

# Virginia State Crime Commission

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Sexting

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2014

# Sexting

## Executive Summary

Sexting, the act of taking a sexually explicit picture and then transmitting it via a picture message from one cell phone to another, is a subject that has attracted increased media attention throughout the past decade. Whenever juveniles engage in sexting, whether through taking a photo of themselves, or receiving such a photo, they are technically in violation of child pornography laws. These criminal statutes were originally intended to punish predatory adults who victimize children and teenagers, and were not intended to be used against teenagers who take photos of themselves, and then send them to others as a form of misguided flirting. Much national debate has taken place as to the appropriate response when incidents of juvenile sexting are discovered.

In the past three years, a number of studies have indicated that sexting among adolescents is prevalent, and does not seem to be decreasing. In 2014, a number of sexting incidents occurred in Virginia which made national news. Concurrently, the Virginia Criminal Justice Conference, which had been considering the topic of sexting in Virginia since 2012, issued some recommended legislation, to treat certain, limited forms of non-malicious sexting as a Class 1 misdemeanor, rather than the usual felony that applies to child pornography cases. The Virginia Criminal Justice Conference gave their recommended legislation to the Crime Commission for review.

At the October meeting the Crime Commission reviewed the proposal that had been put forward by the VCJC. At the December meeting the Crime Commission considered the proposal, as well as the possibility of modifying it by placing further limitations on the proposed new misdemeanor crimes related to sexting. The possible limitations considered were:

- The Class 1 misdemeanor for possession of sexting images would be limited to cases where the defendant only possessed a limited number of such images; e.g., no more than 10.
- The Class 1 misdemeanor for transmission of sexting images would be limited to cases where the images were sent to a particular individual. If the images were sent to a public website, or to more than a certain number of people, the offense would not qualify for the reduced penalty.
- The Class 1 misdemeanor for possession of sexting images would not apply if the defendant paid for the images or their production.

At the conclusion of reviewing all of the proposals, the Crime Commission made no motions on the VCJC's proposed recommended legislation, and made no recommendations on the subject.

## Background and Applicable Virginia Laws

Sexting, a recently invented word derived from the word “texting,” is the act of taking a sexually suggestive photo, usually of oneself, and sending it via a picture message from one cell phone to another.<sup>1</sup> Over the past five to ten years, sexting has attracted increased attention nationwide, as many of the participants taking and receiving such photos are minors. Sexting has raised debates across the country, both amongst policy makers and members of the general public, as to whether or not child pornography laws, which were meant to criminalize the predatory behavior of older adults, are appropriate or effective tools for prosecutors to use when faced with the voluntary actions of teenagers. Complicating the issue are the differing real world situations which arise, running the gamut from a completely non-malicious exchange of photos by two minors, sent as an admittedly inappropriate form of flirting, to the malicious posting of discovered photos on a public website. Should all recipients of sexting photos that involve minors be prosecuted, even if the photos were sent unsolicited, and were not forwarded? Should a minor who takes a sexual photo of himself be prosecuted for what is, technically speaking, the production of child pornography? Ultimately, everyone involved in the national debate is in agreement that sexting by juveniles should be curtailed, although there are differing opinions as to whether or not criminal charges, or the threat of criminal charges, are the best way to achieve this.

In Virginia, most acts of sexting that involve minors will be violations of Virginia’s child pornography statutes, depending upon the nature of the pictures. Virginia Code § 18.2-374.1 criminalizes the production and distribution of child pornography. If a minor takes a lewd or sexual picture of himself, that would be a violation of subsection B(2) of that statute. The penalty would be, if the minor were 15 years of age or older, an unclassified felony carrying from 1 to 20 years; if the minor were younger than 15, the penalty would be an unclassified felony carrying from 5 to 30 years. It should be noted, though, that unless the minor were tried as an adult in circuit court, he almost certainly would not receive such a lengthy sentence. However, his “record” likely would be open for public inspection in court, as he would have been adjudicated delinquent of an offense that would be a felony if committed by an adult.<sup>2</sup> The possession of any such photos would be a violation of Va. Code § 18.2-374.1:1. A first offense would be a Class 6 felony, and a second or subsequent offense would be a Class 5 felony. If the recipient of such a photo re-sends or re-transmits it, or even displays it on the screen of his phone to another, his act of distribution or display would be an additional unclassified felony, carrying from 5 to 20 years. A second offense of distribution or display also carries from 5 to 20 years, but with a mandatory minimum punishment of 5 years. Once again, unless the juvenile were tried as an adult, he would not likely receive such a lengthy sentence, and would not be subject to the mandatory minimum punishment.

Under Virginia law, actual nudity is not required in order for a picture or image to be considered child pornography. Under the relevant definitions provided by Va. Code §§ 18.2-374.1 and 18.2-390, “nudity” includes “a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple.” On the other hand, not all photos involving nudity automatically qualify as child pornography—the nudity in the image must involve a lewd exhibition.<sup>3</sup>

Lastly, a violation of Virginia’s child pornography laws can occur even if no images are involved. If a minor solicits his girlfriend to send him a nude, sexually explicit photo of herself, his solicitation puts him in violation of Va. Code § 18.2-374.1(B), and carries the same penalties as the actual production of child pornography, even if the girlfriend never actually produced such an image. If

the request was sent by e-mail, cell phone, or other communications system, that would be an additional offense of violating Va. Code § 18.2-374.3(B), which is a Class 6 felony.

## Previous Crime Commission Study

In 2009, the Crime Commission examined the topic of sexting.<sup>4</sup> At that time, very few studies and surveys had been conducted on what was a relatively new social phenomenon. The most recent study available at the time of the Commission's report was an online survey conducted in 2008 that had found that 22% of teenage girls, and 18% of teenage boys, had sent or posted images or video showing themselves nude or semi-nude.<sup>5</sup> Eleven percent of young teenage girls, defined as between the ages of 13 and 16 for purposes of the survey, had posted nude or semi-nude images of themselves.<sup>6</sup>

The Crime Commission deliberated upon a number of statutory options that could be enacted to treat sexting differently from other child pornography crimes. Possibilities included lower penalties for certain, limited acts of sexting, and as an alternative, not changing or creating any new criminal penalties, but enacting statutory language that would either mandate or strongly suggest that a child pornography charge should be dismissed after a period of probation, in cases where juveniles had engaged in non-malicious sexting. Ultimately, the Crime Commission decided not to endorse any statutory changes related to sexting. Instead, a letter was sent to the Virginia Department of Education, requesting that efforts be made to educate students on the dangers and illegality of sexting.<sup>7</sup>

## Recent Studies on Sexting

Since 2009, published studies have indicated that sexting continues to be a problem in the United States. A probability sample of 1,839 students in Los Angeles high schools found that 15% of adolescents reported having engaged in sexting; 54% reported knowing someone who had sexted.<sup>8</sup> Another study examined "at risk" seventh graders; 5% of the sample reported having sexted images in the past 6 months.<sup>9</sup>

Other recent studies of high school adolescents have found that 18% to 28% reported sending nude or semi-nude photos. Around 50% of boys reported having received such a photo.<sup>10</sup> Ironically, one study found that students who reported being aware of the possible legal repercussions for sexting were actually more likely to have engaged in sexting.<sup>11</sup> One possible implication of this finding is that education about legal consequences may be insufficient, by itself, to change adolescent behavior when it comes to sexting.

## Recent Press Articles

Throughout 2014, a number of news articles described sexting incidents that occurred in Virginia. Several of the stories were reported nationally. Combined with the recent studies on the topic of sexting, they provide confirmation that this behavior is continuing, and perhaps even increasing, amongst teenagers, since the Crime Commission's previous report in 2009.

In February of 2014, in James City County, a 16 year old teenager was charged after taking nude self-photos of herself and then posting them on Twitter.<sup>12</sup> In April of 2014, the national press reported on a large sexting “ring” that was discovered in Louisa County. Over 1,000 images of underage teenagers had been posted on Instagram accounts, and over 100 teenagers were involved in some manner.<sup>13</sup> This story was later the subject of a lengthy feature article in the November 2014 issue of the *Atlantic Monthly*.<sup>14</sup>

In July of 2014, a Manassas City teenager, suspected of sexting, was the subject of a search warrant to undergo a medical procedure so that his genitals could be photographed, in an effort to compare the warrant photos with a previously sexted image.<sup>15</sup> This resulted in much public criticism; ultimately, the decision was made to not proceed with the warrant and the photos were not taken.<sup>16</sup>

## Virginia Criminal Justice Conference Proposal

For three years, the Virginia Criminal Justice Conference (VCJC) has held a special subcommittee on the topic of sexting.<sup>17</sup> In 2012 and 2013, the subcommittee reported to the full Conference that because recent attempts to pass sexting legislation had not succeeded in the Virginia General Assembly, no proposed sexting laws or revisions should be drafted. In 2013, the entire VCJC unanimously voted that notwithstanding these concerns, the subcommittee should attempt to draft a sexting bill that could be brought to the General Assembly for their consideration.

In September of 2014, the sexting subcommittee decided on some broad parameters for a sexting statute. It should not completely decriminalize any sexting behavior, as even taking a lewd photo of oneself, as a minor, creates an unquestionable risk of harm. It should recognize that qualitatively, some sexting behaviors are less culpable than the conduct that is the primary focus of the child pornography statutes, and are therefore deserving of a lessened penalty. It should fit within existing child pornography statutes, rather than be completely based in newly created statutes. The new sexting crime should be very limited in scope, so that most bad or malicious behavior would still fall within the scope of existing child pornography laws. And, the sexting statute or statutes should contain a “first offender” provision that would apply only to these limited, sexting behaviors.

Using these parameters, the sexting subcommittee drafted possible legislation, and submitted it to the full VCJC for their consideration. The VCJC made a few, minor amendments to the possible legislation. It was the consensus of the VCJC that taking a sexually explicit photo of oneself, without anyone else in the picture, is the least culpable form of juvenile sexting, and is more appropriately punished by a Class 1 misdemeanor, rather than the unclassified felonies which apply to the production of child pornography.<sup>18</sup> However, this new misdemeanor would not apply to images that depict excretory functions, sadomasochistic abuse, or crimes against nature as defined in Va. Code § 18.2-361. The language for this new subsection, which would be added to Va. Code § 18.2-374.1, should mirror the accommodation subsection of Virginia’s drug distribution statute; i.e., the burden would be on the defendant to show that he met all of the requirements to be found guilty of sexting, rather than the production of child pornography.<sup>19</sup>

The VCJC also decided that in instances of consensual sexting, the simple possession of sexually explicit images of a minor should only be a Class 1 misdemeanor. However, this lower penalty would only apply if any child depicted in the images was at least 13 years of age; the possessor of the images was no more than 4 years older than every child depicted; and, the possession was with the knowing consent of every child. It would not apply to images that depict excretory functions,

sadomasochistic abuse, or crimes against nature as defined in Va. Code § 18.2-361. As with the proposed subsection for taking a photo of oneself, this new crime would be a subsection, added to the statute dealing with possession of child pornography, Va. Code § 18.2-374.1:1. It should likewise mirror the accommodation subsection of Virginia's drug distribution statute, with the burden being on the defendant to show that he met all of the requirements to be found guilty of the lesser offense of possession of sexting images.

Lastly, the VCJC recommended that it should be a Class 1 misdemeanor if a child sends a sexting image of himself to another, provided that he is the only person depicted in the image. As with the other proposed new subsections, this misdemeanor would not apply to images depicting excretory functions, sadomasochistic abuse, or crimes against nature as defined in Va. Code § 18.2-361, and would be mirrored on the drug accommodation subsection, with the burden being on the defendant to show that he should not be found guilty of the felony of distribution of child pornography.

In addition to the three new criminal offenses, the VCJC also recommended that a first offender provision be created for sexting, mirroring the language used for Virginia's first offender statute for drug possession.<sup>20</sup> First offender status would only apply to the three new sexting offenses, and would allow a defendant to have the Class 1 misdemeanor dismissed if he successfully completed a treatment or education program; completed community service work, which, in the discretion of the judge, must be at least 10 hours and no more than 100 hours; and successfully complied with any other conditions the court deemed appropriate. This first offender provision would not be available if the defendant ever committed any future sexting offenses.

All other sexting offenses would not be covered by any special statutes or newly created subsections, and instead would be subject to Virginia's child pornography statutes. Examples include the following scenarios:

- The defendant possesses a sexting image, given to him by a friend who tells him that "It's okay to have, my girlfriend gave it to me to share," if the subject of the photo did not in fact knowingly consent for the defendant to possess it.
- The defendant takes a sexually explicit photo of himself, and another person appears in the photo, even though the other person is fully clothed and is not engaged in any sexual behavior.
- The defendant transmits a photo of himself, and another person appears in the photo, even if the other person is fully clothed and is not engaged in any sexual behavior.
- The defendant requested his girlfriend to take or send him a sexting image, even if she never actually did so.

Cases like these could still be handled by prosecutorial discretion, if the prosecutor felt it was appropriate.

Upon the completion of the VCJC's work in finalizing the possible legislation, the VCJC agreed to submit their work to the Crime Commission for their review.

## Summary

At the October meeting, the Crime Commission reviewed the proposal that had been put forward by the VCJC. At the December meeting the Crime Commission considered the proposal, as well as the possibility of modifying it by placing further limitations on the proposed new misdemeanor crimes related to sexting. The possible limitations considered were:

- The Class 1 misdemeanor for possession of sexting images would be limited to cases where the defendant only possessed a limited number of such images; e.g., no more than 10.
- The Class 1 misdemeanor for transmission of sexting images would be limited to cases where the images were sent to a particular individual. If the images were sent to a public website, or to more than a certain number of people, the offense would not qualify for the reduced penalty.
- The Class 1 misdemeanor for possession of sexting images would not apply if the defendant paid for the images or their production.

At the conclusion of reviewing all of the proposals, the Crime Commission made no motions on the VCJC's proposed recommended legislation, and made no recommendations on the subject.

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<sup>1</sup> A more complete description of sexting, and the legal problems it creates, can be found in the Crime Commission's previous report on the topic. VA. STATE CRIME COMM'N, *SEXTING* (2009), available at <http://vscc.virginia.gov/documents/sexting.pdf>.

<sup>2</sup> See Va. Code Ann. § 16.1-305(B1) (2014). All court records regarding adjudications of delinquency, that would be a felony if committed by an adult, are open to the public, if the juvenile was 14 years or older at the time of the offense.

<sup>3</sup> VA. CODE ANN. § 18.2-374.1(A) (2014); *Asa v. Commonwealth*, 17 Va. App. 714 (1994) (photo of a naked teenager, standing, does not meet the definition of sexually explicit material, even though her breasts, buttocks and genitals are pictured, but a photo of her sitting with her knees drawn up to her breasts, with the camera's eye focused on her genitals, does meet the definition).

<sup>4</sup> *Supra* note 1.

<sup>5</sup> The National Campaign to Prevent Teen and Unplanned Pregnancy. (2008). *Sex and tech: Results from a survey of teens and young adults*. Washington, D.C.: Author. Retrieved from [http://thenationalcampaign.org/sextech/PDF/SEXTech\\_Summary.pdf](http://thenationalcampaign.org/sextech/PDF/SEXTech_Summary.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> *Supra* note 1. Independently of this request, the Virginia Department of Education had already completed an information brief on sexting, which included a reminder to school districts that "schools should have a policy in place to address sexting." OFFICE OF EDUCATIONAL TECHNOLOGY, VA. DEPT. OF EDUC., *SEXTING: IMPLICATIONS FOR SCHOOLS* (Oct. 2009), retrieved from [http://www.doe.virginia.gov/support/technology/info\\_briefs/sexting.pdf](http://www.doe.virginia.gov/support/technology/info_briefs/sexting.pdf).

<sup>8</sup> Rice, E., et al. (2012). Sexually explicit cell phone messaging associated with sexual risk among adolescents. *Pediatrics*, 130(4), 667-673.

<sup>9</sup> Houck, C.D. (2014). Sexting and sexual behavior in at-risk adolescents. *Pediatrics*, 133(2), 1-7.

<sup>10</sup> Strassberg, D.S., McKinnon, R.K., Sustaita, M.A., & Rullo, J. (2013). Sexting by high school students: An exploratory and descriptive study. *Archives of Sexual Behavior*, 42, 15-21; Temple, J.R., et al. (2012). Teenager sexting and its association with sexual behaviors, *Archives of Pediatrics & Adolescent Medicine*, 166(9), 828-833.

<sup>11</sup> Strassberg, *supra* note 10.

<sup>12</sup> *Va. Teen Faces Child Porn Charges For Tweeting Nude 'Selfie'*, Washington.CBSlocal.com, Feb. 7, 2014, retrieved from <http://washington.cbslocal.com/2014/02/07/police-teen-faces-child-porn-charges-for-tweeting-nude-photos-of-self/>.

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<sup>13</sup> *Deputies Bust Massive Teen Sexting Ring in Louisa County*, WRIC.COM, Apr. 3, 2014, updated May 2, 2014, retrieved from <http://www.wnct.com/story/25159973/deputies-bust-massive-teen-sexting-ring-in-louisa-county> ; Larry O'Dell, *Va. 'Sexting' Probe Implicates More Than 100 Teens*, WRIC.COM, Apr. 9, 2014, retrieved from <http://wric.com/2014/04/09/va-sexting-probe-implicates-more-than-100-teens/>.

<sup>14</sup> Hanna Rosin, *Why Kids Sext: An Inquiry into One Recent Scandal Reveals How Kids Think about Sexting—And What Parents and Police Should Do about It*, ATLANTIC MONTHLY, Nov. 2014, retrieved from <http://www.theatlantic.com/magazine/archive/2014/11/why-kids-sext/380798/>.

<sup>15</sup> Tom Jackman, *In 'sexting' case Manassas City police want to photograph teen in sexually explicit manner, lawyers say*, WASHINGTONPOST.COM, July 9, 2014, retrieved from <http://www.washingtonpost.com/blogs/local/wp/2014/07/09/in-sexting-case-manassas-city-police-want-to-photograph-teen-in-sexually-explicit-manner-lawyers-say/>.

<sup>16</sup> Tom Jackman, *Manassas City police say they will not serve search warrant in teen 'sexting' case*, WASHINGTONPOST.COM, July 10, 2014, retrieved from <http://www.washingtonpost.com/blogs/local/wp/2014/07/10/manassas-city-police-say-they-will-not-serve-search-warrant-in-teen-sexting-case/> ; Tom Jackman, *Manassas City detective in teen 'sexting' case sues teen's lawyer for defamation*, WASHINGTONPOST.COM, Nov. 13, 2014, retrieved from <http://www.washingtonpost.com/blogs/local/wp/2014/11/13/manassas-city-detective-in-teen-sexting-case-sues-teens-lawyer-for-defamation/>.

<sup>17</sup> The Virginia Criminal Justice Conference was created in 2006 to be the criminal justice system equivalent of the Boyd Graves Conference. It is made up of roughly an equal balance of prosecutors and criminal defense attorneys, and also includes jurists from Virginia's JDR, district, circuit and appellate courts, professors of law, and attorneys who are representatives for the Virginia legislature. The VCJC's goal is to improve criminal justice in Virginia and examine ways in which Virginia's criminal and criminal procedure laws can be strengthened. It is non-partisan and does not seek to favor either the prosecution or the defense. Recommendations are made by the group only if substantial consensus is reached amongst all of the members.

<sup>18</sup> V.A. CODE ANN. § 18.2-374.1 (2014).

<sup>19</sup> V.A. CODE ANN. § 18.2-248(D) (2014).

<sup>20</sup> V.A. CODE ANN. § 18.2-251 (2014).