

April 1, 2014

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Senate Public Safety Committee
State Capitol, Room 2031
Sacramento, California 95814Re: S.B. 838 (Beall) – Sexting, Confidentiality, and Transfer to Adult Court – Oppose
Senate Public Safety Committee Hearing – April 22, 2014

Dear Chairperson Hancock:

We write to express our strong opposition to S.B. 838, “Audrie’s Law” (Beall). The Bill would create a new crime for “sexting,” reduce confidentiality in juvenile court hearings, and expand the number of juveniles tried in the adult criminal system. While S.B. 838 is offered as a response to the tragic death of Audrie Potts, who took her own life after being sexually assaulted and photographed unconscious at a party, it completely misses the mark in addressing the factors that contributed to her mistreatment and preventing such things from ever happening again.

S.B. 838 is flawed from beginning to end. It criminalizes social media behavior that is problematic, but better handled outside the criminal justice system. It ignores the past two decades of research and court decisions holding that adolescents are not deterred by the threat of harsh punishment, and that their lack of maturity makes them less deserving of the harshest punishments. It ignores what actually happens to juveniles tried as adults, and thereby fails to grasp that the “solutions” offered will actually hurt public safety and the well-being of the community.

The Youth Law Center is a national, non-profit public interest law firm working on behalf of children in youth in the child welfare and juvenile justice systems. For more than three decades we have been a part of policy and legislative discussions about the handling of juveniles who commit serious crimes. We were a part of the MacArthur Foundation’s MacArthur Adolescent Development Juvenile Court Training Project, and for a number of years have written and presented on juvenile adjudicative competence and adolescent development. We have also been involved in several appellate court cases and legislative initiatives addressing the treatment of juveniles tried as adults.

Traditional Justifications for Harsh Punishment Do Not Work On Juveniles

Maturity of judgment develops over time. It involves a complex combination of ability to make good decisions and social and emotional capability that adolescents do not yet possess.¹ But because adolescents are in the process of growing up both physically and

¹ Cauffman and Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behavioral Sciences and the Law 741 (2000) pp.741-745;

mentally, they have a greater capacity than adults for positive change. Personality traits change significantly during adolescence, and the process of forming a personal identity is not completed until youth are in their early twenties.² In fact, adolescent criminal behavior often results from experimentation with risky behavior and not from moral deficiency or bad character.³

Only a small proportion of youth who experiment with delinquent or criminal activities persist in such behavior into adulthood.⁴ National research indicates that 6 out of 10 juveniles who enter the juvenile justice system never return on a new referral.⁵ The Pathways to Desistance Study found that only a small proportion of juvenile offenders studied over a seven-year period continued to offend at a high level throughout the follow-up period. The great majority reported low levels of offending after court involvement, and a significant portion of those with the highest levels of offending reduced their reoffending dramatically.⁶ Also, research indicates that for most youth, the

Steinberg, et al., *Age Differences in Sensation-Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 *Developmental Psychology* 1764 (2008) pp.1764-1778; and Gardner and Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 *Developmental Psychology* 625 (2005) pp. 625-635.

² Roberts, et al., *Patterns of Means-Level Change in Personality Traits Across the Life Course*, 132 *Psychological Bulletin* 1 (2006), pp. 14-15; Steinberg and Schwartz, *Developmental Psychology Goes to Court*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* (2003), p. 27; Scott and Steinberg, *Rethinking Juvenile Justice* (2008) p. 52; Steinberg et al., *The Study of Developmental Psychopathology in Adolescence: Integrating Affective Neuroscience with the Study of Context*, in *Developmental Psychopathology*, vol. 2: *Developmental Neuroscience* (Cicchetti and Cohen Eds., 2d ed. 2006), p. 727.

³ Moffit, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 *Psychological Review* 674 (1993), pp. 686, 690; Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Review* (1992), pp. 366-367.

⁴ Steinberg and Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty* (2003), pp. 1014-1015; Moffit, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 *Psychological Review*, *supra*, pp.685-686.

⁵ Snyder and Sickmund, *Juvenile Offenders and Victims: 2006 National Report*, National Center for Juvenile Justice, with the support of the U.S. Department of Justice, Office of Justice Programs (2006): 234-235.

⁶ Mulvey, "Highlights From Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders." Washington, D.C., U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, OJJDP Juvenile Justice Fact Sheet (March 2011): 4; and see MacArthur Foundation, *Research on Pathways to Desistance*, Research Update Created for the Fourth Annual Models for Change National Working Conference (Dec 9, 2009).

period of risky experimentation does not extend beyond adolescence, ceasing as identity becomes settled with maturity.⁷

The Law is Moving in a Different Direction

Drawing on the science of adolescent development, a series of Supreme Court decisions has recognized that juveniles are less culpable than adults and less deserving of the most severe punishments.⁸ Most recently, in *Miller v. Alabama*, the Court observed that: “First, children have a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking. Children ‘are more vulnerable ... to negative influences and outside pressures,’ including from their family and peers; they have limited ‘contro[l] over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings. .. And third, a child's character is not as ‘well formed’ as an adult's; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievabl[e] deprav[ity].’⁹ In presenting these findings, the Court observed that research in developmental psychology and neuroscience continues to confirm and strengthen the Court's earlier conclusions.

Against this backdrop, S.B. 838 looks sadly out of step with what we now know about what makes adolescents think and act the way they do, but also, what works to help them grow toward successful adulthood. The national trend is in the opposite direction. States that jumped on the bandwagon of harsh punishment and transfer to adult court in the 1980's and 1990's are rolling back their laws to incorporate adolescent development principles and to create better balance.¹⁰

S.B. 838 Will Contribute to Higher Recidivism and Public Safety Risk

Even if the Legislature were not concerned with age appropriate interventions for juveniles, it would surely want to consider the impact of this Bill on public safety. On that measure, as well, S.B. 838 would take us in the wrong direction. Extensive research has established that youth whose cases are handled in the adult criminal system recidivate faster and for more serious offenses than youth whose cases are handled in the juvenile

⁷ Bonnie, et al., *Reforming Juvenile Justice: A Developmental Approach*, National Research Council (2013), pp. 1-2.

⁸ *Roper v. Simmons* (2005) 543 U.S. 551; *Graham v. Florida* (2010) 560 U.S. ___, 130 S.Ct. 2011; *J.D.B. v. North Carolina* (2011) 564 U.S. at ___, 131 S.Ct. 2394; *Miller v. Alabama* (2012) ___, 132 S.Ct. 2455.)

⁹ *Miller v. Alabama, supra*, ___, 132 U.S. at ___, 132 U.S. at 2464; citations omitted; bracketed material is in the opinion.

¹⁰ See, for example, Brown, *Trends in Juvenile Justice State Legislation: 2001 – 2011*, National Conference of State Legislatures (2012); Campaign for Youth Justice, *State Trends: Legislative Victories from 2005 to 2010 - Removing Youth from the Adult Criminal Justice System* (2011).

justice system.¹¹ This is hardly surprising, given that “Prisons have been characterized as developmentally toxic settings for adolescents; they contain none of the attributes of a social environment that are likely to facilitate youthful progress toward completion of the developmental tasks that are important to functioning as law abiding adults.”¹² What we know about the California prison system is completely consistent. A study by the Legislative Analyst’s Office found that less than a third of prison inmates were in any kind of educational or vocational program; only about 10% were in academic programs, and 15% of the state’s inmates were on waiting lists.¹³ In addition, California’s prison classification system works against young inmate’s eligibility for programming. Overcrowding and frequent lockdowns serve as an additional impediment to youth seeking educational and rehabilitative programs.¹⁴ Violence is common, and young inmates find themselves in situations in which they must “prove” themselves in order to survive in the prison culture.¹⁵

In contrast, the juvenile justice system is premised on the dual responsibilities to provide accountability and rehabilitation.¹⁶ The Division of Juvenile Facilities provides an accredited high school, special education, vocational training, sex offender training programs, mental health services, victim programs, and a variety of other rehabilitative services¹⁷ not accessible to youth in the adult prison system. Youth may be held in the system until age 23 for a lengthy list of serious offenses set forth in Welfare and Institutions Code section 707, subdivision (b), and sex offenses set forth in Penal Code section 290.008.¹⁸ This means that a person who committed their offense at age 17 could be held for six years – surely an adequate amount of confinement time if we care about producing a functional adult.

¹¹ Bonnie, et al., *Reforming Juvenile Justice: A Developmental Approach*, *supra*, pp. 133-135, 175, and studies cited therein.

¹² *Id.*, at p. 134 (citations omitted).

¹³ Legislative Analyst’s Office, *From Cellblocks to Classrooms: Reforming Inmate Education To Improve Public Safety* (2008).

¹⁴ Human Rights Watch, “When I Die They’ll Send Me Home,” *Youth Sentenced to Life without Parole in California* (2008), pp. 54-58.

¹⁵ *Id.*, at pp. 54-55.

¹⁶ Welfare & Institutions Code § 202.

¹⁷ See http://www.cdcr.ca.gov/Juvenile_Justice/index.html, and links from that web page.

¹⁸ Welfare & Institutions Code §§ 607, subd. (f), 1731.5.

Specific Concerns About S.B. 838 by Section

Section 2 – Adding Penal Code Section 290.1 for Electronically Sharing a Photo of Intimate Body Parts with Specified Intent

This part of the Bill treats common teenage behavior as a crime. It is written so broadly, it will inevitably ensnare many former boyfriends and girlfriends who initially shared unclothed or sexy photos willingly. While we agree that this behavior is unacceptable and should be addressed, criminalization is not the right approach. The State would do better to handle these issues outside the criminal justice system, through education, counseling, work with parents, restorative justice and victim awareness programs. There has been tremendous success in addressing other forms of bullying through such means. We would be glad to work with the author to develop an effective, more responsive approach to sexual harassment and sexual misbehavior by intoxicated youth in social situations.

Also, this section of the Bill is likely to draw legal challenges. It prohibits electronic sharing of photos with “intimate body parts,” defined as “breasts, genital area, groin, inner thighs, and buttocks.” How could anyone possibly know what is included in that definition? Tiny bikinis in which portions of the breasts protrude? Tight clothing that reveals those body parts? It is impossible to tell what would run afoul of the law. This section would surely merit a constitutional challenge for vagueness and overbreadth under the First Amendment. As written, it punishes a good deal of constitutionally protected behavior and fails to give adequate notice of what is prohibited.

In addition, this section of S.B. 838 would treat juveniles more harshly than adults who commit the same sexting behavior. This is because offenses committed against adult victims would only merit a misdemeanor, but those with a juvenile victim would be elevated to wobbler felonies punishable by up to three years in prison. This new crime will disproportionately affect juveniles because they are more likely to have juvenile “victims,” thus catapulting their offense into a wobbler felony, which also would be bootstrapped into the 707(b) provisions for transfer to adult court.

Section 3 – Opening Juvenile Proceedings to the Public in Additional Kinds of Cases

California should not expand the provisions permitting the public to attend juvenile proceedings. There are already 28 crimes on the list, and they are the most aggravated versions of those crimes. We should not be opening juvenile proceedings up any further. The principles of confidentiality in juvenile proceedings are good ones, and we should not dilute those protections by opening the court process any further.

Section 4 – Expanding Section 707(b) to Include “Sexting” and Additional Kinds of Sex Crimes

Welfare and Institutions Code section 707, subdivision (b) contains the list of serious crimes that determines whether young person will be presumed unfit for juvenile court treatment, and whether their case may be direct filed in adult court at a specified age. S.B. 838 would add the new “sexting crime” to the list and would expand the existing forms of rape, sodomy and lewd and lascivious conduct to include situations in which the victims is unable to consent because of being intoxicated, or having a mental disorder or developmental disability.

There is no way the new sexting crime is in the same league as the other 707(b) offenses such as murder, mayhem and aggravated assault. The 707(b) offenses are the most serious ones - so serious that we presume the young person is incapable of being rehabilitated. Moreover, the expansion of rape, sodomy and lewd and lascivious conduct to include situations where the victim is unable to consent because of intoxication will turn an unacceptable, but still fairly common teenage party situation into a 707(b) offense. The current limitations are adequate to assure that the most serious versions of those crimes are treated as such.

Further, the Youth Law Center opposes any expansion of California law on transfer of juveniles into the adult criminal system. We have seen first-hand what happens to youth in the adult prison system, and no Californian should want more of that. The adult system has absolutely nothing for these youth. Prison does not provide young people with the opportunities required in the juvenile system to complete their education, get vocational training, or receive counseling to address their misbehavior. This is bad for the community – they will be released without the necessary skills or realistic chance to successfully reintegrate into and become productive members of society. While youth should surely be held accountable for those crimes, we believe the current 707 list sets forth the most extreme versions of the crimes and should not be expanded.

The Outcome in Audrie’s Case Was Not the Result of Weak Laws

Finally, we must address the notion that harsh new laws are needed because existing law contributed to the perceived “lightweight” dispositions meted out against the young men who sexually assaulted Audrie. That simply is not the case. As we understand it, the offense in this case involved digital penetration while Audrie was unconscious from intoxication. Under current law, that is a felony punishable by up to eight years in prison. (Penal Code section 289, subd. (b).) And again, current law allows youth to be held up to age 23 in the state Division of Juvenile Facilities. Moreover, while we are opposed to handling such cases in the adult system, current law would have allowed it. The youth involved in this case could already have been subjected to fitness hearings to find them unsuitable for juvenile court treatment under Welfare and Institutions Code section 707,

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subdivision (a). Under that scenario, a juvenile court would have determined whether the youth should be handled in the juvenile court based on five criteria (criminal sophistication, whether sufficient jurisdictional time is available to rehabilitate the youth, previous delinquent history, success of past efforts to rehabilitate the minor, and gravity and circumstances of the offense). We will not speculate as to why those laws were not used in this case. This is offered only to make the point that our laws are already some of the toughest in the nation.

We seldom have occasion to oppose a bill by Senator Beall. His office has been such a friend to children and youth in so many other instances. Unfortunately, this seems to be a situation in which a sad case has trumped all common sense. We are very much willing to work with Senator Beall's office toward solutions that more effectively provide accountability, and that may help to prevent what happened to Audrie from ever occurring again. Thank you for your consideration; we urge a "No" vote.

Sincerely,



Sue Burrell, Staff Attorney
YOUTH LAW CENTER

cc: *(By Facsimile Transmission)*
Members of the Senate Public Safety Committee
Honorable Jim Beall (attention Kenton Stanhope, Consultant)
Alison Anderson, Chief Consultant, Senate Public Safety Committee