

“Making up Stories”: Law and Imagination in Contemporary Canada

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“Adeimantus,” I said, “you and I are not making up
stories at the moment; we’re founding a community.”
Plato, Republic, Book II

IN PLATO'S CAVE, as we know, representation was already a problem and troping of representation—art—even more so. The “distortions” produced by written words occasioned “danger” and potential “harm,” a particular concern in the establishment of a “well-regulated community” where “at least for the general rank and file, obedience to those in authority and establishing one’s authority over the pleasures of drink, sex, and food” were paramount (*Republic* Book II). In Canada since *R. v. Sharpe* and *R. v. Malmø-Levine* we appear to be less concerned with drink and food and more with sex and drugs but the concern with representation remains and I suspect that Plato would feel right at home.

In this paper I want to consider some of the things that happen when the Court thinks about making up stories, especially when the artistic merit of those stories is at issue, and what happens when the Court thinks about harm and the public good in the context of art. I am going to suggest that in this hall of interpretive mirrors, art runs a great risk of going up in smoke just as individual freedom recently did in *Malmø-Levine*. Given that the Court has maintained that in certain contexts the perceiver, the perceived and the maker are all liable, I am also going to maintain that teachers have a vested interest in this debate and should prepare accord-

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ingly. But let's return to Plato briefly while bearing in mind that this interdisciplinary approach situates the law in the context of theory ancient and modern rather than undertaking the rigorous analysis of precedent and the rigorous distinction between obscenity and child pornography which a longer paper and the conventions of legal scholarship would require.

Sex, Lies, Plato, Aristotle

For Plato, the rhapsode's gift was inseparable from the underworld of Orphic cults, Dionysian frenzies, and, as we would say now, sex and drugs. The requirement that art depict and serve "the good" was the corollary of the rejection of art produced by "possessed or crazed" hysterics disseminating their misleading and seductive messages so harmful to the young and vulnerable. In the *Ion*, the rhapsode is mocked as an ignorant singer of Homeric verses, devoid of social responsibility and intellectual acumen, inciting the equally ignorant and misguided to delusion and potential riot. The poet, as a well-known passage from the *Republic* puts it, disseminates artistic "lies" which have no "redeeming" value and must be banned since

if the young men of our community hear this kind of thing and take it seriously, rather than regarding it as despicable and absurd, they're hardly going to regard such behavior as despicable in human beings like themselves and feel remorse when they also find themselves saying or doing these or similar things. (*Republic* Book 111)

Under these circumstances, "making up stories" becomes serious business indeed, fraught with anxiety and obsessed with the production of the "good use of language, harmony, grace and rhythm [which] all depend on goodness of character" (*Republic* Book 111). "Goodness" becomes the entry ticket for art into the republic and the only context in which "making up stories" can be justified. Where, as Luce Irigaray puts it, "[r]e-semblance is the law," "founding a community" requires the elimination of any further levels of "distortion" (149–50).

Aristotle's response in the *Poetics* is to undertake a redaction of rhetorical analysis, formalizing Plato's delusion as catharsis, embedding transformation at the center of his process theory of artistic production while developing an understanding of mimesis as fundamental to art. Poetry is invention, constructed of tropes and figures, governed by decorum, expressive of plot, theme, and emotion. From this point on into the Middle Ages, Aristotelian rhetoric develops into a taxonomically complex

but conceptually elegant hermeneutics well adapted to both theological and jurisprudential articulations. The complex and long-lived encounter between this technology for parsing re-semblance and the fear of art which haunts Plato's *Republic* is the stuff of courtroom drama and the foundation of Bill C-20.

Ut pictura poesis: The Question of Pictures

Art is not of much concern to the Court unless art is *in extremis* and categorized as obscenity and pornography, those forms of what feminist theory refers to as "writing the body" which have been the primary focus of the Court's aesthetic theorizing. However, a review of relevant cases will show that the very terms used in defining obscenity and pornography in the *Criminal Code* are themselves at issue in these trials. Criminality is, in a sense, only part of the problem. For example, concepts of plot, fact, evidence, and motivation which are central to the criminal law have very different meanings in literary studies, and the legal fiction of the "reasonable person" sorts ill with hermeneutic understandings, whether ancient or modern, of author and reader.

Simplistic variations on these concepts at law are also readily transformed by such agents as Customs personnel as, to take a personal example, I first discovered some years ago when re-entering Canada after a road trip to Seattle. My expedition had included the purchase of books at the University of Washington Bookstore and I had books and receipt in hand for the Customs officer who, to my surprise, seemed perturbed to find a copy of Roland Barthes' *The Pleasure of the Text* on the top of the pile. Did it have pictures, he asked, and I—unaware at that time of the implications of this question—dutifully explained that it didn't but the illustrated history of Japanese gardens further down in the pile did. My books and I were detained for two hours as security checks were made and Customs officers pored over the stack of books, shaking each one vigorously and combing through the books to find more pictures than there evidently were. Post-9/11, one can imagine the same experience taking a more intimidating form though at the time the detention certainly achieved its intended goal. It wasn't until I served as expert witness for *Little Sister's* several years later that I came to understand that the pleasure of the text could only have one kind of illustration as far as the Customs officers were concerned.

This too is familiar to the history of literary criticism: *ut pictura poesis*, as Horace, following Aristotle, called it—as a picture, so a poem and so, in this instance, a reader. Because the *Criminal Code* provisions on both

obscenity and pornography seek to encompass both pictures (photographs, films, paintings, drawings) and text (regardless of genre), the problem of *ut pictura poesis* saturates the language of the *Code* and creates interesting problems when dealing with “depiction.” As Chief Justice McLachlin writes, the *Criminal Code* Section 163.1 (1)(a)(i) “brings within the definition of child pornography a visual representation of 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.’” On further analysis of this section of the *Code*, Chief Justice McLachlin determines that representation “should include visual works of the imagination as well as depictions of actual people” (*R. v. Sharpe*, 2001 SCC 2, 38). Subsequently, the Chief Justice considers whether “depicted” means “(a) intended by the maker to depict; (b) perceived by the possessor as depicting; or (c) seen as being depicted by a reasonable observer” (42). Setting aside the first two points as “virtually impossible to prove,” Chief Justice McLachlin concludes that in determining whether or not a representation may be termed child pornography with respect to the *Criminal Code* provisions, “The question is this: would a reasonable observer perceive the person in the representation as being under 18 and engaged in explicit sexual activity?” (*R. v. Sharpe*, 2001 SCC 2, 4). The emphasis here on “objective” data (the person, under 18, explicit sex) contrasts sharply with some of the Court’s earlier struggles with representation and is a marker of what is meant in this context by “objectivity.” Compare Judge Gonthier’s minority opinion in *R. v. Butler* where he maintains that “By ‘content’ I mean of course the content of the representation.”

What Kind of Evidence is a (Novelistic) Plot?

In English classrooms everywhere, students are instructed that “actual” persons do not appear in works of fiction. We take the fact/fiction distinction, however complexly theorized, as fundamental to both novelistic and pedagogical practice. And we take the question of the presence or absence of artistic merit as secondary to the generic distinction. That is, a given short story may strike us as deficient aesthetically but we will not therefore automatically assume that its characters are “actual” persons rather than “imaginary” ones. The Courts have taken quite a different view and typically the artistic merit defence has constituted the only boundary when authors (including D. H. Lawrence, John Cleland and John Robin Sharpe, among others) are judged guilty of the fictive acts committed by their fictive characters. To understand this dangerous state of affairs, we have only to remember the Platonic association of the rhapsode with

sex and lies in the context of preventing harm from coming to the well-regulated community. If we consider such recent cases as *Little Sister's* and *Surrey School Board* as well as *Sharpe*, we may also observe that the Courts have persistently been called to make judgements about the artistic value and/or circulation of texts which have a connection to the gay and lesbian community, texts which have in common only the "depiction" of non-heterosexual characters, plots, events, and so on. The persistence of this focus has often been seen by critics as a targeting of the gay and lesbian community from which one might infer that the "public good" is not viewed as being served by representation of, for example, same-sex parents in stories written for young readers—the focus of the *Surrey School Board* case. After all, as delegates to the June 2003 hearing of this Public School Board were told, the representation of gays and lesbians as "normal" could give young people the wrong idea.

Perhaps ironically though with historical justification, what "saves" endangered artistic texts is a defence of which Aristotle would, I hope, be proud and which satisfied Judge Shaw in *Sharpe* (2002). He was responding to the formulation of artistic merit written by Chief Justice McLachlin several months earlier, a formulation which includes such traditional hermeneutic criteria as authorial intention, form and content, "connection with artistic conventions, traditions or styles," "the mode of production, display and distribution," and the opinion of experts. Chief Justice McLachlin also stressed that "any objectively established artistic value, however small, suffices to support the defence" (*R. v. Sharpe* 2001 SCC 2, 63–64), thereby firmly situating her reasoning within the claims to objectivity of both legal and literary hermeneutics. However, in setting aside the community tolerance standard, Chief Justice McLachlin both acknowledged that the particular context of her artistic merit formulation required that she consider the "potential risk of harm to children" and set aside that principle as well, arguing that "To restrict the artistic merit defence to material posing no risk of harm to children would defeat the purpose of the defence. Parliament clearly intended that some pornographic and possibly harmful works would escape prosecution on the basis of this defence; otherwise there is no reason for it" (65).

We learn a number of things from this argument, including the fact that a novelistic plot, characters, narrative conventions, and so on may be "objectively" evaluated such that "imaginary" persons in fiction may be saved from the fate of "actual" ones in real life performing actions which might be in violation of the *Criminal Code*. Only when art enters the realm of the objective may it escape the otherwise subjective fate of the imagi-

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nary as well as the hypothetical wrath of the community whose values have been challenged. However, it is not only child pornography which is associated with harm here but also art more generally and Chief Justice McLachlin quotes Judge Sopinka's admonition that "[a]rtistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression" (*R. v. Sharpe*, 2001 SCC 2.61). Thus art may occasion harm (perhaps even catharsis, a purgative harm, though Chief Justice McLachlin does not explicitly say so) but nonetheless freedom of artistic expression is fundamental to Canadian democracy, even if that modicum of artistic merit occurs in the extreme case of a work of transgressive literature, here a collection of short stories and a novella deemed to be child pornography.¹

Which Public? Whose Good?

Chief Justice McLachlin has little to say about "the public good" in *R. v. Sharpe*, having developed a formulation of artistic merit which supercedes the public or community as arbiter. However, the (pre-*Charter*) case known as *B. v. Brodie* enables us to construe this point further with respect to *Lady Chatterley's Lover*. Judge Ritchie writes that "no significant segment of the population was likely to be depraved or corrupted by reading the book as a whole" while Judge Taschereau, writing a dissenting opinion, states that "[n]obody would seriously think that this novel could be shown on television or that any respectable publisher would make available to the public in a newspaper or a magazine the complete story of 'Lady Chatterley's Lover,' without shocking the feelings of normal citizens."

Thirty years and a lot of television later, Judge Sopinka argued in *R. v. Butler* that harm is "not what Canadians would not tolerate being exposed to themselves, but what they would not tolerate *other* Canadians being exposed to" (Sopinka's emphasis). We can see this principle at work in

1 James Miller (English, University of Western Ontario) and I served as expert witnesses for the Defence in *R. v. Sharpe* (2002 BCSC 423). Professor Miller contextualized Sharpe's impugned texts in terms of the tradition of Sadean transgressive literature and considered such aspects of the texts as form and content, genre, allegory, characterization, plot, conflict, theme, and setting (as Judge Shaw summarizes Professor Miller's testimony in his decision). I considered contexts for Sharpe's work in Victorian fiction and discussed Sharpe's use of irony, narrative voice, genre, and oeuvre (though Judge Shaw balked at this traditional term, saying that he was already suffering a surfeit of technical terms). Both Professor Miller and I endeavoured to perform traditional close analysis of several of Sharpe's short stories for the Court. Professor Paul Delany (English, Simon Fraser University) served as expert witness for the Prosecution on artistic merit and took a negative view of the impugned texts.

the decision of Judge McCombs in the forfeiture hearing for Eli Langer's seized paintings, a context in which the learned Judge devoted considerable energy to the question of the use to which the paintings and drawings constituting Langer's exhibition in the Mercer Union Gallery in Toronto might be put by hypothetical pedophiles who might be predisposed "to act in an anti-social manner" (53) as a result of viewing the exhibition. The sad irony that Langer's paintings expressed his own traumatic experience of childhood sexual abuse was not entirely lost on Judge McCombs, who was reassured "by some of the experts that although the subject-matter of the paintings and drawings is shocking and disturbing, the work as a whole is presented in a condemnatory manner that is not intended to celebrate the subject-matter" (41). This "condemnatory manner" saved Langer's paintings and drawings from forfeiture to the Court.

We could argue that, in fact, the public good was thus well served in the *Langer* case as Judge McCombs ordered Langer's work returned to him. Similarly, in the *Brodie* case, *Lady Chatterley's Lover* was allowed to go free and circulate and in *R. v. Sharpe* (2002), Judge Shaw found in favour of the arguments of the Defence with respect to the artistic merit of Sharpe's collection of short stories and novella. We could also argue that all of these cases waver on the fine edge of harm and the public good—terms indissociable from each other in these cases—and that without the artistic merit defence, the results would likely have been very different. The recurrent concern with "shocking" those *others* who might become "anti-social" bears witness not only to an enduring commitment to the concept of all representation as seductive and dangerous, inherently a force which threatens the well-regulated society, but also a commitment to the concept of "[g]ood art [which] should disturb and provoke" (*Langer* 37 [d]) and whose existence may be demonstrated through the use of hermeneutic traditions. Without the artistic merit defence, what we are left with in this debate is precisely that fear of the rhapsode and of representation itself which justified Plato's condemnation of art.

Smoke and Mirrors

Surely this can't be so. Who would survive an English Major degree with such ideas? Hasn't anybody here read Foucault, Derrida, Gadamer, Fish, even Schleiermacher? Well, no, and not surprisingly given the disciplinary boundary between legal and literary studies and the intricacy of professional training in both cases. What we call "theory" ancient and modern enters the courtroom only via expert witnesses who operate within the terms of formulations like that of Chief Justice McLachlin in *Sharpe*. Oth-

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erwise we have a reliance on the classics and perhaps also on cliché. When we consign freedom of the imagination to Parliament, this is perhaps the best that the Court can produce.

What next? As we've seen, the artistic merit defence as defined by Chief Justice McLachlin bracketed harm and community standards. By eliminating the artistic merit defence, Bill C-20 enables a return to those now-bracketed terms. It could be argued that "harm" and the community standard of tolerance test might once again constitute the key determinants in the interpretation of "the public good" and that by these standards not only would Sharpe's fiction be impugned but Langer's paintings consigned to the Court and Lawrence's novel perhaps drowned as so many copies of *Ulysses* were decades ago. Surely this can't be so.

I have space for only the briefest comment on the Supreme Court's most recent consideration of "harm," the *Malmo-Levine* case, well known in connection with the Liberal government's struggles with the question of the criminalization of marijuana which the Court describes as "a psychoactive drug which 'causes alteration of mental function.'" In its split decision, the Court considered whether the "harm" which arises to a small minority of marijuana users through their use of this drug is cause for the continuing criminalization of use by a majority who are not so harmed. We are told that the state "has an interest in the avoidance of harm to those subject to its laws which may justify legislative reaction. Harm need not be shown to the court's satisfaction to be 'serious and substantial' before Parliament can impose a prohibition. Once it is demonstrated that the harm is not *de minimis*, or not 'insignificant or trivial,' the precise weighing and calculation of the nature and extent of the harm is Parliament's job."

There is an uncanny echo here of the debates about how much artistic merit constitutes enough and whether a "scintilla" is sufficient (*Langer* 72), and it is difficult not to be reminded of Plato and the rhapsodes with their "psychoactive" drugs and art. However, my point here is neither about marijuana nor child pornography per se² but about what happens when Canada's still-extant temperance industry thinks about representation. It may be that the best we can expect if Bill C-20 or its like is passed is a

2 Needless to say, I am not in any way condoning actual abuse of actual children, crimes which other *Criminal Code* provisions fully address. However, my sense is that if the vast amounts of public money which are now poured into pursuing imaginary persons were redirected to addressing the serious problems of real child poverty and women's poverty, especially among aboriginal and other marginalized groups in Canada, fewer lives might be lost and fewer children abused.

version of the *Malmo-Levine* argument about harm. In that unfortunate circumstance, my best hope is that we have a Judge of Louise Arbour's standing still serving on the Supreme Court and prepared to render a dissenting opinion like the one she so eloquently argued in *Malmo-Levine*. Her argument might then look something like this:

the fact that some vulnerable people might harm themselves by using ... [art] is not a sufficient justification to send other members of the population to jail for engaging in the activity. In other words, the state cannot prevent the general population, under threat of imprisonment, from engaging in conduct that is harmless to them, on the basis that other, more vulnerable persons may harm themselves if they engage in ... [art]. (258)

The last word is art.

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