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by Miranda Jolicoeur and Edwin Zedlewski

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Discussion Paper

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What is Sexting?

“Sexting” is defined in Wikipedia as the act of sending sexually explicit messages or photos electronically, primarily between cell phones.¹ Although the word did not exist before 2008, sexting was a finalist for the “word of the year” by the New Oxford American Dictionary in 2009.

Sexting takes advantage of modern communication technology to send messages or pictures to one or more parties. While young people typically practice sexting, other age groups sext as well.²

Sexting is not just a U.S. phenomenon. Reports of sexting have been filed in the United Kingdom, Australia, Canada and even China.

Sexters largely rely on cell phones, which are enormously popular among young people. Estimates suggest that between 73³ and 87⁴ percent of youth own cell phones. Moreover, teens stay digitally connected. Some 89 percent have a profile on a social networking site like MySpace or Facebook.⁵

Not surprisingly, the motivations for sexting are rooted in romance and socialization. Among teens who have sent sex messages or photos, 69 percent sent the message to a boyfriend or girlfriend, 39 percent sexted to someone they dated, and 30 percent sexted to someone they wanted to date.⁶

How Prevalent is Sexting Among Youth?

Estimates of sexting prevalence found in youth surveys vary considerably, suggesting that from 4 to 19 percent of youth have engaged in sexting. Two primary explanations for these differences exist: who was targeted by the survey and how sexting was defined.

The National Campaign to Prevent Teen and Unplanned Pregnancy, in partnership with Cosmogirl.com, conducted an online survey with 653 teens aged 13 to 19 and 627 young adults aged 20 to 26. The vast majority (87 percent) owned cell phones. When sexting was defined as sending a sexually suggestive message, 38 percent of the teens said they had sent sexts, Nineteen percent of teens said they had sent nude or semi-nude photos.

¹ See <http://en.wikipedia.org/wiki/Sexting>.

² See, for example, Leshnoff, J., “Sexting Not Just for Kids,” *AARP Magazine*, November 2009. Available at http://www.aarp.org/family/love/articles/sexting_not_just_for_kids.html

³ Cox Communications, National Center for Missing & Exploited Children, and John Walsh, *Teen Online & Wireless Safety Survey: Cyberbullying, Sexting, and Parental Controls*, Cox Communications, May 2009, available at http://www.cox.com/takecharge/safe_teens_2009/media/2009_teen_survey_internet_and_wireless_safety.pdf

⁴ National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults*, 2009, available at: http://www.thenationalcampaign.org/sextech/pdf/sextech_summary.pdf.

⁵ Ibid.

⁶ Ibid.

Among the young adults surveyed, 58 percent had sent sexually suggestive messages, and 32 percent had sent nude or semi-nude photos.

The Cox Communications Teen Online and Wireless Safety Survey, in partnership with the National Center for Missing & Exploited Children, conducted an online survey of 655 teens between ages 13 and 18.⁷ The survey defined sexting to include:

- Text messages and photos.
- Sending, receiving, and forwarding the messages.

They estimated that 19 percent of teens had been involved in sexting — some 9 percent said they had sent sexts and 19 percent had received sexts. Girls were twice as likely as boys to have sent sexts. Among those who sent messages, 60 percent sent them to a boyfriend or girlfriend; 11 percent sent them to someone they did not know.⁸

The Pew Internet and American Life Project, in partnership with the University of Michigan, conducted telephone surveys with 800 youths aged 12 to 17 and after surveying their parents. The survey was conducted using random-digit dialing until 800 parent and child interviews were completed. Approximately 135,000 calls were made to achieve the response goals.⁹ All child interviews were conducted after parental consent was granted. They estimated that only 4 percent of teens with cell phones had sent sexually suggestive photos and 15 percent had received sext messages, considerably lower estimates than those in previous surveys.

The MTV-Associated Press (AP) survey¹⁰ was conducted online and reached 1,247 respondents between ages 14 and 24. Among young adults (ages 18 to 24), 33 percent had been involved in some type of naked sexting, whereas 24 percent of younger teens had. Overall, 10 percent had shared a naked image of themselves; 45 percent of sexually active respondents (defined as having had sex in the past 7 days) had committed at least one sexting activity.

Some differences among prevalence estimates can be attributed to differences in target populations and definitions, and some to methodology. The Cox survey discussed above used the broadest definition. On the other hand, the National Campaign included 18- and 19-year-olds in their population, which captured the increased prevalence of older groups. The MTV-AP study combined responses of young people between ages 14 and 24, which helps explain some of their higher participation rates. In the Pew survey, two-thirds of the youth interviews were conducted via land lines, with parents in the vicinity. Also, Pew's cutoff age was only 17.

⁷ Cox Communications et al., *Teen Online & Wireless Safety Survey* (see note 3).

⁸ *Ibid.*, 36.

⁹ Lenhart, A., *Teens and Sexting: How and Why Minor Teens Are Sending Sexually Suggestive Nude or Nearly Nude Images Via Text Message*, Pew Internet & American Life Project, December 15, 2009, available at: <http://pewresearch.org/pubs/1440/teens-sexting-text-messages>.

¹⁰ Associated Press and MTV, *A Thin Line: 2009 AP-MTV Digital Study: Executive Summary*, 2009, available at http://www.athinline.org/MTV-AP_Digital_Abuse_Study_Executive_Summary.pdf

What Harm Does Sexting Do?

Sexting engenders a number of potential harms. Some are fairly immediate; others are more remote. Some involve only family and friends; others pertain to larger populations.

The most immediate harm arises from the humiliation of discovery — by parents, authority figures and unintended recipients. Besides humiliation, such discoveries may lead to punishments, such as loss of cell phone privileges or suspensions from school. Other forms of humiliation can occur if recipients are not pleased or if they forward the photos to others. Subsequent harm may also occur through bullying or harassment by recipients. In extreme cases, suicides have resulted.¹¹

Some cases of sexting have resulted in criminal prosecution because the transmission of sexually explicit images of children constitutes child pornography in the United States. For instance, six Pennsylvania high school students were charged with a combination of manufacturing, possessing and distributing pornography when the three girls were discovered to have sent nude and semi-nude photos to three boys.¹² Another Pennsylvania case involved child pornography charges for 16 students.¹³ One of the best-known cases is that of Phillip Alpert. Alpert distributed nude photographs of his former girl friend after a heated breakup. The 18-year-old Alpert was convicted of distributing pornography, placed on probation for five years and must spend 25 years on Florida's sex offender list.¹⁴

Such forms of unwanted notoriety may have longer term consequences. A conviction for a felony or a serious misdemeanor, for example, may create obstacles to college admissions. Sexually explicit photos on social media pages may come to the attention of prospective employers. Such photos may also prove embarrassing for future romantic relationships.

Is Sexting Illegal?

There is no legal definition of sexting, making it a legal gray area. State law enforcement has charged teens under child pornography laws for sexting because sexting falls within the purview of many states' child pornography laws.

¹¹ See Celizic, M., "Her Teen Committed Suicide Over 'Sexting'" *Todayshow.com*, March 6, 2009, available at <http://today.msnbc.com/id/29546030>, and Inbar, M., "'Sexting' Bullying Cited in Teen's Suicide" *Todayshow.com*, December 2, 2009, available at <http://today.msnbc.com/id/34236377>.

¹² Kahan, A., "National Teen Dating Awareness Month: Legal Quandry of Sexting," *In Cold Blog*, available at February 10, 2010, <http://incoldblogger.blogspot.com/2010/02/national-teen-dating-awareness.html>.

¹³ Hurtle, J., "Court Asked to Allow Prosecution for 'Sexting,'" *International Business Times*, January 15, 2010, available at <http://www.ibtimes.com/articles/20100115/court-asked-to-allow-prosecution-for-sexting.htm>.

¹⁴ Feyerick, D., and S. Steffen, "'Sexting' Lands Teen on Sex Offender List," *CNN*, April 8, 2009, <http://edition.cnn.com/2009/CRIME/04/07/sexting.busts/index.html>

State definitions of child pornography vary, but generally can include nude, semi-nude or sexually explicit images of minors. In some states an image of a girl in her bathing suit taken or sent under certain circumstances could trigger the child pornography laws. In other states, and under federal law, the image must depict the genitals or a sexual act.¹⁵ Although some sexting cases would not fall within the federal definition of child pornography, these images fall within the scope of some states' child pornography laws because constitutionally states have fairly free rein to outlaw visual depictions of minors engaged in sexual behavior. Not all state statutes mirror the federal statute, so images must be tested on a case-by-case basis under the relevant state child pornography statute to determine whether the image falls within the purview of the law. Without detailed legislation or case law on sexting, state prosecutors may have the freedom to decide whether to charge teens caught sexting with child pornography.

The Constitution and Sexting

U.S. pornography laws follow the First Amendment. Although non-obscene pornography is protected by the First Amendment, child pornography falls outside of the scope of the First Amendment because of the harm that befalls minors. If adults engage in sexting with other adults, their actions are protected from state intervention under the First Amendment, because sexting is considered free speech. However, when a minor engages in the same behavior it becomes criminal and harsh punishments follow the accused.

Children have constitutional rights, but not to the same extent as adults. Children have First Amendment rights even when they are on public school campuses.¹⁶ Children also have a right to privacy, however there is still a question as to what degree children are afforded this right, especially on school grounds, where most of their cell phones are being confiscated. Their parents have the right to play a role in their upbringing and have a right to be free from a certain level of state intervention in their parenting. Although children have constitutional rights, and their parents have the right to make important decisions in their child's upbringing, states have the right to ensure the protection of children because children cannot protect themselves and do not know or appreciate what is in their own self-interest.¹⁷ Therefore, courts could interpret these laws to find that states can prohibit teens from sexting images of themselves or others to protect them from any harm that could befall them because of their actions.

¹⁵ The federal child pornography statute, 18 U.S.C. § 1466A, makes it a federal crime to knowingly produce, distribute, receive or possess with intent to distribute: a visual depiction of any kind, including a drawing, cartoon, sculpture or painting, that depicts a minor engaging in sexually explicit conduct and is obscene; or depicts an image that is or appears to be, a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex; and such depiction lacks serious literary, artistic, political or scientific value.

¹⁶ *Am. Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 276 (7th Cir. 2001). See also Calvert, C., "Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law," *The Catholic University of America CommLaw Conspectus: Journal of Communications Law and Policy* 18 (1) (2009): 43.

¹⁷ *Ibid.*

Supreme Court Cases on Child Pornography

The Supreme Court has yet to interpret child pornography laws in terms of teen sexting, however holdings from other Supreme Court and state court cases on child pornography may hold clues as to how the Supreme Court will rule on this issue in the future. Constitutional rights have been a central theme in rulings concerning pornography. The First Amendment guarantees free speech, but not all speech is equal in value. For example, in *Roth v. United States*, the Supreme Court struck down state law that outlawed pornography, finding that individuals had a right to possess pornography that is not obscene.¹⁸ On the contrary, the Supreme Court has held that child pornography is not protected by the First Amendment and limits the right to free speech in this area.

The law on child pornography differs from laws on pornography because states have a special interest in the “well-being of [their] youth” and therefore they possess the ability to enact legislation to protect the welfare of minors.¹⁹ In *New York v. Ferber*, the Court found that child pornography is not protected by the First Amendment because of the harm child pornographers and pedophiles cause to minors. This ruling allowed states to combat child pornography with little restraint and confiscate any profits gained through the sexual exploitation of children.²⁰ Since this ruling, any visual portrayals of minors engaged in sexual acts are prohibited, even if those images are not considered obscene.²¹

The Supreme Court put child pornography beyond the scope of the First Amendment and justified its position because of the intrinsic, immediate and direct form of child abuse that occurs when the photograph of the child is taken.²² In addition to that initial harmful action, harm is caused by the permanent record of that specific child abuse, because the images and videos taken are then used, disseminated and distributed.²³ The Court also cited evidence that child pornography interfered with a child’s ability to form healthy attachments later in life. Such children may later have sexual dysfunctions or become sexual abusers.²⁴

Although child pornography is outside of the purview of the First Amendment, child pornography statutes still must meet constitutional standards, meaning that they must be narrowly tailored and cannot be broad catch-all laws. The Supreme Court, in *Ashcroft v. Free Speech Coalition*, struck down a provision of the Child Pornography Prevention Action (CPPA), declaring that it was unconstitutional because it was too broad. The Court found that the CPPA could not ban sexually explicit images that depicted persons

¹⁸ *Roth v. United States*, 354 U.S. 476, 484-485 (1957). The Supreme Court later set the test for obscenity in *Miller v. California*, when it ruled that not all pornography is obscene and set a test to determine obscenity. *Miller v. United States*, 413 U.S. 15, 24 (1973).

¹⁹ *New York v. Ferber*, 458 U.S. 747, 764-65 (1982); *FCC v. Pacifica Foundation* 438 U.S. 726 (1978)

²⁰ *New York v. Ferber*. 458 U.S. 747, 757.

²¹ *Ibid.*, 764-65..

²² *Ibid.*, 758, footnote 9.

²³ *Ibid.*,759,

²⁴ *Ibid.*, 758, footnote 9.

as minors if these people were not actually minors.²⁵ The ruling stated that child pornography must arise from the same harmful incident of child abuse that justified its creation.²⁶ Virtual pornography was not child pornography, because even though it attempted to depict children, the actual images taken were not of children; therefore there was no direct abuse to children.²⁷ Additionally, the court found that while it was probable that virtual pornography could lead to subsequent abuse of children by those that viewed it, the harm was too speculative to outlaw virtual pornography under the First Amendment.

The key in this case is that the Supreme Court found that no child abuse occurred when the virtual pornography was made and that the speculative harm to a minor was too distant to ban this type of pornography under the First Amendment. These two points resonate with teen sexting because teens are choosing to sext pictures of themselves, therefore they are most likely not abused in the process of taking the photo. The harm done to the teen by sending the explicit picture is speculative because there is no definitive harm done in sending the picture. However, the big difference between virtual pornography and underage sexting is that the images depicted in virtual pornography are not those of minors, while the images depicted in underage sexting are minors thus allowing the state to take a more active role in protecting the minor.

States' Interpretation of Constitutional Rights, Child Pornography Laws, and Sexting

Several states have interpreted their own child pornography laws in cases of youth sexting within the standards set by the Supreme Court. These case outcomes have been varied.

In Florida state prosecutors charged a 16-year-old girl and her 17-year-old boyfriend with producing, directing, and promoting child pornography because the couple took photos of themselves that depicted “sexual behavior.” They did not share the photos with any third parties. The state trial court convicted them on all three charges.²⁸ The girl appealed her conviction to the Florida District Court of Appeal, claiming the state had no reason to convict the couple because both parties were minors and the couple did not publish the pictures or share them with anyone.²⁹ She claimed that because of these factors the state had no interest in the case, unless its purpose was to prevent minors from having sexual intercourse. The Florida Supreme Court had already established that preventing minors from having sexual intercourse was a violation of privacy, because minors have a right to

²⁵ The images in question were considered virtual child pornography. The images were not actually of minors, but under the CPPA, the persons in question appeared to be “minors.” The concern stemmed from movies and other artistic expressions, like the movie *Romeo and Juliet*, where teenagers are depicted in sexually explicit images. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)

²⁶ *Ibid.*, 241-242.

²⁷ *Ibid.*.

²⁸ *A.H. v. Florida*, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007); See also Geyer, H., “Sexting — The Ineffectiveness of Child Pornography Laws,” *ABA Criminal Justice Section Juvenile Justice E-Newsletter* 3 (2009), available at <http://www.abanet.org/crimjust/juvjust/newsletterjune09/june09/sexting.htm>.

²⁹ *A.H. v. Florida*, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007).

have sexual intercourse.³⁰ The Florida Court of Appeals denied her claim and held that the couple had no expectation of privacy when it came to nude photographs. The Court of Appeals reasoned that unlike the privacy afforded to those engaging in sexual behavior, photographs signal an intention to keep a record.³¹ The photos had the potential to be shared among third parties and because of this it was unreasonable for either of them to think that the photos could be private.³² Although the court upheld her conviction, both the majority and the dissent commented on the lack of legal guidance in this area.³³

Additionally, the court found that even if teenagers have the right to privacy, the state has a compelling and overriding interest to prevent the publication of photos depicting sexual conduct by a child.³⁴ Florida courts have found that the state's interest is not limited to the production and dissemination of such material, but includes the need to protect minors from their immature judgment.³⁵

In Pennsylvania, the American Civil Liberties Union brought a state sexting case into federal court on the grounds of the First Amendment.³⁶ In late March 2010, the Third U.S. Circuit Court of Appeals in Philadelphia ruled that a prosecutor could not pursue felony charges against a teenage girl for disseminating semi-nude images of herself.³⁷ The case made headlines because the prosecutor only charged the girls featured in the photos and not the boys who possessed cell phone images of the girls. Furthermore, the prosecutor insisted that the girls go to re-education classes that focused on re-examining their gender role.

The Third Circuit found that the prosecutor infringed on the girls' parents' constitutional right to parent by forcing the girls and their parents to make a choice between prosecution for child pornography or attending re-education classes.³⁸ The court found that when the prosecutor forced girls into a re-education program it usurped their parents' role in making decisions for their children in these issues. Judge Thomas Ambro wrote, "An individual district attorney may not coerce parents into permitting him to impose on their children his ideas of morality and gender roles."³⁹ This case marked the first time a

³⁰ B.B. v. Florida, 659 So. 2d 256 (Fla. 1995); Geyer, H. "Sexting" (see note 28).

³¹ A.H. v. Florida, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).; Geyer, H., "Sexting" (see note 28).

³² A.H. v. Florida, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).

³³ Ibid. See also Geyer, H., "Sexting" (see note 28).

³⁴ A.H. v. Florida, 949 So. 2d 234, 238-239 (Fla. Dist. Ct. App. 2007).

³⁵ Ibid.

³⁶ Zetter, K. "ACLU Sues Prosecutor Over 'Sexting' Child Porn Charges," *Wired*, March 25, 2009, available at <http://www.wired.com/threatlevel/2009/03/aclu-sues-da-ov/>.

³⁷ Miller, C.D. "'Sexting' Teens Are Being Labeled Sex Offenders, Lawmakers Look to Change That," *CBS/Associated Press*, March 24, 2010, available at http://www.cbsnews.com/8300-504083_162-504083.html?keyword=sexting.

³⁸ Ibid.

³⁹ "Appeals Court Rejects Prosecution Threat in 'Sexting' Case." *Crime Report*. March 18, 2010, available at <http://thecrimereport.org/2010/03/18/appeals-court-rejects-prosecution-threat-in-sexting-case/>; Duffy, S.P., "3rd Circuit Bars Prosecution Threat for Teen 'Sexting,'" *The Legal Intelligencer*, March 18, 2010, available at <http://www.law.com/jsp/article.jsp?id=1202446406061>.

sexting case reached a federal appeals court. The judgment is important for determining what role law enforcement has in these types of sexting cases that involve minors.⁴⁰

How Are Current Laws Being Enforced?

Prosecutors and law enforcement in different jurisdictions are approaching the issue of teenage sexting and child pornography differently. Some teens are being prosecuted for child pornography and making deals that put them on state sex offender registries. Other prosecutors do not want to prosecute, and so they send youth to counseling.

One issue with inconsistency is that sexting cases do not all appear the same. Some pictures remain between teenagers in a relationship; other images are disseminated widely to a wide range of individuals, which arguably causes more harm to the minor. The ages of teens also vary; some as young as 12 and 13 are sexting.

In a widely publicized case, Florida teenager Phillip Alpert was convicted of child pornography with serious consequences. After fighting with his 16-year-old girlfriend, Alpert, age 18, transmitted nude photographs, given to him by his girlfriend when the two were dating, to almost 100 friends and relatives of his girlfriend. State prosecutors charged Alpert with child pornography and he pled guilty, thinking he would get a reduced sentence. However he did not know that this guilty plea would land him on the Florida sex offender registry list, changing his life forever. Alpert cannot attend college because of his sex offender status, cannot live with his father because of his father's proximity to a school, and is having difficulty finding employment because he has been convicted of a felony. He also attends classes with sex offenders convicted of serious aggravated sexual abuse against minors.⁴¹

In Vermont, a state court sentenced a high school student to three months in prison after he pled guilty to sexually assaulting two female high school students. Law enforcement had charged him with sexual assault after he transmitted sexually explicit images of himself to four female high school students. Two of these female students were underage, which allowed law enforcement to charge the teen with sexual assault of a minor. This charge could have resulted in life in prison for the teen. However, the Vermont legislature passed a sexting law that reduced the penalty for sexting, and the prosecutor dropped the charges regarding the underage sexual assault. In the end, the teen was charged with a reduced sexual assault charge.⁴²

In an Ohio case, law enforcement charged eight teens caught trading nude photos with possession and distribution of child pornography.⁴³ In another Ohio case, a 15-year old

⁴⁰ Hamill, S., "Students Sue Prosecutors in Cell Phone Photos Case," *New York Times*, March 26, 2009, available at <http://www.nytimes.com/2009/03/26/us/26sexttext.html>

⁴¹ Richards, R.D., and C. Calvert, "When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case," *Hastings Communications and Entertainment Law Journal* 32 (2009): 1-39.

⁴² Corbett, D., "Let's Talk About Sext: The Challenge of Finding the Right Legal Response to the Teenage Practice of "Sexting." *Journal of Internet Law* 13 (6) (2009): 3-8, 5.

⁴³ Koch, W., "Teens Caught 'Sexting' Face Porn Charges," *USA Today*, March 11, 2009, available at http://www.usatoday.com/tech/wireless/2009-03-11-sexting_N.htm

girl sent sexually explicit photos on her cell phone to classmates.⁴⁴ Prosecutors avoided criminal prosecution and instead offered to drop the charges if the teen abided by a curfew, lost her cell phone privileges and had supervised Internet access for three months.⁴⁵

Colorado prosecutors have chosen not to prosecute youth, but instead send them to counseling. In a few different sexting cases involving minors, prosecutors ordered counseling programs and did not use the legal system to punish the teens.⁴⁶ However, because this approach relies on the good faith of prosecutors, the judicial system and law enforcement, there is still potential for individuals in power to overstep their boundaries.

What are Legislators Doing About Sexting?

When legislators drafted the current child pornography laws, sexting (or even the possibility of sexting) was beyond imagination. However, in a new digital era with over three-quarters of all youth carrying cell phones, it has become a reality. For minors engaged in sexting, severe consequences can occur.

Several state legislatures are in the process of proposing or passing sexting legislation. Many states have lessened the punishments for teen sexting so that teens are not prosecuted under laws that were intended for child pornographers and pedophiles. However, the approaches are still scattered, and the punishment is on a wide continuum.

Many states opt to reduce penalties for teenagers rather than eliminate them altogether. North Dakota, Utah and Vermont have already passed legislation that reduces penalties for teenagers engaging in sexting. Fourteen other states are considering reducing penalties for minors so they are not punished under the same laws designed to punish child pornographers. Florida, Pennsylvania and Ohio, which have seen a lot of the media frenzy around sexting cases, are currently considering legislation to reduce penalties for teens engaged in sexting.

Legislation in Vermont reduced penalties so that minors will be dealt with as juvenile delinquents. Legislators also used a “Romeo and Juliet”⁴⁷ provision to protect majority-

⁴⁴ Shafron-Perez, S., “Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting,” *The John Marshall Journal of Computer & Information Law* 26 (2009): 431-453, 442.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, 440.

⁴⁷ These laws resemble similar state statutes which protect teenagers close in age from being charged with statutory rape. “Romeo and Juliet” statutory rape laws differ from state to state, but may provide an affirmative defense if the teens are close in age or reduce the penalties for statutory rape. For example, Connecticut’s laws minimize penalties for sexual intercourse between those close in age to a minor so that they cannot be prosecuted by child sex offense laws. If an individual up to two years older has sexual intercourse with a minor under the age of 13 the charge is first degree sexual assault, rather than statutory rape. Conn. Gen. Stat. § 53a-70 (a)(2). The penalty is lessened to second degree sexual assault if the minor is between the ages of 13 and 16. Conn. Gen Stat. § 53a-71 (a)(1)

age teens that date or engage in sexually explicit texting behavior with teens a few years younger.⁴⁸

In states that reduce penalties for teens, such as Utah, minors can still be convicted of sexting and face misdemeanor charges, which can include jail time.⁴⁹ In Arizona, the maximum penalty for youth sexting is four months in jail.⁵⁰

Some states considering new legislation have chosen to add education for teens to their legislation. New Jersey and New York legislators have proposed education programs in lieu of jail or severe punishment for sexting.⁵¹

Some advocates have even proposed federal legislation to tackle the sexting issue. Jessica Logan's⁵² parents and New York attorney Parry Aftab are supporting federal legislation to standardize penalties for minors engaged in sexting.⁵³ They support the proposed School and Family Education About the Internet Act (SAFE Internet Act)⁵⁴ as an alternative federal remedy for sexting. This federal legislation would give a proposed \$175 million in federal funding to the Bureau of Justice Assistance (BJA) to make grants for schools, state agencies and non-profits to help provide research-based Internet safety education programs that feature sexting as an important topic.⁵⁵ This proposal would give states and their agencies the autonomy to decide the best approach for their youth.

A push for standardized sexting legislation could help define sexting in a universal manner and standardize penalties. State legislators have struggled to define sexting and therefore the definition varies across states. Some proposed legislation defines sexting as the transferring, receiving and taking of semi-nude and nude photographs electronically, while other states also consider text messages that contain graphic and lewd speech about sex in this category.⁵⁶ These differences could cause confusion, especially as electronic communications easily travel across state lines and the penalties in different states vary considerably.

Clarifying Law Enforcement's Role in the Age of Teen Sexting

⁴⁸ Vermont S. 125, Act 0058, enacted June 1, 2009, National Council of State Legislatures, "2009 Legislation Related to 'Sexting'", <http://www.ncsl.org/?tabid=17756>

⁴⁹ Utah Code Ann. § 76-10-1204(4)(ii)(b)-(c)

⁵⁰ Arizona S.B. 1266, enacted May 7, 2010; Ariz. Rev. Stat. § 8-309 (2010), National Council of State Legislatures, "2010 Legislation Related to 'Sexting,'" <http://www.ncsl.org/?tabid=19696>

⁵¹ New Jersey A.B. 1560-1562 (2010), New York A.B. .8622 (2010), National Council of State Legislatures, "2010 Legislation Related to 'Sexting,'" <http://www.ncsl.org/?tabid=19696>.

⁵² Logan was a teen who committed suicide after being tormented by her peers about her sexted images. See Celizic, M., "Her Teen Committed Suicide Over 'Sexting'" (see note 11).

⁵³ Shafron-Perez, S., "Average Teenager or Sex Offender?" (see note 44), 447.

⁵⁴ S. 1047, 111th Congress, 1st Session, 2009.

⁵⁵ Shafron-Perez, S., "Average Teenager or Sex Offender?" (see note 44), 447..

⁵⁶ For example, Oklahoma's proposed sexting legislation includes images and text. Okla. H.B. 3321 (2010); National Council of State Legislatures, "2010 Legislation Related to 'Sexting,'" <http://www.ncsl.org/?tabid=19696>

The Supreme Court case, *City of Ontario v. Quon*,⁵⁷ addresses the right to privacy when receiving or sending electronic messages on a hand-held device.⁵⁸ The Court has never addressed this issue, and it could bring new insights into the level of privacy individuals can expect when transmitting messages through their cell phones. Although this case does not address teen sexting head-on, but does address sexually-explicit text messages by adults, it may still play a role in determining the legal avenue for future sexting cases. A ruling in this case is expected in June 2010.

Sexting in the U.S. and Other Countries

If prevalence estimates are reasonably accurate, about 10 percent of young people are engaged in sexting. Given that approximately 17 million youth in the United States are between the ages of 14 and 17,⁵⁹ an estimated 1.7 million teens are sending sexts, more than the number of felonies the U.S. criminal justice system prosecutes each year.

Alternatives to using law enforcement to tackle the issue of teen sexting have been proposed. Many scholars, educators and law enforcement officers advocate using education, punishment by parents and schools, and cell phone control. Some advocate for no law enforcement involvement in the majority of sexting cases, while others advocate for a case-by-case approach (especially when there is wide dissemination). The majority agree that a holistic approach involving the community and law enforcement is necessary to tackle sexting, especially in cases where minors may be harmed.

In the United States some school administrators and faculty are choosing to deal with sexting in the school by suspending teens involved in sexting rather than turning them over to law enforcement.⁶⁰

Civil law remedies could also be used in egregious cases of disseminating provocative photographs through text messaging. Tort law could be used to stop widespread dissemination of such text messages.

In other countries like Canada, Australia and the U.K., governments are focusing on strengthening education to help warn teens about the dangers of sexting. The majority of countries have taken an educational approach to sexting rather than invoking criminal law enforcement. However, China and the United Arab Emirates have enforced criminal penalties for some sexting, no matter what the age of the parties involved.⁶¹

⁵⁷ *City of Ontario v. Quon*, 529 F.3d 892 (9th Cir. 2008), *petition for rehearing en banc denied*, 554 F.3d 769 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 1011 (2009).

⁵⁸ Pepper, F., and J. Coren, "Sexting, Texting and EDD Before High Court," *National Law Journal*, March 24, 2010, available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202446685569>.

⁵⁹ U.S. Bureau of the Census (NC-EST2008-02), Table 2: Annual Estimates of the Resident Population by Sex and Selected Age Groups for the United States: April 1, 2000 to July 1, 2008.

⁶⁰ Quinn, C. "Forsyth 7th Grader Suspended for Sexting Nude Photo of Self," *Atlanta Journal-Constitution*, March 26, 2010, available at: <http://www.ajc.com/news/forsyth-7th-grader-suspended-407085.html>.

⁶¹ "Sexting: Mobile Phone Numbers in Shanghai Can Be Terminated," *China Tech News.com.*, Jan. 19, 2010, available <http://chinatechnews.com/2010/01/19/11424-sexting-mobile-phone-numbers-in-shanghai->

Identifying an Appropriate Response

Given the large number of youths participating in sexting, and the general belief that their behaviors are more foolish than criminal, law enforcement and prosecution should not be the first response. More logically, parents and educators should be the first to respond to sexting. Since sexting among adults is legal, and the vast majority of sexting activity appears to be performed by young people, it makes sense to place monitoring and punishment in the hands of those most likely to encounter youth sexting.

Although this paper recommends that parents and educators play the roles of first responders in sexting incidents, it also recommends that they be taught to identify signs that more serious child pornography activity is also present and to notify law enforcement officials if a formal investigation seems warranted. In all cases, investigations should operate under the principle that the protection of potential victims is the first priority.

How parents and educators can best respond is a matter for further reflection. Teens do not need education on dangers of sexting. In the Cox Communications survey,⁶² 90 percent of the youth surveyed agreed that sexting was somewhat dangerous or very dangerous, and 74 percent said it was wrong. The evaluation of i-SAFE,⁶³ a school Internet safety program, produced similar results. Children who participated in the program gained knowledge, but no differences in risky behavior were observed relative to children who did not participate.

On the other hand, parents and educators need to be educated as to what sexting is, how it can be monitored and how to talk with young people about it. NetSmartz411⁶⁴ helps parents learn about online vocabulary and trends, and provides advice for monitoring a child's cell phone use. In addition, it offers free classroom learning modules for educators. Educators may want to also consider partnerships with parents and community groups to further the dissemination of information on sexting.⁶⁵

can-be-terminated; On Government Business. "Get a Life, Hebei, August 12," *China Economic Review*, September 2009, available at http://www.chinaeconomicreview.com/cer/2009_09/On_government_business.html. Also see "Dubai Jails Indian Couple for 'Sexy Texts,'" *BBC News*, March 17, 2010, available at http://news.bbc.co.uk/2/hi/middle_east/8573565.stm.

⁶² Cox Communications et al., *Teen Online & Wireless Safety Survey* (see note 3), 40, 42-43..

⁶³ Chibnall, S., M. Wallace., C. Leicht, and L. Lunghofer. *I-SAFE Evaluation*. Washington, DC: U.S. Department of Justice, National Institute of Justice, 2006. NCJ 213715. Available at <http://www.ncjrs.gov/pdffiles1/nij/grants/213715.pdf>.

⁶⁴ NetSmartz is maintained and operated by the National Center for Missing & Exploited Children.

⁶⁵ American Association of School Administrators home page "Sexting," <http://www.aasa.org/content.aspx?id=3390>.

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