Adolescents, Sexting and Human Rights

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Abstract

International law has led to many countries changing the definition of 'child pornography' to include adolescents above the age of consent but below the age of majority. At the same time, technological change has led to personal photographic devices (most notably the ubiquitous camera phone) becoming common-place and adolescents are participating in behaviour known as 'sexting'. Whilst there are different versions of this behaviour, one form is where an adolescent freely takes a sexualised photograph of himself or herself and sends it to another. Theoretically, this could breach child pornography laws but it is argued here that it is an expression of the adolescent's sexual identity and thus protected by Articles 8 and 10 of the European Convention on Human Rights.

Keywords: child pornography – sexting – adolescents – freedom of expression – Articles 8 and 10 European Convention on Human Rights

1. Introduction

In recent years there has been concern over the issue of adolescents becoming involved in what is known as sexting behaviour.1 Whilst some believe that this is problematic,2 others have questioned whether the concern is justified...

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1 See, for example, Parker, 'Kids These Says: Teenage Sexting and How the Law Should Deal with It' (2009), available at: works.bepress.com/michaelparker/1 [last accessed 13 August 2013]; and Chalton, 'It’s Only a Picture' (2009) 24 Visual Studies 258.

or whether it is an example of sexual expression by adolescents coming to terms with their sexual identity. This article considers these issues and questions whether it is possible to construct an argument that certain types of sexting behaviour are protected conduct under human rights instruments. It considers the reasons why it is currently subject to the criminal law, arguments surrounding potential harm and reasons why it could be considered to be a form of sexual expression by adolescents. It suggests that where a child has reached the age of sexual consent then it would not be proportionate to criminalise the consensual activity of an adolescent who chooses to take a sexualised picture of himself or herself and send it to another.

2. Defining Sexting

The first issue to consider is the definition of sexting. The term itself is the subject of some debate. Whilst some believe that it is a term first coined by the United Kingdom (UK) press a few years ago, others believe that it was a term coined approximately ten years ago but in a slightly different context: it then meant text-based sexual conversations passed by mobile telephone through SMS technology, whereas it is now commonly thought to be the sending of sexualised photographs by MMS mobile technology. Whilst there are different types of sexting, the type discussed in this article relates to self-generated material. Typically, a person would take a picture of themselves (either nude, semi-nude or even of a sexual act) and would then send this to his or her boyfriend or girlfriend as a 'special picture'.

Sexting is not restricted to adolescents and it has come to popular attention in part through celebrities who sometimes use it to gain publicity (whilst sometimes denying the leak was authorised even when it was). There is little doubt that adolescents are involved in sexting, but the extent of their involvement is perhaps more open to question. In the United States (US), estimates have ranged from between four and twenty per cent of adolescents, whereas
in the UK studies have estimated it at around twelve per cent, although some believe that it may be higher. Part of the difficulty in quantifying adolescent involvement is that, in many instances, it is a private behaviour and thus unlikely to be discussed or identified. The reasons for adolescent involvement are similarly effusive. Some have noted that adolescents have traditionally been at the forefront of developing technologies and have had the greatest take-up of mobile telephones, including smartphones that can be used for sexting. That, of course, does not explain why they are doing it although it does explain how they are doing it and, to an extent, why a significant number are involved (as they account for so many of those with the relevant technology).

Some studies have suggested that adolescents are eschewing sexual intercourse and instead turning to masturbation or the production of pornography because of the risk of sexually transmitted diseases, but others believe that it is more complicated than this. Levick and Moon suggest that it is part of the dating process, including sending messages to those they wish to date, or that they wish to provide a ‘sexy present’ to their partner. Other studies have confirmed this and noted that, ‘the picture emerging from [these studies] speaks to the complex spirals of pleasure and danger that youth who sext not only experience but also appear to accept.’ We will return to the issue of danger below but the comment about pleasure supports the assertion that adolescents are actively engaged in the activity. They see it as a part of their sexual life and that the risks are exaggerated by adults who do not like what they are doing. This is perhaps demonstrated by an online peer-produced dictionary that defines sexting as ‘a term used by adults who are out of the loop.’ The extent to which sexting can be said to be truly consensual is contested. Whilst there is some evidence to suggest that adolescents are actively seeking to become involved, some commentators question whether it is a symptom of a sexualised society where pornography has become mainstream and girls have learnt that ‘boys like this,’ which perhaps may account for why there appears to be more girls involved in sexting than boys.

11 Ibid. at 12–3.
13 See Quayle et al., supra n 2 at 70.
15 Ibid. at 1041.
17 Karaian, supra n 16 at 64.
19 Ringrose et al., supra n 10 at 7; and Calvert, supra n 8 at 10.
There can be little doubt that adolescents are sexually active and it has been noted that ‘research on adolescent development suggests that teens have always found ways to explore their sexual identity and express themselves sexually’. This argument supposes that sexting is simply a new way of adolescents exploring their sexual identity. In essence it could be considered to be the combination of sexual expression and modern communication technologies. The taking of intimate photographs of oneself is not a modern phenomenon and has been common throughout the era of photography but the coupling of photography to instant communication devices undoubtedly adds another element. It has been suggested by some that sexting is an example of a change in the understanding of sexual expression whereby ‘a new generation of young women and teenage girls appear to have embraced, rather than sought to rid the world of, sexual imagery’, which perhaps reflects the growth of third-wave feminists who reject much of the anti-pornography rhetoric of second-wave feminism.

A. Harm

Much of the literature that accompanies sexting refers to its harms and it will be remembered that Karaian spoke not only of a spiral of pleasure but a spiral of danger too. As with the reasoning behind why adolescents are involved in sexting there is considerable disagreement over conceptions of harm. One of the difficulties of discussing sexting is that there are many different types of behaviour that can be classed as sexting, including some that are non-consensual. This article does not focus on non-consensual forms of sexting as these raise different issues and is instead focused solely on the issue of consensual sexting. In particular, this article will seek to explore whether the possible harms involved in even consensual sexting mean that criminalisation is required or whether it can be said to be a form of expression protected as a human right.

Early discussions of sexting considered the activity to be one of self-exploitation, but some commentators have questioned whether this is linked to anti-pornography feelings, and the ‘apparent desire to protect white, heterosexual, middle and upper class, respectable girls’ from both sexual predators

20 Levick and Moore, supra n 14 at 1035.
21 Karaian, supra n 16 at 69.
23 The most comprehensive discussion is presented by Wolak and Finkelhor, supra n 6.
26 Karaian, supra n 16 at 64.
and themselves.\textsuperscript{27} Certainly the issue of ‘exploitation’ is one that is fiercely contested in much of the literature although it has been noted that exploitation is a concept that is difficult to define in its own right.\textsuperscript{28} Sexualised images of children, including adolescents, are ordinarily classed as either abusive or exploitative because of the nature of how they are produced.\textsuperscript{29} This is true of situations even where the image does not depict an adult sexually assaulting a child since the balance of power inherent between adult and child is undoubtedly exploitative in this context.\textsuperscript{30} It is less certain that the same can be true of adolescents who choose to engage in this behaviour and some commentators have rejected the notion that it amounts to exploitation.\textsuperscript{31} It has been noted that the debate between second- and third-wave feminists arguably skews this debate, and so it is perhaps difficult to reconcile this point easily but it is notable that many adolescents themselves refer to sexting as a way of expressing themselves sexually.\textsuperscript{32} Of course, this masks the question of whether they are exploited – including by themselves – because it is difficult to know whether they truly see sexting as a form of sexual expression or whether there is naivety over its consequences and the reasons for engaging in it. There is also the question about whether it may not be exploitative for an individual but is exploitative in the wider sense in that it serves to ‘reproduce cultural and institutional constraints on women’s sexuality more broadly.’\textsuperscript{33}

Leary believes that a sexter suffers harm because the ‘images document the youth’s participation in the production [of sexualised images] and that is exacerbated by the circulation throughout the Internet’.\textsuperscript{34} Certainly the growth of digital communication technologies, and particularly the Internet, has led to a realisation that sexualised images will now be in permanent circulation because once they are placed on the Internet they are quickly downloaded, mirrored and distributed.\textsuperscript{35} In the context of child abuse material, it has been suggested that this can lead to secondary victimisation as a child has to come to terms with the fact that these images are perpetually

\textsuperscript{27} Ibid. at 60.
\textsuperscript{28} For a useful discussion on this in the context of child pornography, see Ost, \textit{Child Pornography and Sexual Grooming: Legal and Societal Responses} (Cambridge: Cambridge University Press, 2009) especially 144–46.
\textsuperscript{29} See Taylor and Quayle, \textit{Child Pornography: An Internet Crime} (Hove: Routledge, 2003) at 4–6; Ost, supra n 23 at 141; and Gillespie, supra n 24 at 22–5.
\textsuperscript{30} Taylor and Quayle, supra n 29 at 2, 35.
\textsuperscript{31} Levick and Moon, supra n 14 at 1042.
\textsuperscript{32} Karaian, supra n 16 at 67; and Lüböf; ‘Sexual Behaviour, Adolescents and Problematic Content’, in Quayle and Ribisl (eds), \textit{Understanding and Preventing Online Sexual Exploitation of Children} (Abingdon: Routledge, 2012) 145.
\textsuperscript{33} Lamb and Peterson, supra n 18 at 705; see also Leary, supra n 25 at 50.
\textsuperscript{35} Taylor and Quayle, supra n 29 at 24.
circulating and that some will use these images for the purposes of sexual gratification. Leary clearly believes that the same can be true of sexting images. The argument would be that a decision taken when X is 16 years may seem harmless but would the 24-year-old X consider it to be harmless? If the images are tagged with their name this could mean that the photograph is identified whenever a person performs a search, including new partners or employers at any time in the future.

Secondary victimisation is clearly important in the context of child sexual abuse material because it is known that psychological harm can be caused, partly because the child victim may believe that those who see the picture could believe that the victim consented to the activity that they were subjected to. It is less clear that this applies to sexting. The context of this article is the consensual taking of an intimate photograph. Thus, the participation is voluntary, and it is less easy for this to be misrepresented. That is not to say that there is no harm, including potentially analogous harm. An intimate picture is, by its very nature, private and whilst an individual may be prepared for one person to see this, they may be embarrassed if it was to be seen more widely. The Internet and related communication technologies provide numerous ways to disseminate the material. With a digital image the creator loses control of the image once it has been sent. Mobile technology means that a person can easily forward the image to others without the original sender knowing that this has happened. If these secondary parties then also send it to others, the distribution can very quickly get out of control with a large number of people seeing the image. The internet provides additional opportunities and a good example of this is the proliferation of sites that encourage people to post intimate pictures of their ex-partners as ‘revenge’. Where widespread dissemination does happen then the potential for distress, and even harm, is very real and there is evidence to suggest that it can lead to bullying and harassment, with other adolescents making moral judgements about their behaviour. Indeed, some commentators have focused on the few

36 See Palmer, Just One Click: Sexual Abuse of Children and Young People Through the Internet and Mobile Telephone Technology (London: Barnado’s, 2004); and Ost, supra n 23 at 123.
37 An expression used to indicate hypertext being located within the photograph to assist in the searching of an item.
39 For an interesting insight into this, see ‘Sara’ in Jonnson and Göran Svedin, ‘Children Within the Images’, in Quayle and Ribisl (eds), Understanding and Preventing Online Sexual Exploitation of Children (Abingdon: Routledge, 2012) 28.
40 Discussed by Taylor and Quayle, supra n 29 at 64.
41 Calvert, supra n 8 at 24.
cases where this has led to the suicide of adolescents.\textsuperscript{42} Whilst this is extremely rare, it does add weight to the argument that there can be negative consequences to even consensual sexting.

\textbf{B. Sexting as Child Pornography}

So far what has been discussed are adolescents taking sexualised pictures of themselves but, whilst this may be largely unproblematic in law in terms of those aged 18 years and above,\textsuperscript{43} it raises serious issues in respect of those under 18 years. In recent years there has been increased attention paid to the issue of child pornography and this has meant increased tightening of the law.\textsuperscript{44} International responses to child sexual exploitation have led many countries to adopt a set of laws whereby sexualised images of a child will legally constitute child pornography.\textsuperscript{45} Most national and international instruments will prescribe a much lower threshold for legal intervention than that of obscenity which is often used for adult pornography.\textsuperscript{46} International law has also been responsible for the raising of the definition of ‘a child’ to 18 years in many countries.\textsuperscript{47} The consequence of this in respect of sexting is that potentially an adolescent who sends a sexualised image of themselves could be considered to be producing child pornography.

By way of example the position in England and Wales will be considered. Section 1 of the Protection of Children Act 1978 (‘the 1978 Act’) makes it an offence, \textit{inter alia}, to take an indecent photograph of a child. The definition of a

\textsuperscript{42} Ibid. at 4; and Ryan, ‘Sexting: How the State can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults’ (2010) 96 Iowa Law Review 357 at 359.

\textsuperscript{43} Although this is subject to two qualifications: first, if it is obscene then sending it to another could be construed as publishing an obscene article (Section 2 Obscene Publications Act 1959 (UK)); second, Section 127 Communications Act 2003 (UK) criminalises, \textit{inter alia}, the sending of a message over a communications network (for example, mobile telephone) that is, \textit{inter alia}, indecent. That said at the time of writing there is no evidence that an adult has been convicted under either offence.

\textsuperscript{44} For a general discussion, see Gillespie, supra n 24; and Ost, supra n 28.

\textsuperscript{45} Within the international context, see, for example, Article 2(c) Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and Article 20(2) Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 25 November 2007, CATS 201.

\textsuperscript{46} Perhaps most notably set out by the U.S. Supreme Court in \textit{New York v Ferber} 458 US 747 (1982), where they held that sexualised images of children fell outside of the First Amendment (see also \textit{Osborne v Ohio} 495 U.S. 103 (1990)) but also see, for example, the Protection of Children Act 1978 (England and Wales), identical provisions are also enacted in Scotland and Northern Ireland, where indecency rather than obscenity (Obscene Publications Act 1959 (UK)) is used. The European Court of Human Rights has accepted the use of indecency as a standard in such cases (see, for example, \textit{O'Carroll v United Kingdom} 41 EHRR SE1).

\textsuperscript{47} For a discussion on this in the UK context, see Gillespie, ‘Tinkering with Child Pornography’ [2003] Criminal Law Review 361.
child is under 18 years, and whilst ‘indecent’ is not defined in statute it is a common-law concept which is applied by reference to recognised standards of propriety. The key definition arguably precedes the 1978 Act when in *R v Stamford* it was held that indecency and obscenity are on opposite sides of the same scale. What is clear, however, is that an image depicting nudity or the naked breasts of a female can amount in law to an indecent photograph of a child. Accordingly, an adolescent who takes a sexualised photograph and sends it to another is technically guilty of two offences, each carrying a maximum sentence of ten years' imprisonment.

There are few defences to an offence under Section 1 of the 1978 Act, but the Sexual Offences Act 2003 (SOA) did create two, including one that is directly concerned with adolescents taking pictures of themselves. Section 45 of the SOA 2003 inserted Section 1A into the 1978 Act and produced an extremely complicated defence. It is not necessary to summarise how the defence operates but it is important to note that it applies only where the child depicted is married or living in an ‘enduring family relationship’ with the defendant. During the passage of the legislation it was said to protect the privacy of marriage and clearly Parliament did not intend the defence to cover adolescents other than those married or living together. In *R v DM* the Court of Appeal was asked to rule on the safety of a conviction of a 23-year-old man who took an indecent photograph of a 17-year-old girl. The case is relatively complicated because there was an issue over whether the victim in the matter consented to the images being taken, although ultimately the Court of Appeal did not need to rule on this for the simple fact that the defence did not apply as this was a ‘one-night stand’ and not a marriage or the parties ‘living together in an enduring family relationship’.

At the time the defence was introduced, Gillespie questioned whether restricting the defence to those married or living together was compatible with the ECHR, and this was the principal attack in *DM*. Counsel for the appellant

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48 Section 7(6) Protection of Children Act 1978.
51 See, for example, *R v Owen* [1988] 1 WLR 134; and *R v O’Carroll* [2003] EWCA Crim 2338.
52 Section 1(1)(b) Protection of Children Act 1978 criminalises, inter alia, distributing an indecent photograph of a child.
53 It is also classed as a ‘sex offence’ although an adolescent would only be subject to the notification requirements under Part 2 of the Sexual Offences Act 2003 if the images depicted a child under the age of 16 years and the person was sentenced to a term of imprisonment for at least twelve months (at para 13, Sch 3 SOA 2003).
54 For a summary of the legislative changes, see Gillespie, supra n 47.
55 A term that is not defined by statute.
56 See Gillespie, supra n 47 at 364, who cites the words of Beverly Hughes MP, a then Home Office minister.
58 The victim was intoxicated (see [3]–[6]) and there was a dispute over whether any sexual activity was consensual or not.
59 Gillespie, supra n 47 at 364.
sought to argue that the Court of Appeal should use their powers under the Human Rights Act 1998 (UK) to widen the defence to include situations where D did not have a reasonable belief that V was under the age of 18 years. The Court of Appeal declined to do so. The Court held that the 'provisions of the 1978 Act are no more than is necessary to accomplish the objective . . . without the prohibition on the taking of indecent photographs there can be no effective protection, and Parliament has identified circumstances in which the taking of such a photograph should not [their emphasis] be criminalised'.

3. A Right to Sext?

The provisions of the 1978 Act and the ruling in DM make clear that, at least in England and Wales, there is a risk that an adolescent who takes a sexualised picture of herself and sends it to someone is potentially guilty of an offence. DM is not of much assistance in the context of this article because, as noted above, there was an issue of consent raised but also because the central issue was one of the reasonable doubt as to age which would not be relevant here as the child will clearly know its own age. However, what of the wider point? From some studies it is known that adolescents consider sexting to be ‘another way of expressing yourself’ and that they consider it to be ‘flirty’, ‘hot’ and ‘dangerous’, all words that would seem to indicate that adolescents perceive it as a form of sexual expression. This would seem to find favour with some authors who believe that the process is a method of an adolescent expressing their sexual identity and that some see it as a way of boosting their self-esteem. Indeed, McLaughlin believes that society is ‘a neat slice of time, immortalising the teen’s body in its youth, providing a token reminder to the viewer of potentially sexual pleasure’ and argues that ‘it is difficult to envision a form of [expression] more elemental, even primordial, than the communication embodied in [sexting images]’. If this is true then can it be said that this is a protected form of expression by an adolescent?

A. Optional Protocol to the CRC


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60 Supra n 57 at [37].
61 Karaian, supra n 16 at 67.
62 Ibid. at 65.
63 Lööf, supra n 32 at 141.
65 Ibid.
prostitution and child pornography (OPSC)\(^{67}\) are probably the most important global instruments on children's rights.\(^{68}\) As noted above the OPSC was, at least in part, responsible for the reinterpretation of child pornography and the meaning of 'child' within it.

Article 13 of the CRC provides 'the child shall have the right to freedom of expression' and this includes 'through any other media of the child's choice'. If sexting is considered to be a form of expression (as some argue) then questions could be raised as to whether criminalising such activity could amount to a breach of Article 13. Of course it should be noted that Article 13 is expressly qualified but perhaps more importantly it must be read in conjunction with Article 3(c) of the OPSC which requires 'as a minimum' that 'producing, distributing, disseminating ... child pornography' constitutes a criminal offence. Given the age of a child is under 18 years within the instruments then it would seem to include the type of images under discussion. Of course, these two articles contradict and thus it would be necessary to identify how they should be balanced against each other in terms of protecting the rights of a child.

A difficulty with both the CRC and the OPSC is that neither have either direct petition\(^{69}\) or a court overseeing their implementation. Oversight of both instruments is administrative rather than judicial with the Committee on the Rights of the Child considering (brief) reports on how the instruments are implemented in member states.\(^{70}\) This perhaps makes it somewhat difficult to identify any particular enforceable right, not least because in England & Wales it has been held that whilst the courts can take note of the instruments they are not bound to interpret domestic law in compliance with them.\(^{71}\) Accordingly, alternative instruments should be addressed.

B. European Convention on Human Rights

The most notable instrument of direct relevance to us is the European Convention on Human Rights (ECHR). As is well known, UK courts are obliged to act in a way compatible with the European Convention rights and freedoms that have been accepted by the UK,\(^{72}\) and this includes interpreting statutes, so far as possible, in a way that is compatible.\(^{73}\) Reference has been made to

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\(^{67}\) 2171 UNTS 227.

\(^{68}\) See, for example, Buck, *International Child Law*, 2nd edn (Abingdon: Routledge, 2011).

\(^{69}\) A third optional protocol (Optional Protocol to the Convention on the Rights of the Child on a complaint mechanism for violations of children's rights) was adopted on the 19 December 2011 although it is not yet in force. This will allow direct petition to the Committee on the Rights of the Child although this is not a court.

\(^{70}\) Buck, supra n 68 at 93–9.

\(^{71}\) See the speech of Baroness Hale in *R (on the application of R) v Durham Constabulary* [2005] 1 WLR 1184 at [44].

\(^{72}\) Section 6 Human Rights Act 1998.

\(^{73}\) Section 3 Human Rights Act 1998.
the fact that some adolescents consider sexting to be a form of expression, meaning that Article 10 – freedom of expression – may potentially be engaged but in a number of cases, arguably beginning with Dudgeon v United Kingdom,74 the European Court of Human Rights (ECtHR) has been clear that the right to a sexual identity is an intrinsic part of Article 8 (right to respect for private life).75 As it was recognised above that sexting may be considered part of the sexual identity of adolescents it is also necessary therefore to consider Article 8.

(i) Article 10

The first Article to consider is Article 10, which provides for freedom of expression. This has historically been considered one of the most important rights within the Convention76 and covers a wide-range of expression. The ECtHR has been very clear that the right applies ‘not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb’77 On the face of it, therefore, a case could perhaps be made that it is possible to bring sexualised images within Article 10. This simple statement masks much of the detail. Whilst, for example, the US Supreme Court has held that certain matters are outside the constitutional protection of the freedom of speech,78 the ECtHR has tended not to adopt this approach and has instead suggested that all forms of expression are capable of protection. The right within Article 10(1) is of course qualified by Article 10(2) and arguably this is where the ECtHR is able to direct its attention where it believes that material is less deserving of protection. Whilst therefore the US Supreme Court argues the material does not constitute ‘free speech’, the ECtHR talks about a justifiable interference with the right under Article 10(2), in essence, reaching the same decision but from a different starting point.

As is well known, for an interference under Article 10(2) to be justifiable it requires four things: it must be in accordance with the law, in the pursuance of a legitimate aim, be necessary and proportionate. In the context of England and Wales it is submitted that the first of these – in accordance with the law – is readily met. The Protection of Children Act 1978 is a statute that clearly establishes that the taking of a sexualised image of a person under 18 years is illegal. As noted already, the definition of child pornography has also been upheld by the ECtHR,79 and thus this element must also be satisfied.

74 A 45 (1981); 4 EHRR 149.
75 Ibid. at para 161.
76 Handyside v United Kingdom A 24 (1976); 1 EHRR 737 at para 49.
77 Vereinigung Bildender Künstler v Austria 47 EHRR 5.
78 See Miller v California 413 U.S. 15 (1973) and, as already discussed, child pornography falls into this exception, see supra n 46.
79 O’Carroll v United Kingdom, supra n 46.
As regards the pursuance of a legitimate aim, it is likely that a number could be claimed but the most relevant would be the ‘protection of health’ (which would include psychiatric harm) and the ‘protection of morals’.

The ECtHR has demonstrated in the past that it considers the protection of children from sexualised material to be an issue that can justify the use of the criminal law. In Handyside v United Kingdom, the ECtHR was called upon to rule on a book that was to be handed out to children and which contained a chapter on sex and sexuality. The UK government wished to censor parts of the book and the ECtHR placed great emphasis on the fact that the material was directed towards ‘children and adolescents aged from 12 to 18’. Similarly, in Müller v Switzerland, the ECtHR considered it important that an exhibition featuring depictions of bestiality were not subject to any age restriction and therefore could be seen by minors. It would seem therefore that the ECtHR recognises that the freedom of expression can be limited in respect of expression relating to, or accessible by, adolescents. The ECtHR has adopted a line that is akin to that of constitutional courts, such as those of the US and Canada, that restricting access to sexualised imagery by children can be legitimate. Of course, this does not address the issue of whether the expression of adolescents should be limited, which arguably raises different issues than where they are the consumers of expression.

(ii) Article 8

Perhaps the more powerful argument relates to Article 8. Whilst Article 8 is, like Article 10, a qualified right, the specifics of the right are more personal. Article 10 concerns expression and is therefore, to an extent, more about political, artistic or other messages to the public but Article 8 concerns, inter alia, the integrity of the person.

Sexual identity

It has been noted already that in Dudgeon v United Kingdom the Court accepted that the sexual identity of a person is within Article 8 and this aspect has been refined by the courts in subsequent cases. The principle was
upheld in Norris v Ireland, where the Court was keen to note that the margin of appreciation extended to contracting parties concerning the criminalisation of sexual activity is not absolute and that the Court would act against instruments it believed discriminated on the basis of sexual identity. This latter principle is perhaps most potently shown in S.L. v Austria, where the Court ruled that a difference in the age of consent between homosexual and heterosexual acts was contrary to Article 8. The Court noted that 'differences based on sex...[or] sexual orientation require particularly serious reasons by way of justification.' This is a point that will be returned to below.

As Article 8 is qualified, the right to sexual identity is not absolute and criminalisation will not always lead to an infringement. A good example of the limits of Article 8 is Stübing v Germany where the applicant had been convicted of offences relating to incest in respect of his biological sister, with whom he had four children. The ECtHR accepted that a consensual incestuous relationship was one that could, prima facie, be protected by Article 8(1), but declined to rule that Article 8(1) had been breached because they believed that the law criminalising incest was within the margin of appreciation that the Court would extend to contracting parties concerning justifiable interferences under Article 8(2). The Court accepted that the eugenics argument could not by itself justify such a conclusion and that, in essence, the question was one of morality. The Court considered whether there was a European consensus on incestuous relationships and, whilst deciding that there was not, paid considerable attention to the fact that a majority of the states parties, to the Convention did criminalise them in some form.

Stübing is important because it recognises that even sexual identity has limits but it is also important because it stresses, within the context of sexual identity, that the Court will look carefully at the necessity and proportionality of any restriction. It is submitted that it is these two concepts that will be most important in the context of any right to sext as, for the same reasons as discussed above, the Protection of Children Act 1978 is likely to be considered both in accordance with the law and in pursuance of a legitimate aim.

Whilst not on the direct point, the ECtHR has been called upon to consider the prosecution of adolescents for child sex offences. In G v United Kingdom a 15-year-old boy had been convicted of the rape of a child under

87 A 142 (1988); 13 EHRR 186
88 2003-I; 37 EHRR 39.
89 In combination with Article 14 (prohibition of discrimination).
90 Supra n 88 at para 37.
91 55 EHRR 24.
92 Ibid. at 55, although interestingly it did so somewhat half-heartedly, in part because both the applicant and the respondent government accepted that it was within Article 8(1) and thus the argument related solely to Article 8(2).
93 Ibid. at 61.
94 Ibid.
95 53 EHRR SE25.
13 years when he had consensual sexual intercourse with a girl aged 12 years. The applicant sought to argue that Article 8 of the ECHR required the state to charge him with the lesser offence of sexual activity between minors but this was rejected by the Court. In part, this was because the Court was not concerned with what an offence was called, but also because they decided that an offence that was ‘to protect the complainant and other children in her position against premature sexual activity, exploitation and abuse’ was legitimate, necessary and proportionate.

This is an important case because it notes that adolescents sometimes need protecting from other adolescents and arguably themselves. It is likely that child pornography laws would similarly be considered to have as their purpose the protection of a child from ‘sexual activity, exploitation and abuse’. However, it is less clear that this justified the use of the law in respect of all children. G was premised on the basis that English law had set an age at which children deserved the full protection of the law because of their lack of maturity. It does not follow that all children require protection from sexual activity, as recognised by the fact that the age of consent is lower than the age of majority.

What is the position in respect of a child who has attained the age of consent? One of the criticisms of increasing the age of ‘a child’ for the purposes of child pornography from 16 years (the age of consent in England and Wales) to 18 years was that it creates a paradox whereby a child is able to have sexual intercourse with as many people as they wish and (largely) in whatever manner they wish but cannot take an intimate photograph of themselves. Can it be said that restricting the sexual activities of an adolescent who has attained the age of consent can be justified?

**Different ages**

The ECtHR has long been concerned with possible discrimination resulting from gender or age, including in respect of the sexual life of a person. In *A.D.T. v United Kingdom*, the Court found a breach of Article 8 where group sexual activity was criminalised because it involved homosexual activity, whereas had it been heterosexual activity it would have been lawful. It has long been held that the overriding objective of Article 8 is to protect an individual from arbitrary interference by the state, and arguably this is an extension of this principle. It is difficult to justify differences in approach to criminalisation. This can also be seen in respect of differences of age. In

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96 Ibid. at particularly para 39.
97 Ibid. at para 38.
98 Gillespie, supra n 24 at 364.
99 31 EHRR 33.
100 *Kroon and Others v Netherlands* A 297-C (1994); 19 EHRR 263.
Dudgeon v United Kingdom,\textsuperscript{101} the ECtHR originally stated that ‘it falls in the first instance to the national authorities to . . . fix the age under which young people should have the protection of criminal law’.\textsuperscript{102} The ECHR has always been considered to be a ‘living instrument’\textsuperscript{103} reflecting the changes to society and twenty years later in S.L. v Austria\textsuperscript{104} the Court was asked to rule on a discrepancy between the age of consent for heterosexual and homosexual acts.\textsuperscript{105} In Austria, at that time, the law prescribed that it was a criminal offence for a man aged over the age of 19 years to have homosexual sexual activity with a child between the ages of 14 and 18 years even though there was no comparable offence for heterosexual acts. The Court was prepared to accept that not only was Article 8 engaged but that Article 14 (prohibition of discrimination) also applied to sexual relations,\textsuperscript{106} and this included where there was a distinction between homosexual and heterosexual activities. The ECtHR, in holding there was a breach of Articles 8 and 14, stated ‘[w]hat is decisive is whether there was an objective and reasonable justification why young men in the 14 to 18 year old age bracket needed protection against any sexual relationship with adult men.’\textsuperscript{107} By analogy it can be argued that there is prima facie discrimination in respect of sexting. There are potentially two dimensions to this discrimination. The first is that a 16-year-old can have sexual intercourse with a 20-year-old, but if she sends that same person a topless picture of herself then potentially she commits a criminal offence. The second dimension is that a 16-year-old cannot send a topless picture of herself to someone else but an 18-year-old can.\textsuperscript{108} It is submitted that this goes to the heart of the necessity and proportionality of the interference (by the legislation that potentially criminalises sexting).

Self-generated content in other instruments

The question of whether self-generated material attracts protection under human rights instruments has been considered by courts in other jurisdictions. Some authors make reference to Miller v Mitchell,\textsuperscript{109} a decision of the 3rd Circuit US Court of Appeals. Whilst it has been suggested that this is the

\textsuperscript{101} Supra n 74.
\textsuperscript{102} Ibid. at para 62.
\textsuperscript{103} See, for example, Van der Mussele v Belgium A 70 (1983); 6 EHR 163.
\textsuperscript{104} 37 EHR 39.
\textsuperscript{105} An issue that was first raised by the European Commission of Human Rights in Sutherland v United Kingdom Application No 25186/94, Article 31 Report, 1 July 1997.
\textsuperscript{106} Supra n 104 at para 46.
\textsuperscript{107} Ibid. at para 41.
\textsuperscript{108} Subject to the use of Section 127 Communications Act 2003 (UK), although there is no evidence that any adult has been prosecuted under this offence for a sexting offence.
\textsuperscript{109} 598 F.3d. 139 (3rd Cir, 2010).
first example of a constitutional review of sexting,\(^{110}\) it is not that simple. The review by that court did not consider the constitutionality of sexting, but rather whether the state prosecutor could oblige a child to undertake a diversion programme without the consent of the parent.\(^{111}\)

Perhaps the more relevant decision is that of the Supreme Court of Canada in \textit{R v Sharpe}.\(^{112}\) This was an important case that concerned the constitutional compatibility of the section of the Criminal Code that dealt with child pornography.\(^{113}\) Much of the discussion in the case is not relevant to this article but one part is, where the Chief Justice referred to ‘privately created recordings of lawful sexual activity made by or depicting the person in possession and intended only for private use’\(^{114}\) The Chief Justice expressly refers to the issue of a teenager taking a picture of him or herself,\(^{115}\) and in this context this would include sexting. The issue that the Court was asked to resolve was whether the criminalisation of all forms of child pornography was compatible with two provisions of the Canadian Charter of Rights and Freedoms. Article 2(b) guarantees the right to ‘freedom of thought, belief, opinion and expression . . . ’ and Article 7 includes the ‘right to life, liberty and security of the person . . . ’ These have been construed in a similar way to Articles 8 and 10 of the ECHR.

The Court accepted that there were legitimate reasons for criminalising material that met the statutory definition of child pornography, but as with the ECHR, it held that the key issues to be determined were their necessity and proportionality:

\begin{quote}
The goal must be pressing and substantial, and the law enacted to achieve that goal must be proportionate in the sense of furthering the goal, being carefully tailored to avoid excessive impairment of the right, and productive of benefits that outweigh the detriment to [freedoms].\(^{116}\)
\end{quote}

The Court accepted that there are dangers to self-produced material, including the possibility that there could be negative attitudinal changes and the possibility that it could ‘fall into the hands of someone who may use it in a way that harms children,’\(^{117}\) but they questioned whether that was sufficient by itself to justify criminalisation. They encapsulated the submissions of the government (arguing that it was constitutional to criminalise such material) as ‘[arguing] that it is necessary to prohibit possession of a large amount of

\(^{110}\) Karaian, supra n 16 at 61.
\(^{111}\) Contrary to the Fourteenth Amendment of the US Constitution.
\(^{112}\) 2001 SCC 2.
\(^{113}\) Section 163.1 Criminal Code.
\(^{114}\) Supra n 112 at para 76.
\(^{115}\) Ibid.
\(^{116}\) Ibid. at para 78.
\(^{117}\) Ibid. at para 100.
harmless expressive material in order to combat the small risk that some material in this class may cause harm to children. The Court ultimately decided that the prohibition of self-produced material of lawful activity ‘trenches heavily on freedom of expression while adding little to the protection the law provides children’.

The limits of Sharpe should be understood. It did not render the child pornography offence unconstitutional but simply created an exception for specific forms of material. For self-produced material it needed to involve lawful sexual activity (that is, the person(s) featured must be over the age of consent) and it only applied where it was recorded consensually and held privately. The Court was clear that where the material was produced or held for anything other than private viewing then the exception would not apply and the criminal law could be appropriately used.

It is submitted that the ruling in Sharpe could assist in understanding the competing interests in respect of the necessity and proportionality under Articles 8 and 10. Sharpe acknowledges that adolescents above the age of consent could view sexualised images as part of their sexual identity and sexual expression. It therefore corroborates the applicability of Articles 8 and 10 to this behaviour. Sharpe shows that the central question is the extent to which the potential negative elements can justify the criminalisation of the material. At the heart of this decision is the fact that it has been said that the purpose of the child pornography law was the protection of children from exploitation, and this is true of the law in England and Wales too. The Canadian Supreme Court decided that there was little evidence that children were exploited in the production of self-generated material and in the context of consensual sexting that is at the heart of this discussion, this would seem to be correct.

Harmful behaviour

It has to be acknowledged that there are harms involved in sexting behaviour. It was seen earlier in this article that the principal harm that is cited in respect of consensual sexting is the loss of control of the image. There are two principal

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118 Ibid. at para 101.
119 Ibid. at para 110.
120 Ibid. at para 116.
121 Ibid. at para 118.
122 See, for example, the comments of McLachlin CJC where she refers (at para 76) to the fact the right to free expression includes ‘individual self-fulfilment and self-actualization’. This suggests the sexual identity issue of Article 8 ECHR is contained within the constitutional protection of free expression under the Canadian constitution.
123 Ibid. at para 28.
ways that this can happen. The first is that the person who takes the photograph loses the mobile telephone that stores the image. This appears to have happened to some celebrities. The second possibility, and probably the more likely, is that the recipient decides to distribute the image. This could either be at the time the image was received or at a later date (such as when someone sends an image to a ‘revenge’ site). It has been noted that this is a possibility but it must be questioned whether this is a justification for criminalising the taking and possession of the photograph, or whether it justifies criminalising the distribution?

It has been said that necessity means more than merely desirable, but that the key test is whether the ‘interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued’. In considering this, the ECtHR will often identify whether there is a European consensus, and this could raise an interesting issue here. Whilst there is unlikely to be a consensus across the individual states, the issue of child pornography—including self-generated material—is expressly dealt with in another Council of Europe Convention, the Lanzarote Convention. Whilst the Lanzarote Convention is not justiciable directly in the ECtHR, it is clear that the ECtHR will increasingly take account of other international treaties, including those of the Council of Europe. Article 20 of the Lanzarote Convention requires contracting parties to criminalise, inter alia, the production, possession and distribution of child pornography. However, Article 20(3) expressly states that contracting parties are not required to criminalise images of a child who has reached the age of consent and ‘where the images are produced and possessed by them with their consent and solely for their own private use’.

This terminology is very similar to that used by the Canadian Supreme Court in Sharpe and perhaps recognises the fact that some adolescents see sexting as a form of sexual expression and their self-identity. A complicating factor is that Article 20(3) is expressly at the discretion of Member States and accordingly this may not assist in identifying a European consensus. Traditionally, where an interference is based on morality the ECtHR will extend a margin of appreciation to the national states. The breadth of this margin differs depending on the circumstances of the case. In Stübner v Germany, the ECtHR stated:

125 Handyside v United Kingdom, supra n 76.
126 Olsson v Sweden (No 1) A 130 (1988); 11 E HRR 259 at para 67.
127 Harris et al, supra n 85 at 352.
129 For example, in K.U. v Finland ECHR Reports 2008; 48 EHR 52, the ECtHR made reference to the Council of Europe Convention on Cybercrime, 23 November 2001, CETS 185.
130 Harris et al., supra n 85 at 349.
131 Supra n 91.
[W]here a particularly important facet of an individual's existence or identify is at stake the margin allowed to the state will normally be restricted...where, however, there is no consensus within the Member States...either as to the relative importance of the interest...or the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider.\(^{132}\)

It is likely that any margin here will be relatively wide because although it arguably goes to the heart of an important issue – the sexual identity of an individual – it is certainly an issue that raises sensitive moral issues and is an issue where there is no consensus, as evidenced by the fact that the Lanzarote Convention makes criminalisation a matter of pure discretion. Even if the margin is broad that does not mean that the ECtHR will not scrutinise the proportionality of the matter, it simply means it will give greater discretion to the State.

**Proportionate response**

The use of the criminal law to tackle consensual sexting would not seem to be a proportionate response to the behaviour. The laws prohibiting child pornography have as their overriding objective the protection of children from exploitation. Where an adolescent of the age of consent is taking a sexualised picture of itself and using it in a private way (including sending it to someone they are in a relationship with), it is difficult to see where the exploitation is in such conduct. Whilst it is conceded that harm can arise, this is less from the initial decision to take the image but rather from the subsequent dissemination of it. These are separate issues. The question that must be asked is whether it is necessary and proportionate to criminalise the taking and possession of a sexualised photograph taken by a child above the age of consent and intended for private use only. Whilst there is a risk of harm to that child the same can be said of sexual intercourse, indeed its potential harms are arguably even more serious, including pregnancy and sexually transmitted diseases, both of which can be life-changing events. If a child of the age of consent can legitimately engage in sexual activity, how can it be said to be proportionate to criminalise sexualised photographs for private use, an arguably less-risky form of behaviour?

This argument is perhaps supported, albeit indirectly, in respect of the recent guidelines published by the Director of Public Prosecutions in respect of communications sent through social media.\(^{133}\) Whilst the guidelines do not

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132 Ibid. at paras 60–61.
133 Available at: www.cps.gov.uk/consultations/socialmediaconsultation.pdf [last accessed 13 August 2013].
apply to this form of behaviour, it does expressly recognise that a prosecution will not normally be in the public interest where children may not appreciate the potential harm and seriousness of their actions. The same could be said of sexting, it can be argued that it is disproportionate (and therefore not in the public interest) to prosecute the taking of sexualised images for private use where adolescents do not appear to appreciate the potential (secondary) harm they expose themselves to.

4. Conclusion

Sexting is an issue that is extremely controversial. It is a phenomenon that many struggle to understand, but research suggests that a significant proportion of adolescents are willingly engaged in it. There can be little doubt that sexting is a risky form of behaviour and that harm can be caused if the image is distributed more widely. This is true also of adults but the child pornography laws apply because, in part, it is thought that an adolescent under the age of 18 may not yet have the capacity to understand the dangers involved in posing for sexualised images. This distinction justifies why children are protected whereas adults are not, but it does not follow that it requires the criminalisation of the adolescent victims themselves. A more proportionate approach would be to recognise this harm by requiring the identification and prosecution of the individual who distributes the images more widely, including to the Internet at large.

The Supreme Court of Canada was clear that the exception that they created in Sharpe applied only to privately held material and the same logic should apply under the ECHR. The protection afforded under Articles 8 and 10 of the European Convention should relate solely to private material and the law should criminalise those who harm a child by disseminating intimate pictures

134 The guidelines primarily address communications under the Malicious Communications Act 1988 and the Communications Act 2003 and expressly state (at para 3) that where the social media is being used to facilitate a substantive crime then prosecutors should use that instead of this guideline. That must be the case here where the substantive offence is one under the Protection of Children Act 1978.

135 Supra n 133 at para 41.


137 Although it remains open to question whether adults require protection. Following K.U. v Finland, supra n 129, it can be said that intimate information posted without consent on the Internet could be a part of the physical and moral integrity of a person worthy of Article 8 protection. It may be possible to invoke the civil law to compensate where information is inappropriately released (an action for breach of confidence, for example), but if the material cannot be recovered could it be argued that the criminal law is required to protect the Article 8 rights of the individual (see, for example, X and Y v Netherlands, supra n 85).
of them. This would be in accordance with protecting the physical and moral integrity of the adolescent, but it is submitted that it would be disproportionate to decide that this risk of harm justified the initial private behaviour. These are two separate actions and the necessity and proportionality of each should be considered. If this is done then it is submitted that Articles 8 and 10 can protect the consensual form of sexting and this should be recognised by the courts.

That is not to say that sexting should be seen as normal or unproblematic behaviour. The risk to the child of embarrassment when images continue to circulate for many years is very real but is it really the role of the criminal law to solve this problem? It is submitted that the use of the law to tackle this behaviour is disproportionate and alternative strategies, including educating young people on the risks that they are taking, would be a more appropriate response.

138 See, for example, K.U. v Finland, ibid.