

NOTE

SIXTEEN, SEXTING, AND A SEX OFFENDER: HOW ADVANCES IN CELL PHONE TECHNOLOGY HAVE LED TO TEENAGE SEX OFFENDERS

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I. INTRODUCTION

In 2007, a Florida state court prosecuted a sixteen-year-old girl, A.H., for electronically sending nude pictures of herself to her seventeen-year-old

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boyfriend.² The court charged A.H. and her boyfriend with producing, directing, and promoting child pornography.³ Under Florida's child pornography laws, A.H. faces a severe prison sentence and may be required to register as a sex offender for the remainder of her life if convicted.⁴ "Imagine in the year 2063, a 70-year-old woman having to post a notice that she is a registered sex offender because of a camera-phone picture she snapped of herself in 2009."⁵

This new form of social interaction has been coined "sexting."⁶ Sexting is the act of sending nude or sexually explicit photographs electronically, either through a picture text message using a cellular telephone or posting the picture on the Internet.⁷ While the idea of sexting may be shocking to adults, it is incredibly popular for teenagers across the United States.⁸ In fact, according to a study by the National Campaign to Prevent Teen and Unplanned Pregnancy, one in five teenagers (twenty percent) admit to participating in sexting.⁹

"What makes sexting so ripe for legal discussion is that it represents a social and technological phenomenon that has outstripped the law," as there is no consensus in the legal community as to the appropriate punishment for teenagers engaged in this behavior.¹⁰ Technological advancements and the resulting misuse by teens have forced prosecutors and legislatures across the country to strike a balance between protecting children from the harms of child pornography and the need to avoid imposing severe punishments on teenagers for unintentionally engaging in criminal behavior.¹¹

² See Riva Richmond, *Sexting May Place Teens at Legal Risk*, NY TIMES (Mar. 26, 2009), available at <http://gadgetwise.blogs.nytimes.com/2009/03/26/sexting-may-place-teens-at-legal-risk/>.

³ See *A.H. v. State*, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007).

⁴ See Fla. Dep't of Law Enforcement, *Florida Sexual Offenders and Predators—FAQ*, FLORIDA DEPARTMENT OF LAW ENFORCEMENT, <http://offender.fdle.state.fl.us/offender/FAQ.jsp#Question16> (last visited January 5, 2011).

⁵ Richmond, *supra* note 2 (quoting Mark Rasch, a former cybercrime prosecutor for the Justice Department, and now an information security and privacy consultant).

⁶ See "Sexting" Shockingly Common Amongst Teens, CBS NEWS (Jan. 15, 2009), <http://www.cbsnews.com/stories/2009/01/15/national/main4723161.shtml>.

⁷ See *id.*

⁸ See *id.*

⁹ See *Sex and Tech Results From a Survey of Teens and Young Adults*, THE NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY (2008), available at http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf.

¹⁰ Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 3 (2009) (citing Editorial, *Flirting With 'Sexting' Remedy*, Lancaster New Era (Pa.), Apr. 3, 2009, at A8).

¹¹ See Jesse M. Nix, *Unwholesome Activities in a Wholesome Place: Utah Teens Creating Pornography and the Establishment of Prosecutorial Guidelines*, 11 J. L. & FAM.

This note will focus on how advancements in technology have surpassed the outdated child pornography laws meant to protect children, and discuss the appropriate legislative response to addressing the criminality of sexting. Part II introduces the phenomenon of sexting and briefly describes the technological advancements that have led to its creation. Part III presents an overview of current state and federal child pornography statutes and explains why charging teenagers for sexting under these statutes is technically permissible under the letter of the law. Part IV discusses the two most common forms of sexting amongst teenagers and how the degree of culpability may vary significantly depending on the circumstances surrounding each case. Part V analyzes possible solutions proposed by legal scholars and state legislators to address the issue of sexting. This section also examines the constitutional issues that have surfaced as a result of child pornography charges being brought against teenagers for sexting and the impact the First Amendment may have on sexting legislation.

Finally, this note will conclude by proposing a plan of action for federal and state legislatures to best address the issue of sexting. The plan requires the combination of both legislative action and educational reform. Federal and state legislatures must first amend the current child pornography laws to create an exception for minors. The exception would exempt minors who produce, disseminate, and or possess nude or semi-nude images of a minor between the ages of thirteen and seventeen. Furthermore, federal and state child pornography laws should incorporate a “Romeo and Juliet” exception into the statute. The “Romeo and Juliet” exception would exclude adults below the age of nineteen from prosecution under the statute, so long as the minor displayed in the picture is within four years of age to the defendant. In addition, federal and state legislatures should draft new legislation declaring sexting between minors a misdemeanor. The second part of the plan is preventative and involves educating teenagers about the dangers of sexting. Under this plan, schools would receive government funding to educate teenagers about the social and legal ramifications of sexting.

II. TECHNOLOGY ADVANCEMENTS THAT HAVE LED TO TEENAGE SEXTING

Advancements in cell phone and Internet technology have created a new forum for social interaction where people no longer talk, but rather text.¹² Multimedia Messaging Service, also known as MMS, allows cell phone users to send text, picture, and video messages to other users with MMS-compatible

STUD. 183, 185 (2008).

¹² See Mickey Alam Khan, *Text Replacing Talk Among Teens: Harris Survey*, MOBILE MARKETER (Sept. 15, 2008), <http://www.mobilemarketer.com/cms/news/research/1716.html>.

phones.¹³ “In order to engage in sexting, a teen needs [only] two simple tools: A phone capable of taking photographs, and a cell phone plan capable of sending and receiving multimedia text messages.”¹⁴ Arguably one of the primary reasons sexting has become so prevalent amongst teens is that cell phone technology has made it incredibly easy to take and send these photographs.¹⁵

Teenagers are also using the Internet as a medium for sexting.¹⁶ Teenagers have begun to upload photographs to the Internet, either from their personal cameras or directly from their cell phones,¹⁷ and then post these images on social networking sites such as Facebook and MySpace.¹⁸ In fact, according to a survey conducted by the National Campaign to Prevent Teen and Unplanned Pregnancy, four percent of teenagers say they have personally posted a nude or semi-nude picture or video of themselves online to sites like MySpace or Facebook.¹⁹ The study also reports that thirty-eight percent of teenagers admit their friends have posted nude or semi-nude pictures on the Internet.²⁰ While the advances in technology have created a new form of high-tech flirtation,

¹³ See t-mobile.com, Support – Search MMS, <http://support.t-mobile.com/doc/tm21396.xml> (last visited Jan. 5, 2011).

¹⁴ Matthew Keys, *Sexting Shatters Lives, Turns Children Into Sex Offenders*, FOX NEWS (Aug. 14, 2009), <http://www.fox40.com/news/headlines/ktxl-news-sexting0814,0,7848396.story>. According to Harris Interactive, four out of five, or seventeen million, teenagers own cell phones with MMS technology. See *National Study Reveals How Teens are Shaping & Reshaping Their Wireless World*, HARRIS INTERACTIVE (Sept. 12, 2008), <http://www.harrisinteractive.com/NEWS/allnewsbydate.asp?NewsID=1334>.

¹⁵ See Gigi Stone, ‘Sexting’ Teens Can Go Too Far, ABC NEWS (Mar. 13, 2009), <http://abcnews.go.com/Technology/WorldNews/sexting-teens/story?id=6456834>; John D. Sutter, *Survey: 15 Percent of Teens Get Sexual Text Messages*, CNN (Dec. 15, 2009), <http://www.cnn.com/2009/TECH/12/15/pew.sexting.survey/index.html>.

¹⁶ See Larry Magid, *MTV’s Sexting Show to Air Stark Message for Teens*, CNET NEWS (Feb. 13, 2010), http://news.cnet.com/8301-19518_3-10453101-238.html (“The MTV program draws on a survey conducted by the TV network and the Associated Press last year that found ‘29 percent (of young people 14 to 24) report receiving messages ‘with sexual words or images’ by text or on the Internet.’”).

¹⁷ See *Upload Photos from a Mobile Phone to Your Facebook Album*, DIGITAL INSPIRATION (Aug. 2, 2009), <http://www.labnol.org/internet/upload-facebook-photos-from-mobile-phone/9320/>.

¹⁸ See Associated Press, *Girl Posts Nude Pics, is Charged with Kid Porn*, MSNBC (Mar. 27, 2009) <http://www.msnbc.msn.com/id/29912729/>. See also *infra* Part II(A). Facebook and MySpace allow users to post photos and videos of themselves on their page to share with other users. See facebook.com, Product Overview, <http://www.facebook.com/press/info.php?factsheet>; myspace.com, About Us, <http://collect.myspace.com/index.cfm?fuseaction=misc.about> (last visited Apr. 3, 2010).

¹⁹ See *Sex and Tech Results From a Survey of Teens and Young Adults*, *supra* note 9.

²⁰ See *id.*

they have also created a number of complex legal issues that can lead to life-altering consequences for teenagers if not resolved.²¹

III. SEXTING: POTENTIAL LEGAL CONSEQUENCES UNDER STATE AND FEDERAL LAWS

Sexting has created a problem where the same laws enacted to protect teens are now being used to prosecute them.²² “The combination of poorly drafted laws, new technologies, draconian and inflexible punishments, and teenage hormones make for potentially disastrous results.”²³ What teenagers do not realize is that what they consider “harmless” flirting, the law considers a felony.²⁴ “It’s illegal under federal and state child-porn laws to create explicit images of a minor, [possess] them or distribute them.”²⁵ Therefore, under a majority of current state laws, a teenager who uses a cell phone to take, send, or keep a sexually explicit photo of a friend or significant other, who just so happens to also be a minor, may be charged with production, dissemination, and possession of child pornography.²⁶

A. *Federal Child Pornography Laws*

Federal Child Pornography laws as written may be applicable against teens caught sexting.²⁷ Section 2252A under title 18 of the United States Code, entitled Certain Activities Relating to Material Constituting or Containing Child Pornography, deems as a felon

(a) Any person who –

(5) . . .

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in interstate or foreign commerce by any means, including by computer, or that was

²¹ See Mathias H. Heck, Jr., “Sexting and Charging Juveniles--Balancing the Law and Bad Choices,” 43-MAR *Prosecutor* 28 (2009).

²² See Richards & Calvert, *supra* note 10, at 3-4.

²³ Richmond, *supra* note 2 (quoting Mark Rasch, a former cybercrime prosecutor for the Justice Department, and now an information security and privacy consultant).

²⁴ See “Sexting” *Shockingly Common Amongst Teens*, *supra* note 6.

²⁵ Richmond, *supra* note 2.

²⁶ See *Sexting In America: When Privates Go Public* (MTV television broadcast Feb. 14, 2010), available at <http://www.athinline.org/videos/17-sexting-in-america-part-1>.

²⁷ See Mike Brunker, ‘Sexting’ Surprise: Teens Face Child Porn Charges, MSNBC (Jan. 15, 2009), <http://www.msnbc.msn.com/id/28679588/>.

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produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct—

Punishment for violation of the federal statutes includes a mandatory prison sentence of no less than five years and no more than twenty years.²⁸ In addition to a prison sentence, a convicted defendant is also required to register as a sex offender for a minimum duration of fifteen years.²⁹

B. State Child Pornography Laws

All fifty states and the District of the Columbia have child pornography statutes that make it illegal to possess, produce, and/or distribute child pornography.³⁰ Under most state statutes, the mens rea required is “knowing” possession, receipt, and distribution; thereby making the defendant’s intent irrelevant.³¹ Furthermore, in all states, a violation of the child pornography statute is considered a felony,³² and there is typically no lesser, misdemeanor charge for this type of behavior.³³ The proscribed periods of incarceration vary

²⁸ 18 U.S.C. § 2252A(b)(1) (2009).

²⁹ See Frequently Asked Questions: The Sex Offender Registration and Notification Act (SORNA) Final Guidelines U.S. Department of Justice, http://www.ojp.usdoj.gov/smart/pdfs/faq_sorna_guidelines.pdf (last visited Jan. 5, 2011); see also Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006). Title I, the Sex Offender Registration and Notification Act (SORNA), of the Walsh Act, establishes a set of minimum standards for all fifty states, as well as the District of Columbia, for sex offender registration and notification. See *id.* Under SORNA, violations of 18 USC § 2253 requires the offender to register as sex offenders for a minimum duration of fifteen years. See *id.*

³⁰ *Laws Concerning Child Pornography*, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1476#7 (last visited Jan. 5, 2011).

³¹ See *United States v. Polizzi*, 549 F. Supp. 2d 308, 347 (E.D.N.Y. 2008).

³² See generally *id.* A felony is a “serious crime punishable by more than one year in prison or death.” BLACK’S LAW DICTIONARY (8th ed. 2004).

³³ *District Attorney Holds Press Conference on Problem of “Sexting” in Berkshire County*, THE BERKSHIRE DIST. ATTORNEY’S OFFICE, http://www.mass.gov/?pageID=bermodulechunk&L=1&L0=Home&sid=Dber&b=terminalcontent&f=nu_2009_0303_sexting_press_conference&csid=Dber (last visited Jan. 5, 2011).

across states and can range anywhere from six months to life in prison.³⁴ For example, in Pennsylvania, a first offense under the state's child pornography statute may result in imprisonment of up to seven years.³⁵ In Florida, the duration of incarceration for knowing possession or knowing receipt is up to five years.³⁶

In addition, a violation of the child pornography statute in most states automatically requires the offender to register as a sex offender.³⁷ As with duration of incarceration, states differ in requirements for sex offender registration.³⁸ Pennsylvania's Megan's Law Statute requires individuals convicted under the state's child pornography laws to register as a sex offender with the state police for a period of ten years.³⁹ In Florida, convicted sex offenders are required to register for at least twenty-five years.⁴⁰

A criminal conviction for sexting also carries personal consequences. The teen will be labeled a felon, "which can trigger a restriction of school activities, such as sports, denial of college admission, and denial of student loan eligibility."⁴¹ In addition, sex offender registration typically controls where the offender is allowed to live, hinders future employment eligibility, and may require enrollment in sex offender treatment courses.⁴²

IV. RECENT CASES HIGHLIGHTING THE VARIOUS FORMS OF SEXTING

One of the primary difficulties in addressing sexting is that the circumstances surrounding each case vary, and these variances may lead to

³⁴ See *Polizzi*, 549 F. Supp. 2d at 454-58.

³⁵ See 18 PA. CONS. STAT. ANN. § 106(b)(4) (2009). See also *Polizzi*, 549 F. Supp. 2d at 457.

³⁶ See *Polizzi*, 549 F. Supp. 2d at 455; FLA. STAT. ANN. § 847.0137 (West 2001); FLA. STAT. ANN. § 775.082(3)(d) (West 2009).

³⁷ See Deborah Feyerick & Sheila Steffen, 'Sexting' lands teen on sex offender list, CNN (Apr. 8, 2009), <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html>.

³⁸ See Scott Matson & Roxanne Lieb, *Sex Offender Registration: A Review of State Laws*, WASH. STATE INST. FOR PUB. HEALTH, 1, 5-9 (July 1996), <http://www.wsipp.wa.gov/rptfiles/regsrtm.pdf>.

³⁹ See 42 PA. CONS. STAT. ANN. § 9795.1(a)(1) (2008).

⁴⁰ See Fla. Dep't of Law Enforcement, *Florida Sexual Offenders and Predators, Important Information*, FLA. DEP'T. OF LAW ENFORCEMENT, <http://offender.fdle.state.fl.us/offender/Important.jsp> (last visited Jan. 5, 2011). Conviction for violation of Florida's child pornography statute is considered a sexual offense and mandates sex offender registration. See *id.*

⁴¹ *District Attorney Holds Press Conference on Problem of "Sexting" in Berkshire County*, *supra* note 33.

⁴² See Marcus Mieto & David Jung, *The Impact of Residency Restrictions on Sex Offenders and Correctional Management Practices: A Literature Review*, CAL. RESEARCH BUREAU (Aug. 2006), <http://www.library.ca.gov/crb/06/08/06-008.pdf>.

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very different levels of culpability.⁴³ For instance, sexting may be considered a consensual act where the teenager willingly takes and sends the nude photograph of himself or herself to another teenager who willingly accepts it.⁴⁴ However, if an image received through a consensual sext is later forwarded to a third party, the act is no longer consensual.⁴⁵ The following cases illustrate the different forms of sexting and the varying levels of culpability associated with each case.

A. *Cases of Consensual Sexting*

Eighteen-year-old Jorge Canal of Iowa was charged and found guilty of dissemination and exhibition of obscene material to a minor.⁴⁶ Canal was convicted for sending a picture of his erect penis to a fourteen-year-old classmate and friend, C.E.⁴⁷ C.E. testified at Canal's trial that she asked him to send her the photograph three or four times prior to receiving it.⁴⁸ Despite the fact that this exchange was consensual, Canal was sentenced to one year of probation, forced to pay a \$250 fine and is required to register as a sex offender.⁴⁹

In another case, a fourteen-year-old girl from New Jersey was arrested and charged for violating the child pornography statute after she posted roughly thirty racy pictures of herself on her MySpace page.⁵⁰ The girl was acting under her own volition and explained she posted the pictures because "she wanted her boyfriend to see them."⁵¹ Even though the girl willingly posted the pictures and technically no harm or exploitation of a minor occurred, she is still guilty of a sexual offense under the law.⁵² If convicted, the girl faces up to

⁴³ See Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 *COMMLAW CONCEPTUS* 1, 31 (2009); July Hilden, *How Should Teens' "Sexting" – the Sending of Revealing Photos – Be Regulated?*, *FINDLAW.COM* (April, 28 2009), <http://writ.news.findlaw.com/hilden/20090428.html>.

⁴⁴ *See id.*

⁴⁵ *See id.*

⁴⁶ *See State v. Canal*, 773 N.W.2d 528, 529 (Iowa 2009).

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See id.* "Registration in Iowa is either for 10-years or for life, depending on the statute the offender is convicted of and if the offender has any prior convictions for qualifying offenses." Frequently Asked Questions, *IOWA SEX OFFENDER REGISTRY*, <http://www.iowasexoffender.com/faq/content> (last visited Jan. 5, 2011).

⁵⁰ *See Beth DeFalco, 14-Year-Old Girl Arrested After Posting Nude Pics*, *ASSOCIATED PRESS* (Mar. 27, 2009), http://www.netlingo.com/more/Girl_arrested.pdf.

⁵¹ *See id.* (quoting Bill Maer, sheriff's spokesman).

⁵² *See id.*

seventeen years in prison and will be required to register as a sex offender.⁵³

B. Case of Involuntary Sexting

When Florida resident Philip Alpert was eighteen-years-old, he pled nolo contendere to the crime of transmitting child pornography.⁵⁴ After getting into a fight with his then sixteen-year-old girlfriend, Alpert decided to e-mail the nude photographs she had sent him over the course of their relationship to over seventy people, including the girl's parents, friends, and teachers.⁵⁵ As a result, Alpert must register as a sex offender in Florida until he is forty-three years old, participate in mandatory community service, and regularly attend sex offender treatment classes.⁵⁶ In addition to his court-ordered sentence, Alpert's personal life has been negatively affected.⁵⁷ Because of his status as a felon and sex offender, Alpert was kicked out of college, can no longer live with his father because he lives too close to a high school, and has thus far been unable to obtain employment.⁵⁸

C. Varying Fact Patterns, Varying Degrees of Culpability

Although Alpert's sentence is serious, his punishment is not easily dismissed as unjustifiable because his actions were malicious and non-consensual. Conversely, Jose Canal's punishment for engaging in a purely consensual act seems to be a serious miscarriage of justice. In Canal's case, both parties were willing participants: she wanted him to send her the photo, and he voluntarily sent it.⁵⁹ In Alpert's case, he was an adult male who received nude pictures of his underage girlfriend, and then proceeded to forward the photographs to third parties without his girlfriend's knowledge or consent.⁶⁰ Alpert was acting maliciously and out of revenge, and thus seems

⁵³ *See id.*

⁵⁴ *See* Hannah Geyer, *Sexting*, ABA CRIMINAL JUSTICE SECTION -JUVENILE JUSTICE E-NEWSLETTER (June 2009), <http://www.abanet.org/crimjust/juvjust/newsletterjune09/june09/sexting.htm>.

⁵⁵ *See id.*

⁵⁶ *See Sexting In America: When Privates Go Public*, *supra* note 26. In his interview with MTV, Alpert explained the class he is required to attend as part of his punishment consists of other registered sex offenders. *See id.* The group discusses topics such as why it is not okay to rape people and how to control sexual feelings for children. *See id.*

⁵⁷ *See Fox News: Harsh Lesson On 'Sexting' Does The Punishment Fit The Crime* (Fox television broadcast Mar. 13, 2009) (interview between Fox News and Phillip Alpert explaining the details of the crime and his punishment).

⁵⁸ *See* Magid, *supra* note 16.

⁵⁹ *See* Grant Schulte, *Iowa court upholds 'sexting' conviction*, USA TODAY (Sept. 18, 2009), available at http://www.usatoday.com/news/nation/2009-09-18-iowa-sexting_N.htm.

⁶⁰ *See* ABA CRIMINAL JUSTICE SECTION, *supra* note 54.

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more culpable.⁶¹ However, under the eyes of the law as written today, the two men received roughly the same punishment.⁶²

The varying levels of culpability described in the above scenarios present difficult questions for legislatures when drafting sexting legislation. Should a blanket approach be applied, in which all cases of sexting are treated the same? Or is a more fact-specific, case-by-case approach better suited for determining the culpability and appropriate punishment for teenage offenders caught sexting?⁶³

V. PROPOSED LEGISLATIVE AND STATE REFORM TO ADDRESS SEXTING

There is a growing consensus among state legislatures and lawyers that although sexting is morally objectionable, legislatures did not consider the act of sexting when drafting child pornography statutes.⁶⁴ In addition, most scholars agree sexting is wrong and teenagers engaged in this type of behavior should be punished.⁶⁵ However, legislatures and government officials have yet to reach widespread consensus as to what the best state response is to sexting and what, if any, punishment would be appropriate for this type of behavior.⁶⁶

A. *Proposed Changes in Legislation*

Vermont recently passed Senate Bill 125, which excludes minors who are caught sexting from prosecution under the state's child pornography laws.⁶⁷ Under the new law, minors charged with sexting will avoid sex offender registration and will not be charged under the state's child pornography statutes, and instead will now be processed through juvenile court.⁶⁸ However, "[t]he law gives only one free pass to teens; subsequent activity by the same offender will result in prosecution under the state's sexual exploitation of children laws."⁶⁹ Furthermore, the new law only decriminalized the conduct if

⁶¹ *See id.*

⁶² *See* Magid, *supra* note 16; *see also* State v. Canal, 773 N.W.2d 528, 529 (Iowa 2009).

⁶³ *See* Kara Rowland, 'Sexting' is Thorny Legal Issue, THE WASH. TIMES (Jun. 23, 2009), available at <http://www.washingtontimes.com/news/2009/jun/23/sexting-is-thorny-legal-issue/>.

⁶⁴ *See* Tamar Lewin, *Rethinking Sex Offender Law for Youth Texting*, N.Y. TIMES (Mar. 20, 2010), available at <http://www.nytimes.com/2010/03/21/us/21sexting.html> (quoting Amy Adler, law professor at New York University).

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See* VT. STAT. ANN. tit. 13 § 2802b(b) (2009); *The Vexing Issue of 'Sexting,'* NAT'L CONF. OF ST. LEGISLATURES (July/Aug. 2009), available at <http://www.ncsl.org/default.aspx?tabid=18006>.

⁶⁸ *See The Vexing Issue of 'Sexting,' supra* note 67.

⁶⁹ Don Corbett, *Let's Talk About Sext: The Challenge of Finding the Right Legal*

the exchange is consensual and between parties within the ages of thirteen and eighteen.⁷⁰

In Pennsylvania, State Representative Seth Grove introduced House Bill 2189 to “address the practice of minors texting risqué photos of themselves or their peers”⁷¹ The purpose of the proposed legislation is to draw a line between potential predators and impulsive teenagers.⁷² “‘Teenagers need to get the message that sending a nude photo – even of themselves – is a crime, and they can be punished for sending these images. However, the punishment should not ruin the rest of their lives,’ said Grove.”⁷³ Under the bill, sexting would be considered a second-degree misdemeanor,⁷⁴ and “would apply if a minor sends nude images of himself or herself or another minor over the age of 13 via electronic communication.”⁷⁵ If however, the photographs depict minors engaged in any sexual act, the conduct would constitute child pornography and be charged as a felony.⁷⁶

B. The “It’s a Problem, but Not a Problem Worth Legislating Over” Approach

While some states consider the current child pornography laws inappropriate for dealing with teenage sexting, other states’ legislatures consider change unnecessary.⁷⁷ Although a teenager caught sexting may be tried under the state’s child pornography statute under the letter of the law in a majority of states, in most situations the teenager is not actually charged.⁷⁸ Based on time considerations, the expense associated with legislative changes, and the fact that teens are rarely charged under child pornography statutes, some states

Response to the Teenage Practice of “Sexting,” 13 NO. 6 J. INTERNET L. 3, 6 (2009). See also S. 125, 111th Cong. § 2802b (2009), available at <http://www.leg.state.vt.us/docs/2010/bills/Passed/S-125.pdf>.

⁷⁰ See *Vermont Considers Legalizing Teen “Sexting,”* 15 NO. 12 QUINLAN, NATIONAL BULLETIN ON DOMESTIC VIOLENCE PREVENTION ART. 6 (Dec. 2009).

⁷¹ See *Grove Introduces Legislation to Address Risqué Teen Testing*, REPUBLICAN PARTY OF PENNSYLVANIA (Jan. 6, 2010), available at <http://www.pagop.org/news/Read.aspx?ID=3221>.

⁷² See *id.*

⁷³ *Id.*

⁷⁴ See *id.* Second-degree misdemeanors in Pennsylvania are punishable up to two years imprisonment. See 18 PA. CONS. STAT. ANN. § 106(b)(7) (West 2010).

⁷⁵ See *Grove Introduces Legislation to Address Risqué Teen Testing*, *supra* note 71.

⁷⁶ See *id.*

⁷⁷ See *‘Sexting’ Not on the Agenda; Teenagers Rarely Charged for Photos*, CONCORD MONITOR, Sept. 11, 2009, available at 2009 WLNR 17847406.

⁷⁸ See *id.*

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have decided not to change their statutes.⁷⁹

For example, while a New Hampshire legislative subcommittee recognized that sexting is a problem, they also decided it is not a problem worth legislating over.⁸⁰ The subcommittee was formed after officials and parents raised concerns over the possibility of felony charges being filed against teenagers who engage in sexting.⁸¹ The subcommittee adopted a “wait-and-see” approach, as opposed to making changes to the current statutes, because no New Hampshire teen had yet been prosecuted for sexting.⁸²

C. Changing the Law is Not the Only Way: Alternative Approaches to Sexting

Other states have decided to initiate alternative action plans rather than make changes to their existing child pornography laws.⁸³ These states chose alternative plans based on the premise that they are less costly and less time-intensive than legislative action, and may in the end prove to be more effective.⁸⁴

For example, Ohio officials “crafted a creative sensible approach called the Prosecutor’s Juvenile Diversion Program.”⁸⁵ The first step under the program is to have a diversion officer from the prosecutor’s office screen teenagers caught sexting to determine if the diversion program is appropriate for the individual.⁸⁶ During the initial screening, the diversion officer considers several factors to determine if the juvenile should be entered into the diversion program or should instead proceed through the court system.⁸⁷ Possible considerations include “previous offenses, prior participation in the diversion program, and whether drugs or alcohol were used to procure the pictures.”⁸⁸ Juvenile offenders who enter the program are under supervision for six

⁷⁹ *See id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See Corbett, supra* note 69, at 6.

⁸⁴ *See id.*

⁸⁵ *Id.*

⁸⁶ Press Release, Montgomery County Prosecutor’s Office, Prosecutor’s Juvenile Diversion Program Announced “Sexting” Will be Targeted (March 4, 2009), http://www.mcoho.org/Prosecutor/docs/03042009_Juvenile_Diversion_Program.pdf (“If it is determined the juvenile does not meet the criteria to be considered for the diversion program, or the juvenile refuses to participate and cooperate, then charges will be filed with the Juvenile Court.”).

⁸⁷ *See Corbett, supra* note 69, at 6-7.

⁸⁸ *Id.*

months, must relinquish their cell phones, and perform community service.⁸⁹ In addition, the juvenile must participate in an education program, focusing “on the legal ramifications [of sexting], the effects on the victim [of sexting], establishing age appropriate sexual boundaries, and responsible use of the internet, cell phones and other communication devices.”⁹⁰

VI. CONCERN OVER POTENTIAL HARM CAUSED BY CHANGING CURRENT LEGISLATION

Despite the consensus among a majority of legislatures that changes to state and federal child pornography laws are necessary to deal with the issue of sexting, there are still some critics who fear that the proposed changes may be problematic.⁹¹ Critics emphasize the need for a high level of scrutiny when changing these laws, explaining changes to current laws and careless drafting of sexting statutes may cause more harm than good.⁹²

A. *Potential Problems with Recent and Proposed Changes in Legislation*

The biggest concern over changes in legislation is the danger of creating loopholes, which would allow child predators and pedophiles to escape prosecution. Some state proposals plan on creating an exception for minors from prosecution under the child pornography statute, so long as the image is “voluntarily produced.”⁹³ The problem results when adolescents voluntarily produce and disseminate sexually explicit images of themselves.⁹⁴ While teenagers generally intend to share this picture with a select few, the images are often transmitted to unintended recipients.⁹⁵ Once a teenager sends a nude or sexually explicit photo of himself or herself to others, the teenager completely loses control over the picture.⁹⁶ The fear is that these pictures may

⁸⁹ See *Diversion Program*, *supra* note 86.

⁹⁰ See *id.*

⁹¹ See Mary Graw Leary, *The Right and Wrong Responses to “Sexting,”* THE DIOCESE OF MADISON (May 12, 2009), http://www.madisondiocese.org/Portals/0/Agencies/Safe_Environment/Sexting.pdf (Professor Mary Leary of Catholic University of America specifically addresses some of the potential risks associated with the recent change in Vermont’s legislation that address sexting. Vermont’s governor subsequently ratified the proposed legislation on July 1, 2009. See VT. STAT. ANN. tit. 13, § 2802b (2010)).

⁹² Leary, *supra* note 91.

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See *Sex and Tech Results From a Survey of Teens and Young Adults*, *supra* note 9 (survey reported 38% of teen girls and 39% of teen boys say they have received sexually suggestive text messages or e-mails that were originally meant for someone else).

⁹⁶ Murad Ahmed, *Police Warn Over Rise of Teenage ‘Sexting’ Trend*, THE SUNDAY

ultimately end up in the possession of pedophiles “who use these images to validate their own sexual proclivities for children.”⁹⁷ If drafters are not cautious when creating exceptions for teenage sexting under the child pornography statutes, legislatures may inadvertently create a loophole allowing pedophiles to escape prosecution simply by arguing that the images they possess are not covered under the statute because they were voluntarily produced.⁹⁸

Another problem with the proposed changes is that the legislation completely ignores the potential harm these images may cause to children.⁹⁹ “[T]he unique harm of child pornography is not only the activity captured in the image, but the fact that it is memorialized out of the control of the child subject for eternity.”¹⁰⁰ As noted above, once the image is sent via cell phone or Internet, the sender relinquishes all control of the image. As a result, teens who “sext” images are at risk of experiencing “depression, anxiety, low self-esteem, and other effects from the fact that these images will be circulated forever.”¹⁰¹ The devastating loss of Jessica Logan in 2008 exemplifies the social danger surrounding sexting.¹⁰² Logan, a sixteen-year-old high school student, sent nude photographs of herself to her boyfriend, who later leaked the pictures to other students at her school.¹⁰³ After being relentlessly tortured and teased by classmates, Logan decided to end her own life.¹⁰⁴ Logan’s story illustrates the importance of educating teenagers about both the criminal and irreversible social consequences of sexting.

These concerns, though serious, do not abrogate the need to alter the current child pornography statutes in response to teenage sexting. However, these criticisms do highlight significant consequences that may result from altered legislation, and highlight the need for careful scrutiny when making changes to child exploitation statutes.

B. Sexting and the First Amendment

Another consideration when addressing sexting centers around the idea that sexting may not be illegal at all, and may in fact be a protected form of speech

TIMES, Aug. 5, 2009, available at http://technology.timesonline.co.uk/tol/news/tech_and_web/article6738532.ece (quoting Will Gardner, chief executive of Childnet International, a child internet safety group).

⁹⁷ Leary, *supra* note 91.

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Keys, *supra* note 14.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

under the First Amendment.¹⁰⁵ The American Civil Liberties Union (ACLU) in a recent case has raised the issue of First Amendment protection and, depending on the outcome, the case may significantly impact the need for sexting legislation.¹⁰⁶

The First Amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech”¹⁰⁷ Although the First Amendment protects most forms of speech, the Supreme Court has carved out a number of exceptions, determining that some categories of speech are outside of the safeguards of the First Amendment.¹⁰⁸

One form of speech not protected by the First Amendment is child pornography.¹⁰⁹ The Supreme Court in *N.Y. v. Ferber* determined child pornography is not entitled to protection under the First Amendment.¹¹⁰ The Court reasoned, “[w]hen a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production, the balance of competing interests is clearly struck, and it is permissible to consider these materials as without the First Amendment’s protection.”¹¹¹ The Court made clear, however, that it did not intend for the exception to be read so broadly as to include any image depicting sexual conduct or lewdness by minors.¹¹² The court wrote, “[t]here are, of course, limits on the category of child pornography . . .” and “distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.”¹¹³

¹⁰⁵ See Shannon P. Duffy, *ACLU Sues DA Over Threat to Prosecute ‘Sexting’ Teens*, LAW.COM (Mar. 26, 2009), <http://www.law.com/jsp/article.jsp?id=1202429399530>.

¹⁰⁶ *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009); see *ACLU Sues Wyoming County D.A. for Threatening Teenage Girls with Child Pornography Charges Over Photos of Themselves*, ACLUPA.ORG (Mar. 25, 2009), <http://www.aclupa.org/pressroom/aclusueswyomingcountydafor.htm>.

¹⁰⁷ U.S. CONST. amend. I.

¹⁰⁸ See HENRY COHEN, CONG. RESEARCH SERV., RL 95-815 FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT, (July 29, 2004), available at <http://www.fas.org/irp/crs/95-815.pdf>.

¹⁰⁹ See *id.*

¹¹⁰ See *N.Y. v. Ferber*, 458 U.S. 747, 765 (1982). See also John A. Humbach, “Sexting” and the First Amendment, 37 HASTINGS CONST. L.Q. 433, 447 (2010).

¹¹¹ See *Ferber*, 458 U.S. at 764.

¹¹² See *id.* See also Humbach, *supra* note 110, at 454-55.

¹¹³ *Ferber*, 458 U.S. at 764-65. Obscene speech is also an unprotected form of speech as declared by the Supreme Court in *Miller v. California*. See *Miller v. California*, 413 U.S. 15, 24 (1973):

[B]asic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a

Then, in *Osborne v. Ohio*, the Supreme Court extended the ruling in *Ferber*, holding possession and distribution of child pornography is also a form of unprotected speech under the First Amendment.¹¹⁴ The Supreme Court explained the purpose of the exception is not to control the defendant's personal thoughts, but to "protect the victims of child pornography . . ." and "destroy a market for the exploitative use of children."¹¹⁵

Despite the Supreme Court's seemingly broad categorical exclusion of child pornography in *Ferber* and *Osbourne*, the recent Supreme Court decision in *Ashcroft v. Free Speech Coalition* narrowed the exception.¹¹⁶ In *Free Speech Coalition*, the Court declared two sections of the Child Pornography Prevention Act of 1996 (CPPA) prohibiting the production, dissemination and possession of *virtual* child pornography as overly broad and unconstitutional.¹¹⁷ In doing so, the Court "concluded virtual child pornography is . . . fully protected by the First Amendment."¹¹⁸ The majority explained "the CPPA prohibits speech that records no crime and creates no victims by its production" adding "[v]irtual child pornography is not 'intrinsically related' to the sexual abuse of children."¹¹⁹ The Court implied "the categorical exclusion should be limited to material that are produced by means of criminal child abuse and exploitation," strongly suggesting that self-produced child pornography where no child is exploited or harmed is constitutionally protected under the First Amendment.¹²⁰ The *Free Speech Coalition* Court explained that "*Ferber's* judgment about child pornography was based upon

whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

¹¹⁴ See *Osborne v. Ohio*, 495 U.S. 103, 111 (1990). See also *Humbach*, *supra* note 110, at 452.

¹¹⁵ See *Osborne*, 495 U.S. at 109.

¹¹⁶ See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002). See also *Humbach*, *supra* note 110, at 463.

¹¹⁷ *Free Speech Coalition*, 535 U.S. at 258. 18 U.S.C. § 2256(8)(B) expanded federal prohibition on child pornography to include "'any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture,' that 'is, or appears to be, of a minor engaging in sexually explicit conduct.'" *Id.* at 241. 18 U.S.C. § 2256(8)(D) expanded the prohibition to include any sexually explicit image that is "'advertised, promoted, presented, described, or distributed in such a manner that conveys the impression' it depicts 'a minor engaging in sexually explicit conduct.'" *Id.* at 242.

¹¹⁸ *Humbach*, *supra* note 110, at 460. See also *Free Speech Coalition*, 535 U.S. at 256. *Free Speech Coalition* includes as "virtual child pornography" images that appear to depict minors but were produced by means other than using real children, such as through the use of youthful-looking adults or computer-imaging technology." *Id.* at 241.

¹¹⁹ *Free Speech Coalition*, 535 U.S. at 250.

¹²⁰ See *Humbach*, *supra* note 110, at 484-85.

how [the child pornography] was made, not on what it communicated.”¹²¹

The limitations expressed in *Ferber*,¹²² coupled with the recent holding in *Free Speech Coalition*,¹²³ open the door to the possibility that sexting may be within the constitutional protection of First Amendment.¹²⁴ The Court seems to be concerned with the harm and exploitation of children involved in the production of child pornography.¹²⁵ The argument then follows that sexting may be outside the categorical exclusion of child pornography, because children are neither harmed nor exploited during the process.¹²⁶ Although the Supreme Court has yet to decide on this issue, in 2008 the ACLU brought the issue before a federal judge for the first time.¹²⁷

In October 2008, school officials confiscated several students’ cell phones and “discovered [two] photographs of [three] ‘scantily clad, semi-nude and nude teenage girls.’”¹²⁸ One of the photographs showed the plaintiffs, Marissa Miller and Grace Kelly, wearing white bras, while the other photograph showed plaintiff, Nancy Doe, wearing a towel “wrapped around her body, just below her breasts.”¹²⁹ The District Attorney asserted that the three girls depicted in the pictures “were accomplices to the production of child pornography because they allowed themselves to be photographed.”¹³⁰ The District Attorney then threatened to prosecute the girls under Pennsylvania’s child pornography statute, unless they participated in an educational program and agreed to write an essay explaining why what they did was wrong.¹³¹ The girls rejected the District Attorney’s offer, insisting they have done nothing wrong.¹³²

In March of 2009, the ACLU, on behalf of the girls and their parents, filed a lawsuit in federal court against the District Attorney, alleging prosecution against the three girls constitutes a violation of the First Amendment.¹³³ The plaintiffs then filed a motion for preliminary injunctive relief in order to bar the

¹²¹ *Free Speech Coalition*, 535 U.S. at 250-51.

¹²² *See Ferber*, 458 U.S. at 764-65.

¹²³ *See Free Speech Coalition*, 535 U.S. at 256.

¹²⁴ *See Humbach*, *supra* note 110, at 484.

¹²⁵ *See id.* at 484.

¹²⁶ *See id.*

¹²⁷ *See Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009); *ACLU*, *supra* note 106.

¹²⁸ *Miller*, 605 F. Supp. 2d at 637.

¹²⁹ *See id.* at 639.

¹³⁰ *ACLU*, *supra* note 106.

¹³¹ *See Miller*, 605 F. Supp. 2d at 638.

¹³² *See id.*

¹³³ *See id.* at 640.

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District Attorney from charging the three girls.¹³⁴ Their motion was granted, and the District Attorney appealed.¹³⁵ The appellate court upheld the district court's ruling, stating that the plaintiffs "have shown a likelihood of success on the merits of their constitutional retaliation claims, and therefore they are entitled to preliminary injunctive relief."¹³⁶ While the appellate court did not make a decision as to the constitutional aspects of the case, ACLU of Pennsylvania Legal Director Vic Walczak thinks the decision is an "important message for prosecutors. . .that there are constitutional limits on their ability to bring criminal charges against kids involved in sexting."¹³⁷

If the ACLU is successful on their constitutional claims in the lower court, sexting may be deemed a protected form of speech. Such a ruling would essentially decriminalize the act of sexting amongst teenagers.¹³⁸ It is therefore important for state legislative officials to consider this possibility when determining how to deal with the problem of sexting.

VII. PROPOSAL

Teenage sexting is not merely a fad that will simply go away on its own.¹³⁹ This section will propose that the most appropriate response is to amend existing state and federal statutes to include an exception for sexting and to create new laws making sexting between minors a misdemeanor. In addition to statutory change, schools and parents must also get involved to educate teenagers about the risks and potentially devastating consequences associated with sexting.¹⁴⁰

A. *Legislative Response*

There is no question that an adult trafficking photos depicting images of minors nude and engaged in sexual activity deserves the punishment imposed by child pornography laws.¹⁴¹ However, there is a question as to whether

¹³⁴ See *Miller v. Mitchell*, 598 F.3d 139, 142-43 (3d Cir. Mar. 17, 2010).

¹³⁵ See *id.*

¹³⁶ *Id.* at 143.

¹³⁷ See Michael Rubinkam, *Court: Pa. DA Can't Bring 'Sexting' Charges*, ABC NEWS (Mar. 17, 2010), available at <http://abcnews.go.com/Technology/wirestory?id=10127262&page=2>. Determination of the constitutional issues was remanded to the lower court. See *id.*

¹³⁸ See Humbach, *supra* note 110.

¹³⁹ See Calvert, *supra* note 43, at 60.

¹⁴⁰ Other commentators have similarly suggested that legislative action and educational intervention are appropriate responses to addressing the problem of sexting. See Elizabeth C. Eraker, *Stemming Sexting: Sensible Legal Approaches To Teenagers' Exchange of Self-Produced Pornography*, 25 BERKELEY TECH. L.J. 555, 589-93 (2010).

¹⁴¹ See Hilden, *supra* note 43.

teenagers engaged in sexting deserve the same punishment. The primary goal of the child pornography statutes when written “was to protect children from adults who, by using the internet and other forms of technology, create a demand for child pornography by downloading, storing, and sharing illegal media, exploit children by posing as youths themselves and planning ‘sexual rendezvous’, and manufacture child pornography for distribution to other pedophiles.”¹⁴² Prosecuting teenagers engaged in sexting clearly runs counter to this purpose. Furthermore, the punishments mandated under the child pornography statutes are immensely disproportionate to the crime of sexting. State and federal legislatures should take two forms of action to better address the issue of sexting: (1) alter existing child pornography laws to create an exception exempting minors engaged in sexting from prosecution under the statute and (2) draft new laws making the act of sexting amongst minors a misdemeanor offense.

1. Exception for Teenage Sexting Under Existing Child Pornography Statutes

Legislatures should alter the current statutes to create exceptions for minors engaged in sexting, exempting them from prosecution under state and federal child pornography laws. The exception would state that the child pornography statute does not apply to minors between the ages of thirteen and eighteen engaged in sexting. It is important that the exception contain an age limit, as opposed to exempting all minors whom possess nude or sexually explicit pictures of other minors, because of the risk of potential harm and exploitation to a child. For example, if a seventeen-year-old teen possess an obscene picture of a five-year-old child, there is much more concern over the risk of harm and exploitation than when the seventeen-year-old possess a picture of another seventeen-year-old. Therefore, it is necessary to include an age limitation, in order to address these public policy concerns, as well as preserve the original intent of the child pornography statutes. Ultimately, this exception will prevent the unjust prosecution and punishment of teenagers, while still maintaining the overarching purpose of state and federal child pornography statutes.

The exception should also include a provision similar to “Romeo and Juliet” statutes. These statutes have been adopted in several states for the purpose of mitigating the charge in cases of statutory rape, where the parties involved are close in age.¹⁴³ “Typically, Romeo and Juliet statutes result in shorter terms of

¹⁴² ABA CRIMINAL JUSTICE SECTION, *supra* note 54 (citing, 144 Cong. Rec. H68 (daily ed. June 3, 1998) (statement of Rep. Lampson)).

¹⁴³ Hilden, *supra* note 43. “Recognizing that teenage sexual experimentation should not be punished as severely as other statutory rape, [states have] instituted a so-called “Romeo and Juliet” law, which serves as a mitigating statute when both actors are close in age. To

incarceration and less post-release supervision than when a teen is charged with the more severe sex crimes.”¹⁴⁴ For example, under the exception, a lesser misdemeanor charge, as opposed to the felony charge under the child pornography statute, could be applied in situations where a sixteen-year-old teenager sexts a nude or sexually explicit picture to her nineteen-year-old boyfriend.¹⁴⁵ The exception would require proof that the sexting was consensual between both parties, the offender is no more than nineteen-years-old, and the two parties are no more than four years apart in age. This exception strikes the necessary balance by recognizing that despite the fact that the conduct is reprehensible and the offender is seen as an adult in the eyes of the law, a severe prison sentence and a sex offender label is grossly disproportionate to the crime.

The exceptions to current child pornography laws should also be clear in articulating that they do not apply to adult offenders. For example, the sexting laws should specifically exclude adult offenders who either (1) send nude or sexual explicit pictures of themselves to minors, or (2) receive, possess, and or disseminate nude or sexual explicit pictures of minors. In addition, the exception should require that adult offenders be charged and prosecuted under the state’s existing child pornography statutes, even if the picture in their possession was the result of a teenager’s voluntary participation in sexting. These changes will adequately close any potential loopholes pedophiles may use to avoid prosecution under the child pornography statutes.

2. Creation of New Laws Making Sexting Between Minors a Misdemeanor Offense

Although teenagers should not be charged under the existing child pornography statutes for sexting, it does not mean that states should completely decriminalize the behavior. In addition to creating an exception to the current child pornography statutes, legislatures should draft new laws that more appropriately address and punish the crime of sexting. Specifically, state and federal legislatures should create new laws making sexting between minors a misdemeanor offense.

The laws should be tailored to address the different types of sexting scenarios and mandate punishment accordingly based on the prosecutor’s

trigger the Romeo and Juliet law, the offender must be less than nineteen years of age, the offender must be less than four years older than the child” Shulamit H. Shvartsman, “*Romeo and Romeo*”: An Examination of *Limon v. Kansas* in Light of *Lawrence v. Texas*, 35 SETON HALL L. REV. 359, 361-62 (2004).

¹⁴⁴ Bruce Gross, *Romeo & Juliet Laws: When the Punishment Does Not Fit the Crime*, AMERICAN PSYCHOTHERAPY ASSOCIATION (2007), available at http://findarticles.com/p/articles/mi_hb013/is_2_10/ai_n29358869/?tag=content;coll.

¹⁴⁵ Hilden, *supra* note 43.

discretion. Specifically, under the new sexting law, prosecutors would have discretion to punish consensual sexting less harshly than in situations where the sexting is involuntary. For example, scenario A involves a sixteen-year-old girl who voluntarily sends a nude picture of herself to a seventeen-year-old boy. Scenario B involves the same facts as scenario A, however in this case after receiving the picture, the boy then forwards the picture of the girl to other people without the girl's consent. Under the new sexting laws, the prosecutor would have discretion to punish the boy in scenario B more harshly than the boy and girl in scenario A.¹⁴⁶

Discretion as to punishment should be based on factors similar to the criteria considered in Ohio's diversion program.¹⁴⁷ Prosecutors may consider whether the offender has been convicted for sexting in the past, and other mitigating or aggravating circumstances, such as the content of the image and whether any coercion was involved.¹⁴⁸

Allowing discretion is preferable to simply formulating a bright-line rule, because an offender's culpability depends greatly on the circumstances surrounding the case. Permitting prosecutorial discretion prevents teenagers from being excessively punished for engaging in what they may consider flirting, while simultaneously enabling prosecutors to adopt a heavy-handed approach when circumstances warrant harsher punishment.

Although the primary motivating factor behind drafting new sexting laws is to make the punishment better fit the crime, sanctions must also deter teenagers from engaging in this behavior. Forms of punishment for first-time offenders could include required educational courses on the dangers of sexting, community service, suspended sentences that become active if the offender violates the sexting law again, and/or fines. However, since sexting has become so popular among teens, mandated educational courses and community service alone likely are not going to provide a sufficient deterrent effect. Therefore, punishment for violating the statute must also include the possibility of being sentenced to a juvenile detention facility or, depending on the circumstances, a prison sentence. However, the punishment should explicitly exclude mandatory sex offender registration. While deterrence is important, sex offender registration would be a disproportionate response to

¹⁴⁶ For example, as punishment, the boy and girl in scenario A may be required to take a class addressing the dangers of sexting and have a suspended community service sentence if caught violating the sexting law again. The boy in scenario B that forwarded along the picture is more culpable and may be required to participate in community service, attend a sexting education class, and pay a fine as punishment for violation of the sexting law.

¹⁴⁷ *Diversion Program*, *supra* note 89 ("If it is determined the juvenile does not meet the criteria to be considered for the diversion program, or the juvenile refuses to participate and cooperate, then charges will be filed with the Juvenile Court.").

¹⁴⁸ *See Heck*, *supra* note 21, at 29.

the crimes, and is contrary to the purpose of mandatory registration.¹⁴⁹ It is important that the law takes a stand against sexting, not only for public policy reasons, but also because of the long-term harmful consequences it can have on the lives of these teenagers. In order to adequately deter teenagers from sexting, it is imperative that the law allows prosecutors to impose sentences that include some form of incarceration.

B. Educational Intervention

Although legislative change is necessary to resolve the problem of sexting, it is not enough. In order to adequately address and resolve the issue of sexting, schools must begin incorporating sexting education into their curricula.¹⁵⁰ Courses would educate students on the dangers of sexting, including the potential social and legal ramifications of the behavior. Curricula should also include information about what to do when receiving an unsolicited sext and how to avoid pressures to sext. The lessons should be tailored for the students based on their age, and students should begin taking sexting courses in middle school and continue in the curriculum through high school.¹⁵¹ School districts should also work to educate parents about sexting, and provide them with information on how to address the issue of sexting with their children.¹⁵²

It is also important to remember that sexting is not necessarily a victimless crime. As illustrated by the tragic suicide of Jessica Logan, the social ramifications of sexting can be devastating, and in some instances, fatal.¹⁵³ In order to help prevent the same type of tragedy from happening again in the future, schools districts should provide counseling in circumstances where the sexually explicit photo of the student is leaked and disclosed to unintended recipients. The counseling would be specifically designed to assist the student in dealing with the emotional trauma associated with the subsequent

¹⁴⁹ According to the Guidelines for National Sex Offender Registration and Notification, the purposes of sex offender registration is to track sex offenders following their release and to notify the community of sex offenders living in their area so they can take precautionary measures. See The National Guidelines for Sex Offender Registration and Notification, Guidelines U.S. Department of Justice, http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf (last visited Jan. 5, 2011). Requiring teenagers engaged in sexting to register as sex offenders does not advance these purposes, because these teenagers do not pose the same threat to the community as individuals convicted of violent sex offenses.

¹⁵⁰ See Calvert, *supra* note 43, at 33-35.

¹⁵¹ See Kathleen McGrory, *Sext Education: Miami-Dade School District Wants to Lead Nation in Stopping Teenage 'Sexting,'* THE PALM BEACH POST, July 10, 2009, available at <http://www.palmbeachpost.com/state/content/state/epaper/2009/07/10/0710sexting.html>.

¹⁵² See *id.*

¹⁵³ See *supra* Part VI.A.; Keys, *supra* note 14.

distribution of his or her picture.

“Advocates . . . claim that greater education about the web will teach children and teenagers about the ‘dangers of predators, cyber bullies and sexting’ and will make them think twice about sending out risqué photos of themselves or others.”¹⁵⁴ Although school and parental involvement will certainly not stop all teenagers from sexting, the educational programs may assist in reducing the behavior’s prevalence among teens.

VIII. CONCLUSION

“In the 1950’s, a broad swath of the United States was convinced that crime and horror comic books were turning the nation’s children into murdering, raping monsters.”¹⁵⁵ Considering that today’s media is rampant with sex, violence, and profanity, it seems almost laughable that horror comics could have resulted in such public outrage and moral panic.¹⁵⁶ Thus far, our reaction to teenage sexting has been the equivalent of the 1950’s reaction to horror comics: overblown moral panic.

The prosecution of teenagers represents a clear example of what can happen when laws built on past cultural values are forced to address unanticipated social phenomena.¹⁵⁷ As technology becomes increasingly intertwined in our everyday lives, future advancements will inevitably create an assortment of complex of legal issues. We can only hope the next time technology outstrips the law, prosecutors and law enforcement officials will take steps to avoid replicating the same miscarriage of justice that has been exemplified by recent sexting cases.

¹⁵⁴ Anne Oblinger, *Congress to Push for Education on ‘Sexting,’* CNN (May 13th, 2009, 04:05 PM ET), <http://politicalticker.blogs.cnn.com/2009/05/13/congress-to-push-for-education-on-sexting/?fbid=PhHeKmusAVI>.

¹⁵⁵ Jesse Singal, *Panic Over Teen ‘Sexting’ Eclipses Bigger Threat*, THE BOSTON GLOBE, Jan. 8, 2010, available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/01/08/panic_over_teen_sexting_eclipses_bigger_threat/.

¹⁵⁶ *See id.*

¹⁵⁷ *See* Humbach, *supra* note 110, at 484.