



TO: House Public Safety & Homeland Security Committee

FROM: Carrie L. Davis, ACLU of Ohio Staff Counsel

DATE: May 18, 2010

RE: HB 473 – Interested Party Testimony

Representatives:

My name is Carrie Davis. I am the Staff Attorney and Legislative Counsel for the American Civil Liberties Union of Ohio (“ACLU of Ohio”), the Ohio Affiliate of the ACLU, the oldest and largest civil liberties organization in the world with over 500,000 members nationwide and over 30,000 members and supporters across Ohio. The ACLU and ACLU of Ohio are non-profit, non-partisan membership organizations devoted to protecting basic civil rights and civil liberties for all Americans and all Ohioans. We are especially concerned with protecting the rights of the most vulnerable among us, our youth.

The ACLU of Ohio offers the following interested party testimony on House Bill 473. While HB 473 does make improvements on the current state of the law, it does not alleviate all of the ACLU of Ohio’s concerns. We believe that while sexting is a poor decision, the criminal courts are not the proper place to address these concerns.

1. Sexting is a growing problem that needs to be addressed. We need to educate, not criminalize, our youth about risky behavior.

A 2009 study by the National Campaign to Prevent Teen and Unplanned Pregnancy found that one in five teenagers admitted to sending nude pictures of themselves over cellphones or the internet. Clearly, this is a growing problem that needs to be addressed.

We can all agree that young people often do not appreciate the consequences of their actions. This is certainly one of those situations. Teens who send compromising pictures rarely realize those photos may be shared with others who were not intended to see them. There is no question that we need to find a way to address this problem, but we need to do so responsibly.

The ACLU of Ohio believes that criminalizing misguided juvenile behavior is not the solution. Young people do not always appreciate the risks and consequences of sexting, and therefore we should educate them about these risks, not criminalize their behavior.

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With new technology comes new challenges. We need to work even harder in our classrooms and living rooms to educate youth about appropriate use of cellphones and the internet.

2. Ohio's felony child pornography laws and sex offender registration laws were designed to protect young people from adult predators, not to criminalize them for their own foolishness.

We support the efforts made in HB 473 to eliminate the problem of sexting teens being threatened with felony prosecution under the state's child pornography laws and registration under the sex offender laws.

There are two relevant felony offenses under Ohio law: R.C. 2907.321 Pandering Obscenity Involving a Minor and R.C. 2907.323 Illegal Use of a Minor in Nudity-Oriented Material or Performance. In addition to whatever sentence may be imposed, persons convicted of one of those felonies would likely also be required to register as a sex offender pursuant to Ohio's Adam Walsh Act.

Those laws were designed to protect young people from being sexually victimized by others. They were never written with sexting in mind, nor should those laws be used in such a manner.

It is especially demeaning to the true victims of sex offenses for whom these laws were designed to protect. Maureen Kanka, the mother who lost her child and advocated for Megan's Law in her honor, has spoken out and said these sexting prosecutions are wrong – teens need intervention and counseling, not legal trouble. (See "Girl Faces Child Porn Charges for Posting Nude Photos of Herself on MySpace," by Beth DeFalco, 03-27-2009, Law.com.)

While anecdotal evidence indicates that numerous teens have been threatened with felony child pornography charges for sexting, we are aware of scant court decisions on the issue. In a case out of Pennsylvania, a federal district court ruled and the appeals court agreed that a county prosecutor could not charge a group of teen girls based on the fact that they appeared partially nude in photos. (See www.aclupa.org/legal/legaldocket/milleretalvskumanick.htm.)

3. The proper way to address poor judgment of teens involved with sexting is to educate them about the risks and consequences, not by criminalizing their behavior. Thus, we are opposed to creating a new misdemeanor offense for teen sexting.

As the United States Supreme Court recognized just yesterday, juveniles are different. In *Graham v. Florida*, Case No. 08-7412, the U.S. Supreme Court held

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that juveniles cannot be sentenced to life without the possibility of parole for non-homicide crimes. In 2005, in *Roper v. Simmons*, 543 U. S. 551, the U.S. Supreme Court ruled juveniles cannot be sentenced to death.

These Supreme Court decisions recognized that juveniles are in fact different, “that punishment for crime should be graduated and proportioned to [the] offense,” *Weems v. United States*, 217 U. S. 349, 367, and that the age of the accused and the nature of the crime each bear on the analysis.

Age, nature of the offense, and proportionality of punishment to harm come up short in when it comes to criminalization of sexting. In the case of teen sexting, the “victim” and the “offender” are often one and the same. A teenager taking and sending her own photo is hurting herself more than anyone else. A teenager who unwittingly receives a photo from someone else is in no way culpable. The only intentional harm that arises is when someone sends another teen’s photo without their permission. However, even that situation often occurs in the context of teenagers not thinking about their actions.

There are better ways to discourage this behavior than by lashing out and criminalizing the victims for what they have naively done to themselves. Although teens need to be taught the risks and potential consequences of sending explicit photos, that should be done by education, not prosecution.

4. Exempting teen sexting from felony laws can be done without weakening protections from “real” sex offenders.

Exempting naïve teen sexting from criminal prosecution will in no way dilute the effectiveness of our sex offender laws. Prosecutors will still be free to prosecute those who would prey on minors and traffic in their images. Law enforcement would likewise be free to apply sex offender registration and notification requirements on those convicted of sex crimes and child-victim crimes.

In fact, a persuasive argument could be made that exempting teen sexting reinforces what our felony child pornography laws were meant to do: protect minors from adults who would prey on them.

5. The proper legal recourse for individuals whose privacy has been invaded lies in pursuing civil litigation.

There should be legal recourse for individuals whose privacy has been invaded by others who maliciously forward images that were intended to be private photos. However, that solution lies in filing a civil suit for damages.

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We have all heard the tragic stories of a teen privately sharing a compromising photo of themselves with a boyfriend or girlfriend, only to have that photo shared with the entire world following their break-up. There should be a disincentive for this kind of spiteful behavior, and civil courts provide an appropriate remedy.

Teens and their parents may file a civil suit against a person who distributes private information with the intent to cause harm. They can also seek damages for the harm caused and seek to have the sender prohibited from doing the same again.

In conclusion, our current laws never contemplated the problem of sexting, nor should they be (mis)used as a substitute for taking the time to address the root problems of sexting. Certainly we should be able to protect our youth without harming them in the process. To that end, we suggest the General Assembly do the following:

- Clarify that criminal offenses relating to taking or sending nude photos do not apply to adolescents who naively take and send their own picture (i.e., the “sexting” sender).
- Clarify that criminal and delinquency offenses relating to possession of nude photos of a minor do not apply to adolescents who just happened to receive a nude picture from another minor (i.e., the “sexting” recipient).
- Clarify that the Adam Walsh Act and other sex offender laws do not apply to minors who send their own photos or inadvertently receive those photos.
- Amend the school curriculum to require instruction about respect for their peers, privacy, responsibility of using electronic media, and to warn teens of the dangers of sending explicit messages via cellphone or the Internet.

Naivety is part of adolescence, and society has a responsibility to teach young people to protect themselves. Threatening teens with criminal prosecution, and all its attendant life-ruining consequences, is not the solution. We need to help our teens better understand the consequences of sexting. That can be better accomplished through intervention and education, not by subjecting teens to further harm.

Respectfully submitted,

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