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## Evidence-based morality

Even those of us who think that the present vogue for evidence-based medicine sometimes goes too far agree that it rests on a reasonable premise: clinical decisions should be based on the best available evidence — on facts, not on convention, prejudice or supposition. Much more sacred is the notion of evidence-based justice, the presumption of innocence until guilt is proven. But there is an analogous notion, one that has become entrenched in public debates about social policy, which requires a little more circumspection. We might call this idea evidence-based morality.

Consider for a moment the perennial debate about capital punishment. Opponents of the death penalty sometimes use the argument that the possibility of execution is not an effective deterrent against capital crimes. This naturally leads to wrangles about the evidence for and against this claim. But what is more interesting is how a pragmatic argument is used to settle a moral point. A philosopher might object that the argument is specious: the *effectiveness* of capital punishment has no fundamental bearing on whether or not it is *right*.

In recent weeks the highly charged debate surrounding child pornography laws in Canada has produced an attempt at evidence-based *jurisprudence*. On June 30 the British Columbia Court of Appeal upheld a ruling that had struck down as unconstitutional the Criminal Code's prohibition against the possession of child pornography. The debate centred on a line of argument that is also familiar in medicine, that of benefits against harms, or the relative likelihood of two possible harms — in this case, the risk of the exploitation and abuse of children versus the risk of eroding the rights to privacy and free expression.

In his dissenting opinion, Chief Justice Allan McEachern raised the problematic issue of evidence. He wrote: "It is apparent that the trial judge was not persuaded by the evidence that the protection of children was enhanced by the prohibition against simple possession of this material."<sup>1</sup> The nature of the association between the existence and availability of pornographic material and the incidence of sexual crimes is no doubt an important one for sociologists, psychologists and criminologists to work out. But, from a wider societal perspective, how relevant is it? Whether or not the possession of pornography leads to, or results from, worse things, is it a value that our society has a genuine interest in upholding? Can it possibly be, in the philosophical sense, a *good*? Can freedom of expression, invoked so predictably as an alibi for hate literature, Holocaust denial and similar abuses, be more worthy of protection than the human dignity of children? In calculating risks in medicine we weigh not only the relative *likelihood* of benefits and harms but the relative *importance* of those benefits and harms. The rules of evidence must be matched by the exercise of common sense. Surely in moral reasoning it is just as important — if not more so — to do the same.

If in fact the terms of the overruled law against the possession of child pornography are unnecessarily broad then let them be revised, carefully. But in doing so it is not merely the relative likelihood of possible outcomes that must be weighed, but the relative priority of the values that our lawmakers are putting on the scale.

### Reference

1. *R. v. Sharpe*, [1999] BCJ no 1555 (QL) at para 220, McEachern CJBC.