

## Children in Pornography after *Sharpe*

Janine Benedet

Volume 43, Number 2, 2002

URI: <https://id.erudit.org/iderudit/043710ar>  
DOI: <https://doi.org/10.7202/043710ar>

[See table of contents](#)

Publisher(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (print)

1918-8218 (digital)

[Explore this journal](#)

Cite this note

Benedet, J. (2002). Children in Pornography after *Sharpe*. *Les Cahiers de droit*, 43(2), 327–350. <https://doi.org/10.7202/043710ar>

Article abstract

In its recent decision in *R. v. Sharpe*, the majority of the Supreme Court of Canada upheld the *Criminal Code* provisions prohibiting the possession and making of child pornography, subject to two exceptions. Despite a narrow construction of the definition of child pornography and a broad reading of the statutory defences, the majority found that prohibiting individuals from making and possessing some kinds of child pornography was an unjustifiable limit on the freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The dissent would have upheld the legislation in its entirety. This article argues that the majority of the Court erred in considering the value of freedom of expression in a detached and abstract manner. Operating in this abstract plane led the Court to approve two significant exceptions on the basis of hypothetical examples of overbreadth, without considering the reality of the exceptions as they relate to documented child pornography cases. As a result, the Court extended constitutional protection to some categories of material that are clearly harmful to children. This result should make us sceptical of the use in *Charter* cases of broad reading in remedies that create complex judicial amendments with unexamined consequences.

## Children in Pornography after Sharpe

Janine BENEDET\*

*In its recent decision in R. v. Sharpe, the majority of the Supreme Court of Canada upheld the Criminal Code provisions prohibiting the possession and making of child pornography, subject to two exceptions. Despite a narrow construction of the definition of child pornography and a broad reading of the statutory defences, the majority found that prohibiting individuals from making and possessing some kinds of child pornography was an unjustifiable limit on the freedom of expression guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms. The dissent would have upheld the legislation in its entirety. This article argues that the majority of the Court erred in considering the value of freedom of expression in a detached and abstract manner. Operating in this abstract plane led the Court to approve two significant exceptions on the basis of hypothetical examples of overbreadth, without considering the reality of the exceptions as they relate to documented child pornography cases. As a result, the Court extended constitutional protection to some categories of material that are clearly harmful to children. This result should make us sceptical of the use in Charter cases of broad reading in remedies that create complex judicial amendments with unexamined consequences.*

---

\* Assistant Professor, Osgoode Hall Law School, Toronto, Ontario. An earlier version of this paper was presented at the Canadian Association of Law Teachers Annual Meeting, Quebec City, Quebec, May 29, 2001.

---

*Dans son arrêt récent, R. c. Sharpe, la majorité de la Cour suprême du Canada a confirmé la constitutionnalité des dispositions du Code criminel qui interdisent la possession et la production de la pornographie juvénile, sujette à deux exceptions. En dépit d'une interprétation étroite de la définition de la pornographie juvénile et d'une lecture généreuse des moyens de défense prévus au Code, la majorité a statué que prohiber aux individus de produire et de posséder certains types de pornographie juvénile était une atteinte injustifiable à la liberté d'expression garantie par l'art. 2(b) de la Charte canadienne des droits et libertés. La dissidence aurait confirmé la législation en sa totalité. Cet article soutient que la majorité de la Cour a erré en considérant la valeur de la liberté d'expression d'une façon isolée et abstraite. Œuvrant à ce niveau abstrait, la Cour a approuvé deux exceptions significatives sur la base d'exemples de portée excessive hypothétiques, sans considérer la réalité de ces exceptions en les associant à des cas documentés de pornographie juvénile. En conséquence, la Cour a étendu la protection constitutionnelle à des catégories de matériel qui sont clairement nocives aux enfants. Ce résultat devrait nous rendre sceptique quant à l'utilisation du remède de l'interprétation large sous la Charte qui crée des amendements juridiques complexes avec des conséquences non-anticipées.*

---

	<i>Pages</i>
<b>1 The Criminal Code provisions</b> .....	330
1.1 The need for legislation .....	330
1.2 Content of the legislation .....	332
<b>2 The use and manufacture of child pornography</b> .....	333
<b>3 The values at stake</b> .....	335
<b>4 The use of the hypothetical case</b> .....	340
4.1 The reasonable hypothetical .....	340
4.2 The reality of the exceptions .....	343
<b>5 The question of the remedy</b> .....	347
<b>Conclusion</b> .....	349

---

Using children to make pornography is a form of sexual abuse that tends to produce an unusual degree of unanimity in the reactions of the legislature, the public, and those who write and study about the criminal law. Almost everyone believes that there can and should be legal restrictions on the manufacture of this material<sup>1</sup>. But even this consensus on child pornography is partial and fragile, as evidenced by the decision of the Supreme Court of Canada in *R. v. Sharpe*<sup>2</sup>, in which the majority<sup>3</sup> read a couple of «exceptions» into the prohibition on the possession of child pornography in s. 163.1(4) of the *Criminal Code*<sup>4</sup>, based on the protection for freedom of expression in s. 2(b) of the *Canadian Charter of Rights and Freedoms*<sup>5</sup>. The dissent<sup>6</sup> would have upheld the legislation in its entirety.

The contrast in the approaches of the majority and the dissent in *Sharpe* raises some important questions about the Court's use of the reasonable hypothetical as a tool in *Charter* analysis; its approach to s. 1 evidence in areas where social science evidence is extensive and inevitably conflicting, and its understanding of sex equality rights more generally. It also indicates that the contextual approach to *Charter* rights, and the rejection of a hierarchy of rights, has not yet firmly found favour with the Court.

This article argues that the majority and the dissent in *Sharpe* did not merely strike the s. 1 balance differently; they balanced different rights and values. It concludes that, in considering this constitutional challenge, the majority of the Court got lost in the realm of the hypothetical and the abstract, in an area where justice demands a focus on the real. This led the majority to add two exceptions to the definition of «child pornography» based on hypothetical examples. This article examines the majority's repeated claim that «this [excluded] material poses little risk of harm to children<sup>7</sup>» «by attempting to answer two questions. First, what material will fall within the exceptions, based on real examples of the making and use of children in pornography? Second, is it really true that such material pose little risk of harm? The reality of the exceptions is that harmful material

- 
1. That unanimity, of course, is entirely lacking in the case of pornography made using «adult» women, as if the crossing of an arbitrary line at 14, or 16 or 18 years of age, signalling as it does the legal construct of «consent», transforms the pornography industry and its product from torture into art.
  2. [2001] 1 S.C.R. 45.
  3. McLachlin C.J. (Iacobucci, Major, Binnie, LeBel and Arbour JJ. concurring).
  4. R.S.C. 1985, c. C-46.
  5. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
  6. L'Heureux-Dubé, Gonthier and Bastarache JJ., writing jointly.
  7. *Supra*, note 2 at 93. See also *id.*, at 94, where the majority asserts that the material falling within the exception «may pose no more than a nominal risk».

that uses real children, especially adolescents, and that serves minimal expressive interests, is now protected under the *Charter*. The fact that these consequences appear to have escaped the consideration of the majority suggests that the broad reading-in remedy they adopted should not be readily embraced in future decisions.

## 1 The *Criminal Code* provisions

### 1.1 The need for legislation

Section 163.1 was added to the *Criminal Code* in 1993. Subsection 163.1(1) defines child pornography<sup>8</sup>, while subsections 163.1(2)—(4) create three hybrid offences of making, distributing and possessing child pornography<sup>9</sup>. While it is true that the legislation was passed quickly, a point relied on by its detractors, it was also true that there was widespread support at the time both in Parliament and among the electorate for legislation that would specifically target child pornography, and that the question had been on the legislative agenda in one form or another for at least the previous eight years<sup>10</sup>.

The legislation responded to a gap in the existing criminal law. While the definition of obscenity in s. 163(8) of the *Criminal Code* was interpreted in *R. v. Butler* to extend to explicit sexual activity involving children, the *Code* does not criminalize possession of obscenity, only its manufacture and sale<sup>11</sup>. The obscenity provisions are inadequate to address the problem

---

#### 8. It provides:

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

(iii) 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.

9. If prosecuted by indictment, making and distributing are punishable by a maximum penalty of 10 years' imprisonment; the maximum term of imprisonment for possession is five years.

10. B. BLUGERMAN, « The New Child Pornography Law: Difficulties of Bill C-128 », (1993) 4 *Media & Comm. L. Rev.* 17, 21-22.

11. [1992] 1 S.C.R. 452. Section 163 (8) of the *Code* provides: « For the purposes of this Act, any publication the dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene. » Manufacture, distribution and sale of obscenity are prohibited by ss. 163 (1) (a) and (2) (a).

of child pornography if it is also important to criminalize possession, either because of distinct harms arising from possession alone, or for reasons of enforcement. At times, the outmoded and limited offence of corrupting the morals of a child was relied on instead, in an attempt to cover this gap<sup>12</sup>.

The obscenity provisions are also inadequate in the scope of the activity involving children that they cover. Specifically, they require « explicit sexual activity » on the part of the child, according to the *Butler* definition<sup>13</sup>. This definition does not easily cover all child pornography. For example, the photographing of children who are naked and posed in a sexual manner would likely not meet the definition of « explicit sexual activity », unless courts are prepared to recognize that the actions of the adult in getting the child to undress and pose is itself a type of « activity »<sup>14</sup>. Nor does the definition of obscenity extend easily to « dress-down » pornography, in which young adult women are presented as children. This category of pornography can include adult women presented as adolescents (in school or cheerleading uniforms) or as children (wearing diapers or with their pubic areas shaved<sup>15</sup>.) The *Butler* decision does not define « child », or provide any guidance for situations in which it is not possible to identify the exact age of the young person used to make the pornography. While these ambiguities could presumably have been addressed in later decisions, it cannot be argued that *Butler* made a child pornography law unnecessary.

The child pornography legislation was also timely because of changes in technology. Technology is important because it affects not only the medium through which pornography is made but also the amount produced,

- 
12. See, e.g., *R. v. E.(F.)*, (1981) 61 C.C.C. (2d) 287 (Ont. Co. Ct.), where charges were laid after the accused took photographs of his eleven year old daughter posed nude or in lingerie in imitation of the poses she had seen in pornographic magazines. Section 172 of the *Code* provides: « Everyone who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. » The provision, even if interpreted to apply to the making or possession of child pornography, is obviously limited to situations in which the child's home is involved.
  13. *Supra*, note 11, at 485.
  14. This explains the presence of subsection 163.1 (a) (ii), which specifically includes the depiction, « for a sexual purpose, of a sexual organ or the anal region. » Indeed, the majority in *Sharpe* interpreted the phrase « explicit sexual activity » in subs. 163.1 (a) (i) to include only those activities toward the extreme end of the scale of sexual contact. See, *infra*, note 23.
  15. J.C. SMITH, *Psychoanalytic Roots of Patriarchy: The Neurotic Foundations of Social Order*, New York, NYU Press, 1990, at p. 203.

consumed, and replicated. In the case of adult pornography, the invention of the home videocassette player in the early 1980s led to a substantial increase in the amount of pornography produced and consumed by men in North America<sup>16</sup>. In the same way, the invention of the Internet has changed and expanded the child pornography industry<sup>17</sup>. Prior to the Internet, child pornography had to be physically transported, by mail or in person, from one user to the next. The Internet makes it easier to store and transmit this material undetected. It also makes it easier to make child pornography. For a few hundred dollars, anyone can now own a digital camera or a scanner and create child pornography anywhere, without involving photo developers or even storing videocassettes or diskettes<sup>18</sup>.

Not only is child pornography being circulated to more people, more of it is being made and more children are being used to make it<sup>19</sup>. Prior to the Internet, it was often the same books and magazines, frequently published in Europe or Asia, that were traded among users<sup>20</sup>. This is no longer true, and new material is made to order for Internet viewers using both local and foreign children<sup>21</sup>.

## 1.2 Content of the legislation

Contrary to the complaints of those who seem to find the use of the simplest words baffling when they are used in a statute that applies to « expression », section 163.1 of the *Code* defines « child pornography » quite

- 
16. For some observations on the increased incidence and prevalence of pornography in Canada as of 1985, when VCR's were still fairly new, see CANADA, *Report of the Special Committee on Pornography and Prostitution*, Ottawa, Canadian Government Publishing Centre, 1985 (chair : P. Fraser), at pp. 87-89.
  17. *Supra*, note 2, at 154.
  18. See the comments of the Ontario Court of Appeal in *R. v. Jewell* ; *R. v. Gramlick*, (1995) 100 C.C.C. (3d) 270, at 277.
  19. *Supra*, note 2, at 136.
  20. For a discussion of the market in the late 1970s in the United States, see T.M. BERANBAUM and others, « Child Pornography in the 1970s », in A. BURGESS (ed.), *Child Pornography and Sex Rings*, Lexington, MA, Lexington Books, 1984, at pp. 10-12. For a discussion of the European and North American market in the 1970s and 1980s, see T. TATE, « The Child Pornography Industry : International Trade in Child Sexual Abuse », in C. ITZIN (ed.), *Pornography : Women, Violence and Civil Liberties*, Oxford, Oxford University Press, 1992, at pp. 204-216.
  21. *R. v. Bauer*, [1999] O.J. (Quicklaw) no. 5294 (C.J.) (teenage girl used in interactive live show on Internet site ; removed clothing and touched herself in response to electronic requests from viewers).

narrowly<sup>22</sup>. The written material covered by the section is limited to material that advocates or counsels sexual activity with a child that would be an offence under the *Code*<sup>23</sup>. As for visual material — photos, drawings, film — the section extends to material presenting a person who is or is depicted as being under the age of 18 and engaged in explicit sexual activity, or where the dominant characteristic of the material is the depiction for a sexual purpose of a sexual organ of a person under the age of 18. The definitions relating to visual material do not extend to mere nudity. The statute is careful to define child pornography with reference to sexual context, not merely anatomy, in contrast to some U.S. statutes<sup>24</sup>. When these provisions are further subjected to the strict construction placed on the section by the majority in *Sharpe*<sup>25</sup>, and its broad definition of the artistic merit defence<sup>26</sup>, it is quite wrong to characterize the definition as sweeping in its scope.

## 2 The use and manufacture of child pornography

The statutory formulation of «child pornography» responds to the reality of child pornography as it is produced and used in Canada today. The counseling provisions address the NAMBLA newsletters, which try to normalize sexual relations between men and boys with pseudo-scientific arguments about the sexuality of children and how children benefit from «intergenerational» sex<sup>27</sup>. The inclusion in the legislation of material

22. See e.g. A.W. MACKAY, «*R. v. Sharpe*: Pornography, Privacy, Proportionality and the Protection of Children», (2000) 10 *Educ. & L.J.* 251, 296 (arguing that the section «casts a broad net»); B. BLUGERMAN, *loc. cit.*, note 10, 26-31 (arguing that it is «disturbing» that «the meaning of a number of key phrases [...] are by no means clear»).

23. There is considerable evidence that this kind of material is very important to many men who sexually abuse children, and who create, catalogue and exchange extensive justifications for their behaviour. For examples of this behaviour, see *R. v. W.A.M.*, [1988] B.C.J. (Quicklaw) no. 2184 (S.C.) (45 volumes of personal diaries and extensive correspondence justifying sexual contact with young girls), and also K.V. LANNING, «Collectors», in T.M. BERENBAUM and others (eds.), *op. cit.*, note 20, at pp. 83-90.

24. *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 1694 (1989).

25. The majority finds that the phrase «explicit sexual activity» as used in s. 163.1 (a) (i) is limited to the «extreme end of the spectrum», meaning «depictions of sexual intercourse and other non-trivial sexual acts.» *Supra*, note 2, at 80-81.

26. The majority rejects the application of a community standards test and holds that the artistic merit defence extends to «any expression that may reasonably be viewed as art»: *id.*, at 87.

27. *R. v. J.R.C.*, [1994] O.J. (Quicklaw) no. 3951 (Prov. Div.); *R. v. Logan*, [1996] B.C.J. (Quicklaw) no. 352 (Prov. Ct.). NAMBLA is an acronym for North American Man-Boy Love Association; its publications advocate the benefits of sex between adult men and boys.



that present persons who appear to be under the age of 18 responds to what can be an intractable problem of proof, especially where the children cannot be traced, but also to the « dress-down » pornography market in which adolescent and young women are deliberately presented as children, often with the clear intention of getting around child pornography laws<sup>28</sup>.

The ways in which children are used and presented in child pornography more generally, whether produced commercially for sale or by « amateurs » for their own use or to trade with others, is quite similar to the ways in which adult women are presented in pornography. The children used range in age from infants to teenagers. The sexual acts include sexual poses ; display of genitals ; fondling ; penetration, including penetration with objects and animals ; urination ; bondage and other forms of violence. Children may be recorded in sexual acts with adults or with each other. Occasionally children are presented in obvious pain or distress, but more often an attempt is made to present the child as a willing participant.

The motivation for making child pornography must be substantial, since it is not often that people choose to make an evidentiary record of themselves committing an offence<sup>29</sup>. Even if the pornography itself were not criminalized, participating in or counseling sexual activity by or with children is a type of sexual assault. In some cases, the pornography provides the evidentiary foundation for sexual assault charges against the accused<sup>30</sup>. These men must find enjoyment or profit in this material that justifies that risk, regardless of the legal status of possession of the material itself. There is no doubt that the market is lucrative ; short videos can sell for hundreds of dollars, although many users prefer to trade rather than sell.<sup>31</sup> For some users it appears that the psychological validation of trad-

---

28. *R. v. Wise*, [1990] O.J. (Quicklaw) no. 1416 (Dist. Ct.) (magazines presenting young women and young teenage girls in child-like poses and contexts ; including one « very young female person » in an act of self-mutilation with a curling iron). In *Wise*, decided before the enactment of s. 163.1, and before *Butler*, the court found these magazines to be obscene under s. 163 (8).

29. The existence of this record is at times almost taken for granted, as it was in the murder trial in Ontario of Paul Bernardo. While the child pornography he made of his victims was central to the trial, there was almost no discussion of why someone who otherwise tried hard to avoid getting caught would make and store these tapes. At a minimum, the opportunity to watch them again must have been worth the risk of detection.

30. See, e.g., *Jewell* ; *Gramlick*, *supra*, note 18 ; *R. v. W.A.M.*, *supra*, note 23 ; *R. v. R.W.*, [2001] O.J. (Quicklaw) no. 2810 (S.C.J.).

31. T. TATE, *loc. cit.*, note 20, at 208. U.S. postal inspectors estimated the value of the commercial child pornography industry in the United States at the end of the 1980s as \$2-3 billion dollars annually. A European distributor offered one investigator 200 hours of tape for \$10,000.

ing material with others is sufficient to overcome the increased exposure to detection, even without a financial motive<sup>32</sup>.

Finally, it is also worth noting that the makers and users of child pornography in North America are almost all men, usually adults, usually white, and often of middle-class means and employed. This is not a *Code* provision that disproportionately affects the poor, aboriginal peoples or young offenders. It targets those who know what the law prohibits and, more importantly, who are very interested in what the law allows. In many of the cases the accused show a considerable degree of interest in the line between legal and illegal conduct and tailor their abuse to conform to what they think the law permits<sup>33</sup>. While none of these facts justifies criminalization, it is another part of the reality that is worth keeping in mind in evaluating the decision in *Sharpe*.

### 3 The values at stake

The reason that it is important to understand what child pornography is, how it operates, what harms it causes, as well as who makes and who uses it, relates directly to the constitutional challenge and how it is framed by the majority and the dissent. This act of determining the nature of the constitutional issue is referred to by the Court as identifying « the values at stake » in this appeal<sup>34</sup>.

Chief Justice McLachlin, writing the majority reasons, begins by focusing on the value of freedom of expression in its classic abstract sense, in terms that have found favour in American decisions interpreting the First Amendment right to freedom of speech. She refers to the Emersonian values of truth, democratic participation and individual self-fulfillment that underlie the freedom of expression guarantee<sup>35</sup>. She also notes that free-

---

32. *Ibid.*, at 210.

33. *R. v. V.P.S.*, [2001] B.C.J. (Quicklaw) no. 930 (S.C.) (accused told social worker that photos of stepdaughter were not child pornography because « as defined, pornographic laws are pictures or photos of genitalia » and her genitals were not shown) ; *Gramlick ; Jewell*, *supra*, note 18 (accused threw videotapes in river when s. 163.1 was passed, were aware of higher penalties for child pornography as compared to obscenity offences). See also *R. v. Cohen*, [1999] O.J. (Quicklaw) no. 4568 (S.C.J.), sentence appeal allowed (2001), 144 O.A.C. 340, where a police officer from the child pornography investigative unit testified that in approximately one-third of the cases in which he had been involved, the offenders kept a file of media clippings on court cases dealing with child pornography.

34. *Supra*, note 2, at p. 70.

35. T.I. Emerson, « Toward a General Theory of the First Amendment », (1963) 72 *Yale L.J.* 877, 878-887.

dom of expression is the matrix on which all other freedoms are founded, and that it is not limited to only certain types of speech<sup>36</sup>. She reminds us that, « [i]f we do not like an idea or an image, we are free to argue against it or simply turn away. »<sup>37</sup> Finally, Chief Justice McLachlin notes that freedom of expression can be limited if the countervailing value is sufficient — and describes this countervailing value as, « the conviction that possession of child pornography must be forbidden to prevent harm to children. »<sup>38</sup>

This statement of the values at stake may seem both uncontroversial and appropriate. After all, the government conceded the s. 2 (b) infringement, which brought the analysis directly to s. 1, and s. 1 envisions a balancing of values. It would be easy to assume that the dissent simply balanced the same values, but reached a different result as to their relative weight. But this assumption would be incorrect, and it misses a more important point of departure between the majority and the dissent in *Sharpe*.

The dissenting reasons, written jointly by Justices L'Heureux-Dubé, Gonthier and Bastarache, set up the context for the s. 1 analysis in a very different way. They begin by framing the issues in these terms :

In the context of this case, the twin considerations of social justice and equality warrant society's active protection of its vulnerable members. [...] The constitutional protection of a form of expression that undermines our fundamental values must be carefully scrutinized<sup>39</sup>.

They later note that :

The very existence of child pornography, as it is defined by s. 163.1(1) of the *Criminal Code*, is inherently harmful to children and to society. This harm exists independently of dissemination or any risk of dissemination and flows directly from the *existence* of the pornographic representation. The harm of child pornography is inherent because degrading, dehumanizing and objectifying depictions of children, by their very existence, undermine the *Charter* rights of children and other members of society. Child pornography eroticises the inferior social, economic, and sexual status of children. It preys on existing inequalities<sup>40</sup>.

This language signals more than a difference in semantics. There is an important distinction between placing limits on the extent to which concerns about harm to others can restrict expression, as an endeavor with intrinsic value (the majority's approach), and asking how much scope society should allow for a practice that perpetuates the inequality of children because that practice falls within the broadly-defined category of expres-

36. *Supra*, note 2, at 71, citing Cardozo J. in *Palko v. Connecticut*, 302 U.S. 319 (1937).

37. *Id.*, at 70.

38. *Id.*, at 73.

39. *Id.*, at 120.

40. *Id.*, at 132.

sion — an attempt to convey meaning, in this case to oneself (the dissent's approach). Of the two, it is the dissent whose analysis is rooted firmly in the reality of child pornography.

The majority's hyper-abstraction acknowledges only in passing that the only Emersonian value at issue here is individual self-fulfillment<sup>41</sup>. The majority fails to consider with any rigour why it is appropriate to place a special value on act, here the use of child pornography, just because it is fulfilling to the person who engages in it. If references to democratic participation and truth are superfluous, as the majority does note later in its reasons, why invoke them at all ?

The majority's reasons are similarly unclear on how freedom of expression as defined to include possession of child pornography forms part of the « matrix » supporting other rights. Which rights ? Freedom of religion ? Freedom of association ? It cannot seriously be claimed that possessing child pornography is the basis for these other rights. Instead the majority is apparently making a more general point, namely that content-neutrality is important to ensure that freedom of expression is truly allowed to flourish, and it is this overall flourishing that supports other rights. Even assuming that this is true, it is also largely irrelevant at the s. 1 stage, where the Court has already recognized that legislative limits can be placed on harmful expression and that harm can be measured in relation to the content of that expression, not merely its form or timing.

The idea that we can turn away from unpopular expression is similarly disengaged from the context of the case. The children who are used to make pornography cannot simply argue against it, or turn away. The suggestion that turning away can be done « simply » implies that opposition to child pornography is merely a question of taste, and that some members of society should not impose their view of this expression on others, so long as they are not forced to look at it. But the objections to child pornography have nothing to do with unwilling exposure or moral objections to what other people enjoy. Once again, this abstract value is not helpful in setting up the balance to be applied in the s. 1 analysis.

The majority does accept, in the rational connection analysis, that there is a « rational basis » for concluding that possession of child pornography may create cognitive distortions that make the abuse of children seem good and normal ; and that it may fuel fantasies that make pedophiles more likely to offend<sup>42</sup>. They also accept that it assists police in uncovering

---

41. *Id.*, at 71.

42. *Id.*, at 97-98.

the actions of those who make and distribute child pornography. This is an important practical truth for law enforcement, although the majority is correct to be wary about using this as the sole justification for the rational connection analysis. It is dangerous to rely on the fact that criminalization of one activity makes the detection of related activities easier if the first activity is not harmful in itself. Here it is unnecessary, in light of the evidence of other harms. The majority also accepts that there is strong evidence that pornography is used to groom children for sexual abuse and that it harms the children who are used to make it<sup>43</sup>.

Nonetheless, the majority finds that the law is over broad, and goes on to read in to the law two exceptions : written material or visual representations created and held by the accused alone, exclusively for personal use ; and visual recordings, created by or depicting the accused, that do not depict unlawful sexual activity and are held by the accused exclusively for private use<sup>44</sup>. To support this result, the Court relies on the fourth branch of the *Oakes* analysis, finding that in these two cases, the effects of the law on freedom of expression are not proportionate to the objective of protecting children.

The dissenting reasons, by contrast, accurately recognize both the minimal extent of the free expression value at issue and the real harms of child pornography. The harms include not only those general harms routinely offered by the experts and noted by the majority : that child pornography fuels sexual abuse or is used to groom children for sexual abuse or that it is sexual abuse in its making — all of which is true — but that being made into pornography or being sexually abused with it causes children physical pain and risks to their physical health ; interferes with healthy emotional development ; makes them feel worthless and afraid, especially if the material is still circulating and being used ; and impedes their own self-fulfillment as children and later as adults.

Most importantly, the dissent recognizes that there are equality interests at stake for children in this case. The Court has repeatedly stated that the *Charter* should not be used by more powerful groups to defeat measures designed to protect those who have been systemically disadvantaged<sup>45</sup>. Child pornography engages the equality rights of children in the most direct way possible. Children are vulnerable to sexual abuse not merely because of their age but also because of social constructions of

---

43. *Id.*, at 99-100.

44. *Id.*, at 103.

45. *Id.*, at 120.

sexuality that contribute to their abuse. The eroticization of dominance and submission, the validation of male sexual entitlement, the idea that the infliction of pain should be arousing for the person inflicting it and is wanted and deserved by the person on whom the pain is inflicted all contribute to a sexual culture that permits the widespread sexual abuse of children. It would be misleading to label this behaviour « deviant » when it is inflicted on anywhere between 10 and 25 % of children in Canada<sup>46</sup>, at least not if the label of deviance is supposed to connote rarity as well as harmfulness. Until fairly recently, there was no effective social support or legal redress for children victimized in this way.

Sexual abuse harms children in many ways. The abuse itself causes distress and physical pain. The lasting trauma can cause developmental delays, problems forming relationships with others, anger and anti-social behaviour, low self-esteem, and fear, among other harms. Where a record is made of the abuse, these harms are increased, because this record can be used to revisit the abuse. Even if the record is possessed only by the abuser, and not sold or traded, the victim knows that her abuser can use the record of her abuse for sexual fulfillment whenever he wants. These injuries are the concrete results of exploiting children's disadvantage. They are injuries of inequality, and the legislature has a right, if not a duty, to address them. With this definition of the « values at stake », the dissent engages in a balancing of two rights rather than setting up the analysis as one of a cherished right and a state limit on it. The dissent balances a modest expression interest against a number of concrete harms to children's equality rights, as well as their rights to security of the person. The individual interests achieved through « expression » are engaged in a social context that also involves the interests of those to whom the meaning is conveyed or, presumably, of those who are used to create the expression. The expressive interest is modest both because individual self-fulfillment at the expense of the rights of others is the interest engaged, and because possession without an attempt to communicate is arguably not even within the ambit of s. 2(b)<sup>47</sup>.

It might also have been worth re-examining the argument that if the child sexual abuse recorded in pornography is an act of violence,

---

46. *Id.*, at 137-138.

47. It is unfortunate that the Crown did not argue this issue. As the dissent points out, the question of whether s. 2 (b) protects both the right to possess material that allows us to understand the thoughts of others and the right to possess material that allows us to understand our own thoughts, was worth exploring, if only to further clarify the weak nature of the expression interest for the s. 1 analysis.

then the act of its recording, in all or some circumstances, is also violence and therefore excluded from s. 2(b) altogether<sup>48</sup>. Although this speaks to the making of child pornography, and not its possession, it does point out some of the absurdity of the Court's very broad approach to s. 2(b). At what point does violence become expression? When is it recorded? When the recording is sold to someone else? When the purchaser of that recording uses it for sexual gratification?

The dissent looks at a number of contextual factors that provide a realistic basis for assessing whether the infringement on expression can be justified as a reasonable limit under s. 1. Unlike the majority's minimal interrogation and acceptance of the social science evidence as meeting the «reasonable basis» threshold, the dissent considers in detail the number of children sexually abused, the concrete harms this causes children, and the societal harm that ensues when attitudes that promote the degradation and dehumanization of children are encouraged. The dissent also points to common law, statutory provisions and international obligations that indicate a concern for the well being of children.

The dissent also spends some time considering the contextual factors that affect the expressive interest. Child pornography is contrary to the promotion of truth and subverts the equal treatment of children as members of a democratic, egalitarian community. In fact, one might conclude that the exclusion of children from participation in the democratic process should make it easier to justify restrictions on expression that infringes their rights, since they have no independent, effective means of reply. Children must rely on adults to speak for them. Finally, the self-fulfillment interest is purely physical and achieved at the expense of children's self-fulfillment. A characterization of the interests at stake that is based in the reality of child pornography and the inequality of children, not to mention the concrete nature of the «expressive» interest, is a better framework for evaluating the legislative response.

#### **4 The use of the hypothetical case**

##### **4.1 The reasonable hypothetical**

The way that this exercise in value framing influences the outcome of the case carries over to the treatment by the Court of the hypothetical

---

48. The argument that racist hate propaganda was violence and therefore not expression was rejected in *R. v. Keegstra*, [1990] 3 S.C.R. 697, at 730-733. Child pornography, where it is the evidentiary record of an act of violence, is closer to expression that is violent in its form.

examples before it. The majority relies on a few hypothetical cases to carve out two exceptions to the child pornography law: written works that are created by the person in possession of them — such as diaries, stories and drawings — and visual works made by or depicting the maker that depict only lawful sexual activity. The majority points to some hypothetical cases that would support each example, focusing in particular on adolescents who keep a journal of their sexual experiences or who take sexual photos of each other as part of a consensual relationship.

Recently, the Court has been criticized for diluting the use of the hypothetical case in its s. 12 jurisprudence on the prohibition of cruel and unusual punishment.<sup>49</sup> In *R. v. Smith*, the first Supreme Court decision to define the scope of s. 12, the Court relied on the hypothetical case of the young traveler crossing the border with a single marijuana joint in his pocket to strike down the mandatory minimum sentence of seven years imprisonment for importing a narcotic<sup>50</sup>. The Court allowed Smith to rely on this example despite the fact that he had imported half a pound of cocaine and received an eight-year sentence. However, in more recent cases, the Court has narrowed the availability of the hypothetical case to challenge mandatory minimum sentences under s. 12 of the *Charter*. In *R. v. Goltz*, the Court held that the hypothetical had to be a « reasonable » one, rather than a « remote or extreme example »<sup>51</sup>. More recently, in *R. v. Morrissey*, the Court went so far as to say that examples from actual cases should not automatically be used as reasonable hypotheticals unless the facts are « common examples of the crime. »<sup>52</sup>

The majority of the Court in *Sharpe* does not appear to apply these same limitations to the use of the hypothetical case in its s. 1 analysis. This generous approach to the use of hypothetical speech limitations has an established history in the United States, where it is justified on the theory of the « chilling effect »: that not only may a vague provision deter valuable expression caught by its ambit, but it may also chill some valuable expression that is not caught by the legislation, because potential « speakers » worry that it might be. This justifies a facial attack on the legislation even where the particular expression at issue in the case would not. This is

---

49. K. Roach, « Mandatory Minimum Sentencing: Searching for *Smith* », paper presented at the Colloquium on Mandatory Minimum Sentencing, Osgoode Hall Law School, March 9, 2001, forthcoming in *Osgoode Hall Law Journal*.

50. [1987] 1 S.C.R. 1045.

51. [1991] 3 S.C.R. 485, 512.

52. [2000] 2 S.C.R. 90.



permissible because the expression that is « chilled » will never come before the courts<sup>53</sup>.

Hypothetical cases may also be used to show that the law is over broad, in that it extends to conduct that is not related to the purpose of the statute and not harmful, although the American cases have placed some limits on the application of hypotheticals for this purpose, since presumably those over broad applications of the law could come before the courts<sup>54</sup>. In *Sharpe*, reasonable hypotheticals form the basis of the two exceptions that the majority reads in to the statute under the final branch of the proportionality test. This raises two concerns.

First, the Court assumes that its hypotheticals are appropriate, representative and non-discriminatory, without any real consideration of whether that is true or how that should be determined. This failure to interrogate which hypothetical cases count prompts a criticism similar to that leveled at the unquestioning application of the « reasonableness » standard in criminal defences : how does the court know that its chosen hypothetical is not based on discriminatory or mistaken assumptions<sup>55</sup>? *R. v. Seaboyer* provides an example of this sort of sexual stereotyping in the name of reasonable examples<sup>56</sup>. The dissenting reasons in that case aptly pointed out the tendency of writers on the topic to invent all sorts of colourful examples of situations in which it would be unfair to exclude sexual history evidence, many of which were based on stereotypes about women that the law itself was designed to address<sup>57</sup>. The assessment of reasonableness, then, is not value-neutral and needs to be approached with overt caution on the part of the Court.

The use of imaginary cases ignores the reality of the problem, rooted in the social inequality of children, that the law was designed to address. The people who are being arrested for possession of child pornography often have multiple items in their collections. They know that this material is illegal. Often the purpose of the multiplicity of files is to trade with others. These individuals are aroused by the sexual exploitation of children. They masturbate to this material and use it to try and get children to do

---

53. See G. Gunther, *Individual Rights in Constitutional Law*, 5th ed., Westbury, NY, Foundation Press, 1992, at 862-870.

54. *Ibid.*

55. See, e.g., T. Quigley, « Battered Women and the Defence of Provocation », (1991) 55 *Sask. L. Rev.* 223 ; M. SHAFFER, « *R. v. Lavallee* : A Review Essay », (1990) 22 *Ottawa L. Rev.* 607.

56. [1991] 2 S.C.R. 577

57. *Id.*, at 683-684.

what is in the pictures or to make more pictures. This is the reality. When we focus on the possibility of adults photographed in suggestive child-like Halloween costumes or beloved uncles who die leaving a legacy of drawings of naked children, to use two examples offered by others who have written or commented on this topic,<sup>58</sup> we become entirely detached from what this offence is really about.

That does not mean that examples of other conduct that might be covered by the provision are inappropriate. But those examples should be grounded in reality, not fantasy. To that end, the Court in *Morrisey* went too far in refusing to look at other cases, even if their facts seem fantastic. After all, those were real situations that resulted in convictions under the provision challenged. But the Court in *Sharpe* should similarly have focused on reality in its consideration of whether the definition of child pornography is over broad. While the situations considered need not come from actual cases, they should at least be proven to exist and they should be critically scrutinized for their real implications. There is something callous about operating in the realm of the abstract while others must live the reality.

#### 4.2 The reality of the exceptions

The hypotheticals used by the majority to strike down portions of the provisions do not have a grounding in reality. Instead, they fall right in with the majority's abstract values approach to defining the contours of the appeal. They are ludicrous examples that are used to chop out substantial exceptions that cover a lot of real, harmful conduct. This is evident if one focuses on the real applications of what the majority terms the « two peripheral applications » of the law now exempted from it.

The first exception is self-created, privately held expressive material that is a work of the imagination. This of course extends both to possessing and to making this kind of child pornography, although not to distribution, since the material is then no longer privately held. This exception is supposed to extend to private diaries and drawings and stories, which, it is assumed, cannot involve real children. This material is constitutionally protected no matter how violent or racist or otherwise harmful the stories. With this exception, the Court appears to have in mind the situation of the

---

58. Law professor Jamie Cameron provided the first example in a television interview with *The National's* Alison Smith at the time the appeal was argued, while defence lawyer Edward Greenspan provided the latter example in: « What, Exactly, is Child Porn ? », *The National Post*, January 29, 2001, A14.

solitary man referred to in U.S. obscenity cases who writes a document in the attic, publishes it in his basement and reads it in his living room<sup>59</sup>.

But the Court is simply wrong to assume that written child pornography never involves real children. It is often important to the person making the written pornography that it be based on a real person. For example, in *R. v. R.W.*<sup>60</sup>, the trial judge described the home environment of the accused's three children as one where « their father was frequently if not almost constantly viewing pornography on videotape and though the Internet, and where drugs alcohol and cigarettes were made available to these children and their friends ». The accused repeatedly sexually assaulted both of his daughters, for example by refusing to let them leave the apartment unless he could first touch their breasts. The police also found in the accused's home approximately 100 pornographic photos and a 36 page story in two parts entitled « Making my Daughter Mine » and « Everyone Else's Play Toy » which describes his children by name and age and which contained « a fictional account of how M. [one daughter] is made a sex slave ... set out in excruciating and horrifying detail. The details include incidents of rape, torture, forced sex with animals, prolonged periods of bondage, intercourse, non-consensual intercourse and fellatio with friends of the father as well as friends of the daughter, and the intended involvement of other friends of the daughter ».

The accused was convicted of possession of child pornography with intent to distribute because the story was written in such a way that it appeared to be intended for an Internet audience. But even without that intent, can it really be said that no child was « exploited or abused » in the production of this material, especially M, who lives with the offender in the home where this material is made and kept? Is this what the majority has in mind when it refers to material « that deeply implicate the freedoms guaranteed under s. 2(b) »<sup>61</sup>? This exception ignores the fact that this is dangerous material and that the private sanctuary of the home is the most common location for abuse of women and children. M has a right to live in a home that does not contain positive presentations of her sexual abuse at the hands of her father, particularly as she is being forced to endure that abuse in real life. She also has a right not to worry that this story will be shown to others or that the acts described in it are what her father is planning for her and her friends next week or next month.<sup>62</sup> We do not automatically allow people to make, use and store other kinds of dangerous

---

59. The first use of this example appears to be in *U.S. v. 37 Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 1417, Black J. dissenting.

60. *Supra*, note 30.

61. *Supra*, note 2, at 106.

items in their homes until they use them to do harm outside the home. Instead, we allow laws that ban possession of these items outright.

Even more troubling is the reality of the second exception, privately created visual recordings of lawful sexual activity made by or depicting the person in possession and intended only for personal use. This exception also applies to both production and possession. This exception does not even require that the material depict the person in possession of it. Here, the Court's examples focus almost exclusively on adolescents who record their sexual acts as part of their sexual development in a mutual, consensual relationship. No evidence is discussed that might indicate if this ever happens, and, if so, under what conditions.

In fact, those adolescents whose « lawful sexual activity » is recorded often do not consent to that recording, are unaware of the recording<sup>63</sup>, or consent to its recording under circumstances of deception or bribery<sup>64</sup>. While the majority adds to its exception the condition that all parties must consent to the creation of the record, the Crown will now have to prove non-consent beyond a reasonable doubt. This will be extremely difficult where the children in the photo or tape cannot be traced and where they have been forced to smile.

The exception leaves unresolved the status of situations where the consent is exacted through the provision of gifts, alcohol or drugs, or by grooming an adolescent with other pornography. The majority does not consider whether these situations would amount to consent in law. In general, the provision of inducements and coaching does not make sexual contact between an adult and an adolescent non-consensual for the purposes of criminal sexual assault law unless there is also a relationship of authority or dependency, for example a teacher and student<sup>65</sup>. As for alcohol and

---

62. See also *W.A.M.*, *supra*, note 23, where the police seized 45 volumes of diaries dealing with the accused's fascination with young girls, identified by name, many of whom he sexually assaulted, over a sixteen-year period.

63. For example, in *R. v. Lee*, [1998] N.W.T.J. (Quicklaw) no. 137 (S.C.), the accused, who was over sixty years of age, had sexual intercourse with a number of teenage girls and filmed them without their knowledge. He gave the girls money to support their drug habits in exchange for sex. In *R. v. D.S.M.*, [2001] B.C.J. (Quicklaw) no. 1913 (S.C.), the accused filmed with a hidden video camera his teenage stepdaughter changing her clothes after a shower.

64. In *Jewell*; *Gramlick*, *supra*, note 18, Jewell's victims were unaware that they were being filmed, while Gramlick's were induced with gifts and trips to be filmed in sexual acts.

65. *Criminal Code*, s. 153 (1). In *Lee*, *supra*, note 63, the court declined to find Lee guilty of sexual assault in those cases where the girls were over the age of 14, or he honestly believed them to be over 14, because they had consented. Note that the provision of money for drugs did not, according to the trial judge, vitiate that consent.

drugs, the criminal law tends to require a very high level of intoxication to vitiate the capacity to consent to sexual intercourse<sup>66</sup>. This would suggest that in these kinds of circumstances, where the sexual activity is filmed, the man making the pornography could invoke the second of the *Sharpe* exceptions.

In other circumstances, more elaborate deception may be used to procure the recording. In *R. v. M.E.*,<sup>67</sup> the accused committed sexual assaults on his stepdaughter about once a week over a four-year period, beginning when she was twelve years old. During this time, the stepfather purported to introduce his stepdaughter to a teenage boy named Dave through the Internet. The stepdaughter believed that she was in love with Dave and was afraid of losing him. Dave began to ask her for nude photos of herself, which she supplied to him through her stepfather. Some were taken by the stepfather and some she took herself. Of course, «Dave» was a fiction created by the stepfather; it was he who corresponded with the stepdaughter, and who asked for and received the photos.

One can assume that this is not the sort of healthy adolescent sexual exploration on which the majority focuses almost exclusively in creating this exception. It is therefore not clear whether the stepdaughter, who would have been about 15 or 16 at the time the photos were taken, «consented to the creation of the record». She might be able to characterize her stepfather's actions as a kind of fraud as to identity vitiating consent<sup>68</sup>, but this places an additional burden on the Crown in order to preserve an exception that does not appear to correspond with reality. Where is the real evidence of adolescents recording their sexual activity to deepen their relationships with one another, without deception, coercion or bribes, and without the involvement of middle-aged men?

The exception also creates practical problems for sexual assault cases in which pornography is made as a weapon against the victim. For example, in one Ontario case, a 15-year-old girl was sexually assaulted by her mother's boyfriend. He took photos during the sexual assault and threat-

---

66. See *R. v. Jensen*, (1996) 106 C.C.C. (3d) 430 (Ont. C.A.). Recently, a Winnipeg man convicted of making child pornography after taking nude photographs of girls aged 13 to 17 whom he had supplied with a home brew described as «liquid cocaine» considered appealing his conviction based on the *Sharpe* exception for «consent», but then changed his mind, apparently based on the trial judge's finding that these girls were too intoxicated to validly consent. M. McIntyre, «Nude-photo Maven Drops Legal Fight: Shutterbug Won't Appeal Child Porn Sentence», *Winnipeg Free Press*, May 12, 2001, A5.

67. [2001] O.J. (Quicklaw) no. 3280 (S.C.J.).

68. *Criminal Code*, s. 265 (3) (c).

ened to disclose them if she told. He was charged with making child pornography and sexual assault. He argued consent<sup>69</sup>. Prior to *Sharpe*, the Crown had the option to proceed solely on the child pornography charges where they believed that to be in the best interests of the complainant. In that case, the complainant might not even have to testify. This could be especially important where the complainant has a mental disability or has no family support. Now, the Crown will have to prove non-consent for both charges.

These are the real implications of the majority's exceptions. They bear little resemblance to the situations on which the examples are based. The exceptions chosen by the majority represent the triumph of the hypothetical over the real. They privilege possibility and imagination over the reality of child sexual abuse and pornography.

## 5 The question of the remedy

The failure of the majority to consider these implications of its exceptions calls into question the wisdom of the breadth of the reading down required to create these exceptions. There are a number of remedial possibilities that flow from a finding that the legislation was constitutional in most of its applications, but unconstitutional as applied to a few situations. One is to strike down the offending sections altogether, either immediately or after a period of time during which invalidity is suspended<sup>70</sup>. Under this approach, although the perceived defect is in the *definition* of child pornography, it would be necessary to strike out the offences of possession and making child pornography as well. It would make no sense just to strike out the definition, leaving the section otherwise intact but with its main term undefined. It would then be open to Parliament to re-enact the sections with a different, more restrictive definition or to invoke the notwithstanding clause in s. 33 of the *Charter* to uphold the legislation in its current form notwithstanding the s. 2 (b) *Charter* violation. This was the option chosen by the British Columbia Court of Appeal, who limited its remedy to the offence of possession only, and is obviously a choice likely to provoke the greatest public and political reaction.

Another possibility suggested by some commentators was to grant constitutional exemptions to individual accused on a case-by-case basis

---

69. The details of this case were recounted to me by a Crown attorney in Ontario. The case is pending.

70. A.W. MCKAY, *loc. cit.*, note 22, at 301; H. STEWART, « A Judicious Response to Overbreadth: *R. v. Sharpe* », (2000) 43 *Crim. L.Q.* 159, 178-179 (supporting remedy of Court of Appeal).

where the facts of the case would result in an unconstitutional application of the law<sup>71</sup>. This approach has the virtue of resting on reality rather than hypothetical cases, but it cannot address the « chilling effect » relied on by opponents of the law. If one is prepared to recognize this effect, the fact that a constitutional exemption can only be sought after a charge, trial, and conviction must be seen as a deterrent to legitimate expression that will simply suppress altogether, rather than permit, the expression in question.

The final remedial option was the one chosen by the Court, which can be described either as reading down the provision to comply with the *Charter*, or reading in the exceptions necessary to make the section constitutional. However, this remedy does not take the form of merely adding in a group unfairly excluded from the benefit of the law, as was done in the two cases on which the majority relies. In *Schachter v. Canada*,<sup>72</sup> the first decision that used reading in as a remedy, the Court added the word « adoptive parent » to a statute providing parental benefits. In so doing, there was little difficulty in foreseeing the practical consequences of this addition. Adoptive parents could now collect a benefit previously available only to natural parents. The one significant consequence was the fact that this addition would require additional expenditure on the part of the government, potentially affecting other fiscal choices. Similarly, in *Vriend v. Alberta*, the Court added the words « sexual orientation » to the grounds of discrimination recognized in Alberta's human rights legislation<sup>73</sup>. Once again, while the decision attracted criticism for interfering with legislative decision-making, it could not be said that the consequences of the addition were unforeseen or complex. In fact, most other provinces had already included this ground of discrimination for some time.

The use of reading in as a remedy in these circumstances made sense for a number of reasons. It did not involve an exercise in legislative drafting; only a couple of words were needed to extend the benefit of the legislation to additional persons. The outcome of the change was predictable and straightforward. Most importantly, the reading in was done in the context of infringements of the equality rights guaranteed by s. 15 of the *Charter*. A meaningful commitment to substantive equality requires that the Court not limit itself to preventing the state from taking away rights and benefits from members of disadvantaged groups, since such a guarantee

---

71. R. FRATER, « The *Sharpe* Edge of the *Corbiere* Wedge: Are 'Reasonable Hypotheticals' Still Reasonable? », (1999) 25 C.R.(4th) 307, 310-311; J. ROSS, « *R. v. Sharpe* and Private Possession of Child Pornography », (2000) 11 *Constitutional Forum* 50, 58.

72. [1992] 2 S.C.R. 679.

73. [1998] 1 S.C.R. 493.

means little to groups whose disadvantage is such that they have never enjoyed those rights and benefits in the first place. Instead, as s. 15 (2) of the *Charter* recognizes, the achievement of equality sometimes requires positive action on the part of government. A failure to live up to this standard cannot be solved simply by taking away the benefit from everyone else. It can fairly be said that the reading in done in those cases met the twin guiding principles identified in *Schachter*: respect for the role of Parliament and respect for the purpose of the *Charter*.

The detailed exceptions that the Court reads in to the child pornography provisions in *Sharpe* share none of these features. In effect, the Court has added two new subsections to the definition of « child pornography », with some associated reasons as to how they might be interpreted and applied. This degree of intervention through reading in is unprecedented. There is no question of extending a legislative benefit to anyone as in the s. 15 context and the real implications of the subsections were clearly not well understood. The length and complexity of the legislative process gives interested parties time to lobby for changes to proposed statutory language and to explore as part of the law-making process the potential implications of new legislation. If the legislature had proposed the two exceptions set out in *Sharpe*, this is exactly what could have happened. This might have resulted in the wording being changed or abandoned altogether.

## Conclusion

If, even after giving the definition of child pornography in the *Criminal Code* such a restrictive definition, and interpreting the exceptions and defences so broadly, the Court was still left with the conviction that the provision was an overbroad infringement on expression based on its two examples, then it should have struck down the law. If the majority of the Court was hesitant to take this step, they might then have examined the source of this hesitation by looking more closely at the reality of their exceptions. Since *Sharpe*, a trial judge in Winnipeg has held that a number of photos of pre-teen girls, distributed on the internet, are not child pornography because they do not meet the dominant sexual purpose definition as explained in *Sharpe*. One of the photos presents a girl, probably 12 or 13, lying naked on her stomach, wearing thigh length stockings and a string of beads around her waist. The accused in that case acknowledged that he masturbated to the photos<sup>74</sup>. Who are the girls in these photos and why are

---

74. L. REYNOLDS, « High Court Ruling Frustrates Police », *Winnipeg Free Press*, July 24, 2001, A6. The man in question, Lloyd Taylor, was convicted of one count of distributing child pornography in relation to another photo.



they being distributed as Internet pornography ? Would they consider that they are being used for a sexual purpose ? Why aren't they the reasonable observers here ?

As for John Sharpe, he filed a complaint with the Law Society of British Columbia against his lawyer for mishandling his appeal. Sharpe told reporters that his lawyer should have argued that child pornography is not harmful at all. He told reporters that with the Internet, child pornography has « never been cheaper, easier, less risky to obtain. If you believe the Crown's theory, there should have been a dramatic increase in child sexual assault. That has not happened. »<sup>75</sup> Sharpe of course continues to deny that the child pornography is itself evidence of sexual abuse. He is disappointed with the reach of the exceptions, since « any serious writer writes for an audience. »<sup>76</sup> This is the reality of children in pornography after *Sharpe*.

Canadian criminal law prohibits the distribution of holocaust denial pamphlets and similar publications as hate propaganda<sup>77</sup>. These documents tell a lie about an identifiable group in order to encourage others to discriminate against members of that group. If someone were to make hate literature about children, what would it look like ? What kind of lie could you tell about children that might make people want to harm them ? Child pornography is a kind of hate propaganda against children. It lies about children's sexuality to further justify their already widespread abuse by adults. It lies to children, who are shown the material as a way of normalizing the sexual abuse inflicted on them, and it lies to users of child pornography, by telling them that children enjoy being sexual for the gratification of adult men. And child pornography does this through the sexual abuse of children, preserving, sharing and re-enacting that abuse. Equality for children, not to mention adult women abused in pornography, will never be achieved by denying these acts of discrimination in favour of an analysis situated in the abstract realm of expression.

---

75. M. HUME, « Pornographer Says He was Betrayed : Believes Lawyer Didn't Defend Him Wholeheartedly », *The National Post*, February 21, 2001, A11.

76. *Ibid.*

77. *Criminal Code*, ss. 318, 319.