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WHO IS HARMED BY FANTASY? A DELIBERATIVE DEMOCRATIC AND *CHARTER* ANALYSIS OF CANADA'S CHILD PORNOGRAPHY LAW

Emily Hansen*

ABSTRACT

This paper interrogates the breadth, necessity, and collateral effects of Canada's child pornography law, as contained in the *Criminal Code*. The author argues that the inclusion of "fantasy" images in the definition of child pornography is over-inclusive, and considers that this may make the law illegitimate and discriminatory. She proposes that this over-inclusive definition arises from the conflation of a particular type of sexual desire with harm to children. The author draws loosely on deliberative democratic theory to structure her analysis of the law's legitimacy, and uses *Charter* analysis to both critique the current law and suggest means of addressing the law's potentially discriminatory character. The author does not support or promote sexual abuse or exploitation of children, nor does she suggest that child pornography should be wholly de-regulated or de-criminalized.

Note: This paper was completed in April 2015. Due to current employment restrictions on updating the research, the case law and legislation cited herein are current to that date only.

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1. INTRODUCTION

The inclusion of “fantasy” images and writing in Canada’s *Criminal Code* definition of child pornography at s. 163.1 is based upon and gives the force of law to a socially-constructed villain: the paedophile.¹ I propose that this definition may be over-inclusive and requires reconsideration because the law may be illegitimate and discriminatory. In particular, this inclusion draws a largely unsubstantiated connection between a pathologized form of sexual desire on the one hand and harm to children on the other.

Section 163.1 looks broad but acceptable if we accept at face value the Supreme Court of Canada’s (“SCC”) standard of assessment and justifications for the law as articulated in *R v Sharpe*.² The laudable objective of protecting children buttresses such an interpretation. I propose we look deeper by questioning why the law is drawn so broadly and who is affected by this expansive approach. Paedophiles – by which I mean those with a sexual attraction to minors – are subject to criminal sanction for gratifying their sexual desire through the use of pornography.³ For child pornography involving actual children, the fact of sexual assault and exploitation in producing the materials unquestionably justifies this restriction.⁴ But that is not necessarily the case for “fantasy” materials.

I propose that this question – whether fantasy materials are properly included in s. 163.1 or whether their inclusion makes the law illegitimate – has not been asked because paedophiles are not publicly, legislatively, or judicially seen as rights-holders in respect of that aspect of their personhood. To explore this perspective I draw on both deliberative democracy and constitutional arguments. Equality and reason are the twin deliberative democratic requirements. Equality refers to the idea that each citizen must occupy a position

¹ *Criminal Code of Canada*, RSC 1985 c C-46, s. 163.1 [*Criminal Code*].

² *R v Sharpe*, 2001 SCC 2 [*Sharpe*]. The standard is a “reasoned apprehension of harm” and the justifications are incitement, grooming, and cognitive distortions.

³ I use the term “paedophile” throughout this paper to refer to people who are sexually attracted to minors. I recognize this is broader than the psychiatric definition and have chosen the term for convenience. I do not, however, unquestioningly support the pathologization of this form of sexual desire. For a fuller discussion of the medical definition, its relationship to the legal definition of child pornography, and the problems with categorizing certain sexual desires as mental illness, below.

⁴ But see Harris Mirkin, “The Social, Political, and Legal Construction fo the Concept of Child Pornography” (2009) 56:2 *Journal of Homosexuality* 233.

equal to that of every other citizen in respect of both their fundamental individual liberties and their public autonomy. Reasoned deliberation requires that parties base their arguments on rational arguments that can be understood by all other parties and respectfully listen to and try to understand others' reasons. I propose that the drafting of s. 163.1 violated these requirements, making the law potentially illegitimate.

I look at judicial constitutional analysis as a form of reason-giving and question whether the current formula for ensuring government adherence to the social contract is flawed. Social context makes it unlikely that the requirements of equality and reasons can be met without legal intervention. It also makes legal intervention through either legislation or a successful challenge under the *Canadian Charter of Rights and Freedoms* unlikely.⁵ As such, s. 7 or s. 15 of the *Charter* might be the appropriate vehicles for understanding and rectifying the law's excesses and for examining the legitimacy of a law based on a social construction that excludes those subject to it from the democratic community from which it arises.

(a) Brief Conclusion

Whereas people with normative sexualities are entitled not only to assert their sexual desires, but to obtain sexual gratification through pornography, paedophiles are categorically precluded from accessing any such materials, regardless of the involvement of or harm to actual children. The idea of normative sexuality is a moving target, but it certainly includes heterosexuals and homosexuals, and increasingly also encompasses certain historically deviant desires such as BDSM.⁶ The fundamentally contingent nature of normative sexuality, and thus what is permissible sexual gratification versus criminal offence, points to the socially contingent nature of the criminalization of certain sexual practices.⁷ This social contingency in turn raises questions of democratic

⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

⁶ A category of erotic play encompassing bondage and discipline, dominance and submission, and sadism and masochism.

⁷ Elaine Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity* (Vancouver: UBC Press, 2012) at 5-6, 10-44.

legitimacy when those who are affected by a law are excluded from the debate around its enactment and are unrepresented by those who were included.

Few would seriously question the often visceral abhorrence that arises in conjunction with the idea of the paedophile. While opposition to child sexual abuse is appropriate, vilifying paedophilic desire is unnecessary. Once this visceral reaction is critically examined, it is arguable that Canada's legal definition of child pornography may be out of step with empirical reality. As such, the law may be democratically illegitimate, discriminatory, and an unjustified infringement on paedophiles' rights to liberty and security of the person. Where legislation, judicial interpretation, and medical and social discourse are interwoven, as in the case of child pornography and paedophilia, it is necessary to disaggregate and critically examine the law as it arises from and contributes to broader socio-political understandings. Elaine Craig has cautioned that "it is always important to recognize the relationship between a legal process, such as the criminal justice system, and its constitutive role in the social context in which it operates".⁸ While legislation sets the initial parameters of a solution to a social problem, the courts are charged with ensuring legislation goes no further than is necessary to protect legitimate social interests. I propose that the problem of s. 163.1 lies in the legislative definition, but that the court is complicit in perpetuating and giving the stamp of legitimacy to socio-political prejudices.

Building on other scholars' analyses of child pornography legislation as a 'moral panic', an unjustifiably broad restriction on freedom of expression, and a conflation of social, medical, and legal discourses, I propose that this view of paedophiles as disentitled to any right to sexual gratification is based on the presumption that all paedophiles either have, or inevitably will, assault children.⁹

⁸ Elaine Craig, "Person(s) of Interest and Missing Women: Legal Abandonment in the Downtown Eastside" (2014) 60:1 *McGill LJ* 1 at 36 ["Person(s) of Interest"].

⁹ On child pornography legislation as a moral panic, see e.g. Suzanne Ost, "Children at Risk: Legal and Societal Perceptions of the Potential Threat that the Possession of Child Pornography Poses to Society" 29:3 *Journal of Law and Society* 436; David Gurnham, *Memory, Imagination, Justice: Intersections of Law and Literature* (Surrey, Eng: Ashgate Publishing, 2009) at 113-32. On child pornography legislation as an unjustifiably broad restriction on freedom of expression, see e.g. Bruce Ryder, "The Harms of Child Pornography Law" (2003) 36 *UBC L Rev* 101; Sara M Smyth, "A 'Reasoned Apprehension' of overbreadth: an alternative approach to the problems presented by section 163.1 of the *Criminal Code*" (2009) 42 *UBC L Rev* 69; Gurnham, *supra* note 9 at 113-32; Suzanne Ost, *supra* note 9. On child pornography legislation as a conflation of social, medical, and legal discourses, see e.g. Elise Chenier, "The Natural Order of Disorder: Pedophilia, Stranger Danger and the Normalising Family" (2012) 16 *Sexuality & Culture* 172; Harris Mirkin, *supra* note 4.

If no children are involved in the production of the material, harm can only ensue if the use of this material will result in other offences, be they the use or production of child pornography involving real children or contact offences against children. It is this rationale that supports the Supreme Court of Canada's justifications for the law's inclusion of fantasy materials.

If the criminalization of fantasy pornography is unnecessary to achieve the law's objective of protecting children, the law goes further than is necessary. While this potential overbreadth has been the target of repeated scholarly inquiry, the concern has universally been freedom of expression: if the provision need not cover these materials, it is an unjustified infringement of expression. My concern lies with the sexual integrity and equality of paedophiles. Expanding the s. 163.1 defences could help to rectify the law's overbreadth. But recognizing the law's effect on paedophiles' *Charter* rights – namely, the s. 7 liberty or security of the person rights or the s. 15 equality right – would better rectify the socio-political exclusion of paedophiles and could be used as a means of protecting paedophiles' ability to access pornographic content that does not cause harm to children. In particular, exempting fantasy pornography from the ambit of s. 163.1 is an avenue worth exploring as a means to balance children's and paedophiles' rights.

(b) Argument Overview

Two matters of definition and scope require attention at the outset. First, I do not wholly subscribe to the medical model of paedophilia as an illness. The word "paedophile" both connotes mental illness and carries social stigma and assumptions, and I attempt to question both the social stigma that attaches to the term and the conceptualization of paedophilia as an illness rather than a sexual identity. Sexual desires are just that: desires, not acts. This paper suggests that rather than categorize particular sexual desires as bad, those who have them as sick, and any behaviour associated with them as criminal, sexual desire should be regulated only to the extent it harms others. I have nevertheless chosen to use the term "paedophile" to refer to those with sexual desire for minors because the alternatives are cumbersome. Second, throughout this paper, I suggest that the scope of the criminal prohibition against child pornography requires re-

examination and should perhaps be narrowed. It is important to clarify the extent of my proposal. Again, I rely on the distinction between desire and act: I neither advocate that child pornography using real children should be permitted nor that sexual relationships between adults and children are acceptable. My proposal is much more limited; I suggest that “fantasy” pornography may be unnecessarily criminalized.

After introducing Canada’s child pornography provision, my argument proceeds in six parts. First, I explain the relationship between child pornography and paedophilia, demonstrating how child pornography laws target paedophiles as a group and exploring the relationship between medical and legal definitions. Second, I discuss the stigmatization that attaches to paedophilia. Third, I briefly explore the theory of deliberative democracy as it relates to paedophilia and child pornography, arguing that the Parliamentary process for s. 163.1 did not satisfy the deliberative democratic model. Fourth, I analyze *Sharpe*, the leading case on s. 163.1. Fifth, I present recent social scientific research that undercuts the reasoning in *Sharpe*. Finally, I offer the broad outlines of a proposal for rectifying the illegitimate and discriminatory character of s. 163.1.

2. CHILD PORNOGRAPHY IN CANADIAN LAW

(a) The Origins of Canada’s Child Pornography Legislation

Canada’s child pornography regime is an outgrowth of certain 1970s social developments: feminism, the anti-pornography movement, and the growing awareness of child sexual abuse.¹⁰

Before 1993, child pornography was not explicitly defined in the *Criminal Code* and was addressed under the general obscenity provision in s. 163.¹¹ At law, material is obscene when the undue exploitation of sex is its dominant

¹⁰ Smyth, *supra* note 9 at 75. Obscenity law is the framework for regulating pornography, but feminist anti-pornography campaigners shifted the obscenity debate from “vague notions of public decency and morality” to a harm-based critique that used a definition of harm including “social harm” arising from the influence of pornography on “public attitudes and beliefs”. *Ibid* 75-76. See especially *R v Butler*, [1992] 1 SCR 452, [1992] 2 WWR 577, 1992 CarswellMan 100 [cited to Carswell] (WL CAN).

¹¹ *Criminal Code*, *supra* note 1 at s. 163.

characteristic.¹² Whether the exploitation was “undue” was historically determined by a community standards test that focused on “what Canadians [...] would not tolerate other Canadians being exposed to”.¹³ In *Butler*, Sopinka J upheld the constitutionality of the obscenity provision but discarded the community standards test in favour of a harm-based approach that evaluates whether the exploitation of sex is “undue”:

Pornography can be usefully divided into three categories: (1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing. [...]

The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner which society formally recognizes as incompatible with its proper functioning. [...] ¹⁴

Sopinka J also explicitly drew a line between adult pornography and child pornography: “explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.”¹⁵ In other words, material that used children in its production would always constitute an undue exploitation of sex.

The growing hyper-visibility of child pornography in the 1970s and 1980s led to an amalgamation with the discourse around the adult pornography industry and “child pornography” was linked in the public eye with “the predatory activities of pedophiles and child sex rings”.¹⁶ There was, however, a legislative and judicial shift from the obscenity provisions regulating pornography generally to the child pornography-specific provision in s. 163.1 of the *Criminal Code*. The 1984 Badgley Report on sexual offences against children (including child pornography) and the 1985 Fraser Report on pornography and prostitution both

¹² *Butler*, *supra* note 10 at para 44.

¹³ *Ibid* at para 48 [emphasis in original].

¹⁴ *Ibid* at paras 59-61.

¹⁵ *Ibid* at para 62.

¹⁶ Smyth, *supra* note 9 at 76-77.

emphasized that the purpose of suppressing child pornography was to protect real children from sexual exploitation; the reports were not concerned with “imaginary representations of child sexual abuse.”¹⁷ The obscenity provision was tied to content, and thus did not directly address the primary concern about child pornography: the exploitation of children (who, unlike adults, cannot legally consent to participate) in producing certain materials.¹⁸ When Parliament drafted s. 163.1, however, the emphasis on harm to actual children that is apparent in both *Butler* and the Badgley and Fraser Reports was lost.

(b) The Legal Definition of Child Pornography: s. 163.1 of the *Criminal Code*

Since 1993, child pornography has been defined for legal purposes in Canada by s. 163.1(1) of the *Criminal Code*. The legislative definition was broader than that previously used under obscenity law, in particular because it included what I will refer to as “fantasy” images and writings. By “fantasy” I mean those images, videos, recordings, or writings that do not depict, describe, or otherwise involve real children, a category that includes drawings, paintings, or computer-generated images, as well as “dress down” pornography, where an adult model is displayed to look like a minor.

The original legal definition of child pornography enacted in 1993 captured a vast range of visual and a smaller range of print materials, only some of which directly involved children in their production.¹⁹ Today, the definition of child

¹⁷ *Ibid* at 79-80. See also Ryder, *supra* note 9 at 111-13 (noting that not only *Butler* and the Badgley and Fraser Committee Reports, but also international instruments such as the *Convention on the Rights of the Child* and the *Optional Protocol on the sale of children, child prostitution, and child pornography* focus on material that uses real children in producing sexual imagery). See generally Special Committee on Pornography and Prostitution (Canada), *Pornography and prostitution in Canada : report of the Special Committee on Pornography and Prostitution* (Ottawa : Minister of Supply and Services Canada, 1985) [Fraser Report]; Committee on Sexual Offences Against Children and Youths (Canada), *Sexual offences against children : report of the Committee on Sexual Offences Against Children and Youths* (Ottawa: Minister of Supply and Services Canada, 1984) [Badgley Report]; Lyne Casavant, James R Robertson, CIR 84-3E, “The Evolution of Pornography Law in Canada” (25 October 2007), online: Parliament of Canada <<http://www.parl.gc.ca/Content/LOP/researchpublications/843-e.htm>>.

¹⁸ Smyth, *supra* note 9 at 80-81.

¹⁹ Gary P Rodrigues, “CRANKSHAW-HIST 163.1” in *Crankshaw's Criminal Code of Canada* (January 2015), online [my emphasis].

pornography at s. 163.1 of the *Criminal Code* has been further expanded.²⁰ The definition now 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;

(b) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;

(c) *any written material whose dominant characteristic 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;* or

(d) *any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.*²¹

(italics showing additions from original 1993 definition; underlining is my emphasis)

The later definition is broader than the original definition. While the inclusion of audio recordings simply reflects technological advancements, the amended definition retained the broad inclusion of representations of explicit child sexuality (i.e. fictional representations and dress down materials) but greatly expanded the provision for written materials, which is matched by the provision for audio recordings. The old definition included only written materials that

²⁰ This occurred through *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, SC 2005, c 32, s 7(1). The 2005 amendments also imposed new mandatory minimum sentences on the various offences created in s. 163.1, which were further increased in 2012 by the *Safe Streets and Communities Act*, SC 2012, c 1.

²¹ *Criminal Code*, *supra* note 1 at s 163.1 [underlining is my emphasis; italics show changes from the 1993 provision].

advocate or counsel sexual activity with a person under 18. By contrast, the new definition also includes material that is primarily about sexual activity with a person under the age of 18, regardless of whether it counsels or advocates such activity.

The s. 163.1 definition captures virtually any material that would be sexually arousing to those who are attracted to persons under 18 years of age. The child pornography definition serves as the anchor for a series of offences including simple possession and accessing, as well as offences for making and distributing materials meeting this definition.²² The defences currently available under the provision are also narrower than they were originally, and would arguably be unavailable for persons other than artists, academics, medical practitioners, and scientific researchers.²³ The practical effect of the provision is to deny sexual gratification through pornography to those attracted to persons under the legal age of majority and to criminalize those who seek such gratification.

3. HOW IS CHILD PORNOGRAPHY RELATED TO PAEDOPHILIA?

(a) Going from Child Pornography to Paedophilia

My analysis is focused on the hypothetical situation of a paedophile who possesses only (i) purely fictional or imaginary written or visual materials depicting or describing explicit child sexuality, or (ii) dress down pornography.²⁴ Although this person possesses child pornography within the Canadian definition, they are viewed and generally labelled not as a person who possesses child pornography, but rather as a paedophile. The problem is the narrative that

²² These are Crown election offences that can be prosecuted as either summary conviction or indictable offences. In either form the offences carry mandatory minimum sentences. *Criminal Code*, *supra* note 1 at ss 163.1(2)-(4.1).

²³ Substantive changes to the defences occurred in 2005, replacing the three original defences with a more stringent single defence that is less favourable to accused persons: *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, SC 2005, c 32, s 7(7). The new defences require that the act have a "legitimate purpose related to the administration of justice or to science, medicine, education or art" and that the act "not pose an undue risk of harm to persons under the age of eighteen years". *Criminal Code*, *supra* note 1 at s. 163.1(6).

²⁴ The latter situation is more problematic because it places an additional burden on the Crown to prove the subject in the material is not over 18 years of age.

quickly attaches to the label “paedophile.”²⁵ As I will discuss in greater detail below, the Canadian definition of child pornography is implicitly linked to paedophilia, a medically-recognized mental illness, and yet the Canadian definition of child pornography captures a broader range of conduct than does the psychiatric diagnosis.

For the sake of clarity, I will lay out the analytical steps that connect the ideas of child pornography and paedophilia. At its simplest, paedophilia – literally meaning child lover – is a status label that denotes a sexual arousal from or sexual attraction to children. While paedophilia is commonly thought of and is classified by the medical community as a mental disorder, the basic core of meaning indicates only a particular type of sexual desire; a paedophile is a person who has this desire. Putting legal definitions to one side, child pornography is sexually arousing content (visual, written or oral) that takes children as the object of focus.

Although child pornography use can indicate paedophilia, there is not necessarily a causal connection or even a correlation between paedophilia and child sexual abuse or between child pornography use and child sexual abuse. Recent Canadian research tested the “intuitive link between possession of child pornography and pedophilia” and concluded that “child pornography offending is a valid diagnostic indicator of pedophilia.”²⁶ The same study found, however, that “child pornography offending might be a stronger indicator of pedophilia than is sexually offending against a child.”²⁷ I will discuss the current state of social scientific literature on the matter and the medical diagnostic criteria in greater detail below. For now, it is sufficient to note that paedophilia, child pornography, and child sexual abuse are often unquestioningly grouped together under the umbrella of paedophilia, despite important differences between them.

In the social consciousness, however, this important distinction between paedophiles and child sexual offenders is rarely drawn. Viewers or users of child pornography are labelled as paedophiles, and a correlative assumption arises that paedophiles are viewers and users of child pornography. The associations go

²⁵ On a similar point, see Craig “Person(s) of Interest”, *supra* note 8; Craig, *Troubling Sex*, *supra* note 7.

²⁶ Michael C. Seto, James M. Cantor, and Ray Blanchard, “Child Pornography Are a Valid Diagnostic Indicator of Pedophilia” (2006) 115:3 *Journal of Abnormal Psychology* 610 at 610, 613.

²⁷ *Ibid* at 613.

further in two respects. First, child pornography is associated with harm to and exploitation of children (arising from both its production and a concern that it will be used to seduce children). Second, paedophilia is associated with sexual abuse and exploitation of children. Only the first step of this line of social reasoning is empirically supported, and then only in the context of pornography using real children.²⁸ When these analytical jumps are put together, paedophiles pose a risk to children either (both) because they sexually abuse children or (and) because they contribute to the harms caused by child pornography, and they can be identified through their use of child pornography. The result is that a status label is associated with an act or acts (child sexual abuse and exploitation; consumption of child pornography). When those acts are criminalized, the chain of assumptions works backwards to criminalize a status. The law can therefore both arise from and confirm categorizations of acceptable and unacceptable sexuality.

Elaine Craig argues that essentialist understandings of sexuality pervade both social and legal discourse and create a binary between natural (normative) sexuality and deviant sexuality, with deviance being the subject of legal regulation.²⁹ Craig argues that sexual identities are not inherently deviant, but rather deviance is socially produced through norms and discourse: discourse produces the subject about which it speaks, a process she refers to as “erotic speciation”.³⁰ In Craig’s analysis, erotic speciation both applies to the criminal law treatment of paedophilia and provides the legal justification for protecting some sexual minorities but not others. The force driving this process is the search for a normative group identity that can only be defined in relation to what it is not.³¹

Craig argues that the court looks at the paedophile as “a member of a discrete and identifiable sexual minority” and takes an essentialist approach based

²⁸ See above historical section.

²⁹ Craig, *Troubling Sex*, *supra* note 7 at 11-12. Essentialist conceptions of sexuality conceive of sexuality as “natural” and pre-social. Craig argues that conceptualizing sexuality as socially constructed better accounts for its complexity and thus facilitates better legal reasoning. Social constructivism posits that identity categories are created through discourse in an iterative process. Social constructivism does not mean that sexuality is a choice or is mutable, but rather is concerned with the social and legal implications of labelling. *Ibid* at 8-19.

³⁰ *Ibid* at 14.

³¹ *Ibid* at 15.

on the identity category – a paedophile is seen as an “unnatural ... sexual *pervert*”.³² The concern is not with what a paedophile does, but with who they are, specifically in terms of their particular sexual desire.³³ For Craig, this type of reasoning demonstrates the judicial reliance on an assessment of “an offender’s ‘true nature’ or innate sexual disposition”.³⁴ The danger is that this type of reasoning “risks convicting an accused for ‘being’ a paedophile”.³⁵ In the context of child pornography, Craig asserts that the rationales for s. 163.1 are thematically linked by the idea that exposure to child pornography can incite paedophiles’ innate sexual orientation.³⁶

Further evidence of this linkage between child pornography use, paedophilia, and child sexual offences and of the effective criminalization of a sexual status is evident upon examining the sentencing practices in child pornography cases. While s. 163.1 criminalizes the simple possession of even one image, regardless of the viewer’s subjective purpose,³⁷ the accused being a paedophile is an aggravating factor for sentencing whereas the accused being deemed not a paedophile is a mitigating factor.³⁸ The implicit logic is either that paedophiles are more likely to offend against children or that it is worse to look at child pornography and achieve sexual gratification than to look at child pornography and not achieve sexual gratification. Given this social and legal nexus between child pornography and paedophilia, the difference between medical definitions of paedophilia and the legal definition of child pornography is important to understand the implications of the law, and thus to assess whether the law is legitimate.

³² *Ibid* at 24 (emphasis in original).

³³ *Ibid* at 33, 35.

³⁴ *Ibid* at 35.

³⁵ *Ibid* at 35.

³⁶ *Ibid* at 40.

³⁷ See e.g. *R v Pressacco*, 2010 SKQB 114 at para 22.

³⁸ See generally *R v Hammond*, 2013 BCSC 439 at para 68. See also *R v Cuttell*, 2010 ONCJ 139 at para 13-14; *R v DLW*, 2014 BCSC 43 at para 85-89.

(b) The Relationship between Legal and Medical Treatment of Sexual Desire for Children

(i) The Medical Definition of Paedophilia

Paedophilia is classified as a subset of paraphilia, which is listed in the DSM (Diagnostic and Statistical Manual of Mental Disorders) as a mental illness. Paraphilia (the broader category) includes: “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving [...] iii) children or other non-consenting persons that occur over a period of at least 6 months.”³⁹ Paraphilic *disorder* is only diagnosed when atypical sexual behaviour or desire either (i) causes personal stress to the individual beyond that resulting from societal disapproval, or (ii) involves sexual desire or behaviour that involves another person’s psychological distress or injury or death, or a desire for sexual behaviour that involves unwilling persons or persons not legally able to consent.⁴⁰

The “personal stress” requirement acts as a limiting diagnostic factor, in that atypical sexual behaviour is only a disorder when it causes “clinically important distress, or impair[s] work, or cause[s] problems with social or personal functioning”.⁴¹ This requirement is still, however, subject to societal influences because impairment may be caused by the stigmatization associated with others knowing of the individual’s sexual interests or preferences.⁴² In effect, paraphilia diagnosis depends on criteria that can arise from societal disapproval.

For paedophilia, the contingency is not only social but also legal. The diagnosis-limiting requirement is meaningless. There are two diagnostic indicators for paedophilia: (i) “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving activity with a prepubescent child or children (generally 13 years or younger)”, (ii) that persist for a minimum of 6 months.⁴³

³⁹ Michelle A McManus, Paul Hargreaves, Lee Rainbow, and Laurence J Alison, “Paraphilias: definition, diagnosis and treatment” (2013) 5 *F1000Prime Reports* 36, online: <<http://f1000.com/prime/reports/m/5/36>>.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Lisa J Cohen and Igor Galynker, “Psychopathology and personality traits of pedophiles: issues for diagnosis and treatment” (2009) 26(6) *Psychiatric Times* 25, online: <<http://www.psychiatrictimes.com/articles/psychopathology-and-personality-traits-pedophiles>>.

Paedophilia can never fall into merely the broader “atypical sexual behaviour or desire” category of paraphilia because it will always involve “persons not legally able to consent”.

(ii) Reconsidering the Legal Definition of Child Pornography

While it is not paedophilia *per se* that is criminalized by s. 163.1, the law acts to criminalize paedophiles who gratify their sexual desires through the use of child pornography.⁴⁴ For my purposes, the critical aspects of the s. 163.1 definition are threefold. First, it includes visual representations and audio recordings involving real persons that are *over* the age of 18 and *do not* advocate or counsel sexual activity with someone under 18 that would be a criminal offence. Second, it includes visual representations that *do not* involve real persons at all (whether under or over the age of 18). Third, it includes written materials and audio recordings that *do* simulate or describe sexual activity with a person under the age of 18 and do so for a sexual purpose, but *do not* actually involve persons under the age of 18. In contrast to the definition of paedophilia in the DSM, the legal definition of child pornography captures material portraying children under the age of 18 years and even material that depicts an adult subject as being under the age of 18 years. Thus while the medical definition of paedophilia is partially contingent on the legal age of consent, the legal definition of child pornography captures a broader range of desire and conduct than is implied in the medical definition of paedophilia.

(iii) Social, Medical, and Legal Discourse Simultaneously Creates and Ostracizes Paedophilia as an Identity.

The simultaneous connection and difference between the medical diagnostic criteria for paedophilia and the legal definition of child pornography is significant in light of Joel Feinberg’s query about the fine line between “sick” (ill) and “sick” (morally repugnant) in relation to crimes. Feinberg noted the phenomenon that “the more bizarre the crime, the stronger one’s inclination to think of the criminal as sick”, noting that this modern tendency runs counter to the historic legal and

⁴⁴ See above text accompanying notes 24-38.

moral recognition that (mental) sickness “[mitigates] culpability”.⁴⁵ For Feinberg, using sickness to condemn behaviour “breeds paradox, for if the most immoral crimes are also the most sick, and the sickest crimes are those for which there is substantial mitigation, then it seems to follow that the worse the crime, the more forgiving we should be of the criminal”.⁴⁶

According to Feinberg, moral and psychiatric judgments blended in the modern era. As the number of recognized medical ailments expanded at the turn of the 20th century, medical authorities turned behaviours subject to moral opprobrium – such as drug addiction, homosexuality, and masturbation – into defined illnesses.⁴⁷ Feinberg proposes that this process is self-reinforcing: pathologizing morally disapproved conduct reinforces the social conception that the conduct is abnormal and morally suspect.⁴⁸ Simply put, the “merging of moral and psychiatric vocabularies [...] in turn produced a blending of moral and psychiatric subject matters”.⁴⁹ But because society evolves, whether a particular behaviour or characteristic is socially frowned upon or considered an illness can change.⁵⁰ Paedophilia is a perfect example.

Recognizing the difficulty in differentiating “between deviant sexual desires arising from mental disorders and displays of sexual orientation that do not emerge from a form of mental illness” led the DSM-V to attempt to clearly delineate paraphilia from paraphilic disorder.⁵¹ Medical practitioners and scientists recognize the socially contingent nature of the definition and diagnostic criteria and the overlap between medical/psychiatric versus social, political, and legal spheres. As McManus et al note, “[d]ue to societal shift in what is defined as sexually deviant the use of ‘paraphilic’ has significantly changed over time, and within cultures”.⁵² As a result, diagnoses may not be rooted in actual psychiatric health, and those who are identified as having these desires may be stigmatized

⁴⁵ Joel Feinberg, “Fusion: The Blending of Moral and Psychiatric Judgments” in *Problems at the Roots of Law: Essays in Legal and Political Theory* (New York: Oxford U P, 2003) at 193.

⁴⁶ *Ibid* at 194.

⁴⁷ *Ibid* at 197.

⁴⁸ *Ibid* at 198.

⁴⁹ *Ibid* at 198.

⁵⁰ *Ibid* at 199.

⁵¹ McManus et al, *supra* note 39.

⁵² *Ibid*.

or caused personal distress, which can then act as evidence satisfying the diagnostic criteria for paraphilic disorder, in a loop that fits neatly into Feinberg's model.⁵³ Where psychiatric diagnoses are repurposed and used – often inappropriately – as the basis for criminal culpability or civil commitment post-incarceration, the result can be troubling: individuals are incarcerated or kept under state control because their sexuality violates societal norms.⁵⁴ A simple and pertinent example outside the context of paedophilia is homosexuality, which until 1973 was classified as paraphilic under the DSM, and has now not only been delisted, but is a *Charter*-protected ground of discrimination.⁵⁵

Feinberg's observations about the mingling of criminality, pathology, and morality are apposite to paedophilia and child pornography. Users (and producers, etc.) of child pornography are seen as perverted, twisted, and "sick."⁵⁶ The presumed exploitation of children for personal gratification is seen as immoral. Paedophiles are not only socially reviled, but can be classified as mentally ill. Moreover, where law is directed at sanctioning (im)moral conduct, it is not just a blending of social and psychiatric judgments, but a blending of social, legal, and psychiatric ways of understanding.⁵⁷

Psychiatric, social and legal definitions blur in the child pornography/paedophilia context. The legal definition that will attach the public label "paedophile" to a person is broader than the psychiatric definition (because in Canada, a single instance of possession is criminalized and the "child" threshold is 18 years). And in the social narrative, paedophile is synonymous with contact offences, or at least the risk thereof. As I discuss in greater detail below, the judicial rationalization of Canada's child pornography law similarly posits a causal connection between child pornography and contact offences. The institutional status of the legal system gives the legal definition a legitimating

⁵³ *Ibid.*

⁵⁴ See generally McManus et al, *supra* note 39; Emma Cooper, ed., *Louis Theroux: A Place for Paedophiles*, (BBC, first televised 21 April 2009).

⁵⁵ McManus et al, *supra* note 39; *Egan v Canada*, [1995] 2 SCR 513, [1995] 2 SCR 513 [*Egan*]. See generally Chenier, *supra* note 9.

⁵⁶ See below text accompanying notes 120-139.

⁵⁷ An earlier version of this paper included a consideration of Elaine Craig's analysis of how legal narratives both confirm and create the exclusion of particular identity categories from the social conscience and how that analysis mapped on to the child pornography and paedophilia context. See Craig, "Person(s) of Interest", *supra* note 8.

power but also imposes an additional level of collective and state-sanctioned moral opprobrium. Thus while the line between the legal definition of child pornography and the psychiatric definition of paedophilia is blurry, the legal definition and criminalization of child pornography also builds into a social narrative. This legal aspect attaches greater stigma to sexual desire for children than may be deserved, both because the legal definition does not differentiate between the various types of material caught in the definition and because of the social and legal narrative that draws a causal connection between child pornography and contact offences against children.⁵⁸ Recognizing the relationship between medical and legal definitions and the influence of social values on each is important because it suggests the social contingency of what is considered deviant versus acceptable desire and conduct in both medical and legal contexts. This category of deviance arises from the interaction between majority moral values, psychiatry, and law. If the social contingency of the concept is recognized, it is easier to question the implications of these definitions for those who are labelled by them and thus to envision changing them to minimize negative effects.

4. THE SOCIAL VILIFICATION OF PAEDOPHILIA

(a) The Stigmatization of Paedophilia in Social, Judicial, and Political Contexts

Paedophiles are a socially reviled group. Judicial, academic, and political speech evidences a general prejudice towards paedophiles.⁵⁹ Majority prejudice of this nature undoubtedly affects the ability to pay respectful attention to and comprehend the reasons that can be given on the other side of the issue. As I will discuss, this violates a condition of deliberative democracy and also undermines the ability to conduct an effective s. 1 justification analysis.⁶⁰ A few examples of this prejudice are opposite.

⁵⁸ On the failure to differentiate, see Ryder, *supra* note 9.

⁵⁹ See, e.g. *R v Reynard*, 2013 BCPC 279 at para 40.

⁶⁰ See below at text accompanying notes 102-118.

Judges and academics have drawn parallels between paedophilia and hate speech, demonstrating the severity of opprobrium that attaches to paedophiles. In *Saskatchewan (Human Rights Commission) v Whatcott*, Rothstein J considered whether certain flyers were hate speech and thus violated provincial human rights legislation.⁶¹ Two of the flyers were found to satisfy the hate speech definition in part because they “[delegitimize] homosexuals by referring to them as filthy or dirty sex addicts and by comparing them to pedophiles, a traditionally reviled group in society”.⁶² Rothstein J reiterated this hierarchy of statuses when he noted, “The flyers also seek to vilify those of same-sex orientation by portraying them as child abusers or predators”.⁶³ Rothstein J held that it was reasonable to conclude that “by equating homosexuals with [...] pedophiles and predators who would proselytize vulnerable children and cause their premature death, [the flyers] would objectively be seen as exposing homosexuals to detestation and vilification”.⁶⁴ In the academic context, Janine Benedet has equated all child pornography with hate speech.⁶⁵

Even more recently, and in the political context, Conservative Canadian Senator Donald Plett derogatorily characterized paedophiles as opportunistic offenders when speaking about Bill C-279.⁶⁶ In discussing whether transgender people should be allowed to use bathrooms corresponding to their gender identity, Sen. Plett asserted that the bill “allows for pedophiles to take advantage of legislation that we have in place”.⁶⁷ His concern was not that transgender

⁶¹ *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11.

⁶² *Ibid* at para 187.

⁶³ *Ibid* at para 189.

⁶⁴ *Ibid* at para 190.

⁶⁵ Janine Benedet, “Children in Pornography After *Sharpe*” (2002) 43 *Cahiers De Droit* 327 at 350. In contrast, Ryder argues for abandoning s. 163.1’s restrictions on imaginary materials in favour of existing *Criminal Code* provisions, proposing that the written works provisions of s. 163.1 (which, at the time Ryder was writing required that written works counsel or advocate sexual offences against children) could be effectively addressed under hate speech laws. Ryder’s proposal fits comfortably with my own analysis of the potential for s. 7 and/or s. 15 protections for paedophiles because hate speech laws are about protecting other members of society from the expression of personally held views that either cause or promote harm to those other members of society. Ryder, *supra* note 9.

⁶⁶ Bill C-279 includes an amendment to the *Canada Human Rights Act* to add gender identity as a protected ground and to the *Criminal Code* as a distinguishing feature for hate crimes and an aggravating factor for sentencing.

⁶⁷ Qtd in Robin Levinson King, “Trans rights bill amendment would bar trans people from public washrooms” *The Star* (25 February 2015), online: <
<http://www.thestar.com/news/canada/2015/02/25/trans-rights-bill-amendment-would-bar-trans->

people would abuse the legislation but rather that paedophiles would, revealing how gender or sexual deviance is associated in many people's minds with paedophilia and with risk to public safety.⁶⁸

The harm to paedophiles is not, however, limited to general social revulsion due to the possible ramifications of a child pornography conviction. As I have already discussed, a determination that the accused in a child pornography case is a paedophile is an aggravating factor for the purpose of sentencing. *R v K (M)* illustrated both the social and legal consequences of a possession for fantasy child pornography.⁶⁹

K. M. pled guilty to possession of child pornography in the form of “cartoon-like depictions and pencil drawings of young children (toddlers)” showing “sexual acts between children, between children and adults, acts of bondage, torture and bestiality” which “the sentencing judge described as ‘vile’ acts” and the Court of Appeal called “disturbing and alarming”.⁷⁰ K. M. was sentenced to 90 days of jail time, a three-year probation wherein he was prohibited from being alone with a child under the age of 16 years and an order preventing him to attending certain public places where children at typically found, including day cares, for 10 years (which prevented K.M. from being alone with his three-year-old daughter or taking her to day care).⁷¹ In addition to these legal consequences, however, K. M. and his wife agreed that he should move out of the family home to “[guard] the family from the stigma of his conviction”.⁷²

The New Brunswick Court of Appeal ultimately dismissed K.M.'s appeal, having refused to admit fresh evidence.⁷³ In concluding that the requisite nexus between the probation conditions and either the offence, or “the protection of society and the offender's reintegration into society” was present, the court imposed an extremely low threshold for demonstrating that the

people-from-public-washrooms.html#>. See especially *Debates of the Senate*, 41st Parl, 2nd Sess, No 149:31 (4 February 2014) at 1550 (Hon Donald N Plett).

⁶⁸ *Ibid.*

⁶⁹ *R v K(M)*, 2010 NBCA 71.

⁷⁰ *Ibid* at paras 1, 7.

⁷¹ *Ibid* at paras 1-2. The Crown admitted that in child pornography cases they “automatically sought” an order preventing the accused being alone with children under the age of 16. *Ibid* at para 3.

⁷² *Ibid* at para 8.

⁷³ *Ibid* at para 29.

offender posed a risk of harm to children beyond the mere fact of conviction.⁷⁴ Although conviction itself was insufficient to establish the required nexus, it was sufficient that the images were “disturbing” and K. M. had kept the pictures for over seven years.⁷⁵ The lynchpin was the nature of the images – they were cartoon drawings of toddlers engaged in sexual acts with adults.⁷⁶

The court’s dismissal of K. M.’s request to admit fresh evidence similarly fixated on the nature of the images. While the court acknowledged its limited capacity to assess the relationship between possession of child pornography, paedophilia, and deviant sexual behaviour, it nevertheless concluded that a clinical and forensic psychologist’s report concluding that K.M. was not a paedophile and that the “risk ... is so low ... that to prevent the father from normally interacting with his daughter may be actually damageable to the family dynamics, and ultimately the child as well” was “deficient” and could not affect the result.⁷⁷ They rejected the report in part because the psychologist had not reviewed the images in question and thus had not seen “[t]he depravity” of the drawings, which in the Court’s opinion “[could not] be translated into words”.⁷⁸

In short, despite having adverted to the Court’s lack of expertise in assessing the nexus between child pornography and pedophilia, the Court went on to conclude that the deviant character of the images was sufficient extra evidence to establish a risk of harm to children. In doing so, the Court treated the logical leap between viewing child pornography and offences against children as sufficiently self-evident to provide the basis for imposing conditions on K. M.’s probation.

Even where paedophiles and child pornography users are not subject to criminal charges, they suffer as a result of social stigmatization and the risk of legal sanctions. This leads paedophiles to self-censor and prevents them from obtaining therapeutic support.⁷⁹

⁷⁴ *Ibid* at paras 19, 21-22.

⁷⁵ *Ibid* at paras 4, 24.

⁷⁶ *Ibid* at para 24.

⁷⁷ *Ibid* at paras 14-15, 22.

⁷⁸ *Ibid* at para 15.

⁷⁹ On this point, see Ariana Olshan, *Examining Pedophilia: Causes, Treatments, and the Effects of Stigmatization* (International Centre for Missing and Exploited Children 2014) at 8-9, 15-22, online:

(b) The Social Construction of Paedophilia Affirms Normative Sexuality and Social Structures

Numerous scholars have emphasized that the idea of paedophilia is a social construction that serves to affirm normative social structures and create a moral rallying point.⁸⁰ Without suggesting that social construction can never provide a basis for moral judgment, recognizing the socially constructed nature of an identity category is an important first step to analyzing the bases for and implications of that categorization. Elise Chenier suggests that the parallel between the historic medical and legal treatment of homosexuality and the current treatment of paedophilia indicate that in the 1970s, the latter took the former's place as a category against which the "norm" is defined.⁸¹ Still, there are important distinctions to be recognized between homosexuality and paedophilia. Destigmatizing paedophilia requires a line drawing exercise that is not necessary with homosexuality. While homosexuality was historically vilified both in terms of desire and act, both are now arguably socially accepted. By contrast, while paedophilic desire need not be vilified, child sexual abuse is a different matter.

Similarly to Chenier, Harris Mirkin argues that the equation of representations of child sexuality with paedophilia and sexual abuse affirm the ideological concept of innocence that exists as a moral standard in modern pluralistic society.⁸² Mirkin proposes that repressing child pornography creates a

http://www.icmec.org/en_X1/icmec_publications/Examining_Pedophilia_-_White_Paper_FINAL_27_May_2014.pdf; and *Virtuous Pedophiles*, online: <<http://www.virped.org>>. See also Amber Hildebrandt, "Virtuous Pedophiles group gives support therapy cannot" *CBC News* (18 July 2014) online: CBC News <<http://www.cbc.ca/news/canada/virtuous-pedophiles-group-gives-support-therapy-cannot-1.2710160>>; *Shadows Project*, online: <<http://www.shadowsproject.net/lang/en/index.html>>. My concern that paedophiles are unable to seek therapeutic intervention does not rest on the assumption that all therapeutic intervention aims to redirect or suppress paedophilic desire. Without purporting to have psychiatric qualifications, the level of social disgust for paedophiles suggests that some might have an interest in therapeutic support. Moreover, recognizing that research on these matters is inconclusive, if there is a risk of cross-over from paedophilic desire to harm to actual children (either through producing child pornography or contact sexual offences), therapeutic assistance to redirect this desire into non-harmful channels should be available.

⁸⁰ See e.g. Chenier, *supra* note 9 at 173, n2, 179; Craig, *Troubling Sex*, *supra* note 7 at 22-23; Harris Mirkin, *supra* note 4 (writing in the US context); Gurnham, *supra* note 9 at 113-32 (writing in the UK context); Ost, *supra* note 9 (writing in the UK context).

⁸¹ Chenier, *supra* note 9 at 175-80.

⁸² Mirkin, *supra* note 4 at 259. *C.f.* Gurnham, *supra* note 9 at 118-19, 126-28 (who has proposed that the dilemma of differentiating "innocent" nude photos of children from child pornography arises from cultural anxieties about the sexualization of children in modern society). Compare Pat Califia, "No Minor Issues: Age of Consent, Child Pornography, and Cross-generational Relationships" at 54-93 in *Public Sex: The Culture of Radical Sex* (San Francisco: Cleis Press, 2000).

moral rallying point for various social groups while also legitimizing increasing government intrusions into private life, thus both creating and policing normative society.⁸³ David Gurnham goes so far as to suggest that “the demonization and scapegoating of the paedophile is convenient cover for the mainstream society to unreflectively indulge its own eroticization of children through the innocence fetish”.⁸⁴ The spectre of the paedophile serves to “allow adults to look with a paedophilic gaze on [children’s] bodies, safe in the knowledge that the real paedophiles are monstrous perverts who have nothing to do with us”.⁸⁵

Elaine Craig treads a similar path, arguing that the “harm” of paedophilia, like the idea of the paedophile, is socially constructed.⁸⁶ In short, what is harmful depends on what a society deems harmful, but once it is so conceived the harm becomes real in the context of that society.⁸⁷ If we accept that both the “harm” and the “paedophile” are socially constructed (i.e. contextual and socially contingent), a determination that the harm should be alleviated presents two alternatives. We can regulate the alleged source of the harm, or take a systemic approach to changing the social context that produces one or both.⁸⁸ In the paedophilia and child pornography context, we have taken the former rather than the latter. By defining paedophiles (child pornography users) as a discrete category of individuals with an innate disposition that is “different in kind” from most of society, the judicial approach obscures the reality that the majority of child sexual abuse is committed by family members.⁸⁹ As a result, policy discussions and legal regulation take the wrong focus, emphasizing protection from the other by identification and containment rather than protection from the family by addressing the social factors that contribute to child sexual abuse.⁹⁰

Legal and policy discussions are, along with judicial reasons and legislative action and enforcement, a form of deliberation by which the contract that

⁸³ Mirkin, *supra* note 4 at 260.

⁸⁴ Gurnham, *supra* note 9 at 128.

⁸⁵ *Ibid* at 128.

⁸⁶ Craig, *Troubling Sex*, *supra* note 7 at 22-23.

⁸⁷ *Ibid* at 23.

⁸⁸ *Ibid* at 23-24.

⁸⁹ *Ibid* at 38, 41; see also Chenier, *supra* note 9 at 174, 182, 184-5.

⁹⁰ Craig, *Troubling Sex*, *supra* note 7 at 41-43; see also Carissa Byrne Hessick, “Disentangling Child Pornography from Child Sexual Abuse” 88 Wash U L Rev 853 at 886- 94.

governs relationships between citizens and between citizens and government is formed. Social context both informs and is informed by both the deliberation and the resultant laws. Provided the deliberation meets certain conditions, citizens agree to be bound by the law and the law is considered legitimate.

5. DELIBERATIVE DEMOCRACY

(a) Legitimacy in a Pluralistic Society: The Twin Pillars of Equality and Reasons

Deliberative democracy is a theoretical framework that posits reasoned deliberation between equal parties as a precondition for the creation of legitimate laws. The framework can also be used to assess the legitimacy of a law that is already in existence. Deliberative democracy⁹¹ proposes a solution to the dilemma of making laws that bind all citizens in a pluralistic society, where it is inevitable that various individuals and groups will have different conceptions of the conditions and requirements for a good social order – what is often referred to as “the good life.”⁹² This theory is particularly suited to assessing Canadian law because the *Charter* can be seen as a constitutionally-entrenched attempt to achieve these conditions. Government action is limited by certain fundamental rights and freedom granted to citizens, who are given a voice through each of the democratically-elected legislature that creates the laws that will bind the citizens, the executive who carry out these laws, and the judiciary who hold both branches the rule of law. By legitimacy, therefore, I mean law that accords with Canadian constitutional values. The relationship between deliberative democracy and the *Charter* is, in my assessment, an iterative one. While the *Charter* can in some cases

⁹¹ I draw loosely on Jürgen Habermas and related theorists' concept of deliberative democracy. While I recognize the existence of other voices in that theoretical perspective, a fulsome discussion of that variety is beyond the scope of the paper.

⁹² Melissa S Williams describes deliberative democracy as being concerned about political justification in the face of moral disagreement (pluralism), and justifying “the exercise of collective political power” by way of “free public reasoning among equals”. Melissa S. Williams, “The Uneasy Alliance of Group Representation and Deliberative Democracy” in Will Kymlicka and Wayne Norman, eds, *Citizenship in Diverse Societies* (Oxford: Oxford UP 2000), at 126-27. See also Jürgen Habermas, “On the Relation between the Rule of Law and Democracy” in *The Inclusion of the Other: Studies in Political Theory*. For a broader perspective on theoretical variety within the deliberative democratic framework see Amy Gutman and Dennis Thompson “What Deliberative Democracy Means” 1-63 in *Why Deliberative Democracy* (Princeton, NJ: Princeton UP, 2004), online: <<http://press.princeton.edu/chapters/s7869.pdf>>.

be a vehicle to secure the fundamental preconditions of equality and respect, the evolving content of particular *Charter* rights is also socially contingent. Thus in other cases, a deliberative democratic process may be required to extend *Charter* protections where they were previously denied.

Jürgen Habermas's theory of the internal relation between law and democracy posits that private and public autonomy must co-exist. For Habermas, the democratic procedure is the sole legitimating mechanism of a law-making process in a pluralistic context.⁹³ A law is only legitimate "if all those possibly affected by it could consent to it after participating in rational discourses".⁹⁴ Legitimacy requires that laws arise from a structure of rational (reasons-based) communicative consultation among all affected parties, each of whom must hold a position of equality in relation to the others. Since law is changeable at the impetus of the political sovereign, for its coercive force to be legitimate it must guarantee the equal autonomy of all legal persons.⁹⁵ Two forms of autonomy are crucial to legitimate a legal system: "the individual liberties of the subject of private law and the public autonomy of citizens".⁹⁶ They exist in a "reciprocal relation", because "legal persons can be autonomous only insofar as they can understand themselves, in the exercise of their civic rights, as authors of just those rights which they are supposed to obey as addressees".⁹⁷ Citizens are "co-legislators" but must participate within the constraints of institution which they define – their mode of communication is circumscribed by the system in which they communicate, and yet if they respect those constraints any and all aspects of the system are open to disagreement and potential change.⁹⁸ Habermas concludes that "[t]he private autonomy of equally entitled citizens can be secured only insofar as citizens actively exercise their civic autonomy".⁹⁹ In other words, it is up to the citizen, acting within the constraints of the democratic institution, to assert their rights through the deliberative mechanism. Habermas, however, failed

⁹³ Habermas, *supra* note 92 at 259.

⁹⁴ *Ibid.*

⁹⁵ *Ibid* at 254-55.

⁹⁶ *Ibid* at 257.

⁹⁷ *Ibid* at 258.

⁹⁸ *Ibid* at 260-61.

⁹⁹ *Ibid* at 264.

to account for certain characteristics of real-world pluralistic society: various sectors of society not be equal or able to communicate with one another.

Melissa S. Williams ascribes to Habermasian deliberative democracy, but addresses Habermas' failure to account for the challenge of including marginalized groups' voices.¹⁰⁰ Ideal theory stumbles in the real world because the pre-conditions of deliberative democracy (equality of participants and deliberation based on reasons) are barriers to meaningful (transformative) participation by marginalized groups. Deliberative democracy requires that participants attempt to persuade one another about "the common good" (i.e. moral agreement about shared aspects of socio-political life) – both what it is and what it requires – using "*moral or ethical*" reasons that others can accept and which are grounded in "what is *common* rather than what is particular to individual or group".¹⁰¹ The trouble arises from the social contingency of reasons, which necessitates permitting marginalized groups to present partial arguments.

(b) Social Context Requires that Marginalized Groups Adopt Partial Positions

Social context is crucially important to deliberative democracy because it shapes both who will be heard and what will count as reasons. Williams proposes that "whether or not citizens will recognize others' reasons *as* reasons may be a socioculturally contingent matter" and that this contingency "may tend to be resolved in a manner that systematically disadvantages the reasons of marginalized groups".¹⁰² Put more simply, so long as deliberative democracy takes institutional and individual impartiality as an unexamined theoretical precondition, it may produce more sound political judgments (in the sense that the full implications of a decision will be better understood), but will tend to reinforce the *status quo* by privileging the interests and reasons of the already-privileged majority.¹⁰³ Unless deliberative democracy takes explicit account of the problems

¹⁰⁰ Williams, *supra* note 92.

¹⁰¹ *Ibid* at 127 [emphasis in original].

¹⁰² *Ibid* at 125.

¹⁰³ *Ibid* at 128-30.

posed for marginalized groups, it cannot offer a “model of justice towards marginalized groups”.¹⁰⁴

Two major issues arise under the standard conception of deliberative democracy: (i) “what counts as a reason for the purposes of political deliberation”, and (ii) whether participants and institutions are able to achieve the promised ends of participant equality.¹⁰⁵ The first issue is that marginalized groups’ reasons may not be recognized as reasonable, and thus could be discounted as falling outside the rubric of deliberation: “the recognition of marginalized groups’ reasons *as reasons for (or acceptable to) other citizens* is a highly contingent matter [...]”.¹⁰⁶ Assessing reasonableness is contingent in a way “structured along the lines of social privilege and disadvantage”.¹⁰⁷ The result is that “[w]hat deliberators could accept as reasons may turn out to depend importantly on who they are and on who is presenting the reasons to them”.¹⁰⁸

The problem is especially acute where the point of disagreement in the deliberative process is “the *social meaning of existing practices*”.¹⁰⁹ This is because in that context, “the reasons that undergird marginalized groups’ critique of the practice *do not function as reasons for members of privileged groups*, because the social meaning of the practice for the marginalized group is (at least initially) inaccessible to them”.¹¹⁰ Williams concludes that this is especially so where “the privileged group’s interpretation of the practice has the consequence of reinforcing their position of relative advantage.”¹¹¹ Thus Williams proposes that deliberative democracy can only achieve its ends if members of these groups are given special dispensation within the deliberative framework to espouse the merits of their position from a partial, as opposed to an impartial, manner.

Williams’ extension of Habermas’ framework solves some problems, but fails to address two of particular concern to my argument. First, Williams seems

¹⁰⁴ *Ibid* at 131.

¹⁰⁵ *Ibid* at 133.

¹⁰⁶ *Ibid* at 134.

¹⁰⁷ *Ibid* at 137.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid* at 138.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

to presume that identity categories or groups are fixed entities that can either be identified or will identify themselves. As such, she avoids the question of the shifting recognition of particular identity categories as legitimate or illegitimate, deserving of protection or not. Second, she does not address the situation where a group who ought to benefit from the special dispensation to speak partially are unable to use their voice because to espouse their position is to risk social and legal sanction and even violence. The two issues interrelate, as those in the second dilemma cannot attempt to assert the legitimacy of their identity category, such that they cannot then go on to advocate from a partial position for rights or protections.

The paedophile exemplifies both these limitations: they are not perceived as a legitimate identity group (as are, for instance, homosexuals or women or persons of Aboriginal descent), nor can they safely advocate for status as such a legitimate identity group. Paedophiles cannot advocate for their rights because they cannot disclose their status – even to a therapist¹¹² – for fear of social and legal sanctions.¹¹³ Moreover, as I will discuss, the legislative debates demonstrate that this perspective was conspicuously absent from the discussions on the breadth and effect of what became s. 163.1. This elephantine void indicates the necessity for some mechanism to include the voices of those whose interests will be affected, but who do not have the social capital to achieve the social and political mobilization that Williams sees as a necessary precondition to marginalized groups' capacity to effect change in the system that oppresses them.

Writing from the standpoint of freedom of expression, Mirkin has explicitly addressed one facet of the democratic exclusion of paedophiles. Mirkin argues that child pornography ought to be brought back under the general obscenity test because pornography can serve as a socio-political rallying point for persons with deviant sexual desires.¹¹⁴ He reasons that the obscenity criteria “[recognize] that there is frequently a political and social content to sexual speech

¹¹² See generally Olshan, *supra* note 79. In the Canadian context, see e.g. *Child and Family Services Act*, RSO 1990 c. c.11, s. 72, *Children and Family Services Act*, SNS 1990, c 5, ss 23-24, *Child, Family and Community Service Act*, RSBC 1996 c 46, ss. 13-14.

¹¹³ See generally Cooper, *supra* note 54; Olshan, *supra* note 79.

¹¹⁴ While Mirkin writes in the US context and thus the specifics of his legal analysis are not directly applicable to the Canadian context, his broader analysis is relevant.

and images, and that sexual speech is different from sexual behavior”.¹¹⁵ Mirkin asserts that “[i]n sexual politics, pornography serves many of the functions of political speech”, particularly for sexual minorities.¹¹⁶ Organizing around their sexual preferences through pornography “serves as an important symbolic community identifier” for members of sexual minorities that brings sexual interests into the light and allows the individual to identify with them.¹¹⁷ In effect, Mirkin proposes that identity can only coalesce in a community, which suggests that the effect of driving socio-politically unpopular identities underground is to squelch their development.

Mirkin’s point about the political-silencing effect of child pornography suppression speaks directly to my argument about the (il)legitimacy of Canadian child pornography law under the deliberative discourse model. The law creates and contributes to barriers that prevent paedophiles from achieving the level of collective organization that Williams proposes is required for marginalized groups to meaningfully assert their position in the deliberative democratic framework. Moreover, the comparison Mirkin draws to other marginalized groups (e.g. race, ethnicity, etc.) support my argument for s. 7 and s. 15 bases of protecting paedophiles.¹¹⁸

I adopt Williams’ development of deliberative democracy, but applying it in the context of paedophilia and Canada’s child pornography law creates a new challenge: finding a way to create conditions that would permit an unbiased assessment of the validity of the assumptions that lead to the social stigma and legal risk associated with disclosing one’s status as a paedophile. Only then can the parameters required to manage risk of harm to children be defined in a way that maximizes the sexual equality and integrity of paedophiles while protecting children from sexual abuse and exploitation.

¹¹⁵ Mirkin, *supra* note 4 at 258

¹¹⁶ *Ibid* at 258

¹¹⁷ *Ibid* at 258-59. Mirkin analogizes this process to the feminist idea that the personal is political.

¹¹⁸ *C.f.* Chenier, *supra* note 9 (making a similar connection in the conclusion of her historical analysis of paedophilia).

(c) Research as Reasons

Research can circumvent the problem of reasons recognition because it is a socially accepted form of reasons. Williams argued that deliberative democracy as described by Habermas failed to account for the position of marginalized groups in society, and I have extended her analysis in analyzing the position of paedophiles. In current society, research holds special weight because of its relative objectivity and verifiability. Thus where a particular group, such as paedophiles, are not recognized by the social majority as deserving of an equal voice or their reasons are not seen as reasons, and where social conditions prevent their coalescing to pressure the majority (as proposed by Williams), research as reasons offers a viable alternative for ensuring their perspective is heard in the deliberative democratic debate.

(d) The Parliamentary Process for s. 163.1 Did not Satisfy the Deliberative Democratic Model

When s. 163.1 was before Parliament, paedophiles had no voice in the democratic process. Though those directly affected by criminal laws are perhaps not usually consulted, s. 163.1 is a special case for two reasons. First, being a paedophile is a sexual identity and is not inherently criminal, but is socially vilified. Consulting paedophiles on a law that expanded the meaning of child pornography and thus restricted their ability to achieve sexual gratification is not ludicrous – it is akin to consulting dog owners when drafting a new by-law that would increase the number of parks prohibiting off-leash pets.¹¹⁹

Second, affected parties – with the exception of paedophiles – *were* consulted during the legislative process. The Standing Committee heard from 13 witnesses, including two Department of Justice members, two police force members, a children's rights advocate, and numerous representatives of the expressive

¹¹⁹ Ryder has also argued this point. Ryder's critique of Canada's child pornography law centres on the law's inclusion of imaginary materials that neither counsel nor advocate sexual offences against children and failure to distinguish them from those that involve actual exploitation or children or advocacy for such exploitation. Ryder intimates that Canada's child pornography law is the product of stigmatizing social influences, as opposed to sound democratic consideration or judicial review of legislative excess. Ryder, *supra* note 9 at 103-04, 108-09, 114-17.

community.¹²⁰ Regardless of the usual conditions for drafting criminal laws, in the case of s. 163.1 representatives of those who would be affected by the law were consulted, with the exception of paedophiles, despite the fact that they were most directly affected. The Parliamentary proceedings are rife with highly partial commentary that equates child pornography users with persons who commit child sexual abuse. They are also distinctly lacking in social scientific evidence, and instead rely heavily on anecdotal testimony.

The Parliamentary debates from the 2nd reading of the Bill demonstrate animosity towards paedophiles and draw a link between child pornography use and child molestation. In introducing the Bill, Rob Nicholson specifically addressed the inclusion of materials depicting adults as being under the age of 18, stating that the underlying concern was that “pseudo child pornography” “promotes the sexual abuse of children”.¹²¹ Similarly, in the Senate debate on June 17, 1993, Sen. Duncan Jessiman referred to the “main purpose” in terms indicating that the main thrust of the bill was not to capture fantasy materials, but rather to capture materials depicting real persons, and particularly real children.¹²²

The concerns raised about the bill in the House of Commons were primarily that the definition was not broad enough.¹²³ The language used by Parliamentarians belies prejudice: Ron MacDonald felt that “everybody would agree that people who exploit children for a sexual purpose and for profits are pretty despicable and low lifes” and referred to the purpose of the legislation as “to try to stop the bottom dwelling, pond scum who exploit our children sexually”.¹²⁴ This illustrates that not only general society but also the democratic representatives responsible for vetting s. 163.1 were both prejudiced against the target group and drew a causal connection between child pornography users and child sexual abusers.

¹²⁰ *House of Commons Debates*, “Minutes of the Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General” No 104 (8 June 1993), No 105 (10 June 1993), No 106 (15 June 1993) [“Standing Committee Minutes”].

¹²¹ *House of Commons Debates*, 34th Parl 2nd Sess, Vol 16 (3 June 1993) at 20329 (Rob Nicholson).

¹²² *Debates of the Senate*, 34th Parl 3rd Sess, Vol 4 (17 June 1993) at 3579 (Hon Duncan James Jessiman).

¹²³ *House of Commons Debates*, *supra* note 122 at 20331, 20333, 20335.

¹²⁴ *House of Commons Debates*, *supra* note 122 at 20332-33 (Ron MacDonald).

In the Standing Committee, Detective Staff Sergeant Robert Matthews of the Ontario Provincial Police's Pornography and Hate Literature Section similarly claimed that "you cannot have child pornography without having child abuse" and equated pedophiles with child abusers, defining "a pedophile" as "an individual who has taken that step and has started to sexually exploit and sexually abuse children".¹²⁵ Det. Sgt. Matthews highlighted "that [child pornography is] used to satisfy the pedophile's sexual fantasies" as one of its dangers.¹²⁶ This latter point is significant, because it supports my contention that despite the law being facially aimed at child pornography because of harm to children, there is a strong undercurrent of criminalizing the fact of sexual desire for children.

By contrast, representatives of the expressive community emphasized concerns about the overbreadth of the bill and its potential to curb free expression. Alan Borovoy of the Canadian Civil Liberties Association expressed concern over the "overbreadth of the bill, the fact that it goes much beyond merely involving real youngsters in real sexual activity", though his concerns were targeted to literary and dramatic works.¹²⁷ In particular, Mr. Borovoy highlighted the lack of evidence supporting the hypothesis that persons exposed to child pornography "might be influenced to do some awful things", an evidentiary hole acknowledged by those producing psychological literature because of "the inadequacy of the studies, the inadequacy of evidence that any significant number of people are actually adversely affected by this material".¹²⁸ These voices, however, had no effect on the wording of the bill. The tone of the discussions suggests that such concerns fell on deaf ears.

Witness' language illustrates the vituperation and moral opprobrium attaching to paedophiles. Det. Sgt. Matthews defined child pornography as including nude or partially nude photographs depicting children in "unnatural poses", but not "natural pictures" such as family photographs of a nude child on a beach. This builds into other scholars' analyses of how "the paedophile" is used

¹²⁵ *House of Commons Debates*, "Standing Committee Minutes", No 106, *supra* note 121 at 4, 8.

¹²⁶ *Ibid* at 4-5.

¹²⁷ *Ibid* at 8, 11-13. See also Mr. Jack Gray of the Writers' Guild of Canada, *ibid* at 36, 38.

¹²⁸ *Ibid* at 10-11.

to construct and enforce normative sexualities.¹²⁹ Similarly, Monica Rainey, President of Citizens Against Child Exploitation, showed certain examples of child pornography to the Standing Committee to “show you the sickening, disgusting viewpoint of those who assault children” and demonstrate “how really twisted it is”.¹³⁰ Both Det. Sgt. Matthews and Ms. Rainey’s choice of language reflects the assumed conjunction of child pornography with child sexual abuse as well as the convergence of morality and illness discussed by Joel Feinberg. Sexually deviant material is seen as morally repulsive and is characterized as “sick”. Detective Wolff of the Pornography Investigation Division from the Vancouver Police Department further distanced paedophiles from normative sexuality by highlighting that Mack’s Leathers, a Vancouver company dealing in leather, bondage, and sexual aids for adults, “feels that with stuff dealing with children, something needs to be done”.¹³¹ By marking out a hierarchy of sexual deviance, Det. Wolff positioned paedophilia as the polar opposite of normative sexuality. What these witness’ language illustrates is not only that there was no voice for paedophiles in the Parliamentary drafting process, but also that Williams’ concern about the inability of marginalized groups to gain a place and to have their reasons understood as reasons is apposite in this context.

Furthermore, both Parliamentarians and witnesses raised concerns about the rushed legislative process and the failure to adequately consult affected groups. In the House of Commons, Ian Waddell expressed concern about the effect of freedom of expression and adverted to the need for “[i]nclusive justice” meaning that “people from all sides come in and discuss the bill”.¹³² Numerous witnesses similarly raised concerns about the limited scope of the consultation process. For instance, Sandra MacDonald, President of the Canadian Film and Television Production Association, concluded her submissions to the Standing Committee by saying, “There was, to the best of our knowledge, no prior consultation on the text of this legislation with either the legal community or affected parties, such as

¹²⁹ See e.g. Craig, *Troubling Sex*, *supra* note 7; Ost, *supra* note 9; Gurnham, *supra* note 9; Chenier, *supra* note 9. See above text accompanying notes 80-90.

¹³⁰ *House of Commons Debates*, “Standing Committee Minutes”, No 105, *supra* note 120 at 11. See also “most sickening stories”, “how sick it really is”, “these sick people”, and “It’s not natural”. *Ibid* at 12, 24, 27at 20.

¹³¹ *Ibid* at 25-26.

¹³² *House of Commons Debates*, *supra* note 121 at 20333-35 (Ian Waddell).

our members.”¹³³ While these voices were not referencing the need to consult paedophiles or other child pornography users, the fact that they could raise these types of deliberative-inclusion concerns without intending to include those parties emphasizes the complete exclusion. This was further highlighted by the only references to paedophile or child pornography voices in the process.

The only references to any voice for paedophiles or their representatives were expressed in terms of the need for exclusion. Sen. Jessiman adverted to the North America Men-Boy Love Association (NAMBLA)¹³⁴ as a “disgusting publication” and argued that inclusion of images of people over 18 depicted as being under 18 was necessary because it promoted publications like NAMBLA’s newspaper.¹³⁵ In the Standing Committee, Department of Justice representatives explicitly rejected any influence from advocacy by interest groups like NAMBLA, while Det. Sgt. Matthews, Det. Noreen Wolff, and Ms. Rainey expressed the view that written materials needed to be included in the definition of child pornography specifically to suppress bulletins published by NAMBLA.¹³⁶ Det. Wolff denounced NAMBLA as “an organization of child molesters” who “continually align themselves with the gay community in an attempt to legitimize their organization”.¹³⁷ These were the only mentions of any input from representative of the potential users of child pornography or their representatives, and were cast in negative and exclusionary terms.

The ability to amend legislation does not excuse the failure to conduct an adequate deliberative process, in particular because of the heated socio-political context surrounding child pornography. Sen. Jessiman commented that “[t]his legislation is not carved in stone. If improved legislation can be suggested, I am sure the government of the day – whichever government is in power – will

¹³³ *House of Commons Debates*, “Standing Committee Minutes”, No 106, *supra* note 120 at 19. See also *ibid* at 22 (Gerald A. Flaherty of the Canadian Broadcasting Corporation).

¹³⁴ NAMBLA is an advocacy organization that promotes removal of age of consent laws, issues numerous publications that include erotica/pornography, and promotes the view that mutually consensual adult-child sex is acceptable and should be destigmatized. *North American Man/boy Love Association*, online: <<http://nambla.org/welcome.html>>.

¹³⁵ *Debates of the Senate*, *supra* note 122 at 3579-80 (Hon Duncan James Jessiman).

¹³⁶ *House of Commons Debates*, “Standing Committee Minutes”, No 104, *supra* note 120 at 8-9. *House of Commons Debates*, “Standing Committee Minutes”, No 105, *supra* note 120 at 13-16, 19.

¹³⁷ *Ibid* at 16.

listen”.¹³⁸ Given the climate that surrounds child pornography and child sexual abuse, Sen. Jessiman’s conviction seems misplaced. The fact that every amendment to s. 163.1 has made the provision more rather than less restrictive suggests that Sen. Jessiman was indeed mistaken.

This complete exclusion calls into question the legitimacy of the law when examined from a deliberative democracy standpoint. Under that framework, deliberation between all those who could be affected by a law is a prerequisite to legitimacy. Where the group most significantly affected by a law was neither present nor represented, the law’s legitimacy is suspect. There was no representative for paedophiles invited to speak before Parliament when they drafted s. 163.1, a law that targets users of child pornography and thus by extension paedophiles. While it is not to be expected that those affected by criminal laws will be consulted at every amendment, s. 163.1 was a brand new criminal provision. Moreover, other stakeholders were invited to comment on the proposed law. In this context, the exclusion of any voice for paedophiles raises democratic concerns. In the Canadian system, however, the courts are another forum for deliberation and inclusion and provide a legitimacy check in that those charged under a law can challenge the constitutionality of that law. For s. 163.1, *Sharpe* should have provided that check.

6. *R v SHARPE*

R v Sharpe remains the definitive case on Canada’s child pornography provision, despite subsequent amendments to s. 163.1. McLachlin CJC wrote the majority reasons, concluding that although the s. 163.1(4) prohibition on the simple possession of child pornography infringed the freedom of expression guarantee in s. 2(b) of the *Charter*, the infringement was justified “given the harm possession of child pornography can cause to children” provided two exceptions were read into the legislation and the defences were broadly interpreted.¹³⁹ These two exceptions were: (i) possession of “self-created expressive material . . . created

¹³⁸ *Debates of the Senate*, *supra* note 122 at 3699 (Hon Duncan James Jessiman).

¹³⁹ *Sharpe*, *supra* note 2 at paras 2, 5, 60. Both the trial judge and the majority in the British Columbia Court of Appeal had struck down the law as an unconstitutional infringement on freedom of expression and an excessive intrusion on personal privacy: *ibid* at para 13-16.

by the accused alone, and held by the accused alone, exclusively for his or her own personal use”, and (ii) “private recordings of lawful sexual activity ... created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused for exclusively private use”.¹⁴⁰¹⁴¹ While the *Sharpe* court may have correctly assessed the provision’s constitutionality given the manner in which it framed the constitutional question and because of the then applicable standard of justification under s. 1, I propose that a deliberative democratic lens exposes the deficiencies in both s. 163.1 and the judicial reasoning that upheld it.¹⁴²

(a) The Judicial Gloss on the s. 163.1(1) Definition of Child Pornography

McLachlin CJC noted that the s. 163.1(1) definition of child pornography captured “any non-textual representation that can be perceived visually”.¹⁴³ On the issue of whether the definition caught imaginary persons, McLachlin CJC concluded that “[t]he available evidence suggests that explicit sexual materials can be harmful whether or not they depict actual children. Moreover, with the quality of contemporary technology, it can be very difficult to distinguish a ‘real’ person from a computer creation or composite” and thus to achieve Parliament’s purpose of protecting against a “reasoned risk of harm to children” “both actual and imaginary human beings” were included.¹⁴⁴ An objective approach was adopted for each of “depicted”, “explicit sexual activity”, and “dominant characteristic” and “sexual purpose”.¹⁴⁵

McLachlin CJC for the majority framed the dilemma as one of balancing privacy and freedom of expression on the one hand against protecting children from “the evils associated with the possession of child pornography” on the

¹⁴⁰ *Ibid* at para 115. This second exemption was defined to defend against the risk of criminalizing self-recorded depictions of sexual activity between adolescents.

¹⁴¹ *Ibid* at para 60.

¹⁴² Janine Benedet offers a counterpoint to my argument that the *Sharpe* court erred by upholding the constitutionality of s. 163.1 without giving due consideration to paedophiles’ rights. She criticizes the majority’s “reading in” approach in *Sharpe*. Benedet, *supra* note 65 at 347-50.

¹⁴³ *Sharpe*, *supra* note 2 at para 35.

¹⁴⁴ *Ibid* at para 38.

¹⁴⁵ *Ibid* at paras 43, 49-50.

other.¹⁴⁶ By contrast, L'Heureux-Dubé J for the minority concluded that child pornography has “no social value” and “only a tenuous connection to the value of self-fulfilment” and thus warranted “only attenuated protection”.¹⁴⁷ On both the majority and minority view, the bulk of the court’s work fell under the s. 1 justification analysis.

(b) Section 1 as “Reasons” and the Social Contingency of the “Harm” Rationale

Section 1 allows the government to justify a law that infringes on citizens’ fundamental rights and freedoms. Section 1 is about the government being permitted to act in ways that infringe on an individual’s rights and freedom to protect the equality of all citizens. Under the *Oakes* test for s. 1, the government must first show that the law has a pressing and substantial objective, and must further show that there is a rational connection between the means chosen and the objective, that the means minimally impair infringed rights and freedoms, and that the infringing effect of the means chosen is proportional to the beneficial effect of the law.¹⁴⁸ Where Parliament is faced with inconclusive social science evidence, it must have a reasonable basis for the law and should be accorded a margin of deference in the means designed to address a particular issue.¹⁴⁹ In the child pornography context, however, the justification standard is lowered even further. *Butler* defined a new “reasonable apprehension of harm” standard for justifying the *Criminal Code* obscenity provision under s. 1.¹⁵⁰ This standard was then adopted by both the majority and the minority in *Sharpe*.¹⁵¹

The main purpose of the law was defined as “the prevention of harm to children” by criminalizing possession of material that “poses a reasoned risk of harm to children”, while “attitudinal harm to society at large” was judicially noticed as a “good incidental” although not argued by the Crown.¹⁵² The Crown

¹⁴⁶ *Ibid* at paras 25-26, 28.

¹⁴⁷ *Ibid* at para 186.

¹⁴⁸ *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

¹⁴⁹ *McKinney v University of Guelph* [1990] 3 SCR 229, 76 DLR (4th) 545.

¹⁵⁰ *Butler*, *supra* note 10 at para 112.

¹⁵¹ *Sharpe*, *supra* note 2 at para 85.

¹⁵² *Ibid* at para 82.

proposed and McLachlin CJC considered five ways that possession of child pornography heightened the risk of child sexual abuse: “(1) child pornography promotes cognitive distortions; (2) it fuels fantasies that incite offenders; (3) prohibiting its possession assists law enforcement efforts to reduce the production, distribution and use that result in direct harm to children; (4) it is used for grooming and seducing; and (5) some child pornography is produced using real children”.¹⁵³ For the purposes of my analysis, it is the cognitive distortions, fantasies, and incitement rationales that are of interest.¹⁵⁴

Cognitive distortions refers to the idea that “child pornography may change possessors’ attitudes in ways that makes them more likely to sexually abuse children. [...] People who could not otherwise abuse children may consequently do so”.¹⁵⁵ While the trial judge rejected this idea because of insufficient scientific evidence demonstrating a link between cognitive distortions and more offences, McLachlin CJC used the reasoned apprehension of harm standard and found that “[w]hile the scientific evidence is not strong, I am satisfied that the evidence in this case supports the existence of a connection”.¹⁵⁶

Incitement refers to the idea that possession “fuels fantasies, making paedophiles more likely to offend”.¹⁵⁷ Again, the trial judge rejected this rationale on the basis that there was not a net effect of increased harm to children: while some studies showed a link between “highly erotic child pornography and offences”, other studies found that “both erotic and milder pornography might provide substitute satisfaction and reduce offences”.¹⁵⁸ Again, McLachlin CJC rejected a scientific proof requirement, and used the reasoned apprehension of harm standard to conclude that the evidence was sufficient to show a rational connection.¹⁵⁹

¹⁵³ *Ibid* at para 86.

¹⁵⁴ The minority judgment written by L’Heureux-Dubé J eschewed any requirement for scientific or traditional evidence to demonstrate a link to attitudinal harm. *Ibid* at para 160, 167.

¹⁵⁵ *Ibid* at para 87.

¹⁵⁶ *Ibid* at para 88.

¹⁵⁷ *Ibid* at para 89.

¹⁵⁸ *Ibid* at para 89.

¹⁵⁹ *Ibid* at para 89.

In sum, both L’Heureux-Dubé J for the minority and McLachlin CJ for the majority took a liberal approach to the minimal impairment requirement, based on the “reasonable apprehension of harm” standard. L’Heureux-Dubé J specifically addressed images that do not use real children, concluding that “Parliament was justified in concluding that such works of the imagination would harm children”, in particular because there was no requirement to “choose the least ambitious means to protect vulnerable groups” and the speech in question was of “low value”.¹⁶⁰ Although L’Heureux-Dubé J was in the minority in *Sharpe*, McLachlin CJC espoused a similar approach.¹⁶¹ In summarizing the harms allegedly caused by child pornography, McLachlin CJC’s stated that “the social science evidence adduced in this case, buttressed by experience and common sense” satisfied the rational connection requirement because “[p]ossession of child pornography increases the risk of child abuse” and these risks could not be adequately targeted by prohibitions falling short of criminalizing possession.¹⁶²

By contrast, both the lower courts and certain Parliamentarians raised concerns about whether the scientific evidence was sufficiently conclusive to uphold the law. For instance, Sen. Stanbury spoke out against Bill C-128 in the Senate Debates. He felt that the bill would not pass constitutional muster because the objective was unclear, no causal relationship between means and objective was evident, and the bill was vague, broad, and failed to differentiate between explicit sex acts involving a seven-year-old and those involving a 17-year-old.¹⁶³ While Sen. Stanbury’s concerns focused on perceived risk of a chilling effect on expression, his comments on the potential result are pertinent:

[T]he government, faced with an opportunity to deal seriously with some of the most hurtful human behavioural aberrations, acted hastily and carelessly, without due consideration or consultation. The result is bad legislation which will cost heavily in dollars and pain while the social diseases they intend to attack continue unabated.¹⁶⁴

¹⁶⁰ *Ibid* at paras 219-220.

¹⁶¹ *Ibid* at paras 85, 88-89.

¹⁶² *Ibid* at para 94.

¹⁶³ *Debates of the Senate, supra* note 122 at 3697 (Hon Stanbury).

¹⁶⁴ *Ibid*.

These same concerns have subsequently been raised by academics.¹⁶⁵ Without proposing to change the s. 1 framework, there is a problem with the “reasoned apprehension of harm” standard in that it silently imports social values into the analysis.

A “reasoned apprehension of harm” that can be found based on inconclusive social scientific evidence by using “common sense” is unduly influenced by social context. Where that social context is one of vilification, as in the case of paedophilia and child pornography, the standard cannot be meaningfully applied.¹⁶⁶ The reasons requirement becomes a sham and merely panders to community (i.e. majority) standards and assumptions. The affected citizens were neither consulted nor represented in the legislative drafting and vetting process, nor was government held to a meaningful standard of justification by the courts, such that the requirements of deliberative democracy were violated and the law can be seen as illegitimate. In particular, the combination of a low standard of proof for any harm Parliament seeks to protect and the social contingency of which groups or practices are seen as requiring protection can create a hurdle for marginalized and vilified groups seeking to make *Charter*-based arguments.

L’Heureux-Dubé J went further than the *Sharpe* majority by framing the issue in s. 163.1 as a competition between children’s s. 7 security of the person and privacy rights and s. 15 equality rights versus paedophiles s. 2(b) freedom of expression rights.¹⁶⁷ While the majority dismissed Mr. Sharpe’s claim that *his* s. 7 rights were engaged, L’Heureux-Dubé J ignored Mr. Sharpe’s s. 7 rights while considering those of children.¹⁶⁸ She emphasized that where government

¹⁶⁵ See e.g. Ryder, *supra* note 9; Smyth, *supra* note 9.

¹⁶⁶ On this point, Brue Ryder has criticized the use of the “reading in” remedy to constitutionalize s. 163.1 as it relates to imaginary works. Ryder sees this as a failure “to hold Parliament responsible for correcting the excesses of the 1992 law”. Ryder proposes that the Court was swayed by social and political influences, and in particular the effect of stigmatizing socio-political pressure – from which the court is supposed to be immune, which in turn invited Parliamentary excess. While my perspective differs from Ryder’s in that I am concerned with the effect on paedophiles, as opposed to abstract freedom of expression rights, his analysis is apposite. Ryder, *supra* note 9 at 108.

¹⁶⁷ *Sharpe*, *supra* note 2 at paras 131, 189-90.

¹⁶⁸ McLachlin CJC concluded that it was unnecessary to consider whether Mr. Sharpe’s s. 7 liberty rights were violated on the basis the argument fully overlapped with his s. 2(b) argument: *Ibid*, paras 18, 23. In my assessment, this was an unjustified method of sidestepping thorny issues, as the focus and purpose of ss. 2(b) and 7 are different.

legislation promotes equality or moves against inequality, government objectives get elevated deference at the s. 1 justification stage.¹⁶⁹ L’Heureux-Dubé J recognized that s. 163.1 was enacted “having regard to moral values”, but argued that not only does Parliament have the “right to make moral judgments in criminalizing certain forms of conduct”, but also the courts “should be particularly sensitive to the legitimate role of government in legislating with respect to our social values”.¹⁷⁰ While legislation arrived at through diligent democratic process may legitimately express shared values, in effect as an output of the deliberative process, competing views and harms associated with the ultimate enactment should be conscientiously considered and were not in this case.

In L’Heureux-Dubé J’s analysis, the only vulnerable and powerless group at play was children, yet given the social sanction paedophiles face if they reveal their sexual desires and thus their effective exclusion *as paedophiles* from democratic discourses, it is arguable that paedophiles are also a vulnerable and powerless group. While this argument provokes the retort that many paedophiles are adult men and thus inherently privileged, such a response ignores that identity is multifaceted and one may hold both privileged and disadvantaged identity markers.

On the attenuated s. 1 standard and given the current social and legal rights recognition and state of research at that time, the *Sharpe* analysis holds up. It is important to note, however, that the low standard of proof required under s. 1 applies specifically where the evidence is inconclusive. This suggests that should more conclusive evidence come to light, the s. 1 analysis could shift. Additionally, Parliamentary choices in cases involving competing rights attract enhanced deference. I have already suggested that social scientific research evidence offers a widely acceptable form of reasons that could be deployed in the deliberative democratic process, and which could thereby contribute to the recognition of groups, such as paedophiles, as requiring protection under the *Charter*.

¹⁶⁹ *Ibid* at paras 187-88, 190.

¹⁷⁰ *Ibid* at para 191.

7. SOCIAL SCIENCE EVIDENCE CALLS THE *SHARPE* RATIONALE INTO QUESTION

The tide of social science research is shifting towards a conclusion that the rationales provided in *Sharpe* for criminalizing fantasy materials are, at the least, riddled with holes. Some research even suggests the reverse is true: child pornography users and contact offenders are largely separate groups, and child pornography can actually reduce the incidence of risk of assaults against actual children. Where a law curtails individual liberty and imposes sanctions for gratifying one's sexual identity, it is only legitimate when it is reasonably based – for instance to protect others in society. The reasons requirement is crucial because otherwise law will drift toward the benefit of the social majority and the *status quo*, to the detriment of marginalized groups and social evolution.

Broad definitions of child pornography and criminalization of possession in various jurisdictions has exposed a new and under-researched category of people with paedophilic orientations: those who “demonstrate a sexual interest in children but seemingly have never and possibly will never be involved in contact sexual offences against children”.¹⁷¹ Kerry Sheldon and Dennis Howitt question the “frequent assumption that the use of Internet child pornography may be a stepping stone towards eventually sexually offending against children” and emphasize that the existence of non-offending paedophiles has been “largely ignored” in research and theory.¹⁷² They conclude that “[i]t is difficult ... to sustain a simple model which suggests that sexual fantasies involving children in some way lead directly to sexual offending against children”.¹⁷³ Rather, despite psychological similarities between Internet offenders and contact offenders, there is a “group with a paedophile orientation who desist (at least temporarily) from

¹⁷¹ Kerry Sheldon and Dennis Howitt, “Sexual fantasy in paedophile offenders: Can any model explain satisfactorily new findings from a study of Internet and contact sexual offenders?” (2008) 13 *Legal and Criminal Psychology* 137 at 140.

¹⁷² *Ibid* at 140-41.

¹⁷³ *Ibid* at 151. On the contrary, Sheldon and Howitt note that “if theory is correct and fantasy drives behaviour, Internet offenders should report the lowest level of paedophilic fantasy as they have no reported acts against children, yet the reverse was true.” One proposed explanation was that “Internet offenders may have less need to contact offend since they can generate fantasy more easily”. *Ibid* at 153.

offending directly against children” that needs to be better understood to facilitate clinical intervention.¹⁷⁴ This is, however, more easily said than done.

Paedophilia and the use of child pornography pose a particular dilemma to researchers because of both the secrecy that surrounds these phenomena and the instability of definitions across cultures and through time.¹⁷⁵ The potential for onerous criminal sanctions as well as the social isolation that can accompany exposure as a paedophile make such secrecy virtually inevitable and thus challenge researchers’ ability to identify research subjects.¹⁷⁶ These problems are heightened by mandatory disclosure regimes that apply to therapists.¹⁷⁷ As a result, samples in research studies are often small and limited to known offenders, which may distort results.¹⁷⁸ Adding to the dilemma, techniques to manage the secrecy issue – such as anonymous participation through the Internet – discredit research findings because they are unverifiable and insufficiently controlled.¹⁷⁹

The International Centre for Missing and Exploited Children produced a report on paedophilia that highlighted the research challenges posed by therapist disclosure obligations and social stigma, and concluded that:

¹⁷⁴ *Ibid* at 156.

¹⁷⁵ In the medical context, McManus et al’s review of the medical diagnostic criteria for paraphilias identified shifting definitional standards and secrecy as major barriers to research. McManus et al, *supra* note 39. *C.f.* John Carr and Zoe Hilton, “Combating child abuse images on the Internet: International Perspectives” in Julia Davidson and Petter Gottschalk, eds, *Internet Child Abuse: Current Research and Policy* (New York: Routledge, 2011) at 52-53. Social science researchers note similar problems. See e.g. Jenny ABM Houtepen, Jelle J Sijtsema, and Stefan Bogaerts, “From child pornography offending to child sexual abuse: A review of child pornography offender characteristics and risks for cross-over” (2014) 19 *Aggression and Violent Behavior* 466 at 467. Similar problems are noted in virtually every study I examined for this paper.

¹⁷⁶ Janina Neutze, Dorit Grundmann, Geord Scherner, and Klaus Michael Beier, “Undetected and detected child sexual abuse and child pornography offenders” (2012) 35 *International J Law and Psychiatry* 168 at 168. See also David L Riegel, “Pedophilia, Pejoration, and Prejudice: Inquiry by Insinuation, Argument by Accusation” (2005) 9:1 *Sexuality and Culture* 88-97 [“Pedophilia”]; *Shadow’s Project, supra* note 79; *Virtuous Pedophiles, supra* note 79.

¹⁷⁷ See above note 112.

¹⁷⁸ See e.g. Michael C Seto, Chantal A Hermann, Cecilia Kjellgren, Gisela Priebe, Carl Goran Svedin, and Niklas Langstrom, “Viewing Child Pornography: Prevalence and correlates in a Representative Community Sample of Young Swedish Men” (2015) 44 *Arch Sex Behav* 67 at 67-68; Seto, Cantor, and Blanchard, *supra* note 26 at 614-5; Neutze, Grundmann, Scherner and Beier, *supra* note 177 at 168-69; Hannah L Merdian, Cate Curtis, Jo Thakker, Nick Wilson, and Douglas P Boer, “The endorsement of cognitive distortions: comparing child pornography offenders and contact sex offenders” (2014) 20:10 *Psychology, Crime & Law* 971 at 989-91.

¹⁷⁹ David Riegel’s Internet-based study, below at note 192, was not successful in the peer-review process. It relied on self-reporting and self-selecting after advertisement posted on numerous Internet sites. While Riegel’s data is intriguing, it cannot attract scientific credibility.

[A]lthough pedophiles have the potential to sexually offend against minors, they do not necessarily wish to engage in CSA [child sexual abuse]. Every effort should be made to better understand the foundations of pedophilic attraction and to identify and establish preventative treatment methods internationally. To achieve this, both legislation and social acceptance, which are highly related to one another, must be modified. [...] [T]he negative impacts of pedophilia possibly can be mitigated with support and treatment to help them cope with their sexual preferences and/or refrain from acting upon their sexual desires toward children.¹⁸⁰

Thus, while Houtepen, Sijtsema and Bogaerts recognized that cross-over does occur, they also recognize that for some people viewing child pornography actually *prevents* cross-over. Moreover, while the precise parameters of the link between child pornography use and contact offences are not yet the subject of scientific consensus, research on cognitive distortions suggests that child pornography users are different than contact offenders.

Research on cognitive distortions has shown that the relationship between cognitive distortions and child sexual offences is more complex than was suggested in *Sharpe*. Howitt and Sheldon compared cognitive distortions in Internet pornography offenders with those of contact offenders against children.¹⁸¹ They found a “significant difference” between Internet and contact offenders: Internet pornography offenders were more likely to endorse the ideas relating to children are sexual objects, such as the idea that children are sexual beings and appropriate objects of sexual attention.¹⁸² Howitt and Sheldon conclude that this is “difficult to reconcile with a simple view that cognitive distortions lead directly to offending against children and that the greater levels of cognitive distortion should be associated with the worst crimes against children”.¹⁸³

Building directly on Howitt and Sheldon’s work, Merdian et al further studied the difference between contact and child pornography offenders with a

¹⁸⁰ Olshan, *supra* note 79 at 22.

¹⁸¹ Dennis Howitt and Kerry Sheldon, “The role of cognitive distortions in paedophilic offending: Internet and contact offenders compared” (2007) 13:5 *Psychology, Crime & Law* 469 at 473.

¹⁸² *Ibid* at 475-76.

¹⁸³ *Ibid* at 482. While recognizing the challenge of drawing strong conclusions due to limited and conflicting research, Howitt and Sheldon concluded that the very idea of cognitive distortions was likely flawed. *Ibid* at 482-84.

view to understanding the risk of re-offence by child pornography offenders (CPOs) and their risk for cross-over to contact child sexual abuse (child sex offenders or CSOs).¹⁸⁴ They bluntly stated that “CPOs should not be treated like CSOs without supportive research evidence”.¹⁸⁵ Their research developed the scale of cognitions used by Howitt and Sheldon to include more diverse and offence-specific cognitions. Their findings accorded with other research indicting “little evidence of antisociality and high psychological barriers [to contact offending] amongst this non-contact offender group”.¹⁸⁶ Merdian et al conclude that “(1) CPOs endorse fewer cognitive distortions than CSOs *on conventional measures of attitudes towards children and sex* and (2) CPOs endorse cognitive distortions *of particular relevance to their offending*, which are not included in standardised measures”.¹⁸⁷ In other words, while child pornography offenders saw looking at child pornography as acceptable, they did not usually see sex with children as acceptable.

Sara M. Smyth’s review of empirical research since *Sharpe* similarly found that the “moral corruption” rationale undergirding the suppression of imaginary works does not hold up. In Smyth’s analysis, recent research indicates that: (i) Internet child pornography consumption is unlikely to result in contact offences against children; (ii) Internet child pornography consumers’ primary interest in children is fantasy-based; (iii) Internet child pornography consumers have more/higher levels of cognitive distortions about child sexuality than contact offenders; and (iv) neither deviant fantasy (such as fantasy about child sexual abuse) nor viewing child pornography is causally linked to committing contact offences.¹⁸⁸ In sum, reputable scientific evidence undermines the linkage between consumers of child pornography and contact-offenders and suggests instead that

¹⁸⁴ Merdian et al, *supra* note 178 at 972.

¹⁸⁵ *Ibid* at 973.

¹⁸⁶ *Ibid* at 987.

¹⁸⁷ *Ibid* at 988. They found that child pornography offenders’ were less likely overall to endorse cognitive distortions, and that their “cognitions are offence-specific . . . CPOs’ agreement was higher towards items that were targeted towards their unique situation” (items along the lines of looking is not as bad as touching, or sexual thoughts about a child are not that bad because they do not really hurt the child). Moreover, while child pornography offenders would endorse statements portraying children as sexual objects, they largely would not endorse statements justifying sexual contact with children. *Ibid* at 988.

¹⁸⁸ Smyth, *supra* note 9 at 96-100.

child pornography may act as an outlet for paedophilic desires and reduce the risk of child sexual abuse in some cases.

A 2002 study of Internet child pornography offenders reported by David L. Riegel found that viewing male child pornography on the Internet provides a “useful as a substitute for actual sexual contact with boys”.¹⁸⁹ Sara M. Smyth cited Riegel’s study as strong evidence in support of this contention, and Carissa Hessick adverts to the fact that Riegel’s study has been noted in other scientific literature.¹⁹⁰ However, Riegel’s study must be treated with some caution because it was published as a letter to the editor because the study did not meet the standards of the peer review process. In Riegel’s study, more than 80% of respondents affirmed that such viewing “redirected” and provided an “outlet that affected no other person”.¹⁹¹ Consistent with that finding, more than 80% rejected the idea that “the use of erotica increased [their] tendency to seek out boys for the sole purpose of sexual activity” and more than 50% of these respondent felt either somewhat or significantly relieved after viewing male child pornography.¹⁹² Riegel noted that the study specifically addressed the idea of “enticing” (what the *Sharpe* court called “grooming”) and more than 75% reported never having shared male child pornography with a male child. While Riegel’s study is weak evidence, Carissa Hessick notes that there are other studies, also controversial due to sampling limitations, “which suggest that, if individuals have access to pornography, then it may reduce contact offences”.¹⁹³ In short, not only is there little if any scientific evidence *supporting* the causal link between

¹⁸⁹ David L. Riegel, “Letter to the Editor: Effects on Boy-Attracted Pedosexual Males of Viewing Boy Erotica” (2004) 33:4 *Arch Sex Behav* 321 at 322 [“Letter to the Editor”]. It is important to note that Riegel’s comment was published as a Letter to the Editor because the lengthier original manuscript did not survive the peer-review process. However, an editor’s note specifically noted that Riegel was invited to submit as a Letter to the Editor because the material would be of interest to members of the academic community. Riegel is a proponent of paedophile-rights and an independent writer and researcher who has published a book as well as several peer-reviewed articles and contributed to a chapter in a human sexuality textbook. I hasten to add that I am not in agreement, nor is this paper proposing the propriety of any sexual relations between adults and children, as Riegel has elsewhere suggested can be acceptable: Riegel, “Pedophilia”, *supra* note 176.

¹⁹⁰ Smyth, *supra* note 9 at 100-101; Hessick, *supra* note 90 at 876-78.

¹⁹¹ Riegel, “Letter to the Editor”, *supra* note 192 at 322.

¹⁹² *Ibid* at 322.

¹⁹³ Hessick, *supra* note 90 at 876-78. Hessick further notes that in the adult pornography context, there is evidence disproving the hypothesis that exposure to violence pornography causes violence against women and suggesting instead an inverse relationship between viewing explicit sexual materials and violence, leading her to the conclusion that “the modern view of non-child pornography is more nuanced and tolerant”. *Ibid* at 878.

child pornography consumption and contact sexual offences, there is also some evidence *contradicting* that link and instead suggesting that child pornography can actually reduce the risk of contact sexual offences.

It is arguable that even on the “reasoned apprehension of harm” standard, the existence of countervailing evidence – as opposed to a mere lack of positive evidence – should affect the s. 1 analysis. Where materials involve actual children – whether they are merely possessed or produced, distributed, etc. – the justification remains unassailable. But where the materials do *not* involve children, as is the case for fantasy materials, the social science evidence showing that the “child pornography begets child sexual abuse” rationale is ill-conceived and that using child pornography can actually alleviate paedophilic desire and thus potentially reduce child sexual abuse should mean that the portion of s. 163.1 including fantasy materials would not satisfy the s. 1 analysis.

In the Senate debate on Bill C-279 to which I referred earlier, Sen. Plett’s concern that paedophiles would abuse any right to use bathrooms corresponding to one’s gender identity was rooted in anecdotal evidence.¹⁹⁴ Another Senator, Sen. Mitchell, responded to Sen. Plett, saying:

I do know that we don't hold everyone in a category responsible for a crime that someone in that category might commit. White males commit crimes, but we don't hold all of us responsible and make all of us act in certain ways because another White male might commit a crime; nor should we hold transgendered people responsible.¹⁹⁵

Sen. Mitchell’s point is relevant to the problem with the legislative standard in s. 163.1, as interpreted by the SCC. The fact some paedophiles commit contact offences against children does not necessarily mean that all paedophiles do, nor does it necessarily mean that all paedophiles should be cut off from child pornography that does not involve actual children. In its current state, research on paedophilia and child pornography likely cannot support a complete reconceptualization of the social and legal treatment of paedophiles, but should

¹⁹⁴ Sen. Plett’s concern arose from an anecdote wherein a man exposed himself to a six-year-old child and her mother in a college change room in Chicago.

¹⁹⁵ *Debates of the Senate*, *supra* note 67 at 1550 (Hon Grant Mitchell).

be a sufficient basis on which to demand a new iteration of democratic deliberation on s. 163.1.

8. *CHARTER* PROTECTION FOR PAEDOPHILES

Paedophiles as a group are marked in society as threatening and mentally ill, and can be criminalized for gratifying their sexual desires. Williams' concerns about the meaningful inclusion of marginalized groups in the deliberative democratic framework are therefore applicable. Williams hypothesized that only socio-political organization and threat to majority well-being would lead to recognition of these groups' voice in the democratic discourse. For paedophiles, this seems unlikely to materialize, despite the existence of online peer support networks that provide a community-building function.¹⁹⁶ The International Centre for Missing and Exploited Children's 2014 report argued that "both legislation and social acceptance, which are highly related to one another, must be modified" to allow research on paedophilia and lead "better understand the foundations of pedophilic attraction" and thus undercut the stigmatization of paedophiles.¹⁹⁷

In Canada, the *Charter* is a beacon of our social values and aims to ensure that individuals and groups in society are treated with dignity and respect by government action. In effect, the *Charter* attempts to create the fundamental condition of equality mandated by the deliberative democratic approach. As such, it is the appropriate vehicle for achieving greater socio-political acceptance of paedophiles, removing the stigma that attends paedophilia, and enabling a more fulsome discussion of the benefits and burdens of s. 163.1. Without removing the stigma, better research and thus better understanding will remain elusive. There are two bases upon which paedophilia could receive *Charter* protection: s.7 and s. 15. In this final section, I propose a broad and necessarily speculative outline of these potential arguments.

¹⁹⁶ See above note 79.

¹⁹⁷ Olshan, *supra* note 79 at 22.

(a) Section 7

As mentioned above, the *Sharpe* court rolled Mr. Sharpe's s. 7 arguments into the s. 2(b) analysis, thus depriving both him and the public of their analysis on these issues. The s. 7 protections for liberty and security of the person ought to be engaged by s. 163.1. Since the offences in s. 163.1 carry mandatory minimum sentences, the liberty interest is engaged in this respect. Section 7 is, however, also engaged in a more fundamental fashion because of the interference with individual sexual desire. Where fundamental personal choices affecting psychological integrity are engaged, liberty and security of the person become intertwined:

Liberty protects “the right to make fundamental personal choices free from state interference” [...] Security of the person encompasses “a notion of personal autonomy involving . . . control over one’s bodily integrity free from state interference” [...] and it is engaged by state interference with an individual’s physical or psychological integrity, including any state action that causes physical or serious psychological suffering [...] ¹⁹⁸

The main challenge posed under the s. 7 framework is the SCC decision in *R v Malmo-Levine*, wherein the court refused to attach constitutional protection under s. 7 to lifestyle choices and rejected the harm principle – that Parliament cannot impose criminal liability in the absence of evidence of harm to others – as a principle of fundamental justice.¹⁹⁹ The appellants in that case raised both liberty and security of the person arguments. The security of the person arguments were rejected by Gonthier and Binnie JJ for the majority in cursory terms: “[T]he Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle. [...] Prohibition would not therefore lead to a level of stress that is constitutionally cognizable. A very different issue would arise if the marijuana was required for medical purposes, but neither appellant uses marijuana for such a purpose.”²⁰⁰

¹⁹⁸ *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 64 (citations omitted) [*Carter v Canada*].

¹⁹⁹ *R v Malmo-Levine; R v Caine*, 2003 SCC 74 [*Malmo-Levine*] at paras 103, 111.

²⁰⁰ *Ibid* at paras 86-88.

The use of child pornography for sexual gratification might well be relegated to the status of a lifestyle choice, and without further research to show a sufficient psychological stress resulting from denying access to this material, a s. 7 argument could be rejected on this basis.²⁰¹ On the other hand, the SCC has more recently rejected a “choice” argument in *Canada (Attorney-General) v Bedford*, where the court acknowledged that some choices (like sex-trade work) are not real choices.²⁰² While the argument is weaker when speaking about using child pornography, the idea of completely suppressing one’s sexual impulses could be classified as a non-choice. Additionally, it is sufficient for s. 7 that the state conduct contribute to the risk of harm.²⁰³ In light of testimonials from paedophiles on peer support forums like *Virtuous Paedophiles*, it is possible that the enhanced isolation and consequent psychological stress resulting from the child pornography prohibition’s perpetuation of social prejudice against paedophiles could meet this standard.

While the risk of imprisonment for a simple possession offence unquestionably implicates the liberty interest,²⁰⁴ a s. 7 challenge could falter on the principles of fundamental justice. The *Malmo-Levine* court rejected the harm principle.²⁰⁵ In *Bedford* and *Carter v Canada (Attorney General)* the SCC affirmed the recognition of three principles of fundamental justice: arbitrariness, overbreadth, and gross disproportionality.²⁰⁶ Section 7 is individually focused: it is enough that a single person’s s. 7 interests are denied.²⁰⁷ Provided an accused could show their use of child pornography within the s. 163.1 definition did not cause attitudinal harm or harm to children, the law would be overbroad in that its means would not be related to its objective. The challenge of proving such an absence of harm would, however, be formidable in light of the amorphous nature of

²⁰¹ Professor Sheila Wildeman (Dalhousie University) also suggested that relegating sexual gratification through pornography to a lifestyle choice might conflict with the recognition that sexual expression by sexual minorities attracts protection under s. 2(b) of the *Charter*, which protection is influenced by s. 15 equality arguments. See e.g., *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 [*Little Sisters*].

²⁰² *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 79-92 [*Bedford*].

²⁰³ *Ibid* at paras 59-71.

²⁰⁴ *Malmo-Levine*, *supra* note 202 at para 89.

²⁰⁵ *Ibid* at paras 111-29.

²⁰⁶ *Bedford*, *supra* note 205 at paras 108-123; *Carter v Canada*, *supra* note 201 at paras 71-73, 83, 85, 89.

²⁰⁷ *Bedford*, *supra* note 205 at para 123.

attitudinal harm. Rather than imposing this onus on the accused, recognizing paedophiles as a group entitled to protection under s. 15 would shift the onus onto the government to demonstrate the necessity of discriminating against paedophiles.

(b) Section 15

The s. 15 analysis has been recently synthesized by the SCC in *Quebec v A*, wherein Abella J spoke for the majority on the s. 15 issue.²⁰⁸ Abella J affirmed the applicability of the *Andrews v Law Society of British Columbia* test as reformulated by *R v Kapp* and *Withler v Canada (Attorney General)* in the following terms:

[323] In sum, the claimant's burden under the *Andrews* test is to show that the government has made a distinction based on an enumerated or analogous ground and that the distinction's impact on the individual or group perpetuates disadvantage. If this has been demonstrated, the burden shifts to the government to justify the reasonableness of the distinction under s. 1. [...]

[324] *Kapp*, and later *Withler v. Canada (Attorney General)*, 2011 SCC 12 (CanLII), [2011] 1 S.C.R. 396, restated these principles as follows: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (*Kapp*, at para. 17; *Withler*, at para. 30). [...]²⁰⁹

In her reasons, Abella J emphasized three points. First, historical disadvantage or prejudice remains a relevant indicator of groups requiring protection, even in the absence of ongoing overt discriminatory societal attitudes.²¹⁰ Second, prejudice or stereotyping are not discrete requirements under the test for discrimination but rather serve as “indicia” of whether a particular distinction has the effect of creating or perpetuating disadvantage.²¹¹ Third, s. 15 is concerned with preventing discriminatory effects, and does not require a discriminatory intention. On this third point, Abella J adopted McIntyre J's discussion of disadvantage in *Andrews*:

²⁰⁸ *Quebec (Attorney General) v A*, 2013 SCC 5 [*Quebec v A*].

²⁰⁹ *Ibid* at paras 323-324.

²¹⁰ *Ibid* at para 318.

²¹¹ *Ibid* at paras 322-30.

[...] [D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has *the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.*²¹²

Abella J also highlighted the symbiotic relationship between discriminatory laws and the perpetuation of prejudice and stereotyping, reasoning that:

[...] Attitudes of prejudice and stereotyping can undoubtedly lead to discriminatory conduct, and discriminatory conduct in turn can reinforce these negative attitudes, since “the very exclusion of the disadvantaged group . . . fosters the belief, both within and outside the group, that the exclusion is the result of ‘natural’ forces, for example, that women ‘just can’t do the job’” (*Action Travail*, at p. 1139).²¹³

Abella J's latter point is particularly relevant in the context of child pornography and paedophilia in two respects. First, s. 163.1 casts the net of child pornography broadly based on the idea that child pornography leads to child sexual offences, yet I have shown that research not only questions this premise but suggests that prohibiting paedophiles from accessing some form of sexual outlet may actually increase the incidence of contact offences, thereby reinforcing the view that there is a natural and unavoidable connection between paedophilia and contact sexual offences. Second, differentiating child pornography from other pornography draws a distinction between normal sexuality and normal pornography (legal, provided it does not cross the obscenity line) and deviant, child-focused sexuality and pornography (illegal). By criminalizing the expression of paedophilic desire, social rejection of those who possess this desire receives the legislative and judicial stamp of legitimacy. Moreover, convicted child pornography offenders are additionally subject to the social rejection that attends criminal conviction. Together, these factors naturalize the exclusion of paedophiles.

Whether paedophilia is a mental disorder or a sexual orientation need not be determined to consider whether s. 15 ought to be applicable to the s. 163.1

²¹² *Ibid* at para 322 [emphasis in original].

²¹³ *Ibid* at para 326.

child pornography provision.²¹⁴ Mental disability is an enumerated ground and sexual orientation is an analogous ground.²¹⁵ While the contextual factors for assessing the “perpetuation of arbitrary disadvantage” might change depending on the categorization of the applicable ground of prohibited discrimination, there would be significant similarities. Abella J identified a non-exhaustive list of these factors, including “pre-existing disadvantage, correspondence with actual characteristics, impact on other groups and the nature of the interest affected”.²¹⁶ I now turn to consider these factors.

The obvious stumbling blocks would be the nature of the interest affected and the impact on other groups. On the former, sexual gratification is seen as a base interest deserving of minimal constitutional protection, though sexual minorities are also seen as protected by equality and freedom of expression values.²¹⁷ On the latter, child pornography has undeniable and serious negative effects on children. The consideration of countervailing interests, however, more properly belongs at the s. 1 justification stage, in particular because of the possibility of drawing the legal prohibition more narrowly so as to exclude materials that do not include real children (i.e. permit fantasy child pornography including so-called “dress down” pornography). On the other hand, as I have endeavored to show, the other factors weigh in favour of recognizing a perpetuation of disadvantage. Canada’s child pornography law makes assumptions that are at least potentially at odds with actual characteristics. Furthermore, paedophiles suffer from pre-existing and ongoing disadvantage in that they are the subject of long-standing social revulsion and vilification. In sum, while this matter will ultimately fall to the courts to determine, there is an arguable case for a s. 15 argument in respect of the effect of s. 163.1 on paedophiles.

²¹⁴ Both categorizations are arguable given their socially contingent nature, but a full consideration of this debate is beyond the scope of this paper. The concept of immutability arguably weighs into both mental disorder and sexual orientation. Mental disorder might perhaps be distinguished on the basis of maladaptivity, but this too depends on majority social values. If the historical treatment of homosexuality is any indicator, the distinction is largely one of socio-political acceptance.

²¹⁵ *Charter*, *supra* note 5 at s 15(1); *Egan*, *supra* note 55.

²¹⁶ *Quebec v A*, *supra* note 211 at para 331.

²¹⁷ *Sharpe*, *supra* note 2 at paras 24, 185-86; *Little Sisters*, *supra* note 204.

(c) The Preferable Solution to Achieve Deliberative Democratic Legitimacy

Recognizing that s. 163.1 violates s. 15 would be a preferable solution to rectifying both the legal and social attitudes towards paedophiles. There is a symbolic and political value attached to a finding of discrimination under s. 15, even where it is found justified under s. 1. A finding of discrimination recognizes the affected group as deserving of societal protection and acknowledges the detrimental effects of a law on that group. On the legal side, s. 15 is preferable for two reasons.

First, justifying s. 15 infringements under s. 1 is easier than justifying s. 7 infringements. This is in large part because the s. 7 and s. 1 tests are inverse to one another: the principles of fundamental justice (arbitrariness, overbreadth, and gross disproportionality) mirror the proportionality components of the *Oakes* test (rational connection, minimal impairment, and proportionality). While the parallel nature of s. 7 and s. 1 suggest that it should be nearly impossible to justify a s. 7 violation, the SCC has recently adverted to the conditions in which such a justification would be possible.²¹⁸

The SCC approach to the s. 1 analysis in *Sharpe* suggests that the provision would be upheld as a justified infringement. While the liberty interest might hold greater weight than freedom of expression, without more conclusive social science evidence or a changed social context, it is possible that the court would nevertheless uphold the provision.

Second, s. 15 is especially susceptible to the balancing of rights inherent in the *Charter* because of the multiple groups receiving protection.²¹⁹ Indeed in *Sharpe* itself L'Heureux-Dube J cast the debate between protecting children and freedom of expression more broadly than the majority and held that children's s. 15 rights were implicated in the child pornography debate. These considerations are significant because of the clear risk of harm posed by child pornography using real children – Parliament must have the authority to create and the court must have the authority uphold laws that prohibit the production and dissemination of child pornography involving real children. Elaine Craig, in advocating for a

²¹⁸ *Carter v Canada*, *supra* note 201 at para 95.

²¹⁹ *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 at paras 26-37.

constructivist approach to legal regulation of sexuality that orients to the protection of sexual integrity, has similarly recognized the unavoidable tension. Craig acknowledges that non-arbitrary legal regulation of sexuality necessarily requires criteria for distinguishing “good” from “bad” sex, which is in tension with the idea of sexuality as socially constructed.²²⁰

On the social side, the benefit of recognizing a s. 15 infringement is that the *Charter* and in particular s. 15 serve as a beacon of fundamental values in Canadian society. A proper assessment of s. 163.1’s legitimacy is hampered by the context of social vilification that surrounds paedophilia. Pertinent research is challenging if not impossible, and the legal test for justification imports community moral standards. Rectifying the social exclusion of paedophiles is not only beneficial in its own right but would reduce the research barriers.²²¹ Moreover, Houtepen, Sijtsema, and Bogaerts suggest that isolated child pornography offenders “may be at greater risk for committing child sexual abuse than those who are also able to discuss their feelings with other non-pedophilic individuals in the offline environment” and that “fantasy-only offenders are at risk due to feelings of loneliness and low self-esteem”.²²² Thus not only may the child pornography law be broader than is necessary to achieve its objective, it may actually be detrimental to that objective. With appropriate research, Parliament could design a law that is properly tailored to achieve its objectives while minimally affecting paedophiles’ ability to maximally exercise their sexual personhood. Should Parliament prove unwilling to do so – a real possibility given the political sensitivity of the issue²²³ – the courts would not be able to defer to Parliament in the face of more conclusive evidence than was available when *Sharpe* was decided.

²²⁰ Craig, *Troubling Sex*, *supra* note 7 at 1-2.

²²¹ On the claim that sexual integrity as a public good, see Craig *Troubling Sex*, *supra* note 7 at 6-7, 18.

²²² Houtepen, Sijtsema, and Bogaerts, *supra* note 175 at 472.

²²³ It is important for the court to lead the charge on refocusing discussions of child sexual abuse away from stranger danger and on to the social factors leading to child abuse in the family because it is unlikely that elected politicians will do so. Craig, *Troubling Sex*, *supra* note 7 at 43.

9. CONCLUSION

Returning to the idea of deliberative democracy, equality is one of the two fundamental conditions for the deliberative democratic model, and legal legitimacy can only be acquired where those who are affected by the law have a chance to weigh in on an equal footing. Section 15 explicitly recognizes that social context places certain groups at a disadvantage and attempts to rectify that disadvantage by constitutionally mandating equality before and under the law. Although more loosely applied, it also serves as a means of advancing social equality. Moreover, advancing equality would also help to facilitate the articulation of reasons that would be understandable to other members of society, in particular through research.

Under our democratic constitutional framework, the courts are charged with ensuring that the legislature respects the fundamental tenets of the *Charter* that represent the basic social consensus on the balance between individual rights and freedoms and legitimate government restrictions on those rights and freedoms. Because of the evolving nature of *Charter* protections, the *Charter* is an attempt to both codify and protect deliberative democratic consensus. Despite its shortcomings, the *Charter* is a real-world instance of a deliberative democratic consensus, and protects the pre-conditions to maintaining legal legitimacy as viewed through the deliberative democratic lens. Courts are charged with protecting both that consensus, and so are in a sense the guardian angels of legitimacy. But where the legal test for assessing the legitimacy of government action becomes watered down and so polluted by social context as to preclude respectful attention to the reasons of all affected parties, the Court can no longer serve that function. Moreover, where legislative deliberation excludes affected parties, the requirements of equality and reasons are no longer met. In these conditions the *Charter* cannot protect the agreed upon balance between the input of legal subjects and the action of lawmakers.

Section 163.1 aims to protect children, but was drafted without deliberation between all affected parties. Most significantly, those who have a sexual desire for children were not consulted before they were criminally prohibited from gratifying their sexual desire. I have endeavoured to show that what is socially and

morally acceptable sexual desire can and does change. Admittedly the necessity of distinguishing between unacceptable sexual acts between adults and children and potentially acceptable adult sexual desire for children poses an additional complexity for examining paedophilia as opposed to homosexuality. Complexity, however, is not an excuse for failing to uphold the sexual integrity and equality of all members of society. The Parliamentary drafting process was deficient when measured against the requirements of deliberative democracy. As a result of the conjunction between a social context that vilifies paedophiles and hinders effective social scientific research and the analytical framework used to assess constitutional legitimacy, the Supreme Court of Canada did not correct these deficiencies. Based on the current state of social scientific research on child pornography and paedophilia, which suggests that only a highly attenuated risk of harm to children is posed by paedophiles using child pornography, s. 163.1 needs reconsideration. In particular, accepting “fantasy” pornography that does not use any real children might strike the appropriate balance between children’s rights and paedophiles’ rights. I have proposed that *Charter* protection for paedophiles under s. 7 and s. 15 offers a means of mitigating social, political, and legal vilification of paedophiles, but will likely be hindered by that same vilification. As such, a return to the fundamental tenets of deliberative democracy is necessary to facilitate the iterative development of *Charter* protections. Careful attention to deliberative democracy and *Charter*-protections for paedophiles are required to achieve the conditions necessary to conscientiously evaluate the appropriate balance between protecting children and protecting paedophiles.