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CAVEAT

SEXTING PROSECUTIONS: MINORS AS A PROTECTED CLASS FROM CHILD PORNOGRAPHY CHARGES

Sarah Thompson*

INTRODUCTION

First love is only a little foolishness and a lot of curiosity.

George Bernard Shaw

Teenagers will explore their sexuality; this is no new phenomenon. However, the ways that teens are exploring their curiosity is changing with technology. This trend has serious repercussions for teens, society, and the law. ‘Sexting’—defined as the act of sending sexually explicit photographs or messages via cell phone¹—is one recently-developed means of sexual exploration. The practice overlaps with the production, distribution, and possession of child pornography that is banned by both state and federal law.² Due to the overlap, minors have been prosecuted under child pornography statutes for producing or sending images of themselves or other minors.³ This is not the proper use of child pornography prosecution, nor is it a solution to the problem of minors sexting. This Comment argues that minors should be a protected class against which child pornography

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1. Definition of “Sext” in English, Oxford Dictionaries, http://oxforddictionaries.com/us/definition/american_english/sext—2?q=sexting (last visited Nov. 9, 2013).

2. *See, e.g.*, 18 U.S.C.A. § 2251 (West).

3. *See, e.g.*, A.H. v. State, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007); State v. Canal, 773 N.W.2d 528, 532 (Iowa 2009); Kristen Schorsch, *Sexting May Spell Court for Children*, CHI. TRIB. (Jan. 29, 2010), http://articles.chicagotribune.com/2010-01-29/news/1001280853_1_sexting-cell-phones-nude.

charges cannot be brought. The solution to the sexting problem does not lie in prosecution. Instead, states should incorporate sexting education into state sexual education and health curricula. Education will help ensure that minors are aware of the risks associated with sexting, without being harmed under a statute that is meant to protect them.

I. SEXTING PROSECUTIONS AND CURRENT STATE LAWS

Law-makers in some states have noted the problem of minor sexting and have created sexting specific statutes that regulate the creation, transmission, or possession of sexualized images of minors specifically by minors. For instance, according to the Florida State Legislature, a minor engages in sexting when “he or she knowingly: uses a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another minor any photograph or video of any person which depicts nudity... and is harmful to minors” or “possesses [any such] photograph or video of any person that was transmitted or distributed by another minor.”⁴ Other states have applied traditional child pornography laws to situations that involve minors sexting.

Lawmakers, prosecutors, and courts’ primary interest in sexting is to prevent the abuse and sexual exploitation of children by extinguishing the market for child pornography.⁵ According to the National Center for Missing & Exploited Children, one-fourth of victims of child pornography produced and posted the images themselves.⁶ Courts have also considered the reputational and emotional harm to minors pictured in pornographic images.⁷ Like child pornography produced out of coercion or sexual abuse, self-created sexting-based images “‘live on,’ creating feelings of anxiety, regret, and fear that are similar to those experienced by traditional child pornography victims.”⁸

Although the primary motivation for sexting regulation and

4. FLA. STAT. ANN. § 847.0141 (West 2012).

5. *See, e.g.*, *People v. Shields*, 199 Cal. App. 4th 323, 334 (2011).

6. *The Perils of Teen Sext*, CHI. TRIB. (Apr. 20, 2009) http://articles.chicagotribune.com/2009-04-20/news/0904190088_1_sexting-child-pornography-teen.

7. Susan Hanely Duncan, *A Legal Response Is Necessary for Self-Produced Child Pornography: A Legislator’s Checklist for Drafting the Bill*, 89 OR. L. REV. 645, 659 (2010).

8. *Id.*

prosecution is to protect minors from the malicious practice of child pornography and child exploitation, courts are also motivated by the idea that minors lack the adequate mental capacity to make decisions related to sexual conduct.⁹ There are tragic stories of teens driven to depression and suicide after their nude images were dispersed by and among their peers.¹⁰

Recently, the prevalence of sexting has caught the attention of law-makers and prosecutors. According to the Pew Institute, fifteen percent of cell-phone-owning teens aged twelve to seventeen say they have received sexually suggestive nude or nearly nude images of someone they know via text messaging on their cell phone.¹¹

Seeing the potential danger in an expansion of sexting, prosecutors have charged minors for sexting under state child pornography laws. In Indiana in 2010, a thirteen-year-old girl and a twelve-year-old boy were charged with child exploitation and possession of child pornography for sending each other nude pictures.¹² In Pennsylvania, one prosecutor charged ten minors in two sexting cases in 2010.¹³ In Florida, a sixteen-year-old girl was adjudicated delinquent on charges of producing, directing or promoting a photograph or representation that she knew included sexual conduct of a child after she and her seventeen-year-old boyfriend took nude pictures of themselves engaged in sexual conduct and emailed them to each other.¹⁴ The Florida appeals court upheld the decision, citing common justifications for sexting prosecution: (1) “that prosecuting the child under the statute in question is the least intrusive means of furthering the State's compelling interest”¹⁵ in protecting the exploitation of children,¹⁶

9. A.H., 949 So. 2d at 238–39; Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography*, 44 VAL. U. L. REV. 1035, 1038 (“Courts have increasingly relied on research about adolescent behavior and brain development to underscore the importance of juvenile court discretion.”).

10. Michael Inbar, *Sexting Bullying Cited in Teen's Suicide*, TODAY NEWS (Dec. 2, 2009, 10:26 AM), http://www.today.com/id/34236377/ns/today-today_news/t/sexting-bullying-cited-teens-suicide/#.UjfcwMZ6YTg (discussing a thirteen-year-old girl who hung herself after she was bullied regarding a topless photo she sent to a boy at her school, who in turn forwarded the photograph to her schoolmates and to a neighboring school, and an 18 year old who killed herself after an ex-boyfriend forwarded nude photos of her).

11. Amanda Lenhart, *Teens and Sexting*, Pew Internet and American Life Project, (Dec. 2009), http://ncdsv.org/images/PewInternet_TeensAndSexting_12-2009.pdf.

12. Schorsch, *supra* note 3.

13. *Sexting Leads to Child Porn Charges for Teens*, CBSNEWS (July 7, 2010, 2:40 PM), http://www.cbsnews.com/8301-18563_162-6552438.html.

14. A.H., 949 So. 2d at 235.

15. *Id.* at 236.

16. *Id.* at 238.

(2) that psychological trauma to the teenagers involved may result from these videos,¹⁷ and (3) that the “appellant was simply too young to make an intelligent decision about engaging in sexual conduct and memorializing it.”¹⁸

Many state laws allow for prosecution of minors engaged in sexting under state child pornography laws.¹⁹ Under current Ohio law, a minor who is caught creating, distributing, or possessing an explicit image of a minor (either himself/herself or another) could face a felony child pornography charge.²⁰ Similarly, in Michigan, a child could be charged under state pornography laws for creating, possessing, or distributing sexually explicit images of a minor child—again, allowing for the prosecution of the minor child who created or was pictured in the image.²¹

Some states have passed sexting-specific statutes to lessen the penalties against minors engaged in sexting. For example, Texas has passed a law that will impose a misdemeanor on a minor’s first sexting offense. Under the statute, a minor may be sentenced to community supervision if he or she completes a state-sponsored sexting education course that is paid for by his or her parents.²² In Pennsylvania, specific sexting-legislation makes *possession* of an explicit image a summary offense and *transmission* of the image a misdemeanor.²³ The statute also encourages judges to “first consider referring the minor to a diversionary program, and may order them to participate and complete an educational program.”²⁴

II. THE PROTECTED CLASS

Charges against minors under child pornography laws have

17. *Id.* at 238–39.

18. *Id.*

19. For a complete list of state sexting and child pornography laws see Sameer Hinduja & Justin W. Patchin, *State Sexting Laws*, CYBERBULLYING RESEARCH CTR. (June 2013), http://www.cyberbullying.us/state_sexting_laws.pdf.

20. *Laws Pertaining to Sexting in the State of Ohio*, MOBILE MEDIA GUARD, http://mobilemediaguard.com/states/sexting_laws_ohio.html (last visited Nov. 9, 2013).

21. *Laws Pertaining to Sexting in the State of Michigan*, MOBILE MEDIA GUARD, http://mobilemediaguard.com/states/sexting_laws_michigan.html (last visited Nov. 9, 2013).

22. Hinduja & Patchin, *supra* note 19, at 7.

23. *Id.* at 6.

24. *Id.*

faced objections on the grounds of privacy,²⁵ the First Amendment, and unreasonable search and seizure.²⁶ Others have criticized the prosecution based on freedom of expression and equal protection grounds.²⁷ The legal concept of the protected class is the best argument against prosecuting minors under child pornography laws. Black's Law Dictionary defines a 'protected class' as a group of people who benefit from protection by statute.²⁸ The term is most commonly used to refer to groups that are protected under Title VII of the Civil Rights Act from discrimination based on race, religion, sex, color or national origin.²⁹ This term has also been used to delineate consumers, competitors, and potential competitors as protected classes under antitrust law.³⁰

In the case of children, the status of a protected class under a law should protect them from prosecution under that law. For example, in *In Re Megan R*, a minor was deemed to be "the protected victim of statutory rape under Pen. Code, § 261.5, a provision designed to criminalize the exploitation of children rather than to penalize the children themselves."³¹ In this case, the state tried to prosecute a minor who engaged in sexual conduct, which gave rise to the statutory rape claim (in addition to prosecuting the adult with whom the minor had engaged). The court held that it could not be the legislature's intention to punish minors under a law that was designed to protect them.³² Similarly, the Utah Supreme Court held that it was an "absurd result" to charge two minors with sexual abuse of a child for sexually touching one another.³³ The court stated that to designate the children as perpetrators meant that there was "no discernible victim that the law seeks to protect."³⁴

Almost every state allows sexual relations between young

25. A.H. v. State, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007).

26. CBS NEWS, *supra* note 13.

27. Dr. JoAnne Sweeny, *Do Sexting Prosecutions Violate Teenagers' Constitutional Rights?*, 48 SAN DIEGO L. REV. 951, 990 (2011).

28. *Black's Law Dictionary* (9th ed. 2009).

29. Christina M. Sautter, *A Matter of Class: The Impact of Brown v. Mclean on Employee Discharge Cases*, 46 VILL. L. REV. 421, 426 (2001).

30. Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 41 (1989).

31. 42 Cal. App. 4th 17, 25 (1996) (holding that a minor could not be guilty of burglary on the theory that she broke and entered with the intent to aid or perpetrate her own statutory rape).

32. *Id.* at 24–25, 49 (1996).

33. *State ex rel. Z.C.*, 165 P.3d 1206, 1211–12 (Utah 2007).

34. *Id.* at 1212.

people and teens who are close in age.³⁵ In New York, for rape in the second degree, the victim must be under fourteen years of age and the defendant must be eighteen years of age or older. For rape in the third degree, the victim must be under seventeen years of age, and defendant must be twenty years of age or older.³⁶ In Maine, a defendant may be charged with sexual abuse of a minor if he or she engages in a sexual act with a person who is either fourteen or fifteen years of age, but only if the defendant is at least five years older than the other person.³⁷ The basic idea underlying these laws is that being a victim of statutory rape precludes prosecution for statutory rape.³⁸

Similarly, children should be treated as a protected class under child pornography laws. These laws seek to protect children from exploitation in the production, reproduction, and distribution of their naked images.³⁹ Given this purpose of child pornography laws, prosecuting children under child pornography laws would do more harm than good.

This is an area of the law where courts must consider the best interest of the child. Scholars have found that youth arrests often signal serious problems to friends, families, neighbors, and bring with it a social stigma.⁴⁰ Early criminal labeling can also have a negative psychological impact on young offenders' views of themselves.⁴¹ Because "adolescents are generally less aware of risks because they have less knowledge and experience than adults, and they typically discount the long-term consequences of their decisions,"⁴² saddling them with court-sanctioned punishment and the stigma of prosecution is not in the best interest of the child.

35. Sweeny, *supra* note 27, at 954.

36. 3 WHARTON'S CRIMINAL LAW § 285 (15th ed.).

37. ME. REV. STAT. tit. 17-A, § 254 (2013).

38. Russell L. Christopher, *Should Being a Victim of a Crime Be a Defense to the Same or a Different Crime?*, 28 PACE L. REV. 783, 790 (2008).

39. Adam Walsh Child Protection and Safety Act of 2006, PL 109-248, July 27, 2006, 120 Stat. 587 ("Viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.").

40. He Len Chung, Michelle Little, & Laurence Steinberg, *The Transition to Adulthood for Adolescents in the Juvenile Justice System: A Developmental Perspective*, in ON YOUR OWN WITHOUT A NET: TRANSITIONS TO ADULTHOOD FOR VULNERABLE POPULATIONS 68, 83 (D. Wayne Osgood, E. Micahel Foster, Constance Flanagan, Gretchen Ruth eds., 2005).

41. *Id.*

42. Levick & Moon, *supra* note 9, at 1038.

III. RECOMMENDED REFORM

Prosecution and legal penalty is not the proper way to deal with the problem of minors sexting, and it would do more harm than good.⁴³ Since the goal of child pornography statutes is to protect minors from exploitation and reputational harms, it is wrong to prosecute minors under a statute intended to protect them. Furthermore, such prosecution is inconsistent with the concept of the 'protected class.' As such, state legislatures should amend their child pornography statutes to indicate that minors, categorically, may not be subject to prosecution under these statutes.

As discussed above, some states have passed sexting-specific statutes. Under some of these laws, sexting is a misdemeanor offense and other statutes favor diversionary and educational programs in place of more traditional punishments. Although these statutes offer a better alternative to prosecution under child pornography laws, the fact remains that these states still treat sexting as a criminal offense and punish the minor.⁴⁴ These comparatively less-severe prosecutions still carry the stigma and psychological harm of court-implemented punishments. As such, states should repeal any laws that seek to punish minors for sexting.

Although prosecution and punishment are not the answer, there is a place where the law can do some good. State lawmakers should incorporate sexting education into health and sexual education curricula. It is important that children are taught that these images may end up in the hands of child predators and may cause them grave emotional harm. Punishment should enter into the equation, but should be driven by schools and parents.

There are many reasons why incorporating sexting education into state-mandated health education curriculum is the proper response to the problem of minors sexting. First, many state legislatures believe that education can produce positive results in this area. Under some statutes, mandatory education classes are

43. Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues - Structured Prosecutorial Discretion Within A Multidisciplinary Response*, 17 VA. J. SOC. POL'Y & L. 486, 488 (2010).

44. Sweeny, *supra* note 27, at 961 (2011). For example, Connecticut law implements a misdemeanor charge for sexting as a minor, but minors may still face up to one year in prison and a 2,000 dollar fine. *Laws Pertaining to Sexting in the State of Connecticut*, MOBILE MEDIA GUARD, http://mobilemediaguard.com/states/sexting_laws_connecticut.html (last visited Nov. 9, 2013).

enforced as a punishment for minors caught sexting.⁴⁵ However, if there is a value to education in this area, which legislators seem to believe that there is, then it should be offered to preempt youth sexting, not to remedy a harm that has already occurred.

Second, this would allow educators to get ahead of the problem by introducing students to the risks of sexting at an early age. Third, implementing these curriculum changes will not be as controversial as other sexual education topics—like the debate over abstinence-only education or whether schools should provide contraceptives. In fact, ninety-five percent of teachers support teaching cyberethics, cybersafety, and cybersecurity in school curricula.⁴⁶

Even states with more decentralized approaches to sexual education have the ability to mandate guiding requirements. For example, Ohio has state-wide general sexual education guidelines that require, among other things, education related to venereal disease and drug abuse prevention, but that make no explicit requirements about what should be taught.⁴⁷ Benchmarks requiring the teaching of sexting education and Internet privacy could be easily incorporated into existing standards even if these standards are broad and will be implemented by local educators.

In these education sessions, educators should stress to students the repercussions of their actions—that the pictures will be leaked, traced to them, will ‘live on’ on the Internet where they may end up in the possession of a child pornographer, and that these images could cause serious and long-lasting harms. Understanding the risks of sexting will decrease the likelihood that juveniles will participate in sexting activities in the future.⁴⁸ Educators should also be open to discussing the pressures that students face and make themselves available for one-on-one counseling. In order to provide the best education and counseling, teachers may need to

45. For example a Texas law requires that minors prosecuted under sexting laws complete a court-ordered education program about sexting’s long-term, harmful repercussions. *Sexting Prevention Legislation Signed into Law*, ATTORNEY GEN. OF TEX (Aug. 1, 2011), https://www.oag.state.tx.us/alerts/alerts_view.php?id=262&type=3.

46. DAVINA PRUITT-MENTLE & PORTIA PUSEY, NATIONAL CYBER SECURITY ALLIANCE, STATE OF K12 CYBERETHICS, SAFETY AND SECURITY CURRICULUM IN U.S.: 2010 EDUCATOR OPINION (Feb. 15, 2010), <http://www.edtechpolicy.org/cyberk12/Documents/C3Awareness/2010Survey.pdf>.

47. Pat Holmes, *Ohio still leaves sexual education to each district*, THE COLUMBUS DISPATCH (Jan. 29, 2012, 10:21 AM), <http://www.dispatch.com/content/stories/local/2012/01/29/ohio-still-leaves-sexual-education-to-each-district.html>.

48. Joanna L. Barry, *The Child As Victim and Perpetrator: Laws Punishing Juvenile “Sexting”*, 13 VAND. J. ENT. & TECH. L. 129, 149 (2010).

attend training related to Internet security and privacy.⁴⁹

Once schools have set clear expectations regarding sexting, they should implement fair and reasonable punishment schemes. One author has mentioned that schools are reluctant to take the lead on punishing sexting for fear of being sued.⁵⁰ A proper handling of the serious punishment would decrease the risk of litigation. First, school officials should show the image to as few people as possible, in order to protect the privacy and minimize harm to the minor. Also, schools should seek to punish the child who produces the image, the child who solicits the image, and any child who passes it on in accordance with their culpability.

CONCLUSION

Minors should not be prosecuted under child pornography statutes, but should be treated as a protected class under child pornography laws. Even laws that implement lesser punishment for sexting are an inappropriate response to the problem of minor sexting. The best way to prevent this practice is to reach students at a young age to inform them of the consequences related to sexting. As such, state legislatures should codify the idea of a minor protected class under child pornography laws and should repeal sexting-specific laws. The state response to this problem should be administered through middle and high school health education programs. However, there is a concern about the message that repealing anti-sexting statutes might send to minors. By repealing the statutes, it might send the message that minor sexting is no longer a priority to state law-makers. Law-makers, schools, and educators can overcome this message by creating and implementing educational programs, and instituting reasonable punishment for those who disregard the school's standards.

49. "Over three quarters of teachers have spent less than six hours on any type of professional development education related to cyberethics, safety, and security within the last 12 months" and only "48 percent of teachers polled responded that they were prepared to discuss the dangers of sexting." Pruitt-Mentle & Portia, *supra* note 46, at 4, 10..

50. Duncan, *supra* note 7, at 668 ("[P]arents of cheerleaders in Washington State recently sued the school after their daughters were suspended from the cheerleading team for sending nude photos of themselves to their boyfriends. The parents alleged that their daughters' due process rights were violated because the school 'needlessly shar[ed] the photos with other school staff members and fail[ed] to promptly report the matter to police as possible child pornography.'").