Begging and Freedom of Expression
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BEGGING AND FREEDOM OF EXPRESSION

Richard Moon

Constitutional challenges are underway against municipal anti-begging (or panhandling) by-laws in several Canadian cities, including Vancouver, Winnipeg and Ottawa.[1] These challenges are based on several grounds. In this comment I will consider the argument that anti-begging by-laws violate freedom of expression under the *Canadian Charter of Rights and Freedoms*.[2]

If, as the Supreme Court of Canada has said, the term 'expression' refers to any act that conveys a message, then begging or panhandling must be protected by section 2(b) of the *Charter*. Begging, no less than advertising or picketing, conveys a message. At minimum, begging involves a request to passers-by for money. The request may be by spoken or written word or by holding out or displaying a cup or hat. Under the Winnipeg by-law, for example, 'panhandle' means "to beg or ask, whether by spoken, written or printed word, for donations of money or other things of value for one's self or for any other person ..."[3] Given the Supreme Court's broad definition of expression, the municipalities defending these anti-begging by-laws may be prepared to concede the breach of section 2(b).[4]

While the Supreme Court defines the scope of the freedom under section 2(b) broadly so as to protect all non-violent forms of expression, when assessing limits under section 1 of the *Charter* the Court distinguishes between core and marginal forms of expression, identifying different instances of expression as more or less valuable and, on that basis, as more or less vulnerable to restriction. Political expression, for example, is considered core expression because it is closely linked to the values underlying the freedom. As such it can be restricted only for the most substantial and compelling reasons. In contrast, pornography, hate speech and commercial advertising are seen as lying at the margins of the freedom's scope, because they are not so directly linked to the values underlying the

1 As I was finishing this comment, the Government of Ontario announced its intention to enact the *Safe Streets Act*, S.O. 1999, c. 8 [editor's note: this Act came into effect January 31, 2000] which prohibits solicitation in an "aggressive manner" (s. 2) and the soliciting of a person "who is using, waiting to use, or departing from an automated teller machine" (s. 3 (2)(a)) or "who is using or waiting to use a pay phone" (s. 3(2)(b)) or "who is in the process of getting in, out of, on or off a vehicle or who is in a parking lot" etc. (s. 3 (2)(c)).

2 Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11 [hereinafter the *Charter*]. I have not addressed the argument that anti-begging by-laws violate s. 15 of the *Charter*, the right to equality. It is worth noting, however, that many of points made in the following discussion also support the claim that s. 15 of the *Charter* has been breached. In particular the disadvantaged position of beggars or of the homeless in general is an important component of a powerful s. 15 argument that municipal anti-begging by-laws reflect, and further aggravate, the marginalization of these groups.

3 City of Winnipeg, By-law No. 6555, *By-law to Regulate and Control Panhandling* (26 January 1995) at s. 2.

4 There are two exceptions to the Court's broad definition of the scope of freedom expression under s. 2(b). First, the Court has said in *Irwin Toy* v. *Quebec (A.G.)*, [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*] at 970 that a violent act, even if intended to carry a message, does not fall within the scope of s. 2(b): "While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection." This exclusion extends only to expression that has a violent *form*. Expression that advocates violence or threatens violence is still protected under s. 2(b), although subject to limits under s. 1.

The Court has also narrowed the scope of s. 2(b) by drawing a distinction between two different kinds of state restriction on expressive activity: state acts that have as their purpose the restriction of expression and state acts that do not have this purpose but nevertheless have this effect. The significance of the purpose/effect distinction, which roughly parallels the distinction in American jurisprudence between content restrictions and time, place and manner restrictions, is that a law intended to limit expression, and in particular the expression of certain messages, will be found to violate s. 2(b) automatically, while a law that simply has the effect of limiting expression will be found to violate s. 2(b) only if the person attacking the law can show that the restricted expression advances the values that underlie freedom of expression. In particular, he/she must show that the restricted expression contributes to the realization of truth, participation in social and political decision-making and diversity in the forms of individual self-fulfilment and human flourishing (*Ibid.* at 976).

freedom. The courts will be more flexible, or less demanding, in their assessment of restrictions on these forms of expression.

In the begging cases, a key question is whether begging should be treated either as core expression or as marginal expression; whether it should be understood as commercial in character or whether it is better understood as a form of political expression that lies at the core of the freedom.[5] If begging is a form of commercial expression, or at least analogous to commercial expression, then its restriction, particularly if in the form of a time, place and manner limitation or if focused on invasive or intimidating instances of begging, may be easily justified under section 1. However, if begging is seen as political in character, restrictions will be more rigorously scrutinized and less likely to be supported under section 1.

The courts routinely state that the category of commercial expression does not lie at the core of the freedom's protection, yet they say very little about why it deserves reduced protection and how it is to be distinguished from political or cultural expression. While begging may look something like advertising, as it involves a request for money, the resemblance is entirely superficial. Begging involves a request for assistance and a claim of need that cannot be made to fit into the model of a commercial transaction. Regardless of whether we think begging can be described as political in character, it is very different from the consumer messages that dominate public discourse. Indeed, it may be that begging is experienced by some passers-by as invasive because it is so different from mainstream (i.e., commercial) expression. Because begging takes place at the margins of public discourse its restriction should be subject to careful scrutiny.

Marginal Expression or Expression at the Margins

Begging involves a request for money and so bears some resemblance to commercial advertising, which encourages consumers to make a product or service purchase. It is 'profit-oriented,' using this phrase in a rather extended way. As such, the argument goes, begging, like other forms of commercial expression, is not core value expression and so its restriction is easier to justify — certainly a time, place and manner restriction should easily survive constitutional scrutiny.

However, before making this link between begging and commercial advertising, it is worth considering the basis for the courts' distinction between commercial advertising (marginal) and political (core) expression. The Supreme Court has said on many occasions that commercial expression is less valuable than other forms of expression because it is profit motivated. However, the Court has not directly explained why this motivation is significant or how it is possible to isolate a category of profit-motivated expression in a public discourse that is dominated by commercial voices and operates on market principles.

The view that advertising does not lie at the core of the freedom and can be restricted under section 1 on less than substantial and compelling grounds, is expressed at the beginning of nearly all judicial decisions concerning commercial expression. For example, in *Rocket* v. *Royal College of Dental Surgeons*, Madame Justice McLachlin observed that, in the case of commercial expression, the motive for imparting information is "primarily economic" and that "the loss" that censorship might cause "is merely loss of profit, and not loss of opportunity to participate in the political process or the 'marketplace of ideas,' or to realize one's spiritual or artistic self-fulfilment."[6] For these reasons, "restrictions on expression of this kind might be easier to justify than other infringements of section 2(b)."[7]

However, Madame Justice McLachlin recognized that while commercial expression may be "designed only to increase profits," it may also play "an important role in consumer choice."[8] Because the interests of the profit-motivated speaker are not significant, any value that profit-motivated (or commercial) expression may

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[5] In the US this has been a critical question. See, for example, H. Hershcoff and A. S. Cohen, "Begging to Differ: The First Amendment and the Right to Beg" (1991) 104 Harvard Law Review 896.

[6] *Rocket* v. *Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232 [hereinafter *Rocket*] at 247.

[7] *Ibid.* at 247. McLachlin J. also notes at 241 that:

> [a]lthough it has been clearly held that commercial expression does not fall outside the ambit of s. 2(b), the fact that expression is commercial is not necessarily without constitutional significance ... It is at [the s. 1] stage that the competing values — the value of the limitation and the value of free expression — are weighed in the context of the case. Part of the context, in the case of regulation of advertising, is the fact that the expression is wholly within the commercial sphere.

[8] *Ibid.* at 247.

have will depend entirely on its contribution to the listener. McLachlin J. considered that:[9]

> [t]hese two opposing factors — that the expression is designed only to increase profit, and that the expression plays an important role in consumer choice — will be present in most if not all cases of commercial expression. Their precise mix, however, will vary greatly.

For this reason she thought "it is inadvisable to create a special and standardized test for restrictions on commercial speech."[10]

Yet, in the later judgment of *RJR Macdonald* v. *Canada A.G.*, McLachlin J. argued that profit motive or economic orientation should not lessen the claim of expression to constitutional protection: "In my view, motivation to profit is irrelevant to the determination of whether the government has established that the law is reasonable or justified as an infringement of freedom of expression."[11] She observed that profit is the motive, in whole or in part, behind a variety of expressive forms, some of which are seen as core to the freedom:[12]

> Book sellers, newspaper owners, toy sellers — are all linked by their shareholder's desire to profit from the corporation's business activity, whether the expression sought to be protected is closely linked to the core values of freedom of expression or not.

It is not clear whether McLachlin J. changed her mind and came to believe that commercial advertising is no less valuable than other forms of expression or whether she simply thought that the lesser protection granted to advertising rests on something other than its profit motivation. If she was arguing the latter, and still accepted that commercial advertising lies outside the core of the freedom, she did not say what this lesser value rests on. Despite these remarks by McLachlin J. in *RJR Macdonald*, the Supreme Court of Canada, in subsequent judgments such as *Hill* v. *Church of Scientology of Toronto* has continued to state that "the fact that the targeted material was expression motivated by economic profit more readily justified the imposition of restrictions."[13]

In a market economy it is difficult to isolate a category of expression for reduced protection on the basis of profit motive or commercial origin.[14] Despite the Court's frequent but very general references to profit motive, two concerns seem to underlie the decision to locate commercial advertising at the margins of freedom of expression. The first has to do with the way in which advertising appeals to its audience — the vague sense that it is often manipulative or misleading. In *Irwin Toy* manipulation was explicitly identified as the basis for restricting advertising directed at children. And in *RJR Macdonald*, concern about manipulation seemed to underlie the Court's distinction between lifestyle cigarette advertising, which could be restricted, and informational cigarette advertising, which could not.[15]

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[9] *Ibid.* at 247–48 continued:

> In *Irwin Toy*, for example, the majority did not emphasize the consumer choice aspect, because the expression in question was advertising aimed at children and the majority clearly felt that protection of consumer choice in children was much less important than it would be in adults. That left the relatively weak value of protecting the appellant's interest in advertising to increase profits to be pitted against the strong countervailing value of protecting children from economic exploitation.

[10] *Ibid.* at 247.

[11] *RJR Macdonald Inc.* v. *Canada (A.G.)*, [1995] 3 S.C.R. 199 [hereinafter *RJR Macdonald*] at 348.

[12] *Ibid.* at 348.

[13] *Hill* v. *Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1174. See also, *Thomson Newspapers* v. *Canada (A.G.)*, [1998] 1 S.C.R. 877 at 943 the Supreme Court of Canada once again stated that "[t]he degree of constitutional protection may vary depending on the nature of the expression at issue."

[14] Commercial enterprises, for reasons of profit, often attempt to influence political action through media advertising. Politicians raise money to spend on campaign speech that follows the model of commercial advertising. As well, the distinction between commercial and cultural expression is difficult to discern in a market economy because culture is often treated as a commodity, something that is advertised and sold for profit. The distinction is also difficult because modern advertising is less about providing consumers with product information and more about representing products as important cultural/social symbols. According to W. Leiss, S. Kline and S. Jhally, in *Social Communication in Advertising* (New York: Metheun, 1986) at 7:

> Advertising is not just a business expenditure undertaken in the hope of moving some merchandise off store shelves, but is rather an integral part of modern culture. Its creations appropriate and transform a vast range of symbolic ideas; its unsurpassed communicative powers recycle cultural models and references back through the networks of social interactions.

As well, even 'non-commercial' forms of discourse, such as political expression, have come increasingly to resemble commercial product and service advertising, relying on soundbites and image associations.

[15] See "*RJR Macdonald* v. *Canada* and the Freedom to Advertise" 7(1) Constitutional Forum 1 (1995) at 3 and R. Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, forthcoming) at c. 3.

The other concern is the power of specific advertisements, or advertising in general, to dominate discourse and displace or overwhelm other messages in the 'market place' of ideas.[16] The commercial domination of public discourse is not specifically identified as a concern in the courts' commercial advertising cases, yet it may be critical to understanding the manipulative or deceptive character of particular ads and may explain the willingness of the courts to set lower standards for the restriction of advertising in general. The overwhelming number of commercial messages that we are confronted with each day reduces the space for critical viewing of particular ads. There are so many ads that it is simply not possible for the audience to reflect on the claims or associations of each. As well, the domination of public discourse by advertising means that the unnatural images or absurd associations of particular ads seem unexceptional. Finally, and most importantly, because the principal channels of public discourse are controlled by commercial interests and carry only advertising and programming funded by advertising, the underlying message of advertising, that self-realization is achieved through consumption — is an almost unchallengeable cultural assumption.[17]

If these concerns, and not profit motive, underlie the reduced protection of advertising, it is not at all clear that begging should be treated as 'marginal expression' under section 2(b). Begging is not simply a request for money that can be assimilated into the model of a commercial or market transaction. It is a claim of need and a request for help that falls entirely outside the realm of consumption and exchange.[18] While we may sometimes feel overwhelmed by the large number of beggars in the downtown areas of certain cities, begging is not part of the mainstream commercial discourse. Indeed, begging is viewed as a nuisance and experienced as invasive because it is so exceptional, because its message of need does not fit within the dominant discourse of lifestyle-based consumption.[19]

The decision to label begging as either political or commercial seems to be governed by the decision-maker's views about social welfare.[20] For those who see

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16 Profit motive may serve as a sort of proxy for these concerns. Pursuit of profit leads speakers to adopt the most effective means of influencing consumer behaviour, which may be something other than rational persuasion. As well, in a market economy, where mass communication is expensive, profit-motivated speech such as advertising comes naturally to dominate public discourse.

17 For an extended discussion of this see R. Moon, *supra* note 16. Concern that certain messages may dominate discourse and overwhelm or displace other views is more explicit in the debate about the regulation of political or campaign advertising. Election spending limitations, which do not restrict the message or form of expression, but only the amount of money that can be spent in support of a particular message, are justified on the ground that unlimited spending will allow the messages of some candidates to 'drown out' those of other candidates.

Manipulation and 'drowning out'/inequality, which are described, and responded to, as separate problems, are really two aspects or dimensions of the much larger problem of the domination of public discourse by commercial messages and the advertising form. Restrictions aimed at either the manipulative impact of expression or the dominance of particular messages, are partial, or symptomatic, responses to this systemic problem. Inequality in election spending is a problem because of the 'advertising' form of campaign expression, which is composed of images and slogans with little evaluative content. Commercial advertisements have a manipulative impact only because they so completely dominate public discourse.

18 I recognize that this position is not be shared by those who view all human interaction through the lens of exchange and all human value through the lens of wealth maximization or preference satisfaction. See for example, R. Ellickson, "Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning" 105 Yale Law Journal 1165 at 1229, in which the author reduced human obligation or charity to a feeling of satisfaction:

> Ordinarily, a panhandler's intended message is wholly transactional, namely, "I would like you to give me money." A beggar essentially invites a pedestrian to enter into an exchange. If the exchange were to be completed, the beggar would receive alms, and the donor would receive the feeling of satisfaction that commonly follows an act of generosity.

19 I note that local merchants are often the main advocates of restrictions on begging, an activity they regard as bad for business. See A. Schafer, "Down and Out in Winnipeg and Toronto: The Ethics of Legislating Against Panhandling" at 7, online: Caledon Institute of Public Policy Homepage <http://www.caledoninst.org/full91.htm> (Date accessed: 8 February 2000):

> Certainly, many inner-city business people believe that the presence of panhandlers costs them customers. Not surprisingly, these merchants are among the strongest supporters of invoking the law to get panhandlers off the street or, at least, off their street.

20 I recognize that an individual's views about social welfare and the need for social or charitable support can sometimes be quite ambiguous. Shortly after he was elected Premier of Ontario, Mike Harris was asked a question about foodbanks. In answering this question, Premier Harris said (and I am paraphrasing) that he thought that it was a good and virtuous thing for individuals to donate to foodbanks. He even indicated that he had on occasion made donations to a foodbank. Yet there seemed to be little common sense in the Premier's statement. The central and most effective component in his campaign platform was the promise to substantially reduce provincial welfare payments. During the campaign Harris argued that welfare was being paid to many people who did not need it and that those who did need it were being paid more than they needed. The Premier also suggested during the campaign that state welfare discouraged able-bodied

poverty and homelessness as the consequence of social-economic forces and who see current social welfare provision as inadequate, begging is a political act or an act of political expression. It is political because it reflects or manifests the deeper political/social problems of poverty and homelessness.[21] On the other hand, for those who see poverty or homelessness as something that is within the individual's control or as something that has occurred because of choices that she/he has made (the result of personal deficiencies), begging is simply a request for money — a self-interested act, that is the cause rather than the symptom of social decay.[22] Or as was said by the U.S. Circuit Court in *Young* v. *New York City Transit Authority*: "The only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost;" or "the object of begging and panhandling is the transfer of money."[23]

Begging may not amount to a critique of the social/political order; nevertheless it is not simply a request for money. It is, more fundamentally, a request for help — an appeal to the audience's concern for, and sense of duty to, those in need. Behind the beggar's request is a claim of need — need for food or shelter or clothing. This claim is sometimes explicit, but more often is simply implied in the request for money.[24] It is a personal claim that can only be understood and evaluated within the social/economic context on the basis of the audience's political views.

It is to the claim of need and appeal for help that the passer-by must respond by giving money or declining to give money or apologizing for not having any change or consciously avoiding any eye contact and walking on. The passer-by may believe that the beggar does not really have such a need and is seeking to mislead her/him. Or perhaps the passer-by thinks that there is some form of need but that her/his donation will not be used appropriately; or even if there is need, nothing is owed to the beggar who is responsible for her/his situation. Yet regardless of whether the passer-by accepts or rejects the legitimacy of the beggar's claim/appeal, there is an engagement between strangers about need and obligation in the community. As Schafer argues:[25]

> When society silences a panhandler or banishes the panhandler from places which have traditionally been public places, such banishment comes close to being a denial of recognition. Each of us has a fundamental need to be recognized by our fellow citizens

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individuals from seeking employment and created a culture of dependency. Yet if this is what the Premier believed, why would he think that anyone should donate to a foodbank? Indeed, he might have argued instead that foodbanks, like welfare, discourage self-reliance and the pursuit of gainful employment.

[21] For a discussion of homelessness in Canada see T. O'Reilly-Fleming, *Down and Out in Canada: Homeless Canadians* (Toronto: Canadian Scholar's Press Inc., 1993).

[22] One's views about the causes of begging seem also to determine one's views about the effectiveness of anti-begging by-laws. Those who see begging as the consequence of socio-economic conditions and not as a matter of choice, believe that these by-laws cannot succeed in ridding the streets of beggars. Beggars have limited options. Once released by the police, they will reappear somewhere else or perhaps even at the same location. See, for example, D. M. Smith, "A Theoretical and Legal Challenge to Homeless Criminalization Policy" (1994) 12 Yale Law & Policy Review 487 at 496. Certainly, the idea of imposing a fine on a beggar seems rather odd.

However, other people believe that begging is a choice the beggar makes, a choice which is encouraged and supported when individuals donate to the beggar. Those who see begging as a choice assume that anti-begging by-laws will remove this incentive and keep beggars off the street. In their view, if we support the practice of begging then we will encourage more and more people to turn to begging as an easy alternative to minimum wage employment. (Or perhaps more accurately if we treat beggars and the homeless badly enough, they might just disappear from sight).

[23] *Young* v. *New York Transit Authority* 903 F.2d 146 (2d. Cir. 1990) at 154. See also: Ellickson, *supra* note 18 at 1230: "the ordinary panhandler does not intend to communicate on any ... political topic, but simply to close a commercial transaction." And R. Teir, "Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging" (1993) 54 Louisiana Law Review 285 at 322:

> It is incredible to assert that those who beg do so in order to express some political or economic idea. Rather, the beggar's aim is to obtain money from passers-by. Standing alone, an offer to exchange nothing for money does not communicate anything concerning a condition, society in general, or any other subject. In fact, in terms of communication, the beggar stands in the same position as the hold-up man with a gun. Both could be seen as purely commercial activity, albeit without the exchange of any goods or services.

[24] *Loper* v. *New York City Police Dept.*, 999 F.2d 699 (2d Cir. 1993) [hereinafter *Loper*] at 704: "Even without particularized speech, however, the presence of an unkempt and dishevelled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance."

[25] *Supra* note 20 at 12. See also *ibid.* at 8:

> Even when a donation is not forthcoming, the person who has been solicited has been drawn, however, briefly, into a personal relationship with a beggar. A bond of sorts has been established. It could be a positive bond of involvement and recognition, or a negative bond of discomfort and hostility.

And *Benefit* v. *City of Cambridge*, 679 N.E. 2d 184 at 190: "The statute intrudes not only on the right of free communication but it also implicates and suppresses an even broader right — the right to engage fellow human beings with the hope of receiving aid and compassion."

as a person with needs and views. The criminalization of panhandling is not only an attack upon the income of beggars, it is an assault on their dignity and self-respect, on their right to seek self-realization through public interaction with their fellow citizens.

To deny a person the right to ask others for help seems like the most fundamental breach of freedom of expression.[26]

While begging may take place at the margins of society or at the margins of our commercially dominated public discourse, it is not marginally connected to the values of truth, democracy and self-realization, which are said to underlie the constitutional commitment to freedom of expression.[27] It may not be 'political,' as that term is used by Alexander Meiklejohn and other democratic theorists of free speech,[28] but it is 'political' in another and perhaps more profound sense of that term.

The Justification for Restricting Begging

Some municipalities, such as Ottawa, have instituted a total ban on begging.[29] They may have done this because they consider that begging, in all its forms, constitutes a general nuisance. Or perhaps they have introduced a general ban because they consider it too difficult to draft or enforce a ban directed exclusively at aggressive or persistent begging. Indeed, it appears that the Ottawa ban is not being rigorously enforced. It may be that the police only enforce the ban when they think that a particular beggar has acted aggressively or dishonestly or when there is a complaint against a particular beggar. However, for obvious reasons, this sort of discretionary power is troubling and unlikely to satisfy the rational connection and minimum impairment components of the courts' section 1 analysis.[30]

Other municipalities have prohibited certain forms of begging or regulated begging in certain contexts. These municipalities argue that their anti-begging by-laws are designed to prevent aggressive or threatening 'begging' (an oxymoron) or begging that is conducted in a persistent and harassing manner. While a commitment to freedom of expression means that an individual cannot be prevented from speaking simply because others are uncomfortable with her/his speech and find it intrusive or irritating, at a certain point expression may become so invasive or harassing that the state is justified in imposing a restriction. A ban that focuses on aggressive or persistent begging can be seen as protecting important individual and community interests. Such by-laws are not illegitimate simply because they focus on a particular form of aggressive communication while leaving other forms of potentially aggressive behaviour unregulated, for it may be that intimidating or harassing charitable solicitation or tourist questioning or newspaper vending has not been

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26 A. Schafer "Down and Out" *supra* note 20 at 10.

27 *Irwin Toy*, *supra* note 5 at 976.

28 A. Meiklejohn, *Political Freedom* (New York: Oxford Univ. Press, 1965).

29 City of Ottawa, By-law No. 117–91, *Nuisance By-law*, s. 1 prohibits all panhandling. However, it creates an exception for charitable solicitation and street performers who receive voluntary contributions.

30 I note that the Ontario *Safe Streets Act, 1999*, *supra* note 2, at s. 3(2)(f) provides that: "No person shall, while on the roadway, solicit a person who is in or on a stopped, standing or parked vehicle for the purpose of offering, selling or providing any commodity or service to the driver or any other person in the motor vehicle." "Solicit" as defined in s. 2 means "to request, in person, the immediate provision of money or another thing of value regardless of whether consideration is offered or provided in return, using the spoken, written or printed word, a gesture or other means."

This provision is designed to get "squeegee kids" off the street. Of course, it does not specifically mention "squeegee kids." I assume that the lawmaker decided to define the scope of the law in more general terms to avoid the complaint that the purpose of the law was simply to suppress a particular social group or prohibit a particular form of communication or exchange.

The problem, however, is that the provision may prohibit other activities that the province (and the community) does not wish to prohibit. For example, in Windsor there is an organization known as the Goodfellows, which has for many years provided Christmas food and gift hampers to poorer families in the city. The Goodfellows raise money over the Christmas period by selling their 'newspaper' at the main road intersections in the city. They (enthusiastically) approach cars stopped at traffic lights and ask for a 'donation' in exchange for the paper. I describe this as a donation because the newspaper is only two pages in length and simply describes the Goodfellows' charitable project. The driver, who makes a donation then places the Goodfellows' newspaper on her/his dashboard so that it is visible. By doing this he/she avoids any further approaches and requests. Similarly, in the case of squeegee kids it is unclear whether one is making a donation or paying for a service.

The fundraising activity of the Windsor Goodfellows is almost certainly caught by this provision. Yet it is difficult to imagine that the police will enforce this law against the Goodfellows. They do good work and cause no obvious harm. Indeed, it is difficult to imagine that the law will be enforced against anyone but the squeegee kids. (And even in the case of the squeegee kids the police may not be willing to devote resources to the law's enforcement). These assumptions or expectations remind us of the law's real purpose or character. The law may be drafted in neutral terms but its purpose (as its selective enforcement will demonstrate) is to the stop the squeegee kids because of who they are and what they look like.

a significant problem requiring specific legislative response.

The Winnipeg and Vancouver by-laws include provisions dealing with peristent begging. The Winnipeg by-law, for example, provides at section 8 that: "No person shall continue to panhandle from a person, or follow a person, after that person has made a negative response."[31] However, these by-laws do not specifically prohibit begging that is physically intimidating; presumably because the use of physical intimidation to obtain money is already covered by the *Criminal Code*. Instead the by-laws restrict begging in certain locations or contexts. For example, the Winnipeg by-law provides that:[32]

> Section 3: No person shall panhandle within 10 meters of:
> (a) the main entrance to a bank, credit union or trust company;
> (b) an automatic teller machine;
> (c) a public entrance to a hospital;
> (d) a bus stop; or
> (e) a bus shelter.
>
> Section 4: No person shall panhandle on a bus operated by the City of Winnipeg Transit Department.
>
> Section 5: No person shall panhandle on an elevator or in a pedestrian walkway.
>
> Section 6: No person shall panhandle from an occupant of a motor vehicle which is (a) parked; (b) stopped at a traffic signal; or (c) standing temporarily for the purpose of loading or unloading.
>
> Section 10: No person shall panhandle after sunset.

The Vancouver by-law bans all of these activities, but it also bans sitting or lying "on a street for the purpose of panhandling."[33]

Begging at the entrance of a bank or hospital may sometimes be conducted in an aggressive or harassing manner, with the beggar physically obstructing the entrance. Yet begging at these locations is no more likely to be aggressive than at any other public location.[34] The most that can be said about these regulations is that they seek to protect members of the public from being confronted by beggars (aggressive or polite) in situations where contact with the beggar is difficult to avoid, or to escape from quickly, or where the 'beggee' may feel more embarrassed by her/his refusal to give. The problem to which these regulations respond is not physically aggressive or intimidating or harassing begging but rather the feeling of invasion or discomfort that passers-by feel when confronted by, or even when confronted with, beggars.

While begging is sometimes conducted in a physically aggressive way, in which the beggar obstructs the pedestrian or threatens her/him, most begging is non-aggressive, and even polite. Nevertheless, begging is experienced by many as invasive or upsetting, or is labelled as 'aggressive' even when it is not conducted in a physically threatening or persistent manner. Public reaction has become increasingly negative as begging has become more common. As Joel Blau observes:[35]

> Some people are generous and do not mind occasional requests for money. Too many requests, though, soon exhaust their generosity. Losing their capacity to engage in single charitable acts, they are increasingly inclined to see homelessness as a disfigurement of the landscape, and begging as a personal assault.

Yet, ironically, we experience begging as invasive because it is not the norm, because it is so different from ordinary public interaction. We are not accustomed to being confronted by others, by strangers, and asked for help. Indeed, many of us experience the mere presence or visibility of the homeless as

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31 *Supra* note 4.

32 *Supra* note 4.

33 City of Vancouver, By-law No. 7885, *A By-law to Regulate and Control Panhandling*, (30 April 1998), s. 6.

34 The Government of Ontario's *Safe Streets Act, 1999*, *supra* note 2 prohibits "aggressive solicitation" and the soliciting of a person "who is using, waiting to use, or departing from an automated teller machine" or "who is using or waiting to use a pay phone" or "who is in the process of getting in, out of, on or off a vehicle or who is in a parking lot" etc.

"Solicit" is broadly defined in this Act. It means "to request, in person, the immediate provision of money or another thing of value, regardless of whether consideration is offered or provided in return, using the spoken, written or printed word, a gesture or other means." Presumably the *Act* is violated when a beggar, identified by general appearance or by a sign asking for spare change, sits near the entrance of a bank or near where cars are being parked and is visible to (or makes eye contact with?) someone leaving a bank or getting out of a car.

35 As quoted in R. Fantasia and M. Isserman, *Homelessness: A Sourcebook* (New York: Facts on File Inc., 1994) at 137.

invasive.[36] We are uncomfortable with, even afraid of, those who are different from us and living in difficult circumstances. We see in these strangers the potential for violence. As well, we are uneasy about what the growing presence of beggars may tell us about our community. We are not comfortable with having to confront so immediately the question of our personal and shared responsibility to others.

Despite the familiar and idealized description of public/political discourse as the free and open exchange of ideas and information among citizens, the fact is that we engage in very little face-to-face communication with strangers.[37] Most of our public discourse is mediated. It is conducted through newspapers, magazines and on television and radio. It is one-directional, in that the vast majority of citizens receive commercial messages or commercially funded messages to which they have no real opportunity to respond. We are unaccustomed to engaging in any sort of verbal exchange with those who are not friends, family or co-workers. This is why it feels invasive when we are addressed by one or more beggars, by strangers.[38] Ironically, it is the failure of mediated social provision (state-provided welfare) that has led to this increase in direct (non-mediated) contact with strangers — with the poor and homeless.

We are more comfortable with approaches by charitable fundraisers because they are more like 'us,' and provide a buffer between us and the needy. The principal distinction between begging and charitable fundraising is that the former is a request to help the speaker, while the latter is a request to help others. But it is difficult to understand why constitutional protection should turn on this distinction.[39] Begging and charitable fundraising are sometimes distinguished on the basis of the effectiveness of the donation. While we feel reasonably confident that money donated to a charity will go to those in need, we are less sure that money given to a beggar is going to someone in need or to someone who will use the money wisely. This second distinction, however, may be more a matter of perception than reality. A large percentage of the money donated to many charities goes to cover fundraising and administrative costs.[40] At the same time, there is no evidence to show that fraudulent needs claims by beggars are anything but the exception.

The other factor that makes begging seem invasive is that it runs against the dominant message of public discourse. Advertising is everywhere, around every corner we turn. Yet we do not see advertising as invasive, or as invasive to the same degree as begging, precisely because it is omnipresent. Advertising defines our public discourse and shapes our assumptions about appropriate social interaction. It is a familiar part of our public environment. It is something we expect to see when we go about our day, something to which we have become accustomed, part of the natural order, the way things are and must be. At the same time, the domination of discourse by advertising — by consumer oriented messages — makes begging seem invasive. The beggar's message about basic unsatisfied need and individual and collective responsibility runs against the principal theme of commercially dominated public discourse, that personal satisfaction and fulfilment are achieved through consumption. While in some communities begging is an accepted part of public interaction, in our consumer society we have come to assume that we should be protected from uncomfortable personal interaction or from being confronted with claims of obligation.

It should be obvious from the foregoing that the partial bans on begging introduced by Vancouver and Winnipeg are not simply 'time, place and manner'

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36 O'Reilly-Fleming, *supra* note 22 at 6: "Why would we wish to fine the hungry for the audacity to ask pedestrians to voluntarily give up a small amount of money? The answer is that we are not fining the beggar for his request, but for his presence on the street."

37 See, for example, Ellickson, *supra* note 19 at 1235:

> Unlike the offer of a handbill, a spoken plea carries an implicit request for eye-contact and oral response. This intrudes more on a pedestrian's privacy and, because the act is more aggressive, creates a more plausible fear of physical danger.

38 Schafer, *supra* note 20 at 8 observes:

> The encounter may not be entirely easy from the beggar's perspective either. It may be a necessary means, however, whereby the beggar obtains subsistence, and it may provide an opportunity publicly to express one's painful condition. But only as a last resort would anyone choose this way of obtaining money or communicating their problems.

39 *Loper*, *supra* note 25 at 704:

> We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others. The distinction is not a significant one for First Amendment purposes.

40 See *Epilepsy Canada* v. *Alberta (A.-G.)* (1994), 115 D.L.R. (4th) 501 (Alta C.A.). In the US, see *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980). In each case the court struck down a law restricting charitable solicitation by an organization that did not devote at least 75 per cent of its revenue to charitable purposes.

restrictions, directed at the physical effects of a particular communicative activity. The Supreme Court of Canada has indicated in previous judgments that 'time, place and manner' restrictions may be easier to justify under section 1 of the *Charter*. Because this type of restriction is aimed at the physical consequences of expression rather than at the content of the communicated message, it will often leave the individual speaker with alternative times, places and manners at/in which to communicate her/his message. The state should be permitted to introduce a reasonable restriction on the time, place and manner of expression, provided the restriction leaves adequate space for expression generally or for the expression of particular views — i.e., provided that there are other times, places and manner in which the expression can take place.[41]

Even though these by-laws do not restrict begging in general, and may leave some space for lawful begging, they are not simply time, place and manner restrictions. They restrict the time, place and manner in/at which a particular kind of speaker can communicate a particular kind of message. Only one kind of communicative approach, begging, is restricted. More significantly, the restricted activity is not defined in terms of its harmful physical consequences.[42]

As presently drafted, these by-laws prohibit begging that is neither persistent nor aggressive. The content or message is a critical part of what these by-laws seek to curtail, even if they do leave open some space for begging.[43] How else can we explain the municipalities' decision to restrict begging, but not other soliciting activities, near the entrance of a hospital or near a bus shelter or to restrict sitting or lying on a street for the purpose of panhanding? If the municipality was concerned only with the nuisance or physical interference the speaker might cause by sitting down on the sidewalk, and was in no way with concerned with her/his message, then the provision would have been broader and included any incident of sitting down on the sidewalk or it would have been narrower so that it dealt only with sitting (or even begging by sitting) that obstructed or impeded pedestrian traffic. Because this and other provisions in the by-law restrict a particular kind of speaker and message and because they do for reasons that relate, at least in part, to the content of the communication, they cannot truly be described as 'time, place and manner' or 'content-neutral' in character and so must be subject to a rigorous standard of review under section 1 of the *Charter*. Begging is banned or restricted because it is experienced as invasive and it is experienced in this way because of its message.

It is difficult not to think that the cities of Winnipeg and Vancouver decided to impose a partial ban, directed at certain kinds of begging or begging in certain circumstances, simply because they recognized that a general ban on begging would have little chance of surviving constitutional review. However, this strategy by the municipalities does not change the substance of the by-laws. The concerns that underlie these partial restrictions are the same as those that underlie Ottawa's general ban and are entirely inadequate as a basis for restricting constitutionally protected freedom of expression.❑

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[41] *Peterborough* v. *Ramsden*, [1993] 2 S.C.R. 1084 at 1106.

[42] In *Irwin Toy*, *supra* note 5 at 974 the Supreme Court of Canada said that a key question is whether "the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed" or whether "the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the message to do so."

[43] Hershcoff, *supra* note 6 at 906:

> Governments that prohibit begging do not forbid all communications among strangers. Indeed they could not constitutionally do so. Instead, bans on begging do not forbid all communications among strangers — the tourist's request for directions, the newspaper seller's exhortation to "read all about it," the politician's pitch to "vote Democratic," and the Christmas Santa's plea to give to the needy — and prevent 'expression' on one particular subject.

R. v. *SHARPE* AND PRIVATE POSSESSION OF CHILD PORNOGRAPHY

June Ross

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.
>
> 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

[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.LR. (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 ...
>
> 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.

THE PREAMBLE, JUDICIAL INDEPENDENCE AND JUDICIAL INTEGRITY

Jeffrey Goldsworthy

Australian voters were recently asked not only whether Australia should become a republic, but also whether a new preamble should be added to their Constitution.[1] The proposed new preamble was part of a package that included a new section 125A, which provided that the preamble "has no legal force and shall not be considered in interpreting this Constitution ..." This provision was included to dispel fears that activist judges might otherwise misuse the preamble, which expressed commitments to abstract principles of political morality. It was feared that they might claim authority to enforce their own understanding of those principles by invalidating laws enacted by a parliament. They might enforce the principles not only indirectly, by using them to creatively "interpret" (change the meaning of) other constitutional provisions, but also directly, on the ground that they have independent constitutional status.

That this was a very real and not a merely fanciful danger is graphically demonstrated by the reasoning of the Canadian Supreme Court in *Reference re: Public Sector Pay Reduction Act (P.E.I.) ("the Provincial Judges' Salaries case")*.[2] In a judgment of Lamer C. J., with which five other Justices concurred, the Court used — or rather, misused — the Preamble of Canada's *Constitution Act, 1867* as a rationalization for inventing a sweeping new constitutional principle of judicial independence. The Court then held that principle to prohibit provincial governments from reducing judicial remuneration, even as part of a general reduction of public sector remuneration for budgetary reasons, in the absence of advice from an independent judicial remuneration tribunal.

The question I propose to discuss is not whether that result is good or bad as a matter of public policy. It is whether the Court's reasoning was good or bad as a matter of law. Only the most extreme sceptic would deny that there is any difference between legal reasoning and arguments about public policy.

The *Constitution Act, 1867* and the *Canadian Charter of Rights and Freedoms*[3] contain some express provisions that help to protect judicial independence but, as the Court pointed out, their scope is limited. First, they apply to inferior provincial courts only when exercising criminal jurisdiction.[4] Secondly, they do not prohibit legislatures from reducing judges' remuneration. Indeed, section 100 of the *Constitution Act, 1867*, by providing that Parliament shall fix and provide the salaries of superior, district and county court judges, appears to positively authorize such reductions.[5] The Supreme Court observed that because of these "large gaps" in their coverage, the express provisions did not comprise "an exhaustive and definitive code for the protection of judicial independence."[6]

But surprisingly, the Court did not conclude that therefore, the Canadian Constitution did not contain such a code — that in true British spirit, the United Kingdom Parliament, which enacted those provisions, entrusted the full protection of judicial independence to the wisdom and democratic accountability of elected legislators. The Court dismissed this possibility, without argument, as "untenable."[7] It concluded, instead, that such a code could be derived from "an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*."[8]

1 Both proposals were defeated at the referendum held on 6 November 1999.

2 [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577 [hereinafter *the Provincial Judges' Salaries case*, cited to D.L.R.].

3 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c.11.

4 Sections 96–100 of the Constitution Act do not apply to inferior provincial courts at all, and s. 11(d) of the Charter applies only to the exercise of criminal jurisdiction: *supra* note 2 at para. 82–85.

5 *Ibid.* at 618–19.

6 *Ibid.* at 617–18.

7 *Ibid.* at 617.

8 *Ibid.* at 617.

To establish that such an unwritten principle existed, the Court relied heavily on a clause in the Preamble providing that the 1867 Act was intended to establish "a Constitution similar in Principle to that of the United Kingdom." But there are at least three powerful objections to basing such a principle on this clause. Indeed, each one of them in itself appears to be fatal to the Court's conclusion.

First, it had previously been held that the Preamble had "no enacting force," and the Court purported to accept this, observing that "strictly speaking, it is not a source of positive law, in contrast to the provisions which follow it."[9] But the Court immediately proceeded to adopt a contradictory understanding, without acknowledging the contradiction. It said that the Preamble nevertheless had "important legal effects." It could be used to identify the purpose of the Constitution and thereby assist the interpretation of ambiguous provisions. More importantly, it "recognizes and affirms" the "organizing principles" that the provisions of the Constitution were intended to effectuate, and it therefore "invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law."[10]

It is not clear why the Court believes that this understanding of the effect of the Preamble is consistent with the established rule that it is not a source of positive law. It could be argued that the Preamble merely "recognizes and affirms," but does not itself enact, the "organizing principles" underlying the Constitution's express provisions. On this view, the Preamble is not itself the source of those principles, which exist independently of it: it merely assists in identifying them. Indeed, the same principles could be identified and enforced even if the Preamble did not exist. But in this case, this is an unconvincing and artificial distinction. If there was some evidence of the existence of the principle apart from the Preamble itself — if, for example, the substantive provisions of the Constitution themselves suggested the existence of such an underlying principle — the Preamble could be regarded as corroborating that evidence. But here there is no evidence of the existence of the supposed principle other than the Preamble itself. The substantive provisions that partially protect judicial independence are not evidence of an underlying principle of complete judicial independence, precisely because their protection is only partial. Indeed, they are more plausibly regarded as evidence for the opposite conclusion, that the Constitution is based on an underlying principle that judicial independence warrants only partial constitutional protection. But if the Preamble amounts to the only evidence of the existence of the supposed principle, there is little if any difference between "recognizing and affirming" that it exists and positively enacting it.

Perhaps for this reason, the Court does not press the distinction between "recognition" and "enactment." Indeed, that distinction is inconsistent with many passages in the Court's reasoning. For example, it says that the Preamble is "*the means* by which the underlying logic of the [Constitution] Act can be given the force of law;"[11] that "the *existence* of many of the unwritten rules of the Canadian Constitution can be explained by reference to the preamble of the *Constitution Act*;"[12] that it was able to "infer this general principle [of parliamentary democracy] *from* the preamble,"[13] and it later refers to "the underlying, unwritten and organizing principles *found in* the preamble."[14] Finally, it declares that: "In fact, it is in the preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located."[15] So the preamble is both "the true source" of a judicially enforceable principle and also "not a source of positive law!"

The second objection to the Court's reasoning is that the Preamble refers to the British Constitution, but as the Court itself acknowledges, the *Act of Settlement* of 1701 only protected the judges of superior courts from dismissal by the Crown.[16] It offered no protection for inferior courts. In his devastating dissent, La Forest J. pointed out that "[t]he independence and impartiality of inferior courts were ... protected through the superintending functions of the superior courts. They were not protected directly under the relevant British 'constitutional' principles."[17] "The overall task of protection sought to be created for inferior courts in the present appeals ... [is] in no way similar to anything to be found in the United Kingdom."[18]

The Court managed to brush aside this second objection in two sentences:

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9 *Ibid.* at 621.

10 *Ibid.* at 621–22.

11 *Ibid.* at 621–22 [italics added].

12 *Ibid.* at 621 [first italics added].

13 *Ibid.* at 624.

14 *Ibid.* at 627 [italics added].

15 Ibid. at 628.

16 *Ibid.* at 627.

17 *Ibid.* at 713–14.

18 *Ibid.* at 710.

However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country."[19]

"In the same way"? Hardly — there is a world of difference between the adoption of new constitutional principles by formal enactment and the spontaneous "evolution" of unwritten principles. So the objection is dismissed by a vague reference to "evolution," combined with a plainly false analogy.

The idea that the meaning of constitutional provisions can spontaneously "evolve," so that the content of those provisions can change without constitutionally prescribed methods of amendment being employed, is extremely dubious at the best of times.[20] Applied to unwritten "underlying" principles, it confers on judges an unbounded authority to find whatever they like in a constitution. I mean this in a strict and literal sense. In the case of written provisions, there is at least a fixed text that limits the extent to which their meaning can supposedly "evolve." The text itself must be formally amended and cannot spontaneously "evolve." In the case of unwritten principles, there is no such limit. They can be held to expand or mutate according to the judges' confidence in their ability to divine "contemporary values" — which in practice means their own values. Indeed, the Court could have used this strategy even if judicial independence had been completely unknown to British constitutionalism in 1867. The Court could have argued that the most fundamental principle of the British Constitution was "good government," that this principle was incorporated within the Preamble and that it had so "evolved" that by 1997 it required total judicial independence! The difference between that imaginary argument, and the one the Court actually employed, is merely one of degree.

The third and most powerful objection to the Court's argument is that the British constitution has never included any judicially enforceable constitutional principle of judicial independence, let alone one that prevents Parliament from reducing judicial remuneration. As La Forest J. observed, "[a]t the time of Confederation (and indeed to this day), the British Constitution did not contemplate the notion that Parliament was limited in its ability to deal with judges."[21] A statute interfering with judicial independence might be condemned in Britain as "unconstitutional," but that would mean "in breach of constitutional convention," not "ultra vires and invalid."[22] The Court's conclusion is therefore based on "an historical fallacy."[23] Moreover, it is not a fallacy whose exposure requires recondite historical knowledge — the first and most elementary fact that anyone investigating the question would learn is that the British Parliament in 1867 was deemed to be legally sovereign.

The most extraordinary, and reprehensible, aspect of the Court's reasoning is that it chooses to simply ignore this obvious and fatal objection. La Forest J., in dissent, is compelled to anticipate a counter-objection to it: namely, that it "is merely a technical quibble."[24] He treats this counter-objection far too respectfully. It would be absurd to describe the difference between a constitutional principle that is judicially enforceable, and one that is not as "merely technical." It would amount to saying that the difference between the British and the American constitutional traditions with respect to the protection of basic constitutional principles is "merely technical." In fact, the difference is plainly one of very great substance, amounting to a radically different allocation of decision-making authority. And remember that the crucial provision in the preamble declares that the Constitution is to be similar in principle to the British — not the American — Constitution.

Curiously, the Court did not reiterate its response to the second objection. It could have said that although, in 1867, the Preamble referred to a principle that was not judicially enforceable, "our Constitution has evolved over time" and it has "grown into a principle" that is now judicially enforceable.[25] As previously explained, when applied to unwritten principles, the "evolving constitution" gambit can be used to surmount any obstacle!

To summarize, the Court employed the following stratagems to avoid the three obvious and fatal objections to its misuse of the Preamble: a self-contradiction, a vague reference to "evolution" combined with a plainly false analogy, and an evasion.

The Court's reasoning exemplifies a style of constitutional interpretation that is becoming increas-

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19 *Ibid.*

20 See J. Goldworthy, "Originalism in Constitutional Interpretation" (1997) 25 Federal Law Review 1, esp. at 35–9.

21 *Supra* note 2 at 707.

22 *Ibid.* at 709.

23 *Ibid.* at 709.

24 *Ibid.* at 710.

25 *Ibid.*

ingly popular in common law jurisdictions. Constitutional provisions are said to serve deeper, more general principles, such as representative democracy and judicial independence. Those principles are then treated not only as aids to the interpretation of the enacted provisions, but as independent and directly enforceable, even though this means going far beyond those provisions. Several members of the High Court of Australia, for example, derived an implied freedom of political speech from the principle of representative democracy that underlies the electoral provisions of the Australian Constitution.[26]

The traditional approach of the courts was to hold unwritten principles to be judicially enforceable only if and insofar as this was "necessarily implied" by the written provisions. The High Court of Australia at least attempted to follow that traditional approach: it argued, albeit unpersuasively, that the electoral provisions of the Constitution could not achieve their intended purpose without the assistance of a judicially enforceable implied freedom of political speech.[27] But the Canadian Supreme Court makes no attempt to demonstrate that a general principle of judicial independence is "necessarily implied" by the Canadian Constitution. It claims that the Preamble gives legal force to the "underlying logic" of the *Constitution Act, 1867*,[28] without making the slightest effort to justify that claim. No doubt that is because the claim could not possibly be justified. As the example of the British Constitution demonstrates, it is possible to value judicial independence while relying on extra legal methods of protecting it. This may be unwise, but cannot plausibly be described as "illogical." *A fortiori*, it is not illogical to enact a constitution that offers partial legal protection for judicial independence — one that protects the independence of some courts from some kinds of interferences, but not of all courts from every conceivable interference. As La Forest J. points out, there is nothing illogical in confining the constitutional protection of judicial independence to superior courts, which are able to review and correct the decisions of unprotected, inferior courts. Neither logic nor practical necessity requires that protecting judicial independence is a matter of "all or nothing."

One problem with ignoring the limited scope of the constitutional provisions that have been enacted, by directly enforcing more general principles that supposedly underlie them, is that it ignores the constitution-makers' decision to give effect to those principles only by particular means and to a limited extent. It elevates or privileges some principles and upsets the balance struck by the constitution-makers between them, and other, competing principles. It treats the written provisions as inadequate expressions of more general principles, rather than as deliberately chosen accommodations of competing principles.[29] In so doing, it substitutes the judges' political judgment for that of the constitution-makers. In addition, it risks making the written provisions redundant. If their precise terms and limited scope can be exceeded whenever the judges deem them unable to fulfil their underlying principles, then they serve little purpose. Why bother with them at all? Why not in all cases go straight to the underlying principles? By *reductio ad absurdum*, the Court's reasoning is in danger of collapsing the *Constitution Act, 1867* into a single norm: the general principles of the British Constitution, as the judges deem them to have 'evolved' in Canada since 1867.

I suspect that judges are increasingly attracted to the idea of enforcing general principles that supposedly "underlie" particular legal rules, partly because of the influence of Ronald Dworkin's legal philosophy. Dworkin has made a powerful case for thinking that the common law is ultimately based on general, underlying principles that guide judges in applying, developing and changing more particular rules and doctrines. But the same is not true of statutory and constitutional law. Dworkin's theory must be shown to fit the facts of legal practice, rather than the facts distorted to fit the theory. It is not an *a priori* truth that every legal rule in every legal system is subordinate to deeper legal principles that are judicially enforceable. In so far as it is true of particular legal systems or parts of legal systems, it is a contingent truth, which depends on the practices of legal officials. Dworkin himself presents his theory as the best "interpretation" of how judges in common law jurisdictions do in fact decide cases at common law, and claims that it is confirmed by the way they themselves describe their reasoning.[30]

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[26] In a later case, the Court disapproved of this reasoning, while reaffirming the existence of the implied freedom: *Lange* v. *A.B.C.* (1997) 189 Commonwealth Law Reports 520.

[27] For criticisms of the Court's reasoning, see J. Goldsworthy, "The High Court, Implied Rights, and Constitutional Change" *Quadrant*, March 1995, 46, and "Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue" (1997) 32 Monash U.L. Review 362 at 371–74.

[28] *Supra* note 2 at 622.

[29] J. Goldsworthy, "Implications in Language, Law and the Constitution" in G. Lindell, ed., *Future Directions in Australian Constitutional Law* (Sydney: Federation Press, 1994) 150 at 178–81.

[30] R. M. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) c. 4 at 86–7, 112 and 115–16, and R. M. Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986) c. 1, 3 and 7.

But there are substantial differences between the common law and statute law in terms of judicial interpretation and application. In the former case, general principles can legitimately be extracted from particular decisions by a kind of inductive reasoning, and then extended to novel circumstances. But in the case of statutes, the courts have consistently disapproved of this approach. Dworkin himself acknowledges this. He describes common law precedents as exerting a "gravitational force" on later cases that is not limited by the linguistic meaning of any particular verbal formula.[31] But statutory provisions possess only "enactment force:" they consist of "a canonical form of words ... that set limits to the political decisions that the statute may be taken to have made."[32] Those words "provide a limit to what must otherwise be, in the nature of the case, unlimited." A legislature (or, we might add, a constitution-maker) "has no general duty to follow out the lines of any particular policy" and it would be "plainly wrong" for a judge to suppose otherwise. It is permissible to argue "that the legislature [or constitution-maker] pushed some policy to the limits of the language it used, without also supposing that it pushed that policy to some indeterminate further point."[33] Judges attracted to Dworkin's jurisprudence should underline these words.[34]

There is a famous scene in the film *The Paper Chase*, in which Professor Kingsfield informs his first-year law students that they will be taught to clear their heads of "mush" and think like lawyers. In the *Provincial Judges' Salaries* case, the Supreme Court seems to have undergone something like the same process in reverse. But there is a difference: the Supreme Court's mush is calculated — it is mush in the service of an agenda.

As a rule, prudence and courtesy require that criticisms of poor judicial reasoning be couched in respectful terms. But strong language is justified in rare cases of extremely poor reasoning. Frankly, I cannot see how the reasoning I have criticized can be explained as anything other than a disingenuous rationalization of a result strongly desired by the judges on policy grounds. How could six judges of a respected Supreme Court have put their names to it? Has the inherently political task of interpreting and enforcing the abstract moral principles of the *Charter* somehow corrupted their ability to perceive, or their willingness to accept, the constraints of legal reasoning? If so, the case may provide an even more important warning for constitutional reformers in Australia than the danger of constitutional preambles.

Modern judges are prone to solemnly invoke "the Rule of Law" to justify inventing or expanding limits to the authority of other governmental institutions. They should reflect on the fact that they too are subject to the rule of law and that, ultimately, the only practical mechanism for ensuring that they abide by it is their own scrupulous intellectual honesty. If that cannot be trusted, the rule of law is in peril.

The rationale for judicial independence relies on judges applying the law in a politically neutral way, rather than changing it to advance their own political goals.[35] In a democracy, officials who exercise political power should be accountable to the electorate, directly or indirectly, rather than independent. Judges who usurp political power therefore undermine the case in favour of their independence. The final irony is that the judges exceeded the limits of their judicial authority in order to add to the Constitution a principle whose rationale depends on their strictly observing those limits.❑

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[31] *Taking Rights Seriously*, *ibid.* at 111.
[32] *Ibid.* at 110.
[33] *Ibid.* at 109–110.
[34] The reasoning of the Court in *Reference re: Secession of Quebec* [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 may be open to this (and other) criticisms, but that must be a subject for separate discussion.

[35] This is true, at least, when the law is both clear and not subject (as the common law is subject) to legitimate judicial amendment.