

# Juveniles as Offenders

Priscilla M. Grantham

Sr. Research Counsel

National Center for Justice and the Rule of Law



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## Overview

- Define and examine the practice of “Sexting”
- Discuss statistics relating to the incidence of sexting
- Examine the various concerns regarding this behavior
- Discuss difficulties in classifying images portraying juvenile sexual self-exploitation
- Review relevant laws and proposed legislation
- Summarize the range of options available to investigators, prosecutors, courts and schools.

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## Sexting:

The production, possession, and dissemination of nude or sexual materials of underage persons (under the age of 18), when such materials were voluntarily produced or distributed by the underage person themselves.



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... and I quote:<sup>1</sup>

“LOL i honestly think it’s like not smart but if yer totally into the guy and you luv him and he luv’s u then there is no harm yeah i agree with ppl if u gotz it flaunt itz but don’t go all naked and slutty i would just be careful about how much you show the camera lol yes i have done it and i’m not upset...LOL :)”

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“lolzzzz yer ur so right i mean we all do it at least once in our lives right? i mean dont we all get a lil silly and flirty at some point in our life!!”<sup>2</sup>

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...and from the boys:<sup>3</sup>

“Yes I have received some pics that include nudity. Girls will send them sometimes, not often. I don’t know why they think it’s a good idea but I’m not going to stop it. Sometimes a guy will get one and forward it to all his friends.”

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“I like classy girls so I don’t like [sexts] as much anymore – it makes them look slutty, but it’s not a big deal if it’s just a topless photo, but when it’s the bottom also it’s a lot more serious.”<sup>4</sup>

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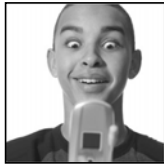
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- Often forwarded by initial recipient without senders consent or knowledge.
- Photos go “viral,” reaching large audiences as forwarded from group to group.



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*“Hey, take a look at this...”*<sup>5</sup>

Teens saying it’s common for nude /seminude photos to be shared with people other than intended recipient:

- Girls – 36%
- Boys – 39%

Teens who have seen nude/semi-nude pictures that weren’t intended to be shared with them.

- Girls - 25%
- Boys - 33%

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**Prevalence:** <sup>6</sup> (2008 study)

Percentage of teens 13-19 who have sent/posted nude or semi-nude pics or videos of themselves:

- 20% of teens overall
- 22% of teen girls
- 18% of teen boys
- 11% teen girls ages 13-16
- 25% teen girls ages 13-16 have sent "sexy texts"

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**The Study:**

- Internet survey
- Commissioned by National Campaign to Prevent Teen and Unplanned Pregnancy & Cosmogirl.com
- Respondents– 653 teens (ages 13-19)
- Conduct of 19 y/o irrelevant as to issue of cp or transmission of nude photographs by a minor.

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% of teens citing *pressure from opposite sex* as reason for sexting:<sup>7</sup>

- Girls – 51%
- Guys – 18%

% of teens citing *pressure from friends* as reason for sexting:<sup>8</sup>

- Girls – 23%
- Guys – 24%

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***But, we are Soul mates...***

15% of teens who have sent nude/semi-nude pics of themselves have done so to someone they only knew online.<sup>9</sup>

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***Oh, That Makes Sense...***

*(reasons teen girls say they sext)*<sup>10</sup>

- To be flirtatious (66%)
- As a sexy present for their boyfriend (52%)
- As response to a sext *they* received (44%)
- As a joke (40%)
- To feel sexy (34%)

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***Main Scenarios for Sexting***

- 1) Exchange of images solely between romantic partners
- 2) Exchanges between partners that are shared with others outside the relationship
- 3) Exchanges between people not yet in a relationship , but where at least one person hopes to be.

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4) Minors may create and post sexually explicit images of themselves on the Internet in order to meet friends or potential sex partners.

5) "Camwhores" – minors who sell sexually explicit images / videos of themselves through webcams as a means of making money.

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### Why Sexting / Why now?

*Perfect storm...*

- Exposure to increasingly younger sexualized "role models"
- Accessibility of technology
- Characteristics of tweens / teens

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### 1. Role models / Media

- Miley Cyrus's performance at Kids' Choice Awards
- Britney Spears schoolgirl video (& others!)
- Gossip Girls, Paris Hilton, et al...

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### 1. Role models / Media



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### Nat'l ad campaign - "Gossip Girl"



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### Sexting and Young

#### Celebrities:

Vanessa Hudgens (*High School Musical*)

Miley Cyrus

Rhianna

Adrienne Bailon (*Cheetah Girls*)

Lindsay Lohan

Paris Hilton

Kim Kardashian ...

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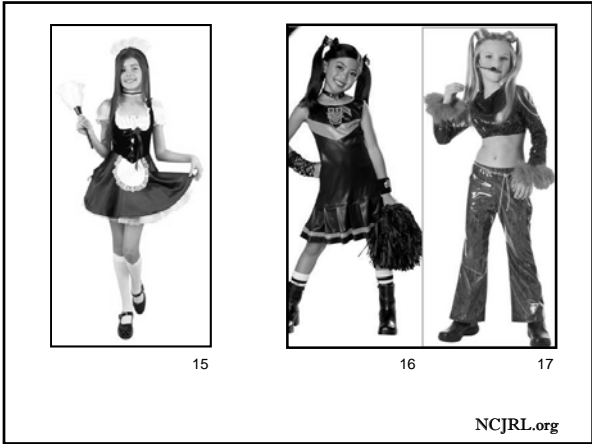
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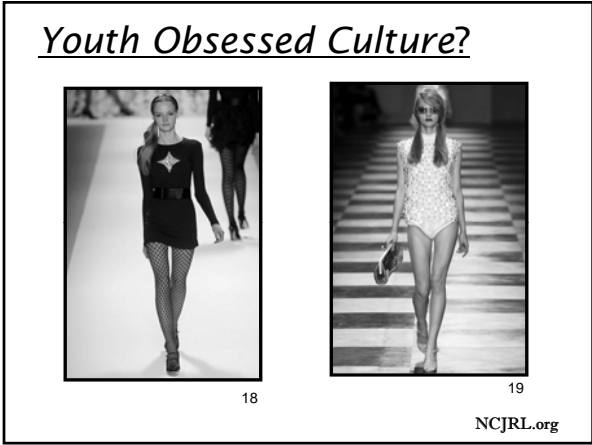
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**2. Accessibility to technology:**<sup>21</sup>

- 75% of 12-17 year olds own cell phones
- **88% of teen cell phone users are texters**
- 23% - first cell phone at age 12
- 23% - age 13
- About 20% of teens have first phone by age 11

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- Teens text as much as or more than they talk on the phone. <sup>22</sup>
- 42 % of teens surveyed say they could text blindfolded. <sup>23</sup>
- Nearly half of U.S. teens say their social life would end or be worsened without their cell phone.

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**3. Characteristics of Tweens / Teens:**

- Instant gratification generation
- Brain still “under construction” until 20-something
- S.Ct. noted the “impetuous and illconsidered actions and decisions” of adolescents, who are “overrepresented statistically in virtually every category of reckless behavior.”<sup>24</sup>

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•Due to inquisitive nature, teens seem to be on cutting edge of technology.

•While the rest of society thinks blogging is still hip, teens have moved on to “tweeting.”

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### Teens & texting...<sup>25</sup>

• Half of teens send 50 or more texts a day or 1,500 texts a month

• 1 in 3 teens send over 100 texts a day, or more than 3,000 texts a month

• 15% of teens who text send more than 200 texts a day, or more than 6,000 texts a month

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• 31 hrs /wk connected to technology<sup>26</sup>

• 3.5 hrs per wk IMing friends

• 2 hrs/wk on You Tube

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**Minors Who Sext: Child Pornographers?**

- One who sends nude/seminude photo to another – production, possession or dissemination of cp
- Recipient of photo – charged with possession of cp because image is on his/her phone
- Initial recipient of image can be charged if he/she forwards the image to anyone else.

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**Sexting & the Law – Considerations:**

- Should extant cp statutes be applied to sexting?
- Is *new* legislation needed to address sexting?
- Are there different forms of sexting, or should all instances be treated to same under the law?
- Would criminal laws be enforceable in a consistent manner? Would laws have deterrent effect on minors?
- Are there alternative methods to address problems and harms of sexting?

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**On One Hand...**

- CDC report – 47.8% high school students had engaged in sexual intercourse. <sup>27</sup>
- 45 % of teens who reported having sex also reported having at least one sexting activity. <sup>28</sup>
- Sexting is the modern way for teens to explore sexuality – like spin the bottle.
- Truth or Dare for the Millennial generation
- Safer than traditional exploration of sexuality - no physical contact. <sup>29</sup>

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***A natural progression...?***

***A few years ago:***

“I’ll show you mine if you show me yours,” ...

***Today:***

“I’ll show you mine and **you** show **mine** to everyone else in cyberspace.”

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***On the Other Hand . . .***

NCMEC study – 5.4% of child pornography images on Internet appear to be self produced. Amounts to hundreds of thousands of images.<sup>30</sup>

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***Possible Consequences:***

- sexual exploitation
- embarrassment
- commercial exploitation
- harassment / suicide death
- prosecution for making, disseminating, &/or possessing child pornography . . .
- Sex offender registry

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Harms to society as a whole:

- Images could be used for grooming
- Sexualization / eroticization of minors encourages societal perceptions of children as sexual objects, which
- leads to further abuse and exploitation

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Is there a harm if the boyfriend or girlfriend who receives the image does *not* share it with others?

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*Child Pornography Laws:*

- In the past, adults exploited / victimized children in order to generate child pornography
- CP laws developed to prevent the exploitation of children used to create these displays

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**Child Pornography Laws:**

Criminal statutes (both Federal and states’) prohibit the production and dissemination of pornography featuring minors engaged in sexually explicit conduct.<sup>31</sup>

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**Why prohibit CP?**

- compelling state interest in safeguarding well-being of children
- Protect children from being sexually abused during the taking of these photographs
- Prevent photographs from becoming tools to coerce children into performing sexual acts.

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**“Protected class” principle:**

Common law – the class of persons a statute is meant to protect should not be subject to punishment under that statute.

i.e. 16 y/o girl who had consensual sex w/ father could **not** be charged as an accomplice to the crime of incest.

People v. Tobias, 21 P.3d 758 (Cal. 2001)

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**Not an absolute...**

NV statute prohibits commission of lewd acts w/ minor under 14.

Boy under the age of 14 fondled 4 y/o cousin – judged delinquent

Ct held: statute meant to protect “minors under age of 14 from all persons, even from other minors under age of 14.”

Cote H. v. Nevada, 175 P.3d 906 (Nev. 2008).

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Child pornography laws (like NV statute) do not distinguish btwn protected class of minors and the adults who engage in prohibited behavior.

No exceptions from criminal culpability when person creating, possessing, or distributing image is a minor.

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**Legislative Intent?**

Did drafters of CP laws anticipate juveniles would be creating & distributing CP by taking pictures of themselves & disseminating via cell phones and social networking sites?

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## Child Pornography - Crimes

Production

Distribution

Possession

Pandering

Grooming

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### “Child Pornography”

**Visual depiction of sexually explicit conduct**, where production involves the use of a minor engaging in conduct...

#### What is Sexually explicit conduct

*(Actual or Simulated)*

- Sexual intercourse
- Bestiality
- masturbation
- Sadistic or masochistic abuse, **or**

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### ***...lascivious exhibition of genital / pubic region.***

Nudity not required

Non-exclusive factors *U.S. v. Dost*

- Focal point of image: child’s genitalia or pubic region
- Sexually suggestive Setting
- Child in unnatural pose or inappropriate clothing
- Child fully or partially clothed, or nude?
- Depiction suggests coyness or willingness to engage in sexual activity
- Depiction intended to elicit sexual response in viewer.

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**CP prosecution - considerations:**

- Are images CP under statute or case law?
- If “lascivious exhibition,” does it meet *Dost* criteria? If state doesn’t follow *Dost*, is image CP by their criteria?
- Was photo taken “consensually”?
- Is “victim” person who sent photo?
- Is victim willing to testify?
- What are societal goals?

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- Cincinnati teen Jessica Logan committed suicide after her boyfriend distributed nude pictures of her she sent him via cell phone.
- Who was victim?
- Would prosecution deter behavior
  - Of initial sender?
  - Of recipient who distributed?

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**If the Shoe Fits...**

Images that minors take of themselves and disseminate via cell phones might fall within the definition of child pornography under applicable Federal or state statutes.

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**Message to Minors...**

- As of 2/2009, arrests of juveniles under cp laws for sexting had occurred in Ala, Conn, FL, N.Y., N.J., Mich, Ohio, PA, TX, Kansas, Wisconsin, and Utah.
- “Kids, these photos can ruin your life, and just to prove it, we’re going to ruin your lives.”

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**Sex Offender Registration:**

- 38 states include juveniles in their sex offender registries.
- Alaska, Florida, Maine register juveniles only if they are tried as adults.
- Indiana registers juveniles if they are 14 or over.
- South Dakota registers juveniles 15 or over.
- Implications of SORNA?

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**Prosecutions Under Existing cp Laws:**

Phillip Albert (18) of Fla. Convicted for sending child pornography for sending a naked picture of his 16 year old girlfriend to her family and friends after they had an argument.<sup>32</sup>

- Felony
- Must register as a sex offender

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**Also in Florida...**<sup>33</sup>

- 16 y/o girl & 17 y/o boyfriend took photos of themselves engaged in “sexual behavior” - sent them from her computer to his email address.
- Did not show anyone else
- Both arrested – charged (as juveniles; s.o.r. not triggered) w/ producing, directing or promoting photograph featuring sexual conduct of a child
- Boy also charged w/ possession of child pornography

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- Girl filed motion to dismiss claiming prosecution not least intrusive means of furthering compelling state interest
- Lower ct denied, appellate ct affirmed: compelling state interest in protecting children from sexual exploitation - applies whether defendant is a child or adult
- Although under state law the couple could legally engage in the act, it was a crime to document it.

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- 14 year old New Jersey girl arrested and charged w/ possession and distribution of child pornography after posting over 30 nude pictures of herself on her MySpace page.<sup>34</sup>
- Conviction would have required registration as sex offender.
- On condition of withdrawing charges, prosecutor required girl to attend 6 months of counseling, probation, and to “stay out of trouble.”

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18 year old Jorge Canal (Iowa) is on sex offender registry: convicted of distributing obscene materials to a minor after sending a picture of his penis by cell phone to a 14 year old female friend who requested it.<sup>35</sup>

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- 15 y/o Ohio girl faced felony charges for illegally using a minor in nudity oriented material for sending nude pics of herself to other minors.<sup>36</sup>
- State dropped cp charges but another felony charge remained viable pending completion of diversion-type program
- She did not comply with conditions.

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***Let's Make a Deal...***<sup>37</sup>

*(Prosecutorial Discretion & Sexting Cases)*

- 14 y/o boy sent sexually explicit photo of ex girlfriend to two 13 y/o classmates - faced possible charges of possession of cp (+) registration as sex offenders.
- Prosecutor instead charged boys with telephone harassment:
  - apologize to victim
  - attend court ordered program about dangers of sexting
  - work with school to create awareness program about sexting

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***Deal, or No Deal...***<sup>38</sup>

Phones confiscated in schools contained “provocative” photos of young teenage girls (topless, underwear, swimsuits)

Threatened prosecution under cp laws unless they participated in education program. Topics: “what it means to be a girl in today’s society” and “non-traditional societal and job roles, and required them to write essays explaining why appearing in the photos was wrong.

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***Of the 3 girls refusing to take class:***

- Two were depicted wearing training bras.
- One was topless, w/ towel wrapped around waist.
- Father of one of the girls asked DA who got to decide what “provocative” meant, DA said he refused to argue that point and could charge all the minors that night

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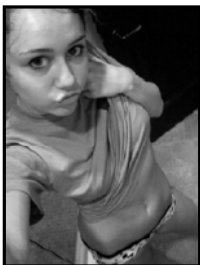
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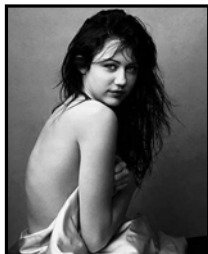
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***Is Lascivious in the eye of the Beholder?***



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Three girls filed civil rights suit against DA alleging he violated their 1<sup>st</sup> Amendment rights with threat of CP prosecution if they refused to take 6 month class designed to educate youths about dangers of “sexting.”

Granted TRO

*March 17, 2010 - 3<sup>rd</sup> Circuit heard appeal:*

Plaintiffs showed likelihood of success on claims that prosecution would not be based on probable cause, but instead on retaliation for exercise of constitutional right not to attend program.

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- Colorado couple, 17 & 15 exchanged cell phone images they recorded while engaging in consensual sex; girl’s mom found pics. <sup>41</sup>
- Couple remanded into counseling
- CO. investigators considered various factors in deciding whether or not to prosecute:
  - age of people involved
  - nature of the images
  - Images distributed?
  - “malicious actions” involved?

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**Sexting Legislation:**

- At least 24 states have introduced bills or resolutions aimed at sexting.
- [www.ndaa.org](http://www.ndaa.org)
- [www.ncsl.org](http://www.ncsl.org)
- General goals:
  - educate young people about risks
  - deter them from the practice
  - apply appropriate penalties

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**States with Laws re: Sexting**

- Arizona
- Illinois
- Louisiana
- Colorado
- Missouri
- Nebraska
- North Dakota
- Utah
- Vermont
- Oregon

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**Vermont** <sup>42</sup>

Created sexting statute: "Minor Electronically Disseminating Indecent Material to Another person"

- tried as juvenile
- no SO registration
- record expunged

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**North Dakota:** <sup>43</sup>

*Criminalizes dissemination of a "sexually expressive image," - "a photograph or visual representation that exhibits a nude or partially denuded human figure."*

Class A misdemeanor to:

- Knowing of its character and content,
- Distributes or publishes, electronically or otherwise,
- a sexually expressive image,
- With the intent to cause emotional harm or humiliation to any individual depicted in the image.

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**Florida:** <sup>44</sup>

Proposed legislation defines new juvenile crime of Sexting – prohibits minors from using computers, cell phones, other electronic devices to send nude pictures of themselves or others, or to re-send pictures of other teens they’ve received.

- 1st offense - \$25 fine or 8 hours community service
- 2nd offense w/in a year – 2nd degree misdemeanor
- 3rd offense w/in 2 years – 1st degree misdemeanor
- 4th offense w/in 3 years - Felony

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**New Jersey:** <sup>45</sup>

*3 pieces of proposed legislation:*

1. Teens caught sexting sent to educational program instead of facing criminal charges;
2. Schools required to educate parents and students about dangers of sexting;
3. Cell phone retailers required to create brochures detailing legal consequences of sexting.

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**Connecticut:** <sup>46</sup>

Proposed bill lessens penalty for sexting between 2 consenting minors.

Reduces charge from felony to misdemeanor when sexting is between minors 13-18 years of age who are in some sort of a relationship.

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**Illinois:** <sup>47</sup>

Criminal offense to sell / distribute a videotape or nude image of another person

- without written consent, and
- with the intent to damage a person's reputation. (Includes uploading images to Internet.)
- Punishable by up to a year in jail and \$2,500 fine.

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**South Carolina:** <sup>48</sup>

H.B. 4504 makes sexting illegal for kids 13-17

- Imposes fine and educational program for offenders
- Record expunged upon completion of program and payment of fine

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**Arizona:** <sup>49</sup>

- Misdemeanor for juvenile to use a computer or cellphone to send or possess "explicit sexual material" of another juvenile.
- Explicit sexual material includes human genitalia, nudity, sexual activity or sadomasochistic abuse.
- Sentences range from max of 4 years to probation, participation in diversion programs or fines.
- No violation if juvenile did not solicit image, did not forward it, and took reasonable steps to destroy it

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**Utah:** 50

Reduces penalties for minors that distribute pornographic material or deal in material harmful to a minor.

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**Ohio:** 52

H.B. 132 would prohibit minors from sending photos / videos depicting any minor in a state of nudity

No defense that minor who sent, exchanged, etc. photo depicting himself/ herself.

Reduces sexting from felony to misdemeanor.

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**Indiana:** 53

S. Res. 90, 116th Gen. Assem., Reg. Sess. (Ind. 1999).

Mandates a study on sexting and:

- the psychology of sexuality and sexual development;
- the psychology of sexual deviants and deviancy; and
- the mental development of children and young adults and how this affects the ability to make certain judgments;

as these issues apply to sex offenses covered by Indiana statutes. The sentencing policy study committee should consider revisions to these statutes based on the results of its study.

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Pennsylvania:<sup>54</sup>

S. 1121, Gen. Assem., 2009 Reg. Sess. (Pa. 2009)

No person under 18 years of age shall use a computer or a telecommunications device to knowingly transmit or distribute a photograph or other depiction of himself or herself or of another minor who is at least 13 years of age, in a state of nudity, to another person who is not more than four years younger or more than four years older than the person transmitting or distributing the photograph or other depiction.

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Judge may order offender to attend an educational program (either as part of a sentence or as part of a diversionary program)

(1) The legal consequences of and penalties for using a computer or a telecommunications device to share sexually suggestive or explicit materials, including applicable Federal and State laws.

(2) The nonlegal consequences, including the effect on relationships, loss of educational and employment opportunities and the potential for being barred or removed from school programs and extracurricular activities.

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(3) How the unique characteristics of the Internet, including the ability to search for and to replicate materials and the limitless audience, can produce long-term and unforeseen consequences from sharing sexually suggestive or explicit materials.

(4) The connection between bullying, including bullying on the Internet, and juveniles sharing sexually suggestive or explicit materials.

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**Nebraska:** <sup>55</sup>

New CP provisions provides affirmative defense for minors who possess sexually explicit images:

- The image portrays only the defendant; or
- The defendant was less than 19 years old,
  - Depiction of sexually explicit conduct portrays a child 15 years or older,
  - The depiction was knowingly and voluntarily provided by the child depicted in the image,
  - The depiction contains only 1 child,
  - Defendant has not made the image available to anyone else,

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# Thank You!

Priscilla M. Grantham  
pgadams@olemiss.edu  
(662) 915-6929

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