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**Regulating youth sexuality, agency and citizenship: developing a coherent criminal
justice response to youth sexting**

Abstract

Currently the law in England and Wales means that young people who engage in mutually consensual teenage sexting may find that this activity has been recorded on their criminal record and may be disclosed in a way which impacts negatively upon the young person's future opportunities even where no charges have been brought. This information can usually only be removed from the records in exceptional and rare cases. This article will argue that this paternalistic and moralistic approach towards mutually consensual teenage sexting overrides consideration of children's rights to explore their sexuality by defining youth sexuality as inherently illegitimate and illegal. The strong preference for safeguarding the future adult the child will become undermines the recognition of children as rights holders right now, depriving the child of agency and voice. The legal response to sexting, and child exploitation more generally, needs to be informed by an understanding of youth sexualities that are more fully based in, and driven by, the realities of young people's sexual lives. By recognising young people as holders of sexual rights and sexual citizenship, this would allow children's voices to be heard in developing responses to expressions of their sexuality.

I. Introduction

Sexting refers to the sending or receiving of sexually explicit text messages including the digital recording of naked, semi-naked, sexually suggestive or explicit images and their distribution via mobile phone messaging, email or social network sites.¹ Ringrose *et al* define it as the ‘exchange of sexual messages or images’ and ‘the creating, sharing and forwarding of sexually suggestive, nude or nearly nude images’.² When adults consensually share explicit photos of themselves, such behaviour is not criminalised. However as child pornography laws in England and Wales do not distinguish non-exploitative consensual teenage sexting from child pornography, they potentially expose both the sender and receiver of youth sexting to the risk of criminal prosecution, classification as a sex offender and/or a permanent criminal record of youthful sexual exploration and experimentation even where no charges have been brought.

This article will argue that current legal responses in England and Wales to the practice of non-exploitive consensual sexting amongst teenagers are based upon a conceptualisation of youth and childhood as a period of time when children and young people are innocent and asexual or pre-sexual. Those young people who are deemed to have sexual experience or knowledge are therefore in need of regulation. Conceptualizing young people’s sexuality in this way erodes the possibility of any meaningful consideration of a children’s rights discourse that goes in any significant way to valuing and empowering young people’s agency, including their agency around exploring and expressing their sexuality. This conceptualisation of youth sexuality reflects the laws hegemonic construction of young people as ‘becomings’ who need to be protected, including protection from their sexuality, rather than ‘beings’ or independent holders of rights. This view of young people as ‘human becomings’ over-emphasises the position of the child as a future adult and consequently downgrades their present interests,

¹ Thomas Crofts, Murray Lee, Alyce McGovern and Sanja Milivojevic, *Sexting and young people* (Palgrave 2015) 4

² Jessica Ringrose, Rosalind Gill, Sonia Livingstone and Laura Harvey, *A qualitative study of children, young people and ‘sexting’* (NSPCC 2012) 9.

accentuates passivity and incompetence and limits the recognition of young people as rights-holders. In a period of development of sexual identity and awareness, mutually consensual teenage sexting should not be equated with the co-production of child pornography. Instead non-exploitative consensual sexting should be more aptly conceptualised as a modern form of sexual behaviour in which young people may (or may not) engage.

The current approach to teenage sexting confusingly views adolescents on the one hand as incapable of rational and reasoned judgment while also expecting them to make wise decisions about expressions of their sexuality and criminalising those who do not. This article will not be arguing that there should be no protection of children in the context of sexting, child exploitation and the creation and distribution of child pornography. There are already a plethora of criminal justice and civil law responses which can challenge, and protect young people from, bullying and exploitive forms of sexting. Instead this article is concerned with the lived experiences of young people and the need to educate policy makers and police in discourses of children's rights dealing with issues of agency, empowerment and deconstructing the innocent child. The criminal justice response to teenage sexting which categorises young people who engage in sexting as producers and distributors of their own child pornography needs to be redrawn in a way in which the child's rights are foregrounded and young people's agency, including sexual agency, is recognised. To understand the lived experiences of young people it is necessary to first consider the extent to which young people are engaging in sexting behaviour.

II. PREVALENCE OF SEXTING

In June 2016 the NSPCC reported that 1 in 7 (approximately 14%) young people in the UK have taken a semi-naked or naked picture of themselves using electronic devices and over half

of these young people went on to share the image with someone else.³ The majority of those who shared images (60%) reported that they knew the person with whom it was shared, however Bowlin estimated that 60% of sexually explicit texts (sexts) have been disseminated beyond the original recipient.⁴ A recent large survey of 4,564 young people aged 14 to 17 across five European countries – England, Italy, Cyprus, Bulgaria and Norway - found that between six% and 44% of young women and 15% and 32% of young men said they had sent a sexual image/message (defined in the study as naked or nearly naked pictures or messages which talked about having sex) to a partner. Similar proportions of young women (between nine% and 49%) and a slightly higher proportion of young men (20% to 47%) reported receiving a sexual image or message from a partner.⁵ In all five countries this was often a reciprocal activity, as approximately 66% of young people who had sent an image/message had also received one. The highest rates for both sending and receiving were in England and the lowest in Cyprus. All of the young people involved in the study were asked to identify how they felt about sending or receiving a sexual image/message and many participants (41% to 87% of young women and 75% to 91% of young men) reported an affirmative impact. Females in England and Norway were more likely to report a negative impact, and this was likely to be associated with the message or image having been shared with other people. 61% of young females in England and 47% in Norway who reported a negative impact of sending a sexual image/message said that the message was shared. This compared with 21% of females in England and 15% in Norway of those who reported an affirmative-only impact and who said

³ Elena Martellozzo, Andy Monaghan, Joanna R Adler, Julia Davidson, Rodolfo Leyva and Miranda AH Horvath, *'I wasn't sure it was normal to watch it' The impact of online pornography on the values, attitudes, beliefs and behaviours of children* (NSPCC 2016).

⁴ John W Bowlin, *kNOw Sextortion: The Facts of Digital Blackmail and What You Can Do to Protect Yourself* (Createspace 2013).

⁵ Nicky Stanley, Christine Barter, Marsha Wood, Nadia Aghtaie, Cath Larkins, Alba Lanau and Carolina Överlien, 'Pornography, Sexual Coercion and Abuse and Sexting in Young People's Intimate Relationships: A European Study' (2016) 33(19) *Journal of Interpersonal Violence* 2919.

that the sexual image/message was shared.⁶ The psychological and social risks of youth sexting have been identified as including increased likelihood of future risky sexual behaviour, suicide, humiliation, ‘slut-shaming’, depression, anxiety disorders and substance abuse.⁷ These outcomes tend to not be associated with the act of sexting itself but because the images have been distributed further than originally intended. Non-consensual taking and/or distributing of private sexual photographs can be dealt with by various other legal means, such as English laws which criminalise revenge porn (Criminal Justice and Courts Act 2015), offences against sending indecent communications (Malicious Communications Act 1988), voyeurism (Sexual Offences Act 2003) and stalking and harassment (Protection from Harassment Act 1997). It is also possible to bring a civil action for breach of privacy, breach of confidence, nuisance and sexual harassment. The Children Act 1989 also creates the opportunity to develop interventions which promote the health and wellbeing of young people and to encourage positive prosocial behaviour. In cases of non-consensual or exploitative sexting it may be thought preferable to proceed by way of civil proceedings seeking a care or supervision order under the Children Act 1989, rather than to embark on a prosecution. Moreover section 67 of the Serious Crime Act 2015 makes it a criminal offence for anyone aged 18 or over to intentionally communicate with a child under 16, where the person acts for a sexual purpose and the communication is sexual or intended to elicit a sexual response. This offence applies to online and offline communication, including social media. The 2015 Act intendeds to protect children from abuse and exploitation at the interface of sexuality, age differences, power, dependency and gendered expectations by criminalising the sending of sexual messages to children by adults and adults contacting children online or by text message with requests to take and send nude photos.

⁶ *ibid* 14.

⁷ Abigail M Judge ‘“Sexting” among US adolescents: Psychological and legal perspectives’ (2012) 20(2) *Harvard Review of Psychiatry* 86; Eric G Benotsch, Daniel J Snipes, Aaron M Martin and Sheena S Bull, ‘Sexting, substance use, and sexual risk behavior in young adults’ (2013) 52(3) *Journal of Adolescent Health* 307; Panagiota Korenis and Stephen B Billick ‘Forensic implications: Adolescent sexting and cyberbullying’ (2014) 85(1) *Psychiatric Quarterly* 97.

Similar results regarding the prevalence of youth sexting have been found in the USA, according to the National Campaign to Prevent Teen and Unplanned Pregnancy 2008 20% of teenagers surveyed had sent or posted nude or semi-nude pictures of themselves. Additionally 39% of teen females and 38% of teen boys reported being sent nude or semi nude images of others, originally intended for someone else.⁸ Rice *et al* and Temple *et al* found that between 15% and 28% of older adolescents have sent a sext.⁹ Dowdell *et al* reported that 15% of their High School sample had been sent a sext and 33% reported knowing someone who had been involved in sexting. Some studies have challenged these statistics.¹⁰ A report by the Pew Research Center found that only five% of 14–17-year-olds have sexted imagery of themselves and 18% have received such imagery.¹¹ The Crimes Against Children Research Center national study suggests even lower figures, of the 1560 10–17-year-olds surveyed, nine% reported having created or received nude or nearly nude images, and only one% reported having created images of themselves that show breasts, genitals, or bottoms.¹² Part of a 25-country study, the EU Kids Online project found that 12% of 11–16-year-old teens have seen or received online sexual messages, although this decreases to four% of that group within the past year.¹³ These inconsistencies may be due to differences in how ‘sexting’ is defined as well as variations between methods and samples.¹⁴ These figures, although contested, suggest that sharing self-

⁸ The National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech, Results from a Survey of Teens and Young Adults* (NCPTUP 2008).

⁹ Eric Rice, Harmony Rhoades, Hailey Winetrobe, Monica Sanchez, Jorge Montoya, Aaron Plant and Timothy Kordic, ‘Sexually explicit cell phone messaging associated with sexual risk among adolescents’ (2012) 130 *Pediatrics* 667; Jeff R Temple, Jonathan A Paul, Patricia van den Berg, Vi Donna Le, Amy McElhany and Brian W Temple, ‘Teen sexting and its association with sexual behaviors’ (2012) 166 *Archives of Pediatrics & Adolescent Medicine* 828.

¹⁰ Eilizabeth B Dowdell, Ann W Burgess, and Robert J Flores, ‘Online social networking patterns among adolescents young adults and sexual offenders’ (2011) 111 *American Journal of Nursing* 28.

¹¹ Amanda Lenhart *Teens and Sexting* (Pew Research Center 2009)

¹² Kimberley J Mitchel, David Finkelhor, Lisa M Jones and Janis Wolak ‘Prevalence and characteristics of youth sexting: A national study’ (2012) 129 *Pediatrics* 13.

¹³ Jessica Ringrose *A Qualitative Study of Children, Young People and ‘Sexting’: A Report for the National Society for Prevention to Children* (NSPCC 2012) 11.

¹⁴ April G Thomas and Elizabeth Cauffman ‘Youth sexting as child pornography? Developmental science supports less harsh sanctions for juvenile sexters’ (2014) 17 *New Criminal Law Review* 631.

generated sexual images has become a more normalised part of modern growing-up, even if it is not all pervasive. This creates a number of problems in how English law responds to this activity and more broadly how the law conceptualises the sexual behaviour of young people.

III. THE LEGAL RESPONSE TO YOUTH CONSENSUAL SEXTING

The age at which young people can lawfully consent to engage in sexual activity is currently 16 years in England and Wales. Age of consent legislation defines the age at which individuals are legitimately regarded as sexual citizens with the right to engage in sexual conduct in personal relationships.¹⁵ The age of consent laws are also intended to protect children from sexual relations by criminalising all forms of sexual behaviour involving young people below the age of consent. Children under 16 are thus constructed by the 2003 Act as immature, naïve, helpless victims with a ‘lack of sexual knowledge’ and an ‘inability to make or understand sexual decisions’.¹⁶ This construction of young people as in need of protection means that non-exploitative consensual sexualised behaviour between young people where one of them is below the age of consent could be criminalised, including mouth-to-mouth kissing, sexual exploration and young people sharing pornographic materials amongst themselves.¹⁷ As such youth sexuality is defined as inherently illegitimate and the sexual subjectivity of young people that claims desire, autonomy and consent is erased.¹⁸

¹⁵ Diane Richardson, ‘Constructing sexual citizenship: theorizing sexual rights’ (2000) 20(1) *Critical Social Policy* 123

¹⁶ Kerwin Kaye ‘Sexual Abuse Victims and the Wholesome Family’ in Elizabeth Bernstein and Laurie Schaffner (eds), *The Politics of Intimacy and Identity* (Routledge 2005) 149

¹⁷ John R Spencer ‘The Sexual Offences Act 2003: (2) Child and Family Offences’ (2004) *Criminal Law Review*, 353.

¹⁸ Angelides Steven ‘Hot for the teacher: the cultural erotics and anxieties of adolescent sexuality’ (2010) 135(1) *Media International Australia*, 71; Belinda Carpenter, Erin O’Brien, Sharon Hayes and Jodi Death ‘Harm, responsibility, age and consent’ (2014) 17 *New Criminal Law Review* 23.

The epistemological assumption that young people's sexuality needs to be managed and regulated is also reflected in child pornography laws and the response to consensual non-exploitive youth sexting. In England and Wales any creation or transfer of naked images of young people potentially constitutes a criminal act of possessing, transmitting, viewing or downloading indecent images of children under the Protection of Children Act 1978. Section 1 of the 1978 Act made it an offence to take an indecent photograph of a child under 16 years of age and also criminalises distributing an indecent photograph of a child. Conviction of these offences carries a maximum 10 years imprisonment and a requirement to comply with Sex Offenders Registration conditions. The Sexual Offences Act 2003 extended the reach of the 1978 Act by redefining the child as 'all persons under 18' years of age, rather than 16. Therefore while 16 and 17 year olds can consent to engage in sexual activity, they cannot take a photograph or make a video unless they are married or in an 'enduring family relationship'.¹⁹ While the 2003 Act provides no guidance on what constitutes an 'enduring family relationship', it is clear that the young people must be at least living together.²⁰ Otherwise any young people under 18 years of age who engage in consensual sexting are at risk of being charged with child pornography offences under the 1978 Act.

Conceptualizing childhood sexuality within the discourse of protection creates a framework which limits space for the sexual subjectivity of young people, their agency or recognition of their rights as sexual citizens. In the USA the legal approach to sexting, similar to the approach in England and Wales, seeks to marginalise and make invisible young people's sexuality and sexual identity and inhibit their exploration of their own sexuality. For example in *Miller v Skumanik*²¹ school officials had found sexually explicit photos on some of the

¹⁹ Sexual Offences Act 2003, s 45.

²⁰ Sexual Offences Act 2003, s 1A(1),(2).

²¹ (2009) 605 F Supp. 2d 634.

students mobile phones. Those appearing in, or possessing, the photos were warned they could face child pornography charges unless they agreed to complete an education programme and serve six months of probation including random drug testing. Three students and their parents resisted and argued that the photos were not intended to be sexual. The exclusive focus of the defence was on desexualisation and innocence as it was argued that the girls took the photos for ‘fun’ and because they are innately ‘irresponsible’, ‘careless’, ‘irrational’ and ‘foolish’.²² There was no defence of their right to freedom of expression. Instead the case was won by arguing that forcing the girls to attend Skumanick’s education program would violate their parents’ right to control the upbringing of their children. The view that once the sexual consciousness of the child is spurred into expression it is dangerous and pathological, and thus in need of outside intervention, is also evident in a judgment of the Florida judiciary in *AH v State*.²³ This case concerned a 16-year-old Florida teenage girl (AH) and her 17-year-old boyfriend (JGW) who in 2005 were charged as juveniles under child pornography laws after taking digital photos of themselves naked and engaged in sex, and then emailing the photos to JGW’s personal account. They were each charged with ‘one count of producing, directing or promoting a photograph or representation that they knew to include the sexual conduct of a child’. AH challenged the ruling on the basis that because she did not email the photos to a third party, the charges were a violation of her privacy rights and thus unconstitutional. Although the age of consent in Florida is 18, there is a close-in-age exemption, which allows for 16- or 17-year-old minors to have sex with someone between the ages of 16 and 23. However, the court ruled that privacy rights do not extend to circumstances in which the ‘minor memorializes the act through picture or video’. Strikingly, the reason given for this is that neither of the two young people had a reasonable expectation that ‘the other would not show

²² Amy A Hasinoff, *Sexting Panic: rethinking criminalization, privacy and consent* (University of Illinois Press, 2015) 28.

²³ *AH v State* (2007) 949 So. 2d 234, 235.

the photos to a third party’ or that the photos would not be disseminated unintentionally. The defendants also, the court concluded, ‘have no reasonable expectation that their relationship will continue’, apparently ‘unlike adults who may be involved in a mature committed relationship’. No evidence was provided that either of them intended to show the photographs to anyone else, as the one dissenting judge highlighted. Nevertheless AH was declared delinquent on the basis of generalized notions of the normative adolescent as both immature and sinister. AH was assumed to be ‘without either foresight or maturity ... too young to make an intelligent decision about engaging in sexual conduct and memorializing it’. No tests of the young woman’s intelligence were even considered; she was merely reduced to the unified category of immature, unintelligent teenager. AH and all teenagers were deemed to have such a compromised capacity for agency that not only was the privacy afforded her to engage in sex with her boyfriend offline not also protected online, but she was in fact punished for this apparently deficient agency.

The paternalistic approach of the English and US criminal justice systems suggests a legal and social context in which adolescents do not have the capacity or the right to pursue sexual pleasure. In England there have been some attempts to alleviate the harshness of the law in this respect. Home Office *Guidance* issued with the Sexual Offences Act 2003 sought to reassure that the English age of consent laws are designed to protect children from abuse and exploitation and not to prosecute under-16s who engage in mutually consenting sexual activity.²⁴ In relation to sexting, recent guidance from the Crown Prosecution Service²⁵ and the College of Policing²⁶ have recommended that the sharing of ‘youth produced sexual imagery’

²⁴ Home Office *Guidance on the Sexual Offences Act 2003* (Home Office, 2003) para 72. Also Home Office *Children and Families: Safer from Sexual Crime – The Sexual Offences Act 2003* (Home Office Communications Directorate 2004).

²⁵ Crown Prosecution Service, *Guidelines on prosecuting cases involving communications sent via social media* (HMSO, 2016).

²⁶ College of Policing, *Briefing Note: Police action in response to youth produced sexual imagery (sexting)* (College of Policing 2016).

amongst young people should not be routinely prosecuted and that most of these incidents should be dealt with informally particularly where there is no evidence of ‘exploitation, grooming, profit motive, malicious intent or persistent behaviour’. While no formal actions may be taken, the police will still need to record on the police intelligence database that a young person has been found creating and sharing sexual images. According to the Home Office Counting Rules 2012 (HOCR), and section 44 of the Police Act 1996, all reports of incidents, whether from victims, witnesses or third parties, whether crime related or not, will result in the registration of an incident report by the police. The reasons for registering all incidents include the need to ensure forces have all the available information in relation to possible crimes in their area and to allow an audit trail to be created to ensure consistency of crime recording between forces. The HOCR are binding rules which police forces are required to follow. Where out of court disposals are used the National Crime Recording Standard (NCRS) requires police forces to record the fact as part of the relevant crime record. The NCRS promotes consistency between police forces in how to record crime and in providing a victim-orientated approach to crime recording. One of the standard principles of the NCRS is that the police register an incident report for all reports of incidents (whether from victims, witnesses or third parties and whether crime related or not).

The National Police Chief’s Council have confirmed that in 2016/17 there were 6200 sexting incidents involving young people reported to the police. This represents an increase of over 33% on the previous year and of 131% on 2014/15, when 2,700 cases were logged.²⁷ In response to this, in 2016 the Home Office introduced a new outcome specifically for consensual teenage sexting cases in crime recording rules, which allows police forces to log an offence

²⁷ National Police Chiefs’ Council *Police dealing with rising number ‘sexting’ cases involving children. Press release, 6 November.* (NPCC 2017); Gavin Hales *A ‘sexting’ surge or a conceptual muddle? The challenge of analogue law and ambiguous crime recording* (Police Foundation 2018).

without any formal action being taken as it is not in the public interest. Outcome 21 can only be used in cases where there is no evidence of exploitation or malicious intent, and is endorsed by advice from the College of Policing to help officers respond to sexting offences proportionately.²⁸ Since 2016 Outcome 21 has been used more than 2000 times. The problem with Outcome 21 is that it is not possible to categorically say that a sexting incident recorded on police systems would never be disclosed during the kind of criminal records checks carried out by employers. Discretion about whether to disclose non-conviction information rests with each Chief Constable managing the process. Any future employer could potentially be made aware of the investigation into alleged sexual offences via the enhanced Disclosure and Barring Service (DBS) system. Most criminal record checks (approximately 93% per year) in England and Wales are for enhanced certificates.²⁹ Any request for an enhanced DBS certificate in England and Wales will disclose both conviction information and relevant police intelligence recorded on the Police National Database. Police intelligence can include reports to the police, informal resolution of criminal matters, an arrest that led to no further action being taken or an unsubstantiated allegation that the police never pursued further. This information can only be removed from the database in exceptional and rare cases.³⁰ The recent landmark Supreme Court judgment of *R (on the application of P, G and W) v Secretary of State for the Home Department*³¹ ruled that the criminal records disclosure scheme was disproportionate and unlawful. The Supreme Court found that the filtering rules which govern when previous offences have to be disclosed on enhanced criminal records checks are a disproportionate interference with the individual's Article 8 rights. The filtering rules mean that cautions for certain offences are filtered, and single convictions for certain offences that did not result in

²⁸ College of Policing, *Briefing Note: Police action in response to youth produced sexual imagery (sexting)* (College of Policing 2016).

²⁹ Disclosure and Barring Service *Disclosure and Barring Service Annual Report and Accounts for the period 1st April 2016 to 31 March 2017* (DBS 2017).

³⁰ Sally Lipscombe and Jacqueline Beard, *Retention and Disclosure of Criminal Records* (UK Parliament 2014).

³¹ (2019) UKSC 3

imprisonment are also filtered. Everything else remains to be disclosed for the entirety of the person's life. The Supreme Court accordingly upheld the declaration of incompatibility under the Human Rights Act 1998 made by the Court of Appeal.³² Nevertheless, in the Court of Appeal Sir Brian Leveson confirmed that it is lawful for information which would not otherwise be included on a basic DBS to be included in an Enhanced DBS, including soft intelligence and a warning, reprimand, caution or penalty notice.³³ Thus any conviction, caution or investigation of consensual sexting between teenagers could result in the impositions of restrictions on the young person's future access to education, employment, travel, insurance and housing.

Instead of recognising sexting as an expression of the well-recognized adolescent need for sexual exploration, sexting is viewed by the English criminal justice system as an illegal activity, albeit one that may not result in a criminal charge but may still restrict the young person's future life opportunities. In doing so, the current approach to responding to non-exploitative teenage consensual sexting and the disclosure of youth criminal records appears to be running contrary to the principal aim of the youth justice system which is to prevent offending by children and young people.³⁴ Preventing offending by young people necessarily involves preventing young people being drawn into the criminal justice system 'with consequent blighting of their life chances' and ensuring that 'children who offend may benefit from a second chance following their earlier errors'.³⁵ The current approach to recording sexting seeks to frame sexting almost exclusively as a dangerous activity and a social problem leaving no space for the recognition of youth agency or recognition of their rights as sexual

³² (2017) EWCA Civ 321

³³ Ibid, para. (64)-(65).

³⁴ Crime and Disorder Act 1998, s 37(1).

³⁵ Bob Neill, *Disclosure of Youth Criminal Records HC 416* (House of Commons Justice Select Committee 2017).

citizens. Responses to sexting are erasing adolescent subjectivity and sexuality and instead assimilating it to a discourse of developmental incompetence.³⁶

This approach to youth criminal records and youth sexting also runs counter to the UK's obligations under international law. The United Nations Convention on the Rights of the Child (UNCRC) represents the most comprehensive legally binding statement of children's rights. Article 40(3) of the UNCRC requires state parties to develop measures for dealing with young people without resorting to judicial proceedings, provided that human rights are respected. The UNCRC not only constructs children as rights-bearing citizens with a range of social, political and civil rights, but also calls upon states to ensure that they are active, participating citizens, playing a role in governance 'according to their age and maturity', rather than simply 'being passively governed'.³⁷ The UNCRC was ratified by the UK in 1991 and under international law this places an obligation on the government to comply with its principles and standards. The UNCRC is not a part of UK national law therefore it is not possible to bring a challenge in the UK courts where there are grounds for believing that the state is violating Convention rights. This is not to say that the rights in the Convention are totally without protection, the United Nations Committee on the Rights of the Child monitors how states are making progress in securing Convention rights for children within their jurisdiction. The United Nations Committee on the Rights of the Child believes that diversion from the criminal justice system avoids stigmatising the child and is cost effective.³⁸ The United Nations Committee on the Rights of the Child recommended that diversion from judicial proceedings should lead to a definite and final closure of the case, without the child in question being treated as having a

³⁶ Ken Plummer *Telling sexual stories: power, change and social worlds* (Routledge, 1995) 150-151.

³⁷ Daiva Stasiulis. 'The Active Child Citizen: Lessons from Canadian Policy and the Children's Movement' (2002) 6(4) *Citizenship Studies* 507, 509.

³⁸ United Nations Committee on the Rights of the Child *General Comment No. 10: Children's Rights in Juvenile Justice, CRC/C/GC/10* (UNCRC 2007) para 11.

criminal record or previous conviction.³⁹ Similarly the United Nations Committee on the Rights of the Child recommend that such processes should only be used where the young person acknowledges their responsibility, freely gives their consent to diversion and where such acknowledgement of responsibility will not be used against them in subsequent legal proceedings.⁴⁰ Thus the UN Convention, and the UN Committee on the Rights of the Child, embrace the concept of autonomy where it is inextricably linked to the concept of the child's evolving capacities (Article 5 UNCRC), the principle of the child's active and informed participation in all matters affecting her or him (Article 12 UNCRC) and the understanding that children are independent holders of rights.⁴¹

IV. CHILDREN'S RIGHTS, AGENCY AND CITIZENSHIP – UNDERSTANDING CHILDHOOD INNOCENCE AND EXPERIENCE

The law's view of children as simultaneously being in need of protection with regard to sex and as potentially dangerous, reflects competing and contradictory constructions of childhood which constitute the child as either inherently innocent (Apollonian) or sinful (Dionysian).⁴² The 'pure' and 'innocent' child is critical to the formation of the good moral heteronormative adult citizen. The desire for sexualised pleasure acts as an arbitrary marker between an innocent childhood and a sexually knowing adulthood.⁴³ Children's access to sexual knowledge and

³⁹ United Nations Committee on the Rights of the Child *General Comment No. 10: Children's Rights in Juvenile Justice* CRC/C/GC/10 (UNCRC 2007); United Nations Committee on the Rights of the Child *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland* (UNCRC 2016).

⁴⁰ United Nations Committee on the Rights of the Child *General Comment No. 10: Children's Rights in Juvenile Justice*, CRC/C/GC/10 (UNCRC 2007) para. 13.

⁴¹ Manfred Liebel 'From evolving capacities to evolving capabilities: contextualizing children's rights' in Daniel Stoecklin and Jean-Michel Bonvin (eds.) *Children's rights and the capability approach: challenges and prospects*. (Springer 2014) 67.

⁴² Chris Jenks, *Childhood*. (Psychology Press 1996).

⁴³ Marah Gubar, 'Innocence' in Philip Nel and Lissa Paul (eds.) *Keywords for Children's Literature* (Routledge, 2011) 121-128; Lydia Kokkola, *Fictions of adolescent carnality: sexy sinners and delinquent deviants* (John Benjamins 2013).

behaviour before it is considered to be developmentally appropriate, discursively defined within a moral, Christian, heteronormative framework, is perceived as corrupting the child's innocence.⁴⁴ The ultimate consequence is perceived to be the formation of the promiscuous adult or the deviant adult citizen. Conceptualizing childhood sexuality within this discourse of protecting the future adult the child will become creates a framework that inexorably pathologizes the sexual subjectivity of children; once the sexual consciousness of the child is spurred into expression it is constructed as dangerous and pathological and in need of outside intervention.⁴⁵ Childhood sexuality within this framework remains solely under the auspices of parents, the state and other adult protectors and prosecutors.⁴⁶ Consequently young people are presented with limited and limiting ways of expressing and scripting their sexuality, sexual feelings and sexual identity⁴⁷ and adults continue to exert power over children's sexuality.⁴⁸

This view underpins the strong emphasis currently being placed on regulating consensual teenage sexting. The potential for criminalising consensual sexting amongst young people negates the possibility that young people might be agents capable of making their own decisions in sexual matters. It may be seen as a reversion to simplistic moralising concerns to silence legitimate debates around children's rights, particularly sexual rights.⁴⁹ The criminal justice system is marking young people who engage in sexting as 'unrecognizable others',⁵⁰ that is youth who fail to maintain socially, and sexually, proper behaviour. This discourse

⁴⁴ Cindy Patton 'Between innocence and safety: Epidemiologic and popular constructions of young people's need for safe sex' in Jennifer Terry, Jacqueline Urla, (eds) *Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture* (Indiana University Press 1995) 338–347.

⁴⁵ Danielle R Egan and Gail L Hawkes, 'Endangered girls and incendiary objects: Unpacking the discourse on sexualization' (2008) 12 *Sexuality and Culture* 291.

⁴⁶ Danielle R. Egan and Gail L Hawkes, 'The problem with protection: Or, why we need to move towards recognition and the sexual agency of children' (2009) 23 *Journal of Media & Cultural Studies* 391.

⁴⁷ Allison Moore and Phil Prescott, 'Absent but present: a critical analysis of the representation of sexuality in recent youth policy in the UK' (2013) 16 *Journal of Youth Studies* 196.

⁴⁸ Michel Foucault *The History of Sexuality* (Penguin 1976).

⁴⁹ Mark Smith and Jo Woodiwiss, 'Sexuality, Innocence and Agency in Narratives of Childhood Sexual Abuse: Implications for Social Work' (2016) 46 *British Journal of Social Work* 2173.

⁵⁰ Nancy Lesko, 'Feeling abstinent? Feeling comprehensive? Touching the affects of sexuality curricula', (2010) 10 *Sex Education* 281

results in policies predicated on protection and containment, within which the voices of children and young people are largely absent. There is no application of a children's rights discourse that reflects young people's experience of the ways in which their sexuality is regarded by adult society and that values young people's agency and autonomy around sexual decision-making. Denying children's agency, autonomy and access to knowledge potentially increases their vulnerability to abuse as it denies them the opportunity to develop the tools to recognise abusive and exploitative behaviour and situations.

The ability to genuinely consent is constitutive of sexual autonomy.⁵¹ Autonomy in this context should be understood as more than merely deliberative but also as affective and interpretive,⁵² that is as 'a suite of rational, affective, deliberative, and self-interpretative skills and competences' that enable a person to 'make choices and act in line with [their] reflectively endorsed beliefs, values, goals, wants, and self-identity'.⁵³ Anderson characterised autonomy as 'an array of capacities that individuals have for leading their lives.... Autonomy competencies include, for example, the ability to appreciate what activities one finds genuinely worthwhile, to figure out how to realize one's ends, and to actually carry out one's intentions in the face of temptations'.⁵⁴ According to Anderson, psychological structures such as self-respect, self-esteem, and self-trust are vitally important agentic resources for autonomy.⁵⁵ As Meyers argues, autonomy is best understood not as flowing from non-interference, but as an ongoing project of 'autonomy competency' that is dependent on supportive relationships,

⁵¹ John Gardner and Stephen Shute 'The wrongness of rape' in Jeremy Horder (ed.) *Oxford Essays on Jurisprudence* (Oxford University Press 2000), 207

⁵² Mianna Lotz, 'Vulnerability and resilience: a critical nexus' (2016) 37(1) *Theoretical Medicine and Bioethics* 45.

⁵³ Catriona Mackenzie, Wendy Rogers and Susan Dodds, 'Introduction' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds.) *Vulnerability: new essays in ethics and feminist philosophy* (Oxford University Press 2014).

⁵⁴ Joel Anderson, 'Vulnerability and autonomy entwined' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds.) *Vulnerability: new essays in ethics and feminist philosophy* (Oxford University Press 2014).

⁵⁵ *ibid.*, 144.

institutions and social practices.⁵⁶ However, as Madhok *et al* note, autonomy should not be conceptualised ‘in a binary relationship of presence/absence’ with coercion.⁵⁷ As they suggest, ‘[i]t is a mistake to see agency as the antithesis of coercion, as if the measure of how much agency we have is how little coercion has been exercised.’⁵⁸ Similarly Lacey rejects the standard liberal view of autonomy and consent as individualistic and the view that they can be evaluated outside of their social context. She states that ‘[i]n focusing on an individualised notion of consent, rather than the conditions under which choices can be meaningful, the prevailing idea of sexual autonomy assumes the mind to be dominant and controlling, irrespective of ... circumstances’.⁵⁹ Alderson’s research on the rights of children to make decisions in the context of their health care and medical treatment illustrates how rethinking the meaning of consent can facilitate a re-conceptualisation of children’s capacity to consent in contexts where a balance is sought between their autonomy rights and their ‘protection rights’.⁶⁰ Alderson recommended that more emphasis is needed on the forms of competence a child develops which are directly relevant to negotiating particular social contexts. Such an approach may better equip the law and the criminal justice system to address ‘questions of power and agency inherent within the notion of sexual choice, and take on the broad task of substantively distinguishing between wanted and unwanted ... interpersonal contact’.⁶¹

Pearce believes that current understanding of young people’s ‘consent’ to sexual activity is based on a medical model which assess their intellectual capacity to understand and

⁵⁶ Diana T Meyers, *Self, Society and Personal Choice* (Columbia University Press 1989).

⁵⁷ Sumi Madhok, Anne Phillips, Kalpana Wilson, and Clare Hemmings, ‘Introduction’ in Sumi Madhok, Anne Phillips, Kalpana Wilson, and Clare Hemmings (eds.) (2013). *Gender, Agency and Coercion* (Palgrave Macmillan 2013) 2

⁵⁸ *Ibid.*, 3

⁵⁹ Nicola Lacey *Unspeakable subjects feminist essays in legal and social theory* (Hart 1998), 117.

⁶⁰ Priscilla Alderson ‘Researching children’s right to integrity’, in Berry Mayall (ed.) *Children’s Childhoods: Observed and Experienced* (Falmer, 1994); Priscilla Alderson and Jenny Montgomery *Health Care Choices: Making Decisions with Children* (Institute of Public Policy Research 1996).

⁶¹ Sharon Cowan ‘Freedom and Capacity to make a choice’, in Vanessa E Munro and Carl F Stychin *Sexuality and the Law: Feminist Engagements* (Routledge 2007), 52.

use contraceptives which is an inadequate framework for understanding the pressures, coercion and control that may be experienced by those who are being sexually exploited. Pearce developed the concept of ‘coerced consent’,⁶² closely aligned to concepts of ‘coercive control’, to ensure that ‘coercion’ does not remain under-theorised and to develop an awareness that autonomy must itself be understood to be socially and inter-subjectively constituted.⁶³ Coerced consent refers to where the child is subtly manipulated into consenting to sexual activity.⁶⁴ Pearce recommended that a social model of consent would enable consent to be contextualised to allow space to understand the abusive, exploitative and coercive relationships and contexts.⁶⁵ Similarly Cowart’s main planks of genuine consent are: that the act of consent must match the consenter’s intention; there must be a mutual understanding of the thing being consented to; and that subjectively speaking, the consenter must feel that they have a genuine range of choices from which to choose.⁶⁶ Munro proposes that consent should be reformulated in a way that enables it to take greater account of the peculiarities of context, constraint, and construction, and to operate with renewed vigor in the pursuit of social justice and in a way which serves to reconnect an abstract sexual choice with the concrete context in which that choice is framed, selected, and then acted upon.⁶⁷ Such a reformulation would allow consent to be understood in a way which recognises and nurtures the young person’s sexual agency and autonomy while also protecting against harmful sexual contact and sexually exploitative

⁶² Jenny Pearce *Young People and Sexual Exploitation: ‘It’s Not Hidden, You Just Aren’t Looking’*. (Routledge, 2009); Jenny Pearce J ‘A Social Model of Abused Consent’, in Margaret Melrose and Jenny Pearce (eds) *Critical Perspectives on Child Sexual Exploitation and Related Trafficking* (Palgrave Macmillan 2013).

⁶³ Mianna Lotz, ‘Vulnerability and resilience: a critical nexus’ (2016) 37(1) *Theoretical Medicine and Bioethics* 45, 57

⁶⁴ Jenny Pearce J ‘A Social Model of Abused Consent’, in Margaret Melrose and Jenny Pearce (eds) *Critical Perspectives on Child Sexual Exploitation and Related Trafficking* (Palgrave Macmillan 2013), 53.

⁶⁵ Jenny Pearce ‘A Social Model of Abused Consent’, in Margaret Melrose and Jenny Pearce (eds) *Critical Perspectives on Child Sexual Exploitation and Related Trafficking* (Palgrave Macmillan 2013), 52-53.

⁶⁶ Monica Cowart ‘Consent, speech act theory, and legal disputes’ (2004) 23(5) *Law and Philosophy* 496

⁶⁷ Vanessa E. Munro ‘Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy’ (2008) 41 *Akron Law Review* 941 and 951.

relationships. The Scottish Law Commission proposed a more nuanced understanding of autonomy in relation to sexual intimacy:

Autonomy is a complex idea but in the context of legal regulation of sexual conduct it involves placing emphasis on a person freely choosing to engage in sexual activity ... Where a person participates in a sexual act in respect of which she has not freely chosen to be involved, that person's autonomy has been infringed, and a wrong has been done to her.⁶⁸

This definition of autonomy recognises the structural constraints upon the process of sexual choice, sexual integrity and consent and allows for consideration of whether the interaction between the parties involves mutuality, agency, relational choice and communication and ultimately whether the sexual contact was genuinely wanted.

Engaging in sexual behaviour is a normal, expected and eventually encouraged social achievement for young adults.⁶⁹ The transition to sexualised adulthood necessarily involves increasing access to sexual knowledge. Repressing the decisional autonomy of sexually active young people endangers their freedom to engage in self-determined sexual relationships. By ignoring children's rights, young people are being denied dignity and respect and treated as 'objects of intervention rather than as legal subjects'.⁷⁰ They are viewed as 'becomings' or underdeveloped or unfinished potential citizens who are not fully equipped to participate in a complex adult world. The view of young people as citizens in development is premised on a conception of dependence, vulnerability and powerlessness as it emphasises passivity and

⁶⁸ Scottish Law Commission *Report on rape and other sexual offences* (The Stationery Office 2007) 1.25

⁶⁹ Laurie Schaffner 'Capacity, consent and the construction of adulthood' in Elizabeth Bernstein and Laurie Schnaffer (eds.) *Regulating Sex: the politics of intimacy and identity* (Routledge 2005) 189-205, 192; Stevi Jackson and Sue Scott, *Theorizing sexuality* (Open University Press 2010).

⁷⁰ Michael Freeman 'Taking children's rights more seriously' in Philip Alston, Stephen Parker and John Seymour (eds.) *Children's rights and the law* (Clarendon Press 1992) 54.

incompetence and limits the recognition of children as citizens and reflects hegemonic discourses of child development which have been primarily underpinned by perceptions of the irrelevance and inappropriateness of sexuality to children's lives.⁷¹ Children's citizenship status is important as it reflects the place of childhood and children in terms of the formal and legal boundaries and the particular constructions of childhood through which laws and policies for children and young people are brought into being.⁷² Arendt defined citizenship as the 'right to have rights'.⁷³ For Neale, seeing children through the lens of their citizenship affects how they are viewed and treated, how youth policy and services are developed and how young people feel about themselves and their value in society.⁷⁴ 'Real citizenship' recognises young people as having strengths and competencies and involves a search for ways to alter the culture of adult practices and attitudes in order to include children in meaningful ways and to listen and respond to them effectively.⁷⁵ According to this definition, citizenship may increase children's status in society so that their voices can be heard in decision-making that affects their lives.⁷⁶ Pakulski analyses citizenship in terms of the right to symbolic visibility, endignifying representation, identity and the maintenance of lifestyle and as a challenge to marginalisation, stigmatisation and assimilation.⁷⁷ In these terms Pakulski argues that citizenship embraces the right to be different, to re-evaluate stigmatised identities and to embrace marginalised lifestyles.

⁷¹ Kerry H Robinson, 'Difficult citizenship: The precarious relationships between childhood, sexuality and access to knowledge' (2012) 3-4 *Sexualities* 276.

⁷² Allison James 'To Be (Come) or Not to Be (Come): Understanding Children's Citizenship' (2011) 633 *The Annals of The American Academy of Political and Social Science* 167

⁷³ Hannah Arendt *The Origins of Totalitarianism* (Andre Deutsch 1986) 277.

⁷⁴ Bren Neale 'Introduction: Young Children's Citizenship' in: Bren Neale (ed.) *Young Children's Citizenship* (Joseph Rowntree 2004).

⁷⁵ Raymond Arthur 'Recognising children's citizenship in the youth justice system' (2015) 37(1) *Journal of Social Welfare & Family Law* 21.

⁷⁶ Vicki Coppock and Louise Phillips 'Actualisation of Children's Participation Rights' (2013) 3(2) *Global Studies of Childhood* 99.

⁷⁷ Jan Pakulski 'Cultural Citizenship' (1997) 1 *Citizenship Studies* 73-86.

The concept of citizenship is valuable as a normative framing for understanding children's right to express their voices and emotions as well as a critical lens for exploring the legal regulation of youth sexual activity. Feminist and queer perspectives have shown that in modern Western society, citizenship has been defined in narrow terms of the idealised heterosexual male engaging in heterosexual norms and practices with rights of self-determination and sexual autonomy being denied to 'citizen-perverts' whose sexual proclivities are regarded as unhealthy.⁷⁸ If young people are to be recognised as citizens a broader understanding of citizenship is needed in order to facilitate a more 'inclusive and conceptually comprehensive view of citizenship'.⁷⁹ Youth citizenship requires young people who are exploring their sexuality to be treated as both competent and in need of protection from harm, exploitation and abuse. This reform should allow for youth citizenship to be recognised in a way which does not devalue their right to remain children. As Verhellen notes:

'the more their competencies are recognised and realised, the more the children will gain a prominent space and place in society, and the more they will ultimately be able to challenge the dominant child image that still does not see them as capable human beings on their own.'⁸⁰

Plummer proposed a concept of 'intimate citizenship' which describes a 'new set of claims around the body, the relationship and sexuality'.⁸¹ Intimate citizenship describes the new kinds of stories which are formulated to articulate experiences of greater equality and empowerment and the beginnings of a democratisation of personhood.⁸² Intimate citizenship should be a part

⁷⁸ For example Gayle Rubin 'Thinking sex: notes for a radical theory of the politics of sexuality' in Carole S. Vance (ed.) *Pleasure and danger: exploring females sexuality* (Routledge & Kegan Paul 1984); David Bell and Jon Binnie 'Sexual citizenship: marriage, the market and the military' in Steven Seidman and Diane Richardson (eds.) *The Handbook of Lesbian and Gay Studies* (Sage 2002); Tovi Fenster 'The right to the gendered city: different formations of belonging in everyday life' (2005) 14(2) *Journal of Gender Studies* 217-231.

⁷⁹ Noel Smith, Ruth Lister, Sue Middleton and Lynne Cox, 'Young people as real citizens: towards an inclusionary understanding of citizenship' (2005) 8(4) *Journal of Youth Studies* 425.

⁸⁰ Eugene Verhellen 'The Convention on the Rights of the Child. Reflections from a historical, social policy and educational perspective' in Wouter Vanderhole, Ellen Desmet, Didier Reynaert, Sara Lembrechts (eds.) *Routledge International Handbook on Children's Rights Studies* (Routledge 2015), 43-59, 55

⁸¹ Ken Plummer *Telling sexual stories: power, change and social worlds* (Routledge 1995) 150-151.

⁸² *ibid* 146, 152, 177.

of life for all individuals, and it consists of: '[. . .] the control (or not) over one's body, feelings, relationships; access (or not) to representations, relationships, public spaces, etc.; and socially grounded choices (or not) about identities, gender experiences, erotic experiences'.⁸³ As Plummer insists, essential facets of intimate citizenship are choice and control.⁸⁴ Plummer uses intimate citizenship to articulate a shift towards the achievement of democratic values in sexual and intimate life which embodies the right to choose 'what we do with our bodies, feelings and emotions'.⁸⁵ Plummer's conceptualisation of intimate citizenship has been developed to include the right to choose and live relationships safely, securely and according to personal choice, with respect, recognition and support from the state and civil society.⁸⁶ Applying Plummer's conceptualisation of intimate citizenship to the issue of responding to consensual teenage sexting, requires the law and police to understand sexual and relational autonomy and accept that young people are 'sexual' and their sexuality must be understood and accepted rather than pathologised and labelled as perverse.

The United Nations Convention on the Rights of the Child (UNCRC) promotes the idea of children as full citizens in their own right and as independent bearers of rights invested with agency integrity and decision-making capacities – that is as a 'citizen now' rather than a 'citizen becoming'.⁸⁷ The UN Convention promotes the view that children are no longer merely 'pre-citizens' or 'potential adults' or 'becomings', but are cast as full human beings invested with important social citizenship rights, including the right to have their voice heard and taken into account in all decision-making. According to Article 12 of the UNCRC children have the right

⁸³ *ibid* 151

⁸⁴ *ibid*

⁸⁵ Ken Plummer *Intimate Citizenship. Private Discussions and Public Dialogues* (University of Washington Press 2006) 7

⁸⁶ Sasha Roseneil 'Intimate citizenship' (2010) 17(1) *European Journal of Woman's Studies* 77; Natalie Oswin and Eric Olund 'Governing intimacy' (2010) 28(1) *Society and Space* 60; Philip Hubbard 'Kissing is not a universal right: Sexuality, law and the scales of citizenship' (2013) 49 *Geoforum* 224.

⁸⁷ Daiva Stasiulis 'The Active Child Citizen: Lessons from Canadian Policy and the Children's Movement' (2002) 6(4) *Citizenship Studies* 507.

to participate and be involved in processes of decision-making, expressing their views clearly in matters that affect them and shall be provided the opportunity to be heard in any judicial proceedings affecting them. The current system of responding to consensual sexting and criminal record checks does not allow this right to be heard. It denies that young people may have the capacity to comprehend themselves and their world including the ability to assimilate and understand sexual information and the capacity to make appropriate choices regarding sex. English law recognises that young people possess these competencies and capacities in some contexts. The House of Lords in *Gillick v West Norfolk & Wisbech AHA*⁸⁸ considered the autonomy of young people in relation to sexual activity and recognised that the agency of the child was crucial and that the young person who fully understood all the issues had a central role to play in deciding what courses of action were most appropriate. The House of Lords held that the mature minor possessed certain rights, in this case the right to a confidential relationship with a doctor for the purposes of receiving contraceptive advice and treatment. Adult patients are entitled to such a confidential relationship, in the same way that adults are allowed to express their sexuality by consensually sharing intimate photos. In *Gillick* Lord Scarman believed that it was important to acknowledge realism and to be ‘sensitive to human development and social change’ and that imposing fixed limits upon the process of growing up was inconsistent with the reality that the independence associated with the transition to adulthood was acquired gradually through the progressive relaxation of parental control rather than suddenly on reaching the age of majority.

This suggests the need for a greater understanding of youth sexualities that are more fully based in, and driven by, the realities of young people’s sexual lives. Bhana’s research suggests that young people desire and seek sexual pleasure within relationships.⁸⁹ Such pleasures

⁸⁸ (1986) AC 112)

⁸⁹ Deevia Bhana ‘Sexualities and gender-based research in youth studies’ in Andy Furlong (ed.) *Routledge Handbook of Youth and Young Adulthood* (2nd ed., Routledge 2017) 339-345.

includes a range of sexual activities and that most young people don't consider sexting to be criminal.⁹⁰ Thus there is a disconnect between the lived experiences of young people and the legal regulation of their behaviour as young people look at sexuality as a key site for the building of relationships, pleasure and desire. The criminal justice response to youth sexual behaviour needs to be reconceptualised in a way which supports and promotes the welfare of the young person. The current response to consensual teenage sexting operates in a way which stigmatises and discredits the young person's own understanding and experiences of sexual behaviour and disregards any claim for sexual rights or freedoms. Changing and reshaping the conceptual framework of analysis and critiquing the hegemonic constructions around autonomy/paternalism, capacity/incapacity, empowerment/protection will potentially create the space to normatively theorise and challenge the unworkable approach of the law and criminal justice system to expressions of youth sexuality.

V. CONCLUSION

Over restrictive rules can be an expression of paternalistic and moralistic sentiments, trying to mould children into the ideal of the innocent and non-sexual persona, rather than an approach that genuinely addresses children's need for protection without disproportionately restricting children's sexual self-determination.⁹¹ As Albury and Crawford argue, educational and policy responses 'should do more than threaten young people with legal penalties or sexual shame'. They should challenge sexual bullying, promote sexual ethics, acknowledge young people's agency and provide them with 'a sexual citizenship that includes mediated self-

⁹⁰ Andres Anastassiou 'Sexting and Young People: A Review of Qualitative Literature' (2017) 22(8) The Qualitative Report 2231.

⁹¹ Gunagxhing Zhi, Suzan van der Aa, 'Trends of age of consent legislation in Europe: a comparative study of 59 jurisdictions in the European continent' (2017) 8 New Journal of European Criminal Law 14.

representation'.⁹² The Supreme Court judgment in *R (on the application of P, G and W) v Secretary of State for the Home Department*,⁹³ which identified two aspects of the current criminal record filtering rules to be disproportionate under Article 8, might offer a powerful starting point. Changing these two central parts of the filtering rules may result in more fundamental reform of how criminal records of young people are maintained. Reconceptualising discourses on childhood sexuality through a framework of recognition that acknowledges children as sexual subjects might also offer a new way of understanding what constitutes normal child sexual behaviour. An ethic of recognising young people as holders of sexual rights and sexual citizenships could promote a more nuanced and collaborative vision that moves beyond a cultural conception of the innocence of childhood towards an understanding of children's sexuality in all of its complexity.⁹⁴ Such a rights framework provides a normative lens through which to critically examine and evaluate the benefits or harms of children's engagement in exploratory sexual activity, thereby helping to identify where and how policy and practice need to change so as to support children's rights more effectively. This lens allows for the reconceptualising of the legal subject and the role of the state and institutions and the creation of spaces of freedom for young people to safely explore their sexuality without focussing primarily on the domination and oppression of youth sexuality. The law needs to challenge coercive, exploitative, abusive, deceptive and unauthorised producing and distributing of sexual images of children while also protecting young people's freedom to engage in self-determined sexual relationships. The current paternalistic protectionist approach fails to distinguish between harmful and mutually consensual sexting and therefore potentially stifles the development of sexual autonomy.

⁹² Kate Albury and Kate Crawford, 'Sexting, consent and young people's ethics: Beyond Megan's Story' (2012) 26 *Journal of Media and Cultural Studies* 471.

⁹³ (2019) UKSC 3

⁹⁴ Danielle R Egan and Gail Hawkes, 'The problem with protection: Or, why we need to move towards recognition and the sexual agency of children' (2009) 23 *Journal of Media & Cultural Studies* 393.

The United Nations Committee on the Rights of the Child in its General Comment 20 on the implementation of the rights of the child during adolescence stated that “States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.”⁹⁵ The current discourse in England and Wales denies children’s subjectivity and instead invites increased surveillance and intervention by the state in the sexual expression of the young. What is needed are new ways of thinking about how young people might be supported in developing and expressing a healthy sense of sexual identity without fear of criminalization and in a way which recognises structural vulnerability and existing inequalities of power and dependence. New and emergent ways of thinking about young people and their decision-making on sexual matters have been discussed in this article which can provide the conceptual underpinnings to challenge current paradigmatic concepts which currently frame and constrain our thinking. This article proposes the concept of ‘intimate citizenship’ as one model that challenges the decontextualised and unreflective legal subject upon which much of law and policy is built. It opens up a new dialogue about how young people might be supported in developing and expressing a healthy sense of sexual identity without fear of criminalization for these expressions and in which their sexual autonomy and vulnerability are acknowledged.

⁹⁵ United Nations Committee on the Rights of the Child *General Comment 20: The implementation of the rights of the child during adolescence* (UNCRC/C/GC/20 2016), para 40.