



Sexting in the USA

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INTRODUCTION

Sexting (a combination of the terms sex and texting) is the act of sending or posting sexually explicit photographs via cellular phones or over the Internet. Recently, sexting has been the subject of national and international attention due, in large part, to the release of a survey on the prevalence of sexting among teens and the initiation of child pornography prosecutions against sexting teens in numerous states across the country.

The first section of this article reviews the current data on teens engaging in sexting. In the second section, this article reviews the criminal charges that have been filed and the proposed legislative responses to sexting. In the final section, this article proposes the best practices for dealing with the teenage sexting phenomenon. ¹

A. Prevalence and Trends

In December 2008, the National Campaign to Prevent Teen and Unplanned Pregnancy and Cosmogirl.com published the results of a “sex and tech” survey. The survey polled 1280 teens and young adults between the ages of 13 and 26 about their cell phone, computer and digital device behaviors and attitudes. Among the results was the finding that 22% of teen girls (with 11% of the girls being between the ages of 13 and 16) and 18% of teen boys have electronically sent or posted nude or semi-nude images of themselves.

Among those teens who had engaged in sexting, the overwhelming majority sent the images to a girlfriend or boyfriend. ² A much smaller percentage of teenagers (21%) admitted to sending the image to someone they wanted to date. A small (15%) but significant percentage of teens had sent nude or semi-nude images of themselves to someone they only knew online.

It is important to note that the methodology and results of this survey have been questioned. In particular, researchers have noted that use of an online poll (rather than a random telephone survey) may have skewed and inflated the results “because the same teenagers who have engaged in such behavior could be the ones most likely to say they have done so in an online poll.” ³

Accepting the finding in the survey that some teenagers, albeit a minority, are transmitting sexually explicit images of themselves, researchers have tried to determine why. The question is even more significant when you consider that teenagers participated in sexting despite thinking that sending sexually explicit messages or pictures was dangerous (67%) and stupid (57%). Only 23% of the teens thought that it was a harmless activity.

The primary reasons for sexting cited by teens in the above survey are that it is “fun or flirtatious,” a “sexy present” for a boyfriend, or a “joke.” An article in the Wall Street Journal concluded that the sexting trend is a combination of peer pressure (mainly young girls being pressured by boys) and a by-product of our highly sexualized culture resulting in a casual attitude towards sex. ⁴

Recently, Beatbullying, a charitable organization in the United Kingdom conducted a survey of more than 2000 11-18-year-olds. The survey indicated that over a third of the respondents (38%) have received an offensive or distressing sexual image via text or email. Of those who had received a sext, 45% received it from a peer, 23% from a current boyfriend / girlfriend, 2% from adults and 30% did not know the sender. These statistics provide support for the argument that “peer to peer anti-social/predatory behaviour is one of the biggest threats facing our young people today online and via mobile phones.” ⁵

B. Seriousness

During the past year, some have questioned whether sexting is a serious issue for the public to focus on. To put this question in perspective, it is helpful to examine sexting in the context of the three forms of online safety identified by Anne Collier of Netfamilynews.org.⁶ The first form of online safety is physical. In the vast majority of sexting cases, the minor consented to the photography being taken, so the potential physical harm to the minor is assessed from the point that the image is posted or shared on line. The minor's physical safety can be at risk because the image can become a source of bullying from peers. In an extreme case, the bullying can lead to tragic consequences, as in the case of Jessica Logan, an 18-year-old Ohio teen who sent nude pictures of herself to her boyfriend. After they broke up, he forwarded the pictures to hundreds of other high school girls and Jessica was harassed relentlessly. Last July, she hung herself in her closet.

The second form of online safety is psychological. As noted above, the teens involved in sexting can become targets for bullies, rumors and harassment, which can affect the emotional and social health of a child. In addition "[s]exting may also profoundly affect the emotional and psychological development of a child. Trust is broken when an image is forwarded without the creator's consent, such as when a boyfriend forwards images that are intended to be private."⁷ The result can be psychologically devastating.

In rare instances, a child who sends a sext can become a victim of psychological and physical abuse. In February 2009, Anthony Stanci, an 18-year-old from Wisconsin was charged with numerous crimes, including child enticement, sexual assault of a child, possession of child pornography and making a bomb threat when he allegedly used a social networking site to create a false identity. Stanci, posing as a girl, offered to send a nude photograph of "herself" in exchange for nude photographs of the boys. In this manner, Stanci obtained more than 30 nude photographs and videos of his male classmates. Upon receipt of the images, Stanci blackmailed the classmates with the threat of publishing them online. At least seven of the minors were coerced into performing sexual acts.⁸

The third and final factor in assessing online safety is reputational and legal harm. Once an image is sent to another cellular phone or posted online, it cannot be retrieved. As a result, the digital age has changed what might have been a forgotten youthful indiscretion and turned it into a public, distributable and permanent part of the teenager's life. Among the potential short term and long term consequences of having an image posted online or forwarding the images of other teens are school discipline, loss of scholarships, college admissions, employment opportunities and criminal charges for possessing, producing or transmitting the sexted image.

I. LEGAL CASES

Historically, a teen who took sexually explicit photographs of themselves had to develop the film at a lab and distribution was limited by the number of copies made from the negative. The digital age has lifted any restriction on distribution. "Now a camera-phone and Internet connection are enough to send the image around the world in an instant, whether or not the sender intended it to reach that far."⁹ In an effort to address the growing number of sexted images being transferred, child pornography prosecutions have been initiated in numerous states.

The use of the criminal justice system to deal with sexting among teens has been sharply criticized. In particular, critics note that the child pornography laws were drafted with the intent to protect minors from sexual abuse committed by adults. "Law enforcement's reaction effectively turns victims into perpetrators...."¹⁰ When the minor creates the image, it turns the child pornography statute "on its head."¹¹

One indication that the criminal justice system may be ill-equipped to handle the sexting cases is revealed by examining the wide variety in how teen sexting cases are handled within and among states.¹² A review of cases in the United States shows that there is little consistency in who is charged, what criminal charges are filed and the sentence imposed. Individuals who have been charged include the creators of the images (the minor who took sexually explicit photos of the themselves), the senders (the individuals who sent the images to others or uploaded the images to the Internet, regardless of whether the minor in the photo consented), recipients (the individuals who received the images on their cell phone or computer, regardless of whether it was solicited) and savers (individuals who received the images and saved them on their mobile device or computer). Depending on the jurisdiction, sexting can be considered a felony, a misdemeanor or an act exempt from criminal prosecution.

Below is a synopsis of a selection of the recent teen sexting cases brought through the criminal justice system.

A. Self Generated and/or Consensual Photographs

1. Iowa

In September 2009, the Iowa Supreme Court upheld the misdemeanor conviction of Jorge Canal, Jr.¹³ The conviction

stemmed from an incident in 2005 when Canal, then-18 years-old, sent a text message of his erect penis to a 14-year-old female. The juvenile female had requested he send the photo. The photo was later discovered by the juvenile's mother, who showed it to her husband, a former reserve police officer. Canal was charged and convicted at trial with the misdemeanor offense of disseminating obscene material to a minor. As part of his conviction, Canal was required to register as a sex offender.

On appeal, Canal argued that there was insufficient evidence to convict him because the photograph did not meet the definition of obscenity. In addition he claimed that his lawyer provided ineffective assistance. He argued that the photo did not meet the legal definition of obscenity. The Iowa Supreme Court rejected the claims finding, in part, that the instruction that "mere nudity does not constitute obscenity" was adequate.

2. New Jersey

In March 2009, a 14-year-old girl was charged with possession and distribution of child pornography when she posted approximately 30 nude pictures of herself on her social networking site.¹⁴ Subsequently, the prosecutor agreed to drop the charges if the girl completed at least six months of counseling.¹⁵

3. Ohio

In October 2008, a 15-year-old girl was arrested and charged with the "illegal use of a minor in nudity oriented material, a second-degree felony; and possession of criminal tools, a fifth-degree felony."¹⁶ The charges stemmed from the girl's use of her cell phone to send nude pictures of herself to other minors. The girl was arrested on a Friday and spent the weekend incarcerated until her arraignment and bail hearing. There is little information about how this case was resolved, presumably because it was referred to juvenile court.

4. Pennsylvania

In October 2008, a Pennsylvania school district provided the district attorney's office with several cellular phones that had been confiscated from students and which contained images of minor semi-nude female students.¹⁷ On February 5, 2009, the district attorney sent letters to the parents of the three females in the photographs and the parents of approximately seventeen students who had the images on their cellular phone. The letter advised the parents that their child had been identified in a possible child pornography investigation, but that all charges would be dropped if the child entered an education and counseling program. Subsequently, all of the minors and their parents, with the exception of the three girls who had been photographed, agreed to enter into a plea with the juvenile court with the understanding that the charges would be dropped upon completion of the program. The parents of

the girls, however, filed a motion for temporary restraining order (TRO) in federal court to prevent the district attorney from filing child pornography charges arguing, in part, that the images did not satisfy the definition of child pornography. In particular, the parents noted that the images did not depict any sexual activity. Among the images were a minor in a bathing suit, two minors in a bra and underwear and a minor wrapped in a towel with her breasts exposed. The federal court granted the TRO on March 30, 2009, in part, finding that a likelihood of success on the merits because the images did not constitute child pornography.

In January 2009, prosecutors in Pennsylvania filed child pornography charges against six teenagers when naked photographs were recovered by the school on the students' cellular phones. Three girls (ages 14 and 15) took naked photos of themselves and sent them to three male friends (ages 16 and 17). The girls were charged with manufacturing, disseminating and possessing child pornography and the boys were charged with possession of child pornography. After the arrests, the police chief indicated that the charges were intended "to send a strong message to other minors who might consider sending such photos to friends."¹⁸

In 2007, a 15-year-old girl from central Pennsylvania was charged as a juvenile with possessing, distributing and creating child pornography after she sent nude pictures of herself to a 27-year-old man via a social networking site.¹⁹ The man also faced unspecified criminal charges.

5. Vermont

In September 2009, an 18-year-old male received 90 days in prison for his participation in directing two teen girls to videotape or photograph themselves performing sexual acts and sending them to him. As part of the plea deal, the most serious offenses of sexual assault and promoting a sexual recording were dropped and the defendant was permitted to plead guilty to the reduced charges of "committing a prohibited act" and "lewd and lascivious conduct."²⁰ The plea was negotiated in recognition of the Vermont legislature's decision to decriminalize sexting. See Section III.A. *infra*.

B. Images that were Forwarded or Posted Online Without the Consent of the Photographed Minor

1. Arizona

Two 13-year-old teenage boys were charged with the misdemeanor offense of using a telephone to offend, harass or intimidate after they displayed a nude photo of a 13-year-old girl which the girl

had sent to them in a cell phone text. ²¹ “Misdemeanor charges were filed because in all likelihood, the teens were not aware of the implications of their actions.... Police say it is important for teens to understand that once a photo is sent out, there is no way of getting it back. Parents are encouraged to talk to their children about what inappropriate electronic behavior is and to check their children’s cell-phone messages.” ²²

2. Florida

In 2007, then 18-year old Philip Alpert sent several dozen people a nude photograph of his 16 year old ex-girlfriend. ²³ Police arrested Alpert and charged him with distributing child pornography, a felony. Alpert pled no contest, but was later convicted and sentenced to five years probation. Under Florida law, Alpert is required to register as a sex offender for 25 years. In addition to the legal consequences, Alpert has also been kicked out of college, is having trouble finding a job as a convicted felon and has lost numerous friends.

In February 2009, an 18-year-old, Bryce Dixon, in a moment of anger based on his belief that his 16 year old girlfriend had cheated on him, forwarded a picture of his girlfriend’s naked breasts to her friend. Dixon was arrested and charged with child pornography, cyberstalking, transmission of harmful information to minors and providing obscene material to a minor. Under the terms of a plea deal, Dixon pled guilty to a misdemeanor count of cyberstalking, thereby avoiding a possible 30 year sentence. ²⁴

3. Idaho

In June 2009, police charged a 15 year old female high school student with a misdemeanor offense of disseminating material harmful to minors. ²⁵ The girl had posed as a secret admirer to trick another female into sending nudge pictures and then forwarded them to several others. When explaining why they had arrested the girl, police explained that they had investigated similar sexting cases this year, but this was the first criminal charge because of “the fact that this was very harmful to this child... we believe (the suspect) showed significant malice.” ²⁶

4. Massachusetts

In January 2009, police in Billerica, Massachusetts investigated the mass transference of a picture of a 14-year-old middle school student which had been sent by the girl to a high school student’s cell phone. ²⁷ “In a matter of minutes, [the photograph] was forwarded via text messaging to many, many children.”

5. Wisconsin

A 17-year-old boy was charged with possessing child pornography, defamation and sexual exploitation of a child after he posted naked pictures of his 16-year-old ex-girlfriend on his social networking site. ²⁸ The teen posted the pictures in a moment of anger.

“Psychologists said the phenomenon reflects typical teenage hormones and lack of judgment, with technology multiplying the potential for mischief.”

II. LEGISLATIVE RESPONSE

In response to the myriad of sexting investigations, charges and criminal cases, legislatures increasingly have expressed concern over the inadequacy of the child pornography laws to handle sexting. “In the past year, at least nine states have introduced legislation aimed at deterring teens from sexting....” ²⁹ These efforts are outline below.

A. Decriminalize: Vermont

In April 2009, Vermont lawmakers introduced a bill to legalize the consensual exchange of graphic images between two people 13-18-years-old. The final bill, enacted on June 1, 2009 provides that minors engaged in sexting would be dealt with in juvenile court and would not be subject to the sex offender registry requirements. ³⁰

At least one law professor has expressed concern over exempting sexting from criminal prosecution. “[T]he legislation fails to recognize the significant issues associated with self-produced child pornography and may contribute to making children more vulnerable to sexual exploitation.” ³¹ In particular, Professor Leary notes that the legislation fails to recognize that the minors in the images are likely to experience depression, anxiety and other negative effects from the fact that the images will be circulating and out of their control forever. In addition, Professor Leary notes that the legislation may inhibit a law enforcement officer’s ability to obtain a search warrant because it requires having probable cause to believe a crime has been committed. By de-criminalizing the production of these images, the officer may lose the opportunity to investigate the circumstances surrounding the production of the image, which upon further examination may have revealed that the minor was not a willing participant, but the victim of blackmail, coercion, domestic violence or a sexual assault. ³²

B. Misdemeanors: Ohio, Utah, Illinois & Nebraska

In Ohio, lawmakers proposed a law to reduce the penalty for sexting from a felony to a first degree misdemeanor, and eliminate the possibility of a teenage offender being labeled a sex offender for years. The proposal was supported by the parents of Jessica Logan, a Cincinnati 18-year-old who committed suicide after the naked picture of herself which she sexted was forwarded to people in her high school. The proposal is still pending. ³³

Utah lawmakers reduced the penalty for sexting for someone younger than 18 from a felony to a misdemeanor.³⁴

The Illinois Senate passed legislation that would make it a crime to distribute nude images to another person without their permission. The legislation is pending in the House. The measure, House Bill 2537, makes it a misdemeanor criminal offense to sell or distribute a videotape or nude image of another person without written consent, and with the intent to damage a person's reputation.

The Nebraska state legislature enacted an affirmative defense for minors who possess sexually explicit images of children 15 and older, as long as the images are of only one child, were taken without coercion, and were not forwarded to anyone else.³⁵

C. A Juvenile Diversion Program: New Jersey

In July 2009, a New Jersey legislator proposed creating a juvenile-diversion program for first-time offenders who sexted without malicious intent. Completing an educational program would give the juveniles the opportunity to avoid prosecution. The program would explain sexting's potential link to cyberbullying and stalking; legal penalties for sharing sexually explicit materials; and the potential for consequences, such as damaged relationships, and loss of educational or job opportunities. The course also would enlighten sexters about the ways their photos can morph far beyond their control, thanks to the easy replication and "infinite audience" of cyberspace. The bill is currently pending in the Judiciary committee.³⁶

D. Indiana: Study

The Indiana legislature passed a resolution calling for a study of "(1) the use of cellular telephones to send explicit photographs and video ("sexting"), especially by children; (2) the psychology of sexuality and sexual development; (3) the psychology of sexual deviants and deviancy; and (4) the mental development of children and young adults and how this affects the ability to make certain judgments; as these issues apply to sex offenses covered by Indiana statutes. The resolution was passed in April 2009.³⁷

III. BEST PRACTICES

As noted throughout this article, there are numerous problems with criminalizing teen sexting behavior. A prominent issue is that the child pornography laws were designed to protect children, not to prosecute them. Trying to fit the facts of a teen sending a sexually explicit email to a boyfriend into a law that was designed for adults who abuse children is a contortion. In addition, the vast majority

of the teens are not predators and do not intend to produce child pornography. Moreover, there is a potential resource issue. "If a 13-year-old taking a picture of herself is the equal of a predator taking a picture of children in sex acts, says danah boyd, at Harvard's Berkman Center for Internet and Society, "we won't have the tools to go after the people we need to go after."³⁸

Rather than initiating criminal charges or imposing significant long term consequences (such as expulsion), for an act that is more thoughtless and frivolous than intentional and malicious, it would be helpful to begin a dialogue about the repercussions of sexting. We should encourage teens to think before they post pictures and delete any sext messages that they receive, rather than forward them. Using the scenarios above and the tragic consequences for Jessica Logan as a teachable moment, parents, educators and law enforcement can "begin a dialogue about the unintended consequences of going too far online."³⁹

The Internet is a wonderful tool for students when used ethically and responsibly. Providing the tools for teens to think critically about their conduct and "make ethical choices about the content and impact on oneself, others and one's community of what one sees, says and produces with social media and digital devices."⁴⁰

IV. REFERENCES

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