

## STEMMING SEXTING: SENSIBLE LEGAL APPROACHES TO TEENAGERS' EXCHANGE OF SELF-PRODUCED PORNOGRAPHY

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Judging from the recent activities of local prosecutors, one might think that a crime wave of child pornography offenses perpetuated by middle- and high-schoolers is flooding the nation.<sup>1</sup> In actuality, the flurry of media coverage has shed light on a phenomenon popularly known as sexting: the digital exchange of sexually explicit images between teenagers using text messaging services on camera-equipped cell phones.<sup>2</sup> Local prosecutors across the country are responding to the increase in sexting incidents by charging the teenage participants with child pornography felonies, which may require them to register as sex offenders.<sup>3</sup> Recent polling data suggests that sexting is pervasive among today's teenagers.<sup>4</sup> Further evidence of the

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1. *E.g.*, Jesse Singal, *Panic Over Teen 'Sexting' Eclipses Bigger Threat*, BOSTON GLOBE, Jan. 8, 2010, at A15; *Naked Photos, E-Mail Get Teens in Trouble*, ASSOCIATED PRESS, June 5, 2008, <http://www.foxnews.com/story/0,2933,363438,00.html>.

2. This Note uses the term "sexting" to describe the exchange of suggestive text messages between juveniles, although there is some popular usage of "sext" and "sexting" to describe exchanges between adults. *E.g.*, Mike Taibbi, *Seniors Spice Things Up With 'Sexting'*, NBC NEWS CHANNEL, Nov. 27, 2009, <http://www.woai.com/news/local/story/Seniors-spice-things-up-with-sexting/S5qx8-cv1Uq6nYMxXgiKmQ.csp> (describing a trend among older adults of exchanging sexually suggestive text messages).

3. In a recent Ohio case, for example, a fifteen-year-old foster girl plead guilty to charges of production of child pornography after she was found to have taken nude photos of herself with a cell phone camera and distributed them to classmates. Russ Zimmer, *Hottinger: Law Didn't Anticipate Cell Phone Photo Case*, ADVOCATE (NEWARK, OH), Oct. 8, 2008, at A1. For a detailed explanation of a sexting investigation and the felony penalties pursued by some prosecutors, see generally 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 (2009).

4. Depending on the study, somewhere between 4% and 20% of teenagers report that they have sent sexually suggestive text messages to another teen. According to a 2008 report by The National Campaign to Prevent Teen and Unplanned Pregnancy (NCPTUP), 20% of teenagers ages 13–19 have "electronically sent, or posted online, nude or semi-nude pictures or video of themselves." NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, *SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1* (2008), [http://www.thenationalcampaign.org/sextech/PDF/SexTech\\_Summary.pdf](http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf); *see infra* Part I (discussing some of the limitations in the methodology underlying this poll). A narrower 2009 survey by the Pew Internet & American Life Project focused exclusively on cell phone transmission of images, finding that 4% of teenagers ages 12–17 who own cell

widespread nature of this phenomenon: search engine queries of “sexting” are at an all-time high,<sup>5</sup> and the New Oxford American Dictionary considered “sexting” among its nominees for new words of the year.<sup>6</sup>

A stark disagreement over the appropriate societal response underlies the popularity of sexting, which has outpaced both the law and technological limitations of prior generations. In at least ten states, authorities have publicly contemplated, and in some instances followed through with, charging the teenage participants with child pornography production, possession, and distribution.<sup>7</sup> In the first appellate decision to explicitly address “sexting among teenagers” in September 2009, the Iowa Supreme Court affirmed that there was sufficient evidence to convict an eighteen-year-old boy of knowingly disseminating obscene material to a minor.<sup>8</sup> The boy e-mailed a sexually explicit photo to a fourteen-year-old friend, accompanied by the message of “I love you.”<sup>9</sup> While youth educators and child psychologists have pushed for a more moderated response to behavior described as “high-tech flirting”<sup>10</sup>—teenage acts fueled by hormones and a lack of judgment—some experts in the Internet safety community support the hard-line approach to teenage sexting adopted by law enforcement authorities and the judicial system.<sup>11</sup>

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phones “report sending a sexually suggestive nude or nearly-nude photo or video of themselves to someone else.” AMANDA LENHART, PEW INTERNET & AMERICAN LIFE PROJECT, TEENS AND SEXTING: HOW AND WHY MINOR TEENS ARE SENDING SEXUALLY SUGGESTIVE NUDE OR NEARLY NUDE IMAGES VIA TEXT MESSAGING 4 (2009), [http://www.pewinternet.org/~media/Files/Reports/2009/PIP\\_Teens\\_and\\_Sexting.pdf](http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf).

5. See Google Trends: Sexting, <http://www.google.com/trends?q=sexting> (last visited Dec. 23, 2009).

6. *Facebook, Twitter Add New Words to Dictionary*, BOSTON GLOBE, Nov. 16, 2009, [http://www.boston.com/business/ticker/2009/11/facebook\\_tweete.html](http://www.boston.com/business/ticker/2009/11/facebook_tweete.html).

7. These states include New Jersey, New York, Alabama, Pennsylvania, Texas, Connecticut, Ohio, Utah, and Florida. See Jesse M. Nix, *Unwholesome Activities in a Wholesome Place: Utah Teens Creating Pornography and the Establishment of Prosecutorial Guidelines*, 11 J.L. & FAM. STUD. 183, 184, 188 (2008); Kim Zetter, *ACLU Sues Prosecutor Over ‘Sexting’ Child Porn Charges*, WIRED.COM, Mar. 25, 2009, <http://blog.wired.com/27bstroke6/2009/03/aclu-sues-da-ov.html>.

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

9. *Id.*

10. Jennifer Golson, *A Debate Swirls Over Teens’ Lurid Pictures: Should Self-Portraits Draw Harsh Penalties?*, NEW JERSEY STAR LEDGER, Mar. 29, 2009, at 1.

11. See, e.g., *id.* (noting that the National Center for Missing and Exploited Children (NCMEC), the non-profit/quasi-government organization that serves as the clearinghouse for reports of child sexual abuse on the Internet, has publicly stated that criminal charges are warranted in some sexting cases).

Although sexting has been described as the modern equivalent of “streaking,”<sup>12</sup> new technologies dramatically enhance the consequences of this behavior. Camera-equipped phones allow permanent recording of images and instant dissemination to large numbers of recipients, transforming fleeting youthful indiscretions into lasting mistakes. Courts have upheld juvenile child pornography convictions for the production and distribution of self-produced pornography in cases of sexting-like activity,<sup>13</sup> including requirements for sex offender registration.<sup>14</sup> The possibility that digital images privately shared between teens will be disseminated to a broader online audience may profoundly affect the participants, causing humiliation at school, pressure at home, and the loss of employment or college prospects. In rarer instances, sexting can be used as a tool to intimidate and harass, and has led to teen suicide in two reported cases in 2009.<sup>15</sup>

The term sexting often describes a broad range of behaviors that differ radically in terms of the actors, motivations, and tactics involved. In this Note, the term “sexting” refers to the self-production and distribution by cell phone of sexually explicit images in the course of consensual, voluntary activity by teenagers. This definition describes a phenomenon differing from the use of texting by sexual predators to exploit youth, a set of issues that is not addressed here,<sup>16</sup> and the use of sexting to cyberbully.<sup>17</sup> This Note

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12. Mary E. Muscari, *Sexting: New Technology, Old Problem*, MEDSCAPE TODAY, May 1, 2009, <http://www.medscape.com/viewarticle/702078>.

13. This includes the use of e-mail to exchange sexually explicit, self-produced photographs or teens’ recording of their own consensual sexual activity using video cameras. Such activities, although not sexting under the strict definition focused on the use of text messaging services on cell phones, still fall under the umbrella of “sexting-like activities.” See *infra* Part II.

14. See *infra* Section II.A.

15. See Libby Quaid, *‘Sexting’ is More Common Than You Might Think*, SEATTLE TIMES, Dec. 4, 2009, [http://seattletimes.nwsourc.com/html/nationworld/2010411092\\_apus sextingpoll.html](http://seattletimes.nwsourc.com/html/nationworld/2010411092_apus sextingpoll.html) (describing the death of Hope Witsell, a thirteen-year-old in Florida who hung herself after being taunted by classmates after a photo she sexted to a boy she liked was forwarded to other students, and the death of eighteen-year-old Jesse Logan in Ohio who hung herself after weeks of ridicule after a sext she sent to her boyfriend at the time was forwarded to other girls).

16. See, e.g., *U.S. v. Hofus*, No. 09-10076, 2010 WL 986799 (9th Cir. Mar. 19, 2010) (affirming the conviction of an adult male attempting to entice two teenage girls using sex messages); *‘Sexting’ Case Goes to Trial*, SARASOTA HERALD-TRIBUNE, Sept. 5, 2009, at B3 (reporting that in a recent sexting incident clearly constituting child sexual exploitation, a Florida high school teacher used his cell phone to seduce a child after he allegedly coaxed the high school student to send naked photographs to him and exchanged sexual text messages with the teen). Several states, including Colorado and Oregon, have recently passed bills to close loopholes in existing criminal laws to punish sexual predators using text messages services to lure children. See National Conference of State Legislatures, 2009

focuses primarily on the typical sexting case involving the limited exchange of provocative messages concerning consensual sexual activity between willing participants.

The prevalence of sexting and the severity of its consequences have prompted state and federal policymakers to consider various legislative proposals, from crafting new criminal offenses to introducing educational programs.<sup>18</sup> In exploring appropriate legal responses to sexting, this Note attempts to strike a balance between competing policy objectives, such as teenage privacy and the state's interest in preventing child sexual abuse and child pornography, while respecting the extent to which the digital revolution changed how teenagers communicate and interact in social spaces. While society may want to minimize teenagers' production and distribution of provocative images even under consensual and private circumstances, sexting should be exempt from treatment under child pornography statutes. In Part I, this Note explores the sexting phenomenon and its underlying causes in the context of a digital generation of teenagers. Part II surveys the varied responses of authorities to sexting incidents, including prosecutors and state legislators. Part III discusses the range of policy issues implicated in designing an appropriate legal framework to address sexting. Part IV concludes by suggesting several legislative components that could help authorities discipline the harms of sexting without resorting to ill-suited child pornography statutes.

## I. DEFINING THE SEXTING PHENOMENON

Recent polls suggest that the practice of sexting is well-engrained in teen culture, although there is a range in survey data concerning the extent of the practice. According to a 2008 report by The National Campaign to Prevent Teen and Unplanned Pregnancy (NCPTUP), 22% of teen girls and 18% of teen boys have used technology to send or post nude or semi-nude pictures or video of themselves to other people, with two-thirds of the recipients being a boyfriend or girlfriend.<sup>19</sup> Beyond the finding that one-in-five teens send "sexts," the NCPTUP's research suggests that an even greater number of teens receive such images and may forward them on to others, making them liable for possession and distribution charges under child pornography

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Legislation Related to "Sexting", <http://www.ncsl.org/default.aspx?tabid=17756> (lasted visited Feb. 22, 2010).

17. See *infra* Section I.B.

18. See *infra* Section II.B.

19. NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, *supra* note 4, at 1.

laws.<sup>20</sup> According to the NCPTUP survey, 31% of teenagers between the ages of thirteen and nineteen report receiving a nude or semi-nude image or video featuring the sender, and 29% of the same group report having had a nude or semi-nude image or video shared with them that was intended to be private.<sup>21</sup> Individuals in relationships exchanged more than half of these photos.<sup>22</sup> Furthermore, 14% of teens acknowledge that they have shared a nude or semi-nude picture or video with someone other than the intended recipient.<sup>23</sup> A 2009 survey conducted by Cox Communications reports similar findings, including the fact that 19% of teens surveyed have engaged in sexting, “sending, receiving, or forwarding sexually suggestive nude or nearly nude photos through text message or email.”<sup>24</sup> Most recently, polling by the Pew Internet & American Life Project produced lower figures, finding that 4% of teenagers ages 12-17 with cell phones report texting nude or nearly nude images of themselves and 15% of that group has “received a sexually suggestive nude or nearly nude photo or video of someone they know on their cell phone.”<sup>25</sup>

While these figures undoubtedly reflect a significant trend, either extreme of the polling data deserves some skepticism. For starters, the NCPTUP poll relied exclusively on an online survey to query youth about their online experiences. Results of online surveys may not be representative when there is a correlation between the subject matter and respondents’ comfort in sharing personal information—teenagers who sext may also be the most likely to reveal such behavior in an online poll.<sup>26</sup> In the opinion of one academic who conducted well-known studies of online teen behavior over the phone, “online poll-takers might be two to four times more likely to send nude photos of themselves than the average teen.”<sup>27</sup> At the same time, the lower numbers found in the Pew Internet & American Life poll for sending

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20. John A. Humbach, “*Sexting*” and the First Amendment 3–4 (Pace Law Faculty Publ’ns, Paper No. 596, 2009), available at <http://digitalcommons.pace.edu/lawfaculty/596/>.

21. NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, *supra* note 4, at 11.

22. *Id.* at 13; Mathias H. Heck, *Sexting and Charging Juveniles—Balancing the Law and Bad Choices*, 43 PROSECUTOR 28, 28 (2009).

23. NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, *supra* note 4, at 11.

24. Press Release, Cox Commc’ns, Cox’s New Survey on Cyber-Safety Finds Many Teens Going Online Wirelessly Without Limits or Controls (May 14, 2009), [http://www.harrisinteractive.com/NEWS/newsletters/clientnews/CoxCommunications\\_NationalCenterMissing&ExploitedChildren\\_Cyber-Safety\\_May2009.pdf](http://www.harrisinteractive.com/NEWS/newsletters/clientnews/CoxCommunications_NationalCenterMissing&ExploitedChildren_Cyber-Safety_May2009.pdf).

25. LENHART, *supra* note 4, at 4–5.

26. Carl Bialik, *Which Is Epidemic – Sexting or Worrying About It?*, WALL ST. J., Apr. 8, 2009, at A9.

27. *Id.* (quoting David Finkelhor at the University of New Hampshire’s Crimes Against Children Research Center).

and receiving explicit text messages may underreport the actual incidence of sexting given that the topic is loaded with “a relatively high level of social disapproval” and thus subjects may not admit to the behavior.<sup>28</sup> Yet even if some fraction of reported teens are engaging in sending or receiving sexually explicit texts, the data is significant enough to warrant discussion

The prevalence of sexting among today’s teenagers reflects the intersection of two trends influencing teenage behavior: the omnipresence of digital technologies and the enhanced sharing and personal expression facilitated by these technologies. In contrast to their parents and grandparents, the current generation of youth is “born digital,” meaning that most major aspects of their lives are mediated by digital technologies, from social interactions to academics to hobbies and entertainment.<sup>29</sup> These individuals never knew an offline world—they “do not stay in touch with pens and scented paper,” but with an endless array of technological gadgets.<sup>30</sup> For adults who view Internet-based socializing as a supplement to life in real spaces, the notion of teens moving seamlessly between face-to-face and computer-mediated social interactions is novel.<sup>31</sup> The concept of using text messaging services to send highly personal photos may sound bizarre to adults, but it is much less so to teens who rely on cell phones as a critical tool to maintain their social connections. According to recent research by the Pew Internet & American Life project, 71% of teens owned cell phones in 2008, an increase from 45% in 2004.<sup>32</sup> Among teen cell phone users, 76% used their phones to send text messages.<sup>33</sup> Another study by the mobile phone industry suggest that 54% of teenage girls and 40% of teenage boys think that their social life would “end” or significantly worsen if texting were no longer available on cell phones.<sup>34</sup> And cell phones are not the only distribution channel by which teens exchange sexts; similar message can also be sent through desktop and laptop computers, usually through e-mail

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28. Lenhart notes that the number of teens in the focus groups who were able to talk about sexting experiences suggests that this effect may have been present in the Pew poll. *See* LENHART, *supra* note 4, at 4 n.10.

29. JOHN PALFREY & URS GLASSER, BORN DIGITAL 2–7 (2008).

30. Humbach, *supra* note 20, at 3.

31. SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 25 (2009) (noting that “[f]or many youth, there really is no clear distinction between life as lived in real space and in cyberspace; one social sphere is now a natural and complementing extension of the other”).

32. AMANDA LENHART, PEW INTERNET & AMERICAN LIFE PROJECT, TEENS AND MOBILE PHONES OVER THE PAST FIVE YEARS: PEW INTERNET LOOKS BACK 3 (2009), <http://www.pewinternet.org/~media/Files/Reports/2009/PIP%20Teens%20and%20Mobile%20Phones%20Data%20Memo.pdf>.

33. *Id.* at 8.

34. HARRIS INTERACTIVE, A GENERATION UNPLUGGED RESEARCH REPORT (2008), [http://files.ctia.org/pdf/HI\\_TeenMobileStudy\\_ResearchReport.pdf](http://files.ctia.org/pdf/HI_TeenMobileStudy_ResearchReport.pdf).

services or social networks.<sup>35</sup> For example, earlier this year, a fourteen-year-old New Jersey girl was charged with distribution of child pornography after posting nearly thirty nude portraits of herself on the social networking site MySpace.<sup>36</sup>

A. TYPICAL SEXTING INCIDENTS

Much remains to be learned about the motivations underlying teenage sexting. Many of the news accounts, however, report behavior reflecting typical expressions of teenage emotions, such as the instance where photos are taken to impress a member of the opposite sex or to record private encounters between teens in a relationship.<sup>37</sup> Although social norms affecting adult behavior may warn against sharing revealing images over cell phones or uploading them to public profiles on social networking sites, teens' online behaviors reflect a different set of norms developed in their online communities. Sometimes these social norms, influenced by an entertainment industry glamorizing outrageous online personalities and the public disclosure of titillating personal information, support brash behavior such as sexting.<sup>38</sup> Among peer-conscious teenagers, an "everybody does it" rationalization can further perpetuate inappropriate activities.<sup>39</sup> According to the NCPTUP poll, of those who have sent suggestive content online, 66% of girls and 60% of boys said that they did it to be "fun or flirtatious."<sup>40</sup> Research about youth cognitive development supports the notion that teenage brains are generally not sufficiently matured to enable consistently good decision-making.<sup>41</sup>

The possibility that an innocent effort to impress friends could have serious consequences does not enter most sexting teenagers' minds. In a spring 2009 Good Morning America "town hall" on sexting, one Texan

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35. LENHART, *supra* note 4, at 12.

36. Golson, *supra* note 10 (noting that the photos were allegedly for the girl's boyfriend to see).

37. See, e.g., *Naked Photos, E-Mail Get Teens in Trouble*, *supra* note 1; see also Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 524 (2008) (discussing how the bulk of teenage self-produced pornography is created by minors in connection with their own consensual sexual activities).

38. NANCY E. WILLARD, CYBER-SAFE KIDS, CYBER-SAVVY TEENS: HELPING YOUNG PEOPLE LEARN TO USE THE INTERNET SAFELY AND RESPONSIBLY 187 (2007) (discussing the influence of sexually provocative images of "hot stars" on teenagers).

39. *Id.* at 142.

40. NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, *supra* note 4, at 4.

41. Quaid, *supra* note 15. By the mid-teens, the brain's reward centers linked to emotional arousal are well-developed, making teens vulnerable to peer pressure. *Id.* However, the frontal cortex, which connects reasoning with emotion and enables people to weigh consequences, is not fully formed until the early twenties. *Id.*

teenager gave a common explanation of how she started sexting at her boyfriends' insistence: "He had kept asking me for [it]... [f]irst, I was kind of like, 'No.' Well then, the further along we got on in the relationship, you know, I thought I really cared about him, and I figured he cared about me, too."<sup>42</sup> The concern that sexted images can be easily distributed over peer-to-peer networks or otherwise fall into the hands of sexual predators,<sup>43</sup> a primary fear of those outraged about sexting, is not a risk most teens recognize.<sup>44</sup> Nor do most teens realize that their actions are illegal and could qualify them for a decades-long sex offender registration requirement.<sup>45</sup>

On the other hand, it is not clear that knowledge of the consequences of sexting would deter most teens. According to an Associated Press-MTV poll, about half of the teens surveyed identified sexting as a behavior carrying the risk of serious punishment, but did it anyway.<sup>46</sup> In the Ohio case described earlier, the fifteen-year-old who distributed nude images of herself via her cell phone did so after a county prosecutor visited her high school to warn students that they might serve twenty years in jail if they were found with or sent sexually explicit images of teenagers on their cell phones.<sup>47</sup> Among experts studying adolescence health, the phenomenon of "teens participating in high-risk behaviors, even though they know that they should not" is well-understood.<sup>48</sup> According to the NCPTUP poll, three-fourths of teens surveyed agreed that sexting can have serious negative consequences,

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42. Cole Kazdin & Imaeyen Ibanga, *The Truth About Teens Sexting: 'GMA' Holds a Town Hall Meeting to Discuss the Growing Teen Trend*, ABCNEWS.COM, Apr. 15, 2009, <http://abcnews.go.com/GMA/story?id=7337547&page=1>. According to the NCPTUP poll, of those teens sending sexually explicit material, 59% of girls said that they did it as a "sexy present" for their boyfriends. NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, *supra* note 4, at 4.

43. See, e.g., Mary G. Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 12-14 (2007) (discussing how juvenile self-produced pornography can fuel the child pornography industry, creating more demand and putting more children at risk of exploitation); see also Smith, *supra* note 37, at 544 (finding that "[m]inors who distribute pornographic images of themselves place may [sic] themselves at risk of being victimized by pedophiles").

44. Quaid, *supra* note 15.

45. Heck, *supra* note 22, at 28-29 (A prosecuting attorney in Montgomery County, Ohio reports that many of her fellow prosecutors are finding that the teenagers engaged in sexting "are completely unaware that what they are doing is illegal.").

46. Quaid, *supra* note 15.

47. *Girl Charged with Sending Nude Photos To Classmates*, WBNS 10TV, Oct. 7, 2008, [http://www.10tv.com/live/content/local/stories/2008/10/07/story\\_nude\\_photos.html?sid=102](http://www.10tv.com/live/content/local/stories/2008/10/07/story_nude_photos.html?sid=102) (noting that the principal of the school "felt there was a good understanding by our student body about the seriousness of the matter").

48. Muscari, *supra* note 12.



although they may not fully understand the particular long-term consequences of sexting.<sup>49</sup>

A final explanation for the sexting trend is the reality that nearly half of American high-schoolers report sexual activity.<sup>50</sup> More generally, as one commentator observes, today's teens, "for better or worse...do not regard sexuality as the monopoly of older generations but as a part of their lives."<sup>51</sup> Sexting could be viewed as merely an expression of teen sexuality in a digital age, reflecting a long-documented trend of teens "using whatever technology is at hand to express themselves and share their behavior with the world."<sup>52</sup>

However, in contrast to previous generations, where the flashing of a classmate might have had only momentary consequence, new technologies greatly enhance the likelihood that such indiscretions will be permanently recorded and disseminated to large audiences.<sup>53</sup> Historically, teenagers who took provocative self-portraits faced the hurdle of developing the film at a photo lab, and distribution was limited by the number of copies purchased. In contrast, today, camera phones and broadband connections enable instantaneous production and distribution, even if the original sender did not intend it.<sup>54</sup> In a recent Massachusetts incident, pictures of a naked fourteen-year-old were allegedly "sexted" to more than 100 cell phones.<sup>55</sup> While the impact of an embarrassing incident in the offline world is largely limited to physical witnesses, an image captured digitally and shared via cell and broadband networks can reach an endless number of people. Further, it is practically impossible to remove the offending object once it has been widely shared.<sup>56</sup>

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49. *Id.*

50. KAISER FAMILY FOUND., SEXUAL HEALTH OF ADOLESCENTS AND YOUNG ADULTS IN THE UNITED STATES (2008), [http://www.kff.org/womenshealth/upload/3040\\_04.pdf](http://www.kff.org/womenshealth/upload/3040_04.pdf).

51. Humbach, *supra* note 20, at 3.

52. Muscari, *supra* note 12.

53. The permanent recording enabled by technologies, and the introduction of child exploitation laws, also has dramatically enhanced the consequences of such activity. *See id.* (noting that although "streaking may have been just a nuisance in its heyday, but it could be deemed a sexual offense today, just as a photo of an underwear-clad teen may now be considered child pornography").

54. Kim Zetter, *Child Porn Laws Used Against Kids Who Photograph Themselves*, WIRED.COM, Jan. 15, 2009, <http://blog.wired.com/27bstroke6/2009/01/kids.html>.

55. Dahlia Lithwick, *Textual Misconduct: What to do About Teens and Their Dumb Naked Photos of Themselves*, SLATE.COM, Feb. 14, 2009, <http://www.slate.com/id/2211169/>. It is not clear how investigators determined the scope of the dissemination of the images involved in this case. *See id.*

56. NANCY E. WILLARD, CYBERBULLYING AND CYBERTHREATS: RESPONDING TO THE CHALLENGE OF ONLINE SOCIAL AGGRESSION, THREATS, AND DISTRESS 48 (2007).

## B. THE CONVERGENCE OF SEXTING AND CYBERBULLYING

The detrimental effects of sexting greatly compound when teenagers use sexting as a tool for online bullying—what is popularly referred to as “cyberbullying” or “sending or posting harmful material or engaging in other forms of social aggression using the Internet or other digital technologies.”<sup>57</sup> A significant difference exists between the exchange of explicit messages between two high-schoolers in a relationship—a sixteen-year-old girl sending a nude photo of herself to her boyfriend—and the use of sexting as a means of harassment—teen girls secretly taking and sending nude photos of a peer changing in a locker room.<sup>58</sup> Whereas in the first instance both individuals voluntarily agreed to the production and distribution, the latter case involves images taken without the consent or control of those involved, and forwarded to large numbers of outsiders with malicious intent. A recent policy statement by the National Center for Missing and Exploited Children (NCMEC) recognized the distinction between sexting and other forms of online harassment and exploitation, noting that “sexting is not the appropriate term to describe youth sending sexually explicit images of themselves to others as a result of blackmail, duress, coercion or enticement,” nor does it include “situations in which young people send sexually explicit images of themselves to adults.”<sup>59</sup> To differentiate voluntary sexting with limited distribution from instances of online harassment, this Note refers to the later as “sextbullying,” a subset of the cyberbullying phenomenon. Although most of the publicly reported cases of sexting involve consensual sharing between teens in a relationship, there are increasingly more examples of sext messages used as tools of coercion and harassment.

Public accounts of two teenagers who committed suicide as a result of sexting incidents tragically illustrate the harms that can result when the lines between sexting and cyberbullying blur.<sup>60</sup> The story of Jesse Logan placed the sexting issue squarely in the public spotlight in 2008.<sup>61</sup> Logan, a high school student from Cincinnati, committed suicide after nude photos she sent to her

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57. *Id.* at 1.

58. *See* Muscari, *supra* note 12 (contrasting the differences between sexting, cyberbullying, harassment, and sexual offenses).

59. National Center for Missing & Exploited Children, Policy Statement on Sexting (Sept. 21, 2009), [http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en\\_US&PageId=4130](http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130).

60. Quaid, *supra* note 15.

61. *See* Mike Celizic, *Her Teen Committed Suicide over Texting*, TODAY SHOW.COM, Mar. 6, 2009, <http://www.msnbc.msn.com/id/29546030/>.

boyfriend were forwarded to other teens and used to harass her.<sup>62</sup> More recently, a Florida thirteen-year-old, Hope Witsell, committed suicide after facing months of incessant bullying by her middle-school peers stemming from a topless photo of herself she sexted to a boy she liked.<sup>63</sup>

Several attributes of cyberbullying distinguish it from its counterpart in the physical world, and in some ways exacerbate the well-established harms of bullying.<sup>64</sup> Simply put, online communities enforce fewer behavioral restraints than the offline world. The anonymity and pseudonymity offered by digital technologies, the viral nature of computer-based communications, and the difficulties in supervising youth activity online, compound the impacts of sexting in sextbullying cases.<sup>65</sup> Besides not requiring the courage needed to confront someone in person, digital aggression is furthered by a disinhibition effect, whereby spatial distance insulates the aggressor from fully comprehending the harmful effect of his actions on the victim.<sup>66</sup> Also, technologies like text messaging or e-mail forwarding dramatically amplify the wildfire effect of spoken rumors; in instances of sextbullying, viral digital transmission means that victims are humiliated over and over again, with the

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62. After Jesse Logan and her boyfriend broke up, he forwarded the photos to other girls, who proceeded to tease Jesse about the photos. *Id.* She grew depressed and started skipping school. *Id.* Eventually, Jesse decided to go on a local Cincinnati television station to tell her story because she “just want[ed] to make sure no one else will have to go through this again.” *Id.* According to Jesse’s mother, Cynthia, the harassment was intense: “Things are thrown at her. Her reaction to all this was...anger, snapping. And I would ask her what was wrong and she wouldn’t... divulg[e] everything, just that she was having a hard time.” Kazdin & Ibanga, *supra* note 42. Two months after the interview, in July 2008, Logan hung herself in her bedroom at the age of eighteen. *Id.*

63. Michael Inbar, ‘Sexting’ Bullying Cited in Teen Girl’s Suicide: 13-year-old Hope Witsell Hanged Herself After Topless Photos Circulated, TODAY SHOW.COM, Dec. 2, 2009, [http://today.msnbc.msn.com/id/34236377/ns/today-today\\_people/](http://today.msnbc.msn.com/id/34236377/ns/today-today_people/). After Witsell sexted the boy she liked, a third party intercepted the photo while using the boy’s cell phone and forwarded the image to friends. *Id.* Before long, the image had spread, not only to many of Witsell’s peers, but also to students at the local high school and neighboring schools, who subjected her to incessant taunting and vulgar comments. *Id.* Friends of Witsell’s reported that people “literally surrounded Hope as she walked the hallways while other students shouted ‘whore’ and ‘slut’ at her.” *Id.*

64. The harms of bullying are well established by research in the education, sociology, psychology, and criminology disciplines. HINDUJA & PATCHIN, *supra* note 31, at 11. Youth who are bullied can become tense, anxious, and afraid, with negative effects on their concentration and school performance as well. In some cases, students avoid school all together. Continued bullying affects targets’ self-esteem and feelings of self-worth and increases their social isolation, leading them to become depressed, anxious, and insecure. *Id.* at 13–15.

65. See HINDUJA & PATCHIN, *supra* note 31, at 25 (discussing cyberbullying but raising issues applicable to sexting as well).

66. *Id.* at 22.

harassment not limited to the school day or campus.<sup>67</sup> The reliance of teens on their cell phones for social connectedness or for safety enhances the problem, as it makes them less likely to ever turn off their phones and escape the victimization. A lack of adult supervision also exacerbates cyberbullying harms. Because most teens are far more tech savvy than their caregivers, they may text freely without the concern that others will discover their bullying or victimization and restrict their access.<sup>68</sup>

To the extent that sexting is used as a tool for online harassment, it presents a far more challenging set of issues than the more orthodox aforementioned sexting behavior. While the primary focus of this Note concerns the common circumstance of teenagers voluntarily producing and exchanging sexually explicit images in a closed circle, it is important to recognize the spectrum of sexting behaviors and the corresponding range of appropriate solutions. Remedies for addressing more typical sexting incidents may not be sufficient in a sextbullying case. This theme is revisited in Part IV's discussion of a model framework for sexting legislation.

## II. LEGAL RESPONSES TO SEXTING

In response to the phenomenon described in Part I, state authorities have taken a range of actions to limit sexting that reflect varying degrees of punitive intent. This Part analyzes the actions of local prosecutors, the courts, and legislators in addressing sexting and similar behaviors involving teenagers' exchange of self-produced pornography.

### A. PROSECUTORIAL DISCRETION AND COURTS' RESPONSES TO SEXTING

Across the country, the discretion of local prosecutors drives a range of different outcomes in sexting cases. Responses range from police officers confiscating cell phones and offering education about the criminal consequences for involved students to more serious felony charges against the primary actors.<sup>69</sup> In the New Jersey case, *supra* Part I, the fourteen-year-old girl charged with the distribution of child pornography for posting nude photos for her boyfriend on MySpace will face a prison sentence of up to seventeen years and the possibility of sex offender registration under the state's equivalent of Megan's Law,<sup>70</sup> if convicted.<sup>71</sup> Although the local

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67. *Id.* at 23.

68. See WILLARD, *supra* note 38, at 3–5 (discussing how “[c]hildren can quickly leave their parents behind in embracing emerging online technologies and activities”).

69. See, e.g., Jo Mathis & Art Aisner, *Teen's Photo Considered Child Porn*, ANN ARBOR NEWS, Oct. 10, 2008, at A1, available at <http://www.mlive.com/news/annarbornews/index.ssf?/base/news-29/1224168016236750.xml&coll=2&thispage=1>.

70. 42 U.S.C. § 14071(e)(2) (2006) (mandating federally that all states pass legislation to make their federal sex offender registries available to the public). See Phoebe Geer, *Justice*

prosecutor involved downplayed the likelihood that a minor without a criminal record would be forced to register as a sex offender, the president of the state's County Prosecutors Association has commented about the need for "very serious consequences" in response to this sort of teen behavior.<sup>72</sup> Prosecutors, as elected officials, may experience intense pressure from constituents on either side of the issue; they may be lobbied to express leniency or could be overwhelmed with requests from parents of teen victims insisting that another teen be prosecuted for the misconduct.<sup>73</sup> Nothing in child pornography laws exempts instances in which minors produce or disseminate pornographic images of themselves. The definitions of these offenses may vary across jurisdictions, but "criminal statutes typically prohibit the production and dissemination of pornography featuring minors in terms that are broad enough to apply to self-produced child pornography."<sup>74</sup>

Although prosecutors may initially charge teens with child pornography offenses in an effort to educate them about the dangers of sexual exploitation on the Internet and to facilitate agreement to lesser penalties, most teens end up with less extreme consequences, such as confiscation of a cell phone, curfews, supervised Internet usage, and community service.<sup>75</sup> Even though the number of reported cases involving teenagers sharing self-produced sexually explicit images is understandably few,<sup>76</sup> some local prosecutors have successfully sought child pornography charges in sexting-like situations. And there is at least some appellate authority affirming minors' convictions for producing sexually explicit images of themselves.<sup>77</sup>

In *Iowa v. Canal*, likely the first case explicitly upholding a "sexting" prosecution, the Iowa Supreme Court recently affirmed an obscenity conviction of an eighteen-year-old boy who sent an explicit photo of himself to a fourteen-year-old friend, accompanied by a photograph of his face and the message, "I love you."<sup>78</sup> The teenage boy sent the photograph only after the girl repeatedly asked him to send the photo, which her parents later

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*Served? The High Cost of Juvenile Sex Offender Registration*, 27 DEV. MENTAL HEALTH L. 34, 36 n.21 (describing Megan's Law).

71. Golson, *supra* note 10.

72. *Id.*

73. Patrick E. Corbett, *Cyberbullying and Other High-Tech Crimes Involving Teens*, J. INTERNET L., Sept. 2008, at 1, 19.

74. Smith, *supra* note 37, at 513.

75. See e.g., Dave Gram, *Vermont May Set Aside Harshest Penalties for 'Sexting'*, HERALD, Apr. 15, 2009, at 3A.

76. Smith, *supra* note 37, at 513.

77. *Id.* See also Smith, *supra* note 37, at 513.

78. 773 N.W.2d 528, 529 (Iowa 2009).

uncovered in the girl's e-mail account and sent to the police.<sup>79</sup> Reviewing a jury verdict challenged on sufficiency of the evidence grounds, the Iowa court found sufficient evidence to convict the eighteen-year-old of knowingly disseminating obscene material to a minor, a misdemeanor requiring him to register as a sex offender.<sup>80</sup> Recognizing the latitude a jury has to determine what constitutes obscenity for its own community under the Supreme Court's *Miller* test,<sup>81</sup> the Iowa court found that the jury could find, applying its own contemporary community standards, that "the material appealed to the prurient interest, was patently offensive, and lacked serious literary, scientific, political, or artistic value."<sup>82</sup>

Besides *Canal*, state courts have upheld child pornography convictions for teenagers' production and distribution of self-produced pornography using technology such as e-mail and video cameras. These cases present policy issues analogous, if not identical, to sexting using cell phones.

In *A.H. v. State*, a teenage girl's conviction of a child pornography offense after exchanging self-produced pornography over e-mail was upheld by a Florida state appellate court.<sup>83</sup> A sixteen-year-old female, A.H., and her seventeen-year-old boyfriend took digital photos of themselves engaged in "sexual behavior," uploaded them to the girl's home computer, and sent them to the boy's personal e-mail account.<sup>84</sup> Although neither teen reportedly showed the photos to a third party, they somehow made their way into the hands of the police.<sup>85</sup> On appeal, A.H. moved to dismiss the charges as an unconstitutional violation of her privacy rights.<sup>86</sup> Given the lack of a significant age difference or any allegation that the pictures were shown to a third party, A.H. argued that the only compelling state interest implicated in

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79. *Id.* at 529.

80. Grant Schulte, *Iowa Court Upholds 'Sexting' Conviction*, DES MOINES REGISTER, Sept. 18, 2009.

81. *Canal*, 773 N.W.2d at 531. *Miller v. California* sets forth the "basic guidelines" for obscenity:

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a 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.

413 U.S. 15, 24 (1973) (internal citations omitted).

82. *Canal*, 773 N.W.2d at 532.

83. 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007).

84. *Id.*

85. *Id.* at 235; see also Declan McCullagh, *Police Blotter: Teens Prosecuted for Racy Photos*, CNET NEWS, Feb. 9, 2007, [http://news.cnet.com/Police-blotter-Teens-prosecuted-for-racy-photos/2100-1030\\_3-6157857.html](http://news.cnet.com/Police-blotter-Teens-prosecuted-for-racy-photos/2100-1030_3-6157857.html).

86. *A.H.*, 949 So. 2d at 235.

her conviction was protecting her and her co-defendant from engaging in sexual behavior until their minds and bodies matured.<sup>87</sup> She further argued that pursuing that interest through a second-degree felony charge for child pornography distribution did not meet the “least intrusive means” test required under state law.<sup>88</sup>

However, while the Florida Supreme Court previously recognized constitutional protection for consensual sexual activity between two sixteen-year-olds in *B.B. v. State*,<sup>89</sup> the *A.H.* court found that this privacy right does not extend to situations where the “minor memorializes the act through pictures or video.”<sup>90</sup> Distinguishing self-produced images of adults engaging in sexual behavior, the court argued that minors cannot reasonably expect that their relationships will continue and the photographs will not be shared with others unintentionally or intentionally, for “profit or bragging rights.”<sup>91</sup> Even if the *A.H.* court recognized a teen’s privacy right in the photos, it found an overriding, compelling state interest in the convictions, stating that “protecting children from exploitation in this statute is the same regardless of whether the person inducing the child to appear in a sexual performance and then promoting that performance is an adult or a minor.”<sup>92</sup> Almost a decade earlier, a Florida appeals court reached a similar conclusion about the state’s interest in “protect[ing] minors from exploitation by *anyone* who induces them to appear in a sexual performance,” recognizing the states’ interest in prosecuting a fifteen-year-old boy who videotaped himself and a younger minor engaged in sexual activity and then shared the tape with a friend when the girl was not present.<sup>93</sup>

Convictions for sexting-like activity in other states have been affirmed on similar rationales. In an unpublished Washington state opinion from 2005, *State v. Vezzoni*, the court upheld a sixteen-year-old boy’s conviction for production and possession of child pornography where he took sexually explicit photos of his girlfriend and then showed them to classmates at school after the couple broke up.<sup>94</sup> Appealing the charges, the boy argued

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87. *Id.*

88. *Id.*

89. 659 So. 2d 256, 259 (Fla. 1995). The court established that the crux of the State’s interest in regulating minor-minor sexual contact was “protecting the minor from the sexual activity itself for reasons of health and quality of life,” and that in the instance of consensual sexual relations between two sixteen-year-olds, the state failed to demonstrate that a conviction for sexual battery was “the least intrusive means of furthering what we have determined to be the State’s compelling interest.” *Id.*

90. *A.H.*, 949 So. 2d at 236.

91. *Id.* at 237.

92. *Id.* at 238.

93. *State v. A.R.S.*, 684 So. 2d 1383, 1387 (Fla. Dist. Ct. App. 1996) (emphasis added).

94. No. 22361-2-III, 2005 WL 980588, at \*1–2 (Wash. Ct. App., Apr. 28, 2005).

that the legislature did not intend for child pornography statutes to apply in situations where teens capable of consenting to sexual activity take nude photos of each other.<sup>95</sup> The court found the plain meaning of the statute unambiguous in its applicability to juvenile offenders, noting the ease by which lawmakers could have created “different degrees of criminal liability on the basis of a specific age disparity between the offender and the victim” if that was their intent.<sup>96</sup>

In a similar case, the Washington Court of Appeals upheld a juvenile conviction for the production of child pornography where a fifteen-year-old boy brought a video camera to high school and taped three female classmates voluntarily exposing their breasts on camera.<sup>97</sup> Though the court determined the boy’s behavior “fell squarely within the unambiguous statutory definition of sexual exploitation of a minor,” it acknowledged that the consequences were “arguably excessive” as applied to a youth “whose conduct lies on the periphery of concerns” that the legislature intended to address with the statute, but declared that “such policy arguments must be directed to the Legislature.”<sup>98</sup>

Cases like *A.H.* and *Vezioni* prompted action from state legislators looking to moderate the “arguably excessive”<sup>99</sup> penalties attached to sexting.<sup>100</sup> Relying on prosecutors to exercise reasonable discretion in sexting cases is not a desirable approach for several reasons.<sup>101</sup> First, states generally have not designed laws to specifically address teens’ transmission of self-produced explicit images, leaving many law enforcement authorities with the view that their only option is to charge teens under statutes designed to punish child pornography traffickers and sexual predators.<sup>102</sup> Indeed, one Internet safety expert described the recent use of child pornography law as “desperate acts by frustrated law enforcement officials.”<sup>103</sup> Second, prosecutors pursuing harsh penalties for sexting teens may be motivated by constituent pressure or by a strong moral opposition to any form of teenage sexual activity, making their exercise of reasonable discretion unlikely. As the Utah Supreme Court noted in *State ex. rel. Z.C.* in which the court overturned

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95. *Id.* at \*1.

96. *Id.* at \*2 (quoting *State v. D.H.*, 9 P.3d 253, 256) (Wash. Ct. App. 2000).

97. *D.H.*, 9 P.3d at 254.

98. *Id.* at 256–58.

99. *Id.* at 257–58.

100. *See infra* Section II.B.1.

101. There are, of course, prosecutors developing reasonable responses to teen sexting. For further discussion of such an approach in Montgomery County, Ohio, see *infra* Part IV.

102. Golson, *supra* note 10.

103. Zetter, *supra* note 54 (quoting Parry Aftab, founder and director of wiredsafety.com).



the conviction of a thirteen-year-old boy for having consensual sex with a twelve-year-old girl, where “there is no discernible victim that the law seeks to protect,” “[t]he primary fail-safe against the absurd application of criminal law is the wise employment of prosecutorial discretion, a quality that is starkly absent in this case.”<sup>104</sup>

Furthermore, data about prosecution rates for the related offense of statutory rape reveals the hard-line response to teenage sexual activity pursued by many prosecutors. A 1997 study by the American Bar Association found that close to one-half of prosecutors surveyed report “always” or “almost always” filing charges when receiving referrals of statutory rape cases from law enforcement.<sup>105</sup> In the Florida *A.H.* and the Washington State *Vezzoni* cases, for example, prosecutors sought charges under statutes with the most severe penalties—“[i]nstead of using prosecutorial discretion wisely and charging the teenagers with charges that fit the crime, prosecutors used statutes that potentially would classify the teenagers as sex offenders.”<sup>106</sup> In other instances, ambiguity over what constitutes child pornography and the severe consequences associated with the content may influence prosecutors to err on the side of seeking stringent penalties. Although the Supreme Court held in *Osborne v. Ohio* that “depictions of nudity, without more, constitute protected expression,”<sup>107</sup> lower courts found that images, even without nudity, can constitute child pornography.<sup>108</sup> Given the uncertainty about these definitions and the inevitable leeway afforded judicial interpretations, “any teen who takes nude or semi-nude pictures of herself is, as a practical matter, in definite legal jeopardy.”<sup>109</sup> And when a zealous prosecutor proceeds with child pornography charges and secures a conviction, the statutes typically proscribe mandatory minimum sentences which restrict a judge’s ability to exercise leniency in sentencing.<sup>110</sup>

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104. *State ex. rel. Z.C.*, 165 P.3d 1206, 1212, 1212 n.9 (Utah 2007).

105. Rigel Oliveri, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 497 (2000) (citing SHARON G. ELSTEIN AND NOY DAVIS, SEXUAL RELATIONSHIPS BETWEEN ADULT MALES AND YOUNG TEEN GIRLS: EXPLORING THE LEGAL AND SOCIAL RESPONSES 22 (American Bar Ass’n Center on Children and the Law 1997), available at <http://www.abanet.org/child/statutory-rape.pdf>).

106. Nix, *supra* note 7, at 189.

107. 495 U.S. 103, 112 (1990).

108. Humbach, *supra* note 20, at 2 n.16. *See, e.g.*, United States v. Knox, 32 F.3d 733, 737 (3d Cir. 1994) (finding that “the federal child pornography statute, on its face, contains no nudity . . . requirement”).

109. Humbach, *supra* note 20, at 15 n.115.

110. Smith, *supra* note 37, at 529.

A recent case litigated by the ACLU is a clear example of a prosecutor taking extraordinarily harsh measures in response to sexting.<sup>111</sup> After discovering a string of sexting incidents at a local school, a Pennsylvania district attorney threatened to charge three teenage girls with the production of child pornography, felonies carrying prison time and mandatory sex-offender registration in Pennsylvania, unless their parents agreed to probation terms including drug testing and a five-week, ten-hour education program discussing “what it means to be a girl in today’s society.”<sup>112</sup> While the district attorney offered the deal to avoid prosecution while still teaching the girls a lesson, the parents refused the terms.<sup>113</sup> With the support of the ACLU, the parents sued for a temporary restraining order alleging violations of their constitutional rights stemming from the district attorney’s threatened retaliation if they refused to allow their children to attend the educational program.<sup>114</sup> At issue in the litigation are two photographs featuring the teenagers, one showing two of the girls at the age of thirteen wearing white opaque bras, and a second photo showing a girl outside the shower with a towel below her chest, exposing her breasts.<sup>115</sup> Among its arguments, the ACLU Complaint contended that “unless the photographs were produced by abusing or coercing the minors, which they were not, or they show the minors engaged in sexual activity or lasciviously displaying the genitals, and again they do not, the photos are expression protected by the First Amendment to the U.S. Constitution.”<sup>116</sup> At a March 2009 hearing, the district court found that there was a “reasonable likelihood” that the plaintiffs would prevail in the argument that the photographs are not illegal under Pennsylvania law, as “the images presented to the court do not appear to qualify in any way as depictions of prohibited sexual acts.”<sup>117</sup>

On appeal, the Third Circuit affirmed the injunctive relief offered the plaintiffs based on their retaliation claim, finding that the district attorney’s threats to pursue a child pornography prosecution after the parents and teenagers exercised their protected rights not to participate in the educational program was unconstitutional.<sup>118</sup> Without addressing whether the sext messages constituted legal child pornography, the appellate court found the

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111. Zetter, *supra* note 7.

112. Miller v. Skumanick, 605 F. Supp. 2d 634, 638 (M.D. Pa. 2009); Zetter, *supra* note 7.

113. Zetter, *supra* note 7.

114. Miller v. Mitchell, No. 09-2144, 2010 WL 935776, at \*1 (3rd Cir. Mar. 17, 2010); Zetter, *supra* note 7.

115. Miller, 605 F. Supp. 2d at 639.

116. Complaint at ¶ 54, Miller v. Skumanick, No. 09CV00540 (M.D. Pa. Mar. 25, 2009), 2009 WL 789513; Miller, 605 F. Supp. 2d at 639.

117. Miller, 605 F. Supp. 2d at 645–46.

118. Miller v. Mitchell, No. 09-2144, 2010 WL 935776, at \*7 (3rd Cir. Mar. 17, 2010).

district attorney's actions were retaliatory based on his lack of probable cause in pursuing the conviction.<sup>119</sup> It found "no indication from this record" that the district attorney had evidence that the teenagers possessed or distributed the images.<sup>120</sup> As one commentator summed up the decision: the court recognized that in pursuing this sexting case, "a prosecutor had gone too far in trying to enforce adult moral standards."<sup>121</sup>

## B. LEGISLATIVE RESPONSES

In the absence of state laws specifically designed to address sexting, a zealous prosecutor may always seek the most stringent charges possible, including convicting under offenses that carry a sex-offender registration requirement.<sup>122</sup> In response to prosecutors' aggressive pursuit of child pornography charges in sexting cases, state legislators across the country have crafted a range of more tailored responses to sexting.<sup>123</sup> Four states passed new sexting laws in 2009, and at least fifteen other states have introduced sexting legislation since 2009.<sup>124</sup>

### 1. *Enacted Laws*

#### a) Vermont

Vermont lawmakers' recent efforts to pass sexting legislation underscore some of the highly divergent views in the debate. In the wake of several high-profile sexting cases in the national media in which teens were charged with child pornography offenses, the Vermont Senate took up the issue in early 2009, adopting an approach later criticized for "legalizing" sexting.<sup>125</sup> The Vermont Senate bill established an exemption for the production, distribution, and possession of child pornography where the individuals involved are between the ages of thirteen and nineteen, and "the child

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119. *Id.*, at \*10.

120. *Id.*

121. Tamar Lewin, *Rethinking Sex Offender Laws for Teenage Texting*, N.Y. TIMES, Mar. 20, 2010, at A1.

122. *See* Nix, *supra* note 7, at 187.

123. Information on state legislation is current as of March 15, 2010 and does not reflect subsequent legislative developments occurring thereafter. Note that the following survey also does not include those states which have passed or proposed laws to address the use of text message services by sexual predators to contact children, which is a problem distinct from sexting as discussed here. *See supra* note 16.

124. *See* National Conference of State Legislatures, 2009 Legislation Related to "Sexting", <http://www.ncsl.org/default.aspx?tabid=17756> (lasted visited Feb. 22, 2010); National Conference of State Legislatures, 2010 Legislation Related to "Sexting", <http://www.ncsl.org/default.aspx?TabId=19696> (lasted visited March 15, 2010).

125. Adam Silverman, *Legalizing Teen 'Sexting' Considered*, BURLINGTON FREE PRESS, Apr. 12, 2009, at C01.

knowingly and voluntarily and without threat or coercion, used an electronic communication device to transmit an image of himself or herself to the person.”<sup>126</sup>

Although the bill contained a provision explicitly stating that prosecutors can pursue charges under the state’s voyeurism statute,<sup>127</sup> it came under fire as some advocates publicly questioned whether the “proposal crosses the line between legalizing a common practice among teens experimenting with sexuality and protecting predators who target and exploit youngsters.”<sup>128</sup> Following the Senate bill’s passage, the NCMEC expressed reservations about the unintended consequences of immunizing genuine sex predators from prosecution: “our concern is that decriminalizing sexting is a blanket response that is too broad a problem not to be handled on a case-by-case basis.”<sup>129</sup> In response to criticism of his bill, the chairman of the Vermont Senate Judiciary Committee wrote an editorial clarifying that the Senate was not “condoning teenage sexting” and asserting its position: “The question is do we want to treat the 20 percent of teens who participate in such behavior as serious felons within our criminal justice system or should we treat it as the societal problem that it is. . . . [W]e have chosen the latter.”<sup>130</sup>

After the public outcry about the Senate’s bill, which necessitated lawmakers defending their approach on national television,<sup>131</sup> the Vermont House of Representatives took a slightly different tactic, creating a new misdemeanor offense that explicitly precludes prosecution under child pornography statutes for sexting offenses. Its version of the sexting bill creates a new offense where a minor “knowingly and voluntarily and without threat or coercion use[s] a computer or electronic communication device to transmit an indecent visual depiction of himself or herself to another person” or the possession of such a transmitted depiction, with an exemption from prosecution where “the person [takes] reasonable steps, whether successful

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126. S. 125, Gen. Assem., 2009–2010 Reg. Sess. §§ 3–5 (Vt. 2009) (as passed by the Senate). The bill modifies VT. STAT. ANN. tit. 13, § 2822 (2009) (use of a child in a sexual performance), VT. STAT. ANN. tit. 13, § 2824 (2009) (promoting a recording of sexual conduct), and VT. STAT. ANN. tit. 13, § 2827 (2009) (possession of child pornography).

127. S. 125 (“[t]his subsection shall not be construed to prohibit a prosecution under section 2605 of this title (voyeurism”).

128. Silverman, *supra* note 125, at C01.

129. Dave Gram, *Teens Accused of ‘Sexting’ May Not Face Child Porn Charges in Vermont*, ASSOCIATED PRESS, April 14, 2009, <http://www.cnsnews.com/news/article/46587>.

130. Richard Sears & Kevin Mullin, *Not Condoning Teen ‘Sexting’*, RUTLAND HERALD, Apr. 15, 2009, <http://www.rutlandherald.com/article/20090415/OPINION02/904150333>.

131. Posting of Terri Hallenbeck to Burlington Free Press vt.Buzz, <http://bfp-politics.blogspot.com/2009/04/sexting-solution.html> (Apr. 17, 2009, 4:51 PM).

or not, to destroy or eliminate the visual depiction.”<sup>132</sup> The legislation specifically exempts minors from prosecution under the states’ child pornography laws and any applicable sex offender registration requirements and specifies that first-time offenders be tried for delinquency in family court as juveniles and referred to the state’s juvenile diversion program.<sup>133</sup> Discussing his bill after its passage through the House, the Judiciary Committee chairman explained the committee’s interest in “mak[ing] it clear that [sexting] is not something that’s appropriate,” in expanding state attorneys’ options “from doing absolutely nothing to using the new provisions that we provided,” and in keeping participants “outside of the sex offenders registry where they do not belong.”<sup>134</sup>

In early May 2009, a joint conference committee resolved the differences between the two bills, largely adopting the House approach in the enacted version.<sup>135</sup> In September 2009, state prosecutors dropped the sexting charges against an eighteen-year-old boy who allegedly directed two teenage girls to videotape or photograph themselves performing sex acts and then send him the material, influenced in part by the state legislature’s action to reduce the penalties associated with sexting.<sup>136</sup>

b) Nebraska

While avoiding the pitfall of invoking public criticism about “legalizing sexting,” Nebraska passed a law that takes a similarly lenient approach to teenage sexting by providing an affirmative defense under certain circumstances.<sup>137</sup> According to the state Attorney General, Jon Bruning, Nebraska does not “want to treat childish behavior as criminal activity.”<sup>138</sup> Legislative Bill 97, signed in May 2009, creates an affirmative defense for the possession of child pornography if: (a) the image portrays no person other than the defendant;<sup>139</sup> or (b) the defendant was less than nineteen, the image

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132. S. 125, Gen. Assem., 2009–2010 Reg. Sess. § 3 (Vt. 2009) (as passed by the House).

133. *Id.*

134. Bob Kinzel, *House Approves Expanded Sex Offender Legislation*, VT. PUB. RADIO, May 4, 2009, [http://www.vpr.net/news\\_detail/84871/](http://www.vpr.net/news_detail/84871/).

135. See Journal of the Senate, Gen. Assem. 2240 (Vt., May 9, 2009), <http://www.leg.state.vt.us/docs/2010/journal/SJ090509.pdf#page=1>.

136. John Curran, *Vermont Teen Gets Reduced Sentence in ‘Sexting’ Case*, ASSOCIATED PRESS, Sept. 3, 2009, [http://www.msnbc.msn.com/id/32681970/ns/technology\\_and\\_science-tech\\_and\\_gadgets/](http://www.msnbc.msn.com/id/32681970/ns/technology_and_science-tech_and_gadgets/).

137. L.B. 97, 101st Leg., 1st Sess. § 15(3) (Neb. 2009).

138. Paul Hammel, *Bill Goes After Sexual Predators, Goes Easy on ‘Sexters’*, OMAHA WORLD-HERALD, Apr. 23, 2009.

139. L.B. 97, 101st Leg., 1st Sess. § 15(3)(a) (Neb. 2009). See also Pam Greenburg, *States Act to Address ‘Sexting’*, NEWS FROM THE STATES, NATIONAL CONFERENCE OF STATE LEGISLATURES (Summer 2009), <http://www.ncsl.org/default.aspx?tabid=17822>.

portrays only a teen older than fifteen and was “knowingly and voluntarily” created and provided to the defendant by the teen in the image, and “the defendant has not provided or made available the visual depiction to another person except the child depicted who originally sent the visual depiction to the defendant.”<sup>140</sup> However, if a person forwards an explicit text they receive to a non-participant, then he or she would face liability for the full range of child pornography charges available under state law.<sup>141</sup> In a move that may have contributed to the political success of the Nebraska affirmative defense, the drafters of the bill also included provisions strengthening penalties for sex offenders’ use of social networking sites and cell phones to exploit children.<sup>142</sup> As the sponsor of the legislation described the bill’s intent, it sought “to protect children from sexual predators by strengthening penalties and bringing Nebraska’s laws up to date. As technology changes Internet predators find new avenues to pursue their victims . . . Nebraska’s justice system must keep pace.”<sup>143</sup>

c) Utah

Legislators in Utah also took early action to deal with the issue of teen sexting, although their remedy reflects a more heavy-handed approach. Reacting to public concern about a series of incidents in the state involving nineteen teenagers taking nude pictures of themselves and then sending these photos to their friends, the Utah legislature initiated efforts to lessen the penalties associated with sexting in 2008.<sup>144</sup> According to one lawmaker in the state Senate, the legislation was prompted in part by parents interfering in law enforcement investigations when they did not want their children charged with felonies for sexting.<sup>145</sup>

Utah’s bill, passed in March 2009, modifies the state’s harmful-to-minors statute<sup>146</sup> to create a lesser misdemeanor offense for prosecutors to use in pursuing sexting cases instead of charging teens with felonies.<sup>147</sup> Although

140. L.B. 97, 101st Leg., 1st Sess. § 15(3)(b) (Neb. 2009).

141. Hammel, *supra* note 138.

142. L.B. 97, 101st Leg., 1st Sess. § 27 (Neb. 2009).

143. SCOTT LAUTENBAUGH, INTRODUCER’S STATEMENT OF INTENT, L.B. 97, 101st Leg., 1st Sess. (Neb., Mar. 11, 2009), <http://nebraskalegislature.gov/FloorDocs/Current/PDF/SI/LB97.pdf>.

144. Linda Thomson, *Felony Too Harsh for Nude Pics?*, DESERET NEWS, Aug 5, 2008, at B05.

145. *Utah Lawmakers ‘OK’ Bill on Sexting*, ASSOCIATED PRESS, Mar. 11, 2009, <http://www.ksl.com/?nid=148&sid=5823252> 2009 (citing a comment from State Senator Gregory Bell).

146. UTAH CODE ANN. § 76-10-1206 (2009) (concerning “[d]ealing in material harmful to a minor”).

147. H.B. 14, Utah Leg., 2009 Gen. Sess. (Utah 2009).

the legislation maintains a sex offender registration requirement for those convicted, it presents some effort at lightening penalties.<sup>148</sup> Under the amendment, teens under the age of sixteen face a lighter-weight class B misdemeanor charge for sending pornographic materials, teens sixteen and seventeen years old face a class A misdemeanor charge for sending pornographic materials, and those eighteen years and older who solicit a younger person to send pornographic or harmful material could be charged with a third-degree felony.<sup>149</sup> The law also assigns penalties of increasing severity to offenders based on their age when they committed the offense.<sup>150</sup> According to the drafters of the legislation, the bill reflects an effort to give prosecutors more options, beyond felony charges, when youth of certain ages sext, taking “into account an individual’s age, maturity and level of sophistication.”<sup>151</sup>

Some criticize Utah’s use of age distinctions to address the severity of the sexting offense, as opposed to focusing on the actual conduct in an inappropriate situation and fitting the punishment to the crime.<sup>152</sup> Focusing on age does not solve the problem created in assigning a disproportionately harsh penalty to a sexting offense, and “[t]o statutorily draw a line that creates differences in punishment between two friends that engage in the same behavior ignores the realities of teenage life.”<sup>153</sup> Instead, the Utah law might have considered demarcating the degrees of punishment based on conduct and whether the activity was voluntary: “[A] better approach would require the law to draw the line between consensual behavior and intentional infliction of harm instead of focusing solely on age.”<sup>154</sup>

d) North Dakota

Compared to the other three states taking action on sexting in 2009, North Dakota took the most hard-line approach.<sup>155</sup> Passed in August 2009, the state’s sexting law adds a new section to its obscenity law<sup>156</sup> creating a class B misdemeanor offense for a person who knowingly acquires and distributes any image of a nude or partially denuded figure “created without

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148. See Nix, *supra* note 7, at 190; *Legislative Briefs*, DESERET MORNING NEWS, Jan. 28, 2009, at A4.

149. H.B. 14, Utah Leg., 2009 Gen. Sess. (Utah 1009).

150. *Id.*

151. Thomson, *supra* note 144, at B05.

152. Nix, *supra* note 7, at 190.

153. *Id.* at 192.

154. *Id.* at 191.

155. Talia Buford, *Bill Would Ease Penalty for ‘Sexting’*, PROVIDENCE JOURNAL, Mar. 2, 2010 (comparing sexting laws passed in Vermont, Utah, Nebraska and North Dakota and finding the North Dakota law the most severe in its assignment of penalties).

156. N.D. CENT. CODE § 12.1-27.1 (2009) (enacted).

the consent of the subject of the image.”<sup>157</sup> A more serious class A misdemeanor applies where a person distributes or publishes a nude or partially nude image “with the intent to cause emotional harm or humiliation to any individual depicted” or where a person distributes or publishes the image after receiving notice of a lack of consent from the individual depicted or a parent or guardian of that individual.<sup>158</sup>

2. *Some Laws Under Consideration*<sup>159</sup>

a) Ohio

Lawmakers in Ohio also recently introduced a bill to create more reasonable penalties for sexting.<sup>160</sup> Importantly, the proposal has the support of Cynthia Logan, the mother of the Ohio teenager who committed suicide after experiencing intense harassment from classmates who circulated a naked photo of her, originally sent to her boyfriend, around her school.<sup>161</sup> The Logan case generated considerable national press and contributed to the uptick in media and legislative interest in sexting.<sup>162</sup> Under current Ohio child pornography law, sexting teens could be charged with a second-degree felony and classified as sex offenders for illegal use of a minor in nudity-oriented material or performance.<sup>163</sup> The new sexting offense, captured in a provision to be added as Section 2907.324 to the state code, would punish teens who create, exchange, receive, or possess nude materials with misdemeanors, requiring time in juvenile detention centers and counseling or attendance at educational programs, and removing the sex offender registration requirement.<sup>164</sup> Echoing the concerns voiced in other states, Ohio State Representative Ronald Maag, the bill’s sponsor, described the legislation’s intent as “giv[ing] prosecutors direction in how to deal with the matter”

157. H.R. 1186, 61st Leg. Assemb. Reg. Sess. (N.D. 2009). *See also* National Conference of State Legislatures, 2009 Legislation Related to “Sexting”, <http://www.ncsl.org/default.aspx?tabid=17756> (lasted visited Feb. 22, 2010) (discussing the North Dakota Chapter 133 passed Aug. 18, 2009).

158. *Id.*

159. This Part surveys a range of the sexting laws that state legislatures considered in the past year, but is not comprehensive. For a full, and regularly updated, summary of sexting legislation under consideration in 2010, see National Conference of State Legislatures, 2010 Legislation Related to “Sexting”, <http://www.ncsl.org/default.aspx?TabId=19696> (lasted visited March 15, 2010).

160. H.B. 132, 128th Gen. Assem., Reg. Sess. 2009–2010 (Ohio 2009).

161. *See* Amber Ellis, *Mother Speaks Out for ‘Sexting’ Bill*, CINCINNATI ENQUIRER, Apr. 13, 2009.

162. *See supra* notes 61–62.

163. Jennifer Baker, *Ohio Bill Tackles ‘Sexting’ Among Teens*, CINCINNATI ENQUIRER, Mar. 26, 2009, <http://news.cincinnati.com/article/20090326/NEWS01/303260045/Ohio-bill-tackles--sexting--among-teens>.

164. H.B. 132.



without resorting to felony child pornography charges for “stupid” teen behavior.<sup>165</sup>

b) Illinois

In Illinois, lawmakers recently introduced an anti-sexting bill that takes an approach distinct from other states. The proposed provision would not charge the person who appears in the explicit photo, but would penalize anyone who forwards the image.<sup>166</sup> Specifically, the proposed legislation creates a new misdemeanor for “a minor under 17 years of age to knowingly disseminate any material that depicts nudity or other sexual conduct by electronic transfer or capture of images of the person’s self image or image of another minor under 17 years of age.”<sup>167</sup> Furthermore, the Illinois proposal creates a new felony where a person engages in sexting with malicious intent:

It is unlawful for a minor under 17 years of age to knowingly obtain an image in violation of [these provisions] and distribute the image or images by means of uploading the nude image on an Internet website with the intent to injure the reputation of the other person or with the intent to cause emotional distress to the other person and to maintain an Internet website or webpage which is accessible to one or more third parties for a period of at least 24 hours.<sup>168</sup>

Notably, the new felony offense for using sexting as a means of harassment does not carry a sex offender registration requirement. As Illinois State Representative Darlene Senger, who introduced the bill, noted, “[t]he consequences in this bill will prevent teenagers from making the same mistake twice, while ensuring that their name and picture does not end up on the Illinois Sex Offender registry for the rest of their lives.”<sup>169</sup>

c) New Jersey

Legislators in New Jersey have focused their efforts on rehabilitative approaches to sexting emphasizing juvenile adjudication and education. New Jersey Senate Bill 2926, introduced June 15, 2009, “[c]reates diversionary

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165. Justin McClelland, *Sexting’ Legislation Proposed to Protect Teens*, OXFORD PRESS, Apr. 14, 2009, <http://www.oxfordpress.com/news/oxford-news/sexting-legislation-proposed-to-protect-teens-76510.html>.

166. H.B. 4583, 96th Gen. Assem., Reg. Sess. 2009–2010 (Ill. 2009).

167. *Id.* § 11-27(a).

168. *Id.* § 11-27(c).

169. Press Release, Office of Ill. State Representative Darlene Senger, Rep. Senger Introduces Bill to Prevent Children From Sexting (July 1, 2009), <http://www.senger.ilhouse.gov/?p=230>.

program for juveniles who are criminally charged for ‘sexting’ or posting sexual images.”<sup>170</sup> Those teens who have not been previously adjudicated delinquent for a criminal offense or convicted of a criminal offense under state law and “were not aware that their actions could constitute and did not have the intent to commit a criminal offense,” qualify for a state Attorney General-created comprehensive education program designed to provide teenagers with information about

the legal consequences of and penalties for sexting or posting sexual pictures online, including the applicable federal and State statutes; the non-legal consequences of sexting or posting such pictures, including, but not limited to, the effect on relationships, loss of educational and employment opportunities, and being barred or removed from school programs and extracurricular activities; how the unique characteristics of cyberspace and the Internet can produce long-term and unforeseen consequences for sexting and posting such photographs; and the connection between bullying and cyber-bullying and juveniles sexting or posting sexual images.<sup>171</sup>

Another legislative proposal introduced in New Jersey, Senate Bill 2925, would require schools and cell phone retailers to create education programs that warn youths about the potential harm accompanying sexting.<sup>172</sup> Following the pattern in other states, in which a local sexting incident prompts legislative action, legislators introduced the bill after local authorities charged a teenager with a child pornography felony for posting about thirty photos of herself on MySpace.<sup>173</sup> According to the sponsor, the legislation’s focus on education is necessary as, “[y]oung people, especially teen girls, need to understand that sending inappropriate pictures is not only potentially illegal, but can leave an indelible mark on them socially and educationally.”<sup>174</sup> A third proposal introduced in New Jersey also adopts an education-oriented approach. Senate Bill 2923 requires school districts to disseminate

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170. S.B. 2926, 213th Leg. (N.J. 2009).

171. *Id.*

172. S.B. 2925, 213th Leg. (N.J. 2009). See National Conference of State Legislatures, 2009 Legislation Related to “Sexting”, <http://www.ncsl.org/default.aspx?tabid=17756> (lasted visited Feb. 22, 2010).

173. See Andrea Billups, *School Districts Paint Dark Picture of ‘Sexting’ Danger*, WASH. TIMES, July 23, 2009, <http://www.washingtontimes.com/news/2009/jul/23/school-districts-hope-students-get-the-picture-abo//print/>. The child pornography charges lodged against the teen were eventually reduced to probation and mandatory counseling. *Id.*

174. *Id.*

information annually to students and parents or guardians about the risks involved in electronically distributing sexually explicit images.<sup>175</sup>

d) Indiana and Virginia

In a more cautious move, several states initiated studies on the issue in 2009. The Indiana legislature adopted legislation in April 2009 to direct the state's sentencing policy study committee to explore the sexting issue.<sup>176</sup> The legislature's resolution urged the sentencing policy committee to review:

- (1) the use of cellular telephones to send explicit photographs and video ("sexting"), especially by children;
- (2) the psychology of sexuality and sexual development;
- (3) the psychology of sexual deviants and deviancy; and
- (4) the mental development of children and young adults and how this affects the ability to make certain judgments; as these issues apply to sex offenses covered by Indiana statutes

and then to "consider revisions to these statutes based on the results of its study."<sup>177</sup>

Virginia legislators expressed a similar discomfort with prosecuting teenagers under child pornography laws for sending nude images of themselves through a computer or cell phone. The Virginia General Assembly accordingly requested that the state crime commission study the sexting issue and offer legislative recommendations for the 2010 session.<sup>178</sup> Such a recommendation gives legislators more time to study a nascent issue before proposing the right remedy for an offense not under consideration when state anti-child pornography statutes were crafted. As the Co-Chair of the Crime Commission, Senator Kenneth Stolle noted, "I don't know any member of the General Assembly who a year ago knew what sexting was. I think the concern is we actually have behavior that has not been contemplated by the statutes or by the General Assembly."<sup>179</sup>

As explored, *supra*, close to one-fifth of states undertook legislative action on sexting in the last year—a strong testament to the public attention focused on this issue. These responses range in focus from providing

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175. S.B. 2923, 213th Leg. (N.J. 2009). See National Conference of State Legislatures, 2009 Legislation Related to "Sexting", <http://www.ncsl.org/default.aspx?tabid=17756> (lasted visited Feb. 22, 2010).

176. S. Res., 116th Gen. Assem., 1st Sess. (Ind. 2009).

177. *Id.*

178. Andrew K. Block, *A Back and A Look Forward: Legislative and Regulatory Highlights for 2008 and 2009 and a Discussion of Juvenile Transfer*, 44 U. RICH. L. REV. 53, 60 (2009).

179. Olympia Meola, *Officials Consider Minors' 'Sexting': They Fear Changing Virginia's Laws Might Protect Pedophiles*, RICH. TIMES-DISPATCH, May 20, 2009, at A01.

prosecutors with more lenient offenses for charging sexters, to authorizing more study of the issue, to proposing new educational resources for students and parents to learn more about the potential harms of sexting. At the same time, the vast majority of states ignored the uptick in sexting, leaving prosecutors in those states with few tools to discipline teenage offenders except woefully inadequate child pornography statutes. Part III examines the policy issues that states must balance in order to prudently address the sexting issue.

### III. POLICY CONSIDERATIONS

Developing a response to teenage sexting that discourages the behavior while appropriately responding to the magnitude of the harms is challenging. To date, the incidence of state prosecutors pursuing child pornography charges against sexting teens suggests that a balanced response is too often abandoned in favor of harsh and inflexible policies disproportionate to the harms at issue. Such responses may also disregard important public policy issues implicated in sexting cases.

#### A. BALANCING THE FIRST AMENDMENT AND SEXTING HARMS

Child pornography, which subjects children to unimaginable harm in the creation of the images, differs markedly from sexting, where the images reflect consensual, and likely legal, activity.<sup>180</sup> Although state prosecutors pursue child pornography charges against sexting teens, some legal scholars question whether the Supreme Court decisions excluding child pornography from First Amendment protection, mainly to prevent youth from being victims of sexual abuse in the production of explicit materials, apply to images produced voluntarily by teens without exploitation.<sup>181</sup>

For good reason, child pornography is categorically denied protection under the First Amendment. *New York v. Ferber* established that regardless of the obscenity analysis, sexually explicit images of children lie outside the protections of the First Amendment.<sup>182</sup> The Court grounded this exclusion in the need to prevent the “sexual exploitation and abuse of children” that

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180. Whether the underlying activity is legal will depend on the nature of the activity, the ages of the participants, and the jurisdiction, and applicable statutory rape law, in which the activity is taking place. Of course, this policy issue is not applicable in sexting instances that involve coercion.

181. Humbach, *supra* note 20, at 5 (“It is a question, therefore, whether the categorical exclusion can be suitably understood to include materials produced under entirely different circumstances, where the originally motivating harms may be absent and the brunt of suppression can savage the lives and future prospects of the very people whom the laws are supposed to protect.”).

182. 458 U.S. 747, 757 (1982).

occurs in the production of the materials—a “government objective of surpassing importance.”<sup>183</sup> The images themselves are “intrinsically related” to the sexual abuse of the child and constitute a “permanent record” of the exploitation.<sup>184</sup> *Ferber* did not clearly limit the categorical exclusion of First Amendment protection to child pornography that perpetuates the harms of child exploitation, finding that a statute could fall within the unprotected category that “does not threaten the harms sought to be combated by the State.”<sup>185</sup> The Court later modified this analysis in *Ashcroft v. Free Speech Coalition*.<sup>186</sup> In *Ashcroft*, the Court considered whether *Ferber* applied to “virtual child pornography,” or “sexually explicit images that appear to depict minors but were produced without using any real children,” in considering the constitutionality of a federal statute criminalizing such materials.<sup>187</sup> In establishing full protection under the First Amendment for virtual pornography, the Court’s analysis “seems to presuppose that the unprotected category is not merely justified but also shaped on the particular harms that motivated its creation.”<sup>188</sup> Finding that the ban on virtual pornography “prohibits speech that records no crime and creates no victims by its production,”<sup>189</sup> the Court arguably clarified that the *Ferber* ban on child pornography applies in instances where there is a close link between the suppressed speech and imminent criminal activity underlying that speech.<sup>190</sup>

In the case of sexting, the harms underlying the speech denied constitutional protection in *Ferber*, which focused on the “exploitation” of children,<sup>191</sup> differ significantly from teens’ self-produced pornography. Although there is much to learn about the psychological effects of voluntary sexting on teens, “there is no reason to think they are similar in nature or degree to the outrageously exploitative and abusive harms relied on in *Ferber*.”<sup>192</sup> Besides the primary exploitation of those children appearing in child pornography, missing in sexting cases, *Ferber* also recognized that “the

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183. *Id.*

184. *Id.* at 759. For more discussion of the legal basis for the prohibition of child pornography and its inapplicability to instances of self-produced child pornography, see Smith, *supra* note 37, at 516–21.

185. *Ferber*, 458 U.S. at 766, 773 (finding that the application of the challenged statute to educational, medical, or artistic works unlikely accounts for “more than a tiny fraction of the materials within the statute’s reach”).

186. 535 U.S. 234 (2002); Humbach, *supra* note 20, at 19–22.

187. *Ashcroft*, 535 U.S. at 241, 239.

188. Humbach, *supra* note 20, at 20.

189. *Ashcroft*, 535 U.S. at 250.

190. See Humbach, *supra* note 20, at 21.

191. *New York v. Ferber*, 458 U.S. 747, 753 (1982) (stating that the “single question” in the case concerned “the abuse of children who are made to engage in sexual conduct for commercial purposes”).

192. Humbach, *supra* note 20, at 23.

materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."<sup>193</sup> Though this harm may apply in sexting cases where the images exchanged between teens circulate outside the intended audience with a "haunting" effect on the participants, the lack of sexual exploitation in sexting factually distinguishes the degree of this harm from the regulatory interest of "surpassing importance" central to *Ferber*.<sup>194</sup> Proponents of prosecuting youth who self-produce pornography under child pornography statutes also argue that a youth's self-produced pornography harms other children because the new images enlarge the market for child pornography and may be used by offenders to groom new victims.<sup>195</sup> However, in analyzing the constitutionality of state efforts to suppress speech in *Ashcroft*, the Court rejected a similar harm argument about virtual child pornography causing future acts of molestation by pedophiles, concluding that such harm was too indirect: the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."<sup>196</sup> Where there is no crime underlying sexting, prosecutions of teenagers under child pornography laws essentially criminalize "the acts of recording, documenting and communicating—in effect making crimes out of essentially pure expression."<sup>197</sup> Further, *Ashcroft* suggests that "statutes that suppress speech will ordinarily have to be justified by a purpose to prevent acts that are not merely harmful, but are harmful enough to be crimes."<sup>198</sup>

Ultimately, it is unlikely that courts will treat sexting images differently than other sexually explicit images of minors, given the state's interest, as articulated in the Florida and Washington juvenile cases involving e-mails and videotapes,<sup>199</sup> in preventing the production and dissemination of *any* images of minors engaged in explicit activity. However, reviewing the Supreme Court's previously articulated rationales for criminalizing child pornography, mainly preventing the exploitation of youth, suggests caution in categorically excluding sexting from First Amendment protection. Though evidence may emerge showing that sexting exploits teens, and those harms warrant a denial of protection under the First Amendment, this topic has yet

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193. *Ferber*, 458 U.S. at 759.

194. *Id.* at 757; Humbach, *supra* note 20, at 24.

195. Leary, *supra* note 43, at 13–19.

196. *Ashcroft*, 535 U.S. at 234 (2002).

197. Humbach, *supra* note 20, at 26.

198. *Id.* at 28.

199. *See* A.H. v. State, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007); State v. Vezzone, No. 22361-2-III, 2005 WL 980588 (Wash. Ct. App. 2005).

to be studied.<sup>200</sup> Meanwhile, it is important to note that the child protection objective underlying the criminalization of child pornography may not justify the regulation of sexting.

#### B. RECOGNIZING TEEN PRIVACY

A second policy interest worth examining concerns the privacy values implicated in sexting and teenagers' rights to autonomy. While the government certainly restricts minors' personal liberties more than adults', American jurisprudence recognizes that teens have some rights of privacy and decisional autonomy; Supreme Court decisions about contraception and state laws addressing minors' access to medical services reflect these rights.<sup>201</sup>

Generally speaking, the extent to which states protect minors' privacy rights in their sexual activity varies widely and depends largely on the age of the participants. For example, in *B.B. v. State*,<sup>202</sup> described *supra* Part II, the Florida Supreme Court found that a minor has a legitimate expectation of privacy in intimate personal activities and that the state failed to meet its burden of proving that a statute criminalizing consensual sex between two sixteen-year-olds furthered a compelling state interest through the least intrusive means (the applicable test in Florida).<sup>203</sup> In contrast to laws that might prohibit adults from engaging in sexual activity with minors, which implicate the state's interest in preventing the sexual exploitation of children, the Florida Supreme Court found that the state's interest was grounded in "reasons of health and quality of life."<sup>204</sup> This state interest did not justify imposing criminal sanctions on minors engaging in consensual sex.<sup>205</sup> Other

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200. Humbach, *supra* note 20, at 24; *cf. id.* at 2 n.16 (discussing how the illegal nature of child pornography inherently prevents scholars from empirical research in the area of sexting, including exploring the quantity of teenage sexting that actually legally constitutes child pornography).

201. Oliveri, *supra* note 105, at 486–87.

202. 659 So. 2d 256 (Fla. 1995).

203. *Id.* at 259; Marilyn G. Hakim, *Privacy Rights of Minors Re: Sexual Intercourse*, 18 J. JUV. L. 316, 317–18 (1997).

204. 659 So. 2d at 259.

205. *Id. Compare State ex. rel. Z.C.*, 165 P.3d 1206, 1212 (Utah 2007) (overturning the sexual abuse of minor convictions of a thirteen year old girl and twelve year old boy who had consensual sex, finding "no discernible victim the law seeks to protect"), *with J.A.S. v. State*, 705 So. 2d 1381, 1386 (Fla. 1998) (finding a compelling state interest in prohibiting consensual sexual activity between two fifteen-year-old boys and two twelve-year-old girls, and affirming statutory rape convictions). Some scholars have attributed these sorts of differing outcomes to courts' recognition of exploitation in instances where the "minor victim was quite young or if the age disparity was significant, the danger of sexual exploitation would rise to a level that supported adjudicating the older minor delinquent." Gregory R. Beck, *J.A.S. v. State: Striking a Balance Between a Minors' Right of Privacy and Florida's Interest in Protecting Minor's Adolescent Development*, 23 NOVA L. REV. 479, 497 (1998).

states have reached opposing conclusions about the privacy rights of a minor to engage in consensual sexual activity with another minor. In *In re T.A.J.*, a California appellate court upheld the misdemeanor conviction of a sixteen-year-old boy accused of having sex with a fourteen-year-old girl, rejecting the youth's argument that he could not be charged under a statute intended to protect him.<sup>206</sup> In that case, the court found that “despite the fact that minors have privacy rights under California’s constitution—and regardless of the fact that many minors are sexually active—minors in California do not have a constitutionally protected right of privacy to engage in sexual intercourse.”<sup>207</sup>

Of course, no court has found that minors have a privacy right to engage in sex with adults,<sup>208</sup> nor that teens have a general privacy right in sexual activity on par with adults.<sup>209</sup> But where the minors engaging in consensual sexual activity are close in age, reformed statutory rape laws either decriminalize such activity or dramatically lower the penalties.<sup>210</sup> More generally, statutory rape laws have fallen into disuse with the recognition of the increased level of sexual activity among teenagers and more permissive societal attitudes toward sex.<sup>211</sup>

This trend toward the recognition of some teenage right to privacy in instances of consensual sexual activity between participants of similar age warrants caution against assigning severe penalties in the typical sexting case. Although courts addressing the issue of minors self-producing pornography have universally found the state’s interest in combating child pornography to trump any privacy right of teens, there may be reason to revisit this conclusion as researchers learn more about the effects of sexting and its distinctions from child pornography. As the dissent recognized in *A.H.*, where two sixteen-year-olds memorialized legal sexual activity in the context of a relationship and intended to keep the photographs private, a teens’ right to privacy arguably should trump any state interest in preventing exploitation under some circumstances.<sup>212</sup> In the rare instance where criminal sanctions

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206. 73 Cal. Rptr. 2d 331, 339 (Ct. App. 1998) (holding that “a minor does not have a legitimate expectation of privacy to engage in consensual sexual activity with another minor”); see Oliveri, *supra* note 105, at 487.

207. Oliveri, *supra* note 105, at 487.

208. *Id.* at 488.

209. *Id.* at 486 (noting that “minors are subject to more restrictive state control than adults”).

210. Smith, *supra* note 37, at 528; Oliveri, *supra* note 105, at 467.

211. See Oliveri, *supra* note 105, at 467–68. But see *id.* at 474–75 (noting that this trend has been counterbalanced by actions in some states to raise the age of consent, enhance penalties for certain kinds of statutory rape, such as adult males’ sexual involvement with teenage girls, and generally increase enforcement of existing laws).

212. See *A.H.*, 949 So. 2d at 239–41 (Padovano, J., dissenting) (finding that the defendant teenager “stands accused of nothing more than taking photographs of herself and



are warranted to address teens' recording of sexual encounters, statutory rape laws are more likely than child pornography statutes to provide an appropriate punishment.<sup>213</sup>

### C. ENSURING PROPORTIONALITY IN PUNISHMENT

A final policy consideration in determining the appropriate response to sexting concerns the need for proportionality. Assigning sex felony charges to teens that produce and distribute provocative images of themselves disproportionately vilifies the underlying behavior, which in many instances is legal sexual activity at least partially protected by state constitutional rights to privacy.

A fundamental principle underlying the American criminal justice system is the notion of moral blameworthiness as the critical determinant of punishment, including the determination of who may be criminally punished and how much punishment convicted offenders should receive. In other words, “[t]o be justified, criminal punishment should be proportional to the blameworthiness of the defendant’s offense; those who are convicted should be punished in accordance with their degree of fault.”<sup>214</sup>

Legislators enacted child pornography laws authorizing severe penalties for producers and distributors to address the “unspeakable harm” caused to children in the creation of these images.<sup>215</sup> This harm of conventional child pornography is compounded by the young age of most victims and the anxiety they experience from having such horrific abuse permanently captured in images that might emerge at any time.<sup>216</sup> By design, these “severe and inflexible” laws authorize sentences up to forty years and often utilize mandatory minimums to limit the extent to which judges can exercise leniency.<sup>217</sup> A felony conviction alone is a serious crime that makes it difficult for released individuals to participate in civil society, including finding work, voting, receiving a clearance for security jobs, serving as a juror, holding public office, possessing a firearm, or receiving licensure in certain professions.<sup>218</sup> Furthermore, under the Sex Offender Registration and Notification Act (SORNA) in the Adam Walsh Child Protection and Safety Act of 2006, states are required to impose registration requirements on

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her boyfriend” and that she “did not attempt to exploit anyone or to embarrass anyone...her expectation of privacy in the photographs was reasonable”).

213. Smith, *supra* note 37, at 528.

214. *Id.* at 508 n.6.

215. *Id.* at 516.

216. *Id.* at 516–17.

217. *Id.* at 529.

218. Muscari, *supra* note 12.

anyone fourteen years of age or older who is convicted of a child pornography offense.<sup>219</sup>

Simply put, the state's valid interest in preventing the production and distribution of sexually explicit images of minors does not justify using the bluntness of child pornography statutes to address sexting. Given available data on the scope of teen sexting and applicable laws covering the production, possession, and distribution of child pornography, one scholar estimates that "as many as 40-50% or more of otherwise law-abiding American teenagers are already felony sex offenders under current law,"<sup>220</sup> raising significant public policy concerns about the broadly sweeping consequences of using child pornography statutes to discipline sexting.<sup>221</sup>

Statistically, most teens involved in sexting incidents are likely older minors. The median age at which U.S. teenagers become sexually active is 16.9 for boys and 17.4 for girls.<sup>222</sup> Punishing sexting minors who could legally marry in many states under harsh statutes designed to punish sexual predators may not be an efficient use of state resources. In the words of one former federal cybercrimes prosecutor, using child pornography laws to prosecute sexting offenses "turns the whole statute on its head."<sup>223</sup>

Furthermore, even where minors are prosecuted in juvenile courts, conviction for child pornography offenses is invariably accompanied by a sex offender registration requirement.<sup>224</sup> The stigmatization, as well as the practical constraints imposed on registered sex offenders in terms of where they can legally live and work, would create an almost unbearable burden for any teenager.<sup>225</sup> Given the public nature of online registration databases, and the community notification systems that exist in many states, a sexting

219. The Act defines "convicted" to include those:

adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse . . . or was an attempt or conspiracy to commit such an offense.

42 U.S.C. § 16911(8) (2006). *See also* 42 U.S.C. § 16913 (2006) (detailing registry requirements for convicted sex offenders).

220. Humbach, *supra* note 20, at 4.

221. *See* National Center for Missing & Exploited Children, *supra* note 59 (stating that "a blanket policy of charging all youth with juvenile or criminal violations will [not] remedy the problem of sexting").

222. KAISER FAMILY FOUND., *supra* note 50, at 1. *See also* Smith, *supra* note 37, at 524.

223. Zetter, *supra* note 54 (quoting Mark Rasch).

224. *See supra* note 219 and accompanying text.

225. Smith, *supra* note 37, at 538-39 ("[As] sex offender registries have taken off, states and local governments have been engaged in an unseemly race to the bottom, trying, in effect, to outdo each other with increasingly draconian residency restrictions aimed at registered sex offenders.").

teenager convicted of child pornography may be ostracized by classmates.<sup>226</sup> In some cases, the ensuing harassment and bullying at school might exacerbate the conditions that prompted the sexting in the first instance.<sup>227</sup> Authorities must also consider the permanence of child pornography charges, as sex offender registration will tarnish a youth's record for life.<sup>228</sup>

#### IV. ELEMENTS OF A MODEL LEGISLATIVE RESPONSE

A survey of the approaches to sexting taken to date by state legislators and a review of the relevant policy issues at stake suggest the need for a cautious response. Although states developing new legislation must tailor it to existing statutes addressing the exchange of sexually explicit materials, the following elements should be considered in new legislative proposals.

##### A. CONSIDERATIONS IN ADDRESSING TYPICAL SEXTING INCIDENTS

Most importantly, directing sexting teenagers to juvenile court, and exempting convicted teens from sex-offender registration statutes, will give juvenile adjudicators the flexibility they need to craft appropriate penalties. Particularly in the case of first-time offenders, where the conduct at issue most likely represents a youthful indiscretion rather than exploitation, adjudicating sexting teens in juvenile court provides the most appropriate response to the injury. The mainstream criminal justice system, and penalties created for serious sex offenses, is far too blunt an instrument to resolve a problem that reflects modern teenage life more than a cyber-crime epidemic.<sup>229</sup>

The juvenile court system may offer further opportunity for more rehabilitative, rather than punitive, responses to sexting. For example, in Montgomery County, Ohio, the local prosecutor and juvenile court created a Prosecutor's Juvenile Diversion Program, under which local juveniles charged with sexting are screened to determine eligibility for diversion from traditional juvenile court proceedings.<sup>230</sup> Factors considered in making these determinations include:

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226. See Smith, *supra* note 37, at 536–37.

227. As part of registration, teens' names, pictures, and offenses of conviction will be available online, making it "difficult to see how minors returning to school after a conviction in juvenile court can even begin to reintegrate into school when students are gossiping and teasing them about the sexually explicit . . . pictures they made." *Id.* at 536–37.

228. See Mathis & Aisner, *supra* note 69, at A1 (describing the considerations of Michigan authorities in charging a fourteen-year-old girl involved in a sexting incident with a child pornography offense, which carries a strict sex-offender registration requirement in the state).

229. See Lithwick, *supra* note 55.

230. Heck, *supra* note 22, at 29.

whether the juvenile has any prior sexual offenses, whether any type of force or illicit substances were used to secure the photos, whether the juvenile has been involved in this particular diversionary program previously, or if there is strong opposition by the victim or law enforcement to the juvenile being involved in a diversionary program.<sup>231</sup>

The diversion program requires juveniles to complete a minimum of six months of supervision, relinquish their cell phones, perform community service, and complete an educational component focused on responsible use of the Internet and communications technologies, the legal ramifications of their conduct, and age-appropriate sexual boundaries.<sup>232</sup> Upon successful completion of the program, any pending charges against the juvenile are dropped or dismissed.<sup>233</sup> The Ohio program addresses the first-time offender involved in sexting—the teenager who does not realize the illegality of his or her actions—and who is “unlikely to re-offend after being educated on the legal ramifications and the possible long term affects on the victim.”<sup>234</sup> The program recognizes, as the founding attorney notes, that “in some cases, charging a juvenile with a felony and labeling them a sexual offender when their actions were clearly a result of poor judgment and ignorance of the law seems harsh for first-time offenders” and the notion that this activity is “best addressed by education and parental involvement.”<sup>235</sup>

Further, in instances where local prosecutors want to pursue criminal charges, crafting penalties outside of sex offense statutes is critical to avoiding mandatory sex-offender registration requirements wildly disproportionate to sexting harms. Compliance with the Adam Walsh Act, and receipt of the federal funding attached to the law, requires states to mandate that convicted sex offenders enroll in state registries.<sup>236</sup> In Virginia, juvenile and domestic relations court judges retain discretion over whether to require juveniles adjudicated delinquent to register as sex offenders, but “[t]his discretion continues to be at odds with the requirements of the Adam Walsh Act.”<sup>237</sup> In deciding whether to charge sexting teenagers with offenses carrying registration requirements, states should also consider the significant costs associated with mandating registration for an increasingly large pool of

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231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Michael F. Caldwell et al., *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 PSYCHOL. PUB. POLY & L. 89, 89–90 (2008).

237. See Block, *supra* note 178, at 61.

offenders, including those juveniles convicted of sexting crimes. Strong empirical evidence further supports the argument for leniency, as juveniles sex offenders rarely re-offend.<sup>238</sup> This suggests that however serious the injury one might attribute to sexting, recidivism concerns should not bolster harsh punishment regimes.

Besides avoiding the consequences of sex-offender registration, creating new offenses that specifically target sexting will enable legislators to avoid the public perception that offenders are going unpunished or that new laws create loopholes for exploitation. The backlash experienced by the Vermont legislature in creating an exemption to sexting under the state's child pornography statutes may instruct other states.<sup>239</sup> While media reports create the impression that most Americans share the belief that sexting teenagers should not receive the same treatment as sex offenders, popular opinions are far from uniform.<sup>240</sup> Creating a tailored offense to adjudicate first-time offenders as delinquent in juvenile court of a misdemeanor may help avoid controversy. Criticism that a sexting misdemeanor will somehow allow serious sexual exploitation to go unpunished—that, as Virginia Delegate David Albo has cautioned, you “change the law and create a loophole for child molesters”<sup>241</sup>—can also be blunted by narrowly defining the crime at issue. For example, crafting the offense to recognize the age difference between participants can help to distinguish those offenses more likely to reflect exploitation than the far more innocent variety of similarly-aged teenagers voluntarily sharing images between co-participants. An age spread of more than three years more likely reflects the presence of coercion, taking the offense outside the realm of the more conventional sexting discussed in this Note.

State authorities could also go a long way in lessening the likelihood that teenagers committing youthful indiscretions will be treated as felony sex offenders by encouraging prosecutors to exercise reasonable discretion in bringing cases. The appropriate mechanism for communicating this message may vary by state, but a clear policy statement from an Attorney General is likely to be influential in disciplining the zealous prosecutor bent on pursuing the most hard-line penalties against sexting teens.

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238. *Id.* (“In Virginia, for example, the [Department of Juvenile Justice] DJJ has reported that between the fiscal years 2002 and 2006, 513 juvenile sex offenders were released from DJJ facilities. By the conclusion of the 2007 fiscal year, only thirteen of those who were released had been convicted of a new sex offense.” (internal citations omitted)).

239. See *supra* Section II.B.1.a).

240. For example, consider the outcry about Vermont's attempt to “legalize” sexting. See *supra* notes 128-129.

241. Meola, *supra* note 179, at A1.

Finally, any effective policy response must also involve an education component directed towards teenagers, parents, and educators. While social science research on sexting is quite nascent, anecdotal evidence suggests that most teenagers charged with criminal offenses in sexting cases did not foresee the consequences. Efforts to incorporate sexting resources into existing Internet and technology safety programs are already underway. For example, schools now crack down on sexting by banning the behavior in codes of conducts, with punishments ranging from mandatory conferences with parents and administrators to new community-based workshops to educate students, parents, and teachers about the dangers of sharing personal information online.<sup>242</sup> Other schools follow the advice of Internet safety experts and require parents and students to sign a contract agreeing to certain conditions regarding the use of cell phones or other personal digital devices on campus, in an effort to ensure that students are aware that sexting is illegal and that their use of technology complies with school disciplinary codes.<sup>243</sup> Although impulsive reactions like banning teenagers' access to cell phones might provide the easiest short-term solution, they will likely do nothing to address the underlying cause of the behavior.<sup>244</sup>

Other government-funded programs and non-profit organizations are focused on addressing the deficit of knowledge about the risks involved in sexting.<sup>245</sup> As one model, the New South Wales government in Australia recently launched an educational campaign to warn children about the "lifetime consequences" of sexting and posting images on social networking sites, including distributing a fact sheet encouraging parents to talk to their children and monitor their children's online profiles for illegal images.<sup>246</sup>

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242. The Houston Independent School District has implemented a ban, in its district code, on "using a cell phone or other personal communication device to send text or e-mail messages or possessing text or e-mail messages containing images reasonably interpreted as indecent or sexually suggestive while at school or at a school-related function." Billups, *supra* note 173.

243. See WILLARD, *supra* note 56, at 188 (describing a "checklist" of issues that should be addressed in an agreement between schools and parents concerning students' use of cell phones on campus).

244. In the instance where the teen producer of pornography is a target of cyberbullying, confiscation of what has become a lifeline for modern adolescents may further socially isolate the victim. See HINDUJA & PATCHIN, *supra* note 31, at 173.

245. See, e.g., ConnectSafely.org, Tips to Prevent Texting, [http://www.connectsafely.org/pdfs/sexting\\_tips.pdf](http://www.connectsafely.org/pdfs/sexting_tips.pdf) (last visited Jan. 24, 2009) ("If a sexting photo arrives on your phone, first, do not send it to anyone else (that could be considered distribution of child pornography). Second: Talk to a parent or trusted adult. Tell them the full story so they know how to support you. And don't freak out if that adult decides to talk with the parents of others involved—that could be the best way to keep all of you from getting into serious trouble.").

246. *Parents Urged to Stop Kids' 'Sexting'*, ASIAN NEWS INT'L, May 3, 2009.

While this Note focuses almost exclusively on legal responses to sexting, education and school community-based solutions are arguably the best means of deterring sexting and avoiding any possibility of harmful effects.

B. CONSIDERATIONS IN ADDRESSING INCIDENTS OF SEXTING AND CYBERBULLYING

When sexting morphs into online harassment, the range of remedies already used to address cyberbullying cases provides a variety of options for dealing with adolescent offenders.

For starters, school administrators can address the behavior through disciplinary actions designed to address cyberbullying or, depending on the seriousness of the offense, work with local authorities to utilize cyberbullying laws specifically crafted to combat online harassment and aggression. Though a school's intervention is limited in some respects by First Amendment restrictions on the extent to which school officials can discipline students for harassing speech that does not involve school resources or occurs off-campus, unless it "materially and substantially" disrupts learning, interferes with school discipline, threatens other students or infringes on civil rights,<sup>247</sup> sextbullying is less likely to raise this limitation. Although not all sexting involves images that legally qualify as child pornography, the legal issues inherent in the transmission of images of nude or partially nude minors, content that is not subject to First Amendment protection, likely provide school officials with sufficient grounds for intervention. An effective policy will include graduated consequences and remedial actions to ensure responses proportional to the severity of the offense.<sup>248</sup> Taking actions like establishing an anonymous reporting system to enable students to come forward without fear of repercussion from other students, which has proved useful in uncovering cyberbullying incidents, could also prove important to limiting the distribution of sextbullying messages.<sup>249</sup>

In the most serious instances of teenagers using sexting as a tool to intentionally harass others, considering criminal sanctions may be appropriate.<sup>250</sup> Authorities, at least in most states, could use the statutory

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247. See HINDUJA & PATCHIN, *supra* note 31, at 116–17 (discussing *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the seminal Supreme Court case establishing limitations on school interference with students' First Amendment rights).

248. *Id.* at 122–23.

249. *Id.* at 123 (discussing the utility of an anonymous reporting system for cyberbullying incidents).

250. Likely, the possibility of criminal liability will provide the grounds for a school's disciplinary action. See *id.* at 122.

scheme covering online harassment to address sextbullying.<sup>251</sup> Forty-five states have laws that explicitly label certain electronic forms of communications as cyberharassment, with some states including cyberharassment offenses under general harassment statutes and others enacting independent laws for cyberbullying.<sup>252</sup> At least seventeen states have passed specific cyberbullying laws that generally include one or more of the following elements: require school districts to include cyberbullying in school anti-bullying policies; criminalize or provide specific penalties for cyberbullying; authorize administrators to take action when off-campus actions affect on-campus discipline; require schools to develop new reporting and disciplinary procedures in cyberbullying cases; and mandate that school districts create and implement Internet safety curricula.<sup>253</sup>

State legislatures that have not adopted new laws addressing cyberbullying in a comprehensive manner should address the issue. Otherwise, faced with public pressure to take action, prosecutors may turn to laws ill-suited to address the immediate offense.<sup>254</sup> In the case of Jesse Logan's suicide, where sexting was used as tool of intentional harassment, Logan's mother consulted with six lawyers in an ultimately unsuccessful effort to find legal recourse for her daughter's death; each one told her that prosecuting the involved teens for child pornography distribution was the only applicable law.<sup>255</sup>

In some instances, sextbullying victims may also find redress through civil tort suits for privacy violations<sup>256</sup> or the infliction of emotional

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251. Sarah Jameson, *Cyberharassment: Striking a Balance Between Free Speech and Privacy*, 17 *COMMLAW CONSPICUOUS* 231, 259 (2008). In light of the lack of a consistent definition for cyberbullying across state laws, Jameson argues for a baseline federal statute addressing cyberharassment. *Id.* at 259–60.

252. *Id.* at 258–59.

253. HINDUJA & PATCHIN, *supra* note 31, at 119 (reviewing laws proposed or passed as of March 2008).

254. For example, in a tragic cyberbullying case in Missouri, in the absence of a state statute addressing online harassment (which has been subsequently enacted), prosecutors used the federal Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030 (2006), to prosecute Lori Drew, a mother involved in a bizarre MySpace hoax to elicit information from a teenage girl, Megan Meier. *See Missouri Begins Prosecuting Under Cyberbullying Law*, ASSOCIATED PRESS, Dec. 20, 2008, <http://www.foxnews.com/story/0,2933,470629,00.html>. Drew's conviction under the CFAA was later overturned for being unconstitutionally vague, although the decision is eligible for appeal. Rebecca Cathcart, *Conviction Is Tossed Out in MySpace Suicide Case*, N.Y. TIMES, July 3, 2009, at A14.

255. Celizic, *supra* note 61.

256. In the privacy realm, the most applicable tort to sexting incidents involving the wide dissemination of images is likely public disclosure of private facts, which establishes liability for the unconsented public disclosure of a private detail of another's person's life, "if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." RESTATEMENT (SECOND) OF TORTS



distress.<sup>257</sup> Often, the simple initiation of legal action against an offender will stop the malicious behavior.<sup>258</sup> Damages might include pain and suffering, costs of counseling for the youth victim, and losses related to lowered school performance or school avoidance. However, pursuing a tort action against a sexting aggressor would likely involve several challenges, especially identifying the parties at fault when text messages are widely transmitted and individual transmitters might not possess the requisite intent for liability. It may take just a few well-publicized cases where the parents of sextbullies are held financially responsible for the harm caused by their children to encourage greater education and supervision regarding teens' use of cell phones.<sup>259</sup>

## V. CONCLUSION

While recent polls and high-profile stories raised the decibel of the public conversation about sexting, the scope and depth of the issue is still relatively unknown. Whether sexting represents merely the latest teen fad or a lasting expression of teen sexuality engrained in popular culture remains to be seen. As state legislators work to address the issue, this Note offers a framework for developing a more balanced response appropriate to the injuries at stake and the underlying policy issues implicated by the behavior. While legal precedent and zealous prosecutors may support the use of child pornography statutes in addressing sexting crimes, such a harsh and inflexible response will rarely, if ever, represent a proportionate remedy to the harm at hand.

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§ 652D (1977). The tort is limited in scope by the great breadth of its newsworthiness exception, which carves out from liability anything occurring in public or which could be considered of social value. Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image over the Internet*, 49 SANTA CLARA L. REV. 313, 378–79 (2009) (arguing that the breadth of the newsworthiness means that the “tort can no longer be an effective tool for protecting individual privacy”) (quoting Jacqueline R. Rolfs, *The Florida Star v. B.J.F.: The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 1107, 1128)). Unless the nudity captured in the text message occurred in public, however, a message containing an image of a minor, who is not legally able to offer consent, is unlikely to qualify for any defenses under the tort. As sext images could be placed online for further dissemination to a potentially limitless audience, the disclosure harms addressed through the public disclosure of private facts make the tort particularly applicable to sexting.

257. Under an intentional infliction of emotional distress theory, a plaintiff would have to show that the defendant intentionally or recklessly took extreme and outrageous action that caused him or her severe emotional distress. RESTATEMENT (SECOND) OF TORTS § 46 (1965). While the tort encompasses action taken with reckless disregard to the possibility of causing distress, so the plaintiff does not necessarily have to show intent, it may be difficult to establish that the sexting itself constituted “extreme and outrageous” conduct.

258. HINDUJA & PATCHIN, *supra* note 31, at 178.

259. See WILLARD, *supra* note 56, at 94–95.

Lawmakers looking to address the sexting phenomenon should focus, instead, on crafting a new misdemeanor outside of child pornography statutes that narrowly addresses the behavior at issue and provides for juvenile adjudication. In instances where sexting escalates to the realm of “sextbullying,” school officials and educators should utilize cyberbullying resources, including newly developed laws specifically designed to address online harassment. In the meantime, controlling knee-jerk reactions to issues like sexting and focusing on sensible solutions will help keep everyone out of trouble.