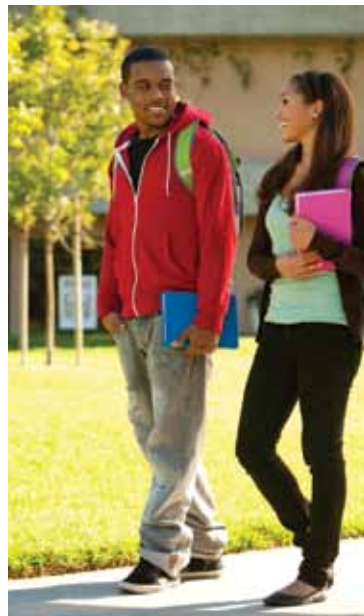




Effective Responses to Teen Sexting

A Guide for Judges
and Other Professionals



Lucy Salcido Carter, JD

Edited by
Jennifer L. White, JD,
and Michael W. Runner, JD

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**SUMMIT ON SEXTING:
DEVELOPING SAFE AND EFFECTIVE RESPONSES
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A GUIDE FOR JUDGES AND OTHER PROFESSIONALS

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Effective Responses to Teen Sexting: A Guide for Judges and Other Professionals

Lucy Salcido Carter, JD

Edited by Jennifer L. White, JD, and Michael W. Runner, JD

In a Cuyahoga County, Ohio sexting case involving eight teenagers, the prosecutors, lawyers, and judge did not want to charge the teens under child pornography laws because of the heavy penalties those laws carry and because none of the teens had criminal records. Instead the judge, Hon. Thomas O'Malley, ordered the teens to attend a sex education class, survey two hundred of their schoolmates about sexting, and report their survey findings to the judge. Through the survey, the teens discovered that most of their classmates did not know that teen sexting was illegal. After that case, Judge O'Malley sent letters to the administrators of all the high schools in the county and offered to go to the schools to speak with students about the dangers of teen sexting.¹

Teen sexting has received much media attention during the past few years following suicides² and child pornography prosecutions³ linked to sexting incidents. Law enforcement officers, judges, school officials, prosecutors, legislators, other policymakers and opinion leaders, parents, and teens themselves have had to consider how best to respond to this issue. Law enforcement reactions to teen sexting have varied from child pornography prosecutions (in some cases, resulting in mandatory sex offender registration for teens) to referrals to educational programs to warnings for first incidents. Responses from school officials have also varied. Some school administrators have told parents that sexting outside of school is not the school's concern. In other cases, school officials have suspended or expelled the teens involved, or called in the police.

Legislatures in many states have passed or are considering new legislation to address teen sexting. New or proposed laws include making sexting a juvenile misdemeanor, prohibiting child pornography charges for teen sexting, and mandating preventative programs in the schools. Because of the media attention and new educational programs, more and more parents and teens are learning that teen sexting is illegal and potentially harmful. However, many parents are still not aware of the issue or how to address it,⁴ and many teens may not understand the full ramifications of sexting or know how to stop it.⁵

1 Many articles cover this story. See, for example, Turner, Karl, "Ohio lawmakers don't want teens convicted of 'sexting' labeled sex offenders," at: http://blog.cleveland.com/metro/2009/04/ohio_lawmakers_dont_want_teens.html.

2 See, for example, Meacham, A., *Sexting-related Bullying Cited in Hillsborough Teen's Suicide* at <http://www.tampabay.com/news/humaninterest/article1054895.ece>. See also Kranz, C., *Nude Photo Led to Suicide* at <http://news.cincinnati.com/article/20090322/NEWS01/903220312/Nude-photo-led-to-suicide>.

3 See, for example, Mabrey, V. and Perozzi, D., *Sexting: Should Child Pornography Laws Apply?* at <http://abcnews.go.com/Nightline/phillip-alpert-sexting-teen-child-porn/story?id=10252790>.

4 See *Sexting Awareness and Perceptions: Parents' Study* at <http://research.lawyers.com/sexting-awareness-and-perceptions-parents-study.html>.

5 Phipper, A., *Sharing Personal Images and Videos Among Young People*, South West Grid for Learning (2009) at <http://www.swgfl.org.uk/Staying-Safe/Sexting-Survey>.

In November 2009, Futures Without Violence (formerly Family Violence Prevention Fund) hosted a national summit on teen sexting. Representatives from health care, public health, violence prevention, and youth development organizations met with members of the media, school administrators, judges, prosecutors, lawyers, and lawmakers to discuss the prevalence and harm of teen sexting, and to develop preliminary recommendations for how to address the problem better. Specifically, Futures Without Violence focused on the sexting issue in the context of possible teen dating violence, bullying and harassment and discussed methods for judges and other professionals to address these cases safely and effectively.



This report reflects summit discussions as well as research on the latest legal, educational, and programmatic responses to teen sexting and answers questions judges and other community leaders may have about this challenging issue. The guidelines at the end of the report suggest key factors for judges to consider in adjudicating these cases and offer suggestions for how judges and other community leaders can educate the public about sexting, prevent unintended consequences for teens who engage in this activity, and distinguish between voluntary, social/sexual experimentation or exploration and coercive, controlling and detrimental tactics that could belie destructive and dangerous youth relationships.

What is teen sexting?

Sexting is a term coined by the media and typically refers to the practice of taking and sending nude or semi-nude photos using cell phones.⁶ Some definitions of sexting include sexually explicit messages, as well as images, and transmission through a wide range of technologies: cell phones, computers, video cameras, digital cameras, and video games.⁷ In 2011, the Concise Oxford English Dictionary added the word “sexting” to the compilation, reflecting the ubiquitous nature of the behavior. The dictionary entry included the use of the word in a sentence: *Like it or not, sexting is part of growing up in 2010.*⁸

What are the potential harms to teens?

Sexting can have serious negative consequences for teens. The criminal justice system’s

6 See, for example, the Wikipedia definition of sexting: the act of sending sexually explicit messages or photographs, primarily between mobile phones, at <http://en.wikipedia.org/wiki/Sexting>. See also the definition on the MTV-sponsored campaign “A Thin Line”: sending or forwarding nude, sexually suggestive, or explicit pictures by cell or online, at <http://www.athinline/facts/sexting>.

7 The National Center for Missing and Exploited Children (NCMEC) defines sexting as “youth writing sexually explicit messages, taking sexually explicit photos of themselves or others in their peer group, and transmitting those photos and/or messages to their peers” by cell phone, computer, video camera, digital camera, or video game. This definition of sexting does not include situations in which youth sent photos under “duress, coercion, blackmail or enticement” or when teens sext with adults. See Policy Statement on Sexting (Sept. 21, 2009) at http://www.missing-kids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130.

8 “Cyberbullying” was also added to the Oxford Dictionary in 2011. The Oxford English Dictionary, at <http://oxford-dictionaries.com/definition/sexting>.

response to sexting can itself lead to lasting repercussions in a teen's life. In some states, teens can face prosecution for child pornography, with convictions leading to the possibility of significant jail time as well as decades of registration as a sex offender. Teens have faced prosecution for child pornography for taking and sending explicit pictures of themselves, as well as others.

But sexting can also be harmful to teens in other ways, for example, as part of a broader pattern of digital abuse,⁹ online harassment,¹⁰ or cyberbullying.¹¹ In addition, teen sexting can be an element in the power and control dynamics of teen dating violence.¹² A 2008 National Council on Crime and Delinquency survey found that approximately one in three adolescent girls in the United States is a victim of physical, emotional, or verbal abuse from a dating partner.¹³ In unhealthy dating relationships, teens may feel pressure to share nude pictures of themselves. In fact, one survey of teens found that about half of teens who admitted to sexting said they felt pressured into sending the photos.¹⁴ Teen girls seem to experience more pressure than teen boys to share explicit photos.¹⁵

Once pictures have been sent, an abusive dating partner can use the threat of forwarding the pictures to other people as a way to control and manipulate the photographed teen. In some instances, teens have asked the photographed person for sexual favors or money in exchange for agreeing not to disseminate compromising pictures. An abusive dating partner might also forward photos to other people to humiliate the photographed teen or as revenge for a break-up. The negative response from peers once such a photo gets out can be devastating to a teen—peer interaction and opinions are so important to this age group. At least two suicides have been linked

9 The MTV/Associated Press study defined digital abuse as any of the following: writing something online that is not true, sharing information about another person who does not want that information shared, writing something mean about someone else, spreading false rumors, threatening physical harm, impersonating someone online, spying, posting embarrassing photos or video, being pressured to send naked photos, being teased, and encouraging people to hurt themselves. See <http://www.athinline.org>; see also <http://www.cbsnews.com/stories/2009/12/03/scitech/pcanswer/main5873653.shtml>.

10 The Crimes Against Children Research Center defines online harassment as “Threats or other offensive behavior, sent online to the youth or posted online about the youth for others to see.” See <http://www.unh.edu/ccrc/cyberbullying.html>. Scholars at this center distinguish online harassment from cyberbullying, saying that cyberbullying must also be accompanied by offline bullying. Other organizations do not include this element in their definitions.

11 The National Crime Prevention Council defines cyberbullying as “when teens use the Internet, cell phones, or other devices to send or post text or images intended to hurt or embarrass another person.” See <http://www.ncpc.org/cyberbullying>. Between 2006 and 2010, 35 states enacted cyberbullying laws. See <http://www.ncsl.org/issues-research/educ/cyberbullying.aspx>.

12 A recent study found that 40% of youth between the ages of 14-24 had experienced physical/sexual abuse and 50% had experienced technology abuse. See Miller, E. and Kirkpatrick R., *Promoting Healthy Relationships in Adolescent Health Settings: The Healthcare, Education, Assessment and Response Tool for Teen Relationships (HEART) Primer and Training Project*, Presentation at the 2012 National Health Conference on Domestic Violence (March 30, 2012) at <http://nchdv.confex.com/nchdv/2012/webprogram/Session2223.html>.

13 Davis, A., *Interpersonal and Physical Dating Violence among Teens* (National Council on Crime and Delinquency, September 2008) at <http://www.nccd-crc.org>.

14 Associated Press and MTV, *The MTV-Associated Press Poll: Digital Abuse Survey* (September 2, 2011) at <http://www.athinline.org/about#research>.

15 One study found that 51 percent of teen girls felt pressure from their boyfriends to sext, while only 18 percent of teen boys felt pressure from their girlfriends. See National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults* (2008) at <http://www.thenationalcampaign.org/sextech>.

to the humiliation the teens experienced from their peers as a result of sexting;¹⁶ other forms of cyberbullying have also been linked to teenage suicidal ideation.¹⁷

With today's technologies, a texted photo intended only for another teen can quickly fall into the hands of adults. Internet anonymity means that adults can pose as teens, and teens sending photos online have no way to know if they are sending their photos to a teen or an adult. Sexting surveys to date have not studied the extent to which teens who sext with adults met online ever physically meet those adults. But the risk of further victimization exists. Indeed, proponents of child pornography prosecutions against teens for sexting argue that sexting, even between consenting teens, increases the availability of child pornography for pedophiles, and that risk is significant enough to warrant extreme measures. Thoughtful limits on teen sexting can reduce the potential for riskier behaviors.

How prevalent is teen sexting?

Prevalence Data on sexting has yielded inconsistent results, with some researchers arguing that the actual prevalence is much lower than the media suggests. These researchers question the methodologies of recent studies, saying that respondents to online surveys are particularly savvy technology users, more likely to sext, and not representative of most American teenagers.¹⁸ Prevalence data from these studies differ. For example, several studies found that roughly 20 percent of teens admitted to being involved in sexting in some way, either by sending, receiving or forwarding photos.¹⁹ However, one study reports that only 4 percent of surveyed youth admitted sending nude photos of themselves.²⁰

The following are some key findings from four surveys of teens and young adults and one survey of parents of teens:

- The vast majority of teens who sexted said they sent the photos to a boyfriend or girlfriend or to someone they wanted to date.²¹
- Older teens and young adults are more likely than younger teens to sext.²²
- The AP/MTV survey found that of respondents who received nude images, 18 percent shared the images with others.²³ Another study completed by Cox Communications found that 30% of "friends of sexters" reported that the image was forwarded to recipients against the senders' wishes.²⁴ Females are somewhat more

16 See note 1.

17 Hinduja, S. & Patchin, J. W., *Bullying, Cyberbullying, and Suicide*, *Archives of Suicide Research*, 14(3), 206–221 (2010).

18 Bialik, C., Which is Epidemic—Sexting or Worrying About It?, *The Wall Street Journal* (April 8, 2009) at <http://online.wsj.com/article/SB123913888769898347.html>.

19 See Digital Abuse Survey at note 14 and Sex and Tech Survey, at note 15.

20 Pew Internet & Am. Life Project, *Teens and Sexting: How and why minor teens are sending sexually suggestive nude or nearly nude images via text messaging* (December 15, 2009) at <http://www.pewinternet.org/Reports/2009/Teens-and-Sexting.aspx>. This 2009 study did not include young adults and defined sexting narrowly as sending sexually provocative pictures via text message only.

21 See note 12.

22 See note 14. Sending a sext is far more prevalent among young adults (19%) compared to teens (7%).

23 See note 14.

24 Cox Communications, *Teen Online and Wireless Safety Survey* (May 2009) at <http://www.cox.com/takecharge/research.asp>.

likely than males to send photos of themselves (65% girls vs. 35% boys), but males and females are equally as likely to sext.²⁵

- In a survey of high school students in England, 30 percent of respondents said they knew someone who had been adversely affected by sexting, but 40 percent did not see anything wrong with sending a semi-nude photo and 15 percent did not see anything wrong with sending a fully nude photo.²⁶
- More than half of all college aged students have received sexually suggestive messages via text messaging and 10 percent of the messages were forwarded without the senders' consent.²⁷
- A recent poll surveyed parents of children between the ages of 10 and 18 before the September 2011 school year and found that nearly half of parents listed sexting as their top concern and 49% of respondents said that their child had received an inappropriate image or message via text.²⁸

Although sexting survey results differ and study methodologies may somewhat skew results, teen sexting is clearly a prevalent behavior, and one with potentially devastating consequences. A recent study shows that 75 percent of youth ages 12 to 17 own cell phones, and 75 percent of teen cell-phone users text daily.²⁹ Older teen girls send a median of 100 texts per day.³⁰ Eighty-three percent of all teens with cell phones use the camera feature regularly, with 64 percent using their phones to share pictures with other people.³¹

What are the legal issues?

Teen sexting raises complex legal questions. Child pornography laws were not intended to address minors who produce sexually explicit images of themselves. Yet once teens transmit sexually explicit images of themselves or other teens, those images can be forwarded to unintended recipients and distributed widely to adults as well as teens. Some legal scholars argue that the state interest in stopping the flow of sexually explicit images of minors demands a strong legal response to teen sexting, including the deterrent lesson of prosecution for child pornography.

Youth-focused organizations such as the Juvenile Law Center (JLC) take the stand that most teen sexting incidents are best handled, not through the criminal justice system, but by the teens' parents and schools.

25 See note 14. See also note 24.

26 See note 5.

27 Science Daily, *New Sexting Laws Put College Students at Risk: More than Half of All College Students Have Been Sexted* (July 20, 2011) at <http://www.sciencedaily.com/releases/2011/07/110720103529.htm>.

28 Rogers, K., *Sexting Tops Parents' Back to School Worries*, Fox Business (August 19, 2011) at <http://www.fox-business.com/personal-finance/2011/08/18/sexting-tops-parents-back-to-school-worries>.

29 Pew Research Center, 2011 Teens and Digital Citizenship Survey, at <http://pewinternet.org/Reports/2012/Teens-and-smartphones.aspx>.

30 See note 29.

31 Lenhart, A. et al., *Teens and Mobile Phones*, Pew Internet and American Life Project (April 20, 2010) at <http://www.pewinternet.org/Reports/2010/Teens-and-Mobile-Phones.aspx>.

On the other hand, some youth development specialists argue that most teens who sext are just using the technology available to them to engage in sexual exploration normal for that age group.³² Civil rights organizations like the American Civil Liberties Union (ACLU) question whether child pornography prosecutions for teen sexting cases are constitutional, arguing that consensual teen sexting is First Amendment protected speech and that parents of teens have a 14th Amendment right to parent their own children regarding these issues.³³ Youth-focused organizations such as the Juvenile Law Center (JLC) take the stand that most teen sexting incidents are best handled, not through the criminal justice system, but by the teens' parents and schools. Both the ACLU and the JLC are opposed to criminalizing teen sexting.³⁴

What does the case law say?

In *State v. Canal*, the Iowa Supreme Court affirmed an obscenity conviction of an eighteen year old boy who “sexted” an explicit photo of himself to a fourteen year old female after the young girl repeatedly requested that he send the picture. Canal’s conviction was upheld and the youth was

ordered to register as a sex offender.³⁵ This was the first higher court case to address transmission of images or messages of a sexual nature between youth via cell phone.

While not many published cases address sexting via cell phone explicitly, appellate courts have upheld child pornography convictions against young adults and adolescents for transmission of “obscene” images by other electronic means. In *A.H. v. State*, a Florida appellate court upheld a teenage girl’s conviction for a child pornography offense for emailing her boyfriend digital photos of them having intercourse. Neither teen shared the images with a third party but the emails were somehow retrieved from the couple’s computers.³⁶

Likewise, Philip Alpert, a Florida resident, was convicted of a felony for sending child pornography, sentenced to five years probation, and ordered to register as a sex offender after emailing a nude photograph of his ex-girlfriend to over seventy people. Alpert was 18 at the time.³⁷

However, in *Miller v. Skumanick*³⁸ and subsequent appeals, Pennsylvania federal courts upheld injunctive relief from child pornography prosecutions of three teenage girls who appeared semi-nude in texted photos. (Someone else had taken the photos and sent them.) The prosecutor had threatened the girls with child pornography charges if they



32 Cumming, P., *Children’s Rights, Children’s Voices, Children’s Technology, Children’s Sexuality*, Presented at Roundtable on Youth, Sexuality, and Technology (May 26, 2009) at <http://www.arts.yorku.ca/huma/cummingp/research.html>.

33 *Miller v. Skumanick*, 605 F. Supp. 2nd 634 (3d Cir. 2009).

34 See Juvenile Law Center and American Civil Liberties Union of Pennsylvania, *Joint Position Statement on HB 2189 and Other Efforts to Criminalize Teen Sexting*, at <http://jlc.org/news/32/teleconference/>.

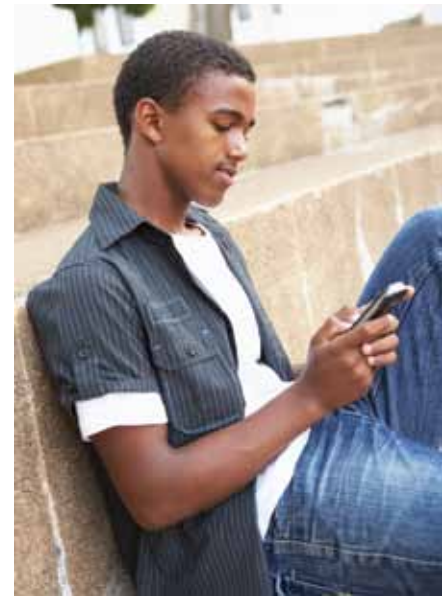
35 *State of Iowa v. Canal*, 773 N.W.2d 528, 529 (Iowa 2009).

36 *A.H. v. State*, 949 So. 2d 234, 234 (Fla. 1st DCA 2007).

37 Feyerick, D. and Steffen, S., ‘Sexting’ Lands Teen on Sex Offender List, CNN Justice (April 7, 2009) at http://articles.cnn.com/2009-04-07/justice/sexting.busts_1_phillip-alpert-offender-list-offender-registry?_s=PM:CRIME.

38 See note 33.

did not agree to probation and to attending an educational program. The girls' parents argued that forcing the teens to attend a class was a violation of the parents' substantive due process rights to parent their own children, and a violation of the teens' First Amendment rights by compelling speech (class attendance). The Third Circuit Court of Appeals found that the district attorney had failed to show a legal basis for child pornography charges because the DA had not provided evidence that the girls knowingly transmitted the photos. The court did not decide whether the photos were child pornography or whether transmission of the photos was constitutionally protected speech. On remand to the district court, the county district attorney stipulated that there would be no prosecution of the case, and the district court judge issued an order making the injunction against criminal charges permanent.



What does the law review literature say?

Legal scholars have begun to examine the issue of sexting in a nuanced way, foregoing prosecution versus non-prosecution for a more contextual and tailored approach, including alternative sentencing and diversionary programs, educational programming, and legislative initiatives. One approach involves distinguishing cases where images and messages are sent voluntarily and between two willing parties from instances where the distribution was malicious, non-consensual, and/or widespread.³⁹

Indeed, the legal community has responded to the media frenzy and research clamor on sexting since 2009 with its own fervor. Professor Mary G. Leary published a recent law review article in order to clarify an approach she propounded in 2007 that many in the legal community considered a “pro-prosecution” stance on teen sexting⁴⁰:

In 2007 the question before prosecutors was whether to use their authority under child exploitation laws to prosecute juveniles who produce, possess, or distribute self-produced child pornography initially or further down the distribution chain. To that question, the original article offered one systemic-based solution: structured prosecutorial discretion. This solution is grounded in the notions of prosecutorial discretion and diversion in the juvenile justice system. That is to say prosecutors have discretion whether to file or not to file charges, or divert the juvenile to alternative programs. Since then, there has been a national dialogue on this issue. The landscape has changed in many ways. One important development is the creation of additional laws to address this issue. Prosecutors are now no longer limited to considering just child pornography charges.

Some legal scholars highlight how the unique aspects of adolescent development affect sexting behaviors and should be taken into account when fashioning a legal response to sexting. One legal scholar, for example, emphasizes that actual child pornography by a teen is very different

39 Halloran McLaughlin, J., *Crime and Punishment: Teen Sexting in Context*, 115 Penn St. L. Rev. 135 (2010).

40 Leary, M.G., *Sexting or Self-Produced Child Pornography? The Dialogue Continues-Structured Prosecutorial Discretion within a Multidisciplinary Response*, 17 Va. J. Soc. Pol'y & L. 486 (2010).

from most teen sexting.⁴¹ She believes that teens who take sexually explicit photos of young children should be prosecuted under child pornography laws. But child pornography laws were passed to protect minors, and when these laws are used to prosecute teen sexting, they actually harm minors. This author is troubled by the inconsistent handling of teen sexting cases by different prosecutors. Legislators, she believes, must protect teens from child pornography prosecutions, craft sexting laws that take into account whether the incident includes intent to harm, and provide educational diversionary programs for sexters who did not engage in harmful, intentional, or harassing dissemination. In most sexting cases, parents and educators are in a better position than law enforcement officials to monitor cell-phone and Internet use and to educate youth about the potential harms of sexting.

Is there a federal law that specifically addresses teen sexting?

To date, no federal laws directly address teen sexting, although some experts have suggested that a federal law to ensure consistency of legal responses across states is needed.⁴² However, several federal laws have influenced the legal debate on teen sexting: 1) the Child Pornography Protection Act of 1996, which added online images of children to the definition of child pornography, but which was deemed overly broad by the court in *Ashcroft v. Free Speech Coalition*; 2) the Adam Walsh Child Protection Law of 2007, which requires sex offenders fourteen and older to register; and 3) obscenity laws that prohibit distribution of obscenities through interstate or foreign commerce, including through the mail or by computer. This last category of laws includes knowingly transferring obscene materials to a person under sixteen, knowingly making a commercial communication via the Internet that includes obscenity and is available to any minor under seventeen, and knowingly using an interactive computer service to display obscenity or child pornography in a manner that makes it available to a person under eighteen.⁴³

How is the criminal justice system responding?

Criminal justice system responses vary from jurisdiction to jurisdiction depending on state laws, the circumstances of a case, and the priorities of the prosecutors, lawyers, and judges.

Prosecution

Charges brought against teens include “disorderly conduct,” “illegal use of a minor in nudity-oriented material,” “open lewdness,” “criminal use of a communications facility,” “telephone harassment,” and “sexual abuse of children.”⁴⁴ Under child pornography laws, sexting teens can be charged with production, promotion, possession, and dissemination of child pornography. Sometimes the teens who sent the photos of themselves are charged, sometimes the teens who received the photos are charged, and sometimes both are charged. The teens (or in some

41 The author states that all teens have lapses of judgment and can be impulsive; many teens engage in behaviors they know are risky; peer opinions are very important; teens are exploring their sexual identities; and technology plays a big role in the lives of today’s teens. See Arcabascio, C., *OMG R U going 2 jail??*, 16 Rich. J. L. & Tech 10 (Spring 2010).

42 Stiles, B., *Effort Begins to Standardize Sexting Penalty*, *Pittsburgh Tribune Review* (April 1, 2009) at http://www.pittsburghlive.com/x/pittsburghtrib/news/mostread/s_618696.html.

43 18 U.S.C. § 1470, 47 U.S.C. § 231, and 47 U.S.C. § 223(d). For a summary of federal obscenity laws, see Citizens’ Guide to Federal Obscenity Laws at http://www.justice.gov/criminal/optf/guide/citizens_guide.html.

44 Shafron-Perez, S., *Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting*, 26 Marshall J. Computer & Info. L. 431 (Spring 2009).

cases, young adults) who have received the heaviest penalties for sexting were not just engaged in consensual sexting between two people, but instead forwarded nude photos as a means of retaliation, revenge, profit-making, coercion, or blackmail.

The juvenile court judge and district attorney in Jefferson County, Alabama agreed that most teen sexting cases would not be prosecuted by the juvenile court. Instead, most cases are now sent back to the schools for discipline, so that students do not end up with court records. In response, local school district officials in that county are planning educational programs for teens and their parents on the dangers of sexting.⁴⁵

Diversion

Prosecutors and juvenile court judges in many locales are beginning to develop case-specific responses that are less punitive and more educational. For example, the juvenile court judges and prosecuting attorney in Montgomery County, Ohio, have developed a diversion program for teens accused of sexting. When cases do not involve other harms, teens are referred for supervision, counseling, and education. Education focuses on the legal ramifications of sexting, the effects on victims, age-appropriate sexual boundaries, and responsible use of the Internet and other digital media. In a press release describing the program, prosecuting attorney Mathias Heck emphasized that most sexting cases are best addressed by education and parental involvement.⁴⁶

Adjudication

In a Cuyahoga County, Ohio sexting case involving eight teenagers, the prosecutors, lawyers, and judge did not want to charge the teens under child pornography laws because of the heavy penalties those laws carry and because none of the teens had criminal records. Instead the judge, Hon. Thomas O'Malley, ordered the teens to attend a sex education class, survey two hundred of their schoolmates about sexting, and report their survey findings to the judge. Through the survey, the teens discovered that most of their classmates did not know that teen sexting was illegal. After that case, Judge O'Malley sent letters to the administrators of all the high schools in the county and offered to go to the schools to speak with students about the dangers of teen sexting.⁴⁷

In a Warren County, Ohio sexting case, the juvenile court judge, Hon. Mike Powell, sentenced a 15-year-old boy to house arrest for thirty days. The girl in the case, also age 15, was ordered to write a report on why teens sext and what the dangers are and to present her report to a court clinic staff panel. Both teens were required to attend counseling, perform one hundred hours of community service, and relinquish their cell phones for thirty days.⁴⁸

Education

Some judges have taken leadership roles to help prevent the problem by speaking to teens, parents, and school administrators about the potential harms of sexting. In addition to reaching

45 White, L., *Jefferson Co. Sexting Cases Not Prosecuted* (October 8, 2009) at http://www2.nbc13.com/news/2009/oct/08/jefferson_co_sexting_cases_not_prosecuted-ar-401733/.

46 See Montgomery County, Ohio Press Release, *Prosecutor's Juvenile Diversion Program Announced: Sexting will be Targeted* (March 4, 2009).

47 See note 1.

48 *Judge Sentences Two Teens for Sexting* (May 12, 2009) at http://www.wdtn.com/dpp/news/WDTN_Judge_sentences_2_teens_for_sexting.

out to school administrators, Judge O'Malley also participated in a panel at a Cleveland town hall meeting on teen sexting.⁴⁹ The town hall meeting was attended by more than one hundred teens and filmed for use as an educational tool in the schools.⁵⁰ Hon. Linda Tucci-Teodosio, juvenile court judge in Summit County, Ohio, spoke on a radio show about the harms of cyberbullying. She offered suggestions to teens on what to do if they receive inappropriate photos and to parents on how to protect their children from sexting.⁵¹

How are state legislatures responding?

In 2011, twenty-one states and Guam proposed or enacted new laws that address teen sexting.⁵² Thus far in 2012, 13 states have introduced legislation that addresses the issue.⁵³ Laws that criminalize teen sexting and institute minor charges are attempts to address the potential harms from sexting and to prevent prosecution under child pornography laws, but may still have unintended, negative consequences for teens. Juvenile Law Center attorneys in an amicus brief for the *Miller v. Skumanick* case highlighted a key danger in criminalizing teen sexting: If abused teens fear prosecution for sexting, they may not report the abuse or seek help.⁵⁴

New laws and proposed bills emphasize the following strategies: 1) making teen sexting illegal but reducing penalties, 2) creating educational and diversionary programs, 3) combining legal sanctions with educational programs, and 4) providing support for commissions to further study the issue.

Legal Sanctions and Reduced Penalties

The most common legislative responses make teen sexting illegal, reduce the charges to juvenile misdemeanors (or lower charges), require automatic expungement of the record when a teen turns eighteen, limit child pornography charges, and prohibit sex offender registration.⁵⁵ Some bills create a hierarchy of penalties based on number of offenses or number of people sexted. Others have different penalties depending on whether the charge is for creation of a photo, possession, distribution, or distribution with intent to harm. Some new laws create affirmative defenses for possession if a teen who received the photo did not request it or coerce the sender, and also took reasonable steps to destroy the photo. For example, a new Arizona law makes sexting to one person a petty offense and sexting to more than one person a class 3 misdemeanor.⁵⁶ A second offense after having completed a diversion program for a petty offense is a class 2 misdemeanor. This law creates affirmative defenses if the teen did not solicit the photo and took reasonable efforts to destroy the photo or report the sexting incident to a parent or school official.

49 Russo, T., *Sexting Town Hall Meeting Held in Cleveland* (March 19, 2010) at <http://blogs.usdoj.gov/blog/archives/date/2010/03>.

50 See note 49.

51 At <http://www.wakr.net/audio.asp>.

52 National Conference of State Legislators, *2011 Legislation Related to Sexting*, at <http://www.ncsl.org/issues-research/telecom/sexting-legislation-2011.aspx> (Last visited April 6, 2012).

53 National Conference of State Legislators, *2012 Legislation Related to Sexting*, at <http://www.ncsl.org/issues-research/telecom/sexting-legislation-2012.aspx> (Last visited April 6, 2012).

54 The Juvenile Law Center's amicus brief in *Miller v. Skumanick* is available at: <http://www.aclupa.org/downloads/amicusmiller.pdf>. See Notes 33 and 38, and accompanying text, for discussion of *Miller*.

55 See notes 52-53.

56 See Arizona Revised Statutes (A.R.S.) §13-3553. See also Arizona Attorney General Tom Horne's "Kids Page" at http://kids.azag.gov/content/teens_sexting.

Educational Programs

Another set of bills emphasizes educational programs for teens charged with sexting.⁵⁷ Several bills propose preventative education in the schools.⁵⁸ A New Jersey assembly bill would require schools to provide annual information to students grades six through twelve on the social, psychological, and criminal dangers of sexting. A related New Jersey bill would create a diversionary program for juveniles facing criminal charges for sexting.

California recently enacted a law that acknowledges February as national teen dating violence awareness month, mandates teen dating violence prevention activities during that month, and lists sexting as an element of teen dating violence: “Digital abuse and ‘sexting,’ the electronic distribution of pictures, videos, or text messages that are sexually explicit, are becoming new frontiers for teen dating abuse.”⁵⁹

Legal Sanctions and Educational Programs

Some legislation criminalizes teen sexting and provides for educational programs. A New York bill would create a juvenile sexting and cyberbullying education demonstration program as a type of diversion for persons under 16 who have engaged in sexting.⁶⁰ A Vermont law passed in June 2009 includes reduced penalties for teen sexting and requires educational programs. The act makes it illegal for teens to send nude photos of themselves. Possession by a teen of a nude photo of another teen is also illegal unless reasonable steps were taken to destroy the photo. Teens who violate the law will be charged in juvenile proceedings, with records being expunged when the teen turns eighteen. The law also directs the sexual violence prevention task force to provide information to schools and other youth-serving organizations about the risks of sexting.⁶¹

A bill pending in South Carolina provides for a civil fine and an educational program for youth who commit the offense and may restrict the subject’s driving privileges under certain circumstances.⁶²

Commissions to Study the Issue

Rhode Island recently passed a bill calling for a special commission of legislators, police, school administrators, and teachers to study cyberthreats, cyberbullying, and sexting and to make recommendations to the state senate about how to address these problems.⁶³

How are schools responding?

Responses by school administrators have varied. Most school policies limit or prohibit cell phone use by students on school grounds to reduce distractions, create an environment conducive to learning, and prevent misuses of technology. Some administrators have argued that teen sexting that happens off school grounds is not the responsibility of the school. Yet sexting incidents that occur off school grounds still have an impact on students’ ability to function well in school.

57 See New Jersey S.B. 2907 at <http://www.njleg.state.nj.us/bills/BillView.asp>.

58 Indiana, Massachusetts, New Jersey, and New York, for example.

59 At http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0051-0100/acr_100_bill_20100201_amended_asm_v98.html.

60 New York A.B. 8131 at http://assembly.state.ny.us/leg/?default_fld=&bn=A08131&term=2011&Summary=Y&Actions=Y.

61 Law and legislative history at: <http://www.leg.state.vt.us/database/status/summary.cfm?Bill=S.0125&Session=2010>.

62 South Carolina S.B. 296 at http://www.scstatehouse.gov/sess119_2011-2012/bills/296.htm.

63 See Rhode Island law at: <http://www.rilin.state.ri.us/BillText/BillText10/SenateText10/S2871A.htm>.

As prosecutors, judges, and parents turn increasingly to the schools as partners in addressing teen sexting, school administrators in many locales are developing official policies for responding to the problem. Organizations that support school administrators are offering information on how to set up these policies.⁶⁴

New policies include sanctions and educational programs, as well as bans on sexting. The New York



City Department of Education, for example, proposed a ban on cyberbullying and sexting with up to a ninety-day suspension if a student is caught sexting either during school or outside of school hours.⁶⁵ Officials at some schools are inviting police to school assemblies to speak to teens about the potential harms of sexting.⁶⁶ Schools are also incorporating information about the harms of sexting into their programs to prevent cyberbullying and teen dating violence.⁶⁷

Most school staff are aware of the problem of teen sexting and support educational efforts to prevent harms from sexting. One survey of school staff found that 90 percent of teachers think that information about the harms of sexting should be taught in the classroom.⁶⁸

How are media organizations responding?

Several media organizations have begun preventative campaigns to educate teens about how to avoid sexting and other risky technology-related behaviors. MTV has an interactive website for teens where they can go to learn more about the harms of digital abuse and how to prevent it.⁶⁹ This website asks teens to rethink sexting in light of the array of repercussions that might occur and to consider whether the idea to sext is their own or the product of coercion, harassment, or bullying. The website also lists some of the potential consequences of sexting, such as developing a bad reputation with peers (if the teen's photo gets circulated), humiliating someone else (if the teen forwards a photo of someone else), and getting arrested (for sending, possessing, or forwarding a photo). MTV has also produced short video clips that follow the lives of two teens who sexted and suffered significant negative consequences as a result.⁷⁰

64 See, for example, Inside the School's online seminar "The Sexting Problem and Possible Responses" available at <http://www.insidetheschool.com/online-seminars/the-sexting-problem-and-possible-responses/>.

65 Smith, C., *School Ban Would Crack Down on Sexting—Even in the Home*, The Huffington Post (June 21, 2010) at http://www.huffingtonpost.com/2010/06/21/new-york-sexting-ban-woul_n_619139.html.

66 See, for example, *Richmond-area Localities Response to Sexting Varies*, Richmond Times Dispatch (May 2, 2009) at http://www2.timesdispatch.com/news/2009/may/02/sexto2_20090501-222901-ar-44681/.

67 See, for example, Seattle Public Schools' Prevention-Intervention Program. Information at: <http://www.seattleschools.org/area/prevention/index.xml>.

68 National Cyber Security Alliance, *The State of K-12 Cyberethics, Cybersafety, and Cybersecurity in the United States*, (February 2010) available at: <http://www.staysafeonline.org/content/nscsa%E2%80%99s-national-k-12-studies>.

69 At <http://www.athinline.org>.

70 Available at: <http://www.mtv.com/videos/news/483801/sexting-in-america-when-privates-go-public-part-1.jhtml?id=1631892>.

The Ad Council in partnership with the National Center for Missing and Exploited Children has created a series of public service announcements and an interactive video, “Your Photo Fate.” These materials educate teenage girls about the potential dangers of posting personal information—including photos of themselves—online and through texting.⁷¹

How are nonprofit organizations responding?

Nonprofits offer information for teens, parents of teens, service providers, and others to prevent the harms of sexting. Many nonprofit organizations provide information for teens in the context of educational programs that promote healthy adolescent relationships. Futures Without Violence has two programs that emphasize healthy teen and pre-teen relationships and educate youth about teen dating violence and the potential harms of practices like sexting. Start Strong programs in 11 communities nationwide use education, policy change, community outreach, and social marketing campaigns to empower youth ages 11 to 14 to develop healthy relationships throughout their lives.⁷² Programs include information for parents, teens, and school administrators on the potential harms of sexting and how to respond effectively to sexting incidents.⁷³ Another Futures Without Violence program, the “That’s not cool” campaign, provides an interactive website for teens where they can access information about how to deal with digital abuse and dating violence, including how to respond to pressure to sext. This website offers callout cards teens can use to respond to potentially abusive situations, videos of scenarios and different possible responses, and a chat room where teens can exchange advice about preventing sexting and digital abuse.⁷⁴

The National Crime Prevention Council has brochures for both teens and parents on the problem of sexting and how to keep teens safe.⁷⁵ The National Center for Missing and Exploited Children developed the Netsmartz Workshop, which provides educators, police, parents, and teens with online information about internet dangers for children and youth.⁷⁶

The Center for Safe and Responsible Internet Use, through its Cyber Savvy Schools program, has published several guides for school administrators and teachers to use to respond more effectively to teen sexting incidents. One guide explains the laws related to teen sexting, students’ rights in school, and the legal parameters within which school staff can respond. Another guide recommends developing a clear school protocol that teachers and administrators can follow, instituting a tiered response depending on the nature of the incident, providing information to teens to prevent sexting, and using a multidisciplinary team to provide support to teens involved in incidents.⁷⁷

71 For more information, see “Your Photo Fate” at <http://www.netsmartz.org/reallifestories/yourphotofate>.

72 See <http://www.startstrongteens.org> for information about the Start Strong program.

73 See, for example, a sexting and digital dating abuse forum hosted by Start Strong Idaho. Information about Start Strong Idaho and the forum is at <http://www.startstrongteens.org/communities/idaho>.

74 See <http://www.thatsnotcool.com/>.

75 At <http://www.ncpc.org/search?SearchableText=sexting>.

76 At <http://www.netsmartz.org/index.aspx>.

77 To access guides, go to the website for the Center for Safe and Responsible Internet Use at <http://csriu.org/>.

Guidelines for Judges

Legal scholars emphasize the importance of judicial discretion in teen sexting cases because no two cases are alike, teens' motivations for sexting vary, and each incident requires a tailored response.⁷⁸ In the courtroom, judges should assess each teen sexting case individually to determine the nature of harm and whether the sexting is part of a broader pattern of cyberbullying or teen dating violence. Judges also have an important role to play in the broader community to provide leadership and education to prevent harms to teens from sexting.

What factors should judges consider in adjudicating teen sexting cases?

- ❑ Assess each case individually to determine the intentions of the sexting teens, the scope and circumstances around the dissemination and the presence and breadth of any possible harm from their actions.
- ❑ Consider in your assessment:
 - any significant age differences among participants
 - the extent of distribution of the photos
 - the presence of abusive or coercive behavior
 - any prior incidents of sexting
 - the level of understanding by participants of the potential harms of sexting
- ❑ Determine whether the exchange of photos was consensual and intended to be private or whether the teen who sent the picture felt pressured to do so. Sometimes actions that appear voluntary are the result of coercion or abuse.
- ❑ Ask teens who send the photos of themselves if they have felt pressure in the relationship to engage in other behaviors against their will. Dynamics of power and control indicate possible teen dating abuse.
- ❑ Determine whether the distribution of the photos included derogatory or abusive language against the person in the photos. Did the person distributing the photos do so to harm or humiliate the person in the photos? Were the recipients of the photos selected to cause greater harm or humiliation to the photographed teen?
- ❑ Assess whether the participants have engaged in other bullying behaviors that could be part of a pattern of cyberbullying or digital harassment.
- ❑ Provide accountability measures that are age-appropriate and reasonable with respect to the level of harm, if any.
- ❑ Mandate counseling and education for teens who are unaware of the potential harms of sexting.
- ❑ Refer teens who have been hurt by a sexting incident to support services to help them cope with the negative consequences and protect themselves from additional harm.
- ❑ Refer teens who have been hurt from sexting as part of teen dating violence to specialized services for victims of dating violence.

⁷⁸ See, for example, comments by Carmen Naso, professor at Case Western Reserve University and former head of the juvenile division of the Cuyahoga County, Ohio prosecutor's office. See note 46.

How can judges participate in efforts to prevent teens from sexting?

- ❑ Collaborate with prosecutors, defense attorneys, mental health professionals, educators, other service providers, and parents to provide a wider range of effective responses to teen sexting.
- ❑ Provide support and education to school administrators to help them understand the laws pertaining to teen sexting and the legal parameters for their responses.
- ❑ Visit local schools and other community venues to present information to teens and their parents about the dangers of sexting and other potentially abusive behaviors.
- ❑ Support and assist in (within ethical constraints) community-based efforts to provide teens with age-appropriate information about how to form healthy relationships and avoid abusive behaviors.
- ❑ Consider providing your opinion to the legislature to support or critique bills, educational programming, or commissions to study the issues around teen sexting.
- ❑ Educate peer members of the judiciary about the nuanced issues that might influence teen behaviors and contribute to sexting.
- ❑ Apply these guidelines and model a tailored, nuanced, and reasonable approach to teen sexting cases to provide leadership to other peer members of the judiciary, prosecutors, system professionals, and the community at large.



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Mission

Everyone has the right to live free of violence. Futures Without Violence, formerly Family Violence Prevention Fund, works to prevent and end violence against women and children around the world.

Our Work

Creating futures without violence has been our vision for over thirty years. Now, it is also our name. From domestic and dating violence, to child abuse and sexual assault, Futures Without Violence works to end some of the most pressing global issues of our time.

We advance the health, stability, education, and security of women and girls, men and boys worldwide. Striving to reach new audiences and transform social norms, we educate and train professionals such as judges, doctors, nurses, and athletic coaches on improving responses to violence and abuse. As well, we work with advocates, policy makers and others to build sustainable community leadership and educate people everywhere about the importance of respect and healthy relationships—the relationships that all individuals, families, and communities need and deserve.

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