Revisiting the “Private Use Exception” to Canada’s Child Pornography Laws: Teenage Sexting, Sex-Positivity, Pleasure, and Control in the Digital Age

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Abstract

In R v Sharpe, the Supreme Court of Canada read in a “private use exception” to the offence of possessing child pornography. The Court reasoned that youths’ self-created expressive material and private recordings of lawful sexual activity—created by, or depicting the accused and held by the accused exclusively for private use—would pose little or no risk to children and may in fact be of significance to adolescent self-fulfillment, self-actualization, sexual exploration, and identity. Fundamental changes in the technological, social, sexual, and legal landscape since Sharpe have resulted in a lack of clarity regarding the exception’s scope. Federal and provincial police and federally funded child protection agencies now regularly inform young people that they do not have the legal right to consensually create and share their digital sexual images with an intimate partner. Scholarly opinion on the exception’s application to teenage sexting is under-considered and varied, and subsequent judicial interpretations of the exception have extended the boundaries of private use while also circumscribing the protection by requiring youth to retain the ability to “maintain control” of their images. Via a mapping of our new technological and legal landscape, as well as a consideration of shifting privacy, communication, and sexual norms, this article examines and clarifies the application of the private use exception to teenagers’ contemporary digital sexual expression practices. This article argues that the private use exception as set out in Sharpe is inclusive of consensual teenage sexting in private yet is too narrow to adequately protect the sexual speech of teens. While subsequent judicial interpretations of the exception have extended the boundaries of private use, these analyses have also potentially and paradoxically circumscribed the protection by requiring youth to retain the ability to “maintain control” their own images. A key goal of this article is thus to interrogate the relationship between privacy and control as it relates to youths’ consensual sexual expression. Finally, this article argues that future considerations of the parameters of the private use exception incorporate an analysis of the benefits of sexual expression for young people as well as a positive sexual rights framework that recognizes the autonomy of youth who are of legal age to consent to sexual relations.

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Revisiting the “Private Use Exception” to Canada’s Child Pornography Laws: Teenage Sexting, Sex-Positivity, Pleasure, and Control in the Digital Age

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In *R v Sharpe*, the Supreme Court of Canada read in a “private use exception” to the offence of possessing child pornography. The Court reasoned that youths’ self-created expressive material and private recordings of lawful sexual activity—created by, or depicting the accused and held by the accused exclusively for private use—would pose little or no risk to children and may in fact be of significance to adolescent self-fulfilment, self-actualization, sexual exploration, and identity. Fundamental changes in the technological, social, sexual, and legal landscape since *Sharpe* have resulted in a lack of clarity regarding the exception’s scope. Federal and provincial police and federally funded child protection agencies now regularly inform young people that they do not have the legal right to consensually create and share their digital sexual images with an intimate partner. Scholarly opinion on the exception’s application to teenage sexting is under-considered and varied, and subsequent judicial interpretations of the exception have extended the boundaries of private use while also circumscribing the protection by requiring youth to retain the ability to “maintain control” of their images. Via a mapping of our new technological and legal landscape, as well as a consideration of shifting privacy, communication, and sexual norms, this article examines and clarifies the application of the private use exception to teenagers’ contemporary digital sexual expression practices. This article argues that the private use exception as set out in *Sharpe* is inclusive of consensual teenage sexting in private yet is too narrow to adequately protect the sexual speech of teens. While subsequent judicial interpretations of the exception have extended the boundaries of private use, these analyses have also potentially and paradoxically circumscribed the protection by requiring youth to retain the ability to “maintain control” their own images. A key goal of this article is thus to interrogate the relationship between privacy and control as it relates to youths’ consensual sexual expression. Finally, this article argues that future considerations of the parameters of the private use exception incorporate an analysis of the benefits of sexual expression for young people as well as a positive sexual rights framework that recognizes the autonomy of youth who are of legal age to consent to sexual relations.

IN 1995, CANADA CUSTOMS AGENTS stopped Robin Sharpe—a middle-aged, gay, retired city planner—and seized from his luggage his self-authored text entitled “Boyabuse—Flogging, Fun and Fortitude: A Collection of Kiddiekink Classics.” Sharpe was subsequently charged with possession of child pornography. The following year, police laid more charges after searching Sharpe’s residence and

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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 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;

(b) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;
seizing his private and unpublished stories, as well as 10 photographs of what Sharpe described as “two nude blond boys in their late teens, gay lovers at the time, hugging, kissing and hamming it up for the camera.”

Facing the stigma of being labelled a child pornographer, and vaguely aware of the criticisms that followed the then newly created child pornography laws, Sharpe decided to challenge the constitutionality of the definition of child pornography and the simple possession provision set out in s. 163.1 of the Code. In 1999, both the British Columbia Supreme Court and the British Columbia Court of Appeal agreed with Sharpe, in part, and struck down the possession provision as a violation of his right to freedom of expression. In 2001, the Supreme Court of Canada similarly determined that criminalizing the possession of child pornography infringed on Sharpe’s right to freedom of expression, but held that this infringement was nevertheless justified under section 1 of the Canadian Charter of Rights and Freedoms because of the need to protect children from harm. Having determined this, however, Chief Justice Beverley McLachlin, writing on behalf of the majority, also acknowledged that the prohibition “captures in its sweep materials that arguably pose little or no risk to children, and that deeply implicate the freedoms [of expression] guaranteed under s. 2(b).” To address this over-breadth and to maintain the constitutionality of our child pornography laws, the Court “read in” a “private use exception” to the offences of making and possessing child pornography. This private use exception would apply to two classes of materials: “(1) Self-created expressive material: i.e., any written material or visual representation created by the accused alone, and

(c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or

(d) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.

2. Ibid at paras 3-4; Robin Sharpe “R vs. Sharpe Personal Account”, online: <robin sharpe.ca/rvssharpe1.html>.
3. Sharpe BCCA, supra note 1 at paras 3-5.
4. Sharpe BCSC, supra note 1 at para 83; Sharpe BCCA, supra note 1 at paras 215-18.
6. Sharpe, supra note 5 at para 105. See also ibid at para 120.
7. Ibid at paras 114–20. In 2008, then Chief Justice McLachlin clarified that “the effect of granting a constitutional exemption would be to so change the legislation as to create something different in nature from what Parliament intended” (R v Ferguson, 2008 SCC 6 at para 50).
held by the accused alone, exclusively for his or her own personal use; and (2) Private recordings of lawful sexual activity: *i.e.*, any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use.”

The Court elaborated further and wrote: “For example, a teenage couple would not fall within the law’s purview for creating and keeping sexually explicit pictures featuring each other alone, or together engaged in lawful sexual activity, provided these pictures were created together and shared only with one another.”

The Court reasoned that not only would these materials “pose little or no risk to children,” but they also “may be of significance to adolescent self-fulfillment, self-actualization and sexual exploration and identity.”

Much has changed in the technological, social, and legal landscape since *Sharpe* was originally decided. As has been the case historically, technological developments have contributed significantly to shifts in communication, privacy, and sexual norms. With increasing access and affordability, camera-equipped smartphones, social networking, and an expanded digital realm have fundamentally changed how, where, and the extent to which adolescents and adults maintain friendships, flirt, hook up, date, have sex, break up, and generally communicate with one another.

While self-produced and distributed sexual images are by no means a new practice, the ease, amount, scope, purpose, and,

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8. *Ibid* at para 128. The use of “*i.e.*” in both instances indicates that these examples are not necessarily exhaustive.


11. For the purposes of this article, digital technology and communication technology are used interchangeably.

to some extent, the meaning of sexual pictures created and shared by those under the age of eighteen has changed in the digital age.\textsuperscript{13}

The goal of this article is to examine the application of the private use exception to digital communication practices and products—specifically, to teenagers’ “sexts” that comprise nude, semi-nude, or sexually explicit images, videos, and text messages consensually created and shared by youth under the age of eighteen via cellular and wireless networks.\textsuperscript{14} At the time that the private use exception was drafted, the Court likely envisioned two teens, together physically in a defined offline context—such as a bedroom or other private space—using a recording device such as a camera or camcorder. In our digital context however—with the development of camera-equipped smartphones, messaging applications, and wireless networking—proximity, physical sexual contact, and celluloid are no longer conceptualized as necessary for teens (or adults) to “participate in the sexual activity” or to “create [images] together.”\textsuperscript{15} Indeed, a growing body of research demonstrates that young people experience the creation and sharing of nudes as flirting and foreplay, and many teens as well as adults are choosing to sext instead of engaging in, or in combination with, offline sexual relations.\textsuperscript{16}

In this digital context, two teens whose texts to one another become increasingly flirtatious and, at some point, involve the creation and digital sharing of nude images are, arguably, both participating in the sexual activity in question.\textsuperscript{17}

The Court in \textit{R v Sharpe} makes it clear that the exclusion for private recordings of unlawful sexual activity applies to the making and possessing of such material

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\textsuperscript{13} Digital is used in this article “to emphasise that our lives are inextricably linked with interactive, networked, remixable and ubiquitous media.” Sonia Livingstone, “Why label our time and life digital?” (26 May, 2015), LSE Department of Media and Communications (blog), online: <blogs.lse.ac.uk/parenting4digitalfuture/2015/05/26/why-label-our-time-and-life-digital>.

\textsuperscript{14} “Sext” is used interchangeably with “nude image” “nude” or “intimate image”. This article also considers non-consensual distribution of consensual sexts given that, as is argued below, the teasing apart of consensual and non-consensual distribution is more complex than is often acknowledged.

\textsuperscript{15} \textit{Sharpe, supra} note 5 at para 116.


\textsuperscript{17} Indeed, the exception, if read narrowly, may actually require physical proximity and sexual contact in order for youths’ sexual expression to be deemed significant sexual exploration or important for their self-actualization and identity.
but not to its publication or distribution. That is, the private use exception will not apply to any material that is transferred to a person other than its creator or a participant in its creation. However, subsequent interpretations of the exception expand the definition of “participant” and recognize the role of “digital sharing” in our contemporary cultural and technological context, thus effectively extending the exception to include the “transmission” or “distribution” of child pornography. While successive courts have considered the scope of the private use exception, none have directly considered the consensual teenage sexting scenario. As Karaian has argued elsewhere, this is likely due, in part, to police and prosecutorial discretion and constraint. Nevertheless, scholarly opinion on the exception’s application to this practice is under-considered and varied. Whereas Lara Karaian and Andrea Slane have both argued that youths’ digital sexual expression is captured by the exception, others have suggested that the exception would arguably not apply to sexts that are shared with a remote partner “because the recipient neither participated in the creation of, nor is depicted in, the recording,” therefore disqualifying the images and the young people from inclusion. Moreover, lack of clarity regarding the exception’s application to sexts has resulted in confusion about young peoples’ constitutionally protected expressive rights. Since 2005, federal and provincial police and federally funded child protection agencies have been informing young people that they do not have the legal right to consensually create and share digital sexual images with an intimate partner and that doing so could result in child pornography charges.

18. Sharpe, supra note 5 at paras 116-118.
19. Ibid at paras 116, 118.
21. One exception is R v Schultz, 2008 ABQB 679 at para 129, wherein Justice Topolniski drew on a hypothetical and argued that the private use defence would not apply to a teenage female who took explicit photographs and shared them with others via the Internet.
25. For the purposes of this article, young people—that those between the ages of twelve and eighteen—are referred to interchangeably with youth, adolescents, and teens.
One such example is the Saint-Jérôme Police Service, which was awarded the 2017 Minister of Justice National Youth Justice Policing Award for its anti-sexting campaign: “Campagne sexton: reflète la bonne image de toi et pas obligé de tout partager.” Consensual sexting in this campaign is framed as self-exploitation and illegal. This project has established a strong media presence, including a commercial on the dangers of ‘sexting’ which has appeared over a thousand times at the Saint-Jérôme cinema. The project was also featured on the front pages of three local papers as well as in television and radio interviews. The effects of this activity on adolescents’ sexual expression, and the damaging effects of this policing for young peoples’ self-fulfillment, self-actualization, sexual exploration, and identity have yet to be adequately considered.

This article argues that the private use exception as set out in Sharpe is inclusive of consensual teenage sexting based on four grounds: the text and spirit of the exception; subsequent judicial interpretations of the exception; fundamental shifts in the technological and sexual terrain since the exception was established; and, recent material amendments to the Criminal Code—namely, the development in 2015 of the Protecting Canadian’s from Online Crime Act (Online Crime Act) and its new intimate images provision, which makes non-consensual intimate image distribution a criminal privacy offence. Having said this, this article also argues that the private use exception as it currently exists is too narrow to adequately

28. Ibid. This collaborative campaign (which also included the Canadian Centre for Child Protection, youth prosecutors in the province of Québec, and the Commission scolaire de la Rivière-du-Nord) disseminated its message via a “Sexto intervention kit for schools,” which, according to the Department of Justice press release, has reached over 10,000 students since 2016.
29. Ibid. School resource officers across Canada have identified teenage sexting as a major part of their current work. Royal Canadian Mounted Police and provincial police have self-produced anti-sexting initiatives that disseminate this message across a variety of platforms. See also "Un Sexto, C’est Quoi?" Ville de Saint-Jérôme, online: <www.vsj.ca/fr/sextos.aspx>. The Châteauguay police’s “awareness campaign” titled “Sexs Are Porn” targets students aged twelve to seventeen and involves police visits to six schools to warn about the dangers of consensual sexting. “Châteauguay Police Launch ‘Sexs Are Porn’ Campaign to Rein in Teen Sexting” (25 January 2018), online: CBC News <http://www.cbc.ca/news/canada/montreal/teen-sexting-ch%C3%A2teauguay-police-1.4502186>. (“The police have noted that, on average, since 2014, half of the child pornography files handled by the SPVG were associated with this phenomenon.” (English translation of French website, online: <http://www.gatineau.ca/portail/default.aspx?p=guichet_municipal%2fpolice%2fzone_jeunesse%2fprogrammes_ecoles_secondaires%2fgarde_ca_pour_toi >).
30. Protecting Canadian’s from Online Crime Act, SC 2014, c 31; Criminal Code, RSC 1985, c C-46, s 162.1(1).
protect the sexual speech of teens. While subsequent judicial interpretations of the exception have extended the boundaries of private use, these analyses have also potentially and paradoxically circumscribed the protection by requiring youth to retain the ability to “maintain control” of their own images. A key goal of this article is thus to interrogate the relationship between privacy and control as it relates to youths’ digital sexual expression.

In order to clarify the exception’s scope and its applicability to teenage sexting this article begins with a mapping of judicial interpretations of the private use exception from its inception in 2001 up to and beyond the Supreme Court of Canada’s most recent consideration of the defence in *R v Barabash*. From here, fundamental shifts in the technological and sexual terrain are charted in order to establish a chronology of technological developments and their effects since *Sharpe*. These technological and sexual shifts are then discussed in relation to changes in the legislative terrain, namely the development of new criminal law provisions that explicitly acknowledge young people’s ability to consent to sending intimate images of themselves to a peer, including to peers who did not “participate” in the image’s creation. This most recent legislative development reclassifies the non-consensual distribution of images that meet the definition of child pornography as a privacy violation, thus constructing youths’ digital sexual expression as ontologically other than child pornography. Next, privacy’s meaning, its parameters, and the safeguards required to protect and regulate it in our digital context are considered. Here the implication of “networked privates” and “context collapse” for the meaning of “private use” are discussed. It is argued that the near impossibility of maintaining control and the paradoxical implications of believing in “control” as a means of preventing harm, requires further consideration. A more nuanced “privacy calculus” is advanced.

Finally, the article considers the ways in which the sharing of images, including non-consensual sharing, can be understood as a modern-day iteration of the sexual rumour mill. Reframing the sharing of sexts as sexual rumours, it is argued, has implications for how we understand the meaning and boundaries of privacy, control, and harm at the heart of the private use exception. The article concludes by suggesting that a consideration of the value of sexual expression and pleasure for youth is central to any calculation of the costs of classifying youths’ sexual expression as harmful to children and thus as outside of Charter protections. It is argued that any clarification of the parameters of private use must incorporate an analysis of the benefits of sexual expression for young people

32. Department of Justice, *Cyberbullying and the Non-consensual Distribution of Intimate Images* (Ottawa: Department of Justice, June 2013) at 18.
and a positive sexual rights framework that recognizes the autonomy of youth who are of legal age to consent to sexual relations. Moreover, this article argues that risk of harm posed to children by adolescent sexting does not outweigh the countervailing right of youths’ freedom of expression, and that adolescent sexting has a legitimate purpose despite being unrelated to the administration of justice or to science, medicine, education or art. Finally, this article advances the position that even in the case of non-consensual distribution of consensual sexts, child pornography charges are at best ill conceived and at worst unconstitutional.

I. JUDICIAL INTERPRETATIONS OF THE PRIVATE USE EXCEPTION: FROM SHARPE TO BARABASH

Parliament’s main purpose for banning the production, distribution, and possession of child pornography is the prevention of harm to children and the need to send a message to Canadians “that children need to be protected from the harmful effects of child sexual abuse and exploitation and are not appropriate sexual partners.”33 The Court in Sharpe notes that Parliament set its targets on clear forms of “child pornography”: “depictions of explicit sex with children, depictions of sexual organs and anal areas of children and material advocating sexual crimes with children.” It did not, however, “cast its net over all material that might conceivably pose any risk to children or produce any negative attitudinal changes” but, rather, only over material that poses a reasoned risk of harm to children and, even then, only where the countervailing right of free expression or the public good does not outweigh that risk of harm.34

As noted above, in an effort to remedy a law that the Supreme Court of Canada deemed “substantially constitutional and peripherally problematic,” the Court chose to “read into the law an exclusion of the problematic applications of s. 163.1.”35 Chief Justice McLaughlin read two provisions as being an exception to the possession of child pornography. She writes:36

… In this case, s. 163.1 might be read as incorporating an exception for the possession of:

1. Self-created expressive material: i.e., any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and

33. Sharpe, supra note 5 at para 34, citing House of Commons Debates, 34-3, No 16 (3 June 1993) at 20328.
34. Ibid at para 34 [emphasis added].
35. Ibid at para 114.
36. Ibid at para 115.
2. Private recordings of lawful sexual activity: i.e., any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use.

The first category, the Court notes, would capture materials such as a teenager’s confidential diary or any other written work or visual representation created by, and possessed by, a single person for their sole use.37 The second category “would protect auto-depictions, such as photographs taken by a child or adolescent of him-or herself alone, kept in strict privacy and intended for personal use only.”38 According to the Court, the activity recorded must be legal in that it must be consensual and must preclude the exploitation or abuse of children. In addition, all of the parties must also have consented to the creation of the record, and the person possessing the recording must have personally recorded or participated in the sexual activity in question.39

Following the 2001 Supreme Court of Canada’s decision in Sharpe, the four counts of child pornography possession filed against Sharpe were remitted for trial with the newly formed private use exception defence in place. The Crown submitted that Sharpe’s impugned stories contravened section 163.1(1)(b) of Criminal Code, which makes illegal any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen. In 2002, Justice Duncan Shaw of the Supreme Court of British Columbia acquitted Sharpe of all charges pertaining to the written materials.40 He held that within criminal law the threshold is elevated to material that actively induces an offence against children, which he did not find to be true of the stories in Sharpe’s possession. With respect to the impugned images, Sharpe argued that they depicted legal sexual activity between youth (at that time, the age of consent was fourteen)41 and, thus, met the prongs of the newly established defence under the private use exception. Justice Shaw, however, found no evidence that the photos were in fact kept in strict privacy. Referring to the Supreme Court of Canada’s previous decision and its reiteration that “the protection afforded by this exception would extend no further than to materials intended solely for private use. If materials were shown to be held with any intention other than for personal

37. Ibid.
38. Ibid at para 116. In both instances, the use of “such as” indicates that the example is not exhaustive.
39. Ibid.
40. Sharpe BCSC, supra note 1.
41. The age of consent in Canada was raised to sixteen in 2008. Much of the case law cited herein refers to fact scenarios involving fourteen- and fifteen-year olds who were legally able to provide consent at the time that the incidents occurred.
use, their possession would then fall outside the exception’s aegis and be subject to the full force of s. 163.1(4),”42 Justice Shaw found that “the photographs must be intended for the private use of the parties depicted within.”43 Thus, he found Sharpe guilty on all counts relating to the photographs.

The issue of private and personal use was central to the next interpretation of the exception, six years after it was originally drafted. In 2007, the Ontario Court of Appeal delivered its decision in R v Dabrowski, wherein a twenty-eight-year-old male, who pretended to be nineteen, engaged in an intimate, five-month-long relationship with a fourteen-year-old female.44 During the relationship, the couple filmed themselves engaging in sex acts alone and in front of the accused’s friends. When the relationship ended, Dobieslaw Dabrowski gave the physical videotape recordings to a friend for safekeeping. He was charged with uttering a threat by telephone, criminal harassment, and creating, possessing, and distributing pornography but was acquitted on all counts at trial. At trial, Justice Lynn Leitch of the Superior Court of Ontario reasoned that creation for private use did not mean that the tapes have to remain in the creator’s possession. Drawing on the definition of possession as set out in section 4(3) of the Criminal Code, Justice Leitch noted that “a person is in possession of an item when he knowingly has it in the actual custody or possession of another. The item is therefore in the actual possession of one person and attributed to the other.”45 Given the evidence that the “[tapes] were given to someone for safe keeping who did not watch them, who was asked not to watch them or show them to anyone,” Justice Leitch writes: “I am not satisfied that the video tapes were created or possessed with anything other than the intention for [private] personal use.”46

On appeal, the Crown argued that Justice Leitch erred when she applied the private use defence to a fact scenario wherein the materials were given to a third party who was neither a creator nor a participant. This interpretation of possession, the Crown argued, was overly liberal. In addition, they alleged that threats to distribute the materials were not adequately scrutinized by the trial judge and that these threats classified the materials as being beyond simple “personal use” and, therefore, outside of the protection of the Sharpe defence. Accepting this argument in part, Justice of Appeal James MacPherson referenced Sharpe and noted that, “[i]f materials were shown to be held with any intention

42. Sharpe, supra note 5 at para 118.
43. Sharpe BCSC, supra note 1 at para 19.
45. Ibid at para 9.
46. Ibid.
other than for personal use, their possession would then fall outside the exception's aegis and be subject to the full force of s.163.1(4).”47 The issue of whether the accused created or used the videos in order to extort or threaten the girl was determined to be central to the determination of guilt and to the applicability of the Sharpe defence, and a retrial was ordered. However, with the case concluded, Justice MacPherson rejected the Crown’s “bright line” assertion that possession be exclusive and physical in order to qualify for the defence, stating instead:

Although the “private use” exception should be applied with genuine caution, it goes too far to equate it in an absolute fashion with exclusive possession. Such an equation would render unlawful such activities as placing these videotapes in a safety deposit box or turning them over to a lawyer or other trusted person for safekeeping.

In my view, there is an evidentiary connection between holding relevant material in ‘strict privacy’ and maintaining exclusive possession. It is a factual question whether giving up exclusive possession results in a loss of strict privacy. Each case must be assessed on its own facts. 48

To determine the circumstances in which another party may be in possession of the materials, Justice MacPherson enumerated a list of relevant questions:

Questions such as to whom was the material given, what was the purpose or reason for the transfer, what terms or conditions were agreed upon when the material was given up, what control did the accused maintain over the material, was the material in fact viewed by anyone other than the consensual participants, would be relevant, all in the context of the credibility of the accused and others. 49

Justice MacPherson drew on a body of case law that interpreted private possession as “joint possession” requiring knowledge, consent, and some degree of control. Not only does this shift away from requiring strict physical possession and towards effective control, expanding the scope of what can be considered private materials, but it also, in effect, extends the scope of the exception to transmission or distribution of “child porn.” This right is extended further in subsequent case law with implications for teenage sexting’s constitutionality.

The first case to examine the private use exception as it pertains to the Internet was the Ontario Superior Court of Justice’s decision in R v Bono.50 In this case, a fifty-two-year-old male who pretended to be a sixteen-year-old boy named “Marco” pursued an online relationship with the victim from when

47. Ibid at para 24, quoting Sharpe, supra note 5.
48. Ibid at paras 29-30.
49. Ibid at para 30.
50. R v Bono, 2008 CanLII 51780 (ON SC) [Bono].
she was fourteen until she was seventeen years of age.\textsuperscript{51} In 2002, when the victim was sixteen years of age, she videotaped herself masturbating and sent them to “Marco.”\textsuperscript{52} At the age of seventeen, she made three additional videos and sent them to another of Bono’s aliases, a thirty-eight-year-old man named “Anthony,” who would intervene to repair the deteriorating relationship between “Marco” and the girl. Over that time, thousands of online text-based communications and countless phone discussions transpired between the victim and the aliases created by the applicant.\textsuperscript{53} Having pled guilty to charges of possessing child pornography and child luring, Bono brought an application to strike his guilty pleas, arguing that he was not informed of the defence of private use. Justice Guy DiTomaso concluded that the private use exception did not apply based on the fact that “the applicant had not recorded the images nor had he participated in the sexual activity in question.”\textsuperscript{54} In addition, given that consent to engage in otherwise lawful sexual activity was vitiated by fraud, Justice DiTomaso concluded that the images depicted unlawful sexual activity and therefore failed another key prong of the private use test. Furthermore, the court reasoned that Bono’s conduct posed “a reasoned risk of harm to children” that would negate the applicability of the exemption.\textsuperscript{55} As such, the viability of the “private use” exemption as a defence failed, and the application to strike his earlier guilty pleas was dismissed.\textsuperscript{56}

It was not until the 2011 decision in \textit{R v Keough} that the private use exception’s scope and application as a defence in a criminal matter was thoroughly considered, particularly as it relates to third-party possession.\textsuperscript{57} In this case, Jason Keough was charged with making and possessing child pornography, among other offences, after the Royal Canadian Mounted Police searched his home and seized a number of video recordings depicting the sexual activities between two young couples whom he had befriended over the course of his employment as a community youth worker and school guidance counsellor and as a roommate. In the first scenario of this case, fifteen-year-old S.C. and her eighteen-year-old boyfriend M.A. consensually produced a video recording their sexual relations solely for their own private use. Keough provided the video recording equipment

\textsuperscript{51} Presumably using chat rooms, although details are not provided.
\textsuperscript{52} Presumably via a postal delivery service, although details are not provided.
\textsuperscript{53} \textit{Bono}, supra note 50 at para 25.
\textsuperscript{54} \textit{Ibid} at para 24.
\textsuperscript{55} \textit{Ibid} at para 26.
\textsuperscript{56} \textit{Ibid} at para 24.
\textsuperscript{57} \textit{Keough}, supra note 20 at para 295. Here, Justice Manderscheid concluded that the exception operates as a defence in law, such as self-defence or provocation. \textit{Criminal Code}, RSC 1985, c C-46, ss 34-35, 37, 232.
to M.A. for making that recording. Initially, the recording of M.A. and S.C. was on a mini-cassette, but, upon M.A.’s request, Keough copied the mini-cassette recording to a VHS-format recording. The VHS-format recording was then given to M.A. However, M.A. and S.C. subsequently agreed that the VHS recording should be destroyed. Keough, however, despite knowing S.C.’s age, proceeded to keep the original and produced two additional copies.

It was determined by the trial judge that S.C. and M.A.’s recording qualified for the private use exception as they had recorded lawful sexual activities and the recording was created together. At appeal, the question considered by Justice Donald Manderscheid was whether “the format change and copying by a third party have the effect of removing the private use exemption.” From the evidence provided, Justice Manderscheid concluded that it did not. Functionally, the materials remained for private use even though the recordings of S.C. and M.A. were in the possession of a third party—namely, Keough—because they were not accessible by anyone other than the creators. Hence, the video’s “privacy” remained intact. The court concluded that M.A and S.C. must have consented to any collateral viewing of the recorded sexual episode that may have occurred during the format change. However, the court ultimately found that S.C. did not consent to Keough having ongoing possession of the recordings of her and M.A. and that this lack of consent removed this recorded material from the private use exception. As such, Keough was found guilty of possession of child pornography.

In the second scenario of the case, a couple that lived with Keough—twenty-year-old C.V. and sixteen-year-old J.W.—video recorded themselves engaging in various sexual activities. At some point, Keough was provided with copies, but how or why he had come into their possession was not resolved by the court. Again, the question faced by Justice Manderscheid was whether

58. Ibid at para 168.
59. Ibid at para 170.
60. Ibid at para 171.
61. Ibid at para 190.
62. Ibid at para 199.
63. Ibid at para 200.
64. Ibid at para 193.
65. Ibid at para 208.
66. Ibid at para 211.
67. Ibid at para 216.
Keough's possession could be caught within the scope of the private use exception. Since there was no evidence to suggest that J.W. had ever consented to the accused's possession of the recordings, let alone on an ongoing basis, the defence was negated and Keough was found guilty. This finding thus reiterated that third-party possession can qualify as being functionally private and within the exception's parameters as long as the image's original creators have consented to it and effectively maintained control of the images.

To arrive at these findings, Justice Mandersheid first summarizes the characteristics of private use material set out in Sharpe:

(1) all participants must consent;
(2) no exploitation or abuse may be involved;
(3) the sexual activity must be lawful;
(4) the person in possession must have either:
   (a) been a participant in the recorded sexual activity or
   (b) recorded the sexual activity. 68

Having done so, he points to Sharpe at paragraph 116 in order to map the scenarios to which the exception applies:

(i) A records A for A,
(ii) B records A for A or B,
(iii) A or B records A and B for A or B, or
(iv) C records A and B for A, B, or C.

What the exception does not explicitly identify is the following:

(i) A records A for B, or
(ii) A or B records A and B for C. 69

This mapping is instructive for a few reasons. First, it makes explicit Justice Manderscheid’s earlier finding that “the private use exception would not seem to include a sexually explicit recording created by a young person on their own, and then provided to a second person who is an intimate, but who was not present when the recording was made” (the A records A for B scenario referenced

68. Ibid at para 188.
69. Ibid at para 69 citing Sharpe, supra note 5 at para 116.
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above). The mapping also demonstrates that the constitutionality of sexual recordings of youths is not subject to a normative taste test given that consensual voyeuristic threesomes and the recording thereof (C records A and B for A, B, or C) are protected. As Justice Manderscheid notes, the exception as set out in Sharpe applies where one person records the sexual activities of a second person. He thus states: “I cannot see any principled reason where that would not also apply where two persons engaged in sexual activities and were recorded by a third.” He then goes on to note that it is not illegal for a person between ages 14 and 18 to engage in sexual activities in front of an observer. … The observation of those sexual activities is not, in itself, illegal, provided the young person consents to that viewing and there is no exploitive component (Criminal Code, s. 153) or conduct that attracts the other Criminal Code offenses which address morality or sexual activities (for example, Criminal Code, ss. 151, 152, 163, 167, 173).

By recognizing and making explicit the constitutionality of the “C records A and B for A, B, or C” scenario, Justice Manderscheid reveals an important and false division between participating and recording. That is, by acknowledging the voyeuristic scenario, Justice Manderscheid recognizes the sexual nature of viewing—the fact that the recorder in the third-party scenario is implicitly recognized as also being a participant in the sexual activity and an owner of the expression that is produced in this context. Given this reasoning, the exclusion of a common sexting scenario from protection—namely, the “A records A for B” or the “A or B records A and B for C” scenarios—necessitates further analysis. Justice Manderscheid writes:

It would seem very strange that an adolescent’s healthy sexual relationship and self actualization would not be reinforced by that adolescent making sexual recordings of themselves, and then sharing those with their partner. … I conclude that to interpret the R v Sharpe private use exception to exclude that category of material possession and transfer would deny effective Charter relief by taking an “overly restrictive interpretation” of the scope of the private use exception identified in R v Sharpe.

Justice Manderscheid arrives at this conclusion in part by acknowledging how the shifting technological landscape facilitates such expression. He writes:

70. Ibid at para 189.
71. Ibid at para 206.
72. Ibid at para 207.
73. Ibid at para 276.
74. Ibid at para 277.
The kind of technology available to young persons today provides an unprecedented ability for young persons to record themselves privately and then share those recordings. A young woman may take a topless photo of herself on her cell phone and then send that to her boyfriend. Inside that kind of context I think the *R v Sharpe* private use exception could and should apply.

Thus, Justice Manderschied effectively extends the exception’s scope to include the “distribution” of “child pornography” if the sexual relations depicted are consensual and the recipient is deemed legally able to possess the material distributed to them, thus precluding scenarios involving exploitation or abuse.75

Justice Manderscheid conceptualizes his interpretation as clarifying third-party possession, noting that the newly protected third-party possession exception would be negated in instances where possession was76

1. without the consent of all persons recorded;
2. obtained by fraud or deception;
3. a result of coercion, threat, or extortion;
4. results in the loss of control of the private use material;
5. in exchange for any form of consideration; or
6. otherwise exploitive or abusive.

Keough thus clarified that “private use” materials can be shared with, or, put differently, distributed to, parties who were seemingly “not involved” in their creation, provided certain requirements are met and can be maintained. Again, “loss of control of the private use material” is explicitly reinforced as a key element of the standards required to mitigate risks of harm to children. According to Justice Manderscheid, effective control is lost when: “(1) the private use materials are transferred or used in a manner not authorized by the third party, or (2) the ‘owners’ of the private use materials are unable to demand the return of the materials or their destruction.”77 Despite his explicit acknowledgement of the role of technology in facilitating new sexual opportunities and modes of expression, Justice Manderscheid sidesteps the problem of maintaining control when it comes to new digital technologies. Thus, the relationship between privacy and maintaining control, and the impact of this requirement for the scope of the exception, is discussed in greater detail below.

75. *Ibid* at para 283.
76. *Ibid* at para 71.
77. *Ibid* at para 289.
The next significant interpretation of the exception, and the first to deal specifically with social media and smartphones, is found in *R v Cockell*.78 Brian Cockell, who was twenty-eight years old, met the two female complainants, D.P. and D.C., on Nexopia, a Canadian social media site, when they were twelve and thirteen years of age respectively. He later exchanged cellphone numbers and began texting, meeting up with, and engaging in, sexual activities with both complainants separately. A number of sexual images and videos of D.C. were found on the accused’s various laptops and Blackberry cellphone, all of which were taken with her consent. At issue in Cockell’s appeal of two charges of possession and one charge of making child pornography was whether or not the trial judge properly assessed whether D.C. was fourteen years of age (the age of consent at that time) before engaging in sexual contact with the accused, thus rendering the sex consensual and making the private use defence potentially available to the appellant.79

The appeal court agreed with the defence submission that, due to unreliable testimony from D.C., inconclusive evidence from forensic meta-data experts, and no supporting submission from the trial judge, there was no reliable evidence to support allegations that the accused had engaged in sexual contact with D.C. before she was fourteen years old.80 The appeal court also acknowledged D.C.’s testimony that she had consented to the recording of the sexual activity.81 However, Justice Myra Bielby of the Alberta Court of Appeal, in interpreting the Supreme Court of Canada’s decision in *Sharpe*, extended the exception’s requirements by adding two additional prerequisites to the availability of the defence. The first was that there must be a demonstrated “mutuality of benefit” for all of the parties involved with the materials and the second was that there must be a standalone analysis of a young person’s consent to ensure that their participation in creating the materials was given outside of potentially abusive or exploitative circumstances.82 The court then concluded that there was little or no mutuality of benefit for D.C. resulting from the creation of the materials, based in part on the fact that the materials were stored solely on computers owned by the accused as well as on D.C.’s testimony that she had taken the photographs “not for her own pleasure, but rather to send to the appellant when he was out of

79. Ibid at paras 1-7.
80. Ibid at paras 26-27.
81. Ibid at para 11.
82. Ibid at paras 36, 38.
town to cheer him up; she testified that she wanted to please him.”

Justice Bielby then went on to cite the age difference between the two parties, the manner in which the relationship evolved, and the disapproval that D.C.’s parents showed for the relationship as evidence that the relationship was exploitative of the young female.

Combined, these findings prompted the court to rule that,

there is simply no evidence to establish the mutuality and the evidence which was led points to the existence of exploitation rather than contraindicates it. There is thus no “air of reality” to the appellant’s claim to the private use defence. Therefore, although the trial judge did not give reasons for the rejection of this defence, in the circumstances, no substantial wrong or miscarriage of justice occurred so that the appeal on this ground must be dismissed.

Cockell’s leave to appeal this verdict to the Supreme Court of Canada was denied, and no reasons were provided.

However, as Cockell was being decided, another challenge to the private use exception—R v Barabash—was working its way through the legal system and was ultimately heard by the Supreme Court of Canada in 2015. In 2012, Donald Barabash, who was sixty years old, was charged with one count of possessing child pornography. Both he and the co-accused, Shane Rollison, who was forty-one years old, were also charged with making child pornography. The recordings at issue depicted the accused, primarily Rollison, engaging in a variety of sexual acts with the complainants, D. and K., two fourteen-year-old female runaways who had taken up residence in Barabash’s home. These recordings were discovered as the result of a police investigation of a sexually explicit image of D. and K. which, according to K.’s testimony, was created by D., using Barabash’s computer and web camera, and then posted online to Nexopia by D. without K.’s consent. D., however, was never charged with child pornography offences for these actions.

It was determined by the lower court that the females were of legal age (at the time of the incident); that they were willing and consenting participants in the sexual acts and their recordings; and, that the accused did make and possess child pornography. The central question then concerned the applicability of the private use defence to the circumstances of the accused.

At trial, Justice Denny Thomas ruled that the private use exemption outlined in Sharpe had three requirements: (1) the sexual activity recorded must be lawful; (2) the recording must be made with consent from all parties depicted within; and, (3) the recording must be held

83. *Ibid* at para 42.
84. *Ibid* at paras 42-44.
85. *Ibid* at para 45.
86. *Barabash* ABQB, *supra* note 31 at paras 3-16.
for private use only by those involved in its creation. In doing so, he rejected the Crown’s interpretation of the exception as requiring that two separate and additional requirements be met—namely, that the images must also (1) have “self-actualizing” or “self-fulfilling” properties and, additionally, (2) be determined to not result from situations that could be viewed objectively as exploitative or abusive of children. Justice Thomas rejected this argument and concluded that “[t]his inquiry goes beyond whether the recorded activities are legal, consensual, and private, and instead requires investigation of the quality and meaning of those recorded activities.” Such a requirement, he argued, would constitute a morally driven “taste test,” which he deemed contrary to the court’s intent when creating the defence, adding:

I observe that in R v Sharpe at para. 107 public perception is specifically excluded as a reason to criminalize recordings of teenagers engaged in sexual activities: ... “The fact that many might not favour such forms of expression does not lessen the need to insist on strict justification for their prohibition. As stated in Irwin Toy, supra, at p. 976, ‘the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment.’”

Justice Thomas also commented on the court’s limited ability to fairly and objectively evaluate what is self-actualizing or expressive sexuality as an outside observer, and he highlighted a number of negative outcomes for youth should the Crown’s line of argument be accepted, such as enhanced criminal liability of young persons, reduced prosecutorial discretion, a lack of clear rules or guidelines for youth as to what is legal sexual activity, and the disproportionate or differential criminalization of marginal and minority youth. Dismissing these additional requirements as invalid, as well as the Crown’s arguments that a “synergy of negative factors”—such as drug use by the females, the young age of the females, the large age difference between the parties, and the nature of the sexual acts in the recordings—classify the recordings as being beyond the protection of the defence, Justice Thomas found the accused to have met the three requirements set out in Sharpe and acquitted both defendants.

At appeal, the Crown relied on the ruling in Cockell to argue that the trial judge in Barabash erred in his interpretation of the private use defence. The majority of the court agreed and held that the private use exemption required

87. Ibid.
88. Ibid at para 190.
89. Ibid at para 163[emphasis in original].
90. Ibid at para 215.
91. Ibid at paras 251-68.
92. Ibid at para 10.
a determination of “mutuality of benefit” for all of the parties involved in the creation of the materials. The appeal court also ruled in favour of creating an additional standalone requirement that the recorded material must “not involve child exploitation or abuse as cognizable in law generally, not just crimes under the Code.”93 The majority found that the trial judge had erred by not properly considering the exploitative circumstances surrounding the recordings and their creation and instituted guilty verdicts in place of the acquittals on all counts.94

The accused appealed and tasked the Supreme Court of Canada with clarifying the private use exemption’s requirements. Justice Andromache Karakatsanis, on behalf of a unanimous Court, disagreed with the appeal court’s interpretation of Sharpe and held that exploitation is a component of the lawfulness requirement and that no additional analysis of factual exploitation is required to qualify for the defence.95 Section 153.1 of the Criminal Code deems unlawful any sexual communications or activities with young persons that arise out of relationships of trust, authority, dependency, or exploitation. If unlawfulness due to exploitation is proven beyond a reasonable doubt, the private use exemption cannot be raised, regardless of whether or not the young person has consented to the activities and their recording. Justice Karakatsanis also highlighted that section 153.1(2) provides a list of some of the indicators a trial judge can consider when examining the presence of exploitation, such as (1) the age of the young person; (2) the age difference between the parties; (3) the evolution of the relationship; and (4) the degree of control or influence the person has over the young person.96 In addition, Justice Karakatsanis disagreed with the Crown’s argument that the private use exemption requires evidence of a “mutuality of benefit” to all those involved in the creation of the materials. This, she argued, would add an unnecessary complication to the private use exemption; thus, she found that the determination of the material’s potential benefits was up to the lawful owners and creators.97 Having upheld the exception as set out in Sharpe, however, Justice Karakatsanis noted that the Court in Sharpe had not included any reference to the creator or participant’s right to maintain ongoing control or to the right to the return or destruction of the recording raised. She acknowledged that, while this issue was not relevant on the facts of the appeals before her.98

94. *Ibid* at paras 11-12.
96. *Ibid* at para 36.
97. *Ibid* at para 52.
98. *Ibid* at para 30 [emphasis added].
self-actualization (paras. 102–10). In my view, the balance struck between the right of free expression and preventing harm to children in Sharpe suggests that young persons who participate in a sexual recording caught by the private use exception retain the ability to ensure its return or destruction. This understanding of the exception would provide protection for young persons who may suffer anxiety or distress from the knowledge that another person possesses such material and could unlawfully share it. It would serve to address circumstances in which the risk of harm outweighs the expressive value of the recording, contrary to the principles articulated in Sharpe. However, since the question of a right to access or destruction is not relevant on the facts of these appeals, I would not make any final pronouncement about it.

Ultimately, the Supreme Court of Canada acknowledged that, while the Crown erred in law when attempting to institute additional requirements to the private use defence, its concerns about the possible exploitative nature of the relationship were warranted based on the age differences and the fact that the young females had a history of addiction and homelessness.\textsuperscript{99} In reviewing the facts of the case and the trial decision, the Court ruled that “the trial judge’s factual findings do not adequately establish whether the appellants were in positions of trust or authority towards the complainants, whether the complainants were dependent upon them, or whether the relationships were exploitative of K. and D., as required by s. 153,” and, as such, a new trial should be held to assess the facts of the case in light of the clarifications made to the role of exploitation in regards to the private use exemption.\textsuperscript{100} This case has not yet come to pass. Dabrowski has since died, and Rollinson is awaiting further action by the Crown.\textsuperscript{101}

II. FUNDAMENTAL SHIFTS IN THE TECHNOLOGICAL AND SEXUAL TERRAIN

Digital communication technologies existed when Sharpe was decided in 2001. However, the evolution of digital and wireless technologies has fundamentally shifted the social and sexual terrain since then.\textsuperscript{102} These fundamental shifts necessitate a reconsideration and clarification of the private use exception’s borders, the relevance and possibility of “maintaining control” of one’s images, and of the balance between a right to expression and countervailing interests and harms. The majority in Sharpe did not reference the Internet in the body of their decision. The dissent, however, argued that “the widespread availability of computers and the Internet has resulted in new ways of creating images, and has

100. \textit{Ibid} at para 61.
101. As per Dillon Brady’s correspondence with Rollinson’s attorney.
facilitated the storage, reproduction, and distribution of child pornography.”

While the dissent’s claim about the widespread nature and availability of the Internet is valid, the Court was likely referring to evidence provided in the 1999 British Columbia Court of Appeal decision in *Sharpe*, which referenced the scanning of images from print magazines or celluloid, saving these scans onto CD-ROMSs, JAZ drives, and disks, and distributing them via email and chat rooms.

While Canadians were world leaders in terms of Internet use in 2001, half of the adults in the United States (eighteen years of age and over)—more than ninety-four million people—did not have Internet access. Moreover, while about seventeen million US teens between the ages of twelve and seventeen were using the Internet in 2000 (73 percent), and thirteen million were using instant messaging, the PEW Research Center found that in 2001 the telephone remained the principle communication amongst teens. Ultimately, while the Internet and digital communication were emerging as a popular means of communication and expression for youth, the sea change in technology that has since swept over us had not yet materialized. Despite the fact that Mark Prensky coined the controversial term “digital native” in 2001 to refer to children who had grown up using digital technology, Prensky was referring primarily to youths’ use of video games and computers with precursors to the World Wide Web such as Bulletin Board Services and UseNet. These technologies predate the development of Web 2.0, user-generated content, camera-equipped smartphones, wireless networking, and social media. Indeed, the Web 2.0 gained

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103. *Sharpe*, *supra* note 5 at para 166.
104. *R v Sharpe*, 1999 BCCA 416 at para 33. According to Detective Waters’s evidence to the British Columbia Court of Appeal,

> [t]he largest volume of material is being distributed through the use of the Internet, through computers—computer distribution. This can involve material that has been scanned from publications or pictures of children engaged in sexual activity. We’ve seen the older child pornography publications that were produced in Europe and Asia that are now showing up on computer and being distributed on the computers through the Internet. The pictures are scanned, which means that they are changed into an electronic format and placed on disk—computer disk. … It’s been an electronic format on disk and then can be distributed through the computer, either through—which I stated earlier, through email or chat rooms or ICQ.

prevalence after 2002, one year after the “dot-com” bust and the Supreme Court of Canada’s decision in *Sharpe*.  

Wireless network capabilities did not develop in Canada and the United States until the mid-2000s. The first camera-equipped smartphones were released in 2000 and were far from affordable or ubiquitous. It was not until 2007 that the first iPhone was released. Finally, the earliest social networking sites and video-sharing sites all came after 2001 and included Friendster (2002), Makeoutclub (2003), MySpace (2003), Nexopia (2003), Facebook (2006), and YouTube (2005). Many of these online platforms have since fallen out of popularity with youth and been replaced with newer applications such as Twitter (2006), Tumblr (2007), Instagram (2010), and Snapchat (2011). As these technologies have become more affordable and accessible, we have witnessed an amazing uptake in their usage and in how they have altered our modes of communication and expression. The PEW Research Center’s 2018 survey, “Teens, Social Media and Technology,” found that smartphone ownership is now nearly universal among teens of different genders, race and ethnicities, and socio-economic backgrounds. These mobile connections “are in turn fueling more-persistent online activities: 45% of teens now say they are online on a near-constant basis.”  

Such activity has increased from the PEW Research Center’s 2015 report examining teenagers’ use of social media and mobile phones to create, maintain, and end their friendships and romantic relationships, which determined that “[f]ully 88% of American teens ages 13 to 17 have or have access to a mobile phone of some kind, and a majority of teens (73%) have smartphones.”

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87 percent of American teens aged thirteen to seventeen have, or have access to, a desktop or laptop computer, and 58 percent of teens have, or have access to, a tablet computer. Overall, teens have relatively robust levels of access to technology devices, with seven out of ten teens having access to three or four of the five items asked about on the survey: desktop or laptop computer, smartphone, basic phone, tablet, and game console. The Pew Research Center’s 2018 “Teens, Social Media and Technology” survey also concluded that “[t]he social media landscape in which teens reside looks markedly different than it did as recently as three years ago.”

These new modes of communication are now widely used by adults and teens to make and maintain friendships, “hook up” (by facilitating offline sex), engage in digital intimacy or cybersex, date (often long distance), and break up with romantic partners. Online spaces now play a major role in how adults and teens flirt, pursue, and communicate with potential and current crushes. In her “Six Facts about Teen Romance in the Digital Age,” Monica Anderson reveals that, “[a]lthough most teen romantic relationships do not start online, digital platforms serve as an important tool for flirting and showing romantic interest. Half of teens (50%) say they have friended someone on Facebook or another social media site as a way to show romantic interest, while 47% have expressed attraction by liking, commenting on or interacting with that person on social media.” When asked about a number of ways in which they might spend time with their current partner or significant other (or most recent past partner, in the case of teens who are not currently romantically involved but who have been in a relationship of some kind in the past), 92 percent of teens in romantic relationships have spent time text messaging with their partner at least occasionally; 70 percent have spent time together posting on social media sites; and 69 percent have spent time with their significant other using instant or online messaging. Other common ways in which teens have spent time with their romantic partners include video chatting (55 percent); using messaging

113. Ibid.
114. Ibid.
115. Anderson & Jiang, supra note 111 at 3.
116. Ibid.
117. Ibid.
119. Lenhart, Anderson & Smith, supra note 12 at 32.
applications (49 percent), email (37 percent), and talking while playing video games together (31 percent).\footnote{120} Numerous US and Canadian studies indicate that adults and youth now regularly use smartphones for creating and sharing sexual and nude imagery. A recent ongoing six-year longitudinal study of 964 ethnically diverse high school students in the United States concludes that “sexting is a new ‘normal’ part of adolescent sexual development and not strictly limited to at-risk adolescents.”\footnote{121} A 2018 meta-analysis of thirty-nine sexting studies (with 110,380 participants) determined that the observed increases in teenage sexting since 2009 corresponded to increases in smartphone ownership among teens.\footnote{122} Although rates of sexting are hard to determine due to the variance in definitions and sampling techniques,\footnote{123} the 2018 meta-analysis found that about one in seven individuals (or 14.8 percent) between the ages of twelve and seventeen had sent sexts, and approximately one in four individuals (27.4 percent) had received them.\footnote{124} These numbers mark a significant increase from the 2009 PEW Research Center’s findings of 4 percent and 15 percent of twelve to seventeen year olds, sending and receiving sexts, respectively.\footnote{125}

Canadian studies have reached similar conclusions. In 2014, Media Smarts released its national Canadian survey of nearly 5,500 students from Grade 4 to Grade 11 entitled \textit{Sexuality and Romantic Relationships in the Digital Age}.\footnote{126} According to this study, sexting practices tend to increase with age and accessibility to personal cellphones: eight per cent of students in Grades 7–11 with access to a cellphone have sent a sext of themselves to someone, while nearly 25 percent of those participants had received a sext.\footnote{127} Fifteen per cent of students

\begin{footnotesize}
\footnote{120. Ibid at 32.}
\footnote{121. Jeff R Temple & Hyejeong Choi, “Longitudinal Association between Teen Sexting and Sexual Behavior” (2014) 134 Pediatrics e1287 at e1287.}
\footnote{122. Sheri Madigan et al., “Prevalence of Multiple Forms of Sexting Behavior among Youth: A Systematic Review and Meta-Analysis” (2018) 172 JAMA Pediatrics 327.}
\footnote{123. Lenhart & Duggan, supra note 12. According to Bianca Klettke and her co-authors’ recent systematic review of the literature on sexting’s prevalence rates, “both sending and receiving sexts is substantially more prevalent amongst adults than adolescents”. Bianca Klettke, David J Hallford & David J Mellor, “Sexting Prevalence and Correlates: A Systematic Literature Review” (2014) 34 Clinical Psychol Rev 44 at 48-9.}
\footnote{124. Madigan et al., supra note 122.}
\footnote{127. Ibid.}
\end{footnotesize}
in Grade 11 admitted to having sexted at least once, and just under one-quarter of the students with access to a cellphone who have sent a sext of themselves reported that the person who received the sext forwarded it to someone else. Of the twenty-four per cent of students in Grades 7–11 with cellphones who have received a sext from its creator, fifteen per cent forwarded it to someone else. The findings of this study also indicate that, “although boys and girls are equally likely to create a sext, older students in general, and boys in particular, are more likely to receive them and forward them to others,” yet “sexts of boys are more likely to be forwarded than sexts of girls.” Furthermore, the majority of participants admitted to sexting regardless of the household rules set by their parents, which suggests that teens may continue to sext regardless of whether adults deem it socially acceptable. The findings of Media Smarts study are in line with research on teenaged sexting coming out of the United States, such as Bianca Klettke, David Hallford, and David Mellor’s systematic review of the literature. Additional evidence reveals that, across all age groups, the proportion of cellphone owners that say that they have sent and received sexual or nude pictures has increased over time. Statistically significant increases between 2012 and 2014 demonstrate that this expressive practice is growing in prevalence and importance.

Klettke and co-authors’ 2014 review of the sexting literature, as well as Livingstone and Smith’s review of research published evaluating the harms experienced by child users of online and mobile technologies since 2008, conclude that mobile and online risks are increasingly intertwined with pre-existing (offline) risks in children’s lives. For instance, Livingstone and Smith found that the risks of cyberbullying, contact with strangers, sexual messaging and pornography generally affect fewer than one in five adolescents who frequent the Internet. “Prevalence estimates”, they suggest, “vary according to definition and measurement, but do not appear to be rising substantially with increasing access to mobile and online technologies, possibly because these technologies pose no additional risk to offline behaviour, or because any risks are offset by a

128. Ibid.
129. Ibid.
130. Ibid.
131. Klettke, Hallford & Mellor, supra note 122 at 45.
132. Lenhart & Duggan, supra note 12.
133. Ibid at 18.
commensurate growth in safety awareness and initiatives.” They go on to state, “To those who find it implausible that new technologies have not increased the risk of harm in children’s lives, it is worth noting that, over the period when internet and mobile use have risen sharply, long-term measures of harm to children reveal little or no increase over recent years, and some reductions in bullying and victimization.”

III. FUNDAMENTAL SHIFTS IN THE LEGISLATIVE TERRAIN: NEW INTIMATE IMAGES LAWS

Fundamental shifts in the legislative terrain include debates about the applicability of child pornography offences to youths’ self-created and shared digital sexual imagery. These developments raise significant questions about the scope of the private use exception and the constitutionality of our child pornography laws more broadly. In 2012, federal, provincial, and territorial ministers responsible for justice and public safety struck a subcommittee to identify potential gaps in the Criminal Code related to the non-consensual distribution of “intimate images” of both adults and youths. The Coordinating Committee of Senior Officials’ Cybercrime Working Group (CCSO CWG) released their report the following June. In it, they advanced a definition of an intimate image, which, they acknowledged, would constitute child pornography if the person depicted was less than eighteen years of age. This definition, they write,

raises questions as to what options should be available to deal with an adult or young offender who may have distributed an intimate image of a person who is under the age of 18. Should the offender be charged with a child pornography offence? Or should the police and/or Crown have the option of proceeding under the proposed new offence, which would be a less serious and less stigmatizing offence?

On 20 November 2013, Minister of Justice Peter MacKay introduced Bill C-13, An Act to Amend the Criminal Code, The Canada Evidence Act, the Competition Act, and the Mutual Legal Assistance in Criminal Matters Act, in the House of Commons. The Bill integrates most of the CCSO CWG’s recommendations and creates a new Criminal Code offence (section 162.1) of

135. Livingstone & Smith, supra note 134 at 645-46.
136. Ibid.
137. CCSO CWG, supra note 32.
138. Ibid at 18.
knowingly publishing, distributing, transmitting, selling, making available, or advertising an “intimate image” of a person without the consent of the person depicted within. The definition of “intimate image” for the purposes of the new provision includes materials that are captured by the child pornography laws. Notably, consent to distribution is a defence in the new intimate images law and thus seems to support the broader interpretation of “private use” set out by Justice Manderscheid in Keough. As such, with the development of this new provision, the legislature implicitly acknowledges that a teen can consent to transmitting or distributing intimate images of him or herself to another teen, including a teen who did not “participate” in the image’s creation. The only restriction imposed is that an intimate image cannot be non-consensually sent to a third party. Also of note is that the new hybrid offence is punishable on indictment by up to five years of imprisonment or, upon summary conviction, to a fine of not more than $5,000 and/or six months of imprisonment. The penalty for child pornography, also a hybrid offence, however, includes mandatory minimum sentence of between ninety days and one year depending on the charge, mandatory registration as a sex offender, compliance with a DNA bank order, and the stigma of a child pornography conviction.

The CCSO CWG acknowledges a reluctance by the members of the provincial and territorial Public Prosecution Service of Canada to lay any child

140. Criminal Code, RSC 1985, c C-46, s 162.1(2). Section 162.1(2) includes the following:

   Intimate image means a visual recording of a person made by any means including a photographic, film or video recording,
   (a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;
   (b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and
   (c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.is defined as a visual recording (as opposed to written materials or audio recordings, for example) by means of a photographic, film or video recording. It must be of a person: in the nude; or exposing his or her genital organs or anal region or breasts; or engaged in explicit sexual activity.

141. Bill C-13 does not add the new offence to s 150.1 of the Criminal Code, which outlines the sexual offences for which consent is not a defence as well as the rules relating to age of consent. Julia Nicol & Dominique Valiquet, Legal and Social Affairs Division, Parliamentary Information and Research Service, Legislative Summary: Bill C-13: An Act to Amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act, Publication no. 41-2-C13-E (11 December 2013, revised 28 August 2014).

pornography charges in non-consensual distribution cases involving consensually created images depicting persons under eighteen years of age: “In their view, the harm resulting from the non-consensual distribution of intimate images (i.e., breach of privacy) is qualitatively different from the harm resulting from the distribution of child pornography (i.e., sexual exploitation of children).”  

Whereas a major objective of child pornography laws is to protect children from sexual abuse in the making of child pornography, to protect children who have been abused from further harm via the consumption of their abuse images, and to protect children by preventing the fueling of fantasies and facilitation the sexual solicitation of children, the new “intimate images” law constructs the harms of this same materials in terms of humiliation, reputational damage, emotional, physical and economic fallout.

Other members of the CCSO CWG expressed the view that the child pornography provisions were not designed to address non-consensual distribution: “The prevalence of this activity among young adults and youth has been fueled by the growth in social media and it is becoming increasingly evident that these types of cases are being dealt with differently by police, Crown and the courts than


144. CCSO CWG, supra note 32. Notably, the harms that may flow from non-consensual distribution of consensually produced sexts are not entirely distinct from the physical, emotional, and psychological consequences that may flow from the dissolution of off-line sexual romances and distribution of sexual rumours. Furthermore, greater acknowledgement of the complex relationship between sexting and the development of mental health issues and suicide is necessary. In one interview regarding a high profile sexting and cyberbullying case, Amada Todd’s mother, Carol, is quoted as saying:

“Amanda’s story, when you look at all the different pieces, it’s very complicated,” Todd said from her home in Port Coquitlam, B.C., adding that her daughter had a learning disability that affected her coping skills. “I don’t really like it when they say Amanda was cyberbullied to death. That wasn’t the case and I don’t think there’s enough supports for kids for mental health issues, which is ultimately why they take their own lives.

‘typical child pornography cases.’” This claim has significant bearing for the constitutional status of consensually created and shared images and the scope of the private use exception. Moreover, it has significant implications for contemporary policing and child protection initiatives. Any anti-sexting campaigns initiated by police agencies or federally funded child protection agencies should be updated immediately so that they are not in direct contradiction to the law.

Some federal representatives of the CCSO CWG expressed concerns that the broad scope of child pornography offences may be questioned if cases involving older teens are being more often resolved by resorting to the proposed intimate images offence. Indeed, this broad scope should be questioned in light of the developments outlined above and in the following sections of this article. Even the staunchest child protectionists and critics of the freedom of expression argument advanced in Sharpe have argued that youth who create sexual images of themselves “are not in actual fact in possession of child pornography notwithstanding the definition in the Canadian criminal code” and that the oppression of the minor is clearly missing when non-exploitative conditions prevail. The new intimate image provision thus captures the same self-produced materials as our child pornography laws yet reclassifies this imagery, redefines its harms, and subsequently reduces its sentences. The implication of this for expanding the private use exception’s scope is significant.

Relatedly, it should be noted that the harms of defining child pornography broadly and imprecisely also concern those working in the field of child protection and child sexual abuse. Advocating for more specific and clear terminology when defining sexual representations of children and youth, Jennifer Martin

145. CCSO CWG supra note 32 at 18. The authors cite R v Walsh (2006), 208 OAC 42 at para 60. This case involves a twenty-three-year-old man who distributed sexual photographs of his fifteen-year-old former girlfriend to at least one friend, leading to further distribution to her school community and family.

146. Sonja Grover, “Oppression of Children Intellectualized as Free Expression under the Canadian Charter: A Reanalysis of the Sharpe Possession of Child Pornography Case” (2004) 11:4 Intl J Child Rts 311 at 317. It should be noted, however, that Grover suggests these youth “need to be assessed by Child Welfare to determine whether there are or are not child protection concerns, rather than being held criminally liable for expressing their sexuality” and that their depictions and written materials ought to be considered unlawful because of the risk they pose to other children who may be victimized if the images are used by others to groom them. Grover also argues that if it is found that the depictions held by minors “involve coercion of one child by another, for instance an older child against a younger child, or even one peer against another, the material would then also become, on the view expressed here, a category of child pornography this time produced by children themselves.” at 330, note 1.
and Ramona Alaggia note how issues of language are not merely semantic. Referring to images of child sexual abuse and exploitation as child pornography rather than as child sexual abuse images online (CSAIO), they argue, has negative social and legal consequences. Using the term child pornography when referring to CSAIO “may contribute to detachment and to a degree of disconnection from the egregious nature of the material,” and they note that “[s]ome argue that the term child pornography distorts the serious nature of child victimization when used in reference to sexual abuse images of children because it implies conventional pornography with a child subject and, as such, conveys the impression of consensual activity.” Imprecise language similarly has implications for how we respond culturally and legally to adolescents’ digital produced and shared sexual images. Referring to these as images child pornography gives rise to myriad concerns about the violation of young peoples’ constitutionally protected expressive rights and to their potential criminalization as child pornographers.

IV. SHIFTING PRIVACY AND COMMUNICATION NORMS: NETWORKED PRIVACY, THE CONTROL PARADOX, AND AN UPDATED PRIVACY CALCULUS

Privacy is one of the key elements of the private use exception as well as one of the key issues of our time. And, yet, “there is little consensus regarding what privacy is and when it has been violated.” This is complicated further by new technologies that have significantly increased the volume of data that is now being (self)-produced, widely and rapidly shared, infinitely stored, aggregated, and subsequently subjected to powerful algorithms for future use by individuals, corporations, and the state. Given the centrality of privacy to the exception, its meaning, parameters, and the safeguards required to protect and regulate it in our digital context begs further consideration.

148. Ibid at 407.
150. See danah boyd’s discussion of the ease with which data can be recorded and archived, copied, shared with large audiences, accessed by others, and found in the future. danah boyd, It’s Complicated: The Social Lives of Networked Teens (New Haven: Yale University Press, 2014).
Nearly a decade has passed since Facebook creator Mark Zuckerberg was misquoted as claiming that “privacy is no longer a social norm.” Since then, US and Canadian scholars and courts have clarified that privacy remains a widely maintained value but that it is experienced differently in a digital context. Leading technology and social media scholars, danah boyd and Alice Marwick, have consistently found that “people care deeply about privacy and develop innovative strategies to achieve privacy while participating in the systems that allow them to access information, socialize with friends, and interact with contemporary entertainment platforms.” boyd has influentially argued that new information and communication technologies have blurred the boundary between public and private, resulting in, what she calls, “networked privates” and “networked publics” with diverse influences on individuals’ concerns and their decisions regarding privacy. These networks have come about in part because the properties of digital technology and social media have made creating boundaries around these online spaces far more difficult. As boyd notes, most social networking sites are structured on the principle of “public by default, private through effort.” Consequently, young people who have active social lives online have been found to “shy away from the conventional binary model which sees information as either open or secret, safe to share or unsafe,” preferring instead “to manage disclosure by sharing deliberately selected pieces of information based on audience and context” and to purposefully anonymize their images by excluding identifying features or contexts. The next section reconsiders the meaning of “private use” in a digital culture wherein one’s belief in control is paradoxical, contexts collapse, and images are increasingly taking the place of words.

154. boyd, It’s Complicated, supra note 150 at 47.
155. Ibid at 61.
A. CONTROL AND ITS PARADOXES

In the literature on privacy, one’s protection of one’s privacy often depends on the degree of control they are able to maintain, so much so that “privacy itself is often defined as the control over personal information flows.”157 As the case law outlined above reveals, the Supreme Court of Canada and subsequent judicial interpretations of the private use exception associate the prevention of future harm to one’s self and to other children with “maintaining privacy” and with “maintaining control.”158 The issue of control is raised in Keough, where Justice Manderscheid found that the “third-party possession private use exception is always negated where possession is: (1) without the consent of all persons recorded … (4) results in the loss of control of the private use material,”159 adding that “effective control is lost when … the ‘owners’ of the private use materials are unable to demand the return of the materials or their destruction.”160 It is also reiterated in Barabash, despite not being central to the fact scenario under consideration by the court.161

Given fundamental shifts in technology and the social and sexual context in which nudes are produced, distributed, and interpreted, emphasizing the “maintenance of control” as a ground for constitutional protection and a means of preventing harm to other children has become increasingly untenable. The affordances of digital technology—the ease, speed, and scope with which sexual imagery can be created, recorded, copied, archived, shared, and searched, as is referenced in more recent case law—evidences the near impossibility of maintaining control.162 Moreover, while privacy and control of one’s images remain a high priority for young people and adults alike, digital technology has altered communication and sexual norms in such a way that to opt out of, or abstain from, digital sexual expression is less and less a viable choice for many individuals, despite knowledge of its risks.

Evidence of young peoples’ attempts to manage their privacy is demonstrated by shifts in usage over time. In 2008, Kevin Lewis, Jason Kaufman, and Nicholas

157. Brandimarte, Acquisti & Loewenstein, supra note 153 at 341 [citations omitted].
158. R v Keough, supra note 20 at para 192.
159. Ibid at para 71.
160. Ibid.
161. R v Barabash, supra note 31 at para 27.
162. R v Keough, supra note 20.
Christakis found that 33 percent of teenagers used privacy controls. By 2012, however, 60 percent of teens were using “friends only” filters, and 25 percent restricted their communication to “friends of friends.” This is demonstrated further by teens’ move away from Facebook to newer platforms such as Snapchat—a mobile messaging application released in 2012—that provide private channels for communication between smaller groups of friends. Paul Hodkinson argues that while some teenagers’ content remains fully public, including users of platforms such as Twitter that do not offer friends-only controls, “there may be a direction of travel among teens towards friends-only communication as default where it is available.”

While the management of privacy online by teens affords a degree of “control over how information flows, who has access to it, and in what context,” the possibility of full control has been called into question by technology experts such as Microsoft researcher danah boyd. In her research on youths’ integration of technology into their everyday practices, boyd argues that, in a networked age, “[a]ny model of privacy that focuses on the control of information will fail.” Achieving absolute control, boyd writes, presumes many things that are often untenable. … One slip-up or data leakage and whatever was once protected can easily enter into a networked public where it may enter broader databases, be aggregated with other data, and circulate. In a networked world, data is more persistent, replicable, searchable, and scalable than ever before. Trying to achieve perfect control will only lead to frustration.

Whether as a result of snooping parents, broken-hearted or malicious ex-partners, hackers, or the sheer nature of our technological infrastructure, legal expectations of complete control are unsustainable and should not preclude

168. boyd, supra note 150.
169. Ibid.
consensual teenage sexting from qualifying for constitutional protection as private use materials. Even the criminal justice system’s attempts to control private data, including court-protected names of young offenders and victims of crime, have proven vulnerable to Google search algorithms and hackers.\footnote{Lisa Vaas “12-Year-Old Canadian Boy Admits to Hacking Police and Government Sites for Anonymous” (26 October 2013), online: \textit{Sophos.com} \<https://nakedsecurity.sophos.com/2013/10/26/12-year-old-canadian-boy-admits-to-hacking-police-and-government-sites-for-anonymous/>; Andrew Duffy, “Google Is Linking Secret, Court-Protected Names—including Victim IDs—to Online Coverage,” \textit{Ottawa Citizen} (21 September 2017), online: \<http://ottawacitizen.com/news/local-news/google-is-linking-secret-court-protected-names-including-victim-ids-to-online-coverage>.}

Moreover, the greater sense of privacy and control afforded by new privacy measures and applications has raised questions about the paradoxical impact of one’s sense of control for online interactions. A growing body of studies from the social and behavioural sciences reveal that managing and maintaining privacy in our contemporary context is not only more physically difficult but also psychologically complex.\footnote{Brandimarte, Acquisti & Loewenstein, supra note 153. Peter Harris, “Sufficient grounds for optimism? The relationship between perceived controllability and optimistic bias” (1996) 15 J Soc & Clinical Psychol 9; Neil Weinstein, “Why it won’t happen to me: Perceptions of risk factors and susceptibility” (1984) 14 Health Psychol 431.} Early research has identified control as a determinant of risk perception and risk taking; people are more willing to take risks, and judge those risks as less severe, when they feel in control. For instance, one study found that participants who were provided with greater explicit control over whether and how much of their personal information researchers could publish ended up sharing more sensitive information with a broader audience—the opposite of the ostensible purpose of providing such control.\footnote{Brandimarte, Acquisti & Loewenstein \textit{ibid} at 341.} Research thus shows that a greater sense of control can paradoxically reduce privacy concern, which, in turn, can have unintended effects.\footnote{\textit{Ibid} at 346 [citations omitted].} According to Brandimarte, Acquisti, and Loewenstein’s study, people who experience more perceived control over limited aspects of privacy sometimes respond by revealing more information (less privacy), to the point where they end up being more vulnerable as a result of the measures ostensibly meant to protect them.\footnote{\textit{Ibid} at 340.}

On the other hand, lower perceived control can result in lower disclosure, even if the associated risks of disclosure are lower: “In other words, our results provide evidence that control over personal information may be a necessary (in ethical or normative terms) but not sufficient condition for privacy
KARAIAN, BRADY, REVISITING THE “PRIVATE USE EXCEPTION” 337

protection.”

175 Brandimarte, Acquisti, and Loewenstein label this complexity the “control paradox.” The development of more privacy control may allow users of person-to-person photo-sharing applications to share more sensitive information with larger, and possibly riskier, audiences. 176 For example, early adopters (primarily youth) of Snapchat believed the application’s promise to “disappear” their images or videos (or “snaps”) within seconds of them being received, thus preventing the communiqué from being saved and redistributed. Snapchat quickly became a popular means of sharing nudes. However, soon after its widespread adoption, Snapchat’s promise to erase images and inform senders if a screenshot had been taken was revealed to be false. 177 If we assume that the future of data is networked and that we can no longer rely on control of data to achieve privacy, it becomes imperative to look for alternate models for understanding youths’ right to express their sexuality. As boyd notes, 178

[the challenges of networked privacy are not new issues, but social media and networked culture magnifies them in significant ways. The data that underpins networked sociality and algorithmic life connects people across numerous axes time and time again. The future is only going to be more networked, more interwoven, more of a gnarly hairball that’s impossible to untangle without harsh cleaving. Expecting that people can assert individual control when their lives are so interconnected is farcical. Moreover, it reinforces the power of those who already have enough status and privilege to meaningfully assert control over their own networks.

B. CONTEXT COLLAPSE

If we cannot rely on control to achieve privacy in a networked age, how then can we think about privacy as it pertains to one’s intimate images and videos? Drawing on Helen Nissenbaum, boyd argues that we need to understand privacy in context but that we must also recognize how digital technologies result in “context collapse.” 179 Privacy norms exist in a dialectic relationship with our technological, social, sexual, and legal terrain. They also differ between nations and within communities, depending on the specific context, one’s subject position,

175. Ibid at 345.
176. Ibid.
178. boyd, supra note 150 at 350.
and the nature of the relationship between people in any given interaction. The assumption that all people understand, experience, and achieve privacy equally, particularly as it relates to marginalized subjects such as youth, and to collapsing contexts, begs further acknowledgement in law, more generally, and in child pornography law, more specifically.

One of the primary points established across boyd’s work is that, while “networked publics” share certain features with bedrooms, park, schools and shopping malls, they differ substantively from physical public spaces with respect to how difficult it is for young people to control access to themselves and their content. Social networking platforms, including mobile applications, are less restricted in terms of form and function than material places. Facebook or Snapchat for example, often brings together individuals from different contexts—college friends, siblings, old school friends, work colleagues and others—and such a diverse audience may make it difficult for individuals to grasp the context in which they are operating and/or to present an effective, coherent, and nuanced impression of themselves. For boyd, then, young people’s attempts to establish themselves socially and make sense of their place in the world are taking place in an environment in which control over the reach of what they share is an ongoing battle. Social worlds regularly “collide uncontrollably” in online spaces where sharing publicly becomes established as a default approach, and the achievement of greater privacy requires extensive vigilance. Such a situation, boyd argues, inverts the norms of socialization in physical spaces, where interactions are usually restricted to small, visible groups.

The assumption that digital contexts are stable across space and time also requires re-evaluation. As Goodwin and co-authors note, social networking

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180. Ibid.
182. Kath Albury “Just because it’s public doesn’t mean it’s any of your business: Adults’ and children’s sexual rights in digitally mediated spaces” (2017) 19 New Media & Soc’y 713 at 720.
184. Hodkinson, supra note 166 at 278.
185. boyd, It’s Complicated, supra note 150.
sites problematize context, leading users to grapple with how to manage contextual integrity: 187

With developments in digital technology there is a potential loss of control over the context in which such texts are read, re-read and shared (potentially ad infinitum). The meanings subsequently made of the behaviour, possibly years after the fact, can be radically different from those of the user’s peer group, and the potential consequences not always positive. … The threat posed by such forms of “context collapse” is particularly heightened for youth pursuing online activities that sit outside dominant social norms.

Loss of control over context has contemporary and future criminal implications for teenage sexters and sext recipients. Innocently swiping through one’s pictures with a friend and accidentally exposing them to a nude you took or received in the context of an earlier sexual exchange would theoretically subject you to distribution charges. Similarly, while a sixteen-year-old’s sext may remain fixed across time, the context in which this image is possessed will change over time and established norms and meanings can collapse. A teenage girl’s ownership of her then teenage girlfriend’s sext, ten years after she received it and post the dissolution of their relationship, may result in her being viewed as possessing child pornography, even in the absence of her ex-girlfriend’s exploitation or abuse.

Research with youth finds that, while many young people are aware of risks related to their online activities, they see the compromise of their privacy as unavoidable, even imperative, in order to connect with peers online and to acquire social and personal benefits through accessing social network sites. 188 Accessing sexual benefits are no different. Thus, for adults and young people alike, being overly concerned with privacy can result in digital exclusion and sexual abstinence. For the majority of people, such exclusion is undesired and untenable, resulting in a shift towards privacy pragmatism rather than a lack of concern about privacy. 189 Research in this area demonstrates that people “are concerned about their privacy but are willing to trade some of it for something beneficial.” 190 Niki Fritz and Amy Gonzales draw from privacy calculus theory, which frames online information provision as a trade off for economic or

189. Raynes-Goldie, supra note 185 at 193.
190. Ibid.
social benefits.\textsuperscript{191} Again the inclusion of sexual benefits can be implied by the latter category.

A privacy calculus approach decides whether to disclose information, weighing both the perceived benefits and the justification for data. Fritz and Gonzales consider privacy to be relative rather than simply present or absent, important or unimportant. Such a nuanced approach to privacy attitudes interrogates how participants come to the choices they make \textit{vis-à-vis} disclosure or concealment rather than attempting to measure a nebulous privacy concern.\textsuperscript{192} Fully grasping this privacy calculus in the digital age requires an acknowledgement of the fact that youth have always, and successfully if given the right tools, balanced the benefits of engaging in sexual activity and speech against its risks. It also requires a consideration of the ways in which sexual images have, to some extent, come to replace acts and words. This latter consideration is discussed below.

\textbf{C. SHIFTING COMMUNICATION NORMS}

How and why control is “lost” in the digital context can be explained in part by how digital technology has altered communication norms. While some of the earliest legal writing about teenage sexting analogized the practice to modern-day love letters,\textsuperscript{193} the acknowledgement of the role that images have come to play in young people’s romantic lives is equally important. Indeed, according to Rebecca Venema and Katharina Lobinger, digital images are the same as words for young people (insert surprised-face emoji here).\textsuperscript{194} They constitute “visual conversations” or a form of “visual texting.” Teens, it has been found, routinely refer to the act of photo sharing via Snapchat as “sending a message” rather than as “sending a photo” and describe their interactions as “chatting through pictures.”\textsuperscript{195} Placed in this framework, loss of control of one’s image can be conceived of as a modern-day expression of the sexual rumour mill. A particularly extensive and invasive one, but a rumour mill nonetheless. Whereas earlier generations may have written or received a love letter or dialled their crush on a landline and engaged in a bit of awkward but steamy phone sex, teens today are as likely to go online to rate

\begin{itemize}
\item \textsuperscript{191} Niki Fritz & Amy Gonzales, “Not the Normal Trans Story: Negotiating Trans Narratives While Crowdfunding at the Margins” (2018) 12 Intl J Comm 1189.
\item \textsuperscript{193} Day, supra note 16.
\item \textsuperscript{194} Rebecca Venema & Katharina Lobinger, “And Somehow It Ends Up on the Internet’: Agency, Trust and Risks in Photo-Sharing among Friends and Romantic Partners” (2017) 22 First Monday np.
\item \textsuperscript{195} \textit{Ibid}.
\end{itemize}
their crush as “hot,”196 to flirt on Chatroulette,197 or to use Snapchat to send a nude photo.198 Technology, it seems—from paper and pens to cellphones and the Internet—has always been used by youth to connect, explore, to communicate desire, to move things to the next level, and even, sadly, to shame one another for these desires and behaviours.

Recipients of love notes, phone calls, online ratings, and now nudes are also known to share these technology-facilitated expressions of interest without permission. The note is passed around, the phone call is recalled or even possibly recorded, the online rating is screen shot, and the nude is forwarded. Motivations for doing so are varied and range from getting a laugh, expressing excitement and pride, or just plain spitefulness.199 Typically, one does not ask the love-letter writer, the caller, the clicker, and, now, the photographer for consent to share their “words.” This is the nature of the sexual rumour mill. The rumour mill may be immoral, or wrongful, but its status as criminal is questionable and far from inherent. Understood in this way, the sharing or distribution of images as words affects how we understand privacy and consent with respect to sexual speech. Indeed, the sexual rumour mill has always been the source of embarrassment, shame, and other sorts of negative, and sometimes serious social and even legal (mainly civil law) consequences. The framing of sexual image-based “chats” or “messages” between young people via the wide-angle lens of child pornography laws can distort their meaning and obscure their relationship to young people’s pre-digital sexual speech, as well as to the research that evaluates how communication norms have changed with the development of digital technology. Arguing this is in no way meant to excuse malicious redistribution of images but rather to recognize that how we understand the meaning and boundaries of privacy, control, and communication at the heart of the private use exception also has implications for non-consensual image sharing.

V. POSITIVE RIGHTS, SEX-POSITIVE LEGAL FRAMEWORKS, AND THE VALUE OF SEXUAL PLEASURE

With the creation of the private use exception, the Supreme Court of Canada sought to “weigh the costs of the law to freedom of expression against the benefits it confers,” specifically, the benefit of protecting other children from harm. The Court concluded that the standard necessary to demonstrate harm was not concrete scientific proof but, rather, a standard of “reasoned apprehension of harm.” They ultimately concluded that the risk of this harm posed by the exempted materials was “small, incidental and more tenuous than that associated with the vast majority of material [involving sexual abuse and exploitation] targeted by s. 163.1(4).”

In light of digital technology’s effect on privacy, sexual, and communication norms, the creation and distribution of youths’ sexual expression is now more probable, prominent, and accessible than was likely imagined by the Court in 2001. This warrants a re-evaluation of the cost-benefit analysis at the heart of our child pornography law and the private use exception, particularly a re-evaluation of the benefits of this expression for youth. While it has been argued by US legal scholars that the consensual distribution of youths’ sexts ought to be equated with harm to other children and thus criminalized as child pornography, even if this means convicting a large number of youths, this is a rare perspective in the literature, if not in US case law. Few works to date have considered the relevance of sexual pleasure for obscenity determinations, and even fewer have done so in relation to young peoples’ digital sexual expression.

To appreciate the affordances of sexual pleasure and digital sexual expression for youth, and to adequately weigh the benefits of digital sexual expression

200. Sharpe, supra note 5 at para 101.
201. Ibid at para 85.
202. Ibid at para 100.
204. While this article advocates for greater legal attention to pleasure it is also necessary to acknowledge how pleasure is mobilized by the state to “responsibilize” citizens for managing their risks and selves, and how this can in turn serve as a neo-liberal tool for normalizing and governing marginalized populations. Thus, the goal of this article is not to glorify or to sanitize pleasure, but to nevertheless advocate for its intrinsic value and its potentially positive productive effects. For further discussion of the limits of pleasure see generally Michel Foucault, The History of Sexuality Vol. 2: The Use of Pleasure, translated by Robert Hurley (New York: Random House, 1985). For a discussion of how “acceptable bodily pleasure” has historically been accessible only by those deemed reasonable, responsible, productive and ‘good’ see Pat O’Malley, P & Mariana Valverde, “Pleasure, Freedom and Drugs: The Uses of ‘Pleasure’ in Liberal Governance of Drug and Alcohol Consumption” 38 Soc 25.
against its risks, Canadian courts should consider adopting both a positive
rights framework—one that balances the body’s needs to be free from abuse
and exploitation with its need for health and pleasure—as well as a sex-positive
legal framework—one that considers the intrinsic value of sexual pleasure and
which factors the relevance of sexual pleasure into legal determinations of
constitutionally protected speech.\textsuperscript{205}

To date, the legal regulation of sex and sexual expression primarily seeks to
ensure freedom from sexual insecurity, rather than the freedom to access sexual
information and freedom to experience desired sexual pleasure and expression.
This positive rights approach has found greater acceptance in global sexual
and reproductive health policy than in obscenity law, and could better inform
interpretations of the private use exception and its parameters.\textsuperscript{206} For instance,
according to the World Association for Sexual Health (WAS), there is a “growing
awareness and understanding that ‘pleasure and prevention’ go hand in hand”
and that “[s]exual health promotion programs for all groups, including youth
and people with disabilities, should embody the reality that sexual pleasure and
intimacy are strong motivating factors for sexual behavior [including sexual
expression] and that sexual pleasure contributes to happiness and well-being.”\textsuperscript{207}
The WAS Declaration of Sexual Rights thus considers physical, psychological,
intellectual, and spiritual value of sex and sexual pleasure and advocates for
service providers to recognize the harms of abstinence [and implicitly criminal]
responses to youth sexuality.\textsuperscript{208} Moreover, WAS declares that sexual rights are
integral to universal human rights and enumerates all peoples’ rights to sexual
pleasure, emotional sexual expression, and the right to associate freely. Sexual
expression here is defined as the “right to express [one’s] sexuality through
communication, touch, emotional expression and love.”\textsuperscript{209}

\textsuperscript{205.} For more on the intrinsic value of sexual pleasure see: Michel Foucault, \textit{The History of
Sexuality} (New York: Pantheon, 1978); Gayle Rubin “Thinking Sex: Notes for a Radical
Theory of the Politics of Sexuality,” in Carol Vance, ed, \textit{Pleasure and Danger: Exploring Female
NYU L Rev 89 at 150.

\textsuperscript{206.} World Association for Sexual Health, \textit{Sexual Health for the Millennium: A Declaration and

\textsuperscript{207.} \textit{Ibid} at 8.

\textsuperscript{208.} \textit{Ibid}.

\textsuperscript{209.} \textit{Ibid} at 155.
Legal and political scholars have argued that a positive rights framework should be extended to youth\(^{210}\) and to youths’ digital sexual expression,\(^{211}\) and that the latter right be extended despite the impossibility of complete privacy in the digital age. Albury, for example, argues that youths’ digital sexual rights cannot be “contingent on complete privacy since the capacity for ‘spreadability’ (or copying and sharing) is an intrinsic aspect of contemporary digital culture. ... For adults to insist that young people only have sexual rights where they are assured of absolute privacy can, therefore, be seen as a de facto demand for digital non-participation or abstinence.”\(^{212}\) While, as Planned Parenthood notes, “[p]ublic discourse about the physiological and psychosocial health benefits of sexual expression has been almost entirely absent,”\(^{213}\) there is a growing body of research “demonstrating that sexual expression may have health benefits for improving quality of life and self-esteem and for reducing stress, depression and suicide.”\(^{214}\)

The relevance of a sex-positive, pleasure acknowledging, legal framework for conceptualizing and responding to youths’ digital sexual expression is further reinforced by Kaplan’s critique of the devaluing of sexual pleasure in “several areas of law central to how we experience sex and sexual pleasure” such as obscenity laws. She argues that “accepting the premise that sexual pleasure has intrinsic value challenges the organizing principles of these areas of law and requires us to reexamine our approach to them.”\(^{215}\) Criminal censure of youths’ digital expression, would thus require the courts to weigh the risk of the harm occurring, the severity of the harm, and the cost of prohibiting the activity. This cost would more adequately factor in sexual pleasure for pleasures sake (as it does with other speech acts, such as humour, literature, and art), in addition to the role that this pleasure plays in youths’ self-actualization, fulfillment, and development of their identity.\(^{216}\)

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\(^{211}\) Albury, *supra* note 181 at 716.

\(^{212}\) *Ibid.*


\(^{214}\) *Ibid.*

\(^{215}\) See Kaplan, *supra* note 205 at 92. Notably, for Kaplan, “sexual pleasure” is not limited to physical sexual relations but rather refers to ‘physical and psychological enjoyment that is interpreted as sexual or erotic by the individual experiencing it. *Ibid* at 94.

\(^{216}\) In this way, Kaplan undermines the idea that sex and sexual expression is only valuable if it has some *added* value-such as medical or artistic.
pleasure enriches our ability to regulate activities that affect said pleasure because it requires legislatures and courts to be honest about the trade-offs associated with proposed regulation and interference. It yields a more complete assessment of the true harms and benefits of the activity we seek to regulate.” The failure to recognize the applicability of a positive rights, and sex-positive legal framework for judicial assessments of youths’ digital sexual expression thus distorts the calculus of its harms. Accepting the premise that adolescents are sexual and that sexual pleasure and sexual expression has as much intrinsic value for them as it does for adults allows us to better acknowledge that a range of adolescent porn, like much adult porn, is not obscene and unconstitutional—even if it is not fully controlled or maintained as private.

A more accurate calculation of the harms of teenage sexting also requires a more careful analysis of whether the loss of control of one’s sexual images poses a reasoned risk of harm to other children. Prevalence rates are helpful here. While teenage sexting rates demonstrate the practices is relatively common and on the increase, research indicates that there has been a large decline in child sexual abuse from 1992 to 2010, post the development of Web 2.0 and user generated content. Similar trends are noted in the United Kingdom. In the United States, studies show that a very small proportion of sex offences against children (under 2 per cent) had an online component. The studies on online sex offending show that most online offenders are persons who know their victims from offline contexts, like school or church, and that the dynamics of online and offline offenders are similar.

With respect to the Court’s concern in Sharpe about the use of sexual images to: fuel cognitive distortions about children as appropriate sexual partners; groom children for sexual abuse; fuel fantasies of pedophiles; and contribute to the market for child pornography, again these concerns make more sense when there are large differences in age between those in the images, as well as the presence of exploitation and abuse. Moreover, as other legal scholars have argued, the harm that stems from the illicit circulation of consensually produced sexts is different from the harm that

217. Kaplan, supra note 205 at 151.
arises via the circulation of child pornography. Finally, concerns about sexting’s impact on the market for child pornography are overstated:

In both contexts, the market is usually a secretive enclave, closed to all except for members of an in-group. However, there are social and technological differences between the two markets. For child pornographers, the in-group is pedophiles, hebephiles, or people with an interest in deviant/paraphilic pornographic material. The market is global and is accessed primarily through anonymizing network routing processes. For youths who sext, the market typically comprises peers from schools or youth programs and is usually limited to local friends. The exchanges predominantly occur over cellular networks, directly through texting, or via various messaging applications…Because of the relative size and technological savviness of youths who sext, illicit markets tend to be small and are shut down easily relative to child pornography markets. There is little, if any, evidence demonstrating that the two markets ever intersect. Thus, the likely longevity of the harm in the two scenarios is also different.

VI. CONCLUSION

This article demonstrates the myriad ways in which the technological, social, sexual, and legal landscape has changed since Sharpe was decided in 2001. Offline and online are no longer considered separate and distinct realms that map neatly onto real/fake sex or legitimate/illegitimate sexual expression. An intimate, sexually exploratory exchange between young people is now at least as likely to occur across networks of fibre optics as it is in parked cars. In this context, the consensual creation and sharing of digital sexual images with a crush, long-term partner, or even a complete stranger can serve, for some, as a modern-day love letter, flirting, or foreplay. For others, sexting is a precursor to offline sex or understood as the practice of safe(r) sex, with a host of benefits and a degree of risk, as is the case with off-line sex and expression. Indeed, as research on teenage sexting reveals, the creation and distribution of digital sexual images is the new norm for many.

These fundamental shifts, it has been argued, have had significant implications for the scope of the private use exception and its applicability to

223. Ibid at 2927.
More recent interpretations of the exception have expanded the definition of “participant” and recognized the role of “digital sharing” in our contemporary digital context. This, along with legislative rationales for Canada’s new intimate images provisions, has effectively expanded the exception’s parameters and extended its applicability to youths’ digitally self-created and consensually transmitted pornography. However, this right has also been constrained by judicial decisions requiring that youth maintain the ability to control their images, a near impossibility in the digital age.

Youths’ lack of control over their sexual images has, unfortunately, been addressed in Canada via the application of child pornography laws. However, even in instances where the sexual image of a youth is redistributed without their consent, courts have recognized that the loss of privacy experienced by the individual is “a very different issue than what was before the Court in Sharpe.” In R v MB for example, a sixteen-year-old girl was convicted of distributing child porn after she shared an image of her boyfriend’s ex-girlfriend with her best friend via a cellphone and with the ex-girlfriend via a private Facebook message. The British Columbia Court of Appeal later found that the trial judge had erred when they dismissed M.B.’s submission “that cell phones with cameras did not exist when Sharpe was decided, and that the Court could not have foreseen the frequency with which adolescents take and share sexual photos of themselves.”

This case was heard before the new intimate images laws came into effect and the conviction is currently under appeal.

With these developments comes the urgent need for judicial or legislative clarification of the private use exception. This may come in the form of an appeal; the enumeration of a consensual “sexting” defence to Canada’s child pornography provisions; or via a redrafting and narrowing of the definition of child pornography in the code so that it captures only those images that stem from the sexual abuse and exploitation of an actual child. At the very least, child advocates such as the Canadian Centre for Child Protection, federal and provincial policing agencies, and future courts need to be made aware of these developments so that they can avoid infringing on youths’ constitutional rights.

For instance, in April of 2019 Minister of Justice and Attorney General of Canada, David Lametti, announced additional funding in excess of $77,000 to support...
an anti-sexting campaign that inaccurately describes the consensual creation of teenage sexting as “self-exploitation” and as criminal. Additional concerns exist regarding the improper application of extra-judicial measures to youth (such as forced participation in criminal diversion programs where no crimes have been committed) or the charging of youth with child pornography provisions in instances of “intimate image” distribution, as seen with the recent charging of a fourteen-year-old Winnipeg boy with child pornography offences. Teaching youth they do not have to right to digital sexual expression or charging them as child pornographers in non-consensual distribution cases distorts not only our perceptions of young people’s sexuality and sexual expression, but also our understanding of child pornography as a legal category. Ultimately, we need to be more creative and respond to violations of trust and privacy in a more measured and extra-legal manner, even if these violations deeply offend or cause relational, emotional, and economic distress.

Moving forward, policing agencies, child advocates, and the courts should better consider Article 13 of the United Nations Convention on the Rights of the Child which states that “the child shall have the right to freedom of expression” and that this “includes through any other media of the child’s choice.” Of course, as Alisdair Gillespie notes, this right must be read in conjunction with other articles such as Article 3(c) of the Optional Protocol to the Convention on the Rights of the Child, which requires “as a minimum’ that producing, distributing, disseminating ... child pornography constitutes a criminal offence,” as well as Article 10 of the European Convention on Human Rights, which finds that “all forms of expression are capable of protection,” and which proclaims that any overruling of this guarantee must be “proportionate.” The evidence provided throughout this article suggests that the application of child pornography laws with regard to consensual, as well as most non-consensual distribution contexts, does not adequately and proportionately respond to youths’ digital sexual speech,

even to their malicious speech. Future calculations of the affordances and harms of youths’ digital sexual expression require a more progressive and nuanced analysis of shifting privacy and communication norms, as well as a sex-positive analysis of the value of sexual pleasure for youth and the role of digital technology in their contemporary social and sexual relations.