

**CHILD PORNOGRAPHY
IN
THE WOODSHED**

by

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A THESIS SUBMITTED IN PARTIAL FULFILMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS
in
THE FACULTY OF GRADUATE STUDIES
(Department of Law; School of Law; Graduate Programme)

We accept this thesis as conforming
to the required standard.

THE UNIVERSITY OF BRITISH COLUMBIA

August 2000

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ABSTRACT

This is a deconstruction of “child pornography” through an analysis of media images of child spanking and their relationship with the criminal law and cinema, video and broadcasting regulation in Britain and Canada. It suggests that the law’s primary concern is not the protection of children but the elimination of the heresy that children are sexually attractive.

Chapter 1 introduces the phenomenon under discussion, namely internet sites that collect stills and clips from mainstream movies and television showing children receiving corporal punishment. The chapter postulates that these sites are for sexual gratification and explores what society understands by “sexual exploitation of children” and “sex” itself.

Part I considers whether the web sites are child pornography under English or Canadian criminal law. Chapter 2 looks at Canada’s definitions of obscenity and child pornography. Chapter 3 asks whether the images might be indecent according to England’s law. These chapters examine the law’s understanding of child spanking as a sexual act, exploring what constitutes “sex”. While Part I declines to state definitively whether such web sites are illegal, it argues that the movies and television from which the images originate are tolerated for the reasons that give the images sexual appeal.

Part II looks at the regulation in Canada and Britain of the movies and television from which the images are taken. Chapter 4 deals with cinema and video regulation, which prohibits eroticising violence and children, and asks how films are nevertheless rife with images of child beating used for sexual arousal. Chapter 5 similarly examines broadcasting regulation and asks whether the ban on sexualising children might be unconstitutional under the *Canadian Charter of Rights and Freedoms*.

Part III concludes by looking at how society permits the eroticisation of children, while condemning the “paedophile”. It suggests that the web sites may arise from childhood trauma over corporal punishment, compares the harm of that practice with that caused by the web sites and concludes that if there be prohibition, then it should be of child spanking, rather than the sites, which are non-exploitative testament to ingenuity in the face of a hypocritically censorial regime.

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ACKNOWLEDGMENTS

I thank my supervisor Bruce MacDougall for his reassurance at times of self doubt. It was because of him that I came to UBC, and it was his encouragement and guidance at every stage of my progress through the university that made this thesis, my degree and everything I have done here possible.

I thank also Professor Bill Black of UBC's Faculty of Law for his thoughtful and valuable comments on the draft thesis, as well as Professor Joel Bakan for opening my eyes to many things.

I thank Aleardo for his love and support. Finally I thank also the unknown internet "pornographers" without whose labours there would have been no thesis: the anonymous creator of the *Movie and TV Spanking Page*, Arild, Hoolio, Apollo, Archivist, Comixpank and Bost'n Bob.



Cover illustration: from the Our Gang short Wedding Worries (1941), director Edward Cahn, (MGM).

“Woodshedding: punishing children away from the house where their hollering won’t be heard.”

Wilkinson, P. R., *Thesaurus of Traditional English Metaphors*
(London: Routledge, 1993) at 187

“Though later Americans might recall the woodshed as the place father whipped or spanked the sons out of earshot of the women of the house, ... early colonists knew the wood house as a frighteningly dark and bitterly cold place where snakes and spiders lurked, as well as, perhaps, Indians, bears, and ghosts.”

Flexner, S. B., *Listening to America*
(New York: Simon and Schuster, 1982) at 338

“Something nasty in the woodshed: a traumatic experience in a person’s past; an unsavoury secret.”

Wilkinson, P. R., *Thesaurus of Traditional English Metaphors*
(London: Routledge, 1993) at 187

Chapter 1

INTRODUCTION

Few are likely to feel indifference upon discovering that adults are masturbating over images of children being beaten. Physical chastisement of children is a divisive issue in society, seen by many as cruel and dangerous and by others as salutary. But both camps will unite in condemnation not only when moderation is exceeded, but when children become the object of adults' sexual desire, even more so when they are employed as a means of adult sexual gratification. Included in the taboo are the creation and use of children's images to feed the lust directed towards them.¹ Thus when images of severe child beatings become readily available as erotica, two channels of outrage, one at physical cruelty and another at sexual abuse, conflate.²

How much greater will concern be when it is learnt that the internet, that much-feared lair of all who would harm our little ones, is the vehicle for such images. Our worst fears about the new technological demon conflagrate with despal for the paedophile and loathing for the child beater.

Alarm may be accompanied by surprise when it is learnt that the internet images being found so sexually gratifying are not some shaky amateur videos, barely decipherable after being copied and re-copied as they circulate among NAMBLA³ members, using doe-eyed

¹ Prior to the introduction of section 163.1 of Canada's *Criminal Code*, R.S.C. 1985, c. C-46, which prohibits child pornography, a poll by the Canadian government suggested that 94% of Canadians wanted some action to be taken to prohibit child pornography: Russell MacLellan, MP (Cape Breton - The Sydneys), speaking on section 163.1's 3rd reading (then Bill C-128), *House of Commons Debates*, (15 June, 1993) pp. 20864 - 20883 at p. 20870.

² "I cannot think of anything more despicable really than the exploitation of children for violent or sexual purposes ...": Bill Blaikie, M.P. (Winnipeg Transcona), speaking on the 3rd reading of Bill C-128, later s. 163.1 of Canada's *Criminal Code*, which prohibits child pornography, *House of Commons Debates*, (15 June, 1993) pp. 20864 - 20883 at p. 20872.

³ North American Man-Boy Love Association, the notorious organisation that supports "intergenerational, non-exploitative" love between men and boys.

boys in South-East Asia, or Polaroids of some poor white kid taken in return for a few dollars in an anonymous hotel room.

Instead the images are the product of Hollywood. They are stills and clips taken from family entertainment films distributed around the multiplexes. They come from works by such venerated organs as the BBC. The victims are the children of middle class parents who propelled them into drama school. The pornographers win Oscars.⁴ They have never been prosecuted, or even censured by broadcasting standards authorities. They have passed through every hurdle of cinema and video censorship and classification. And this is in two countries noted for the rigour of their media regulation, Britain and Canada.

This thesis is about those movie and television stills and clips. It results from my discovery of extensive internet libraries, containing hundreds of such images, compiled together under headings such as *The Movie and TV Spanking Page*,⁵ *Arilds Movie Spanking List*⁶ and *The Corporal Punishment Archive*.⁷ Those collections seem to have but one function, to sexually arouse those who eroticise the physical chastisement of children. Are their contents child pornography, as defined by law? If they are, why aren't the movies and TV programmes from which they are taken also illegal? If they are not, why is it that images that arouse such ire are permitted to circulate on the internet?⁸ What is the criminalisation of child pornography for, why do we have regulation of broadcasting, cinema and videos, if it is not to prohibit the sexualization not only of children, but of violence to children?

I shall look at the criminal law of Britain and Canada, both of which penalise with particular severity the distribution of erotic imagery of children. I shall also deal with the cinema, video and broadcasting regulators in those countries, all of whom lay special emphasis on prohibiting both the eroticisation of children and of violence. How did the movies survive these regimes? Are they pornographic, or did the images that were extracted from them for the spanking web sites somehow mysteriously transform into child pornography in the process of being transferred to the internet?

This thesis focuses on images of children being beaten, but I hope it also has some wider application to the issue of child pornography. I shall deal with the questions raised above, but also touch on some more basic ones, questions that, though basic, are perhaps not simple. What is child pornography? How should we define it? Exactly what is it that we want to prohibit, and why?

⁴ The film *Midnight Cowboy* (directed by John Schlesinger), awarded an Academy Award as Best Film for 1969, contains an extremely brief shot of a naked boy being spanked while lying over the lap of his grandmother.

⁵ <http://www.geocities.com/Hollywood/Studio/8716/cbhome.htm>

⁶ <http://www.moviespank.com/>

⁷ <http://home.freeuk.net/mkb/mainpage.htm>

⁸ It is acknowledged that the reproduction of such stills and clips on the internet constitutes a breach of copyright and perhaps other intellectual property rights in both countries. My interest is however in their relation to the criminal laws relating to obscenity and child pornography.

My essential thesis is that central to the purpose of child pornography laws is the eradication of the heresy that children are sexually attractive. This is not to say that the laws are not also meant to serve their stated purpose, namely the protection of children. For the law, the protection of children requires the eradication of the heresy. Rather I suggest that the law should focus more on the harm caused by acts done to children, rather than their eroticisation. I believe that the law legitimises treatment of children that is infinitely more harmful to them than their appearance in erotic imagery. Child spanking is the paradigm. This practice, to my perception, heaps an intolerable burden of humiliation on the child. Yet the laws of Canada and Britain, while both explicitly legitimising the act that causes the harm, strive to eradicate sexual enjoyment derived from the thought of the act.

I must personalise this perception, for I wish to avoid universalising claims to truth in the manner of those so quick to equate sexually explicit material with degradation of those appearing in it, or child pornography with exploitation. I recognise that the experience of spanking as humiliation is not universal among children, that for some physical chastisement has barely any significance at all, or may be a badge of honour, its incurrence and endurance a source of self esteem. Certainly I hope to be more tolerant of these views than are the decriers of child pornography to the hypothesis that some children may regard their appearance in erotic imagery with indifference, a means to easy money or, dare I say it, as pleasurable, increasing their self worth and confidence with the knowledge that they possess beauty.

This thesis deconstructs child pornography. This I am happy to do, for I do not like child pornography. That is not to say that I see some encroaching moral threat to our society, some cancer waiting to strike at our most vulnerable and innocent citizens. Far from it. I just don't like the whole fuss about it.

That being so, it would be satisfying not only to deconstruct child pornography but to dissolve the category altogether, to the point where I can announce it does not exist. I am repeatedly told that child pornography is a scourge. How I would like to say there is nothing for us to be rid of, except the trite sanctimony of those in ceaseless decial, the absurdity of laws that seek to define it and the fraud and hypocrisy of those who seek to apply those definitions.

Sadly, such a statement is disingenuous, for the words "child pornography" do have meaning for me. Indeed the term is loaded with meaning. If asked to define the term, my most honest answer would be that I mean nothing more than those images of children that upset me. The upset might not always come directly from the images. They may upset me because I realise that although I am meant to get upset, I don't. Child pornography is material defined by desire and superego, by taste and guilt.

I would prefer not to have to define child pornography at all, but to simply snipe at definitions offered by others. Unfortunately I cannot write about child pornography without taking some stand on what the term means for me. If I do not state it, then it will be read into what I say. For instance, as for my wish to deny that child pornography

exists, I have to acknowledge that there are images of children that some people use to aid their sexual arousal. Thus my understanding of child pornography is revealed. I shall also concede that there are probably images of children that no one uses to aid sexual arousal, thereby creating the binary opposition needed to give the term some meaning. But I do not want to embellish my categorisation further unless I have to.

Deconstruction of child pornography is difficult because I live in a culture preoccupied with the concept. We are committed to its destruction, but certainly not its deconstruction. My culture is also obsessed with other tricky terms I shall use in this thesis, like “sex” and “sexual”. I have done my fair share of personal obsessing over these terms, so over time I have developed an understanding of what they mean for me. I have wholeheartedly entered into the discourse on sexuality identified by Foucault, so much so that I have now written a thesis adding to it, a contribution Foucault would no doubt consider so unnecessary.⁹ I think I know what is meant by sex when my culture talks about it. I know when I am aroused and I know what is supposed to arouse me. I also have a pretty good idea what does arouse me, and have dutifully fretted over the divergence of the two. So I feel entitled to use the term sex, even though I do not have the first clue how to define it.

This being so, I feel equipped to enter the debate on the “problem” of child pornography, but not in terms of the “problem” being how best to eliminate it, but the “problem” being deciding what it is. Until this is clear, I prefer to sit out the crusade against it.

Maybe someone somewhere can devise a definition of child pornography that will permit me wholeheartedly to support efforts at its elimination. I have no doubt there are images out there that would shock and appal me, and that things have been done to children to create them that would shock and appal me. Having spent some months searching for child pornography on the internet, and having found hundreds of images that might well be considered child pornography, I have to report that I have not seen one that has remotely shocked and appalled me.

I listen to those who condemn child pornography speak of the need to protect children from harm. Certainly such a cause is sufficiently hedged for me to applaud it with passion. I too want to see children protected from harm, although not all children, and not all of the time. My concern is that I am not sure I agree with many who propound laws against child pornography as to exactly what harm we are trying to protect children from.

I have now spent some months considering English and Canadian laws prohibiting child pornography. Suffice it to say, I do not like them. I have read their definitions of what constitutes child pornography, as well as the judgements of those who seek to apply them. Any certainty as to what is and what isn’t child pornography still eludes me. More fundamentally, I do not like the criteria used. If these criteria reflect the perceived harms that the laws are concerned with, then count me out.

⁹ Foucault, M., *A History of Sexuality, Volume 1*, trans. R. Hurley (New York: Random House, 1978)

I cannot deny that the laws have probably prevented some hurt to some children somewhere. But they have done so in a manner so full of absurdity, with so much double dealing and deceit, causing so much harm to those every bit as innocent, as needy and deserving of protection as the children who are supposed to benefit, that I feel unmoved by those who clamour for more laws of the same ilk. I realise that law is a blunt tool, and have low expectations of it, but surely we can do better than this.

DEFINING “SEXUAL EXPLOITATION OF CHILDREN”

When I speak of the agenda of proponents of child pornography laws, the agenda I approach with so much scepticism, I am also aware that there is no single, clearly defined agenda. All the same, there is certainly strong consensus that the aim is to protect children from harm, and the harm might be widely identified as “sexual exploitation”.¹⁰

I can rally to the cause of protecting children from sexual exploitation, although I am not entirely sure what it means. I have a reasonably clear idea of what exploitation is: lack of consent and some form of power imbalance seem essential ingredients, neither of which appeal to one with both libertarian and egalitarian sentiments. But the concept is far more problematic. When, for instance, must apparent consent be abrogated, as arising from a state of innocence, false consciousness, or whatever? The law largely ignores the sexual wishes of the child, so exactly who is doing the exploiting?

Rather than attempt a definition of sexual exploitation, let me conjure up a mental image of a child being sexually exploited. This thesis is about images, so permit me to at times speak through imagery. To my mind, a paradigm of sexual exploitation is a young girl being violently raped by a fully mature man. She is six, he is twenty-something. Disregarding her screams, he pins her down, his strength easily overcoming her puny attempts at resistance. Having no regard for anything but his own physical pleasure, he penetrates her. As a result she suffers terrible pain and perhaps lasting injury. She is exposed to immense psychological trauma as well as the risk of sexually transmitted disease, which may kill her. For the man the girl served no other purpose than a means to satisfy his desire. This, without doubt, is sexual exploitation. It is a shocking image which repulses, and rightfully so. No game of deconstruction, no intellectual whimsy, shall hold back my most vehement condemnation.

¹⁰ The long title to the *Protection of Children Act*, 1978, c. 37, the English act dealing with the taking and distribution of indecent photographs of children, reads: “An Act to prevent the exploitation of children by making indecent photographs of them; and to penalise the distribution, showing and advertisement of such indecent photographs”. In presenting Canada’s law against child pornography (*Criminal Code*, *supra* note 1, s. 163.1) to the House of Commons for its second reading, Rob Nicholson M.P., Parliamentary Secretary to the Minister of Justice and Attorney General of Canada and Minister of State (Agriculture), said: “We are taking important steps to protect children from sexual abuse and exploitation. ... The purpose of a law specifically addressing child pornography is to deal with the sexual exploitation of children and to make a statement regarding the inappropriate use and portrayal of children in media and art which have sexual aspects.”: *House of Commons Debates*, (3 June, 1993) pp. 20328 - 20336 at p. 20328 (2nd reading of Bill C-128).

What happens if I pick apart the various elements in this narrative? How much can I morph this mental image before the quality of exploitation dissolves? I write here not so much of my own perception of exploitation, for I shall come to that in due course, but that which I perceive in the society about me. Let us start with gender. Men exploit women, we are often reminded, but switching genders does nothing to dispel exploitation. Indeed, doesn't it just increase the audience's repugnance? Swap the girl for a boy and one sexual perversity is heaped upon another. Make the assailant a woman and she not only abuses her power as an adult, she betrays all trust imbued in her by womanly virtue.

What if we tone down the lack of consent? Go to the opposite extreme, so that the child is now pleading for sex, and it still makes no difference. True, the scene loses its violence and thus some of its horror, but the child is still exploited. It doesn't matter if the child's consent derives from indifference or desire. A child's consent is meaningless, its desires irrelevant.

Add years to the child and things start to change. Add sufficient years and everything becomes dependent on consent and desire. As the child reaches the threshold of adulthood, wherever that may be set, consent renders rape into lawful sexual intercourse. Exploitation may still be perceived between consenting adults. It does not need a feminist consciousness to see exploitation of the desperately poor prostitute. But add sexual desire on both sides and any consensus on exploitation has been left far behind.

What if we keep the child at six, swap her protest for beckoning of desire, but start to take years away from her sexual partner? At some point doesn't exploitation dissipate? When two six year olds compare their private parts, are we witnessing exploitation?

The levelling of the ages threatened perceived power imbalance. Power is endowed by age, or more exactly by having the quality of 'adult'. And 'adult' means having sexual knowledge. Those possessed of the quality 'child' are dispossessed of sexual knowledge or at least, thanks to Freud, have it only in latent form. Children are possessed of the antithesis of sexual knowledge, for they imbue sexual innocence.¹¹ That is why they cannot consent to sex, for they know not what sex is.

All children are innocent, but some are more innocent than others. Even a child might exploit another, even when both exhibit desire, if one is possessed of more innocence than another. The mentally disabled (akin to innocent) child is exploited by the mentally able, younger children are exploited by older. Perhaps gender is not so irrelevant after all. Boys, made as they are from frogs and snails and puppy dog tails, use their sexual knowledge to exploit the sugar and spice innocence of girls.¹² What, after all, are boys

¹¹ "One of the joys of childhood is having the innocence of being a non-sexual person for a while or just being able to be free in their persona. They are not little boys or little girls, they are children and they have that innocence all around them": Lynn Hunter, M.P. (Saanich - Gulf Islands), speaking at the 3rd reading of Bill C-128, later to become s. 163.1 of Canada's Criminal Code, *House of Commons Debates*, (15 June, 1993) pp. 20864 - 20883 at p. 20876.

¹² "What are little boys made of?

Frogs and snails

And puppy-dogs' tails,

but miniature men, apprentices to the sexual exploitation of women? Thus in 1996 Jonathan Prevette, a six-year old American boy, was suspended from school for sexual harassment after kissing a girl classmate on the cheek.¹³

But let us return to children as just children, as representations of childhood, the embodiment of innocence. Children cannot exploit children, just as innocence cannot exploit innocence. Strangely, at a certain age, perhaps when some of the childhood innocence has rubbed off, the criminal law will probably still intervene. In England two children aged 10 to 15 engaged in sexual fumbling are both guilty of a criminal offence. In this case we might just start to question whether the law is entirely motivated by the eradication of exploitation.¹⁴

What if we retain the original age gap, the interaction between adult and child, but we start to morph the activity they are involved in? Instead of penetration, the adult is now touching the child's genitals. Our perception of the gravity of the offence may change, our horror subdues a little, due perhaps to the act being seen to pose less pain or physical danger to the child.¹⁵ But the act seems just as exploitative. Substituting buttocks for the genitals probably changes little. Switch to a bodily region more removed from the genitals and we start to ask questions. As we move away from penetration, sexual desire becomes less a presumed motive. Why is that man touching a child's feet? His lustful gaze alarms us that he is a foot fetishist and the perception of exploitation returns. His white coat comforts us that he is a chiropodist. We realise that touching genitals and buttocks may be a medical examination too, but in those instances there is a shifted burden of proof. Touching a child's feet is an innocent act until proven otherwise. Anyone fondling a child's genitals has some explaining to do.

What if we discount all physical touching? Can a child be sexually exploited through other means? What about, for instance, engagement in dialogue? Is there a difference between asking a child the size of his penis and reaching a hand under the bed clothes to feel it? Words can be as intrusive as straying fingers.

What about straying eyes? Is the child caught in an adult's lustful gaze exploited? A look is often said to be as abusive as physical contact. Women complain of being

That's what little boys are made of.
 What are little girls made of?
 Sugar and spice
 And all that's nice,
 That's what little girls are made of."

Anonymous nursery rhyme, quoted in *Nursery Rhymes* (J. O. Halliwell; 1844).

¹³ Kincaid, J. R., *Erotic Innocence: The Culture of Child Molesting*, (Durham: Duke U. P., 1998) at 151 - 152

¹⁴ In contrast, the Canadian *Criminal Code* (*supra* note 1) has devised a relatively complex legal scheme around the age of sexual consent, which more clearly suggests that exploitation is its primary concern. See s. 150.1.

¹⁵ In England sexual intercourse, defined as penetration, between a man and a girl under the age of 13 is punishable with life imprisonment, or any shorter term, regardless of her consent: *Sexual Offences Act*, 1956, 4 & 5 Eliz. 2, c. 69, s. 37 (1) - (3), Sch. 2 para. 2 (a). Any other sexual assault not involving penetration is punishable with just 10 years' imprisonment: *ibid*.

visually raped, so surely children can too. Does the child need to be aware of the gaze for it to be abusive? Even if aware of the gaze, does the child need to understand the desire behind it?

What if the child only learns of the desire behind the gaze, or the gaze itself, after the event? In that case, who exploited the child, the observer or the informant? What if the child learns of the desire years later, when an adult? Can an adult somehow suffer retrospective child abuse? Does exploitation still occur if a child's informant is mistaken about the desire? If the child is being exploited, it is becoming confusing to see how, why and by whom. And is our indignation at all these touches, words and stares thwarted if the child enjoyed the attention all along, understands the desire perfectly and, darn it, doesn't care a fig? Or, blasphemy of blasphemies, perhaps the child got off on it too.

I felt safe asserting that the original child rape image is exploitation, and I joined in its condemnation with zealotry. But now I have strayed into much less certain ground. For one thing, I have dared to challenge the gospel of childhood innocence. After all, "they want it too" is the cry of that most hideous of ogres, the paedophile. It is a cognitive distortion, according to no less an authority than the Canadian judiciary.¹⁶ It is not a sentiment to express too loudly if you want friends in polite company. If by expressing it I have advocated or counselled illegal sexual activity, then I have committed a criminal offence and this thesis is itself unlawful child pornography.¹⁷

Safer to write of the person who lusts after children, who sketches a child drawn from his imagination, who then puts the picture in his drawer, hidden from the view of others for ever more. How is such behaviour viewed by all those "right-thinking" men and women who, our judges are so fond of thinking, fill our society, marginalizing the "sick", "evil" and "perverted"? No doubt the act is that of the latter and not the former. But perhaps some of the former, after communicating a few shudders down the spine, and letting their utter incomprehension be known, could let it pass. Even some Canadian judges couldn't get too excited about it.¹⁸ But others do, enough for a law to be passed against it.¹⁹

Perhaps they see the drawing, although it does not represent a particular child, as exploitative of all children, because of some desecration of a symbolic representation of child. After all, the imagined child will simply be a pot-pourri of all the real children the artist has encountered, even if only indirectly through other images of children. Is there an affront to all those children who together constitute the artist's understanding of child, or even to all children in all places at all times, past, present and future?²⁰

¹⁶ *R. v. Sharpe*, (1999), 175 D.L.R. (4th) 1, 134 C.C.C. (3d) 222, (B.C.C.A.), [hereinafter *Sharpe*]

¹⁷ Canada's *Criminal Code*, *supra* note 1, s. 163.1, [hereinafter Section 163.1]

¹⁸ *Sharpe*, *supra* note 16.

¹⁹ Section 163.1, *supra* note 17

²⁰ Tom Wappel, Canadian M.P. (Scarborough West) and a prime supporter of Canada's anti-child pornography laws, has been quoted as saying: "The victim is 'the child' of society in a sort of metaphysical sense": Z. Margulis, "Canada's Thought Police", 3.03 *Wired Magazine*, (March 1995): <http://www.efc.ca/pages/wired-3.03.html>

What if the child in the picture being masturbated over *was* real, but is no longer so? What if it is dead, or now an adult? Is there exploitation through some affront to the memory of the child? What if the now grown up child desires that adults masturbate over his childhood photos? What if a man is masturbating over images of himself as a child? In this scenario, who, precisely, is exploiting whom?

It will be apparent that all these questions become relevant when considering internet collections of stills from Hollywood movies that show children being spanked. Some stills date back to the 1930s. The child actors are now elderly or dead. Even with more recent productions, I doubt whether many of the children know about these internet sites. These children consented to being filmed. And as they dropped their pants and bent over, mooning their buttocks for their fellow actor's cane, the camera and an audience of countless millions, didn't it occur to them, or at least their parents, that someone, somewhere, might just find the whole thing a little bit sexy?

It should be clear by now that I have moved the debate from child abuse to pornography. It will be obvious that the two are inextricably linked. Some will argue that they are synonymous, and that is the question I have been raising. Susan Edwards, for instance, claims that child pornography is nothing less than "a record of the systematic rape, abuse and torture of children".²¹ Others will see a distinction between pornography and child abuse, the gap between saying and doing. But that distinction is not universally acknowledged. One practitioner working with child sex abusers has been cited as saying:

I do not agree with the arguments that fantasy is something that happens in your head and that behaviour is something else. In my experience fantasy and behaviour are directly connected.²²

Many will claim that the link is causal, and attempts have been made to prove and disprove this claim empirically, with conflicting results.²³ Others are concerned simply with the thought. As Canadian MP Tom Wappel, a prime supporter of anti-child pornography measures, has been quoted as saying about written sexual fantasies:

It is wrong to have these fantasies and wrong to write them down. Period.²⁴

In my above musings on what acts might constitute child sexual exploitation, I included reference to looking at children. Is the act of looking through binoculars at a child who is playing, oblivious of such attention, akin to the same act if the binoculars are replaced by a camera and telephoto lens and a finger triggers the shutter? Some would say yes, that the creation of an image in the latter scenario changes everything. It is not the act of taking such photographs that is in issue, they argue, but how they are understood, how their content and their existence inform our understandings not just of children, but how we should relate to them and what we can do to them. Thus in four out of the 19 child

²¹ Edwards, S.S.M., "Prosecuting 'Child Pornography': Possession and Taking of Indecent Photographs of Children", (2000), 22(1) 2000, *Journal of Social Welfare and Family Law*, 1-21

²² Cited in Tate, T., "The Child Pornography Industry: International Trade in Child Sexual Abuse", in C. Itzen (ed.), *Pornography, Women, Violence and Civil Liberties*, (Oxford U. P., 1992) at p. 243.

²³ See for instance, the judgements of the British Columbia Supreme Court in *Sharpe*, *supra* note 16.

²⁴ Margulis, *supra* note 20

pornography prosecutions in England in the second half of 1995, children were photographed unawares using hidden cameras. All four defendants were convicted.²⁵

I cannot address all these arguments, but for the moment I hope it is clear that both the discourse on child sexual abuse and child pornography rest on the same constructions, those of 'adult', 'child', 'sex' and 'exploitation'. It is my intention to explore those constructions by reference to a particular category of images that, for me, lie intriguingly on the cusp of the last two. I have in mind images of children being spanked.²⁶

DEFINING "SEX"

The choice of spanking might raise eyebrows. For some, spanking is not sex, especially not spanking a child. Glanville Williams, a leading authority on English criminal law, has expressed amazement that smacking a boy's buttocks might constitute an indecent assault.²⁷ *Ipsa facto*, images of children (or boys at least) being spanked are not pornography.

They might accept that spanking or being spanked gives rise to sexual excitement in some adults, but it is a mere fetish, the inappropriate attachment of sexual interest to something other than the real thing. Thus it will be conceded that spanking a lover might be sexual, if one or both does it for sexual pleasure. But generally it will be termed foreplay, a digression on the way to what sex is really about. Just as our construction of "child" is rooted in innocence and "adult" in sexual knowledge, so does our construction of "sex" emanate from the primordial procreative act, the penetration of the vagina by the erect penis. The closer conduct mimics that act, the more sexual it is.

As with the lack of consensus on the boundaries of exploitation, so will there be a paucity of agreement on the precise confines of the sexual. One Canadian judge simply said "that well-known term does not require definition."²⁸ The most help another judge could offer was:

... the terms ["sex acts" and "sexual activity"] are difficult to define but I think any

²⁵ Edwards, S.S.M., "Prosecuting 'Child Pornography': Possession and Taking of Indecent Photographs of Children", (2000), 22(1) 2000, *Journal of Social Welfare and Family Law*,: 1-21

²⁶ I use the term "spanking" as a convenient shorthand to encompass all acts of hitting the buttocks, whether by hand or with an implement. To my mind the term is specific to the buttocks. This is important since I believe it is this anatomical factor that often lends the act its sexual potential and, as shall be seen in chapters 2 and 3, is of central importance in determining the legitimacy of images of corporal punishment. The buttocks need not necessarily be naked. I do not mean the term's rather homely flavour to exclude savage beatings, including those with implements, which could cause severe injury. There is no other word that is buttock specific but which lacks the connotations of moderate, childhood correction.

²⁷ Williams, G.L., "What is an Indecent Assault?", (1987), vol. 137, *New Law Journal*, Sept. 18, 1987, pp. 870-2.

²⁸ Mifflin C.J.N., *R. v. Piercey* (1986), 60 Nfld. & P.E.I.R. 76, 181 A.P.R. 76 (Nfld. C.A.)

reasonable persons would clearly know and understand a "sex act" or "sexual activity" if he or she saw it.²⁹

That sex exists in desire seems incontrovertible. The act of drawing a child takes on a sexual hue when it is motivated by sexual desire, otherwise the act lacks the quality of sexual. Discussion as to whether sketching can in itself be a sexual act has a touch of the semantics about it. Less debateable is the sexual quality of other acts, like the masturbation which, it is feared, will accompany the drawing. Masturbation mimics the penetration identified above, so it is sexual. Thus any penetration becomes a metaphor for *the* penetration. Knives become phallic, as do guns. Eyes can penetrate a woman's blouse. Some object to references to "penetrating observations".³⁰

As we begin to digress further from genital friction and penetration to discover the boundaries of the sexual, we need other guidelines. One is to imbue certain bodily parts with the quality of the sexual. Exactly how this is done is not clear, but certainly association with the procreative act seems one method. Most obviously this encapsulates the penis and the vagina. Perhaps because the anus can also be penetrated, that is included, as are the buttocks that surround them. Women's breasts, claimed to be buttocks by proxy, are also strong candidates. Not only touching these parts becomes sexual, but also showing them, looking at them, creating images of them, even talking about them.

But using these criteria alone, we run into problems. Penetrating a vagina with a finger looks like sex, but it may be a medical examination, in which case it isn't sex at all. Building a church seems pretty non-sexual, but perhaps the spire is a phallic symbol. These acts are lent a sexual quality by reference to desire. It is desire that remains our most trusty companion in the search for the sexual. If an act is motivated by that desire, then it is a sexual act. If it isn't, then it's not. You can do anything you like to a child, and if it's not motivated by sexual desire, it's not sexual.

Thus with spanking a child. Certainly nothing gets penetrated during a spanking and the genitals are not directly involved. So it is not obviously sex, even though the buttocks are involved. Instead it only becomes a sexual act when sexual desire is involved. (It will be presumed that if there is sexual desire, then it will be on the part of the adult spanker.) Thus spanking is subjectively sexual, whereas penetrating the vagina with the penis is objectively sexual.

The correlation of pain and pleasure is a familiar concept to most, the words sadism and masochism have everyday currency. While an understanding of the erotic pleasure in extreme S&M might escape many, the pleasure from a playful smack on the buttocks will be more widely familiar. Use of the British slang idiom "slap-and-tickle", meaning petting, kissing and caressing, has been recorded since the early years of the 20th

²⁹ Dohm J., *Red Hot Video Ltd v. Vancouver (City)* (1983), 24 M.P.L.R. 60, 48 B.C.L.R. 381, 5 D.L.R. 61 (B.C.S.C.)

³⁰ Mackinnon, C.A., "Feminism, Marxism, Method and the State", (1983) 8 *Signs* 635.at p. 636, n 4.

century.³¹ Perhaps due to the demise in child corporal punishment, the word spanking is finding a new meaning. We now spank the puppy, or the monkey.³² Interestingly enough, this refers to masturbation.

Some may simply refuse to believe that spanking a child can be considered sex, so let me spell it out in their language, so that even those with the most vanilla of sexual preferences can see it. Naked buttocks, smooth, rounded contours of flesh, soft, warm and pert, are exposed, hoisted onto the lap, the spankee's genitals pressed against the spanker's thighs. One small move and both parties' genitals touch. The hand presses against buttocks, reddening the flesh around the anus, that gateway to erotic bliss, to the colour of sexual desire. Those who warn against the sexual dangers of spanking children constantly refer to the way the buttocks' nerve endings connect directly with those of the genitals, inextricably entwining stimulation of one with that of the other. Is it so hard to see that for some spanking a child, or seeing one being spanked, is the most erotic experience imaginable, and not just a detour *en route* to "proper" sex?

Yet spanking is equivocal, fascinatingly so. It is sex and yet not sex. A child is spanked for being naughty. A child is spanked for the spanker's sexual pleasure. It is the same action. It looks the same and is quite probably the same experience for the child. As for the first scenario, pro-spankers say corporal punishment is for the benefit of the child, anti-spankers see it as symptomatic of well meaning but misguided parenting. Neither see it as exploitation. As for the second, hurting and humiliating a child for no other reason than one's own sexual gratification takes us pretty close to the horror of my opening narrative of child rape, which I presented as paradigmatic of child sexual exploitation. But if the spanking fetishist has waited until an available child is naughty (and what child will not oblige by occasionally being naughty?) and if spanking is truly salutary, then the child is all the better for it. Thus spanking is not only sex and yet not sex, it is exploitation and yet not exploitation.

Spanking is an area where not just equivocation but also irony abounds. Spanking is a manifestation of sexual desire, yet perhaps a child is spanked for masturbating or looking at pornography. Children are touched in probably their second most sexual region, yet within certain parameters this act is protected by the laws of many western nations, including Canada and England.³³ It is a practice applauded by the very voices most outspoken in their vociferous hounding of the paedophile. The religious right say it is not just salutary but essential, required by no less an authority than God.³⁴ He who commands that it is better for him who offends any of these little ones that a millstone be

³¹ "A joky and innocuous euphemism for love-play of various degrees of intensity. The phrase dates from the Edwardian era but was most popular in the late 1950s, usually in the form of "a bit of slap-and-tickle": Thorne, T., *Dictionary of Contemporary Slang* (London: Bloomsbury, 1997), at 355.

³² This expression seems to have gained currency since the US film *Spanking the Monkey* was released in 1994 (director David O. Russell), a film with a number of masturbatory references.

³³ see chapters 2 and 3, below.

³⁴ Most famously Prov 13:24: "He that spareth his rod hateth his son: but he that loveth him chasteneth him betimes (diligently)."

hanged about his neck and he be cast into the sea,³⁵ and would have us suffer our little children unto Him, would still smack their bottoms when they came.

Spanking is violence and yet not violence. Hitting a child is one of the few occasions other than self defence where it is still lawful to strike someone without their apparent consent. In fact lack of apparent consent is not irrelevant, it is essential for the act to retain its legitimacy. Other sexual assaults on children may be exploitative whether or not the adult understands the child to want it, although probably sex with a desirous child is less repugnant than its rape. But spanking a child who wants to be spanked somehow loses its innocence. It must be a punishment, the child must not want to get it and the adult must not want to give it. The famous plaintive cry “this will hurt me more than it hurts you” is not just for the child’s comfort.

When characterised as images of sexual violence, photographs of child pornography seem the embodiment of all that the laws against child pornography and obscenity, as well as the regulation of cinema, video and broadcasting, wish to eradicate. How curious, therefore, that movies containing such images are given “G” certificates³⁶ and broadcast on daytime TV.³⁷

THE INTERNET IMAGES OF CHILDREN BEING SPANKED

Let me at this point say more about the images I have found on the internet. I discuss the movies and television programmes that are the sources of many of the images in greater detail in chapters 4 and 5, when I deal with the regulation of cinema, video and broadcasting.

The images I have found and which are the immediate subject of this thesis vary widely, their only common factor being that they all show children³⁸ being hit, or appearing to be hit, by adults. The images can be usefully divided into two categories. The first consists of those images taken from what might be termed the “mainstream media”. Loosely speaking this refers to those media, and the images displayed thereby, which are widely considered to fall well outside the “pornographic”, as that term is generally understood. I refer to television channels like those offered by the BBC, CBC, CBS and their ilk, that

³⁵ *Luke*, Chapter 17, Verse 2. See also *Matthew*, Chapter 18, verse 6 and *Mark*, Chapter 9, verse 42.

³⁶ A “G” (for “General”) certificate is used by some Canadian film classification boards to indicate that a film is suitable for viewing by an audience of all ages, including unaccompanied children. The British equivalent, awarded by the British Board of Film Classification, is a “U” (for “Universal”) certificate. See chapter 5 for details.

³⁷ The film *Midnight Cowboy* (directed by John Schlesinger), awarded an Academy Award as Best Film for 1969, contains an extremely brief shot of a naked boy being spanked while lying over the lap of his grandmother.

³⁸ In the context of child pornography, English law defines a child as anyone under 16. Canadian law includes anyone under 18, as well as those older people depicted as being under 18. When I use the term in the context of analysing English or Canadian law on child pornography, I generally have in mind the definition of the country under discussion.

are broadcast into almost every home in the western world. I refer also to the films shown at movie theatres worldwide, not the flea-pit sex cinemas, but the multiplexes.

I do not mean it to connote the soft porn widely and legally available. I am not just thinking of the “adult drama” shown under an “R” certificate, or broadcast late in the evening with a viewer advisory, that causes a flap in the media and with the broadcasting standards authorities. I have in mind family entertainment, daytime (even children’s) television, classics like *Oliver Twist* and *The Adventures of Tom Sawyer* as well as more modern peak-time and Cineplex favourites. Often such material is aimed at children. Indeed, since most of the movies tell stories about children, there is a preponderance of material aimed at a family audience. I also refer to the print media, books, magazines and comics that are easily available to the general public and are intended for general consumption by people of all ages, including children. However space does not permit this thesis to explore these items.

The second category includes images not taken from such mainstream media sources and which appear to have been produced specifically in order to appeal to those who eroticise spanking children. For convenience these might be termed “purpose-made erotica”. Such images tend to be either (often crude) line drawings or still photographs. The latter are harder to come by than either the former or images from mainstream media. Indeed the vast majority of such images I have found appeared on just two sites, both of which required considerable hunting down and which needed special code words for access. These sites, which I found during 1999 but which were removed in early 2000, apparently as a result of complaints, together linked to over 100 photographs.

This thesis centres on images in the first category and in particular stills and clips from mainstream movies and tv. These can be found on web sites that require no payment or special codes for access. They can be found simply through commonly used indices and search tools like *Yahoo!*³⁹ I have drawn mostly on two particular web sites containing collections of such material, although there are more like them.⁴⁰ These are *Arilds Movie Spanking List*⁴¹ and *The Movie and TV Spanking Page*.⁴² Together they link to, or have at some time linked to,⁴³ stills and clips from around 145 mainstream films and television programmes showing children⁴⁴ being beaten, as well as references to and descriptions of almost 100 more movies and programmes.⁴⁵

³⁹ <http://uk.yahoo.com/>

⁴⁰ For instance, *The Corporal Punishment Archive*, *supra* note 7.

⁴¹ *Supra* note 6.

⁴² *Supra* note 5.

⁴³ At the time of writing many of the links from *The Movie and TV Spanking Page* (*ibid.*) to movie stills and clips were not working. I do not know whether the links do not work through technical problems or through acts of censorship. However they have worked in the past, and all the images referred to on this page have been accessed by me at some stage. What is more, the site operator, perhaps realising that some links cannot be re-established, has removed some movie and TV programme titles from the list on the home page. The list is therefore now considerably shorter than it was when I first found it some years ago.

⁴⁴ i.e. under 18 years

⁴⁵ These statistics were correct as at 1 August, 2000. The web sites continue to expand, albeit slowly.

All of the films shown have received general theatrical or video release in at least one country, including in most cases Canada and Britain, often certified as suitable for viewers of all ages. The television programmes have been produced and broadcast by television networks catering to the general audience, such as the BBC. Many of the films star the biggest-name, family entertainers in Hollywood, like *The Horse Soldiers* (1959)⁴⁶ with John Wayne and *The Seven Little Foys* (1955)⁴⁷ featuring Bob Hope. Many received huge critical acclaim, like the Academy-Award winning *Midnight Cowboy* (1969)⁴⁸ starring Dustin Hoffman and Jon Voight.

As for the television programmes, many were intended for general family viewing and some come from works meant especially for children. For instance, the page links to stills from BBC serialisations of the novels *Great Expectations* and *Tom Brown's Schooldays*,⁴⁹ which were broadcast early evening in Britain. One web site shows clips from a BBC schools programme showing boys being caned.⁵⁰ In all cases where I have seen the source material, which is many, I can vouch that, with one exception, the stills are shown in their entirety, appearing just as a single frame of the original film, without addition or subtraction, enhancement or alteration.⁵¹ As for stills from works I have not seen, there are no obvious alterations.

The category of images from mainstream media is not restricted to stills and clips from films and television productions. Paintings and drawings from a number of sources can also be found.⁵² A particularly fruitful source appears to be children's illustrated books and comics, such as the British *Beano*,⁵³ as well as other classics such as the Billy Bunter books.⁵⁴

Across both categories the age of the child being hit varies widely. Some appear to be as young as two or three, while others are in their late teens. Typically the age will range from around 8 to 14. My exploration of the Internet suggests that images involving boys are more numerous and easier to access than those involving girls.

⁴⁶ Director John Ford.

⁴⁷ Director Melville Shavelson.

⁴⁸ Director John Schlesinger.

⁴⁹ see Fig. 28, Chapter 5.

⁵⁰ *The Corporal Punishment Archive*, *supra* note 7.

⁵¹ The exception is a group of stills found on the *Movie and TV Spanking Page*, *supra* note 5, from the film *Joe the King* (1999), some of which have been doctored to give the impression that more than one slap is shown. Red colouring has also been added to the buttocks. However, the still from the film I show below is undoctored.

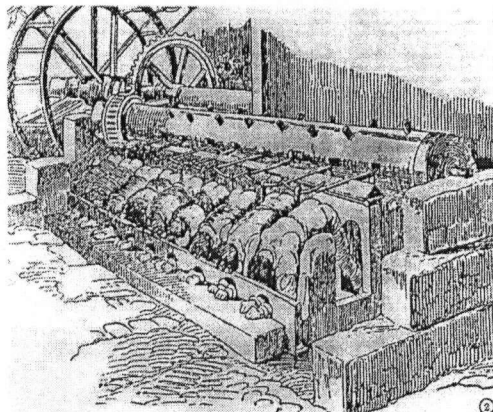
⁵² See, for instance, *Comixpank 2*: <http://members.xoom.com/comixpankII/>. The original Comixpank site was apparently taken down by Xoom in mid-January, 2000, without any explanation being given other than it was outside their terms and conditions. See also *The Corporal Punishment Archive*, *supra* note 7, *Nobbin's Spanking Art*: <http://www.ultspank.com/nobbin/nobbin.htm>, and *The Spirit's Visual Arts Gallery*: <http://spiritworks-art.com/>

⁵³ See, for instance, *Comixpank 2*, *supra* note 52 and *The Corporal Punishment Archive*, *supra* note 7.

⁵⁴ Author Frank Richards.



Fig. 1 & 2: The spanking web sites do not only display stills and clips from films and television, but also extracts from children's cartoon books, photos of implements, real life spankers and spankees, extracts from books, newspaper clippings, school and judicial corporal punishment regulations, anything to do with the subject. The cartoon above was found on a web site known as ComixpankII: (<http://members.xoom.com/comixpankII/>). It is typical of hundreds found in (mostly British) children's comics up until the 1980s, which invited children to laugh at the retribution being meted out to their peers. The World Corporal Punishment Research site <http://www.corpun.com> has the largest collection of material other than stills from TV and films, including an illustration of this 19th century German design for automated spanking (below).



The punishment is almost invariably being applied to the buttocks, although just once or twice the target is the palm or the back. All images that seem to fall into the category of purpose-made erotica involve striking the buttocks. In both categories the buttocks may or may not be naked and may or may not be out of sight. The genitals have only been visible in one image, which fell into the last mentioned category. Many show no nudity at all.

Whether any actual beating is taking place in any of the images is unclear. As for images from mainstream media, I assume that the punishment is generally simulated, so no child actor gets hurt. This is not always the case. The boy lead in the British film *Kes* (1969)⁵⁵, for instance, claims that he and other boys were paid extra to undergo being caned with considerable force on their palms.⁵⁶ In the case of images from other sources, it is often quite apparent that make-up has been applied, often very crudely, to suggest welts or reddening of the buttocks, thus suggesting that no actual blows are struck. Very occasionally, however, the marks appear authentic.

Not all images are recently created. Some that appear to be purpose-made erotica look 19th century in origin. *Arilds Movie Spanking List* describes a spanking scene from a film dating from 1895, directed by the father of cinema, Louis Lumière.⁵⁷

I wrote to the web pages' producers to discover more about the sites and, in particular, whether any legal challenge had been made to them. Despite repeated requests for information, none replied. However, during 1999 one site I had been monitoring, which was limited to a few stills from mainstream movies and a few written spanking fantasies, none of which were overtly sexual, closed down. The operator, calling himself Dr Ridding, cited as his reason "ever increasing repressive action of the Police and State in the UK" and quoted three recent cases in particular as prompting his decision.⁵⁸ One, according to Dr Ridding, involved a man given a prison sentence for taking photographs of fully clothed boys under his care going about their normal day activities. In another a man was apparently convicted of possessing child pornography after he extracted sequences of mainstream TV and films, including *Danton*⁵⁹ and re-recorded them in slow motion. Without further information it has proved impossible to establish the veracity of these claims.

THE PURPOSE BEHIND THE INTERNET IMAGE COMPILATIONS

Perhaps credible reasons, outside the sexual, can be conceived for a web sites that makes available a compilation of several hundred images of children being variously thrashed, but none comes to mind. Generally, however, the sites will contain no explicit reference to the images being sexually exciting or to them being intended as erotica. In fact little or no explanation is generally given for the site, except perhaps some bland statement that it is intended for those "interested in" the subject of childhood spankings. Often the closest that the sites come to any explicit suggestion that the images might at least be considered

⁵⁵ Director Ken Loach

⁵⁶ P. Bracchi, "Kes brought me fame but I've paid the price of childhood success; the boy hero of one of Britain's greatest films on life after stardom", *Daily Mail* [London], (5 October, 1999), p. 13, from an interview with one of the boys, David Bradley.

⁵⁷ *L'Arroseur arrosé*.

⁵⁸ <http://forsite.net/ridding>

⁵⁹ Which film of this name is not known.

Fig. 3



Figs 3 to 6: Spanking scenes vary in explicitness and nudity. Fig. 3 (above) from David Lean's 1946 adaptation of Great Expectations (Cineguild) is typical of the least explicit, which retain modesty. Fig 4 (below) comes from Bottoms Up (1960, directed and produced by Mario Zampi), the comic feature film spawned by the BBC television comedy series Whack-O! (1956-60 and 1971-72). The film and the TV show both, as their names imply, centred around canings. (See chapter 4 for comment). Fig. 5 originates from the 1991 movie Poison (Bronze Eye Productions, director Todd Haynes) and does not shy from a close-up, without any real need. Fig. 6 was taken from Joe the King, (1999, 49th Parallel, director Frank Whaley) and is unnecessarily gratuitous in its nudity. Did the over-the-knee spanking have to be shot from that angle? Figs. 3, 5 and 6 were found on The Movie and TV Spanking Page. Fig. 4 comes from Arilds Movie Spanking List.

Fig. 4



Fig. 5



Fig. 6



offensive is that a warning might be posted to people entering the sites that they should go no further if images of children being physically punished might offend them. There are other hints suggesting that the images are intended for use as erotica. Sometimes the person devising the site will separate images of girls from boys, male spankers from women.

Occasionally images of children being spanked will appear on sites that purport to give advice and support to parents in matters of child rearing. Typically such sites are recognisable because they present themselves as supporting an agenda in parenting which they refer to variously as “traditional” or more often “biblical” or even “Christian”. These sites will take a pro-spanking stance, often giving the issue the greatest prominence on the web page. Often such web sites, even if they do not contain such images themselves, will offer links which, either directly or through a series of links, will lead to child spanking images. Indeed while searching for child spanking images on the web I soon found terms such as “Christian parenting”, “traditional family” and “Biblical” child rearing far more fruitful entries into search engines than more obvious terms like “child spanking”.

I do not mean to suggest that all sites supportive of corporal punishment for children are fronts for erotica, but I believe many are. Take one example, a site offered by an individual calling himself “Goodfathr”, who claims to be an ordained Christian minister in the United States. Headed *ParentNow Magazine*, as at March 2000 the site described itself thus:

ParentNow Magazine is a Christian based parenting website devoted to the proper raising of children through Biblical teachings. We believe that it is a Christian parent's responsibility to bring up their children in the ways of the Lord. As such, we support such things as Biblical discipline (also understood to mean the proper use of corporal punishment, i.e., spanking) when it is needed to correct acts of willful disobedience and misbehavior.⁶⁰

The home page included, under the heading *Discipline* a photograph of a boy of around eight apparently being spanked on his clothed buttocks.⁶¹ The site also included a page headed *Recommended viewing*⁶² which in turn linked to *The GoodFathr Collector's Series of Great Motion Pictures*. This page itself contained four animated images of children being spanked, taken from various mainstream movies, and listed 41 others under a sub-heading which read:

Each one of these movies are terrific in their own right, but each one also contains a scene where a wilfully disobedient or misbehaving child is disciplined with corporal punishment.⁶³

⁶⁰ <http://www.geocities.com/~goodfathr/about.html>. Goodfathr stills runs a web site at that address, but it has now altered considerably.

⁶¹ <http://www.geocities.com/~goodfathr/>. See Fig. 7, this chapter.

⁶² <http://www.geocities.com/~goodfathr/view.html>

⁶³ <http://www.geocities.com/~goodfathr/collect.html>

The page then offered links enabling videos of these films to be purchased. The rationale offered for collecting together these titles was that the site's author considered that it may be salutary for families with young children to sit together to watch films depicting spankings, so that the children may become aware of the consequences of disobedience.

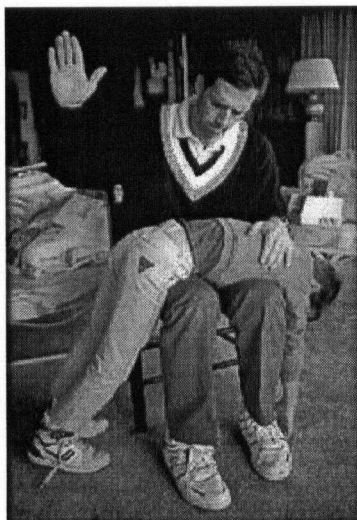


Fig. 7: The spanking photograph found on Goodfathr's home page. According to the World Corporal Punishment Research site, the still originally comes from an article advocating spanking on ABC News' web page, August 14, 1997: abcnews.com. In either context, it seems entirely unnecessary.

The site also offers Goodfathr's detailed instructions on how to spank (it must be applied to the naked buttocks, it seems), as well as emails from parents and occasionally children purporting to describe spankings and asking for and receiving Goodfathr's opinions, including on minutiae of technique. Goodfathr also operates email lists and chat rooms for discussion on spanking, where the subject receives detailed dissection. He used to operate *The Red Bottom Club*, an email subscription list that invited children to exchange descriptions of spankings they had received. After a while this list was replaced by the more subtly named *Kidspeak*, where requests that children submit spanking stories are more discreetly made. I might add that the original list attracted many contributions of the nature sought, although what proportion was genuine and how many were fantasies submitted by adult fetishists remains a subject for conjecture. Goodfathr also created an internet "radio" station, apparently devoted largely to this subject, although he announced its closure in August 2000.

It is among the email lists set up by Goodfathr and others that the clearest evidence can be found that the compilations of images, even if not intended to be sexually arousing, are enjoyed in that way. The web pages containing movie stills also often have "comments books" where messages can be posted. There are also a number of other lists catering for

those “interested” in spanking children (again the sexual nature of the interest is never spelled out by those devising the lists). I have monitored two such lists, called *Kidspank* and *Boyspanker*. The content of emails vary from invitations to spanking sessions, discussion on how and why spanking is sexually exciting, debate (sometimes serious) on whether children should be spanked and, if so, what methods should be used, reminiscences of childhood spankings received, as well as accounts, supposedly from parents, of spankings inflicted on children. Among these are often expressions of appreciation for spanking images, including those taken from mainstream media. There are also requests that parents supply photographs or sound recordings of real child spankings.

NORMATIVE ATTITUDES TO THE CORPORAL PUNISHMENT OF CHILDREN

In dealing with the subject of spanking children, I make a number of assessments of the normative values of my society, the views of the reasonable men and women already referred to as the judiciary’s favourite yardstick. Some have already become apparent, for instance that the normative thinker is appalled by the idea of taking pleasure from a child being physically hurt and does not consider children to be suitable object choices of adult sexuality, or appropriate means for adults to achieve sexual gratification. What is more, I have assumed that the normative thinker’s primary understanding of an adult spanking a child is as a means of chastisement or a venting of anger towards it, rather than as a sexual act. I mean by this first that he (for until recently the normative thinker in the eyes of the law was a man) is not personally aroused sexually by the act, whether real or imaginary, whether as observer or participant, and secondly that other factors will need to be present before he will connote a sexual motive to those involved in the act, whether adult or child.

I make fewer presumptions about normative views on taking pleasure from pain. Increasingly widespread is the view that what consenting adults do in private is their own business. Rather than condemnation, S&M is more likely to be greeted with sniggers. Perhaps, in these more enlightened times, the “right-thinking” man might himself enjoy spanking his wife as a bit of harmless fore-play before getting down to the more natural process of copulation. Who knows, he might even enjoy getting spanked by his wife, although again only as a sexual appetiser and more for her enjoyment than his own. Wry amusement at one of humanity’s sexual peccadilloes is unlikely to be extended to scenarios involving children.

Leaving aside its sexual potential, use of corporal punishment on children, as I have already observed, is a divisive issue among society, an issue on which “right-thinking” people are permitted to divide. A 1998 British Government survey found that 88% of parents felt smacking was sometimes necessary.⁶⁴ According to a 1995 US survey 94%

⁶⁴ Office of National Statistics

of parents reported using corporal punishment with their very young children.⁶⁵ Among supporters of physical chastisement, approval will be dependent on how it is used, how often and, of course, the severity. Thus the British survey found that only 7% approved of caning.⁶⁶

The law, that most normative voice of all, tolerates corporal punishment in both Britain and Canada, although over recent decades increasing moderation has been required. Public approval seems to diminish as the child gets older and the punishment becomes more ritualised. Many proponents distinguish a quick, light smack to a three-year-old from the set piece spanking of a child in or approaching its second decade. Although those with qualms about the act's sexual ramifications might balk at the choice of buttocks, this part of the child will generally be advocated as a "safe" and therefore appropriate target.

Chastisement of boys has retained societal approval far longer than for girls. In Britain, for instance, the judicial system, which it must be recalled has historically not only permitted but also itself employed corporal punishment in the correction of juvenile offenders, ceased flogging female criminals in 1828. Boys in mainland Britain were judicially birched on their naked buttocks until 1948. In the UK-dependent Isle of Man and Channel Islands this continued until 1980, when the authorities grudgingly discontinued the practice following the intervention of the European Court of Human Rights.⁶⁷

ASSUMPTIONS AS TO ATTITUDES TO CHILD SPANKING IMAGES

This thesis rests on the assumption that the images from mainstream television and films that I have found on child spanking web pages will be viewed differently, and with far greater disapprobation, when displayed on those internet sites than when set in their original movie or TV context. Indeed I assume that in the latter context they will attract little or no disapproval, or will at least be considered legal. I assume that what will be disapproved of is the act of collecting them on child spanking fetish sites. I also assume that their erotic enjoyment will, to varying degrees, raise discomfort, whether as part of the original movies or on the web pages.

I assume that concern will be felt at a number of levels; for the welfare of the children directly involved, for that of children generally, along with a more abstract unease at the idea that hurting a child might be found sexually gratifying.⁶⁸ I suspect that much of this

⁶⁵ Family Research Laboratory at the University of New Hampshire

⁶⁶ Office of National Statistics

⁶⁷ Anthony, E., *Thy Rod and Staff*, (London: Abacus, 1996), at 39.

⁶⁸ ⁶⁸ "I cannot think of anything more despicable really than the exploitation of children for violent or sexual purposes both in the sense of the children who are used to create these photos and so on and in the sense of the children who may subsequently be victimised in a truly physical sense by people who are moved to do that by consuming that particular child pornography": Bill Blaikie, M.P. (Winnipeg

distress, on the first level at least, will dissipate in the case of spanking images taken from mainstream media, produced as they are in the controlled environment of the television or Hollywood studio. But even so, there may be concern for the child's feelings, or those of the adult who was the child, if it should be learned that the images are being used as erotica. Spanking is often seen as a form of humiliation. How much magnified is the humiliation if it is sexually enjoyed. Ironically the pro-spankers, who seem quite sanguine about humiliating a child by spanking, may be the most vociferously outraged, since support for corporal punishment is an attitude generally associated with conservative attitudes, including views on sexual morality.⁶⁹

It is assumed that anti-pornographers, as well as many who normally tolerate adult pornography, will express concern that the image's availability will lead to abuse of children. Anxiety can only be heightened if sexual pleasure is derived precisely from hurting children. Such a desire is likely to bring even those who condone adults having sex with children to the collective outcry. I can imagine many paedophiles, whether practicing or not, condemning not only anything that physically hurts children but also the desire to inflict such pain.⁷⁰ Indeed NAMBLA's web site quotes one of the organisation's resolutions:

NAMBLA condemns corporal punishment, kidnapping, rape, and sexual exploitation. Participation in corporal punishment, kidnapping, rape, and sexual exploitation is contrary to NAMBLA'S statement of purpose. It is grounds for expulsion from NAMBLA (adopted December 4, 1983).⁷¹

Indeed the sexual enjoyment of such images seems certain to offend against every prescription of normative behaviour, whether those prescriptions arise from concerns about violence to children or about sexualising children. Some say children should not be spanked. Most say it should at least be kept private. Almost everyone agrees it should not be enjoyed. Even if enjoyed, it should still only be done when absolutely necessary. Certainly images should not be created to pander to the appetite. Even if such images are created, they should not involve children in their production. Children should not be sexually desired. Even if they are, they should not be the subject of pornography. Even if child pornography is to be made available, at least let it not be of children being hurt.

I assume that the strength of reaction of "right-thinking" members of society to the existence of such web sites and the sexual enjoyment derived from them would correlate

Transcona), speaking on the 3rd reading of Bill C-128, later s. 163.1 of Canada's *Criminal Code*, *supra* note 1, which prohibits child pornography, *House of Commons Debates*, (15 June, 1993) pp. 20864 - 20883 at p. 20872.

⁶⁹ Up until the introduction of section 163.1 of the *Criminal Code*, *supra* note 1, Canada's law against child pornography, the family caucus of the Conservative Party in Canada was strongly urging the Minister of Justice to come forward with a bill dealing with such material: Speech of John Reimer M.P. (Kitchener) to House of Commons on 3rd reading of s. 163.1 (then Bill C-128): *ibid.*, at p. 20864.

⁷⁰ "NAMBLA condemns sexual abuse and all forms of coercion ...", NAMBLA bulletin editorial, quoted by Tom Wappel, M.P. (Scarborough West) during the 3rd reading of Bill C-128, which became s. 163.1 of Canada's *Criminal Code*, *supra* note 1, *House of Commons Debates*, (15 June, 1993) pp. 20864 - 20883 at p. 20877.

⁷¹ <http://www.qrd.org/orgs/NAMBLA/nambla.replies.to.ilga.secretariat>

to the degree and explicitness of child nudity involved in the image, as well as the brutality of the punishment depicted. It will not matter that, in the case of images from mainstream media, the children presumably consented to being thus filmed, as did their parents (for the consent did not extend to their inclusion in the web site). It will also make little difference if it is learnt that the child was an adult, or had even died, by the time the web site was created.

Images of children being beaten might be seen as a particularly distasteful form of sadistic pornography, worse even than those of children being fondled, but mainstream movies abound with the former images, much more than the latter. Perhaps Hollywood produces them to horrify us with brutality to children, but the acts' cruelty only heightens their appeal for the flagellant.

THE PURPOSE BEHIND EACH CHAPTER

Chapter 2 deals with Canada's laws relating to images that depict children in a sexual context. It looks at both the general prohibition on obscene material⁷² as well as the specific offence relating to child pornography.⁷³ In particular it discusses the legitimacy, *vis-à-vis* those laws, of the stills and clips showing children being beaten that have been taken from mainstream movies and television and displayed on the internet child spanking sites. Chapter 3 conducts a similar exercise as regards English law, except that England's laws on obscenity will not be covered, since in the case of photographs (which term includes film) it will always be easier for the prosecution to secure conviction using the law that relates specifically to images of children.

In the absence of any case law specifically on these points, no definitive answer to the question of the image's legitimacy as regards the obscenity and child pornography laws can be given. Nevertheless I believe that the exercise conducted in those chapters is worthwhile. What is instructive is the identification of those factors that would both assist and hinder any prosecution.

Since it is assumed that the images of child beating that have been taken from the mainstream media are legitimate in their source material, the emphasis of chapters 2 and 3 is on the legitimacy of those images in the context of the child spanking web sites. However much of what I have to say in those chapters relates to "purpose-made erotica" images of children being spanked, which I have also found on the internet. These chapters thus form Part I of the thesis.

In Part II the focus shifts to the films and TV programmes from which spanking images have been stolen. Chapters 4 and 5, which make up Part II, deal with regulation of cinema, video and television in Canada and Britain. I feel that these are every bit as important in determining freedom of expression, since these are the media of our age.

⁷² *Criminal Code*, *supra* note 1, s. 163

⁷³ *Ibid.*, s. 163.1

The central question of those chapters is how it is that, given the paramount importance the regulators put on eradicating sexual violence, particularly towards children, the movies and television programmes containing images of child beatings survived censorship.

In the context of these chapters I feel that the choice of Britain and Canada is particularly apt. Not only are both presumed to be similar in culture, at least as regards cultural norms concerning child beating and paedophilia, both have a well-founded reputation as stringent media regulators in the area of sexual portrayal. Canada in particular has developed its obscenity laws explicitly with a view to eradicating sexual violence towards vulnerable groups. This is an issue I shall take up in the following chapter.

Part I

THE CHILD SPANKING WEB SITES

Chapter 2

THE WEB SITES AND CANADIAN CRIMINAL LAW

Both Canada and England use the coercive power of the criminal law to endorse and enforce their societies' restrictions on images that connect childhood with sexuality. England has a long history of restricting "obscene" material and continues to do so.¹ Canada, deriving much of its law from that parent, has retained the criminalisation of obscenity, although the way the term is (ostensibly at least) understood has diverged somewhat in recent years.² Even so, it is entirely conceivable that images of child nudity or children involved in activities branded sexual will fall foul of those prohibitions.

Yet neither country has seen fit to stop there. Both have supplemented obscenity laws with legislation relating specifically to material depicting children. In England this is the *Protection of Children Act*, 1978.³ The Canadian equivalent is Section 163.1 of the

¹ *Obscene Publications Act*, 1959, 7 & 8 Eliz. 2, c. 66, ss. 2(1) as amended. The test for obscenity is whether the material's effects are, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to see it: *ibid.*, s. 1 (1). Whether material is obscene is entirely an issue for the jury, with no expert evidence admissible: *R. v. Anderson* [1972] 1 QB 304, (C.A.) It is a defence to prove that distribution was justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern: *Obscene Publications Act*, 1959, s. 4(1).

² S. 163 of the *Criminal Code*, R.S.C. 1985, c. C-46, [hereinafter Section 163]. The statutory definition of "obscenity" has been embroidered (and justified) by the Supreme Court of Canada in *R. v. Butler*, [1992] 1 S.C.R. 452, 8 C.R.R. (2d) 1, [hereinafter *Butler*.]

³ *Protection of Children Act*, 1978, c. 37. See Appendix II.

Criminal Code.⁴ Only the second employs the term “child pornography”, the first relating to indecent photographs of children, which it is an offence to create or distribute.⁵

The initial purpose of this chapter is to enquire as to the legitimacy under the Canadian criminal law of images of children being spanked. The English law will be the subject of the following chapter. Of particular interest are those images that have been extracted from mainstream movies and television and displayed collectively on web sites devoted to images of children receiving corporal punishment. I emphasise the legitimacy of those images in the context of those web pages. I have assumed that the images are legitimate in the original context of the film or television programme from which they were taken. The widespread availability and high profile of those movies and shows, together with the lack of any prosecutions, support this assumption.

I have found no case law directly on this issue. Consequently no definitive answer can be given to the enquiry whether the web pages and the images displayed thereon breach the criminal law. Nevertheless I believe the exercise is worthwhile. More interesting than the question “are they legal?”, and more revealing of the way in which the law and society construct “child pornography”, and indeed “sex” and “child”, is the nature of the enquiry that must be followed in applying the law to this category of images.

INTRODUCTION TO CANADIAN AND ENGLISH LAWS ON CHILD PORNOGRAPHY

Canada and England, in their laws dealing with erotic material, both single out images of children for particularly harsh measures. In Canada the maximum penalty for offences relating to child pornography is 10 years’ imprisonment⁶, as opposed to just two years’ for offences involving obscene material generally.⁷ In England the standard of “indecent”, which is the test for photographs of children, is a lower threshold than “obscenity”, meaning that such images can be illegal as indecent even though they would not be regarded as obscene.⁸ Even so, the maximum penalty for creating or distributing both indecent child photographs and obscene material is the same: three years’ imprisonment, or a fine, or both.

⁴ [hereinafter Section 163.1]. See Appendix I.

⁵ *Protection of Children Act*, 1978, s. 1(1).

⁶ This is the maximum penalty for importing, distributing, selling or possessing for the purpose of distribution or sale any child pornography: *Criminal Code*, s. 163.1(3). The maximum penalty for mere possession is five years’ imprisonment. However this latter offence has been held unconstitutional by the British Columbia Court of Appeal: *R. v. Sharpe*, (1999), 175 D.L.R. (4th) 1, 134 C.C.C. (3d) 222, (B.C.C.A.) [hereinafter *Sharpe*]. The judgement of the Supreme Court of Canada is pending. See below for further discussion on the case.

⁷ *Criminal Code*, s. 169. This is the maximum penalty for making, printing, publishing, distributing, circulating, selling, exposing to public view or having in possession for the purpose of publication, distribution, circulation, sale or exposure to public view any obscene material: *Criminal Code*, s. 163.

⁸ “Indecency is at the lower end of the scale”: *R. v. Stanley*, [1965] 2 QB 327, [1965] 1 All ER 1035, [1965] 2 WLR 917, (C.C.A.)

England's *Protection of Children Act* and Canada's Section 163.1 are interestingly different in many respects, but it is not my intention to conduct an exhaustive comparative exercise. Instead I dwell on just those differences that relate directly to the narrow topic of child spanking images taken from the mainstream media and displayed collectively on child spanking web sites. As for the two countries' laws dealing with obscene material generally, no comparison is entered into. Indeed England's obscenity laws will receive no treatment at all, since, unlike Canada, there can be no incentive for English prosecutors to use those laws in the case of photographs (a term which includes film) of children, when the *Protection of Children Act*⁹ utilises the lower threshold of indecency.

Before embarking on our main discussion relating to child spanking images, it is worth noting that both the *PCA* and Section 163.1 are expressed to serve broadly the same purpose: the protection of children.¹⁰ Child pornography laws might seek to serve two constituencies; the first being children actually involved or likely to be involved in production, and secondly the broader range of those thought to suffer from such material's distribution, possession and use, which may include all children. In its original form, the English law applied only to photographs, whereas Canadian law includes all images, such as drawings, etc., whether or not a child model is used. Thus English law only functioned to protect the second constituency once it had already failed with the first, whereas the Canadian law sought to protect the two groups independently of each other.

This distinction was blurred in 1994, just one year after Section 163.1 received royal assent, when the *PCA* was extended to cover "pseudo-photographs", being images, whether or not made by computer graphics, which appear to be photographs.¹¹ The concern was the doctoring of photos, particularly by attaching a child's face to an adult's body. Even so, the English law continues to apply only to images of persons who are *in fact* under 16 years, whereas Section 163.1 extends to images not just of persons up to 18, but older persons depicted as being under 18. Leaving aside the disparity in age chosen as a parameter of childhood, it continues to be Canadian law, more than English, that focuses on depictions that invoke the concept of childhood, rather than actual child involvement in production.

More immediately striking, however, is Canada's attempt at some precision in defining what is prohibited, an exercise which the English law does not even pretend to embark on. The latter goes no further than to state that the photographs of children that are

⁹ Hereinafter the *PCA*.

¹⁰ The *PCA*'s long title reads: "An Act to prevent the exploitation of children by making indecent photographs of them; and to penalise the distribution, showing and advertisement of such indecent photographs". Introducing Bill C-128 (which became Section 163.1) for its 2nd reading, Rob Nicholson M.P. (Parliamentary Secretary to Minister of Justice and Attorney General of Canada and Minister of State (Agriculture) said "We are taking important steps to protect children from sexual abuse and exploitation": *House of Commons Debates*, (3 June, 1993) pp. 20328 - 20336 at p. 20328.

¹¹ *Criminal Justice and Public Order Act*, 1994, c. 33

prohibited are those that are “indecent”. It is left to judges to flesh out what this means, and ultimately to juries to interpret it. Section 163.1, on the other hand, reads:

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

With precision should come certainty. When in Canada I create images of children, I at least know that they are lawful as long as they do not advocate or counsel illegal child sexual activity or depict explicit sexual activity or nudity. I do not have to muse over whether they may be indecent, whatever that might mean. Even nudity is defined for me with apparent anatomical precision. There is yet more comfort to come for the photographer and film maker; the forbidden body parts must be the image’s “dominant characteristic”, a phrase that almost resonates with the reassuring objectivity of empiric measurement. Finally, to further console the libertarian, such depictions are only forbidden if for “a sexual purpose”. Sadly, in its application this definition’s allure of ease and certainty quickly evaporates. Problems start to appear as soon as I give initial consideration to whether it might apply to images of children being spanked.

First, for the purposes of subsection 163.1(1)(a)(i), which defines child pornography in terms of depiction of explicit sexual activity, I shall discuss whether spanking constitutes “explicit sexual activity” under Canadian law, or sexual activity at all for that matter. This is a continuation of the enquiry raised in the last chapter: what is sex and, in particular, is spanking part of it? Later I shall move on to subsection 163.1(1)(a)(ii), which defines child pornography in terms of child nudity.

CHILD SPANKING IMAGES AS DEPICTIONS OF SEX

Is spanking a child a sexual activity?

The issue as to whether depictions of child spanking constitute depictions of sexual activity is relevant not only in relation to Section 163.1. If Canadian prosecutors feel unable to shoehorn child spanking images into the definition of “child pornography”, they might have recourse to Section 163,¹² which concerns offences relating to obscene material generally. Section 163 defines obscenity thus:

For the purposes of this Act, any publication a dominant characteristic of which is the

¹² See appendix I.

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.¹³

The most important test to be applied to determine when exploitation is undue is the “community standard of tolerance test” which asks the jury to decide the issue of what is “undue exploitation” of sex by reference not to what they themselves would tolerate being exposed to, but to what they would not tolerate other Canadians being exposed to.¹⁴ Another is the “internal necessities” test, also known as the artistic defence, which excludes material required for the “serious treatment” of a theme, even if by itself it would offend community standards.¹⁵

In 1992 the Supreme Court of Canada was called upon to determine the constitutionality of Section 163, given that the country had 10 years earlier incorporated into the constitution the *Canadian Charter of Rights and Freedoms*, which guarantees for everyone the right to freedom of expression,¹⁶ subject only to section 1 of the *Charter*, which allows “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. The resulting decision in *R v. Butler* was that Section 163, although a limit on freedom of expression, was permitted by the *Charter’s* section 1.¹⁷

In reaching that conclusion it was held that the courts must apply the community standard test on the basis of the harm exposure to the material might cause, harm meaning that it predisposes persons to act in an anti-social manner. In his judgment on behalf of the entire court, Sopinka J. divided pornography into three categories: (1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanising, and (3) explicit sex without violence that is neither degrading nor dehumanising. Of these categories Sopinka J. said:

... the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.¹⁸

Thus special treatment is again extended to images of children. Violence, degradation or dehumanisation are required to render images of adults obscene. For children, it is sufficient that they are employed in the image’s production. It must follow, *a fortiori*, that images employing children that are violent, degrading and dehumanising are the quintessence of obscenity. How, then, can there even be a debate about child spanking images? Isn’t hitting a child violence? Isn’t the act, particularly when coupled with a requirement to expose the buttocks and bow down, the quintessence of degradation and

¹³ *Criminal Code*, s. 163 (8).

¹⁴ *Butler*, *supra* note 2.

¹⁵ *Ibid.*

¹⁶ Section 2 (b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, [hereinafter the *Charter*].

¹⁷ *Butler*, *supra* note 2.

¹⁸ *Butler*, *supra* note 2.

dehumanisation? Even without the help of *Butler*, the statutory definition of obscenity could quite conceivably encapsulate spanking,¹⁹ which is certainly violence (unless violence is constructed in a way I find difficult to understand), is arguably cruelty, is possibly horror and may be crime.

The most obvious hindrance to this conclusion is the requirement of sex, both in Section 163's definition of obscenity and *Butler's* embellishment of the term. Neither the judgment nor the statute defines "sex" further. Allow me, therefore, to elaborate an observation made in the introduction. Perhaps it is to point out the obvious, but it needs saying. "Sex" is informed by normative concepts of what constitutes sexual activity. The procreative act is the epitome of "normal" sex (particularly if it is not done solely for pleasure). Conduct that is imitative of that act, to the extent that it also involves friction against the genitals, is also easily regarded as sexual (such as masturbation, frottage and oral and anal sex). With such activities, there is a presumption that they are motivated (although not necessarily by all, or indeed any, of the participants) by the desire to achieve sexual arousal, or to gratify cravings generated by such arousal. The further an act deviates from the procreative act, the less sexual purpose is presumed.

The same applies to depictions of acts. Thus an image of a child masturbating is presumed to have been produced for a sexual intention (i.e. it is pornography), unless a non-sexual purpose for the image is established. Child spanking, however, deviates further from the procreative act. Therefore a picture of a child being beaten is not presumed to have a sexual purpose, i.e. it is not presumed in the absence of other evidence to be pornography. The test is the extent to which the depicted activity corresponds to the procreative act. The more it does so, the easier is the task of the prosecution.

The depiction of pain and humiliation being inflicted on a child are thus irrelevant in determining whether an image is sexual, and therefore whether it has the essential ingredient of obscenity. This is despite the obscenity laws being expressed as being intended to prevent harm, particularly to children. Instead the issue is approached from the normative standpoint of what constitutes sex. Spanking deviates substantially from the procreative act, so it is not sex. Therefore images of it are not images of sex, or at least explicit sex. They do not exploit sex and they do not portray sex coupled with violence, so they fail both the statutory and *Butler* tests of what constitute obscenity.

There are, of course, degrees to which images of spanking are not images of sex. An image of a naked man with a woman across his lap, spanking her naked buttocks, both with genitals on display, is far closer to an image of sex than is an image of a school master, fully dressed, caning the hand of a schoolboy, also fully dressed. Indeed many may have no hesitation in decrying the former as an image of sex. The components that lend this image a sexual quality are all those tied to the procreative act: the display of the genitals, the involvement of man and woman, the choice of the buttocks as target, with their proximity to the genitals and anus, the alternative route to penetration. These components are lacking in the latter image.

¹⁹ *Criminal Code*, s. 163.(8).

Most interestingly, the involvement of a child is a factor that distances the act portrayed in the latter image from the procreative act, since the child, being sexually immature, is incapable of procreation. Despite evidence that the laws on obscenity and child pornography put special emphasis on eliminating children from erotic imagery, they achieve the opposite by insistence on the depiction of sex. They shall continue to do so until either a sexual component to the image is no longer required, or until an understanding of sex based on something other than the procreative act is achieved.

Yet spanking, even child spanking, can constitute sexual activity in the eyes of Canadian law, although, as stated above, the involvement of children means that greater effort is required by courts for them to see the activity as sexual. This emanates, in part, from the historic practice, still tolerated by many, of striking children as a means of punishment. The right to do so remains enshrined in Canadian law in the form of section 43 of the *Criminal Code*:

Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

Since the law prohibits sex between adults and children, or young children at least,²⁰ then that which the law expressly permits adults to do to children cannot be sex. However, Section 43 is qualified. Most importantly, it requires that the force used on the child be "by way of correction", thus leaving the door open for force which is not applied "by way of correction" to constitute illegal, and possibly sexual, activity. As I shall explain below, however, the issue is not so straightforward.

The most obvious function of Section 43 is as a defence to the charge of assault, which concerns the non-consensual, intentional application of force, or attempt or threat thereof.²¹ But it also helps determine when a spanking is a sexual assault. This offence is, after all, simply an aggravated form of assault, with the same requirement that force be applied. Without a sexual element, assault has a maximum prison term of five years.²² Introducing a sexual element doubles this to 10.²³ A non-sexual assault that uses a weapon, a term which in one case was interpreted as including a spanking paddle,²⁴ or which causes bodily harm, is punishable with 10 years imprisonment,²⁵ increased to 14 when sexual.²⁶ Wounding, maiming, disfiguring or endangering life increases the maximum penalty to 14 years for a non-sexual assault²⁷ and life imprisonment for a sexual assault.²⁸

²⁰ The issue of the age of consent in Canada is dealt with in Chapter 5, see below.

²¹ For details on what actual, attempted or threatened application of force is sufficient, see *Criminal Code*, s. 265 (1).

²² *Ibid.*, s. 266

²³ *Ibid.*, s. 271.

²⁴ *R. v. Taylor*, (1985), 59 A.R. 179, 36 Alta. L.R. (2d) 275, 19 C.C.C. (3d) 156 (C.A.)

²⁵ *Criminal Code*, s. 267.

²⁶ *Ibid.*, s. 272.

²⁷ *Ibid.*, s. 268

²⁸ *Ibid.*, s. 273.

When the offence of sexual assault replaced that of indecent assault in 1983,²⁹ the courts, given the *Criminal Code's* omission of a definition for "sexual", had to determine whether the term varied from "indecent", and if so how.

In 1984 the New Brunswick Court of Appeal, deciding that "sexual" was tantamount to "genital", acquitted a man of sexual assault who broke into a neighbour's house and fondled a girl's breasts but made no contact with her genitals.³⁰ At around the same time the Alberta Court of Queen's Bench considered the case of *R. v. Taylor*³¹ in which the accused, in seeking to discipline a 15-year-old girl placed in his care, administered several blows with a wooden paddle to her naked buttocks. The trial judge considered that the disrobing may well have been indecent, but that "indecent" is not akin to "sexual". Since there was no evidence of sexual motive as opposed to an intention to correct misbehaviour, then there was no sexual assault. This was despite the fact that the girl's wrists had been tied to a post for the punishment and she was required to stand there naked for up to fifteen minutes while the accused talked to her. The trial judge was impressed by the fact that the discussion prior, during and following the incident concerned her misbehaviour and there was no "overt sexual advance" or "remarks that could be construed as being sexual in nature".³²

Both decisions were subsequently overturned by appeal courts who considered that the term "sexual assault" should have wider application. First *Taylor* reached the Alberta Court of Appeal, which overturned the acquittal and ordered a new trial. Laycraft C.J.A.³³ rejected not only reliance on genital involvement but also the importance the trial judge had placed on whether the accused was motivated sexually. Instead he reverted to a concept of "sexual" little changed from that of "indecent". Thus "sexual assault" was defined as "an act of force in circumstances of sexuality as that can be seen in the circumstances".³⁴

This approach won the approval of the Supreme Court of Canada when the New Brunswick case reached them. Speaking for an unanimous court,³⁵ McIntyre J. held:

Sexual assault is an assault ... committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?"³⁶

²⁹ *Criminal Law Amendment Act*.

³⁰ *R. v. Chase*, (1984), 55 N.B.R. (2d) 97, 13 C.C.C. (3d) 187, 40 C.R. (3d) 282, 144 A.P.R. 97 (N.B.C.A., reversed by S.C.C., see below)

³¹ See (1985), 59 A.R. 179, 36 Alta. L.R. (2d) 275, (1985), 44 C.R. (3d) 263, 19 C.C.C. (3d) 156 for the report of the case upon appeal to the Alberta Court of Appeal.

³² *Ibid.*, (1985), 44 C.R. (3d) 263, at p. 269, *per* Laycraft C.J.A.

³³ *Ibid.*, speaking for a unanimous court: Laycraft C.J.A., Haddad and Belzil JJ.A.

³⁴ *Ibid.*, approving Martin J.A. of the Ontario Court of Appeal in *R. v. Alderton*, (1985), 49 O.R. (2d) 257

³⁵ Dickson C.J. and Beetz, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ. Chouinard J. took no part in the judgement.

³⁶ *R v. Chase*, [1987] 2 S.C.R. 293, at p. 302, 37 C.C.C. (3d) 97

Although these definitions are all hopelessly circular, it is at least clear from them that sexual assault is a crime of general, rather than specific intent. McIntyre considered that factors such as the part of the body touched, the nature of the contact and the situation in which it occurred would all be relevant in determining whether the conduct was sexual. The purpose of the person committing the act would also be a relevant factor, to the extent that it may appear from the evidence. However he emphasised that motive is but one of many issues to be considered, the importance of which will vary depending on the circumstances.

Thus in the case of spanking, even if the Section 43 caveat referred to above (that the force applied to the child must be for the purpose of correction) has been complied with, this need not be determinative in establishing whether sexual assault has been committed. Thus in *R v. J.L.A.P.* (1994) the Manitoba Court of Queen's Bench heard the case of a man who spanked the naked buttocks of his co-habitant's daughters, one 13 and later 14 years old and the other 10. Although there was no evidence to counter the accused's assertion that the spankings were purely by way of discipline, he was convicted of sexually assaulting the older girl. Quoting the Ontario Court of Appeal, who noted:

... Parliament has criminalized sexual assault because it represents an unacceptable intrusion upon, or violation of, the victim's sexual privacy or integrity...³⁷

Beard J. said he could not imagine anything more humiliating to a 13 or 14 year-old girl than for a man to make her "bare herself from the waist to the knees so that he could spank her bare bottom":

This represents an unacceptable intrusion upon the complainant's sexual privacy and is not justified by the excuse that it was intended as a form of discipline.³⁸

Beard J. laid specific emphasis on the girl's relative maturity, referring to her as "entering womanhood". The fact that her childhood status was wearing thin and she had achieved sexual maturity clearly helped Beard J. to see her spanking as a sexual act. She thus received special protection not because she was a child but because she was almost adult. It is significant that no prosecution was brought as regards the 10-year-old sister, who was spanked in the same manner.

The implication of *J.L.A.P.* is that spanking is humiliating for adults, but not for children. Children, it seems, are less concerned by exposing their naked buttocks and presenting them to the attentions of an adult. It is curious, therefore, that Canada has a special law prohibiting even the mere possession of an image whose dominant characteristic is depiction of a child's anal region, while it has no parallel law regarding that of an adult. It is odd that offending a child's modesty, even that of an imaginary, dead or long since grown-up child, by photographing or sketching its anal region, is sufficient to justify ten years' imprisonment, whereas producing the most vile of images of sexualised violence, that degrade and dehumanise adults, is punishable with only two years' imprisonment.

³⁷ *R. v. V.(K.B.)*, [1993] 2 S.C.R. 857, (1993), 82 C.C.C. (3d) 382, (1992), 71 C.C.C. (3d) 65, at p. 70.

³⁸ *R. v. P.(J.L.A.)*, (1994) 91 Man. R. (2d) 302, [1994] M.J. No. 175 (Q.B.), [hereinafter *J.L.A.P.*]

Beard J. was also particularly concerned that the beating was given by a man not related to the girl and either before or soon after he had begun living with the family. The assumption that it is less humiliating for a child to be spanked by a member of the family well known to the child, rather than by a comparative stranger, seems equally fatuous to me. Given that spanking must be a moment of great humiliation, isn't it better to have it performed by strangers who, it will be hoped, will disappear from the child's life as rapidly as they appeared?

Despite the scenario presented by *J.L.A.P.* being considered sexual assault regardless of the accused's motive, time and again child spankers have avoided being charged with sexual assault because they were able to satisfy the prosecution that spankings were by way of correction rather than to sexually satisfy. In *E.H. v. T.G.* (1995), where a nine-year-old girl was spanked by her father on the bare buttocks, the Nova Scotia Court of Appeal, having accepted that the spanking was a means of punishment, saw no evidence of sexual assault unless other factors existed, such as deliberate insertion of fingers into the crevice between the buttocks.³⁹ Just striking the bare buttocks was not enough. In *R v. Dupperon* (1984) a father who belted his son 10 times, also on the bare buttocks, was not even charged with sexual assault.⁴⁰ He even escaped conviction for causing actual bodily harm, despite the beating causing bruising, far worse injuries than those in *J.L.A.P.*

Note that the boy was 13, the same age as the girl in *J.L.A.P.*, and so, to paraphrase Beard J., "entering manhood". A man baring another man's buttocks looks less like sex, it seems. It has already been noted that chastisement of boys has taken longer to gain societal disapproval than that of girls. Turning to England for a moment, *Halsbury's Laws* claims that the requirement that corporal punishment be administered in a decent manner applies only to female recipients.⁴¹ The case it cites in support dates from 1842, when the master of a workhouse was convicted for beating a naked female inmate.⁴² The indecency of the mode of correction, inflicted by someone of the opposite sex, rather than the severity of the flogging, rendered it unreasonable chastisement.

Perhaps the difference in treatment of the accused in *J.L.A.P.* and those in *Dupperon* and *E.H. v. T.G.* might be accounted for in part by the assailants in the latter cases being the children's own father. Not so in *R. v. Fritz* (1987),⁴³ where an uncle of two 13 and 14 year old girls, who had lived with him just two and a half years, was not even charged with sexual assault (and was acquitted of non-sexual assault) after he strapped them with a plastic belt across the buttocks and thighs. Perhaps what determined the issue was that he allowed them to retain their underwear.

³⁹ *E.H. v. T.G.*, (1995) 146 N.S.R. (2d) 254, [1995] N.S.J. No. 503, (N.S.C.A.)

⁴⁰ *R. v. Dupperon*, (1984) 37 Sask. R. 84 (C.A.), 16 C.C.C. (3d) 453

⁴¹ *Halsbury's Laws of England*, vol. 11(1), 4th ed. (reissue), (London: Butterworths, 1990) at para. 497, p. 374.

⁴² *R. v. Miles*, (1842) 6 Jur 243 (Kent Assizes)

⁴³ *R. v. Fritz*, (1987), 55 Sask. R. 302 (Q.B.)

It is apparent that as regards many instances of child beating, even those involving one or more of the factors of nudity, sexual maturity and spanker/spankee gender difference present in the *J.L.A.P.* scenario, whether the assailant has a sexual motive remains a paramount consideration.

All of the above scenarios involved spanking the buttocks. When genitals are involved, even very young boys, being punished by their own fathers, receive a high degree of protection. In *R. v. K.B.V.*⁴⁴ the Supreme Court of Canada upheld a conviction of sexual assault where a father grabbed his three-year-old son's genitals, despite the fact that there was no evidence to counter the father's assertion that he did so not for sexual gratification, but as a punishment, the child having done the same to his father and other adults. Involving genitals in punishment, it seems, will automatically be sexual assault, whereas the naked buttocks, except in circumstances similar to those in *J.L.A.P.*, will not be.

While motive is only one of a number of factors to be considered in the offence of sexual assault, it is of central importance in that of sexual interference, an option for the prosecution when the victim is under 14 years. This offence, found in section 151 of the *Criminal Code*, concerns the touching, *for a sexual purpose*, directly or indirectly, with a part of the body or with an object, of any part of a child's body. The maximum sentence for sexual interference is 10 years imprisonment,⁴⁵ the same as for sexual assault which causes no bodily harm. This offence does not require the component of force, and so could apply to simulated spankings, where the child is fully consensual, although some degree of touch, at least indirect touch (which presumably relates to touching through clothing) is required.

If spanking a child is sexual activity, is it *explicit* sexual activity?

To summarise, therefore, spanking a child can be a sexual offence. If a charge of sexual assault is brought, then a sexual motive is likely to be of considerable importance, if not entirely determinative. If a charge of sexual interference is brought, then motive will be dispositive.

Does it follow on the strength of this that images of children being spanked might be considered either obscene or child pornography? The definition of child pornography presents a problem for the prosecution that, I believe, is in most cases insurmountable. Section 163.1(1)(a)(i) refers to child pornography as being depictions of *explicit* sexual activity. It may be argued, following *J.L.A.P.*, that at least the scenario presented in that case is sexual activity that is explicit. Having decided that sexual assault is an offence of general rather than specific intent, it follows that in this scenario it is sufficient *mens rea* to intend the spanking, regardless of what motive lies behind it. In other words, the action speaks for itself. It is therefore explicit.

This argument may hold, but it leaves all the other spanking scenarios where motive was highly relevant. If the sexual nature of an action is contingent on the motive behind it,

⁴⁴ See note 37, *supra*.

⁴⁵ *Criminal Code*, s. 151.

then surely that action is not explicit. Thus as a general rule images of a child being spanked cannot be images of explicit sexual activity unless it is communicated through the image to the observer that the spanking is motivated by sexual desire.

The definition of "obscenity" in Section 163 is more promising for the prosecution. To repeat its wording, Section 163(8) defines obscene material as "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". Thus there is no requirement of explicitness on the face of the statute.

Butler was the case that tried to justify the obscenity laws in an era when traditional arguments that maintaining public morality meant restricting sexual permissiveness were holding less sway. It did so by shifting their target to the portrayal of sex coupled with violence, or images of sex that are degrading or dehumanising. At the same time *Butler* spoke of the particular need to protect women, and even more so children, from the nefarious effects of pornography.

How ironic, therefore, that *Butler* did nothing to remove the greatest hurdle to any argument that child beating images are obscene. Sopinka J., in maintaining that pornography can be divided into just three categories, defined each category as involving depictions of explicit sex. It follows that if child spanking is generally not explicit sex, then images of child spanking must fall outside the category of pornography.

This, of course, need not be a fatal problem for the prosecution. First, pornography and obscene material need not be synonymous. Secondly, Sopinka J.'s judgement could be qualified. Anything in law is capable of reinterpretation. Nevertheless, this development in Canadian law, that was intended to protect vulnerable groups from degradation through sexual imagery, fails in the case of images of sexualised violence where sexual desire is somehow not made overt.

If I am correct in my interpretation that the scenario presented in *J.L.A.P.* constitutes explicit sex, then absurdity is added to irony. Beard J.'s concern in that case was that the spanking was particularly humiliating because the girl was entering adulthood. *Butler* singles out children as a group needing special protection, even greater than that required by women. Unlike women, children's depiction in the context of sexuality will be obscene even if not coupled with violence, and even if not degrading or dehumanising. Yet images of a girl suffering the type of spanking given in the *J.L.A.P.* scenario would be prohibited in large part not because of the victim's childhood, but because of her passage to adulthood.

This is just part of a larger absurdity. In repost to everything that I have said, including this whole thesis, it might be argued that the law is not concerned with images of violence and degradation that just happen to be eroticised by the few with non-orthodox understandings of sexuality, such as the child spanking movie stills found on the web sites, but with those images of violence and degradation that eroticise violence and degradation by reference to what the law understands as sex, namely normative sexuality

that is rooted in the procreative act. If that is so, then it is curious that the law, which is premised on approval of such normative sexuality, attempts to weed out a sexuality it disapproves of, namely sadomasochism, only when sadomasochism manifests itself through normative sexuality.

This may be justified by arguing that the law is only interested in the dissenting sexuality of sadomasochism when it infests and threatens the purity of normative sexuality. I suggest that rather law can only see the dissenting sexuality when it takes on the form of normative sexuality. Perhaps this is since sadomasochism, rooted as it is in power, is too close to what law is all about.

THE REGULATION RELATING TO THE DEPICTION OF CHILD NUDITY

Section 163.1(1)(a)(ii), which defines child pornography by reference to child nudity, looks far more promising for those who would censor erotica showing children being beaten. There is no requirement that the activity shown should constitute sex, but instead apparently simple regulations relating to what bodily parts can be shown. The regulation can be paraphrased thus:

Child pornography [includes] a ... visual representation ... 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 18 years" (emphases added).⁴⁶

"Depiction" and "sexual organ"

There is little case law to assist in an understanding of the regulation, so some presumptions need to be made. Probably "depiction" in this context means "making visible", although the two need not be synonymous, the former being broader in meaning than the latter.⁴⁷ I shall presume that "sexual organ" refers to the genitals. In no spanking image from mainstream media that I have seen are genitals visible, nor in "purpose-made" child spanking erotica, save for a young boy's penis in one photograph.⁴⁸

"Anal region"

The reference to "anal region" is more threatening to the images' legitimacy. Cinema and television are full of child spanking images that show children's bare buttocks. Never, from what I have seen, is the anus detectable, and there is no indication that "anal region" is synonymous with the buttocks. Even if it is granted to the prosecution that the buttocks constitute part of the "anal region", will it be conceded that the buttocks are depicted even though clothed? Certainly this would greatly multiply the number of movies likely to fall foul of Canadian law.

⁴⁶ Paraphrasing from *Criminal Code*, s. 163.1 (1)(a)(ii).

⁴⁷ "Depiction" might, for instance, include symbolic representations, etc.

⁴⁸ At the time of writing this photograph was no longer accessible at the web site address at which I found it in late 1999.

I would normally have some difficulty thinking of a photograph that includes the seat of a child's trousers as being a visual representation whose dominant characteristic is the child's anal region. But what if the seat of the trousers fills the frame? And what if the child is bent over, trousers taut, so that the outline of the buttocks is clearly displayed? I can imagine juries squirming at such images, particularly once they are exhibited in collection. How much greater will be their discomfort if the child is being required to present those buttocks to an adult, whose full attention is riveted upon them, and who is reaching out to place a hand on them. The understanding that all this is happening within the scenario of a spanking will for most dissipate much or all disapprobation, as context renders the sexual asexual, the forbidden legitimate. But while the act depicted may transform from one of unspeakable abhorrence to one of misguided parenting (or good child-rearing, depending on one's point of view), the court should recall that what it is called upon to judge is not the scenario in which the "anal region" is depicted, but the depiction of the anal region itself, whether it is the image's dominant characteristic and whether it is for a sexual purpose.

Is it so improbable that a court, infuriated at web sites like *The Movie and TV Spanking Page*, would decide that the dominant characteristic of the images thereon is the depiction of children's anal regions, even in the case of those that show fully clothed children bending over? I grant that it would be less questionable for the court to term such images "indecent", for indecency is unquestionably subjective. To that extent the Canadian law is more liberal than the English. But if intent on a conviction, does the court really have to stretch the wording of Section 163.1 so far to achieve its desired result?

It is already difficult to see how the Canadian law has advanced the causes of certainty and objectivity in law significantly beyond the English measure of "indecent". Perhaps this is not surprising, given that the child nudity regulation was introduced into Bill C-128, which became s. 163.1, on the afternoon of the day of its 3rd reading, and that the bill was rushed through Parliament in less than two weeks, during the closing days of Kim Campbell's Conservative government.⁴⁹

If the reader dismisses as fanciful a regulation concerned with child nudity being used to prohibit images of fully clothed children, then perhaps more tolerance will be shown of the idea that a photograph taken behind a child who is bent over and displaying its bare buttocks might be a depiction of its anal region. If so, this still calls into doubt the legitimacy of well over 40 mainstream movies and television programmes that continue to be broadcast or circulate around cinemas and video stores in Canada or Britain without legal challenge, that have been certified as lawful and in most cases suitable for children by regulatory authorities and, in a number of cases have had huge critical acclaim and even Oscars heaped upon them.⁵⁰ Yet before denouncing such works as illegal, Section

⁴⁹ Rob Nicholson, M.P. (Parliamentary Secretary to Minister of Justice and Attorney General of Canada and Minister of State (Agriculture), speaking at the bill's 3rd reading, *House of Commons Debates*, (15 June, 1993) pp. 20864 - 20883, at p. 20875.

⁵⁰ see Chapter 4 for further on which films I have in mind and the censorship and classification of films and videos in Britain and Canada.

163.1 presents two further hurdles for the prosecution: depiction of the anal region must be the image's "dominant characteristic" and the depiction must be for "a sexual purpose".

"Dominant characteristic"

It can be imagined that certain measures can be taken by an image's creator to increase the likelihood that a certain characteristic will be considered dominant. Most obviously, attention can be drawn to something simply by making it fill the frame, so it takes up the largest surface area. With hardly more subtlety, dominance can be achieved by removing other focuses of interest, or by placing the object in centre frame.

These exact methods were employed by Academy-Award winning director Richard Attenborough when in *Young Winston* (1972) he filmed a young boy lying face down in bed. His nanny pulls back the covers and lifts his night shirt and for a moment a child's buttocks, shot almost square on, fill the Panavision cinema screen. Yet Attenborough, the epitome of avuncular, was still allowed to have young children sit on his lap when he played Father Christmas in the 1994 remake of *Miracle on 34th Street*.⁵¹ *Young Winston*, a film about Winston Churchill's early life, seems the antithesis of those images of child nudity we would have little problem branding pornography, even though in the latter genitals or buttocks may be not quite so predominant or centre frame.

Given the inadequacy of empirical measurements, such as surface area proportion, we resort to asking what is the focus of attention in the picture. Since naked buttocks are so rarely seen, I can imagine that the sight of them is likely to arrest the attention of most people, regardless of the age or sex of their owner, their physical condition or the sexual proclivities of the viewer. Probably, therefore, the honest viewer might invariably hold them to be the dominant characteristic of any image in which they appear.

I might simply be betraying an unhealthy interest in this bodily region. Perhaps my fixations should be disregarded and we should look instead to the reasonable viewer. But does the reader really need persuading that a test based on the "reasonable viewer" is a meaningless cloak for subjectivity? It achieves nothing more than empowerment of the super-ego, since instead of asking ourselves what we really see, we ask ourselves what we think we ought to see, if only we were reasonable.

A more fruitful approach might be to determine the issue by reference to the techniques the creator used to draw the viewer's attention. This seems more objective, but less true to the statute, which does not enquire as to the dominant characteristic in terms of purpose.

It is easy to imagine the astonishment and outrage of the producers of the mainstream media sources from which spanking stills have been taken if they learned of any suggestion that the dominant characteristic of their work is the depiction of a child's anal

⁵¹ Directed by Les Mayfield.



Fig. 8: Sexual partners? This still, as well as figs. 9 and 10 below, are from the movie Young Winston (1972, Columbia Pictures, directed by Richard Attenborough). All three are included in the internet Movie and TV Spanking Page. Fig. 8 shows young Winston Churchill (Russell Lewis) being threatened with severe punishment by the headmaster of his preparatory school (Robert Hardy) for insolence. Fig. 9 shows Winston in a line of boys, all waiting to be caned.





Fig. 10: The aftermath of the caning. Winston's nanny lifts his nightdress to reveal welled buttocks. Is this a visual representation, the dominant characteristic of which is the depiction, for a sexual purpose, of the anal region of a person under the age of 18 years?

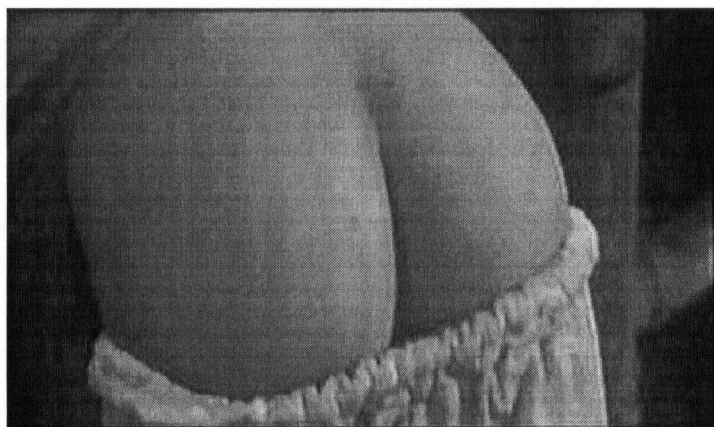


Fig 11: Is this even more so? A still from the Kung Fu film Kids from Shaolin (1983, Jet Li, directed by Xinyan Zhang), found on The Movie and TV Spanking Page. See Chapter 4 for further discussion on this film, which was released in Canada with a "14" certificate and in Britain (theatrically and on video) with a "15" certificate.

region. Justifications for including a child beating scene will be various: it is essential to the plot or character development, or the film's authenticity to the historic reality that such treatment was meted out to that particular child, or to children in similar circumstances. Probably the purpose is to depict brutality and cruelty, to elicit empathy for the child character. The showing of the bare buttocks could thus be defended as

necessary to indicate the harshness of the beating, although its purpose in some films, like *Kids from Shaolin*, seems to simply be to amuse.

The movie's producer would probably concede that since the punishment is being delivered to the buttocks then that unavoidably increases their prominence in comparison to those of a naked child depicted in other circumstances, but they would still maintain that their inclusion in the material is incidental to what they would probably contend is the image's true dominant characteristic, namely the depiction of a child being beaten. Producers would therefore be at pains to emphasise the whole scenario depicted rather than any component part of the image, particularly if that part be a taboo region of a child's body.

That being the case, surely the same argument would be available to the person who took a still or clip from the film and exhibited it on the internet. If the dominant characteristic of an image is something other than the buttocks visible therein, then that should remain the case regardless of the context in which it is presented. If the image appears among many others that depict naked buttocks, or appears under a heading "a picture of bare buttocks", then we are likely to understand the image differently while it is in that context. It is indisputable that context alters meaning, but I suggest that in interpreting section 163.1 the issue of "dominant characteristic" should not be conflated with the issue of meaning, which is largely informed by our understanding of the purpose behind an image's presentation, an issue which section 163.1(1)(a)(ii) raises separately with the qualifier that banned images of child nudity must be "for a sexual purpose".

"Sexual purpose"

What the contexts I have described above really tell us is the exhibiter's purpose in presenting the image to us. This leads us to the greatest hurdle that must be cleared by the prosecution. Under the child nudity regulation, a depiction is only child pornography if it is for a sexual purpose.⁵² This is supplemented by the defence contained in s. 163.1(6), whereby an accused charged with dealing with child pornography shall be acquitted if the material alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose.

There may be a number of motives behind the creation of an image and the construction of the section suggests that if one is sexual then this shall be outweighed by the educational, scientific and medical. Artistic merit is a trump card, excusing all purpose, even the sexual. Thus, it seems, it is permissible to deliberately arouse sexual desire, even towards children, provided art is the means chosen. "Art", of course, defies definition and whether it can ever deliberately arouse sexual desire towards children is another discussion. Section 163.1's veneer of objectivity and certainty rubs thinner with every turn of the analysis.

More interesting in the case of extracts from mainstream media being presented as erotica is this question: whose purpose must be sexual for the image to constitute child

⁵² Presumably "sexual purpose" might include the sexual gratification of the person distributing the image, as well as an intent to create sexual gratification on the part of the viewer, or both combined.

pornography, that of the person creating the original work, or that of the person presenting an extract thereof? I shall happily accept the protestations of Richard Attenborough as well as Xinyan Zhang, director of *Kids from Shaolin*, that no sexual purpose was anywhere remotely near their minds when they created the images shown above. But do they become child pornography when they are captured as stills and displayed on the internet *Movie and TV Spanking Page*?

Much hinges on the term "depiction". The verb "to depict" can take inanimate and animate subjects. Thus we may say that a photograph depicts a landscape, or that a photographer depicts a landscape in a photograph. I suggest that the former is effectively an abridgment of the latter. What is generally understood by the term is the idea that a visual representation has been calculated to communicate certain content. This sense of the word is supported by inclusion in Section 163.1 of reference to the idea that depiction can have purpose. The issue is therefore depiction as an act of a human agent rather than by the image itself.

A visual representation has both form and content. In its journey from the moment when it was first captured on film to the screen of my computer monitor as part of *The Movie and TV Spanking Page*, the form of a movie still or short clip will have changed many times as it passed from medium to medium. First it appeared on the strip of celluloid contained in the camera that initially created it. It was copied onto other strips of celluloid and then most likely onto magnetic video tape, since the internet images under discussion here were most likely taken either from video cassettes of the films or from a video recorded off-air from a broadcast.

The next significant step in the image's journey was when someone transferred the image from their video cassette recorder onto their computer and then uploaded the image to an internet service provider who stored it and made it available to net users. Finally, using a facility provided to me by my internet service provider, I downloaded the image to my computer screen. The image's form has thus gone from a strip of celluloid to data stored on magnetic tape to a piece of binary code.

It seems to me wholly artificial to describe the act of causing each of these changes in form as the act of depiction. Copying seems the most apt description of what has happened. We naturally refer to the video cassette being a *copy* of the film and when I decided to include some of the images here I *copied* them to my hard drive and then *copied* them into this thesis. The act of depicting must surely at least connote some knowledge on the part of depictees as to what they are depicting. No knowledge of the image's content was needed by many of the agents who helped it reach my computer.

When the content of the image is examined, the situation, at least initially, seems equally straightforward. In most cases I have seen the original film or television programme from which the internet images or clips are taken. Diminution of picture quality aside, I can see no way in which the stills and clips shown on the internet vary from the image contained in the original source material, except of course that the stills do not give the illusion of movement. There has been no zooming-in, digital enhancement or morphing.

Again this suggests that no fresh act of depiction has taken place since the film was originally shot. This being the case, the enquiry as to whether the depiction is for a sexual purpose seems to require an examination of the purpose of those who produced the source material.

For the court to accept any other position would require a conclusion that when the image was thus extracted from its source and presented in another context, a fresh act of depiction took place. One way to do this might be to have an understanding of the term "depiction" that contains an element of exhibition. Thus an act of depiction takes place not when an image is created but when it is exhibited. A middling interpretation might require that elements of both creation and exhibition are required, so that the act of depiction is at least incomplete until the image is displayed.

This seems to me an unsatisfactory interpretation of the statute. Perhaps the strongest argument against it is that the section prohibits mere possession of child pornography. It has already been held that this is the case even for images that have only ever been seen by their creator.⁵³ Surely it is not even required that the image's creator has seen the image. I cannot imagine that someone who has taken lewd photographs of children could escape prosecution simply because arrest was prior to the film being developed.

A second and more fruitful approach might be to argue that when an image is taken from its source material and thereby stripped of its original context and placed in another, its character changes to the extent that it can no longer be truly said to be the same image. This being so, it is no longer reasonable to see the web site creator's action as copying, but rather the creation of a new depiction.

In pursuing this line of argument, the prosecution would emphasise not only how the character of the image has changed due to the removal of the original context, but also what qualities have been lent to it by its new context. It is certainly true that the visual representation under consideration is not just the image from the source material but the web site as a whole, including any words or other images that may be displayed along with the stolen image. What has been added is an issue I shall return to. First, however, I want to look at what might be said to have been taken away.

It is undeniable that context is fundamental to our understanding of an image. The child spanking clips and stills that appear on the internet are likely to be abhorred principally because they take an image out of the context that gave it legitimacy. This needs serious consideration. More than most images, a single frame from a movie can be said to be dependent on context. Along with thousands of others and a soundtrack, it contributes to something that can truly be said to be greater in total than the sum of its parts. A movie stirs emotions that viewing every frame, or even sequence, in isolation would leave untouched. In its 120 or so minutes of narrative, it tells stories, creates characters, action, atmosphere and mood, multifaceted and intricately nuanced, a world within a world, a snapshot of potentially every aspect of the human experience.

⁵³ *Sharpe, supra* note 6.

Speaking more prosaically, a still also has context in that it is one of many intended to pass rapidly through a cinema projector, with the potential of contributing to the illusion of movement.⁵⁴ In context it therefore has a determined duration, a mere fraction of a second. Even when taken in conjunction with all those frames like it, for the image created on the screen may produce no illusion of movement, each shot has a duration determined by the movie's editor.

This touches on both one of the chief objections to the creation of the web sites under discussion and also one of their chief purposes. It can be imagined that movie producers who feel it proper to depict in their works the naked buttocks of children will nevertheless consider it improper to linger on them longer than is absolutely necessary. Once the viewer has acknowledged whatever message it is intended for their inclusion to convey, whether it be that the beating was on the bare skin, that the buttocks are badly welted, or whatever, the image will be replaced by another on the screen. This, with notable exceptions, is true of most of the movies that I have seen from which child spanking stills are taken.⁵⁵ The web sites, on the other hand, allow their users to effectively freeze frame the image so that it can become the subject of the lingering, lustful gaze, and no doubt accompanying masturbation, that must be a major source of the outrage felt by many at this phenomenon. The VCR's pause button, or simply a camera pointed at the cinema or TV screen, permit the same scrutiny, but the web page goes further; it does it for you, thus inviting the gaze found so objectionable.

While the above may be grounds for disapprobation of the web site creator, the mere fact that prolonged scrutiny has been aided, or even incited, does not to my mind convincingly support the notion that a fresh act of depiction has occurred. Certainly this argument entirely loses the point that the true source of the visual representation available on the internet is not the movie as a whole, or even the relevant scene, but is a single frame. After all, a single frame is all that is needed to create the internet image. The child pornography law deals with the creation, distribution and possession of the form of an image as a concrete reality. In what meaningful sense is an image on a single rectangle of celluloid cut from a strip, visible when held against a light, less permanent than one projected many times per second onto a flickering computer monitor?

Going beyond such, perhaps rather cheap arguments based on the physiology of the image's form, it seems particularly artificial to argue that the potential duration of visibility of an image is to be the determinative factor in distinguishing one image from another. Certainly no such argument holds sway in intellectual property law, where the publication in permanent form such as the printed media of a single frame from a movie or television programme is unquestionably a potential breach of copyright. In this context no argument is entertained that a separate work has been created because the image has been given lasting form.

⁵⁴ The same general principle applies to video tape, whether relayed to the television screen from a domestic video cassette recorder or a broadcast signal. The VCR and the broadcast signal project on to the TV screen a number of still images which, shown in quick succession, can create the illusion of movement.

⁵⁵ This issue is explored further in Chapter 4.

But leaving aside the issue of form, what of perhaps the most inviting argument of the prosecution, that the internet still is child pornography because it is presented as a compilation of child spanking images that has no credible purpose other than to sexually titillate, whereas the image's original context was a film designed for entirely different purposes. Was there not a fresh act of depiction when the still was shorn of all the qualities possessed by the movie as a whole? If a web page contains nothing more than a handful of stills from a movie, with nothing added, is it not misleading to say that the web page is just part of the movie? Surely a new and separate work, bearing only a tangential relationship to the original, has been created. Therefore a fresh act of depiction must have taken place and it is that act's purpose which determines whether the resulting product is child pornography.

There is no doubt that it is purpose that distinguishes our attitude to Richard Attenborough from the anonymous compiler of the *Movie and TV Spanking Page*. Eager though I am to proclaim paedophilia in mainstream culture and decry some dreadful double standard, I can understand precisely why Attenborough chose to light up the cinema with a young boy's buttocks. Winston Churchill's childhood beatings at his preparatory boarding school made sufficient impact on him to earn mention in his autobiography.⁵⁶ The movies' caning scenes are voiced over with a letter in which Churchill pleads for his parents to come and visit him and are interspersed with sequences showing their preoccupation with political activities. The buttocks shown are badly welted, so we understand that what we are being shown are not the buttocks but the welts, to muster sympathy for the boy. The buttocks are being shown by his concerned nanny to his mother, who thereby is confronted with what has been happening to her son during her distraction with her husband's political career. The scene thus contributes to a major theme of the movie as a whole, Churchill's estrangement from his distant and ambitious father.

Clearly Attenborough's defence counsel would emphasise all this, as would the prosecutors of the internet pornographer, who seems particularly culpable for having stripped the child nudity images of all their redeeming context. It is this approach which, I believe, might well be the death blow to any defence. I have no doubt that Section 163.1's proponents meant the law to work in exactly this way, to separate the Richard Attenboroughs from the internet pornographers. Surely that is precisely why they included an artistic merits defence.

In my view, whether the section achieves this result depends entirely on how one ambiguity in the section is decided. (So much for the Canadian experiment at clarity). Decided one way, the wheat is separated from the chaff just as the censors intend. Decided the other way, then both Attenborough and the child spanking web site designer must stand or fall together. The section defines child pornography in terms of written material, which these images clearly are not, or "photographic, film, video or other visual representation". Given the grammatical structure, "film" in this context must be adjectival. The section is therefore concerned with "film representation". Ambiguity arises from the word "film", which can be understood as the physical strip of celluloid on

⁵⁶ Churchill, W.L.S., *My Early Life*, (London: The Reprint Society, 1944).

which an image appears, or as synonymous with “movie” or “motion picture”. Thus a still from *Young Winston* is a film representation because it was initially captured on a strip of film, but *Young Winston* is also a film representation of Churchill’s early life.

The latter interpretation distinguishes the creator of the web sites from the producers of their source movies. It characterises the former’s act as taking a detail from a single visual representation and allows for the simile of cutting out of, or zooming in on a particular part of a photograph or other image, which I find easier to see as the creation of a fresh image, as a separate act of depiction. But while this construction assists the web site designers’ prosecutors, it creates terrible hurdles for other prosecutions. If we are concerned with movies as a whole, how difficult it becomes to censor those that contain a single sequence of graphic child nudity, even the most lascivious close-ups of child genitals, for the movie will only constitute child pornography if such depictions constitute the dominant characteristic of a work that will typically last two hours.

THE SIMILARITY OF CONTEXT BETWEEN THE MOVIE AND THE WEB SITE

Thus the question of whether child spanking images constitute child pornography under Canadian law must ultimately lie unresolved and the Canadian experiment in introducing certainty deemed, partly at least, a failure. However carefully I dissect the statutory definition, I am no nearer being sure whether taking stills or clips from mainstream movies and compiling them on a web site has somehow transformed them into child pornography, or whether, being the same images, the legality of the web pages is dependent on that of the source movies. Rather than continue what is likely to be a fruitless enterprise, I prefer to take stock of what has become apparent in my efforts so far.

First, five criteria have emerged by which Section 163.1 determines what is child pornography. The first is the age, or depicted age, of at least one person in the image. The second is content; what does the image show? The third is context. Although not explicitly included in the section, context affects how we understand an image, in particular how we interpret its dominant characteristics. The fourth, which is entwined with the third, is purpose. In fact this has emerged as the central issue. Once the purpose is understood in depicting a child’s buttocks, (because it is shown being spanked), and once the purpose is understood in touching them (to punish the child) and in depicting them being touched (to show a child being punished), then the act and depiction are legitimised, for the sexual becomes non-sexual. Once purpose has played a role in our understanding of the image, it becomes the next enquiry: why is a child spanking being depicted, anyway?

In all of this, it will no doubt have been noticed that far from hindering the defence the fact that a child’s buttocks are being depicted in the context of being beaten assists rather than hinders the defence’s cause. The fact that the images from *Young Winston* show what violence has been done to a child has only worked in Attenborough’s favour. The

scenario whereby buttocks are depicted has, it may be argued, changed the image's dominant characteristic from that of the depiction of bare buttocks to that of the depiction of physical punishment, to which nudity is incidental. And earlier in the movie, when another boy is shown bending over, presenting his naked buttocks to headmaster and camera alike, and the teacher is shown taking aim with a cane, the depiction of this child's humiliation and imminent hurt legitimises not only the parading of his nudity, but also the depiction of a sexual act, the touching of a child's buttocks, which in the context of physical punishment does not seem so sexual after all.

So shouldn't the same work in favour of the web site creators? After all, the pages are not showing children's buttocks in no context at all. So far I have argued that it is the taking of the images out of context that really appals. But I question how much context has meaningfully changed. No image can be presented void of context, and the web pages give context as well as take it away. Taking the web site that contains the *Young Winston* images, its title is *The Movie and TV Spanking Page* and it is stated to be a site "dedicated to documenting instances of spanking of boys in cinematic and television productions" (emphasis in the original).⁵⁷ The *Young Winston* stills appear alongside shots from around 100 other movies, the only common feature of which is that they all involve scenarios in which a boy is physically punished. From each movie there is generally around 10 or so images, making around 1,000 stills in all. Most of the stills do not show the punishment itself, but rather the build up to it or the aftermath. If the punishment is shown, then very rarely can bare buttocks be seen. In fact in most images not even the seat of the trousers is visible. Thus of the 17 stills from *Young Winston* included in the page, only three show buttocks, clothed or unclothed.

This web site, and those like it, are not simply about showing bare buttocks any more than are the source movies. If that were their only purpose, they would not offer the film clips from which the stills are taken, and they would be called *The Movie and TV Children's Bare Bottoms Page*. That is not to say that the depiction of nudity is not important to the web site creator and those who use it. Any sight of a child's bare buttocks is pounced on with glee. There is a tendency in the comments books that often accompany the web sites for particular praise to be heaped on those movies that show nudity, although rarely is it spelled out that it is the nudity that gives particular pleasure. But much more is going on than the depiction of the anal region. When it occurs, it is a welcome bonus, but it is also deeply contextualised by the web site, and it is contextualised in exactly the same way as in the source movies. In both cases we are not concerned with depictions of anal regions, but of the issue of childhood chastisement.

Contextualisation occurs at two levels in the source movie. The depiction of the anal region is contextualised as part of a spanking scene, which is in turn contextualised as part of the movie's larger subject matter. If the web site cannot be criticised for failing at the first step, does it omit the second? For each set of images, the page gives a few lines of text concerning their source movie. Generally this will identify the film and then give a brief synopsis of its subject matter and plot. While the text will generally not concern itself overly with passages of the movie other than the spanking scene depicted, it will

⁵⁷ www.geocities.com/hollywood/studio/8716/cbhome.htm

normally give some information about the identity of the boy and the punisher shown, the circumstances and the reason for the punishment, as well as its outcome. Thus an attempt is made, albeit rather superficially, to replicate the context the film gives to the spanking scene. For instance, in the case of *Young Winston*, the stills are preceded by the following text, quoted here in full:

"Young Winston (movie – new scans) Another visit to the headmaster's study.

"From the British movie dealing with the childhood of Winston Churchill. There are three scenes here. In the first, a group of boys are lined up outside the headmaster's study for punishment at morning assembly. The first boy is summoned to his fate, but leaves the door open. We see him bending over with his bottom bared for the cane. In the second scene, Winston himself is due for a caning, and we see him waiting outside the dreaded study door. In the last, Winston's nanny is not very impressed when she discovers the state of his bottom after he comes home for the holidays."

Thus we are told the identity of one of the boys, someone whose subsequent history is internationally familiar. Far from being dehumanised, he is being given a complete, and famous, human identity. The whole beating scenario is explained to us, at least as much as it is developed in the film. We also learn who is inspecting Winston's injuries and her reaction thereto. There is not a single significant aspect to the movie's depiction of the beatings that is not incorporated either in the web site's text or the accompanying images. The same is true, with a few exceptions, of the other 100 movies contained on the web site, and those included in some other similar web sites I have found, at least as far as the significant number of movies that I have seen are concerned.

There should be no surprise about this. What renders these images sexually stimulating will vary from aficionado to another, but probably it is precisely what prompted their inclusion in the films in the first place. I see no reason to believe that the original context diminishes their erotic appeal, indeed there is good reason to anticipate that the web site's removal of aspects of the original context will diminish rather than enhance the sexual thrill. Certainly I do not see how the web pages, with their few lines of plot summary, can be taken to have added erotic value.

Sado-masochistic sexuality is complex and individual, not easily available to generalisation. But why should it not excite to learn about who this boy is, what he has done to deserve punishment, the circumstances in which it will be given, the anticipation that precedes it and the contrition that follows. Where and when, who, how and why, the web sites and other literature devoted to the sexuality make it clear that everything remotely connected to the fetish is of interest. They supply the legislation permitting corporal punishment, the rules for its application, the punishment books in which it is recorded, details of implements used, the ritual, the rooms, buildings, clothes, every minutiae.

If producing the web site constitutes the production of pornography, then the inclusion of such additional material runs counter to the common criticism that pornography objectifies or dehumanises those who appear in it. Those decrying the decontextualisation of the images may have been perceiving an exercise in objectification, in which young Winston ceased to be a complete child, with intellect and

emotions, with family and schoolmates, existing in a real time and place. Instead he becomes a pair of buttocks. But nothing, I aver, is further from the truth of these web pages. The excitement comes not just from the child's body, although that is probably an essential ingredient, but from his thoughts and feelings, not just about his own punishment, but those of the children around him. How do the assembled boys feel about watching some of their number being beaten? What goes through their minds as they await their turn and approach the "dreaded study door"? Attenborough touches on these issues, and the web site, with all the means available to it, reiterates what he has to tell us about them. Attenborough seeks to present us with portraits of complete children and it is every aspect of those portraits that is eroticised.

Thus the web page designer attempts nothing more nor less than Attenborough, the depiction of a real and complete child. True, the web site is only interested in the child in the context of corporal punishment. It does not go on to tell us about Winston's strained relationship with his mother, his estrangement from his remote father, or other tales from his childhood. But in the 17 stills and the few lines of text at its disposal it communicates everything about the punishment scenario that was communicated in the source movie.

And what material Attenborough presents for the internet sites to draw from! He gives us a line of handsome, cherubic boys, clean and smartly dressed, all meekly passive.⁵⁸ We see their reactions as they are summoned by the headmaster and as sentence is passed on them. We see the preparation for punishment, the fear and foreboding, the moment of submission, the aftermath of tears and contrition. With the inclusion of bare, striped buttocks the S&M fetishist can call "full house". However much Attenborough wished to communicate a sense of horror at the beatings, everything has been carefully replicated through the images selected for the web sites.

Some may suspect that the web sites are but a thinly disguised excuse to show child nudity, the content which Section 163.1 is ostensibly framed to prohibit. I have already made it clear that I regard this as missing their true purpose. The web sites have, in my view, two primary functions. They make their audience aware of what movies contain images of corporal punishment and they present the most relevant movie clips and images in a format that facilitates easy access and prolonged examination.⁵⁹ Thus I do not see them as distinct works, to be considered separate from the source materials, but rather the latter's encapsulation. They extract those elements of the movies that are of most interest to the fetishist, but it remains the movies, and not the web pages, that are being sexually enjoyed.

But one difference is undeniable, one which I have touched on already while dealing with the issue of sexual purpose. Attenborough never told us that any of this stuff is sexy. The web pages do not explicitly state it either, but we know the message is there, hidden in the code. The web pages reveal and evidence that which causes us discomfort. First, not only do some find children erotic, but the arousal comes from the thought of them

⁵⁸ See Fig. 9, this chapter.

⁵⁹ And have thus been invaluable aids in preparing this thesis.

being hit and humiliated. Secondly, the images that are found exciting are in the movies we have so enjoyed and applauded.

THE ARTISTIC DEFENCE

Considering what I have said, are there any valid grounds for applying the artistic merit defence to the films but not the web sites? To apply the defence as formulated in Section 163.1 seems particularly suspect. Sub-section (6) offers a defence where the representation has artistic merit or an educational, scientific or medical purpose. Again it is a question of construction whether "representation" refers to the individual still or sequence or the motion picture when taken as a whole. The latter interpretation is hampered by reference in subsection (6) to the "representation" being that which is alleged to constitute child pornography, which surely requires us to look at the relevant film segment in isolation. Taking the film as a whole hardly seems rational, since it is hard to see why the artistic merit of an entirely discrete section of the film should protect a wantonly lascivious sequence that otherwise meets the definition of child pornography. Also, as already noted, taking the film as a whole would dilute any depiction of child nudity, making prosecutions of films that occasionally lapse into prurience difficult. More likely, therefore, seems to be the construction whereby we take the offending film segment in isolation, in which case I have already argued that there is no valid reason why the movies should be distinguished from the web page.

If a charge of obscenity were brought against the web page producers, then the artistic merit defence would take the form of the common law "internal necessities" test, the final measurement used to calculate when depictions of sex constitute its undue exploitation. The test was formulated by Sopinka J. in *Butler* thus:

The need to apply this test only arises if a work contains sexually explicit material that by itself would constitute the undue exploitation of sex. The portrayal of sex must then be viewed in context to determine whether that is the dominant theme of the work as a whole. Put another way, is undue exploitation of sex the main object of the work or is this portrayal of sex essential to a wider artistic, literary, or other similar purpose? ... The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole. Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression.⁶⁰

This is a far more sophisticated test, one that clearly calls for the movie as a whole to be compared with the web page. When doing so, the task of justifying the latter is considerably tougher.

The first point to note is that the test only arises if the movie spanking scenes are "sexually explicit", an issue already discussed. Secondly, the defence should only protect the films if the depiction of the spankings, child nudity, etc. is "*essential* to a wider artistic, literary or similar purpose". Whether it is *essential* to that purpose is a question

⁶⁰ *Butler*, *supra* note 2.

of how the purpose of the movie is characterised. If *Young Winston* is presented as a portrait of Winston's troubled relationship with his parents, then it is hard to see why it was essential for Attenborough to communicate this by showing us Winston's buttocks, or all the psychological build-up to the beatings. If *Young Winston* is characterised as a narrative of his childhood savage beatings, then surely the web site does just as artistic a job of portraying them.

This is a problem for the prosecution in any circumstance where an element of undue exploitation is extracted from a larger "artistic" work for the prurient enjoyment of the former in isolation. The more remote the characterisation of the larger work's artistic purpose is from the element of undue exploitation of sex contained therein, the harder it is to justify the element of undue exploitation as essential to the wider purpose. The nearer the characterisation of the artistic purpose comes to whatever is represented in the element of undue exploitation, the easier it is for the person extracting that element to claim the same artistic purpose.

It also goes without saying that "artistic purpose" is as subjectively value-laden as is "artistic merit". In the game of deconstruction these are the first concepts to fall.

Finally I repeat my larger point. All the movies I deal with here can be said to have artistic purpose and merit, if by that is meant that all deal with much else aside from the depiction of spanking. The web sites, it must be said, are preoccupied with corporal punishment. All the same, I hope I have suggested that it is not just the incidental nudity involved, nor the act of hitting which is the subject of the internet pages. If it were, then most of the stills they contain would not relate to the prelude and aftermath of the punishment. The web sites concern the full scenario and the whole child. The whole child the fetishist is interested in when watching *Young Winston* is not the child seen in the movie, but the fetishist's construction of that child, with all the transference of emotion from fetishist to child that contributes to this sexuality. But then, the child we see is but an actor, and what he represents in the movie is Attenborough's mental construction of Churchill, and all the transference that that involves.

SUMMARY

Canada justifies its obscenity laws by reference to the need to eradicate images that sexualise violence and degradation, thereby serving to protect vulnerable groups, particularly children. Movies that contain child spanking scenes depict both violence and degradation, and the child spanking web sites are evidence that they are eroticised.

For these scenes to be obscene, the acts shown must be understood as constituting sex. Since spanking is somewhat removed from the procreative act, its sexual character is obscure. What is more, corporal punishment for children has been explicitly legitimised

by the Canadian criminal law.⁶¹ Since sexual activity between young children and adults is illegal, it follows that spanking cannot *per se* constitute sex.

Nevertheless spanking can constitute sexual activity in Canadian law. Even though children are said to need a particularly high degree of protection, it takes greater effort for the law to see spanking a child as sexual than spanking an adult, due to the legitimisation of the practice as a means of punishment.

Of considerable importance in determining whether spanking is sex is whether the spanker is motivated by an intention to punish, or to receive sexual gratification. This suggests that spanking is not explicitly sexual. The law, particularly that against child pornography, further confounds itself by requiring that for an image to constitute pornography, the sex depicted must be explicit.

As for the second part of Section 163.1's definition of child pornography, which defines it in terms of depiction of child nudity, this seems a more serious challenge to images of child spanking, particularly since many prominently show the child's buttocks. The main unresolved issue, as regards images taken from mainstream media, is determining whether the sexual purpose of the compiler of child spanking internet sites taints images taken from mainstream movies and television that were not originally produced for a sexual purpose.

This debate raises the issue of context. A major criticism of the internet child spanking sites is likely to be that they take images out of context. This argument will be relevant in determining whether there is a fresh act of depiction and also whether the "artistic merit" defence should apply to the images once they are in the new context of the child spanking web page. However I argue that in no meaningful way does the context of the web page differ from that of the movie. The web page, rather than significantly shifting context, simply facilitates access to the image and its convenient freeze framing for close examination.

The significant difference, however, is that the web page communicates a message that the images are sexually exciting, something which the source movies do not inform us. It is that heresy that upsets us so, and ultimately that message that threatens to brand the images, when presented on the child spanking web sites, as child pornography.

⁶¹ *Criminal Code*, s. 43

Chapter 3

THE WEB SITES AND ENGLISH CRIMINAL LAW

The last chapter dealt with child spanking images in relation to Canada's general obscenity laws as well as those dealing specifically with child pornography. As already stated, an examination of England's obscenity laws is unnecessary since English legislation relating to erotica involving children defines what images are prohibited by simple reference to the term "indecent", which is not only looser than the Canadian definition of child pornography, but is a lower standard than that employed in English obscenity law. There is no reason, therefore, why prosecutions relating to photographs (including film) of children should be brought under English obscenity law.

England's *Protection of Children Act*¹ outlaws the creation and distribution of indecent photographs and pseudo-photographs of children. The law's very title tells us its aim, to protect children from some hurt or harm. My enquiry, therefore, is whether it prohibits images of children being beaten.

My analysis of Section 163.1 of Canada's *Criminal Code* centred on the status in criminal law of spanking images extracted from mainstream media and presented on the internet, as compared to the identical image's status as part of the source movie. Under the Canadian law a depiction of a child's anal region will only be prohibited if for a sexual purpose. My enquiry largely related to whose purpose is relevant, the creator of the movie or the web site.

¹ *Protection of Children Act*, 1978, c. 37. See Appendix II

Judicial doctrine in England is that for that country's law neither is relevant. In *R v Graham-Kerr* (1988) the Court of Appeal considered the case of a man who took two photographs of a naked seven-year-old boy at a swimming pool naturist session.² The Court of Appeal excluded as irrelevant his admission that he received sexual gratification from taking or looking at the photographs. The jury was required to address just one issue: were the photographs indecent? They had to decide the issue simply on the basis of the photographs themselves, why they were taken did not matter. The only *mens rea* that needed to be proved was that the photographs were intentionally created, both in the sense that photosensitive film was deliberately exposed, and that it was exposed with the intention of capturing whatever image is alleged to be indecent. Otherwise the circumstances surrounding and the motives behind the exposure are irrelevant and the photograph must speak for itself.

In reaching this conclusion, the Court of Appeal distinguished the *mens rea* of the offence of taking indecent photographs from that of indecent assault by characterising the latter as an ephemeral matter, whereas a photograph is permanent and "may last a large number of years, pass from hand to hand and so on". The mischief the law seeks to address is the existence of indecent photographs of children, and the issue of a photograph's indecency should not be related to the motivation of the person who took it, which may long since have been forgotten.

I hope to show that this dogma in no way reflects the reality of the way in which the test of indecency is in practice understood and applied. But first, let me also settle an issue in English law that remained unsettled in Canadian law. The *Protection of Children Act* defines "photograph" as including not only "film", which in this context I take to be synonymous with movie as opposed to the photosensitive material inserted into cameras, and also "photographs comprised in a film".³ This latter inclusion suggests that each movie frame can be considered in isolation and a movie's producer or distributor can be prosecuted for just one single indecent frame. Despite *Graham-Kerr*, however, it is hard to imagine that context would be entirely ignored. Surely at least the durational aspect would be considered, since a single frame, when exhibited as part of a movie, could only have subliminal impact on the audience. Even if a camera shot lingers on the screen long enough for viewers to consciously note its contents, I suspect that the jury would see it in the context of at least a segment of the movie and their attitude will be influenced by whatever comes on either side. Even so, this definition of "photograph", permitting movies to be considered still by still should, according to *Graham-Kerr*, counter any argument that a movie still might be perfectly decent in its original context, but criminally indecent on the spanking fetishists' web site.

But since I put no faith in the doctrine expressed in *Graham-Kerr*, I do not see this as a resolution to the issue. So indulge me in enquiring further, beginning with the meaning of indecency. As with England's test for obscenity, no statutory definition of the term exists, but it is clear that it is tied invariably to sexuality. Equally agreed is that it presents a lower threshold than obscenity; that which is obscene is necessarily indecent,

² *R. v. Graham-Kerr*, [1988] 1 WLR 1098, 88 Cr App Rep 302, (C.A.), [hereinafter *Graham-Kerr*]

³ *Protection of Children Act*, s. 7(2)

but not *vice versa*. As with obscenity, whether an image is indecent is a question for the jury, with no expert evidence permissible. The appropriate test is to refer to “the recognised standard of propriety”.⁴ To be prohibited, a photograph showing a child need only be incidentally indecent. The indecency need not relate directly to the child.⁵ Thus a photograph of two adults copulating may fall foul of the prohibition simply because a child appears elsewhere in the frame.

Would English law consider images of children being beaten to be indecent? What factors might render them so? Since this is an issue for the jury, attempts to answer these questions require an examination of societal mores rather than legal norms. Nevertheless, juries are directed by judges, and the way they are directed may help to predict how they will decide the issue.

Despite extensive research, I have found just one report of a charge being brought in England or Wales in relation to images of children being spanked.⁶ In 1997 the *Guardian* recounted a tale of a 57-year-old businessman who was charged with possessing an indecent photograph after police searched his home and found a photograph of a 13 or 14-year-old boy being caned.⁷ Significantly the newspaper reports that the boy was naked, “although his private parts were not visible”. I take this to mean that his bare buttocks were. One might predict that child nudity is likely to be a significant factor in determining whether a photograph of a child is indecent in England, just as in Canada it is one of the statutory tests to determine what constitutes child pornography. Indeed one British Obscene Publication Squad officer has been quoted off the record as saying “any nude picture of a child under the age of consent is indecent”.⁸ I also suggest that juries would understand nudity to include exposure of the buttocks. This is not to say that juries will necessarily consider photographs of children’s buttocks indecent, merely that the exposure of the buttocks has a quality different from exposure of any other anatomy, save the genitals and, in the case of pubescent girls, the breasts.⁹

No further information is available from the *Guardian* account and it is not even entirely clear whether the caning image resulted in the man’s conviction. If it did, it is impossible to separate out the factor of child nudity from the depiction of a caning. Would the latter in itself be sufficient to render an image indecent?

⁴ *R. v. Stamford*, [1972] 2 QB 391, 56 Cr App Rep 398, (C.A.), *R. v. Owen*, [1988] 1 WLR 134, 86 Cr App Rep 291, (C.A.), *R. v. Graham-Kerr*.

⁵ *Protection of Children Act*, 1978, s. 7(3)

⁶ I have also found newspaper report of the converse situation, where a 48-year-old man was charged after he had a boy photograph him being caned by another boy, both boys being apparently around 14 or 15. It is not clear from the report whether it was the resulting photographs that led to conviction, or surrounding sexual activities he indulged in with the boys: “Offences were wicked, ex-childcare man told”, *Leicester Mercury*, (8 September, 1998), p. 9

⁷ D. Birkett, “Monsters with Human Faces”, *Guardian* [London], (27 September, 1997), Weekend section, p. TT22

⁸ D. Newnham & C. Townsend, “Pictures of Innocence”, *Guardian* [London], (13 January, 1996), Weekend section, p. 12

⁹ Indeed in one case examined below, where a photographer was charged with taking two indecent photographs of a naked seven-year-old boy, one being a frontal shot and the other his rear view, it was the latter and not the former that gave rise to a conviction: *Graham-Kerr*

ANALOGISING BETWEEN THE DEPICTION AND THE ACT DEPICTED

Given the paucity of clear precedents, we need to approach the question by way of analogy. If spanking a child constitutes an indecent act, then possibly a picture of a child being spanked will be an indecent image. The indecency of a depiction may well be determined by the indecency of the act depicted. Thus Canada defines child pornography by reference to whether explicit sexual (in this context synonymous with indecent) activity is depicted.

Of course the assertion that the law bans images of that which is banned requires extensive qualification. Television and movies routinely refer, visually as well as verbally, to the most blatantly sexual assaults on children. The issue is one of explicitness. Conversely images of entirely legitimate acts done by an adult to a child might easily be considered indecent, for example film shot covertly in the doctor's surgery.

Nevertheless, I believe that the legitimacy of the act photographed is instructive in determining the legitimacy of the photograph. Justifications for laws prohibiting child pornography rest, in large part, on concerns that the depiction will incite, or facilitate, that which is depicted. And if the concern is for the well-being of the particular child photographed, rather than the photograph's implications for other children, then the issue is the legitimacy of the act in which that child is engaged.

The act depicted and the depiction are inseparable, but they are not identical. For instance, many child spanking images will not be pictures of real spankings, but of simulated spanking. I shall presume that most images taken from mainstream media fall into the latter category, although it has already been noted that Ken Loach's *Kes* paid its young actors extra to be caned.¹⁰ A second presumption informs our understanding of the cinema spanking; that the child is consenting to it, whereas children do not consent to the real thing. Of course this presumption may be entirely fatuous. Children may be entirely complicit in accepting a real spanking, not necessarily because they want pain but out of fear, remorse, sense of duty, or whatever. Conversely a child actor's performance may be the product of compulsion, from an overbearing parent who sees fame and fortune arising from it. But whatever the reality of the situation, our understanding of the child's consent is different. Otherwise the surrounding circumstances of the spanking, such as the extent of the child's nudity, the pose which the child is required to adopt, the holding of the child and the amount, although not force, of physical contact (by hand or implement) with the buttocks may be identical. The degree of humiliation felt by the child may also be similar. Indeed why shouldn't a simulated spanking be the more humiliating, watched as it is by a camera crew, family and friends and an audience of millions?

¹⁰ See Chapter 1

For our present purposes, no distinction need be drawn between real and simulated spankings. Whichever it is, if a spanking is considered to have been a sexual act, then the most likely charge will be that of indecent assault.¹¹ As for the issue of the child's consent, or indeed complicity, in the case of assaults that are indecent, the consent of anyone under 16 is irrelevant.¹² For an indecent assault to be committed, there must be an element of assault, as well as indecency. Assault may be defined as any act, committed intentionally or recklessly, which causes another person to apprehend immediate and unlawful personal violence.¹³ Thus not only spanking, but also threatening a spanking, might easily constitute an assault. Violence need not necessarily connote an act that causes pain; the gentlest touch will suffice. Thus a simulated spanking, or just the threatening of the same, may also be an assault. In all cases, the absence of pain is irrelevant although, as we shall see, the infliction of pain may be relevant as a motive.

In the case of simulated child spanking, it may be the case that, even given the irrelevance of lack of pain and the child's consent, the prosecution fails to characterise the act as possessing the quality of an assault. For instance, there may be a lack of physical contact, or of threat of personal violence. If so, recourse may be had to the lesser offence of indecent conduct towards a child, which requires no element of assault.¹⁴ An act of gross indecency, rather than just indecency, is needed. What distinguishes "gross indecency" from straightforward "indecency" is not defined by statute and is unclear. Presumably it is nothing more than a slightly heightened standard of indecency.

It must be born in mind that consent is only irrelevant if the assault on the child is indecent. This is well illustrated in *R v. Sutton*.¹⁵ A football coach took three team members, boys aged 11 and 12, to his home to photograph them naked, with the intent of selling the photographs to a pornographic magazine, the photographs concentrating on their genitals. He was acquitted of indecent assault. There was sufficient violence to constitute the element of assault needed for the offence of indecent assault, in that the coach touched the boys, however gently. The boys, it should be noted, were entirely willing to be photographed and cooperated fully. However, the fact that he only touched them on their hands, arms, legs and torso, and then only for the purpose of indicating to them how they should pose for the photographs, meant that the touches lacked the quality of indecency. The Court of Appeal held that the determinative factor in deciding whether an indecent assault had been committed was not the circumstance of the touching (i.e. that it was committed in the course of photographing naked boys for a pornographic

¹¹ *Sexual Offences Act*, 1956, 4 & 5 Eliz. 2, c. 69, s. 14, (indecent assault of women, which term includes girls) and s.15 (indecent assault of men, which term includes boys).

¹² *Sexual Offences Act*, 1956, s. 14(2) in the case of girls and s.15(2) in the case of boys.

¹³ *Fagan v. Metropolitan Police Comr.*, [1969] 1 QB 439 at 444, 52 Cr App Rep 700, (D.C.), *per* James J. [hereinafter *Fagan*]. Also *R. v. Venna*, [1976] QB 421, [1975] 3 All ER 788, (C.A.), [hereinafter *Venna*]

¹⁴ *Indecency with Children Act*, 1960, 8 & 9 Eliz. 2, c. 33, s. 1(1) as amended.

¹⁵ *R. v. Sutton* [1977] 1 WLR 1086, 3 All ER 476, 66 Cr. App.R. 21 (C.A.), [hereinafter *Sutton*].

magazine) but the nature of the touching. Lord Widgery CJ, giving judgment for the court, concluded:

Juries should, therefore, be directed, in cases of indecent assault against children under 16, that if there is a touching which is in itself indecent it is indecent assault however willing the child may be, but that if the touching is not in itself indecent there will be no assault and thus no indecent assault unless the touching itself is hostile or threatening or one which the subject has demonstrated a reluctance or unwillingness to accept.

The second part of this statement, which deals with touching that is not in itself indecent, is capable of two readings. Possibly Lord Widgery CJ is merely stating, in a rather tortured way, that the lack of indecency in the touching means that there is no element of indecency, added to which the absence of hostility or threat means that there is no element of assault either. Thus the charge of indecent assault fails on two counts; there is no indecency and there is no assault. Alternatively, and more likely, Lord Widgery CJ is saying that in the absence of indecency in the touching, there will still be indecent assault if the element of assault exists (i.e. there is hostility or threat). If this interpretation is correct, the element of indecency, if not supplied by the touching, must come from the circumstances.¹⁶ Thus man-handling of boys who are unwilling or reluctant to be touched and photographed, where the man-handling is designed to compel them to pose for indecent photographs, would constitute indecent assault, rather than mere assault, even though the man-handling is not in itself indecent because, for instance, contact is only made with hands, arms, legs and torso.¹⁷

Sutton arose prior to the creation of the offence of taking indecent photographs, which would have been the most obvious charge to bring. This is convenient for us, as well as for Sutton, since it allows an examination of the relationship between the taking of a photograph and acts done in the posing for it. If my interpretation of Lord Widgery CJ's comment (quoted above) is correct, then *Sutton* suggests that the presence of a camera can render a non-indecent act indecent. This seems to warn against too much reliance on using the decency of the act depicted as a measure as to whether the depiction is indecent, since the photograph can affect the act photographed, as well as *vice versa*. No doubt a jury's attitude to an image of a child being spanked is coloured by the fact that the spanking is before a camera. Outside movie production, innocent explanations for spanking or pretending to spank a child in front of a camera are hard to come by, at least ones that are plausible.

Sutton involved touching of the hands, arms, legs and torso of compliant children to create images with a sexual purpose. Let us assume that the child actors of the movies that form the source material of the child spanking web sites are just as willing to engage in a simulated spanking for the cameras. The difference is that they are touched on their

¹⁶ This runs contrary to the interpretation of the case by the prominent criminal law scholar Glanville Williams, Emeritus Professor of Law and Honorary Fellow of Jesus College, Cambridge. See his article "The meaning of Indecency", (March 1992) vol. 12, *Legal Studies*, pp. 20-33. The decision in *Sutton* (*supra* note 15) has been criticised as incorrect. See, for example, Hall, J., "Can Children Consent to Indecent Assault?", [1996] *Criminal Law Review*, pp. 184-8

¹⁷ In *Sutton* (*supra* note 15) the Court of Appeal also concluded that a charge of indecent conduct towards children would have been more appropriate.

buttocks. What bearing does this have on the legitimacy of the act depicted? How come in this case the product of their labours is destined not for an illicit market but the multiplexes, to be viewed by family audiences, with all the blessing of the law and the regulators? Let us assume that (like Sutton) the spanking actor is not touching the child for his own sexual gratification and (unlike Sutton) is not concerned with satisfying the sexual cravings of others, but simply the delivery an Oscar-winning performance. Is our star nevertheless running into dangerous territory by pretending to slap a young co-star's buttocks, rather than, say, thighs?

OFFENCES ARISING FROM PHYSICAL ASSAULTS

To answer these questions, as well as to further enquire into the law's understanding of what constitutes an indecent photograph of a child, further analysis of the law's attitude to the sexual propriety of spanking is needed. This usefully starts with a look at how the law deals in general with the striking of another's body, leaving aside for the moment the act's potential sexual aspect.

As stated about, the common law offence of assault will be committed by anyone who, intentionally or recklessly, causes another person to apprehend immediate and unlawful personal violence.¹⁸ Once violence is actually used, the offence becomes that of battery.¹⁹ The maximum penalty for both offences is six months' imprisonment or a fine of £5,000²⁰, or both.²¹ If actual bodily harm is occasioned then the maximum penalty increases to five years' imprisonment.²² Since actual bodily harm can include painful blows that, although causing no visual damage such as bruising, produce tenderness and soreness for some time thereafter,²³ it could quite easily result from more severe spankings. Moving up the scale of brutality, unlawfully and maliciously inflicting grievous bodily harm (defined as bodily harm that is "really serious"²⁴) or wounding (which requires that the skin be broken²⁵) is also punishable with five years' imprisonment²⁶, but if grievous bodily harm or wounding is intended, rather than the result of recklessness, then life imprisonment may be imposed.²⁷

¹⁸ *Fagan*, *supra* note 13 at 444, DC per James J. Also *Venna*, *supra* note 13.

¹⁹ 1 Hawk PC c15(2) ss 1, 2. See, e.g., *Collins v. Wilcock*, [1984] 3 All ER 374, [1984] 1 WLR 1172, 79 Cr App Rep 229, 148 JP 692, (D.C.)

²⁰ Approximately \$11,500 CDN.

²¹ *Offences against the Person Act*, 1861, 24 & 25 Vict., c. 100, s.47 (amended by the *Criminal Justice Act*, 1988, s. 170(2), Sch. 16)

²² *Ibid.*

²³ *R. v. Reigate Justices, ex p. Counsell* (1983) 148 JP 193, (D.C.). A classic definition of "actual bodily harm" comes from *R. v. Donovan*, [1934] 2 K.B. 498 at 509, 25 Cr App Rep 1, (C.A.) (per Swift, J.): "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling".

²⁴ *DPP v. Smith*, [1961] AC 290 at 334, 44 Cr App Rep 261, (H.L.)

²⁵ *R. v. Wood and McMahon* (1830) 1 Mood CC 278 (Gloucester Assizes); *Moriarty v. Brooks* (1834) 6 C&P 684, 172 E.R. 1419; *R. v. Beckett* (1836) 1 Mood & R 526, 174 E.R. 181

²⁶ *Offences against the Person Act*, 1861, s. 20

²⁷ *Ibid.*, s. 18

In the case of assaults on children the prosecution have the alternative of bringing a charge of cruelty to a child, which carries a maximum gaol sentence of 10 years, twice that for deliberately causing actual bodily harm, and for recklessly wounding or causing grievous bodily harm.²⁸ This offence can only be committed by those with responsibility for the child, so it seems to be the betrayal of trust put in them that is being punished.²⁹ Wilfully assaulting a child is considered a form of cruelty, provided it causes "unnecessary suffering or injury to health".³⁰ However the provision specifically excludes the right of any parent or other person having the lawful control or charge of the child to administer punishment.³¹

Indeed the common law has always exempted from the offences of assault and battery an act done in the course of the correction of a child, while under age, by its parent or person *in loco parentis* or, in certain circumstances, of pupils by their teachers.³² This exception is of course subject to certain parameters. The correction is required to be reasonable and moderate considering the age and health of the child³³ and administered with a proper instrument.³⁴

As part of its slow demise, corporal punishment has recently been prohibited in English schools. First, in 1986, it was banned from state-funded and special schools.³⁵ A handful of private schools retained its use, but as recently as September 1999 the ban was extended to all schools.³⁶ Nevertheless, corporal punishment remains available as a sanction in the home, as well as for those few children educated at home.³⁷

In 1998 a nine-year-old boy took the British Government to the European Court of Human Rights after his step-father, who had caned him "with considerable force" on more than one occasion on his legs and buttocks, was acquitted on a count of assault occasioning actual bodily harm. The European Court held that the boy had been subjected to "inhuman or degrading punishment" and that existing English law failed to adequately protect him.³⁸ But even Britain's new Labour administration³⁹ has refused to consider banning corporal punishment outright. Instead Government's response has been to publish proposals for new guidelines to enable courts to better determine what

²⁸ *Children and Young Persons Act*, 1933, 23 & 24 Geo. 5, c.12, s. 1(1) as amended.

²⁹ Child is defined as a person under 16; *Children and Young Persons Act*, 1933, s. 1(1) as amended.

³⁰ *Ibid.*

³¹ *Ibid.*, s. 1(7), as amended. As for teachers, see however the following paragraph re. the abolition of corporal punishment in English schools.

³² *R. v. Hopley* (1860) 2 F&F 202 at 206, 175 E.R. 1024, *per* Cockburn CJ, [hereinafter *Hopley*]; *R. v. Griffin* (1869) 11 Cox CC 402 (Liverpool Assizes).

³³ *R. v. Mackie* (1973) 57 Cr. App. R. 453 (C.A.)

³⁴ *Hopley*, *supra* note 32, at 206.

³⁵ *Education (No. 2) Act*, 1986, c. 61, s. 47(1), subsequently replaced by the *Education Act*, 1996, s. 548.

³⁶ *School Standards and Framework Act*, 1998, c. 31, s. 131.

³⁷ It is not permitted in the case of children for whom education is provided, otherwise than at school, under any arrangements made by a local education authority; *ibid.*, s. 131(1)(b).

³⁸ *A. v. The United Kingdom*, (1998), Eur. Court. H.R. 2692, [1998] 3 FCR 597, [1998] FLR 2 959, EctHR.

³⁹ Elected to power with an overwhelming majority in May, 1997, after 18 years of Conservative government.

constitutes “reasonable chastisement”.⁴⁰ These proposals include a ban on hitting with implements, beatings that result in bruising and striking around the head.

THE ROLE OF MOTIVE IN THE OFFENCE OF INDECENT ASSAULT

It has already been observed that if a sexual component is suspected in the case of child spanking, the obvious charge to bring is that of indecent assault. The maximum penalty for this is 10 years’ imprisonment, twice that for assault occasioning actual bodily harm or, if caused through recklessness rather than intent, even grievous bodily harm or wounding. Therefore administering, or even just threatening, the gentlest spanking, if it is considered an indecent act, might incur a penalty twice as harsh as that resulting from giving a beating that causes the most terrible of injuries. Clearly the English law’s primary concern is only the brutality of an act if the brutality is particularly severe and is intentional. Otherwise the law’s principal anxiety is for conduct’s sexual propriety. This is further evidenced by the emphasis, in the offence of indecent assault, on the element of indecency rather than that of assault. The requirement of violence is absolutely minimal. The gentlest touch or softest caress will suffice, acts which possess no quality of violence as normally understood.

Precisely what, therefore, is being so severely punished? The element of indecency, whether in relation to photographs of children or assaults, is an issue for the jury. Nevertheless, recent judicial decisions have helped to clarify how judges understand not just the concept of indecency but also sexuality. Conveniently for us, the most significant recent case involved child spanking.

In *R v. Court* (1988)⁴¹ the House of Lords considered an incident in which a shop assistant took a 12-year-old customer into the back of his shop, pulled her across his knee and spanked her through her shorts⁴². When asked by police why he had done so, he replied “I don’t know - buttock fetish”. He admitted assaulting the girl, but denied that the assault was indecent. His counsel argued that evidence of his motive, which had not been made known to the girl, should be excluded on the basis that it could not render indecent an act which on the overt circumstances was not indecent. This argument forced the Court of Appeal and the House of Lords into an examination of what constitutes sex itself.

The majority in the House of Lords approached the issue by creating a tripartite categorisation of assaults.⁴³ The first consists of those that clearly appear indecent, such

⁴⁰ UK Government consultation document, *Protecting Children; Supporting Parents*, (London: H.M.S.O., 18 January, 2000).

⁴¹ *R. v. Court*, [1989] AC 28, 87 Cr App Rep 144, (H.L.), [hereinafter *Court*]

⁴² To avoid confusion between British and North American English, note that ‘shorts’ here refer not to underwear but to short trousers, the outer garment, known in North America as short pants.

⁴³ per Lord Ackner, *Court*, *supra* note 41, Lord Keith of Kinkel, Lord Fraser of Tullybelton, and Lord Griffiths agreeing, Lord Goff of Chieveley dissenting.

as groping a vagina or tearing a woman's clothes. In such cases, a lack of indecent purpose or intention will prevent conviction, although the defendant will have the burden of rebutting a presumption to the contrary. Thus a necessary intimate medical examination of a young girl is permitted,⁴⁴ although it is its medical necessity that saves the act, not the lack of indecent purpose. Thus a medical examination carried out by the doctor for his private research, when consent of the child's parent to the examination had been obtained on the basis of its being medically necessary, could still constitute indecent assault.⁴⁵ A woman whose clothes are torn due to being jostled on a packed train may have been assaulted, but the assault will not be indecent if her assailant's intention was none other than to force his way past her to exit the train.⁴⁶

The second category consists of acts which are incapable of being regarded as indecent. In such a case no measure of indecent intent can render it so. Thus a defendant who, on a number of occasions removed a shoe from a girl's foot, was acquitted of indecent assault (the case having been withdrawn from the jury by the judge due to lack of circumstances of indecency), even though the defendant admitted that he removed the shoe for sexual gratification.⁴⁷ Removing someone's shoe, it seems, cannot in itself be indecent, however much it is motivated by sexual gratification. It simply isn't sex.

The third category are those acts which are rendered indecent purely by reference to the indecent intent of the assailant. Spanking, it seems, falls into this category. Lord Griffiths characterised it as equivocal, capable of being indecent assault and also punishment. In deciding which is the case, he suggested that the first question the jury is likely to ask itself is why the spanking was being given. If it were due to the child's misbehaviour, that might be assault, but would probably not be indecent. If it were to satisfy "perverted sexual gratification", then Lord Griffiths said he would be surprised if that were not considered indecent. Evidence of the Defendant's sexual motive was therefore admitted in order to permit the jury to determine whether the spanking constituted indecent assault. The shop assistant was convicted.

Evidence of motive was only admitted in *Court* because spanking is an act of ambiguous sexuality. The judiciary thus recognised in it a sexual component, missing in the case of removing someone's shoe. What is it in the act that lead the judiciary to perceive it as (potentially at least) sexual? The trial judge, with the Court of Appeal's approval, characterised the spanking as "repeated physical contact in an area immediately adjacent to that girl's private parts".⁴⁸ One writer, L. J. Moran, put great store on this reference to genital proximity, arguing that genital proximity is determinative in the law's understanding of the sexual.⁴⁹ Certainly the case law suggests that genital proximity is

⁴⁴ See also *Gillick v. West Norfolk and Wisbech Area Health Authority*, [1986] AC 112, [1985] 3 All ER 402 (H.L.)

⁴⁵ *Court*, *supra* note 41, per Lord Ackner (*obiter dicta*).

⁴⁶ *Ibid.*, (*obiter dicta*)

⁴⁷ *R. v. George*, [1956] Crim.L.R. 52, (Lincoln Assizes), approved in *Court*, *supra* note 41.

⁴⁸ *Court*, *supra* note 41, per Ralph Gibson L.J.

⁴⁹ Moran, L. J., "Indecent Assault: What is Indecency?" [1989] Vol. XI(1), *The Liverpool Law Review*, pp. 99-109.

very important in determining what is sexual, hence the decision in *Sutton*.⁵⁰ Sometimes the genital component need be little more than incidental. Thus in *Beal v. Kelley* a man who grabbed a 14-year-old boy's arm was only considered to have committed indecent assault because he was at the same time exposing his erect penis to the boy, having just asked the boy to rub it.⁵¹ More tangentially, in *R v. Leeson* kisses implanted by a man on a 13-year-old girl's face and neck were only deemed an indecent assault because they were accompanied by a suggestion that sexual intercourse should take place.⁵² Convincing though these instances are in supporting Moran's genital proximity theory, he overlooks those many cases where the fondling of a woman's breasts was considered to constitute indecent assault and their display to constitute indecency, suggesting that the law's understanding of sexuality is somewhat more complex than simply the genital.

Nevertheless, the involvement of the buttocks, rather than the act of hitting, seems decisive in rendering spanking potentially sexual. Thus in *R v. Donne-Davis*, a case considered below, the trial judge similarly characterised hitting teenage boys on the buttocks as sexually equivocal, unlike the slapping of a person's face, which he described as an "act which cannot by any stretch of the imagination be looked at by anyone as being an indecent act".⁵³ However, the view that spanking has the potential of being indecent is not universal. Glanville Williams, one of Britain's leading criminal law scholars, criticised the House of Lords' ruling in *Court* because for him hitting a person's buttocks is entirely akin to removing a girl's shoe; it may be done for a sexual motive, but it is nevertheless incapable of being an indecent act. For Williams, *Court*'s assault involved no "invasion of the victim's sexual privacy in any realistic sense" and he suggests restricting the definition of indecency anatomically, to include the sex organ "or the immediate approach to it" but so as to exclude the buttocks and breasts.⁵⁴

Endless debate (and titillation) can be had mapping which parts of the human anatomy are sexual. All the same, the House of Lords admitted evidence of sexual motive in *Court*, on the grounds that spanking is on its face sexually equivocal. The case teaches that buttock spanking may be permissible, as long as it is not done for a sexual motive.

In *Court* a distinction was made between deriving sexual pleasure and being motivated by sexual pleasure. Lords Ackner and Goff of Chieveley both considered the (now perhaps rather tired) hypothetical instance of a doctor giving a young girl an intimate examination. Both were of the opinion that if the examination were necessary, then any sexual satisfaction derived therefrom by the doctor would not render it an indecent assault. The pleasure the doctor derives is not his motivation. Thus *Court*'s problem was that his pleasure was not achieved through acting on proper motives. Proper motives rescue sexual gratification. So, what would have been the outcome if he had replied to

⁵⁰ *Supra*, note 15.

⁵¹ e.g. *Beal v. Kelley*, [1951] 2 All ER 763, 49 LGR 833, 115 JP 566, 35 Cr App Rep 128, [1951] WN 505, (D.C.)

⁵² *R v. Leeson*, (1968) 52 Cr. App. R. 185 (C.A.)

⁵³ *R v. Donne-Davis*, *The Independent* [London], February 18, 1991 (C.A.), [hereinafter *Donne-Davis*].

⁵⁴ Williams, G.L., "The Meaning of Indecency", (March 1992) vol. 12, *Legal Studies*, pp. 20-33 Williams, G.L., "What is an Indecent Assault?", (1987), vol. 137, *New Law Journal*, Sept. 18, 1987, pp. 870-2, which concerns *Court* (*supra* note 41), but was written prior to the House of Lords' judgment.

the police's question as to why he spanked the girl: "I did it because she was naughty. But, incidentally, I have a buttock fetish"? Even if believed, would he have avoided conviction?

Not according to the later Court of Appeal decision in *R v Donne-Davis*.⁵⁵ This concerned a man who during the 1980s managed to slipper, cane and paddle the buttocks of some 50 boys he employed in the course of his decorating business. The boys hardly seem to have been entirely hapless victims. Of the 14 boys, aged between 13 and 16, who gave evidence, all testified that they had known of the defendant's policy regarding corporal punishment before they started work. Even so, many of the boys continued working for him for a year or more, despite being chastised at least once a day, frequently with their trousers down. Four were given the option of being disciplined by having their wages docked instead of a beating, but all chose the latter. Indeed one 'victim' gave evidence on the Defendant's behalf, to the effect that he had never been touched in any indecent way.

The Defendant claimed that the chastisements were genuine punishments from which he gained no pleasure. His undoing was no doubt the stack of literature on beatings found at his home (kept, he claimed, for academic research and to support his campaign to have corporal punishment retained) as well as the fact that he secretly videoed some of the whackings (in case there was any allegation that the beatings were excessively savage, he claimed). He was convicted on 15 counts of indecent assault and was sentenced to 12 months imprisonment on each count concurrent.

Similar to the House of Lords in *Court*, the trial judge regarded spanking as equivocal. He therefore addressed the issue of motive, instructing the jury that their verdict would depend on whether the Defendant's motive was to chastise or to gain sexual pleasure. But he also addressed a third possibility, namely that Donne-Davis may have had mixed motives, some sexual, some non-sexual.

The Court of Appeal rejected the Defendant's argument that such mixed motives were insufficient for a conviction. Defence counsel sought to rely on the reference in *Court* to the hypothetical doctor who sexually enjoys conducting an intimate medical examination of a young girl. Since the House of Lords had concluded that provided the examination was necessary, no indecent assault had occurred, he obviously hoped to draw support from this. Unfortunately for him the Court of Appeal found it "quite impossible" to equate the two scenarios. The doctor's motive, they concluded, would be purely medical and his enjoyment wholly incidental. Their ruling was therefore:

It matters not if the jury decided that the appellant had mixed intentions, so long as they were satisfied that he had as one of his intentions a real sexual motive, rather than one lurking in the recesses of his mind.⁵⁶

If I were to adopt two opinions that are entirely supported by English law, namely that the

⁵⁵ *Supra* note 53.

⁵⁶ per McCowan LJ, *Donne-Davis*, *supra* note 53.

striking of a teenage boy's buttocks can be a legitimate form of punishment and that punishment is a necessary component in treating and preventing a youngster's transgressions, then I see it as entirely possible to equate the medical examination with the chastisement, the first being necessary to ensure the child's medical health, the second its moral well-being.

Perhaps the difference lies in the range of alternatives available to Donne-Davis in disciplining his employees. His methods were, to say the least, unorthodox in the late 20th century (although perfectly normal not much more than a century earlier). Was he punished because he preferred an unusual form of discipline to an available range of more common ones? Is his conviction really grounded in our scepticism at his choice, given that it so conveniently gratifies a sexual penchant the evidence (pretty unmistakably) suggests he had? Is the doctor in a very different situation, being landed with no alternative but to examine the child patient providence has provided him, and thus licensed to enjoy his good fortune?

The flaw in the doctor scenario is that few if any medical procedures are universally acknowledged to be essential. No doubt evidence could always be found from other doctors that they would have treated the patient differently. Perhaps testimony could be sought from a specialist to the effect that most competent non-specialists, such as the doctor in question, would have performed the examination, regarding it as necessary, but that the specialist's superior knowledge would enable him to devise alternative medical strategies to avoid the examination. In such a case, surely the issue of necessity would be approached subjectively, the question being whether the accused doctor genuinely believed an examination to be necessary. So too might Donne-Davis have regarded his actions as entirely necessary, with no adequate alternative available, at least for all but the four boys to whom he gave the option of a financial penalty. His testimony to the court certainly suggested as much. Perhaps he had sought authority from the very book upon which the court would permit him to swear his oath.

To summarise, an act which is entirely capable of appearing indecent may not be indecent through lack of indecent intent. An act which is incapable of seeming indecent, like slapping the face, cannot be rendered indecent through indecent intent. An act that is somewhere in the middle, which happens when the buttocks are hit instead of the face, will be indecent if the pursuit of sexual gratification lies among the desires motivating it, even if it is not the primary motive, provided that motive is "real" and not one "lurking in the recesses of the mind".⁵⁷

Precisely when a motive is "real", albeit an extremely minor one, and when it is merely "lurking in the recesses of the mind", is unclear. Perhaps it is relevant that the hypothetical doctor, whose sexual enjoyment of the patient's medical examination lurked, according to the court, in the recesses of his mind, was, according to both Lords Ackner and Goff of Chieveley, a man enjoying a young girl. Conversely Donne-Davis, whose sexual desire, even if only a very minor motivating factor, was considered by the court to be all too real, was a man sexually enjoying boys. The concept of the stalking sexual

⁵⁷ per McCowan LJ, *Donne-Davis*, *supra* note 53

invert, driven by an exaggerated, perverted lust that requires constant satiation, is thus revived and contrasted with the almost normal man, able to suppress his almost normal sexual desire for the young female patient before him who, after all, is only a few years' younger than the object of all our normative desires.

THE ROLE OF MOTIVE IN THE OFFENCE OF TAKING INDECENT PHOTOGRAPHS OF CHILDREN

How much does any of the above throw light on whether spanking images, rather than spanking itself, might be deemed indecent? Let us first summarise our conclusions on how English law deals with the latter. Child spanking is equivocal. It can constitute child punishment, which, if done with no sexual motive whatsoever, is entirely legal provided it is reasonable and done by the parent or guardian, or is subject to relatively minor penalty if reasonable and administered by any one else. Alternatively it can constitute indecent assault, subject to far heavier penalty, if it is motivated, even to just an infinitesimal degree, by sexual motive. Clearly the law is concerned predominantly with the act's sexual propriety rather than its brutality, unless it is deliberately calculated to be so harsh as to inflict grievous bodily harm or wounding.

Whereas motive is crucial in determining whether spanking is a sexual (indecent) or a non-sexual (decent) act, I began this chapter by quoting the doctrine stated in *Graham-Kerr* that in the case of photographs of children, the motive behind their creation is of no relevance.

If purpose is irrelevant, then what of context? Does it follow that if a still of a child being spanked was legitimate as part of the movie from which it was taken, then it must necessarily remain legitimate when placed in the context of, for instance, the internet *Movie and TV Spanking Page*? Photographs in medical textbooks are often quoted as the quintessential example of images that might appear pornographic outside the textbook, but are legitimate when placed therein. Surely what distinguishes the one context from the other is the purpose to which the textbook is intended, that is the hallowed cause of medical healing. Therefore can context be meaningfully distinguished from purpose? The textbook thus endows the image with a purported purpose and legitimacy, but only when within its context. Thus context is simply the communicator of purpose.

Nevertheless, the *Protection of Children Act* contains no defence which is obviously akin to that found in Section 163.1, which permits images with artistic merit or scientific purpose, suggesting that neither purpose nor context is relevant. Instead the PCA provides a statutory defence where there is a "legitimate reason" for distributing or showing indecent photographs.⁵⁸ The fact that this is unavailable to the person taking, permitting to be taken or making the photographs suggests it is intended to protect either those taking a more passive, and perhaps unknowing, role in their circulation than that taken by the photographer, or, as was suggested in the debate during the bill's passage

⁵⁸ See *Protection of Children Act*, 1978, s. 1(4)(a).

through Parliament, law enforcement agents or clinical psychiatrists.⁵⁹ However the Earl of Halsbury remarked that the defence would also be available to, for instance, the editor of a journal in which the photograph of a syphilitic child's private parts was published, suggesting that it is only those involved at the point of the photograph's production that are unprotected.⁶⁰ I have found no prosecution of material such as the paediatrician's textbook, suggesting that the Earl of Halsbury's assertion holds true.

The same earl also remarked that the journal editor would also have the defence that the photograph was not indecent. If so, images, by means of their context, meaning purpose, simply cease to be indecent. This suggests that despite the assertion in *Graham-Kerr* that motive is irrelevant, it has considerable bearing. Photographs taken for the inclusion in medical textbooks are permitted, photos taken for paedophile magazines are not.

I have found no reported case law dealing with allegations that movie stills constituted indecent photographs of children when taken from a movie that was considered innocuous as a whole. But I have found an allegation that a movie constituted an indecent photograph when taken from stills that were apparently considered innocuous in their original form. Although the converse scenario, it is illuminating on the role of context. In *R v Tucker*⁶¹ (1995) the Court of Appeal considered the case of a Defendant who videoed photographs of very young, naked children. In videoing the photographs, apparently taken on a beach, he panned slowly down from their heads, stopping with their "private parts", then slowly panning back, with on one occasion a slight closing in on the "sexual parts" of a child for a very brief time. The Defence argued that the original stills were typical of millions of holiday beach snaps taken each year. The judge seemed to agree, but pointed out that it was the video, not the original stills, that had to be considered. In his summing up he said:

Apply your common sense. Is a picture of it [a child's body] or a particular part of it indecent unless the picture of sexual parts of the body is incidental, as it is if you just take a snapshot of a nudist beach with a pretty background and a sparkling sea? If it is incidental, if it just happens to be there, or if it is medical, or even if it is artistic, then of course the picture which includes the private parts is not indecent.

This passage received no censure from the Court of Appeal. The Defendant had appealed against conviction on the basis that the words invited the jury to allow their minds to dwell on the subjective view of the defendant, in other words why he possessed the pictures, when the PCA specifically states that the view is objective. The Court of Appeal disagreed that the judge's words might be understood in that way, particularly once they were supplemented by the following:

"But you have to ask the question: set aside motives, set aside context, set aside everything but the picture itself, are shots of a child's sexual parts, full stop, indecent?"

⁵⁹ H.L., *Parliamentary Debates*, vol. 392, col. 539-555, 1977-78.

⁶⁰ *Ibid.*, at col. 553.

⁶¹ *R. v. Tucker* [1995] E.W.J. No. 3211 (QL) (C.A.)

The Court of Appeal endorsed this comment as a clarification of the earlier quoted passage. To my mind it seems to open up confusion again. The judge had presented as a legitimate image the photograph of a “pretty background and a sparkling sea”, which incidentally contained a naked child. What I believe he had in mind is the photograph which, from its content, appears to have been taken with the pretty background and sparkling sea in mind. Hence it is a photograph *of* beautiful scenery, which *contains* a naked child, not *vice versa*.

We use photographs to communicate the photographer’s intentions in taking them. Thus artists speak to us through their art. If we see a photograph of scenery we consider beautiful, we understand that the photographer’s motive in snapping the shutter was to capture the beautiful scenery. Once we have reached that understanding, the inclusion of naked children in the image is incidental and the photograph is legitimate. The context in which we find the photograph will then add to our understanding of why it was taken. If it is in a calendar, it appears like a commercial endeavour, if in a gallery, then an artistic one. Both ways it is still a photograph *of* beautiful scenery. But when Tucker took the same image and panned down the children’s bodies, a different intention is imputed to him. Thus motive is everything. *Graham-Kerr* may require us to set it aside, but all that case really does is render direct oral testimony on motive inadmissible. The mute can still speak.

Why the jury convicted Tucker we shall never know for sure, but certainly they were invited by the judge to consider the way he videoed the photographs, panning from face to private parts and slightly closing in on the latter in the case of one child. I suggest that Tucker was punished when the video formed an electronic record of his gaze, of the way he looked at the photographs. His crime was that when he saw what we see as photographs of pretty beaches and sparkling seas, what he saw were the children’s private parts. He looked at the pictures the wrong way.

The trial judge’s comments also betray another reality, that juries are allowed to know context. They would be permitted to know that a photograph appeared in a medical journal, an art exhibition dealing with child abuse, or a mainstream movie. I repeat his words:

If it is incidental, if it just happens to be there, or if it is medical, or even if it is artistic, then of course the picture which includes the private parts is not indecent.

The judge states it as an obvious. He and his fellow judges would no doubt be amazed that I have spent so long puzzling over whether images of child nudity in movies that depict child spanking are indecent. It would be interesting to know if they could resolve the status of the images in *The Movie and TV Spanking Page* just as easily. In the case of the internet spanking sites, the difficulty in perceiving any purpose for the collections of images other than sexual enjoyment is bound to colour the jury’s judgment of them, even if the images are taken from mainstream media. It would also be fascinating to see if in such a case a judge would be as quick to direct a jury to “set aside motives, set aside context, set aside everything but the picture itself” as the one in *Tucker*.

Although it does not relate directly to the class of images under discussion here, it is worth noting that another factor likely to be made known to the jury is the relationship between the photographer and the child. This too can connote purpose. A proud parent's snapshot of their naked young offspring has a far more innocent hue than that of a passing stranger. Just a parent's consent may be enough to legitimise photographs. Thus in *Graham-Kerr* no objection was raised to nude photographs of the same boy that were taken, with his parents' consent, by an "official" photographer at the naturist swimming session. (Exactly why an "official" photographer was considered appropriate at a naturist swimming session is not explained.)

Occasionally, though, parents' snapshots raise suspicion. But such cases attract howls of protest, particularly, I presume, from other parents. Most famous in Britain was television newsreader Julia Somerville's arrest in 1995 after film developers reported to the police photographs of her seven-year-old daughter in the bath. Cries of outrage drowned out even the *Schadenfreude*, the *Guardian* newspaper devoting its leader article to the case, under the heading "A Clear Failure of Commonsense".⁶² Britain is not alone in this. In February 2000, following the arrest of a mother in Oberlin, Ohio for taking nude bathtub photos of her 8-year-old daughter, a candlelight vigil in her favour attracted 200 supporters and a fund for her defence collected \$35,000.⁶³ If the world is seen to consist of the "us", normal, decent folk and the "them", the paedophiles, then the former certainly look after those they perceive as their own. No such generosity is extended the "them". As I write, cars are burned in the streets of Britain, windows are smashed and one man has committed suicide for fear of the mob as the "us" riot against paedophiles.⁶⁴ This latter day *Kristallnacht* follows the decision of the *News of the World* newspaper to publish the names, photographs and addresses of 200 convicted child sex offenders, so that the public may know their whereabouts after serving their prison sentences. The Stars of David are out again.

SUMMARY

The central issue of the last chapter on Canadian law concerned the importance which that country's child pornography law puts on the purpose behind a depiction of child nudity. The doctrine in *Graham-Kerr* is that the purpose behind taking a photograph of a child is irrelevant in determining whether that photograph is indecent. Instead the issue of whether a photograph of a child is indecent, the central enquiry under the *Protection of Children Act*, has to be decided simply on the basis of the photograph itself. Yet I have argued that this doctrine in no way reflects the reality of the way in which the test of indecency is understood and applied.

⁶² Leading article, "A Clear Failure of Commonsense", *Guardian* [London], (7 December, 1995), p. 20. See also C. Fitzherbert, "Notebook: Snap out of it - and bare all in private", *Daily Telegraph* [London], (25 June 1996), p. 22. Somerville was subsequently released with no charges being laid.

⁶³ T. J. Sheeran, "Mom Charged With Taking Porn Shots of Daughter, 8", *Chattanooga Times*, (12 March, 2000), p. A3.

⁶⁴ "Families Flee Paedophile Protests", *BBC News Online*, (9 August, 2000): http://news.bbc.co.uk/1/hi/english/uk/newsid_872000/872436.stm

I have approached the issue of whether images of child spanking are indecent by asking whether child spanking is itself indecent. English law considers this act equivocal. It will be indecent if motivated, even to a very small degree, by a sexual purpose and even if that purpose is not communicated to the child. What is therefore being punished is the sexual enjoyment.

As regards the taking of indecent photographs, although *Graham-Kerr* states that purpose is irrelevant, it is clear that the photograph's context is. But context is simply the communicator of purpose. Thus, despite the assertion in *Graham-Kerr*, motive has considerable bearing.

In the last chapter dealing with Canadian law, I concluded that what ultimately distinguishes the spanking web sites from the movies is that only the former communicate that images of children being beaten are sexually exciting. This ties in with the prohibited video of the children on the beach in *Tucker*, which revealed that its creator considered them sexually attractive. Thus, if the web sites constitute pornography, then the two countries seek to prohibit them for the same fundamental purpose: the elimination of the heresy that children are sexy.

Part II

THE CHILD SPANKING MOVIES

Chapter 4

CINEMA AND VIDEO REGULATION

Attention now turns to the movies that the child spanking internet sites draw on for material. I also move from the criminal law to cinema and video regulation. In our haste to examine freedom of expression issues in relation to the criminal law, I believe that insufficient weight is sometimes given to the impact such regulation, as well as that of broadcasting (which I consider in the next chapter) has on what we see in the most influential media of the 20th century.

Both Britain and Canada regulate the exhibition, sale and hire of films and videos.¹ Film censorship in Britain grew out of the licensing of cinemas by city and town councils and other local authorities, which was in turn an extension of the licensing of pubs and music halls. When introduced in 1909, cinema licensing was ostensibly for the physical safety of patrons,² but two years later local authorities were permitted to use their licensing powers to censor films prior to exhibition. Within a few years most Canadian provinces had followed suit, introducing legislation allowing the censorship of films.³

THE FILM BOARDS

Local authorities in Britain continue to have the power to ban films from cinemas in their area, as well as to place restrictions on who can see them. Since 1952 this power has been supplemented by a responsibility to prohibit the admission of children to films

¹ In both countries many exceptions apply. For instance, in many Canadian provinces certain non-profit film societies are exempt; see e.g. British Columbia's *Motion Picture Act*, R.S.B.C. 1996, c. 314, s. 4.

² *Cinematographic Act*, 1909, 9 Edw. 7, c.30

³ E.g. 1911 in Ontario, 1913 in British Columbia and 1915 in Nova Scotia.

classified as unsuitable for them.⁴ Local authorities may delegate the classification of films and in practice the task has been remitted almost entirely to the British Board of Film Classification.⁵ The BBFC, originally known less euphemistically as the British Board of Film Censors, is a non-governmental organisation founded by the film industry in 1912 to establish some national uniformity in standards.⁶ Local authorities almost invariably accept its judgment, although occasionally a few rogue councils take exception to a particularly controversial movie and override the BBFC's certification, banning the film from their jurisdiction, or at least imposing a more restrictive certificate.⁷

Of Canada's ten provinces, all except Newfoundland impose a licensing system on films shown theatrically. Some provinces have pooled resources, reducing the number of film review boards to six. New Brunswick, Prince Edward Island and Nova Scotia have formed the Maritime Film Classification Board, which Newfoundland cinemas often refer to. None of the territories have a board and tend to take classifications from neighbouring provinces. Thus the Yukon refers to British Columbia's Film Classification Office, which also categorises films for Saskatchewan.⁸ The North West Territories turns to Alberta's Film Classification Section,⁹ while Manitoba, Ontario and Quebec have their own classification boards¹⁰.

FILM AND VIDEO CENSORSHIP

Most cinemas in Britain are prohibited by their licences from showing any film deemed to offend against good taste or decency or to be offensive to public feeling.¹¹ In addition cinema licences in London impose additional requirements, including a stipulation that films must not be likely to promote sexual humiliation or degradation of or violence towards women. It is these standards, among others, that are reflected in the BBFC's guidelines and which it imposes in censoring films.¹²

The BBFC's remit was extended in 1984 when the Video Recordings Act introduced classification for virtually all video recordings offered for sale or hire commercially in the

⁴ *Cinematograph Act*, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 68

⁵ *Ibid.*, s. 3 (1) (a) and *Ellis v. Dubowski*, [1952] 3 KB 621, (D.C.). See also *R. v. Greater London Council, ex parte Blackburn*, [1976] 3 All ER 184, [1976] 1 WLR 550, (C.A.).

⁶ British Board of Film Classification web site: <http://www.bbfc.co.uk/>

⁷ E.g. the film *Crash*, (director David Cronenberg), given an '18' certificate by the BBFC but banned by some local authorities, including the City of Westminster that covers London's main entertainment district, on the basis that it was thought to eroticise injuries sustained in car accidents: *Ibid.*

⁸ B.C.'s Film Classification Office is part of the Public Safety and Regulatory Branch of the Ministry of Attorney General and is governed by the *Motion Picture Act*, *supra* note 1. The FCO took over responsibility for Saskatchewan in October 1997.

⁹ Alberta's Film Classification Section is governed by the *Amusements Act*, R.S.A. 80, c.A-41.

¹⁰ Manitoba has a Film Classification Board, authorized under the *Amusements Act*, C.C.S.M. c. A70. The Ontario Film Review Board receives its mandate through the *Theatres Act*, R.S.O. 1990, c. T.6 and operates as an arms-length agency reporting to the Minister of Consumer and Commercial Relations. Quebec has the Régie du Cinéma, governed by the *Cinema Act*, R.S.Q., c. C-18.1.

¹¹ This term is contained in the model licensing conditions suggested by the Home Office.

¹² BBFC web site, *supra* note 6.

UK. Central government entrusted this task to the BBFC which, since media concern about "video nasties" in the early 1990s, has been required to have special regard to the possibility of harm to potential viewers, or through their behaviour to society because of the way the video deals with criminal behaviour, violence, horror, sex or illegal drugs.¹³

Of the Canadian provinces that regulate film distribution, all except Manitoba allow their governments to require cuts to a film, or to refuse a licence altogether.¹⁴ The same applies to videos, with the additional exception of Alberta.¹⁵ However many provinces require only certain videos to be submitted for review. For instance, British Columbia asks to see only videos of "adult films" as defined by statute.¹⁶ Videos may either be refused permission for distribution outright, or may be censored.

Being non-governmental, the BBFC works primarily from guidelines rather than statute. The type of material that will not be tolerated in Canada is generally itemised in some detail in each province's legislation. These regulations vary in particulars, but fundamentally they are alike. My interest here is not to compare provinces, nor do I wish to contrast their legislation with the BBFC's guidelines. Broadly speaking, the provinces and Britain target the same material for prohibition: excessive violence, particularly where that violence is sexualised, and involvement of children in sexual behaviour. My interest is in how and why distinctions are drawn between the acceptable and the prohibited. Rather than contrast the two countries, I refer to both to lend generality to my comments, as well as to broaden the number of works under discussion, for release of some films has only been attempted in one or other of the countries.

Nor do I subject the BBFC's guidelines and all the various Canadian pieces of legislation to the close scrutiny and extensive analysis with which I examined the two countries' criminal law. There is simply too many of them. What is more, the BBFC's guidelines are exactly that, mere guidance for the implementation of standards that British cinema and video regulators, like England's criminal law, decline to itemise. Close analysis of their formulation would be inappropriate, for they are not applied in the same way as legislation.

Given the large number of film boards in the two countries, I concentrate my discussion on the BBFC, the legislation of British Columbia¹⁷ and the Maritime Film Classification Board (MFCB). I choose British Columbia because it is the province in which I write and it is a populous Anglophone province.¹⁸ Although the Maritime provinces contain only about 6% of Canada's population, the MFCB is a useful supplement to British

¹³ *Video Recordings Act*, 1984, c. 39, s. 4A, added by the *Criminal Justice and Public Order Act*, 1994, c. 33, s. 90 (1).

¹⁴ e.g. *British Columbia Motion Pictures Act*, *supra* note 1, *Ontario Theatres Act*, s. 3 (7) (a), *supra* note 10, *Quebec Cinema Act*, *supra* note 10, art. 81.

¹⁵ *Ibid.*, plus *Alberta Amusements Act*, R.S.A. 80, c.A-41

¹⁶ *Motion Pictures Act*, s. 5(3), *supra* note 1. See Appendix III for statutory definition of "adult motion picture", *ibid.*, s. 1.

¹⁷ *Ibid.*

¹⁸ British Columbia has around 13% of Canada's population and is the second most populous Anglophone province.

Columbia because the latter censors only a small proportion of videos. The Maritimes were chosen over other, larger Anglophone provinces (Ontario and Alberta) because the latter do not impose a classification system for videos. Quebec was avoided since its Francophone character may introduce greater variants from Britain first in terms of cultural norms and secondly in terms of the films and videos being released there. Some of the films I shall be examining were released in Canada on video, but not theatrically. However all of the films identified by name that follow, unless specified otherwise, were released in Britain and in Canada with the approval of the censoring bodies.

FILM AND VIDEO CLASSIFICATION

For those films that are permitted exhibition, Britain, as well as the nine Canadian provinces that regulate cinema, have a classification system. In the case of Britain, Manitoba, Quebec and the Maritime provinces this also extends to videos. For the remaining Canadian provinces, there exists a voluntary video classification system, which uses the same categorisation scheme as is used in cinemas west of Manitoba.

Britain's classification system has six categories, which relate primarily to their suitability for viewing by children. The Canadian systems are all variants of this scheme. Thus each has a category, known as "U" (for Universal) in Britain and "G" (for General) in much of Canada, whose films and videos are available to all, including unaccompanied children. Next comes a "PG" category, meaning that parental guidance is advised, although admission is open to all.

Britain's next two categories are "12" and "15", meaning that the minimum age for viewing these films, or the purchase or hire of these videos, corresponds to the number by which the certificate is known. The situation in Canada is more complex. Many film boards have their own categorisation system and each varies slightly from the other. In general the categories are known by a number, but instead of imposing an absolute age bar, the number normally denotes that children under that age can see the movie if accompanied by an adult.

At the top end, all classification systems have categories that impose an absolute minimum age on admission. "18" in Britain corresponds to "Restricted" in most of Canada, meaning that no one under 18 is permitted entrance, except in the Maritimes, where those under 18 are still permitted entrance if accompanied by an adult.

Many systems have an additional top-end category, which is essentially reserved for erotica. Britain has "R18", much of Canada has "Adult" and the Maritimes have "XXX". Special restrictions apply, in particular the prohibition of attendance by anyone under 18. Most systems also require that advertisements for films carry captions that indicate the basis on which a restrictive certificate was granted. Such captions will typically refer to violent scenes, nudity and bad language.

THE FACTORS THAT DETERMINE CENSORSHIP AND CLASSIFICATION

All systems basically determine category by criteria of violence and sex. Britain allows some violence even in "U" certificate films, but in any film with a "12" certificate or less, violence to individuals must be brief, especially in a realistic context. As for sexual behaviour or references, none is tolerated in "U" certificate films, whereas in "18" films scenes of simulated sex are allowed, although they may be limited because of length or strength.

Nudity is also a determinative factor in classification. In Britain levels of permissiveness range from "U" classified films, where little or no nudity is allowed, to "18" certificate films, in which extensive full-frontal nudity is permitted, whether or not in a sexual context, as long as there is no "undue focus on the genitals".¹⁹

Of greatest concern in Britain and Canada is where violence and sex meet. Depictions of sexual violence are particularly restricted in all systems. In Britain none is permitted in "U" or "PG" films. "12" certificate movies may only include sexual violence that is implied or briefly indicated, and only then when justified by the story. Sexually violent images are allowed in "15" certificate films only if they are brief, isolated, and justified by context. With an "18" certificate sexual violence may be implied and sometimes shown, as long as the scenes "do not offer sexual thrills".²⁰

The BBFC recognises that the primary purpose of "R18" certificate films is to induce sexual arousal and the focus will be on real sexual activity. In terms of length and strength, the BBFC claim to do no more than to impose the criminal law, but implied in their guidelines is that they impose additional restrictions when it comes to ensuring that violence is not sexualised and that only consenting adults are depicted. The BBFC tolerates a "broader range of mild fetish material" in "R18" films, but not threats, humiliation or realistic depictions of pain. Thus the classification guidelines state:

Sex where one person is forcibly restrained is also censored, and bondage or whipping are often cut. So, too, are sex scenes accompanied by pain or humiliation.²¹

Similar sentiments prohibiting the sexualization of violence are expressed by the various Canadian boards. British Columbia, for instance, will not permit any depiction of coercion into explicitly shown sexual activity, bondage in a sexual context, explicit sexual scenes involving violence, and brutality to or torture of persons that are portrayed with such a degree of reality and explicitness that they would be intolerable to the community.²² There is however an exception for works where the theme, subject matter or plot is artistic, historical, political, educational or scientific.²³

¹⁹ BBFC web site, *supra* note 6.

²⁰ *Ibid.*

²¹ BBFC, *Guidelines for Classifying Films and Videos*.

²² *Motion Picture Act*, s. 5 (3), *supra* note 1. See Appendix III.

²³ *Ibid.*, s. 5 (5).

The MFCB will not permit graphic or prolonged scenes of violence, torture, cruelty or human degradation, the depiction of the physical abuse or humiliation of human beings for the purposes of sexual gratification or as pleasing to the victim, or the depiction of indignities to the human body in an explicit manner.²⁴ There is no artistic defence.

In 1997 the BBFC required 44 videos, and in 1998²⁵ 46 videos (but no films) to be edited to remove or reduce scenes of sexual, or sexualised, assault or abusive, harmful or degrading sexual activity, including the beating of naked or semi-naked women.²⁶ Yet one internet site lists around 850 mainstream (i.e. non-pornographic²⁷) movies that, it is claimed, show or at least contain some reference to spanking.²⁸ Of these around 100 are movies that show or refer to spanking children. Another site lists around 140 mainstream movies or television programmes that show children under 16 being spanked.²⁹ When combined with the other major internet databases of movie and tv child spankings that I have found³⁰, the number of films and tv shows that actually *show* children under 16 being spanked comes to around 230. Many others contain references to spankings, or have spankings that are heard but not seen.

To give some sense of proportion, the average number of feature films the BBFC was asked to classify each year between 1980 and 1998 was 353.³¹ Representing only a few weeks' work for the BBFC³², the number of films and tv programmes that show children being spanked is of course tiny compared to the total amount of material produced each year. On the other hand, I hope these figures will convince that I am not dealing with just a tiny handful of isolated incidents.

THE SEXUALIZATION OF CHILDREN

Unlike Canadian regulations, the British guidelines never explicitly prohibit the depiction of children in a sexual content. Nevertheless the BBFC have taken upon themselves the task of interpreting the criminal law's ban on indecent photographs of children. Take, for instance, *Lolita* (1998),³³ the film often cited as cinematic child pornography.³⁴ This was

²⁴ MFCB web site: <http://www.gov.ns.ca/aga/filmguides.htm>

²⁵ These are the latest two years for which data were available at the time of writing.

²⁶ BBFC Annual Report, 1998

²⁷ Here I am using this term to indicate that the films and videos received general cinema or video release, as opposed to the sex cinema circuits and sex video shops.

²⁸ *The Really Big List of Spanking in the Cinema*, compiled by Bostnbob, http://www.cfpub.com/boston_bobs_list.html#B. Of the entire list, the compiler raises serious doubts about some claims, but says that of 55% (466 movies) he has either seen them himself or had them reported to him "by sources with a long record of reliability".

²⁹ *Arilds Movie Spanking List*: <http://www.moviespank.com/>

³⁰ *The Movie and TV Spanking Page*: <http://www.geocities.com/Hollywood/Studio/8716/cbhome.htm>.

³¹ BBFC Annual Report, 1998

³² The BBFC also classifies around 4,000 videos each year.

³³ Director Adrian Lyne

the second film adaptation of Vladimir Nabokov's novel concerning a middle-aged man's sexual obsession with a precocious young girl, played in the film by a 15-year-old. The film was viewed by the BBFC's entire team of examiners and management and the opinions of the police and leading counsel were sought as to its legality. The Board also consulted two distinguished child psychiatrists as to whether the film was likely to encourage paedophile behaviour.

Finally the film was awarded an "18" certificate for theatrical release without cuts being made.³⁵ The BBFC's report on the affair shows that two factors in particular helped the decision. First was the use of a 19-year-old body-double in all questionable scenes (the English law being concerned with the age of the actors, rather than the age of the characters they portray). Secondly, in considering whether the film might, even though legal, cause widespread offence, the BBFC's concerns were assuaged by the dire results the liaison brings the movie's protagonist, thus giving out the message that the breaching of "a necessary social taboo" is wrong and brings many ill-consequences in its train.³⁶

Other films get off less lightly. In 1996 the BBFC considered *Kids*,³⁷ the film whose broadcast on Canadian television was approved by the Canadian Broadcasting Standards Council.³⁸ The BBFC was less tolerant, requiring cuts totalling 59 seconds before granting the movie an "18" certificate.³⁹ The Board considered that two scenes constituted indecent photographs of children under the criminal law. The first was a rape of an unconscious young girl by a teenage boy. The concern arose not from those two characters, both of whom were played by actors over 16, but from an underage boy who was sleeping in the foreground of the frame. The other censored scene showed the same boy having his chest kissed.⁴⁰

In 1998 the BBFC, again fearing a breach in the criminal law, would only allow release on video of the Spanish film *The Ages of Lulu*⁴¹ after cuts of 2 minutes, 55 seconds.⁴² The film is about a woman whose obsessive sexuality nearly leads to her downfall. The BBFC explained its required cuts thus:

The film opens with a baby girl being washed and powdered, an innocent enough shot except that the camera is looking between the baby's legs at that part of her anatomy

³⁴ See, e.g., Edwards, S.S.M., "Prosecuting 'Child Pornography': Possession and Taking of Indecent Photographs of Children", (2000), 22(1) 2000, *Journal of Social Welfare and Family Law*,: 1-21, at 2, where she states: "The sexual abuse of children is extensive and widely disseminated in film (*Lolita*) ..."

³⁵ The film was given the same certificate when released on video in 1999. The film also received an "18" certificate in the Maritimes. All information on BBFC film classifications is taken from their web site, which offers a film classification search facility: *supra* note 6. All information on MFCB film classifications is taken from their web site, which offers a similar facility: *supra* note 24.

³⁶ BBFC press release, 20 March, 1998.

³⁷ Director Larry Clark

³⁸ See Chapter 5, below, for a full discussion on the CBSC's decision.

³⁹ The film also received an "18" certificate in the Maritime provinces.

⁴⁰ BBFC's web site, *supra* note 6. This second cut scene must have been so inconspicuous that despite the fact I was looking out for it, I missed it when viewing the video of the film I rented in Vancouver.

⁴¹ *Les Etades de Lulu*, director Bigas Luna. The video was eventually released with an "18" certificate.

⁴² The film does not appear to have been released theatrically in Britain, theatrically in British Columbia nor at all in the Maritime provinces.

which comes to symbolise her voracious sexual appetite. The point is taken immediately, and yet the shot was held through the whole of the opening credits, drawing attention to the baby's sex in a manner which seemed to us to constitute an indecent photograph. A cut was made.⁴³

It seems that it was not so much the shot but the camera's lingering gaze for the length of the opening credits that worried the BBFC. Thus duration as well as content can render an image indecent, an issue I shall return to.

THE CHILD SPANKING MOVIES

Most of the 230 or so works appearing on the child spanking internet sites are films initially released theatrically or, very occasionally, on video. They are thus works that fall under the remit of the various film and video classification offices. Some are foreign-language works that never sought release in Britain or Canada. Most, however, have been approved for release, theatrically or on video, in both countries. None were given a rating higher than "18" in Britain or "Restricted" in Canada.⁴⁴

There are too many films and videos to identify individually, so in discussing their classification let me limit myself to those that are most explicit in depicting spankings and which also involve child nudity. If I only consider instances where spankings of children under 16 are actually shown on camera, where the spanking is on the naked buttocks and where the naked buttocks are clearly visible to the audience, then without prolonged searching and using only two of the spanking databases available⁴⁵, I can find 31 such works. Some are television programmes and others are foreign language films that never sought release in Canada or Britain. Nevertheless, at least 17 were films and videos approved for release in Britain, three with a "PG" certificate,⁴⁶ four with a "12" certificate,⁴⁷ six with a "15" certificate,⁴⁸ and four with "18" certificates.⁴⁹ At least 25

⁴³ BBFC Annual Report, 1998.

⁴⁴ Note that *Arilds Movie Spanking List* (*supra* note 29) deals with movies that depict the spanking of adults as well as those that involve children. This statement may not apply to some of the works included in that list that involve the spanking of only adults. It is true, however, as far as that site deals with films that depict the spanking of children.

⁴⁵ *Arilds Movie Spanking List*: *supra* note 29 and *The Movie and TV Spanking Page*: *supra* note 30.

⁴⁶ *Young Winston*, (directed by Richard Attenborough), received an "A" certificate (roughly equivalent to the present "PG" certificate) when theatrically released in 1972. When released on video in 1988 it received a "PG" certificate. *Lies My Father Told Me*, (Jan Kadar) also received an "A" certificate when theatrically released in 1975. *Yankee Zulu*, (Gray Hofmeyr) received a "PG" certificate when released theatrically in 1995 and when released on video in 1996.

⁴⁷ *Night of the Hunter*, (Charles Laughton), was originally released with an "X" certificate (equivalent to the current "18") in 1955, but was released on video with a "12" certificate in 1995 and again in 1999. *Lord of the Flies* (Peter Brook) was released theatrically in 1963. The certificate it was awarded at the time by the BBFC is unknown, although according to the BBFC it was given a "AA" certificate (a now defunct category that limited admission to those over 14) in 1970. It is currently available in Britain on video under a "12" certificate. *The Slingshot* (Ake Sandgren) was released theatrically in 1994 and on video in 1995. *The Day the Sun Turned Cold* (Yim Ho) was released theatrically in 1996.

⁴⁸ *Kung Fu Kids*, (Yin-Ping Chu), released theatrically in 1986 and on video in 1992; *Pelle the Conqueror*, (Bille August), released on film in 1988 and on video in 1990; *At Play in the Fields of the Lord*, (Hector

were approved for release in Canada,⁵⁰ at least three with a "General" rating,⁵¹ at least nine with a "14" rating⁵² and at least five with "18" rating⁵³.

None went into the highest categories; "R18" in Britain, "Adult" in British Columbia and "XXX" in the Maritimes. Indeed a child spanking scene could not determine such classification, for it would constitute recognition that children were permitted a role in erotica. Eroticising children is an issue for censorship, not classification. That is why the 31 bare buttock scenes referred to above are spread more or less evenly through the classifications. If a child spanking scene survives censorship then it has no bearing on classification.

Certainly spanking is violence. What is more, it is recognised in British and Canadian culture and law as potentially sexual. Given the severe constraints in both countries on sexualising violence, why is it so prevalent in cinema? Even more mystifying is the preponderance of children as the recipient, for blending children with sexualised violence surely produces the most taboo cocktail of all.

The most obvious objection to my drift is that child spanking is at most ambivalent. It may be granted to me that it is sometimes an ambiguous manifestation of sexuality, but most times it is a straightforward act of punishment. What is more, objection may well be taken to characterising a few smacks on the buttocks as violence. If child spanking is not *per se* sexual, and if it is at most marginally violent, then what is all the fuss about?

Even if objectors to the way my argument is going are prepared to go so far as to concede that for many, perhaps even most or all of us, spanking plays a part in some kind of latent sexuality, they may well fail to see that as grounds to prohibit films from including such material. They may point out that physical chastisement has featured in almost every childhood since time began, even if not as directly experienced, then as a threat or some kind of potential calamity. For some children it was perhaps not so calamitous and goes barely remembered in adulthood. But for many spanking, or the threat thereof, numbers among the most dramatic, indeed traumatic, experiences of their formative years. There can be no surprise, or objection raised, they may say, if cinema occasionally portrays what children have experienced and dreaded for millennia.

Babenco) released theatrically and on video in 1992; *Farewell My Concubine* (Chen Kaige), released theatrically in 1993 and on video in 1994; *Kids from Shaolin - Shaolin Temple 2* (Xinyan Zhang) was released theatrically in 1984 and on video in 1996, *The General* (John Boorman) was released theatrically in 1998 and on video in 1999.

⁴⁹ *Midnight Cowboy* (John Schlesinger), released theatrically in 1969 and on video in 1988 and again in 1999; *Moritz, Lieber Moritz* (Hark Bohm), released theatrically in 1979 and on video in 1987; *Dog Day* (Yves Boisset), released theatrically in 1983 and on video in 1985; *Edge of Sanity* (Gerard Kikoine), released theatrically and on video in 1989.

⁵⁰ Not all were necessarily released in all provinces, but all were released in either British Columbia or the Maritimes.

⁵¹ *Young Winston*, *Lord of the Flies* and *Mixed Company* (Melville Shavelson), released in 1974.

⁵² *Lies My Father Told Me*, *Yankee Zulu*, *Night of the Hunter*, *The Slingshot*, *Kung Fu Kids*, *Pelle the Conqueror*, *At Play in the Fields of the Lord*, *Kids from Shaolin - Shaolin Temple II* and *Joe the King* (Frank Whaley), 1999.

⁵³ *Farewell My Concubine*, *Midnight Cowboy*, *Dog Day*, *Edge of Sanity* and *The General*.

I have no disagreement with the last sentiment. God help us if we censor images of child spanking, whether it be as depictions of violence or otherwise acts of cruelty, or because of their sexual appeal. My interest here is in simply examining what makes some representations of the same acceptable, while others are not.



Fig. 12 & 13 : Scenes from The Day The Sun Turned Cold (1994, Pineast Production, director Ho Yim), found on The Movie and TV Spanking Page, showing a particularly brutal beating with a tethered bundle of bamboo rods. The extent of the nudity is typical of many other beating sequences.

I have no information on child spanking scenes having ever been censored, but presumably there would come a point when they are either so brutal, or alternatively so sexual, that some line would be crossed. As for brutality, some cinematic child beatings are so brutal as to chill. Thus in the Academy Award-nominated *Farewell My Concubine* (1993)⁵⁴ several boys are beaten on their bare buttocks with metal swords. In *The Day the Sun Turned Cold* (1994)⁵⁵, another Chinese movie, a boy is thrashed on the bare skin with a tethered bundle of bamboo rods. Such punishments could fairly be termed torture and the acceptability of their depiction depends no doubt on how graphic they are. The line of enquiry that interests me more, however, is how among spanking images erotica is distinguished from non-erotica.

SPANKING EROTICA

Some indication might come from works that are to my mind unmistakable as spanking erotica. No doubt such videos exist involving children, but I have not seen any, and none have been obtainable through the child spanking web pages, bulletin boards and chat rooms I have monitored. Much more easily obtainable are the vast number of titles on the adult video market showing adults being spanked. In many nothing that might otherwise be considered remotely like a sexual practice takes place. There is no kissing, fondling, masturbation or penetration. The genitals go unmentioned and may not even be seen. Yet the video boxes generally maintain that the actors are over 18, a further acknowledgement that spanking is potentially sexual.

I have seen a number that cater for the gay spanking fraternity, and I have no reason to believe that the straight videos are substantially different, with genders appropriately adjusted. Typically an attractive young sportsman, not much passed his 18th birthday, is being berated by his equally attractive but older coach for under-performing. He needs something to buck up his ideas, because his father doesn't seem up to the job. Or two young army recruits are in trouble with their handsome, muscular sergeant, but are eager to pay for their misdemeanours in any way that will not forfeit home leave. Of course they are to be spanked in front of other recruits, which will oh, so heighten the humiliation. After an initial, brief dialogue establishing the scenario, the rest is just plain spanking. Many dozens of slaps are shown, typically landing first on tight clothing and then on bare buttocks, which redden as the action proceeds. The smacks are accompanied by the cries of anguish and pained grimaces from their recipients, together with some additional admonitions from the "top". It is not difficult to foresee that such videos involving children would raise more than eyebrows at the film boards.

The BBFC's censoring of *The Ages of Lulu*⁵⁶ has already illustrated how simple duration can render an image inadmissible. It will not need spelling out to the reader that spanking videos, like other erotica, are intended to accompany masturbation. The spanking, or

⁵⁴ Directed by Chen Kaige. BBFC rating theatrically and on video: "15". MFCB rating: "18".

⁵⁵ Director Ho Yim. BBFC rating theatrically and on video: "12". MFCB rating not known, but the video is available in British Columbia (e.g. Limelight Video, 3701 W. Broadway, Vancouver.)

⁵⁶ See above.

whatever has erotic appeal, must therefore last long enough for the viewer to reach orgasm, the director using what skills he has to stretch out the action. Images excite disapprobation when they are of sufficient duration to become a masturbatory accompaniment. In the spanking videos caricatured above, the sight of blows repeatedly landing on reddening bare buttocks are clearly a core elements in the videos' erotic appeal. Many mainstream movies involving children minimise such shots, showing just the bare minimum for the audience to register what is going on.⁵⁷ Thus the need for the spanking web sites; to freeze these fleeting images. The internet completes a process that substantially undermines the censor's work; the permanent capture of the brief moment. First cameras had to be smuggled into the cinema or artfully clicked before the tv. Then the VCR called for a generation to become skilled in one-handed manipulation of the remote control's freeze-frame and replay buttons. Now the internet eliminates such fumbling and the censor must look afresh at the role of brevity as a licence for the explicit.

This was acknowledged by the BBFC when in 1998 it refused a certificate for the release of the movie *Maniac* on video.⁵⁸ This dreadful slasher movie, available in Canada, features a number of beautiful women, and one man, being variously murdered. The murder scenes are graphic, but not lengthy. Yet the BBFC is wise to the versatility of the VCR. Among the BBFC's concerns was that release on video would enable the women's murders to be viewed repeatedly "as masturbatory material in the home."⁵⁹

We have a strict policy on rape and sexual violence. Forcible stripping and exposing of breasts is disallowed if the assault is staged for the pleasure of the male viewer. We are stricter with such scenes on video than on film since they could be played over and over again in the privacy of the home and lead some viewers to find the use of force sexually arousing.⁶⁰

The Video Recordings Act, which empowered the BBFC to censor videos, clearly indicates that the suitability of material as the accompaniment for masturbation numbers among the government's concerns. The Act exempts from BBFC censorship certain material, including video games. However a video game is not exempt if, to any significant extent, it, *inter alia*, depicts human sexual activity or is designed to stimulate or encourage human sexual activity.⁶¹

Meechie v. Multi-Media Marketing (1995)⁶² concerned a video game that included brief sequences of naked women. The game had not been submitted to the BBFC for approval,

⁵⁷ An extreme example is *Midnight Cowboy*, where the spanking scene lasts no more than about 2 seconds. The spanking is part of male hustler Joe Buck's troubled dream, and appears to be a flash-back to his troubled childhood rearing from his grandmother.

⁵⁸ The film had earlier been refused a certificate for theatrical release in 1981. It was originally released in the United States in 1980 and was released in the Maritimes under an "18" certificate. It is available in Vancouver on video, e.g. Limelight Video, 3701 West Broadway. Director William Lustig.

⁵⁹ BBFC Annual Report, 1998

⁶⁰ BBFC Guidelines for Classifying Films and Videos

⁶¹ *Video Recordings Act*, 1984, s. 2

⁶² *Meechie (For The Kent County Council Trading Standards Department) v. Multi-Media Marketing (Canterbury) Limited (Trading As Interactive Girls Club) And Another*, (1995) 94 LGR 474, [1995] NLOR No 2641, [1995] E.W.J. No. 5259, (D.C.)

but the District Court concluded that it should have been. First, it was held that the images were not part of the game. Secondly, even if they were, their sexual nature forfeited the benefit of the video game exemption. Among the images was one of a woman bending over, with the camera homing in on her naked buttocks, with pubic hair in view. Apart from the pubic hair, this equates to the spanking images under discussion here. What concerned Simon Brown L.J., however, was that the woman concerned “is swaying her buttocks in what is designed to be an enticing fashion and displaying her labia in ever clearer close-up”. He thus deemed such images as designed likely to a significant extent to stimulate or encourage human sexual activity. He was of the view that even material that is “mildly suggestive” can meet that test. Unclear is whether the images would have met the test without the swaying and the zooming in on the genitals.

CHILD SPANKING IN MAINSTREAM CINEMA

Although some mainstream filmmakers show as little nudity and as few smacks as possible, many others are surprisingly reluctant to have the camera demurely turn away. Considered classics among connoisseurs of severe school beatings are those of Malcolm McDowell in *If* (1971)⁶³ and Rupert Everett in *Another Country* (1984)⁶⁴. Both actors play boys in their teens being graphically caned, although in fact both were in their mid-twenties at the time of filming. However, the boy who played the title role in the BBC’s television serialisation of the novel *Tom Brown’s Schooldays* was only 13 when the programme’s producers allowed the camera to linger on his clothed buttocks throughout most of the 12 strokes of his caning.⁶⁵ In *The General* (1998)⁶⁶ there is no shying away from showing us the bare buttocks of a dozen or more boys being belted.

Most graphic is *The Toilers and the Wayfarers* (1995).⁶⁷ This film contains a spanking scene that is difficult to distinguish from those in the spanking videos caricatured above, even though the victim is a 16-year-old boy and so well within the definition of “child” for the purposes of Canada’s criminalisation of child pornography. Despite this, the video is available in some of Vancouver’s non-pornographic video stores.⁶⁸ It was not submitted for approval to the British Columbia Film Classification Board,⁶⁹ suggesting that its distributors did not think it fell under the statutory definition of “adult video”, which includes videos depicting the coercing, through the use or threat of physical force or by other means, of a person to engage in a sexual act, where that sexual act is depicted in sexually suggestive scenes.⁷⁰

⁶³ Director Lindsay Anderson. BBFC rating on theatrical release: “AA” (later given a “15” rating when released on video in 1986).

⁶⁴ Director Marek Kaniévska. BBFC rating on theatrical release and video: “15”. MFCB rating: “14”.

⁶⁵ See Fig. 28 in Chapter 5. Note, however, that since this was never released theatrically or on video it did not fall within the BBFC’s jurisdiction. The series does not appear to have been released theatrically or on video in Canada.

⁶⁶ Director John Boorman. BBFC rating theatrically and on video: “15”. MFCB rating: “18”.

⁶⁷ Directed by Keith Froelich. This does not appear to have been released in Britain or in the Maritimes.

⁶⁸ e.g. Videomatica, 1855 W. 4th Ave.

⁶⁹ Telephone call to BCFCB, August 11, 2000.

⁷⁰ *Motion Pictures Act*, s. 1, *supra* note 1. See Appendix III.



Fig 14: Still from The Toilers and the Wayfarers (1995), showing a spanking of a 16-year-old barely distinguishable from the spanking porn videos. The scene is in German, hence the sub-title, which appears in the original video. This still was found on The Movie and TV Spanking Page.

The boy, dressed in nothing but very tight and very short shorts, is hauled over his father's knee for insolence. There is no coy diversion of the camera's gaze. Instead 30 slaps are clearly shown being landed, the first nine through shorts and the remaining 21 on bare flesh, once the shorts are pulled down. The buttocks, shot from two different angles, remain prominently visible throughout the spanking. Everything but duration resembles a spanking video. The punishment clocks in at just 35 seconds, long enough to pull down the trouser fly, but not much else.

It is uncertain whether the video ever received British Columbia government approval, but probably it did not need to. This is only required if it constitutes an "adult motion picture", a term elaborately defined by statute.⁷¹ Apart from films that have been previously submitted but failed to receive approval, or were only approved with cuts or with limited distribution, this term refers to films that depict scenes of either brutality or torture, or certain sexual content.⁷² Unless a spanking constitutes the former, and it appears that is was thought that a hand spanking would stretch the language, its representation does not *per se* require approval, since "sexual act" is defined to refer only to real or simulated acts of intercourse or masturbation, genital-genital, genital-anal, oral-genital or oral-anal connection between human beings, or genital connection between human beings and objects. Thus spanking, though recognised as potentially sexual, is

⁷¹ *Ibid.*

⁷² *Ibid.*

legislated out of the sexual sphere by the legislation's genital and anal preoccupations. This is despite the fact that the British Columbia film regulations are elsewhere clearly designed to outlaw images that sexualise children.⁷³

Can mainstream works really be distinguished from spanking videos simply by reference to duration of visible nudity and how graphically a spanking is shot? The reader has probably already observed the other big difference between the two. In mainstream movies the spanking scene is part of a much broader narrative. It is on this that the whole concept of an artistic defence hangs. Art may be a story that involves a spanking, but it's unlikely to be a story about a spanking. Even so, spankings sometimes seem entirely incidental to the plot, as in the junk action movie *Dog Day* (1984)⁷⁴, where the graphic bare buttock belting of a small boy springs out of nowhere and does nothing to advance the plot, which involves a bank robber's flight from the police.

Other spankings are, to varying degrees, integral to the plot. It would be odd not to include a scene of David Copperfield being caned by Mr Murdstone⁷⁵, or the school beating of Tom Sawyer⁷⁶, in any film versions of these classic novels. Although the events have some importance in the books, the stories could be told without them. But why should they be done without? It may be its role in the plot that saves the scene in *Toilers*. The spanking takes up just 35 seconds of a 75 minute film, which traces the boy's coming out as gay, his alienation from his home life in small town Minnesota and his move to the big city, where he struggles to survive. The spanking is the deed that prompts the boy to run away from home. Some other indignity could have been chosen, but the screenwriter's choice should be respected.

Fundamental to the distinctions I am drawing between spanking erotica and mainstream movies is that the former are tangible evidence of a heretic sexual interest. What is worse, they help its practice: they seem to fulfil no other purpose than masturbatory aids. *Toilers* sits closer to the dividing line than most. The story line and the way the camera occasionally lingers on the boy's attractive physique betray that the film is intended for a gay male audience. All the same, such features only warrant remark because of their rarity; similar cinematic treatment of a young woman's body is so familiar as to pass unnoticed among the mass of the mainstream. (It is notable how the term 'pornographic' hovers lower over the head of gay cinema than over straight.) The spanking scene's

⁷³ *Ibid.*, which requires the Film Classification Board to remove any depictions of persons who are or who appear to be under the age of 14 involved in sexually suggestive scenes, whether or not they appear nude or partially nude: s. 5(3) see Appendix III.

⁷⁴ Directed by Yves Boisset. The film is also known as *Canicule*, its French title. Lee Marvin plays a bank robber who takes refuge in a French farmhouse when a robbery goes wrong and he is being pursued by police. The only possible justification for the inclusion of the whipping is to further depict the mayhem and brutality endemic at the farmhouse. The film is so messy, it is difficult to reach any interpretation. BBFC classification on release on video: "18" (no theatrical release). MFCB classification: "18".

⁷⁵ There have been at least nine English-language film and TV versions of Charles Dickens' *David Copperfield*. The three I have seen all show the caning and I have found stills from two versions on the internet, including the 1935 version directed by George Cukor, BBFC rating on theatrical and video release: "U", MFCB classification: "G".

⁷⁶ Mark Twain's novel has been shot for cinema and TV at least 18 times. I have found stills from just two versions on the internet.

length and graphic nature suggest that its true purpose is to sexually arouse, but it does not take the additional step towards censorship; it does not take the form of a masturbatory aid with no other purpose. Its adaptation for that purpose is performed by the spanking web page which, predictably, borrows heavily from the work.

If what saves *Toilers* is that it was a film that involved spanking, rather than being a film about spanking, how much can the next two films effectively plead that defence? And why were they both given “U” certificates when released in Britain, thus deeming them thoroughly suitable for all ages? The title of the 1960 British comedy *Bottoms Up*⁷⁷ reveals its primary interest. This comedy, set in a British boarding school, treats the caning of schoolboys as a matter of the greatest hilarity. Together with the BBC television series that spawned it (again the title says it all: *Whack-O!*⁷⁸), which was still being produced as late as 1972, these works represent the nadir of British television and cinematic obsession with child beating. In *Bottoms-Up* no canings are actually shown, for seeing pain might spoil the fun, and admittedly there other story lines, but even so the subject is recurrent in both dialogue and plot. Puns abound about beatings and buttocks. Several boys are bent over during the film, the climax of which is the comic headmaster’s attempt to beat five boys all at once with an unwieldy four-metre cane. The camera closes in on the buttocks of the five bent over boys, including the main boy character, called (what else?) Wendover, as the headmaster prepares them. The element of humiliation inherent in spanking (and most obviously realised through the requirement to bend over) was clearly considered hilarious. It is all more material for the web sites.

Exploitation of the comic potential in seeing boys being caned continued in the 1980 short film *The Dollar Bottom*,⁷⁹ which also received a ‘U’ certificate. This time the entire plot revolved around child beating. The boys of a Scottish school set up an insurance scheme against corporal punishment. The scheme results in boys choosing to be beaten so as to collect a pay-out. Thus we discover that being beaten as a child is not so bad after all and a little money makes it all worthwhile. *Kids from Shaolin*, (1983)⁸⁰ becomes, for something as macho as a Kung Fu flick, incredibly fixated on the buttocks of one small boy.⁸¹ It finds no fewer than four opportunities to display them bare, each being treated humorously: when he is discovered attempting to protect himself from a caning by placing a metal plate in his trousers, during Kung Fu practice, when he sits on a porcupine, when he is put across his mentor’s lap and, after being told he is the naughtiest boy in the village and so playfully pleading to be spanked, he is, while in the same position, pricked by a needle in the buttocks while his mentor attempts to repair a large tear in the seat of the trousers the boy is wearing. “Did I hurt you?”, the mentor asks the boy. “No, I’ve got used to it”, comes the child’s resigned response. So, might weary viewers add, are we.

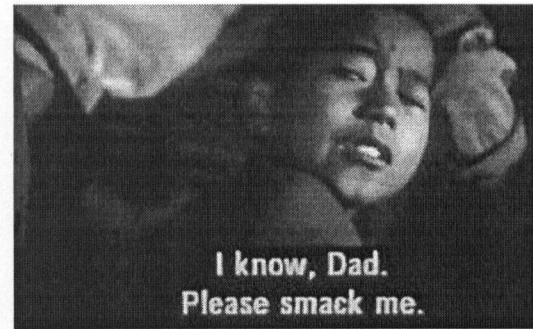
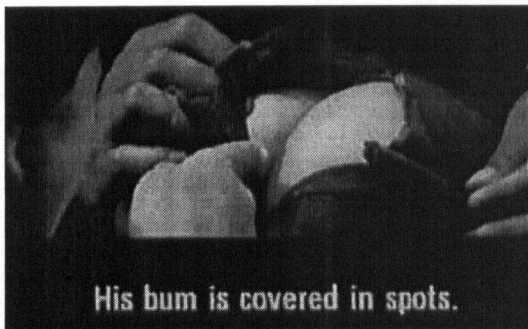
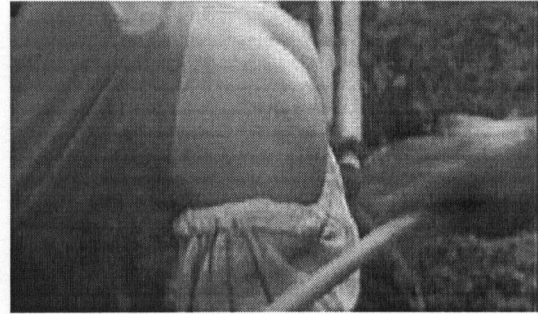
⁷⁷ Directed by Mario Zampi. The film does not appear to have been released in the Maritime Provinces.

⁷⁸ Broadcast by the BBC, 1956 - 60, reprised 1971-72.

⁷⁹ Directed by Roger Christian. It does not appear to have been released in the Maritimes.

⁸⁰ Directed by Xinyan Zhang. The film’s original title was *Shao Lin Xiao Zi* and it is also known under the titles *Kids of Shaolin*, *Shaolin Boys*, *Shaolin Kids* and *Shaolin Temple II - Kids from Shaolin*. BBFC classification on theatrical and video release: “15”. MFCB classification: “14”.

⁸¹ In fact, this is not the only Kung Fu film to include a spanking. *Kung Fu Kids* (1986), directed by Yin-Ping Chu also shows a boy’s bare buttocks being spanked.



Figs 15 to 18: These stills, with subtitles, all come from the Kung Fu film Kids from Shaolin (1983, Jet Lee, director Xinyan Zhang). The fighting has to take a break while we are shown the bare buttocks of the same little boy on four separate occasions. These images come from three different scenes (the top row are from the same scene) and were all found on The Movie and TV Spanking Page. The top two images come from a scene where a row of boys are caned. The boy shown in the other two scenes has his pants pulled down after he is discovered trying to use a metal plate as protection. What's with the finger in Fig. 17?

If *Bottoms Up* and *The Dollar Bottom* are primarily about spanking, and *Kids from Shaolin* is so interested in showing, caning, spanking and pricking a small boy's buttocks, why are they not pornography? Clearly the censors perceived no sex. Yet the spanking videos show no sexual activity either, at least as sex is defined by British Columbia's *Motion Picture Act Regulations*.⁸² Yet the sexual interest in the spanking videos is palpable; we can see no other reason to produce them. To convince that the last three movies are sexual takes greater effort. No doubt their audience would, in equal measure, be both shocked and outraged at any suggestion that what they were watching is sexually titillating. It is when sexual interest is spelled out that society objects. Little boys are not deemed sexually appealing, so it is acceptable to show their buttocks. Yet, paradoxically, little boys are so sexually appealing that we must go to tremendous lengths to protect them. Eradication of child pornography is probably one of the censors' ultimate goals,

⁸² B.C. Reg. 260/86

yet what hinders their efforts is the very value (i.e. children are not sexy) that they are trying to uphold.

Thus all the child beating scenes I have mentioned were approved by the censors because none were regarded as “sexual, or sexualised, assault or abusive, harmful or degrading sexual activity”.⁸³ The element of assault was certainly there, since (with one exception referred to below) there is no suggestion that the child consents. Arguably abuse and harm are present, depending on one’s attitude to corporal punishment. Degradation, or at least humiliation, is surely also present. So, often, is child nudity. The element that is missing is sex.

Sex might be considered entirely subjective; any activity is sexual if at least one party involved considers it so. Canada and England’s criminal laws disagree,⁸⁴ but cinema regulators’ remit extends beyond application of the criminal law. Instead they are concerned with broad societal attitudes and norms. In *R v Court* the law admitted evidence of sexual gratification to render child spanking a sexual act. The censors could similarly seek out such evidence and deem to be child sex any spanking perpetrated with a sexual motive.

In no film that I have seen is it spelled out in entirely non-equivocal terms that the person spanking the child is deriving sexual gratification. In *The Basketball Diaries* (1995)⁸⁵ a teacher who paddles Leonardo DiCaprio, playing a high school student, is accused of being a pervert by another boy. The allegation remains untried and there is nothing about the teacher’s performance that indicates to me sexual enjoyment.⁸⁶ Generally, however, the film maker’s purpose in depicting (at least the more severe) beatings seems to be to elicit sympathy for the child and shock at the pain and humiliation it is suffering, as well as antipathy for the heartless inflictor of the punishment. This can be achieved without dwelling on the latter’s sexual predilections.

It can be imagined that directors wishing to hint at sexual pleasure, but not being able or willing to spell it out, might do so through a lustful gaze, a tremble to the hand or voice, a lick of the lips. *Lawrence of Arabia* (1962)⁸⁷ makes rather heavy-handed use of such tools when the protagonist (as an adult) is caned by Turkish troops. I have found just one film, arguably involving a child, that employs similar visual language of sexual desire. In *Moritz, Lieber Moritz*⁸⁸, a German film released theatrically and on video in Britain under an ‘18’ certificate, but apparently not available in Canada, the aunt’s gaze at her teenage nephew’s naked buttocks and the protrusion of her tongue as she strikes them have a

⁸³ *Ibid.*

⁸⁴ See, for instance, *R. v. George*, [1956] Crim.L.R. 52, (Lincoln Assizes), in which it was held that removing a shoe from a young girl’s foot could not constitute indecent assault. See also Chapter 2.

⁸⁵ Directed by Scott Kalvert, (1995). BBFC classification on theatrical and video release: “18”. MFCB classification: “18”.

⁸⁶ The compiler of one major spanking web site disagrees and describes the teacher as “salivating” during the punishment: *Arild’s Movie Spanking List*, *supra* note 29.

⁸⁷ Directed by David Lean. BBFC classification on theatrical and video release: “PG”. MFCB classification: “G”.

⁸⁸ Directed by Hark Bohm, (1977). BBFC classification theatrically: “X” (equivalent to the modern “18”).

distinctly sexual edge. It should be said, however, that the actor playing the nephew is, in my estimation, 16 if not older, disqualifying the scene as an indecent child image under English law.



Figs 19 & 20: Two stills from Moritz, Lieber Moritz (1979, director Hark Bohm). The aunt's face exudes sensuality as she strikes her young nephew in a beautifully shot sequence. The images are taken from Arilds Movie Spanking List.

In many other films the beater, generally through facial expression, exhibits pleasure in the beating.⁸⁹ Rarely is there anything to indicate that the pleasure derives from sexual gratification, rather than a simple taste for cruelty, although I question whether the two can be meaningfully distinguished. Sometimes, particularly in older films made when spanking was more openly accepted, the spanker is smiling along with the audience in

⁸⁹ *The Slingshot* and *David Copperfield* are but two of many examples that immediately spring to mind.

satisfaction that justice is being meted out to a deserving brat.⁹⁰ In other films the pleasure seems to come from the realisation of revenge. Some films possibly suggest more, but the message is so heavily coded as to be easily capable of misinterpretation. I find it hard to imagine that anyone who pursues high school freshmen with as much enthusiasm as the paddle-wielding upperclassman in *Dazed and Confused* (1993)⁹¹ could be motivated by anything less powerful than the imperatives of the groin. The movie shows two (fully clothed) boys being caught and falling victim to his paddle, but no sexual motive is suggested beyond the energy and glee the upperclassman lends to his task. This may be a depiction of brutality we prefer to compartmentalise into the non-sexual category, separate from what we like to distinguish as sadism.

Outside the spanking sphere, there is nothing rare about films that represent adults' sexual desire for teenagers, if not younger children. There are all those films that present such relationships, including incest, unambiguously as sexual abuse, a social ill as evil as rape. None that I have seen contain graphic sex. Just enough is shown so that the audience knows what is happening. The rest of the film is devoted to ensuring that what has happened is soundly condemned.⁹²

Series like *Little Rascals*,⁹³ produced from 1922 to 1944, clearly condoned spanking as a natural part of child rearing. As the activity has become increasingly marginalised in society, so have films become more condemnatory. One of the most interesting, and certainly unexpected, critiques appears in the tawdry horror film *Edge of Sanity* (1989)⁹⁴. This movie grafted the Jekyll and Hyde story onto the legend of Jack the Ripper, suggesting that Hyde was Jack. It suggests that the Ripper's fury against women, unleashed by Dr. Jekyll's drug, originated from Jekyll's humiliation at being taunted by a woman while being spanked naked as a young boy. All the same, the film does not miss the opportunity to show us the boy's bare buttocks in the process.

Lolita has already been mentioned, and seems the most immediately quoted example of cinema 'paedophilia'.⁹⁵ In the original novel Professor Humbert's step-daughter, who becomes the object of his sexual obsession, is just 12. Neither movie version dared use such a young actress. Instead *Lolita* is played both times by a 15-year-old. In Stanley

⁹⁰ This is the case in many of the spankings that appear in the *Little Rascals* or *Our Gang* series of cinema shorts produced from 1922 to 1944. See Chapter 6 for more on these.

⁹¹ Director Richard Linklater. BBFC classification on theatrical and video release: "18". MFCB classification: "14".

⁹² *I Know my First Name is Steven* (1989) directed by Larry Elikann, a made-for-TV American film that was released in Britain on video, is a good example of a work that is extremely circumspect at depicting the sex, and which is devoted entirely to depicting the trail of misery that results. BBFC certification on release on video: "15" (no theatrical release in Britain). I have no information on whether it was released in Canada. *Priest* (1994), directed by Antonia Bird, includes one momentary shot of the father lying in missionary position with his daughter. Both are apparently fully clothed. The rest of the film is equally condemnatory as to what has happened. BBFC certification on theatrical and video release: "15". MFCB certification: "14".

⁹³ These were initially directed by Hal Roach.

⁹⁴ Director Gérard Kikoïne. BBFC certification on theatrical and video release: "18" (after requiring that 2 mins, 18 secs be removed). MFCB certification: "18".

⁹⁵ See *supra*, note 34.

Kubrick's 1962 version, not even a kiss is shown between her and the protagonist; the fact that sex is taking place is heavily coded. The 1997 remake is far more explicit. Lolita is depicted as younger, although she does not look 12, the two kiss passionately and there is a fleeting and distantly shot glimpse of her breasts. Even so, neither film



Figs 21 & 22: In Stanley Kubrick's 1962 Lolita, the title role, supposedly a 12-year-old girl, was played by 15-year-old Sue Lyon (left). This is the most revealing shot of her in the film. In the 1997 re-make the role was taken by Dominique Swain (right), also 15. Neither looks remotely 12. Despite Lolita often being referred to as cinematic child pornography, these stills were taken not from erotic web sites but from the videos' boxes.

contains as much child nudity as the 31 movies with bare spanking scenes referred to above. The difference is that the two are having vaginal intercourse, (spelled out in the later film), which is unmistakably sex. What is more significant is that unlike most films depicting "child abuse", *Lolita* is far from innocent in bringing about her sexual liaison with her stepfather (again this is much more strongly stated in the later film). Although the BBFC interpreted the 1997 film as a cautionary tale against sex with children, this message is far more shaded than in those works that starkly characterise child exploitation, the man being more exploited than the manipulative girl.⁹⁶

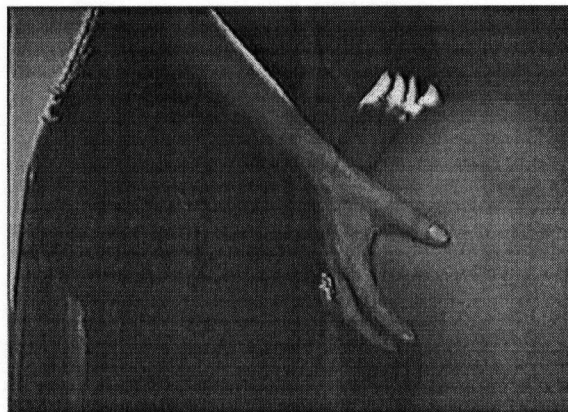
Just as young *Lolita* seduces Professor Humbert, so does coquettish young Tadzio make eyes at the sickly middle-aged composer who lusts after him in *Death in Venice* (1971).⁹⁷ As in *Lolita*, however, intergenerational love receives no positive reinforcement, the boy drawing the man to a pathetic end. What distinguishes *Death in Venice* from *Lolita* is that in the former the man's sexual desires are not realised. The boy's role in the seduction is also far more subtle, even disputable. Hence the film attracted far less controversy.

⁹⁶ Indeed I think the BBFC's interpretation of the ultimate message of the film is debateable.

⁹⁷ Director Luchino Visconti. BBFC certification on theatrical release: "AA" and "15" on video release in 1988. MFCB classification: "G".



Figs. 23 to 25: Exit to Eden (1994) dares to introduce spanking as an element in childhood sexuality. Yet it shows some circumspection as regards the body of young Brian Davila (below), who plays Eliot being spanked as a boy for mischief. 30-year-old Paul Mercurio is afforded less modesty when he plays Eliot later in life, although he is spanked as erotic foreplay at an S&M vacation centre (bottom image). Eliot's boyhood spanker, (Rajia Baroudi) is similarly required to display some of her sexual assets. The top two images were taken from The Movie and TV Spanking Page. That of Mercurio comes from Arilds Movie Spanking List, which also deals with adult spankings.



In just three films that I know of, it is suggested that the pleasure in spanking is the child's. I do not have in mind those numerous films where the spanking is given in jest, as horseplay, to the amusement of both spanker and spanked.⁹⁸ Rather I am thinking of those few films in which children seek out spankings. *Moritz, Lieber Moritz* has already been mentioned. A teenage boy, who is attracted by his beautiful young aunt, deliberately misbehaves so as to be spanked by her. When the aunt appears in his bedroom the boy is naked and face down in bed, pretending to sleep. The aunt pulls back the bed cover, takes up a ruler left conveniently by the bed side and the camera closes up on the buttocks as they are struck, with obvious relish. The aunt's gaze and the subsequent look exchanged between them clearly suggests mutual pleasure at the proceedings.

The proviso about the nephew being possibly over 16 does not apply to *Dottie Gets Spanked*⁹⁹. This British short, which enjoyed just a limited art theatre release under a '12' certificate in 1996,¹⁰⁰ deals with a seven-year-old boy's fascination with spanking. He sees his favourite (adult) female sit-com star being spanked on TV, is threatened with a spanking by his parents and later fantasises about being spanked himself. The film shows part of the boy's fantasy, where he is put over someone's knee, but he is not actually spanked on camera. Thus the desire is depicted, but not its realisation.

The only film I know that depicts both desire and realisation is *Exit to Eden* (1994).¹⁰¹ The central character is Elliot Slater, a man who is aroused by being spanked by women. The film includes a scene from Elliot's childhood when, aged around seven, he misbehaves in order to earn himself a spanking from his family's buxom young French housekeeper. The maid is shown pulling down his trousers and delivering at least one smack through the boy's underpants, the other blows being shot so as to keep her voluptuous breasts in vision. After several smacks the boy sighs with pleasure. For a mainstream movie, this film is brave in depicting the spanking fetish as acceptable, so much so that even the romantic hero can have one. The film concludes with Elliot marrying his dominatrix, showing that true love and spanking can cohabit.

Like the boy spanking in *Dottie Gets Spanked*, the spanking of Elliot as a boy is far from graphic. Neither involves nudity. Conversely that of Elliot the man shows bare buttocks, very closely shot, suggesting that the producers were far more relaxed once no child was involved in an act that pleasure renders sexual. This is consistent with the criminal law's concept that spanking is sex once it has a sexual motive. Cinema will depict spanking as representing sex for either adult or child participant, but will do so cautiously. Graphic

⁹⁸ For example, in *The Bad Seed*, (director Mervyn LeRoy), given an '18' certificate in 1956 by the BBFC, a mother laughs while spanking her giggling (fully clothed) 8-year-old daughter. MFCB classification: "14".

⁹⁹ Director Todd Haynes

¹⁰⁰ It was subsequently released on video in 1997 under the same certificate. I have no information on it being released in Canada.

¹⁰¹ Director Garry Marshall. The film was released in both Britain (theatrically and on video) and Canada under an "18" certificate.

depictions are reserved for spanking as non-sexual. And regardless of the significance spanking might have for its participants on the screen, public morality determines that it must never, ever, have significance as sexual for the viewer.

Chapter 5

BROADCASTING REGULATION

Broadcasting is a regulated enterprise in both Britain and Canada. With minor exceptions, licences have been required by any station transmitting radio or television programming since the very inception of the media in the early decades of the 20th century.¹ Both countries continue to justify such regulation chiefly on the basis that frequencies are a finite resource that must be allocated to maximum public benefit. Thus, as well as various technical requirements, both countries regulate content.

This chapter looks at the extent to which those regulations control the eroticisation of children. Even more than the cinema and video regulators examined in the last chapter, it will be seen that those who oversee broadcasting are intolerant of such practices. In addition the broadcast regulations, particularly in Canada, are geared towards prohibiting the sexualization of violence. Again I shall enquire into how it is that despite these measures, images from Canadian and British television have found their way to the internet child spanking sites.

This chapter has another purpose. I also consider Canadian broadcast regulations in the area of eroticising children in relation to Canada's constitution, which guarantees the right to freedom of expression.² Britain's derisory efforts to incorporate the same right

¹ E.g. a licence was required under the *Radiotelegraph Act*, S.C. 1913, c. 43 when the Marconi Company of Montreal first transmitted a series of test programmes in Canada in 1919. See Kaufman, D. S., *Broadcasting Law in Canada*, (Toronto: Carswell, 1987). EMI had to apply to the General Post Office when it proposed a public television service in Britain in 1933. The present legislation requiring licences in Britain is the *Broadcasting Act*, 1990, c. 42, s. 13 for television and s. 97 for radio. As for Canada, it is the *Broadcasting Act*, S.C. 1991, c. 11, s. 32. (1).

² Section 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, [hereinafter the *Charter*].

into its laws, which has taken the form of the adoption of the *European Convention*, need not detain us.³ The Convention specifically permits governments to require licenses for broadcasting, and allows sufficient grounds for restricting the freedom, including the prevention of crime and the protection of health or morals, that it is unlikely to have much impact on the broadcast regulations of most liberal democracies.⁴ Conversely, the *Canadian Charter of Rights and Freedoms* has led to a culture of judicial activism in Canada concerned with protecting freedom of expression from government restriction.

I did not embark on a similar exercise as regards Canada's criminal law or cinema and video regulation in the area of eroticising children. As for the criminal law, the constitutionality of the obscenity provisions has already been confirmed by the Supreme Court of Canada.⁵ Those relating to child pornography have also received judicial approval, except in one aspect, which will be discussed below.⁶ Regarding cinema and video regulation, I felt that since many issues relating to their constitutionality in this area would be the same as for that of broadcast regulations, then to discuss the constitutional status of both regulatory regimes would involve duplication. Analysis of the broadcasting rules was preferred over those of cinema and video since, as I shall elaborate below, the former raise two particular issues of interest. First, it is disputable whether the broadcast rules are an act of government and thus required to conform to the constitutional restraint on measures abridging freedom of expression, whereas the cinema and video regulations are unmistakably acts of government, embodied as they are in provincial legislation. Secondly, there is some dispute as to whether the right to freedom of expression is synonymous with the right to broadcast, whereas the same is less likely to apply to the right to exhibit films or distribute videos.

BACKGROUND TO BROADCASTING REGULATION

The licensing of private commercial stations began in Canada in 1922, the same year that the British Broadcasting Company was founded. Becoming the British Broadcasting Corporation in 1927, the BBC monopolised British broadcasting in its early decades, during which there was no real state regulation on issues of decency in broadcasting. Instead the government was content to rely on the Corporation's politically appointed governors as stalwarts against any moral decline.⁷

The advent of competition from commercial television in 1955 led to a perceived decline in standards in British broadcasting and from the 1960s onwards there was relentless campaigning, primarily from Christian groups, for government to bring both

³ *Human Rights Act*, 1998, c. 42, s. 1.

⁴ *European Convention on Human Rights and Fundamental Freedoms*, Article 10, 213 U.N.T.S. 221

⁵ *R. v. Butler*, [1992] 1 S.C.R. 452, 8 C.R.R. (2d) 1, [hereinafter *Butler*]

⁶ They were approved in *Re. The Queen v. Langer*, [1995] 97 C.C.C. (3d) 290, (1995) 123 D.L.R. (4th) 289, (Ont. C.A.), but part was struck down by the British Columbia Court of Appeal in *R. v. Sharpe*, (1999), 175 D.L.R. (4th) 1, 134 C.C.C. (3d) 222, (B.C.C.A.), [hereinafter *Sharpe*], see discussion below. The judgment of the Supreme Court of Canada is pending in the latter case.

⁷ For a history of British broadcasting regulation relating to taste and decency, see Smith, A., *Television, An International History*, 2nd ed. (Oxford U. P., 1998), chapter 9.

the BBC and independent television to heel.⁸ Although the Conservative government of the early 1970s toyed with the idea of an independent statutory body to adjudicate on complaints, prompting the BBC to set up its own complaints commission, it was not until 1990 that another Conservative government established the Broadcasting Standards Council, with limited but statutory powers in the areas of violence, sexual conduct and matters of taste and decency.⁹ With its merger in 1996 with the body established to adjudicate on complaints concerned with fairness and privacy in broadcasting, the Broadcasting Standards Council became the Broadcasting Standards Commission.¹⁰

Since 1976 regulation of broadcasting in Canada has fallen under the remit of the Canadian Radio-Television and Telecommunications Commission. The *Broadcasting Act*, 1991 authorises the CRTC to make regulations respecting standards of programmes for the purpose of giving effect to the government's broadcasting policy,¹¹ which is elucidated in section 3 of that Act and which primarily concerns protection of national identity, but which also contains the vague exhortation that programming "should be of high standard".¹² In 1978 the CRTC, in accordance with the Act's precursor, produced its first such regulations for cable and wireless television as well as radio.¹³

In Britain the *Broadcasting Act* of 1996 obliged the new Broadcasting Standards Commission to draw up a code giving guidance as to practices to be followed in connection with the portrayal of sexual conduct in programmes, as well as "standards of taste and decency for such programmes generally".¹⁴ Consequently in June 1998 the BSC¹⁵ published its *Code on Standards*, which was a revision of the Code produced by the defunct Broadcasting Standards Council.¹⁶ The Broadcasting Act requires broadcasters to reflect the general effect of that Code in devising any codes dealing with standards and practice for their programmes.¹⁷

Canada's regulation of sexual conduct is far more circuitous. The current regulatory framework, introduced between 1986 and 1990, fell between the 1982 creation of a constitutional guarantee of freedom of expression¹⁸ and the 1992 case of *R. v. Butler*,¹⁹

⁸ By far the most famous complainant was Mary Whitehouse, a Christian school teacher, who from 1963 became synonymous with the "moral crusade" on television. She launched her "Clean Up TV" campaign in 1964.

⁹ *Broadcasting Act*, 1990, *supra* note 1.

¹⁰ *Broadcasting Act*, 1996, c. 55

¹¹ *Broadcasting Act*, *supra* note 1, s. 10(1)(c).

¹² *Ibid.*, s. 3(1)(g).

¹³ These were subsequently replaced by the *Radio Regulations*, SOR/86-982 and the *Cable Television Regulations*, SOR/86-831, both of 1986, and the *Television Broadcasting Regulations*, SOR/87-49, 1987. The *Specialty Services Regulations*, SOR/90-106 and the *Pay Television Regulations*, SOR/90-105 were added in 1990 to complete the regulatory framework of television.

¹⁴ *Broadcasting Act*, 1996, *supra* note 10, s. 108(1)

¹⁵ In this thesis the abbreviation BSC refers to the Broadcasting Standards Commission, established in Britain in 1996, rather than its predecessor, the Broadcasting Standards Council.

¹⁶ See Appendix IV.

¹⁷ *Broadcasting Act*, 1996, *supra* note 10, s. 108(2)

¹⁸ Section 2 (b) of the *Charter*, *supra* note 2.

¹⁹ *Supra*, note 5

which removed doubt as to the constitutionality of the criminalisation of obscene material.²⁰ Perhaps for this reason, the CRTC's broadcasting regulations relating to the depiction of sexuality and nudity do nothing more than duplicate that criminal law.²¹ Instead the regulations focus on the exposure of individuals or groups to hatred or contempt on the basis of such grounds as race and sex.

A pre-occupation with egalitarian concerns, rather than the preservation of sexual morality, is evident from both the title and the wording of the Canadian broadcasting code concerned with the depiction of nudity and sexual activity. *The Sex-Role Portrayal Code for Television and Radio Programming*, however, is not the direct work of the CRTC, but was devised by the Canadian Association of Broadcasters, who also set up the Canadian Broadcasting Standards Council to consider complaints brought under it. Rather than being framed in the language of taste and decency, the Code centres on systemic discrimination and degradation based on gender. Almost as an adjunct appears a prohibition against the "sexualization" of children.

Just as the *Sex-Role Portrayal Code* reflects the Canadian criminal law, which has legitimised its prohibition of obscene material primarily on the basis of women's comparatively disempowered status,²² so is the standard of "decency" enshrined in the BSC's *Code on Standards* obviously informed by the concept of indecency in English criminal law. The term "decency" is typically coupled with "taste" in British broadcasting, the *Code on Standards* distinguishing the two by defining the former as based on more deep, fundamental values and emotions.²³

Despite the British Code's more traditional terminology, the BSC has clearly absorbed the same ethic of gender egalitarianism that seems to animate its Canadian counterpart. What is more, both the BSC and the CBSC are functionally very similar. Both consider audience complaints only subsequent to broadcast, both require a response from the broadcaster and both may impose just one sanction; the transmission by an offending broadcaster of a summary of the regulators' finding. National distinctions are further blurred when the nature of the complaints filed by the two countries' respective audiences are compared. Both reflect very similar concerns, which are mainly depiction of disadvantaged groups, profanity, foul language, violence and, of course, sexual conduct.

²⁰ *Criminal Code*, R.S.C. 1985, c. C-46, s. 163

²¹ The regulations prohibit obscene language and, in the case of television, obscene pictorial representations: *Television Broadcasting Regulations*, 1987, *supra* note 13, s. 5(1), *Cable Television Regulations*, 1986, *ibid.*, s. 15.1, *Specialty Services Regulations*, 1990, *ibid.*, s.3, *Radio Regulations*, 1986, *ibid.*, s. 3. Note that pay television is exempt from both prohibitions: *Pay Television Regulations*, 1990, *ibid.*, s. 3(2). Obviously it is, however, subject to the general criminal law on obscenity.

²² See *Butler*, *supra* note 5.

²³ BSC *Code on Standards*, para. 16

THE CONSTITUTIONALITY OF THE CANADIAN *SEX-ROLE PORTRAYAL CODE*

Section 2(b) of the *Canadian Charter of Rights and Freedoms* guarantees everyone, with specific reference to the press and “other means of communication”, the right to freedom of expression, subject only to section 1 of the *Charter*, which permits “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Before considering whether the *Sex-Role Portrayal Code*, which is without doubt a restriction on broadcasters’ freedom of expression, would be upheld under this saving provision, I need first to address whether the Code is susceptible to *Charter* review at all, given that the Charter only allows challenge to limitations on guaranteed rights if they result from acts of government.

Ostensibly the *Sex-Role Portrayal Code* is an exercise in self-regulation, referred to by the CBSC as being “without the heavy club or formalities of government sanctions”.²⁴ Certainly the CBSC seems non-governmental, being a creation of the broadcasting industry.

Nevertheless, I believe that the Code can be challenged. First, its history dispels any claim as an industry initiative. It derives from a 1982 report, *Images of Women*, prepared by the Task Force on Sex-Role Stereotyping, which had been formed by the CRTC in 1979. That report directed private broadcasters to organize industry initiatives to address the portrayal of the genders. The CAB subsequently devised its *Voluntary Guidelines on Sex-Role Stereotyping*. In 1986 the CRTC required revision of those Guidelines. As a result, the present Code was formulated, receiving CRTC approval in 1990.²⁵

Secondly, and more significantly, although the Code is often referred to as voluntary, adherence is a condition imposed by the CRTC on all private television and radio licensees, unless they have their own CRTC-approved *Sex-Role Portrayal Code*, as does the CBC.²⁶ This arises from a power bestowed on the CRTC by the *Broadcasting Act*, which permits it to grant licences subject to such conditions as it deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1).²⁷ This policy includes the very broad requirement that programming originated by broadcasting undertakings should be of “high standard”.²⁸

Few would disagree that the CRTC is an organ of government. Indeed it has already accepted that it is susceptible to *Charter* review.²⁹ Therefore any challenge to the

²⁴ CBSC web site, <http://www.cbsc.ca/english/whatis.htm>

²⁵ Grant, P.S. et al., *1998-99 Canadian Broadcast and Cable Regulatory Handbook*, (Vancouver: McCarthy Tétrault, 1998)

²⁶ *Ibid.*

²⁷ *Broadcasting Act*, 1991, *supra* note 1, s. 9(1)

²⁸ *Ibid.*, s. 3(1)(g)

²⁹ *Assn. of Canadian Distillers v. Canadian Radio-television and Telecommunications Commission*, [1995] 2 F.C. 778, [1995] F.C.J. No. 886, (1995) 126 D.L.R. (4th) 386 (F.C.C.)

constitutionality of the Code would most likely take the form of a challenge against a decision by the CRTC to decline to grant or renew a licence, or to revoke an existing one, on the grounds of a licensee's failure or an applicant's refusal to comply with the Code.³⁰ In such a case the court would effectively be considering whether the terms of the Code warrant mandatory compliance.

The above is grounded in two premises. The first is hardly likely to meet challenge; that broadcasting is a means of expression. The second seems to me just as unproblematic; that since section 2(b) guarantees everyone freedom of expression, then it must also guarantee everyone a right to broadcast, fettered only by such restrictions as are justifiable under section 1. Of course this right need not be (and is unlikely to be) interpreted positively, meaning that the right may not be to have the means to broadcast (equipment etc.) provided, but simply the right not to be impeded in broadcasting. Therefore the requirement of a licence to broadcast, or more exactly Government's ability to refuse such a licence, must itself be a restriction on a right guaranteed by s. 2(b). It follows that the CRTC, by imposing a requirement, as a term of all licences, that the *Sex-Role Portrayal Code* (or its equivalent) be adhered to, is restricting that right. Argument should then turn on whether this requirement, as well as the licensing scheme as a whole, is justified under section 1.

Surprisingly in 1984 the Federal Court of Canada rejected such an approach. *New Brunswick Broadcasting Co. Ltd. v. CRTC* concerned not the *Sex-Role Portrayal Code* but government regulations against concentration of media ownership.³¹ The CRTC refused to grant NBBC a full term licence on the basis that it was owned by a group that also published newspapers in the same circulation area. NBBC's argument that this infringed the s. 2(b) rights not only of itself but also of its potential audience was rejected on the grounds that s. 2(b) does not extend to the right to use the property of others as a means of expression. Since radio frequencies have been declared by Parliament to be public property, no one has a *Charter* right to use them, but only the right to purchase air time from a licensed station. Nor did the court recognise a *Charter* right on the part of the public to a broadcasting service to be provided by NBBC. The court thus saw broadcasting not in terms of a means of expression but in terms of use of property.³²

The notion that there is no right to freedom of expression if the exercise of the same involves use of public property did not receive support in later cases brought before the Supreme Court of Canada. For instance, in *Committee for the Commonwealth of Canada v. Canada*³³, which involved leafleting at a publicly owned airport, and *Ramsden v. City of Peterborough*³⁴, which concerned posterage on city owned utility poles, the right to both activities, within certain parameters, was upheld, despite the use of publicly owned

³⁰ *Broadcasting Act*, 1991, *supra* note 1, s. 9 (1) also permits the CRTC, in furtherance of its objectives, to revoke or amend licences, as well as refuse to renew them.

³¹ *New Brunswick Broadcasting Co. Ltd. v. CRTC*, [1984] 2 F.C. 410, (1984) 13 D.L.R. (4th) 77, 12 C.R.R. 249 (C.A.)

³² But buying air time from a licensed station is, surely, a much clearer case of using the property of another than is setting up a broadcasting station to transmit directly.

³³ [1991] 1 S.C.R. 139, (1991) 77 D.L.R. (4th) 385, 4 C.R.R. (2d) 60

³⁴ *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, (1993) 106 D.L.R. (4th) 233, 16 C.R.R. (2d) 240

property. I suggest that these decisions, with others, would now lead to *NBBC v. CRTC* being overturned.

If I am correct, then in the event of a constitutional challenge to the *Sex-Role Portrayal Code*, the onus would fall on the CRTC to show that its policy of requiring adherence is justifiable under Section 1. At first brush there seems a good chance that it would. The *Charter* specifically permits laws, programmes and activities that have as their object the amelioration of conditions of disadvantaged individuals or groups, including those disadvantaged because of sex, as well as age, which may support the ban on sexualising children.³⁵ Although written before the decision, the Code accords strikingly with *R v Butler*, in which the constitutionality of the criminal law on obscenity was upheld not on grounds of preserving some standard of public morality opposed to sexual permissiveness but on the basis of the harm, particularly to women, but also to children, supposedly caused by the depiction of certain sexual conduct. Thus, under the heading 'General Principles', the Code states:

Nothing in this Code should be interpreted as censoring the depiction of healthy sexuality. However, broadcasters shall avoid and eliminate the depiction of gratuitous harm toward individuals in a sexual context, as well as the promotion of sexual hatred and degradation.

In this thesis, due to lack of space, I need to restrict myself to just those parts of the Code that deal with sexuality and children. This issue is raised in just two passages, the first again in the context of eliminating gender stereotyping:

Broadcasters shall be sensitive to the sex-role models provided to children by television and radio programming. In this context, programmers shall make every effort to continue to eliminate negative sex-role portrayals, thereby encouraging the further development of positive and progressive sex-role models. The "sexualization" of children in programming is not acceptable, unless in the context of a dramatic or information program dealing with the issue.

Later the Code reiterates:

Television and radio programming shall refrain from the exploitation of women, men and children. Negative or degrading comments on the role and nature of women, men or children in society shall be avoided. Modes of dress, camera focus on areas of the body and similar modes of portrayal should not be degrading to either sex. The sexualization of children through dress or behaviour is not acceptable.

The Code gives no further guidance on what is meant by sexualization.³⁶ An initial enquiry must be whether the prohibition is "void for vagueness". To quote one of

³⁵ *Charter*, *supra* note 2, s. 15 (2).

³⁶ This term is of course capable of a wide range of interpretations. It could simply involve suggesting that children have sexual feelings, although it appears from the CBSC's decision relating to Showcase's broadcast of the movie *Kids* (discussed below) that this is not the case. It also seems that the term is not intended to relate to gender stereotyping or the shielding of children from viewing sexual material, matters which are dealt with elsewhere in the regulations (e.g. elsewhere in the *Sex-Role Portrayal Code* and also in the CAB's *Code of Ethics*).

Canada's leading constitutional law authorities:

A vague law offends the values of constitutionalism. It does not provide sufficiently clear standards to avoid arbitrary and discriminatory applications by those charged with enforcement. It does not provide reasonable notice of what is prohibited so that citizens can govern themselves safely. Indeed, as American judges have noted, a vague law may lead citizens to steer far wider of the unlawful zone than they would if the boundaries were clearly marked.³⁷

However, the standard of precision required by judges is low. All that is required is an "intelligible standard" for the application of the prohibition.³⁸ In other words, the law must not be "so obscure as to be incapable of interpretation using the ordinary tools".³⁹ Given that the statutory definition of obscene material⁴⁰ has been upheld as a sufficiently intelligible standard,⁴¹ and given that a lower standard of certainty is likely to be required of broadcasting regulations than the criminal law, I think there is a good chance that the prohibition would not be "void for vagueness".

Akin to this point, however, is the requirement in section 1 of the *Charter* that any restrictions on the guaranteed freedoms be only those that are *prescribed by law*. In 1984 the Ontario Court of Appeal held that "guidelines" issued by the Ontario Board of Censors and which limited the power of the Board to censor films did not constitute a law.⁴² Consequently they could not be taken into account in deciding whether the general power of the Board to censor films violated freedom of expression. The Sex-Role Portrayal Code could well be subject to a similar line of argument.

The Howard Stern decision

Leaving aside such arguments, which may well defeat any claim by the CRTC that the requirement of compliance with the Code is defensible under section 1, I turn to consider how adjudications under the Code by the CBSC throw light on how "sexualisation" of children is to be understood. In the 10 years since it was established in 1990, the CBSC has received complaints of alleged child sexualization in relation to just two programmes. In the case of just one programme was there a finding against the broadcaster. This was *The Howard Stern Show*, aired on radio station CILQ-FM (known as Q107). Howard Stern is a "shock jock", a radio presenter who delights in outraging with comments that challenged taboos. By the time the issue of sexualising children was considered in February 1998, a mass of complaints had already been upheld against the programme, prompting the CBSC to take the unusual step of requiring that special safeguards be implemented against further breaches of its codes. These were evidently ineffectual, since numerous additional complaints followed, including allegations of children being

³⁷ Hogg, P.W., *Constitutional Law of Canada*, (Toronto: Carswell, loose leaf edition), para. 35.7(c), (referring to *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109).

³⁸ *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927 at 983, 39 C.R.R. 193.

³⁹ *Osborne v. Canada*, [1991] 2 S.C.R. 69 at 94, 82 D.L.R. (4th) 321

⁴⁰ i.e. a 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. *Criminal Code*, *supra* note 20, s. 163 (8).

⁴¹ *Butler*, *supra* note 5

⁴² *Re. Ontario Film and Video Appreciation Society*, (1984) 45 O.R. (2d) 80 (C.A.)

sexualised. The CBSC's adjudication quotes three examples of such alleged sexualization. The following will suffice to give a flavour of all three:

Robin Quivers: In the State of New York, there's an alarming rate of syphilis among babies, Howard.

Howard Stern: Who are they getting it on with?

Robin Quivers: Ah, ah, ah, ah, ah! I don't know. Ah, ah, ah, ah, ah! Could you imagine?

Howard Stern: Yeah, nothing better than a good baby!

Robin Quivers: Ah, ah, ah, ah, ah!

Howard Stern: Yeah, I mean, I don't like to talk about it that much on the air because people think I'm sick. You know what the worst thing about having sex with your sister is?

Robin Quivers: Oh, please!

Howard Stern: Breaking the crib.⁴³

The CBSC, speaking through its Ontario Regional Council, could not have been more condemnatory:

The Regional Council has not previously been called upon to assess the content of talk radio programming of a more serious nature than that involving the participation, real or imagined, of children in sexual acts. However permissive the view of society may be toward consensual sex among adults, there is *no* tolerance in civilized societies for child pornography in any form. ... (emphasis in original).

In the view of the Ontario Regional Council, the program segments quoted above constitute violations of Clause 4 of the *Sex-Role Portrayal Code* which provides very clearly that 'The sexualization of children through dress or behaviour is not acceptable.'⁴⁴

I consider the CBSC's equation of Stern's comments with child pornography to be risible. Although in general parlance "pornography" can be applied entirely whimsically, a body such as the CBSC might give some consideration to its meaning in law. I accept that it is rather pedantic to point out that the statutory definition of child pornography extends only to visual representations and written material, and so excludes radio transmissions. The spoken word can be readily equated with the written, which constitutes child pornography when used to advocate or counsel illegal sexual activity involving children. Words can also paint pictures, and a verbal description of sexual activity or of a child's body can be considered akin to a visual representation, although the criminal law on child pornography does not do so. It appears that the CBSC condemned Stern's words as child pornography both for what they depict as well as for what they advocate. Thus the CBSC speak of being called on to assess "radio programming ... involving the participation, real or imagined, of children in sexual acts".⁴⁵ But surely Stern was depicting child nudity and explicit sexual activity no more than any one who raises the issue (certainly less than I am) and in recent times both issues are certainly favourites to raise.

⁴³ Canadian Broadcast Standards Council Decision 97/98-0487, 488, 504 and 535 re. *The Howard Stern Show*, (CILQ-FM), decided 20 February 1998 (Ontario Regional Council), available at <http://www.cbsc.ca/english/decision/980220.htm>.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

In a later decision the CBSC, referring to the above quoted words of Stern, commented:

That case presented a clear violation of Clause 4 of the *Sex-Role Portrayal Code*. The host was, after all, albeit in jest, advocating the sexual abuse of children.⁴⁶

I believe that this charge also fails, although countering it requires greater effort. As acknowledged by the CBSC, Stern is clearly joking. This was regarded as no defence by the CBSC:

The difficulty with the position of those who would excuse comments on the basis of comedic intent is that the extension of the principle to its logical extreme would lead to a conclusion which the Council finds untenable. It would ultimately justify *any* comment which a host or broadcaster said was intended to be humorous.⁴⁷

This comment demonstrates an alarming lack of sophistication in the CBSC's approach to construing meaning. First the CBSC is imputing on those who perceive comedic intent as relevant in the interpretative exercise the simplistic view that humour is necessarily inoffensive. Such a position is clearly wrong: comments can be offensive exactly because they are meant to be funny. More fundamentally, the CBSC is incorrect in looking at the meaning that is intended, rather than that which is communicated. What is relevant is what is heard by the listener, not what is in the mind of the speaker. All the same, the message will be used by its recipient to attribute intention to its speaker and the attributed intention will then determine whether offence is taken. It is perceived rather than actual intention that is decisive, however mistaken the perception may be.

Once comedic intent is understood, this entirely colours interpretation. Jokes can be subjected to the most sophisticated dissection, but at the simplest level they generally convey one message: here is something to laugh about. Core is this implication that humour is contextually appropriate. The CBSC would have been more persuasive in characterising Stern's comments as child pornography if it did so along these lines: that they trivialise child abuse by deeming it an issue available to humour, and that by doing so a step is taken towards condoning it, which is in turn a step towards its advocacy or counsel.

Even so, I do not find it persuasive to argue that Stern even moves towards advocating or counselling child abuse. His wisecrack must be seen in the context of a shock jock setting out to challenge taboos. In the case of jokes that are self-consciously "sick", the implication of contextual appropriateness for humour contains a twist. The joke says that this is a subject unsuitable for humour, which is exactly why it is suitable for this type of humour. Even without Stern's explicit acknowledgment that his talking about having sex with children will be considered sick, as well as Robin Quivers' professed disapproval at

⁴⁶ CBSC Decision 97/98-1151 re. *Showcase Television's* transmission of *Kids*, decided 3 February 1999 (Ontario Regional Council), available at: <http://www.cbsc.ca/english/decision/990203d.htm>. (discussed below), [hereinafter *Showcase Decision*].

⁴⁷ *Ibid.*

the sentiment being literally expressed, Stern's joke implicitly conveys his understanding that the subject should not be treated lightly.

Stern recognises the taboo against introducing adult sexuality into childhood, but is disrespectful of it. Like all acts of disrespect, his tacitly acknowledges the status of that which is not being shown expected deference. It may be argued that acts of disrespect erode authority, and that the cumulative effect of such humour will be to lessen the taboo. But it can be argued equally convincingly that the norm is thus reinforced. A taboo can only survive through reiteration. The resultant outcry from Stern's comment afforded an opportunity to restate the norm. Indeed the indignity he engendered lent greater force to its reassertion.

Objection might be taken to this last line of reasoning on two grounds. First it relies on events consequent to the broadcast rather than the broadcast *per se*. Even so, Stern's words were in themselves a reminder of the norm, as if such reminder were needed. Secondly it only allows for the reinforcement of the taboo in the minds of its proponents. For dissidents it may have the effect of confirming their non-conformity, an oft spoken objection to child pornography. But not only does this require a pre-existing dissidence, which I can hardly imagine being engendered by this broadcast, it also appears dependent on non-conformists recognising Stern as a fellow dissident, a perception that, to my mind, needs to be founded on a lot more than this rather hackneyed gag.

And if Stern were to be imagined to be advocating sex offending, who is to say that his efforts should be effectual anyway? The actions of the dissident could well dissuade others of the same dissidence. Why should we imagine that delight in rebellion, in being naughty and different, is taken only by Stern?

Even if my predictions about the repercussions of Stern's words are not accepted, I hope I can at least achieve widespread acceptance that erosion of the taboo is but one of a multitude of possible outcomes to what he says. But probably the most immediate consensus achievable on the CBSC's ruling, as indeed might be reached concerning my rather laboured analysis of it, is that it makes a great deal of fuss over nothing. When asked if he is promoting or discouraging sex offending, most would probably see his comments as having no effect either way.

Although the CBSC might consider Stern's comments and their ilk as insidious, if pressed they might accept that what really offended them was not any advocacy of sex offending, but his lack of gravitas when dealing with a subject that, for many, does not readily lend itself to humour. In this context the gravitas required is something more than remaining po-faced, it means some expression of disapprobation. In other words, it is not that Stern condoned adult/child sex, but that he failed to condemn it. Probably censure need not be explicit. The right tone of voice might suffice, or just use of the axiomatic term "child abuse". Thus the Stern decision suggests that the CBSC expects more from broadcasters than adherence to the *Criminal Code's* prohibition on the advocacy of illegal child sexual activity. It requires its denunciation.

The Showcase Decision

Ample evidence to support the above assertion comes from the second CBSC decision on an allegation of sexualising children. This was levelled against Showcase Television after it aired the movie *Kids* in April 1998, shortly after the Stern decision. This drama is set among inner-city teenagers, mostly aged between 13 to 15 years, who are heavily into drugs and sex. The film follows a boy who, despite being infected with the AIDS virus, continues to indulge his passion for having sex with virginal girls. One of his discarded affairs discovers that she has contracted the virus from him. The movie culminates with the girl possibly passing the virus onto another boy when she is raped at a party while unconscious from drugs and alcohol. The movie was both preceded and followed by what the CBSC called a “sober discussion of the realities depicted in the film”, involving various authorities on teenage sexual practices, drug use and AIDS.

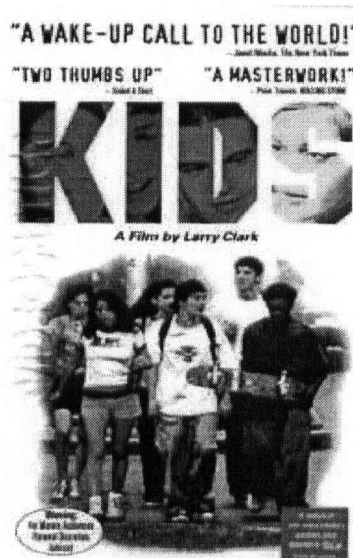


Fig. 26: Video box cover for the movie which the CBSC did not consider “sexualization” of children: *Kids* (1995), directed by Larry Clark.

The complaint made reference to the various depictions of underage sexual intercourse, including the rape. Whereas the Stern case dealt solely with the spoken word, this case involves visual representations. This being so, the criminal law on child pornography could potentially apply to the film, although I assume from the absence of any prosecution that either the scenes were considered insufficiently explicit to be illegal, or that the defence of artistic merit or educational purpose was thought to apply.⁴⁸

⁴⁸ See *Criminal Code*, *supra* note 20, s. 163.1(6)

The CBSC declined to uphold the complaint that the film sexualised children:

While young persons are depicted in the movie as involved in sexual activity, the movie is *about* the dangers of such promiscuity, among other things. The Council does not believe that the restriction on the sexualization of children was meant to prohibit *all* programming dealing *in any way* with child sexuality. For example, the Council does not expect that a violation of Clause 4 of the *Sex-Role Portrayal Code* would result from the broadcast of programming (whether documentary or dramatic) which deals with the sexual abuse of children. (emphasis in original).⁴⁹

What is telling is the importance of the film's emphasis on the dangers of promiscuity in the young. Similarly interesting is the use of the term "sexual abuse" in the example of a programme that might not fall foul of the Code, a term which connotes censure. Note also that the Code refers to the sexualization of children as acceptable "in the context of a dramatic or information program dealing with the issue". For "dramatic", read "sombre", and for "information", read "disapprobation". Any concerns the CBSC may have had about *Kids* were no doubt further assuaged by the earnest studio discussion broadcast either side of it. What is important is not so much the depiction of children in sexual activity (provided, of course, that certain parameters of explicitness are observed), but what message accompanies them.

Similarly the criminal law exempts from prohibition depictions of adult/child sex that have artistic merit or an educational, scientific or medical purpose.⁵⁰ The artist laments the child's suffering,⁵¹ science pathologises the desire, medicine seeks its cure and the educationalist teaches its prevention.

It is worth noting the extent to which it makes a difference whether the child sex depicted or advocated is legal. With the child pornography debate so focussed on abuse of children by adults, it is often overlooked that depictions of entirely legal child sexual activity, such as solitary masturbation or sexual activity between children of approximately equal age, might be prohibited as illegal. Remember too that in the context of child pornography, 'child' is defined as anyone up to the age of 18. Unless there is a relationship of trust or authority between the parties, many sexual acts committed by an adult with a teenager between 14 and 18 are legal. Indeed the child pornography prohibition is drafted so widely as to even include depictions of sex between a seventeen year old married couple.

The criminal law only defines the written word as child pornography when used to advocate or counsel child sexual activity that is illegal. What is more, the only depictions of child sex or nudity that constitute child pornography are those that take the form of visual representations. Verbal material that depicts child nudity or sex, even if such sex is illegal, does not constitute child pornography unless it crosses that line into advocacy or counsel.

⁴⁹ *Showcase Decision*, *supra* note 46.

⁵⁰ See *Criminal Code*, s. 163.1(6)

⁵¹ Note the successful use of the artistic defence in *Re. The Queen v. Langer*, [1995] 97 C.C.C. (3d) 290, (1995) 123 D.L.R. (4th) 289, (Ont. C.A.)

Much of the sexual activity depicted in *Kids* was probably legal.⁵² Yet what saves these depictions from censure is not this, but that the film became a cautionary tale about sexual promiscuity. It should not be assumed that the CBSC are taking some moral stance opposed to permissiveness: the perceived danger may well be the contraction of disease and certainly there is no indication of condoms in the film's sexual encounters. All the same, the Showcase decision indicates that unlike that of the criminal law, the CBSC's tolerance of depictions of at least some child sexual activities is contingent upon negative portrayal.

Conclusions re the meaning of the 'sexualization' of children

To summarise, the *Sex-Role Portrayal Code*, as administered by the CBSC, appears to extend beyond the criminalisation of child pornography in the following respects:

1. It applies to the spoken word, both in its descriptive and prescriptive capacities, whereas the criminal law deals only with visual representations and the written word.
2. Verbal depictions of *illegal* child sexual activity do not constitute child pornography unless they cross the line into advocacy or counselling. It appears that the CBSC, instead of just prohibiting advocacy, also require that depictions of illegal child sex be contextualised negatively.
3. Verbal depictions, advocacy and counselling of *legal* child sexual activity do not constitute child pornography. It seems that at least in the case of sexual promiscuity, the CBSC again requires negative contextualisation.

Would the Code be upheld under section 1 of the *Charter*?

Given the above extensions beyond the criminal law, would the *Sex-Role Portrayal Code's* prohibition on sexualising children, if challenged as unconstitutional, be upheld as a reasonable limit demonstrably justifiable in a free and democratic society? I shall assume that the *Criminal Code* relating to the prohibition on distributing child pornography would be upheld, as it was by the British Columbia Court of Appeal in *R v. Sharpe*.⁵³ I therefore need only examine the extensions beyond the criminal law I have identified above.

Whether the prohibitions might be permitted to extend to radio would depend in part on how the courts view the rationale behind exempting the spoken word from the child pornography law. Given the haste with which the bill to enact Section 163.1 passed through Parliament, probably no conscious decision was made to differentiate between

⁵² I shall leave aside for these purposes the complex issue of criminal liability for passing on the AIDS virus. Even the 'rape' may not have constituted a criminal act if the perpetrator was under 14: *Criminal Code*, *supra* note 20, s. 150.1(3).

⁵³ *Sharpe*, *supra* note 6. This case held s. 163.1 unconstitutional only in so far as it relates to mere possession, as opposed to distribution or possession for the purposes of distribution, of certain types of child pornography. The Supreme Court of Canada's judgement on this matter has been reserved and is expected shortly.

the written word, which is included in the prohibition, and the spoken, even less so when the latter is broadcast. The amendment to include the written word was pressed on Parliament by Detective Sergeant Matthews, Head of the Child Pornography Task Force of the Ontario Provincial Police and Detective Wolff of the Vancouver Police Department Pornography Task Force during the bill's hurried committee stage, just hours before the bill received its third reading.⁵⁴ In doing so Matthews and Wolff made particular reference to NAMBLA,⁵⁵ which had been publishing bulletins containing verbal advocacy of "intergenerational, non-exploitative" love between men and boys, without any accompanying erotic imagery. MP Tom Wappel,⁵⁶ who sat on the committee to which Matthews and Wolff made their appeal, seems to have been particularly appalled by the organisation. Speaking of NAMBLA's *Bulletin*, he said: "the whole magazine is an intellectual attempt to justify paedophilia".⁵⁷ Intellect, it seems, is not something to apply to this issue.

Thus the inclusion of the written word seems to be specifically in response to NAMBLA's publications. The courts would no doubt see that radio advocacy of illegal child sexual activity can be analogised to the same promotion by NAMBLA bulletins and, if upholding a prohibition on the latter, would no doubt allow regulation of the former, especially when no criminal sanctions exist.

Once it does so, it would no doubt extend to the spoken word used both to depict and advocate illegal child sex. I am also sure that the court would allow a less stringent test of explicitness, as well as a prohibition of a lesser degree of nudity, as regards both the spoken word and visual depictions, on the basis of television and radio's relative accessibility for children and also because there is an element of intrusiveness by both media into the home, often to an unwary audience which has comparatively little warning of such material or means for its avoidance, even as regards programming broadcast late at night. In this respect, the courts would still permit broadcasters the role of guardians of public taste and sensibility, despite the fact that protection from offence is not generally considered by the libertarian approach to freedom of expression to justify its limitation.⁵⁸

Less clear is whether the courts would uphold the requirement of negative contextualisation for all depictions or discussion of child sexual activity. I think that most likely a distinction would probably be drawn on the basis of whether the activity is legal. The clearest indication of this comes from the British Columbia Court of Appeal in the recent and much publicised prosecution of John Sharpe for possession of child pornography. In considering the constitutionality of the charge, Southin J. examined one of the common justifications for prohibiting child pornography, namely that it reinforces

⁵⁴ House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Solicitor General*, (June 10, 1993) at 105:16

⁵⁵ North American Man-Boy Love Association

⁵⁶ MP for Scarborough West.

⁵⁷ Said during the committee stage of Bill C-128, which became Section 163.1. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Solicitor General*, *supra* note 54.

⁵⁸ The upholding of Canada's anti-hate speech laws suggests that this argument is not entirely accepted in Canadian law.

paedophiles' 'cognitive distortion', i.e. their supposed belief that children are appropriate participants in sexual activity. She said:

To believe that a child could not only not be harmed by premature sexual conduct, but also take pleasure in it, seems to me an absurdity, and, therefore, a 'cognitive distortion'. But to believe that sexual congress between an adolescent and an adult (who may only be eighteen) may be a good thing or, at least, is not an unmitigated evil, is not, in modern Canada in which many adolescents, by their own choice, are not chaste, a 'cognitive distortion'. I may think it would be better if they were, but that is a matter of morality not reality.⁵⁹

Earlier in her judgment Southin J. defines 'child' as being under 14 years and 'adolescent' as between 14 and 18. Since 14 coincides with the age of consent for most sexual activities, Southin J. is indicating readiness for some level of expression, perhaps even taking the form of visual depiction, that presents legal sexual activity involving adolescents and adults as perhaps salutary for those involved. As for discussion of activity involving younger children, no such tolerance is shown. Probably Southin J. only had in mind incidents of children being led into sexual activities by adults, but certainly any permissive attitude to such behaviour is dismissed as a form of madness. Thus it can be seen how strong a hold societal norms can take.

REGULATION OF BRITISH BROADCASTING'S TREATMENT OF CHILDHOOD SEXUALITY

In marked contrast to Canada, where the *Sex-Role Portrayal Code* has given rise to complaints of the sexualization of children against just two programmes (one upheld) in 10 years, Britain's Broadcasting Standards Commission considered complaints against 13 programmes just in the 16 month period from February 1999 to May 2000. Complaints were upheld against four of the programmes. I have no ready explanation as to why the issue is raised far more frequently in Britain. It raises the question whether the BSC's *Code on Standards* is more restrictive in this regard, but this is not immediately apparent from its wording.⁶⁰ The BSC's attitude is well encapsulated in the sentence that introduces the issue:

A sexual relationship between an adult and a child or between under-age young people can be a legitimate theme for programmes: it is the treatment which may make it improper, or even unlawful. The treatment should not suggest that such behaviour is legal or is to be encouraged.⁶¹

It is unlikely that Canada's regulators would take exception to these sentiments. The Code then goes on to prohibit transmission of explicit sexual acts between adults and children.⁶²

⁵⁹ Sharpe, *supra* note 6

⁶⁰ BSC *Code on Standards*, see Appendix IV for an extract thereof.

⁶¹ *ibid.*, para. 87

⁶² *ibid.*



Fig. 27: The sex scene from Channel 4's Queer as Folk, whose explicitness attracted censure from Britain's Broadcasting Standards Commission. 15-year-old Nathan, lying down, was played by 18-year-old Charlie Hunnam. This still from the series was found on the internet and is thus available in Canada. If taken to show a person depicted as under 18 and depicted as engaged in explicit sexual activity, it constitutes child pornography in Canada, unless it is considered to have artistic merit or an educational, scientific or medical purpose.

All four programmes against which complaints were upheld in the period under examination⁶³ were condemned not so much for their message but the explicitness in which it was delivered. The greatest number of complaints, 138, arose from Channel 4's *Queer as Folk*, a television drama set around Manchester's gay village.⁶⁴ While some complaints had no bearing on sexuality, many did. Most controversially, the series followed the first sexual experiences of Nathan, a 15-year-old gay boy. Episode one showed his first experience, an encounter with a promiscuous 30-year-old man that forms one of the most graphic depictions of gay sex I have seen on television. Although no genitals are shown, the nature of the sexual activity between the man and boy is clearly implied and even the boy's semen is referred to. Nathan was played by an 18-year-old, so although the sexual acts depicted are illegal in Britain, the scene could not constitute an indecent photograph under English law. Conversely, the sex portrayed would have been legal in Canada, yet the scene would very easily have fallen within the Canadian

⁶³ i.e. February 1999 to May 2000. This is the period for which the BSC was able to make available its reports on its adjudications.

⁶⁴ Channel 4, February, March, and April 1999, 2230-2310 and 2315-2350. Reported in BSC Bulletin 22, June 1999. This series also accounted for 163 of the 300 complaints made in 1999 to the Independent Television Commission relating to sexual portrayal.

Criminal Code's definition of child pornography.⁶⁵ The series contained no obvious condemnation of Nathan's sexual experiences, which he clearly sought out and enjoyed. The BSC, correctly in my view, took the view that the series neither encouraged nor condoned paedophilia. However, it was troubled by the explicit and graphic depiction of Nathan's first sexual encounter and that aspect of the complaints was upheld.

The other programmes criticised were all radio. A complaint about offensive language in a discussion about begging was upheld after the presenter suggested that a 14-year-old girl, who was the victim of abuse in the eyes of the law, may have consented to her sexual encounters, being one of a number of "14-year-old slags with knickers on a piece of elastic getting themselves pregnant".⁶⁶ The BSC made no objection to the general discussion, just that one expression. A complaint of sexual innuendo was made against a BBC local radio discussion on a group of dancers dressed as boy scouts who, as part of an Elton John performance, stripped on stage.⁶⁷ The presenter's allegedly graphic description of the dance movements were meant to underline his conviction that the star's performance would encourage child abuse. The BSC considered the comments "both explicit and unexpected". Finally, a commercial station had a finding against it when a man's description of his sexual relation with his 5-year-old daughter was broadcast in error in the midst of an advertising break!⁶⁸

The BSC's refusal to uphold complaints about other programmes that deal with sexuality in the context of children generally enforce themes apparent from an examination of Canadian complaints. Thus dramas that portrayed sexual relationships between pupil and teacher,⁶⁹ bored older woman and teenage boy⁷⁰, two adolescents,⁷¹ as well as another involving incest⁷² avoided censure both because the sex was kept non-explicit and because they did nothing to condone or encourage such behaviour. A young person's discussion programme that dealt with under-age sex was also acceptable because it "treated a serious subject in a responsible way", meaning presumably that it posted plenty of warnings.⁷³

⁶⁵ Despite this, the series has been broadcast uncut in Canada and in early 2000 also received a limited theatrical release in Vancouver, British Columbia. I am uncertain as to whether legal concerns gave rise to edits for the latter showing.

⁶⁶ *Mike Dickin*, Talk Radio, 13 December 1998, 0100-0600. Reported in BSC Bulletin 19, March 99.

⁶⁷ *The John Gaunt Show*, BBC Three Counties Radio, 30 November 1999, 0700-1100. Reported in BSC Bulletin 29, February 2000.

⁶⁸ *Tim Shaw Phone-in*, Radio Hallam FM, 31 August 1999, 2200-0200. Reported in BSC Bulletin 26, November 1999.

⁶⁹ *All Things Fair*, BBC 2, 2 July 1999, 0035-0245, reported in BSC Bulletin 25, October 1999, which achieved BSC approval because the programme was perceived as being intended to "stress the need for whole rather than partial relationships". Also *Family Affairs*, Channel 5, 23 June 1999, 1830-1900, reported in BSC Bulletin 26, November 1999.

⁷⁰ *Love in the 21st Century*, Channel 4, 28 July and 4, 11 and 18 August 1999, 2130-2200, reported in BSC Bulletin 26, November 1999.

⁷¹ *Family Affairs*, Channel 5, 12 October 1999, 1830-1900, reported in BSC Bulletin 27, December 1999.

⁷² *Heartbeat*, ITV, 5 December 1999, 2000-2100. Reported in BSC Bulletin 30, March 2000.

⁷³ *Café 21*, BBC 2, 13 November 1999, 0930-1000, reported in BSC Bulletin 28, January 2000.

Conversely, the complaints that the sitcom *The League of Gentlemen* made light of child abuse are reminiscent of those against Howard Stern, but were adjudged differently.⁷⁴ The BSC accepted the BBC's explanation that the purpose of the series, about an imaginary town where surreal tastelessness is the order of the day, was to mock the town's residents rather than to endorse their behaviour. Similarly Stern parodies the insensitivities so common and yet so insidious in society.

Given this thesis' particular examination of images of child spanking, of particular interest are two viewers' complaints about a sequence in Channel 4's *Making the Grade* in which a mother physically punished her son.⁷⁵ This was a documentary series about a school dubbed one of the worst in Britain. The 11-year-old boy in the sequence had been permanently excluded from two schools and now had been refused entry into even this one. His constant presence at home added to his strained relationship with his mother and the two frequently fought. The sequence showed the mother dragging the crying boy into the house after his refusal to come indoors, shouting and hitting him a number of times along the way.

Having not seen the programme, I do not know how close the spanking comes to what English and Canadian courts consider to constitute sex. Certainly there is no fear expressed by the complainants or the BSC that it constituted indecent assault, or that its depiction may be sexually appealing. The viewers' concerns were why the film crew did not intervene and whether the boy had given his consent to the broadcast. Thus his humiliation resulting from the smacking seems to be acknowledged by at least one viewer.

Channel 4 assured the BSC that the boy and his parents had given consent at the beginning of filming generally, although no specific agreement seems to have been given to broadcast of the particular sequence. The channel claimed that its team was there as impartial observers, but that they would have intervened "had they felt that the boy was in real danger". This appears to have satisfied the BSC, who did not uphold the complaints.

The same month the BSC was directly called upon to address the sexuality of cruelty to children when a viewer complained about Channel 5's documentary on Ian Brady and Myra Hindley who, having tortured and killed a number of children in the 1960s, still count among Britain's most reviled murderers.⁷⁶ The viewer complained that the inclusion in the programme of a photograph of one of their victims would appeal to "sadistic paedophiles". Channel 5 justified the inclusion by saying it was with the consent of the victim's mother, that Hindley's repeated attempts, right up to recent times, to secure release from prison kept her in the public domain and the photo, which had taken a central role in the investigation, illustrated the horror of the crimes and the way they were recorded. The photo had been cropped to show just the victim's face and

⁷⁴ *The League of Gentlemen*, BBC2, 1 February 1999, 2130-2200, reported in BSC Bulletin 22, June 1999.

⁷⁵ 7 November 1999, 1930-2000, reported in BSC Bulletin 28, January 2000.

⁷⁶ *The Moors Murders - The Investigation*, Channel 5, 29 September 1999, 2250-2320, reported in BSC Bulletin 28, January 2000.

shoulder and was featured twice, each time for just a few seconds, in those parts of the programme dealing with its discovery and forensic analysis. The BSC considered that the photograph was insufficiently explicit to have been of interest to sadists or paedophiles, and that its use had been contextually justifiable. The complaint was not upheld.

In the same period the BSC dealt with five other programmes against which complaints relating to sadomasochism were brought, although none involved children. Complaints against three programmes were upheld. Eight viewers took exception to the depiction of S&M practices in a Channel 4 series of documentaries on human sexual desire.⁷⁷ The first looked at the effect on Western sexuality of the spread of Christianity, the equation of sex with sin and the way in which for some religion, eroticism and pain came to be interwoven. The programme included a sequence shot in the “religious room” of a bondage club in which a contributor had drawn a link between sado-masochistic behaviour in the 20th century and flagellation and the religious tradition of sexual repression. A performance artist made those links visible. According to Channel 4, the scene, while striking, was not sexually explicit, and was justified in the context of the programme.

The second programme dealt with the issue of how individual patterns of sexual desire develop, including those relating to S&M. It included scenes of a dominatrix with her client. Both programmes were broadcast late at night and had been preceded by a clear warning. Nevertheless the BSC considered the length and detail of the scenes to have exceeded acceptable boundaries.

A drama series about London’s Vice Squad attracted complaints about sexual portrayal.⁷⁸ In one episode the set of an S&M film was shown, although no sexual act was seen, or implied. The episode was preceded by a clear warning, but the BSC was worried about its early scheduling (the episodes started at 9pm, the watershed hour).

Channel 5 News received just one complaint about an item, broadcast at 6pm, about London’s annual S&M Pride march and fair.⁷⁹ The BSC was concerned that scenes shot at the fair, which is publicly accessible and which Channel 5 said involved people in costumes “no more outrageous than might be seen at a fancy dress party” had exceeded acceptable boundaries for a news programme broadcast in the early evening.

The BSC is concerned about the pageantry and theatre of adult S&M practices, yet the scenes of child beating I have seen on British television are the most explicitly graphic and torturous I have seen anywhere. They require that programmes showing the regalia and trappings of adult sadomasochism be rescheduled to well past the watershed and that scenes of a paying client’s indulgence with his dominatrix be reduced, even though

⁷⁷ *Anatomy of Desire*, Channel 4, 23 and 30 November 1998, 2200 - 2305, reported in BSC Bulletin 19, March 1999.

⁷⁸ *The Vice*, ITV, 4/11/18/25 January and 1/8 February 1999, 2100-2200, reported in BSC Bulletin 21, May 1999.

⁷⁹ Channel 5, 16 April 1999, 1800-1830, reported in BSC Bulletin 23, July 1999.

shown after 10 pm. Yet I have seen one BBC children's programme that shows most of the 12 strokes of a 13-year-old's caning landing on his (clothed) buttocks⁸⁰ and another including three separate beating scenes, including a caning and a birching.⁸¹ Both were shown at around 5 pm and aimed specifically at children.

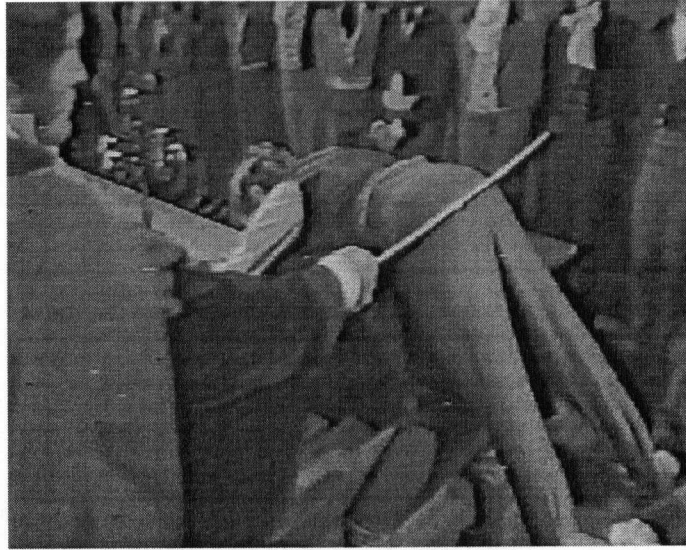


Fig 28: Still from the 1970s BBC television adaptation of Thomas Hughes 1857 novel Tom Brown's Schooldays. Most of Tom's 12 strokes of the cane are graphically shown. The boy playing the part was approximately 13. This still was found on the Movie and TV Spanking Page.

These are not isolated instances. Just three of the web sites that contain stills and clips from around 230 movies showing children being spanked also list 36 television productions showing child beatings.⁸² 31 are English-language and most were broadcast in either Britain, Canada or both.⁸³ Just as film review boards generally impose tighter constraints on video than on cinema, so can television, given its intrusiveness into the home and the difficulty with legislating to control children's access, be expected to be more tightly controlled than either. Yet I have discovered no great difference between

⁸⁰ This was a BBC serialization of Thomas Hughes 1857 novel *Tom Brown's Schooldays*, produced and first shown in the mid 1970s.

⁸¹ *Young Charlie Chaplin*, the story of the comic's boyhood, produced and first broadcast in the mid 1990s.

⁸² *Arilds Movie Spanking List*: <http://www.moviespank.com/>, *The Movie and TV Spanking Page*: <http://www.geocities.com/Hollywood/Studio/8716/cbhome.htm> and *The Corporal Punishment Archive*, <http://home.freeuk.net/mkb/mainpage.htm>.

⁸³ 16 are British productions, four are American, four Australian, one Canadian and one South African. The remaining five works were non-English language, four from Germany and one from Spain.

the movie industry and broadcasters in their treatment of child spanking images.⁸⁴ Taking just the 22 productions specifically made for British or Canadian television, two are British documentaries both broadcast early evening. One was specifically about spanking⁸⁵ and the other was about the Prince of Wales' childhood!⁸⁶ Few of the other 19 drama productions are what might be considered adult dramas and most were broadcast during daytime or early evening. For instance, two were adaptations of Dickens novels⁸⁷, and Canada produced *Huckleberry Finn and Friends*⁸⁸. Two children's programmes have already been mentioned. Yet another is a programme for schools that shows boys being caned on the hand.⁸⁹

The BBC's *Producers' Guidelines*, drafted (mostly⁹⁰) voluntarily by the Corporation's Editorial Policy Unit for the guidance of production staff, reads:

Violence against women should not be portrayed as an erotic experience. Where in rare cases, a link between violence and sexual gratification is explored as a serious theme in drama, any depiction must be justified by its context and not simply designed to arouse.

Similar sensitivities apply to violence against children.⁹¹

The Independent Television Commission oversees Britain's commercial television stations. The *Broadcasting Act*, 1990 obliges the ITC to draw up a code on programme standards and empowers them to impose sanctions, including fines, for its breach.⁹² Their *Programme Code* reads:

Dramatic truth may occasionally demand the portrayal of a sadistic character, but there can be no defence of violence shown or heard solely for its own sake, or of the gratuitous presentation of sadistic or other perverted practices.

...

Scenes which may unsettle young children need special care. Scenes of domestic friction, whether or not accompanied by physical violence, can easily cause particular fear and insecurity.⁹³

The Joint Working Party on Violence, consisting of the BSC, the BBC and the ITC, in their *Statement of Common Principles on the Portrayal of Violence on Television*, stated:

The combination of violence and sex will be treated with special care. The graphic portrayal of violent sexual behaviour will rarely be justifiable.⁹⁴

⁸⁴ One distinction is that, taking the sample of around 260 films and TV programmes offered through the web pages, a greater proportion of cinema movies (around 15%) involve child nudity than do productions made especially for British or Canadian TV (around 5%). With such a small sample I do not believe that this is significant.

⁸⁵ "Loving Smacks", from the British current affairs strand *Cutting Edge*.

⁸⁶ *Charles Windsor's Schooldays*.

⁸⁷ *Oliver Twist* (1999) and *Great Expectations*, both BBC TV.

⁸⁸ Broadcast in 1979 and based on Mark Twain's 1884 novel, *The Adventures of Huckleberry Finn*.

⁸⁹ BBC Schools TV.

⁹⁰ The codes relating to impartiality and accuracy were required by the government upon the renewal of the BBC's *Charter* in 1996.

⁹¹ BBC *Producers' Guidelines*, (3rd edition, November 1996).

⁹² *Broadcasting Act* 1990, *supra* note 1, ss. 6 and 7.

⁹³ Independent Television Commission, *Programme Code*, para. 1.6(i), sub-para. (f) and (h)

Thus sexual gratification from violence to children can be depicted, but cannot be delivered to the viewer. No television production that I have seen indicates that this licence is being exploited, yet the web sites are testament to the prohibition's frequent, if unwitting, breach.

⁹⁴ Joint Working Party on Violence, *Statement of Common Principles on the Portrayal of Violence on Television*, para. 14.

Part III

CONCLUSION

Chapter 6

CONCLUSION

THE CHILD SPANKING WEB SITES

Part I looked at whether the web sites that display stills and clips from the mainstream media might constitute illegal child pornography if all the material involves child spanking. No definitive answer could be given, nor can it ever be. English law, especially, eschews particularity, reserving judgment on what is “indecent” until the picture is before it. Canadian law has attempted some precision in defining child pornography, but my conclusions as to what is tolerated in that country are little more concrete than those relating to England.

On one point, Canadian law comes close to defining child pornography in the way that, I believe, we truly understand it. The depictions of child nudity that are pornographic, it says, are those with a sexual purpose. Even so, the law has got itself into rather a tangle. Who’s purpose are we talking about, that of the person creating the image, or those who, getting a sexual thrill from such images, collect and share them with likeminded aficionados? Now that the internet has brought within everyone’s grasp the ability to transport images from one context and, without diminution in quality, to broadcast to millions the same image in another, this matter needs resolving.

The reader may see this thesis as simply an illustration of the artistic or “internal necessities” defence in action. If this be the case, let me repeat my arguments on that score. English law, on the face of it at least, has no “artistic purpose” defence. According to the doctrine in *Graham-Kerr*, images should be evaluated on their own merits. I hope by now that it is clear that this is a fallacy and that in reality images are judged very much by surrounding circumstances, by context and apparent purpose.

Secondly, while Canada’s section 163.1 explicitly states an artistic merit defence, it is a question of construction whether the merits of a movie still or clip have to be taken in isolation from those of the movie as a whole. I have argued that probably it does, in

which case the stills and clips must be possessed of the same artistic merit when forming part of the web sites as when part of the movie.

Less easy to dismiss is the common law “internal necessities” test as it has developed in Canada. First, however, this can only save images that are sexually explicit. The vast majority, if not all of the child spanking images I have dealt with do not seem to meet that criterion. Secondly, the inclusion of the suspect material must be *essential* to a wider literary, artistic or similar purpose. As for film clips and stills problems arise in attempts to separate them from the movie in its entirety. The closer the characterisation of the entire film’s artistic purpose is to the depiction of whatever is contained in the extract to which objection is raised, the easier it is for the extractor to claim the same artistic purpose. The more distant the characterisation of the artistic purpose of the movie is from the depiction of the offending material, the harder it is to persuade that that material is essential to the film’s wider purpose.

As for the spanking scene, I repeat that both movie and the web pages are communicating precisely the same “artistic” message. A child is to be beaten. A child is scared: the dread of foreboding mounts as the moment of execution is nigh. A child is first humiliated and then hurt. The act is one of wanton cruelty, or it is a salutary delivery of just deserts. Whatever the film is saying, the collection of images on the web site says the same thing. They are nothing more than a convenient conduit of the same message. That which is communicated by the movie is that which makes the images so erotically thrilling: the fear, the degradation, the cruelty or delivery of retribution. Or at least that is what will make it appealing to some. The essence of this thesis is that each will bring to the image their own understanding.

Whether or not the child spanking web sites constitute child pornography, it is clear that something happens that invites disapprobation when stills and clips from family viewing shows are compiled onto web pages with titles like *The Movie and TV Spanking Page*. If the latter cannot be branded pornography then many, who enjoyed the movies without raising an eyebrow at the buttocks and beatings paraded before them, would probably like them to be.

Another approach to determining whether the web pages are child pornography is to test whether their prohibition might be justified using the rationales normally quoted in defence of child pornography laws. Harm is generally perceived as being done to two classes of children, those directly involved in production and the wider range of children, which may include all children, who are for various reasons perceived as being endangered as a result of the material’s existence. As for those children shown on these web pages, if the production of the images was damaging then that was the fault of Hollywood and its ilk. As for whether harm will be done by the inclusion of the stills and clips in the web sites, an issue I have already touched on, presumably the only harm can be some psychological dent caused by the knowledge that the images are found arousing. The children involved are in many cases now adult, or dead. As for those who survive, no assumption can be made as to how knowledge of their inclusion in the web sites will be experienced.

More interesting are the arguments relating to harm to children not involved in production. These were conveniently summarised in the judgement of the British Columbia Court of Appeal (BCCA) in *R v. Sharpe*,¹ in which the constitutionality of Section 163.1's prohibition of mere possession of child pornography was being tested *vis-à-vis* section 2(b) of the *Canadian Charter of Rights and Freedoms*, which guarantees a right to freedom of expression, and section 1 of the *Charter*, which allows government to abridge that right provided the limits are reasonable, prescribed by law and can be demonstrably justified in a free and democratic society. The court's three judges were unanimous in agreeing that the section violates (and *per* Rowles J. "profoundly violates"²) the guarantee of freedom of expression and the majority held that the violation could not be saved under section 1 of the *Charter*.

In reaching that conclusion the court sought to identify what harm laws prohibiting possession of child pornography is intended to prevent, aside from that to children involved in its production.³ The prosecution case had relied heavily on expert evidence from Dr Peter Ian Collins, an assistant professor of the Department of Psychiatry, University of Toronto and a forensic psychiatrist attached to the Toronto police service. He referred to three potential dangers arising from child pornography. First he suggested that child pornography is shown to children to suggest to them that sexual contact with adults is healthy and normal, thereby "grooming" them ready for sex.⁴ Secondly, he claimed that child pornography might fuel the paedophile's sexual fantasies. He referred to "very good literature"⁵ written about how child pornography will incite paedophiles to re-offend, including evidence that slightly more than one third of child molesters and rapists claim to have at least occasionally been incited to commit an offence by exposure to pornography.⁶ Thirdly he claimed that such material reinforces "cognitive distortions", defined by Dr Collins as "the rationalizations and the justifications that [paedophiles] have for their deviant behaviour".⁷

The court accepted that perhaps harm could be occasioned by material not involving children in its production. However the majority held that, by comparison with material involving actual children, such material poses less danger of indirect harm. The conclusion was reached that Section 163.1, prohibiting as it does both types of material, overreaches the limits on freedom of expression required by anti-child pornography laws.⁸ Partly for this reason, the section's ban on the mere possession of child pornography was struck down as failing to meet the criteria of the *Charter's* section 1 savings clause.⁹

¹ *R. v. Sharpe*, (1999), 175 D.L.R. (4th) 1, 134 C.C.C. (3d) 222, (B.C.C.A.), [hereinafter *Sharpe*.]

² *Ibid.*, para. 174

³ See, for instance, *per* Rowles J., *ibid.*, para. 183

⁴ See, for instance, *per* Southin J., *ibid.*, para. 45

⁵ Quoted by Southin J., *ibid.*, para. 50

⁶ See, for instance, Southin J., *ibid.*, para. 51

⁷ Quoted by Southin J., *ibid.*, para. 42.

⁸ See, for instance, *per* Rowles J., *ibid.*, para. 205

⁹ The government appealed to the Supreme Court of Canada who heard the matter in January 2000. At the time of writing their reserved judgment had not been released.

Taking Dr. Collins' arguments in turn, the idea that potential sex offenders might show children cinema and television images of beatings, which in many cases have been specifically produced to show the full horror of the event, in order to "groom" them into acceptance of similar thrashings, hardly seems likely. More possible, perhaps, is that the spanking fetishist might show a naughty child images of more mild punishments in order to persuade the child that he should submit to such treatment on the basis that such punishments are normal and healthy. That being so, the original movies would surely be just as effective grooming tools, as would, for that matter, Section 43 of the Canadian *Criminal Code*, or the authorisation of corporal punishment in the British government's proposed guidelines.¹⁰

As for Dr. Collins' claim that child pornography might fuel the paedophile's sexual fantasies, a review of the social science literature on pornography inciting sexual offences falls outside the scope of this thesis. Nevertheless it should be noted that despite Dr. Collins' reference to what he termed "very good literature"¹¹ on child pornography as incitement, the British Columbia Supreme Court in *R v. Sharpe*, as a finding of fact, held that while "highly erotic" pornography incites some paedophiles to commit offences, the same material helps others to relieve pent-up sexual tension, and it is not possible to say which of the two foregoing effects is the greater. However the judge held that "mildly erotic" pornography appears to inhibit aggression.¹² Whether spanking images might be considered "highly" or "mildly erotic" is unclear, but these findings were not disputed by the British Columbia Court of Appeal (BCCA).¹³

Dr. Collins' third claim, that child pornography reinforces "cognitive distortions", is the hardest to dispose of. He cited as examples the belief that children want sex with adults, or that our condemnation of intergenerational sexual activities is culturally relative, such relationships having gained approval in other ages and societies.¹⁴ Obviously Dr. Collins' notions of a "cognitive distortion" are based on a basic claim to truth, i.e. that children are not suitable objects of sexual desire.

A review of the medical or psychological literature on the dangers of adult-child sex is outside the scope of this thesis. Nor was it attempted by the BCCA, yet Southin J., as quoted in Chapter 5, was happy to state that "to believe that a child could not only not be harmed by premature sexual conduct, but also take pleasure in it, seems to me an absurdity, and, therefore, a "cognitive distortion".¹⁵

I do not intend to argue with such statements, but simply to reveal them as what they are. The jargon "cognitive disorder", so much part of the *scientia sexualis* of western culture identified by Michel Foucault, was no doubt seized on by the courts in *Sharpe* because it

¹⁰ UK Government consultation document, *Protecting Children; Supporting Parents*, (London: H.M.S.O., 18 January, 2000).

¹¹ Quoted by Southin J., *Sharpe*, *supra* note 1, at para. 50.

¹² *per* Southin J., *ibid.*, para 24.

¹³ See, for instance, Southin J., *ibid.*, para. 67.

¹⁴ *Ibid.*, para. 42.

¹⁵ *Sharpe*, *supra* note 1, para. 44.

lent credibility to their pathologising of adult-child sex. How much more refreshing it would have been if the court had seen the term for what it is, psycho-babble for “bad thoughts”, representing a moral judgment on sexuality, and then expressly based their judgments on the belief that it is a moral judgment that law should uphold.

I have argued that the reason the web sites attract disapprobation is that they communicate a message we do not want to hear. It is a message we did not learn from the original movies, but the web site tells it us loud and clear. It is that these child spanking scenes are sexy. The situation is akin to *R v. Tucker*, where the accused was convicted for videoing photographs, panning with his camera up and down the bodies of naked children who had been incidental to an innocent picture of a beautiful marine landscape. Tucker was punished for looking at the photograph the wrong way. The web sites attract disapproval because they look at movies the wrong way and, what is worse, invite us to do the same.

And the new understanding they impart to us is not just that these images are sexy, it is that child spanking is sexy. Since many of us have been spanking our children for years, and we were in turn spanked as children by our own parents and teachers, those embodiments of an authority that has tried so hard to win our adherence through endearment, and which we have so obligingly loved and respected, it is not a comfortable message to hear.

THE CHILD SPANKING MOVIES

This thesis, then, is about a heretical understanding of culture, a heresy evidenced by the web pages examined primarily in Part I. The second part of this thesis turned attention from the web sites to the movies and television shows from which the images were taken. Part II explored the phenomenon whereby these films and programmes survived censorship regimes in Britain and Canada that place a premium on eradicating sexualised violence. Censors, it seems, do not look at the movies the wrong way. When they see child spanking, they do not see sex, nor am I sure that they see violence. Thus their myopia permits hundreds of films containing such scenarios to be certified as suitable for the very youngest of children and then broadcast as daytime children’s television.

A few films, like *Exit to Eden*, acknowledge the eroticism of spanking and, when applied to children, approach the subject with considerable circumspection. But such works are exceptional. Involving children in adult sexuality is a subject most filmmakers and broadcasters prefer to steer clear of, unless it is to condemn it, disapprobation which seems required by Canadian and British broadcasting regulators. The irony is that those film makers and broadcasters produce in such abundance images for those who eroticise beating children.

A CALL FOR PROHIBITION?

I began by saying that this thesis is an exercise in deconstructing “child pornography”. Deconstruction means dismantlement, not elimination. All the component parts of the structure remain, ready to be reconstructed if and however we so wish. Thus with “child pornography”, after we have deconstructed the term the images of children are still with us, as are the children who appear in them and those that do not, as are the adults who masturbate over them and those who do not. All the desires subsist, the will to love and hate children, to protect them and to be cruel to them, to preserve them as embodiments of sexual innocence, and to desecrate those idols with semen.

One possible conclusion to draw from this thesis is that we should reconstruct “child pornography” so as to incorporate child spanking images and then to ban them along with all the other images to which the term is applied. This thesis is about images and their analysis, so let me encapsulate this argument, and later part of my response to it, by way of analysis of yet another image. I found the picture that adorns its cover on the web site *Arild's Movie Spanking List*.¹⁶ It is a still from an episode¹⁷ in the *Our Gang* or *Little Rascals* series of comic shorts produced from 1922 to 1944, a rich source of child spanking images.¹⁸ After releasing laughing gas at a wedding party, the four rascals, Spanky (what name could be more eloquent?), Froggy, Mickey, and Buckwheat are receiving their punishments.

Does the cover picture encapsulate child pornography? Many define pornography as the degradation and dehumanisation of its subjects. An audience of adults looks on as four boys are spanked, methodically and mechanically. The audience laugh, clearly relishing the spectacle. Since this is a comedy, we are invited to laugh with them. The powerful chortle at the humiliation of the powerless. Are we witnessing, indeed being compromised into, a process of dehumanisation, whereby four humiliated children, reduced to their constituent parts, become eight buttocks ready for the spanking?

Thankfully it is beyond the scope of this thesis to attempt to redraft the law's formulation of what constitutes child pornography. I do not wish for such a task, for it seems clear now that what renders an image pornographic has nothing to do with what that image contains, but the understanding that is brought to it. Categorising images as pornographic and non-pornographic is not a game for me.

But lest others decide that images such as the one I display on the cover are child pornography, let me plead that if they are child pornography, then at least let them not be prohibited. Yes, for some this is sex. Yes, to that extent they couple sex with violence. Yes, they are of children being humiliated. Yes, they degrade and perhaps even dehumanise. And yes, they employ children in their production. But to ban these pictures would exceed even the absurdity of attempting to work through the process of how the law defines what practices are sexual and what not sexual, trying to decide when

¹⁶ <http://www.moviespank.com/OurGang.html>

¹⁷ *Wedding Worries*, produced in 1941 and directed by Edward Cahn.

¹⁸ According to *Arild's Movie Spanking List*, *supra* note 16, 13 of the shorts feature children being spanked.

sex is explicit and when not explicit, what is a child's anal region and what is not, whether taking a still from a movie is an act of copying or depicting, and other insanities the law has drawn me into hereto.

It will be apparent by now that the "menace" of child pornography is not a subject I can write about with much ire. Sometimes I can even tolerate the inane attempts to control it. Yet the sanctimonious platitudes that always accompany them infuriate me. So does the cover picture. It seems bizarre beyond all comprehension that this humour is tolerated, yet Howard Stern's joke is labelled child pornography.

What really riles me about the cover picture is not so much the spanking itself, but the onlookers. Not only do they take obvious pleasure in degradation, these adults are dressed in their finery, the uniforms of the elite, the conservatives, quick to condemn and slow to comprehend, with their smug assuredness of moral ascendancy.

IS OUR SOCIETY PAEDOPHILIC?

How satisfying it would be to ascribe to these onlookers the epithets with which they are so keen to label others. Paedophiles. Unnatural. Perverts. Incomprehensible and disgusting. By blurring the distinction between childhood pornography and family entertainment, I have come close to doing so. Part of the pleasure of writing this thesis has to be to turn the tables, to render the marginalized mainstream, the proper improper.

Others have done likewise, writing with great insight on how society condemns the paedophile and yet itself eroticises the child. In one such article, *Pedophilia in Everyday Life*,¹⁹ Richard Mohr masterfully dissects an advertisement placed in the business section of the *New York Times* which shows a stunningly beautiful 13-year-old boy who has fallen prey to the evil of narcotics. With considerable perceptiveness Mohr identifies how the advertiser uses this sylph-like boy's pouting, seductive gaze to doubly demonise drugs by conflating them with those other social ills, effeminacy and homosexuality. By sniffing the cocaine before him this boy, it seems, has been corrupted by all three. First, femininity has encroached on his masculinity, hence his androgynous appeal. Secondly, his come-hither gaze suggests that his object of desire is us, the mostly male readership of the paper's business pages. By this trick, however, the advertisers have turned us all into paedophiles:

Perhaps we have here an example of what Foucault hints at when in the *History of Sexuality* he repeatedly but vaguely refers to "perverse implantations," those means by which culture instills or invokes sexual desires, rather than represses or punishes them. The ad gives its viewer ideas, ones that he might very well not have had otherwise. If not exactly nudging him toward action, the ideas at least open the mind to new possibilities for actions; and they do so, even though they are put forth in a context of condemnation and suppression.²⁰

¹⁹ R. Mohr, "Pedophilia in Everyday Life", *The Guide: Gay Travel, Entertainment, Politics and Sex*, (January 1999), available at: <http://www.guidemag.com/features/pedophilia>

²⁰ Mohr, *supra* note 19.

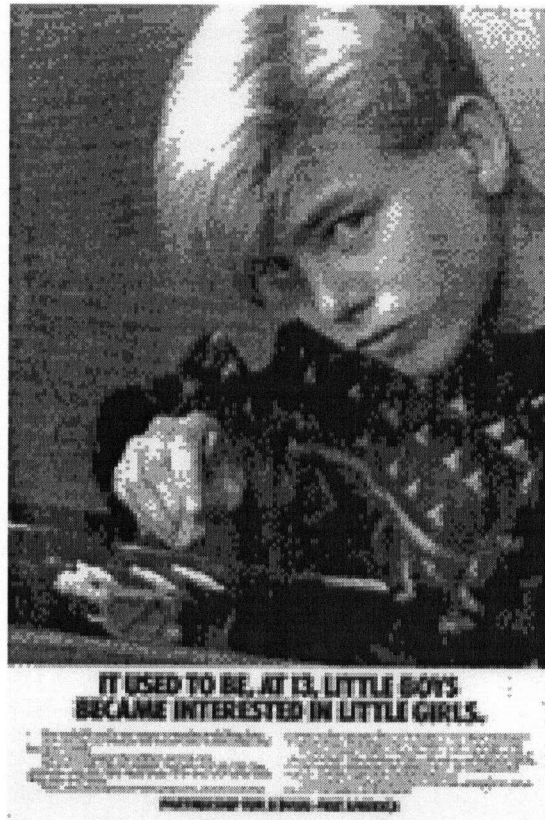


Fig. 29: The anti-drugs advertisement Richard Mohr uses to illustrate Pedophilia in Everyday Life.

Arguing that such images are common in society, Mohr argues:

Society seems to need these images. And the images are allowed to the extent that they are buffered, not read in the first instance as sexual representations, and do not develop beyond mere suggestive idea into a pedophilic discourse, a context of meaning for the pedophile. Indeed the social requirement that the pedophile's existence be shadowy helps realize the social requirement that sexy images of children will not be read as such. Society needs the pedophile: his existence allows everyone else to view sexy children innocently. But his conceptualization by society must not be allowed to be rich enough to be interesting, to constitute a life. Sexy images of children abound, but NAMBLA remains a universal whipping boy.

The *Lolita* films come close to breaching this rule, accounting for their condemnation and, in my view, their excellence.

In another book that universalises paedophilia,²¹ James Kincaid, having identified our enthusiasm to adore children, also points to our profound resentment of them, manifested in part by spanking, "our culture being as reluctant to abandon this custom as to acknowledge its pleasures".²² He refers in particular to the furore that swept the United States in 1994 when Michael Fay, an American teenager, was sentenced to a caning by the Singapore government for vandalism.²³ Much of the publicity took the form of a debate on human rights. Kincaid writes:

My own feeling is that the national mind found itself wondrously concentrated not on rights but on buttocks, either generic or Michael Fay's particular set.

He quotes publicist David Schmidt as saying:

I can guarantee the exclusive pictures of his buttocks are worth at least one-half million - maybe more. People want to see his buttocks.²⁴

Kincaid then presents an impressive collage of media obsession with Fay's caning, coverage that enquired into and reported on every minute detail of the punishment, accompanied by a copious number of photographs, drawings and cartoons. Given our obsession with the subject, is it any wonder that our movie makers seek to satiate our appetite with graphic depictions of child beatings and the buttocks involved?

In their rush to illustrate cultural paedophilia, these authors tend, on occasion, to stretch the evidence to make their point. Not wanting the same criticism to be made of me, I shall not characterise society's sexuality as predominantly paedophilic on the basis of a few hundred films that show children being spanked. Hundreds of films are released each year and hours of television air time are filled, without child spanking showing its face. Even the spanking web sites themselves show a bigger picture of society's sexuality. *Arilds Movie Spanking List*²⁵ lists 272 mainstream films where women²⁶ get spanked, (245 by men, just 27 by other women), but just 13 where girls get spanked. On the other hand the site lists just 28 films where men²⁷ get spanked, (18 by other men, 10 by women), but 132 where boys get spanked (108 by men, 24 by women). Thus the total number of movies that show adults being spanked²⁸ is 300, twice the number that show child spankings (145). 91% of the adults shown being spanked are women,²⁹ in 90% of cases by men.³⁰

²¹ Kincaid, J. R., *Erotic Innocence: The Culture of Child Molesting*, (Durham: Duke U. P., 1998), in particular chapter 5.

²² *Ibid.*, p. 145.

²³ *Ibid.*, pp. 147 - 150.

²⁴ *Ibid.*, p. 148.

²⁵ <http://www.moviespank.com/>

²⁶ i.e. over 18.

²⁷ i.e. over 18.

²⁸ i.e. punished by means of being struck on the buttocks.

²⁹ Interestingly the proportion of boys among the children shown being spanked is exactly the same figure.

³⁰ Of course this statistical exercise must be approached with considerable caution. What appears on *Arilds Movie Spanking List* (*supra* note 25) will reflect in large part the sexual interests of those compiling and contributing to the page, rather than the true state of cinema.

One expects to be hit hard, says judge



Caning head is cleared of assaulting boy



John Fearman: Exam target

A HEADMASTER accused of caning a 13-year-old boy with 'considerable force' for getting poor exam results was cleared of assault yesterday on the direction of a judge.

He told the court: 'If one has the misfortune to be caned, one expects to be hit hard.'

The boy, Barry Tavner, now 14, who was a pupil at the El470-a-year Friern Barnet Grammar School, North London, had earlier told Knightsbridge Crown Court that he was given one stroke of the cane for every two marks below a previously set target.

The 'target' of a 55 per cent average in the exams was agreed at an earlier meeting with headmaster John Fearman.

Barry, of Crouch End, North London, said that when he achieved only a 45 per cent average he was called back to see the headmaster. 'He said I had ten marks less than I was supposed to have got. But he thought that ten strokes was too much.'

'He said he would give me one stroke of the cane for every two marks below.' The headmaster then hit him five times with the cane. 'It was very painful, I cried,' he said.

Mr Jeffrey Rucker, prosecuting, said Barry's GP and a police doctor agreed that 'considerable force' was used in the caning.

Family GP Dr Christopher Hindley, who examined Barry after the caning, told the court: 'He had considerable bruising of both buttocks.' He added that the boy also had 'five wheel marks'.

The court heard that in a statement to the police, Fearman, 38, who denied causing actual bodily harm, described Barry as a 'highly intelligent and articulate pupil' who was under achieving because of laziness.

Judge Christopher Harbord QC said there was insufficient evidence and directed the jury to return a not guilty verdict.

By GILL SWAIN

Barry: Injuries influenced Commons

Fig. 30: Daily Mail [London], 21 July 1987. Seven years prior to the Michael Fay case, Britons could enjoy not only reading about 13-year-old Barry Tavner's caning from his headteacher, but seeing his buttocks in a major national daily. The Sun, the country's biggest selling paper, carried a similar photograph. The accompanying article reveals that the teacher was acquitted. This photograph of the article was found on The World Corporal Punishment Research web site.

The big picture is that the main object of sexual desire, as culturally represented, remains the adult woman. What is more she is depicted as degraded, indeed infantilised, by being

spanked, almost invariably by men. Feminists would hardly be surprised by such a revelation. The male, heterosexual gaze of the cinema camera is almost axiomatic.³¹

Even so, the radical feminist agenda on pornography is not the subject of this thesis, save to mention two points. First, as I argued in chapter 2, the feminist rationale for prohibiting pornography (i.e. that it is degrading to women), which is encapsulated in the *Butler* decision, appears from evidence presented by this thesis to have failed to protect children from erotic imagery of violence. Secondly, I hope that I have illustrated how indistinguishable the pornographic is from the non-pornographic. To repeat, pornography is rendered so not by the image's content, but by the understanding that is brought to it. Pornography is not what pornography is, but how pornography is seen.

I return to Mohr, who succinctly encapsulates the main thrust of this thesis thus:

Society's panicked worry then is not chiefly about the sexiness of kiddy pics - either as something inherently dirty or as having aesthetic, erotic, and moral effects on people in general. Rather, social conventions simultaneously insist upon and convulse over the existence of a certain type of *mind*, one which - quite independently of what it sees and does - can be branded as perverted. This becomes even clearer if one sorts through the tangle of statutes, regulations, administrative interpretations, and judicial decisions that makes up current kiddy porn law.³²

CHILD PORNOGRAPHY IN THE WOODSHED

The title of this thesis refers in part to the woodshed as the traditional venue for spanking children in American families. A "woodshedding" has become an American idiom for the chastisement of children and Kincaid quotes a letter published in the *Los Angeles Times* as stating that "Michael Fay deserved the 'woodshed' treatment".³³ My choice of title refers not only to the idea, central to what I have written, that images of what goes on in the woodshed might be seen as child pornography. I also allude to my hope that, in querying our preconceptions about child pornography and problematising the phrase, it has itself been subjected to some "woodshed" treatment.

Yet "woodshed" has another idiomatic role. In Stella Gibbons' classic 1932 novel *Cold Comfort Farm*, Great Aunt Ada Doom was haunted for life by a childhood experience in the woodshed. The book never reveals what had befallen her, but to have "seen something nasty in the woodshed" has stuck in the English language as a metaphor for being traumatised by some long distant memory.

The connection between child beating and sexual excitement has been acknowledged for millennia. Petronius (c. 27 - 66 A.D.) spoke of it in the *Satyricon*³⁴, as did Festus and

³¹ In that case, why does the camera favour the spanking of boys over that of girls? Are there simply more stories about boys? Probably there are. Or are boys little women, to be stripped, bent over and caned (figuratively fucked) by the men through whose gaze we see the world?

³² Mohr, *supra* note 19

³³ Kincaid, *supra* note 21, p. 149.

³⁴ Written c. 61 A.D.

Lucian.³⁵ A 1669 "Children's Petition" to the English Parliament referred to the "unquenchable appetites" of lecherous schoolmasters for the flogging of their pupils. Rousseau (1712 - 1788) traced his lifetime penchant for flagellation back to being spanked by his childhood nanny. Freud also wrote of it, saying that sexual arousal from childhood spankings are "well known".³⁶

Psychoanalyst Robert J. Stoller wrote of the eroticisation of traumatic experiences as a means of triumphing over them.³⁷ Having for some time monitored internet bulletin boards for those sexually aroused by the subject of corporal punishment for children, I have been struck by the number who refer to having been spanked in their own childhoods. Although the reliability of such evidence is highly suspect, might the child spanking web sites, simply be symptomatic of efforts to conquer childhood trauma?

Certainly I can see much in spanking to overcome. I believe the practice heaps an intolerable degree of humiliation on the child. The greatest harm is not the hitting, which rarely causes injury or significant physical pain, but the ritual that accompanies it, the baring of the buttocks, the bowing down, the theatre of submission and all the symbolism vested therein. If this thesis is to be understood as prescriptive of law as a means of prohibition, then let the ban fall here. With the British government determined not to repeal the law's enshrinement of the right, but rather to define what is reasonable chastisement in a way that addresses not the degradation caused by the act but its physical dangers, and with section 43 of Canada's *Criminal Code* having been upheld as constitutional as recently as July 2000,³⁸ without its sexual or humiliating ramifications having been addressed in the judgement, hope of such reform seems very distant in both countries.

I proffer Stoller's writings on sexualization as an attempted means of triumphing over trauma with some reticence. I have no desire to thereby pathologise the eroticisation of child spanking by suggesting it is an aberration that requires explanation. The sexuality has been pathologised enough. Let it be accounted for after normative heterosexuality has been convincingly justified.

Even so, what Stoller has to say shifts the identity of the victim of child pornography from the child to the pornographer. The same concept is familiar, and somewhat trite, in child abuse discourse: child abuse produces child abusers, so that the abuser is also the victim. Normally this is used as just another means of condemning the abuse.

³⁵ see Scott, G. R., *History of Corporal Punishment*, (London, Torchstone Books, 1950)

³⁶ Freud, S., "Three Essays on the Theory of Sexuality" (1905), in *The Standard Edition of the Complete Works of Sigmund Freud*, J. Strachey, (ed.), (London, Hogarth Press, 1953).

³⁷ Stoller, R. J., *Pain & Passion: A Psychoanalyst Explores the World of S & M*, (New York, Plenum Press, 1991), see especially Introduction and Conclusion.

³⁸ Section 43 was upheld as constitutional by the Ontario Superior Court: *Canadian Foundation For Children, Youth And The Law v. The Attorney General In Right Of Canada*, (2000), 98-CV-158948, Lexis 1321

Despite my arguments, some will still maintain that child pornography is synonymous with child abuse, that both are exploitation. To this I can only wearily retort: it depends on how you define your terms. I began in the introduction by raising various scenarios and asking which were sexual exploitation. I did so without taking a position on any. So let me, in the closing paragraphs of this work, take a position on one scenario. Taking images of children being spanked from mainstream movies and television, that have survived all the rigours of regulation presented by the criminal law, film censorship boards and broadcasting authorities, collecting them together on internet sites and distributing them for the delectation of those sexually aroused by such material, is not sexual exploitation. Nor is masturbating over those images. Rather such practices are testament to human ingenuity under the most oppressive of censorial regimes.

I accept that for some of the child actors involved, learning of what is happening might be upsetting. Whether the upset of the revelation will be so great that its avoidance deserves the curtailment of freedom of expression seems far from obvious. That appearance in pornography will be experienced as exploitation cannot be framed as a universal truth by those who berate pornography. Similarly I am prepared to accept that some, perhaps many, children do not experience spankings as humiliating or degrading and may barely remember them once the sting has worn off.

Child pornography and "child abuse" are areas rife with claims to truth. That terrible things are done to children to create images for the sexual titillation of adults is undeniable. That every image of child nudity, child spanking or child engagement in sexual activity exploits and abuses a child, even those involved in their production, is wide open to challenge.

Children have been spanked and beaten since the dawn of time. Let every aspect of that historic reality, the nudity, the pain and the humiliation, continue to be recorded in imagery, and let the experience of those images, the way they are used, detested, enjoyed and, yes, masturbated over, continue to be as various as those of the spankings themselves.

Roy Baker
Vancouver
August 2000

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APPENDICES

APPENDIX I

CANADIAN CRIMINAL CODE

R.S.C. 1985, c. C-46

Section 163

S.C. 1993, c. 46, s. 1.

Corrupting morals

- (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.

Idem

- (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.

Defence of public good

- (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.

Question of law and question of fact

- (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.

Motives irrelevant

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

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

Definition of "crime comic"

- (7) [omitted]

Obscene publication

- (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.

Section 163.1

S.C. 1993, c. 46, s. 2.

Definition of "child pornography"

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

Making child pornography

- (2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of
- (a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or
 - (b) an offence punishable on summary conviction.

Distribution or sale of child pornography

- (3) Every person who imports, distributes, sells or possesses for the purpose of distribution or sale any child pornography is guilty of
- (a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or
 - (b) an offence punishable on summary conviction.

Possession of child pornography

- (4) Every person who possesses any child pornography is guilty of
- (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
 - (b) an offence punishable on summary conviction.

Defence

- (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.

Defences

- (6) Where the accused is charged with an offence under subsection (2), (3) or (4), the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose.

[Subsection 7 omitted]

APPENDIX II

PROTECTION OF CHILDREN ACT, 1978 (c. 37)

Sections 1 & 7

(English legislation)

Section 1:

- (1) It is an offence for a person
 - (a) to take, or permit to be taken or to make, any indecent photograph or pseudo-photograph of a child; or
 - (b) to distribute or show such indecent photographs or pseudo-photographs; or
 - (c) to have in his possession such indecent photographs or pseudo-photographs, with a view to their being distributed or shown by himself or others; or
 - (d) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo-photographs, or intends to do so.
- (2) For purposes of this Act, a person is to be regarded as distributing an indecent photograph or pseudo-photograph if he parts with possession of it to, or exposes or offers it for acquisition by, another person.
- (3) Proceedings for an offence under this Act shall not be instituted except by or with the consent of the Director of Public Prosecutions.
- (4) Where a person is charged with an offence under subsection (1)(b) or (c), it shall be a defence for him to prove
 - (a) that he had a legitimate reason for distributing or showing the photographs or pseudo-photographs or (as the case may be) having them in his possession; or
 - (b) that he had not himself seen the photographs or pseudo-photographs and did not know, nor had any cause to suspect, them to be indecent.

[Subsection 5 omitted].

Section 7 (Interpretation):

- (1) The following subsections apply for the interpretation of this Act.
- (2) References to an indecent photograph include an indecent film, a copy of an indecent photograph or film, and an indecent photograph comprised in a film.
- (3) Photographs (including those comprised in a film) shall, if they show children and are indecent, be treated for all purposes of this Act as indecent photographs of children and so as respects pseudo-photographs.
- (4) References to a photograph include

- (a) the negative as well as the positive version; and
 - (b) data stored on a computer disc or by other electronic means which is capable of conversion into a photograph.
- (5) "Film" includes any form of video-recording.
- (6) "Child", subject to subsection (8), means a person under the age of 16.
- (7) "Pseudo-photograph" means an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph.
- (8) If the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes of this Act as showing a child and so shall a pseudo- photograph where the predominant impression conveyed is that the person shown is a child notwithstanding that some of the physical characteristics shown are those of an adult.
- (9) References to an indecent pseudo-photograph include
 - (a) a copy of an indecent pseudo-photograph; and
 - (b) data stored on a computer disc or by other electronic means which is capable of conversion into a pseudo-photograph.

APPENDIX III

MOTION PICTURE ACT

R.S.B.C. 1996, c. 314

Sections 1 & 5

(British Columbia legislation)

Extract from section 1 - Interpretation

In this Act

“adult film” means a film that produces or reproduces an adult motion picture;

(...)

“adult motion picture” means

- (a) a motion picture that was submitted for review under the former Act or under section 2 (1) of this Act for the purpose of exhibition in a theatre and, following the review,
 - (i) was not approved,
 - (ii) was approved, but had a portion removed, or
 - (iii) was approved, but with a condition that it may only be exhibited in theatres designated by the director,
- (b) a motion picture that has not been reviewed under section 5 that depicts
 - (i) explicit sexual scenes,
 - (ii) the coercing, through the use or threat of physical force or by other means, of a person to engage in a sexual act, where that sexual act is depicted in explicit sexual scenes or sexually suggestive scenes,
 - (iii) incest or necrophilia,
 - (iv) bondage in a sexual context,
 - (v) persons who are or who appear to be under the age of 14 involved in sexually suggestive scenes, whether or not they appear nude or partially nude,
 - (vi) persons who are or who appear to be under the age of 18 involved in explicit sexual scenes,
 - (vii) explicit sexual scenes involving violence,
 - (vii) scenes of brutality or torture to persons or animals, depicted in a realistic and explicit manner, or
 - (ix) sexual conduct between a human being and an animal, or
- (c) a motion picture that contains scenes that depict conduct or an activity that is prescribed in a regulation made under section 14 (d);¹

“film” means photographic film, pre-recorded video tapes, pre-recorded video discs and includes any other object or device on or within which there is recorded, by photographic, electronic or other means, the content of a motion picture, and from which, by the use of projector, machine or other appropriate technology, the motion picture may be viewed, exhibited or projected;

Sub-sections 5 (3) - (5):

¹ Depictions of urination and defecation for sexual gratification are prescribed: Motion Pictures Act Regulations, Reg. 2.

- (3) Subject to section (5), the director shall, before approving a motion picture ... remove or require the removal of, by erasure or otherwise, any portion of it that depicts
 - (a) the coercing, through the use of threat of physical force or by other means, of a person to engage in a sexual act, where the sexual act that was coerced is depicted in explicit sexual scenes,
 - (b) incest or necrophilia,
 - (c) bondage in a sexual context,
 - (d) persons who are or who appear to be under the age of 14 involved in sexually suggestive scenes, whether or not they appear nude or partially nude,
 - (e) persons who are or who appear to be under the age of 18 involved in explicit sexual scenes,
 - (f) explicit sexual scenes involving violence,
 - (g) scenes of brutality to or torture, maiming or dismemberment of persons or animals that are portrayed with such a degree of reality and explicitness that the scenes would, in the director's opinion, be intolerable to the community,
 - (h) sexual conduct between a human being and an animal, or
 - (i) conduct or an activity that is prescribed in a regulation made under section 14 (f).
- (4) Subject to subsection (5), the director shall not approve of a motion picture submitted under section 2 (1) or an adult motion picture submitted under section 3 (1) where the motion picture or the adult motion picture predominantly consists of any, or a combination of, scenes referred to in subsection (3) (a) to (i).
- (5) The director is not required to remove material under subsection (3) or refuse approval of a motion picture or adult motion picture under subsection (4) where he considers that the theme, subject matter or plot of the motion picture or adult motion picture is artistic, historical, political, educational or scientific.

APPENDIX IV

EXTRACTS FROM THE BSC'S *CODE ON STANDARDS*, 1998

Children

- 87 A sexual relationship between an adult and a child or between under-age young people can be a legitimate theme for programmes: it is the treatment which may make it improper, or even unlawful. The treatment should not suggest that such behaviour is legal or is to be encouraged.

Explicit sexual acts between adults and children should not be transmitted.

- 88 The Protection of Children Act, 1978, makes it an offence to take an indecent photograph, film or video-recording of a child under the age of 16, or involve a child below 16 in a photograph or recording which is itself indecent – even if the child's role in it is not. Even when legal advice judges material to be on the right side of the law, it should be subjected to careful scrutiny at the highest level over the need to include the sequence in the programme. This applies even when the child is played by an older actor or actress.

Incest and Child Abuse

- 89 The inclusion of these subjects in well-established serials or single programmes may be justified as public information, even in programmes directed at older children. These programmes may also play a legitimate role in warning children of the dangers of abuse, and advising them of the help available.
- 90 Where a play or film takes incest as its theme, there should be particular awareness of the relative ease with which some people, including children, may identify characters or actions with their own circumstances, and may also take them as role models.
- 91 In television, material of this kind should be accompanied by clear labelling of the programme's content, while sensitive scheduling and labelling are also called for in radio.