"Obscenity Has Fallen to the Wayside": The Decline of the Obscenity Provisions Amongst Law Enforcement Professionals in Canada

by

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Abstract

Since the landmark *Butler* case in 1992, obscenity, or more specifically adult pornography, has “fallen to the wayside,” in terms of legal consideration. Recent legal consideration has focused primarily on child pornography, and internet-based pornography, in a post-*Butler* era. Consequentially, the criminal justice system has experienced a shift in priorities; since *Butler*, only child-related obscene materials are subjected to criminal justice system scrutiny. This study explores the experiences of criminal justice system personnel to learn about shifts in law enforcement priorities since the enactment of the child pornography provision in 1993 and the role of the internet in this shift in priorities. I conducted 16 qualitative semi-structured interviews with criminal justice system personnel, guided by a feminist lens. Participants included current and retired members of the police (municipal and RCMP), Crown counsel, and defence lawyers; five participants had been involved in major court decisions of obscenity and child pornography (*Little Sisters*, 2000; *R. v. Butler*, 1992; *R. v. Klassen*, 2012; *R. v. Neil*, 2015*; R. v. Sharpe*, 2001). Analysis revealed a changing definition of obscenity, that material which historically would not have been tolerated for consumption, was now tolerated by the general community. More importantly, the perception emerged that obscenity was readily accessible via the internet, and no longer viewed as a priority for the criminal justice system. Participants identified the internet as a game changer; the availability and accessibility of child pornography online flooded the criminal justice system with depictions of the sexual abuse of real children that necessitated a priority response. As such, the focus and emphasis from the criminal justice system shifted away from violence against women and children, supported in *Butler* (1992), to child pornography, particularly that which features the sexual abuse of children. This shift in priorities resulted in a decline in law enforcement focus on obscene material, ultimately letting obscenity fall to the wayside. This research concludes with policy recommendations, including educating parents and children early about the issues with obscenity.

Keywords: pornography, obscenity, child pornography, child sexual abuse

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Chapter 1.

Introduction

In *R. v. Butler* (1992), the Supreme Court of Canada (SCC) determined that obscene material was entitled to protection under the *Canadian Charter of Rights and Freedoms*, however, the government was entitled to limit that right to expression given the evidence that obscene material presented a risk of harm to women and children. The legal definition for obscenity is material in which the dominant characteristic is the undue exploitation of sex (s. 163 of the *Criminal Code;* clarified in *R. v. Butler*, 1992). Material meeting that definition, as discussed in the landmark *Butler* case, includes depictions of violence, degradation, and humiliation. Historically, the obscenity provision included all types of pornography, however, since the implementation of the child pornography provisions in in the *Criminal Code* in 1993, obscenity, legally speaking, now specifically covers adult material.

Butler provided a legal distinction between material to be regulated (e.g. degrading and/or dehumanizing pornography), and obscene material causing harm, which was prohibited. Since *Butler* (1992) obscenity has not been the focus of widespread discussion in the legal community. However, feminists have expressed concern that the consumption of pornography causes harm to women and children (Coyne et al., 2019; Dines, 2010; Dworkin, 1995; MacKinnon, 1992). While some feminists such as Dworkin and MacKinnon, have argued that all pornography is obscene, not all pornography meets the legal standard for obscenity set out in *Butler* (1992). Radical feminists have defined pornography:

> as the graphic, sexually explicit subordination of women through pictures or words, including the presentation of women in a dehumanized way as sexual objects or commodities; as enjoying pain, rape, or humiliation; as body parts (such as breast, vagina, or buttocks); or in any other way that sexualizes degradation, pain or subordination. (Lederer & Delgado, 1995, p. 5)

However, as Ashton, McDonald and Kirkman (2016) identified “There is no consensus on a definition of ‘pornography’” (p. 334; Campbell & Kohut, 2017; Short, Black, Smith, Werneck & Wells, 2012). Bridges et al. (2016) point out that definitions vary, and is often

defined by its accessibility, sexual explicitness, intent to arousal, compared to erotica, or through its features of violence against women – as evident by the definition above from Lederer and Delgado (1995). Most of the pornography readily available is outlined by Corsianos (2007) as:

> mainstream pornography…defined as material that consists of sexual content of any shape or form (usually combines sex acts with the exposure of genitals in images (pictures and/or acts) and words and where the goal of the material is to sexually arouse viewers or listeners and usually sold for profit. (p. 865)

For radical feminists, their concern stems from the idea that when some individuals consume pornographic material, they associate sexual pleasure with the images they see. When the images depicted are violent or depict children, the association between violence or children and sexual pleasure rises, increasing the likelihood that the individual will act out on those deviant sexual desires (Ray et al., 2014). Dines (2010) argues that adult pornography has progressively become more "obscene" from a legal standpoint since *Butler*, drawing particular attention to the influence of technology on how pornography is accessed and disseminated. Specifically, viewing pornography has shifted from buying in person or through mail order, to individual purchasing or streaming pornography online, often for free (Carroll et al., 2008). Similar concerns have been expressed regarding child pornography; one study which reviewed technological effects on pornography identified that the "Internet has caused the most explosive growth in child pornography than at any other time in history" (Shell, Martin, Hung & Rueda, 2007, p. 45). Now, individuals can distribute child pornography worldwide with just a click of a button (Mitchell, 2003, p. 103), contributing to a market that increases risk of sexual violence against women and children (*R. v. Spencer,* 2014). Bell (1997) has suggested that the child pornography provision in the *Criminal Code* was created as a result of the publicity around child pornography, creating what has been referred to as a "pornographic panic" (p. 209), and fueling the debate that pornography was responsible for the sexual abuse of children (*The Badgley Report*, 1985). Since the creation of the *Criminal Code* child pornography provisions, the laws have been subjected to interpretation before the judiciary through particular cases, including: *R. v. Sharpe* (2001)*, R. v. Spencer* (2014), and *R. v. Barabash* (2015).

The internet's role in influencing our ability to possess material in a digital manner, rather than in a physical sense was also discussed in the aforementioned

cases. According to Shor (2019), the internet “has become the main source of pornography consumption over the last decade” (p. 1018). Arguably, the rise of the internet brings with it advantages and disadvantages, with more specific concerns directed towards the availability of pornography online. The courts have acknowledged research that indicates the potential role that pornography may play in causing harm to children (*R. v. Sharpe*, 2001). Rather than addressing that research directly, the courts focus instead on the concern of keeping children safe from harm from potential child predators who either have consumed the pornographic material or are using children to create and distribute child pornography.

Concerns presented by the internet have been acknowledged in academic research, statistics, and news media, such as the rise of child pornography, as identified by The Canadian Centre for Child Protection (Karamali, 2019). Recently, an artistic representation of the sheer volume of child pornography cases was found online. In Toronto, almost 11,000 lollipops, a homage to the term “Lolli,” were on display. Lolli, or Lolita, is typically a reference to the classic novel *Lolita,* referencing a sexualized relationship between a girl and an older male (Kusz & Bouchard, 2019). This number, according to the Canadian Centre for Child Protection, represents the number of child pornography images found, on average, online in a 12-hour period (Karamali, 2019). The sheer number of images available online presents challenges for the criminal justice system, as Sgt. Sharon Hanlon, of the Ontario Provincial Police Child Exploitation Unit states there are “[m]ore than 10,000 [victims] a day, we don’t have the resources” (Karamali, 2019, para. 8). Continuing the discussion on the lack of resources, Lianna McDonald, executive director for the Canadian Centre for Child Protection, admits “they had no idea the scope of the problem” (para. 14), referencing the sheer volume of images that the police respond to globally. For example, the Canadian Centre for Child Protection, since 2017, “has found more than 10-million pictures of child sexual abuse since its inception” (Karamali, 2019, para. 13). Clearly, the internet has brought with it a rise in the amount of child pornography that is accessible to the public.

The availability of pornography online has brought with it challenges for the criminal justice system. In 2018, Justice Boxall, for the Ontario Court of Justice, spoke of the increasing number of cases that appear before his court, adding that the police face inherent challenges investigating these types of crimes given the limited resources available:

> Whether that's because the offences are increasing because the relative ease of the Internet allows access to it or whether we're seeing more of them before the courts because the police have better detection methods and so on is not clear, but what is clear is that the prevalence of this is very extensive and the prevalence of child sexual exploitation and the detection of it are complex. And the sad reality of it is if the police had greater resources, they would bring even more perpetrators to court. There are limitations on their resources to do it. (*R. v. Laframboise*, 2018, para. 8)

The internet, as well as technological advances, have continued to challenge both the police and the courts. For example, Celli and Harris (2018), for CBC News, reported that 42 child sex dolls were seized by Canadian Border Services Agency (CBSA), assessing them as a form of child pornography. According to CBSA, these dolls were constructed to look like young female children and often included items associated with children (e.g. Hello Kitty hairclips). Individuals who purchase these dolls use them for a sexual purpose. The concern is that the use of such dolls may increase the risk of individuals engaging in sexual abuse of children, not unlike the arguments made by Crown counsel in *Sharpe* (2001). This argument contrasts with the long-standing debate that the use of such pornographic materials may be cathartic (Celli & Harris, 2018). Complicating the policing of such material is the fact that child sex dolls are currently legal in the U.S.A. However, in Canada, sex devices, when combined with written descriptions, have been found illegal under Canadian obscenity law (*Dechow v. The Queen,* 1978).

The above information points to the availability of child pornography, online, as well as the challenges faced by the criminal justice system in investigating both obscenity and child pornography in a technological internet age. This research begs the question, if the rise of the internet brought with it an increase in obscene pornography, why are these images or videos not being visibly prosecuted through our criminal justice system, as we saw in *Butler*? If criminal justice is not concerned with images that are arguably harmful to women, as defined by the SCC in *R. v. Butler* (1992), what *is* our justice system focusing on? I propose that our criminal justice system has shifted from focusing on the harms pornography causes to women, to focusing primarily on pornography that depicts, and harms, children and youth. I utilized a feminist informed interviewing approach to conduct interviews with criminal justice system personnel, including, but not limited to, Crown Counsel, defence lawyers, and police officials, to examine the shift in priorities in the Canadian criminal justice system since the

implementation of the child pornography provisions in 1993. I also asked about the internet's role, if any, in influencing this shift in priorities.

The impact of this research lies in its ability to identify why pornographic material previously identified as a contributing factor to violence against women, has been ignored by the legal system since *Butler* (1992). In this technological age in which all kinds of pornography are readily available at the click of a button, and individuals are accessing pornography at a younger age, criminal justice responses to these crimes reflect the level of prioritization given to harmful material (Skorska et al., 2018). Pornographic and non-pornographic materials are becoming more violent and degrading, especially with respect to those images that depict women (Coyne et al., 2019; Dines, 2010; Shor, 2019), and this problem is occurring across all media (MacRae, 2003; McNair, 2002). This problem is concerning given that Canadian courts have accepted evidence that this type of material is potentially harmful to women and children, in the form of increasing the risk that individuals will learn to associate sex with violence, and then abuse women or children. This study draws attention to a potentially neglected area within the criminal justice system and informs obscenity policy that has the potential to address how the justice system responds to violence against women. The dissertation consists of seven chapters as outlined below.

Chapter two outlines the relevant literature informing this dissertation. This chapter starts by examining the current *Criminal Code* provisions for both obscenity and child pornography. This discussion includes an outline of academic research defining pornography and child pornography, acknowledging that the radical feminist perspective of pornography considers how women are differentially impacted by pornography. An outline of the decisions of the Fraser Committee (1985) and the Badgley Committee (1984) are provided, as well as an analysis of how their decisions could be reflective of a moral panic against child pornography and child sexual abuse. This section of the literature review concludes by providing a discussion of legislation and various bills that updated the *Criminal Code* provisions, as well as statistical data about obscenity and child pornography crimes in Canada.

A consideration of the Canadian legal cases that have either informed legislation pertaining to obscenity or child pornography are discussed, as well as those cases that have presented *Charter* challenges for the SCC, or the provincial Courts of Appeal to

consider follows. Cases of importance include *R. v. Butler* (1992), wherein the SCC assessed whether the obscenity provisions violated an individual's *Charter* right to freedom of expression. The SCC decision in *Butler*, regarding the assessment of obscenity, was updated in *R. v. Labaye* (2005), changing the determination of obscenity from one of community tolerance, to an assessment of the risk of harm. In *R. v. Sharpe* (2001), the SCC determined that the right to freedom of expression was outweighed by society's vested interest in protecting children from the harms of child pornography. In *Sharpe,* the SCC introduced the private use exemption, a decision subsequently revised in *R. v. Barabash* (2015), noting that the private use exemption was void in cases of sexual exploitation. Lastly, the SCC decision in *Little Sisters* (2000) is considered in light of its application of the obscenity provision to LGBTQ2 material. Additional supplementary cases, *R. v. Katigbak* (2011), *R. v. Price* (2004), *R. v. Swaby* (2017) and *R. v. Smith* (2005), that identified concerns about privacy, the right against unreasonable search and seizure, the constitutionality of mandatory minimum sentencing, and the last major court decision on obscenity are discussed, respectively.

The next section focuses on theoretical perspectives on pornography, identifying the different arguments presented by academics and legal professionals regarding the effect of pornography on consumers. Four approaches, moral-conservative, liberal, feminist, and pro-pornography sex worker, inform research into the effects of obscenity and child pornography (Linz & Malamuth,1993). This research often includes a special consideration of the internet's role in changing the way people access, create, and share depictions of both obscenity and child pornography. As Carroll et al. (2008) describes, the internet has created a "triple-A engine" (p.7), through its accessibility, affordability and anonymity. These three factors combine to revolutionize pornography consumption, and the facilitation of crimes against children, such as online sexual abuse, child pornography and child luring.

The next section of Chapter two presents academic research that has assessed the effects that obscenity has upon society in terms of violence against women, youth, body image, sexual behaviours, and relationships, as well as a consideration of the positive effects of pornography on individuals. Research in this area is plagued with methodological concerns, including participant selection, inconsistent definitions of obscenity and measurements of consumption, as well as chronological concerns. The research into the assessment is mixed: some studies report negative effects, while

others report no effect, or a positive effect of pornography. A need for long term studies, as well as qualitative research into the effect of pornography is evident.

The final section of the literature review considers research that assesses the effect of child pornography upon consumers. This section acknowledges that the term child pornography is inherently problematic, as Sinclair et al. (2019) argues that the term pornography implies an element of consent not present in child pornography. Sinclair et al. prefers the term child sexual exploitation material, to accurately represent the sexual abuse that children experience when their abuse is captured on camera. My study uses the term child pornography, to reflect the current term used within the *Criminal Code*, which defines a child as someone under the age of 18. Child pornography research includes a consideration of the effect of how technology and the internet has changed the ability to create and share child pornography, as well as the facilitation of new ways of sexually abusing children through technology and the internet. How sex offenders collect, share and distribute images of child pornography are considered in the context of Canadian law as well as its effect on children. Lastly, this section considers the ways that children are differentially harmed through child pornography, as well as the harms they face when depictions of their abuse are shared online.

While research into the effect of pornography has been inconclusive, the rise of the internet has brought with it the ability of society to access pornographic content, arguably obscene content, at the click of a button. If content that aligns with the decision in *Butler* (1992) is readily available for production and distribution online, why, since *Price* (2004), have the generators of this material, by all appearances of publicized cases in online databases (e.g. CanLi, Lexus Nexus) not been prosecuted by the Canadian justice system? This question underlies the research of this dissertation.

Chapter three outlines the research methods and methodology for the current study. My methodology utilizes a feminist standpoint to inform my research process. This chapter presents the applications of a feminist analysis to qualitative legal analysis, recognizing that this type of research, while not aligning with traditional notions of feminist research, is important to women. I describe my method as the use of qualitative interviews to collect data from my sample. Next, my sampling strategies are explained, noting that my research followed a snowball and purposive type of sampling to recruit participants. My research utilized Rubin and Rubin's (2012) steps to organize and

analyze qualitative data. This organization was then followed by an open coding process to analyze the interviews, such as that used by Blair (2015), Fabian (2010) and Saldaña (2011). Lastly, ethical considerations, limitations, as well as the importance of keeping biases in check via a reflexive process are outlined.

Chapter four outlines the considerations and definitions of both obscenity and child pornography as interpreted by criminal justice personnel. In their definitions, participants speculated about the types of images that would meet the definition for obscenity. Participants explained their experiences, or lack thereof, in responding to both obscenity and child pornography. In particular, participants described key differences between obscenity and child pornography, namely in the ability of adults to consent to participate in, and consume, pornography. In outlining their definitions of obscenity and child pornography, participants defined the types of crimes they believed would occur simultaneously. Lastly, an analysis of the implementation of the child pornography provisions is presented, in light of the experiences of criminal justice system personnel when, among other considerations, legislative changes occurred.

Chapter five outlines how the implementation of the child pornography provisions coincided with technological advancements that started to arise in the 1990s. Of particular concern for this research, is the rise of the internet in the mid 1990s. It was the combination of the legislative changes, including the implementation of the child pornography provisions, as well as the rise of the internet, which transformed the way the criminal justice system responded to obscenity and child pornography. In chapter five, I outline how the rise of the Internet, in addition to other technological advancements, created a flooding of pornography readily accessible to individuals. It is this availability, and particularly access to adult pornography, which led participants to question whether adult pornography posed any risk to society. It is this lack of risk, as well as an increased tolerance of adult pornography, which led to participants suggesting that it was not in the public's best interest to pursue obscenity cases. Lastly, I outline the specific impact the internet has had upon child pornography offences.

In chapter six, I outline how society has experienced a shift, which has created a culture which both tolerates the consumption of adult pornography, as well as one that emphasizes the vulnerability of children who need to be protected. As such, child pornography crimes have been prioritized over obscenity offences, with offences

involving the sexual abuse of real children being prioritized above all. This prioritization occurs at a time of limited available resources available to respond to all pornography related crime, as well as a belief that pursuing obscenity offences are not in society's best interest. Chapter six concludes that the crime of obscenity has essentially "fallen to the wayside" with child pornography prioritized above obscenity crimes.

The final chapter concludes my research. Chapter seven outlines society's shift away from all pornography or obscenity, towards focusing solely on child sexual exploitation materials since the implementation of the child pornography provisions in 1993, combined with the rise of the internet. Even within the child sexual exploitation material, that which depicts real children appears to be prioritized above cartoon or morphed images of child pornography. Participants identified that adult pornography, or obscenity, was everywhere, and adults had the capacity to consent to both participate in, and consume, pornography privately. While some participants acknowledged the potential for obscenity to be harmful to society, they emphasized that the criminal justice system did not have the financial resources to respond to all instances of child pornography, much less obscenity. Considerations of moving forward in terms of policy responses and allocation of financial resources are presented.

Chapter 2.

Literature Review

In Chapter two, I present the current *Criminal Code* offences and definitions for obscenity and child pornography. Next, I discuss the most relevant obscenity or child pornography cases that challenged the *Criminal Code* provisions or provoked Parliament into updating or changing the provisions. Lastly, I explore the historical and current research into the societal effects of both adult and child pornography.

Obscenity and Child Pornography in Canada

In Canada, it is illegal to make, print, publish, distribute, circulate, or possess, for any of the aforementioned purposes, material that is defined as obscene under s. 163 of the *Criminal Code* (see Appendix A). It is also illegal to make, distribute, possess or access child pornography, as defined in s. 163.1 of the *Criminal Code*. The English *Hicklin* (1868) case, on which Canada originally based its obscenity test, defined obscene material as pornographic when it had the potential to corrupt the morals of those who consume it, with particular concern for those most susceptible to corruption. Radical feminists expanded this definition and specifically applied it to violence against women and children:

> as the graphic, sexually explicit subordination of women through pictures or words, including the presentation of women in a dehumanized way as sexual objects or commodities; as enjoying pain, rape, or humiliation; as body parts (such as breast, vagina, or buttocks); or in any other way that sexualizes degradation, pain or subordination. (Lederer & Delgado, 1995, p. 5)

Some feminists define pornography as that which contains images of male dominance perpetrated against women (MacRae, 2003; Sun, Wright & Steffen, 2017). However, I include all forms of pornography, including that which depicts women as dominant, gay pornography and child pornography, recognizing that men, women, children and youth of varied sexualities are affected by the consumption and/or production of pornography. Bridges, Sun, Ezzell, and Johnson (2016) identify a variety of definitions of pornography used in academic research; some individuals define pornography based on factors such as availability, harm, purpose, and/or explicitness. Erotica is included in some definitions,

or it has its own category for comparison. I follow the *Criminal Code's* definition of obscene material which features "the undue exploitation of sex" (s. 163(8)). Case law and academic research outline four types of pornography: sexually violent pornography, degrading/dehumanizing pornography, erotica, and sexual education material (*R. v. Wagner,* 1985; Skorska, Hodson & Hoffarth, 2018; Stock, 1995). Violent pornography involves acts of physical violence towards other individuals, whereas degrading pornography may include scenes of degradation or dehumanization. While some individuals (Dines, 2010) may argue degradation and dehumanization causes harm to women, in the depictions, there is no physical harm; for example, when a man ejaculates upon a women's face it is defined as a form of dehumanizing sexual activity. In erotica, the key focus is consensual and mutually affective sex (Skorska et al., 2018). Canadian police and Crown have primarily concerned themselves with prosecuting material defined as sexually violent pornography and degrading/dehumanizing pornography, as the justices in *Butler* (1992) accepted that this material met the standard for obscenity because it featured the undue exploitation of sex. Ingrained in this definition is the understanding that child pornography falls into one of the first two categories, out of concern that child pornography harms children.

In response to the concerns raised by feminists and moral entrepreneurs alike (Brannigan & Goldenberg, 1986; Jenkins, 2001; Smith & Attwood, 2014; Zgoba, 2004), Parliament convened two committees: The *Committee on Sexual Offences against Children and Youths* (the Badgley Committee) in 1984 that focused on child sexual abuse and *The Fraser Committee* in 1985 that concentrated on pornography and prostitution, with a focus on adult material. The Fraser Committee advocated a censorship approach and focused on the potential harm pornography could cause, specifically the harm arising from the objectification of women and to those who are unwilling participants (Casavant & Robertson, 2007; Lacombe, 1994; Government of Canada, 1986). The Fraser Committee advocated for a child pornography specific offence, emphasizing the need for severe penalties to deter individuals from producing child pornography to protect children from harm (Casavant & Robertson, 2007; Ryder, 2003; Smith & Attwood, 2014). The committee also found severe methodological limitations in pornography research that resulted in inconsistent information as to its effect (Canada, 1985).

The Badgley Committee (1984) included a discussion of the use of children in pornography and children having access to it (MacDonald, 1984). They argued that there was no child pornography "epidemic" in Canada: however, it appeared "barely legal" adult pornography, whereby adults were depicted as minors, was being imported into Canada (MacDonald, 1984). Applying a moral-corruption perspective, Ryder (2003) argued that material that does not depict real children can cause indirect harm, because the consumption of child pornography legitimizes the sexual abuse of children and decreases inhibitions for those who are sexually attracted to children – both of which arguably lead to the sexual exploitation of children. As such, The Badgley Committee (1984) recommended the creation of child-pornography-specific offences to respond to this concern (Casavant & Robertson, 2007). They advised that possession be included in the provision, to decrease the market for child pornography (MacDonald, 1984). Benedet (2002) suggested that these provisions were meant to address a gap in obscenity provisions, namely that the simple possession of obscene material was not a crime. The Badgley Committee acknowledged the lack of empirical evidence regarding the effects of pornography and advocated for more research (MacDonald, 1984; Moon, 2002). Ryder (2003) discussed the public outrage that resulted following the 1996 decision in *Sharpe* which held that someone could create material which depicted the violent sexual abuse of children and not be charged under Canadian law (Diamond, 2009).

Both committees advocated for the creation of specific provisions in the *Criminal Code* to protect children from harm (Gotell, 2001/2002). Arguably, these committees were formed because the obscenity provisions were often challenging to enforce (Government of Canada, 1986), with some individuals suggesting that police and Crown were not doing enough to protect women and children from harm (Lacombe, 1994). More importantly, both committees drew attention to the fact that child pornography was not specifically mentioned in the *Criminal Code*. The Fraser Committee explicitly drew attention to the concern that children were being used to create pornography and that pornography was being consumed by young persons. Between the two committees, 160 recommendations were made to the government and private agencies. These recommendations focused on the innocence of children and the need to create law reform that would protect children from harm. Gotell (2001/2002) proposed that the new legislation constituted one of the strongest child pornography laws in the world,

suggesting it was the result, in whole or in part, of a moral panic. Parliament's increased use of more severe criminal sanctions to control offenders, such as mandatory minimum sentences, to protect children from harm emphasized this perspective (Gotell, 2001/2002). While the Fraser Committee acknowledged that obscene material does feature violence against women, the overall focus of the two committees was the harms faced by children. The two reports represent the beginning of a moral panic, and the first step towards the creation of the child pornography provisions currently found in the *Criminal Code.*

As defined by Cohen (1972), a moral panic is a period in which a person or situation is targeted for intervention, because it represents a threat to society's values; these threats are often reinforced by media and politicians. Goode and Ben Yehuda (1994) identify five characteristics of a moral panic: concern; hostility; consensus; disproportionality; and volatility. Many of these characteristics are present in the case of child-pornography panic, as suggested by Gotell (2001/2002). Garland (2008) draws attentions to the "recurring contemporary panic" regarding child sex offenders, noting an apparent consensus that these individuals are both feared and hated; they have become the folk devils identified by Cohen (1972), as well as eliciting the hostile reaction as identified by Goode and Ben Yehuda (1994). This panic led to political and legislative responses, as seen by the above-noted reports, reflecting concerns raised by the threat posed by child sex offenders. Zgoba (2004), in a discussion of the child abduction and child molestation fears in the U.S., agrees with Gotell (2001/2002), that the proliferation within the news media of cases involving sexual abuse and child abductions has created a moral panic about child abduction and sexual abuse. Using evidence of increasing penalties and sanctions against child offenders, including the Amber Alert and Megan's Law, or Mandatory Minimum Sentences in Canada (*Bill C-2*,2005), Zgoba argues that "few other crimes evoke the fear and outrage as crimes against children" (2004, p. 388). This argument is consistent with labelling theory research on sex offenders who have one of "the most highly stigmatized labels that exist in modern societies" (Mingus & Burchfield, 2012, p. 97) including labels such as monster or pervert (Simpson, 2009). Of all categories of sex offenders, the most hated is the child sex offender (Stebbins, 2016).

These circumstances created a child protection climate identified by Angelides (2004), who notes that child protection advocates and feminists crusaded for rights of child sexual abuse victims in the 1970s and 1980s. Even then, feminists identified the

antiquated notion of stranger danger was problematic – as male relatives or acquaintances were more likely to be the perpetrators of sexual abuse of children (Sinclair et al., 2019; Zgoba, 2004). Angelides described this movement as a "reinterpretation" of child sexual abuse" (p. 142), which shifted from seeing children as sexual beings who played a role in their abuse, to acknowledging the inherent power dynamics that exist in a victim/abuser relationship. Using a feminist perspective, sexual abuse is now about "power and powerlessness" and the inability of children to consent (p. 148). Angelides sees this transition as "[t]he feminist use of power … to evade, silence, erase, and repress a signifier of child sexuality" (p. 154). This societal shift is problematic for Angelides, in that it completely erodes any consideration of children as sexual beings. For Angelides, this perspective contrasts with a heteronormative, child protection model of child sexuality, which sees children as non-sexual beings, who need to be protected from harm. This perspective is represented in the current laws on pornography and child sexual abuse.

Various Bills have been created to address the crime of child pornography and update *Criminal Code* provisions. In 1997, Bill C-396 restricted the use of the internet to distribute pornographic material involving children (Duhamel, 1996). Bill C-15A, in 2002, updated the child pornography provisions to include "transmit" and "make available" to address the proliferation of child pornography online (Valiquet, 2010). Child pornography related offences, including new additions of internet related offences, were added to the list of offences for which a person could be designated a "long-term offender" (Goetz & Lafrenière, 2002). Luring a child over the internet was also criminalized and added to the long-term offender list. Publications deemed to be child pornography on a balance of probabilities would be subjected to forfeiture provisions and Internet Service Providers (ISPs) may be directed to delete images or videos of child pornography found online (Goetz & Lafrenière, 2002). Another piece of legislation directed towards ISPs, was Bill C-22*,* which introduced mandatory reporting for ISPs when they find child pornography (Valiquet, 2010), and the *Protecting Canadians from Online Crime Act* in 2015 which allowed the criminal justice system to ask ISPs "to delete non-consensual intimate images" (Dodge & Dale, 2018, p. 639).

In 2004, Bill C-2[1], addressed public concerns around the age of consent and raised it to 16 years. This bill resulted from the *Sharpe* (2001) case (see below), that addressed changes to the artistic merit defence originally found in the child pornography provisions. The defence shifted from a liberal interpretation of what constitutes art, to a defence that permitted exemptions when an artistic, scientific or legitimate purpose which does not feature an undue risk of harm to children was identified (MacKay, 2005). The maximum penalty for child pornography offences by summary conviction was increased to 18 months' imprisonment, mandatory minimum sentences (MMS) were introduced, and the offence of voyeurism was updated (The Office of the Federal Ombudsman for Victims of Crime, 2009; MacKay, 2005).[2] A mandatory minimum sentence (MMS) is laid out in the *Criminal Code* that when a person is convicted of a particular offence, the minimum sentence that they receive will be as written. The goal of MMS was to help eliminate disparity in sentences, as judges have essentially lost the ability to assign a sentence lower than the MMS (Allen, 2017). Prior to 2005, MMS were typically only used in serious crimes that carried lengthy penalties, such as treason and murder. In 2005, and since then, multiple legislative changes have occurred with respect to the application of MMS to child pornography offences, with subsequent adjustments over the years. In 2012, Bill C-10 "increase[d] or impose[d] mandatory minimum penalties, and increase[d] maximum penalties, for certain sexual offences with respect to children" (Bill C-10, 2012, p. 2). Bill C-22 *Tougher Penalties for Child Predators Act* (2015) turned the making and the transmitting child pornography offences from hybrid, into indictable offences (Allen, 2017). Ultimately, adults "bear the responsibility for safeguarding and protecting [the] child from sexual exploitation" (Sinclair et al., 2019, p. 167) and only through cooperative measures, such as those identified above, and keeping up with technological advances can society properly address crimes of child sexual exploitation (Sinclair et al., 2019).

The internet, combined with technology, means Canadians, and arguably most of the developed world, have "access to the internet across multiple devices and platform[s] and from virtually anywhere in the world" (p. 151). In response to the growing concerns

[1] An earlier version of these suggestions can be found in Bill C-20 (MacKay, 2004).

[2] Penalties for sexual offences were also increased under Bill C-2. For example, section 161 of the *Criminal Code* was updated allowing for judges to prohibit offenders from attending certain areas, such as parks or schools (MacKay, 2005).

around the availability and accessibility of child pornography online, Canada launched the *National Strategy for the Protection of Children from Sexual Exploitation on the Internet* in (2004). The strategy's goal was to create a coordinated response to child sexual exploitation, including the development of the RCMP National Child Exploitation Coordination Centre (Office of the Federal Ombudsman for Victims of Crime, 2009). A key response to child sexual exploitation in 2005 was Cybertip.ca, a "Canada tipline for reporting online child sexual exploitation offences" (Sinclair et al., 2019, p. 156). This tipline received 40,251 reports in 2016-2017, in addition to the 27,300 tips received at the National Child Exploitation Coordination Centre in 2016 (Sinclair et al., 2019). There was also the creation of the Canadian Centre for Child Protection in 2011, an organization responsible for the reporting of child pornography; this organization often coordinates with the Integrated Child Exploitation (ICE)[3] units in investigating cases of child sexual exploitation (Allen, 2017). Allen points out that it was after the creation of cyber tip that there was an increase in police reported incidents of child pornography between 2001-2006, and another increase between 2012-2015.

In 2009, the Office of the Federal Ombudsman for Victims of Crime offered recommendations for the Government of Canada to respond to crimes of child sexual exploitation and child sexual abuse images. Specifically, they focused on the internet's effect on these crimes, with particular emphasis on both the anonymity it offers, and accessibility, not only to images, but other individuals with similar sexual interests in children (Office of the Federal Ombudsman for Victims of Crime, 2009). The internet is not responsible for creating sex offenders, as per Dr. Peter Collins, "[t]he Internet is not 'creating a sexual interest in children' but it's creating victims" (Haines, 2006, as cited in The Office of the Federal Ombudsman for Victims of Crime (2009), p. 4). These concerns reflect a child protection climate, with child sexual exploitation and child sexual abuse images "ranked as one of the top three concerns for parents regarding children" (Canadian Centre for Child Protection, 2008 as cited in The Office of the Federal Ombudsman for Victims of Crime (2009), p. 2). Additional concerns included the increasing number of violent images, with younger children being portrayed in child

[3] The Integrated Child Exploitation Unit is a specialized unit within BC that focuses upon child sexual exploitation offences, including those related to child pornography.

pornography; as well as the sheer volume of images that are uploaded and searched for online on a daily basis (Office of the Federal Ombudsman for Victims of Crime, 2009).

Evidence from the Office of the Federal Ombudsman for Victims of Crime (2009) indicates that the federal government has continued to increase funding and implement legislation to address child pornography and child sexual abuse. However, the police, given the thousands of images of child sexual exploitation available online, "are struggling to keep up with the number of cases they have" (p. 12). Additional concerns identified in the report include "accessing information about suspects, identifying children, and preventing future abuse" (p. 12). Recommended solutions focus on providing resources, as well as experts who are able to support them, and support from the private sector, such as ISPs. Through the *Personal Information Protection and Electronic Documents Act* (PIPEDA), ISPs may provide police with information about customers or internet users involved in child pornography; however, this is not a legal requirement. This added barrier contributes to what is already a lengthy investigation and increases the risk to children.

The Office of the Federal Ombudsman for Victims of Crime (2009) argues child sexual abuse goes unreported in child pornography offenders, suggesting that these offenders are going beyond "just looking at pictures" (p. 7). However, the report offers little evidence to support the aforementioned claim yet uses this argument as evidence in tipping the balance between offender's privacy and the harm that child pornography images poses to children. This "Big Brother" notion, as outlined in Office of the Federal Ombudsman for Victims of Crime, suggests that Canadians are hyper-focused on police having access to private information. However, the information provided to police, such as name and address, are no different, the author argues, than providing the police with your license when you are pulled over. With the cooperation of ISPs, police can spend more time tracking down victims of sexual exploitation in a timely manner, which has the potential to limit and ideally, prevent sexual abuse. The Office of the Federal Ombudsman for Victims of Crime argues that we need to consider the rights of the victim, as their privacy rights are violated when images of their sexual abuse are shared online. This privacy violation is compounded by the ongoing trauma experienced by children, or later on as adults, as their images or videos of their abuse is on the internet forever. As one victim stated:

> I never escape the fact that pictures of my abuse are out there forever. Everything possible should be done to stop people looking at pictures of child abuse. Each time someone looks at pictures of me, it's like abusing me again. (Office of the Federal Ombudsman for Victims of Crime, 2009, p.40)

Essentially, victims of child sexual abuse are revictimized over and over again, necessitating advocacy and better support services for victims of child sexual exploitation, as well as a system to help remove those images (Office of the Federal Ombudsman for Victims of Crime, 2009; Wolak et al., 2014). Subsequent to *Every image, every child: Internet-facilitated child sexual abuse in Canada* (2009) being released, software now uses hash values to track, and remove, known images of child sexual exploitation (Kusz & Bouchard, 2019; Wolak et al., 2014).

Given the above changes to the provisions, it is important to examine official data about obscenity and child pornography crimes in Canada. Statistics Canada (2019) captures the number of incidents of pornography and obscenity related offences reported each year, as shown *Figure 2-1* below. Child pornography offences are reported in two categories: possessing or accessing child pornography and making or distributing child pornography. Obscenity offences are included within the broader category of sexual offences, public morals and disorderly conduct (Part V of the *Criminal Code*). Statistics Canada presents aggregate data on the number of incidents of offences under Part V of the *Criminal Code*. Specific data on the number of obscenity charges were not provided in the Statistics Canada report. What data are provided, indicates that the number of child pornography-related offences outweighs the number of obscenity cases reported to the police each year in Canada.

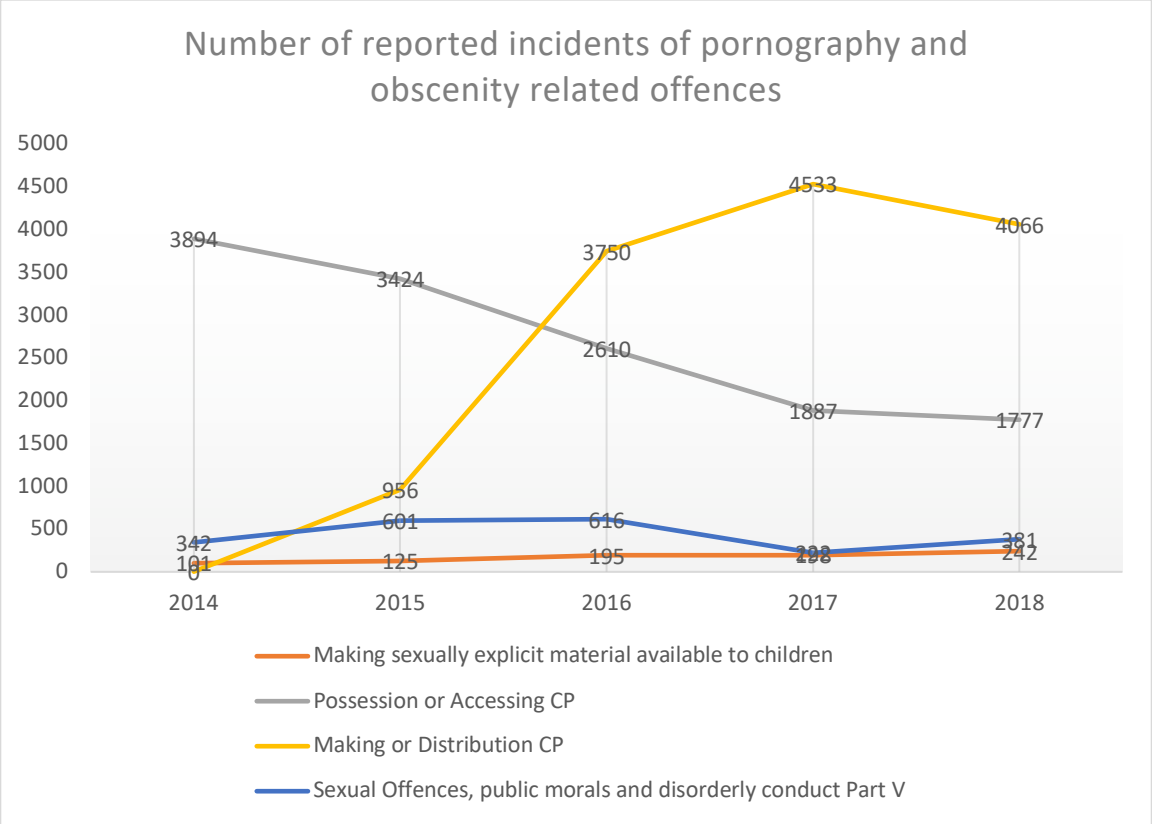

Figure 2-1 Number of reported incidents of pornography and obscenity related offences

In 2018, 6,420 child pornography offences were reported to police, with 5,843 reported in 2017 (Moreau, 2019). This change represents an increase, when in 1998, five years after the child pornography provisions were introduced, there were 55 offences and in 2008, there were 1408 (Valiquet, 2010). However, these numbers should be interpreted carefully given the various legislative changes that have occurred to child pornography offences over the last twenty years.

Canadian Cases of Obscenity

Prior to the implementation of the *Canadian Charter of Rights and Freedom* (1982; Appendix B), obscenity cases before the superior courts focused on clearly establishing the types of material that met the *Criminal Code* definition of obscenity. Additionally, materials likely to meet the community standards test, or rather, what one individual would tolerate other individuals being exposed to, were clarified. In assessing whether or not impugned materials met obscenity standards, namely, whether the dominant characteristic featured undue exploitation of sex, the Canadian justice system

developed a common-law test to assess obscenity. Originally, Canadian (and American) law adopted the English *Hicklin* (1868) test, used to assess whether the material in question corrupted the morals of those who consumed it. When *Criminal Code* amendments in 1959 added an obscenity offence, many courts believed that the *Hicklin* test could co-exist with the then s. 159 obscenity provision. However, in *Brodie v. The Queen* (1962), the SCC clarified that the new provision was the standard for obscenity and replaced the *Hicklin* test with the internal necessities test and the community standards test. The community standard of tolerance test has since been refined and clarified by the courts, confirming that the courts believed contemporary, national standards within Canadian society would determine what should be considered obscene.[4]

While Canadian courts addressed the obscenity provisions in lower level courts, it was not until the *Butler* case in 1992 that the SCC addressed the question of whether the provisions violated s. 2(b) of the *Charter*. In *Butler* (1992), the accused, Donald Butler was convicted at trial for eight counts of selling and possessing for distribution obscene material. Justice Wright found that obscene material was protected under the *Charter* (see Appendix B), and only material which depicted violence, cruelty, or non-consensual sexual activity could be saved using section one of the *Charter*. The Manitoba Court of Appeal affirmed the conviction and substituted convictions on other counts, following the Crown's appeal against the trial acquittals on those counts. Butler appealed to the SCC, which found that the obscenity provision did inhibit expression, and therefore infringed s.2(b) of the *Charter* (see Appendix B). However, this interpretation was not an exhaustive guarantee, whereby individuals could say whatever they want without limitation; it was subjected to section one scrutiny. Section one of the *Charter* allows the government to limit rights that would otherwise be protected by the *Charter*, in the interests of protecting society from harm.

In the SCC *Butler* (1992) decision, Justice Sopinka concluded that community standards of tolerance related to degrading and dehumanizing material, namely, that material believed to cause harm, would generally not be tolerated by society. The

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[4] Cases of importance which addressed the community standards of tolerance included: *R. v. Dominions News & Gifts Ltd.* (1963); *R. v. Great West News. Ltd.* (1970); *R. v. Goldberg and Reitman* (1971); *R. v. Kiverago* (1973; 1978); *R. v. Ramsingh et al.* (1984); and *R. v. Sudbury News Service Limited* (1978).

objective of the obscenity provisions was to protect society, particularly women and children, from the harms of pornography – distancing itself from a moral disapproval of pornography (*R. v. Butler*, 1992). In Justice Sopinka's view, "the courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure" (para. 59). In the Court's assessment of harm, Justice Sopinka noted that the pressing objective of the obscenity provisions was the risk that consumption of obscene material may lead to antisocial attitudes. Referencing the *MacGuigan Report* (1978), pornography reinforced gender stereotypes and normalized the victimization of women within a sexualized context, which represented the risk of harm. However, the SCC acknowledged that the causal relationship of obscenity to societal harm was controversial. While previous cases, for example, *R. v. Fringe Product Inc.* (1990), reviewed expert evidence and concluded that a relationship between pornography and harm exists, this assessment was not universally accepted. The *Fraser Report* (1985) did not find evidence of any causal relationship between pornography, violence or sexual abuse of children, unlike the findings of the *MacGuigan Report* (1978). The SCC, consistent with the previous case law (*Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989), found conclusive evidence of harm was not required, rather Parliament need only have a "reasonable basis" (para. 104) to apprehend a risk of harm.

In its judgment, the Court drew attention to the fact that there was a "reasoned apprehension of harm" from the consumption of pornographic materials; evidence before the court suggests this to be so, which in turn justifies Parliament's decision to criminalize obscene expression (*R. v. Butler*, 1992, para. 107). Given this evidence, the SCC ultimately concluded that, even though the obscenity provision violated one's right to freedom of expression, the pressing concern of protecting women and children from harm was substantial enough to warrant limiting freedom of expression under section one of the *Charter*.

The *Butler* (1992) decision was revised in *R. v. Labaye* (2005). Of importance here, while *Labaye* was initially applied to the indecency provisions, namely whether group sex in a private club was illegal under the bawdy house provisions (s.210(1), repealed 2019), the SCC determined that the newly created harm-based test applied to both the indecency provisions, and obscenity provisions. Rather than focus on a question of morality, as defined in *Hicklin* (1968), and then revised to a question of

community standards of tolerance, as outlined in *Brodie* (1962), the initial move towards a harm-based question of obscenity in *Butler*, was solidified in *Labaye*. The SCC determined that the assessment of whether publications would be obscene was a two-pronged approach to whether (a) the material causes harm or carries with it a significant risk of harm, and (b) that risk of harm threatens the functioning of society. As of yet, the SCC has not applied this test to cases of obscenity.

Overall, case law argues that contemporary Canadians generally tolerate the sale of erotica, or non-violent adult pornography, when consumed privately (*R. v. Wise*,1990). This acceptance of pornography represents a shift in tolerance, whereby erotic, adult, non-violent material was historically not tolerated (e.g. *Penthouse* magazine in *R. v. Provincial News Co., Penthouse International Ltd. and Guccione,* 1974). As per *Butler* (1992) violent pornography, seen to cause harm to society is generally not tolerated, and sexually explicit pornography which is not violent, but is degrading or dehumanizing may feature the undue exploitation of sex if "the risk of harm is substantial" (no para. #). *R. v. Wagner* (1985), first included these categorizations of pornography when Dr. Check testified that degrading or dehumanizing material had the potential to cause harm to society and would thereby exceed community standards. Evidence of the tolerance of such material was found in *R. v. Smith* (2005), where Smith successfully appealed his conviction under the obscenity provisions and was granted a new trial (leave to appeal to the SCC was denied in 2006). The material did not depict sexual activity, rather the pictures were staged, involving professional actors and involved no real violence (e.g. a woman with an arrow protruding from her vagina). At trial, Dr. Collins outlined sexual deviances, sadomasochism, necrophilia, and picquerism – which described people who are aroused "by the portrayal of people being stabbed with sharp objects" (para. 11). Regarding harm, he said that these materials could affect the attitudes of consumers, in that the events are normalized. Dr. Malamuth also testified that "one-third of men are sexually aroused by sexual violence and ten percent are aroused by depictions of non-sexual acts of violence committed by men on women" (para. 12). He concluded that the material could be harmful in that it could lead to desensitization towards violence against women. Even though the material did not depict sex, both experts pointed out that the women in the videos were chosen because they were "sexy" and were positioned in sexually submissive manners, with objects in sexual regions. Conversely, in one of the last major cases to address obscenity, *R. v. Price*

(2004), the material in question featured bondage, dominance, and sadomasochism (BDSM). Justice Low accepted expert evidence which supported the idea that Canadians would be accepting of BDSM, suggesting that Canadians are tolerant of material which featured consensual sex and violence. However, deliberately inflicting serious bodily harm even with consent is a criminal offence (*R. v. Welch*, 1995; *R. v. Zhao*, 2013).

Another example of the controversy surrounding Canadians' tolerance of obscene material is the case of Little Sisters (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000). Little Sisters Book and Art Emporium, referred to as Little Sisters, was a bookstore which published material written for the homosexual (LGBTQ2) community. They imported books from the United States and testified that hundreds of their books and magazines were intercepted by Canada Customs. In considering community standards of tolerance, the appellants suggested that the *Butler* decision should only be applied to graphic, heterosexual obscenity: they emphasized that the *Butler* decision focused on the harms that pornography caused to women. They suggested the need for evidence that homosexual pornography caused harm to society, which they argued did not exist. At trial, Justice Smith concluded that there was enough evidence to support that homosexual pornography caused a reasoned apprehension of harm, as per the *Butler* (1992) decision. On appeal to the SCC, Justice Binnie, for the majority, pointed out that the *Butler* decision was concerned with harm to the community, not taste or morality, regardless of whether the material was homosexual or heterosexual. In the SCC's view, the *Customs* legislation when enforced properly, in accordance with what Canadians would tolerate, passed section one analysis. However, the Court ruled that the Canadian customs officials had not applied the legislation in a fair manner – the problem was with the unfair application of the legislation, not the legislation itself.

Canadian Child Pornography Cases

The most prominent child pornography case before the SCC was that of *R. v. Sharpe* (2001). Sharpe was found in possession of child pornography material and charged with possession and distribution of child pornography. Sharpe argued that the criminalization of the mere possession of child pornography violated his fundamental rights to freedom of expression and the right to life, liberty and security of person, as

protected by the *Charter* (Appendix B). He further argued that these violations were not justified, as set out in section one of the *Charter,* in a free and democratic society. In their decision, the SCC concluded that the possession of child pornography is a form of expression, and as such, is subject to protection under the *Charter.* The SCC was faced with the question of whether this limit was a justified infringement in a free and democratic society. Chief Justice McLachlin argued that the evidence suggested that child pornography was harmful, regardless of whether real children were depicted or not. In support of the harmful hypothesis, it was asserted that child pornography encouraged cognitive distortions, increase sexual fantasies of offenders and was used to groom children, thereby increasing the risk that children would be sexually abused. The provision was also identified as being helpful for law enforcement professionals in combating the production and distribution of child pornography. Lastly, there was child pornography that featured real children, who were sexually abused, in order for the material to be produced.

While the trial judge concluded that there was little evidence linking the sexual abuse of children to cognitive distortions in sexual offenders, the SCC determined that Justice Shaw applied the incorrect standard, and therefore the evidence submitted by the Crown was sufficient to support a link between child pornography and a reduction in sexual inhibitions. Evidence supported the proposition that explicit child pornography may lead to sexual abuse of children, but erotica may provide a cathartic effect for pedophiles. While this evidence appears contradictory, the SCC found that the evidence of harm was sufficient to meet the reasoned apprehension of harm standard as it fueled deviant fantasies. The third type of harm was not considered in detail by the trial judge: however, the SCC noted that criminalizing possession offered a benefit by aiding police investigation into those who produced and distributed child pornography (*R. v. Butler*, 1992). Evidence was clear on the fourth harm, namely that child pornography aided pedophiles in grooming children for sexual abuse, and criminalizing possession reduced the use of child pornography to groom and sexually abuse children (Office of the Federal Ombudsman for Victims of Crime, 2009; Taylor & Quayle, 2001). The same can be said regarding the use of real children to create child pornography, which depicted children being sexually abused, and the possession of such material created a market for it, which in turn fueled the demand. The harms children experience when they are sexually abused are well documented including complex trauma, sex trade/sex trafficking, and

photographic evidence of sexual abuse (Angelides, 2004; Farley, 2006; Sinclair et al., 2019).

Sharpe, the accused, accepted that there is material that causes harm to children, and that possession of this type of material should be subject to criminal sanctions. However, he contended that s. 163.1 captures material that, arguably, did not cause harm to children. Sharpe's concern was that the "law catches material that poses no risk of harm to children and because the links between possession of child pornography and harm to children are weak" (*R. v. Sharpe*, 2001, para. 30). When interpreting the child pornography provision, the term "person" can refer to both real or imagined children. When this interpretation is applied to the *Sharpe* case, it becomes apparent that there are inherent *Charter* issues, as this interpretation would include images that individuals have created for their own personal use – not for distribution or sharing. However, the SCC noted that, despite the benefits of criminalizing possession of child pornography, it does capture material that a reasonable person would not define as child pornography, or material that poses little risk of harm to children – such as self-created materials for personal use or material where children/youth created self-representations. Given that it captures such materials, the law cannot be proportionate, and was therefore not justified under section one of the *Charter.* Typically, in these cases the proper course for the SCC to follow would have been to allow the appeal and have Parliament make the change to the legislation. Rather than allowing the appeal, the SCC suggested a remedy of "reading in" an exception to the *Criminal Code* namely, that s.163.1 excludes self-created expressive material and private recordings of lawful sexual activity – also known as the private use defence. Perhaps, the SCC was unwilling to accept the public criticism that would have followed if they had allowed *Sharpe's* appeal, or alternatively, they were simply saving the legislature from the trouble of what would have been a relatively routine change.

After the *Sharpe* case, Parliament revamped the "public good" defence in the child pornography legislation to a two-part test: legitimate purpose and no undue risk of harm to children under 18. Referencing *Bill C-2*, the goal of the legislation was to protect children from sexual exploitation. In *R. v. Katigbak*, (2011), the SCC explored the implications of these changes to the provisions, when the appellant was charged under the child pornography provisions stemming from a collection of child pornography materials that he collected over a seven year period, that spanned the changes to the

provisions. Katigbak argued that he collected the materials for an artistic merit purpose, to "present the issue of child exploitation from the perspective of the child" (para. 2). Before 2005, the defence of artistic merit was available to Katigbak, after November 1 2005, this defence was no longer available; he would have to prove that the collection of the material "(1) has a legitimate purpose related to the administration of justice or to science, medicine, education or art; and (2) does not pose undue risk of harm to persons under the age of 18" (para. 3). Part of his argument was that by collecting images he was conducting research into child pornography as means to "explore his emotional responses to it" (para. 17). From there, he intended to use those responses to create an art exhibition; however, the SCC found that "Parliament only intended the defence to apply where the materials themselves had artistic merit, and not where the accused simply had an artistic purpose for possessing them" (para. 39). For the public good defence available prior to November 1, 2005, the SCC found that the accused was entitled to have this defence raised at trial and ordered a new trial.

After *Sharpe*, the SCC continued to address various questions raised by the child pornography provisions, and subsequent changes to the provisions. For example, in *R. v. Spencer* (2014), the SCC examined a case in which the accused had downloaded child pornography using the file sharing program LimeWire. LimeWire "allows users to download files directly from the computers of other users" (para. 7), meaning that once someone downloads a file, it can be made available for others to download. This ability was used to justify charging Spencer with making available child pornography. The SCC addressed two important issues in this case. The first related to reasonable search and expectations of privacy. A police investigation discovered that a computer at Spencer's IP address had downloaded child pornography. The police made a "law enforcement request" through PIPEDA for the customer's information; Shaw complied and provided the account holder, Spencer's sister's information. This information was then used to obtain a search warrant for Spencer's home. Spencer's computer, located during the search, contained hundreds of images and videos of child pornography. The question before the court was whether the search of Spencer's computer violated his section eight *Charter* right that prohibits unreasonable search and seizure. While the SCC found that Spencer had an expectation of privacy and that the search was not authorized by law, the evidence was not excluded given the seriousness of the offence and society's interest in protecting children from the harms of child pornography. The second issue

was the question of the making available offence; Spencer argued that he could not be convicted for this offence as he was unaware that he was sharing child pornography files. The SCC ordered a new trial so that the trial judge could properly assess whether Spencer was willfully blind to the sharing of child pornography via LimeWire.

The question of right to privacy was also addressed in the SCC decision in *R. v. Cole* (2012). Here, the SCC determined that even on a work computer, an individual had a reasonable expectation of privacy in situations in which the work computer was also used for personal purposes. Police searches of work computers without the consent of the individual, would result in a *Charter* violation under section eight– against unreasonable search and seizure. However, in *Cole*, the SCC found that excluding evidence of child pornography found on the computer would bring the administration of justice into disrepute and ordered a new trial. In both *Spencer* and *Cole*, the SCC acknowledged that *Charter* violations occurred but included the evidence because of the risk of harm posed to children through child pornography, and society's vested interest in protecting children from harm. Society's concerns regarding the harms of child pornography can outweigh even *Charter* protections, as shown in these decisions.

The ability of the police to access evidence which may contain child pornography continues to plague the courts with constitutional challenges as to how these seizures impact privacy and the right against unreasonable search and seizures. For example, the case of *R. v. Morelli* (2010) involved the question of whether the presence of child pornography on the accused's company computer was sufficient evidence to support the application for a search warrant. On appeal, the SCC focused on the fact that the accused had been charged with possession, and not with accessing child pornography, and therefore, any search warrant was for evidence that the accused was *in possession* of child pornography. That, along with other evidence suggesting that police relied on generalizations of offenders, led the SCC to exclude the evidence, allow the appeal and entered an acquittal. In *R. v. Reeves* (2018), the accused's spouse gave the police permission to enter their home and take the accused's computer. The SCC ultimately restored the acquittal applied at trial, noting that Reeves did have an expectation of privacy on the shared computer with his spouse. As such, "the consent of Reeves' spouse did not nullify his reasonable expectation of privacy, or operate to waive his *Charter* rights in the computer" (para. 4).

The SCC clarified the private use exemption, set forth in *Sharpe* in *R. v. Barabash* (2015). Based on *Sharpe* (2001), the private use defence had three components: the depictions were of legal sex, consent was obtained, and the publications were held for private use (see also *R. v. Keough,* 2011; *R. v. P. (W.E.),* 1991). *Barabash* determined that in situations that involved sexual exploitation, consent, the second component of the private-use exception, was negated. Additional concerns focused on the introduction of MMS implemented by *Bill C-2* (2005). MMS were created over fears about how child pornography can desensitize children to sexual behaviour with adults, that adults could use it to groom children for sexual abuse, individuals who collect and/or view it do not see themselves as causing direct harm to children, or lastly, may lower inhibitions in pedophiles, leading to the sexual abuse of children (Office of the Federal Ombudsman for Victims of Crime, 2009; *R. v. Jakobsen,* 2006; *R. v. Kwok*, 2007; *R. v. Nisbet*, 2010; Taylor & Quayle, 2001). Therefore, to prevent individuals from creating child pornography, the criminal justice system needs to deter those who possess it. However, problems have been documented with MMS, including the loss of discretion and increased court delays as accused persons want to avoid a sentence of incarceration (Allen, 2017). While various cases have upheld the constitutionality of MMS (*R. v. Cristoferi-Paolucci*, 2017; *R. v. Schultz*, 2008; *R. v. Watts*, 2016), a BC Superior Court struck down the provisions, specifically s. 163.1(4), in *R. v. Swaby* (2017), on the basis that it violated Swaby's right against cruel and unusual punishment, protected by section 12 of the *Charter*. Crown's appeal to the BC Court of Appeal (*R. v. Swaby,* 2018) was dismissed, as was the application for leave to appeal to the SCC (*R. v. Swaby,* 2019). This decision was subsequently confirmed, and applied, for accessing child pornography in the case of *R. v. Hamlin* (2019).

In cases involving charges of sexual assault, distribution of an intimate image, child pornography, and obscenity, offenders have made comments on how pornography has shaped their offending. For example, in *R. v. Williams* (2018), Dr. Woodside highlighted offender's lengthy criminal history in a psychiatric report:

> He also noted that his use of child pornography 'fueled' his prior offending against children; he stated that prior to the index offenses he had been viewing pornography again, relating to 'naughty neighbours', people 'roleplaying' coercive sexual encounters and amateur pornography. He stated he was exploring fetish sites regarding hands, feet, etc. although he noted his interest was primarily in feet. He stated he became increasingly "curious" and began taking pictures while out in the community... (para. 6)

Part of Williams' prescribed treatment included banning access to all pornography, including adult material. The court further pointed out that Williams consumed pornography prior to committing acts of sexual assault and concluded that his "Use of pornography appears to have been a collateral circumstance in the context of some of the offending" (para. 285). Similarly, in *R. v. McFarlane* (2018), he accounted his filming of his friend's sister while she was in the bathroom resulted "from his interest in pornography relating to 'peeping toms' and being aroused when he was in 'control'" (para. 3). In another case involving child pornography, Mr. Wysom described how he was addicted to adult pornography. When he found himself becoming desensitized to adult pornography, he indicated that he sought out more arousing, and illegal pornography, including child pornography (*R. v. Wysom*, 2018). As time passed, the publications that he was accessing were becoming more explicit and involved younger and younger children. These cases, as discussed below in the section Effects of Obscenity, counter the argument that consuming pornography can have a cathartic effect upon offenders, and reduce their urges to sexually offend (Fisher et al., 2013; Garos, Beggan, Kluck & Easton, 2004; Seto & Eke, 2005).

The aforementioned cases suggest that the Canadian court system has shifted its focus from the harms of obscenity as whole, including the detrimental effect of obscene pornography on women and children, to focusing primarily on the harms child pornography causes to children and youth. This shift shows the implementation of the child pornography provisions, post-*Butler* (1992), combined with the rise in the use of the internet, has contributed to a shift in priorities for the Canadian criminal justice system. The internet makes it easy to possess digital material, rather than physical materials relevant pre-*Butler* (1992) cases. In *Butler* (1992) Detective Noreen Waters, from the Vancouver Police Department, testified that the internet has resulted in an "explosion of the availability of child pornography" (para.11). This concern is echoed in reviews of pornography research that express concerns about the increased availability of pornography (Seto et al., 2001). Moreover, the internet has created an anonymous space for people to access pornography privately, or more problematically, via the dark web[5] (Horsman, 2017; Ray et al., 2014; Wolak et al., 2014). In *R. v. D.G.F*. (2010),

[5] The dark web, or the deep net, is internet content that is not accessible through your typical search engines (e.g. Google). Sophisticated users access content through the dark web via software such as the Onion Router (O'Brien, 2004). Through the dark web, illegal content, including child pornography, can be accessed (Horsman, 2017).

Justice Feldman, speaking for the majority, emphasized that the offences of possession and distribution of child pornography "appear to be increasing and expanding as technology becomes more sophisticated, encouraging the production of child pornography and greatly facilitating its distribution" (para. 22).

Theoretical Perspectives on Pornography

A variety of theories explain how pornography affects individuals; many of these explanations are found in the court cases discussed above. Linz and Malamuth (1993) summarize three explanations: conservative-moralist approach, liberal, and (radical) feminist. In the conservative-moralist approach, Linz and Malamuth argue that proponents of this perspective support the censorship of pornography because it has the potential to cause harm to the consumer in the form of desensitization. Supporters of the liberal approach are anti-censorship and see pornography as "harmless fantasy" (Linz & Malamuth, 1993 p.5). Feminists adapted this perspective: liberal, radical, and sex-positive are all varieties of feminist perspectives. Radical feminists, like MacKinnon (1993) and Dworkin (1995) represent the extreme, anti-pornography position within feminist literature. For these feminists, pornography is an extension of the patriarchal culture in which society exists, and pornography is used as form of sexual violence against women and children, to subjugate and control women. From their perspective, all forms of pornography are harmful, as pornography constructs women as sexual objects, and male consumers, when they consume pornography, associate the depictions in pornography with pleasure. Dworkin (1993) argues that, in pornography, women experience violence, degradation, and humiliation; when men consume this material, it reinforces the idea that women experience sexual pleasure when experiencing violence or humiliation. Dworkin and MacKinnon's perspectives are consistent with a conservative moralist approach in that they advocate for the censorship of pornographic material. Gail Dines (2010) offers a recent example of the radical feminist perspective of pornography. Dines asserts that the internet has become the main source for male pornography consumption. Dines expresses particular concern over the proliferation of what she defines as gonzo pornography: "hard-core, body-punishing sex in which women are demeaned and debased" (p. xi). Like MacKinnon and Dworkin, Dines argues that the consumption of gonzo pornography creates a culture of men who normalize sexual violence against women. Farley (2006), in their research on sex trafficking, would also

represent a radical feminist perspective of pornography, noting that women may be trafficked to be exploited in pornography.

Alternatively, liberal feminists offer a different perspective. Liberal feminists emphasize that women are active participants in their sexuality, thereby having the ability to choose to perform in pornography, or consume it (Rubin, 1993; Pitcher, 2006; Taormino, 2013). Consistent with the liberal perspective identified above by Linz and Malamuth (1993), liberal feminists believe that women should "be free to choose" including decisions to consume, and or participate in pornography (McElroy, 1995, chapter 6, para. 1). Liberal feminists counter arguments by radical feminists that not all pornography is harmful, positing that erotica, and feminist/female centered pornography are not harmful to women. Rather, these forms of pornography are created with women's sexuality in mind, often with female, and feminist, producers and/or directors involved with the process (Taormino, 2013).

Lacombe (1994) offers a fourth perspective from the viewpoint of sex-trade workers and sex-positive feminists, who argue that women can have the choice to participate in and consume pornography. Smith and Attwood (2014) dissect the different frameworks of the debates on pornography, noting that they appear to be framed "as a good or bad thing, as liberating or empowering, or as dangerous or oppressive (p. 11). This framework of pornography as either good or bad, suggests for Smith and Attwood that there is normal (e.g. good) sex. They identify this definition as problematic because it is framed from a heteronormative perspective, with bad sex being sexual acts that exist outside of that norm (such as BDSM, sex toys, trans).

As a self-described feminist, I struggled to align myself within these theoretical perspectives. I acknowledge the arguments put forward by radical feminists that violent pornography has the potential to harm women and children. More importantly, I believe that when children and youth are exposed to pornography, especially violent and/or degrading pornography, it has the potential to change their attitudes and perceptions towards women in a negative manner. However, I struggle with the idea that all forms of pornography are harmful. As identified by Taormino (2013) there has been a shift in the last 30 years which has embraced the notion that women can choose to embrace their sexuality, and choose to consume, or participate in pornography. However, I believe that this idea of a choice is intertwined with power and privilege. As a Caucasian, able-

bodied, heterosexual women, I have a considerable amount of power relative to other women; to say I have the ability to truly make those choices identified by liberal feminists would be fair. However, I do think that all women have equitable access to opportunities, and the idea of choice for women is often an illusion of choice as there is no other option available to them. As such, in this dissertation I draw on both a radical and liberal feminist lens for analysis.

Anti-porn feminists, such as MacKinnon and Dworkin, have faced a barrage of criticism, from academics and feminists alike. Shrage (2005) takes problem with many of MacKinnon's arguments, but of note is the idea that there exist two opposite ends of the spectrums, we either dehumanize women through desexualisation, or we objectify through sexualization – she asks is there not a middle ground that exists whereby women can embrace their own sexuality? Shrage suggests that simply being desired by another person does not mean that they are being objectified or dehumanized. For Shrage, "objectification occurs when one persists in disregarding key aspects of persons for the wrong purposes" (p. 55). She contends that there can be such a thing as healthy, consensual sex and desire, where "sexual desire aims at more of one's partner than her sexed body; it aims at producing emotional or mental states through contact with her sexed body" (p.56). Examples of this include solitary sexual activities, such as masturbation.

Shrage (2005) concludes that the relationship between the person who consumes pornography and the pornography actor should be likened to a market relationship, not unlike that found in sex work. Shrage contends that individuals have the ability to recognize that the actor is providing them with a service, as an object of sexual desire, however, at the same time respecting the actor and realizing that what they are watching is fantasy. While criticism from MacKinnon (1997) suggests that all forms of pornography is violent, Shrage (2005) argues that this represents a distinct category within pornography. If one were to examine the more specific sub-type of BDSM pornography, which contains simulated violence, there are both men and women who act as submissives and/or dominants, and strict rules are in place to keep individuals safe in these types of scenarios. While there may be individuals who violate those rules, Shrage argues they represent a minority of the consumers/participants and most individuals recognize that the scenarios depicted in pornography are fantasy, not fact.

Shrage concludes that rather than focusing on simulated violence, society should be more concerned about real acts of violence against women.

The pro-pornography argument put forward by feminists, and sex trade workers, such as Lacombe (1994), is found in an interview with self-proclaimed feminist erotic filmmaker Erika Lust. In Williamson's (2016) interview, Lust agrees with feminists such as MacKinnon (1997) and Dines (2010) that mainstream pornography whereby women are objectified, is created by men for men, and there is an emphasis on the depictions of violence. However, where she differs from radical feminists is that, just because there is problematic porn, does not mean that all porn is bad. For her, she believes, and creates, ethical feminist pornography that is focused on consent. In her films, men and women are treated as equals, with the capacity to consent, and discuss in detail the process of obtaining consent. These depictions of violence within a BDSM portrayal occur in the context of consent, and a loving relationship or sexual encounter. She argues that "we have to have films that also show sex as a healthy, positive thing that people do together, not as something you do to someone" (Williamson, 2016, para., 30). She believes that pornography can be a healthy form of sexual health education for youth, when the focus is on consent, real depictions of real people, and diverse voices. For individuals in the LGBTQ2 community, offering real depictions of sex that includes diversity can be reassuring to members of this community and helps to normalize their sexuality (McKee, 2005). The concept of ethical pornography is also discussed by Vasquez (2012) in her interview with queer pornographers. For these directors, like Lust, the emphasis is on portraying real, consensual, safe sex, that feature diversity of body, races, and sexuality. Pornography becomes an economic means to make a living, like sex work, where women choose to participate (Dewey, 2018; Lacombe, 1994; Vasquez, 2012). Other female pornography directors, such as Ms. Naughty, and feminist blogger Lady Cheeky, discuss how there is now a market for feminist pornography that is centered on consent, body/sex positive, and showcasing bodies of women of all ages/types (Ryan, 2017).

The above theoretical perspectives inform the following discussions and academic research into the effects that pornography, combined with the rise of the internet, has upon society. The research has shifted from focusing on the general harms that pornography may cause, to focusing more specifically on the harms of child

pornography, or how children and youth are affected when they consume, or are depicted in, pornography.

The Internet

The internet has been a gamechanger in how offenders engage in criminal activity and has presented challenges to the criminal justice system in responding to cybercrime. The internet has changed the ways in which pornography is disseminated and accessed by the general, and deviant, population. The internet has made crimes of child pornography easier to both possess and distribute, thereby resulting in a growth of child pornography – even though it existed before (Allen, 2017; Holt, 2018; Horsman, 2017; Kloess et al., 2019; Simpson, 2009). Allen (2017) documents how "the Internet has had a considerable impact on the nature of child pornography, particularly on the volume and extent of online distribution and access to images" (p. 9; Horsman, 2017). Technology allowed for the creation of "cyber-dependent (offences which can only be committed using technology) and cyber-enabled (offences exacerbated by technology)" (Horsman, 201,7p. 449). When applied to child pornography and obscenity, both types of offences are apparent. For example, accessing child pornography as a cyber-dependent offence is only facilitated through the use of the Internet, whereas distributing pornography, historically done through the mail, can now be distributed online as a cyber-enable offence. Carroll et al. (2008) outlines the timeline for the technological advances that occurred that have changed the way people access pornography, transitioning from personal computers in the 1980s, to pay-per-view (PPV) movies in the early 1990s, followed by the accessibility to the internet in households. In addition, technological advances, such as scanners or web cameras, have also made it easier for child pornography to be created, distributed, and shared online (Kloess et al., 2019; Steinberg, 2019). It is the rise of the internet that has led to what Cooper et al. referred to as a "sexual revolution" (p. 130), "facilitated by its accessibility, affordability, and anonymity" (Bridges, Sun, Ezzell, & Johnson, 2016, p. 1; Kloess et al., 2019; Shor, 2019; Wolak et al., 2014). Citing Cooper and colleagues (2000), Carroll et al. (2008) notes that:

> [T]hese technological advances have created a 'triple-A engine' that fuels an increased tread of pornography consumption, referring to the increased accessibility (millions of pornography websites are available 24 hours a day, 7 days a week), affordability (competition on the Internet keeps prices low, and there are a host of ways to get free pornography), and anonymity

> of sexually explicit materials (in the privacy of one's own home, people perceive their accessing of pornography to be anonymous)." (p.7)

As will be outlined below, this triple A engine has contributed to the increased access to both adult, and child pornographic material. The ability to individuals to access at home, for free, pornographic, and perhaps illegal, content at the click of the button, has created challenges for the criminal justice system.

Grubbs et al. (2017) discuss how pornography use represents 13% of online usage, suggesting that there are people who use the internet for pornography with regularity. Supporting this statistic, Carroll et al. (2008) outlined that pornography represented 25% of searches online. Weaver et al. (2011), citing results from the General Social Survey in the USA, reported that 24.7% of American use sexually explicit media (SEM)– pornography – with men reporting higher usage than woman. In Weaver et al.'s survey, they found that 36.7% of 559 adult participants used pornography. Harkness, Mullan, and Blaszczynski (2015) note that in 2006, in the U.S.A., 13.33 billion dollars was reported for pornography revenue; Carroll et al. (2008) reported a profit of 100 billion dollars worldwide in 2008. Of concern for youth, is that this increased availability may have resulted in increased amounts of youth accessing pornography (Peter & Valkenburg, 2011). One study by Wolak, Mitchell, and Finkelhor (2007) found pornography use increased with age, with first use starting in adolescence. Wolak et al. also pointed out gender differences in youth, with between 2-8% of 10-17 year old girls accessing pornography in the last year, versus 11% of 12-13 year old boys, and 38% of 16-17 year old boys.

Research consistently finds that men use pornography more than women, which might explain why pornography tends to cater towards "masculine notions of sex" (Ashton et al., 2018; Bridges et al., 2016; Cooper et al., 2004; Peter & Valkenburg, 2011, p. 1016). Tylka (2015) attributes the increased use of pornography amongst men to better access to the internet via at home computers and smart phones, and availability of free pornography online (Ashton et al., 2018; Cooper et al., 2004). For example, Bridges et al. (2016) found that men used pornography a few times a month on average, compared to women who use pornography once per year (See also Willoughby et al., 2016). Gender differences were also found in those who have never used pornography; just over 12 percent of men reported never using pornography, compared to 55% of women (Bridges, et al., 2016). In Brand et al. (2011), participants reported first online

sexual activity at 16 years old, and currently reported an average of two days per week for cybersex, with an average of approximately 36 minutes per day. Willoughby et al. (2016) in their assessment of 1755 couples, found that 35% of heterosexual couples recounted equal pornography use. A recent survey from the popular pornography website PornHub, found that, in 2016 women accounted for 26% of users of their website (Ryan, 2017). In 2017, PornHub had 81 million visitors to the site, on average, per day, with Canadians spending on average approximately ten minutes per visit (Skorska, Hodson & Hoffarth, 2018). In their study, Skorska et al. (2018) found that all participants had viewed pornography at some point in their lives and had an average first viewing age of 13 years old. Kühn and Jürgen's (2014) cited research that 66% of men and 41% of women regularly consume pornography each month.

The internet has continued to facilitate technological advances not only in how pornography is accessed, but in how pornography is created as well. McGlynn, Rackley and Houghton (2017) provided a continuum of image-based sexual abuse which has been facilitated through the internet and technology. For example, upskirting occurs when men, take pictures of women, typically under their skirts – thus the term upskirting as a means to secure images of women's genitalia (McGlynn et al., 2017). Another example is that of sexualized photoshopping which allows individuals to photoshop images, for example, they may take a pornographic image and put a picture of another women over top of the image – thus creating the illusion that the person depicted is engaging in acts of pornography. Through the computer, individuals can also create pornographic "pseudo photographs," or images which do not feature a real person (Taylor & Quayle, 2001, p. 104). Jesselyn Cook (2019), writing for the *HuffPost,* discussed the new trend of deepfake pornographic videos. Deepfake videos involve creating "a doctored video created with artificial-intelligence software that can make someone appear to do or say anything" (para. 4). Algorithms are used to photoshop individuals into pornographic videos, creating a DIY pornographic video for unsuspecting people. Cook (2019) identifies how these types of videos create problems for women, as there are now websites that cater to individuals to create pornography. For example, an individual can send in a picture of their love interest and have that image photoshopped into pornography; McGlynn et al. (2017) cite one example in the US where 12% of non-consensual pornography featured photoshopped images. This type of imagery has been identified in academic research as a "growing problem" (Nolan, 2017, p. 8), particularly in

intimate relationships (Lee & Anderson, 2016). These images are often shared onto women's personal social media, emails, and with family members. Cook points out that with technical advances, even amateurs can create deepfake videos. Franks, a law professor, identified that:

> "Women can tell men, 'I don't want to date you, I don't want to know you, I don't want to take my clothes off for you,' but now men can say, 'Oh yeah? I'm going to force you to, and if I can't do it physically, I will do it virtually,'" said Franks. "There's nothing you can really do to protect yourself except not exist online." (Cooks, 2019, para. 21)

Pornography is no longer about the objectification of actors. Women now fear having their intimate image posted without their consent, but now with technological advances, women need to fear even being online. The focus on the effect of pornography is therefore not limited to willing actors who participate in the creation of pornography, but real women whose images are illegally obtained and/or photoshopped and distributed without their consent (Powell & Henry, 2018; Steinberg, 2019). For example, in the U.S. "one in ten women under the age of thirty have had a sexualized image either threatened to be posted or actually posted online" (Steinberg, 2019, p. 932-933). However, Powell and Henry (2018) point out that child related offences are often prioritized over "technology-facilitated sexual violence" against women (p. 291).

Sinclair, Duval, and Ste- Marie (2019) identified how the internet contributed to the sexual exploitation of children. They argue that the notion of stranger danger has been reframed with the formation of technological advances that have changed the way offenders sexually abuse children. In particular, Sinclair et al. draw attention to the changes the internet has made to the creation of online relationships, and the need to educate youth no longer on the notion of "stranger danger," but on the level of risk presented by friends and acquaintances. This perception of anonymity and privacy, combined with peer pressure to post online, and have an online presence, increases the risk for children and youth, with the internet becoming a "virtual hunting ground for child sex offenders" (Sinclair et al., 2019, p. 156-157). This factor is compounded as offenders are often "technologically savvy, know where and how to access potential victims, and have insight in youth's behaviour" (Sinclair et al., 2019, p. 160). Their technological abilities include encrypting storage devices to ensure no one can access them (Office of the Federal Ombudsman for Victims of Crime, 2009). Unless an offender voluntarily provides their passwords, which is unlikely given the prison sentence associated with

possession of child pornography, it is up to the police to keep up with technological advances to be able to break encryptions (Office of the Federal Ombudsman for Victims of Crime, 2009).

With the rise of technology, there has been a rise in computer savvy individuals – including what Horsman (2017) sees as smarter criminals who have the ability to abuse technology. Horsman describes how cybercrimes are "some of the easiest illicit acts to commit" (2017, p. 453). Horsman (2017) points out that "The Internet now provides the main platform for a number of offences, not least the acquisition and distribution of images depicting child sexual abuse" (p. 449). Peer-to-peer (P2P) networks have emerged as online tool for offenders to share illegal content, including child pornography (Hirschtritt, Tucker, & Binder, 2019). Through P2P networks, offenders download software and search for child pornography, or other illegal content, using special keywords. For example, Kusz and Bouchard (2019) describes girl keywords nimphets/nymphets, Lolita/lola/lolli/lolly, vagina, and pussy. Via P2P networks, such as the Gnutella network, offenders download files from their peers, and share files, not unlike the more common search engines like Limewire. Wolak et al. (2014) outline the use of RoundUp technology to detect illegal content on P2P networks. Once the content is detected, Wolak et al. (2014) point out that "it requires significant resources to make a criminal case against a suspect when the case begins with only an IP address observed trafficking in CP" (p. 349). Wolak et al. outline the volume of content on the Gnutella network in one day: "Including duplicates, on an average day, RoundUp observed 122,687 known CP files shared worldwide on the Gnutella P2P network" (Wolak et al., 2014, p. 351).

In one example of a P2P network, 244,920 addresses were found to have shared images of child pornography (Hirschtritt et al., 2019). In another example, according to data from the Internet Watch Foundation, 78, 589 web addresses contained child pornography in 2017; Of those images, "57 percent of the images depicted youth 10 years old and younger" (Hirschtritt et al., 2019, p. 155). Bissias et al. (2015) estimate that 1.7 million IP addresses across the world in December 2014 shared *known* images of child sexual exploitation. Horsman describes the volumes of these crimes as "beyond current quantification methods" (p.449). More importantly, is the inability for the criminal justice system to effectively cope with the influx of cases. For example, Horsman cites

data from the Internet Watch Foundation that 1.5 million people have viewed illegal content online; however, there have only been 40,000 reports.

Cybercrime has presented particular challenges for the criminal justice system. For example, Horsman (2017) discussed the CSI effect and how it applies to online criminals who know how they can be tracked online and utilize technology to cover their trail. Compared to more traditional forms of evidence, such as DNA, it is relatively easy to destroy digital evidence. Digital crimes are harder to detect, and "lack the tangibility of more traditional offences" (Horsman, 2017, p. 452). For example, when compared to a murder, there is tangible evidence in the form of a body, a crime scene, or eyewitness reports to inform the criminal justice system a crime has taken place (Horsman, 2017). Compared to digital crimes, they can go undetected for periods of time, making it challenging, if not impossible, to detect an offender. For example, accessing or possessing child pornography in their own home, there are often no eyewitness to report the crime. Identifying the location and identity of both the offender and the victim are challenging (Holt, 2018; Jones, 2007). Jones (2007) describes the difference in scale with cybercrimes. For example, there are challenges for the police, who traditionally respond to crimes with one offender and one victim whereas with cybercrime, there are often multiple victims across the world (Jones, 2007). International boundaries are often crossed with digital crime, making it challenging to police across jurisdictions (Holt; 2018; Horsman, 2017; Koziarski & Lee, 2020; Marcum et al., 2010; Powell & Henry, 2018). The challenges often lie in the lack of agreements with other countries, as well as variations in definitions of child pornography and child exploitation (Holt, 2018).

While Horsman (2017) describes how offenders may fall prey to a sting, the sheer volume of illegal activity allows them to hide "in plain sight" (p. 449). In fact, Hirschtritt et al. (2019) suggest that the current statistics on child pornography and exploitation are low "Because many people who view, distribute, or even produce online sexual exploitation material are never arrested, the current literature likely underestimates the extent of online sexual exploitation in the United States" (p. 163). Through the sheer volume of material which exists, the criminal justice system lacks the resources to respond to all cybercrime. Bissias et al. (2015) points out that there are limited resources for the criminal justice system to respond to child pornography (Dodge & Dale, 2018; Holt, 2018). As such, Horsman (2017) points out that the criminal justice system often triages resources to those crimes which are deemed high risk, such as

child pornography and child sexual exploitation (Allen, 2017; Holt, 2018; Koziarski & Lee, 2020; Wolak et al., 2014).

Horsman (2017) outlines the challenges in responding to digital crime, advocating for "significant investment in terms of research and development in order to cultivate new investigative procedures", which he describes as "unsustainable" (p. 452). Açar (2017), on the other hand, argues for "more effective global policies" in combatting child sexual exploitation (p. 259). Açar (2017) identifies the importance of different organizations in fighting child sexual exploitation: government organizations, NGOs, criminal justice system, and the private sector. In order for these organizations to work effectively there needs to be advanced technology and educated criminal justice system professionals to use that technology (Açar, 2017; Dodge & Dale, 2018; Koziarski & Lee, 2020; Marcum, Higgins, Freiburger, & Ricketts, 2010; Powell & Henry, 2018; Wolak et al., 2014). Koziarski and Lee (2020) suggest that rather than training criminal justice system professionals on technology, organizations could recruit "highly trained civilians to address more complex forms of cybercrime" (p. 205). Koziarski and Lee (2020) suggest a "triangulation" between "researchers, police practitioners, and cybersecurity experts" as an effective means to respond to cybercrime (p. 206). Utilizing this approach will help police officers to best target "time, effort, and resources to improve their performance and legitimacy as effective responders to cybercrime" (p. 206)

Despite recent legislative changes across the world to combat child sexual exploitation and child pornography, Açar (2017) acknowledges that variations exist between countries, challenging the ability of the criminal justice system to respond effectively. Açar advocates for "deeper legal harmonization of secondary legislation between countries for a more concerted global action" against child sexual exploitation and child pornography (p. 260). Açar (2017) advocates for public awareness and encouraging policy makers to respond to these crimes. For example, NGOs can play a role in raising the public's awareness about child sexual exploitation. Private sectors, such as financial institutions or ISPs, can help to bring child sexual exploitation to the attention of criminal justice system (Açar, 2017). Holt (2018) describes the use of private industries in responding the child pornography and child exploitation. For example, in the US, the Financial Coalition against Child Pornography was formed in 2016, a combination of financial institutions and ISPs. This agency provides information to the

criminal justice system on the financial side of child pornography and child exploitation – such as identifying when cryptocurrencies are used pay for illegal content (Holt, 2018). This agency can also block the payment for illegal content (Holt, 2018). Koziarski and Lee (2020) argue that public awareness can increase knowledge, awareness, and risk management and thereby "decreased need for police intervention" (p. 205). ISPs also have a proactive role in blocking access to illegal content, as well as the creation of technology to identify images of child exploitation and remove them (Holt, 2018). However, some research has indicated that ISPs are often hesitant to provide assistance to the criminal justice system (Powell & Henry, 2018). Without the assistance of ISPs, this creates legal barriers, as well as time and cost restraints, ultimately creating additional delays in investigating and responding to child pornography.

The challenges with digital crime are that it advances so rapidly, with new updates on a near daily basis, making it almost next to impossible for the criminal justice system to keep up (Bissias et al., 2015; Dodge & Dale, 2018; Holt, 2018; Horsman, 2017; Wolak, Liberatore & Levine, 2014). These types of cases are also time consuming (Dodge & Dale, 2018). Açar (2017) recognizes that the criminal justice system, in particular the police, responses are outdated (e.g. sting operations). Horsman describes digital forensics as a "reactive state where it is impossible to match pace with the rate at which new devices enter the market for consumers to potentially abuse" (2017, p. 452). Açar (2017) suggests that it may be impossible to contain child pornography because of the volume of material that exists.

Some researchers (Bissias et al., 2015; Dodge & Dale, 2018; Wolak et al., 2014) advocate for a more proactive manner to respond to child pornography, as the current reactive approach, such as shutting down websites, have been proven to be ineffective (Bissias et al., 2015; Jones, 2007). One proactive means of responding to child exploitation material identified by Bissias et al. (2015) is the use of computer software to track activity on P2P networks. These proactive responses, according to Dodge and Dale (2017) needs to be "sex positive and refrain from shaming or blaming victims" (p. 652). Wolak et al. (2014) argue for the use of technology like RoundUp to prioritize high traffic contributors to eliminate child pornography files. There needs to be an investment in technology to track illegal content, like RoundUp, as well as collaboration with computer scientists to create such technology. Of importance for any intervention strategy is the need for academics to evaluate whether these strategies are successful,

and to continue utilizing the strategies that have been demonstrated through evidence-based research as the most effective (Holt, 2018; Koziarski & Lee, 2020; Marcum et al., 2010; Wolak et al., 2014).

Effects of Obscenity

In the following section, I outline the research into the effect of obscenity. Initially, researchers focused on the escalation of harm theory of pornography, namely that pornography increases the changes of individuals engaging in acts of violence towards women. The research into the effect of obscenity has broadened to consider other forms of harm, such as effect on body image, brain function, negative affect, high-risk sexual behaviours, and relationships. In addition, research now considers the positive effects of consuming pornography on society.

Violence Against Women

Historically, early studies of the effects of pornography focused on pornography as a contributing, or casual, factor of violence against women. One Canadian researcher, Malamuth, has focused his career on researching the effects of pornography, and has testified in many Canadian court cases as an expert witness (*Little Sisters Book and Art Emporium v. Canada*,1996; *R. v. Butler*,1989; *R. v. Smith*, 2012). Malamuth's research primarily used an experimental approach, to recruit college students, and expose them to pornography and then assess their responses. Overall, his research demonstrated inconsistent results regarding pornography effect on violence against women, rape myths, arousal, and sexual aggression (Check & Malamuth, 1986; Malamuth, 2007; Malamuth & Check, 1981;1983). Other research used surveys to assess the effect of pornography, again, the results are mixed (Garos, Beggan, Kluck & Easton, 2004; Kingston, Fedoroff, Firestone, Curry & Bradford, 2008; Malamuth, Addison & Koss, 2000, Sommers & Check, 1987; Vega & Malamuth, 2007). Unlike experimental studies, survey studies only show some form of relationship between the assessed variables (e.g. pornography and sexual violence against women) and they cannot account for a causal relationship between the variables. An additional variable may explain the relationship between pornography and violence that is not being assessed by the survey (Baer, Kohut & Fisher, 2015). For example, Williams et al. (2009) in their

assessment of undergraduate populations, found that psychopathy and neuroticism could moderate the relationship between pornography and violence. Visser, DeBow, Pozzebon, Bogaret, and Book's (2015) study offered additional support for psychopathy, while in Bogaert, Woodard and Hafer (1999) lower intelligence was the moderating factor. Later research by Malamuth et al. (2000) examined two moderating variables: sexual promiscuity (SP) and hostile masculinity (HM). Their research found that these two variables moderated the relationship between pornography and violence (Baer et al., 2015; Malamuth et al., 2000).

Building off earlier studies on pornography (Hald, Malamuth & Yuen, 2010; Linz & Malamuth, 1993; Malamuth & Check, 1981; Malamuth, Hald & Koss, 2011), Skorska, Hodson and Hoffarth (2018) assessed the effect that degrading pornography and erotica have upon objectification towards women. In their assessment of 82 heterosexual university male students, participants were asked to view degrading pornography taken from one of the three categories; popular pornographic DVD clips; erotica, taken from the Movie Network; or control, taken from CBC News (Skorska et al., 2018). Overall, participants reported higher levels of objectification, hostility, and discrimination in the fictious scenario after viewing the degrading pornography content for ten minutes. Interestingly, in the scenario women were also objectified after participants viewed erotica, but to a greater extent in the pornographic clip – consistent with the hypothesis of escalating harm (Linz & Malamuth, 1993). Individuals who watched degrading pornography were more likely to report hostile sexist attitudes towards the fictious woman in the scenario they were given. They conclude that the effect seen by consumers of erotic material may indicate support for the effect of pornography exposure more generally in terms of how men treat women (Skorska et al., 2018). An argument at odds with the claims by Lacombe (1994) and Lust (2016).

Glascock (2005) built on the idea put forth by early feminists (e.g. Brownmiller, 1975; Dworkin, 1981; MacKinnon, 1997) that pornographic material is created by men, for men, in order to facilitate men gaining power over women. Participants viewed three different types of clips: degrading pornography, erotica, and neutral images (e.g. National Geographic clips). Comparisons were made between male and female participants in how they viewed the male and female participants in the films, as well as self-reported levels of arousal. Men reported higher levels of arousal than women to the degrading images, however, they reported equal levels of arousal to the erotica.

Interestingly, male participants identified that the actors were being degraded, however, they still reported experiencing arousal. Glascock argued this is because male participants identified "more with the male character who is not perceived as degraded" (p.51). Both men and women perceived the characters in the erotica to be assertive, and not degraded, offering some support for early research on the objectification of women.

Offering a perspective consistent with sex positive feminists who acknowledge that women have agency to consume and participate in pornography, McKee asked users of pornography participants their opinions about pornography. McKee (2005) discusses the various ways in which research has focused on the effects of pornography, yet rarely does the voice of the consumer as an active subject enter into the debates on pornography. McKee's research is different from previous experimental research (Linz & Malamuth, 1993; Malamuth & Check, 1981) in that it is a qualitative perspective and focuses on the individual's perception of the effects of pornography. Consistent with results seen across pornography research, individuals could not agree whether pornography affected consumers, much less what type of effect (positive or negative even) occurred from consuming pornography. Participants reported they were not harmed through the consumption of pornography, but expressed concern pornography could negatively influence others, especially those with mental health issues or addictive personalities (McKee, 2005).

Obscenity and Youth

There has been a growing trend in academic research to assess more specifically how pornography may affect youth. The importance of expanding pornography studies outside of the typical college participant pool is necessary, as multiple studies identified adolescence as when individuals start using pornography (Brand et al., 2011; Skorska et al., 2018; Wolak et al., 2007).

Peter and Valkenburg (2011) have a lengthy academic career in studying pornography and assessing its effects on youth. As is true in Canada, they point out that sharing pornographic material with youth is illegal in most countries (see s.171.1 of the *Criminal Code*), however, that does not stop youth from accessing pornographic material themselves. Peter and Valkenburg explore whether pornography use functions as a forbidden fruit, based on the idea that raging hormones peak in adolescence, resulting in

increased sexual desire and curiosity. Peter and Valkenburg (2011) compared adults and adolescents in the Netherlands on pornography consumption, education, relationships status, attachment to friends, sensation seeking and depression, and sexual orientation. They found no significant differences on the above factors between youth and adults who viewed pictures or videos with visible genitalia. In fact, the majority of participants had not consumed that type of material: “7% of all adolescents and 9% of all adults reported that, in the 6 months before the survey, they had looked at pictures with clearly visible genitals on the internet at least once per week” (p.1019). This figure was compared to 75% of youth and 74% of adults who never consumed that material in the last six months.

However, significant differences emerged in consumers of sexually explicit pornography, with 8% of youth versus 6% of adults indicating they viewed such videos at least once a week. The only demographic to affect pornography use was gender; education and age did not affect use. Only 63% of adult males reported they never consumed such videos, compared with approximately 85-91% of women (Peter & Valkenburg, 2011). Those with sensation seeking personality characteristics were more likely to consume pornography (see also Voon et al., 2014; Wolak et al., 2007), and those individuals who identified as not exclusively heterosexual used more pornography. Peter and Valkenburg (2011) argue youth are not the primary consumers of pornography; however, their research does identify a category of youth that consume pornographic material regularly. However, they only measured consumption levels and did not assess the effect pornography consumption had upon youth.

While some youth may choose to visit pornographic websites, other youth are involuntarily exposed to pornography through spam email or misspelled google searches. Wolak et al. (2007) explore the prevalence of pornography consumption among a sample of youth aged 10-17 and examine differences between youth who sought out pornography versus those who experienced unwanted exposure. They question the effect of pornography upon youth, as concerns over the rise of pornography online has created an environment where youth, who are not emotionally prepared to viewed pornography, are involuntarily exposed to it (Wolak et al., 2007). In a telephone survey, 42% of youth “had been exposed to online pornography in the past year”, with two thirds reporting unwanted exposure, which was highest among teenagers aged 13-17 (Wolak et al., 2007, p. 251). There was also support for a vulnerability factor for youth

who are impulsive or experience depression, with those youth reporting higher rates of exposure. Wolak et al. (2007) suggested that consumption of pornographic material online may be indicative of a developmentally appropriate behaviour for teenage boys, but caution that there is a lack of research in the effect of pornography consumption on youth (Peter & Valkenburg, 2011; Shor, 2019).

Carroll et al. (2008) questioned how technological advances specifically affected the sexuality, relationships, and risk-taking behaviours in the population of emerging adults, aged 18-26 years old. Carroll et al. assessed the levels of pornography use and acceptance among emerging adults, and then asked how these rates of use and acceptance related to sexuality, substance use, and family formation. Participants were asked to complete an online survey asking them about their frequency of use of pornography (never, monthly, weekly, daily) and risky behaviours (premarital sex, casual sex, sex outside of marriage, number of sexual partners over lifetime and last 12 months). Consistent with previous studies (Cooper et al., 2000) gender differences were found in pornography use, with 87% of men and 31% of women reporting consumption of pornography (Carroll et al., 2008). What emerged as an interesting gender difference was that despite the majority of women not consuming pornography, almost half of them agreed it was acceptable to use pornography. Comparatively, 66.5% of men agreed it was acceptable to use pornography – a smaller percentage than consumers, suggesting that some consumers of pornography feel it is unacceptable to consume pornography. For men, one in five reported using pornography daily or multiple times per week, compared to 3.2% of women (Carroll et al., 2008). Pornography use patterns remained consistent over the age cohorts, contrary to the prediction that pornography use would decline with age, as in other substance use behaviours. Carroll et al. (2008) found that pornography use was significantly related to sexual values and behaviours. There was also “a small but significant connection between pornography use and number of lifetime sexual partners among emerging adult men and their acceptance of extramarital sexual behavior” (p.19). This result was also significant when combined with acceptance of pornography, whereby “the more that men accepted and use pornography, the more likely they were to be accepting of premarital and casual sexual behavior” (p. 19). For those men and women who used pornography daily, they were found to have higher numbers of lifetime sexual partners (compared to nonusers). The implication is that the

number of sexual partners may be related to higher risk behaviour in the form of exposure to STDs (Brand et al., 2011; Cooper et al., 2004).

The content of pornographic videos may have important implications in terms of how youth may be affected by the consumption of pornography. Shor (2019) examined pornographic videos available through the pornographic website PornHub. More specifically, they looked at whether the age of the actor was related to the content of the videos, in the form of aggressive and/or degrading behaviour. Shor hypothesized that teenaged actors would be more likely to experience aggressive behaviour than their older counterparts and would be more likely to react positively in the form of climaxing or finding the behaviour to be more pleasurable. For Shor, the concern is that pornography functions as informal sex education for youth, and when there are youth modelled in the pornography they consume, they may be more likely to mimic the behaviour found in pornography (see also McKee, 2005). In their review, Shor examined 172 videos found on PornHub, which featured 117 adults and 55 teenagers. Videos were coded for acts of aggression (e.g. biting, punching, kicking, BDSM, forceful penetration), these acts were also coded for consent, whether there was resistant pleasure, unhappiness, and verbal or nonverbal indications that the act was unwanted. Non-consensual aggression was not a common trend as it was only found in 15% of the videos; overall, aggression was found in 43% percent (Shor, 2019). However, teenage performers, versus adults, were more likely to be involved in risky acts (e.g. anal sex) or acts of degradation (e.g. ejaculated upon). Overall, female performers reacted positively to aggressive acts, but teenage participants were more likely to display pleasure and climax to these acts. Shor theorizes that when adolescents watch such material, aggressive and degrading acts become normalized as healthy sexual behaviour for teenagers. Legitimization of such behaviour could lead to youth forcing their sexual partners into engaging in these behaviours; or for individuals to feel pressured to engage in such behaviours (Shor, 2019). Shor concluded that content featuring teenage participants, particularly young women, normalizes a fantasy of sex with youth.

In a meta-analysis of sexual media use Coyne et al. (2019) offer a recent investigation into the effect sexual content has upon consumers. They build on the arguments above, that sexual content could contribute to violence against women, but also assess the effect sexual content has on sexual attitudes, sexual behaviours, and rape myth acceptance. Rather than focus solely on pornography, they recognized, like

McNair (2002) and MacRae (2003), that sexualized content was mainstream and available via TV, films, videos games or music, and specifically excluded pornography research. Overall, Coyne et al.'s (2019) research emphasized a relationship between consumption of sexual content and more permissive sexual attitudes, and acceptance of rape myths – arguments not unlike those found by radical feminists (Dines, 2010; Dworkin, 1981; MacKinnon, 1987;1997). There was evidence that the consumption of sexual content increased the likelihood of engaging in high-risk sexual behaviours, as will be outlined in the following section (Bridges et al., 2016; Herbenick et al., 2019). For Coyne et al. (2019) age and gender emerged as significant, moderating variables, with the effect size for youth being almost double that of adults, and men, being stronger than women.

Others Forms of Harm

Research into the 21st century on the effect of pornography has shifted from measuring a cause and effect relationship between the consumption of pornography and violence against women and/or children. The focus has expanded to include other forms of harm: including body image, brain function, negative affect, and high-risk sexual behaviours.

Research into pornography has also assessed the effect on men's body image and well-being. Tylka (2015), for example, builds on studies done by Morrison, Morrison, and Bradley (2007), and Morrison, Harriman, Morrison, Bearden, and Ellis (2004). This study suggests that pornography consumption negatively affects the viewer's body related self-esteem. By focusing on what Tylka defines as a mesomorphic ideal, the media, pornography included, has created an unrealistic expectation for men of what an ideal man should look like - strong, muscular, lean, and have no body fat. The media also outlines how they should act, "strong, controlled, respected, able to deal with anything that comes their way, dominant, successful, and predatory" (p. 98). Tylka suggests that this inability to reach unrealistic standards of the mesomorphic man creates negative emotional affect in men. Tylka also references a study by Brooks (1995) that described the centerfold syndrome. Brooks argued that when men internalize a stereotypical gender role, they can develop negative and dysfunctional sexual thoughts and behaviour. This process includes looking at images of women, objectification, trophism of women (as prizes to be won), and the association of

masculinity with power. Brooks (1995) and Tylka (2015) agree these stereotypes reflect a form of hegemonic masculinity.

In her study, Tylka (2015) looks at how pornography affects pressure to conform to the mesomorphic ideal, body appreciation, and emotional well-being. She focused on male undergraduate students, and problematically, only used one item to assess pornography use: “I view pornography” – rarely, sometimes, often, usually and always (the last item was combined with usually). Increased pornography use was positively associated with the conformation to the mesomorphic ideal. Higher pornography use was also correlated with decreased body appreciation, which included decreased self-care, and increased buy in to the mesomorphic ideal (Tylka, 2015). Increased buy in is negatively implicated in the formation of problematic eating and/or exercising behaviours. Lastly, pornography use was linked with increased romantic attachment avoidance and anxiety. This affect included, per Tylka’s participants, problems forming an emotional attachment with intimate partners –such as sex without intimacy or becoming fearful of their partner leaving. In future directions, Tylka (2015) argues pornography functions as a tool for sexual education, and thereby shapes, whether positively or negatively, interactions with future partners.

In Elder and Brooks (2012), schemas of heterosexual men are examined via qualitative interviews. In their interviews, participants were asked about their sexuality and relationships with women. All 21 participants indicated that they engaged in “checking out” (p.170) women’s bodies. Elder and Brooks argued checking out occurs in pornography as well; women’s bodies are objectified when they are voyeured upon in pornography, and in the real world. Pornography, as well, creates unrealistic expectations of sex and intimacy, as one participant put it “Why can’t it be like in porn, where everything’s just perfect?” (p.170). A strong majority (15/21) of participants indicated that they lacked confidence in their appearance, participants felt that their bodies did not measure up to celebrities or pornography actors, suggesting that pornography influences consumers in the form of negative body self-image (Elder & Brooks, 2012).

Continuing research into the psychological effect of pornography, Johnson, McCreary, and Mills (2007) examined the effects magazines images of muscular men and sexy women upon male undergraduate student’s feelings of self-esteem,

muscularity, and psychological well-being. Exposure to objectified female images resulted in increased self-reported levels of anxiety and hostility compared to exposure to male and neutral objectified images. Johnson et al. (2007) connected this result with early research on pornography (Donnerstein & Berkowitz, 1981; Malamuth & McIlwraith, 1998) linking exposure to explicit media to aggression behaviours towards women. Johnson et al. suggest that the imagery presented does not necessarily have to be pornographic to have that effect on men, it is enough that the images of women are sexy and objectified, as evident by the magazines used in this study.

Pornography can also influence an individual's brain function, with researchers utilizing brain scans to assess how pornography changes consumers' brains. Voon et al. (2014) discussed the effect of viewing sexually explicit materials in a set of subjects with compulsive sexual behaviour (CSB), comparing their results with healthy volunteers. They built off a study by Kühn and Jürgen (2014) which identified that prolonged pornography consumption decreased brain activity; which is implicated in desensitizing subjects to pornography. Those individuals who met the criteria for CSB had experienced negative effects in their life, including loss of a job and/or intimate relationships, suicidal ideation, and negative sexual affect (e.g. erectile dysfunction). Voon et al. identified the differences between the two groups, the CSB men first viewed online pornography at 13.89 years old, compared to healthy volunteers at 17.15 years old. Self-reported differences in viewing frequency existed with CSB participants reported viewing pornography 13.21 hours per week compared to the 1.75 hours per week in healthy males (Voon et al., 2014). Overall, this study argues that pornography differentially affects those with compulsive sexual behaviour in multiple ways. More importantly, Voon et al. point out that there is some support for pornography have a negative effect upon consumers, which is moderated by other variables, such as CSB.

Additional studies into the effect of pornography on the brain emphasize how viewing pornography, when combined with masturbation, functions as a form of social learning. Banca et al. (2016) in their study of individuals with CSB, argued that the internet offers a wealth of rewarding stimuli, including multiple forms of pornography. The authors label online pornography consumption as a problematic use of pornography. For individuals with CSB, there was a greater habituation to sexual stimuli. This social learning process occurs online, and habituates the individuals to pornography, as a form of operant conditioning, which was confirmed in brain activity functions (Banca et al.,

2016). The ultimate concern with habituation has been echoed by other authors (Eccles, Marshall & Barbaree, 1988; Linz & Malamuth, 1993; Seto et al., 2001) when individuals become habituated to certain forms of pornography, they may seek out alternative, more novel forms in order to achieve the same level of sensation or reward. Anecdotally, this theory of escalation was found in the cases identified above, such as *R. v. McFarlane* (2018), *R. v. Williams* (2018), and *R. v. Wysom* (2018).

In their analysis of pornography's effect upon mood, Laier and Brand (2017) focused on internet-pornography-viewing disorder (IPD). This particular disorder is the subject of controversy among researchers, with some suggesting the consumption of pornography may represent a form of sexually addictive behaviours, and others suggesting it may be a form of an internet addiction (Banca et al., 2016; McNair, 2014). Participants were surveyed on their symptoms of IPD, mood, stress, and internet pornography use, after they had viewed pornography. Prior to viewing pornography, participants reported low scores on IPD and stress, and a good mood. However, increased mood and decreased sexual arousal was reported when individuals consumed pornography (Laier & Brand, 2017). Increased stress was also associated with participants' motivation to use internet pornography; meaning the more stress an individual experienced, the more motivated they were to use internet pornography. Laier and Brand (2017) connected sexual arousal to a form of classical conditioning whereby "sexual arousal can be understood as an unconditioned stimulus which can become associated to external and internal former neutral cues leading to cue reactivity and resulting craving reactions" (p. 12). This link provides evidence that IPD is a form of addiction.

Pornography Use and Sexual Behaviours

The effect of pornography includes a consideration of how pornography use affects an individual's sexual behaviour including engagement in risky sexual behaviours, aggressive or violent sexual behaviours, sexual problems, or increased risk of contracting an STI. Harkness et al. (2015) identify that pornography can operate as a source of socialization, particularly for youth. As a form of socialization, pornography could inform consumer's views of condom use, casual sex, and their risk of contracting an STI. In their meta-analysis, Harkness et al. (2015) found no articles outlining the relationship between STI occurrence and pornography use. Results indicated a mixed

association for unsafe sex practices, including condom usage, and pornography consumption. Overall, many studies also found a relationship between number of sexual partners and pornography use; results regarding casual sex were mixed (Harkness et al., 2015).

Pornography and sexual behaviours were assessed in a survey of U.S. individuals aged 14 to 60 years old (Herbenick et al., 2019). A large portion of respondents, primarily women, reported feeling scared during sex: “12.5% of adolescent women and 3.8% of adolescent men indicated that this [feeling scared during sex] had happened to them, as did 23.9% of adult women and 10.3% of adult men” (p.4). Women describe experiencing choking, sexual assault, incest, coerced or unwanted sex, and painful intercourse. Anecdotal reports from men and women offered different perspectives of scary sex. For example, men experienced fear when having sex with women who were menstruating, the first time they had sex, and about a partner’s sexual history (Herbenick et al., 2019). Women, conversely, discussed aggression, sexual assaults, threats with weapons, choking, and pain. Herbenick et al. (2019) highlighted choking in particular (see also Khazan, 2019), noting that choking, along with anal sex, is often found in pornography (Bridges et al., 2016).

Online pornography consumption has also been researched with respect to how consumption, when combined with stress, is related to sexual problems. Cooper, Galbreath, and Becker (2004) looked at “online sexual activity” (OSA) among men, which they defined “as the use of the internet for any activity that involves sexuality (including the use of text, audio or graphic files), whether for purpose of recreation, entertainment, exploration, support, education, commerce, attaining sexual or romance partners” (p. 223). They agree with other scholars (Boies, 2002; Greenfield, 1999; Hare et al., 2014; Kohut & Fisher, 2013; Kohut, Baer & Watts, 2016; McKee, 2005; Morrison et al., 2004; Smith, 2003) that the internet can be used for positive discussions of sexuality, and sexual health education, but it can also be addictive, and contribute to problematic sexual behaviours. While most individuals who use the internet for online sexual activity do not experience online sexual problems, some individuals who spend a significant amount of time online could be described as sexually compulsive (Cooper et al., 2004). Cooper et al. argued that individuals who report high levels of use as a coping mechanism for stress experience adverse effects associated with internet use. In their study of 384 men, Cooper et al. (2004) classified respondents into groups based on their

reasons for going online (to take a break, a form of education, cope with stress, engage in sexual activities, socialize, meet people for sex, dating, buy sexual materials, and support) and then assessed the effect of online sexual activity upon relationships, experimentation with sexual behaviours, and masturbation. Like previous research, (Boies, 2002; Campbell & Kohut, 2017; Hare et al., 2014) they found that online sexual activity had a positive effect on relationships in real life. For example, some individuals used OSA as a form of education, and experienced increased sexual activity with a partner. A similar effect was noted for men who used OSA to secure a dating or sexual partner. These men also reported experimenting with sexual behaviours, but they did not define what they meant by these novel behaviours. For those men who reported using OSA as a form of stress relief, they documented more problematic effect of pornography, including complaints from their significant others and more masturbation. Cooper et al. concluded that when sexual compulsivity was left unchecked, there could be more problematic sexual activity.

Brand et al. (2011) examined sexual arousal to pornographic images online and how they may predict problematic psychological symptoms such as anxiety, depression and compulsivity. They agree with previous authors (Cooper et al., 2004) that individuals who report problems with OSA have described problems in their workplace, risk of contracting STDs, and the continuing question of whether pornography use leads to increased sexual aggression (against women). While the more traditional understanding of cyber-sex is online sex via the use of a web camera, Brand et al. expand the definition to include the search for real life sexual partners, use of pornography (reading, images, videos), and online chatting. They hypothesized that sexual arousal, psychological symptoms, the number of OSA, and time spent on OSA increased risk of cybersex addictions. Results found a significant positive relationship between participant's self-reported sexual arousal and psychological symptoms as a result of cybersex use. However, the time spent using OSA or engaging in cybersex was unrelated to psychological symptoms. Cooper et al. (2004) asked participants about their internet usage, and attitudes and behaviours related to internet usage and sexuality. On the variable compulsion, approximately one third of respondents indicated they would like to change or decrease their OSA, and 9.6% describing their OSA as "out of control" (p.137); however, they did not explain why participants felt this way. The authors also examined sexual consequences of OSA, including offline sexual activity, with

approximately five percent of participants reporting their “offline sexual activity decreased” (p.137), and 10% feeling addicted to OSA.

Based on the above research, the effect of OSA on individuals operates on a continuum. One side of the spectrum includes the recreational users, individuals who engage in OSA for casual, positive purposes, e.g. sexual education, for fun, masturbation, meet new partners or for a distraction (Cooper et al., 2004). Moving further right along the continuum, is the sexually compulsive group, who use OSA for sexual purposes, or who use pornography to relieve stress. As you move further along this continuum, the risk for problematic behaviour increases in the form of poor coping methods, depression, and other mental health concerns (Cooper et al., 2004). At the far end of the spectrum is the at-risk group, who reported problematic sexual behaviours, including online sexual problems, or online sexual compulsivity (Cooper et al., 2004). A pathway towards problematic sexual behaviours occurs when people use the internet for OSA as a coping mechanism for stress.

Taking a gendered perspective, Bridges et al. (2016) examine how pornographic scripts are reproduced in real-life relationships. They hypothesize that the gender dynamic of the male-aggressor, and female-submissive, found in many pornographic publications, would be replicated in real life sexual relationships. Utilizing Frith and Kitzinger’s (2001, p. 210) definition of sexual scripts as “culturally available messages that define what “counts as sex, how to recognize sexual situations, and what to do in a sexual encounter,” Bridges et al. (2016) theorize that individuals may selectively apply pornographic scripts based on their individual differences, such as gender. More importantly, factors often associated with pornography consumption, such as masturbation and attaining orgasm, may increase the likelihood that pornographic scripts are adopted. Crucially for this study is whether what Bridges et al. defines as “morally questionable and risky sexual behaviours” (p. 3), such as anal sex, spanking, normalization of sexual abuse of children, are adopted in these heightened states of sexual arousal, which are then stored in memory. Bridges et al. argues that when these scripts are stored in our memory and associated with rewards (such as reaching orgasm), they are more likely to be applied in real life.

In their study, Bridges et al. (2016) theorized that pornography typically depicts men as aggressors and women as submissive. For those individuals who described

higher use of pornography, they would report higher rates of engaging in acts found in pornography, such as anal sex, ass-to-mouth, ejaculation upon a woman's face, spanking, and choking. They also hypothesized that there would be gendered differences in the frequency of engagement in these sexual acts, with men reporting increased engagement in aggressive acts, and women reporting more engagement in submissive acts. To measure these variables, they asked whether participants tried the activity, either as the aggressor or the target, whether they liked it or not, and for those individuals who had not tried the act, asked if they would like to try it. The degrading or uncommon behaviours included, double penetration, anal sex, ass-to-mouth, oral sex with the woman kneeling and the man standing, men ejaculating upon a woman's face, and name-calling.

Consistent with their hypothesis, men were more likely than women to express interest in engaging in all the degrading/uncommon behaviours asked (Bridges et al., 2016). Interestingly, higher pornography use, consistent with the concerns expressed by the judges in *Butler* (1992), was associated with a greater desire to engage in all activities, including degrading activities. Men were significantly more likely than women to have tried the aggressor behaviours (e.g. spanking as opposed to being spanked), whereas women were more likely to report being the target of the behaviours (e.g. being spanked as opposed to spanking) (Bridges et al., 2016). With the exception of hair-pulling, light spanking, and tying up their partner, women rarely acted as the aggressor. Future research should focus on why individuals were engaged in these types of behaviours – Bridges et al. theorized that they may be doing so at the request of a partner who witnessed such behaviour in pornography.

Building off Bridges et al. (2016), Sun, Wright and Steffen (2017), apply sexual script theory and argue that women are more likely to have tried, or express interest in trying, submissive sexual behaviours found in pornography. They hypothesize that this influence is affected by the age at which women first consumed pornography, with younger reports of first consumption being associated with submissive behaviour. This theory was based on early exposure having "a lasting effect of the perceptions of sexual normativeness and desirability" and being "more accessibly in memory" (Sun et al., 2017, p. 3). Of 392 survey participants, only five women indicated they had never been exposed to be pornography; the majority of participants (88.4%) were exposed at 18 years of age or younger. The majority of participants identified an average pornography

use of once per month, a lower frequency than men (Ashton et al., 2018; Bridges et al., 2016; Cooper et al., 2004; Peter & Valkenburg, 2011). Results indicated that "women were more likely to express interest and engage in submissive behaviour than dominant behavior" (p.5). For engagement in submissive sexual activity, Sun et al. (2017) reported that more than two thirds of women had engaged in penis worship, facial ejaculation, and anal penetration, almost one third gagged, one quarter had been called names, and between 7-8 % had participated in a gang bang, Ass-to-mouth (ATM), or double penetration. The younger a woman was when she first consumed pornography, led to a stronger association between participating in submissive behaviour, as well as consuming pornography with a partner (Sun et al., 2017). However, it was pornography consumption itself, and not necessarily the age at which a woman first consumed it, that was associated with the acceptance of male dominance/female submission script behaviour. Sun et al.'s (2017) study offers support for the sexual script theory, that women learn submissive behaviours and scripts through the consumption of pornography, which is moderated by age.

While research into the effect pornography has upon direct physical harm to women, such as in the form of sexual aggression or antisocial attitudes (*R. v. Butler*, 1992), has been at best inconsistent, the above research points to a more holistic understanding of the effect of pornography. Research now questions whether pornography has the potential to harm individuals in the form of their mental health (depression, anxiety, self-esteem, body image), risky sexual behaviours (multiple partners, casual sex, sex without condoms), and aggressive or degrading sexual activities (ATM, choking, ejaculating upon a person's face). Throughout these studies, research suggests a gendered difference not only in the consumption of pornography, but in the adoption of the behaviours or attitudes depicted in pornography, exists. Thus, despite the differences in types of harm initially outlined in *Butler* (1992), which justified the obscenity provisions, the above academic research supports the concern that obscenity is harmful, and therefore continue to rationalize the enforcement of the provision.

The Positive Impact of Pornography

A harm-based perspective of pornography ignores research that finds that women voluntarily choose to consume pornography (Morrison et al., 2004; Smith, 2003)

or even participate in pornography (Lacombe, 1994), as such research has also explored whether pornography has a positive effect on consumers. In a unique study, Kohut and Fisher (2013) found that exposure to sexually explicit material featuring clitoral self-stimulation was found to increase this masturbatory behaviour in women; offering support for the educational use of pornography. Boies (2002), in his assessment of undergraduate students, found that more than half of them reported using the internet as a means of sexual education. Furthermore, they found a correlation between learning something new and increased improvement in their real-life relationships (Boies, 2002). Kohut, Baer, and Watts (2016) uncovered that men who consumed pornography were more likely to be supportive of gender equality. In an assessment of Canadian male and female undergraduate students, men who reported high levels of pornography consumption had higher self-esteem and lower sexual anxiety, and women reported a higher sexual self-esteem (Morrison et al., 2004).

Support for pornography's positive effect has also been examined from a sexual health perspective. Hare, Gahagan, Jackson, and Steebeek (2014) conducted semi-structured qualitative interviews with 12 young, heterosexual adults on the effect of pornography. Participants described the positive effect of pornography including increased: sexual knowledge, self-confidence, body image, open-mindedness towards other sexual orientations, sexual desires, and sexual ability (Hare et al., 2014). However, some participants reported negative outcomes with consuming pornography, including problems with consuming too much pornography (Hare et al., 2014). Unlike previous research which has suggested pornography negatively impacts relationships (Voon et al., 2016), participants found pornography to be helpful in increasing communication with their partners.

While little research has focused on the homosexual community, with many of them being primarily opinion based (Kendall, 1993; 2004), a few studies have assessed the effect of pornography on homosexual men. Duggan and McCreary (2004), for example, found that gay men had higher levels of consumption of pornography than heterosexual men. This high level of consumption supports the normative consumption of pornography in the gay community, as argued in *Little Sisters* (2000) (Morrison, Morrison & Bradley, 2007). In assessing differences in depression, masculinity, body image, eating/exercise habits, the only significant difference found was that gay men were more likely to have thinness eating attitudes (e.g. were on a diet) and were more

likely than heterosexual men to report anxiety over their physical body. In an expansion on Duggan and McCreary's (2004) study, Morrison et al. (2007) utilized an internet survey to assess men on masculinity, exposure to pornography, negative attitudes towards homosexuality, genital self-image, safer sex practices and sexual esteem. The only significant relationship found was between masculinity ideal and pornography consumption, consistent with Tylka's results in 2015. Morrison et al. (2007) concluded that pornography consumption was unrelated to genital satisfaction or low sex self-esteem and was related decreased concern about safe sex, therefore negating the anti-pornography feminist arguments made by Kendall (2004).

In a qualitative review of studies on pornography that focused on women's experiences, Ashton, McDonald, and Kirkman (2018) found that women across various studies reported conflicting feelings towards pornography. On one hand, women recounted feelings of empathy towards actors who chose, or were forced, to participate in pornography. However, many women also described feelings of sexual arousal, of using pornography for their personal pleasure on their own, or with a partner. Some women discussed the negative effect pornography had upon their self, including feelings of shame or inadequacy with their body. Adolescent women, for better or worse, reported using pornography as a form of sexual education (Ashton et al., 2018). Ashton et al. found that, unlike previous research by Willoughby et al. (2016), some women discussed the positive influence pornography had upon their relationship in the form of increased intimacy or the desire to try new sexual activities. However, Ashton et al.'s research points out pornography does feature violence, and many of the studies reviewed found that women did not support violence in pornography. Some studies discussed how the depiction of violence in pornography had a negative effect in women's lives in the form of sexual violence and/or forced sexual activity (Ashton et al., 2018).

The above research stands in contrast to arguments by feminists that all pornography is harmful. Participants report that pornography can have a positive influence on their sexual behaviour and relationships yet appear to recognize that there may also problematic pornography when violence is featured, or actors are coerced. Perhaps the above discussion represents one of the exceptions outlined in *Butler* (1992), namely that erotica, material which focused on healthy and consensual sexual behaviours, would not be considered to meet the definition for obscenity. This exception

was on the basis that erotica did not carry with it the level of risk of harm presented in violent, or degrading pornography, and could therefore be safely regulated.

Effects of Child Pornography

Research into the effects of child pornography consumption presents its own unique challenges. First, it is problematic to study the effects of child pornography, as it is unethical to show individuals child pornography and then assess the effects, the way previous researchers have done to measure the effects of adult pornography (Ly, Murphy & Fedoroff, 2016). An additional challenge is that viewing child pornography is a stigmatized behaviour, and individuals may be unlikely to report viewing it out of social desirability (Ray et al., 2014). Child pornography brings forth two harms that are typically not found with adult pornography, the use of children to produce child pornography and when children consume it (Casavant & Robertson, 2007; Jenkins, 2001). The Canadian courts have emphasized the importance society places on the criminal justice system to protect children from the harms of pornography. As per Justice Fish in *R. v. Morelli* (2010):

> To be sure, offences involving child pornography are particularly insidious. They breed a demand for images that exploit vulnerable children, both economically and morally. Understandably, offences of this sort evoke a strong emotional response. They generate widespread condemnation and intense feeling of disapprobation, if not revulsion. (para. 8)

Justice Finlayson, prior to the proliferation of pornography online, noted that pornography was now "so easily prepared and disseminated through relatively inexpensive means…it has emerged as a very real problem in our society" (*R. v. Jewell*, 1995, p. 277; cited in *R. v. J.S.,* 2018). Justice Finlayson clearly foreshadowed the effect technology would have upon the crime of child pornography.

The courts have responded in various ways to address child pornography. In Canada, for example, child pornography offences include the depiction of individuals who appear to be under the age of 18. This provision includes depictions of adults depicted as minors, fictional images, or cartoon images. Seto (2010), in a discussion of pedophilia diagnosis and the use of child pornography, emphasized the importance of assessing the effect of consuming child pornography that features imaginary children. For consumers of child pornography, regardless of whether the depictions are real or

fictitious, the content is the same and can elicit the same physiological arousal (Seto, 2010). As well, in as identified in *R. v. Sharpe* (2001), cartoon images can still be harmful, particularly when they feed the demand for child pornography. Also, with technological advances, it becomes difficult to tell when a publication is fictitious or real (Simpson, 2009). This evidence offers credence to the Canadian legislation prohibiting cartoons or anime images of sexual abuse of children.

On the other hand, Simpson (2009) questioned the application of the child pornography provisions to publications that do not feature real children, such as cartoons, or Japanese anime. He asked whether these types of publications are harmful, when there are not real children abused, and whether criminalizing these types of images represents a moral argument against child pornography, rather than a harm-based one. Simpson expressed concern over the criminal justice system's ability to regulate the fantasy of individuals in a digital age, while simultaneously balancing privacy, with the threat of harm to children in the form of sexual violence. As Simpson outlines, through criminalizing possession of cartoon images of child pornography, society's concern is protecting the person from moral corruption, as seen in *Hicklin* (1868).

Referencing the New South Wales Supreme Court decision in *McEwen v. Simmons* (2008), Simpson (2009) drew attention the court's distinction between child pornography which featured sexual abuse of children, and to cartoon images which involve no children being physically harmed. Justice Gregory in *U.S. v. Whorley* (2008) outlined how policing cartoons poses the risk of regulating sexual fantasies of individuals, and policing cartoon images were not responding to the concerns and risk of harm of actual living persons. For Simpson, he likened child pornography provisions which include animated child pornography to criminalizing the thoughts or fantasies of people, rather than punishing individuals for behaviour or harm they caused to children.

In the US, computer generated images of child pornography are not covered under child pornography legislation, as the link between consumption of said images and child sexual abuse was "too indirect" (Simpson, 2009, p. 262). Simpson (2009) connected the crime of policing cartoon images to the luring provisions and the use of police stings as a means to proactively response to child sexual exploitation crimes. For example, Simpson outlines:

> The concern is that in seeking to entrap those inclined to groom children online, we may also entrap individuals caught up in their own fantasy world and who would never actually engage in sexual activity with a child. The justification for such laws can therefore only be that the aim is to punish the thought, regardless of whether it will ever be acted upon. (2009, p. 265)

These proactive responses, Simpson argues, criminalize those individuals for their intent, as opposed to actual misconduct. Some of these individuals who are arrested for luring, Simpson suggests, may not have gone on to offend against children, as such the law is punishing them for their fantasies.

One of the biggest questions in child pornography research is what effect, if any, does consuming child pornography have upon offenders - namely in the form of whether it increases contact offending against children (Quayle & Taylor, 2002). Quayle and Taylor (2002) conducted interviews with child pornography offenders to assess the effect the internet had upon their offending. Notably, one of their themes focused on how offenders used child pornography images as a means of sexual arousal, and for sexual fantasy. For example, Quayle and Taylor described how for one offender, viewing the image of child pornography "reinforce[d] existing fantasies and was used to give permission to act on them" (p. 340). Furthermore, the offenders appeared to have their own moral code when it came to viewing images, which reinforced and normalized their sexual fantasy. Such codes included no children under 10, no BDSM, and the misconception that when children were smiling it indicated they were not viewing sexual abuse (Quayle & Taylor, 2002). However, these codes were not ubiquitous among all offenders.

For these 13 offenders, their images functioned as "collectibles" (p. 341). Offenders obtained pleasure from collecting pictures, fulfilling gaps in their collection, even if they were not sexually aroused by those images (Quayle & Taylor, 2002). It became akin to "kinda like trading baseballs cards" (p. 342) as one offender described it, which further normalized the behaviour when images of child sexual exploitation are reduced to trading like baseball cards or stamps. Offenders obtained additional pleasure not only from collecting images or videos in a series, but also cataloguing and organizing the images. Taylor and Quayle (2001) define this behaviour as a psychological process for offenders, which involves collecting all the images or videos in a series, as means of completing their collection (Taylor & Quale, 2001). When they fill a gap in their collection, it provides them with additional arousal or satisfaction. For example, they describe how

the size of collection, and how well it is organized, offers an indication of how "an individual has become absorbed within the adult sexual-interest-in-children community" (Quayle & Taylor, 2002, p. 106). In characterizing their collections, participants outlined a pattern of escalation in decreasing age or increasing explicitness of the images. For example, progressing from teenage websites, to younger and younger children, or progressing from child pornography to bestiality pornography, including full intercourse with animals (Quayle & Taylor, 2002). The Office of the Federal Ombudsman for Victims of Crime report *Every Image* (2009) agrees with Taylor and Quayle (2001; Quayle & Taylor, 2002), that there appears to be an obsession among collectors of child pornography, whereby individuals develop a need to obtain more images, and more graphic and violent images. Like Taylor and Quayle, the document likens this process to individuals who trade baseball cards or stamps, as a means to collect them all (The Office of the Federal Ombudsman for Victims of Crime, 2009). Quayle and Taylor (2002) notes that large collections of child pornography can symbolize a high status among offenders, as well as facilitate access into community groups. The sexualization of children is further normalized, when offenders have like-minded individuals to share and trade images (Quayle & Taylor, 2002; Wolak et al., 2014).

Some of the offenders spoke of how accessing child pornography was therapeutic as it helped to control or release their interests in children (Quayle & Taylor, 2002; see also Fisher et al., 2013; Garos, Beggan, Kluck & Easton, 2004; Seto & Eke, 2005). Quayle and Taylor (2002) concluded that their participants experienced increasing arousal through viewing child pornography, as well as a cathartic effect on offenders to reduce contact offending. As the authors pointed out, it was the internet that facilitated near instant access to this kind of material – most of which was freely obtained. In turn, this access has created offenders who may exhibit obsessive compulsive behaviour in the form of downloading multiple images or videos as a means to obtain a large collection and/or fill gaps in their collections (Quayle & Taylor, 2002). Considering the large amount of child pornography that exists online, Quayle and Taylor advocate for police having a psychological understanding of the motivation of offenders, rather than solely focusing on technological tools. Lastly, they acknowledge the delicate balance that must be achieved within the criminal justice system between freedom of speech, censorship, and decreasing risk of harm to children.

As part of the COPINE Project, Taylor and Quayle (2001) offered a descriptive continuum of the types of material that child pornography offenders collect. They divided collections of child pornography into three categories:

1. Indicative: material depicting clothed children, which suggests a sexual interest in children;
2. Indecent: material depicting naked children which suggests a sexual interest in children;
3. Obscene: material which depicts children in explicit sexual acts. (p. 98)

These three categories are further divided into ten levels, ranging from indicative, often legal content, to the more explicit, obscene, images of child sexual exploitation that meet the *Criminal Code* definition for child pornography. In their typology, levels 1-3 would typically not be illegal, and levels 6-10 would meet the criteria for child pornography, however the middle levels may or may not be illegal depending on the country, and what the image looks like. Since the creation of this continuum, it has since been updated to five levels: level 1 “erotic posing with no sexual activity,” level 2 “nonpenetrative sexual activity between children, or solo masturbation by a child,” level 3 “nonpenetrative sexual activity between adults and children”; level 4 “penetrative sexual activity involving a child or children or both children and adults”; and level 5 “sadism or penetration of, or by, an animal” (Kloess et al., 2019, p. 176). Taylor and Quayle (2001) emphasize that pedophiles’ collections often have a range of images from indicative, to sadistic or bestiality. Included in these collections are “pseudo photographs” (p.104) defined as:

> constructed photographs, of often very cleverly done with great technical sophistication, using digital reconstruction techniques to create an image that is not a photograph of a real person, or of real events. Thus, the head of a child might be placed on to the body of a woman, where the body features are manipulated to make it appear to be that of a child (breast reduced in size or eliminated, pubic hair eliminated, and so on). (p. 104)

The key defining factor in these constructed images is that the person in them does not exist. In both the UK and Canada, these types of images are criminalized (Kloess et al., 2019).

Steinberg (2019) examines the challenges in responding to morphed images. Steinberg defines morphed child pornography as involving actual children, “however, the full image often combines an “innocent” image of a child with a sexual or nude image of

an adult" (p. 911). In these examples, pedophiles, will take images of children from public social media accounts, and morph them into child pornography. Steinberg identified morphed images as a growing problem, noting on one website there were 45 million images which were stolen from social media.

The internet presents additional challenges for crimes of child sexual exploitation. Sinclair et al. (2019), identifies how "offenders who sexually abuse children may also record the abuse and distribute it online, contributing to an additional layer of victimization for the child" (p. 150). The connection between child sexual contact offending and distribution of child pornography remains clear - offenders film and distribute the real abuse of children (Wolak, Liberatore & Levine, 2014). This offending creates trauma and mental health disorders that can affect children over the course of their life (Bissias et al., 2015) Hirschtritt, Tucker, & Binder, 2019; Sinclair et al., 2019). The various ways in which children and youth can be affected by sexual abuse include feelings of betrayal, particularly when they know the offender, feelings of powerlessness stigmatization, and feeling ashamed, and traumatic sexualization (Powell & Henry, 2018; Sinclair et al., 2019; Steinberg, 2019). Angelides (2004) defines those feelings of shame and self-blame as forms of cognition distortion of the abuse. McCuish, Cale, and Corrado, (2017) identified that child sexual abuse is a risk factor for adolescent sexual offending. They also discussed other effects of sexual abuse including "early onset sexual behaviour" and the inability to develop healthy attachments to others (McCuish et al., 2017, p. 128). This trauma is compounded when the abuse is filmed, and subsequently creates a record of the abuse, as well as creates the added fear of being identified by consumers (Powell & Henry, 2018; Sinclair et al., 2019; Steinberg, 2019; Wolak et al., 2014).

The internet also functions as a tool for child sex offenders through online sexual grooming, a way in which offenders groom, or prepare a child for sexual abuse (Sinclair et al., 2019; Steinberg, 2019). Tactics such as normalizing sexual behaviours are used, including providing advice and questions, and framing their questions as a normal, adult process. Sinclair et al. (2019) suggest that pornographic images, including adult pornography and child pornography, can be used by offenders to lower inhibitions for victims, and normalize sexual contact between adults and children. In the Office of the Federal Ombudsman for Victims of Crime (2009), they agree that offenders can use child pornography images to groom or coerce children. Taylor and Quayle (2001) point

out that in the grooming process, offenders use pornography, both adult and child, to coerce children to pose for the camera – a risk factor also identified in *R. v. Sharpe* (2001) and by Steinberg (2019, see also Holt, 2018).

In assessing the harms of child pornography, Eke, Seto, and Williams (2011) argued that there are two key questions to be answered: whether individuals who are charged with a child pornography related offense have committed a sexual assault against a child or if they will sexually assault a child in the future. Building on a previous study (Seto & Eke, 2005), Eke et al. (2011) followed the offending pattern of child pornography offenders. The overall recidivism rate was 32%, however, only 34 offenders (6.3%) were charged with a contact sexual offense after their child pornography offense; sexual recidivism was 11.0%. It was those individuals who had a history of violent offenses who had the highest rate of recidivism.

The Child Pornography Offender Risk Tool (CPORT) was developed by Seto and Eke (2015) to assess the recidivism risk of child pornography offenders. They created this tool over concern that child pornography offenders often are at risk of sexually abusing children (see Seto & Eke, 2017). However, previous studies (Seto, Hanson, & Babchishin, 2011) have found that child pornography offenders have a low recidivism rate for a new sex-related charge over an average follow up time of three years. In Seto and Eke's study, in a five year follow up, only 4% of offenders had committed a sexual offense against a child and 12% a new child pornography offense. Based on the criteria of those who re-offended, Seto and Eke (2015) created the CPORT, a seven-item scale to predict recidivism for child pornography offenders, which included a consideration of child pornography consumption (see Seto, 2013).

Additional research on the effects of child pornography consumption was conducted by Ray, Kimoni, and Seto (2014). Of those who reported consuming child pornography (21.1% of their sample), they spent more time view pornography, with an average of 12.85 hours compared to 7.05 for non-child pornography consumers. Ray et al. found that child pornography users were six times as likely to indicate they would sexually abuse a child if they believed they could get away with it. The authors concluded that child pornography consumption acts as a risk factor for child sexual abuse but that it interacts with other variables to have the effect on behaviour, consistent with previous research (Seto et al., 2011). These links were also found in research by

Aslan, (2011) who described that viewing child pornography may result in imitation, whereby offenders copy what they see in pornography. Viewing child pornography normalizes the feelings of sexual attraction towards children, which can encourage a motivated offender to sexually abuse children (Aslan, 2011). However, Ly et al. (2016) defined “Internet only offenders” as a category of offenders who had been charged with child pornography offences with no contact with children. These categories of offenders were more likely than contact offenders to have a higher level of education, be a first-time offender, and admit to their offending. Hirschtritt, Tucker, and Binder (2019) agree with these categorizations, and add a third: mixed offenders who engage in contact and online offending. However, Hirschtritt et al. caution that the category of online offenders may be mixed offenders whose contact offenses have not been officially reported; often these offences are self-reported in subsequent research (Bissias et al., 2015) Steinberg, 2019). Upon review of the literature, Hirschtritt et al. found that online only offenders generally had low rates of recidivism, compared to mixed offenders who had a higher rate of recidivism (2019).

The challenges faced by the criminal justice system are outlined by Kloess, Woodhams, Whittle, Grant, and Hamilton-Giachritsis (2019), noting how the criminal justice system needs to identify victims, as well as ascertain the age of individual(s) depicted. Kloess et al. recognized that it is difficult for medical professionals to accurately ascertain the age of individuals in pornography. They had five law enforcement professionals code 300,000 indecent images of children. The five participants identified various challenges in identifying images of child sexual exploitation, such as when there was an inconsistency between the person’s facial features and the rest of their body (Kloess et al., 2019). This inconsistency was perhaps indicative of the morphed images described by Taylor and Quayle (2001), or it could be evidence that the offender was making the child look older (Kloess et al., 2019). For example, children could pose in an adult way, wear makeup, and/or dress provocatively (e.g. a push up bra or lingerie) as means to look older (Kloess et al., 2019). Conversely, it could also be an adult trying to look younger, as a means of infantilizing adult women (Kusz & Bouchard, 2019), through removal of pubic hair, or dressing them a certain way. In very young children, prior to puberty and the development of sexual or secondary sexual characteristics, it is easier to identify that they are in fact children, it is around adolescence that it becomes harder to ascertain the age of the person in the image

(Kloess et al., 2019). This challenge is further compounded by the fact that children develop sexually at different rates, which may also be affected by the ethic group the individual belongs too (Kloess et al., 2019). Additional factors participants considered included signs of distress or discomfort and environmental indicators (e.g. whether they were in a child's room or a hotel room). The authors concluded that given the challenges for law enforcement professionals in assessing age and level of indecency in images for adolescent victims, there is a chance they may be more likely to prioritize those images where it is clear the individual depicted is underage (Kloess et al., 2019). They advocate for the creation of technology, including software to be able to identify images of child sexual exploitation, both as a means of reducing human error, as well as mitigating the mental health affect upon those professionals who are reviewing images (Kloess et al., 2019).

Researchers have also identified the problematic terms the criminal justice system uses to define child sexual exploitation material, such as child pornography and kiddie porn. Sinclair et al. (2019) argues that these terms reduce what are depictions of child sexual abuse to pornography, which normalizes child pornography, and child sexual abuse. They further suggest that when the term pornography is used, it implies an element of consent, however, children cannot consent to participate in pornography. Sinclair et al. advocate for the use of the term child sexual exploitation material, or child sexual abuse material. Evidence from The Office of the Federal Ombudsman for Victims of Crime, in the report *Every Image* (2009) agrees, noting that when the term pornography is used it "is commonly understand to be associated with depictions of sexual activity between consenting individuals" (p. 14). Considering the types of images described in *Every Image*, including depictions of the sexual abuse of infants with umbilical cords still attached, the term child pornography trivializes the harm that children experience from child sexual exploitation and child pornography (The Office of the Federal Ombudsman for Victims of Crime, 2009).

Moving Forward in Pornography Research

This chapter has outlined the criminal justice system response to obscenity and child pornography, specifically identifying how, over the course of several decades, there has been a drop in the number of obscenity charges, as well as publicized obscenity cases. With ongoing legislative changes to the obscenity provisions, starting with the

implementation of the child pornography provisions in 1993, there has been a rise in the number of charges related to child pornography, as well as significant cases discussed before the SCC. Theoretical positions on pornography were identified, including a considering of how technological advances, specifically the rise of the internet, has changed the way in which pornographic material is produced, created, shared, and accessed. These technological advances, combined with ongoing legislative changes, have presented challenges to the criminal justice system in responding to, and prioritizing, both obscenity and child pornography offences.

In this chapter, I discussed the inconclusive and problematic nature in assessing the harm of pornography. There are also serious methodological limitations associated with the various studies including no consistent definition of what that harm looks like (Linz & Malamuth, 1993). Additional limitations included the lack of qualitative research, with Attwood (2005) advocating for the use of qualitative research in assessing the effect of pornography, emphasizing the serious shortcomings with using quantitative methods to measure the effect of media in a laboratory setting. Weitzer (2011) argued that there is no way to assess with full confidence that pornography is responsible for violence against women. It is also challenging to account for all the extraneous variables, such as: demographic, personality, family, culture or consumption amount that could be found to interact with pornography to increase or decrease harmful behaviour or attitudes (Kingston et al., 2008; Kingston et al., 2009; Weitzer, 2011). The harms of child pornography are more apparent, especially when children are harmed in the production of child pornography. However, empirical evidence which specifically looks at child pornography offenders has yet to find a strong, significant relationship between consumption of child pornography and contact sexual offending (Fisher et al., 2013). On the other hand, Kingston et al. (2008) did find that pornography use was connected to a higher risk of sexual aggression amongst child molesters. Evidence as to the cathartic effect of child pornography and the diversion of offenders from sexual office is inconclusive (Carter et al., 1987; Fisher et al. 2013; *R. v. Williams,* 2018; *R. v. Wysom*, 2018; Seto & Eke, 2005), thereby suggesting the harmful effects of consuming child pornography, like pornography, have not been consistently established in research.

While expert evidence has been considered in courts in assessing the harm caused by obscenity and child pornography, the above discussion points to variation in

how harm to women and children is defined, and the expert evidence that is considered in evaluating what harm, if any, occurs. However, public opinion, as evident by surveys and case law, has found that individuals are generally tolerant of adult pornography, and the line is drawn at child pornography. Historically, concerns have been raised about how pornography has the potential to harm society in the form of antisocial attitudes and violence against women. Research has yet to prove there is a conclusive link, and case law since *Price* (2004) has by all appearances shifted to focus on the harm pornography causes to children. The question then becomes, is this appearance true? My research asks the question, given the relative lack of published cases that have included obscenity charges, has obscenity, essentially fallen to the wayside of criminal system professionals? While research is inconsistent regarding the effect of pornography upon individuals, given the explosion of the availability of pornography via the internet, and the acknowledgment that most people have consumed pornography at one point in their lives, the question of why obscene material is not being policed by the justice system is necessary to assess.

This focus has important implications in terms of the creation of policy addressing child protection and the distribution of resources. To assess the changes that occurred within the criminal justice system after the implementation of the child pornography provision, I ask the following research questions:

1. According to criminal justice system personnel, what shifts in law enforcement priorities are evident since the enactment of the child pornography provision in 1993?

2. According to criminal justice system personnel, how did the internet influence this shift in priorities?

In the next chapter, I outline the methods and methodology used to answer the above research questions. More specifically, I outline the feminist methodology utilized to frame my research process, and the qualitative interview method, following a semi-structured interview guide, to collect data from my participants. Purposive sampling strategies are outlined and justified. The coding process follows Rubin and Rubin's (2012) steps to organize and analyze qualitative data. This organization was then followed by an open coding process to analyze the interviews, such as that used by Blair (2015), Fabian (2010) and Saldaña (2011).

Chapter 3.

Methods & Methodology

For my research, I conducted semi-structured interviews among criminal justice system professionals who had experience with the obscenity and/or child pornography provision. These professionals included individuals who had experience with prosecuting, defending, and/or investigating, crimes related to obscenity or child pornography – more specifically lawyers and police officers. To obtain a spectrum of perspectives, I interviewed both current and retired professionals. This chapter outlines the feminist methodology which informed my research process. This chapter discusses the qualitative interview methods utilized to collect data, and the open coding process followed to analyze the interviews. Therefore, my study combines a feminist, qualitative theoretical approach to conduct interviews with criminal justice system personnel regarding the changes in the Canadian criminal justice system response to obscenity and child pornography.

Methodology: A Feminist Perspective

My research uses a feminist standpoint to inform my research process, methodology, and questions. Reinharz (1992) sees feminism not as a method, rather as a perspective, used to inform and develop methods – "there is no single 'feminist way' to do research" (p. 243). While traditional feminist qualitative research typically focuses on interviewing women (Rubin & Rubin, 2012), an alternative perspective suggests that feminist research should focus on those issues that are of great importance to women (Glesne, 2011). The study of how the criminal justice system responds to hard-core, obscene, pornography is important to women affected by pornography. Feminist research, such as that conducted by Dines (2010) and Coyle et al. (2019), suggests that the prevalence of obscene pornography contributes to a rape culture, which in turn legitimizes sexual violence against women (Skorska et al., 2018). This perspective represents a radical feminist perspective of pornography, which outlines pornography as harmful to women through the consumption of pornography, whereby men learn to associate sex with violence (Coyle et al., 2019). Harm is not limited to physical acts of violence and also takes the form of degrading and humiliating acts within pornography

(Brownmiller, 1975; Dines, 2010; Farley, 2006; Lacombe, 1994; MacKinnon, 1987; Shor, 2019). This radical feminist perspective has traditionally informed provisions criminalizing obscene material (see *R. v. Butler*, 1992).

Method

Engaging in qualitative methods allows researchers to study their topic in depth and with rich detail (Rubin & Rubin, 2012). Due to the nature of the data, the rich detail typically derives from a small, selected numbers of cases. Depth involves seeking explanations, or exploring alternative experiences offered by the participant. Detail involves specific information, such as who, what, where, when, and how, which then allows the researcher to explore the meaning and understanding of the specific details. Rubin and Rubin (2012) also highlight the importance of obtaining a vivid account of the interview. Vividness is achieved by asking for stories about experiences, and background information to provide context for participant answers. Ultimately, the ability to collect rich, deep, detailed, and vivid data is based on the quality of the interviewer. Patton (1990) agrees that "generating useful and credible qualitative findings through observation, interviewing, and content analysis requires discipline, knowledge, training, practice, creativity, and hard work" (p. 11).

I used a general interview guide, or semi-structured interview, approach for my interviews. This method allows for the interview to flow like a natural conversation between two people and gives room for the interviewer to probe for additional detail. Rubin and Rubin (2012) advocate for the use of a conversational guide, which contains a checklist/outline and a list of probes, to offer guidance to the interviewer during the interview process (see Appendix D). This method is more in line with today's approach to qualitative research which utilizes semi-structured interviews, where some general questions are planned, but it is not as rigid in its structure or order. Jacob and Furgerson (2012) outline several tips in conducting interviews and argue that interviewers need to adapt on the spot during an interview and revise the interview guide based on the participant's responses and the interviewer's instincts. A standardized interview, with specific questions followed in the exact same order, does not allow for this type of flexibility.

Data Collection Process

Sampling

A purposive sampling technique was utilized, as I was interested in a specific research topic, by interviewing a variety of individuals who work within the justice system. This technique is defined by Palys and Atchison (2014), as a form of either intensity sampling "sampling people whose interest or vocation makes them 'experiential experts' because of their frequent or ongoing exposure to a phenomenon" (p. 113) or criterion sampling – sampling "individuals who meet a certain criterion" (p. 114). In my research, it is individuals who are experts in investigating, prosecuting, or defending child pornography and/obscenity related offences who were recruited to participate in my research. Thus, the criterion was experience within the criminal justice system, in responding to either, or both, types of crimes. Patton (1990) further defines engaging in purposive sampling as selecting specific "information-rich cases" that can be studied in detail (p. 169). These individuals included: RCMP, municipal police, Crown lawyers, and defence lawyers. Those individuals selected included criminal justice system personnel who were involved in key obscenity cases, such as *Butler* (1992) and *Sharpe* (2001). Interviewing key criminal justice personnel involved in various stages of the criminal justice system allowed me to obtain a better sense of how obscenity and child pornography cases are prioritized differently at the various stages of arrest and prosecution.

I approached initial participants based on prior relationships with members of the criminal justice system. Participants were then provided with a letter that some chose to disseminate to their organization and/or to colleagues they thought might be interested in participating in the research. When collecting data with a feminist perspective, researchers such as Reinharz (1992) suggest there might be benefits when one interviews friends, namely that having that initial rapport with participants might make it easier for them to tell their story, which in turn, enhances the credibility of a researcher. I found that having rapport with the initial participants was helpful in gaining access to additional participants. However, interviewing friends or colleagues can also introduce challenges, in that friends or colleagues may assume that I know things about them, and therefore may not provide complete responses. This concern was addressed by communicating to participants to answer the questions assuming I had no information,

as well as the use of probes to facilitate further discussion. Another concern was that they may be wary of telling me things they believed might not put them in the best light. I reminded participants of my commitment to confidentiality, as addressed in the consent form, when such concerns arose.

Initial research identified five participants located on Vancouver Island and the Lower Mainland. These participants provided my information to other potential participants located in British Columbia, Alberta, Ontario, and across Canada. My initial goal was to complete between 15 and 20 interviews with criminal justice system members, interviewing five members from each profession: police, defence lawyers, Crown, and judges. However, this strategy proved a challenging goal. Surprisingly, police, including current and retired officers, were more willing to talk to me than other professions; while lawyers proved to be the most difficult to access. No judges were interviewed, as I was unable to gain access through gatekeepers. In total, 11 police officers, one Crown counsel, three defence lawyers, and one law professor were interviewed. After completing 16 interviews, my initial pool of participant resources for recruiting additional individuals was exhausted. While I did not meet my initial goal of interviewing 20 participants, analysis of the interviews revealed I had reached data saturation (Glaser & Straus, 1967). It was not necessary to interview a lot of people, but rather to reach that saturation point – in which I had enough information, competing viewpoints, repeating themes, and additional data did not provide new information.

Interviews

In conducting the interviews, it was important to begin with non-controversial questions – behaviours, activities, and experiences – then move on to opinions and feelings (Jacob & Furgerson, 2012; Patton, 1990). Rubin and Rubin (2012) agree that you need to start by asking easy questions, be empathic, then you ask the tough questions, following them up with easier or less stressful questions (see also Jacob & Furgerson, 2012). As indicated in the Interview Guide (Appendix D), the interview process began by asking participants questions about their experience within the criminal justice system, before delving into questions about obscenity and pornography, and lastly asking questions about their opinions and perspectives on the aforementioned topics.

Interview questions (see Appendix D for Interview Guide) were carefully created to ensure that questions were open ended and did not limit the response options of the interviewee (Jacob & Furgerson, 2012). Dichotomous responses – e.g. yes/no – were kept to a minimum. Jacob and Furgerson (2012) advocate for the use of big, expansive questions, to invoke unexpected responses from the participant. Given the nature of the interview questions, and the importance of attending to non-verbal cues, it is ideal to conduct the interviews in person. However, given the goal of conducting interviews across Canada, flexibility in the interview approach was required. In some interviews, technical difficulties meant that interviews were conducted over the phone. There were also two interviews with police officers where firewalls and geographical distance necessitated that interviews were conducted over the phone. In these interviews, the use of verbal cues was important to communicate to the participants that I was listening attentively. Skype or FaceTime was used as an alternative to ensure that verbal cues were not missed. Probes, or prompts, were used to follow up on questions to ensure a more rich, detailed response (see Appendix D). The use of prompts is more effective when the questions are broad, as per Jacob and Furgerson (2012). Lastly, leading questions, those that encourage the participants to answer in a particular manner, were avoided.

Transcription

Interviews were transcribed through a professional company, All West BC, who signed a confidentiality form to ensure the confidentiality of participants was maintained. I verified transcriptions for accuracy, and to initiate the analysis process for the interviews. The decision to utilize professional transcribers was weighed carefully. Providing a full transcription of the interviews is a "time and labour intensive" process, which may result "in a significant time lag between data collection and completion of transcription for analysis, which can disrupt the iterative process of qualitative research" (Hennink & Weber, 2013, p.701). Furthermore, transcription, when conducted by professionals, such as All West BC, has an increased accuracy of transcription. As such, I opted for the use of the transcription company to allow for a timely analysis of the interviews, often within a week of the interview being completed. However, it is important to acknowledge the drawbacks associated with not completing my own transcription, namely a lost opportunity for initial analysis and the inability to correctly identify proper

punctuation or non-verbal cues, which could change the meaning of the transcript (Hennick & Weber, 2013).

Coding and Analysis

As outlined in the following section, my research utilized Rubin and Rubin's (2012) steps to organize and analyze qualitative data, followed by an open coding process to analyze the interviews (Blair, 2015; Fabian, 2010; Saldaña, 2011).

Despite minor differences between analytical approaches, there appears to be a consensus as to what the overall interview analytical approach should look like. Chowdhury (2015) identifies that "[I]n a nutshell, analysis of qualitative data thus begins by listening, transcribing, reading and coding of recorded interviews and observational data, then categorizing and siftings of the data" (p. 1139). The first step, as agreed by several researchers (Glesne, 2011; Patton 1990; Rossman & Rallis, 1998), is organizing the information and attempting to interpret what the researcher has heard and experienced. In conducting my thematic analysis, I followed the process outlined by Rubin and Rubin (2012), who acknowledged the need to first organize data. This step is followed by searching interview transcripts for themes; a process Rubin and Rubin refer to as recognition. For these steps of the process, I first verified my transcripts for accuracy, then uploaded them into *NVivo*, a computer-assisted qualitative data analysis software; this program allowed me to organize the transcribed interviews by question. The questions were then read, analyzed, and organized by theme. The use of such software is supported by other researchers (Chowdhury, 2015; Weitzman & Michael, 1995) who suggest that these programs can support the interpretation of data. However, Chowdhury (2015) also identifies that the analysis of such results is ultimately up to the researcher, who interprets the social interactions and nuances that occur in a natural conversation. Once the data has been organized, the researcher can then conduct a thematic analysis, and search interview transcripts for themes and key concepts (Glesne, 2011). A theme is defined as "a pattern found in the information that at the minimum describes and organizes possible observations or at the maximum interprets aspects of the phenomenon" (Boyatzis, 1998, p.vii). Further a theme can be identified at the manifest, or clearly visible, level, or at the latent level, which reveals the underlying information (Boyatzis, 1998, p.vii). Thematic analysis involves seeing a pattern "in seemingly random information" (Boyatzis, 1998, p.3).

Several themes were identified in the research: the changing definition of obscenity, the increased prevalence of child pornography, and lastly, that obscenity has fallen to the wayside. This identification of initial themes, prior to coding, is consistent with the template coding process utilized by Blair (2015) and Braun and Clarke (2006). This deductive approach to qualitative analysis is where the codes are defined by the researcher, a priori, from the current research. One of the problems Blair (2015) identified with this approach is the need to determine ahead of time which code(s) would be best suited to the research topic. The importance here is the "keyness" of themes – how they relate back to the original research question(s) (Braun & Clarke, 2006, p. 1). Reflexivity was also important in this type of analysis, as identified by Blair (2015). It was therefore an important part of the analytical process that I reflect upon whether the codes I chose were a good fit once I started reading through my transcripts.

However, this issue was addressed by not limiting the themes to those identified within the research, rather a more iterative process, as discussed by Fabian (2010) was utilized. This process was described by Blair (2015), as an open coding process which allows themes to emerge from the data and is based on repeatedly reading through the material and recoding for themes. Blair suggested that this approach can be done line by line, or by coding key concepts; I followed in Blair's (2015) footsteps and used the second approach. As themes emerged from the data, like Fabian (2010), I then went back to the literature to build upon the emerging themes. Flexibility is essential in this process, which sometimes means going back to re-code material when new themes are identified, confirming the importance of research as iterative (Glesne, 2011). Thus, allowing for "categories [to] emerge from the data" (Fabian, 2010, p. 101). These phases focus on the importance of being reflexive through the research process and relating the themes back to key concepts.

Following the identification of themes, the meaning of the specific themes and concepts were defined, and then synthesized together to form a cohesive understanding of the research subject (Rubin & Rubin, 2012). After clarifying came elaboration, where additional concepts and themes are defined. Lastly, each interview was coded, whereby I labelled the theme, and coded each transcript when that theme occurred. This part of the process involved not only looking at the individual transcripts separately, but also making comparisons between interviews (Rubin & Rubin, 2012). Through analysis of interview transcripts categories and themes were constructed and organized in order to

assess patterns and relationships. Data intimacy, as per Saldaña (2011), was achieved through transcription, reading, and rereading through transcriptions. Throughout this process, I made memos about patterns/themes, and color-coded key words and themes to assist in this process, as discussed by Saldaña (2011).

As such, I utilized the combined approach outlined by Blair (2015), noting that I identified some themes ahead of time within the literature, that would guide the data analysis. Saldaña (2011) identified a similar practice in his process coding, whereby themes, such as key words, are identified within interview transcripts. This process reflects the theoretical thematic analysis discussed by Braun and Clarke (2006), reflecting that "researchers cannot free themselves their theoretical and epistemological commitments" (p.12). A theoretical thematic analysis is "driven by the researcher's theoretical or analytic interest in the area" (p. 12) – which is reflected by my feminist perspective and interest in obscenity. Using this perspective allowed me to reflect on feminist themes that emerge from the data.

Biases/Reflexivity

Personal biases may arise during the interview process, and researchers must be aware of their biases, and have a plan as to how they will handle the interview when situations that are upsetting come up; this relates to a discussion of reflexivity (Rubin & Rubin, 2012). Rather than debate the problems of subjectivity versus objectivity in research methods, Patton (1990) suggests the researchers take on a "stance of neutrality," which "means that the investigator does not set out to prove a particular perspective or manipulate the data to arrive at predisposed truths" (p. 55). Glesne (2011) argues that it is impossible for researchers to enter into research as a "blank slate"; rather, researchers are influenced by their biases and assumptions (p. 31). I have spent over a decade researching pornography, which highlights my expertise as a researcher in this field. However, this also means that I have formed opinions on pornography – which are guided by my feminist lens, growing up in a police family, as well as my role as a parent of three children. In conducting my interviews, I needed to be aware of my biases and ensure they would not influence my research, my questions or responses to participants. However, this was challenging during some of the interviews, as participants revealed perspectives that were inconsistent with my own. My goal was to be mindful of my own bias, and to take on Patton's (1990) "stance of neutrality" during

the interviews to keep my biases in check (p.55). Saldaña (2011) advocates for the use of memo writing, not only for thematic analysis, but also to allow for researchers to reflect on how they relate to the topic of concern or any personal reflections regarding the study. To help stay reflexive throughout the process, I wrote memos to record insights and personal biases to allow for reflection on any biases or opinions that may come up during interviews. Upon reviewing transcripts of the interviews, and conducting the analysis, notes and thoughts were taken down to ensure reflexivity throughout the research process.

Ethical Considerations

In assessing ethical concerns, Glesne (2011) emphasizes the importance of ethical codes that direct the research process, but argues that the continuous relationship and communication with the participants ensures researchers consistently meet ethical standards, including those set by the TCPS2 and Simon Fraser University's *Ethics Review of Research Involving Human Participants'* policy. As the researcher, I assured participant's confidentiality by using pseudonyms to anonymize data, as transcribing and in the write-up. Participants were asked to select a pseudonym, one that they have not used before, prior to the interview. Additionally, identifying details were not disclosed to anyone verbally or in writing. However, given that there is a small sample of experts within the field of obscenity and child pornography, participants were informed prior to starting the interview that complete anonymity is difficult to guarantee. Some participants discussed how their unique career path made them easily identifiable to their peers. When this concern arose in the interviews, we revisited the confidentiality agreement, and considered how to best protect the participants' identity upon write up. Some participants requested copies of the transcript or to a review a draft of the analysis section upon write up. Participants were given an opportunity to review and comment on their interviews and the paper. However, some participants opted to use their own name as they had no concerns about protecting their own confidentially, they were comfortable having their name associated with their interview.

As with any research project that involves that use of human participants, informed consent is required prior to beginning data collection. Research participants were emailed the consent form in advance and asked to review it prior to meeting (see Appendix C). Before beginning the interview, the consent form was reviewed with

participants, including asking if they understood the risk and benefits of the research and reminding them that they could withdraw at any point from the study. Participants were asked for permission to use a digital audio recorder to record the interview. Many researchers (Glesne, 2011; Saldaña, 2011) advocate for the use of recording devices to help the researcher pay attention to what their research participant is saying, rather than attempting to transcribe verbatim during the interview. Saldaña (2011) specifically comments on the use of recording devices to allow for the interviewer to pay attention to non-verbal cues such as body language and facial cues. Informed consent was achieved via a written consent form. While no participants declined being recorded, should a participant have declined verbatim notes would have been taken.

Specific interview questions were not provided in advance, to avoid influencing participant's spontaneous responses. However, research participants knew the general research questions prior to the interview, in part, to ensure that they had enough information about the study to inform their decision to participate in the research. Participants were also asked not to share their experience with other potential participants, to avoid additional influences. Consideration was given to potential participant distress, as talking about pornography, especially child pornography, could be an upsetting topic for some individuals. As a researcher, I needed to consider that participants may experience psychological distress and may need debriefing upon completion of the interview, and I was prepared to provide participants with contact information for counselling resources that would be available via their professional associations. However, no participants reported, or exhibited, any feelings of distress during the interviews. As James put it, asking him to discuss what he did as part of his daily routine was like asking someone else about brushing their teeth. Participants were specifically selected because of their professional experience working with obscenity and pornography offences; the questions were consistent with the experiences they encountered in their line of work.

Limitations

There exist limitations in my research. Utilizing a non-probability sampling strategy can be problematic, as researchers may include or exclude individuals based on whether or not they meet the criteria (Palys & Atchison, 2014). For my research, this type of sampling strategy was the best means to gain access to participants who a) have

been historically difficult to access and b) have the specialized expertise with obscenity and child pornography. With these caveats in mind, my small sample size is accounted for, as gaining access to participants was problematic. Despite insider access to participants, via prior relationships with criminal justice system personnel, some individuals who were invited to participate declined to participate – most of the time because they felt they did not have the requisite expertise to participate. Some participants indicated that they would need permission from their superiors in order to patriciate. In particular, while the initial goal was to gain access to judges to participate in the research, all of those who were invited to participate declined. The same issue occurred with Crown counsel, as many indicated they would need permission from the BC Prosecution Service in order to participate – permission which was not sought in this research.

The police proved to be the most accessible group of participants, representing almost three-quarters of the sample. The results of this research, therefore, could be biased towards a police perspective. With that being said, there was variety in backgrounds of the police: ICE members, general duty, retired members, “vice” officers, research analysts, ballistics and scene identifiers, and other specialized units.

Additional limitations include an open coding process to analyze the transcript. Historically, any approach likened to a grounded theoretical analysis has been met with controversy, namely because of the belief that a truly grounded approach means that the themes are subject to researcher bias (Blair, 2015). This limitation was addressed through the use of an open coding technique (Blair, 2015), allowing for the creation of themes from the literature prior to coding, while also giving space for the creating of new themes from the data, which are then verified through revisiting the relevant literature.

Chapter 4.

The Changing Definition of Obscenity "You Know It When You See It"

Chapter three outlined the feminist methodology and qualitative interviewing method utilized to collect and analyze the data for this dissertation. The final sample of participants included 16 participants from a variety of backgrounds, including one Crown, three defence lawyers, one law professor, seven retired police officers, and four active police officers. Of the police officers, five worked on specialized units in child sexual exploitation. To assess participant perceptions regarding the apparent shift in priorities away from all pornography to focus specifically on child pornography, participants were first asked about their experiences and opinions regarding the current obscenity and child pornography provisions. In this section, I explore how participants interpreted the obscenity provisions, and discuss their experiences, if any, responding to obscenity as a crime. Participants outlined the differences between obscenity and child pornography, drawing specific attention to the capacity of adults to consent to sexual activity, and to participate in pornography, whereas children do not have the same capacity. Participants included consideration of the types of crimes that are comorbid with both obscenity and child pornography, in addition to theorizing about the types of images or publications that would meet the definition for obscenity.

Obscenity

One of the first interview questions asked participants to share their understanding of the obscenity provisions, as they appear in the *Criminal Code* (see Appendix A), which reads as follows:

> **163 (1)** Every one commits an offence who
>
> makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or
>
> **(8)** For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of

> the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

Ten participants indicated that they either did not realize that this was a provision in the *Criminal Code*, that they were unfamiliar with it, or had no experience with it. Except for two individuals, Wesley and George, both defence lawyers, participants did not report any direct experience with enforcing the obscenity provisions. As Catherine identified when discussing her experience with obscenity "And I'm honestly not aware of anyone who did. It just wasn't something -- it seems almost like one of those sections in the Code where everybody was kind of not sure what it really meant." A. echoed a similar concern:

> You made an interesting point though with the obscenity provisions, because I don't know that it's considered at all in policing really. I think as a substantive offense on its own I don't think we really look at it. I've never seen an obscenity charge in my 19 years of policing.

When asked to explain why, A. noted that it could be a knowledge gap among officers, or it could be "lack of it being in the public interest." This notion of public interest is explored in more detail in chapter six.

With the creation of the child pornography provisions in 1993, the obscenity provisions now cover specifically adult pornography which meets the standard for obscenity set out in *Butler* (1992). Participant responses, however, reflected a different interpretation of the provision. When asked to describe their understanding of the obscenity provisions, all members of the police immediately responded that obscenity included child pornography. Rex, a retired police officer, defined obscenity as "what would offend people graphic sexual photographs, or documents, or recordings, video, verbal," with specific examples being child pornography, bestiality, and historically, anything gay. Notably absent from his definition of obscenity was adult pornography, more specifically the type of adult pornography defined as obscene in *Butler* (1992)*:* explicit sex with violence; explicit sex without violence, but which subjects people to treatment that is degrading or dehumanizing. Most individuals defined obscenity as a broad term, which encompassed various activities. For example, Sally, a Crown prosecutor, included child pornography, bestiality pornography, luring, and prostitution in her definition of obscenity. A few participants discussed violent or degrading acts as obscene, which would be consistent with the definitions offered by *Wagner* (1985) and *Butler* (1992), or even with the *Criminal Code* definitions. These definitions are also

consistent with some feminist researchers, that pornography is violent, particularly towards women (Bridges et al., 2016; Coyle et al., 2019; Dines, 2010; Shor, 2019). Kim, a former police officer, described obscenity as “depictions of rape or violence.” Rock Climber and A., both RCMP officers, agreed that obscene material included sexual imagery.

What I found the most interesting in this discussion is that participants would answer earlier in the interview that they had no experience with the obscenity provisions, but later would describe responding to crimes that would meet the current and historical definition for obscene material. I followed up to these examples, asking participants about the crimes these individuals were charged with, and if obscenity charges were considered? Most often the answer was no, however, some participants indicated that, in their opinion, they believed that these examples would be obscene. For example, John discussed the case of *R. v. Bakker* (2005) who videotaped violent sexual assaults of sex trade workers. In this case, three complainants consented to bodily harm by Bakker. He pled guilty for charges of sexual assault, sexual touching and sex tourism. Bakker, “pa[id] another sex trade worker to allow him to kick her hard in her unclothed vaginal area on four separate occasions while each time he wore a hiking boot or a hiking style boot” (*R. v. Bakker*, 2005, para. 13). All three assaults were filmed, and featured the “pain, humiliation, and degradation” (*R. v. Bakker*, 2005, para. 15), consistent with previous obscenity cases (*R. v. Butler*, 1992), yet no obscenity charges were discussed in this example, nor were the video tapes defined by the courts as obscene. There was also no evidence offered in the case as to whether the videotapes were distributed, which is the standard for illegality in the *Criminal Code*.

I was struck by how the police, in particular, provided succinct detail regarding the collections they reviewed, often indicating that these depictions were seared into their head for the rest of their life. Many of them spoke of the impact of viewing these collections, which I coded as the mental anguish in investigating these offences. Conversely, lawyers did not provide the same level of description of the collections. For example, Carole described pornographic images that were imported across the Canada/U.S. border in the early 1990s:

> It was a comic book drawing and it had an adult male raping a young male child. It had the adult male -- or sorry, it had the young male child fighting back and then the child being raped by a cartoon dog that was

> in the cartoon script. And then the dog being raped. Very graphic, I can actually still to this day picture that comic strip in my mind. It was, it depicted something so vile and so violent I can still see it today as if I saw it for the first time that day.

Anna, as a member of the ICE[6] Unit in BC, described images of violent adult pornography often found as part of the collection of child pornography:

> Anna: I mean, you just, it's within -- it's part of their collection, right? Like I remember there was one image that was so shocking that we kind of all looked at it, right? And it was like, you know a man's scrotum nailed to a board, right?
>
> Q: Wow.
>
> Anna: Yeah. And I mean like lots of nails, right, and I believe this person was still alive. Like this was not a dead, I think it was an erect penis. I could be wrong. I can't remember, but, yeah, I mean that was one, there was lots of, like, a few like that. Not lots, a few.

A., another former member of the ICE unit in BC, stated:

> I don't recall any [collections] that didn't at least have a component of adult pornography along with the child pornographies. And I don't recall any that didn't have bestiality. Most of them had bestiality as I can recall.

In these examples, neither Carole, A., nor Anna recalled there being any obscenity charges laid against these individuals, despite evidence that these offenders were sharing the obscene images – and not just child pornography.

When prompted by asking what about adult pornography, participants said that they did not think that it was illegal to privately consume adult pornography – consistent with the decision in *Butler* (1992) and the *Criminal Code*. Participants were asked if they thought any adult pornography would meet the standard for obscenity, and what emerged was an interesting distinction between what they personally thought was obscene, but not necessarily illegal:

> Q: Do you think that there's any adult pornographic material that could be considered obscene or illegal?
>
> Anna: I mean, me personally? Yeah, it's all obscene. But illegal. Yeah, I do. I want to say when they're inflicting the pain. I think that may be illegal, like if they're torturing. But I'm sure that probably exists, I know

> it exists from my time in the unit and then, like the bestiality stuff. I'm pretty sure that's still illegal. Yeah. So yeah, there's adult stuff that's illegal, yeah.

In my interview with Rex, when asked to describe what his understanding of pornography was, he identified that "obscenity is in the eye of the beholder." Kim expressed a similar sentiment, adding that "you know it when you see it but it's hard to define":

> Well, I guess it all comes down to your definition of pornography. And I'm sure there's a great code you're familiar with about you know it when you see it but it's hard to define. I would say that it was very likely these pictures had as an intent sexual stimulation, but we have to recognize that for some individuals what sexually excites them might be very different than what excites someone else. So the whole idea of you know Playboy centerfold or a typical pornographic video that you might find on the -- on the internet, we say, yeah, that's sex but other times someone might see a picture of a woman's feet or high-heeled shoes and that, to them, is sexually exciting. For other people seeing a picture of somebody who is bound up, or someone being raped, or someone being put into a submissive position, that's sexually stimulating for them, even though it might not be sexually stimulating in terms of a mainstream perspective.

Both were referring to section 163(8) in the *Criminal Code,* that describes obscene material as the "undue exploitation of sex," (*Criminal Code,* 1985) and is subjectively interpreted by those individuals who are viewing it; the ways individuals are raised, their belief system, their ethnicity, are all factors that Rex identified as influencing their interpretation of said material. However, Rex further elaborated that it is up to the SCC to determine what is obscene and "if they deem it to be obscene then it's obscene, there's no getting around that." These issues are further exacerbated by changing perceptions around what meets those community standards of tolerance for obscenity, as Kim discussed how case law "will evolve and change over time."

The various responses made by police and lawyers regarding material that meets the definition for obscene are consistent with case law and research that identified challenges in assessing what would meet a Canadian standard for obscenity (*R. v. Butler*, 1990; R*. v. Doug Rankine Co*., 1983; Robertson, 2003, Young, 2008). Kim discussed *Playboy* centrefolds as examples in the 1990s, whereas James identified adult pornography that featured torture. Both A. and Anna discussed torture pornography as well, including depictions of a man with nails in his scrotum, or hypodermic needles being stuck in a person's skin; showing that, as Rex put it,

“pornography is in the eye of the beholder.” James agreed, noting that “And again, realize my barometer of what is fucked up is very different than the average person's barometer because I look at child porn all the time. Like horrible child porn.” James went on to describe how torture pornography, including using machines to cause pain, or having “electro-type devices they're inserting into someone's anus or vagina or whatever and causing pain” meets the criminal definition for obscenity.

Without prompting, Ed, the academic lawyer, was one of the few to specifically identify adult pornography as obscene, in addition to child pornography. Ed indicated that “the main focus [of the criminal justice system] has been related to preventing harm to women and children, they're vulnerable populations.” Elaborating, Ed defined obscene material as that which depicts violence, children, or those who appear to be children:

> Violence, of course. I mean in a holistic sense, so it could be physical violence, it could be aggression, abusive language, depiction of sexual interactions, lacking consent. I think all of these things and more would potentially be considered violent and/or degrading.

This definition is consistent with the obscene material described as harmful in *R. v. Butler* (1992). Ed acknowledged, from an academic perspective, the literature on pornography identifies a spectrum of pornography material which ranges:

> From the stuff Gail Dines focuses on a lot that's in the mainstream, which has become increasingly violent and degrading in relation to the treatment of women to material that's hyper violent; pseudo snuff films; material involving individuals having sex with animals to all sorts of subgenres.

While historically child pornography was enmeshed within the obscenity provisions, for almost 24 years child pornography has had its own provision under the broader obscenity provision. In a pre-*Butler* era, obscenity included adult pornography that was violent and/or degrading material, however, among the criminal justice personnel the emphasis appears to be on protecting children from the harms of pornography.

In the discussion with participants two key factors were identified as necessary to meet their standard for obscenity: age and consent. The question of age is relevant to the child pornography provisions, because, as found in the *Criminal Code* (Appendix A), child pornography is defined as a person who is, or appears to be, under the age of 18. The other key factor, consent, is relevant to age as well, with participants identifying that

children cannot consent to sexual activity with an adult, nor can they consent to have their images of sexual activity distributed.[7] Of interest for the obscenity question, consent was the key determining factor in participants' assessment of adult images of obscenity. Consent is a topic that has emerged in feminist and neo-liberal research that centers around the idea that people can choose to consume, and create, adult pornography (Linz & Malamuth 1993; Pitcher, 2006; Rubin, 1993; Taormino, 2013). In their assessment of consent, the focus is on the person's capacity to consent to sexual activity. For example, Sierra, a defence attorney, when asked about his experience with adult pornography expressed "But as I say, I don't ever run across a file like that. Like the only thing I could think of if it's non-consensual. Then you are into other provisions of the Code, probably sexual assault, that type of thing. And bestiality. But with adults, but still."

In their discussion around consent and obscenity, some participants identified the relatively new provisions found in the *Criminal Code*: the illegal distribution of intimate images without consent. Kusz and Verdun-Jones (2018) argued that this provision represented the new focus for concerns over adult pornography, namely revenge pornography in the form of someone illegally distributing their images without their consent, with the images/videos being taken with or without their permission (Powell & Henry, 2018; Walker & Sleath, 2017). When prompted about obscenity, James discussed this new crime in detail:

> A common thing you have nowadays -- I hate to say common, but it is common -- is the distribution of intimate images without consent. And that's sort of newer law that's come in in the last few years, where case law's made it abundantly clear that you send your boyfriend intimate images then their relationship ends and he vengefully decides to post your images on the internet or whatever, without your consent, he can be criminally charged. And we're actually seeing lots of that these days. The proliferation of social media and cell phones and everything else. Everybody who's between the ages of fifteen and twenty-five has taken a naked picture at some point. And whether they send it to their friend, boyfriend or whatever, or if someone gets into their phone or their computer gets hacked, it's a growing problem.

[7] Some exceptions exist, such as children being able to share images of their sexual activity where the depictions were of legal sex, consent was obtained, and the publications were held for private use (*R. v. Barabash*, 2015).

Sally, as well, identified distribution of intimate images as being obscene. Sally went into more detail focusing on how this particular crime can have both adult and child victims. However, Sally also brought up an interesting point here, that if someone was distributing an intimate image of a very young individual, they would be more likely to be charged under the child pornography or sexual abuse provisions than for distributing an intimate image. Another example, which would not meet the private use exemption set out in *Barabash* (2016) would be a couple under the age of 16 in possession of sexually explicit photographs of each other; theoretically, they both could be charged with possession of child pornography (Dodge & Dale, 2018; Powell & Henry, 2018). However, Dodge and Dale (2018) in interviews with police officers found that police often used their discretion to respond in alternative manners, such as referring them to a social program or talking to them, in situations where youth shared intimate images.

What emerged in the discussion about obscenity is the notion that there have been changes within the criminal justice system, and society, as to what is obscene. The various professionals identified, as consistent with case law on obscenity, that there is a wide range of material that could be seen as obscene, depending on individual personal and professional characteristics. As noted above, the recognition of child pornography as obscene, suggests a focus and emphasis on children, or even animals, as a priority for the criminal justice system. This connection between obscenity and child pornography, is not unlike the experience of Powell and Henry (2018) in their interviews with police about “technology-facilitated sexual violence”. When Powell and Henry asked stakeholders about the nature of technology facilitated sexual violence, with the intent of focusing on adults, participants included information on child pornography and child sexual exploitation (2018). This emphasis, and prioritization, on child related material continued through the interviews and will be elaborated upon in more detail throughout this chapter, as it informs a key component of my theory that there has been a shift in priorities towards child pornography.

Child Pornography

Compared to obscenity, participants were quicker to define child pornography. Participants often went beyond describing what child pornography was and discussed the more specific offences found within the child pornography section of the *Criminal Code*, such as possession, distribution, production of child pornography. Sally, the

Crown prosecutor, provided the most succinct understanding of the child pornography provisions, listing almost verbatim, the offences from the *Criminal Code*:

> For example, dealing with child pornography under Section 163.1 of the *Criminal Code*, which would include both -- not only possession but also accessing, distribution, sharing or making available, as well as making.

Participants generally agreed about the types of publications that would be illegal went beyond child nudity. As Carole discussed:

> So, my understanding of it is pornographic material where it involved a child, somebody that falls under the definition of a child, there are different age components that come into play, but it can be, it can be something where the purpose is for a sexual purpose. So if it's simply a number of children on a beach and they're running naked and the purpose is not focused on the child's genitalia or reproductive organs or any sexual organs, whatever the case may be, if that's not the focus then sometimes that falls outside the scope of child pornography.

In her example, illegal images go beyond the stereotypical naked baby in the bathtub images and require a sexual purpose to the images; or, conversely, an excessive amount of emphasis on the genitalia. James elaborated, indicating that sometimes the child does not even need to be nude to be classified as child pornography

> But the imagery they have is -- you could have a child wearing a bra and underwear, but the posing of the child, the focal point of the shot [on genitalia], etc., makes it fall under the definition of child pornography under the *Criminal Code*.

Both of these categorizations are consistent with research into collections of child pornography, such as Taylor, Holland, and Quayle's (2001) continuum of child pornography imagery: indicative, indecent, and obscene. Taylor et al. (2001) expand to ten types within these broad categorizations: indicative, nudist, erotica, posing, erotic posing, explicit erotic posing, explicit sexual activity, assault, gross assault, and sadistic/bestiality. The nudist images are consistent with the definition outlined by Carole, given that the beach and bathtub would be appropriate places for children to be nude. Conversely, the description outlined by James fall in line with the posing, erotic posing, or explicit erotic posing categorization. The categorizations of images within child pornography collections are important for responding to this crime. The collections need not always consist of illegal images, e.g. obscene images, but can consist of legal, indicative or indecent images, which may be used inappropriately by collectors of child pornography for a sexual purpose (Taylor et al., 2001).

In their identification of what constitutes child pornography, participants outlined in more detail, compared with obscenity, the types of images that they had either encountered, or believed would meet the definition for child pornography. The sheer variety of imagery that emerged in their answers speaks to, I argue, the technological advances that have emerged with respect to manufacturing child pornography, and the need to prioritize child pornography in their response to obscenity. Building off the examples described by Carole and James above, Mary pointed out that the publications need not be of real children to meet the definition for child pornography. Fictional stories, sketches, anime, or cartoons publications meet the legal definition for child pornography as the *Criminal Code* (1985) reads under s.163.1(a) (i) "that shows a person who is or *is depicted as being under the age of eighteen years* and is engaged in or is depicted as engaged in explicit sexual activity" (emphasis added). The clear distinction within the *Criminal Code* is important here, as publications only need to contain images of individuals who *appear* to be under 18, regardless of their actual age. Mary went on to provide more specific examples of the types of imagery, defined as Lolicon and Shoticon:

> Yeah, so Lolicon are the images in the form of anime that has young girls being sexually abused and the Shoticon is that anime that shows young boys being sexually abused.

These images featured animated pornography of adults sexually abusing children. Mary also discussed morphed images, in which

> They'd take the head of one child, the arms of another child, the body of another child and put it all together. You often see morphed images with a person, say for example my head at 49 and the body of a 20-year-old.

These types of images are defined by Taylor et al. (2001) as "pseudo-photographs" which:

> are constructed photographs, often very cleverly done with great technical sophistication, using digital reconstruction techniques to create an image that is not a photograph of a real person, or of real events. Thus, the head of a child might be placed on to the body of a woman, where the body features are manipulated to make it appear to be that of a child (breast reduced in size or eliminated, pubic hair eliminated, and so on). The person portrayed in the resultant picture, of course, does not exist. (p. 104)

These types of images are contrasted with the more extreme types of images on the child pornography spectrum featuring sexual abuse of real children, as morphed or pseudo images do not feature a real child person. Pseudo images have been successfully prosecuted in Canadian courts, including *R. v. Butler* (2011). The accused in this case "came into possession of photos of a young girl and superimposed her head on the nude bodies of other young girls" (para. 28); he pled guilty to possessing and making child pornography, including the above images in question. A similar response is seen with respect to animated material. In *R. v. Machuelec* (2016), the accused was convicted of possession of animated child pornography. Justice Munroe, in a discussion of aggravating factors notes that "The fact that it was animated and did not contain real persons does reduce its harm and thus its harmfulness, but it certainly does not eliminate its abhorrent nature" (para. 39), and later refers to the imagery as "realistic animation form" (para. 40). James described these images further:

> Computers, and given newer computer technology now have the ability to generate realistic looking images of anything, really. You can make Mark Zuckerberg look nude, right? People are using that technology to make their own real-looking child pornography.

As will be discussed below, the technological ability to generate child pornography creates more challenges for the criminal justice system to investigate these images, in addition to flooding the criminal justice system with child pornography.

The last type of child pornography participants described was arguably one of the most heinous and would fall among the obscene category of child pornography outlined by Taylor et al. (2001). John, a retired RCMP member and volunteer for an organization that rescues trafficking victims, described "made to order" child pornography, as well as "the marketing of live sex assault by video." Technological advances allow individuals to order the type of images that they want in one of two ways: through the use of webcams whereby offenders watch live videos of children being sexually assaulted, and can coach them to act in specific manners, or, offenders can request a particular type of sexual assault video to be sent to them, adding to their collection.

One particularly disturbing type of child pornography was made-to-order porn, which Anna provided the following example of how offenders request child pornography:

> 'I want to see a little redheaded girl giving a blow job with today's date on it.' Right so, you'll get a little redheaded girl giving a blowjob with today's date on it. So that's horrible.

Similarly, James described how crowd funding has now found its way into child pornography, where:

> Essentially crowd funded to raise X amount of money to pay someone else they've all found in their global internet community, to live offend against their own child and record it and then provide those images and videos to the people crowd funding that.

Noreen, described how the internet facilitated crimes of live offending:

> I also said there was never the ability -- before we had another file where this fellow was sexually abusing a little girl who was ten, and he was sending the pictures out to other people and it was in a chatroom at that time that he's engaged to. And I said there's never been the ability before for someone to actively -- to molest a child and have others around the world actively involved who are telling him what he should do to that child, and then he was sending out pictures out there.

These types of offences outlined above, are in line with Horsman's (2017) discussion of cyber-enable offences, crimes that existed prior to the Internet (e.g. sexual abuse of children) but have been exacerbated by the Internet.

The types of child pornography outlined above have been found in Canadian case law. For example, in *R. v. J.S.* (2018), the accused was sentenced for distribution of child pornography, described as material that "attracted the 'upper echelon' of the child pornography industry – that is, those, like the appellant, who sexually abused children to whom they had access and recorded the abuse for the purpose of distribution." (para. 15). These types of offenders are contact offenders, and to access these types of websites, individuals had to provide evidence that they "could make child pornography 'to order' based on what other members wanted to see. To use the example given by the officer who testified at the trial, a member of the board might ask another member to spank or urinate on a child in his care" (para. 15). These publications represent only a fraction of the child pornography collections, and the sexual abuse of children, that come to the attention of the criminal justice system (*R. v. J.S.*, 2018).

Child pornography offenders amass huge collections of child pornography that feature a wide variety of imagery and videos (Taylor et al., 2001). Police must sort through, and categorize the collections, prior to sending the information to Crown. This

process often entails sorting through hundreds of thousands of horrible images of child pornography, and sometimes adult pornography. In their discussion of paedophile pornography collections, Taylor et al. (2001) outline how categorizing child pornography collections assist law enforcement. At minimum, it is helpful for police in ascertaining how many images meet the legal standard for child pornography.

However, Taylor et al. also comment on how collectors use these collections of images, noting that they are "deliberate choices by an individual to acquire sexual material" (p. 99). In collections, a variety of images often do not meet the legal definition for child pornography, however, they are still useful to inform the legal process. Moreover, judges often note in their discussion of aggravating factors how the accused will organize their images into categories. Justice Malloy in *Kwok* (2007) highlights two ways in which collections factor into aggravating circumstances of the offences: its size and nature. Taylor and colleagues agree stating the:

> Size of collection may be indicative of the degree of involvement in the processes of collecting material, and the extent to which an individual has become absorbed within the adult sexual interest in children community. Obsessional sorting or organising of the material is also an indication of the offender's involvement with the pictures and the amount of time spent 'off-line' engaging with the material. (p. 105-106)

Taylor et al. (2001) suggest there is a psychological process that occurs when these individuals collect images – for example for offenders "finding pictures that fill gaps [in their collections] is highly reinforcing to the collector and may add psychological value to a series" (p. 105). This understanding of collections was identified in detail by James, who provided examples of investigations where there were hundreds of thousands of images that needed to be categorized. He suggested that "These guys will…often maintain substantial collections because trading in child pornography is" a big business which he likened to baseball card trading. Justice Clark, in *R. v. Crane* (2018) described how the offence of possession of child pornography, in particular, has resulted in "a 'trading card' mentally" that he attributes to the ease and accessibility of child pornography available online (para. 64). This likening of child pornography collections to baseball card trading was also described by a victim in *R. v. Kwok* (2007):

> The absolute worse [*sic*] thing about everything that happened to me was that Matthew [her abuser] put my pictures on the internet. He traded them with other people like baseball cards. What kind of people want to see

> pictures of a little girl being abused in this way? ... I know that these pictures will never end and that my 'virtual abuse' will go on forever. (para. 51).

Detective Coakley testified in *R. v. J.S.* (2018) that:

> it is the 'new' children being portrayed in child pornography images that attract the most demand in terms of the 'trading card mentality' surrounding collections of child pornography. This value only means that new and real children are being abused to satisfy the demand. (para. 101)

Like baseball card trading, and as identified by Taylor et al. (2001) and James, the goal is to trade images or cards so to fill gaps in their collection, as well as have a variety of images and videos to offer to other collectors to fill their gaps – a heinous form of *quid pro quo*. When considering the above discussion of made to order pornography, offenders can request specific types of child pornography material, resulting in children being sexually abused to fill their collection; a process not unlike trading baseball cards.

Participants often went beyond child pornography to discuss sexual exploitation of children more broadly – crimes that are often comorbid with child pornography, within Canadian court cases, including sex tourism, luring, invitation to sexual touching, and sexual assault (*R. v. Klassen*, 2012; *R. v. Neil*, 2015). George articulated the following in relation to the production of child pornography that features real children:

> So, if I -- and as I say, child pornography, it goes -- I mean, the making and producing of this stuff goes hand-in-hand with the sexual assaults against children. They are inextricably intertwined. You can't produce this stuff without abusing a child. You are committing a separate crime, whether or not that video works or not. You are committing a crime against that child, okay.

George described these offences as "really important other provisions that protects children other than -- that work in conjunction with Section 163.1 of the *Criminal Code*." For many participants, the cases that involved the filmed sexual abuse of children, were often first identified before discussing those offenders who "only" possessed or accessed child pornography.

Multiple participants identified child sexual tourism when defining child pornography. George emphasized the significance of sex tourism laws in particular, whereby s. 7(4.1) of the *Criminal Code* captures individuals who "commit[s] an act in another country, produces child pornography offshore, [they] are still caught by this." The emphasis appears to be not just on child pornography itself, but on contact-related child

pornography that includes the sexual abuse of children. Anna spent most of her time in the ICE unit investigating one major significant case, *R. v. Klassen* (2012). Klassen was found to be in possession of adult pornography, child pornography, and bestiality pornography. Additional imagery included depictions of Klassen sexually abusing young children in Cambodia and Colombia; in these videos Klassen had electronically covered his face. In *R. v. Klassen* (2012), Klassen unsuccessfully appealed his sentence of 11 years' incarceration. The initial charges were the result of Klassen importing the pornography in Canada – by mailing it to himself. However, the only materials to warrant criminal charges in this example were child pornography; he was not charged in relation to the obscene images. In the child pornography publications, Klassen filmed the sexual abuse of the young women he abused. Klassen's collection of obscene material was only mentioned in court as a means to categorize the material rather than any recognition that the adult or bestiality images were illegal. Rex also mentioned how child pornography offenders would go to places like Thailand or Southeast Asia to "have sex with underage children, and gather up pornography and bring it back, back to Canada for distribution." Noreen, retired from a municipal police force, discussed how she was part of various investigations in which men were found with images of themselves sexually abusing young boys. These experiences prompted her to become involved in the creation of the sex tourism legislation.

Lastly, John, had the most experience with sex tourism and child pornography, and was involved in identifying locations of the sexual abuse in the *Klassen* and *Neil* cases. The case of Neil, aka Swirly Face (*R. v. Neil,* 2015) focused on a bail hearing for charges under sex tourism laws for sexual touching and invitation to sexual touching and making/possession/accessing child pornography. Neil had "digitally swirled" (para. 6) his face to remain hidden in the videos he made of him sexually abusing children. Neil ultimately pled guilty and received a 5.5-year sentence related to child pornography (CBC News, 2017). The categorization of pornography found in the possession of the accused, included adult pornography. Again, in this case the creation and distribution of adult pornography was a categorical factor, as opposed to a criminal or illegal element to consider in the case.

Age as a relevant factor in pornography was discussed in three different manners. The first, and not surprising manner, was that the primary determining factor in whether material was child pornography was the ability to assess the age of the person

depicted. This definition is consistent with that found in the *Criminal Code*. However, the exact age at which material becomes child pornography, and not adult pornography, was not clear. For example, Rex described the child pornography provisions as addressing the problem of people "abusing their authority" among children of "tender years" defined as those who were "under 7." James said it was someone "under the age of 18," or a minor. Building on this category, four of the police officers, Carole, Noreen, Kim, and John, identified how the child pornography provisions conflicted with the sexual assault provisions. Additional challenges were noted by John:

> Oh, I actually forget now when it is in terms of there were several ages quoted to me under different circumstances, 16 and 18. 18, age of majority, but then 16 -- and this is an area I don't fully understand because I haven't had a case associated with this.

Noreen discussed the conflict inherent in these offences, whereby individuals could legally consent to sexually activity at the age of 14 (in the 1990s) but could not participate in pornography.

With age identified as a pivotal factor in child pornography crimes, participants discussed challenges in assessing the age of persons depicted in pornography. Anna outlined how in cases of child pornography the police brought in doctors to assess the publications in question. Their responsibility was to ascertain the age of individuals in the depictions to determine whether or not the person(s) were under the age of 18. Anna said that often doctors did not want to become involved in the file for multiple reasons:

> Well, because they're busy themselves. Because they don't want to be the one liable. They don't want to have this kind of training. They don't train them for sexual maturation ratings, right, like.

For example, doctors faced difficulties in viewing child pornography and examining the images for age appropriate features, with particular challenges in assessing Asian victims, especially young women. John, in his experience working in Southeast Asia, identified this in detail:

> And sometimes -- not sometimes. I think frequently, we would have to deal with that to a slightly higher level, just because we were dealing with Southeast Asian children. And Southeast Asians can look smaller and more youthful than they actually are, and this has been raised in court. Which is -- there's a level of absurdity here on a legal level when you're challenging that kind of stuff when the child is seven. But still it's drawn in. And so, one of the key factors for us was actually determining

> age and actually to the court's satisfaction that we can say this is a minor for sure. And so, we would talk so physicians about bone development, structures behaviours, muscle development, whatever, all the physical attributes they could assess age from.

Anna discussed how she received training on sexual maturation ratings – "So basically to rate a child's age based on their genitals, right?" Assessing age becomes more complicated during puberty, or for children she defined as "late bloomers." These challenges in assessing age in individuals, underscores some of the complexities that police and Crown have to consider when they are responding to images or videos of child pornography. The advice of various experts, including someone who is able to ascertain within certain degrees of specificity whether someone is under 18 years of age, in addition to specialists such as John, who identified locations of child sexual exploitation, is necessary. According to Anna, for the aforementioned reasons, police officers recommended charges on the youngest individuals, they would pick the images/videos with the "much minimal, minimal development basically."

The complexities in assessing age led to another discussion about an individual's capacity to consent to sexual activity. Participants recognized that the age of consent had changed over the course of the years, from 12, to 14, to 16. Within this capacity to consent, therein lies exemptions depending on the ages of both individuals involved, as well as the position of power either individual may hold. John states:

> Obviously if you have a 14-year-old and a 14-year-old it's a whole different animal to a 14-year-old and a 40-year-old, so the age disparity is critical. Those actual ages I don't recall now in terms of what threshold we were trying to get to and for what clauses in the law for those files.

Mary commented on this problem in more detail, as her role within the police is focused on policy and research, and she was part of the group that pushed to raise the age of consent. Changing the age of consent was not necessarily important to child pornography, but it was important to child exploitation, as the U.S. states that border Canadian provinces have different ages for consent. Mary discussed what this pattern of offending looked like prior to raising the age of consent:

> People would meet, offenders, potential offenders from other States where the age of consent was 16 would engage in relationships online with children age 14 or above in Canada, knowing that the age of consent was lower here. And then arranging for a meet in Canada, having a sexual encounter with that child at the age of 14. And at times the child believing that it was a consent situation because they had

> developed a relationship with this person, and parents finding out and being not supportive of that. But really until the legislation changed, they weren't committing an offence.

For Mary, a key element to child pornography was consent: "Child pornography has a -- obviously pornography has a consent element, and with a child, with child sexual exploitation there is never a consent." Despite changing legislation around the capacity of children to consent to sexual activity, children under the age of 18 do not have the capacity to consent to a sexually exploitative relationship. Based on these factors, age combined with the incapacity to consent were the determining factors in labelling child pornography.

Consent was also a key determining factor in adult pornography, assuming, from a liberal perspective, that those individuals have agency to participate in pornography – it is about consent and choice (Linz & Malamuth, 1993; Pitcher, 2006; Rubin, 1993; Taormino, 2013). This factor appears to be the key distinction between adult and child pornography, as adults have the capacity to consent to participate in and consume pornography. However, feminists such as MacKinnon (1997) and Dworkin (1981) offered a counter argument to the liberal perspective, that women, because they live in a patriarchal society with limited financial options available, have little to no choice to participate in pornography. Often it may be the only choice, like prostitution, to make an income. Some argue that women may be forced to participate in pornography, as described by the infamous Linda Lovelace in the movie *Deep Throat* (Lacombe, 1994). Ed discussed consent in detail, identifying that "I think there is just a convenient blanket assumption of consent when it comes to adults." For him, the assumption of consent was problematic given that he perceived that those participating in pornography included sex trafficking victims, a concern echoed by feminists (Farley, 2006; Nichols, 2016). Like children, individuals who are sex trafficked cannot consent to sexual activity; it is coerced consent (Farley, 2006).

In discussing the definition of child pornography, various participants identified problems with the term pornography when discussing children, preferring instead to call these publications child sexual exploitation material. As Mary argued above, the term pornography implies a form of consent, and children cannot consent to sexual activity. For Mary, the term child pornography "doesn't represent the gravity of the material or the offences" and advocates "to have the language around that changed to represent, be

more representative of the actual abuse that's happening" to child sexual exploitation materials. Carole agreed that using the term child pornography to argue for policy or legislative changes, "doesn't really confer how graphic some of the things are or how vile some of the things are." James concurred that the term pornography suggests consent in the publications. He further argued that using pornography to describe child material normalizes child sexual exploitation, and essentially groups it together with material that everyone consumes:

> Where there is none in the material we're viewing and we're calling child pornography. Pornography is something that myself, colleagues, my wife, everyone -- I shouldn't say everybody -- but many people look at pornography. And if you choose to do that, by all means. I just have personal ethical concerns with calling what's happening to these children pornography.

James advocated for changing the terms to child sexual abuse imagery, or child sexual abuse material – CSAM. Anna suggested that using inappropriate language, such as "kiddie porn," minimizes the abuse that children experience when those images are created and consumed by other offenders. Her goal is to educate individuals, primarily on how "these [images] are actual children getting sexually abused." These police officers see the need for appropriate language use that a) acknowledges that children are unable to consent to participate in pornography and b) that the depictions of children in pornography, or child sexual exploitation materials, often feature graphic displays of children being sexually abused by adults – at the far end of the continuum outlined by Taylor et al. (2001).

From the debate among participants around defining child pornography emerged a discussion of how child pornography was prioritized by the criminal justice system over adult material. Participants identified in more explicit detail the child pornography offences, as well as the crimes associated with child pornography (e.g. child sexual abuse, sex tourism, luring). Ed discussed a "red line," which he labelled a binary perception between child pornography and every other type of pornography. Child pornography on the one side of the line, is illegal, and all other forms of pornography are acceptable in society. In accordance with this red line, child pornography is prioritized over obscenity, particularly if it features the sexual abuse of real children. The prioritization of child pornography is elaborated upon throughout the next two chapters.

The Implementation of the Child Pornography Provisions

After defining obscenity and child pornography, and discussing their experiences with both provisions, participants were asked to outline what they noticed in their profession after the child pornography provisions were implemented in 1993. In this section, participants explored the societal shift towards child protection that occurred. With the child protection climate initiated in the 1980s by feminists, and the work of the Badgley (1984) and Fraser Committees (1985), legislation with the goal to protect children from the harms associated with child pornography was implemented.

This question was designed to assess whether particular aspects of the criminal justice system actively started to investigate more child related cases, after the provisions came into effect. Given the breadth of experience from participants, their age range, and time of employment within the criminal justice system, it seemed a challenging question to answer. Many did not have the experience to answer the question, some, like Anna, because they were not employed in the criminal justice system in 1993. Others, like John, were working in specialized areas, such as bullet identification, and did not notice any changes until they were seconded to a child exploitation investigation. For example, Anna became involved in the ICE unit after visiting Thailand in 2002 and witnessing the sexual exploitation of children in public:

> When I started to take notice of child sexual exploitation, in 2002 I went to Thailand. And you know seeing all the sex tourism that was going on there just, like -- I mean what you'd see, like you'd see an 80-year-old man and a 16-year-old girl or a 70-year-old man and a 13-year-old girl. Like clearly, couldn't speak each other's language, like clearly an inappropriate alignment or whatever and it was just everywhere. And this was what was out in public. So, I thought if we're seeing this in public, what's going on behind closed doors, right? And at the time I was in the drug unit, I'd always wanted to be in the sex crimes unit. I was trying to get out of the drug unit, and they put a posting for this child sexual exploitation unit and like I'd just got back from Thailand, so I was like, "Yes, I'm all over this."

Carole, who was working at Customs and Excise at the time of change said:

> You know I just recall a lot of debates and pretty much people trying to interpret different aspects of it. And over the years I remember a lot of debate over whether certain things were artistic representation or if they crossed the line, but no I don't recall a significant change as a result.

Noreen worked with the Vancouver Police in the Coordinated Law Enforcement Unit and was assigned to focus on pornography in 1992, prior to the implementation of the child pornography provisions. She was part of a group of investigators that spearheaded the creation of the provisions and was part of the team who investigated Robin Sharpe (*R. v. Sharpe*, 2001). Noreen provided a very detailed outline of the challenges that arose when the child pornography provisions came into effect. For example, working with Crown counsel to follow through with charges was complicated because no Crown wanted to be the first to prosecute the child pornography offences. As Noreen put it:

> Oh no, you know, they didn't want to be the first one, you know, and create bad law. It was an absolute struggle to get anybody to do the first cases. I mean, it was an absolute fight with prosecutors.

Part of the struggle, Noreen said, was examining all the contents of child pornography collections found in cases like *Sharpe* (2001); followed then by getting Crown to examine the collection. She provided one example from the *Sharpe* case:

> Anyway, I took the material to the Crown in Surrey, who would have been handling that file, for Sharpe. Gave it to one prosecutor. Well, he starts reviewing, he goes, "Well, I'm not reading this, it's so disgusting." And I said, "Do you think I don't know that?"

When the Crown reviewed the content, Noreen noted that it took him a year to review all the material. Additional challenges she faced included the lack of police resources to provide support to child pornography investigations: "I mean I was basically the only one that -- and they had one other officer working with me, that was dealing with the pornography." Additional support was also provided through collaborations with the RCMP and Customs and Excise; however, as discussed in more detail below, this support was never enough to adequately respond to child pornography.

One of the most surprising parts that Noreen described was the struggle that she had in educating members of the criminal justice system, non-government organizations (NGOs), and even the community, as to just how graphic and violent the depictions of child pornography, and adult pornography as well, were. Noreen often provided vivid descriptions of the types of material that she examined not only as part of the criminal investigation, but often as a means to catalogue large collections. For example, Noreen described the case of Joe Arvey:

> So, I was on the stand, close to three days on the stand with Joe Arvey. He and I were back and forth because he produced a book, which actually in the States the fellow was convicted of obscenities, and it's called Boiled Angel. And Boiled Angel is mainly drawings and stories, but the drawings are so graphic, it shows – like a man adopting a little boy and then he's engaged in sex with the little boy, and then he engages in sex with babies. Throws the babies into a meat grinder, and then makes it into dog food and feed them to the dog, and then the dog is engaging in sex with the boy.

The magazine in question was also subjected to much debate in *R. v. Laliberte* (1992), which ultimately found that the magazine was not obscene. At the same time, Noreen was also investigating the *Little Sisters* (2000) case. Noreen expressed concern that the LGBTQ2 community was arguing that pornography was necessary for the sexual development of young adults within that community. Again, Noreen provided detailed descriptions of the type of material that she was responsible for investigating:

> The other thing that I couldn't get over is, Little Sisters argued that the violent material is needed by the gay community. I thought, "Why?" Why? I mean, there were stuff that we seized that had -- I mean, I don't care if it's consensual, to men hung up with black mass where their face is being beat. You know, their backsides were bloody and then having their scrotums nailed to a sawhorse and pins put through their penis.

While expert evidence continues to present conflicting arguments as to the affect viewing such images has on sexual development of young adults (Banca et al., 2016; Bridges et al., 2016; Carroll et al., 2008; Cooper et al., 2004; Harness et al., 2015; Sun et al., 2017; Weaver et al., 2011) the descriptions offered by participants, such as Noreen, were often framed as presenting risk of harm to consumers – a discussion that is continued in the section on harms of obscenity.

Ed, the academic lawyer, noted that "child pornography was not something that I had really thought much about prior to the *Sharpe* decision." In discussing *Sharpe* (2001), Ed recalled that, as a law student at the time, there was public outcry over the SCC's decision to allow individuals to produce their own child pornography for personal use. The decision meant that Sharpe was allowed to write fictional stories of the sexual abuse of children, as long as he did not distribute them to others (2001). Another lawyer, Sierra, who was not practicing law at the time the provisions began, stated, "They've always been there for me." Referencing his time practicing law in Ontario, he found that defending these types of cases were rare, citing that child pornography cases were more prevalent in BC. For Sierra, the apprehension was not about the rise of the provisions or

the response of the criminal justice system, rather he was concerned how society had gotten to this point. Sierra referenced the vicious cycle often in the literature (McCuish, Cale, & Corrado, 2017) that “they [offenders] are abused and yet they carry on and do it themselves,” combined with the issue of substance abuse. Wesley, primarily a defence lawyer, stated that with the creation of child pornography provisions led to a rise in prosecutions. He connected the rise with the internet: “Well, they started being prosecuted, right? And that has -- and then of course what's happened in tandem with those provisions is the explosion of the internet, right?”

In a unique discussion, George outlined the implementation of the child pornography provisions that represented a shift in attitudes towards sexual offences against children. As a defence lawyer, he found that “it was generally accepted like kiddie porn is bad, but that was it,” with sentences against child sexual offenders consisting of probation, rather than the mandatory minimum periods of incarceration we see now. He described that “you would actually see a whole general progression in the attitudes of society in general and the courts and how sentencings were conducted.” In particular, providing examples whereby “sexual offences against children were just brushed off,” and that “they were really not treated seriously by the courts.” George provided two graphic examples of how societal attitudes towards sexual violence against children has changed. The first was the changing behaviour towards the crime of incest, which George outlined, “when I was kid growing up, people laughed about – they called it inbreeding, right? Well, now we call it incest and we call it a crime.” The second example was graphic description of a cartoon that appeared in *Playboy* magazine:

> So, in this cartoon, it was -- this guy showed me, in a mainstream magazine, I think it's Playboy, I may be wrong, but I'm pretty darn sure it was a Playboy magazine he showed me. And it was a father spanking his daughter and he has his finger out so that it would be going into her vagina, and then girl's comment is, “Daddy, I love the way you spank me.” Eh? And this guy shows me. And you think about that, this is a mainstream magazine, and this was making -- this is a cartoon joking about a father molesting his child and how humorous it was.

George described the societal shift here, that this cartoon in an older pornographic magazine was marketed as funny, yet now it would meet the definition for child pornography. Açar (2017) called this a “paradigm shift” which legitimized child sexual exploitation as a serious crime (p. 260). George attributed the shift in societal attitudes to the second wave feminists, such as Andrea Dworkin (1981) and Gloria Steinheim

(1980), who advocated for changes to legislation for violence against women and children, a shift discussed in more detail in chapter six.

Some of the participants were not working within the criminal justice system when the child pornography provisions were implemented in 1993, and instead discussed legislative changes to the obscenity and child pornography provisions that occurred within their career. Anna identified how the child pornography provisions and updates to that legislation sparked conversations around youth and the age of consent. As discussed earlier, the age of consent was raised from 14 to 16 in 2008 (Bill C-2, 2008), but child pornography is defined as depicting those under the age of 18. This difference has the potential to create problems given that youth have the capacity to consent to sexual activity, but not document it. This problem was originally identified in *Sharpe* (2001), based on the notion that within the child pornography provisions, to withstand *Charter* scrutiny, required private use exemption. The three factors to the private use defence were: the depictions were of legal sex, consent was obtained, and the publications were held for private use (*R. v. Barabash*, 2015; *R. v. Sharpe*, 2001). In *Sharpe*, the accused, an adult, created self-written stories for his personal use. The SCC clarified the private use exemption in *R. v. Barabash* (2015). This case differed from Sharpe in that the material depicted two minors, who were at the time of the offence of the legal age to consent, having sex with adult males. The SCC determined that in cases of sexual exploitation, the private use defence did not apply, even if the children/youth in question had consented, the consent was negated by the presence of an exploitative relationship (*R. v. Barabash*, 2015).

Participants identified when the child pornography provisions were implemented, specialized units were created to respond not only to child pornography, but to child sexual exploitation more generally. Some police, like Rex, attributed the creation of specialized units to the rise in sex tourism, and the need to investigate child sexual exploitation on an international level, with documented incidents of Canadians sexually abusing children in Thailand. Rock Climber, a retired RCMP, put forward the idea that these units were created for a specialized response to child pornography from experts:

> As opposed to giving it to the young guy on the block when the complaint come in and nobody else wanted it, it got shuffled off, the guy had no idea what to do with it, right?

Catherine expanded on the creation of ICE units, that the child pornography provisions "changed policing and it changed -- it necessitated a better response than we initially were providing." She suggested that the implementation of child pornography provisions created an influx in cases of child pornography, which necessitated a structured response to this crime, including having specialized police with education with training and the tools to respond to these types of crimes.

Mary, in her role in the RCMP, noted that the child pornography provisions have been updated multiple times since the original provisions were implemented in 1993. She discussed the creation of the child luring provisions, s. 172.1 of the *Criminal Code*, which includes using telecommunication devices to communicate with children for the purpose of sexual abuse, and other related crimes. As examined below, the creation of the luring provisions, among others, was related to technological advances and the rise of the use of the internet for offenders to commit crimes against children. Compared to child pornography crimes, which Mary suggested were reactive in nature, the child luring provisions allowed police to proactively respond to potential child sex offenders before the abuse happens. Sally, the prosecutor, noted that the creation of the Mandatory Minimum Sentences (MMS) for child pornography offences resulted in major changes within the criminal justice system, generally, but also against children. Initially, MMS for child pornography in 2005 were 14 days, since then they have kept going up (*Bill C-2*, 2005). Sally described the lack of consensus from the courts as to whether MMS past *Charter* scrutiny in the form of violating section 12 against cruel and unusual punishment:

> And in some cases -- and it just differs from region to region in Canada. But in some cases, the mandatory minimums were struck, where the judges felt that the mandatory minimums were grossly disproportionate and struck them. And so, for the rest of the province the Crown could not use that as a provision. And in some cases, they were upheld, where Courts have felt that they were fine. They were fit sentences. So, I think that was sort of the biggest challenge. And when one is looking at cases, then you're trying to find a sentencing case if you have a conviction or a guilty plea. And you have one province saying mandatory minimum applies and then you have your own province or the next province over saying it doesn't apply. It makes the entire sentencing calculation -- or maybe not calculation, but the entire sentencing approach a little bit more complicated and tricky. But that's been sort of the biggest challenge, I think, both to defence and Crown Prosecutors.

In the case of *Swaby* (2018), the B.C. Court of Appeal confirmed that s.163.1(4) mandatory minimum sentence for possession of child pornography violated Swaby's *Charter* rights against cruel and unusual punishment and declared this section to be of no force and effect. A similar decision was reached in the Ontario Court of Appeal, in R*. v. John* (2018). In *R. v Hamlin* (2019), this decision was applied for the crime of accessing child pornography. At the very least, these decisions point to some agreement between provinces that mandatory minimum sentences for possessing or accessing child pornography are unconstitutional.

Sally observed the challenges within these provisions, while they provided consistency in sentencing and all convictions for child pornography guaranteed a minimum sentence, which in turn, limits judicial discretion to assign alternative sentences. On the other hand, despite variations in the content of child pornography material, as Taylor and Quayle (2001) indicate, consistency in sentencing can also be a problem. Sally provided the following example:

> However, the term consistency is quite a bit fluid, or perhaps full of question marks because you've got to look at the actual fact scenario. And you have an individual who's possessing 10 images versus 1,000 images. And one has mental health issues, the other one doesn't. And they both receive let's say one year. The sentence itself is consistent, but the facts underlying the sentence are inconsistent.

The challenges Sally presents are consistent with government of Canada reports (Allen, 2017), and account for why the government of Canada is supposedly reviewing the MMS legislation. Building on the challenges presented by MMS, Rex expressed frustration with the court's lack of use of the maximum penalties for child pornography crimes. He went as far as to suggest "It's a joke" that the court, or even the Crown, does not present them as an option for the court to consider.

Wesley also discussed MMS, expressing that he is "not sure that really makes a big difference," as judges use case law to guide their sentencing decisions. He also indicated that judges may make exceptions in certain cases, referencing with child pornography provisions one of the key determining factors would be the size of the collection: "Well, I mean if you've got 20,000 images as opposed to two, the two you may never be charged. And if you were charged, the court would give you the least possible sentence it could." For those with thousands of images, Wesley argued that they have a higher level of involvement, and are thereby more culpable, as opposed to the individual

who mistakenly clicks on an image of child pornography. For example, in the case of *R. v. Swaby* (2017), an exception was made to the MMS as Swaby was not seen to be as culpable given his mental capacity, and a conditional sentence was imposed instead.

The aforementioned discussion outlined how participants defined child pornography and obscenity, based on their experiences with investigating, defending and charging individuals with both or either of these crimes. Notably, was the lack of experience participants had in responding to obscenity as a crime. This lack of experience meant that ten participants struggled to clearly define obscenity and did not recognize that it was still a current offence found within the *Criminal Code.* It became quite apparent that the focus was on child pornography offences, as participants clearly articulated the definitions of child pornography, including the various offences that were found in s.163.1, as well as other comorbid offences, including child sex tourism. A variety of responses was noted when participants discussed the implementation of the child pornography provisions. As individuals with a variety of experience within the justice system were interviewed, only a handful of participants were able to provide first-hand experience of the changes that occurred when the child pornography provisions were implemented in 1993. Some participants outlined how ongoing legislative changes to these provisions created additional challenges in responding to child pornography, and child sexual exploitation. Many of these challenges experienced by police over the course of nearly three decades, was intertwined with the technological advances that arose in the mid 1990s. In particular, the internet was flagged as one of the biggest challenges faced by the criminal justice system in responding to sexual crimes against children generally speaking, including child pornography offences. These challenges, combined with the rise of the internet, as outlined in chapter five, contributed to the prioritization of child pornography images, above obscenity.

Chapter 5.

Pornography and the Internet

The implementation of the child pornography provisions coincided with the increased accessibility to technical advances, including dial-up internet in the 1990s. These combined changes, in addition to new legislation for child pornography and child sexual abuse, led to a transformation in how the criminal justice system responded to these crimes. In this chapter, I outline the rise of the internet and how technological changes led to a flooding of pornography available online, thereby increasing access to pornographic material. Subsequently, this access and flooding led to an explosion of adult pornography, including obscene publications, becoming widely available and with such availability, participants questioned whether it carried with it a risk of harm. In particular, they suggested because adult pornography was everywhere, and not harmful, it was not in the public's interest to pursue obscenity cases. This decision is discussed in relation to how there was a societal shift in towards tolerating adult pornography, including that which met the legal definition for obscenity. I explore how the internet has specifically impacted child pornography through the flooding of publications of child pornography and the new forms of child pornography available through technological advances and the internet. Lastly, I outline the influence of these new forms and availability in terms of normalizing pornography depicting the sexual abuse of children.

The Rise of the Internet

When asked about the implementation of the child pornography provisions, many participants transitioned into answering the subsequent question about the rise of the internet. This question had two parts: what participants noticed when pornography became available online and how this impacted the criminal justice system response to obscenity and child pornography. Five key themes emerged with respect to availability of all types of pornography online, which I argue are related to each other. Technological changes, led to the flooding of pornography, including child pornography, available online, which thereby increased accessibility for individuals to access not only "normal" pornography, but also illegal content. These themes directly relate to how the internet influenced the criminal justice system response to obscenity and child pornography.

Technological Changes

Many participants discussed technological changes, including the internet, that were on the rise around the same time that the child pornography provisions were introduced. Some found that these changes resulted in significant modifications to how the criminal justice system responded to child pornography, as opposed to the actual legislative changes. Those employed in the criminal justice system in the 1990s outlined the transition they experienced in the work force from using paper to computers, and the challenges in keeping up with technological changes. Catherine, for example, discussed how she was working in a small community, and technological changes were rapid for both the public and the detachment:

> I recall that I had my first home computer at that time, as did some of my friends and co-workers, so computers were kind of a new thing in your home. Certainly, in our workplace, computers coming into the workplace were new.

She described how these technological changes, combined with the legislative changes, such as the introduction of the child pornography provisions, were intimidating. As outlined below, technological changes brought both advantages and disadvantages to the criminal justice system response to obscenity and child pornography. Carole for example, elaborated on the complexity of technology and the internet:

> All of those things are positives. So, with some of the bad things that came with the internet, there are also came a whole bunch of really good things. Trying to find that balance or making it so that we can be as effective as possible continues, I think, to be a challenge and not a challenge that we're done facing by any means. But I think that it also needs to be tempered with the fact that there have been some real positives as well that have come out of this.

The advantages and disadvantages that technology and the internet brought to the criminal justice system are elaborated upon throughout this chapter.

Over the course of the 16 interviews, I obtained a sense of the chronology of how technology, and in particular the internet, changed the way individuals accessed and shared pornography. Carole described it best when she stated that "it wasn't that new crimes were happening it was just that crime was happening in a different way. They were finding new ways of doing it. Child exploitation and child pornography have always existed." Now, offenders had the ability to share images and videos of child pornography

with encryption codes, thus making it easier to hide their crimes (Dodge & Dale, 2018; Horsman, 2017; Steinberg, 2019). The timeline in Figure 1 outlines the technological advancements of the last three decades, that documents the ways individuals were accessing or sharing pornography at the time (Carroll et al., 2008; Cooper et al., 2004; Tylka, 2015).

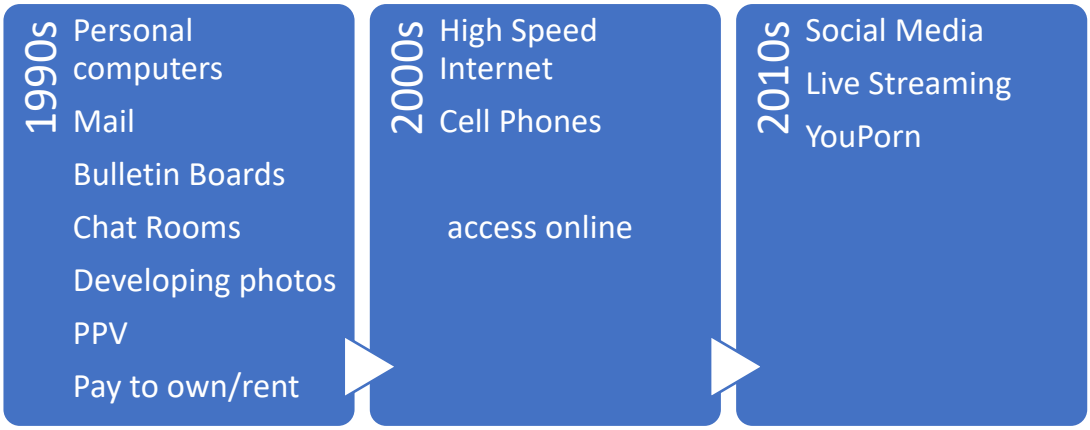

Figure 5-1 Technology Timeline

Mary outlined how the internet changed the way people accessed pornographic content; originally it was distributed or purchased via mail or it was hidden in the top shelf of stores available for purchase (Carroll et al., 2008). Individuals who wanted to share pornography, particularly illegal content, had limited options that available that left them open to legal intervention. For example, Anna and Carole both described cases where participants were charged under the obscenity or child pornography provisions for mailing packages to others or themselves. Other individuals who wanted to have their original content developed, were forced to take their film to get developed in a local drug store (see, for example, *R. v. Hawkshaw*, 1982). As George described it, “So the production of this stuff, you know, the days of developing film are long gone.”

James discussed how offenders used Virtual Private Networks (VPN) to “disguise where you are or what computer you're using, to make it so that your actual identity location computer cannot be identified.” Rex described how offenders could now do things like digitally swirl their faces in online images and videos, thereby making it more challenging for the police to identify offenders. In *R. v. Neil* (2015) the accused utilized technology to hide his pornography, including how the “applicant [Neil] endeavoured to

conceal his use of that machine by passwords, encryption programs, a data wiping program and a service which enables users to search online anonymously and to hide their internet history" (para. 18). This description also fits with Catherine's explanation of how initial responses to society's ability to access the internet were met with excitement. However, it was then followed by the realization that the internet can be used for "dark" purposes, such as sharing and accessing child pornography (Horsman, 2017).

Additionally, offenders could now commit crimes via the internet, necessitating a criminal justice system response through the creation of new offences, accessing (clicking on child pornography), transmitting child pornography (online), child luring, and the distribution of intimate images offences. All of these crimes allow for offenders to commit sexual crimes against individuals without ever meeting them in person. When one considers the impact of these cases, such as Amanda Todd and Rehtaeh Parsons, two young women in Canada who killed themselves after having their intimate images distributed online, the implications of this offence against its victims is huge (CBC News, 2013; CBC News, 2015; Dodge & Dale, 2018; Koziarski & Lee, 2020; Powell & Henry, 2018). Noreen agreed, noting that those children who fall prey to pedophiles who capture images or videos of their abuse, are at increased risk of suicide (Koziarski & Lee, 2020). Noreen connected it to the fact that once these images are online, they are there forever:

> And, you know, the internet, yes, there's good things, but in relation to that, there's lots of very negative stuff in relation to trying to protect kids and help them to understand that this stuff is out there forever.

Additional concerns included the police struggling to identify the children in the images, as documented by Noreen:

> You know, and a lot of time we were never able to identify the children. You know? And we'd get all of this material and we have no idea who the children were.

Today, the police use image analysis to help identify the thousands of victims (Office of the Federal Ombudsman for Victims of Crime, 2009). While this system is not automated, and is still time consuming, it helps to identify at least some of the victims. Mary noted one of the positives of the internet was that it gave a voice to victims, or at least the ability for victims to leave a digital footprint for the criminal justice system to trace; however, this idea relies on the ability to be able to identify, and subsequently find

the victims (Powell & Henry, 2018). Carole suggests another positive aspect of online technology, and notes that the social media platform, *Facebook*, helps identify, and potentially track down, missing persons, including those who are victims of child sexual exploitation.

Early on the internet increased access to pornography, but it was still slow. Kim pointed out the changes that came with the advent of high-speed internet, which thereby further increased society's ability to access it, and share it, almost immediately with high speed internet. Cell phones with computer and internet capability only exacerbated the problem; people now have the ability to film abuse as it happens, and easily share it – or worse live stream it. James, a current member of the RCMP, described the transition as follows:

> Pornography is -- 20 years ago, 25 years ago, if you wanted pornography you had to walk into that back black curtained area of the video store or be pulling the magazines off the top rack at the Macs Milk or whatever. With pornography becoming so prevalent on the internet, it's now available to anyone at any time on any type of digital device, not any type, but any sort of mobile phone, tablet, computer, laptop.

Now pornography is available "at the push of button," as Mary put it, which has contributed to normalizing such materials. According to Kim, the internet allowed for the creation of specialized areas or niches, for all types of sexual material for individuals to consume. Cooper and colleagues (2004), note these technological changes have facilitated the creation of a "sexual revolution" (p. 130). Not all pornography content available online is necessarily illegal, for example, participants described particular fetishes such as BDSM, MILF (Mom I'd Like to Fuck), urinating and defecating on each other, gang-rape, gay sex and "whips and chains and all that kind of stuff" (James). As Kim described, when asked to outline the types of content found online: "I mean, anything that someone has a demand for, someone is going to figure out a way to supply it." George agreed, noting "… you often find that with the advent of handheld phones, the making of this pornography is incredibly easy to do." As Holt (2018) described it in his discussion of cybercrime, "The Internet has become a mechanism for access to sexual content featuring virtually any gender, sexual preference, and fetish" (p. 143).

The internet allowed individuals with illegal sexual desires a secret space to access and share illegal material, such as child pornography, bestiality pornography or

snuff films, via the dark web. McNair (2002) described this transformation as a shift away from the heteronormative understanding of sexuality, man/woman, to the diversity of sexualities that can be found in society. Justice Clark described how this process plays out in cases of possession of child pornography:

> Sadly and unfortunately, possession of child pornography facilitated through the internet is on the rise. The incidence of this behaviour expands as technology becomes more sophisticated, thus encouraging the production and distribution of it. The victims, of course, are innocent children who became props in a perverted show played out for an ever wider audience, not only of voyeurs, but of perpetrators. (*R. v. Crane*, 2018, para. 54)

These technological changes ultimately contributed, many participants argued, to the flooding of pornography, or rather the proliferation of pornography available online, as outlined in the next section.

Flooding of Pornography

When participants were asked to describe, initially at least, the internet's effect on all types of pornography, most agreed that the criminal justice system experienced a flooding of cases of child pornography, as well as adult-oriented pornography. The judiciary has identified how the internet has directly influenced child pornography offences, through increased availability of all types of pornography, as well as the ability to share material instantly (*R. v. J.S.*, 2018; *R v. Nisbet*, 2011). During the interviews, it became apparent that the police were inundated with images that they then had to analyze and investigate. This theme was echoed by Noreen noting that the rise of the internet, resulted in a shift from collecting printed material:

> then it was that they [offenders] were collecting thousands, and thousands and thousands of images, and then they were connecting with other pedophiles online so that they could collect with people who are of like mind.

She further explained that "it just exploded," "and the collections though, just got to be larger, and larger, and large, because of the internet." Participants often described how offenders had special hard drives filled with thousands of images of child pornography; a shift from what Rex noted in responding to one child pornography in the 1990s, when he found boxes of printed material. As such, the police were responsible for reviewing all the potential illegal images to determine what charges, if any, were appropriate to

forward to Crown. When applied to large collections, police officers must review hundreds, or even thousands of images and/or videos of illegal content; in some examples, it was impossible to review all the content because offender's collections were so vast. Anna, another police officer, said "we [the police] literally could not investigate all the potential offenders out there because of the internet, because of this electronic transfer of data. It just exploded the problem." In addition, Rock Climber drew attention to the effect on police who view thousands and thousands of these images, a concern repeated by Noreen and Catherine. Anna also shared how investigating these types of crimes, and viewing the images, started to fry her brain (Kloess et al., 2019).

Within this theme of flooding of pornography available online, a discussion of how the court system became flooded with the number of charges that police recommended to Crown. Anna provided an example of a case which 300 charges were put forward by the police; the Crown's response was that society could not handle that number of charges. On the other hand, James outlined how the flooding of child pornography, created an expectation by Crown counsel to see large number of images or videos in a child pornography collection. He questioned whether Crown would even prosecute a file with only 88 images in a collection. For James, this was evidence of the shift that happened within the court system:

> I would think that if 20 years ago you put a file before the courts and said, "Your Honour, through whatever investigation that occurred we did a search warrant on the children's house and look, we found that he had pictures, that he had printed pictures of children being abused, and there was seven of them. He had seven of these images of children being, let's say, sexually assaulted. Small children being sexually assaulted by adult males." I feel that back then it would have been shocking. I feel the number, or the volume of images possessed wouldn't have been a massive deciding factor. If you had a few, if you had 20, it wouldn't really matter to the judge because it would just be, you're a person who had this content and you're going to be sentenced accordingly.

Now, at least for James, the volume of the collection became an important factor in assessing whether to proceed with the charge approval. Larger collections of child pornography are therefore prioritized, by police and Crown, as a means of allocating scarce criminal justice system resources to cases with a greater likelihood of conviction. This theme is also found in the case law and literature, where the size of the collection is identified as an aggravating factor in child pornography cases (*R. v. Kwok*, 2007; Taylor

et al., 2001). The prioritization of child pornography, over adult pornography, as a means of allocating resources is discussed further in chapter six.

Accessibility

Carole described the implication of the access to the internet as being incredibly widespread:

> That's my own personal opinion, but I think we could throw as many officers as we could at it, and we would still not bring it to an end. It's that pervasive.

The proliferation of pornography available online has gotten to the point where, Sierra believes at least, the criminal justice system would never be able to "put a lid on this." As outlined above, pornography had to be purchased, in store, in person, or discretely on pay-per-view (PPV) (Carroll et al., 2008). Now society has access to all types of pornography, instantly, for free (Ashton et al., 2018; Carroll et al., 2008; Cooper et al., 2000). Research into the effect of the technological advances on pornography, describe the resulting internet as a "triple-A-engine" (Carroll et al., 2008; p. 7), with the increased accessibility, affordability, and anonymity (Wolak et al., 2014). Evidence points to the accessibility, and the sheer numbers of individuals who view pornography regularly; Carroll et al. (2008) report that pornography is available at the click of a button online "24 hours a day, 7 days a week" (p. 7). To continue, 13% of online access is for pornography (Grubbs et al., 2017) and the popular website, *PornHub,* has 58 million visits per day (Sniewski & Farvid, 2020). Additional research points to the billions of dollars spent on pornography each year (Carroll et al., 2008; Dines, 2010; Harkness et al., 2015).

James proposed the idea that accessibility of child pornography encouraged some individuals to offend against children, citing the example of an 80-year-old man who acted on pedophilic thoughts that he had for years after consuming child pornography. Mary and A., two other police officers, echoed James' concern, believing that the increased availability of pornography, in particular child pornography, legitimized the sexual abuse of children and escalated behaviours. John outlined a conversation that he had with a police psychologist about the proliferation of child pornography online:

> And I remember him telling me, he said, "This is just the beginning. This is just the beginning, this is growing, and growing, and growing. We have no idea what we're headed into." And I don't know if anybody has

> studied this, it would be very hard to study it and get stats on, but the police psychologist I talked to about this on one occasion said, "how many guys who frequent child porn sites, or access child pornography frequently, how many of them go on to contact crimes?" And he said a significant percentage. And he said, so you can expect -- and he says it's a long burn, they don't do it quickly, but he was of the opinion that 20 years from then, that's 2008, 20 years, 25 years from then, he says you're going to see a massive increase just where it has percolated with all these guys. Because he says the stats of users are going up. And he said there are people that use child pornography and they remain passive, but a significant percentage will act out. And he said we are not going to be in a position to cope, and our society has no clue what's coming

This anecdotal evidence is consistent with some research into pornography, such as by Kingston et al. (2008) who found an increased risk of sexual aggression when pedophiles use pornography. Continued evidence suggest that pornographic scripts normalizes the sexual abuse of children (Aslan, 2011; Bridges et al., 2016; Ryder, 2003). However, other researchers, such as Fisher et al. (2013) found the contrary-- no relationship between consuming pornography and contact sexual offending (Barak & Fisher, 1997; Barak et al., 1999; Fisher et al., 2013; Ly et al., 2016; McKee, 2005; McKee, 2007; Morrison et al., 2007). At its core are the challenges in assessing the effect of access to pornography on offenders without conducting longitudinal studies, or retrospective studies. It is safe to say that in the examples described above the police believe access to pornography fuels child pornography related offences.

The Internet and Responding to Obscenity

Participants outlined the more specific effect that availability and accessibility of adult material had upon the justice system in terms of responding to obscenity as a crime, but also in terms of how obscene material affected consumers. As John so aptly described it, "the internet is a game changer in everything here" – with pornography offences and as well as other forms of criminal activity. While some participants declined to speak on obscenity, as it was outside their area of expertise, others drew on academic research and media influences to facilitate an informed discussion around obscenity and the internet. In the following sections, I outline how participants conceptualized the effect of obscenity and risk of harm on society, leading into to a discussion on how responding to obscenity as a crime, was not in the interest of the public good. Lastly, I outline the

social shift experienced over the last several decades towards tolerating adult pornography, even that which is considered obscene under the law.

The Explosion of Pornography and Risk of Harm

Participants described how the internet resulted in explosion of adult pornography online. In the discussion that followed, participants reported that obscenity was no longer the focus of the justice system, and as discussed in chapter six, priorities shifted to child pornography. In accounting for this shift away from obscenity, a discussion of the explosion of adult pornography influenced the following factors: the inability of the justice system to keep up with pornography offences, the risk of harm (or lack thereof) in consuming obscene material, the educational value, and lastly, the question of pursuing crimes that are not considered to be in the public's best interest.

Participants described how the material they respond to is just "a drop in the bucket" in terms of the magnitude of exploitive material. John outlined how the criminal system cannot keep up with the availability of pornography online:

> So I don't know how to deal with it, but clearly that's the big difference the internet has made in terms of if you want 5,000 people to have a copy of X video, you can do that in minutes, and you can do it in 30 different countries. There is no legal system in the world that has adapted fast enough to keep up with that kind of distribution.

As such, this shift necessitated a response to prioritize materials that warrants criminal justice system intervention. Participants also expressed varying opinions as to whether or not this material was harmful. Many identified that adult material was not harmful as long as all participants consented to participate, and be photographed, within the publications. Harm occurs when consent was not given; in those examples, participants identified that the crime then became sexual assault, or illegal distribution of an intimate image, as opposed to a crime of obscenity. This theme is outlined further in chapter six.

For consumers of obscene materials, the picture of harm was not clear. George, who was involved in the *Butler* (1992) case, compared the concerns about pornography to the recent apprehensions associated with the legalization of marijuana. The misplaced concern is that ready access to pornography means more people use it, which would result in increase in sexual crimes. As George pointed out, and academic research agrees (Gentry, 1991; Ferguson & Hartley, 2009; Kutchinsky, 1991; Malamuth,

2007; McNair, 2014; Scott & Schwalm, 1998), there has been no associated increase in sexual crimes in the last 30 years, or more specifically since pornography exploded online. George still argued, however, that young people may get wrong ideas, or antisocial thoughts or attitudes, when they access pornography. This idea of harm to children and youth who consume adult pornography was noted by other participants. Mary identified that pornography, for better or worse, can be a source of sexual education for youth – an argument reflected in both academic research (Coyne, et al., 2019; Shor, 2019; Tylka, 2015; Williamson, 2016) and by the appellants in the *Little Sisters* (2000) case. She indicated that:

> exposure to adult pornography, depending on the type, if it's extremely violent or sadistic or manipulative, degrading, that does –- research had demonstrated that it has an impact on the development of a healthy sexuality in a negative way.

Mary's primary concern was that depictions of violence create "a false impression of what healthy sexual relationships look like." On the other hand, she recognized that pornography could be a positive source of education for youth, and especially gay youth. Again, this argument was used *Little Sisters* (2000), with Justice Binnie reiterating the argument made by Little Sisters and interveners that "homosexual erotica plays an important role in providing a positive self-image to gays and lesbians, who may feel isolated and rejected in the heterosexual mainstream. Erotica provides a positive celebration of what it means to be gay or lesbian" (para. 53). Sierra and Anna agreed that youth access to such materials may result in problematic or unhealthy understanding of sexual behaviour, which could lead to illegal behaviour.

Noreen added onto to Mary's argument that youth are affected by pornography consumption, noting that:

> it really gives them a distorted understanding of anything to do with sex or anything else. Because it, I mean some of it is just horrific that's out there.

John described how, in a conversation with an ISP about pornography, the ISP outlined that online pornography is how youth learn about sexuality and develop healthy relationships. John's reaction was shock:

> An astonishing phrase, an astonishing statement to make that I don't believe is justified at all. I think everything would indicate that the

> degree of violence, even found in regular pornography, would indicate that it does the very opposite to developing stable relationships. It's actually very destructive in terms of stable relationships and the dehumanizing of particularly women, but also men, in terms of the role of pornography and the degree of abusive behavior in [pornography].

Offering support for Noreen's argument that the pornography out there is "horrific" Shor (2019) provided a recent content analysis of online pornography. Of note, was that 43% of videos featured aggression (e.g. biting, punching, kicking, BDSM, forceful penetration), and 15% depicted non-consensual aggression with female adolescent performers reacting positively to aggressive acts – including displaying pleasure and/or depicting orgasm. Research into the effect of pornography on youth is mixed and limited (Peter & Valkenburg, 2011; Shor, 2019); however, there appears to be consensus that the first time pornography is accessed is during adolescence (Brand et al., 2011; Skorska et al., 2018; Wolak et al., 2007), lending support to the concern expressed by participants that pornography may affect youth.

James indicated that when actors, or real people, are treated in a degrading or dehumanizing manner it has the potential to be harmful, particularly towards women:

> And that can definitely, I think, have an effect on the psyche of the men who are watching them and their view of women and can alter their perspective of the value of women.

This particular concern was the basis for limiting the right to freedom of expression in *Butler* (1992), acknowledging that degrading or dehumanizing material had the potential for increased risk of harm to women and children in the form of sexual violence, or antisocial attitudes facilitating sexual violence against women and children. Anna outlined how this process worked, with reference to the sale of the adult pornographic magazine, *Barely Legal*, which featured a woman who appeared to be under the age of 18 on its cover:

> It's like a rape fantasy basically, right, you know, kind of thing. It's like saying these women can't wait to come of age so they can have sex with you, right? Basically, it's the fantasy that they're feeding, right? Which is not – it's absolutely disrespectful to these young girls. And it's like – I mean to me it's like – you know, I remember hearing about this, you know, position that profs at SFU were taking, which was that child pornography's not harmful. It's not – if they're just looking at images, and I'm like, you stare at these images long enough, you're going to want to do that. Right, like you feed that fantasy, you're going to want

> to act on it, right? That would be my position. (a) why feed the fantasy and (b) these are real children that are being abused.

For Anna, the concerns about adult pornography extended into how adult material could also be harmful to children; namely, when adult material features the infantilization of adult women as children (Kusz & Bouchard, 2019), it feeds into the fantasy of child sex offenders and thereby normalizes their behaviour, which potentially increases risk of harm to children (Shor, 2019).

Other participants expressed concern that adult pornography could be used as a tool to groom children for sexual abuse, as discussed in *Sharpe* (2001). Anna outlined how child sex offenders will discuss masturbation with children, and start to show them adult pornography:

> And so, he starts showing him adult pornography, which would be vanilla -- not vanilla, but male and female adult pornography to start with. And then he starts showing him men on men and then he starts showing him like adult child pornography or children engaged, right? So, they use it as a grooming tactic.

In the example described by Anna, an increasing degree of exposure to pornographic material occurs, from heterosexual legal content, to illegal child pornography material, which is used as a means to normalize and legitimize sexual abuse of children.

Research into the risk of harm of pornographic material is inconsistent, with various studies arguing pornography does not cause violence, while others find it related to people acting violent (Barak & Fisher, 1997; Barak et al., 1999; Baron, 1974; Fisher & Barak, 1991; Fisher & Grenier, 1994; Fisher et al., 2013; Gentry, 1991; Kutchinsky, 1991; Ly et al., 2016; McKee, 2005; McKee, 2007; Morrison et al., 2007; Scott & Schwalm, 1998). Wolak et al. (2007) suggested that the effect of pornography consumption depends on vulnerability factors such as impulsiveness or depression. Carroll et al. (2008) found a relationship between pornography use and risky sexual behaviour, with others suggesting a connection between pornography use and risk of contracting STDs (Brand et al., 2011; Cooper et al., 2004). Coyne et al. (2019), conversely, found support for the consumption of sexual content as significant factors in risky sexual behaviours, rape myth acceptance, and sexual attitudes. However, the *Butler* (1992) decision, focused on the presumption of harm, without proof of actual harm. In their categorizations of pornography, the SCC found that depictions of violence

would always be obscene, as they carried a substantial risk of harm, whereas depictions of degrading and dehumanizing behaviours could be obscene if they were found to carry a risk of harm; erotica would not be considered obscene.

This categorization of harm, connected with the community standards of tolerance test, was maintained until the decision in *Labaye* (2005), which reconceptualized the obscenity test away from the community standards of tolerance, to one which focused primarily on risk of harm. The problem with the *Labaye*, as evident by academic research (Jochelson & Kramar, 2011; Kusz, forthcoming), and anecdotal evidence from participants, is the lack of consensus regarding the nature of harm of obscene material, and the risk of harm. Wesley summarizes it best:

> I'm not arguing that it's harmful, I'm arguing that it has the potential to change us and if we see it as commonplace, that means it has changed us. That's a change. Harmful/not harmful, I don't know. Does it make me, or does it make any of us more likely to engage in violence? I don't know. I have no idea.

When compared with child pornography, the harms are more evident in research. Children do not have the capacity to consent, so any depictions that feature children are publications of the sexual abuse against those children. Additional forms of harm to children through child pornography were identified in *Sharpe* (2001): creating cognitive distortions in child sex offenders, increased sexual fantasies in offenders, and the use of child pornography by offenders to groom children. While some research supports the cathartic hypothesis, that offenders who view child pornography have reduced sexual urges to abuse children (Fisher et al., 2013; Garos, Beggan, Kluck & Easton, 2004; Seto & Eke, 2005), Catherine disagrees:

> And then I'm aware that there is another body of people, and this is a stretch for me, that some people say, "Well no, no, no, this is a good thing, because these people are at home on their computer and they are viewing this stuff, and this is their outlet. And I'm sure that they're not carrying that out into the world and harming any children." I have a really hard time buying that.

Catherine documented how prevalent pornography was in the course of her investigations across various offences. In her experience, as well as her colleagues, she found that "there is always this undercurrent of pornography." She specifically referenced

Clayton Eichler[8] and his collection of pornography, including violent adult material. Catherine advocated that more research needed to be done to assess what role, if any, pornography played when individuals like Clayton Eichler, consumed violent pornography, such as necrophiliac pornography, and what effect, if any, such consumption had on his violent offences.

Obscenity and the Public Good

The concept of harm fits with another conversation that ensued, that of criminal justice system responding to crimes deemed to in the public best interest, or the public good. Participants suggested that the justice system carefully weighs what crimes to pursue based on what is in society's best interest, which includes a consideration of the risk of harm of each crime. Ed, a lawyer, argued that obscenity cases are "costly, and they're going to involve in many cases constitutional challenges and dragging on for years." According to Ed, and others, the criminal justice system "at the end of the day, [the criminal justice system is] just emptying a sinking ship with a thimble" in responding to concerns around adult pornography. For these reasons, Ed contended, "some agencies have taken on the mentality that it is not a good use of public resources to police the obscenity cases that don't involve children." A. agreed with Ed, noting that "we don't have an obscenity unit in the RCMP," hypothesizing that this may be because obscenity is not in the public's interest because it was commercialized, or perhaps because it has not warranted any media attention. However, A. pointed out, there is an ICE unit, focused on child sexual exploitation and child pornography. When asked to expand, A. indicated that she didn't think Crown would support an obscenity charge – unless there was evidence of an assault or lack of consent.

The theory of the public good is consistent with criminal justice system policy. In BC, for example, according to the *Crown Counsel Policy Manual on Charge Assessment Guidelines*, Crown must consider two key factors before approving charges:

1. whether there is a substantial likelihood of conviction; and, if so,

[8] Clayton Eicher pled guilty to second degree murder of two indigenous women (CBC News, 2016). It is believed that both women were strangled, one woman's remains, Richele Bear, were never recovered. Eicher indicated that he was high on meth when the crimes were committed and could not provide a location of Bear's remains (CBC News, 2016).

2. whether the public interest requires a prosecution. (p. 2)

Assuming a substantial likelihood of conviction, the Crown must then "determine whether the public interest requires a prosecution" (p. 3). However, the provincial government has recognized that resources are limited, and that "Justice does not require that every provable offence must be prosecuted" (p. 3). Relevant to this discussion, in weighing the decision not to approve charges are two factors: "the offence is of a trivial or technical nature" or "the law giving rise to the offence is obsolete or obscure" (p. 5). The lack of knowledge of the obscenity provisions existing within the *Criminal Code*, and others just describing adult pornography as big business, supports the notion that Crown may not be approving charges because they perceive the law is obsolete. Ed defined the obscenity law as "dead letter," meaning "law that is on the book, but is very, very rarely enforced".

The other component with respect to the Crown Counsel Policy Manual, is that the offence of obscenity has become trivial, which ties in with the above discussion on the risk of harm. If obscenity, or rather adult pornography, is everywhere, and society has not experienced a significant increase in sexual based offences, one could conclude that proliferation of obscene material available online is not harmful to society. To continue, if obscene content has become normalized (Coyne et al., 2019; MacRae, 2003; McNair, 2002; 2014), and more people are consuming it, a conviction would be challenging to obtain, according to Ed:

> A conviction beyond a reasonable doubt, the likelihood that a trier of fact is going to uphold criminal sanctions when it is content that he or she is consuming, or their kids, they've got their kids consuming, you know? In the case of juries, several of the jurors certainly are likely to be consumers of that content.

If police, lawyers, or even judges, consume adult pornography, as Ed described it, it would "be a hard sell" to secure charges, much less a conviction under the obscenity provisions. The constant presence of obscenity found within pornography collections further emphasizes its trivialness. Anna in her role as a member of ICE, described how it was always there – "it's just part of their collection, right?" Noreen agreed, repeatedly saying that adult pornography "was just everywhere," and that "the internet just exploded, and that stuff was out there everywhere." As part of their investigations into child pornography, Noreen said that "they always found that stuff" referencing obscene material. Another police officer, Catherine, described how adult pornography was almost

always found when a search was conducted – even when the search was not related to an obscenity or child exploitation offence.

The SCC decisions in *Butler* (1992), and again in *Sharpe* (2001), outlined two main arguments that formed the basis for the *Charter* challenges. On one hand, the *Criminal Code* provisions against obscenity and child pornography were legitimized because they protected society from harm, in the form of either violence against women and children, or antisocial attitudes which create a risk for violence against women and children. Feminists, such as Dines, (2010), Dworkin (1981), MacKinnon (1987; 1997), as well as academic researchers such as Coyne et al. (2019), Malamuth (2007), Kingston et al. (2008;2009), and Shor (2019) offered support for this argument of pornography as harmful. On the other side of the argument was concern around the rights of individuals, including freedom of speech, to consume, and create, pornographic material.

Individuals have the right to privacy and the right to be protected from unlawful governmental searches, under section eight of the *Charter*, which states that "everyone has the right to be secure against unreasonable search or seizure." The other concern was that the publications themselves are a form of protected speech, under section two of the *Charter*. John described the challenges in balancing privacy and civil rights in our technological age:

> So, one side is rapid in terms of the criminal activity, and the actual legal environment it functions in is still at a slow, dogged procedural world that cannot begin to keep up. Now, I don't have a solution for that, because I am not for throwing civil rights and privacy out the window. So I don't know how to deal with it, but clearly that's the big difference the internet has made in terms of if you want 5,000 people to have a copy of X video, you can do that in minutes, and you can do it in 30 different countries.

Wesley agreed that as a democratic society Canadians:

> pride ourselves -- I mean, the essence of privacy, of having a protected zone of privacy -- you have a protected zone of privacy right now and the state cannot invade that zone absent reasonable cause and that is like very high standard.

This standard of privacy, according to Wesley, "lies at the core of many of our rights" and he furthered advocated that they are "pretty bloody important." While these liberties are important, they also present challenges, particularly to police.

Butler (1992) included similar arguments, namely that adults should have the ability to privately consumed consensual, adult, pornography. In *Butler* (1992), the SCC found the obscenity provision violated Butler's right to freedom of expression. However, a section one analysis found this violation was a reasonable limit on one's right to freedom of expression, given that the goal of the provision was to protect society from the harms of consuming such material, and protecting women and children from the harms of sexual violence was of paramount concern to warrant limiting Butler's right to freedom of expression. In this case, there is a shift away from morality and tolerance, and a shift towards criminalizing obscenity and child pornography as a means of preventing harm to women and children (Kusz, forthcoming). Even now, individuals consume adult material that features violence that goes well beyond that *Butler* standard.

Sharpe (2001), conversely, was charged with possession of child pornography, and made the argument that criminalizing the possession of self-created material, used for personal purposes, was a violation of his right to freedom of expression. Notably, the SCC, in their discussion of freedom of expression, stated that it is "among the most fundamental rights possessed by Canadians" (*R. v. Sharpe,* 2001, para. 21). Even if the content is depraved, or offensive, this does not mean that it is not afforded protection under section two of the *Charter*. The prevention of "dirt for dirt's sake" is not a legitimate goal of Parliament which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*. However, this does not automatically mean that every form of expression is guaranteed protection, the rights of those harmed by potentially offensive material must also be taken into consideration. There must be minimal impairment of the freedom of expression when it is subjected to limitation. In this case, the SCC determined that the provision did violate Sharpe's right to freedom of expression, and in a shift away from the *Butler* decision, argued that the provision could not be saved under section one of the *Charter.* Given that the section captures materials for personal use, such as self-created images, the law cannot be proportionate, and was therefore not justified under section one of the *Charter.* The SCC suggested a remedy of reading an exception in the *Criminal Code*, that s.163.1 excludes self-created expressive material and private recordings of lawful sexual activity. This exception was applied when the depictions were of legal sex, consent was obtained, and the publications were held for private use (*Barabash*, 2015). In *Barabash*, the SCC found that in situations with

evidence of sexual exploitation, the private use exceptions did not apply. This case represents what Catherine and Rex were describing as both the subjective interpretation of obscenity, and the emphasis on individual liberties over protection of society (Kusz, forthcoming).

These arguments fall in line with what Catherine identified, that within Canada:

> it seems like we have a very strong need to put emphasis on the individual liberty for people" including "someone's individual liberty to, make, or possess, or share these materials.

Catherine indicated that this makes it hard for the police, and ultimately the justice system, to come up with an objective standard of pornography and harm, as well as challenging for police to respond to crimes like obscenity, where there is an emphasis on individual rights to possess and consume that material privately. John agreed that this perception exists, noting ISPs seem to believe that pornography "needs to be more protected in Canadian society" as "this is the basis on which the youth of Canada determine from a safe distance, through pornography, their own sexuality."

However, as Carole notes, the overwhelming concern about privacy appears to be out of proportion with reality:

> Absolutely there are needs for protection for privacy, but people are so worried about their own privacy, not realizing or not caring that if you haven't done anything, nobody's going to be looking at you. And even if you have done something, police are so overwhelmed in terms of a significant lack of capacity and tools that the likelihood is pretty small that you're going to get caught.

The challenge is to find a balance between protecting privacy, and freedom of expression rights of individuals, while simultaneously balancing the risk of harm obscene material and child pornography may create to society. This balance is considered below in light of the shifting tolerance towards adult pornography, that occurred alongside the explosion of pornography online.

A Social Shift Towards Tolerance

The challenges to balancing rights and harm was accompanied by a shift in societal attitudes towards pornography. As George described society's response to the proliferation of adult material online, "Yeah, I don't think there was a huge shift. I think it

just came in and nobody even noticed, right?" George referenced the *Brodie* (1962) decision as evidence of the social shift away from morality, towards one of tolerance and harm. In *Brodie,* the SCC determined that material that violated Canadian standards of tolerance was obscene, through the creation of the community standard of tolerance test. This test, developed in response to the changes made to the obscenity provisions in 1959, allowed Canadian judges to assess whether publications met the criminal standard for obscenity (*Brodie v. The Queen*, 1962). *Brodie* set forward the question posed before the judiciary: would the Canadian community tolerate the consumption of the material by other members of society? Justice Freedman confirmed that these standards must be contemporary: "times change, and ideas change with them" (*R. v. Dominion News & Gifts Ltd.*, 1962, para. 61).

This assessment shifted to a question of tolerance and risk of harm after the *Butler* (1992) decision and was finally removed to a solely harm-based test after *Labaye* (2005). Since *Butler* (1992), the courts shifted from concerns that adult related material has the potential to cause violence in the form of violence against women. The judiciary has recognized since *Butler* that depictions of BDSM are now tolerated within the community (*R. v. Price*, 2004), and *Labaye* (2005) has created an obscenity test that focuses on the risk of harm, with an emphasis on protecting society for harm that threatens our values in a free, equal, and democratic society (Jochelson & Kramar, 2011). George described the challenge of finding a Canadian standard "is like saying a person with their head in the oven and their feet in the freezer is on average comfortable." He elaborated on the problems that in Canada:

> I mean, we have such a disparity of views. What's right in one community isn't necessarily right in another community. So, defining that as a community standard becomes impossible. You have to look to something else. So, in other words, regulating morality.

Other participants discussed changing social norms and tolerance for obscene publications. Sally, a Crown prosecutor, described the difference between social norms and illegal behaviour in her definition of obscenity. She noted that bestiality was illegal, and that while some adult pornographic material may be "taboo or improper or doesn't fit within the norm," it does not necessitate criminal justice system intervention. She described the case of a woman (or a man) walking down the street in limited or suggestive clothing; while society may find that indecent or inappropriate, it does not mean it is illegal. Wesley used the show *Jackass* to explain the social shifts in the types

of materials now considered shocking. The show *Jackass* depicted adult males engaging in “such wonders as, to highlight but a few, beer enemas, urine snow cones, a catapult poo toilet, piss attacks, midget fights, and fart masks” (Sahni, 2013, p. 69). Wesley explained that 20 to 30 years ago a show like *Jackass* would be shocking to most people, yet now it is an acceptable part of our culture. He cited technological advances and access as part of the reason. With a computer, depictions are now more realistic and graphic – the same is true for video games:

> Here's a simple example going back to what we're talking about. So if you saw a war movie from the '50s into the '60s, I don't think you would see a scene where as far as you can tell you're actually seeing a human being walking, holding this, the stump, holding the top of the arm with one hand and the arm is gone and the ligaments and blood and everything is coming out where the elbow used to be. The person stops, picks up the arm and continues walking. And that was a scene from the movie *Saving Private Ryan*. That ability to depict reality, that scene would be virtually impossible to produce a decade before that or 20 years before that. More like 20 years, I guess. Yes. But you never saw that kind of a scene, it was not possible to create. And that's just one small image from a highly – what's the word I want – publicized movie, watched movie. So, you're seeing much more graphic violence that is available when you turn the TV on.

As such, with changing technology, and exposure to more graphic displays, Wesley suggested people are becoming more “immune or inured to” these depictions. The historical application of obscenity decisions prior to *Butler* in 1992, means the community standards of tolerance test was applied to movies that by today’s standards would not be shocking (e.g. *Vixen*, *Last Tango in Paris*, or *Dracula Sucks).* Mary applied this theory of shock and immunity to how youth have become desensitized to adult pornography:

> Their access to adult pornography is multiplied significantly over the years and that also -- it normalizes that type of material, but also desexualizes them in a way where just a normal or regular sexual interaction doesn’t have the same impact with them if they’re used to watching a lot of very graphic, for example, pornography including rape. Then that can impact what they need in terms of their own sexual stimuli.

The desensitization can be problematic, as some researchers (Coyne et al., 2019; Shor, 2019) have identified that it can lead to the acceptance of rape myths, and normalization of sexual violence against women.

In assessing whether child pornography offences have been prioritized over obscenity the above section points to many considerations that the criminal justice system has used to explain their response to obscenity. While participants recognized that the internet has "exploded" with the availability of pornography online readily accessible to all, they believe this material is no longer shocking, and does not carry with it the same risk of harm that child pornography does. This assessment of harm, combined with the challenges of charging and prosecuting an obscenity (or any pornography offence), including *Charter* challenges, a lack of time and financial resources, as well as the societal perception that obscenity is tolerated and not in the public's interest to pursue, has resulted in obscenity becoming a law of the past.

The Internet and Responding to Child Pornography

The following section offers additional evidence regarding the prioritization of child pornography over adult material, outlining how the internet impacted criminal justice system responses to child pornography. Participants first described the effect of the flooding of child pornography online, as well as the creation of new forms of child pornography, which were not possible prior to the internet or technological advances. These changes contributed to the normalization of child pornography, and ultimately the sexual abuse of children. Participants also described how the internet changed the way children and society perceived "stranger danger" – when offenders pose as friends online. These themes all contributed to the challenges faced by the criminal justice system in responding to child pornography in an internet age. However, many participants also discussed the positive effect of the internet, and its use as a means to address the crime of child pornography. This discussion of child pornography and the internet makes it further apparent that the criminal justice system prioritizes child pornography over obscenity.

The Flooding of Child Pornography

Participants were asked to expand on the impact of the internet on criminal justice system responses to child pornography. Rex stated "well it certainly flooded the judiciary with the prevalence was huge. Is huge." When asked how the criminal justice system was managing the flood of cases, Rex responded with "probably not very well"

indicating they were “overwhelmed with it, and how widespread it was.” Carole, retired from the RCMP, agreed with Rex saying that “there’s more case of child exploitation than anybody can possibly imagine,” further describing the numbers as “staggering.” She elaborated:

> The number if we’re talking about child exploitation today on the internet, the volume is so staggering that we could continually throw resources at it, but given how things are currently structured in terms of information sharing and judicial authorizations that are required, we would barely make a dent in it if we threw a third of the RCMP at it. It is that complex.

Ed indicated that in Nanaimo the police use software to track searches for child pornography, it functions like a map of the city that lights up. He described the map at nighttime “is like a Christmas tree being lit up,” further solidifying the argument that “the floodgates have opened in relation to the number of people accessing this material.” James confirmed the picture of child pornography in Nanaimo. In a city of approximately 100,000 people, his team forwards one case a week to Crown counsel for charge approval. In Vancouver, Wesley, a defence lawyer, said that they “probably have four cases of child pornography at any given time” in his office.

This flooding of child pornography is confirmed in the literature, which acknowledges that technological advances have changed the ways in which society accesses and disseminates pornographic material (Carroll et al., 2008; Wolak et al., 2014). One study found that the “internet has caused the most explosive growth in child pornography than at any other time in history” (Shell, Martin, Hung & Rueda, 2007, p. 45). As Rex suggested “Now it’s just [taps hand against table] hit a button and stuff goes,” referring to accessing and sharing pornography. Current literature suggests that this widespread availability of pornography contributes to a market that may affect sexual violence against women and children (Coyne et al., 2019; Dines, 2010; *R. v. Spencer,* 2014; Shor, 2019), a concern echoed by participants in their consideration of both the new forms of child pornography that the internet facilitated, as well as the normalization of the sexual abuse of children.

New Forms of Child Pornography

As discussed above, technology and the internet, created an environment where child pornography was accessible, free, and everywhere (Carroll et al., 2008; Wolak et

al., 2014). As a result of this interaction, new forms of child pornography were generated, as well as the creation of new offences to respond to new ways of producing, sharing. or accessing child pornography (Marcum, Higgins, Freiburger, & Ricketts, 2010; Steinberg, 2019). This argument is not to say that these types of images or videos did not exist prior to the internet, however the internet created and facilitated an environment which made it easier for individuals to produce, distribute, and trade such images; what Carole described as “creative” offending (Jones, 2007; Marcum et al., 2010). New offences have been created, including physical possession of child pornography, and accessing pornography online (without actually keeping the image/video), which individuals often do through file sharing software. Earlier versions of this software, such as Kazaa or LimeWire, have passed *Charter* scrutiny (*R. v. Spencer*, 2014). File sharing software is now defined in the *Criminal Code*, as a form of distribution of child pornography in which an individual makes it available (unintentionally or not), or knowingly transmits it online (163.1(3)). Additionally, James identified, but did not name, applications available online or via cell phones used for trading images of child pornography. Literature has confirmed that offenders use person-to-person (P2P) networks to share child pornography images, thus facilitating crimes such as accessing, possession, and distribution, as well as the more disturbing manners in which publications may be shared (Hurley et al. 2013; LeGrand, Latapy, & Magnien 2009; Wolak et al., 2014). As outlined earlier, the internet provided a venue for individuals to share, and trade, graphic images of child pornography through made to order pornography, live offending, and crowd funding child pornography (Holt, 2018).

Others described how very young children were often victimized when they were in diapers. To the average person, these types of images would trigger a visceral reaction, however collectors of child pornography have a different response: the desire to collect more images (Taylor & Quayle, 2001). These types of images are contradictory to what John argued some people perceive child pornography to be: “It’s not about sex, or young women who develop early, it’s about children who are scared, and men get off on it.” He further described it as “Predatory and power-based,” using the example of how an abuser was sexually aroused in response to a young girl who was so afraid of him that she urinated on herself. This concept of power-based pornography is not a new one, as feminist research has been arguing for decades that pornography is about men having power over women (Brownmiller, 1975; Coyne et al., 2019; Dines, 2010; Dworkin,

1981; Glascock, 2005, MacKinnon, 1997). With child pornography, it becomes adults (most often male), having power over children (Dodge & Dale, 2018; Powell & Henry, 2018).

The Normalization of Child Pornography and the Sexual Abuse of Children

The accessibility of pornography, combined with the flooding of pornographic imagery online, arguably contributes to the normalization of pornography, but also the normalization of potentially illegal material, and the sexual abuse of children and women (Aslan, 2011; Bridges et al., 2016; Nichols, 2016; *R. v. Sharpe*, 2001). Participants voiced trepidation over how the flooding and accessibility of pornography caused harm to society, particularly to children and youth. For example, Noreen noted how increased access to pornographic images, facilitated access to these materials for youth:

> I mean it concerns me that young boys and girls are getting access to some of this material because it really gives them a distorted understanding of anything to do with sex or anything else. Because it, I mean, some of it is just horrific that's out there.

The ability to share images of child pornography online with like-minded individuals has resulted in the creation of a community of people who are sexually aroused by children and/or youth (Quayle & Taylor, 2002). Technology allowed for individuals to shift away from historical ways of interacting with likeminded individuals, where they would have to physically go up to someone and ask, “hey do you like child pornography.” However, as described by Mary, these conversations never occurred between offenders. John agreed, noting that the internet has resulted in “the creation of a community where there was none.” Now, with the internet, according to Mary, “there are spots that people can go to find likeminded individuals who also -- who agree with the sexual relationship between adult and children. So, they share that material back and forth, it’s a safe place for them to talk about different things, to share techniques and motivations, et cetera.” Via the internet, on chatrooms, or discussion boards, not only is the desire for children normalized, but now individuals have access to a community that is willing to share and trade images, videos and stories with each other (Wolak et al., 2014). Thus, again, being rewarded for their arousal, as well as fulfilling a need to complete their collections of publications (Taylor & Quayle, 2001). Mary outlined the process:

> So, you wouldn't have that open forum where you could meet four or five people in a day that also believe that child sexual abuse is okay. And now they -- or to reinforce those stereotypes as well. So, it fuels that there's nothing wrong you, that it's normal, that it's safe, that it's okay, it's beneficial to the child. All that normalizes it -- normalizes the sexual abuse of children and can, in some offenders, again not all, but in some offenders break down that stigma, break down those barriers and encourage them to continue to engage in sexual abuse of children.

Ultimately, this means individuals with cognitive distortions that sex with children is acceptable, can now connect with other individuals with the same distortion, which can in turn, encourage harmful behaviour. In *Sharpe* (2001), Chief Justice McLachlin stated that child pornography encouraged cognitive distortions and sexual fantasies of offenders. Cognitive distortions are consistent in research on the harms of child pornography (Aslan, 2011), as well as research into pornographic scripts. For example, Bridges et al. (2016) identifies how child sexual abuse is normalized through pornography and is rewarded when one attains orgasm.

As discussed in chapter two, the consumption of pornography, more specifically child pornography, has two schools of thought. On one hand, some argue that when offenders consume child pornography it has a cathartic effect, meaning that rather than sexually abusing children, offenders are aroused and released through consumption of child pornography (Carter et al., 1987; Fisher et al., 2013; Garos, Beggan, Kluck & Easton, 2004; *R. v. Sharpe*, 2001; Seto & Eke, 2005). On the other hand, there is evidence of escalating harm, meaning that when offenders consume child pornography, they eventually become unsatisfied or desensitized to the material in question, and need to escalate to the next level – whether it is through consuming new or more explicit forms of child pornography, or escalating to contact offences (Aslan, 2011; Fisher et al., 2013 ; *R. v. Sharpe*, 2001; Ray et al., 2014; Steinberg, 2019). A. described how one offender connected the widespread availability of pornography to his offending pattern:

> Anyway, it was the investigators that had worked on the Michael Briere murder of Holly Jones back in Toronto in 2002. And we watched part of his interview, parts of his interview. And he said, suggested that it was the availability of the child pornography that kind of heightened his awareness of it but also his need, increased his need. He never was able to satisfy his need. So ultimately, he had to go out on the street, rape and murder a child because he just couldn't get enough of it on the internet. But that the internet and the availability of those materials had led him to do that, to have that hunger.

Wesley as well, described a similar category of offenders, which he likened to those with a DSM diagnosis of pedophilia, an attraction to children, or hebephilia, an attraction to youth. In those cases where there is a DSM designation, Wesley outlined how these are the offenders “who becomes entranced by it and starts downloading more and more.”

On the other hand, George offered the opposite perspective on child pornography offenders. According to George, these offenders did not normalize child pornography, or their illegal behaviour. He defined child pornography offenders as one of the most stigmatized group of offenders. In fact, George expressed some reluctance to go into detail of the cases of child pornography offenders out of concern for their privacy; he cited how after their cases were complete, he condensed the file down to the bare minimum to reduce risk of the information becoming accessible. He indicated that he had never done a child pornography trial, namely because the accused are “embarrassed about the whole thing” and “they just want to deal with it as quickly and quietly as possible.” As such, most of the clients plead guilty and admit that the publications are child pornography, and then “We schedule a sentencing Friday afternoon when the press isn't there and we just quietly deal with it.” These offenders appear to recognize that “the stigma of [this crime] is very high and it stays for life.” This argument is reflected in labelling theory research on sex offenders that shows the label sex offender is “among the most highly stigmatized labels that exist in modern societies” (Mingus & Burchfield, 2012, p. 97), with child sex offenders often considered the worst of the sex offenders (Stebbins, 2016). While the above theme suggests that accessing the material may be normalized, once the behaviour of accessing child pornography is made public, it is still very much a stigmatized offence that carries with it a black mark imprinted upon the offender for the rest of their life.

Stranger Danger

As a result of technology and the internet, the understanding of stranger danger has changed (Sinclair, Duval, & Ste-Marie, 2019). Parents used to warn their children to watch out for strangers (e.g. pedophiles) on the street, concerned that strangers would kidnap and molest their children (Sinclair et al., 2019). Now, with the internet, Carole described how children can be “getting groomed and lured through your computer when you [the parents] thought they were safe and sound in your house.” Noreen further

explained that children, and perhaps parents, do not have the same understanding of strangers online:

> They aren't -- you know, they don't put up the blinders as if they were out on the street and it's a stranger who approaches a child. And kids are always reporting that sort of stuff. "Mom, this person tried to, you know, talk to me on the street or lure me."

However, children do not report the strangers that they encounter online, because for whatever reason they do not identify them as a stranger (Sinclair et al., 2019). With technology, relationships for youth have, according to Mary, primarily shifted from in person to online, resulting in a decreased time lapse whereby people transform from strangers to friends (Sinclair et al., 2019). Mary expanded upon this dynamic, labelling it stranger danger offline, and stranger danger online:

> They can meet someone online and then assume that they're best friends within, you know, an hour or two hours or have an online relationship with someone for years and then not really knowing who that person is.

Noreen expressed concern about sex offenders using the internet to sexually abuse children. She discussed how she lectured about the dangers of children connecting with strangers online:

> But that's the whole thing, they [children] don't see a stranger. And I'd say to parents that I lecture, "Okay, a stranger comes to your door with a bag over their head and says, 'I want to go to your child's bedroom and talk to them on my own.' You wouldn't let them in your house." But, I said, every day parents let strangers in their home through the use of the internet.

That said, the internet gave individuals anonymity, and they could pretend to be any image and gender they chose, giving certain individuals the ability to exploit children (Carroll et al., 2008; Sinclair et al., 2019; Wolak et al., 2014). Noreen described how this happened in the case of *Sharpe* (2001), who used the internet to lure children. Noreen emphasized the need to educate parents and children to be wary of who they are meeting online. In academic research, Steinberg (2019) advocates for parents to be educated about the risks of posting images online.

Policing Challenges

The following discussion outlines the challenges that are specific to the police in responding to child pornography online. As A. described, technology, and the internet, resulted in the ability to identify potential offenders with greater ease. As opposed to individuals conducting face-to-face transactions in private, the transaction of accessing or sharing files online can be traced through ISPs. The hidden nature of child pornography historically made it even harder to investigate and track these crimes. According to Noreen, the explosion of pornography online has increased the number of offenders – while they may be easier to track down, now there's so many of them. Noreen outlined this challenge in more detail:

> But then we started to identify more of these people because of the internet. Because now they are corresponding with one another. The stings would be set up. We did some in our own office at CLU. These were ones that were done in the U.S. they would identify people up here. And the other problems started to get, and I know it still is, is that they are getting so much material they don't have enough officers to do all the forensic analysis of all the computer materials that is being seized.

Additional challenges are presented in terms of tracking down offenders, as with the internet there is now the potential for cases to cross national boundaries. Both Ed, a lawyer, and Rock Climber, a retired police officer, commented on the jurisdictional issues presented by the internet. They emphasized the challenges in terms of getting anything done when crimes cross countries, and jurisdictional boundaries with different laws. Rock Climber focused on how international cases are difficult, or nearly impossible to "meet the standard of conviction" namely "because either the victims or the subjects of the obscene material or the pornography are unknown, or unavailable, as witnesses." Not only are obstacles presented in victim identification, as Rock Climber emphasized that these international cases are typically more expensive. There are "no boundaries" in international cases, according to Sierra. An example was presented by Anna in one case she investigated, "Three different countries, 35 crimes scenes, 65 victims," plus the depictions were in Spanish, requiring transcription and interpretation. Rex offered the example of sex tourism, with Canadians going to Southeast Asia to sexually assault children, film it, and then share it online with other offenders. *R. v. J.S.* (2018) documented the challenges of responding to such crimes. Concerns included: the private nature of the crimes, victims not having a voice, encrypted images, tracing offenders, and tracking down the victims "is enormously challenging and depends on

extraordinarily skillful and patient investigation as well as some degree of luck" (para. 104). Research on cybercrime has pointed to the complexities in responding to crimes that occur across jurisdictional boundaries (Holt, 2018; Horsman, 2017; Koziarski & Lee, 2020; Marcum et al., 2010; Powell & Henry, 2018).

Some participants outlined challenges to responding to society members, and criminal justice system partners (e.g. ISPs, funders, MPs, policy makers) who did not understand how bad child pornography really is, which is then combined with concerns around privacy and the right to freedom of expression. Carole discussed these concerns in extensive detail. At one point during her career, Carole worked in tech crime, and would have conversations with, as she defined, "the people that run the internet" about police investigations into crimes such as child exploitation. Her role, as she described, "has been trying to educate people on exactly how bad child exploitation can be and exactly how big an issue it is today." The response that she received from policy makers, was "'It's not that bad,' or 'You guys are always playing this card to try and get new tools', downplaying how serious and extreme child exploitation can be." Steinberg (2019) described related challenges in explaining the risk of morphed imagery to policy makers. On a similar note, Mary encountered the same resistance from criminal justice system players who were uninformed, who often told Mary:

> "These are only pictures. They're not real children." Without recognizing that a picture of child pornography, if indeed is a real child and not a morphed image, is an image of a child being sexually abused.

For these two police officers, with firsthand experience with child sexual exploitation, communicating to other members of society about the content of the images or the trauma experienced by children harmed by these images, created additional work for them, and the potential for roadblocks to arise during the course of their investigations. The other side of this coin, as described by Mary, is that crimes such as possession or accessing child pornography are essentially punishing someone for what they watch. Simpson (2009) outlined concerns in their research over policing someone for having immoral thoughts. As outlined earlier in this chapter, the criminal justice system must navigate a balance between two competing interests: protecting children from harm, and the rights of privacy, and freedom of expression for individuals. Mary described the resistance encountered by some people to these crimes, and the need for education:

> So, they are and, you know, they will make something, say something such as, "It's not as bad as sexually abusing a child, looking at child pornography." Well, you're -- as a user of child pornography, you're encouraging the production of child pornography because you're wanting more and more material and that does contribute to the sexual abuse of a child, because then every image that's made there's a child being sexually abused. So, there's education in terms of all sectors of society as well.

The connection between consumption of child pornography material, and the concern over supply and demand has been well documented in academic research (Aslan, 2011; Farley, 2006) and court cases (*R. v. Kwok,* 2007; *R. v. Sharpe, 2001*). The need to continually educate the public, and professionals, about child pornography represents an additional hurdle for the criminal justice system to address inappropriate responses to child pornography.

Unique challenges were presented when the child pornography provisions were first implemented and the police were flooded with child pornography cases, particularly those put forward via the internet. Catherine noted that these two factors "necessitated a better response than we [the police] initially were providing;" which included the creation of the ICE (Integrated Child Exploitation) Units. These units were primarily focused on investigating crimes of child pornography, child exploitation, and child sexual assault. Through the creation of ICE, specialized units were funded and trained about child exploitation, and provided a more structured response to the crime of child sexual exploitation. Noreen indicated that despite this creation of a specialized unit:

> other problems started to get, and I know it still is, is that they are getting so much material they don't have enough officers to do all the forensic analysis of all the computer materials that is being seized.

Mary expanded on these challenges experienced by the justice system, noting that despite the creation of the ICE unit, cases of child exploitation were "technologically complex," took more time, and were expensive. Anna provided the example of how she spent three years working on the same file. In these types of international files, A. described how referrals in the ICE unit come via Ottawa or Interpol, "so it's generally months until information gets to its destination or investigating agency"; thus, further time lags are created. With the internet, files can be created instantaneously, and deleted just as fast; they could be days, months, or even years old. This process creates additional problems for the police in particular to navigate; as A. further outlined "Is it on a server?

Has it been deleted? Is it still – does it still exist where it was originally shared or viewed or accessed?" John outlined how society has shifted from mailing and printing pornographic material, to instantly sharing digital files. This change facilitates a rapid criminal offence, yet, the criminal justice system continues to respond to this crime with a slow process in the form of warrants, which are necessary to protect privacy of individuals. While John does not have a solution, he believes that "There is no legal system in the world that has adapted fast enough to keep up with the distribution." Police officers advocated for additional resources including hiring members and training them to respond to child exploitation and finding technological solutions so the criminal justice system could keep up with the more creative aspects of offending that the criminal justice system was encountering.

Moving Forward

Despite their perceptions of the influence of the internet, participants offered counter examples to the challenges experienced by criminal justice system professionals. Wesley, offered no opinion, indicating that in his profession as primarily a defence lawyer, he did not notice anything when pornography became prolific online. Rock Climber said that "I am not really in a position to say if they're [the police] keeping up or trying to catch up" to crimes of child pornography. Other participants offered optimistic opinions about how the internet could contribute to a solution for child pornography offences. Sally believed Canada is doing a good job in responding to child sexual exploitation. George, a defence lawyer, agreed with Sally, noting that the police are doing "a good job. I mean, there is still work to be done, but they're pretty aggressive, and the public supports that work, wholly, okay?" He continued, emphasizing that the police must keep up with technological advances to "shut down" child pornography. However, he stressed that while the police continue to adapt and come up with proactive ways to respond to child pornography, more work needs to be done. One technological advancement described by John were bots, automated software which remove child pornography from the internet. These systems use hash values to track down and remove known images of child sexual exploitation (Kusz & Bouchard, 2019; Wolak et al., 2014). The RCMP use this type of software to track known images of child sexual exploitation or child pornography, and thereby locate individuals who are purchasing, accessing, or distributing these images (Kusz & Bouchard, 2019; Wolak et

al., 2014). John offered another example from Ireland, where computer savvy civilian members worked with the criminal justice system to combat child sexual exploitation and child pornography. Koziarski and Lee (2020) point out that “recruiting highly trained civilians to address more complex forms of cybercrime is more effective than providing advanced training to existing or new officers” (p. 205).

Criminal justice system personnel can access information through the *Personal Information Protection and Electronic Documents Act* (PIPEDA), which allows the private sector to provide information to the police (e.g. information from ISPs), when there is a lawful authority. Carole described how while this legislation works in practice, different interpretations regarding what constitutes lawful authority remain. Some agencies have made exceptions in cases of child exploitation, but Carole indicated that during her time as a police officer, she still encountered resistance from other agencies in terms of sharing information, which in turn stalled investigations.

Other participants expressed hope for the future, as potential solutions were being explored by the criminal justice system. Carole outlined how technology has facilitated the use of hot lines, and social media applications like *Facebook*, that allow the criminal justice system to put out amber alerts when individuals are missing. Changing legislation, and keeping up to date with technology, were described by George as part of the solution to the rise of internet child pornography. He outlined how peace bonds, formerly applied to disputes between individuals, could now be used against individuals who may commit a sexual offence. Through a peace bond, a judge could impose conditions upon an offender that would prevent them from committing a child pornography offence. George went on to describe the peace bond in more detail:

> If you look at section 810.1(1), of the Criminal Code, where fear of a sexual offence. And this is a really, really important provision, and if you look at all the sections, if you think on reasonable grounds a person is going to commit a crime under section 163.1, which is to manufacture child pornography, okay? If you think that somebody is going to make kiddie porn, you can get under section 810.1 an order from a court, preventing the person, okay? So, it says a provincial court judge made this order to prohibit the person from having contact from any person under 16 years of age, prohibiting a person from having internet or other digital network, attending a park, prohibiting them from communicating directly or indirectly with any person specifically identified.

The use of a peace bond to manage the risk of would be child pornography offenders, represents a form of proactive policing to prevent future harm to children, and is arguably, as George defined it, “really powerful stuff.” This type of policing is not unlike the proactive policing for child luring outlined by Simpson (2009), which focuses on preventing sexual offending before it happens, as opposed to the more reactive type of policing typically seen in the ICE units. John described the lack of a proactive response as frightening:

> I'm trying to think -- I think every child porn file I ever did was not pursued by the police agency. It landed on them and they had to deal with it. That's pretty frightening, if you have very little proactive activity, prevention activity going on, investigationally or otherwise.

John’s comments stand in stark contrast to George’s belief that the police are “quite proactive from what I've seen, and how they keep on working to shut it [child pornography] down.”

Mary collectively summarized the concerns from other participants in combating child sexual exploitation of child pornography: it is not just a law enforcement issue. A need for the collective support of educators, social programming, and technological solutions from the tech industry and parents is apparent. Mary particularly identified proactive solutions in the form of empowering and engaging youth to become involved in creating solutions. Carole summarized it nicely when she says:

> But I do think that legislation has to move faster and be more progressive in terms of making sure the police have sufficient tools that enable them to move very quickly to stop some of the cases, to stop any case of child exploitation that is happening.

Mary and Carole spoke to the ongoing challenges experienced by the criminal justice system in investigating child pornography, and the complexities that are involved that extend well beyond the justice system.

As outlined above, the internet has impacted how the criminal justice system has responded to obscenity and child pornography. For obscenity, the explosion of adult pornography online has created a community that normalizes and tolerates adult pornography, and therefore deemed not to be in society’s best interest to pursue a criminal justice system response. On the other hand, the explosion of child pornography online, warrants serious criminal justice system intervention that prioritizes child

pornography over obscenity offences. In the next chapter, I explore in further detail how obscenity has “fallen to the wayside” and child pornography offences have been prioritized, with child pornography featuring the real sexual abuse of children being the primary focus of criminal justice system intervention.

Chapter 6.

Obscenity Has Fallen to The Wayside

The previous two chapters focused on the changing definition of obscenity, the new child pornography provision created in 1993, and the subsequent rise of the internet and its effect on obscenity and child pornography. Most participants identified the explosion of child pornography online and the apparent emphasis the criminal justice system has on responding to child pornography. My final question to participants asked their opinion as to whether obscenity, specifically adult pornography, still warranted a criminal justice system response. This theme is where the most interesting responses occur, while adult material which meets the *Butler* (1992) - or even the newer *Labaye* (2005) - standard is technically still illegal, the participants indicated that it was something that was very rarely, if ever, dealt with through the criminal justice system. In this chapter, I explore the final component of my analysis, namely that the prioritization of child pornography crimes, created through the flooding of child pornography and the criminal justice system's lack of resources, has led to obscenity as a crime, falling to the wayside.

A Societal Shift Towards Child Protection

Wesley and Sierra argued that in the last 30 years society has experienced a shift in morals. This shift in morality is tied to the creation of a child protection climate, whereby offences that involve harm to children are prioritized above all others. Participants recognized limited resources are available, referring to actual criminal justice system members available to respond to, investigate, and prosecute such cases, as well financial limitations, and time constraints. These limitations mean that the criminal justice system needs to assess which cases warrant their limited resources, thus, necessitating the creation of a system to prioritize cases where the risk of harm, and society's interest, is deemed highest. Participants believed this was justified because the possession of adult pornography, and its consumption, is legal, and adult pornography, or obscenity, is just "big business". While some participants identified the various ways in which obscenity charges could arise, only two participants out of 16 had been involved in obscenity cases – and those occurred in 1983 and 1992. One

participant referenced a relevant obscenity decision in 2005 (*R. v. Smith*, 2005), but no individuals identified recent experience with the obscenity provisions. As the following themes outline, obscenity as a crime, has essentially "fallen to the wayside."

As identified in chapter two, feminists and moral entrepreneurs drew attention to the harms that women and children faced from sexual violence and pornography (Jenkins, 2001; Brannigan & Goldenberg, 1986). The two committees, the Badgley Committee (1984) and the Fraser Committee (1985), advocated for specific responses in the *Criminal Code* which would protect women and children from harm. From the Fraser Committee (1985), specifically, the roots of the child pornography provisions were formed. As Gotell (2001/2002) argued, these committees shaped the stage for a moral panic for the sexual exploitation of children, and the beginnings of a child protection climate. This shift towards child protection was also identified by George, who connected it to the shift in community standards of tolerance. Rather than focusing on tolerable materials for consumption (*R. v. Brodie*, 1962), we have since shifted towards a harm-based theory of obscenity (*R. v. Butler*, 1992; *R. v. Labaye*, 2005). In particular, the emphasis shifted to protect children from harm, rather than *women and* children (Angelides, 2004; *R. v. Morelli*, 2010). George suggested that this shift was the result of the work of second wave feminists, such as Andrea Dworkin and Gloria Steinem, who drew attention to the harm that obscenity and pornography caused to women and children. Dworkin (1981) and MacKinnon (1997) were early advocates for the abolition of pornography on the basis that pornography caused harm to women in the form of facilitating unequal power dynamics. Women were objectified within pornography, which when men consumed, reproduced the unequal power dynamics and objectification in reality. While these harms were acknowledged in *Butler* (1992), the focus since then has been primarily on the harms of children in pornography, with Jochelson and Kramar (2001) outlining that the evidence as to the harm of obscenity is inconsistent, whereas the evidence of children being harm by child pornography is more apparent, and thereby prioritized.

In discussing the child protection climate, participants distinguished between children and adults regarding capacity to consent and make decisions for themselves. Carole, for example, differentiated between what happens when children go missing, as opposed to adults. She emphasized societal "responsibilities to look after children,"

which included an obligation to report when a child is missing. She points out that there are no similar obligations for adults, noting that:

> But as an adult, and the example I give people all the time is who hasn't at some point in their adult life wanted to walk away for a few hours, hasn't wanted to take a day away from their life.

Building off the theme of a child protection climate, Carole suggested that "the climate that we see around protection of children – because we need to protect the children and we need to protect once they've been found and rescued." Catherine agreed that compared to adults, children are vulnerable and need protection. She pointed out:

> I'm not aware of -- there's no special -- for example we had a specialized unit that responds to child pornography, but we don't have a specialized unit that responds to obscenity that doesn't involve children. So, I think the priorities in my thoughts, my experience is the priorities they are on the stuff that is related to children, as opposed to the obscenity.

When asked to elaborate why child material was prioritized over adult material, Catherine said that her belief was:

> that children, they are vulnerable in our community and in our society, and I think it's reflexive of the need to step up and protect the most vulnerable, which are children, as opposed to adults who, I think there is some expectation that as an adult you can make decisions that protect yourself, whereas a child can't.

For Catherine, children are vulnerable and warranted protection, on the other hand, adults were viewed as more capable, as was seen in the chapter five discussion on consent being a distinguishing factor for illegal content. In a child protection climate, the emphasis is on the vulnerability of children, whereas adult women are seen as able to consent to participate in the creation of such material; an argument consistent with the recommendations of *The Badgley Report* (1984) and *The Fraser Report* (1985).

Prioritizing Cases

As participants discussed the current criminal justice system response to obscenity, what emerged was a consideration of how police and Crown prioritize cases. Many participants highlighted limited resources within the criminal justice system, and the lack of capacity to investigate all cases of exploitation, obscenity and/or child pornography. This argument builds on an earlier theme, that the criminal justice system

has experienced a flooding of cases of child pornography, and that, as Carole identified, "The numbers every country is dealing with are staggering." To demonstrate the limited resources, Anna pointed out that during her time in the ICE unit, they only had seven individuals responding to child exploitation for all of BC. She discussed how she spent three to four years of her time on the ICE unit investigating a single case, emphasizing the amount of time that is necessary just at the police stage to properly investigate one offender involved in child exploitation. Anna expanded on the struggles in responding to child exploitation:

> Like I said, it's an explosive problem that's nowhere near -- like we used to always try to appeal to upper management to give us more members and they would always say, "Yes, yes, we're going to give you more." And a few times we did get more, but like we would have needed a thousand members to start to tackle this problem, honestly.

Ed explained that the obscenity cases are no longer enforced because they are costly, and are at risk of being challenged constitutionally, as seen in *Butler* (1992). Given that adult pornography is everywhere, Ed likened a police response to "just emptying a sinking ship with a thimble, this is kind of the -- and there is some truth to that." Given this proliferation of adult pornography, especially that which is available online, Ed suggested that our criminal justice system has "taken on the mentality that it is not a good use of public resources to police the obscenity cases that don't involve children." To his knowledge, the police are not currently investigating any cases of obscenity.

As shown above, there are limited resources in terms of investigative bodies who are able to respond to all cases of child exploitation, financial resources are always a struggle, and the investigations are extremely time consuming (Biassias et al., 2015; Dodge & Dale, 2018). Remember that police officers, such as Anna and Noreen, are responsible for viewing and cataloguing often thousands of images of pornography – after which the images/videos are sent to Crown who may view them as well. John suggested that faced with these limited options, that police typically "go for the low hanging fruit. They go for the easy file." In his experience, all the investigations that he witnessed were reactive files, "it landed on them [the police] and they had to deal with it." He described the lack of proactive activity on the part of the police as "pretty frightening." But at the same time, with numbers so large, and limited financial resources, the police need to be practical in terms of their investigations. Child exploitation cases, while reducing harm, are defined as difficult files, and unlikely to obtain a conviction. The same

could be said for obscenity files, which hold a ring of truth to it considering the lack of charges and convictions found in Canadian data.

Anna discussed how the police prioritized cases or charges in ICE investigations, agreeing with John who said the police:

> picked the worst of the worst. We kind of picked the most blatant, like, where his face is clear or her face was clear and she was clearly underage, that kind of stuff.

The most obvious examples of child pornography are those cases most likely result in a conviction. This reason aligns with earlier discussions regarding the role of medical doctors who are trained in assessing sexual maturation in child pornography investigations. Doctors are unwilling to assess images of child pornography, citing lack of expertise or a desire not to be exposed to traumatic material, which means only the more egregious cases may make it through the court system. As Justice Bourgeois stated in *R. v. Goldberg* (2018):

> As a society, faced with the alarmingly increasing numbers of reports of online child sexual exploitation and the potentially increasing complexity of such investigation, we probably need to refocus our priority when allocating the limited public resources to protect our children. (para. 59)

The less obvious cases, such as adult cases in which the question of consent is murky, are probably not even on the radar of criminal justice system professionals.

When discussing obscenity, participants noted three key things: they wanted to prioritize crimes in the public interest, possessing or viewing adult pornography was not a crime, and adults can choose to watch pornography. As outlined above, when Crown counsel in BC makes a decision to approve charges, they ask whether the crime is in the public interest. Both Kim and Rock Climber pointed out that child exploitation cases typically received more media attention and the public perceived that child offenders need to be locked up. As Sierra put it, “child pornography, big deal. It is a big deal” within the criminal justice system; obscenity, on the other hand, was not seen as a major concern for the public and accordingly the government also does not pay attention. A. identified that:

> I haven't seen anything internally or externally to suggest that they've [RCMP] made it any sort of priority or that there's been anything worthy

> of being in the public interest to pursue to the extent that it would actually make a news headline.

In A.'s 19 years of policing she had never seen an obscenity charge, and she suggested this was reflected a lack of public interest, or a focus on other more serious offences – such as child exploitation or sexual assault. However, many participants were unfamiliar with the obscenity provisions, emphasizing the prioritizing of child-related material, as they focused primarily on child exploitation and child pornography.

Adults, theoretically, are embodied with the capacity to consent to sexual activity, and the freedom to choose to participate in and to consume pornography – whereas children do not have the same capacity. James pointed out the assumption that a video of adults participating in pornography, occurs between two (or more) consenting adults; with limited exceptions for private use as per *Barabash* (2012), depictions of children engaged in sex with adults, or sex with other children is automatically a crime. Rex, paraphrasing Pierre Elliot Trudeau described how "it's not the government's business to set policy and laws governing adult person's sexuality in their homes" and "two consenting adults could do whatever they want." Rex noted the historical perception that women were forced to participate in pornography:

> Ya, so now, like I said its big business, there's lots of women that make millions of dollars doing porn and uh they call themselves movie stars, only ya know, adult movies stars. And if they're doing it for money, and they're consenting, and they're not being forced. Ya ok, they're objectified, um, they don't have to do it, they don't have to make the money, if they're not all doped all and nobody's holding a gun to their head, then they're a consenting adult. They can always go work at Walmart; they don't have to do that.

James agreed with Rex, that what two people do in their bedrooms, as long as they are adults, and not harming society, they can "fly at her"; even if that means sharing obscene material with other adults. Some feminist scholars (Assister & Carol, 1993; Gill, 2007; McElroy, 1995; Pitcher, 2006; Taormino, 2013) offer support for Rex and James' argument, suggesting that through the feminist movement, women have become empowered, and can choose to participate in pornography. The problem is though, that despite this neo-liberal perspective of female agency, pornographic material still tends to depict women as sexual objects, reflecting their "subordinate sexual political and socioeconomic state" (McNair, 2002, p. 113). More importantly, despite this *choice* to participate, italicized because choice is dependent upon the privilege that each woman

possesses based on her class, race, sexuality, ability, the material is typically still produced and consumed by and for men (Mulvey, 1988; Nichols, 2016) and often features material which is violent, and degrading, thus meeting the standard for obscenity (Shor, 2019).

Interestingly, Ed touched on the issue of consent, as discussed by Rex and Catherine. He presented a different perspective, acknowledging the neo-liberal perspective that those individuals involved pornography can consent. According to Ed, this perspective ignores the evidence that "a portion of the participants are coerced, either in a physical sense, perhaps as human trafficking victims, or through economic desperation." Farley (2006) found evidence of coercion in the sex trade and pornography and many of the so-called participants are victims of human trafficking. According to Farley, women who are depicted in pornography are first trafficked and prostituted in filming, and then again when the films are distributed or purchased for consumption. In a more recent discussion, Nichols (2016) builds on the arguments of radical feminists like MacKinnon (1997) and Farley (2006), that pornography facilitates the objectification of women, which legitimizes an environment conducive to sex trafficking, and normalizes violence against women.

Obscenity and the Criminal Justice System

While the majority of participants had no first-hand experience with the obscenity provisions (except for Wesley and George), many of them offered their opinion about when the criminal justice system would, or could, respond to obscene adult pornography. In fact, many of the police participants indicated that adult pornography was almost always found in the course of their investigations. However, despite opinions indicating that some of the materials found would meet the standard for obscenity set in *Butler* (1992), charges were never laid. As Noreen described:

> most of the adult material that we would get would be basic just pornography, not always prohibited material. But there were cases where it was prohibited material as well.

She explained no obscenity charges were laid in these examples because the focus and emphasis were on the child material. George indicated that "So the straight stuff, the straight, heterosexual stuff does not seem to be any issue at all." However, he

suggested that homosexual material, such as that identified in *Little Sisters* (2000), may not be tolerated in the same way, especially when materials are crossing the border (*R. v. T.M.*, 2013). George pointed out that the internet changed things:

> keep in mind, moving stuff across, physically across borders is no longer -- physically bringing stuff in, has changed, right? Everything is streamline. Like if I want to get something, it's all online, right?

These comments make the crime of importing obscene material over the border, somewhat moot.

While obscenity was not the focus of their investigations, participants offered alternative ways in which the criminal justice system could respond to obscenity. For example, obscenity was often included as a category when cataloging all the images and videos police had to review in child pornography investigations. James discussed that when reviewing thousands of images of child pornography, he put adult material into a category to count the total number of images. While James found that 95% of the material was not concerning, a small portion was shocking, including bestiality and torture porn, and could potentially meet the standard for obscenity. This categorization of publications, as noted by James, could be used in sentencing as an aggravating factor:

> But in cases where this person has an extensive collection of child pornography, but also has an extensive collection of, whether it's commercial production or not, an extensive collection of people being hurt by other people. You have sadomasochistic type videos. If I go, "Well Your Honour this guy had 30,000 videos of children being raped and another 2,000 videos of people inserting broken bottles into a women's anuses and vaginas," there's something to be said about the shock factor you put before the court. And I think would that lead to a greater sentence? Would it be an aggravating factor? Yeah, I would think so.

A. elaborated that during the course of her child exploitation investigations, the adult pornography found appeared to be consensual, commercialized productions. A., in her role in ICE, discussed how they categorized material as well:

> I think what we used to do is we'd, you know, we'd say there's 537,000 images that meet the threshold of child pornography. There's 100,000 that meet the categorization of sexual assault. There's 50,000 that are adult pornography.

However, A. described how these counts were for police purposes only and were rarely provided to Crown. She suggested that if this crime were to arise, the focus would be on

the assault that occurred, as opposed to obscenity. More importantly A. questioned "if an investigator on the street would even know to consider" an obscenity charge. A.'s statement offers supports for Ed's argument that the obscenity law is essentially "dead letter," meaning that a "law is on the book, but is very, very rarely enforced."

Cataloguing images, including obscene ones, also occurred in *R. v. D.G.F.* (2010), in which the accused pled guilty to seven crimes against children, including the sexual abuse of his daughter, and possession and distribution of child pornography. In the Ontario Court of Appeal's decision, Justice Feldman described the accused's collection:

> The respondent also possessed DVDs and CDs containing 3,454 child pornography photographs, 58 child pornography videos, 2,096 child nudity images, 10 child nudity videos, 1,116 images of obscenity and 57 videos of obscenity (obscenity was agreed by the parties to be material where the dominant characteristics is the undue exploitation of sex or sex depicting crime, horror, cruelty or violence), including depictions of the respondent sexually abusing his daughter. (para.11)

Despite acknowledging that the accused was in possession, and actively sharing, these videos online, he was not convicted under the obscenity provisions. These discussions of obscenity are consistent with the argument put forward by James that obscenity is used as a categorical factor. Interestingly, the obscene publications warranted no further discussion in the Court of Appeal's decision.

Participants offered two alternative charges within the context of obscenity investigations. For example, participants discussed section 162.1(1) of the *Criminal Code* that criminalizes the distribution of intimate images. James outlined in chapter five how these cases often occurred within in the context of a relationships, in which a person shares an intimate image with their partner. Sally, the Crown provided the only example of responding to this crime; she prosecuted a case:

> under the domestic abuse umbrella, wherein the partner was taking pornographic images of his partner while she was unconscious and/or asleep, and then sharing those images with others.

In this atypical example, charges were laid under the distribution of intimate images section.

The second example that participants offered involved situations in which an actual crime was filmed, and then distributed. An often-cited example is the snuff film, "defined as a commercially produced movie of un-simulated murder distributed for economic gain," sometimes associated with "extreme pornography" (Adams, 2017, p. 92). Ed defined snuff films as those "in which a female typically is ultimately depicted as being murdered. So, there would be that sort of extreme level of a depiction of violence" that met the definition for obscenity set out in *Butler* (1992). Kim and Anna discussed that snuff films shifted police concern from the obscene nature of the film, to the filming of a homicide. Other similar examples that focus on the illegal act depicted included assaults, or sexual assaults, including cases in which the person depicted is unconscious, sleeping, or intoxicated. In those examples where the person is incapacitated, there are incapable of giving consent to the sexual activity, as well as being filmed.

In addition to homicide and sexual assaults, participants also suggested that depictions of bestiality could meet the definition for obscenity. The notion of bestiality as obscene is an interesting consideration, as bestiality itself is prohibited by the *Criminal Code*, defined as "any contact, for a sexual purpose, with an animal" (s.160(7)). *Butler* (1992) did not explicitly mention bestiality as a consideration for obscenity charges, as it focused on violence against women and children. However, since then bestiality depictions have been recognized as occurring in pornography. The SCC case of *R. v. D.L.W.* (2016) sparked legislative changes to update the bestiality provisions to include all forms of sexual contact, as opposed to being limited to penetrative acts, as a means to increase protection for vulnerable victims, including children (Department of Justice, 2019). While participants suggested that depictions of bestiality would meet the definition for obscenity, none had encountered an obscenity charge for bestiality publications in their career. James noted that bestiality pornography featuring adults was often found, but never charged, within child pornography collections:

> A recurring theme that we see is men who are into child pornography usually of young females, when we find adult content it's often animals having sex with adult females. So, I've seen many animals, different types – it doesn't matter I suppose. Anyway, lots of animals, farm type animals having sex with adult females.

A. agreed with James that offenders always had bestiality pornography in their collection. Similar to obscenity, bestiality pornography was considered as a categorical

factor for police officers to describe collections of materials. Bestiality could be viewed as an aggravating factor at sentencing, where they can be used, as James described, “to paint the picture of the accused as a monster of sorts, that type of material can be very helpful.” As Noreen explained:

> Well it was there [obscenity including bestiality], but it didn’t seem like the prosecutors or anybody wanted to deal with the adult material. Even though it was an offence, like under *Butler*.

While it appears that criminal justice system personnel believe that bestiality images are beyond what society tolerates, for these participants, they have not formed the basis for an obscenity investigation or charge when they are part of child pornography collections.

Lastly, Ed argued that obscenity could function as a token charge, or part of a “side dish” to other charges, such as child pornography charges. However, none of the police officers or Crown indicated that they had included an obscenity charge in a child pornography investigation. John, as a police member who investigated human trafficking, suggested “token efforts” towards obscene websites or files may exist:

> So, all of that activity that we see on the internet, the vast majority of it isn't pursued. They may make token efforts and go after an internet provider and say “pull that file,” or “shut down that website.”

John suggested, however, that this response was time consuming and ineffective, as police have to file an application to shut down a website and that can take two weeks. In that time frame, John pointed out, “That site can change its name, move servers and be up and running again in a matter of minutes.” Academic research agrees that this response is ineffective (Bissias et al., 2015). So, even if an officer pursues alternative options to obscenity charges for an obscene publication or website, those responses do not offer long term solutions to the proliferation of obscenity online.

Chapter Summary

In this chapter, I outlined the societal shift away from the culture outlined in *Butler* (1992), whereby publications that featured a risk of harm to women and children necessitated a criminal justice system intervention. With shifting standards of tolerance, towards one where obscenity is ubiquitous and accepted, there has been a resulting emphasis on child pornography, with the belief that children are vulnerable and need to

be protected for harm. With the rise of the internet, and the accessibility and availability of child pornography, combined with the limited resources available for the criminal justice to adequately responded to all the child pornography online, there is a need for the criminal justice to prioritize their response. As such, child pornography is prioritized above obscenity, and material which features the sexual abuse of children is prioritized above other representations of child pornography (e.g. morphed or cartoon images). While criminal justice system personnel identified other ways in which obscenity could trigger a response, such as a categorical factor, distribution of intimate images, or when an assault has occurred, obscenity has, for all intents and purposes, as a crime fallen to the wayside among law enforcement professionals. In the final chapter, I outline the rise of the internet, the proliferation of child pornography online, and how, combined with a societal shift, the obscenity provisions have become a law no longer utilized by the criminal justice system.

Chapter 7.

Conclusion

To assess the changes that occurred within the criminal justice system after the implementation of the child pornography provision, I asked the following questions:

1. According to criminal justice system personnel, what shifts in law enforcement priorities are evident since the enactment of the child pornography provision in 1993?
2. According to criminal justice system personnel, how did the internet influence this shift in priorities?

Sixteen interviews were completed with various members of the criminal justice system: 11 police officers, including five retired police officers, one Crown, three defence lawyers, and one law professor. Of those 16 participants interviewed, only two had direct experience responding to obscenity; both were defence lawyers, including one involved in the *Butler* case 28 years ago, and another in an obscenity case in the 1980s. Many participants were unaware of any investigations or charges ever occurring for obscenity during the course of their often-lengthy careers in the criminal justice system. While some outlined scenarios in which obscenity charges were appropriate, such as depictions of bestiality or sexual assault, they had no knowledge of either scenario resulting in an obscenity charge, much less a conviction. What was even more surprising is that many individuals, including current RCMP members and Crown, indicated they did not know that obscenity was a crime within the *Criminal Code*. The reasons for this lack of knowledge were answered during the interviews—the criminal justice system prioritizes child pornography and child sexual abuse. The justifications for prioritizing child pornography, particularly that which features real children, are summarized below.

Since the enactment of the child pornography provisions, participants outlined how the criminal justice system struggles with responding to this crime. The prioritization of child pornography, over obscenity, was originally found in arguments made by The Badgley Committee in 1984, which focused on child sexual abuse and The Fraser Committee in 1985, which concentrated on pornography and prostitution. Both committees advocated for the creation of specific provisions in the *Criminal Code* to protect children from harm. These committees built on research led by feminist concerns

that children needed to be protected from harm because they are innocent, whereas adults could consent, at least on some level, to participate in pornography. This argument coincided with the theme that the current criminal justice system operates in a child protection climate, whereby crimes against children, including child pornography and the sexual abuse of children, are prioritized.

While the SCC in *Butler* (1992) confirmed that obscenity presented a risk of harm to society, namely through the normalization and legitimization of violence against women and children, participants provided a different interpretation. Discussions with participants revealed that adult pornography was everywhere, readily available at the click of a button, commercialized as a big, multi-billion dollar a year business, and mainstreamed through Hollywood productions on television and the big screen. Furthermore, they argued that as long as people were consuming the material privately, in their own homes, the law could not police the private possession and consumption of adult pornography. As multiple participants noted, there was so much material that the police did not have the capacity to respond to all the child pornography offences, much less obscenity, explaining why adult material fell to the wayside, at least for law enforcement professionals. The rise of the internet meant adult pornography was found everywhere. Rex also identified that "[I]t's probably a lot more accepted than what it ever has been. Because it's say, it's out there," suggesting that even members of the criminal justice system, such as lawyers and judges, may be consuming pornography. Noreen noted that it was normal for police officers to find "basic" adult pornography when they conducted searches for crimes unrelated to pornography, or even unrelated to sexual offences. Noreen also discussed the acceptability of adult pornography within the justice system: "I think because they look and say, 'Oh, well, it's all available on the internet, anybody can get it.' You know, it's the attitudes of people who think it's fine." This argument is consistent with research conducted by McNair (2002; 2014) and MacRae (2003), who argued that pornography has become mainstream and normalized within society. There is so much pornography, in general, to respond to, and with the limited resources available in terms of investigative abilities and financial resources, the criminal justice system cannot keep up (Açar, 2017; Bissias et al., 2015; Dodge & Dale, 2018; Holt, 2018; Horsman, 2017; Wolak, Liberatore & Levine, 2014). As Noreen put it:

> But the adult material, I mean that was -- sort of fell, honestly, fell to the wayside because of all of the proliferation of all the child pornography. I mean it was just everywhere.

Essentially, obscenity has become what Ed defined as dead letter law – "law that is on the book, but is very, very rarely enforced."

This argument is consistent with the obscenity provisions, which, unlike the child pornography provision, does not criminalize the possession of obscene materials. Individuals must do more than possess or make the material; it also requires an intent, or actual, publication or distribution of the obscene publication. They questioned, given that adult pornography, including obscene imagery was so readily available, how could it present a risk of harm to society? Even in the more recent case of *Labaye* (2005), the SCC confirmed that obscene material was still prohibited when it: a) causes harm or carries with it a significant risk of harm, and (b) that risk of harm threatens the functioning of society. *Butler* confirmed that obscenity presented a risk of harm which threatened society, however, the risk of harm, as evident by academic research into obscenity, has been inconclusive (Garos, Beggan, Kluck & Easton, 2004; Kingston, Fedoroff, Firestone, Curry & Bradford, 2008; Malamuth, Addison & Koss, 2000, Sommers & Check, 1987; Vega & Malamuth, 2007).

Some participants explained the types of material they believed could meet the basis for an obscenity charge, including depictions of bestiality or sexual assaults captured on film, or torture pornography. Police officers Catherine, James, and Anna indicated that they often found these types of material during investigations; however, no charges were filed for obscenity in these examples, nor were they aware of any obscenity charges occurring during their careers. The criminal justice system did not concern themselves with these depictions, unless it was obvious a crime had occurred (e.g. sexual assault). However, if a film captured a sexual assault, assault, or homicide, participants indicated it was then an offence against the person that would be the focus of the investigation, rather than the filming or distribution of the film, such was the case in *R. v. Bakker* (2005). Some participants, including James and Sally, acknowledged that the illegal distribution of an intimate image, may include obscene depictions; however, only one participant, a Crown counsel, had experience with the intimate image provision. George, in a discussion of the *Little Sisters* (2000) case, indicated that obscenity offences are still found in the *Customs Act* when individuals bring material, such as

LGBTQ2 pornography, across the border. For George, material outside the heterosexual norm had more potential to face obscenity charges; future research might focus on the types of material prosecuted under *Criminal Code* obscenity provisions, or the *Customs Act*. However, George pointed out that with the internet, individuals rarely transport obscene content over the border – they just log onto their computer or smart phone and click a button for instant access to obscenity. As George suggested "enforcement becomes next to impossible on the straight stuff in any event, because it's just so prevalent, right?"

Adult imagery only warranted consideration when police had to catalogue large collections of pornography. James described how in his experience it was used to help paint a picture of the accused as a monster. Adult pornography, or obscene material, is therefore used by the criminal justice system for descriptive means, or potentially as an aggravating factor for the judge to consider during sentencing. Anna, conversely, noted that while police categorized the materials, she did not believe the results were shared with Crown. Future research should include additional interviews with ICE units to assess how pornography collections are categorized, and whether those categorizations are included in the report to Crown counsel or to the judge. Future research into how judges weigh the presence of obscene material, if at all, would be useful.

Participants outlined that, not only does the internet facilitate the commission of child pornography and related crimes such as child sexual abuse, rather it was the combination of technological advances that accompanied the rise of the internet which changed the way sexual crimes against children were committed (Allen, 2017; Holt, 2018; Horsman, 2017; Kloess et al., 2019; Simpson, 2009). The internet created a system that was flooded with images/videos of horrific violations of children, as noted by Noreen who spent hundreds of hours cataloging images and videos of child pornography before cases, such as *Sharpe* (2001), went to court. For example, the internet helped facilitate the commission of online crimes against children, luring them over the internet, grooming them to either send pornographic images, or sexually abusing them (Holt, 2018; *R. v. Sharpe*, 2001; Sinclair et al., 2019). As Sinclair et al. (2019) found, with whom Noreen agreed, the notion of stranger danger, and fearing strangers on the street no longer applied. The larger concern stems from the anonymity that the internet allows, combined with youth accessing social media, and normalizing connecting with strangers online (Carroll et al., 2008; Sinclair et al., 2019). In addition to luring children, participants

outlined concerns with sex trafficking, with many acknowledging that victims of sex trafficking are often depicted in child pornography that is shared online and found in large collections of child pornography offenders. Ed, Rock Climber, and Anna outlined how the combination of child pornography with sex trafficking and sex tourism further complicated investigations when there were cross-border concerns, challenges in identifying victims, as well as offenders (Holt, 2018; Horsman, 2017; Koziarski & Lee, 2020; Marcum et al., 2010; Nichols, 2016; Powell & Henry, 2018). Additionally, with technological advances, sex traffickers have the ability to live stream sexual abuse (Açar, 2017). This change means that offenders can pay to watch sexual abuse happening in real time. The potential for individuals to make special requests, described by John as 'made to order' child pornography, allows an offender to put in a special request which aligns with their sexual preferences. These types of offences are not limited to sex traffickers; in *R. v. J.S.* (2018), the offender uploaded and streamed depictions of the sexual abuse of children in his care.

Technological changes have also facilitated the creation of child pornography and obscene material. Morphed images, as well as cartoon images of child pornography meet the *Criminal Code* definition of child pornography. Key here is that the individuals only need to be depicted as under 18 – they do not have to be a real person, or child. However, only a few participants, including Mary and Anna, identified these images as forming part of the problem for child pornography. The majority of participants provided experience with crimes involving the sexual abuse of real children; James, for example, said he had never been a part of an investigation into child pornography that did not focus on the sexual abuse of a real child. This emphasis on productions that feature the sexual abuse of children speaks to the allocation of limited resources, to prioritize cases that feature the most risk of harm to society, particularly children, consistent with the child protection climate outlined above. Academic research into cybercrime has identified the limited amount of resources that are available to investigate and respond to cybercrime (Açar, 2017; Bissias et al., 2015; Dodge & Dale, 2018; Holt, 2018; Horsman, 2017; Wolak et al., 2014). In fact, some researchers indicate that the only cybercrime that results in criminal justice intervention is child pornography and child exploitation; namely, as a means to allocate limited resources to the most vulnerable population (Horsman, 2017). Allen (2017) expands on how the criminal justice system triages child pornography cases:

> The increase in reporting of online child pornography has challenged the capacity of law enforcement agencies; the resulting increased caseload may mean that police services are triaging cases and concentrating on combined files for the most series cases, which may have an impact of the characteristics and outcomes of cases over times. (p. 9)

As such, it is often those cases that feature the sexual abuse of children that are prioritized by the criminal justice system (Allen, 2017; Horsman, 2017).

These changes affected the ability of the criminal justice system to respond to child pornography in two important ways. Through the internet, offenders can amass large collections of images and videos of both obscenity and child pornography. This means that when police respond to one offender, they often have to sort through and categorize thousands of publications to ascertain if they meet the legal definition for child pornography. These large collections are consistent with a psychological need described by Taylor and Quaye (2001) for child pornography offenders to amass large collections, not unlike baseball cards, and to fill any gaps in their collections. Secondly, the internet and technology has created a community of like-minded individuals who share a sexual interest in children, as described by Mary. The ability to communicate with like-minded individuals helps normalize child pornography and a sexual interest in children, fuel a demand for child pornography, which in turn, encourages the sexual abuse of children, and the creation of child pornography. Prior to the internet, offenders obtained depictions of child pornography either through the mail, or through other offenders – a process which rarely occurred according to Mary.

Evidence suggests a shift with the criminal justice system now prioritizing child pornography, over other types of pornography, including obscenity. Even though participants identified that obscenity may pose a risk of harm, when youth consume obscenity, or when obscenity is used for grooming purposes, it is not a crime that warrants a criminal justice system response ((Açar, 2017; Bissias et al., 2015; Dodge & Dale, 2018; Holt, 2018; Horsman, 2017; Wolak, Liberatore & Levine, 2014). Accordingly, they recognized that the criminal justice system did not have the capacity to respond to obscenity; in reality, the criminal justice system does not even have the capacity to respond to all crimes of child pornography. For example, James identified how it was those publications which featured real children being sexually abused that were the focus of criminal justice system personnel. Within the publications that met the legal definition of child pornography, including cartoon and pseudo-images, participants,

including John, described how they had to pick “the worst of the worst” to best utilize limited resources (Allen, 2017; Horsman, 2017). Concerns that these cases were time consuming and complex, meant they picked cases with publications that were obviously child pornography (Dodge & Dale, 2018). This process also helped ensure that medical professionals could ascertain with an increased degree of accuracy that the person depicted is in fact a minor, which, in turn, increased the likelihood of obtaining a conviction in court. Individuals linked the prioritization process with the decisions made by Crown counsel in BC for approving charges (BC Prosecution Service, 2019). Namely, the criminal justice system responds to crimes in the public’s best interest, with participants pointing to the existence of a child protection climate, that children are incapable of consent, and thereby warrant protection from sexual exploitation. Adults, on the other hand, can give consent to participate, and consume pornography privately in their own home; as such, investigating obscenity is not in society’s best interest.

This shift in priorities resulted in adult pornography falling to the wayside, no longer subjected to criminal justice system scrutiny. As Ed described it, in legal terms, obscenity has essentially been rendered dead letter law, meaning it is a law on the books, but rarely enforced. Even if police have knowledge of Canadian obscenity laws, it became apparent that some of the newer police officers (such those who joined the police force since 2000), were not aware of obscenity provisions or that adult pornography could form the basis for criminal charges separate from child pornography. Police officers suggested that even if obscenity was “on police radar,” the Crown would never charge, mainly because would not be viewed as in the public interest. This perspective is consistent with academic research:

> When the significance of a photograph is determined by legal definitions, necessarily photographs that fall outside that definition tend either to be ignored or not evaluated because they may be seen as secondary or incidental to the main focus of prosecution. (Taylor et al., 2001, p. 99)

As such, obscene images are ignored as they fall outside those legal definitions of child pornography. This narrative of obscenity, and adult pornography, is not unlike the discussion that occurred with respect to crime comics. Prior to 2018, crime comics were included in the *Criminal Code* definition of obscenity, being described, under s. 163 (7):

> as a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(a) the commission of crimes, real or fictitious; or

(b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

In 2018, the government of Canada recognized this law was "obsolete or redundant" (Bill C-51, 2018, p. 9) and deleted it from the *Criminal Code*. Considering the discussions with participants, it would not be surprising if obscenity followed the same path. However, participants expressed concern as to how obscenity could affect youth, for example, in the form of increased desire to engage in degrading or violent activities, with men engaging in aggressive behaviours and women engaging in acts of submission (Bridges et al., 2016; Coyne et al., 2019; Sun et al., 2017)), or engaging in higher risk sexual activity (e.g. anal sex, ATM) which increases exposure to STDs (Brand et al., 2011; Cooper et al., 2004). Participants like Noreen, Mary, and Catherine, questioned the role that obscenity played in offending patterns, and wondered whether the consumption of obscenity could lead to an escalation in terms of material accessed. For instance, consumers may initially seek out heterosexual pornography, and then escalate to illegal content – violent pornography, bestiality pornography, or child pornography (Quayle & Taylor, 2002).

This thesis highlights the lack of resources in the criminal justice system for responding to pornography. Participants described a flooding of child pornography, in addition to the billions of images and videos of adult pornography, available online. Horsman (2017) cites data that 1.5 million people have viewed illegal content, including child pornography, online. Bissias et al. (2015) "estimate that about 3-in-10,000 Internet users worldwide were sharing known CEM [child exploitation materials] on these five P2P networks" (p. 189). While the data indicates that only a small percentage of the population is accessing child pornography, that we know about, there are hundreds of thousands of individuals accessing this content, and sharing millions of images (Bissias et al., 2015). These cases are time consuming, complex, involve *Charter* challenges, and are extremely expensive to investigate (Açar, 2017; Bissias et al., 2015; Dodge & Dale, 2018; Holt, 2018; Horsman, 2017; Wolak, Liberatore & Levine, 2014). The individuals interviewed in this study outlined the hours dedicated to responding to crimes of both child pornography, child sexual exploitation, violence against women, and obscenity. These challenges mean the criminal justice system is in dire need of increased funding to help to provide additional support, particularly to the police, in

responding to these types of crimes. The ability to proactively investigate would both reduce child pornography and might also give the criminal justice system, particularly law enforcement professionals, time to investigate obscenity (Bissias et al., 2015; Dodge & Dale, 2018; Wolak et al., 2014). Mary, for example, outlined that the reactive nature of child pornography investigations is problematic:

> Historically the issue of online child sexual exploitation is seen as being a law enforcement-only issue, but by the time it becomes a law enforcement issue the offences have already happened.

Mary further explained that in order to have an effect on child sexual exploitation and child pornography, there needs to be increased awareness and prevention efforts. For her, these efforts included the use of technology, and specific funding towards technological training to allow for the criminal justice system to, as John outlined in chapter six, adapt to "keep up with that kind of distribution" which the internet has created. Part of adapting includes the engagement of law enforcement agencies internationally in coordinating a response to child pornography and child sexual exploitation. However, these measures may not address some of the more intractable problems in responding to child pornography, such the difficulty in tracking the source of the distribution, the effort in arresting outside of one's own jurisdiction, or the challenges of extradition.

Academic research has outlined how the criminal justice can shift to a more proactive means of responding to cybercrime, and more specifically child pornography and child exploitation. For example, Açar (2017) identifies how the criminal justice system can coordinate with government agencies, NGOs and the private sector (Holt, 2018). Developing a coordinated response could help bring attention to the harms of child pornography, as well as obscenity. Part of the role of the private sector would include public awareness campaigns, as identified by Mary, and bring these crimes to the attention of the public and policy makers, perhaps as a means to increase funding to these resources (Açar, 2017). With the advancement of technology, and the creation of tech savvy offenders, there is a need for additional education and training for criminal justice system professionals (Açar, 2017; Dodge & Dale, 2018; Koziarski & Lee, 2020; Marcum et al., 2010; Powell & Henry, 2018). A recognized need for specialized experts, especially responding to child pornography exists, however, being a specialized expert takes a toll on those investigating to it. To maintain those experts, we need to be able to

support them. Increased access to outside resources is also important, including training medical doctors to conduct maturational assessments, which would have the dual effect of increasing their willingness to testify in court as to the age of child pornography victims. Technological experts, such as those explained by John in Ireland, who support the police in investigating child pornography, would also be helpful to provide police and the criminal justice system with the ability to keep up with offenders technologically. One example described by Bissias et al. (2015) is the use of software like RoundUp to track and remove known images of child pornography. Lastly, evaluation of strategies by academic researchers is important so that the criminal justice system can implement the most effective strategies (Holt, 2018; Koziarski & Lee, 2020; Marcum et al., 2010; Wolak et al., 2014).

Additional research with criminal justice system personnel should assess the effect of responding to these cases, and consider their needs, in addition to the obvious increased financial resources, to respond to more instances concerning obscenity and child pornography. It is also essential to provide psychological and emotional support for those investigating these crimes, as many participants, and academic research (Koziarski & Lee, 2020) discussed the psychological effect of investigating child pornography. Anna outlined that she spent years working on one case to secure a conviction, a process she described as “frying her brain” which in turn, changed her perception of the world – “You start to look at everybody like they're pedophiles.” While this work is normalized by participants, as described by James, it is not normal to look at horrific pornography on a regular basis, and many participants described how it affects their lives and perception of the world.

Finally, additional research and evidence to assess the risk of harm of obscene materials is essential. Cases such as *Butler* (1992), *Little Sisters* (2000), and *Labaye* (2005), recognize that obscene material carries a risk of harm. However, the courts have not clearly defined the risk obscenity poses to the public, or assessed what it looks like, in this technological, internet age. *Butler* (1992) determined that a “reasoned apprehension of harm” was required (para. 107). While *Labaye* confirmed this approach in 2005, this standard has yet to be applied in an obscenity case. As outlined in Kusz (forthcoming), the expert research regarding the risk of harm obscene material carries has been methodologically flawed, and the results inconsistent. As such, we need sound, longitudinal, research into the effect of pornography on consumers, and

especially on youth. Having an understanding of how pornography effects youth in particular, is of importance, given that individuals access pornography during their adolescence, particularly young men. Having the awareness that obscenity, and thereby adult pornography, is a viable charge in the course of pornography investigations, may revitalize these provisions and increase awareness amongst law enforcement professionals of the potential risk of harm that obscene material carries. Alternatively, there is the potential for an understanding of the effects of obscenity to inform alternative policies that address violence against women. If society recognizes that we do not have the ability to respond to child pornography, what else can we do to mitigate the effect of obscenity, and the risk of harm it carries, upon society? In light of recent events within Canada, including the #MeToo movement, and the acquittal of Jian Ghomeshi, there has been a revitalization by women and feminists alike over the concern about sexual violence against women. Given the lengthy history of anti-violence research, this calls for a renewed interest in studying the effects of pornography.

Participants did not question whether or not obscenity was harmful to society. In fact, as outlined above, participants recognized that obscene material carried with it a risk of harm. However, with limited sources, along with the lack of understanding that obscenity was a risk, obscenity has fallen to the wayside amongst law enforcement professionals. For criminal justice personnel, the internet created an environment where pornography was everywhere, and they did not have the ability to respond to all pornography. There was a huge inability to respond to all investigations of obscene pornography and, as such, criminal justice system personnel have taken their limited resources and applied them where the risk of harm was the most visible: children (Allen, 2017; Horsman, 2017; Jochelson & Kramar, 2011). Admittedly, limited resources are available to address cybercrime as a whole. Accordingly, the risk of harm presented to real children, who are physically and sexually abused to produce child pornography, must be the focus and priority of the criminal justice system.

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Appendix A. Offences Tending to Corrupt Morals

Offences Tending to Corrupt Morals

163 (1) Every one commits an offence who

(a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or

(b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever;

(b) publicly exhibits a disgusting object or an indecent show;

(c) offers to sell, advertises or publishes an advertisement of, or has for sale or disposal, any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage; or

(d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section, the motives of an accused are irrelevant.

(6) [Repealed, 1993, c. 46, s. 1]

(7) In this section, ***crime comic*** means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(a) the commission of crimes, real or fictitious; or

(b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

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

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;

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

(c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or

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

(2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

(3) Every person who transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission, making available, distribution, sale, advertising or exportation any child pornography is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

(4) Every person who possesses any child pornography is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

(4.1) Every person who accesses any child pornography is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

(4.2) For the purposes of subsection (4.1), a person accesses child pornography who knowingly causes child pornography to be viewed by, or transmitted to, himself or herself.

(4.3) If a person is convicted of an offence under this section, the court that imposes the sentence shall consider as an aggravating factor the fact that the person committed the offence with intent to make a profit.

(5) It is not a defence to a charge under subsection (2) in respect of a visual representation that the accused believed that a person shown in the representation that is alleged to constitute child pornography was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

(6) No person shall be convicted of an offence under this section if the act that is alleged to constitute the offence

(a) has a legitimate purpose related to the administration of justice or to science, medicine, education or art; and

(b) does not pose an undue risk of harm to persons under the age of eighteen years.

(7) For greater certainty, for the purposes of this section, it is a question of law whether any written material, visual representation or audio recording advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

164 (1) A judge may issue a warrant authorizing seizure of copies of a recording, a publication, a representation or any written material, if the judge is satisfied by information on oath that there are reasonable grounds to believe that

(a) the recording, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is a voyeuristic recording;

(b) the recording, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is an intimate image;

(c) the publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is obscene or a crime comic, as defined in section 163;

(d) the representation, written material or recording, copies of which are kept in premises within the jurisdiction of the court, is child pornography as defined in section 163.1; or

(e) the representation, written material or recording, copies of which are kept in premises within the jurisdiction of the court, is an advertisement of sexual services.

(2) Within seven days of the issue of a warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the maker of the matter seized under subsection (1), and alleged to be obscene, a crime comic, child pornography, a voyeuristic recording, an intimate image or an advertisement of sexual services, may appear and be represented in the proceedings to oppose the making of an order for the forfeiture of the matter.

(4) If the court is satisfied, on a balance of probabilities, that the publication, representation, written material or recording referred to in subsection (1) is obscene, a crime comic, child pornography, a voyeuristic recording, an intimate image or an advertisement of sexual services, it may make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication, representation, written material or recording referred to in subsection (1) is obscene, a crime comic, child pornography, a voyeuristic recording, an intimate image or an advertisement of sexual services, it shall order that the matter be restored to the person from whom it was seized without delay after the time for final appeal has expired.

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

(a) on any ground of appeal that involves a question of law alone,
(b) on any ground of appeal that involves a question of fact alone, or

(c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI and sections 673 to 696 apply with such modifications as the circumstances require.

(7) If an order is made under this section by a judge in a province with respect to one or more copies of a publication, a representation, written material or a recording, no proceedings shall be instituted or continued in that province under section 162, 162.1, 163, 163.1 or 286.4 with respect to those or other copies of the same publication, representation, written material or recording without the consent of the Attorney General.

(8) In this section,

advertisement of sexual services means any material — including a photographic, film, video, audio or other recording, made by any means, a visual representation or

any written material — that is used to advertise sexual services contrary to section 286.4. (*publicité de services sexuels*)

court means

- **(a)** in the Province of Quebec, the Court of Quebec, the municipal court of Montreal and the municipal court of Quebec,
- **(a.1)** in the Province of Ontario, the Superior Court of Justice,
- **(b)** in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,
- **(c)** in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court,
- **(c.1)** [Repealed, 1992, c. 51, s. 34]
- **(d)** in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, in Yukon and in the Northwest Territories, the Supreme Court, and
- **(e)** in Nunavut, the Nunavut Court of Justice; (*tribunal*)
-

crime comic has the same meaning as in section 163; (*histoire illustrée de crime*)

intimate image has the same meaning as in subsection 162.1(2). (*image intime*)

judge means a judge of a court. (*juge*)

voyeuristic recording means a visual recording within the meaning of subsection 162(2) that is made as described in subsection 162(1). (*enregistrement voyeuriste*)

Appendix B. *Canadian Charter of Rights and Freedoms*

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Appendix C. Consent Form

Consent Form

From Obscenity to Child Pornography: The Evolution of the Criminal Justice System Response to Pornography

Study team:

Principal Investigator: Jennifer Kusz

Faculty Supervisor: Dr. Simon Verdun-Jones

Research Personnel: transcriber

The results of this study will be reported in a dissertation submitted to the School of Criminology at the end of the research, and will be a public document.

Sponsor: Simon Fraser University

This study is being funding by the Vancouver Island University Inquiry Grant.

Invitation and Study Purpose

You are being invited to take part in this research because you are, or were, employed within the criminal justice system and have expert knowledge of the obscenity and/or child pornography provisions found in the Canadian *Criminal Code*.

Voluntary Participation

Your participation is voluntary. You have the right to refuse to participate in this study. If you decide to participate, you may still choose to withdraw from the study at any time, up to the completion of data collection, without any negative consequences to the education, employment, or other services to which you are entitled or are presently receiving.

What happens if you say "Yes, I want to be in the study?

If you say “Yes,” here is how we will do the study:

- ✓ We will ask you about trends within the criminal justice system: has there been a shift in priorities for the criminal justice system regarding the obscenity and child pornography provisions found in the *Criminal Code,* what role has the Internet played, if any, in shifting priorities
- ✓ Interviews will last approximately one hour, for one visit.
- ✓ An audio recording device will be used to record the interview.

Is there any way being in this study could be bad for you?

There are no foreseeable risks to you in participating in this study.

What are the benefits of participating?

We do not think taking part in this study will help you. However, in the future, others may benefit from what we learn in this study.

Will you be paid for taking part in this research study?

We will not pay you for the time you take to be in this study.

How will your privacy be maintained?

Your confidentiality will be respected. Information that discloses your identity will not be released without your consent unless required by law. If the researchers are requested to reveal information by subpoena, the researchers may reveal your identity and other information you disclose to me during the course of this study to the authorities. All documents will be identified only by a unique code number and kept in a locked filing cabinet. Participants will not be identified by name in any reports of the completed study; pseudonyms will be used to maintain confidentiality during the interview.

Data records will be kept on a computer hard desk, and password protected. Hardcopies of the data will be kept in a locked cabinet in the researcher’s office. Once the interview transcripts have been transcribed, audio transcripts will be destroyed.

Access to data will be limited to principal researcher, her supervisor, and transcriber. Data will be retained indefinitely via SFU vault.

What if I decide to withdraw my consent to participate?

If you choose to enter the study and then decide to withdraw at a later time, all data collected about you during your enrollment will be destroyed.

Organizational permission

Permission to conduct this research from your organization [Regional Crown Counsel, RCMP Headquarters] has not been obtained. The risk of your participation without the organization's consent is unknown but may include risks towards your employment and/or reputation.

Study results

The results of this study will be reported in a graduate thesis and may also be published in journal articles and books. The main study findings may be presented at academic conferences.

Who can you contact if you have questions about the study?

You can contact the principal investigator, Jennifer Kusz, or the faculty supervisor, Simon Verdun-Jones, if you have any inquiries regarding the study.

Who can you contact if you have complaints or concerns about the study?

If you have any concerns about your rights as a research participant and/or your experiences while participating in this study, you may contact Dr. Jeffrey Toward, Director, Office of Research Ethics

Future Contact

Please indicate yes/no if you consent to be contacted for follow-up purposes or to participate in other studies by the principal investigator.

Participant consent and signature page.

Taking part in this study is entirely up to you. You have the right to refuse to participate in this study. If you decide to take part, you may choose to pull out of the study at any

time prior to write up without giving a reason and without any negative impact on your employment.

Consent will be documented via audio transcription and in investigator's field notes. Digital recordings will be destroyed upon transcription. Transcripts will be kept for a period of five years, and then destroyed.

The results of this study will be reported in a dissertation submitted to the School of Criminology at the end of the research. The results of this study may also be published in journal articles and books or presented at academic conferences.

Your signature below indicates that you have received a copy of this consent form for your own records.

Your signature indicates that you consent to participate in this study.

You do not waive any of your legal rights by participating in this study.

_____

Participant Signature Date (yyyy/mm/dd)

_____

Printed Name of the Participant signing above

Appendix D. Interview Guide

Interview Guide

1. Please provide your age and gender.
2. Please outline your experience working with the criminal justice system?
3. Please tell me about your understanding of the obscenity provisions?
4. Please tell me about your experience with the obscenity provisions?
5. Please tell me about your understanding of the child pornography provisions?
6. Please tell me about your experience with the child pornography provisions?
7. What did you notice in your profession when the child pornography provisions came in place in 1993 (If applicable)?
8. What did you notice in your profession when pornography became available via the Internet?
9. How did this impact criminal justice system response to cases of obscenity?
10. How did this impact criminal justice system response to cases of child pornography?
11. Discuss your recent experience with obscenity provisions – how does the criminal justice system currently respond to obscenity?

Prompts

- When did that happen?
- What was your involvement in the situation?
- Would you elaborate on that?
- Could you say some more on that?
- What did you mean by…
- You haven't mentioned adult material, how would that fit in?
- It sounds like you were saying….
- How so?
- Why is that important?
- Could you give me an example?