

WHY SEXTING IS “VEXING”¹

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“Sexting” – the act of sending sexually suggestive or explicit images between electronic devices, specifically cell phones – has received increasing attention of late not only because of the numbers of young people who are either aware of or have engaged in this practice but also due to the potential for serious legal, social and personal safety consequences that accompany it. These consequences include: 1) Serious criminal charges and possible registration as a sex offender, a designation that could change someone’s life permanently; 2) embarrassment and humiliation that may be only temporary or could seriously interfere with educational or employment opportunities, with long-term social costs; and 3) in worst-case scenarios, physical and/or emotional harm to self or others.

Individuals – and particularly young people – engage in sexting for different purposes, ranging from communication between current or potential romantic partners as well as a virtual alternative to physical sexual activity to more serious interactions such as cyber-bullying or other threatening – including predatory – behaviors. Sexting can be a thoughtless and impulsive act involving absolutely no intent to do harm – or it can be premeditated and even dangerous, such as a tool for harassment and stalking. Thus, the situational nature of sexting – and the nature of the persons engaged in it – demands a variety of well-tailored responses. What may be the appropriate reaction in one instance may be too heavy-handed – or too lenient – in another.

For example, you might discover two teens in a relationship have willingly shared sexually explicit images “for their eyes only.” In this situation, the best response may be to ensure they are provided with information about the potential dangers associated with sexting as well as comprehensive sexual health education that can help enhance their ability to distinguish between healthy and possibly harmful behaviors. On the other hand, if an adult is involved in the receiving, sending and/or possession of such images the legal system should be engaged without question. But these are just two possible situations out of many – legal intervention might also be necessary if only minors are involved, depending on the severity of the circumstances, such as broad dissemination of an image coupled with harassing activity. The system response should be proportional to the case presented.

The fact-specific nature of sexting requires a flexible and nuanced systemic response that spans the broad continuum from short-term, basic prevention tactics to more punitive and intervention-based strategies that could carry life-altering consequences. Neither the law nor the family nor the schools are the sole source of an answer and for this reason policy makers, public safety officials and educators are still working – and in some instances, struggling – to

¹ The National Conference of State Legislatures (hereinafter NCSL), <http://www.ncsl.org/default.aspx?tabid=18006#sexting>, last visited Apr. 19, 2010.

craft balanced solutions. It's not for nothing that the National Conference of State Legislators refers to "sexting" as a "vexing issue."²

Background Data

In late 2009 the Pew Internet and American Life Project at the Pew Research Center (hereinafter "Pew study") released findings from a telephonic and paper survey of 12-17 year olds asking about sexting.³ According to the responses, four percent of the teens with cell phones said they had sent "sexually suggestive nude or nearly nude images of themselves to someone else via text messaging."⁴ Fifteen percent of the teens with cell phones had received similar images.⁵ The Pew study data also showed no difference in the results by gender – both girls and boys were equally likely to have sent a sexually suggestive image to someone else.⁶ Although the older teens in the group were more likely to have sent or received images, the study found "little variation across age groups in the likelihood of having sent a sexual image by text."⁷ The results did show, however, that teen responsibility for payment of cell phone bills had an impact on the likelihood of sending sexts (17 percent of those who paid their own bill versus three percent of those who did not).⁸

These numbers may not be as high as one might expect given the amount of attention sexting has received in the media but the study also noted that this is "a topic with a relatively high level of social disapproval" and it is possible that survey respondents may not have been entirely candid, leading to underreporting.⁹ Other studies utilizing online surveys have shown a wide array of responses, including these three: 1) The National Campaign to Prevent Teen and Unplanned Pregnancy and several research partners released "Sex and Tech," a 2008 study showing that 19 percent of teens aged 13-19 had sent a "sexually suggestive picture or video of themselves to someone via e-mail, cell phone or by another mode," and 31 percent had received "a nude or semi-nude from someone else";¹⁰ 2) Cox Communications, the National Center for Missing and Exploited Children and Harris Interactive released a study in 2009 stating that nine percent of teens ages 13-18 "had sent a sexually suggestive text message of email with nude or nearly nude photos," while three percent had forwarded one and 17 percent had received one;¹¹ and 3) MTV and the Associated Press conducted a poll in 2009 and reported

² *Id.*

³ Amanda Lenhart, Pew Internet and American Life Project, Pew Research Center (hereinafter Pew), *How and why Teens are Sending Sexually Suggestive Nude or Nearly Nude Images via Text Messaging* (Dec. 2009), www.pewinternet.org (last visited Apr. 19, 2010).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Pew, *supra* note 3.

¹⁰ *Id.* citing National Campaign to Prevent Teen and Unplanned Pregnancy, http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf (last visited Apr. 19, 2010).

¹¹ Pew, *supra* note 3, citing Cox Communications Teen Online & Wireless Safety Survey, in Partnership with the National Center for Missing & Exploited Children (NCMEC) and John Walsh (May 2009).

that one in 10 young adults between the ages of 14 and 24 “have shared a naked image of themselves with someone else” and 15 percent have received a similar image. Eight percent “have had someone send them naked images of someone else they know personally.”¹²

According to the Pew study, in 2009 83 percent of 17 year olds and 58 percent of 12 year olds own a cell phone.¹³ These numbers have increased significantly since an earlier survey in 2004.¹⁴ Text messaging by young people is also increasing, with another recent study from the Pew Internet and American Life Project showing that in September 2009 54 percent of teens surveyed texted daily and half sent 50 or more texts a day, totaling 1,500 texts a month.¹⁵ The technology is here to stay – and will only improve in sophistication and ease of use over the coming years – which means that sexting is an issue that not only will not go away but will also evolve in complexity. How we choose to handle sexting today is fundamental to how the issue will be treated – and understood – in the future.

Law and Policy Response

The National Conference of State Legislatures reports that as of March 15, 2010, 15 states have introduced or are considering bills that address sexting.¹⁶ In 2009, 11 states considered the issue.¹⁷ Various state approaches include education, deterrence and penalties (both misdemeanor and felony), generally in the form of stand-alone sexting laws or bills – or at least considered in the context of dissemination or possession of child pornography, among other related laws.¹⁸ These legislative actions seem to be addressing at least some of the concerns about “unintended consequences” when only minors are involved in sexting – overly punitive systemic responses that can turn a teen’s bad decision into a lifetime determined by the negative consequences associated with a criminal conviction and sex offender status. At the same time, these important concerns have to be balanced with criminal penalties that should be kept as options in egregious cases.

In Vermont a law was passed in 2009 that creates penalties for a “minor electronically disseminating indecent material to another person” but also allows for exceptions based on the existence of any prior delinquency adjudications and allows for expungement of records related to violations of this section of the law when the minor turns 18.¹⁹ Different penalties are provided for adults.²⁰ A Florida bill under consideration this year proposes a blend of criminal

http://www.cox.com/takecharge/safe_teens_2009/media/2009_teen_survey_internet_and_wireless_safety.pdf (last visited Apr. 19, 2010).

¹² Pew, *supra* note 3, citing MTV-AP Digital Abuse Study, Executive Summary. AThinLine.org.

http://www.athinline.org/MTV-AP_Digital_Abuse_Study_Executive_Summary.pdf (last visited Apr. 19, 2010).

¹³ Pew, *supra* note 3.

¹⁴ *Id.* In 2004, 64 percent of 17 year-olds and 18 percent of 12 year-olds had cell phones.

¹⁵ Amanda Lenhart, Rich Ling, Scott Campbell, and Kristin Purcell, Pew Internet and American Life Project, Pew Research Center, *Teens and Mobile Phones* (Apr. 2010), www.pewinternet.org (last visited Apr. 20, 2010).

¹⁶ NCSL, *supra* note 1, at <http://www.ncsl.org/default.aspx?tabid=19696> (last visited April 19, 2010).

¹⁷ NCSL, *supra* note 1, at <http://www.ncsl.org/default.aspx?tabid=17756> (last visited April 19, 2010).

¹⁸ *Id.*

¹⁹ 13 V.S.A. 2802b (Vt. 2010).

²⁰ *Id.*

sexting and it is likely that a thorough examination of this issue will result before laws are changed in any significant manner.³⁴

Next Steps: Recommendations for Minnesota

As legislators expand their understanding of sexting, they should look to the actions other states have undertaken thus far and select those responses that are reasonable in application. Many county attorneys in Minnesota already employ a situational analysis when it comes to sexting and utilize alternatives to criminal prosecution (or even decline prosecution) when only minors are involved and the circumstances warrant. Appropriate criminal penalties should still be included in any proposed legislation but given that many offenders are minors every attempt should be made to ensure that if a penalty is applied against a minor it will not carry a significant consequence such as sex offender registration unless there is a compelling reason to do so (adults, however, should continue to be subject to registration if the conviction is a qualified offense). In the case of minor offenders (specifically those without prior adjudications), opportunities for no criminal charges (but not without exception, as mentioned above), diversion, education, non-criminal penalties and expungement of records related to sexting offenses should be explored. Prevention-related activities such as school-based education and public service announcements should be included alongside any intervention measure in order to raise awareness about the issue among teens and adults alike.

Finally, discussions around sexting provide yet another opportunity for policy makers, educators, parents and the general public to consider the issue of comprehensive sexual health education. Teens engaged in sexting – even if it’s “just” virtual sex – need information about healthy sexuality as well as coercive and other harmful sexual behaviors. Prevention and intervention activities implemented concurrently and in a thoughtful manner will not only help teens to better understand the possible consequences of sexting but will also help parents, guardians, teachers, friends and others to engage in a meaningful dialogue about sexuality with young people who seem to need it now, more than ever.

³⁴ S.F. 2945, 86th Leg. (Mn. 2010) and H.F. 3103, 86th Leg. (Mn. 2010)