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RESEARCH ARTICLE / ARTICLE DE RECHERCHE

Misunderstandings and Intentional Misrepresentations: Challenging the Continued Framing of Consensual and Nonconsensual Intimate Image Distribution as Child Pornography

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Abstract

Many educational presentations continue to straightforwardly frame both consensual and nonconsensual intimate image distribution among youth as child pornography. This continues despite the availability of a purpose-built offence for nonconsensual intimate image distribution (NCIID) that was designed, in part, to avoid the use of child pornography offences in NCIID cases and the existence of a "private use exception" that limits the applicability of child pornography offences in cases of consensual "sexting" among youth. This sometimes inaccurate and, I argue, inappropriate focus on child pornography offences is especially common in presentations by police and public safety personnel. Through a discursive analysis of Canadian case law and a case study of educational approaches provided by the CyberScan unit, I find that the continued dominance of a child pornography framing is based on both genuine misconceptions of how these offences apply to intimate image distribution and intentional misrepresentations of the legal context.

Keywords: Nonconsensual intimate image distribution; child pornography; sexting; criminal law; education; revenge porn; youth

Résumé

De nombreuses présentations éducatives continuent d'assimiler à la fois la distribution consensuelle et non consensuelle d'images intimes chez les jeunes à de la pornographie juvénile. Une qualification qui continue malgré l'existence d'une infraction spécialement

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désignée pour la distribution non consensuelle d'images intimes (DNCII) ayant été conçue, en partie, pour éviter le recours à des infractions de pornographie juvénile dans les affaires de DNCII, et malgré également une « exception d'usage privé » limitant l'applicabilité des infractions de pornographie juvénile dans les cas de « sexting » consensuel entre jeunes. Ce recours aux infractions de pornographie juvénile est parfois inexact, et même inapproprié selon moi, mais s'avère pourtant particulièrement courant dans les présentations des policiers et des acteurs de la sécurité publique. Grâce à une analyse discursive de la jurisprudence canadienne et à une étude de cas sur les approches pédagogiques fournies par l'unité CyberScan, je conclus que cette tendance à appréhender de telles actions à travers la lunette de la pornographie juvénile est fondée à la fois sur des incompréhensions quant à la façon dont ces infractions s'appliquent à la distribution d'images intimes et sur des représentations erronées intentionnelles du contexte juridique.

Mots clés: Distribution non consensuelle d'images intimes; pornographie juvénile; sexting; droit criminel; éducation; pornodivulgation; jeunesse

Introduction

In 2015, the provincial court of British Columbia found KF, a seventeen-year-old girl, guilty of possession and distribution of child pornography. KF was jealous of AK, a fifteen-year old girl, because they had been sexually involved with the same teen boy. Acting maliciously on this jealousy, KF chose to nonconsensually distribute an image of AK performing oral sex that was found on the teen boy's phone (*R v KF* 2015). KF is not at all the typical perpetrator that comes to mind when we think of "child pornographers," with all the baggage of child sexual abuse and adult/child power differentials that this highly stigmatizing label evokes (Primack 2018). Yet, KF is not the only Canadian teen to have been charged or convicted as a child pornographer for nonconsensually distributing an intimate image of a peer. While the introduction of the purpose-built charge of nonconsensual intimate image distribution (NCIID) in 2014 provides a more appropriate option for charging that applies to perpetrators of all ages, many educational presentations and resources for young people continue to prioritize framing both nonconsensual *and consensual* image distribution among teens as child pornography.

Canada's child pornography law, at section 163.1 of the *Canadian Criminal Code* (1985), makes it illegal to make, possess, distribute, or access photographs or video of a person under the age of eighteen that depicts the person engaged in explicit sexual activity or depicts their sexual organs or anal region for a sexual purpose. While typically associated with addressing the recording of child sexual abuse and sexual exploitation motivated by pedophilia (*R v Sharpe* 2001), child pornography laws also can be—and have been—used against young people who perpetrate NCIID against their under-eighteen peers. Child pornography laws also could, in *theory*, be used to charge consensual youth "sexters" (i.e., people under the age of eighteen who consensually share nude/sexual images of themselves with their close-in-age peers or who receive such images from a peer) in some limited circumstances. Although the available

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case law does not show evidence of any child pornography convictions for consensual and privately held sexting in Canada[1] (and there is reason to believe this will continue to remain the case due to the creation of a private-use exception in *R v Sharpe* 2001) and much judicial discourse is critical of its use in NCIID cases among young people, many young people continue to receive educational presentations and resources (largely provided by police and other public safety personnel) that frame both consensual and nonconsensual intimate image distribution primarily as "child pornography." This framing manifests, for instance, as threats to consensual young sexters that they will be convicted of child pornography offences (despite a lack of evidence that this is occurring in Canada) and a framing of NCIID as child pornography that ignores the, I will argue, more appropriate discussion of this act as a violation of consent that is wrong regardless of the victim's age. As child pornography offences are highly stigmatizing due to their association with capturing child sexual abuse wherein the age difference between victim and perpetrator makes both the image-capturing and any sexual activity between the two illegal (Dodge and Spencer 2018; Shariff and DeMartini 2015), this child pornography framing is concerning in both its theoretical implications (e.g., muddying the concept of child pornography) and practical implications (e.g., causing victims of NCIID to avoid seeking help due to fears of being criminalized for their act of consensual sexting, failing to stress to young people the importance of consent in image-sharing decisions regardless of age, unduly stigmatizing young perpetrators of NCIID and young consensual sexters as "child pornographers") (Karaian and Brady 2020; Dodge and Lockhart 2022; Hasinoff 2013).

While a cohort of Canadian scholars have long expressed concern with the framing of consensual intimate image distribution (Karaian and Brady 2020; Bailey and Hanna 2011) and nonconsensual intimate image distribution (Slane 2013; Dodge and Spencer 2018; Karaian and Brady 2020) as child pornography, this article demonstrates that some mainstream educational presentations and materials for young people continue to frame these acts primarily and straightforwardly as child pornography despite the complexity of the legal reality and the negative impacts of prioritizing this framing. The continued dominance of this problematic framing seems to be based on both some genuine misconceptions of how child pornography laws apply and are generally used in response to consensual/nonconsensual intimate image

[1] The common assumption that sexting convictions have occurred in Canada is likely due in part to media coverage of jurisdictions within the USA that *have* criminally convicted young consensual sexters in rare cases (Jolicoeur and Zedlewski 2010; Primack 2018). Based on the available case law, cases in Canada involving seemingly consensual sexting have only resulted in child pornography convictions when those images were shared with a third party without consent. For example, in *R v CNT* (2015), in which, on appeal, the image-sharing between young people was interpreted to be largely consensual despite being initially interpreted as coercive, the facts of the case would still exclude it from the *R v Sharpe* (2001) exception for consensual and privately held intimate image-sharing because CNT shared the images he received with another person without consent.

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distribution *and* intentional misrepresentations of the legal landscape due to a desire to use scare-tactic educational approaches that rely on the fear provoked by highly stigmatizing child pornography charges. Therefore, in this article, I review the judicial discourse on this topic to clarify the sometimes complex legal landscape and explore a case study of the continued framing of NCIID and sexting as child pornography in educational presentations to young people.

To demonstrate and challenge the continued framing of NCIID and sexting among young people as child pornography, this article brings together two research projects—one on the judicial discourse regarding nonconsensual/consensual intimate image distribution and one on educational responses to nonconsensual/consensual intimate image distribution. The first project undertook a critical discourse analysis of Canadian criminal cases in which child pornography charges were applied to cases of NCIID between close-in-age young people (i.e., cases in which the offender and victim could legally consent to sexual activity with each other); these findings are supplemented by existing legal scholarship regarding consensual and nonconsensual intimate image distribution (see Appendix A for further methodological details). The second project undertook interviews with members of Nova Scotia's CyberScan unit—a provincial public safety unit tasked specifically with responding to and educating Nova Scotians about NCIID and cyberbullying, to understand their educational responses to consensual and nonconsensual intimate image distribution among young people (see Appendix B for further methodological details). I find that, while there is no evidence in the available case law of child pornography convictions for young "sexters" engaged in consensual and privately held image-sharing in Canada and judicial beliefs regarding applying child pornography charges to cases of NCIID among young people are varied, mainstream educational approaches provided by organizations such as CyberScan continue to straightforwardly frame both consensual sexting and nonconsensual intimate image distribution among young people as child pornography and often use threats of child pornography charges as a misguided scare tactic in education.

Clarifying the Legal Discourse

Consensual Intimate Image Distribution among Young People

As I will demonstrate below, some educational presentations and materials continue to threaten those under the age of eighteen with charges of child pornography for *consensual* sexting and even for creating nude/seminude photos of themselves that they have never shared. Despite these scare-tactic approaches in education, there is no evidence in the available case law or documented in legal scholarship that young Canadians have ever actually been convicted of child pornography for consensual sexting that is kept private between the youths involved. This is due in part to the decision in the Supreme Court of Canada case of *R v Sharpe* (2001), which limited the circumstances in which young people themselves can be charged as child pornographers. In *R v Sharpe* (2001), the Supreme Court of Canada developed the private-use exception which states

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that those aged under eighteen who consensually create and privately hold sexual images of themselves or themselves with a legal (i.e., close-in-age) sexual partner should be excluded from child pornography offences (Bailey and Hanna 2011; Slane 2013). In *Sharpe*, the majority decision states that this kind of consensually made and privately held intimate image could be "of significance to adolescent self-fulfillment, self-actualization and sexual exploration and identity" (*R v Sharpe* 2001, para 109). Although this decision was made before the popular use of Web 2.0 and knowledge of "sexting" as it is now understood, Karaian and Brady (2020) explain that the case law has continued to develop in a manner that would exclude most circumstances in which consensual teen sexting generally takes place. As they detail, despite the fact that courts have still not specifically considered the "consensual teenage sexting scenario," likely due to police and Crown discretion that stops these cases from reaching courts, "subsequent interpretations of the exception expand the definition of 'participant' and recognize the role of 'digital sharing' in our contemporary cultural and technological context" in ways that would include a wider set of circumstances in which young people's consensual image-sharing occurs (Karaian and Brady 2020, 306). Although Karaian and Brady do note some potential for charging consensual youth sexters due to "judicial decisions requiring that youth maintain the ability to control their images, a near impossibility in the digital age" (Karaian and Brady 2020, 347), they agree with early arguments from Slane (Schwartz 2013; Slane 2013) that the private-use exception can and should be inclusive of young people's consensual sexting.

Regardless of narrow legal possibilities of conviction, it remains unlikely that consensual youth sexting will be successfully convicted as child pornography in future cases due to a general lack of malice or harm in such cases and the resulting discretion of police and Crown prosecutors in avoiding such charges (Karaian and Brady 2020). While it would certainly be helpful to receive concrete clarification from courts or government regarding the exclusion of consensual teen sexting from the purview of child pornography laws (Karaian and Brady 2020), the existing legal landscape leaves little *real* concern that consensual sexters will be convicted as child pornographers. In addition to case law decisions rejecting a child pornography framing, several leading scholars in this area, both in Canada and internationally, have argued that child pornography laws are inappropriate to apply to consensual image-sharing among young people because this act does not reflect the issues of child abuse and child sexual exploitation that child pornography laws were created to address (Bailey and Hanna 2011; Hasinoff 2013; Primack 2018; Slane 2013; Shariff and DeMartini 2015). Additionally, judicial discourse in Canada has recognized that harm occurs only when intimate images are obtained through extortion or when they are shared with a third party without consent (*R v Zhou* 2016); the legal discourse has recognized consensual image creation and sharing as, if not "normal" (*R v Zhou* 2016) and "of significance" (*R v Sharpe* 2001, para 109), then at the very least not a concern for the criminal justice system. This focus on nonconsensual distribution is further confirmed by the creation of the specific NCIID offence. Despite all this evidence in favor of respecting young people's right to sexual expression and excluding their acts of consensual and privately held sexting from the purview of child

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pornography laws, I will demonstrate below that this has not stopped some educational campaigns from recklessly misrepresenting the legal context and inappropriately using threats of child porn charges as a scare tactic.

Nonconsensual Intimate Image Distribution among Young People

While the legal discourse is evidently in favor of avoiding a child pornography framing of consensual intimate image-sharing among young people, it is less settled regarding the use of child pornography offences in response to acts of *nonconsensual* intimate image distribution among young people. The charge of child pornography has been used to respond to NCIID among young people in several Canadian criminal cases. This includes, for instance, child pornography convictions for two teen boys in the well-known NCIID case of Rehtaeh Parsons (Segal 2015) and convictions for two teen girls in the cases of *R v MB* (2016) and *R v KF* (2015) in British Columbia. Some of these cases predate, or occurred in the early days of, the introduction of Canada's specific offence for nonconsensual intimate image distribution; therefore, some judges may have used child pornography offences reluctantly due to a perceived lack of options. However, despite Canada's introduction of a specific NCIID offence in 2014, young people who nonconsensually share intimate images of their under-eighteen peers do continue to sometimes be charged, and sometimes convicted, under child pornography offences. For example, in 2018, a twelve-year-old boy and fourteen-year-old boy in Quebec pled guilty to child pornography offences after nonconsensually distributing nude images of their female classmates (CBC News 2018) and, in 2021, a fourteen-year-old girl and her fifteen-year-old boyfriend were charged with possessing and distributing child pornography for allegedly sharing a nude image of the girl's fourteen-year-old ex-boyfriend (*CTV News* 2021). Although the use of this charge continues in some cases, there is evidence that judges often avoid utilizing child pornography offences and instead convict using the purpose-built NCIID offence when both charges have been applied in a case. Additionally, even before the NCIID offence was available, some judicial discourse already expressed disproval of using child pornography offences in NCIID cases involving close-in-age young people.

While educational presentations and resources sometimes straightforwardly assert that young people will be charged with child pornography offences for acts of NCIID, judicial beliefs about the appropriateness of framing NCIID as child pornography vary widely. A minority of judges are seemingly uncritical in their application of child pornography charges to youth, such as Judge Hoy in the case of *R v KF* (2015) that was mentioned at the opening of this article. The facts of this case describe KF, a seventeen-year-old girl, experiencing jealousy toward AK, a fifteen-year old girl, and choosing to nonconsensually distribute an image of AK performing oral sex. Despite the lack of any age-based power imbalance between victim and offender, Judge Hoy convicts KF of possession and distribution of child pornography, and states that "the public has a keen interest in ensuring that offences involving child pornography are prohibited" (*R v KF* 2015, para 7). Likewise, in the case of *R v Y* (2015) in which a sixteen-year-old boy

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created a fake online profile to deceive a sixteen-year-old girl into sharing intimate images that he later posted on the victim's social media account, the judge asserts that it is

> immaterial that 'Y', 16 years old ..., is not the accused who typically comes to mind when we think of the harms associated with child pornography. The child pornography legislation is intended to protect children but not immunize them if they offend against the provisions. ... As this case shows, even other vulnerable teens can be perpetrators. (*R v Y* 2015, para 21)

These judges take these cases of NCIID at face value and conclude that, because nude images of those aged under eighteen are involved, the actions fall within the definition of child pornography despite the fact that the accused is not the person that "typically comes to mind" (i.e., an age discrepancy and/or power imbalance that makes any sexual interactions illegal) in these cases. However, a majority of judges in the available case law have expressed varying levels of concern with, or outright rejection of, the child pornography framing of NCIID.

Even before the option to simply charge with the purpose-built NCIID offence, some judges were already rejecting the use of child pornography charges in NCIID cases among young people. *R v SB et al.* (2014) is a case from British Columbia in which three fourteen-year-old boys nonconsensually exchanged intimate images of several of their thirteen- to fifteen-year-old female peers. In this case, Justice Dickey expresses concern that the young offenders were charged with distributing child pornography. Justice Dickey asserts that these charges, and the implication that the young people were child pornographers or part of a "child pornography ring," resulted in the "matter receiving widespread media attention in Kamloops, provincially, and possibly nationally" and the offenders being ostracized and harassed (*R v SB et al.* 2014, para 9). In this case, the three youth offenders chose to plead guilty to single counts of criminal harassment and the judge commented that

> it is unfortunate that the offenders were originally charged with distribution of child pornography or in any way referred to as being part of a child pornography ring. The stigmatization that comes with the use of such terms is totally disproportionate to the circumstances before me. The evidence does, however, support the charge of criminal harassment. (*R v SB* et al. 2014, paras 19–20)

Other judges have made similar arguments that child pornography charges are much too stigmatizing and incongruent to use in cases of NCIID among close-in-age young people. The judge in *R v Zhou* (2016) comments that "the stigma associated with child pornography exceeds any that would accompany a charge of criminal harassment or some of the other options available under the *Criminal Code* for criminalizing non-consensual sexting or distribution of intimate images" and that "the stigma that resulted from the original charges related to 'child pornography' remains and has had a significant impact on [the offender]" (*R v Zhou* 2016). Additional judicial support for questioning the use

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of child pornography charges in such cases is demonstrated in a Nova Scotian case in which child pornography charges against six teens were dropped in favour of using charges of nonconsensual intimate image distribution (at s 162.1 of the *Criminal Code of Canada*) and the judge commented that child pornography charges were not a good fit for such cases (MacIvor 2017). Some judges have rejected the use of these charges on the straightforward basis that the intention behind child pornography laws (i.e., to deter the sexual exploitation of children by adults) is simply not related to the issue of youth who nonconsensually share images of other youth. Regardless of the specific reasons for finding child pornography charges incongruent with acts of NCIID among young people, it seems that the availability of the more appropriate NCIID offence (that was introduced in 2014) offers a clear alternative route to sanction this act without applying the unduly stigmatizing and misaligned label of child pornography or muddying the meaning of "child pornography" (Karaian and Brady 2020).

There is seemingly no reason to utilize child pornography offences in cases of NCIID now that the specific offence for the nonconsensual distribution of intimate images is available; it could be that this charge only continues to linger due to a continued lack of understanding regarding the availability of the specific NCIID offence or because police are charging with both NCIID and child pornography offences due to an, I would argue unnecessary, attempt to cover all their bases. In 2013, when the new NCIID offence was just being envisioned, it was already supposed that this would be the perfect solution to the undesirable use of child pornography charges against young perpetrators of NCIID. It was thought that this new offence would, in the words of then Prime Minister Stephen Harper, be used to "deal with these kinds of matters" (Segal 2015, 91). Andrea Slane, one of the leading Canadian scholars and trailblazers in analyzing this issue, also stated in 2013 that a new offence aimed specifically at the act of NCIID would do "a better job of getting at the nature of the harm involved in circulating sexual images of another person against his or her will regardless of their age" (Schwartz 2013). She further explained that a specific NCIID law would "help ensure that a more coherent message runs through the criminal offences that apply to non-consensual distribution of intimate images: namely, that these acts inflict harm on the subject's sexual integrity, regardless of the subject's age" (Slane 2013, 120). As Slane highlights here, it is difficult to imagine why a young person would be subject to a more stigmatizing and severe offence than an adult perpetrator for committing the same act and, additionally, the NCIID offence clarifies that nonconsensual distribution is wrong due to the violation of consent and privacy involved, regardless of the victim's age. The federal government's Cybercrime Working Group, Canadian Crown attorneys, and Canadian police officers have all also acknowledged concerns with the overly stigmatizing use of child pornography charges in these cases to various extents (Dodge and Spencer 2018; Karaian and Brady 2020). The argument against using child pornography offences in NCIID cases in Canada also aligns with choices made in other jurisdictions to avoid the use of child pornography charges when other options are available. For instance, in the European context, Crofts and Lievens (2018) state that "if all actors that are involved are minors, the use of targeted provisions, such as those recently adopted by a number of European legislators,

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are to be preferred above applying child pornography legislation, as the rationale of the latter is to punish adult perpetrators that intend to sexually abuse children" (12).

Despite a great deal of acknowledgement of the inappropriateness of using child pornography offences for NCIID, we are unfortunately still seeing the application of child pornography offences in some NCIID cases nearly a decade after the creation of Canada's specific NCIID offence. It seems that more attention is needed on the availability of a clear alternative offence and on the judicial, scholarly, and professional discourse that has provided convincing arguments against the application of child pornography offences. As Karaian and Brady assert, there is an "urgent need for judicial or legislative clarification" on the use of child pornography charges in cases of both consensual and nonconsensual intimate image distribution among young people to ensure the protection of young people's consensual sexual expression (in the case of sexting) and to avoid the inappropriate use of child pornography charges (in the case of NCIID) (2020, 347); however, in the meantime, those who educate about image distribution among young people can at least seek to correctly describe a child pornography framing of NCIID as ill-suited and widely challenged. As I detail in the next section, many educational presentations for youth do not accurately reflect the reality of the nuanced legal landscape for consensual/nonconsensual intimate image-sharing described above and instead engage in claims that a wide variety of image creation and sharing scenarios fit easily into a child pornography framing. This approach is at times misleading, at other times simply wrong, and commonly fuelled by an unwise scare-tactic approach to education.

Challenging the Child Pornography Framing in Educational Presentations and Resources

Despite an increasingly clear legal rejection of using child pornography charges to regulate consensual and privately held sexting (with no evidence of convictions in the available case law or legal research) and widespread scepticism toward using child pornography charges for NCIID, some educational resources and presentations for young people continue to straightforwardly frame these acts as child pornography. Educational presentations and resources created by police have been especially influential in the continued misleading information about the relevant legal context. In terms of education on consensual sexting, police continue to ignore the private-use exception established in *Sharpe* (2001) (and further developed in later case law) and assertively frame consensual sexting as child pornography and misinform young people that "they do not have the legal right to consensually create and share digital sexual images with an intimate partner" (Karaian and Brady 2020, 306). There are myriad examples of the Royal Canadian Mounted Police (RCMP) and local police in several Canadian jurisdictions providing educational resources or media releases that warn consensual young sexters that they will be charged as child pornographers for a variety of scenarios that would easily fit within the *Sharpe* exception. For example, in 2021, the RCMP in Nova Scotia worked with their "Youth Cybercrime

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Advisory Committee" to create an educational video that incorrectly implies that those aged under eighteen will be charged for creating a nude image of themselves or sharing a nude image of themselves privately with a peer: "you can get charged for it. Having the picture, or sending the picture, kind of thing. Like, you can get charged for both of them because that's child pornography" (Royal Canadian Mounted Police 2021). A staff sergeant in Saskatchewan similarly stated to the media that "taking intimate photos of anyone under 18 years of age is child pornography and is illegal to make or share those images even if it's between two consenting teenagers known to each other" (Risom 2022). In 2021, news coverage of RCMP educational approaches in Alberta likewise sent incorrect messaging about sexting and the law, with an RCMP school liaison officer explaining that they go into schools to "shed light on the legal consequences of sexting" and explain to young people that

> when you are taking those [intimate] pictures, even though you are agreeing to them, if you are under the age of 18, you are inadvertently creating child pornography, which is something that is in the Criminal Code and that the police take very seriously. Once the pictures are taken and then sent to someone, they are transmitting child pornography. (Ferensowicz 2021)

Scenarios that without question would fit within the *Sharpe* exception and represent young people's right to expression, such as simply capturing a nude image of oneself that is not necessarily shared, are often included in such assertive warnings, such as this statement from the North Bay Police Service: "when these young people, under the age of 18, start taking naked photographs of themselves I tell them that they are making child pornography" (Estabrooks 2023). Even in a Nova Scotian RCMP news release telling parents to have an "open, non-judgemental conversation" with their teens about intimate image-sharing, they suggest that parents inform young people that "sending intimate images or videos of yourself … is problematic for many reasons. These include but are not limited to: … If the person is under 18, intimate content is considered child pornography. Distributing child pornography can result in up to 14 years in jail" (CityNews Halifax 2020). It is hard to imagine how a conversation about image-sharing could be nonjudgemental when it, incorrectly, implies that a young person could be charged with child pornography for even taking a picture of themselves and warns of several years in jail as a result (ignoring the fact that even in malicious cases of NCIID young people are unlikely to see any jail time in most cases under Canada's *Youth Criminal Justice Act*).

As well as ignoring established rights of young people to self-expression and increasing legal and scholarly recognition of consensual sexting as a "normal" (*R v Zhou* 2016) and even healthy part of sexual exploration, this misinformation is also extremely concerning as it is well documented that victims of NCIID are less likely to seek support from adults if they believe they will be charged as child pornographers themselves (especially, one could imagine, if they are threatened with fourteen years in jail) (Dodge and Lockhart 2022; Shariff and DeMartini 2015). This unintended consequence of child pornography threats for consensual sexters was well articulated by a teen interviewee in my previous research with Emily Lockhart (2022). Seventeen-year-old Avery described being in a school

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assembly in which young people were told that sending your own nudes could result in criminalization through child pornography charges:

> there was a social worker and a police officer there that were talking to us about it and like saying that sending nudes, that's like, if you send your own nude that's still distributing child pornography so ... I'm pretty sure half the people there sent nudes themselves and no one was trying to say that cause they were probably like oh there's a police officer right there and they're gonna arrest me in the middle of the gym. (Avery, aged seventeen)

This quote demonstrates the high level of unnecessary fear that is created by spreading misinformation about the legal context surrounding sexting. The private-use exception and case law extending this exception seems to have been entirely ignored in police educational and media messaging here and, even if these police are unaware of the specifics of the law, they are at least aware that they are not actually charging consensual youth sexters and that they even use their discretion to avoid charges of child pornography in most cases of non-consensual distribution (Dodge and Spencer 2018). Karaian and Brady highlight the extent of continued misinformation about sexting and the law, explaining that, in 2019, the minister of justice and attorney general of Canada "announced additional funding in excess of $77,000 to support an anti-sexting campaign that inaccurately describes the consensual creation of teenage sexting as 'self-exploitation' and as criminal" (Karaian and Brady 2020, 347). Although there are scenarios of teen sexting that are currently untested by the law, meaning that educational messages do need to provide some careful caveats, it is nevertheless important that young people receive accurate information that there is a legal exception for images they take of themselves and keep private or share privately and consensually with a close-in-age peer (i.e., someone they could legally engage in sexual activity with under the law).

In terms of NCIID, despite convincing scholarly, governmental, and judicial challenges to the framing of NCIID as child pornography and the availability of a more appropriate offence, many police and public safety presentations and resources on this topic continue to prioritize the child pornography framing. Although it would seemingly be both more appropriate and clearer to explain to young people that people of all ages can be charged with the NCIID offence for violating consent and privacy through nonconsensual distribution, it seems that a focus on NCIID as child pornography often dominates. For instance, educational resources from the YWCA imply that young perpetrators of NCIID will be charged with child pornography offences while adult perpetrators of the same act will be charged with the—more applicable—NCIID offence. Their "Quick Guide on Sexual and Image Based Abuse" states:

> Is it illegal for someone to share my intimate images without my consent if I'm under the age of 18? Yes. Under the criminal code section 163, if you are under the age of 18, it's considered child pornography. Can I be prosecuted for distributing someone's private images even if they are over the age of 18? Yes. If you or someone you know has or is thinking about distributing

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> someone's private images without their consent, it's considered a publication, etc., of an intimate image without consent under section 162 and you can be prosecuted for it. (YWCA 2023)

Similarly, police news releases and educational materials often frame child pornography as the only offence that applies to NCIID among young people (Sherwin 2021), rather than simply discussing the applicability of the much more appropriate NCIID offence; if they believe they must mention the possibility of child pornography charges being used, this could be done by explaining that, in some cases, the ill-suited child pornography offence may be charged if an officer is unaware of the purpose-built NCIID offence and the fact that it was designed to replace this (mis)use of the child pornography provisions. Framing child pornography charges as appropriate to use in cases of NCIID among young people not only reinforces a problematic differential treatment of adult and child perpetrators of NCIID, but also "distorts … our understanding of child pornography as a legal category" (Karaian and Brady 2020, 348). In 2013, Slane explained that the creation of a specific NCIID offence would be a welcome change as it would help shift the focus of wrongdoing from the "subject of a sext to the person who wrongfully distributes it" (121); however, despite child pornography being a highly stigmatizing offence that was designed for an entirely different purpose, a decade later, there is still evidence of police and others focusing on the child pornography framing when educating young people about both consensual sexting and nonconsensual distributing.

CyberScan Case Study

Acknowledging the troubling inaccuracy in educational messages to young people regarding image distribution, I undertook interviews with Nova Scotia's CyberScan unit to understand how an organization focused specifically on responding to NCIID is educating young people on this topic. When I first began my case study of CyberScan, I imagined that this unit, which was inspired by the *Rehtaeh Parsons* case and had a core focus of educating young people about NCIID, would provide nuanced and precise information on the law related to image distribution and could therefore be used to challenge the common inaccuracy in educational messages. However, I found that CyberScan agents were assertive in framing both consensual and nonconsensual intimate image-sharing among young people as child pornography.

With CyberScan's focus on nonconsensual distribution and other technology-facilitated *harms*, it was surprising to learn through interivews with CyberScan agents that they are often called upon to give warnings to young people invovled in *consensual* intimate image creation and sharing. CyberScan agents explained that parents and school officials often ask them to respond to teens who have consensually created an intimate image of themselves or have consensually shared an intimate image with a partner or friend (CS2; CS5; CS6). Despite the clarity in the law that young people have the right to self-create and privately hold intimate images of themselves, CyberScan agents report that they sometimes have one-on-one discussions with youth who have consensually created or

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shared their image in which they tell them that they could be charged as child pornographers even for simply taking a nude photo of themselves. As one agent stated:

> [I tell youth], if you are taking a photograph of yourself and you are under the age of 18, you've just made child pornography. If you're sharing it, you've now distributed child pornography. If someone is receiving it, they are in possession of child pornography. And those are serious Criminal Code offences. So we would talk to them about that. Now, between you and I, there is some discretion there with the police, but we wouldn't bring that up with the youth. If police are seeing that a girl has shared a video of herself with a boyfriend and the parents found it, you know the police aren't [going to charge her] because the harm was not there … they didn't share it with the world, they were sharing it between themselves. Yes it is absolutely illegal for them to do that, but in reality the response will be to just get them to delete and remove [the images], that would be the appropriate approach when you are dealing with that type of situation. (CS4)

These comments show a mixture of both *misunderstanding* parts of the relevant law regarding sexting and *intentionally* miscommunicating that police would likely lay charges. While the agent seems to honestly be unaware of *Sharpe* and related case law, and therefore believes that "it is absolutely illegal" for a young person to create an image of themselves for their own use (which is clearly excluded from child pornography laws) or consensually share it with a close-in-age peer (which is excluded in the majority of situations and has seemingly not resulted in a conviction based on available case law), they also intentionally conceal from young people that police discretion and a lack of harm in relation to consensual image creation/sharing would effectively remove any likelihood of legal repercussions. While some evidence-informed educational resources in Canada now recognize, in agreement with the Supreme Court of Canada, that "sexting can be a healthy way for young people to explore sexuality and intimacy when it's consensual" ("Sexting" 2023), CyberScan agents did not communicate this to young people. Threatening young people with child pornography charges is likely to create unnecessary fear of criminalization for those who have already consensually created or shared images of themselves, and also sends the message that victims of nonconsensual distribution should avoid seeking support from adults as they risk criminalizing themselves (Dodge and Lockhart 2022). On the other hand, youth may simply ignore this message as a sign of how out of touch adults are, as they may know from experience that those in their school who have been found consensually sexting were not criminalized, thereby sending the message that adults are not a safe or useful place from which to receive accurate information on this topic.

While CyberScan's responses do not currently reflect the true legal context, the way in which CyberScan agents use warnings of child pornography offences in response to consensual sexting does vary in forcefulness depending on the agent delivering the message. While some described explicitly threatening youth

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who engage in consensual acts with child pornography offences, others described taking a somewhat more balanced approach which told youth that

> if you're a young person in Canada under the age of 18 and you take a naked photo of yourself, technically you're in possession of child pornography. [But if someone shares your image without consent and] you come and give us the information, you're not going to get in trouble. We are going to help you. (CS2)

While this kind of explanation may be less likely to discourage victims of NCIID from reporting, consensual youth sexters still hear the message that they have *technically* committed a criminal offence and, therefore, may still avoid seeking adult support. A second agent explained a similar approach, saying:

> [we tell youth that] even taking a picture of themselves is illegal ... it is technically child pornography. But I tell them the police are there to help, ... if you are a victim of this they are not going to charge you with making child pornography because you took a picture of yourself. (CS5)

While this approach is certainly better than the forceful use of criminal offences as a scare tactic to try to stop consensual image creation and sharing, this kind of messaging is likely to leave youth confused and uncomfortable about seeking adult support. And, again, it wrongly states that even creating and privately keeping a nude image of yourself is child pornography despite the decision in *Sharpe.*

While CyberScan agents could do a much better job of communicating the realities of the current legal context, the complexity of child pornography laws in relation to youth's consensual image-sharing does leave agents in a difficult spot in terms of providing clear messaging. Messaging would certainly be easier if child pornography offences were clarified to more explicitly exclude consensual sexting. However, there is no reason to believe that consensual youth sexters will suddenly start to be legally regulated and, therefore, many educational initiatives for youth in Canada now discuss consensual intimate image-sharing as a sexual act that, like all consensual sexual acts, has both potential risks and rewards but is not inherently wrong or harmful. CyberScan, police, and other organizations engaged in education should consider implementing this kind of nonjudgemental and sex-positive approach to education about sexting, as this is now widely recognized as the most evidence-informed approach (Albury, Hasinoff, and Senft 2017) and has been taken up by Canadian organizations such as Kids Help Phone ("What is Sexting?" 2023), Webwise.ca ("Sexting with My Boo" 2016), and MediaSmarts ("Sexting" 2023). These organizations discuss the legitimate reasons for which a young person might choose to create or share intimate images and, thereby, create an opening to nonjudgementally discuss both the potential risks and rewards of this behaviour, and provide tips on how to sext more safely and the importance of consent. These resources also all explain the details of the legal context of intimate image-sharing for youth in Canada, but they highlight (to various extents) that there are legal exceptions for close-in-

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age youth who share images consensually and privately, and that what is most important is to respect the consent and privacy of others. Although warnings of child pornography charges for consensual sexting from CyberScan and others are likely a well-intentioned attempt to reduce the risk of nonconsensual distribution, this scare-tactic approach ignores young people's rights to sexual expression and sends the harmful message that consensual sexters have done something wrong, immoral, and even illegal; these messages are most harmful when they act to reaffirm victim-blaming/shaming beliefs that make victims of nonconsensual intimate image distribution less likely to seek support due to fears of being criminalized or harshly judged ("Cyberbullying Hurts" 2012; Dodge and Lockhart 2022; Fairbairn, Bivens, and Dawson 2013; Naezer and van Oosterhout 2021). As I elaborate elsewhere (Dodge forthcoming), this kind of scare-tactic educational approach results in an educational focus on responsibilizing victims for ensuring "cyber safety" rather than asserting the importance of consent and the need for all of us to respect each other's rights to privacy and bodily autonomy.

In terms of *nonconsensual* intimate image distribution among young people, CyberScan agents also focused on a child pornography framing rather than discussing the purpose-built offence of nonconsensual intimate image distribution that more accurately reflects the issue at hand and that will be a relevant lesson regardless of age. For example, PowerPoint slides used by CyberScan for educational presentations to Grades 8 and up wrongly state that the NCIID offence can only be used in adult cases and that child pornography offences are the only option to use for cases of NCIID among young people. Likewise, when asked what further education is needed for young people and their parents to combat NCIID, an agent stated that more understanding of "child porn" laws is a primary concern (CS2). However, one of the agents interviewed did understand that child pornography charges were very rarely used in NCIID cases and that, in rare cases in which criminal charges are used at all, the NCIID framing is preferred:

> I've never seen a kid charged with [child porn], ... like police really don't want to charge a young person with that. [In one case] they were contemplating which charge and they went with the nonconsensual image charge .... I really don't think they charge too many youth [with either criminal offence]. ... I would think it would be one of the more serious ones if police did charge, like not just two youth exchanging photos and one person getting mad and sending it out, but maybe if it was really targeted and the person kept ... really harassing them. (CS5)

Despite this recognition, which echoes findings from my previous work with Dale Spencer (2018) regarding police reluctance to use child pornography charges for NCIID cases, it was not clear that this was in any way communicated to young people.

An unexpected implication of CyberScan's framing of these images as child pornography was that they believed they were legally bound to report all cases of NCIID and sexting to police under the duty to report child pornography (*Child*

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Pornography Reporting Act 2008). Although CyberScan agents acknowledge that the vast majority of victims of NCIID want to avoid police involvement in their cases, they expressed that, in cases of NCIID among young people, there is no option to respond entirely informally, even if this is the preference of everyone involved, because of the duty to report child pornography to police (CS4). An agent explained their perspective on this:

> So basically I guess if we witness child pornography or even if we get a call that there was a mutual relationship between youth and they exchanged images and so on, we would still have to check that that is reported to local police, and then they would deal with that whatever way they felt necessary. But I would have to make sure it was at least reported, just because that's my duty to report under [Nova Scotia's] Child Pornography Reporting Act. (CS5)

As research finds that the vast majority of victims would prefer to avoid contacting police and hope to deal with cases of NCIID through informal mechanisms, especially in cases among young people (Powell and Henry 2017; Dodge and Lockhart 2022), this interpretation of a necessity to report young sexters and image distributors to police could result in additional anxiety for young people and more reason to avoid seeking adult support.

Conclusion

With the more appropriate offence of nonconsensual intimate image distribution now long available in cases of NCIID, it is difficult to understand why the ill-suited child pornography framing continues to dominate some educational presentations and resources. As Segal describes in his *Independent Review of the Rehtaeh Parsons Case* in relation to the use of child pornography offences for NCIID cases:

> Many would agree that charging youths with child pornography-related offences is an unintended use of the Criminal Code's child pornography provisions. While there is a valid debate to be had on that issue, the question no longer needs to be decisively answered in light of the new criminal offences relating to distributing or making available intimate images without consent. While the child pornography offences remain available in cases like this one, these new offences would cover most instances where young persons distribute images of a sexual nature without consent, and they are arguably a better way of addressing cases where all involved are youth. (Segal 2015, 91)

While nonconsensual intimate image distribution can rightly be said to be *technically* child pornography, there is little utility in discussing this technicality with young people when they can instead be made aware of the potential legal consequences through the NCIID offence—an offence that better communicates

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that the harm is related to breaching the consent and privacy of another regardless of their age (Slane 2013). If those providing education believe child pornography charges must be mentioned in relation to NCIID, due to the unfortunate fact that some young people do continue to be charged with this offence, it could be explained that these charges are still sometimes used by those who do not recognize that a main intention in creating the NCIID offence was to replace this "unintended" use of the child pornography offence. The application of child pornography charges to youth cases of NCIID results in both unfortunate material effects such as fourteen-year-olds' being labelled as part of a "child pornography ring" (*R v SB et al.* 2014) and a theoretical challenge to our understanding of the distinct harm of child pornography (i.e., a uniquely stigmatizing label for the sexual exploitation of children by adults). This article has shown that the judicial discourse was divided on the appropriateness of this application of child pornography even before the NCIID offence was available and that the use of child pornography offences in these cases is convincingly criticized by judges and legal scholars. In fact, in my previous research with Spencer (2018), we found that even police officers who frame NCIID as child pornography in their educational outreach believe that these charges are inappropriate and far too harsh to use against youth in the majority of NCIID cases, as they perceive the charge as having been created to respond to the high level of predation and social scorn associated with child sexual abuse by adults.

With increasing legal clarity that it is very unlikely for close-in-age young people who share intimate images consensually and privately to be charged with child pornography, it is likewise difficult to understand why the child pornography framing dominates educational discussions of "sexting." When consensual sexters are straightforwardly told that they have committed child pornography through taking and sharing an image of themselves, this can create unnecessary fear of criminalization, deny young people's right to sexual expression, increase feelings of victim blaming/shaming if their images are shared without consent, and decrease the likelihood that victims of nonconsensual distribution will seek support from adults (Karaian and Brady 2020; Dodge and Lockhart 2022). Leading scholars of image distribution consistently find that we must stress to young people that consent is key and that the legal system is there to help protect victims from *nonconsensual, harassing, or abusive* image-sharing (Ringrose, Regehr, and Whitehead 2021; Albury, Hasinoff, and Senft 2017). When both consensual and nonconsensual image distributions are framed as child pornography, it ignores this central importance of consent in differentiating these acts and fails to accurately describe the locus of harm in acts of NCIID or the self-expression rights related to sexting. It may be that police and public safety officers are less able or willing to provide educational messages that centre topics such as consent and rights to sexual expression, opening up additional questions regarding whether these topics might be better guided by sex educators or well-informed teachers/counsellors who can include them within broader discussions of consent and healthy relationships (Dodge forthcoming).

To put it simply, framing consensual sexting among close-in-age young people as child pornography is largely legally inaccurate and is stigmatizing of consensual behaviours, while framing NCIID among young people as child

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pornography is legally accurate, but is ill-suited for clarifying the relevant harms and largely unnecessary given the purpose-built NCIID offence. Therefore, I echo Karaian and Brady's argument that, in regard to both consensual and nonconsensual image distribution, there is an "urgent need for judicial or legislative clarification" (2020, 347) to send the clear message that these acts are not properly "child pornography." However, regardless of whether this clarification occurs, it is necessary for those providing educational presentations and resources to better communicate the nuanced legal reality. Yet, my case study of the CyberScan unit provides a troubling finding that even some organizations in Canada that are purpose-built to respond to intimate image distribution among young people are to some extent misunderstanding and, at times purposely, miscommunicating the legal response to image distribution in Canada. Those educating young people on these issues need to make a commitment to better understand the relevant legal response and to stay informed about best practice for education in this area. It is important that, when the law is discussed, it is communicated accurately; however, it might be even more important for those providing education on this topic to consider that legal messages are actually secondary in significance to helping young people understand the importance of consent and relevant rights to privacy, sexual expression, and bodily autonomy (Albury, Hasinoff, and Senft 2017; Karaian 2014; Slane 2013; Dodge 2023).

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Appendix A: Case Law Methodology

The analysis of NCIID case law involving child pornography charges in this article is part of a larger research project that aimed to map and interrogate judicial understandings of NCIID in Canada through a discourse analysis of Canadian legal cases. In this article, I focus on a subsection of findings from this discourse analysis related to the understanding of NCIID as child pornography. To find court cases responding to acts of NCIID, I searched for English-language cases[2] using three Canadian case law databases: CanLII, WestlawNext Canada, and LexisNexis Quicklaw. Within each of these databases, I utilized a Boolean search to collect cases containing one or more of the following search terms: "nude photograph"; "nude picture"; "nude image"; "naked photograph"; "naked picture"; "naked image"; "sexting"; "revenge porn"; "sex tape"; "intimate video"; "sexual video"; and "intimate image." While the nonconsensual distribution of intimate images has been specifically recognized as a criminal offence within Canadian law since 2014, I was interested in how the treatment and understanding of these cases have changed over time and, therefore, case law searches were not limited to a particular time period and were conducted up to March of 2018. Ultimately, this resulted in a data set of thirty-two unique criminal cases involving the nonconsensual distribution of intimate images, eleven of which included child pornography charges. These cases involving child

[2] A limitation of this research is that only English-language cases were collected due to my lack of fluency in French.

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pornography charges were included if the victims and offenders were close-in-age youths who were all under the age of eighteen or if the offender was over the age of eighteen but was close enough in age to the victim to be legally involved in sexual acts. The resulting eleven cases that were deemed to be cases of NCIID utilizing child pornography charges are the focus of this article. It is important to note the limits of case law analysis. As not all cases are published on legal databases, and because the analysis looked only at English-language case law, it is not possible to make generalizable conclusions about the existing legal response to these cases. Nonetheless, important conclusions can be drawn by analyzing the available case law and contextualizing these findings within related academic and government research documenting the legal response to young people's intimate image distribution.

Appendix B: Case Study Methodology

The case study aspect of this article is pulled from a broader research project investigating responses to technology-facilitated harms provided by Nova Scotia's CyberScan unit. In-depth, semi-structured interviews were completed with four CyberScan staff working in 2016, including the unit's complaints coordinator and three government enforcement agents (two additional agents were employed by CyberScan at this time but were not available for interviews due to travel commitments), and three CyberScan staff working in 2020, including one complaints coordinator and two government enforcement agents (this was the entire staff of CyberScan at this time). Interviewees were anonymized and are all referred to as "agents" and cited using anonymous codes. CyberScan interviewees from 2016 are cited as CS1, CS2, CS3, and CS4, and interviewees from 2020 are cited as CS5, CS6, and CS7.

A semi-structured interview style was used to allow unexpected perspectives to emerge while also ensuring some consistency through an interview guide that included nineteen questions about the successes and inadequacies of CyberScan's approach. All interviews were voice recorded and transcribed in full. Relevant educational documents produced by CyberScan, such as PowerPoint slides and handouts, were also analyzed. Interviews and documents were coded using QSR NVivo qualitative research software to help organize transcripts into thematic "nodes" in an efficient and iterative manner (Bringer, Johnston, and Brackenridge 2006). Nodes were assigned through an initial process of open coding all interviews, followed by second and third reviews of all interviews to complete a deeper analysis that included making comparisons between nodes and writing conceptual and theoretical memos (Bringer, Johnston, and Brackenridge 2006). This article focuses on the nodes titled "education" and "child pornography framing."

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