STUDY NOTE
Unwholesome Activities in a Wholesome Place:
Utah Teens Creating Pornography and the Establishment
of Prosecutorial Guidelines

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I. INTRODUCTION

In Davis County, Utah, idyllic suburban towns sit under the shadow of the Wasatch Mountains. Many people attend churches, volunteer with civic organizations, and enjoy time with family and friends. The teenagers in the area score highly on standardized tests,1 volunteer their free time, and some attend private religious classes off-campus during the school day.2

Suddenly a trend starts to spread among Davis County teenagers that puts police, prosecutors, and parents on edge. The media starts questioning local law enforcement. “The conduct involved here runs the spectrum from being less severe to some shocking-type behavior,” says Davis County Attorney Troy Rawlings.3

“It’s out there and it’s happening. It’s felonies, potentially federal felonies, and the kids are clueless,” adds deputy Davis County Attorney Ronald Dunn.4

This is not the story of Ren McCormack and the PG-rated movie, Footloose—incidentally filmed in Utah—where a small town makes dancing illegal and the teenagers in the town rebel against the ban.5 It is the story of local teenagers throughout Davis County using cell phones to take nude photos of themselves and

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2 Released-Time Classes for Religious Instruction, UTAH ADMIN. CODE r. 277-610-3 (2008). High school students, mostly members of the Church of Jesus Christ of Latter-day Saints, or Mormons, voluntarily leave school grounds for an allotted amount of time for religious instruction. See also Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981) (finding that released time religious programs are not per se unconstitutional).
5 Footloose is a 1984 film that tells the story of Chicago-raised teenager, Ren McCormack (played by Kevin Bacon). McCormack moves to a small town where the town government has banned dancing and rock music. Ren and his classmates want to have a senior prom with music and dancing, but must find a way to get around the law and the local reverend, who makes it his mission in life to keep the town free from those influences. See FOOTLOOSE (Paramount Pictures 1984).
trading the photos with their friends via text message. A police investigation began in January 2008 when six Farmington Junior High School students took photos of themselves and shared them among their inner circle of friends. A parent found the photos on their child’s cell phone and reported it to the police. Police investigated and questioned the teens, ultimately finding that thirteen- and fourteen-year-old boys and girls were trading photos of their own genitals and breasts. Further investigation by the Davis County Attorney’s Office uncovered several more cases involving students at five junior highs and three high schools. While the photo-trading was mostly consensual, one case revealed that a “thirteen-year-old West Bountiful girl received an explicit [photo] through a misdialed number,” and another instance revealed that some teenage boys used explicit photos “as weapons to coerce girls into doing things they weren’t willing to do.”

This phenomenon is not unique to Davis County. In Salt Lake County, a sixteen-year-old was charged with sending nude photos of himself to several teenage girls. Similar incidents have been reported in New Jersey, New York, Alabama, Pennsylvania, Texas, and Connecticut. Furthermore, law enforcement officials from other counties have contacted Davis County prosecutors for advice because of similar incidents occurring in their communities.

Despite their consensual nature, current Utah law considers these photos to be child pornography. That classification puts Utah teenagers who engage in this

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7 Nude Photos Traded Over Cells, Police Say, supra note 6 at B2.

8 Id.

9 Id.

10 Ben Winslow, Cases of Nude Photos by Teens Grows to 28, DESERET MORNING NEWS, Apr. 1, 2008, at B5 [hereinafter Winslow, Cases Grow].

11 Winslow, Charges Coming, supra note 4, at B1.

12 Id.

13 Melinda Rogers, Prosecutors Call for Law on Nude Teen Pics: But They Acknowledge a Charge of Misdemeanor Lewdness Likely Won’t Hold Up in Court, SALT LAKE TRIB., June 05, 2008, at B2 [hereinafter Rogers, Prosecutors Call for Law].

14 Reitz, supra note 6, at C6.

15 Winslow, Cases Grow, supra note 10, at B5.

16 Federal law also defines child pornography, see 18 U.S.C. § 2256(8).

17 UTAH CODE ANN. § 76-5a-2 (2008):

(1) “Child pornography” means any visual depiction, including any live performance, photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

(a) the production of the visual depiction involves the use of a minor engaging in sexually explicit conduct;

(b) the visual depiction is of a minor engaging in sexually explicit conduct; or
type of inappropriate behavior at risk for being charged with felonies that, if convicted, carry substantial consequences typically reserved for more heinous crimes.

Today’s teenagers live in a world where cell phones and text messaging are ubiquitous; nearly three out of every five teenagers own a cell phone. Without text messaging capabilities, a recent poll stated that forty-seven percent of teens responded that their social life would “end or be worsened.” Prosecutors and law enforcement, battling the misuse of emerging technology by teenagers, must find a way to balance the need to eliminate the harms of child pornography and punish the people who create it with the need to the protect offending teenagers from unwittingly committing a serious and punishable offense.

II. RECENT CHANGES TO UTAH’S STANDARD FOR SEXUAL OFFENSES

A. Legislative Amendments in the Code to Match Emerging Technology

The legal implications of text messaging have only recently been addressed in Utah. During the 2008 Legislative Session, legislators amended the “enticing a minor” statute to reflect the impact technological changes have on criminal prosecution. Before the amendment, an adult who text-messaged a minor to “solicit, seduce, lure, or entice” the minor into sexual activity could not be charged under the statute since “text messaging” wasn’t specifically identified. Accordingly, such adults could effectively avoid second-degree felony charges and registration as a sex offender by limiting their solicitous conduct to text-messaging. To remedy this undesirable outcome, Representative Kerry Gibson and Senator Jon Greiner sponsored a bill that added “text messaging” to the “Enticing a minor” statute. On the floor of the House of Representatives, Gibson stated the purpose of the amendment was to “[m]ake sure that text messaging is included and that crime can be aggressively investigated and prosecuted just like it

(c) the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

19 HARRIS INTERACTIVE, A GENERATION UNPLUGGED 15 (2008), available at http://files.ctia.org/pdf/HI_TeenMobileStudy_ResearchReport.pdf (“The study was conducted online among a nationally representative sample of 2,089 teenagers across the U.S. who have cell phones (ages 13–19). More than 100 questions were asked about mobile phone usage, attitudes, behaviors, and teens’ desires and aspirations for the future including mobile communications and entertainment.”).
21 See UTAH CODE ANN. § 76-4-401 (2003).
23 See Staff, Man is Arrested on Porn Distribution Count, DESERET MORNING NEWS, Feb. 18, 2008, at B5.
could be if it was used using [sic] the Internet.”25 In Senate chambers, Greiner added, “[w]hat it’s basically doing is bringing us into the twenty-first century by realizing that enticement of minors can happen other than the way that the code is originally written and brings text messaging into the criminal code.”26 The bill, which passed and was enrolled in 2008, defines text messaging as an “electronic text or one or more electronic images sent by the actor from a telephone or computer to another person’s telephone or computer by addressing the communication to the person’s telephone number.”27 However, legislators likely did not anticipate that teenagers would be charged under the statute for text messaging nude photos of themselves to each other.

B. Judicial Interpretations of the Utah Code

The Utah Supreme Court recently heard a case involving an analogous situation that answers how Utah courts might interpret the statute as it applies to teenagers. At thirteen, Z.C. engaged in consensual sex with a twelve-year-old boy and became pregnant.28 Both minors were charged with delinquency petitions for sexual abuse of a child under Utah Code Ann. § 76-5-404.1, a second-degree felony if committed by an adult.29 Z.C. moved to dismiss the charge against her, arguing that it violated her constitutional rights and that the legislature did not intend for two minors, engaging in consensual sex,30 to be charged with sexual abuse of a child.31 Regarding Z.C.’s constitutional claim, the Utah Supreme Court ruled that “under the plain language of the statute, a child is a person and may be adjudicated delinquent for sexually touching another child with the requisite intent.”32 However, on Z.C.’s other claim, the court found that “applying the statute to treat Z.C. as both a victim and a perpetrator of child sex abuse for the same act leads to an absurd result that was not intended by the legislature.”33 In sum:

By filing delinquency petitions for child sex abuse against both participants for sexually touching one another, the State treats both children as perpetrators of the same act. In this situation, there is no discernible victim that the law seeks to protect, only culpable participants.

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26 Id.
28 State ex. rel. Z.C., 165 P.3d 1206, 1207 (Utah 2007).
29 Id.
30 The court rightly notes: “we employ the term ‘consensual’ in its conventional, rather than its legal, sense. Children under the age of fourteen cannot legally consent to intercourse or sexual touching in the state of Utah. Utah Code Ann. § 76-5-406(9) (2003).” Id.
31 Id.
32 Id. at 1209.
33 Id. at 1208.
that the State seeks to punish. We know of no other instance in which the State has attempted to apply any sexual assault crime to produce such an [absurd] effect.\textsuperscript{34}

The court added that their ruling only applied to situations where there was no true victim or perpetrator.\textsuperscript{35} In situations where a physically mature child abuses a younger or smaller child, there is a clear difference between the perpetrator and the victim, so it is “logical that the legislature intended to include such acts within the scope” of sexual abuse of a child.\textsuperscript{36}

Since the court ruled that sexual assault crimes presuppose a perpetrator and a victim,\textsuperscript{37} the court likely would view teenagers trading nude photos of themselves to each other in the same way. In a recent case concerning Utah’s sex offender registry, Chief Justice Durham took the opportunity to allude to recent news reports of teenagers taking indecent photos with their cell phones and sending them to friends.\textsuperscript{38} While this specific issue was not properly before the court, she asked about the possibility of these teenagers having to register as sex offenders.\textsuperscript{39} Chief Justice Durham’s question implied that this type of punishment might be too harsh for teenagers who did not think through the consequences of their actions.\textsuperscript{40} In response, the attorney representing the state seemed to agree with the Chief Justice, stating “[t]aking dirty [photos] with a cell phone hardly seems like an offense deserving such a punishment.”\textsuperscript{41} But since prosecutors have the discretion to file charges, as discussed below, a zealous prosecutor could file charges against teenagers for taking “dirty photos” that would presumably result in putting the teenager on the sex offender registry.

\section*{III. PROSECUTORIAL DISCRETION}

In \textit{State ex. rel. Z.C.}, the Utah Supreme Court stated “[t]he primary fail-safe against the absurd application of criminal law is the wise employment of prosecutorial discretion. . . .”\textsuperscript{42} “Unfortunately, we can’t ensure that all prosecutors will use their discretion wisely.”\textsuperscript{43}

\begin{itemize}
  \item \textsuperscript{34} \textit{Id.} at 1212.
  \item \textsuperscript{35} \textit{Id.} at 1213.
  \item \textsuperscript{36} \textit{Id.}
  \item \textsuperscript{37} \textit{Id.} at 1214.
  \item \textsuperscript{38} Geoffrey Fattah, \textit{Parents Fear Kids will be on Sex List}, \textit{Deseret Morning News}, Apr. 5, 2008, at B1.
  \item \textsuperscript{39} \textit{Id.}
  \item \textsuperscript{40} Audio recording: Utah Supreme Court Oral Arguments before Utah Supreme Court in State v. Briggs, No. 20070186 (Utah Oct. 31, 2008), http://www.utcourts.gov/courts/sup/streams/index.cgi?mon=20084.
  \item \textsuperscript{41} \textit{Id.}; Fattah, supra note 38, at B1.
  \item \textsuperscript{42} \textit{Z.C.}, 165 P.3d at 1212 n.9.
  \item \textsuperscript{43} In \textit{State ex. rel. Z.C.}, the Utah Supreme Court asked “why the prosecutor could not have accomplished the intended result by basing the delinquency petition on a victimless offense that more accurately fits the conduct at issue.” \textit{Id.}
Davis County Attorney Troy Rawlings said that the best charge for teenagers who text nude photos of themselves to others is “dealing in harmful material to a minor,” a third-degree felony. However, another prosecutor in a different Utah jurisdiction could charge these teens with sexual exploitation of a minor, a second-degree felony that could possibly require the teen to register as a sex offender when they turn twenty-one.

In Florida, charges were brought against A.H., sixteen-years-old, and J.G.W., seventeen-years-old, for taking digital photos of themselves while naked and engaging in sexual behavior. The photos were never shared with a third party, but the state alleged that they were emailed from one computer to another. The state charged each of them with “one count of producing, directing or promoting a photograph or representation that they knew to include the sexual conduct of a child . . . ” J.G.W. was “also charged with one count of possession of child pornography . . . ”

In Washington, Anthony Vezzoni was charged with “dealing in depictions of a minor engaged in sexually explicit conduct,” “possession of depictions of a minor engaged in sexually explicit conduct,” and “sexual exploitation of a minor.” Vezzoni, then sixteen-years-old, had sex with his sixteen-year-old girlfriend, T.N. Afterwards, Vezzoni asked T.N. if he could take nude photos of her, and she agreed. One week later, the couple broke up, and Vezzoni showed the photos of T.N. to several classmates at school.

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44 Utah Code Ann. § 76-10-1206 (2008). Dealing in material harmful to a minor:
(1) A person is guilty of dealing in material harmful to minors when, knowing or believing that a person is a minor, or having negligently failed to determine the proper age of a minor, the person intentionally:
   (a) distributes or offers to distribute, exhibits or offers to exhibit, to a minor or a person the actor believes to be a minor, any material harmful to minors;
   (b) produces, performs, or directs any performance, before a minor or a person the actor believes to be a minor, that is harmful to minors; or
   (c) participates in any performance, before a minor or a person the actor believes to be a minor, that is harmful to minors.
45 Rogers, Prosecutors Call for Law, supra note 13, at B2.
46 Utah Code Ann. § 76-5a-3 (2008):
(1) A person is guilty of sexual exploitation of a minor:
   (a) when the person knowingly produces, distributes, possesses, or possesses with intent to distribute, child pornography; or
   (b) if the person is a minor's parent or legal guardian and knowingly consents to or permits that minor to be sexually exploited under Subsection (1)(a).
47 Sexual exploitation of a minor is a felony of the second degree.
49 Id.
50 Id.
51 Id.
53 Id.
54 Id.
55 Id.
In both cases, prosecutors decided to charge the teenagers using the strongest possible statutes. Instead of using prosecutorial discretion wisely and charging the teenagers with charges that fit the crime, prosecutors used statutes that potentially would classify the teenagers as sex offenders.

The prosecutorial pendulum can swing both ways. While some people will agree with Florida’s and Washington’s stringent application of the law, others will argue that “kids will be kids” and charges should never be filed against them because the intent to create a victim does not exist. Kathy Reimherr, a member of the Utah Sentencing Commission, says:

I don't think we should be stepping into anything like this so fast, either by making laws or arrests. I worry about knee jerk reactions. It seems to me like much of this is a phase, much like streaking or pet rocks or baring your chest at Spring Break. Stupid, embarrassing [sic] but possibly belongs in a different court, such as the court of poor taste . . . . I find it ridiculous that [prosecutors are] pressing charges against most of these kids anyway, and the real risk is that this gets on a record and haunts you forever.56

A middle ground must be found between the two extremes. States should restrict the disturbing social behavior of teenagers taking nude photos of themselves by criminalizing it, but not to the felony level. After all, ten percent of children believe that it is acceptable to post photos of themselves online.57 According to the National Center for Missing and Exploited Children, 5.4 percent of child pornography images found on the Internet are self-produced.58 This trend will only increase with population growth and the growth of the internet.59 Because charging teenagers who take nude photos of themselves with a felony is a prosecutor’s only option,60 the law should change to give prosecutors more guidance.

IV. Utah’s Possible New Standard: An Amendment to the Code

One possible solution is to let Utah Courts determine the legislative intent of the statute to possibly exempt teenagers from felony charges and convictions. However, instead of wasting money and court resources to determine whether or not the legislature intended teenagers to be prosecuted under the statute, one Utah legislator has already filed a draft amendment to the statute.

56 E-mail from Kathy Reimherr, Member, Utah Sentencing Commission, to Jesse Michael Nix, author (Sept. 21, 2008, 11:33:40 MST) (on file with author).
58 Id. at 19.
59 Id. at 22.
60 See Rogers, Prosecutors Call for Law, supra note 13.
A. Representative Sheryl Allen’s Amendment

Due to the recent surge of cases involving teenagers and sexually provocative cell phone photos, the Utah Sentencing Commission reviewed ways of changing the law to provide prosecutors more options.\(^{61}\) Davis County Attorney Troy Rawlings persuaded all the implicated teenagers in Davis County to resolve the issue through non-judicial adjudication where the teens only received a charge of misdemeanor lewdness.\(^{62}\) However, in future cases, if a teenager is uncooperative and wants to take their case to court, prosecutors will be forced to charge the teenager with a felony.\(^{63}\) Given that many of the teenagers are thirteen- or fourteen-years-old, Rawlings is reluctant to do that.\(^{64}\)

To give prosecutors more tools to deal with these situations, Davis County Representative Sheryl Allen, presented the Utah Sentencing Commission with a proposed amendment.\(^{65}\) The “Material Harmful to Minors” amendment provides new penalties for minors that “distribute pornographic material or deal in material harmful to a minor.”\(^{66}\) “Persons 16 or 17 years of age are guilty of a Class A misdemeanor; and persons younger than 16 years of age are guilty of a Class B misdemeanor.”\(^{67}\)

A “person 18 years of age or older who solicits a person younger than 18 to distribute pornographic material or deal in material harmful to a minor is guilty of a third degree felony and is subject to specified penalties.”\(^{68}\)

The Utah Sentencing Commission endorsed the change\(^{69}\) and will recommend that Utah legislators adopt the changes during the 2009 Legislative session.\(^{70}\)

B. Age vs. Conduct

Although the amendment will provide prosecutors with the option to file misdemeanor charges against teenagers, establishing age distinctions between class A and B misdemeanors is not the best solution. The amendment should instead establish penalties based on conduct because age distinctions do not adequately address the general problems associated with these teenagers. It should focus on prosecuting conduct in inappropriate situations since age distinctions will only add to the problem by creating unnecessary age divisions.


\(^{62}\) Id.

\(^{63}\) Id.


\(^{65}\) Id.


\(^{67}\) Id.

\(^{68}\) Id.

\(^{69}\) Id.

\(^{70}\) Id.
If the current problem is prosecutors charging teenagers with felonies (a charge that most law enforcement officials believe is too harsh for this type of crime), Representative Allen’s offered amendment does not solve it. Although her recommendations are an improvement because they make punishment less severe, prosecutors will still not have the necessary discretion to make the punishment fit the crime. Instead, they would still be forced to charge teenagers for an offense that does not warrant the more serious penalties.

A recent case involving a sixteen-year-old West Jordan High School student illustrates how Allen’s amendment would function in practice. The teen sent sexually explicit photos to a girl and asked her to send nude photos of herself to him. When she refused and asked him not to send sexually explicit photos to her, he ignored her request and continued to send more photos. In this case, the student was sixteen-years-old and convicted of a class A misdemeanor after pleading with the prosecutor. Under the proposed amendment, if the student had been fifteen instead of sixteen and had harassed a girl in the same way, he would only be charged with a class B misdemeanor. Using age instead of conduct to determine the charge limits prosecutors’ ability to make the punishment fit the crime and does not comport with the goal of providing prosecutors with more discretion in charging these teenagers.

Teenagers who engage in sending nude photos of themselves to others fall into two categories: consensual and non-consensual. Thus, a better approach would require the law to draw the line between consensual behavior and intentional infliction of harm instead of focusing solely on age. The previously discussed cases of State ex. rel. Z.C. and A.H. v. State of Florida involved teenagers engaged in consensual behavior where a true “victim” was lacking. It is likely that in all cases where the minors’ behavior is obviously consensual, prosecutors should charge teenagers with class B misdemeanors. Yet, the cases of Washington v. Vezzoni and the West Jordan High School student involved teenagers who engaged in non-consensual behavior. Other conduct within this category would include teenagers who use sexually explicit images of themselves or others to embarrass, harass, or even blackmail. With ninety-three percent of teenagers using the internet, fifty-five percent of teenagers using social networking websites like Facebook and Myspace, and forty-seven percent of teenagers

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71 Melinda Rogers, Teenager Sentenced for Cell Phone Lewdness, SALT LAKE TRIB., Aug. 29, 2008 at A1 [hereinafter Rogers, Teenager Sentenced].
72 Id.
73 Id.
74 165 P.3d 1206 (Utah 2007).
75 949 So.2d 234 (Fla. Dist. Ct. App. 2007).
77 Rogers, Teenager Sentenced, supra note 71.
78 See Editorial, Cell-phone nudes: Amend Utah law to make punishment fit crime, SALT LAKE TRIB., June 7, 2008 at D2.
79 LENHART ET AL., supra note 18, at 1.
80 Id. at 3.
posting photos online where others can see them, embarrassment, harassment, and blackmail are highly likely. These offenses are far more serious, and therefore prosecutors should charge teens with class A misdemeanors. A fourteen-or fifteen-year-old teenager should be given a harsher punishment for harassing other students with nude photos of themselves and not be able to hide behind the strict language of the proposed amendment.

Laws that differentiate between teenagers above sixteen or teenagers below sixteen usually apply to sexual conduct between adults and minors. It is important for the state to protect younger teenagers from predatory adults and acknowledge that older teenagers are more mature. However, in this context, where teenagers send sexually explicit photos among themselves, and adults are not involved, age differentiation is not as important. Teenagers are forced to interact with each other—regardless of age—at school, at work, and in church. To statutorily draw a line that creates differences in punishment between two friends that engage in the same behavior ignores the realities of teenage life. When teenagers interact with other teenagers near their own age, punishment based on conduct is more important than punishment based on age. Prosecutors can consider age when assessing inappropriate behavior, but conduct should determine the charge.

V. CONCLUSION

Parents have always disapproved of certain aspects of teenage life, whether it be dancing, clothing, or language. Most of the time, these changes in teenage culture between the generations are harmless. However, teenagers in Davis County do not realize that taking a nude photo of themself and sending it to other teenagers is not a fad, but is a crime that should be punished. In order to serve the best interests of these children, prosecutors in Utah must have the discretion to give lesser charges to these teenagers rather than charging them with felonies. Moreover, prosecutors must also have the discretion to charge a teen with a misdemeanor based on a teenagers conduct, not age.

81 Id. at 13.