

Should teens have the right to sext? Privacy, consent, and social media

Hasinoff, Amy Adele (forthcoming, 2012) “Should teens have the right to sext? Privacy, consent, and social media” In J. Greenberg and C. Elliott (Eds.) *Communication in Question: Competing Perspectives on Controversial Issues in Communication Studies*. Toronto: Thomson Nelson.

In early 2009, parents of nearly twenty students at a high school in Pennsylvania received a letter from the district attorney that opened with this statement: “[Your child] has been identified in a police investigation involving the possession and/or dissemination of child pornography” (Searcey, 2009). He explained that school officials had found sexually explicit photos of classmates on some of the students’ cell phones, and those appearing in or possessing the photos could face child pornography charges unless they agreed to complete an education program and serve six months of probation, including random drug testing (Walczak, et al., 2009). Most of the students agreed to a version of this deal, while three girls and their parents took legal action to obtain a restraining order preventing the district attorney from filing child pornography charges.

“Sexting,” which is often defined as the practice of sending sexually explicit images or text through cell phones or via internet applications, has been widely discussed in U.S. mass media since December 2008, when a national survey reported that 20 percent of teenagers had sexted (The National Campaign to Prevent Teen and Unplanned Pregnancy, 2008).¹ Educators typically advise abstinence from sexting while law enforcement officials respond to sexting with child pornography charges for the adolescents involved. Neither adequately separates the abusive forms of sexting, such as maliciously distributing a private image, from the relatively harmless practices of consensual sexting.

A consensus has emerged in the U.S. that a criminal justice response is necessary to address sexting. While few legal analysts argue that felony charges are necessary, most recommend reducing the penalty for consensual sexting between teenagers to a misdemeanor or to apply other lesser consequences, such as in the Pennsylvania case. To date, most legal reforms U.S. state legislatures are considering involve this type of reduction in the severity of the crime for sexting teenagers who meet a narrow set of conditions (Greenberg, 2010; Sacco, et al., 2010). By maintaining that sexting should be at the very least a misdemeanor offense, U.S. laws reflect the dominant idea that teenagers should not have the right to sext.

My central argument is that if teens have the right to consensually create sexts, then they can also have the right to keep these images private—even if they distribute images of themselves selectively. Affirming that teenagers have the right to consensually create and share explicit images helps to protect them from peers who might maliciously distribute their private photos.

¹ A different study reports that only 4% of teenagers have sexted, though it defines sexting more narrowly (Lenhart, 2009).

Sexting and the law

Advances in digital photography and distribution technologies have made it easy for many people to produce and distribute images of their sex acts. When teenagers do this, the photos and videos they create and share can be legally classified as child pornography since the law makes no exception for minors (people under 18 years old) who create sexually explicit images of themselves. For example, in a U.S. state such as Pennsylvania, two 17-year-olds can legally have sex, but if they create a digital image of their sex acts, even for their own use, this depiction can meet the legal definition of child pornography. The fact that child pornography laws are vague enough and broad enough to use against sexting teenagers amplifies the panic about sexting: the label “child pornography” makes sexting seem more dangerous and deviant while the law allows prosecutors to pursue these cases, adding to the public discussion of the issue.

While the *Canadian Charter of Rights and Freedoms* and the U.S. *First Amendment* both provide some protections for freedom of expression for people of all ages,² child pornography laws in both countries take priority. Child pornography laws were designed to address child sexual abuse and exploitation, but when applied to minors they criminalize both teens who distribute images without permission as well as self-expression and consensual behaviors between teenagers. These laws were also intended to combat the sexual exploitation of all minors more broadly by seeking to reduce the distribution and availability of sexual images of minors.

To date, no adolescent in Canada has been charged with child pornography offenses for private, consensual sexting. This is in part because a 2001 Canadian Supreme Court decision (“*R. v. Sharpe*,”) established that privately held images depicting lawful sexual activity do not qualify as child pornography. In Canada, then, two minors who engage in legal sex acts are allowed to photograph these acts but not share these images with any third parties. There is no such exception for private use in the U.S., and indeed parents and school officials have discovered private images on adolescents’ cell phones and then initiated child pornography charges against teens and/or their young adult partners.

If an image is explicit enough to qualify as child pornography, a prosecutor who is alerted by a parent or school about it can choose to charge the minors involved with producing, distributing, and possessing child pornography. When a common behavior like sexting is subject to harsh punishment, authorities decide whom to investigate and whom to prosecute—these decisions are not always fair.

Laws that prohibit all forms of sexting are particularly troubling because girls are disproportionately punished for sexting, even if it is consensual. Though surveys indicate that adolescent boys and girls sext at similar rates, much of the attention and punishment for sexting is directed at teenage girls who take photos of themselves. Few people seem concerned about teenage boys involved in sexting (unless they become registered sex offenders) because boys are not usually required to maintain the ideals of sexual purity

² Each country has a different history and approach to protecting citizens’ freedom of expression rights.

and chastity imposed on teenage girls. The double standard that teenage boys who are sexually active are often praised or tolerated while girls are criticized and shamed for engaging in the same activities has a significant impact on the responses to sexting. This means that girls who sext may be punished—supposedly to protect them from harming themselves—while boys who sext are often ignored, since many people think, “boys will be boys.” This leads to cases like one in Seattle in which two girls were suspended for sexting while the boys who distributed their private images without permission were not punished at all (Blanchard, 2008).

The illegality of sexting does not just affect girls excessively; it also impacts queer³ youth, racialized youth, and low-income youth, whose sexual activities are often scrutinized more thoroughly and punished more severely. For example, in a 2010 Oregon case, the mother of a 16-year-old girl disliked that her daughter was dating a young woman (who was 19 years old), so she took her daughter’s cell phone and turned it over to local police. Since the girls had exchanged some explicit text messages and suggestive photos, the older girl was charged with producing child pornography, which could have netted her six years in prison and mandatory sex offender registration (Slovic, 2010). Race may have also played a role in this case, as both girls are African American and the justice system in the U.S. has a long history of enforcing laws more harshly on people of color (Alexander, 2010). In another case in Ohio, a prosecutor singled out a girl in the foster care system for sexting. In a TV news segment, a state public defender commenting on this case criticized the prosecutor for misusing child pornography law by “[choosing] an economically disadvantaged person to make an example of” (“Teen faces,” 2008). Ensuring that adolescents have the right to sext is the most effective way to protect them from these kinds of unfair prosecutions.

Some legal analysts and prosecutors contend that punishment for sexting is necessary because sexually explicit images of minors, regardless of the conditions of their production, could facilitate adults’ sexual abuse of other minors. This argument contends that an adult’s abusive actions may have been aided or encouraged by viewing a teen’s self-created image without her permission. On U.S. television news-commentary program *The O’Reilly Factor*, a former prosecutor argues for criminal consequences for a 15-year-old girl who posted images of herself online. She argues: “This isn’t a crime just against this one child. This is against all children. Because those pictures, while they may not have injured her, led perpetrators to seek more images, more pictures of kids, which puts more kids at risk as victims” (O’Reilly, 2004). This kind of attempt to protect minors from objectification and exploitation is well intentioned but it paradoxically blames teenage girls for contributing to the broad social problem of child sexual abuse. More importantly, the vague possibility that a sext may contribute to an abuser’s fantasies is not a good enough reason to prohibit the practice, especially given all the other problems this prohibition creates.

In addition to worries that sexts will enter the child pornography market, some commentators also refer to the dangers of online predators to argue that sexting must be

³ Here I use “queer” as an umbrella term to refer to lesbians, gay men, transgender people, bisexual people, and anyone who identifies with the term.

criminalized and prevented. A former prosecutor speaking on a CNN news program argues that criminal charges for sexting are necessary because, she says, “Adults in the real child pornography business will hunt you down and take advantage if they find these pictures, and they will” (CNN, 2009). This comment implies that taking a nude picture of oneself virtually guarantees that a predator “will hunt you down.” Prosecutors and media commentators tend to refer to victimization by online predators as the ultimate and potentially deadly consequence of sexting. However, the concern about online predators targeting minors whose photos they have found online is largely spurious, since the vast majority of physical and sexual assaults against adolescents are still committed by family members, intimate partners, and acquaintances, as they were before digital media were invented (Wolak, et al., 2008).

Sexting and consent: Making crucial distinctions

While the risks of online predators are exaggerated in discussions of online safety, the more common problem that private images can be distributed without permission is a serious issue. Just as it is now easy to send a sexual partner a nude photo, it is also very easy for someone to send that photo to many other people—though both of these acts are often called “sexting,” they are very different behaviors with different motivations, intents, and outcomes. The commentary about sexting typically views all forms of sexting (consensual or abusive) as equally damaging and harmful. Part of the problem is that child pornography laws do not account for the fact that teens sometimes produce and share such images; if the image is explicit enough, the law considers all parties involved (the victims, perpetrators, and consensual participants alike) as child pornography producers, distributors, and possessors.

People may enjoy sharing images consensually, but girls report being traumatized and humiliated if someone distributes their private images without permission (Powell, 2010). It is vital to carefully distinguish between types of sexting and to fully consider questions of consent and intent in any sexting incident. If a consensually produced image is shared between partners or friends, then this type of sexting can be a sex act and a form of interpersonal communication. On the other hand, if one or more people distribute this private image without permission, then this type of sexting is a form of sexual harassment and is nonconsensual. While the aim of consensual sexting is pleasure and communication, the goal of abusive sexting is often to harm and humiliate someone. These are each very different behaviors with implications that demand different responses. In short, consensual sexting should be ok, abusive sexting should not.

The fact that adolescents currently have no right to sext means that it’s possible to presume that a teen who consensually sexted her partner is just as guilty of crime and wrongdoing as someone who maliciously distributes her photos with the intent to harm and humiliate her. Currently, a teenager who suffers from abusive sexting has few options for recourse against the person who purposefully harmed her, since reporting the incident to authorities makes her vulnerable not only to harsh judgment and punishment but potentially to child pornography charges, especially in the U.S. The problem with viewing sexting as simply deviant and criminal for everyone involved is that it makes the

malicious distribution of private images seems like a normal and inevitable part of sexting (Slane, 2010). In fact, most private sext images remain private.⁴ If the typical sexting scenario is instead viewed as the consensual exchange of images then it is obvious that sexting is not inherently harmful, but that the malicious distribution of private images certainly is. I argue that in order to accurately recognize harmful, malicious behaviors, it is necessary to first recognize and acknowledge teenagers' right to engage in consensual sexting.

A better response to sexting

Minors already have some limited rights to sext in Canada, thus the need for legal reform is currently less urgent than in the U.S. However, in both Canada and the U.S., many online safety programs exclusively counsel sexting abstinence. Since a significant number of teens are sexting, it seems unlikely that any school program or public service announcement could convince them to avoid the practice. Educational messages could instead give youth (and adults) practical advice about the precautions they could take when using the internet and cell phones as a part of their sexual relationships.

In order to reduce the incidence of abusive sexting, online safety messages could focus on discouraging unauthorized forwarding. For example, one component of MTV's 2010 online safety campaign advises against forwarding images. The website explains: "When you get a sext, you might not know if the person would be cool with you sending it around, so better to hit delete rather than forward" (2010). The site also warns that forwarding may "help humiliate the person in the pic—contributing to their emotional distress" (2010). While this kind of advice might seem obvious, it is actually very different from most educational messages about online safety, which often target girls and advise them to simply abstain from sexting in order to protect themselves (Hasinoff, 2010; Shade, 2007).

Abusive sexting occurs within the larger context of gender- and sexuality-based victimization in schools. Girls, queer youth, and other marginalized youth are most likely to be harassed and bullied if someone distributes their private sexual images. Many education researchers stress that bullying and harassment reflect broad social norms and school cultures, and can only be addressed effectively through collective action by administrators, teachers, and students (see for example: Meyer, 2009; Perrotti & Westheimer, 2001). Neither legally prohibiting sexting nor advising abstinence is likely to reduce the incidence of abusive sexting or sexting-related harassment. The problem is much larger than cell phone cameras and requires broadly addressing gender and sexual harassment by making significant changes in the attitudes and policies that underlie these

⁴ In Cox Communications' survey, only 2% of teens (13-18 years old) who sent a sext report that their image was forwarded to someone they did not want to see it (Thomas, 2009, p. 38). In MTV's survey, 14% of teens who sexted report that the person they sent the image to shared it with other people without their permission (Gatti, 2009, p. 15). Both the Cox and the MTV studies were produced in partnership with the National Center for Missing & Exploited Children, but Cox may be biased nonetheless toward reporting lower rates of victimization because they are invested in demonstrating that cell phones are safe.

recurring issues. If teens had the right to sext, it would be clear that addressing abusive sexting and sexual harassment is the way forward.

Conclusion

While many legal and educational commentators believe they are protecting youth from victimization by making sure sexting is illegal, I argue that they are actually exacerbating the problem. This is because when sexting is illegal for everyone, it lets abusive sexters off the hook. One of the ways that abusive sexters avoid blame is because of the idea that no teenager should be creating sexting images in the first place. This leads to the problematic consensus in mass media and law that everyone involved in sexting—regardless of whether their behavior was consensual or abusive—is equally guilty of wrongdoing.

Teens should have the right to sext: this means they would have the same rights as adults to produce sexual images of themselves without fear of prosecution for creating child pornography. The right to sext is also about the right to demand that these images are kept private. While further legal reforms are needed to protect online privacy (for youth and adults), allowing teens the right to sext is the first step to clarifying that people who receive these images have no right to distribute them further without permission. The panic about sexting teens highlights the need for broader conversations about social media that can fully account for the complicated issues of privacy and consent in new digital media environments.

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