PROTECTING 'INNOCENCE'? DECONSTRUCTING LEGAL REGULATION OF CHILD SEXUALITY

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1.0 INTRODUCTION

> *What is emerging is a new penal system, a new legislative system, whose function is not so much to punish offences against these general laws concerning decency, as to protect populations and parts of populations regarded as particularly vulnerable.*[1]

Michel Foucault's assessment of modern law as a multifaceted and contradictory force — dichotomising subjects, but in doing so, paradoxically forming them[2] — pertinently predicted the growth of concepts of 'risk' and 'protection' to legal and social discourse in the past several decades. Sociologist Ulrich Beck similarly suggests that contemporary political and social formations are increasingly motivated by the identification and management of risks.[3] Nowhere is this growth more evident than in the proliferation of 'rights discourse' — a discourse which, in many circumstances, is unselfconsciously adopted both by those seeking new legal protections, and those seeking to defend the *status quo*. This phenomenon is increasingly clear in the area of children's rights, the dominant detractor of which is a conservative appeal to the 'rights of the family'.[4] In such debates, certain vulnerabilities and certain risks come to be seen not only as *worthy* of protection, but as central and universal characteristics of particular identities.[5] And as 'rights', such arguments desperately seek to trump each other and overcome their subjectivity — protection of vulnerabilities becomes not only an *ethical* question, but a test of 'civilised'

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1 Foucault Michel, 'Sexual Morality and the Law' in Foucault Michel (ed Kritzman Lawrence D) *Politics, Philosophy, Culture: Interviews and Other Writings 1977–1984* Routledge New York and London 1988 p 271 at 276.

2 See Part 3 of Foucault Michel (trans Alan Sheridan) *Discipline and Punish: The Birth of the Prison* Random House New York 1995 pp 135 – 230.

3 Beck Ulrich *The Risk Society: Towards a New Modernity* Sage Publications Ltd London, California and New Delhi 1992.

4 See Guggenheim Martin *What's Wrong with Children's Rights* Harvard University Press Cambridge, Massachusetts and London 2005 p 17.

5 Douzinas Costas 'The End(s) of Human Rights' (2000) 26 *Melbourne University Law Review* 445 at 457.

behaviour and therefore of 'collective identity' itself. For Foucault, then, law legitimates itself through its claim to represent collective values and to provide protection, even as it produces and organises certain subjects as vulnerable and thus in need of such protection. In these circumstances, it is understandably children — the *most* innocent and vulnerable — who are subjected to the greatest legal regulation of their identities, culminating for Foucault in their inability to trust or even acknowledge their own desires.[6]

This article seeks to assess Foucault's conception of the child as 'constructed' through law, through regulation of perhaps the most anxiety-inducing aspect of the child: their access to sexuality. Although this paper deals primarily with legislative provisions and developments in the Australian context — particularly within Victoria, which has been especially proactive in asserting children's sexual (or, as the case may be, non-sexual) rights — the level of debate and critique of issues appears similar in the United States and to a lesser extent in Canada and Europe. In any jurisdiction, comparatively little literature analyses the construction of children beyond crude analogies to feminism and women's subjugation — a pattern evident even amongst those who are critical of the current climate of repression of discussion or analysis of active child sexuality.[7] There is a particular absence of critiques that actually *engage with* rather than merely assume children's voices and desires, in efforts to articulate or critique their legal rights. The zenith of children's rights protection, the *Convention on the Rights of the Child*,[8] was debated without any consultation on the part of those whose interests it purports to protect, as if such interests were self-evident; and, in the realm of sexuality, the suggestion that children might contribute to understandings of child sexual encounters remains controversial. Whilst questions of authenticity and the excavation of 'subaltern' voices has informed debates in postcolonial, indigenous and gendered contexts,[9] the only substantial critique of children's rights in the West (particularly in the United States) comes from the family rights movement: a movement which rarely claims to speak 'for' children (although it does claim to uphold their best interests).[10] The lines of this debate thus foreclose the possibility of challenges to a static understanding of children as docile subjects, and the children's rights movement remains conceptualised analogously to a liberal feminist framework, which presumes that children's interests fit easily within adults' existing understanding and assumptions.

This paper contends that this is itself evidence of how deeply ingrained dominant discourses of child sexuality are, despite the work of historians such as Philippe Ariès who have long demonstrated that the child is a legally constructed identity, historically and politically contingent. Indeed, famously, Ariès argued that in certain periods 'the child' did not exist,[11] whilst

6 Foucault above note 1 at p 278.

7 For a critique of this reliance on feminism for the interpretation and condemnation of child sexual abuse, see Angelides Steven, 'Feminism, Child Sexual Abuse and the Erasure of Child Sexuality' (2004) 10(2) *GLQ: A Journal of Lesbian and Gay Studies* 141.

8 Opened for signature 20 November 1989, 1577 UNTS 44 (entered into force 2 September 1990).

9 The seminal text being, of course, Spivak Gayatri Chakravorty 'Can the Subaltern Speak?' in Grossberg Lawrence and Nelson Cary (eds) *Marxism and the Interpretation of Culture* University of Illinois Press Illinois 1988 p 271.

10 See Guggenheim above note 4 at p 9.

11 Ariès Philippe (trans Robert Baldick) *Centuries of Childhood: A Social History of Family Life* Random House New York 1962 p 36.

in others the identity was relevant only for particular genders[12] or social classes.[13] Whilst this paper does not seek to judge the effectiveness of legal responses to child sexuality, or to propose a definitive interpretation or definition of sexual abuse and non-abuse, I instead seek to consider and deconstruct the reasons why the laws relating to child sexuality have adopted rights discourse and thereby particular understandings of the child.

This paper is, then, an attempt to pry open the assumptions and boundaries in which the debate (or lack of debate) over children's rights has been deadlocked. Adopting a Foucauldian analysis, I firstly recognise that law constructs children as innocent, docile subjects, which in turn requires and generates a conceptual partition between adult and child sexuality and forces children to mistrust their own understandings of sexuality as 'undeveloped' and unreliable. This risks potentially traumatic and deleterious consequences for children. Thus, whilst any analysis ought to consider sexuality *through* children's own eyes, this is itself problematic given the devaluation of children's voices and the disassociation of children's desires from themselves: a problem never adequately confronted, even in Foucault's work, with its implicit, emancipatory faith in human autonomy and consequent stubborn intent to justify sexual conduct by consent.[14] This paper thus turns to psychoanalytic theory to critique and interrogate Foucault's construction of subjects and the possibilities of self-understanding, using parts of the psychoanalytic theory of Jacques Lacan to identify how a discourse of children's rights develops around the shared, collective belief in childhood innocence. I use psychoanalysis to consider the psychological investment of children and adults in these existing constructions of childhood, concluding that the construction of the child as a 'docile', innocent rights-bearer is, ironically, a construction that centres on satisfying *adult* fantasies rather than the protection of the child.

2.0 'INNOCENT' UNDERSTANDINGS OF CHILD SEXUALITY

2.1 An Object of Hysteria

The obvious starting point for an historicising analysis of child sexuality is in the concept of hysteria. Since the end of the twentieth century,[15] child sexuality has become the archetypical 'moral panic', leading to enormous and continuing legal reform, particularly in Australia and the United States.[16] In turn, this panic has generated a legal discourse of 'risk' which goes beyond

12 As above at p 51.

13 As above at p 239.

14 Even Foucault's understanding of intergenerational sex seems predicated on understanding the regulation of the adult rather than the child: see Alcoff Linda Martin 'Dangerous Pleasures: Foucault and the Politics of Pedophilia' in Hekman Susan J (ed) *Feminist Interpretations of Michel Foucault* Pennsylvania State University Press, Pennsylvania 1996 p 99.

15 Mirkin Harris 'The Pattern of Sexual Politics: Feminism, Homosexuality and Pedophilia' (1999) 37(2) *Journal of Homosexuality* 1 at 2.

16 For instance, in 2005 alone, the Victorian Parliament introduced three significant pieces of legislation — the *Children, Youth and Families Act 2005* (Vic), *Working with Children Act 2005* (Vic), and the *Child Wellbeing and Safety Act 2005* (Vic) —

managing the incidents of sexual abuse, instead focusing on protection of children through the identification of ever-expanding groups of child sexual abusers. In the 1970s and 80s, sexual abuse focused on the newly-created scientific category of the 'paedophile'[17], followed shortly afterwards by fear of a massive black market satiated by child pornographers.[18] The fear subsequently escalated as feminists, seeking to implode the public-private dichotomy, saw 'closed' institutions such as schools and the family as increasingly responsible for the corruption of child sexuality.[19] This is a hysteria that culminated in the politically charged trial of Jesse Friedman and his son in the United States, teachers against whom allegations of childhood abuse became increasingly implausible. The case nevertheless captured the public imagination and led to a large number of similar outbreaks of hysteria throughout kindergartens and primary schools in the West.[20] The Friedman case — a clear example of hysteria in which children's evidence was subsequently revealed to have been cajoled and manipulated — importantly coincided with an increasing awareness of sexual abuse in the home, which perhaps suggests a reactionary panic over the direction and growing influence of various feminisms.[21] Following the privatisation of education and increased scrutiny of family relationships, however, recent commentary suggests the fear has returned to the figure of the 'anonymous paedophile', albeit one more dangerous than ever thanks to technologies such as the internet.[22]

Whilst the *threats* to children and their sexuality have developed and expanded remarkably over the last decades, however, a similar phenomenon does not appear to have occurred for the child. Tracing the development of child sexual hysteria in the past few decades (particularly viewed in the context of feminism and in light of the struggle to 'liberate' women from the home) seems to reveal more about the power relations of the family, and political elements of children's identities, than about children as subjects themselves. On the contrary, 'the child' — especially the child as *non-sexual* — and his or her needs have remained relatively constant in the last few decades, and come to be seen as static and obvious: under-critiqued and often assumed as self-evident. With this lack of a theoretical basis, the discourse of children's rights, particularly when adopted to protect sexual integrity, has in some respects come to appear strangely hollow — as if by focusing increasingly on the protection of rights, one might circumvent the central questions of *which interests* are selected as the child's, and as worthy and capable of protection.

as well as amendments to the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic), all of which provided significant measures to protect children from abuse.

17 Angelides Steven 'Historicizing Affect, Psychoanalyzing History: Pedophilia and the Discourse of Child Sexuality' (2004) 46 *Journal of Homosexuality* 79 at 83.

18 As above at p 84.

19 Angelides above note 7 at p 145.

20 This is a phenomenon described in the film *Capturing the Friedmans* (ed Andrew Jarecki, 2003) and analysed in Satter Beryl 'The Sexual Abuse Paradigm in Historical Perspective: Passivity and Emotion in Mid-Twentieth-Century America' 12(3) *Journal of the History of Sexuality* 424 at 425.

21 Satter above note 20 at pp 446–7.

22 Johnston Chris 'Brave New World or Virtual Pedophile Paradise? Second Life Falls Foul of Law' *The Age* (Melbourne) 10 May 2007 p 3.

This, of course, does not mean childhood is static outside of the 'moral panic' discourse, which Kenneth Thompson considers a uniquely modern phenomenon.[23] The child was clearly not always subject to a similar level of fear over sexual abuse, meaning the production of children as uniquely 'vulnerable' is a relatively recent development. In the 17th and 18th centuries, at least in certain urban areas of Europe, there is evidence that the distinction between adults and children was much less pronounced generally (particularly given the use of child labour, which ensured children's economic importance to society).[24] Concomitantly, it has been suggested that a greater scope for sexual autonomy may have existed.[25] Not only were sexual crimes against minors characterised as crimes of 'sexual interference', for example (thus implicitly recognising the reality of childhood sexuality and that this sexuality might be active rather than latent) but, conversely, legislative provisions acknowledged the possibility of *children* actively abusing their sexuality against others.[26] Even throughout the 20th century, at least until radical feminism sought to undermine paternal authority over the private sphere, sexologists such as Kinsey,[27] together with Freudian theorists,[28] posited the existence of an *active* childhood sexuality, if not the possibility of a child sexuality which could be potentially corrupting to adults. These ideas (albeit almost unthinkable now) were both influential and generated debate around children's sexual activities, questioning the nature of child sexuality itself. For Freud, for example, childhood identity was *centrally* constructed around a flexible sexuality, a 'polymorphous perversity'.[29] Critically, this sexuality was not necessarily linear in development; nor was there necessarily any strong division between sexual and platonic relations, unconscious psychic strategies such as 'transference' often ambiguously straddling this divide in Freud's case studies.[30] In contrast, child sexuality is *now* constructed as precisely the opposite: fragile and not-yet-developed, and always at risk of being corrupted or deformed by premature tampering; assuming that it is *possible* (not merely desirable) that children 'grow normally' without external 'sexual influences'. The position in Australia seems succinctly summarised by the Victorian Court of Appeal, which recently stated that 'the legislature has made it crystal clear that children under the age of 16 years *must be protected*' from any sexual contact.[31]

In this environment, debate over the underlying questions of legal regulation of child sexuality — as reflected in attempts to lower the legislative age of consent, for example — is

23 Kenneth Thompson, *Moral Panics: Key Ideas* Routledge London and New York 1998 p 2.

24 Ariès above note 11 at p 239.

25 Ariès above note 11 at p 106.

26 The offence of 'sexual interference' remains in Canada, but does not or no longer exists in many other jurisdictions: see *Criminal Code* RS C 1985 c 19 s 1; and the delineation of sexual crimes against children as produced only by adults is similarly recent: *Crimes Act 1958* (Vic) s 41, although this section has since been repealed.

27 Kinsey Alfred Charles, Martin Clyde and Pomeroy Wardell *Sexual Behavior in the Human Male* Indiana University Press Indiana 1948.

28 For a discussion of Freud, see Angelides above note 17 at p 82.

29 Freud Sigmund 'Infantile Sexuality' in Freud Sigmund (trans Strachey James) *Three Essays on the History of Sexuality* Basic Books 2000 p 39 at 57.

30 See, for example, the case of the 'Ratman': Freud Sigmund 'Notes Upon a Case of Obsessional Neurosis ("Ratman") and Process Notes for the Case History' in Freud Sigmund (ed Gay Peter) *The Freud Reader* W W Norton & Co New York and London 1995 p 239.

31 *R v Coffey* (2003) 6 VR 543 at 551 (emphasis added).

severely curtailed. Questioning of these laws and their rationales appears primarily and automatically to imply that children may be responsible for their own abuse.[32] Indeed, the radical feminist approach, although almost entirely discredited in other contexts, seems the pervasive and ubiquitous approach to child sexuality, in its insistence that the victim of abuse be seen as utterly powerless, and that the law therefore be uncomplicated and 'obvious'.[33] In the contemporary debate, then, child sexuality has come to be seen almost invariably as an 'innocence' of a liberal, autonomous, but as-yet-undeveloped individual; an innocence to be 'preserved' *by* and *from* others.

2.2 'The Child' in Foucauldian Law

But if this narrative of protection is historically contingent, at least as it relates to child sexuality, this only renders *more* curious the reasons why the responsibility of law to protect 'sexual innocence' is now so incontestable. For Foucault, the neurosis over protection of child sexuality reflects a broader shift in the law, away from crime and onto a more insidious production of identity.[34] For Foucault, the law no longer centres on crime and punishment, but has developed a strategy of 'risk protection.' The law pre-identifies both criminals and victims, scientifically classifying on the one hand 'childhood, which by its very nature is in danger' and on the other, 'dangerous individuals, who are generally adults'.[35] In this way, the law orders subjects through what Foucault terms the 'set of relations that delineates sites'[36] — that is, the individual is, in a democratic post-modernity, no longer reliant on a sovereign Other for identity. Instead, the subject is now merely a nexus of power relationships, and it is the nature of these *relationships* that identifies the subject. This is a conception of the individual in obvious tension with liberal understandings of the subject as 'enclosed', and the conception of the victim assumed by the laws of child sexuality. Yet under a Foucauldian conception of law, children are primarily recognised as a class of potential victims of harm *by others*, and always regarded as 'at risk'. Obviously, this process is self-referential and paradoxical: relationships necessarily exist *between* subjects, whilst at the same time, these relationships *form* those very subjects. Similarly, the process is self-perpetuating: law disciplines bodies into this order, professes merely to 'recognise' the order as pre-existing, and then uses this recognition to justify further identification, regulation and protection.[37]

The recognition of these subjects is therefore problematic. For the perpetrator, 'the aim is to show how the individual already resembles his crime before he has committed it.'[38] Accordingly, a scientific and legal discourse around the 'paedophilic' identity has been

32 Angelides above note 7 at p 141.

33 Mirkin above note 15 p 3.

34 See Part 3 of Foucault above note 2, particularly pp 135–170.

35 Foucault above note 1 at p 281.

36 Foucault Michel 'Of Other Spaces' (1986) 16(1) *Diacritics* 22 at 23.

37 As above at 24.

38 Foucault Michel (trans Burchell Graham) *Abnormal: Lectures at the Collège de France, 1974 – 1975* Picador New York 2003 p 19.

constructed, in spite of evidence that the overwhelming majority of sexual abuse of children occurs within families and by male relatives who are likely to claim later that the abuse was caused by stress or substance abuse, rather than by those 'inherently' sexually 'orientated' towards children.[39] In fact, recent cases in Victoria involving prosecution of 'paedophiles' reveal that much of the oral arguments and legal judgments centre on whether the accused is 'orientated' towards children, thus justifying the moniker of paedophile, even where the physical and mental elements and consequences of the crime are not disputed.[40] Ashley JA of the Victorian Court of Appeal recently determined that 'the risk of a *paedophile* re-offending would be [considered] greater than the risk posed by a person not so characterised who had in the past, on occasion, offended in such a way,'[41] as if the Courts could simply rely on *identification* of an offender as a 'paedophile' to determine the risk of recidivism, even though it *is* recidivism which seemingly defines the paedophile.

2.3 The doctrine of innocence

Similarly, for children, law must generate a *particular vulnerability* common to the class of victims to justify the law's increasing intervention. Critically, this vulnerability cannot rely on evidence of physical, emotional or even psychological harm — evidence which is difficult to adduce, particularly in those cases where children claim *not* to have come to harm. In Victoria, the most prominent such case in recent years was *DPP v Ellis*, in which a female teacher, Karen Ellis, engaged in sexual relations with a male teenage pupil who claimed — before and after the sexual relationship — to have instigated the relationship and, indeed, to have actively seduced her.[42] In that case, the 'victim' in fact tendered a statement to the Court that the offence had caused him no harm.[43] The comparatively lenient sentence nevertheless caused a substantial uproar amongst certain sections of the community alleging gender bias, circumventing entirely the question of the *degree* of harm which was caused.[44] Indeed, academic papers and reports discussing the 'harm' often have significant difficulty in identifying precisely *why* sexualisation of children is 'inherently' harmful. For example, a recent report deeply critical of the sexualisation of children in the media, commissioned by the Australia Institute, merely asserts as its justification that:

> Premature sexualisation carries a range of risks for children ... Children's general sexual and emotional development can be affected by [such] exposure ... to the degree that children

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39 Itzen Catherine 'Child sexual abuse and the radical feminist endeavour: an overview' in Itzen Catherine (ed) *Home Truths about Sexual Abuse: A Reader* Routledge London and New York 2000 p 1 at 5.

40 See *R v Pridgeon* 23/11/06 (Unrept, VSCA, Ashley, Callaway and Vincent JJA) at [37]. See also *R v MAS* 29/04/98 (Unrept, VSCA Winneke P, Brooking and Charles JJA) where the medical definition had been applied, albeit that the accused was seen as capable of rehabilitation.

41 See *R v Pridgeon* 23/11/06 (Unrept, VSCA, Ashley, Callaway and Vincent JJA) at [37].

42 *DPP v Ellis* 05/05/05 (Unrept, VSCA, Callaway, Batt and Buchanan JJ).

43 As above at [18].

44 Leung Chee Chee 'Outcry from Crime Victim Groups as Teacher Avoids Jail' *The Age* (Melbourne) 11 November 2004 p 3.

> focus on sexualising themselves rather than pursuing other more age-appropriate developmental activities, all aspects of their development may be affected.[45]

The harm caused to children is primarily explained away in this report through tautologies. Premature sexualisation is harmful *because it is premature*; exposure to sexuality harms development because it is termed 'exposure' and thus assumed to be unnatural or simply absent in children; and sexualising one's self is harmful because it distracts children from more 'age-appropriate activities' — again simply assuming sexuality is not a normal or appropriate part of development. Any vulnerability to be relied on, which avoids the problems of 'consent' or willingness, must instead, like the Australia Institute's report, commit to children's vulnerability *a priori*, and see sexuality as a foreign element to which children might be dangerously 'exposed'. I suggest the necessary vulnerability be characterised as the child's innocence *before* the intrusion of 'adult sexuality', which can then be seen as *always* and *inherently* traumatising.[46] It is this reliance on an inherent trauma that seems to explain the demand by the Crime Victims Association for 'equal punishment' of child sex offenders such as former teacher Karen Ellis, and the desire to equate all offenders equally despite the drastic differences in actual harm between particular cases.[47] The narrative of 'innocence' thus acts to securely identify the child as 'victim' despite the historically and politically fluctuating nature of the child, ensuring the continued justification of legal regulation.

The premise of this article is that the language of 'innocence' in this context is *never deployed innocently*. My argument is that the presentation of childhood sexual abuse as a 'loss of innocence' constructs childhood sexuality as premature, blameless and untouched;[48] the irony, of course, is that this conception of 'untouched' sexuality is itself a strongly regulated and constructed legal device. It is a device used to justify severe regulation of access to child sexuality, thus further protecting and insulating the law's conception of that sexuality. Regardless of whether loss of innocence in fact 'exists' (which is, of course, an entirely different question to whether the innocence is *constructed*), using this narrative as the basis of the crime of sexual abuse is deeply problematic. This can quite simply be demonstrated through the development of the law of rape, for example, which has long illustrated the weaknesses (if not moral unacceptability) of asserting or imputing characteristics on a victim in an effort to justify the criminality of an act. Historically, sexual innocence or chastity was a *requirement* of a finding of rape,[49] such that women assessed as being 'without sexual integrity' were seen as unlikely not to consent to sexual relations.[50] Even with this doctrine overturned, sexual integrity or innocence was long used to judge the extent of

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45 La Nauze Andre and Rush Emma 'Letting Children be Children: Stopping the Sexualisation of Children in Australia' *The Australia Institute Discussion Paper No 93* 2006 pp v–vi.

46 See discussion of Jean Danet in Foucault above note 1 at p 271.

47 See comments attributed to the Crime Victims Association: Leung above note 44 at p 3.

48 Reid Christopher B, 'The Sexual Innocence Inference Theory as a Basis for the Admissibility of a Child Molestation Victim's Prior Sexual Conduct' (1993) 91(4) *Michigan Law Review* 827.

49 For an in-depth analysis of this proposition in the United States, see Anderson Michelle J 'From Chastity Requirement to Sexuality Licence: Sexual Consent and a New Rape Shield Law' 70(1) *George Washington Law Review* 51 at p 53.

50 As above at pp 74–76 (see especially footnotes 122–126).

harm suffered by rape victims.[51] This focus on 'sexual innocence', whilst now (at least theoretically) discredited in rape cases, remains the implicit and unspoken central basis of the greater penalties for child sexual abuse. As it did in rape law, this focus on a concept of 'sexual innocence' continues to degrade both victim and accused. Firstly, in its purported effort to protect children from being re-traumatised, the law instead adopts a *doctrinal* answer to the question of harm, rather than listening to or reflecting on the voices of victims. This distracts from recognising the *actual harm* child sexual abuse may cause, entirely preventing judgment over that question or dealing with it only as an 'aggravating factor'.[52] Usually, however, once the identifier of 'child sexual abuse' is applied to the crime, the law's assessment of harm may simply end.[53] Secondly, the law's reliance on innocence may prevent the child from identifying as a victim at all. If the child does not feel 'innocent' — and, indeed, it is well accepted that many children consider *themselves* guilty in cases of abuse[54] — reliance or reiteration of this 'requirement' (more likely put as being a 'necessary' or 'normal' loss in the act of sexual abuse) will lead children to feel they are 'inadequate' victims; or, alternatively, will further traumatise victims by seeing themselves as 'broken' or 'damaged' as compared with 'normal', 'innocent' children. At critical moments, I thus suggest, the law ostensibly protecting children comes to adopt a different agenda, with potentially deleterious results for those it claims to protect.

3.0 COMING TO TERMS WITH A LOSS OF INNOCENCE

3.1 Leaving Childhood

The hysteria over child sexuality thus requires and legitimates the conception of the child as innocent — yet it does so for reasons that go beyond the protection of children. What, then, causes this hysteria? If part of the answer is the Foucauldian construction of a concept of 'innocence' to justify law's ever-increasing intrusion into child sexuality, this still leaves the question of how a child's subjectivity manages to *exceed* the limits of this discourse of innocence and hysteria. Specifically, how does the Foucauldian model explain how children — with their paradoxical relationship to subjectivity, being both interpellated by the law's desires and thoroughly discounted and disbarred from the 'adult sphere' — *do* become recognised subjects and victims? How can children — whose voices, albeit innocent, are distinctly *not* 'mature' or 'trustworthy'[55] — come to be seen as legitimate legal subjects? One difficulty with Foucault's account is that, despite the historically contingent understanding of children as innocent, this understanding seems to be perpetuated by law — and more specifically the changing relation of

51 As above at pp 93–94.

52 As the New South Wales Court of Appeal did in *R v Cunningham 05/06/06* (Unrept, NSWCA, Grove, Simpson and Bell JJ).

53 See, for example, *DPP v Foot* 24/09/99 (Unrept, VSCA, Phillips CJ, Phillips and Buchanan JJ).

54 Angelides above n 7 at p 141.

55 Meyer Jon'a *Inaccuracies in Children's Testimony: Memory, Suggestibility, Or Obedience to Authority* The Haworth Press New York 1997 pp 1–3.

the subject from Sovereign law to a network of dispersed power relations and socially constructed identities — rather than by subjects themselves. Hence for Foucault, the problem is in *law* itself and its contribution to hegemonic identity constructions. He thus suggests (at least at one point in his career) a liberationist model in which the legislative age of consent is abolished and the existence of 'consent' decided on an *ad hoc* basis by judges.[56] Yet does this solution not, ironically, only grant *further* power to the law? To demonstrate the self-perpetuating power of law, consider the construction of 'the child' as an identity: subjectivity appears to be a process of self-recognition, of turning law's 'panoptic gaze' against one's self.[57] But it is this process of recognition that generates not only self-surveillance mechanisms, but concomitantly subjectivity itself:

> The individual is not to be conceived as a sort of elementary nucleus... on which power comes to fasten ... It is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires, come to be identified and constituted as individuals.[58]

In this way, law is conceived as legitimating particular ways in which the subject conducts relationship with others, and thus comes to identify his or herself. Subjectivity is necessarily *reliant* on social and ideological structures of power such as the law, just as the child is reliant on appearing adult and narrating a loss of innocence to be recognised as a victim. Yet there is a paradox in this conception — subjectivity is predicated on the individual 'turning in on itself' in a particular way, as if the individual *did* pre-exist legal recognition, and justifying Foucault's insistence on autonomy and the possibility of meaningful consent. This invites the question of how the (pre-)subject's 'desires' — the reason *why* the pre-subject turns in on itself — can pre-exist the subject, and from where these desires are imparted. Given that desires are themselves only rendered coherent through their organisation in an individual, the 'why' question is strangely bypassed in Foucault's understanding, in favour of the assumption that a radical 'consent' must be possible if subjects are to be autonomous. The 'where' question is similarly problematic — each increasing number of groups of offenders retreats 'the child' further away from potential sources of positive identity and desires: schools, families, community groups, even advertising in the most recent fears of abuse.[59] Each of these spheres is now increasingly characterised by danger, foreclosing the possibility of a subjectivity not dominated by protection, and leading the child back to the law both for protection and for desire. We are left, then, with only a strangely self-enclosed legal construction of the child, limiting the possibility of interrupting dominant conceptions.

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56 Foucault above note 1 at p 273.

57 Foucault above note 2 at p 197.

58 Foucault Michel 'Body/Power' in Foucault Michel (ed Gordon Colin) *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* Random House New York and Toronto 1980 p 98.

59 See La Nauze and Rush above note 45.

3.2 Psychoanalysis and Innocence

If we assume that desire, including sexual desire, occurs as a necessary aspect to childhood and that this desire is not itself merely an aspect and manifestation of identity politics, then Foucauldian power relations must be supplemented with an understanding of individual desire as a driving force for the subject and a possible source of autonomy that, at least in one sense, exceeds social and legal regulation. For psychoanalysts following Jacques Lacan, the origins of subjectivity — the possibility of *turning in* to the law — lie exactly in these desires.[60]

Indeed, for Lacan such desires inform the very basis of subjectivity, even at birth. Lacan posits that the subject first begins to understand itself as autonomous and capable of individual desire in the 'mirror stage' of his or her development, when the child first recognises his or her body in a mirror:

> The fact is that the total form of the body by which the subject anticipates in a mirage the maturation of his power is given to him only as a Gestalt, that is to say in an exteriority in which this form is certainly more constituent that constituted ... [and] in conflict with the turbulence of the motions which the subject feels animating him.[61]

What occurs is, however, not 'real': the child sees its flailing limbs and lack of control, but instead comes to imagine its body as controlled and idealised; all that is needed is sufficient discipline and control for psychological satisfaction.[62] The 'conflict' of the child in its identification as an individual — violently separating his or her desires from those of the mother, and adopting what Melanie Klein terms paranoid-schizoid mechanisms to abject others and attempt to exert control over its body[63] — suggests that Lacan would be sceptical of the possibility of an idealised 'childhood innocence'. Rather, for Lacan the process of becoming an individual, and of entering the social order, is essentially *already* traumatic, reliant as it is on schizoid abjection of desires, thoughts and behaviours attributed to the mother.[64] Sexuality, potentially and perhaps *inherently* traumatic, should not, therefore, be conceptualised as an unprecedented loss of innocence.

Indeed, for Lacan it is no surprise that the subject's very construction occurs in the realm of affect and hysteria.[65] Lacan contends that children turn to law in defiance of maternal care, to define and regulate themselves in the social order. But since law must render arbitrary distinctions which are necessarily unstable — relying on language even though it is self-referential and thus insufficient to ever secure complete definitions or distinctions[66] — we must accept these shared

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60 Lacan Jacques 'The Mirror Phase as Formative of the Function of the I' in Zizek Slavoj (ed) *Mapping Ideology* Verso London 1995 p 93 at 94.

61 As above at p 94.

62 As above at p 94–95.

63 Klein Melanie 'Notes on some Schizoid Mechanisms' in Klein Melanie (ed Mitchell Juliet) *The Selected Melanie Klein* Free Press New York 1987 p 175 at 177.

64 Lacan above note 60 at p 96.

65 Lacan Jacques *The Four Fundamental Concepts of Psychoanalysis* W W Norton & Co New York and London 1998 pp 161–174.

66 Because they do not constitute us completely, just as the social order (the symbolic) cannot 'capture' us completely; see discussion below. Lacan Jacques (trans Tomaselli Sylvana) *The Seminar of Jacques Lacan: Book II – The Ego in Freud's Theory and in the Technique of Psychoanalysis, 1954–55* W W Norton & Co New York and London 1991 p 235–248.

fantasies and desperately overlook the inadequacies and 'gaps' (what Lacan terms 'the Real') in law's functioning.[67] As psychoanalyst Slavoj Zizek states it, 'belief supports the fantasy which regulates social reality'[68] — that is, psychoanalysis questions whether our social relationships, indeed our very modes of subjectivity, are regulated (and this regulation justified) based on a *shared fantasy* in need of protection. This would seem to justify the anxiety and insistence on innocence in childhood — after all, as psychoanalysis would have it, the fantasies most foundational to the social order and most critical to our understandings of ourselves (such as our childhood) generate the greatest anxiety when they are shown to be unstable and unworkable.[69] How, for example, can we reconcile the continuing tension in cases where children's sexual desire is a critical part of the sexual abuse (despite being ignored and written-over in legal judgments[70]), whilst still maintaining a 'loss of innocence' as the critical element and justification of the crime? Psychoanalysts such as Melanie Klein and Jacques Lacan suggest, the existence of a basic fantasy (or 'master signifier') generates secondary anxieties and fuels further social fantasies, such that a language and system of fantasies and symbols comes into being, attempting to settle but merely perpetuating and deferring anxiety.[71] As opposed to Foucault, then, psychoanalysis adopts emotion — rather than power — as the source perpetuating existing social structures. I now suggest two possible manifestations of these 'secondary anxieties', as necessary responses to the failures of the 'innocence' conception of childhood — firstly, in the *forced* disassociation of children from their own self-understandings, and secondly, in the complete actual and conceptual sequestration of children from adult sexuality.

3.3 'Forgive Them, For They Know Not What They Do'[72]

Perhaps the strongest argument for regarding children as *uniquely* sexually vulnerable is their social naïveté, which is said to render children unable to understand the emotional and psychological consequences of their actions.[73] Thus innocence entails not only protection from others, but also protection of children *from their own understandings.* This is reflected in responses to childhood sexual behaviour (even *between* children) as 'growing up too soon',[74] as if the sexual incentive was merely the result of intrusion from the 'adult world'. Such a rationale might be seen in psychoanalytic discourse as the attempt to imagine the child within a hegemonic paradigm of linear development towards autonomy, instead of imagining the chaotic, uncontrolled desires characterising the child prior to the mirror stage. In this view, since law must remain coherent, arrange populations distinctively and provide the hope of a stable identity to its subjects, the 'vulnerable' must be protected not only from the 'dangerous', but also, paradoxically, from their

67 Lacan above note 65 at p 26.

68 Zizek Slavoj *The Sublime Object of Ideology* Verso London 1989 p 36.

69 As above at pp 37–38.

70 Angelides above note 7 at p 136.

71 Klein above note 63 at p 179.

72 *The Holy Bible*, Luke 23:34.

73 La Nauze and Rush above note 45 at p v.

74 As above – consider merely the title of the report, 'letting children be children', as an example of this assumption of childhood as non-sexual.

own understandings and behaviours: they must be protected from what they want. Indeed, in Foucault's understanding of modern power, as in Lacanian psychoanalysis, subjects must be taught precisely to see themselves as insulated, and to recognise themselves only in particular ways and — more precisely — *through* a particular gaze. As an example, Foucault draws on Jeremy Bentham's panopticon prison as a model of modern subjectivity — a prison in which the incarcerated cannot know if they are being observed, and so self-regulate their behaviour by imagining themselves as under continued observation.[75] In the same way, individuals come to regulate their behaviour in society, by identifying themselves through another[76] — such that children not only come to see themselves through an adult gaze in which their desires are ignored, but the child is seen *by others* through standard social norms which entirely devalue and discount these sexual desires. In this respect, Foucauldian theory draws strong parallels to the Lacanian subject's dual relationships to the Other of law — firstly, one's understanding of one's self develops through the disconcerting and alienating 'gaze' of this Other that is law; and secondly, one's engagement with other subjects can only be rendered *through* the mirror of this Other.

Importantly, this is an entirely different position to commentators who protest the denial of children's subjectivity by noting the reality that children cannot always get what they want[77] or those who point out that children (much like adults) may not always 'want' what is best for them.[78] These arguments are self-evidently true. My argument is, rather, that certain desires, certain possibilities, are de-legitimated through law. In the castration which is necessary for normal subjectivity, these desires' mere possibility becomes unrecognisable. Instead, children must be interpellated to *distrust* and then lose their 'wants' and adopt a new language of 'wants' which fit the dominant understandings and narratives of legal institutions. Children, that is, must be told what they want, and how they feel. Yet, with the need to overwrite desires by imposing legal regulation, there is of course an implicit admission that children *are* sexual and not innocent, even though this admission can be promptly forgotten in the forced disassociation of the child from its own self-understandings. Instead this self-identity is to be taken from the law, leaving children as not only under the 'protection' of law, but ultimately in 'receipt' of its content, structures and scriptures.[79]

Of course, the imposition of legal desires onto children runs entirely contrary to the claim of law to 'represent' children. Indeed the law seems more often to refer to children's 'needs' and 'welfare', thus allowing further distinctions between children's perceived needs and their subjective 'desires,'[80] devaluing the latter and considering the former as self-evident. Even progressive law reform efforts appear to approach children's needs as self-evident, or draw on a

75 Foucault above note 2 at p 195.

76 As above at p 195–198.

77 See for example Guggenheim above note 4.

78 La Nauze and Rush above note 45 at p 6.

79 The concept of being 'in receipt of law' is borrowed from Rogers Juliet *Fantasies of 'Female Genital Mutilation': Flesh, Law and Freedom Through Psychoanalysis* PhD Thesis at University of Melbourne 2007 at p 30.

80 Victorian Law Reform Commission *Sexual Offences: Final Report* Report No 78 (2003–04) Chapter 5, considering reasons why children may refuse to bring claims.

culture of 'experts' such as psychologists or rights advocates, without either engaging with children or admitting that their needs might be heterogeneous.[81] This often reflects these reports' substantive recommendations, which prefer the intervention of 'children's representatives' rather than hearing from children themselves (for reasons which are, of course, often laudable).[82] In short, the law claims to have a 'correct' way to deal with children, and the dominant assumption is that the law merely needs to be modified to 'correctly' understand and act on children's needs. Not only is this problematic in its homogenisation of children and the creation of an identity in the attempt to find a 'correct response', it ignores the opposite problem: the potential for legal institutions to affect the *child's* understandings of events, to not only devalue but to rework the child's experiences, constructing the child (even to her- or himself) as a traumatised innocent in need of protection.

Numerous recent examples of sexual assaults against children in particular jurisdictions reveal this problem, to the extent that children's comments are often interpreted as complaints and result in legal action; action in which the child is then completely removed from proceedings except perhaps as an interrogated witness.[83] A prominent example occurred several months ago in the United States, in which newspapers reported that a nine-year-old child had mentioned to her teacher that she had watched her parents have sexual intercourse, and that her parents were aware of this and thought it a natural curiosity.[84] The parents were subsequently prosecuted and convicted of child neglect, despite the child apparently finding the matter more boring than traumatising.[85] Indeed, it was reported that the judge, in an apparently merciful and compassionate gesture, stated that he wanted to 'spare the girl' from testifying at all.[86] The fact of the child apparently expressing desire and interest in her 'complaint' was ignored not only by the media and in the law (rightly or wrongly), but also — strangely and paradoxically — by commentators critiquing the consequent 'loss of innocence' and corruption of the girl that the parents' behaviour had apparently caused.[87]

Even where children's assertions can be less ambiguously interpreted as complaints, the child is still placed uncomfortably in the position of needing to see its own identity *through* language understood by the law. Recent Victorian cases reveal the coaxing of children's voices by the prosecution away from their preferred language of sexual abuse as 'embarrassing', and instead construing them as 'grievances', complaints and forms of harm.[88] Why is it so difficult for courts to accept that conduct may have simply been embarrassing to discuss? Rather than the conduct being 'more-than-embarrassing', children need to appear knowledgeable, understanding themselves *through* law, as if they were *not* children, to have a valid claim of abuse. Embarrassment must 'give way', just as innocence must be destroyed in a child's narrating of events *as* 'sexual

81 As above.

82 As above at p 264.

83 As above at pp xxx and 266.

84 Fitzpatrick Edward 'Sex ed method leads to felony charges' *The Providence Journal* 10 February 2007 at p A1.

85 Fitzpatrick above note 84 at p A1.

86 Fitzpatrick Edward 'Pair who had sex in front of child given probation' *The Providence Journal* 20 March 2007 at p A1.

87 As above at p A1.

88 *R v Knigge* 01/08/03 (Unrept, VSCA, Winneke P, Phillips and Chernov JJA) at [11]–[12].

abuse', if such abuse is to appear as a loss of innocence. After all, should the child victim appear *too* innocent, then the innocence could hardly appear to be lost. At the point where the Court accepts the evidence of the child victim, in relating their loss of innocence, the child is therefore ultimately disassociated from him or herself. As the 2004 Victorian Law Reform Commission report on sexual offences notes, albeit for substantially different reasons, the giving of such evidence (and its subsequent interpretation) is certainly likely to risk re-traumatising the child victim.[89]

3.4 Regulating the Loss of Innocence

Yet infusing children with a self-understanding of themselves as 'traumatised victims' can never in itself be sufficient: to protect the imagined notion of innocence as a 'natural state', any possibility of a *social influence* of sexuality from the 'adult sexual sphere' must also be removed in an effort to 'purify' crimes of sexual abuse. As in the Australia Institute report which so desperately and repeatedly seeks to remove any vestiges of sexuality (which is presumed to be controlled and created for adults) from the realm of childhood,[90] so is law concerned to remove the conceptual possibility of children being tainted by 'outside' sexual influences *before* the offence occurs. After all, the claim that any childhood sexual activity can be excused on the basis that children 'cannot understand themselves' is only persuasive where such activity, where it exists, can be described as directionless and itself innocent. Thus, there remains the necessity of enforcing a separation — both a conceptual and a physical separation — between the spheres of child and adult sexuality, and in particular from the perceived paedophilic identity. Similarly, the possibility of turning to law to adopt a stable identity can only succeed where such law can successfully *place* one's identity within a category, even though such a category is inherently linguistic, and thus incapable of comprehending the abjected elements of the self.

This attempted strategy of division is implemented concomitantly with the understanding of children as always 'at risk', and with the move from punishment of criminal behaviour to pre-emptive recognition of the criminal. The move to insulate childhood sexuality is particularly pronounced in Victoria, where recent legislation such as the *Working with Children Act 2005* (Vic) continually offers a new layer of protection of children, through the promise of an *anticipatory* division between children and 'deviants'. The Act introduces a regulatory scheme whereby all adults working (including as volunteers) in a position of responsibility or control over children must obtain a 'Working with Children' certificate, which certifies that the worker has not had prior sexual convictions.[91] This law is Foucauldian *par excellence*: the *type* of perpetrator is identified,[92] as is the *type* of victim[93] and the relationship between victim and perpetrator.[94] The Act's requirements of character-testing of adults, as manifestations of law, thus secure the child

89 Victorian Law Reform Commission above note 80 at p 310.

90 La Nauze and Rush above note 45 at p v.

91 *Working With Children Act 2005* (Vic) s 1.

92 *Working With Children Act 2005* (Vic) ss 12–14.

93 *Working With Children Act 2005* (Vic) s 3(1) (definition of 'child').

94 *Working With Children Act 2005* (Vic) ss 8, 9.

from the offender.[95] This comes despite the unintended effect of the legislation, reflecting the neurotic return of the shared fantasy and the continuing imagining of transgressing law: the fact that any person working in a relationship of responsibility with children must now be interpellated by the law, and then reminded of the possibilities and vulnerabilities of childhood sexuality (despite the intention of the law to remove such possibilities).

Similarly, the provisions of the *Crimes Act 1958* (Vic) dealing with sexual offences against children leave the uneasy and imperfect impression of a clear distinction between victim and offender, and of the operation of power relations between adult and child. The child appears 'powerless' to ever *be* the exploiter — for example, children may be exempt from laws relating to child pornography,[96] and from certain other sexual offences.[97] The law even has influence on medical discourse: for example, the American Psychiatric Association's definition of paedophilia as a psychological disorder relies on several carefully defined but utterly arbitrary limits, requiring 'sufferers' of paedophilia to be over sixteen years of age and at least five years older than the sexually desired person. This definition is obviously generated by social values rather than science, and I suggest it is done so to meticulously prevent confusion over victims and paedophiles.[98] In legal discourse it has been said that

> a distinction is made between offenders whose deviant behaviour is a product of a deviant sexual preference for children, and those whose deviant behaviour is situationally induced and occurs in the context of a normal sexual preference structure.[99]

Yet this argument no longer seems to carry much efficacy — arguments over the accused's 'stress' or other reasons for their behaviour are generally overlooked or given extremely short thrift in Victorian courts. The possibility of child sexual abuse being an alarmingly normal phenomenon is repeatedly entertained, then dismissed, as if the Courts needed continuous reminding of the possibilities of child sexuality, but also need to assign this activity to a deviant minority. Indeed the only recent cases in which the Courts were particularly reluctant to consider the epithet of 'paedophile' were those cases where the offenders were young or female and thus impliedly vulnerable themselves,[100] defying legal expectations of the paedophile, and correspondingly generating significant social hysteria.[101]

3.5 Fantasising Loss

95 *Working With Children Act 2005* (Vic) s 1.

96 *Crimes Act 1958* (Vic) s 70(2)(d).

97 *Crimes Act 1958* (Vic) s 45(4)(b).

98 American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* American Psychiatric Publishing Inc New York 1994 p 528.

99 Howells Kevin 'Adult Sexual Interest in Children: Consideration Relevant to Theories of Aetiology' in Cook Mark and Howells Kevin (eds) *Adult Sexual Interest in Children (Personality, Psychopathology, and Psychotherapy)* Academic Press 1984 p 55 at 76.

100 As in *DPP v Ellis* 05/05/05 (Unrept, VSCA, Callaway, Batt and Buchanan JJ).

101 'Ellis, Victim speak out' *Sydney Morning Herald* 20 November 2005 at p 8.

What I have suggested, then, is that the law of child sexuality reflects the psychoanalytic subject in its performative repetition of hysteria coupled with attempts to disassociate itself entirely from such hysteria. I have suggested that the child's subjectivity forms itself precisely through this tension. Slavoj Zizek, in describing the role of law in Lacan's psychoanalytic theory, states that 'for the law to function "normally" the dependence of the law on its own process of enunciation must be repressed into the unconscious'.[102] For Zizek, as for Lacan, the law's functioning relies exactly on such a continued repetition, its continued assertion of being *needed*, and the ability to arouse anxiety and fantasy to justify this need. In psychoanalysis, then, the anxiety surrounding childhood sexuality is a *product* of the law which purports to alleviate anxiety, and the narrative of innocence is but a *fantasy* adopted to explain the psychological necessity of legal regulation. That is, innocence creates an *imagined* law that, in a Freudian sense, must continually invite its own transgressions to provide psychological satisfaction.

One can imagine, then, a conception of child sexuality and the protection of children's sexual rights which spirals into increasing hysteria and alarmism. In fact, the legal anxiety over distinguishing between victim and perpetrator has extended to the point that criminal offences against the child can occur, paradoxically, *without* a child. Tellingly, this leap has occurred at the newest bastion of child sexual abuse law: regulation of the internet. For example, transmitting material that 'looks like' child pornography is clearly an offence;[103] and debate has been initiated around the use of underage avatars in cyberspace for virtual intergenerational sexual activity, even where the actual user adopting the child avatar is an adult.[104] In these cases, the aim of legal regulation becomes even more clearly the protection of a conception of innocence rather than the protection of actual victims. By completely removing the presence or necessity of children in such crimes, even as they are prosecuted as contributing to children's loss of innocence, the literal powerlessness and lack of voice accorded to the child by law is further demonstrated. What is instead evident is a continued, even *heightened*, paranoia over the scope of child protection law; each layer of protection remaining insufficient to protect the child (even where, as in the most recent legislative interventions, the child is only *conceptually* at risk), if not *exacerbating* the very anxieties such law claims to assuage. Against such anxiety, the law needs continually to reassert this division between child and adult sexuality through continually, and with increasing intensity, iterating the need for regulatory intervention and division.

If this suggests that innocence is a fantasy, in the sense of being imaginary, Lacanian theory also helps explain the *centrality* of this notion to modern law, and the incessant reliance on that doctrine to prosecute sexual abuse, as a means of *continual repetition* of the fantasy of innocence. Indeed, the very claims of children, noted above, which *allow* my critique of innocence are continually readopted to serve the purposes of the laws of child sexuality. In each abovementioned case of abuse, just as in the Friedman case and the subsequent scandals in the late 1980s and early 1990s,[105] the child (although necessarily seen as undependable) submits to a

102 Zizek above note 68 at p 38.

103 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) s 57A.

104 See Johnston above note 22.

105 See discussion above.

desired language of harm as a conceptual loss of identity, apposite to the presumed 'whole' of the non-abused adult. For Lacan, this continual repetition of fantasy is created because the mirror-stage involves the abjection of the maternal elements of the child in the effort to perform an imagined autonomy.[106] The acquiring of subjectivity is, for Lacan, also an *alienating* of the self. This leaves an *absence* to be filled through attempting a complete engagement with the paternal social order; further necessitating a castration of 'unsociable' desires, and entirely estranging the individual from its pre-social existence.[107] Yet since the very existence of the social order — the order of language and communication — is based on the *absence* of the maternal, the social order can never resolve the individual's desire.[108] Rather, the desire remaining from the pre-social 'Real' is reflected in what Lacan terms the '*objet petit a*':[109] not the object that *causes* the desire, but an object that the individual adopts as its goal, to *explain*, *locate* and give an *object* to this pre-existing desire. The desire for an imaginary 'lost' innocence is, I suggest, precisely such an object. As scholars such as Adler and Lindsay have recognised, laws protecting against abuse continue to require judges, lawyers and the law to adopt a paedophilic gaze[110] — that is, to identify paedophilia or certain deviant behaviours as sexual, and as possible alternative subjectivities. Adler posits that this requires the judge to imagine and explore the possibilities and limits of child sexuality, of imagining activity or material as potentially sexual, of identifying at what point the 'sexual domain' (an adult conception) is entered, and more generally of *fantasising* the possibilities of child sexuality. Desires are *imposed* and *removed* from the subject by the law, and yet this process never succeeds entirely, as the prohibitions of the social order become objects of obsession. Children's sexual desire is then both obsessively intriguing and horrifying, threatening the propriety of adults, who can only imagine themselves as individuals, capable of fulfilling desire, by ensuring a distance between themselves as whole, and children as incapable. Lacan's approach, then, might suggest that a move *away* from child sexuality as unprecedented and traumatic is needed; and that, instead, we should seek an understanding of the *complexities* and *differing* consequences of sexuality, and the ways in which victims come to incorporate or abject experiences into their understanding of self. Although the child, and the adult, are never entirely autonomous, and the subject is always de-centred and removed from its experience, the question must be asked whether this legitimates the child's understanding being discounted in law.

106 Lacan above note 60 at p 96.

107 As above at p 102.

108 Lacan above note 65 at pp 203–206.

109 As above at pp 67–79.

110 Adler Amy 'The Perverse Law of Child Pornography' (2001) 101 *Columbia Law Review* 209.

4.0 CONCLUSION

Child sexuality and the prevention of sexual abuse generate acute anxieties and relentless hysteria. Yet these discourses are uniquely modern and representative of Foucault's model of dispersed networks of power relations. Increasingly, however, these discourses are relied upon by subjects as strategies to avoid, encircle and repeat their own deficits and desires. This justifies increasing legal regulation and intrusion over those assigned with such deficits: in particular, the very children adopted as victims. This has the effect of producing neurotic identities that distort, and repress understandings of child sexuality. At the same time, the problematic and sometimes contradictory doctrines underpinning this discourse protect deeply seated psychoanalytic narratives, crucial to adults' sense of identity. These contradictions thus remain strangely under-theorised and placed beyond debate; attempting to do otherwise risks being accused of blaming the victim. This article does not seek to do any more than open up the terms of the debate and suggest where the reliance on 'childhood innocence' may be detrimental to the very victims the doctrine seeks to protect. It seeks to question the possibility of psychological and psychosocial barriers to rational discussion of the law in this area, and the potential contributions psychoanalysis might offer in analysing and respecting the central role of affect in generating these discourses.

I have suggested that such a discussion might reveal that the construction of children as innocent subjects, the conceptual partitions between adult and childhood sexuality, and the enforced alienation of children from their own experiences all remain problematic elements of the law of child sexuality. Perhaps most significantly of all, these factors prevent the law from recognising alternative understandings of harm and desire; understandings that children — whether victims or otherwise — might bring to the law. These factors will need to be addressed before children will be able to effectively engage in, or contribute to, the law of child sexuality. ●