Harm in the Digital Age: Critiquing the Construction of Victims, Harm, and Evidence in Proactive Child Luring Investigations

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ABSTRACT

Since 2002, both Parliament and the Court have repeatedly cited the dangers that online affordances pose to young people, the anonymity and protections that they grant offenders, and the complexities that they bring to the law. This project explores the underlying logics and implementation of section 172.1 of the *Criminal Code* ("Luring a Child") and critiques the current practice of governing child luring through proactive investigations by police. Proactive child luring investigations rely on using a state-created imaginary victim and have historically been granted large and undefined scopes through both law and Parliamentary bills. Investigations of this nature have been used to police marginalized sexualities and sex work communities and have inflicted substantial harms upon those who are wrongly caught up in investigations. We question the legitimacy of proactive investigations as a redress to child sexual exploitation online by examining child luring cases. We note that while prosecutions brought forward through the proactive investigation process have significantly increased,

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they rarely uncover any instances of harmful behaviour, 'real' victimization, or any criminal activity aside from the initial conversation.

I. INTRODUCTION

Regulating, policing, and denunciating sexual offences against youth are part of the fabric of most societies and are alive and well in the Canadian context. In the past few decades, both Parliament and the Court have repeatedly cited the dangers that online affordances pose to young people, the anonymity and protections that they grant offenders, and the complexities that they bring to the law. This project will consider section 172.1 of the *Criminal Code* ("Luring a Child") as a site of this complexity and critique the current practice of governing child luring through proactive investigations. We will begin by outlining the development of the law through a discussion of Parliamentary bills that formed and expanded upon section 172.1, arguing that both the scope of behaviour captured and the severity of sentencing have increased. Perhaps the most dramatic change to the legislation occurred in 2019. The Supreme Court of Canada released a ruling regarding the constitutionality of section 172.1 brought forward in *R v Morrison*, declaring a section of the law to be of no effect.[1] While this may address some of the critiques brought forward in this project, we are predominantly concerned with the ability to police, surveil, and govern behaviour without a victim, something section 172.1 still allows.

Proactive child luring investigations have yet to receive academic critique, despite relying on a unique legal ontology that allows the state to imagine and construct offences absent a 'victim.' A proactive investigation relies upon the anonymity of online spaces; police officers pose as youth online — often young women — and act as 'bait' for potential predators. Often these discussions are initiated by the officers. In many of the cases we have found, officers are responding to posts seeking casual sexual relationships and, more troubling, at times these posts have no clear solicitation of youth underage. Policing in this online context allows us to read the state's construction of the "digital girl" as both highly sexualized and commoditized.[2] Police present young people as willing communicants

1 2019 SCC 15 [*Morrison* 2019].

2 Jane Bailey & Valerie Steeves, "Will the Real Digital Girl Please Stand Up?: Examining the Gap Between Policy Dialogue and Girls' Accounts of their Digital Existence" in J Macgregor Wise & Hille Koskela, eds, *New Visualities New Technologies: The New Ecstasy*

who are compliant, even enthusiastic, about an in-person meeting. However, when young women exercise sexual agency online, they are met with regulation at best and criminalization at worst.[3] We suggest that the state is not concerned with harm to an individual but rather harm to a community ideology.[4] Policing and law in this context exemplifies a tension between how state-imagined youth and real youth are able to behave online.

Police present underage communicants as hyper-sexual through their aggressive pursuit of potential predators while the state continually fails to acknowledge a young person's sexual autonomy and capacity to consent until they are 14, 16, or 18 years of age. Shifts toward the acceptance — or even the acknowledgement of — sexual agency, such as the decision in *R v Sharpe*,[5] are often responded to by Parliament through anxiety governance and new legislation that places further restrictions on youth while avoiding meaningful discussions of victimization and exploitation aside from the inflexible structure of age of consent. This ideology, far from being concerned with protecting youth, reflects and enforces community-based standards of acceptable sexuality. It also provides pathways for the justice system to ignore the complexities of coercive or otherwise harmful sexual experiences when experienced by persons over the legal age of consent.

We also demonstrate that proactive investigations have been strategically deployed by police in ways that target marginalized sexualities through an analysis of two criminal cases, *R v Gowdy*[6] and *R v Pengelley*.[7]

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of Communication (Farnham, UK: Routledge, 2012) 41 at 56. In these spaces, police are saturating the online chat rooms with digital girls. This demonstrates a "market demand" for young women and girls who behave in particular ways online and thus, this hyper-sexualized performance is readily available, easily accessible, and 'provided' by police to a market of would-be assailants. The commodification of young women in this way and the consumption of now readily available conversation also warrants some critique.

3 *Ibid*. Young people's sexual agency is often missing from legal conversations regarding sex, which has frequently been acknowledged by scholars like Karaian in Canada, and Baker in the United States. See Lara Karaian, "Policing 'Sexting': Responsibilization, Respectability and Sexual Subjectivity in Child Protection/Crime Prevention Responses to Teenagers' Digital Sexual Expression" (2014) 18:3 Theoretical Criminology 282; Carrie N Baker, *Fighting the US Youth Sex Trade: Gender, Race, and Politics* (Cambridge: Cambridge University Press, 2018).

4 Richard Jochelson & Kirsten Johnson Kramar, *Sex and the Supreme Court: Obscenity and Indecency Law in Canada* (Halifax: Fernwood Publishing, 2011).

5 2001 SCC 2 [*Sharpe*].

6 2014 ONCJ 592 [*Gowdy* 2014].

7 2009 CanLII 19936 (ON SC) [*Pengelley*].

Marginalized sexuality in these cases is seen through belonging to the LGBT community and through participation in BDSM communities, respectively. In these cases, the police officers initiated communication without any grounds to suspect either Mr. Gowdy or Mr. Pengelley; here, they relied upon a *bona fide* investigation and cast the entirety of the internet as a possible site of criminal activity. Although they rationalized their suspicions for the Court, we argue that these men were likely approached because their sexuality fell outside what officers considered acceptable within their respective communities. Further, the ensuing investigation and aggressive pursuit of these men falls dramatically outside the intentions of a proactive investigation. We suggest that, from the information available in these cases, these men had minimal interest in the communicants created by the officers and no interest in luring children whatsoever.

With this in mind, we question the legitimacy of proactive investigations as a redress to child sexual exploitation online and note that while prosecutions brought forward through proactive investigations have been significantly increasing, they fail to uncover any instances of harmful behaviour, "real" victimization, or any criminal activity aside from the initial conversation. We discuss these findings at the end of the paper and make subsequent recommendations for proactive investigations that would better address harm and protect children online.

II. ENTRAPMENT

Although proactive investigative tactics involve the ongoing, exclusive communication with a police officer rather than an underage victim, it is rare for a court to hear a defence of entrapment. Rather than defending an accused from criminal responsibility, an entrapment defence is intended to uphold and control investigative procedures and safeguard against abuses of process. In this sense, the true purpose of an entrapment defence is to deter police conduct that is deemed unacceptable. In some cases, a court may even find that police conduct forms the foundation of the criminality before the court. It is our position that proactive child luring investigations will, in many instances, demonstrate egregious police involvement akin to entrapment. Despite this, there are very few Canadian criminal cases, and even fewer child luring cases, where entrapment is used as a defence. This is likely due to how the doctrine of entrapment works: an accused must first be found guilty, and then entrapment is assessed on a balance of

probabilities with the burden of proof resting on the accused.[8] Although proactive investigation tactics for child luring cases require the construction of the victim and an active co-creation of evidence between the accused and police, we see it as highly unlikely for the courts to accept an entrapment defence.[9] This is predominantly informed through the precedent set by the Court and for the high importance placed by the state in protecting children from harm.

In Canada's leading case on the doctrine of entrapment, the SCC found that:

> [T]here is entrapment when, (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry; (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.[10]

From *Mack*, the Supreme Court of Canada establishes two branches to the doctrine of entrapment: (1) when, absent reasonable suspicion or a legitimate investigation, the accused is presented with an opportunity to offend, or (2) police induce the commission of an offence. In only two luring cases, *R v Gerlach*[11] and *R v Chiang*,[12] did the accused suggest that actual inducement occurred. While proactive investigative tactics are, at times, quite aggressive, our suggestion is that the first branch of entrapment could be used to remedy the more egregious policing practices justified under section 172.1. While there must exist a reasonable suspicion either in the person targeted or in the location to justify a proactive investigation, we believe that investigations in practice have moved beyond a *bona fide* inquiry and into random virtue testing. More troubling, we see many investigations moving into a new realm entirely: into the policing of acceptable sexuality. Here, we suggest the courts attend to the spaces online where police conduct their investigations. As we have argued elsewhere, by capturing the entirety

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8 Brent Kettles, "The Entrapment Defence in Internet Child Luring Cases" (2011) 16:1 Can Crim L Rev 89.

9 *Ibid.*

10 *R v Mack*, [1988] 2 SCR 903 at 964–65, 1988 CanLII 24.

11 2014 ONCJ 646.

12 2010 BCSC 1770.

of the internet as a 'targeted location' suitable to a *bona fide* inquiry, the law feeds into social anxiety surrounding children and the internet.[13]

When ruling on luring cases, the courts frequently portray the internet as a space rife with criminal activity and an acceptable location to target for a proactive investigation. In *R v Levigne*,[14] an online profile, irrespective of its specific location, was described as "both a shield for the predator and a sword for the police."[15] We argue that it is unlikely for all profiles to be effective tools for predation, as there are many spaces and forums where children are unlikely to be found. While the doctrine of entrapment has yet to be used successfully,[16] it may pose a challenge should the courts begin to question how particular spaces online are targeted and subject to suspicion by police. There is a need to question the legitimacy of an untethered conception of 'risk' online; there is further need to question whether this conception embodies a valid form of social governance. It is critical that the law recognize that the very real product of proactive policing investigations is the creation of a victim, the co-creation of evidence by the police and accused, and the construction of harm. This project argues that, rather than preventing harm or curbing risks of harm, police officers are engaging in random virtue testing within their communities. Further, in many cases, this virtue testing extends beyond the law's intention to protect children and results in the policing of acceptable sexuality through the strategic use of victim construction and selection of space. We suggest that Canada has seen a significant expansion of these cases and has accordingly expanded the scope of the legislation. In this sense, the state is making more space for co-created evidence and legitimizing its use by affording it more legal weight.

III. PROACTIVE INVESTIGATION BILLS

Child luring legislation has seen significant Parliamentary attention and change since its inception; many of these changes serve to further entrench anxieties around youth sexuality and sexual exploitation. The legislation was

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13 Lauren Menzie & Taryn Hepburn, "Technologies of Regulating Sexual Offences against Youth" in Richard Jochelson & James Gacek, eds, *Sexual Regulation and the Law: A Canadian Perspective* (Bradford, ON: Demeter Press, 2019) 114.

14 2010 SCC 25 [*Levigne*].

15 *Ibid* at para 25.

16 The doctrine of entrapment was only once used successfully in *R v Bayat*, and the decision was ultimately overturned on appeal. See *R v Bayat*, 2010 ONSC 5606, rev'd 2011 ONCA 778.

born in 2002 through Bill C-15A responding, in part, to the decision that had been reached the previous year in *Sharpe*.[17] Heightened social concern post-*Sharpe* over the dangers of technology for Canadian youth contributed to the introduction of the offence of luring a child and to raising the age of consent,[18] demonstrating the pervasive anxiety around youth sexuality and the risk of sexual exploitation of children in a digital age.[19]

Responding to public anxiety, Bill C-15A purported to address threats posed by the internet, particularly the threat of sexual exploitation of youth; the bill proposed to amend the *Criminal Code* by "(a) adding offences and other measures that provide additional protection to children from sexual exploitation, including sexual exploitation involving use of the Internet."[20] It then introduced a new section, section 172.1, "Luring a Child," which specifically penalized the use of a computer to communicate with a person who is, or is believed to be, under 18 years.[21] It later included amendments to identify instances of exploitation for youth under 16 or 14 years of age, depending on the connected offence. As part of the legislation, it was specified that the courts could not entertain a defence of mistaken belief that the communicant was of legal age "unless the accused took reasonable steps to ascertain the age of the person."[22] At no point did this legislation

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17 Bill C-15A, *An Act to amend the Criminal Code and to amend other Acts*, 1st Sess, 37th Parl, 2002, cl A(3) (assented to 4 June 2002), SC 2002, c 13; *Sharpe*, *supra* note 5. The *Sharpe* decision was concerned with the tensions between freedom of expression and the censorship of child pornography, where Robin Sharpe argued that his written child pornography, BOYABUSE, had artistic merit (some scholars agree: see Shannon Bell, "Sharpe's Perverse Aesthetic" (2002) 12:1 Const Forum Const 30).

18 Janine Benedet, "Children in Pornography after Sharpe" (2002) 43:2 C de D 327; Lyne Casavant & James R Robertson, *The Evolution of Pornography Law in Canada* (Ottawa: Parliamentary Information and Research Service, 2007); Lise Gotell, "Inverting Image and Reality: R. v. Sharpe and the Moral Panic around Child Pornography Art/Morality/Child Pornography: Perspectives on Regina v. Sharpe" (2001) 12 Const Forum Const 9; Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet*, reissue ed (New York, NY: New York University Press, 2003).

19 Janine Benedet, "The Age of Innocence: A Cautious Defense of Raising the Age of Consent in Canadian Sexual Assault Law" (2010) 13:4 New Crim L Rev 665 [Benedet, "Age of Innocence"]; Tyler Carson, "Legislating Sexual Morality: Youth Sexuality and Canada's Rising Age of Consent Laws" (2013) Hard Wire 25; Tatiana Savoia Landini, "Vulnerability and its Potential Perils on the Criminalization of Online Luring in Canada and Court Cases Tried in Ontario (2002-2014)" (2018) 8:2 Contemporânea 543.

20 Bill C-15A, *supra* note 17 at para 3.

21 *Ibid*, cl A(3).

22 *Ibid*.

clarify what could be seen as a "reasonable step." By amending the legislation to attend specifically to the age of the communicant and, more importantly, by redefining the age at which youth may be considered agentic, Parliament is indicating that the age of consent itself can be considered a solution to prevent youth victimization. Instead of examining youth harm, victimization, or sexual exploitation as a wrong in and of itself, this legislation frames the wrong in terms of a definite age. This line suggests that there is a fundamental difference between a 15-year-old and a 16-year-old that makes the latter more agentic and thus, less likely to be subject to victimization than the former. In doing so, a nuanced and critical understanding of the exploitation and victimization of young people is closed off.

In 2007, Bill C-277 made the first amendment to the section and started a pattern of two bills passing within a year that increase the penalties and scope of section 172.1.[23] The sole objective of Bill C-277 was to increase the penalties for offenders: the maximum available sentence doubled from a term of no more than five years to a term of no more than ten years. This exemplifies the growing concern surrounding youth exploitation and online predators,[24] despite empirical data suggesting a significant decline in the number of teenagers receiving solicitations online from 2000 to 2006.[25] Adler notes that this crime is actually quite rare, and this is supported from our analysis of Canadian luring cases, where there had only been 122 cases across the country in the past nine years (2011-2019). The second bill came in 2008, as the Harper government quickly passed Bill C-2, termed the 'Tackling Violent Crime Act.'[26] This Bill expanded the range of the offence by adding more relevant sections and subsections to be captured under section 172.1,[27] which intended to provide "more effective sentencing and

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23 Bill C-277, *An Act to amend the Criminal Code (luring a child)*, 1st Sess, 39th Parl, 2007, cl 1 (assented to 22 June 2007), SC 2007, c 20.

24 Steven Roberts, *An Analysis of the Representation of Internet Child Luring and the Fear of Cyberspace in Four Canadian Newspapers* (MA Thesis, Ontario Tech University, 2011) [unpublished], online: <ir.library.dc-uoit.ca/xmlui/bitstream/handle/10155/186/Roberts_Steven.pdf?sequence=3> [perma.cc/S7U8-HYTZ].

25 Amy Adler, "To Catch a Predator" (2011) 21:2 Colum J Gender & L 130.

26 Bill C-2, *Tackling Violent Crime Act: An Act to amend the Criminal Code and to make consequential amendments to other Acts*, 2nd Sess, 39th Parl, 2008, cl 14 (assented to 28 February 2008), SC 2008, c 6.

27 When section 172.1 was first included in the *Criminal Code*, there were a small number of relevant offences that could be linked to an offender's communication. These were separate charges that were tied to the intention of the initial communication; by

monitoring of dangerous and high-risk offenders."[28] Considering the strategies employed during proactive investigations and the minimal harm that is curbed through these investigatory techniques, designating offenders "dangerous" and "high-risk" contributes further to an anxious reading both of youth sexuality and online affordances.[29] This expansion legitimizes investigations initiated and, in many ways, wholly constructed by police and demonstrates an increased policing power granted through Parliament despite evidence illustrating that this kind of crime is very rare.

After the introduction of mandatory minimums in 2010's Bill C-10,[30] child luring legislation was altered in response to the Supreme Court of Canada's decision in *R v Bedford* by Bill C-36 in 2014.[31] Despite the 'Protection of Communities and Exploited Persons Act' being a response to sex work laws, the opportunity was taken to expand yet again on section 172.1, expanding the behaviours captured by the section. As was the case in 2007 and 2008, this legislation was promptly followed by Bill C-26 in 2015,[32] which increased the punishment for offences. Though the rates of instances of child luring remained relatively stable throughout this period,

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expanding these sections, Parliament gave the courts greater power to construct and imagine the intentions of offenders.

28 Bill C-2, *supra* note 26, Summary (c).

29 Joseph Fischel, "Per Se or Power? Age and Sexual Consent" (2016) 22:2 Yale JL & Feminism 279; Andrea Slane, "Luring Lolita: The Age of Consent and the Burden of Responsibility for Online Luring" (2011) 1:4 Global Studies Childhood 354 [Slane, "Luring Lolita"].

30 Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, 1st Sess, 41st Parl, 2010, s 2, cls 10- 38 (assented to 13 March 2012), SC 2012, c 1.

31 The Court struck down three pieces of legislation, arguing that they affected the ability of sex workers to moderate risk, acting to decriminalize adult prostitution by allowing open communication, bawdy houses, and living off the avails of prostitution (See *Canada (AG) v Bedford*, 2013 SCC 72). The Harper government acted to prevent this decriminalization with Bill C-36 in 2014. This Bill criminalized the purchase of sex work. See Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2014, cl 9 (assented to 6 November 2014), SC 2014, c 25.

32 Bill C-26, *An Act to amend the Criminal Code, the Canada Evidence Act and the Sex Offender Information Registration Act, to enact the High Risk Child Sex Offender Database Act and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2015, cl 10, 11 (assented to 18 June 2015), SC 2015, c 23.

child luring legislation continued to expand both relevant offences and sentences. This discrepancy suggests that the increasing regulation and punishment do not reflect the current atmosphere of online child exploitation, making the use of proactive investigations under this legislative scheme troubling. Employing mandatory minimums when there is no victim and the conversation has been predominantly driven by police is difficult to justify. Section 172.1, subsections 3 and 4 were recently challenged before the Court. These subsections are as follows:

> Presumption re: age
> (3) Evidence that the person referred to in paragraph (1)(a), (b) or (c) was represented to the accused as being under the age of eighteen years, sixteen years or fourteen years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.
>
> No defence
> (4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least eighteen years of age, sixteen years or fourteen years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.[33]

Subsection 172.1(3) forms a legal presumption that an accused would have believed an online communicant is under the legal age if they had represented themselves as such. Although there is room for a defence if an accused can provide contrary evidence, it would then fail to satisfy the requirements of subsection 172.1(4). When there is no defence available without taking reasonable steps, any contrary evidence that supports an accused's belief that they are communicating with someone above the age of consent will always fail to be accepted by the courts. It is also problematic the ways in which the reasonable steps requirement errs dangerously close to endorsing predatory behaviour. Without ever clarifying what the courts should see as a reasonable step, the state has, in some sense, given justification for pressing an online communicant for photos, video chats, or in person meet-ups.[34] Asking questions about school and home life may be seen as an attempt to determine or confirm a communicants age; it may also be seen as grooming behaviour.[35] Reading these provisions together, the law is placing an evidentiary burden on the accused. The accused must both be able to prove that there is "evidence to the contrary" within the meaning of

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33 *Criminal Code*, RSC 1985, c C-46, ss 172.1(3), (4).

34 *R v Morrison*, 2015 ONCJ 599 [*Morrison* 2015]; *Pengelley*, *supra* note 7.

35 *Morrison* 2015, *supra* note 34; *R v Legare*, 2009 SCC 56.

subsection (3) and that they have satisfied this through taking "reasonable steps" under subsection (4). Having evidence to the contrary, without taking into consideration what the courts see as reasonable steps, will be insufficient grounds for a defence.[36] In this sense, the courts again establish that there is significant risk and dangers from online sexual communication. By requiring that an accused take reasonable steps, nearly all of which resemble conventional luring behaviours, the courts stress the instability and uncertainty that comes from talking online. Some work has argued that this construction of 'risky' spaces recasts sexual violence as predominantly committed by advantageous strangers.[37] This casting glosses over both the complexities of sexual violence and the primary sources of sexual violence: the people with whom we are closest. Through these subsections, the court creates precarity in all communications that take place online, particularly in an atmosphere rife with proactive investigations.[38]

Douglas Morrison sought to find both these subsections inoperable, as he believed they infringed upon his right to be presumed innocent and violated the principles of fundamental justice under sections 11(d) and 7 of the *Charter*, respectively.[39] He also argued that the prescription of a mandatory minimum sentence violated his right not to be subjected to cruel and unusual punishment, under section 12 of the *Charter*.[40] At both trial and appellate levels, the judgements rendered recognized that these sections, particularly when read together, violated section 11(d) of the *Charter*, with some disagreement as to whether both subsection (3) and (4), or just subsection (3) should be struck from the offence.[41] In 2019, the Supreme Court released a decision that agreed, in part, with Morrison's submissions, arguing that the presumption regarding an online communicant's age should be declared inoperable under section 11(d) of the *Charter*. While this finding may influence the probability of a conviction resulting from a proactive investigation, it will not fundamentally change the way these investigations are conducted. In many proactive investigations, the intention is to deploy and articulate a particular type of

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36 *Levigne*, *supra* note 14.

37 Fischel, supra note 29.

38 Kettles, *supra* note 8; Landini, *supra* note 19; Statistics Canada, *Child Luring Through the Internet*, by Jennifer Loughlin & Andrea Taylor-Butts, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2009); Bailey & Steeves, *supra* note 2.

39 *Morrison* 2019, *supra* note 1 at paras 5–7.

40 *Ibid* at para 8.

41 *Morrison* 2015, *supra* note 34; *R v Morrison*, 2017 ONCA 582 [*Morrison* 2017].

victimized youth in line with the interests of the state. The communicant is portrayed by police as naive, curious, interested in trying various sexual activities, highly agentic and independent, and, depending on their age, often somewhat experienced.[42] Indeed, police investigations have most recently mobilized consensual sex work to stretch the bounds of proactive child luring investigations and further cast the young women they portray as autonomous, willing, even enthusiastic participants in a sexual exchange.

These cases arise from a new investigatory process named 'Project Raphael': officers maintain active profiles on adult sex work websites, and only after a prolonged communication and discussion of costs and services will they disclose their age as younger than posted or previously communicated. Not only does this investigation target persons who are seeking consensual sex with an adult, it also articulates a hyper-sexualized character through the online communicant. By situating the communication on escort sites, police officers remove any need to lure or groom a victim, indeed, the focus of the exchange <u>is</u> sex, specifically, sex offered by an agentic, entrepreneurial young woman who sets the terms and price of the encounter. This disparate treatment of youth through policy and police construction both gives the state a means to govern and control the boundaries of acceptable sexuality while still promulgating its investment to sexualize and uncomplicate the sexualization of young women.

Morrison's submission that these sections violated his principles of fundamental justice are tied to the stigma and severe punishment resulting from these offences when the offence is solely tied to an objective fault.[43] Indeed, the designation of a sex offender status in cases where an accused is communicating only with an adult police officer is strange, particularly when there is no tangible harm. Like many others charged under section 172.1, Morrison was targeted through a proactive investigation, which further complicates the issue as he had no history of offending, communicating with children, and no other offences that arose from the investigation. There are significant consequences from this section and that these investigations have the capacity to <u>do</u> significant harm to those accused rather than prevent harm to youth. This is demonstrated through two case studies, *R v Gowdy* 2014 and *R v Pengelley* 2009, where we argue

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42 See Bailey & Steeves, *supra* note 2 for a discussion of the paradoxes and perceptions of young women online.

43 *Morrison* 2019, *supra* note 1 at para 7.

proactive investigations targeted two marginalized sexual communities with the intent to enforce community-based standards of acceptable sexuality.

IV. *R v Gowdy* (2014): Court of Appeal for Ontario

Kris Gowdy served as a youth pastor in Durham, ON, a small, tight-knit community of roughly 2,500 people. He attracted the attention of local police when he posted an advertisement on Craigslist, seeking "under 35, jocks, college guys, skaters [and] young married [guys]."[44] A detective found the terms "under 35", "skaters", and the word "young" that preceded "married [guys]" to be concerning and believed there was a possibility that Gowdy was directing his ad at persons under the legal age of consent. He created a fictitious online persona, 'Brad' who was 15 years of age, and responded to Gowdy's ad. Throughout their communication, Gowdy asked 'Brad' several times if he was of legal age to receive fellatio, the agreed upon sex act put forward in Gowdy's ad.[45] 'Brad' never responded to this specifically, but continued to engage with Gowdy and make plans to meet up.

Gowdy was arrested at the scene of intended assignation, and upon a vehicle search incident to arrest, officers found medical documentation in Gowdy's car that confirmed that he was HIV-positive.[46] In addition to the charge of luring a child, Gowdy was charged under section 273(2) of the *Criminal Code* for attempted aggravated sexual assault.[47] The Durham Regional Police media relations unit was asked after Gowdy's arrest and interviewed to issue a news release that disclosed Gowdy's charges, professional work history, HIV status, social media presence, and Church affiliation and to include his photograph.[48] When Detective Norton of the Durham police department was asked why he made this choice, knowingly violating Gowdy's right to privacy, he said: "I made a decision to put out a press release to advance the investigation… to make — ensure that the

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44 *Gowdy* 2014, *supra* note 6 at para 1.

45 *Ibid* at para 3.

46 *Ibid* at para 4.

47 The charge of attempted aggravated sexual assault was withdrawn just before Kris Gowdy's trial began.

48 *Gowdy* 2014, *supra* note 6 at para 14; *R v Gowdy*, 2016 ONCA 989; Joshua David Michael Shaw, "Contagion and the Public Body: A Re-Ordering of Private and Public Spheres in R v Gowdy" (2018) 39 Windsor Rev Legal Soc Issues 127.

community was safe."[49]

Shaw sees this unlawful disclosure as exemplifying both the hegemonic exegesis of law and the construction of a positive HIV-status through biopolitical governmentality, where the "healthy community" needs to be protected from the "diseased object."[50] Despite the fact that the Court agreed that disclosure was unlawful, in Gowdy's case, they refused a stay of proceedings; Justice Block ultimately found that Gowdy's sexuality and HIV-positive status would have no stigma attached to it greater than the stigma from the perfectly lawful charge of child luring.[51] The Court then, is not responsible for remedying the damage done to Gowdy's reputation within his Church and community, as this is damage that he himself did by virtue of who he was. While we wholeheartedly agree with Shaw's reading of the police press release, we would push this further and critique the initial contact and subsequent pursuit of Kris Gowdy by law enforcement as similarly relying upon hegemony and the perceived integrity of a community. The decision to respond to Gowdy's Craigslist ad is untenable if the state was truly interested in preventing harm to underage youth. We argue that local police intentionally looked past terms that salvaged the intention of Gowdy's post, "married [guys]", "under 35", "college guys", and relied upon a risk-averse logic that responded to Gowdy's sexuality in a small town rather than any perceived threat to youth.

Gowdy's case exemplifies one instance where proactive child luring investigations have been used to police sexuality. While a great deal of work has recognized and catalogued Canada's long history of discrimination against LGBTQ groups, there has been less engagement with how the state actively polices kink.[52] Similar to LGBTQ groups, individuals who choose to practice consensual kink can be (and have been) caught in the reach of the law.[53] The *Pengelley* case demonstrates the state's continued interest in governing and policing consensual kink. The choice to actively police an adult-only kink site under the guise of preventing the sexual victimization of youth is a clear overextension of the law, demonstrating how the rationale

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49 *Gowdy* 2014, *supra* note 6 at para 18.

50 Shaw, *supra* note 48 at 131.

51 *Gowdy* 2014, *supra* note 6 at paras 37–41, 49.

52 Gary Kinsman & Patrizia Gentile, *The Canadian War on Queers: National Security as Sexual Regulation* (Vancouver: UBC Press, 2010); Jochelson & Kramar, *supra* note 4.

53 Ummni Khan, *Vicarious Kinks: S/M in the Socio-Legal Imaginary* (Toronto: University of Toronto Press, 2014).

of a proactive luring investigation provides the state with new legal tools to govern sexual expression.

V. *R v Pengelley* (2009): Ontario Superior Court of Justice

Nicholas Pengelley first met 'Stephania Cacciatore'[54] in an adult-only fantasy chat room that he frequented.[55] The chat room was described by the Court as "hard core", "part of kinky land", and "for adult discussions about, and the sharing of, sexual fantasies."[56] It was also found by the Court to not be "a dating site or a place designed to be used to meet others in the physical world... it is not a troubled teen's area of the internet."[57] Officer Deangelis' choice then, to create the character profile for 'Stephania', list her age as 18 (a requirement of the site), and strike up a conversation in this adult chat room seems, at best, misguided. When prompted by the Court, Deangelis could offer no explanation for why he spent time as 'Stephania' in the chat room, why he suspected predators might be in this chat room, or why one could reasonably expect to find a 12-year-old girl accessing this chat room.

Precedent states that police officers are allowed to treat the entirety of the internet with suspicion to conduct *bona fide* investigations of online predators.[58] However, in light of the law's history of criminalizing BDSM consensual kink,[59] the intentions behind conducting an investigation of luring on such a niche space should be taken with a grain of salt. Deangelis' investigation of Pengelley certainly fell beyond the scope of what should be reasonable for a proactive investigation of online child luring and was further complicated by his interactions after making contact. Pengelley was sent a photo taken by Deangelis of a 32-year-old woman, who had been posed and staged to look younger. Immediately after sending this photo, Deangelis sent Pengelley a message saying that they had lied about the age on their profile: 'Stephania' was actually 12, not 18. Read by a reasonable person in a kink-friendly space, it was much more likely that 'Stephania' was

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54 'Cacciatore', given as Stephania's legal last name, means "hot" in Italian. Here, the choice to use sexualized names online could be seen as a baiting strategy by police, but it could also convey an artificial or inauthentic online persona.

55 *Pengelley*, *supra* note 7 at paras 2, 27.

56 *Ibid* at para 30.

57 *Ibid* at para 31.

58 *Levigne*, *supra* note 14.

59 Khan, *supra* note 53.

an adult woman with an age-play kink and not an underage girl. After Pengelley told the accused he had no interest in meeting or having sex in real life, supported both by the nature of the chat room and his past conversations, Deangelis added him as a friend to keep chat lines open. Deangelis also communicated as 'Stephania' during all hours of the day, including school days, and initiated the majority of the conversations. Towards the end, Deangelis contacted Pengelley repeatedly, getting no response back; Pengelley testified that, at this point, he had lost interest in 'Stephania' entirely.[60]

While Pengelley was not convicted, Justice Dawson stated that he found a great deal of the conversation troubling.[61] Pengelley's chats are described as "lurid", "explicit", "graphically sexual", and his past conversations in the chat room were seized and analyzed before the Court. What ultimately spared Pengelley from conviction was not Deangelis' conduct or the nature of the chat room, but the fact that Pengelley requested to see 'Stephania' via webcam, taking what the Court viewed in this case as a reasonable step.[62] In many cases, however, that same conduct is viewed as evidence of the accused's intention to lure and exploit. Unlike Gowdy's case, the police involved were not reprimanded for their conduct during the proactive investigation, despite the fact that it blatantly contradicts the aims to protect children from harm. Officer Deangelis could provide no reasons why a predator or a child might be present in the space he conducted this investigation, and the case offers no explanation for why Pengelley was investigated further after explicitly saying he had no interest in meeting 'Stephania' or why he was arrested after losing interest. The practice of proactive investigations to target all online space as risky or otherwise dangerous to youth has the potential to bring significant consequences to those in marginalized sexual communities, and the law offers little protection for those unlucky enough to be the target of investigation.

VI. IMAGINING OFFENCES AND HARM

In both *Pengelley* and *Gowdy*, the state is responding to an imagined harm that might befall a real child. Section 172.1 is intended as precautionary legislation, designed to prevent harm before it occurs and

60 *Pengelley*, *supra* note 7 at para 48.
61 *Ibid* at paras 47, 49.
62 *Ibid* at para 56.

respond proactively to risky behaviours. Here, we would suggest that this section could be read as pre-criminal, where the state believes it can predict offences at the expense of due process.[63] Jochelson and Kramar argue that, with respect to sexual offences, the way that the Canadian state understands harm has changed.[64] We have moved from understanding 'harm' as against a person to 'harm' as offending a community morality; sexuality governance is not limited to behaviours that harm, but rather behaviours that go against the community.[65] Here, the luring offence is intended as a tool that allows the state to intervene prior to the commission of a subsequent sexual offence.[66] The crime is preparatory and inchoate, but it needs to be resituated within our current social context "rife with cultural anxieties about both online communication and youth sexuality."[67] What 'offends' a community will vary in the eyes of the officers investigating and in the courts adjudicating. Child luring law has been defined predominantly in common law and, therefore, an individual officer's assessment of what is 'risky' is placed before a court. The assessment is then before the court to make a similar assessment which is maintained across Canada and thus, will vary depending on the nature of the community. The result is legislation that lacks clarity in scope, in the nature of the prohibited acts, and in the underlying harm.[68]

We argue that there is a misguided understanding of the dominant characteristic in a luring offence, in line with Andrea Slane's work.[69] In Shannon Bell's analysis of the *Sharpe* decision, she identifies an important tension from legal assessments of child pornography that can be understood within the context of proactive investigations.[70] Bell is attentive to the ways that assessments of child pornography happen outside of their intended audience and context by persons who are concerned only with finding pornography. Court system experts, without having the contextual nuance

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63 Richard Jochelson, James Gacek & Lauren Menzie, *Criminal law and Precrime: Legal Studies in Canadian Punishment and Surveillance in Anticipation of Criminal Guilt* (New York, NY: Routledge, 2018).

64 Jochelson & Kramar, *supra* note 4.

65 *Ibid*; Jochelson, Gacek & Menzie, *supra* note 63.

66 Slane, "Luring Lolita", *supra* note 29.

67 *Ibid* at 354.

68 *Ibid.*

69 *Ibid*; Andrea Slane, "From Scanning to Sexting: The Scope of Protection of Dignity-Based Privacy in Canadian Child Pornography Law" (2010) 48:3/4 Osgoode Hall LJ 543 [Slane, "Scanning to Sexting"].

70 Bell, *supra* note 17.

that comes from familiarity with genre, could only classify Robin Sharpe's writing as child pornography.[71] We would suggest, here too, that in proactive luring investigations the dominant characteristic of the offence becomes the represented age of the communicant and not the content of the communication, the behaviour of the officer, the potential for exploitation, and the intentions of the accused. The Court sees luring by seeing age; in doing so, the represented age of an undercover officer is often enough for conviction alone. Slane is similarly critical of luring cases involving real youth that hinge on an age of consent; young people who are exploited online occupy a tenuous status as victims where, once they reach the age of sexual consent, they become blamed by the law for their victimization.[72] Youth who fall below this age are consequently denied sexual agency and the potential for online intimacy.[73]

In constructing and imagining an online, potential luring victim, officers play into and reproduce tropes about young people online. A proactive luring investigation contributes to crime statistics representing rates of youth victimization and further fuels the widespread cultural anxiety about the vulnerability and recklessness of young people online.[74] This perpetuates the rising concern with youth victimization, where incidents are entirely manufactured through proactive investigations such as in *Gowdy*, but are then presented to the public as a real, quantifiable risk.[75] This 'imaginary' victimization functions as a means of control, to cast youth as vulnerable and ill-equipped in an increasingly digitized world. Finkelhor has termed this phenomenon 'juvenoia', where youth sexuality exists on a binary of acceptability driven predominantly by age.[76] Here, we can ignore the complexities of youth sexual violence and label an exchange assaultive without considering any substantive nuance. Blame then is either relegated to an offender for having 'underage' sex or to a young person above the age

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71 *Ibid* at 33.

72 Slane, "Luring Lolita", *supra* note 29 at 360.

73 *Ibid.*

74 *Ibid*; Statistics Canada, *Police-Reported Sexual Offences Against Children and Youth in Canada, 2012*, by Adam Cotter & Pascale Beaupré, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2014); David Finkelhor, *The Internet, Youth Safety and the Problem of 'Juvenoia'* (Durham, NC: University of New Hampshire, Crimes Against Children Research Center, 2011).

75 Adler, *supra* note 25.

76 Finkelhor, *supra* note 74.

of consent for being reckless. This becomes a socio-legal tool to ignore the complexities of our sexualization and commodification of children.[77]

Here, the law (re)partitions sexual morality on Manichean lines, where harm is relocated to discrete bodies.[78] Policing proactively allows us to sustain the conception of the 'sex offender' as a morally blameworthy person who creates the risk of exploitation, rather than a turn to critique our society that presents conflicting and paradoxical notions of youth sexuality.[79] The imaginary victim and the state's faith in its ability to imagine offences becomes a tool to uncomplicate the nature of youth sexuality, age difference, and online intimacy.[80] It further becomes a tool to govern and expose sexuality that is unacceptable within a community under the guise of preventing harm.

By pathologizing those accused through proactive investigations, the law can claim to redress and curb harms associated with child sexual exploitation through taking sex offenders 'off the streets.' The very construct of a sex offender suggests significant risk to reoffend and suggests that these offences are bound up in a particular type of person who exemplifies an 'evil' not seen throughout society.[81] Inherent in this legislation is that these people pose a risk and that, absent state intervention, would go on to sexually abuse and exploit youth through the means of online communication.[82] Harm is not a self-evident category within the law.[83] However, we question the ability of our current proactive investigation processes to respond to the tangible social harms that they claim to be preventing.

We identified four possible sources of harm that could be seen through luring cases: (1) whether a real person was victimized ("Real Victim"); (2) whether there was a history of violent or sexual offending ("History of Offending")[84]; (3) whether there was any identified communication, of any

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77 Bailey & Steeves, *supra* note 2.

78 Fischel, *supra* note 29 at 281.

79 Bailey & Steeves, *supra* note 2; Finkelhor, *supra* note 74.

80 Slane, "Luring Lolita', *supra* note 29.

81 Fischel, *supra* note 29; Andrew Koppelman, "Reading Lolita at Guantanamo or, This Page Cannot be Displayed" (2007) 57:2 Syracuse L Rev 209.

82 Gregor Urbas, "Protecting Children from Online Predators: The use of Covert Investigation Techniques by Law Enforcement" (2010) 26:4 J Contemporary Crim Justice 410.

83 Khan, *supra* note 53.

84 Categorizing offenders as 'pathological' or seeing past offenders as posing a risk to reoffend absent other evidence is something that should be, and has been, critiqued

kind, with underaged youth ("Communication"); and (4) whether any other charges were discovered as a result of the investigation, thus indirectly identifying a possible source of harm ("Other Charges").[85] We then analyzed all available trial court cases where an accused was charged under section 172.1 of the *Criminal Code*. We identified whether this accusation was made through a proactive investigation or through another means of discovery and whether it resulted in a conviction.

Below, we present our findings with respect to proactive policing investigations. The absence of harm and risks of harm is evident within the table. However, when police restrict the scope of the investigation to online spaces that present a greater degree of reasonable suspicion or to a person that they believe poses a risk to the community, we can see a greater likelihood that a proactive investigation will capture more harmful, or otherwise risky, behaviours. These cases, where we believe investigations align closer to a true *bona fide* inquiry, are marked in grey. What can be seen from the results is that there are effective ways for proactive luring investigations to respond to and prevent the reoccurrence of harm but, as it stands, this policing practice does little to prevent tangible harm from occurring.

A. Proactive Investigations

	Real Victim	History of Offending	Communication	Other Charges	Conviction
R v RA, 2019	1	0	1	1	Y
R v Weiland, 2019	0	0	0	1	N
R v Vander Leeuw, 2019	0	0	1	1	Y
R v CDR, 2019	0	0	0	0	Y

(Joseph J Fischel, "Transcendent homosexuals and dangerous sex offenders: Sexual harm and freedom in the justice imaginary" (2010) 17 Duke J Gender L & Pol'y 277). However, for the purpose of identifying any potential source of harm, we chose to use this as a category to suggest that a proactive investigation might effectively catch incidences of recidivism, as this is a common rationale for their use.

85 We did not distinguish additional charges laid by the presence of harm. In fact, in one of the cases we analyzed, the only other charge laid was accessing an open wifi connection.

R v King, 2019	0	0	0	0	Y
R v Olynick, 2019	0	0	0	0	Y
R v Parks, 2018	0	0	0	0	Y
R v Haniffa, 2018	0	0	0	0	Y
R v Freeman, 2018	0	0	0	1*	Y
R v Randall, 2018	0	0	0	0	Y
R v Chheda, 2018	0	0	0	0	Y
R v Barnes, 2018	0	0	0	0	Y
R v Birley, 2018	0	0	0	0	N
R v Thakre, 2018	0	0	0	0	Y
R v Jaffer, 2018	0	0	0	0	Y
R v Allen, 2018	0	0	0	1**	Y
R v Wheeler, 2017	0	0	0	0	Y
R v Gucciardi, 2017	0	0	0	0	Y
R v Drury, 2017	0	0	0	0	Y
R v Gardner, 2017	0	1	1	0	Y
R v Harris, 2017	0	0	0	0	Y
R v Mills, 2017	0	0	0	0	Y
R v Gowdy, 2016	0	0	0	0	Y
R v KBR, 2016	0	0	1	0	Y
R v Cooper, 2016	0	0	0	0	Y
R v Ghotra, 2016	0	0	0	0	Y
R v Rodwell,	0	0	0	1	Y

2016					
R v Lambe, 2015	0	0	0	0	Y
R v Froese, 2015	0	0	0	0	Y
R v Slade, 2015	0	1	1	1	Y
R v Morrisson, 2015	0	0	0	0	A***
R v Brown, 2014	0	1	0	1	Y
R v RY, 2014	0	0	1	1	Y
R v Stiltz, 2013	0	0	0	0	Y
R v Walther, 2013	0	0	0	1	Y
R v Doxtator, 2013	0	0	0	1	Y
R v White, 2013	0	0	1	1	Y
R v Dobson, 2013	0	0	0	0	Y
R v Thaiyagarajah, 2012	1	1	1	1	Y
R v Cooke, 2012	0	0	0	0	Y
R v McCall, 2011	0	0	0	0	Y
R v Holland, 2011	0	0	0	0	Y
R v Somogyi, 2010	0	0	1	1	Y
R v Sargent, 2010	1	0	1	1	Y
R v RJS, 2010	0	0	1	1****	Y
R v Pengelley, 2010	0	0	0	0	N
R v MacIntyre, 2009	0	0	0	0	Y

R v Nichol, 2009	0	1	1	0	Y
R v Moodie, 2009	0	1	1	1	Y
R v Armstrong, 2009	0	1	1	1	Y
R v Bergeron, 2009	0	0	0	1	Y
R v Read, 2008	0	0	0	0	Y
R v Villeneuve, 2008	0	0	0	0	Y
R v Arrojado, 2008	0	0	0	0	Y
R v Gurr, 2007	0	0	1	1	Y
R v Dhandhukia, 2007	0	0	0	0	Y
R v Randall, 2006	0	0	0	0	Y
R v Folino, 2005	0	0	0	0	Y
R v Jepson, 2004	0	0	0	0	Y
R v Harvey, 2004	0	0	1	1	Y
R v Blanchard, 2003	0	0	0	0	Y

* charged with "child pornography" because of a sexual conversation online with the police officer

** charged with "making pornography available" while talking to the police officer

*** conviction dismissed at the SCC; new trial ordered

**** charged with accessing an open wifi connection

B. No Proactive Investigation

	Real Victim	History of Offending	Communication	Other Charges	Conviction
R v Fawcett, 2019	0	0	0	0	Y
R v Koenig, 2019	1	0	1	1	Y
R v EL, 2019	1	0	0	1	N
R v Jat, 2019	1	0	1	1	Y
R v Drumonde, 2019	1	0	1	0	Y
R v Crawley, 2018	1	1	1	1	Y
R v Clarke, 2018	1	1	1	1	Y
R v BS, 2018	1	1	1	1	Y
R v Hathaway, 2018	1	0	1	0	Y
R v Geikie, 2018	1	0	1	1	Y
R v Brown, 2018	1	0	1	1	Y
R v WG, 2018	1	0	1	1	Y
R v Blinn, 2018	1	0	1	1	Y
R v Patterson, 2018	1	1	1	1	N
R v Pantherbone, 2018	1	0	1	1	Y
R v Dawe, 2018	1	0	1	0	Y
R v Lauzon, 2018	1	1	1	1	Y
R v Di Clemente, 2018	1	0	1	0	N
R v Shaw, 2018	1	0	1	0	Y
R v JE, 2018	1	0	0	0	Y
R v Carter, 2018	1	1	1	1	Y
R v SB, 2017	1	1	1	1	Y
R v TR, 2017	1	1	1	1	Y
R v Thompson,	1	0	1	0	Y

2017					
R v Chicoine, 2017	1	0	1	1	Y
R v Otokiti, 2017	1	0	1	1	N
R v JC, 2017	1	0	1	1	Y
R v Boriskewich, 2017	1	1	1	1	Y
R v Cutter, 2017	1	0	1	1	Y
R v McColeman, 2017	1	0	1	1	Y
R v Gashikanyi, 2017	1	0	1	1	Y
R v AAG, 2017	1	1	1	1	Y
R v CL, 2017	1	0	1	1	Y
R v Hussein, 2017	1	0	1	1	Y
R v Dominaux, 2017	1	0	1	1	Y
R v Hood, 2016	1	0	1	1	Y
R v AJD, 2016	1	0	1	1	Y
R v BS, 2016	1	0	1	1	Y
R v Janho, 2016	1	0	1	0	Y
R v AH, 2016	1	0	1	0	Y
R v Giovannini, 2016	1	1	1	1	Y
R v McLean, 2016	1	0	1	1	Y
R v Hajar, 2016	1	0	1	1	Y
R v Vergara-Olaya, 2016	1	0	1	1	Y
R v Olson, 2016	1	0	1	1	Y
R v Scott, 2016	1	1	1	1	Y
R v RW, 2016	1	0	1	1	Y
R v Webster, 2016	1	0	1	1	Y

R v MC, 2016	1	1	1	0	Y
R v Brown, 2015	1	0	1	1	Y
R v Hammermeister, 2015	1	0	1	1	Y
R v Rafiq, 2015	1	0	1	0	Y
R v Reynard, 2015	1	1	1	1	Y
R v Marcipont, 2015	1	0	1	0	Y
R v Ambrus, 2015	1	0	1	1	Y
R v Miller, 2015	1	0	1	1	Y
R v MGP, 2015	1	0	1	1	Y
R v SH, 2015	1	0	1	1	Y
R v EN, 2015	1	0*	1	1	Y
R v Callahan-Smith, 2015	1	1	1	1	Y
R v KN, 2014	1	0	1	1	Y
R v JJS, 2014	1	1	1	1	Y
R v Smith, 2014	1	0	1	1	Y
R v B, 2014	1	0	1	1	Y
R v SS, 2014	1	0	1	0	Y
R v Vincent, 2014	1	0	1	1	Y
R v KO, 2014	1	0	1	1	Y
R v MJAH, 2014	1	0	1	1	Y
R v Moreira, 2014	1	0	1	1	Y
R v Snook, 2013	1	0	1	1	Y
R v Lamb, 2013	1	1	1	1	Y
R v Stewart, 2013	1	1	1	1	Y
R v Mills, 2013	1	1	1	1	Y
R v Mackie,	1	0	1	1	Y

2013					
R v Craig, 2013	1	0	1	0	Y
R v Danielson, 2013	1	0	1	0	Y
R v Nightingale, 2013	1	0	1	1	Y
R v Garofalo, 2012	1	0	1	0	Y
R v Rice, 2012	1	1	1	1	Y
R v Paradee, 2012	1	0	1	1	Y
R v Caza, 2012	0	1	0	1	N
R v Cockell, 2012	1	0	1	1	Y
R v Matticks, 2012	1	0	1	1	Y
R v Snow, 2011	1	0	1	0	Y
R v Porteous, 2011	1	0	1	1	Y
R v JJH, 2011	1	0	1	0	Y
R v Bridgeman, 2011	1	1	1	1	Y
R v Aimee, 2010	1	0	1	1	Y
R v Young, 2010	1	0	1	1	Y
R v Harris, 2010	1	0	1	0	Y
R v Dragos, 2010	1	0	1	0	Y
R v Rouse, 2010	1	0	1	0	Y
R v Porter, 2010	1	0	1	0	Y
R v Gibbon, 2009	1	0	1	0	Y
R v Bono, 2008	1	1	1	1	Y
R v Lithgow, 2007	1	0	1	1	Y
R v Innes, 2007	1	0	1	1	Y
R v Haddon, 2007	1	0	1	1	Y

R v Fong, 2007	1	1	1	1	N**
R v Horeczy, 2006	1	0	1	0	Y
R v Legare, 2006	1	0	1	0	N***
R v Brown, 2006	1	0	1	0	Y
R v CJ, 2005	1	0	1	1	Y
R v Okipnak, 2005	1	0	1	1	Y
R v Carratt, 2005	1	1	1	0	Y

* Case references a "troubled past" without directly discussing a criminal record.

** Convicted for sexual assault, but not for communicating for the purpose of sex. Victim was underage and assaulted multiple times by Fong.

*** Overturned and convicted after appeal.

C. Summary of Findings

Our findings illustrate that the majority of proactive investigations fail to address any tangible harm posed by the accused. It is then difficult to say with certainty that this is behaviour that would have occurred independent of law enforcement intervention; in fact, the evidence demonstrates that police contact likely induced the offence.[86] The nature of offences through a proactive investigation means that police are able to strategically co-create evidence likely to result in a conviction. Proactive investigations have taken place on BDSM-themed, adult-only chat rooms, as well as on adult escort sites, falling significantly outside where a predator could reasonably be said to look for victims. However, there were some investigations that seemed to be well-founded and thought out by police; in a few cases, proactive investigations were used to check-up on a probation order, were part of a sting of pedophilic chat rooms, or involved taking over a real person's account to investigate a complaint of possible luring. The state's faith in its ability to imagine consequential harm has not been demonstrated by the policing strategies employed. We argue that this then becomes about enforcing community held ideas of acceptable sexuality, which involve the

[86] Kettles, *supra* note 8; Urbas, *supra* note 82.

surveillance and policing of marginalized sexual communities as in *Gowdy*, *Pengelley*, and others. We then move to make recommendations for regulating proactive investigations to avoid morality-based policing that ignores the real risks of exploitation faced by youth online.[87]

VII. RECOMMENDATIONS

This investigation has shown that there is a clear disconnect between the stated intentions of a proactive investigation under section 172.1 and its results. This disconnect is obscured through an observable moral panic surrounding youth, sexuality, and online intimacy. Moral panics are a phenomenon characterized by intense or heightened concern about a "deviant" or "folk devil" who poses a threat to "normal" society members.[88] The phenomenon generally regards youth, sexuality, and the internet as pervasive and high-risk people, behaviour, and space, despite evidence demonstrating that the perceived risk is largely imagined.[89] The state elects to rely on a statutory age of consent rather than engage constructively with (non)consensual youth sexuality and the potential for exploitation; in this sense, we have seen significant governance and criminalization of youth for behaviours like 'sexting' that many scholars have argued are a part of healthy and consensual sexual exploration.[90] On a legislative front, Parliament

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87 Slane, "Luring Lolita", *supra* note 29.

88 Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*, Routledge Classics (New York, NY: Routledge, 2011); Erich Goode & Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (Oxford: Wiley-Blackwell, 2009).

89 Ian Butler, "Child Protection and Moral Panic" in Viviene E Cree, Gary Clapton & Mark Smith, eds, *Revisiting Moral Panics* (Chicago: Policy Press, 2015) 73; Roberto Hugh Potter & Lyndy A Potter, "The Internet, Cyberporn, and Sexual Exploitation of Children: Media Moral Panics and Urban Myths for Middle-Class Parents?" (2001) 5:3 Sexuality & Culture 31; Joanne Westwood, "Unearthing Melodrama: Moral Panic Theory and the Enduring Characterisation of Child Trafficking" in Viviene E Cree, Gary Clapton & Mark Smith, eds, *Revisiting Moral Panics* (Chicago: Policy Press, 2015) 83.

90 Benedet, "Age of Innocence", *supra* note 19; Carol L Dauda, "Childhood, Age of Consent and Moral Regulation in Canada and the UK" (2010) 16:3 Contemporary Politics 227; Alexa Dodge & Dale C Spencer, "Online Sexual Violence, Child Pornography or Something Else Entirely?: Police Responses to Non-Consensual Intimate Image Sharing among Youth" (2018) 27:5 Soc & Leg Stud 636; Slane, "Scanning to Sexting", *supra* note 69; Andrea Slane, "Legal Conceptions of Harm

needs to refocus the law to engage in a contextual analysis of the nature and circumstances of online sexual relationships to make determinations as to whether they are exploitative.[91] The use of imaginary victims and imagining offences only serves to present a fallacy where exploitation is clear and identifiable and youth are vulnerable, reckless, and lack agency.

We suggest that imaginary victims created through proactive investigations only serve to muddy our socio-legal construction of youth sexuality and exploitation. To this end, we propose that they be used only as an investigative tool and not as evidence to move forward with prosecution. For offenders that would communicate with an undercover officer and violate a peace bond or the conditions of their sex offender designation, this could result in charges laid under a separate section.[92] The offence of luring a child should then be rewritten to only account for instances where an offender is communicating with someone under the age of consent, not where they simply believe they might be. This limits the number of cases that could be brought before the court, and prosecution is restricted to cases with a clearly demonstrated risk of harm. Further, police officers should undergo sensitivity training and education with respect to marginalized sexual communities. We argue that *Gowdy* and *Pengelley* exemplify a deliberate targeting of marginalized sexual communities and the strategic governance of acceptable sexuality.[93]

However, to fully remedy the issues with section 172.1, Parliament needs to turn away from governance at the age of consent and find an effective way to legislate through the basis of exploitation. While this project is a far cry from our current legislative potential, by doing away with our socio-legal dichotomy of youth and consent, we can form better legislative responses to the online sexual abuse of youth.[94]

Related to Sexual Images Online in the United States and Canada" (2015) 36:4 Child & Youth Services 288.

91 Slane, "Luring Lolita", *supra* note 29.

92 Jochelson, Gacek & Menzie, *supra* note 63.

93 Jochelson & Kramar, *supra* note 4. Further, there is a societal conflation of unacceptable sexuality with an immoral character.

94 Bailey & Steeves, *supra* note 2; Slane, "Luring Lolita", *supra* note 29.