

OSGOODE

OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY

The Moral Complexity of Child Pornography Law: Progress and Paradox

May 7, 2007

Professor Bruce Ryder

moral complexity of Canada's child pornography offence

- s.163.1 of the *Criminal Code*, enacted in 1993, has both a solid and urgent moral core and a morally dubious periphery
- enforcement has focused, with increasing success in achieving convictions, penalties and protective orders, on the core objective of suppressing child abuse images
- at the moral periphery, child pornography law can cause more harm than it prevents; indeed, it can reproduce the very harms it seeks to suppress

moral core of child pornography offence

- criminalizes the production (ss.2), distribution (ss.3), possession (ss.4) and accessing (ss.4.1) of images that record the abuse of real children
- supported by 2 powerful rationales: 1) deterring the abuse of children by punishing all elements of the supply and demand; 2) reducing the ongoing affront to a person's dignity that images of his or her abuse as a child represent

child abuse images: record of successful enforcement

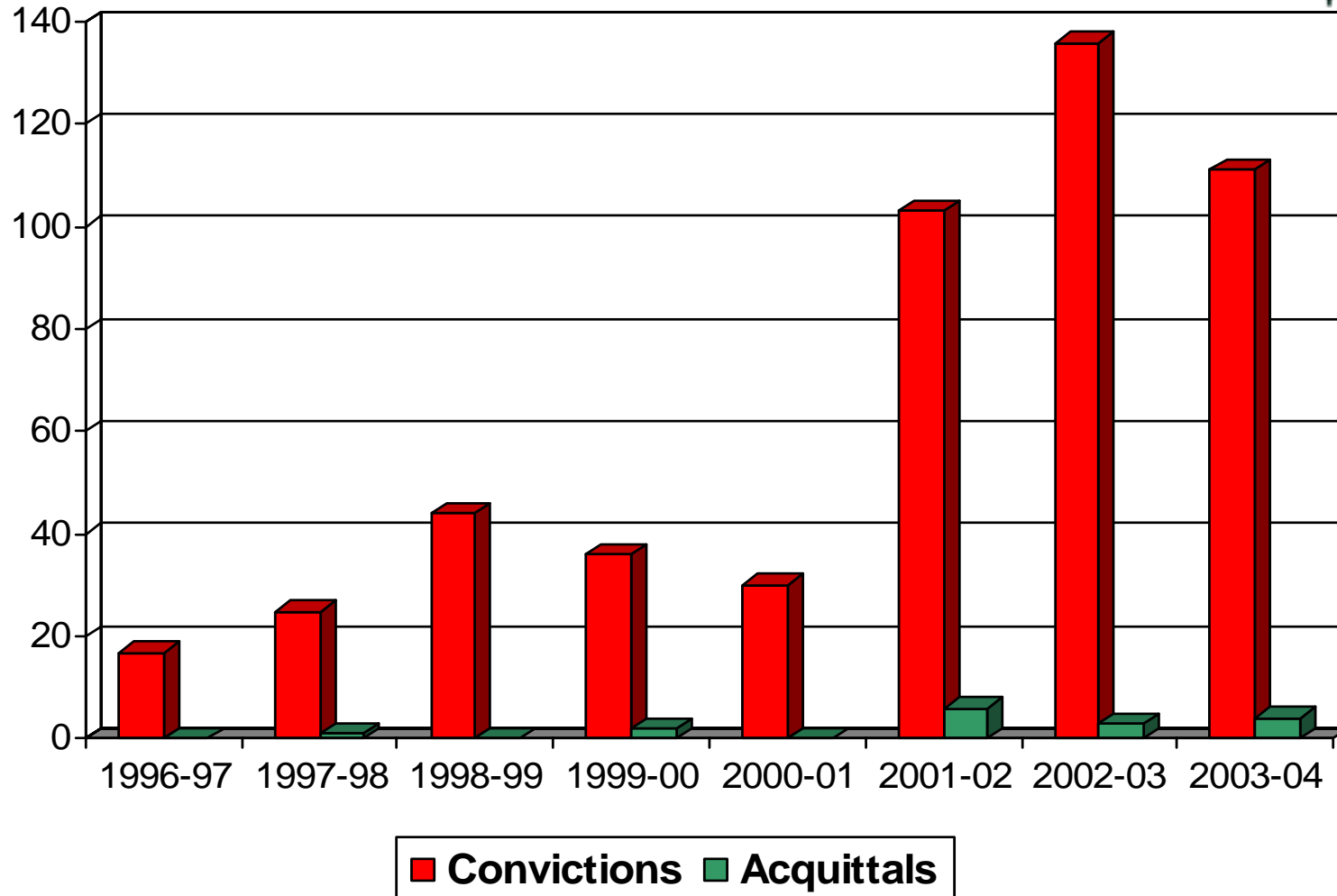
- s.163.1 has proven to be a powerful weapon against those who use the internet to distribute and use child abuse images
- dramatic increase in prosecutions since the late 1990s; majority involve possession charges regarding images of abuse of pre-pubescent children
- guilty pleas are the norm; acquittals are rare

Child Pornography Case Dispositions, 1996-2004

Source: Canadian Centre for Justice Statistics

OSGOODE

OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY

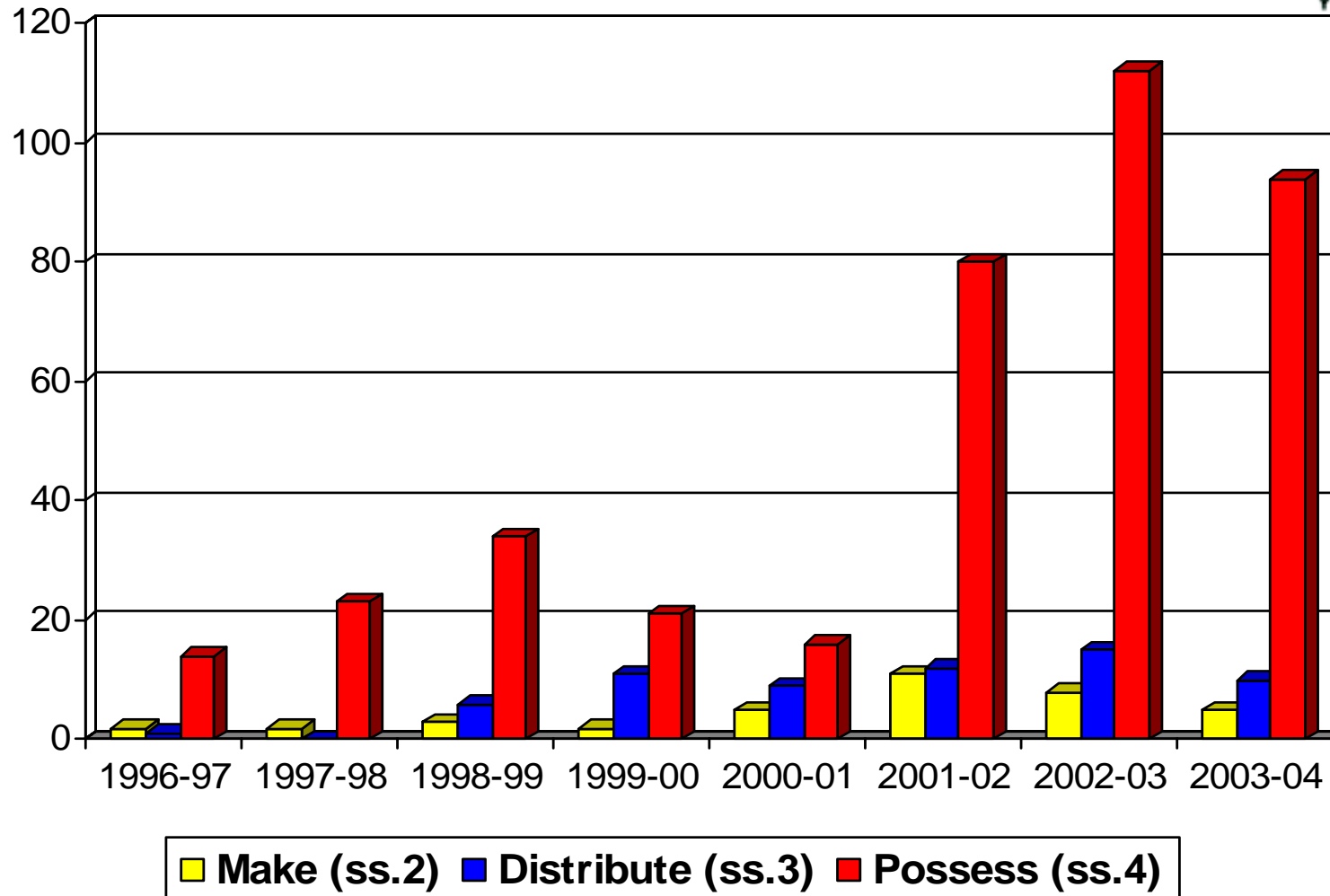


Child Pornography Convictions by Section 163.1 Offence

Source: Canadian Centre for Justice Statistics

OSGOODE

OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY



child abuse images: Parliament supports a more punitive approach

- added new offences to s.163.1, including transmitting and accessing (2002)
- replaced defence of artistic merit with narrower “legitimate purpose” defence (2005)
- increased penalties; now mandatory minimum jail sentence for all those convicted of child pornography offences committed after Nov. 1, 2005 (1 year for making or distributing; 45 days for possessing or accessing)

child abuse images: the courts support a more punitive approach

- sentencing practices more severe (jail terms; probation; prohibition orders; DNA; sex offender registry)
- conditional sentences increasingly rare (75% of convictions reported on QuickLaw over last year resulted in jail sentences; average length was 1 year)

moral periphery of child pornography offence

- embraces materials that are not records of child abuse and subjects them to the same stigmatizing and punitive regime
- amendments in 2002 and 2005 have made the problem of overreach much worse than it was at the time of *Sharpe* (SCC 2001)
- the legal validity and the moral authority of the core of s.163.1 is put at risk by Parliament's overreach

materials caught by s.163.1 that are not child abuse images

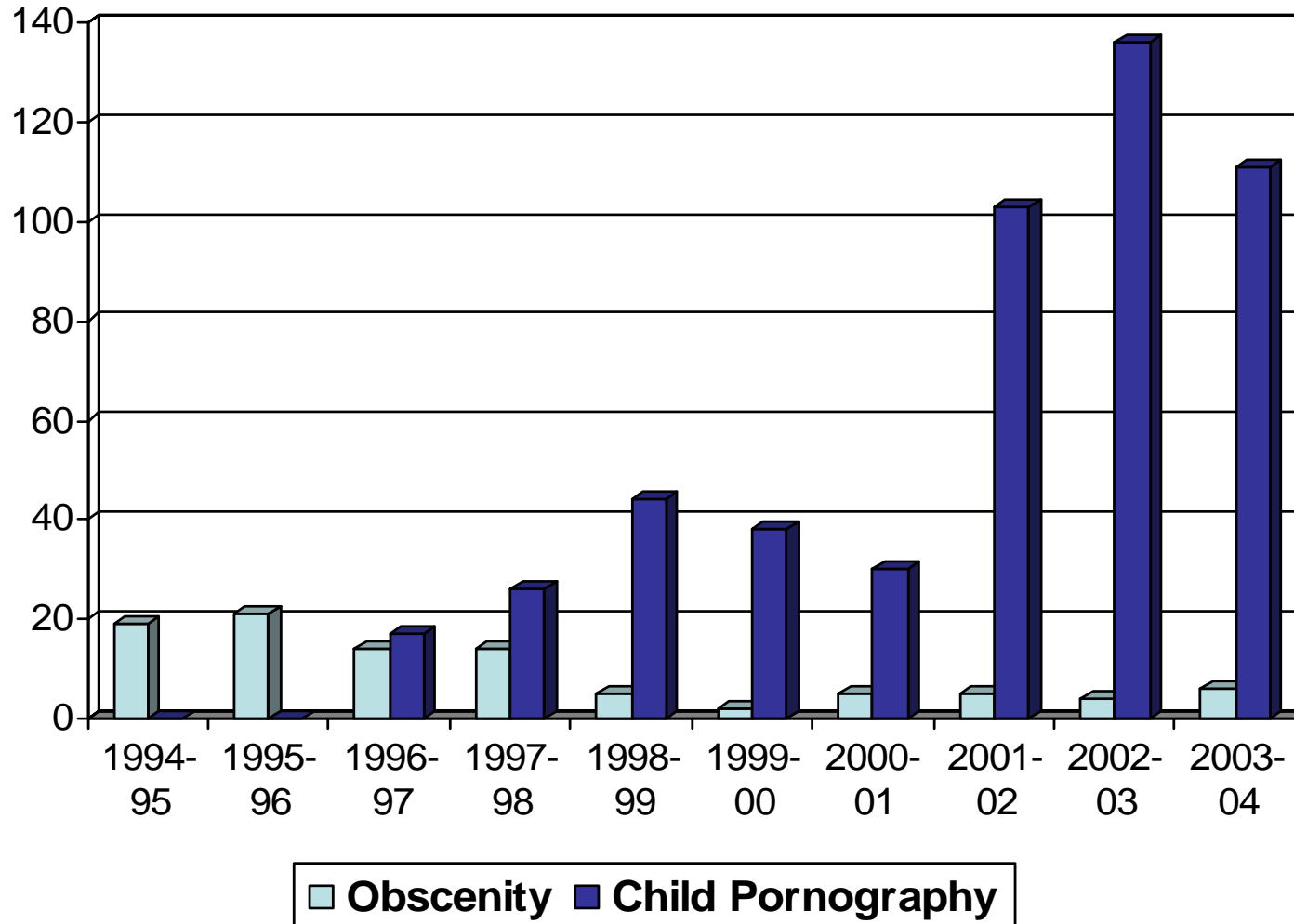
1. images depicting adolescents or young adults in sexual poses or engaged in lawful sexual activity
 - on rare occasions, possession of this material is the sole basis for prosecution: see, e.g., *R. v. Duval* 2007 Ont CJ (conditional discharge; now would face mandatory 45 day jail term)
 - rise of child pornography prosecutions has occurred at the same time as the near disappearance of obscenity prosecutions related to representations of adult sexuality

Obscenity and Child Pornography Case Dispositions, 1994-2004

Source: Canadian Centre for Justice Statistics

OSGOODE

OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY



images of lawful sexual activity

- non-violent adult pornography (over 18): circulates legally and widely in various media
- obscenity provision: contains no simple possession offence; persons convicted are not subject to intense stigma, mandatory minimum sentences, sex offender registration, DNA orders or s.161 prohibition orders
- child pornography (under 18): any use is a serious offence subject to intense social condemnation, a mandatory jail term, DNA order, prohibition order, sex offender registration

materials caught by s.163.1 that are not child abuse images

2. creative works that are products of the imagination, including stories and paintings
 - Parliament extended the definition of written child pornography in 2005, at the same time as it removed the artistic merit defence and added mandatory jail sentences
 - on rare occasions, this material is the sole basis for prosecution: see, e.g., *R. v. Austin* 2006 BC Prov Ct (conditional discharge for accessing stories; now would face mandatory 45 day jail term)

resulting paradoxes of child pornography law

- child pornography law is incoherent when it makes it a crime to possess or look at material that involved no harm in production
- the theory is that looking increases the risk of committing offences against children or youth
- since they must look at it, all those involved in investigating, prosecuting and judging such material pose, on this theory, the same kind of serious risks to society as those whose behaviour they are condemning
- some judges in child pornography cases describe material in detail in their opinions and thus, on this theory, are producing and distributing harmful child pornography

addressing the paradoxes of child pornography law

- judges ought not to reproduce detailed descriptions or passages from offending representations in their opinions
- materials that are not child abuse images should be removed from the child pornography offence
- non-sexual child abuse images should be treated by the criminal law in the same way as child sexual abuse images (as in Australia's Criminal Code Act)