

Trouble at teens' fingertips: Youth sexting and the law

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The last decade has seen a rapid increase in the use of smartphones among young children and adolescents. One consequence of this phenomenon is sexting. Although researchers of sexting have yet to arrive at a single, cohesive definition for the behavior, it generally involves the transmission of text, pictures, or videos containing sexual material. Different definitions of the behavior have led to widely varying estimates of its prevalence, although some studies have documented relatively high rates of sexting among teenagers. As adolescence is the time period in people's lives where the psychological tasks of identity consolidation and the development of intimate relationships become primary, it is not surprising that many teens utilize sexting as one way of practicing skills associated with successful completion of these tasks. The criminal prosecution of sexting cases, then, raises many legal and ethical questions. Offenders may be prosecuted under state or federal child pornography laws or state-specific sexting laws. Sexting laws, particularly in instances of consensual sext exchange, call into question who they are meant to protect and from what. In this article we review the research on teen sexting, its prevalence, and its association with mental health problems; summarize legal responses to the behavior in the United States; and identify considerations for prosecutors and legal decision-makers facing sexting cases.

1 | INTRODUCTION

The rapid growth in the use of Internet-enabled mobile devices among adults and teenagers the world over in the last decade has created new avenues for individuals to communicate, develop relationships, and form social networks. Sexting is one of the results of this phenomenon. As people of all ages increasingly rely on mobile technology to interact with family, friends, and peers, it is not surprising that sexually themed conversation, sexual exploration, and explicit image-sharing via mobile devices have become commonplace. Particularly among adolescents who are developing into sexual maturity, the prevalence of sexting is high. Although such behavior may be normative in our increasingly mobile world, laws in the United States have not adapted to the variety of potential situations that can arise out

of sexting. As a result, teens and adults have been convicted of the production and sharing of child pornography due to sexts. Prosecuting teenagers who engage in sexting may in some circumstances result in severe, long-term legal and psychological consequences for offenders that are more harmful than beneficial.

2 | THE TECHNOLOGICAL LANDSCAPE

Smartphones, or Internet-enabled cellular phones that are capable of many functions found on a traditional computer, have rapidly become the mainstream mobile communication device in the United States. In 2015, the Pew Research Center reported that 64% of American adults owned a smartphone, up from 35% in the spring of 2011. In addition, many are heavily dependent on their smartphones for online activities. Ten percent of American adults have no broadband Internet service at home, 15% have limited options for online access other than their cell phone, and 7% have both no broadband at home and limited options for online access (Pew Research Center, 2015). Teenagers also have widespread access to smartphones. In a study of teens' online behavior, the Pew Research Center found that in late 2014 approximately three-quarters of American teenagers aged 13–17 years “have or have access to” a smartphone; 92% of teens reported going online daily, with 24% being online “almost constantly” due to the access afforded by smartphones (Lenhart, 2015).

Many teens go online to access social media platforms such as Facebook, Instagram, Snapchat, Twitter, and others. As of 2015, 71% of teens reported using Facebook, 52% reported using Instagram, and 41% reported using Snapchat (Lenhart, 2015). Social media platforms are designed for easy access and use via smartphone technology. Common aspects of these programs include the ability to share pictures, post comments, and send private messages to other users. One platform, Snapchat, became popular because it granted users the ability to send pictures or “snaps” to other users for a specified number of seconds, after which the picture would disappear. Such technology may encourage teenagers to exchange media that they otherwise might not share in the mistaken belief that the content will remain private after delivery. In reality, Snapchat allows message recipients to take screenshots of the “snap” pictures and redistribute them, and Snapchat “chat” files may remain on their servers for up to 30 days if unopened by the recipient (Snapchat, 2017), leaving them potentially vulnerable to exposure by hackers. Unfortunately, teens often overestimate the level of privacy they can expect from modern communications technology.

3 | DEFINING AND MEASURING SEXTING

Two related issues inherent in understanding sexting are the definition of the behavior and its prevalence. There is no single, agreed-upon definition for sexting. Recently Barrense-Dias, Berchtold, Suris, and Akre (2017) undertook a review of 223 articles related to teen (age 18 and under) sexual communication identified from academic databases using the search terms “sexting”, “sex-texting”, “sexual messaging”, and “sexto” (Spanish for “sext”) to describe the behavior. Based on their inclusion criteria they utilized 18 studies to evaluate how researchers define sexting. They noted that authors consider different media types, actions, transmission modes, and sexual characteristics when defining this behavior. In terms of media types, they found that researchers have variously considered sending text messages, images, or videos – alone or in combination – to be sexting. They also distinguished “active sexting” (including creating, posting, sending, showing and forwarding messages) from “passive sexting” (such as requesting, receiving, or receiving requests for sexual messages). All studies considered transmission via an Internet-enabled or mobile device to be sexting, while some distinguished between posting online generally and directly sending messages or images to another person. Lastly, they found that studies utilize a variety of sexual “descriptors” for the media, including sext, sexting, sexy, sexually explicit, sexually related, sexually suggestive, sexual contents, nude, naked, and nearly or partially nude or naked. Clearly, even among those researching this behavior, there is no single definition for what constitutes sexting. Furthermore, though the term's similarity to “texting” suggests an exclusive focus on the

use of cellular telephony, sexting may encompass other online activities involving a computer or other Internet-enabled device.

Not surprisingly, the wide breadth of definitions of sexting has resulted in broad prevalence estimates for the behavior. In their review of the various research definitions of sexting, Barrense-Dias et al. (2017) also identified widely varying types of sexting measurements. For example, researchers in one study conducted on 18,709 European boys and girls aged 11–16 years measured sexting prevalence as seeing or receiving messages about having sex, or images of people naked or having sex, on the Internet in the last 12 months (Livingstone & Gorzig, 2014). In this recipient-based research, the authors identified a sexting prevalence of 15%. In contrast, a study of nearly 15,000 European boys and girls aged 11–16 years measured sexting by whether or not the child had posted a sexual message of any kind on the Internet (Baumgartner, Sumter, Peter, Valkenburg, & Livingstone, 2014). Focusing on the senders or posters of messages, the authors identified sexting rates of between 0.9% (in Bulgaria and the Netherlands) to 11.5% (in Sweden). The authors found that teens who were older, had greater frequency of Internet use, and were more sensation-seeking were more likely to engage in sexting. They found that in “traditional” countries, or those characterized by conservative world-views, unequal gender roles, and restrictive sexual attitudes, there was a significant difference between rates of sexting among boys and girls, with more boys than girls sexting.

In the United States, prevalence rates of sexting are similarly broad. In a survey of 1,560 Internet users aged 10–17 years, Mitchell, Finkelhor, Jones, and Wolak (2012) reported relatively low rates of sexting among US teens. Of their participants, 2.5% reported that they appeared in or created nude or nearly-nude images, and 7.1% reported receiving nude or nearly-nude images in the past year. Other researchers have reported substantially higher rates of these and similar behaviors among adolescents. In 2012 Temple et al. described findings from 948 participants from seven public high schools in southeast Texas: 28% of the students reported that they had sent a naked picture of themselves through text or email, whereas 31% indicated that they had asked someone to send a sext, and 57% had been asked to send a sext. The authors considered that Mitchell et al.'s low reported rates may have been due to their random-digit-dialing approach, which tends to result in less ethnically diverse, higher socioeconomic status, and more conservative participants.

One consistent finding in studies of the prevalence of sexting is that the rate of sending sexts appears to increase as youth age. In 2009, the Pew Research Center reported that 8% of 17-year-olds with cell phones had sent a sexually provocative image via text, as compared with 4% of teens aged 12–17. Similarly, 30% of 17-year-olds indicated that they received a nude or nearly nude image on their phone, as opposed to 15% of teens aged 12 to 17. Teens who paid for all of the costs associated with their cell phone use were more likely to engage in sexting (Lenhart, 2009). Similarly, in Temple et al.'s (2012) study, respondents' sending rates increased with increasing age. Approximately 20% of those aged 15 and younger indicated that they had sent sexts, as compared with 33% of 17-year-olds and 45% of subjects 18 and older. The increased prevalence of sexting as youths age may be secondary to an increased access to smartphone technology in older children as well as increased sexual interest and desire.

Currently available prevalence data on sexting suffer from inconsistent definitions of the behavior. Definitions used in research have included a wide variety of activities, including both “active” sending of sexually themed messages and “passive” requests for such messages. Researchers have variously considered text messages, pictures, and/or videos as “sexts.” In addition, different sampling methods and study populations have yielded drastically different results. While the majority of studies suggest that sexting is a relatively common phenomenon, there is a broad range of prevalence estimates in the literature.

4 | PUTTING SEXTING IN CONTEXT

Adolescent sexual behavior has typically been framed academically and politically as a “problem behavior” associated with other undesirable outcomes, such as substance use, sexually transmitted infections, unintended pregnancy, and criminal behavior. Not surprisingly, the growth of teen access to mobile technology and the resultant cases of sexting

with criminal consequences in the media have contributed to the public's concern about adolescent sexual behavior and the risks associated with sexting. Although there is some risk of harm, in some ways teenage sexting may be considered a normative behavior in an increasingly technologically connected world (Lippman & Campbell, 2014).

Adolescence, occurring from approximately age 13 to 19 years, is a time of intense biological, sexual, and psychosocial change in humans. In early adolescence humans begin the process of puberty, during which hormonal signals originating in the brain stimulate the gonads to produce sex hormones that influence the growth and function of sex organs, the brain, the endocrine system, connective tissues, and other organs (DeLamater & Friedrich, 2002). Amidst physical changes and the newly developed capability to engage in sexual intercourse, adolescents face numerous developmental tasks, including the establishment of a stable sense of self, sexual orientation and gender identity (Erikson, 1968), as well as learning to manage physical and emotional intimacy in the setting of relationships with others (Furman, Brown, & Feiring, 1999). Two skills that adolescents must develop to accomplish these tasks include self-presentation and self-disclosure. Self-presentation refers to an individual's selective presentation of aspects of one's self to others, and self-disclosure is the revealing of intimate aspects of one's true self (Schlenker, 1986). Failure to develop these skills adequately may lead to the inability to accomplish the developmental tasks, with resulting role confusion, social isolation, or impaired relationships (Erikson, 1968).

Mobile technology has enabled teenagers to access information and communicate with others around the globe in ways that never existed before. These capabilities are likely to fundamentally alter the ways in which teenagers navigate the psychosocial tasks of adolescence. Valkenburg and Peter (2011) described some of the possible impacts of online communication on adolescent psychosocial development. They noted how some of the characteristics of online communication, including anonymity, asynchronicity, and easy accessibility of information, can enhance adolescents' control over how they utilize and develop the skills of self-presentation and self-disclosure. In terms of sexual development, this controllability makes it easier for adolescents to explore their own sexual interests and sexual identities. Qualitative research on young men and women's views of sexting reveals that, indeed, motivations for sexting may include having fun, addressing boredom, engaging in sexual experimentation, or as a component of a long-distance relationship (Walker, Sancı, & Temple-Smith, 2013). In some ways, then, adolescents may utilize mobile technology and sexting as a way of exploring sexuality, sexual identity, and intimacy, which could assist in furthering their psychosocial development.

The potential benefits offered by online communication exist alongside genuine concerns and risks for adolescents. For example, anonymity of online posts or messages makes it easier for individuals to engage in anonymous cyber-harassment, cyberbullying, and vengeful online behavior (Valkenburg & Peter, 2011). Revenge pornography is one such type of cyber-harassment that involves the posting of explicit sexual material featuring an individual without the person's permission for the purpose of humiliation. Notably, the material is often voluntarily created and initially shared in the context of an intimate relationship (Franks, 2015). Revenge pornography websites frequently post the victim's name, social media account links, and other identifying information as well. The Cyber Civil Rights Initiative (CCRI) reported the results of a survey that 90% of revenge porn victims are women. Although CCRI acknowledged that their sample was self-selected based on use of their website, which was predominantly visited by women, the findings demonstrate the potential for gender inequality in the prevalence of harmful sexting behavior. Furthermore, being a victim of revenge pornography may result in significant negative outcomes, including emotional distress and associated feelings of anger, shame, and depression, as well as social isolation, impaired relationships, and increased risk for suicide (Cyber Civil Rights Initiative, 2014; Kamal & Newman, 2016).

Although revenge pornography may represent an extreme example of the potential harm that can result from sexting, milder forms of harassment, bullying, or sharing of sexually explicit images or videos among friends or acquaintances can also result in psychological distress to victims. In fact, some researchers have reported that sexting without specified negative social consequences can result in emotional harm. For example, 21% of Mitchell et al.'s (2012) respondents who appeared in or created nude or nearly-nude images reported feeling "very or extremely upset, embarrassed, or afraid" as a result. The same was true for 25% of those who received such images. Unfortunately, the authors did not obtain additional information from participants regarding the reasons for their emotional

responses or determine if subjects experienced persistent distress or negative psychological consequences from sexting.

There may be important gender differences in sexting, including its negative effects. A qualitative study of young men's and women's experiences with sexting indicated that potentially harmful aspects of the behavior include women feeling pressured to be involved in sexting, the use of images for blackmail or revenge, and the double standard of sexual reputation in relation to sexting. Specifically, girls who sext may be considered "slutty" and responsible for the potential negative consequences of doing so, whereas boys do not experience the same level of responsibility (Walker et al., 2013). In addition, females may be shamed when sexts meant to be private are made public, in a "gendered double standard" (Burkett, 2015, p. 838). Indeed, research finds that female victims of shared sexts tend to blame themselves for the choice of sending a sext, rather than the sharer for forwarding the sext or making it public (Burkett, 2015).

5 | SEXTING ETHICS

Central to a discussion of the ethics of sexting are the concepts of consent and privacy. Sexts are sent for many consensual reasons, including to maintain intimacy in the course of a relationship, to initiate a relationship, to sexually express oneself, or to make a joke (Burkett, 2015; Friedman, Sorrentino, & Friedman, 2017). With the consensual transmission of a sext, there is the expectation of privacy, specifically that the sext will not be forwarded to or shared with others. Hasinoff and Shepherd (2014) studied the online privacy norms among young adults. Almost all respondents believed that maintaining the privacy of sexts was the expected social norm. In addition, they believed that a third party who received a forwarded sext had an obligation not to share the image further.

Another ethical concern is the impact of sexting on adolescents' abilities in forming and maintaining intimate relationships. Social competence in navigating teenage relationships includes asserting displeasure and managing conflict. A preliminary study found that those teens with more technology-based communication had lower levels of these competencies than teens who participated in more traditional communication (Nesi, Widman, Choukas-Bradley, & Prinstein, 2017). However, other studies have found that teens use technology in positive ways. Half of the teens in one study used technology when discussing sexual health with their partners (Widman, Nesi, Choukas-Bradley, & Prinstein, 2014), and consistent condom use was three times more common among teens using technology to discuss birth control and protection.

Education programs that seek to help teens understand the potential long-term consequences of sexting may have the unintended consequence of victim blaming, similar to speaking to teen girls about their skirt length in efforts to combat rape. Albury and Crawford (2012) describe this as "a model of 'crime prevention' in which perpetrators of abuse or violence are strangely absent" (p. 465). Rather than focusing on the non-consensual forwarding of sexts, they focus on avoidance of sexting altogether, even though the behavior is relatively common (Hasinoff & Shepherd, 2014). There is a parallel between such sexting education programs and sex education that focuses on abstinence rather than on safe sex practices.

6 | SEXTING AND MENTAL HEALTH

There has been relatively little research conducted to determine if adolescents who engage in sexting experience psychological impairment as a result of the behavior. Of 2,036 European 11- to 16-year-olds reporting that they received a sexual message on the Internet in the last 12 months, 24% responded "yes" when asked if they felt "bothered ... uncomfortable, upset, or [felt] that [they] shouldn't have seen it" (Livingstone & Gorzig, 2014, p.11). Subjects who were younger, female, less sensation-seeking, had pre-existing psychological difficulties, and used the Internet less were more likely to endorse experiencing harm from the message. As previously mentioned, Mitchell et al. (2012) found that approximately one-quarter of teens who sexted experienced psychological distress from the behavior.

Studies on sexting and specific psychiatric problems remain limited. Temple et al. (2014) evaluated 937 teens from Texas public high schools on rating scales for depression, anxiety, impulsivity, and a positive response for a history of substance use. They found that subjects who had sent naked pictures of themselves to someone else through text or email were more likely to score higher on scales of depression and impulsivity, as well as more likely to report a history of substance use. The two groups did not differ in terms of reported anxiety symptoms. Another study on teens aged 15–18 years in Belgium demonstrated a positive association between sending a picture sext and depressive symptoms (Van Ouytsel, Van Gool, Ponnet, & Walrave, 2014). It is important to note that cultural and legal differences between nations may play a role in shaping not only teens' sexting behavior (Baumgartner et al., 2014), but also their psychological responses to it. One study that utilized the *Diagnostic and Statistical Manual of Mental Disorders* criteria for major depressive disorder found that female youths aged 13–18 years who sent or showed someone sexual pictures of themselves in which they were nude or nearly nude had a greater risk of mild depressive symptomatology than those who did not sext (Ybarra & Mitchell, 2014). Notably there was no difference between female sexters and non-sexters for major depressive symptomatology or between male sexters and non-sexters for any depressive symptomatology. Lastly, one study found that teens reporting a history of sexting were at increased risk of having attempted suicide in the last year, contemplating suicide in the last year, and feeling sad or hopeless for 2 or more weeks in the last year (Dake, Price, Maziarz, & Ward, 2012). The evidence regarding the relationship between teen sexting and specific psychiatric disorders or psychological sequelae remains scant and inconclusive.

7 | PROSECUTING SEXTING

Sexting among minors may be prosecuted and punished in a variety of ways. Minors may be charged under federal or state child pornography statutes, which carry stiff sentences and often require registration as a sex offender. The impact of the trauma of prosecution, a felony conviction, and effects on a child's reputation, emotional health, and relationships in such situations appear obvious. In addition, minors face the same barriers as do felons and registered sex offenders when searching for employment, housing, and education (Colbert, 2011; Levenson & Cotter, 2005). An example of the misapplication of such statutes to teen sexting is the case of Trey Sims, who at age 17 was charged with possession and distribution of child pornography for sending his 15-year-old girlfriend sexually explicit photographs and video recordings of himself after she had sent him nude photographs. The girlfriend's mother brought the explicit media to the police's attention. Though the photographs and videos were exchanged in a consensual relationship, Sims received a 1-year suspended sentence for a reduced charge of felony possession of child pornography. Sims later sued the detective involved in the case, who as part of the investigation demanded that Sims masturbate in the presence of others while he took pictures of the act. The United States Court of Appeals for the Fourth Circuit ruled in favor of Sims' claim of a violation of privacy under the Fourth Amendment (*Sims v. Labowitz and Richardson*, 2017).

In attempts to decrease prosecution under child pornography statutes, states have increasingly passed sexting laws that provide an alternative form of justice (Hinduja & Patchin, 2016). Currently, 25 states have enacted sexting laws and 33 have adopted related revenge pornography laws. Many of these laws go by titles such as Transmission of Sexually Explicit Images by a Minor. Nine of the statutes include the specific word "sexting." Significant variability exists from state to state in how these statutes are defined and enforced (Spooner & Vaughn, 2016). Statutes may focus on the age of the person sending or receiving the sext and/or analyze the method and purpose of the dissemination (Lorang, McNeil, & Binder, 2016). If convicted under a sexting law, a teenager might still be prosecuted and convicted of a misdemeanor, felony, or delinquent offense (Spooner & Vaughn, 2016). For example, a state lawmaker in California recently proposed a sexting law that would let schools suspend or expel kids for sexting, focusing on cases where the communication is meant to humiliate or harass a pupil (White, 2016).

Despite the creation of sexting laws, prosecutors still have considerable latitude in determining whether to pursue charges and under which specific statute. In interviews with 378 state prosecutors, Walsh, Wolak, and Finkelhor (2013) found that 62% had been involved in a juvenile sexting case; 36% had filed charges and the majority of these

charged the juvenile with felony child pornography production. In some cases, the juvenile was required to register as a sex offender. Prosecutors noted, however, that when charges were pursued in sexting cases, the cases generally involved additional factors such as malicious intent, distribution, a large age difference between individuals involved, or a graphic nature of images. In those not charged, sex education classes, community service, cell phone restriction, essays, and/or letters were common mandates.

Although sexting statutes arose seemingly to curtail prosecution of teens under existing child pornography laws, questions remain as to the practical, moral, and legal purpose of prosecuting teens for sexting at all if the sexting was consensual. There is a motivational, ethical, and arguably legal difference between minors who use sexts to bully, harass, stalk or seek revenge and those who exchange sexts as part of a consensual interaction with the anticipation of privacy (Spooner & Vaughn, 2016). Laws that criminalize consensual sexting appear to punish those whom they were designed to protect and also appear to represent a moral backlash against acts that are considered normative modes of expression by many (Day, 2010; Valkenburg & Peter, 2011).

8 | LEGAL BASES FOR SEXTING LEGISLATION

The United States Constitution guarantees a right to free speech under the First Amendment. This right, like many constitutional rights, is not absolute. One limitation of the First Amendment right to free speech is obscenity. How obscenity is defined, however, has long been a subject of debate and litigation. In *Miller v. California* (1973), the Supreme Court affirmed that obscenity was not protected by the First Amendment and that obscene materials and speech can thus be regulated by the state. *Miller* involved unsolicited mailing of sexually explicit materials for advertisement purposes. The Court established a three-prong test in *Miller* to determine whether speech is obscene:

- a. whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest,
- b. whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
- c. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value (p. 24–25).

The Court did not consider all forms of pornography unprotected, only that which would be classified as “obscene.”

Nine years later, in *New York v. Ferber* (1982), the Supreme Court clarified that the distribution of child pornography, even if it does not meet the obscenity criteria outlined in *Miller*, does not qualify as protected speech. In reaching its decision, the Court emphasized the short- and long-term effects and harm to victims of child pornography and the government’s compelling interest in preventing the exploitation of minors. The Court noted that child pornography interferes with a child’s ability to form healthy relationships, is a form of abuse, and continues the harm to the child through its distribution. In *Ashcroft v. Free Speech Coalition* (2002), the Court limited the definition of “child pornography” in finding unconstitutional a portion of the Child Pornography Protection Act, which banned virtual child pornography. The State argued, in part, that virtual child pornography should be banned because its existence perpetuated the child pornography market. The Court did not find this argument persuasive. The Court emphasized that no child was actually harmed in the production of virtual child pornography and iterated that a direct connection must exist between speech and imminent illegal conduct.

9 | APPLYING THE LAW TO SEXTING

How do these landmark cases then apply to teenage sexting? Did the Court intend teen sexting to be classified as child pornography? As Humbach (2010) noted, a careful reading of the *Ashcroft* decision appears to define child

pornography as that which includes coercive exploitation of a child by an adult, commercial profit and elements of immediate and future harm (see also McLaughlin, 2012). A consensual sext between teens, then, does not on its face appear to fit this definition. Prosecution of teen sexters results in a paradoxical dilemma: prosecuting teens for creating sexts essentially classifies them, the “victims,” as predators. In addition, some have successfully argued that statutes used to prosecute teen sexters are unconstitutionally vague. The Pennsylvania Supreme Court in *In Re C.S.* (2012) noted that while teenagers would or should be aware that child pornography is illegal, they would be “clueless” that sexting was prohibited under a child pornography law.

Others argue that teen sexting is fundamentally harmful, or could be, and that the State must protect teens from self-exploitation and limit the flow of pornography into the commercial market (Leary, 2010; Szymialis, 2010; Weins & Hiestand, 2009). The assumption is that sexts will eventually find their way into the child porn market, even if originally shared with or intended for other teens. Even the possibility of distribution has been enough to substantiate a conviction, as in *A.H. v. Florida* (2013). Government intervention is justified under the doctrine of *parens patriae*, recognizing that children must be protected from immature actions which might result in unintended negative consequences. Oddly, in the criminalization of sexting, the teenager is punished for their immature acts while also being told they are being “protected” from them (Thomas & Cauffman, 2014). Minors in nearly all states are presumed legally incapable of entering into contracts and voting, and are prohibited from buying tobacco and alcohol (Costello, McNiel, & Binder, 2016). These laws exist to protect minors from immature, ill-conceived decisions. However, it is interesting that no similar protections exist in relation to minors’ capacity to engage in online activities (Costello et al., 2016). In addition, *parens patriae* must be balanced with a teen’s right to privacy, First Amendment protections for non-obscene speech, and the fundamental right of parents to raise their children as defined in *Troxel v. Granville* (2000).

10 | RECOMMENDATIONS FOR LEGAL APPROACHES TO TEEN SEXTING

The prosecution of teen sexters has resulted in cases that appear frivolous, excessively punitive, and ill-considered in light of their long-term consequences on teens’ lives and futures. Teens have also been inconsistently prosecuted under child pornography laws. A better legal approach would consider teens’ inherent immaturity and reduced criminal culpability due to ongoing cognitive, social and psychological development. When adolescents must make decisions quickly, in the presence of peers, or in emotionally charged situations, they are more likely to make poorer decisions than adults (Steinberg, 2008). Teens’ vulnerability and impulsivity are due in part to structural and functional changes within the brain, primarily the prefrontal cortex (Steinberg, 2008; Steinberg, Cauffman, Woolard, Graham, & Banich, 2009). Sexts are often sent in an emotionally charged situation, to express or gain the love, admiration, acceptance, or romantic interest of a peer or significant other. Teens, therefore, are probably prone to make impulsive, poorer decisions when engaged in sexting.

The Supreme Court has recognized the effect of adolescent immaturity and neurobiology in decision-making. In multiple recent decisions, including *Roper v. Simmons* (2005), *Graham v. Florida* (2010), and *Miller v. Alabama* (2012), the Court has recognized that adolescents are less criminally culpable than adults due to their propensity for thrill-seeking, impulsivity, inability to extricate themselves from their environments, susceptibility to peer influence, and poor judgment. Prosecution of teen sexters under child pornography statutes does not appear to take into account this diminished culpability. Even if a sext was not considered child pornography but was categorized as “obscene,” the teenager’s motivation, intent, and the content of the sext should be considered. There is a fundamental difference between charging two teen lovers for exchanging consensual sexts and the forwarding or public posting of sexts with an intent to harass or defame someone. Absent a component of malice, a teen sexter at the most should be charged with a status offense, seeing that the same acts, if perpetrated by an adult, would not constitute a crime.

If teen impulsivity is in part neurobiologically driven, then how might an adolescent be protected from poor decision-making? Improved judgment and self-control come with age, but teens can at least be taught what

constitutes a “harmful” sext, encouraged to communicate their sexuality in healthy ways, and educated about the negative effects of sharing and distributing sexts. The most logical places to promote healthy sexual development, expression, and communication, and to deter unhealthy sexting, would be at home and school. Globally, initiatives should focus on the deterrence of bullying, cyber-bullying, and harassment. Educational programs within schools, open communication with parents and monitoring of online activity, and peer mentoring may all have a role to play in teaching teens healthy ways of managing sexual impulses and the potential harm in some forms of sexting (Berson, Berson, & Ferron, 2002; Hinduja & Patchin, 2012; Lorang et al., 2016; McEachern, McEachern-Ciattoni, & Martin, 2012).

11 | THE ROLE OF MENTAL HEALTH PROFESSIONALS

Psychiatrists and other mental health professionals have a meaningful role to play when working with individuals engaged in sexting. First and foremost, it is important to be familiar with the relevant laws of the jurisdiction in which one practices. Although sexting may be considered criminal behavior in some jurisdictions, psychiatrists and other mental health professionals are not mandated to report criminal behavior including sexting unless it involves suspected child abuse or maltreatment. In terms of respecting patient–therapist confidentiality and patient autonomy, then, it is critical that one has a sense of those sexting-related behaviors that may require reporting to authorities and those that do not.

Mental health professionals have a role in treating individuals who sext. They can educate patients about the potential criminal ramifications of their behavior. Mental health professionals may be able to encourage teens to practice safe sexting, should they choose to sext, as part of the general discussion surrounding safe sexual behavior. Asking the individual the intention of the behavior, as well as discussing foreseeable outcomes, can help to clarify the appropriateness of the sexting behavior. This information should be weighed in the context of the participant's developmental age as well as the nature of the relationship between the sender and the receiver.

In patients who are engaging in hostile, vindictive, or otherwise harmful sexting, mental health professionals can assess for additional types of disordered conduct and attempt to curb the patient's behavior. If inappropriate sexting co-occurs with other problematic sexual behaviors, then consultation with a clinician experienced with juvenile sexual misconduct may be indicated. For those individuals who have been harmed by sexting, an evaluation of psychiatric symptoms, including depression, hopelessness, social isolation, anxiety, suicidality, and others, is warranted. Clinicians can refer patients to resources like the Cyberbullying Research Center to obtain support and recommendations to address and cope with inappropriate sexting.

12 | CONCLUSIONS

Teen sexting remains a controversial issue. Researchers have yet to arrive at a single cohesive definition of the behavior, in part because of the various roles one may play in creating, sending, receiving, or disseminating a sext. Most recent studies indicate that teen sexting is a relatively common phenomenon. The potential emotional impacts of sexting remain unclear, although intuitively they are likely to be more harmful if there are elements of coercion in a sext's production, violation of the creator's privacy, or public exposure of images or videos.

Teen sexting covers a spectrum of behaviors from normative to problematic. Consensual teen sexts in which the creator, sender and receiver are willing participants in the exchange should not be categorized as child pornography and most likely should not be prosecuted under sexting statutes. In the absence of a finding of malice in a defendant, it is unclear what purpose sexting laws serve teens. There are probably better, less harmful ways than criminal prosecution to encourage teens to express their sexuality in a healthy manner.

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