

INTRODUCTION: CONSTRUCTIONS, THEMES AND CRITICAL TENSIONS

In writing this book, I have chosen to focus upon two highly sensitive and disturbing phenomena that tend to generate a commonly shared repugnance, matters which our contemporary society has chosen to target as one part of its attempts to protect children from sexual abuse and related acts. Social, medical and legal narratives upon the subject of child sexual abuse abound. However, despite the considerable political, legal and societal concern and media coverage that child pornography and sexual grooming attract, these critical phenomena have not, thus far, been subjected to detailed socio-legal and theoretical scrutiny. Moreover, legal research and literature on child pornography and grooming are, at this point, still fairly sparse. The time is thus ripe for us to engage in a critical analysis and evaluation of the way in which society and law are responding to these subjects. A close analysis of child pornography and grooming is particularly important, since they offer case study exemplars of problems that law and society have sought to tackle to avoid not only actual, but also potential and more remote, harms to children.

However, one of the consequences of the increased legal and societal attention paid to child sexual abuse and related acts over the last few decades is that anyone wishing to carry out critical socio-legal research does so only after much serious thought and with caution. There is an inevitable concern about the reception of a work that critically analyses society's attempts to address and eradicate what is considered to be an abhorrent evil in our society. Child sexual abuse, after all, is a subject that is capable of evoking strong and raw emotion. An author may be treading on dangerous ground if he or she tries to predict the way in which readers will respond to his or her work or the impact that it will have, but I can at least explain my rationale for writing this book. I intend to encourage a reassessment of the way in which we, as a society, endeavour to protect children from the threat of physical and psychological harm that child pornography and grooming represent. As a consequence, a central

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theme explored within this work is that of children's vulnerability to harm and their exploitation.

My main objective is to expose and analyse what are, in my view, the critical tensions that exist within current legal and social discourses surrounding child pornography and grooming. These critical tensions form the principal themes of the book. Throughout, my analysis revolves around the framing and constructions of children, child pornography and grooming in legal, social, political and cultural narratives. There is a pivotal argument that runs through this book. It may not come as a surprise that I will reason that child pornography and grooming are both stark examples of adults exploiting children. However, I will argue that, in certain important respects, society is not dealing with this exploitation in an appropriate way. It is vital that we reframe the way in which this exploitation is ideologically presented if we truly wish to offer children the best protection that we can and, at the same time, respect and value them for who they really are. I develop my argument through socio-legal analysis, and there is also an empirical dimension to my research. The remainder of this chapter will introduce the main theories that inform the analysis within this book and highlight significant themes and tensions that the work addresses.

SOCIAL CONSTRUCTION THEORY AND
A DISCOURSE OF MORALITY

All of the themes that I identify and analyse in the next section involve tensions that society must deal with so that it can get to grips with what it really wants to protect children from. Moreover, these tensions must be tackled in order to discourage a reaction to child pornography and grooming that inadvertently places children at further risk of harm. These tensions have emerged because of the way in which children are constructed as social and legal beings. Just as crucially, they exist because of the manner in which society and law construe the harms of child pornography and grooming. As a consequence, social construction theory and the concept of a morality discourse underpin my central analysis and method and thus it is to these that I first turn.

Social construction theory gained prominence in the late 1960s following the publication of Berger and Luckmann's influential work,

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The Social Construction of Reality.¹ Berger and Luckmann contended that the reality that exists around us is socially defined, the result of human activity, and their work provides an explanation of the processes by which 'knowledge' within a society becomes established as 'reality'.² According to Berger and Luckmann, 'all social phenomena are constructions produced historically through human activity'.³ In any social world, meanings are attached to experiences, activities, institutional processes and social phenomena, and become embedded into the objective reality of that society. Berger and Luckmann introduced the idea of a symbolic universe within which all human experience takes place. Essentially, 'Symbolic universes ... are bodies of theoretical tradition that integrate different provinces of meaning and encompass the institutional order in a symbolic totality'.⁴ The symbolic universe ensures the continued existence and acceptance of the objective reality of the social world. This book is concerned with exploring a symbolic universe in which problematic constructions of children exist, and in which perceptions of the prevalence of, and harms engendered by, child pornography and grooming may be distorted.

The idea that 'the child' and childhood are constructions is, of course, not new. In 1989, James and Prout saw social construction as an essential tenet of what they described as the emergent paradigm for the sociological study of childhood.⁵ Some eight years later, social construction discourse had become sufficiently prominent in this field for the same authors to comment that 'writers or researchers who do not acknowledge the constitution of childhood within socially and historically situated discourse or who fail to give weight to its variability and relativity are currently more or less guaranteed a much more critical reception than was previously the case'.⁶ As a consequence of recognizing the role that constructions play in the definition of childhood, it becomes apparent that there is no universal child or childhood.⁷ For particular reasons, however, certain constructions of childhood can gain special prominence and become defining, taken-for-granted characteristics of 'the child'. As will become apparent, it is the dominant, critical constructions of childhood innocence and vulnerability that I am concerned with in this book. These categorizations may seem

¹ Berger and Luckmann 1967.

² Berger and Luckmann 1967: 116. ³ Ibid.: 106. ⁴ Ibid.: 95.

⁵ James and Prout 1990: 3. See also James *et al.* 1998: 26–8. ⁶ James and Prout 1997: x.

⁷ See James *et al.* 1998: 27; Jackson 1982: 28; and Jenks 1996.

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appropriate and inevitable in contemporary society, but are they? I adopt an approach known as unmasking constructionism,⁸ through which I intend to reveal that the construction of innocence in particular has a dubious, if not fallacious, authority. I also intend to expose the purpose of this construction.⁹

The communication of certain social definitions and constructions ensures that they play a significant role in the way in which we define ourselves and interact with the world around us, as explained by Trenholm: 'Coordinated interaction is intimately tied to our ability to create and maintain definitions of self and others ... these definitions are created by society and supported by communication.'¹⁰ In other words, constructions of the child and the harms of child pornography and grooming come into being through social and legal structures, culture, politics and, last but not least, the media. Through communicating these constructions to each other, we ensure that they gain further credence and strength. Child pornography and grooming have come to be perceived as social problems through the communication of constructions that reflect a high level of concern about them. In addition, as Searle observes, it is important to be aware that 'social reality is created by us for our purposes and seems as readily intelligible to us as those purposes themselves'.¹¹ Thus, perceiving children as innocent and vulnerable serves to ensure that we protect them and continue to see them as fundamentally different from adults. Childhood innocence and vulnerability are constructions of the powerful protectionist discourse which currently prevails in the social and legal world. One of the primary concerns of this book is that the taken-for-granted constructions of children we most commonly communicate to each other and accept may, in fact, be creating an unrealistic and dangerous social reality. I am thus utilizing social construction theory to 'raise consciousness' about the societal and legal reaction to child pornography and grooming.¹²

It is when our attention is brought to the crucial communicative tools of language and discourse that the influence of morality becomes apparent. Foucault's discourse analysis encourages reflection upon why we construct and perceive phenomena in the way that we do. Whilst I do not apply a specifically Foucaultian approach to discourse in this book, I draw broadly on the emphasis he places on the power of discourse

⁸ See Hacking 1999: 20. ⁹ Ibid. ¹⁰ Trenholm 1991: 9. See also Gergen 1999.

¹¹ Searle 1995: 4. ¹² See Hacking 1999: 6.

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to shape our understanding of the object being studied.¹³ I apply the concept of discourse to refer to the operation of language, interactions and practices in social, legal and ideological contexts.¹⁴ One particular focus of this book is a discourse of morality. We interpret certain behaviour, especially behaviour that is norm-breaking, through a lens of morality, and discourse enables us to convey our moral judgement of the actor. Bergmann alerts us to the fact that our personal lens of morality is shaped through discourse: 'whenever respect and approval (or disrespect and disapproval) for an individual are communicated, a moral discourse takes place ... Morality is constructed in and through social interaction, and the analysis of morality has to focus, accordingly, on the intricacies of everyday discourse.'¹⁵ In other words, discourse and morality go hand in hand.¹⁶

A discourse of morality surrounds and influences the way in which we perceive and construct child pornography and grooming. As a consequence of this morality discourse, our understandings of and reactions to both phenomena are influenced by juxtaposing constructions such as innocence versus depravity, purity versus corruption, child versus adult, the normal adult versus the abnormal paedophile and protection versus abuse. If, as I will shortly discuss, there has been a disproportionate reaction to child pornography and grooming, it is morality which has given content to this reaction.¹⁷ Morality is capable of invoking such strong emotions and responses that I will argue we may have witnessed a panic about these phenomena, generated by the authorities' reactions, the media and public opinion. In fact, the moral discourse that exists upon child pornography, grooming and child sexual abuse generally is so strong that one cannot choose to reject this discourse without being excluded from the social reality that is so intertwined with it.

Morality also pervades the legal discourses upon child pornography and grooming. Child pornography exists within a moral, ideological framework of indecency. Judicial and legislative condemnations of both phenomena are bolstered by moralistic terminology. Given the nature

¹³ Discourses are 'practices that systematically *form* the object of which they speak. Of course discourse is composed of signs; but what they do is more than use these signs to designate things. It is this more that renders them irreducible to language [langue] and to speech. It is this "more" that we must reveal and describe.' Foucault 1972: 49 (my emphasis).

¹⁴ See also Meyer 2007: 22. Generally, I use the term 'discourse' without subscribing to a particular theory.

¹⁵ Bergmann 1998: 286.

¹⁶ See Bergmann on the 'proto-moral' dimension to discourse. *Ibid.*: 283–5.

¹⁷ Goode and Ben-Yehuda 1994: 142.

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of child pornography and grooming and the subject under threat, it is almost inevitable that social and legal understandings of the problem are shaped by morality. Indeed, the presentation of the harm of child pornography and grooming that I support, exploitation,¹⁸ has an inherently moral dimension. However, too much of a focus on morality can detract attention from the main harms of these phenomena. I argue that one of the primary reasons why the placing of indecency at the heart of the current child pornography laws is so problematic is because the concept of indecency does not adequately address the fact that children are exploited and, in some cases, abused. It is around this exploitation that social and legal concerns should be framed.

With this theoretical framework in mind, I will now introduce, in turn, the critical tensions that this book is concerned with: children's vulnerability and the question of harm, childhood innocence, child pornography and grooming as contemporary moral panics and finally, the vulnerability of individual rights.

CRITICAL TENSIONS

Protecting children's vulnerability to exploitation and the crucial question of harm

Suffering children appear as archetypal victims, since childhood itself is defined by weakness and incapacity.¹⁹

Any research relating to children inevitably entails a focus on the sacred in society. In social culture, theory and policy, children enjoy a heavily guarded and highly cherished status. Because of the particular characteristics that we attribute to 'the child', behaviour that places children at risk of harm appears more harmful to us than the same behaviour that exposes adults to risk.²⁰ In the social and legal world, children are categorized as a vulnerable class in need of protection from physical and certain kinds of psychological threats. According to the British Government, for example, children are particularly vulnerable 'because

¹⁸ I explore the concept of exploitation in Chapter 3. I should state from the outset that I apply Feinberg's analysis of harm and exploitation. See Feinberg 1984; and Feinberg 1988. I see exploitation as the harm of child pornography and grooming in a normative sense and because pornographers and groomers set back children's interests.

¹⁹ Holland 2006: 143. ²⁰ See also Jackson and Scott 1999: 90.

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of their immaturity of judgement, lack of authority in relation to adults and physical vulnerability'.²¹

Sociological discourses have drawn attention to the question of whether and to what extent the vulnerability that children are seen to possess is an innate or a socially constructed vulnerability. For Lansdown, children's vulnerability is, in part, a structural vulnerability socially constructed by their lack of civil status.²² Jackson sees claims that children are vulnerable and weak as justifying a social world in which children are unable to make their own decisions, have no ability to exercise rights and remain dependent on adults.²³ Diduck suggests that it is the power of the notion of childhood, coupled with the physical dependency of children, which causes their welfare to be prioritized over protection of their legal rights.²⁴ It would appear, then, that the social reality of vulnerability that children experience is only partly the result of a natural characteristic of childhood and is largely defined by a society that has accentuated this particular image of the child. Children experience this socially defined vulnerability because it is so prevalent that it permeates their lived reality. Additionally, children's vulnerability to exploitation is not fixed; it is dependent on the way in which both vulnerability and exploitation are defined in the particular social world, the social context and constructions of that social context.

The concept of vulnerability is frequently alluded to when the protection of children is at issue. Whilst protecting children from harm is considered to be a specific parental duty,²⁵ a broader responsibility is placed on our society, on our lawmakers and adjudicators, for the welfare of all of the children who exist within it.²⁶ In the American Supreme Court case of *Bellotti v. Baird*,²⁷ for example, which involved the question of whether the requirement of parental consent for minors requesting an abortion was unconstitutional, Justice Powell emphasized '[t]he Court's concern for the vulnerability of children'. He stated that the 'peculiar vulnerability of children' was one of the main reasons that the Supreme Court had previously held that it was not possible to equate children's constitutional rights with those of adults.²⁸ In the more recent English

²¹ Home Office 2000: para. 4.1.2. See also Goodin 1985: 191: the characteristics of 'limited information, understanding, sophistication, etc. – make children inevitably vulnerable'.

²² See Lansdown 1994: 34–5. ²³ Jackson 1982: 26.

²⁴ Diduck 1999: 130–1. See also Piper 2000: 40. ²⁵ See Goodin 1985: 79–83.

²⁶ See Lansdown 1994: 33; and Diduck 1999: 131. ²⁷ 443 US 662 (1979).

²⁸ *Ibid.*: 633–4.

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case of *R. v. Kabir*,²⁹ the Court of Appeal held that the trial judge's decision that the offender serve a minimum term of thirteen years for the murder of his ten-month-old son was unduly lenient, because an aggravated feature of the crime was that 'the victim in this case was particularly vulnerable because of his age; he was helpless'.³⁰ Countless more examples exist of an emphasis upon the need to protect children's vulnerability in legal discourses.

The desire to protect what is most vulnerable is particularly apparent when there is a risk of children and behaviour of a sexual nature being brought together.³¹ As Kleinmans comments: 'Children and sexuality are western sacred cows of the present age.'³² Sachsenmaier goes so far as to argue that 'protection of children from harm, particularly sexual abuse, is the moral imperative our society has adopted as the most important'.³³ Children's particular vulnerability to sexual abuse was emphasized when the Sexual Offences Bill (which became the Sexual Offences Act 2003) was being debated in Parliament:

Sexual crime, and the fear of sexual crime, has a profound and damaging effect on the lives of individuals and communities. A responsibility rests on the Government adequately to protect everyone in society from such crimes, *especially those who are most vulnerable to abuse: children and persons with a mental disorder or learning disability*.³⁴

Although children and adults with mental disorders are both categorized as vulnerable groups in relation to sexual behaviour, there is a distinction drawn between the *level* of protection that it is considered should be offered to both groups, because of the accepted social and cultural perception that children are unable to consent to involvement in sexual acts. During the Parliamentary debates referred to above, Lord Falconer responded to the question of whether the protection offered by the proposed offence of meeting a child following sexual grooming³⁵ should also be extended to adults with mental disorders. In his view, extending the scope of the offence in this way would lead to a situation where:

even though the right of those people who have the capacity to consent is recognised – albeit with some form of mental impairment – nevertheless

²⁹ [2005] 1 Cr. App. R. (S). ³⁰ *Ibid.*, para. 23, *per* Lord Woolf C. J.

³¹ See, e.g. Summit 1990: 64. ³² Kleinmans 2002: 233. ³³ Sachsenmaier 1998.

³⁴ Hansard, HL Deb, 13 February 2003: column 771 (Lord Falconer) (*my emphasis*).

³⁵ Now s. 15 of the Sexual Offences Act 2003.

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they are entitled to especial protection and they should not be able to make the kinds of judgments that the rest of us are entitled to make ... But because of our profound concern not to prevent people who do have the capacity to consent to be able to court and be courted in the way that other adults are, I am not sure that it would be right to extend this protection to those who do have the capacity to consent.³⁶

The difference in the level of protection regarding sexual behaviour is rationalized then, because law and society recognize the autonomy of adults with mental disorders (at least to some degree in this context), and respect for their autonomy outweighs concerns regarding their vulnerability. In contrast, children are seen as non-autonomous in this context; we cannot see them as playing any kind of complicit role in sexual behaviour they are involved in. As a consequence, whereas an adult with a mental disorder will see his right to autonomy protected (assuming he has the capacity to consent to sexually related behaviour),³⁷ the child's right remains framed around protection from harm.³⁸ Wendy and Rex Stainton Rogers believe the conception that children are incapable of consent is based on 'a sensibility to their vulnerability to adult power' rather than an understanding derived from a developmental perception of children's intellectual capability.³⁹ The notion of victimization also plays a role here. King and Piper argue that legal and social constructs of the child present the notion of children as victims and consequently: 'In child protection the concepts of the willing victim or contributory negligence simply do not arise.'⁴⁰

In cases specifically involving child pornography and grooming, the vulnerability of the child victim(s) is commonly emphasized. In referrals or appeals against sentences that have come before the Court of Appeal, for example, judges regularly make references to the child victim being particularly vulnerable.⁴¹ Members of the legislature are also keen to stress this characteristic. When the Bill that would become

³⁶ Hansard, HL Deb, 1 April 2003: columns 1265–6.

³⁷ Although cases such as *F. v. West Berkshire Health Authority* [1989] 2 All ER 545 evidence that legal recognition of a mentally incapacitated individual's autonomy regarding sexual behaviour and its possible repercussions is limited.

³⁸ See also Waites 2005: 38 and 218. ³⁹ Stainton Rogers and Stainton Rogers 1999: 191.

⁴⁰ King and Piper 1995: 65.

⁴¹ See, e.g. *R. v. Mohammed* [2006] EWCA Crim. 1107, para. 13; *R. v. Wilson* [2006] EWCA Crim. 505, para. 12; *Attorney General's Reference (no. 3 of 2006)* [2006] EWCA Crim. 695, para. 10; and *R. v. GA* [2006] EWCA Crim. 1201, para. 13.

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the first piece of legislation on child pornography was being debated in the House of Lords, Lord Robertson reminded the other Members of the House that: ‘we need to be sure that we do not lose sight of the special qualities, limitations and vulnerability of children’.⁴² The concept of vulnerability thus inevitably shapes legal and societal responses to child pornography and grooming, and is consequently an important focus of my analysis within this book. Specifically, I will examine the nature and reality of the threat that child pornography and grooming represent, and consider what exactly makes children so vulnerable in these contexts and ways in which society can tackle this vulnerability. Another necessary element of my focus on the notion of vulnerability is to understand and assess the extent to which there are parallels between the way in which child pornographers and groomers exploit the vulnerability of children.

Whilst the emphasis placed on children’s vulnerability plays an important and compelling role in promoting child protection, the powerful nature of the concept of vulnerability creates a tension. Because children are distinguished as a special vulnerable group, as victims in need of protection, it can become difficult to respond objectively to the level of threat posed to them. I will assess whether the legal and social mechanisms that currently exist to combat child pornography and grooming are protecting children appropriately and effectively serving ‘society’s need to protect vulnerable children’.⁴³ It also seems that the strength of the desire to protect children causes us to be less inclined to demand proof of real, definite harm before we criminalize behaviour that may pose a threat. Social and legal narratives present the protection of children as imperative. The protectionist discourse has become so powerful and compelling that, when it comes to the legal regulation of the possession of indecent images of children, the fact that there is a risk of potential, more remote, harm to children as a consequence of this behaviour suffices. We do not demand, for example, proof that the possessor of child pornography will be incited to go out and sexually abuse a child. Indeed, the criminalization of the possession of child pornography and of arranging to meet a child following sexual grooming can be seen as examples of the targeting of behaviour that can potentially cause harm to children.⁴⁴ Also, if the individual in question has already

⁴² Hansard, HL Deb, 5 May 1978: column 566. ⁴³ Home Office 2000: para. 3.6.11.

⁴⁴ See generally Husak 2008: 44. This is not to say that the possession of an indecent photograph of a child offence under the Criminal Justice Act 1988 is only targeted at behaviour that is