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Justin A. Giordano

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ARTICLES

THE UNITED STATES CONSTITUTION'S FIRST AMENDMENT VS. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: A COMPARATIVE ANALYSIS OF OBSCENITY AND PORNOGRAPHY AS FORMS OF EXPRESSION

JUSTIN A. GIORDANO, ESQ.*

INTRODUCTION

This paper will seek to analyze and contrast the differences between the American and Canadian approaches to pornography and obscenity, as well as the effect of the Internet on the dissemination of this material.

Proponents of unrestrained expression in this area believe that such expression is the true test of the highly revered and acclaimed freedom of speech clause prominently featured in the First Amendment of the United States Constitution, and its Canadian counterpart: the Free Expression Clause,¹ Canadian Charter of Rights and Freedoms, Constitution Act, 1982 R.S.C. Appendix II, No. 44, §2(b) (Can).

* The author is on the Business, Management & Economics faculty of Empire State College of the State University of New York. Professor Giordano specializes in Business Law and the Legal Environment as well as International Law, International Business Law and Entertainment [and Media] Law, teaching at the undergraduate and graduate level. He has also taught at the law school level in the capacity of visiting/adjunct Professor of International Law & Entertainment Law. He is licensed as an attorney at law in the states of New York, New Jersey and Connecticut, and admitted to the Supreme Court of the United States, the Court of the Armed Forces, the United States Court of Federal Claims, and the United States Court of Appeals for the Federal Circuit.

Professor Giordano is also a contributing columnist to two professional [law] monthly journals/magazines as well as contributing articles to various general interest publications. Special acknowledgement to Mr. Joseph Michelucci, Q.C., a practicing attorney in Toronto, Canada, who provided significant research contribution and authorship assistance pertaining to the "Canadian law" component of this article.

1. 1 CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Constitution Act, 1982 R.S.C. 1985, Appendix II, No. 44, Sched. B, Pt I, s. 2 (Can.). The Free Expression Clause provides: "Everyone has the following fundamental freedoms:

- a) freedom of conscience and religion;
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- c) freedom of peaceful assembly; and
- d) freedom of association.

Canada, the United States' closest relative in the community of nations, adopted a new Constitution in 1982.² This Constitution sought to enshrine some of the highest ideals known to mankind, drawing freely from the best that the world has to offer in legal and constitutional thought. It is no surprise that the United States Constitution was scrutinized and drawn upon generously. In fact, some Canadian legal scholars claim that they sought to improve on the venerated American document, while avoiding what they may have judged to be its pitfalls and shortcomings.³

Overall, the Canadian legal establishment's aim has steadfastly been to protect free speech while incorporating safeguards designed to protect against expression primarily offensive to females, minorities and other groups historically perceived to have been unfairly treated. But while the goal is indisputably laudable, the question that stubbornly arises at every at every turn is: when does this safeguard impede true freedom of speech and expression, even if that speech or expression is hurtful, offensive or harmful to some or is in extremely poor taste to others? The "slippery slope" argument has long since gained cliché status, but nonetheless it is still considered a powerful argument against restrictions on free speech.⁴

The pornography controversy is unlikely to just fade away. Indeed with the advent of the Internet, the issue has once again been brought to the forefront with renewed vigor. The United States Supreme Court's latest ruling relating to this matter was handed down on June 26, 1997, in the *Reno, Attorney General of the United States, v. American Civil Liberties Union* decision (hereinafter *Reno v. ACLU*).⁵ The case dealt with the dissemination of pornography and obscenity on the Internet.

Those who oppose pornography remain steadfast in their belief that freedom of speech (and expression) does not entail the unfettered, unlimited, and uncontrolled dissemination of pornographic material.⁶ Furthermore, their contention is that most of the materials that are

The First Amendment to the United States Constitution provides, in its entirety: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. *Id.*

3. Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 4 AM. B. FOUND. RES. J. 681 (1987).

4. "Slippery slope" is a term used to describe the potentially easy segue way between a safeguard to protecting a freedom and such a safeguard's possible impediment to expressing such freedom.

5. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

6. *R. v. Hicklin*, (1868) L.R. 3 Q.B. 360, 371.

currently considered pornographic should instead be classified as obscene, thus outside the protective umbrella of the First Amendment.⁷

Canada has had to grapple with this controversial and provocative issue as well. However, as this paper will show, Canadians have approached this challenging and often treacherous area of law somewhat differently than their American counterparts.

PORNOGRAPHY VS. OBSCENITY

Unlike many other democracies, freedom of expression has long been a fundamental aspect of constitutional democracy. However, the rights of freedom of speech and expression must always be balanced against any limitation on certain types of expression that are deemed to undermine society's sense of decency.

Pornography has been a very controversial form of expression; it has come to symbolize a deep sense of immorality and decay to some while representing ultimate liberation and a celebration of human sexuality to others. Some American feminist commentators have stated that the "[g]ood pornography has value because it validates women's will to pleasure. It celebrates female nature. It validates a range of female sexuality that is wider and truer than that legitimated by the non-pornographic culture. Pornography (when it is good) celebrates both female pleasure and male rationality."⁸

On the other hand, the Canadian MacGuigan report stated that "[t]he 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."⁹

Thus, this medium elicits an extremely mixed reaction; it has come to be seen as both an expression of free will and as a great impediment to sexual equality and the objectification of the female personae. The issue of pornography elicits very strong reactions from people across the political spectrum as well, and these reactions have not failed to get the attention of legislators in Canada and the United States.

Both American and Canadian legislatures have struggled to define where "good" pornography ends and obscenity begins. As a result, Canadian and American courts have had to revisit the topic of sexually explicit material and obscenity on a number of occasions to refine

7. *Reno*, 521 U.S. at 874-75, 886.

8. West, *supra* note 3, at 696.

9. *Report on Pornography by the Standing Committee on Justice and Legal Affairs*, 18 MacGugan Report 4 (1978); (This is a Government of Canada Publication).

what would otherwise be, and some contend still is, a rather vague area of the law

THE RESPECTIVE LEGISLATION

The Canadian legislation is contained in the Canada Criminal Code, a federal statute with equal application across the country. Section 163(8) of the Canada Criminal Code, R.S.C. 1985, Ch. C-46 creates a criminal offense for selling, exposing or possessing a publication whose dominant characteristic is the "undue exploitation of sex" or sex combined with any crime, horror, cruelty or violence.¹⁰

By contrast, the United States does not have a national standard. There is, however, a "three prong test" outlined in the *Miller v. California* decision which serves to determine whether the obscenity threshold has been crossed.¹¹

10. Canadian Criminal Code, R.S.C., ch. C-46, § 163(8) (1985) (Can.). "For the purposes of this Act, any publication of dominant characteristic of which is the undue exploitation of sex, or of sex and anyone or more of the following subjects, namely, horror, cruelty and violence, shall be deemed obscene." See also, Canadian Criminal Code R.S.C., ch. C-46, § 163(8) (1985) (Can.).

"(1) Every one commits an offence who:

- (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever, or
 - (b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.
- (2) Everyone commits an offence who knowingly, without lawful justification or excuse,
- (a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever;
 - (b) publicly exhibits a disgusting object or an indecent show;
 - (c) offers to sell, advertises or publishes an advertisement of, or has for sale or disposal, any means, instructions medicine, drug or article intended or represented as a method of causing abortion or miscarriage; or
 - (d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal disease or diseases of the generative organs.
- (3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that 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.
- (6) Where an accused is charged with an offence under subsection (1), the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge.
- (7) In this section, "crime comic" means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially. . . (b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.)

11. *Miller v. California*, 413 US 15, 39 (1973). The three prong test developed by the Court was: "(a) whether the average person, applying contemporary community standards would find

THE TRANSFORMATION OF OBSCENITY: MORALITY VS. EQUALITY

In Canada the question of sexually explicit materials and obscenity has undergone profound changes. The test evolved from an examination of whether the materials in question would "deprave and corrupt those whose minds are open to such immoral influences" to whether this type of material was "harmful" to society and not simply a "lapse inappropriate or good taste."¹²

As expounded in *R. v. Butler*, the leading Canadian case in the area of pornography as obscenity, the harm was characterized as having a detrimental effect that placed "women (and sometimes men) in positions of subordination . . . [which] . . . run against the principles of equality and dignity of all human beings."¹³ The *Butler* court held that "[h]arm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men. . . or, . . . the reverse."¹⁴

The *conceptual* notion of harm has had both its critics and its supporters. In this transformation from morality to equality, the Supreme Court of Canada has accepted a generalized and gender-based theory of harm that would prohibit sexually explicit materials. This theory is based on the idea that sexually explicit materials reinforce an ideology of gender-domination or portrays female sexuality in a false or degrading manner. However, such a generalized theory of harm does not necessarily prove that certain types of sexually explicit material are *actually* harmful. Therefore, whether characterized as morality or as gender-based harm, a prohibition of sexually explicit materials permits expressive activity to be suppressed. The public policy supporting such a prohibition is that sexually explicit materials are inconsistent with a conventional standard of propriety, albeit one that is more cherished in contemporary society.¹⁵

In the United States, the relevant test is still the *Miller* standard.¹⁶ Under this test, sexually explicit material is obscene if: 1) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; 2) the work depicts in a patently offensive way sexual conduct specifically

that the work, taken as a whole appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

12. *Id.* at 204.

13. *R. v. Butler*, (1992) 1 S.C.R. 452, 479.

14. *Id.* at 485.

15. Jamie Cameron, *Abstract Principle v. Contextual Conceptions of Harm: A Comment on R. v. Butler*, 37 MCGILL L.J. 1135, 1138 (1992).

16. *Miller*, 413 U.S. 15.

defined by the applicable state law; and 3) the work, taken as a whole, lacks serious literary, artistic, political or scientific value.¹⁷ The first prong of this test was adopted from the *Roth v. United States*¹⁸ decision and with the second prong, which adopts the standard of offensiveness, the American standard has not moved away from the protection of morality, as it would appear that the Canadian standard has done.

However, the question of obscenity as an equality issue was decided in *American Booksellers Association v. Hudnut*.¹⁹ This case involved a constitutional challenge to an Indianapolis civil rights ordinance that defined pornography in terms of its injury to women and outlawed it as a form of sex discrimination.²⁰

The Indianapolis ordinance,²¹ drafted by Andrea Dworkin and Catherine MacKinnon, (two well renowned American feminist activists) created a civil remedy for anyone who could prove he or she was harmed by certain defined conduct or content, specifically where the conduct or content²² involved "graphic sexually explicit subordination of women".²³ It must be noted however, that this ordinance did not constitute a prohibitive criminal law, but simply provided the opportunity for compensatory remedies after the fact and upon proof that harm was inflicted on a plaintiff. In invalidating the ordinance at trial, Judge Barker concluded that it was aimed at speech traditionally protected by the First Amendment, and as such was not directed specifically as obscenity.²⁴

17. *Id.* at 39.

18. *Roth v. United States*, 354 U.S. 476, 489 (1957).

19. *Am. Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771F. 2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

20. *Id.*

21. INDIANAPOLIS GENERAL ORDINANCE NO. 35, § 16-3(q)(1)-(6) (1984). The ordinance, in creating a civil remedy defined pornography as follows:

- (1) Women are presented as sexual objects who enjoy pain or humiliation; or
- (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
- (3) Women are presented as sexual objects tied up or mutilated or bruised or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
- (4) Women are presented as being penetrated by objects or animals; or
- (5) Women are presented in scenarios of degradation, injury abasement, torture, show as filthy or inferior bleeding bruised or hurt in a context that makes these conditions sexual; or
- (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

22. *Id.*

23. *Id.*

24. *Hudnut*, 598 F. Supp. At 1326.

Moreover, in her opinion, Judge Barker states that sex discrimination is not so compelling (i.e., a compelling state interest) as to outweigh the right of free speech.²⁵ It is interesting to note that the plaintiffs also sought to rely on the child pornography case of *New York v. Ferber*,²⁶ a decision upholding a ban on child pornography. The plaintiff argued unsuccessfully that the protection of women was a compelling state interest and analogous to the protection of children, and such an interest was sufficiently meritorious to override the First Amendment free speech protection clause.²⁷

Judge Barker applied the classic *Miller* analysis in this case and held that sex discrimination does not meet the compelling state interest test nor the "clear and present, imminent danger" test,²⁸ both of which emanate from the strict scrutiny doctrine. Meeting the standards established by at least one of these tests is required to override the First Amendment free speech provision.²⁹ From a Canadian perspective, it could be argued that the analysis applied by Judge Barker, which has grown out of the American jurisprudence and culminated in *Miller*, is unduly narrow.

In Canada, if it can be *shown* that a type of sexually explicit material prohibited by statute *actually* caused sex discrimination, then would at least get the same treatment as a person harmed by other prohibited forms of speech such as defamation.³⁰ Therefore, in Canadian jurisprudence, this decision would have been based on whether it could be shown that sexually explicit material actually causes sex discrimination, rather than whether sex discrimination is important enough to override the Canadian free speech provisions.

The danger with this type of ordinance, as the anti-censorship feminists have pointed out, is that it creates the impression that sex degrades women but not men; that men are raving beasts; that sex is dangerous for women; that sexuality is male and not female; that men inflict sex on women and that heterosexuality is somehow sexist because penetration is a sign of submission.³¹ Moreover, the defendant's reliance on the *Ferber* decision coupled with the ordinance's strong presumption of coercion merely reinforces the notion that women are incapable of consent.³² As stated above, without conclusive proof that this type of material actually causes sex discrimination coupled with

25. *Id.*

26. *New York v. Ferber*, 458 U.S. 747 (1982).

27. *Hudnut*, 598 F.Supp at 1332.

28. Rebecca Benson, Pornography and the First Amendment: American Booksellers v. Hudnut, 9 HARV. WOMEN'S LJ. 153, 162 (1986).

29. *Ferber*, 458 U.S. 747.

30. *Benson*, supra note 29, at 168.

31. *Id.* at 171.

32. *Id.* at 171-72.

the fact that the ordinance made no mention of sexist non-sexually explicit material that is far more common on television or in advertising, the Indianapolis ordinance was trying to enforce a conventional standard of propriety.

In summary, S. 163 of the Canadian Criminal Code specifically prohibits certain types of pornography that depict the physical abuse of women.³³ Violation of S. 163 constitutes a crime. In contrast, the Indianapolis ordinance did not directly prohibit any material from being produced or sold, nor did it constitute a crime.³⁴ Instead, it merely created a civil remedy for an aggrieved party who could prove harm by the defined conduct or content previously described.

1. *Obscenity in Canadian Case Law*

The leading decision in the area of obscenity, with regard to pornography, is *R. v. Butler*.³⁵ In that case, the accused was charged with numerous counts of possessing and distributing obscene material under S.163, and the Court was faced with deciding whether S. 163 infringed on the right to freedom of expression guaranteed by S. 2(b)³⁶ of the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982 R.S.C. 1985 Appendix II, No. 44* and what test to apply in defining "undue exploitation of sex."³⁷

Obscenity and the Canadian Charter of Rights and Freedom

By its very nature, obscenity legislation will come directly in conflict with the right to freedom of expression guaranteed by S.2(b) of the *Charter*.³⁸ However, S. 2(b) is subject to the limitation imposed by S. 123 of the *Charter* if it can be shown that there exists a "pressing and substantial" reason to limit this right.³⁹

The leading case in the area of freedom of expression is *Irvine Toy v. Quebec*.⁴⁰ In this case, the Canadian Supreme Court developed the test to determine whether an activity constitutes a form of protected expression.⁴¹ The Court stated that, "[w]e cannot . . . exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity con-

33. Canadian Criminal Code R.S.C., Ch. C-46 § 163 (1995) (Can).

34. *Id.*

35. *Butler*, 1 S.C.R. 452, 460.

36. Constitution Act, 1982, R.S.C., App. II, No. 44 Sched. B, Pt. I, § 2 (1985) (Can). "Everyone has the following fundamental freedoms: . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other communications."

37. Canadian Criminal Code, R.S.C., Ch. C-46, § 163(8) (1995) (Can).

38. Constitution Act, at § 2.

39. *Id.* § 1.

40. *Irvine Toy v. Quebec*, 94 N.R. (S.C.R.) (1989).

41. *Id.* at 174.

veys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee.”⁴²

As far as pornography is concerned, the Supreme Court of Canada, in *Butler*, overturned a Manitoba Court of Appeals decision that pornography should not be included under the ambit of protected expression.⁴³ Thus, pornography is considered a protected form of expression as long as it is not obscene. This limit was challenged as an infringement on s. 2(b) of the charter.⁴⁴ To this end, the Court divided pornography into three basic categories: 1) material with explicit sex and violence; 2) explicit sex without violence but which subjects people to degrading treatment; 3) explicit sex without violence that is not degrading.⁴⁵

Section 163(8) expressly prohibits the first category of pornography and may prohibit some forms of pornography in the second category if they exhibit “undue exploitation of sex.”⁴⁶ In defining what types of material would be prohibited in the second category, the Court stated, “the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex, which is degrading or dehumanizing, may be “undue” if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as an undue exploitation of sex unless it employs children in its production.”⁴⁷

Furthermore, if the material is not considered obscene under this definition, it will not become obscene by virtue of the manner in which, or the audience to whom, it is exposed.⁴⁸ From prior cases there are two tests that the Court accepted in determining what types of material portray an undue exploitation of sex: (1) the “community standard of tolerance” test; and (2) the degrading or dehumanizing test. The community standards test is not concerned not with what Canadians would not tolerated being exposed to themselves. Rather, the test is the degree of exposure they would find unacceptable for other Canadians.⁴⁹ This standard is a very flexible standard and changes with time.⁵⁰ For the most part, the interpretation of this standard is left to the discretion of the trial judge or the jury, and it is also

42. *Id.* at 212.

43. *Butler*, 1 S.C.R. 452, 460 (Can.)

44. Constitution Act, at § 2.

45. *Butler*, 1 S.C.R. 452, 470 (Can.)

46. Canadian Criminal Code R.S.C., Ch. C-46, § 163(8) (1985) (Can.).

47. *Butler*, 1 S.C.R. 452, 471 (Can.)

48. *Id.* at 465.

49. *Id.* at 465-66.

50. *Id.* at 466.

important to note that the test is based on tolerance and not personal taste.

Thus, the only guidelines expressly laid down to define "community standard" are: (a) the standard must be a national standard and not merely the standard of a small segment of the population; (b) the standard must reflect what a person would not tolerate *another* person being exposed to and; (c) it must be based on tolerance and not taste.⁵¹ All three components of the test must be met in order to declare the material in question obscene.⁵²

According to the Canadian Supreme Court, the community standard test is more important than the degrading test.⁵³ As the Court recognized in *Butler*, these tests are not mutually exclusive tests; the degradation test is encapsulated within the community tolerance test such that, as suggested in prior jurisprudence,⁵⁴ if the material is considered degrading it will necessarily fail the community standard test. Section 163 was deemed to infringe upon S. 2(b) of the *Charter* because the Court ruled that the type of expression in question need not be redeeming in the eyes of the court, as long as the government's purpose is to specifically restrict certain types of communications or materials based on their content. However, S. 163 was saved by operation of s. 1 of the *Charter*, and the major motivating factor throughout the Supreme Court of Canada's application of the *Oakes*⁵⁵ test was the above-mentioned concept of harm.

In applying the proportionality component of the *Oakes* test, the Court seems to have accepted a lower standard of proof regarding the harm caused to society by pornography. This is due partly to the fact that pornography is a form of expression whose main aim is economic profit (which places it at the lower end of the expression spectrum)⁵⁶.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Towne Cinema Theatres v. The Queen*, 18 C.C.C. (3d) 193 (1985).

55. The *Oakes* test, derived from *R. v. Oakes*, 1 S.C.R.103 (1985), provides a possible defense for the government after the plaintiff has proven that a possible defense for the government after the plaintiff has proven that a certain piece of legislation infringes on one of the guaranteed rights in the Canadian Charter of Rights and Freedoms. If a plaintiff proves that their rights have been infringed, the government can save the legislation if it can show:

- 1) What the governmental or social purpose is that the impugned law or government action was intended to achieve. *Id.* at 135.
- 2) That this objective is one of substantial importance or pressing significance in a free and democratic society, so as to warrant the infringement of constitutional rights. *Id.* At 138.
- 3) That the measure adopted by the government to obtain its objective is rationally connected to the end sought to be achieved. *Id.* At 106.
- 4) That the method chosen by the government to meet its objective places the least restrictions on the right in question and is proportional to the end sought to be achieved (proportionality test). *Id.* At 139.

56. *Oakes*, 1 S.C.R. 103, 104.

Thus, in *Butler*, the Supreme Court of Canada accepted that if there was a reasonable basis for concluding that harm will result, actual proof of harm was not required.⁵⁷

It is important to note that “the reasonable basis” test enunciated in the *Butler* case which could effectively make certain forms of pornography illegal, are in sharp contrast to established American case law which has consistently held that once material has been categorized as pornographic but not obscene, it cannot lose its First Amendment protection. Furthermore, even if one could make the case that harm might result as a consequence of the dissemination of pornographic material, unless it can be ascertained that such harm is imminent i.e., the Clear and Present Danger Test, the First Amendment shield remains in effect.⁵⁸

Obscenity in American Case Law

As stated above, the leading American case in the area of obscenity in *Miller v. California*.⁵⁹ The three-part *Miller* test essentially comprises the same elements as the Canadian undue exploitation of sex standard.⁶⁰ However, the individual prongs of each test differ in their scope and application.

In *Miller*, the Supreme Court abandoned the “utterly without redeeming social value” test in the *Memoirs* case and adopted the three part test referred to above.⁶¹ However, it is interesting to note that the Court reaffirmed that they recognize “that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the *sensibilities* of unwilling recipients.”⁶² (emphasis added).

Furthermore, the court added that the material must be patently offensive and that the standard by which to determine whether material is obscene is a community standard and not a national one. The community standard is one which recognizes that “[p]eople in different states vary in their tastes and attitudes. . .”⁶³ With the use of this language, it appears that the American standard is still very much couched in terms of morality.

Since the first two parts of the test involve local communities and state laws and are issues to be left to the juries, the Courts have gener-

57. *Butler*, 1 S.C.R. 452, 471.

58. *Reno*, 521 U.S. 844, 845.

59. *Miller*, 413 U.S. at 15.

60. *Id.* at 39.

61. *Id.* at 24 (citing *Memoirs v. Mass.* 383 U.S. 413, 419 (1966)).

62. *Id.* at 19.

63. *Id.* at 33.

ally been unwilling to establish a national standard for obscenity. In *Hamling v. United States*, the Supreme Court of the United States held that disseminators of obscenity must adhere to differences in obscenity standards between the states.⁶⁴ In *Smith v. United States*, Justice Stevens set forth his view of the obscenity problem by stating in his dissent, “[i]n the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors’ subjective reactions to the materials in question rather than by the predictable rules of law.”⁶⁵

PUBLIC DECENCY VS. “HARM” TO SOCIETY

The Canadian and American approaches to obscenity are very different in two respects: the Canadian system is based on whether it can be said that the materials in question would be harmful to society, while the American system is based on public decency; and the “community” standard test in Canada is a national standard while in the American jurisprudence it is a regional or state standard.⁶⁶

As mentioned above, actually proving that the materials in question are harmful to society is a difficult task indeed. The social science data is inconclusive in this regard.⁶⁷ However, the Supreme Court of Canada is content to give the government the benefit of the doubt in cases where there is a reasonable basis for the intent of the impugned legislation. Toward this end, the Supreme Court of Canada relied on the American case of *Paris Adult Theatre I v. Slaton*⁶⁸ in supporting the view that even though social science data is inconclusive, the government can quite reasonably determine that a connection does or might exist between antisocial behavior and obscene materials. This view was also supported by other Canadian cases as well.⁶⁹ Moreover, in the overwhelming majority of cases, the fact that pornography is a form of expression that is motivated by economic profit. Thus restrictions on this type expression are “easier to justify than other infringements.”⁷⁰

Proponents for the Canadian approach would present the following argument: the difference between a regional community standard test

64. *Hamling v. United States*, 418 U.S. 87 (1974).

65. *Smith v. United States*, 431 U.S. 291, 316 (1977) (Justice Stevens dissenting).

66. Joseph E. Scott, *What is Obscene? Social Science and the Contemporary Community Standard Test of Obscenity*, 14 INT’L J.L. & PSYCHIATRY 29 (1991).

67. Augustine Brannigan, *Obscenity and Social Harm: A Contested Terrain*, 14 INT’L J.L. & PSYCHIATRY 1 (1991); see also William A. Fischer and Amy Barak, *Pornography, Erotica and Behavior: More Questions than Answers*, 14 INT’L J.L. & PSYCHIATRY 65 (1991).

68. *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973).

69. See e.g., *R. v. Keegstra*, [1990] 3 S.C.R. 697.

70. *Butler*, 1 S.C.R. 452, 482.

and the national community standard is significant because the regional test is based on the principle that a person should not be unwillingly exposed to obscene material rather than protecting the right to free speech. While it can be said that this approach better protects the rights of citizens by its flexibility (what is obscene in Utah may not be obscene in California) it would tend to reinforce the State's right to suppress speech rather than protect a person's right to free expression. With a harm based approach as adopted by the Canadian Supreme Court, a national test is compulsory since it cannot be argued that a type of sexually explicit material is harmful in part of the country but not in another part of the country. Moreover, the community standard test also tends to invite the communities' prejudices into the test.

In terms of comparative analysis however, it is worth nothing that under Canadian law, the comparable test to the American "compelling state interest" and "clear and present danger" tests (as required by the strict scrutiny doctrine) is the "pressing and substantial" test, derived from the *Oakes* case.⁷¹ The "pressing and substantial" test mandates that if there is a reasonable basis that harm will ensue, then this basis is sufficient to limit free expression.⁷² The reasonable basis can be founded and predicated on social science, e.g., studies, experts, etc., even if other science is inconclusive in the particular matter at issue. Thus the notion of basing a decision which would result in limiting free speech and expression on admittedly inconclusive evidence would be counter to the fundamental traditions of American jurisprudence, which it is generally believed, has served the American republic rather well.

Another area of marked difference between the two countries' approaches on this matter relates to the issue of a national standard being supreme and uniformly imposed on the entire nation. The United States has long staunchly held to its deeply-rooted principle that the individual "[s]tates retain all powers not expressly delegated to the Federal government nor prohibited to them by the United States Constitution."⁷³ This principle is clearly enshrined in the Tenth Amendment of the Constitution, representing one of the ten principles of the Bill of Rights. Therefore, the prospect of a national standard for the purpose of establishing constraints on free speech while eliminating local input is essentially a foreign concept to the American legal tradition. Thus, setting the equivalent of a Canadian style national stan-

71. *Keegstra*, 3 S.C.R. 697, 698 (citing *R. v. Oakes*, [1986] 1 S.C.R. 103).

72. *R. v. Oakes*, 1 S.C.R. 103, 104 (1986).

73. U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved respectively, or to the people.").

dard in the United States would undoubtedly prove to be a most challenging proposition.

OBSCENITY IN CYBERSPACE

The debate over pornography and obscenity has been brewing to a boil in the recent past over the role pornography and obscenity occupy on the Internet. As alluded to earlier, camps on both sides of this issue have emerged, energized their troops, and applied as much political pressure as their respective resources afforded them. To the delight of some and consternation of others, the heated debate culminated with the enactment of the Communications Decency Act of 1996 (hereinafter CDA or Act).⁷⁴ It should be noted that this law was part of the Telecommunications Act of 1996.⁷⁵ The CDA sought through two of its provisions to protect minors from harmful material on the Internet.⁷⁶

Title 47 U.S.C.A. Sec. 223 (a)(1)(B)(ii) criminalizes the “knowing” transmission of obscene or indecent messages to any recipient under the age of 18, whereas Section 223 (d) prohibits the “knowing” sending or displaying to a person under the age of 18 of any message that, in context, depicts or describes, in terms “patently offensive” as measured by contemporary community standards, sexual or excretory activities or organs”.⁷⁷ The CDA further stipulated that a violation of either statute could result in up to a \$250,000 fine and/or two years in prison.⁷⁸ The ink was barely dry on this Act when a consortium of Internet users, publishers, and civil liberties advocates (including the ACLU) filed a complaint seeking to have these provisions struck down as unconstitutional and in flagrant violation of the First Amendment.⁷⁹

The case wound its way up to the United States Supreme Court, and *Reno v. ACLU* was argued on March 19, 1997 and decided on June 26, 1997.⁸⁰ The Court, in a 7 to 2 vote, struck down the two provisions in question.⁸¹ It held that: “the CDA’s indecent transmission and patently offensive display provisions abridge the freedom of speech protected by the First Amendment.”⁸² The Court concluded that this would be punitive in its “application and a content based

74. 47 U.S.C.A. §. 223 (2000).

75. *Id.*

76. *Reno v. ACLU*, 521 U.S. 844 (1997).

77. *Id.* at 845.

78. 47 U.S.C.A. § 223(d) (2000).

79. *Reno*, 421 U.S. 844.

80. *Id.*

81. *Id.*

82. *Id.* at 845.

blanket restriction on speech.”⁸³ More specifically they stated that the CDA cannot be applied to “the Internet” a medium that, unlike radio, receives full First Amendment protection, and cannot be properly analyzed as a form of time place and manner regulation because it is a content based blanket restriction on speech.⁸⁴ The time, place and manner analysis has been held constitutional in terms of being a limited, tailored, and non-content based restriction on freedom of speech, but this standard clearly is not applicable here.

The Court also pointed out that the United States Government’s right to investigate and prosecute the obscenity and child pornography activities is absolutely preserved, and in no way encumbered by this decision.⁸⁵ Obscenity and child pornography are already illegal and subject to criminal prosecution under current Federal Law and the various State criminal codes, thus negating the need for new legislation to address those concerns. This decision is not surprising given the historical reluctance by the United States Supreme Court to impose undue restrictions on free speech, including pornographic material.

As of this date, the Canadian Supreme Court has not had to adjudicate a case similar to or closely resembling the above. In terms of a more comprehensive comparison and analysis however, it must be stressed that a website operator will still be held criminally liable for posting obscene material on the Internet. The community standard component of the *Miller* “three-prong” test remains in fully enforceable and unaffected by the *Reno v. ACLU* decision.⁸⁶ Therefore, any website operator posting material on the Internet must be mindful of the critical issue of jurisdiction (vis-a-vis the community standard test applicable to that jurisdiction). In fact, if a neighboring state can prove that the website operator (in putting up a website outside its boundaries) creates jurisdiction within the home state, then the criminal laws of the home state would apply to the content of the website.⁸⁷

To illustrate the point, in *United States v. Thomas* 46, the operators of a pornographic website in California were charged with transporting obscene materials via a common carrier, and transporting obscene material in interstate or foreign commerce.⁸⁸ They were convicted in a Tennessee Court applying the local community standard rather than that of the defendants’ home state of California.⁸⁹ One of the two

83. *Id.*

84. *Id.*

85. *Id.* at 864.

86. *Id.* at 872.

87. *Id.* at 844.

88. *United States v. Thomas*, 74 F. 3d 701, 705-06 (6th Cir. 1996).

89. *Id.* at 711.

defendants in that case was also convicted in Utah on the same charges, this time applying Utah's community standard.⁹⁰

In Canada, a theoretical defendant facing similar charges as the defendants in *United States v. Thomas*, would have to be in compliance with a single national standard. Therefore, the possibility of a defendant being convicted in one province and not another becomes an effective impossibility. However, a scenario could result in which a defendant is found guilty of transmitting or transporting obscene material in one State while not guilty in a sister State, remains a distinct possibility in the United States.

CONCLUSION

The comparative analysis presented indicates that the line between pornography and obscenity is not as clearly delineated in Canada as it is in the United States. Important points of distinction between the American and the Canadian approach to pornography exist and are worth re-emphasizing. In the United States the Supreme Court extends full First Amendment freedom of speech protection to pornography, except as it pertains to child pornography.⁹¹ In Canada however, the barrier between pornography and obscenity is more porous and allows for content-based restrictions, as prescribed in the "Pressing and Substantial Interest" test. Therefore, there is a greater possibility for the imposition of restrictions on this form of speech and expression. Furthermore, the concept of restricting or limiting speech and expression, premised solely on inconclusive social science, in order to avoid future social or other harm which may occur (i.e. the lower evidentiary threshold of the "Pressing and Substantial Interest test"),⁹² runs generally counter to American legal tradition and thought. Naturally the notorious "yelling fire" in a crowded theatre is not protected speech nor is speech that runs afoul of the "Clear and Present Danger" test. The fundamental principle however, remains unaltered.

Lastly the notion of group rights is also not one that is well received by American courts. Conversely, the Canadian approach which embraces the concept of "social harm." This approach is at least partially anchored on group rights and the extension of preferential treatment to some but not others.⁹³ In fact, it would appear that the Canadian approach could make its courts, including the Supreme Court of Canada, more susceptible to pressure brought on by the political whims

90. *Id.*

91. *Reno*, 521 U.S. at 845.

92. *Keegstra*, 3 S.C.R. 697, 698 (citing *R. v. Oakes*, [1986] 1 S.C.R. 103).

93. *Paris Adult Theatre*, *supra*, note 68.

of the times. The pornography versus obscenity controversy could easily be utilized as a legal vehicle to attain certain socio-political goals, and there is preliminary evidence to indicate that such might be occurring in Canada.

Indeed the Canadian pornography and obscenity laws strongly favor females by structuring the enforcement of those laws in a manner designed to overwhelmingly and in almost comprehensively protect those groups.⁹⁴ Although the goal expounded above may be highly commendable, without the benefit of irrefutable evidence demonstrating that individual members of a given group are in imminent peril, and not simply the victims of ridicule, humiliation, crudeness, and sexual debasement, then letting the justice system take sides is fraught with dangers and can often lead to unforeseen consequences. It should always be remembered that "harm" to either an individual or a group is ultimately a criminal matter, and once evidentiary proof has been presented that a criminal act has been committed, criminal statutes and civil remedies will be readily available to the injured party.

Essentially this comparative analysis has uncovered a number of differences, some significant while other less so. However similarities also abound between the two nations in this area of law. They are founded on the common belief that free speech, be it enshrined in the First Amendment of the United States Constitution or in S. 2(b) of the Canadian Charter of Rights and Freedoms, is fundamental and vital to the growth, prosperity and vibrancy of these two neighboring countries.

94. Canadian Criminal Code, R.S.C., ch. C-46, § 163(8) (1985) (Can.).