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Abstract
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Keywords
Privacy; Right of; Photographs--Law and legislation; Child pornography--Law and legislation; Respect for persons--Law and legislation; Canada

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The Canadian approach to privacy rights in one's body is embedded in the relationship between interests in privacy, bodily integrity, and human dignity. Clarifying these interests is complicated by Canada's middle-ground stance between the European "dignity-based" approach to privacy and the US "liberty-based" orientation. The Canadian approach is closer to the European model when intrusions upon the body are conceived as wholly or mostly non-consensual (*e.g.*, strip searches, voyeurism, and most child pornography). However, once consent plays a potentially determinative role, the US liberty-based approach gains ground. This reluctance to fully align dignity with privacy results in confusion about the scope of ongoing privacy interests in nude images, as evidenced by recent debates about the use of airport body scanners and the appropriate response to adolescent "sexting." The author argues that a clearer alignment with a dignity-based approach emerging in Canadian child pornography jurisprudence would better address the harms caused by misuse of photography, as applicable to both children and adults.

L'attitude canadienne en matière de droits à la vie privée en ce qui concerne le corps d'une personne est intégrée dans les relations entre les intérêts de la vie privée, à l'intégrité physique et à la dignité humaine. La clarification de ces intérêts se complique en raison de la position mitoyenne du Canada entre l'attitude européenne « axée sur la dignité » en matière de droits à la vie privée et l'orientation américaine « axée sur la liberté ». L'attitude canadienne se rapproche le plus du modèle européen selon lequel les atteintes à l'intégrité physique sont conçues comme étant entièrement ou essentiellement non consensuelles (*p. ex.* les fouilles à nu, le voyeurisme et la majorité de la pornographie infantile). Cependant, une fois que le consentement joue un rôle potentiellement déterminant, l'attitude américaine axée sur la liberté gagne du terrain. Cette hésitation à harmoniser entièrement la dignité aux droits à la vie privée sème la confusion quant à la portée des intérêts permanents en matière de droits à la vie privée dans les images de nudités, comme le prouvent les récents débats relatifs à l'utilisation de scanners corporels dans les aéroports et la réponse appropriée aux « textos

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sexy » que s'échangent les adolescents. L'auteur fait valoir que l'harmonisation plus claire à une attitude axée sur la dignité qui émerge dans la jurisprudence canadienne sur la pornographie infantile aborderait mieux les préjudices causés par l'usage abusif de la photographie, tels qu'ils s'appliquent aux enfants et aux adultes.

THE NATURE AND SCOPE of legally enforceable privacy rights are notoriously vague, and yet the concept of privacy continues to play a central role in judicial reasoning concerning a person's right to control his or her own body.[1] In Canadian jurisprudence, the vague contours of privacy rights manifest themselves in frequent references to interrelated interests in "privacy, bodily integrity, and human dignity,"[2] which have developed over the last decade in two body-centered contexts. The first is protection against unreasonable bodily searches, as per section 8 of the *Canadian Charter of Rights and Freedoms*,[3] and the second pertains to child pornography offences. In both contexts, clarifying the differences between privacy, bodily integrity, and dignity interests is complicated because of the legal culture in Canada, which occupies a middle ground between the European "dignity-based" approach to privacy and the US "liberty-based" orientation. Most of the time,

1. Lisa Austin, "Privacy and Private Law: The Dilemma of Justification" (2010) 55 McGill L.J. 165 at 168 (noting "there is little consensus regarding what privacy is and when it has been violated"). See also Daniel J. Solove, "A Taxonomy of Privacy" (2006) 154 U. Pa. L. Rev. 477.
2. *R. v. Grant*, [2009] 2 S.C.R. 353 at para. 104 [*Grant*].
3. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

wavering between these approaches does not seriously affect the outcome of cases.[4] In contexts where the legality of a practice involving images of nude bodies is unclear, however, occupying such a middle ground makes it difficult for decision makers to arrive at consistent and appropriate conclusions.

In his article entitled "The Two Western Cultures of Privacy," James Q. Whitman distinguishes between the European and US approaches on the basis of their divergent origins: a cultural premium on protecting reputation influenced the development of European law, while protection from state intrusion into the home informed the US approach.[5] He extends this distinction to approaches toward bodily privacy in European and US contexts. The European understanding of privacy rights—that "[e]veryone has the right to respect for his private and family life"[6]—considers dignity interests as integral to the right to respect for private life. European privacy rights include an *ongoing* right to "the physical and moral integrity of the person, including his or her sexual life,"[7] thus affording the person protection which is not automatically lost by means of consent or publicity. On the other hand, the US approach to privacy derives from "anxieties about maintaining a kind of private sovereignty within our own walls," and therefore focuses on the right to shield oneself from *initial* public exposure.[8] In the US context, the right to bodily privacy—especially in photographs—can be lost or traded away by being the subject of public attention or by consenting to share information or images with another person.[9]

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4. Where violations of bodily privacy interests are clear—such as cases dealing with making, distributing, and possessing images of child sexual abuse—the particulars of the approach to privacy do not tend to affect the result.
5. "The Two Western Cultures of Privacy: Dignity Versus Liberty" (2004) 116 Yale L.J. 1151 at 1161.
6. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221.
7. The European Court of Human Rights considers these rights to apply not only to restrict searches by state authorities, but also to require states to adopt measures that would "secure respect for private life even in the sphere of the relations of individuals between themselves." *Case of X and Y v. The Netherlands*, no. 8978/80 (26 March 1985) at para. 23 [*Case of X and Y*]. This case was brought against the Netherlands for failing to criminalize sexual activity with a person with a mental disability that rendered that person incapable of consenting. In other words, sexual assault and age of consent crimes are related to securing respect for "private life."
8. Whitman, *supra* note 5 at 1162.
9. As Whitman notes, US liberty-based approaches to privacy are strongly rooted in the reasonable expectations paradigm wherein the expectations of adults are seriously reduced once a photograph is willingly made and shared with another person. *Ibid.* at 1196-1202.

In this article, I show that the Canadian approach rests somewhere between the US and European approaches, but is closer to the European model (which melds interests in privacy, bodily integrity, and human dignity) when intrusions upon the body are conceived as wholly non-consensual (*e.g.*, strip searches, voyeurism, and most forms of child pornography). Canada's allegiance to the European model extends somewhat further to include those child pornography cases where consent plays some role. However, once consent plays a more central role that could factor into the outcome of the case, the US liberty-based approach gains ground in Canadian jurisprudence. This wavering between approaches occurs, for instance, in cases where consensually-made photographs are non-consensually recontextualized.[10] These cases demonstrate that, in Canada, dignity-based interests in a minor's nude image persist as a right to control the context in which images will be placed, though Canadian courts remain reluctant to recognize these dignity interests as a form of privacy interests even here. Ongoing dignity rights concerning one's nude image are thus more strongly articulated in Canada than in the United States—but mostly with respect to minors, as willingness to enforce ongoing dignity-based privacy interests of adults is decidedly weaker.

The reluctance in Canada to fully align dignity with privacy, combined with the differential protection of children and adults, has resulted in persistent public confusion about the nature of privacy interests in nude images. This public confusion, which is shared by policymakers, is apparent in news coverage of situations at the margins of child pornography law, where the legality of certain practices is unclear. News coverage, however, by distilling a legal debate for presentation to the public, can reveal the cultural glue connecting assumptions about the law that attempt to make sense of a legal or policy response. By identifying the gaps and contradictions embedded in news coverage, one can learn about what broader cultural work remains to be done to make rights regarding nude images comprehensible. I suggest that clearer alignment with a European dignity-based approach to privacy interests in nude and sexual images would better address the harms caused by misuse of photography as articulated in Canadian child pornography jurisprudence and that this, in turn, would yield more certainty.

10. Recontextualization refers to instances in which a photograph is taken with the consent of the subject for a limited and specific audience, but is then taken out of that context or is more widely distributed without the consent of the subject.

Crucially, however, I also argue that once these harms are identified and rooted in a dignity-based understanding of privacy, it will be even harder to justify withholding the same broader privacy protections afforded to children from adults.

Two recent examples of news coverage clearly illustrate popular confusion over the nature of privacy interests in nude images, especially images of nude children: first, the child pornography risk related to the use of body scanners in Canadian airports and second, the appropriateness of child pornography charges for youth exchanging sexual images among themselves. In both of these cases, policymakers rather thinly invoke privacy as the primary legal rationale for pursuing a particular policy direction. In both cases, invoking privacy harms problematizes the parallel tendency to draw a sharp distinction between the interests of children and adults.

In early 2010, the Government of Canada claimed to have successfully addressed the general privacy concerns raised by the installation of body scanners at the nation's airports following recommendations made by the Privacy Commissioner of Canada. The next day, however, the government announced that minors would be exempt from scanning entirely.[11] This development resulted in two front-page stories in the *Toronto Star* on 6 January 2010: one bearing the headline "Travellers Face 'Virtual' Strip Search" and the other "Child Porn? Kids Won't Be Scanned."[12] The "Child Porn?" article quoted Senator Colin Kenny, chair of the Senate Committee on National Defence and Security, asking, "Why are they excluding minors?" and included a file photo of Senator Kenny throwing up his hands, emphasizing the inexplicability of the exemption from a security perspective.[13] The article portrayed the government as doggedly vague about the reasons behind the exemption, with Transport Minister John Baird stating only that "[c]oncerns were expressed with respect to children and we listened to those concerns."[14] The article stressed the link to more universal privacy interests even as the government actively resisted such a link, noting that Assistant Federal

11. Transport Canada, News Release, H002/10, "Government of Canada Invests in Full Body and Behaviour Screening to Further Enhance Security at Canadian Airports" (5 January 2010), online: <http://www.tc.gc.ca/eng/mediaroom/releases-2010-h002e-5794.htm>.

12. Tonda MacCharles, "Travellers Face 'Virtual' Strip Search" *Toronto Star* (6 January 2010) A1; Tonda MacCharles, "Child Porn? Kids Won't Be Scanned" *Toronto Star* (6 January 2010) A1 [MacCharles, "Child Porn?"].

13. MacCharles, "Child Porn?," *ibid.*

14. *Ibid.*

Privacy Commissioner Chantal Bernier had stated in an interview that her office's recommendations had highlighted the "heightened" privacy concerns over the scanning of children.[15] The article left unexplained the reasons why children's privacy concerns would be greater than those of adults. If the concern for children's privacy interests arises from the possible misuse of nude images produced by body scanners for sexual purposes, would not adults' interests also be at risk? Or if the privacy concerns are inherent to the fact that a person will be viewed naked by airport security personnel, then again, are not adult and child interests alike? Since the source of concern is not elaborated, the distinction between children and adults appears unfounded.

The second example concerns Canadian news reporting of US teenagers charged with child pornography offences for circulating nude or sexual images of their peers or themselves, despite the absence of comparable Canadian cases.[16] Both Canadian and US news coverage tend to lump together malicious exchanges of such images with playful or romantic exchanges under the neologism "sexting."[17] News coverage of legal arguments has sometimes suggested that these non-malicious incidents are, at worst, invasions of privacy that should not be considered child pornography.[18] I suggest that a lesser criminal offence, such as

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15. *Ibid.*

16. See *e.g.* Glenn Johnson, "Indiana Kids Face Felony Charges for 'Sexting'" [*Saskatoon*] *Star Phoenix* (30 January 2010) C12; "Sexting's Sting" *The Hamilton Spectator* (30 April 2009) A12; and Nicole Baute, "'Sexting' Nude Photos A Concern Among Teens; Is It Criminal Behaviour or Just Today's Version of Spin the Bottle?" *Toronto Star* (9 January 2010) L10.

17. "Sexting" is a portmanteau which combines "sex" and "texting" and refers to the exchange of sexual images and messages via mobile phones.

18. Amy Adler, a prominent First Amendment scholar, took part in a discussion of the US legal approach to sexting on a *Nightline* segment on 1 April 2010. The NYU School of Law News quoted her as saying that the malicious distribution of sexual images among peers is "a particularly bad kind of sexting, because it really is a malicious embarrassment of another person." Adler added that

> while there may be some sort of criminal sanction that's appropriate in this scenario, to me child pornography law is simply inappropriate here. Again, because it's not the case of a pedophile exploiting a child and sexually abusing that child in order to take a picture. It's more of an invasion of privacy.

"On Nightline, Amy Adler Discusses Legal Consequences of Sexting" *NYU School of Law News* (2 April 2010), online: <http://www.law.nyu.edu/news/ADLER_NIGHTLINE_SEXTING>. For the original story, see Vicki Mabrey & David Perozzi, "'Sexting': Should Child Pornography Laws Apply?" *ABC News* (1 April 2010), online: <http://abcnews.go.com/Nightline/phillip-alpert-sexting-teen-child-porn/story?id=10252790>.

invasion of privacy, may serve well as a discretionary alternative in such situations—as well as similar ones between adults—but I resist the implication found in some news reporting that invasion of privacy is not an essential feature of child pornography offences.[19] Instead, it is precisely because dignity-based privacy interests are protected by child pornography offences that we can identify the more generalized wrongs of malicious distribution of intimate photos that affect both adolescents and adults.

The contrast between these two scenarios is informative. News coverage of body scanners melds privacy concerns with child pornography risks. Children are portrayed as deserving higher levels of dignity-based privacy protection than adults, even in a closely-controlled security environment. In contrast, coverage of sexual-image exchange between peers may portray invasion of privacy as an alternative harm, thereby separating privacy concerns of older youth from the dignity interests protected by child pornography offences. Given the confusion exemplified by these two news threads, it is important to clarify the nature of privacy violations in Canadian child pornography law in relation to images of children.[20] Identifying and elaborating Canada's middle-ground stance between European dignity-based and US liberty-based orientations to privacy can help to clarify these controversies. Such an effort may also help to identify more principled solutions to violations of privacy through photographs. The most appropriate solutions, I argue, would predominantly include the extension of dignity-based privacy protections further into those contexts where consent currently plays a central legal role, thereby drawing more consistent parallels between the privacy interests of children and adults. The capacity to provide legal consent would then no longer reduce a person's protection from violations of bodily privacy caused by misuse of photography, such as unauthorized circulation of airport scanner images or intimate photos.

In order to fully elaborate the nature of dignity-based privacy interests in Canadian law, Part I sets out the interests in privacy, bodily integrity, and dignity

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19. See Andrea Slane, "Sexting, Teens and a Proposed Offence of Invasion of Privacy" *IP Osgoode* (16 March 2009), online: <http://www.iposgoode.ca/2009/03/sexting-teens-and-a-proposed-offence-of-invasion-of-privacy/> [Slane, "Sexting"].

20. I have chosen to ignore the indirect harms to children set out in *R. v. Sharpe* (*i.e.*, cognitive distortions about children as appropriate sexual partners, use in grooming children for sexual abuse, fuelling fantasies of pedophiles, and contributions to the market for child pornography) and limit my discussion to harms to the real people who are the subjects of such photographs. See *R. v. Sharpe*, [2001] 1 S.C.R. 45 [*Sharpe*].

discussed in search and seizure jurisprudence. Part II considers the Supreme Court of Canada's approach to two types of privacy harms suffered by sexual abuse victims depicted in child pornography, as discussed in *R. v. Sharpe*.[21] Part III then explores how, in *Sharpe* and subsequent child pornography case law, judges have elaborated on the nature of the privacy harms caused by misuse of photography in situations where the photograph does not clearly document sexual abuse. This progression through the Canadian case law highlights a trend toward greater refinement of the dignity-based privacy interests at stake. I argue in conclusion that recognizing these interests should support the extension to adults of the protections that are currently afforded to minors.

I. PRIVACY, BODILY INTEGRITY, AND DIGNITY INTERESTS IN SEARCH AND SEIZURE LAW

Canadian judicial discussion of the interrelationship between privacy, bodily integrity, and human dignity has focused on section 8 *Charter* challenges to police strip searches and on the harms to victims of child pornography.[22] Discussion in the section 8 case law is particularly robust, as it is the primary task of the courts to determine whether and how a defendant's section 8 rights were violated. In child pornography cases, however, discussion of the harm to victims is secondary to a court's primary task of determining whether the defendant committed an offence and appears mostly at the sentencing stage as a factor pointing to the gravity of the offence. Nonetheless, borrowing from the strip search case law can help to frame a discussion about privacy rights violations in child pornography. Since violations of privacy, bodily integrity, and dignity can occur not only via the photographic depiction of sexual abuse, but also via photography that, while not depicting abuse, is taken or distributed in a sexually abusive way, a discussion of section 8 case law related to recording technologies will also be helpful.

The strip search and recording technology threads of section 8 case law operate within the broader constitutional protection of privacy, which identifies three major realms of privacy: territorial (or spatial), personal, and informational.[23]

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21. *Ibid.*

22. *Charter*, *supra* note 3, s. 8 ("Everyone has the right to be secure against unreasonable search or seizure").

23. *R. v. Dyment*, [1988] 2 S.C.R. 417 at para. 19 [*Dyment*], citing Department of Communications & Department of Justice, *Privacy and Computers* (Ottawa: Information Canada, 1972) at 12-14.

Territorial claims were originally tied to property—especially the home—and have expanded to include a reasonable expectation of privacy in other areas.[24] Personal privacy has been linked to the "sanctity of a person's body," with a focus on the affront to human dignity of state intrusions upon one's body.[25] In other words, privacy concerns the invasion of a person's body in a moral sense, not just in a physical one.[26] Informational privacy pertains to a person's right to control personal information, which is also "based on the notion of the dignity and integrity of the individual."[27]

The Supreme Court recently reiterated the three realms of privacy protection, but noted that personal privacy deserves the highest level of protection while informational privacy is subject to greater justifiable encroachments than the other two realms.[28] In *R. v. Tessling*, the Court noted that "[p]rivacy of the person perhaps has the strongest claim to constitutional shelter because it protects bodily integrity, and in particular the right not to have our bodies touched or explored to disclose objects or matters we wish to conceal,"[29] but that "[b]eyond our bodies and the places where we live and work, however, lies the thorny question of how much *information* about ourselves and activities we are entitled to shield from the curious eyes of the state."[30] The degree to which an individual can have a reasonable expectation of privacy in personal information, and consequently is entitled to protection under section 8, depends on the nature of the information.[31] The distinction between personal privacy and informational privacy is potentially relevant to discussions of nude or sexual photographs, insofar as such photographs

24. *Dyment*, *ibid.* at para. 20 ("territorial claims were originally legally and conceptually tied to property ... [but] what is protected is people, not places").

25. *Ibid.* at para. 21.

26. *Ibid.*

27. *Ibid.* at para. 22.

28. *R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 20 [*Tessling*]. The case concerned police use of infra-red technology to read heat emissions from a residential home without a warrant. The decision turned on whether the police's use of the infra-red technology implicated the accused's personal, territorial, or informational privacy and whether the resulting information violated a reasonable expectation of privacy. A unanimous Court ruled that the search mainly involved the informational zone and that it did not constitute an infringement of a reasonable expectation of privacy.

29. *Ibid.* at para. 21.

30. *Ibid.* at para. 23 [emphasis in original].

31. *Ibid.* at para. 27.

affect both personal and informational privacy, as I will demonstrate in Parts II and III of this article.

The underlying principled rationale for protecting privacy interests wavers in Canada's section 8 case law between fidelity to human dignity on the one hand and human liberty on the other. The former appears to be somewhat separate from and broader than privacy (*e.g.*, respect for one's full personhood),[32] while the latter is "[g]rounded in man's physical and moral autonomy, [where] privacy is essential for the well-being of the individual."[33] This in-between approach to privacy means that it is not always clear whether affronts to personal or informational privacy are privacy violations because they amount to indignities on a person (the European approach), or whether the dignity violations are separate from and exceed the concept of privacy (the US approach). These issues are crucial to understanding some of the complexities troubling public discussion of airport scanners and sexting, which I will clarify in the course of the analysis below. First, I set out section 8 jurisprudence concerning strip searches in order to demonstrate how Canadian law handles issues of dignity and privacy in relation to coercive bodily intrusions.

A. STRIP SEARCHES

The Supreme Court has defined a strip search as "the removal or rearrangement of some or all of the clothing of a person to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments."[34] The interests affronted by strip searches are similar to those at issue in the child pornography context: both involve the exposure of private areas of the body for visual inspection by others. In *R. v. Golden*, the Court held that the exposure of private areas makes this type of search more intrusive than a pat-down search over clothing, but that visual inspection is generally less intrusive than physi-

32. Dignity interests have been more fully discussed in *Charter* challenges based on the guarantee of equality rights in s. 15. See *e.g. Trociuk v. British Columbia (A.G.)*, [2003] 1 S.C.R. 835.

33. *Dyment, supra* note 23 at para. 17, citing Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967) at 349-50. In *Tessling*, the Court quotes Westin's definition of informational privacy in liberty-based terms: "[t]he claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." *Tessling, supra* note 28 at para. 23, citing Westin at 7.

34. *R. v. Golden*, [2001] 3 S.C.R. 679 at para. 47 [*Golden*]. The case concerns how to determine when a warrantless strip search conducted in a public place incident to an arrest is permissible under the *Charter*.

cal searches (*e.g.*, body cavity searches).[35] In its focus on strip searches, this case law thus addresses the conditions under which a person may be subjected to visual inspection of their private areas by a state agent. Since no one could reasonably be expected to freely choose to be subjected to such inspections, these are always coercive situations, even when a suspect is cooperating with authorities.

The strip search case law discusses privacy rights in the context of how to assess whether a particular search was conducted in an abusive or reasonable manner. Throughout, the boundaries between privacy and broader dignity violations are blurry, since aspects of privacy violations are rooted in dignity interests, but dignity interests are cast as larger than privacy interests alone. The violations of bodily integrity described in *R. v. Stillman* as "the ultimate affront to human dignity"[36] refer primarily to intrusive physical touching of the defendant's body (*e.g.*, to retrieve bodily samples), but also include exposing the defendant's body to view. The Court in *Golden* considers that "visual inspection of the appellant's buttocks, in and of itself, interfered with his privacy, dignity, and integrity."[37] Touching is not necessarily intrusive; an ordinary frisk search over clothing involves a "minimal invasion of the detainee's privacy and personal integrity."[38] The removal or rearrangement of clothing, however, results in "the serious infringement of privacy and personal dignity that is an inevitable consequence of a strip search."[39] Consequently, a "higher degree of justification is required in order to support the higher degree of interference with individual freedom and dignity."[40] The Court deems strip searches to be "inherently humiliating and degrading for detainees regardless of the manner in which they are carried out" and notes that "[s]ome commentators have gone as far as to describe strip searches as 'visual rape.'"[41]

The Court repeatedly refrains, however, from distinguishing between privacy, dignity, and bodily integrity, preferring instead to consider these interests as both similar and distinct, and as simultaneously infringed by an improperly conducted strip search. The Court seems to associate dignity interests with the exposure of

35. *Ibid.* at para. 89.

36. [1997] 1 S.C.R. 607 at para. 39. See also *Golden, supra* note 34 at para. 76.

37. *Golden, ibid.* at para. 106.

38. *Ibid.* at para. 98.

39. *Ibid.* at para. 99.

40. *Ibid.* at para. 98.

41. *Ibid.* at para. 90. The Court also cites Paul R. Shuldiner, "Visual Rape: A Look at the Dubious Legality of Strip Searches" (1979) 13 J. Marshall L. Rev. 273.

a person's private areas, under conditions devoid of free choice. Dignity-preserving measures that follow from this thinking include allowing a person to remove his or her own clothing. The privacy-specific violations inherent to strip searches, on the other hand, are discernible in the Court's recommendations for proper strip search protocols, such as encouraging police to conduct searches inside a police station, rather than in the field.[42] This approach correlates the gravity of the privacy violation with the degree to which a strip search has been conducted under public versus private conditions. Since at least one officer needs to be present, a strip search is never conducted entirely in private, and so some violation of privacy interests is inherent.[43]

Dignity interests are more generally treated as "interests beyond the right of privacy" in section 8 case law,[44] such that an unreasonable search impacts "the protected interests of privacy, and more broadly, human dignity."[45] This tendency to partially separate dignity violations from privacy violations—which in strip search contexts are limited to the degree to which a person controls the exposure of his or her body to an audience—is significant in that this same separation appears in (and troubles) child pornography case law and the public perception of the privacy interests that it protects.

This analysis also helps make sense of the contrast between the Government of Canada's assurances that "privacy concerns" were adequately addressed in the deployment of body scanners in Canadian airports,[46] while some European governments continue to consider the machines to be intolerably violative of privacy interests.[47] The measures listed in the government's background to the press release focus on a narrower understanding of privacy interests, and only require minimizing the public exposure aspect of the search and safeguarding informational privacy:

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42. *Golden*, *ibid.* at paras. 101-02.
43. *Ibid.* at para. 104 ("the factors set out above ensure that when strip searches are carried out ... they are conducted in a manner that interferes with the privacy and dignity of the person being searched as little as possible").
44. *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 159.
45. *Grant*, *supra* note 2 at para. 78.
46. Transport Canada, *supra* note 11.
47. "'Strip Search Scanners': Germany Reconsiders Controversial Airport Security Measure" *Speigel Online* (12 December 2009), online: <http://www.spiegel.de/international/germany/0,1518,669574,00.html>.

> Passenger privacy is fully respected because the technology does not retain personal information from the passengers it screens. The image is not correlated in any way with the name of the passenger or any other identifying information. The screening officer will review the images in a separate room, and will not be able to view the passenger; and the screening officer who is in control of the passenger will not be able to view the image from the full body scanner. In addition, the images are deleted from the system as soon as the review is complete.[48]

These measures, however, do not address the inherent violation of dignity-based interests that a visual inspection of a person's private areas entails. Privacy Commissioner of Canada Jennifer Stoddart issued a more expansive statement, wherein dignity-based interests are partially reunited with the government's narrower understanding of privacy. She writes that "while any invasion of privacy is deplorable, the federal government has promised to respect the privacy and human dignity of travelers."[49] She reports that passengers who are asked to submit to a secondary screening (after the usual metal detectors) will be allowed to choose between a pat-down search and the body scan. Dignity-based violations, for Stoddart, are thus minimized by the voluntary nature of the body scans,[50] which suggests agreement—at least implicitly—with the US liberty-based approach. From a European perspective, however, dignity interests are not easily protected by consent alone, since affronts to human dignity are a collective concern.[51] Consequently, European airport authorities that approved the use of body scanners are using software that projects a stylized image of a human body, rather than the actual outlines of the individual being scanned.[52] In Canada, such

48. Transport Canada, *supra* note 11.

49. "Airport Security Scanners Must Respect Privacy, Privacy Commissioner Insists," Op-ed (January 2010), online: <http://www.priv.gc.ca/media/nr-c/2010/op-ed_100107_e.cfm>.

50. *Ibid.* Stoddart also notes that though blurring the image of "specific body parts" was discussed, such measures were rejected because they would undermine the security value of the scanners.

51. Famous European cases illustrating the Continental approach to human dignity as non-negotiable include the "dwarf-tossing" case in France (where a person's willingness to engage in an activity that is deemed to be an affront to human dignity did not outweigh the state's right to enact the legislation and did not constitute discrimination) and German jurisprudence related to pornography (which distinguishes between degrading images that treat the subject of the images as an object and are consequently an affront to human dignity and those that are not). *Manuel Wackenheim v. France*, UN HRC, 75th Sess., UN Doc.CCPR/C/75/D/854/1999 (2002). For discussion of the German approach to pornography, see Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC: Duke University Press, 1997) at 425.

52. MacCharles, "Child Porn?," *supra* note 12.

measures were considered but rejected as compromising security objectives.[53] The same security versus privacy balancing exercise ended differently in Europe and Canada because, in this instance, Canada leaned toward the US liberty-based model in which consent suffices to dispel concern.[54]

Returning to the role played by concerns about child pornography in the Canadian debate, when pressed to justify the exclusion of minors from airport body scanners, the government quickly explained that minors could not give valid consent.[55] Interestingly, this explanation does not appear to have been vetted by the privacy commissioner's office[56] and is not supported by Canadian law, since generally a legal guardian can give consent on behalf of a minor.[57]

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53. Stoddart, *supra* note 49.

54. Privacy concerns have not held up the *deployment* of body scanners at US airports, where they have become a means of primary and mandatory screening. This is not to say that US privacy advocates are not concerned about their use, but rather that privacy concerns do not carry the same weight capable of delaying the use of the technology in the US context. The Electronic Privacy Information Center (EPIC), a US-based privacy advocacy group, has recently filed a lawsuit to stay the use of body scanners in US airports pending review of possible violations of privacy rights located in a variety of US sources, including the Fourth Amendment of the US Constitution, which protects against unreasonable search and seizure. For full documentation related to this suit, see Electronic Privacy Information Center, "EPIC v. DHS (Suspension of Body Scanner Program)" (2 July 2010), online: <http://epic.org/privacy/body_scanners/epic_v_dhs_suspension_of_body.html>. A grassroots effort to lodge a protest against the scanners as an inherent dignity-based invasion of privacy also declared 24 November 2010, the day before US Thanksgiving and thus the busiest air travel day in the year, as "National Opt-Out Day," where travellers are urged to "opt out" of the scans and thereby slow down the security screening measures in protest. See National Opt-Out Day, online: <http://www.optoutday.com>.

55. Richard J. Brennan, "Some Nations Treated 'Differently'; Baird Says Travellers from 145 Countries Face Strict Visa Rules; Defends Scanner Exemption for Minors" *Toronto Star* (7 January 2010) A06.

56. *Ibid.*

57. With the exception of photography that qualifies as child pornography, legal guardians are generally empowered to give consent regarding personal information collection (including consent to be photographed) on behalf of minor children. A letter that the Office of the Privacy Commissioner of Canada sent to the Canadian Air Transport Security Authority in October 2009 reportedly noted the Commissioner's understanding that airport officials would only scan minors with the consent of guardians accompanying them. Jim Bronskill, "Privacy Watchdog OKs 'Naked' Airport Scanners" *Toronto Star* (30 October 2009) A14. See also *Personal Information Protection Act Regulations*, B.C. Reg. 473/2003, s. 2(2)(c) (a guardian

The government's focus on a minor's incapacity to consent reveals two issues: first, that the government is willing to concede that full-body scanners can be used to produce child pornography (a conclusion likely reached for political, rather than legal reasons);[58] and second, that consequently the broader, non-negotiable dignity interests re-enter the debate, although the government is attempting to confine them to situations where consent cannot be validly obtained directly from the subject.

B. RECORDING DEVICES

The second thread of Canadian section 8 jurisprudence relevant to the child pornography context concerns surreptitious electronic recordings of conversations and actions. These cases shed some light on how Canadian law conceives of privacy in relation to recording technologies (*e.g.*, hidden cameras, surveillance cameras, and hidden microphones) where the dominant paradigms are the reasonable expectation of privacy and consent. Strip search cases do not address these elements because strip searches inherently impinge upon reasonable expectations of privacy and are intrinsically coercive. The recording technology case law thus helps to clarify the Canadian approach to the role of consent in determining whether privacy and dignity rights have been violated. This is especially relevant when determining an appropriate approach to the circulation of consensually-made sexual images among teenagers.

Surreptitious recording cases address privacy as a right to limit the audience for private matters, at least vis-à-vis the state, and not as a matter encroaching

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of a minor can "give or refuse consent to the collection, use and disclosure of personal information of the minor under the Act, if the minor is incapable of exercising that right").

58. Ian Dowty, legal adviser to Action on Rights for Children (a British children's rights organization), is quoted in the *Toronto Star* as saying, "As we've seen on the Internet, these machines clearly show genitalia, that in our view must result in an indecent image by any definition." MacCharles, "Child Porn?," *supra* note 12. The Government of Canada under Prime Minister Stephen Harper has taken a particularly hard line on child pornography offences and may well agree with Dowty's position. However, the position that any nude image of a child is inherently child pornography is much broader than the current definition of child pornography set out in Canadian law. As elaborated below, Canadian child pornography law allows for a defence of legitimate purpose that would surely cover the airport scanners. Consequently, child pornography offences would legally only arise with respect to these images in the event of their misuse for illegitimate purposes (*i.e.*, by individuals who viewed the scans for sexual purposes, or saved or circulated the resulting images outside the airport security context).

upon human dignity per se. In *R. v. Duarte*,[59] the Supreme Court struck down the police practice of warrantless participant surveillance, whereby any party to a conversation could consent to the use of electronic surveillance equipment. The Court strongly distinguished the level of privacy that one can expect when talking to or otherwise interacting with a person in the flesh from that which one can expect when interactions are recorded.[60] The Court thereby departed from a practice upheld in the United States that affords much less privacy protection to information held by third parties.[61] The Court, however, placed an emphasis on the surreptitiousness of these recordings, leaving it unclear whether a similar right to control who listens to them exists once a person has consented to being recorded:

> [T]he assessment whether the surreptitious recording trenches on a reasonable expectation of privacy must turn on whether the person whose words were recorded spoke in circumstances in which it was reasonable for that person to expect that his or her words would only be heard by the persons he or she was addressing. As I see it, where persons have reasonable grounds to believe their communications are private communications in the sense defined above, the unauthorized surreptitious electronic recording of those communications cannot fail to be perceived as an intrusion on a reasonable expectation of privacy.[62]

The Court in *Duarte* focuses on the idea that, though one cannot control another person's recounting of events or conversations witnessed, one should be able to expect that these events cannot be turned into a permanent record able to be distributed to others absent one's consent.[63] The Court only considers non-consensual recording as seriously compromising that person's reasonable expectation to be protected from the public exposure of the events captured on the recording. It is unclear whether the inverse—that consent to recording

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59. [1990] 1 S.C.R. 30 [*Duarte*]. The Court extended the principles in *Duarte* to surreptitious video recording in *R. v. Wong*, [1990] 3 S.C.R. 36 at paras. 43-44.

60. *Duarte*, *ibid.* at paras. 28-31.

61. See *United States v. White*, 401 U.S. 745 (1971). See also *United States v. Miller*, 425 U.S. 435 (1976). The second case concerned cheques and deposit slips held by a bank. The Court ruled that there was

> no legitimate "expectation of privacy" in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business (at 442).

62. *Duarte*, *supra* note 59 at para. 28.

63. *Ibid.* at para. 30.

consequently reduces expectations of privacy regarding further distribution of the recording—is implied.[64]

While section 8 jurisprudence struggles with such questions, the Quebec *Charter of Human Rights and Freedoms* offers greater clarity in its assurance that "[e]very person has a right to respect for his private life."[65] This guarantee in the Quebec *Charter* closely reflects European human rights instruments and thus their dignity-based orientation to privacy. That orientation has had a meaningful impact in privacy jurisprudence in Quebec. In *Aubry v. Éditions Vice-Versa*,[66] for example, the Supreme Court takes the Quebec *Charter* provision to protect against non-consensual photography, even in public places, and invokes the comments of a French scholar to support ongoing dignity-based privacy interests in images of oneself:

> Such a feeling is likely to be offended each time a photographer invades someone's privacy or serves it up to the public. The camera lens captures a human moment at its most intense, and the snapshot "defiles" that moment. The privileged instant of personal life becomes "this object image offered to the curiosity of the greatest number." A person surprised in his or her private life by a roving photographer is stripped of his or her transcendency and human dignity, since he or she is reduced to the status of a "spectacle" for others. ... This "indecency of the image" deprives those photographed of their most secret substance.[67]

In this statement, the harms of objectification are still linked to consent, such that harms to dignity are linked to a lack of consent and the attendant harms to autonomy interests. Nevertheless, the harms are broader than those contemplated by the US liberty-based approach to privacy in that they persist even in public

64. No section 8 cases will likely address ongoing privacy interests in private recordings that were meant to be used in a specific context for a limited audience and period of time, since such recordings would not in themselves qualify as searches if they were made by someone other than a state agent. Instead, they are merely evidence and subject to the commensurate rules.

65. R.S.Q. c. C-12, s. 5 [Quebec *Charter*].

66. [1998] 1 S.C.R. 591 [*Aubry*].

67. *Ibid.* at para. 69, L'Heureux-Dubé & Bastarache JJ., citing Jaques Ravanas, *La protection des personnes contre la réalisation et la publication de leur image* (Paris: Librairie générale de droit et de jurisprudence, 1978) at 388 [trans. by L'Heureux-Dubé & Bastarache JJ., ellipsis in original].

spaces.[68] Since even a person in plain public view retains privacy interests, the Court in *Aubry* opens the door to possible recognition of dignity-based privacy interests that could persist where a person has consented to being photographed for a limited audience.

Whether *Duarte* and *Aubry* contribute to a normative right to control the audience for consensually-made recordings remains to be seen. Since the existence of photographs factually diminishes an individual's control of the resulting images (in that a document that can be circulated now exists), a narrowly factual approach to reasonableness might conclude that consenting to be photographed should reduce a person's reasonable expectation of privacy in that photograph. A dignity-based approach, on the other hand, would not hinge on the widespread social disregard for privacy as the yardstick for reasonableness. Instead, the degree to which a person was objectified or turned into an instrument for use by others would be of primary concern. The child pornography jurisprudence reviewed below helps to clarify this distinction.

II. HARMS TO PRIVACY AND DIGNITY OF SEXUAL ABUSE VICTIMS IN *R. V. SHARPE*

The *Criminal Code* amendments in 1993 that created Canada's original child pornography offences[69] followed Canada's ratification in 1991 of the *Convention on the Rights of the Child*,[70] which required signatories to take appropriate legislative action to protect minors under eighteen years of age from "all forms of sexual exploitation and sexual abuse," including "exploitative use of children in pornographic performances and materials."[71] The language and theory of children's rights scholarship thoroughly informed the new child pornography offences, but the language of the offences did not explicitly link sexual exploitation with

68. *Aubry*, *ibid.* at para. 70. The judgment assesses damages by way of the social harm caused to the complainant rather than relying on any inherent harm in the act of non-consensual photography itself.

69. R.S.C. 1985, c. C-46, s. 163.1 [*Criminal Code*].

70. *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990, accession by Canada 13 December 1991) [*CRC*].

71. *Ibid.*, art. 34(c). For an in-depth account of the history of Canada's approach to child pornography vis-à-vis international obligations, see Jane Bailey, "Confronting Collective Harm: Technology's Transformative Impact on Child Pornography" (2007) 56 U.N.B.L.J. 65 at 68-75.

privacy rights. The Supreme Court's reasons in *Sharpe*, however, dedicate significant space to the elaboration of the harms that child pornography causes to children; it is here that the Court explicitly discusses the underlying dignity and privacy rights of children pictured in child pornography.[72] Although scholarly debate about an offender's privacy rights under the *Charter*'s freedom of expression guarantee has been fairly robust,[73] and advocates for strong protection of children's rights have stressed the harm caused to child pornography victims,[74] the violation of privacy rights as another form of harm to children has only recently received scholarly attention.[75]

Chief Justice McLachlin's majority opinion in *Sharpe* conceives of harm as defined by its effects on real children whose sexual abuse is pictured in photographs and videos that indisputably qualify as child pornography. The primary harm to this population is established using research showing that victims pictured in recorded and circulated child pornography suffer psychological harms over and above those suffered by victims of child sexual abuse without recording.[76] The harm to victims caused by recording technologies is captured in the frequently invoked concept of a "permanent record of abuse and exploita-

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72. *Sharpe*, *supra* note 20 at para. 1. The defendant, Sharpe, challenged the child pornography possession offence on freedom of expression grounds.

73. *Charter*, *supra* note 3, s. 2(b). See *e.g.* June Ross, "*R. v. Sharpe* and Private Possession of Child Pornography" (2000) 11 Const. Forum Const. 50; Wayne MacKay, "*R. v. Sharpe*: Pornography, Privacy, Proportionality and the Protection of Children" (2000) 12 N.J.C.L. 113; Travis Johnson, "Child Pornography in Canada and the United States: The Myth of Right Answers" (2006) 29 Dal. L.J. 375; and Stan Persky & John Dixon, *On Kiddie Porn: Sexual Representation, Free Speech, and the Robin Sharpe Case* (Vancouver: New Star Books, 2000).

74. See *e.g.* Janine Benedet, "Children in Pornography after *Sharpe*" (2002) 43 C. de D. 327; 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 Int'l J. Child. Rts. 311.

75. Jane Bailey, "Toward an Equality-Enhancing Conception of Privacy" (2008) 31 Dal. L.J. 267; Jane Bailey, "Missing Privacy through Individuation: The Treatment of Privacy in the Canadian Case Law on Hate, Obscenity, and Child Pornography" (2008) 31 Dal. L.J. 55; and Sara M. Smyth, "A 'Reasoned Apprehension' of Overbreadth: An Alternative Approach to the Problems Presented by Section 163.1 of the *Criminal Code*" (2009) 42 U.B.C. L. Rev. 69.

76. See *e.g.* Roger J.R. Levesque, *Sexual Abuse of Children: A Human Rights Perspective* (Bloomington: Indiana University Press, 1999); Ethel Quayle & Max Taylor, eds., *Viewing Child Pornography on the Internet: Understanding the Offence, Managing the Offender, Helping the Victims* (Dorset, England: Russell House Publishing, 2005).

tion."[77] Abuse victims who are featured in child pornography struggle more to recover from their abuse, fear that they may be recognized by anyone at any time from the images, and experience a loss of control over what, when, and to whom they can disclose their abuse experiences.[78] Some of these harms are rooted in the ongoing affront that such images are to the victim's dignity (that is, turning the victim into an object for use by others) and others stem from loss of control over the audience for the image and the information it contains (*e.g.*, that the person pictured is a victim of sexual abuse).

Chief Justice McLachlin describes the harm resulting from "the abuse of children in the production of pornography" as follows:

> The child is traumatized by being used as a sexual object in the course of making the pornography. The child may be sexually abused and degraded. The trauma and violation of dignity may stay with the child as long as he or she lives. ... [T]he child must live in the years that follow with the knowledge that the degrading photo or film may still exist, and may at any moment be being watched and enjoyed by someone.[79]

Possessors of pornographic images of real children thus continually revictimize the child by using that moment of the child's abuse for their own gratification (the dignity-based harm of sexual objectification) and by having access to privileged information about the victim (hence damaging the victim's capacity to control his or her presentation of self to others).[80] Each of these can be considered privacy rights violations, depending on the cultural-theoretical rationale underlying the concept of privacy in operation. A dignity-based approach to privacy would see both sexual objectification and the circulation of private information as privacy harms; a liberty-based approach tends not to recognize sexual objectification as a privacy harm unless the sexual contact and photography were wholly non-consensual and has difficulty with protecting sexual information where the subject legally consented to acts. Canadian wavering between these two approaches is elaborated below.

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77. *Sharpe*, *supra* note 20 at para. 169, L'Heureux-Dubé J., concurring. The phrase "permanent record of the victim's abuse" also appears in the majority decision in the leading US case on the constitutionality of child pornography possession offences. See *Osborne v. Ohio*, 495 U.S. 103 at 111 (1990).

78. Tink Palmer, "Behind the Screen: Children Who Are the Subjects of Abusive Images" in Quayle & Taylor, eds., *supra* note 76, 61.

79. *Sharpe*, *supra* note 20 at para. 92.

80. See Austin, *supra* note 1.

A. BODILY INTEGRITY AND DIGNITY: SEXUAL EXPLOITATION AND SEXUAL OBJECTIFICATION

The term "exploitation" is used in the *Criminal Code* to describe offences where the offender exerts power to coerce a person to perform for the benefit of the offender or where a person's vulnerabilities have been taken advantage of for the benefit of the offender.[81] The term is used in the *Convention on the Rights of the Child*,[82] and is implicit in the two main types of visual images involving real children that are prohibited in child pornography offences: first, where people under eighteen years of age are engaged in or depicted as engaged in explicit sexual activity and second, where the dominant characteristic of the image is the depiction of a sexual organ or the anal region of a person under eighteen "for a sexual purpose."[83] Both types of images are considered exploitative because minors are at a presumed power disadvantage compared with the photographer (except in very limited intimate circumstances).[84] Minors are deemed to be legally incapable of overcoming the exploitative nature of these dynamics through consent, making child pornography cases fertile ground for expanding dignity-based privacy in the absence of the complications of consent.

The reasons for setting the age of consent for sexual photography higher than the age of consent to engage in sexual relations were discussed by the Court of Appeal of Alberta in *R. v. Hewlett*,[85] a case dealing with sexually explicit photographs of minors meant for commercial distribution via an adult porn website. The teenagers involved had responded to an advertisement asking for models over age eighteen. The court reiterated that a child's right to be protected from exploitation is at the core of the child pornography offences,[86] cited the descriptions of harms to children from the majority and concurring judgments in *Sharpe*,[87] and rejected the defence argument that photographs of older teenagers (in this case, the models were fifteen, sixteen and seventeen years old) should be treated

81. *Criminal Code*, *supra* note 69, s. 153 (sexual exploitation), s. 153.1 (sexual exploitation of a person with a disability), s. 279.01 (trafficking in persons).

82. *CRC*, *supra* note 70, art. 34.

83. *Criminal Code*, *supra* note 69, s. 163.1(1)(a).

84. *Sharpe*, *supra* note 20 at para. 116.

85. (2002), 312 A.R. 165 [*Hewlett*].

86. *Ibid.* at paras. 19-20.

87. *Ibid.* at paras. 21-23.

differently than photographs of younger children vis-à-vis the requirements for the offence:

> The protection afforded by the legislation extends to all children under 18, no matter their age, and rightly so. Society has recognized the legitimate need to safeguard all children in this category from exploitative conduct. Children are not adults and cannot be expected to exercise judgment as if they were.[88]

Hewlett thus makes clear that sexual photography is a specific type of presumptively "exploitative conduct," and minors cannot be legally expected to fully appreciate its exploitative nature. The bold lines drawn between adults and minors are justified by a general fiduciary obligation of the legal system to protect the interests of vulnerable parties, including children.[89]

Canadian child pornography case law includes many instances where a minor's involvement in child pornography was ancillary to commercial sexual exploitation (*e.g.*, prostitution or for-profit pornography),[90] or where a more informal exploitation occurs, such as participation in sexual photographs for money, drugs, alcohol, shelter, or other gifts.[91] Some feminist scholars have considered the very idea that any person could exchange consent to sexual photography for money or other collateral to be inherently demeaning to human dignity,[92] while others stress that consent determines whether a person's dignity

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88. *Ibid.* at para. 24. The court notes that where offences involve images of younger children or sexual violence, these facts can be considered aggravating factors. It does not follow, however, that the fact that the images involved youth at the higher end of the prohibited range (that is, closer to age eighteen) and depicted no violence should be considered mitigating factors.

89. I do not take issue here with the distinction between minors and adults regarding capacity to consent. Differential treatment is arguably justified by developmental differences between children and adults, but such differences have no bearing on the underlying privacy interest that I have argued is shared by adults and children alike.

90. *R. v. G.P.* (2004), 229 N.S.R. (2d) 61 (C.A.); *R. v. Hunt* (2002), 6 Alta. L.R. (4th) 238 (C.A.); *R. v. Bauer*, [1999] O.J. No. 5294 (Ct. J.) (QL); and *R. v. McGowan* (1995), 102 C.C.C. (3d) 461 (Ont. Ct. J.).

91. *R. v. B.H.L.*, [2009] A.J. No. 163 (Prov. Ct.) (QL); *R. v. Johnson* (2008), 317 Sask. R. 123 (Q.B.); *R. v. Shablak* (2007), 264 Nfld. & P.E.I.R. 167 (Nfld. S.C. (T.D.)); *R. v. Jewell* (1995), 100 C.C.C. (3d) 270 (Ont. C.A.); *R. v. Lee* (1998), 125 C.C.C. (3d) 363 (N.W.T. S.C.); and *R. v. Henricks*, [1999] B.C.J. No. 1246 (S.C.) (QL).

92. See *e.g.* Catharine A. MacKinnon, "Pornography, Civil Rights, and Speech" (1985) 20 Harv. C.R.-C.L.L. Rev. 1.

is damaged or remains intact.[93] Taking consent out of the legal equation for minors means that sexual photography is always non-consensual and hence exploitative (again, except in very limited, intimate circumstances). However, the issue of adolescent consent to sexual photography continues to complicate those cases where more straightforward forms of exploitation are absent or unclear.[94]

The description of offending images in the second category (whose "dominant characteristic" is the depiction of sexual organs) implicitly acknowledges that some images that prominently feature a minor's sexual organs may not be inherently exploitative: where the image is *not* intended for use "for a sexual purpose." Sexual purposes are assumed to convert a neutral nude photo into an exploitative one by sexually objectifying the child who is pictured.[95] The boundaries of exploitative and non-exploitative nude imagery are notoriously blurry; the investigation and sometimes prosecution of non-abusing parents in the United States is a commonly invoked example of over-reach in child pornography laws by critics who decry such laws' deeper incursion into freedom of expression.[96] In any case, it is the fiduciary obligation to protect minors from their increased risk of exploitation that also informs this second type of prohibited image, where again it is the sexual objectification of a minor's body that is deemed to be exploitative and an affront to human dignity.[97]

Changes to the available defences to Canada's child pornography offences, enacted in 2005, depict child pornography as always fundamentally about the exploitation of children via sexual objectification.[98] Under the old law, the accused had a defence if the material "ha[d] artistic merit or an educational, scientific or

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93. See *e.g.* Carol S. Vance, "More Pleasure, More Danger: A Decade after the Barnard Sexuality Conference" in Carol S. Vance, ed., *Pleasure and Danger: Exploring Female Sexuality*, 2d ed. (London: Pandora, 1992) xvi.

94. See Part III(B), below.

95. *Sharpe*, *supra* note 20 at para. 51.

96. For a recent example, see Dan Przygoda, "Couple Sues Walmart for Calling Cops Over Bath Time Photos: Children Were Taken Into Protective Custody Over Pictures Taken at Bath Time" *ABC News* (20 September 2009), online: <http://abcnews.go.com/GMA/Weekend/parents-sue-wal-mart-children-bath-time-photos/comments?type=story&id=8622696>.

97. See Parts III(A) and III(B)(1), below.

98. Department of Justice Canada, Backgrounder, "Highlights of Bill C-2 Amendments to Protect Children and Other Vulnerable Persons" (July 2005), online: <http://www.justice.gc.ca/eng/news-nouv/nr-cp/2005/doc_31584.html>.

medical purpose"[99]—a factual determination based on the nature of the materials. The new defences provide exemption for acts that have "a legitimate purpose related to the administration of justice or to science, medicine, education or art" and that do not "pose an undue risk of harm to persons under the age of eighteen years."[100] The combined requirements of "legitimate purpose" and no "undue risk of harm" to minors shift emphasis away from the expression rights of offenders (where an image could conceivably have artistic merit despite being exploitative of the youth pictured)[101] and toward the prevention of harm to children (where even if an image has a legitimate artistic purpose, it is indefensible if it poses an undue risk of harm).[102]

Parliament's reasoning in effecting the latest amendments is ostensibly similar to that of the US Supreme Court in *New York v. Ferber*,[103] which held that child pornography is not entitled to First Amendment protection. The judgment quotes a New York assemblyman who supported the law, stating that "it is irrelevant to the child [who has been abused] whether or not the material ... has a literary, artistic, political or social value."[104] The US law *only* applies to images of real children, while the Canadian law is significantly broader, as it applies to drawings and fictional stories. However, the US and Canadian rationales for not allowing artistic or other merit defences to override harms to real children pictured in child pornography coincide.

Thus far, criminalizing child pornography is mainly justified by a legal system's obligation to protect minors from sexual exploitation, based on the belief that youth are more vulnerable to exploitation because of their still-developing reasoning capacity, lower financial and social independence, and lack of life

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99. The full provision, prior to the 2005 amendments, read: "[w]here the accused is charged with an offence under subsection (2), (3), (4) or (4.1), the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose." *Criminal Code*, *supra* note 69, s. 163.1(6), as am. by S.C. 1993, c. 46, s. 2; S.C. 2002, c. 13, s. 5.

100. *Ibid.*, s. 163.1(6).

101. McLachlin C.J.C. notes this possibility in *Sharpe*, *supra* note 20 at para. 65 ("Parliament clearly intended that some pornographic and possibly harmful works would escape prosecution on the basis of this defence; otherwise there is no need for it").

102. *R. v. Katigbak* (2010), 100 O.R. (3d) 481 (C.A.).

103. 458 U.S. 747 (2000) [*Ferber*].

104. *Ibid.* at 761.

experience.[105] By rooting the harm of child pornography in sexual objectification as an injury to human dignity, however, the Canadian case law provides a segue to a consideration of whether that harm is also conceived as a harm to privacy along the European model, and what difference that might make when dealing with the less straightforward types of child pornography cases. The majority in *Sharpe* does not explicitly use the language of privacy to describe this violation to the child's dignity rights, but Justice L'Heureux-Dubé's concurring judgment does. She notes that "[t]he privacy interests of those children who pose for child pornography are engaged by the fact that a permanent record of their sexual exploitation is produced"[106] and that, "[i]f disseminated, child pornography involving real people immediately violates the privacy rights of those depicted, causing them additional humiliation."[107]

Justice L'Heureux-Dubé's concurring judgment in *Sharpe* explicitly casts sexual exploitation as an aspect of privacy harms, where children's privacy interests are tied to their physical and psychological integrity. This is an understanding of privacy that is close to the European understanding of privacy rights. The European Court of Human Rights, for instance, does not draw a distinction between privacy violations and physical or sexual integrity violations, finding instead that the latter can constitute the former in the way that a cavity search is a privacy violation *because* it is a violation of physical integrity and hence human dignity.[108] In other words, the European approach shared by Justice L'Heureux-Dubé sees all sexual offences as a violation of the victim's personal privacy, and there is no coherent way to separate the privacy offence from the sexual offence. Chief Justice McLachlin's understanding in *Sharpe* of the harm of sexual objectification, on the other hand, is that it is degrading and hence an affront to the victim's personhood (without reference to privacy) and consequently a violation of the child's dignity.

A closer look at the narrow exception to child pornography possession offences created by the Court in *Sharpe* for consensual, intimately-held photography highlights, however, the *implicit* dignity-based privacy values at stake in exploitative photographs, even if Chief Justice McLachlin does not explicitly identify

105. Canadian Red Cross, "What Makes Young People Vulnerable to Exploitation?" online: <http://www.redcross.ca/main.asp?id=029031>.

106. *Sharpe*, *supra* note 20 at para. 189.

107. *Ibid.* at para. 164.

108. *Case of X and Y*, *supra* note 7.

them as such (hereinafter referred to as the implicit dignity-based approach to privacy). While phrased in terms of the right to freedom of expression of teenagers,[109] the exception Chief Justice McLachlin reads out of the child pornography possession offence equates sexual objectification with harm to privacy interests. She holds that possession of sexual images of adolescents over the age of consent will not be deemed possession of child pornography in the following circumstances:

> The person possessing the recording must have personally recorded or participated in the sexual activity in question. That activity must not be unlawful, thus ensuring the consent of all parties, and precluding the exploitation or abuse of children. All parties must also have consented to the creation of the record. The recording must be kept in strict privacy by the person in possession, and intended exclusively for private use by the creator and the persons depicted therein.[110]

Two safeguards against exploitation via objectification are contained in this exception: the requirement that both the sexual activity and the recording be consensual and the requirement that subsequent possession and use of the recording be limited to the intimate partners for their mutual pleasure (or by the child in the case of self-photography). In other words, such photographs or videos become subject to the provision again as soon as they are shared outside the intimacy of the partners, which assumes that only the original intimate relationship precludes sexual objectification and exploitation.[111] Circulation among non-intimate people converts the image into an instance of exploitation and so constitutes a violation of dignity-based privacy interests.

Subsequent interpretation of the exception has refined the intimacy requirement by requiring proof that the minor subject of the sexual photo shares pleasure in the use of that photo with the photographer. In other words, evidence must also overcome the power differential inherent to sexual photography,

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109. Freedom of expression values contain privacy components—namely, those forms of expression that are related to individual autonomy and self-fulfillment. See *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927 at para. 53.

110. *Sharpe*, *supra* note 20 at para. 116.

111. The United Kingdom has similarly attempted to legally define scenarios where it is possible for teenagers to engage in sexual self-expression that is not exploitative, but more narrowly limits the exception to minors sixteen years and older who are married or living common law in a family relationship. *Sexual Offences Act 2003* (U.K.), 2003, c. 42, ss. 45(3)-(4). For a discussion, see Yaman Akdeniz, *Internet Child Pornography and the Law: National and International Responses* (Hampshire: Ashgate, 2008) at 48.

which exposes the subject of the photograph (and not the photographer) to potential exploitation.[112] The trial court re-hearing the *Sharpe* case subsequent to the Supreme Court's ruling places emphasis on the mutuality required by Chief Justice McLachlin's use of the word "and" in "private use by the creator and the person depicted."[113] In other words, the court rules that photographs taken for the pleasure of the adult photographer alone are not eligible for the exception since they still objectify the minor subject. The intimate photo exception is consequently not available if a minor is given money, drugs, or other gifts in exchange for posing for sexual photographs, even if these photographs are not circulated to others; such photographs were not taken for mutual benefit.[114]

B. INFORMATIONAL PRIVACY: AUTONOMY AND HARM TO CAPACITY FOR SELF-PRESENTATION

My analysis of dignity-based harms caused to the subjects of child pornography has thus far considered how recording and circulating images of abuse is linked to sexual objectification. Another type of harm caused to the subjects of child pornography concerns the subject's ability to control self-presentation. This harm was identified by Chief Justice McLachlin in *Sharpe* when she stated that "the child must live in the years that follow with the knowledge that the degrading photo or film may still exist."[115] The harm lies in the child's fear that sexual or sexualized images will be seen by people in his or her social environment, such that he or she loses the ability to control this highly personal information and consequently how he or she is perceived by others. In some instances, the circulation of highly personal information may also result in sexual or other objectification, a further affront to human dignity.[116] However, this harm is not only tied to sexual objectification since victims can experience humiliation, anxiety, shame, and fear when informed that their photographs have been viewed by anyone, regardless of whether the viewing occurs "for a

112. *R. v. Sharpe*, [2002] B.C.J. No. 610 at para. 19 (S.C.) (QL).

113. *Sharpe*, *supra* note 20 at para. 116.

114. For Canadian case law on this matter, see *supra* notes 90-91.

115. *Sharpe*, *supra* note 20 at para. 92.

116. In a broader dignity-based approach, objectification need not be sexual to amount to an affront to human dignity. See Julie Cohen, "Examined Lives: Informational Privacy and the Subject As Object" (2000) 52 Stan. L. Rev. 1373 at 1424.

sexual purpose" (*e.g.*, when victims are informed that photographs have been viewed by police investigators).[117]

Among the varied and overlapping theories of privacy is a strain that considers privacy to be crucial to creating the conditions for people to be able to define themselves.[118] Self-definition is generally conceived as an autonomy-based interest whereby individuals are able to assert appropriate control over the circulation of sensitive personal information. Some scholars, including Lisa Austin, argue that this privacy interest is better rooted in identity than in autonomy interests, an approach that may cast informational privacy as dignity-based.[119] Canada's privacy laws, which govern the handling of personal information by governments and businesses, and common law tort actions, such as "publication of private facts," tend to derive from a liberty-based approach to privacy, insofar as they are narrowly concerned with securing consent to disclose information. But disclosure of sexual information, especially information pertaining to a history of sexual abuse or exploitation, weighs especially heavily on dignity-based interests, which are broader than merely a question of whether or not the subject has consented to disclosure. Protecting this type of dignity-based privacy justifies the availability of publication bans on the names of sexual assault victims in court records, including children who are the subject of child pornography images.[120] Losing the capacity to shape

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117. As Palmer, *supra* note 78 at 66, describes it:

> The key to understanding the trauma to child victims when being informed that the images of them have been discovered lies with the fact that they have no control whatsoever of the disclosure process. They can't choose when to disclose, what to disclose, how to disclose and who they want to disclose to. They are left impotent and knowing that police officers and social workers will be aware of intimate details of what has happened to them. What they believed to be a "secret" becomes a most open secret and they are left feeling humiliation, shame and fear.

US child pornography case law has also considered the informational privacy aspect. The US Supreme Court found the continuing existence of the "permanent record" of a child's sexual abuse or other sexual exploitation to implicate "the individual interest in avoiding disclosure of personal matters." See *Ferber*, *supra* note 103 at 760, citing *Whalen v. Roe*, 429 U.S. 589 at 599 (1977). This type of harm is also echoed in Canadian s. 8 jurisprudence regarding the right of individuals to control a "biographical core of personal information." See *R. v. Plant*, [1993] 3 S.C.R. 281 at para. 20.

118. Daniel J. Solove, "Conceptualizing Privacy" (2002) 90 Cal. L. Rev. 1087; Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (New York: Random House, 2000) at 223. See also Jeffrey Rosen, "The Purposes of Privacy: A Response" (2001) 89 Geo. L.J. 2117.

119. *Supra* note 1.

120. *Criminal Code*, *supra* note 69, s. 486.4(3).

one's identity as an abuse survivor is thus a further dignity-based privacy harm caused by the existence and circulation of exploitative images, and forms a further aspect to Chief Justice McLachlin's implicitly dignity-based approach to privacy.

Understanding the two aspects of harm elaborated in *Sharpe* (the harm of revictimization and the harm to self-presentation) is useful to clarify privacy interests at stake in the two categories of child pornography cases that do not involve photographic recording of sexual abuse or sexual exploitation: voyeurism (*e.g.*, surreptitious recording of a person nude or engaged in sexual activity) and recontextualization cases (*e.g.*, where a nude or sexual image is distributed to a different audience or for a different purpose than the subject anticipated).

Returning again to the debate in the news media about body scanners, the above analysis leads to the conclusion that subjecting a child to a body scan for the purpose of airport security may be some form of objectification (hence the European objections on dignity-based privacy grounds) but it is not sexual objectification and so is not captured in child pornography offences in Canada. However, should such images be used for an illegitimate purpose (*i.e.*, sexual or commercial), they would amount to exploitation via sexual objectification. An ancillary harm would then arise from the knowledge that these images are circulating or may be circulating among people using them for illegitimate (*i.e.*, sexual) purposes. These harms are shared by children and adults alike, although the Government of Canada has only signalled concern for children here.[121]

The problem of non-consensual exchange between teenagers of consensually-made sexual images similarly depends on understanding the dignity-based harms underlying child pornography offences, so that circulation of intimate images outside of the protection of intimacy subjects the individual to sexual objectification. Cases of malicious distribution of intimate photographs (after a break-up, for example) may also be considered a criminal variation on private law privacy actions, such as "intrusion upon seclusion" and "publication of private facts," where dignity-based informational privacy is more closely coupled with the dominant dignity-based harm of sexual objectification. However, child pornography law also formally treats cases of consensual distribution (*e.g.*, where a minor circulates sexual images of him or herself) as criminal exploitation of a minor,[122] and the

121. Brennan, *supra* note 55.

122. There have been no prosecutions of minors for self-distribution of sexual images to date in Canada. The possibility of a minor being prosecuted for these acts is mentioned in *R. v. Schultz* (2008), 450 A.R. 37 at paras. 129-30 (Q.B.) [*Schultz*].

consensual aspect of the distribution continues to trouble the development of an appropriate policy response to these cases despite the legal incapacity of minors to consent. As discussed further in the next part, while there are legitimate concerns here, finding an appropriate solution for non-exploitative distribution should not compromise the broad protection of dignity-based privacy interests currently afforded by child pornography law.

III. DEFINING ABUSIVE PHOTOGRAPHY

I use the term "abusive photography" to refer to images of real children that do not document physical sexual abuse or other exploitation, but which nonetheless qualify as child pornography. Because defendants in cases involving abusive photography tend also to possess more straightforward child abuse images, discussion of abusive photography in the cases is not crucial to the outcome, but refines the jurisprudence.[123] In some cases, variations on abusive photographic practices that do not technically qualify as child pornography are further discussed by courts as aggravating factors at sentencing.[124] Consequently, the range of images discussed as abusive to privacy and dignity interests in Canadian child pornography case law is exceptionally broad.

There are three circumstances where a photograph of a real child qualifies as child pornography in Canada but no abuse in front of the camera is involved: (1) voyeurism images, where a child or youth is surreptitiously photographed with no contact or direction from the photographer, (2) where initially neutral nude images are placed in an explicitly sexual context, and (3) where sexually explicit or nude photographs that qualify for the intimate photo exception set out in *Sharpe* become child pornography upon circulation outside the intimate context of the original partners. The last two circumstances are both instances of recontextualization of a photograph, and so the harms occasioned upon victims

123. See *e.g. R. v. C. (W.)*, [2004] O.J. No. 5985 (Sup. Ct.) (QL) (where the offender possessed one thousand child pornography images; one was an altered image depicting the offender with his young niece); *R. v. Jiggins*, [2003] A.J. No. 462 (Ct. J.) (QL) (where the offender possessed many images of nude children, in addition to more explicit child pornography).

124. See *e.g. R. v. Vassey* (2007), 298 Sask. R. 205 (Ct. J.) (where, upon sentencing, the court also considered a collection of photos the accused had taken at girls' gymnastics events and videos of him masturbating while wearing a female gymnastics outfit); *R. v. Coutu*, 2007 CarswellOnt 8648 (Sup. Ct.) (WL) [*Coutu*] (where surreptitious videotaping of the defendant's niece and other children in the community were aggravating factors).

share some features. How the harm to human dignity is discussed in voyeurism and recontextualization cases will be examined in turn, below.

A. VOYEURISM

A unifying feature of voyeuristic images is the surreptitious, non-consensual aspect of the photography, capturing images of acts and states that are otherwise reserved for the individual alone or in the company of intimates. Voyeurism has been a criminal offence in Canada since 2005, with regard to both adult and child victims.[125] Prior to 2005, voyeuristic images of children and youth were sometimes captured by child pornography offences, and child pornography charges continue to be laid for voyeuristic images involving minors, rather than the lesser charge of voyeurism.[126]

To justify the creation of a voyeurism offence, the Department of Justice Canada distinguishes between the privacy violations and sexual violations that follow from acts of voyeurism, considering these violations as parallel but different:

> The harm to be addressed by a voyeurism offence can be assessed from two perspectives. From a policy perspective, it can be argued that the state's interest in protecting the privacy of individual citizens and its interest in preventing sexual exploitation of its citizens coalesce where the breach of privacy also involves a breach of the citizen's sexual or physical integrity.[127]

This justification for creating a voyeurism offence mirrors the section 8 jurisprudence regarding strip searches that similarly conceived of bodily integrity (and the attendant dignity interests connected to it) as broader than the concept of

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125. *Criminal Code*, *supra* note 69, s. 162:

> (1) Every one commits an offence who, surreptitiously, observes—including by mechanical or electronic means—or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if (a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity; (b) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or (c) the observation or recording is done for a sexual purpose.

126. *R. v. K.(G.)*, [2007] O.J. No. 4308 (Ct. J.) (QL); *R. v. J.E.I.* (2005), 204 C.C.C. (3d) 137 (B.C. C.A.) [*J.E.I.* 2005]; *R. v. H.(M.)* (2002), 166 C.C.C. (3d) 308 (B.C. C.A.); *R. v. M.(D.S.)*, [2001] B.C.J. No. 1913 (S.C.) (QL); and *R. v. J. (R. B.)* (2006), 421 A.R. 216 (Ct. J.).

127. Department of Justice Canada, *Voyeurism as a Criminal Offence: A Consultation Paper* (Ottawa: Communications Branch, 2002), online: <http://www.justice.gc.ca/ehg/cons/voy/voy.pdf> [Justice Canada, *Voyeurism*].

privacy, which is limited to regulating the degree to which an act (or information) is made public or kept private.[128] However, the consultation process leading up to the creation of the voyeurism offence, and some features of the voyeurism offence as it was enacted, make the distinction between these two types of harms more interconnected than they might appear.

The consultation paper released by Justice Canada in 2002 cites the development of smaller and more widely accessible visual recording technologies as a primary reason for the need to create such an offence at that time. The paper states that "with the new technology, voyeurism itself may now involve a breach of privacy much greater than could have been foreseen when the Code was drafted—one that undermines basic notions of freedom and privacy found in a democratic society."[129] Implicitly taking a dignity-based approach to privacy, the consultation paper asserts that people have a right to live free of surreptitious observation by not only state actors, but also by private individuals. The significance of the extended quote in the previous paragraph is that Justice Canada links "the state's interest in protecting the privacy of individual citizens and its interest in preventing sexual exploitation of its citizens" in the service of democratic values.[130] The distinction between breach of privacy and breach of sexual or physical integrity, while still discernable in these statements, is blurred through the invocation of "basic notions of freedom and privacy."

This distinction is also tenuous in voyeurism-type child pornography cases and becomes all the more interconnected once other troubling but not illegal images are included in the sentencing decisions (typically dealing with non-consensual zoom lens photography of children in public places). While the non-consensual feature of the zoom lens photography is the same, the photographs are not taken in circumstances that the law currently understands as inspiring a reasonable expectation of privacy, unless privacy is understood to include a dignity-based right that guards against sexual objectification more generally. The child pornography case law dealing with voyeurism consequently elaborates Canadian jurisprudence on the interests at stake in non-consensual photography. These two types of voyeuristic scenarios (in private spaces and in public) will be discussed below.

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128. Part I(A), above.

129. Justice Canada, *Voyeurism*, *supra* note 127 at 1.

130. *Ibid.* at 8.

1. SURREPTITIOUS PHOTOGRAPHS INVOLVING PRIVATE SPACES OR ACTS

The dominant form of voyeuristic images that qualify as child pornography mirrors the qualifications of the separate criminal offence of voyeurism, and so involves the surreptitious recording of a person under eighteen in a state of undress or the surreptitious recording of an adolescent engaged in sexual relations. The combination of non-consensual recording and a reasonable expectation of privacy in the spaces and acts photographed constitute a violation of dignity interests (coercive exposure of a person's body) as well as the related harm to capacity for self-presentation (by enlarging the audience without the knowledge or consent of the subject of the photograph). In such cases, Canadian courts have been inclined to view *any* images revealing nude bodies of minors obtained via surreptitious voyeuristic recording as child pornography, whether or not the images could be considered to have as a "dominant characteristic" the depiction of sexual organs, and whether or not the accused collected the images "for a sexual purpose," as the *Criminal Code* provision requires. In other words, Canadian courts deem the *surreptitiousness* of the recording of nude bodies (*i.e.*, changing clothes, taking a bath, or using the washroom) to ensure that the resulting images automatically satisfy both the "dominant characteristic" and "sexual purpose" requirements. Surreptitiously recorded images of exposed bodies inherently sexually objectify the subject of the photograph, and so enact a violation of privacy, irrespective of the offender's motives.

R. v. J.E.I.[131] serves as an example of this reasoning where surreptitious intrusion on a victim's solitude or intimacy amounts to sexual exploitation. In that case, the accused took advantage of a hole in an unfinished bathroom wall of his home and videotaped some of his daughter's teenaged friends, editing together only the portions of the resulting footage where breasts, genitals, or buttocks were exposed. An expert for the defence argued that the recording had not been done "for a sexual purpose," but rather out of "idle curiosity."[132] The court considered the "sexual purpose" requirement to capture a variety of violations of sexual integrity, including "some sort of thrill over the invasion of privacy as such":[133]

> The nature of the invasion of privacy is after all the unguarded depiction of the sexual organs and nudity of the subject. Whether such depictions cause sexual stimulation

131. [2003] B.C.J. No. 3092 (S.C.) (QL) [*J.E.I.* 2003], aff'd *J.E.I.* 2005, *supra* note 126.

132. *Ibid.* at para. 15.

133. *Ibid.* at para. 20.

> in some viewers might not express quite the test in a case of this kind, which is perhaps more accurately described as one of sexual embarrassment of the subjects. I am satisfied beyond a reasonable doubt that whatever was intended by the person making the videotapes, such depictions are for a sexual purpose within the meaning of the section and that the harm sought to be inhibited by that section includes this activity. The tapes are therefore child pornography within the meaning of this section.[134]

The offence here is grounded in harm to privacy described as "sexual embarrassment of the subjects." This harm combines the broader concept of dignity with privacy in that "sexual embarrassment" both objectifies the subject and exposes him or her to unwanted audiences—in other words, it is the act of having one's dignity interests publicly affronted.

The *J.E.I.* trial decision was rendered in the course of the consultation period leading up to the creation of the general voyeurism offence. Consequently, it may reflect the broader scope of that offence, which also includes instances of sexual objectification regardless of the motivations of the offender,[135] where the "physical or sexual integrity of the victim" is compromised for other purposes, "such as to generate visual representations for commercial sale, to harass or intimidate the victim, or to amuse others at the victim's expense."[136] The latter two motivations presume that the victim is identifiable from the resulting images, while generating images for commercial sale would apply even to images where a person's face or other identifying characteristics are not in the frame.

By including images wherein the subject cannot be identified, the voyeurism offence views sexual objectification as a collective dignity-based privacy harm. Similar to child pornography cases dealing with voyeuristic images, the voyeurism offence is not primarily about punishing the sexual proclivities of the offender, but rather about defending against the harm enacted on the sexual integrity of the victim in circumstances where there is a reasonable expectation of privacy and/or a high degree of harm to dignity. Although the "and/or" in this formulation is still necessary because the *Criminal Code* and the case law continue to waver on whether these types of harms are distinct and separable,

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134. *Ibid.* at paras. 20-21. Note that this type of voyeuristic, non-sexual image would not qualify as child pornography under US law, which at the federal level requires "graphic or simulated lascivious exhibition of the genitals or pubic area of any person" under the age of eighteen years. 18 U.S.C. § 2256 (2006).

135. *Criminal Code*, *supra* note 69, s. 162(1).

136. Justice Canada, *Voyeurism*, *supra* note 127 at 9.

they are closer together here than anywhere else in Canadian law, and so reflect Canada's implicit dignity-based approach to privacy.[137]

2. SURREPTITIOUS PHOTOGRAPHS IN PUBLIC PLACES: ZOOM LENS CHILD PORNOGRAPHY?

The close relationship between violations of dignity and violations of reasonable expectations of privacy informs the discussion of zoom lens photography in child pornography offenders' collections. Such images do not meet the legal definition of voyeurism and are not easily classified as child pornography because of two significant features: first, the children's bodies are clothed, and second, the children's bodies are photographed in public places (such as beaches or pools), where there is no reasonable expectation of privacy as commonly understood by the law. The question therefore becomes whether and to what degree dignity-based privacy harms are caused by such images.

In *R. v. Neilly*,[138] discussion of the harm of sexual objectification in *Sharpe* is implicitly extended to photographs of children in bathing suits taken with a zoom lens. The offender was found to have an extensive collection of photographs straightforwardly qualifying as child pornography, but his sentence of a one-year custodial term also found a basis in the more than five hundred images focusing on the genital and buttock areas of young girls (albeit covered by their bathing suits) that he had taken in public swimming areas.[139] The Crown submitted these photographs as evidence that the accused made "an active effort to find little girls and collect repugnant material."[140] The more passive activity of viewing sexually explicit images of unnamed children colours the active photography of easily identifiable local girls, making the resulting images part of the spectrum of images the accused possessed "for a sexual purpose." By accepting this evidence, the trial court in *Neilly* considered sexual objectification to be a privacy violation that inheres where there is a social expectation of privacy in the personal space

137. In *Coutu*, the court addresses dignity-based *privacy* harms caused by surreptitious recording of children: "[e]ven though it was unbeknownst to them, it was a violation of their privacy and personal integrity." *Supra* note 124 at para. 19.

138. [2005] O.J. No. 5973 (Sup. Ct.) (QL) [*Neilly*].

139. The sentence was upheld on appeal. The court referred to "the fact that [the defendant] went into the community and surreptitiously made *sexually-explicit photographs* of young girls." *R. v. Neilly* (2006), 209 O.A.C. 155 at para. 4 [emphasis added].

140. *Neilly, supra* note 138 at para. 20.

around a person's body, and hence a *proximity* and *focus* that strangers are not socially condoned to breach.[141] The court considered the images harmful enough to order the exhibit containing them sealed.[142]

The court in *Neilly* did not discuss whether images of the clothed genital and buttock regions of children would independently qualify as child pornography, as this determination was not necessary to consider such photographic practices to be an aggravating factor. In the United States, this issue is extensively explored in *United States v. Knox*,[143] although in that case girls were posed and directed to perform for the camera rather than being surreptitiously recorded in a public place. The *Knox* case determined that zooming in on the genital areas, even where covered by underwear or a bathing suit, of a young girl posing provocatively for the camera amounts to lascivious exhibition of the genitals or pubic area of a minor, which is prohibited by US law. The reasoning addresses the nature of the images themselves, rather than the harm of such intrusive photography on the girls.[144] The Canadian *Neilly* case, on the other hand, approached the zoom lens images from the perspective of the dignity-based privacy harm to the subjects of the photographs, considered in the context of the accused's collection of sexual photographs as a whole.

Although the *Aubry* case presented the possibility that non-consensual photography, in general, results in both dignity and autonomy rights violations (at least in Quebec, with its stronger European privacy orientation), voyeurism—that is, non-consensual photography featuring sexual objectification—clearly

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141. Similar concerns about the function of technologies that enable widespread privacy invasion involving sexual objectification in public places arises in legislation addressing "up-skirt" photography—use of a hidden camera located in a shoe or bag to take photographs up women's skirts—in the United States. A federal up-skirt offence was created by the *Video Voyeurism Prevention Act of 2004*, which provides that a reasonable expectation of privacy includes "circumstances in which a reasonable person would believe that a private area of the individual would not be visible to the public, regardless of whether that person is in a public or private place." 18 U.S.C. § 1801 (2006).

142. The court in *Neilly*, *supra* note 138, also implicitly refers to the second type of privacy harm set out in *Sharpe*, *supra* note 20: namely, living with the knowledge that such images exist and may be in circulation even though that knowledge is only potential in this case since the girls did not know they were being photographed. See *Neilly* at para. 92.

143. 32 F.3d 733 (3d Cir. 1994) [*Knox*].

144. The *Knox* court does note, however, that "[t]he films themselves and the promotional brochures ... demonstrate that the videotapes clearly were designed to pander to pedophiles." *Ibid.* at 737.

involves closely overlapping autonomy- and dignity-based affronts such that lack of consent, while surely an aggravating factor, is not the only source of harm. Further, the identifiability of the subjects of such photographs, while also an aggravating factor, is not determinative of harm either, making such actions affronts to collective dignity-based privacy interests in Canada as well.[145] Although the dignity-based approach to privacy is not as broad in Canada as it is in Europe generally, it is evident in prohibitions against voyeurism.

B. RECONTEXTUALIZED IMAGES

The second major category of images that, notwithstanding that they do not document physical acts of sexual abuse, nonetheless qualify as child pornography are images that have been recontextualized in one of two ways: first, nude images, typically of young children, which only become child pornography upon being placed within a sexualized context, and second, nude or sexual images of adolescents that initially qualify for the intimate photography exception but which become child pornography upon circulation outside of the original intimate context. There are significant differences between these two types of recontextualization cases; however, drawing a parallel between them on the basis of the harm caused by a shift in audience helps elucidate the Canadian approach to these harms.

1. "INNOCENT" NUDES PLACED IN AN EXPLICITLY SEXUAL CONTEXT

In the United States, some nude photographs of children qualify as child pornography depending on the nature of the image and regardless of context.[146] In contrast, Chief Justice McLachlin in *Sharpe* considers the "for a sexual purpose" requirement as a major part of what determines the legal classification of a photograph:

> Family photos of naked children, viewed objectively, generally do not have as their "dominant characteristic" the depiction of a sexual organ or anal region "for a sexual purpose." Placing a photo in an album of sexual photos and adding a sexual caption

145. An identifiability requirement in some of the US up-skirt statutes has been criticized by some observers. See *e.g.* Lance E. Rothenberg, Note, "Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space" (2000) 49 Am. U. L. Rev. 1127.

146. This determination is not as simple as it sounds. See Amy Adler, "The Perverse Law of Child Pornography" (2001) 101 Colum. L. Rev. 209 at 241.

> could change its meaning such that its dominant characteristic or purpose becomes unmistakably sexual in the view of a reasonable objective observer.[147]

This short passage establishes an exception for "family photos of naked children" in a specifically Canadian way: namely, that the "dominant characteristic" and "sexual purpose" requirements are dependent on context, and that contextual meaning determines whether or not harm has been caused to the child who is pictured. In the phrase "family photo," Chief Justice McLachlin no doubt idealizes the family to mean the non-sexual circle of care—suppressing the reality that most sexual abuse occurs within family relationships—but her aim is clearly to distinguish between a photo in a non-abusive family photo collection and one in an abusive collection (which may be created by a family member).[148] Harm to the child pictured in such photographs occurs subsequent to when the photograph was taken, upon the sexual objectification of the child's image.

At least one Canadian case, *R. v. Nedelec*,[149] has applied Chief Justice McLachlin's reasons to a situation involving a found family photograph (*i.e.*, where it is not a family member who has placed the photo in a sexual context). Because the accused also possessed photographs that more straightforwardly qualified as child pornography, discussion of this particular photograph was not necessary to secure conviction. Instead, the discussion serves merely to elaborate the dignity-based harm of sexually recontextualizing such photographs. The photograph depicted a three- or four-year-old girl, who was not known to the accused, sitting on the floor opening a Christmas present with her nightgown hitched up and no underwear on. The defendant claimed that he had found the image in an envelope at a garbage dump and that he did not possess it for a sexual purpose, but rather merely as a collector of varied things, including photographs. Since he had placed this photo in an album containing more explicit sexual

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147. *Sharpe*, *supra* note 20 at para. 51.

148. Indeed, most child pornography production takes place in the course of sexual abuse within families. See *e.g. R. v. C.P.*, [2008] N.B.J. No. 390 (C.A.) (QL); *R. v. M.(L.)*, [2008] 2 S.C.R. 163; *R. v. M. (J.A.)* (2007), 295 Sask. R. 150 (Ct. J.); *R. v. F. (J.)*, 2006 CarswellOnt 5575 (Sup. Ct.) (WL); *R. v. J. (R.B.)* (2006), 421 A.R. 216 (Ct. J.); *R. v. P. (G.E.)* (2004), 229 N.S.R. (2d) 61 (C.A.); *R. v. W. (R.)*, [2001] O.J. No. 2810 (Sup. Ct.) (QL); *R. v. M. (B.C.)* (2008), 238 C.C.C. (3d) 174 (B.C. C.A.); *R. v. E. (R.W.)* (2007), 86 O.R. (3d) 493 (C.A.); *R. v. B. (A.)*, [2006] O.J. No. 2543 (Sup. Ct.) (QL); *R. v. L. (A.F.)*, 2005 CarswellAlta 1968 (Ct. J.) (WL); *R. v. S. (V.P.)*, [2001] B.C.J. No. 930 (S.C.) (QL); *R. v. B. (T.L.)* (2007), 404 A.R. 283 (C.A.); and *R. v. W. (L.A.)* (2006), 290 Sask. R. 43 (Ct. J.).

149. [2001] B.C.J. No. 2243 (S.C.) (QL) [*Nedelec*].

images, the court found that he possessed the photo for a sexual purpose, which converted it into child pornography.[150]

Since context does not figure into the determination of whether an image is exploitative and meets the legal definition of child pornography in the United States, the Americans have more contentious examples of non-abusing family members being charged with child pornography offences for baby-in-the-bath-type photographs. The Canadian approach benefits by understanding harm to be determined by context, although misapplication of child pornography offences is certainly possible in Canada, too. Nonetheless, in Canadian jurisprudence, it follows that a nude image could violate child pornography law if it is circulated outside the non-abusive family's circle of care, but not if it remains within that circle of care.[151]

Another scenario that highlights the contrast between dignity- and liberty-based approaches to privacy concerns arises where images published in a non-pornographic context are subsequently republished in an explicitly pornographic context. In the United States, republication in a pornographic context does not change the status of the nude photo of a child, since an image either attracts First Amendment protection (and hence is not child pornography) or it does not.[152] Efforts to litigate such cases as violations of privacy at private law have also been unsuccessful in the United States,[153] whereas European law affords ongoing privacy

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150. *Ibid.* at para. 49.

151. In the media coverage of the recent case from Arizona (Przygoda, *supra* note 96), the defendant's lawyer curiously appears to follow the Canadian rather than US approach:

> ABC News was able to obtain access to four of the photos. There are still nine other photographs which were not released because the Demarees' lawyer said that the photos were intended for private home use and showing them to outside parties would violate the law for distribution of child pornography.

152. In the United States, to qualify as child pornography the images in question must portray "sexually explicit conduct," which means actual or simulated (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person. See 18 U.S.C. § 2256(2) (2006). The case law has elaborated what content is captured by "lascivious exhibition of the genitals or pubic area," but this content is not affected by context. *Knox*, *supra* note 143.

153. Actress Brooke Shields initially won an injunction based on breach of contract against a photographer who had republished nude photos of her at age ten in an adult magazine. See *Shields v. Gross*, 451 N.Y.S.2d 419 (App. Div. 1982). The state's Court of Appeals, however, vacated the injunction and ruled against Shields. See *Shields v. Gross*, 461 N.Y.S.2d 254

rights to the subject of a nude photograph (adults as well as children), even after it has been published.[154] While no Canadian cases have yet explored this scenario, non-exploitative nude photographs of children initially published in art or educational publications may be sheltered by the "legitimate purpose" defence, and it is likely that the same photographs would lose the shelter of this defence if they were republished in an explicitly pornographic publication. The reasoning is similar to the family photograph exception, in that the context determines whether the subject of the photo has been sexually objectified, thereby suffering from the attendant harms to dignity-based privacy. Further, in a dignity-based approach, harm to capacity for self-presentation is also not dependent on the secrecy of the information, but instead can be affected by the context in which that information acquires meaning. In other words, the privacy harms inflicted on the child subject by the context of the photo determines its criminal status, and so protection of these interests cannot be lost merely by previous publication or by blanket consents to photographers, as they are in the United States.[155]

Canada is similar to Europe on this point, although in Europe it is not just a minor but any person who does not lose dignity-based privacy interests in a nude photograph—even after an image has been published in a particular context, and even where that person has a highly sexualized public persona.[156] While Canada is clearly closer to the European approach when it comes to images of nude children, it is not clear how useful Canadian law would be to seek redress for privacy violations for recontextualized nude or sexual images of adults, or where the images do not depict a person nude. Proposed changes to copyright legislation, for instance, appear to privilege copyright over privacy interests such

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(N.Y. 1983). Shields then brought an action in federal court for invasion of privacy and sought a further injunction that was rejected. See *Shields (Litigation guardian of) v. Gross*, 563 F. Supp. 1253 (S.D.N.Y. 1983). Another federal court reached a similar conclusion in a Texas case dealing with nude photos of children initially published in an educational text on sexuality and republished in an adult magazine. See *Faloona v. Hustler Magazine*, 607 F. Supp. 1341 (N.D. Tex. 1985).

154. Whitman, *supra* note 5 at 1198.

155. Austin, *supra* note 1. Adult non-consensual publication or republication of private photos is an underdeveloped area of law in Canada. For a discussion of several Australian cases, see David Rolph, "Dirty Pictures: Defamation, Reputation and Nudity" (2006) 10 Law Text Culture 101.

156. Whitman, *supra* note 5 at 1199, citing C.A. Versailles, 8 June 2000, *S.A. Multimania Prod. c. Madame L.*, No. 859, 12ème ch.; Trib. gr. inst. Paris, 29 May 2002, *S.A. SPPI c. Société Fox Média*, No. R6: 01/04400, 3ème ch.

that a person hiring a photographer for a private event or sitting would automatically alienate his rights in an image of himself (and other people at a private event) by default.[157] Canada thus cannot be said to have one coherent approach to privacy. Understanding this inconsistency might help clarify the specific ways that the next category of images—distribution of private sexual photos of and by teenagers—causes so much conceptual difficulty, especially when Canadians fail to distinguish the Canadian legal context from US debates regarding similar cases in the United States.

2. CIRCULATED CONSENSUAL IMAGES

The final category of images that do not depict physical acts of sexual abuse but may qualify as child pornography arises when a photograph taken in a private, presumptively non-exploitative context becomes problematic upon distribution outside of that original context: namely, consensual photographs of consensual sex between persons legally capable of consent.[158] This category by definition concerns sexual photographs of teenagers under the age of eighteen, but over the age of consent (which may range from twelve to sixteen, depending on the age of the partner).[159] The photographer may be the teenager photographed, another teenager, or an adult.

In its most straightforward interpretation, the exception applies to minors taking photographs of themselves for their own exclusive enjoyment and to their

157. Bill C-32, *An Act to amend the Copyright Act*, 3d Sess., 40th Parl., 2010, ss. 6, 38 (1st reading 2 June 2010). In particular, the law would change the current scheme (wherein copyright in a commissioned photograph rests with the person who commissioned and paid for it) so that copyright would always rest with the photographer unless contractually transferred. Private individuals who have commissioned work (*e.g.*, hiring a wedding photographer) would be exempt from copyright infringement for private use of the photographs, but the proposed changes do not in any way restrict the way in which a photographer can use such a photograph, even if it was taken at a private function or sitting (*e.g.*, "boudoir photography" intended as a gift from one intimate partner to another).

158. *Sharpe*, *supra* note 20 at para. 116. The application of the exceptions to both possessing and making child pornography offences is at para. 128.

159. The general age of consent in Canada is sixteen, but close-in-age exceptions permit sexual relations in two cases: between twelve- and thirteen-year-olds and a partner less than two years older, and between fourteen- and fifteen-year olds and a partner less than five years older—in both cases provided that the partner is not in a position of trust. Until 1 May 2008, the age of consent in Canada was fourteen (except in trust relationships), so at the time of the *Sharpe* decision the general age of consent was fourteen. *Criminal Code*, *supra* note 69, s. 150.1.

legal sexual partners taking photographs of their sexual encounters for their mutual and exclusive enjoyment.[160] Chief Justice McLachlin is very clear that these photographs qualify as child pornography as soon as they are circulated outside of this limited personal or intimate context:

> I reiterate 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 use, their possession would then fall outside the exception's aegis and be subject to the full force of s. 163.1(4). Indeed such possession might also run afoul of the manufacturing and distributing offences set out in ss. 163.1(2) and 163.1(3).[161]

The key difference between the photographs subject to this exception and the "family photo" exception is that here the photographs are explicitly sexual, increasing the sensitivity of their content. Moreover, exchanging sexual photographs appears to have increased as a regular social practice between sexual or romantic partners due to the centrality that digital technologies have assumed in children's evolving social practices (be they positive or negative).[162] Tension consequently arises at the prospect of potentially prosecuting many teenagers for distributing child pornography where the photo subjects are peers who were willing participants in the photography. The potential for such prosecutions has led to calls for a more appropriate policy response.[163]

In order to explore how Canadian law frames dignity-based privacy harms caused by circulation of such photos, I will analyze cases of malicious circulation of images separately from situations where photographs are not maliciously circulated. In the first category, there is limited reported Canadian case law; in

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160. *Sharpe*, *supra* note 20 at para. 128.

161. *Ibid.* at para. 118.

162. "Sex and Tech: Results from a Survey of Teens and Young Adults" *The National Campaign to Prevent Teen and Unplanned Pregnancy* & *COSMOgirl.com* (10 December 2008), online: <http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf>.

163. Many US states have introduced bills to address "sexting" as something other than child pornography or as a special case of child pornography requiring different treatment. As one news report on a bill introduced in Kentucky noted, "Legislation regarding sexting was introduced in at least 11 states in 2009, with six passing the bills, according to the National Conference of State Legislatures. The bills were a mix of increased penalties, decreased penalties and the creation of educational programs about the dangers of sexting." Andrew Thomason, "Bill Targets Youth Who Send 'Sexts'" *The [Bowling Green] Daily News* (9 January 2010), online: <http://bgdailynews.com/articles/2010/01/10/news/news3.txt>.

the second category, there is no reported case law. Police in Canada have not yet pursued child pornography charges where youth have non-maliciously distributed consensually taken sexual photos of other youth,[164] and none of the reported cases involving malicious distribution deal with a young offender.[165] Instead, peer situations are typically addressed outside of the criminal justice system or through diversion, and so jurisprudence concerning consensual exchange between teenagers of sexual photos is largely hypothetical.[166] While an offender's motive for distributing a consensually-made sexual photo of a minor is irrelevant to determining whether a child pornography offence has been committed, motive has clearly been influential in discretionary decisions about whether to lay charges and pursue prosecution. Further, motive in these types of situations might signal reduction or elimination of the dignity-based privacy harms to the subjects of the photographs, and so an exploration of what Canadian courts have said about the privacy and dignity harms caused by circulating such photos will potentially help to chart a more consistent course when these cases arise.

The classic scenario involving malicious circulation arises where a jilted boyfriend intentionally circulates a sexual photo of his ex-girlfriend among their peers, families, or the public at large in order to humiliate her, but claims to be unaware that he is committing a child pornography offence (frequently, the

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164. There is at least one unreported case concerning non-malicious distribution, where an eighteen-year-old male was ultimately convicted of corrupting morals rather than distributing child pornography. See *Schultz, supra* note 122 at para. 102, citing *R. v. T.M.M.*, (1 October 2007) 070356779P1 (Alta. Prov. Ct.).

165. *R. v. Walsh* (2006), 206 C.C.C. (3d) 543 (Ont. C.A.) [*Walsh* 2006]; *R. v. Dabrowski* (2007), 86 O.R. (3d) 721 (C.A.) [*Dabrowski*]; and *Schultz, ibid.*

166. Interview of Roberta Sinclair, Manager of Research and Development of the National Child Exploitation Coordination Centre (29 October 2008). Sinclair indicated that peer-on-peer exploitation of this sort was generally being handled through alternative channels at the local level, and that a concerted policy response was still being worked out. See also Andrea Slane, *Child Sexual Exploitation, Technology and Crime Prevention Education: Keeping Pace with the Risks?* (Report prepared for Public Safety Canada, 19 August 2009) [unpublished], online: <http://socialscienceandhumanities.uoit.ca/assets/assets/documents/Slane_-_Keeping_Pace_Report_August_19_2009_FINAL2.pdf>. In *Schultz*, an Alberta court considered the hypothetical case of a young teenager deliberately circulating sexual images of herself, but only with regard to whether applying a mandatory minimum sentence for child pornography offences in such a circumstance would offend s. 12 of the *Charter*. The court concluded that imposing the mandatory minimum sentence on youth who circulated sexual images of themselves would not amount to cruel and unusual punishment, due to the indirect harms to other children that child pornography also occasions. *Schultz, supra* note 122 at paras. 129-30.

partner insists that what he has done is not, or should not be, a child pornography violation).[167] The three reported Canadian cases addressing malicious distribution uniformly follow the conceptual framework set out in *Sharpe*, where circulation of images outside of this cocoon of intimacy and mutuality reintroduces the likelihood of sexual objectification and its attendant harm to dignity-based privacy interests.[168]

The dignity basis of the harm caused by disseminating such photographs justified findings of guilt in all three reported cases. In *R. v. Walsh*,[169] a twenty-three-year-old man 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. In *R. v. Schultz*,[170] a twenty-year-old offender repeatedly exposed intimate photographs of his sixteen-year-old former girlfriend to public view on various websites, calling attention to her age and how to locate her. Finally, in *R. v. Dabrowski*,[171] even threats to expose intimate videos to public view vitiated the "private use" exception, since such threats implied that these materials were no longer being held for a mutual intimate purpose. From these cases, one can conclude that the exception is very narrow and is strictly limited to making and possessing photographs as part of an intimate relationship.[172]

Similar to the family photos exception, recontextualization into a non-intimate context changes the meaning of the photograph from a presumption of intimate connection to sexual objectification. Consequently, the courts again interpret the "for a sexual purpose" requirement broadly, so that criminal liability attaches whenever a person breaches the intimate context for any purpose other than a

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167. *Walsh* 2006, *supra* note 165 at para. 35; *Schultz*, *ibid.* at paras. 19, 61, 71.

168. *Sharpe*, *supra* note 20 at para. 116. Exceptions to this presumption were not considered, but might include situations where the teenaged subject of a sexual photo privately shares a photo he or she has taken with an intimate partner, or privately shares a photo taken within a previous relationship with a subsequent intimate partner.

169. *Supra* note 165 at paras. 6-7.

170. *Supra* note 122 at paras. 2-11.

171. *Dabrowski*, *supra* note 165 at paras. 24-27.

172. The secondary harm to informational privacy, namely the non-consensual dissemination of information about how the adolescent behaves in intimate circumstances (including what he or she looks like in intimate poses), could be inferred from the facts of these cases, but is not discussed by the courts. Recalling such private law actions as the US tort of "publication of private facts," circulation of sexual images meant for an intimate context impair the photo subject's capacity to define his or herself in a variety of social contexts (*e.g.*, family, school, et cetera).

respectful, dignity-preserving connection. As the court states with regard to the defendant Walsh:

> In the present matter, it seems that the production and distribution of the child pornography involved a desire to humiliate and embarrass and perhaps to ruin the life of the victim. ... [T]he creation and distribution were clearly done for a form of gratification by Mr. Walsh.
>
> I am unable to discern the nature of that gratification. I have heard of things like revenge. I have heard of things like a desire to make the victim hurt like he felt he was hurting because she ended the relationship, and there may be other aspects of gratification which are not evident in this matter, but nonetheless this matter falls within a form of gratification by distribution of what happens to be, in the circumstance in which it occurred, the production and distribution of child pornography.[173]

In this case (and in *Schultz*) the offence was understood to redress the deliberate, hurtful sexual objectification of the teenaged victim.[174] The desire to humiliate, embarrass, or otherwise expose the victim to harm by offering her body and sexual behaviours to the view of others undoubtedly affected her dignity-based privacy interests by treating her as a degraded sexual object rather than respecting her as a person.

Cases of malicious distribution fit most easily within the existing conception of harm set out in the child pornography jurisprudence, but the problem of the law's response to adolescent social immaturity appears at the margins of these cases. In *Walsh*, for instance, police discretion to charge some individuals and not others is apparent, insofar as the account of events leading up to the defendant's arrest implicates quite a few of the victim's classmates, only two of whom appear to have been in some way engaged by the criminal justice system.[175] And yet all of the teenagers who passed on the collage of images no doubt treated the victim as a sexual object and satisfied the technical requirements of child pornography

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173. *Walsh* 2006, *supra* note 165 at para. 23, citing *R. v. Cheyne*, 2004 CarswellOnt 8872 at paras. 78-80 (Ct. J.) (WL). Two other actors in the Walsh events were also prosecuted. The first co-accused, Simon Cheyne, had printed the collage of sexual pictures and put a copy in the victim's locker at school. He pleaded guilty alongside Lee Walsh. See *R. v. Cheyne*, 2004 CarswellOnt 8871 (Ct. J.) (WL). In the course of the guilty plea of the two men, the Crown indicated that one other person had been charged: Sarah Short, who had distributed the collage by email to several people (including the victim's father) after having a falling out with the victim. Short's case appears to have been resolved by other means.

174. See *Schultz*, *supra* note 122 at paras. 45-46, 88.

175. *Supra* note 165 at paras. 6-7.

offences. Consequently, decisions not to charge any of the other youth involved in redistributing the pictures must have been due to other considerations, not whether the elements of the offence were met.

From the limited case law, it appears that prosecutions are only fully pursued in Canada where the accused was a legal adult and where he acted maliciously and did not show remorse—in other words, where sexual exploitation of a younger person was intentionally carried out by someone who is old enough to know better.[176] This unofficial, discretionary response explains why there are currently no reported cases of non-malicious distribution (*i.e.*, a youth sending a sexual photo of him or herself to his or her current intimate partner; youths deliberately circulating sexual images of themselves publicly; or a youth showing another youth a sexual photo ancillary to bragging about his or her intimate partners, rather than to humiliate them).[177] While it would preserve the Supreme Court's reasoning in *Sharpe* to interpret the intimate photo exception to capture private sexual photo exchange via technology (provided it is between intimate partners and for the purpose of mutual enjoyment), the scenarios featuring wider non-malicious distribution are difficult to reconcile with the Court's reasoning.[178]

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176. However, even in these cases judges have acknowledged that public distribution of intimate photos is less egregious than some other behaviours that constitute child pornography offences—a consideration that is not relevant to guilt, but can be taken into account in relation to bail, sentencing, and parole conditions. See *R. v. Walsh* (2005), 75 O.R. (3d) 38 (C.A.) [*Walsh* 2005]. The decision involves a hearing on parole conditions, where the events are characterized as "not the more typical situation where an offender is using the Internet as a business or a hobby to view or distribute child pornography." Feldman J.A. further commented that "[t]his was a one time, immature and very unfortunate response to a personal life event" (at para. 12). For discussion of this comment, see *Schultz*, *supra* note 122 at para. 119.

177. The National Child Exploitation Coordination Centre, in its 2005 environmental scan of online sexual exploitation of children and youth, identifies "self-exploitation" as an area of concern that requires some policy direction. To view the executive summary of this report, see National Child Exploitation Coordination Centre, *Internet Based Sexual Exploitation of Children and Youth Environmental Scan* by Roberta Sinclair & Daniel Sugar (Ottawa: NCECC Strategic and Operations Support Services, 2005), online: <http://www.rcmp-grc.gc.ca/ncecc-cncee/factsheets-fichesdocu/enviroscan-analyseenviro-eng.htm>.

178. Interpretive problems with the intimate photo exception include that a sexual photograph that a minor takes of him or herself cannot legally be sent to his or her intimate partner. However, it would be within the spirit of the exception for a person to send to an intimate partner a photo of him or herself that he or she (or even a previous intimate partner) took, so long as the photo is being used as part of a non-exploitative intimate relationship.

This difficulty derives primarily from the Court's categorical assumption that any circulation outside an active intimate partnership necessarily amounts to sexual exploitation and so causes the attendant dignity-based privacy harms. In the Court's view, there is no possibility that a more publicly circulated sexual photo can be viewed as either legitimate sexual expression by the subject or admiring of and not degrading to the subject.[179] Further, even where a youth is quite confident in the non-exploitative nature of her sexual expression, the Court deems anyone who circulates sexual images of children to contribute to the indirect harms to children in general, such as encouraging cognitive distortions among predatory adults that underage youth are appropriate sexual partners. Yet despite the Court's clear inclusion of even non-malicious distribution of sexual images of youth in child pornography offences, no prosecutions have gone forward for non-malicious distribution. Law enforcement agencies clearly operate on some sense that pursuing child pornography charges in such cases is out of step with the offender's actions.[180]

In order to address this discomfort, some US states have proposed alternative, lesser offences for minors who exchange sexual images non-maliciously;[181] other

179. Lara Karaian has argued that youth should be empowered not only to say "no" to sex, but also to say "yes" in appropriate circumstances. She sees lack of access to positive sexual expression as part of the trouble with the law's approach to non-malicious sexual image exchange ("sexting"). Lara Karaian, "Lolita Speaks: Girls, 'Sexting' and the Law" (Revised draft of paper presented to the Annual Meeting of the Canadian Law and Society Association, 4 June 2010) [unpublished, on file with the author].

180. Public sentiment toward these incidents tends to limit the scope of harm to the specific people involved. In the United States, where charges have sometimes been laid for non-malicious distribution, media coverage of the controversy over charging such youth is common. See *e.g.* "Father of Teen 'Sexter': My Child's Not a Sex Offender" *MyNorthwest.com* (3 February 2010), online: <http://www.mynorthwest.com/?sid=279116&nid=11>; Maryclaire Dale, "US Court on 'Sexting': Child Porn or Child's Play?" *The Associated Press* (15 January 2010), online: <http://abcnews.go.com/US/wireStory?id=9570752>; "'Sexting' Shockingly Common Among Teens" *CBS News* & *Associated Press* (15 January 2009), online: <http://www.cbsnews.com/stories/2009/01/15/national/main4723161.shtml>; and "Teen Faces Charges for her Own Nude Photos: Public Defender is Disputing the Child Pornography Charges" *ABC News* (14 October 2008), online: <http://abcnews.go.com/video/playerIndex?id=6034996>.

181. One example is an Ohio bill that would make "reckless" creation, exchange, and possession of nude images of minors between minors via a telecommunications device a misdemeanour. Felony charges could still apply for cases where there was malicious intent. U.S., H.B. 132, *A bill to enact section 2907.324 of the Revised Code to prohibit a minor, by use of a telecommunications*

states have created exceptions to mandatory sentencing or mandatory sex offender registration for distribution by young offenders.[182] The option of creating a lesser offence provides prosecutors more flexibility, so that the gross inconsistencies of the current all-or-nothing discretionary options can be better mitigated.[183] I have advocated elsewhere for a distinct criminal offence of invasion of privacy as an alternative in situations involving peer circulation of sexual photos, provided that this offence does not imply that similar-aged people cannot exploit one another, and provided further that the lesser offence preserves harm to dignity-based privacy as its underlying rationale.[184] The rationale for creating lesser offences, imposing less severe punishments, or even not imposing any criminal sanction in some situations should clearly derive from considerations of the specific circumstances and appropriate responses thereto, and should not undermine the validity of claims to harm experienced by victims more broadly.

IV. CONCLUSION

My analysis of Canadian jurisprudence on dignity-based privacy interests unpacks the ambiguities revealed in news media attempts to set out the privacy interests protected by child pornography law. If viewed from a dignity-based perspective,

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device, from recklessly creating, receiving, exchanging, sending, or possessing a photograph or other material showing a minor in a state of nudity, 128th Gen. Assem., Reg. Sess., Ohio, 2009.

182. See *e.g.* U.S., S.B. 125, *An Act Relating to Expanding the Sex Offender Registry*, 2009-2010, Reg. Sess., Vt., 2009 (enacted).

183. Closer examination of the role played by police and prosecutorial discretion in these cases is beyond the scope of this article. For further discussion on this point, see *e.g.* Anna Pratt & Lorne Sossin, "A Brief Introduction of the Puzzle of Discretion" (2009) 24 C.J.L.S. 301. The US exercise of discretion has been criticized because in some cases it results in no punishment for egregiously malicious exchange of intimate photographs among peers, while in other cases fairly harmless actions are punished too harshly. Creating an option between child pornography charges and no charges at all may be a fitting solution that will reduce the conundrum such cases currently cause for those having to exercise such discretion.

184. Slane, "Sexting," *supra* note 19. Any doubt that peers cannot exploit one another by exchanging sexual images should be dispelled by recent reports that a sixteen-year-old boy took photographs and videotaped the gang rape of a sixteen-year-old girl who had been drugged at a rave party in Pit Meadows, British Columbia and posted the images on a social networking site. Efforts to remove the images from circulation have been futile, as they have been reposted and widely circulated among local teenagers. See "Police Can't Block Facebook Rape Images" *CBC News* (16 September 2010), online: <http://www.cbc.ca/canada/british-columbia/story/2010/09/16/bc-facebook-rave-rape.html>.

airport body scanners do not pose different privacy threats to children than they do to adults: children and adults both have the same dignity-based interest in avoiding exposure of private body parts and in limiting the purpose for and context in which the resulting images are viewed. However, minors are currently entitled to greater protection than adults against violations of dignity-based privacy, especially with regard to harm caused by the recontextualization of nude photographs. Consequently, the policy decision to exclude minors from the scans may address the risk of images being used for anything other than legitimate security purposes. But if that risk exists for children, then it should be addressed vis-à-vis adults as well.

The transport minister's statement that minors were excluded because they could not consent to the scans, however, confuses the issue because it only makes sense if the images produced by body scanners inherently qualify as child pornography. Such a conclusion does not account for the current legitimate purpose and no undue risk of exploitation defences, nor for the interpretations of the scope of the law set out in *Sharpe.* Instead, it seems to assume that any form of objectification of the nude body of a child is problematic—a potentially (if unintentionally) dignity-based approach[185]—while at the same time sticking to a liberty-based approach that centres only on consent. A more coherent approach would honour the dignity-based privacy interests of both children and adults by ensuring greater safeguards against misuse and providing alternative, less intrusive means of security screening to everyone.

The second issue—the proper treatment of youth who exchange sexual photographs of themselves or each other—is far more complicated, as evidenced by the common exercise of discretion employed to manage the "lack of fit between legal rhetoric and reality" in these cases.[186] While there are a variety of legitimate reasons to pursue alternative measures to address these situations where the punishments seem to outweigh the crimes, I have argued that any alternative measures should not undermine the, at least implicit, dignity-based approach to bodily privacy that has emerged in the child pornography case law. Instead, a

185. The government may, of course, be approaching the images from a more socially conservative—that is, prudish—perspective that sees all nudes as sexual, rather than from a human rights angle that aims to protect all images of the body against objectification and exploitation.

186. Pratt & Sossin, *supra* note 183 at 304 (summarizing the contribution of Doreen McBarnet to the study of discretion). See Doreen J. McBarnet, *Conviction: Law, the State and the Construction of Justice* (London: Macmillan, 1981).

lesser criminal offence of invasion of privacy should not be considered a different type of offence, but rather one that shares with child pornography offences the aim of protecting the subjects of sexual photographs from sexual exploitation. Invasion of privacy is also inherent to child pornography offences, and creating a lesser charge would provide police and prosecutors with another discretionary option to address the specifically interpersonal nature of peer exchange of sexual images without having to invoke child pornography charges.

In particular, I am concerned that adolescents should not lose the more robust dignity-based protections they are currently afforded by child pornography law. An alternative regime that focused more on autonomy would lead to young people who consent to being photographed suffering a reduced expectation of privacy in the resulting images. I consider this the subtext of some of the media coverage highlighting arguments that would remove sexting from the purview of child pornography without providing a means to distinguish harmful acts within now common, technology-aided sexual practices. Though I agree that the non-exploitative exchange of sexual images should not be prosecuted as child pornography, I encourage the creation of a lesser offence of invasion of privacy that might apply, as voyeurism does, to both adults and children. This would protect the ongoing dignity-based privacy interests everyone should enjoy in sexual photographs meant for an intimate audience. Such a move would also preserve the parallel autonomy-based approach to adult sexual imagery (which permits adults to consent to publicize their own sexual imagery) but would not consider consent to sexual photography in one limited context as an overall reduction in one's legally enforceable expectations of dignity-based privacy.

Robert C. Post has theorized that the harms of privacy violations that stem from dignity interests are intuitively powerful because they arise from a "rupture of significant normative expectations," where "[i]nfringements of these norms are experienced as intrinsically harmful, because they are violative of the self."[187] Post's notion of the integrity of the self is fundamentally intersubjective: the self is embedded in a social fabric where all members of the community owe one another a basic level of respect. Non-consensual circulation of nude or intimate photographs suffers from an in-between orientation because Canadian legal culture considers a person's dignity to be seriously harmed by non-consensual nude

187. "Three Concepts of Privacy" (2001) 89 Geo. L.J. 2087 at 2092.

photography (voyeurism), but appears willing to concede non-consensual public circulation of an intimate photograph as the price an adult pays for having participated in such photography. Canada is in a better position to resist this result than the United States, where the alienability of adult privacy and of dignity rights to one's image is more wholesale.

In short, Canadian child pornography jurisprudence is quietly developing a framework for understanding the dignity-based privacy rights of the subject of photographs that may influence the development of broader privacy rights in photographs in Canada. Some aspects of the harms caused by child pornography offences are closely connected to the age of the victims (*e.g.*, their enhanced vulnerability to exploitation); other aspects of the privacy harms suffered by the subjects of photographs would be experienced by anyone. Specifically, the privacy rights articulated in the child pornography case law should have implications for adult privacy rights in relation to non-consensual circulation of nude photographs (including those produced by a body scanner) and of sexual photographs meant for an intimate audience. Accepting these harms in cases where photographs feature children is more straightforward because children are not deemed able to consent, but adults should retain these same dignity-based interests, even after attaining the capacity to voluntarily engage in nude or sexual photography.