History of Sexting Legislation in Illinois

*By Elizabeth Clarke**

As the home of the world's first juvenile court, and more recently the beneficiary of the MacArthur Foundation's Adolescent Brain Development Research Network, Illinois has a long history of progressive statutory reform on issues impacting justice for children in conflict with the law.[1] Recently, that history was expanded by an innovative response to the emerging issue of adolescent sexting.

In the spring of 2010, Illinois legislators began responding to an isolated tragedy involving adolescent sexting in the western suburbs of Chicago.[2] Existing Illinois pornography laws were broad enough to criminalize the sexting conduct underlying the incident, but these laws included mandatory registration as a sex offender. The initial response was a knee-jerk reflex to specifically criminalize adolescent sexting, thereby expanding the existing criminal code for pornographic conduct. Representative Darlene Senger introduced HB 4583 ("Bill"), which created the misdemeanor offense of Sexting that made it unlawful for a minor under the age of seventeen to knowingly disseminate any material depicting nudity or other sexual conduct by electronic transfer.[3] The Bill also made it a Class 4 felony for a minor under the age of seventeen to upload nude images on the internet.[4] Minors convicted under these proposed statutes would face criminal penalties as well as mandatory sex offender registry requirements. A similar bill was proposed in the Senate, SB 2513.[5]

"Sexting" is a relatively new phenomena related to the emerging technological texting trend. While distribution of pornographic images has long been an issue, the ability to rapidly and widely disseminate the images presents a new twist because of the internet and wireless telephone technology. Teenagers are rampant texters. A recent Pew Study reveals that over 75% of U.S. teens have a cell phone and over 66% of them send text messages.[6] The same study reveals that teenagers also engage in sexting in large numbers, estimating that 15% of teens have received nude or suggestive pictures on their cell phones.[7]

Discussions began in earnest following the filing of Representative Senger's criminal sexting bill and similar legislation in the Senate. Illinois legislators had already been well educated on adolescent brain development research and its implications for criminal culpability. This recognition that "youth are different" already led the Illinois Legislature to: pull youths back from adult court through drug transfer reform and statutory jurisdiction reform as well as raise the age to eighteen for juveniles charged with misdemeanors; pull juvenile prisons away from the adult prison agency; protect the confidentiality of juvenile arrest records by prohibiting its dissemination to federal agencies; and create a statewide fiscal incentive program to divert youth from prison (Redeploy Illinois).[8] Further, the Illinois Legislature had already strongly committed to a progressive approach to adolescent sex offenses, allowing the possibility of eventual removal from the sex offender registry. In light of this background, the potential branding of adolescents as sex offenders through the impact of sexting legislation was particularly troubling, and pressure began to mount for a middle ground approach that could sidestep the criminal code. Legislators took note of the already relatively pervasive nature of teenage texting, and the potentially exponential impact of any criminal definition of sexting. The legislators continually expressed concern over the sexting conduct and a desire to formulate a response that was proportionate and effective.

Three groups took a lead role in these sexting discussions—the Illinois Juvenile Justice Initiative, the ACLU of Illinois and Illinois prosecutors—meeting alongside local law enforcement and victims' advocates. The discussions were constrained by the reality of pressure to pass a bill based on publicity surrounding a Chicago suburban incident, counterbalanced by the reluctance to enforce, let alone broaden, existing pornography laws due to the wide sweep of the controversial sex offender registry.

The ACLU of Illinois distributed the following fact sheet summarizing the concerns with the proposed sexting legislation:[9]

> **"Sexting" is Best addressed by parents and schools, not courts**
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> Senate Bill 2513, as amended, makes it unlawful for a minor under [eighteen] to use a computer or electronic communication device to transmit an indecent visual depiction of himself or herself to another person (i.e. lewd exhibition of the unclothed or transparently clothed genitals, pubic area, buttocks, or, if the person is female, a fully or partially developed breast). A minor who receives the sext faces prosecution for a Class B misdemeanor if he or she fails to delete the sext.

Criminalizing sexting is bad policy, a case of the cure being far worse than the problem. "Sexting"—the sharing of sexually suggestive photos or videos, by cell phone or online—is fairly commonplace among teens. According to a 2009 AP/MTV poll, [three] in [ten] teens have been involved in sexting. This action is consistent with adolescents' exploration of their sexual identities—as these photographs are typically sent to intimate partners or individuals with whom the teenager seeks to be intimate with. During their adolescent years, youth spend a significant amount of time engaging in self-exploration. Much of this includes sexual exploration. Among teens that have sent nude or semi-nude text messages, 66% of girls and 60% of boys say they did so to be "fun or flirtatious" and 40% of girls said they sent sexually suggestive texts as a "joke."

Criminalizing sexting uses the law as a sword and not a shield. Research on adolescent sexual development suggests that teens have always found ways to explore their sexual identity and express themselves sexually—sexting is merely the newest form of this. Technology infiltrates and colors everything that young people do, so when they express themselves—whether it's frustration about school or parents, excitement with friends, or developing intimacy with a partner—teens often do so through technological communication venues, without worrying about the uniquely transferable nature of text messages or e-mail precisely because it is not considered unique in their lives. Prosecuting these cases per SB 2513 misapplies the law, using it as a sword and not a shield to protect exploited victims. Sending more youth into the juvenile delinquency system for behavior that is consistent with their normal adolescent development unnecessarily exposes youth to possible sex offender registration in other states and further collateral consequences of adjudication—or in the case of a second offense under SB 2513, a possible adult conviction for life.

Criminalization of sexting traumatizes the law-abiding teen. For most youth between the ages of [thirteen] and [seventeen], being charged with a crime, brought before a judge and faced with the possibility of incarceration is a traumatic event far outweighed by the activity the state seeks to prevent in prosecuting consensual sexting.

Criminalization of Sexting will overburden limited juvenile court resources. In light of the significant numbers of teens who sext and to the extent a sext is discovered and prosecuted (primarily one surmises via school officials confiscating cell phones), Illinois will divert needed juvenile court resources and manpower to such nonviolent consensual activity at the expense of the many youth in our state's juvenile justice system in dire need of resources and mental health attention.

Education is the Solution—from parents, schools and the media. Parents should educate their children about the dangers of sexting, and schools should educate their students about these dangers. Private companies like MTV have launched national campaigns—athinline.org—to empower teens to make wiser choices with modern communication equipment. Rather than do a great disservice to a majority of sexting teens by treating them as lawbreakers, we must educate youth about responsible behavior and communication.

The legislators wanted a proportionate and effective response, without using criminal sanctions. Thus, the focus of the discussions became finding a mechanism to ensure counseling without criminalization.

A proposal began to surface out of the discussions that would treat sexting through Article III of the Juvenile Court Act, as a Minor Requiring Authoritative Intervention (MRAI), rather than through the delinquency provisions in Article V. The advantage to a MRAI adjudication is that these proceedings are purely civil in nature, with no resultant "arrest" and without any possibility of incarceration. Additionally, the possibility of registration on a sex offender registry is further removed in a MRAI proceeding. The minor who was the subject of a MRAI adjudication would be subjected to counseling and the possibility of community service. In addition, both minors involved in a sexting incident—the minor sending the image and the minor receiving it—could receive counseling necessary to ensure they both understood the consequences and would stop the activity, but neither of the minors would receive criminal sanctions, such as an arrest record, incarceration, or sex offender registry, that could permanently alter their lives.

The resulting legislation passed the Senate unanimously on April 27, 2010, and is now Public Act 96-1087, effective January 1, 2011:[10]

> Sec. 3-40. Minors involved in electronic dissemination of indecent visual depictions in need of supervision.

(a) For the purposes of this Section:

"Computer" has the meaning ascribed to it in Section 16D-2 of the Criminal Code of 1961.

"Electronic communication device" means an electronic device, including but not limited to a wireless telephone, personal digital assistant, or a portable or mobile computer, that is capable of transmitting images or pictures.

"Indecent visual depiction" means a depiction or portrayal in any pose, posture, or setting buttocks, or, if such person is female, a fully or partially developed breast of the person.

"Minor" means a person under 18 years of age.

(b) A minor shall not distribute or disseminate an indecent visual depiction of another minor through the use of a computer or electronic communication device.

(c) Adjudication. A minor who violates subsection (b) of this Section may be subject to a petition for adjudication and adjudged a minor in need of supervision.

(d) Kinds of dispositional orders. A minor found to be in need of supervision under this Section may be:

(1) ordered to obtain counseling or other supportive services to address the acts that led to the need for supervision; or

(2) ordered to perform community service.

(e) Nothing in this Section shall be construed to prohibit a prosecution for disorderly conduct, public indecency, child pornography, a violation of the Harassing and Obscene Communications Act, or any other applicable provision of law.

This legislation passed in the House overwhelmingly with a roll call vote of 114 to one, and passed the Senate unanimously, without any comments, questions, or debate on April 27, 2010.

Illinois legislators have the benefit of years of education on juvenile justice issues, including extensive discussions and testimony on adolescent brain development and its implications for culpability. The Illinois legislature is well aware that adolescents are more impulsive than adults and less likely to be able to appreciate long range consequences of their actions—youth are different. The Illinois legislature and courts have also long struggled with the disproportionate impact of sex offender registry laws on adolescents, which effectively criminalize adolescent sexual exploration and permanently brand the adolescent as a sex offender. The Illinois model of sex offender registry removal for adolescent sex offenders is frequently cited as a national model. Thus, the Illinois legislature was uniquely prepared to deal with the complex subject of an appropriate and proportionate response to sexting.

The final sexting legislation reflects the legislature's desire to produce a systemic response to effectively reflect society's concern that youth not engage in sexting, while also reflecting the legislature's concern that the response be proportionate to the activity. The Article III sexting statutory reform discussed above allows youth to be brought into the court system and given counseling and community service without the permanent scars of an arrest record, incarceration and involvement in the sex offender registry. This legislation also permits extreme cases that rise to a level of pornography or harassment to be treated through the existing delinquency court where the existing criminal code and delinquency adjudications are sufficient. Overall, the Illinois Legislature succeeded in crafting a proportionate and potentially effective response to the society's concerns about today's new challenge of adolescent sexting.

Endnotes

[*] Elizabeth Clarke is the President of the Juvenile Justice Initiative.

[1] Juvenile Justice Initiative, www.jjustice.org.

[2] Michelle Manchir, *Sexting Bill Passes Illinois Senate*, CHI. TRIB., Mar. 18, 2010, http://articles.chicagotribune.com/2010-03-18/news/ct-met-illinois-sexting-bill-0319-20100318_1_sexting-illinois-house-nude-picture ("The sexting trend surfaced in the suburbs in December when Plainfield police launched an investigation after a 16-year-old honors student at Plainfield East High School sent a nude photo of herself to a classmate, who forwarded it to several friends.").

[3] H.B. 4583, 96th Gen. Assemb. (Ill. 2010), http://ilga.gov/legislation/96/HB/PDF/09600HB4583.pdf.

[4] *Id*

[5] S.B. 2513, 96th Gen. Assemb. (Ill. 2010), http://ilga.gov/legislation/96/SB/PDF/09600SB2513.pdf.

[6] Ians, *15 Percent of US Teens Engage in 'Sexting'*, Tech2.com, India, Dec. 18, 2009, http://tech2.in.com/india/news/mobile-phones/15-percent-of-us-teens-engage-in-sexting/100982/0.

[7] *Id.*

[8] *See* Juvenile Justice Initiative, *supra* note 1.

[9] American Civil Liberties Union of Illinois, www.aclu-il.org.

[10] 705 ILCS 405/3-40.