

TWO BILLS DEMONSTRATE THE DIFFICULTY IN LEGISLATING TEEN SEXTING

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In November 2016, Cañon City High School, in Cañon City, Colorado, was rocked by a scandal involving 300 sexually explicit images of students being shared among more than 100 teenagers.¹ This case, and others around the country, have caused considerable consternation among prosecutors, school officials, parents, and those who want to ensure juveniles do not suffer criminal consequences for acting like teenagers in the age of easily created, shared and exploited digital images.

Colorado, like most states, has struggled for several years to determine the proper criminal consequences for a juvenile² who sends or receives sexually explicit images electronically. The focus of most of these concerns has been images sent through text messaging, colloquially known as “sexting,” but the concept also includes other messaging platforms, such as Facebook Messenger and Snapchat.³

Surveys indicate that between one-third to one-half of sixteen- and seventeen-year-olds engage in the exchange of sexually explicit images.⁴ However, a recent study by the Cyberbullying Research Center disputes these numbers, reporting that, of 5,500 middle and high school students ages twelve to seventeen surveyed, only twelve percent reported sending a sexually explicit image in their lifetime and nineteen percent reported receiving such an image.⁵ Clearly, these statistics are based on vastly different sample groups, but the bottom line is that this is happening whether adults like it or not.

Under Colorado law, authorities could have charged students in the Cañon City case with felony child pornography and forced them to

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¹ Sara Rose, No. 1 Story of 2015: *Cañon City School District Sexting Scandal*, THE DAILY RECORD (Dec. 31, 2015, 6:04 PM), http://www.canoncitydailyrecord.com/ci_29331493/no-1-story-2015-canon-city-school-district.

² For purposes of this article and the legislation discussed, juvenile means a person under eighteen years of age.

³ KENNETH V. LANNING, NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, CHILD MOLESTERS: A BEHAVIOR ANALYSIS 119–20 (5th ed. 2010) http://www.missingkids.com/en_US/publications/NC70.pdf#page=13.

⁴ See Alex McKechnie, *Majority of Minors Engage in Sexting, Unaware of Harsh Legal Consequences*, DREXEL NOW, (June 18, 2014), <http://tinyurl.com/h7xzqf8>; Amy Adele Hasinoff, *Teenage Sexting is Not Child Porn*, N.Y. TIMES (Apr. 4, 2016), <http://tinyurl.com/zwedhsy>.

⁵ Justin W. Patchin, *New Teen Sexting Data*, CYBERBULLYING RESEARCH CTR. (Feb. 24, 2017), <http://cyberbullying.org/new-teen-sexting-data>.

register as sex offenders.⁶ Currently, twenty-five states have statutes that explicitly address sexting between minors, although there is little consistency in how that is done, with some states only addressing the sending of images, some addressing the receiving of images, and some addressing both.⁷

The existing statutory scheme in Colorado provides a prosecutor with only two options—charge a juvenile with the felony of sexual exploitation of a child or child pornography, or file no criminal charges.⁸ This has been an unsatisfactory scheme, and many other states are faced with similar statutory challenges. In the past two years, two very different visions of how to address this issue have come to light through the legislative process.⁹

In 2016, a bill was proposed to create a misdemeanor of Misuse of Electronic Images by a Juvenile.¹⁰ This bill, which created a new misdemeanor aimed exclusively at this behavior, was supported by prosecutors' offices throughout the state.¹¹ Prosecutors argued that, even if sexting has become typical teenaged behavior, it should still be criminalized, and compare it to drug and alcohol use.¹²

However, youth and sexual assault victim advocates adamantly opposed the bill, in large part because it would allow a juvenile who took a picture of himself or herself and consensually shared it with a partner to be charged with the crime.¹³ The bill included an affirmative defense, to allow an individual to escape conviction, but not avoid being charged initially.¹⁴ Advocates believed that this option could result in the victim of abusive "sexting," i.e. a teenager who took and shared a picture of themselves which was then shared with others without their consent, to be charged and be forced to mount an affirmative defense.¹⁵ By virtue of being charged with a crime, regardless of whether charges are ultimately dropped, the charged juvenile would be unable to access criminal legal

⁶ Rose, *supra* note 1.

⁷ *Sexting Laws Across America*, CYBERBULLYING RESEARCH CENTER, <http://cyberbullying.org/sexting-laws> (last visited Apr. 2, 2017).

⁸ See Rose, *supra* note 1.

⁹ Misuse of Electronic Images by a Juvenile, H.B. 16-1058, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016); Misuse of Electronic Images by a Juvenile, H.B. 17-1064, 71st Gen. Assemb., Reg. Sess. (Colo. 2017); Juvenile Sexting Crime, H.B. 17-1302, 71st Gen. Assemb., Reg. Sess. (Colo. 2017).

¹⁰ H.B. 16-1058.

¹¹ COLORADO DISTRICT ATTORNEYS' COUNCIL, SUPPORT HB 1058 – MISUSE OF ELECTRONIC IMAGES BY A JUVENILE 1 (2016), http://coga.prod.acquia-sites.com/sites/default/files/html-attachments/h_phc_2016a_03152016_committee_summary/160315%20AttachE.pdf.

¹² *Id.*

¹³ *Misuse of Electronic Images by a Juvenile: Hearing on H.B. 16-1058 Before the H. Comm. on Pub. Health Care and Human Servs.*, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016) [hereinafter *Hearing*] (statement of Raana Simmons, Colo. Coalition Against Sexual Assault, Lydia Waligorski, Colo. Coalition Against Domestic Violence, Laura Reinsch, One Colorado, & Jennifer Eyl, Rocky Mountain Children's Law Ctr.).

¹⁴ See H.B. 16-1058.

¹⁵ *Hearing*, *supra* note 13.

system based victim services and would become ineligible for victim compensation, potentially preventing them from receiving needed counseling or other services in the aftermath of a traumatic experience.¹⁶ This bill also failed to ensure that district attorneys would not use the felony option as a means to coerce juveniles into pleading guilty to the misdemeanor. Due to a well-mounted opposition to the bill, it died in committee.¹⁷

During the 2017 Colorado legislative session, two bills have been introduced on this issue.¹⁸ The first bill revives the Misuse of Electronic Images bill from 2016, with modifications to address some, but not all, of the concerns that were raised in 2016.¹⁹ The other bill,²⁰ supported by a wide-ranging group of stakeholders including the Colorado Coalition Against Sexual Assault, the Colorado Defense Bar, Colorado Youth Matter, Colorado Organization for Latina Opportunity and Reproductive Rights, and the Rocky Mountain Children's Law Center,²¹ creates several options for prosecutors, but ensures that teenagers exchanging images consensually cannot be charged with a crime.²²

House Bill 17-1064 (HB 1064), sponsored by the same legislators who sponsored 2016's failed bill,²³ is supported primarily by prosecutors around the state who believe that all sexting should be criminalized and that, as was explained in testimony last year, teenagers do not understand the consequences of sexting, therefore, there should be criminal consequences to deter it.²⁴ This year's bill includes some important improvements over last year's version. Specifically, the 2017 bill adds an affirmative defense if the juvenile, "distributed, displayed, or published a sexually explicit image as a result of coercion, intimidation, or harassment."²⁵ The bill leaves in place the affirmative defense that the recipient of the image did not solicit or request the image, did not participate in or encourage the making of the image, did not transmit or distribute the image to another person, and took steps to destroy or delete the images within 72 hours or reported the receipt of the image to law enforcement or a school official in that timeframe.²⁶ However, if the juvenile fails to take these steps, they can be charged with a Class 2 misdemeanor in the same manner in which a juvenile who knowingly

¹⁶ *Id.* (statement of Raana Simmons, Colo. Coalition Against Domestic Violence).

¹⁷ *HB 16-1058 Misuse of Electronic Images by a Juvenile*, COLO. GEN. ASSEMB., <https://leg.colorado.gov/bills/hb16-1058> (follow "Committees" hyperlink) (last visited Apr. 2, 2017).

¹⁸ H.B. 17-1064; H.B. 17-1302.

¹⁹ H.B. 17-1064; H.B. 16-1058.

²⁰ H.B. 17-1302.

²¹ The author is an employee of the Rocky Mountain Children's Law Center, a member of the Colorado Coalition Against Sexual Assault Public Policy Committee, has assisted with the drafting of this legislation, and has actively supported this approach to the issue.

²² *See* H.B. 17-1302.

²³ *Id.*; H.B. 16-1058.

²⁴ *Hearing, supra* note 13 (statement of Tariq Sheikh, 17th Judicial Attorney's Office).

²⁵ H.B. 17-1064.

²⁶ *Id.*

distributed, displayed or published an image with the intent to cause emotional distress would be charged.²⁷

Under this scheme, a juvenile who commits Misuse of an Electronic Image could be charged with a class two misdemeanor and could not also be charged with a felony for the same act. That does not mean that a prosecutor cannot threaten to charge the juvenile with a felony in order to have them plead to a misdemeanor, however. This year's version of the bill also adds a petty offense option,²⁸ which was proposed in an amendment in 2016, but never adopted before the bill was killed.²⁹

To qualify for the petty offense charge instead of the misdemeanor, the juvenile who sent the image must have sent it to a juvenile who is fourteen years of age or older and within four years of age of the offending juvenile; only sent the image once; sent an image that only depicts the sender and no other person (there is no exception for a picture that includes the recipient); the juvenile reasonably believed the image was solicited or requested by the recipient; and the juvenile explicitly told the recipient not to distribute, display, or publish the image to any other person.³⁰

This bill does not include a provision for restorative justice sentencing options or any educational component to ensure that teens are aware of the law's provisions and the ways in which they can avoid criminal consequences for sexting. It also does not address prosecutors' ability to charge or threaten to charge juveniles with felony sexual exploitation of a child for these same acts.

House Bill 17-1302, sponsored by Rep. Pete Lee (R—Colorado Springs), creates two new crimes—possessing of private images by a juvenile and posting of private images by a juvenile.³¹ This proposal explicitly carves out an exception to the sexual exploitation of a child statute³² by adding a definition of the term “disclose publicly,” meaning “to make [] available to the public or enough people that a reasonable person would regard the information as likely to become public knowledge.”³³ The bill also adds a section providing that it is not a violation of the statute if:

[T]he person is under eighteen years of age and the child is at least fourteen years of age or less than four years younger than the person, unless the person: knowingly discloses publicly any sexually exploitative material that depicts the child; or knowingly distributes,

²⁷ *See id.*

²⁸ *Id.*

²⁹ COLO. GEN. ASSEMB., *supra* note 17.

³⁰ *See* H.B. 17-1064.

³¹ H.B. 17-1302.

³² COLO. REV. STAT. § 18-6-403 (1981).

³³ H.B. 17-1302.

displays, or publishes, with the intent to obtain a pecuniary benefit from anyone, sexually exploitative material that depicts the child.³⁴

It also prohibits charging a juvenile with sexual exploitation of a child if the juvenile's actions satisfy the elements of one of the newly created misdemeanors.³⁵

The heart of the bill creates two new crimes as mentioned above-posting a private image by a juvenile (a misdemeanor), and possessing a private image by a juvenile (a petty offense).³⁶ Both crimes include aggravating factors that raise the level of the offense.³⁷

To be charged with posting a private image, a juvenile must:

[K]nowingly distribute, display, or publish to the view of another person a sexually explicit image of a juvenile other than himself or herself: without the depicted person's consent; or when the recipient did not solicit or request to be supplied with the image [] and suffered emotional distress; or when the person knew or should have known that the depicted juvenile had a reasonable expectation [of privacy with regard to the image]; or knowingly distributes, displays, or publishes [an image of themselves to the view of more than one other person at a time.]³⁸

Those involved in drafting the bill are hopeful that the felony charge will only be used in cases where it can easily be proven that the distribution was to more than just a few people, such as through "pay for play" websites or other platforms where the distribution is out of the control of the person posting the image.

To be charged with possessing a private image, a juvenile must: "[K]nowingly possess a sexually explicit image of another juvenile without the depicted juvenile's consent"³⁹ It is not a crime if the possessing juvenile took reasonable steps to destroy or delete the image within seventy-two hours after receiving it, or reported the receipt to law enforcement or a school official within the same timeframe.⁴⁰ A juvenile also commits the crime of possessing of a private image by a juvenile if the juvenile knowingly possesses a sexually explicit image of another juvenile after the depicted juvenile withdrew their consent for the person to possess the image and the person failed to delete or destroy the image within seventy-two hours of the request.⁴¹

³⁴ *Id.*

³⁵ *Id.*

³⁶ *See id.*

³⁷ *See id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

Posting a private image by a juvenile can be elevated to a class one misdemeanor if:

[T]he juvenile committed the offense with the intent to coerce, intimidate, threaten, harass, or otherwise cause emotional distress to the depicted juvenile, or the juvenile had previously posted a private image and completed a diversion program for the act or had a prior adjudication for posting a private image by a juvenile; or the juvenile distributed, displayed, or published three or more images that depicted separate and distinct juveniles.⁴²

Possessing a private image by a juvenile is petty offense, unless the “unsolicited possessor . . . knowingly kept or saved three or more separate images of separate and distinct juveniles” for more than seventy-two hours.⁴³

In addition to creating the new crimes detailed above, the new bill takes a restorative justice approach to the issue of teen sexting. It provides for a juvenile to be ordered to participate in restorative justice practices, if “the victim has been consulted, advised, and invited to participate,” in addition to any other sentence the court deems appropriate.⁴⁴ The bill further encourages district attorney’s offices to develop diversion programs for first time offenders.⁴⁵ However, sentencing is not dependent on the victim’s willingness to participate in restorative justice options.⁴⁶

Finally, the bill tasks the School Safety Resource Center, created by statute in Colorado Revised Statute § 24-33.5-1803, with making available “model lessons . . . regarding the dangers and consequences of sexting,” to be used by school districts to educate students and to make them aware of the provisions of the bill regarding deleting or reporting images within seventy-two hours.⁴⁷

Sponsors of both bills are motivated by a desire to protect juveniles. Their vastly different approaches; however, demonstrate what a complex issue this is from both a public policy and public safety standpoint. Philosophically, the difference between the bills comes down to a question of whether all teen sexting should be criminal and whether the threat of criminal consequences serves as a deterrent for such behavior. Anecdotally, even taking the district attorneys’ argument regarding drugs and alcohol at face value, it is clear that criminal consequences deter *some* teens from risky or criminal behavior, but not all. The bills are schedule to be heard by the House Judiciary Committee on April 11,

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

2017, at 1:30 p.m., which will present a unique challenge for legislators. It will be interesting to see how this conflict unfolds as the legislative session progresses and which approach, if any, becomes law in Colorado.