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Maurice "Mac" VerStandig

ACTUAL EXPLOITATION, SIMULATED EXPLOITATION, AND A TIN DRUM: A COMPARATIVE ANALYSIS OF CHILD PORNOGRAPHY LAW IN THE UNITED STATES AND CANADA

Maurice "Mac" VerStandig [*]

SUMMARY

The United States and Canada – two of the world's foremost modern, liberalized societies – regularly combat an awkward and painful tension between free speech rights and the wellbeing of minors. Though there generally exists a consensus that child pornography represents a certain dark realm of material outside the oft-amorphous protections afforded speech, the establishment of an acceptable working definition of this criminal fodder has proven contentiously difficult. This paper explores each nation's struggles with this tension, through the lens of legislative efforts, judicial responses, and the productions that seem to perennially blur the line between art and crime. It is ultimately this paper's contention that existing child pornography statutes would be wisely supplanted by the enforcement of other law already in existence.

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[*] University of Wisconsin-Madison (B.A., with honors in the major, 2006); University of Miami School of Law (J.D., *cum laude*, 2009).

"The only other kind of movies I did was x-rated films,
but I was a teenager, I was a kid then.
I don't really remember any of it,
and I don't really think about any of it."
-Nora Kuzma (aka Traci Lords)
Larry King Live
March 16, 1990

A. INTRODUCTION

A United Press International dispatch from November 27, 1980 notes, "New World-Mutual Pictures announced Volker Schlondorff, director of the film which won Cannes and Academy awards, was 'extremely pleased' with the Ontario Censor Board's decision to approve the film with a restricted rating."[1] The movie in question was *Tin Drum*, a widely-lauded cinematic tale based on a best-selling novel.[2] As a condition of granting such approval, the provincial government organization demanded two scenes be spliced out of the movie.[3]

Seventeen years later, the same film would come under fire in Oklahoma, where police took to confiscating copies of the acclaimed foreign production after a state judge ruled it to violate child pornography laws.[4] The crackdown was so severe that officers took to examining video store rental logs and arresting "customers who had rented the film in early 1997."[5] Patrons of a library who checked out the tape were greeted at their homes by

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[1] Untitled, *United Press International*, Nov. 27, 1980.
[2] Gary Arnold, *A Sadly Different Drum; The Failed Effort to Depict Grass' Novel,* THE WASHINGTON POST, April 25, 1980, at C1.
[3] *See* Untitled, *supra* note 1.
[4] Jay Hughes, *Judge: Video Not Pornographic,* CHICAGO SUN TIMES, Oct. 22, 1998, Features, at 37.
[5] Scott Hettrick, *VSDA Prevails in 'Drum' Case,* THE HOLLYWOOD REPORTER, Dec. 23, 1998.

plainclothes policemen.[6] Concluding a legal battle that lasted some eighteen months, a federal judge deemed the film to not violate the state's child pornography laws, after earlier declaring the seizures unconstitutional.[7]

A profound distinction exists between the variety of black-market fodder that chronicles the exploitation of helpless children for purposes of perverse consumption and a genuinely artistic undertaking like *Tin Drum* that captures mainstream cinematic awards in Europe and North America alike. Yet, that film's edgy depictions - most notably a scene portraying a minor engaged in oral sex[8] - led authorities in Canada and the United States to essentially conflate this meaningful distinction. While Ontario's censorship and Oklahoma's banning may prove radically different means of addressing a common "problem," the reality is that each connotes a chilling sense of Orwellian behavior.

The critical inquiry, borne out of the prolonged saga of *Tin Drum* as well as numerous other incidents, is twofold: Whether Canada and the United States may abrogate speech rights so as to ban child pornography and, if so, just how each nation may go about defining properly the resultant prohibited realm of material. This article will explore the relevant postures of both countries, emphasizing *Ashcroft v. Free Speech Coalition*[9] and *R. v. Sharpe*,[10] recent cases that helped define the permissive contours of both Canadian and American[11] free speech law with regard to child

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[6] *HMH Awards: this year's first amendment champs,* PLAYBOY, March 1999, at 45.

[7] *See* Hughes, *supra* note 4.

[8] *Id.*

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

[10] R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2 (Can.).

[11] The term "American," literally and most broadly, may be understood to reference the entirety of that land between northernmost outpost of Nunavut, Canada and southernmost point of Ushuaia, Argentina and neighboring Chile. It is, however, common parlance in both Canada and the United States to embrace this term as a specific reference to the people, customs, and goings-on of the latter nation. Accordingly, this article will use the term in this narrower context, meaning not to proceed in ignorance toward the larger usage but, rather, proceeding out of a simple linguistic convenience.

pornography. The issues encompassing this remarkably dark area of law are, in many ways, uniquely compelling inasmuch as they pit liberalized Western views of free speech against long-held social and legal principles that prioritize the protection of children as especially vulnerable members of society. While the requisite correlative balancing act is an inherently nuanced endeavor, it shall be the contention of this article that the appropriate jurisprudential and philosophical remedy is to emphasize the criminalization of those various acts that inherently give rise to the creation of child pornography, treating the resultant material as evidence in lieu of contraband.

B. BACKGROUND: PORNOGRAPHY V. CHILD PORNOGRAPHY

Concurring in *Jacobellis v. Ohio*,[12] Justice Stewart famously observed of pornography, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it."[13] Neither the United States nor Canada offers a formal definition of "pornography," though each country has delineated a means of determining that which is considered to be legally obscene. The Canadian standard, as noted in the Report of the Special Committee on Pornography and Prostitution,[14] is statutorily derived:

> The *Criminal Code* does not use the word pornography in its prohibitions dealing with offensive material. Subsections 159(1) and 159(2)(a) deal with the production, distribution and sale of "obscene" matter. Subsection 159(8) provides that

[12] Jacobellis v. Ohio, 378 U.S. 184 (1964).
[13] *Id.* at 197 (Stewart, J., concurring).
[14] PORNOGRAPHY AND PROSTITUTION IN CANADA: REPORT OF THE SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION, Vol. 1 (1985) [hereinafter "FRASER REPORT"].

> for purposes of the *Code*, any publication "a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence" is deemed to be obscene.[15]

The American standard, however, originates largely from case law and is far more complex.

In *Roth v. United States*,[16] the Supreme Court[17] delineated a test for determining that which is obscene: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[18] This standard would later be slightly modified in *Miller v. California*,[19] where a three prong test was established:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[20]

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[15] *Id.* at 45-46.

[16] Roth v. United States, 354 U.S. 476 (1957).

[17] Inasmuch as this article addresses cases decided by both the Supreme Court of the United States and the Supreme Court of Canada, the former institution shall be denoted by its proper name and, periodically, simply as the "Supreme Court;" the latter court will be recognized as the "Supreme Court of Canada" or the "Canadian Supreme Court."

[18] *Roth*, 343 U.S. at 489.

[19] Miller v. California, 413 U.S. 15 (1973).

[20] *Id.* at 24 (internal citations omitted).

The crux of the *Miller* test is twofold: any suspect works must be examined macroscopically, and the concept of "obscenity" is limited to material of a sexual nature. This is important inasmuch as while social vernacular occasionally permits the deeming of particular acts of violence or other moral offense to be "pornographic," the legal scope of the term is limited to prurient works.

Given the contextual demands of both the Canadian and American definitions of obscenity, it becomes evident that child pornography - logically a subset of pornography and, *ergo*, a subset of obscenity - must entail different considerations. Western social norms dictate that while sexual acts involving consenting adults, when taken as part of a larger artistic work, may not constitute obscenity, similar acts performed by children are not as easily dismissed. Yet the per se disallowance of such matter, regardless of context, would do little more than recreate the aforementioned *Tin Drum* dilemma.

Accordingly, "child pornography" must be something more than the mere existence of children in pornographic - or obscene - material, inasmuch as that which would not otherwise be deemed "obscene" has the potential to become horrific when produced with children. Even aside from the public interest in protecting from exploitation those not sufficiently mature to offer consent, an important legal distinction does exist: sexual acts, even of a tremendously prurient caliber, are traditionally allowed between consenting adults,[21] whereas a prohibition exists on the involvement of children in such acts.

The Criminal Code of Canada renders guilty of an offense: "Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of

[21] There are, of course, certain circumstances in which the law tends to prohibit consensual sexual acts between consenting adults – incest and, in some states, adultery, being notable examples. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 10-501 (2002); MD. CODE ANN., FAM. LAW § 2-202 (2002). These prohibitions, however, derive from a radically different line of legal and social reasoning, and their basis is well outside the topical scope of this article.

the body of a person under the age of 16 years."[22] In the United States, the specific statutory rape laws vary by state, however, by way of anecdote, the Texas Penal Code provides:

> A person commits an offense if, with a child younger than 17 years and not the person's spouse, whether the child is of the same or opposite sex, the person: (1) engages in sexual contact with the child or causes the child to engage in sexual contact; or (2) with intent to arouse or gratify the sexual desire of any person: (A) exposes the person's anus or any part of the person's genitals, knowing the child is present; or (B) causes the child to expose the child's anus or any part of the child's genitals.[23]

The applicable prohibition in the District of Columbia provides, "Whoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act shall be imprisoned for any term of years or for life and, in addition, may be fined an amount not to exceed $ 250,000."[24]

These laws are critical to an understanding of child pornography and its regulation, in that this particularly odious form of "speech" meaningfully differs from the traditional scope of obscenity inasmuch as the underlying act portrayed is criminally punishable unto itself. In this regard, it is important to distinguish between such portrayals of a documentary and fictitious nature. The former variety of child pornography is evidence of an act (or acts) criminalized in the United States and Canada; the latter is merely the dramatic presentation of such an act (or acts) as imagined. Proceeding into an examination of applicable case law, this distinction is essential.

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[22] Canada Criminal Code, R.S.C., ch. C-46, § 151 (2000).
[23] TEX. PENAL CODE ANN. § 21.11 (2007).
[24] D.C. CODE § 22-3008 (2008).

C. CANADA'S CHILD PORNOGRAPHY LAW

Under the umbrella of "Offences Tending to Corrupt Morals,"[25] [26] the Criminal Code of Canada addresses child pornography in detail. A precise definition of this core term is offered in four parts, each deserving of some parsing herein. The first encompasses:

> (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[27]

This language does not merely touch upon literal acts but, indeed, dramatically imagined acts as well. The repetitive use of "or is depicted as being" shows the Canadian statute interprets child pornography to be more than the mere documentation of otherwise-illegal exploitive conduct. The above wording also encompasses material that while not depictive of a sexual act, serves to arouse a sexual interest, or that, while otherwise a legal sexual act, is illegal because of its focus. Again, this is significant in that it brings into the realm of child pornography that which is otherwise permissible when not visually memorialized - the mere depiction of a child's sexual organ, a natural component of the human body, is criminalized here (provided such be "for a sexual purpose").

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[25] R.S.C., ch. C-46, § 163.1 (1985).

[26] In an attempt to preserve the dignity and veracity of several quotations in this article, various words common to the English language are spelled with slight differences attributable to the varying literary customs of the United States and Canada.

[27] R.S.C., ch. C-46, § 163.1(1)(a) (1985).

The code next prohibits, "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."[28] This aspect proves intriguing because it serves to prohibit not an actual act but, rather, the mere advocacy of such an act. In a sense, this provision conflates the encouragement of acts of child pornography with literal acts of child pornography. Moreover, the statute does not demand that anything come of such advocacy - this language is not tantamount to American "fighting words" prohibitions[29] in that there is no requirement that an ensuing act of illegality be likely, nor is it akin to a classic "conspiracy" charge[30] in that no act in furtherance of the advocated wrongdoing is required.

The third body of material deemed by the Criminal Code of Canada to constitute child pornography is, "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."[31] This element is, in essence, a hybrid of the previous two components - the "dominant characteristic" language from the first sub-section is again used here to insert a subjective threshold, while the literary emphasis of the second sub-section controls the variety of content in question. Yet this language seems rather unnecessary in that the prohibition on advocacy of such acts contained in the previous provision appears to encompass in part the same material that is banned here. Indeed, one could easily contend any literary description, crafted to serve a prurient interest, is the inherent promotion of its very contents. Only the most fantastical of propagations would seem outside this scope, and even then it may seem that the "dominant characteristic" ceases to be the sexual act in question and commences to be whatever foundation

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[28] R.S.C., ch. C-46, § 163.1(1)(b) (1985).
[29] *See generally* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
[30] *See generally* Yates v. United States, 354 U.S. 298 (1957).
[31] R.S.C., ch. C-46, § 163.1(1)(c) (1985).

gives rise to such a heightened departure from the permissive contours of reality.

The final variety of child pornography outlined by this statute is "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."[32] This language is the simplest to address in that it does not significantly or meaningfully deviate from the third provision. The only distinction is that this component addresses audio recordings in lieu of written material - the same impact is felt and the same issues exist.

The statute goes on to prohibit, with varying accompanying terms of imprisonment, the creation of child pornography, its distribution, its possession and its access.[33] It is considered an aggravating factor if "the person committed the offence with intent to make a profit."[34]

Next, the Criminal Code of Canada addresses potential defenses to violations of these laws. The statute provides:

> It is not a defence to a charge under subsection (2) in respect of a visual representation that the accused believed that a person shown in the representation that is alleged to constitute child pornography was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.[35]

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[32] R.S.C., ch. C-46, § 163.1(1)(d) (1985).
[33] R.S.C., ch. C-46, § 163.1(2)-(4) (1985).
[34] R.S.C., ch. C-46, § 163.1(4.3) (1985).
[35] R.S.C., ch. C-46, § 163.1(5) (1985).

In essence, this language amounts to a disallowance of any defenses premised on willful ignorance of the prohibited nature of the subject material. However, where there is a genuine mistake of fact - i.e., where a citizen investigates the nature of a prohibited article and is truly led to believe s/he is bearing witness to a work that centers on an adult, not a child - this defense is allowed.

This scenario, which is simply a good faith mistake of fact with regard to the age of a pornographic subject, has played out before in the adult entertainment industry. In 1986, it was learned that Nora Kuzma, a prominent adult movie actress who worked under the name "Traci Lords," was in fact under the age of 18 during the filming of several productions in which she starred.[36] The deception in this instance was so thoroughly convincing that, even after the revelation of Ms. Kuzma's true age, one major newspaper reported, "Making the rounds in porn film circles is the buzz that Traci Lords was legally an adult when she appeared in several explicit films, and reports that she was only 15 are part of a carefully planned marketing plot to remove her early films from the shelf -- so they won't compete with new porn projects on which she's working as producer."[37] Given that the Report of the Special Committee on Pornography on Prostitution observes, "Pornographic material coming into [Canada] comes overwhelmingly from the United States,"[38] it is easy to see how one of Ms. Kuzma's underage productions could have deceived the Canadian public as thoroughly as it did the American public.

The final portion of the Criminal Code of Canada's prohibition on child pornography is the furnishing of a second defense:

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

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[36] Ron Russell, *Law on Child Pornography Struck Down,* THE LOS ANGELES TIMES, Dec. 17, 1992, at A3.

[37] Michael Sneed and Kathy O'Malley, *Making New Friends...,* CHICAGO TRIBUNE, July 30, 1986, at 12.

[38] FRASER REPORT at 87.

> 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.[39]

The exception provided here, very similar in nature to the *Miller* test used by the United States in obscenity cases, is facially sensible. While one may be led to ponder just how prophylactic the term "art" is, this term may well be necessarily ambiguous so as to allow a subjective determination that works like *Tin Drum* are permissible while the mere feigning of artistic intent will not alone provide grounds for an otherwise-prohibited work to garner an exemption. However, it is not immediately clear just what "undue risk of harm" is intended by this statutory language, which surely does not speak to the prohibited acts of advocacy in the statute, and is at odds with any banned material that features actual children. Accordingly, it seems appropriate to proffer that this defense is aimed at some variety of controlled situations – scenarios not otherwise housed by the enumerated defenses, but so thoroughly innocuous in nature as to not present any meaningful social threat.

[39] R.S.C., ch. C-46, § 163.1(6) (1985).

D. *R. V. SHARPE*

The Canadian Charter of Rights and Freedoms,[40] a core component of the Constitution Act of 1982,[41] provides in relevant part, "Everyone has the following fundamental freedoms: ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[42] The Charter does, however, preemptively caveat, "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[43] It is against these provisions that any limitation on speech must be assessed, and it is this language that has given rise to constitutional challenges of Canada's obscenity and child pornography laws.

In 1992, the Canadian Supreme Court was faced with one such constitutional challenge. In *R. v. Butler*,[44] the Court, considering the contours of this Charter provision, observed of how a questionable cinematic work should be subjectively assessed:

> [I]n creating a film, regardless of its content, the maker of the film is consciously choosing the

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[40] CONSTITUTION ACT, 1982; SCHEDULE B [hereafter "CAN. CONST"]; art. I.

[41] "Canada does not have a single constitutional text akin to those of France, Germany, Italy, the Netherlands, Spain, or the United States. Canada's Constitution includes several components, including portions of the unwritten constitution and common law of Great Britain, as well as two major texts of constitutional import: the Constitution Act of 1867 (as amended) and the Constitution Act of 1982, of which the Charter of Rights and Freedoms is a part." Pauline Cote and T. Jeremy Gunn, *Essay: The Permissible Scope of Limitations on the Freedom of Religion or Belief in: Canada*, 19 EMORY INT'L L. REV. 685, 691 (2005).

[42] CAN. CONST. art. I. §2.

[43] CAN. CONST. art. I. §1.

[44] R. v. Butler, 1992 S.C.R. LEXIS 44 (1992).

> particular images which together constitute the film. In choosing his or her images, the creator of the film is attempting to convey some meaning. The meaning to be ascribed to the work cannot be measured by the reaction of the audience, which, in some cases, may amount to no more than physical arousal or shock. Rather, the meaning of the work derives from the fact that it has been intentionally created by its author.[45]

Widely hailed by the Canadian public, the impact of this ruling was noted by one newspaper which reported, "In the press, editorialists held out the hope that vice squads, armed with the court's new guidelines on what was obscene, would go about their business more astutely -- and stop seizing laughable 'pornography,' such as the film version of Gunther Grass' 'The Tin Drum' [sic]."[46]

Some eight years later, the landmark case of *R. v. Sharpe* came before the Court. Again concerned with the extent of the Charter's reach, the judicial body this time addressed the constitutionality - or lack thereof - of Canada's aforementioned child pornography laws. The fundamental issue at hand was well summarized in the majority ruling scribed by Chief Judge McLachlin when he questioned, "Is Canada's law banning the possession of child pornography constitutional or, conversely, does it unjustifiably intrude on the constitutional right of Canadians to free expression?"[47] The Court answered this question mostly in the affirmative, but inserted a caveat that two exceptions to the statute must be recognized for it to properly comport with the guarantees of the Charter.

John Robin Sharpe was charged with two counts of possession and two counts of possession for purposes of

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[45] *Id.* at 63.

[46] Mary Williams Walsh, *Chill Hits Canada's Porn Law*, LOS ANGELES TIMES, Sept. 6, 1993, at A1.

[47] R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2, 33 (Can.).

distribution or sale under Canada's child pornography law.[48] Prior to trial, the defendant challenged the constitutionality of the charging statutes, leading the government to argue that while the possession charges may be in violation of the freedoms guaranteed in the Charter, they are within the permissive confines of the same document's preemptive caveat.[49] The trial judge ruled the restrictions contained in the child pornography statute to be impermissible, and this holding was upheld on initial appeal.[50] The case then came before the Supreme Court of Canada.

In an early portion of his analysis, Chief Judge McLachlin observed candidly the balancing test inherent in deciding this matter, "If we do not like an idea or an image, we are free to argue against it or simply turn away. But, absent some constitutionally adequate justification, we cannot forbid a person from expressing it."[51] This notion – the limited permissible means of addressing otherwise-problematic varieties of speech – underscores the issue before the Court, and foreshadows the duration of the opinion.

The court proceeds to examine an initial threshold matter: whether child pornography is even within the confines of that protected by the Charter. As the opinion notes, "Child pornography does not generally contribute to the search for truth or to Canadian social and political discourse. Some question whether it engages even the value of self-fulfillment, beyond the base aspect of sexual exploitation."[52] In lieu of focusing on this troubling philosophical inquiry, however, the court takes note of a more intellectually simplistic dilemma posed by the case at hand, "The concern in this appeal, however, is that the law may incidentally catch forms of expression that more seriously implicate self-fulfillment and that do not pose a risk of harm to children."[53]

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[48] *Id.* at 1.
[49] *Id.* at 2.
[50] *Id.*
[51] *Id.* at 44.
[52] *Id.* at 45-46.
[53] *Id.* at 46.

The court goes on to identify some of this "incidental" expressions that otherwise fall victim to the statute's over-breadth:

> This definition of child pornography catches depictions of imaginary human beings privately created and kept by the creator. Thus, the prohibition extends to visual expressions of thought and imagination, even in the exceedingly private realm of solitary creation and enjoyment. As will be seen, the private and creative nature of this expression, combined with the unlikelihood of its causing harm to children, creates problems for the law's constitutionality.[54]

This concern of the court sheds further light upon the mysterious second element of the statute's second affirmative defense, that the suspect material "does not pose an undue risk of harm to persons under the age of eighteen years."[55] The court here appears to be suggesting that this subjective concept, used only to modify an enumerated affirmative defense in the statute itself, may give rise to other situations – outside the confines of this statutory exception – where the freedoms of the Charter may trump normative governmental concerns.

The decision, however, goes on to specifically address certain varieties of content the court understands to not fall within the scope of the statute. Specifically, Chief Judge McLachlin notes, "Absent evidence indicating a dominant prurient purpose, a photo of a child in the bath will not be caught. To secure a conviction the Crown must prove beyond a reasonable doubt that the 'dominant characteristic' of the picture is a depiction of the sexual organ or anal region 'for a sexual purpose.' If there is a reasonable doubt, the accused must be acquitted."[56] Unlike the aforementioned commentary on privately created – and held –

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[54] *Id.* at 56.
[55] R.S.C., ch. C-46, § 163.1(6)(b) (1985).
[56] R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2, 63-64 (Can.).

imaginary depictions, this portion of the opinion does not appear to constrain the relevant statute so much as to interpret the legislative prose: it is contextually evident that the mere photographic depiction of a child in the nude is not meant to fall within the confines of child pornography and, *ergo*, the court sees fit to making such abundantly clear.

Intriguingly, the court goes on to suggest that while child pornography may be a lingual subset of pornography, it is to be afforded a separate variety of legal treatment than obscenity. Insinuating the clear distinction between prurient matter involving adults and the same depicting children, the court opines, "The definition of child pornography ... stands independent of the defence of artistic merit ... I do not find it incongruous to interpret the defence of artistic merit to the child pornography offences differently from that developed under the obscenity provisions."[57] This comment is important inasmuch as it stands amidst an opinion that mainly serves to only define and, in some cases, limit the child pornography statute. Here the court appears to be suggesting that a traditional obscenity defense, specifically provided for in the statute, should and will be construed according to a different methodology in cases of child pornography. This suggestion once again begs the *Tin Drum* dilemma.

Proceeding with this analysis, differentiating child pornography and obscenity, the court introduces a compelling policy rationale for the stringent dichotomy:

> 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

[57] *Id.* at 74-75.

> viewing may induce attitudes and arousals that increase the risk of offence.[58]

This finding moves the court's constitutional analysis in a clear direction: the question of whether or not the applicable statute infringes the freedoms provided in the Charter may be presumably answered in the affirmative, but the law itself will be nonetheless defended using the same document's preemptive caveat. Indeed, the Charter itself provides these very freedoms only exist, "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[59] The thrust of the inquiry now shifts to whether the child pornography ordinance in question serves to address behavior outside of those "reasonable limits."

Proceeding into an examination of whether or not the infringement is permissible within these constitutional confines, the Canadian Supreme Court delineates a legal test remarkably similar to the rigorous inquiry the Supreme Court of the United States has come to reference as "strict scrutiny."[60] Specifically, "The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account."[61]

Addressing the first prong of this test, the court construes the statute as being proper, "In the vast majority of the law's applications, the costs it imposes on freedom of expression are outweighed by the risk of harm to children. The Crown has met the burden of demonstrating that the possession of child pornography poses a reasoned apprehension of harm to children and that the goal of preventing such harm is pressing and

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[58] *Id.* at 92.
[59] CAN. CONST. art. I. §1.
[60] "In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available." *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).
[61] *Sharpe*, 1 S.C.R. 45, 2001 SCC 2, 94 (Can.).

substantial."[62] Essentially, and in light of its aforementioned discussion of the pervasive harms of child pornography, the court believes the material outlawed by this statute to be of such substantial ill as to give rise to some infringement of the Charter.

The court, however, goes on to find that while the statute does effectively catch material of a dangerous nature, it also encompasses more innocuous content and, as such, is facially overbroad. Chief Judge McLachlin writes:

> However, the prohibition also captures in its sweep materials that arguably pose little or no risk to children, and that deeply implicate the freedoms guaranteed under s. 2(b). The ban, for example, extends to a teenager's sexually explicit recordings of him or herself alone, or engaged in lawful sexual activity, held solely for personal use. It also reaches private materials, created by an individual exclusively for him or herself, such as personal journals, writings, and drawings. It is in relation to these categories of materials that the costs of the prohibition are most pronounced.[63]

This condemnation of the law's broad reach continues:

> The restriction imposed by s. 163.1(4) 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. The distinction between thought and expression can be unclear. We talk of "thinking aloud" because that is often what we do: in many cases, our thoughts become choate only through their expression. To ban the possession of our own

[62] *Id.* at 99.
[63] *Id.* at 101.

> private musings thus falls perilously close to criminalizing the mere articulation of thought.[64]

The court, while clearly mindful of the grave implications of child pornography - as evidenced by earlier portions of this same opinion - appears equally concerned that a benevolently-intentioned statute may contain inadvertently Orwellian provisions. To be sure, this is not a manifestation of the *Tin Drum* dilemma, but instead an intellectual indictment of any so-called free society that dares to conflate thought with action, even when applicable conceptualizations of "action" may be extended to include mere speech. "Thought crimes" are a veritable taboo in the Western world - for panoply of reasons - and the court here seems significantly concerned that one such offense may be found to exist within the Revised Statutes of Canada.

In closing, the court announces its remedy to this delicate situation, electing to preserve the statute in question, but imposing two restrictions on its potential impact:

> The guarantees provided in ss. 2(b) and 7 of the Charter require the recognition of two exceptions to s. 163.1(4), where the prohibition's intrusion into free expression and privacy is most pronounced and its benefits most attenuated: (a) The first exception protects the possession of expressive material created through the efforts of a single person and held by that person alone, exclusively for his or her own personal use. This exception protects deeply private expression, such as personal journals and drawings, intended solely for the eyes of their creator. (b) The second exception protects a person's possession of visual recordings created by or depicting that person, but only where these recordings do not depict unlawful sexual activity, are held only for private use, and were

[64] *Id.* at 103-04.

> created with the consent of those persons depicted.[65]

These two limitations appear clearly targeted at the aforementioned concern regarding thought crimes, and the continued propagation of a Western society that values deeply the forgiving realms of privacy. To the extent journals and similarly therapeutic modes of private expression prove personally redeeming to Canada's citizenry, the court feels any attempt to bring their unobtrusive contents into the prohibited realm of child pornography would be in contravention of the Charter.

The second condition imposed by the Court is slightly more curious; the language used by Chief Judge McLachlin appears to invite protection chiefly for productions created by – and for – legal minors who desire to memorialize their sexual traits or exploits through a visual medium. Since this exemption is limited to the depiction of activities that are themselves legal, this language, when considered in concert with Canada's aforementioned statutory rape law,[66] appears to only impact solo productions, and couple or group productions where all involved parties are between the ages of 16 and 18.

Given the in-depth treatment of the child pornography statutes afforded by *R. v. Sharpe*, and the court's thorough survey of the potential issues presented by the law, the relatively microscopic finding that only two narrow exemptions need be made seems peculiar. *Expressio unius est exclusio alterius* – by identifying, discussing and vividly professing the mandatory allowance of these two additional defenses, the court is inherently suggesting the permissiveness of all other conceivable defenses not enumerated to be unnecessary. The child pornography prohibition is long, broad and far-reaching – even going so far as to deem the mere advocacy of prescribed acts to be impermissible. Yet only four viable exemptions exist – the two included in the statute and the two created by the court.

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[65] *Id.* at 119.

[66] R.S.C, ch. C-46, § 151 (1985).

E. THE UNITED STATES' CHILD PORNOGRAPHY LAW

The United States' prohibition on child pornography is found in a code section titled "Sexual Exploitation and Other Abuses of Children."[67] While the language of this statute has significant historical roots,[68] it was meaningfully modified by the Child Pornography Prevention Act of 1996 (CPPA), which, in relevant part, updated the law to address modern technological advances.[69] The statutes addressing child pornography exist separate and aside from the United States federal law on obscenity.[70]

While this article is predominately concerned with a narrow definitional portion of the CPPA, the broader American prohibition on child pornography is relevant in that it is the language on which the CPPA acts. The United States Code meaningfully addresses this topic in seven parts. Given that Congress' legislative powers over this subject are derived from the Commerce Clause,[71] each provision contains a certain modicum of jurisdictional language, which is beyond the scope of this article's focus.[72]

Each provision shares the common overhanging modifier of "Any person who,"[73] and goes on to enumerate a specific act or

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[67] 18 U.S.C.A. §§ 2251-2260A (West, Westlaw through Oct. 2008 amendments).

[68] *See generally* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225; Child Protection Act of 1984, Pub. L. No. 98-292; Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690.

[69] *See, e.g.*, 18 U.S.C.A. § 2256(8)(b) (West, Westlaw through Oct. 2008 amendments).

[70] 18 U.S.C.A. §§ 1460-1466 (West, Westlaw through Oct. 2008 amendments).

[71] U.S. CONST. art. I, §8, cl. 3.

[72] To be sure, the jurisdictional issues raised by these provisions are fascinating, and certainly fodder enough for diligent academic inquiry. Their exclusion from this article should not be viewed as a qualitative judgment as to their relative importance, but, rather, merely an effort to tightly focus this examination on constitutional matters of speech, not jurisdiction.

[73] 18 U.S.C.A § 2252A(a) (West, Westlaw through Oct. 2008 amendments).

acts that "shall be punished as provided in subsection (b),"[74] with that subsection defining the punitive consequences of such acts.[75] The first excerpt touches "any person who knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography."[76] Truly simplistic, this language serves as a blanket inclusion of those who use interstate commerce to move child pornography.

The second provision, utilizing the same jurisdictional language, touches persons who "receive or distribute"[77] child pornography or "any material that contains child pornography."[78] The third excerpt touches "any person who knowingly reproduces any child pornography,"[79] or who "advertises, promotes, presents, distributes, or solicits... (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct."[80] The specific description of the latter two forms of material, as opposed to the generic use of the term "child pornography," which is a defined term,[81] essentially serves to broaden significantly the scope of this particular prohibition beyond that affecting those who move, receive or distribute suspect material. In essence, a wider net is cast to allow the punishment of those in the business of advertising, promoting, presenting, distributing or soliciting material depicting a minor in a sexually explicit act. This language is also significant in that, like the Canadian statute, it relies on the term "depiction" as a means of encompassing the visualization of

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[74] *Id.*
[75] 18 U.S.C.A. § 2252A(b) (West, Westlaw through Oct. 2008 amendments).
[76] 18 U.S.C.A. § 2252A(a)(1) (West, Westlaw through Oct. 2008 amendments).
[77] 18 U.S.C.A. § 2252A(a)(2) (West, Westlaw through Oct. 2008 amendments).
[78] 18 U.S.C.A. § 2252A(a)(2)(B) (West, Westlaw through Oct. 2008 amendments).
[79] 18 U.S.C.A. § 2252A(a)(3)(a) (West, Westlaw through Oct. 2008 amendments).
[80] 18 U.S.C.A. § 2252A(a)(3)(B) (West, Westlaw through Oct. 2008 amendments).
[81] 18 U.S.C.A. § 2256(8) (West, Westlaw through Oct. 2008 amendments).

acts both real and imagined. The use of "actual minor" in the second provision, juxtaposed to its absence from the first, confirms this reality. This prosaic election, as will be shown later herein, proves important to the Supreme Court in *Ashcroft v. Free Speech Coalition*.[82]

The fourth provision touches any person who "knowingly sells or possesses with the intent to sell any child pornography"[83] within the jurisdictional confines of the statute,[84] while the fifth excerpt uses near-identical language to include any person who "knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography."[85] Much like the first provision, these excerpts contain meanings evident in their simplistic text. The seventh provision is similarly ordinary in its language, touching any person who "knowingly produces with intent to distribute, or distributes, by any means, including a computer, in or affecting interstate or foreign commerce, child pornography that is an adapted or modified depiction of an identifiable minor."[86]

The sixth excerpt, however, is both the most complex and topical for purposes of this article. Subject to the usual litany of jurisdictional restrictions, it affects any person who "knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct."[87] The critical aspect of this language, for purposes of this study, is "or computer generated image or picture," a component that was introduced by the CPPA.[88] It is

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[82] *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).
[83] 18 U.S.C.A. § 2252A(a)(4) (West, Westlaw through Oct. 2008 amendments).
[84] *Id.*
[85] 18 U.S.C.A. § 2252A(a)(5) (West, Westlaw through Oct. 2008 amendments).
[86] 18 U.S.C.A. § 2252A(a)(7) (West, Westlaw through Oct. 2008 amendments).
[87] 18 U.S.C.A. § 2252A(a)(6) (West, Westlaw through Oct. 2008 amendments).
[88] *See Ashcroft*, 535 U.S. at 241.

this terminology that gave rise to the controversy underpinning *Ashcroft v. Free Speech Coalition*.[89]

F. *ASHCROFT V. FREE SPEECH COALITION*

As obscenity law has evolved in the United States, the Supreme Court has taken care to legally differentiate child pornography from other brands of prurient material, ensuring the exploitation of children not be subject to the relatively liberal standards of the test enunciated in *Miller v. California*.[90] In 1982, the Court observed:

> The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.[91]

This assertion suggests the Court to view obscenity laws and child pornography laws to serve a fundamentally different compelling government interest.

Thus, while American case law suggests both obscenity and child pornography to be permissibly regulated, despite the First Amendment's guarantee that "Congress shall make no law ... abridging the freedom of speech,"[92] the rationale for the abrogation of these two suspect forms of speech is fundamentally different. Relevantly, this means that the mere existence of artistic merit – a conclusion that denies a finding of obscenity under the *Miller* test – will not confer protected status upon a work of child

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[89] *See id.*
[90] Miller v. California, 413 U.S. 15, 24-26 (1973).
[91] New York v. Ferber, 458 U.S. 747, 758 (1982).
[92] U.S. CONST. amend. I.

pornography. In making this distinction, the Supreme Court noted:

> The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. "It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value."[93]

With this distinction, however, the dilemma of *Tin Drum* is once again presented. If literary, artistic, political or social value is to be of no consideration, then the line between an internationally award-winning film and a black-market piece of pure exploitation is suddenly blurred to a spectacular degree.

Seemingly cognizant, however, of this distinction between obscenity and child pornography standards, Congress passed the CPPA. The act made several meaningful changes to the existing child pornography laws, but its definitional adjustment proved most notable. In addition to the inclusion of "or computer

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[93] *Ferber*, 458 U.S. at 761 (quoting in part Memorandum of Assemblyman Lasher in Support of NY CLS Penal § 263.15).

generated image or picture" in the sixth excerpt of prohibited material discussed above, the very definition of "child pornography" was changed to cover:

> [A] visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where-- (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) 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; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.[94] [95]

With the inclusion of "computer-generated image" both here and in the list of prohibited matter, a veritable issue arose: the rationale underpinning a different form of consideration for child pornography than ordinary obscenity – i.e., the abuse of children – was no longer applicable.

Realizing this new digital inclusion, as well as the CPPA's addition of other material that does not involve actual minors, the Free Speech Coalition – a California-based group of persons in the adult entertainment industry – and panoply of other parties brought suit to challenge the constitutionality of the law, claiming it to be impermissibly overbroad.[96] The case was dismissed in

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[94] 18 U.S.C.A. § 2256(8) (West, Westlaw through Oct. 2008 amendments).

[95] The term "computer-generated" is hyphenated in 18 U.S.C. § 2256(8) but not in 18 U.S.C. § 2252(a)(6). There does not appear to be any meaningful rationale for this distinction, nor should it be construed for analytical purposes as anything more than a drafting inconsistency.

[96] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 243 (2002).

District Court, but the United States Court of Appeals for the Ninth Circuit reversed, with certiorari then being sought - and granted – by the Supreme Court.[97] In defining the scope of the question at hand, the Supreme Court noted:

> We consider in this case whether the Child Pornography Prevention Act of 1996 (CPPA), abridges the freedom of speech. The CPPA extends the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children. The statute prohibits, in specific circumstances, possessing or distributing these images, which may be created by using adults who look like minors or by using computer imaging.[98]

Ultimately, the Court found these provisions of the CPPA to be unconstitutional, eloquently observing, "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."[99]

In reaching this finding, the Court examined Congress' rationale for expanding existing child pornography laws, analyzing the substantive harm addressed as well as the methodology of the legislative response. Specifically, the Court noted:

> In its legislative findings, Congress recognized that there are subcultures of persons who harbor illicit desires for children and commit criminal acts to gratify the impulses. Congress also found that surrounding the serious offenders are those who

[97] *Id.* at 243-44.
[98] *Id.* at 239-40 (citations omitted).
[99] *Id.* at 255.

> flirt with these impulses and trade pictures and written accounts of sexual activity with young children.[100]

This rationale helps shed light on the inclusion of material that involves youthful-appearing adults and computer-generated matter – Congress is not merely concerned with the exploitation of children that occurs during the production of child pornography but, indeed, the exploitation that social theory suggests to occur as a result of child pornography. In a sense, the legislative intent suggests that prurient depictions of minors are actually a form of enabling the exploitation of minors – the material newly covered by the CPPA is almost tantamount to a so-called gateway drug in that the compelling rationale for its prohibition concerns largely the potential for future acts of a more severe criminal caliber. The Court, however, proved unconvinced that this theory allowed sufficient justification for the law, writing, "The prospect of crime, however, by itself does not justify laws suppressing protected speech."[101]

Understanding these prohibitions to be accordingly impermissible under child pornography jurisprudence, the Supreme Court proceeded to consider whether the subject material might still be subject to prohibition under ordinary obscenity standards. However, as Justice Kennedy writes for the Court:

> The CPPA, however, extends to images that appear to depict a minor engaging in sexually explicit activity without regard to the *Miller* requirements. The materials need not appeal to the prurient interest. Any depiction of sexually explicit activity, no matter how it is presented, is proscribed. The CPPA applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual

[100] *Id.* at 244-45 (citations omitted).
[101] *Id.* at 245.

> abuse. It is not necessary, moreover, that the image be patently offensive. Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards.[102]

This comment of the Court's suggests that Congress may, indeed, proceed with the legislative prohibition of material that feigns child pornography through the use of youthful-appearing actors or digital means, but that such a prohibition must conform to the generally more permissive artistic standards of *Miller*. In essence, Justice Kennedy is noting that the CPPA's expanded definition of child pornography is, for legal purposes, errant – only material involving actual minors may be construed as child pornography, and that merely depicting minors shall, instead, be construed as obscenity. From a legislative point of view, it matters not if this secondary class of material is prohibited as child pornography, obscenity or anything else – the Court will treat it as obscenity.

Insisting upon the application of the *Miller* standard, largely because of its contextual exemption for socially meritorious works, the Court addresses (albeit not specifically) a portion of the dilemma posed by *Tin Drum*:

> [T]eenage sexual activity and the sexual abuse of children ... have inspired countless literary works. William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. In the drama, Shakespeare portrays the relationship as something splendid and innocent, but not juvenile. The work has inspired no less than 40 motion pictures, some of which suggest that the teenagers consummated their relationship. Shakespeare may not have written sexually explicit scenes for the Elizabethean audience, but were modern directors to adopt a less conventional

[102] *Id.* at 246.

> approach, that fact alone would not compel the conclusion that the work was obscene.[103]

Chief Justice Rehnquist, in a dissenting opinion, strongly objects to this rationale of the Court, noting, "[W]e should be loath to construe a statute as banning film portrayals of Shakespearian tragedies, without some indication -- from text or legislative history -- that such a result was intended."[104] (In an apparent demonstration of strict constructionism, Justice Scalia, who otherwise joined in Chief Justice Rehnquist's dissent, makes a specific point of not endorsing this portion of the opinion.)[105]

Still, it is not this rationale that moves the Court to declare the relevant legislative text incompatible with existing normative methods of judicially examining child pornography statutes. The artistic controversy only emerges once this finding is accepted and the Supreme Court proceeds with an obscenity analysis as per *Miller*, and under this rationale the law is nonetheless declared unconstitutional as overbroad. The CPPA, while surely well-intentioned, ultimately proved fatally flawed for its prohibition of otherwise-legitimate speech as a means of preempting the occurrence of future acts.

G. COMMENT

In his order of October 10, 1998, United State District Judge Ralph G. Thompson found, "the inclusion of the three suggestive scenes in issue in a film which does not have the dominant theme of appeal to prurient interest and is a serious bona fide artistic work, does not warrant its subjection to the criminal penalties of the child pornography statute."[106] With this finding, *Tin Drum* was once again legal in Oklahoma.

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[103] *Id.* at 247 (citing Romeo and Juliet, act I, sc. 2, l. 9 ("She hath not seen the change of fourteen years"); Romeo and Juliet (B. Luhrmann director, 1996)).
[104] *Ashcroft*, 535 U.S. at 270 (Rehnquist, C.J., dissenting).
[105] *Id.* at 271 n.2 (Rehnquist, C.J., dissenting).
[106] Oklahoma v. Blockbuster Videos, Inc., 1998 U.S. Dist. LEXIS 22096, at 18.

Still, the very fact that this Oscar-winning production was forced through the rigors of the judicial process suggests American child pornography jurisprudence to have reached a point of such thorough blurring as to render questionable works of acclaimed artistic merit. This has led New York University School of Law Associate Professor Amy Adler[107] to observe, "If we pushed the definition in the evolving case law to the extreme, it seems to threaten all pictures of unclothed children, whether lewd or not, and even pictures of clothed children, if they meet the hazy definition of 'lascivious' or 'lewd.'"[108]

The Supreme Court's reasoning in *Ashcroft*, published after Ms. Adler's commentary, does little to alleviate the concerns raised by *Tin Drum* – the actor in that movie was an actual child, not a youthful-appearing adult or computer simulation.[109] In fact, despite portraying a boy of 16 years, the actor was only 11 years old at the time of his performance.[110] Had the scenes' filming required actual sexual contact, the end product may still be prohibited matter in the American heartland.[111] Indeed, if the young actor had actually been required to engage in genuine sexual activity as part of the role, the debate over whether or not the film constitutes child pornography would be secondary, with the movie itself being evidence of another crime: statutory rape. In Canada the sexual touching of anyone under the age of 16 is illegal[112] and American state laws serve to prohibit the same variety of activity.[113]

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[107] Ms. Adler is now a Professor of Law, but was an Associate Professor of Law at the time she published this quoted material. *Compare* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001) *with* Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108 (2005).

[108] Amy Adler, *The Perverse Law of Child Pornography* at 240.

[109] *Blockbuster Videos*, 1998 U.S. Dist. LEXIS 22096, at 7 n.2.

[110] *Id.*

[111] *Id.* at 8.

[112] R.S.C., ch. C-46, § 151 (1985).

[113] *See, e.g.*, Tex. Penal Code § 21.11 (2007), D.C. Code § 22-3008 (2008).

This reality is compelling inasmuch as it demonstrates how most child pornography is already illegal. Whether a camera is in the room or not, the prurient touching of a child is illegal. Further, to the extent that act of molestation is arranged by others (directors, distributors, etc.), they are part and parcel of a conspiracy to commit the underlying crime, meaning they, too, can be charged under other portions of the penal code. Existing laws also encompass obscenity. Black market child pornography, generally, is obscene – it is difficult to envision an overwhelming quantity of matter containing redeeming literary, artistic, political or scientific value being swapped about on street corners and in underground cyber-exchanges.

Accordingly, it seems the variety of content in the United States and Canada that is criminal only under child pornography laws is not only relatively scarce but, indeed, precisely that ambiguous sort of matter that each country's high court has struggled to address. For a prurient image, production or other material to not contain evidence of any criminal offenses, and to also not prove obscene, it must – by logical deduction – be something that does not sexually harm a minor and that is of sufficient social character to not be obscene. If the act is legal to perform or view in person, and its visual preservation isn't obscene, it seems counter-intuitive to outlaw its second-hand viewing.

If society does not deem the penalties for such underlying offenses sufficient to address, and deter, child pornography, it is rather simple to amend relevant statutes. The sentences for obscenity can include an enhancement for material that includes children, and the punishment for statutory rape – as well as other forms of child molestation or endangerment – can, too, contain enhancement clauses for when the act is memorialized with intent to distribute. This jurisprudential approach would encompass the same seedy lineup of characters already indictable under child pornography laws – with the possible exception of customers.

With regard to those customers, arguably the least harmful link in the chain already, it may be that criminalization is in error.

There are, generically, two varieties of persons who possess and consume child pornography: Those who take a prurient interest in its contents, and those who do not. The latter variety of persons are largely similar to those who own, rent or view a copy of *Tin Drum* in that while it may be argued that they have run afoul of the letter of the law, they certainly have not violated its spirit. Philosophically, the punishment of these individuals is problematic.[114]

As for those customers who do posses and consume child pornography for prurient purposes, the analysis is more troubling. On one hand, there can be little question as to their moral culpability - to derive any modicum of pleasure from the degradation of children is decidedly repulsive. Yet given the premium both the United States and Canada place on free speech and personal privacy, it does bear pondering whether their acts should be criminalized. The harms perpetrated through mere possession of child pornography are inherently secondary - the possessor is not the one who harmed a child or created obscene matter.[115] But for the obvious moral concerns, this lone viewer is almost indistinguishable from the curious citizen who watches one of the many troubling beheading videos now available on a fairly wide basis. While the intent behind the viewing, and reaction, are surely different, to punish based solely on these elements would be to propagate the variety of thought crimes long ago shunned in the Western world.

It is argued that those who view child pornography may have a propensity to then pursue acts of sexual deviation with actual children. These subsequent acts, however, are already illegal. To punish based solely on the potential - no matter how great - of their occurrence would be not merely Orwellian but, indeed, an outright affront of the democratic principles of free will

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[114] *See* Aristotle, Nicomachean Ethics, Bk. V, ch. 4 (350 B.C.E.).

[115] Of course, to the extent that anyone who possesses child pornography is also the creator of the material, or part of the aforementioned conspiracy, they are already subject to criminal penalty and, thus, fall outside the class of individuals being discussed here.

that provide a foundation for much of Canadian and American society. *Post hoc ergo propter hoc.* As the Supreme Court of the United States eloquently observes in *Ashcroft*, "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.'"[116]

There is, of course, a policy reason for criminalizing possession of child pornography: it deters the purchase of such exploitive matter and, in doing so, lessens the financial incentive that drives production. Yet if advanced, liberal societies like the United States and Canada are to stand in opposition to the concept of punishing one's thoughts, the ability to distinguish between those who view acts of child exploitation and those who view other illegal acts is greatly diminished. It is one thing to declare the photograph, recording or other instrument to be evidence of criminality; it is altogether a different thing to declare that those who voluntarily view such evidence are, themselves, guilty of a crime.

Canada and the United States both have an altogether proper, strong national interest in the protection of their children. As one scholar notes, "Children occupy a privileged position within liberalism, because they are deemed to lack the capacity to make their own choices and decisions."[117] It may also be contended that each nation has a certain interest in prohibiting obscene matter from corrupting the morals of its population. Yet each of these objectives is theoretically achieved through laws separate and apart from child pornography statutes. In this regard, the variety of legislation discussed in both *Ashcroft* and *Sharpe* is largely surplusage - the further criminalization of already prohibited acts. Accordingly, it bears considering why either nation should tolerate the persistence of such a blurred

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[116] *Ashcroft* 535 U.S. at 253 (quoting in part Stanley v. Georgia, 394 U.S. 557, 566 (1969)).

[117] Susan M. Easton, The Problem of Pornography: Regulation and the Right to Free Speech 23 (1994).

realm of law, full of faults and moral contention, if a specific prohibition on child pornography is not even necessary to achieve the desired ends.