Child sexual abuse in the digital era : Rethinking legal frameworks and transnational law enforcement collaboration

Witting, S.K.

CHAPTER III: REGULATING BODIES: THE MORAL PANIC OF CHILD SEXUALITY IN THE DIGITAL ERA

Abstract

With access to the Internet increasing, children's sexual explorative behaviour has expanded to the online space. This has led to a revival of the moral panic around child sexuality, in particular due to the increasing phenomenon of consensual 'sexting' between minors. This moral panic is fuelled by concerns about children's sexual abuse and exploitation in the context of child sexual abuse material. In an attempt to protect children, consensual 'sexting' between minors is in some countries categorised as the production and dissemination of 'child pornography', leading to the prosecution of involved children as sex offenders. The right to be protected from sexual abuse and exploitation is hence the dominant narrative. This Chapter argues that the criminalisation of children for consensual sexual exploration in the online space is counterproductive to the objective of child protection. Instead, countries should take a rights-based approach to consensual 'sexting' between minors, and balance autonomy and child protection concerns through an exclusion of consensual 'sexting' between minors from the scope of 'child pornography' provisions.

This Chapter was originally published in the Critical Quarterly for Legislation and Law, Vol. 1 (2019), pp. 5-34. This Chapter was updated after publication and hence the content deviates from what was previously published.

I. INTRODUCTION

The regulation of sexual offences is the regulation of bodies. What is considered sexually 'deviant', which practices and preferences cross the line into the socially unacceptable, which body enjoys which degree of sexual autonomy – sexual offences are informed by society's understanding of normative sexuality.[1] As Butler puts, '[the] regulation of gender has always been part of the work of heterosexist normativity'.[2] As society changes over time, so do sexual offences. A good example for this development is the criminal offence of 'sodomy', which originally criminalised a wide range of non-procreative sexual activity, including oral sex, same-sex sexual activity or masturbation.[3] Regardless of the use of force or abusive authority, any non-procreative sexual activity was considered a criminal offence. The meaning of sodomy has changed in the last decades, focusing on men having sex with men, while decriminalising non-procreative sexual activity between heterosexual partners. Even sodomy laws in the current form are under development, with India and Botswana being amongst the latest countries to declare its sodomy laws unconstitutional.[4]

However, the sexual offences discourse has been until today hampered by a misunderstanding of intimacy and sexualised violence, which becomes obvious with regard to the criminalisation of sodomy and the decriminalisation of rape within marriages.[5] It shows that, on the one hand, consensual sexual activity between same-sex partners is criminalised simply because it is perceived as sexually deviant intimacy and harmful to society as a whole; on the other hand, non-consensual sexual activity within a marriage is not criminalised, as it is based on the oppression of the female body and hence socially acceptable.

Another contested area of sexual rights concerns the sexuality of children.[6] While the age of consent to sexual activity differs greatly around the world, the most common age of consent is set at 16 to 18 years.[7] It has to be noted, however, that the age of consent varies greatly between boys and girls, as well as for hetero- and homosexual children.[8] While the regulation of a minimum age of consent to sexual activities aims to protect children from sexual abuse and exploitation by adults,[9] it can create legal challenges regarding consensual sexual activities between children. As sexual exploration, ranging from hugging to kissing to sexual intercourse, is part

---

[1] Joachim Renzikowski, *Primat des Einverständnisses? Unerwünschte konsensuelle Sexualitäten*, in: Ulrike Lembke (edit.), *Regulierungen des Intimen. Sexualität und Recht im modernen Staat*, Wiesbaden 2017, p. 198.
[2] Judith Butler, *Undoing Gender*, New York 2004, p. 186.
[3] Katherine Crawford, *European Sexualities 1400–1800*, Cambridge 2007, p. 156.
[4] Kanad Bagchi, *Decriminalising Homosexuality in India as a Matter of Transformative Constitutionalism*, Verfassungsblog, 9 September 2018, available at: https://verfassungsblog.de/decriminalising-homosexuality-in-india-as-a-matter-of-transformative-constitutionalism/ (accessed 3 October 2018); Gautam Bhatia, *Section 377 Referred to a Constitution Bench: Some Issues*, Indian Constitutional Law and Philosophy, 8 January 2018, available at: https://indconlawphil.wordpress.com/2018/01/08/section-377-referred-to-a-constitution-bench-some-issues/ (accessed 3 October 2018); Alan Yuhas, *A Win for Gay Rights in Botswana Is a 'Step Against the Current' in Africa*, New York Times, 11 June 2019, available at: https://www.nytimes.com/2019/06/11/world/africa/botswana-gay-homosexuality.html (accessed 20 January 2020).
[5] Ulrike Lembke, *Sexualität und Recht: Eine Einführung*, in Ulrike Lembke (ed.), *Regulierungen des Intimen. Sexualität und Recht im modernen Staat*, Wiesbaden 2017, p. 5.
[6] Arguing that child sexuality has always been an indicator and an instrument to manage the moral health of a nation, Murray Lee et al., *'Let's Get Sexting': Risk, Power, Sex and Criminalisation in the Moral Domain*, International Journal for Crime and Justice, Vol. 2 (2013), p. 41; highlighting that the 'idealized concept of the heterosexual nuclear family is at the core' of the age of consent debate in Canada, Carol L. Dauda, *Sex, Gender, and Generation: Age of Consent and Moral Regulation in Canada*, Politics & Policy, Vol. 38 (2010), p. 1161.
[7] SRHR Africa Trust (SAT), TrustLaw, Arnold & Porter Kaye Scholer LLP, *Age of Consent: Global Legal Review*, Johannesburg 2017, p. 12; arguing that statutory rape laws did not aim to protect children from forced sexual activity but were primarily designed to protect a girl's virginity, Henry F. Fradella/Jennifer M. Summer, *Sex, Sexuality, Law and (In)Justice*, New York 2016, p. 201.
[8] SRHR Africa Trust (SAT), TrustLaw, Arnold & Porter Kaye Scholer LLP, *Age of Consent: Global Legal Review*, p. 12.
[9] Belinda Carpenter et al., *Harm, Responsibility, Age, and Consent*, New Criminal Law Review: An International and Interdisciplinary Journal, Vol. 17, No. 1 (2014), p. 27.

of the normal sexual development of teenagers, the age of consent law is at risk of criminalising consensual sexual activities between minors.[10] As the laws which aim to protect children should not punish them for developmentally normal sexual activity, many countries have enacted so-called Romeo-and-Juliet clauses, which – dependent on the country-context – exempt sexual activity between teenagers from prosecution if the partners are not more than two or more years apart in age.[11] This age gap is considered close enough to minimise the risk of abuse of power or authority by the older partner and to ensure that both partners can make an informed and autonomous decision on whether to engage in sexual activity.

While contact sexual activity between children is nowadays widely acknowledged within the abovementioned framework, the sexual exploration of children through the use of information and communication technologies has revived the moral panic around child sexuality. Children and adolescents below the age of 18 years constitute one-third of Internet users worldwide.[12] In 104 countries, more than 80 per cent of the youth population are online.[13] In so-called 'developed' countries, 94 per cent of young people aged 15-24 use the Internet, compared with 67 per cent in 'developing' countries and only 30 per cent in 'Least Developed' Countries.[14] It is therefore not surprising that sexual exploration has expanded to the Internet.[15]

A common form of such online sexual exploration is 'sexting'. The term is a portmanteau of the words 'sex' and 'texting', and describes self-produced sexually suggestive or explicit images and texts that are distributed by cell phone messaging, Internet messenger, social networks and the like.[16] Further, there is a distinction between 'primary sexting', which describes material produced and possessed with the consent of the depicted person(s), and 'secondary' sexting, which describes the further dissemination of such material without the consent of the depicted person(s).[17] Apart from such (at least initially) consensually produced and shared material between teenagers, there is a massive amount of child sexual abuse material available online, depicting the sexual abuse and exploitation of children in all age groups.[18]

With teenage sexting material and 'child pornography' objectively depicting the same behaviour, i.e. sexual activity involving a minor, the law in most countries does not differentiate between the circumstances under which the material was produced but criminalises the production, dissemination and possession of both groups of materials as 'child pornography' offences. As 'primary' sexting material is produced and shared with the consent of the depicted person(s), without use of force or abuse of authority, it does not depict the sexual abuse and exploitation of a child. The CRC Committee in its Guidelines regarding the implementation of

---

[10] A good example is the previous South African legislation that in most circumstances criminalised all forms of sexual interaction among children below the age of 16 years and which was declared unconstitutional in 2015. See *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35, further discussed in IV. A.

[11] Fradella/Summer, *Sex, Sexuality, Law and (In)Justice*, p. 202; Carpenter et al., *Harm, Responsibility, Age, and Consent*, pp. 36–37.

[12] UNICEF, *The State of the World's Children 2017*, New York 2017, p. 1.

[13] ITU, *ICT Facts and Figures in 2017*, https://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2017.pdf (accessed 3 October 2018).

[14] *Ibid.*

[15] Jane Bailey/Hanna Mouna, *The Gendered Dimensions of Sexting: Assessing the Applicability of Canada's Child Pornography Provision*, Canadian Journal of Women and the Law, Vol. 23 (2011), p. 413.

[16] UNICEF, *Regulation of Child Online Sexual Abuse. Legal Analysis of International Law & Comparative Legal Analysis*, Windhoek 2016, p. 16.

[17] *Ibid.*, pp. 37–38.

[18] Sixty per cent of material analysed by the Internet Watch Foundation, a UK-based NGO combating child sexual abuse material on the Internet, depicts children between 11 and 15 years, while fourty per cent depicts children between 0 and 10 years, of which one per cent depicts children between 0 and 2 years (Internet Watch Foundation, *Once upon year: Annual Report*, Cambridge 2018, p. 28, available at: https://www.iwf.org.uk/sites/default/files/reports/2019-04/Once%20upon%20a%20year%20-%20IWF%20Annual%20Report%202018.pdf (accessed 16 January 2020)); stating that girls and Caucasian children figure disproportionately in child sexual abuse material, UNICEF, *Child Safety Online. Global Challenges and Strategies*, New York 2012, p. 15.

the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (hereafter the Guidelines) seems to share this viewpoint, by stating that 'this conduct in and of itself is not necessarily illegal or wrongful'.[19] However, there is an inherent risk for sexting material to become more widely available than initially intended.[20] As the depicted person(s) naturally loses control of the material once shared, he or she has to rely on the confidentiality and integrity of the receiver. Such trust is often broken when the relationship ends and the material is widely circulated to embarrass the former partner.[21] This risk proves to be a reality when looking at the number of self-produced sexting material available on child sexual abuse material websites, which has been increasing over the past couple of years.[22] In short, the same picture, depending on the context it is available in and depending upon the person who accesses it, can become abusive towards the child, although the initial production was non-abusive.

This poses a pivotal question for the legislator: due to the risk of abuse and exploitation inherent in self-produced material, should such material be categorised as 'child pornography' from the beginning, and hence should anyone – irrespective of the context – who produces, disseminates and possesses it be considered a 'child pornography' offender? Or does the law have to find a way of addressing 'primary' sexting and 'child pornography' differently? This Chapter aims to investigate the criminal response to 'primary' sexting from a comparative perspective and through a constitutional lens. As the regulation of teenage sexting touches upon core questions of teenage sexuality, the private sphere as well as freedom of expression (II.), this discussion examines how the US, Canada, and Germany have addressed the topic of teenage sexting (III.), after which it proposes a solution to this complex question (IV. and V.).

II. *O TEMPORA, O MORES!*: TEENAGE SEXUALITY AND DIGITALISATION

This section provides an introduction to the intersection of teenage sexuality in the digital era as well as to teenage sexting and child sexual abuse material.

A. Teenage sexuality in the digital era

Sexuality, identity, intimacy, and interpersonal connection are matters of interest to teenagers in their journey of identity exploration and construction. While these areas have been traditionally explored and constructed in offline interactions between the self and others, an increasingly important realm for such activities is the Internet.[23]

Online sexual exploration is becoming a significant component of teenagers' sexuality.[24] In this regard, it has to be noted that online and offline sexual exploration do not co-exist in silos but are interconnected and hence need to be analysed in a holistic manner.[25] Due to the specific means of interaction in the online space, 'these online behaviors might be similar, exaggerated,

[19] CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156 (10 September 2019), para. 42.
[20] *Ibid*.
[21] Alisdair A. Gillespie, *Child Pornography. Law and Policy*, pp. 31–33; UNICEF, *The State of the World's Children 2017*, pp. 220-221.
[22] UK National Crime Agency, *National Strategic Assessment of Serious and Organised Crime 2018*, London 2018, p. 10; Internet Watch Foundation, *Once upon year: Annual Report*, p. 28.
[23] David Smahel/Kaveri Subrahmanyam, *Adolescent Sexuality on the Internet: A Developmental Perspective* in: Fabian M. Saleh/Albert J. Grudzinskas/Abigail M. Judge, *Adolescent sexual behavior in the digital era*, Oxford 2014, p. 62.
[24] Noting that teenagers increasingly consider sexting to be 'normal', CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156, para. 42.
[25] Smahel/Subrahmanyam, *Adolescent sexual behavior in the digital era*, p. 63.

or even reversed from their offline counterparts'.[26] Important factors which, among others such as accessibility and affordability of online services, are characteristic for adolescent online behaviour, are disinhibition and self-disclosure.[27] Being able to interact with others in an (at least perceived) anonymous manner might lead adolescents to be much bolder and more open and courageous than in offline face-to-face interactions. Taking into account the role that peer-to-peer exchange plays in building one's sexuality in adolescence, technology is the medium of choice, as it makes such exchange nearly effortless.[28]

The various ways in which adolescents explore their sexuality online include searching for information about sexuality and sexual health, constructing and presenting a sexual identity, engaging in sexual interactions online, as well as accessing sexually explicit content.[29] Regarding sexual interaction with others online, this may entail sexualised conversations, as well as activities such as direct visual interaction via webcams, including masturbation or other sexual activities.[30]

Similar to contact sexual exploration, digital sexual exploration comes with potential risks for teenagers. These risks can – if not detected and managed properly – turn into harm. However, it has to be acknowledged that sexual exploration, whether in direct contact or through information and communication technology, is in itself not harmful, as it is part of the normal sexual development of children. Digital exploration poses risks for children, such as unwanted dissemination of material, which can – potentially, not inevitably – turn into harm. The differentiation between harm and risk is crucial in guiding the debate around teenage sexting.[31] It will be shown in section III. that this differentiation is unfortunately often times blurred.

B. Child sexual abuse material and teenage sexting – two sides of the same coin?

To understand the difficulties around child sexual abuse material and teenage sexting, it is crucial first to elaborate on the legislative content of child sexual abuse material, before engaging with the discourse on its relationship to teenage sexting.

With regard to the definition of the term 'child pornography', it has to be noted that it varies greatly between national legislations and within international law. While material covers text, audio and/or visuals, the subject can include actual children, persons who are made to appear as minors and/or virtual 'child pornography'.[32] The criminalised conduct ranges from production, dissemination and possession to the mere accessing of such material.[33]

However, most 'child pornography' provisions have one element in common, which is that the consent of the depicted child is always considered invalid – hence, the lack of consent is

---

[26] *Ibid.*
[27] *Ibid.*
[28] April Gile Thomas/Elizabeth Cauffman, *Youth Sexting as Child Pornography? Developmental Science Supports Less Harsh Sanctions for Juvenile Sexters*, New Criminal Law Review: An International and Interdisciplinary Journal, Vol. 17 (2014), p. 642.
[29] Smahel/Subrahmanyam, *Adolescent sexual behavior in the digital era*, p. 65.
[30] *Ibid.*, p. 71.
[31] Stating that risk refers only to the probability of harm, and that children need to be exposed to risk in order for them to become resilient adults, Sonia Livingstone/Brian O'Neill, *Children's Rights Online. Challenges, Dilemmas and Emerging Directions* in: Simone van der Hof/Bibi van den Berg/Bart Schermer (eds.), *Minding Minors Wandering the Web: Regulating Online Child Safety*, The Hague 2014, p. 25; see also UNICEF, *Child Safety Online. Global Challenges and Strategies*, p. 26.
[32] For an in-depth discussion on virtual child sexual abuse material from a comparative perspective, see Sabine K. Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 1*, Computer and Telecommunications Law Review, Issue 3 (2018), pp. 61 *et seq.*; and Sabine K. Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 2*, Computer and Telecommunications Law Review, Issue 4 (2018), pp. 73 *et seq.*
[33] For a comparative analysis of child pornography legislation in Botswana, South Africa, the Philippines, Uganda, Germany and Canada, see UNICEF, *Regulation of Child Online Sexual Abuse. Legal Analysis of International Law & Comparative Legal Analysis*.

not a relevant element of 'child pornography' offences. This is in line with the CRC Committee's stance that 'children can never consent to any form of their own sale, sexual exploitation or sexual abuse'.[34] The rationale for this is twofold. First, the perceived consent of the child should not be a valid defence in court for the accused. It is a common misperception that all child sexual abuse material depicts the use of force or violence and that the child victim always looks distressed or is in pain or crying. However, such material does not invariably depict 'obvious', 'visual' harm to the child.[35] Children might be depicted as if they enjoy or are at least compliant with the sexual activity. This is, however, a result of a grooming process or the child's way of accepting the abuse, rather than an expression of informed consent. Therefore, the mere expression or conduct of the child does not give any further indication of the child's actual level of consent. Secondly, and even more importantly, 'child pornography' provisions seem to operate on the presumption that the depicted act is unlawful anyway and that there is hence no reason to consider the consent of the child if he or she could not consent to the depicted act in the first place.

While this may be true for the vast majority of material, it is indeed more complex for the self-generated material discussed in this Chapter. How this fundamental difference causes a contradiction within the legal system will be discussed in the next sections.

III. TEENAGE SEXTING ACROSS THE WORLD: USA, CANADA, GERMANY

This section discusses the approach taken to teenage sexting and 'child pornography' in the US, Canada, and Germany. While the US's approach of strictly subsuming sexting under 'child pornography' might have changed in 2010, Canada describes teenage sexting in a landmark Supreme Court decision on 'child pornography' as an area which raises constitutional concerns if such behaviour is criminalised. Germany, in recent law reforms, has incorporated an exemption clause in its juvenile pornography provision, aligning it with European frameworks on 'child pornography'.

A. USA: non-protected speech in the name of child protection

As for the broader regulation of 'child pornography', three Supreme Court decisions, namely, *Miller v California*, 413 US 15 (1973), *New York v Ferber*, 458 US 747 (1982) and *United States v Stevens*, 559 US 460 (2010), set the framework in which the constitutionality of the criminalisation of sexting between minors has to be discussed.

1. *Miller v California*, 413 US 15 (1973)

In *Miller v California*, 413 US 15 (1973), the Court held that lewd and obscene speech does not receive First Amendment protection because obscenity serves no crucial role in the exposition of ideas and has little social value. In order to be considered 'obscene', the work as a whole must appeal to the prurient interest, must be patently offensive in the light of community standards, and lack serious literary, artistic, political, or scientific value.[36] In line with this approach, many states in the US drafted 'child pornography' provisions which included the obscenity of the material as a necessary element of 'child pornography' offences. However, some states, including New York, went further and criminalised 'any performance which includes

[34] CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156, para. 72.
[35] Gillespie, *Child Pornography. Law and Policy*, pp. 22-23.
[36] *Miller v California* 413 US 15 (1973), at 24.

sexual conduct by a child less than sixteen years of age', regardless of the obscenity of the material in question.[37]

2. *New York v Ferber*, 458 US 747 (1982)

In *New York v Ferber*, 458 US 747 (1982), the Court held that 'child pornography' is a category of speech not protected by the Constitution[38] and that such depictions may be prohibited regardless of their obscenity: obscenity has not been considered a necessary criterion when it comes to 'child pornography' provisions.[39] First, the Court set out that it had a compelling interest in protecting the physical and psychological integrity of minors.[40] It confirmed that 'the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child'.[41] Further, the production of 'child pornography' material is 'intrinsically related to the sexual abuse of children [….] [T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation'.[42] Their artistic value is to be considered 'modest, if not *de minimis*'.[43]

3. *United States v Stevens*, 559 US 460 (2010)

Today, all states in the US have enacted 'child pornography' legislation, and the federal Sex Offender Registration and Notification Act requires mandatory sex offender registration if the convicted defendant is over the age of 14.[44] Therefore, courts across the country have been faced with the question of whether the considerations with regard to 'child pornography' set out in *Ferber* also cover teenage sexting material. In cases where the conduct was confirmed as falling under the definition of 'child pornography', the legal consequences ranged from diversion and plea bargaining to convictions.[45] In the prominent case of *Ab. H v State* 949 So. 2d 234 (2007), the 16-year-old A.H. and her 17-year-old boyfriend J.G.W. were charged as juveniles under the 'child pornography' laws. The charges were based on digital photos A.H. and J.G.W. took of themselves naked and engaged in sexual behaviour. The state alleged that, while the photos were never shown to a third party, A.H. and J.G.W. emailed the photos to another computer from A.H.'s home. A.H. was convicted for 'producing, directing or promoting a photograph or representation that she knew to include the sexual conduct of a child'.[46]

Looking at the arguments put forward in *Ferber* to justify the exclusion of 'child pornography' from First Amendment protection, it is arguable whether the intention behind such exclusion is equally applicable to teenage sexting cases. First, there is no evidence that consensual teenage sexting causes physical, emotional or mental harm to the child.[47] As discussed above, 'sexting' can be considered to form part of a child's sexual exploration using the means of technol-

---

[37] Frederick Schauer, *Codifying the First Amendment: New York v Ferber*, The Supreme Court Review, Vol. 1982 (1982), p. 290.
[38] *New York v Ferber*, 458 US 747 (1982), at 764.
[39] *New York v Ferber*, 458 US 747 (1982), at 747.
[40] *New York v Ferber*, 458 US 747 (1982), at 757.
[41] *New York v Ferber*, 458 US 747 (1982), at 758.
[42] *New York v Ferber*, 458 US 747 (1982), at 759.
[43] *New York v Ferber*, 458 US 747 (1982), at 762.
[44] Julia H. McLaughlin, *Exploring the First Amendment Rights of Teens in Relationship to Sexting and Censorship*, University of Michigan Journal of Law Reform, Vol. 45 (2012), p. 320.
[45] Joanna R. Lampe, *A Victimless Sex Crime: The Case for Decriminalizing Consensual Teen Sexting*, University of Michigan Journal of Law Reform, Vol. 46 (2013), p. 710.
[46] Lampe, *A Victimless Sex Crime: The Case for Decriminalizing Consensual Teen Sexting*, pp. 709–710; for an in-depth discussion of the case, see Antonio M. Haynes, *The Age of Consent: When is Sexting No Longer Speech Integral to Criminal Conduct*, Cornell Law Review, Vol. 97 (2012), pp. 385 – 387.
[47] McLaughlin, *Exploring the First Amendment Rights of Teens in Relationship to Sexting and Censorship*, p. 324.

ogy. Further, it has to be stressed that in contrast to 'child pornography' material, teenage sexting material does not depict child sexual abuse but lawful sexual activity.[48] Unfortunately, this fundamental difference has been rejected in the Illinois Supreme Court case *People v Hollins*, 2012 IL 112754, and led to the absurd result that a 32-year-old man can legally have sex with his 17-year-old girlfriend (the age of consent in Illinois is 17 years), but is convicted as 'child pornography' offender because they produced photographic material of their sexual acts. The defendant's argument that 'he was in the same position as anyone who photographs his or her legal, consenting sex partner [and] […] it is not reasonable or fair for the legislature to prohibit the sex partners of such people from photographing such otherwise lawful, private, sexual activity', was turned down by the Court.[49]

In the dissenting opinion, two justices argued that the Court in its analysis failed to consider *United States vs Stevens, 559 US 460 (2010),* which, in their opinion, has a significant impact on the assessment of the case at hand.[50] In *United States vs Stevens,* the Supreme Court of the United States clarified that the exclusion of 'child pornography' from First Amendment protection is not based on a mere cost-benefit analysis, and that such an analysis is not sufficient for creating new categories of exempted speech.[51] Rather, the Court argued that *Ferber* grounded its analysis in a 'previously recognised, long-established category of unprotected speech',[52] quoting *Giboney v Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949) in *Ferber*: '[T]he constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.'

Following *Stevens*, the dissenting opinion in *Hollins* stressed that *Ferber* did not create a new category of exception to First Amendment protection for 'child pornography' material[53] and hence that 'child pornography' is not exempted from First Amendment protection per se, only in cases where 'the photograph [is] an integral part of conduct in violation of a valid criminal statute' (internal quotation marks omitted).[54] As *Stevens* is a binding authority for the Illinois Supreme Court, the dissenting opinion therefore concluded that the material at hand does not constitute 'child pornography' as defined by the Supreme Court in the context of First Amendment considerations.[55]

4. Assessment

While the shift from *Ferber* to *Stevens* has to be generally welcomed with regard to teenage sexting cases, it might leave in a grey area a range of material that does not obviously depict sexual abuse of a child. An example of such material could be a child posing in a sexually suggestive manner or masturbating, as nudity or masturbation per se are not criminal offences. Assuming that *Stevens* did not intend to preclude such material from the First Amendment exemption, further specification is required in determining which conduct exactly constitutes the sexual abuse: the interaction with the child itself, or photographing a child in a sexualised

[48] *Ibid.*, p. 324.
[49] *People v Hollins*, 2012 IL 112754, para. 39–42.
[50] *Ibid.*, para. 47.
[51] *United States v Stevens*, 559 US 460 (2010), pp. 8-9.
[52] *Ibid.*, p. 8.
[53] *People v Hollins*, 2012 IL 112754, para. 67.
[54] *Ibid.*, para. 66.
[55] *Ibid.*, para. 68, 70.

position.[56] If the latter is considered the underlying criminal act,[57] then sexual abuse and speech are one identical act. This line of argument creates the offence 'sexual abuse through the act of photographing', which seems quite artificially constructed.

Regardless of the challenges of the interrelation of underlying criminal act and speech, it has to be awaited if the Supreme Court actually goes as far as accepting that age-of-consent and 'child pornography' provisions need to be stringently aligned to prevent online and offline sexual activity from being treated differently.

B. Canada: Balancing 'right to document' and potential harm to children

Canada has since 2001 worked on balancing child protection and freedom of expression concerns in sexting cases. Starting with a private use exception for certain categories of 'child pornography' developed in the landmark decision *R v Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, several court decisions have further developed the range of the private use exception.

1. *R v Sharpe*, 2001 SCC 2

In its landmark decision *R v Sharpe*, 2001 SCC 2, the Canadian Supreme Court had to decide whether Canadian law, which criminalises the possession of 'child pornography', is unconstitutional because it violates freedom of expression as guaranteed under the Canadian Constitution.[58] The key question therefore was whether Canadian law criminalises the possession of an unjustifiably broad range of 'child pornography' material.[59] The Court held that the infringement of the accused's right to freedom of expression is justifiable.

First, it started by setting out the values at stake: freedom of the expression, on the one hand, and prevention of harm to children, on the other.[60] It stressed that children are in the need of protection from the harmful effects of any form of child sexual abuse and exploitation and should not be considered appropriate sexual partners.[61] However, the importance of freedom of expression demands a clear legal framework as to what constitutes 'child pornography'.[62] When delving into the exact meaning of the term 'person' as used in section 163(1) of the Canadian Penal Code, the Court stated that 'person' includes auto-depictions of teenagers, and that teenagers could hence be charged and convicted for taking and keeping photos of themselves engaged in sexual activity.[63] While the current defence of public good as contained in section 163(1) could theoretically be applied in such cases, by arguing that the public good is served by possessing materials that promote the expressive and psychological well-being or enhance one's sexual identity in ways that do not involve any harm to others, the Court noted

---

[56] MacKenzie Smith, *You Can Touch, But You Can't Look: Examining the Inconsistencies in Our Age of Consent and Child Pornography Laws*, Southern California Law Review, Vol. 87 (2014), p. 870; in Haynes, *The Age of Consent: When is Sexting No Longer Speech Integral to Criminal Conduct*, p. 395, Haynes argues that on the basis of *Stevens*, most teenage sexting activities should enjoy First Amendment protection, because 'neither nudity, masturbation, nor even large amounts of teenage sext are illegal'. However, he fails to acknowledge that a nude child or a child masturbating is also not a criminal offence per se, but it can be assumed there is no intent to also decriminalise the depiction of such sexual activity.

[57] Smith, *You Can Touch, But You Can't Look: Examining the Inconsistencies in Our Age of Consent and Child Pornography Laws*, p. 870.

[58] *R v Sharpe* [2001] SCC 2, para. 1.

[59] *Ibid.*, para. 5.

[60] *Ibid.*, para. 29.

[61] *Ibid.*, para. 34.

[62] *Ibid.*

[63] *Ibid.*, para. 40–41.

that such defence might not be sufficient to exclude each case of teenage sexting from the criminal justice system.[64]

Therefore, the Court raised concerns that the current legal framework catches material which is at the centre of a person's self-fulfilment but which poses little to no harm to others. The Court developed two categories of material: first, private journals, writings or other works of the imagination, which are created and kept exclusively for oneself,[65] and secondly, 'privately created visual recordings of lawful sexual activity made by or depicting the person in possession and intended only for private use',[66] such as teenage sexting material.

In order to determine whether the limitation of freedom of expression imposed by section 163(1) is justified under the Constitution, the Court identified the reduction of child exploitation and the prevention of harm to children as a pressing and substantial legislative objective. With regard to the proportionality between the limitation to freedom of expression and the benefits of the law, the Court found that there is a rational connection between the law and the pursued purpose, by arguing, inter alia, that 'child pornography' promotes cognitive distortions, fuels fantasies that could incite offenders, or can be used to groom or seduce children.[67]

Further, in order to determine whether the law only minimally impairs freedom of expression, the Court stressed that it suffices if the law is reasonably tailored to its objectives and impairs the concerned right not more than reasonably necessary.[68] The Court averred that the second category of material as defined previously presents only a small risk of causing harm to children, as the material was initially produced by him- or herself and hence the risk of negative attitudinal changes is not expected to be significant.[69] Following this line of argument, the law might be overbroad. However, the Court postponed the final determination of this issue to the final stage of the proportionality test, i.e. the final balance.[70] The Court therefore had to determine whether the benefits of the law in achieving prevention of harm to children outweigh the impact of the law on freedom of expression.[71]

In this context, the law recognised that such material might be relevant for teenagers' self-fulfilment, self-actualisation and sexual exploration and identity, and could even assist in building 'loving and respectful relationships through erotic pictures of themselves engaged in sexual activity'.[72] If such acts were criminalised, the impact on freedom of expression could not be justified through the potential benefits of the law in preventing harm to children. While generally holding that the 'child pornography' provisions contained in section 163(1) are constitutional, the Court ruled that in the two previously identified categories, the infringement on freedom of expression cannot be justified. Particularly with regard to teenage sexting, the Court states:

> It further prohibits a teenager from possessing, again exclusively for personal use, sexually explicit photographs or videotapes of him- or herself alone or engaged with a partner in lawful sexual activity. The inclusion of

[64] *Ibid.*, para. 71.
[65] *Ibid.*, para. 75; for an in-depth analysis of the constitutionality of the inclusion of the first category of material, see Chapter II, or Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 1* and Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 2*.
[66] *R v Sharpe* [2001] SCC 2, para. 76.
[67] *Ibid.*, para. 86.
[68] *Ibid.*, para. 95–96.
[69] *Ibid.*, para. 100.
[70] *Ibid.*, para. 101.
[71] *Ibid.*, para. 102.
[72] *Ibid.*, para. 109.

> these peripheral materials in the laws' prohibition trenches heavily on freedom of expression while adding little to the protection the law provides children.[73]

Summarising the elements of second-category material, the Court states that auto-depictions taken by a child of him- or herself alone, kept in strict privacy and intended for private use only should be excluded. Further, recordings of lawful sexual activity are exempted, if the person possessing the recording has either personally recorded it or participated in the sexual activity, if the sexual activity is lawful, ensuring consent of all parties and precluding abuse or exploitation of the depicted child, and if the parties have consented to the recording.[74] These exemptions apply both to the possession as well as the production of such material.[75]

The Court therefore concluded that it upholds section 163(1) of the Criminal Code, but while reading two exceptions into it:

> (a) The first exception protects the possession of expressive material created through the efforts of a single person and held by that person alone, exclusively for his or her own personal use. This exception protects deeply private expression, such as personal journals and drawings, intended solely for the eyes of their creator.
>
> (b) The second exception protects a person's possession of visual recordings created by or depicting that person, but only where these recordings do not depict unlawful sexual activity, are held only for private use, and were created with the consent of those persons depicted.[76]

In the dissenting opinion, the justices claimed that the Court had applied a formalistic and rigid approach and not taken the factual and social context into account.[77] Further, the dissenting opinion stressed that 'the more distant the expression from the core values underlying the right, the more likely action restricting it can be justified'.[78] It stated that with regard to 'child pornography', the value of the expression is limited, and only pursues basic needs of physical arousal.[79] The same low level of expression was allocated to teenagers who produce sexually explicit material. Such activities are considered 'harmful self-indulgence supporting unhealthy attitudes towards oneself and others'.[80] It was argued that authorship and intention are irrelevant when it comes to 'child pornography' if Parliament's pursued objective, i.e. prevent the harm which flows from the very existence of such material, is to be achieved.[81] Submitting that there does exist a very real harm to teenagers, the dissenting opinion pointed out that it is impossible to determine whether the adolescent depicted in a certain picture has been exploited in its production.[82] Further, presenting statistics that 30 per cent of sex offenders in Canada are below the age of 18 years, it is stressed that even auto-depictions by teenagers could be used to groom other children, and hence that such auto-depictions indeed have the potential to be used to for exploitative purposes.[83] In general, society needs to be protective of the state of childhood, which is considered 'as a time, firstly, for the enjoyment of innocence and, then, gradually for the development out of innocence'.[84] Even though children might have the capacity to legally consent to sexual activity, they are not considered capable of foreseeing

[73] *Ibid.*, para. 110.
[74] *Ibid.*, para. 116.
[75] *Ibid.*, para. 117.
[76] *Ibid.*, para. 128.
[77] *Ibid.*, para. 154.
[78] *Ibid.*, para. 181.
[79] *Ibid.*, para. 185.
[80] *Ibid.*, para. 212.
[81] *Ibid.*, para. 215, 217.
[82] *Ibid.*, para. 229.
[83] *Ibid.*, para. 230.
[84] *Ibid.*, para. 231.

the consequences of creating a permanent record of them engaging in such activity.[85] In conclusion:

> Any deleterious effect on the self-fulfilment of teenagers who produce permanent records of their own sexual activity in an environment of mutual consent is, therefore, by far outweighed by the salutary effects on all children resulting from the prohibition of the possession of child pornography.[86]

In the majority and dissenting opinion, it is clear that the former considers teenage sexting as valuable speech which impacts on the final balance in favour of freedom of speech, whereas the latter denies teenage sexting any higher value and hence argues in favour of (perceived) child protection concerns.

2. *R v Dabrowski*, 2007 ONCA 619

The range of the private use exception created in *Sharpe* has been further specified in Ontario Court of Appeal's *R v Dabrowski*, 2007 ONCA 619. In this case, a 28-year-old man had a sexual relationship with a 14-year-old girl. They decided to videotape some of their sexual activity. When the relationship ended, the accused gave the videotapes to a friend for 'safekeeping',[87] but allegedly threatened her later to share the videos with her family or put them on a public website.[88] As the girl initially agreed to the production of the video, the question arose whether in this case the 'private use' exception applied.

Apart from the factual concerns as to whether the accused indeed made threats to make the material public, which would consequently exclude the applicability of the 'private use' exemption, the Court had to determine whether the fact that the accused transferred the tape to a third party rendered the 'private use' exemption inapplicable. The Court interpreted the term 'private use' as not equal to exclusive possession. Transferring the material to another person such as a lawyer or trusted party for safekeeping would not deactivate the applicability of the 'private use' exemption.[89] To ensure that the exemption is handled with caution, the Court spelled out factors to be considered in order to determine whether giving up exclusive possession resulted in a loss of privacy:

> Questions such as to whom was the material given, what was the purpose or reason for the transfer, what terms or conditions were agreed upon when the material was given up, what control did the accused maintain over the material, was the material in fact viewed by anyone other than the consensual participants, would be relevant, all in the context of the credibility of the accused and others.[90]

In conclusion, the 'private use' exemption is not interpreted in the sense strictly of exclusive possession manner, but rather taken to mean effective control over the material, which is to be determined according to the factors laid out above. As a consequence, the presiding officer in *R v Dabrowski* ordered a new trial.[91]

---

[85] *Ibid.*
[86] *Ibid.*, para. 238.
[87] *R v Dabrowski*, 2007 ONCA 619, para. 2-5.
[88] *Ibid.*, para. 11.
[89] *Ibid.*, para. 28–29.
[90] *Ibid.*, para. 30.
[91] *Ibid.*, para. 31.

3. *R v Keough,* 2011 ABQB 48

After *Dabrowski*, the 'private use' exception created in *Sharpe* was elaborated upon in the Court of Queen's Bench of Alberta case *R v Keough,* 2011 ABQB 48. In this case, 15-year-old S.C. and 18-year-old M.A. produced a video of themselves engaged in sexual activity.[92] With the agreement of S.C., the video, then on a mini-cassette, was to be turned into a VHS recording. To this end, M.A. handed the material to a third person, the accused, who returned the material after the transformation to VHS recording. S.C. and M.A. decided that the VHS should be destroyed afterwards, and M.A. told S.C. he had done so. However, he had in fact handed the recording to the accused (again) for him to destroy it. The accused retained the material and copied the recording.[93]

In this case, the Court had to decide the scope of the private use exception, and conclusively, the scope of the 'right to document' as developed under *Sharpe*.[94] As a starting-point, it spelled out the elements of the private use exemption clause developed in *Sharpe* as follows:

> This passage provides some characteristics of private use materials:
>
> 1. all participants must consent,
> 2. no exploitation or abuse may be involved,
> 3. the sexual activity must be lawful,
> 4. the person in possession must have either:
>
> a) been a participant in the recorded sexual activity, or
>
> b) recorded the sexual activity.[95]

First, the Court considered whether the format change and the copying had the effect of removing the 'private use' exemption.[96] If the owners of the material continue to exert control over the material, the Court concluded that the private use exemption would still apply.[97] Even if the accused had viewed the material during the copying process, the situation would be comparable to the accused *in persona* observing the sexual activity between S.C. and M.A.[98] As such observation is not illegal as long as all parties consent to it, the viewing of the material is also not illegal.[99] Keeping in mind that both S.C. and M.A. had consented to the format change, the Court concluded that they also consented to any collateral viewing during the format-change.[100]

However, the fact that the accused continued to have access to the material without the consent of S.C., namely after it was returned to him by M.A. with the instruction to destroy the material, rendered the private use exemption inapplicable in this case. S.C. was clearly under the impression that M.A. had destroyed the material, and hence did not consent to the continuous access by the accused.[101] Therefore, the Court found the accused guilty of possession of 'child pornography'.[102]

---

[92] *R v Keough*, 2011 ABQB 48, para. 24–30.
[93] *Ibid.*, para. 168–180.
[94] *Ibid.*, para. 196.
[95] *Ibid.*, para. 188; note that the additional element that 'no exploitation or abuse may be involved' in the private use exception has been struck down by the Supreme Court in *R v Barabash*, 2015 SCC 29 (see III. B. 4.).
[96] *Ibid.*, para. 199.
[97] *Ibid.*, para. 203.
[98] *Ibid.*, para. 207–208.
[99] *Ibid.*, para. 207.
[100] *Ibid.*, para. 208.
[101] *Ibid.*, para. 210.
[102] *Ibid.*, para. 216.

4. *R v Barabash*, 2015 SCC 29

In *R v Barabash*, 2015 SCC 29, the Canadian Supreme Court again developed the interpretation of the *Sharpe* private use exception, focusing on the element of 'unlawful sexual activity'. In *Barabash*, two 14-year-old girls who were from troubled family backgrounds and had a history of drug addiction, criminal offences and - in the case of one girl – exploitation in prostitution, had run away from an adolescent treatment centre and stayed at the 60-year-old accused's residence, which one of the girls at trial described as a stereotypic 'crack house'. Another accused, Barabash's 41-year-old friend, visited frequently and was also involved in drug abuse. During the time the girls stayed at the residence, they were involved in the creation of video recordings of sexual activity and still images with each other and with Barabash's friend, with Barabash operating the camera. Both accused were charged with making 'child pornography', with Barabash charged additionally with possession of 'child pornography'.[103]

While the trial judge confirmed that the material constitutes 'child pornography', he held that all elements of the private use exception in *Sharpe* were met and entered acquittals.[104] The trial judge's decision was appealed on the grounds that there was an error in the interpretation of the private use exception. The Court of Appeal, relying on *R v Cockell*, 2013 ABCA 112, 553 A.R. 91, held that the private use exception contained additional elements, namely that 'there was no exploitation or abuse involved in the creation of the recording, and a requirement that parties intended the pornographic material to be for the private use of all those involved in its creation'.[105] Therefore, the Court of Appeal held that

> the issue of lawfulness in this context was not limited to whether any specific crime was committed against the children on the video, or in the physical process of making the video. The lawfulness of the activity in the video for the purpose of an exception that protected expressive freedom was activity that did not involve child exploitation or abuse as cognisable in law generally, not just crimes under the *Code*.[106]

The Supreme Court in *Barabash* rendered this interpretation of *Sharpe* incorrect, as exploitative or abusive circumstances are sufficiently covered by the element of lawfulness. As even consensual sexual activity with a child in a relationship of dependency or in a relationship that is exploitative to that child is a criminal offence, regardless of the consent of the child, the Court saw no need for an additional element.[107] Relevant indicia of an exploitative relationship include the age of the young person and the age difference with the sexual partner, the evolution of the relationship and the degree of control or influence over the young person.[108] As the elements of an exploitative relationship are, however, assessed with regard to the sexual activity, the Crown argued that there is a need to examine how exploitation may have influenced a young person's consent to being recorded. The Crown submitted that this needs to be assessed separately from the consent to the underlying sexual activity. In the opinion of the Court, this

---

[103] *R v Barabash*, 2015 SCC 29, para. 4–8.
[104] *Ibid.*, para. 10.
[105] *Ibid.*, para. 11.
[106] *Ibid.*, para. 36.
[107] *Ibid.*, para. 34–35 quoting section 153. (1) of the Criminal Code [emphases added]:
153. (1) Every person commits an offence who is *in a position of trust or authority* towards a young person, who is a person with whom the young person is in a *relationship of dependency or who is in a relationship with a young person that is exploitative* of the young person, and who

> (a) for a sexual purpose, *touches*, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or
>
> (b) for a sexual purpose, *invites, counsels or incites* a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person.

[108] *Ibid.*, para. 36.

problem can arise only when the underlying sexual activity is not considered unlawful. In the context of Canadian law, this would require a situation where no sexual touching occurs or where the touching is not invited, counselled or incited, for example a nude posing image. The Court noted that in such cases, consent to the sexual activity and to the recording are oftentimes intertwined. Acknowledging that 'an exploitative relationship would be relevant to the common law rules of consent in the context of consent to recording', the Court observed that such circumstances did not arise in the case at hand and therefore would be left to 'a case with a proper record and argument. The implications might be far-reaching'.[109]

Furthermore, the Court held that an additional element of 'mutuality of benefit' cannot be derived from the wording of the private use exception in *Sharpe* and complicates the private use test while not adding any distinct benefit.[110] Apart from the above issues around the lawfulness, consent and exploitation, the Court in an *obiter dictum* stated that the range of the 'solely for private use' requirement as set out in *Sharpe* has to be interpreted in terms of consent to the ongoing possession.[111] This means that depicted persons 'retain the ability to ensure its return and destruction'.[112]

Although the Court struck down the additional element of abuse or exploitation, it held that the trial judge had insufficiently analysed whether the relationship between the girls and the accused was exploitative, which in consequence rendered the underlying sexual activity unlawful. In particular, circumstances such as drug addiction, the need for shelter, and a history of homelessness and exploitation in prostitution, had to be considered in the present case.[113] The Court also stressed that the trial judge wrongfully focused on the exploitative character of the activity, rather than the broader relationship.[114]

5. Assessment

It is commendable that, as early as 2001 in *Sharpe*, the Canadian Supreme Court took a child-rights approach to the issue of teenage sexting, stressing the value of the expressed speech and carefully balancing this right against the risk involved. What might be criticised, however, is the inconsistency of the elements applied in the private use exception.[115] Taking into account the most comprehensive list of elements as stated above in *Sharpe*,[116] the Court has developed an exemption clause that acknowledges a 'right to document'[117] and balances this right with child protection concerns. Even though it is not specified whether this 'right to document' is rooted in freedom of expression, the right to privacy or any other charter right, the child-rights perspective on teenage sexting is visionary.

However, the wide interpretation of the exception clause in particular in *Dabrowski* is of concern. In contrast to *Keough*, the material in *Dabrowski* was from the beginning shared without the consent of the depicted child. Even in that case, the Court accepted that exclusive possession is not required, as long as it can be established that the accused is still in control of the material. While this can be accepted in case of transferring the material to a safety box or a lawyer, it seems disproportionate to draw an equal conclusion if the material is transferred to a third party who is not by contract or by position obliged to act with discretion and integrity. In such a case, the potential harm to the depicted child outweighs the freedom-of-expression aspect raised in *Sharpe*. The dissemination of the material to a third party without the consent

[109] *Ibid.*, para. 47 and 48.
[110] *Ibid.*, para. 52 and 53.
[111] *Ibid.*, para. 29.
[112] *Ibid.*, para. 30.
[113] *Ibid.*, para. 54 and 55.
[114] *Ibid.*, para. 56.
[115] The element of consent to the production of material is missing in *R v Sharpe* [2001] SCC 2, para. 109.
[116] Most comprehensive list contained in *R v Sharpe* [2001] SCC 2, para. 116.
[117] *R v Keough*, 2011 ABQB 48, para. 196.

of the depicted child should therefore only fall under the private use exception if the third party has a legitimate interest in the possession and if confidentiality of the material can be maintained.

Apart from the issue of whether the private use exception is applicable in cases where the material is shared with third parties, the Court in *Keough* made a further remarkable interpretation of the *Sharpe* exception. In the previous Court of Queen's Bench of Alberta case *R v Bono*, [2008] O.J. No. 3928 (QL), a 14-year-old girl recorded herself masturbating and sent the material to the accused. The Court had held that the *Sharpe* exception clause only applies if the person in possession of the material had either recorded or participated in the sexual activity in question, and hence rendered the private use exception inapplicable in this case.[118] While this is in line with the wording in *Sharpe*, the Court in *Keough* held that such an interpretation would be overtly restrictive, as such conduct 'reinforces healthy sexual relationships and self-actualization'.[119] Therefore, the Court expanded the scope of the private use exception to include such 'selfie' scenarios.

The Supreme Court's *Barabash* decision states that with regard to the underlying sexual activity, elements of abuse and exploitation are sufficiently covered by the element of 'lawful sexual activity'. However, the Crown rightfully questions whether – apart from the element of 'consent to recording' – there is a need for assessing exploitative circumstances with regard to the recording. Although the Court leaves this question open intentionally, it can be inferred from the deliberations that the Court operates on the basis that sexual activity and recording are so closely intertwined that only in the case where the sexual activity does not fall under the term 'exploitative relationship', as spelled out in the Criminal Code, can a loophole with regard to exploitative recording occur. The question is thus: if the recording is consensual but exploitative, does this automatically mean that the sexual activity is also exploitative and hence unlawful, rendering the private use exception inapplicable? Or do cases occur where the exploitative element refers solely to the recording? If this is so, there is indeed a need for an additional element of exploitative relationship with regard to the recording. In the Canadian context, such an additional element either requires that the Supreme Court, in amending *Sharpe*, explicitly recognise such an element, as it cannot be derived from the wording, or that the Criminal Code's catalogue of offences with regard to sexual activity in an exploitative relationship be expanded.[120]

C. Germany: modelling European standards in national legislation

Sections 184b and 184c of the German Criminal Code[121] broadly criminalise the creation, possession, and dissemination of child sexual abuse material. Germany's Criminal Code differentiates between 'child pornography' (the depicted person is below the age of 14 years), as stipulated in section 184b, and juvenile pornography (the depicted person is 14 years or older, but

[118] *R v Bono*, [2008] O.J. No. 3928 (QL), para. 24; it has to be noted that the Court in *Bono* rendered the private use exception inapplicable not only because the accused did not record or participate in the material, but also because he pretended to be a 16-year-old boy while actually being a 52-year-old man. As he misrepresented his identity to the victim, the consent of the victim was considered invalid, which also led to the inapplicability of the private use exception (*R v Bono*, [2008] O.J. No. 3928 (QL), para. 6, 24).
[119] *R v Keough*, 2011 ABQB 48, para. 276–277.
[120] Joshua Sealy-Harrington/Ashton Menuz, *Keep It To Yourself: The Private Use Exception for Child Pornography Offences*, The University of Calgary Faculty of Law Blog, available at: https://ablawg.ca/2015/06/23/keep-it-to-yourself-the-private-use-exception-for-child-pornography-offences/ (accessed 21 October 2018).
[121] English version of the Penal Code available at: https://www.gesetze-im-Internet.de/englisch_stgb/ (accessed 20 January 2020).

below the age of 18), as stipulated in section 184c. The differentiation between child and juvenile pornography impacts mainly on the range of the sentence – the definition and the catalogue of offences have been largely aligned.[122]

The regulation of child and juvenile pornography was strongly influenced by the Lanzarote Convention[123] as well as the Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and 'child pornography' (hereafter 'Directive').[124] Major changes in the legislative framework with regard to child and juvenile pornography were first enacted in 2008, followed by an amendment in 2015. As an in-depth discussion of both criminal code amendments exceeds the scope of this Chapter, the section below will focus on the 2015 amendment in the light of the Lanzarote Convention and the Directive.

1. Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse ('Lanzarote Convention')

Although Germany ratified the Lanzarote Convention only on 18 November 2015, the Convention prompted legislative reform in the area of child sexual abuse and exploitation after its signature on 25 October 2007.[125] The Convention aims to set a standard for various forms of child sexual abuse and exploitation offences and enhance international collaboration in the prevention of and response to such offences.[126] In article 20(1) and (2), the Convention provides for a broad criminalisation of 'child pornography' offences that responds to developments such as child webcam sexual abuse by criminalising the mere accessing of 'child pornography' without downloading the material.[127] Further, article 20(3) provides member states with an opt-out mechanism for teenage sexting material. The exemption clause reads as follows:

> Each Party may reserve the right not to apply, in whole or in part, paragraph 1.a and e to the production and possession of pornographic material […] involving children who have reached the age set in application of Article 18, paragraph 2, where these images are produced and possessed by them with their consent and solely for their own private use.

Member states hence can make reservations in respect of the criminalisation of the production or possession of images which involve children who have reached the legal age for sexual activities as prescribed in national law, and where the images are produced and possessed by them with their consent and solely for their own private use.[128] From the wording of the exemption clause, it is apparent that the lawfulness of the underlying sexual activity is not explicitly mentioned. However, as the consent to recording of a sexual activity logically implies the consent to such underlying activity, this is not problematic.

---

[122] Tatjana Hörnle, *Die Umsetzung des Rahmenbeschlusses zur Bekämpfung der sexuellen Ausbeutung von Kindern und der Kinderpornographie*, Neue Juristische Wochenschrift (2003), p. 3523.
[123] Germany signed the Lanzarote Convention on 25 October 2007, and ratified it on 18 November 2015, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures?desktop=true (accessed 23 October 2018).
[124] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0093 (accessed 23 October 2018).
[125] Gesetzentwurf der Fraktionen CDU/CSU and SPD, BT-Dr. 18/2601 (23 September 2014), p. 1.
[126] Susan H. Bitensky, *Introductory Note to Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, International Legal Materials, Vol. 49 (2010), p. 1663; for an assessment of the international collaboration mechanism in the Lanzarote Convention, see Chapter VI.
[127] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, pp. 22–23; Council of Europe, *Explanatory Report to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, para. 140.
[128] Council of Europe, *Explanatory Report to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, para. 144.

2. Directive 2011/93/EU of 13 December 2011

The Directive was precedented by the EU framework decision 2004/68/JHA of 22 December 2003 (hereafter framework decision).[129] The framework decision aimed to ensure that serious criminal offences such as the sexual exploitation of children and 'child pornography' are addressed in a comprehensive manner, with standardised constituent elements of criminal law.[130] Acknowledging that the framework decision only criminalised a limited number of offences, did not sufficiently address new forms of abuse and exploitation using information technology, and did not sufficiently provide for instruments facilitating transnational law enforcement collaboration, the EU Commission in 2009 submitted a proposal for a new framework decision[131] that aimed to repeal and incorporate the 2003 framework decision.[132] Apart from broadly criminalising 'child pornography' offences in article 5, the Directive 2011/93/EU of 13 December 2011 (hereafter the Directive) in its article 8(3) provides for an optional exemption clause for various consensual activities. With regard to 'child pornography', it states:

> It shall be within the discretion of Member States to decide whether Art. 5(2) [acquisition or possession] and (6) apply to the production, acquisition or possession of material involving children who have reached the age of sexual consent where that material is produced and possessed with the consent of those children and only for the private use of the persons involved, in so far as the acts did not involve any abuse.

First, it has to be noted that the Directive exempts not only the production and possession of such material, but also its acquisition. This term creates a contradiction in the exemption clause, as the terms 'acquisition' and 'private use' naturally exclude each other: material which has been used, produced and possessed by children solely for their private use cannot be up for acquisition at the same time. Interesting is that in contrast to the Lanzarote Convention, the Directive adds an element pertaining to the recorded act, stating that the acts shall not involve any abuse. Further, the use of the term 'persons' instead of 'children' with regard to the private use indicates that the material can be produced and possessed by adults, as long as the other elements of the exemption clause are fulfilled.

---

[129] Framework Decisions can best be compared to the legal instrument of a Directive. Both instruments are binding upon member states as to the result to be achieved, but leave to the national authorities the choice of the form and method of implementation.

[130] EU framework decision 2004/68/JHA of 22 December 2003, para. 7; apart from criminalising, inter alia, the production, dissemination and possession of child pornography material, the framework allows member states to exclude certain conduct related to child pornography, in particular providing the option to exempt teenage sexting from the applicability of the child pornography provision. In art. 3(2)(b), the framework states:

> A Member State may exclude from criminal liability conduct relating to child pornography:
>
> […] (b) referred to in Article 1(b)(i) and (ii) where, in the case of production and possession, images of children having reached the age of sexual consent are produced and possessed with their consent and solely for their own private use. Even where the existence of consent has been established, it shall not be considered valid, if for example superior age, maturity, position, status, experience or the victim's dependency on the perpetrator has been abused in achieving the consent […]

While the framework decision judging from its wording seems to be modelled after *Sharpe*, it is not clear whether the additional indicators for an exploitative situation apply to the consent to the sexual activity, the recording, or both.

[131] Under the 1997 Treaty of Amsterdam, framework decisions were binding upon the member states as to the result to be achieved but shall leave to the national authorities the choice of form and methods. This instrument was repealed by the 2009 Lisbon Treaty, which established the instrument of directives. Directives are binding, as to the result to be achieved, upon any or all the member states to whom they are addressed, but leave the choice of form and methods to the national authorities.

[132] Commission of the European Communities, *Proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA*, 2009/0049 (CNS), pp. 3, 6.

3. Criminal Code Amendment

The 2015 Criminal Code Amendment aimed at aligning German legislation with the Lanzarote Convention and the Directive.[133] As with the 2008 version of the juvenile pornography provision,[134] the 2015 Criminal Code amendment included an exemption clause:

> Subsection (1) no. 3, also in conjunction with subsection (5), and subsection (3) do not apply to acts by persons relating to such youth pornography which they have produced exclusively for their personal use with the consent of the persons depicted.[135]

This exemption clause aims to address some of the flaws of the 2008 amendment. While it exempts not only the possession but also the production of juvenile pornography, it is not required that the material was produced by persons under the age of 18 years, as was required under the 2008 exemption clause.[136] The latter aimed to address situations where the consensual production of a 17- and 18-year-old was criminalised.[137] It has to be noted that this aspect is not in line with the Lanzarote Convention which solely speaks of 'children'. Further, it remains problematic that only persons who produce the material fall under the exemption clause. It is, however, commonly agreed that the person who is depicted in the material could also possess the material even if he or she were not involved in its production.[138] The same teleological reduction should apply if a person possesses material which was solely produced by another person and solely depicts the producer,[139] for example where one partner possesses a 'selfie' of the other.

4. Assessment

As mentioned above, the exemption solely of the producer of the material, despite the proposed teleological interpretation, remains a concern. Furthermore, assuming that the purpose of the child and juvenile pornography provision is to protect children from sexual abuse, it is only consequent to ensure that these provisions are aligned with the other provisions addressing sexual activity with children.[140] German law provides for a complex system of age limits on sexual interaction. While any sexual interaction with a child below the age of 14 years is prohibited,[141] sexual activity with 14-17-year-old adolescents is generally legal. However, there are various exceptions to that rule. With regard to the age group of 14- and 15-year-old ado-

---

[133] BT-Dr. 18/2601, p. 1.
[134] With the 2008 criminal code amendment, the government detached the child pornography provisions from the depiction of sexual abuse and included a new section 184c that criminalised adolescent pornography depicting children between 14 and 17 years inclusively (Gesetzentwurf der Bundesregierung, BT-Dr. 625/06 (1 September 2006), p. 11). Acknowledging that material consensually developed by teenagers cannot be treated equally with other forms of child and adolescent pornography (BT-Dr. 625/06 p. 11.), the draft amendment in its final version included an exemption clause in section 184c, modelled after art. 3(2)(b) of the 2003 framework decision: 'The 1st sentence [obtaining possession of juvenile pornography] shall not apply to acts of persons related to juvenile pornography produced by them while under eighteen years of age and with the consent of the persons therein depicted.'
[135] Official translation of the German Criminal Code ('Strafgesetzbuch') available here: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1756 (accessed 11 May 2020.
[136] Tatjana Hörnle in: *Münchener Kommentar zum Strafgesetzbuch*, §184c, para. 18–20.
[137] Beschlussempfehlung und Bericht des Ausschusses für Recht und Verbraucherschutz, BT-Dr. 18/3202 (12 November 2014), p. 24.
[138] Tatjana Hörnle in: *Münchener Kommentar zum Strafgesetzbuch*, para. 18–20.
[139] *Ibid.*
[140] Helmut Baier, *Die Bekämpfung der Kinderpornographie auf der Ebene von Europäischer Union und Europarat*, Zeitschrift für Urheber- und Medienrecht, Vol. 39 (2004), p. 45.
[141] See §176 (1) Criminal Code.

lescents, the sexual activity is illegal if the adolescent is entrusted to the perpetrator for educational or caretaking purposes,[142] or if a perpetrator who is above the age of 21 years takes advantage of the adolescent's lack of sexual self-determination.[143] With regard to adolescents between the age of 16 and 17 years, sexual activity is illegal if, for example, the perpetrator takes advantage of the adolescent's dire straits,[144] or if the adolescent obtains some form of reward for the sexual activity.[145]

While this complex system aims to protect children from any form of sexual abuse and exploitation, it is surprising that the exemption clause with regard to juvenile pornography merely requires the consent of the adolescent, regardless of how or under which circumstances such consent was obtained. For example, while the sexual activity of a 15-year-old learner with his or her 35-year-old teacher – regardless of the adolescent's consent - amounts to a criminal offence,[146] the production of juvenile pornography material between these two actors falls under the exemption clause as long as the adolescent gives consent.

Even though it can be assumed that a teleological interpretation of the exemption clause in such a case would result in its inapplicability to avoid inconsistencies within the legal framework, the wording alone does not consider exploitative relationships as invalidating an adolescent's consent. As a result, adolescents who engage in production and possession of juvenile pornography might be less protected than adolescents who engage in contact sexual activity with the same partner. On the other hand, this inconsistency might be intentional, and could be explained with a lower encroachment threshold: since the impact of actual sexual interaction is potentially more harmful to the adolescent, it might justify that in the area of juvenile pornography, the adolescent enjoys more sexual autonomy. In the abovementioned case, this means that the 15-year-old learner and the 35-year-old teacher can legally produce and possess juvenile pornography, while sexual acts in this constellation remain illegal.

Further, the exemption clause does not speak about the consensual or lawful underlying sexual activity. It is submitted that when consenting to the recording of the sexual activity, a person also consents to the recorded sexual activity. However, this constellation undermines the complex system of age of consent under German law, because only consent to both the recording and the recorded activity is required. This leaves out potentially exploitative facts that influenced the teenager's consent in the first place.

In conclusion, the German exemption clause, despite going into the right direction, is erroneous in some respects. Apart from the inconsistency with the legal framework on contact sexual activity, the continuous criminalisation of 'selfies' through sole protection of the producer, even if the possessed image is a depiction of the possessor him- or herself, raises serious constitutional concerns with regard to the principle of legal certainty as well as the right to sexual self-determination.[147]

---

[142] See §174 (1) Criminal Code.
[143] See §182 (3) Criminal Code.
[144] See §182 (1) Criminal Code.
[145] See §182 (2) Criminal Code.
[146] See §174 (1) 1. Criminal Code (sexual abuse of wards).
[147] Henning Ernst Müller, *Gesetzgeberischer Murks - der geplante § 184c StGB (Jugendpornografie)*, beck-blog, 18 September 2014, available at: https://community.beck.de/2014/09/18/gesetzgeberischer-murks-der-geplante-184c-stgb-jugendpornografie (accessed 24 October 2018); the principle of legal certainty can be derived from art. 20 III German Constitution ('Grundgesetz'); the right to sexual self-determination has been developed as part of the right to informational self-determination, art. 1 in conjunction with art. 2(1) German Constitution; for an in-depth discussion of the term 'sexual self-determination' under German criminal law, see Tatjana Hörnle, *Sexuelle Selbstbestimmung: Bedeutung, Voraussetzungen und kriminalpolitische Forderungen,* Zeitschrift für die gesamte Strafrechtswissenschaft (2015), pp. 851–887.

IV. REGULATING BODIES: BALANCING AUTONOMY AND PROTECTION

The experiences of the US, Canada and Germany are proof of the complexity of the issues at hand. This section first discusses whether consensual teenage sexting should be exempted from 'child pornography' offences, and if so, which elements should constitute such an exemption clause.

A. A model for a rights-based approach to teenage sexuality: the South African *Teddy Bear Clinic* case

Regardless of the result of the specific teenage sexting discussions, it is striking that most debates are fought in a legal vacuum detached from a rights-based approach. Apart from *Sharpe* and *Barabash*, which mention freedom of expression and a 'right to document' in their deliberations, it is surprising that the teenage sexting debate is mainly conducted from a child-protection, rather than a child-rights, angle.[148]

It is crucial to stress that the regulation of teenage sexting infringes upon such teenager's most private sphere (sexuality) and hence that the criminalisation of such behaviour necessarily needs to be discussed within the realm of child rights such as freedom of expression, the right to privacy or other rights dealing with a person's sexuality or sexual expression. The key question is thus whether this extends to a right for minors to record and document their own lawful sexual activities, in particular sexual conduct and nudity, and consensually share and possess this content. Which right is most suitable to serve as a defence mechanism in such cases, and how exactly various level of infringement can be justified and on which grounds, are matters that go beyond the scope of this publication.[149] Instead, it is submitted, any form of regulation, whether criminal or other, that infringes upon a child's private sphere has to be discussed in the context of a rights-based approach.[150]

Taking a rights-based approach in the context of children, however, also means taking into account the rights-holder's limitations and children's evolving capacities. In turn, it means recognising that sexual autonomy does not always equate to consent.[151] This is particularly relevant where power relationships, relationships of trust or dynamics of authority come into play, as children tend to be specifically vulnerable to such influences due to their developing capacity. It is also the reason why laws in many countries not only criminalise sexual activity with children under a certain age but often limit the validity of consent given in situations where there is a risk that the consent is not given entirely voluntarily (e.g. in relationships of dependence between the child and the other person, or where there are differences in age). Therefore, the child protection lens with regard to potential vulnerability needs to be applied within the context of child's rights, not vice versa.

---

[148] A potential reason for this from an international children's rights perspective might be that the CRC does not provide for a mechanism to solve a conflict of various children's rights, see Livingstone/O'Neill, *Minding Minors Wandering the Web: Regulating Online Child Safety*, p. 28.

[149] Arguing that consensual sexting between minors under certain circumstances is protected under Art 8 (Right to Privacy) and Art 10 (Freedom of Expression) of the European Convention on Human Rights, Gillespie, *Adolescents, Sexting and Human Rights*, pp. 632 *et seq.*

[150] Lars Lööf, *Sexual behavior, adolescents and problematic content* in: Ethel Quayle/Kurt M. Ribisl (eds.), *Understanding and Preventing Online Child Sexual Exploitation and Abuse*, Oxon 2012, p. 134; stating that in order to properly weigh these conflicting rights, further research into gender, consent and minority/vulnerable/at-risk youth is required, Sonia Livingstone/Jessica Mason, *Sexual rights and sexual risks among youth online,* London 2015; arguing that discounting children's autonomy in the 'sexting' discourse amounts to paternalism, Sara Fovargue/Suzanne Ost, *Does the theoretical framework change the legal end result for mature minors refusing medical treatment or creating self-generated pornography?*, Medical Law International, Vol. 13 (2013).

[151] For an in-depth discussion of the concepts of sexual autonomy and consent, see Joseph J. Fischel/Hillary O'Connell, *Disabling consent, or reconstructing sexual autonomy*, Columbia Journal of Gender and Law, Vol. 30 (2015).

As an illustration of a rights-based approach to teenage sexuality, the South African Constitutional Court case *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another,* [2013] ZACC 35 (hereafter *Teddy Bear Clinic)* comes to mind. Remarkable in this case are the introductory remarks, which clearly seek to separate issues of morality around teenage sexuality from the problem at hand:

> At the outset it is important to emphasise what this is not about. It is not about whether children should or should not engage in sexual conduct. […] Rather we are concerned with far narrower issue: whether it is constitutionally permissible for children to be subject to criminal sanctions in order to deter early sexual intimacy and combat the risks associated herewith.[152]

In this case, the Court had to decide whether provisions in the Sexual Offences Act, which criminalised consensual sexual acts with children between 12 and 16 years, were unconstitutional.[153] If two children in that age group engaged in consensual sexual activity, they were both prosecuted and held guilty for statutorily raping the other.[154] The situation was aggravated by the establishment of the national sex offender registry as well as the mandatory reporting requirements for caregivers.[155]

The applicants in *Teddy Bear Clinic* argued that such criminalisation has various harmful effect on the child, such as exposure to the criminal justice system, and would have a negative effect on the child's understanding of, and healthy attitudes towards, sexuality.[156] In summary, the provisions infringe upon a range of children's constitutional rights, such as human dignity, privacy, bodily and psychological dignity, as well as upon the principle of the best interests of the child.[157] This infringement can not be justified as there is no correlation between the limitations and the purpose they aim to achieve.[158] In contrast, the respondents argued that the provisions did not infringe upon the child's rights but instead advanced and protected them by delaying the choice to engage in consensual sexual activities.[159] They submitted alternatively that, in case the Court found that rights are infringed, there is no less restrictive means and that the provisions have to be read in conjunction with the juvenile justice legislation. In this context, the measures would be implemented only after giving due consideration to the child's interests.[160]

Before delving into the constitutional analysis, it is worthwhile to briefly elaborate on the expert evidence submitted by the applicants. The expert submission stated that the adolescent phase is a critical and transformative period with long-lasting effects in shaping adult lives.[161] Children engage in a range of sexual activities from kissing to sexual intercourse. This exploration is healthy, as long as the person is emotionally ready and willing. Further, the experts stressed that support by adults in children's lives is crucial to help them make healthy choices. If children do not have a safe environment within which they can discuss their sexual experiences and ask questions, they lack this guidance.[162] With regard to the criminal provisions, the experts pointed out a range of negative social and psychological effects. Children would experience a mixture of shame, embarrassment, anger and regret, which may lead to a generally

---

[152] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another,* [2013] ZACC 35, para. 3.
[153] *Ibid.,* para. 11.
[154] *Ibid.,* para. 21.
[155] *Ibid.,* para. 17–18.
[156] *Ibid.,* para. 28.
[157] *Ibid.,* para. 29.
[158] *Ibid.,* para. 30.
[159] *Ibid.,* para. 31.
[160] *Ibid.,* para. 32.
[161] *Ibid.,* para. 44.
[162] *Ibid.,* para. 45.

negative attitude towards sexual relations, feelings that could have a chilling effect on their help-seeking behaviour. The criminal provisions therefore contribute to the silencing of children, in particular as caregivers and institutions are faced with the mandatory reporting obligation with regards to sexual offences and hence might not be approached anymore. This makes them more vulnerable to negative and risky behaviour and outcomes.[163]

In its analysis, the Court had to determine whether any rights are limited by the impugned provisions, and if so, whether the limitations are reasonable and justifiable in an open and democratic society. First, the Court stressed that children enjoy each of the fundamental rights in the Constitution granted to everyone as individual bearers of rights.[164] The Court went on to establish that the right to human dignity was limited by the criminal provisions. It held that dignity relates to the inherent worth of all individuals, that children's dignity rights are not dependent on the rights of their parents, and that rights are not held in abeyance until their bearers reach a certain age.[165] The criminalisation of consensual sexual conduct is a form of stigmatisation which is degrading and invasive: if one's consensual sexual choices are disrespected by society, one's innate sense of self-worth is inevitably diminished.[166]

With regard to right to privacy, the Court stated that the Constitution protects the inner sanctum of personhood, including family life and sexual preference. The way in which we give expression to our sexuality is at the core of this area of private intimacy: if, in expressing our sexuality, we act consensually and without harming one another, the invasion of that space constitutes breach of privacy.[167] This applies in equal force to the consensual sexual conduct of adolescents and is exacerbated by the mandatory reporting requirements.[168] Further, the South African Constitution recognises the best interests of the child both as a right as well as a guiding principle.[169] Provisions or conduct that affect children in general need to be tested against this standard.[170] The provisions in the Sexual Offences Act increase the risk of harm to children by driving sexual activity underground, cutting off support structures, and creating an atmosphere in which adolescents do not freely discuss sexuality anymore.[171] The effects of diversion or imprisonment are not in line with the requirement of growing up free from avoidable trauma.[172] Even if a child is diverted from the criminal justice system, he or she still has to face arrest and investigation before being diverted. Lastly, the Court made a significant remark:

> Indeed, it strikes me as fundamentally irrational to state that adolescents do not have the capacity to make choices about their sexual activity, yet in the same breath to contend that they have the capacity to be held criminally liable for such choices.[173]

In the ensuing limitation analysis, the Court accepted that the purpose of legislation is to discourage adolescents from prematurely engaging in consensual sexual conduct.[174] With regard to the nature and the extent of the limitation, it regarded the provisions as a deep encroachment.[175] With regard to the relation between the limitation and statutory purpose, the respondents submitted that children will be deterred from engaging in sexual activity, and this will

[163] *Ibid.*, para. 47.
[164] *Ibid.*, para. 38.
[165] *Ibid.*, para. 52.
[166] *Ibid.*, para. 55.
[167] *Ibid.*, para. 59.
[168] *Ibid.*, para. 60.
[169] *Ibid.*, para. 65.
[170] *Ibid.*, para. 69.
[171] *Ibid.*, para. 72.
[172] *Ibid.*, para. 74.
[173] *Ibid.*, para. 79.
[174] *Ibid.*, para. 81.
[175] *Ibid.*, para. 82.

assist in controlling the effects of sexual intercourse, such as pregnancy and STDs.[176] The Court did not buy into that narrative, and stated that there is lack of proof that the existence and enforcement of these provisions actually leads to the reduction of harm, as maintained by the respondents. It instead followed the expert submission that, as a consequence of the criminalisation, sexual activity is driven underground, away from guidance of parents.[177] Further, the Court stated that the provisions could also deter children from reporting crimes such as rape if they initially agreed to a sexual activity but withdrew their consent in the process and were subsequently raped. In such a case, the child might not report the crime, as he or she was at risk of being prosecuted for the initial consensual sexual activity.[178] Therefore, the Court held that there is no rational link between the provisions and the stated purpose.[179] Elaborating on less restrictive means, the Court stressed that a variety of less restrictive means are available to encourage adolescents to engage in healthy and responsible sexual relationships, such as improving parent-child sexual communication as well as comprehensive sex education, as opposed to abstinence or no sex education.[180] In conclusion, the Court held that the provisions in the Sexual Offences Act criminalising the adolescents for engaging in consensual sexual conduct are unconstitutional.[181]

Recognising both that the criminalisation of teenagers' sexuality touches upon the core of their rights and that they face specific vulnerabilities, the Court set an example of the balancing of autonomy and protection. This decision should be formative in any legal approach to teenage sexting, given that teenage sexting is a form of sexual exploration and teenage sexual activity and hence similar considerations come into play. Taking a rights-based approach as set out in *Teddy Bear Clinic* as a starting-point, the next section will discuss the value of the criminalisation of teenage sexting in the name of protection.

B. Criminalisation in the name of protection – a twisted concept

As the introductory remarks in *Teddy Bear Clinic* made clear, the Court intentionally tried to discuss the issue at hand detached from any moral assessment of whether children should have sex or not. However, when it comes to teenage sexting, the debate seems to be overshadowed by broader concerns about child sexuality, child sexual abuse and exploitation as well as new forms of technology.

As with the dissenting opinion in *Sharpe*, scholars have argued in favour of a criminalisation of teenage sexting either as 'child pornography' offence or as separate, more lenient criminal offence. The arguments for such criminalisation range from the limited value of the expression and the risks related to teenage sexting to the deterrent effect of such legislation.[182] When setting out these arguments, the language that is used usually portrays the child as an innocent being who must be protected at all costs against premature 'sexualisation', a tendency which reveals an 'angel/devil dichotomy' underlying these arguments.[183] If a child dares to break out

[176] *Ibid.*, para. 85–86.
[177] *Ibid.*, para. 87.
[178] *Ibid.*, para. 93.
[179] *Ibid.*, para. 94.
[180] *Ibid.*, para. 98–99.
[181] *Ibid.*, para. 101.
[182] For a comprehensive overview of the debate around sexting and its potential harm for children, see Alisdair A. Gillespie, *Adolescents, Sexting and Human Rights*, Human Rights Law Review, Vol. 13 (2013), pp. 626 *et seq.*; see further the arguments put forward in Megan Sherman, *Sixteen, Sexting, and a Sex Offender: How Advances in Cell Phone Technology Have Led to Teenage Sex Offenders*, Boston University Journal for Science and Technology Law, Vol. 17 (2011), pp. 157–158; Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation, Virginia Journal of Social Policy and Law*, Vol. 15 (2008), p. 39.
[183] Dana Northcraft, *A Nation Scared: Children, Sex and the Denial of Humanity*, American University Journal of Gender, Social Policy & the Law, Vol. 12 (2004), p. 511; applying Freud's theory of sexuality to argue that the motives behind

of this label, he or she faces severe consequences.[184] Additionally, girls face the consequences of a 'virgin/whore dichotomy', as they are not supposed to have any sexual desire in the first place.[185] Children, and in particular girls, are hence deprived of any sexuality, let alone a right to express such sexuality, and seem to be granted only a right to protection from sexual exploitation.[186] This approach is – again - especially oppressive for girls, as it perpetuates the old narrative that the only way to keep them safe is to exclude them from the platforms of participation.[187]

These underlying dynamics seem to be the true cause for the urge to criminalise consensual teenage sexting. This is not surprising, as the unresolvable contradictions in the legal framework caused by such a criminalisation cannot seriously be untangled on a technical basis. First, it seems rather obvious that it is a twisted concept that the law turns the same person it intends to protect into the offender, in order to – again - protect that same person. This would mean that the depicted person is simultaneously the victim and the perpetrator.[188]

Further, as pointed out in *Teddy Bear Clinic*, it is contradictory that a child is considered to be mature enough to have criminal capacity, while at the same time considered not mature enough to decide whether to engage in sexual activity. In fact, it is more in line with child development concerns to set a higher age of criminal responsibility and lower age of consent. Comparing criminal liability and consent to sexual activity, there are different questions the child needs to answer: Do I know what is right and wrong and am I capable of seeing the consequences of my actions? Or: Am I capable of giving informed consent to an action which will have no legal consequences? It has to be kept in mind that sexual activity in contrast to criminal activity is not inherently deviant, as sexual activity forms part of the normal developmental processes adolescents go through. Therefore, it is submitted that a higher threshold should be expected in terms of age limits for criminal activity in contrast to sexual activity, given that criminal activity is not an expression of a normal developmental stage. The best interests of the child principle requires us to take an approach which ensures the safety and well-being of children, and weigh our judgment against this objective. Although both decisions – engaging in criminal conduct or in sexual activity – might be largely emotional and impulsive ones, more maturity should be required from a child with regard to criminal liability, as the child needs to assess the legal consequences of his or her behaviour. Therefore, it is contradictory and not in the best interests of the child to assume that a child lacks the capacity to consent to sexual activity but has criminal capacity.

When debating consensual sexting between minors, it is remarkable that this phenomenon is primarily discussed in the realm of child sexual abuse material. While child sexual abuse material and teenage sexting have merely the material depicting sexual activity of children in

---

the criminalisation of sexting might actually be the expansion of the latency phase, Matthew H. Birkhold, *Freud on the Court: Re-interpreting Sexting & Child Pornography Laws*, Fordham Intellectual Property, Media & Entertainment Law Journal, Vol. 23 (2013).

[184] *Ibid.*

[185] Northcraft, *A Nation Scared: Children, Sex and the Denial of Humanity*, p. 512; arguing that 'slut-shaming' on social networking sites is a reflection of the sexual double standards which reward men for sexual activity, while women engaging in sexual activity is sanctioned for not performing femininity in an appropriate way, Kathleen van Royen et al., *Slut-shaming 2.0* in: Michel Walrave et al. (eds.), *Sexting. Motives and risk in online sexual self-representation,* Cham 2018; Jessica Ringrose et al., *Teen girls, sexual double standards and 'sexting': Gendered value in digital image exchange*, Feminist Theory, Vol. 14 (2013), p. 307.

[186] Carpenter et al., *Harm, Responsibility, Age, and Consent*, p. 31; arguing that adults have been preventing children from understanding and experiencing their own sexuality by tabooing child sexuality, Kate Millet, *Beyond Politics? Children and Sexuality* in: Carole S. Vance (ed.), *Pleasure and Danger. Exploring female sexuality*, Boston 1984, pp. 218 – 219.

[187] Laurie Penny, *Unspeakable Things*, Bloomsbury 2014, p. 165.

[188] Jamie L. Williams, *Teens, Sexts, & Cyberspace: The Constitutional Implications of Current Sexting & Cyberbullying Laws*, William and Mary Bill of Rights Journal, Vol. 20 (2012), p. 1032; stating that there is a risk that adolescents who engage in sexting will be labelled as 'dangerous sex offenders', WeProtect Global Alliance, *Global Threat Assessment 2019*, London 2019, p. 32; Fovargue/Ost, *Does the theoretical framework change the legal end result for mature minors refusing medical treatment or creating self-generated pornography?*, p. 26.

common, their underlying dynamics are fundamentally different. Child sexual abuse material depicts child sexual abuse and exploitation, while teenage sexting depicts the consensual sexual activity of teenagers.[189] It is therefore submitted that, as the starting point, we need to rethink the reference point for assessing teenage sexting.[190] Teenage sexting should be discussed in the broader context of sexual activity of teenagers, as it is just another form of teenage sexual activity. As much as sexualised violence is a potential risk for teenagers engaging in sexual activity, child sexual abuse material is a risk for teenagers engaging in sexting. Despite this risk, the CRC Committee in its Guidelines makes it clear that 'States parties' should not criminalize adolescents of similar ages for consensual sexual activity'.[191]

Taking the sexual activity of teenagers as a starting-point and building on the rights-based approach in *Teddy Bear Clinic*, the question arises whether any arguments could justify a different assessment of teenage sexting in contrast to contact sexual activity. When comparing the risk of sexualised violence, pregnancy and STDs inherent to contact sexual activity with the risk of dissemination of material against the will of the depicted person, it is clear that the latter risks cannot be considered more intrusive to a teenager's life (rather the opposite).[192] Moreover, the criminalisation of teenage sexting could lead to the same negative effects as the criminalisation of sexual activity between teenagers discussed in *Teddy Bear Clinic*: teenage sexuality is driven underground, parental guidance on safe sexting is hampered, and teenagers refrain from seeking support if material is disseminated against their will. Given the CRC Committee's stance on consensual sexual activity between adolescents of similar ages mentioned above, it is not surprising and rather consequent that the Committee applies the same standard for online sexual activity by stating that 'children should not be held criminally liable for producing images of themselves'.[193]

The criminalisation of consensual sexting between minors is counterproductive at any level. It is hence submitted that consensual teenage sexting needs to be excluded from 'child pornography' provisions. The necessary elements of such an exemption clause are discussed below.

C. Elements of an exemption clause

The exemption clauses provided for in *Sharpe*, the Lanzarote Convention, EU Directive and German legislation differ, and hence provide for contrasting levels of protection for minors engaged in sexting. This section aims to provide guidance on the optimal elements of an exception clause.

First, with the exception of the EU directive, the exemption clauses decriminalise only the production and possession of teenage sexting material. The inclusion of any other actions should be avoided, as it might negatively expand the scope of the provision. Strictly speaking, if the distribution of teenage sexting material is not covered by the exemption clause, the material could never be shared with the partner, as this always amounts to distribution. However, it is submitted that 'distribution' means the dissemination of material to an unknown number of

---

[189] Arguing that it is difficult to detect any form of exploitation if an adolescent who has reached the age of consent takes a sexualised picture of him- or herself and shares it with an intimate partner, Gillespie, *Adolescents, Sexting and Human Rights*, p. 641.

[190] Acknowledging that the autonomy vs protection debates in child law are often overlooked in the context of sexting, Ann Skelton/Benyam Mezmur, *Technology changing @ a Dizzying Pace: Reflections on Selected Jurisprudence of the UN Committee on the Rights of the Child and Technology*, Peace Human Rights Governance, Vol. 3 (2019), p. 279.

[191] See also CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156, para. 73; acknowledging that the setting of an age of sexual consent recognises children's evolving capacities, ECPAT, *Explanatory Report to the Guidelines Regarding the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Bangkok 2019, p. 74.

[192] Gillespie, *Adolescents, Sexting and Human Rights*, p. 641.

[193] CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156, para. 67.

recipients, and alternatively, that the 'distribution' between partners would be covered by applying a teleological interpretation of the terms 'possession' and 'production', as such a clause otherwise prevents any form of sharing and hence defeats its purpose.

Moreover, regarding the subjects of the exemption clause, it is clear that people who are either depicted in the recording or who have participated in its creation should be included in an exemption clause. Assuming that a wide range of teenage sexting material includes 'selfies', which are often produced without any other person being present or participating, a person who consensually possesses such material and has received it from the depicted person should enjoy the same level of protection, as anything else would simply not reflect the reality of teenage sexting. Further, the exemption clause should include 'persons' not only 'children', to ensure that close-in-age sexual activity between an adolescent and a young adult is equally excluded as long as it is legal under the laws of the respective country,

With regard to the interpretation of the term 'private use', reference is made to the deliberations on the broad interpretation of the term 'private use' in *Dabrowski*. Even if not interpreted in the strict sense of exclusive possession of the participant, the third party to which such protection is extended must be able to ensure the highest level of confidentiality and have a legitimate reason for the possession of such material.

In view of the interconnectedness of contact and digital sexual activity, the legislative framework should respond to these phenomena in unison: this requires an alignment of age-of-consent laws with any regulations regarding teenage sexting. Acknowledging that the risk related to teenage sexting is equally likely to turn into harm compared to the risk related to contact sexual activity, there is no justification for treating these two forms of teenage sexual activity differently. Generally, the term 'lawful sexual activity' is preferred in contrast to 'consensual sexual activity', as the national framework might criminalise even consensual sexual activity with a minor if there is an exploitative relationship of any kind.

If the national framework with regard to contact sexual activity only focuses on the consent of the child, regardless of any elements of abuse and exploitation, it might be useful to add an element of 'abuse and exploitation', to ensure children are sufficiently protected. However, this is rather a gap in the age-of-consent laws and should primarily be addressed at that level. As has been debated in *Sharpe*, the question arises whether with regard to the recording of the lawful sexual activity, mere consent is sufficient, or whether an additional element of 'lack of abuse and exploitation' should be added. One might argue that if a child consented to the sexual activity without any elements of abuse or exploitation present, there is no need for a distinct element with regard to the recording, as long as the child gives consent to the recording. However, it has to be noted that these elements are not always congruent: a teenager might be pressured into agreeing to a recording, while not being pressured into the recorded sexual activity. In the absence of an additional element on the recording level, the described scenario might be protected by the exemption clause, even though the consent given to the recording was obtained in the context of an abusive or exploitative situation. Therefore, the recording itself should be consensual and that consent should have been obtained without any factors of abuse or exploitation being present. As suggested by the Canadian Supreme Court in *Barabash,* this exploitative element could be considered to be factored into the consent element in common law countries. However, considering that this suggestion was given from a common law perspective, and to make it clear and transparent that exploitative elements might also render the consent given to the recording invalid, the mentioning of an additional element is recommended.

Finally, it seems plausible that – as pointed out in the *obiter dictum* in *Barabash* – the exemption clause should only be applicable as long as all participants consent to the ongoing possession of all parties. However, this topic requires more in-depth research and consideration and hence exceeds the scope of this Chapter.

V. PREVENTING RISK FROM TURNING INTO HARM IN THE DIGITAL SPACE

In conclusion, the criminalisation of consensual sexting between minors is not the right instrument to prevent risk turning into harm. Although criminal law seems often to be the least complex (or most comfortable) solution, and assuming that in the majority of cases the aim of such intervention is truly to protect children from any form of abuse and exploitation, the generational digital divide might significantly contribute to the moral panic around children's digital sexual exploration. As digital sexual exploration is a relatively alien concept for the older generation, they might not understand why teenagers engage in such behaviour in the first place. This lack of understanding of the underlying dynamics can lead to overreaction and result in a blurred perception of risk and harm.

One of the key interventions to ensure that risk does not turn into harm is the capacitation of children to detect risks and respond to them. According to the CRC Committee, this includes as a minimum mandatory school education on online behaviour and safety, to ensure children are capacitated to adequately react to risks.[194] With a particular focus on online sexual exploration, this online behaviour and safety training should go hand in hand with comprehensive sexuality education, focusing on gender stereotypes, sexual autonomy, and building healthy sexual relationships with oneself and others, both online and offline.[195] At the same time, creating a safe and confidential environment in schools, homes and the community for questions about sexuality and sexual exploration could assist in promoting safer sex(ting). As these interventions are not a quick-fix but require long-term investments in the education and social welfare sector, they might be less popular than simply criminalising such behaviour. Or, in the words of Laurie Penny: 'The scourge of the underage slags must be stamped out by any means necessary, as long as those means don't involve actually providing useful sex education.'[196]

---

[194] CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156, para. 40(b), 42.

[195] For the online component of comprehensive sexuality education, this should include informing adolescents that non-consensual sharing of images can have legal consequences, as well as building resilience for adolescents not to engage in 'sexting' if this does not feel right, see Thomas Crofts/Eva Lievens, *Sexting and the Law* in: Michel Walrave et al. (eds.), *Sexting. Motives and risk in online sexual self-representation,* Cham 2018, p. 130; other topics should include the concept of consent, critical media analysis tools and critical pornography analysis, see Livingstone/Mason, *Sexual rights and sexual risks among youth online,* p. 47.

[196] Laurie Penny, *Teenage girls and the pill*, New Statesman America, 2 November 2010, available at: https://www.newstatesman.com/blogs/laurie-penny/2010/11/young-girls-sex-access-pill (accessed 3 October 2018).