

STOP Newsletter

**Services and Training
for Officers and Prosecutors**

Inside this Issue:

PAGE 2

How Should Teens' "Sexting"
- the Sending of Revealing Photos -
Be Regulated?
(continued)

PAGE 3

Firearms Prohibition Notification
To Domestic Violence Offenders

How Should Teens' "Sexting" – the Sending of Revealing Photos – Be Regulated?

By Julie Hilden

Recently, the Wall Street Journal and its law blog reported on a Pennsylvania controversy over "sexting" – the practice of sending nude or semi-nude photos of oneself or others via cell phone. After some "sexted" photos were confiscated from students at a high school, the local District Attorney threatened to file broad child-pornography charges if the teens were not willing to enroll in a five-week compulsory educational program covering topics such as "what it means to be a girl in today's society." (This topic is telling; sexting controversies often seem to be connected to adults' discomfort with girls' expression of their sexuality. It seems likely, too, that discomfort with gay teens' sexuality will eventually lead to a sexting controversy as well.)

The ACLU rightly responded with a lawsuit. Because First Amendment rights were at issue, the suit could properly be filed prior to charges being brought, in order to address the ongoing "chilling effect" on speech of the threat of prosecution hanging overhead. A federal judge has temporarily enjoined the D.A. from filing charges, with a hearing to occur at a later date.

These particular charges are ill-grounded in law, as the ACLU has pointed out. The photos at issue show teen girls in their bras or, in one case, topless. In contrast, child pornography laws typically

cover lascivious displays of the genitals and/or sexual activity. Thus, this is likely to be an easy case -- as the judge's initial ruling, granting an injunction in the ACLU's favor in part because of its high likelihood of success on the merits, indicates.

This is not the first time that old laws have proven to be a bad fit with recent technology. But it's an especially worrying example of a general problem, because both criminal charges and First Amendment rights are at issue.

In this column, I will consider how the law should respond when much harder cases regarding sexting come along, as they inevitably will. These cases would involve photos of underage teens having sex, displaying their genitals in a lascivious way, or both. Accordingly, these cases could validly form the basis for child-pornography charges. But should they always trigger charges? Or should the law be adjusted to take into account the factual nuances of the case?

Should There Be "Romeo and Juliet" And Age-Specific Exceptions for Sexting?

There is no question that if an adult traffics in photos that fit the child pornography laws – that is, photos that include a lascivious display of an underage person's genitals, or show an underage

continued on page 2



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person having sex -- it is a very serious crime, as well as despicable behavior. Indeed, the Supreme Court recently issued an opinion allowing the prosecution of even those traffickers who offer virtual child pornography (involving no real children) but believe it is real

But what if teenagers take the photographs and do the trafficking, and the subjects and recipients of the photos are exclusively the teenagers themselves? Should the crime – and the penalties – be the same?

My answer is a strong "No." We should craft new laws specifically for sexting before old laws -- designed for graver and much more morally bankrupt, dangerous, and exploitative contexts -- are applied to sexting, and serious injustice results.

One good model for the regulation of teens' sexting might be the statutory rape laws – which sometimes offer a so-called "Romeo and Juliet" exception when the two parties to an act of sex are close in age (say, 18 and 16, or 17 and 15). If a 16-year-old "sexts" a photo of himself or herself at an 18-year-old high school classmate's invitation, surely that is far less disturbing than if the 16-year-old does so at the invitation of a 40-year-old adult.

Such exceptions might accord well with our sense of when sexting is really disturbing, and appropriately deemed a crime, and when it is better addressed (if at all) with non-criminal remedies such as school suspension, parental punishments, and the like. Notably, the ACLU, in the Pennsylvania case, has suggested that "sexting," in some cases, is not innocuous and may perhaps be penalized – but not through the criminal law.

The Tricky Issues of Consent that Sexting Raises, Especially with Respect to Forwarding

"Romeo and Juliet" exceptions in the sexting context probably will do more good than harm, in practice. But they will also have costs, if they are applied as bright-line rules.

That's because sexting is, in a way, more complicated than statutory rape. Statutory rape, by definition, comes out of a consensual act of sex; if it didn't, it would just be rape. The argument is that the young person's consent is not valid due to his or her immaturity, not that consent was not given. Thus, defining a crime as statutory rape moots out the consent issue. But often, the nature of sexting is intertwined with issues of consent and lack of consent that cannot be so easily put aside.

For instance, a 16-year-old sophomore girl might "sext" a nude photo

she has taken of herself to her 18-year-old senior boyfriend, yet not intend that he share it with his 18-year-old friends. In my view, the girl's sexting the photo to the boyfriend would and should be immune from prosecution under a Romeo and Juliet exception – but one might argue that his forwarding of the photo to his same-age friends should not be immune (especially, but perhaps not only, if the girl did not consent to the forwarding). In other words, with respect to sexting, a pure age-based Romeo and Juliet exception, one that renders consent irrelevant, could be a refuge for scoundrels.

This example shows a strong tension between simple, bright-line age-based safe harbors for sexting, and a nuanced inquiry into whether the original "sexter" consented to forwarding. And there may be another nuance as well: Based on my admittedly limited knowledge as a member of Generation X and a viewer of the documentary "American Teen" (which covers a sexting story, among others), it seems to me that sexting in high school may be intimately bound up with issues of popularity, insecurity, and humiliation. And that explosive mix could lead to important and tricky issues regarding consent, particularly consent to forwarding.

For instance, a teen might authorize forwarding, but then later falsely claim that he or she did not consent, if the forwarding was accompanied by the forwarder's humiliating commentary on his or her body or if such commentary by recipients led to humiliation at school. Parental disapproval – or ignorance -- of teen relationships could lead to lying, too. In addition, a good-looking teen could deem it cooler to pretend that he or she was not, in fact, the driving force ensuring that a particularly flattering and explicit photo of him or her had ended up being "sexted" to the whole school but was "shocked, shocked to discover" that this had occurred.

In sum, I suspect that there is a whole complex anthropology here that it will be difficult for adults to fully understand. High-school communities might have unspoken "default rules," such as: "You can forward, but only with the photographer's – or subject's – okay." Or, "You can forward, but only to our clique, not to outsiders."

It's worth considering, here, that the worst sexting abuses, among teenagers, might lead to a civil claim for intentional infliction of emotional distress, or to expulsion from school. In light of these possible remedies, as well as the chance that parents will take action, it's possible that Romeo-and-Juliet exceptions, although not ideal, might be good enough.

Firearms Prohibition Notification to Domestic Violence Offenders

By: Pennsylvania Coalition Against Domestic Violence, Legal Department

The Violence Against Women Reauthorization Act of 2005 added a new STOP certification requirement regarding judicial notification, 42 U.S.C. § 3796gg-4(e). Specifically, in order for Pennsylvania to receive its STOP funding, it must certify that "its judicial administrative policies and practices include notification of domestic violence offenders of the requirements delineated in § 922(g)(8) and (g)(9) of Title 18, United States Code, and any applicable related Federal, State, or local laws [.]"

18 USC §922(g)(8) defines a qualifying protection order and requires that PFA defendants be notified that it is unlawful for a person who is subject to a qualified protection order to possess a firearm or ammunition. Pennsylvania Protection From Abuse Orders have the required notice on the order.

The prohibitions found in 18 USC § 922(g)(9) - Misdemeanor Crime of Domestic Violence of the Federal Gun Control Act bar possession of firearms and ammunition by a defendant convicted of such a crime and require notification of the prohibitions to those convicted defendants. Pennsylvania does not have a specific misdemeanor "crime of domestic violence," but there are cases in which a perpetrator of domestic violence is charged criminally. In United States v. Hayes, 129 S. Ct. 1079 (2009), the United States Supreme Court considered whether those charges had to include a domestic relationship as a required element of the underlying offense for 18 U.S.C. § 922(g)(9) to apply. The Court held that the relationship did not have to be an element of the crime for the gun prohibition to attach. Pennsylvania law mirrors the prohibition in the federal gun ban.¹

Practical Implications

In light of the *Hayes* decision and Pennsylvania law, it is important that Pennsylvania prosecutors and the judiciary ensure that domestic violence offenders receive judicial notification of federal and state firearms prohibitions if the crime with which the defendant is charged constitutes a misdemeanor and is committed against a current or former spouse, a person who cohabits with or has cohabited with the

victim as a spouse, parent or guardian, parent, or guardian of the victim. Unlike the notification pursuant to § 922(g)(8), the notification is not automatically delivered to defendants through service of a protection order.

Different counties' notifications procedures may vary and may provide the notice at different stages in the judicial proceeding. All counties must ensure that the domestic violence offender is fully informed of the consequences of a plea or conviction.

If the defendant is prepared to enter a guilty plea or a plea of nolo contendere, the notifications must be delivered prior to entry of that plea. A failure to fully inform a defendant of all terms and conditions could result in a defense motion to withdraw a guilty plea. The county may consider institutionalizing formal notice of §922(g)(9) and 18 Pa. C.S. § 6105(c)(9) at the time of formal arraignment to ensure timely and proper notification.

The court may also wish to consider having either the prosecutor or the judiciary conduct a colloquy with the defendant in open court during a bail hearing after conviction or at sentencing. The colloquy would be conducted in conjunction with setting the conditions and prohibitions, including firearms and ammunition possession, to be imposed upon the defendant pursuant to §922(g)(9) and Pennsylvania's Uniform Firearms Act, 18 Pa. C.S. § 6105(c)(9). These prohibitions are set in order to provide for the safety of the victims, witnesses, and the public in general.

The National Center on Domestic and Sexual Violence proposed a notice for prosecutors and the judiciary to provide to criminal defendants charged in any crime against a person. This notice could be provided at any stage of the criminal process, but if it is delivered prior to conviction or entry of a plea, it relieves the state court of having to make separate findings about whether a defendant is in fact guilty of a qualifying misdemeanor crime of violence under federal law in order for the prohibition to apply.

continued on back cover

18 Pa.C.S. §6105(c)(9) provides: A person who is prohibited from possessing or acquiring a firearm under 18 U.S.C § 922(g)(9) (relating to unlawful acts) If the offense which resulted in the prohibition under 18 U.S.C § 922(g)(9) was committed, as provided in 18 U.S.C § 921(a)(33)(A)(ii) (relating to definitions), by a person in any of the following relationships:

- (i) the current or former spouse, parent or guardian of the victim;
- (ii) a person with whom the victim shares a child in common;

- (iii) a person who cohabits with or has cohabited with the victim as a spouse, parent or guardian; or
- (iv) a person similarly situated to a spouse, parent or guardian of the victim;

then the relationship need not be an element of the offense to meet the requirements of this paragraph.



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Such exceptions would still allow authorities to crack down on the 18-year-old senior who takes and "sexts" a photo of a 13-year-old eighth-grader, and who truly is engaging in child pornography. Yet these exceptions would also avoid imposing stiff criminal penalties on more-or-less same-age kids for what is, in essence, ugly immaturity, not crime. Alternatively, a compromise solution would create low-level misdemeanor offenses relating to sexting – offenses that would ensure that teenagers, who are often impulsive, could not ruin their lives with a single, ill-considered forward.

Julie Hilden, who graduated from Yale Law School, practiced First Amendment law at the D.C. law firm of Williams & Connolly from 1996-99 and has been writing about First Amendment issues for a decade. Hilden, a FindLaw columnist, is also a novelist. This column originally appeared on FindLaw.com.

Firearms Prohibition Notification to Domestic Violence Offenders

The suggested notice provides:

If you are convicted of a misdemeanor crime involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim or are or were involved in another, similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm, including a rifle, pistol, or revolver, or ammunition, pursuant to federal law 18 U.S.C. 922(g) (9) [and/or state law]. If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney.

This information is available at:

www.ncdsv.org/images/42%20USC_Judicial%20Notification_Federal%20Gun%20Control%20Laws.pdf

If you have any questions, please don't hesitate to contact PCADV's Legal Department at 1-888-235-3425 or (717) 671-4767.