes unlawfully withheld are so small that no governmental actor (other than an occasional prosecuting attorney) or policymaker is affected.²¹⁸ The reduction in federal revenues is cloaked by clerical rounding. Thus, allocations to social programs are not affected nor are tax rates increased as a result of individual acts of evasion. Even if the act becomes public knowledge, the possibility of its leading others to pay less than they owe is insignificant because that likelihood is not large and the total withholdings of the actor and those he influences are still de minimis from the perspective of any policymaker. The snowball effect of a single act of tax avoidance is a tax protester's delusion. Yet, if people generally failed to pay taxes, the pillars of government would be shaken, to the great disadvantage of all citizens. Accordingly, failure to pay taxes is a violation of the requirements of rule consequentialism and punishment of tax evaders can be justified on that basis.

Likewise, individual acts of insider trading typically neither cause nor risk harm. The profit enjoyed by the inside trader is not a loss suffered by any one individual, but lost profits spread among the broad pool of stock traders who otherwise would have possessed the undervalued shares purchased by the inside trader. The loss to each was de minimis. Cumulatively, however, wide-spread insider trading would undermine investor confidence in the fairness of the stock market necessary for market long-term stability.²¹⁹ Accordingly, it is properly criminalized.

REVENUE SERV., TAX GAP FOR TAX YEAR 2006 OVERVIEW (2012), https://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf [<https://perma.cc/8NS8-U75D>].

218. For 2006, there were approximately 138 million individual federal taxpayers in the United States. See INTERNAL REVENUE SERVICE, SOI TAX STATS-INDIVIDUAL STATISTICAL TABLES BY FILING STATUS, <https://www.irs.gov/uac/soi-tax-stats-individual-statistical-tables-by-filing-status>. The underpayment attributable to individual underreporting and underpayment was approximately 271 billion dollars. See INTERNAL REVENUE SERV., TAX GAP FOR TAX YEAR 2006 OVERVIEW, (2012), https://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf [<https://perma.cc/QY5Q-7489>]. The average payment deficit was therefore less than \$2000. *Id.* In comparison, discretionary spending on the federal level for 2006 was approximately 1 trillion dollars. See Kimberly Amadeo *FY 2006 U.S. Federal Budget and Spending*, THE BALANCE, Mar. 23, 2017 <https://www.thebalance.com/fy-2006-u-s-federal-budget-and-spending-3306309> [<https://perma.cc/7PYK-ACBZ>]. Thus the average underpayment was 2 billionths of the discretionary federal budget—truly a very small drop in a very large bucket. *Id.*

219. See Spencer Derek Klein, Note, *Insider Trading, SEC Decision-Making, and the Calculus of Investor Confidence*, 16 HOFSTRA L. REV. 665, 704 (1988). The justification is also common among proponents of prohibiting insider trading. See A.C. Pritchard, *United States v. O'Hagan: Agency Law and Justice Powell's Legacy for the Law of Insider Trading*, 78 B.U. L. REV. 13, 48 (1998) ("Insider trading impairs investor confidence, thereby discouraging capital formation and reducing liquidity."); see also Ian B. Lee, *Fairness and Insider Trading*, 2002 COLUM. BUS. L. REV. 119, 138 (2002). In *U.S. v. O'Hagan*, 521 U.S.

The criminalization of prostitution has long been a controversial matter. Justifications have been advanced that focus on harms associated with specific instances of prostitution. The Model Penal Code's prohibition of prostitution,²²⁰ for example, rests on a concern that venereal diseases might be spread through such sexual activity in a given encounter.²²¹ The risks of crimes against the prostitution patron, or against the prostitute, have been cited as a reason for banning prostitution.²²² Finally, the argument has been made that prostitution is an inherently immoral act that degrades the person selling his or her body.²²³ Such arguments have been closely scrutinized and convincingly debunked. Empirically there is little support for the claims that prostitution creates a high risk of venereal disease transmission or crime compared to regimes of either decriminalized or regulated commercial sex.²²⁴ The normative condemnation of prostitution undervalues sexual autonomy and rests on an antiquated view of sex as inherently tied to procreation.²²⁵ More persuasive, however, is the argument that if prostitution were widely engaged in, the cumulative effect would be the commodification, commercialization, and ultimately the devaluation of sex. Margaret Jane Radin asks us to:

Suppose newspapers, radio, TV, and billboards advertised sexual services as imaginatively and vividly as they advertise computer services, health clubs, or soft drinks. Suppose the sexual partner of your choice could be ordered through a catalog, or through a large brokerage firm that has an "800" number, or at a trade show, or in a local showroom. Suppose the business of recruiting suppliers of sexual services was carried on in the same way as corporate headhunting or training of word-processing operators. A change would occur in everyone's discourse about sex, and in particular about women's sexuality. New terms would emerge for particular gradations of market value, and new discussions would be heard of particular abilities or qualities in terms of their market value. With this change in discourse would come a change in everyone's experience.

642, 658 (1997), the Supreme Court justified criminalization based on the market-undermining effect of insider trading, not on any individual victim theory.

220. MODEL PENAL CODE § 251.2 (AM. LAW INST. 1980).

221. *Id.* ("Of special importance to the continuation of penal repression, however, was the perceived relationship between prostitution and venereal disease.").

222. MORRIS PLOSCOWE, *SEX AND THE LAW* 247 (1951); David A. J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1215-16 (1979).

223. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 390-92 (1975); see also CHARLES FRIED, *RIGHT AND WRONG* 142-43 (1978).

224. See Richards, *supra* note 222, at 1215-20.

225. See *id.* at 1239 ("Legal enforcement of a particular sexual ideal fails equally to accord due respect to individual autonomy.").

The open market might render subconscious valuation of women (and perhaps everyone) in sexual dollar value impossible to avoid. It might make the ideal of nonmonetized sharing impossible.²²⁶

This significant social harm is thus one that only arises as the aggregate of many acts of prostitution. Individual instances of prostitution are therefore candidates for criminalization and punishment within the rule consequentialist framework.

Environmental crimes are also ones that manifest the harms underlying them on the aggregate level. Criminal penalties including imprisonment, for example, are available against individuals who knowingly violate requirements of the Clean Air Act, such as air quality emission standards established by state implementation plans, or requirements of the Clean Water Act, such as discharge limits established by permit.²²⁷ While sometimes cases are brought involving significant harm or risk of harm to the environment or public health,²²⁸ prosecutions are commonly brought in cases involving deceptive conduct, facilities that operate outside the regulatory system, and repetitive violations, even in the absence of actual environmental harms.²²⁹ That actual harm is not a sine qua non of environmental prosecutions should not be surprising. Standards for emissions and discharges are established for the regulated community as a whole to protect public goods such as the atmosphere and large bodies of water. Individual violations may have a de minimis effect on overall environmental quality, while widespread disregard of regulatory standards would have a significant environmental impact. Environmental crimes, like child pornography possession, are crimes of aggregation for only on the aggregate level does cognizable social harm typically emerge.

Finally, looting shares many of child pornography possession's relevant features. Looting is a crime, distinct from theft or burglary, in seven states.²³⁰ According to Stuart Green, liability for looting typically requires that an actor "(1) make an unauthorized entry into a home or business; (2) in which normal security of property is not pre-

226. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1922 (1987) (footnote omitted).

227. See Clean Water Act, 33 U.S.C. § 1319(c) (2006) (criminalizing the discharge of a pollutant in violation of the Clean Water Act); Clean Air Act, 42 U.S.C. § 7413(c)(4)-(5)(A) (2006).

228. See David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1246-48 (2009) (recommending that "the government should prosecute only when there is evidence that the violations charged caused the harm").

229. *Id.* at 1248-52.

230. See Stuart P. Green, *Looting, Law, and Lawlessness*, 81 TUL. L. REV. 1129, 1140 n.34 (2007).

sent by virtue of some natural disaster or civil disturbance . . . ; and (3) thereby obtain control over, damage, or remove the property of another.”²³¹ Penalties for looting are often greater than those for theft or burglary.²³² Because looting occurs in the shadows of a natural or civic disturbance, and such disturbances typically affect a broad section of the population, the opportunities for looting arise for many simultaneously. Indeed, most incidents of looting are committed by groups.²³³ Looting has been described as a “dangerous form of group criminal conduct.”²³⁴ Group conduct does not necessarily entail coordinated conduct. Looters, however, will generally act with knowledge that they are not acting alone. This is so because the background condition for looting—natural disaster and social disturbance—are public phenomena and allow looters, knowing that law enforcement is stretched thin, to act publically and with impunity. It has been theorized that looting is a form of “contagion” which takes place when a sufficient number of persons converge or get caught up in the excitement.²³⁵ In addition, resources to be looted, seized for survival, or purloined for profit are finite. Under these circumstances, individual looters can plausibly claim that “If I did not take it, somebody else would have,” or, at the very least, “Given the amount being taken by other looters, what I took did not significantly add to the losses suffered by the establishment looted.” It requires little imagination to believe that one more items taken from a commercial establishment will merely overdetermine, rather than cause, its bankruptcy or be a trivial aspect of the insurance claim that will be made anyway. Furthermore, even if individual looters realize that looting is “contagious,” they will know that their act of looting cannot significantly add to the level of social disruption that exists independently of them. The contagion will occur whether they participate or not. Such reasoning as above of course should not be condoned. But neither should it be condemned on the ground that it is erroneous as a factual matter. Rather, it is objectionable on grounds similar to the grounds cited in connection with possession of child pornography: The wrongfulness of individual acts is not exclusively a function of their individual consequences. Acts may be condemned as instances of the aggregates that are the causal vehicles of actual social harm.

231. *Id.* at 1142.

232. *Id.* at 1141.

233. See Roger D. Scott, *Looting: A Proposal to Enhance the Sanction for Aggravated Property Crime*, 11 J.L. & POL. 129, 152 (1995).

234. *Id.* at 133-34.

235. See *id.* at 136, 140.

VI. CONCLUSION

So understood, where then does this leave child pornography possession in terms of the proportionality principle? The most plausible argument for the consistency of child pornography possession penalties and the proportionality principle, I have argued, is that the penalties appropriately reflect the culpable wrongdoing of the typical defendant when the effects of his acts are considered in the aggregate under an appropriately generalized description. Unrestrained purchasing and trading of child pornography by those with such predilections would lead to substantial undermining of the social norms against child sexual abuse and stimulate the production of child pornography to meet increased demand, leading to higher rates of child sexual assaults. Likewise, greater violations of victims' privacy would ensue. In contrast, unrestrained child sexual abuse by pedophiles, considered in aggregate, might actually produce a backlash and stronger measures to prevent child sexual abuse. The wrongfulness of contact offenses lies in their actual effects, not their aggregate ones. When it comes to proportionality, the penalties for child pornography possession thus should not be compared to the penalties for crimes such as child sex abuse or statutory rape. Such crimes lie on a different moral scale. Rather, the penalties for child pornography possession should be compared to the penalties for other crimes of aggregation, like tax evasion, insider trading, desertion, looting, etc. The proportionality principle is to be applied not at the level of individually caused harm, but at the level of the aggregate harm associated with the actual or hypothetical class of acts the law seeks to deter. Admittedly, this move waters down the proportionality principle. It does not, however, reduce it to utilitarianism, for there is no guarantee that proportional punishment, so defined, will be sufficient to produce a socially optimal level of crime. Whether this weakened version of the proportionality principle is an intuitively attractive moral principle is a question open for discussion.