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November 24, 2014

Senator Thomas K. Norment, Jr., Chair
Virginia State Crime Commission
P.O. Box 6205
Williamsburg, VA 23188

Dear Senator Norment:

The Virginia State Crime Commission is considering whether to recommend legislation for consideration in the 2015 General Assembly Session that would specifically criminalize teenage sexting. The ACLU of Virginia opposes any legislation that would make teenage sexting a criminal offense, whether a new misdemeanor or a felony. Any such legislation could feed a majority of Virginia teens into the school-to-prison pipeline and, particularly because of likely disparate and uneven enforcement, would create more problems than it purports to solve. Such a law would also raise serious constitutional concerns and ignore evidence on deterring the undesirable behavior of juveniles. Sexting should be addressed by parents and educators, not prosecutors and judges.

Laws against the production and distribution of child pornography exist to protect children from abuse and exploitation by adults, not to turn children into criminals. As a case in Manassas this summer demonstrated, subjecting a teenager to criminal charges – in that case, felony child pornography charges – is worse than the sexting itself. Such actions should not result in criminal sanctions, whether a misdemeanor or a felony adjudication, or a lifetime on the sex offender registry. Until we focus on sexting as a problem in need of a parental and community solution rather than court involvement, we are sending our children into our juvenile and adult criminal justice systems because of the digital equivalent of "mooning" and similar antics that took place in pre-social media generations.

The U.S. Supreme Court has long recognized the fundamental right of parents to raise children without unnecessary intrusion by the state. "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."[1] One federal appeals court recently held that a parent's constitutional rights were violated when a Pennsylvania prosecutor threatened to charge the woman's daughter with child pornography crimes for sending a picture of herself wearing only a towel, unless the girl participated in a course teaching

[1] Miller v. Mitchell, 598 F.3d 139, 150 (3d Cir. 2010) (quoting M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996)).

that sexting is wrong. The court found the prosecutor violated the parent's "fundamental right to raise her child without undue state interference."[2]

Just three years ago, the U.S. Supreme Court announced a common sense decision articulating why the justice system has historically treated and continues to treat children differently. Children "generally are less mature and responsible than adults," they "often lack the experience, perspective, and judgment to recognize and avoid" bad choices, and they "are more vulnerable and susceptible to outside pressures than adults," the Court said. These three points make clear why the solution to sexting lies in our classrooms and living rooms, not in our courtrooms.

Scientific research of the juvenile justice system strongly suggests that a new criminal sanction will not have the same deterrent effect on kids' behavior as it might on adults. For a criminal sanction to have a deterrent effect on a set of individuals, it is critical that the targeted individuals are rational actors. Yet juveniles, who by definition are immature, often do not act rationally.[3] Moreover, for those juvenile offenders who end up in detention, "confinement under punitive conditions may increase recidivism in young offenders after release rather than reducing it."[4] Not only does the creation of a new criminal law fail to deter the undesired behavior, but incarceration of the juvenile offender increases the risk that he or she will offend again.

The enactment of a new criminal offense for sexting, a widespread behavior practiced by more than half of teens,[5] threatens to draw limited law enforcement and judicial resources away from their proper focus on violent offenders. Every hour police and courts spend investigating a naked picture taken by one teen and sent to another is an hour not spent dealing with rapes, robberies, and murders. The Crime Commission should consider this important opportunity cost and the unintended but predictable consequences for public safety.

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[2] *Id.* at 151.

[3] *See* REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 122 (Robert J. Bonnie et al. eds., 2013) (finding that "the anticipated response of peers has a greater impact on juveniles' choices about criminal activity than does the threat of sanctions"); David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1573 (2004).

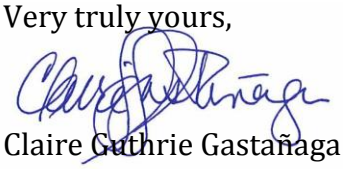
[4] REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 123 (Robert J. Bonnie et al. eds., 2013).

[5] Alex McKechnie, *Majority of Minors Engage in Sexting, Unaware of Harsh Legal Consequences*, DREXEL NOW, June 18, 2014, http://drexel.edu/now/archive/2014/June/Sexting-Study/.

"The Supreme Court has recognized three related reasons for criminalizing child pornography: to prevent abuse of children, to prevent child victims from being 'haunted' by their participation in child pornography, and to 'dry up' the market for child pornography."[6] Because these rationales do not apply to sexting, a new sexting law may be subject to a higher level of scrutiny. Unless such a law is narrowly tailored to meet a compelling government interest, it is likely to criminalize protected speech. The Commonwealth has yet to articulate such an interest in criminalizing the behavior of so many Virginia teenagers. Further, although obscenity and child pornography are not protected by the First Amendment,[7] both categories have limits.[8] "[D]epictions of nudity, without more, constitute protected expression."[9] Attempts to prosecute anyone for the possession or distribution of a nude image, without more, will violate the First Amendment.

We urge the Commission not to recommend the creation of a new sexting misdemeanor offense in the Commonwealth. Such a crime would infringe on constitutional rights, fail to correct undesired behavior, and pull resources away from more important public safety goals. Instead of recommending that this behavior be criminalized, the Crime Commission should go on record encouraging police and prosecutors to leave regulation of and sanctions for this kind of teen behavior to parents and school officials.

Very truly yours,



Claire Guthrie Gastañaga
Executive Director

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[6] Joanne Sweeny, *Sexting and Freedom of Expression: A Comparative Approach*, 102 KY. L.J. 103, 117 (2014) (internal citations omitted).

[7] *See* Miller v. California, 413 U.S. 15, 24 (1973) (defining the obscenity test as "(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" (internal citations omitted)); New York v. Ferber, 458 U.S. 747 (1982) (holding that a state statute criminalizing the distribution of child pornography does not violate the First Amendment).

[8] *See, e.g.,* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (holding that portions of the Child Pornography Prevention Act of 1996 were unconstitutional).

[9] Osborne v. Ohio, 495 U.S. 103, 112 (1990).