Oppression of children intellectualized as free expression under the Canadian Charter: A reanalysis of the Sharpe possession of child pornography case

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Overview of R. v. Sharpe

In R v. Sharpe, the Canadian Supreme Court held that “simple possession” of child pornography did not violate the Canadian criminal code as long as the material was for the use of its creator only and self-authored without the involvement of any other person (i.e. no child was used to create the images, text or other representation). The Court further held that the section of the Canadian criminal code prohibiting simple possession under these conditions was a violation of the S. 2 (b) Charter right to freedom of expression. “Simple possession” refers to possession of solely self-created child pornography without the intent to distribute. This article reanalyzes this Canadian Supreme Court decision.

The Court described the material falling under the Canadian Criminal Code legal definition of child pornography in the following terms:

“Child pornography”, as defined in S. 163.1(1) of the Code, includes visual representations that show a person who is or is depicted as under the age of 18 years and is engaged in or is depicted as engaged in explicit sexual activity and visual representations the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of 18 years. “Child pornography” also includes visual representations and written material that advocates or counsels sexual activity with a person under the age of 18 years that would be an offence under the Code (Court summary, emphasis added).

The Court made clear that the visual material captured in the offence of “simple possession” of child pornography depicts:

acts at the extreme end of the spectrum of sexual activity – acts involving nudity or intimate sexual activity represented in a graphic and unambiguous fashion. Thus, representations of casual intimacy, such as depictions of kissing or hugging, are not covered by the offence. It targets visual materials only where they feature a sexual organ or anal region as a “dominant characteristic” for a “sexual
As regards advocating or counselling sexual activity with a minor, the writings or visual representations would be prohibited only if they referred to criminal acts under the code:

Writings are caught only where they actively advocate or counsel *illegal sexual activity* with persons under the age of 18 (73, emphasis added).

In *Sharpe*, the writings in the defendant’s possession did counsel that children are appropriate sexual objects as is clear from the testimony on the content of that material:

Also entered into evidence was a collection of 17 stories written by the respondent. At trial, Detective Waters commented as follows on these stories:

They’re extremely violent stories, the majority of them, with sexual acts involving very young children, in most cases, under the age of 10 engaged in sadomasochistic and violent sex acts with either adults or children, other children, both male and female.

They’re extremely disturbing with just the descriptions of the sexual acts with the children. . . . And the theme is often that the child enjoys the beatings and the sexual violence and that they are wanting it and actually seeking it out (138).

Note also that imaginary children and youths depicted are also included in the Canadian criminal code definition of child pornography:

This definition of child pornography catches depictions of imaginary human beings privately created and kept by the creator (39).

Thus the Canadian Supreme Court clarified the state of the law in regards to the prohibitions regarding “simple possession” *before* the decision in *Sharpe* as follows:

the prohibition extends to visual expressions of thought and imagination, even in the exceedingly private realm of solitary creation and enjoyment (39).

The prohibition also captures visual depictions of persons older than 18 who nevertheless look as children in sexually explicit material. The material must fit the objective criteria for child pornography as assessed by a reasonable observer. The intent of the individual who created or possesses the material is irrelevant. The criteria for child pornography under the original definition then being: a) explicit sexual representations in visual form involving a real or imagined child or youth with a sexual purpose as a dominant characteristic and/or b) written or visual material advocating or counselling in favour of *unlawful* sexual activity with a child or adolescent both with no exemptions. Note that the Canadian criminal law as regards simple possession of child pornography does not in fact capture intellectual or artistic representation, in