

Lyric Pronouncements, the Cachet of the Offended Reader, and the Limits of “The Public Good”

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ON JUNE 26 2002, EYELEVELGALLERY IN HALIFAX installed a video art piece by Toronto artist Lyla Rye, titled “Byte.” The video features Rye playing a game with her baby daughter: Rye sings into the baby’s mouth and in response, her daughter bites Rye’s lip. The game on the tape runs for eight minutes and includes over 40 manipulations of the same twelve-second clip. This clip is presented repeatedly with a variety of masks and effects applied to it, designed to draw the viewer’s attention to different aspects of the interaction by concealing others. This video ran in the front window of the gallery, situated on Barrington Street, one of Halifax’s busiest downtown strips.

Two weeks after the show had been installed, on July 10, the Vice Squad of the Halifax Regional Municipal Police force swooped in and removed the video tapes from the gallery. A woman had seen the video as she was walking down the street and complained to the police that she considered the representation to be pornographic. Within days, the police had received six complaints in total: three formal complaints and three verbal complaints. Never mind that the show had presumably already passed the litmus test of countless viewers who had passed by eyelevel’s Barrington Street window as this young woman had done. Never mind that Rye’s video was also on display at Ontario’s Grimsby Public Art Gallery where no other viewers complained. And never mind that on July 5, five days



Byte—video still by Lyla Rye (2002)

before the ultimate confiscation, a police officer had visited eyelevel gallery and pronounced the video harmless (at least according to the “harm-based” provisions of Canadian pornography law¹). In spite of all this, the confiscated tapes remained in police possession and eventually, when the Crown determined that it could make no case under the pornography law, Rye’s video was assessed under the corruption of public morals section of the Criminal Code. This section, article 163.2, states that “everyone commits an offence who knowingly, without lawful justification or excuse, sells, exposes to public view, or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever.” In moving from the law on child pornography to the law on public morals, the Crown seemed to be looking for a loophole, some gap between pornography and obscenity. Still, no charges were laid. Yet,

1 There may be two reasons for this. One is that the law, at least as it was written then, protects artistic representations. Section 163.1.6 reads that “Where the accused is charged with an offence under subsection (2), (3), or (4), the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has *artistic merit or an educational,*

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Rye's work and eyelevelgallery were not vindicated. Instead, the police used the public morals section of the Criminal Code to curtail public circulation of the image by issuing a threat. Rye and eyelevelgallery were put on alert: the police were not going to press charges, but when they returned the tapes, they warned "that may change" if the gallery persisted in showing the work.²

The police could not find any fault with the video according to the provisions of the pornography law: it did not constitute a "harm." And yet, presumably, six readers felt enough harm was being or had been done to warrant a complaint. But harm to what or to whom? If the video did not contravene the pornography law in the first instance, what could possibly make it obscene enough to offend public morals in the second? The answer is probably nothing. Not being charged under one law does not, of course, exempt one from being charged under another. However, if the obscenity in question were sexual in nature and the image were not sexually obscene under the pornography law, it seems unlikely that it would be obscene in

scientific or medical purpose" (emphasis added). And Rye does have an artistic goal here: in her press release, she said she was "interested in examining the nature of the mother-child relationship and the issues of power and control that images of children raise." Clearly, eyelevelgallery thought Rye's work had artistic merit, too, which would explain why they chose to showcase her work in the front window. (Little did the gallery know that by trying bring art into the view of average citizens, they would get such a response.) The other possibility is that Rye's video could not be prosecuted for producing pornography likely because according to the Criminal Code at the time, child pornography "shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years." It would have been quite a stretch for the Crown to decide that the interaction between Rye and her daughter amounted to explicit sexual activity.

- 2 Virtually every Halifax media outlet ran a story about the Rye case in the summer of 2002. For various accounts of the details of the case, please see eyelevelgallery's "Media Release," available at <http://www.eyelevelgallery.ca/archives/windowarchives/windowsarchives2002/Gallery_statement_lyla_rye.htm>; Lyla Rye's "Media Statement from Lyla Rye," available at <http://www.eyelevelgallery.ca/archives/windowarchives/windowsarchives2002/MediaStatement_Lyla_Rye.pdf>. As well, David Armstrong provides an excellent overview of the case in "Art, Censorship & Indignation," *Arts Atlantic* 73 (Fall 2002): 33–35. Also of note: in the winter of 2003, the *Globe and Mail* picked up on Rye's work when it was being shown in Cambridge, Ontario. The writer provides an account of the eyelevelgallery controversy and how Rye's work has advanced since in the context of increased fears surrounding artistic images of children. See Sarah Milroy's "The Mother of All Controversies" in *The Globe and Mail*, Tuesday, Feb. 25, 2003, R1.

any other sense. But this did not stop the police from threatening to apply the public morals law to eyelevelgallery. The effect was unofficial censorship. The police openly threatened to lay charges against the gallery that provided the viewing context and, more insidiously, Rye herself.³ What they wanted was for the gallery to stop showing the tapes. Publicity itself was the problem.

It may well be the case that the police should not have insisted upon testing Rye's video against the public morals section of the Criminal Code. It is most certainly the case that the police should not have threatened the gallery: they should either have charged the gallery or left it alone. But under the "public morals act," suddenly there was much more ambiguity and more room for the police to bully both Rye and the gallery. They could do so by focussing on the public display of the art instead of on the art itself. In so doing, they were adhering not to any artistic standard, but to a tenuous notion of what counts as the public good. The harm that seemed to require redress was not the harm to any child, real or imagined, but the harm implicitly caused to the sensibilities of the offended readers. These "offended readers" in turn came to define "public morals" and were elevated to an overdetermined position as publically symbolic readers.

The Lyla Rye case in Halifax should give us pause for a number of reasons: it reveals, first of all, how vulnerable the arts are, even when there actually are laws to protect representations that have artistic merit; it shows, secondly, how wobbly the very idea of public morality is and how vulnerable the definition of obscenity is to being the domain of offended readers. The actions of the Halifax police foreshadow the kinds of investigations we might expect when Bill C-20 itself becomes law. Not only does Bill C-20 eliminate the artistic merit defence from the pornography provisions of the Criminal Code, it also imports into the child pornography provisions the very ambiguous language surrounding public morals and "the public good" that the Halifax police used to threaten eyelevelgallery. Given that the artist merit defence is part of common law (as the Sharpe decision illustrates), it may be that artistic merit will persist as a basis for artists to claim some legal cover, even in light of the language in Bill C-20. The bigger problem, to my mind, is the central and incipient moralism of the "public good" in this law. The proposed language reads:

3 The police told Rye that they had informed Children's Aid about the investigation. The artist expected that if the gallery continued to show this video, Children's Aid would be on her doorstep the next day. Rye did not make this detail public at the time for fear of escalating what was already a media frenzy (Lyla Rye, email to the author, 21 February 2004).

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- 6) No person shall be convicted of an offence under this section if the acts that are alleged to constitute the offence, or if the material related to those acts that is alleged to contain child pornography, serve the public good and do not extend beyond what serves the public good.
- 7) For the purposes of this section,
 - (a) it is a question of law whether any written material or visual representation advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;
 - (b) it is a question of law whether an act serves the public good and whether there is evidence that the act alleged or the material goes beyond what serves the public good, but it is a question of fact whether the act or the material does or does not extend beyond what serves the public good.

This language is almost identical to the language of the corruption of morals section of the Criminal Code that the police used to assess Lyla Rye's work. This language flattens the "public good" into a knowable, concrete, singular thing. It assumes that there is consensus about what the public good actually is. If it is indeed "a question of fact whether the act or material does or does not extend beyond what serves the public good," then the very complex idea of "public good" is simplified. The law imagines that a given "act or material" is either for or against "the public good." No single act or material could serve "the public good" according to one reader and undermine it according to another. In theory, the law may allow for there to be different readings of "the public good," but ultimately one reading will matter more than the others.

What makes the Lyla Rye case worthy of our attention in light of the passing of Bill C-20 is the way that, in yoking together two different provisions of the Criminal Code to assess Rye's work, the Halifax police foreshadow the kinds of investigations we might expect when Bill C-20 itself becomes law. From the Rye case, we can see how very malleable the idea of "public morals" is and how easily public morality and obscenity alike are defined by the most offended readers. The Crown sought a loophole in the public morals section of the law that would make "showing" the video the big problem (or so the threat to the gallery implies). In doing so, they seemed to be trying to shift the burden of proof for obscenity from the legal definitions under pornography law to the fact that the public, represented by only a handful of voices, perceived there to be obscenity. The law, it seemed, was being applied to justify the complainants'

perceptions. Those who complained that moral boundaries were been breached implicitly set the terms of “public morality.” Bill C-20, the new child pornography law, has imported the very ambiguity surrounding “public” moral standards into the law by insisting that we can determine as a matter of fact what counts as “the public good.” But if the “public good” can be so easily defined and so factually assessed, why does the law itself not so define it?

The law cannot define “public good” because the very idea of the “public good” is abstract until someone takes the risk of defining it and laying him or herself open to an inevitable disagreement. Bill C-20 is therefore problematic in the way that it blithely assumes that whether “material does or does not extend beyond the public good” is a matter of fact. The claim to factuality assumes that one reading of the material can apply consistently to all members of the fictive public. This assumes an objective standard of public life that, like readings of pornography themselves, are wildly inconsistent and do not exist in any sustained, concrete manifestation.

In the absence of a debate about public morality, the language of public moralism jumps in to fill the breach. The voice of moralism is, typically, the voice of the offended reader, those six complainants in the Lyla Rye case who were convinced that “Byte” was child pornography and an offense to public morals. Let’s review the chain of events in the “Byte” incident: a woman, walking down Barrington St., sees “Byte” in eyelevelgallery’s window. She is disturbed and seeks validation from her friends, who also, in turn, read the video. This woman and five other people complain to the police; one officer reads the piece as harmless, but later another officer reads the video differently and seizes the tapes. Remember that hundreds of other people have already seen Rye’s video, either at the Grimsby Gallery or in the same eyelevelgallery on Barrington St.

What makes the anonymous woman walking down the street, or even the six complainants collectively, a symbolic reader? After all, she has become the lyric reader of pornography as John Stuart Mill might have imagined it: hers is the reading “overheard” by millions of other Canadian readers who picked up a newspaper or checked their news in the CBC website. Why did police respond so quickly (if overzealously) to this woman’s complaint and why is the complaint itself newsworthy? Why does this particular reading of the video have such cachet? How is it that the offended reader has become so emboldened and so lyrically significant? To be sure, the phenomenon of “offended reading” has acquired its cachet in more widespread contexts than the reading of pornography. Its evolution would make for a worthy research project, especially since claiming offence

is as much a left wing as it is a right wing political shibboleth. However, I would like to lay out some suggestions about how being offended has been validated in particular by the culture of pornography law in Canada and about how it is that offended readers themselves validate and elevate to popularity naive readings of the culture around them.

The offended reader has acquired more and more authority when it comes to the adjudication of pornography cases in Canada. And we're not just talking about readers who casually pass by gallery windows. We can look as high up as the Supreme Court where we see such reading institutionalized. In *Bad Attitude/s on Trial*, Becki Ross, an expert witness in the *R. v. Scythes* case, presents an analysis of her efforts "to explicate and contextualize the specificities, nuances, and complexities of lesbian s/m fantasy, alongside the sociopolitical meanings it engenders within lesbian s/m subcultures" (153). These efforts, she argues, were "unintelligible to gatekeepers of obscenity law in Canada" (153). Ross attributes this to "the legal privileging of a school of social science research that delivered certainty in the stunning absence of empirical evidence" (153).

What Ross observes as a matter of experience, Christopher Nowlin makes the object of a more expansive investigation in *Judging Obscenity: A Critical History of Expert Evidence*. Here, he diagnoses a very interesting pattern in the way judges use and interpret expert social science testimony in the context of pornography cases: "for most Canadian judges," he observes, "some or any expert evident purporting to link a particular activity (or 'cause') with a broader social problem (or 'effect')—however controversial or inconclusive that evidence might be—is enough to support Parliament's 'reasonable apprehension of harm' about the problem in question" (10). Thus, for instance, in the first case to interpret Canada's last pornography law, *R. v. Langer*, Justice McCombs, following Justice Sopinka's ruling in the *Butler* case, began his judgment by acknowledging the following:

There is considerable controversy within the behavioural science community about the effects, if any, of child pornography upon behaviour. The main reason for the controversy appears to be that it is virtually impossible to conduct studies with sufficiently rigorous adherence to proper scientific method to produce statistically reliable results. After all, paedophiles are not anxious to identify themselves or to co-operate with researchers. The problems of small sample size, false reporting, interviewer distortion, and a myriad of other inherent

difficulties contribute to the difficulty of scientific study. (qtd. in Nowlin 194)

In other words, even according to McCombs, there is no solid and reliable evidence that child pornography causes pedophilia. And yet, McCombs concluded, “In my opinion, in light of the evidence which I have accepted concerning the use to which child pornography is sometimes put, and the consequent risk of harm to children, Parliament had a reasonable basis for criminalizing not only the creation and dissemination of child pornography, but its possession as well” (qtd. in Nowlin 194). Curiously, what McCombs had originally described as unreliable evidence now seems to support his conclusions about the legislative facts of the case. Legislative facts are those “facts” that judges piece together as the motivation and context that gave rise to the emergence of a particular piece of legislation.⁴ It is precisely the effort to determine such “facts” that Nowlin is calling into question in his study. He says, “Legislative fact-finding in American and Canada is a misnomer insofar as it is much more a matter of argument proper than objective, impartial ‘fact’ finding” (223). *Any or some* assertion that harm can be proven to stem from pornography has suddenly trumped all other assertions, even though the judge himself finds the evidence inconclusive. Nowlin makes a convincing argument by citing case after case where judges follow a pattern similar to the one McCombs displays. Any or some assertions, however inconclusive, that pornography causes harm justify the suggestion that “Parliament had a reasonable basis for criminalizing” pornography. Nowlin concludes that “the particular limitations McCombs identifies in relation to paedophile research, such as sample size, false reporting, and interviewer distortion, are applicable to all social science research and for the most part render such research far more unreliable than most social scientific communities are likely to concede” (195).

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4 The distinction between legislative facts and adjudicative facts was first made in 1942 by Kenneth Culp Davis:

When an [administrative] agency finds facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were—the agency is performing an adjudicative function, and the facts may conveniently be called adjudicative facts. When an agency wrestles with a question of law or policy, it is acting legislatively ... and the facts which inform its legislative judgment may conveniently be denominated legislative facts. (qtd. in Nowling 10)

See Nowling for a more thorough assessment of these definitions.

Nowlin ultimately is concerned with what he perceives as the way Canadian judges fail ever to be critical of evidence that is really an argument about a controversial policy masquerading as fact.⁵ But his analysis provides us with an interesting structure for thinking about the relationship between *worry about harm* and *what counts as the facts about harm* in the context of Canadian pornography law. In their efforts to decide whether “Parliament had a reasonable apprehension of harm,” Canadian judges, Nowlin submits, want to rely on facts that quite simply are not facts at all. When McCombs declared that “Parliament had a reasonable basis for criminalizing not only the creation and dissemination of child pornography, but its possession as well,” he may have been diagnosing the fact that Parliament worries. Indeed it is likely true that Parliament does worry about rampant child abuse and how to protect children. But this is not the same thing as saying they have reason to assume that there is a cause/effect link between child pornography and pedophilia. As even McCombs had to admit, there is insufficient evidence to determine that pornography causes pedophilic behaviour. What he diagnoses then, as a matter of “legislative fact” seems to be the fact that Parliament worries about harm to children, not the fact that Parliament could not have reasonably foreseen a causal link between possessing or viewing child pornography and child abuse itself.

The worry about children being harmed is a worry that gets a lot of press, not just in Canada, but all over North America as James Kincaid’s work has shown. In “Producing Erotic Children,” Kincaid argues that the category of the “the child” and the category of “the erotic” have begun to overlap because we idealize innocence to the point of fetishizing it. As a result, the figure of the child (in diaper ads, in underwear, on television) is ubiquitous. Lauren Berlant has even argued that the child in the United States has become the ideal citizen. We therefore need the figure of the child molestor to be firmly in place as the figure of desire for the child gone wrong (the same might be said of the child pornographer). That way, we can feel comfortable in our own idealization of the child. We cannot bear to have this nice dichotomy between the good (innocent, non-desiring child) and the bad (preferably anonymous dirty old man) to be interrupted by complexity—such as the child’s actually having desires or the molestor’s being not a stranger or a priest, but a family member. And so, as Kincaid

5 Interestingly, Nowlin observes that on an increasing basis, the Supreme Court seems to be relying more on expert testimony from the humanities as opposed to the social sciences, something he sees as reason to be optimistic about the status of the humanities.

points out, we have a double bind: we have “public spectacles of child eroticism, an eroticism that can be flaunted and also screened, exploited and denied, enjoyed and cast off, made central and criminal” (10). What seems to be simple, obvious, and a matter of common sense is much more complicated than we want it to be: “We are instructed to crave that which is forbidden, a crisis we face by not facing it, by becoming hysterical, and by writing a kind of pious pornography, a self-righteous doublespeak that demands both lavish public spectacle and constant guilt-denying projections onto scapegoats” (11). The double bind here produces worry to the point of panic about harm to children. The result is lyrically offended readers, like those six readers in Halifax, producing “pious pornography.” And Lyla Rye becomes one such scapegoat.

In Canada, however, unlike the America that Lauren Berlant describes, worried and offended readers of sexual images have more authority, if not more merit, precisely because their worries are validated and reproduced by the Supreme Court.⁶ The way that expert testimony is weighed in the Canadian courts tells us a great deal about the culture of pornography in Canada—not the culture of the industry itself, but the way pornography is presented to us in our culture. It’s not as if pornography cases are heard in court and simply stay there. Pornography *cases* in Canada are big newsmakers. As one pornography decision after another comes down, Canadians receive the message that any or some assertion that pornography causes harm is law. The inconclusiveness of the evidence itself does not make it to the front pages of the newspapers. Only the conclusion or the final judgment does. The reader who is offended by pornography in general and child pornography in particular is regularly validated by the Supreme Court and sees in the news his or her license to be offended. Even where there is no immediate harm present, the internalization of that law makes readers vigilant. To take offense at any image one perceives to be pornographic is to be lawful. The language of those morally outraged by pornography (from the anonymous young woman who complained about “Byte” to LEAF, the Women’s Legal Education and Action Fund, and to Catherine MacKinnon) bears this out. They defend their diagnoses of

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6 It’s not that American readers are not as offended by pornography in general or child pornography in particular, but American law is much more narrowly defined than Canadian law when it comes to pornography. The terms of debate take slightly different form. For more on the relationship of pornography law to American public life, see Lauren Berlant’s *The Queen of America Goes to Washington City: Essays on Sex and Citizenship*.

pornography and their unearthing of pornographic images as a public service—nay, a civic duty.

Given that the history of pornography case law in Canada has validated this approach to pornography, a new law that enshrines “the public good” as a “matter of fact” further elevates such readers of images to high moral status. Bill C-20’s problem is not just that it continues to accept the any or some evidence that viewing or possessing child pornography is harmful. Cumulatively, the evidence presented to the courts suggests that whether pornography is sexually liberating or sexually debilitating is a matter of debate and, quite frankly, a matter of reading. Again, all we know as a matter of fact is that there are widely divergent views on this matter.

For some readers, it would seem to be obvious that curtailing representations of child pornography makes good sense; they cannot imagine how having such images in circulation might even constitute a public good. But consider Rye’s own statement of her artistic aim: she is “interested in examining the nature of the mother-child relationship and the issues of power and control that images of children raise” (Rye). In whose interests is it for us *not* to examine these issues of power and control *in public*? In removing the artistic merit defence and importing the nebulous language of the “public good,” Bill C-20, in effect, removes the legal grounds that Rye has for circulating her video in public, or at least makes it easier to press the issue as Halifax police did. In turn, it makes the offended reader a lyric reader, pronouncing naively but with authority, on the quality of artistic representations in the public sphere (a rather odd display of citizenship at a time with Canadians think of themselves more as taxpayers than citizens). Bill C-20 will further institutionalize this kind of reading in law and produce the effect of consigning to the closet any investigation of the nature of power and control that ambiguous representations of child innocence may raise. In making Rye’s video *so* public, it was, in fact, eyelevelgallery that exercised the more admirable civic duty, not the offended readers who complained.

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