Making a Bad Law Worse

Stan Persky
John Dixon
Capilano College

In its final days in office, the Jean Chrétien government had some good—or at least provocatively interesting—ideas about justice. It proposed to legalise same-sex marriage, and it offered a plan to partially decriminalise the use of marijuana. It also had one very bad idea: Bill C-20, a proposal to amend and strengthen the existing child pornography law (Sec. 163.1 of the Criminal Code). The centrepiece of Bill C-20 is a disturbing move to eliminate the defence of "artistic merit or an educational, scientific or medical purpose" against a charge of child pornography, and replace it with a defence of serving the "public good." Then, having abolished "artistic merit," the drafters of the bill further proposed that "any written material the dominant characteristic of which is the *description,* for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence" under the Criminal Code should also be made a crime.[1] Though the passage of Bill C-20 was interrupted by the prorogation of Parliament

1 Italics ours. Bill C-20, it should be noted, is an "omnibus" bill, and contains many other provisions unrelated to the child pornography law, particularly a proposal to criminalise the sexual exploitation of young people in ways that go beyond existing restrictions on lawful sex between young people and adults. Although we regard this proposal to be as objectionable and incoherent as the proposed

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in November 2003, the new government of Prime Minister Paul Martin has the option of resuming consideration of this legislative scheme.

To understand how and why the Parliament of Canada arrived at the startling idea of partially striking down the longstanding right of artists to freedom of speech and expression requires a bit of history.[2] Ever since its legislative passage in summer 1993, more than a decade ago, Sec. 163.1 of the Criminal Code (a supplement to Sec. 163, the law against obscenity) was conceptually inchoate. Yet, the original notion for a child pornography law, as drafted by the Ministry of Justice, was reasonably coherent. The core idea was that any sexual representation of actual children that was produced through the commission of a sexual crime against those children should be prohibited. For example, it is illegal for an adult to engage in sexual touching of children under the age of fourteen or to counsel or induce the sexual touching of such children. It's also illegal for adults to engage in sex with persons under the age of eighteen with whom they are in a relation of authority or trust (such as relationships between teachers and students under eighteen), or to provide an "inducement" for young people under eighteen to engage in sex with adults (as in prostitutional circumstances). Since such acts are crimes against children and young people, the reasoning went, representations of those acts perpetuated and extended the harm caused by the original violation.

Stan Persky and **John Dixon** teach philosophy at Capilano College in North Vancouver, B.C., and are the authors of *On Kiddie Porn: Sexual Representation, Free Speech and the Robin Sharpe Case* (Vancouver: New Star, 2001).

The new law also contained one novel feature: while obscenity law criminalised the making, distribution and sale of obscene materials, the child pornography law also criminalised the *mere possession* of child pornography, the first law in Canadian jurisprudence to criminalise simple possession of expressive materials.

Unfortunately, the law passed by Parliament in 1993 was far different from the one envisaged by its drafters. Once the bill reached the Commons, it was drastically expanded by legislators, and the law that was hastily passed in June 1993 was, in our view, constitutionally "overbroad."

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amendments to the child pornography law, we restrict our comments here to the latter. The proposed "public good" defence is worded to protect acts that "serve the public good and if the acts alleged do not extend beyond what serves the public good." We refrain from comment on the notion of acts that serve the public good and yet, at the same time, extend beyond what serves the public good, as a conception that ought to be beyond the purview of even logic-chopping philosophers.

2 The argument presented here follows that of the British Columbia Civil Liberties Association's (BCCLA) "Submission to the Standing Committee on Justice and Human Rights," August 11, 2003. The authors of this commentary are members of the Board of Directors of the BCCLA.

The term "overbreadth" means, in legal circles, that a law captures activities and materials that are protected by the Constitution and that should not be criminalised.

The overbreadth of the child pornography law is found in the law's definition of child pornography. In Section 163.1, "child pornography" means "a photographic, film, video or other visual representation … that shows a person who is or is depicted as being under the age of 18 years and is engaged in or is depicted as engaged in explicit sexual activity." As well, child pornography includes representations "the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of 18 years." Finally, child pornography also includes "any written material or visual representation that advocates or counsels sexual activity with a person under the age of 18 years" that would be a crime under the Criminal Code.

The definition of child pornography is overbroad, we contend, for the following reasons:

1. The prohibition against child pornography is not restricted to representations of actual children, but includes representations of a) persons who are not children, but are merely "depicted" as children, and b) imaginary persons. It is not clear how such depictions cause direct harm to children.
2. The definition of child (persons under the age of eighteen) is too broad. The age of sexual consent in Canada is fourteen, therefore the law creates the anomaly that a lawful act, when represented, becomes an unlawful representation. For instance, while it is lawful for two 16-year-olds to engage in sex, a photograph of them doing so is illegal. It is not clear how a lawful activity causes harm through its transformation into a representation. The same thing is true of lawful nude activities that result in the representation "of a sexual organ or the anal region" of a person under the age of eighteen.
3. Finally, the law also criminalises written material "that advocates or counsels" certain illegal sexual activities. Although it is legal to verbally advocate such illegal activity—just as it is legal to advocate violent overthrow of the government—the child pornography law makes it criminal to commit such thoughts or expressions to writing. This not only violates constitutional freedom of speech protections, it is also dangerously close to the creation of "thought-crime."

Underlying the overbreadth of the child pornography law is a deeper doctrinal debate about "harm" in relation to the Criminal Code. We hold the view that the standard of legal harm ought to be direct, measurable damage to person or property, an idea famously found in John Stuart Mill's *On Liberty.* We also hold the corollary view that indirect harms, such as influencing people to believe in "bad ideas" that may lead to "bad acts," should be inadmissable as a basis for criminal law. The contrary doctrine, that a "reasoned apprehension of harm" is a sufficient basis to criminalise expressive materials, is, for us, an unacceptable violation of freedom of speech, one of the fundamental freedoms protected by Section 2 of the Charter of Rights and Freedoms in Canada's Constitution. Much of the child pornography law appears to be directed at preventing apprehended harms that might be caused by a very small class of persons who might be influenced by viewing child pornography. It is as if we made a law prohibiting the representation of bank robberies or car chases on the grounds that it might cause some individuals to rob banks or drive recklessly.

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The child pornography law does, however, contain one saving feature: "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." Interestingly, the first case heard under the new law, in December 1993, six months after its proclamation, involved a Toronto artist, Eli Langer, who had exhibited paintings depicting sex between adults and children. An Ontario court quickly determined that Langer and his work were protected by the "artistic merit" defence.

The first significant challenge to Section 163.1 didn't occur until some years later. Robin Sharpe, a Vancouver writer (whose writing included fictional child pornography), was arrested in 1995 and eventually charged with possessing child pornography. The child pornography that Sharpe allegedly possessed included a manuscript of short stories that he had written. When Sharpe's case was heard in 1998, the accused challenged the constitutionality of the simple possession clause of the law, on the grounds that it violated his right to freedom of thought, speech, and expression. To the surprise and dismay of many conservatives and their political representatives, both the trial judge and the B.C. Appeals Court agreed with Sharpe and struck down the possession clause of Section 163.1 as being an unacceptable violation of the Constitution. The constitutional part of the case was ultimately settled by the Supreme Court of Canada in *R. v. Sharpe* (2001).

In its decision, the court took on the overbreadth argument. While the constitutionality of the child pornography law was upheld, the court

decided that the law came perilously close to overbreadth, and could be saved only by "reading in" some changes to the interpretation of the meaning of the law. So, for example, the court ruled that "written materials and visual representations created and held by the accused alone, exclusively for personal use; and visual recordings, created by or depicting the accused, that do not depict unlawful sexual activity and are held exclusively for private use" were not child pornography that violated the possession clause of the law.

In terms of analyzing Bill C-20, some of the most interesting passages of Chief Justice Beverly McLachlin's majority decision in *R. v. Sharpe* were about the defence of artistic merit. Again, because the law raised such troubling constitutional concerns about rights of privacy and freedom of thought and speech, the court thought it important to spell out the meaning of the artistic merit defence, in the process broadening the meaning of the notion and consequently narrowing the scope of the child pornography law.

The court invoked a crucial precedent from its 1992 decision on obscenity law in *R. v. Butler:* "Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression." Added McLachlin, "Simply put, the defence must be construed broadly." This is the passage in law—the culmination of three-quarters of a century of legal debates about banned books, going back to James Joyce's *Ulysses*—that justifies what might be called the "privileged" free speech rights of artists, rights that exempt artists from restrictions on expression that apply to the general populace. (There are, by the way, similar free speech "privileges" accorded to legislators, academics, and the media.) These free speech privileges should not be viewed as "special interest" rights, but as a recognition that certain expression, such as art, is so fundamental to the values of a democratic polity that its protection must come under special vigilance.

Does "artistic merit" refer to the quality of the art? No, said Chief Justice McLachlin. "A person who produces art of any kind is protected, however crude or immature the result of the effort is in the eyes of the objective beholder.… I conclude that 'artistic merit' should be interpreted as including any expression that may reasonably be viewed as art. Simply put, artists, so long as they are producing art, should not fear prosecution." With that, Sharpe was remitted for trial.[3]

3 A more complete discussion of *R. v. Sharpe* is to be found in Stan Persky and John Dixon*, On Kiddie Porn,* p. 166 ff.

At his trial, the Crown contended that Sharpe's stories were a violation of the proscription of written advocacy of sexual crimes against children, even though the writing didn't directly advocate or counsel anything. The Crown argued that the descriptions in the stories amounted to advocacy. Sharpe not only denied the implication of advocacy but, more tellingly, replied that the stories had artistic merit and he produced expert witnesses to testify to that effect. Sharpe was acquitted on the charge that his stories were child pornography on the grounds of the artistic merit defence (though he was found guilty on a count of possessing child pornography photographs).

The acquittal on artistic merit grounds provoked, as the case had done periodically for several years, a tremendous political uproar. It was this political outcry that motivated the Justice Department's proposal in Bill C-20 to abolish the artistic merit defence in the case of child pornography, and to replace it with a defence of "public good."

With the historical background in view, the objections to the proposed modifications of the child pornography law can be succinctly stated:

1. The defence of "public good" is fatally "vague." "Vagueness," as a legal term, means in this instance that the standard of "public good" is so unclear that it is not possible for an accused to reasonably determine whether or not an expression serves the "public good" and he or she is thus placed in unreasonable legal jeopardy. Like beauty, public good is one of those notions to be found in the eye of the beholder.
2. The notion of serving the public good is an inappropriate criterion for art. No state should require a work of art to serve the public good, upon threat of suppression. More broadly, judging thoughts and expressions by the standard of public good is repugnant to the entire conception of thought, discussion and expression protected by the Constitution. Simply put, a democratic government should not have the right to require its citizens to serve the public good when thinking or expressing themselves.
3. Given the Supreme Court of Canada's particular attention to the artistic merit defence and how closely the child pornography law skirted unconstitutionality, the proposed amendments not only display a sort of contempt for the court, but almost certainly will be found unconstitutional should they become law and face a constitutional challenge in court.

It should be noted that the parliamentary Justice Committee, upon hearing public submissions at its October 2003 hearings, proposed to

amend the “public good” defence to read that “acts or material that serve the public good include acts or material that are necessary or advantageous to the administration of justice or the pursuit of science, medicine, education or art.” Rather than repeating the objections to this more convoluted bit of legalese, perhaps the best response is a simple, Thanks, but no thanks.[4]

What the proponents of Bill C-20 envisage is an accused resembling Sharpe who is denied the right to claim artistic merit. When the accused then argues that the impugned material does not advocate or counsel illegal acts, the proponents then invoke the additional amendment prohibiting mere descriptions of illegal acts. While the bill’s proponents imagine capturing obscure child pornographers, the amended law could conceivably also capture Plato’s *Symposium,* Nabokov’s *Lolita,* and such films as Franco Zeffirelli’s version of Shakespeare’s *Romeo and Juliet,* notwithstanding the Supreme Court’s explicit exemption of such works from the charge of advocating illegal sexual acts.

Perhaps the kindest thing that can be said about this misconceived proposal, with its deep misunderstandings of both art and democracy, is that protecting expression and art is an important goal for legislatures. Prohibiting art is not. It is sometimes said that there is nothing so irresistible as a bad idea whose time has come. We can only hope that this bad idea about “public good” is not one whose time has come.

Protecting expression and art is an important goal for legislatures. Prohibiting art is not.

4 See Tousaw, p. 4.

Works Cited

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