THE DANGER OF FIGHTING MONSTERS: ADDRESSING THE HIDDEN HARMS OF CHILD PORNOGRAPHY LAW

Robert J. Danay*

This article seeks to expose and address some of the counter-intuitive harms that are currently being wrought by the operation of both Canadian and American child pornography laws. The author explores the way in which these laws serve to perpetuate the sexualization of children in society, and examines the myth of the "salivating pedophile" upon which the law is based. The author also considers the impact of zealous efforts to suppress child pornography on rights of freedom of expression, as well as their over-shadowing effect with respect to other pressing social concerns. In light of these concerns, he proposes several recommendations for reform of the current pornography law. The author suggests that such reforms would criminalize actual harm to children rather than anachronistic notions of "moral corruption" that currently animate child pornography legislation.

Cet article cherche à présenter et régler certains des torts contre-intuitifs qui sont actuellement amenés par les lois sur la pornographie juvénile au Canada et aux États-Unis. L'auteur examine comment ces lois servent à perpétuer la sexualisation des enfants dans la société, et étude le mythe du « pédophile salivant » dont la loi s'inspire. L'auteur examine aussi l'impact de l'effort diligent fait pour supprimer la pornographie juvénile sur les droits de liberté et d'expression ainsi que leur effet d'éclipse par rapport à d'autres préoccupations sociales pressantes. Dans le contexte de ces préoccupations, il suggère plusieurs recommandations de réforme de la loi actuelle sur la pornographie. L'auteur laisse croire que ces réformes pourraient criminaliser le tort véritable aux enfants plutôt que les notions anachroniques de «corruption morale» qui animent actuellement les lois sur la pornographie.

* Robert Danay, B.Sc. (Hons., Toronto), LL.B (Osgoode), B.C.L.(Oxford), and currently as counsel in the Business and Regulatory Section of the federal Department of Justice. The opinions expressed in this paper are those of the author, and not necessarily those of the Department of Justice or the Government of Canada. I would like to thank Professor Bruce Ryder, Paul Heisler, and the anonymous *RCS* reviewers for their assistance and guidance in the preparation of the paper. Responsibility for all errors and omissions remains my own.

2005
Revue d'études constitutionnelles

> "Whoever fights monsters should see to it that in the process he does not become a monster."
> -Friedrich W. Nietzsche[1]

> "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears."
> -Justice L. Brandeis[2]

I. INTRODUCTION

It is undeniable that child sexual abuse is a topic that "evokes visceral disgust in all reasonable people."[3] Child pornography, as an element or by-product of such abuse, must evoke similar revulsion. Thus, it would seem perfectly reasonable that legislators seek to aggressively stamp out all forms of child pornography in an effort to eradicate the social blight that is child sexual abuse. According to popular reasoning, those who commit acts of child sexual abuse are not normal offenders, such as thieves, robbers or drunk drivers. Those who commit child sexual abuse, and, by association, those who consume child pornography, are sexual *predators*. In a recent debate over new child pornography legislation in the House of Commons, Dr. Keith Martin, then a Canadian Alliance MP, argued:

> [A]nyone can make a mistake, that is part of being human. However the type of *creature* with whom we are dealing, to which this law applies, is a serial *predator* and sexual abuser of children. That puts these types of individuals in a class by themselves I would think.[4]

Given such rhetoric, there is little room left to suggest that a law aiming to protect innocent children from inhuman predatory sexual "creatures" is not also inherently worthwhile and laudable. Fol-

---

1 Friedrich Nietzsche, *Beyond Good and Evil*, trans. by Walter Kaufmann (New York: Vintage Books, 1989) at 89.

2 *Whitney* v. *California*, 274 U.S. 357, 376 (1927) (Brandeis J., concurring).

3 Bruce Ryder, "The Harms of Child Pornography Law" (2003) 36 Univ. of British Columbia Law Rev. 101 at 10 [Ryder].

4 *House of Commons Debates*, 138, 51 (3 February 2003) at 3056 (Keith Martin) [emphasis added].

lowing the logic of this rhetoric leads to framing those who dare to oppose the strictest regulation of child pornography as hopelessly misguided libertarians, pedophiles, or both. Demonstrating this reasoning, Andrew Vachss, a lawyer (and crime fiction author) representing abused children, has argued that "[i]n truth, when it comes to child pornography, any discussion of censorship is a sham, typical of the sleight of hand used by organized pedophiles as part of their ongoing attempt to raise their sexual predations to the level of civil rights."[5] I would like to suggest that this sort of inflammatory rhetoric and reasoning is based on hysterical misinformation and has masked some of the real harms that stem from our current child pornography prohibitions. I would also like to challenge the logic traditionally employed by those arguing in favour of progressively harsher penalties for increasingly trivial "pedophilic" acts. If left unchecked, the drumbeat of increased criminal sanctions in the area of child pornography law may, in addition to other notable harms, actually serve to intensify our society's current obsession with sexualized children, and thereby reinforce the very blight the law is attempting to eradicate.

In the first part of this article, I explore the way in which child pornography laws serve to perpetuate the already-rampant sexualization of children in our society. I also examine how the law is rooted in the myth of the "salivating pedophile," the origins of which can be traced back to Victorian England. In part two, I detail the degree to which pressing social concerns, particularly those involving non-sexual child abuse and neglect, are overshadowed and ignored when we place a disproportionate emphasis on the suppression of child pornography. In part three, I discuss the way in which the hysteria motivating our aggressive stance on child pornography threatens to devastate our constitutionally enshrined freedoms of expression, with demonstrably destructive effects upon fields as disparate as art, literature, journalism and medicine. In the final part of the article, I consider the fate of child pornography law in light of its attendant harms and propose several reforms that, in concert, might serve to mitigate the damage caused by its operation

[5] "Age of Innocence" *The [London] Guardian* (17 April 1994), 14.

in practice. The focus of these recommendations is on the criminalization of actual harm to children rather than the anachronistic notions of "moral corruption" that currently animate much of the child pornography legislation.

II. CHILD PORNOGRAPHY LAW'S HARMFUL EFFECTS

A. The Perpetuation of Pernicious Discourse

The first of the undesirable effects stemming from our current child pornography legal regime is the law's contribution to the sexualization of children. In "The Perverse Law of Child Pornography," Amy Adler sets out this compelling argument:

> [T]hese laws, intended to protect children from sexual exploitation, threaten to reinforce the very problem they attack. The legal tool that we designed to liberate children from sexual abuse threatens to enslave us all, by constructing a world in which we are enthralled – anguished, enticed, bombarded – by the spectacle of the sexual child.[6]

As I will show, it is indeed patent that a criminal trial concerning child pornography involves a public display wherein the image of the child as a sexual creature is exhibited and reinforced, even though it is being condemned in the process.

Both in the United States and Canada, the process of prosecuting child pornography offences entails increasingly involved forays into a prurient realm in which the child is the central object of interest. According to Adler, child pornography cases require the courts to take on the *gaze of the pedophile* in order to root out pictures of children that harbor secret pedophilic appeal. The growth of child pornography law has opened up a whole arena for the elaborate exploration of children as sexual creatures."[7] No one would argue that the courts are intentionally endorsing the notion that children are sexual creatures, but the fact remains that "even when a child is pictured as a sexual victim rather than a sexual siren, the child is still

[6] (2001) 101 Columbia Law Rev. 209 at 210.

[7] *Ibid*. at 213 [emphasis added].

pictured as sexual."[8] As I discuss further below, the sexualization of children through criminal law proceedings is all the more disquieting when the general discursive capacity of the law, as articulated by scholars such as Carol Smart,[9] is taken into account. I will now set out some concrete examples from recent case law and legislation in order to demonstrate the existence of this phenomenon.

In the United States, the definition of "child pornography" has undergone considerable expansion in an effort to snuff out all materials that may hold some arousing appeal for pedophiles (or potential pedophiles). For example, under the federal *Child Protection Act*,[10] the use of a child in a "sexual performance" is prohibited. A "sexual performance" includes not only "intercourse, sexual bestiality, masturbation, sado-masochistic abuse" but also any "lascivious exhibition of the genitals." The various attempts at judicially defining the term "lascivious" reveal the extent to which courts have, like a deer caught in headlights, become locked into the "pedophilic gaze." For example, in *United States v. Knox* (1994), the Third Circuit Court of Appeals held that a depiction could constitute a "lascivious exhibition of the genitals" *even if a child is wearing clothes*.[11] In that case, the accused was in possession of videotapes that zoomed in on the genital areas of clothed girls. The court's analysis on this point is instructive: "in several sequences, the minor subjects, clad only in very tight leotards, panties, or bathing suits, were shown specifically spreading or extending their legs to make their genital and pubic region entirely visible to the viewer. In some of these poses, the child subject was shown dancing or gyrating in a fashion indicative of adult sexual relations."[12] By engaging in such an analysis, the Court in *Knox* required judges in future cases to carefully, explicitly and publicly scrutinize the genital and pubic regions of clothed minors in an effort to reveal the images' sexually

8 *Ibid.*

9 For example, see Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

10 Pub. L. No. 98-292, 98 Stat. 204 at 205 (1984) (codified and amended at 18 U.S.C. 2253 (1994)).

11 32 F.3d 733 (3rd Cir. 1994) at 744 [*Knox*].

12 Ibid. at 747.

stimulating nature. In cases such as *Knox*, courts basically put the "sexual child" on public display, while simultaneously condemning those who view children in such a manner.

In *Knox*, the court was applying a test for determining whether materials were "lascivious" that was originally set forth in *United States v. Dost* (1986).[13] This test requires a court to analyze the following six factors:

1. whether the focal point of the visual depiction is on the child's genitalia or pubic area;
2. whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
3. whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
4. whether the child is fully or partially clothed, or nude;
5. whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and,
6. whether the visual depiction is intended or designed to elicit a sexual response in the viewer.[14]

The application of these factors, as in *Knox*, necessitates a drawn out analysis of materials that most people would not, in the past, have considered obscene or even sexual in nature. Through such analyses, police, judges, lawyers, and, ultimately, members of the public are forced to closely inspect increasingly innocuous images of children (and children generally) to determine whether the depicted children might be acting in a sexual manner. When considered in this light, it is hard to deny that courts are getting caught up in some sort of intense revulsion and fascination with sexualized children. Through cases such as *Knox* and *Dost*, American courts have allowed themselves to be-come unwitting cultural conduits and amplifiers of the pernicious notion that children are sexual objects.

In an effort to condemn all materials that might hold some special inciting effect upon alleged pedophiles, the judicial pedophilic gaze is extending to materials that are increasingly mundane. This trend

[13] *United States* v. *Dost*, 636 F. Supp. 828 (S.D. Cal. 1986) [*Dost*].
[14] *Ibid.* at 832.

is all the more distressing given the evidence of certain professed pedophiles who claim to *prefer* more innocent representations of children.[15] For these people, it may be the very "sexual naïvete" of the depicted children that is arousing. For example, a recent survey involving members of the North American Man Boy Love Association (NAMBLA), an organization for pedophiles, revealed that its members derived erotic stimulation through watching "children on network television, the Disney channel, and mainstream films."[16] The author of the study poignantly concluded that he "found NAMBLA's 'porn' and it was Hollywood."[17] If this is so, the judicial search for pedophilic material threatens to publicly sexualize all images of children no matter how innocuous the context.

In Canada, the prohibition against the simple possession of child pornography can be found at section 163.1 of the *Criminal Code.*[18] Under subsection (1), child pornography is defined as:

> (a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
>
> (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
>
> (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; [or]
>
> (b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act[.]

As with U.S. legislation, several elements of this section necessitate extended examinations of allegedly pornographic materials in a variety of problematic ways. Primarily, the determination of whether the materials depict the sexual organs or anal region of a person under eighteen *for a sexual purpose* requires

15 Adler, *supra* note 6 at 259.

16 See James R. Kincaid, *Erotic Innocence: The Culture of Child Molesting* (Durham, N.C.: Duke University Press, 1998) at 115 (citing Matthew Stadler) [Kincaid].

17 *Ibid.*

18 R.S.C. 1985, c. C-46 s. 163.1(1) [*Criminal Code*].

the judicial adoption of the "pedophilic gaze." In general, I would argue that the "sexual purpose" test imports a dangerously subjective element into prosecutions stemming from child pornography. As opposed to looking at the materials from some objective perspective, this test begs the court to examine impugned materials from the perspective of a pedophile in order to expose the motivation of the accused in collecting or possessing the materials in question. This exercise is patently ill-advised, as it explicitly requires courts to take on the "pedophilic gaze" when examining materials involving children.[19]

The case of *R. v. Nedelec* (2001)[20] illustrates the degree to which child pornography prosecutions under the *Criminal Code* oblige courts to publicly "expose" the sexual content of even the most innocent of childhood depictions. In *Nedelec*, the accused was charged with possession of child pornography in contravention of section 163.1 of the *Criminal Code*. The police seized from the possession of the accused, among other materials, a picture of a three- or four-year-old girl opening Christmas presents. In the picture the child was wearing a nightgown that was up around her waist. Her "genital area" was described by Shaw J. as being "prominent."[21] Shaw J. found that this picture, as with the many other pictures and

[19] It must be acknowledged that, in some respects, the very effort to draw a bright line around child pornography is itself inevitably subjective. That is, by its very nature, there is no uncontested and impartial definition of child pornography. However, this *definitional* question is distinct from the issue of whether the *judicial assessment* of child pornography will be conducted in a subjective or objective manner. An objective judicial analysis would seek to examine materials based on the obvious characteristics of the materials themselves (e.g., depictions of a child's sexual organs, or of sexual contact between adults and children, etc.). By contrast, the judicial assessment at issue in the "sexual purpose" test requires judges to interpret and predict the subjective *reason* for possession, and therefore the presumed effect of impugned materials on a pedophile. It is through this analysis that the definition of child pornography becomes perniciously subjective (in particular from the presumed point of view of a pedophile). Thus, though the definition of child pornography is itself inherently subjective, I would still argue that its judicial *assessment* ought not to be.

[20] *R.* v. *Nedelec*, [2001] B.C.J. No. 2243 (B.C.S.C.) (QL) [*Nedelec*].

[21] *Ibid.* at para. 10.

literature collected by the accused, was collected for a sexual purpose, and thus constituted child pornography. In so concluding, Shaw J. held that "[h]owever *innocently* the picture was taken, the clear and prominent depiction of the little girl's genital area is *startling*."[22] I contend that when, after careful examination of a family photo of a toddler opening up her Christmas presents, the court finds the depiction of the child's genitalia to be "startling," it is clearly locked into the pedophilic gaze. If it was truly "innocently taken," there should be nothing even remotely startling about a photograph in which a toddler's genitals happen to be exposed. By branding such materials as sexual in nature, the Court is publicly reinforcing the notion that children, even toddlers opening their Christmas presents, can reasonably be considered to be sexual objects.

The prosecution of simple possession of child pornography is unique in that it requires courts, as well as the participating police, attorneys and support staff, to repeatedly violate the very law that has been allegedly breached by the accused. As the rulings in *Knox*, *Dost*, and *Nedelec* demonstrate, prosecutions involving child pornography, by their very nature, necessitate an excruciatingly minute analysis of impugned materials in an effort to elucidate and catalogue any latent sexually charged qualities. If even "accessing" (as opposed to possessing or downloading) pornography is a crime,[23] then all prosecutions involving child pornography are tainted by repeated breaches of the law. To my knowledge, no other criminal prosecution produces this phenomenon. Courts need not engage in perjury, fraud, theft, or sexual assault in order to prosecute such offences.

If I were to confront members of the judiciary and Crown with the allegation that they had continually violated section 163.1 of the *Criminal Code* throughout the course of any given prosecution involving child pornography, they would likely argue that though

[22] *Ibid.* at para. 49 [emphasis added].

[23] It is an offence under s. 163.1(4.1) of the *Criminal Code* to merely "access" child pornography on one's computer.

this may be technically true, the examination of such materials is not harmful in the context of a court proceeding.[24] They might argue that it is the consumption of such materials by predatory sexual monsters that is pernicious. Normal, upstanding members of the judiciary, the bar, and even the general public are not at risk of sexually abusing children through exposure to morally corrupting child pornography. However, as I will now demonstrate, the distinction between the inhuman creature that is the pedophile and society at large is largely fallacious.

(i) Our Pedophilic Society and the Myth of the "Salivating Pedophile"

The notion that those whose sexual proclivities include an attraction to children are members of an insular and distinct sub-culture in society is simply false. It is clear to any rational observer that children, or adults with strikingly child-like appearances, are regularly and unabashedly displayed as sexual creatures in innumerable fora. This sexualization occurs through mass media, advertising, films, and music, and it pervades all elements of our social discourse. One need look no further than the musical craze of "boy and girl bands," and the likes of plainly sexualized children such as Britney Spears and Christina Aguilera for examples of this social trend. According to Judith Levine, author of *Harmful to Minors: The Perils of Protecting Children from Sex*:

> [W]e have arrived at a global capitalist economy that, despite all our tsk-tsking, finds sex exceedingly marketable and in which children and teens served as both sexual commodities (JonBenét Ramsey, Thai child

[24] Note that with the passage in July 2005 of Bill C-2, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 1st Sess., 38th Parl., 2004 [Bill C-2], possession of child pornography for a "legitimate purpose" relating to "the administration of justice" is expressly exculpated. This legislation, which has been passed but has not yet come into force, implicitly recognizes the odd reality that the very investigation and prosecution of child pornography possession constitutes at least a *prima facie* breach of s. 163.1 of the *Criminal Code.*

prostitutes) and consumers of sexual commodities (Barbie dolls, Britney Spears).[25]

At the same time as we bombard ourselves with popular images of sexualized children, we repeatedly and loudly decry the scourge of child sexual abuse and, by association, consumers of child pornography. Popular daytime talk shows such as Oprah Winfrey, Sally Jessy Raphael, Maury Povich, and countless others continually air special episodes exploring often-graphic accounts of child sexual abuse.[26] One particularly longstanding case of public and media fascination with (possible) child sexual abuse is that surrounding the pop singer Michael Jackson. In 2003, the documentary *Living With Michael Jackson*, detailing the singer's ongoing (and possibly sexual) relationships with young boys, was viewed, reviewed and widely discussed by worldwide audiences of unprecedented proportions.[27] The apparently inexhaustible public thirst for details about the pop singer's alleged sexual improprieties with children was further displayed by the rabid coverage surrounding Mr. Jackson's recent molestation trial.[28] The trial, which involved detailed testimony by various individuals claiming to have witnessed Jackson showering or fondling young boys, as well as testimony from children having claimed to have been molested by the singer, has been described as "a spectacle and a media circus, attracting a queasily obsessive degree of public attention."[29] It would not thus be an understatement to claim that we, as a society, have a more than keen interest in the twin subjects of sex and children. At the same time as we enthusiastically lap up a barrage of images of

---

25 (Minneapolis: University of Minnesota Press, 2002) at 4.

26 See Kincaid, *supra* note 16 at 2.

27 See "Mixed U.S. Reaction to Jackson Interview," online: BBC News Homepage <http://news.bbc.co.uk/1/hi/entertainment/tv_and_radio/2735315.stm>.

28 For example, "some 2,000 journalists from more than 30 countries" attended the Santa Barbara County courthouse on 13 June 2005 to report on the rendering of the jury's verdict in the Jackson case. See Christopher Parkes, "Curtain Falls on Media Circus As Jury Finds Jackson Not Guilty" *Financial Times* (14 June 2005), online: <http://news.ft.com/cms/s/7a30e812-dc70-11d9-819f-00000e2511c8.html>.

29 Andrew Gumbel, "Michael Jackson's Trial Is As Weird As He Is" (8 March 2005), online: Sunday Culture <INK"http://www.sunday independent.co.za/index.php?fArticleId=2511936&fSectionId=1083&fSetId=>.

sexualized children, and any media stories relating to sex involving children, we condemn the pedophile and the viewer of child pornography in the most vitriolic of terms.[30]

The legal process of child pornography prosecution has become an integral element of a cultural fascination with sexuality and children. According to Richard Kincaid, author of *Erotic Innocence: The Culture of Child Molesting*:

> In the case of child molesting and its culturally approved narratives, we have stories that allow us a hard-core righteous prurience; it's a scapegoating exercise we have come to depend on. Through these stories of what monsters are doing to children, we find ourselves forced (permitted) to speak of just what it is that they are doing; *we take a good, long look at what they are doing*. . . . We reject this monstrous activity with such automatic indignation that the *indignation comes to seem almost like pleasure*.[31]

This judicial fascination with the graphic details of child pornography is not an academic fantasy that Kincaid has conjured up for the purposes of supporting his thesis. For example, at a recent

---

[30] For an excellent Canadian example of this phenomenon, see the coverage relating to the sentencing of Michael Briere, who pleaded guilty to sexually assaulting and murdering ten-year-old Holly Jones (apparently after having downloaded child pornography). One particularly telling example is *The Globe and Mail* reporter Jan Wong's vivid description of her attempt at finding child pornography on the Internet. Wong's account of her descent into "cyber-hell" included graphic descriptions of various pornographic sites that she managed to track down:

> The photos were amateurish and badly lit. They appeared to be taken in ordinary homes, a rumpled living room, a cheaply tiled bathroom. a sunny back yard. One terrible photo showed a little girl, maybe six years old, lying on a couch, naked from the waist down. A man, completely naked, was touching her vagina with his hand. He could have been her father.
>
> I clicked on that photo. . . .

Jan Wong, "A Journey into Depraved Cyberspace" *The Globe and Mail* (19 June 2004).

[31] Kincaid, *supra* note 16 at 7 [emphasis added].

sentencing hearing for an individual convicted of possessing child pornography, Giesbrecht A.C.J. described some of the impugned materials as follows:

> [A] crying toddler is shown gagging on a man's sperm. A little girl is shown being mounted by a German Shepherd. Children are shown masturbating each other. Children are shown in bondage. An adult male is seen forcing his penis into a child's mouth, and then ejaculating in her mouth. The toddler is heard crying "No, No." Another picture shows the rape of a handcuffed and hooded child. Perhaps the most poignant scene, and one that will stay in my mind forever, is the image of an adult male ejaculating into the vagina of a child. The child has a soother in her mouth.[32]

This excerpt demonstrates, in stark and disturbing terms, the way in which the vivid judicial condemnation of hard-core pornography can become virtually indistinguishable from the impugned lascivious materials themselves.

An even more recent example of judicial fascination with the graphic details of materials involving sex with children is that of the Ontario Court of Appeal in *R v. Beattie* (2005).[33] The *Beattie* case was concerned with the acquittal of an individual charged with the possession of child pornography. The materials at issue were a series of fictional stories seized from the home of the accused. These graphic stories portrayed children as willing participants in various sexual acts with adults, often the children's own parents. Based on the Supreme Court's ruling in *R. v. Sharpe* (2001),[34] the only legal issue was whether or not such stories, when viewed objectively, sent the message that "sex with children can and should be pursued."[35] The trial judge held that since there was no *explicit* advocacy of sex with children, the stories did not fall within the definition of child pornography established by the Supreme Court.[36] The Court of Appeal disagreed with the trial judge's interpretation of *Sharpe* and

---

32 *R. v. Hardy*, [2002] M.J. No. 238 (Man. Prov. Ct.) (QL) at para. 6.
33 [2005] O.J. No. 1302 (C.A.) [*Beattie*].
34 [2001] 1 S.C.R. 45 [*Sharpe*].
35 *Ibid*. at para. 56.
36 *Beattie*, supra note 29 at para. 21.

held that no explicit message was required – the portrayal of children as willing participants in sexual acts with supposedly loving parents *implicitly* sent the message that sex with children ought to be pursued.[37] Note that I was able to summarize the facts, the legal issue and its resolution without having to delve into a protracted examination of the impugned stories' content. However, Laskin J., writing for the Court, found it necessary to include an entire section in his judgment in which the stories were described, graphically excerpted and categorized in meticulous detail. The Court's decision in *Beattie* thus represents yet another example of a case paradoxically condemning child pornography through its repeated and detailed exposition and exploration.

Perhaps in an effort to mask our secret prurient interest in sexualized children (and justify the public display of child sexual abuse in the courts), we (as a society) have also constructed a myth of the "salivating pedophile" – a brutal and incorrigible sexual predator of children, lurking about schoolyards, waiting to pounce. It is popularly believed that "the recidivism of pedophiles is almost 100%, if not 100%."[38] This statistic, recently quoted so confidently by an MP in the House of Commons, is grossly inaccurate. In fact, the recidivism rates of child sex offenders are among the lowest in the criminal population.[39] Studies examining thousands of sex offenders in both the United States and Canada have found that approximately 13 percent of sex offenders are rearrested, compared with 74 percent of all prisoners.[40] With treatment, the rate of recidivism is even lower.[41] The widespread public response to the sexual assault and murder of ten-year-old Holly Jones in Toronto demonstrates the extent of the Canadian public's belief in the incorrigible nature of child sexual predators. During the

---

37 *Ibid.* at paras. 22-26.

38 *House of Commons Debates*, 138, 51 (3 February 2003) at 3052 (R. Harris).

39 Levine, *supra* note 25 at 26.

40 *Ibid*., citing R. Karl Hanson & M. Bussière, "Predictors of Sexual Offender Recidivism: A Meta-Analysis" (1996) 66:2 J. of Consulting and Clinical Psychology 348.

41 *Ibid*., citing E. Lotke, Sex Offenders: Does Treatment Work? (Washington, D.C.: National Centre for Institutions and Alternatives Report, 1996) at 5.

investigation of the murder, the public was shocked to learn that there were an estimated 200 known sex offenders within a three-kilometre radius of the child's home (though the police quietly admitted that these included all types of sex offenders, and "not just pedophiles").[42] Despite the fact that the man ultimately charged with the murder, thirty-five-year old software developer Michael Briere, had no criminal record,[43] a grassroots movement calling for harsher penalties for "sexual predators of children" (a proposal dubbed "Holly's Law"), steadily gained momentum following Jones' murder. In fact, a petition in support of "Holly's Law" garnered over 420,000 signatures.[44] Similarly, Jones' murder spurred renewed calls for a national sex offender registry (again, despite the fact that the child's alleged killer was not such an offender, and would not have appeared on any registry search).[45] The incessant focus on supposed sexual predators having nothing to do with the Holly Jones murder is paradigmatic of a society obsessed with children as sexual objects. It seems that many groups used Jones' murder as a well-intentioned but still misguided justification for descending further into the frenzy of fear stemming from the myth of the child sexual predator.

As the public response to Holly Jones' murder demonstrates, our society is convinced that hordes of pedophiles lurk around every corner, waiting for the opportune moment to seize upon on unsuspecting children. However, studies show that most sexual abuse of children is perpetrated by members of the child's immediate family rather than strangers.[46] In addition to false notions about rates of recidivism and colourful profiles of the lurking pedophile, numerous other hysterical misconceptions about the nature and

42 "Holly's Killer a 'Monster' Say Police," online: CBC News Homepage <http://www.cbc.ca/stories/2003/05/14/jones_invest030514>.

43 "Laying Down the Law," online: Cable Pulse 24 Homepage <http://www.pulse24.com/News/Top_Story/20030811-011/page.asp>.

44 Online: Holly's Law Homepage <http://www.hollyslaw.ca/>.

45 O. Wood, "Sex Offender Registry," online: CBC News Online Homepage <http://www.cbc.ca/news/indepth/background/sexoffender_registry.html>.

46 Levine, *supra* note 25 at 28.

severity of the threat posed to society by monstrous pedophiles abound.[47]

(ii) The Historical Roots of our Pedophilic Obsession

In *Erotic Innocence*,[48] Richard Kincaid elucidates the historical roots of the social phenomenon that I have been describing. Building on the work of Michel Foucault,[49] Kincaid traces the evolution of popular Western conceptions of sexuality and children over the past two or three centuries. Kincaid argues that the notion that children are pure, chaste and innocent was first formulated in England during the Victorian era. Historians such as Phillipe Ariès have argued that that before the seventeenth century children were essentially viewed as miniature adults, and were therefore given the freedom to fight, steal, study, have sex, travel, find homes and work, with little protection or interference from adults. [50] The idea of childhood as a state of innocence, according to Ariès, was a creation of Victorian British society in the nineteenth century. At the same time, the Victorians concocted a new ideal of the sexually desirable object. Unfortunately, the "new" child and the sexually desirable object had identical characteristics, including "softness, cuteness, docility, and passivity."[51] According to Kincaid, "[w]e've been living, not so happily, with the results of [the Victorians'] bungling ever since."[52] Thus, we *as a society*, as opposed to only that incorrigible group of monstrous pedophiles, are collectively afflicted with a neurotic combination of sexual lust for the child (or the child-like) and a belief that children are asexual innocent creatures who must be protected at all costs. Thus, the public spectacle of the sexualized

---

47 *Ibid.* at 25-32; for example, Levine cites the oft-repeated misconception that equates those who abduct and kill children with pedophiles;"pedophiles abduct and murder children, and people who abduct and murder children are pedophiles" at 23.

48 Kincaid, *supra* note 16.

49 See *The History of Sexuality: An Introduction, Vol. 1*, trans. by Robert Hurley (New York: Vintage Books, 1990) [Foucault].

50 See Phillipe Ariès, *Centuries of Childhood* (New York: Vintage Books, 1962).

51 Levine, *supra* note 25 at 27.

52 Kincaid, *supra* note 16 at 52.

child, whether on television or in the courts, simultaneously beguiles and disgusts us.

As we have seen, our society's simultaneous attraction to and abhorrence of sexualized children is reflected in and amplified by the law of child pornography as it is currently formulated and prosecuted. In an effort to publicly attach the powerfully stigmatizing label of "pedophile" upon society's most hated and feared members, courts assiduously pore over even the most innocent of materials in order to publicly draw out any trace elements of (supposedly inappropriate) childhood sexuality for all to see. This process, which is, arguably, a result of the social trend described above, ensures that the image of the sexualized child remains prominently featured in the public consciousness.

The characterization of child pornography law as influencing and being influenced by prevailing social norms recognizes that the law does not operate in a vacuum. Reasoning in this manner, Adler submits that child pornography law harms society through what she terms a "disease model."[53] According to this model, child pornography law "[l]ike everything else . . . has been infected by the sexualization of children; it is symptomatic of the illness it fights. And once infected, the doctor spreads the disease to his other patients."[54] In this way, the law, through its attempt at protecting children from sexual oppression, continually reinforces the troubling notion that children are, in fact, sexually violable creatures.

In response to the "disease model," one might rightly inquire as to how it is that the perpetuation of a discourse in which children are characterized as sexual creatures serves to actually harm children. In response to this question, one should turn to the work of Michel Foucault. Foucault argues that, in general, the discourses defining and characterizing sex are part of an ongoing and dynamic process by which sexuality *itself* is shaped and reconstituted.[55] In other

[53] Adler, *supra* note 6 at 255.
[54] *Ibid.*
[55] Foucault, *supra* note 49 at 158-59.

words, "discussion [of sexuality] changes, *indeed produces*, the thing discussed." Put simply, if we constantly discuss the sexualization of children, in the courtroom or in other fora, we will manage to *actually* sexualize children, in the eyes of both children and adults. It is for this reason that "the process by which we root out child pornography is part of the reason we can never fully eliminate it; the circularity of the solution exacerbates the circularity of the problem."[56] As a result, when our legal system repeatedly reinforces, through its own discourse and legal tests, the image of the sexual child, it seems clear that more than mere words are at stake.

The general capacity of our legal system to shape everyday lives through the perpetuation of its own rhetorical discourse, as persuasively articulated by Carol Smart in *Feminism and the Power of the Law*,[57] underscores the harm that child pornography law can wreak upon society if left unchecked. Smart refers to the work of Foucault in canvassing the ways in which the law, as a discourse that claims to "speak the truth," exercises significant power in a society, such as our own, that values truth.[58] The locus of such power is the exclusion or marginalization, by the law, of competing or contradictory versions of truth. For example, through legal methods of reasoning, proof and the rules of evidence, the law consistently excludes as inadmissible those versions and sources of truth that it deems unreliable or superfluous. Smart illustrates this aspect of the law in her characterization of a solicitor's duties:

> Primarily the job of the solicitor is to translate everyday affairs into legal issues. On hearing a client's story, the solicitor sifts it through a sieve of legal knowledge and formulations. Most of the story will be chaff as far as the lawyer is concerned, no matter how significant the rejected elements are to the client. Having extracted what law defines as relevant, it is translated into a foreign language of, for example, ouster injunctions, unfair dismissals, constructive trusts. The parts of the story that are cast aside are deemed immaterial to the case and the good solicitor is the one who can effect this translation as swiftly as possible. This is the routine

[56] *Ibid*. at 264.
[57] *Supra* note 9.
[58] *Ibid.* at 9-14.

> daily practice of law in which alternative accounts of events are disqualified.[59]

Thus, through its influential claims to "speak the truth" and its related tendency to exclude alternative forms of knowledge, the law regularly shapes, and indeed defines, a panoply of popular conceptions of reality. This general discursive power of the law renders the sexualization of children through criminal child pornography proceedings a phenomenon worthy of careful consideration.

B. Distraction from "More Pressing Ills"

In addition to reinforcing the image of the sexualized child, child pornography law is harmful in that it dominates discussions of the welfare of children that ought to be far more diverse. Richard Kincaid catalogues a series of pressing concerns relating to the welfare of children in the American context (though equally applicable in Canada) that receive nowhere near as much media or judicial attention as the "national emergency"[60] of child sexual abuse and child pornography. For example, Kincaid notes the fact that the number of children living below the poverty line in the United States grew by 26 percent between 1985 and 1995, while 2,000 American children die each year from physical abuse and neglect, with 160,000 more seriously injured at the hands of abusive adults.[61] In addition, Kincaid believes that "[e]motional abuse is so widespread that we hardly bother to study it; and neglect, which accounts for the largest number by far of child abuse cases, is also almost certainly the most underreported."[62] In Canada, the rate of child poverty increased by 43 percent during the 1990s, with children representing 40 percent

---

59 Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (London: Sage, 1995) at 74 [citations omitted].

60 See Ian Hacking, "The Making and Molding of Child Abuse" (1991) 17 Critical Inquiry 253 at 257.

61 Kincaid, *supra* note 16 at 160.

62 *Ibid.*

of food bank users (256,406).[63] By 2001, 1,071,000 Canadian children, or almost one child in six, lived in poverty.[64] Commenting on some of these statistics, Lise Gotell has condemned as counterproductive the treatment of legislative attacks on child pornography as a panacea for complex child welfare issues: "[d]efining child pornography as an ultimate evil induces a tunnel vision in which real threats to the welfare of children, from poverty and disintegrating social programmes to the complexities and pervasiveness of child sexual abuse, are obscured."[65] Taking Gottell's argument a step further, Kincaid bluntly concludes that "[w]e fix our eyes on sexual abuse, a comparatively minor problem, because it pleases us to talk about it."[66] If this is so, it represents a tragically ironic consequence of an effort supposedly designed with the best interests of children in mind.

Similarly, Bruce Ryder has commented on the relative paucity of attention given by Canadian legislators to the socio-economic conditions that might give rise to the production of child pornography itself:

> [T]he Canadian government's commitment to eradicating the range of socio-economic conditions identified . . . . as con-tributors to the production of child pornography is as limited as its approach to the politics of criminalizing child pornography is vigorous (vigorous at least at the symbolic level).[67]

These socio-economic factors, derived from the *Optional Protocol on the sale of children, child prostitution, and child pornography*,[68] include poverty, economic disparities, gender discrimination,

---

63 Campaign 2000, "Family Security in Insecure Times: Tackling Canada's Social Deficit" (2001), online: <http://www.campaign 2000.ca/rc/01bulletin/01bull.html>.

64 *Ibid.*

65 "Inverting Image and Reality: *R. v. Sharpe* and the Moral Panic Around Child Pornography" (2001/2002) 12:1 Constitutional Forum constitutionnel 9 at 22.

66 Kincaid, *supra* note 16 at 160

67 Ryder, *supra* note 3 at 114.

68 *Optional Protocol on the sale of children, child prostitution, and child pornography*, G.A. Res. 54/263, U.N. GAOR, U.N. Doc. A/Res/54/263 (2000), 54th sess., Annex II.

dysfunctional families, and lack of education. The way in which legislators have geared child pornography and child sexual abuse laws toward stifling the desires of feared "serial predators" rather than the numerous pressing structural concerns that underlie the actual production of child pornography is just another way in which child pornography law, as it is currently constituted, distracts us from far more pressing social ills involving children.

C. Infringement of Freedom of Expression

In addition to contributing to the ongoing sexualization of children and distracting us from more pressing concerns, child pornography laws seriously threaten the integrity of fundamental and constitutionally enshrined freedoms of expression. Through our collective zeal to clamp down upon and eliminate child pornography, legislatures and courts (both in Canada and the United States) have engaged in a steady expansion of the definition of child pornography as well as a reduction in the availability of defences to child pornography related charges. The ramifications of this trend on the right to free expression, which, according to the Supreme Court of Canada, "permeates all truly democratic societies and institutions,"[69] are profound and alarming.

With respect to the expansion of the definition of child pornography, I have already detailed the degree to which this phenomenon has taken place both in Canada, through the "sexual purpose" test, and the United States, through the "lascivious exhibition" standard. The following are some startling American examples of just how far this trend has gone: Blockbuster Video was charged with a violation of obscenity and child pornography statutes for renting out the Academy Award winning film *The Tin Drum*, based on a novel by Günter Grass;[70] numerous family members, including a sixty-five-year-old grandmother and respected

[69] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1336.

[70] *Oklahoma ex rel.* Macy *v. Blockbuster Videos Inc*., 27 Media L. Rep. 1248 (W.D. Okla. 1998).

photographer,[71] have been charged with making and possessing child pornography for taking pictures of children in the family in allegedly inappropriate ways;[72] professors[73] and reporters[74] attempting to do research on the phenomenon of child pornography have been charged and convicted. From this brief survey it is clear that the current expansion of the definition of child pornography in the United States has potentially stifling effects on the freedom of expression of artists, academics, the media, and members of the general public alike.

To understand fully this unsettling trend in the American context, it must be noted that in *New York v. Ferber* (1982),[75] the first U.S. Supreme Court decision treating the relationship between child pornography law and freedom of speech, the Court held that child pornography is obscene, and thus not expression protected by the First Amendment. Thus, without constitutional protection,[76] the laws regulating child pornography have been allowed to trench upon expressive freedoms almost completely unchecked, with the constant calls for tougher regulation showing no signs of abating. It is for this reason that Adler has argued that child pornography is the "new crucible of the First Amendment," replacing political dissent as the area in which "popular pressure on courts and legislatures exerts

---

71 Kate Coscarelli & Jeffery C. Mays, "Photos of Undressed Kids Get Grandmother Arrested" *Newark Star-Ledger* (5 February 2000) 1.

72 Adler, *supra* note 6 at 241.

73 See Vern Bullough, "History of Adult Human Sexual Behaviour with Children and Adolescents in Western Societies" in J. Feierman, ed., *Pedophilia: Biosocial Dimensions* (New York: Springer-Verlag, 1990) 69 at 82-85.

74 In *United States v. Matthews*, 11 F. Supp. 2d. 656 (D. Md. 1998), aff'd 209 F. 3d 338 (4th Cir. 2000) [*Matthews*], a National Public Radio reporter was found guilty of possession of child pornography in the context of legitimate research. The Court held that even "well-intended uses" of child pornography are prohibited.

75 458 U.S. 747 (1982) [*Ferber*].

76 This trend may have begun to reverse itself, with the recent U.S. Supreme Court case of *Ashcroft v. The Free Speech Coalition* 122 S Ct. 1389 (2002) [*Ashcroft*]. In this case the Court found the *Child Pornography Protection Act* (*CPPA*) to be unconstitutional to the extent that it attempted to criminalize the possession of materials in which adults merely *appeared to be minors*. The Court held that such a provision did in fact violate the First Amendment.

itself most ferociously" and where "the greatest encroachments on free expression" have become accepted and commonplace.[77]

In Canada, the trend towards stricter regulation and application of child pornography laws has also been notable. The *Criminal Code* prohibition against simple possession of child pornography (section 163.1) was originally enacted in 1993. Since that time, there have been several dubious prosecutions, similar to those in the United States, under the *Criminal Code* scheme. For example, in 1993, Canadian artist Eli Langer was charged after a show in which he displayed some paintings portraying sexual relations involving what *appeared to be* young males under the age of eighteen. Though Langer was ultimately exonerated after the trial judge found artistic merit in the painter's work,[78] the Ontario government used a forfeiture application to seize the paintings as child pornography, with the intention of destroying them.[79]

Another example of the disconcerting application of *Criminal Code* child pornography provisions occurred in February 2000, when a father of two children was arrested for making child pornography after a technician at a photo lab processed a roll of family snapshots that included pictures of the accused father's four-year-old son "goofing around" without his pyjama pants. Though the charges were ultimately dropped, the process exacted a heavy toll on the accused. His original bail conditions included a requirement that he leave the family home. Subsequent to the laying of the charges, the Children's Aid Society demanded a custody hearing and parenting courses for the man and his wife. The accused, a recent immigrant, spent his entire savings on legal costs.[80]

---

77 Amy Adler, "Inverting the First Amendment" (2001) 149 Univ. of Pennsylvania Law Rev. 921 at 921-22.

78 *Ontario (Attorney General)* v. *Langer* (1995), 123 D.L.R. (4th) 289 (Ont. Gen. Div.).

79 See M. O'Malley & O. Wood, "The Supreme Court and Child Porn: Saving Children or Thought Control?" online: CBC News Homepage <http://www.cbc.ca/news/indepth/background/sharpe_pornography.html>.

80 "The Supreme Court and Child Porn", online: CBC News Online <www.cbc.ca/news/background/childporn/>.

The constitutionality of section 163.1 of the *Criminal Code* was called into question in *R. v. Sharpe* (2001),[81] which was heard before the Supreme Court of Canada. In *Sharpe*, the police seized writings composed by the accused, including a collection of violent stories entitled "Sam Paloc's Boyabuse – Flogging, Fun and Fortitude: A Collection of Kiddiekink Classics."[82] In addition, the police seized a collection of books, manuscripts, stories and photographs that the Crown alleged to be child pornography. The Supreme Court, in a judgment written by McLachlin C.J.C., held that section 163.1 of the *Criminal Code* violated freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*.[83] However, subject to two "read-in" limitations on the definition of child pornography, the violation of freedom of expression stemming from the impugned section was found to represent a reasonable limit in a free and democratic society under section 1 of the *Charter*.[84] The majority of the Court held that, if left intact, the definition of child pornography in section 163.1 would have struck an inappropriate balance between the protection of children from sexual abuse and protection of freedom of expression. Thus, McLachlin C.J.C. held that the definition of "child pornography" should be read as though it contained an exception for: (1) any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and, (2) any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use.[85]

In *Sharpe*, the Supreme Court attempted to interpret and define the constitutional boundaries of the various elements of the criminal child pornography possession provisions. In doing so, the Court was

---

81 *Sharpe, supra* note 34.

82 *Ibid.* at 62.

83 *Ibid.* at 72-73; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

84 *Ibid.* at 118-19.

85 *Ibid.*

attempting to *limit* the operation of the provisions, an approach that can be contrasted with the aggressive expansionism employed by many American courts.[86] For example, the majority in *Sharpe* attempted to elucidate the requirement under section 163.1(1)(a)(ii) that materials have, as a "dominant characteristic," the depiction of a sexual organ or anal region "for a sexual purpose." McLachlin C.J.C. held that "[f]amily photos of naked children, viewed objectively, generally do not."[87] The placing of such photography in "an album of sexual photos and adding a sexual caption could change its meaning,"[88] however. In attempting to prevent the arrest of parents and other family members for taking innocent photographs, the Court held that "[a]bsent evidence indicating a dominant prurient purpose, a photo of a child in the bath will not be caught."[89] Thus, it would seem that despite upholding the extremely dubious "sexual purpose" test unaltered, the Court was attempting to restrict cautiously, rather than enlarge, the definition of "child pornography" to protect the right to free expression.

With respect to advocating or counselling sexual activity with a person under the age of eighteen years under section 163.1(1)(b), the Court held that "the prohibition is against material that, viewed objectively, sends the message that sex with children can and should be pursued."[90] McLachlin C.J.C. made sure that literary works "aimed at description and exploration of various aspects of life that *incidentally* touch on illegal acts with children"[91] were exempt from the operation of the section. Literature such as Nabokov's *Lolita* and Plato's *Symposium* were offered by the Court as examples of such materials that did not "advocate or counsel" sexual activity with children. In Sharpe's trial following the Supreme Court ruling, Shaw J. found that Sharpe's "Kiddiekink" stories were morally repugnant, but concluded that they did not counsel the reader to engage in such

86 See for example *Knox*, *supra* note 11, or *Dost*, *supra* note 13.
87 *Sharpe*, *supra* note 34 at 82.
88 *Ibid.*
89 *Ibid.*
90 *Ibid.* at 83.
91 *Ibid.* [emphasis added].

proscribed acts.[92] Thus, Sharpe was found not guilty with respect to his composition, possession and distribution of the fictional "Kiddiekink" written materials.[93]

The majority of the Supreme Court in *Sharpe* also tried to limit the operation of section 163.1 by upholding the defences available under the section at that time. When *Sharpe* was decided, the available defences under section 163.1 included educational, scientific, or medical purposes, the nebulous "public good" defence, and, most controversially, the defence of "artistic merit." McLachlin C.J.C. held that the defence of artistic merit "must be construed broadly"[94] so that "a person who produces art *of any kind* is protected, however crude or immature the result of the effort in the eyes of the objective beholder."[95] The defences of educational, medical or scientific purpose as well as the defence of public good were also upheld and construed broadly by the Court.

The general reaction to the Supreme Court ruling was mixed. Child advocates were pleased that section 163.1 was not struck down in its entirety as it had been by the trial court and the B.C. Court of Appeal. However, there was some concern over the two exceptions that were read-in by the Court. Some argued that they created a "loophole for pedophiles."[96] REAL Women of Canada, an intervener in the case, argued that "[i]n their attempt to strike a balance, the Supreme Court justices have overreached. They naively trust that

---

92 *R.* v. *Sharpe* (2002), 91 C.R.R. (2d) 235 (B.C.S.C.) at para. 37 [*Sharpe* B.C.S.C.].

93 *Ibid.* Shaw J. further held that if he was incorrect about whether the written materials counselled the reader to commit a child sexual offence, the material in question had "artistic merit" at paras. 66-68. This conclusion was based on the evidence of several expert witnesses, all of whom testified that a much more violent and offensive text by the Marquis de Sade had "artistic merit." Furthermore, the materials had "artistic merit" because they used literary devices common to literature.

94 *Sharpe*, *supra* note 34 at 86.

95 *Ibid.* at 87 [emphasis added].

96 "The Child Pornography Decision: Where Do We Go from Here?" citing Mark Hecht, online: Focus on the Family Homepage <http://www.fotf.ca/family facts/analysis/010901.html>.

child pornography created by a pedophile will remain for private use. . . . They obviously live in a world far removed from the realities of life."[97] However, these criticisms were mild when com-pared to the maelstrom that followed Mr. Sharpe's acquittal on charges relating to his "Kiddiekink" stories. Shaw J.'s finding that such writings had "artistic merit" as defined by the *Criminal Code* and interpreted by the Supreme Court of Canada was the main flash point.[98] Critics feared that the ruling would:

> [s]erve to encourage pedophiles to continue to write and distribute material that encourages the exploitation of children. In this latter regard, it is important to note that once this material – no matter how squalid and disgusting – is found to be "artistic," there will be no restrictions on its distribution.[99]

Spurred on by such concerns, the federal government introduced Bill C-2[100] into Parliament in 2004.

Bill C-2, which was passed by Parliament in July of 2005 (though had not yet come into force as of this writing), stands to reverse the ruling of the Supreme Court of Canada in *Sharpe* in several notable ways. First, the definition of child pornography would be extended to the possession of "any written material the dominant characteristic of which is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence."[101] That is, if and when Bill C-2 comes into force, even where an individual composes materials for her own personal use (in a diary, for example), without any intention of distribution, possession of such materials would violate the new section 163.1.

---

97 *Ibid*., citing REAL Women of Canada.

98 See M. Hume, "Sharpe's Porn Has 'Merit': Court" *National Post* (27 March 2002) A1; J. Armstrong, "B.C. Court Finds Artistic Merit in Sharpe's Child-Sex Stories" *Globe and Mail* (27 March, 2002) A1.

99 E. Schuster, "'Artistic Merit' Trumps Child Protection: B.C. Judge Protects Child Pornography in Some Circumstances," citing Gwen Landolt of REAL Women Canada, online: The Interim Homepage <http://www.lifesite.net/interim/2002/may/02artisticmerit.html>.

100 Bill C-2, *supra* note 24.

101 *Ibid*. s. 7(2).

This prohibition functionally criminalizes unpopular or unpalatable thoughts, and represents a troublesome development.[102] In this regard, the words of U.S. Supreme Court Justice Oliver Wendell Holmes are apposite: "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate."[103] The enactment of this measure would also explicitly override one of the two read-in exceptions to the law, despite the Supreme Court's holding to the effect that the criminalization of personal writings trench "heavily on freedom of expression while adding little to the protection the law provides children."

A second aspect of Bill C-2 that merits comment is the reformulation of the defences available to exculpate the *prima facie* commission of child pornography offences. In particular, under the new section 163.1(6):

> (6) No person shall be convicted of an offence under this section if the act that is alleged to constitute the offence
>
> (a) has a legitimate purpose related to the administration of justice or to science, medicine, education or art; and
>
> (b) does not pose an undue risk of harm to persons under the age of eighteen years.[104]

Though the language of this defence is marginally less disconcerting than previous incarnations proposed in Parliament,[105]

---

[102] *Sharpe*, *supra* note 34 at 109.

[103] *United States v. Schwimmer*, 279 US 644 (1929) at 654-55 (cited with approval by McLachlin J. in *R. v. Zundel*, [1992] 2 S.C.R. 731 at 753).

[104] Bill C-2, *supra* note 24.

[105] For example, Bill C-20, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 2nd Session, 37th Parliament, first reading December 5, 2002 [Bill C-20], would have eliminated the defences of artistic merit, educational, medical, or scientific purpose and left only the vague defence of public good as the only exculpatory avenue once the possession of child pornography under section

there are still several notable deficiencies with the current version. First, I would argue that the awkward phrase regarding a "*legitimate* purpose related to . . . (emphasis added)" actually has no independent objective meaning for the courts to apply. Indeed, the term "legitimate" has been defined as, *inter alia*, "being in compliance with the law."[106] As a result, the new section 163.1(6) is tainted by a circularity that unwisely delegates to the courts the uncomfortable task of defining "legitimacy," without any reference to any independent yardstick. Such a task is daunting indeed, given the diversity and breadth of the contexts at issue.[107] This approach is likely to result in an *ad hoc* and unprincipled approach, leaving citizens in the dark as to the permissible scope of those activities that somehow happen to touch upon "child pornography," as it is currently (i.e., broadly) defined. Such uncertainty may indeed cause individuals involved in the enumerated pursuits to steer clear of any activity that might not fall into the nebulous definition of

163.1 was proven. Moreover, in order to ensure that no scientist, psychiatrist, journalist, or professor could ever legitimately study child pornography directly, the Bill stipulated (at s. 7(2)) that "the motives of an accused are irrelevant" with respect to the possession or viewing of proscribed materials.

[106] See *Webster's Ninth New Collegiate Dictionary*, under "legitimate."

[107] Should Bill C-2 actually come into force and courts are indeed called upon to define legitimacy in the context of child pornography defences, I would recommend that legitimacy be assumed in all activities falling into the areas enumerated by s. 163.1 (*i.e.*, administration of justice, science, medicine, education, and art), save where actual physical or psychological harm to children can be reasonably assumed or proven. Such an interpretation would minimize the extent to which courts are called upon to engage in inappropriate policy-making and would provide what is perhaps the only rational yardstick by which "legitimacy" could be defined. Any act that results in actual harm to actual children, no matter what the forum, is indefensible and ought to be criminalized. Defining legitimacy in accordance with actual harm to children would also provide a modicum of certainty to those engaged in activities in the enumerated areas.

I emphasize that even if courts were to follow my recommended interpretation of legitimacy, such a state of affairs would still be grossly inadequate. This is so as even if legitimacy is attributed to all those activities in the enumerated areas that do not involve physical or psychological harm to actual children, there are likely to be serious problems with *proving* that a given activity is *not* going to somehow cause harm to children. Also, I would argue that the scope of the enumerated areas is itself too narrow and ought to be expanded. Both of these issues are discussed in greater detail below.

"legitimate." Such caution would be more than understandable given the grave stigma associated with a criminal conviction involving child pornography. Such a "chill" on otherwise laudable and socially valuable endeavours renders the defence ill-advised, at best. The uncertain scope of the available defences may also render the provisions constitutionally void for vagueness.[108]

A second and related deficiency with the new "legitimate purpose" defence is its rather narrow scope of application. There are a number of apparently legitimate and constitutionally protected activities that are excluded from the list of approved areas. One glaring example is the area of journalism. Indeed, *Globe and Mail* reporter Jan Wong, in her rather graphic description of her trip into child pornography "cyberhell," taken for the benefit of readers following the Holly Jones murder case,[109] would appear to have criminally "accessed" child pornography in contravention of section 163.1 in pursuit of an activity that did not have a "legitimate purpose." Such a result would be similar to that which currently exists in the United States, where, as noted above, journalists have been held criminally liable for conducting legitimate research on child pornography.[110]

Though Wong's "investigation" and subsequent report may have been gratuitous and sensationalist, it ought to have been protected under the *Charter*, section 2(b) of which expressly protects "freedom

[108] See, for example, *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1152 *per* Lamer J. (as he then was): "It is essential in a free and democratic society that citizens are able, as far as possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards." See also *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *R. v. Zundel*, (1987), 58 O.R. (2d) 129 (C.A.); *Luscher v. Deputy Minister, Revenue Canada, Customs and Excise*, [1985] 1 F.C. 85 (C.A.), at 89-90; and D. Stuart, "The Canadian Void for Vagueness Doctrine Arrives with No Teeth" (1990), 77 C.R. (3d) 101.

[109] *Supra* note 30.

[110] See, *e.g.*, *Matthews*, *supra* note 74.

of the press." In this regard, the recent dictum of Lord Birkenhead, of the UK House of Lords is apt:

> Without freedom of expression by the media, freedom of expression would be a hollow concept. The interests of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment. In this regard it should be kept in mind that one of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally.[111]

Similarly, the European Court of Human Rights has emphasized, as a matter of human rights law, the importance of diligently protecting freedom of the press:

> [F]reedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. Whilst the press must not overstep the bounds set, inter alia, in the interest of "the protection of the reputation or rights of others," it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog."[112]

The right of the public to receive the information gathered by the press is also protected in Canada, pursuant to section 2(b) of the *Charter*.[113] Given the extent of widespread misinformation at play

---

[111] *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609 (H.L.), cited with approval in *Goddard v. Day* [2000] A.J. No. 1558 (Q.B.).

[112] *Jersild v. Denmark* (1994), 298 Eur. Ct. H.R. (Ser. A) 23 at para. 31. See also *Observer and Guardian v. the United* (1991), 216 Eur. Ct. H.R. (Ser. A) 20 at paras. 29-30.

[113] The Constitution protects the right to receive expressive material as much as it does the right to create it. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at para. 41; and *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1339-40. Section 2(b) "protects listeners as well as speakers." *Ford v. Québec (Attorney General)*, [1988] 2 S.C.R. 712 at 767.

in the case of child pornography and pedophilia in general (discussed above), it is important that the press be able to investigate and report to the public on the *actual* character, incidence, and effects of such phenomena. As a result, the failure of the "legitimate purpose" defence to include a reference to journalism represents another notable shortcoming.

Finally, the new defences in section 163.1 of the *Criminal Code* ought to be criticized given that any individual charged with a child pornography offence must prove, in order to exculpate herself, that her impugned conduct "does not pose an undue risk of harm to persons under the age of eighteen years." This requirement is both remarkably vague and impossible to actually meet. With regard to vagueness, the requirement immediately begs a number of questions. What sorts of harms are at issue? Physical harm? Psychological, attitudinal or perhaps moral harm? How is the "risk" of harm to be calculated? It seems unlikely that any objectively verifiable data could be proffered to compute the risk of harm to children posed by many acts involving child pornography.[114] Even if such a calculation were possible, how much risk of harm must be present in order to be considered "undue"? Again, the courts are left in the unenviable position of answering these problematic policy questions, the determination of which is a task far more suited to the legislature.[115]

All of the above indicates that the passage of Bill C-2 is but another unfortunate chapter in the ongoing saga that has been Parliament's well-intentioned but rather inept attempt at eradicating

[114] For example, it seems an impossible task to determine, with any semblance of exactitude, the risk posed to minors by the act of "accessing" images of child pornography on one's computer. The risk in this case would appear to be that the viewer will be morally or psychologically corrupted into either (a) actually molesting children or (b) seeking to view even *more* child pornography, which would create a indefinable demand for a product that involved harm to children in its production. It would seem that neither possibility can be quantified with any degree of certainty. This question is discussed in greater detail below.

[115] See, generally, *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 at para. 83; and *South Westman Regional Health Authority Inc. v. Souris (Town)*, (2002), 163 Man. R. (2d) 294 (C.A.) at paras. 25-26.

child pornography from the Canadian landscape. Regardless of its underlying intentions, it is clear that Parliament's vision has become clouded by the contemporary cultural sandstorm surrounding children and sexuality. As a result, its legislation threatens to grossly curtail a number of vital social activities (including scientific research into the phenomena of child pornography and pedophilia) as well as fundamental freedoms of expression.

The importance of freedom of expression as a general matter was eloquently articulated by McLachlin C.J.C. in *Sharpe*:

> Among the most fundamental rights possessed by Canadians is freedom of expression. It makes possible our liberty, our creativity and our democracy. It does this by protecting not only "good" and popular expression, but also unpopular or even offensive expression. The right to freedom of expression rests on the conviction that the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and images. If we do not like an idea or an image, we are free to argue against it or simply turn away. But, absent some constitutionally adequate justification, we cannot forbid a person from expressing it.[116]

If our constitutionally enshrined freedoms of expression are to have any real meaning, then a true balance must be sought between such freedoms and the *actual* protection of children. In the next section of the paper, I explore several ways in which this might be accomplished.

III. MITIGATING THE HARMS OF CHILD PORNOGRAPHY LAW

In "The Harms of Child Pornography Law,"[117] Ryder identifies, and attempts to rectify, what he terms the "incoherence" of Canadian child pornography law. Ryder argues that the current scheme is incoherent to the extent that it uniformly regulates three fundamentally different forms of expression.[118] These three forms of

[116] *Sharpe*, *supra* note 34 at 70.
[117] Ryder, *supra* note 3 at 104.
[118] *Ibid.* at 109.

expression are images that involved harm in their production, materials that can be labelled as hate propaganda and "harmless" sexual representations. Professor Ryder persuasively argues that these vastly disparate forms of expression demand disparate legal responses. As a result, he properly recommends that criminal laws dealing with child pornography be revamped with a view to proscribing only those materials that involved actual harm to children in their production, or that advocate the harming of children.

In addition to rationalizing the applicable *Criminal Code* provisions and reasonably protecting freedoms of expression, Ryder's recommendations would, in my view, have the salutary effect of addressing some of the concerns raised by Adler and Kincaid. In effect, these proposals may serve to mitigate the degree to which the prosecution of child pornography offences serves to perpetuate the sexual objectification of children. In addition, by reducing the emphasis placed by the law on the prosecution of child pornography in all its *theoretical* forms, it is possible that more attention may be given to other, often-ignored child welfare issues. As I discuss Ryder's recommendations, I will point out some of the ways in which the harms I have detailed would be mitigated.

A. Materials Involving Harm in Production

The first form of expressive materials under the current ambit of section 163.1 considered by Ryder are materials that demonstrably harmed children in their production. The restriction on such materials is at the heart of Canadian child pornography laws. In the 1984 *Report of the Committee on Sexual Offences Against Children and Youth* (the "*Badgley Report*"),[119] the committee found that "in reference to child pornography, it is the circumstances of its production, namely, the sexual exploitation of young persons, which

[119] Committee on Sexual Offences Against Children and Youth, *Sexual Offences Against Children: Badgley Report*, vol. 1 (Ottawa: Supply and Services Canada, 1984) at 99-103.

is a fundamental basis for proscription."[120] Similarly, in *Sharpe*, the Supreme Court found the prevention of harm to actual children to be the purpose underlying the *Criminal Code* child pornography provisions.[121] Treating the prohibitions against counselling/ advocating and the possession of harmless sexual representations under the same section as materials involving harm to children is confusing and irrational. The availability of the defence of artistic merit (or, should Bill C-2 come into force, the defence of a "legitimate purpose") in cases where the expression in question involved proven harm to children in its production is most problematic. Ryder rightfully characterizes this element of the current scheme as "a blinding stupidity" and an "abominable feature of the current law."[122] Another consequence of grouping these disparate forms of expression together is that the producers and consumers of materials that did not involve any harm to children in their production are falsely branded as "child pornographers," "sex offenders," and "pedophiles."

Ryder recommends that the prohibition against the possession of materials that involved harm in their production remain in place.[123] This recommendation is prudent, subject to some strict parameters on the definition of "harm." One of the major difficulties with child pornography law elucidated by Adler is the way in which courts are required to inspect impugned materials, especially visual images, for hidden sexual content. In my estimation, prosecutions targeting materials that caused true abuse in their production entail the least possible degree of "pedophilic gazing."[124] Generally speaking, no

[120] *Ibid.* at 101.

[121] *Sharpe*, *supra* note 34 at 73.

[122] Ryder, *supra* note 3 at 114.

[123] *Ibid.*

[124] Admittedly, even in cases where courts are not required to uncover hidden sexual content in otherwise non-sexual representations of children (such as cases where the sexual acts involving children are explicit), the perpetuation of the notion that children are sexual objects is promulgated. However, the restriction of the definition of child pornography to such cases would represent a justifiable measure, as the incidental sexualization of children through the court proceedings would be in a justifiable effort to reduce serious harm to actual children.

subjective and detailed exploration of impugned materials is needed in the case of representations depicting actual sexual abuse, such as forced intercourse with a child. The sexual and, more importantly, abusive content of such representations is patent from any reasonable perspective. By contrast, materials depicting minors who are engaged in acts that are not patently abusive, such as children opening Christmas presents or taking baths, involve a high degree of judicial inspection from the vantage point of the pedophile. Adler notes that "once we accept that prohibited depictions of 'sexual conduct' by children can include not only explicit sex acts, but also the more subjective notion of 'lascivious exhibitions,'"[125] we put in motion the sexualization of children through the taking on of the pedophilic gaze. Thus, I would recommend that the criminal definition of child pornography be limited to materials wherein children are engaged in "explicit sex acts." Any broader definition of "harm" could open the floodgates to the prohibition of over-inclusive categories of expression.

Though the nebulous "lascivious exhibition" standard is not in place in Canada, as I have shown, the "sexual purpose" test (from section 163.1(1)(a)(ii) of the *Criminal Code*) requires a similarly dubious examination of materials from the perspective of a pedophile. Under the current regime, "innocently taken" family photographs incidentally displaying the genitalia of children can be characterized by courts as having a seedy "sexual purpose."[126] Asking whether particular photographs or videos of children's genitalia or anal regions were taken or collected for a sexual purpose strays too far from the pressing issue of harm and becomes involved in the prurient and destructive realm of judicial pedophilic gazing. For this reason, the sexual purpose test must be abandoned.

The abandonment of the sexual purpose test, and a focus on actual harm to actual children, would be accomplished through the

[125] Adler, *supra* note 6 at 261.
[126] See *Nedelec*, *supra* note 20.

elimination of section 163.1(1)(a)(ii)[127] in its entirety. If this were done, the only visual materials that would be proscribed under section 163.1(1)(a) would be those portraying "a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity."[128] In order to keep the focus of the law on harm to actual children, this pared-down definition of child pornography should be amended to cover only depictions of persons who are underage, not those who are merely depicted as being underage.

B. The Hateful Advocacy of Harmful Acts

With respect to the prohibition against disseminating materials that counsel or advocate the commission of sexual crimes against minors, Ryder recommends that it be removed from the operation of the child pornography provisions and absorbed into the existing criminal hate speech regime (under section 319 of the *Criminal Code*).[129] Section 319 of the *Criminal Code* states that "every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace" is guilty of an offence. Children can clearly be characterized as an identifiable group under this section. The adoption of this measure would have several salutary effects. First, it would move the law's emphasis away from sexuality and youth and towards the true target of the prohibition: "the hateful advocacy of harmful acts."[130] In this regard, this reform would have the valuable effect of decreasing the degree to which courts are forced (or tempted) to employ discourse that unnecessarily sexualizes children. If Ryder's recommendation were adopted, judicial attention would be focused not on hidden prurient qualities inherent in particular impugned materials, but on the express advocacy of harm, sexual or otherwise, to children. This reform

[127] The subsection prohibits the possession of materials "the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years."

[128] *Criminal Code*, *supra* note 18.

[129] Ryder, *supra* note 3 at 115.

[130] *Ibid.* at 116.

would remind the courts that the true purpose underlying all child pornography laws is the prevention of actual harm to actual children, and not the detailed analysis of all materials that might hazily "send the message that sex with children can and should be pursued."[131] In my estimation, for all the reasons set forth by Adler, Kincaid, and others, this reminder is sorely needed.

C. "Harmless" Representations

The final category of expressive materials caught by the current child pornography prohibition is material involving no harm in its production. These materials include imaginary visual representations (paintings, cartoons, sculptures and the like). In addition, the possession of written materials describing unlawful sexual relations involving children also falls into the category of "harmless" expressive representations, the production and possession of which should not be prohibited under the *Criminal Code*.[132]

In *Sharpe*, the Court held that the possession of child pornography, in general, is harmful because "(1) child pornography promotes cognitive distortions; (2) it fuels fantasies that incite offenders; (3) prohibiting its possession assists law enforcement efforts to reduce the production, distribution and use that result in direct harm to children; (4) it is used for grooming and seducing victims; and (5) some child pornography is produced using real children."[133] The encouragement of "cognitive distortion" and the fuelling of dangerous fantasies are the only two elements from this list that would apply to impugned materials that neither involve harm in production nor constitute hate speech. McLachlin C.J.C. explains the difficult and questionable concept of "cognitive distortion" as follows: "child pornography may change possessors' attitudes in ways that makes them more likely to sexually abuse children. People may come to see sexual relations with children as normal and even beneficial. *Moral inhibitions* may be weakened.

[131] *Sharpe*, *supra* note 34 at 83-84.
[132] Ryder, *supra* note 3 at 124-25.
[133] *Sharpe*, *supra* note 34 at 96-97.

People who would not otherwise abuse children may consequently do so."[134] It should be noted that the trial judge in *Sharpe* rejected both the causation of cognitive distortions and the fuelling of dangerous fantasies as appropriate bases for banning child pornography. He did so due to the complete absence of evidence that might substantiate the existence of such phenomena. However, the majority of the Supreme Court in *Sharpe* held that Parliament was not required to offer scientific proof of the benefits of banning child pornography. Rather, in order to justify the prohibition, it need only demonstrate a "reasoned apprehension of harm." Applying this test,[135] the majority in *Sharpe* approved of both the cognitive distortion and fantasy fuelling justifications for banning the possession of child pornography.[136]

The Court's position in this regard has been properly met with significant criticism. For example, Robert Martin argues that "[i]t is disturbing that the majority did not require concrete evidence to support any of these hypotheses. The trial judge was less confident of his own omniscience and demanded proof of the actual harm caused by child pornography."[137] Both the cognitive distortion and fantasy fuelling justifications represent anachronistic notions of "moral corruption." The moral corruption argument has its roots in obscenity law dating back to the mid-nineteenth century.[138] Ryder properly rejects the adoption of this sort of reasoning into child pornography law, arguing that:

> [T]he evidence simply does not support the 'causal hypothesis' that underpins the moral corruption style of argument. Its enduring appeal probably lies, not in its rationality, but in its promise of simple solutions to disturbing and complex social problems.[139]

---

134 *Ibid*. [emphasis added].
135 *Ibid*. at para. 85.
136 *Ibid*. at paras. 88-89.
137 "Case Comment: *R.* v. *Sharpe*" (2001) 39 Alberta Law Rev. 585 at 588.
138 (1868), 3 L.R. Q.B. 360 at 371.
139 Ryder, *supra* note 3 at 121.

Similarly, in *Ashcroft*, the U.S. Supreme Court rejected the notion that materials not involving direct harm to children could be proscribed without violating the First Amendment. Justice Kennedy held that "while the Government asserts that the images can lead to actual instances of child abuse, *the causal link is contingent and indirect*. The harm does not necessarily flow from the speech, but depends upon some unquantified potential for subsequent criminal acts."[140] The majority of the Court in *Ashcroft* also held:

> [T]he Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.[141]

Ultimately, the restriction on expression that does not involve harm to children in its production is (among the currently prohibited forms of child pornography) the most injurious to freedom of speech, and as with all child pornography prohibitions, it inherently entails a degree of harmful sexualization of children. At the same time, as we have seen, the evidence supporting the restriction is tenuous at best.

In this section I have recommended, subject to certain caveats, that Ryder's parsing of child pornography law into three distinct categories be adopted as a measure both to protect fundamental freedoms of expression and to lessen the degree to which courts are required to take on the pernicious "pedophilic gaze." More specifically, I propose that, subject to a narrow reading of the term "harm," the production and possession of materials involving harm in their production continue to be prohibited and subject to serious sanction. Materials advocating the sexual abuse of children should not be treated under the child pornography provisions of the *Criminal Code*, but should be transplanted into the criminal hate propaganda regime. Finally, materials that do not involve any harm to children in their creation should be removed altogether from the operation of the *Criminal Code* child pornography provisions.

---

[140] *Ashcroft, supra* note 67 at 1402 [citation omitted] [emphasis added].

[141] *Ibid.* at 1403.

IV. CONCLUSION

As long as criminal courts continue to prosecute individuals for possessing child pornography, at least some of the harms to society detailed by Adler and Kincaid stemming from such prosecutions will continue to operate. However, through the recommendations I have set forth, I have sought to minimize the extent of those harms as much as possible. With regard to possession offences, I make these proposals based on the assumption that the benefits of criminalizing the possession of child pornography at all outweigh its associated costs. The most reasonable rationale underlying the criminalization of the possession of child pornography is that consumers of such materials create a demand for a product that involves harm to actual children.[142] There is no way to be certain with any degree of scientific exactitude if the benefits stemming from this indirect attack on the prevention of sexual abuse of children outweigh the intangible harm of publicly sexualizing children through criminal court proceedings. However, I would recommend against the complete abolition of the child pornography prohibitions based on the mere suspicion that the harms stemming from its prosecution outweigh the harms to children that could be averted through the maintenance of the prohibition.

I believe that the most prudent course of action is to recognize the degree to which the judicial process further drenches our society in its rhetoric of sexualized children, and to minimize the degree to which it continues to do so. Furthermore, it must be recognized that we are a society whose ferocious and unrelenting condemnation of child sexual abuse and child pornography is simultaneously reasonable and hysterical. We must be vigilant to curtail the degree to which our hysteria is amplified through the law, making victims of our children and our fundamental freedoms. It is only through this strict vigilance that our child pornography laws (and our children) will survive what may indeed be the legal "crucible" of our time.

[142] Ryder, *supra* note 3 at 109.