

CONFRONTING COLLECTIVE HARM: TECHNOLOGY'S TRANSFORMATIVE IMPACT ON CHILD PORNOGRAPHY

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The world, I think, can be divided into 2 kinds of people: ...those who think the Internet and the new communications technologies herald a revolution calling for radical rethinking of our basic notions of law and politics and society, and those who think it does not, that it is simply more of the same, an incremental change in the way human interaction proceeds.¹

INTRODUCTION

The epigraph suggests a dichotomy that makes categorization simple – those who accept that Internet and new communication technologies present changes “in kind” which necessitate abandonment of “old” ways of thinking about law, politics, and society, and those who deny this new reality and seek to treat it merely as incremental change. Those in the latter group are not infrequently portrayed as luddites, unwilling and unable to accept that technology necessitates rethinking everything from the ground up. Through the exploration of the impact of emerging technologies on child pornography, I suggest that this dichotomy is more fictional than real; technological developments can facilitate both transformative and incremental change. Perhaps more importantly, I suggest that transformations brought about by technology need not compel us in every instance to abandon old ways of thinking. These transformations may actually reaffirm the significance of previously made commitments and values that have been under-recognized in examinations of the justification for existing laws. In so doing, these transformations offer us not only the opportunity to get clearer about our values and commitments, but to explore new justifications for “old” ways of thinking that did not previously exist, were ignored, or were once considered weak.

It is a crime in Canada to participate in many facets of the child pornography industry, from possessing and knowingly accessing child pornography through to

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¹ David G. Post, “The Cyberspace Revolution” (Keynote Address, Computer Policy & Law Conference, Cornell University, July 1997) [unpublished] online: Temple University <<http://www.temple.edu/lawschool/dpost/Cornell.html>>.

manufacturing and distributing it.² Criminal prohibitions apply whether the material in question derives solely from the imagination, involving no “real” children in its production, or actually depicts “real” children.³ With certain limited exceptions, it is equally illegal to photograph the sexual abuse of a child, to write a story advocating sexual activity with an “imaginary” child, to photograph an adult posing as a child engaged in explicit sexual activity, and to draw pictures showing “imaginary” children in explicit sexual activity.⁴ Criminal restrictions on the latter examples relating solely to stories and depictions of imaginary children are characterized as “virtual child pornography” for the purposes of this paper.

The *Criminal Code* (*Code*) provisions relating to child pornography have been the object of considerable academic, NGO, and judicial commentary and criticism, as well as political debate.⁵ Technological innovation, in particular the Internet, renewed and perhaps intensified the debate prompting calls for international action, legislative reform, and academic comment. Much of the debate focuses on technology’s impact on the “scope” of the problem of child pornography and its

² *Criminal Code*, R.S.C. 1985, c. C-46, s. 163.1 as am. by S.C. 1993, c. 46, s. 2 [*Code*].

³ Visual material depicting children engaged in explicit sexual activity is caught, as is material featuring as a dominant characteristic the sexual organ or anal region of a child for a sexual purpose. The proscription also applies to the depiction of both real and imaginary persons. *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 72 [*Sharpe*].

⁴ The Supreme Court of Canada outlined two exceptions relating to personal use in *Sharpe, ibid.*, which are discussed in detail below in Part II. “Child” for the purposes of the *Code, supra* note 2, s. 163.1(1), relates to persons under the age of 18.

⁵ See e.g. Bruce Ryder, “The Harms of Child Pornography Law” (2003) 36 U.B.C.L. Rev. 101 (QL) [Ryder]; Lise Gotell, “Inverting Image and Reality: *R. v. Sharpe* and the Moral Panic Around Child Pornography” (2001/2002) 12 Const. Forum 9; Amy Adler, “Inverting the First Amendment” (2001) 149 U. Pa. L. Rev. 921; Amy Adler, “The Perverse Law of Child Pornography” (2001) 101 Colum. L. Rev. 209; Janine Benedet, “Children in Pornography after *Sharpe*” (2002) 43 C. de D. 327; and Sanjeev Anand, “A Case for Upholding the Child Pornography Law” (1999) 25 C.R. (5th) 312; See e.g. John D. McAlpine et al., “Factum of the Intervener, British Columbia Civil Liberties Association” (30 December 1999), online: BCCLA Factum: *R. v. Sharpe* in the Supreme Court of Canada <<http://www.bccla.org/othercontent/sharpesc.html>>; Letter from A. Alan Borovoy to The Hon. Marion Boyd (7 January 1994), online: CCLA Positions <<http://www.ccla.org/pos/letters/aglanger.shtml>>; Canadian Conference of the Arts, “Canadian Conference of the Arts’ Backgrounder on Bill C-2” (4 April 2005), online: Backgrounder on Bill C-2 <<http://www.ccarts.ca/en/advocacy/publications/policy/c12backgrounder.htm>>; Christopher Waddell, “National Affairs Committee Report”, in *PEN Canada 2002-2003 Annual Report*, online: AnnualReport02-03.pdf <<http://www.pencanada.ca/media/AnnualReport02-03.pdf>> at 33; Writers’ Union of Canada, “Submission of the Writers’ Union of Canada, League of Canadian Poets, Periodical Writers Association of Canada, and Playwrights Guild of Canada to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness on Bill C-2” (31 March 2005), online: justice.pdf <<http://www.writersunion.ca/justice.pdf>>; Letter from David Matas to the House of Commons Justice Committee on Bill C-20 (7 October 2003), online: Beyond Borders <<http://www.beyondborders.org/p8.shtml>>; In striking down the *Child Pornography Prevention Act of 1996*, 18 U.S.C. §§ 2256(8)(B), 2256(8)(D) (1996) [CPPA], which prohibited, among other things, possession of “virtual child pornography”, the United States Supreme Court (USSC) stated: “In contrast to...speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not ‘intrinsically related’ to the sexual abuse of children”. *Ashcroft v. The Free Speech Coalition* 535 U.S. 234 (2002) at 250 [*Ashcroft*]. The arduous path of promulgation and amendment of the *Code* provisions relating to child pornography is discussed in detail in Part I below.

increased accessibility.⁶ Somewhat less attention has been paid to the potentially transformative aspects of these technologies and their impact on foundational issues, such as the justifications for regulating child pornography which bring into stark relief the significance of its broader collective harms.

The “old” way for thinking about the justification for restrictions such as these was outlined in the Supreme Court of Canada’s (SCC) landmark decision on the constitutionality of the provision as it stood in 1992 in *Sharpe*.⁷ The SCC referred in its reasons to the objectives of preventing harm to children, including allusions to their rights to dignity, privacy and bodily integrity.⁸ However, its analysis of harms was premised first and foremost on the risk of physical harm to individual children associated with the creation and consumption of both virtual and non-virtual child pornography.

This paper urges further reflection on the understanding of the harms of child pornography identified by the SCC in an attempt to get clearer about the rights and interests at stake, while grappling with the impact of related technological advances. I argue that the impact of the Internet and related digital technologies is not simply incremental, but also transformative. Emerging technologies blur the line between conscience, expression and action in ways that cry out for an understanding of the harms of child pornography encompassing not just the extremely concerning physical harm to individual children, but also broader social harms to children’s collective dignity and equality rights.

Part I is an examination of the legal history leading to and connecting prior child pornography legislation with recently enacted amendments, including two key cases involving virtual child pornography in the offline context – *Sharpe* and *Langer*.⁹ Part II examines the harms analysis accepted by the SCC in *Sharpe*, assessing in particular its emphasis on individuated physical harm, which has subsequently been repeated in other cases. Part III explores the ways in which the Internet and related technological advances have presented incremental challenges to the enforcement and prosecution of child pornography laws. It then considers technologically-initiated transformative change that leads to an understanding of harms focusing not only upon physical harm to individual children, but also broader collective harms to children’s equality.

⁶ See e.g. Max Taylor, “The Nature and Dimensions of Child Pornography on the Internet” (Paper presented to the International Conference on Combating Child Pornography on the Internet, 1 June 2002) [unpublished], online: The nature and dimensions of child pornography on the Internet <http://www.ipce.info/library_3/files/nat_dims_kp.htm> [Taylor, “Nature and Dimensions”]; Benedet, *supra* note 5 at 332; Ethel Quayle & Max Taylor, “Child Pornography and the Internet: Perpetuating a Cycle of Abuse” (2002) 23 *Deviant Behavior* 331 at 356-57 [Quayle & Taylor, “Child Pornography and the Internet”]; and Donna M. Hughes, “The Use of New Communication and Information Technologies for the Sexual Exploitation of Women and Children” (2002) 13 *Hastings Women’s L. J.* 129, online: [new_tech.pdf](http://www.uri.edu/artsci/wms/hughes/new_tech.pdf) <http://www.uri.edu/artsci/wms/hughes/new_tech.pdf> [Hughes, “Sexual Exploitation”].

⁷ *Sharpe*, *supra* note 3.

⁸ *Ibid.* at paras. 28, 92 (McLachlin C.J.C.), 158, 164 (L’Heureux-Dubé, Gonthier, and Bastarache JJ.).

⁹ *Sharpe*, *ibid.*; *Re Paintings, Drawings and Photographic Slides [by Eli Langer]*, [1995] O.J. No. 1045 at paras. 13-15 (QL) [Langer].

PART I – CANADA’S CHILD PORNOGRAPHY PROVISIONS

The criminalization of acts relating to child pornography in Canada has followed a long and somewhat arduous path, reacting and responding to international obligations undertaken by Canada in relation to the rights of children, as well as constitutional challenges and judicial interpretations that have spurred legislative action.

1. Leading to *Sharpe* - Events of the 1990’s

In 1991, Canada ratified the Convention on the Rights of the Child (CRC).¹⁰ The CRC required signatory nations to, among other things, take all appropriate legislative, administrative, social, and educational measures to protect those under the age of 18 from all forms of violence (including sexual abuse) as well as economic and sexual exploitation (including participation in pornographic performances and materials).¹¹ While courts have relied on these obligations in interpreting domestic legislation affecting the rights and well-being of children, Canada has not transformed many of its CRC obligations into domestic law.¹²

Until 1993, child pornography in Canada was dealt with under the obscenity provision of the *Criminal Code*, the constitutionality of which the SCC upheld in *Butler*.¹³ The Court found that, having regard for community standards of tolerance with respect to the risk of harm pornography poses to women and children, the following were permissibly restricted unless their portrayal was shown to be “essential to a wider artistic, literary, or other similar purpose”:

- (i) sex coupled with violence; and
- (ii) explicit sex which is degrading or dehumanizing if the risk of harm is substantial.¹⁴

At the same time, the SCC held that explicit sex which is not violent, dehumanizing, or degrading is generally within community standards, “unless it

¹⁰ *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, GA Res. 44/25, 44 UN GAOR, Supp. No. 49, UN Doc. A/44/49 (1989) 166 (entered into force 2 September 1990, accession by Canada 13 December 1991).

¹¹ *Ibid.*, art. 1, 19; *Ibid.*, art. 32; *Ibid.*, art. 34.

¹² See e.g. *Baker v. Canada*, [1999] 2 S.C.R. 817 at paras. 70-71. Nonetheless, the SCC recently upheld the constitutionality of the “corporal punishment” provision of the *Code*, which permits parents and children to use “reasonable force” by way of “correction” of the children in their care. *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] 1 S.C.R. 76, 2004 SCC 4 [*Foundation for Children, Youth and the Law*]; For accounts of other serious and growing socio-economic issues concerning children that remain unaddressed, see Ryder, *supra* note 5 at para. 35; Gotell, *supra* note 5 at 12; Campaign 2000, “Decision Time for Canada: Let’s Make Poverty History ‘2005 Report Card On Child Poverty in Canada’ (2005), online: 05NationalReportCard.pdf <<http://www.campaign2000.ca/rc/rc05/05NationalReportCard.pdf>> at 1; and Stephen Gaetz, “Safe Streets for Whom? Homeless Youth, Social Exclusion, and Criminal Victimization” (2004) 46 Cdn. J. Criminology & Criminal Justice at 423.

¹³ *Code*, *supra* note 2; *R. v. Butler*, [1992] 1 S.C.R. 452 (QL) [*Butler*].

¹⁴ *Butler*, *ibid.* at paras. 60, 62.

employs children in its production.”¹⁵ The Court’s analysis focused not only on individuated physical harms associated with the production and consumption of obscenity, but also its broader affront to equality. Sopinka J., for the majority, accepted that the effects of obscenity could alter attitudes toward women and children, undermining their place in the community just as hate propaganda can alter attitudes toward members of targeted groups. The majority cited with approval the following passage from Dickson C.J.C.’s reasons in the hate propaganda context:

[T]he alteration of attitudes held by the recipients of hate propaganda may occur subtly, and is not always attendant upon conscious acceptance of the communicated ideas. Even if the message of hate propaganda is rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient’s mind as an idea that holds some truth, an incipient effect not to be entirely discounted...¹⁶

In June 1993, Parliament added s. 163.1 to the *Code*, which specifically addresses child pornography.¹⁷ In addition to criminalizing the making, printing, publishing, distributing, and circulating of child pornography (which were the restricted acts with respect to obscenity pursuant to s. 163), s. 163.1 criminalized possession for the purposes of publication, distribution, or sale, as well as simple possession of child pornography.¹⁸

“Child pornography” included both visual representations depicting or advocating sexual activity with persons under 18, and certain depictions of the sex organs or anal region of a person under 18, in addition to written materials advocating or counselling sexual activity with a person under 18.¹⁹ The three statutory defences included: (i) artistic merit or an educational, scientific, or medical purpose; (ii) serving the public good, and (iii) an honest though mistaken belief that the persons depicted were over 18.²⁰

Over the course of the next several years, the provisions were the focus of significant police investigation, yielding numerous prosecutions.²¹ *Langer* and *Sharpe*, two of the more high profile and controversial prosecutions, related (at least in part) to virtual child pornography in the “offline” context.²² *Sharpe* eventually

¹⁵ *Ibid.* at para. 60.

¹⁶ *Ibid.* at para. 74, citing *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 747-48, [1991] 2 W.W.R. 1 [*Keegstra* cited to S.C.R.].

¹⁷ The *Code*, *supra* note 2, s. 163.1.

¹⁸ *Ibid.*, ss. 163.1(2)-(4).

¹⁹ *Ibid.*, ss. 163.1(1)(a)(i)-(ii), (b); *Ibid.*, s. 163.1(1)(b).

²⁰ *Ibid.*, s. 163.1(6); *Ibid.*, s. 163.1(7); *Ibid.*, s. 163.1(5).

²¹ Nationwide, “[b]etween 1997 and 2002, police laid charges against 226 men and 11 women for production or distribution of child pornography.” Rebecca Kong *et al.*, “Sexual Offences in Canada” (2003) 23:6 *Juristat* 1 at 10, online: 0060385-002-XIE.pdf <<http://dsp-psd.communication.gc.ca/Collection-R/Statcan/85-002-XIE/0060385-002-XIE.pdf>>.

²² “Offline” is used here to refer to materials that were not in any way communicated via or stored on computer networks at the time of prosecution.

made its way to the SCC and represents the Court's latest commentary on the constitutionality of restricting child pornography.

(A) *Langer*

On 20 April 1995, McCombs J. of the Ontario Court (General Division, as it then was) dismissed a Crown application under s. 164 of the *Code* for forfeiture of five large oil paintings and thirty-five small pencil drawings by artist Eli Langer, which depicted children involved in various sexual activities, some of which included adults.²³ McCombs J. accepted the Crown's evidence that child pornography (even that involving no real children in its making) could pose a risk of harm to children, insofar as it might be used to fuel the fantasies of pedophiles and reinforce their cognitive distortions, and to "groom" children to facilitate their sexual exploitation.²⁴ In dismissing the application, McCombs J. found that the images in issue posed no realistic risk of harm to children.

In response to the defence's facial constitutional challenge to s. 163.1, McCombs J. found that the provision justifiably restricted an accused's *Charter* right to freedom of expression, given the risk of harm child pornography poses to children and the tailoring of the provision (e.g. the defence of artistic merit).²⁵ Rejecting the overbreadth argument advanced by the respondent, he noted that "[i]n an age of technical breakthroughs such as computer imaging, child pornography legislation should not be limited to images created through the use of real children."²⁶ Nevertheless, he concluded that the materials in issue before him had artistic merit and did not fall below the community standard of tolerance in terms of the risk of harm to children, thus requiring their return to *Langer*.²⁷

(B) *Sharpe*

Six years later in *Sharpe*, the SCC upheld the constitutionality of the s. 163.1 possession offence.²⁸ However, the majority read out two applications of the possession provision, which it found could not be justified under s. 1 of the *Charter*.²⁹ The majority concluded that: (i) self-created, exclusively privately held works of the imagination; and (ii) "privately created visual recordings of lawful sexual activity made by or depicting the person in possession and intended only for private use" constituted unjustifiable infringements on freedom of expression and therefore should be read out of the provision's ambit.³⁰

²³ *Langer, supra* note 9 at paras. 13-15.

²⁴ *Ibid.* at paras. 26-29.

²⁵ *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 2(b) [Charter]; Langer, supra* note 9 at para. 135.

²⁶ *Langer, ibid.* at para. 124.

²⁷ *Ibid.* at paras. 172-75.

²⁸ *Sharpe, supra* note 3.

²⁹ *Charter, supra* note 25, s.1.

³⁰ *Sharpe, supra* note 3 at paras. 75-76.

While the Court acknowledged that the provision applied to depictions of both real and imaginary persons, it held that the prohibition on possession of the materials defined in s. 163.1(1) was justified in order to prevent harm to children. The Court accepted that the main purpose behind the child pornography law was to “prevent harm to children by banning the production, distribution and possession of child pornography, and by sending a message to Canadians ‘that children need to be protected from the harmful effects of child sexual abuse and exploitation and are not appropriate sexual partners’.”³¹

The Court found that, apart from the two exceptions identified, the child pornography provisions were tailored to catch only material posing a “reasoned risk” of harm to children.³² The Court concluded that the provision addressed four harms associated with child pornography, which are discussed in detail in Part II below.

2. Events Following Sharpe – National and International Focus on Technology

A series of Internet and technology-related events coalescing around the time of the release of the SCC’s decision in *Sharpe* shifted significant global attention to the topic of child pornography.

The Government announced in its Speech from the Throne on 31 January 2001 that it would “focus on safeguarding Canadians from new and emerging forms of crime...[by, among other things, acting to] safeguard children from crime, including criminals on the Internet...[and taking] steps to ensure that our laws protect children from those who would prey on their vulnerability.”³³

Later that year, Canadian police forces announced “Project Snowball”, a national operation to crackdown on online child pornography.³⁴ In tandem with this development, the Integrated Child Exploitation Unit was created in an effort to coordinate nationwide investigations relating to online child pornography.³⁵ Since that time, specialized police units have arisen in jurisdictions across the country and

³¹ *Ibid.* at para. 34 (citing the *House of Commons Debates*, 16 (3 June 1993) at 20328).

³² *Ibid.* at para. 35.

³³ Government of Canada, “Speech from the Throne to Open the First Session of the 37th Parliament of Canada” (30 January 2001), online: Information Resources <http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=InformationResources&sub=sftddt&doc=sftddt2001_e.htm>.

³⁴ Creation of Snowball followed the raid of a Dallas home that led to disclosure of the names of some 300,000 subscribers to an online pornography website from 60 countries (including 2329 Canadians). “The Landslide Case” *The Fifth Estate* (5 November 2003), online: CBC News: the fifth estate: Landslide <<http://www.cbc.ca/fifth/landslide/case.html>> [CBC, “Landslide”]. The investigation and prosecution of these offences in the United Kingdom generated significant media attention, particularly in relation to suicides by a number of accused men prior to their trials. In Ontario, the Ontario Provincial Police received 267 names of potential suspects; they arrested 32 and 30 were convicted. Toronto Police Services arrested 22 people from a list of 241 potential suspects; 18 of the 22 arrested were convicted following a guilty plea. “Global child porn probe led to false accusations” *CBC News* (14 March 2006), online: Global child porn probe led to false accusations <www.cbc.ca/story/world/national/2006/03/14/landslide-porn060314.html> [CBC News, “False accusations”].

³⁵ Alex Reid, “Child Porn List Counts 82 Manitobans” *New Winnipeg* (17 January 2003).

focus has shifted toward Internet training and investigation, along with further international cooperative investigations.³⁶

In the fall of 2001, Canada undertook a number of related international obligations. On 10 November 2001, it signed the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Optional Protocol).³⁷ The Optional Protocol requires signatories to ensure that, among other things, their criminal law covers producing, distributing, disseminating, importing, exporting, offering, selling, or possessing “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.”³⁸

Only days later, Canada signed the European Union’s Cybercrime Convention, which requires signatories to address a number of substantive and procedural legal issues aimed at the need for “increased, rapid and well-functioning international cooperation” in cybercrime related matters.³⁹ Signatories are to put in place adequate legislative measures to deal with four categories of online activities, including child pornography.⁴⁰ Article 9 requires criminalization of production for purposes of distribution, offering or making available, as well as distributing, transmitting, procuring, and possessing child pornography in a computer system and/or a computer-data storage medium.⁴¹ It defines child pornography to include

³⁶ For example, the Toronto Police Force developed a child pornography unit, as did the Ontario Provincial Police. Parliamentarians were apprised of these and other developments during the debate surrounding Bill C-15A, which is discussed in further detail below, *House of Commons Debates*, 174 (23 April 2002) at 1005, 1010 (Larry Spencer). Legal authorities and certain Canadian ISPs are also working together with Cybertip.ca (Canada’s national tip line for reporting instances of child pornography and child sexual exploitation) to reduce Canadian access to online child pornography housed on servers outside of Canada through an initiative announced in late 2006 entitled Project Cleanfeed Canada: “Project Cleanfeed Canada: Frequently Asked Questions” *Cybertip.ca*, online: Childfind/Cybertip <http://www.cybertip.ca/en/cybertip/cf_faqs>.

³⁷ *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, 25 May 2000, UN GAOR, 54th Sess., UN Doc. A/RES/54/263 (2000) (entered into force on 18 January 2002) [Optional Protocol]. Four years later, on September 14, 2005, Canada ratified the *Optional Protocol*, see Office of the Minister of Foreign Affairs, “Canada Ratifies UN Optional Protocol Against the Sale of Children, Child Prostitution and Child Pornography” *Foreign Affairs and International Trade Canada* (14 September 2005), online: Foreign Affairs and International Trade Canada <http://w01.international.gc.ca/MinPub/Publication.asp?Language=E&publication_id=383023&docnumber=163>.

³⁸ Optional Protocol, *ibid.*, art. 2(c), 3(c).

³⁹ *Cybercrime Convention*, 23 November 2001, Eur. T.S. No. 185 (entered into force 1 July 2004), online: Council of Europe <<http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>>, Preamble, [Cybercrime Convention]. In Canada, the procedure-related provisions of the *Cybercrime Convention* have been the subject of the Lawful Access Consultation, which has attracted important privacy-related concerns. See “Canadian government proposals for updating criminal laws and facilitating law enforcement in the electronic age” *Canadian Internet Policy and Public Interest Clinic (CIPPIC)* (15 November 2005), online: Lawful Access - CIPPIC <<http://www.cippic.ca/en/projects-cases/lawful-access/>> [CIPPIC, “Lawful Access”].

⁴⁰ The other three categories are: (i) offences against the confidentiality, integrity, and availability of computer data and systems; (ii) certain computer-related offences (e.g. forgery and fraud); and (iii) offences relating to copyright and related rights (*Cybercrime Convention, ibid.*, art. 2-10).

⁴¹ *Ibid.*, art. 9(1).

material showing a minor or someone appearing to be a minor engaged in, or appearing to engage in, sexually explicit conduct.⁴² Although the Convention defines “minor” as a person under 18 and covers both virtual and non-virtual child pornography, it specifically recognizes the right of signatories to lower the age to 16 and to reserve against application of the provisions relating to virtual child pornography.⁴³

On 26 March 2002, in the midst of numerous initiatives and consultations arising from the Cybercrime Convention and G8 strategy sessions, John Robin Sharpe was convicted of two counts of possession of child pornography following the retrial ordered by the SCC.⁴⁴ It was Sharpe’s acquittal on two other counts of possession for purposes of distribution that once again led his case to become a lightning rod for controversy and calls for legislative reform.⁴⁵

While numerous private members’ and government bills relating to reform of child pornography laws were proposed in 2001 and 2002, ultimately Bill C-15A received royal assent in June 2002 (2002 Amendment).⁴⁶ In addition to facilitating

⁴² *Ibid.*, art. 9(2).

⁴³ *Ibid.*, art. 9(3); *Ibid.*, art. 9(4). The Cybercrime Convention came into force on 1 July 2004. As of 25 April 2005, 38 EU member states had signed the Convention, and 10 of those had ratified it. “Simplified Chart of Signatures and Ratifications” *Council of Europe* (25 April 2005), online: <<http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=49&CM=16&CL=ENG>>. Five member states made express declarations, of which only one – Hungary – expressly reserved against criminalizing visual depictions of a person appearing to be a minor engaged in sexually explicit conduct.

⁴⁴ For example, in connection with its Cybercrime Convention obligations, Canada launched its lawful access consultation (relating to procedural and investigative powers) in 2002, with another round of consultation in 2003 and a more confined third round in 2005. “Lawful Access – Consultation” *Department of Justice Canada* (20 October 2005), online: Lawful Access – Consultation Document <http://canada.justice.gc.ca/en/cons/la_al/>. For a critical analysis of earlier proposals, see CIPPIC, “Lawful Access” *supra* note 52; For a summary see “Meeting of G8 Ministers of Justice and Home Affairs,” *Ministère de l’Intérieur, France* (5 May 2003), online: UofT G8 Information Centre: G8 Ministers of Justice and Interior Meetings <www.g8.utoronto.ca/justice/justice030505.htm>; *R. v. Sharpe*, [2002] B.C.J. No. 610 (B.C.S.C.) (QL) [*Sharpe II*].

⁴⁵ For example, Alliance MP Gurmant Grewal criticized the decision of the B.C. Supreme Court in *Sharpe II*, focusing in particular on the defence of artistic merit. Calling for reform, he stated in the House: “[T]his is a gigantic loophole that the Liberals are permitting to stand where young children are being exploited by the animals in our society. What are they doing about that case?”, *House of Commons Debates*, 154 (10 April 2002) at 1750 (Gurmant Grewal).

⁴⁶ *An Act to Amend the Criminal Code and to Amend Other Acts*, S.C. 2002, c. 13 [2002 Amendment]. Although the focus here is on Bill C-15A because it was ultimately enacted in 2002, numerous proposals for legislative change proliferated on the Parliamentary agenda from 2001 to 2004 (including prior incarnations of what eventually became Bill C-15A). A search on the term “pornography” on the legislative information site of the Library of Parliament indicates that from 1 January 2001 to 4 October 2004, 16 bills relating to child pornography (some connected specifically with the Internet) were introduced in legislative debates. See “Search Results for Pornography” *Library of Parliament, LEGISInfo* online: LEGISINFO – The Library of Parliament’s research tool for finding information on legislation <<http://www.parl.gc.ca/legisinfo/index.asp?Language=E&Session=14&List=search>>.

prosecution of child sex tourism offences and creating an Internet luring offence, the 2002 Amendment modified the child pornography provisions by:⁴⁷

- (i) specifically prohibiting various Internet-related modes of distributing child pornography through a computer system, including: transmitting and making it available;⁴⁸
- (ii) specifically prohibiting knowingly accessing or causing child pornography to be transmitted to oneself;⁴⁹
- (iii) providing for warrants of seizure specifically relating to computer systems within the jurisdiction storing or making available child pornography;⁵⁰
- (iv) providing for forfeiture of things used in the commission of a child pornography offence;⁵¹ and
- (v) adding child pornography to the list of offences for which courts may order convicted offenders or persons who it is reasonably feared will commit one or more of an enumerated list of sexual offences against a person under 14 to abstain from particular activities (*e.g.* having contact with minors).⁵²

Canada continued its legislative, enforcement and educative efforts against child pornography in 2003-2004 and by 2005, numerous local, national and international Internet child pornography arrests had made headlines.⁵³ On 20 July 2005 Bill C-2, *An Act to Amend the Criminal Code (protection of children and other vulnerable persons)* (2005 Code Amendment), received royal assent.⁵⁴ The 2005 Code Amendment's preamble refers to Canada's international obligations under the

⁴⁷ 2002 Amendment, *ibid.*, s. 3(2), now *Code* s. 7(4.3); *ibid.*, s. 8, now *Code* s. 172.1.

⁴⁸ *Ibid.*, s. 5(2), now *Code* s. 163.1(3)(a).

⁴⁹ *Ibid.*, s. 5(3), now *Code* s. 163.1(4.1)-(4.2). For further discussion, see David Goetz & Gerald Lafreniere, Legislative Summary, Bill C-15A: An Act to Amend the Criminal Code and to Amend Other Acts, LS-410E (30 September 2002).

⁵⁰ 2002 Amendment, *ibid.*, s.7, now *Code* s. 164.1.

⁵¹ *Ibid.*, s. 7, now *Code* ss. 164.2-3.

⁵² *Ibid.*, ss. 4, 18, now *Code* s. 161 and s. 810 respectively.

⁵³ For a more detailed description, see Government of Canada, "Response by Canada to July 30 request of Special Rapporteur on the sale of children, child prostitution and child pornography" *Office of the High Commissioner for Human Rights* (2004), online: <<http://www.ohchr.org/english/issues/children/rapporteur/Canada%20Gov.doc>>; Ed Lavandera & Stacia Deshishku, "Ex-Boy Scout official faces child porn charges" *CNN* (28 March 2005); "Belarus Company Executives Extradited from France to Face Charges in Global Internet Child Porn Case" *U.S. Immigration and Customs Enforcement* (11 January 2005), online: U.S. Charges Belarusians with Online Pornography Conspiracy – US Department of State <<http://usinfo.state.gov/eur/Archive/2005/Jan/12-845122.html>>; and Canadian Press, "Toronto man faces child porn charges" *Winnipeg Sun* (25 January 2005).

⁵⁴ *An Act to Amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32.

CRC and the Optional Protocol and notes that technological developments are facilitating sexual exploitation and breaches of privacy.⁵⁵

The 2005 Code Amendment maintains, and arguably expands (for example, by replacing the artistic merit and public good defences with the defence of legitimate purpose), criminal prohibitions on a wide variety of activities relating to works of the imagination involving children that do not actually include any real children in their production.⁵⁶ Thus, traditional communicative forms, such as the stories at issue in *Sharpe II* and the paintings and drawings at issue in *Langer*, would continue to be susceptible to prosecution (and perhaps to conviction in the case of the *Sharpe II* materials).⁵⁷ Further, audio recordings are now also covered. Conviction in relation to all of these forms would be possible with respect to materials the predominant characteristic of which is to describe or represent sexual activity with someone under 18 for sexual purposes, even if they do not advocate or counsel sexual activity with children.⁵⁸

PART II – CONCEPTUALIZING “HARM”

In accepting that the *Code* restrictions on possession of child pornography were constitutionally justifiable in *Sharpe*, the SCC concluded that there was sufficient social science evidence, when combined with common sense and experience, to substantiate a reasoned apprehension of four kinds of harm arising from possession of child pornography:⁵⁹

- (i) *child sexual abuse* – harm to children’s rights to dignity, bodily integrity, and privacy resulting from the sexual exploitation of children

⁵⁵ *Ibid.*, at Preamble.

⁵⁶ *Ibid.*, s. 7(7), amending *Code* ss. 163.1(6)-(7).

⁵⁷ The trial judge in *Sharpe II* found that the written materials in issue did not advocate or counsel sexual activity with persons under 18 and had artistic merit, *supra* note 44 at paras. 32-34, 107-09. Given Shaw J.’s description of the materials as repugnant, it is at least open to question whether the new legitimate purpose without undue risk test would have been satisfied. On the other hand, the test included in s. 7(7) of the 2005 Code Amendment appears to have many similarities with McComb J.’s interpretation of the artistic merit defence in *Langer*, where that court concluded that the work had artistic merit and did not pose unreasonable risk of harm to persons under the age of 18, *supra* note 9 at para. 153.

⁵⁸ The Ontario Court of Appeal had already ruled prior to the amendment that writings describing sex between fathers and their young daughters, though not explicitly advocating or counselling sex with children could nevertheless fall within the “advocating and counselling” prohibition because they implicitly suggested that sex between adults and children was appropriate. See *R. v. Beattie*, (2005) 75 O.R. (3d) 117 (C.A.).

⁵⁹ The SCC explicitly rejected the argument that the Crown was required to produce “scientific proof based on concrete evidence” linking the possession of child pornography with the harms listed. As it had in the context of the obscenity provisions, the Court accepted that there was sufficient, though not in every instance conclusive, evidence to support a reasoned apprehension of a connection between the harms listed and the possession of child pornography. See *Sharpe*, *supra* note 3 at paras. 85-94. Certain aspects of the controversy surrounding the adoption of this standard are discussed in further detail below.

- in the production of pornography and the continuing dissemination (or threat of dissemination) of these images over time;⁶⁰
- (ii) *cognitive distortions* – increased risk of physical harm to children by “banalizing the awful, and numbing the conscience...[perhaps] making the abnormal seem normal and the immoral seem acceptable” thereby increasing the risk pedophiles will sexually abuse children;⁶¹
 - (iii) *fuelling fantasies* – increased risk of physical harm to children by fuelling fantasies that incite sexual abuse of children;⁶² and
 - (iv) *grooming* – if it is legal to possess child pornography, it is more readily available for use in grooming children in order to facilitate physical offences against them.⁶³

Each of the harms listed by the SCC is tied in some way to the important objective of preventing physical harm to individual children by promoting their dignity, bodily integrity, and privacy rights through efforts to reduce the risk that they will be victimized by physical sexual abuse. With respect to non-physical collective harms, McLachlin C.J.C. noted:

While the government in this case did not present attitudinal harm to society at large as a justification for the law’s intrusion on the right of free expression, this may be seen as a good incidental to the law’s main purpose – the prevention of harm to children.⁶⁴

In contrast, the dissenting reasons of L’Heureux-Dubé J. referred directly to collective, non-physical equality harms, stating:

The written material and images captured by s. 163.1(1) (which depict children engaged in explicit sexual activity or which depict their sexual organs for a sexual purpose), degrade and dehumanize them. They portray children as mere sexual objects available for the gratification of adults. They play on children’s inequality. Hence, this material is in direct conflict with the guarantee of equality in s. 15.⁶⁵

The primacy of concern for the physical harms of child pornography expressed in the reasons of the *Sharpe* majority is also reflected in the approach Canadian courts have subsequently taken with respect to sentencing offenders; both analytically in sentencing methodologies and informally through the judicial language used to describe the material before them. The risk an offender presents to the community and the nature of the material at issue in each case figure prominently in sentencing decisions related to child pornography offences.⁶⁶ Examination of the

⁶⁰ *Ibid.* at para. 92.

⁶¹ *Ibid.* at paras. 87, 88.

⁶² *Ibid.* at para. 89.

⁶³ *Ibid.* at para. 91.

⁶⁴ *Ibid.* at para. 82.

⁶⁵ *Ibid.* at para. 188.

⁶⁶ *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5 at paras. 99-104.

“risk” factor in child pornography cases frequently focuses on whether the offender has been medically analyzed as being at high risk for future physical offences.⁶⁷ Often this analysis focuses on whether the offender has been diagnosed as a pedophile.⁶⁸

The results in one case indicate that virtual child pornography will be treated less seriously (at least in terms of sentence) than non-virtual child pornography. In *Chin* the offender pled guilty to importing child pornography in relation to mail-ordered animated magazines from Japan depicting the sexual abuse of children.⁶⁹ In jointly submitting that a non-custodial sentence was appropriate, the Crown and defence counsel referred to the nature of the material as a mitigating factor. While the Crown submitted that the material continued to pose a risk of harm, in terms of inflaming the interests of pedophiles, Crown counsel also argued that:

in the accused's favour, there were no real children exploited in the creation of this. So that separates it from the vast majority of cases. ...[T]here are cases in child pornography sentences where a [non-custodial sentence] might not be inappropriate. In this case here where the accused has entered a guilty plea and there are no actual children, perhaps this is one of those cases, Sir. And the Crown is suggesting in all the circumstances that it is one of those cases.⁷⁰

The submissions of defence counsel echoed these sentiments:

In any event, the Crown has fairly described the material as – as artistic in nature. And I use that word guardedly. It's an artistic depiction described in the disclosure material as cartoon-like. The point being that of course these are not photographs and they do not directly ...exploit children.⁷¹

⁶⁷ See e.g. *R. v. Weber*, [2003] O.J. No. 3306 (C.A.); *R. v. Cohen*, [2001] O.J. No. 1606 (C.A.); *R. v. Batslaw* (2004), 186 C.C.C. (3rd) 473 (Man. C.A.); *R. v. Craig*, 2005 CarswellOnt 664 (Ont. Ct. J.) (eC) [*R. v. Craig*]. For cases in which offenders diagnosed as pedophiles were determined not to present a significant risk of subsequent physical offences, see e.g. *R. v. Mallett*, 2005 CarswellOnt 4350 (Ont. Sup. Ct. J.) (eC); *R. v. Anderson*, 2005 CarswellAlta 634 (Alta. Prov. Ct.) (eC) [*R. v. Anderson* (2005)].

⁶⁸ The diagnosis is generally premised upon the *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Washington, D.C.: American Psychiatric Association, 1994) section 302.2 [DSM-IV], which requires the subject: (i) to be at least 16 years old and a minimum of five years older than the child described in (ii); (ii) to have had over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges or sexual activity with a child (generally under 13 years of age); and (iii) to have acted on the urges or been markedly distressed or experienced interpersonal problems due to these fantasies. Although not all child sexual offenders meet the strict definition of “pedophilia” (see Kenneth V. Lanning, “Child Molesters: A Behavioral Analysis” *National Center for Missing and Exploited Children* (2001), online: NC70.pdf <http://www.missingkids.com/en_US/publications/NC70.pdf> at 22, 25), some studies suggest that those diagnosed as pedophiles pose a higher risk of repeat offending. See R. Karl Hanson & Monique T. Bussière, “Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies” (1998) 66 *J. Consulting & Clinical Psychology* 348.

⁶⁹ *R. v. Chin*, [2005] A.J. No. 1712 (Prov. Ct. (Crim. Div.)) [*Chin*].

⁷⁰ *Ibid.* at paras. 30, 32.

⁷¹ *Ibid.* at paras. 48-50. It is notable that the transcript shows that it was the judge who initially completed the sentence, inserting “exploit children” and that this phrase was then adopted in the submissions of counsel. Defence counsel later referred to situations in which conditional sentences were imposed in relation to what he called “the real child pornography”, *ibid.* at para. 54.

The prioritization of the physical harms of child pornography is also evident in the language used to describe the nature of the child pornography at issue in these particular cases. In some instances, child pornography is categorized as more serious in relation to the level of physical abuse thought to be depicted, as follows:

- Level 1 - Non-erotic/non-sexualized material;
- Level 2 - Dominant characteristic is focus on genital, sex organ, or anal region;
- Level 3 - Explicit sexual activity and assaults between adults and children or between young children;
- Level 4 - “Gross” assaults involving penetration by adults; and
- Level 5 - Sadistic sexual images involving children.⁷²

Similarly, the emphasis on physical harm is often reflected in the language courts use to describe the images involved in a case. In *Sutherland*, after describing a number of images involving ten and eleven year old girls in penetration, fellatio, and “strip tease” as “quite disturbing and numbingly similar”, the sentencing judge went on to list as a mitigating factor that “[t]here [wa]s no evidence that any of the images involved things like torture or mutilation of children.”⁷³ One court described as “non-violent” the rape of an unconscious minor captured in the child pornography at issue in the case.⁷⁴ Another judgment described as a mitigating factor the fact that a man who lured a 14 year old girl to a motel room in order to use her in the production of child pornography had not touched the girl himself during production.⁷⁵ Comments of this nature, as well as equating the seriousness of images with the level or type of physical violence depicted is, of course, not isolated to situations involving child sexual abuse or child pornography. They are part of a broader socio-legal pattern that all too often prioritizes, while at the same time mischaracterizing, the physical violence of sexual assault.⁷⁶

⁷² These roughly approximate the “levels” approach adopted by the English Court of Appeal in *R. v. Oliver*, [2002] E.W.J. No. 5441, and also relied upon in Canada in *R. v. G.H.K.*, [2005] B.C.J. No. 2874 at para. 8 (Prov. Ct.); and *R. v. Missions*, [2005] N.S.J. No. 177 at para.14 (C.A.).

⁷³ *R. v. Sutherland*, [2006] B.C.J. No. 796 at paras. 7, 9 (Prov. Ct. (Crim. Div.)).

⁷⁴ *R. v. Paton*, 2005 CarswellNun 7 (Nu. Ct. J. (Prov. Div.)), cited in *R. v. Moen*, 2006 W.C.B.J. LEXIS 4 at para. 8(j) (Lexis).

⁷⁵ *R. v. Fulton*, [2005] AJ No. 1077 at para. 63 (Prov. Ct. (Crim. Div.)) [*R. v. Fulton*].

⁷⁶ As noted by “Jane Doe”, “[c]ontrary to its original intent, the term “sexual assault” has been hijacked, once again, to minimize the violent nature of forced sexual intercourse or rape. The definition focuses instead on the presence or degree of bodily harm or injury that accompanies a rape. It makes a date rape or a rape by your partner or co-worker, where there is no physical violence, less serious or violent than, say, my rape [by a stranger at knife-point] was... . The current definition places acts of unwanted touching, molestation and other assaultive or degrading sexual behaviour that women experience solely because of their gender at the bottom of a hierarchy under the rubric of sexual assault.” Jane Doe, *The Story of Jane Doe: A Book About Rape* (Toronto: Random House, 2003) at 113-14. While this need not be the case as some courts have recognized that “violence” should not be confined to physical attacks (see *R. v. Newton*, [2006] O.J. No. 1108 at para. 83 [*Newton*]), legal analyses are all too often predominated by a focus on physical harms (see e.g. *L.M. c. R.*, [2006] J.Q. No. 4966 (C.A.)).

Most critics of restrictions on possession of child pornography, and of the *Code* provisions in particular, do not dispute children's right to be free from abuse.⁷⁷ However, in the context of the *Code* provisions in general and the SCC's analysis in *Sharpe* in particular, two principle contentions relating to the relevant social science evidence and the breadth of the provisions continue to be debated.

With respect to social science evidence, it is argued that the connection between possession of child pornography, especially virtual child pornography, and physical harm to children is simply too tenuous to justify limiting possessors' rights to freedoms of conscience, expression and privacy.⁷⁸ These critiques acknowledge the existence of studies showing that those convicted of sex offences against children are frequently also consumers of child pornography. However, they point out that such studies do not conclusively demonstrate any necessary *cause and effect* relationship between consumption and subsequent commission of physical offences.⁷⁹ In contrast, others have argued that provisions of the type currently in the *Code* and approaches such as those of the SCC in *Sharpe* do not go far enough in terms of protecting the rights and interests of children.⁸⁰ These critiques argue greater attention ought to be paid to the powerful evidence on the role of child pornography in the *lived reality* of sexually abused children.⁸¹

With respect to the breadth of provisions like those found in the *Code*, it has been argued that such restrictions trench too far on individual expression and may actually hinder adolescents' and teens' healthy sexual exploration and development

⁷⁷ At least one organization, NAMBLA, argues that sex between adults and children is not necessarily abusive and promotes sexual relations between men and boys. See *R. v. B.J.F.W.*, [2004] S.J. No. 392 at para. 48.

⁷⁸ See e.g. "Civil Liberties Group Supports Prohibitions Against Child Pornography, But Opposes Current Law" *British Columbia Civil Liberties Association* (26 April 1999), online: BCCLA News Release: Civil liberties group supports prohibitions against child pornography, but opposes current law <<http://www.bccla.org/pressreleases/99sharpe.html>>; "Submissions to the Standing Committee on Justice and Human Rights Re: Child Pornography Provisions of Bill C-20" *Canadian Civil Liberties Association* (7 October 2003), online: CCLA Positions <<http://www.ccla.org/pos/briefs/oct7%20-%20child%20pornography%20provisions.shtml>>; and Ryder, *supra* note 5 at paras. 8, 54-55, 62-64.

⁷⁹ Ryder, *ibid.* at paras. 8, 54-55, 62. For a review of the numerous studies on the relationship between viewing child pornography and committing sexual offences against children, see L. Jill Rettinger, "The Relationship between Child Pornography and the Commission of Sexual Offences Against Children: A Review of the Literature" *Department of Justice Canada* (March 2000), online: [rr00-5.pdf](http://www.justice.gc.ca/en/ps/rs/rep/2000/rr00-5.pdf) <<http://www.justice.gc.ca/en/ps/rs/rep/2000/rr00-5.pdf>>.

⁸⁰ Quayle's research, for example, suggests that much of the material contained in the collections of pedophiles and others engaged in the child pornography trade is not even covered by the legal definitions of child pornography: Max Taylor & Ethel Quayle, *Child Pornography: An Internet Crime* (New York: Brunner-Routledge, 2003) at 6 [Taylor & Quayle, *Internet Crime*]; See e.g. Benedet, *supra* note 5 at 335-37; Diana E.H. Russell, "Pornography as a Cause of Rape" in *Against Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1994), online: Porn Table of Contents <<http://www.dianarussell.com/pornoc.html>> (discussing the connection between adult pornography and rape); and with respect to the equality implications, see "Memorandum of the Interveners Beyond Borders, CASE, ECPAT and the International Bureau for Children's Rights in *R. v. Robin Sharpe*" *Beyond Borders* (30 November 1999), online: [Beyond Borders](http://www.beyondborders.org/p6.shtml) <<http://www.beyondborders.org/p6.shtml>>.

⁸¹ Benedet, *supra* note 5 at 335-337.

by prohibiting, among other things, depictions and stories of otherwise lawful sexual activity.⁸² In response, it has been noted that the SCC in *Sharpe* limited the restriction on possession of auto-created works and images that are held privately and therefore do not become part of the child pornography trade. Further, it has been argued that even these exceptions go too far by protecting third-party adult possession of photographs of legal sexual activity between youths taken by the possessor.⁸³

The purpose of this paper is not to re-hash or attempt to resolve the debate on whether provisions like those in the *Code* strike an appropriate freedom of expression balance.⁸⁴ Instead, this paper is meant to explore the question of how the introduction of emerging technologies might reshape the focus of that analysis or affect its validity, all else being equal. However, some observations with respect to the social science and over-breadth debates seem to be necessary in order to contextualize the technology-focused discussion that follows.

Protecting individual children from the physical and emotional harms resulting from sexual abuse is an indisputable social good, but legal analyses relating to child pornography that focus on this aspect of harm have, perhaps tellingly, failed to fully take account of collective equality harms that have been specifically highlighted in other contexts, such as obscenity.⁸⁵ A continuing focus on the strength or weakness of the social science evidence relating to the connection between individual consumption and subsequent physical offences risks continued obfuscation of broader collective implications that I will suggest are likely to be brought to the fore by emerging technologies. It is not suggested that these broader concerns are necessarily unconnected with individual physical harm. It certainly seems plausible to anticipate that widespread commodification of children and their sexuality as “things” properly possessed and traded for the consumptive “pleasure” of others could play a role in facilitating attitudes receptive to (or at least less concerned

⁸² While the child pornography provisions in the *Code* impose restrictions with respect to persons or depictions of person under the age of 18, other provisions in the *Code* legally recognize the capacity of persons aged 14 and over to consent to engage in non-exploitive sexual activity. The provisions relating to the age of consent were made the subject of Bill C-22, *An Act to Amend the Criminal Code (Age of Protection) and to Make Consequential Amendments to the Criminal Records Act*, 39th Parl., 1st Session (First Reading: 3 April 2006), online: LEGISINFO <<http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=14&Type=0&Scope=1&query=4804&List=toc-2>>.

⁸³ Benedet, *supra* note 5.

⁸⁴ For what it is worth, I find the arguments in favour of the validity of these kinds of restrictions to be the more compelling ones, particularly in light of the broader social consequences of the child pornography trade, which are discussed in detail below.

⁸⁵ *Butler*, *supra* note 13 at para. 74. See *Keegstra*, *supra* note 16 and accompanying text.

about) physical abuse.⁸⁶ What I want to suggest, however, is the importance of closely examining the other social harms that the commodification process itself may occasion on community commitments to equality and dignity, and to children and youths as the targeted group within that community. In that regard, I find the words of Dickson C.J.C. (as he then was) in the context of hate propaganda to be instructive. I suggest that we reframe the inquiry in a manner that probes more deeply the ways in which the commodifying impact of the child pornography trade typecasts children and youths as entities properly “denied respect and dignity simply because of [the personal] characteristic [of age]” – “[a] brand of expressive activity...wholly inimical to the democratic aspirations of the free expression guarantee.”⁸⁷ In so doing, we may be in a position to confront more directly the ways in which this trade undermines community aspirations for a society founded on equality among all citizens.⁸⁸

It may also be that the debate surrounding the breadth of provisions like those found in the *Code* and the lawful sexual activity and sexual exploration of youths will be altered by technology – a topic discussed in further detail below in Part III, 1(B). However, even apart from technological advances I would suggest that we ought to be cognizant of the qualitative differences between youths engaging in lawful sexual activity and exploration, and the capturing of that activity in a distributable record. When that record moves beyond the possession of those who created and/or are depicted or identified in it, the record itself can be used to occasion assaults on the dignity, equality and personal privacy of any individual youths involved – even where the activity itself was non-exploitive and consensual. Further, once the pornographic material moves beyond its creator, it risks becoming part and parcel of the trade in child sexuality, triggering broader collective concerns, even in situations where no identifiable “real” children or youths are involved. These concerns are likely to take on renewed significance as we confront technological developments that make it increasingly easy not just to create the record, but to disseminate it, download it, cut and paste it and re-distribute it to connected consumers worldwide.

PART III. THE DIFFERENCE DIGITAL TECHNOLOGIES MAKE

Digital technological developments, such as the Internet, present marked technosocio-cultural change of unprecedented proportion, at least in terms of facilitating the

⁸⁶ For a compelling analysis of the connection between pornography, discrimination, and violence, see Catharine A. MacKinnon, *Women's Lives, Men's Laws* (Cambridge, Massachusetts: Harvard University Press, 2005) at 302-03, 341-42. In the context of the long term connections between hate speech, discrimination, and violence, see Alexander Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (New York: New York University Press, 2002) at 99-117; Laura J. Lederer & Richard Delgado, *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography* (New York: Hill and Wang, 1995); and Gordon W. Allport, *The Nature of Prejudice*, 3rd ed. (Reading, Massachusetts: Addison-Wesley, 1979).

⁸⁷ *R. v. Keegstra*, *supra* note 16.

⁸⁸ In general, Canadian law has done little to advance either the meaning or the cause of equality for children in society. Marvin Bernstein, “The Decision of the Supreme Court of Canada Upholding the Constitutionality of Section 43 of the Criminal Code of Canada: What this Decision Means to the Child Welfare Sector” (2006) 44 *Family Court Review* 104, online: Blackwell Synergy - Single Article Purchase <<http://www.blackwell-synergy.com/doi/full/10.1111/j.1744-1617.2006.00070.x>>.

rapid exchange of multiple types of content (text, images, voice, etc.) between users across dispersed geographic regions in a context that may, in many circumstances, feel quite private to the user, and yet is readily accessible to, or just the push of a button away from, a wide public audience. The ever-improving and increasingly available software and hardware that enable creation of increasingly lifelike “virtual” images and manipulation and reintegration of “real” images represent a similarly significant techno-socio-cultural development.

In the context of laws restricting child pornography (on which there has been both a remarkable level of international consensus as well as a deep and fundamental level of local, national, and international controversy), both of these aspects of the changing technological context present incremental and transformative challenges.⁸⁹ The monumental expansion of distribution and accessibility of child pornography facilitated by the Internet and other digital technologies aiding in its creation generate not only incremental effects in terms of scope, but also the potentially transformative opportunity to confront more directly the collective harms of child pornography and the rights of children and youths in our communities.

1. Incremental Effects

Technological change regularly challenges the efficacy of law in addressing human behaviours and expands the scope of behaviours previously circumscribed by law. Advances in digital technologies have, in fact, posed practical challenges relating to the enforcement of prohibitions on child pornography. These challenges have been addressed through changes in both legislation and enforcement strategy in an effort to continue to combat child pornography.

(A) *Expanded Access and Distribution and “Virtual” Imagery*

Digital networks have expanded the accessibility of many types of images and information – and this is no less true in the context of child pornography. As Martin Calder has noted:

The Internet with its growing capacity to exchange in real time written messages, telephone calls, data, sound, still and moving pictures, has broken the traditional communication barriers and makes incalculable quantities of information of all kinds and forms instantly available to anyone with a personal computer...Child pornography has thus grown into a massive industry that systematically promotes the abuse of children.⁹⁰

⁸⁹ The online market for pornography has driven technological innovation, particularly with respect to pressure to increase bandwidth and improve video-streaming. See Frederick Lane, *Obscene Profits: The Entrepreneurs of Pornography in the Cyber Age* (New York: Routledge, 2000); and Jon Swartz “Online porn often leads high-tech way” *USA Today* (9 March 2004), online: USAToday.com – Online porn leads high-tech way <http://www.usatoday.com/money/industries/technology/2004-03-09-onlineporn_x.htm>.

⁹⁰ Martin C. Calder, “The Internet: Potential, Problems and Pathways to Hands-On Sexual Offending” in Martin C. Calder, ed., *Child Sexual Abuse and the Internet: Tackling the New Frontier* (Dorset: Russell House, 2004) at 6-7 [Calder].

The impact of the Internet on the scope of the child pornography trade has also been noted in judicial reasons relating to online child pornography charges and, not infrequently, features prominently in decisions on sentencing.⁹¹ As noted by the Alberta Court of Appeal in *Hunt*:

The menace that distribution of child pornography through the internet poses cannot be underestimated. The internet provides an unregulated, instant world-wide distribution network that is immediately accessible for viewing, downloading, and even wider distribution.⁹²

As part of its mandate, the Combating Paedophile Information Networks in Europe (COPINE) Project has amassed a database of pictures from 60 Internet newsgroups involving the online trade in child pornography.⁹³ As of 2001, its database included approximately 80,000 pictures and more than 400 video clips ranging from “non-erotic” pictures sexualized by persons with an interest in children through to sexual images of children involving sadism or bestiality.⁹⁴ The COPINE Project reported in 2001 that, on average, images involving two new children per month were appearing in the newsgroups that it monitored, that the age of the children involved appeared to be getting younger, and that the number of Eastern European children involved had grown.⁹⁵ Over the two year period from 2000 to 2002, members of the COPINE Project estimated that they had downloaded explicitly sexual images of over 2000 boys and girls and a similar number involving erotic naked posing. Three hundred to 350 of the children in their sample had been photographed while being sexually assaulted over the prior 10 to 15 year period.⁹⁶

⁹¹ See e.g. *R. v. Lac*, [2005] AJ No. 1019 at para. 55 (Prov. Ct. (Crim. Div.)) [*Lac*]; *R. v. Rideout*, [1998] A.J. No. 199 at para. 53 (Prov. Ct. (Crim. Div.)); *R. v. M.L.*, [2005] A.J. No. 82 at para. 15 (Prov. Ct. (Crim. Div.)) [*R. v. M.L.*].

⁹² *R. v. Hunt*, [2002] AJ No. 831 at para. 29 (C.A.).

⁹³ The COPINE Project was founded in 1997 as part of the Department of Applied Psychology, University College Cork, Ireland and works in coordination with numerous international law enforcement and other agencies to address child sexual exploitation on the Internet. The database, which was amassed from 2001 to 2004, has since been transferred to INTERPOL. See “Copine Project” *Copine Project*, online: COPINE Project Homepage <<http://www.copine.ie/index.php>>.

⁹⁴ The COPINE project categorizes child pornography into ten levels from images classified as indicative (non-erotic pictures of children) to sexualized images obviously involving pain and/or animals. Max Taylor, Ethel Quayle & Gemma Holland, “Child Pornography, the Internet and Offending” (2001) 2 Cdn. J. Policy Research 94 at 96, online: ISUMA Child Pornography, the Internet and Offending <http://www.isuma.net/v02n02/taylor/taylor_e.shtml> [Taylor, Quayle & Holland]. Its categorization involves images of children (e.g. “indicative”) that do not fall within legal definitions of child pornography because, as Taylor argues elsewhere, the legal definitions of child pornography are, in fact, under-inclusive since many persons with a sexual interest in children sexualize what would otherwise be perceived of as non-sexualized images of children. See Taylor, “Nature and Dimensions”, *supra* note 6.

⁹⁵ Taylor, Quayle & Holland, *ibid.* at 96.

⁹⁶ Taylor, “Nature and Dimensions”, *supra* note 6 at 8.

The COPINE Project reported that child pornography is accessed and created online through:

- (i) bulletin board systems, where those with access can engage in real time conversation as well as uploading and downloading files;
- (ii) Internet Relay Chat, which affords opportunities not only for real time communication, but for the direct exchange of files and images from one participant to another;
- (iii) the World Wide Web, which allows access to images and relatively easy capturing and downloading of images; and
- (iv) usenet and newsgroups, which permit the posting of requests for images and their exchange, with an estimated 1000 illegal photographs being posted per week.⁹⁷

The current evidence relating to the relationship between online child pornography and child sexual abuse appears to reveal trends similar to those noted in the offline environment. Those committing sexual offences against children are often consumers of child pornography, using it for purposes of sexual gratification, as well as for grooming children to participate in their own victimization.⁹⁸ One U.S.-based study of online child victimization showed that 40% of offenders arrested for possession of child pornography were also individuals who had sexually victimized children, with the two crimes being discovered in the same investigation.⁹⁹ Of those arrested, 39% possessed moving images in digital or other video formats, 65% had basic home computing equipment, 22% had particularly powerful computing equipment, but only 7% had computer equipment that might be considered similar to equipment an expert would own, and only 3% had images generated through computer graphics.¹⁰⁰

⁹⁷ Taylor, Quayle & Holland, *supra* note 94 at 97.

⁹⁸ In many instances, those charged with child pornography offences are also charged with, or have previously been convicted of, offences involving child sexual assault. See *e.g.* *R. v. Netzel*, [2006] O.J. No. 1411 (Ct. J. (Gen. Div.)); *R. v. J.P.F.*, [2002] B.C.J. No. 1439; *R. v. A.G.M.*, [2001] B.C.J. No. 1529; *R. v. Sharif*, [1998] B.C.J. No. 3211; *R. v. M.A.G.*, [1998] B.C.J. No. 3210; *Lac*, *supra* note 91; *R. v. M.B.H.*, [2004] O.J. No. 1679 (C.A.); *R. v. T.C.*, [2004] 72 O.R. (3d) 623 (C.A.); *R. v. Hall* (2004), 70 O.R. (3d) 257 (C.A.); *Newton*, *supra* note 76; *R. v. Gabourie*, [2005] A.J. No. 1950; With respect to the offline context, see U.S., *Stopping Child Pornography: Protecting our Children and the Constitution: Hearing Before the Senate Committee on the Judiciary*, 107th Cong. (2002) at 62-63 (testimony of Ernest E. Allen, President & Chief Executive Officer, The National Center for Missing and Exploited Children), online: 88680.pdf <<http://a257.g.akamaitech.net/7/257/2422/18aug20031230/www.access.gpo.gov/congress/senate/pdf/107hr/88680.pdf>>. With respect to the online context, see Janis Wolak, David Finkelhor & Kimberly J. Mitchell, "Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study" *National Center for Missing & Exploited Children* (May 2005), online: NC144.pdf <http://www.missingkids.com/en_US/publications/NC144.pdf>.

⁹⁹ Wolak, Finkelhor & Mitchell, *ibid.* at 7, 16.

¹⁰⁰ *Ibid.* at 7-8. In *Tylek*, [2006] A.J. No. 391 (Prov. Ct. J.), the offender had, among other things, created what he referred to as "boy-art" in which he digitally cut and pasted photographs of his own genitals on photographs of young boys.

Digital technologies that facilitate the full or partial generation of images, such as photo-shopping, also have the potential to change the child pornography trade. Digitally created virtual child pornography primarily includes two categories of material: (i) child pornography images that are wholly computer generated; and (ii) child pornography images created from images of real children, but which have been digitally manipulated in some way (e.g. the face of an actual child is digitally superimposed on a picture of an adult body engaged in sexual activity). Some have argued that wholly computer generated images that are virtually indistinguishable from photographic images of actual children do not yet exist and are unlikely to be widely produced, at least in the short term.¹⁰¹

The technologies for creation of digital humans are currently extremely expensive, complex, time-consuming, often require highly specialized environments in which to operate, and frequently depend upon photographs of real people in order to function.¹⁰² These features render such technologies relatively inaccessible for use outside of specialized environments, such as large production studios with significant financial resources. Even in those situations, it is difficult to exactly mirror humans, particularly if they are in motion, without creating a “fake” that is discernable either to the naked eye or with the use of increasingly sophisticated equipment.¹⁰³ That said, as the power of personal computers multiplies and the accessibility of high-quality photo-shopping technologies increases, the future may well hold the prospect of more widespread creation of photorealistic images that are wholly computer generated.¹⁰⁴ As one author has noted:

Five years down the road, experts say, a hybrid between a game and a movie could allow viewers/players to design and direct their own films and even put themselves into the action. You might first cast the film by scanning photos of real people – you and your friends, for instance – and running software that would create photoreal 3-D models of those people. Then, in real time, you could direct the film’s action via a hand-held controller or keyboard – anything from zooming the camera around the

¹⁰¹ Richard L. Hardy, “Virtual Child Pornography: Fact or Fiction?” *National Association of Attorneys General Cybercrime Newsletter* 7 (April-May 2004) 2 at 4 [Hardy]. See also Susan S. Kreston, “Defeating the Virtual Defense in Child Pornography Prosecutions” (2004) 4 J. High Tech. L. 49 at 72.

¹⁰² Nadia Magnenat-Thalmann & Laurent Moccozet, “Some New Challenging Research Topics in Human Animation” *17th Spring Conference on Computer Graphics (SCCG’01)* (2001), online: <http://csdl2.computer.org/persagen/DLAbstoc.jsp?resourcePath=/dl/proceedings/sccg/&toc=comp/proceedings/sccg/2001/1215/00/1215t0c.xml&DOI=10.1109/SCCG.2001.945332> at 12-13; Barnabas Takacs & Bernadette Kiss, “The Virtual Human Interface: A Photorealistic Digital Human” (2003) 23 *IEEE Computer Graphics and Applications* 5 at 38.

¹⁰³ Hardy, *supra* note 101 at 3, quoting Dr. Robert Fiete, “Detecting Fake Images” (Lecture presented at Examination of Digital Child Pornography, Chappaqua, New York 2 December 2003); Tsuneko Ikedo, “Creating Realistic Scenes in Future Multimedia Systems” (2002) 9 *IEEE Multimedia* 4 at 61; and Siwei Lyu & Hany Farid, “How Realistic is Photorealistic?” (2005) 53 *I.E.E.E. Transactions on Signal Processing* 845.

¹⁰⁴ For an impressive example of one wholly computer generated still image of an adolescent face, see Alceu Baptista, “Kaya”, online: [Kaya](http://www.vetorzero.com.br/kaya/) <<http://www.vetorzero.com.br/kaya/>>.

characters to making the lead actor run in a certain direction. Interactive entertainment... is where the real future is.¹⁰⁵

Technologies for digitally manipulating real photographic images are much more widely available and commonplace.¹⁰⁶ One expert notes:

Today, altering the content of an image does not require dark room tricks but merely a PC with image editing software. Desktop software is readily available and easy to use, allowing anyone to quickly and creatively alter images. The easiest approach is to simply cut a section from one image and embed it into another image. The desktop software allows the creator to modify the extracted image to the appropriate size and rotation. The software on the market today is so easy to use that pre-school children have little difficulty creating impressive altered images.¹⁰⁷

While technologies are available for detecting situations in which real photographic images have been manipulated, reaching a definitive conclusion in that regard in relation to any particular image can be complicated by numerous factors, including situations in which the size of the digital file containing the image is reduced in order to transmit it via the Internet.¹⁰⁸

(B) Enforcement and Prosecution Challenges

At the same time as these technological changes have, at least to some extent, made child pornography a more visible social problem leading to calls for greater legal regulation such as those discussed in Part I above, they also present certain challenges for enforcement and prosecution.¹⁰⁹ Three of the more prominent of these include: (i) the problem of identification; (ii) the meaning of “possession” in a digital context; and (iii) the “virtual image” defence.

i. The Problem of Identification

One of the key features of many forms of Internet communication has been the ability to participate without necessarily disclosing one’s name, address, or other personally identifying information. Pseudonymous and anonymous communication can play a critical role both in facilitating socially valuable forms of communication,

¹⁰⁵ Gregory T. Huang, “The New Face of Hollywood” (2004) 107:7 *Technology Review* 67 at 69, online: *Technology Review* <<http://www.techreview.com/articles/04/09/huang0904.asp>>.

¹⁰⁶ For a discussion of some of the current advances in photo-shopping software, see: “Adobe Photoshop”, online: *Image editing tools for photo retouching – digital software by Adobe* <<http://www.adobe.com/products/photoshop/newfeatures.html>>.

¹⁰⁷ Robert Fiete, “Photo Fakery” (2005) 5 *OE Magazine* 16, online: *oe magazine – photofakery* <<http://www.oemagazine.com/fromTheMagazine/jan05/photofakery.html>>.

¹⁰⁸ Lyu & Farid, *supra* note 103; See Timothy J. Perla, “Attempting to End the Cycle of Virtual Pornography Prohibitions” (2003) 83 *B.U.L. Rev.* 1209 at 1220-21.

¹⁰⁹ One of the key barriers to law enforcement relates to jurisdictional issues, which the international initiatives referred to in Part I are partially designed to address. For further analysis of Internet jurisdiction issues more generally, see Michael Geist, “Is There a There There? Towards Greater Certainty for Internet Jurisdiction” (2001) 16 *Berkeley Tech. L.J.* 1345.

such as whistle-blowing, as well as in facilitating socially destructive forms of communication, such as child pornography and hate propaganda. Consumers and purveyors of child pornography rely on anonymity and pseudonymity in an effort to prevent connection between their online activities and their real space identities.¹¹⁰ These kinds of challenges led one Toronto Police Service detective to observe “officers...were falling behind sex offenders because they lacked the tools and training to properly investigate crimes...or penetrate shadowy communities of pedophiles.”¹¹¹

Paradoxically, more technology has proven to be part of the answer to these technological barriers to identification. Members of police forces now rely upon anonymity and pseudonymity in order to infiltrate online child pornography rings in order to gain identifying information that has led to numerous arrests.¹¹² Further, Microsoft’s Child Exploitation Tracking System (CETS) allows the RCMP to maintain a centralized database permitting investigators from more than 25 Canadian police forces to share information about perpetrators and victims and has had an international impact.¹¹³

While pseudonymity and anonymity online are undoubtedly challenging in terms of law enforcement, the traceable record of online activity kept by most ISPs has proven to be a ready cache of identifying information.¹¹⁴ When records can be obtained from ISPs (through appropriate judicial processes) it is, in some ways, more possible than ever before to identify those involved in many aspects of child

¹¹⁰ On the other hand, at least a certain number of child pornography consumers have been convicted as the result of failing to recognize the degree to which providing credit card information left a trail between their online consumption activities and their real space identities. That notwithstanding, a number of those charged as a result of the Landslide investigation claim to have been the victims of credit card fraud. See CBC, “Landslide”, *supra* note 34; and CBC News, “False accusations”, *supra* note 34).

¹¹¹ Paul Roberts & Joris Evers, “Microsoft creates tools to crack child porn cases” *The Industry Standard* (7 April 2005), online: Microsoft creates tools to crack child porn cases: Internet News from The Industry Standard <<http://www.thestandard.com/internetnews/001202.php>>.

¹¹² In March 2006, 40 people were arrested from Canada, the United States, Australia, and England in connection with an online child pornography chat room that Edmonton and Toronto police infiltrated using the alias of an Edmonton man they had arrested while he was still logged on to the chat site. See Adrian Humphreys, “Child porn ring busted: at least 10 of 40 arrested in Canada” *The National Post* (16 March 2006). See also *R. v. Anderson*, [2006] A.J. No. 244 (Prov. Ct.).

¹¹³ Roberts & Evers, *supra* note 111; CETS reportedly led to the Toronto Police Services laying charges for sexual assault against a man already arrested in relation to child pornography by identifying a link between information in two separate investigations that had been ongoing in the United States (*ibid.*).

¹¹⁴ However, identification of the subscriber associated with a particular Internet Protocol address is not necessarily identification of the individual responsible for the material in issue. Even where the subscriber and household can be identified, where a number of individuals have access to the computer and account identified, further work must be done to determine which individual is responsible for the content. Identification in these situations has been made relying on both traditional means (analyzing the opportunity of others to gain access) (see *R. v. Missions*, *supra* note 72), as well as through technological means by demonstrating that the accused was “signed on” at the terminal using a password known only to him during the same session in which child pornography was accessed.

pornography.¹¹⁵ As noted in the results of the Uniform Crime Reporting Survey (UCRS) in 2003:

Since 1998, there has been an eight-fold increase in the number of charges laid by police for child pornography, from a low of 20 charges in 1998 to a high of 159 charges in 2003. This increase may be attributed to the proliferation and affordability of digital video and camera equipment coupled with the ease of transmitting images over the Internet as well as increased enforcement efforts and targeted detection by police forces.¹¹⁶

ii. The Meaning of “Possession”

Numerous arguments focusing on particular aspects of digital network technology have been advanced by those accused of possessing child pornography.¹¹⁷ Of primary focus has been the question of what constitutes proof of “possession” in a digital environment.¹¹⁸ “Possession” for purposes of Canadian criminal law requires proof that, at the relevant time, the individual accused had the impugned material in his or her “personal possession or...knowingly ha[d] it in any place, whether or not that place belongs to or is occupied by him [or her], for the use or benefit of himself [or herself] or of another person.”¹¹⁹

In the digital networked context, a question has been raised as to whether one must download material from the network onto the hard drive of one’s computer in order for possession to be proven. In *Daniels* the Newfoundland Court of Appeal considered whether the accused could be convicted of possession of child pornography in a situation where he subscribed to a bulletin board from which files containing child pornography could be downloaded after requesting permission from the board operator.¹²⁰ The accused claimed that although he had requested permission to download files, the content of which had been described to him in graphic detail, he had aborted the downloading process, so that he had never viewed the images contained in the files, nor had he actually downloaded the files to his computer’s hard drive.

¹¹⁵ Identification, of course, is complicated by numerous other technological devices and systems that permit individuals to further cloak their identities. The use of proxy servers and anonymous remailers are two examples of such anonymizing technologies. See e.g. Myrna L. Wigod, “Privacy in Public and Private E-Mail and On-Line Systems” (1998) 19 Pace L. Rev. 95 at 141-42; Robyn Forman Pollack, “Creating The Standards of a Global Community: Regulating Pornography on the Internet – An International Concern” (1996) 10 Temp. Int’l & Comp. L.J. 467 at 480-81.

¹¹⁶ Kathy Aucoin, Canadian Centre for Justice Statistics, “Children and Youth as Victims of Violent Crime” 25:1 Juristat 1 (April 2005) at 11.

¹¹⁷ For a fuller discussion of these issues, see Ty E. Howard, “Don’t Cache Out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files” (2004) 19 Berkeley Tech. L.J. 1227.

¹¹⁸ See e.g. George S. Takach, “Criminal Law” in *Computer Law*, 2nd ed. (Toronto: Irwin Law, 2003) at fn 3 (QL).

¹¹⁹ *Code*, supra note 2, s. 4(3)(a).

¹²⁰ *R. v. Daniels*, [2004] N.J. No. 406 (C.A.).

After reviewing the definition of “possession” noted above, the Court of Appeal upheld Daniels’s conviction, finding that although he had not actually been in possession of child pornography, he had constructively possessed it in that: (i) he knew that the files contained child pornography; (ii) he intended or consented to possession of them (as proven by his request to download); and (iii) he had control over the material once the downloading process commenced, regardless of whether he fully downloaded the files and viewed the images they contained. The Court concluded:

Once the downloading of the transmission commenced, the material was in a place over which Daniels had control. If he had not engaged the skip file function, reception of the image and downloading would have been completed. This situation may be contrasted with the five other files containing child pornography that Daniels ordered, but aborted before the downloading commenced.¹²¹

In circumstances such as those in *Daniels*, it appears incumbent on the Crown to prove that the downloading process has commenced, even if it has not been completed, in order for possession to be made out.¹²² In some U.S. cases, where an accused has viewed child pornography online without downloading it, prosecutors have relied on forensic analysis to show deletion of files containing child pornography previously stored on an accused’s computer. In those situations, accused persons have argued that “possession” cannot be proven where they have taken steps to delete files containing child pornography, including those in the temporary cache on their computers.¹²³

While the success of the defence has been divided, those U.S. courts dealing with it have generally continued to analyse the same elements of “possession” as are used in the offline context.¹²⁴ However, as one U.S. prosecutor has pointed out, two situations can be distinguished.¹²⁵ First, evidence as to what was stored in the temporary cache file could be led simply as proof that an accused had been in prior possession of child pornography (in which case whether the accused knew or intended for the files to be backed up is irrelevant). Second, the content of the cache file could be led as evidence of present possession (in which case the accused’s knowledge of the existence of the cached files is relevant).¹²⁶

¹²¹ *Ibid.* at para.14.

¹²² Downloading and printing have been found in the U.K. context to amount not only to “possession”, but to “making” indecent images of children. See *R. v. Bowden*, [2001] Q.B. 88.

¹²³ “A cache...is a storage mechanism designed to speed up the loading of Internet displays” by making and storing copies of the visited web pages in temporary files that can be relied upon to speed up access to that content the next time it is sought by the computer. See Howard, *supra* note 117 at 1239-40.

¹²⁴ *Ibid.* at 1253.

¹²⁵ These distinctions may also be relevant to proof of possession where forensic computer analysis reveals that files containing child pornography have been deleted from the hard drive of an accused’s computer. One U.K. court concluded that an accused could not be said to be in possession of child pornography at a time when the files containing it had been deleted from his hard drive and were no longer retrievable by him. See *R. v. Porter*, [2006] E.W.J. No. 9 at paras. 21-22 (C.A. (Crim. Div.)).

¹²⁶ Howard, *supra* note 117 at 1254-55.

Other features unique to networked technology have formed the basis for possession-related defences, even where images have actually been downloaded to the computer's hard drive. A number of accused persons have relied on the so-called Trojan horse defence. A Trojan horse "is a malicious computer program that is disguised as legitimate software" which creates a "back door" to one's computer, allowing those placing the software on the computer to access that computer to, among other things, cause the downloading of files not otherwise known to the computer's owner.¹²⁷ Accused men in the United Kingdom have walked away from child pornography charges after bringing forward opinions from computer forensic experts that demonstrated the presence of Trojan horses on their computers, which were blamed for the downloading of the child pornography found on their computers during police investigations.¹²⁸

While responding to the defence has proven somewhat challenging, one of the more promising responses appears to be in the development of a credible and consistent computer forensic analysis that can be easily explained to juries and judges.¹²⁹ In order to address the defence, prosecutors may need to lead evidence that no Trojan horses or other viruses were found on the computers of those accused.¹³⁰

Digital networked technologies, then, present certain challenges in terms of proving that an accused is in "possession" of impugned materials. Many of these challenges necessitate careful consideration when charges are laid and in identifying what evidence the prosecution must lead in order to prove its case. The charge of "intentionally accessing" child pornography represents one alternative to addressing the challenges related to "possession". Charges relating to intentionally accessing child pornography (using, for example, an Internet browser), while averting the need for proof of downloading (or partial downloading), still require proof of intention –

¹²⁷ Alan Phillips, "The Trojan Horse Defence" *7Safe Information Security* (January 2005), online: The Trojan Horse Defence <<http://www.7safe.com/resources/SecurityMatters200501.htm>>.

¹²⁸ "Man Blames Trojan Horse For Child Pornography, Sophos Anti-Virus Reports" *Sophos* (1 August 2003), online: Man blames Trojan horse for child pornography, Sophos Anti-Virus reports <<http://www.sophos.com/virusinfo/articles/porntrojan.html>>; John Schwartz, "Acquitted Man Says Virus Put Pornography on Computer" *The New York Times Company* (11 August 2003), online: Acquitted Man Says Virus Put Pornography on Computer <<http://www.mindcontrolforums.com/virus-put-pornography-computer.htm>>; John Leyden, "Trojan Defence Clears Man on Child Porn Charges" *The Register* (24 April 2003), online: Trojan defence clears man on child porn charges | The Register <<http://www.theregister.co.uk/content/archive/30385.html>>. The Trojan defence has been raised unsuccessfully in the U.S. See generally Susan W. Brenner *et al.*, "The Trojan Horse Defense in Cybercrime Cases" (2004) 21 Santa Clara Computer & High Tech. L.J. 1.

¹²⁹ Megan Carney & Marc Rogers, "The Trojan Made Me Do It: A First Step in Statistical Based Computer Forensics Even Reconstruction" *Center for Education and Research in Information Assurance and Security, Purdue University* (2004), online: 2004-15.pdf <http://www.cerias.purdue.edu/tools_and_resources/bibtex_archive/archive/2004-15.pdf>.

¹³⁰ This was the case in *State of Dakota v. McKinney*, 699 N.W.2d 460 (S.C.S.D. 2005).

which may be susceptible to challenge in light of the online proliferation of pornographic spam.¹³¹

iii. The “Virtual Image” Defence

In some jurisdictions outside of Canada restrictions on child pornography do not apply to virtual child pornography. However, as the U.S. example below demonstrates, the absence of restrictions on virtual child pornography can lead to practical problems in child pornography prosecutions whether or not the images actually involve real children. The United States Supreme Court (USSC) held in *Ashcroft v. Free Speech Coalition* that restrictions on pornographic images not depicting real children unduly infringed freedom of expression and could not withstand First Amendment scrutiny.¹³² As a result, the USSC struck down a federal provision that purported to restrict images which were wholly computer generated.¹³³ The Court found that the physical abuse of real children had been the primary justification for its earlier upholding of restrictions on child pornography, and that no such justification could be found with respect to wholly computer generated images.¹³⁴

Ashcroft was interpreted to impose a burden on prosecutors of child pornography offences to prove: (i) the images in issue were created in their entirety with a real child, rather than using digitally created images of children; and (ii) the defendant knew the child in the picture was real.¹³⁵ While prior to *Ashcroft* the virtual image defence was rarely raised and was even more rarely successful, the incidence of both raising the defence and achieving a successful result rose following the USSC’s decision.¹³⁶ In 2003, Congress responded to *Ashcroft* by passing the

¹³¹ *Code*, *supra* note 2, s. 163.1(4); See Julia Scheeres “Porn Spam: It’s Getting Raunchier” *Wired News* (30 September 2002), online: [Wired News: Porn Spam: It’s Getting Raunchier <http://www.wired.com/news/culture/0,1284,55420,00.html>](http://www.wired.com/news/culture/0,1284,55420,00.html).

¹³² *Ashcroft*, *supra* note 5.

¹³³ Congress later responded by enacting the *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003*, Pub. L. No. 108-21, § 401(d), 117 Stat. 650, 670 (2003) (codified as amended in various sections of 18, 28, & 42 U.S.C.) [*PROTECT Act*]. 18 U.S.C. § 2256 (8)(B) (Supp. 2003) in particular restricts computer generated images that are virtually indistinguishable from a real child. The amended provision was premised on commentary in the USSC decision that seemed to suggest that restrictions on extremely realistic representations of children may be acceptable. However, the amended provision does not appear to be relied upon frequently in child pornography prosecutions.

¹³⁴ *New York v. Ferber*, 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982).

¹³⁵ In *U.S. v. Marchand*, 308 F. Supp. 2d 498 at 505 (D.N.J. 2004), the New Jersey federal district court held that proof of actual knowledge or wilful blindness would be sufficient to satisfy the “knowledge” requirement; *Kreston*, *supra* note 101 at 49, 53.

¹³⁶ A search of federal, state, and supreme court cases in Lexis Nexis and Westlaw in the summer of 2005 indicated that the defence was raised 27 times prior to *Ashcroft*, *supra* note 5. The defence was successful only once, but it was raised more than 150 times following *Ashcroft* and met with success on 27 occasions. Here, the term “success” includes: (i) situations in which prior judgments were vacated and the matter sent back for re-trial (the majority of “successful” cases) (see Audrey Rogers, “Playing Hide and Seek: How to Protect Virtual Pornographers and Actual Children on the Internet” (2005) 50 Vill. L. Rev. 87 at 92-93 [Rogers]; see e.g. *United States v. Ellyson*, 326 F.3d 522 at 530 (4th Cir. 2003); *United States v. Richardson*, 304 F.3d 1061 at 1063 (11th Cir. 2002); and *United States v. Hilton*, 2003 U.S. Dist. LEXIS 4208 at 19-20 (D. Me. 2003)); (ii) situations where evidence was

PROTECT Act, which requires prosecutors to prove each image in question depicts an actual child or that it is indistinguishable from an actual child.¹³⁷ After giving notice of their intention to raise the defence (including a summary of the evidence to be relied upon), accused persons may show either that: (i) the images in issue were created using actual people who were not minors at the time of production; or (ii) the images in issue were not created using any real child under the age of majority.¹³⁸ Whether the virtual image defence has or will significantly affect the successful prosecution of online child pornography in the U.S. is a matter of some debate.¹³⁹ It is clear that prosecutorial strategies for addressing the evidentiary requirements arising from the defence continue to develop (modifications that are unnecessary in jurisdictions such as Canada where statutory prohibitions are aimed at both virtual and non-virtual child pornography).¹⁴⁰

While obviously not insurmountable, digitized technologies do present obstacles for the enforcement and prosecution of offences relating to online child pornography that can complicate legal efforts to address it. In terms of the “two kinds of people” referred to in this paper’s epigraph, I suggest challenges of these types represent incremental changes in the way that society proceeds. They do not, in and of themselves, call for a radical re-thinking of our justifications for regulating child pornography or whether it makes sense to continue to use law as a tool for doing so. However, there are aspects of digital technologies that may well be transformative – particularly in terms of how we understand the harms of child pornography.

2. Transformative Effects

Grappling with what has been referred to here as the “incremental” effects of the Internet and digital technologies on law enforcement efforts relating to child

excluded because the prosecution failed to prove the authenticity of the images (see *e.g.* *Commonwealth v. Simone*, 63 Va. Cir. 216 (2003) and *United States v. Sims*, 252 F. Supp. 2d 1255 (U.S. Dist. 2003)); and (iii) some military cases where the member was convicted of a lesser included offence such as “service discrediting and prejudicial to good order” (see *e.g.* *United States v. Deal*, 2005 CCA LEXIS 49 (N.M.C.C.A. 2005); *United States v. Anderson*, 60 M.J. 548, 2004 CCA LEXIS 152 (A.F.C.C.A. 2004)).

¹³⁷ *PROTECT Act*, *supra* note 133; John P. Feldmeier, “Close Enough For Government Work: An Examination of Congressional Efforts to Reduce the Government’s Burden of Proof in Child Pornography Cases” (2003) 30 N.Ky.L. Rev. 205 at 223.

¹³⁸ Feldmeier, *ibid.* at 223; *PROTECT Act*, *supra* note 133, § 2252A(c)(1)(A)-(B), § 2252A(c)(2).

¹³⁹ For further discussion, see Feldmeier, *ibid.*, and Rogers, *supra* note 136. One national survey conducted a year after *Ashcroft*, *supra* note 5, indicates that the “virtual child” defence was raised in 40% of the cases handled by the state and local prosecutors who responded to the survey, although only 5% of those cases went to trial and only 4% of the survey respondents said their offices were pursuing fewer child pornography cases because of the USSC’s ruling. See Wolak, Finkelhor & Mitchell, *supra* note 98 at 22-23.

¹⁴⁰ For further details, see Kreston, *supra* note 101 at 54-61; As McLachlin C.J.C. stated in *Sharpe*, “with the quality of contemporary technology, it can be very difficult to distinguish a ‘real’ person from a computer creation or composite. Interpreting ‘person’ in accordance with Parliament’s purpose of criminalizing possession of material that poses a reasoned risk of harm to children, it seems that it should include visual works of the imagination as well as depictions of actual people.” *Sharpe*, *supra* note 3 at para. 38.

pornography is central to the very practical and current concerns about law's continuing efficacy and *raison d'être* in light of technological development. However, it is not enough to discuss the ways in which the Internet and digital technologies make it more difficult to enforce the law, whether because of a growth in the number of offences, difficulties associated with identifying offenders, or statutory interpretation issues (such as the meaning of "possession"). Analyzing online child pornography provides an opportunity for a glimpse at the socially transformative effects of technology, requiring us to revisit and perhaps better understand four key regulators of human behaviour – law, architecture, social norms, and the market – as well as their relationship to and interaction with one another.¹⁴¹ Studying online child pornography brings into sharp relief certain aspects of these four behavioural regulators and their inter-relationship, and highlights the very limited nature of a singular focus on individuated physical harms.

(A) Regulation of Child Pornography before the Internet

Prior to the Internet and to the proliferation of relatively inexpensive digital video creation and streaming technologies, the market, technology, and social norms placed relatively severe constraints on access to and distribution of child pornography. In the pre-Internet era and prior to the proliferation of technologies such as digital cameras, scanners and video editing programs, the child pornography market was primarily based on the sale of hardcopy materials distributed by mail.¹⁴² As a result, manufacturing and accessing child pornography was expensive and time-consuming. In concert with these market and technology-related factors, social norms played a significant role in constraining access to and distribution of child pornography. Those who took the risks associated with physically going out to find or even ordering child pornography in hardcopy by mail risked not only criminal charges, but severe and long-term social ostracism as well. As one Internet consultant advised:¹⁴³

Formerly men used to have to remove themselves from their community by three levels [to find extreme, violent pornography]. First, they had to go somewhere, physically, then know where to go and know how to find it. The Web makes it very easy to get that far removed quickly.¹⁴⁴

The level of subterfuge necessary to gain access to and distribute hardcopy child pornography as well as the social isolation of adults with a known sexual

¹⁴¹ See Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999).

¹⁴² Donna M. Hughes, "The Impact of the Use of New Communications and Information Technologies on Trafficking in Human Beings for Sexual Exploitation: A Study of Users" (Paper presented to the Council of Europe, May 2001), online: [study_of_users <http://www.uri.edu/artsci/wms/hughes/study_of_users>](http://www.uri.edu/artsci/wms/hughes/study_of_users) at 6-7 [Hughes, "Trafficking"]. Mail appears to be playing an increasingly reduced role in the child pornography market, although some producers who advertise on the Internet continue to distribute by mail.

¹⁴³ The ability to download and save significant quantities of child pornography onto relatively small media, such as disks or USB keys has also facilitated easier concealment of possession of child pornography than was previously the case in relation to videotapes, magazines, and other hardcopy forms. Quayle & Taylor, "Child Pornography and the Internet", *supra* note 6 at 355.

¹⁴⁴ Hughes, "Sexual Exploitation", *supra* note 6 at 139.

interest in children from the broader community, combine to form significant barriers to involvement with child pornography. As discussed in Part I above, the law has also attempted to play a role in the process of behaviour regulation by prohibiting numerous activities relating to child pornography; from possession through to production and distribution. In the pre-Internet context, these regulations were characterized as justifiable limitations on the free expression of child pornography consumers and producers, in light not only of the physical harms occasioned on individual children abused in the process of creating child pornography, but also based on a reasoned apprehension of risk of future physical harms and, collaterally, to reinforce a social norm against viewing children as sexual partners.¹⁴⁵

However, prior to the Internet the actual number of child pornography charges laid was relatively small.¹⁴⁶ The legal justifications for restricting child pornography, combined with the relatively small number of charges laid, tended to support and reflect a perception of child pornography as a problem associated with an isolated group of people who were at risk of sexually assaulting an individual child.¹⁴⁷ The Internet and digital technologies may well transform this perception, compelling us to question the continuing validity of focusing on individuated physical harms, pushing us toward a closer examination of the long-term societal effects of evermore broad-based commodification of child sexuality and increasingly extreme images of child sexual abuse.¹⁴⁸

(B) Internet Transformation of Market, Social, and Technological Regulation

Whereas hardcopy technologies worked along with social norms and market characteristics to discourage involvement with child pornography, the Internet and the proliferation of other digital technologies appear to be occasioning quite different effects. These technologies break down previous market-related barriers by making it considerably faster, easier, less expensive, and less risky to access and distribute child pornography.¹⁴⁹ Access to unprecedented quantities and types of child

¹⁴⁵ See Part I, above, for more on this topic.

¹⁴⁶ Statistics indicate that only 20 child pornography related charges were laid in 1998, but had increased to 159 in 2003. Aucoin, *supra* note 116 at 5.

¹⁴⁷ However, as discussed in Part II above, the categorization of those at risk of sexually assaulting children is not as simple to define or isolate as one might imagine. See *supra* note 68 and accompanying text. The tendency toward categorization, while important in terms of risk identification and treatment, may also have had the effect of diverting attention from the broader social problem of the commodification of children and their sexuality.

¹⁴⁸ The point here is not to deny child sexuality, nor to suggest that child sexuality has not already been co-opted as a marketing mechanism. Rather, the point is to illustrate the importance of thinking about broader equality impacts of more widespread desensitization to the commodification and exploitation of child sexuality that digital technologies appear to risk. In this regard, I am reminded of the shifting community standard that members of one provincial film review board noted had led to acceptance of increasingly humiliating and degrading acts by men against women in pornography: Bonnie Sherr Klein (director), *Not a Love Story: A Film About Pornography*, (National Film Board: 1981).

¹⁴⁹ The Internet is often said to bring with it the "triple As": affordability, accessibility, and anonymity. Al Cooper *et al.*, "Cybersex Users, Abusers, and Compulsives: New Findings and Implications. A Special Issue of the Journal of Sexual Addiction and Compulsivity" in Al Cooper, ed., *Cybersex. The Dark Side of the Force* (Philadelphia: Bruner-Routledge, 2000).

pornography at the touch of a button in the privacy of one's own home appears to be generating significant shifts in terms of who is consuming and producing child pornography, as well as in how it is being consumed and the content of the material itself.¹⁵⁰ Quayle and Taylor note:

King has...argued that it is not the simple availability of pornography online that has created [a need for further study on the impact of the Internet on sexuality], but the fact that people now have access to types of material that were previously available only at great expense and or personal risk.¹⁵¹

Although there remains a commercial element in child pornography manufacturing and distribution, these technologies facilitate both the sharing and trading of child pornography free of charge, as well as its non-commercial production.¹⁵² In addition, it would appear that a growing proportion of children and youths are learning about sexuality through sometimes abusive and exploitative online pornography.¹⁵³ Further, adult males with no prior experience with child pornography and no previously recognized sexual interest in children now form part of the online consumer group:

It is also evident that while there are people who have a previously acknowledged sexual interest in children, for whom the Internet becomes a medium for meeting their expressed preferences, there are equally those who seem to have had no prior knowledge that the images might be sexually arousing for them. In the latter case, we do not know whether such 'dormant' interests might ever have found expression without the Internet.¹⁵⁴

Some recent Canadian cases relating to online child pornography seem to support these observations. While many men convicted of online child pornography

¹⁵⁰ The term "shifts" is used with caution. Earlier studies of child pornography have tended to focus on convicted child sex offenders. It may well be that a much broader demographic was involved in the market for child pornography even prior to the advent of the Internet.

¹⁵¹ Storm A. King, "Internet Gambling and Pornography: Illustrative Examples of the Psychological Consequences of Communication Anarchy" (1999) 2 *CyberPsychology & Behavior* 175; Ethel Quayle & Max Taylor, "Model of Problematic Internet Use in People with a Sexual Interest in Children" (2003) 6 *CyberPsychology & Behavior* 93 at 94 [Quayle & Taylor, "Model of Internet Use"].

¹⁵² Quayle & Taylor, "Child pornography and the Internet", *supra* note 6 at 334.

¹⁵³ Dolf Zillmann, "Influence of Unrestrained Access to Erotica on Adolescents' and Young Adults' Dispositions Toward Sexuality" (2000) 27 *J. Adolescent Health* 41; and Ethel Quayle & Max Taylor, "Young People Who Sexually Abuse: The Role of the New Technologies" in Marcus Erooga and Helen Masson, eds., *Children and Young People who Sexually Abuse Others: Current Developments and Practice Responses*, 2d ed. (New York: Routledge, 2006).

¹⁵⁴ Quayle & Taylor, "Model of Internet Use", *supra* note 151 at 103.

offences meet the relatively strict diagnostic criteria for pedophilia, others do not.¹⁵⁵ Those convicted include men from across the spectrum of occupational categories and income levels, some of whom were married with children and considered to be upstanding members of their communities.¹⁵⁶ At least one offender attempted to explain his conduct in terms of addictive behaviours derived from prolonged Internet use, claiming that his addiction “blossomed with the advances in computer technology and the Internet” because they facilitated an “endless flow” of pornographic images to his home computer.¹⁵⁷ We should reject the “computer-made-me-do-it” defence as any form of justification for engaging in the exploitation of children and their sexuality. Nevertheless, the way in which technology reduces the degree of personal risk that might otherwise have previously deterred many adults from becoming involved may well compel us to confront more directly the broader effects of a more easily accessed trade in child sexuality that appears to include increasingly violent images of child sexual abuse.¹⁵⁸

While social, market, and technological factors may have worked to keep most people from engaging in the offline child pornography trade, it would appear that certain aspects of the way in which the online trade in child pornography is proceeding could, for some, lead to active and consuming engagement. While many begin as one-way consumers of online child pornography by purchasing and downloading images for personal sexual gratification, their level of involvement often progresses to interaction in a community of other offenders and/or in real-time creation of child pornography through online interactions with children. Martin Calder notes:

The presence of complex social structures in the computer underground indicates that on a social organizational level, adults with a sexual interest

¹⁵⁵ The DSM-IV, *supra* note 68, prepared by the American Psychiatric Association is typically relied upon by experts in determining whether an accused should be diagnosed a “pedophile”. Section 302.2 confines pedophilia to those with lasting, recurring sexual fantasies or sexual urges relating to pre-pubescent children, thereby excluding from its scope a considerable number of adults with a sexual interest in children. See Lanning, *supra* note 68; See *e.g.* *R. v. Craig*, *supra* note 67; *R. v. Pecchiarich*, [2001] O.J. No. 3940 (S.C.J.); and *R. v. Anderson* (2005), *supra* note 67; See *e.g.* *R. v. Carratt*, [2005] A.J. No. 743 (Prov.Ct. (Crim. Div.)); *R. v. Harlos*, [2005] A.J. No. 541 (Prov. Ct. (Crim. Div.)); *R. v. M.L.*, *supra* note 91; *R. v. Woroby*, [2003] M.J. No. 98 (C.A.); *R. v. Yaworski*, [2000] OJ No 2613; *R. v. Fulton*, *supra* note 75.

¹⁵⁶ See *e.g.* *R. v. Cohen*, [2001] OJ No. 1606 (C.A.); *R. v. Fulton*, *ibid.* In the context of luring, see *R. v. Folino*, [2005] O.J. No. 4737 (C.A.).

¹⁵⁷ *R. v. Anderson* (2005), *supra* note 67 at para. 17.

¹⁵⁸ Concerns relating to adult sexual interest in children are not new. “[I]n a study by Briere and Runtz (1989) non-sex offending college students were asked to fill out a questionnaire regarding their sexual attraction to children. Within this study, “21% of the students admitted to sexual attraction to some children, 9% described sexual fantasies involving children, 5% admitted to having masturbated to those fantasies, and 7% stated there was some likelihood of having sex with a child if detection and punishment were unlikely”. Noel Clark, “Sex Offender Treatment Program” *Sex Offender Safeguard Program* (2001), online: Safe Guard Programme – Sex Offenders in Community based Treatment <<http://inpsyte.ca/chapter3.html>> (quoting John Briere & Marsha Runtz, “University Males’ Sexual Interest in Children: Predicting Potential Indices of “Pedophilia” in a Non-Forensic Sample” (1989) 13 *Child Abuse & Neglect* 65 at 65). However, to the extent that digital technologies provide a lower-cost, less personally risky means to express that interest, they open up new questions as to the broader social risk of mainstreaming escalating levels of exploitative imagery and conduct.

in children act as ‘colleagues’. The pictures in themselves act as a form of currency, legitimising activity and creating social cohesion.¹⁵⁹

The sense of online community built around the sexual exploitation of children, all while attempting to mutually reaffirm the “rightness” of the activity, is frequently founded on the dehumanization of the children abused.¹⁶⁰ Many offenders note that they did not see the images as involving real children, or reaffirm amongst themselves that the images depicted happy, smiling children, rather than children being abused.¹⁶¹ Further, some offenders gain satisfaction beyond sexual gratification from membership in online communities in that they are able, without identifying themselves, to find others with an identity of interest that is too risky to express in the offline world.

Granic and Lamey suggested that the Internet has provided people with experiences that have led to a reinterpretation of society, relationships, and the self. This is very relevant for people with a sexual interest in children. Through the Internet we see a potential change in the offenders’ beliefs, values, and cognitive styles, as they act and interact outside of the confines of a conventional hierarchy. One consequence of this (and also a contributory factor) may be increased risktaking behavior. It is possible that such experiences may empower sex offenders, who have otherwise felt marginalized within a conventional society.¹⁶²

Membership in these communities also typically requires building credibility by showing oneself to be an avid and extensive collector, and sometimes producer, of child abuse imagery.¹⁶³

Credibility and status could be achieved through the size of the collection of photographs or through the exchange or trade of new or ‘rare’ material such as pictures or text. The latter would consist of fantasy stories, or talk of previous ‘contact activities’. Again, cognitions that supported such behavior tended to emphasize the feeling of importance gained from owning and distributing such images, while at the same time equating the pictures with more socially desirable commodities, such as works of art.¹⁶⁴

¹⁵⁹ Calder, *supra* note 90 at 8 (referring to the study by Max Taylor *et al.*, “Child Pornography, the Internet and Offending” (2001) 2 ISUMA: Canadian Journal of Policy Research 94).

¹⁶⁰ Hughes, “Trafficking”, *supra* note 142 at 28.

¹⁶¹ See *e.g.* R. v. Anderson (2005), *supra* note 67 at paras. 18-19; Quayle & Taylor, “Child Pornography and the Internet”, *supra* note 10 at 340.

¹⁶² Isabela Granic & Alex V. Lamey, “The Self-Organization of the Internet and Changing Modes of Thought” (2000) 18 *New Ideas in Psychology* 107; Quayle & Taylor, “Model of Internet Use”, *supra* note 151 at 103.

¹⁶³ “Anecdotal evidence suggests that the production of pornographic images for personal use is not unusual. However, the production of pornographic images was also seen in the context of trading, where having new material to trade facilitated the acquisition of highly desired and preferred other images. Within the community of the Internet, having private pictures to trade also brought with it status and power within that community.” Quayle & Taylor, “Model of Internet Use”, *ibid.* at 101

¹⁶⁴ *Ibid.* at 100.

For some, as gaining credibility in the online community becomes increasingly important, the commodification of child sexuality, abuse and the dehumanization of children become increasingly evident. As two offenders noted:

We were trading pictures...kinda like trading baseball cards. [T]here was also the thrill in collecting them. You wanted to get complete sets so it...was kind of like stamp collecting as well.¹⁶⁵

In this atmosphere of commodification and consumption, it is unsurprising that offenders may reach satiation with a certain level of child pornography and then “progress” to increasingly physically violent images involving younger and younger children.¹⁶⁶ One Canadian offender noted that over time he built up a tolerance to adult pornography, eventually moving on to increasingly physically violent images of child sexual abuse. He advised the court, “the more I did it, the harder it had to be”.¹⁶⁷

In the context of online child pornography, we see quite graphically the ways in which regulators of human behaviour interact. Aspects of Internet communication such as anonymity and pseudonymity, along with the proliferation of digital recording and editing equipment have transformed key aspects of the market and social norms, which had previously worked to limit involvement with child pornography. These transformations bring into stark relief disturbing questions about troubling perceptions of children and their sexual accessibility among many adults who would previously have been perceived as being far-removed from the world of “pedophiles” and other child sex offenders, as well as the dehumanizing impact of exploitative commodification that extends well beyond individuated physical harms.

(C) Legal Transformation and the Concept of Harm

These market, social, and technological changes affect the law in both incremental and transformative ways. Incrementally, as discussed in Part III, 1(B) above, these changes have occasioned new interpretive and enforcement challenges that have been addressed to some extent through legislative amendments, such as the addition of the offences of “accessing” child pornography and the related offence of luring.¹⁶⁸ However, technological change could also raise important transformational questions with respect to the concept of the harms of child pornography previously considered foundational to its restriction.¹⁶⁹

¹⁶⁵ Quayle & Taylor, “Child Pornography and the Internet”, *supra* note 6 at 342.

¹⁶⁶ Calder, *supra* note 90 at 28.

¹⁶⁷ Anderson (2005), *supra* note 67 at paras. 18-19.

¹⁶⁸ See Part III, 1(B), above, for more on this topic.

¹⁶⁹ These technological, market, and social norm transformations might also lead us toward questioning the expression/conduct distinction that has been central to the conception of child pornography, obscenity, and hate propaganda as constitutionally protected “expression”, the restriction of which necessitates “proof” of harm in the first place. In the context of real-time creation of child pornography in online chat rooms, which often directly involves child participants, the line between the violent “form” and the violent “content” seems increasingly blurrier and perhaps more difficult to justify — a subject I intend to investigate in future writing.

Regardless of the state of the art in creating digital images, the Internet and digital technologies such as photo-shopping do nothing to alter the validity of the justifications previously offered in support of the *Code* restrictions on child pornography. Images depicting the sexual violation of children, whether they include real children, digitally “morphed” children, or completely digitally created images of children, still engage the legislative objectives of preventing physical harm to children. While digitally altered and completely digitally created images of the sexual violation of children need not involve the actual physical violation of a real child (like the stories in *Sharpe*, the paintings in *Langer*, or the animated images in *Chin*), these types of images would still continue to engage the concerns expressed in *Sharpe* about the risk of future physical harm to children to the extent that they may fuel fantasies, reinforce cognitive distortions relating to sexual abuse of children, and/or be used for grooming children.¹⁷⁰ As McCombs J. noted in *Langer*:

The evil of child pornography lies not only in the fact that actual children are often used in its production, but also in the use to which it is put...Because of the ways in which child pornography is used by paedophiles, the risk of harm is present whether or not real children are used in its creation.¹⁷¹

Two elements of the harms analysis in *Sharpe*, *Langer*, and *Chin* are noteworthy in terms of thinking about the social and market transformations wrought by the Internet and digital technologies. First, the analysis prioritizes physical harms to individual children over broader non-physical harms. In the context of a potential future in which increasingly realistic digitally created images of child sexual abuse are made possible by technology, we may be entering into an era in which child pornography offences will be treated less seriously. Where a real child is not actually abused in producing the image, the remaining justifications relate to the continuing risk of physical harm (analyzed primarily from the perspective of the pedophile) and the much less developed and oft-neglected “incidental” good of denouncing the exploitation of children and their sexuality.

If, through technology, we were to arrive at a future in which no child was physically harmed in the making of child pornography, should crimes relating to child pornography be treated less seriously? I suggest that, even if technology were to facilitate such a future, and even if the risk of subsequent sexual offences against children following consumption of virtual child pornography were minimal, there would nevertheless remain a valid justification for its restriction. Fostering the equality and dignity of children in our society demands the legislative expression of public disapprobation of the exploitation of children as sexual commodities for the on-demand consumptive “pleasure” of others. These should not, as the SCC’s reasons in *Sharpe* suggested, be considered an “incidental” good of restrictions on child pornography. Rather, they ought to be viewed as central justifications, which should take on renewed significance in light of the technologically-facilitated

¹⁷⁰ See *Sharpe*, *supra* note 3, for list of potential harms; *Langer*, *supra* note 9; *Chin*, *supra* note 69; See also *supra* notes 59-65 and accompanying text.

¹⁷¹ *Langer*, *supra* note 9 at paras. 28-29.

communities online that starkly reveal a growing market for human commodification. While we have a long way to go in terms of giving real meaning to the equality rights of children, restrictions on materials that blatantly market them as sexual commodities for others' gratification, whether virtual or non-virtual, remain a worthwhile step in the right direction.¹⁷²

The transformations brought about by technology also highlight a second foundational concern relating to the current legal analysis of the harms of child pornography – the risk of physical harm to a child tends to focus solely on an analysis of the behaviour of pedophiles. The analysis seems to rely upon the notion that it is primarily pedophiles who are at risk of sexually assaulting children. The social science evidence referred to in Part III. 2(B) above reminds us of “situational” offenders who sexually assault children not because they have an ongoing sexual interest in children, but because the opportunity presents itself.¹⁷³ Further, as greater numbers of those with no previously acknowledged sexual interest in children increasingly come into contact with child pornography by virtue of the Internet, concerns arise not only relating to impacts on physical offences, but also to the risks of more widespread desensitization towards children's well-being and basic humanity:

Quayle (2002) concluded that whilst there is little support for a direct causal link [between viewing child pornography and subsequent contact offences against children], individuals who are already predisposed to sexually offend are most likely to show an effect of exposure to pornography and are the most likely to show the strongest effects....The exposure thus influences but does not cause the offending. What appears to be clear is that someone accessing child pornographic images will at the very least be desensitising themselves and this is a concern in its own right.¹⁷⁴

The transformation of the market and social norms facilitated by the Internet and related technologies could lead us to raise certain foundational questions about prior legal analyses of the harms of child pornography. Widespread access to and participation in the child pornography trade could have an impact on contact offences as more individuals become aware of and find community legitimation for that interest. At this stage, we do not know whether these aspects of the online child pornography trade will impact the current social science evidence on the link between viewing and subsequent contact offences. In any event, we should be concerned about the degree to which widespread dissemination and growing participation will mainstream and further desensitize members of the broader community to the commodification of children and their sexuality – further

¹⁷² In *Foundation for Children, Youth and the Law*, *supra* note 12, the SCC's decision in relation to corporal punishment is particularly troubling in this regard. While, on one hand, we restrict child pornography purportedly primarily in an effort to minimize the risk of physical harm to children, children do not enjoy the full protection of the assault provisions of the *Criminal Code*.

¹⁷³ See *supra* note 68 and accompanying text. See also Taylor & Quayle, *Internet Crime*, *supra* note 80 at 12-13.

¹⁷⁴ Calder, *supra* note 90 at 17, referring to Quayle & Taylor, “Child Pornography and the Internet”, *supra* note 6.

undermining their place and status within our society. As the Special Committee on Pornography and Prostitution concluded:

[T]here are magazines, films and videos produced solely for the purpose of entertainment whose depiction of women in particular, but also, in some cases, men and young people, demeans them, perpetuates lies about aspects of their humanity and denies the validity of their aspirations to be treated as full and equal citizens within the community.¹⁷⁵

Broadening the analysis of harm to more directly take into account the collective harms of the child pornography trade is consistent with the SCC's analysis in the hate speech context and recognizes the role that harmful expression has historically played in paving the way for attitudinal changes essential to longer-term discriminatory acts and ultimately, in some cases, to acts of physical violence against target groups. As Dickson C.J.C. noted:

The threat to the self-dignity of target group members is thus matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination and even violence against minority groups in Canadian society.¹⁷⁶

CONCLUSION

The project of the paper was to suggest that thinking of technological developments as presenting either incremental or transformative challenges is unrealistically dichotomous. Examination of the issue of online child pornography suggests that the Internet and related digital technological developments present both incremental and transformative change. Perhaps more importantly, the examination suggests that we proceed cautiously with any assumption that transformational change necessarily requires us to abandon existing legal regulation and the values underlying it. While transformational change may present an opportunity for fresh thinking about what else may be at stake in the context subject to regulation, it may also serve to reaffirm "old" commitments.

Incrementally, the Internet and related digital technologies have facilitated expansion of the child pornography market by easing access and lowering the costs of production and distribution. These aspects of the market have raised public awareness of child pornography as a social problem, stimulating calls for legal responses at the local, national, and international levels. Reinigorated enforcement efforts, however, have met with numerous challenges that in some cases have led to legislative reform, including the addition of the "accessing" offence and related luring provisions. In other cases, these challenges have necessitated revised enforcement and prosecutorial strategies to address identification issues associated with online anonymity and pseudonymity, as well as (in the U.S. context) the complications of the virtual image defence. While provoking incremental changes in

¹⁷⁵ Department of Justice, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, vol. 1 (Ottawa: Communications and Public Affairs, Dept. of Justice, 1985) at 103 (the "Fraser Report"), cited by Gonthier J. in *Butler*, *supra* note 13 at 514.

¹⁷⁶ *R. v. Keegstra*, *supra* note 16.

legislation and in enforcement and prosecution strategy, certain aspects of these and other challenges may also prove to be transformative – relating to the foundational aspects of our justifications for regulating and of our legal approaches to child pornography offences.

By destabilizing social norms and market constraints that previously acted to curb involvement with child pornography, the Internet and related technologies are bringing into stark relief questions about the risks of widespread child sexual commodification, including increasingly extreme images of child sexual abuse. In so doing, these technologies challenge us to expand the focus of concern justifying restrictions on child pornography beyond physical harms to individual children. As technology leads us down a road toward increasingly realistic digitally created virtual child pornography that need not involve abuse of real children in its making, we confront more directly the effect of widespread commodification of children and their sexuality on children's collective equality and dignity interests. These broader collective interests, once referred to by the SCC as an "incidental" good of restrictions on child pornography, are likely to take on increasing importance in terms of the constitutional justifications for those restrictions.

Unlike most hate propaganda, much non-virtual child pornography is produced through physical assaults on real human beings. Eliminating these physical harms is and ought to remain a central focus of restrictions on child pornography. However, like all hate propaganda, both virtual and non-virtual child pornography spreads a message that undermines the humanity of its targets by converting them and their sexuality into commodities for exploitation, discrimination and abuse. Taking a public stand against these broader social harms ought also to be seen as a central focus of restrictions on child pornography. Technological change may lead us towards this transformation; toward recognition that child pornography, like other forms of hate speech:

harms the individual who is the target; ...perpetuates negative stereotypes [and] promotes discrimination by...creating an atmosphere of fear, intimidation [and] harassment.²¹⁴

In the context of child pornography, breaking this kind of cycle could play an important role in fostering equality for children and ought to be recognized as more than an "incidental" good of its legal restriction.

²¹⁴ Lederer & Delgado, *supra* note 86 at 4-5.