R. v. *Sharpe* and Private Possession of Child Pornography

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In *R.* v. *Sharpe*[1] the British Columbia Supreme Court and Court of Appeal struck down the offence of private possession of child pornography under section 163.1 of the *Criminal Code*.[2] The challenges to section 163.1 were based principally on freedom of expression,[3] although I will argue that this reliance was more nominal than substantive, and that the true concerns related not to expression but to privacy. At least three distinctive arguments can be discerned in the four judgments emanating from the two courts.

Firstly, it was argued that criminalizing private possession of child pornography, as opposed to manufacture, distribution or possession for these purposes, unreasonably restricts expression. One of the grounds for the decision of Southin J. A. in the Court of Appeal was that, because of the predominant privacy interests involved, simple possession of expressive material cannot be criminalized, as this would constitute a "hallmark of tyranny."[4] She came to this conclusion notwithstanding the concession of counsel on the appeal that prohibiting mere possession of some forms of child pornography is a justifiable limit on freedom of expression.[5] The second argument, which formed the basis of the decision by Shaw J. at the trial level, was that because of the privacy elements at stake when simple possession is prohibited, the "reasoned apprehension of harm" approach to justifying limits on free expression should be rejected and an increased standard of proof of harm required.[6] The third argument, that the law is overbroad, was primarily relied on by counsel at the appellate level and by Rowles J. A. in striking down the law.[7] The intrusion into privacy caused by prohibiting simple possession factors in this argument, too, but just as one feature that, together with the definition of the type of expression prohibited, gives rise to overbreadth. I propose to deal with each of these arguments, as well as remedial issues not addressed in the judgments.

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1 (1999), 169 D.L.R. (4th) 536 (B.C.S.C.) (per Shaw J.), aff'd 175 D.L.R. (4th) 1 (B.C.C.A.) (per Southin and Rowles JJ.A., McEachern C.J.B.C. dissenting) [hereinafter *Sharpe*].

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.

The constitutionality of section 163.1 has now been subjected to judicial scrutiny in three provinces. The best known of these cases is the subject of this comment. But the law was also challenged in Ontario in another high profile case involving the drawings of Eli Langer. In this case the drawings were held to be exempt from the prohibition, but the law itself was upheld as constitutional: *Ontario (A.G.)* v. *Langer* (1995), 97 C.C.C. (3d) 290 (Ont. C.J. (Gen. Div.)); leave to appeal to S.C.C. denied 100 C.C.C. (3d) vi [hereinafter *Langer*]. Finally, in *R.* v. *K.L.V.* [1999] A.J. No. 350 (Q.B.) the law was upheld and applied.

3 Other sections of the *Canadian Charter of Rights and Freedoms* were referred to as well: ss. 2(a), 2(d) and 15 at the trial level and ss. 7 and 8 at the appellate level (*Sharpe, supra* note 1 at 556–59, S.C.; and 41 and 88–90, C.A.), but these provisions were not relied on by any of the justices.

4 *Ibid.* at 51.

5 *Ibid.* at 84.

6 Southin J.A. also seems to have contemplated this when she held, in the alternative, that "to make criminal the private possession of expressive material of any kind is or ought to require the most compelling evidence of necessity" (*ibid.* at 56).

7 Overbreadth also appeared in the alternative grounds for decision of Southin J.A. at 57.

THE LAW'S EXTENSION TO PRIVATE POSSESSION

A significant source of the argument regarding private possession is the Supreme Court of Canada decision in *R.* v. *Butler*,[8] dealing with the general obscenity provision of the Criminal Code. The Court upheld section 163 of the Code, which prohibits the creation or distribution of explicitly sexual material that involves violence, or degrading or dehumanizing treatment, or that employs children in its production. Section 163.1, added subsequently, expands the earlier prohibition in two notable ways. It is extended to material that does not involve children in its production (and does not involve violence, degradation or dehumanization). I will return to this aspect in the "overbreadth" section that follows. Further, simple or private possession, as opposed to possession for the purpose of publication or distribution, is now prohibited. This assumes particular significance because the non-extension of section 163 to simple possession was commented on by the Supreme Court in the section 1 analysis in *Butler*, as one factor considered in reaching the conclusion that section 163 minimally impaired free expression.[9] A similar point was made with regard to the criminal prohibition of hate propaganda in the section 1 analysis in *R.* v. *Keegstra*.[10]

Is the prohibition of simple possession of at least some forms of child pornography a reasonable limit on free expression? Child pornography shows children "engaged in explicit sexual activity" or depicts "for a sexual purpose" the sexual organs or the anal regions of children. It is beyond dispute that the use of children to produce pornography is exploitive and abusive.[11] The possessors, or consumers, of this material are an integral part of the market for the material, which indirectly encourages further abuse, and which perpetuates the abuse that has already occurred by providing an ongoing record of it. This connection between the market and the exploitive use of children led the United States Supreme Court to uphold a prohibition on simple possession of child pornography.[12]

Technological change provides another reason to prohibit possession. With the advent of the Internet it is no longer possible (if indeed it ever was) to control a distribution network solely by controlling manufacturers and distributers. They may be beyond the reach of Canadian law enforcement.[13] If the distribution of child pornography is to be controlled within Canada, it is necessary to prohibit receipt, or in other words possession, as well as publication.

Additional reasons to prohibit simple possession of child pornography arise from the nature of the harms sought to be avoided. The harms arise not only from the creation and distribution of child pornography, but from its private possession or use.[14] Indeed, it may be the very "privacy" of the use that places children at risk. Expert evidence in the *Sharpe* case and others described the use of child pornography in a way that directly facilitates sexual abuse of children. Some pedophiles show the images to children as a part of a "grooming" or "seduction" process, in order to

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8 (1992) 89 D.L.R. (4th) 449 (S.C.C.) [hereinafter *Butler*].

9 *Ibid.* at 486.

10 (1990) 61 C.C.C. (3d) 1, at 56 [hereinafter *Keegstra*].

11 *Convention on the Rights of the Child*, adopted by resolution 44/25 of the General Assembly of the United Nations on 20 November 1989, and ratified by Canada on 13 December 1991, confirms the right of children to protection from "all forms of sexual exploitation and abuse," including "exploitive use in pornographic performances and materials." (Article 34). *Report of the Committee on Sexual Offences Against Children and Youth*, vol. 9 (Ottawa: Queen's Printer, 1984) at 100 [hereinafter *Badgley Report*] describes child pornography as "a direct and palpable product of child sexual abuse."

The *Badgley Report* concluded that while there was "virtually no commercial production of child pornography in Canada," there was evidence of non-commercial production for private use (at 1180–84 and 1197–1210); see *Report of the Special Committee on Pornography and Prostitution*, vols. I and II (Ottawa: Queen's Printer, 1985) at 568–69 [hereinafter *Fraser Report*]. Further, the abuse of children outside of Canada is a concern of Canada pursuant to the *Convention on the Rights of the Child*: *Sharpe*, at 87, per McEachern C.J.B.C. (C.A.); see also *Fraser Report*, at 633.

See also *New York* v. *Ferber*, 458 U.S. 747 at 758 (1982): "The use of children as subjects of pornographic materials is harmful to the psychological, emotional and mental health of the child," cited by *United States Senate Report 104-358 in Respect of the Child Pornography Prevention Act 1996* (U.S. Senate: August 1996) [hereinafter *Senate Report*].

12 *Osborne* v. *Ohio*, 495 U.S. 103 (1990), with application to child pornography that involved children it its production. See also *U.S.* v. *Hilton*, 167 F. 3d 61 (U.S.C.A., 1st Circ.), taking the same approach with regard images that appear to be real children, but did not involve real children in sexually explicit poses or conduct. Such "virtual" child pornography may involve adults who appear to be and are presented as children, or may be computer-"morphed" images created without the use of any real models, or by altering innocent images of real children. The prohibition of the possession of virtual child pornography was justified in order to destroy the market for the exploitive material (which might be indistinguishable from the virtual material), and because of its potential use to "groom" or seduce children into sexual activity (see *infra*, note 15 and accompanying text).

13 L. C. Esposito, "Regulating the Internet: The New Battle against Child Pornography" (1998) 30 Case Western Reserve J. of Intn'l L. 541.

14 *Fraser Report, supra* note 11 at 633.

"normalize" the subject of sex.[15] Possession for this purpose, or even showing the images to children, would not appear to be caught by a prohibition on publication or distribution.[16] Clearly, no right to privacy can supercede a child's right to security when it comes to abusive actions. Child pornography as a "criminal tool" is an intrinsic part of abusive actions.[17]

In view of the relation between the harms sought to be avoided and "simple possession," it is not surprising that the child pornography law extends to private possession. This is not an arbitrary or unreasoned extension of the criminal prohibition, but one that reflects the type of harm sought to be avoided, and is necessary to ensure an enforceable law in modern circumstances.

Reasoned Apprehension of Harm

Another harm that may result from child pornography is that it may "incite" pedophiles to offend by reinforcing "cognitive distortions" (beliefs in the normalcy of the behaviour) and by contributing to a fantasy life that may be subsequently "acted out."[18] But individual behaviour is variable, and the ability to prove the causes of behaviour through research is limited, with the result that evidence on these points is inconclusive. Literature dealing with these issues was reviewed before the trial judge by Dr. P. I. Collins, a clinical forensic psychiatrist with an expertise in sexual deviancy and pedophilia.[19] This review led Shaw J. to make "findings of fact" including the following:

3. "Highly erotic" pornography incites some pedophiles to commit offences.
4. "Highly erotic" pornography helps some pedophiles relieve pent-up sexual tension.
5. It is not possible to say which of the two foregoing effects is the greater.
6. "Mildly erotic" pornography appears to inhibit aggression.
7. Pornography involving children can be a factor in augmenting or reinforcing a pedophile's cognitive distortions.
8. There is no evidence which demonstrates an increase in harm to children as a result of pornography augmenting or reinforcing a pedophile's cognitive distortions.

Shaw J. held that the section 1 burden justification had not been met because the evidence did not establish that the instances in which possession of child pornography leads to harm outnumber or outweigh the instances in which it is harmless or provides a beneficial cathartic effect.[20] This imposed a higher burden than that imposed by the Supreme Court of Canada in *Butler*, in which social science evidence about the negative effects of violent, degrading or demeaning pornography was likewise "inconclusive."[21] In *Butler* the court refused to assess "competing social science evidence," requiring only the demonstration of

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15 *Sharpe, supra* note 1 at 543 (S.C.) and 35–36 (C.A.); *R.* v. *K.L.V., supra* note 2 at paras. 8–10 (the facts of the case involved the accused showing a photograph conceded to constitute child pornography to two five-year-old girls in a residential backyard); *Langer, supra* note 2 at 304. The *Badgley Report, supra* note 11 at 1284 referred to evidence collected in a national survey as to incidents of children being shown pornography and sexually assaulted by the same person.

16 *Sharpe, ibid.* at 100 (C.A.), per McEachern C.J.B.C. This conclusion is consistent with *R.* v. *Rioux*, [1970] 3 C.C.C. 149 (S.C.C.), which concluded that a private showing of obscene films in the accused's home did not constitute circulation or distribution under s. 163 of the *Criminal Code*. In *R.* v. *K.L.V., ibid.*, the accused, who was alleged to have shown child pornography to two five-year-old girls, was charged with possession.

17 *U.S.* v. *Hilton, supra* note 12 at 67, citing *Senate Report, supra* note 11.

18 *Sharpe, supra* note 1 at 543–45 (S.C.) and 36–37 (C.A.).

19 Dr. Collins (and three unnamed psychologists) also testified in *R.* v. *K.L.V., supra* note 2. The trial judge in that case concluded that child pornography does play a harmful role in inciting fantasies that may lead to offences and in reinforcing abnormal beliefs. The trial judge accepted Dr. Collins' testimony that, while some pedophiles indicate that child pornography relieves impulses, "studies show that that is not the case." Dr. Collins and a total of five psychologists (three for the Crown, two for the defence) testified in *Langer, supra* note 2. In *Langer*, McCombs J. concluded that "although the evidence may not *scientifically* establish a clear link between child pornography and child sexual abuse," there is "general agreement among clinicians that some paedophiles use child pornography in ways that put children at risk" (at 304). The United States Committee on the Judiciary also heard evidence that pedophiles use the material to "whet" their appetites (*Senate Report, supra* note 11, Part IV.B).

20 *Supra* note 1 at 552–53 (B.C.S.C.).

21 *Supra* note 8 at 482–83, noting the contrasting conclusions of the *Fraser Report, supra* note 11, which found no causal relationship between pornography and harm and the *Report on Pornography by the Standing Committee on Justice and Legal Affairs* (1978) (the *MacGuigan Report)* and the Attorney General's Commission on Pornography, *Final Report* (United States, 1986) (the *Meese Report)* which found such a link.

a "reasoned apprehension of harm."[22] This relaxed standard of proof was justified on the basis that the restricted form of expression was "far from the core of the guarantee of freedom of expression."[23]

The clinical and social science evidence of harm would seem to meet at least the standard established in *Butler*.[24] The type of expression involved, particularly in view of the artistic merit defence in section 163.1(6), would seem to be equally distant from the core values of section 2(b).[25] What then would distinguish *Butler* and call for a stricter standard of proof of harm? In the view of Shaw J., the distinguishing factor was the increased intrusion into privacy resulting from the prohibition of simple possession.[26] Does the law's extension to private possession exacerbate its interference with constitutional rights?

Privacy and Freedom of Expression

It has been established that the *Charter*'s protection of the right to privacy extends beyond the section 8 guarantee against unreasonable search or seizure and is included in section 7's protection of liberty.[27] Privacy in relation to "intimate details of the lifestyle and personal choices of the individual" has been recognized as fundamental.[28] Privacy has also been referred to in relation to section 2(b), as an element that can provide added significance to a free expression claim.[29]

The limits of privacy as a constitutional right, as with the related concepts of liberty[30] and personal autonomy,[31] are problematic and have not been fully delineated. But privacy is not a right that supercedes other rights and freedoms.[32] The Supreme Court has never suggested, for example, that privacy is entitled to greater protection than freedom of expression.[33]

Further, while the privacy element of the constitutional interest may be greater, the freedom of expression element is very much lessened. In much of the private use of child pornography, no communication is involved. Freedom of expression protects the act of *conveying meaning*.[34] A conveyance implicitly involves both a conveyor, or speaker, and a recipient, or listener. Generally, both the benefits and the harms of expressive activity relate to its shared character. Core values associated with free expression, the free flow of information within the democratic process and the search for truth in the "marketplace of ideas," and forms of expression closely related to those core values, are inherently public. The harms associated with expression, and relied on to justify infringements of free expression, are, primarily, harms caused by the dissemination of information or ideas and the influence that these may have on the audience.[35]

The value of free expression to self-fulfilment and individual development does call for an extension of the protection into the private sphere, as does section 2(b)'s reference to freedom of thought, belief and opinion. But as one moves from the publication of artistic expression, which is related to the discovery of political and social truth, towards purely individual forms of expression, the connection to section 2(b) becomes more tenuous:[36]

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22 *Ibid.* at 483–84. The court noted that, similarly, there was no proof of a causative link between hate propaganda and actual hatred of an identifiable group, citing *Keegstra, supra* note 10.

23 *Ibid.* at 488. A higher standard would appear to apply in the case of political expression close to these core values: *Thomson Newspapers Co.* v. *Canada (Attorney General)* (1998), 159 D.L.R. (4th) 385 (S.C.C.).

24 It should also be recalled that its potential to influence behaviour is only one aspect of the harm associated with child pornography (*Sharpe, supra* note 1 at 93, per McEachern (C.A.)). The other forms of harm, that involve direct child exploitation and abuse, do not have parallels in *Butler, ibid.* or *Keegstra, supra* note 10.

25 *Sharpe, ibid.* at 63, per Rowles J.A. (C.A.).

26 Shaw J. relied on the third branch of the proportionality test, as developed in *Dagenais* v. *C.B.C.* (1994), 120 D.L.R. (4th) 12 (S.C.C.) [hereinafter *Dagenais*], which requires that the actual salutary effects of an impugned law be weighed against its deleterious effects. But he did not suggest that *Dagenais* overruled *Butler, supra*, note 8. Rather, the intrusion into private possession created a deleterious effect not present in *Butler* (*Sharpe, ibid.* at 548, 553–54).

27 *R.* v. *Mills*, [1999] S.C.J. No. 68 [hereinafter *Mills*] at para. 79, citing *R.* v. *Dyment*, [1988] 2 S.C.R. 417 at 427, where La Forest J. commented that "privacy is at the heart of liberty in a modern state."

28 *Mills, ibid.* at para. 81.

29 *Sharpe, supra* note 1 at 551–52 (S.C.) and at 68–69 (C.A.), per Rowles J., citing *Butler, supra* note 8, *Keegstra, supra* note 10, and *Canada (Human Rights Commission)* v. *Taylor* (1990), 75 D.L.R. (4th) 577 (S.C.C.) [hereinafter *Taylor*].

30 *Reference re ss. 193 and 195.1 of the Criminal Code* (1990), 56 C.C.C. (3d) 65 (S.C.C.) at 94–96, per Lamer J. (as he then was).

31 *Rodriguez* v. *B.C.* (1993), 107 D.L.R. (4th) 342 at 390–91.

32 On the need to balance the right to privacy and the right to make full answer and defence, see *Mills, supra* note 27.

33 On the contrary, one right can never "trump" another: *Mills, ibid.* at para. 61; *Dagenais, supra* note 26 at 37.

34 *Irwin Toy Ltd.* v. *Quebec (Attorney General)* (1989), 58 D.L.R. (4th) 577 (S.C.C.) at 606–07.

35 *Ibid.* at 611.

36 *Keegstra, supra* note at 80, per McLachlin J. (as she then was).

> On its own, this justification for free expression is arguably too broad and amorphous to found constitutional principle. Furthermore, it does not answer the question of why expression should be deserving of special constitutional status, while other self-fulfilling activities are not.

While the Supreme Court of Canada has recognized a link between free expression and privacy, it is at least as likely that private expression has been to some extent immunized from regulation because it is generally less harmful, not because it is more valuable:[37]

> The benefit obtained from prohibiting private conversations between consenting individuals is arguably small, since only those who are already receptive to such messages are likely to be interested in receiving them. On the other hand, the invasion of privacy may be significant.
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> The connection between s. 2(b) and privacy is thus not to be rashly dismissed, and I am open to the view that justifications for abrogating the freedom of expression are less easily envisioned where expressive activity is not intended to be public, in large part because the harms which might arise from the dissemination of meaning are usually minimized when communication takes place in private, but perhaps also because the freedoms of conscience, thought and belief are particularly engaged in a private setting.[38]

I have set out above some connections between harm and private possession of child pornography, in terms of maintaining a market and use in the "grooming" or seduction of children. In addition, the role of child pornography in fuelling fantasies or reinforcing cognitive distortions provides another instance in which harm is associated as much with private possession as with public dissemination. When it comes to child pornography, it is true that "only those who are already receptive to such messages are likely to be interested in receiving them," but the postulated harm occurs through the exposure of precisely those persons to the messages.

Justice Shaw held that because the child pornography law extended to private possession, the constitutional challenge before him was distinguishable from *Butler*. With respect, I would argue that this distinction is without substance. The added element of privacy detracts from core free expression concerns as much as it adds to them, and privacy, like other constitutional rights, is subject to limitation. The reasoned apprehension of harm test developed in *Butler* suitably balances Parliament's concern to protect the most vulnerable members of society against a free expression interest that is peripheral at best.

Overbreadth and Hypothetical Cases

As noted earlier, on the appeal Sharpe's counsel conceded that the prohibition of simple possession regarding some forms of child pornography would constitute a reasonable limit on free expression. The argument advanced, and accepted by Rowles J. A., was that the prohibition was overbroad as a result of the following features:

1. "children" for purposes of the section, are defined as persons below the age of eighteen, even though persons between the age of fourteen and eighteen can consent to sexual activity provided it does not fall within certain prohibited relationships;[39]

2. the provisions require only representations of children, not that actual children be employed in the making of child pornography;

3. written works that advocate criminal sexual activity with persons under the age of eighteen are included in the prohibition;

4. the prohibition of simple possession, combined with the foregoing, means that self-created works of the imagination would be caught by the section; and

5. the defence of artistic merit is focused on the public value of a work, and is not suitable to exempt from liability personal records of intimate thoughts, as in a diary or sketch.

The court referred to several hypothetical examples, claimed to be within the terms of section 163.1 but not

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[37] *Taylor, supra* note 29, at 967 per McLachlin J. (as she then was), cited in *Sharpe, supra* note 1 at 552 (S.C.).

[38] *Taylor, ibid.* at 936-37 per Dickson C.J.C., cited in *Sharpe, ibid.* at 552 (S.C.) and 69 (C.A.).

[39] *Criminal Code*, s. 153(1), sexual exploitation; or s. 212(4), payment for sexual services.

reasonably related to the harms sought to be avoided, as follows:[40]

> A person who sketches a drawing or cartoon which depicts a person under 18 years of age engaged in explicit sexual activity would be liable under s. 163.1(4) despite the fact that the materials are self-authored and never shown to anyone. Anyone who simply sketches and keeps a crude drawing of the sexual organ (which may include breasts . . .) or anal region of a person under the age of 18 years would be caught by s. 163.1(4). A couple, even a married couple, who record their own sexual activity would be criminally liable if one or both were between 14 and 17 years of age, even though the act depicted is lawful and the material remains in their private possession. A narcissistic 17-year-old youth, to take another example, would be criminally liable if he simply took an erotic nude photograph of himself and kept it in his private possession. A person could be prosecuted under s. 163.1(4) for possessing a self-authored statement, perhaps even a diary entry, which advocated sexual offences with persons under 18 years of age even though that material is only a written record of the author's private thoughts and is never disseminated or shown to anyone.

My position is that in none of these circumstances should the individuals described be subject to criminal sanction. These materials and circumstances are simply too far removed from the harms described in the expert evidence.[41] McEachern C.J. suggested that even material of this type could possibly cause harm to children, if it should somehow come into the wrong hands. He admitted that "some conduct that does not present a serious risk of harm to children" would be criminalized, but suggested that this would be "very rare"[42] and should not invalidate the legislation as "there is always a risk that a law may have some unintended consequences."[43] But the mere possibility of harm, not supported by evidence, does not rise to the standard of a "reasoned apprehension of harm," and an unintended consequence that interferes with a constitutionally protected right or freedom should not be lightly dismissed.

The hypothetical cases are far removed from the circumstances and the material at issue in *Sharpe*. The facts of the case were not fully elaborated, as the *Charter* argument preceded trial, but the seized items were described as computer discs containing a text entitled "Sam Paloc's Flogging, Fun and Fortitude, A Collection of Kiddie Kink Classics" and a collection of books, manuscripts, stories, sketches and photographs, including photographs of nude boys displaying their genitals or anal regions.[44] The disjunction between the actual case before the court and the hypothetical cases, and the impression that such hypothetical cases may be unlikely to occur or to result in prosecution, should, in my view, cause some degree of discomfort when the possession offence is set aside and Sharpe is acquitted.

It is clear, as pointed out by Rowles J. A., that the Supreme Court of Canada has approved the use of "reasonable hypothetical examples" to illustrate overbreadth in a challenged law. Constitutional challenges take into account the full reach and effect of a law, not simply its application in the case before the court. Such an approach may be seen as particularly appropriate where there is a danger that free expression or other constitutionally protected activities would be "chilled" by the continued validity of a constitutionally overbroad law.[45] Further, prosecutorial discretion is not a sufficient safeguard of rights and liberties, and therefore not an adequate response to statutory overbreadth.[46]

Accepting the premises that overbreadth may result in invalidation of a law and that the inherent or potential scope of the law, rather than the likelihood of prosecution, should be the determining factor in considering overbreadth, there remain two issues. Does section 163.1, a law intended to capture material of the type possessed by Sharpe, really capture the material described in the hypothetical cases? If so, is it necessary to sacrifice the possession offence as a whole in order to protect persons not before the court, or may remedial alternatives save the "good" applications of the law and eliminate only the "bad"?

As I explore these issues below, I am accepting the position implicit in an overbreadth argument that the real concern regarding the law is not its application to persons and activities who are its real "targets," but its incidental, unintended application to others. However, I suspect that at times overbreadth arguments are employed as a guise to cover uneasiness about the law's application even to

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40 Sharpe, *supra* note 1 at 77–78 (C.A.), per Rowles J.A.
41 *Ibid.* at 73.
42 *Ibid.* at 101.
43 *Ibid.* at 102.
44 *Ibid.* at 87.
45 *Ibid.* at 67–68, citing a number of cases including *R.* v. *Heywood* (1994), 120 D.L.R. (4th) 348 (S.C.C.) [hereinafter *Heywood*], and *R.* v. *Zundel* (1992), 95 D.L.R. (4th) 202 (S.C.C.) [hereinafter *Zundel*].
46 *Ibid.* at 79, citing *Zundel, ibid.*

its "targets." Such uneasiness could result from concerns about the "reasoned apprehension of harm test," and a disposition to require clearer evidence of harm as a precondition to limit free expression.[47] While I do not share this view, at least pertaining to low value expression,[48] I do appreciate the value of facing and dealing directly with the perhaps "hard" cases before the courts, rather than relying on easier hypothetical cases as a basis for striking down laws. One value to limiting the reliance on overbreadth, whether by means of statutory interpretation or the employment of remedial alternatives, is that this will require us to face these hard cases directly. If Sharpe can convince the trial judge that he employs child pornography "to relieve pent-up sexual tension" and not in the commission of offences, does not *his case* for constitutional protection deserve to be considered directly, even if it is to be rejected, rather than being hidden behind sanitized hypothetical cases?

Interpretation of Section 163.1

The majority justices in *Sharpe* spent little time on interpretation of section 163.1, moving instead directly to *Charter* issues. This is particularly noticeable in the decision of Rowles J. A. relating to the alleged over-breadth. She simply accepted the submissions of counsel that the submitted hypothetical cases would come within the terms of the section, rather than exploring the possibility of a construction that would eliminate some or all of the problematic examples. McEachern C. J., in the dissent, did pursue such interpretations, and in so doing followed the approach that has consistently been adopted by the Supreme Court of Canada in overbreadth challenges.

Where the language of the statute permits this, the court has employed a narrowing construction as a method of protecting *Charter* rights and freedoms without invalidating a potentially problematic statute. The most recent example of this approach is *R.* v. *Mills*.[49] The court upheld sections 278.1 through 278.91 of the *Criminal Code* as providing a reasonable balance between the right to privacy in confidential therapeutic records and the right of access to such records for the purpose of making full answer and defence to a criminal charge. In doing so McLachlin J. (as she then was) addressed defence arguments that requirements that documents, to be produced to the trial judge (at the first stage) or to defence counsel (at the second stage), must be "necessary in the interests of justice," could unduly restrict an accused's access to evidence necessary for his defence. McLachlin J. responded:[50]

> Section 278.5(1) is a very wide and flexible section. It accords the trial judge great latitude. Parliament must be taken to have intended that judges, within the broad scope of the powers conferred, would apply it in a constitutional manner — a way that would ultimately permit the accused access to all documents that may be constitutionally required ...
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> The criterion in s. 278.5 that production must be "necessary in the interests of justice" invests trial judges with the discretion to consider the full range of rights and interests at issue before ordering production, in a manner scrupulously respectful of the requirements of the Charter ...[51]

A similar approach was adopted in *Butler*, in which the use of open-ended and subjective terminology in section 163 of the *Criminal Code* effectively allowed the court to merge the tasks of statutory interpretation and judicial review. In defining the terms referring to publications in which a "dominant characteristic" is the "undue exploitation" of sex, the Court stipulated that only material for which a reasoned apprehension of harm could be shown, and that has little or no artistic or literary value, should be interpreted as coming within the scope of the prohibition.[52] The Court's subsequent section 1 analysis held that the section so interpreted reasonably restricted free expression, citing largely the same considerations. The *Charter* was not violated, but the result was clearly dependent on the narrowing construction placed on the statute.[53]

In *Keegstra* the statutory language, prohibiting the wilful promotion of hatred, was not as open-ended, but interpretation nonetheless formed an important element of the Supreme Court decision. The majority held that these words required an intention to cause an intense and extreme negative reaction to the target group.[54] They were interpreted as narrow words giving rise to a narrow offence, which accordingly was a reasonable limitation of free expression. The dissenting justices, who would have

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47 As advocated in J. Cameron, "Expressive Freedom Under the *Charter*" (1997) 35 Osgoode Hall L. J. 1.

48 J. Ross, "Nude Dancing and the *Charter*" (1994) 1 Rev. Cons. St. 298 at 334–36.

49 *Supra* note 27.

50 *Ibid.* at para 130.

51 *Ibid.* at para 133.

52 *Supra* note 8 at 469–71.

53 K. Roach, *infra* note 60 at 14.340. That the *Butler* construction reduced the scope of the law has been affirmed by subsequent case law, e.g., *R.* v. *Hawkins* (1993), 86 C.C.C. (3d) 246 (Ont. C.A.).

54 *Supra* note 10 at 59–60.

struck down the law as overbroad, interpreted these terms much more broadly.[55]

While the court has demonstrated a clear willingness to "save" legislation by construing it with explicit or implicit reference to *Charter* standards, it has refused to take this step where the statutory language is either unduly broad and poorly focused, or is not reasonably susceptible of a narrowing interpretation. *Zundel* is an example of the former. The majority held that section 181 of the *Criminal Code,* which prohibited the wilful publication of false news or statements likely to cause injury or mischief to a public interest, affected such a broad and vague class of speech that its restriction of free expression could not be justified under section 1.[56] *R.* v. *Heywood* is an example of the latter. The majority held that a prohibition directed to persons convicted of sexual offences against loitering must be interpreted with reference to the ordinary meaning of the word "loiter," which did not require malevolent intent. The resulting broad prohibition was an unreasonable interference with liberty.[57]

Is the language of section 163.1 reasonably susceptible of a narrowing construction that would eliminate at least some of the problematic hypothetical cases? McEachern J. A. reasoned convincingly that this was the case. He noted that only written works that "advocate" or "counsel" criminal offences are prohibited; these terms would require some form of intended publication, and would not apply to diaries or other self-authored words intended only for one's own perusal. Further, only representations of "explicit," not "implicit" sexual activity are within the proscription.[58] I would add that the requirement that the "dominant characteristic" of depictions of sexual organs or anal regions be "for a sexual purpose" is also subject to a narrowing interpretation,[59] and would seem to place the narcissistic seventeen-year-old described in one of the hypothetical cases in the clear. Further, the defence under section 163.1(6) should be liberally interpreted to include personal therapeutic purposes within the scope of protected educational and medical purposes. Sketches and stories penned in a process of self-analysis, or even a couple's recordings of their sexual relationship taken for the purpose of furthering that relationship, would be protected from criminal liability under this approach.

I would concede that even with such interpretations, some works of the imagination, in the hands of the person who created them, will be subject to criminal penalty even though no reasoned apprehension of harm to children would arise with respect to them. Such a concern can be avoided only where the statutory language is susceptible of an interpretation that closely aligns with *Charter* concerns.[60] Section 163.1 may create greater certainty in its application by employing less flexible language than section 163, but it does so at the risk of creating injustice in the case of its potential for "unintended consequences," as McEachern J.A. describes them.

THE REMEDY

Consideration of the appropriate form of remedy is notably absent in both of the decisions in *Sharpe*. Shaw J., having found the simple possession offence not justified under section 1 of the *Charter*, struck it down without further discussion. The majority justices of the Court of Appeal dismissed the Crown's appeal without discussing the remedy. But striking out a law, or a severable portion of a law, is only one remedial alternative available when the *Charter* has been violated. Other remedies include reading down, reading in, and constitutional exemptions.

Reading down to narrow the application of a law was an established constitutional remedy prior to the *Charter*, and has been employed in *Charter* cases. The term is employed primarily in circumstances in which a narrowing interpretation can be seen as consistent with statutory intent.[61] Reading down is essentially statutory interpretation with constitutional requirements in mind and has already been addressed.

Reading in involves adding a provision to legislation, and is most often associated with extending the application of an underinclusive law.[62] But it also describes the addition of qualifications or restrictions to limit the application of a law, where this remedy is

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55 *Ibid.* at 99.

56 *Supra* note 45.

57 *Supra* note 45. Dissenting decisions in both *Zundel* and *Heywood* would have saved even these laws by narrow interpretations, relying explicitly or implicitly on *Charter* standards in arriving at these interpretations.

58 *Sharpe, supra* note 1 at 99.

59 *Langer, supra* note 2 at 314, noted the use of similar terminology in s. 163 and s. 163.1, in coming to the conclusion that a community standards test based on harm should be employed in the assessment of a defence based on artistic merit.

60 As is the case with s. 163, as defined in *Butler, supra* note 8 at 470–71, 485.

61 P. Hogg, *Constitutional Law of Canada*, Loose-leaf Edition (1997) at 37.1(g). K. Roach, *Constitutional Remedies in Canada,* Loose-leaf, (1998) at 14.430–14.550, describes "mild" and "strong" forms of reading down. The latter is more commonly called reading in and is addressed below.

62 *Schachter* v. *Canada* (1992), 93 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Schachter*]; *Vriend* v. *Alberta* (1998), 156 D.L.R. (4th) (S.C.C.) [hereinafter *Vriend*].

perceived as overriding statutory intent. Reading in to restrict the application of a law is a rarely employed *Charter* remedy, yet it can usefully confine the scope of *Charter* holdings. Although they did not address reading in in *Sharpe*, the British Columbia Court of Appeal did employ the remedy in *R.* v. *Wilson*[63] to read restrictively the term "peace officer" in a *Motor Vehicle Act* provision for random stops of motor vehicles by peace officers. The term as defined in the Act included any person having a constable's powers, which would have included persons such as cattle horn inspectors and weigh masters. The stop in the case was, however, by a police officer. The court held that the statutory definition was not ambiguous and was unconstitutionally overbroad. However, the section could be read to authorize stops only by certain categories of peace officers. The result was that the accused was unable to benefit from a finding of unconstitutionality, as the stop in the case was valid under the modified provision.[64]

Guidelines for the determination of when reading in should be selected as a remedy in preference to invalidation of a law are set out in *Schachter*.[65] The remedy effectively rewrites a statute, so precision is a particular concern. The court should not make "ad hoc choices from a variety of options, none of which [is] pointed to with sufficient precision by the interaction between the statute in question and the Charter,"[66] nor "fill in large gaps in the legislation."[67] Reading in seems to be best employed where inserting a few words into the statute will resolve the constitutional violation.[68] Such is not the case with respect to section 163.1, which would appear to be a better candidate for the remedy of constitutional exemption.

A constitutional exemption occurs where a court holds that a law cannot be applied to a particular person or in particular circumstances because of the requirements of the *Charter*. This remedy is generally distinguished from reading down or reading in, which change the scope of a law, and conceptualized as an individual remedy. Nonetheless, because of the precedential value of decisions, the effect of a constitutional exemption is similar to reading down or reading in.[69]

One difference between constitutional exemptions and reading in is that the former develops on a case-by-case basis. This obviates the need to identify a few words to be incorporated into the statute, but it does have the potential to introduce significant uncertainty into application of the law. It is important, therefore, that as and when exemptions are granted, the grounds should be carefully articulated and that appellate courts should lay down guidelines as to when an exemption would be warranted.[70]

Other grounds for selecting reading in or constitutional exemptions as appropriate remedies are in my view present in many *Charter* cases, including *Sharpe*. It must be demonstrated that the exemption would be consistent with the legislative objective. There should not be significant budgetary repercussions. Further, the exemption should not create a substantial change in significance or "thrust" of the law.[71]

These requirements are present in this case and others, yet both reading in and constitutional exemptions are rarely used, and often, as *Sharpe* demonstrates, not even considered.[72] Both the majority and dissenting judgments in the *Sharpe* case demonstrate the costs that are imposed by the courts' hesitation to read in or grant constitutional exemptions. Laws may be unnecessarily invalidated, as by the majority, or unusual but individually significant constitutional violations may go unremedied, as contemplated by the dissent. By far the better approach, in my opinion, would be to apply the law to Sharpe and others in similar circumstances, secure in the knowledge that, should the need arise in future case, constitutional exemptions would be available to protect those who have sketched or authored private works of the imagination, or have photographed themselves, from criminal liability.

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63 (1993), 86 C.C.C. (3d) 145 (B.C.C.A.)

64 See also *R.* v. *Parker* (1997), 12 C.R. 251 (Ont. C.J., Prov. Div.): drug possession and cultivation offences were read so as to exempt from their ambit persons who require smokeable marijuana for personal medically approved use, thus obviating the need to strike down these laws.

65 *Supra* note 61.

66 *Ibid.* at 19.

67 *Vriend, supra* note 61 at 442.

68 As was the case in *Vriend, ibid.*

69 K. Roach, *supra* note 60 at para. 14.570

70 *Ibid.* at para. 14.810.

71 *Schachter, supra* note 61 at 19–25; *Vriend, supra* note 61 at 444–45.

72 The Supreme Court of Canada has not yet granted a constitutional exemption. The issue is now before the court: *R.* v. *Latimer* 121 C.C.C. (3d) 326 (Sask. Q.B.); rev'd [1998] S.J. No. 731 (Sask. C.A); leave to appeal to S.C.C. granted. Following his second trial, Robert Latimer was granted a constitutional exemption from the ten-year minimum sentence for murder. The Court of Appeal reversal is now under appeal to the Supreme Court of Canada.

The court could adopt the "dialogue" approach,[73] striking down the law so that it may be legislatively rewritten, but this approach still entails temporary invalidation of an important law (unless the remedy is delayed). Further, in this case a legislative response would not have clear advantages as compared with a constitutional exemption. It would be as difficult for Parliament as for the court to cure section 163.1's overbreadth with a few words. Drastic surgery on the law would, of course, cure its overbreadth, but would also cut back on the law's effectiveness. To eliminate the offence of private possession, as the British Columbia courts did, not only protects possessors of harmless material, but possessors of clearly harmful material, including that which involved actual children in its production.[74] Ironically, eliminating the offence of possession would not necessarily provide immunity for the hypothetical individuals, who could conceivably be charged with *making* child pornography under section 163.1(2), rather than possessing it under sections (4). Other potential amendments are problematic as well. To eliminate "works of imagination" from the offence, or in other words works which do not involve actual children in their production, would exempt harmful material in the form of computer-created or "morphed" images,[75] or even drawn or painted representations of children involved in explicit sexual activity, any of which could cause the same harm as actual photographs in terms of "grooming" or fuelling fantasies.[76] To eliminate written works from the law protects not only diary entries, but material which in clear and extreme terms advocates and counsels sexual abuse of children.

One possible amendment of the law would be the incorporation of language to create a greater degree of judicial discretion as to its application, for example, by prohibiting only representations reasonably associated with past or potential sexual exploitation or abuse of children. But such an approach could create as great or greater uncertainty as to the application of the law as would the constitutional exemption approach.

Conclusion

Section 163.1 of the *Criminal Code* demonstrates concern for free expression by employing words such as "explicit," "dominant characteristic," and "for a sexual purpose" that lend themselves to a narrow interpretation, and by providing a defence for material with "artistic merit or an educational, scientific or medical purpose." Appropriate interpretation of the prohibition and the defence should ensure that in the vast majority of cases only expression that is reasonably associated with harm to children will result in criminal liability. Should rare cases arise where this is not the case, a constitutional exemption should be ordered.

Although the British Columbia courts considered the case on the basis of free expression, the interest asserted by Sharpe has little to do with expression. In the private use of child pornography, no one is talking to anyone, no message is communicated and there is no contribution to the marketplace of ideas. Striking down the offence of simple possession, but maintaining a ban on publication or distribution, does nothing to protect the give and take of information or ideas. While the right to privacy also merits constitutional consideration, we should not exaggerate the tenuous association between the public benefits adhering to a system of free expression, and the private liberty claimed by Sharpe.

Harms associated with child pornography arise directly from its "private" possession. This factor, combined with the conclusion that the ban on possession of child pornography should be justifiable according to the "reasoned apprehension of harm" test, leads me to the opinion that the Supreme Court of Canada should find that private possession of child pornography is not the place to draw a line and should overturn the invalidation of section 163.1.❑

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[73] P. W. Hogg and A. A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75; discussed in *Vriend, supra* note 61 at 438–39, 448.

[74] *Sharpe, supra* note 1 at 100 (C.A.) per McEachern C.J.

[75] *U.S.* v. *Hilton, supra* note 12.

[76] *Langer, supra* note 2 at 305, 326. There is a discussion of overbreadth, and a holding that proposed alternative means would not sufficiently respond to the legislative objectives, at 324–27.