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THE *CHARTER* REVOLUTION: IS IT UNDEMOCRATIC?

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INTRODUCTION

A new book on the *Canadian Charter of Rights and Freedoms* by two professors from the University of Calgary, F.L. Morton and Rainer Knopff, is entitled *The Charter Revolution and the Court Party*.[1] By the "*Charter* revolution" the authors refer to the active law-making role assumed by the Supreme Court of Canada since the adoption of the *Charter of Rights* in 1982.[2] By the "Court Party" they refer to a cluster of interest groups promoting *Charter* rights through litigation.[3] The thesis of the book is that these groups have been successful in obtaining changes in the law from the Supreme Court of Canada that could not have been achieved in the representative legislative assemblies. That, they argue, is wrong because it is "undemocratic."[4]

I agree that there has been a *Charter* revolution. I also agree that there is a Court Party, but I will argue that the cluster of interest groups using litigation as their strategy is much broader than the authors acknowledge. I also agree that the effects of these two phenomena have not been wholly beneficial, but I argue that, on the whole, the result is one that enhances rather than usurps a democratic dialogue.

THE *CHARTER* REVOLUTION

Let me first acknowledge that there has been a "*Charter* revolution." There is no doubt that the *Charter of Rights and Freedoms* has been given a much more expansive interpretation than the old *Canadian Bill of Rights*,[5] even when the language of the two instruments is the same.[6] In the criminal justice area, where the majority of *Charter* cases have come from, the rights have been interpreted more broadly than their equivalents in the United States, even under the Warren court.[7]

Moreover, the Supreme Court of Canada has not adhered to those counsels of procedural restraint that Alexander Bickel famously described as the "passive virtues."[8] The Court has developed no doctrine of ripeness;[9] mootness rarely defeats proceedings;[10] lack of standing also rarely defeats proceedings (because of generous discretionary public interest standing);[11] public interest intervenors are often admitted to appeals (even when they are antagonistic to a criminal defendant);[12] statutes are occasionally struck down on the basis of hypothetical facts that bear no resemblance to the facts before the Court;[13] sweeping constitutional rulings are occasionally issued in *obiter dicta*;[14] and

1 F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000). The book is reviewed in L. Sossin, "Courting the Right" (2000) 38 Osgoode Hall L.J. 531.

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

3 Morton & Knopff, *supra* note 1 at 24–32.

4 *Ibid.* at 149.

5 *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

6 P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) c. 32, describes the decisions rendered under the *Canadian Bill of Rights* and contrasts the interpretation given to the *Charter of Rights and Freedoms*.

7 R. Harvie & H. Foster, "Ties that Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law under the Charter" (1990) 28 Osgoode Hall L.J. 729; and "Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law under the Charter" (1992) 24 Ottawa L.Rev. 39.

8 A. Bickel, *The Least Dangerous Branch*, 2d ed. (New Haven: Yale University Press, 1986) c. 4. Whether the passive virtues are indeed virtues is, of course, disputed by those who favour a less restrained role for the courts than did Bickel.

9 Hogg, *supra* note 6 at s. 56.4.

10 *Ibid.* at s. 56.3.

11 *Ibid.* at s. 56.2(d).

12 *Ibid.* at s. 56.6.

13 See *e.g. R.* v. *Smith*, [1987] 1 S.C.R. 1045 (striking down minimum sentence for importing drugs); *R.* v. *Heywood*, [1994] 3 S.C.R. 761 (striking down prohibition of previously convicted sexual offenders from loitering in playgrounds).

14 See *e.g. R.* v. *Brydges*, [1990] 1 S.C.R. 190 at para. 27 (instructing police officers to warn arrested persons of the availability of free duty counsel and legal aid); *Delgamuukw* v.

statutes are occasionally directly amended by the Court simply "severing" words that create a constitutional defect or even "reading in" new language that would cure the constitutional defect.[15]

In a study published in 1997, Allison Bushell (now Thornton) and I found sixty-five cases in which the courts had struck down or directly amended a federal or provincial law under the *Charter of Rights* since its adoption in 1982,[16] and there are many more cases in which the actions of police officers or government officials have been annulled. This is certainly a "*Charter* revolution."

THE COURT PARTY

Morton and Knopff, as political scientists, are interested in how the enhanced law-making power of the Supreme Court of Canada affects political behaviour. They use the expression "the Court Party" to encompass a cluster of interest groups promoting rights, and they point out that these groups have adapted to the *Charter* revolution by looking to the courts to advance their policy objectives. The groups they identify include feminist groups, gay and lesbian groups, poverty activists, as well as more traditional civil libertarians promoting freedom of expression, freedom of religion and fairness in the criminal justice system.[17] These actors, it is argued, have succeeded in persuading the Court to adopt unpopular left-wing causes that could not survive the public scrutiny that is characteristic of democratic decision-making.[18]

However, the policy objectives of the groups that comprise the "Court Party" are not always consistent with each other, and they sometimes find themselves on opposite sides of a *Charter* case, as has occurred, for example, in cases involving hate propaganda,[19] pornography,[20] and rape-shield laws.[21] The expression "the Court Party" is misleading in its suggestion of a monolithic movement with the same objectives. What the members of the so-called Court Party have in common is an interest in supporting the power of judicial review under the *Charter*, because that power is often the means by which they can attain policy objectives that are not attainable in the elected legislatures.

In the sense used by Morton and Knopff, there has always been a "Court Party."[22] The term could easily be used for business groups that resist the regulation imposed on them by elected legislative bodies.[23] They have historically used judicial review to rewin policy battles lost in the elected legislative bodies. As J.R. Mallory pointed out fifty years ago, the force that drives constitutional litigation has typically been "the reaction of a free economy against regulation."[24] The most famous examples of the reaction of a free economy are the cases decided in the *Lochner* era (1905-1937) in the United States, where rights to liberty, property and due process were used by the Supreme Court of the United States to defeat legislation imposing fairer employment conditions on business and protecting trade unions.[25]

While the extreme laissez-faire interpretations of the American *Bill of Rights* ended in 1937, business corporations are still a major source of constitutional litigation in the United States as well as in Canada. In Canada, before the adoption of the *Charter* in 1982, business corporations used the division of powers provisions of the Constitution to challenge government regulation.[26] Since the adoption of the *Charter*, business corporations have used *Charter* litigation to challenge a variety of regulatory laws, for example, the prohibition on Sunday shopping,[27] restrictions on

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B.C., [1997] 3 S.C.R. 1010 at paras. 165-69(defining aboriginal title).

15 Hogg, *supra* note 6 at ss. 37.1(e) and (f) provide examples of severance and reading in.

16 P.W. Hogg & A.A. Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75 at 81.

17 Morton & Knopff, *supra* note 1 at c. 3.

18 *Ibid*. at 59.

19 *R.* v. *Keegstra*, [1990] 3 S.C.R. 697; *R.* v. *Zundel*, [1992] 2 S.C.R. 731; *Ross* v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

20 *R.* v. *Butler*, [1992] 1 S.C.R. 452; *Little Sisters Book and Art Emporium* v. *Canada*, [2000] 2 S.C.R. 1120; *R.* v. *Sharpe*, [2001] 1 S.C.R. 45.

21 *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577; *R.* v. *Mills*, [1999] 3 S.C.R. 668.

22 This is recognized by Morton and Knopff, *supra* note 1 at c. 3.

23 Sossin, *supra* note 4 at 541, comments that "The Court Party, if it includes groups which seek to use the courtroom to further a policy agenda, constitutes a big tent indeed, with gay and lesbian activists alongside tobacco executives, and LEAF [Women's Legal Education and Action Fund] shoulder to shoulder with the NCC [National Citizens' Coalition]."

24 J.R. Mallory, "The Courts and the Sovereignty of the Canadian Parliament" (1944) 10 Can. J. Economics & Poli. Sci. 169; quoted in Morton & Knopff, *supra* note 1 at 64.

25 The story is briefly related in Hogg, *supra* note 6 at s. 33.4(b).

26 See *e.g*. the cases challenging food and drug standards (Hogg, *supra* note 6 at s. 18.3), regulation of anti-competitive behaviour (*ibid.* at s. 18.6), Sunday observance laws (*ibid* at s. 18.7), movie censorship (*ibid.* at s. 18.11), regulation of the insurance industry (*ibid.* at s. 21.5), regulation of labour relations and standards (*ibid.* at s. 21.8), regulation of agricultural marketing schemes (*ibid.* at s. 21.9) and regulation of cable television (*ibid.* at s. 22.13(c)).

27 *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295 (law struck down); *R.* v. *Edwards Books and Art*, [1986] 2 S.C.R. 713 (law upheld).

advertising,[28] and the enforcement provisions of competition law.[29]

Moreover, trade unions are also arguably members of the Court Party, since they too have traditionally turned to the courts to accomplish objectives that cannot be accomplished elsewhere. However, under the *Charter*, trade union challenges to restrictions on collective bargaining have been uniformly unsuccessful.[30] This is part of the evidence offered by Michael Mandel,[31] (among others)[32] for his argument that the "legalization of politics" under the *Charter* is not only undemocratic, but a powerful reinforcement of business and other vested interests. Any gains for the disadvantaged, he argues, are more than made up for by the gains to the advantaged. The outcomes produced by representative legislative bodies would on the whole produce more progressive results. Mandel's argument is interesting, because it is virtually the same as that of Morton and Knopff, but comes from an opposite ideological standpoint. Mandel's "Court Party" is the business corporations and the cluster of interest groups that support business objectives.

The "Court Party" identified by Morton and Knopff is quite unlike the business groups identified by Mandel or indeed any groups motivated by their own direct self-interest or that of their members. The Morton–Knopff Court Party pursues what some political scientists have called "postmaterialist" issues. These are not issues that directly serve the economic self-interest of their members (as manufacturers' associations or trade unions would do, for example), but are rather general issues such as the promotion of freedom of expression and religion, education for language minorities, equality for women, gay and lesbian people and racial minorities, and criminal law reform. They are not business issues, and the activities of these postmaterialist groups cannot be characterized as the reaction of a free economy against regulation. Nor are they for the most part working class issues, although improving the lot of the disadvantaged is often a goal of postmaterialist *Charter* litigation. Support for the postmaterialist issues comes from an intellectual class of academics, students, professionals, journalists and civil servants. The values that they promote are held much more strongly by intellectuals than by the general public, which makes the anti-majoritarian power of the courts attractive.[33]

One would expect postmaterialist groups to be weak, because their goals are public and do not directly benefit their members. Because of the lack of selfish incentives for membership, it is hard to obtain adequate resources simply through membership dues. What is needed is a patron to supply funding. Morton and Knopff show that, to a remarkable extent, that patron has been the government, usually the federal government. Secretary of State funding has been provided to native groups, official language minority groups, multicultural groups and women's groups. The federal Court challenges programme, which was cancelled by the Progressive Conservative government in 1992 but revived by the Liberal government in 1995, supports *Charter* litigation.[34]

Why would government want to support groups that are challenging existing government policies and laws? The authors do not dodge this difficult question. They point out that in some cases, for example, official language minorities, the group's policies are consonant with federal public policies in favour of bilingualism and national unity. In some cases, there are already public programmes in place and public officials see value in organized constituents who work to promote and expand the programmes from outside government.[35] What the authors do not point out is that politicians would not continue to authorize these expenditures of public funds unless there was public support for assistance to rights-seeking groups.[36] There is indeed that support, which is not surprising considering the stability of public support for the *Charter* and for judicial review.[37] As I will argue in the next two sections of this paper, public notions of democracy are not at all offended by judicial review, and the efforts of the Court Party should be seen as, not merely addressed to courts, but as contributions to a

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[28] *Irwin Toy* v. *Quebec*, [1989] 1 S.C.R. 927 (law prohibiting advertising directed at children upheld); *Rocket* v. *Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232 (restrictions on advertising by dentists struck down); *RJR-MacDonald* v. *Canada*, [1995] 3 S.C.R. 199 (restrictions on advertising of tobacco products struck down).

[29] *Hunter* v. *Southam*, [1984] 2 S.C.R. 145 (law struck down).

[30] *Re Public Service Employees Relations Act (Alberta)*, [1987] 1 S.C.R. 313; *PSAC* v. *Canada*, [1987] 1 S.C.R. 424; *Professional Institute* v. *Northern Territories*, [1990] 2 S.C.R. 367; *RWDSU* v. *Saskatchewan*, [1987] 1 S.C.R. 460; *Professional Institute* v. *Northwest Territories*, [1990] 2 S.C.R. 367; *ILWU* v. *Canada*, [1994] 1 S.C.R. 150.

[31] M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson Educational Publishing, 1994).

[32] See *e.g.* J.A. Fudge & H.J. Glasbeek, "The Politics of Rights: A Politics With Little Class" (1992) 1 Social and Legal Studies 45; A.C. Hutchinson, *Waiting for CORAF: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

[33] Morton & Knopff, *supra* note 1 at 78–79.

[34] See *e.g.* I. Brodie, "The Court Challenges Program" in *Law, Politics and the Judicial Process in Canada*, F.L. Morton, ed., (Calgary: University of Calgary Press, 1992) 251.

[35] Morton & Knopff, *supra* note 1 at c. 4.

[36] Sossin, *supra* note 4 at 537.

[37] See *infra* notes 44, 45 and accompanying text.

dialogue about rights that engages the public and the legislative bodies no less than the courts.

My conclusion is that the phenomenon of a "Court Party" is not a new one, and indeed the Morton–Knopff postmaterialist Court Party (despite frequent aid by government) lacks the resources and incentives of the business Court Party and on some issues is a counterweight to the business Court Party. In the end, any group has to persuade the Supreme Court of Canada of the rightness of its views in the context of a case in which the other side is also fully argued — often with help from another member of one of the Court Parties. While no one would doubt the influence on the Supreme Court of Canada's *Charter* decisions of the intervenor briefs by LEAF and the Canadian Civil Liberties Association (for example), it is not as if the postmaterialist groups have the field to themselves, and it seems likely that their views have resonated with our political and legal traditions and have influenced public opinion and legislative action as well as the decisions of courts.

DEMOCRACY AND CIVIL LIBERTIES

Morton and Knopff are opposed to both the Court Party and the *Charter* revolution, which they describe as "fundamentally undemocratic, not just in the simple and obvious sense of being anti-majoritarian, but also in the more serious sense of eroding the habits and temperament of representative democracy."[38] They complain that public policies are set by courts, not by representative majorities; that rights claimants are not prepared to accept the judgment of representative majorities; and that political discourse becomes inflated and intolerant when it is framed in the language of rights.

The issues to which the authors regularly return for their examples are women's rights, including the issue of abortion, gay and lesbian rights, minority official language rights and the rights of criminal defendants.[39] Discussion of these issues is usually framed in the language of rights, because it is difficult for the groups pressing these issues to assemble majorities for their positions in the representative assemblies. They point to the *Charter* because it does contain guarantees of liberty, security of the person, fair trial, minority language rights and equality. Admittedly the language is vague, and admittedly there is room for conflict among the rights. But it was clearly understood from the inception of the *Charter* that the scope of the rights would have to be determined by the courts, and that once a court has determined that a claim is properly based on a guaranteed right that claim would have to trump competing public policies unless there was a particularly strong justification for the limitation of the right (another issue expressly remitted to the courts).

It would be foolish to claim that there is no disadvantage to judicial review under an entrenched Charter of Rights. The increased influence of courts and lawyers in the public policy process is a matter that the authors are right to be concerned about. But are they right to see the outcomes as undemocratic? What are the elements of a flourishing democracy? Obviously, the most important elements have to do with effective public participation in setting public policy. Free elections with universal adult suffrage are the foundation, of course, and these must be supported by competing political parties and by freedom of expression, including freedom of the press. But most people would add that the fair treatment of individuals and minorities is also characteristic of a flourishing democracy. At a minimum, that requires an independent legal profession and an independent judiciary, so that the rule of law, binding on governments as well as powerful private parties, is a reality.

Does the fair treatment of individuals and minorities also require guaranteed rights enforced by judicial review? That is a question on which reasonable people differ. Probably the answer is no, since Canada before 1982 was clearly a flourishing democracy respectful of rights despite the absence of an entrenched Charter. Moreover, the policy tools and resources available to legislatures are vastly superior to those of courts, and many important protections of rights have been, and could only be, the creation of legislatures. Labour standards, labour relations laws, human rights codes, employment equity and pay equity come to mind.

But it is undeniable that, in a system of unfettered parliamentary supremacy, it is possible for the majority to enact rules that treat individuals or minorities unfairly. The issues that engage Morton and Knopff are good examples. The feminist literature has shown that many of our legal rules, even those that are gender-neutral in form, operate to the disadvantage of women. Women are not a minority, but they are not proportionately represented in the legislative assemblies, and there has been a tendency, at least in the past, for their interests to be ignored or overruled. The same comment applies in spades to the gay and lesbian community. The fact is that discrimination on the basis of sex, sexual orientation, race, national origin and other improper bases has not been eliminated from our legal system. It is also a notorious fact that

[38] Morton & Knopff, *supra* note 1 at 149.
[39] See *ibid*. at c. 4.

representative assemblies are very sympathetic to the victims of crime and to the efforts of the police and courts to control crime, and there are continuous political pressures to reduce the restraints on police investigative techniques, to erode the right to full answer and defence, and to make penalties and conditions of imprisonment harsher. Needless to say, those accused of criminal behaviour find little support or sympathy in representative assemblies.

The idea that there are rights that should not be subject to legislative repeal simply by an appeal to the general welfare is widely accepted as consistent with or even essential to a democratic polity. It will be recalled that that is the thesis of Professor Ronald Dworkin's famous article, "Taking Rights Seriously."[40] John Hart Ely took Dworkin's idea a step further, arguing that constitutionally guaranteed rights actually reinforce the democratic process by making up for deficiencies in the composition of the legislative assemblies. On this theory, the *Charter* rights provide support for vulnerable groups ("discrete and insular minorities") who are not properly represented in the democratic process.[41]

These theoretical ideas seem to be supported by the legislative history of the *Charter*. Its adoption in 1982 was the product of a widespread public debate, in which the inevitable risks of judicial review played a prominent role. Admittedly, the *Charter* was never put to and approved by a popular referendum, but it has always commanded widespread popular support. A poll taken in 1999, on the heels of two controversial *Charter* decisions by the Supreme Court of Canada, showed eighty-two per cent of those polled saying that the *Charter* was "a good thing," and sixty-one per cent saying that the courts, not the legislatures, should have the last word when the courts decide that a law is unconstitutional.[42] These high levels of support for the *Charter* and for the powers of the Supreme Court of Canada have remained fairly stable over the years since the *Charter* was adopted.[43] As noted earlier, these levels of support have not escaped the notice of elected politicians who provide funding for groups to bring *Charter* litigation.[44]

I conclude that it is an impoverished definition of democracy that makes no provision for a Charter of Rights or for judicial review. Under most understandings of democracy, both those of intellectuals like Dworkin and Ely and those of ordinary people who respond to opinion polls, there is room for judicial review under a Charter of Rights.

DIALOGUE

The compatibility of the *Charter* with democracy is reinforced by the notion of judicial review as a "dialogue" between the Supreme Court of Canada and the legislatures. Most writing about the *Charter* falls into the trap of assuming that, when the Supreme Court of Canada strikes down a law, the Court's decision is the last word on the topic. But this is to view the *Charter* through an American lens. Everyone remembers President Franklin Roosevelt's desperate (and ultimately unnecessary) plan to "pack" the Supreme Court of the United States in order to salvage the New Deal from the depredations of the Court.[45] More recent controversies in the United States over the rights of criminal accuseds, flag-burning, pornography, abortion and capital punishment all proceed on the basis that nothing can be done about the decisions of the Supreme Court except to amend the constitution (normally a forlorn hope) or to use the appointment power to gradually change the composition of the Court and hope for more popular results (a highly speculative endeavour).

Canada's *Charter* contains two features that have no counterparts in the American *Bill of Rights*: section 1 and section 33. Section 1, which was borrowed from international human rights charters,[46] permits a *Charter* right to be limited by the competent legislative body, provided the limitation "can be demonstrably justified in a free and democratic society." Section 33, which is an indigenous Canadian invention (since borrowed by

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[40] R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1979) c. 7, originally published as R. Dworkin, "Taking Rights Seriously" (1970) 15:11 New York Review of Books 23.

[41] J.H. Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1982). The same idea has been applied to the Canadian *Charter* by H.S. Fairley, "Enforcing the Charter: Some Thoughts on an Appropriate and Just Standard of Judicial Review" (1982) 4 Supreme Court L.R. 217; and P.J. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21 U.B.C.L.Rev. 87.

[42] J.F. Fletcher & P. Howe, "Canadian Attitudes towards the Charter and the Courts in Comparative Perspective" (2000) 6:3 Choices 4; "Supreme Court Cases and Court Support: The State of Canadian Public Opinion" (2000) 6:3 Choices 30. The surveys were taken after the decisions in *R.* v. *Feeney*, [1997] 2 S.C.R. 13 (excluding reliable evidence of a gruesome murder on the basis that the police had entered the accused's home without a warrant) and *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 (adding sexual orientation as a prohibited ground of discrimination in Alberta's human rights legislation). Both decisions led to considerable public criticism of the Supreme Court of Canada and of the power of judicial review.

[43] The study referred to in the previous note compared answers given in 1987 with those given in 1999, finding similar levels of support (*ibid.* at 5–14).

[44] See *supra* note 34 and accompanying text.

[45] D. O'Brien, *Storm Center: The Supreme Court in American Politics* (New York: Norton, 1986) at 67.

[46] See Hogg, *supra* note 6 at c. 35.1 for elaboration.

Israel[47]), permits a *Charter* right to be overridden by the competent legislative body, provided the legislation explicitly announces that it is to operate notwithstanding the *Charter* right. These two provisions are important structural differences between the Canadian *Charter* and the American *Bill of Rights*. Their purpose is to give a much stronger role to the representative assemblies on rights issues than is allowed by the Constitution of the United States. Sections 1 and 33 can be seen as a typically Canadian compromise between the American model of judicial review and the English model of parliamentary sovereignty.

In 1997, Bushell and I looked at the sequels to all the cases in which laws had been struck down by the Supreme Court of Canada for violation of the *Charter*.[48] We found that the competent legislative body did *not* usually let matters rest with the decision of the Court. In two cases, the Court's ruling was effectively reversed by the legislature, once by invoking section 1[49] and once by invoking section 33.[50] In the majority of cases, the Court's ruling was followed by new legislation that accomplished the same legislative objective but with some new civil libertarian safeguards to accommodate the Court's ruling. This pattern, which is fully documented in the footnoted article, led us to describe the relationship between the Court and the legislatures as a "dialogue" — meaning by that term to indicate that sections 1 and 33 of the *Charter* (among other features) usually allow room for a legislative reaction to a Court decision, and a legislative reaction is indeed usually forthcoming.

This idea of a dialogue between courts and legislatures is a serious challenge to the Morton–Knopff thesis. If *Charter* decisions are ultimately reviewable by elected legislative bodies, using the distinctively Canadian vehicles of sections 1 or 33, then it becomes much less significant whether the decisions have been achieved through the efforts of the Court Party or have been made in disregard of popular sentiment. In the last few pages of the book, the authors grapple with this problem. Professors Morton and Knopff acknowledge that the dialogue theory is "undoubtedly true in the abstract," but they say that it is "too simplistic."[51] It is too simplistic, because it "fails to recognize the staying power of a new, judicially created policy status quo."[52] By this they mean that once the Court has spoken, governments may find it expedient to leave the issue alone, thus preserving the judicial decision.

One of the two examples Morton and Knopff provide of "the staying power of the new judicially-created policy status quo" is the aftermath to the *Morgentaler* decision,[53] which struck down the therapeutic abortion provisions of the *Criminal Code* on the ground that they offended section 7 of the *Charter*. The Government of Canada introduced a new bill to re-criminalize abortion, but with less onerous requirements for legal therapeutic abortions. The new bill was passed by the House of Commons and then defeated in the Senate on a tie vote.[54] To be sure, the status quo created by the Supreme Court of Canada (no regulation of abortion) was preserved. But this example could as easily be treated as a case of dialogue since the Government did propose a substitute law for the one struck down and very nearly succeeded in enacting it.

The other example they provide is the aftermath of the *Vriend* decision,[55] where the Supreme Court of Canada added sexual orientation to the grounds of discrimination for which a remedy was available under Alberta's *Human Rights, Citizenship and Multicultural Act*.[56] The Government of Alberta mused publicly about restoring the old version of the statute by invoking section 33, but eventually decided not to do so, thus leaving the new ground of sexual orientation in the *Act*.[57] The authors comment that the judicial ruling had "raised the political costs of saying no to the winning minority" and the Government concluded that "the safest thing was to do nothing."[58] But what does this example show? Only that it is politically difficult to directly reverse a decision of the Supreme Court of Canada on an equality issue. Is that not as it should be? Reversal is possible in a case where there is a sufficiently strong popular revulsion of the Court's ruling, and this is an exceedingly important safeguard, forcing governments to take responsibility for their decisions and avoiding the extreme forms of court-packing and court-bashing that occur in the United States.

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47 See Z. Segal, "The Israeli Constitutional Revolution: The Canadian Impact in the Midst of a Formative Period" (1997) 8:3 Constitutional Forum 53.

48 Hogg & Bushell, *supra* note 16.

49 Following the Supreme Court's ruling in *R.* v. *Daviault*, [1994] 3 S.C.R. 63, Parliament enacted an amendment to the *Criminal Code*, making self-induced intoxication no defence to a crime of general intent.

50 Following the Supreme Court's ruling in *Ford* v. *Quebec*, [1988] 2 S.C.R. 712, the National Assembly of Quebec reenacted essentially the same ban on English language signs, accompanied by an invocation of s. 33.

51 Morton & Knopff, *supra* note 1 at 162.

52 *Ibid*.

53 *R.* v. *Morgentaler (No. 2)*, [1988] 1 S.C.R. 30.

54 *Senate Debates* (31 January 1991) at 5307.

55 *Vriend* v. *Alberta*, *supra* note 42.

56 R.S.A. 1980, c. H-11.7.

57 Alberta Hansard (9 April 1998) at 1485.

58 Morton & Knopff, *supra* note 1 at 165.

In fact, as noted earlier in this paper, the power to reverse a judicial ruling has in fact been exercised twice in Canada. It was done once by the National Assembly of Quebec, which reversed the *Ford* decision and restored its French-only law for commercial signs, and it was done once by the Parliament of Canada, which reversed the *Daviault* decision and restored the rule that intoxication is no defence to criminal offences of general intent.[59] The decision of the Government of Alberta not to attempt to reverse the *Vriend* decision was probably based on a correct judgment that popular support was lacking for such a move.[60] The fact that the move was legally possible and was seriously examined by the Government means that the sequel to *Vriend* could easily be regarded as an example of dialogue rather than as an example that contradicts the dialogue idea.

In any event, *Ford*, *Daviault* and *Vriend* are not typical cases. In the great majority of *Charter* cases, there is no political impulse to directly reverse the judicial decision. Usually, the attitude of the government whose law was struck down is not one of hostility to the Court's civil libertarian concern; rather, the issue for the government is (as it was after *Morgentaler*) the crafting of a new law that accommodates the Court's concerns while preserving the legislative objective. A good example is provided by the Parliament of Canada's reaction to a series of decisions by the Supreme Court of Canada that ruled that surreptitious electronic surveillance by police informers wearing body packs or using hidden cameras was an unconstitutional search and seizure under section 8 of the *Charter*.[61] In my view, this was an extravagant extension of the guarantee against unreasonable search and seizure and an unfortunate impediment to the safety and reliability of police investigations.[62] What Parliament did, however, was to promptly amend the *Criminal Code* by providing for the issue of a warrant to authorize various forms of electronic surveillance and providing for measures to be taken without warrant in situations of emergency or danger to the police officer.[63] It cannot be said, therefore, that the decisions of the Court had any long-term adverse consequences, and it is arguable that the field of electronic surveillance was in need of more regulation, which has now been provided.

The legislative action that followed the decisions on electronic surveillance is a much more typical response to a *Charter* decision striking down a law than is the legislative inaction that followed the decisions in *Morgentaler* and *Vriend*. In the 1997 dialogue study, Bushell and I looked at the responses to sixty-five decisions in which laws had been struck down on *Charter* grounds. Of the sixty-five cases, all but thirteen elicited some response from the competent legislative body. Seven responses consisted simply of the formal repeal of the offending law, but in the remaining forty-five cases — more than two-thirds of the total — a new law was substituted for the old law that had been struck down.

A dramatic example of the acceptance by the Supreme Court of Canada of the notion of dialogue is the *Mills* case,[64] decided after the Hogg and Bushell study. In that case, the Court upheld a new set of rules for confidentiality of records of sexual assaults that were more restrictive of the accused's right to make full answer and defence than had been stipulated in the earlier *O'Connor* decision.[65] The Court offered the idea of dialogue as a reason for deferring to Parliament's judgment as to the appropriate balance between the accused's right to make full answer and defence and the privacy right of the complainant.

To return to the Morton–Knopff thesis, in the majority of *Charter* cases, the "staying power of a new judicially created policy status quo"[66] is not very strong at all. In those rare cases where government simply cannot abide the Court's interpretation of the *Charter*, reversal is usually legally possible, and can be accomplished politically where public opinion is particularly strong, as *Ford* and *Daviault* demonstrate. Where public opinion is less strong or is divided, government may choose to leave the decision in place, as *Vriend* demonstrates.

The important point about the idea of dialogue is that judicial decisions striking down laws are not necessarily the last word on the issue, and are not usually the last word on the issue. The legislative process is influenced by but is not stopped in its tracks by a *Charter* decision. The ultimate outcome is normally up to the legislative body.

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59 *Supra* notes 49, 50.

60 Fletcher & Howe, *supra* note 42 at 34, 39, report a majority of seventy-eight per cent of respondents expressing agreement with the outcome of *Vriend*, and note that majorities were present in all regions of the country.

61 *R.* v. *Duarte*, [1990] 1 S.C.R. 30; *R.* v. *Wiggins*, [1990] 1 S.C.R. 62; *R.* v. *Wong*, [1990] 3 S.C.R. 36.

62 Hogg, *supra* note 6 at s. 45.5(b) elaborates these criticisms.

63 *Criminal Code*, R.S.C. 1985, c. C-46, as am. by S.C. 1993, c. 40, s. 487.01.

64 *R.* v. *Mills*, [1999] 3 S.C.R. 668.

65 *R.* v. *O'Connor*, [1995] 4 S.C.R. 411.

66 Morton & Knopff, *supra* note 1 at 162.

CONCLUSION

Yes, there has been a "*Charter* revolution," giving a new role to the courts in enforcing a body of guaranteed rights, which are expressed in such vague language that the courts have a great deal of choice in selecting the "correct" interpretation. And yes, there is a "Court Party," consisting of groups who have accommodated to the new reality and seek to achieve their policy goals in the courts. But the judicial decisions to which Morton and Knopff object can easily be accommodated to a notion of democracy that is not pure majoritarian decision-making, but which acknowledges that the fair treatment of individuals and minorities sometimes needs the intervention of courts. In any case, as I hope I have shown, the intervention of courts does not close down the marketplace of ideas, and a public debate usually follows any important *Charter* decision. That debate often increases public awareness of minority perspectives (consider for example the strong public support that now exists for same-sex rights), which in turn influences the form that any legislative response takes. Because of sections 1 and 33 of the *Charter,* the legislature usually has a good deal of discretion as to the appropriate response to a *Charter* decision, and, bearing in mind public opinion, will normally want to replace a law that has been struck down with one that accomplishes the public policy objective but is more inclusive of minorities and less intrusive of guaranteed rights.

This kind of interaction between the efforts of the Court Party, the decisions of the Courts, the debate in the public media and the ultimate response of the legislature is by no means undemocratic. The claim that judicial review under the *Charter of Rights and Freedoms* is "undemocratic" cannot be sustained.❑

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INVERTING IMAGE AND REALITY: *R.* V. *SHARPE* AND THE MORAL PANIC AROUND CHILD PORNOGRAPHY

Lise Gotell

> Banalizing the awful and numbing the conscience, exposure to child pornoraphy may make the abnormal seem normal and the immoral seem acceptable.[1]

In the atmosphere of high anxiety surrounding the Supreme Court's decision in *R.* v. *Sharpe*, abnormal and normal collide and fantasy and representation become equated with reality. It is my intent in this short article to explore the complex cultural and political conditions that give meaning to the Supreme Court's unanimous endorsement of stiff criminal penalties for possessing sexual representations of adolescents and children. In the *Criminal Code* provisions on child pornography and in the discursive web woven by both the majority and minority opinions in *Sharpe*, anxieties about the well-being of children are being projected onto the highly symbolic target of child pornography. Any dissent is pathologized and cast into what has become an elastic category — "the pedophile." As Weeks writes, "[m]oral panic occurs in complex societies when deep rooted and difficult to resolve social anxieties become focussed on symbolic agents that can be easily targeted."[2] There is strong evidence that we are in the midst of a moral panic around child pornography, the contours of which require careful analysis.

THE *CRIMINAL CODE* PROVISIONS

Bill C–128, creating a number of specific criminal offences relating to child pornography,[3] was rushed through Parliament in the dying days of the Mulroney government. The stated intent of the new child pornography law was to "deal with the sexual abuse and exploitation of children."[4] Concerns about the use of children in the production of sexually explicit images had been raised in the mid-1980s in the *Badgley Report* and in the *Fraser Report*.[5] Both reports had recommended the creation of an offence limited to

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1 *R.* v. *Sharpe*, [2001] S.J.C. No. 3 at para. 88 per McLachlin C.J.C. [hereinafter *Sharpe*].

2 J. Weeks, *Against Nature* (London: River Ocam Press, 1991) at 118 [hereinafter *Against Nature*].

3 *Criminal Code*, R.S.C. 1985, c. C–46, s. 163.1 as added by S.C. 1993, c. 46, s. 2.

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

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

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or

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

…

(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.

4 Canada, House of Commons, *Proceedings of the Standing Senate Committee on Justice and Legal Affairs*, (3 June 1993) at 20328.

5 Canada, *Report of the Committee on Sexual Offences Against Children and Youths* (Ottawa: Government of Canada, 1985) at 101–102 (Chair: Robin F. Badgley) [hereinafter *Badgley Report*]; Canada, *Report of the Special Committee on Pornography and Prostitution* (Ottawa: Minister of Supply and Services Canada, 1985) at 561–650 (Chair: Paul Fraser) [hereinafter *Fraser Report*].

visual depictions of real children, with *Badgley* committee members deeply divided on the issue of whether simple possession merited criminalization.[6] At first glance, the introduction of Bill C–128 appears to be a direct response to these reports, set also against an international climate in which many other national governments were passing legislation to combat the sexual abuse of children in pornography.[7] In 1991, Canada ratified the *United Nations Convention on the Rights of the Child*, which required measures to prevent the exploitative use of children in pornographic materials.[8] International commitments and new concerns about Internet and computer pornography prompted a flurry of national legislative initiatives around child pornography in the 1980s and 1990s.[9]

Canada's initiatives, however, were both stronger and more comprehensive. Bill C–128 proliferated the criminal sanctions that had already been attached to child pornography. Sexual offense provisions in the *Criminal Code* prevent an accused from relying on the defense of consent of children under the age of fourteen.[10] To record sexual activity with someone under fourteen is thus to depict what is already a criminal act. In upholding the obscenity provisions of the *Criminal Code* in *R.* v. *Butler*, Sopinka J. had specifically identified sexual representations that use children in their production as inherently harmful, constituting by definition the "undue exploitation of sex" and therefore criminally obscene.[11] As Cossman and Bell emphasize, under the law as it existed prior to Bill C–128, the production, distribution and sale of sexually explicit materials involving children was already prohibited, as was possession for the purposes of distribution and sale.[12]

Had the Mulroney government wanted to add a possession offence to the existing prohibitions, it could have done so with a minor amendment to the *Criminal Code*. To take such a path, however, would have been to miss out on the high symbolism of creating a new child pornography law. Bill C–128 stood as an emphatic expression of governmental concern over the sexual exploitation of children. In departure from the existing obscenity regime, offering no statutory definition of "obscene" beyond the vague phrase, "undue exploitation of sex," the new section 163.1 of the *Criminal Code* codified a detailed and expansive definition of "child pornography." The legislation adopted a literalist approach to defining child pornography.[13] Implicit in such an approach is the assumption that representations contain unambiguous meanings and thus there can be a clearly demarcated category of "child pornography." It is assumed that one can easily determine whether or not any representation falls within this category by a simple exercise in observation independent of context.

According to the definition set out in section 163.1, child pornography is, first of all, any visual representation of a child engaged in sexual activity or depiction "for a sexual purpose" of the genital or anal region of a child.[14] This first element is entirely consistent with the kind of material targeted in the recommendations of the *Badgely Report*[15] and the *Fraser Report*[16] and in international documents like the *United Nations Convention*.[17] But section 163.1 exceeds this definition in several significant ways. Included within the enlarged criminally prohibited category of child pornography are written materials that "advocate or counsel sexual activity with a child"[18] and sexual representations in which an adult pretends to be a child.[19] In these respects, Bill C–128 criminalizes materials that are pure fantasy and involve no real children in their production.[20] And remarkably, section 163.1 defines a child as anyone under the age of eighteen, even though under age of consent provisions adolescents fourteen to seventeen years old can legally

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6 *Badgley Report*, *ibid.* at 101–102; *Fraser Report*, *ibid*. at 584–85, 629.

7 M. Healey, "Child Pornography: An International Perspective" working document for the World Congress on Sexual Exploitation of Children (2000) 1 at 15–22, online: The Sex Positive Initiative <wysiwyg://11/http://www.sexpositive.com/SP…/production_essays/child_porn_congress.htm> (date accessed: 31 July 2001).

8 *Sharpe*, *supra* note 1 at para. 171 per L'Heureux-Dubé J. Article 34 of the *UN Convention on the Rights of the Child* reads, "States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measure to prevent: … c) The exploitative use of children in pornographic performances and materials." GA Res. 44/25, annex, UN GAOR, Supp. (No. 49) at 167, Agenda Item 44, UN Doc. A/44/49 (1989).

9 Healey, *supra* note 7 at 15–17.

10 *Criminal Code*, R.S.C. 1985, c. C–46, as added by S.C. 1993, c. 19 (3[d] Supp.), s. 1, s. 150.1.

11 *R.* v. *Butler*, [1992] 1 S.C.R. 452 at para. 60 [hereinafter *Butler*].

12 B. Cossman & S. Bell, "Introduction" in B. Cossman *et al.*, eds., *Bad Attitude/s on Trial* (Toronto: University of Toronto, 1997) 3 at 39.

13 See B. Arcand, *The Jaguar and the Anteater: Pornography and the Modern World* (Toronto: McLelland & Stewart, 1991) at 24–25 for a discussion of this approach.

14 *Supra* note 3, ss. 163.1(a)(i) and (ii).

15 *Badgley Report*, *supra* note 5.

16 *Fraser Report*, *supra* note 5.

17 *Supra* note 8.

18 *Supra* note 3, s. 163.1(b).

19 *Ibid*., s. 163.1(a)(i).

20 Cossman & Bell, *supra* note 12 at 39; K. Doyle & D. Lacombe, "Scapegoat in Risk Society: The Case of the Pedophile/Child Pornographer Robin Sharpe" (2000) 20 Stud. Law Polit. Soc. 184 at 194.

engage in sexual activity.[21] The new provisions also attach stiff penalties to child pornography, making it an offense punishable by up to ten years imprisonment to make, distribute or possess for the purposes of distribution and creating an offence of simple possession, punishable by up to five years imprisonment.[22]

Many other legislative schemes passed in the last fifteen years do criminalize possession, based upon the rationale that this will both reduce the market for images whose production involves sexual exploitation and remove the often difficult task of proving intent to distribute.[23] Canada's law is by no means unique in this respect. Yet in combining a possession offence with an extremely broad definition of child pornography and in the level of penalties established, the Canadian legislation constitutes what is widely recognized as one of the strongest criminal laws in the world.[24] In fact, as Doyle and Lacombe contend, this is a "[d]raconian law that could only have come out of a climate of panic."[25] Elements of this panic lurk just beneath what appears to be a concerned legislative response to child sexual abuse. If the story of Canada's child pornography law tells us anything, it is that first glances can be deceptive.

THE LAW AND ORDER STATE

The introduction of Bill C–128 stands as an expression of the kind of state that is emerging from the ashes of the old Keynesian state. Like a Phoenix, the neoliberal state is born both lithe and strong. The hyperpoliticization of child pornography that began with the enactment of Bill C–128, and has continued on in governmental hysteria around the *Sharpe* case, must be understood within the broader context of the elaboration of a new state form. The neoliberal state seeks legitimation through its ability to constrain itself: to retreat from the economy; to reduce social spending; and to eliminate budgetary deficits. At the same time as this state represents a "rolling back" however, it simultaneously has meant a rolling forward. As the components of the post-war order are dismantled, including the welfare state, the need for strong government to maintain social order correspondingly increases. As Keane writes, neoliberalism works "to increase the effectiveness of state policies by downgrading the instrumental dimensions of the state (as provider of goods and services to civil society) in favour of its role as a powerful, prestigious and enduring guardian of the Nation … as a guarantor of domestic law and order [and] social stability."[26]

As I have argued elsewhere, from the election of the Tories in 1984, through Liberal governments of the 1990s, criminalization became an increasingly preferred response to social anxieties. It was preferred because it promises to contain social disorder, preferred because it enhances the authority of the state, preferred because it can promise to accomplish these things without, at the same time, departing from the neoliberal objective of reducing social spending.[27] Criminalization is politically attractive because it simplifies conflicts, stresses moral outrage over reason, allocates blame, and offers concrete goals. Over the past fifteen years, for example, governmental efforts to appear responsive to women's issues have been framed almost entirely within a law and order agenda. The complexities of gender subordination have been swallowed into "violence against women." As this discursive narrowing has occurred, new criminal justice initiatives proliferate and supplant broader equality enhancing, social policy responses.[28]

At this point, it may appear that I have wandered far from the topic of child pornography. But it is crucial, I think, to look at the figure of the "child" and the social importance of "child protection" from within this broad landscape. The child, of course, falls outside the rugged demands of neoliberal citizenship.[29] One cannot hold a child responsible for his/her poverty; children cannot be subjected to workfare, for example. The problems of children can be attributed to individually blameworthy adults, with the symbolic figures of the "deadbeat dad" and the "welfare mother" rising to the status of neoliberal cultural icons in recent years.[30] But, nevertheless, even as Canadian governments are busily shedding the obligations of

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21 *Supra* note 3, s. 163.1 (a)(i).

22 *Supra* note 3, ss. 163.1 (2) and (3).

23 Healey, *supra* note 7 at 15–22; *Sharpe*, *supra* note 1 at para. 180 per L'Heureux-Dubé J.
The rationale of reducing the market for child pornography prompted the United States Supreme Court to uphold a possession offense in *Osborne* v. *Ohio*, 495 U.S. 103 (1990).

24 Healey, *supra* note 7 at 19.

25 Doyle & Lacombe, *supra* note 20 at 194.

26 J. Keane, *Democracy and Civil Society* (London: Verso, 1988) at 8.

27 L. Gotell, "A Critical Look at State Discourse on Violence Against Women: Some Implications for Feminist Politics and Women's Citizenship" in C. Andrew & M. Tremblay, eds., *Women and Political Representation in Canada* (Ottawa: University of Ottawa Press, 1998) 39 [hereinafter "A Critical Look"]; L. Gotell, "Policing Desire: Obscenity Law, Pornography Policy and Feminism" in J. Brodie, ed., *Women and Canadian Public Policy* (Toronto: Harcourt Brace, 1996) 279.

28 "A Critical Look," *ibid.*

29 J. Brodie, "Meso-Discourses, State Forms and the Gendering of Liberal Democratic Citizenship" (1997) 1:2 Citizenship Studies 237.

30 *Ibid.* at 238.

social citizenship, they cannot abandon children in need. The Mulroney government's 1989 promise to end child poverty by the year 2000[31] must be seen against this backdrop. Children, represented as if free floating from parents and communities, have been increasingly centred as objects of public policy.

But what kinds of public policies? Over the 1990s, the goal of deficit reduction, the erosion of universal social programs and deep cuts in transfer payments to the provinces have drastically weakened the social safety net.[32] As neoliberalism reframes the role of the state, Canadian children, according to social activists, are substantially worse off at the beginning of the new millennium.[33] The rate of child poverty increased by forty-three per cent over the 1990s, standing at nineteen per cent by 1998.[34] It is estimated that 256,406 Canadian children rely on food banks.[35] There are good reasons to be concerned and perhaps even panicked about child welfare. But anxieties about the well-being of children have been contained and discursively redirected onto narrow and highly specific targets in recent years. The objective of "protecting" children has been framed within the law and order state and its preferred policy instrument of criminalization. A concerted governmental effort to enhance criminal penalties against child abuse has coincided with the attenuation of social policy responses to child welfare. Since 1988, thirteen law reform efforts have been initiated as a result of calls to protect children covering: sexual assault, sexual interference, invitation to sexual touching, sexual exploitation, indecent acts, incest, anal intercourse, guardians procuring sexual activity, householders permitting sexual activity, living off the avails of a prostitute under eighteen, obtaining a person under eighteen for a sexual purpose and crucially, child pornography.[36] In the narrative underpinning such initiatives, Canadian children are constructed as being in danger and under threat from "criminals." "Criminals" become the evil outsiders of an unsettled variegated society, and we are invited to define ourselves against these dangerous "others." Child molesters, as Doyle and Lacombe contend, become "a sort of meta-criminal, the worst among various evils."[37] Simultaneously, society and governments are let off the hook. Criminalization works to individualize the attribution of responsibility for child welfare. Through the high symbolism of criminal law reforms like Bill C–128, the state is positioned as the protector of innocent child victims.

SEXUAL ANXIETIES, MORAL PANICS AND SCAPEGOATS

Locating the intensified criminalization of child pornography within the law and order state provides us with one set of coordinates. The political and economic contours of the law and order state have a parallel in the realm of the sexual. Just as the neoliberal state emerges in reaction to the perceived excesses of the Keynesian state, a "recessionary erotic economy" is emerging in response to the transgressive logic of the sexual revolution.[38]

The current era is one marked by sharp conflicts over sexuality. Sexuality, according to such theorists as Rubin and Weeks, has become more overtly politicized. In fact, a kind of panic logic prevails.[39] The contemporary sexual panic follows a period of unprecedented sexual exploration and politicization.[40] Central to the sexual revolution beginning in the 1960s were the transgression of sexual authority, the emergence of conspicuous and proliferating sexualities that sought to violate sexual norms, and the politicization of sexual identities, including gays, lesbians, transsexuals and women, who sought enfranchisement of their desires. In the present context, the optimism of the sexual revolution has been undermined and identified by many actors as a cause of social decline. This is because the new sexual politics which were thrown open in the late twentieth century were profoundly unsettling, disrupting many taken-for-granted beliefs and "causing confusion in the mental universe of many people, especially those already

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31 On 24 November 1989, the Mulroney Tories supported an all-party House of Commons resolution which stated "This house seeks to achieve the goal of eliminating poverty among Canadian children by the year 2000." Campaign 2000, *End Child Poverty in Canada* (2000), online: Campaign 2000 <http://www.campaign2000.ca/> (date accessed: 31 July 2001).

32 The federal government, with the demise of the Canada Assistance Plan in 1995, cut federal transfers to the provinces by an estimated $12 billion. While substantial funding was restored to health care in 1999, there were no similar increases for social welfare. Campaign 2000, *Report Card on Child Poverty in Canada* (2000) at 5–6, online: Campaign 2000 <http://www.campaign2000.ca/national_2.htm> (date accessed: 31 January 2001).

33 Campaign 2000, *Child Poverty in Canada: A Report Card* (2000) at 2, online: Campaign 2000 <http://www.campaign2000.ca/natl%20rc%20eng%202000.pdf 2.htm> (date accessed: 31 July 2001) [copy on file with author]; YWCA, "Press Release on Throne Speech" (30 January 2001), online: Policy Action Research List <PAR–L@unb.ca> (date accessed: 31 January 2001) [copy on file with author].

34 Campaign 2000, *ibid.* at 2, 5.

35 Forty per cent of food bank users are children, although children represent only twenty-six per cent of the Canadian population (*ibid.* at 12).

36 Doyle & Lacombe, *supra* note 20 at 188.

37 *Ibid.*

38 L. Singer, *Erotic Welfare* (New York: Routledge, 1993) at 116.

39 *Ibid.*; *Against Nature*, *supra* note 2.

40 Singer, *supra* note 38 at 115–16.

threatened by other changes."[41] As Gamble notes, for example, sexual freedom has been condemned by many conservative critics for creating a "general questioning of authority and the undermining of the moral community represented by the traditional family."[42]

Singer has emphasized how the discursive construct "epidemic," formed initially as a response to AIDS, has become the predominant contemporary discourse of the erotic.[43] Treated as a retributive consequence of past transgressions, the discourse of sexual epidemic provides the rationale for heightened surveillance and repression of marginalized sexual communities. In this context, again, the figure of the child acquires immense symbolic significance. Seeking to chart what she describes as a moral panic around child pornography, Higonnet writes,[44]

> Childhood has become sacrosanct. [We] place a high value on childhood not only because we care about how actual adults treat actual children, but also because we freight childhood so heavily with ideals. Once upon a time, the values of innocence, purity and nature could be variously located. Now we only seem able to find them in what we imagine to be the beleaguered bastion of childhood. If natural, pure innocence is equated with a complete absence of sexuality … then sexual abuse of children violates the ultimate social taboo. From there it takes one step to blame child pornography.

It is this step that requires disentangling and it is this step that underlies the child pornography law and is cemented in the Supreme Court's decision in *Sharpe*.

The child as a symbol of innocence, asexuality and moral boundaries comes to represent sexual order. The visible sexuality of the child symbolizes, in turn, the violation of sexual order. Some social critics who have emphasized the hysteric character of contemporary attitudes to child pornography contend that this is an echo of an underlying moral panic around child sexual abuse.[45] According to Doyle and Lacombe, recent reports of unprecedented increases in child sexual abuse and the proliferation of media stories focussed on extreme cases (the Maple Leaf Gardens case, for example) reflect and express changing definitions of child abuse and have resulted in highly exaggerated responses.[46] Yet studies continue to show that the sexual coercion of children is a pervasive and highly underreported problem.[47] Based upon a national population survey, the Badgley committee reported that fifty-three per cent of women and thirty-one per cent of men were sexually abused when they were children.[48] In 1997, sixty-two per cent of sexual assaults reported to the police involved children and adolescents as victims (half of these were children under twelve).[49]

Feminist activism beginning in the 1970s can claim much of the credit for breaking the silence around the sexual coercion of children.[50] Feminist-inspired research challenged simplistic deviancy models and redefined child sexual abuse as a political and gendered problem. Among the underlying factors identified by feminist theorists and social researchers were: power imbalances between men and women and between adults and children that frame and enable sexual coercion; the predominant discourses that normalize sexual aggression and passivity as integral to institutionalized heterosexuality; and social structures sustaining privatized child-rearing that shroud the family in a veil of privacy.[51] Empirical research lent support to this kind of politicized analysis that rooted child sexual abuse within prevailing definitions of masculinity, femininity and within the patriarchal nuclear family. For example, it is reported that in seventy-five per cent of cases, the accused is a family member or someone well known to the child.[52] By far the largest categories of offenders are fathers,

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41 J. Weeks, *Sexuality* (London: Tavistock Publications, 1986) at 106.

42 A. Gamble, *The Free Economy and the Strong State* (Durham: Duke University Press, 1988) at 198.

43 Singer, *supra* note 38.

44 A. Higonnet, "Conclusions Based on Observation" (1996) 9 Yale J. Crit. 1 at 1.

45 Doyle & Lacombe, *supra* note 20.

46 *Ibid*. at 191–98.

47 R.G. Rogers, *Reaching For Solutions: Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada* (Ottawa: National Clearinghouse on Family Violence, Health and Welfare Canada, 1990), online: Health Canada, National Clearinghouse on Family Violence <www.hc–sc.gc.ca/hppb/familyviolence /childsa.htm> (date accessed: 31 July 2001).

48 *Badgley Report*, *supra* note 5 at 193.

49 Canadian Centre for Justice Statistics, "Sex Offenders" (1999) 19:3 Juristat 1 at 11.

50 M. Rivera, "Introduction" in M. Rivera, ed., *Fragment by Fragment: Feminist Perspectives on Memory and Child Sexual Abuse* (Charlottetown: Gynergy, 1999) 13 at 15.

51 *Ibid*.; A. Duffy, "The Feminist Challenge: Knowing and Ending the Violence" in N. Mandell, ed., *Feminist Issues: Race, Class and Sexuality* (Scarborough: Prentice Hall, 1995) 152 at 154–55, 165–68; Canadian Panel on Violence Against Women, *Changing the Landscape: Ending Violence –– Achieving Equality –– Final Report* (Ottawa: The Panel, 1993).

52 *Badgley Report* as cited in Government of Nova Scotia, *Fact Sheet 5: Child Sexual Abuse* (N.S.: Province of Nova Scotia, 2000), online: Province of Nova Scotia <http://www.gov.ns.ca/coms/facts5.htm#end4> (date accessed: 26 July 2001).

stepfathers, uncles and older siblings.[53] The gendered dimensions of child sexual abuse are revealed by consistent findings that men represent ninety-five per cent of perpetrators, while the majority of victims are girls.[54]

This is not the place for an extensive examination of the complexities of child sexual abuse. What I want to highlight is how these complexities have been reduced to the most simplistic terms through the equation of child sexual abuse and child pornography; this is at the heart of the panic that I am seeking to identify. This insistent equation swirls within and frames the media and advocacy commentary on *Sharpe*. As feminist columnist Michele Landsberg reductively expresses it, "[c]hild pornography constitutes sexual abuse in itself."[55] Similarly the child advocacy organizations Beyond Borders, CASE (Canadians Addressing Sexual Exploitation), EPCAT (End Child Pornography and Trafficking in Children for Sexual Purposes) and the International Bureau for Children's Rights contend that child pornography "is either the inducement of children to engage in unlawful sexual activity or the exploitative use of children in pornographic performances."[56] On the right, and expressing conservative anxieties about sexual pluralism, the Evangelical Fellowship of Canada argues that "[s]exual activity with children is one of the last taboos that is slowly breaking down. This [contemporary] belief that we make our own truth and are a law unto ourselves, would allow the consumption of child pornography and sex with children."[57] In each of these expressions, there is a clear slippage from image to reality. Child pornography becomes constituted as the graphic public face of a practice that has been shrouded by secrecy and privacy. As image becomes reality, however, so too is reality contained within, distorted and simplified by representation.

The unbroken bridge between reality and representation is cemented through assertions of a virtual epidemic of child pornography. As Landsberg writes, for example, "the exposure of immense child pornography rings … drives home the point that this is big, global business."[58] But just how pervasive is the problem of child pornography? In a three year period from 1996–1999, the FBI's Innocent Images child pornography taskforce opened 2609 cases, with only twenty per cent of these generating indictments and just seventeen per cent resulting in convictions.[59] According to an editorial in the *Nation*, "[t]his low number suggests that the problem is hardly of a scale to fit the [current] panic."[60] Moreover, it is widely acknowledged that there is virtually no commercial market for child pornography.[61] Child pornography circulates predominantly through the black market exchange of images facilitated by the Internet.[62] But the privatized nature of exchange fuels other anxieties. Frequently conjured up is the image of the omnipresent and anonymous child pornographer invading the sanctity of the home through computer lines, tempting curious and vulnerable adults and luring unwary children onto pornographic sites.[63] Yet again, however, the "epidemic" of Internet pornography tends towards exaggeration. As one indication, a 1995 investigation of 3.5 million America Online subscribers located only 125 child pornography offenders. As Higonnet asks, would we be as morally outraged if 125 might be guilty of another crime?[64]

The hysteria swirling around child pornography was clearly evident in reactions to the British Columbia Supreme Court and Court of Appeal decisions in *Sharpe*[65] that struck down the possession section of the *Criminal Code* as an invasion of freedom of expression and privacy. Doyle and Lacombe describe a panic spinning out of control in which the B.C. Law Courts were inundated with outraged calls.[66] Both the trial judge and the accused/respondent were subjected to death threats.[67] The Court of Appeal ruling was also harshly condemned by federal Members of Parliament, including one Reform member who asserted that it gave

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53 *Ibid*.; R. Oldroyd, "Child Sexual Abuse: Statistics, Trends, and Case Outcomes" The Forum, online: Judicial Research and Statistics Association <www.jrsainfo.org/pubs/forum/archives/Mar92.html> (date accessed: 26 July 2001).

54 Government of Nova Scotia, *supra* note 52; *Badgley Report*, *supra* note 5 at 215; Canadian Panel on Violence Against Women, *supra* note 51 at 11.

55 M. Landsberg, "Porn law loopholes an affront to children's dignity" *Sunday Star* (4 February 2001) A4.

56 *R.* v. *Sharpe*, [2001] S.C.J. No. 3 (Intervenor's Factum at 8) [hereinafter "Intervenor's Factum"].

57 Evangelical Fellowship of Canada, "Innocence Preserved: Protecting Children for Child Pornography" (Background Paper) September 2000 at 1, online: Evangelical Fellowship of Canada <http://www.efc-canada.com/na/docs/innoc.htm> (date accessed: 31 January 2001).

58 Landsberg, *supra* note 55.

59 "Cynthia Stewart's Ordeal" *Nation* 270:17 (1 May 2000) 4.

60 *Ibid*. at 5.

61 Healey, *supra* note 7 at 7; Higonnet, *supra* note 44 at 4; *Badgley Report*, *supra* note 5 at 1180.

62 Healey, *ibid*. at 4; Higonnet, *ibid*. at 9.

63 Healey, *ibid*. at 11.

64 Higonnet, *supra* note 44 at 4.

65 *R.* v. *Sharpe* (1999), 169 D.L.R. (4th) 536 (B.C.S.C.) [hereinafter *Sharpe BCSC*], aff'd 175 D.L.R. (4th) 1 (B.C.C.A.) [hereinafter *Sharpe BCCA*].

66 Doyle & Lacombe, *supra* note 20 at 184–85.

67 *Ibid*. at 185, 201.

"pedophiles the right to abuse children."[68] Here we can observe representation and reality flipping like two sides of the same coin, spinning into one.

At the heart of the contemporary panic around child pornography lies the symbolic figure of the "pedophile." It is through an analysis of this figure that we can observe the distortions that result from the equation of child pornography and child sexual abuse. John Robin Sharpe, of course, has become emblematic of this figure. How have we come to know him? He is first of all constructed as a pathological deviant, condemned not only for his activities (which consist mainly of possessing and producing sexually explicit representations of adolescents) but also for his identity. He has often been referred to as a pedophile, especially in the conservative media.[69] Sharpe himself, although he is rarely permitted a voice in highly caricatured media representations, describes his sexual attractions as being directed at adolescent boys.[70] "Pedophilia," a psychiatric category, refers to an erotic attraction to prepubescent children.[71] In the construction of Sharpe as a "pedophile" this pathologized category becomes elastic, extended beyond its definitional boundaries to include what are, under age of consent provisions, legal activities.[72]

The insistent construction of Sharpe as a dangerous pedophile is striking when compared with other recent high-profile cases in which men have been accused of actually assaulting minors. Jack Ramsay, for example, a former Reform Party M.P., was convicted of the attempted rape of a fourteen-year-old native girl thirty years ago when he was an RCMP officer. While this conviction has been recently set aside and a new trial ordered, Ramsay has admitted to sexual touching.[73] This incident was non-consensual and clearly an abuse of power. There is, however, a qualitative difference in the media treatment of Ramsay. Reports of the accusations have adopted an objective[74] and even forgiving posture — this was a forgivable error in judgment. Jack Ramsay has not been represented as a "pedophile." Sharpe, by contrast, who has not yet even been convicted of possessing child pornography and has never been accused of sexual assault, has become, in Doyle and Lacombe's words, "not just a child pornographer, but a pedophile and a freak — *something* to be policed."[75] There is an odd contradiction evident in these differing responses to child pornography and to allegations of actual child sexual abuse. We are encouraged to castigate images, pathologize their possessors and at the same time, to deny practices; once again, image and reality become inverted.

The constructed image of the child pornographer not only works to shift our attention to representation, it also functions to deny the systemic nature and characteristics of child sexual abuse. As I have argued earlier, child sexual abuse is overwhelmingly a heterosexual crime. This is erased in the dominant construction of the pedophilic child pornographer as homosexual. Representations of Sharpe have focussed obsessively on his homosexuality.[76] In this manner, the pedophile and the homosexual are twinned, presented as if inevitably linked. Cossman and Bell contend that this fusion has precipitated a prosecutorial focus on homosexual representations; the child pornography law, as with other laws crafted to regulate sexual expression, becomes a means of policing and stigmatizing sexual minorities.[77] Not only this, however, but linkage between child pornography and male homosexuality also works to relegitimize deviancy models of child sexual abuse. Its "troubling" existence in the "normal" heterosexual family is obscured, as ultimate responsibility is projected onto the "pathological" outsider.

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[68] *Ibid.* at 185.

[69] See *e.g.* "Child porn on to the Supreme Court" *Alberta Report* 26:29 (26 July 2000) 36 at 36.

[70] Doyle & Lacombe, *supra* note 20 at 195.

[71] The *Diagnostic and Statistical Manual of Mental Disorders* lists the essential features of pedophilia as "recurrent, intense, sexual urges and sexually arousing fantasies, of at least six months duration, involving sexual activity with a prepubescent child" (American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 3d ed. (Washington, DC: Author, 1987) at 284). The prepubescent child generally is thirteen years old or younger. The perpetrator is sixteen years old or older, at least five years older than the victim, and has an enduring and exclusive sexual interest in children. The majority of pedophiles and child molesters are men, according to the DSM-IV. Most often pedophiles are relatives, friends, or neighbours of the child victims (American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Washington, DC: Author, 1994) at 528) [hereinafter *DSM-IV*].

[72] Doyle & Lacombe, *supra* note 20 at 195–96; S. Bell, "*On ne peut voir l'image* [The image cannot be seen]" in Cossman *et al.*, *supra* note 12, 199 at 208.

[73] See *R.* v. *Ramsay*, [2001] S.J. No. 17 at para. 10 (Sask. C.A.).

[74] See *e.g.* L. Coolican, "Ramsay retrial date set on attempted-rape charge" *The Edmonton Journal* (13 March 2001) B5.

[75] Doyle & Lacombe, *supra* note 20 at 185.

[76] *Ibid.* For example, the *Alberta Report* refers to Sharpe's stash of "*homosexual* erotica," referring to Sharpe as both a "Vancouver *homosexual*" and a "*pedophile*." This representation works to fuse the categories homosexual and pedophile. *Alberta Report*, *supra* note 69; "If it feels good, stop" *Alberta Report* 26:33 (30 August 2000) 28 at 28.

[77] Cossman & Bell, *supra* note 12 at 41.

Child pornography is relentlessly portrayed as a threat from the outside. Arguments about the epidemic proportions of child pornography are deployed in order to justify the need to draw boundaries around the threatened home. As one legal commentator on the constitutionality of section 163.1 of the *Criminal Code* hyperbolically insists, for example, "the Internet is fast becoming the most significant factor in the sexual abuse of children."[78] In this exaggerated and misleading narrative, the "child pornographer/child sexual abuser/pedophile" moves invisible among us, but is always outside trying to sneak in. A similar narrative emerges in a poster campaign launched in Sharpe's Vancouver neighbourhood, in which he is portrayed as a threat to the family and to the community. He comes to symbolize the child pornographer invading the safety of our neighbourhoods by stealth. As the poster warns, "watch for him … because you have to know he is watching you."[79]

In many ways, as my discussion suggests, the contemporary panic around child pornography constitutes a backlash against feminist inspired insight that child sexual abuse is social, structural and systemic, with the privatized family constituting one of its main forums. We are encouraged to focus on the evil outsider and against this "dangerous" outside, the family reconstituted as a safe haven. Through these interchanges between public and private, children's sexuality is located within the private, a private sphere where above all else they need protection from sexual explicit images, and where they are positioned as innocent and powerless victims.

I have been describing a political and cultural context in which our legitimate concerns about the well-being of children have been persistently narrowed. Through the law and order state and its preferred instrument of criminalization, our anxieties about the welfare of children become directed onto the problem of child sexual abuse, defined principally as a criminal justice issue. Through panicked reactions to child pornography, the complex social, systemic and gendered dimensions of child sexual abuse virtually disappear, replaced with the repetitive slippage from reality to representation. This equation of child pornography and child sexual abuse is reiterated, cemented and legitimized in the recent Supreme Court decision in *Sharpe*.

THE SUPREME COURT DECISION IN *SHARPE*

With the force of the two lower court decisions in *Sharpe*,[80] the edifice upon which the child pornography law was erected was perilously shaken. Relying upon a series of interlinked arguments, the trial judge and two of the three Court of Appeal Justices ruled that section 163.1(4) of the *Criminal Code* (the possession section) constituted an unjustifiable intrusion on freedom of expression.[81] First, the uniqueness of a criminal possession offense was highlighted by the B.C. Court of Appeal.[82] It is crucial to remember that it is not a criminal offence to possess other harmful expressive materials, including texts that advocate genocide.[83] Drawing on classic civil libertarian reasoning, Southin J.A. argued that because a possession offence comes precipitously close to criminalizing thought, "the hallmark of tyranny,"[84] it can never constitute a justifiable limitation on freedom of expression. Second, and in the alternative, Southin J.A. emphasized that because privacy and expression rights are implicated, for a possession offense to constitute a reasonable limitation on constitutional freedoms the most compelling evidence of necessity is required.[85] The test established by the Supreme Court in *Butler*, requiring a "reasoned apprehension of harm"[86] for limiting expression, is thus insufficient. Echoing the trial decision, Southin J.A. contended that there is little conclusive evidence linking the possession of child pornography to increases in child sexual abuse. While some studies have found that "highly erotic materials"[87] incite offences, others suggest that such materials reduce the incidence of abuse by relieving sexual tensions. Similarly, while pornography involving children may reinforce "cognitive distortions"[88] (the belief that sex with children is normal), there is no evidence linking this with an increase in harm to

78 S. Anand, "A Case for Upholding the Child Pornography Law" (1999) 25 C.R. (5th) 313.

79 Doyle & Lacombe, *supra* note 20 at 185–86.

80 *Supra* note 65.

81 *Sharpe BCCA, supra* note 65.

82 *Ibid*. at paras. 88–95 per Southin J.A.

83 "Intervenor's Factum," *supra* note 56 at para. 18; possessing materials advocating genocide is not a criminal offence (*Criminal Code*, R.S.C. 1985, c. C–46, as added by S.C., c. 19 (3d Supp.), s. 1, s. 150.1; *Criminal Code*, *ibid*., s. 318).

84 *Sharpe BCCA, supra* note 65 at para. 95 per Southin J.A.

85 *Ibid*. at para. 124.

86 *Butler, supra* note 11 at 483–84.

87 The trial judge's findings of fact in *Sharpe BCSC, supra* note 65 at para. 19. These findings were based upon literature reviewed by expert Dr. P.I. Collins, forensic psychiatrist. These findings include both the harmful and the beneficial cathartic effects of child pornography. For a discussion, see J. Ross, "*R.* v. *Sharpe* and Private Possession of Child Pornography" (2000) 11 Constitutional Forum 50 at 52.

88 *Sharpe BCSC, supra* note 65 at para. 13.

children.[89] Finally, Rowles J.A. of the B.C. Court of Appeal emphasized that an overbroad definition of child pornography, in combination with a possession offense, led to the criminalization of many materials that posed little risk of harm to children, including: self-created and privately held works of the imagination; sexual self-representations created by adolescents; and private written materials that advocate sex with those under eighteen.[90]

In striking down section 163.1(4), the two lower court decisions undermined the easy equation of child pornography and sexual abuse and the myopic focus on representation that this induces, delegitimizing a law that is, as I have argued, heavily weighted with symbolism. The intensity of political reactions to these decisions demonstrates the extent of symbolic investment in the child pornography law. There was an unprecedented level of legislative support for introducing the notwithstanding clause should the law be struck down on appeal to the Supreme Court, with the Federal Justice Minister suggesting that the government would keep this option open.[91]

It is critical to set the recent Supreme Court decision in *Sharpe* against this broad backdrop. Some media commentators, child advocacy organizations and the right-wing Alliance Party reacted with outrage to the *Sharpe* decision, arguing that it created "a loophole for pedophiles."[92] Far from weakening the criminal regulation of child pornography, I want to suggest that the main impact of the Supreme Court decision has been to strengthen the law by re-establishing its legitimacy and the web of connections between representation and child sexual abuse upon which it rests.

With resounding unanimity, the Supreme Court upheld the possession section as a reasonable limit on expression in the context of social problem hyperbolically described as nothing less than "an evil."[93] The 6/3 division in the judgment arose on the appropriate interpretation of the definition of child pornography and whether or not the possession sections caught relatively harmless categories of sexual representation. The majority judgment, written by McLachlin C.J.C., sought to clarify and darken the line around "harmful" and thus justifiably prohibited representations, reading in two narrow exceptions to the prohibitions on possession in order to remedy the law's overbreadth. The dissent, penned by L'Heureux-Dubé J., departed from the majority both in casting a much wider net over the range of representations falling within the meaning of child pornography and in emphatically denying its overbreath. While there are undeniable differences in tone in these two opinions, they sing in harmony on one fundamental point that is repeated endlessly throughout the decision as a whole — prohibiting the possession of child pornography reduces child sexual abuse.

This refrain is articulated most clearly in the dissenting judgment in which child pornography comes to colonize virtually all sexual representations of adolescents and children and is itself defined as an activity — that is, child sexual abuse. The tenuous relationship between the simple possession of child pornography and the activity of sexual coercion is transformed into certainty in the narrative woven by L'Heureux-Dubé J. While acknowledging a "dearth"[94] of scientific evidence, she nevertheless declares that "a correlation between greater access to child pornography and child sexual abuse does exist."[95] L'Heureux-Dubé J. finds section 163.1(4) a justifiable limit on freedom of expression primarily because there is always a danger that materials will find their way into the hands of "paedophiles."[96] The virtually uncontainable danger of sexual representations of all those under eighteen, even privately held works of the imagination, even the diary entries of adolescents, are located here in the ever-present possibility of their "dissemination."[97] The "pedophile," the deviant outsider, assumes an insistent presence here. He is the obsessive collector of any image, even crude drawings, suggesting underage sexuality;[98] he cleverly deploys pornography to "groom" children[99] and yet is himself oddly childlike, acting out his "deviant" desires prompted by the cue of representation.[100]

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89 *Ibid*. As Southin J.A. comments, Collins' testimony (*supra* note 86), which emphasized the attitudinal harms of child pornography, was opinion rather than objective fact (*Sharpe BCCA, supra* note 65 at paras. 65–66 per Southin J.A.).

90 *Sharpe BCCA, supra* note 65 at paras. 177–207 per Rowles J.A.

91 Landsberg, *supra* note 55; J. Armstrong, "Kiddie-porn law headed to top court" *The Globe and Mail* (1 July 1999) A1.

92 Landsberg, *supra* note 55; "Supreme Court backs bulk of child porn law" CBC News (26 January 2001) 22:43:09.

93 *Sharpe, supra* note 1 at paras. 28, 93 per McLachlin C.J.C.

94 *Ibid*. at para. 201 per L'Heureux-Dubé J.

95 *Ibid*. at para. 202.

96 She even extends this hyper-elastic category to include teenagers producing self-images, arguing that "there is no valid reason to presume that teenage authors of sexually explicit videos cannot themselves be pedophiles" (*ibid*. at para. 212). According to the DSM-IV, this falls outside the pathological category pedophile — "The perpetrator is sixteen years old or older, at least five years older than the victim, and has an enduring and exclusive sexual interest in children." (*DSM-IV, supra* note 71).

97 *Ibid*. at para. 164 per L'Heureux-Dubé J.

98 *Ibid*. at para. 219.

99 *Ibid*. at paras. 205–10.

100 *Ibid*. at para. 201.

The tone of McLachlin C.J.C.'s opinion is, by contrast, measured; the thrust, some would assert, is "liberalizing." But the liberalization she offers is restricted and must be seen within the opinion as a whole. Her opinion opens with an abstracted analysis of the constitutional values at stake in the case.[101] McLachlin C.J.C. pronounces on the constitutional issues that are implicated by section 163.1(4) before laying out a definition of "child pornography." In this way, child pornography becomes an indefinite term into which meaning may be poured indiscriminately. The judgment thus begins with the assertion that child pornography, both loaded with meaning and undefined, lies far from the values of freedom of expression. In ten short paragraphs, she asserts that it (all sexual representations of those under eighteen? or only some?) is "prurient,"[102] "base,"[103] "offensive,"[104] "does not contribute to the search for truth or to Canadian social and political values," and is linked only with the value of self-fulfillment.[105] Drawing on common sense meanings allows McLachlin C.J.C. to construct this as yet undefined category of representations in thoroughly negative terms. By contrast, she articulates the countervailing interests as normatively good and imperative. Society has an interest, she insists, in "protecting children from the evils associated with the possession of child pornography."[106] In emphatic language, she claims that child pornography (again, all sexual representations of those under eighteen? even imaginative representations?) "involves the exploitation of children."[107] The equation of representation and reality is thus established at the outset of this "liberalizing" opinion.

The liberalizing appearance of the majority judgment lies principally in its efforts to clarify and rein in the definition of "child pornography." McLachlin C.J.C. so desperately wants to render the meaning of "child pornography" constitutional that she at times interprets section 163.1 in ways that depart from its clearly expansive wording. For example, while included in the statutory definition are visual representations of those "depicted as being under eighteen" McLachlin C.J.C. insists that this be given an objective meaning. The proper interpretation, she argues, lies in the "sense that would be conveyed to a reasonable observer."[108] In other words, to be child pornography the image must seem to be believably of a child. The danger of depicting someone pretending to be under eighteen, she contends, lies in the potential for this representation to be used "for the purposes of seduction";[109] the linkage between image and action seems to appear most frequently in this opinion when it is probing the outer edges of the expansive statutory definition. Linking the danger of depiction to the potential of seduction serves to legitimize the criminalization of representations of adults pretending to be children. Yet making the test for depiction the believability of the pretense, McLachlin C.J.C. reins in one clear source of the law's overbreadth.

In order to fall within the criminalized category of child pornography, the majority judgment emphasizes that the visual representations must be explicit, involve nudity and have a clear sexual purpose defined as being "intended to cause sexual stimulation."[110] A photo of a child in the bath would not, in most instances, fall within the proper interpretation of child pornography and in this way, the elasticity of the statutory definition is again restricted. But McLachlin C.J.C. leaves open the potential for the same image to be criminalized in certain contexts. Departing from the literalist approach inherent in the legislation, the meaning of visual sexual representations becomes linked with context in the judgment. Should the same photo of a child in the bath be found among other clearly sexual images, McLachlin C.J.C. suggests, its meaning could change.[111] Peaking through this contextual gesture is the suggestion that should this photo be found on a "pedophile's" computer, it becomes child pornography — its danger becomes contingent upon the identity of its possessor.

Perhaps the most significant aspect of the judgment lies in its explicit redefinition of the provision on written materials. McLachlin C.J.C. dramatically narrows the thrust of the provision; prohibited written materials must explicitly "advocate" or "counsel" in the sense of actively promoting, "the commission of sexual offences with children."[112] The majority judgment erects a distinction between materials that explore sex with children (materials such as Plato's *Symposium* and anthropological studies) and those that send "the message that sex with children can and should be pursued."[113] This distinction is one that could be seen as consistent with the statutory wording. Yet in linking "counselling" with criminal sexual activity, McLachlin C.J.C. moves far from the statutory definition of written child pornography. Even though section 163.1(1)(b)

[101] *Ibid*. at paras. 21–31 per McLachlin C.J.C.
[102] *Ibid*. at para. 27.
[103] *Ibid*. at para. 24.
[104] *Ibid*. at para. 21.
[105] *Ibid*. at para. 24.
[106] *Ibid*. at para. 28.
[107] *Ibid*.
[108] *Ibid*. at para. 43.
[109] *Ibid*.
[110] *Ibid*. at paras. 44–53. The quotation is at para. 50.
[111] *Ibid*. at para. 51.
[112] *Ibid*. at para. 55.
[113] *Ibid*. at para. 56.

refers to "activity with a person under the age of eighteen," McLachlin C.J.C. contends that it was not intended to criminalize written materials that include sexual representations of fourteen-to-seventeen-years-olds when the sexual activity is consensual and does not involve payment or the abuse of trust.[114] The problems that arise from the criminalizing depictions of adolescent sexuality are partially addressed through this blatant judicial redefinition.

There is an evident difference in the treatment of written and visual materials within McLachlin C.J.C.'s discussion of the proper interpretation of child pornography. Pictures that show even nudity are vulnerable to criminalization while words that describe sexual activity can, very often, escape. Visual materials that depict fourteen-to-seventeen-year-olds are cast into the dark container of child pornography while written depictions of adolescent sexuality, for the most part, remain outside. Here the visual is presented as inherently more dangerous than text: pictures speak louder than words. Why is this? First, because according to McLachlin C.J.C., the meaning of the written is more open to interpretation; therefore, as the Court held in *Little Sisters*,[115] "it may be difficult to make the case of obscenity against written texts."[116] Second, and implicit in this judgment, is the assumption that the visual is more open to literal interpretation. Pictorial images often come to visually mark the transgression of the boundary between adult and child and symbolically represent child sexual abuse. In this construction, and in the visual/text distinction upon which it rests, we can see how the precision that McLachlin C.J.C. so desperately attempts to write onto the definition of child pornography remains illusive; representations of adolescents are cast as both necessarily within and outside the category of child pornography.

The liberalizing guise of this opinion, as well as its residual and yet firmly denied instabilities are also apparent in the discussion of statutory defenses. McLachlin C.J.C. insists that the defenses of "artistic merit," "educational, scientific and medical purpose" and "public good" be given a broad meaning.[117] As for artistic merit, this includes anything that "may reasonably be viewed as art."[118] A valid claim must include more than the intent of the producer, and the standard set for each of these defenses is the standpoint of the reasonable observer.[119] While McLachlin C.J.C. lists a number of factors that could be used in the determination of "artistic merit," she defers the refinement of these factors to the development of case law.[120] The art/porn distinction is at once asserted and yet remains highly unstable. Grounding this discussion is an insistence that sexual representations of children and adolescents must be connected with some other purpose to render them valuable. Sexual representations that are not linked to some higher purpose remain "base"[121] and "prurient."[122] But the line between good and bad, valuable and dangerous, remains permeable despite McLachlin C.J.C.'s assertions to the contrary.

The underlying purpose of these efforts to darken the line around prohibited representations is made explicit in the majority's analysis of whether the limits on freedom of expression imposed by the possession section can be "demonstrably justified in a free and democratic society" — the *Charter* section 1 analysis.[123] As McLachlin C.J.C. insists, "Many of the … 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."[124] Creating the appearance of clarity, of a dark line containing harmful representations, allows McLachlin C.J.C. to move the possession section close to a constitutional standard. As I have suggested, however, the appearance of a dark line is deceptive. It rests on a chain of unstable distinctions — adolescent/child; counsel/describe; word/image; art/porn. Nonetheless, the assertion of precision serves a rhetorical purpose in the opinion, permitting McLachlin C.J.C. to pronounce unequivocally on the dangers that flow from the

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114 *Ibid*. at para. 58.

115 *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

116 *Sharpe, supra* note 1 at para. 103 per McLachlin C.J.C.

117 *Ibid*. at paras. 61–71.

118 *Ibid*. at para. 63.

119 *Ibid*. at paras. 64, 68, 70.

120 *Ibid*. at para. 64.

121 *Ibid*. at para. 24.

122 *Ibid*. at para. 27.

123 Section 1 of the *Charter of Rights and Freedoms* reads "*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" (*Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 1). As McLachlin C.J.C. explains, "[t]o justify the intrusion on freedom of expression, the government must demonstrate … 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 *Thompson 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 the 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" (*Sharpe, supra* note 1 at para. 78).

124 *Sharpe, supra* note 1 at para. 98 per McLachlin C.J.C.

possession of child pornography — the contents of the dark container.

In its section 1 analysis we can see most clearly how the majority's narrative becomes caught up in the same discursive web woven by the dissent. At the heart of this web lies the equation of child pornography and sexual abuse. Prohibiting possession, argues McLachlin C.J.C., is rationally connected with the pressing goal of reducing the sexual exploitation of children.[125] In assessing rational connection, McLachlin C.J.C. departs significantly from the two lower court decisions in this case, re-establishing "reasoned apprehension of harm" as the standard.[126] Moving from concrete evidence to "apprehended harm" permits the assertion that even without proof, we can predict that the possession of child pornography leads to child sexual abuse.

McLachlin C.J.C. frames the clear dangers of possession in the following ways:

> "exposure … may reduce *paedophiles'* defenses and inhibitions against sexual abuse of children;"[127]
>
> "possession … fuels fantasies, making *paedophiles* more likely to offend;"[128]
>
> "criminalizing … possession … aids in prosecuting … distribution and use;"[129]
>
> "[s]exually explicit pornography involving children poses a danger … because of its use by *p[a]edophiles* in the seduction process;"[130]
>
> "[c]riminalizing possession may reduce the market … and the abuse of children it often involves."[131]

Of these factors, only the final harm is conclusive and only in relation to a narrow category of representations — children are harmed in making visual pornography. The fourth factor, the use of pornography in seduction, is presented as being "clear and uncontradicted."[132] It is, nevertheless, important to recognize there have been no studies that would point to its significance as a causal and pervasive factor in child sexual abuse (even though such studies could be done using trial transcripts to see how frequently grooming through pornography actually occurs in reported cases). The first two factors that child pornography weakens pedophiles' "inhibitions against sexual abuse of children" and that child pornography "fuels" pedophiles' "fantasies" are based on research that is contradicted by studies demonstrating how the use of pornography may actually inhibit sexual abuse by relieving tensions.[133] The tenuous nature of the linkages between representation and reality made evident in the lower court decision become transformed into certainty here. Based upon "social scientific evidence," "buttressed by experience and common sense," McLachlin C.J.C. strongly concludes that "[p]ossession of child pornography increases the risk of child abuse."[134]

As in the dissent, the dangers of child pornography are projected onto the figure of the pedophile; he is repeatedly invoked in the majority's section 1 analysis. He is presented as the bridge between representation and reality, especially when the dangers of possession seem most difficult to establish. Echoing and at the same time legitimizing the moral panic on which the child pornography legislation depends, the *Sharpe* decision creates a condensation. Its readers are moved from the broad concerns about "preventing harm to children" to the problem of "child sexual abuse" to "child pornography" and then back again, repeatedly assured along the way that banning possession will enhance child welfare. In the seductive loop of this judgment, there is much that is eclipsed. The seriousness and complexity of child sexual abuse, the very problem that Parliament claimed to be addressing through enacting section 163.1, is never explored, except through the flat assertion that child pornography increases child sexual abuse. In this way, image and action are not only fused, image comes to replace reality. With the insistent presence of the 'pedophilic child pornographer' invoked thirty-two times in the judgment as a whole,[135] our concerns about sexual abuse are projected outwards, away from the home and family, away from the everyday.

Oddly, if child sexual abuse is represented opaquely in the judgment, so too is child pornography. McLachlin C.J.C. is most concerned to probe the edges of the category, to create the appearance of a clear

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125 *Ibid*. at para. 82.
126 *Ibid*. at para. 85.
127 *Ibid*. at para. 88 [emphasis added].
128 *Ibid*. at para. 89 [emphasis added].
129 *Ibid*. at para. 90.
130 *Ibid*. at para. 91 [emphasis added].
131 *Ibid*. at para. 92.
132 *Ibid*. at para. 91.

133 As the trial judge summarized the conflicting findings of the existing social science research in her findings of fact: "[h]ighly erotic" pornography incites some pedophiles to commit offences; "[h]ighly erotic" pornography helps some pedophiles to relieve sexual tension; "[m]ildly erotic" pornography appears to inhibit aggression (*Sharpe BCSC*, *supra* note 65 at para. 19).
134 *Sharpe*, *supra* note 1 at para. 94 per McLachlin C.J.C.
135 *Sharpe*, *supra* note 1. A word count of the decision revealed that the word "pedophile" appeared 32 times.

distinction between the dark container and that which lies outside. She finds that the definition created by the legislation broadly targets undeniably harmful representations. To the extent that it catches too much, however, it is only with respect to two narrow categories of representations: "[s]elf- created expressive material … created by the accused alone … exclusively for his or her own personal use"; and "[p]rivate recordings of lawful sexual activity … created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use."[136] Such materials, including private writings and "adolescents recording themselves," McLachlin C.J.C. argues, pose little risk of harm to children[137] and to criminalize their possession "deeply implicates section 2(b) freedoms" bordering on thought control.[138] She therefore finds that because the possession section catches such peripheral materials, it fails to meet the proportionality test. For this reason, she chooses to read in two exceptions to section 163.1(4) to exclude these narrow categories of representations.

It is largely on the basis of this remedy that some media commentators and child advocacy organizations have condemned the decision. In this view, the main impact of *Sharpe* is the creation of "loopholes" in the child pornography law. But just how wide are these "loopholes" and what is their rhetorical purpose in the decision as a whole? It is clear that self-created privately held works of the imagination and private sexual self-representations of adolescents are caught by section 163.1(4). The majority opinion, however, emphasizes that the central danger of child pornography (aside from sexual exploitation in production) lies in its dissemination (*to pedophiles*). Materials that are not communicated fall outside this logic; they also constituted the bulk of the "hypotheticals" relied on by the respondent and civil libertarian intervenors. Creating these narrow exceptions allows McLachlin C.J.C. to resolve the contradiction between, on the one hand, allowing adolescents to legally engage in sexual activity, and on the other, disallowing any form of representation of this activity. And like her acrobatic efforts to create precision in the definition of child pornography, the creation of these exceptions enables her to pronounce unequivocally on the harms of the dark container.

As June Ross has argued, the B.C. Court of Appeal's focus on "incidental hypotheticals" and overbreadth diverted attention from the "hard" cases, from the kinds of material possessed by Sharpe, from the presumed contents of the "dark container."[139] Ross contends that "overbreadth arguments are employed as a guise to cover uneasiness about the law's application even to its 'targets' and can be used as a constitutional justification for weakening a law that has a moral imperative."[140] As I have suggested, however, when the interior of the dark container of child pornography remains opaque, we, as readers, are drawn into the seductive loop of assumed linkages between the welfare of children, child sexual abuse and child pornography that the decision serves to re-establish. What would happen if we allowed the child pornographer to speak? What would happen if we were forced to interrogate the proposition that child pornography causes sexual abuse with reference to the kind of images and texts possessed and created by Sharpe? This is the work that is done in Bell's analysis in this issue. This is precisely the kind of hard work that the decision in *Sharpe* avoids. Bell's analysis of the "hard cases" questions a simplified equation of representation and harm and asks us to consider instead the social value of specific sexually explicit texts and images. Through this analysis, the distinctions upon which McLachlin C.J.C.'s interpretation rests — adolescent/child; counsel/ describe; word/image; art/porn — are revealed as highly precarious.

CONCLUSION

The main impact of the *Sharpe* decision, as I have insisted, has been to re-legitimize the equation between representation and reality that lies at the heart of the current moral panic around child pornography. Federal Justice Minister Ann McLellan predictably seized upon *Sharpe* as a victory: "Today's Supreme Court decision is a victory for our children. The Government's priority throughout this case has been, and will continue to be, the safety of our children."[141] Just three weeks after the release of the decision, deploying the legitimacy bestowed by the Supreme Court in *Sharpe*, McLellan announced new legislation targeting the Internet transmission of child pornography. This legislation, yet to be introduced, would add another layer of criminalization to sexual representations of children, with penalties of up to ten years for distribution on the Internet, added to existing penalties for possession and distribution for child pornography.[142]

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136 *Ibid*. at para. 115.
137 *Ibid*. at para. 105.
138 *Ibid*. at para. 108.
139 Ross, *supra* note 86 at 50.
140 *Ibid*. at 55–56.
141 Canada, Department of Justice, "MINISTER OF JUSTICE ISSUES STATEMENT ON R. v. SHARPE" (27 January 2001), online: Department of Justice Canada <http://canada.justice.gc.ca/en/ news/nr/2001/doc_25860.html> (last modified: 27 July 2001).
142 T. Barrett, "McLellan to toughen laws against Internet predators" *The Edmonton Journal* (14 March 2001) A1, A14.

In all this focused legislative and judicial attention on the evils of child pornography, we are pulled into a reassuring web of connections, from the "safety of our children" to the prevention of "sexual abuse" to the eradication of the "pornography" that enables this. But this reassurance comes at a cost, as I have suggested in this article. Defining child pornography as an ultimate evil induces a tunnel vision in which real threats to the welfare of children, from poverty and disintegrating social programmes to the complexities and pervasiveness of child sexual abuse, are obscured. In this way, the current hysteria around sexualized images of children can be seen a backlash against social structural analysis of disadvantage and disempowerment — a backlash that is entirely consistent with the myopic vision of the law and order state.

There are justifications for criminalizing possession when child pornography is carefully defined as images that involve the sexual abuse of children in their production. Achieving precision in criminal prohibitions on child pornography beyond the illusion created in McLachlin C.J.C.'s reasoning also necessarily involves erecting a clear line between adolescent and child. It is incongruous to recognize that adolescents can consent to sexual activity and then to criminalize any non-private expression of adolescent sexuality. The *Sharpe* decision tells us that young people's sexual expression is permitted only so long as it is never communicated — young people cannot use sexual imagery to create fantasies, to challenge oppressive sexual norms, to work out sexual boundaries or enhance their sexual autonomy. They cannot, in short, be the authors of their own sexualities because of the ever-present danger that this material might fall into the hands of "pedophiles." It may well be that allowing adolescents agency within the realm of sexual representation could help to combat sexual coercion and domination. The recognition that sexual texts and images can have value in themselves will, however, necessitate escaping from the unremitting sex negativity that frames Canadian judicial thinking on pornography.❑

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R. v. *SHARPE* AND THE DEFENCE OF ARTISTIC MERIT

June Ross

The impact of judicial decisions is sometimes most significant and most controversial in relation to matters that were not at the forefront in the legal proceedings. The decision in *R.* v. *Sharpe*[1] may be such a case. In this decision, the Supreme Court of Canada upheld, with minor qualifications, the offence of private possession of child pornography under section 163.1 of the *Criminal Code*.[2] The case was argued and resolved largely as an issue of privacy — could the prohibition on child pornography extend to private possession, while remaining within constitutional limits?[3]

At the same time, the Court, in discussing the "artistic merit" defence to child pornography (and obscenity in general), not only expanded this defence by suggesting that it be given a more broad interpretation than in the past, but also altered the definition of the defence itself. These modifications have changed the law with respect to this defence not only in the context of section 163.1, but also under section 163's prohibition on obscenity. By rejecting the community standards test set out in *Langer*[4] and affirming the harm test set out in *Butler*,[5] the Court suggests a more objective determination of "artistic merit." This modification brings the test into accord with current *Charter* principles that value the freedom of nearly any expression so long as it does not pose a risk of significant harm to society. Looking at the path that the Court took provides us with some important insights about the relationship between freedom of expression, the harm principle and the idea of artistic merit.

CONSTITUTIONAL RIGHTS AND HARM

Charter rights and freedoms are interpreted consistent with their purposes.[6] Section 2(b) protects expression because of its value in the search for truth, in the promotion of participation in social and political decision-making, and in individual development and self-fulfillment.[7] Given the breadth of these purposes almost any expression may have some value, and therefore, the Court has held all content and almost any form of expression are entitled to *Charter* protection.[8]

Recognizing the importance of rights, the *Sharpe* decision adopts *Butler*'s notion that only a "reasoned

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1 [2001] S.C.J. No. 3, rev'g (1999), 175 D.L.R. (4th) 1 (B.C.C.A.), which had aff'd (1999), 169 D.L.R. (4th) 536 (B.C.S.C.) [hereinafter *Sharpe*]. Sharpe was remitted for trial on all charges.

2 R.S.C. 1985, c. C–46, as am. 1993, c. 46, s. 2. Relevant portions of the section are set out below:

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

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

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or

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

(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.

(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.

3 Section 163.1 of the *Criminal Code*, unlike section 163 upheld in *R.* v. *Butler* (1992), 89 D.L.R. (4th) 449 (S.C.C.) [hereinafter *Butler*], prohibits simple possession of the material. This extension to private possession led the British Columbia courts to conclude that the interference with free expression was more egregious, and could not be justified under section 1 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. While it has been argued that free expression protects only communicative activities and not private possession, in *Sharpe*, the majority held that "freedom of thought, belief, opinion, and expression" extends to the possession of expressive materials, which "allows us to understand the thought of others or consolidate our own thought." *Supra* note 1 at para. 25.

4 *Infra* note 25.

5 *Supra* note 3.

6 *Hunter* v. *Southam*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

7 *Quebec (Attorney General)* v. *Irwin Toy Ltd.*, 58 D.L.R. (4th) 577 at 612 (S.C.C.) [hereinafter *Irwin Toy*].

8 *Ibid.*

apprehension of harm" could justify infringing the freedom of expression.[9] The majority of the Court[10] used both interpretive and remedial instruments to conform the child pornography legislation to the harm principle. First, it held that the child pornography offence could be kept substantially within constitutional limits by a narrow reading of various terms of the provision.[11] In the same vein, a liberal approach should be taken to the statutory defences.[12] As a result of this interpretive approach, the majority concluded that, subject to two "peripherally problematic" applications,[13] only expression that is reasonably associated with harm to children would result in criminal liability. The Court then narrowed the scope of the prohibition to avoid the problematic applications. Firstly, the legislation would not apply in the case of a person who created such materials solely for his or her personal use. Secondly, it would be inapplicable in the case of "a teenager … 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."[14]

It was argued in *Sharpe* that child pornography may "change possessors' attitudes in ways that makes them more likely to sexually abuse children."[15] The evidence in support of this harm was "not strong," but it "support[ed] the existence of a connection."[16] It was also argued that child pornography may fuel fantasies of pedophiles and incite them to commit unlawful acts. As to the evidence of this harm, McLachlin C.J.C. commented:[17]

> 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.

With regard to some forms of harm arising from some forms of child pornography the evidence is much stronger. Where children are employed in the production of child pornography, there is a direct link between the material and harm to children.[18] But this proven connection to harm cannot justify the full breadth of section 163.1's definition of child pornography, which extends to all forms of "visual representation" of persons "depicted" as children, and "any written material or visual representation that advocates or counsels" criminal sexual activity with children. For all aspects of the law to constitute justifiable limitations on free expression, as the

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9 *Butler, supra* note 3 at 504; *Sharpe, supra* note 1 at para. 85.

10 *Sharpe, supra* note 1, per McLachlin C.J.C., Iacobucci, Major, Binnie, Arbour and LeBel JJ. concurring. L'Heureux-Dubé J., Gonthier and Bastarache JJ. concurring, interpreted the provision more broadly and would have upheld it without exception.

11 *Ibid.* The potential scope of section 163.1 was confined by narrow interpretations of the terms "explicit sexual activity" (interpreted as "intimate sexual activity represented in a graphic and unambiguous fashion" (*ibid.* at para. 49)); "dominant characteristic" and "sexual purpose" (whether a "reasonable viewer, looking at the depiction objectively" would perceive the depiction as "intended to cause sexual stimulation to some viewers" (*ibid.* at para. 50)); and "advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act" (*ibid.* at para. 54) (not a "mere description," but material that "sends the message that sex with children can and should be pursued" (*ibid.* at para. 56)). These interpretations exclude more extreme examples of overreaching, such as pictures of children kissing, family photos of naked children, anthropological works and political advocacy to lower the age of consent.

12 The defences of "artistic merit," "educational, scientific or medical purpose," and "public good," should all be construed liberally (*ibid.* at para. 60, with details following at paras. 61–71).

13 *Ibid.* at para. 111.

14 *Ibid.* at para. 110. These were excluded from the scope of the law through the remedial approach of upholding the law in its general application, while reading in exceptions for the problematic situations (*ibid.* at para. 115). This involves an extension of the remedy of reading in, but essentially the approach adopted is one I have supported before, arguing that it follows from established principles in the jurisprudence, including the "reasoned apprehension of harm" test (*Sharpe, supra* note 1 at para. 85, citing *Butler, supra* note 3 at 504) and the requirement to interpret legislation, to the greatest extent possible, in conformity with the Constitution (*ibid.* at para. 33, citing *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038 at 1078, among other authorities).

15 *Sharpe, supra* note 1 at para. 87.

16 *Ibid.* at para. 88.

17 *Ibid.* at para. 89.

18 In addition, the Court held that there was "clear and uncontradicted" evidence that child pornography may be used by paedophiles to show to children as a part of a "grooming" or "seduction" process (*ibid.* at para. 91). Thus, it seems that even material that was not created using children and consequently would not be directly harmful, could still pose a reasoned apprehension of harm.

This is in contrast to the American approach. Under the *Child Pornography Prevention Act of 1996*, (Pub. L. No. 104–208, & 101(a), 110 stat. 3009–26) 1982, child pornography is more narrowly defined than under s. 163.1, as it is limited to pornography that involves actual children in its production or, since 1996, that appears to involve actual children (computer-"morphed" or "virtual" child pornography). However, no defence is provided for works of artistic merit. The law as it stood before 1996 withstood a First Amendment challenge in *New York* v. *Ferber*, 458 U.S. 747 (1982) at 766–74. See also *Osborne* v. *Ohio*, 495 U.S. 103 (1990) upholding the prohibition of simple possession of this type of child pornography. The fate of the provisions regarding virtual child pornography has not been determined. They were upheld in *U.S.* v. *Hilton*, 167 F. 3d 61 (1st Circ. 1999) and *U.S.* v. *Acheson*, 195 F. 3d 645 (11th Circ. 1999), but struck down in *Free Speech Coalition* v. *Reno*, 198 F. 3d 1083 (9th Circ. 1999); cert. granted 121 S.Ct. 876.

Court held that they do,[19] attitudinal harm and the attendant reasoned apprehension of harm test must be brought into the equation.

The reasoned apprehension of harm test does provide a degree of protection for free expression. But, alone, it is insufficient. Consider the application of the test to political expression. Were we to permit the censorship of political expression that is "unpopular, distasteful or contrary to the mainstream"[20] on the basis that such expression might change attitudes and lead to conduct perceived by the mainstream to be harmful, a central purpose of section 2(b) would be frustrated. Under both the obscenity and child pornography offences, a defence for works of artistic or literary merit is crucial in ensuring that only expression "far from the core" of section 2(b) is affected.[21] This defence, which guarantees that expression that "rests at the heart of freedom of expression values"[22] is shielded from liability, is the subject matter of the next part of the paper.

ARTISTIC MERIT, OBSCENITY, AND THE COMMUNITY STANDARD OF TOLERANCE

In both *Butler* and *Sharpe*, artistic or literary merit was not directly raised, but the defence was nonetheless discussed in the course of comprehensive reviews of the challenged statutory provisions. In *Sharpe*, the majority, adverting to free expression concerns, adopted a very broad interpretation of the artistic merit defence to child pornography. It held that while artistic merit must be "objectively established,"[23] this does not require the demonstration of any particular level of meritorious performance, as it should not be only good or experienced or conventional artists who are shielded from criminal conviction. Rather, what is required is artistic quality or character:[24]

> [A]ny 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 ...

McLachlin C.J.C. went on to reject McCombs J.'s holding in *Ontario (A.G.)* v. *Langer*[25] "that material, to have artistic merit, must comport with community standards in the sense of not posing a risk of harm to children."[26] This, McLachlin C.J.C. argued, would add a qualification to the defence not stated by Parliament, and would "run counter to the logic of the defence, namely that artistic merit outweighs any harm that might result from the sexual representation of children in the work."[27]

The nature of artistic merit, and the relative significance of artistic merit and the harm to children that may be caused by child pornography, lay at the heart of the *Langer* case. Langer had displayed several oil paintings and pencil sketches of children engaged in sexual acts both with and without adults. An art critic reviewed his works in the *Globe and Mail* under the title, "Show Breaks Sex Taboo."[28] The review prompted a call to police, leading to an investigation and the seizure of the works.[29] A forfeiture hearing under section 164 of the *Criminal Code* followed,[30] during which extensive evidence and argument was presented on the issue of artistic merit.

McCombs J. held that although section 163.1 provides that "artistic merit" is an absolute defence, the term does not merely possess the meaning that would be assigned to it by the artistic community and must conform to a "notion of artistic merit [that] emerges from, and is bound up with, considerations of contemporary standards of community tolerance, based on the risk of

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19 Unless they fall within the private creation and possession exceptions described, *supra* notes 10 and 11 and accompanying text.

20 *Irwin Toy, supra* note 7 at 606, commenting on the scope of the free expression guarantee.

21 *Butler, supra* note 3 at 488. See also at 482.

22 *Ibid.* at 471, cited in *Sharpe, supra* note 1 at para. 61.

23 *Sharpe, supra* note 1 at para. 63. At paragraph 64, the Court noted that factors to be considered in the determination of artistic character include the intention of the creator, the form and content of the work including its "connections with artistic conventions, traditions or styles," the opinion of experts, and the mode of production, display and distribution.

24 *Ibid.*

25 (1995), 123 D.L.R. (4th) 289 (Ont. Ct. (Gen. Div.)); leave to appeal to S.C.C. denied 100 C.C.C. (3d) vi [hereinafter *Langer*].

26 *Sharpe, supra* note 1 at para. 65.

27 McCombs J. relied on *Butler, supra* note 3 in associating a community standard of tolerance with the artistic merit defence, and L'Heureux-Dubé J. indicated support for a common approach. McLachlin C.J.C. gave less weight to this concern, noting that the statutory defence under section 163.1 was conceptually different from the judicially-created defence under section 163, so that different approaches could be justified.

28 K. Taylor, "Show Breaks Sex Taboo" *Globe and Mail* (14 December 1993) C5, online <http://collections.ic.gc.ca/mercer/348.html> Taylor stated: "Eli Langer's show of eight paintings and various small pencil drawings ... breaks one of the last taboos: the sexuality of children. The paintings, gorgeously rendered in a duo-toned chiaroscuro of red and black, show children and adults in various forms of sexual play ... Langer's attitude toward these activities is ambivalent — they are depicted with both horror and fascination — but what is definitive about the paintings is that the children are not portrayed as victims but rather as willing participants."

29 *Langer, supra* note 25 at 296.

30 The nature of the forfeiture provisions and the hearing is discussed, *ibid.* at 297 and 327–29.

harm to society."[31] This interpretation was defended as consistent with the interpretative approach employed with regard to obscenity and because it would advance the statutory purpose of protecting children from harm.[32] To conclude otherwise, McCombs J. warned, would lead to the result that even "a scintilla of artistic merit" would justify "even the most harmful depictions."[33]

Notwithstanding the qualification placed on the artistic merit defence, McCombs J. concluded that Langer's "deeply disturbing"[34] paintings and drawings were not proscribed by section 163.1. The works had accepted artistic merit in the view of expert witnesses,[35] but this was not determinative. It was also necessary to consider the risk of harm to children. This would be clear if children were involved in the production of the material (they were not), and could also be proved if the material were of the type used by paedophiles to fuel fantasies. There were differing expert opinions on the latter point, with the defence expert testifying the drawings and paintings had a "frightening quality" and were unlikely to be so used. Relying on this evidence, McCombs J. held that a "realistic risk of harm" had not been proven.[36] Thus, harm, rather than artistic value, appeared to be the overriding consideration. This was indicated by McCombs J.'s comment that in the "rare circumstance where a depiction has merit in the view of artistic community, but nevertheless creates a strong risk of harm to children," the artistic merit defence would fail.[37]

McCombs J. justified the incorporation of community standards into the artistic merit defence, as consistent with the law relating to obscenity. The artistic merit defence to obscenity is largely a judicial creation, flowing from interpretation of the statutory requirements that "a dominant characteristic" of the subject material be "the undue exploitation of sex."[38] If the sexual aspect of a work is incidental to the exploration of an artistic or literary theme, this supports the conclusion that the dominant characteristic of the work is not the exploitation of sex. Alternatively stated, if the sexual aspect forms part of the "internal necessities" of a work that pursues an artistic or literary purpose, any exploitation is not undue. This interpretation was introduced in the 1962 *Brodie*[39] decision in which the Supreme Court of Canada considered the 1959 *Criminal Code* obscenity provision in the context of a prosecution of D.H. Lawrence's *Lady Chatterly's Lover*.[40] Justice Judson concluded that the book was not obscene because of its literary merit, and linked this holding to both of the statutory requirements of dominant characteristic and undue exploitation. The protection of artistic and literary freedom of expression was the underlying policy for this interpretation.[41] Recognizing the importance of expert witnesses in this context, Judson J. stated: "I can read and understand but at the same time I recognize that my training and experience have been, not in literature, but in law."[42] Justice Judson also linked the statutory requirement of "undueness" to the concept of community standards.[43] This, however, was described as a test that might be either additional or alternative to the internal necessities test, and not as a qualifier of artistic or literary merit.[44]

In the subsequent Supreme Court of Canada decisions that elaborated upon the community standards test, the relationship of the community standards test and the artistic defence was not resolved. Rather, another test of undueness, the "degrading or dehumanizing" test, was introduced and artistic merit was not argued.[45] However, the Manitoba Court of Appeal in *R.* v. *Odeon Morton Theatres Ltd.*,[46] holding that the film *Last Tango in Paris* was not obscene, relied on the film's artistic quality and its conformity with community standards of tolerance, without clearly distinguishing these two factors.[47]

In *Butler*, Sopinka J. reconciled the community standard of tolerance test with the more recently developed degradation or dehumanization test, holding that there is undue exploitation only in works whose dominant characteristic is the depiction of explicit sex combined with violent, degrading or dehumanizing treatment of persons. The depiction of explicit sex unaccompanied by such features is not undue, unless

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31 *Ibid.* at 308.
32 *Ibid.* at 311.
33 *Ibid.* at 313.
34 *Ibid.* at 298.
35 *Ibid.* at 306.
36 *Ibid.* at 304.
37 *Ibid.* at 314–15.
38 *Criminal Code, supra* note 2, s.161(1)(8).
39 *R.* v. *Brodie* (1962), 32 D.L.R. (2d) 507 at 527–28 (S.C.C.) [hereinafter *Brodie*].
40 *Brodie, ibid.* note 39 at 524. Justice Judson wrote for only four of the five majority justices, but his decision has been authoritatively adopted in subsequent Supreme Court of Canada decisions, including *Butler, supra* note 3 at 463.
41 *Supra* note 39 at 528.
42 *Ibid.*
43 *Ibid.* at 528–29, adopting the approach in *R.* v. *Close*, [1948] V.L.R. 445.
44 *Ibid.* at 529: "whether the question of 'undue exploitation' is to be measured by the internal necessities of the novel itself or by offence against community standards, my opinion is firm that this novel does not offend."
45 *R.* v. *Dominion News & Gifts (1962) Ltd.*, [1964] 3 C.C.C. 1 (S.C.C.), adopting the dissenting reasons of Freedman J.A. in [1963] 2 C.C.C. 103 (Man. C.A.); and *Towne Cinema Theatres Ltd.* v. *The Queen* (1985), 18 D.L.R. (4th) 1 at 10 (S.C.C.) [hereinafter *Towne Cinemas*].
46 (1974), 45 D.L.R. (3d) 224 (Man. C.A.) [hereinafter *Odeon Theatres*]. This case was referred to with approval by the Supreme Court of Canada in *Butler*.
47 *Ibid.* at 233, 235.

children are employed in the production of the material.[48] The rationale for bringing these tests together was that contemporary Canadian society would tolerate exposure to sexually explicit material except that which causes harm in the sense that it "predisposes persons to act in an antisocial manner as, for example, the physical or mental mistreatment of women by men or, what is perhaps debatable, the reverse."[49]

Justice Sopinka went on to deal with the relationship of the artistic defence to these other tests:[50]

> How does the "internal necessities" test fit into this scheme? The need to apply this test only arises if a work contains sexually explicit material that by itself would constitute the undue exploitation of sex. … The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole.

This is a clear statement that the artistic merit defence should in some way be qualified by the community standard of tolerance. How this is to occur requires closer examination. First of all, the artistic merit defence is not reached until the community standard of tolerance has been, at least on a *prima facie* basis, exceeded. Under *Butler* this means that the material is of a type that is believed by the national community to be likely to cause harm by predisposing persons to engage in antisocial conduct — in other words that the material combines depictions of explicit sex with violent, degrading or dehumanizing treatment. It seems unlikely that the community would come to a different conclusion about the potential harmfulness of such material on the basis that it has artistic or literary merit,[51] but the Court does not indicate that the initial assessment as to harmfulness must be reversed for the artistic defence to succeed. Rather, the Court assumes that *the community is prepared to tolerate a risk of harm regarding art and literature* that it would not tolerate regarding other material. This assumption has not been empirically established or even tested. However, it is consistent with the *Brodie* interpretation of Parliament's intention underlying the definition of obscenity: "[t]he section recognizes that the serious-minded author must have freedom in the production of a work of genuine artistic and literary merit."[52] It is also consistent, as I have shown, with the Court's interpretation of the purposes underlying section 2(b) of the *Charter*.

THE APPROPRIATE ROLE FOR COMMUNITY STANDARDS

Even if it is accepted that a risk of harm does not outweigh artistic merit, under sections 163 and 163.1 and the *Charter*, this does not necessarily mean that community standards should play no role. It seems clear that there must be some objective quality to artistic merit. The subjective intention of the creator is a necessary component when determining artistic merit, but is not sufficient, as merely "calling oneself an artist" should not constitute a defence.[53] Arguably, a community standard of tolerance[54] may provide a workable approach to the ascertainment of artistic merit in an objective sense. However, close examination supports the view that the community standard test is not well suited to dealing with questions of artistic merit.[55] From a theoretical perspective, reference to a common or average standard is out of place in this context. The need to protect artistic or literary works must extend to works that are "unpopular, distasteful or contrary to the mainstream."[56] The reading or viewing tastes of the majority have not been relied upon to defend and likely would not have protected from criminal liability many literary or artistic works of great merit, even masterpieces. As stated by Frederick Schauer, commenting on the "literary-value test" in American obscenity law:[57]

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48 *Butler*, *supra* note 3 at 471.

49 *Ibid.* at 470. The "harm" requirement does not signal a return to *Hicklin*'s "tendency to deprave" test (*infra* note 51). As elaborated in *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at paras. 47, 56–57, 61–62) the new test is based on a reasonable apprehension of harm, not on a violation of moral standards.

50 *Ibid.* at 471.

51 The community might come to the same conclusion as courts applying the *Hicklin* test. Under that test, in which obscenity was that which had a "tendency ... to deprave and corrupt those whose minds are open to such immoral influences," the innocent or artistic purpose of the author was not relevant: see *R.* v. *Hicklin* (1868), L.R. 3 Q.B. 360 at 372–73, 377; *Brodie*, *supra* note 39 at 530.

52 *Supra* note 39.

53 *Sharpe*, *supra* note 1 at para. 232. See also paras. 63, 64.

54 *Towne Cinemas*, *supra* note 45 at 15.

55 This conclusion applies equally with regard to the *Criminal Code* obscenity provision as with regard to the child pornography offence, because it does not depend on the statutory formulation of the defence, but on issues relating to the theoretical basis for and functional operation of the community standard test which is an element of both offences.

56 *Irwin Toy*, *supra* note 7 at 606. Citing this concern, the United States Supreme Court, in *Pope* v. *Illinois*, 481 U.S. 497 (1987) at para. 11, rejected the application of a community standards test to the determination of merit, and found instead that "[t]he proper inquiry is not whether an ordinary member of a given community would find serious literary, artistic, political, or scientific value ... but whether a reasonable person would find such value in the material." The Court added that the "reasonable person" may find valuable a work believed to be such by only a minority of a population (*ibid.*).

57 F. Schauer, *The Law of Obscenity* (Washington, D.C.: Bureau of National Affairs, 1976) at 144.

> [T]he literary-value test embodies implicitly the concept that the purpose of the obscenity laws is not to "level" the available reading matter to the majority or lowest common denominator of the population ... It is obvious that neither *Ulysses* nor *Lady Chatterley's Lover* would have literary appeal to the majority of the population ... Yet this has not prevented the courts from finding literary merit in these and other works which clearly have an intellectual appeal to only a minority of the population.

One can object that this theoretical concern arises only if a community standard of taste, rather than tolerance, is applied. But here a functional problem regarding the community standard test arises. A review of case law demonstrates that there is a significant risk, in applying the community standard test to a question of artistic merit, that an adjudicator will end up applying a standard of taste. The community standard test effectively invites an adjudicator to reject expert evidence of artistic merit, and to substitute his or her view of the community standard of tolerance. There is unlikely to be any compelling evidence of the community standard of tolerance for artistic works. An adjudicator is thus left with little guidance from the evidence, and with little to substitute for expert opinion other than his or her subjective reaction.[58]

R. v. *Cameron*[59] provides an example. The case arose out of a showing of sixty drawings by twenty-two artists under the title "Eros 65." Expert witnesses agreed that the works possessed artistic merit.[60] Nonetheless, the majority judgment held that the drawings were obscene as they exceeded the community standard of tolerance.[61] The majority placed little or no weight on the expert evidence, complaining that the experts were too concerned with "form" and not sufficiently concerned with the sexual content of the drawings.[62] The majority concluded, by referring to "the drawings themselves," that they were "of base purpose and their obscenity [was] flagrant."[63]

Cameron included a lengthy dissenting judgment by Laskin J.A. (as he then was), which was highly critical of the majority, and which has since received favourable comment by the Supreme Court of Canada.[64] The dissent noted that a work should be considered as a whole, including its composition, method and manner of execution, as well as its subject matter,[65] and that the standard applied should be one of tolerance, not taste. The dissent also commented on the importance of expert evidence:[66]

> A standard must come from experience of art; it cannot rise from a vacuum if it is to be something more that a personal reflex ... [W]e are concerned with changing criteria, with movement in public taste that takes place under the push, initially at any rate, of artists themselves and their sponsors.

Therefore, a court *must* weigh expert evidence, and *must* be careful not to replace expert opinion with a personal assessment:[67]

> [E]ven the most knowledgeable adjudicator should hesitate to rely on his own taste, his subjective appreciation, to condemn art. He does not advance the situation by invoking his right to apply the law and satisfying it by a formulary advertence to the factors which must be canvassed in order to register a conviction.

The problem with the community standards test as applied to artistic merit is that it deflects attention from the expert evidence, which should be accorded significant weight,[68] and provides a vague substitute regarding which little or no relevant evidence is available. This creates a significant likelihood that adjudicators will be influenced by their lack of appreciation for a particular work[69] or for

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58 This can occur outside the context of artistic merit, as well. The Supreme Court of Canada has held that, while evidence as to the community standard of tolerance (such as rulings by censor or classification boards) is not conclusive, it should only be rejected for "good reason." Adjudicators must beware not to apply their own opinions about "tastelessness or impropriety" for their assessment of the community standard of tolerance: *Towne Cinemas*, *supra* note 45 at 19–20.

59 (1966), 58 D.L.R. (2d) 486 (Ont. C.A.) [hereinafter *Cameron*]. Another example, from the same year, is found in *R.* v. *Duthie Books Ltd.* (1966), 58 D.L.R. (2d) 274 (B.C.C.A.) [hereinafter *Duthie Books*] dealing with a critically-acclaimed book, *Last Exit to Brooklyn* by Hubert Selby (New York: Grove Press, 1964).

60 In *Cameron*, *ibid.* at 515–16, Laskin J.A. (as he then was), dissenting, noted that the expert evidence left "not the slightest doubt" that the drawings had artistic merit. The majority did not suggest that there was any conflict in the evidence on this point.

61 *Ibid.* at 497.

62 *Ibid.* at 496.

63 *Ibid.* at 497.

64 An appeal to the Supreme Court of Canada based on Laskin J.A.'s dissent was refused, the Court holding that the dissent did not raise a question of law "in a strict sense." An application for leave to appeal was also denied: (1967) 62 D.L.R. (2d) 328. Some 18 years later, in *Towne Cinemas*, *supra* note 45, Dickson C.J.C., while disagreeing that expert evidence as to obscenity or community standards is required, did agree with Laskin J.A.'s statement, presented in the text, *supra* note 60, that adjudicators should hesitate to substitute their own opinions of the value of a work for that of the expert witnesses.

65 *Cameron*, *supra* note 59 at 512.

66 *Ibid.* at 514.

67 *Ibid.* at 515.

68 *Supra* note 60 and accompanying text.

69 There seems to be little other explanation for *Duthie Books*, *supra* note 59, in which there was uncontradicted expert evidence of literary merit and of the importance of the sexual aspects to the

art generally. For example, the majority in *Cameron* suggested that any artistic objectives relating to the depiction of lines or the interplay of shade and light could be achieved by drawing human figures engaged in other activities![70]

CONCLUSION

The question of artistic merit in relation to pornography has been reviewed by the Supreme Court in a number of cases over the years. The watershed decision in relation to the law of obscenity came in the *Butler* case. It limited obscenity to explicit depictions of sexual activity combined with violent, degrading or dehumanizing treatment of persons, and provided that even this narrowed category of material could be shielded from liability under section 163 through the artistic merit defence. In much the same way, *Sharpe* is a defining case. The Court's interpretation of child pornography and artistic merit narrows the potential scope of section 163.1.

There is much to commend in the *Sharpe* approach to artistic merit. Whether the decision is based on the view that the community is prepared to tolerate a risk of harm regarding art and literature that it would not tolerate regarding other material, or on the view that artistic merit carries more constitutional weight than does a risk of harm, the importance the Supreme Court of Canada assigned to artistic expression appropriately reflects *Charter* imperatives. Some types of expression are particularly valuable, from a constitutional perspective, including an "artist's attempt at individual fulfillment."[71] If expression of this degree of significance is to be restricted, it should not be because of a risk of harm only, but on the basis of proven harm. This would not make artistic expression, or other valuable forms of expression such as political expression, immune from all regulation, but it would make such expression immune from regulation based on only a reasoned apprehension of harm. Where proven harm exists, as when children are employed in the production of child pornography, even the significant *Charter* value of artistic expression could be outweighed. But with a broad definition of child pornography, and reliance on the reasoned apprehension of harm test, a defence for material of literary or artistic merit is a constitutional necessity.

But caution is still warranted. The Court was commenting without the benefit of a factual context,[72] and the precise boundaries of the defence still need elaboration. For example, in its effort to ensure that the defence is available to all sincere artists and not only to those who are successful or conventional, the majority described the defence as extending to "any objectively established artistic value, however small."[73] This definition contains competing messages, and is open to misinterpretation. Artistic merit must have objective substance; subjective intention is necessary but not sufficient. But the defence must not be confined to only those works that appeal to majoritarian tastes. The required level of artistic value must be set "low" enough to provide room for artistic exploration, so that public tastes may move and minority tastes may be allowed expression. The danger is that, if the bar is set too low, the concept of an objective quality may be lost, with only an idiosyncratic or subjective standard remaining. After all, it is likely that "there is someone, and perhaps even some 'expert,' who will see literary merit in anything."[74]

It all comes back to balance. Although the child pornography law is a reasonable and justifiable limit on free expression in most of its applications, it must accommodate individual privacy interests.[75] There must also be freedom for "the serious-minded" artist or author "in the production of a work of genuine artistic and literary merit."[76] The application of the law to the targeted "hard core, low value" material is constitutional and pursues important aims, seeking to protect vulnerable children from serious abuse. These aims are worth pursuing, though we must also remain sensitive to countervailing concerns, and though the pursuit will inevitably require hard decisions.❑

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novel's theme. Nonetheless, the Court held, without reference to evidence or further explanation, that "any literary or artistic merit ... and any sincere and valid purpose ... are clearly submerged by the undue and decided over-emphasis of the objectionable characteristics" (*ibid.* at 282).

70 *Supra* note 59 at 499–500.

71 *Butler*, *supra* note 3 at 485.

72 Noting that the defence had not been raised in the courts below and was not addressed in the evidence, L'Heureux-Dubé J. suggested that its "boundaries" should not be determined (*Sharpe*, *supra* note 1 at para. 232).

73 *Ibid.* at para. 63.

74 Schauer, *supra* note 57 at 144. The difficulty involved in arriving at an appropriate description of the requisite level of artistic merit is apparent in American jurisprudence. See *ibid.*

75 J. Ross, "*R.* v. *Sharpe* and Private Possession of Child Pornography" (2000) 11:2 Constitutional Forum 50.

76 *Brodie*, *supra* note 39 at 528.

SHARPE'S PERVERSE AESTHETIC

Shannon Bell

INTRODUCTION: SHARPE AND ART

Robin Sharpe[1] was charged with possession of child pornography under section 163.1 of the *Criminal Code*.[2] He argued that the section violated his freedom of expression under the *Canadian Charter of Rights and Freedoms*.[3] The Supreme Court of Canada found that the provision prohibited the possession of visual representations that a reasonable person would view as depictions of explicit sexual activity with a person under the age of eighteen. The Court found that the sexual nature of the representations must be determined objectively. That is, it must be the "dominant characteristic."[4] In addition, the Court found that the section prohibited possession of written or visual materials that actively induce or encourage sexual acts with children.[5]

Leaving the task of distinguishing "art" from "pornography" to the courts is problematic on three levels. Firstly, the Supreme Court's definition of possession of pornography contradicts the very definition of art because it restricts the possession of self-created pornographic works to those intended for the creator's eyes only. The importance of the ability of an artist to share his work with others is ignored. Secondly, because the courts analyze these works in the context of pornography, rather than other artistic works with similar themes and elements, they are ill-prepared to recognize the artistic merit of such pieces. Finally, a literary analysis of Sharpe's work clearly demonstrates its artistic merit.

FOR ONE'S OWN PERSONAL USE VERSUS FOR ONE'S EYES ALONE

> *Bell: What does the court's decision to allow the possession of self-created materials (written and visual) for one's own use mean in terms of your own work?*
>
> *Sharpe: The exceptions are meaningless. [They] were based on a false premise in the case of written material that the author does not and never intends to show his/her material to anyone else; this is not how writers operate. Most writers and artists seek the perusal of friends and others they respect.*
>
> *Bell: Do you think it is meaningless for almost everyone?*
>
> *Sharpe: Except for lawyers and vanilla civil libertarians, yes. It is a token gesture.*
>
> *Bell: A token gesture to what?*
>
> *Sharpe: Freedom of expression.*
>
> *Bell: Where does possession end and possession for the purpose of distribution begin?*
>
> *Sharpe: Possession should include private showing and communication. If I have something and I want to show it to you then that is part of possession. The private sharing of things should not be considered distribution.*[6]

In *Sharpe* the Supreme Court of Canada found that the *Criminal Code* provisions encompass two circumstances in which there is no potential harm to children and therefore read in two exceptions to the offence of possession of child pornography. One exception removed the criminal sanction from the possession of written or visual material, that, while

1 *R.* v. *Sharpe*, [2001] S.C.J. No. 3 [hereinafter *Sharpe*].
2 R.S.C. 1985, c. C-46, as am. S.C. 1993, c. 46, s. 2.
3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].
4 *Sharpe*, *supra* note 1 at para. 50.
5 *Ibid.* at para. 56.
6 Interview with Robin Sharpe (14–16 February 2001).

meeting the definition of child pornography, was created by the accused alone and held for his or her own personal use.[7]

There is very hastily added "for his or her eyes alone" to this exception.[8] There is a significant difference between the phrases for one's "own personal use" and for one's "eyes alone." Personal use includes unpublished private showing and communication; for his or her eyes alone means no one else sees the material. The latter nicely fits the example given, a teenager's confidential diary; but it is highly unlikely that a teenager's diary would come under scrutiny anyway. The other material that fits into the first category is "any other written work or visual representation confined to a single person in its creation, possession and intended audience."[9]

What if you were an author who has read dissenting works of philosophy and literature such as Marquis de Sade's *The 120 Days of Sodom*,[10] Algernon Charles Swinburne's *The Flogging Block: An Heroic Poem*,[11] and William Burroughs' *The Wild Boys*,[12] all of which, in unpublished form, would fall under the new and specific artistic merit defence for child pornography? What if you felt that your written material had similar merit in the same perverse aesthetic? You as a writer would very likely make a number of copies of your manuscript and distribute it to friends and fellow authors to solicit their critical assessments; you as an author might send the manuscript to potential publishers to have it reviewed. This is precisely what Robin Sharpe was doing when the police intercepted ten computer-disk copies of his manuscript *BOYABUSE*, in 1995. Very quickly the reviewers became court professionals — police, medical doctors, a psychiatrist and a couple of government censorship bureaucrats — whose task it is to assess the child pornography content of a work. Once your work is accused of being child pornography, your readership is narrowed to those employed by the criminal justice system; criminal assessors are not known for having a background in literature, let alone in a perverse literary aesthetic.

The problem with the addition of "for his or her eyes alone" to the personal use exception is that, although it allows for a broadened understanding of artistic merit, the people reading self-created expressive material suspected of being child pornography are those in the criminal justice system whose job it is to determine if the work is child pornography. They are experts like Dr. Peter Collins, who claims to objectively "as a forensic psychiatrist, [be able to] diagnose someone as being a pedophile solely based on the fact that they have fantasies."[13] In this context they will perhaps see only sexual acts that involve three-year old children, violence against children, murder of children. Does de Sade's work "advocat[e] the commission of criminal offences against children"?[14] Does his work "actively advocate or counsel illegal sexual activity with persons under the age of 18"?[15] Of course, if a police official trained in determining child pornography, someone like Noreen Waters, who under cross-examination admitted, "I don't read the material other than as part of my job,"[16] were given a computer disk of de Sade's work, all she would see would be child abuse.

There is another difficulty with this exception. Artistic merit is assessed after material has been charged as child pornography. This means a writer, rather than being simply a failed author, could potentially be subject to imprisonment should a nervous acquisitions editor at a press pass what she deems to be an unmeritorious manuscript containing depictions of explicit child sexuality on to Project P(ornography) or CLUE (Coordinated Law Enforcement Unit), Pornography Portfolio. The "for his or her eyes alone" qualification serves to prohibit unpublished authors who write about childhood sexuality from ever showing their manuscripts to anyone.

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7 In contrast to the Court's problematic articulation of the first exception, the second exception reflects a more liberal approach and actually excludes more images from the definition of child pornography than it seems at first. The second exception protects the recording of lawful sexual activity, provided "[t]he person possessing the recording … personally recorded or participated in the sexual activity in question" (*Sharpe, supra* note 1 at para. 116). The example the Court provides, "a teenage couple creating and keeping sexually explicit pictures featuring each other alone or together engaged in lawful sexual activity," (*ibid.*) is quite innocuous, as such examples tend to be. The potential radicalism of the second exception is obvious once more controversial lawful sexual activity is entertained. For example, it seems that I can possess a picture of a fourteen-year-old sexual partner or friend playing with her or his genitals, providing he/she agrees to be photographed and the photograph is not shown to anyone else; that is to say, no third party will ever see it — it remains for our "personal use only" (*ibid.*).

8 *Ibid.*

9 *Ibid.*

10 Marquis de Sade, *The 120 Days of Sodom*, trans. A. Wainhouse & R. Seaver (New York: Grove, 1966).

11 A. Swinburne, *The Flogging Block: An Heroic Poem. By Rufus Rodworthy, Esq. (Algernon Swinburne). With Annotations by Barebum Birchmore (Bertram Bellingham)* (London: 1777) [On file at the British Library, Ashley 5256]. Cited in I. Gibson, *The English Vice: Beating, Sex and Shame in Victorian England and After* (London: Duckworth, 1978).

12 W.S. Burroughs, *The Wild Boys* (New York: Grove Press, 1971).

13 *R.* v. *Sharpe*, [1999] B.C.J. No. 1555 (C.A.) (*voir dire* transcripts) at 64.

14 *Sharpe, supra* note 1 at para. 72.

15 *Ibid.* at para. 73.

16 *Supra* note 13 at 100.

ARTISTIC MERIT IN *SHARPE*

> *Were my writings a threat to children, adolescent boys in this case? I know most people would find the tales shocking, disgusting and highly offensive but would anyone be tempted to act out harmfully as a result of misinterpreting my BOYABUSE stories? I certainly did not think so although I am aware that works of great moral authority such as the Bible have had that unfortunate effect ... The stories contain much that would be considered obscene and abusive but they were my stories and I felt they had some literary merit.*[17]

In *Sharpe*, the Court noted that the *Criminal Code* prohibition on possession of child pornography provided a defence for possession of materials with "artistic merit."[18] Finding that "artistic merit" should be determined objectively and include "any expression that may reasonably be viewed as art,"[19] they established that "[a]ny objectively established artistic value, however small, suffices to support the defence."[20] Chief Justice McLachlin indicated that "art includes the production, according to aesthetic principles of works of the imagination, imitation or design."[21]

The Court rejected the interpretation of community standards and harm in *Langer*[22] on the ground that "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."[23] They noted that "[t]o restrict the artistic merit defence to material posing no risk of harm to children would defeat the purpose of the defence."[24] The Court stated that "Parliament clearly intended that some pornographic and possibly harmful works would escape prosecution on the basis of this defence."[25]

In the context of section 163.1 of the *Criminal Code*, the Court's definition of artistic merit is unique on two counts. First, the Court privileges artistic merit over potential harm to society. Child pornography can be obscene, harmful and at the same time, art. Second, artistic merit is understood "differently from that developed under the obscenity provisions."[26] Chief Justice McLachlin states "the language of 'internal necessities' and the logic of 'either obscenity or art' [is] inapposite."[27] While leaving the determination of artistic merit to the trial judge, the Court suggests eight possible criteria to be taken into account when assessing artistic merit.[28] It is these criteria, and not the test of whether the work is predominately a sexual portrayal or whether it has a wider artistic purpose (the internal necessities test), that are determinant in the artistic merit defence.

When evaluating the artistic merit of a piece of literature, it must be remembered that reading is a political act: people read from positions in the world, whether these positions are acknowledged or not. How the reader produces meaning is the result of an interaction between all the texts he/she has read in the past, his/her positionality in the world, and the text of the moment. A number of meanings can be appropriated and read from the same text; the meaning of the text is produced by the reader through a process of grafting: the reader's meaning is grafted onto the text at hand.[29] The accused's body of work, the work charged and the work not charged, must be looked at simultaneously, and the accused's charged work must be placed inside the broader context of writing or images of a similar aesthetic genre. For example, fictive works of the imagination need to be situated in relation to other similar fictive works of the imagination by other authors; one needs to assess works of the imagination that involve children, explicit sexual activity and sadomasochistic practices in the context of other published works of the imagination which include the very same themes.

The question applied to written material in order to determine if it is child pornography is does it "advocate or counsel sexual activity with a person under the age of eighteen years."[30] The test is "whether the material, viewed objectively, advocates or counsels,"[31] whether it can be seen as "'actively inducing' or encouraging" sexual offences with children.[32]

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17 R. Sharpe, *R.* v. *Sharpe: A Personal Account,* [unpublished, on file with the author] at 3 [hereinafter "A Personal Account"].

18 *Sharpe, supra* note 1 at para. 61.

19 *Ibid.* at para. 63.

20 *Ibid.*

21 *Ibid.* at para. 64. For a discussion of the interplay in the courts between artistic merit and the community standards test, see June Ross' contribution to this issue, "*R.* v. *Sharpe* and the Defence of Artistic Merit."

22 *Ontario (A.G.)* v. *Langer* (1995), 123 D.L.R. (4th) 289 (Ont. Gen. Div.), leave to appeal to S.C.C. refused 100 C.C.C. (3d) vi.

23 *Sharpe, supra* note 1 at para. 65.

24 *Ibid.*

25 *Ibid.*

26 *Ibid.* at para. 67.

27 *Ibid.*

28 These criteria are: 1) "The subjective intention of the creator," 2) "[t]he form … of the work," 3) [t]he "content of the work," 4) the work's "connections with artistic conventions, traditions or styles," 5) "[t]he opinion of experts on the subject," 6) "the mode of production," 7) "the … mode of display," and 8) "the … mode of distribution." *Ibid.* at para. 64.

29 See S. Bell, *Reading, Writing and Rewriting the Prostitute Body* (Bloomington & Indianapolis: Indiana University Press, 1994) at 7–8.

30 *Supra* note 2, s. 163.1(1).

31 *Sharpe, supra* note 1 at para. 56.

32 *Ibid.*

> "He has a small boy shit upon the paten, and he eats this while the boy sucks him."[33] "He only flogs boys aged from fourteen to sixteen and he has them discharge into his mouth afterward. Each is warmed by one hundred lashes; he always sees two at a sitting."[34] "He wishes to *depucelate* [deflower] none but little girls between the ages of three and seven, in the bum. This is the man who had her *pucelage* [virginity] in this manner; she was four years old, the ordeal caused her to fall ill, her mother implored this man to give aid, money, But his heart was of flint..."[35] "He buries the muzzle of a shotgun in the boy's ass, the weapon is loaded with buckshot; and he has just finished fucking the lad. He pulls the trigger; the gun and his prick discharge simultaneously."[36]

Clearly, these words of de Sade cannot be taken as counselling or advocating these sadistic sexual activities. This is obvious because they are so extreme; they are detailed fantasies. With de Sade, readers have been given a context; great philosophers such as Simone de Beauvoir, Pierre Klossowski, Maurice Blanchot, Georges Bataille, Max Horkheimer and Theodor Adorno have contextualized his writing as philosophy *vis-à-vis* the French Revolution;[37] de Sade's writings are in university libraries and are taught in university literature, philosophy and political theory courses.

The role and testimony of the Crown experts present a serious problem: if a photo of someone under eighteen includes an erect penis, the eyes of the expert are trained to immediately focus on the sex organ or anal region, because their job is to determine whether these regions constitute "the dominant characteristic of the representation."[38] It is, perhaps, their task, the task of determining the dominant characteristic, that isolates, freezes and thus fetishizes the sex organ even though the semi-erect or erect penis is in the presence of a total body — face, knees, hair, arms, toes, torso, thighs, feet, neck, hands. Not only does the Supreme Court decision refrain from establishing criteria for determining what constitutes the "dominance" of a characteristic, but even refrains from establishing "the meaning of 'sexual organ'"[39]

Sharpe's writing was assessed by Detective Noreen Waters (the police expert witness for the Crown), and two individuals from the provincial Film Classification Branch. Assessors like these individuals read from the position of censorship and detection of child abuse, reading with such mantras as "all sexually explicit depictions of children, youths under eighteen are child pornography." Of course, a text that combines child sexuality in which the children have agency with sadomasochistic ritual rites of endurance and flagellation is going to be considered "the cruelest pieces of writing I have ever read"[40] by someone like Mary-Louise McCausland, the Director of Film Classification for British Columbia, who, according to Sharpe's notes, states:[41]

> These stories convey, through a sense of the narrator's satisfaction, that the sexually violent acts being carried out both against the children and by the children are pleasurable, satisfying and beneficial for all involved. It is this theme, and the fact that the abuse of children is presented in all three cases (*Timothy and the Terrorist*, *The Rites at Port Dar Lan: Part One*, and *Tijuana Whip Fight*) as being nontraumatic, that led me to determine that these works of fiction counsel adult sex with children and are therefore child pornography as defined by section 163.1 of the Criminal Code.

Court system experts will never be able to see merit in writing like that of Robin Sharpe because they just don't have the context; of course, they can count the number of child–child and man–child sexual acts, but the only genre they have to contextualize that work is child porn. Sharpe's work, for a reader like myself, a reader schooled in the counter-psychoanalysis of Deleuze and Guattari, the classical literary sadism of de Sade, the more contemporary literary sadomasochism of George Bataille and the ethics of Emmanuel Levinas, is a masterpiece of sadistic compassion.[42] Perhaps Sharpe's intent was to create masturbatory material. Yet his writing is too complex, intricate, detailed and sophisticated; it draws on too many literary conventions to be merely masturbatory material. But then, as the *Sharpe* decision stipulates, "the subjective intention of

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[33] de Sade, *supra* note 10 at 581.

[34] *Ibid*. at 592.

[35] *Ibid*. at 599.

[36] *Ibid*. at 653.

[37] de Sade, *supra* note 10; Marquis de Sade, *The Complete Justine, Philosophy in the bedroom, and other writings*, trans. R. Seaver & A. Wainhouse (New York: Grove Press, 1965); G. Bataille, *Eroticism*, trans. M. Dalwood (San Francisco: City Light Books, 1986) at 269; M. Horkheimer & T. Adorno, *Dialectic of Enlightenment*, trans. J. Cumming (New York: Continuum, 1972).

[38] *Sharpe, supra* note 1 at para. 52.

[39] *Sharpe, supra* note 1 at para. 52. At para. 53, McLachlin C.J.C. suggests that "[p]rudence suggests leaving the precise content of 'sexual organ' to future case-law."

[40] "A Personal Account," *supra* note 17 at 8.

[41] *Ibid*.

[42] S. Bell, "Sadistic Compassion" (Learned Societies Conference, Canadian Political Science Association, Memorial University, St. John's, Newfoundland, 1997) [unpublished].

the creator will be relevant, although it is unlikely to be conclusive."[43]

SHARPE'S PERVERSE AESTHETIC

Kobena Mercer, writing on Robert Mapplethorpe's *Black Book*,[44] a photo book of black male nudes, identifies what he terms the perverse aesthetic.[45] The perverse aesthetic, in addition to being sexually explicit, contains a textual ambivalence that ensures the uncertainty of any one, singular meaning;[46] it is Sharpe's fivefold transgression of age, sadomasochism, homosexuality, race and sexual commerce that potentially disturbs the reader. According to conventional wisdom, the reader encountering such works must be revolted; one must voice one's disgust otherwise one could be mistaken for a pedophile. Sharpe uses the strategy of perversion in which the liberal humanist values of autonomy, self-possession, self-development, self-worth, individual freedom and empowerment are writ large, but on small bodies.

Sharpe's strategy, like de Sade's, of saying everything about what must be kept silent, steps outside the law — a law that, in the words of Southin J.A. of the British Columbia Court of Appeal, "bears the hallmark of tyranny."[47] What is Sharpe's crime? It is twofold: primarily it is the portrayal of "incorrect," improper oedipalization; it denies, overrides, the "proper" identity formation of the modern subject: individuation as a process that places the child in subordination to parental authority as preparation for later subordination to societal authority.[48] In Sharpe's work, the children are masters of their own bodies and souls; they are not oedipalized. "Oedipus informs us: if you don't follow the lines of differentiation daddy-mommy-me ... you will fall into the black night of the undifferentiated."[49] It is precisely here "in the black night of the undifferentiated," written in the broad daylight of the mythical and mystical "Port Dar Lan" that Sharpe's detailed fantasies take place. "The pervert ... resists oedipalization ... he\she has invented other territorialities to operate in."[50] For Sharpe, this other territory is the imaginary realm. De Beauvoir's observation of de Sade that "he attached greater importance to the stories he wove around the act of pleasure than to the contingent happening; he chose the imaginary,"[51] applies equally as well to Sharpe. However, Sharpe's libertine turn inward into his "beliefs, opinions, thoughts and conscience"[52] out of the necessity, brought about by the charging of his material, has been articulated with a libertarian political strategy that demands freedom of expression, particularly the right to concretize and possess, in tangible, material form, the intangibility of one's own thoughts, one's own fantasies.

Sharpe's second crime is not being Sadean enough; specifically he transgresses the great transgressor de Sade on two counts. On the first count, Sharpe violently disrupts de Sade's work from its point of excess: silence; that is "from the beyond of the bedchamber."[53] Sophie, in *The 120 Days of Sodom*, emerging from the closet, the offstage chamber, "uttered a piercing scream."[54] In his sadomasochistic writing, Sharpe, like Georges Bataille, is attempting to write the scream, the narration of the human exposed to pain. Sharpe, like Bataille, is concerned with the moment in which the self is torn open and exposed to what is other to it; the boundary between the self and other liquefy; in a sense Sharpe, in the tradition of Bataille, is delivering the words/feelings of those who remain speechless and thus are merely victims in de Sade's imaginary world. For de Sade there is no other as bounded being, only the sovereign man: but in Sharpe's writing this sovereign man comes apart as a bounded being when his partners in crime are boys with agency and not the silent child victims of de Sade. Sharpe is writing the scream as a combination of the will to laughter, "those moments ... that make one gasp," "moments when the ceaseless operation of cognition is dissolved,"[55] the moments privileged by Bataille, and the will to endure, the practice of the art of fortitude. Sharpe is combining play, laughter and fortitude; his boys are having fun with the men and with each other having sex and engaging in sadomasochistic activities. Victim and executioner, man and boy, laughter and feats of endurance, pleasure and pain slip into one another.

On the second count, Sharpe's stories fall into what I refer to as postcontemporary sadomasochism. De Sade, the excess theorist of Enlightenment reason, destroyed the objects of his desire. Sadism is replayed in the postcontemporary and in Sharpe's writing, not as the Sadean negation of other, but as respect for the other's

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43 *Sharpe, supra* note 1 at para. 61.

44 R. Mapplethorpe, *Black Book* (London: Bulfinch Press, 1986).

45 K. Mercer, "Just Looking for Trouble: Robert Mapplethorpe and Fantasies of Race" in L. Segal & M. McIntosh, eds., *Sex Exposed: Sexuality and the Pornography Debate* (London: Virago Press, 1992).

46 *Ibid.* at 105–106.

47 *R.* v. *Sharpe*, [1999] B.C.J. No. 1555 at para. 95 (C.A.).

48 G. Deleuze & F. Guattari, *Anti-Oedipus: Capitalism and Schizophrenia*, trans. R. Hurley, M. Seem & H. Lane (Minneapolis: University of Minnesota Press, 1983).

49 *Ibid*. at 78.

50 *Ibid*. at 67.

51 De Sade, *supra* note 10 at 9.

52 *R.* v. *Sharpe*, [1999] B.C.J. No. 54 at para. 37 (S.C.).

53 M. Henaff, *Sade, The Invention of the Libertine Body*, trans. X. Callahan (Minneapolis: University of Minnesota Press, 1999) at 78.

54 De Sade, *supra* note 10 at 525.

55 G. Bataille, "Knowledge of Sovereignty" in F. Bottting & S. Wilson, eds., *The Bataille Reader* (Oxford & Malden Mass: Blackwell Publishers, 1997) 310 at 312.

limits. The other is neither a victim nor the executioner, but a partner in a power exchange of erotic energy. "Each partner serves as an audience, [a witness] to the other, and in the process, contains the other."[56] One has "the Other in one's skin," the "Other within one's self," to quote Levinas.[57] The victim and the executioner, the master and the slave, the dominant and the submissive, the boy and the man, are set face to face.

There are moments in which the caress of a whip, the burning piercing of a needle, takes the players to what Levinas refers to as the mystery of alterity, "always other … always still to come ... pure future ... without content."[58] The moment of sadomasochistic climax is described as "an ecstatic mind/body release ... [in which] the building of pain/pleasure so concentrates ... awareness into the here and now ... [that] you spin away ... into no place and no time"[59] and no age and no being. This disembodiment is the pure power and joy of sadomasochism in which one reaches the ecstatic moment of simultaneous escape and presence. Sharpe narrates this moment of touching God through the transformation of pain in his "rather autobiographical first novel"[60] *Rupert: Unexpurgated*;[61] he does so with de Sade's love of precise detail.

> I will worship God in my own way. After all, I'm eleven now and the church says you only have to be seven to know right from wrong … [M]y crucifixion pose prayers are getting better … And then I found these big headed roofing nails … And are they ever sharp! … They sure make my crucifixion pose more realistic. I can squeeze them a little bit harder or softer, just as I want, and feel the nail pain in my palms. I can concentrate longer and get closer to Jesus … I was squeezing the nails harder and harder each day and getting braver and braver. Then one day I squeezed real hard and blood started to run down one hand, just like in my Jesus picture. It sure hurt but I [was] so thrilled I kept squeezing harder and harder still. Wow, I was just shaking and my peeney was throbbing. I'd never felt that close to Jesus before. The blood was almost squirting out so I rubbed some on my other hand and on my side like where Jesus was stabbed. I looked at myself and my Jesus picture and then I smeared it all over me. It was like I was right there with Him, just the two of us, Jesus and me. My peeney was aching and I remembered they'd done something to Him down there so I smeared blood on it. Oooh! It felt real funny, it sort of tingled. I got back into a proper crucifixion pose right away. Was this a sign? I wasn't sure but something had happened. It was the type of feeling you should get when you're baptized[.][62]

Rupert, a fictionalized version of Robin Sharpe, is one of the most sensitive, naive, intelligent, spiritual, passionate and ethical boys in literature. *Rupert Unexpurgated* is a coming of age story documenting Rupert's wonderment at the world, at the inappropriate behaviour of his friends, and at his changing "peeney." The novel contains the obligatory pubescent boy circle jerks with the unusual addition of "Oscar's chizz bottle" for collecting the fraternal discharges. Rupert struggles with his desire for his friends — "I wanted to tell him no and I wanted him to jack me"[63] — and his own correct code of ethics derived from devout religious beliefs enacted in devout but innocently desolate religious practices. I suspect what has prohibited the more general publication of *Rupert Unexpurgated* is the Bataillean worship scene in which Rupert's boy energy and boy blood is mixed with god energy. For Bataille "God is a whore";[64] for Sharpe, God is a little boy.

There remains a scandal of sadomasochism, but not the obvious scandal: rather, the scandal of sadomasochism is, according to Anne McClintock, "the provocative confession that the edicts of power are reversible … The economy of s/m is the economy of conversion: slave to master ... pain to pleasure, [boy to man, man to boy, profane to sacred, self to other, other to self] and back again."[65] Sadomasochism stages the signs of power in church, state, home, school and in so doing delegitimizes these; it can also delegitimize the differentiation of adult and child. Sharpe combines the scandal of sadomasochism that reverses power differentials with the scandal of intergenerational intimacy that crosses age appropriate behaviour boundaries. He presents both as completely consensual activities. "Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing."[66]

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[56] A. McClintock, "Maid to Order: Commercial S/M and Gender Power" in P. Gibson & R. Gibson, eds., *Dirty Looks: Women, Pornography, Power* (London: FBI Publishing, 1993) at 224–25.

[57] E. Levinas, *Otherwise Than Being*, trans. A. Lingis (Hague & Boston: M. Nijhoff, 1981) at 86, 96.

[58] E. Levinas, *Time and the Other*, trans. R. Cohen (Pittsburgh: Duquesne University Press, 1987) at 89.

[59] D. Stein, *Urban Aboriginals* (Ottawa: Oberon Press, 1994) at 90.

[60] "A Personal Account," *supra* note 17 at 2.

[61] R. Sharpe, *Rupert Unexpurgated* (Vancouver: Kalayaan Publications, 1995).

[62] *Ibid*. at 35.

[63] *Ibid*. at 62.

[64] *Eroticism*, *supra* note 37 at 269.

[65] McClintock, *supra* note 56 at 207.

[66] *R.* v. *Butler*, [1992] 1 S.C.R. 452 at para. 49.

The most contentious of Sharpe's seventeen stories in *BOYABUSE*[67] are "The Rites At Port Dar Lan: Part One," "The Rites At Port Dar Lan: Part Two," "The Rites At Port Dar Lan: Part Three," and "Tijuana Whip Fight." "The Rites at Port Dar Lan" trilogy pushes all censorship buttons. The three-part story is structured around "boys' initiation rites" that take place in the imaginary Port Dar Lan, "a very isolated settlement on the coast of Borneo."[68] Sharpe is drawing on two codings of sadomasochistic actual or imagined practice: ritual and a designated sacred/profane space located outside time, a place beyond societal and moral restraint for the time one is there. Ali, a veteran of Dar Lan, informs the protagonist, on his first visit:[69]

> To enjoy the unique delights of Dar Lan to the fullest your mind must be clear and free from the constraints of ordinary morality. Dar Lan is a land of suffering and noble courage, of endurance and sweet agony, of drama and pathos where outrageous lusts and fantasies find satisfaction and fulfilment in both loving and torturing boys … [H]ere we make a mockery out of mere perversity. It is a dangerous place for the normal mind[.]

What Sharpe accomplishes by introducing cash as early as paragraph two in "The Rites at Port Dar Lan, Part One" is to link consensual sadomasochism with commercial sadomasochism; by establishing that the boys are supporting the community through sexual and sadomasochism activities with paying sponsors from the outside, Sharpe inverts the usual and appropriate power/authority relation in which adults are responsible for children's and adolescents' well-being. Here Sharpe has introduced the foreign (the refugee boys of Borneo and their exchanges with western male tourists) of the exotic; the Port Dar Lan stories remain open to the possibility of a racist reading. It is perhaps Sharpe's ingenuity, an ingenuity shared with Mappelthorpe in his representation of the black male body, that he is able repeatedly to take the reader close to making charges of racism and then to have the reader refrain. The boys speak in broken English: "Jean suggested, 'Maybe you like to go to sandbar, see boys play rape tag. Just like ordinary tag but after tag you fuck boy too.'"[70]

However, like Mapplethorpe's work, Sharpe's work ambivalently falls short of the charge of racism. Perhaps this is because the boys are in charge; perhaps it is because they are equal to (although not the same as) their adult sponsors; perhaps it is the writer's profound respect for the boys' fortitude or perhaps Sharpe's work, in a manner that is almost unheard of in such extreme sexual literature, contains what one finds in the work of the Levinasian philosopher Alphonso Lingis.[71] Sharpe, like Lingis, allows the trace of God to show through as he exposes us to the faces of the foreigner, the stranger outside the economy of the same, as he exposes us to the sexualized other: foreign, child, sadistic, masochistic, homosexual.

Lingis theorizes the semen exchange culture of the Sambia of Papua New Guinea documented by the Stanford anthropologist Gilbert Herdt.[72] Lingis explains:[73]

> For the Sambia, the vital fluids transubstantiate as they pass from one conduit to another. They are the scarce resources of the life, growth, strength, and spirituality of the clan. ... The abundance of male fluid produced in the men is transmitted to the mouths of boys, where it masculinizes them by being stored in their innately empty *kereku-kerekus* [semen organs]. It is marriages ... that determine which boys have access to the fluid of which men.

The most shocking sexual vignette in *BOYABUSE* actually mimics tongue-in-cheek the central sacred masculinity rituals of the Sambia. A stranger, Simon, takes the protagonist to his home. The following scene unfolds:[74]

> [T]he sister was nursing a sturdy two year old and ruffling his genitals ... his sister offered tea. The child was reluctant to give up his teat ... The two year old sulked briefly and then waddled over to his brother watching TV, and tugged on his shorts. The five year old ignored him for almost a minute but then without taking his eyes off the screen he half rolled over, pulled down his shorts and let his brother suck on him ... "Soon," Simon observed, "he'll want his brother to fuck him, but he gets fed up doing it when held rather be screwing kid his own age, but I don't want to discourage the little one from

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67 R. Sharpe, *BOYABUSE: Flogging, Fun and Fortitude – A Collection of Kiddiekink Classics* (1987-1995) [unpublished; on file with the author] [hereinafter *BOYABUSE*].

68 R. Sharpe, "The Rites At Port Dar Lan: Part One" in *BOYABUSE*, *ibid.* at 61 [hereinafter "Rites: Part One"].

69 *Ibid.* at 70.

70 R. Sharpe, "The Rites at Port Dar Lan: Part Two", in *BOYABUSE*, *supra* note 67 at 126 [hereinafter "Rites: Part Two"].

71 A. Lingis, *Foreign Bodies* (New York: Routledge, 1994).

72 *Ibid.* at c. 8. Sambia is a fictitious name given to these people by Herdt to protect their identity. Gilbert Herdt tells of the Sambia in his book, *Guardians of the Flute: Idioms of Masculinity* (New York: McGraw-Hill, 1981) and two books he edited: *Rituals of Manhood* (Berkeley: University of California Press, 1982) and *Ritualized Homosexuality in Melanesia* (Berkeley: University of California Press, 1984).

73 *Supra* note 71 at 140–41 [footnotes omitted].

74 "Rites: Part Two," *supra* note 70 at 127–28.

> trying. ... The five year old was now disinterestedly fucking his brother, his eyes still glued to the TV screen. "My late brother fucked me from infancy and I tasted my uncle's milk while I still suckled on my mother's."

Only the profoundly humourless who have never encountered anthropological studies of sexual initiation rites would read this as advocacy. The description is remarkably similar to actual Sambian rites:[75]

> The first three initiations, [for Sambian males] at ages seven to ten, at eleven to thirteen, and at fourteen to sixteen, function to forcibly break the boys from their long association with their mothers, and their milk. At the first initiation, the seven-to-ten year old boys are weaned from their mothers' milk and foods to male foods and the penis milk of youths of their brother-in-law's clan. After the third initiation, they will serve as fellateds to feed semen into first- and second-stage boy initiates. The fourth initiation purifies the youth and issues in cohabitation with his wife.

By the third paragraph of "The Rites At Port Dar Lan: Part One" the rules of the ritual, "puberty rites,"[76] are set out:[77]

> The boys had to undergo severe tests of their manhood including heavy whippings which left them scarred and the initiates were circumcised slowly and painfully with a crude stone saw knife. This the boys had to endure silently without flinching.

Here, four main codes of sadomasochism are explicitly set out: severe tests, heavy whipping, cutting, and silent endurance. Taking one beyond one's limit is prohibited; this is an explicit postcontemporary sadomasochism rule. "Those who abuse the boys beyond their limits are not welcome back."[78] However, if you want a boy's respect, "push him to his limits."[79] Sharpe is careful to state: "The boys do not allow themselves to use drugs."[80] He doesn't state that they are not allowed to use drugs. The control lies with the boy. The boys participated with a Doctor Swartz in designing the rituals. "He and the boys set out the rules and standards ... the boys ... run the show. Those who've been through the entire process, the cutlings, form a Council who make the rules and rule on exceptions."[81] There are different endurances, different feats for different ages beginning with the minor torments of the stinging thong and light cane at seven and culminating with circumcision at fifteen. At each stage the boys seek a foreign sponsor who gets to perform these privileges for a price.

Providing a trace to similar feats of youth in ancient Rome, Sharpe points out that the boys don't "compete under the whip as happened in the temple games of Artemis Orthia in ancient Roman Greece. Plutarch recorded how bleeding boys, their bones flayed bare, would often die before they'd yield."[82] Ali informs that "[s]ome of the boys love the whip just as I can remember the cane. I came across the cane in one of the last great schools in England."[83] Here Sharpe is connecting the rituals at Dar Lan with the long tradition of flogging at English boys schools that so fascinated the Victorian poet Algernon Charles Swinburne that he wrote an anonymous lengthy mock-epic poem, "The Flogging-Block: An Heroic Poem"[84] about it.

> How those great big ridges must smart as they swell! How the Master does like to flog Algernon well! How each cut makes the blood come in thin little streaks from that broad blushing round pair of naked red cheeks.[85]

The faces of Sharpe's imaginary boys shine through his writing. Sharpe is no paternalistic adult author patronizing his boy characters; rather, he is the boys he has created; they are parts of himself that can be traced back to their genesis in his own boyhood, self-inflicted, sadistic, masochistic ordeals.

> Ali leant over Paul and placed his hands on the boy's shoulders looking him in the eyes, and kissed him on the forehead. And then without haste Ali began inserting additional sticks between those already there. The holes started tearing through to each other, ripping the flesh. Paul was exhausted from the pain but he made no move to struggle or cry out. There was only ten minutes left. After the last stick had been shoved through only a few strands of skin still connected the foreskin to the shaft, these Ali snipped, and he took the now detached ring of skin and slid it onto his finger holding up his hand so all could see. "A souvenir of your

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75 *Supra* note 71 at 139.
76 "Rites: Part One," *supra* note 68 at 62.
77 *Ibid.*
78 *Ibid.* at 63.
79 *Ibid.* at 70.
80 *Ibid.* at 63.
81 *Ibid.* at 62.
82 *Ibid.* at 63.
83 *Ibid.*
84 A.C. Swinburne, "Algernon's Flogging" in Gibson, *supra* note 11 at 121.
85 *Ibid.*

> courage my friend." Ali said respectfully to Paul. Then taking one of the buddies bolos Ali deftly sliced off the ring of bruised and torn skin of Paul's remaining foreskin to make it a clean cut and blood flowed at last. Paul was able to smile as the money was counted out and he shook Ali's hand firmly before his buddies walked him down to the sea to wash off in the surf. He had probably just purchased his freedom from the stifling confines of Dar Lan.[86]

Port Dar Lan is a rule-bound, highly ethical fantasy space; it is anti-Sadean: the so-called victims have set the rules and make the perpetrators abide by these. Sharpe is able to hold an ambivalence between presenting the boys as victims of exploitative circumstances — poverty and the sexual tourism of the west — and portraying the boys as exercising control inside these confines: extracting a price, setting the rules, running the show and proving fortitude.

The boys' feats at Dar Lan, their spirit, their ability to endure, their strength and wildness, the absence of social conventions link Sharpe's boys to William Burroughs' imaginary wild boys; Burroughs' eighteen short stories are collected into a book under the title *The Wild Boys*, which is the name of the fifteenth story. Burroughs begins his wild boys story with:[87]

> They have incredible stamina. A pack of wild boys can cover fifty miles a day. A handful of dates and a lump of brown sugar washed down with a cup of water keep them moving like that — The noise they make before they charge[.]

The wild boys, "in their early-and-mid teens,"[88] originate out of the violence of French colonialism in Morocco, but the phenomenon catches on.

> The legend of the wild boys spread and boys from all over the world ran away to join them. Wild boys appeared in the mountains of Mexico, the jungles of South America and Southeastern Asia. Bandit country, guerrilla country, is wild-boy country. The wild boys exchange drugs, weapons, skills on a world-wide network.[89]

Wild boys all over the world are united by the goal of total revolution: "We intend to march on the police machine everywhere ... The family unit and its cancerous expansion into tribes, countries, nations we will eradicate at its vegetable roots."[90] Tender, magical and romantic, as the boys are with one another:[91]

> His hands mold and knead the body in front of him pulling it against him with stroking movements that penetrate the pearly grey shape caressing it inside. The body shudders and quivers against him as he forms the buttocks around his penis stoking silver genitals out of a moonlight grey then pink and finally red the mouth parted in a gasp shuddering genitals out of the moon's haze a pale blond boy spurting thighs and buttocks and young skin.

This does not exclude the violence of Burroughs' wild boys who play with one another's genitals and afterwards "bus[y] themselves skinning the genitals"[92] of captured soldiers whose "heart, liver and bones" are removed for food. This reveals by contrast the fair play of Sharpe's boys of Dar Lan and Sharpe's gladiator Tijuana whip fighting boys, who fight for money and for the pleasure of their mixed audience of boys, locals and foreigners. *The Wild Boys* is legal; *BOYABUSE* is illegal. "The opinion of experts on the subject may be helpful."[93]

> In my stories s/m is a form of fortitude; the boys of Port Dar Lan and Tijuana Whip Fight have endurance and the pride or self-knowledge which comes from the ability to take it. You will notice an absence of humiliation in the stories; one of the rules in Port Dar Lan is that there be no master-slave relationship; the boys have autonomy. The stories really are about fortitude and calculating fortitude; the interaction is all negotiation; the boys agree to something for a price.[94]

That Sharpe's work has literary merit is unquestionable; it no more advocates the actions depicted than does de Sade's work or Burroughs' work. Sharpe's detailed fantasies relate as the dark underside to his published work *Manilamanic: Vignettes, Vice and Verse*, a slightly fictionalised ethnographic narration of the street hustling scene on the boy corner in Manila's now defunct sex zone. *Manilamanic* is a book about street youth — boys, hustlers and beggars — as seen through the eyes of the western traveller who spends time with them. Sharpe's respect and love for his semi-fictionalised characters recuperates their lives, lives outsiders would portray as merely deprived and at points quite

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86 "Rites: Part One," *supra* note 68 at 80-81.
87 Burroughs, *supra* note 12 at 145.
88 *Ibid.* at 148.
89 *Ibid.* at 150.
90 *Ibid.* at 139–40.
91 *Ibid.* at 160.
92 *Ibid.* at 156.
93 *Sharpe, supra* note 1 at para. 64.
94 *Supra* note 6.

horrendous. Sharpe is able to show the agency of the so-called victims and their joy of life, even in dire material circumstances.

Perhaps the real power and beauty of Sharpe's published and unpublished writing is that it is unrecoupable, not "co-optable"; for it both fits and in some ways goes beyond the genre that Deleuze and Guattari term "[s]trange Anglo-American literature":[95] literature from Henry Miller to Allen Ginsberg, Jack Kerouac, and William Burroughs. Sharpe's home is with these "men who know how to leave, to scramble the codes, to cause flows to circulate, to traverse the desert."[96] Like the writing of Miller, Ginsberg and Burroughs, Sharpe's writing "overcome[s] a limit … shatter[s] a wall";[97] but unlike that of his literary neighbours, Sharpe's writing does not "fail to complete the process."[98] Deleuze and Guattari argue that although these writers "shatter the wall" "[t]he neurotic impasse again closes — the daddy-mommy of oedipalization"[99] and capitalism close in and they become counter-cultural icons, despite themselves. Sharpe's work resists appropriate oedipalization and mocks the capitalist free-market by portraying boys as sexual entrepreneurs supporting an extended community, in the case of Port Dar Lan.

Bell: How would you characterise your writings?

Sharpe: They're detailed fantasies.

Bell: Detailed fantasy. I have never written about anything I haven't done.

Sharpe: [laughs] In that case I would have written nothing.

Bell: I am not a fiction writer. How does one, how do you write fantasy?

Sharpe: The fantasy creates the interpersonal situation and this situation expands. The way I write is a jig-saw puzzle method. I don't set out an overall plot and then start at one end and work through it. Rather, I start, then other things fit in; there are implications from these and it ends up as a complete story.

Bell: What motivates you. Why do you write?

Sharpe: Because I get off on it, I enjoy it, I get high on it, I laugh and cry while writing; it's thrilling when you get so into something and reach a level of consciousness that's sort of ecstatic.[100]❑

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[95] Deleuze & Guattari, *supra* note 48 at 132.
[96] *Ibid.* at 132–33.
[97] *Ibid.* at 133.
[98] *Ibid.*
[99] *Ibid.*

[100] *Supra* note 6.