

## IS CRIMINALIZATION THE RIGHT APPROACH TO TAKE TO PREVENT OR REACT TO SEXTING?

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### ABSTRACT

Sexting (sexually explicit text messaging) has become a serious problem for our youth, our society, and our legal system. Our legal system, with society, is grappling with the legal mechanisms by which we control sexting and how we punish those who illegally sext.

### INTRODUCTION

The proliferation of “sexting” has become a serious problem in multiple ways: legally, societally, and sociologically. Legally, the problem is that the legal community is using child pornography laws to deal with sexting, causing some unintended results. Societally, the issue is, in a broader way than just the legal approach, what should be done about sexting. The sociological issues involve the impact of sexting on children and young adults. Thus, sexting is a difficult subject with which to grapple. Palfrey (2010) notes that “relevant youth practices are shifting very quickly. Social norms in digitally mediated environments are extremely powerful. These norms often trump law and public policy and, in turn, pose special problems for those who seek to impose traditional methods of direct regulation (p. 6).” Lynn (2010), indicating the sense of urgency to develop appropriate strategies to deal with sexting and other technology-oriented youth practices, argues that “American society has existed in a perpetual state of moral panic regarding the impact of technologies on the development of youths since the early twentieth century (p. 4).”

The National Campaign to Prevent Teen and Unplanned Pregnancy and Cosmogirl.com reported on a poll of almost 1300 teens and young adults between the ages of 13 and 26. They found that 22% of teen girls and 18% of teen boys have sent or posted nude or semi-nude images of themselves electronically (Gifford, 2012). Lloyd and Suellentrop (2011) report online and cell phone access and usage have risen in the last ten-plus years; they also report that more than 30% of young adults (ages 20-26), both men and women, have acknowledged that they sexted. Further, they report that these young people see sexting as *flirty*; they also accept that such messages and images will be seen by others than those to whom they sent it. These youngsters

also rationally understand that sending such content can have serious negative consequences. McLaughlin (2010) likens preadolescents to actors who are experimenting with different personality facets in their efforts to determine who they are, as part of the process of personality identification. It is then arguable that this is no more an issue to youngsters in terms of normal, though risky behavior, than singing in the shower or primping in front of a mirror with one's girl friends at a sleepover party.

Unfortunately, the potential consequences of sexting are radically different than singing in the shower to find out if one is going to be the next superstar. Sexting raises all sorts of difficult problems, not the least of which is a definition of what it is. Indeed, the concept of sexting is a problem, as it appears to have become a word only fairly recently. Parker (2009) reports that the earliest known use of the term "sexting" is in 2005, in a newspaper report and that the second edition of the 2005 New Oxford English Dictionary contains no definition of sexting. Thus, sexting and all the associated issues, legal, societal and sociological, are all recent developments and, as such, there are still many, many questions associated with them.

### **Sexting: How It Happens and Why It's Bad**

Sexting involves the sending or posting of sexually suggestive text messages and pictures via electronic means (Palfrey, 2010; Parker, 2009). It has also been described as the exchange of sexually explicit messages electronically (Palmer, 2010). Further, sexting has been defined as the practice of youngsters writing sexually explicit messages and/or creating sexually explicit pictures of themselves or others and then sending those materials to peers (Sacco, Argudin, Maguire, Tallong and Cyberlaw Clinic, 2010). Sweeney (2011) defines sexting as the transmission of nude or sexually explicit images of themselves or their peers via cell phones or over the Internet. Further, she suggests that sexting is a normal teenage behavior: the problems associated with sexting stemming from teens' poor impulse control and risk assessment abilities. That is that teens engage in these behaviors without thinking about possible consequences to their actions. Gifford (2012) reports that youngsters sext to flirt, to send a present to a boy/girlfriend or as a joke. It is prompted by peer pressure and is "a by-product of our highly sexualized culture resulting in a casual attitude towards sex (Gifford, p. 1)." Gifford points out that sexting is a combination of the words sex and texting and that it is the act of sending or posting sexually explicit photographs via cell phones or on the Internet.

Sacco et al., (2010), report on a recent survey on sexting among teens and young adults in the United States. There are three main scenarios in which sexting occurs. First, images are exchanged between two romantic partners. Second, images are exchanged between romantic partners and then share them with others. Finally, images were transmitted by one person who wanted to initiate a romantic relationship with the recipient of the image.

Sexual solicitation and other problematic sexual encounters, internet-related bullying and harassment, access to problematic content inclusive of pornographic and self-harming materials and sexting have been identified as key issues in the realm of risky behaviors and safety online. These issues have been presented as being the core issues associated with sexting (Sacco et al., 2010). Gifford (2012) cites areas of serious harm that could accrue through sexting. First, when minors post inappropriate pictures, their physical safety can be at risk through bullying from

peers; such harassment can lead to serious and even fatal harm. The second form of online safety threatened by sexting is psychological: bullies target the subject of the inappropriate message or image for rumors and harassment. Such behaviors can cause emotional and psychological damage to a child's normal development: for example, trust is broken when others besides the intended recipient are allowed to view the materials by the intended recipient. Finally, Gifford cites reputational and legal harm as the third challenge to online safety. Once an image is posted, it is irretrievable. Thus, months or years later, the message or image may still be viewed: *a forgotten youthful indiscretion* can be turned into a public, distributable and permanent part of someone's life. Gifford suggests that consequences may be disciplinary in nature, a loss of scholarships or college admission, altered ability to gain employment and, most serious, the possibility of criminal charges being filed for possession, producing or transmitting sexted images. However there are worse consequences of sexting. There have been a number of teen suicides after a private picture sent to a boyfriend was widely distributed to students at school (Bowker and Sullivan, 2010). This is no way to say that sexting is strictly a teen problem. Remember that sexting jumps from 20 % of aged 13-19 to 33% of young adults ages 20-26. However, there should be means to protect minors especially when the content could be considered child pornography.

### **Legal Solutions or Problems?**

Sullivan (2010, p. 47) summarizes the legal dilemma: "teens who engage in the practice of 'sexting' are either treated as if they were pedophiles or released with a slap on the wrist." Further, it has been noted by many authors that sexting is not the same thing as child pornography as child pornography was originally envisioned and as definitions and sanctions associated with child pornography have developed: "sexting between underage parties is a very different thing than an adult exploiting children by making them participate in pornographic photos or films in which they are unwilling participants (Kaufman, 2010, p. 11)." Child pornography involves child abuse or exploitation of a minor by an adult through the actions of creating, possessing and distributing images of minors posed in the nude or in a sexually provocative manner. Child pornography laws were not intended to pertain to acts by children themselves, which is what sexting really is among teens (Gifford, 2012).

Moreover, there is apparently little consistency among jurisdictions about how sexting should be treated, i.e., as some classification of a felony or misdemeanor and the severity of the penalties imposed. Those who are charged with illegal sexting can include the creator of the image, the sender of the image, the recipient of the image and those who save the image. Penalties have ranged from incarceration and required registration as a sex offender to required counseling, community service, educational obligations to no penalties at all for instances where the jurisdiction has exempted sexting as a criminal offence (Gifford, 2010).

At this point, there are two legal avenues to address sexting, both in the criminal law: the use of child pornography statutes and the use of statutory rape charges. Child pornography statutes' purpose is to "eradicate the mistreatment, torture, and abuse of young children (Sayle, 2000, p. 274)." Child pornography statutes exist in all states and generally prohibit any activity which would facilitate, encourage, offer or solicit sexually explicit conduct of or with a child or another individual believed by the offender to be a child or any visual depiction of the conduct. Thus, a

teenager sending a sexually explicit image to another teenager would be subject to a criminal charge of child pornography, even though the sender of the image and even the recipient of the image were both minors. Those guilty of child pornography statutes are subject to required registration as a sex offender.

Statutory rape statutes were founded on precepts of concern that adults may coerce children into having sex, giving the adult power over the child and corrupting the child (Parker, 2009). Statutory rape is defined as “sexual intercourse with a person who is below the statutory age of consent (p. 8),” with an average age of consent being sixteen. States have carved out exceptions to the statutory rape laws relative to minors having sexual encounters with other minors, but the point is that most states still criminalize this behavior at some level. Sweeney (2011) notes that “Romeo and Juliet” exceptions to statutory rape laws have been used to prevent prosecution of minors having sex with each other if they are close in age: the twisted legal problem that sexting presents is that, under statutory rape laws, minors can actually have sex with each other legally, but they can be subject to criminal prosecution for merely sending a nude or semi-nude image of themselves to each other, even voluntarily. So, again, the question is: is criminalization the right approach to take to prevent or react to sexting?

Sacco et al., (2010) identified constitutional issues associated with criminal laws dealing with sexting. The weightiest issue is that of freedom of expression. The government has guaranteed via the First Amendment freedom of speech; there are indeed some prohibitions with regard to how freely we may speak, like prohibiting words that incite violence or defamation, but in general our freedom to freely express ourselves is great. One exception that has been long noted is child pornography: we are not free to engage in child pornography as, in the balance of rights between the disseminator of the speech and the subject of the speech (the child), the rights of the subject of the speech to be protected from the myriad harm of involvement in child pornography far outweigh the rights of the disseminator. One legal argument with using child pornography laws to prosecute sexting cases is that the harms that accrue as a result of child pornography are not as strong as those surrounding sexting: for example, sexting is often done voluntarily between two actors, both of whom are minors and so subject to the same kinds of protections.

One legal solution is to change sexting from a felony to a first degree misdemeanor, relieving the convicted teen of the requirement to register as a sex offender (Sullivan, 2010). Other laws would accomplish the same thing but place age limits on those defendants entitled to be relieved of the sex offender registration requirement. Sullivan (2010) very clearly opines that decreasing the penalty for sexting violations from a felony to a misdemeanor is appropriate for the “ill-conceived and foolish activity of sexting (p. 52).” Gifford (2010) found that some jurisdictions are decriminalizing sexting: minors engaging in sexting would be diverted to the juvenile court system for processing. Parker (2009) concludes that teen sexting should never be a crime and that, if it is foolishly made criminal, these youngsters should never be subject to sex offender registration requirements as a punishment. Decriminalizing sexting, however, has its own pitfalls: it limits the ability of authorities to investigate claims of sexting which, even if decriminalized, are still hurtful in a variety of ways.

McLaughlin (2010) developed a model teen sexting conduct statute which includes a section on statutory intent; that intent is to create a consistent legal response across state and federal lines to deal with the creation, possession, and distribution of teen sexting images. Further, the intent is

to promote early intervention, which speaks to the issues of prevention, detection and administrative policies to avert harm in the first place. McLaughlin is also a proponent of diversionary programs to teach teens about sexting and its negative consequences, as well as to punish those who sext with the intent to cause emotional harm, embarrassment or stigmatization of those depicted. Finally, the model statute directs that the juvenile court system be utilized for sexting offences, rather than the adult criminal justice system, to avoid potentially egregious and disproportional punishments like sex offender registration for offenders who do not fit the normal mold of those engaging in child pornography.

### **Potential Solutions**

Sexting, as with other electronic security issues, can be managed in four different ways, both by society, parents, and the legal system. Detection systems can be placed on the technology that allows sexting by youngsters by their parents/guardians to find out if the youngsters are engaging in unacceptable transmissions like sexting. Preventative measures can be taken to prohibit unacceptable transmissions before they happen, preventing any harm from even occurring. One of the easiest ways is to block text pictures on the kid's cell phone. This will prevent the child from sending or receiving an explicit picture via texting. However, this will not stop sexually explicit worded text messages or for nude photos to be transmitted via email or another digital medium. Administrative policies can be placed on youngsters by the appropriate authority figure to provide guidelines as to what online/Internet behaviors are acceptable and which are forbidden. Unfortunately, many of the administrative protection tools available for home PCs are not available for cell phones. Finally, reactive measures can be taken in the event that unacceptable and/or illegal behaviors have occurred (Nicholson, 2012). The problem with these solutions are not entirely effective. Especially in the case of reactive measures. Once the content is on the Internet and private computers, mobile devices and cell phones, there is very little chance of remediating the problem and removing all the content.

Palfrey (2010) suggests that a policy solution to the problem of sexting is a combination of approaches that address the causes and practices of sexting. Such a solution includes the use of direct regulation, the involvement of parents, educators, social workers, and pediatricians. Noting that privacy regulation is a massively difficult area of social and legal policy, Palfrey recognizes that privacy rights are under siege in our efforts to control personal data access. He suggests that youth be persuaded to be more attentive to their own personal privacy rights: self-protection is a pathway to convince youth not to engage in sexting or any other online sharing of personal information. Palfrey provides five policy approaches to online privacy concerns of youth:

- We should understand the manner in which youth engage in “digital life” and how they understand the concept of private vs. public
- Adults should responsibly acknowledge their roles in the application of privacy rights to youth and, in good faith, whether the application is violative of rights
- Educate youth media literacy skills, without sole reliance on “scare tactics”
- Businesses need to bolster their privacy policies to make them stronger and more readily accessible and understandable by anyone utilizing their online services

- We need to review the self-regulatory nature of privacy frameworks to reassess how privacy policies have worked, whether they have been efficacious and how they can be better constructed to preserve privacy rights in appropriate measures

Lynn's (2010) research on media sources investigation of appropriate responses to sexting yielded a number of suggestions. Parents were urged to become involved with their children by talking with them about sexting and its consequences. Gifford (2010) suggests that adults and teens engage in a dialogue about sexting: to encourage teens to think about what they are doing when they sext and what the potential consequences might be, even how they will handle those potential consequences if they present themselves. Other suggestions included surveillance of youth, restriction or deprivation of the ability to engage in sexting. Of course, legal sanctions have been not only suggested, but implemented as well, with mixed results at best. Palmer (2010) echoes the suggestion for education: youth must be educated to the potential harm sexting can cause to themselves and others. Sullivan (2010) also found suggestions of education as a potential solution, the education related to counseling required as part of a legal mandate for those formally accused and found guilty of sexting: a "re-education" program was proposed to enable teens to better understand why sexting is wrong. Additionally, counseling, community service and life-skills training have been suggested to augment potential legal sanctions (Sullivan, 2010).

### CONCLUSIONS

Sexting is a problem that needs to be discussed as part of ethical behavior in schools and universities. Parents and students need to be educated on the issues of sexting and the consequences that once content is posted or distributed, there is no getting it back. Teachers and professors need to have conversations with their students on ethical uses of technology and the devastating effects it can on their lives or the lives of others.

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 services.' (Gifford, 2010, p. 5).

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