二零零二年四月十六日
美國最高法院就兒童色情物品所作判決
及該項判決對本港《防止兒童色情物品條例草案》的影響

本文件應法案委員會成員在二零零二年五月三日第二次會議上提出的要求而擬備，分析今年四月十六日美國最高法院 Ashcroft, Attorney General, et al. v. Free Speech Coalition 一案中推翻《**1996** 年防止兒童色情物品法》(**Child Pornography Prevention Act of 1996**)主要條文的判決(見附件 A)（本文件所有附件只具英文本），並引用其他國家有關的判決及法例，分析上述判決對本港**《防止兒童色情物品條例草案》**的影響。

美國最高法院裁判：

Ashcroft, Attorney General, et al. v. Free Speech Coalition

《1996 年防止兒童色情物品法》

2. 這項法例把美國聯邦政府禁制兒童色情物品的的範圍擴大，除利用真正兒童製作的色情影像*(《美國法規》(U.S. Code)標題 18 第 2256(8)A)條)*外，還涵蓋對"是或看似是未成年人明顯涉及性的行為"的"任何視像描劃，包括任何照片、影片、錄影帶、圖像或電腦圖片或電腦產生的影像圖片"*(第 2256(8)(B)條)*[1]。因此，*第 2256(8)(B)條*禁制一系列明顯的涉及性的行為的影像(或有稱為"虛擬的兒童色情物品")；這些影像看似描劃未成年人，但實際上並非利用真正兒童製作，而是以其他方法製作，例如利用外貌年青的成人或借助電腦繪圖技術。

---

[1] 除有關"看似"的條文外，《1996 年防止兒童色情物品法》亦禁止"宣傳、推廣、展示、描述或分發任何明顯涉及性的行為的影像，以致給人一種印象"，覺得該影像描劃"參與明顯涉及性的行為的未成年人"(第 2256(8)(D)條)。訂立第 2256(8)(D)條的目的，是防止製作或分發以兒童色情物品為名目招徠的色情物品。這條法例亦已被最高法院裁定違憲。

3. 這宗訴訟由一個成人娛樂事業協會和其他有關人士提出。反對《1996 年防止兒童色情物品法》的理由是“看似”的條文*(第 2256(8)(B)條)*，過於籠統、含糊，以致打擊受美國憲法第一修正案(First Amendment)保障的創作活動。第一修正案指令，國會不得立法限制言論自由。

判決

4. 美國最高法院以六對三多數票，裁定“看似”的條文*(第 2256(8)(B)條)*和“給人一種印象”的條文過於籠統，且有違憲法。

5. 大法官 Kennedy 的判決獲其他四位法官贊同。他指出，根據美國既定的法律原則，一般來說，色情物品如按照 Miller v. California (413 U.S.15)案的原則屬*淫褻*，才可加以禁制。此外，凡描劃真正兒童的色情物品，不論有關影像是否淫褻，一律予以禁制，這是基於美國致力保護兒童免他們在製作過程中受利用進行色情活動(New York v. Ferber, 458 U.S. 747, 758)，並致力檢控利用兒童進行色情活動的人(New York v. Ferber, 458 U.S. 761)。

6. 根據 *Miller* 案的裁判，禁制淫褻物品表示政府必須證明有關物品在整體上挑起淫念，以*社會規範*來說明顯惹人反感，同時也欠缺在嚴肅文學、藝術、政治或科學方面的價值。此外，要確定有關物品的*補償價值*，必須從整體評價。假如有關場面屬故事情節，即使該場面獨立來看或會惹人反感，但作品本身也不會基於這個原因而成為淫褻物品。

7. 最高法院裁定第 2256(8)(B)條規管的範圍超出了 *Miller* 案對淫褻物品的禁制範圍；因為不論以何種方式描劃明顯的涉及性的行為，也在該條禁制之列。該條法例涵蓋所有看似描劃 17 歲的人參與明顯的涉及性的行為的圖像，即使這類圖像*並非*在所有情況下都違反*社會規範* [2]。最高法院指

---

[2] 具體來說，大法官 Kennedy 發現《防止兒童色情物品法》“適用於心理學手冊內一幅圖像和一套描劃性虐待慘況的電影。”

出，第 2256(8)(B)條的另一個問題，就是連具有重大補償*價值*的言論也加以禁制。最高法院關注到該條法例禁制涉及青少年參與性行為的意念的視像描劃，但青少年性愛行為卻是現代社會存在的現實，也是多個世紀以來文藝作品的題材。有多部備受好評的電影描劃參與性行為的青少年，均選用外貌年輕的成人演員。根據上述法例，這些電影會一律受管制，而其文學價值不會成為考慮因素。

8. 最高法院指出，*Ferber* 案的判決也不支持第 2256(B)條的規定。該案的判決確認禁制兒童色情物品的分發、銷售和製作，因為這些作為本身在兩方面涉及性侵犯兒童。首先，這些色情物品是兒童受性侵犯的永久記錄，繼續流傳只會損害曾參與其事的兒童；其次，販賣兒童色情物品所得到的利潤誘使更多人投入製作。

9. 第 2256(8)(B)條規管的範圍超出了 *Ferber* 案的禁制範圍。該條法例禁制看似是兒童色情物品的視像描劃，即使在其製作過程中並不涉及真實侵犯兒童事件。

10. 對政府認為兒童色情物品鮮見具有價值的言論，最高法院持相反看法。最高法院認為虛擬的兒童色情物品可能會具有重要價值，因它可作為另一種可容許的表達工具。

11. 此外，最高法院駁回政府提出支持《防止兒童色情物品法》各項禁制的其他論點。政府的論點如下：

(a) 戀童癖者可能會利用虛擬的兒童色情物品誘惑兒童；
(b) 虛擬的兒童色情物品會刺激戀童癖者的色慾，並會誘使他們從事非法行為；
(c) 要杜絕利用真正兒童製作色情物品的市場，必須禁制這類虛擬影像；以及
(d) 由於難以分辨影像究竟是利用真人兒童還是由電腦繪圖技術製作，因此必須同時禁制以這兩類方式製作的影像。

最高法院駁回上述論點，主要是由於他們認為虛擬的兒童色情物品與真實虐兒事件兩者之間沒有必然和直接的關係。另外，假如可利用電腦虛擬影像製作色情物品，沒有多少個色

情物品製作人會甘冒受檢控之險而侵犯真人兒童。最高法院也十分重視成人所享有的自由。

12. 最高法院更裁定第 2252A(c)條所訂的免責辯護並不足夠。該條規定假如被告可證明所製作的物品只利用成人，而另一方面，分發的方式也沒有給人一種印象，覺得物品描劃真人兒童，便可引用免責辯護。不過，該項免責辯護只適用於“管有”罪行，而且並不適用於以電腦繪圖技術產生的影像。

13. 大法官 Clarence Thomas 也是最高法院持多數意見的法官，在他另擬的判詞中，他認為“政府維護《防止兒童色情物品法》的最可令人信服之處是檢控理據—管有和傳播真人兒童的色情影像的人，可藉聲稱有關影像由電腦產生，為其罪行製造合理疑點，從而免被定罪”。不過，雖然政府能列舉有被告人提出該項免責辯護的個案，但卻沒有列舉有被告人提出該項免責辯護而得直的案例。因此，大法官 Thomas 得出的結論是，他會贊同佔多數的法官的看法，直至政府能證明實在有需要防止被告人提出該項免責辯護。

14. 法官 Sandra Day O'Connor 對於上文的意見同意與反對參半[3]。她認為看似描劃未成年人參與明顯的涉及性的行為的影像與實際侵犯兒童事件兩者之間的因果關係過於薄弱。她以條文過於籠統為理由而推翻“看似”的條文，但只限於一個情況，就是該項條文用於規管歸入*年青成年人色情物品*這個小分類的案件，因為這個小分類的電影可能在嚴肅文學、藝術或政治方面具有價值。不過，她支持禁制電腦產生的兒童色情物品，但表明禁制只限於幾可亂真的視像描劃，因為觀看者根本不會察覺到這類色情物品實際上並非真正兒童的攝影圖像。她強調保護兒童是不可推卸的責任，並認同政府的“檢控理據”(見上文第 13 段)。此外，她指出未有人能舉出具有重大價值或不會促使兒童受侵犯的虛擬的兒童色情物品的實例。

---

[3] 對於法官 O'Connor 反對的事項，首席法官 William H. Rehnquist 和法官 Antonin Scalia 表示亦有同感。

15. 最後，首席法官 Rehnquist 與法官 Scalia 均不同意佔多數的法官的看法。首席法官 Rehnquist 支持保留“看似”的條文，並把該項條文的釋義收窄，只適用於禁制利用電腦產生但實際上難以區分是否涉及真正兒童的露骨兒童色情物品。色情物品如純粹暗示性行為或利用外貌年青的成人演出，則不受規管。首席法官 Rehnquist 強調必須執行國家的兒童色情物品法例，他並不同意佔多數的法官指《防止兒童色情物品法》違反言論自由權利的觀點。

加拿大最高法院就 R. v. SHARPE[4] 案的裁決

16. 在美國最高法院以表達自由為理據而推翻 Ashcroft 案中“看似”的條文以前，加拿大最高法院在二零零一年一月二十六日 R. v. Sharpe 案中卻支持加拿大的相應法律條文，認為有充分理據限制該項自由（判決載於附件 B）。

17. Sharpe 被控根據加拿大《刑法》(Criminal Code) 第 163.1(4)條所訂的兩項管有兒童色情物品的罪名及其他罪名。他質疑第 163.1(4)條是否違憲，指稱該項條文違反憲法保障的表達自由。

18. 根據《刑法》第 163.1(1)條的定義，“兒童色情物品”包括顯示未滿 18 歲或被描劃為未滿 18 歲的人參與或被描劃為參與明顯的涉及性的活動的視覺影像，而有關視覺影像的主要特徵，是為涉及性的目的描劃未滿 18 歲的人的性器官或肛門範圍。“兒童色情物品”也包括鼓吹或慫使與未滿 18 歲的人進行某項性活動的視覺影像及文字材料，只要根據《刑法》，與未滿 18 歲的人進行該項性活動即屬犯罪的。

19. 儘管被告以侵犯表達自由為其中一個理據來質疑第 163.1(4)條，並測試該條文是否符合“合理”、“相稱”和“構成是低程度的限制”三個準則，但加拿大最高法院全部

---

[4] [2001] 1 S.C.R. 45；2001 SCC 2；2001 S.C.R. LEXIS 2

九位法官均支持第 163.1(4)條，他們確認：

(a) 幻想創作的視覺作品與真人描劃均一概禁止；以及
(b) 如某些視覺描劃在明理的觀察者眼中看似未滿 18 歲的人參與明顯的涉及性的活動，則這些視覺描劃一概禁止。

20. 有關第 163.1(4)條是否只限於涉及真正兒童的兒童色情物品的問題，判決書第 38 段說明：

> *“……禁止管有的是否只限於真人的影像，或是否延伸至幻想創作的繪圖、卡通或電腦產生的合成影像。所得的證據顯示，不論是否描劃真正兒童，明顯的涉及性的物品也是有害的。再者，以現代製作科技的質素，我們也很難把“真人”與電腦創作影像或合成影像區分。既然國會把管有對兒童構成合理傷害風險的物品列作刑事罪行，則根據此目的對“人”作出釋義，似乎除了真人的描劃外，也應該包括幻想創作的視覺作品。儘管控告的條文和第 163.1(1)(b)條中的“人”指有血有肉的人，但我最終認為第 163.1(1)(a)條中的“人”也包括真人和構想出來的人。”*

21. 全部九位法官甚至堅持禁制*鼓吹*或*慫使*與與未滿 18 歲的人進行某項性活動的*文字材料*或*視覺影像*，只要根據《刑法》，與未滿 18 歲的人進行該項性活動即屬犯罪的[5]。

22. 各法官確認管有兒童色情物品（一種表達工具）是《憲章》(Charter)所保障的一種表達形式。不過，法院注意

---

[5] 佔多數與佔少數的法官意見不一之處如下：佔多數的法官列出對兒童構成輕微傷害或不會構成傷害的兩類物品，並把這兩類物品撇除於第 163.1(4)條的範圍以外。這兩類物品分別是(1)由被告創作和只由被告管有的文字材料或視覺影像，而僅作個人用途者；以及(2)由被告創作或描劃被告但不是描劃非法性活動的視覺記錄，而只由被告管有作個人用途者。這兩類例外情況同樣適用於第 163.1(2)條“製作”兒童色情物品的罪行，但不適用於印刷、出版或管有作發布用途的兒童色情物品。佔少數的法官則認為無需列出這兩類例外情況，因為這些類別同樣構成傷害。

到，國會通過第 163.1(4)條，是要達到一個迫切和重要的目標，就是把管有對兒童構成某程度傷害風險的物品列作刑事罪行。在下列五方面，法院認為管有兒童色情物品對兒童構成傷害：

(a) 兒童色情物品會令人誤解與兒童進行性行為是可以接受的；
(b) 這類物品令人產生性幻想，促使人們犯罪；
(c) 禁止管有這類物品可有助執法工作，從而減少製作、分發和使用這類對兒童構成直接傷害的物品；
(d) 這類物品可用來唆使和誘惑兒童；以及
(e) 部分兒童色情物品以真人兒童製作。（判決書第 82 至 94 段）

23. 此外，L'Heureux-Dube、Gonthier 和 Bastarache JJ 強調，保護兒童是一個重要和普遍獲得認同的目標。兒童平等權利、他們的人身保障和私隱權益，都是《憲章》賦予的權利。另一方面，兒童色情物品雖然是一種表達形式，但只能獲得較低程度的保障，因為這種表達方式價值不高，與表達自由背後保障的核心價值不大相關。

24. 最高法院也注意到《刑法》第 163.1(6)及(7)條提供了免責辯護，以保障表達自由；這些包括"具有藝術價值"、"為教育、科學或醫學的目的"和"有利公益"。

25. L'Heureux-Dube、Gonthier 和 Bastarache JJ[6] 表示，如果在整體背景下研究有關條文產生的效果，則法例帶來的利益遠遠超過對表達自由和私隱權益構成的任何損害。雖然有關法例妨礙了某些人尋求自我滿足，但這種尋求自我滿足的形式只屬於可鄙和猥褻的層次。那些管有兒童色情物品***（不論是否涉及真正兒童）***的人在尋求自我滿足時，卻損害到所有兒童的權利。因此，禁止管有這類物品符合加拿大*《憲章》*的價值觀。此舉可培育和維護兒童的尊嚴，同時帶

---

[6] 判決書第 242 段。

出一項信息，就是兒童與社會上其他成員一樣，都受到同等的尊重。國會制定了一條合理的法例；這條法例也是一個自由民主的社會所需的。

英國

26. 根據英國的《**1988** 年刑事司法法》(**Criminal Justice Act 1988**)第 160 條，任何人管有兒童的不雅照片或虛擬不雅照片，即屬犯罪。若整體證據顯示某人在照片中看似未滿 16 歲[7]，則該人會被視作當時是兒童。按照定義，“虛擬照片”[8]指由電腦繪圖技術或其他方法產生而看似照片的影像。若任何虛擬照片所顯示的人給人的印象是兒童，則就本法例的各方面而言，該照片會被視作顯示兒童；即使該照片所顯示的人具有一些成人[9]的身體特徵，但如果該照片顯示的人給人的總體印象是兒童，則也會被視作顯示兒童。

27. 上訴法庭在 **R. v. Land**[10] 案中對“證據顯示”條文作出詮釋，並確認該項條文在無法辨認被不雅描劃的人或無法確定其年齡的情況下十分重要。上訴法庭表示：

> “〔該“證據顯示”條文〕顯示針對要辨認照片所描劃的身分不詳人士和要確定其年齡這兩方面所明顯存在的困難，因而這條文凸顯出就《1978 年保護兒童法》而言該人是否兒童，是推論所得的事實，正式證明並非必需…”

上訴法庭依據“證據顯示”條文，維持被告罪名成立的判決。

---

[7] 見《1978 年保護兒童法》(Protection of Children Act 1978)第 2(3)條，該條根據《1988 年刑事司法法》(Criminal Justice Act 1988)第 160(4)條執行。

[8] 見《1978 年保護兒童法》第 7(7)條，該條根據《1988 年刑事司法法》第 160(4)條執行。

[9] 見《1978 年保護兒童法》第 7(8)條，該條根據《1988 年刑事司法法》第 160(4)條執行。

[10] [1999]QB 65[1998] 1 All ER 403, [1998] 3 WLR 322, [1998] 1 FLR 438, 162 JP 29, [1998] Fam Law 133

28. 提述“虛擬照片”，目的是針對電腦產生的影像。國務大臣 David Maclean 曾在下議院代內政大臣回覆一個問題，他在書面回覆中表示（一九九三年十二月七日下議院議事錄第 234 卷第 161 欄）：

> “我們建議擴大現行法例的規管範圍，以便涵蓋電腦製造的模擬兒童色情物品，並就對電腦色情物品有影響的法例作出其他重大修訂。”

新南威爾斯

29. 根據澳洲新南威爾斯的《1900 年刑事罪行法》(Criminal Act 1900)，兒童色情物品指基於指明理由被列為“拒予分類”[11] 的影片、刊物或電腦遊戲，或如進行分類會基於指明理由列為“拒予分類”的未經分類的影片、刊物或電腦遊戲，指明理由即有關物品描述或描劃未滿 16 歲兒童或**看似未滿 16 歲兒童**（不論是否參與涉及性的活動）的方式，可能會引起明理的成人反感。

30. 條文內“看似未滿 16 歲兒童”的字眼表示證明表面年齡便已足夠。此外，由於電腦遊戲在法例涵蓋範圍之內，因此虛擬影像也受到管制。雖然沒有找到新南威爾斯法庭就虛擬影像所作出的裁決，但根據記錄，在澳洲昆士蘭曾經有人因為管有虐兒電腦遊戲而被定罪；有關電腦遊戲看來涉及電腦產生的影像，而並非真人兒童[12] 的影像。

---

[11] “拒予分類”指分類委員會(Classification Board)根據澳洲聯邦的《1995 年分類(刊物、影片及電腦遊戲)法》(Classification (Publications, Films and Computer Games Act) 1995)所劃分的類別。根據該項法例，刊物、影片或電腦遊戲可列為“拒予分類”的類別，其中一項理由是，其“描述或描劃未滿 16 歲兒童或看似未滿 16 歲兒童（不論該兒童是否參與涉及性的活動）的方式可能會引起明理的成人反感”。

[12] 澳洲的最高法院和上訴法庭就一項判刑上訴個案作出裁決時，明確表示，承認控罪的答辯人的其中一項罪名是管有虐兒電腦遊戲；有關電腦遊戲看來涉及電腦產生的影像，而並非真人兒童的影像（R. v. Hoch; exparte AG [2001] QCA 63(2001 年 2 月 26 日)）

海外案例和法例的分析

31. 從上文有關海外案例和法例的概況看來，四個司法管轄區的法例雖然用詞不同，但均包含“看似”的概念，用於表面年齡和電腦產生的影像兩方面—

(a) “若整體證據顯示某人在被拍攝時看似未滿 16 歲，則該人會被視為當時是兒童。”(英國)
(b) “未滿 18 歲或被描劃為未滿 18 歲的人”(加拿大)
(c) “未成年人或看似未成年人”(美國)
(d) “未滿 16 歲或看似未滿 16 歲的兒童”(澳洲新南威爾斯)

換言之，四個司法管轄區的立法機關全都決定，利用外貌年青的成人[13]和電腦產生的影像所製作的色情物品，均應禁制。

32. 立法機關的決定獲加拿大最高法院予以肯定和支持，只有少數的例外情況[14]。此外，有關禁制看來從未在英國或澳洲新南威爾斯的法庭受到質疑。

33. 美國最高法院推翻對沒有利用真人兒童製作的色情物品的禁制，所持理由是該項禁制是對表達自由的不合理限制。不過，雖然加拿大的類似禁制也因表達自由的觀點而受到質疑，但加拿大最高法院卻作出完全不同的裁判，並且認為保留禁制是合理的。兩國法院提出的觀點值得我們考慮。

---

[13] 唯一的“例外情況”是，《美國法規》第 2252A(c)條載有免責辯護，訂明：“凡被控違反第(a)款..第(2)段[接收]..或第 4 段[擁有以圖出售]的人，如證明以下情況，可以此作為免責辯護—
(1) 被指稱的兒童色情物品是利用一個或多於一個真人參與明顯涉及性的行為而製作；
(2) 該等真人在有關物品製作時全部都是成人；及
(3) 被告人宣傳、推廣、展示、描述或分發該物品時，所用方式並無給人一種印象，覺得有關物品是對未成年人參與明顯的涉及性的行為的視覺描劃或含有該等視覺描劃。

[14] 見上文註腳 5。

34. 首先，美國法院再三申明重視言論自由，並確認看似是兒童色情物品的物品也是一種應該受到保障的言論表達形式。保護兒童的觀點只是略有提及。加拿大法院的取態較為平衡；不僅重視《憲章》賦予的言論自由，而且指出兒童是社會上最脆弱的群體之一，因此強調保護兒童是一個重要和普遍獲得認同的目標，加拿大法院同時也尊重兒童的平等權利、他們的人身保障和私隱權益。由此帶出的第一個問題是：“社會人士面對兒童色情物品的問題時，如何權衡保護兒童和表達自由這兩方面的輕重？”

35. 第二，在上述兩件案件中，美國政府和加拿大政府分別就看似是兒童色情物品的物品所造成的實質傷害和涉及心態方面的遺害而提出的論據十分相似。可是，美國法院並不承認製作該類色情物品與真實侵犯兒童事件兩者之間存在因果關係，儘管美國國會的調查結果認為因果關係確實存在。與美國法院的看法不同，加拿大法院同意兩者存在這種關係，並接納國會作出的評估。由此帶出的第二個問題是：“社會人士如何評估看似是兒童色情物品的物品對兒童所造成的傷害和對兒童的真實侵犯？”

36. 第三，美國法院並不承認虛擬的兒童色情物品與真實侵犯兒童事件兩者之間存在因果關係，同時很快便指出虛擬的兒童色情物品具有重要價值，可作為一種可容許的表達工具。美國法院更肯定，假如可利用電腦虛擬影像製作色情物品，沒有多少個色情物品製作人會甘冒受檢控之險而侵犯真人兒童。另一方面，加拿大法院卻認為表達自由的權利背後的價值，包括尋求個人的自我滿足、藉公開交流意見追尋真理，以及對民主十分重要的政治討論。而兒童色情物品一般都不會有助追尋真理或者引發對加拿大社會和政治事務的討論，因此價值不大。有些人甚至質疑這類色情物品在所謂尋求自我滿足方面的價值，是否只限於達到利用兒童進行色情活動的可鄙目的。由此帶出的第三個問題是：“社會人士認為看似是兒童色情物品的物品具有什麼價值？”

37. 第四，兩國法庭也考慮到，由於難以把真人影像與電腦創作影像或合成影像區分，因此在檢控上產生的困難。隨着現代科技進步，管有和傳播真人兒童的色情影像的人，可藉聲稱有關影像由電腦產生，為其罪名製造合理疑點，從

而免被定罪。加拿大法庭接受以上論點。在美國方面，國會在制定《防止兒童色情物品法》時，亦承認有此困難存在，但法庭就 Ashcroft 一案作出裁決時則拒絕接受該論點。

38. 第五，受保護兒童的年齡限制也是美國法庭判決的關鍵。美國的法庭推翻“看似”的條文，主要是因為該條文禁制一些對青少年的視覺描劃，而這些描劃並沒有違反*社會規範*。根據《防止兒童色情物品法》，只要影像中的人看似未滿 18 歲，便會受到禁制。法庭指出，這個年齡限制不但較許多州份的合法結婚年齡為高，也高於可同意進行性行為的合法年齡，而在現代社會中青少年參與性活動亦是不爭的事實。在加拿大方面，雖然《刑法》第 163.1 條訂明的年齡限制亦為 18 歲，但由於加拿大法庭重視保護兒童和有見於下文所討論的涵蓋範圍廣泛的免責辯護條文，所以有關條文得以保留。

39. 第六，美加兩國防止兒童色情物品立法下的免責辯護規定不同，也是導致兩國法庭作出不同裁判的重要因素。美國的法例並沒有考慮有關描劃的補償價值，這也是美國法庭推翻“看似”的條文的主要原因。幾套備受好評的電影，以至心理學手冊的一幅圖像也被用作實例，以證明《防止兒童色情物品法》禁制範圍不當，使不應禁制的物品受到禁制。另一方面，加拿大法庭並非不重視藝術價值，相反，加拿大的法例不像美國的法例。美國的法例並不保障具有補償價值的作品，但加拿大的法例則訂定明確的免責辯護—“具有藝術價值”、“為教育、科學或醫學的目的”及“有利公益”，使表達自由權利所保障的價值得以確定。

為香港制定《防止兒童色情物品條例草案》

40. 在為香港擬訂上述條例草案時，當局留意到兒童色情物品是國際關注的全球問題。此外，加拿大、英國和澳洲等多個國家均禁制不涉及真人兒童的兒童色情物品。香港不論從作為國際社會的一員的角度，或從本地社會的角度出發，均有迫切需要保護兒童，與各國聯手打擊兒童色情物品。

41. 對於上文第 22 段所載加拿大政府提出兒童色情物品

可能在五方面對兒童構成傷害，我們完全同意。兒童色情物品不論是否涉及真人兒童，同樣極為罪惡，必須加以禁止。我們認為，美國法庭在保護兒童方面沒有給予適當的重視，並在沒有依據的情況下認定看似是兒童色情物品的物品所具有的價值。美國最高法院的裁決代表審理有關案件的法官所持的多數意見，但無論這個裁決有多大的參考價值，我們認為必須從保護兒童的較廣闊觀點來看這件事，而且應該考慮其他國家的經驗。

42. 在適當地考慮了人權方面的問題和參考過上述法庭案例的判決後，當局認為條例草案中對兒童色情物品所下的定義，與表達自由的權利所擬保障的表達方式不大相關。保護兒童的重要性非常高，而且肯定較少數可能對兒童有淫念的人所應有的利益和權利更為重要。值得注意的是，美國的文化和社會背景與香港的不同。美國最高法院的判決雖然可作為有用的參考，但在擬訂條例草案時必須顧及本港和國際社會的價值觀和標準。

43. 另外，檢控上確實存在的困難，我們必須解決。香港並非兒童色情物品的製造中心。絕大部分檢獲的兒童色情物品，都是在海外地方利用外國兒童製作的。因此，要證實在香港檢獲的兒童色情物品中所描劃兒童的身分和年齡，本港執法機關實在無能為力。為有效地執法，法例必須涵蓋描劃看似是兒童的人的色情物品。事實上，美國在二零零二年四月三十日迅速提交《**2002** 年防止兒童淫褻及色情物品法》(**Child Obscenity and Pornography Prevention Act of 2002**)(載於附件 C)，以回應 Ashcroft 一案的裁決。該立法建議的其中一項目的，就是訂明，電腦產生的影像如描劃真人未成年人參與明顯的涉及性的行為，或與描劃真人這樣行為的影像比較“**實際上無法區分**”，均受禁制。國會現正審議這條規管範圍較為的狹窄的法案。美國政府希望這條法案能獲通過，使兒童得到充分保護，免受利用進行色情活動。

44. 在年齡限制方面，我們的建議的規管範圍比美國或

加拿大狹窄。條例草案第 3 條所訂罪行的年齡限制為 16 歲，這與可同意進行性行為的合法年齡看齊[15]。條例草案的目的，是禁制看似描劃未滿 16 歲的人的圖像，因為法律上認為這類人士心智未夠成熟，不能對有關性的事情作出決定，因而特別容易受到傷害。

45. 我們亦接納，某些作品因具有藝術價值，或用於教育、科學或醫學的目的，或有利公益，以致即使可能屬於“兒童色情物品”定義範圍內的物品，也值得受到保護。條例草案第 4(1)條特別就此訂明免責辯護；這樣便可處理美國最高法院所批評美國法例沒有顧及“具有補償價值”的涉及性的描劃的論點。

46. 有人或會辯說，既然並不涉及真正兒童，條例草案中“看似”的條文便是對思想自由和表達自由的箝制。其實當局十分重視這兩種自由，並致力加以保障。條例草案所建議施加的限制恰當適中，而且理由充分，因為保護兒童有迫切的需要。值得注意的是，加拿大《憲章》保障各種形式的自由，而該國在法例中明文禁止提倡或慫使與未滿 18 歲的人進行某項性活動的文字材料或視覺影像，只要該項性活動根據《刑法》屬犯罪行為，而最高法院在作出裁決時亦支持這項禁制。然而，條例草案並不打算禁止以文字表達的兒童色情物品。

47. 根據上述原因，當局藉條例草案，建議一些它認為合理和相稱的限制，以達到保護兒童的目的。

二零零二年六月
保安局

[a:US judgment-chi.doc]

---

[15] 條例草案對《刑事罪行條例》(第 200 章)增訂 138A 條，禁止促致、提供或利用未滿 18 歲的人，以製作色情物品或作真人色情表演。

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ASHCROFT, ATTORNEY GENERAL, ET AL. *v.* FREE SPEECH COALITION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00–795. Argued October 30, 2001—Decided April 16, 2002

The Child Pornography Prevention Act of 1996 (CPPA) expands the federal prohibition on child pornography to include not only pornographic images made using actual children, 18 U. S. C. §2256(8)(A), but also "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct," §2256(8)(B), and any sexually explicit image that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct," §2256(8)(D). Thus, §2256(8)(B) bans a range of sexually explicit images, sometimes called "virtual child pornography," that appear to depict minors but were produced by means other than using real children, such as through the use of youthful-looking adults or computer-imaging technology. Section 2256(8)(D) is aimed at preventing the production or distribution of pornographic material pandered as child pornography. Fearing that the CPPA threatened their activities, respondents, an adult-entertainment trade association and others, filed this suit alleging that the "appears to be" and "conveys the impression" provisions are overbroad and vague, chilling production of works protected by the First Amendment. The District Court disagreed and granted the Government summary judgment, but the Ninth Circuit reversed. Generally, pornography can be banned only if it is obscene under *Miller* v. *California*, 413 U. S. 15, but pornography depicting actual children can be proscribed whether or not the images are obscene because of the State's interest in protecting the children exploited by the production process, *New York* v. *Ferber*, 458 U. S. 747, 758, and

in prosecuting those who promote such sexual exploitation, *id.*, at 761. The Ninth Circuit held the CPPA invalid on its face, finding it to be substantially overbroad because it bans materials that are neither obscene under *Miller* nor produced by the exploitation of real children as in *Ferber*.

Held: The prohibitions of §§2256(8)(B) and 2256(8)(D) are overbroad and unconstitutional. Pp. 6–21.

(a) Section 2256(8)(B) covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in this Court's precedents or First Amendment law. Pp. 6–19.

(1) The CPPA is inconsistent with *Miller*. It extends to images that are not obscene under the *Miller* standard, which requires the Government to prove that the work in question, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value, 413 U. S., at 24. Materials need not appeal to the prurient interest under the CPPA, which proscribes any depiction of sexually explicit activity, no matter how it is presented. 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. The CPPA also prohibits speech having serious redeeming value, proscribing the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature for centuries. A number of acclaimed movies, filmed without any child actors, explore themes within the wide sweep of the statute's prohibitions. If those movies contain a single graphic depiction of sexual activity within the statutory definition, their possessor would be subject to severe punishment without inquiry into the literary value of the work. This is inconsistent with an essential First Amendment rule: A work's artistic merit does not depend on the presence of a single explicit scene. See, *e.g.*, *Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass.*, 383 U. S. 413, 419. Under *Miller*, redeeming value is judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive. See *Kois* v. *Wisconsin*, 408 U. S. 229, 231 *(per curiam)*. The CPPA cannot be read to prohibit obscenity, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the obscenity definition. Pp. 6–11.

(2) The CPPA finds no support in *Ferber*. The Court rejects the Government's argument that speech prohibited by the CPPA is vir-

tually indistinguishable from material that may be banned under *Ferber*. That case upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were "intrinsically related" to the sexual abuse of children in two ways. 458 U. S., at 759. First, as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. See *id.*, at 759, and n. 10. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network. *Id.*, at 760. Under either rationale, the speech had what the Court in effect held was a proximate link to the crime from which it came. In contrast to the speech in *Ferber*, speech that is itself the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children. While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts. The Government's argument that these indirect harms are sufficient because, as *Ferber* acknowledged, child pornography rarely can be valuable speech, see *id.*, at 762, suffers from two flaws. First, *Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the First Amendment's protection. See *id.*, at 764–765. Second, *Ferber* did not hold that child pornography is by definition without value. It recognized some works in this category might have significant value, see *id.*, at 761, but relied on virtual images—the very images prohibited by the CPPA—as an alternative and permissible means of expression, *id.*, at 763. Because *Ferber* relied on the distinction between actual and virtual child pornography as supporting its holding, it provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well. Pp. 11–13.

(3) The Court rejects other arguments offered by the Government to justify the CPPA's prohibitions. The contention that the CPPA is necessary because pedophiles may use virtual child pornography to seduce children runs afoul of the principle that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it. See, *e.g.*, *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 130–131. That the evil in question depends upon the actor's unlawful conduct, defined as criminal quite apart from any link to the speech in question, establishes that the speech ban is not narrowly drawn. The argument that virtual child pornog-

raphy whets pedophiles' appetites and encourages them to engage in illegal conduct is unavailing because the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it, *Stanley* v. *Georgia*, 394 U. S. 557, 566, absent some showing of a direct connection between the speech and imminent illegal conduct, see, *e.g.*, *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 *(per curiam)*. The argument that eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well is somewhat implausible because few pornographers would risk prosecution for abusing real children if fictional, computerized images would suffice. Moreover, even if the market deterrence theory were persuasive, the argument cannot justify the CPPA because, here, there is no underlying crime at all. Finally, the First Amendment is turned upside down by the argument that, because it is difficult to distinguish between images made using real children and those produced by computer imaging, both kinds of images must be prohibited. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612. The Government's rejoinder that the CPPA should be read not as a prohibition on speech but as a measure shifting the burden to the accused to prove the speech is lawful raises serious constitutional difficulties. The Government misplaces its reliance on §2252A(c), which creates an affirmative defense allowing a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is insufficient because it does not apply to possession or to images created by computer imaging, even where the defendant could demonstrate no children were harmed in producing the images. Thus, the defense leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones. Pp. 13–19.

(b) Section 2256(8)(D) is also substantially overbroad. The Court disagrees with the Government's view that the only difference between that provision and §2256(8)(B)'s "appears to be" provision is that §2256(8)(D) requires the jury to assess the material at issue in light of the manner in which it is promoted, but that the determination would still depend principally upon the prohibited work's content. The "conveys the impression" provision requires little judgment about the image's content; the work must be sexually explicit, but otherwise the content is irrelevant. Even if a film contains no sexu-

ally explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that such scenes will be found in the movie. The determination turns on how the speech is presented, not on what is depicted. The Government's other arguments in support of the CPPA do not bear on §2256(8)(D). The materials, for instance, are not likely to be confused for child pornography in a criminal trial. Pandering may be relevant, as an evidentiary matter, to the question whether particular materials are obscene. See *Ginzburg* v. *United States*, 383 U. S. 463, 474. Where a defendant engages in the "commercial exploitation" of erotica solely for the sake of prurient appeal, *id.*, at 466, the context created may be relevant to evaluating whether the materials are obscene. Section 2256(8)(D), however, prohibits a substantial amount of speech that falls outside *Ginzburg*'s rationale. Proscribed material is tainted and unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed, sold, or described. The statute, furthermore, does not require that the context be part of an effort at "commercial exploitation." Thus, the CPPA does more than prohibit pandering. It bans possession of material pandered as child pornography by someone earlier in the distribution chain, as well as a sexually explicit film that contains no youthful actors but has been packaged to suggest a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled. The First Amendment requires a more precise restriction. Pp. 19–20.

(c) In light of the foregoing, respondents' contention that §§2256(8)(B) and 2256(8)(D) are void for vagueness need not be addressed. P. 21.

198 F. 3d 1083, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment. O'CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., and SCALIA, J., joined as to Part II. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, J., joined except for the paragraph discussing legislative history.

SUPREME COURT OF THE UNITED STATES

No. 00–795

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL., PETITIONERS *v.* THE FREE SPEECH COALITION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 16, 2002]

JUSTICE KENNEDY delivered the opinion of the Court.

We consider in this case whether the Child Pornography Prevention Act of 1996 (CPPA), 18 U. S. C. §2251 *et seq.*, 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. The new technology, according to Congress, makes it possible to create realistic images of children who do not exist. See Congressional Findings, notes following 18 U. S. C. §2251.

By prohibiting child pornography that does not depict an actual child, the statute goes beyond *New York* v. *Ferber*, 458 U. S. 747 (1982), which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process. See *id.*, at 758. As a general rule, pornography can be banned only if obscene, but under *Ferber*, pornography showing minors can be proscribed

whether or not the images are obscene under the definition set forth in *Miller* v. *California*, 413 U. S. 15 (1973). *Ferber* recognized that "[t]he *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." 458 U. S., at 761.

While we have not had occasion to consider the question, we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not. The CPPA, however, is not directed at speech that is obscene; Congress has proscribed those materials through a separate statute. 18 U. S. C. §§1460–1466. Like the law in *Ferber*, the CPPA seeks to reach beyond obscenity, and it makes no attempt to conform to the *Miller* standard. For instance, the statute would reach visual depictions, such as movies, even if they have redeeming social value.

The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*.

I

Before 1996, Congress defined child pornography as the type of depictions at issue in *Ferber*, images made using actual minors. 18 U. S. C. §2252 (1994 ed.). The CPPA retains that prohibition at 18 U. S. C. §2256(8)(A) and adds three other prohibited categories of speech, of which the first, §2256(8)(B), and the third, §2256(8)(D), are at issue in this case. Section 2256(8)(B) prohibits "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that

"is, or appears to be, of a minor engaging in sexually explicit conduct." The prohibition on "any visual depiction" does not depend at all on how the image is produced. The section captures a range of depictions, sometimes called "virtual child pornography," which include computer-generated images, as well as images produced by more traditional means. For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." The statute also prohibits Hollywood movies, filmed without any child actors, if a jury believes an actor "appears to be" a minor engaging in "actual or simulated . . . sexual intercourse." §2256(2).

These images do not involve, let alone harm, any children in the production process; but Congress decided the materials threaten children in other, less direct, ways. Pedophiles might use the materials to encourage children to participate in sexual activity. "[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." Congressional Findings, note (3) following §2251. Furthermore, pedophiles might "whet their own sexual appetites" with the pornographic images, "thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children." *Id.*, notes (4), (10)(B). Under these rationales, harm flows from the content of the images, not from the means of their production. In addition, Congress identified another problem created by computer-generated images: Their existence can make it harder to prosecute pornographers who do use real minors. See *id.*, note (6)(A). As imaging technology improves, Congress found, it becomes more difficult to prove that a particular picture was produced using actual children. To ensure

that defendants possessing child pornography using real minors cannot evade prosecution, Congress extended the ban to virtual child pornography.

Section 2256(8)(C) prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although 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*. Respondents do not challenge this provision, and we do not consider it.

Respondents do challenge §2256(8)(D). Like the text of the "appears to be" provision, the sweep of this provision is quite broad. Section 2256(8)(D) defines child pornography to include any sexually explicit image that was "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct." One Committee Report identified the provision as directed at sexually explicit images pandered as child pornography. See S. Rep. No. 104–358, p. 22 (1996) ("This provision prevents child pornographers and pedophiles from exploiting prurient interests in child sexuality and sexual activity through the production or distribution of pornographic material which is intentionally pandered as child pornography"). The statute is not so limited in its reach, however, as it punishes even those possessors who took no part in pandering. Once a work has been described as child pornography, the taint remains on the speech in the hands of subsequent possessors, making possession unlawful even though the content otherwise would not be objectionable.

Fearing that the CPPA threatened the activities of its members, respondent Free Speech Coalition and others challenged the statute in the United States District Court

for the Northern District of California. The Coalition, a California trade association for the adult-entertainment industry, alleged that its members did not use minors in their sexually explicit works, but they believed some of these materials might fall within the CPPA's expanded definition of child pornography. The other respondents are Bold Type, Inc., the publisher of a book advocating the nudist lifestyle; Jim Gingerich, a painter of nudes; and Ron Raffaelli, a photographer specializing in erotic images. Respondents alleged that the "appears to be" and "conveys the impression" provisions are overbroad and vague, chilling them from producing works protected by the First Amendment. The District Court disagreed and granted summary judgment to the Government. The court dismissed the overbreadth claim because it was "highly unlikely" that any "adaptations of sexual works like 'Romeo and Juliet,' will be treated as 'criminal contraband.'" App. to Pet. for Cert. 62a–63a.

The Court of Appeals for the Ninth Circuit reversed. See 198 F. 3d 1083 (1999). The court reasoned that the Government could not prohibit speech because of its tendency to persuade viewers to commit illegal acts. The court held the CPPA to be substantially overbroad because it bans materials that are neither obscene nor produced by the exploitation of real children as in *New York* v. *Ferber*, 458 U. S. 747 (1982). Judge Ferguson dissented on the ground that virtual images, like obscenity and real child pornography, should be treated as a category of speech unprotected by the First Amendment. 198 F. 3d, at 1097. The Court of Appeals voted to deny the petition for rehearing en banc, over the dissent of three judges. See 220 F. 3d 1113 (2000).

While the Ninth Circuit found the CPPA invalid on its face, four other Courts of Appeals have sustained it. See *United States* v. *Fox*, 248 F. 3d 394 (CA5 2001); *United States* v. *Mento*, 231 F. 3d 912 (CA4 2000); *United States* v.

Acheson, 195 F. 3d 645 (CA11 1999); *United States* v. *Hilton*, 167 F. 3d 61 (CA1), cert. denied, 528 U. S. 844 (1999). We granted certiorari. 531 U. S. 1124 (2001).

II

The First Amendment commands, "Congress shall make no law . . . abridging the freedom of speech." The government may violate this mandate in many ways, *e.g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990), but a law imposing criminal penalties on protected speech is a stark example of speech suppression. The CPPA's penalties are indeed severe. A first offender may be imprisoned for 15 years. §2252A(b)(1). A repeat offender faces a prison sentence of not less than 5 years and not more than 30 years in prison. *Ibid.* While even minor punishments can chill protected speech, see *Wooley* v. *Maynard*, 430 U. S. 705 (1977), this case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law. The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, the CPPA is unconstitutional on its face if it prohibits a substantial amount of protected expression. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973).

The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people. 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. See Congressional Findings, notes following §2251; see also U. S. Dept. of Health and Human Services, Admini-

stration on Children, Youth and Families, Child Maltreatment 1999 (estimating that 93,000 children were victims of sexual abuse in 1999). Congress also found that surrounding the serious offenders are those who flirt with these impulses and trade pictures and written accounts of sexual activity with young children.

Congress may pass valid laws to protect children from abuse, and it has. *E.g.*, 18 U. S. C. §§2241, 2251. The prospect of crime, however, by itself does not justify laws suppressing protected speech. See *Kingsley Int'l Pictures Corp.* v. *Regents of Univ. of N. Y.*, 360 U. S. 684, 689 (1959) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech") (internal quotation marks and citation omitted)). It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities. See *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it"); see also *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment'") (quoting *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989); *Carey* v. *Population Services Int'l*, 431 U. S. 678, 701 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression").

As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. See *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 127

(1991) (KENNEDY, J., concurring). While these categories may be prohibited without violating the First Amendment, none of them includes the speech prohibited by the CPPA. In his dissent from the opinion of the Court of Appeals, Judge Ferguson recognized this to be the law and proposed that virtual child pornography should be regarded as an additional category of unprotected speech. See 198 F. 3d, at 1101. It would be necessary for us to take this step to uphold the statute.

As we have noted, the CPPA is much more than a supplement to the existing federal prohibition on obscenity. Under *Miller* v. *California*, 413 U. S. 15 (1973), the Government must prove that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value. *Id.*, at 24. 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 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.

The CPPA prohibits speech despite its serious literary, artistic, political, or scientific value. The statute proscribes the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages. Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. 18 U. S. C. §2256(1). This is higher than the legal age for marriage in many States, as well as the age at which

persons may consent to sexual relations. See §2243(a) (age of consent in the federal maritime and territorial jurisdiction is 16); U. S. National Survey of State Laws 384–388 (R. Leiter ed., 3d ed. 1999) (48 States permit 16-year-olds to marry with parental consent); W. Eskridge & N. Hunter, Sexuality, Gender, and the Law 1021–1022 (1997) (in 39 States and the District of Columbia, the age of consent is 16 or younger). It is, of course, undeniable that some youths engage in sexual activity before the legal age, either on their own inclination or because they are victims of sexual abuse.

Both themes—teenage 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. See Romeo and Juliet, act I, sc. 2, l. 9 ("She hath not seen the change of fourteen years"). 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. *E.g.*, Romeo and Juliet (B. Luhrmann director, 1996). Shakespeare may not have written sexually explicit scenes for the Elizabethean audience, but were modern directors to adopt a less conventional approach, that fact alone would not compel the conclusion that the work was obscene.

Contemporary movies pursue similar themes. Last year's Academy Awards featured the movie, Traffic, which was nominated for Best Picture. See Predictable and Less So, the Academy Award Contenders, N. Y. Times, Feb. 14, 2001, p. E11. The film portrays a teenager, identified as a 16-year-old, who becomes addicted to drugs. The viewer sees the degradation of her addiction, which in the end leads her to a filthy room to trade sex for drugs. The year before, American Beauty won the Academy Award for Best Picture. See "American Beauty" Tops the Oscars, N. Y.

Times, Mar. 27, 2000, p. E1. In the course of the movie, a teenage girl engages in sexual relations with her teenage boyfriend, and another yields herself to the gratification of a middle-aged man. The film also contains a scene where, although the movie audience understands the act is not taking place, one character believes he is watching a teenage boy performing a sexual act on an older man.

Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach. Whether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute's prohibitions. If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value. This is inconsistent with an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene. See *Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass.*, 383 U. S. 413, 419 (1966) (plurality opinion) ("[T]he social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness"). Under *Miller*, the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive. See *Kois* v. *Wisconsin*, 408 U. S. 229, 231 (1972) *(per curiam)*. For this reason, and the others we have noted, the CPPA cannot be read to prohibit obscenity, because it lacks the required link between its

prohibitions and the affront to community standards prohibited by the definition of obscenity.

The Government seeks to address this deficiency by arguing that speech prohibited by the CPPA is virtually indistinguishable from child pornography, which may be banned without regard to whether it depicts works of value. See *New York* v. *Ferber*, 458 U. S., at 761. Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. *Id.*, at 761, n. 12; see also *id.*, at 775 (O'CONNOR, J., concurring) ("As drafted, New York's statute does not attempt to suppress the communication of particular ideas"). The production of the work, not its content, was the target of the statute. The fact that a work contained serious literary, artistic, or other value did not excuse the harm it caused to its child participants. It was simply "unrealistic to equate a community's toleration for sexually oriented materials with the permissible scope of legislation aimed at protecting children from sexual exploitation." *Id.*, at 761, n. 12.

Ferber upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were "intrinsically related" to the sexual abuse of children in two ways. *Id.*, at 759. First, as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being. See *id.*, at 759, and n. 10. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network. "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or

otherwise promoting the product." *Id.*, at 760. Under either rationale, the speech had what the Court in effect held was a proximate link to the crime from which it came.

Later, in *Osborne* v. *Ohio*, 495 U. S. 103 (1990), the Court ruled that these same interests justified a ban on the possession of pornography produced by using children. "Given the importance of the State's interest in protecting the victims of child pornography," the State was justified in "attempting to stamp out this vice at all levels in the distribution chain." *Id.*, at 110. *Osborne* also noted the State's interest in preventing child pornography from being used as an aid in the solicitation of minors. *Id.*, at 111. The Court, however, anchored its holding in the concern for the participants, those whom it called the "victims of child pornography." *Id.*, at 110. It did not suggest that, absent this concern, other governmental interests would suffice. See *infra*, at 13–15.

In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children, as were the materials in *Ferber*. 458 U. S., at 759. While the Government asserts that the images can lead to actual instances of child abuse, see *infra*, at 13–16, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.

The Government says these indirect harms are sufficient because, as *Ferber* acknowledged, child pornography rarely can be valuable speech. See 458 U. S., at 762 ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*"). This argument, however, suffers from two flaws. First, *Ferber*'s judgment about child pornography was based upon how it was made,

not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment. See *id.*, at 764–765 ("[T]he distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection").

The second flaw in the Government's position is that *Ferber* did not hold that child pornography is by definition without value. On the contrary, the Court recognized some works in this category might have significant value, see *id.*, at 761, but relied on virtual images—the very images prohibited by the CPPA—as an alternative and permissible means of expression: "[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative." *Id.*, at 763. *Ferber,* then, not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding. *Ferber* provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well.

III

The CPPA, for reasons we have explored, is inconsistent with *Miller* and finds no support in *Ferber*. The Government seeks to justify its prohibitions in other ways. It argues that the CPPA is necessary because pedophiles may use virtual child pornography to seduce children. There are many things innocent in themselves, however, 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. The Government, of course, may punish adults who provide un-

suitable materials to children, see *Ginsberg* v. *New York*, 390 U. S. 629 (1968), and it may enforce criminal penalties for unlawful solicitation. The precedents establish, however, that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it. See *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115 (1989). In *Butler* v. *Michigan*, 352 U. S. 380, 381 (1957), the Court invalidated a statute prohibiting distribution of an indecent publication because of its tendency to "incite minors to violent or depraved or immoral acts." A unanimous Court agreed upon the important First Amendment principle that the State could not "reduce the adult population . . . to reading only what is fit for children." *Id.*, at 383. We have reaffirmed this holding. See *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 814 (2000) ("[T]he objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative"); *Reno* v. *American Civil Liberties Union*, 521 U. S., at 875 (The "governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults"); *Sable Communications* v. *FCC*, *supra*, at 130–131 (striking down a ban on "dial-a-porn" messages that had "the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear").

Here, the Government wants to keep speech from children not to protect them from its content but to protect them from those who would commit other crimes. The principle, however, remains the same: The Government cannot ban speech fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but

this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.

The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. 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." *Stanley* v. *Georgia*, 394 U. S. 557, 566 (1969). First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. See *Kingsley Int'l Pictures Corp.*, 360 U. S., at 689; see also *Bartnicki* v. *Vopper*, 532 U. S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it"). The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time." *Hess* v. *Indiana*, 414 U. S. 105, 108 (1973) *(per curiam)*. The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) *(per curiam)*. There is here no attempt, incitement, solicitation, or conspiracy. The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connec-

tion, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.

The Government next argues that its objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well. Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children. The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.

In the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive. See *Osborne*, 495 U. S., at 109–110. Even where there is an underlying crime, however, the Court has not allowed the suppression of speech in all cases. *E.g.*, *Bartnicki*, *supra*, at 529 (market deterrence would not justify law prohibiting a radio commentator from distributing speech that had been unlawfully intercepted). We need not consider where to strike the balance in this case, because here, there is no underlying crime at all. Even if the Government's market deterrence theory were persuasive in some contexts, it would not justify this statute.

Finally, the Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. Experts, we are told, may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The

necessary solution, the argument runs, is to prohibit both kinds of images. The 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.

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. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . ." *Broadrick* v. *Oklahoma,* 413 U. S., at 612. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.

To avoid the force of this objection, the Government would have us read the CPPA not as a measure suppressing speech but as a law shifting the burden to the accused to prove the speech is lawful. In this connection, the Government relies on an affirmative defense under the statute, which allows a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. See 18 U. S. C. §2252A(c).

The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a seri-

ous problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor. The statute, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof. Failure to establish the defense can lead to a felony conviction.

We need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms. It allows persons to be convicted in some instances where they can prove children were not exploited in the production. A defendant charged with possessing, as opposed to distributing, proscribed works may not defend on the ground that the film depicts only adult actors. See *ibid.* So while the affirmative defense may protect a movie producer from prosecution for the act of distribution, that same producer, and all other persons in the subsequent distribution chain, could be liable for possessing the prohibited work. Furthermore, the affirmative defense provides no protection to persons who produce speech by using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors. See *ibid.* In these cases, the defendant can demonstrate no children were harmed in producing the images, yet the affirmative defense would not bar the prosecution. For this reason, the affirmative defense cannot save the statute, for it leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones.

In sum, §2256(8)(B) covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment. The provision abridges the

freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional.

IV

Respondents challenge §2256(8)(D) as well. This provision bans depictions of sexually explicit conduct that are "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." The parties treat the section as nearly identical to the provision prohibiting materials that appear to be child pornography. In the Government's view, the difference between the two is that "the 'conveys the impression' provision requires the jury to assess the material at issue in light of the manner in which it is promoted." Brief for Petitioners 18, n. 3. The Government's assumption, however, is that the determination would still depend principally upon the content of the prohibited work.

We disagree with this view. The CPPA prohibits sexually explicit materials that "conve[y] the impression" they depict minors. While that phrase may sound like the "appears to be" prohibition in §2256(8)(B), it requires little judgment about the content of the image. Under §2256(8)(D), the work must be sexually explicit, but otherwise the content is irrelevant. Even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie. The determination turns on how the speech is presented, not on what is depicted. While the legislative findings address at length the problems posed by materials that look like child pornography, they are silent on the evils posed by images simply pandered that way.

The Government does not offer a serious defense of this

provision, and the other arguments it makes in support of the CPPA do not bear on §2256(8)(D). The materials, for instance, are not likely to be confused for child pornography in a criminal trial. The Court has recognized that pandering may be relevant, as an evidentiary matter, to the question whether particular materials are obscene. See *Ginzburg* v. *United States*, 383 U. S. 463, 474 (1966) ("[I]n close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the [obscenity] test"). Where a defendant engages in the "commercial exploitation of erotica solely for the sake of their prurient appeal," *id.*, at 466, the context he or she creates may itself be relevant to the evaluation of the materials.

Section 2256(8)(D), however, prohibits a substantial amount of speech that falls outside *Ginzburg*'s rationale. Materials falling within the proscription are tainted and unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed, sold, or described. The statute, furthermore, does not require that the context be part of an effort at "commercial exploitation." *Ibid.* As a consequence, the CPPA does more than prohibit pandering. It prohibits possession of material described, or pandered, as child pornography by someone earlier in the distribution chain. The provision prohibits a sexually explicit film containing no youthful actors, just because it is placed in a box suggesting a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled. The First Amendment requires a more precise restriction. For this reason, §2256(8)(D) is substantially overbroad and in violation of the First Amendment.

V

For the reasons we have set forth, the prohibitions of §§2256(8)(B) and 2256(8)(D) are overbroad and unconsti-

tutional. Having reached this conclusion, we need not address respondents' further contention that the provisions are unconstitutional because of vague statutory language.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 00–795

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL., PETITIONERS *v.* THE FREE SPEECH COALITION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 16, 2002]

JUSTICE THOMAS, concurring in the judgment.

In my view, the Government's most persuasive asserted interest in support of the Child Pornography Prevention Act of 1996 (CPPA), 18 U. S. C. §2251 *et seq.*, is the prosecution rationale—that persons who possess and disseminate pornographic images of real children may escape conviction by claiming that the images are computer-generated, thereby raising a reasonable doubt as to their guilt. See Brief for Petitioners 37. At this time, however, the Government asserts only that defendants *raise* such defenses, not that they have done so successfully. In fact, the Government points to no case in which a defendant has been acquitted based on a "computer-generated images" defense. See *id.*, at 37–38, and n. 8. While this speculative interest cannot support the broad reach of the CPPA, technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children. In the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction.

The Court suggests that the Government's interest in

enforcing prohibitions against real child pornography cannot justify prohibitions on virtual child pornography, because "[t]his analysis turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech." *Ante*, at 17. But if technological advances thwart prosecution of "unlawful speech," the Government may well have a compelling interest in barring or otherwise regulating some narrow category of "lawful speech" in order to enforce effectively laws against pornography made through the abuse of real children. The Court does leave open the possibility that a more complete affirmative defense could save a statute's constitutionality, see *ante*, at 18, implicitly accepting that some regulation of virtual child pornography might be constitutional. I would not prejudge, however, whether a more complete affirmative defense is the only way to narrowly tailor a criminal statute that prohibits the possession and dissemination of virtual child pornography. Thus, I concur in the judgment of the Court.

SUPREME COURT OF THE UNITED STATES

No. 00–795

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL., PETITIONERS *v.* THE FREE SPEECH COALITION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 16, 2002]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join as to Part II, concurring in the judgment in part and dissenting in part.

The Child Pornography Prevention Act of 1996 (CPPA), 18 U. S. C. §2251 *et seq.*, proscribes the "knowin[g]" reproduction, distribution, sale, reception, or possession of images that fall under the statute's definition of child pornography, §2252A(a). Possession is punishable by up to 5 years in prison for a first offense, §2252A(b), and all other transgressions are punishable by up to 15 years in prison for a first offense, §2252A(a). The CPPA defines child pornography to include "any visual depiction . . . of sexually explicit conduct" where "such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct," §2256(8)(B) (emphasis added), or "such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct," §2256(8)(D) (emphasis added). The statute defines "sexually explicit conduct" as "actual or simulated- . . . sexual intercourse . . . ; . . . bestiality; . . . masturbation; . . . sadistic or masochistic abuse; or . . . lascivious exhibition of the genitals or pubic area of any person." 18 U. S. C. §2256(2).

The CPPA provides for two affirmative defenses. First, a defendant is not liable for possession if the defendant possesses less than three proscribed images and promptly destroys such images or reports the matter to law enforcement. §2252A(d). Second, a defendant is not liable for the remaining acts proscribed in §2252A(a) if the images involved were produced using only adult subjects and are not presented in such a manner as to "convey the impression" they contain depictions of minors engaging in sexually explicit conduct. §2252A(c).

This litigation involves a facial challenge to the CPPA's prohibitions of pornographic images that "appea[r] to be . . . of a minor" and of material that "conveys the impression" that it contains pornographic images of minors. While I agree with the Court's judgment that the First Amendment requires that the latter prohibition be struck down, I disagree with its decision to strike down the former prohibition in its entirety. The "appears to be . . . of a minor" language in §2256(8)(B) covers two categories of speech: pornographic images of adults that look like children ("youthful-adult pornography") and pornographic images of children created wholly on a computer, without using any actual children ("virtual-child pornography"). The Court concludes, correctly, that the CPPA's ban on youthful-adult pornography is overbroad. In my view, however, respondents fail to present sufficient evidence to demonstrate that the ban on virtual-child pornography is overbroad. Because invalidation due to overbreadth is such "strong medicine," *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973), I would strike down the prohibition of pornography that "appears to be" of minors only insofar as it is applied to the class of youthful-adult pornography.

I

Respondents assert that the CPPA's prohibitions of youthful-adult pornography, virtual-child pornography,

and material that "conveys the impression" that it contains actual-child pornography are overbroad, that the prohibitions are content-based regulations not narrowly tailored to serve a compelling Government interest, and that the prohibitions are unconstitutionally vague. The Government not only disagrees with these specific contentions, but also requests that the Court exclude youthful-adult and virtual-child pornography from the protection of the First Amendment.

I agree with the Court's decision not to grant this request. Because the Government may already prohibit obscenity without violating the First Amendment, see *Miller* v. *California*, 413 U. S. 15, 23 (1973), what the Government asks this Court to rule is that it may also prohibit youthful-adult and virtual-adult pornography that is merely indecent without violating that Amendment. Although such pornography looks like the material at issue in *New York* v. *Ferber*, 458 U. S. 747 (1982), no children are harmed in the process of creating such pornography. *Id.*, at 759. Therefore, *Ferber* does not support the Government's ban on youthful-adult and virtual-child pornography. See *ante*, at 10–13. The Government argues that, even if the production of such pornography does not directly harm children, this material aids and abets child abuse. See *ante*, at 13–16. The Court correctly concludes that the causal connection between pornographic images that "appear" to include minors and actual child abuse is not strong enough to justify withdrawing First Amendment protection for such speech. See *ante*, at 12.

I also agree with the Court's decision to strike down the CPPA's ban on material presented in a manner that "conveys the impression" that it contains pornographic depictions of actual children ("actual-child pornography"). 18 U. S. C. §2256(8)(D). The Government fails to explain how this ban serves any compelling state interest. Any speech covered by §2256(8)(D) that is obscene, actual-child por-

nography, or otherwise indecent is prohibited by other federal statutes. See §§1460–1466 (obscenity), 2256(8)(A), (B) (actual-child pornography), 2256(8)(B) (youthful-adult and virtual-child pornography). The Court concludes that §2256(8)(D) is overbroad, but its reasoning also persuades me that the provision is not narrowly tailored. See *ante*, at 19–20. The provision therefore fails strict scrutiny. *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000).

Finally, I agree with Court that that the CPPA's ban on youthful-adult pornography is overbroad. The Court provides several examples of movies that, although possessing serious literary, artistic or political value and employing only adult actors to perform simulated sexual conduct, fall under the CPPA's proscription on images that "appea[r] to be . . . of a minor engaging in sexually explicit conduct," 18 U. S. C. §2256(8)(B). See *ante*, at 9–10 (citing Romeo and Juliet, Traffic, and American Beauty). Individuals or businesses found to possess just three such films have no defense to criminal liability under the CPPA. §2252A(d).

II

I disagree with the Court, however, that the CPPA's prohibition of virtual-child pornography is overbroad. Before I reach that issue, there are two preliminary questions: whether the ban on virtual-child pornography fails strict scrutiny and whether that ban is unconstitutionally vague. I would answer both in the negative.

The Court has long recognized that the Government has a compelling interest in protecting our Nation's children. See *Ferber*, *supra*, at 756–757 (citing cases). This interest is promoted by efforts directed against sexual offenders and actual-child pornography. These efforts, in turn, are supported by the CPPA's ban on virtual-child pornography. Such images whet the appetites of child molesters,

§121, 110 Stat. 3009–26, Congressional Findings (4), (10)(B), in notes following 18 U. S. C. §2251, who may use the images to seduce young children, *id.*, finding (3). Of even more serious concern is the prospect that defendants indicted for the production, distribution, or possession of actual-child pornography may evade liability by claiming that the images attributed to them are in fact computer-generated. *Id.*, finding (6)(A). Respondents may be correct that no defendant has successfully employed this tactic. See, *e.g.*, *United States* v. *Fox*, 248 F. 3d 394 (CA5 2001); *United States* v. *Vig*, 167 F. 3d 443 (CA8 1999); *United States* v. *Kimbrough*, 69 F. 3d 723 (CA5 1995); *United States* v. *Coleman*, 54 M. J. 869 (A. Ct. Crim. App. 2001). But, given the rapid pace of advances in computer-graphics technology, the Government's concern is reasonable. Computer-generated images lodged with the Court by *Amici Curiae* National Law Center for Children and Families et al. bear a remarkable likeness to actual human beings. Anyone who has seen, for example, the film Final Fantasy: The Spirits Within (H. Sakaguchi and M. Sakakibara directors, 2001) can understand the Government's concern. Moreover, this Court's cases do not require Congress to wait for harm to occur before it can legislate against it. See *Turner Broadcasting System, Inc.* v. *FCC*, 520 U. S. 180, 212 (1997).

Respondents argue that, even if the Government has a compelling interest to justify banning virtual-child pornography, the "appears to be . . . of a minor" language is not narrowly tailored to serve that interest. See *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989). They assert that the CPPA would capture even cartoon-sketches or statues of children that were sexually suggestive. Such images surely could not be used, for instance, to seduce children. I agree. A better interpretation of "appears to be . . . of" is "virtually indistinguishable from"—an interpretation that would not cover the exam-

ples respondents provide. Not only does the text of the statute comfortably bear this narrowing interpretation, the interpretation comports with the language that Congress repeatedly used in its findings of fact. See, *e.g.*, Congressional Finding (8) following 18 U. S. C. §2251 (discussing how "visual depictions produced wholly or in part by electronic, mechanical, or other means, including by computer, which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children" may whet the appetites of child molesters). See also *id.*, finding (5), (12). Finally, to the extent that the phrase "appears to be . . . of" is ambiguous, the narrowing interpretation avoids constitutional problems such as overbreadth and lack of narrow tailoring. See *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932).

Reading the statute only to bar images that are virtually indistinguishable from actual children would not only assure that the ban on virtual-child pornography is narrowly tailored, but would also assuage any fears that the "appears to be . . . of a minor" language is vague. The narrow reading greatly limits any risks from "discriminatory enforcement." *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 872 (1997). Respondents maintain that the "virtually indistinguishable from" language is also vague because it begs the question: from whose perspective? This problem is exaggerated. This Court has never required "mathematical certainty" or "meticulous specificity" from the language of a statute. *Grayned* v. *City of Rockford*, 408 U. S. 104, 110 (1972).

The Court concludes that the CPPA's ban on virtual-child pornography is overbroad. The basis for this holding is unclear. Although a content-based regulation may serve a compelling state interest, and be as narrowly tailored as possible while substantially serving that interest, the regulation may unintentionally ensnare speech that has serious literary, artistic, political, or scientific

value or that does not threaten the harms sought to be combated by the Government. If so, litigants may challenge the regulation on its face as overbroad, but in doing so they bear the heavy burden of demonstrating that the regulation forbids a substantial amount of valuable or harmless speech. See *Reno*, *supra*, at 896 (O'CONNOR, J., concurring in judgment in part and dissenting in part) (citing *Broadrick*, 413 U. S., at 615). Respondents have not made such a demonstration. Respondents provide no examples of films or other materials that are wholly computer-generated and contain images that "appea[r] to be . . . of minors" engaging in indecent conduct, but that have serious value or do not facilitate child abuse. Their overbreadth challenge therefore fails.

III

Although in my view the CPPA's ban on youthful-adult pornography appears to violate the First Amendment, the ban on virtual-child pornography does not. It is true that both bans are authorized by the same text: The statute's definition of child pornography to include depictions that "appea[r] to be" of children in sexually explicit poses. 18 U. S. C. §2256(8)(B). Invalidating a statute due to overbreadth, however, is an extreme remedy, one that should be employed "sparingly and only as a last resort." *Broadrick*, *supra*, at 613. We have observed that "[i]t is not the usual judicial practice, . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily." *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 484–485 (1989).

Heeding this caution, I would strike the "appears to be" provision only insofar as it is applied to the subset of cases involving youthful-adult pornography. This approach is similar to that taken in *United States* v. *Grace*, 461 U. S. 171 (1983), which considered the constitutionality of a federal statute that makes it unlawful to "parade, stand,

or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." 40 U. S. C. §13k (1994 ed.). The term "Supreme Court . . . grounds" technically includes the sidewalks surrounding the Court, but because sidewalks have traditionally been considered a public forum, the Court held the statute unconstitutional only when applied to sidewalks.

Although 18 U. S. C. §2256(8)(B) does not distinguish between youthful-adult and virtual-child pornography, the CPPA elsewhere draws a line between these two classes of speech. The statute provides an affirmative defense for those who produce, distribute, or receive pornographic images of individuals who are actually adults, §2252A(c), but not for those with pornographic images that are wholly computer generated. This is not surprising given that the legislative findings enacted by Congress contain no mention of youthful-adult pornography. Those findings focus explicitly only on actual-child pornography and virtual-child pornography. See, *e.g.*, finding (9) following §2251 ("[T]he danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct"). Drawing a line around, and striking just, the CPPA's ban on youthful-child pornography not only is consistent with Congress' understanding of the categories of speech encompassed by §2256(8)(B), but also preserves the CPPA's prohibition of the material that Congress found most dangerous to children.

In sum, I would strike down the CPPA's ban on material that "conveys the impression" that it contains actual-child

pornography, but uphold the ban on pornographic depictions that "appea[r] to be" of minors so long as it is not applied to youthful-adult pornography.

SUPREME COURT OF THE UNITED STATES

No. 00–795

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL., PETITIONERS *v.* THE FREE SPEECH COALITION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 16, 2002]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA joins in part, dissenting.

I agree with Part II of JUSTICE O'CONNOR's opinion concurring in the judgment in part and dissenting in part. Congress has a compelling interest in ensuring the ability to enforce prohibitions of actual child pornography, and we should defer to its findings that rapidly advancing technology soon will make it all but impossible to do so. *Turner Broadcasting System, Inc.* v. *FCC,* 520 U. S. 180, 195 (1997) (we "accord substantial deference to the predictive judgment of Congress" in First Amendment cases).

I also agree with JUSTICE O'CONNOR that serious First Amendment concerns would arise were the Government ever to prosecute someone for simple distribution or possession of a film with literary or artistic value, such as "Traffic" or "American Beauty." *Ante,* at 3–4 (opinion concurring in judgment in part and dissenting in part). I write separately, however, because the Child Pornography Prevention Act of 1996 (CPPA), 18 U. S. C. §2251 *et seq.,* need not be construed to reach such materials.

We normally do not strike down a statute on First Amendment grounds "when a limiting instruction has been or could be placed on the challenged statute." *Broadrick* v. *Oklahoma,* 413 U. S. 601, 613 (1973). See, *e.g., New*

York v. *Ferber,* 458 U. S. 747, 769 (1982) (appreciating "the wide-reaching effects of striking down a statute on its face"); *Parker* v. *Levy*, 417 U. S. 733, 760 (1974) ("This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied"). This case should be treated no differently.

Other than computer generated images that are virtually indistinguishable from real children engaged in sexually explicitly conduct, the CPPA can be limited so as not to reach any material that was not already unprotected before the CPPA. The CPPA's definition of "sexually explicit conduct" is quite explicit in this regard. It makes clear that the statute only reaches "visual depictions" of:

> "[A]ctual or simulated . . . sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; . . . bestiality; . . . masturbation; . . . sadistic or masochistic abuse; . . . or lascivious exhibition of the genitals or pubic area of any person." 18 U. S. C. §2256(2).

The Court and JUSTICE O'CONNOR suggest that this very graphic definition reaches the depiction of youthful looking adult actors engaged in suggestive sexual activity, presumably because the definition extends to "simulated" intercourse. *Ante*, at 9–11 (majority opinion); *ante,* at 4 (opinion concurring in judgment in part and dissenting in part). Read as a whole, however, I think the definition reaches only the sort of "hard core of child pornography" that we found without protection in *Ferber*, *supra*, at 773–774. So construed, the CPPA bans visual depictions of youthful looking adult actors engaged in *actual* sexual activity; mere *suggestions* of sexual activity, such as youthful looking adult actors squirming under a blanket, are more akin to written descriptions than visual depic-

tions, and thus fall outside the purview of the statute.[1]

The reference to "simulated" has been part of the definition of "sexually explicit conduct" since the statute was first passed. See Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. 92–225, 92 Stat. 8. But the inclusion of "simulated" conduct, alongside "actual" conduct, does not change the "hard core" nature of the image banned. The reference to "simulated" conduct simply brings within the statute's reach depictions of hard core pornography that are "made to look genuine," Webster's Ninth New Collegiate Dictionary 1099 (1983)—including the main target of the CPPA, computer generated images virtually indistinguishable from real children engaged in sexually explicit conduct. Neither actual conduct nor simulated conduct, however, is properly construed to reach depictions such as those in a film portrayal of Romeo and Juliet, *ante*, at 9–11 (majority opinion); *ante*, at 4 (O'CONNOR, J., concurring in judgment in part and dissenting in part), which are far removed from the hard core pornographic depictions that Congress intended to reach.

Indeed, we 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. In fact, Congress explicitly instructed that such a reading of the CPPA would be wholly unwarranted. As the Court of Appeals for the First Circuit has observed:

> "[T]he legislative record, which makes plain that the [CPPA] was intended to target only a narrow class of images—visual depictions 'which are virtually indis-

---

[1] Of course, even the narrow class of youthful looking adult images prohibited under the CPPA is subject to an affirmative defense so long as materials containing such images are not advertised or promoted as child pornography. 18 U. S. C. §2252A(c).

> tinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct.'" *United States* v. *Hilton*, 167 F. 3d 61, 72 (1999) (quoting S. Rep. No. 104–358, pt. I, p. 7 (1996)).

Judge Ferguson similarly observed in his dissent in the Court of Appeals in this case:

> "From reading the legislative history, it becomes clear that the CPPA merely extends the existing prohibitions on 'real' child pornography to a narrow class of computer-generated pictures easily mistaken for real photographs of real children." *Free Speech Coalition* v. *Reno*, 198 F. 3d 1083, 1102 (CA9 1999).

See also S. Rep. No. 104–358, *supra,* pt. IV(C), at 21 ("[The CPPA] does not, and is not intended to, apply to a depiction produced using *adults* engaging i[n] sexually explicit conduct, even where a depicted individual may appear to be a minor" (emphasis in original)); *id.*, pt. I, at 7 ("[The CPPA] addresses the problem of 'high tech kiddie porn'"). We have looked to legislative history to limit the scope of child pornography statutes in the past, *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 73–77 (1994), and we should do so here as well.[2]

This narrow reading of "sexually explicit conduct" not only accords with the text of the CPPA and the intentions of Congress; it is exactly how the phrase was understood prior to the broadening gloss the Court gives it today. Indeed, had "sexually explicit conduct" been thought to reach the sort of material the Court says it does, then films such as "Traffic" and "American Beauty" would not have been made the way they were. *Ante*, at 9–10 (dis-

---

[2] JUSTICE SCALIA does not join this paragraph discussing the statute's legislative record.

cussing these films' portrayals of youthful looking adult actors engaged in sexually suggestive conduct). "Traffic" won its Academy Award in 2001. "American Beauty" won its Academy Award in 2000. But the CPPA has been on the books, and has been enforced, since 1996. The chill felt by the Court, *ante*, at 6 ("[F]ew legitimate movie producers . . . would risk distributing images in or near the uncertain reach of this law"), has apparently never been felt by those who actually make movies.

To the extent the CPPA prohibits possession or distribution of materials that "convey the impression" of a child engaged in sexually explicit conduct, that prohibition can and should be limited to reach "the sordid business of pandering" which lies outside the bounds of First Amendment protection. *Ginzburg* v. *United States*, 383 U. S. 463, 467 (1966); *e.g.*, *id.*, at 472 (conduct that "deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed" may lose First Amendment protection); *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 831–832 (2000) (SCALIA, J., dissenting) (collecting cases). This is how the Government asks us to construe the statute, Brief for United States 18, and n. 3; Tr. of Oral Arg. 27, and it is the most plausible reading of the text, which prohibits only materials "*advertised, promoted, presented, described, or distributed in such a manner* that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U. S. C. §2256(8)(D) (emphasis added).

The First Amendment may protect the video shopowner or film distributor who promotes material as "entertaining" or "acclaimed" regardless of whether the material contains depictions of youthful looking adult actors engaged in nonobscene but sexually suggestive conduct. The First Amendment does not, however, protect the panderer. Thus, materials promoted as conveying the impression

that they depict actual minors engaged in sexually explicit conduct do not escape regulation merely because they might warrant First Amendment protection if promoted in a different manner. See *Ginzburg, supra*, at 474–476; cf. *Jacobellis* v. *Ohio,* 378 U. S. 184, 201 (1964) (Warren, C. J., dissenting) ("In my opinion, the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene"). I would construe "conveys the impression" as limited to the panderer, which makes the statute entirely consistent with *Ginzburg* and other cases.

The Court says that "conveys the impression" goes well beyond *Ginzburg* to "prohibi[t] [the] possession of material described, or pandered, as child pornography by someone earlier in the distribution chain." *Ante*, at 19–21. The Court's concern is that an individual who merely possesses protected materials (such as videocassettes of "Traffic" or "American Beauty") might offend the CPPA regardless of whether the individual actually intended to possess materials containing unprotected images. *Ante,* at 10; see also *ante,* at 4 ("Individuals or businesses found to possess just three such films have no defense to criminal liability under the CPPA") (O'CONNOR, J., concurring in judgment in part and dissenting in part)).

This concern is a legitimate one, but there is, again, no need or reason to construe the statute this way. In *X-Citement Video, supra,* we faced a provision of the Protection of Children Against Sexual Exploitation Act of 1977, the precursor to the CPPA, which lent itself much less than the present statute to attributing a "knowingly" requirement to the contents of the possessed visual depictions. We held that such a requirement nonetheless applied, so that the Government would have to prove that a person charged with possessing child pornography actually knew that the materials contained depictions of real minors engaged in sexually explicit conduct. 513 U. S., at

77–78. In light of this holding, and consistent with the narrow class of images the CPPA is intended to prohibit, the CPPA can be construed to prohibit only the knowing possession of materials actually containing visual depictions of real minors engaged in sexually explicit conduct, or computer generated images virtually indistinguishable from real minors engaged in sexually explicit conduct. The mere possession of materials containing only suggestive depictions of youthful looking adult actors need not be so included.

In sum, while potentially impermissible applications of the CPPA may exist, I doubt that they would be "substantial . . . in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U. S., at 615. The aim of ensuring the enforceability of our Nation's child pornography laws is a compelling one. The CPPA is targeted to this aim by extending the definition of child pornography to reach computer-generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct. The statute need not be read to do any more than precisely this, which is not offensive to the First Amendment.

For these reasons, I would construe the CPPA in a manner consistent with the First Amendment, reverse the Court of Appeals' judgment, and uphold the statute in its entirety.

Her Majesty The Queen *Appellant*

v.

John Robin Sharpe *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Alberta, the Canadian Police Association (CPA), the Canadian Association of Chiefs of Police (CACP), Canadians Against Violence (CAVEAT), the Criminal Lawyers' Association, the Evangelical Fellowship of Canada, Focus on the Family (Canada) Association, the British Columbia Civil Liberties Association, the Canadian Civil Liberties Association, Beyond Borders, Canadians Addressing Sexual Exploitation (CASE), End Child Prostitution, Child Pornography and Trafficking in Children for Sexual Purposes (ECPAT) and the International Bureau for Children's Rights *Interveners*

Indexed as: R. *v.* Sharpe

Neutral citation: 2001 SCC 2. File No.: 27376.

2000: January 18, 19; 2001: January 26.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law -- Charter of Rights -- Freedom of expression -- Child pornography -- Whether possession of expressive material protected by right to freedom of expression -- Canadian Charter of Rights and Freedoms, s. 2(b).

Constitutional law -- Charter of Rights -- Right to liberty -- Whether Criminal Code prohibition of possession of child pornography infringing right to liberty -- Canadian Charter of

Rights and Freedoms, s. 7 -- Criminal Code, R.S.C. 1985, c. C-46, s. 163.1(4).

Constitutional law -- Charter of Rights -- Freedom of expression -- Child pornography -- Crown conceding that Criminal Code prohibition of possession of child pornography infringing freedom of expression -- Whether infringement justifiable -- Canadian Charter of Rights and Freedoms, s. 1 -- Criminal Code, R.S.C. 1985, c. C-46, s. 163.1(4).

Criminal law -- Child pornography -- Criminal Code prohibiting possession of child pornography -- Scope of definition of "child pornography" -- Defences available -- Criminal Code, R.S.C. 1985, c. C-46, s. 163.1.

The accused was charged with two counts of possession of child pornography under s. 163.1(4) of the *Criminal Code* and two counts of possession of child pornography for the purposes of distribution or sale under s. 163.1(3). "Child pornography", as defined in s. 163.1(1) of the *Code*, includes visual representations that show a person who is or is depicted as under the age of 18 years and is engaged in or is depicted as engaged in explicit sexual activity and visual representations 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 18 years. "Child pornography" also includes visual representations and written material that advocates or counsels sexual activity with a person under the age of 18 years that would be an offence under the *Code*. Prior to his trial, the accused brought a preliminary motion challenging the constitutionality of s. 163.1(4) of the *Code*, alleging a violation of his constitutional guarantee of freedom of expression. The Crown conceded that s. 163.1(4) infringed s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* but argued that the infringement was justifiable under s. 1 of the *Charter*. Both the trial judge and the majority of the British Columbia Court of Appeal ruled that the prohibition of the simple possession of child pornography as defined under s. 163.1 of the *Code* was not justifiable in a free and democratic society.

Held: The appeal should be allowed and the charges remitted for trial.

Per McLachlin C.J. and Iacobucci, Major, Binnie, Arbour and LeBel JJ.: In order to assess the constitutionality of s. 163.1(4), it is important to ascertain the nature and scope of any infringement. Until it is known what the law catches, it cannot be determined that the law catches too much. Consequently, the law must be construed, and interpretations that may minimize the alleged overbreadth must be explored. In light of Parliament's purpose of criminalizing possession of material that poses a reasoned risk of harm to children, the word "person" in the definition of child pornography should be construed as including visual works of the imagination as well as depictions of actual people. The word "person" also includes the person possessing the expressive material. The term "depicted" refers to material that a reasonable observer would perceive as representing a person under the age of 18 years and engaged in explicit sexual activity. The expression "explicit sexual activity" refers to acts at the extreme end of the spectrum of sexual activity -- acts involving nudity or intimate sexual activity represented in a graphic and unambiguous fashion. Thus, representations of casual intimacy, such as depictions of kissing or hugging, are not covered by the offence. An objective approach must be applied to the terms "dominant characteristic" and "for a sexual purpose". The question is whether a reasonable viewer, looking at the depiction objectively and in context, would see its "dominant characteristic" as the depiction of the child's sexual organ or anal region in a manner that is reasonably perceived as intended to cause sexual stimulation to some viewers. Innocent photographs of a baby in the bath and other representations of non-sexual nudity are not covered by the offence. As for written material or visual representations that advocate or counsel sexual activity with a person under the age of 18 years that would be an offence under the *Criminal Code*, the requirement that the material "advocates" or "counsels" signifies that, when viewed objectively, the material must be seen as actively inducing or encouraging the described offences

with children.

Parliament has created a number of defences in ss. 163.1(6) and (7) of the *Code* which should be liberally construed as they further the values protected by the guarantee of free expression. These defences may be raised by the accused by pointing to facts capable of supporting the defence, at which point the Crown must disprove the defence beyond a reasonable doubt. The defence of "artistic merit" provided for in s. 163.1(6) must be established objectively and should be interpreted as including any expression that may reasonably be viewed as art. Section 163.1(6) creates a further defence for material that serves an "educational, scientific or medical purpose". This refers to the purpose the material, viewed objectively, may serve, not the purpose for which the possessor actually holds it. Finally, Parliament has made available a "public good" defence. As with the medical, educational or scientific purpose defences, the defence of public good should be liberally construed.

The possession of child pornography is a form of expression protected by s. 2(*b*) of the *Charter*. The right to possess expressive material is integrally related to the development of thought, opinion, belief and expression as it allows us to understand the thought of others or consolidate our own thought. The possession of expressive material falls within the continuum of intellectual and expressive freedom protected by s. 2(*b*). The accused accepts that harm to children justifies criminalizing possession of some forms of child pornography. The fundamental question therefore is whether s. 163.1(4) of the *Code* goes too far and criminalizes possession of an unjustifiable range of material.

The accused also alleges that s. 163.1(4) violates his right to liberty under s. 7 of the *Charter*, arguing that exposure to potential imprisonment as a result of an excessively sweeping law is contrary to the principles of fundamental justice. It is not necessary to consider this argument separately as it wholly replicates the overbreadth concerns that are the central obstacle to the justification of the s. 2(*b*) breach. The s. 1 analysis generally, and the minimal impairment consideration in particular, is the appropriate forum for addressing over broad restrictions on free expression.

In adopting s. 163.1(4), Parliament was pursuing the pressing and substantial objective of criminalizing the possession of child pornography that poses a reasoned risk of harm to children. The means chosen by Parliament are rationally connected to this objective. Parliament is not required to adduce scientific proof based on concrete evidence that the possession of child pornography causes harm to children. Rather, a reasoned apprehension of harm will suffice. Applying this test, the evidence establishes several connections between the possession of child pornography and harm to children: (1) child pornography promotes cognitive distortions; (2) it fuels fantasies that incite offenders to offend; (3) it is used for grooming and seducing victims; and (4) children are abused in the production of child pornography involving real children. Criminalizing possession may reduce the market for child pornography and the abuse of children it often involves. With respect to minimal impairment, when properly interpreted, the law catches much less material unrelated to harm to children than has been suggested. However, the law does capture the possession of two categories of material that one would not normally think of as "child pornography" and that raise little or no risk of harm to children: (1) written materials or visual representations created and held by the accused alone, exclusively for personal use; and (2) visual recordings created by or depicting the accused that do not depict unlawful sexual activity and are held by the accused exclusively for private use. The bulk of the material falling within these two classes engages important values underlying the s. 2(*b*) guarantee while posing no reasoned risk of harm to children. In its main impact, s. 163.1(4) is proportionate and constitutional. Nonetheless, the law's application to materials in the two problematic classes, while peripheral to its objective, poses significant problems at the final stage of the

proportionality analysis. In these applications the restriction imposed by s. 163.1(4) regulates expression where it borders on thought. The cost of prohibiting such materials to the right of free expression outweighs any tenuous benefit it might confer in preventing harm to children. To this extent, the law cannot be considered proportionate in its effects, and the infringement of s. 2(*b*) contemplated by the legislation is not demonstrably justifiable under s. 1.

The appropriate remedy in this case is to read into the law an exclusion of the two problematic applications of s. 163.1. The applications of the law that pose constitutional problems are exactly those whose relation to the objective of the legislation is most remote. Carving out those applications by incorporating the proposed exceptions will not undermine the force of the law; rather, it will preserve the force of the statute while also recognizing the purposes of the *Charter*. The defects of the section are not so great that their exclusion amounts to impermissible redrafting and carving them out will not create an exception-riddled provision bearing little resemblance to the provision envisioned by Parliament. While excluding the offending applications will not subvert Parliament's object, striking down the statute altogether would most assuredly do so. Accordingly, s. 163.1(4) should be upheld on the basis that the definition of "child pornography" in s. 163.1 should be read as though it contained an exception 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. These two exceptions apply as well to the offence of "making" child pornography under s. 163.1(2) (but not to printing, publishing or possessing child pornography for the purpose of publication). The exceptions will not be available where a person harbours any intention other than mere private possession.

Per L'Heureux-Dubé, Gonthier and Bastarache JJ.: Under our society's democratic principles, individual freedoms such as expression are not absolute, but may be limited in consideration of a broader spectrum of rights, including equality and security of the person. The Crown conceded that the right to free expression was infringed in all respects, unfortunately depriving the Court of the opportunity to fully explore the content and scope of s. 2(*b*) of the *Charter* as it applies to this case. At the same time, it is recognized that, at this stage, our jurisprudence leads to the conclusion that, although harmful, the content of child pornography cannot be the basis for excluding it from the scope of the s. 2(*b*) guarantee. No separate analysis under s. 7 of the *Charter* is required. The s. 7 liberty interest is encompassed in the right of free expression and proportionality falls to be considered under s. 1 of the *Charter*. The only issue is whether the infringement of freedom of expression is justifiable under s. 1. Section 1 recognizes that in a democracy competing rights and values exist. The underlying values of a free and democratic society guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon those rights. A principled and contextual approach to s. 1 ensures that courts are sensitive to the other values which may compete with a particular right and allows them to achieve a proper balance among these values. At each stage of the s. 1 analysis close attention must be paid to the factual and social context in which an impugned provision exists.

An appraisal of the contextual factors in this case leads to the conclusion that Parliament's decision to prohibit child pornography is entitled to an increased level of deference. Child pornography, as defined by s. 163.1(1) of the *Criminal Code*, is inherently harmful to children and to society. This harm exists independently of dissemination or any risk of dissemination and flows from the existence of the pornographic representations, which on their own violate the dignity and equality rights of children. Although not empirically measurable, nor susceptible to proof in the traditional manner, the attitudinal harm inherent in child pornography can be inferred from degrading or dehumanizing representations or treatment. Expression that degrades or dehumanizes is harmful in and of itself as all members of society suffer when harmful

attitudes are reinforced. The possibility that pornographic representations may be disseminated creates a heightened risk of attitudinal harm. The violation of the privacy rights of the persons depicted constitutes an additional risk of harm that flows from the possibility of dissemination. Child pornography is harmful whether it involves real children in its production or whether it is a product of the imagination. Section 163.1 was enacted to protect children, one of the most vulnerable groups in society. It is based on the clear evidence of direct harm caused by child pornography, as well as Parliament's reasoned apprehension that child pornography also causes attitudinal harm. The lack of scientific precision in the social science evidence relating to attitudinal harm is not a valid reason for attenuating the Court's deference to Parliament's decision.

The importance of the protection of children is recognized in both Canadian criminal and civil law. The protection of children from harm is a universally accepted goal. International law is rife with instruments that emphasize the protection of children and a number of international bodies have recognized that possession of child pornography must be targeted to effectively address the harms caused by this type of material. Moreover, domestic legislation in a number of democratic countries criminalizes the simple possession of child pornography.

As a form of expression, child pornography warrants less protection since it is low value expression that is far removed from the core values underlying the protection of freedom of expression. Child pornography has a limited link to the value of self-fulfilment, but only in its most base aspect. Furthermore, in prohibiting the possession of child pornography, Parliament promulgated a law which seeks to foster and protect the equality rights of children, along with their security of the person and their privacy interests. The importance of these *Charter* rights cannot be ignored in the analysis of whether the law is demonstrably justified in a free and democratic society and warrants a more deferential application of the criteria set out in the *Oakes* test. Finally, Parliament has the right to make moral judgments in criminalizing certain forms of conduct. The Court should be particularly sensitive to the legitimate role of government in legislating with respect to our social values.

Section 163.1(4) of the *Code* constitutes a reasonable and justified limit upon freedom of expression. In proscribing the possession of child pornography, Parliament's overarching objective was to protect children. Any provision which protects both children and society by attempting to eradicate the sexual exploitation of children clearly has a pressing and substantial purpose. Section 163.1(4) is also proportionate to the objective. First, prohibiting the possession of child pornography is rationally connected to the aim of preventing harm to children and society. The possession of child pornography contributes to the cognitive distortions of paedophiles, reinforcing their erroneous belief that sexual activity with children is acceptable. Child pornography fuels paedophiles' fantasies, which constitute the motivating force behind their sexually deviant behaviour. Section 163.1(4) plays an important role in an integrated law enforcement scheme which protects children against the harms associated with child pornography. Paedophiles use child pornography for seducing children and for grooming them to commit sexual acts. Lastly, children are abused in the production of child pornography. The prohibition of the possession of child pornography is intended to reduce the market for this material. If consumption of child pornography is reduced, presumably production and the abuse of children will also be reduced.

Second, the prohibition of the possession of child pornography minimally impairs the right to free expression. Although s. 163.1(4) is directed only to the private possession of child pornography, children are particularly vulnerable in the private sphere, since a large portion of child pornography is produced privately and used privately by those who possess it. The harmful effect on the attitudes of those who possess child pornography similarly occurs in private.

Consequently, prohibiting the simple possession of child pornography has an additional reductive effect on the harm it causes. The prohibition of the possession of child pornography also captures visual and written works of the imagination which do not involve the participation of any actual children or youth in their production; in enacting s. 163.1(4), Parliament sought to prevent not only the harm that flows from the use of children in pornography, but also the harm that flows from the very existence of images and words which degrade and dehumanize children and to send the message that children are not appropriate sexual partners. The focus of the inquiry must be on the harm of the message of the representations and not on their manner of creation, or on the intent or identity of their creator. Given the low value of the speech at issue in this case and the fact that it undermines the *Charter* rights of children, Parliament was justified in concluding that visual works of the imagination would harm children.

The inclusion of written material in the offence of possession of child pornography does not amount to thought control. The legislation seeks to prohibit material that Parliament believed was harmful. The inclusion of written material which advocates and counsels the commission of offences against children is consistent with this aim, since, by its very nature, it is harmful, regardless of its authorship. Evidence suggests that the cognitive distortions of paedophiles are reinforced by such material and that written pornography fuels the sexual fantasies of paedophiles and could incite them to offend. Although the prohibition in s. 163.1(4) extends to teenagers between the ages of 14 and 17 who keep pornographic videotapes or pictures of themselves, this effect of the provision is a reasonable limit on teenagers' freedom of expression. A review of adolescent child pornography cases reveals that there is a great risk that they will be exploited in its creation. Hence, while adolescents between the ages of 14 and 17 may legally engage in sexual activity, Parliament had a strong basis for concluding that the age limit in the definition of child pornography should be set at 18. It is not necessary that the provision contain a defence to protect teenagers who are in possession of erotic videos or pictures of themselves. Such a defence would undermine Parliament's objective of protecting all children, since some adolescents under the age of 18 groom other children into engaging in sexual conduct. There is also no guarantee, even when a teenager is in possession of a pornographic picture or videotape depicting himself or herself, that it was created in a consensual environment. The creation of permanent records of teenagers' sexual activities has consequences which children of that age may not have sufficient maturity to understand. The Court should defer to Parliament's decision to restrict teenagers' freedom in this area. The provision does not amount to a total ban on the possession of child pornography. The provision reflects an attempt by Parliament to weigh the competing rights and values at stake and achieve a proper balance. The definitional limits act as safeguards to ensure that only material that is antithetical to Parliament's objectives in proscribing child pornography will be targeted, and the legislation incorporates defences of artistic merit, educational, scientific or medical purpose, and a defence of the public good.

Third, when the effects of the provision are examined in their overall context, the benefits of the legislation far outweigh any deleterious effects on the right to freedom of expression and the interests of privacy. Section 163.1(4) helps to prevent the harm to children which results from the production of child pornography; deters the use of child pornography in the grooming of children; curbs the collection of child pornography by paedophiles; and helps to ensure that an effective law enforcement scheme can be implemented. In sum, the legislation benefits society as a whole as it sends a clear message that deters the development of antisocial attitudes. The law does not trench significantly on speech possessing social value since there is a very tenuous connection between the possession of child pornography and the right to free expression. At most, the law has a detrimental cost to those who find base fulfilment in the possession of child pornography. The privacy of those who possess child pornography is protected by the right against unreasonable search and seizure as guaranteed by s. 8 of the *Charter*. The law intrudes into the private sphere because doing so is necessary to achieve its salutary objectives. The

privacy interest restricted by the law is closely related to the specific harmful effects of child pornography. Moreover, the provision's beneficial effects in protecting the privacy interests of children are proportional to the detrimental effects on the privacy of those who possess child pornography.

Cases Cited

By McLachlin C.J.

Referred to: *R. v. Butler*, [1992] 1 S.C.R. 452; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *R. v. Zundel*, [1992] 2 S.C.R. 731; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Palko v. Connecticut*, 302 U.S. 319 (1937); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Dyment*, [1988] 2 S.C.R. 417; *R. v. Edwards*, [1996] 1 S.C.R. 128; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R. v. Lucas*, [1998] 1 S.C.R. 439; *R. v. Hurtubise*, [1997] B.C.J. No. 40 (QL); *R. v. Dionne* (1987), 38 C.C.C. (3d) 171; *Ontario (Attorney General) v. Langer* (1995), 123 D.L.R. (4th) 289; *R. v. American News Co.* (1957), 118 C.C.C. 152; *R. v. Delorme* (1973), 15 C.C.C. (2d) 350; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R. v. Martineau*, [1990] 2 S.C.R. 633; *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *M. v. H.*, [1999] 2 S.C.R. 3; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *R. v. Heywood*, [1994] 3 S.C.R. 761; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

By L'Heureux-Dubé, Gonthier and Bastarache JJ.

Referred to: *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *R. v. Mills*, [1999] 3 S.C.R. 668; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Lucas*, [1998] 1 S.C.R. 439; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2

S.C.R. 1083; *R. v. Zundel*, [1992] 2 S.C.R. 731; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989; *R. v. Mara*, [1997] 2 S.C.R. 630; *R. v. Hess*, [1990] 2 S.C.R. 906; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Young v. Young*, [1993] 4 S.C.R. 3; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *United States v. Hilton*, 167 F.3d 61 (1999); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *R. v. K.L.V.*, [1999] A.J. No. 350 (QL); *R. v. Jewell* (1995), 100 C.C.C. (3d) 270; *Osborne v. Ohio*, 495 U.S. 103 (1990); *R. v. E. (B.)* (1999), 139 C.C.C. (3d) 100; *United States v. Knox*, 32 F.3d 733 (1994); *R. v. Pointon*, Man. Prov. Ct., October 23, 1997; *R. v. Geisel*, Man. Prov. Ct., February 2, 2000; *R. v. Davis*, [1999] 3 S.C.R. 759; *M. v. H.*, [1999] 2 S.C.R. 3.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 7, 8, 15.

Child and Family Services Act, R.S.O. 1990, c. C.11, ss. 40(2), (3), (5), (7) to (10), 41 to 44.

Child and Family Services Act, S.M.1985-86, c. 8, ss. 21 to 26, 38(7), 53.

Child and Family Services Act, S.N.W.T. 1997, c. 13, ss. 10, 11(1), 33.

Child and Family Services Act, S.S. 1989-90, c. C-7.2, ss. 2(1)(p), 7, 8, 13, 17, 18(1).

Child, Family and Community Service Act, R.S.B.C. 1996, c. 46, ss. 16 to 19, 25 to 33.

Child Trafficking and Pornography Act, 1998 (No. 22) (Ir.), ss. 2, 6.

Child Welfare Act, R.S.N. 1990, c. C-12, ss. 13, 14, 15.

Child Welfare Act, S.A. 1984, c. C-8.1, ss. 17, 18.

Children and Family Services Act, S.N.S. 1990, c. 5, ss. 26(2), (3), 27, 28, 29, 33(1), (3), 34.

Children's Act, R.S.Y. 1986, c. 22, s. 119.

Classification (Publications, Films and Computer Games) Act 1995 (Austl.) (No. 7 of 1995).

Constitution Act, 1982, s. 52(1).

Convention on the Rights of the Child, Can. T.S. 1992, No. 3, arts. 1, 2, 9, 16, 19, 32, 33, 34, 35, 37.

Criminal Code (Belgium), art. 383*bis*.

Criminal Code, R.S.C. 1985, c. C-46, ss. 22, 150.1, 151, 152, 153, 159, 160(3), 163 [am. 1993, c. 46, s. 1], 163.1 [ad. *idem*, s. 2], 170, 171, 172, 212(4), 215, 271, 272, 273.

Criminal Justice Act 1988 (U.K.), 1988, c. 33, s. 160.

Criminal Justice and Public Order Act 1994 (U.K.), 1994, c. 33, ss. 84 to 86.

Declaration of the Rights of the Child, G.A. Res. 1386 (XIV) (1959), preamble.

Draft Joint Action to combat child pornography on the Internet, [1999] O.J.C. 219/68, art. 1.

Family and Child Services Act, R.S.P.E.I. 1988, c. F-2, ss. 1(1)(c), 15(1), (1.1), 16(1), 17(1)(b), 19(b).

Family Services Act, S.N.B. 1980, c. F-2.2, ss. 1, 31(5), 32, 33, 51(1), 62(3).

Films, Videos, and Publications Classification Act 1993 (N.Z.) No. 94, ss. 2, 3, 131.

International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 24.

International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, art. 10(3).

International traffic in child pornography, ICPO-Interpol AGN/65/RES/9 (1996).

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography, A/RES/54/263 (2000), Annex II.
Protection of Children Act 1978 (U.K.), 1978, c. 37, ss. 1, 7.

Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc A/810, at p. 71 (1948), art. 25(2).

Young Offenders Act, R.S.C. 1985, c. Y-1, s. 20.

Youth Protection Act, R.S.Q., c. P-34.1, ss. 2, 3, 46.

18 U.S.C. §§ 2252(a)(4)(B), 2256 (1994 & Supp. IV 1998).

Authors Cited

Bala, Nicholas, and Martha Bailey. "Canada: Recognizing the Interests of Children" (1992-93), 31 *U. Louisville J. Fam. L.* 283.

Bessner, Ronda. "Khan: Important Strides Made by the Supreme Court Respecting Children's Evidence" (1990), 79 C.R. (3d) 15.

Blugerman, Brian, assisted by Laurie May. "The New Child Pornography Law: Difficulties of Bill C-128" (1995), 4 *M.C.L.R.* 17.

Canada. Committee on Sexual Offences Against Children and Youths. *Sexual Offences Against Children* (Badgley Report). Ottawa: Minister of Supply and Services Canada, 1984.

Canada. Criminal Intelligence Service. *Annual Report on Organized Crime in Canada*. Ottawa: The Service, 2000.

Canada. Health and Welfare Canada. Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada. *Reaching for Solutions.* By Rix G. Rogers. Ottawa: The Advisor, 1990.

Canada. House of Commons. Standing Committee on Justice and Legal Affairs. *Report on Pornography.* Issue No. 18, March 22, 1978, p. 18:4.

Canada. House of Commons. Standing Committee on Justice and the Solicitor General. *Minutes of Proceedings and Evidence*. Issue No. 105, June 10, 1993, pp. 105:4-105:5,105:21.

Canada. *House of Commons Debates*, 3rd Sess., 34th Parl., vol. XVI, June 3, 1993, p. 20328.

Canada. Senate. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs.* Issue No. 50, June 21, 1993, p. 50:41.

Canada. Senate. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs.* Issue No. 51, June 22, 1993, p. 51:54.

Canada. Special Committee on Pornography and Prostitution. *Report of the Special Committee on Pornography and Prostitution* (Fraser Report). Ottawa: The Committee,1985.

Canadian Oxford Dictionary. Edited by Katherine Barber. Toronto: Oxford University Press, 1998, "explicit".

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Driedger on the Construction of Statutes, 3rd ed. By Ruth Sullivan. Toronto: Butterworths, 1994.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 2, loose-leaf ed. Scarborough, Ont.: Carswell, 1992 (updated 1999, release 1).

Levesque, Roger J. R. *Sexual Abuse of Children: A Human Rights Perspective*. Bloomington: Indiana University Press, 1999.

New Oxford Dictionary of English. Edited by Judy Pearsall. Oxford: Clarendon Press, 1998, "explicit".

New Shorter Oxford English Dictionary on Historical Principles, vol. 1. Oxford: Clarendon Press, 1993, "art".

Roberts, Julian V. "Sexual Assault in Canada: Recent Statistical Trends" (1996), 21 *Queen's L.J.* 395.

Ross, June. "*R.* v. *Sharpe* and Private Possession of Child Pornography" (2000), 11 *Constitutional Forum* 50.

Stephen, James Fitzjames, Sir. *A Digest of the Criminal Law (indictable offences)*, 9th ed. By Sir Lewis Frederick Sturge. London: Sweet & Maxwell, 1950.

Sugunasiri, Shalin M. "Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability" (1999), 22 *Dalhousie L.J.* 126.

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

United Nations. Commission on Human Rights. *Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography*, 55th Mtg., 1992/74.

United Nations. General Assembly. *Sale of Children, Child Prostitution and Child Pornography: Note by the Secretary-General*, U.N. Doc. A/49/478 (1994).

Watson, Jack. "Case Comment: *R. v. Sharpe*" (1999), 10 *N.J.C.L.* 251.

APPEAL from a judgment of the British Columbia Court of Appeal (1999), 136 C.C.C. (3d) 97, 127 B.C.A.C. 76, 207 W.A.C. 76, 175 D.L.R. (4th) 1, 25 C.R. (5th) 215, 69 B.C.L.R. (3d) 234, [2000] 1 W.W.R. 241, [1999] B.C.J. No. 1555 (QL), 1999 BCCA 416, dismissing a Crown appeal from a decision of the British Columbia Supreme Court (1999), 22 C.R. (5th) 129, 169 D.L.R. (4th) 536, [1999] B.C.J. No. 54 (QL), declaring void s. 163.1(4) of the *Criminal Code*. Appeal allowed.

John M. Gordon and *Kate Ker*, for the appellant.

Gil D. McKinnon, *Q.C.*, *Richard C. C. Peck*, *Q.C.*, and *Nikos Harris* for the respondent.

Cheryl J. Tobias and *Kenneth J. Yule*, for the intervener the Attorney General of Canada.

James H. Flaherty, *Christine Bartlett-Hughes* and *Laurie Lacelle*, for the intervener the Attorney General for Ontario.

Joanne Marceau and *Jacques Gauvin*, for the intervener the Attorney General of Quebec.

Daniel A. MacRury, for the intervener the Attorney General of Nova Scotia.

Mary Elizabeth Beaton, for the intervener the Attorney General for New Brunswick.

Shawn Greenberg and *Holly Penner*, for the intervener the Attorney General of Manitoba.

Joshua B. Hawkes, for the intervener the Attorney General for Alberta.

Timothy S. B. Danson, for the interveners the Canadian Police Association (CPA), the Canadian Association of Chiefs of Police (CACP) and Canadians Against Violence (CAVEAT).

Frank Addario and *Michael Lacy*, for the intervener the Criminal Lawyers' Association.

Robert W. Staley, *Meredith Hayward* and *Janet Epp Buckingham*, for the interveners the Evangelical Fellowship of Canada and the Focus on the Family (Canada) Association.

John D. McAlpine, *Q.C.*, *Bruce Ryder* and *Andrew D. Gay*, for the intervener the British Columbia Civil Liberties Association.

Patricia D. S. Jackson and *Tycho M. J. Manson*, for the intervener the Canadian Civil Liberties Association.

David Matas, *Mark Eric Hecht* and *Jean-François Noël*, for the interveners Beyond Borders, Canadians Addressing Sexual Exploitation (CASE), End Child Prostitution, Child Pornography and Trafficking in Children for Sexual Purposes (ECPAT) and the International Bureau for Children's Rights.

The judgment of McLachlin C.J. and Iacobucci, Major, Binnie, Arbour and LeBel JJ. was delivered by

THE CHIEF JUSTICE --

I. Introduction

1 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? That is the central question posed by this appeal.

2 I conclude that the law is constitutional, except for two peripheral applications relating to expressive material privately created and kept by the accused, for which two exceptions can be read into the legislation. The law otherwise strikes a constitutional balance between freedom of expression and prevention of harm to children. As a consequence, I would uphold the law and remit Mr. Sharpe for trial on all charges.

3 The respondent, Mr. Sharpe, was charged on a four-count indictment after two seizures of material. The first seizure was made by Canada Customs. It consisted of computer discs containing a text entitled "Sam Paloc's Boyabuse -- Flogging, Fun and Fortitude: A Collection of Kiddiekink Classics". Two charges were laid with respect to this material -- one for illegal possession under s. 163.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, and one for possession for the purposes of distribution or sale under s. 163.1(3) of the *Code.* The second seizure was at Mr. Sharpe's home pursuant to a search warrant the validity of which will be contested at trial. Police officers seized a collection of books, manuscripts, stories and photographs the Crown says constitute child pornography. Again, two charges were laid -- one of simple possession and one of possession for the purposes of distribution or sale.

4 Mr. Sharpe brought a preliminary motion challenging the constitutionality of s. 163.1(4) of the *Criminal Code*. He does not challenge the constitutionality of the offence of possession for the purposes of distribution and sale, which will go to trial regardless of how this appeal is resolved. Mr. Sharpe contends that the prohibition of possession, without more, violates the guarantee of freedom of expression in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms.* The trial judge ruled that the prohibition was unconstitutional, as did the majority of the British Columbia Court of Appeal. The Crown appeals that order to this Court.

5 The Crown concedes that s. 163.1(4)'s prohibition on the possession of child pornography infringes the guarantee of freedom of expression in s. 2(*b*) of the *Charter*. The issue is whether this limitation of freedom of expression is justifiable under s. 1 of the *Charter*, given the harm possession of child pornography can cause to children. Mr. Sharpe accepts that harm to children justifies criminalizing possession of some forms of child pornography. The fundamental question therefore is whether s. 163.1(4) of the *Criminal Code* goes too far and criminalizes possession of an unjustifiable range of material.

II. Provisions of the Legislation and the *Charter*

6 In 1993, Parliament enacted s. 163.1 of the *Criminal Code*, creating a number of offences relating to child pornography. The provision supplemented laws making it an offence to make, print, publish, distribute, or circulate obscene material (s. 163), and to corrupt children (s. 172). With the enactment of s. 163.1, the *Criminal Code* contains a comprehensive scheme to attack child pornography at every stage -- production, publication, importation, distribution, sale and possession. Subsections (2) and (3) of s. 163.1 criminalize possession of child pornography for the purpose of publication and possession for the purpose of distribution or sale. Section 163.1(4) extends the prohibition to possession *simpliciter*:

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.

7 The scope of this offence depends on the definition of "child pornography"

in subs. (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.

8 The offence is subject to a number of defences, set out in subs. (6) and (7):

(6) Where the accused is charged with an offence under subsection (2), (3) or (4), the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, 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) or (4).

9 Subsection (7) imports the "public good" defence from the obscenity provisions of the *Criminal Code*:

163. . . .
(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section, the motives of an accused are irrelevant.

10 Section 2(*b*) of the *Charter* guarantees freedom of expression as follows:

2.Everyone has the following fundamental freedoms:
. . .

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

11 Section 7 of the *Charter* guarantees a right to liberty as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

12 Section 1 of the *Charter* affirms the entitlement of everyone to the fundamental rights guaranteed by the *Charter*, subject to justifiable limits:

1. 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.

III. Judicial Decisions

1.British Columbia Supreme Court (1999), 22 C.R. (5th) 129

13 In the British Columbia Supreme Court, Shaw J. courageously ruled that s. 163.1(4) is unconstitutional. He held that the objective of the law is to combat material that puts children at risk of harm. He reviewed evidence that child pornography arguably creates this risk through its use for grooming or seduction; by the use of children in its manufacture; by confirming or augmenting cognitive distortions of paedophiles; and by inciting paedophiles to commit offences against children. However, although this Court in *R. v. Butler*, [1992] 1 S.C.R. 452, did not require conclusive proof that obscene materials cause harm, Shaw J. apparently required such proof and found little scientific evidence linking the possession of child pornography to these risks. As a result, he considered the salutary effects of the law to be limited. As for the law's deleterious effects, he found that "the invasion of freedom of expression and personal privacy is profound" (para. 49) and held that they were "not outweighed by the limited beneficial effects of the prohibition" (para. 50). Shaw J. concluded that the law was inconsistent with the *Charter* and could not be justified under s. 1, rendering it invalid under s. 52(1) of the *Constitution Act, 1982*.

2.British Columbia Court of Appeal (1999), 136 C.C.C. (3d) 97

14 The Court of Appeal, by a margin of 2 to 1, upheld the trial judge's conclusion. Southin J.A. found the law invalid for two reasons. First, she held that "legislation which makes simple possession of expressive materials a crime can never be a reasonable limit in a free and democratic society. Such legislation bears the hallmark of tyranny" (para. 95). On this approach, any prohibition of private possession of child pornography, as opposed to manufacture, distribution or possession for these purposes, would always, of necessity, unjustifiably restrict freedom of expression. In the alternative, Southin J.A. found that the law failed the proportionality test of s. 1. Like the trial judge, Southin J.A. held that the most compelling evidence of necessity is required to justify a prohibition on mere possession, and that the legislation catches too much lawful conduct unrelated to harm to children, notably in relation to teenage sexuality.

15 Rowles J.A. held the law invalid on the ground that it is unjustifiably overbroad. Sympathetic to Parliament's goal, she argued eloquently for the need to protect children from sexual abuse. She noted that child pornography does not lie close to the core of protected expression, and found that Parliament had a reasonable basis for concluding that criminalizing possession of child pornography would reduce the risk of harm to children. Rowles J.A. held, however, that the law failed because it caught much more material than necessary to achieve the objective, mainly relating to teenage sexuality, an intrusion on free expression aggravated by its impact on privacy. "By providing a sentence of incarceration for the possession of recorded thoughts and expression, including one's own thoughts and expression, the legislation trenches deeply upon the core values enshrined in the *Charter* and essential to a free and democratic society" (para. 213). In the result the law raises "the spectre that legitimate and non-harmful expression will be chilled as individuals are forced, in the words of the trial judge, to become their own censors" (para. 213). On the other side of the balance, the only "value added" by criminalizing possession of child pornography, in addition to the other offences, was a modest contribution to law enforcement (para. 214).

16 McEachern C.J.B.C. would have upheld the law. Since Mr. Sharpe conceded that possession of some pornographic material should be prohibited, the only issue was where to draw the line between permissible and impermissible material. McEachern C.J.B.C. considered

Shaw J. to have erred in not considering the suppression of the market for child pornography, and hence the prevention of the abuse of children in the course of producing child pornography, to be a salutary effect of the prohibition. He found the definition of child pornography in the section carefully drafted and rationally connected to the objectives of the legislation. In his view, limitations in the law offered considerable protection against problematic prosecution. Acknowledging that the law catches some teenage sexual material unrelated to the harm, he doubted Parliament could have drafted it in a way that avoided such difficulties. The hypothetical examples of unrelated material were remote and likely to arise infrequently. McEachern C.J.B.C. concluded that "any balancing of the risk of harm to children against the risk of harm to `innocent' possessors of child pornography as defined must be resolved in favour of children" (para. 292).

17 The decisions in the British Columbia courts reveal four distinctive arguments. At the far end of the spectrum is Southin J.A.'s argument that prohibition of private possession of child pornography can never constitute a justifiable infringement on free expression. Next is the position of the trial judge, adopted by Southin J.A. in the alternative, that the benefits of the law are limited and do not outweigh its negative effects on freedom of expression and privacy. The third argument, put forward by Rowles J.A., is that the law is unjustifiably overbroad. The fourth argument, adopted by McEachern C.J.B.C., is that the only issue is overbreadth and that on balance the law's infringement on freedom of expression is justified.

IV. Issues

18 Two issues arise: whether the prohibition of possession of child pornography in s. 163.1(4) limits a *Charter* right and, if so, whether the infringement is justified. On the first issue the Crown concedes that the law intrudes upon the guarantee of free expression in s. 2(*b*) of the *Charter*. The respondent also alleges a violation of his right to liberty under s. 7 of the *Charter*, arguing that exposure to potential imprisonment as a result of an excessively sweeping law is contrary to the principles of fundamental justice. Since this argument wholly replicates the overbreadth concerns that are the central obstacle to the justification of the s. 2(*b*) breach, it is not necessary to consider it separately. The weight of authority commends the s. 1 analysis generally, and the minimal impairment consideration in particular, as the appropriate forum for addressing allegations of overly broad restrictions on free expression: *Butler*, *supra*; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *R. v. Zundel*, [1992] 2 S.C.R. 731.

19 The basic issue thus reduces to whether the limit imposed by the law on free expression can be justified under s. 1 of the *Charter*. If aspects of the law cannot be justified, the further question arises of whether a remedy short of striking down the entire law as unconstitutional is appropriate.

20 Reflecting these issues, the constitutional questions have been stated as follows:

1 Does s. 163.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, violate s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

2 If s. 163.1(4) of the *Criminal Code* infringes s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, is s. 163.1(4) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purposes of s. 1 of the *Charter*?

3 Does s. 163.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, violate s. 7 of the *Canadian Charter of Rights and Freedoms*?

4 If s. 163.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringes s. 7 of the *Canadian Charter of Rights and Freedoms*, is s. 163.1(4) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purposes of s. 1 of the *Charter*?

V. Analysis

A. *The Values at Stake*

21 Among the most fundamental rights possessed by Canadians is freedom of expression. It makes possible our liberty, our creativity and our democracy. It does this by protecting not only "good" and popular expression, but also unpopular or even offensive expression. The right to freedom of expression rests on the conviction that the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and images. 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.

22 Nevertheless, freedom of expression is not absolute. Our Constitution recognizes that Parliament or a provincial legislature can sometimes limit some forms of expression. Overarching considerations, like the prevention of hate that divides society as in *Keegstra*, *supra*, or the prevention of harm that threatens vulnerable members of our society as in *Butler*, *supra*, may justify prohibitions on some kinds of expression in some circumstances. Because of the importance of the guarantee of free expression, however, any attempt to restrict the right must be subjected to the most careful scrutiny.

23 The values underlying the right to free expression include individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 765. While some types of expression, like political expression, lie closer to the core of the guarantee than others, all are vital to a free and democratic society. As stated in *Irwin Toy*, *supra*, at p. 968, the guarantee "ensure[s] that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection", the Court continued, "is . . . `fundamental' because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual". As stated by Cardozo J. in *Palko v. Connecticut*, 302 U.S. 319 (1937), free expression is "the matrix, the indispensable condition, of nearly every other form of freedom" (p. 327).

24 The law challenged in this appeal engages mainly the justification of self-fulfilment. 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-fulfilment, beyond the base aspect of sexual exploitation. The concern in this appeal, however, is that the law may incidentally catch forms of expression that more seriously implicate self-fulfilment and that do not pose a risk of harm to children.

25 As to the contention that prohibiting possession of expressive material does not raise free expression concerns, I cannot agree. The right conferred by s. 2(*b*) of the *Charter* embraces a continuum of intellectual and expressive freedom -- "freedom of thought, belief, opinion and expression". The right to possess expressive material is integrally related to the development of thought, belief, opinion and expression. The possession of such material allows us to understand the thought of others or consolidate our own thought. Without the right to possess expressive material, freedom of thought, belief, opinion and expression would be compromised. Thus the

possession of expressive materials falls within the continuum of rights protected by s. 2(*b*) of the *Charter*.

26 The private nature of the proscribed material may heighten the seriousness of a limit on free expression. Privacy, while not expressly protected by the *Charter*, is an important value underlying the s. 8 guarantees against unreasonable search and seizure and the s. 7 liberty guarantee: see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Mills*, [1999] 3 S.C.R. 668. Indeed, as freedom from state intrusion and conformist social pressures is integral to individual flourishing and diversity, this Court has observed that "privacy is at the heart of liberty in a modern state": *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 427; see also *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 50. Privacy may also enhance freedom of expression claims under s. 2(*b*) of the *Charter*, for example in the case of hate literature: *Keegstra*, *supra*, at pp. 772-73; *Taylor*, *supra*, at pp. 936-37. The enhancement in the case of hate literature occurs in part because private material may do less harm than public, and in part because the freedoms of conscience, thought and belief are particularly engaged in the private setting: *Taylor*, *supra*. However, the private nature of much child pornography cuts two ways. It engages the fundamental right to freedom of thought. But at the same time, the clandestine nature of incitement, attitudinal change, grooming and seduction associated with child pornography contributes to the harm it may cause children, rather than reduces it.

27 In summary, prohibiting the possession of child pornography restricts the rights protected by s. 2(*b*) and the s. 7 liberty guarantee. While the prurient nature of most of the materials defined as "child pornography" may attenuate its constitutional worth, it does not negate it, since the guarantee of free expression extends even to offensive speech.

28 This brings us to the countervailing interest at stake in this appeal: society's interest in protecting children from the evils associated with the possession of child pornography. Just as no one denies the importance of free expression, so no one denies that child pornography involves the exploitation of children. The links between possession of child pornography and harm to children are arguably more attenuated than are the links between the manufacture and distribution of child pornography and harm to children. However, possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children. Possession of child pornography may facilitate the seduction and grooming of victims and may break down inhibitions or incite potential offences. Some of these links are disputed and must be considered in greater detail in the course of the s. 1 justification analysis. The point at this stage is simply to describe the concerns that, according to the government, justify limiting free expression by banning the possession of child pornography.

29 These then are the values at stake in this appeal. On the one hand stands the right of free expression -- a right fundamental to the liberty of each Canadian and our democratic society. On the other stands the conviction that the possession of child pornography must be forbidden to prevent harm to children.

30 Mr. Sharpe does not suggest that the prevention of harm to children can never justify limiting free expression. Where the two values stand in stark opposition, prevention of harm to children must prevail. He suggests rather that the limitation s. 163.1(4) imposes on free expression must fail because the law catches material that poses no risk of harm to children and because the links between possession of child pornography and harm to children are weak.

31 In order to deal with these concerns, we must determine what material the law, properly construed, catches, and on that basis answer the question of whether those restrictions on free speech are in fact justified by the goal of preventing harm to children.

B. *The Nature and Scope of the Infringement of the Charter*

32 While the Crown concedes that s. 163.1(4) limits freedom of expression, this does not eliminate the need to consider the nature and scope of the infringement in determining whether or not it is justified. Until we know what the law catches, we cannot say whether it catches too much. This Court has consistently approached claims of overbreadth on this basis. It is not enough to accept the allegations of the parties as to what the law prohibits. The law must be construed, and interpretations that may minimize the alleged overbreadth must be explored: see *Keegstra*, *supra*, *Butler*, *supra*, and *Mills*, *supra*. So we must begin by asking what s. 163.1(4) truly catches as distinguished from some of the broader interpretations alleged by the respondent and some of the interveners in support. The interpretation of the section is a necessary pre-condition to the determination of constitutionality, although it is understood, of course, that courts in future cases may refine the analysis in light of the facts and considerations that emerge with experience.

33 Much has been written about the interpretation of legislation (see, e.g., R. Sullivan, *Statutory Interpretation* (1997); R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994); P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000)). However, E. A. Driedger in *Construction of Statutes* (2nd ed. 1983) best captures the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87, Driedger states: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Recent cases which have cited the above passage with approval include: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 144; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, at para. 30; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550, at para. 22; *Friesen v. Canada*, [1995] 3 S.C.R. 103, at para. 10. Supplementing this approach is the presumption that Parliament intended to enact legislation in conformity with the *Charter*: see Sullivan, *Driedger on the Construction of Statutes*, *supra*, at pp. 322-27. If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted: see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 1010; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 660; *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 66.

34 Parliament's main purpose in passing the child pornography law was to prevent harm to children by banning the production, distribution and possession of child pornography, and by sending a message to Canadians "that children need to be protected from the harmful effects of child sexual abuse and exploitation and are not appropriate sexual partners": *House of Commons Debates*, 3rd Sess., 34th Parl., vol. XVI, June 3, 1993, at p. 20328. However, Parliament did not cast its net over all material that might conceivably pose any risk to children or produce any negative attitudinal changes. Mindful of the importance of freedom of expression in our society and the dangers of vague, overbroad legislation in the criminal sphere, Parliament set its targets principally on clear forms of "child pornography": depictions of explicit sex with children, depictions of sexual organs and anal areas of children and material advocating sexual crimes with children. Through qualifications and defences Parliament indicated that it did not seek to catch all material that might harm children, but only material that poses a reasoned risk of harm to children and, even then, only where the countervailing right of free expression or the public good does not outweigh that risk of harm. With this aim in mind, I turn to s. 163.1.

35 Section 163.1(1) defines child pornography in terms of two categories: (1) visual representations (s. 163.1(1)(*a*)); and (2) written and visual advocacy and counselling material (s.

163.1(1)(*b*)). Visual representations include "a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means". This is broad enough to include drawings, paintings, prints, computer graphics, and sculpture: in short, any non-textual representation that can be perceived visually.

36 A visual representation can constitute child pornography in three ways:

1. By showing a person who is, or is depicted as, being under the age of 18 years and is engaged in, or is depicted as engaged in, explicit sexual activity (s. 163.1(1)(*a*)(i));

2. By having, as its dominant characteristic, the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of 18 years (s. 163.1(1)(*a*)(ii)); or

3. By advocating or counselling sexual activity with a person under the age of 18 years that would be an offence under the *Criminal Code* (s. 163.1(1)(*b*)).

Written material can constitute child pornography in only the last of these ways (s. 163.1(1)(*b*)). The ambit of these provisions depends on the meaning of the terms used.

1. "Person"

37 In order to constitute child pornography, a visual representation must show, depict, advocate or counsel sexual activity with a "person". Two issues arise here: (1) does "person" apply only to actual, as opposed to imaginary persons; and (2) does it include the person who possesses the material?

38 The first issue is important because it governs whether the prohibition on possession is confined to representations of actual persons, or whether it extends to drawings from the imagination, cartoons, or computer generated composites. The available evidence suggests that explicit sexual materials can be harmful whether or not they depict actual children. Moreover, with the quality of contemporary technology, it can be very difficult to distinguish a "real" person from a computer creation or composite. Interpreting "person" in accordance with Parliament's purpose of criminalizing possession of material that poses a reasoned risk of harm to children, it seems that it should include visual works of the imagination as well as depictions of actual people. Notwithstanding the fact that "person" in the charging section and in s. 163.1(1)(*b*) refers to a flesh-and-blood person, I conclude that "person" in s. 163.1(1)(*a*) includes both actual and imaginary human beings.

39 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.

40 The second issue is whether "person", as the term is used in s. 163.1(1)(*a*), includes the person who possesses the material. That is, does the definition of "child pornography" catch "auto-depictions" -- for example, sexually explicit photographs a person has taken of him- or herself alone? Given that Parliament has not qualified or limited the definition of "person" in s. 163.1(1)(*a*), I conclude that Parliament intended to catch such auto-depictions, even where the person making the depiction, although under 18, does not appear to be a child, and intends to keep the depiction entirely in his or her own possession. This too creates constitutional problems, as we will see.

41 The legislation defines children to include all those under the age of 18. This doubtless

reflects Parliament's concern that older teenagers may look or be made to look like children. However, this age limit extends the reach of the law to material beyond the ordinary conception of child pornography. For example, it raises the possibility that teenagers, perhaps even married teenagers, could be charged and imprisoned for taking and keeping photos or videos of themselves engaged in lawful sexual acts, even if those materials were intended exclusively for their own personal use. This prohibition engages the value of self-fulfilment and may be difficult to link to a reasoned risk of harm to children, again raising particularly troubling constitutional concerns.

2. "Depicted"

42 Section 163.1(1)(*a*)(i) brings within the definition of child pornography a visual representation of 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" (emphasis added). Does "depicted" mean: (a) intended by the maker to depict; (b) perceived by the possessor as depicting; or (c) seen as being depicted by a reasonable observer?

43 The first and second interpretations are inconsistent with Parliament's objective of preventing harm to children through sexual abuse. The danger associated with the representation does not depend on what was in the mind of the maker or the possessor, but in the capacity of the representation to be used for purposes like seduction. It is the meaning which is conveyed by the material which is critical, not necessarily the meaning that the author intended to convey. Moreover, it would be virtually impossible to prove what was in the mind of the producer or possessor. On the second alternative, the same material could be child pornography in the possession of one person and innocent material in the hands of another. Yet the statute makes it an offence for anyone to possess such material, not just those who see it as depicting children. The only workable approach is to read "depicted" in the sense of what would be conveyed to a reasonable observer. The test must be objective, based on the depiction rather than what was in the mind of the author or possessor. The question is this: would a reasonable observer perceive the person in the representation as being under 18 and engaged in explicit sexual activity?

3. "Explicit Sexual Activity"

44 Section 163.1(1)(*a*)(i) catches visual representations of "explicit sexual activity". Sexual activity spans a large spectrum, ranging from the flirtatious glance at one end, through touching of body parts incidentally related to sex, like hair, lips and breasts, to sexual intercourse and touching of the genitals and the anal region. The question is where on this spectrum Parliament intended to place the boundary between material that may be lawfully possessed and material that may not be lawfully possessed. A number of indications suggest that Parliament intended to draw the line at the extreme end of the spectrum concerned with depictions of intimate sexual activity represented in a graphic and unambiguous manner.

45 The first indication is Parliament's use of the word "explicit" to describe the activity depicted. Parliament could have simply referred to "sexual activity". Instead, it chose "explicit sexual activity". "Explicit" must be given meaning. According to the *Canadian Oxford Dictionary* (1998), "explicit" in the context of sexual acts means "describing or representing nudity or intimate sexual activity". Similarly, "explicit" according to the *New Oxford Dictionary of English* (1998) means "describing or representing sexual activity in a graphic fashion". This suggests that the law catches only depictions of sexual intercourse and other non-trivial sexual acts.

46 This restricted meaning is supported by the fact that in creating other offences, like sexual assault, Parliament uses the word "sexual" without any modifiers. To constitute sexual assault,

the sexual aspect of the contact must be clear. The addition of the modifier "explicit" in s. 163.1 suggests that this at least is required.

47 A restrained interpretation of "explicit sexual activity" is also supported by reading s. 163.1(1)(*a*)(i) and s. 163.1(1)(*a*)(ii) together. They are designed to cover two types of depiction: (i) the depiction of explicit sexual activity; and (ii) the static depiction of the sexual organs or anal regions of children. Subparagraph (ii) clearly indicates that Parliament's concern was with visual representations near the extreme end of the spectrum. While it is possible in the abstract to argue that Parliament intended a much broader sweep for subpara. (i) than for (ii), it seems more likely that Parliament was seeking to catch in subpara. (i) the activity-related counterpart to subpara. (ii).

48 Finally, Parliament's goal of preventing harm to children related to child pornography supports a restrained interpretation of "explicit sexual activity". The evidence suggests that harm to children produced by child pornography arises from depictions of explicit sexual acts with children at the extreme end of the spectrum. The literature on harm focuses mainly on depictions of sexual activity involving nudity and portrayal of the sexual organs and anal region. It is reasonable to conclude that this sort of material was uppermost in Parliament's mind when it adopted this law.

49 I conclude that "explicit sexual activity" refers to acts which viewed objectively fall at the extreme end of the spectrum of sexual activity -- acts involving nudity or intimate sexual activity, represented in a graphic and unambiguous fashion, with persons under or depicted as under 18 years of age. The law does not catch possession of visual material depicting only casual sexual contact, like touching, kissing, or hugging, since these are not depictions of nudity or intimate sexual activity. Certainly, a photo of teenagers kissing at summer camp will not be caught. At its furthest reach, the section might catch a video of a caress of an adolescent girl's naked breast, but only if the activity is graphically depicted and unmistakably sexual. (For a discussion of such concerns see B. Blugerman and L. May, "The New Child Pornography Law: Difficulties of Bill C-128" (1995), 4 *M.C.L.R.* 17.)

4. "Dominant Characteristic" and "Sexual Purpose"

50 The objective approach should also be applied to the term "dominant characteristic" in s. 163.1(1)(*a*)(ii), which targets possession of visual material whose "dominant characteristic" is "the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years". The question is whether a reasonable viewer, looking at the depiction objectively and in context, would see its "dominant characteristic" as the depiction of the child's sexual organ or anal region. The same applies to the phrase "for a sexual purpose", which I would interpret in the sense of reasonably perceived as intended to cause sexual stimulation to some viewers.

51 Family photos of naked children, viewed objectively, generally do not have as their "dominant characteristic" the depiction of a sexual organ or anal region "for a sexual purpose". Placing a photo in an album of sexual photos and adding a sexual caption could change its meaning such that its dominant characteristic or purpose becomes unmistakably sexual in the view of a reasonable objective observer: see *R. v. Hurtubise*, [1997] B.C.J. No. 40 (QL) (S.C.), at paras. 16-17. 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.

5. "Sexual Organ"

52 Section 163.1(1)(*a*)(ii) catches static depictions for a sexual purpose of the "sexual organ" or "anal region" of a person under 18 years, provided this is the dominant characteristic of the representation. This raises the question of the meaning of "sexual organ".

53 Prudence suggests leaving the precise content of "sexual organ" to future case-law. However, no one suggests that s. 163.1(1)(*a*)(ii) was designed to catch depictions of eyes or lips. Parliament's purpose of targeting possession of material associated with a reasoned risk of harm to children suggests a restrained interpretation of "sexual organ" in subpara. (ii), similar to that discussed above with respect to subpara. (i).

6. Written Material: "Advocates or counsels"

54 The second category of child pornography caught by s. 163.1(1) is "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".

55 This section is more limited than the definition of visual pornography in s. 163.1(1)(*a*), which captures sexual "representation[s]" of children. Section 163.1(1)(*b*) is confined to material relating to activity that would be a crime under the *Criminal Code*. Moreover, it is confined to material that "counsels" or "advocates" such crimes. On its face, it appears to be aimed at combating written and visual material that actively promotes the commission of sexual offences with children.

56 At stake is not whether the maker or possessor of the material intended to advocate or counsel the crime, but whether the material, viewed objectively, advocates or counsels the crime. "Advocate" is not defined in the *Criminal Code*. "Counsel" is dealt with only in connection with the counseling of an offence: s. 22 of the *Criminal Code*, where it is stated to include "procure, solicit or incite". "Counsel" can mean simply to advise; however in criminal law it has been given the stronger meaning of actively inducing: see *R. v. Dionne* (1987), 38 C.C.C. (3d) 171 (N.B.C.A.), at p. 180, *per* Ayles J.A. While s. 22 refers to a person's actions and s. 163.1(1)(*b*) refers to material, it seems reasonable to conclude that in order to meet the requirement of "advocates" or "counsels", the material, viewed objectively, must be seen as "actively inducing" or encouraging the described offences with children. Again, Parliament's purpose of capturing material causing a reasoned risk of harm to children may offer guidance. The mere description of the criminal act is not caught. Rather, the prohibition is against material that, viewed objectively, sends the message that sex with children can and should be pursued.

57 Without suggesting that the distinction is easy to apply in practice, a purposive approach appears to exclude many of the alleged examples of the law's overbreadth. For instance, works aimed at description and exploration of various aspects of life that incidentally touch on illegal acts with children are unlikely to be caught. While Nabokov's *Lolita*, Boccaccio's *Decameron*, and Plato's *Symposium* portray or discuss sexual activities with children, on an objective view they cannot be said to advocate or counsel such conduct in the sense of actively inducing or encouraging it. Nor would the section catch political advocacy for lowering the age of consent because such advocacy would not promote the commission of an offence but the amendment of the law. Likewise, an anthropological work discussing the sexual practices of adolescents in other cultures and describing such adolescents as well-adjusted and healthy would not be caught because it would be merely descriptive as opposed to advocating or counselling illegal acts. I note that in any event these examples would likely fall within the artistic merit, medical, educational, scientific, or public good defences, discussed below.

58 It must also be remembered that it is only the advocating or counselling of sexual activity with a person under the age of 18 that would be an offence under the *Criminal Code* that is

captured by this part of the definition of child pornography. Many of the sexual offences in the *Code* apply only to sexual activity involving an individual under the age of 14. For instance, the offences of sexual interference (s. 151) and invitation to sexual touching (s. 152) apply only when individuals 13 or under are involved, unless the person doing the touching or inviting is in a position of trust or authority (s. 153). Advocating the consensual sexual touching of a 16-year-old is not an offence under s. 151 and therefore would not be caught by this part of the child pornography definition. However, advocating such touching by, for example, a teacher or hockey coach, is an offence and would be caught. Similarly, inviting a 14-year-old to consensually sexually touch another person is not an offence under s. 152 and would also not be caught (subject to the same position of trust or authority exception). Finally, advocating consensual vaginal intercourse with a 15-year-old is not an offence, as the age of consent is 14. Written materials or visual representations that advocate or counsel such acts of intercourse are therefore also not caught by s. 163.1(1)(*b*).

59 However, it must be observed that the provision is broad enough to capture written works created by the author alone, solely for his or her own eyes. For example, the law could arguably extend to a teenager's favourable diary account of a sexual encounter. The interpretations of "advocates or counsels" and the fact that the description must be of an unlawful act reduce the likelihood of this happening. Nevertheless, the possibility remains that a teenager's private account of a sexual encounter could be caught. This example, like that of a drawing made and kept exclusively by the accused, engages the value of private self-fulfilment and appears to pose little real risk of harm to children, rendering it constitutionally problematic.

7. The Defences

60 In addition to limiting the ambit of the definition of child pornography, Parliament created a number of defences. In so doing, Parliament recognized that the law could unduly impinge on some of the values protected by the guarantee of free expression, like artistic creativity, education, medical research, or other public purposes, and sought to provide protection for activities furthering these values. The defences should be liberally construed with this purpose in mind.

(a) *The Defence of Artistic Merit*

61 Section 163.1(6) provides a defence for a representation or written material that constitutes child pornography if it has "artistic merit". Three issues arise regarding the ambit of this defence: (1) the meaning of "artistic merit"; (2) whether artistic works must conform to "community standards" in order to gain the protection of the defence; and (3) the procedure for considering the defence. When construing the defence of artistic merit, we must keep in mind the admonition of Sopinka J. in *Butler*, *supra*, at p. 486: "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." Simply put, the defence must be construed broadly.

62 The first question is what the defence covers. It seems clear the defence must be established objectively, since Parliament cannot have intended a bare assertion of artistic merit to provide a defence. This leaves two possibilities. First, "artistic merit" may refer to the quality of the work in the opinion of objective observers. It is not uncommon in everyday discourse to say of a work of art that, although it is genuinely art, it possesses little or no "artistic merit". If "artistic merit" is used in this sense, then the task of the court would be to determine how good the work of art was. Art students learning their craft, inept artists and artists breaking conventions to establish new idioms might well find their work classified as lacking "artistic merit" and hence lose the benefit of the defence. On the assumption that this was the meaning of "artistic merit", it was argued that the defence is too limited and arbitrary to protect artistic

expression adequately.

63 The second meaning that can be ascribed to "artistic merit" is "possessing the quality of art", or "artistic character". On this meaning, a person who produces art of any kind is protected, however crude or immature the result of the effort in the eyes of the objective beholder. This interpretation seems more consistent with what Parliament intended. It is hard to conceive of Parliament wishing to make criminality depend on the worth of the accused's art. It would be discriminatory and irrational to permit a good artist to escape criminality, while criminalizing less fashionable, less able or less conventional artists. Such an interpretation would run counter to the need to give the defence a broad and generous meaning. I conclude that "artistic merit" should be interpreted as including any expression that may reasonably be viewed as art. Any objectively established artistic value, however small, suffices to support the defence. Simply put, artists, so long as they are producing art, should not fear prosecution under s. 163.1(4).

64 What may reasonably be viewed as art is admittedly a difficult question -- one that philosophers have pondered through the ages. Although it is generally accepted that "art" includes the production, according to aesthetic principles, of works of the imagination, imitation or design (*New Shorter Oxford English Dictionary on Historical Principles* (1993), vol. 1, p. 120), the question of whether a particular drawing, film or text is art must be left to the trial judge to determine on the basis of a variety of factors. The subjective intention of the creator will be relevant, although it is unlikely to be conclusive. The form and content of the work may provide evidence as to whether it is art. Its connections with artistic conventions, traditions or styles may also be a factor. The opinion of experts on the subject may be helpful. Other factors, like the mode of production, display and distribution, may shed light on whether the depiction or writing possesses artistic value. It may be, as the case law develops, that the factors to be considered will be refined.

65 This brings me to the issue of whether the defence incorporates a community tolerance standard. In *Ontario (Attorney General) v. Langer* (1995), 123 D.L.R. (4th) 289 (Ont. Ct. (Gen. Div.)), McCombs J. interpreted s. 163.1(6) as importing a requirement that material, to have artistic merit, must comport with community standards in the sense of not posing a risk of harm to children. I am not persuaded that we should read a community standards qualification into the defence. To do so would involve reading in a qualification that Parliament has not stated. Further, reading in the qualification of conformity with community standards would run counter to the logic of the defence, namely that artistic merit outweighs any harm that might result from the sexual representations of children in the work. Most material caught by the definition of child pornography could pose a potential risk of harm to children. To restrict the artistic merit defence to material posing no risk of harm to children would defeat the purpose of the defence. 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.

66 The third issue is how the artistic merit defence functions procedurally. The test, as mentioned, is objective. The wording of the section suggests that it functions in the same manner as other defences such as self defence, provocation or necessity. The accused raises the defence by pointing to facts capable of supporting it (generally something more than a bare assertion that the creator subjectively intended to create art), at which point the Crown must disprove the defence beyond a reasonable doubt: see *Langer*, *supra.*

67 I add this footnote. The statutory defence of artistic merit to a charge of possession of child pornography is conceptually different from the defence of artistic merit to a charge of obscenity under s. 163 of the *Criminal Code*. With respect to s. 163, the meaning of obscenity and the defence of artistic merit are largely judicial creations. It turns on whether the sexual portrayal is the dominant purpose of the work, on the one hand, or essential to a wider artistic purpose, on

the other (the internal necessities test). It also asks whether the sexual aspect of the work, viewed in context, would meet community standards of tolerance. The definition of child pornography, by contrast, stands independent of the defence of artistic merit, making the language of "internal necessity" and the logic of "either obscenity or art" inapposite. For this reason, and with the greatest respect for the contrary view expressed by McCombs J. in *Langer*, *supra*, 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.

(b) *The Defence of "Educational, Scientific or Medical Purpose"*

68 Section 163.1(6) creates a defence for material that serves a medical, educational or scientific purpose. This refers to the purpose the material, viewed objectively, may serve, not the purpose for which the possessor actually holds it. How the material was produced or is possessed is obviously relevant to this determination. While arguably few medical, educational and scientific works would fall within s. 163.1(1), Parliament has made it clear that if they do, possession of them is legal. The procedural aspects of the defence of artistic merit would apply to this defence.

69 The defence of possession for medical, education and scientific purposes, like the other defences, should be interpreted liberally in accordance with Parliament's intent. On such an approach, possession of materials for therapeutic purposes might meet the requirements of the defence. This defence will apply in appropriate circumstances to sketches and stories penned in the process of self-analysis or a couple's record of their sexual conduct held for the purpose of furthering that relationship: J. Ross, "*R.* v. *Sharpe* and Private Possession of Child Pornography" (2000), 11 *Constitutional Forum* 50, at p. 57.

(c) *The Defence of "Public Good"*

70 "Public good" has been interpreted as "necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest": J. F. Stephen, *A Digest of the Criminal Law* (9th ed. 1950), at p. 173, adopted in *R. v. American News Co.* (1957), 118 C.C.C. 152 (Ont. C.A.), at pp. 161-62, and *R. v. Delorme* (1973), 15 C.C.C. (2d) 350 (Que. C.A.), at pp. 358-59. The public good defence has received little interpretation in the obscenity context, and a precise definition of its ambit is beyond the scope of this appeal. Once again, a purposive interpretation would appear to be appropriate. Examples of possession of child pornography which could serve the public good include possession of child pornography by people in the justice system for purposes associated with prosecution, by researchers studying the effects of exposure to child pornography, and by those in possession of works addressing the political or philosophical aspects of child pornography. Again, the same procedure would apply as for the defence of artistic merit.

71 It might be argued that the public good is served by possession of materials that promote expressive or psychological well-being or enhance one's sexual identity in ways that do not involve harm to others. In some cases this might eliminate some of the more problematic applications of s. 163.1(4). For example, it might in certain cases foreclose the law's application to visual works created and privately held by one person alone, or to private recordings by adolescents of their lawful sexual activity. Nevertheless, the public good defence might not answer all concerns as to the law's breadth. Absent evidence of public good in the particular case, a person might still be convicted for possession of material that directly engages the value of self-fulfilment and presents little or no risk of harm to children. Thus, while the public good defence might prevent troubling applications of the law in certain cases, it would not do so in all.

8. Summary of Material Caught by Section 163.1(4)

72 Section 163.1(4) of the *Criminal Code* evinces a clear and unequivocal intention to protect children from the abuse and exploitation associated with child pornography. It criminalizes the possession of a substantial range of materials posing a risk of harm to children. Written material and visual representations advocating the commission of criminal offences against children is caught. Visual material depicting children engaged in explicit sexual activity is caught, as is material featuring, as a dominant characteristic, the sexual organ or anal region of a child for a sexual purpose. The reach of the proscription is further broadened by extending it to the depiction of both real and imaginary persons. As a result, the law appears to catch a substantial amount of material that endangers the welfare of children.

73 At the same time, the legislation recognizes the importance of free expression and the danger of a sweeping criminal prohibition. It catches visual representations only where the sexual activity depicted is explicit, thus excluding kissing, hugging and other forms of casual intimacy. It targets visual materials only where they feature a sexual organ or anal region as a "dominant characteristic" for a "sexual purpose", precluding the application of the law to innocent baby-in-the-bath photos and other scenarios of non-sexual nudity. Writings are caught only where they actively advocate or counsel illegal sexual activity with persons under the age of 18. Complementing these limits inherent in the s. 163.1(1) definition are an array of defences aimed at enhancing the protection of free expression by excluding materials with redeeming social benefits. Works of art, even of dubious artistic value, are not caught at all. Materials created for an "educational, scientific or medical purpose", liberally construed, are also exempted. Finally, a public good defence, the precise scope of which remains to be determined, further protects the possession of materials serving a necessary or advantageous social function.

74 These exclusions support the earlier suggestion that Parliament's goal was to prohibit possession of child pornography that poses a reasoned risk of harm to children. The primary definition of "child pornography" does not embrace every kind of material that might conceivably pose a risk of harm to children, but appears rather to target blatantly pornographic material. Additionally, the defences exempt classes of material raising special free expression concerns. In this way, Parliament has attempted to meet the dual concerns of protecting children and protecting free expression.

75 Yet problems remain. The interpretation of the legislation suggested above reveals that the law may catch some material that particularly engages the value of self-fulfilment and poses little or no risk of harm to children. This material may be grouped in two classes. The first class consists of self-created, privately held expressive materials. Private journals, diaries, writings, drawings and other works of the imagination, created by oneself exclusively for oneself, may all trigger the s. 163.1(4) offence. The law, in its prohibition on the possession of such materials, reaches into a realm of exceedingly private expression, where s. 2(*b*) values may be particularly implicated and state intervention may be markedly more intrusive. Further, the risk of harm arising from the private creation and possession of such materials, while not eliminated altogether, is low.

76 The second class of material concerns privately created visual recordings of lawful sexual activity made by or depicting the person in possession and intended only for private use. Sexually explicit photographs taken by a teenager of him- or herself, and kept entirely in private, would fall within this class of materials. Another example would be a teenaged couple's private photographs of themselves engaged in lawful sexual activity. Possession of such materials may implicate the values of self-fulfilment and self-actualization, and therefore, like the material in the first category, reside near the heart of the s. 2(*b*) guarantee. And like the material in the first category, this material poses little risk of harm to children. It is privately created and intended only for personal use. It depicts only lawful sexual activity. Indeed, because the law reaches

depictions of persons who are or appear to be under 18, the person or persons depicted may not even appear to be children.

77 These examples suggest that s. 163.1(4), at the margins of its application, prohibits deeply private forms of expression, in pursuit of materials that may pose no more than a nominal risk of harm to children. It is these potential applications that present the most significant concerns at the stage of justification.

3.Is the Limitation on Free Expression Imposed by Section 163.1(4) Justified Under Section 1 of the Charter?

78 Crown counsel has conceded that criminalizing possession of child pornography limits the right of free expression. The question we must answer is whether that limitation is reasonable and demonstrably justified in a free and democratic society. To justify the intrusion on free expression, the government must demonstrate, through evidence supplemented by common sense and inferential reasoning, that the law meets the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, and refined in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877. The goal must be pressing and substantial, and the law enacted to achieve that goal must be proportionate in the sense of furthering the goal, being carefully tailored to avoid excessive impairment of the right, and productive of benefits that outweigh the detriment to freedom of expression.

79 Before we turn to these issues, we must consider the argument that prohibitions on private possession of child pornography can never be justified. Such laws, Southin J.A. asserted, constitute "the hallmark of tyranny" (para. 95). They represent such a fundamental intrusion on basic liberties that they can never be justified in a free and democratic society.

80 Section 1 of the *Charter* belies the suggestion that any *Charter* right is so absolute that limits on it can never be justified. The argument posits that some rights are so basic that they can never be limited as a matter of principle, precluding any evaluation under s. 1. This is both undesirable and unnecessary. It is undesirable because it raises the risk that laws that can be justified may be struck down on the basis of how they are characterized. It is unnecessary because s. 1 provides a basis for fair evaluation that upholds only those laws that do not unjustifiably erode basic liberties.

81 I conclude that the argument that limitations on possession of child pornography can never be justified as a matter of principle must be dismissed. We must conduct a detailed analysis of whether the law's intrusion on freedom of speech can be justified under s. 1 of the *Charter*.

1. Is the Legislative Objective Pressing and Substantial?

82 I earlier concluded that Parliament's objective in passing s. 163.1(4) was to criminalize possession of child pornography that poses a reasoned risk of harm to children. This objective is pressing and substantial. Over and above the specific objectives of the law in reducing the direct exploitation of children, the law in a larger attitudinal sense asserts the value of children as a defence against the erosion of societal attitudes toward them. While the government in this case did not present attitudinal harm to society at large as a justification for the law's intrusion on the right of free expression, this may be seen as a good incidental to the law's main purpose -- the prevention of harm to children.

2 Is There Proportionality Between the Limitation on the Right and the Benefits of the Law?

83 Parliament can prohibit possession of child pornography. The issue in this case is whether it has done so in a reasonable and proportionate manner having regard to the right of free

expression.

(a)*Rational Connection*

84 As the first step in showing proportionality, the Crown must demonstrate that the law is likely to confer a benefit or is "rationally connected" to Parliament's goal. This means that it must show that possession of child pornography, as opposed to its manufacture, distribution or use, causes harm to children.

85 This raises a question pivotal to this appeal: what standard of proof must the Crown achieve in demonstrating harm -- scientific proof based on concrete evidence or a reasoned apprehension of harm? The trial judge insisted on scientific proof based on concrete evidence. With respect, this sets the bar too high. In *Butler*, *supra*, considering the obscenity prohibition of the *Criminal Code*, this Court rejected the need for concrete evidence and held that a "reasoned apprehension of harm" sufficed (p. 504). A similar standard must be employed in this case.

86 The Crown argues that prohibiting possession of child pornography is linked to reducing the sexual abuse of children in five ways: (1) child pornography promotes cognitive distortions; (2) it fuels fantasies that incite offenders; (3) prohibiting its possession assists law enforcement efforts to reduce the production, distribution and use that result in direct harm to children; (4) it is used for grooming and seducing victims; and (5) some child pornography is produced using real children.

87 The first alleged harm concerns cognitive distortions. The Crown argues that child pornography may change possessors' attitudes in ways that makes them more likely to sexually abuse children. People may come to see sexual relations with children as normal and even beneficial. Moral inhibitions may be weakened. People who would not otherwise abuse children may consequently do so. Banning the possession of child pornography, asserts the Crown, will reduce these cognitive distortions.

88 The trial judge discounted this harm due to the limited scientific evidence linking cognitive distortions to increased rates of offending. Applying the reasoned apprehension of harm test yields a different conclusion. While the scientific evidence is not strong, I am satisfied that the evidence in this case supports the existence of a connection here: exposure to child pornography may reduce paedophiles' defences and inhibitions against sexual abuse of children. Banalizing the awful and numbing the conscience, exposure to child pornography may make the abnormal seem normal and the immoral seem acceptable.

89 The second alleged harm is that possession of child pornography fuels fantasies, making paedophiles more likely to offend. The trial judge found that studies showed a link between highly erotic child pornography and offences. However, other studies suggested that both erotic and milder pornography might provide substitute satisfaction and reduce offences. Putting the studies together, the trial judge concluded that he could not say that the net effect was to increase harm to children (para. 23). Absent evidence as to whether the benefit from sublimation equals the harm of incitement or otherwise, this conclusion seems tenuous. More fundamentally, the trial judge proceeded on the basis that scientific proof was required. The lack of unanimity in scientific opinion is not fatal. Complex human behaviour may not lend itself to precise scientific demonstration, and the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of. Some studies suggest that child pornography, like other forms of pornography, will fuel fantasies and may incite offences in the case of certain individuals. This reasoned apprehension of harm demonstrates a rational connection between the law and the reduction of harm to children through child pornography.

90 The third alleged harm -- that criminalizing the possession of child pornography aids in

prosecuting the distribution and use of child pornography -- was not expressly considered by the trial judge. Detective Waters testified that as a result of possession charges, the police have been able to uncover persons involved in producing and distributing child pornography. The Criminal Lawyers' Association argues that it is dangerous to justify violations of rights on the sole basis that they will assist in the detection and prosecution of other criminal offences. Such reasoning, it argues, could be used to justify many other violations of fundamental rights. Given the evidence linking possession with harm to children on other grounds, it is not necessary to resolve the question of whether an offence abridging a *Charter* right can ever be justified solely on the basis that it assists in prosecuting other offences. It is sufficient to note that the fact the offence of possession aids prosecution of those who produce and distribute child pornography is a positive side-effect of the law.

91 The trial judge was satisfied that the evidence relating to the fourth alleged harm, the use of child pornography to "groom" or seduce victims, showed a rational connection. The evidence is clear and uncontradicted. "Sexually explicit pornography involving children poses a danger to children because of its use by pedophiles in the seduction process" (para. 23). The ability to possess child pornography makes it available for the grooming and seduction of children by the possessor and others. Mr. Sharpe does not deny that some child pornography can play an important role in the seduction of children. Criminalizing the possession of child pornography is likely to help reduce the grooming and seduction of children.

92 The fifth and final harm -- the abuse of children in the production of pornography -- is equally conclusive. Children are used and abused in the making of much of the child pornography caught by the law. Production of child pornography is fueled by the market for it, and the market in turn is fueled by those who seek to possess it. Criminalizing possession may reduce the market for child pornography and the abuse of children it often involves. The link between the production of child pornography and harm to children is very strong. The abuse is broad in extent and devastating in impact. The child is traumatized by being used as a sexual object in the course of making the pornography. The child may be sexually abused and degraded. The trauma and violation of dignity may stay with the child as long as he or she lives. Not infrequently, it initiates a downward spiral into the sex trade. Even when it does not, the child must live in the years that follow with the knowledge that the degrading photo or film may still exist, and may at any moment be being watched and enjoyed by someone.

93 It is argued that even if possession of child pornography is linked to harm to children, that harm is fully addressed by laws against the production and distribution of child pornography. Criminalizing mere possession, according to this argument, adds greatly to the limitation on free expression but adds little benefit in terms of harm prevention. The key consideration is what the impugned section seeks to achieve beyond what is already accomplished by other legislation: *R. v. Martineau*, [1990] 2 S.C.R. 633. If other laws already achieve the goals, new laws limiting constitutional rights are unjustifiable. However, an effective measure should not be discounted simply because Parliament already has other measures in place. It may provide additional protection or reinforce existing protections. Parliament may combat an evil by enacting a number of different and complementary measures directed to different aspects of the targeted problem: see, e.g., *R. v. Whyte*, [1988] 2 S.C.R. 3. Here the evidence amply establishes that criminalizing the possession of child pornography not only provides additional protection against child exploitation -- exploitation associated with the production of child pornography for the market generated by possession and the availability of material for arousal, attitudinal change and grooming -- but also reinforces the laws criminalizing the production and distribution of child pornography.

94 I conclude that the social science evidence adduced in this case, buttressed by experience

and common sense, amply meets the *Oakes* requirement of a rational connection between the purpose of the law and the means adopted to effect this purpose. 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.

(b)*Minimal Impairment*

95 This brings us to a critical question in this case: does the law impair the right of free expression only minimally? If the law is drafted in a way that unnecessarily catches material that has little or nothing to do with the prevention of harm to children, then the justification for overriding freedom of expression is absent. Section 163.1(4), as a criminal offence, carries the heavy consequences of prosecution, conviction and loss of liberty, and must therefore be carefully tailored as a "measured and appropriate response" to the harms it addresses: *Keegstra*, *supra*, at p. 771. At the same time, legislative drafting is a difficult art and Parliament cannot be held to a standard of perfection: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy*, *supra*; *R. v. Chaulk*, [1990] 3 S.C.R. 1303. It may be difficult to draft a law capable of catching the bulk of pornographic material that puts children at risk, without also catching some types of material that are unrelated to harm to children. This is what McEachern C.J.B.C. had in mind when he suggested that it is difficult to see how Parliament could have drafted the law in a way that eliminated the possibility of "unintended consequences" (para. 292).

96 This Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. 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: see *Edwards Books and Art Ltd.*, *supra*; *Chaulk*, *supra*; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Butler*, *supra*; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *M. v. H.*, [1999] 2 S.C.R. 3.

97 This approach to minimal impairment is confirmed by the existence of the third branch of the proportionality test, requiring that the impairment of the right be proportionate to the benefit in terms of achieving Parliament's goal. If the only question were whether the impugned law limits the right as little as possible, there would be little need for the third stage of weighing the costs resulting from the infringement of the right against the benefits gained in terms of achieving Parliament's goal. It was argued after *Oakes*, *supra*, that anything short of absolutely minimal impairment was fatal. This Court has rejected that notion. The language of the third branch of the *Oakes* test is consistent with a more nuanced approach to the minimal impairment inquiry -- one that takes into account the difficulty of drafting laws that accomplish Parliament's goals, achieve certainty and only minimally intrude on rights. At its heart, s. 1 is a matter of balancing: see *Dagenais*, *supra*; *RJR-MacDonald*, *supra*; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Thomson Newspapers*, *supra*.

98 Against this background, I turn to the legislation here at issue. Mr. Sharpe argues that s. 163.1(4) fails the minimal impairment test because the legal definition of child pornography includes material posing no reasoned risk of harm to children. However, as discussed earlier, properly interpreted, the law catches much less material unrelated to harm to children than Mr. Sharpe suggests. Depictions of kissing, hugging and other activity short of "explicit" sexual activity, works of art even of limited technical value, and family photos of naked children absent

proof of a dominant sexual purpose, all fall outside the scope of the law. Many of the other hypothetical examples relied on in the courts below as suggesting overbreadth either disappear entirely on a proper construction of the statutory definition of child pornography, or are narrowed to the extent that material is caught only where it is related to harm to children. If these were the only grounds for concern arising from s. 163.1(4), I would have little difficulty concluding the provision is carefully tailored to its objective. It should also be remembered that to effect a conviction under s. 163.1(4), as under any other criminal provision, the Crown must establish that the accused possessed the requisite *mens rea*; this requirement, too, limits the reach of the statute.

99 The fact remains, however, that the law may also capture the possession of material that one would not normally think of as "child pornography" and that raises little or no risk of harm to children: (1) written materials or visual representations created and held by the accused alone, exclusively for personal use; and (2) visual recordings, created by or depicting the accused, that do not depict unlawful sexual activity and are held by the accused exclusively for private use.

100 Possession of material in these categories is less closely tied to harm to children than the vast majority of material caught by the law. Children are not exploited in its production. The self-created nature of the material comprising the first category undermines the possibility that it could produce negative attitudinal changes. In the second category, those depicted may well not even look like children. This said, some material in these categories could conceivably cause harm to children. Self-created private expressive materials could conceivably abet negative attitudinal changes in the creator, although since the creation came from him or her in the first place one would not expect the effect to be significant. A self-created private depiction or writing in the possession of the maker could fall into the hands of someone who might use it in a way that harms children. Again, a person's video or photo of him- or herself engaged in a lawful sexual act could present an image that looks like a child, which could possibly come into the hands of someone who would use it to harm children. So it cannot be denied that permitting the author of such materials to keep them in his or her custody poses some risk. However, the risk is small, incidental and more tenuous than that associated with the vast majority of material targeted by s. 163.1(4). Indeed, the above-cited examples lie at the edge of the problematic classes of material. The bulk of the material in these two problematic classes, while engaging important values underlying the s. 2(*b*) guarantee, poses no reasoned risk of harm to children.

101 The government's argument on this point is, in effect, that it is necessary to prohibit possession of a large amount of harmless expressive material in order to combat the small risk that some material in this class may cause harm to children. This suggests that the law may be overbroad. However, final determination of this issue requires us to proceed to the third prong of the proportionality test -- the weighing of the costs of the law to freedom of expression against the benefits it confers.

(c)*Proportionality: the Final Balance*

102 This brings us to the third and final branch of the proportionality inquiry: whether the benefits the law may achieve in preventing harm to children outweigh the detrimental effects of the law on the right of free expression. The final proportionality assessment takes all the elements identified and measured under the heads of Parliament's objective, rational connection and minimal impairment, and balances them to determine whether the state has proven on a balance of probabilities that its restriction on a fundamental *Charter* right is demonstrably justifiable in a free and democratic society.

103 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 substantial. Explicit sexual photographs and videotapes of children may promote cognitive distortions, fuel fantasies that incite offenders, enable grooming of victims, and may be produced using real children. Written material that advocates or counsels sexual offences with children can pose many of the same risks. Although we recently held in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, that it may be difficult to make the case of obscenity against written texts, materials that advocate or counsel sexual offences with children may qualify. The Crown has also met the burden of showing that the law will benefit society by reducing the possibility of cognitive distortions, the use of pornography in grooming victims, and the abuse of children in the manufacture and continuing existence of this material. Explicit sexual photographs of children, videotapes of pre-pubescent children, and written works advocating sexual offences with children -- all these and more pose a reasoned risk of harm to children. Thus we may conclude that in its main impact, s. 163.1(4) is proportionate and constitutional.

104 I say this having given full consideration to the law's chilling effect. It is argued that fear of prosecution under s. 163.1(4), and the attendant social stigma, will deter people from keeping legal material and thus chill legitimate expression. However, the interpretation of the law offered in this decision may go some distance to reducing the uncertainty that feeds the chilling effect. Families need not fear prosecution for taking pictures of bare-bottomed toddlers at the beach or children playing in the backyard, given the requirement that the dominant purpose be sexual. As case law develops, greater certainty may be expected, further reducing the law's chilling effect. On the record before us, the chilling effect, while not insignificant, does not appear to represent a major cost as it relates to the vast majority of material captured under s. 163.1(4).

105 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. At the same time, it is here that the link between the proscribed materials and any risk of harm to children is most tenuous, for the reasons discussed earlier: children are not exploited or abused in their production; they are unlikely to induce attitudinal effects in their possessor; adolescents recording themselves alone or engaged in lawful sexual activity will generally not look like children; and the fact that this material is held privately renders the potential for its harmful use by others minimal. Consequently, the law's application to these materials, while peripheral to its objective, poses the most significant problems at this final stage of the proportionality analysis.

106 As noted in discussing the values at stake in this appeal, privacy interests going to the liberty of the subject are also engaged by the legislation in question. However, these interests largely overlap with the s. 2(*b*) values and are properly considered in the final balancing stage under s. 1.

107 I turn first to consider the law's application to self-created works of the imagination, written or visual, intended solely for private use by the creator. The intensely private, expressive nature of these materials deeply implicates s. 2(*b*) freedoms, engaging the values of self-fulfilment and self-actualization and engaging the inherent dignity of the individual: *Ford*, *supra*, at p. 765; see also my comments in *Keegstra*, *supra*, at p. 804. Personal journals and writings, drawings and other forms of visual expression may well be of importance to self-fulfilment. Indeed, for young people grappling with issues of sexual identity and self-awareness, private

expression of a sexual nature may be crucial to personal growth and sexual maturation. The fact that many might not favour such forms of expression does not lessen the need to insist on strict justification for their prohibition. As stated in *Irwin Toy*, *supra*, at p. 976, "the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment".

108 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 private musings thus falls perilously close to criminalizing the mere articulation of thought.

109 The same concerns arise in relation to auto-depictions; that is, visual recordings made by a person of him- or herself alone, held privately and intended only for personal use. Again, such materials may be of significance to adolescent self-fulfilment, self-actualization and sexual exploration and identity. Similar considerations apply where the creator of the recordings is not the sole subject; that is, where lawful sexual acts are documented in a visual recording, such as photographs or a videotape, and held privately by the participants exclusively for their own private use. Such materials could conceivably reinforce healthy sexual relationships and self-actualization. For example, two adolescents might arguably deepen a loving and respectful relationship through erotic pictures of themselves engaged in sexual activity. The cost of including such materials to the right of free expression outweighs any tenuous benefit it might confer in preventing harm to children.

110 I conclude that in broad impact and general application, the limits s. 163.1(4) imposes on free expression are justified by the protection the law affords children from exploitation and abuse. I cannot, however, arrive at the same conclusion in regard to the two problematic categories of materials described above. The legislation prohibits a person from articulating thoughts in writing or visual images, even if the result is intended only for his or her own eyes. It further prohibits a teenager from possessing, again exclusively for personal use, sexually explicit photographs or videotapes of him- or herself alone or engaged with a partner in lawful sexual activity. The inclusion of these peripheral materials in the law's prohibition trenches heavily on freedom of expression while adding little to the protection the law provides children. To this extent, the law cannot be considered proportionate in its effects, and the infringement of s. 2(*b*) contemplated by the legislation is not demonstrably justifiable under s. 1.

D.*Remedy*

111 Confronted with a law that is substantially constitutional and peripherally problematic, the Court may consider a number of alternatives. One is to strike out the entire law. This was the choice of the trial judge and the majority of the British Columbia Court of Appeal. The difficulty with this remedy is that it nullifies a law that is valid in most of its applications. Until Parliament can pass another law, the evil targeted goes unremedied. Why, one might well ask, should a law that is substantially constitutional be struck down simply because the accused can point to a hypothetical application that is far removed from his own case which might not be constitutional?

112 Another alternative might be to hold that the law as it applies to the case at bar is valid, declining to find it unconstitutional on the basis of a hypothetical scenario that has not yet arisen. In the United States, courts have frequently declined to strike out laws on the basis of hypothetical situations not before the court, although less so in First Amendment (free expression)

cases. While the Canadian jurisprudence on the question is young, thus far it suggests that laws may be struck out on the basis of hypothetical situations, provided they are "reasonable".

113 Yet another alternative might be to uphold the law on the basis that it is constitutionally valid in the vast majority of its applications and stipulate that if and when unconstitutional applications arise, the accused may seek a constitutional exemption. Ross, who concludes that s. 163.1(4) is constitutional in most but not all of its applications, recommends this remedy: Ross, *supra*, at p. 58.

114 I find it unnecessary to canvas any of these suggestions further because in my view the appropriate remedy in this case is to read into the law an exclusion of the problematic applications of s. 163.1, following *Schachter v. Canada*, [1992] 2 S.C.R. 679. *Schachter* suggests that the problem of peripheral unconstitutional provisions or applications of a law may be addressed by striking down the legislation, severing of the offending sections (with or without a temporary suspension of invalidity), reading down, or reading in. The Court decides on the appropriate remedy on the basis of "twin guiding principles": respect for the role of Parliament, and respect for the purposes of the *Charter* (p. 715). Applying these principles, I conclude that in the circumstances of the case reading in an exclusion is the appropriate remedy.

115 To assess the appropriateness of reading in as a remedy, we must identify a distinct provision that can be read into the existing legislation to preserve its constitutional balance. In this case, s. 163.1 might be read as incorporating an exception for the possession of:

1. Self-created expressive material: i.e., 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. Private recordings of lawful sexual activity: i.e., 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.

The first category would protect written or visual expressions of thought, created through the efforts of a single individual, and held by that person for his or her eyes alone. The teenager's confidential diary would fall within this category, as would any other written work or visual representation confined to a single person in its creation, possession and intended audience.

116 The second category would protect auto-depictions, such as photographs taken by a child or adolescent of him- or herself alone, kept in strict privacy and intended for personal use only. It would also extend to protect the recording of lawful sexual activity, provided certain conditions were met. The person possessing the recording must have personally recorded or participated in the sexual activity in question. That activity must not be unlawful, thus ensuring the consent of all parties, and precluding the exploitation or abuse of children. All parties must also have consented to the creation of the record. The recording must be kept in strict privacy by the person in possession, and intended exclusively for private use by the creator and the persons depicted therein. Thus, for example, a teenage couple would not fall within the law's purview for creating and keeping sexually explicit pictures featuring each other alone, or together engaged in lawful sexual activity, provided these pictures were created together and shared only with one another. The burden of proof in relation to these excepted categories would function in the same manner as that of the defences of "artistic merit", "educational, scientific or medical purpose", and "public good". The accused would raise the exception by pointing to facts capable of bringing him or her within its protection, at which point the Crown would bear the burden of disproving its applicability beyond a reasonable doubt.

117 These two exceptions would necessarily apply as well to the offence of "making child

pornography" under s. 163.1(2) (but not to printing, publishing or possessing for the purpose of publishing); otherwise an individual, although immune from prosecution for the possession of such materials, would remain vulnerable to prosecution for their creation.

118 I reiterate that the protection afforded by this exception would extend no further than to materials intended solely for private use. If materials where shown to be held with any intention other than for personal use, their possession would then fall outside the exception's aegis and be subject to the full force of s. 163.1(4). Indeed, such possession might also run afoul of the manufacturing and distributing offences set out in ss. 163.1(2) and 163.1(3).

119 It is apparent that the availability of the second exception turns on whether Parliament had criminalized the depicted sexual activity. Parliament may affect the scope of the exception by narrowing or broadening the range of sexual activity that is criminalized. (More broadly, of course, Parliament, in its wisdom, may choose to redraft the statute to reflect the concerns that compel the Court to hold that the statute cannot constitutionally apply to the two stipulated exceptions.)

120 Thus described, the proposed exception relates only to materials that pose a negligible risk of harm to children, while deeply implicating s. 2(*b*) values and the s. 7 liberty interest by virtue of their intensely private nature and potential connection to self-fulfilment and self-actualization. With the contours of this exception in mind, I proceed to the question of whether reading in this exception is the appropriate remedy for the overbreadth of s. 163.1(4).

121Schachter, *supra*, holds that reading in will be appropriate only where (1) the legislative objective is obvious and reading in would further that objective or constitute a lesser interference with that objective than would striking down the legislation; (2) the choice of means used by the legislature to further the legislation's objective is not so unequivocal that reading in would constitute an unacceptable intrusion into the legislative domain; and (3) reading in would not require an intrusion into legislative budgetary decisions so substantial as to change the nature of the particular legislative enterprise. The third requirement is not of concern here. The first two inquiries -- conformity with legislative objective and avoidance of unacceptable law-making -- require more discussion.

122 The first question is whether the legislative objective of s. 163.1(4) is evident. In my view it is. The purpose of the legislation is to protect children from exploitation and abuse by prohibiting possession of material that presents a reasoned risk of harm to children. This question leads to a second: whether reading in will further that objective. In other words, will precluding the offending applications of the law better conform to Parliament's objective than striking down the whole law? Again the answer is clearly yes. The applications of the law that pose constitutional problems are exactly those whose relation to the objective of the legislation is most remote. Carving out those applications by incorporating the proposed exception will not undermine the force of the law; rather, it will preserve the force of the statute while also recognizing the purposes of the *Charter*. The defects of the section are not so great that their exclusion amounts to impermissible redrafting, as was the case in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, and *R. v. Heywood*, [1994] 3 S.C.R. 761. The new exceptions resemble those that Parliament has already created and are consistent with its overall approach of catching mainstream child pornography reasonably linked to harm while excluding peripheral material that engages free speech values. Moreover, since the problematic applications lie on the periphery of the material targeted by Parliament, carving them out will not create an exception-riddled provision bearing little resemblance to the provision envisioned by Parliament. This suggests that excluding the offending applications of the law will not subvert Parliament's object. On the other hand, striking down the statute altogether would assuredly undermine Parliament's object, making it impossible to combat the lawfully targeted harms until it can pass new

legislation.

123 I recognize that questions may arise in the application of the excepted categories. However, the same may be said for s. 163.1 as drafted. It will be for the courts to consider precise questions of interpretation if and when they arise, bearing in mind Parliament's fundamental object: to ban possession of child pornography which raises a reasoned apprehension of harm to children.

124 The second prong of *Schachter*, *supra*, is directed to the possibility that reading in, though recognizing the objective of the legislation, may nonetheless undermine legislative intent by substituting one means of effecting that intent with another. As we noted in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, the relevant question is "what the legislature would . . . have done if it had known that its chosen measures would be found unconstitutional" (para. 167). If it is not clear that the legislature would have enacted the legislation without the problematic provisions or aspects, then reading in a term may not provide the appropriate remedy. This concern has more relevance where the legislature has made a "deliberate choice of means" by which to reach its objective. Even in such a case, however, "a deliberate choice of means will not act as a bar to reading in save for those circumstances in which the means chosen can be shown to be of such centrality to the aims of the legislature and so integral to the scheme of the legislation, that the legislature would not have enacted the statute without them": *Vriend*, *supra*, at para. 167.

125 In the present case it cannot be said that the legislature has made a deliberate choice of means in the sense that phrase was used in *Vriend*, *supra*. Clearly, s. 163.1(4) is a deliberate choice of means in the general sense that the provision was adopted to address the problem of child abuse and exploitation. I see no evidence, however, that Parliament saw the statute's application to the two problematic categories of materials (i.e., self-created expressive materials and private recordings that do not depict unlawful sexual activity) as an integral part of the legislative scheme. On the contrary, given that the risk to children posed by materials falling within these two categories is relatively remote, it seems reasonable to conclude that such materials are caught incidentally, not deliberately, and that Parliament would have excluded these two categories from the purview of the law had it been seized of the difficulty raised by their inclusion.

126 The legislative history of Bill C-128, which introduced s. 163.1(4), reinforces my view that reading in an exclusion of the problematic material would not unduly intrude on the legislative domain. As was noted during the Senate Committee's proceedings, there had over the years been a great deal of debate, both within Parliament and in the country more generally, about the problem of child pornography and the appropriate way to address it (*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 50, June 21, 1993, at p. 50:41 (statement of Richard Mosley, Chief Policy Counsel, Criminal and Social Policy, Department of Justice)).

127 After expressing concern over the potential for constitutional problems arising from Bill C-128, the Honorable Gérald-A. Beaudoin, Chairman of the Senate Committee, concluded:

> There is, obviously, also the problem the courts will face. The Supreme Court of Canada has to interpret the Constitution and the Criminal Code. If the legislation is very vague, greater power is given to the judges. This is a difficulty which, in cases involving obscenity and pornography, perhaps, cannot be avoided. In other words, to a certain extent it has to be left to the courts.

(*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 51, June 22, 1993, at p. 51:54)

As Senator Beaudoin predicted, it has fallen to the Courts to interpret s. 163.1(4) and judge its ultimate validity in accordance with that interpretation. The British Columbia Courts found the law constitutionally wanting and struck it down in its entirety. I too, find it to be constitutionally imperfect. However, the defects lie at the periphery of the law's application. In my view, the appropriate remedy is to uphold the law in its broad application, while holding that it must not be applied to two categories of material, as described above: self-created, privately held expressive materials and private recordings that do not depict unlawful sexual activity.

E. *Summary*

128 I would summarize my conclusions with respect to s. 163.1(4) in general terms as follows:

1. The offence prohibits the possession of photographs, film, videos and other visual representations that show or depict a person under the age of 18 engaged in explicit sexual activity. Visual representations of any activity that falls short of this threshold are not caught. Thus, representations of casual intimacy, such as depictions of kissing or hugging, are not covered by the offence.

2. The offence prohibits the possession of visual representations that feature, as a dominant characteristic, the depiction of a sexual organ or the anal region of a person under the age of 18 for a sexual purpose. Innocent photographs of a baby in the bath and other representations of non-sexual nudity are not covered by the offence.

3. The offence prohibits the possession of written or visual material that actively induces or encourages unlawful sexual activity with persons under the age of 18. Written description that falls short of this threshold is not covered by the offence.

4. Courts should take an objective approach to determining whether material falls within the definition of child pornography. The question is whether a reasonable person would conclude, for example, that the impugned material portrays "explicit" sexual activity, or that the material "advocates or counsels" sexual offences with persons under 18. Courts should also take an objective approach in determining the availability of any statutory defence.

5. The various statutory defences (i.e., artistic merit; educational, scientific or medical purpose; and public good) must be interpreted liberally to protect freedom of expression, as well as possession for socially redeeming purposes.

6. 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 created with the consent of those persons depicted.

7. These two exceptions apply equally to the offence of "making" child pornography under s. 163.1(2).

8. Neither exception affords protection to a person harbouring any other intention than private possession; any intention to distribute, publish, print, share or in any other way disseminate these

materials will subject a person to the full force of s. 163.1.

VI. Conclusion

129 I would uphold s. 163.1(4) on the basis that the definition of "child pornography" in s. 163.1 should be read as though it contained an exception 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. The constitutional questions should be answered accordingly.

130 I would therefore allow the appeal and remit the respondent for trial on all charges.

The following are the reasons delivered by

131 L'HEUREUX-DUBÉ, GONTHIER AND BASTARACHE JJ. -- In this appeal, we are asked to assess the constitutionality of s. 163.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46. The Court must determine whether Parliament may legitimately criminalize the possession of the material it has defined as child pornography. Specifically, we must decide whether s. 163.1(4) is an unjustified infringement of the right to free expression found in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The Court is also asked to determine whether s. 163.1(4) infringes s. 7 of the *Charter*. In our view, the s. 7 liberty interest is encompassed in the right of free expression and proportionality falls to be considered under s. 1. Accordingly, no separate s. 7 analysis is required.

132 A discussion of these constitutional questions must take place within the broad political, social and historical context in which they arise; see *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, at p. 438; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 647; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1352; see also S. M. Sugunasiri, "Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability" (1999), 22 *Dalhousie L.J.* 126, at pp. 133-34. The impugned provision of the *Criminal Code* must also be interpreted in light of *Charter* values reflected in s. 1 as elaborated in cases such as *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136, and *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 64. See *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892.

133 In the context of this case, the twin considerations of social justice and equality warrant society's active protection of its vulnerable members. Democratic and constitutional principles dictate that every member of society be treated with dignity and respect and accorded full participation in society. In this sense, government legislation that protects the vulnerable plays a vital role. Given our democratic values, it is clear that the *Charter* must not be used to reverse advances made by vulnerable groups or to defeat measures intended to protect the disadvantaged and comparatively powerless members of society. The constitutional protection of a form of expression that undermines our fundamental values must be carefully scrutinized. On this point, it is helpful to refer to *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, where Dickson C.J. stated, at p. 779:

> In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

This principle has been emphasized, *inter alia*, in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 993; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R 1038, at p. 1051; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 86. These reasons explain why we cannot agree with McLachlin C.J. that the scope of the

prohibition against the possession of child pornography is overbroad, and why the legislation is justified under s. 1 in its entirety.

134 The respondent's argument that s. 163.1(4) is unconstitutional rests on his claim that the prohibition of the possession of child pornography unjustifiably infringes the right to free expression. Section 163.1(4) states:

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.

Section 163.1(1) defines "child pornography" as:

(*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.

These provisions must be read in conjunction with s. 163(3), which provides a "public good" defence:

(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

They must also be read in light of the broad defences found in s. 163.1(6):

(6) Where the accused is charged with an offence under subsection (2), (3) or (4), the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose.

135 In this way, "child pornography" was defined by Parliament to encompass a broad range of material that it determined was harmful to children. It includes both representations that involve real children in their production as well as products of the imagination, such as drawings and written material. Importantly, the provisions do not distinguish between representations created by electronic or mechanical means. Both are captured. The definition is designed to cover representations involving persons either under the age of 18 or depicted as being under the age of 18. Nevertheless, Parliament has limited the protection from the harm of child pornography to a certain degree, striking the balance it deemed appropriate between the rights and values at stake.

136 The facts that give rise to this appeal are as follows: Mr. Sharpe was charged with two counts of possession of child pornography for the purpose of distribution or sale, as well as two counts of possession *simpliciter* of child pornography contrary to s. 163.1(4). Prior to the start of his trial in the Supreme Court of British Columbia, the accused challenged the constitutionality of a number of provisions of the *Criminal Code*, including s. 163.1(4).

137 The nature of the materials in the respondent's possession is typical of the material that may be caught by the impugned provision. Detective Noreen Waters of the Coordinated Law Enforcement Unit (Pornography Portfolio), City of Vancouver Police Department and the chief police investigator in this matter, testified at the *voir dire* that a large quantity of photographs, books and manuscripts as well as 10 computer disks containing a series of stories were seized from the respondent. The photographs were of boys. The great majority of them appear to be under the age of 18, and some appear to be pre-pubescent. With very few exceptions, the boys are naked or mostly naked, and are posed in a manner that prominently displays their genitals. Some photos are of a boy with an erection, and some depict a boy apparently masturbating. A few photos show two boys embracing or kissing. One photo shows two boys performing fellatio on each other.

138 Also entered into evidence was a collection of 17 stories written by the respondent. At trial, Detective Waters commented as follows on these stories:

> They're extremely violent stories, the majority of them, with sexual acts involving very young children, in most cases, under the age of 10 engaged in sadomasochistic and violent sex acts with either adults and children, other children, both male and female.
>
> They're extremely disturbing with just the descriptions of the sexual acts with the children particularly in relation to circumcision. And the theme is often that the child enjoys the beatings and the sexual violence and that they are wanting it and actually seeking it out.

139 After reviewing the testimony of Detective Waters and that of Dr. Peter Collins, an expert in forensic psychiatry, sexual deviance and paedophilia, the trial judge ruled that the prohibition of the simple possession of child pornography in s. 163.1(4) violated the right to free expression guaranteed by s. 2(*b*). He concluded that the violation was not saved by s. 1. Accordingly, the two charges of possession *simpliciter* of child pornography were dismissed: (1999), 22 C.R. (5th) 129. The trial with respect to the charges of possession for the purpose of distribution or sale was adjourned pending the appeal of the trial judge's ruling. The majority of the British Columbia Court of Appeal (Southin and Rowles JJ.A., McEachern C.J.B.C. dissenting) upheld the trial judge's ruling: (1999), 136 C.C.C. (3d) 97. The Attorney General of British Columbia is now appealing.

140 The right to free expression is at the heart of this appeal. So is child pornography. Under our society's democratic principles, individual freedoms such as expression are not absolute, but may be limited in consideration of a broader spectrum of rights, including equality and security of the person; see *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 61; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 877. The context here is one of competing rights; we must keep this in mind when determining whether s. 163.1(4) is an unjustified violation of the respondent's right to free expression.

I. Freedom of Expression

A. *The Nature and Scope of the Guarantee to Free Expression in Section 2(b) of the Charter*

141 Even before the advent of the *Charter*, Canadian courts recognized that the right to free expression was a fundamental part of democratic values, and a necessary element in ensuring the participation of individuals and groups in society; see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at pp. 583-86. After the right to free expression was entrenched in the *Charter*, courts acknowledged that its value extended beyond the simple need for participation in a democratic society; see *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 764; *Edmonton Journal*, *supra*; *Irwin Toy*, *supra*; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Keegstra*,

[1990] 3 S.C.R. 697. In *Irwin Toy*, *supra*, at p. 976, the majority identified three values which form the foundation of the right to free expression: (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making should be fostered and encouraged; and (3) diversity in the forms of individual self-fulfilment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom the meaning is conveyed.

142 The core values emphasized in *Irwin Toy*, *supra*, and in later cases such as *Keegstra*, *supra*, identify the purpose of the right to free expression in a free and democratic society. The importance of the right rests, in part, in expression's role in affirming individual ideas and communicating views. However, it must be remembered that the individual right to free expression is exercised within a broad societal context. As stated in *Irwin Toy*, *supra*, at p. 976, the self-realization of those whose activities or representations convey meaning is linked to the self-realization of those to whom the meaning is conveyed. In this sense, the values identified as central to free expression take into account the fact that individual and societal goals are not mutually exclusive.

143 The Supreme Court of Canada has dealt with the right to free expression in a number of cases, including *Dolphin Delivery*, *supra*; *Ford*, *supra*; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Edmonton Journal*, *supra*; *Irwin Toy*, *supra*; *Taylor*, *supra*; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Keegstra*, *supra*; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Butler*, *supra*; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Ross v. New Brunswick School District No. 15*, *supra*; *R. v. Lucas*, [1998] 1 S.C.R. 439; and *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877. From the outset, the Court defined "expression" broadly to mean any activity or representation that conveys meaning or attempts to convey meaning in a non-violent form; see, for example, *Reference re ss. 193 and 195.1(1)(c) of Criminal Code*, *supra*, at p. 1180; *Rocket*, *supra*, at p. 244; and *Keegstra*, *supra*, at pp. 729 and 826.

144 The right to free expression extends, for example, to commercial expression. In *Ford*, *supra*, at p. 767, the Court underscored the basis for the protection of commercial expression as follows:

> Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy.

See also *Irwin Toy*, *supra*, and *RJR-MacDonald*, *supra*. Similarly, the Court has recognized that picketing has a communicative element and is therefore protected by s. 2(*b*): see *Dolphin Delivery*, *supra*, at p. 588; *B.C.G.E.U.*, *supra*; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083.

145 The Court has also had occasion to deal with the issue of hate propaganda. In *Irwin Toy*, *supra*, the majority affirmed the doctrine of content neutrality, stating that s. 2(*b*) protects all messages, "however unpopular, distasteful or contrary to the mainstream" (p. 968); see also *Keegstra*, *supra*, at p. 729. In *R. v. Zundel*, [1992] 2 S.C.R. 731, the Court, applying this principle, unanimously concluded that the content-neutral approach to s. 2(*b*) meant that even deliberate falsehoods are a protected form of expression.

146 The Court was asked to address the subject of pornography in *Butler*, *supra*, finding that

pornography, including obscenity, was protected expression. Since there are no content-based restrictions on s. 2(*b*), it followed that pornographic material, no matter how offensive, was covered by the s. 2(*b*) guarantee.

147 From these cases, it is clear that in characterizing the right to free expression under s. 2(*b*), the Court has developed a two-pronged test. Initially, courts must determine whether the activity in question is expression for the purposes of s. 2(*b*). It is incumbent upon the person alleging a violation to prove that the activity conveys or attempts to convey meaning. The Court has stressed that the content of the expression is irrelevant; provided that there is an attempt to convey meaning, s. 2(*b*) is engaged; see *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *supra*; *Butler*, *supra*; *Zundel*, *supra*, at p. 753. The exception to this general principle is that s. 2(*b*) does not protect activity which conveys a meaning but does so in a violent form. The Court has indeed recognized that expression consists of both content and form, two distinct expressive elements that are inextricably connected; see *Keegstra*, *supra*, at p. 729; *Irwin Toy*, *supra*, at p. 968.

148 Once it is established that the activity in question conveys or attempts to convey meaning in a non-violent form, courts must turn to the second stage of the analysis. This involves a determination of whether the law or government action actually restricts expression. Determining whether expression is restricted is distinct from the first step of deciding whether any particular activity constitutes expression; see *Ford*, *supra*. While individual self-fulfilment, the attainment of truth, and participation in a democratic society are important considerations in the s. 1 analysis, the ambit of the interests protected is not dependent on them; see *Zundel*, *supra*, at pp. 752-53, where McLachlin J. (as she then was) confirmed that any content which conveys meaning is protected if it does not take a violent form.

B. *Is the Simple Possession of Child Pornography Protected by Section 2(b) of the Charter?*

149 With the above principles as a backdrop, the first step in answering the constitutional questions posed in this case is to determine whether the possession of child pornography is protected by s. 2(*b*), which guarantees the right to "freedom of thought, belief, opinion and expression".

150 It is clear that s. 163.1(4) restricts expression if the possession of child pornography can be considered expression. While the Crown has conceded this latter question, it is important to recognize that the right to free expression in s. 2(*b*) has always been considered to protect only those activities which are communicative; see e.g., P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 40-8; J. Watson, "Case Comment: *R. v. Sharpe*" (1999), 10 *N.J.C.L.* 251, at p. 256. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *supra*, at p. 1206, Wilson J. commented:

> With respect to s. 193 of the *Code*, I do not see how the provision can be said to infringe the guarantee of freedom of expression either on its own or in combination with s. 195.1(1)(*c*). In my view, only s. 195.1(1)(*c*) limits freedom of expression. Section 193 deals with keeping or being associated with a common bawdy-house and places no constraints on communicative activity in relation to a common bawdy-house. I do not believe that "expression" as used in s. 2(*b*) of the *Charter* is so broad as to capture activities such as keeping a common bawdy-house. [Emphasis added.]

151 From our jurisprudence, it is unclear whether the requirement that an activity convey or attempt to convey meaning excludes all activities which are not *prima facie* communicative from the scope of the right to free expression in s. 2(*b*). For example, this Court speculated that the

parking of a car is not protected expression since it is not a *prima facie* communicative activity; see *Irwin Toy*, *supra*, at p. 969. While it may be true that s. 2(*b*) guarantees the right to possess "material [that] allows us to understand the thought of others", the scope of the right (in the spectrum developed by McLachlin C.J., at para. 25) to create and possess self-authored works, especially those not intended for others, in order to "consolidate our own thought" is far from clear. Thus, in our view, it is unfortunate that the Crown conceded that the right to free expression was violated in this appeal in all respects, thereby depriving the Court of the opportunity to fully explore the content and scope of s. 2(*b*) as it applies in this case. At the same time, we recognize that, at this stage, our jurisprudence leads to the conclusion that, although harmful, the content of child pornography cannot be the basis for excluding it from the scope of the s. 2(*b*) guarantee.

II. Section 1

A. *Contextual Approach to Section 1*

1. Methodology

152 To decide whether the limits on the accused's right to free expression imposed by s. 163.1(4) of the *Criminal Code* are justified under s. 1, we must determine whether the limits on the right constitute "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Since the advent of the landmark decision in *Oakes*, *supra*, we have made this determination in two stages. At the first stage, the Court examines whether the objective or purpose behind the limit is of sufficient importance to justify overriding a *Charter* right. The second stage considers whether the legislative means chosen are rationally connected to the legislative objective, whether those means minimally impair the *Charter* guarantee that has been infringed, and finally whether the salutary effects of the impugned provision are proportional to its deleterious effects.

153 While the guidelines set out in *Oakes* provide a useful analytical framework for the practical application of s. 1, it is important not to lose sight of the underlying purpose of that section, namely to balance individual rights and our communal values. Where courts are asked to consider whether a violation is justified under s. 1, they must be sensitive to the competing rights and values that exist in our democracy. As Dickson C.J. advised in *Oakes*, *supra*, at p. 136:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

> In *Slaight Communications*, *supra*, at p. 1056, a majority of this Court recognized that the underlying values of a free and democratic society guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon those rights.

154 In keeping with the underlying purpose of s. 1 and the democratic values which it seeks to encourage, this Court has eschewed a formalistic and rigid application of the framework set out in *Oakes* in favour of a principled and contextual approach. As Wilson J. recognized in *Edmonton Journal*, *supra*, at pp.1355-56, a particular right or freedom may have a different value depending on the legislative context. An examination of the factual and social context in which an infringement of that right occurs allows the court to evaluate what truly is at stake in a

particular case. In addition, the contextual approach ensures that courts are sensitive to the other values which may compete with a particular right and allows them to achieve a proper balance among these values. Section 1 determinations, therefore, are not to be made in a vacuum, nor are they to focus exclusively on the right or freedom infringed.

155 More recently, this Court has emphasized that close attention must be paid to the factual and social context in which an impugned provision exists at each stage of the s. 1 analysis. In *Thomson Newspapers*, *supra*, Bastarache J., for the majority of this Court, stated as follows, at para. 87:

> The analysis under s. 1 of the *Charter* must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes*, [1986] 1 S.C.R. 103, requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.
>
> This approach is consistent with the approach taken by the majority of this Court in *Keegstra*, *supra*, at p. 760; *Butler*, *supra*, at p. 499; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 63; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 36; *Lucas*, *supra*; and was followed in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989.

156 A principled approach to the question of whether a limitation is reasonable and demonstrably justified in a free and democratic society must therefore take into account all of the interests and values which are at play in the given factual context and these considerations must underlie each stage of the s. 1 analysis. A failure to consider the beneficial aspects of the law, the values and rights which it seeks to protect and foster, and the actual nature of the right infringed in the particular case until the final stage of the proportionality analysis risks doing violence to the balance between individual rights and community goals which s. 1 seeks to achieve. Before turning to the direct application of the *Oakes* test, it is necessary to consider the contextual factors introduced in *Thomson Newspapers*, *supra*.

2. Context

157 An examination of the social, legislative and factual context of an impugned provision and the nature of the right that it has infringed is important in determining the degree of deference owed to the legislature in applying the various steps in the s. 1 analysis. What type of proof should the Court require of the government to justify its choice of means? How much evidence must the government provide of the harm which it has sought to address? In *Thomson Newspapers*, *supra*, Bastarache J. identified some of the contextual factors that are relevant to the determination of these questions (at para. 90). Amongst these factors are: the nature of the harm at issue and consequent inability to measure it scientifically or the efficaciousness of a remedy (as in *Butler*, *supra*, at p. 502); the vulnerability of the group which the legislature seeks to protect (as in *Irwin Toy*, *supra*, at p. 995; *Ross v. New Brunswick School District No. 15*, *supra*, at para. 88); that group's own subjective fears and apprehension of harm (as in *Keegstra*, *supra*, at p. 857); and the nature of the expressive activity affected. The additional factor we consider is the enhancement of other *Charter* values, which recognizes the right of Parliament to give effect to moral values. While these five factors do not serve as criteria which the government must satisfy, they are relevant to the determination of whether an impugned provision is demonstrably

justified.

(a) *Nature of the Harm and Inability to Measure It*

158 The very existence of child pornography, as it is defined by s. 163.1(1) of the *Criminal Code*, is inherently harmful to children and to society. This harm exists independently of dissemination or any risk of dissemination and flows directly from the existence of the pornographic representations, which on their own violate the dignity and equality rights of children. The harm of child pornography is inherent because degrading, dehumanizing, and objectifying depictions of children, by their very existence, undermine the *Charter* rights of children and other members of society. Child pornography eroticises the inferior social, economic, and sexual status of children. It preys on preexisting inequalities.

159 The *Report on Pornography* by the Standing Committee on Justice and Legal Affairs (1978) (MacGuigan Report), spoke of the effects of pornography as follows (at p. 18:4):

> The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.

160 In a similar manner, child pornography creates a type of attitudinal harm which is manifested in the reinforcement of deleterious tendencies within society. The attitudinal harm inherent in child pornography is not empirically measurable, nor susceptible to proof in the traditional manner but can be inferred from degrading or dehumanizing representations or treatment; see *Thomson Newspapers*, *supra*, at para. 92, and *R. v. Mara*, [1997] 2 S.C.R. 630. In the past this Court has not held Parliament to a strict standard of proof in showing a link between the expressive activity in question and the harm which it seeks to prevent, but has afforded Parliament a margin of appreciation to pursue legislative objectives based on less than conclusive social science evidence; see *Irwin Toy*, *supra*, at p. 990; *Keegstra*, *supra*, at p. 776; *Butler*, *supra*, at p. 504.

161 In *Butler*, *supra*, this Court recognized that some forms of pornography create attitudinal harm. *Butler* concerned an accused who was charged with various counts related to selling, possessing for the purposes of distribution and exposing obscene materials that did not involve children. While considering the meaning of obscenity within the context of s. 163(8) of the *Criminal Code*, Sopinka J., writing for the majority, stated, at p. 479, that degrading and dehumanizing material

> would, apparently, fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible of exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole.

162 Since "child pornography" is fully defined in s. 163.1(1), the community standards test developed for determining whether adult pornography is obscene has no role in determining whether pornography involving children falls within the child pornography prohibition. However, *Butler* is important since it recognizes that harmful material involving explicit sex and children may be constitutionally proscribed; see *Butler*, *supra*, at p. 485, *per* Sopinka J.; at p. 516, *per* Gonthier J. Section 163.1(1) targets material similar to the type found to be harmful in *Butler*.

The impugned provision recognizes that the possession of child pornography has a particularly deleterious effect on society since the persons depicted and most directly harmed are children.

163 Implicit in the Court's reasons in *Butler* is the recognition that expression that degrades or dehumanizes is harmful in and of itself. The Court broadened the traditional individualistic notion of harm, and recognized that all members of society suffer when harmful attitudes are reinforced. This broader notion of harm was also emphasized in *Keegstra*, *supra*, at pp. 747-48, where Dickson C.J. explained the attitudinal harm of hate propaganda as follows:

> . . . the alteration of views held by the recipients of hate propaganda may occur subtlely, and is not always attendant upon conscious acceptance of the communicated ideas. Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient's mind as an idea that holds some truth, an incipient effect not to be entirely discounted . . . .

164 In addition to the types of harm discussed above, child pornography creates a risk of harm that flows from the possibility of its dissemination. If disseminated, child pornography involving real people immediately violates the privacy rights of those depicted, causing them additional humiliation. While attitudinal harm is not dependent on dissemination, the risk that pornographic representations may be disseminated creates a heightened risk of attitudinal harm.

165 Child pornography is especially valuable to paedophiles. Dr. Collins defined paedophilia in these terms: "Paedophilia is a form of paraphilia. Paraphilia very simply is the clinical term denoting sexual deviance. . . . [Paedophilia] is the erotic attraction or the sexual attraction to pre-pubescent children". Paedophiles tend to use child pornography in two primary ways. First, representations of children as sexual objects or engaged in sexual activity are used to reinforce the opinion that children are appropriate sexual partners; these cognitive distortions are then used to justify paedophilic acts. Second, many paedophiles show child pornography to children in order to lower their inhibitions towards engaging in sexual activity and to persuade them that paedophilic activity is normal; see Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children* (1984) ("Badgley Report"), vol. 2, at p. 1209.

166 It should be emphasized that some of the material in the respondent's possession was on computer disk and capable of instantaneous distribution, creating a risk that this material might in fact be disseminated. The widespread availability of computers and the Internet has resulted in new ways of creating images, and has facilitated the storage, reproduction, and distribution of child pornography. Detective Waters likened this increased distribution to a tidal wave. As stated in Criminal Intelligence Service Canada's *Annual Report on Organized Crime in Canada* (2000), at p. 13: "The distribution of child pornography is growing proportionately with the continuing expansion of Internet use. Chat rooms available throughout the Internet global community further facilitate and compound this problem. The use of the Internet has helped pornographers to present and promote their point of view." Criminalizing the possession of child pornography may reduce the market for child pornography and decrease the exploitative use of children in its production.

167 In short, the lack of scientific precision in the social science evidence relating to attitudinal harm available to Parliament is not a valid reason for calling into question Parliament's decision to act. It has been estimated that over 60,000 Canadians have been depicted at a young age in sexually explicit material; see Badgley Report, *supra*, vol. 2, at p. 1198. It goes without saying that child pornography which sexually exploits children in its production is harmful. Moreover, we have seen that the harms of child pornography extend far beyond direct, physical exploitation. It is harmful whether it involves real children in its production or whether it is a product of the imagination. In either case, child pornography fosters and communicates the

same harmful, dehumanizing and degrading message.

168 The basis for s. 163.1 was the clear evidence of direct harm that child pornography causes, as well as Parliament's reasoned apprehension (based on the available social science evidence) that child pornography also causes attitudinal harm. The decision to act was consistent with the Fraser Committee's call for measures prohibiting child pornography (*Report of the Special Committee on Pornography and Prostitution* (1985) ("Fraser Report")). As we will see in the next section, s. 163.1 is consistent with action taken by other countries, and the international community, which have recognized and addressed the need to protect children.

(b) *The Vulnerability of Children and Their Subjective Fears*

169 Section 163.1 was enacted to protect children. Because of their physical, mental, and emotional immaturity, children are one of the most vulnerable groups in society, particularly with regard to sexual violence. Child pornography plays a role in the abuse of children, exploiting the extreme vulnerability of children. Pornography that depicts real children is particularly noxious because it creates a permanent record of abuse and exploitation. An analysis of the vulnerability of the group and their subjective fears supports Parliament's decision to prohibit child pornography.

(i) Actions Taken to Protect Children in Canada

170 Canadian society has always recognized that children are deserving of a heightened form of protection. This protection rests on the best interests of the child. The vulnerability of children is a product of the innate power imbalance that exists between adults and children. As a result of this vulnerability, children are often targets of violence and exploitation. It has been estimated that in almost 80 percent of sex crimes committed, the victims are girls, boys and young men and women under the age of 20; see N. Bala and M. Bailey, "Canada: Recognizing the Interests of Children" (1992-93), 31 *U. Louisville J. Fam. L.* 283, at p. 292. Fully two-thirds of sexual assault victims in 1993 were children, and one-third of all victims were under the age of 10; see J. V. Roberts, "Sexual Assault in Canada: Recent Statistical Trends" (1996), 21 *Queen's L.J.* 395, at p. 420. Indeed, it is thought that one in four girls and one in 10 boys will be victims of sexual assault before they reach the age of 18; see R. Bessner, "Khan: Important Strides Made by the Supreme Court Respecting Children's Evidence" (1990), 79 C.R. (3d) 15, at p. 16.

171 The need to protect children from harm has been an ongoing concern for Canada. In 1991, Canada ratified the United Nations' *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, an international instrument that affirms the need to protect children from various forms of harm, including discrimination (art. 2), violence (art. 19), separation from parents except where necessary for the child's best interest (art. 9), interference with privacy, family and home (art. 16), work that threatens health, education or development (art. 32), harmful drugs and involvement in their production or distribution (art. 33), abduction, trafficking or sale (art. 35), torture (art. 37), and sexual exploitation (art. 34). Canada's support for the Convention demonstrates this country's strong commitment to protecting children's rights.

172 In addition to ratifying the Convention, Canadian legislators have adopted other measures aimed at protecting children. Hence s. 163.1(4) is part of a broader scheme of *Criminal Code* offences which recognize the vulnerability of children and attempt to protect them from exploitation. For example, some *Criminal Code* provisions prevent an accused from relying on the consent of complainants under a certain age. For many offences the age of consent is 14, and for others it is 18; see *Criminal Code*, ss. 150.1, 151, 152, 153(1), 159, 160(3), 170, 171, 172, 271, 272, 273. In particular, s. 150.1 recognizes that children under the age of 14 are extremely vulnerable to sexual exploitation, and thus prevents those charged of doing so from raising the

defence of consent. Similarly, s. 212(4) prevents any person from receiving the sexual services of a person under the age of 18 for consideration. Other sections are designed to address children's special vulnerability. Section 215 imposes a legal duty on parents or guardians to provide the necessaries of life to children under 16 years of age. Finally, there exists a special framework for dealing with children as young offenders. Under the *Young Offenders Act*, R.S.C. 1985, c. Y-1, children are offered procedural safeguards, and are subject to attenuated penalties.

173 In the civil law context, child protection legislation provides for apprehension of a child when, for example, there is a risk that the child may be harmed; see *Child Welfare Act*, S.A. 1984, c. C-8.1, ss. 17, 18; *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, ss. 16 to 19 and 25 to 33; *The Child and Family Services Act*, S.M. 1985-86, c. 8, ss. 21 to 26, 38(7), 53; *Family Services Act*, S.N.B. 1980, c. F-2.2, ss. 1, 31(5), 32, 33, 51(1), 62(3); *Child Welfare Act*, R.S.N. 1990, c. C-12, ss. 13, 14, 15; *Child and Family Services Act*, S.N.W.T. 1997, c. 13, ss. 10, 11(1), 33; *Children and Family Services Act*, S.N.S. 1990, c. 5, ss. 26(2), (3), 27, 28, 29, 33(1), (3), 34; *Child and Family Services Act*, R.S.O. 1990, c. C.11, ss. 40(2), (3), (5), (7) to (10), 41 to 44; *Family and Child Services Act*, R.S.P.E.I. 1988, c. F-2, ss. 1(1)(c), 15(1), (1.1), 16(1), 17(1)(b), 19(b); *Youth Protection Act*, R.S.Q., c. P-34.1, ss. 2, 3 and 46; *The Child and Family Services Act*, S.S. 1989-90, c. C-7.2, ss. 2(1)(p), 7, 8, 13, 17, 18(1); *Children's Act*, R.S.Y. 1986, c. 22, s. 119.

174 Canadian courts have shown an increased awareness of the rights and interests of children. Our Court has repeatedly articulated the importance of protecting children and youth from various forms of harm; see, for example, *R. v. Hess*, [1990] 2 S.C.R. 906, at p. 948, *per* McLachlin J.; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Irwin Toy*, *supra*; *Young v. Young*, [1993] 4 S.C.R. 3; *L. (D.O.)*, *supra*, at p. 439, *per* L'Heureux-Dubé J. The common law, based on the *parens patriae* jurisdiction, has recognized the power of state institutions to intervene to protect children who are at risk; see, for example, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 88. Further, in cases such as *Young v. Young*, *supra*, at pp. 84-85, this Court has reaffirmed that any decision affecting a child must be made in his or her best interests, which include, but are not limited to, ensuring that the child is protected from harm, whether caused by others or self-inflicted, and, importantly, seeking to foster the healthy development of the child to adulthood.

(ii) Actions Taken Internationally to Protect Children

175 The protection of children from harm is a universally accepted goal. While this Court has recognized that, generally, international norms are not binding without legislative implementation, they are relevant sources for interpreting rights domestically; see *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at pp. 349-50; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

> . . . the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.

176 In *Slaight Communications*, *supra*, at pp. 1056-57, this Court explained that a balancing of competing interests must be informed by Canada's international obligations. The fact that a value has the status of an international human right is indicative of the high degree of importance with which it must be considered; see also *Keegstra*, *supra*, at p. 750.

177 Both legislators abroad and the international community have acknowledged the

vulnerability of children and the resulting need to protect them. It is therefore not surprising that the *Convention on the Rights of the Child* has been ratified or acceded to by 191 states as of January 19, 2001, making it the most universally accepted human rights instrument in history.

178 Indeed, international law is rife with instruments that emphasize the protection of children. Article 25(2) of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc A/810, at p. 71 (1948), recognizes that "childhood [is] entitled to special care and assistance". The United Nations *Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV) (1959), in its preamble, states that the child "needs special safeguards and care". In 1992, the United Nations Commission on Human Rights adopted the *Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography*, 55th Mtg., 1992/74. Additional instruments such as the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, art. 10(3), and the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 24, also emphasize the protection of children. The recent *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, A/RES/54/263 (2000), which prohibits, *inter alia*, child pornography, has already been signed by 69 states; see <http://www.unhchr.ch/html/menu3/b/treaty18_asp.htm> (accessed January 23, 2001).

179 Section 163.1 of Canada's *Criminal Code* reflects a growing trend towards the criminalization of the possession of child pornography. A number of international bodies have recognized that possession must be targeted to effectively address the harms of child pornography; see *Sale of Children, Child Prostitution and Child Pornography: Note by the Secretary-General*, U.N. Doc. A/49/478 (1994), at paras. 196-97; *Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography*, *supra*, at para. 53; *Draft Joint Action to combat child pornography on the Internet*, [1999] O.J.C. 219/68, art. 1; *International traffic in child pornography*, ICPO-Interpol AGN/65/RES/9 (1996).

180 Domestic legislation in a number of countries criminalizes the possession of child pornography, regardless of whether the possessor has an intent to disseminate; see, for example, Australia: *Classification (Publications, Films and Computer Games) Act 1995* (Cth.), and state and territorial legislation in the Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia, which classify and prohibit various forms of child pornography; Belgium: art. 383*bis* of the *Criminal Code*, which proscribes private possession of figures, things, films, photos, slides or other visual representations of sexual acts or positions involving persons under 16 that are characterized as pornographic; England: *Protection of Children Act 1978* (U.K.), 1978, c. 37, ss. 1 and 7; *Criminal Justice Act 1988* (U.K.), 1988, c. 33, s. 160, and *Criminal Justice and Public Order Act 1994* (U.K.), 1994, c. 33, ss. 84 to 86), which target private possession of photographs and pseudo-photographs of persons under 16 or who appear to be under 16; Ireland: *Child Trafficking and Pornography Act, 1998*, ss. 2 and 6, which defines child as a person under the age of 17, bans the private possession of (1) any visual representation that shows a person who is or is depicted as a child engaged in or witnessing explicit sexual activity and any visual representation whose dominant characteristic is the depiction of the genital or anal region of a child for sexual purposes; (2) any audio representation of a person who is or is represented as being a child and who is engaged in or is represented as being engaged in explicit sexual activity; (3) any visual or audio representation that advocates, encourages or counsels any sexual activity with children which is an offence; and (4) any visual representation or description of or information relating to a child that indicates or implies that the child is available to be used for the purposes of sexual exploitation; New Zealand: *Films, Videos, and Publications Classification Act 1993*, ss. 2, 3 and 131, which proscribes private possession of publications that describe, depict, express or otherwise deal with matters such as sex, horror, crime, cruelty, or violence

such that the availability of the publication is likely to be injurious to the public good in that it promotes, supports or tends to promote or support the exploiting of children or young persons, for sexual purposes; and the United States: 18 U.S.C. §§ 2252(a)(4)(B) and 2256 (1994 & Supp. IV 1998), which targets photographs, film, video or pictures, computer or computer-generated images or pictures of sexually explicit conduct involving a person who is under 18 or who appears to be under 18. This statute has been interpreted as including only those visual images which are easily mistaken for that of a real child; see, for example, *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999), at p. 72. Therefore, drawings, sculptures and paintings are not proscribed.

(c) *The Nature of the Expressive Activity Affected*

181 The nature of the expressive activity at issue is another important contextual factor that has emerged from the Court's s. 2(*b*) jurisprudence. The Court has emphasized that under s. 1, the level of protection to which expression is entitled will vary with the nature of the expression. The more distant the expression from the core values underlying the right, the more likely action restricting it can be justified; see *Keegstra*, *supra*, at p. 765; *Lucas*, *supra*, at para. 34. Defamatory libel, hate speech and pornography are far removed from the core values of freedom of expression and have been characterized as low value expression, which merits an attenuated level of constitutional protection; see *Lucas*, *supra*, at para. 93; *Butler*, *supra*, at p. 500; *Keegstra*, *supra*, at p. 765. These forms of expression receive an attenuated level of constitutional protection not because a lower standard of justification is applied to the government, but because the low value of the expression is more easily outweighed by the objective of the infringing legislation: see *Thomson Newspapers*, *supra*, at para. 91.

182 We will now address the nature of the expression in light of the three core values of freedom of expression: (1) the search for truth; (2) participation in political decision-making; and (3) diversity in forms of self-fulfilment and human flourishing.

183 It is clear that the possession of child pornography contributes nothing to the search for truth. The impugned provision prohibits the possession of material which visually depicts children engaged in sexual activity or which has as its dominant characteristic the depiction, for a sexual purpose, of the sexual organ or the anal region of a child. The written material prohibited is that which advocates or counsels the commission of sexual offences against children. The message conveyed by child pornography perpetuates lies about children's humanity. It promotes the false view that children are appropriate sexual partners and that they are sexual objects to be used for the sexual gratification of adults. It encourages and condones their sexual abuse. These messages contribute nothing to the search for truth and are in fact detrimental to that search.

184 It is equally clear that there is no link between the possession of "child pornography" (as defined in s. 163.1(1)) and participation in the political process. While children may not be accorded equal participation in our political process, they are deserving of equal treatment as members of our community. In *Keegstra*, *supra*, at p. 764, Dickson C.J. recognized that messages of degradation, which undermine the dignity and equality of members of identifiable groups, subvert the democratic aspirations of the expression guarantee by undermining the participation of those groups in the political process. In *Thomson Newspapers*, *supra*, at para. 92, Bastarache J. found that the same could be said of pornographic expression. He recognized that in *Irwin Toy*, *supra*, the interests of advertisers meant that there was a likelihood that their speech would manipulate children and would play on their vulnerability. In each of these cases, the type of speech involved systematically undermined the position of some members of society. Child pornography similarly undermines the position of children in society. In this sense, it is antithetical to the democratic values underlying the guarantee of freedom of expression.

185 The expression at issue in this case is linked to the value of self-fulfilment, but only in a limited sense since s. 163.1(4) of the *Criminal Code* in no way impedes positive self-fulfilment. In *Butler*, *supra*, the Attorney General for Ontario argued that the only value underlying pornography as a form of expression was self-fulfilment in its most base aspect, that of pure physical arousal (pp. 499-500). We find this argument particularly apposite in relation to child pornography. Child pornography is used to fuel the fantasies of paedophiles and is also used to facilitate their exploitation of children. It hinders children's own self-fulfilment and autonomous development by eroticising their inferior social, economic and sexual status. It reinforces the message that their victimization is acceptable. In our view, that message denies children their autonomy and dignity. In relation to adult pornography, Sopinka J. found in *Butler* that such expression does not stand on an equal footing with other kinds of expression which directly engage the "core" of the freedom of expression values (p. 500). We agree with this statement and find it equally applicable in the context of child pornography.

186 The possession of child pornography has no social value; it has only a tenuous connection to the value of self-fulfilment underlying the right to free expression. As such, it warrants only attenuated protection. Hence, increased deference should be accorded to Parliament's decision to prohibit it.

(d) *Enhancement of Other Charter Values*

187 This Court has previously considered the *Charter* rights of other members of society as a contextual factor relevant to determining the proper level of deference. For example, in *Keegstra*, *supra*, the impugned legislation prohibited the willful promotion of hatred against any identifiable group. Dickson C.J. found that s. 15 and s. 27 of the *Charter* were relevant to determining the importance of the government's objective of eradicating hate propaganda. At p. 756, he quoted with approval the following statement of one of the interveners in the case:

> Government sponsored hatred on group grounds would violate section 15 of the *Charter*. Parliament promotes equality and moves against inequality when it prohibits the wilful public promotion of group hatred on these grounds. It follows that government action against group hate, because it promotes social equality as guaranteed by the *Charter*, deserves special constitutional consideration under section 15.

In *Taylor*, *supra*, Dickson C.J. further emphasized the role of other *Charter* rights in the application of s. 1, stating that in applying *Oakes*, the Court must "give full recognition to other provisions of the *Charter*, in particular ss. 15 and 27" (pp. 916-17). In our view, the positive influence of a government measure on other *Charter* rights, and in turn the negative effect of an expressive activity on the rights of other members of the community, are important factors to be considered in the application of the s. 1 analysis. This approach ensures that the analysis of whether an impugned provision is reasonably justified in a free and democratic society is undertaken in a manner which promotes our democratic values.

188 In the Fraser Report, *supra*, the Committee described its concerns with child pornography as follows (vol. 2, at p. 571):

> . . . we are concerned with depictions that can be seen to undermine the values which we believe are fundamental to our society. It is our view that material which uses and depicts children in a sexual way for the entertainment of adults, undermines the rights of children by diminishing the respect to which they are entitled.

This description of the effects of child pornography on children's rights strikes a sombre chord. The written material and images captured by s. 163.1(1) (which depict children engaged in explicit sexual activity or which depict their sexual organs for a sexual purpose), degrade and

dehumanize them. They portray children as mere sexual objects available for the gratification of adults. They play on children's inequality. Hence, this material is in direct conflict with the guarantee of equality in s. 15. In *Butler*, *supra*, Sopinka J. stated as follows, at p. 497:

. . . if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on `the individual's sense of self-worth and acceptance'.

Similarly, Parliament's attempt to prohibit the possession of child pornography can be seen as promoting children's right to equality.

189 Child pornography also undermines children's right to life, liberty and security of the person as guaranteed by s. 7. Their psychological and physical security is placed at risk by their use in pornographic representations. Those children who are used in the production of child pornography are physically abused in its production. Moreover, child pornography threatens the physical and psychological security of all children, since it can be encountered by any child. Regardless of its authorship, be it of the child or others, it plays on children's weaknesses and may lead to attitudinal harm; see Fraser Report, *supra*, vol. 2, at pp. 570-71. We recognize that privacy is an important value underlying the right to be free from unreasonable search and seizure and the right to liberty. However, the privacy of those who possess child pornography is not the only interest at stake in this appeal. The privacy interests of those children who pose for child pornography are engaged by the fact that a permanent record of their sexual exploitation is produced. This privacy interest is also triggered when material which is created by teenagers in a "consensual environment" is disseminated.

190 In enacting s. 163.1(4) and prohibiting the possession of child pornography, Parliament promulgated a law which seeks to foster and protect the equality rights of children, along with their security of the person and their privacy interests. The importance of these *Charter* rights cannot be ignored in the analysis of whether the law is demonstrably justified in a free and democratic society and warrants a more deferential application of the criteria set out in *Oakes*.

191 In enacting s. 163.1(4), Parliament set social policy having regard to moral values, as it is entitled to do. It is accepted that, while the criminal law is not confined to prohibiting immoral acts, Parliament does have the right to make moral judgments in criminalizing certain forms of conduct. In *Butler*, *supra*, Sopinka J. found as follows, at p. 493:

. . . I cannot agree with the suggestion of the appellant that Parliament does not have the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society.

The Court should be particularly sensitive to the legitimate role of government in legislating with respect to our social values. Like all legislative decisions, however, such moral decisions and judgments must be assessed in light of *Charter* values.

192 The appraisal of each of the contextual factors demonstrates that in this case increased deference to Parliament is warranted. With that in mind, we now apply the *Oakes* test to s. 163.1(4).

B. *Application of the Oakes Test*

1. Is the Objective Pressing and Substantial?

193 Parliament's overarching objective in proscribing the possession of child pornography was

to protect children. This is set out in the following statement, made by the Parliamentary Secretary to the Minister of Justice as he introduced what is now s. 163.1 for second reading in the House of Commons:

. . . children matter. They are the most vulnerable members of our society. They are vulnerable to emotional, sexual, and physical abuse. Our children must have the opportunity to grow up in safe, nurturing communities protected from such abuse.

The purpose of a law specifically addressing child pornography is to deal with the sexual exploitation of children and to make a statement regarding the inappropriate use and portrayal of children in media and art which have sexual aspects.

Our message is that children need to be protected from the harmful effects of child sexual abuse and exploitation and are not appropriate sexual partners. [Emphasis added.]

(*House of Commons Debates*, 3rd Sess., 34th Parl., vol. XVI, June 3, 1993, at p. 20328)

194 Parliament has recognized that children are the most vulnerable members of our society and that they are especially vulnerable to sexual abuse. Any provision which protects both children and society by attempting to eradicate the sexual exploitation of children clearly has a pressing and substantial purpose.

195 The pressing need for this legislation is supported by the presence of legislation which prohibits the possession of child pornography in most free and democratic societies. As noted, laws in Australia, Belgium, England, Ireland, New Zealand and the United States criminalize the possession of child pornography, regardless of whether the possessor has an intent to disseminate; see also *Butler*, *supra*, at p. 497, for adult pornography.

196 As discussed above, this legislation is consistent with Canada's international commitment to protect children. In particular, it addresses our responsibilities under art. 34 of the *Convention on the Rights of the Child*:

State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, State Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(*a*) The inducement or coercion of a child to engage in any unlawful sexual activity;

(*b*) The exploitative use of children in prostitution or other unlawful sexual practices;
(*c*) The exploitative use of children in pornographic performances and materials.

Article 34 reflects the international community's strongly held belief that the protection of children from the harms of child pornography is essential to their rights.

197 Having established the pressing and substantial nature of the objective of Parliament's prohibition of the possession of child pornography, we now consider whether the means chosen are proportional.

2. Proportionality

(a) *Rational Connection*

198 It is particularly important to bear in mind at this stage the contextual factors previously examined which collectively warrant increased deference to Parliament's chosen means. As mentioned earlier, in the determination of whether the means are rationally connected to the

objective, Parliament is not held to a strict standard of proof. The standard is whether Parliament had a reasoned apprehension of harm. We must simply ask whether Parliament had a reasonable basis, on the evidence tendered, for believing that the prohibition of child pornography, as defined in s. 163.1(1) of the *Criminal Code*, would reduce the harm to children and society; see *Irwin Toy*, *supra*, at p. 994; *Butler*, *supra*, at p. 502. Parliament need not have had conclusive evidence before enacting the provision.

199 The Crown has provided five links between prohibiting the possession of child pornography and preventing harm to children and society which convincingly establish that s. 163.1(4) is rationally connected to its objective. Moreover, the expert evidence led at trial supports the reasonableness of Parliament's decision to act.

200 Dr. Collins testified at trial to the first type of harm identified by the Crown, namely that the possession of child pornography contributes to the cognitive distortions of paedophiles. He testified that it is generally accepted amongst the vast majority of forensic psychiatrists that possession of child pornography reinforces some paedophiles' cognitive distortions. He described these "offence-facilitating beliefs" as the rationalizations and justifications that paedophiles have for their deviant behaviour. Cognitive distortions contribute to the paedophile's belief that sexual activity with children is acceptable, and that children enjoy sex with adults. Dr. Collins concluded that child pornography, cognitive distortions and the validation of the belief that sexual activity with children is acceptable are inextricably linked.

201 The testimony of Dr. Collins illustrates that there is indeed a link between the possession of child pornography and harmful attitudes about the willingness of children to engage in sexual activity with adults. The statement of Ms. Monica Rainey from Citizens Against Child Exploitation before the Standing Committee on Justice and the Solicitor General explains the potentially distortional effect of child pornography:

> It is ludicrous to believe that child pornography has no effect on those who watch it. If that were true, why do we have advertisers selling billions of dollars of advertising for 90-second commercials? If 90 seconds work in advertising, we are fools to believe that 90 minutes of viewing adult sex with children will have no negative influence on those who are already addicted to children.
>
> (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General*, Issue No. 105, June 10, 1993, at p. 105:21)

However, there is a dearth of empirical research which addresses whether these types of attitudes actually cause sexual abuse. The difficulty in obtaining empirical proof of a link between the possession of pornography and criminal behaviour was described in the Badgley Report, *supra*, vol. 2, which cited the U.K. Report of the Committee on Obscenity and Film Censorship (1979), as follows, at p. 1273:

> Since criminal and anti-social behaviour cannot itself, for both practical and ethical reasons, be experimentally produced or controlled, the observations must be made on some surrogate or related behaviour . . . The fundamental issue in this field concerns *the relations that hold between reactions aroused in a subject by a represented, artificial, or fantasy scene, and his behaviour in reality* . . . We can only express surprise at the confidence that some investigators have shown in supposing that they can investigate *this* problem through experimental set-ups in which reality is necessarily replaced by fantasy. [Emphasis added in Badgley Report.]

This difficulty, however, should not serve as a bar to prohibiting the possession of child pornography. In this regard, the comments of Burger C.J. in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), at pp. 60-61, on obscene material are apposite:

Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature . . . could quite reasonably determine that such a connection does or might exist.

In our view, based on the evidence, Parliament's apprehension that child pornography reinforces the cognitive distortion that children are appropriate sexual partners was reasonable.

202 With respect to the second link, Dr. Collins testified to the theory that child pornography fuels paedophiles' fantasies. He identified fantasies as the motivating force behind all sexually deviant behaviour, described paedophiles as "notorious for being collectors" of pornography, noted that the most explicit child pornography was the most coveted, and testified that in his own experience a correlation between greater access to child pornography and increased child sexual abuse does exist.

203 In assessing whether Parliament had a reasonable basis for concluding that the possession of child pornography would harm children by fuelling the fantasies of paedophiles, it is important to bear in mind that these fantasies are based on children's degradation and dehumanization. The derivation of sexual pleasure from the possession of child pornography undermines children's rights and does violence to the values which are essential to a free and democratic society. In our view, Parliament had a reasonable basis for believing that the prohibition of the possession of child pornography would foster and protect children's *Charter* rights.

204 The third link arises from the important role of s. 163.1(4) as part of an integrated law enforcement scheme which protects children against the harms associated with child pornography. In addition to Detective Waters' testimony that the police have found distributors and producers of child pornography through laying simple possession charges, Detective Inspector Matthews of the Child Pornography Unit of the Criminal Investigation Bureau of the Ontario Provincial Police, noted in his affidavit submitted to the British Columbia Court of Appeal that virtually all of the child pornography being created and distributed today is communicated by computer through the Internet. It is largely traded privately between paedophiles for the sole purpose of increasing their private collections. Therefore, paedophiles can acquire large collections of child pornography without being detected. Because of the secrecy involved in the trade of child pornography, the distribution provisions of s. 163.1 of the *Criminal Code* are insufficient to control its proliferation. Detective Inspector Matthews noted that with possession as an offence, law enforcement agencies now have the justification to seize the images and text of child pornography stored on computers and diskettes. This ensures that the material cannot be used in a manner which is harmful to children, and that it is not distributed further.

205 One of the most compelling links between the possession of child pornography and associated harms to children is the use of child pornography by paedophiles to groom children into committing sexual acts. Detective Inspector Matthews testified as follows before the Standing Committee on Justice and the Solicitor General about the use of child pornography as a grooming tool:

It's often used as a tool by pedophiles to seduce children. They use it as a tool to lower their inhibitions. They do that by exposing the children to photographs. They'll usually start out with photographs of partial nudity and then they'll work their way up to total nudity and children being involved in actual sex acts.

Another dangerous part is that when they photograph these children, especially if they're in the neighbourhood, the children may very well recognize their peers, so there's that added

pressure that if it's all right for an adult to photograph their peers in the nude and take advantage of them and exploit them, then perhaps it's all right for them to do that with them.

(*Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General*, *supra*, at pp. 105:4-105:5)

See also Badgley Report, *supra*. The potential of child pornography as a grooming tool is often evident from the manner in which the material is presented. For example, in the *voir dire*, Detective Waters described a comic book called *Cherubino* which depicts a child with an adult male as a team of crime fighters. Each crime fighting episode ends with a sexual encounter. The pornography is thus produced in a form which is appealing to children, encouraging them to believe that such behaviour is normal.

206 The Badgley Committee found that paedophiles sought out materials depicting children engaged in sexual conduct to use them to persuade other children to engage in similar conduct. In the Committee's view, this fact demonstrated the need for express legal sanctions against the possession of child pornography (vol. 1, at p. 101). The Committee's research indicated (vol. 2, at pp. 1282-83) that

the occurrence of unwanted exposure to pornography may have been experienced by a sizeable number of Canadians, many of whom were children and youths when the incidents took place. In many of these incidents, the persons committing these acts were well known to children or were responsible for their welfare. One in 63 persons (1.6 percent of persons in the National Population Survey) reported having been exposed to pornography and also having been sexually assaulted at the time or following the exposure.

. . . In the Committee's judgment, the incidents reported likely constitute an under-estimate of the occurrence of situations involving exposure to pornography followed by a sexual assault.

Twenty of the 33 persons who reported that they had been shown pornography and sexually assaulted by the same person were children when the incidents occurred (vol. 2, at p. 1279).

207 The use of child pornography to groom children is also evident in those cases which have considered s. 163.1 of the *Criminal Code*. For example, in *R. v. K.L.V.*, [1999] A.J. No. 350 (QL) (Q.B.), a man showed two children a photo of a young girl with her dress pulled up over her head, exposing her genitals. In *R. v. Jewell* (1995), 100 C.C.C. (3d) 270 (Ont. C.A.), one of the accused, Gramlick, had produced 33 videotapes of sexual activity among children and adults. Before participating in the filming, the children were shown commercial videos of child pornography and the accused's own homemade videotapes "to stimulate them sexually and to reassure them that their conduct was normal" (p. 274).

208 Thus, the evidence demonstrates that child pornography is used in the seduction process and links the prohibition against possession with the prevention of harm to children.

209 As discussed by McLachlin C.J., the final link identified by the Crown, the abuse of children in the production of pornography, is conclusive (at para. 92). The prohibition of the possession of child pornography is intended to reduce the market for it. If consumption is reduced, presumably production will also be reduced. This fact was recognized by the United States Supreme Court in *Osborne v. Ohio*, 495 U.S. 103 (1990), at pp. 109-10. Parliament had additional evidence before it that the prohibition of private possession of child pornography would protect children from the harm of being used in its production. The hearings before the Fraser Committee revealed that the private preparation of child pornography was the major mode of resorting to the material. It urged Parliament to recognize that much, if not most, of the exploitation of children in pornography would occur in private (vol. 2, at p. 584). Similarly, the

Badgley Committee found that privately produced material was a major source of child pornography (vol. 2, at p. 1197).

210 Both the Badgley Committee and the Fraser Committee found that the then existing *Criminal Code* framework relating to obscene publications was inadequate to deal with the circumstances attending the making and distribution of child pornography. The Badgley Committee found as follows (vol. 1, at p. 101):

> The general definition of obscenity does not reflect the state's particular and more compelling interest in prosecuting and punishing those who promote the sexual abuse of children in this manner. The definition of "obscene publication" in section 159(8) of the *Criminal Code* pertains to the overall content of the publication, rather than to the circumstances of its production. In reference to child pornography, it is the circumstances of its production, namely, the sexual exploitation of young persons, which is a fundamental basis for proscription. [Emphasis deleted.]

To fill the gap in the *Criminal Code* the committee recommended that the private possession of any visual representation of a person under 18 participating in explicit sexual conduct (including the lewd exhibition of the genitals) be prohibited (vol. 1, at pp. 102-103). The Fraser Committee expressed the concern that the existing law of obscenity would not capture child pornography prepared in private for private use, because of the application of a more forgiving community standard for materials used privately (vol. 2, at p. 584). It also recommended that the private possession of child pornography be prohibited. These recommendations contribute to the conclusion that Parliament had a rational basis for deciding that prohibiting the private possession of child pornography was essential to the protection of children from the abuse inherent in its production.

(b) *Minimal Impairment*

211 In conducting an analysis of whether s. 163.1(4), in combination with the definition of "child pornography" set out in s. 163.1(1), minimally impairs the right to free expression, the Court must be particularly sensitive to the contextual factors which we have previously discussed.

212 As Cory J. recognized in *Lucas*, *supra*, at para. 57, the negligible value of the expression restricted is an important factor in the minimal impairment analysis, which requires the Court to assess whether Parliament has struck a reasonable balance between the individual right which has been infringed and the community goals and values which Parliament seeks to protect. Without a true understanding of the type of expression which is being impaired, there is a risk that its connection to the s. 2(*b*) guarantee and our democratic values will be misrepresented. There is a risk that the balance will be skewed in favour of abstract notions of the value of expression in a democracy when the activity at issue does not serve those values. As we have seen, child pornography is in many ways antithetical to the values underlying the s. 2(*b*) guarantee. It has only a tenuous connection to the value of self-fulfilment, and only at its most base and prurient level. With respect, we see no evidence to support the notion that sexually explicit videos of teenagers "reinforce healthy sexual relationships and self-actualization", as suggested by McLachlin C.J., at para. 109, rather than being harmful self-indulgence supporting unhealthy attitudes towards oneself and others, as alluded to in the Fraser Report (see below, at para. 231). On the other hand, we have noted the harm to children that can be caused by such material by reinforcing cognitive distortions (see paras. 165 and 223) and creating instruments susceptible of being used for grooming. Moreover, there is no valid reason to presume that teenage authors of sexually explicit videos cannot themselves be paedophiles.

213 Furthermore, the Court must not lose sight of the other rights and democratic values

which Parliament has sought to protect in enacting s. 163.1(4) of the *Criminal Code*. The prohibition of the possession of child pornography is consistent with the democratic values which are essential in our community, and also with the *Charter* rights of children. It is legislation which promotes respect for the inherent dignity of children by curbing the existence of materials which degrade them. This in turn helps to protect children's equality and security rights.

214 Parliament need not show that the provision is perfectly tailored to its objective; see *RJR-MacDonald*, *supra*, at p. 342; *Ross v. New Brunswick School District No. 15*, *supra*, at para. 108. Nor need Parliament show that there was no other reasonable measure which could achieve its objective and interfere less with the freedom of expression guarantee. Given the contextual factors which are at play in this particular case, and the deference to Parliament's choice of means that they warrant, we agree with the following statement of Dickson C.J. in *Keegstra*, *supra*, at pp. 784-85:

> . . . s. 1 should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a *Charter* right or freedom. It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim.

215 In the court below, Rowles J.A. began her analysis of the impugned provision by highlighting the fact that it solely targeted the private possession of child pornography. She found that because s. 163.1(4) is directed only to the private possession of material, as opposed to the dissemination of material to others, it substantially reduced the likelihood that the imposition of criminal sanctions would prevent any potential harm to children. Similarly, McLachlin C.J. finds that photographs and videos of teenagers taken of themselves for their own personal use should not be proscribed (paras. 41 and 76-77) because of the privacy interest and diminished risk of harm to children. With respect, we cannot agree. In reaching this conclusion, McLachlin C.J. and Rowles J.A. fail to recognize that children are particularly vulnerable in the private sphere, a fact that was recently recognized by the Ontario Court of Appeal in *R. v. E. (B.)* (1999), 139 C.C.C. (3d) 100. *E. (B.)* involved a constitutional challenge to s. 172 of the *Criminal Code*, which prohibits, *inter alia*, participation in sexual immorality in the home of a child thereby endangering the morals of the child. The court found that the provision infringed the accused's right to freedom of expression, but that the infringement was justified under s. 1. In conducting his s. 1 analysis, Doherty J.A. made the following statement, at p. 125:

> In concluding that the objective outweighs the harm done to the right protected by s. 2(*b*), I have considered that s. 172 reaches inside the home. That reach is a significant aggravating feature when considering the harm done by the section to the right of freedom of expression. That same feature, however, is essential if the section is to serve its purpose. Unfortunately, it is in the home where children are most susceptible to the kinds of conduct at which s. 172 is aimed.

Doherty J.A.'s observation is particularly apposite in the context of this case. As we have discussed above, the evidence is clear that a large portion of child pornography is produced privately, and used privately by those who possess it. The harmful effect on the attitudes of those who possess it similarly occurs in private. With respect to grooming, our knowledge of the sexual abuse of children has evolved to recognize that sexual assaults occur in private as often, if not more often, as in public places. We cannot agree that prohibiting the simple possession of child pornography will not have an additional reductive effect on the harm that child pornography causes. While the possession prohibition infringes privacy more than those

provisions which prohibit the distribution and production of child pornography, its intrusiveness is necessary to achieve Parliament's goal. We firmly disagree with McLachlin C.J., at para. 75, where she states that self-created privately held expressive materials should be exempted from the prohibition against possession of child pornography. Whether the material is produced by the actor himself or a third party is irrelevant. Otherwise, two identical videos will be treated differently on the basis of authorship and intent, both of which are extremely difficult to prove and have no bearing on the apprehension of harm that comes from the actual content of the material.

216 Rowles J.A. found that the impugned provision, in combination with the definition of child pornography, did not minimally impair the right to freedom of expression because it captured visual and written works of the imagination which do not involve the participation of any actual children or youth in their production. The prohibition of the possession of those materials, in her view, could only be justified on the basis of the indirect harms caused by their simple possession. She found that there was a lack of social science evidence regarding the effects of these works of the imagination and that the court should be reluctant to draw an inference of harm given the profound violation of freedom of expression and privacy which results from making the private possession of works of a person's own imagination a criminal offence.

217 With respect, we cannot agree with her analysis. As explained earlier in these reasons, the harm which Parliament sought to prevent in enacting s. 163.1(4) of the *Criminal Code* extends beyond the harm which flows from the use of children in pornography. Parliament also sought to prevent the harm which flows from the very existence of images and words which degrade and dehumanize children and to send the message that children are not appropriate sexual partners. All of the contextual factors at play in this particular case indicate that Parliament's choice of means in protecting children should be respected. Therefore, we disagree with Rowles J.A. that a court should be reluctant to draw an inference of harm simply because of the intrusion of the legislation into the private sphere. Parliament was justified in having a reasonable apprehension that works of the imagination would be harmful to children and society.

218 With respect to visual representations which depict children engaged in explicit sexual activity, and visual representations where the dominant characteristic is the depiction, for a sexual purpose, of a sexual organ or the anal region of a child, the focus must be on the harm of their message and not on the intent or identity of their creator. McLachlin C.J. is of the view that Parliament's concern with "explicit sexual activity" is limited to "visual representations near the extreme end of the spectrum" (para. 47). She implies that "nudity or intimate sexual activity" (para. 49) is required for material to be caught by the law. In our view, this approach is not consistent with an interpretation which focusses on the purpose of the legislation, which is to prevent the harms that arise from the possession of child pornography. To ensure that Parliament's purpose is fulfilled, when deciding on the correct interpretation of the terms in s. 163.1(1), it is of overriding import to consider the content of the material which will fall just outside the scope of the prohibition. For example, this consideration motivated the decision in *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994), which refused to create "an absolute immunity for pornographers who pander to pedophiles by using as their subjects children whose genital areas are barely covered" (p. 752).

219 Visual images which do not use children in their creation can also convey a message of degradation and dehumanization. For example, in *R. v. Pointon*, Man. Prov. Ct., October 23, 1997), the accused had in his possession hundreds of types of hand-drawn pornography and written text. The majority of the drawings in his possession portrayed children under the age of 10 engaged in various types of explicit sexual activity with each other and with adults. Amongst

the pictures was one entitled "The Family Secret" which depicted two young girls, one in the act of fellatio with an adult male. The caption below the picture read: "What started as a simple weekend at the cabin with daddy became incest". This case suggests that drawings, sketches and other works of the imagination are valuable to paedophiles in their collections.

220 Parliament was justified in concluding that such works of the imagination would harm children. The majority held in *Irwin Toy*, *supra*, at p. 999, that "[t]his Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups." Similarly, in *Thomson Newspapers*, *supra*, Bastarache J. made the following observation with respect to materials which degrade and dehumanize vulnerable groups, at para. 116:

> Canadians presume that expressions which degrade individuals based on their gender, ethnicity, or other personal factors may lead to harm being visited upon them because this is within most people's everyday experience. In part, this is because of what we know and perhaps have experienced in our own lives about degrading representations of our personal identity. In part, it is because we know that groups which have historically been disadvantaged in economic or social terms are vulnerable to such expression. In part, it is because our values encourage us to be solicitous of vulnerable groups and to err on the side of caution where their welfare is at stake. In part, it is based on the short logical leap that degrading representations, and exhortation of certain views which degrade the humanity of others, can beget that behaviour.

Given the low value of the speech at issue in this case, and the fact that it undermines the *Charter* rights of children, Parliament was justified in its concern to include visual works of the imagination in its definition of child pornography.

221 Rowles J.A. found that the inclusion of written material was particularly troublesome in the context of the possession offence and found that the law was too broad in capturing written works of the imagination. In her view, the inclusion of material that is only a record of the author's private thoughts (and not shown to anyone), came very close to criminalizing objectionable thoughts. In our view, the inclusion of written materials in the offence of possession does not amount to thought control. The legislation seeks to prohibit material that Parliament believed was harmful. The inclusion of written material which advocates and counsels the commission of offences against children is consistent with this aim, since, by its very nature, it is harmful, regardless of its authorship.

222 In examining whether the prohibition of the possession of written child pornography minimally impairs the right to free expression, we must bear in mind that only material which advocates or counsels the commission of an offence against a child is included in the definition set out in s. 163.1(1)(*b*). We disagree with McLachlin C.J., at para. 59 of her reasons, where she finds that s. 163.1(1)(*b*) is overbroad with regard to some materials on the basis of their authorship and the intent of the possessor. The intent of the author or possessor of the material is not relevant to determining whether it advocates or counsels the commission of a crime. Section 163.1(1)(*b*) covers all written material which seeks to persuade the commission of offences against children. The focus of the inquiry must be on the content of the material itself and not on the circumstances in which it was created, nor on the form of the material, for example whether it be a novel, a poem or a diary. Any material which, upon examining the message which it conveys in the context of the piece as a whole, seeks to persuade the commission of sexual offences against children will be caught by the law. Thus, depending on the context, individual chronicles of sexual activity may well fall within the scope of the definition.

223 There is evidence to support Parliament's choice to include written material which advocates or counsels the commission of sexual offences against children. Dr. Collins testified

that the cognitive distortions of paedophiles were reinforced by written materials which advocate sexual activity with children. Having such views expressed in written form would validate their beliefs about children. In his opinion, written pornography would also fuel the sexual fantasies of paedophiles, and in some cases could incite them to offend.

224 Similarly there was a great deal of testimony before the Standing Committee on Justice and the Solicitor General of the need to prohibit the possession of written materials which advocate or counsel the commission of sexual offences against children. Detective Waters testified about the publications and bulletins put forth by such groups as the North American Man-Boy Love Association (NAMBLA). The organization and its publications advocate adult males having sex with young boys. It is self-described as the "most outspoken and affluent U.S. pedophile group that is affiliated to pedophile groups world-wide". Detective Waters testified that a number of members of the group had been arrested for sexual offences involving children. She noted that in the December 1992 *Bulletin*, on p. 4, NAMBLA commented that their New Zealand affiliate AMBLA was having problems due to the introduction of strict laws relating to the possession of child pornography and that later, AMBLA folded due to these laws (March 1993 *Bulletin*, at p. 3). The inclusion of the private possession of written materials which advocate or counsel the commission of offences against children, therefore, is not redundant and furthers the objective of preventing harm to children and society in a manner that the prohibition of their production and distribution alone could not.

225 We turn now to the second ground upon which Rowles J.A. found that s. 163.1(4) did not minimally impair the s. 2(*b*) guarantee, namely that the provision applies to teenagers between the ages of 14 and 17 who keep videotapes or pictures of themselves engaged in explicit sexual activity or who keep pictures of themselves, the dominant purpose of which is the depiction of their sexual organs or anal regions for a sexual purpose. In our view, when viewed in its context, this effect of the provision is a reasonable limit on teenagers' freedom of expression.

226 The definition of "child" as "a person under the age of eighteen years" is justified in light of the objective of the prohibition of child pornography. While adolescents between the ages of 14 and 17 may legally engage in sexual activity, Parliament has prohibited such conduct in certain contexts. Section 153 of the *Criminal Code* prohibits sexual contact between adolescents and those who are in a position of trust towards them. Section 212(4) makes it illegal to obtain for consideration, or to communicate for the purpose of obtaining for consideration, the sexual services of a person under the age of 18. The common purpose underlying both of these sections is the prevention of the sexual exploitation of adolescents. Parliament's definition of "children" is also consistent with the definition of a child in the *Convention on the Rights of the Child*. Article 1 defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier". This international convention requires that Canadian children under the age of 18 be protected as a class. A review of adolescent child pornography cases reveals that there is also a great risk that they are exploited in its creation.

227 In *R. v. Geisel*, Man. Prov. Ct., February 2, 2000, the accused was found in possession of 22 photographs of teenaged girls in various states of undress. In some of the photographs one of the teenaged girls was engaged in sexual activity with a teenaged boy. The accused had befriended the girls and had allowed one of them to stay at his house when she ran away from home. The girls would visit the accused and he would take photographs. Before taking the photographs the accused would provide the girls with alcohol which he described to them as "liquid cocaine" because it was so strong. In *Jewell*, *supra*, the accused Gramlick produced his own pornographic videotapes involving 12 children whose ages ranged from 11 to 17. Five of the boys were under the age of 14 and were filmed engaging in sexual acts with each other and with adult men, including a prostitute. The boys used in the pornography "were generally

described as being from impoverished and broken homes" (p. 274). They were enticed into performing by rewards of money, cigarettes and gifts. The other accused, Jewell, videotaped his sexual activities with 12 boys, the youngest of whom was 10 years old. Some of them had no knowledge that they were being filmed. Again, money, cigarettes and alcohol were used as bribes. "In some instances, [Jewell] posed as a friendly father figure, who disguised his house as a place of refuge when the young boys left their homes. He took some of the boys on trips unavailable to them in their own homes, to places like Disneyworld in Florida and Canada's Wonderland. There was evidence that he shared these boys with Gramlick and other associates" (p. 276).

228 A recent case before this Court further reveals the exploitation that can occur once pornographic representations of adolescents exist. In *R. v. Davis*, [1999] 3 S.C.R. 759, the accused was charged with sexually assaulting several complainants. One of the complainants was 15-16 years old at the time. The accused had posed as a photographer who could launch the complainant's modelling career. He took nude photographs of the complainant and afterwards refused to show them to her. Eventually she asked for the negatives of the pictures. The accused told her that if she wanted the negatives she would have to perform sexual acts with him, and that if she refused, he would send the photographs to her mother.

229 These cases illustrate the very real harm which can be visited upon adolescents between the ages of 14 and 17. In each one, however, the exploitation involved in the production of the pornographic videotapes and pictures would not be evident from viewing them. It is impossible, from looking at a picture, to determine that the adolescent depicted therein has not been exploited. Hence, Parliament had a strong basis for concluding that the age limit in the definition of child pornography should be set at 18 in order to protect all children from the harm of being used in the production of child pornography. The provision recognizes, as do ss. 153 and 212(4) of the *Criminal Code*, that while adolescents may be capable of consenting to sexual activity, their consent is vitiated in circumstances where there is a possibility that they may be exploited.

230 Rowles J.A. suggested that s. 163.1(4) could be tailored more effectively to protect teenagers who are in possession of erotic pictures or videotapes of themselves. She noted that the Australian State of Victoria had provided a defence to the possession of child pornography when the minor, or one of the minors depicted in the film or photograph is the defendant. In our view, such a defence would undermine Parliament's objective of protecting all children. Some adolescents under the age of 18 sexually exploit other children. Rix Rogers, in *Reaching for Solutions* (1990) (the Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada), at pp. 18-19, referred to survey findings showing that 30 percent of sex offenders in Canada are under the age of 18. Similarly, the Fraser Committee found as follows (vol. 1, at p. 25):

> [There is] the real possibility that young persons of 16 or 17 . . . may be involved in taking advantage of still younger children, by introducing them to prostitution, to performing in pornographic displays for filming, and so on. Such exploitation might be of the older child's own motion, or it might be engineered by adults who perceive the advantage in having as fronts those who are free from serious criminal responsibility.

(See also R. J. R. Levesque, *Sexual Abuse of Children: A Human Rights Perspective* (1999), at p. 214, citing studies including a 1996 paper in the *Journal of the American Academy of Child and Adolescent Psychiatry* estimating that "adolescents commit over 50 percent of sexual offenses perpetrated against children under twelve years of age".) Thus, there is no guarantee, even when a teenager is in possession of a pornographic picture or videotape depicting himself or herself, that it was created in a consensual environment or that the photograph or videotape will not be used by the teenager to groom other children into engaging in sexual conduct. The

latter point demonstrates that this material has the potential to exploit children even in the hands of those who are depicted in it.

231 Thus, we cannot agree with the approach to this issue taken by McLachlin C.J. The inclusion of teenage pornography in s. 163.1(4) is consistent with the legislative purpose of providing for the effective protection of children by reducing the potential for harm caused by pornographic material. McLachlin C.J. is not persuaded that auto-depictions of teenage sexual activity are harmful. With respect, Parliament was justified in restricting teenagers from creating a permanent record of their sexual activity. While adolescents between the ages of 14 and 17 may legally engage in sexual activity, the creation of a permanent record of such activity has consequences which children of that age may not have sufficient maturity to understand, as illustrated in *Davis*, *supra*. Furthermore, the Fraser Committee recognized that children, because of their vulnerability, are not always accorded the same autonomy as adults. It states (vol. 2, at p. 561):

> We do not, for example, consider that the principles of individual liberty and responsibility can be applied to children to the same extent as they can to adults. Children may well have valid claims to autonomy in wide ranges of conduct. However, the liberty to engage in behaviour which is regarded as harmful will be withheld from children with more frequency than it is withheld from adults. Various justifications may be offered for this. The child may be too young or inexperienced to appreciate the harmfulness of the behaviour, or its nature or extent. In addition, quite apart from the characteristics and maturity of the individual child, adult society may be protective of the state of childhood, which is seen as a time, firstly, for the enjoyment of innocence and, then, gradually, for development out of innocence. The exposure to certain kinds of influence or behaviour may be seen as a disruption of the valuable process of gradual maturation.
>
> . . . In the case of pornography . . . we think that there is strong justification for treating children as vulnerable, and effecting some decrease in their liberty.

Parliament made a legitimate policy decision in determining that the possession of adolescent self-depictions of sexual activity should be prohibited. Depictions of teenagers have the potential to be created in conditions which are exploitative and can be used to exploit other children. The Court should defer to Parliament's decision to restrict teenagers' freedom in this area. The worry that s. 163.1 interferes unduly with the freedom of expression of teenagers must also be addressed in light of the *Young Offenders Act*, another set of provisions designed to address children's special needs. Under this Act, any teenager convicted for possession of child pornography would have the benefit of a more lenient sentence and measures aimed at rehabilitation and social reintegration (see s. 20); he or she would also avoid the permanence of a criminal record.

232 In considering whether s. 163.1(4), in conjunction with the definition of child pornography, minimally impairs the guarantee of freedom of expression, it is important to bear in mind that the provision does not amount to a total ban on the possession of child pornography. The provision reflects an attempt by Parliament to weigh the competing rights and values at stake and achieve a proper balance. First, the definitional limits act as safeguards to ensure that only material that is antithetical to Parliament's objectives in proscribing child pornography will be targeted. Second, the legislation incorporates defences of artistic merit, educational, scientific or medical purpose, and a defence of the public good. With regard to the defence of artistic merit, McLachlin C.J. writes that "[a]ny objectively established artistic value, however small" (para. 63), provides a complete defence. In our view, the boundaries of the artistic merit defence do not need to be decided in this appeal, especially since the defence also applies to the prohibitions against the publication, distribution and sale of child pornography that are also found in s. 163.1.

However, we would consider anomalous interpreting artistic merit to provide a complete defence in a case in which the same material would fail the artistic merit test under the obscenity provisions of the *Criminal Code*. We must give effect to Parliament's deliberate decision to avoid the term artistic "purpose", which it adopted for the educational, scientific and medical defences. Artistic merit must be determined with regard to composition and emphasis according to the criteria described in para. 64 of McLachlin C.J.'s reasons and through careful attention to artistic conventions, expert opinions and modes of production, display and distribution. Simply calling oneself an artist is not an absolute shield to conviction.

233 In light of the analysis above, we conclude that Parliament has enacted a law which is appropriately tailored to the harm it seeks to prevent. Therefore, we conclude that the impugned provision minimally impairs the rights guaranteed by s. 2(*b*).

(c) *Proportionality of Effects*

234 At this stage of the analysis we must examine whether the deleterious effects of the infringement are proportional to the salutary objective and effects of s. 163.1(4); see, e.g., *M. v. H.*, [1999] 2 S.C.R. 3, at para. 133; *Dagenais*, *supra*, at p. 889. In *Thomson Newspapers*, *supra*, at para. 125, Bastarache J. described this portion of the analysis as providing an opportunity to assess, in light of the practical and contextual details which are explored in the first two stages of the analysis, whether the benefits which accrue from the limitation are proportional to its deleterious effects, as measured by the values underlying the *Charter*.

235 We begin with an analysis of the salutary effects of the prohibition of the possession of child pornography. The greatest benefit to prohibiting the possession of child pornography is that it helps to prevent the harm to children which results from its production. By aiming to eradicate the legal market for such materials, the legislation acts as a powerful force to reduce the production of child pornography. By reaching into the private sphere, the legislation extends protection to those children who are used in privately created pornographic materials. Section 163.1(4) also deters the use of child pornography in the grooming of children. The prohibition makes it more difficult for paedophiles to use child pornography to lower children's inhibitions towards sexual activity, and thus reduces the effectiveness of this abhorrent method of seduction. Similarly, the prohibition curbs the collection of child pornography by paedophiles. This protects children against sexual abuse by eliminating those materials which fuel paedophilic fantasies and incite paedophiles to commit sexual assaults. The prohibition of the possession of child pornography also helps to ensure that an effective law enforcement scheme can be implemented.

236 The legislation is beneficial to society as a whole. Section 163.1(4) sends a clear message to all Canadians that the degradation and dehumanization of children, and their use as sexual objects for the gratification of adults is inappropriate. This benefits society by deterring the development of antisocial attitudes and complements the legislation's positive effect on children's rights. As the Fraser Committee noted, materials which use and depict children in a sexual way for the entertainment of adults undermine the rights of children by diminishing the respect to which they are entitled. The prohibition of the possession of such materials sends the message that the use of children as sexual objects is unacceptable, and thereby promotes children's position as equal members in society.

237 The impugned legislation is said to have a deleterious effect on both the right to free expression as guaranteed by s. 2(*b*) and on the value of privacy. We turn first to the effect of the provision on the freedom of expression. As we discussed above, the law does not trench significantly on speech possessing social value; there is a very tenuous connection between the possession of child pornography and the right to free expression. At most, the law has a detrimental cost to those who find base fulfilment in the possession of child pornography.

238 As we have stated, we do not find objections to the restriction of auto-depictions of adolescent sexuality compelling. In our view, the provision is consistent with the protection of children and does not serve as an unjustified impediment to the self-fulfilment of adolescents. As the Fraser Committee noted, restrictions on children's liberties are sometimes necessary because of their vulnerability. The cases involving depictions of teenagers engaged in explicit sexual activity demonstrate that pornography depicting teenagers is sometimes produced under conditions of exploitation, rather than mutuality and consent. Any deleterious effect on the self-fulfilment of teenagers who produce permanent records of their own sexual activity in an environment of mutual consent is, therefore, far outweighed by the salutary effects on all children resulting from the prohibition of the possession of child pornography.

239 In most cases, the prohibition's restriction on expression will affect adults who seek fulfilment through the possession of child pornography. These adults seek to fulfill themselves by deriving sexual pleasure from images and writings which objectify and degrade children. It is important to emphasize that the self-fulfilment denied by the law is closely connected to the harm to children. The benefits of the prohibition of the possession of child pornography far outweigh any deleterious effect on the right to free expression.

240 The legislation affects privacy interests because it extends its reach into the home. However, we must be careful not to exaggerate the severity of this deleterious effect. The privacy of those who possess child pornography is also protected by the right against unreasonable search and seizure as guaranteed by s. 8 of the *Charter*. Before any police investigation could take place within the home, a judicial officer would first have to make a determination that the law enforcement interests of the state were, in the particular situation, demonstrably superior to the affected individual's interest in being left alone. The law intrudes into the private sphere because doing so is necessary to achieve its salutary objectives. Child pornography is produced in private, and child pornography is used privately to entice children into sexual activity. Thus, the privacy interest restricted by the law is closely related to the specific harmful effects of child pornography.

241 In examining the law's effect on privacy interests, it is important not to lose sight of the beneficial effects of the provision in protecting the privacy interests of children. When children are depicted in pornographic representations, the camera captures their abuse and creates a permanent record of it. This constitutes an extreme violation of their privacy interests. By criminalizing the possession of such materials, Parliament has created an incentive to destroy those pornographic representations which already exist. In our view, this beneficial effect on the privacy interests of children is proportional to the detrimental effects on the privacy of those who possess child pornography.

242 When the effects of the provision are examined in their overall context, the benefits of the legislation far outweigh any harms to freedom of expression and the interests of privacy. The legislation hinders the self-fulfilment of a few, but this form of self-fulfilment is at a base and prurient level. Those who possess child pornography are self-fulfilled to the detriment of the rights of all children. The prohibition of the possession of such materials is thus consistent with our *Charter* values. It fosters and supports the dignity of children and sends the message that they are to be accorded equal respect with other members of the community. In our view, Parliament has enacted a law which is reasonable, and which is justified in a free and democratic society.

III. Disposition

243 We would allow the appeal and remit the charges for trial.

Appeal allowed.

Solicitor for the appellant: The Ministry of the Attorney General, Vancouver.

Solicitors for the respondent: Gil D. McKinnon and Richard C. C. Peck, Vancouver.

Solicitor for the intervener the Attorney General of Canada: The Department of Justice, Vancouver.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of Nova Scotia: The Public Prosecution Service (Appeals), Halifax.

Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Solicitor for the intervener the Attorney General for Alberta: Alberta Justice, Calgary.

Solicitors for the interveners the Canadian Police Association (CPA), the Canadian Association of Chiefs of Police (CACP) and Canadians Against Violence (CAVEAT): Danson, Recht & Freedman, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association: Sack Goldblatt Mitchell, Toronto.

Solicitors for the interveners the Evangelical Fellowship of Canada and the Focus on the Family (Canada) Association: Bennett Jones, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: McAlpine Gudmundseth Mickelson, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Tory Tory, Toronto.

Solicitor for the interveners Beyond Borders, Canadians Addressing Sexual Exploitation (CASE), End Child Prostitution, Child Pornography and Trafficking in Children for Sexual Purposes (ECPAT) and the International Bureau for Children's Rights: David Matas, Winnipeg.

THIS SEARCH | THIS DOCUMENT | GO TO
Next Hit | Forward | New Bills Search
Prev Hit | Back | HomePage
Hit List | Best Sections | Help
Doc Contents

H.R.4623

Child Obscenity and Pornography Prevention Act of 2002 (Introduced in House)

SECTION 1. SHORT TITLE.

This Act may be cited as the `Child Obscenity and Pornography Prevention Act of 2002'.

SEC. 2. IMPROVEMENTS TO PROHIBITION ON VIRTUAL CHILD PORNOGRAPHY.

(a) Section 2256(8)(B) of title 18, United States Code, is amended to read as follows:

> `(B) such visual depiction is a computer image or computer-generated image that is, or appears virtually indistinguishable from, that of a minor engaging in sexually explicit conduct; or'.

(b) Section 2256(2) of title 18, United States Code, is amended to read as follows:

> `(2)(A) Except as provided in subparagraph (B), `sexually explicit conduct' means actual or simulated--
>
> > `(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
> >
> > `(ii) bestiality;
> >
> > `(iii) masturbation;
> >
> > `(iv) sadistic or masochistic abuse; or
> >
> > `(v) lascivious exhibition of the genitals or pubic area of any person;
>
> `(B) For purposes of subsection 8(B) of this section, `sexually explicit conduct' means--
>
> > `(i) actual 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) actual or lascivious simulated;
> >
> > > `(I) bestiality;
> > >
> > > `(II) masturbation; or

`(III) sadistic or masochistic abuse; or

`(iii) actual or simulated lascivious exhibition of the genitals or pubic area of any person;'.

(c) Section 2252A(c) of title 18, United States Code, is amended to read as follows:

`(c)(1) Except as provided in paragraph (2), it shall be an affirmative defense to a charge of violating this section that the alleged offense did not involve child pornography produced using a minor engaging in sexually explicit conduct or an attempt or conspiracy to commit an offense involving such child pornography.

`(2) A violation of, or an attempt or conspiracy to violate, this section which involves child pornography as defined in section 2256(8)(A) or (C) shall be punishable without regard to the affirmative defense set forth in paragraph (1).'.

SEC. 3. PROHIBITION ON PANDERING MATERIALS AS CHILD PORNOGRAPHY.

(a) Section 2256(8) of title 18, United States Code, is amended--

(1) by inserting `or' at the end of subparagraph (B);

(2) in subparagraph (C), by striking `or' at the end and inserting `and'; and

(3) by striking subparagraph (D).

(b) Chapter 110 of title 18, United States Code, is amended--

(1) by inserting after section 2252A the following:

`Sec. 2252B. Pandering and solicitation

`(a) Whoever, in a circumstance described in subsection (d), offers, agrees, attempts, or conspires to provide or sell a visual depiction to another, and who in connection therewith knowingly advertises, promotes, presents, or describes the visual depiction with the intent to cause any person to believe that the material is, or contains, a visual depiction of a minor engaging in sexually explicit conduct shall be subject to the penalties set forth in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

`(b) Whoever, in a circumstance described in subsection (d), offers, agrees, attempts, or conspires to receive or purchase from another a visual depiction that he believes to be, or to contain, a visual depiction of a minor engaging in sexually explicit conduct shall be subject to the penalties set forth in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

`(c) It is not a required element of any offense under this section that any person actually provide, sell, receive, purchase, possess, or produce any visual depiction.

`(d) The circumstance referred to in subsection (a) and (b) is that--

`(1) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

`(2) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;

`(3) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

`(4) any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

`(5) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.';

(2) in the analysis for the chapter, by inserting after the item relating to section 2252A the following:

`2252B. Pandering and solicitation.'.

SEC. 4. PROHIBITION OF OBSCENITY DEPICTING YOUNG CHILDREN.

(a) Chapter 71 of title 18, United States Code, is amended--

(1) by inserting after section 1466 the following:

`Sec. 1466A. Obscene visual depictions of young children

`(a) Whoever, in a circumstance described in subsection (d), knowingly produces, distributes, receives, or possesses with intent to distribute a visual depiction that is, or is virtually indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct, or attempts or conspires to do so, shall be subject to the penalties set forth in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

`(b) Whoever, in a circumstance described in subsection (d), knowingly possesses a visual depiction that is, or is virtually indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct, or attempts or conspires to do so, shall be subject to the penalties set forth in section 2252A(b)(2), including the penalties provided for cases involving a prior conviction.

`(c) For purposes of this section--

`(1) `visual depiction' includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image, and also includes any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means;

`(2) `pre-pubescent child' means that the child, as depicted, does not exhibit significant pubescent physical or sexual maturation. Factors that may be considered in determining significant pubescent physical maturation include body habitus and musculature, height and weight proportion, degree of hair distribution over the body, extremity proportion with respect to the torso, and dentition. Factors that may be

considered in determining significant pubescent sexual maturation include breast development, presence of axillary hair, pubic hair distribution, and visible growth of the sexual organs; and

`(3) `sexually explicit conduct' has the meaning set forth in section 2256(2).

`(d) The circumstance referred to in subsections (a) and (b) is that--

`(1) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

`(2) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;

`(3) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

`(4) any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

`(5) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

`(e) In a case under subsection (b), it is an affirmative defense that the defendant--

`(1) possessed less than three such images; and

`(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof--

`(A) took reasonable steps to destroy each such image; or

`(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.'; and

(2) in the analysis for the chapter, by inserting after the item relating to section 1466 the following:

`1466A. Obscene visual depictions of young children.'.

(b)(1) Except as provided in paragraph (2), the applicable category of offense to be used in determining the sentencing range referred to in section 3553(a)(4) of title 18, United States Code, with respect to any person convicted under section 1466A of such title, shall be the category of offenses described in section 2G2.2 of the Sentencing Guidelines.

(2) The Sentencing Commission may promulgate guidelines specifically governing offenses under section 1466A of title 18, United States Code, provided that such guidelines shall not result in sentencing ranges that are lower than those that would have applied under paragraph (1).

SEC. 5. PROHIBITION ON USE OF MATERIALS TO FACILITATE OFFENSES AGAINST MINORS.

Chapter 71 of title 18, United States Code, is amended--

(1) by inserting at the end the following:

`Sec. 1471. Use of obscene material or child pornography to facilitate offenses against minors

`(a) Whoever, in any circumstance described in subsection (c), knowingly--

`(1) provides or shows to a person below the age of 16 years any obscene matter or child pornography, or any visual depiction that is, or is virtually indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct; or

`(2) provides any obscene matter or child pornography, or any visual depiction that is, or is virtually indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct, or any other material assistance to any person in connection with any conduct, or any attempt, incitement, solicitation, or conspiracy to engage in any conduct, that involves a minor and that violates chapter 109A, 110, or 117, or that would violate chapter 109A if the conduct occurred in the special maritime and territorial jurisdiction of the United States,

shall be subject to the penalties set forth in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

`(b) For purposes of this section--

`(1) `child pornography' has the meaning set forth in section 2256(8);

`(2) `visual depiction' has the meaning set forth in section 1466A(c)(1);

`(3) `pre-pubescent child' has the meaning set forth in section 1466A(c)(2); and

`(4) `sexually explicit conduct' has the meaning set forth in section 2256(2).

`(c) The circumstance referred to in subsection (a) is that--

`(1) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

`(2) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction or obscene matter by the mail, or in interstate or foreign commerce by any means, including by computer;

`(3) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

`(4) any visual depiction or obscene matter involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or

that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

`(5) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.';

(2) in the analysis for the chapter, by inserting at the end the following:

`1471. Use of obscene material or child pornography to facilitate offenses against minors.'.

SEC. 6. EXTRATERRITORIAL PRODUCTION OF CHILD PORNOGRAPHY FOR DISTRIBUTION IN THE UNITED STATES.

Section 2251 is amended--

(1) by striking `subsection (d)' each place it appears in subsections (a), (b), and (c) and inserting `subsection (e)';

(2) by redesignating subsections (c) and (d), respectively, as subsections (d) and (e); and

(3) by inserting after subsection (b) a new subsection (c) as follows:

`(c)(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its possessions and Territories, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

`(2) The circumstance referred to in paragraph (1) is that--

`(A) the person intends such visual depiction to be transported to the United States, its possessions, or territories, by any means including by computer or mail;

`(B) the person transports such visual depiction to, or otherwise makes it available within, the United States, its possessions, or territories, by any means including by computer or mail.'.

SEC. 7. STRENGTHENING ENHANCED PENALTIES FOR REPEAT OFFENDERS.

Sections 2251(d), 2252(b), and 2252A(b) of title 18, United States Code, are each amended by inserting `chapter 71,' immediately before each occurrence of `chapter 109A,'.

SEC. 8. SERVICE PROVIDER REPORTING OF CHILD PORNOGRAPHY AND RELATED INFORMATION.

(a) Section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032) is amended--

(1) in subsection (b)(1)--

(A) by inserting `2252B,' after `2252A,'; and

(B) by inserting `or a violation of section 1466A of that title,' after `of that title),';

(2) in subsection (c), by inserting `or pursuant to' after `to comply with';

(3) in subsection (d)--

(A) by striking the heading and inserting the following new heading: `Voluntary provision of information by service providers';

(B) by designating the current text of subsection (d) as paragraph (1); and

(C) by adding at the end of subsection (d) the following new paragraph:

`(2) A provider of electronic communication services or remote computing services described in subsection (b)(1), which reasonably believes that it has obtained knowledge of facts and circumstances indicating that a violation of section 2251, 2251A, 2252, 2252A, 2252B, or 2260 of title 18, involving child pornography (as defined in section 2256 of that title), or a violation of section 1466A of that title, may have occurred or will occur, may make a report of such facts or circumstances to the Cyber Tip Line at the National Center for Missing and Exploited Children, which shall forward that report to the law enforcement agency or agencies previously designated by the Attorney General under subsection (b)(2). Except as provided in subsection (b)(1), the Federal Government may not require the making of any such report.'; and

(4) by amending subsection (f)(1)(D) to read as follows:

`(D) where the report discloses a violation of State criminal law, to an appropriate official of a State or subdivision of a State for the purpose of enforcing such State law.'.

(b) Section 2702 of title 18, United States Code is amended--

(1) in subsection (b)--

(A) in paragraph (6)--

(i) by inserting `or' at the end of subparagraph (A)(ii);

(ii) by striking subparagraph (B); and

(iii) by redesignating subparagraph (C) as subparagraph (B);

(B) by redesignating paragraph (6) as paragraph (7);

(C) by striking `or' at the end of paragraph (5); and

(D) by inserting after paragraph (5) the following new paragraph:

`(6) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032); or'; and

(2) in subsection (c)--

(A) by striking `or' at the end of paragraph (4);

(B) by redesignating paragraph (5) as paragraph (6); and

(C) by adding after paragraph (4) the following new paragraph:

`(5) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032); or'.
