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# Sexting: When are State Prosecutors Deciding to Prosecute? The Third National Juvenile Online Victimization Study (NJOV-3)

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## Sexting: When are State Prosecutors Deciding to Prosecute? The Third National Juvenile Online Victimization Study (NJOV-3)

Wendy Walsh, Janis Wolak, & David Finkelhor

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### Abstract

The majority of state prosecutors (62%) in the sample that had worked on technology facilitated crimes against children had handled a sexting case involving juveniles, and 36% of prosecutors in the sample reported that they had ever filed charges in these cases. When charges were filed, the majority charged child pornography production felonies and 16% of prosecutors had sexting cases that resulted in the defendant being sentenced to sex offender registration. Research needs to continue to help prosecutors develop tools and strategies to deal with these complex crimes.

### Sexting

Sexting, or the creation of images by minors that meet statutory definitions of child pornography, poses a number of challenges for prosecutors. Often isolated incidents, some with serious criminal justice consequences, have garnered wide spread media attention. Yet, sexting is not that prevalent among youth. A recent national study of youth between the ages 10 and 17 found that 1% of youth had appeared in or created nude or nearly nude pictures or videos that were sexually explicit in the past year.<sup>1</sup>

Sexting often falls within states' definitions of child pornography – which prohibit the production, possession, and distribution of images depicting sexually explicit activity involving minors. Since the National Conference of State Legislatures began tracking sexting legislation in 2009, 20 states have enacted bills to address youth sexting.<sup>2</sup> Generally the legislation aims to educate young people about the risks of sexting, and deter them from it, and apply appropriate penalties by protecting youth from harsh sentences under child pornography statutes, which were created to protect youth from sexual exploitation by adults.

A number of reviews have explored why many current laws are problematic.<sup>3-5</sup> Yet, no studies have examined how these types of cases are resolved once they reach prosecutors' offices. The purpose of this exploratory study was to find out how often prosecutors offer alternatives to charging minors and how often charges are filed. We also examined the extent to which minors had to register as sex offenders as part of

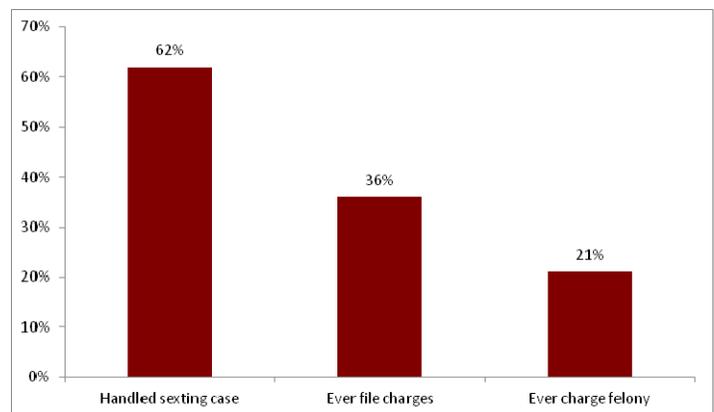
their sentence, and explored circumstances under which prosecutors decided to file charges. In the absence of extensive empirical research on this topic, it is hoped that this exploratory study will enhance our understanding about how prosecutors are handling sexting cases. The data come from wave 3 of the National Juvenile Online Victimization (N-JOV) Study.

### What is sexting?

The sample for this analysis includes prosecutors in state courts who have handled a sexting case. This was determined by answering yes to this question, "Have you ever handled a sexting case (whether or not charges were filed)? By 'sexting' I mean sexual images produced by juveniles (with no adult involvement). Sexting includes creating or distributing such images. Sexting would also include high school students who are above the age of 17 – i.e. 18 or 19 year olds."

The majority of prosecutors had handled a sexting case (whether or not charges were filed) and 36% of prosecutors have ever had a sexting case with charges filed.

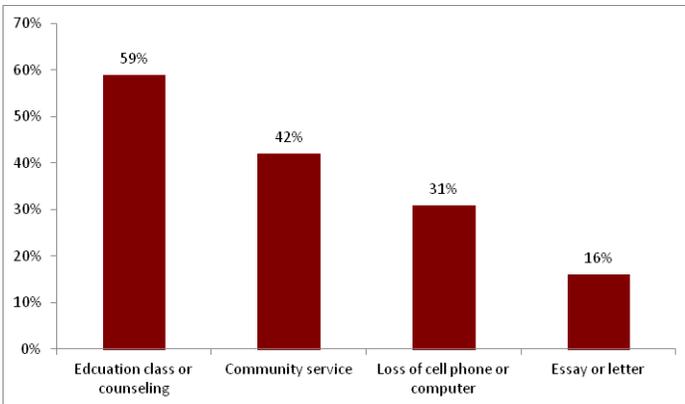
Figure 1. Percentage of prosecutors who had handled or filed charges in sexting cases



Note. Sample size = 378 prosecutors who worked on technology facilitated crimes against children

When prosecutors handled these cases, they presented minors with a wide range of alternatives to being charged.

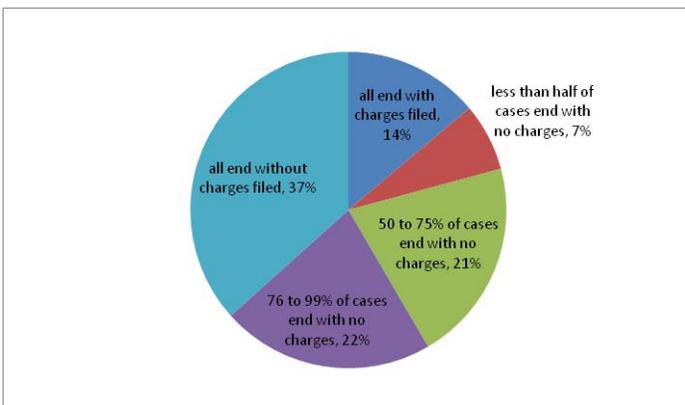
Figure 2. Types of alternatives to being charged



Note. Sample size = 236 prosecutors who had handled a sexting case

Prosecutors were asked what percentage of their sexting cases they have ever handled ended with no charges filed. 59% said that all (37%) or nearly all (22%) of their cases ended with NO charges. However, 21% said that most (7%) or all (14%) of their cases ended with charges filed.

Figure 3. Percentage of sexting cases with no charges filed



Note. Sample size = 236 prosecutors who had handled a sexting case

Of those that had filed charges, 62% had charged juveniles with felonies related to sexting cases and the majority (84%) charged child pornography production felonies. This charging occurred even in cases where images did not show sexually explicit conduct or exhibition of genitals, according to 17% of prosecutors.

Most prosecutors had sexting cases resolved by plea agreements (71%) or juvenile court (69%). Half of prosecutors (50%) mentioned diversion, 26% said dismissal of charges, and 4% said by a criminal trial. And 16% of prosecutors who

had filed charges in these cases had ever had a sexting case that resulted in the defendant being sentenced to sex offender registration.

**Circumstances in which prosecutors would file charges**

In order to better understand when prosecutors would file charges, prosecutors were asked an open ended question about the types of circumstances in which they would file charges in these cases. Most prosecutors mentioned that they would need some type of additional offense, such as harassment, unruly behavior, or stalking, in order to file charges and that the circumstance would have to move beyond the boyfriend/girlfriend situation.

There were four main themes that described when prosecutors would file charges against a minor.

**Malicious intent/bullying/coercion or harassment (36%)**

- If pictures were taken by a boyfriend or girlfriend who then started distributing pictures widely with the motive to get even or to harm the other person's reputation.
- If a juvenile gave a photo to someone with the expectation that privacy be maintained, but then the images were distributed as a way to bully the juvenile.

**Distribution (25%)**

- If a youth were sending images of herself to many people and there had already been an intervention, but she would not stop sending images, might charge to get her in the system.
- If the images were forwarded to someone else without the victim's consent, the charge might be invasion of privacy.

**If a large age difference existed between the people involved (22%)**

- If a 19-year-old boy was getting a 12 or 14 or 15-year-old girl to take pictures of herself and then the pictures were sent to a minor, might charge with contributing to the delinquency of a minor.
- If the image was of a child under age 12 and sexually explicit, this would meet the CP felony statute.

**Graphic nature of the images (9%)**

- If violence was involved
- Gang rape, severe violence
- Only if very explicit pictures

**Discussion**

The range of outcomes found in this study (i.e. alternatives to charging, not filing charges, charging with child pornography felony, requiring sex offender registration) mirrors the wide range of types of cases seen by law enforcement. For example, the NJOV3 sample of law enforcement agencies estimated that 3,477 cases of youth-produced sexual images were handled by law enforcement during 2008 and 2009.<sup>6,7</sup> Two-thirds of these cases involved an “aggravating” circumstance beyond the creation and/or dissemination of a sexual image. In these aggravated cases, either an adult was involved (36% of cases) or a minor engaged in malicious, non-consensual or abusive behavior (31% of cases). An arrest occurred in 36% of the aggravated youth-only cases and in 18% of youth-only cases with no aggravating elements.

In this sample of prosecutors that had worked on facilitated crimes against children, one-third had ever filed charges in sexting cases. It is important to keep in mind that this is a convenience sample of prosecutors and results do not reflect national estimates about how often prosecutors handle sexting cases. Results from this exploratory indicate that research needs to continue to help prosecutors develop tools and strategies to deal with these complex crimes.

**How the National Juvenile Online Victimization (N-JOV) Study was conducted**

The N-JOV Study collected information from a national sample of law enforcement agencies about the prevalence of arrests for and characteristics of technology-facilitated child sexual exploitation crimes. Three waves of the study have been conducted in 2001, 2006, and 2010. In all waves of the study, we used a two-phase process of mail surveys followed by telephone interviews to collect data from a national sample of the same local, county, state, and federal law enforcement agencies. First, we sent mail surveys to a national sample of more than 2,500 agencies. These surveys asked if agencies had made arrests for online sex crimes against minors during the respective one-year timeframes. Then we conducted detailed telephone interviews with law enforcement investigators about a random sample of arrest cases reported in the mail surveys.

An additional component of the Third N-JOV Study (N-JOV3) was to conduct telephone interviews with prosecutors involved with technology-facilitated child sexual exploitation crimes. Law enforcement investigators who had made arrests for technology-facilitated child sexual exploitation crimes and participated in N-JOV3 (N=818) provided the names of 545 state prosecutors involved with prosecuting technology facilitated crimes. Although the law enforcement sample included federal agencies, we were unable to obtain approval to include federal prosecutors in this study. Because law enforcement investigators provided the names of prosecutors to contact for this component of the study, it is also

important to keep in mind that this is a convenience sample of prosecutors.

The purpose of the N-JOV3 Prosecutor Survey was to gather information about the experiences state prosecutors have when they prosecute technology-facilitated crimes against children – including prosecuting child pornography (CP), online undercover chat cases where an undercover agent was portraying a minor, online enticement cases involving identified victims, and when handling sexting cases. After receiving the names of prosecutors from law enforcement investigators, we sent letters to prosecutors explaining the purpose of the study. This was followed by telephone calls asking if they would like to participate in the study. For more information about the methodology see ([http://www.unh.edu/ccrc/pdf/CV293\\_NJOV3%20Prosecution%20Study%20Methodology%20Report\\_1-18-13.pdf](http://www.unh.edu/ccrc/pdf/CV293_NJOV3%20Prosecution%20Study%20Methodology%20Report_1-18-13.pdf)).

Between May and August 2011, telephone interviews were conducted with 378 prosecutors.

The following table describes the final disposition of the sample.

	Number	%
Number of prosecutor names	554	--
Screened out (i.e. did not prosecute any child sexual exploitation cases in the past 2 years)	72	
<b>Eligible cases</b>	<b>482</b>	
Unable to contact (i.e.no agency or prosecutor contact after 8 attempted calls, repeated rescheduling with prosecutor and interview never done)	46	10%
Refused to do interview	26	5%
Pending when study closed	32	7%
<b>Completed interviews</b>	<b>378</b>	<b>78%</b>
Did not handle a sexting case	142	
<b>Subsample of prosecutors who have handled a sexting case (whether or not charges were filed)</b>	<b>236</b>	

### Box on sample characteristics of prosecutors who have handled a sexting case (N=236)

The respondents were experienced prosecutors.

- 34% had 10 or more years experience
- 9% had 8 to 9 years experience
- 16% had 6 to 7 years experience
- 23% had 4 to 5 years experience
- 16% had 1 to 3 years experience
- 1% had less than one year experience

Association with Internet Crimes against Children (ICAC) Take Force

- 77% yes
- 23% no

Type of prosecution unit

- 46% worked for a general prosecution unit
- 23% worked with a sex crimes unit
- 13% worked with a juvenile victims unit
- 10% worked with a juvenile court unit
- 7% worked with a computer crimes unit
- 26% worked with other types of units

Attend training in how to prosecute Internet-related crimes

- 86% yes
- 14% no

Number of sexting cases handled in career

- 30% handled 1 to 3 cases
- 21% handled 4 to 6 cases
- 5% handled 7 to 9 cases
- 15% handled 10 to 15 cases
- 10% handled 16 to 20 cases
- 10% handled 21 to 40 cases
- 9% handled more than 40 cases

5. Ostrager, B. (2010). SMS. OMG! LOL! TTYL: Translating the law to accommodate today's teens and the evolution from texting to sexting. *Family Court Review* 48(4), 712-726.
6. Wolak, J., Finkelhor, D., & Mitchell, K. (2012). How often are teens arrested for sexting? Data from a national sample of police cases. *Pediatrics*, 129(1), 1-9.
7. Wolak, J. & Finkelhor, D. (2011). *Sexting: A typology*. Durham, NH: Crimes against Children Research Center.

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We welcome inquires about our research. Please contact [wendy.walsh@unh.edu](mailto:wendy.walsh@unh.edu).

### REFERENCES

1. Mitchell, M., Finkelhor, D., Jones, L., & Wolak, W., (2012). Prevalence and characteristics of youth sexting. *Pediatrics*, 129(1), 13-20.
2. National Center for State Courts (2012). National 2012 Sexting Legislation. Retrieved January 17, 2013 from <http://www.ncsl.org/issues-research/telecom/sexting-legislation-2012.aspx>
3. Bailey, J. & Hanna, M. (2011). The gendered dimensions of sexting: Assessing the applicability of Canada's child pornography provision. *Canadian Journal of Women & the Law*, 405-441.
4. Levick, M. & Moon, K. (2010). Prosecuting sexting as child pornography. *Valparaiso University Law Review* 44(4), 1035-1054.



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