

## **Sexting at Sixteen: Reflections on Legal and Professional Issues**

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### **Abstract**

Sexting, or the act of sending, receiving, or retaining sexually explicit text messages, pictures, or video using cellular phones, represents a significant problem with growing legal implications for adolescents. With 75% of 12–17 year-olds in the United States owning cell phones and with teenagers averaging over 3,000 texts per month, the risk for minors engaging in sexting activities is high. Unfortunately, many mental health professionals are not aware of either the extent of sexting among teenagers nor the risks of sexting from a legal perspective. This article provides a commentary and professional reflection on the issues.

**Keywords:** Sexting with children, Sexting, children in court Setting, child counseling

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With 75% of 12–17 year-olds in the U.S. reporting owning cell phones, with more than half of teens sending text messages on a daily basis (Lenhart, Ling, Campbell, & Purcell, 2010) and with teenagers averaging over 3,000 texts per month (Nielsen Company, 2010) the risk for minors engaging in sexting activities is notable. In fact, in an Associated Press/MTV poll of 600 teens, 18% of teens have reported receiving a naked picture or video from another person and 10% of teens reported sending naked pictures or videos of themselves to others. Even more concerning is that 17% of teens report forwarding images that they have received on to others, without the consent of the individual depicted in the image (Knowledge Networks, 2009).

Without qualification, then, the risk of sexting is significant. Still, many mental health professionals are unaware of the legal implications which can result from such an activity. Looking within the legal community, one of the most well publicized legal cases involving consensual sexting among underage teenagers began when images of three 13-year-old somewhat scantily clad adolescent females in Pennsylvania were discovered by teachers on the cell phones of male classmates in the Tunkhannock School District in 2008 (Miller v. Skumanick, 2009). Almost immediately school officials provided the district attorney (D.A.) with the confiscated cell phones. Ultimately the D.A. decided the images were provocative and that the girls were accomplices in the production of child pornography.

The D.A. subsequently threatened felony child pornography charges against the youth depicted in the images, as well as those who were found to have the sexts stored on their cell phones unless they participated in a counseling remediation program, probation, and drug testing. Understand, the penalty for being found guilty of these charges - child pornography - could result in a lengthy prison term and a permanent criminal record (Miller v. Skumanick). While all of the students found in possession of the images agreed to participate in the reeducation program, the teens depicted in the sexts did not, arguing that they were not involved in the images' dissemination to the individuals who received the images. The three filed a lawsuit alleging that their First Amendment right to free expression had been violated.

Following two years of legal proceedings and an appeal to the United States Court of Appeals, the Third Court of Appeals ruled that the teenagers could not be prosecuted under child pornography laws solely for appearing in the cell phone images (Miller v. Mitchell, 2010). United States District Judge James Munley issued an injunction asserting that the photographs did not constitute child pornography under Pennsylvania law and that the youngsters were protected under the First Amendment. In this case, while these teenagers

were ultimately not convicted of possession or distribution of child pornography, the case exemplifies the potentially far-reaching legal consequences associated with digitalized nude or seminude images and the subsequent distribution of easily reproducible sexts.

Putting this into perspective, this case represents one of a growing number of sexting cases with significant legal implications. Understand, this case actually began with a fairly typical, impulsive childhood act made when, reportedly, two of the 13-year-old girls were complaining about the heat on a hot summer night and removed several pieces of clothing, while remaining in undergarments, to feel cooler while at a family backyard swimming pool. Their friend, likely thinking it harmless, used her cell phone to take a photograph of her friends clad in their undergarments. Unfortunately, what began as a summer swim soon evolved into a major court ruling with far reaching implications.

While this ruling ultimately possessed significantly positive implications in protecting adolescents, other cases have not been as positive and have led to adolescents with convictions of child pornography and placement on the registry for sex offenders. This paper, in a basic way reflects on a sampling of these legal decisions, examines the implications for youth, provides a clear definition of sexting, and examines implications specifically for mental health professionals working with adolescents. Given that such cases, all based on the use of new “smart phone” technology, are so new, the implications for children are profound. It is our hope that this commentary will provide an up-to-date reflection for mental health professionals and potentially stimulate discussion on risks for children from smart phone technology which simply did not exist a few scant years ago.

## Background

Advances in cell phone technologies have resulted in new challenges related to privacy, safety, and legal rights. In fact, cell phone ownership and usage has become increasingly commonplace among adolescents, with 33% owning smart phones that connect to the Internet (Nielsen Company, 2010), and with 75% of 12–17 year-olds reporting owning cell phones (Lenhart, Ling, Campbell, & Purcell, 2010), new technological advances allow typical cell phone users to send digital text messages, as well as images through the Internet almost instantaneously.

Relative to this paper, what is sexting? For the purposes of this discussion, “sexting” can be defined as the act of sending, receiving, or retaining sexually explicit text messages, pictures, or video using cellular phone or other digital media technology. While sexting most commonly occurs between cellular phones users, sext messages can also be transmitted through e-mail, instant messaging, or through online social networking sites. An essential component of a sext is that it is produced and disseminated with the full volition of the person depicted. As such, sext messages differ fundamentally from sexually explicit language or images being distributed without a person’s consent.

The National Center for Missing and Exploited Children (2011) notes that child pornography is defined as any visual depiction (photograph, film, videotape, picture, or digital image) produced by electronic, mechanical, or other means, where production involves a person under age 18 engaging in sexually explicit conduct. Thus, all cell phone images, or sexts, depicting teenagers under the age of 18 may fit the legal definition of child pornography. Since 17% of teens report sharing naked videos or pictures that they have received with other individuals beyond the intended recipient (Knowledge Networks), both the consensual and nonconsensual distribution of sexually explicit text messages, images, and videos have important social, emotional, and legal implications for children, teens, and families. We argue that it is essential for mental health professionals working with youth to be knowledgeable about sexting as many adolescents, parents, and professionals are simply unaware of the risks associated with such transmissions.

### *Legal Considerations*

Legal outcomes of sexting can change a life course. In fact, when sexting occurs, the person depicted, the photographer, or any individual who forwards sexts can face legal charges. A transmitted image of oneself or another person, in a seminude or nude state, can be interpreted as the transmission of child pornography for individuals under the age of 18.

A review of legal cases across the United States indicates that sexting has resulted in powerful and often untoward consequences for youth. A review of news articles across the United States indicates that at least 41 states have prosecuted sexting cases. Concurrently, legislation is changing; 15 states have passed laws involving sexting with youth, with another 11 states having proposed changes in regulatory law, and 6 states having failed legislation proposals as of September 2011. Figure 1 illustrates the current state of legislation related to sexting in the United States. To further understand the issues facing children, teens, and families, consider the following sampling of cases which illustrate how adolescent risk-taking behaviors can result in legal adjudication. Following a brief discussion of each case the legal outcomes are reviewed.

#### *Case Illustration #1*

In 2005, a Florida juvenile court charged a 16-year-old girl and her 17-year-old boyfriend with the production of child pornography. This decision followed the discovery of digital photographs that the two teens had taken of themselves while engaged in sexual activity. This case was prosecuted despite the fact that the images were taken consensually and were never distributed beyond the couple (A.H. v. Florida, 2007).

#### *Case Illustration #2*

In 2009 a 14-year-old teen in New Jersey was charged with possession and distribution of child pornography after she posted nude photos of herself on Myspace.com for her boyfriend and she erred in not using privacy settings to limit them from being viewed by others. These charges can carry a maximum of 17 years of incarceration along with required registration as a sex offender (DeFalco, 2009).

### *Case Illustration #3*

In 2010, after nude cell phone images of one student were forwarded, three Washington state middle school students were charged with felony distribution of child pornography. These charges can carry a maximum of 30 days incarceration in a juvenile detention facility along with required registration as a sex offender (Pawloski, 2010).

### *Case Outcomes and Legal Decisions*

In each of these cases the legal charges were eventually reduced; i.e., in Florida, the teens were convicted of delinquency; in New Jersey, the teen was placed on probation and required to undergo therapy; and in Washington, the charges were reduced to misdemeanors with the expectation that they would be dropped pending completion of a juvenile court diversion program (A.H. v. Florida; Associated Press, 2011; Q13 Fox News Online, 2010). However, these cases still clearly emphasize the legal implications that sexting can have, including potentially facing child pornography charges and sex offender registration. Unfortunately, these case examples are not exceptional. In fact, as noted, legal charges related to sexting have been filed in 41 states across the United States, with one Utah juvenile court attorney reporting that he sees a least one youth sexting case filed weekly (Park, 2010).

Tragically, legislation across the United States does not adequately address changing technology and teen use of technology that places minors at high risk for engaging in sexting activities that, while consensual, are illegal. Still, the laws are changing. Since 2009, 32 states have considered legislation related to sexting, with the majority of bills aimed at decreasing penalties for minors engaged in consensual sexting (National Conference of State Legislatures, 2011). For example, the State of Connecticut differentiated between felony child pornography and underage sexting by creating a misdemeanor for certain acts of sexting or acts involving electronic child pornography by persons 13 to 15 years of age for transmission and 13 to 17 years of age for possession (Connecticut Public Act 10-191, 2010). Similarly, in Illinois, a bill was signed into law in 2010 reducing penalties for consensual sexting to a misdemeanor, with penalties increasing for further distribution, up to a felony charge for distribution on the Internet. (Illinois Public Act 096-1087, 2011).

## Social-Emotional Implications

Clearly, the harmful effects of sexting can extend beyond the courtroom, with many teens experiencing emotional distress, bullying, alienation, and loss of privacy following the transmission of intimate images. For clinicians, such points are notable. Moreover, with over 20% of teens reporting having either sent or received a sext, the risk is high for teens to experience depression, isolation, hopelessness, and even suicidality as a result of sexting (Knowledge Networks, 2009). As powerful illustration, in 2008, 18-year-old Ohio resident Jessica Logan committed suicide after a nude image that she had previously sent to her boyfriend was distributed to hundreds of classmates and students at area schools after they broke up (Kranz, 2009). Similarly, 13-year-old Floridian Hope Witsell committed suicide in 2009, following months of bullying and taunting after she sent a topless image of herself to a boy and it was forwarded to students in area schools (Meacham, 2009). Certainly, this suicide alone and the implications on the family suggest that therapists can offer important assistance in primary, secondary, and tertiary ways.

In another important case, Angie Varona, the subject of an ABC News Nightline story, moved schools two times and then began home-schooling after pictures she took at age 14 spread across the internet. At present, her name results in over 600,000 Google hits (ABC News, 2011). Certainly these two cases poignantly illustrate the devastating consequences that can be associated with sexting among youth.

How can we support youth coping with issues related to sexting? Fundamentally, adolescents, parents, and school personnel are unlikely to fully understand all the risks involved in sexting. Because children's reasoning is still developing and poor planning, poor decision-making, and a lack of understanding can create greater risk (Steinberg & Scott, 2003), not all teens may recognize that the transmittal of a nude or seminude image is illegal and may violate child pornography laws. Additionally, rather than only working with students following a sexting crisis, there are preventative activities that mental health providers can take to promote awareness of the risks associated with sexting. Psychoeducational, school based groups are one example of a helpful illustration, and parent education workshops is another community option.

From a legal perspective, for a teen who receives unsolicited sexts, an affirmative defense may exist in numerous states as well as in Federal court, if one or more of the

following criteria are met: (a) fewer than three visual images of child pornography are possessed, (b) the teen did not knowingly purchase, procure, request, or take other action to cause the images to come into their possession, (c) the teen promptly took reasonable actions to destroy each image, (d) the teen reported the matter to a law enforcement agency and did not allow any person other than law enforcement access to the depictions, (e) the teen reasonably believed that the person depicted was at least 16- to 18-years-old and not severely cognitively impaired, or (f) the images were for a bone fide artistic, medical, scientific, or educational purpose (National District Attorneys Association, 2010). It is essential to be aware of legislation in the specific state where one works, as there are important legislative differences by state.

### Conclusions

With the legal implications of sexting often encompassing charges of child pornography as well as placement on a sex registry adolescents, parents, and mental health professionals can benefit from a thoughtful examination of the legal implications associated with the transmission of certain images through smart phone technology. In fact, mental health professionals working with youth have an unprecedented opportunity to act as catalysts for positive change in this area by educating youth, by educating professionals working with youth – teachers and school-based professionals for instance who might educate teenagers in those venues, and by helping to educate society about the risks associated with these acts under present laws.

In this article it has been suggested that since the risks of sexting between and among youth is so high, and because youth do not always understand the implications of sexting, and because adolescent reasoning is not fully developed, it can be beneficial for society to develop laws specific to teenagers engaged in this activity. Both specific cases involving sexting were explored and the status of case law was highlighted to provide readers with a timely understanding of the issues.

Clearly the risk of sexting is high among teenagers. It is also notable that a number of victims have reacted negatively, including committing suicide, and it was also noted that some of those who have forwarded images have been prosecuted for having engaged in child pornography. Given such negative outcomes for all involved, thoughtful legislation specific to adolescent developmental needs can make a profound difference in the lives of the victims,

transgressors, and their families. The challenges are great. The positive outcomes are potentially even greater.

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