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Child Pornography in Canada and the United States: The Myth of Right Answers

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Child pornography is an increasing worldwide concern and is one of the most active fronts in the ongoing battle between freedom of expression and public safety and morality. In 2005, the child pornography provisions of the Canadian Criminal Code *were amended in response to the controversial decision of the Supreme Court in* R. v. Sharpe. *Similar legislative response has occurred in the United States following the U.S. Supreme Court decision in* Ashcroft v. Free Speech Coalition. *A comparative examination of the legislative and judicial treatments of the issue of child pornography in these countries reveals that despite reaching differing rights-balancing positions, the debate in both nations revolves around similar points. Further to this analysis, the difficult issue of child pornography is used as an example of how a theory of rights involving judicial review, as championed by Ronald Dworkin, may be preferable to a democratic foundation of rights as suggested by authors such as Jeremy Waldron.*

La pornographie juvénile est un problème en progression constante dans le monde entier et c'est l'un des champs de bataille les plus actifs où s'affrontent la liberté d'expression, la sécurité publique et la moralité. En 2005, les dispositions du Code criminel *canadien sur la pornographie juvénile ont été modifiées en réaction à l'arrêt controversé de la Cour suprême dans* R. c. Sharpe. *Une réponse similaire a été donnée aux États-Unis à la suite de la décision de la Cour suprême de ce pays dans l'affaire* Ashcroft v. Free Speech Coalition. *Une étude comparative du traitement législatif et du traitement judiciaire de la question de pornographie juvénile dans les deux pays montre que le débat tourne autour des mêmes points, malgré le fait qu'ils soient arrivés à des positions différentes pour ce qui est de l'équilibre entre les droits. À la suite de cette analyse, la difficile question de la pornographie juvénile est utilisée comme exemple de la façon dont une théorie des droits comportant un examen judiciaire, telle que la défend Ronald Dworkin, peut être préférable à une fondation démocratique des droits comme le suggèrent des auteurs comme Jeremy Waldron.*

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Introduction

The rise of the Internet has increased the public awareness, and likely also the prevalence, of many forms of "expression" (written, visual, and otherwise) that society at large would consider immoral. One of the most prominent is child pornography, the control of which is now an issue of worldwide concern.[1] In 2001, the Supreme Court of Canada addressed the issue in *R. v. Sharpe* [*Sharpe (S.C.C.)*], where the majority read in exceptions to *Criminal Code* provisions dealing with child pornography.[2] Parliament has since responded with Bill C-2, *An Act to Amend the Criminal Code (protection of children and other vulnerable persons)*

1. See, e.g., the preamble to the *Optional Protocol to the Convention on the Rights of the Child* on the sale of children, child prostitution and child pornography, entered into force 18 January 2002, online: <http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm>; ratified by U.S. 23 December 2002, online: <http://www.unhchr.ch/html/menu2/6/crc/treaties/status-opsc.htm>; ratified by Canada 14 September 2005, online: <http://www.justice. gc.ca/en/news/fs/2005/doc_31622.html>.
2. *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 [*Sharpe (S.C.C.)*].

and the Canada Evidence Act (see Appendix I). These amendments were published in the *Canada Gazette* on 19 September 2005 and the new provisions, to the extent they vary from those considered in the *Sharpe (S.C.C.)* decision, are likely to give rise to a constitutional challenge under, among other possible grounds, the *Charter* protection for freedom of expression. Child pornography has also recently come before the Supreme Court of the United States in *Ashcroft v. Free Speech Coalition* [*Ashcroft*]. In that case, the U.S. Court struck for overbreadth federal laws prohibiting the possession of child pornography.[3] In the U.S. as well, Congress has responded with constitutionally questionable legislation.[4]

Child pornography pushes the furthest boundaries of the principle of freedom of expression, as such content tends to fall outside almost any argument for the value of protecting what individuals wish to write, say, or draw. Many nations are thus struggling with the extent to which child pornography deserves protection on freedom of expression grounds, and the result reveals much about how limits on free speech can and should be justified. Canada and the United States provide useful examples in this respect. Both have broad, constitutionally entrenched protections for freedom of expression and a tradition of strong judicial review on the issue of free speech. However, the United States and Canadian Supreme Courts have set very different limits for child pornography possession offences. The United States has drawn a more or less solid, well-defined line requiring restrictions on free speech to have a direct connection with abuse of actual children. In Canada, the Supreme Court has allowed much broader possession offences, which include works of the imagination such as writing, to pass constitutional scrutiny.

Comparing possession offences in the United States and Canada illuminates this interesting difference. More importantly, in undertaking this comparison I seek to establish several arguments. Foundationally, both the Parliament of Canada and the United States Congress are pushing for a greater emphasis on the protection of children over the protection of freedom of expression, and both consider the same spectrum of arguments for and against prohibiting possession of child pornography in balancing these values. Further, the response of the respective Supreme Courts to child pornography offences reveals a significant and substantial difference in the conception of harm caused by child pornography.

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3. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) [*Ashcroft*].

4. *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003* [*PROTECT Act*], Pub.L. 108-21, Apr. 30, 2003, 117 Stat. 650. Note particularly: 18 U.S.C.A. § 2256 (8)(B), 18 U.S.C.A. § 2256 (11), 18 U.S.C.A. § 2252A(c)(2) as well as the entirely new provision, 18 U.S.C.A. §1466A. Very minor changes were made to 18 U.S.C.A. § 2252A(b)(1) by the *Adam Walsh Child Protection Act*, 2006, Pub. L. 109-248. See also note 107.

In considering these differences, the issue of child pornography can be used as an example of the myth of right answers on issues of constitutional rights, a concept that has been prominently advanced by Jeremy Waldron.[5] In both the United States and Canada there has been competition between legislative and judicial decision-makers regarding the appropriate limits of freedom of expression, with differences of opinion amongst the judges and between courts and legislatures. These differences, and the inter-jurisdictional variations between Canada and the United States, are instructive of the variable nature of the meaning of rights.

Having established that there is no right answer, in a theoretical sense, to the rights-balancing dilemma posed by child pornography, I will compare Waldron's theory, that legislatures are best positioned to determine the extent of fundamental rights, with the argument of Ronald Dworkin, that such decisions should be made through a principled balancing of constitutional rights conducted by judges. The conclusion to be drawn is that Waldron's view is weakened in a context such as child pornography, and that such situations require a principled approach to constitutional rights balancing conducted by judges.

The history of child pornography possession law in Canada will be outlined in detail to show that there is a legislative push for a greater emphasis on protecting children in this country. Similarly, an overview of the history and status of child pornography possession in the United States will demonstrate a similar situation. The various arguments in balancing freedom of expression and the protection of children will be compared as they are advanced in each jurisdiction. In considering the differing positions of legislatures and courts in Canada, it is necessary to address dialogue theory, which I will decline to apply in the current discussion, preferring to treat judicial rights decisions as definitive. Within this context, the theories of Waldron and Dworkin will be applied to the child pornography example.

I. *Canada*

1. *The* Sharpe *case*

Provisions addressing child pornography were added to the *Criminal Code* in 1993.[6] In 1999, this legislation was challenged by Mr. John Robin Sharpe as violating his rights of freedom of expression, s.2(b), and liberty,

5. Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999) [Waldron, *Disagreement*].

6. See Appendix I.

s.7, of the *Charter*.[7] In *R. v. Sharpe*, Shaw J. of the B.C. Supreme Court struck down s.163.1, and three justices of the British Columbia Court of Appeal, writing separately, upheld this decision 2-1.[8] The Supreme Court of Canada allowed the Crown appeal.[9] The conclusion in the Supreme Court was that s.163.1 (1993) "incidentally" created potential circumstances of constitutional inconsistency, which was remedied by "reading in" two exceptions to the definition of child pornography for "(1) any written material or visual representation created by the accused alone and held by the accused alone, exclusively for his or her own personal use; and (2) any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use."[10] The Supreme Court also indicated that the defences to the child pornography offences (s.163.1(6)(1993)), including the important "artistic merit" defence, should be interpreted liberally.[11] Following this decision, Mr. Sharpe's case returned to trial, and he was acquitted of several charges.[12] The trial of Mr. Sharpe has importance in Canada due to its particularly negative reception, and the flurry of legislative response it provoked.

2. *Legislative response to* Sharpe

Unsuccessful amendments to s.163.1(1993) were advanced in Bill C-20 and Bill C-12.[13] These were more or less direct responses to the government's concern with the ultimate outcome of the second Sharpe trial.[14] In the speech from the throne on 5 October 2004, Prime Minister Martin promised that his government would table legislation to, among other things, "crack down on child pornography."[15] The first bill tabled by

7. *R. v. Sharpe* (1999), 169 D.L.R. (4th) 536, 22 C.R. (5th) 129 (B.C.S.C.) [*Sharpe (B.C.S.C. 1999)*].

8. *Ibid.*; *R. v. Sharpe,* 1999 B.C.C.A. 416, 175 D.L.R. (4th) 1 [*Sharpe (B.C.C.A.)*].

9. *Sharpe (S.C.C.), supra* note 2 at 243.

10. *Ibid.* at para. 129. The case is important beyond its subject matter as a precedent for the constitutional remedy of "reading in."

11. *Ibid.* at para. 128.

12. *R. v. Sharpe*, 2002 B.C.S.C. 423, 54 W.C.B. (2d) 474 [*Sharpe (B.C.S.C. 2002)*].

13. Bill C-20 was tabled in December 2002, was considered in committee, and was reported to the House of Commons in October 2003 with amendments. However, the Bill died with that Parliamentary session: Bill C-20, 37th Parliament, 2nd Session, online: <http://www.2.parl.gc.ca/HouseBills/BillsGovernment.aspz?Language=E&Mode=1&Parl=37&Ses=2#C20>. The text of C-20, as amended, was re-introduced in February 2004 as Bill C-12, which passed in the House of Commons and was read in the Senate before the dissolution of Parliament on May 23, 2004, when a Federal election was called: Bill C-12, 37th Parliament, 3rd Session, online: <http://222.2.parl.gc.ca/HouseBills/billsgovernment.aspx?Parl=37&ses=3&Language=E&Mode=1#C12>.

14. *Sharpe* (*B.C.S.C. 2002*), *supra* note 12. See, e.g., Bill C-20, Legislative Summary C-20 LS-444E; Bill C-12, Legislative Summary LS-467E.

15. Prime Minister Paul Martin, Speech from the Throne, 5 October 2004, online: <http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=sftdd+&Doc=sftddt2004_2_e.htm>.

his minority government was Bill C-2, *An Act to Amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*.[16] The result was the successful amendment of s.163.1(1993) (see Appendix I). The *Sharpe (B.C. S.C. 2002)* case figured prominently in comments in the House of Commons when Bill C-2 was introduced and when it was considered by the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness [Justice Committee].[17] In his statement to the Justice Committee at their first meeting on the issue, Minister of Justice Irwin Cotler indicated explicitly that the purpose of the amendments to the child pornography provisions was to address the negative outcome of the trial decision in *Sharpe (B.C. S.C. 2002)*: "the idea here [with Bill C-2] was to expand the definition of pornography, [to]... facilitate the work of the prosecutors, and at the same time to address—or redress, if you will—the lacunae that had developed as a result of the Sharpe case."[18]

a. *"Advocates or counsels" and the* Sharpe *case*

Mr. Sharpe faced several possession charges, including possession for the purpose of distribution or sale (s.163.1(3)(1993)) and simple possession (s.163.1(4)(1993)), with elements of the simple possession charges relating to both written materials (stories) and photographs.[19] Although he was convicted on the charges relating to the photographs, Mr. Sharpe was acquitted on those relating to the written materials.[20]

There were two written works at issue in the decision. The first was *Sam Paloc's Boyabuse: Flogging, Fun and Fortitude – A Collection of Kiddiekink Classics* (Sam Paloc was Mr. Sharpe's pen name).[21] This collection of short stories included, for example, "Timothy and the Terrorist." Shaw J. quotes Mr. Sharpe's description of that story: "Young,

16. See Bill C-2, 38th Parliament, 1st Session, online: <http://www.2.parl.gc.ca/HouseBills/BillsGovernment.aspx?Language=E&Mode=1&Parl=38&ses=1#C2>.

17. Bill C-2 was considered in eleven meetings of the Justice Committee, one of which was conducted in camera and for which evidence is not available. The Bill was amended with regards to child pornography only by adding mandatory minimum sentences (voted on in Meeting 42), although many other changes were suggested and discussed. See list of meetings of Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness (JUST) for 38th Parliament, 1st Session, online: <http://cmte.parl.gc.ca/cmte/committeelist.aspx?lang= 1&parlses=381&jnt=0&selid=e21_&com=8984>: Meeting 22, February 22, 2005; Meeting 24, March 8, 2005 [in camera]; Meeting 26, March 24, 2005; Meeting 27, April 5, 2005; Meeting 29, April 7, 2005; Meeting 31, April 12, 2005; Meeting 32, April 14, 2005; Meeting 33, April 19, 2005; Meeting 34, April 21, 2005; Meeting 35, May 3, 2005; Meeting 42, June 2, 2005.

18. *Ibid.* Meeting 22 at 10:05. This is also made clear in Bill C-2, Legislative Summary LS-480E, Revised 16 June 2005.

19. *Sharpe (B.C. S.C. 2002)*, *supra* note 12 at paras. 1-2.

20. *Ibid.* at paras. 122-129.

21. *Ibid.* at para. 4.

Innocent White Boys Sold as Sex Slaves to a Sadistic and Murderous Sultan Plot their own Freedom and Overthrow a Corrupt and Hated Regime in the Process." Shaw J. notes that "the story contains beatings, man-boy and boy-boy sexual acts and a circumcision."[22] The other written work at issue was a book, written by Mr. Sharpe, and found in his apartment.

Shaw J. found that Mr. Sharpe's stories did not represent, pursuant to the definition in s.163.1(b) (1993), "written material...that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under [the *Criminal Code*]."[23] He indicated that although the works "arguably glorify the acts described therein" and that "the descriptions may well be designed to titillate or excite the reader (if the reader is so inclined)," the stories do not meet the definition because they do not "actively advocate or counsel the reader to engage in the acts described."[24]

b. *The responsive amendments*

The simple conclusion reached by Parliament was that the "advocates or counsels" test was far too generous to accused. Bill C-2 has therefore added to the definition of child pornography s.163.1(c)(2005) and s.163.1(d)(2005). The new s. 163.1(c)(2005) defines as child pornography written material of which the "dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under [the *Criminal Code*]."[25] The three key elements of the new s.163.1(1)(c) are the "dominant characteristic" requirement, the "sexual purpose" requirement, and the "activity that would be an offence" requirement; s.163.1(d)(2005), using the same language, includes audio recordings. This provision theoretically raises the same concerns, but the present discussion will focus on s.163.1(c)(2005).

The new s.163.1(c)(2005) requires material to describe "sexual activity with a person under the age of eighteen years that would be an offence under this Act" (see Appendix I). This is the same limitation that previously applied only to the "advocates or counsels" provision, s.163.1(b)(1993/2005), and it represents a significant restriction. With reference to the "advocates or counsels" section, McLachlin C.J. in *Sharpe (S.C.C.)* cites this limit as one reason that the provision "is more limited than the definition of visual pornography in s. 163.1(1)(a)(1993)."[26]

22. *Ibid.* at para. 9.
23. *Ibid.* at para. 36.
24. *Ibid.* at para. 33.
25. See Appendix I. The same amendment was forwarded in Bill C-20 and Bill C-12.
26. *Sharpe (S.C.C.)*, *supra* note 2 at para. 55. At para. 57 McLachlin C.J. provides a useful list of examples.

"Dominant characteristic" also appears elsewhere. The language is used in s. 163(8) of the *Criminal Code*, which deals with adult obscenity and was interpreted in *R. v. Butler* [*Butler*].[27] However, the Court in *Sharpe (S.C.C.)* rejects the "community standards" approach for child pornography, and this is a central element of the interpretation of "dominant characteristic" in *Butler.* Further, the Supreme Court in *R. v. Labaye* [*Labaye*] has moved away from the "community standards" approach for adult indecency, and towards a more objective, harm-based test.[28] More relevant is McLachlin C.J.'s interpretation of "dominant characteristic" and "sexual purpose" from *Sharpe (S.C.C.)*, which is premised on its application only to visual material. The visual provisions are limited by anatomically specific language, but the objective test for the determination of "dominant characteristic" and "sexual purpose" could easily be applied to the new provisions.[29]

"Sexual purpose" was also interpreted in *Sharpe (S.C.C.)* with regard to the visual child pornography provisions. "Sexual purpose" was determined to be context based, so that what might not be pornography in one context, such as in a family album, might be in another, such as an album with photographs of many children, or photographs with a sexual caption.[30] The "sexual purpose" test is arguably directed at the submissions made by the Crown at Mr. Sharpe's trial, *Sharpe (B.C. S.C. 2002)*. There, the prosecution advanced the theory that Mr. Sharpe's writings were pornography because they were *intended to be.*[31] To support this theory, the Crown entered into evidence letters from Mr. Sharpe's computer, arguing they clearly indicate that Mr. Sharpe meant the stories to be stimulating, for himself and others.[32] Shaw J. agreed with this analysis, but rejected this Crown theory, because "it attempts to draw a distinction between pornography, on the one hand, and artistic merit, on the other."[33] The "sexual purpose" requirement of the new "dominant characteristic" branch of the child pornography definition directly addresses the Crown argument, and seems positioned to make it successful in the future. As indicated by the comments of Minister of Justice Cotler before the Justice Committee, Mr. Sharpe's works would have met the "dominant characteristic" and "sexual purpose" test.

Although arguably still restrictive given the legislative intent and the reasoning from *Sharpe (S.C.C.)*, particularly the limitations of requiring

27. *R v. Butler*, [1992] 1 S.C.R. 452, (1992) 89 D.L.R. (4th) 449 [*Butler*].
28. *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728 [*Labaye*].
29. *Sharpe (S.C.C.)*, *supra* note 2 at paras. 50-51.
30. *Ibid.* at para. 51.
31. *Sharpe (B.C.S.C. 2002)*, *supra* note 12 at paras. 101-104.
32. *Ibid.* at para 102.
33. *Ibid.* at para. 104.

a "sexual purpose" and that the writing describe an actual offence, the new s.163.1(c)(2005) deliberately seeks to broaden the definition of child pornography using the "dominant characteristic" language. The definition of child pornography, which dictates the scope of material that is made illegal, is central to liberty concerns. The "advocates and counsels" provision (163.1(b)(1993)) has not been significantly altered or removed.[34] However, the addition of the "dominant characteristic" provisions significantly changes the balance that was laid out by the Supreme Court in *Sharpe (S.C.C.)*. The effect of this change is critical to the judicial reception of the new provision, because the inclusion of written works and drawings was central to the concerns in *Sharpe (S.C.C.)*. Further, the particular manner of this inclusion was a critical consideration in the Supreme Court preserving the previous legislation.[35]

However, it is important to stress that even the new broadened definition, read in context with the rest of s.163.1, as "the advocates and counsels" section was in *Sharpe (S.C.C.)*, would still likely exclude most literary and artistic material that is often raised as a concern. The amended definition would not, for example, put Shakespeare's *Romeo and Juliet*[36] at risk—an important point that is often missed.[37] McLachlin C.J., in the context of the "advocates and counsels" provision, notes that given a "purposive approach...works aimed at description and exploration of various aspects of life that incidentally touch on illegal acts with children are unlikely to be caught."[38] The input of the witnesses before the Justice Committee indicates that the "dominant characteristic" provision is intended to operate in a similar manner.[39]

c. *"Artistic merit" and the* Sharpe *case*

Section 163.1(6) & (7)(1993) previously provided that a "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, scientific, or medical purpose" (see Appendix I). Despite Bill C-2 being

34. The only difference is the addition of audio recordings: see Appendix I. Note also that the "advocates and counsels" provision was considered by the Ontario Court of Appeal: *R. v. Beattie*, 75 O.R. (3d) 117, (2005) 196 O.A.C. 95 (Ont. C.A.), leave to appeal refused without reasons [2005] S.C.C.A. No. 319.

35. *Sharpe (S.C.C.)*, *supra* note 2 at para. 35.

36. Kennedy J. in *Ashcroft*, *supra* note 3, helpfully cites *Romeo and Juliet*, act I, sc. 2, l. 9, where Capulet remarks, "She hath not seen the change of fourteen years."

37. See, e.g., the statements to the Justice Committee of Bill Freeman, Writers' Union of Canada (Meeting 27 at 9:35) and John Greyson, Artist Member, Canadian Artists' Representation (Meeting 31 at 9:15), *supra* note 17. However, this by no means invalidates the concerns of artists over the "chilling effect" the legislation could have on expression. See also note 120.

38. *Sharpe (S.C.C.)*, *supra* note 2 at para. 57.

39. See Minister of Justice Cotler, Meeting 22, *supra* note 17.

an omnibus bill which involved several other significant amendments to the *Criminal Code* and the *Canada Evidence Act* (including adding the offence of "voyeurism" and significantly altering the law on child testimony) the child pornography amendments, especially regarding "artistic merit," occupied the majority of the debate in the House of Commons and discussion in the Justice Committee.[40] Mr. Sharpe raised the "artistic merit" defence at his trial, and Shaw J. heard from four experts on the issue—three English professors and one psychiatrist. A useful example, since Shaw J. indicates that he placed "substantial weight" on his testimony, is Professor James Miller, from the University of Western Ontario, who testified for the defence.[41] He broke down Mr. Sharpe's stories based on a variety of literary elements, finding examples of allegory, characterization, plot, parody, setting, and other literary devices. Two of the central elements of the analysis were theme and the literary tradition Mr. Sharpe's works represent. Miller found the "ethical theme of fortitude" throughout Mr. Sharpe's work and classified it under "the Sadean tradition of transgressive literature," which refers to the writings of Marquis de Sade; "focusing attention on transgressive sexuality...[i]t represents the defiant breaking of taboos controlling sexual relations and practices."[42] Shaw J. placed less emphasis on the testimony of the other defence witness. He also largely rejected the evidence of the Crown expert because his view of morality played a "significant role" in his analysis and he implicitly applied a "community standards of tolerance" test, which, as has been discussed, the Supreme Court rejected in *Sharpe (S.C.C.)*.[43] Shaw J.'s decision carefully considers the law from *Sharpe (S.C.C.)*, and in concluding that Mr. Sharpe's work has artistic merit, he takes note of McLachlin C.J.'s indication that "any objectively established artistic value, however small, suffices to support the defence."[44] On the strength of the expert testimony, and given this low bar, Shaw J. found that Mr. Sharpe succeeded on the "artistic merit" defence.[45]

d. *The responsive amendments*

In response, the new *Criminal Code* provisions remove the defence of "artistic merit" (see Appendix I). The amended provisions require the accused to prove materials have a "legitimate purpose related to the

40. *House of Commons Debates*, No. 007 (13 October 2004); No. 010 (18 October 2004); No. 112 (9 June 2005).
41. *Sharpe (B.C. S.C. 2002), supra* note 12 at para. 68.
42. *Ibid.* at paras. 61, 64.
43. *Ibid.* at para. 96.
44. *Sharpe (S.C.C.), supra* note 2 at para. 63, quoted in *Sharpe (B.C. S.C. 2002), supra* note 12 at para. 113.
45. *Sharpe (B.C. S.C. 2002), supra* note 12 at para. 121.

administration of justice, or to science, medicine, education or art," (s.163.1(6)(a)(2005)) and to further establish that the work "does not pose an undue risk of harm to minors" (s.163.1(6)(b)(2005)) (see Appendix I). Minister of Justice Cotler refers to this as the "two-pronged, harm-based, legitimate-purpose defence."[46] It is intended to place a much higher burden on the accused and attempts to allow much less material to be saved. Justice Minister Cotler indicated that "[u]nder this test it will not be enough to show some artistic value, as was the situation in the Sharpe case."[47]

The Minister also indicated that Bill C-2 creates a "harms-based" test, which was the focus of the Supreme Court in *Sharpe (S.C.C.)*.[48] However, this somewhat misrepresents the majority decision in *Sharpe (S.C.C.)*. Although McLachlin C.J. for the majority considered the impact of harm on children, her analysis focused mostly on the definition section and the overall balancing of freedom of expression with protecting children.[49] *Sharpe (S.C.C.)* requires that some harmful material will be saved by the defence, as this is its purpose: "Parliament clearly intended that some pornographic and possibly harmful works would escape prosecution on the basis of this defence; otherwise there is no need for it."[50] The Bill C-2 amendments seem more influenced by the minority decision in *Sharpe (S.C.C.)*, which found s.163.1(1993) entirely constitutional.[51] L'Heureux-Dubé J. emphasizes that the materials caught by the 1993 definition of child pornography are legitimately restricted, because the message conveyed by such material is inherently harmful, regardless of its source or the nature of its production or possession. This justification naturally and logically includes works of the imagination.[52] The view that the material caught by the definition of child pornography is inherently harmful speaks directly to the new defence in s.163(1)(b)(2005), which requires that material

46. Meeting 22, *supra* note 17 at 10:20.
47. *Ibid.* at 9:25.
48. Meeting 27, *supra* note 17 at 9:25. Mr. Marc David (Chair of the National Criminal Justice Section, Canadian Bar Association) suggests this in his statement to the Justice Committee.
49. *Sharpe (S.C.C.)*, *supra* note 2 at paras. 18-110.
50. *Ibid.* at para. 65.
51. *Ibid.* at para. 242.
52. *Ibid.* at paras 217, 220. Justices Bastarache and LeBel, dissenting, make a similar claim in *Labaye, supra* note 28 at para. 109: "According to contemporary Canadian social morality, acts such as child pornography, incest, polygamy and bestiality are unacceptable regardless of whether or not they cause social harm. The community considers these acts to be harmful in themselves."

not pose an *undue* risk of harm.[53] The addition of "undue" softens the language, making it is less extreme than the standard the dissent in *Sharpe (S.C.C.)* advocates. However, it is clear that the amendments enacted by Bill C-2 attempt to shift the balance in the direction of preventing harm to children, and thus away from the majority decision which emphasizes that "artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression."[54]

II. *United States*

1. *Caution regarding the United States law*

Beyond the cases noted below, this discussion examines only federal law in the United States dealing with the possession of child pornography. It is pedantic to note that the states have criminal law jurisdiction in the United States, but it is relevant to the current discussion that in *U.S. v. Maxwell* the 11th Circuit Court (Alabama, Florida, and Georgia) found the simple possession offence in 18 U.S.C.A. § 2252A outside federal jurisdiction under the trade and commerce power.[55] Fortunately, the value of the comparison in the current discussion is not tied to the validity of the American law.

2. *History of child pornography in the United States*[56]

"The First Amendment to the United States Constitution provides: 'Congress shall make no law abridging the freedom of speech, or of the press.'"[57] The protection of freedom of speech has been read very broadly in the United States, and as in Canada, freedom of speech is a source of much constitutional litigation in the area of obscenity. The American

53. The harm-based test for adult indecency outlined by the Supreme Court in *Labaye*, *supra* note 28, has relevant parallels to the legislated harm-based defence in s.163(1)(b)(2005). The first part of the *Labaye* test requires conduct which by its *nature* represents a "significant risk of harm" to an individual or society, and references three examples of types of harm that can arise from indecency, of which the second, discussed in detail at paragraph 36, is "harm to society by predisposing others to anti-social conduct". This type of harm is one of the principal justifications for child pornography possession laws (as is discussed below).

54. *Sharpe (S.C.C.)*, *supra* note 2 at 61.

55. *U.S. v. Maxwell*, 386 F.3D 1042 (11th Cir. 2004). For a discussin of this case, see "Recent Cases: *U.S. v. Maxwell*" (2005) 118 Harv. L. Rev. 2477. In *U.S. v. Williams*, 444 F.3d 1286 (11th Cir. 2006) [*Williams*], the same Court more recently found the "pandering" provision, which was added by the *PROTECT Act*, unconstitutionally vague. Among other things, this section prohibited advertising or promotion, which is notably similar to the addition of "advertising" to the offence in 161.1(3)(2005) (Appendix I).

56. See also *Williams*, *supra* note 55 at 1289-1296. Circuit Judge Reavley (from the 5th Circuit, sitting by designation for the 11th Circuit) provides a detailed overview of the legislative progression and judicial consideration of child pornography law in the United States.

57. Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law*, 15th ed. (New York: Foundation Press, 2004) at 984. See also <http://www.gpoaccess.gov/constitution/html/amdt1.html>.

Bill of Rights, like almost all constitutional documents, does not contain an explicit limiting provision equivalent to s.1 of the Canadian *Charter*. However, this does not mean that freedom of speech is not limited. The United States Supreme Court has found "obscenity" to be outside the protection of the First Amendment because it is "of such slight social value as a step to truth that any benefit that may be derived from [it] is outweighed by the social interest in order and morality."[58] The limiting of obscene speech in the United States has thus been accomplished through various controversial definitions of obscenity. The original landmark case in this regard is *Roth v. U.S.* (1957) and subsequent significant reevaluations of the law have occurred in the complementary 1973 decisions *Miller v. California* [*Miller*] and *Paris Adult Theatre I v. Slaton*.[59]

The issue of child pornography did not come before the U.S. Court until 1982. In the foundational case of *New York v. Ferber* [*Ferber*] the U.S. Court decided that *Miller* should not apply to child pornography, and separately excluded child pornography from First Amendment protection.[60] White J. for a unanimous U.S. Supreme Court indicated that the State should have more freedom in restricting this form of speech than regular obscenity.[61] In *Ferber* the U.S. Court identified a compelling State interest, beyond that with regards to adult obscenity, in protecting the psychological well-being of children.[62] The U.S. Court rejects a "community standards" type test—such as was used in *Miller*—because, as White J. indicates, "it is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value" (Justices Brennan and Marshall dissented on this point).[63]

However, the law at issue in *Ferber* dealt with the distribution of child pornography, not possession. In regard to adult obscenity, the U.S. Court found in *Stanley v. Georgia* (1969) [*Stanley*] that the First Amendment prohibits private possession offences.[64] It was not until *Osborne v. Ohio* (1990) [*Osborne*] that child pornography possession offences were considered. In *Osborne*, the Majority found that *Stanley* does not apply to

58. *Ibid.* at 1094.
59. *Roth v. U.S.*, 354 U.S. 476 (1957 [*Roth*]); *Miller v. California*, 413 U.S. 15 (1973) [*Miller*]; *Paris Adult Theatre I v. Slaton* 413 U.S. 49 (1973).
60. *New York v. Ferber*, 458 U.S. 747 (1982) [*Ferber*].
61. Sullivan & Gunther, *supra* note 57 at 1115.
62. *Ferber*, *supra* note 60.
63. *Ibid.* at 761.
64. *Stanley v. Georgia*, 394 U.S. 557 (1969) [*Stanley*].

child pornography because, consistent with the *Ferber* decision, there is a greater State interest in protecting children from harm.[65]

a. *Current judicial consideration*

Child pornography was most recently considered by the U.S. Supreme Court in *Ashcroft*.[66] At issue was the definition of child pornography from the *Child Pornography Prevention Act of 1996* (CPPA), particularly 18 U.S.C.A. § 2256 (8)(B) and 18 U.S.C.A. § 2256 (8)(D). (B) includes visual material where "such visual depiction is, *or appears to be*, of a minor engaging in sexually explicit conduct [emphasis added]" and (D) deals with the advertising of images described in the section.[67] At issue with regards to possession is (B), which includes "virtual" child pornography in the definition.

The legislation does not attempt to exclude virtual child pornography from the First Amendment with an obscenity test, as provided for in *Miller*.[68] Further, Kennedy J., writing for the majority of the U.S. Court, concludes quickly and succinctly that virtual child pornography extends beyond the special category of speech removed from First Amendment in *Ferber*. Virtual child pornography, by not meeting either of these requirements, is thus protected speech, and Kennedy J. indicates that the provision "prohibits speech despite its serious literary, artistic, political, or scientific value."[69] The U.S. Court surveys the various arguments regarding child pornography (as will be discussed below), but ultimately strikes down the legislation as overbroad.

O'Connor J., dissenting in part, agrees that the inclusion of "youthful-adult" pornography (young-looking minors) is overbroad, but suggests that the prohibition on "virtual-child" pornography (wholly computer-created images) is not.[70] Chief Justice Rehnquist, joined by Scalia J. in part in

65. *Osborne v. Ohio*, 495 U.S. 103 (1990) [*Osborne*]. In this case, as in *Sharpe (S.C.C.)*, there was significant consideration given to the sufficiency of the limitation provided by the definition of obscenity. The majority found that the Ohio law, as it had been re-interpreted by the Ohio Supreme Court, provided a sufficiently narrow definition. Brennan J., who concurred in the 1969 decision in *Stanley*, along with Marshall and Stevens JJ., dissented, finding the pornography definition overbroad and extending the constitutional prohibition of possession offences from *Stanley* to the child pornography context.

66. *Ashcroft*, *supra* note 3.

67. Subsection (C) was not before the Court, but deals with innocent images of actual children modified so that they appear to be engaged in "sexually explicit conduct." Kennedy J. at 242 indicates that "[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*." Note also that "sexually explicit conduct" is separately defined in 18 U.S.C.A. § 2256(2) and there is a separate definition for (B). See note 74.

68. *Ashcroft*, *supra* note 3.

69. *Ibid.* at 246.

70. *Ibid.* at 261.

his dissent, disagrees that the definition in the CPPA extends beyond the most "hardcore" materials, which would come within the protection of *Ferber*. He also justifies the provisions by noting that if it has not already, technology is soon likely to make distinguishing actual records of abuse from virtual images impractical.[71] Thomas J., concurring along these lines but deferring the legal conclusion, suggests that if technology *does* evolve in this way, then a narrow definition, with a sufficient defence, may be constitutionally sound at that time.[72]

b. *Legislative response*

Not surprisingly, the dissent of Rehnquist C.J. and concurring judgment of Thomas J. have been fertile ground for Congress's response to the *Ashcroft* decision. In 2003 Congress passed the *PROTECT Act*, the preamble of which directly addresses the issue of technology. It asserts that technology has changed, that distinguishing real and virtual child pornography is and will continue to be "prohibitively expensive," and goes on to state that the decision in *Ashcroft* has caused a dramatic rise in defendants arguing the images they possessed are virtual and not real pornography, making the law difficult to prosecute.[73] The *PROTECT Act* thus amends 18 U.S.C.A. § 2256 (8)(B) to read, "such visual depiction is a digital image, computer image, or computer-generated image *that is, or is indistinguishable from*, that of a minor engaging in sexually explicit conduct"[74] [emphasis added]. Under 18 U.S.C.A. § 2256 (11) "indistinguishable" is determined on an ordinary person test, and excludes "depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults." The *PROTECT Act* also includes 18 U.S.C.A. § 2252A(c)(2), providing a positive defence that the production did not involve actual minors.

Congress has thus responded to *Ashcroft* by attempting, using different language, to include virtual child pornography under the exception created in *Ferber*. The legislation is tailored to the U.S. Supreme Court's concerns

71. *Ibid.* at 267.

72. *Ibid.* at 259.

73. *PROTECT Act*, *supra* note 4.

74. Importantly, a more specific definition was added by the *PROTECT Act*. For the purposes of the virtual child pornography provision, 18 U.S.C.A. § 2256(2)(B) defines "sexually explicit conduct" as:

> (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;
> (ii) graphic or lascivious simulated;
> (I) bestiality;
> (II) masturbation; or
> (III) sadistic or masochistic abuse; or
> (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person.

with regard to technology, the potential artistic value of the material captured, and the availability of a defence. The issue is, of course, much more complex. However, it is sufficient to indicate for the purposes of the current discussion that Congress is attempting to shift the balance in favour of protecting children over freedom of expression, although the possible scope of the shift, because of the decisions of the U.S. Supreme Court, is much more narrow than what the Canadian Parliament has attempted.

However, Congress additionally enacted a separate, parallel child pornography provision, 18 U.S.C.A. §1466A. This provision is similar to the Canadian law, as it includes the offence of possessing "a visual depiction of any kind, including a drawing, cartoon, sculpture or painting" that: depicts a minor engaging in "sexually explicit conduct" and "is obscene;" *or* that depicts certain specific types of activity and lacks "serious literary, artistic, political, or scientific value."[75] Although the legislation is constitutionally suspect, it demonstrates the extent to which American legislators would like to push for inclusion in defining child pornography.

III. *Comparison and analysis*

The usual justifications for freedom of speech are familiar, and McLachlin C.J. summarizes some of the major ideas succinctly: "individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy."[76] Both Canada and the United States have rigorous and principled protection of free speech, but in both nations it has been accepted that there are limits with regard to free expression in the context of obscenity.[77] Similarly, in both countries there is a tradition of hesitancy, or of particular scrutiny, where a law targets the content and not simply the form of expression.[78] However, both recognize that content regulation is not entirely barred. White J. for a unanimous U.S. Court summarizes this justification regarding child pornography in *Ferber*: "a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs

75. 18 U.S.C.A. §1466A(b). The item in question must "depict an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex." This specificity is more restrictive than the Canadian definition.

76. *Sharpe (S.C.C.)*, *supra* note 2 at para 23.

77. *Butler*, *supra* note 27; *Roth* and *Miller*, *supra* note 59.

78. In Canada, this was a central consideration in *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 [*Irwin Toy*]. In the U.S., this issue is considered in the child pornography context in *Ferber*, *supra* note 60.

the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[79]

The balancing in Canada under s.1 of the *Charter* is similar. Applying this form of reasoning, courts in both nations have rejected a "community standards" test for child pornography.[80] In *Ashcroft*, the U.S. Court is clear that a "community standards" test is only valuable where there is some conceivable value to society that needs to be weighed against the tolerance of the community.[81] In the U.S., as in Canada, child pornography is rejected as a class, so that case-by case weighing of "value" is not necessary. This all-or-nothing approach makes the definitional limitations for child pornography key concerns in *Sharpe (S.C.C.)*, *Osborne*, and *Ashcroft*, and is the core of the significant judicial disagreement seen on both Courts. This disagreement is indicative, in both jurisdictions, of a residual concern that speech should never be easily rejected and restricted. As Brennan J. (dissenting) notes in *Osborne*, "[w]hen speech is eloquent and the ideas expressed lofty, it is easy to find restrictions on them invalid. But were the First Amendment limited to such discourse, our freedom would be sterile indeed."[82]

The principal concern underlying consideration of the issue in both jurisdictions is the extent to which extraneous or potentially valuable expression might be caught by a definition of child pornography, and thus be included in the unprotected class. Thus the Canadian Court in *Sharpe (S.C.C.)* created exceptions to the definition and the majority in *Ashcroft* rejected expanding the class of material excluded from the First Amendment in *Ferber*.[83] The dissenting judges in *Sharpe (S.C.C.)* and *Ashcroft* argue that the definition is restricted to sufficiently "hardcore" materials that it is protection enough.[84] A similar concern, which stems from the same source, is whether material that is unjustly captured can be saved by a defence. The defences suggested by the U.S. Court in *Ashcroft* and provided by the *PROTECT Act*, and the "artistic merit" and "legitimate purpose" defences in Canada, reflect this fear of class, content-based

79. *Ferber*, *supra* note 60 at 763-64. See also *Sharpe (S.C.C.)*, *supra* note 2 at para. 24.

80. *Sharpe (S.C.C.)*, *supra* note 2; *Butler*, *supra* note 27; *Ferber supra* note 60; *Miller supra* note 59.

81. *Ashcroft*, *supra* note 3, which determines that "virtual" child pornography might have some value, and thus cannot be excluded from the First Amendment, as child pornography showing actual abuse had been in *Ferber*.

82. *Osborne*, *supra* note 65 at 148; see also *Sharpe (S.C.C.)*, *supra* note 2 at para. 21.

83. The division of child pornography in this way, requiring different levels of justification for restrictions on records of actual abuse and other 'child pornography,' has also been suggested in Canada: see Bruce Ryder, "The Harms of Child Pornography Law" (2003) 36 U.B.C. L.Rev. 101.

84. Unlike the U.S. Court, L'Heureux-Dubé J. additionally conceded that speech of some value may be caught, but emphasized that this would be rare and that the goal of protecting children is sufficient to outweigh the concern. See *Sharpe (S.C.C.)*, *supra* note 2.

restrictions. Such defences operate in the manner of a tail-end "community standards" test. Definitional concerns reflect underlying judgments about what particular content is likely or unlikely to have enough "value" to be worth protecting. Although the amended legislation in both jurisdictions aims for a "right" balance in the context of what the Court is willing to accept, there is no objectively correct interpretation of what is and is not "child pornography."

1. *The value of sexual speech*

The justification for allowing bans on child pornography is largely based on its negligible value as expression, and the assumption that such expression has such a total lack of value should be briefly addressed.[85] Engaging in a debate on the fundamental justifications for free speech is well beyond the scope of this paper. However, in proceeding, it is important to note—and oversimplify—the argument that subversive speech, regardless of content, should be protected in a free and democratic society, and that sexual speech, because it is subversive, should not be suppressed.[86] The classification of Mr. Sharpe's writings as "transgressive" literature in *Sharpe (B.C. S.C. 2002)* should not be quickly ignored. Before proceeding to other factors considered by the Canadian and U.S. Court, it is useful to note that the general treatment of sexual expression is itself a contentious issue, and the easy dismissal of child pornography as beyond the pale in a society that values and protects free speech should not pass unquestioned. On this, as on the other points to be discussed, there is no "right" answer; there is, however, a lack of debate.

2. *Possession with the intent to distribute*

The link between child pornography and child abuse is central to the restriction of such material. The production of child pornography is argued by almost no one to be tolerable in any society, with the glaring exception of groups such as NAMBLA, who question the underlying justification that children cannot consent to, and should not be involved in, sexual relations with adults.[87] Distribution and possession offences are justified by tying these activities to actual child abuse. With regard to distribution offences it is generally accepted, as the U.S. Court accepted in *Ferber*, that distribution is inherently linked to production: "the distribution network

85. *Irwin Toy*, *supra* note 78; see also *Sharpe (S.C.C.)*, *supra* note 2 at 23. Regarding adult obscenity, the majority in *Labaye*, *supra* note 28, seems to move away from judging the value of expression by favouring a harm-based, objective test.

86. See, e.g., Brenda Cossman, "Disciplining the Unruly: Sexual Outlaws, *Little Sisters* and the Legacy of *Butler*" (2003) 36 U.B.C. L. Rev. 77.

87. NAMBLA, the North American Man-Boy Love Association, argues for the rights of young people to consent to sex.

for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled."[88] Possession for the purposes of distribution is an offence in Canada, 163.1(3)(1993/2005), but this and similar child pornography offences have not been a focus of legislative or judicial attention in Canada or the United States. Debate does not begin to emerge until offences of simple possession are considered, and it is indicative of the debate regarding these offences that the minimum restriction required by the UN optional protocol relating to child pornography is possession for the purpose of distribution.[89]

3. *Arguments regarding child pornography possession offences*

a. *The link between child pornography and child abuse*

Although distribution arguments are to some extent applicable to possession, the context of the possession argument is more complex. Broadly construed, there are two arguments which justify possession by drawing a link to child abuse: the theoretical causal argument, and the practical enforcement argument. The theoretical causal argument suggests child pornography fuels the cognitive distortions of pedophiles, and that in doing so it potentially incites child abuse. Possession of it should thus be illegal.[90] The practical enforcement argument rests on two claims. First, possession offences aid in the enforcement of bans on distribution and production, which are more difficult to prosecute; second, they reduce the market for child pornography, thus removing support for production and reducing incidence of child abuse.[91]

The theoretical link: cognitive distortions and inciting child abuse

Because the cognitive link is the most potentially powerful justification for restricting child pornography, it is also one of the most contested. The general issue is further complicated because few commentators on the issue of child pornography feel the need to rationalize their contentions or justify their arguments. Although McLachlin C.J., as an example, separates the argument regarding "cognitive distortions" from the argument that child pornography incites abuse, the sole underlying concern is whether viewing child pornography increases the risk of child abuse.

88. *Ferber*, *supra* note 60 at 759.

89. *Supra* note 1. Article 3(1)(c) requires state parties, at a minimum, to prohibit: "producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2."

90. *Ashcroft*, *supra* note 3 at 253-54; *Sharpe (S.C.C.)*, *supra* note 2 at 88-89.

91. The arguments are mentioned, for example, in *Ferber*, *supra* note 60 at 758-60 (which extends the argument only as far as distribution and promotion); in *Osborne*, *supra* note 65 at 108-10; in *Ashcroft*, *supra* note 3 at 249-51; and in *Sharpe (S.C.C.)*, *supra* note 2 at paras. 90, 93.

That child pornography reinforces fantasies seems instinctively obvious, and the experts who testified before the Justice Committee and work with pedophiles indicated that their experience supports this connection.[92] Nevertheless, on the isolated issue of the influence of child pornography on those who view it, Canada and the United States have maintained the libertarian view espoused in *Stanley*, which Kennedy J. refers to when he states that "the right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[93] McLachlin C.J. echoes this in *Sharpe (S.C.C.)*: "the restriction imposed by s. 163.1(4)(1993) regulates expression where it borders on thought. Indeed, it is a fine line that separates a state attempt to control the private possession of self-created expressive materials from a state attempt to control thought or opinion."[94]

However, considering the further argument that child pornography "fuels fantasies that incite offenders" one begins to encounter debate involving scientific studies of pedophilia.[95] In *Sharpe (S.C.C.)* McLachlin C.J. indicated that the scientific evidence of a connection at the time was weak. Unfortunately, at the time of the drafting of Bill C-2, no more conclusive evidence was available.[96] The principal expert witnesses heard by the Justice Committee on Bill C-2 were Mr. Karl Hanson (Senior Research Officer, Corrections Research Division, Department of Public Safety and Emergency Preparedness) and Dr. Peter Collins (Manager, Forensic Psychiatry Unit, Behavioural Sciences Section, Ontario Provincial Police and Associate Professor, University of Toronto).[97]

Even these two experts disagreed. The issue is difficult to study, and a scientific confirmation or rejection of the common sense link does not seem forthcoming. An interesting complication noted by Dr. Collins confirms this sentiment:

> [B]efore the Internet it was exceedingly hard to get child pornography. It was expensive. It took some effort. The Internet has allowed affordability, accessibility, and anonymity, when it comes to child pornography. We are now perhaps seeing a group of offenders who would not have come to light before.[98]

92. See, e.g., Det Insp Angie Howe, Meeting 35, *supra* note 17, at 10:10.
93. *Ashcroft*, *supra* note 3 at 253.
94. *Sharpe (S.C.C.)*, *supra* note 2 at para. 108.
95. *Ibid.* at para. 86.
96. *Ibid.* at para. 88. Dr. Peter Collins was a witness both in *Sharpe (B.C. S.C. 1999)*, *supra* note 7, and before the Justice Committee concerning Bill C-2 at Meeting 35, *supra* note 17.
97. Meeting 35, *supra* note 17.
98. *Ibid.* at 11:25.

Thus, to the extent that previous studies are informative, they are likely measuring very different offenders from those child pornography seeks to target in the technology age. There is simply no conclusive answer available from science.

The reasonable connection can thus be accepted or rejected as sufficient depending on the factors it is being balanced against. In *Sharpe (S.C.C.)*, McLachlin C.J. finds the evidence sufficient. Noting that "complex human behaviour may not lend itself to precise scientific demonstration," she indicates that there is nevertheless a "reasoned apprehension of harm," and that "the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of."[99] However, even if the evidence of a connection is accepted as sufficient, there is the counter-argument that the law should not prohibit thoughts, but acts. Marshall J. colourfully notes in *Stanley* that, "given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."[100] In 1969, he was referring to adult pornography that would now be far from the most extreme that is freely available, but the principle behind the argument remains current and the science has advanced less than would have been hoped.

Yet neither position is unreasonable, and this overview of the status of the social science data and the various arguments seeks only to demonstrate that the link between child abuse and child pornography cannot be conclusively established, and that even if it could, the law could reasonably choose to decline to prosecute individuals on the basis of such a connection.

The practical link: prosecutorial efficiency and the market for child pornography

The other argument linking child pornography to child abuse takes the law enforcement perspective that possession offences assist in reducing the production and distribution of the material and therefore aid in protecting children. The counter-argument, from a libertarian perspective, is that regardless of this assertion, the State should be required to endure the

99. *Sharpe (S.C.C.)*, *supra* note 2 at para 89. Notably, the standard applied to such evidence regarding child pornography, as a class, in *Sharpe (S.C.C.)* seems less stringent than the standard for the Crown to prove adult indecency on a case-by-case basis, which is set out by McLachlin C.J. in *Labaye, supra* note 28 at paras. 58-61. The likely justification, as she notes in *Labaye* at para. 61, is that "risk is a relative concept. The more extreme the nature of the harm, the lower the degree of risk that may be required to permit use of the ultimate sanction of criminal law."

100. *Stanley, supra* note 64 at 567.

headache of prosecuting only distribution, or possession for the purpose of distribution, in order to preserve privacy and freedom of expression.[101]

There have been strong dissenting voices on possession offences generally in Canada and the United States. The dissenting justices of the U.S. Court in *Osborne* applied the rigorous protection of privacy from *Stanley*; Brennan J. interestingly suggests that possessing child pornography is no different from receiving a newspaper knowing it was produced using child labour: sanctions against possession would help combat the child labour problem, but could not override the right to receive the newspaper.[102] In her concurring opinion on the B.C. Court of Appeal in *Sharpe* (B.C. C.A.), Southin J.A. notes that "...to the extent to which, if at all, American authorities on their Constitution, are of value in Canada, I agree with the animadversions of Brennan J. on making 'possession' a crime."[103]

In *Sharpe (S.C.C.)* the Court declined to address whether the prosecutorial efficiency argument could support possession offences, and McLachlin C.J. was content to leave this as a "positive side-effect of the law."[104] The connection of possession to the market for pornography is also given short consideration, with the Court in *Sharpe (S.C.C.)* accepting that production is fuelled by the market, and that possession offences reduce the market.[105] Reinforcing bans on production and distribution is thus seen as a valid but not necessarily sufficient ground for supporting possession bans.[106]

In *Osborne*, which considered records of actual abuse, the U.S. Court endorsed possession offences, approving of the State attempt "to stamp out this vice at all levels in the distribution chain."[107] In *Ashcroft*, which considered "virtual" child pornography, the U.S. Court distinguishes virtual pornography as not contributing to the "market," rather it is suggested that if virtual child pornography were truly indistinguishable, it would displace records of actual abuse as producers would be able to avoid the risk of using real children.[108] Having already decided that virtual child pornography is protected speech, the U.S. Court in that case indicates that

101. See *Stanley*, *supra* note 64, and the opinion of Southin J.A. in *Sharpe (B.C. C.A.)*, *supra* note 8.
102. *Osborne*, *supra* note 65 at 145, n. 19.
103. *Sharpe (B.C. C.A.)*, *supra* note 8 at para. 56. Given the context of her judgment, however, Southin J.A. was likely referring only to self-created materials such as those at issue in *Sharpe (B.C.C.A.)* and not agreeing with Brennan J. more generally that *any* possession offence violates the rights of privacy and free expression.
104. *Sharpe (S.C.C.)*, *supra* note 2 at para. 90.
105. *Ibid.* at para. 92.
106. *Ibid.* at para. 93.
107. *Osborne*, *supra* note 65 at 110. The argument is also marshalled by Congress in its note from recent amendments (18 U.S.C.A. § 2551) to bolster the trade and commerce power basis for the federal child pornography provisions: *Adam Walsh Child Protection Act*, 2006, *supra* note 4 at § 501.
108. *Ashcroft*, *supra* note 3 at 254.

the prosecutorial efficiency argument "in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down."[109]

Both the Canadian and U.S. Supreme Court deal with these arguments very concisely, but with very different emphasis. The Canadian Court, having largely accepted the arguments regarding grooming (as discussed below), cognitive distortions, and incitement, was not particularly concerned with this aspect. The U.S. Court in *Ashcroft* had essentially decided the issue in advance by including virtual child pornography under the First Amendment protection, and distinguishing *Osborne*.

Just like the arguments with regards to cognitive distortion and incitement, a connection is easy to identify, but it is the context of the ultimate balancing, and not the strength of the connection, that determines the outcome. It is the nature of the material considered that justified the U.S. Court in endorsing this connection in *Osborne* but rejecting it in *Ashcroft*, for example. The connection arguments are marshalled depending on the underlying characterization of the content of the expression being discussed. If the content is deemed worthless, the connections are sufficient to outweigh the liberty concern, as in Canada and *Osborne*. If they are considered to have some peripheral value, the connections are deemed insufficient to balance the restriction, as in *Ashcroft*. There is thus no "right" answer to the question, except that dictated by the value assigned to the expression before the strength of the connection is considered.

b. *Grooming*

Another argument that has been advanced is that possession of pornography should be restricted because it is used in the "grooming" of sexual abuse victims. As noted by Kennedy J., "a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity."[110] The argument that possession should be restricted because it makes pornography available for this purpose was accepted by the Canadian Court in *Sharpe (S.C.C.)*, where it was concluded that possession offences are likely to prevent the seduction of children.[111] In testimony before the Justice Committee on Bill C-2, none of the expert witnesses placed any weight on the grooming argument, noting that pedophiles were much more likely to use adult pornography for this purpose.[112] Perhaps the most trenchant argument in

109. *Ibid.* at 255.

110. *Ashcroft*, *supra* note 3 at 241, quoting from the congressional findings of the CPPA 1996.

111. *Sharpe (S.C.C.)*, *supra* note 2 at para. 91.

112. See, e.g., Dr. Collins, Meeting 35, *supra* note 17 at 10:35.

this respect is advanced by Kennedy J. in *Ashcroft*: "there are many things innocent in themselves...such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused."[113]

Again, the context of analysis determines the weight to be given to the argument. Where the speech being restricted is marginalized and the potential harm to children is emphasized, the argument that it may be used for grooming is found instructive. Where the right to freely possess the material underlies the analysis, the argument is rejected.

4. *Divergent theories of harm*

For each of the major arguments generally considered with regard to child pornography, it has been suggested that multiple positions can be reasonably supported in a free and democratic society.[114] Although adherents of different interpretations hold their opinions very strongly, and validly, none of the practical or behavioural justifications for possession offences is conclusive if freedom of expression concerns are enforced with sufficient strictness. Underlying the differences on each of these arguments is a simple difference in the characterization of child pornography. The U.S. Court in *Ashcroft* maintains the line suggested by *Ferber*, which posits that a class restriction of child pornography must be defined based on how it is made, not on the content it communicates: "where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment."[115] This more or less dictates a position on each of the arguments canvassed. This position can be summarized as a slippery-slope argument that protects all but the most directly harmful material from suppression. The basis for this position is that prohibiting more material risks that speech not deserving of the morally loaded brand "child pornography" will be caught. It is a logical and defensible position from a liberty standpoint, and is the position that Alan Borovoy, for the Canadian Civil Liberties Association, argued before the Justice Committee should be adopted in Canada.[116]

In complete contrast, Justice L'Heureux-Dubé in her dissent in *Sharpe (S.C.C.)* strongly characterizes child pornography as inherently harmful.

113. *Ashcroft*, *supra* note 3 at 251. The same argument was advanced to the Justice Committee by Alan Borovoy, Meeting 26, *supra* note 17 at 9:30.

114. This is true even of the courts. As noted, there were dissents in *Sharpe (B.C. C.A.)*, *supra* note 8, and *Sharpe (S.C.C.)*, *supra* note 2. The American Supreme Court split in several ways in *Ashcroft*, *supra* note 3, and as noted in *Williams*, *supra* note 55, four United States circuits upheld possession and pandering provisions of the CPPA, whereas the 9th Circuit, in the decision that was upheld by the majority of the Supreme Court in *Ashcroft*, struck them down.

115. *Ashcroft*, *supra* note 3 at 251.

116. Meeting 26, *supra* note 17 at 9:15.

Its message with regards to children is characterized as a self-contained wrong, independent of the manner of production or use of the material.[117] The majority takes a less explicit view, simply adding together the various major justifications in support of s.163.1(1993):

> Possession of child pornography increases the risk of child abuse. It introduces risk, moreover, that cannot be entirely targeted by laws prohibiting the manufacture, publication and distribution of child pornography. Laws against publication and distribution of child pornography cannot catch the private viewing of child pornography, yet private viewing may induce attitudes and arousals that increase the risk of offence. Nor do such laws catch the use of pornography to groom and seduce children. Only by extending the law to private possession can these harms be squarely attacked.[118]

Implicit in this arithmetic is a lesser version of the argument of Justice L'Heureux-Dubé, that possession offences can be justified by the reasonable apprehension of harm to children generally.[119] This type of harm does not have to be directly connected to abuse of children, and for this reason the Canadian Supreme Court endorses inclusion of material that could not conceivably be prohibited under the American constitutional régime, such as self-created written works. It is noteworthy, however, that the liberal interpretation of the "artistic merit" defence, to some extent, reversed this broad inclusion, although the onus to demonstrate the material has value is shifted to the accused. Borovoy criticizes this back-end approach to free-speech protection; noting the significant ordeal and stigma of being tried for child pornography, he indicates that "only a lawyer can be consoled by the ultimate outcome of a case."[120]

5. *Dialogue theory*

In Canada it is almost axiomatic that a discussion of the interplay of courts and legislatures consider the issue in the context of dialogue theory. "Dialogue theory" in Canada can be traced to an often cited paper by

117. *Sharpe (S.C.C.), supra* note 2.

118. *Ibid.* at para. 94.

119. The concept of harm from obscenity negatively affecting society as a whole is reflected in *Butler, supra* note 27, and harm to society is a central concern of the harm-based test for adult indecency in *Labaye, supra* note 28.

120. Meeting 26, *supra* note 17 at 9:40. Note that in this meeting reference is made to the well-known Eli Langer case, *Ontario (Attorney General) v. Langer* (1995), 123 D.L.R. (4th) 289, 97 C.C.C. (3d) 290. In Meeting 29, *supra* note 17, Frank Addario appeared as a witness for the Canadian Conference of the Arts. Mr. Addario had been counsel for Mr. Langer and he gives an overview of the case and describes its impact on Mr. Langer. Mr. Langer is also cited as an example, with regard to the "chilling effect" of child pornography law on art, by Charles Montpetit, Responsable of the Committee for the Freedom of Speech, Union des écrivaines et des écrivains québécois.

Peter Hogg and Allison Bushell (now Thornton).[121] The basic concept is that court judgments are not simply orders to be obeyed because they are open to modification and reversal by legislatures.[122] Hogg and Thornton argued that in most cases where the Supreme Court of Canada struck down a law, legislatures responded with a new law.[123] There is thus a "dialogue" between courts and legislatures. Kent Roach's book *The Supreme Court On Trial* is a prominent example of Canadian perspectives on the concept of "dialogue" between courts and legislatures.[124] Roach argues that dialogue prevents judges from having American-style judicial supremacy, and uses this contrast to assuage fears of judicial activism. He indicates that the structure of the Canadian constitution, and particularly the *Charter*, prevents the need to be concerned about the extent to which judges are restrained or activist in interpreting the constitution:

> [A]ppointing Dworkin's Hercules to the Court may not be as scary in Canada... because judges under a modern bill of rights cannot enforce their view of abstract moral principles as the final word, but must also listen to government's justifications for limiting such rights. If Hercules runs amuck, the legislature can enact ordinary legislation that overrides or derogates from his interpretation of rights.[125]

The basic assertion of dialogue theory in general, which is echoed by Roach, is that there are two mechanisms available in Canada that allow Parliament to converse with the courts about rights. Section 1 of the *Charter* sets out that rights guarantees are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 33 of the *Charter* allows legislatures to declare that an act or provision "shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." Notwithstanding declarations are subject to a five-year sunset clause.

Fully addressing the many critiques of dialogue theory is beyond the scope of this paper. However, the amendments enacted with Bill C-2 relate directly to the discussion of dialogue theory in Canada, as the response to these amendments would represent the third in a line of legislative

121. Peter W. Hogg & Allison Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75.
122. Peter W. Hogg & Allison A. Thornton, "The Charter Dialogue Between Courts and Legislatures" in Paul Howe & Peter H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal & Kingston: McGill-Queen's University Press for The Institute for Research on Public Policy, 2001) 106.
123. *Ibid.* at 110.
124. Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).
125. *Ibid.* at 234.

responses to Supreme Court decisions on controversial issues. The other important "dialogues" are represented by *R v. O'Connor* [*O'Connor*] and *R. v. Mills* [*Mills*], sometimes referred to as the "rape shield" cases, and two voting rights cases brought by the same complainant, Mr. Sauvé.

O'Connor and *Mills* dealt with disclosure of private records of complainants in sexual abuse cases.[126] The "dialogue" issue was that the four-judge dissent in *O'Connor* was adopted into legislation by Parliament, and when it was challenged in *Mills*, the Court upheld the legislation.[127] Professor Roach and others have held out the decision in *Mills* as supporting dialogue, quoting the Court's statement that courts do not

> hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups. ...If constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, then this court has an obligation to consider respectfully Parliament's attempt to respond to such voices.[128]

However, the deference shown to Parliament in *Mills* is clearly of a very limited type, as the Court clarified in the later case of *Sauvé v. Canada (Chief Electoral Officer)* [*Sauvé 2002*].[129]

Briefly, the Court in the previous case brought by Mr. Sauvé struck down, as a violation of the s.3 *Charter* right to vote, a provision in the *Canada Elections Act* which prevented individuals detained by the state from voting. Parliament responded to this decision by amending the section to disenfranchise only prisoners serving more than two years. This less severe provision came before the Court in *Sauvé 2002*, and was also struck down. Writing for the majority of the Court McLachlin C.J. indicated that:

> the core democratic rights of Canadians do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion. Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights.[130]

The Chief Justice was clear that rights interpretation is exclusive to the Court. McLachlin C.J. further noted that:

126. *R. v. O'Connor*, [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235.
127. *R v. Mills*, [1999] 3 S.C.R. 668 at para. 22.
128. *Ibid.* at para. 58; quoted by Roach, *supra* note 124 at 280.
129. *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519.
130. *Ibid.* at para. 13.

> the fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a "dialogue". Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of 'if at first you don't succeed, try, try again.'[131]

The potential parallel in the sequence of the provisions dealing with child pornography is too obvious to be omitted. Given the Court's indications in *Sauvé 2002*, the argument advanced by Roach, prior to that case, that Canada does not have American-style judicial review, is seriously undermined. I will thus proceed on the basis that Canada and the United States do not have significantly different régimes of judicial review. On this premise, it is reasonable to compare and contrast the merits of judicial as opposed to legislative decision-making on the issue of child pornography in the two countries.

6. *Waldron and Dworkin*

"Comparative Law demonstrates the relativity of our own national systems, and deconstructs the myth of right answers."[132] This sentiment with regard to the mutual influence of international private law is equally salient in constitutional law, particularly in the context of the United States and Canada. The concept of the myth of right answers is related to the argument advanced by Jeremy Waldron that disagreement is inevitable in society, which is one of the foundations on which he builds a sophisticated critique of judicial review. Reasonable individuals, be they judges, lawmakers, or paupers, will disagree not only about what represents justice in the context of the law generally, but will disagree fundamentally on the meaning and scope of basic rights. This requires, inevitably, a system of authority for resolving disagreement. As Waldron quips, "Majoritarian democracy is the theory of authority with which most of us are familiar, but others include 'Toss a coin', 'Let the king decide', and 'Leave it to the judges.'"[133] The question of how to build and justify a legitimate theory of authority has occupied legal philosophers for centuries, but the democratic justification generally rests on a concept of popular participation as a method of legitimization. Michelman provides a conception of democracy along these lines, characterizing the system as an imperfect struggle which nevertheless provides validity even for unjust laws, since they arise out of

131. *Ibid.* at para 17.

132. Martijn W. Hesselink, *The New European Legal Culture* (Deventer: Kluwer, 2001) at 52, referencing the ideas of Horatia Muir Watt, co- director of the Centre for Comparative Law, University of Paris.

133. Jeremy Waldron, "A Right-Based Critique of Constitutional Rights" (1993) 13 Oxford J. Legal Stud. 18 at 32 [Waldron, "Critique"].

the best possible participatory procedure in striving for the ideal.[134] This concept is important to Waldron's critique of judicial decision-making:

> If a process is democratic and comes up with the correct result, it does no injustice to anyone. But if the process is non-democratic, it inherently and necessarily does an injustice, in its operation, to the participatory aspirations of the ordinary citizen. And it does *this* injustice, tyrannizes in *this* way, whether it comes up with the correct result or not.[135]

Dworkin's justification for his central disagreement with Waldron—that society does sometimes need to "leave it to the judges"—rests on a different foundation for the concept of membership in society. He posits a need for "moral membership," which requires more than simple participation, because participation can only be premised on certain relational preconditions in society.[136] These conditions include such things as universal suffrage, bona fide concern for other members, and, as is relevant in the current discussion, free speech.[137] The conditions cannot arise from a vacuum, and might not necessarily arise from majoritarian decision-making. Dworkin thus suggests that liberty is not sacrificed when the majoritarian premise is ignored, but rather enhanced when it is "rejected outright in favour of a constitutional conception of democracy."[138] Michelman has admitted the fundamental difficulty of democracy in accounting for the existence of these relational preconditions.[139] However, attacking along different lines, Waldron points out a similar inconsistency at the foundation of rights-based theories of authority. These theories have difficulty reconciling an inherent conflict: rights of liberty are premised on individuals as rational, moral agents considerate of the rights of others, yet a rights theory supporting judicial review posits that the same individuals, in aggregate, represent the potential tyranny of the majority.[140]

This debate cannot be resolved in the context of child pornography. However, the survey of this issue in Canada and the United States is useful for more than simply pointing out jurisprudential differences and highlighting that there is no objectively "right" answer to the balance between protecting freedom of expression and protecting children from

134. Frank Michelman, "How Can the People Ever Make the Laws? A Critique of Deliberative Democracy" in James Bohman & William Rehg, eds., *Deliberative Democracy* (Cambridge, MA: MIT Press, 1997) 145.
135. Waldron, "Critique," *supra* note 133 at 50.
136. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996) at 24.
137. *Ibid.* at 24-25.
138. *Ibid.* at 24.
139. Michelman, *supra* note 134.
140. Waldron, *Disagreement*, *supra* note 5 at 14.

harm. The legislative responses to the decisions in *Ashcroft* and *Sharpe (S.C.C.)* are not unreasoned or unreasonable. However, they do relate to the debate between majoritarianism and judicial review.

In all of the several hundred pages of testimony before the Justice Committee, only a few arguments were made against the expansion of the child pornography provisions. Artists' groups submitted that the removal of the artistic merit defence could have a "chilling" effect on artistic expression, and the Canadian and British Columbia Civil Liberties Associations similarly advanced concerns that the provisions would capture legitimate speech.[141] As was noted, the argument that sexual speech should be protected if only because it *is* subversive was not canvassed.

With regard to legislative deliberation on the grander scale, it is significant that Bill C-2 passed in the House of Commons without any debate about whether the amendments were necessary—or any critique except that they were too soft on pedophiles. Mr. Joe Comartin (Windsor-Tecumseh, NDP), suggested that the "legitimate purpose" and "undue risk of harm" test would be unclear and impractical, but was concerned only because, having practised as a criminal lawyer, he felt the provision was "ideal for the criminal defence bar."[142] After being considered by the Justice Committee—which amended Bill C-2 with respect to child pornography to add mandatory minimum sentences for all offences, including possession—the Bill passed in the House of Commons by agreement of all parties, and a third reading was waived.[143] It received short consideration in the Canadian Senate, with only a few words being spoken in support of the Bill.[144] The *PROTECT Act* received similar treatment in the United States. Tabled in the U.S. Senate, it passed 84-0. The House of Representatives made non-substantial changes, and there it passed 400-25, following which the U.S. Senate accepted the amendments 98-0. No major debate was engaged in, and the minor issues that arose were resolved in committee.[145]

The complete failure to debate a potentially significant issue of free speech seems a prima facie failure of legislatures as the ideal forum for

141. *Supra* note 17: CCLA in Meeting 26; BCCLA in Meeting 27.

142. *House of Commons Debates*, No. 007 (13 October 2004) at 15:50 (Joe Comartin).

143. <http://www.parl.gc.ca/LEGISINFO/index.asp?List=ls&Query=4199&session=13&Language=e>.

144. *Debates of the Senate (Hansard)*, Vol. 142, Issue 70 (14 June 2005) [First Reading]; Vol. 142, Issue 73 (20 June 2005) [Second Reading]; Vol. 142, Issue 84 (19 July 2005) [Third Reading]. See also "Committee Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs," 38th Parliament, 1st Session, 22 June 2005 and 23 June 2005, Vol. 142, No.17, online: <http://www.parl.gc.ca/38/1/parlbus/commbus/senate/Com-e/lega-e/17cv-e.htm?Language=E&Parl=38&Ses=1&comm_id=11>.

145. *PROTECT Act*, 2003, *supra* note 4.

balancing rights claims. Michelman concedes that democracy in practice can only strive for an ideal which can never be reached,[146] and recognizing such gloomy examples of legislative one-sidedness, Waldron argues that the imperfections of democracy cannot justify another theory of authority which is equally flawed, such as judicial review.[147] Rejecting the prospect of the tyranny of the majority, Waldron notes that underlying his theory is his hope, what he calls the "aspirational quality" of his normative theory of law, that citizens and representatives "do vote on the basis of good faith and relatively impartial opinions about justice, rights, and the common good."[148] He convincingly argues that the level of cynicism required to truly believe that individuals only ever act in their own self-interest is ultimately defeating of any decision-making process, and is not a fair critique of democratic decision-making.[149]

The child pornography example does not undermine this fundamental hope and does not show that legislative representatives act only in their own, or their constituents', self-interest, but it does suggest that Dworkin is correct that, on some issues, there is a tyranny of the majority. A lack of debate does not indicate a lack of good faith or inability to act selflessly, and the lawmakers in Canada and the United States were acting in the utmost good faith: the legislative response to court decisions sought to increase the emphasis on protecting children from harm. However, the discussion of the various arguments advanced with regard to child pornography shows that there is no objectively correct balance between free expression and the protection of children. The differences of opinion between the judges in both jurisdictions and between jurisdictions highlight this. What the child pornography issue demonstrates is that there are some issues that make it impossible, politically, for legislators to argue both sides of a rights debate.

In the legislative responses considered here, legislators showed an utter indifference to the rights concerns that were considered in detail by the Canadian and U.S. courts. Dr. John Dixon (Vice-President, British Columbia Civil Liberties Association), in his testimony to the Justice Committee, gave an impassioned presentation on the general "ignorance" of the public as to the meaning and fine distinctions of the law on child pornography.[150] Although Waldron's confidence in the ability of citizens and their representatives to act in more than bare self-interest is inspiring

146. Michelman, *supra* note 134.
147. Waldron, "Critique," *supra* note 133 at 45.
148. Waldron, *Disagreement*, *supra* note 5 at 14.
149. Waldron, "Critique," *supra* note 133 at 36.
150. Meeting 27, *supra* note 17 at 9:00.

and, in this context at least, supportable, it may still be that they are not capable of acting without a form of other-disregard. Pedophiles are precisely the kind of group that push the boundaries of the democratic model forwarded by theorists such as Michelman and Waldron and seem to require the protections Dworkin advances, because they are so easily disregarded.

The legislative amendments of Bill C-2 and the *PROTECT Act* are carefully and reasonably tailored to the debates occurring in their respective jurisdictions. Nevertheless, the scope of the legislation was not restricted by reasonable debate amongst legislators concerning the interests involved, but by the limits set by judicial debate. Cracking down on child pornography sells well, and protecting free speech in this particular context is not a popular argument. This is not to suggest that pedophiles are an unfairly oppressed minority who must be protected by judges.[151] Rather, the example serves to suggest that democratic representatives are unable to reasonably argue regarding the extent to which pedophiles may be *fairly* oppressed in, to use the Canadian language, a free and democratic society.

Conclusion

"The vibrancy of a democracy is apparent by how wisely it navigates through those critical junctures where state action intersects with, and threatens to impinge upon, individual liberties."[152] To extend Iacobucci J.'s comment, I would suggest that Parliament and Congress could have been more attentive in fine-tuning the balance drawn between protecting children and freedom of expression. At least in the context of child pornography, it may be argued that, despite the fundamental flaws of judicial review, there are situations where judges are indeed useful in taking a more balanced and principled approach in maintaining the conditions for liberty. However, even the extremes of the Canadian dissent of L'Heureux-Dubé J. in *Sharpe (S.C.C.)* and the American dissent of Brennan J. in *Osborne* are far removed from the sort of free-speech provisions that lead down the road to a police state. Neither position, if it were the majority, would tarnish democracy. The American Supreme Court continues to approve of the familiar adage: sticks and stones may break my bones, but names can never hurt me. The Canadian Supreme Court may be beginning to disagree, positing that certain speech content is itself morally and psychologically harmful to individuals and society. This foundation in Canada permits

151. Although this argument exists: see Harris Mirkin, "The Pattern of Sexual Politics: Feminism, Homosexuality and Pedophilia" (1999) 37:2 J. of Homosexuality 1.

152. *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 at para. 15.

the view that content is fairly restricted where there is a reasonably apprehended connection to harm to individuals, particularly children. The result of comparing child pornography possession law in the United States and Canada seems to be that the American Court finds the free speech slope more slippery than the Canadian Court, and neither Congress nor Parliament are particularly adept skiers.

Appendix I

s.163.1 Child Pornography Provisions, 1993 and 2005

R.S. 1985, c.C-46; 1993, c. 46, s. 2; 2002, c. 13, s. 5.

163.1 (1) In this section, "child pornography" means

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
  (i) that 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
  (ii) 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; or

(b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

Criminal Code, R.S.C. 1985, c.C-46, s.163.1, as am. by S.C. 2005, c.32.
(Canada Gazette vol. 28, no. 48, 12 September 2005)

163.1 (1) In this section, "child pornography" means

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
  (i) that 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
  (ii) 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;

(b) any written material, visual representation *or audio recording* that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;

(c) *any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or*

(d) *any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.*

163.1(2):

(2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or
(b) an offence punishable on summary conviction.

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years *and to a minimum punishment of imprisonment for a term of one year*; or
(b) an offence punishable on summary conviction *and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of ninety days.*

161.1(3) Every person who transmits, makes available, distributes, sells, imports, exports or possesses for the purpose of transmission, making available, distribution, sale or exportation any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

161.1(3) Every person who transmits, makes available, distributes, sells, *advertises,* imports, exports or possesses for the purpose of transmission, making available, distribution, sale, *advertising* or exportation any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years *and to a minimum punishment of imprisonment for a term of one year*; or
(b) an offence punishable on summary conviction *and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of ninety days.*

163.1(4) Every person who possesses any child pornography is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or (b) an offence punishable on summary conviction.	(a) an indictable offence and liable to imprisonment for a term not exceeding five years *and to a minimum punishment of imprisonment for a term of forty-five days*; or (b) an offence punishable on summary conviction *and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days*.
163.1(4.1) Every person who accesses any child pornography is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or (b) an offence punishable on summary conviction.	(a) an indictable offence and liable to imprisonment for a term not exceeding five years *and to a minimum punishment of imprisonment for a term of forty-five days*; or (b) an offence punishable on summary conviction *and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days*.
163.1(4.3) is added	*(4.3) If a person is convicted of an offence under this section, the court that imposes the sentence shall consider as an aggravating factor the fact that the person committed the offence with intent to make a profit.*

163.1(6) and (7):
(6) Where the accused is charged with an offence under subsection (2), (3), (4) or (4.1), 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, scientific or medical purpose.

(7) Subsections 163(3) to (5) apply, with such modifications as the circumstances require, with respect to an offence under subsection (2), (3), (4) or (4.1).

(6) No person shall be convicted of an offence under this section if the act that is alleged to constitute the offence

(a) *has a legitimate purpose related to the administration of justice or to science, medicine, education or art; and*

(b) *does not pose an undue risk of harm to persons under the age of eighteen years.*

(7) For greater certainty, for the purposes of this section, it is a question of law whether any written material, visual representation or audio recording advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.