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The Harms of Child Pornography Law

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THE HARMS OF CHILD PORNOGRAPHY LAW

BRUCE RYDER[†]

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I. THE IMPORTANCE OF CRITICALLY EVALUATING CHILD PORNOGRAPHY LAW

The definition of child pornography in Canada's *Criminal Code*¹ is remarkably expansive. In amendments enacted in 2002,² and further

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

amendments currently before the House of Commons,³ the government has signalled its commitment to further expansion. Our legislators do not seem capable of resisting the argument that the broader the criminal prohibitions on the creation, dissemination and use of child pornography, the better children will be protected from the risks of sexual abuse.

Child sexual abuse is a topic that evokes visceral disgust in all reasonable people. Demands for the enactment of child pornography laws followed shortly after the “discovery” of child sexual abuse, largely as a result of feminist efforts, as a disturbingly widespread social phenomenon in the 1970s. The difficulty of preventing acts of sexual abuse and punishing the perpetrators has generated a great deal of anger and anxiety. It is perhaps understandable that, as a result, much of this anger and anxiety gets directed at representations of child sexual abuse, and that the difference between *representations* of harmful acts and *actual* harmful acts is often lost in public discourse. As Lise Gotell has noted, discussions of child pornography are pervaded by

...a clear slippage from image to reality. Child pornography becomes constituted as the graphic public face of a practice that has been shrouded by secrecy and privacy. As image becomes reality, however, so too is reality contained within, distorted and simplified by representation.⁴

Noble and urgent motivations do not necessarily generate good law or good public policy. Our legislators have yielded too quickly to the temptation to adopt apparently simple solutions to a complex, disturbing and systemic social problem. In doing so, they have pushed back our traditional understandings of the appropriate limits on the use of the criminal law to suppress expressive material.

Amy Adler has argued in the U.S. context that

Child pornography law is the new crucible of the First Amendment. It tests the limits of modern free speech law the way political dissent did in the times of Holmes and Brandeis... . Therefore, the law of child pornography is as important

² *An Act to amend the Criminal Code and to amend other Acts*, S.C. 2002, c. 13, s. 5.

³ Bill C-20, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 2nd Sess., 37th Parl., cl. 7 [Bill C-20] (first reading 5 December 2002).

⁴ Lise Gotell, “Inverting Image and Reality: *R. v. Sharpe* and the Moral Panic Around Child Pornography” (2001/2002) 12 *Const. Forum Const.* 9 at 14. See also Kegan Doyle and Dany Lacombe, “Scapegoat in Risk Society: The Case of Pedophile/Child Pornographer Robin Sharpe” (2000) 20 *Studies in Law, Politics and Society* 183.

for free speech scholars to scrutinize today as was the law of subversive advocacy earlier this century.⁵

Adler's concern is even more apt in Canada where the child pornography offence is broader and the constitutional constraints placed on the expansion of child pornography law are thus far much less rigorous than they are in the United States.⁶ The strength of our commitment to freedom of expression is revealed most clearly by our response to the kinds of speech that are considered dangerously unthinkable in any particular era. Just as communist speech was to the 1920s and 1930s,⁷ child pornography and anti-terrorism laws are to the first decade of the new millennium. They are two contemporary developments that deserve heightened critical attention from civil libertarians.

The aim of this essay is to challenge the view that the expansion of child pornography offences can lead only to a decrease in harm to children and to society. Canadian child pornography law, I will suggest, is incoherent. It is a mix of progressive and regressive developments, crying out for fundamental reconsideration.

In some respects, child pornography law makes a valuable contribution to the prevention of child sexual abuse by targeting the production, dissemination and use of material – “real” child pornography – that involved harm in production. It also improves the law by criminalizing written and visual material that advocates the commission of sexual crimes against children and youth. The *Criminal Code* did not previously prohibit this kind of hate propaganda. These are two important advances; yet as we shall see, even in regard to “real” child pornography and hate propaganda, the law is badly compromised.

In other respects, the law causes harm to society by suppressing thoughts and expression concerning child and youth sexuality that involved no harm in production, fall short of advocating harm and that have at best a tenuous connection to the commission of harmful acts. The child pornography offence criminalizes a range of creative expression in the absence of any persuasive evidence of a risk of harm. While the Supreme Court of Canada made a

⁵ Amy Adler, “Inverting the First Amendment” (2001) 149 U. Pa. L. Rev. 921 at 921-22. See also Amy Adler, “The Perverse Law of Child Pornography” (2001) 101 Colum. L. Rev. 209.

⁶ See Part III.C.2., *infra* (text accompanying notes 64-80).

⁷ See Frank R. Scott, “The Trial of the Toronto Communists” in *Essays on the Constitution: Aspects of Canadian law and politics* (Toronto: University of Toronto Press, 1977) 49 at 49: “The trial and conviction of the eight Toronto Communists [in 1931] caused many Canadians to ask themselves for the first time just what our British traditions of freedom of speech and association really mean, if anything.”

contribution to limiting these aspects of the law in the *Sharpe*⁸ ruling, a more fundamental reconsideration of the design and scope of the child pornography offence is required.

II. THE BREADTH AND INCOHERENCE OF CANADA'S CHILD PORNOGRAPHY LAW

The problems begin with the broad definition of child pornography employed in the *Criminal Code*. The definition, set out in s. 163.1(1), reads as follows:

163.1 (1) In this section, "child pornography" means

- (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.

Note that written texts are included only if they advocate or counsel the commission of sexual offences against children or youth. If Bill C-20 is passed in its current form, the definition will be extended to cover more written material, including fictional representations of child and youth sexuality.⁹ The Bill proposes to add a new subsection to the definition of child pornography in s. 163.1(1):

⁸ *R. v. Sharpe*, [2001] 1 S.C.R. 45 [*Sharpe* (2001)]. The Court held that the offence of simple possession of child pornography in s. 163.1(4) of the Code is, in most of its applications, a reasonable limit on the freedoms of thought, opinion, belief and expression set out in s. 2(b) of the *Charter of Rights and Freedoms*. The majority found that two kinds of applications of the law were unconstitutional. They chose to limit the scope of the provision by employing the "reading in" remedy. The majority added two exceptions to the law for materials possessed by the accused exclusively for personal use: 1) written or visual representations created by the accused; and 2) visual recordings of lawful activity created by or depicting the accused. For an extensive critique of the Court's ruling, See Stan Persky and John Dixon, *On Kiddie Porn: Sexual Representation, Free Speech and the Robin Sharpe Case* (Vancouver: New Star Books, 2001).

⁹ *Supra* note 3, cl. 7(1).

(c) 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 under this Act.

Section 163.1 applies to visual representations of real children, and to representations of imaginary children.¹⁰ Producing and distributing a record of actual child sexual abuse is treated in the same manner as a sketch, painting or sculpture that depicts sexual abuse. The section defines “child” as a person under the age of eighteen, even though the age of consent to sexual activity is fourteen for most purposes. In ordinary parlance, and in the *Criminal Code*, we do not refer to persons aged fourteen to seventeen as children. It would be more consonant with the scheme of the Code to refer to children as persons under the age of fourteen, to youth as persons aged fourteen to seventeen, and to adults as persons eighteen and over.¹¹ In this and other ways, s. 163.1 uses the emotive and stigmatizing term “child pornography” in manipulative ways. It is obviously problematic to treat an act as lawful, and then to subject any use or viewing of representations of that act to substantial criminal penalties.

How to deal with the age issue in a child pornography law is a challenge. Attempting to ascertain, through visual inspection of a sexual image, the age of a young person used in the production of that image is a difficult or impossible task. The vulnerability of teenagers to commercial exploitation and other forms of coercion is a serious concern. For these reasons, simply using fourteen as the age to define child pornography would not be a satisfactory solution. A more cautious approach to the age issue is appropriate. But even on a cautious approach, it is not apparent why the law does not adopt more reasonable alternatives. For example, why not use a phrase such as “is or appears to be under the age of fourteen”, rather than using eighteen as the age at which childhood presumptively ends for the purposes of sexual expression? If it really is necessary to treat representations of sexual activity that involved or appear to involve persons aged fourteen to seventeen as presumptively criminal to prevent the commercial or coercive sexual exploitation of teenagers,¹² why not include a defence that allows the accused to demonstrate that no harm or commercial exploitation was involved in the production of the images?

Section 163.1 of the *Criminal Code* establishes a comprehensive set of offences related to child pornography including the familiar offences of making, printing, publishing, distributing, selling, importing, and possessing

¹⁰ *Sharpe* (2001), *supra* note 8 at para. 38.

¹¹ This is how I am using these terms in this article.

¹² For a defence of this aspect of the law, see Janine Benedet, “Children in Pornography After *Sharpe*” (2002) 43 C. de D. 327.

for any of these purposes.¹³ A recent amendment added prohibitions on exporting and transmitting, and possessing for either of these purposes.¹⁴ The maximum penalty for any of the above offences is ten years' imprisonment. Finally, the child pornography provision includes two offences never before employed by our criminal law to target expressive material: an offence of simple possession,¹⁵ and an offence of knowingly accessing – simply viewing – child pornography.¹⁶ It is, now, a criminal offence just to look at what you know to be child pornography. The maximum penalty for simply possessing or looking at child pornography is five years' imprisonment.

Some of the recent amendments are a legitimate response to the challenges of prosecuting the users of real child pornography. This material circulates predominantly through the exchange of images on the Internet. At the moment, the vast majority of child pornography prosecutions involve charges of simple possession of pictures that record the actual sexual exploitation of children or youth. In this regard, the simple possession offence, considered essential to effective enforcement at the time of its enactment in 1993, is even more so now as Internet distribution has burgeoned. Yet, users of real child pornography could easily avoid prosecution by not taking physical possession of pictures. If we are truly determined to limit the creation and supply of these images because they involve serious harms in their production, then we need also to target every aspect of the demand. Hence, the new accessing and transmitting offences. "Accessing" child pornography is defined as "knowingly" causing "child pornography to be viewed by, or transmitted to" oneself.

Henceforth, to gain convictions, the Crown will not have to prove that accused persons actually took possession of child pornography by downloading material onto their computers. It will be enough to show that they intentionally viewed websites, email attachments or any other visual or written representation that they knew fell within the definition of child pornography. This certainly pushes Parliament's understandings of the harms of using child pornography to the limit. It may well be justifiable in the case of real child pornography, but to subject persons to criminal penalties for simply looking at imaginary visual representations or texts, like stories or paintings, is absurd. The recent amendments have heightened the folly of treating disparate phenomena in the same way under the same rubric of "child pornography". We will not develop coherent policy in this area until we

¹³ *Criminal Code*, *supra* note 1, ss. 163.1(2) and (3).

¹⁴ *Ibid.*, s. 163.1(3), as am. by S.C. 2002, c. 13, s. 5(2).

¹⁵ *Ibid.*, s. 163.1(4).

¹⁶ *Ibid.*, s. 163.1(4.1), as am. by S.C. 2002, c. 13, s. 5(3).

abandon the unified approach s. 163.1 takes to very different kinds of sexual expression.

The law currently includes three defences: artistic merit, “an educational, scientific or medical purpose”, and serving the public good. A bizarre and troubling feature of the law is that the artistic merit defence operates as a complete defence no matter what the charge or the nature of the material at issue. The language of s. 163.1(6) of the *Criminal Code* gives no discretion to a judge: it states the accused “shall be found not guilty” if the representation or written material that is the subject of the charge has artistic merit. In other words, the creators and purveyors of pictures that involved the commission of heinous crimes in their production could be exonerated if those pictures are artfully conceived. Moreover, the Supreme Court has stated that “[a]ny objectively established artistic value, however small, suffices to support the defence”, even if the material in question is harmful.¹⁷ The Court added that the “educational, scientific or medical purpose” defence should also be interpreted liberally.¹⁸

The existence of these defences was essential to the Supreme Court’s conclusion that the simple possession offence is constitutionally valid in most of its applications. Chief Justice McLachlin, writing for the majority of the Court in *Sharpe*, summarized her conclusion that the child pornography provisions did not trench unduly on civil liberties:

... the legislation recognizes the importance of free expression and the danger of a sweeping criminal prohibition. ... Writings are caught only where they actively advocate or counsel illegal sexual activity with persons under the age of 18. Complementing these limits inherent in the s. 163.1(1) definition are an array of defences aimed at enhancing the protection of free expression by excluding materials with redeeming social benefits. Works of art, even of dubious artistic value, are not caught at all. Materials created for an “educational, scientific or medical purpose”, liberally construed, are also exempted. Finally, a public good defence, the precise scope of which remains to be determined, further protects the possession of materials serving a necessary or advantageous social function.

... the defences exempt classes of material raising special free expression concerns. In this way, Parliament has attempted to meet the dual concerns of protecting children and protecting free expression.¹⁹

If Bill C-20 is enacted by Parliament, virtually every constraining element of the existing provision emphasized by McLachlin C.J.C. in the above passage will be removed from the law. Written material would be caught if it

¹⁷ *Sharpe* (2001), *supra* note 8 at para. 63.

¹⁸ *Ibid.* at para. 69.

¹⁹ *Ibid.* at paras. 73-74.

has as its dominant characteristic the description of sexual offences involving children and youth for a sexual purpose.²⁰ The defences of artistic merit and “educational, scientific or medical purpose” would be repealed.²¹ The only remaining defence would be serving the public good, a defence that the Court acknowledged to be of uncertain and imprecise scope.²²

As the foregoing review of the Canadian child pornography law reveals, and contrary to the suggestion of the Chief Justice, Parliament has in fact done little to balance the “dual concerns” of protecting children from sexual exploitation and upholding civil liberties. Parliament gave short shrift to the concerns of civil libertarians in 1993, expanding the scope of the child pornography offence just prior to third reading without any opportunity for public comment on the changes.²³ The Court failed in *Sharpe* to hold Parliament responsible for correcting the excesses of the 1993 law. In fact, it resorted to its most extensive use of the “reading in” remedy to rescue the law and thus let Parliament off the hook for achieving constitutional compliance. It is perhaps not surprising that the Court was anxious to repair the law itself and thus avoid the institutional heat it would have taken for striking down the child pornography law. The power of the words “child pornography”, and the political necessity of declaring one’s unwavering commitment to stamping it out, invited judicial caution which in turn invited further Parliamentary excess. Bill C-20 is the latest indication that Parliament is willing to take extreme measures in the name of protecting children while giving little or no serious consideration to the expressive freedoms supposedly guaranteed by the *Charter*.

In summary, Bill C-20, like the child pornography provision as a whole, is rendered incoherent by its insistence on responding to very different kinds of expressive material in the same way. It makes very good sense to repeal the defence of artistic merit insofar as material that involved harm in its production is concerned. The same is true with respect to material that is the equivalent of hate propaganda because it advocates the commission of offences against children and youth. The inclusion of an artistic merit defence for these two types of material was a blinding stupidity in the first place. But to repeal the defence of artistic merit with respect to imaginary representations

²⁰ *Supra* note 3, s. 7(1).

²¹ *Ibid.*, s. 7(2).

²² *Sharpe* (2001), *supra* note 8 at paras. 70-71.

²³ *House of Commons Debates*, Vol. XVI (15 June 1993) at 20843 (committee report received), pp.20863-83 (third reading debate and vote); Brian Blugerman and Laurie May, “The New Child Pornography Law: Difficulties of Bill C-128” (1995) 4 *Media & Comm. L. Rev.* 17 at 19-26; D. Lyon “A Bad Law on Child Pornography” *Globe and Mail* (22 June 1993) A23.

that involved no harm in production, and do not advocate the commission of harmful acts, makes no sense.

To be effective, the constitutional dialogue between courts and legislature must be a genuine conversation founded on mutual respect and mutual commitment to the rights and freedoms guaranteed by the constitution. Bill C-20's provisions in relation to child pornography are a direct affront to the Supreme Court's ruling in *Sharpe*. If Members of Parliament pass the Bill in its current form, thereby repealing the artistic merit defence at the same time as the provision is extended to cover even more imaginative expression, they would be sinking to a new low in their dialogue with the courts on the appropriate scope of our constitutional rights and freedoms.

III. BEYOND A UNIFIED APPROACH

To move child pornography law in a more rational and constructive direction, we need to overcome the unified approach the law now takes to disparate phenomena. The current definition of child pornography embraces three very different kinds of expressive material: 1) images involving harm in production; 2) hate propaganda; and 3) harmless representations of the sexuality of children and youth. It then treats these disparate phenomena in the same way, subjects them all to the deeply stigmatizing label "child pornography", makes it possible for accused persons to raise the same defences in relation to each, and subjects each kind of material to the same range of penalties. A law that responds to these three different kinds of expressive materials in distinct ways could accomplish the objective of preventing harm to children more effectively while avoiding the harms to society that result from the current law. I will briefly describe each kind of material and then outline the response I argue the criminal law should take to each.

A. IMAGES INVOLVING HARM IN PRODUCTION

At the core of the current definition of child pornography are images that record the actual sexual abuse of actual children. These kinds of images are what most people think of when they think of child pornography. A widespread consensus exists that the harms involved in the production of sexually explicit images using real children justify the imposition of serious penalties on anyone knowingly involved with their production, distribution or use.

The addition of the child pornography offence to the *Criminal Code* in 1993²⁴ was driven by a clear and compelling moral imperative: the need to criminalize the simple possession of images that recorded the sexual abuse of

²⁴ *Criminal Code*, *supra* note 1, as am. by S.C. 1993, c. 46.

real children. In the 1992 *Butler* ruling, the Supreme Court of Canada stated that the obscenity provision of the Code prohibits sexually explicit images that involve the use of real children in their production.²⁵ The obscenity provision, however, does not include an offence of simple possession. It does include a range of offences related to the production, publication and distribution of obscenity, including offences of possession for those purposes. Simple possession – meaning possession in circumstances where the Crown cannot prove an intention to further reproduce, distribute or sell the material – is not prohibited by the obscenity provision.

The creation of sexually explicit images using real children is a serious crime because it involves the commission of serious crimes. According to the criminal law, young persons are presumed to lack the capacity to give meaningful consent to sexual contact until they reach the age of fourteen. With the exception of consensual sexual exploration by twelve and thirteen year olds with their peers,²⁶ our law treats all sexual contact with children as the equivalent of sexual assault. While the application of criminal prohibitions to consensual sexual exploration between children of any age is of questionable value, youth and adults who engage in sexual activity with children are committing assaults that at the very least constitute serious interferences with children's dignity and autonomy, and often result in the infliction of grievous and enduring forms of physical and emotional pain.

The creators, producers and distributors of sexual explicit images that use real children in their production are obviously the worst offenders in this context. Identifying and arresting them, however, has proven very difficult. As a result, it is now widely accepted that stopping the abuse of children in the production of sexually explicit images requires that the criminal law target persons contributing to the demand as well as the supply of this material. With the enactment of the child pornography offence, Parliament added an offence of simple possession of expressive material to our *Criminal Code* for the first time in Canadian history. The theory is that those who purchase or collect pictures of actual child abuse, even if only for their personal use, are creating a market for an activity that causes serious harm to children. A second related understanding of the harm involved is that the very existence of records of child sexual abuse is an affront to the dignity of the children involved. The urgent need to combat the harms related to the use of children in the production of sexual imagery is the moral core of the child pornography offence. When I refer to "harm in production", it is these harms I have in mind.

²⁵ *R. v. Butler*, [1992] 1 S.C.R. 452 at 485 [*Butler*].

²⁶ *Criminal Code*, *supra* note 1, s. 150.1(2).

The creation of an offence designed to prevent harm in the production of expressive material is a novel and welcome development in the law. Anti-pornography feminist scholars have long argued that women are often sexually assaulted in the production of sexually explicit imagery, and that preventing further harm in production is a compelling rationale for proscribing records of real violence.²⁷ Yet, obscenity law has been slow to embrace this rationale for proscription, clinging instead, as will be explored in section III.C.1. below, to an unpersuasive “moral corruption” paradigm that emphasizes the indirect harms of exposure to violent representations. Shifts in the patterns of enforcement of obscenity and related bodies of law, on the other hand, suggest that harm in production is emerging as our dominant concern.

For example, the definition of obscenity set out by the Supreme Court in *Butler*²⁸ includes (1) material that depicts violence, (2) material that is degrading and dehumanizing and poses a substantial risk of harm to society, and (3) material that used children in its production. The third category of “real” child pornography involves harm in production. Material that falls within the first category, representations of sexual violence, normally involves harm in production as well since most prosecutions relate to imagery produced using real people. It is only the middle category of degrading and dehumanizing material that poses a substantial risk of harm to society – the most uncertain and controversial branch of the *Butler* definition – that does not clearly express a dominant concern with harm in production.

Further evidence of our emerging focus on material that involved harm in production is that prosecutions of novels and other texts consisting solely of written words, the main preoccupation of obscenity law up until the 1960s, are now rare. Apart from writings that constitute hate propaganda, few would notice if they ceased altogether. As Binnie J. remarked, with some understatement, in the *Little Sisters* case,

It may be very difficult to make the case of obscenity against a book, which is a medium perhaps less likely to be conducive to harm and more likely to be protected by the artistic merit or “inherent necessities” defence. The history of unsuccessful prosecutions of literary works in this country since *Brodie v. The Queen*, [1962] S.C.R. 681 (*Lady Chatterley’s Lover*) seems to bear out this difficulty.²⁹

²⁷ See e.g. Catharine A. MacKinnon, *Only Words* (Cambridge: Harvard University Press, 1993).

²⁸ *Butler*, *supra* note 25.

²⁹ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at para. 65 [*Little Sisters*].

Contemporary obscenity practice, if not obscenity law, evidences a shift in focus to material that involved harm in production: representations of actual violence against actual people. Perhaps it is only a matter of time until obscenity law catches up.

The focus of legislators' comments during the legislative and committee debates on Bill C-128 (which added s.163.1 to the *Criminal Code* in 1993) was the need to criminalize the simple possession of pictures that involved a record of the sexual exploitation of real children.³⁰ There was no discussion of whether the production or use of creative representations of imaginary children increases the risk of sexual exploitation of children.

Since the mid-1980s, debate in Canada regarding child pornography has been heavily influenced by two comprehensive reports on the subject. The 1984 *Report of the Committee on Sexual Offences Against Children and Youth* (the *Badgley Report*)³¹ and the 1985 *Report of the Special Committee on Pornography and Prostitution* (the *Fraser Report*)³² were invoked regularly in the debates leading to the passage of Bill C-128. Both reports clearly stated that the objective of suppressing child pornography is to prevent the exploitation of real children in the production of sexually explicit images. Neither report identified creative sexual representations of imaginary children as a problem contributing to the sexual exploitation of children. The *Badgley Report* recommended the creation of a child pornography offence that would be limited to visual depictions that used children or youth in their production. Concerning the inadequacy of existing obscenity law to address child pornography, the Committee stressed,

*In reference to child pornography, it is the circumstances of its production, namely, the sexual exploitation of young persons, which is a fundamental basis for proscription.*³³

Like the *Badgley Report*, the Fraser committee's research revealed an "absence of a really effective and direct sanction against persons who involve

³⁰ *House of Commons Debates*, Vol. XVI (3 June 1993) at 20328-36 (second reading), (15 June 1993) at 20863-83 (third reading); Canada, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General*, 34th Parl., No. 105 (8 June 1993), (10 June 1993), (15 June 1993); Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 34th Parl., No. 50 (21 June 1993), No. 51 (22 June 1993).

³¹ Canada, *Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths [Badgley Report]* (Ottawa: Minister of Supply and Services Canada, 1984). See vol. 1 at 99-103 and vol. 2 at 1079-1285.

³² Canada, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution [Fraser Report]* (Ottawa: Minister of Supply and Services Canada, 1985). See vol. 2 at 561-650.

³³ *Badgley Report*, *supra* note 31, vol. 1 at 101 (emphasis in original).

children in pornography.” Therefore, the committee found “it is necessary to provide direct criminal sanctions which would deter the use of children in the production of pornography.” The committee recommended the creation of a number of sexual offences “specifically to address the use of young persons in the production of sexually explicit material.”³⁴

The importance of the objective of preventing harm in production of child pornography is also underscored by Canada’s international obligations. The *Convention on the Rights of the Child*, ratified by Canada in 1991, commits signatories to taking steps to protect children from all forms of sexual exploitation and abuse, including “the exploitative use of children in pornographic performances and materials.”³⁵ The Convention defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”³⁶ Canada has also signed, although it has not yet ratified, the *Optional Protocol on the sale of children, child prostitution, and child pornography*.³⁷ The *Protocol* requires states to prohibit child pornography, defined as “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.”³⁸

The child pornography provisions of the Convention and the *Protocol* are devoted exclusively to material that *uses* children – real human beings – in the production of sexual imagery. Neither document commits states to putting prohibitions in place on imaginative representations that do not involve harm in production. Bill C-20 recites the need to fulfill Canada’s international obligations in the preamble, referring to the Convention and the *Protocol*.³⁹ Yet the controversial changes Bill C-20 would make to our child pornography offence – expanding its reach more deeply into creative written expression, and removing the defences of artistic merit and educational, scientific or medical purpose with respect to such imaginary work – find no support in either document.

It is worth noting that the preamble to the *Protocol* emphasizes the importance of a “holistic approach” to combating child pornography:

³⁴ *Fraser Report*, *supra* note 32, vol. 2 at 584-5, 629.

³⁵ *Convention on the Rights of the Child*, 20 November 1989, Can. T.S. 1992 No. 3, Art. 34.

³⁶ *Ibid.*, Art. 34(c).

³⁷ *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography*, UN GAOR, 54th Sess., Annex II, Agenda Item 16, UN Doc. A/RES/54/263 (2000) [*Protocol*].

³⁸ *Ibid.*, Art. 2(c).

³⁹ *Supra* note 3.

Believing that the elimination of the sale of children, child prostitution and child pornography will be facilitated by adopting a holistic approach, addressing the contributing factors, including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behaviour, harmful traditional practices, armed conflicts and trafficking in children ...⁴⁰

Interestingly, the Canadian government's commitment to eradicating the range of socio-economic conditions identified in the *Protocol* as contributors 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). No doubt there is a connection between this absence of a commitment to systemic, structural change and the prominence of symbolic politics.⁴¹

In summary, the *Badgley Report*, the *Fraser Report* and Canada's international obligations all support the view that material that involved harm in production calls for a serious criminal response, including a simple possession offence, and strong penalties. Artistic merit should be irrelevant. The harms associated with this kind of material clearly outweigh, and are in no way attenuated, if the sexual abuse of children is recorded artistically. The fact that the creators, purveyors and users of images that involved the actual abuse of actual children can be exonerated if the images had artistic merit is an abominable feature of the current law. The criminal prohibitions on this category of material need to be strengthened and broadened. If passed, Bill C-20 will accomplish this result by repealing the defences of artistic merit and an educational, scientific or medical purpose. In this regard, Bill C-20 proposes to move the law in a direction consonant with Canada's international obligations. Further strengthening of the law would be achieved if material that involved harm in production were treated separately in the *Criminal Code*. At the moment, the inclusion of other less horrendous forms of expression within the child pornography offence dilutes the uncompromising condemnation material involving harm in production deserves.

B. HATE PROPAGANDA

The current definition of child pornography also includes, in s. 163.1(1)(b), written material or visual representations that advocate or counsel the

⁴⁰ *Protocol*, *supra* note 37, Preamble.

⁴¹ See Gotell, *supra* note 4 at 22: "Defining 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. In this way, the current hysteria around sexualized images of children can be seen as a backlash against social structural analysis of disadvantage and disempowerment – a backlash that is entirely consistent with the myopic vision of the law and order state."

commission of sexual crimes against children or youth. As interpreted by the Supreme Court in *Sharpe*, this aspect of the definition of child pornography does not catch material that merely describes or depicts the commission of sexual offences.⁴² To meet the threshold of advocacy or counselling, the written or visual work must actively induce or encourage the commission of offences. The material, viewed objectively, must send the message that behaviour that amounts to sexual assault or exploitation of children and youth “can and should be pursued”.⁴³

Written works, in contrast to visual representations, do not otherwise fall within the current definition of child pornography. The reason for this is that the rationale driving the enactment of the child pornography offence in 1993, as recounted above, was to prohibit the simple possession of visual material that involved actual harm in production. Section 163.1(1)(b) was added just before third reading of the Bill in the House of Commons in response to concerns expressed about the written advocacy of activity that constitutes the sexual abuse of children.

Written expression, fictional or otherwise, regarding child sexuality or child sexual abuse is not prohibited by the current law unless it advocates or counsels the commission of sexual offences against children or youth. The distinction between description, examination or analysis of harm on the one hand, and advocacy of harm on the other, is crucial – and frequently lost in public debate. In a democratic state we must be free to examine and explore all aspects of our society, perhaps especially its darker and more troubling aspects. We do little to eradicate, and may exacerbate, a systemic harm by rendering its realities a taboo subject for creative and intellectual investigation.

Written or visual representations that advocate or counsel the commission of offences against children or youth are a different matter. As McLachlin C.J.C. noted in *Sharpe*, “[a]lthough we recently held [in *Little Sisters*⁴⁴] that it may be difficult to make the case of obscenity against written texts, materials that advocate or counsel sexual offences with children may qualify.”⁴⁵ Indeed, the circulation of material that explicitly advocates the commission of serious acts of violence against any identifiable group should be capable of being suppressed by the criminal law without violating Canadian understandings of the appropriate balance between expressive freedoms and equality rights. Advocating violence against an identifiable group is likely to constitute hate propaganda as defined by s. 319 of the *Criminal Code*.

⁴² *Supra* note 8 at para. 56.

⁴³ *Ibid.*

⁴⁴ *Supra* note 29.

⁴⁵ *Supra* note 8 at para. 103.

Advocating or counselling the commission of sexual offences against children or youth is best treated in the same manner as other kinds of hate propaganda. The rationale and appropriate scope of the prohibition on this material would be clearer if it were removed from the child pornography provision, and, instead, "age" were added as a prohibited ground to the definition of "identifiable groups" in s. 318(4).⁴⁶ As is the case with other material caught by s. 319, possession or private communication should not be an offence, because our concern is with the public spreading of hate. As with material that involved harm in production, artistic merit should be irrelevant. Hate-mongering is more pernicious, not less so, if it is executed artfully. The defences set out in s. 319(3) of the Code capture matters that ought to concern us regarding potentially hateful expression more effectively than the defences set out in the child pornography offence.

The Supreme Court's reasoning in *Keegstra*⁴⁷ is helpful in articulating the limits of an offence targeting public communications that advocate or counsel the commission of offences or otherwise spread hate against a group defined by age or other personal characteristics. The offence is made out if the person accused of communicating hateful messages intended to promote hatred or must have known that such a result was substantially certain to occur. The word "hate" limits the prohibition to what Dickson C.J.C. called the "most severe and deeply-felt form of opprobrium".⁴⁸

There are a number of advantages to treating material that advocates or counsels the commission of acts harmful to children and youth as hate propaganda rather than child pornography.

First, it directs our attention to what is truly objectionable: the hateful advocacy of harmful acts. The word pornography promotes the unfortunate misapprehension that the root of our concern is descriptions of the sexuality of children and youth. Of course, sexuality is all too frequently the vehicle for the expression of violence and hate, and the sexual nature of a violation is connected to its severity. Nevertheless, it is the nature and degree of the hate

⁴⁶ The limited definition of "identifiable group" set out in s. 318 (offence of advocating genocide) is applicable to s. 319, the hate propaganda provision. Consequently, the prohibition on hate propaganda applies only to material targeting groups identified by "colour, race, religion or ethnic origin." In addition to "age", "sex" and "sexual orientation" need to be added to the definition as well, given the prevalence of hateful speech directed at women and sexual minorities. Indeed, given their association with deeply rooted patterns of prejudice that have proven persistent across space and time a strong case can be made for including most personal characteristics listed in anti-discriminations laws, like s. 15 of the *Charter of Rights and Freedoms* and human rights statutes.

⁴⁷ *R. v. Keegstra*, [1990] 3 S.C.R. 697.

⁴⁸ *Ibid.* at 786.

and violence that should be the focus of our condemnation. The fact that it takes a sexual form is relevant in assessing the severity of the harm inflicted.

Second, our obsession with sexual representations has distracted us from paying attention to other kinds of hateful expression. Sadly, in our culture the physical and emotional abuse of children is prevalent in both sexual and non-sexual contexts. Why should representations advocating the commission of non-sexual crimes against children and youth be treated less harshly by the criminal law? Moving hateful expression from the child pornography to the hate propaganda provision would result in a more comprehensive and rational legal condemnation. Indeed, the law's response to all sexual representations, including obscenity that depicts adults, would be improved if we removed any sexual component from our definitions of expressive material prohibited by the criminal law. If the obscenity and child pornography provisions were repealed and replaced with two new offences relating to material that constitutes hate propaganda, and material that involved harm in production, we would do much to advance the protection of women, children and other vulnerable groups at the same time as we better secured the expressive freedoms guaranteed by the *Charter*.

C. HARMLESS SEXUAL REPRESENTATIONS

The definition of child pornography embraces sexual representations of children or youth that involved no harm in production, and do not amount to hate propaganda. It does so in three ways. It includes imaginary visual representations such as sculptures, drawings and paintings. It also includes visual records of lawful sexual activity engaged in by teenagers. If Bill C-20 becomes law, the definition will soon extend to "any written material the dominant characteristic of which is the description, for a sexual purpose" of the commission of sexual offences against children and youth. These three kinds of material involve no harm in production, nor do they promote hate or advocate the commission of crimes against children. I will refer to them collectively as "harmless sexual representations".

1. MORAL CORRUPTION ARGUMENTS

Of course, many people do not agree that these kinds of representations are "harmless". They would argue that even if representations did not involve harm in production, and even if they do not advocate or counsel the commission of crimes against children and youth, exposure to them makes it more likely that those exposed will commit sexual crimes against children. But this "indirect harm" argument is unpersuasive. The argument that exposure to imaginary representations of criminal activity causes persons exposed to engage in criminal activity has been a fixture of thinking about obscenity law for more than a century. It had been gradually declining in

credibility since the 1950s before being given new life in the 1990s in the context of child pornography. I will refer to it as a “moral corruption” argument, because it rests on the proposition that a person’s morals will be corrupted and criminal behaviour induced by exposure to representations of crime. This familiar style of argument runs as follows: exposure to representations of bad acts causes bad thoughts, which in turn causes bad behaviour, therefore the criminal suppression of the representations of bad acts is justified.

For many years, obscenity law was dominated by the “moral corruption” test put forward by Chief Justice Cockburn in the 1868 English case of *R. v. Hicklin*:

[T]he test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.⁴⁹

The *Hicklin* test was interpreted by the courts in at least three senses: the tendency of the material could be to arouse bad thoughts in the minds of persons exposed to it; the tendency of the material could be to incite persons exposed to it to commit immoral or illegal acts; and the tendency of the material could be to endanger prevailing standards of public morality.⁵⁰ Normally, these three conceptions of moral corruption would be intertwined in judicial reasoning and legislative debates: the harm consisted of the arousal of bad thoughts (that is, thoughts out of line with public standards of morality) that were presumed to create a risk of the commission of bad acts (normally conceived of as sexual activity other than procreative acts within marriage).

The *Hicklin* moral corruption style of argument was not used solely to justify restrictions on sexual expression. It was presumably the basis of Customs’ prohibition on the importation of dozens of pulp magazines specializing in crime and detective fiction in the 1930s and 1940s.⁵¹ Moral

⁴⁹ (1868) L.R. 3 Q.B. 360 at 371.

⁵⁰ See Norman St. John-Stevan, *Obscenity and the Law* (London: Secker and Warburg, 1956) at 126.

⁵¹ It is difficult to know for sure why the Customs department banned particular titles since Customs did not issue reasons for its decisions. Customs officials had the power to prohibit the importation of “immoral” or “indecent” literature from the time of Confederation until 1985, when the prohibition was declared unconstitutional and replaced with a prohibition on the importation of obscene material. Official memoranda were issued to Customs collectors from the 1880s to the late 1950s instructing officials to detain particular titles at the border. The official memoranda from 1928-47, which can be found in the Metro Toronto Reference Library, Special Collections, contain many titles of pulp magazines devoted to crime and detective stories. For an overview of Customs’ censorship of literature, see Bruce Ryder, “Undercover Censorship: Exploring the History of the Regulation of Publications in Canada” in Klaus Petersen and Allan C. Hutchinson eds., *Interpreting Censorship in Canada* (Toronto: University of Toronto Press, 1999) 129 at 131-138.

corruption arguments led Parliament to enact a prohibition on crime comics in 1949.⁵² The assumption was that youth exposed to representations of crime would be incited to commit criminal acts themselves.⁵³ Members of Parliament asserted a correlation between acts of juvenile delinquency and the reading of crime comics, which they backed up with lurid tales of crimes committed by youth who they alleged were simply copying what they had read in the comics. Of course, millions of youth read crime comics at the time, so the discovery of a correlation between crime comics and juvenile delinquency was not particularly revealing.⁵⁴ The chief logical fallacy relied upon by the proponents of the crime comics offence was the leap from correlation to proof of causation. Yet, at the time, no Member of Parliament challenged the causal hypothesis regarding crime comics. The “common sense” of the debate was that the apprehension of harm was a reasoned one. This consensus lasted only a few years. The crime comics offence, still in the *Criminal Code*, has been essentially a dead letter since the mid-1950s.⁵⁵

When the obscenity provision of the *Criminal Code* was amended in 1959, the Minister of Justice, Davie Fulton, asserted that his intention was not to call into question the *Hicklin* precedent. Rather, it was to provide greater certainty and objectivity to obscenity law. This could be done, Fulton suggested, if Parliament supplemented the *Hicklin* test with a statutory presumption that exposure to material that unduly exploited sex as a dominant characteristic would have morally corrupting effects.⁵⁶

Nor did the 5-4 ruling of the Supreme Court of Canada in the *Lady Chatterley's Lover* case, *Brodie v. The Queen*,⁵⁷ disrupt the moral corruption paradigm. A majority of the Court ignored Fulton's views, and stated that the *Hicklin* test was no longer part of the law of obscenity in Canada. As a result, the Court treated the amendment that Fulton had intended to be a statutory

⁵² *An Act to amend the Criminal Code*, S.C. 1949 (2nd Sess.), c. 13, s. 1.

⁵³ See e.g. *House of Commons Debates*, Vol. I (4 October 1949) at 511-18, (6 October 1949) at pp. 578-89, Vol. III (5 December 1949) at 2687-99.

⁵⁴ See Bradford W. Wright, *Comic Book Nation: The Transformation of Youth Culture in America* (Baltimore & London: John Hopkins University Press, 2001). As Wright puts it (at 96), “It was hardly surprising that juvenile delinquents read comic books, since upwards of 90 percent of all children and adolescents read them”.

⁵⁵ The prohibition on crime comics has attracted substantial scholarly attention. See e.g. Janice Dickin McGinnis, “Bogeymen and The Law: Crime Comics and Pornography” (1988) 20 *Ottawa L. Rev.* 3; Jonathan Swainger, “American Crime Comics as Villains: An Incident from Northern Canada” (1998) 22 *Legal Studies Forum* 215; Augustine Brannigan, “Mystification of the Innocents: Crime Comics and Delinquency in Canada, 1931-1949” (1986) 7 *Criminal Justice History* 111.

⁵⁶ *House of Commons Debates*, Vol. V (6 July 1959) at 5517-46.

⁵⁷ [1962] S.C.R. 681.

presumption as the sole definition of obscenity. Obscenity law could no longer be concerned with morality writ large. Henceforth it would be focused exclusively on sexual immorality: material that unduly exploited sex as a dominant characteristic. The *Brodie* decision reformulated, but did not remove, the moral corruption arguments at the heart of obscenity law. The difference between the members of the Supreme Court was that the dissenters believed that all expression that aroused “lewd” thoughts ought to be criminalized, while the majority believed that to be the case only of “dirt for dirt’s sake” (dirt in this context apparently meaning sexual expression).

Thirty years later in *Butler*,⁵⁸ the Court held that protecting moral standards – that is, prohibiting “dirt for dirt’s sake” – is not a sufficiently important objective to justify overriding *Charter* freedoms. In doing so, Sopinka J., writing for the majority, described the discredited *Hicklin* test as one devoted primarily, if not exclusively, to the preservation of society’s moral standards.⁵⁹ Sopinka J. rejected this aspect of the *Hicklin* conception of moral harm: it was no longer acceptable to suppress speech to maintain “conventional standards of propriety”.⁶⁰ In other regards, the moral corruption paradigm – exposure to bad thoughts can be safely presumed to cause persons so exposed to commit bad acts – remained intact and indeed was given new legitimacy by *Butler*. The Court accepted the “causal hypothesis”, even though the government offered no persuasive evidence in support of it. Sopinka J. claimed that his acceptance of the causal link was based in “reason”.⁶¹ But in the absence of social science evidence, how can that be so? And even if we are willing to assume that the prohibition is based on “a reasoned apprehension of harm”, why is the obscenity provision restricted to sexual representations? Why should we be any less concerned about fictional representations of non-sexual violence? The very existence of obscenity as a category limited to sexual representations is deeply irrational.

As Brenda Cossman has persuasively demonstrated, the *Butler* ruling purports to present a new feminist paradigm but is in fact just “morality in drag”.⁶² A straight genealogical line joins *Hicklin*, *Butler* and child pornography law. The difference lies in the conception of the vulnerable

⁵⁸ *Supra* note 25.

⁵⁹ *Ibid.* at 492.

⁶⁰ *Ibid.* at 498.

⁶¹ *Ibid.* at 504.

⁶² Brenda Cossman, “Feminist Fashion or Morality in Drag? The Sexual Subtext of the *Butler* Decision” in B. Cossman *et al.*, eds., *Bad Attitudes on Trial: Pornography, Feminism and the *Butler* Decision* (Toronto: University of Toronto Press, 1997) 107. See also Brenda Cossman, *Censorship and the Arts: Law, Controversy, Debate, Facts* (Toronto: Ontario Association of Art Galleries, 1995).

persons at risk of moral corruption: youth and the lower classes according to *Hicklin*, adult men according to *Butler*, and pedophiles according to child pornography law.

The problem is that, at least as far as fictional depictions of crime and violence are concerned, the evidence simply does not support the “causal hypothesis” that underpins the moral corruption style of argument.⁶³ Its enduring appeal probably lies, not in its rationality, but in its promise of simple solutions to disturbing and complex social problems such as juvenile delinquency, the perceived moral failings of the lower classes, violence against women, or the sexual abuse of children.

The lack of evidence to support the causal hypothesis underlying the moral corruption argument helps explain why fictional representations of non-sexual crime and violence in popular culture no longer attract a criminal response. There is no rational basis for treating exposure to imaginary representations of sexual assault as more dangerous than exposure to representations of murder and mutilation. As for imaginary or real representations of the lawful sexual activity of teenagers, it is even less rational to presume that people exposed to them will be more likely to commit unlawful sexual acts. We need to face up to and remove this odd collection of beliefs embedded in our child pornography law.

2. CONSTITUTIONAL LIMITATIONS

Constitutional challenges to child pornography laws in the United States have been successful in focusing those laws on material that involved harm in production. The U.S. Supreme Court has considered child pornography laws on three occasions. In *New York v. Ferber*,⁶⁴ the Court upheld a New York statute that prohibited the distribution of visual material that depicted a person under the age of 16 engaged in a “sexual performance”. Justice White, delivering the opinion of the Court, held that the restriction on free speech was justified by the state’s compelling interest in preventing the sexual exploitation and abuse of children. “[T]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental

⁶³ See Jonathan Freedman, *Media Violence and Its Effect on Aggression: Assessing the Scientific Evidence* (Toronto: University of Toronto Press, 2002). Freedman undertakes a thorough examination of studies that have tested what he calls the “causal hypothesis” (preface, at p. x): the notion that exposure to fictional media violence increases aggression. He concludes (at p. 210) that “the evidence does not support the notion that exposure to media violence causes aggression or desensitization to aggression”. See also Martin Barker and Julian Petley eds., *Ill Effects: The Media/Violence Debate* (London & New York: Routledge, 1997).

⁶⁴ *New York v. Ferber*, 458 U.S. 747 (1982).

health of the child.”⁶⁵ Targeting the distribution and use of real child pornography may help reduce the harms of child sexual abuse in three ways:

First, the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. ... *Third*. The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.⁶⁶

Justice White noted that a law prohibiting sexual representations that did not involve children in their production would not be rationally connected to the objective of preventing the sexual exploitation of children.⁶⁷

In *Osborne v. Ohio*,⁶⁸ the Court upheld a simple possession offence in a law again restricted to material that used actual children in its production. Justice White, again writing for the Court, spoke of the need “to stamp out this vice at all levels of the distribution chain.”⁶⁹ In addition to the concerns expressed in *Ferber* relating to harm in production, Justice White cited the value of encouraging the destruction of child pornography to prevent pedophiles from using it “to seduce other children into sexual activity.”⁷⁰

The Court later pulled away from the latter line of argument in *Ashcroft v. The Free Speech Coalition*.⁷¹ At issue was the validity of Congress’ attempt to proscribe “virtual child pornography” in the 1996 *Child Pornography Protection Act (CPPA)*. The Act prohibited “any visual depiction” that “is, or appears to be, of a minor engaging in sexually explicit conduct”.⁷² The provision extended to images that did not involve harm in production, but were visually indistinguishable from those that did. The Court struck down the provision as a violation of freedom of speech.

Justice Kennedy, writing for the majority, stated that a prohibition limited to “real” child pornography would be justified for the reasons expressed in *Ferber*. Even if such material had serious literary, artistic or other merit, that would not excuse the harm caused in its production; however, material that

⁶⁵ *Ibid.* at 758.

⁶⁶ *Ibid.* at 759, 761.

⁶⁷ *Ibid.* at 764-5.

⁶⁸ 495 U.S. 103 (1990).

⁶⁹ *Ibid.* at 110.

⁷⁰ *Ibid.* at 111.

⁷¹ 122 S. Ct. 1389 (U.S. 2002).

⁷² 18 U.S.C. §. 2256(8)(B) (2002).

did not involve harm in its production could not be suppressed by the *CPPA* without violating the First Amendment. In Justice Kennedy's words,

In contrast to the speech in *Ferber*, speech that is itself the record of sexual abuse, the *CPPA* prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children, as were the materials in *Ferber*. 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.⁷³

Justice Kennedy then dismissed the "grooming" argument that images that did not involve harm in production may be used by pedophiles in attempts to seduce children. As he pointed out, if we accepted the logic of this argument as sufficient to sustain the imposition of criminal penalties on expression, the consequences for civil liberties could be sweeping:

There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused.⁷⁴

Moreover, he added, we cannot allow what is fit for children, or pedophiles, to set the standard of what is permissible for the entire population.⁷⁵ As for the argument that virtual child pornography would incite pedophiles to criminal activity,

[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 a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.⁷⁶

The U.S. Supreme Court rulings on child pornography laws are helpful in two regards: they insist that the law draw a clear distinction between material that involved harm in production and material that is alleged to cause "indirect harms"; as well, they critically evaluate "moral corruption" arguments and find them lacking.

The Supreme Court of Canada's ruling in *Sharpe*, in contrast, is especially weak on both of these points. Throughout her judgment for the majority, McLachlin C.J.C. treats the harm in production and moral corruption rationales as having equivalent moral force. Indeed, much of her section 1

⁷³ *Supra* note 71 at 1402.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* at 1402-3.

⁷⁶ *Ibid.* at 1403.

analysis draws no distinction between real and imaginary sexual representations, as if they raised the same set of concerns and issues. She accepted uncritically the argument that exposure to any child pornography, even material that involved no harm in production, may cause persons to engage in criminal activity.⁷⁷ The Chief Justice was not troubled by the fact that the scientific evidence in support of the causal hypothesis is “not strong”.⁷⁸ She asserted that a “reasoned apprehension” of indirect harm exists.⁷⁹ These indirect harms include the likelihood that pedophiles’ bad thoughts will be confirmed and fuelled by exposure to representation of bad acts (the “cognitive distortions” argument); that they will use representations of child and youth sexuality in attempts to induce children to engage in illegal sexual activity (the “grooming” argument); and that exposure to representations of sexual offences will cause those exposed to commit sexual offences in the future (the “incitement” argument). All three are familiar variations on the “moral corruption” theme.

The acceptance of the “cognitive distortions” and “grooming” arguments as a sufficient reason for suppressing creative works seriously undermines our commitment to freedom of expression. If these are sufficiently compelling reasons for overriding the constitutional status of the freedom, virtually any material that expresses ideas that meet with official disapproval could be suppressed. “Cognitive distortions” is just fancy language for bad ideas. We cannot suppress expression simply because we do not like the ideas expressed. The “grooming” argument, as Justice Kennedy noted in *Ashcroft*, would justify the suppression of any material by reference to the use it may be put to by pedophiles. We should not limit everyone’s freedom to create, write, read and view to material that poses no danger in the hands of the most troubled members of society.

The conclusion that a reasoned apprehension of indirect harms justifies the suppression of expression is troubling with respect to both types of material caught by s. 163.1 that do not involve harm in production: representations of lawful teenage sexuality and works of the imagination. On what reasoned basis would we presume that exposure to images of lawful acts leads people to commit crimes? On what reasoned basis would we conclude that exposure to imaginary representations of crimes leads people to commit crimes? Does the Chief Justice mean to suggest that all forms of popular entertainment that depict criminal acts could be

⁷⁷ *Supra* note 8 at para. 28 (“Possession of child pornography may facilitate the seduction and grooming of victims and may break down inhibitions or incite potential offences”).

⁷⁸ *Ibid.* at para. 88.

⁷⁹ *Ibid.*

suppressed on a “reasoned apprehension of harm” without violating the *Charter*? The ruling in *Sharpe* leaves us with no reason to be confident that irrational fears and anxieties, rather than reason, are at work here.

I have suggested that a better approach would be to remove material that falls short of hate mongering, and involved no harm in production, from the *Criminal Code* altogether. The “indirect harms” that allegedly arise from this kind of material are too speculative and uncertain to support a criminal prohibition. Parliament appears to be moving in precisely the opposite direction, seeking to condemn this material as forcefully as the “real” child pornography and the hate propaganda described above. If Bill C-20 is passed, the category of harmless sexual representations that fall within the definition of child pornography will be expanded, and the defences of artistic merit and an educational, scientific or medical purpose will be repealed. Depriving accused persons of these defences in charges relating to harmless sexual representations renders the child pornography provision as a whole vulnerable yet again to a *Charter* challenge. In this regard, Parliament’s zeal, far from protecting children from harm, is recklessly threatening the whole edifice of child pornography law.⁸⁰

3. STORIES, PAINTINGS AND SEXUAL EDUCATION

Because those who argue that child pornography law threatens legitimate civil libertarian concerns are often accused of raising far-fetched or unreal “hypothetical” scenarios,⁸¹ let me illustrate the child pornography offence’s impact, or potential impact, on harmless sexual representations by using three very real examples of expressive material drawn from the case law: John Robin Sharpe’s stories, Eli Langer’s sketches and paintings, and the sex education book *Show Me!*

i. John Robin Sharpe’s Stories

John Robin Sharpe was charged in 1996 with simple possession, and possession for the purposes of distribution or sale, of both his own written work and hundreds of pictures of teenage boys. His case went to trial in 2002 after his challenge to the validity of the possession offence failed at the Supreme Court

⁸⁰ See June Ross, “*R. v. Sharpe* and the Defence of Artistic Merit”, (2001/2002) 12 Const. Forum Const. 23. As she concludes (at 29), “Where proven harm exists, as when children are employed in the production of child pornography, even the significant *Charter* value of artistic expression could be outweighed. But with a broad definition of child pornography, and reliance on the reasoned apprehension of harm test, a defence for material of literary or artistic merit is a constitutional necessity.”

⁸¹ See e.g. Benedet, *supra* note 12.

of Canada.⁸² At trial, he was convicted in relation to the pictures, some of which depicted children under the age of fourteen.⁸³ This aspect of the disposition of his case should be relatively uncontroversial because some of this material involved harm in production. It depicted the commission of sexual offences against children, namely sexual interference, an invitation to sexual touching (or at least the photographic equivalent thereof), and perhaps also sexual exploitation in the case of boys aged fourteen to seventeen.⁸⁴ Mr. Sharpe was acquitted on the charges relating to the stories he authored. Although the stories described sadomasochistic sexual activity involving children and youth, Shaw J. held that they did not counsel or advocate the commission of crimes. In a clear-headed judgment, remarkable for its courage in the current climate, he concluded as follows:

While *Boyabuse* and *Stand By America, 1953* arguably glorify the acts described therein, in my opinion they do not go so far as to actively promote their commission. The descriptions may well be designed to titillate or excite the reader (if the reader is so inclined) but these descriptions do not actively advocate or counsel the reader to engage in the acts described.

Nor, in my view, do *Boyabuse* and *Stand By America, 1953* send “the message” that sex with children can and should be pursued. If that were the case, then literature describing murder, robbery, theft, rape, drug use and other crimes in such a way as to make them appear enjoyable would likewise be said to advocate or counsel the commission of those crimes. In my opinion, such literature is not what the “advocates or counsels” requirement is intended to capture.

Where written material is simply a thinly disguised exhortation to seduce children or to otherwise make them prey to sexual crimes, such writing may well advocate or counsel such crimes. But that is not the case with *Boyabuse* and *Stand By America, 1953*. These writings simply describe morally repugnant acts.⁸⁵

Although it was not necessary to his decision, Shaw J. provided a second reason for dismissing the charges against Mr. Sharpe in relation to his stories: they had artistic merit. After fully canvassing the conflicting expert opinion presented at trial, he concluded that, even though the scenes of sadomasochistic violence and sex involving young boys were morally repugnant, they were presented in a manner that had some literary merit.⁸⁶

⁸² *Sharpe* (2001), *supra* note 8.

⁸³ *R. v. Sharpe*, 91 C.R.R. (2d) 235, [2002] B.C.J. No. 610 (B.C.S.C.) (QL) [*Sharpe* (2002) cited to B.C.J. (QL)].

⁸⁴ The offences of sexual interference, invitation to sexual touching, and sexual exploitation are set out in ss. 151, 152 and 153 of the *Criminal Code* respectively.

⁸⁵ *Sharpe* (2002), *supra* note 83 at paras. 33-35.

⁸⁶ *Ibid.* at paras. 107-15.

According to s. 163.1(6) of the *Criminal Code*, a judge has to acquit if artistic merit exists, and the Supreme Court said any literary merit would suffice.⁸⁷ For these reasons, the conclusion reached by Shaw J. seemed unavoidable.⁸⁸

Nevertheless, his ruling generated another firestorm of protest,⁸⁹ just as his initial ruling invalidating the simple possession offence had three years earlier.⁹⁰ Many people seemed to find it inconceivable that artistic merit could exonerate someone who has created and possessed child pornography. Such a reaction makes perfect sense in relation to material that involved harm in production or that amounts to hate propaganda. Yet, creative expression that simply describes criminal acts should not be illegal for that reason alone, whether it has artistic merit or not. The first reason that Shaw J. gave for dismissing the charges arising out of Mr. Sharpe's possession of his stories – that they did not constitute the equivalent of hate propaganda – is the most compelling.

Unfortunately, Parliament has responded, in Bill C-20,⁹¹ by directly targeting the two reasons why stories like Mr. Sharpe's could not provide the basis for a criminal conviction under the current law.

First, if Bill C-20 is passed, written work or visual representations that merely describe activity that amounts to a sexual offence against children or youth will constitute child pornography, if that description is the dominant characteristic of the work and it is done for a sexual purpose. Mr. Sharpe's stories may well fall within this proposed extension of the law. A cautious criminal lawyer might advise him to cease sharing his stories with anyone else and to destroy extra copies. Mr. Sharpe could keep a copy or perhaps several copies so long as he has no intention of ever showing them to anyone.⁹² No matter how morally repugnant we find the acts depicted or described in works of the imagination, requiring the creators of imaginative works to destroy their creations on penalty of criminal sanction should never occur in a society that claims to be free and democratic.

⁸⁷ *Supra* note 17 and accompanying text.

⁸⁸ For a discussion of the artistic merit of Mr. Sharpe's stories, see Shannon Bell, "Sharpe's Perverse Aesthetic" (2001/2002) 12 *Const. Forum Const.* 30.

⁸⁹ See e.g. Mark Hume "Sharpe's Porn Has 'Merit': Court" *National Post* (27 March 2002) A1; Jane Armstrong "B.C. court finds artistic merit in Sharpe's child-sex stories" *Globe and Mail* (27 March 2002) A1.

⁹⁰ *R. v. Sharpe*, (1999) 169 D.L.R. (4th) 536 (B.C.S.C.), *aff'd* (1999), 175 D.L.R. (4th) 1 (B.C.C.A.), *rev'd* by the Supreme Court of Canada, *supra* note 8.

⁹¹ *Supra* note 3.

⁹² Simple possession of his own stories, exclusively for his own personal use, would fall within the exception added to the law by the Supreme Court of Canada in *Sharpe* (2001), *supra* note 8.

Second, the artistic merit defence would be repealed if Bill C-20 were passed. The result would be the creation of a taboo topic, one that cannot be imagined or explored in the form of words or images without incurring a substantial risk of criminal prosecution. If Parliament does decide to embrace these extreme results by passing Bill C-20, it is likely that the child pornography law will not survive the inevitable *Charter* challenge.

ii. Eli Langer's Paintings and Sketches

Eli Langer's sketches and paintings were exhibited at the Mercer Union Gallery in Toronto in 1994. This exhibit generated one of the first prosecutions brought pursuant to the child pornography provisions of the *Criminal Code*.⁹³ After initially laying charges against Mr. Langer and the gallery, the Crown decided to proceed with a forfeiture application pursuant to s. 164 of the Code. The works of creative visual expression in question involved what the judge, McCombs J., described as "deeply disturbing" depictions of children engaged in sexually explicit activity. After assessing the conflicting expert evidence presented to the court, McCombs J. said he could not conclude that the paintings and sketches posed a realistic risk of harm to children.⁹⁴ As he put it, although

... the subject-matter of the paintings and drawings is shocking and disturbing, the work as a whole is presented in a condemnatory manner that is not intended to celebrate the subject-matter. In other words, the purpose of the work is not to condone child sexual abuse, but to lament the reality of it.⁹⁵

Moreover, McCombs J. accepted the uncontradicted expert evidence that Mr. Langer's work had artistic merit.⁹⁶ In the result, he dismissed the Crown's attempt to have the paintings and sketches destroyed, and ordered them returned to Mr. Langer.

If Bill C-20 becomes law, the defence of artistic merit would no longer be available, nor would the defence of an educational, scientific or medical purpose. Paintings and sketches like Mr. Langer's would violate s. 163.1 unless the defence of public good applied. Bill C-20 proposes that the public good defence be reframed in the following terms:

No person shall be convicted of an offence under this section if the acts that are alleged to constitute the offence, or if the material related to those acts that is

⁹³ *Ontario (Attorney General) v. Langer* (1995), 123 D.L.R. (4th) 289 (Ont. Ct. Gen. Div.), leave to appeal and cross-appeal to the Supreme Court of Canada refused 11 October 1995.

⁹⁴ *Ibid.* at 304.

⁹⁵ *Ibid.* at 306.

⁹⁶ *Ibid.*

alleged to contain child pornography, serve the public good and do not extend beyond what serves the public good.⁹⁷

The public good is a notoriously vague concept. As the Supreme Court acknowledged in *Sharpe*, the precise contours of the defence of public good are uncertain. Parliament has not provided any guidance on its meaning. It is not defined in the *Criminal Code* or in the proposed amendments contained in Bill C-20. Since it is so vague, and since it now determines the degree to which creative expression falling within the definition of child pornography can escape criminal sanction, the courts may well find that the child pornography offences now violate s. 7 of the *Charter* (as well as s. 2(b)) and that they fail to meet the “prescribed by law” component of the s. 1 analysis.⁹⁸ The “public good” is analogous to the “public interest”, a phrase the Supreme Court of Canada has found to be unconstitutionally vague.⁹⁹ Both expressions are “standardless”.¹⁰⁰ How would judges determine whether works of art exploring issues of child and youth sexuality serve the public good? And how would creators of such works make sure that they did not exceed the bounds of serving the public good?

The public good defence has been part of the obscenity provision of the Code since its original enactment in 1892. It has played little role in protecting works of art or literature in the reported case law. It did serve to exonerate Dorothea Palmer when she was charged with distributing birth control

⁹⁷ *Supra* note 3, cl. 7(2), proposing to amend s. 163.1(6) and (7) of the *Criminal Code*.

⁹⁸ To be upheld as a reasonable limit on *Charter* rights or freedoms, government action must be “prescribed by law”. To meet the prescribed by law component, a law must not be too vague. Vagueness is also a principle of fundamental justice for the purposes of s. 7 of the *Charter*. A law will be held to be unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. See e.g. *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606. The requirements of the vagueness doctrine should be strict in the context of criminal prohibitions on the creation, dissemination, use and viewing of expressive material. The potential for “chilling” creative expression is real. Creators need to know with some degree of certainty at what point their imaginative work might be crossing the line into criminal territory. The best approach, I have argued, is to leave creative expression that does not amount to hate propaganda outside the scope of the criminal law altogether.

⁹⁹ *R. v. Morales*, [1992] 3 S.C.R. 711, 732 (“...the term ‘public interest’ is incapable of framing the legal debate in any meaningful manner or structuring discretion in any way... No amount of judicial interpretation of the term ‘public interest’ would be capable of rendering it a provision which gives any guidance for legal debate.”); *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1113 (“We find the ‘public interest’ justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.”).

¹⁰⁰ *Morales*, *ibid.* at 715.

information in 1936.¹⁰¹ In 1952, the Ontario Court of Appeal concluded that the defence did not apply to the distribution of four paperback novels, including two of Erskine Caldwell's novels depicting poverty and debauchery in rural Georgia.¹⁰² The same court rejected the defence in 1956 in an obscenity case involving a pulp paperback novel depicting the personal struggles of a psychiatric patient, including his difficulties in forming intimate relationships with women.¹⁰³

The public good defence did not assist the Barbara Cameron Gallery when it was charged in 1965 under the obscenity provision for displaying paintings that depicted adult nudity and sexuality.¹⁰⁴ Aylesworth J.A., writing for the majority of the Ontario Court of Appeal, noted that "there is little judicial guidance upon the general subject of public good."¹⁰⁵ He then went on to reject the defence, making it clear that, in his view, material found to be obscene could rarely, if ever, promote the public good:

Why is it necessary for the sake of the student or for the sake of education of the public in the appreciation of art so far as the human form is concerned, to depict obscene subject-matter, to place the human figure, for example, in a posture of "sexual invitation" or the human figures in a relationship with one another such as has already been described with respect to these drawings? To me, the posing of the question invites one answer only. To accomplish that which it is said these drawings accomplish by way of public benefit and to the restricted extent described in the evidence of the experts, the exposure of these obscene drawings was wholly unnecessary...¹⁰⁶

The paintings that were at issue in *Cameron* are now a long way removed from contemporary understandings of obscenity. Still, judges in child pornography cases may well replicate the response to the public good defence evoked by material Aylesworth J.A. considered obscene in 1966. Though the moral context is very different, the moral fervour is likely to be similar. Only

¹⁰¹ *R. v. Palmer* (1937), 68 C.C.C. 20 (Ont. C.A.). The trial judge in that case was clearly grateful that the defence permitted him to help prevent the nation from, as he put it, "wandering in the intellectual and social wilderness on this vital subject." *Ibid.* at 31.

¹⁰² *R. v. National News Co. Ltd.* (1953), 106 C.C.C. 26 (Ont. C.A.) (The paperback books at issue were Erskine Caldwell's *Journeyman* (Penguin #646, 1947) and *Tragic Ground* (Penguin 661, 1948), Mae West's *Diamond Lil* (Dell #525, 1951), and Tereska Torres' *Women's Barracks* (Gold Medal #132, 1950)).

¹⁰³ *R. v. American News Company Limited*, [1957] O.R. 145 (C.A.) (The paperback book at issue was Peter Denzer's *Episode* (Popular Library #621, 1954)).

¹⁰⁴ *R. v. Cameron*, [1966] 4 C.C.C. 273 (Ont. C.A.), appeal quashed and leave to appeal dismissed, [1967] 2 C.C.C. 195 [*Cameron*].

¹⁰⁵ *Ibid.* at 288.

¹⁰⁶ *Ibid.*

Laskin J.A., alone in dissent in the *Cameron* case, was willing to confront the inadequacies of the public good defence. He pointed out that it would be more coherent to remove material that serves the public good from our understanding of obscenity altogether, rather than treating acts that serve the public good as a defence.¹⁰⁷ He added that “the anomalous character of the defence is aggravated by Parliament’s failure to provide any definition or any clue to its meaning”.¹⁰⁸

Bora Laskin’s observations are equally applicable to the child pornography offence if Bill C-20 passes in its current form. The vague and undefined public good defence would carry the entire burden of exonerating any creative visual or written representations that have as a dominant characteristic the depiction of child or youth sexuality for a sexual purpose, or any creative visual representations of children or youth engaging in explicit sexual activity, or any creative visual representations that depict the sexual organs or anal region of children or youth for sexual purposes. Clearly, paintings like Eli Langer’s – and a wide range of other harmless forms of artistic expression – could be vulnerable to destruction in a forfeiture application if Bill C-20 becomes law. Artists would be vulnerable to prosecution for simple possession if they showed their work to others.¹⁰⁹ In addition, artists and galleries would be vulnerable to prosecution for putting on public exhibits. Patrons of art galleries could be prosecuted just for looking if they attended an exhibit like the Mercer Union show with knowledge of its contents – or if they did not avert their eyes immediately upon viewing the material. The same would be true of anyone visiting an artist’s studio. It is plain that the insistence on treating creative expression in the same way as “real” child pornography may lead to increasingly absurd and disturbing consequences.

iii. *Show Me!*

My third example of harmless sexual expression potentially caught by Canada’s evolving and expanding child pornography law is the sex education book *Show Me!*.¹¹⁰ Originally published in Germany, *Show Me!* generated controversy in North America from the outset because it presents information about child and youth sexuality in a context devoid of shame or embarrassment. It uses graphic photographs by American photographer Will

¹⁰⁷ *Ibid.* at 315.

¹⁰⁸ *Ibid.*

¹⁰⁹ The exception for private possession of creative expression carved out by the Supreme Court in *Sharpe* 2001 (see *supra* note 8) would then no longer apply, because the exception applies only to material held exclusively for the creator’s use.

¹¹⁰ Will McBride and Helga Fleischhauer-Hardt, *Show Me!: A Picture Book of Sex for Children and Parents* (New York: St. Martin’s Press, 1975).

McBride to depict subjects such as children's erotic play, teenagers' sexual exploration, sexual intercourse, pregnancy and childbirth. The text accompanying the pictures includes children's spontaneous responses to the vivid imagery in the book. The book concludes with information for parents about sexuality and sex education written by German psychologist Helga Fleischhauer-Hardt.

Show Me!'s unorthodox approach to the sexual education of children and youth is explained in the foreword:

We have made this book for children and parents. In their hands it can be an aid to sexual enlightenment. But above all we hope it will show parents that natural sexuality develops only when children are surrounded from birth onwards by a loving family and environment which does not repress sexuality. We don't believe a child will have "found the answer" to sex simply by looking at the pictures in this book. A good understanding requires rather a continuing exchange between parent and child, a dialogue which helps the child express his questions and problems concerning sex and resolve them. The photographic part of this book is meant as a taking-off point for parents. Internal bodily processes such as conception and pregnancy as well as anatomical facts should be presented to the child in simple words by the parents themselves. The text at the end of the book makes suggestions for this purpose. It gives parents basic information on the development of sexuality and sex education. We are of the opinion that only an explicit and realistic presentation of sex can spare children fear and guilt feelings related to sexuality. For this reason we chose photography as a medium. With much care and under great difficulty we succeeded in photographing the children in such a way that their natural behavior came through. We thank the children and their parents for their help in putting together the photographs. The captions to the pictures are gathered from their spontaneous comments. We hope this book will serve parents and children as a source of information and guide them toward a happy sexuality marked by love, tenderness and responsibility.¹¹¹

When, in the summer of 1975, MacMillan Company sought to import the book for distribution in Canada, it was banned by Customs. The ban was lifted after a month and MacMillan commenced distribution, at which point the company was charged with violating the obscenity provision of the *Criminal Code*. After a trial featuring a range of witnesses, including Marshall McLuhan for the Crown, and Rabbi Gunther Plaut for the defence, the judge concluded that the book was not obscene.¹¹² Graburn Co. Ct. J. noted that the book recognizes pre-marital pubertal sexuality "as one of life's realities".¹¹³ He identified "sexual conduct in the context of love" as the theme of the

¹¹¹ *Ibid.* at 3-4.

¹¹² *R. v. MacMillan Co. of Canada Ltd.* (1976), 31 C.C.C. (2d) 286 (Ont. Co. Ct. J. Crim. Ct.) [*MacMillan*].

¹¹³ *Ibid.* at 318.

book.¹¹⁴ In concluding that *Show Me!* did not offend community standards of tolerance, he recognized a truth that child pornography law seems determined to suppress: children are sexual beings. In his words,

Sexual education, in the view of the authors and some of the witnesses, should begin at an early age. Many parents, I am told both by the authors and the witnesses, are unaware of their own total sexuality and view it with feelings of guilt and repression. Parents in such a condition cannot be expected to convey to their children a healthy attitude towards sexual matters. If parents do become informed and aware of their own sexuality, then they are in a position to deal positively and healthily with the fact that their children are sexual beings and to develop their children's sexuality with the help of the book, within the framework of the family, love, responsibility and morality, according to the witnesses.¹¹⁵

Graburn Co. Ct. J. gave careful consideration to the question of whether the book involved any harm in production, the very issue that later emerged as the dominant concern of child pornography law. He concluded that the authors were not "callous to the rights and dignity of the children", noting that there was no evidence to contradict the authors' claim that the parents of the children depicted in the book were present and helpful during the photography.¹¹⁶ As a result of his thoughtful and comprehensive ruling, *Show Me!* circulated freely in Canada in the mid-1970s.

Graburn Co. Ct. J.'s emphasis on educative value and the absence of harm in production in the *Show Me!* trial provides a sharp contrast to the assessment of the book that occurred twenty-five years later in a child pornography prosecution. In *R. v. Nedelec*,¹¹⁷ the accused was charged and convicted of simple possession of visual images that he had downloaded from the Internet and collected from magazines and other sources. The police also found the book *Show Me!* in the accused's collection of pornographic material. Wedge J. found that the book, along with much of the other material seized, constituted child pornography. In doing so, she did not cite the *MacMillan* ruling, nor did she contradict Graburn Co. Ct. J.'s conclusion that there was no evidence that the book involved harm in production. She simply concluded that the photos violated the definition of child pornography in s. 163.1(1), and briskly dismissed the argument that any defence could be raised on behalf of *Show Me!*:

I conclude that the defence of educational purpose is not available to Mr. Nedelec. The book "Show Me" is described by its authors as a "picture book of sex for

¹¹⁴ *Ibid.* at 319.

¹¹⁵ *Ibid.* at 321.

¹¹⁶ *Ibid.* at 314.

¹¹⁷ 2001 BCSC 1334 [*Nedelec*].

children and parents” whose objective is “to contribute to the sexual liberation of children and adolescents”. Notwithstanding this characterization of the book by its authors, I conclude that when viewed objectively the book is thinly disguised child pornography. It blatantly sexualizes children. It also sends the message young children are capable of engaging in sexual activity and that such activity should be encouraged and promoted.¹¹⁸

The shift in tone and perspective from the 1976 ruling in *MacMillan* to the 2001 ruling in *Nedelec* provides an illuminating measure of the regressive impact of child pornography law. The *MacMillan* ruling emphasizes the educative value of openly confronting the fact that children and youth have erotic feelings and sexual curiosity. It also asks whether any children or youths were harmed in the production of the material. The *Nedelec* ruling, on the other hand, asks us to adopt a “pedophilic gaze”. The judge assessed *Show Me!* solely from the point of view of persons who desire sexual contact with children. According to this perspective, the potential impact of expressive material on pedophiles determines what can circulate lawfully for all of society. The *Nedelec* ruling supports Amy Adler’s observation that “[c]hild pornography law has changed the way we look at children... The law requires us to study pictures of children to uncover their potential sexual meanings, and in doing so, it explicitly exhorts us to take on the perspective of the pedophile.”¹¹⁹

The *Hicklin* test of obscenity was often criticized and ultimately rejected in part because it let the supposed moral vulnerabilities of youth and the lower classes determine the scope of freedom of expression for everyone. The pedophile now substitutes for the child and the morally suspect masses, but the effect is the same. Our conclusion in either case should also be the same: moral corruption arguments do not provide sufficiently compelling reasons to justify the suppression of expressive material by the criminal law.

IV. FROM SEX AND ART TO VIOLENCE AND HATE

In conclusion, let me briefly summarize the argument I have presented. The incoherence of Canadian child pornography law has its roots in Parliament’s decision to use the criminal law to respond in the same way to three very different categories of sexual representations. The different kinds of harm involved in each category call for distinct legal responses.

First, I have suggested that material that involved harm in production should be the focus of our condemnation. There is no reason to restrict our condemnation of this sort of material to images that involved the infliction of harm to children in their production. Nor should we restrict the criminal law’s

¹¹⁸ *Ibid.* at para. 54.

¹¹⁹ Adler, “Perverse Law” *supra* note 5 at 256.

response to images recording the commission of sexual acts. Material that involved serious harms in production should be treated separately by the criminal law and punished harshly. A case can be made to justify offences of simple possession and even simply viewing expressive material, so long as the prohibition is narrowly tailored to capture only material that involved harm in production.

Second, I have suggested that material that did not involve harm in production should be the subject of criminal prosecution only if it meets the definition of hate propaganda set out in the *Criminal Code*. Again, artistic merit should be no defence. It should not be an offence to simply possess or simply access this material, since our concern is with the public dissemination of the most vitriolic forms of hate speech.

Finally, I have argued that expressive material that did not involve harm in its production, and that falls short of hate propaganda, should be no concern of the criminal law. Moral corruption arguments do not provide a compelling basis for the imposition of criminal sanctions on the creation, dissemination and use of expressive material. To justify criminal prohibitions, we need a reason other than our dislike of the ideas expressed. The notion that exposure to fictional or imaginary representations of criminal acts causes criminal behaviour is a persistent one. The social science evidence, however, does not support the "causal hypothesis" in relation to this type of material. We ought not to rely on it as the basis for criminal prohibitions. If we can succeed in leaving the moral corruption paradigm behind, sexuality and art would no longer be the central concepts in the debate. Perhaps we would then be less distracted from the urgent need to focus on eradicating the conditions that produce violence and hate. Those conditions include, but are by no means limited to, the prevalence of hate propaganda and of expressive material that involved violence in its production.

