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Teen sexting: Prevalence, characteristics and legal treatment



Carolina Villacampa

University of Lleida, Spain

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ABSTRACT

Criminal policy adopted in sexual offences, initially intended to protect minors and youths, has led some countries to criminalise online sexual contact between teens themselves. Prevalent engagement in sexting by minors has already been subject to sanction in the US and could be sanctioned in European countries in the case of punitive criminal policy in this area becoming widespread. This study, conducted in Spain with a sample of 489 youths between the ages of 14 and 18, determines the lifetime prevalence of teen participation in sexting behaviours, the profile of those who sext, the dynamics of their participation and the emotional effects it can have on the parties involved. In light of the results, an approach to sexting is proposed that, in keeping with the discourse of normalcy, is based more on education than sanction, avoiding approaches that link this behaviour necessarily with the idea of deviation.

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1. Introduction

'Sexting', a portmanteau of the words 'sex' and 'texting', refers to communications of a sexual nature, including both text messages and images, sent via mobile phones and other electronic means (Calvert, 2009–2010; Chalfen, 2009; Ferguson, 2011; Katzman, 2010; Lenhart, 2009; Wolak and Finkelhor, 2011). The conceptualisation of this phenomenon has not been devoid of problems. The definitions of sexting offered in the literature have been so varied as to render comparison of the reported findings on the prevalence of sexting very difficult (Drouin et al., 2013; Klettke et al., 2014; Lievens, 2014; Ringrose et al., 2012). The above definition is broad, including both text messages and the sending of images, and not limited to pornographic content. In contrast, the concept of sexting used in this paper is narrower, including only communications of a sexual nature containing images (photographs or videos).

Despite the disparity of definitions, there is consensus regarding the need to differentiate within this category between 'primary sexting', consisting of the actual production or self-production of the image, generally consensual, and 'secondary sexting', in which the image is sent with or without the consent of the person depicted in it (Calvert, 2009–2010; Lievens, 2014; Ringrose et al., 2012; Wolak and Finkelhor, 2011). In addition, the typology of Wolak and Finkelhor (2011) introduces factors for assessing the harmfulness of sexting by differentiating between 'experimental sexting' –taking place in the context of an established romantic relationship, to generate romantic interest in another youth or for other reasons, but in the absence of any criminal behaviour- and 'aggravated sexting' –involving adults in the act or including criminal or abusive elements on the part of the minors themselves in relation to the creation, sending or possession of sexual images produced by minors-.

E-mail address: cvillacampa@dpub.udl.cat.<http://dx.doi.org/10.1016/j.ijlcrj.2017.01.002>

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As this typology makes clear, some instances of sexting can be extremely harmful for the youths involved. However, based on the idea that every case of sexting might be uniformly harmful, one of the main consequences of the criminal policy fight undertaken in the US during the 1980s against sexual predators, grounded in real concerns but also in moral panic and stereotypes such as 'stranger danger' (Finkelhor, 2009; Jewkes, 2012; Yung, 2010), has been the adoption of legal measures to put an end to all cases of the activity across the board. Initially, the only objective of these legal measures was to address the problem of adult paedophiles who were allegedly taking advantage of the facilities offered by the widespread use of information technology to prey on increasing numbers of children. However, at the turn of the millennium, legal remedies adopted to react against adult sexual offenders had begun encompassing children involved in sexual communications through information technologies, whom it suddenly seemed necessary to protect from themselves and who ended up being accused of the commission of offences concerning child pornography by certain prosecutors. During the first decade of the new millennium concern regarding the risky sexual behaviour in which teens might engage began to grow, attracting the attention of the media (BestAnd Bogle, 2014).

As with other punitive legislative reactions, beyond the existence of a real danger, the sharing on social media of alarming information has helped to fuel what some have called a 'moral panic' over sexting (Crimmins and Seigfried-Spellar, 2014; Crofts et al., 2015; Hasinoff, 2015; Shariff, 2015). Timely publicising of extreme cases has led to the widespread consideration of sexting to be a risky behaviour, with the consequent overreaction of the US criminal justice system, giving rise to the paradox that laws designed to combat child pornography are now being used to punish children themselves for sexting (Rahders, 2015; Thomas and Cauffman, 2014). According to the dichotomist approach to the opposition victim-perpetrator generally adopted in the context of sexual offences (McAlinden, 2014), children who sext cease to be viewed as ideal victims and become sanctionable subjects that no longer fit the ideal victim stereotype. These children end up running afoul of anti-child pornography laws initially designed to punish adults not only in the US, but also in Canada (Shariff, 2015) or Australia (Crofts et al., 2015; Blyth and Roberts, 2014–15).

In this highly punitive context, some scholars have embraced the application of anti-pornography laws to children (Duncan, 2010–11). However, the majority view under US doctrine has advocated the adoption of a specific criminal justice solution for adolescents, albeit initially one of a punitive nature (Bosak, 2012; Hiffa, 2010–11; Morris, 2014; Walters, 2010–11). Although most Americans do not favour an approach completely removed from the context of criminal law (Barry, 2010–11), the possibility of decriminalising such behaviours and respecting them as a manifestation of children's human rights, provided they are consensual, is increasingly accepted (Crofts et al., 2015; Gillespie, 2013; Lievens, 2014; Shariff, 2015; Simpson, 2013; Spooner and Vaughn, 2016; Wolak and Finkelhor, 2011), reserving sanctions solely for cases of non-consensual, secondary sexting. Some have even suggested the need to recognise young people's capacity to decide when sexting is consensual, regulating it as a sexual act and protecting the minors' right to engage in it (Hasinoff, 2015). These expert opinions have had their influence in the passage of ad hoc laws to fight teen sexting in 23 US states since 2009.

Some European countries could undergo with a similar process in this matter, criminalising the conduct of minors who self-produce child pornography (primary sexting), as well as the possession or acquisition of child pornography by other minors who receive such images, whether or not they then forward them on. In European countries, the category of criminally relevant conducts in terms of child pornography could be broadened, above all, by the effect of the provisions of the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse ("Lanzarote Convention") and Directive 2011/93/EU on combating sexual abuse and sexual exploitation of children and child pornography. Although both documents take a victim-oriented approach, they have also entailed the assumption of a punitive policy at a global European level, establishing very broad requirements for what constitutes a conduct related to child pornography. This is true to such an extent that sexting behaviours, that is, the production, accessing, acquisition, possession or distribution of sexts, involving the production or sending of pornographic material will fall within the scope of such recognised offences. Art. 20.3 of the Lanzarote Convention provides that the parties reserve the right not to apply its provisions to the production or possession of pornographic material in cases involving children who have reached the legal age for sexual activities when the images are produced and possessed by the children themselves, with their consent, and are solely for their own private use. Art. 8.3 of the Directive includes a similar provision with regard to the production, acquisition or possession of such material.

Whilst both texts establish the possibility for states not to criminalise these conducts, they leave the decision entirely to the state's discretion. In some European countries, the production, acquisition, possession and distribution of child and juvenile pornography is a crime that can be committed by teens themselves. Although this does not necessarily mean that currently the respective sections of the following national criminal laws are being enforced against teens, this could be the case in United Kingdom (section 1 Protection of Children Act 1978, section 160 Criminal Justice Act 1988 and section 62 Coroners and Justice Act 2009), Germany (sections 184b and 184c German Criminal Code, except for production), France (section 227–23 French Criminal Code), Italy (sections 600ter and 600quater Italian Criminal Code, except for self-production) or Spain (sections 183 ter and 189 Spanish Criminal Code). Some of these countries –Germany, France and Italy– have not even included a clause excluding the perpetrators of sexual offences against minors from criminal responsibility when they are minors too. Others, such as Spain, have included it, but in a way that does not exempt teenagers from criminal responsibility for sexting. In the Spanish Penal Code this clause was included only for cases of abuse, sexual aggression and online child grooming, but not for offences related to child pornography, the area in which sexting falls. In England and Wales, since January 2016, if a young person is found creating or sharing images, the police can choose to record that a crime has been committed but that taking formal action is not in the public interest (Home Office, 2016; Youth Justice

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