Teenagers, Sexting, and the Law
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**Abstract**

The phenomenon of teen sexting emerged as a result of the proliferation of digital technology. More than 40 studies have established that teen sexting occurs relatively frequently and is a rising trend, commensurate with the ubiquity of smartphone ownership in teens. Studies have shown that sexting is associated with incidences of increased sexual behavior. US state laws on sexting vary widely, from decriminalization to misdemeanor charges or prosecution for child pornography with harsh sentences. Teen behavior and digital invention have outpaced the development of new laws, and this has the potential to have dire legal ramifications for teens. Separating consensual sexting from nonconsensual sexting and actual child pornography is a critical next step for law enforcement agencies and policy makers to catch up to technology. In this article, we argue that consensual teen-to-teen sexting does not warrant law enforcement involvement but rather is a health and education issue that is better addressed at home, in schools, and in primary care.

With the advent of smartphones, the past decade has witnessed a new manifestation of adolescent sexual behavior known as sexting. In 2018, 95% of teens owned or had access to a smartphone.1 Smartphones are the mechanism through which many teens are sharing explicit images and videos of themselves with other teens. Teen sexting behavior has created confusion with respect to potential legal repercussions (ie, the possession and distribution of material that can be considered child pornography). Notably, many child pornography laws were written and passed before the advent of the digital technology era, and this has resulted in a patchwork of state laws that vary from noncriminalization of sexting and education to misdemeanor charges or felony indictments that can potentially result in 20-year prison terms and permanent sexual offender status. Indeed, 23 states still use child pornography statutes to prosecute teenagers caught engaging in sexting with other teens. With increased interest in the phenomena associated with new technology (eg, sexting, cyberbullying, Internet addiction, and pornography), new research has provided some answers as to why and how teenagers sext and what the possible penalties (if any) should be, all of which will be reviewed herein.

**Definition**

Although there is no universally agreed on definition of sexting, most scholars define it as some variation of the sending or receiving of sexually explicit pictures, videos, or text messages via smartphone, digital camera, or computer.2 The National Center for Missing and Exploited Children 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 smartphone, computer, video camera, digital camera, or video game.2 Complicating matters, there is also no universal definition of what “sexually...
explicit" entails, and it can range from a full nude body to partial or fully exposed breasts or male genitalia.

Many courts have adopted the definition first used by a federal trial court in United States v Dost. There, the critical issue before the court was whether the pictures depicted the minors engaging in sexually explicit conduct as defined in the federal statutes that criminalize the creation and distribution of child pornography. That court set forth 6 nonexclusive factors in determining if "a visual depiction of a minor constitutes a 'lascivious exhibition of the genitals or pubic area'" under 18 US Code §2255(2) (E), the definitions section of the statutory scheme (Id. at 830) is as follows:

1. whether the focal point of the visual depiction is on the child’s genitalia or pubic area;
2. whether the setting of the visual depiction is sexually suggestive (ie, in a place or pose generally associated with sexual activity);
3. whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
4. whether the child is fully or partially clothed or nude;
5. whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and
6. whether the visual depiction is intended or designed to elicit a sexual response in the viewer (Id. at 832).

The federal definition of child pornography5 cites “graphic or simulated lascivious exhibition of the genitals or pubic area” or “a minor engaging in sexually explicit conduct.” It confines itself to visual depictions only, not text messages. State laws often follow the federal definition, but many states have now passed separate sexting legislation that specifically addresses this increasing form of adolescent behavior and perhaps constitutionally protected First Amendment speech.

**PREVALENCE OF TEEN Sexting**

Because studies have varied with how they define sexting, ages of children and teenagers studied, and conditions under which sexting has occurred, prevalence estimates can vary widely. The best current estimate of sexting prevalence comes from a recent large-scale meta-analysis that statistically summarized 39 studies published before 2017 with 110,380 subjects. Results revealed that the prevalence of sexting behaviors is as follows: sending a sext (14.8%), receiving a sext (27.4%), forwarding a sext without consent (12.0%), and having a sext forwarded without consent (8.4%). This meta-analysis involved studies from multiple countries (22 in the United States, 12 in Europe, 2 in Australia, 1 in Canada, 1 in South Africa, and 1 in South Korea), and mobile devices were the most common technology involved. Among studies included in the meta-analysis, most examined sexting via the sharing of images (28% of all studies) or images and/or videos (36%), whereas others examined sexting via the sharing of images, videos, and/or explicit text messages (36%). The prevalence of sexting did not vary by sex but did vary by age, with an increase in sexting as teens progressed through adolescence.

More recent research has corroborated the Madigan et al6 meta-analysis. A 2017 study of 1208 12- to 18-year-old Los Angeles teens found that 17% had sent a sext, and 24% had received a sext.7 Another 2017 study in Utah of 656 high school students found that 15.8% of boys and 13.6% of girls had sent a sext, and 40.5% of boys and 30.6% of girls had received a sext.8 Similar to Madigan et al, Strassberg et al9 showed that the prevalence of forwarding sexts was 12.2% for boys and 7.6% for girls. In 2018, a Pennsylvania survey of 6021 ninth- to 12th-graders found that 29% of teens were engaged in consensual sexting.9 In this study, nearly one-third of the sexts were specifically identified as being consensual, whereas 3% were reported as being nonconsensual, a 10-fold difference.9 Taken together, the prevalence of sexting among teens is becoming more established. Several researchers have identified an urgent need to clarify the characteristics of those who sext, the conditions under which sexting occurs safely versus harmfully, as well as the possible consequences of teen sexting in terms of concerning physical (eg, early sexual debut) and mental health outcomes (eg, depression, anxiety, and delinquency).10,11 Pressing questions in the field include the following:

1. When does sexting typically begin? Are there differential consequences for boys and girls who engage in sexting?6,12,13 Do outcomes differ according to the type or content of material sexted? Are multiple partners sometimes involved?
2. How many sexts involve coercion? Research suggests that some sexts may be coercive in nature.4,14,15 Are unwanted sexts the equivalent of bullying? Adequately defining coercion, both qualitatively and quantitatively, will be an important step in moving this literature forward.
3. Is there an association between sexting and other risk-taking behaviors or an impact on normative sexual development or body self-image? Is early versus later sexting onset associated with greater or fewer physical and mental health consequences? Increasing research indicates an association with sexual intercourse or intention to have sexual intercourse in the near future7,9,16–21 and having multiple
sexual partners. However, the connection between sexting and drug use, anxiety and depression, and a history of sexual abuse (cited in several studies\(^9,18-23\)) is correlational at best and not firmly established.\(^6\) Meta-analyses are needed to resolve discrepancies in the literature, and longitudinal studies are needed to examine the temporal order of associations.

4. Are there certain conditions when teen sexting has fewer consequences? Sexting that occurs within an existing or committed teen relationship may include less coercion and fewer health risk behaviors.

5. Are there ways to determine prevalence other than self-reports? Searching police reports, online forums, hotline reports, or even hypothetical vignettes for teens could help establish more accurate estimates of prevalence.\(^10\)

In sum, research from >40 studies to date suggests that teen sexting is common, is often consensual, increases with age, and is on the rise likely because of the increase in smartphone ownership in teens and greater acceptance among teens of pursuing sexual intimacy online.\(^6\)

**WHY TEENS SEXT**

A consensus of experts has concluded that teen sexting is a modern form of flirting or romantic overture.\(^6,13,18,24-32\) Sexting appears to most often be done consensually compared with nonconsensually,\(^8\) and only a small minority of adolescent girls and boys report being coerced to sext.\(^14,33\)

Although consensual sexting it is not known to be initially harmful to either party, the act of sexting does carry the risk of prosecution in many states as well as the risk of future nonconsensual dissemination of sexual images. In the most extreme consequences, sexts have been disseminated without consent, constituting a form of cyberbullying with tragic outcomes.\(^34-36\)

**FORMS OF CONSENSUAL TEEN SEXTING**

Consensual teen sexting is as follows:

1. Purely consensual, from 1 teen to another: Although this behavior potentially carries risk given that digital images can be permanent (eg, even Snapchat sexts can be ‘grabbed’ by third-party applications), it falls within the context of normative adolescent sexual development and brain maturation. With respect to this latter point, the human brain is not fully mature until age 25 years or older, especially areas of the frontal cortex (dealing with judgment) and the limbic system (dealing with impulsiveness).\(^37\)

2. Consensual but coerced sexting: This may fall within the context of pressure to engage in other sexual activities and could be a legitimate topic for ongoing discussions about implicit and explicit sexism as well as acceptable and consensual sexual behavior.\(^15,38\) A more precise definition of what constitutes coercion and the degree to which it is consensual is essential in future research endeavors to adequately understand this form of sexting.

Nonconsensual teen sexting (ie, anything that goes beyond the boundary of the initially intended teen recipients) is as follows:

1. Disseminated sexts: This occurs when a sext has been disseminated against the wishes of 1 of the partners or without the initial sender’s knowledge (eg, forwarding of sexts and revenge porn). Although the prevalence of this form of sexting is lower than that of consensual sexting, the ramifications are qualitatively and potentially far greater given their nonconsensual nature and resulting psychosocial consequences (embarrassment, shame, and rejection).\(^11,14,18,39,40\)

2. Sextortion: An emerging phenomenon, sextortion involves the threatened dissemination (for money, sex, or more images) of explicit or embarrassing sexual images without consent.\(^41\) The only current study sampled >5500 middle and high school students and found that 5% had been the victim of sextortion and 3% had threatened others who had shared an image with them in confidence. Boys and nonheterosexual youth were more likely to be targeted, and boys were more likely to target others.\(^42\)

3. Teen sexts that have been requested or accessed by an adult: We argue that this behavior fits within the traditional definition of child pornography except in ‘Romeo and Juliet’ cases, in which a statute prohibits prosecution or provides an affirmative defense to prosecution if the parties are close enough in age as defined by the statute.

**SUPREME COURT DECISIONS**

US Supreme Court decisions suggest that a shift from the 23 states’ stance of adhering to child pornography laws to address sexting is indicated.

In *New York v Ferber*,\(^43\) the court concluded that distributing child pornography is inevitably tied to the sexual abuse of children because the material is a permanent record of the abuse whereby children have been sexually exploited. They emphasized the victim’s “physiological, emotional, and mental health” (Id. at 758). The decision categorically exempted child pornography from the First Amendment protections that adult pornography receives. The child protection rationale applied not only to the production of child pornography but also to the distribution of it because
pornographic depictions of children are “intrinsically related to the sexual abuse of children” (Id. at 759).

In Ashcroft v Free Speech Coalition, the court struck down prohibitions on “virtual” or computer-generated child pornography and pornography involving actors who appear to be (or are held out as) minors but, in fact, are adults. The court explained that such pornography “records no crime and creates no victims by its production” (Id. at 250). The key element cited was that child pornography emanated from the sexual abuse of minors, which the court described as “a most serious crime and an act repugnant to the moral instincts of a decent people” (Id. at 244). More recently, in United States v Stevens, the US Supreme Court continued to endorse the “intrinsically related to the underlying abuse” standard that came out of Ferber and would seem to exclude sexting between romantic teen partners (Id. at 471).

Furthermore, the US Constitution’s First Amendment could allow for the protection of consensual sexting. The Ferber decision went on to say that “nudity, without more, is protected expression” (Id. at 765, fn. 18, further citation omitted). Consequently, there may be an argument to be made that consensual teen sexting constitutes protected speech. “It is not the sexual depiction of youths in visual media that renders it unprotected speech, as child pornography laws are often interpreted as proclaiming, but the abuse of a child that occurs in its production and distribution that renders it so.”

**LEGAL IMPLICATIONS OF TEEN Sexting**

At present, teen sexting may be prosecuted under state law, which varies considerably from state to state, or conceivably under federal law if the teens involved live in different states. Such prosecutions can be devastating and costly, both to the teenagers involved and to their families. After Ferber, state law closely followed the federal law addressing child pornography, which was first enacted in 1978. Because smartphones did not become commonly used until 2010, the federal law does not specifically address sexting other than possessing sexual content on computers.

States may offer expanded free speech protection for sexting under their own state constitutions. Indeed, 27 states have passed laws that specifically address sexting (see https://cyberbullying.org/sexting-laws for a state-by-state interactive map; Figs 1 and 2). For example, New Mexico and Maine have exempted teen sexting from the scope of child pornography statutes under certain circumstances. In New Mexico, child pornography laws are not applicable when a teen <18 years of age possesses an explicit image in which the depicted child is 14 to 18 years old and the depicted teen knowingly and voluntarily consented to the possession. In Maine, there is no prohibition on the possession of sexually explicit material if the person is at least 14 or 15 years of age and the possessor is <5 years older than the person depicted. Essentially, these states have decriminalized sexting.

New Jersey and New York have also created leniency in state constitutions in which they allow for a diversionary program rather than full prosecution under child pornography statutes. Such programs involve educating the teenagers charged on such topics as legal and nonlegal consequences of sharing sexually suggestive materials. Georgia and Utah allow for reduced, misdemeanor penalties if certain criteria are fulfilled. For example, in Georgia, the possessor must be age 18 years or younger, the teen depicted must be at least age 14 years, consent must exist, and there can be no distribution. Indiana and Nebraska have added “affirmative defenses” to their child pornography statutes. For example, in Nebraska, a visual depiction that portrays only the defendant...
constitutes 1 affirmative defense. A second defense is when only 1 teen is depicted, he or she knowingly and voluntarily participated in the production of the image without any coercion, and there was no distribution. The remaining 19 states separate sexting as misdemeanor offenses and often have Romeo and Juliet provisions; for example, in Texas, if the minors are within 2 years of age of each other and are in a "dating relationship," there is an affirmative defense to the misdemeanor sexting statute.57

In the 23 other states, teens who engage in sexting can be prosecuted, convicted, and sentenced to up to 20 years in prison and receive a lifetime sexual offender status for production and possession of child pornography. Interestingly, in these states, a teen sexter can be charged as both an offender and a victim. One could easily argue that if a youth creates a sext to be (consensually) shared with another similar-aged peer, he or she is not an exploited or abused child victim but rather an adolescent engaging in sexual behavior in the digital age. Even if a law considers youth to be victims, incarcerating them will not protect them. Moreover, in many of these states, consensual real-life sex between teens >16 years of age is legal.

CASE EXAMPLE

In 2014, a Minnesota girl was charged with felony distribution of child pornography after she used Snapchat to send a revealing selfie to a boy at her school.58 The boy took a screenshot of the photograph before it disappeared and then distributed it to his friends without her consent. If convicted, she faced up to 10 years in prison and had to register for life as a sex offender. A Minnesota judge dismissed the charge in March 2018.

In his ruling, Rice County District Judge John Cajacob wrote that the state’s child pornography statute is designed to protect children from victimization and that punishing the girl for sending sexual images of herself produces “an absurd, unreasonable, and unjust result that utterly confounds the stated purpose of the statute.” He went on to say that “the punishment is vastly disproportionate to this girl’s ‘crime.’ This court cannot see how subjecting [the girl] to registering as a sexual offender would protect her or teach her anything but that the justice system is cruel and unjust. The idea that heavy-handed enforcement of pornography laws is going to help these misguided, struggling teens is itself absurd.”59
TABLE 1 Advice for Pediatricians

Anticipatory Guidance and Interventions for the Practicing Pediatrician

- With tweens and teens, incorporate sexting into your ongoing discussions of safe sex and healthy relationships. Discuss potential legal and psychosocial consequences without shaming this relatively common adolescent behavior. Discuss how they can be good digital citizens by being safe, legal, and ethical online.
- With parents, talk about the different types of sexting: consensual, nonconsensual, and coerced. Let them know that if their children consensually sext with other teens, it does not mean that they are "bad." Instead, encourage them to use this opportunity to talk about healthy relationships, safe sexual practices, and digital citizenship.
- With policy makers, advocate for policy changes that decriminalize consensual sexting between adolescents and work with policy makers on laws that penalize adult-child sexting, revenge porn, and misuse of potentially harmful forms of sexting (coerced and nonconsensual sexting).
- With schools and communities, work to incorporate evidence-based programs on sexting and digital citizenship into antibullying and healthy-relationship curricula.

A POSSIBLE COMPROMISE

On the basis of the evidence presented above, we argue that consensual sexting between teens should not be unlawful. In essence, consensual sexting between adolescents should be decriminalized. Just like sex, sexting should be considered a health and development issue, not a legal issue. We argue that prosecutions should be limited to the more egregious and nonconsensual acts in which there is exploitation via further distribution, commercial or otherwise, or in which a third party might be involved outside of the adolescent relationship scenario that might be indicative of coercion or exploitation. In Table 1, we provide anticipatory guidance for pediatricians and health care professionals seeking to address sexting and its legalities with policy makers, teens, parents, as well as schools and communities.

Society seems to understand and acknowledge that teenagers are capable of doing "dumb things" and engaging in risky behaviors. In addition to the human desire of sexual curiosity, teen brains are not fully developed, making them susceptible to impulsive decisions and less consideration of consequences. Furthermore, younger teens may be unaware of the potential dangers of sexting. Thus, we argue that consensual teen-to-teen sexting does not warrant law enforcement involvement but rather is a health and education issue that is better addressed at home, in schools, and in primary care.

Child pornography laws were enacted long before smartphones came into existence. Teen behavior and digital invention have outpaced the development of new laws, and this has the potential to have dire legal ramifications for teens. States should consider restructuring or modeling their laws to mirror New Mexico’s, which has made an exception to child pornography laws when sexting occurs in teens <18 years of age, the depicted image is of a teen 14 to 18 years of age, and the depicted teen knowingly and voluntarily consented to the possession.

Below, we offer specific legislative or judicial suggestions for assessing various forms of sexting.

Consensual Sexting

What seems logical and appropriate, from both a pediatric and a legal viewpoint, is to separate consensual sexting from nonconsensual and coerced sexting as well as actual child pornography. With self-produced naked images, a sexting teenager’s only potential victim is himself or herself. Far from being forced or enticed into submitting to sexual acts that are being recorded (the definition of child pornography), the teen is deciding to create and/or share a sexually explicit image of himself or herself. In the context of flirting or a romantic relationship, this may be completely innocuous.

Sexting teens may also be engaging in a legal sexual relationship (~41% of teens have sexual intercourse by the time they graduate high school). Thus, it is counterintuitive that they could be considered old enough to consent for sex (or even to get married) but prosecuted for sending nude or seminude pictures of themselves to each other. With time and increasing maturity (not to mention the inevitable change in relationships) a sexting teen may regret having created the explicit image. Nevertheless, pediatricians, child psychologists, and other teen-focused health care providers would agree that this behavior does not rise to the level of severe criminal behavior potentially requiring many years of incarceration and permanent sexual offender status.

Furthermore, sexting prosecutions can expose teens and families to severe embarrassment and unwanted notoriety in the newspapers. Significant legal expenses can also be incurred. Data from a national sample of 2700 law enforcement agencies about sexting cases between 2008 and 2009 found that arrests occurred in one-third of the cases, including 18% of the consensual cases. The authors noted, “Sexting also involves episodes, an estimated 33%, with no malicious elements that were better characterized as experimental romantic and sexual attention seeking among adolescents.” More recently, teens in several states have been charged as sexual offenders for engaging in sexting. Moreover, in 2017, the US House of Representatives passed the Protecting Against Child Exploitation Act, which would have subjected sexting teens to 15- to 30-year prison sentences had the US Senate voted to approve the act.
All this said, we are not encouraging or condoning teen sexting; rather, we are suggesting that it be decriminalized. The decriminalization laws of states such as Maine and New Mexico would seem most progressive, followed by misdemeanor statutes and Romeo and Juliet laws. Efforts by schools, parents, and mental health personnel should be vigorously employed to educate adolescents about potential risks involved.

Coercive Sexting
Defining coercion in a relationship may be problematic from a legal viewpoint, and more research is needed to understand the prevalence and consequences of this form of sexting. Initial studies do reveal that more girls are asked to send sexual pictures than they actually do. Even within the context of a peer-to-peer adolescent romantic relationship, there may be instances in which pressure or coercion is applied to produce sexting images. But as discussed above, rather than be a law enforcement issue, this should be addressed as an educational opportunity to explore issues of adolescent sexual development and consent.

Nonconsensual Sexting and/or Dissemination
Forwarding sexts without consent may represent a potential form of cyberbullying and should not be excused or tolerated. Yet, this behavior does not seem to rise to the level of actual child pornography unless such images fall into the hands of adults, in which case the onus falls on the adult who retains, posts, or forwards the sexts. Although such teens may require more intensive education and rehabilitation and possibly even be subjected to prosecution and be liable for damages, we argue that they should not be considered child pornographers.

Child Pornography
The US Supreme Court has clearly delineated that adults who sexually abuse children and teens and record that exploitation should be prosecuted to the fullest extent of the law. Even adults who have obtained “self-produced” teen images may merit prosecution, subject to any Romeo and Juliet–type exception or affirmative defense. Similarly, in those rare instances in which minors may go beyond producing sexual images of themselves and choose to disseminate them to adults or coerce other minors to submit to sex and filming, prosecution may be appropriate.

CONCLUSIONS
Parental and societal concerns inevitably revolve around teens’ sexual activity, and sexting has brought those concerns front and center. Traditionally, government has always had a compelling interest in protecting minors, but only using the “least restrictive means necessary.” Fears that sexting represents an increased sexualization of teens in society do not appear justified because sexual intercourse and certain risky sexual behaviors have actually decreased over the last 2 decades. There are 22 million 13- to 17-year-olds in the United States. Smartphone ownership or access now stands at 95% of all teens, a 22% increase from 2014 to 2015 according to the most recent report, and the average age of acquisition is 10.3 years. If ~15% of teens are sending sexts and 30% are receiving them in the United States, that would amount to 3.3 million sending sexts and 6.6 million receiving sexts, an overwhelming number if prosecutions are to occur. From pure numbers alone, consensual sexting appears to now represent a common adolescent behavior in the digital era that does not warrant prosecution.

ACKNOWLEDGMENT
We thank Ken Stalter, JD, for his valuable research contributions.

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Pediatrics 2019;143;
DOI: 10.1542/peds.2018-3183 originally published online April 15, 2019;

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