

SEXTING AND SEXTORTION: Texting and Extortion Get a XXX Twist

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INTRODUCTION

Some call it flirting. Others call it harmless fun. When minors are involved, however, the police and district attorneys have had another word for it – child pornography. If you haven't guessed it, we're talking about sexting. Sexting is defined as the sending or receiving of sexually-explicit or sexually-suggestive images or video via a cell phone or the Internet. Most commonly, the term has been used to describe incidents where individuals take nude or semi-nude images of themselves and then send those pictures to others. Yet, despite the widespread and often breathlessly erotic media coverage of teenage sexting stories, almost everyone has gotten in the act. In fact, the *AARP Monthly* magazine recently published an article called “*Sexting Not Just for Kids*,” which advised tech-competent seniors to try sexting as a way to spice up the over 50 love life--complete with a “sexting dos and don'ts” section. And we won't even get into the high-profile celebrity incidents – ahem, ‘nuff said about Tiger Woods and Brett Farve.

A recent study conducted by The National Campaign revealed some startling statistics – statistics which we believe are, if anything, an under-representation of the prevalence of sexting. First, with respect to the percentage of teenagers who have sent or posted nude or semi-nude pictures or video of themselves, 20 percent of those surveyed reported that they engaged in such activity, with slightly more teenage girls (22 percent) than boys (18 percent) admitting doing so. What's worse, 15 percent of those who have sent or posted a suggestive photograph of themselves stated that they had done so to someone they only knew online. Sending or posting

sexually suggestive messages are even more common. In total, 39 percent of all teenagers surveyed have sent or posted sexually suggestive messages, usually to a boyfriend or a girlfriend. However, 44 percent of teen girls and boys reported that it is common for these messages to get shared with individuals other than the intended recipient. Finally, the survey tended to demonstrate that teens don't think about the consequences' - many reported that they sent messages or pictures as a "sexy present," to be "fun or flirtatious," in response to such content they received, or (heaven forbid) simply as "a joke."

FLIRTING WITH DANGER

At first glance, sexting might appear to be relatively harmless. It's hard to argue that the exchange of "naughty" pictures or messages between boyfriends and girlfriends (over the age of 18 of course) are not too troublesome if kept between themselves and merely ogled over in private. In fact, it would appear that as long as sexted images are taken voluntarily and shared consensually, they are unquestionably protected expression under the First Amendment. Yet, this is almost never the case. Far too commonly, once these images are created, they create vast social harm as they are disseminated publicly online and, sometimes, are even sent to strangers over the Internet.

As we alluded to above, for minors and those interacting with minors, sexting is an entirely different matter. Child pornography laws, which are designed to protect children from adult predators, criminalize any form of sexting – consensual and non-consensual – where the person in the photo is under 18 years-old. Put another way, if either individual – the recipient or the sender – are minors, prosecutors have not hesitated to levy felony child pornography charges for taking, sending, disseminating, and/or possessing sexual images of themselves and/or other

minors. For instance, In June 2010, eight students from Susquenita High School learned a tough lesson about sexting. These students, ranging in age from 13 to 17, were accused of using their cell phones to take, send, or receive nude photos of one another and in one case a short video of oral sex. The activities resulted in a felony pornography charge for each minor. Similarly, in March 2009 a 14-year-old boy in Brooksville, Florida and a 14-year-old girl from Passaic County, New Jersey both faced child pornography charges after they took sexually explicit images of themselves and allowed others to view them. Specifically, in those instances, the teenage boy sent a picture of his genitalia to the cell phone of a female classmate and the young girl posted 30 explicit picture of herself on MySpace.com. If convicted, all of these individuals could be legally labeled as sex offenders and be forced to carry a stigma that could haunt them throughout their lives, all for what many might label a youthful, sophomoric indiscretion. Just ask Donald Kellison, a young adult, who now has a record for possession of child pornography after his then underage teenage girlfriend sent sexy photos to his cell phone. While Kellison appealed the ruling and argued that the photos did not meet the “lewd exhibition of nudity” requirement,¹ the Virginia Court of Appeals found no error in the lower court’s decision and upheld the conviction.

Further compounding the problem of sexting is the very real danger of sextortion, a newly minted term which has caught fire in the media. In essence, sextortion arises where an individual contacts someone who has sent a sexually suggestive image of him or herself and threatens to expose the image to friends, family, or the public at large unless more explicit images are sent or unless the victim agrees to have sex with sextortionist. While no one currently

¹ In support of this argument, Kellison’s ex-girlfriend testified that Kellison was her boyfriend when she took the photographs and sent them to him, and they “retained that relationship at the time” of defendant’s trial.

tracks the number of cases involving sexual extortion in state and federal courts, it is fairly safe to say that the numbers of incidents are increasing dramatically. For instance, a Wisconsin man received 15 years in prison after it was discovered that he had been posing as a girl on Facebook to trick male high school classmates into sending him nude photos, which he then used to extort them for sex. Likewise, a 31-year-old Californian man was arrested in June 2010 after the FBI accused him of hacking into over 200 computers and threatening to expose nude photos he found unless their owners posed for more sexually explicit videos. What's worse, 44 of the victims were juveniles and authorities have stated that the accused was able to remotely activate some victims' webcams without their knowledge and record them undressing or having sex.

Finally, other stories demonstrate the real harm that can result, which can stretch far beyond "sexual exploitation, and embarrassment to commercial exploitation and even death." For example, in Syracuse, New York, a group of teenage girls were shocked to learn that another boy had collected revealing pictures they had sent to their boyfriends from the Web and was selling a DVD of them. And then there was the tragic case of 18-year-old Jessica Logan, who committed suicide after she sent a nude photograph to her boyfriend that was later spread throughout her high school. Logan was harassed daily at school by a group of girls and eventually became so depressed that she was afraid to go to school.

ADDRESSING THE PROBLEM WITH TEXT AND TECHNOLOGY

Given the relatively recent nature of the sexting phenomena, the law and technology have been slow to adapt. First, with respect to the law (and as illustrated above), state and federal legislatures have been left to shoehorn sexting into traditional child pornography laws – laws that were not intended to address sexting and thus, the legal consequences for teens engaging in

sexting are often truly bizarre. Likewise, technology has also been unable to keep pace. As a result, parents have often been left completely in the dark or only able to tell their children to “be careful” or “use good judgment.” Fortunately, all the recent media attention has resulted in both legal and technological changes.

TEXT

Between 2009 and 2010, at least 28 states introduced legislation aimed at tackling sexting. Generally speaking, the legislation can be seen as addressing one of two issues. The first type aims to deter and apply appropriate penalties to youth who engage in sexting. The second looks to close loopholes in existing criminal laws so that sexual predators are prohibited from using text messages to contact children. With respect to the former category of laws, many states have opted to reduce penalties for teenagers rather than eliminate them altogether. North Dakota, Utah and Vermont have already passed legislation that reduces penalties for teenagers engaging in sexting. Another 14 states have considered reducing penalties for minors so they are not punished under the same laws designed to punish child pornographers. Yet, it is important to note that while states have adopted reduced penalties for teens, minors can still be convicted of sexting and face misdemeanor charges, which can include jail time. In Arizona, for instance, the maximum penalty for youth sexting can be up to four months in jail.

In addition to the reduced punishments, some states have also chosen to add an educational aspect to their sexting legislation. These educational programs can either be a separate component or, in the case of New Jersey and New York, used in lieu of jail or severe punishment.

There are also those that have advocated for proposed federal legislation to combat the sexting issue. Many of these individuals support the proposed School and Family Education About the Internet Act (SAFE Internet Act) as an alternative federal remedy for sexting. If approved, the legislation would provide approximately \$175 million in federal funding to the Bureau of Justice Assistance (BJA) to make grants for schools, state agencies and non-profits. These grants would be designed to help provide research-based Internet safety education programs that feature sexting as an important topic.

Make no mistake, we believe that these recent changes are a great first step. However, standardized sexting legislation might better serve to address the problems. Because sexting can take many forms, state legislators have struggled to define the term. As a result, there are numerous definitions that vary across states, which could result in considerable confusion, especially given the ease with which electronic communication travel across state lines. Likewise, standard penalties would also serve society-at-large and provide clarity on a fuzzy topic. Here, however, we would stress that penalties need to fit the crime. There must be a delineated format tailored to a variety of circumstances. Clearly, a man who hacks into hundreds of computers (some of which are owned by minors) deserves more than a simple slap on the fingers. But, a boyfriend and girlfriend that share a suggestive photograph that accidentally winds up in the hands of others hardly deserve to be labeled as sex offenders.

TECHNOLOGY

Technology too has attempted to address the sexting problem. Both Apple and Google have created apps for their respective cell phone platforms. For Apple, it recently announced that the US Patent and Trademark Office had approved its 2008 patent for a program designed to

prevent users from sending or receiving “objectionable” text messages. While the patent does not actually mention sexting, it appears pretty obvious that the program was designed with that problem squarely in mind. Basically, the program includes a control application, which evaluates whether or not the communication contains approved text based on, for example, objective ratings criteria or a user’s age or grade level, and, if unauthorized, prevents such text from being included in the text-based communication. Specifically, if the unauthorized text is found, the control application could be programmed to alert the user, the administrator or other designated individuals of the presence of such text. In addition, the control application can be set up to require that the user replace the unauthorized text or even automatically delete the text or the entire communication.

Not to be outdone, Google also has a similar program available for the Android operating system. Dubbed the Mobile Nanny, this parental control system allows parents to monitor, filter and restrict what a child sends and receives on his or her Android phone. Specifically, Mobile Nanny, which is a stealth application, gives parents access to every action their child performs in an easy online account. This includes every text message sent or received, every call dialed or received and every photo captured. Parents can also use the program to block any phone number from SMS and calls. Web sites and applications can also be blocked. Moreover, a parent can even set up a specific time schedule that the phone can be used, thus restricting the time their child can use the device. Mobile Nanny also includes instant SMS commands the parent can send to the child’s phone, which allows the parent to track where their child is at any given time using the Instant GPS Locate command. It also provides an anti-theft feature for tracking the number of any SIM inserted into the phone in case the phone is lost or stolen.

Again, this new technology is certainly a step in the right direction. And, when in the hands of a concerned parent, it undoubtedly will be quite useful. However, it's not hard to see the potential for abuse. If either program were installed on someone's cell phone by an individual with malicious intent, that person would effectively have control over a large amount of personal data and would be in a position to watch all activity on the smartphone. It is not hard to imagine suspicious spouses or paramours engaging in this activity, which is really no different than the covert installation of spyware on computers which we see all the time.

CONCLUSION

For those who believe in Sodom and Gomorrah, the advent and prevalence of sexting and sextortion must surely seem like humanity is crying out for divine punishment. The truth is that teenagers with raging hormones have always behaved foolishly – we've just given them tech toys that allow them to do so quickly and with little consideration of consequences. That, coupled with peer pressure, certainly seems to explain how we got to this juncture so quickly. And, indeed, child predators have always been quick to adopt new technological means to their own deviant ends.

For once, we've been pleased to see that the law has hastened (a relative term when applied to the law) to address this new phenomena. Far too often, we've seen Draconian punishments handed out to foolish and immature young people who are not, by any stretch of the imagination, child pornographers or predators. Grappling with this new behavior promises to be challenging – and with each new technological advance, another challenge seems to await us. We can only imagine what five more years of technological advances will bring.

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