



PENN STATE LAW REVIEW

Crime and Punishment: Teen Sexting in Context

Julia Halloran McLaughlin*

Table of Contents

| | |
|--|-----|
| INTRODUCTION | 136 |
| I. PLACING TEEN SEXTING IN PERSPECTIVE..... | 138 |
| A. <i>The Faces of Teen Sexters</i> | 138 |
| B. <i>The Scope of Teen Sexting and the Overt Sexualization of Teens</i> | 140 |
| C. <i>The Overt Sexualization of Teens</i> | 142 |
| II. TEEN SEXTING RELATIVE TO THE COGNITIVE DEVELOPMENT OF TEENS | 143 |
| III. FEDERAL CHILD PORNOGRAPHY LAW AND TEEN SEXTING | 146 |
| IV. STATE COURTS AND LEGISLATURES RESPOND TO TEEN SEXTING | 150 |
| A. <i>State Cases</i> | 150 |
| B. <i>State Legislative Responses</i> | 159 |
| V. CONSTRUCTING A MEASURED RESPONSE TO TEEN SEXTING.... | 168 |
| A. <i>Scholarship Review</i> | 168 |
| B. <i>Recognizing a Zone of Teen Privacy</i> | 173 |
| C. <i>Creating a Teen Sexting Legal Framework</i> | 175 |
| D. <i>Proposed Teen Sexting Statute</i> | 175 |
| CONCLUSION | 181 |

* Thanks to my colleague Rebekah Gleason Hope and my research assistant, Caitlin Whalen. I am also grateful to the colleagues who attended my paper presentation at FCSL, including Heidi Anderson, Scott DiVito, Don Jones, Sonya Hoener, Quince Hopkins, Darren Latham, Lynn McDowell and Rod Sullivan. Their comments and suggestions helped to improve my paper. Finally, I am indebted to Frank Derby, Brian Foley, Jana McCreary and Christopher Roederer for their willingness to review and comment upon working drafts of this paper, particularly with respect to refining the proposed legislation.

INTRODUCTION

In 2009, teen sexting¹ dominated news headlines. A Pennsylvania prosecutor made history when he arrested and charged a group of eighteen teens with sex abuse of a minor, a felony charge carrying a prison term and the further penalty of registering as a sex offender.² In Ohio, eight teens were caught trading nude photos on their cell phones and were charged with possession and distribution of child pornography.³ Tragically, in July 2008, an Ohio eighteen-year-old committed suicide following the dissemination by her former boyfriend of nude photos she had shared with him while dating.⁴ A similar revenge sexting episode occurred in Orlando, when an eighteen year-old man sent a nude photo of his former girlfriend, aged seventeen, to seventy people.⁵

Most recently, on February 24, 2010, a Wisconsin teen was sentenced to fifteen years in prison after he pleaded no contest to two felony charges of sexual abuse of a child.⁶ Anthony Stancl admittedly used Facebook to pose as a girl and convinced more than thirty of his

1. For the purposes of this paper, teen sexting is defined as the practice among teens of taking nude or partially nude digital images of themselves or others and texting them to other teens, emailing them to other teens or posting them on web sites such as Myspace.com or Facebook.com.

2. Sean D. Hamill, *Students Sue Prosecutor in Cellphone Photos Case*, N.Y. TIMES, Mar. 26, 2009, at A21, available at http://www.nytimes.com/2009/03/26/us/26sexttext.html?_r=1&scp=1&sq=Sexting&st=nyt. Because the photos are of minors, the act of taking the picture may satisfy the definition of creating child pornography and publishing it to others may qualify as distribution.

3. Wendy Koch, *Teens Caught 'Sexting' Face Porn Charges*, USA TODAY, Mar. 11, 2009, available at http://www.usatoday.com/tech/wireless/2009-03-11-sexting_N.htm.

4. Mike Celicik, *Her Teen Committed Suicide Over 'Sexting'*, TODAY, Mar. 6, 2009, <http://today.msnbc.msn.com/id/29546030> (last visited May 1, 2010). Currently, The Estate of Jessica Logan is suing a variety of defendants for stalking, harassment, dissemination of private material intentional infliction of emotional harm, negligence, violation of civil rights and wrongful death. The Complaint filed in the Court of Common Pleas of Hamilton County, Ohio is captioned Logan v. Salyers, Case No. A0904647 (May 8, 2009), available at <http://news.cincinnati.com/assets/AB134652512.PDF>. The case was removed to the United States District Court for the Southern District of Ohio on December 2, 2009 and is captioned Logan v. Sycamore Community School Board, No. 1:2009cv00885 (Dec. 2, 2009) (S.D. Ohio). The docket is available at http://dockets.justia.com/docket/court-ohsdce/case_no-1:2009cv00885/case_id-.544455.134738/http://dockets.justia.com/docket/court-ohsdce/case_no-1:2009cv00885/case_id-134738/http://dockets.justia.com/docket/court-ohsdce/case_no-1:2009cv00885/case_id-134738/.

5. Bianco Prieta, *Sexting' Teenagers Face Child-porn Charges*, ORLANDO SENTINEL, Mar. 8, 2009, available at <http://www.orlandosentinel.com/news/local/orl-asec-sexting-030809,0,1493554.story>.

6. Associated Press, *Wisconsin Teen Gets 15 Years for Facebook Sex Scam*, http://lacrossetribune.com/news/state-and-regional/wi/article_f3056090-21a0-11df-8ff6-001cc4c03286.html.

New Berlin High School male classmates to send him naked pictures of themselves.⁷ He then used the photos to “blackmail at least seven boys, ages 15 to 17, into performing sex acts.”⁸

Teen sexting is not isolated to instances of blackmail or coercion. In fact, it is relatively common among teens. Forty-four percent of teen boys questioned said that they have seen sexual images of teen girls in their schools and 15% admit to distributing such images.⁹ One high school official in Ohio predicted that if he viewed the 1500 cell phones in the building, one-half to two-thirds would hold indecent photos.¹⁰ The statistics are a revealing glimpse into the world of the new millennium teen.

Technology has, once again, outpaced the law. In the sixties, spin the bottle and seven minutes in heaven introduced young teens to the mysteries of the opposite sex. In the seventies, a racy Polaroid picture seemed miraculous. Now, the societal veil cloaking teenage sexuality has been lifted entirely and budding libidos have escaped from dim basements into cyber space. Sex is omnipresent in our society: on prime-time TV, in magazines, movies and on the web. Youth is glorified, sex is celebrated and youthful sex joins these twin ideals.

The broad language of the First Amendment, designed to protect free expression, leaves courts and legislators ill-equipped to distinguish between child pornography and teen sexting images. Now that every teen with a cell phone is a potential creator and purveyor of nude photos, where is the line between legal expression and illegal predation? All teen sexting is not equally harmful to teens. Our existing law is indeed a blunt instrument because it fails to distinguish between teen sexting images and true child pornography. Statutory reform is needed at both the state and federal levels to create a just and balanced legal response to teen sexting.

The first part of this paper examines the available teen sexting case law across the United States in relationship to the developmental stages of teen cognitive maturation. The second part of this paper explores the federal law and policy underlying the distinction between obscenity and child pornography. The third part reviews the judicial and legislative

7. Laura Walker, *Stencl Gets 15 Years in Prison in Facebook Coercion Case*, MILWAUKEE J. SENTINEL, Feb. 24, 2010, available at <http://www.jsonline.com/news/waukesha/85252392.html>.

8. *Id.* Stencl’s attorney argued for leniency because his client’s crimes stemmed from his internal struggle with homosexuality, which worsened when he was “‘outed’ by an older boy with whom he had a sexual relationship in school.” *Id.*

9. Celzic, *supra* note 4.

10. Murad Ahmed, *Teen ‘Sexting’ Craze Leads to Child Pornography Charges*, TIMES ONLINE, Jan. 14, 2009, available at http://technology.timesonline.co.uk/tol/news/tech_and_web/article5516511.ece.

response, thus far, to teen sexting. The fourth part considers the existing scholarship regarding teen sexting in relationship to the constitutional rights enjoyed by teens and proposes a developmentally appropriate legal response to teen sexting. This approach includes a sphere of sexual privacy for older teens, prohibits sexting images of teens without their consent and punishes teens who sext with the intent to harm, embarrass or humiliate.

I. PLACING TEEN SEXTING IN PERSPECTIVE

This section of the article is further divided into three parts. The first examines the varying faces of teens who sext. The second surveys the prevalence of teen sexting and the third explores the overt sexualization of teens in America.

A. *The Faces of Teen Sexters*

In February of 2009, a Newsweek reporter focused on the recent phenomena of teen sexting in Alabama, Connecticut, Florida, Michigan, New Jersey, New York, Ohio, Pennsylvania, Texas, Utah and Wisconsin.¹¹ Recognizing that all teen sexting acts are not equal, the reporter queried whether cases of teen sexting that constitute cyber-bullying should be treated in the same manner as the voluntary creation and exchange of “naughty Valentine’s Day pictures.”¹²

Perhaps the answer to this question should depend upon the motivation, intent and expectation of the individual offering up the digital teen image, as well as the party disseminating it. Sometimes this is the same person, but other times, it is not. Despite the varying degrees of intended and unintended harm that may arise from teen sexting, until recently, state laws across the United States defined the creation, possession and dissemination of images of nude or partially nude pictures of minors as a crime related to child pornography.¹³ Thus, prosecutors across the country have confronted teen sexting incidents,

11. Dahlia Lithwick, *Teens, Nude Photos and the Law*, NEWSWEEK Feb. 23, 2009, available at <http://www.newsweek.com/2009/02/13/teens-nude-photos-and-the-law.html> (last visited June 19, 2009). See also Wendy Koch, *Teens Caught Sexting Face Porn Charges*, USA TODAY, Mar. 3, 2009, http://www.usatoday.com/tech/wireless/2009-03-11-sexting_N.htm (last visited June 30, 2009).

12. Lithwick, *supra* note 11; see also Koch, *supra* note 11.

13. Child Pornography State by State Pornography, 50 State Statutory Surveys, Criminal Laws, Crimes, 0030 SURVEYS 5 (Thompson Reuters/West 2009), available at https://web2.westlaw.com/result/default.wl?rltdb=CLID_DB18970283015226&srch=TRUE&db=SURVEYS&sv=Split&service=Search&eq=search&fmqv=s&sskey=CLID_SSSA23298393015226&method=TNC&action=Search&query=CHILD+PORNOGRAPHY&mt=208&fn=_top&origin=Search&vr=2.0&rlt=CLID_QRYRLT4344403015226&rp=%2fsearch%2fdefault.wl&ifm=NotSet&cfid=1&rs=WLW10.06.

each varying in the degree of harm, if any, without any specialized training or explicit statutory directives. Given the trend to try juveniles guilty of adult crimes in adult courts and sentence them accordingly, some teens have been tried and convicted as adults under child pornography laws, resulting in jail time and sexual offender registration penalties.¹⁴

The recent surge of teen sexting cases highlights the need for a particularized legal standard designed for teens to distinguish between voluntary and consensual sharing of self-taken digital images and cases in which images have been wrongfully procured or wrongfully disseminated. For example, in Scranton, Pennsylvania, the prosecutor lost a federal lawsuit¹⁵ alleging that he violated the First Amendment rights of three female teens by threatening to charge them with sexual abuse of a minor unless each agreed to attend a ten-hour class dealing with pornography and sexual violence.¹⁶ Seventeen other students, 13 girls and 4 boys accepted the prosecutor's deal and did not seek federal intervention. In the Scranton case, there was no evidence of cyber-bullying nor intent to harm.¹⁷ In stark contrast, Jesse Logan, an Ohio teen committed suicide following an excruciatingly painful senior year during which she was harassed because her former boyfriend forwarded nude pictures of Jesse to a number of his female student friends at the same school.¹⁸ The cyber-bullying was not sufficiently addressed by the authorities in time to prevent Jesse's suicide.¹⁹

In Florida, an eighteen year old male teenager emailed nude photos of his former 16 year-old girlfriend to more than 70 people after she broke up with him.²⁰ One reporter referred to his decision as an attempt to obtain "revenge with an electronic blast." He was charged with transmitting child pornography, is now serving five years on probation and must register as a sex offender until he reaches the age of 43.²¹ The defendant, Phillip Alpert, agreed to an interview with Robert Richards and Clay Calvert which was subsequently published in the *Hastings Communications and Entertainment Law Journal*.²² During his interview, Alpert disclosed some disconcerting information. First, he

14. See, e.g., *A.H. v. Florida*, 949 So.2d 234, 235 (Fla. Dist. Ct. App. 2007); see also *Washington v. A. Vezzoni*, 127 Wash. App. 1012 (Wash. App. Div. 2005).

15. See *infra* notes 101-22 and accompanying text.

16. Hamill, *supra* note 2.

17. See *infra* notes 101-22 and accompanying text.

18. Celzic, *supra* note 4.

19. Prieta, *supra* note 5.

20. *Id.*

21. *Id.*

22. Robert D. Richards and Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1 (2009).

said the prosecutors warned him that they could charge him with over 140 counts of possession and distribution of child pornography and, if convicted, he could spend the rest of [his] life in jail.”²³ Alpert was unprepared for the consequences of his actions. Not only did he face five years of probation, semi-annual polygraphs, forced classes to prevent reoffending and registration as a sex-offender for 25 years, or until he turned 43,²⁴ he also faced unanticipated consequences. He had to leave his father’s home and live on his own in order to comply with the rule that, as a sex-offender, he could not live within the area of the high school he attended,²⁵ he was harassed by classmates when he returned to school,²⁶ he has been unable to obtain a job because he must acknowledge that he has been charged with a felony on the employment forms²⁷ and he was expelled from his community college based on the sexting plea.²⁸ Finally, he has his own page in the digital Florida sex offender registry.²⁹

In the Ohio and Florida examples, although the image was voluntarily made and shared with a boyfriend, the decision to disseminate the nude photos to embarrass or disgrace the person depicted is a knowing act intended to harm the individual depicted. This conduct, although intentional and harmful in nature, falls short of the conduct traditionally associated with creation, dissemination and possession of child pornography.

B. The Scope of Teen Sexting and the Overt Sexualization of Teens

Several recent surveys have been conducted to help measure and appreciate the prevalence of sexting. The 2008 survey conducted by CosmoGirl.com and the National Campaign to prevent Teen and Unwanted Pregnancy revealed some startling statistics:

39% of teens send or post sexually suggestive messages;

48% of teens have received sexually suggestive messages;

20% of teens have sent/posted nude or semi-nude pictures or videos of themselves;

23. *Id.* at 20.

24. *Id.*

25. *Id.*

26. *Id.* at 21.

27. *Id.*

28. *Id.* at 22.

29. *Id.* at 21. The Florida sexual offender registry flyer can be found at <http://offender.fdle.state.fl.us/offender/flyer.do?personId=60516>.

69% of teens sending nude or semi-nude pictures or videos sent them to a boyfriend or girlfriend;

44% say it is common for sexually suggestive pictures to be shared with people other than the intended recipient.³⁰

Another more recent survey reported that 65.5% of teens between the ages of 13-19 have sexted.³¹ Clearly, the teens of the new millennium have left the baby boomers in the basement gloom in terms of sex and tech.

The increase in the number of teens sexting might be tied to the increasing prevalence of sex in society, particularly as reflected in our television programming. In 2005, the Kaiser Foundation published a report entitled *Sex on TV* and reported the following statistics:

70% of the shows viewed by teens contained at least one scene with sexual content;

45% contain some portrayal of sexual behavior;

37% contain precursor sexual behavior only;

8% contain intercourse behaviors.³²

Adolescent exposure to sex on TV correlates with the acceleration of teen sexual activity.³³ The sexting statistics seem to bear this out. Another noteworthy study by the American Psychological Association focuses upon the sexualization of girls and reports:

Recently, public attention has focused on the sexualized self-presentations by some girls on these Web sites and the dangers inherent in this practice although there is currently no research that has assessed how girls portray themselves or how dangerous this

30. Linda Lowen, *The National Campaign to Prevent Teen and Unplanned Pregnancy and CosmoGirl.com Reveal Results of Sex & Tech Survey: Large Percentage of Teens Posting/Sending Nude/Semi Nude Images*, available at http://www.thenationalcampaign.org/media/PDF/2008/Aboutcom_12.10.08.pdf (last visited July 13, 2009).

31. Susan Lipkins, Jaclyn Levy & Barbara Jerabkova, *Sex Offender Statistics by A Voice of Reason, Sexting Part II: Results and Recommendations of Sexting Study* (Jul. 2, 2009), <http://sexoffender-statistics.blogspot.com/2009/07/sexting-part-ii-results-and.html> (last visited Jul. 13, 2009).

32. Kaiser Family Foundation, *Sex on TV Survey*, pages 51-52, available at <http://www.kff.org/entmedia/upload/Sex-on-TV-4-Full-Report.pdf>.

33. *Id.* at 57.

practice is. Some girls have posted notices of their sexual availability (citation omitted).³⁴

The report also noted that:

Peers also participate in the sexualization of girls. . . . Brown (2003) found that teenage girls will seek revenge by negatively sexualizing girls whom they perceive as a threat (e.g. by labeling them as sluts). Several authors (citations omitted) have argued that girls now equate popularity with sexiness and view behaving in a sexual way with boys as a pathway to power.³⁵

Thus, adolescent women walk a fine line between exuding sexuality and avoiding the label of slattern.

C. *The Overt Sexualization of Teens*

Psychologists recognize that, “[i]dentity is the developmental hallmark of adolescence in Western cultures. . . . [P]readolescents are like actors as they experiment with different features of their newly forming identities and try on different social ‘masks.’”³⁶ This overt sexualization of girls may lead to damaging psychological consequences. “[P]erhaps the most insidious consequence of self-objectification is that it fragments consciousness. Chronic attention to physical appearance leaves fewer cognitive resources available for other mental and physical activities.”³⁷ The harm is not confined to girls and women, but also extends to men and boys. “If girls and women are seen exclusively as sexual beings rather than as complicated people with many interests, talents, and identities, boys and men may have difficulty relating to them on any other level, other than sexual.”³⁸

Given the foregoing research, sexting can be viewed as an outgrowth of society’s overt sexualization of girls and women. The majority of reported sexting incidents involve the self-creation or consensual creation of sexual photos by teenage women and the further dissemination of them. The self-creation of sexualized photos by teens may be characterized as part of the adolescent identity formation process. Nevertheless, sexting has potentially negative consequences. Leigh Goldstein suggests that we, as adults, are complicit in the creation of a

34. American Psychological Association, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS (2007), <http://www.apa.org/pi/women/programs/girls/report-full.pdf> (last visited July 15, 2009)

35. *Id.* at 17.

36. *Id.* at 21.

37. *Id.* at 22.

38. *Id.* at 29. Thus, this early sexualization of girls harms both genders.

construct of childhood innocence that places children at risk.³⁹ She notes, “[t]he silencing of minors’ sexual desires and subjectivity encourages children in general to be ashamed of and/or deny aspects of their identities. . . . Due to our current legislation and recent legal history, it is virtually impossible to hear a child’s voice on the subject of sexuality. . . . By making a minor’s sexual body into what must not be seen and her voice into what cannot be heard, we have . . . made children into the ultimate objects of desire. In effect, [commercial society is] fostering the very audience or ‘market,’ that child pornography laws and legislation seek to eliminate.”⁴⁰ The irony becomes apparent: adults, through marketing of clothing and other consumer goods, television content, advertising,⁴¹ magazines and music videos aimed at teens, sexualize children, particularly females. When children recreate or model the sexualized conduct, they are branded felons and pornographers under our existing child pornography laws. Thus, the evolving sexual identity of adolescents is both suppressed and criminalized. Until society moves beyond the sexual objectification of the youthful female body,⁴² reform is needed to address the draconian⁴³ legal consequences of teen sexting viewed as child pornography.

II. TEEN SEXTING RELATIVE TO THE COGNITIVE DEVELOPMENT OF TEENS

A review of the literature dealing with juvenile cognitive, psychosocial and organic brain development demonstrates the need to

39. Leigh Goldstein, *Documenting and Denial: Discourses of Sexual Self-exploitation*, 51 JUMP CUT: A REVIEW OF CONTEMPORARY MEDIA, Spring 2009 <http://www.ejumpcut.org/currentissue/goldstein/text.html> (last visited July 12, 2009).

40. *Id.*

41. See, e.g., Anne Cunningham, *Calvin Klein Unzipped: A Look at the Morality of Selling Teen Sexuality*, <https://ls2.cmich.edu/cgi-bin/wa?A3=ind9612&L=AEJMC&E=0&P=2201187&B=—&T=text%2Fplain> (last visited July 12, 2009).

42. See, e.g., Catherine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U.L. REV. 793, 799-803 (1991); but see Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, Et al. in American Booksellers Association v. Hudnut*, 21 U. MICH. J. L. REF. 69, 125-131 (1987-1988). Some scholars have argued that pornography has a negative effect on male sexuality. See, e.g., Harry Brod, *Pornography and the Alienation of Male Sexuality*, in RETHINKING MASCULINITY: PHILOSOPHICAL EXPLORATIONS IN LIGHT OF FEMINISM, 237, 241 (Larry May, Robert A. Strikwerda & Patrick D. Hopkins eds., Rowman & Littlefield 2d ed. 1996) (1992).

43. If minors are tried as adults for child pornography crimes, they face some of the most severe consequences under the applicable federal sentencing guidelines because each illegal image is considered a separate charge. For example, in *United States v. McElroy*, 353 Fed. Appx. 191 (11th Cir. 2009), the defendant unsuccessfully appealed his 20 year sentence following his guilty plea in response to two counts of receiving child pornography in violation of federal law.

consider developmental stages in drafting a particularized teen sexting law. Teens are not children, nor are they adults. They inhabit a shadow world, many hours of it spent online. Teens caught in this indeterminate world between childhood and adulthood face added uncertainties. It is often difficult to predict the legal standard a civil court will apply to resolve disputes involving minors.⁴⁴ Likewise, the criminal justice system is inconsistent in its application of the criminal law to juveniles.⁴⁵ Historically, the juvenile justice system was created to rehabilitate minors who committed crimes.⁴⁶ In response to the rise in crime rates committed by minors, many states introduced statutes requiring minors to be tried as adults for violent crimes.⁴⁷ The role and goals of the juvenile justice system continue to evolve. Nevertheless, the initial justification for the juvenile justice system remains constant: teens are in the process of maturing, but have not yet attained adulthood.

Teens are engaged in important developmental tasks. They are separating from parents, creating an independent sense of self through school, activities, work and peer interaction and learning to make sound decisions independently.⁴⁸ Adolescence is a time when maturation of the limbic system outpaces frontal lobe development.⁴⁹ Thus, puberty is accompanied by “a proliferation of receptors for dopamine”⁵⁰ which may explain the increase in risky behaviors, including unsafe sex,⁵¹ as teens pursue their hormone driven search to experience pleasure and social bonding.⁵² In terms of cognitive understanding, while teens approach adults in terms of understanding and reasoning, they do not process information as quickly as do adults and may be less capable of making real-time, reasoned decisions.⁵³ They are less able to evaluate risks and rewards and are less able to accurately weigh long-term and short-term consequences.⁵⁴ The psycho-social differences between adults and adolescents are even more pronounced. Teens are more susceptible to peer pressure, more oriented to peers generally, more prone to risky behavior and less able to self-regulate than their adult counterparts.⁵⁵

44. ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 80 (2008).

45. *Id.* at 96-99.

46. *Id.* at 85-88.

47. *Id.* at 96-99.

48. *Id.* at 58.

49. *Id.* at 48.

50. *Id.*

51. *Id.* at 51.

52. *Id.* at 48-49.

53. *Id.* at 36.

54. *Id.* at 54.

55. *Id.* at 38-43.

These differences have recently been linked to the biological development of the adolescent brain. With respect to conduct that requires the teen to consider long-term and short-term consequences of risky conduct, teens are likely to discount the long-term risks and give disproportionate weight to the short-term advantages because the executive function located in the frontal lobe has not been fully formed.⁵⁶ Additionally, teens are also hostage to an evolving limbic system which craves the chemicals associated with strong feelings, such as anger or elation.⁵⁷ Thus, teens are subject to impulsive behavior and radical mood swings.⁵⁸ The most severe swings occur upon the onset of puberty, as the brain regulates the production of dopamine, the source of the pleasure sensation and oxytocin, the chemical associated with social bonding.⁵⁹ During this stage of tremendous brain maturation, the teen reaches sexual maturity and is expected to begin the process of separating from parents and becoming independent.⁶⁰ In many instances, the teen's peer group replaces the family as the teen's source of amusement, self-worth and guidance.⁶¹

Based on these developmental differences, it is no wonder that between 39%⁶² and 65.5%⁶³ of U.S. teens are sexting. Teens do not evaluate risks and benefits of risky conduct as quickly as adults.⁶⁴ Thus, the send button beckons and impulsivity takes over.⁶⁵ When asked to identify reasons to send or post sexy messages or pictures of themselves on line, the teens responded:⁶⁶

| Female Response | Reasons Chosen | Male Response |
|-----------------|---|---------------|
| 44% | In response to such content ⁶⁷ | 44% |
| 66% | To be fun and flirtatious ⁶⁸ | 60% |

56. *Id.* at 44.

57. *Id.* at 48.

58. *Id.* at 43.

59. *Id.* at 48.

60. *Id.* at 34.

61. *Id.* *But see*, Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 116-17 (2009) (“[T]he range of neuroscientific arguments before the courts—state and federal, juvenile and criminal—is both wide and deep. Their impact, however, has been shallow.”).

62. Lowen, *supra* note 30, at 1.

63. Lipkins, Levy & Jerabkova, *supra* note 31.

64. Scott & Steinberg, *supra* note 44, at 37.

65. *Id.* at 47.

66. Lowen, *supra* note 30, at 9.

67. *Id.* at 4. Each participant in the survey could select more than one reason from the listed options.

68. *Id.*

When asked about the reasons to be concerned about sending sexy messages or pictures, more than half failed to identify getting in legal trouble as a concern.⁶⁹ These statistics reveal the ingredients of a perfect storm. It should come as no surprise that teens, with immature executive decision making powers, under the influence of naturally occurring chemical mood swings, are engaging in impulsive teen sexting conduct, designed to achieve short term and immediate gratification, without considering long term consequences. Teen sexting provides one more way for teens to individuate from family, gain peer approval and explore their sexuality. Thus, teens ignore or undervalue the long-term psychological and legal consequences of sexting. Because 56% of those sexting do not perceive the conduct as illegal, the potential risk of legal prosecution is absolutely irrelevant to their decision-making process.⁷⁰ With respect to the minority of teens who recognized that there might be negative legal consequences associated with sexting, it is highly unlikely that these teens would define sexting as a form of child pornography, triggering felony criminal sanctions and sexual offender registration. Therefore, the following pressing question arises: how should prosecutors and state legislators respond to teen sexting?

III. FEDERAL CHILD PORNOGRAPHY LAW AND TEEN SEXTING

While the First Amendment guarantees freedom of speech, not all speech is of equal societal value. In *Roth v. United States*,⁷¹ the Court recognized the adult's right to possess pornography so long as it was not obscene. In *Miller v. California*,⁷² the Supreme Court identified the controlling definition of obscenity, recognizing that not all pornography constitutes obscenity.⁷³ In an attempt to stamp out child pornography, the Court recognized in *New York v. Ferber*,⁷⁴ the ability of the states to enact legislation to protect the welfare of minors and, in furtherance of this interest, to outlaw depictions of minors which portray sexual acts,

69. *Id.* at 14. Only 46% of teens surveyed recognized that sexting might result in legal prosecution. *Id.*

70. *Id.* at 14.

71. *Roth v. United States*, 354 U.S. 476, 484-85 (1957).

72. *Miller v. California*, 413 U.S. 15, 24 (1973). In *Miller*, the Supreme Court introduced the following definition of obscenity:

- (a) The average person, applying contemporary community standards, finds that the work, taken as a whole, appeals to 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.

73. *Id.* at 26.

74. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982).

even if the images did not satisfy the definition of obscenity.⁷⁵ In reaching its decision, the *Ferber* Court relied heavily upon the legislative judgment that using children in pornography harms them in a number of ways: it interferes with a child's ability to form healthy attachments later in life;⁷⁶ it is an intrinsic form of child abuse;⁷⁷ it is a permanent record of the abuse and continues the harm to the child through distribution.⁷⁸ Given this evidence of immediate and ongoing harm to children used in the production of child pornography, the *Ferber* Court recognized a state's right to reject the *Miller* obscenity test as too narrow⁷⁹ and set out to craft a specific standard under which to analyze the constitutionality of state child pornography laws. The *Ferber* court noted, "[a]s with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or as authoritatively construed."⁸⁰

Thus, the *Ferber* Court created, in addition to the *Miller* obscenity exception, the child pornography exception, another category of speech falling outside of the protections afforded by the First Amendment.⁸¹ Nevertheless, legislation prohibiting child pornography must satisfy some constitutional standards. "Here the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of 'sexual conduct' proscribed must also be suitably limited and described."⁸²

The court continued to clarify its holding in relationship to the *Miller* obscenity standard,

The *Miller* formula is adjusted in the following respects: [a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that the sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. . . . As with obscenity

75. *Id.* The court adjusted the *Miller* formulation in the following manner, "[a] trier of fact need not find that the material appeals to the prurient interest of the average person, it is not required that sexual conduct portrayed be done so in a patently offensive manner and the material at issue need not be considered as a whole." *Id.* at 764.

76. *Id.* at 758.

77. *Id.* at 759.

78. *Id.*

79. *Id.*

80. *Id.* at 764.

81. *Id.*

82. *Id.*

laws, criminal responsibility may not be imposed without the element of scienter⁸³ on the part of the defendant.⁸⁴

Somewhat cryptically, the court noted that “the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retain First Amendment protection.”⁸⁵ This exception seems to accord First Amendment protection to written works.

Following *Ferber*, state and federal lawmakers passed legislation prohibiting the creation, possession and distribution of child pornography. In 1996, Congress passed The Child Pornography Protection Act.⁸⁶ This statute banned not only the use of live children in pornography, but also computer generated images.⁸⁷ This portion of the law was struck down by the US Supreme Court in 2002.⁸⁸ Next, Congress passed The Prosecutorial and Other Remedies to End the Exploitation of Children Today Act⁸⁹ in 2003. This act introduced a new pandering and solicitation law and survived constitutional review by the Supreme Court in 2008.⁹⁰

Only child pornography that satisfies the definition of obscenity is prohibited under the federal statute.⁹¹ In addition to the federal statutes

83. The element of mens rea in child pornography cases requires intentional conduct with respect to each element of the crime. See Note, *Child Pornography, the Internet and the Challenge of Updating Statutory Terms*, 122 HARV. L. REV. 2206, 2209-10 (2009). It seems far from clear that teens engaging in sexting satisfy the requisite mens rea element to qualify as child pornographers.

84. *Ferber*, 458 U.S. at 764-65.

85. *Id.*

86. The Child Pornography Protection Act, Pub. L. 104-208, *partially invalidated by* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

87. 18 U.S.C. § 2256 (1978) prohibited “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture,” that “is, or appears to be, of a minor engaging in sexually explicit conduct,” and any sexually explicit image that is “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” it depicts “a minor engaging in sexually explicit conduct. . . .” *Id.*

88. *Free Speech Coalition*, 535 U.S. 234. The *Free Speech Coalition* court held:

Thus, the CPPA does more than prohibit pandering. It bans possession of material pandered as child pornography by someone earlier in the distribution chain, as well as a sexually explicit film that contains no youthful actors but has been packaged to suggest a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled. The First Amendment requires a more precise restriction.

Id. at 234.

89. 18 U.S.C. § 2252 (2003).

90. *U.S. v. Williams*, 553 U.S. 285 (2008).

91. *Id.* at 293-94.

described above, Congress also passed the Adam Walsh Act (AWA).⁹² The first title of this act is referred to as SORNA.⁹³ It creates a national sex offender registry and seeks to eliminate differences in state sexual offender registration laws, in order to implement a uniform national standard.⁹⁴ The statute requires mandatory sex offender registration if the convicted defendant is over the age of 14.⁹⁵ Today, every state has a statute criminalizing the creation, possession and distribution of child pornography⁹⁶ and federal law mandates state enforced sexual offender registration.⁹⁷ As a result, teens engaged in sexting may be charged under child pornography laws and become subject to federally mandated sex offender registration rules.

Given the broad directive of *Ferber*, requiring that the prohibited conduct be adequately defined, the specific definition of child pornography differs from state to state. Many states include in the

92. 42 U.S.C. § 16911 (2009) (“Adam Walsh Act”).

93. The first subchapter of the AWA is entitled the Sex Offender Registration and Notification Act (“SORNA”). 42 U.S.C. § 16913 (2009). Some commentators have questioned the constitutionality and wisdom of AWA. See, e.g., Anne Marie Atkinson, *The Sex Offender Registration Act (SORNA): An Unconstitutional Infringement of States’ Rights Under the Commerce Clause*, 3 CHARLESTON L. REV. 573 (2009); Steven J. Costigliacci, *Protecting our Children From Sex Offenders: Have We Gone Too Far?*, 46 FAM. CT. REV. 180 (2008).

94. See, e.g., Jacob Frumkin, *Perennial Punishment? Why the Sex Offender Registration and Notification Act Needs Reconsideration*, 17 J. L. & POL’Y 313 (2008). Frumkin states:

AWA sets forth harsh penalties for a sex offender who simply fails to register as required by SORNA. First, a conviction for failing to register can result in a statutory maximum of ten years in prison. Theoretically, a judge can now sentence an offender to a longer term for failure to register than the term a sex offender served for the sex crime itself. Second, for every “change of name, residence, employment, or student status,” a sex offender has only three business days to update his or her registration. The pre-existing federal misdemeanor penalty for failure to register as a sex offender allowed for a markedly longer duration: ten business days. Third, a sex offender must continue to register for at least fifteen years, even for low-level (Tier I) sex offenses requiring less than a year in jail. Depending on a sex offender’s classification as set forth in SORNA, he or she must verify the registration and provide, among other things, a current photograph, DNA sample, and fingerprints at least once a year (and as much as three times a year for Tier III offenders). Fourth, AWA significantly broadens the quantity of required registration information beyond preexisting statutes. Finally, the scheme allows for optional exemptions that each state may choose to adopt. The difficulty of knowing how to address these additional requirements all but ensures registration violations for offenders unfamiliar with the framework of a state where he or she moves, works, or attends school.

Id. at 318-20.

95. *Id.* at 345.

96. See 50 State Statutory Surveys, *supra* note 13.

97. See 42 U.S.C. §§ 14071-14072 (2009). States are required to adopt minimum sex offender registry standards in order to receive federal law enforcement funding. *Id.*

definition of child pornography “the exhibition of breasts, as well as genitals.”⁹⁸ Some states prohibit the creation, possession and distribution of “sexually suggestive images of minors,” thus eliminating the nude or partially nude requirement.⁹⁹ Clearly, images depicting sexual conduct by a child may fall far short of the local definition of obscenity.

As demonstrated by the wave of teen prosecutions across the country,¹⁰⁰ teen sexting conduct often falls within the definition of state child pornography law and exposes teens to criminal prosecution, imprisonment, fines and mandatory sexual offender registration. Given these harsh and unanticipated results when teens are prosecuted under child pornography laws, courts and legislatures are struggling to find an appropriate and measured legal response. Any such response should recognize the expanding zone of teen constitutional rights as they approach adulthood.

IV. STATE COURTS AND LEGISLATURES RESPOND TO TEEN SEXTING

The first part of this section reviews the case law addressing teen sexting. The second part of this section surveys state legislative responses to teen sexting. A review of the existing case law demonstrates that teens have indeed faced child pornography charges, suffered conviction and have been required to register as sex offenders. A review of the legislation in response to the reality of teen sexting reveals a tendency to treat all teen sexting as a criminal misdemeanor or felony, without considering the infirmities of this response.

A. *State Cases*

State courts across the country have been faced with the dilemma of whether the broad language of child pornography laws encompasses teen sexting conduct. Teens and their parents have been shocked to discover that child pornography laws are broad enough to encompass this conduct.

98. For example many states have adopted a legal standard which affords to courts and prosecutors broad discretion in categorizing an image of a minor as pornographic. *See, e.g.*, 720 ILL. COMP. STAT. 5/11- 20.1(a)(1)(vii) (Supp. 2009) (“depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed or transparently clothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast of the child or other person”); OKLA. ST. ANN. TIT. 21, § 1024.1 (West 2002) (visual depictions “where the lewd exhibition of the uncovered genitals has the purpose of sexual stimulation of the viewer, and defining forbidden sexual conduct to include acts of exhibiting human genitals or pubic areas”).

99. WIS. STAT. ANN. § 948.01(7)(e) (West 2008) (“visual depictions of sexually explicit conduct including the lewd exhibition of intimate parts”).

100. *See infra* text accompanying notes 101-65.

For example, last year, the parents of three teenage women sued the District Attorney of Wyoming County, Pennsylvania in relationship to his threat to charge the three women as accomplices in the production of child pornography in relationship to sexting.¹⁰¹ In October, 2008, the school district confiscated several student cell phones containing pictures of nude or semi-nude female students.¹⁰² The school turned the photos over to the district attorney, who initiated a criminal investigation.¹⁰³ The district attorney believed that not only the teens' possession of nude or semi-nude photos of minors, but also those teens that were pictured, were violating Pennsylvania's child pornography law.¹⁰⁴ He asserted that the teens' conduct constituted a felony and could result in long prison terms, a permanent record and sex offender registration rules.¹⁰⁵

In February 2009, the district attorney sent letters to approximately 20 students. The teens with pictures on their phones were all men. The teens pictured were all women.¹⁰⁶ The prosecutor did not send letters to the disseminators.¹⁰⁷ The photos in question were taken between one and two years before the images were confiscated and charges were filed.¹⁰⁸ The parents of the teen girls pictured argued that although the girls were nude or semi-nude in the pictures, the pictures did not depict sexual conduct of a child and were in no way sexually provocative.¹⁰⁹ The letters indicated that the teens had been identified in a police investigation involving the disposition of child pornography and that the charges would be dropped if the child successfully completed a six to nine month program focused on education and counseling.¹¹⁰

Three of the girls and their parents filed a Section 1983 action alleging that the charges constituted improper retaliation for the exercise of the First Amendment right to free expression and to be free from compelled state speech.¹¹¹ The parents also claimed that the district attorney's conduct violated the parents' Fourteenth Amendment right to

101. *Miller v. Skumanick*, 605 F. Supp.2d 634, 640 (2009).

102. *Id.* at 637.

103. *Id.*

104. *Id.* at 637-38. The teens were charged pursuant to 18 PA. CONST. STAT. ANN. § 6312 (West 2008) which prohibits the dissemination of material depicting a minor engaged in prohibited sexual acts.

105. *Id.*

106. *Id.* at 640.

107. *Id.* at 638.

108. *Id.* at 639.

109. *Id.*

110. *Id.* at 638.

111. *Id.* at 640. The parents identified the essay regarding "Why what I did was wrong," a part of the prosecution's deal to avoid adult prosecution, as unconstitutional forced speech.

control the upbringing of their children and requested injunctive relief.¹¹² The court took testimony and heard argument regarding the merits and entered a temporary restraining order barring the district attorney from charging the teen women until further order of the court.¹¹³

The court ruled that the temporary restraining order was warranted because the parents had established the likelihood of success of the merits, irreparable harm, the balance of hardships favored injunction and public policy favored entry of the temporary restraining order.¹¹⁴ In reaching this conclusion, the court found that the parents and the children had asserted constitutionally protected rights and had satisfied the temporary restraining order burden.¹¹⁵ The court recognized both the parental right to family privacy and the teens' right to be free from compelled speech as constitutionally protected interests.¹¹⁶ The threat of criminal charges constituted the type of "retaliatory conduct sufficient to deter a person of ordinary firmness from exercising his First Amendment Rights."¹¹⁷

On March 17, 2010, the Third Circuit upheld the district court order.¹¹⁸ By the date of oral argument, then District Attorney Skumanik had decided to drop the charges against the two teenage girls who were pictured in bras and to proceed against only the teen who appeared topless in a towel, as if emerging from the shower.¹¹⁹ The Third Circuit panel determined that:

In sum, absent an injunction, the Does would have to choose either to assert their constitutional rights and face a prosecution of Nancy Doe based not on probable cause but as punishment for exercising their constitutional rights, or forgo those rights and avoid prosecution. On the facts before us, this Hobson's Choice is unconstitutional. While "the Government retains broad discretion as to whom to prosecute," "the decision to prosecute may not be deliberately based on . . . arbitrary classification, including the exercise of protected statutory and constitutional rights." (Citations omitted).¹²⁰

The Third Circuit focused on the absence of probable cause to charge Nancy Doe with the crime of child abuse. Even assuming the photo

112. *Id.*

113. *Id.* at 647.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* The court adopted the plaintiff's characterization of the plea deal as retaliatory conduct sufficient to state a § 1983 claim.

118. *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

119. *Id.* at 146-7.

120. *Id.* at 155.

constituted a ‘prohibited sexual act,’ there was no evidence that Nancy Doe possessed or distributed the photo. Thus, the defendants had successfully alleged and proved the absence of probable cause, a required element of their retaliatory prosecution claim.¹²¹ On April 30, 2010, the district court entered a permanent injunction barring the prosecution of the defendants on charges related to the two photos.¹²²

Other reported teen sexting prosecutions did not result in federal charges against the prosecutors. In 2007, the Florida Court of Appeals upheld the adjudication of a teen-age woman as delinquent for “producing, directing or promoting a photograph or representation of sexual conduct of a child.”¹²³ In this case, A.H. was 16 and her boyfriend 17 when they took digital pictures of themselves engaged in sex and emailed the pictures from A.H.’s house to her boyfriend’s home computer.¹²⁴ The pictures were never shown to any third-parties. Both were charged as juveniles for violating Florida Statute 827.071(3), setting forth Florida’s child pornography law.¹²⁵ A.H. challenged the statute as unconstitutional because it implicated her privacy rights and was not sufficiently narrowly tailored. The trial court rejected A.H.’s claim. A.H. entered a nolo contendere plea and was placed on probation. A.H. preserved the issue of the constitutionality of the Florida statute as applied and appealed.

A.H. argued that given the fact that she and her boyfriend were both minors and the photos were not published, the only remaining compelling state interest to justify state intrusion into matters of intimate association was to prevent the teens from engaging in sex “until their minds and bodies had matured.”¹²⁶ A.H. argued this directly violated her right to privacy established in *B.B. v. State*,¹²⁷ establishing a minor’s right to have sexual intercourse.¹²⁸ She reasoned that if teens have the right to have sex, they have the right to memorialize it through photos.¹²⁹

121. *Id.* at 154.

122. *Miller v. Mitchell*, No. 3:09cv540, 2010 WL 1779925 (M.D. Pa. Apr. 30, 2010).

123. *A.H. v. State*, 949 So.2d 234 (Fl. Dist. Ct. App. 2007).

124. *Id.* at 235.

125. *Id.* at 236. Florida Statute § 827.071 provides in relevant part:

(3) A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a child less than eighteen years of age. Whoever violates this subsection is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

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

127. *BB. v. State*, 659 So.2d 256 (Fla. 1995).

128. *Id.*

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

The Florida Court of Appeals rejected this argument reasoning that the Florida right to privacy did not encompass any reasonable expectation of privacy concerning nude photos.¹³⁰ The snap of a photo evidences intent to keep a record.¹³¹ The court reasoned that, by taking the photos and sharing the photos between themselves, neither teen had a reasonable expectation of privacy; therefore, it was unreasonable to expect that others would not share the photos with other third parties.¹³² The court's ruling seems driven by facts not of record and based upon the view that teens, driven by "profit motives, bragging rights or upon the termination of the relationship," will disseminate the photos to the public.¹³³

Even assuming the existence of a protected teen privacy interest, the Florida court reasoned that the state's interest in preventing publication of photos depicting sexual conduct by a child constituted a compelling state interest.¹³⁴ Section 827.071 does not include age distinctions, but rather prohibits the sexual exploitation of minors by anyone.¹³⁵ The court further noted that the state's interest is not limited to the dissemination of such material, but includes its very production according to the court to protect minors from their immature judgment.¹³⁶ Lack of publication of the photos was irrelevant to the determination. The court deemed the defendant, "too young to make an intelligent decision about engaging in sexual conduct and memorializing it."¹³⁷ Thus, the court of appeals affirmed the trial court's adjudication.

In dissent, Justice Padovano objected to the majority's reliance upon § 827.071 to punish the minor defendant, since the law was actually designed to protect this defendant.¹³⁸ Justice Padovano was unable to reconcile the Florida Supreme Court's ruling recognizing that the right to privacy in the Florida Constitution extended to minors and rendered unconstitutional a statute prohibiting carnal intercourse between minors¹³⁹ with the ruling of the majority.¹⁴⁰

Absent evidence showing the parties intended to publicize the photos, Judge Padovano ruled that if Article I, Sec. 17 of the Florida Constitution privacy provision encompasses a minor's right to engage in

130. *Id.* at 237.

131. *Id.*

132. *Id.*

133. *Id.* at 237.

134. *Id.* at 238.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 239.

139. *Id.*

140. *Id.*

sex, it must likewise protect the minor's right to take a picture of herself having sex.¹⁴¹ Judge Padovano distinguished *ARS* on the basis that the young defendant had shared the videotape with a third-party, thus undermining the teen's privacy claim.¹⁴² Judge Padovano concluded, "I believe the court has committed a serious error. The statute at issue was designed to protect children, but in this case the court has allowed the state to use it against a child in a way that criminalizes conduct that is protected by constitutional right of privacy."¹⁴³

In addition to courts in Pennsylvania and Florida, Washington courts have also faced the issue of teen sexting in the more familiar form of photographs. In 2005, the Washington court of appeals upheld the trial court's conviction of Anthony Vezzoni.¹⁴⁴ The defendant, while he was 16, dated T.N., who was then also 16, for four months in 2002. Ultimately, Anthony and T.N. had sex in September.¹⁴⁵ Thereafter, on the same day, Anthony took nude photos of T.N. with her permission.¹⁴⁶ One week later, the couple broke up. In January of the next year, Anthony, developed the film and took the pictures to school where he showed them to several classmates.¹⁴⁷

Anthony was tried as an adult.¹⁴⁸ Following a bench trial Anthony was convicted of possession of and dealing in the depictions of a minor engaged in sexually explicit conduct under RCW9.68A.070.¹⁴⁹ He appealed his conviction, arguing that the statute was unconstitutional because it violated his privacy rights under the federal and state constitutions.¹⁵⁰ He argued that his privacy right encompassed the right to take the photos of T.N. with her permission.¹⁵¹

The court characterized the state's interest in protecting children from sexual exploitation as sufficiently compelling to prohibit the possession of child pornography.¹⁵² The court relied upon the Washington precedent of *State v. D.H.*, in which the 15-year-old defendant videotaped the breasts and buttocks of three classmates, one of

141. *Id.*

142. *Id.* at 240.

143. *Id.* at 241.

144. *State v. Vezzoni*, No. 22361-2-III, 2005 WL 980588 (Wash. App. Div. Apr. 28, 2005).

145. *Id.* at *1.

146. *Id.*

147. *Id.*

148. *Id.*

149. Prior to amendment, the Washington statute provided: "A person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a class B felony." WASH REV. CODE. § 9.68A.070 (2010).

150. *Vezzoni*, 2005 WL 980588 at *1.

151. *Id.*

152. *Id.* at *2.

whom he followed until she complied.¹⁵³ He then showed the videotape to several other classmates.¹⁵⁴ He was charged with sexual exploitation of a minor and convicted.¹⁵⁵ He argued that the statute was intended to apply to adults, not minors; however, neither the trial court nor the appellate court was persuaded by this argument because the statute was unambiguous.¹⁵⁶ Thus, based upon the holding in *State v. D.H.*, the court rejected Anthony's argument on appeal and upheld the conviction under the sexual exploitation of a minor statute.¹⁵⁷

Anthony also challenged the constitutionality of the statute because the category of banned speech in the statute was not sufficiently narrow because it lacked the word lewd and, further, it lacked a scienter element.¹⁵⁸ The court ruled that the pictures of minors need not be lewd, but merely sexually stimulating, a fair inference from the photos in question.¹⁵⁹ The court summarily rejected the defendant's scienter arguments.¹⁶⁰

There are striking similarities and important differences in the facts underlying the decisions in the Pennsylvania, Florida and Washington cases. In all three principal cases discussed above, the minors were threatened with prosecution under or were adjudicated or convicted under state child pornography laws. In all three cases, the prosecuted minors were between the ages of 16 and 17.¹⁶¹ In all three cases, the images in question were created with the permission of the individuals depicted who were between the ages of 13-17.¹⁶² Finally, none of the images were obscene.¹⁶³ In the Pennsylvania and Washington cases, the images were shared with classmates without the prior consent of those pictured,¹⁶⁴ while in the Florida case the pictures were merely uploaded to a computer with the consent of the minors pictured and never further published.¹⁶⁵

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at *3

159. *Id.*

160. *Id.* at *4.

161. *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009), *aff'd* by *Miller v. Mitchell*, 2010 U.S. App. LEXIS 5501 (3d Cir. 2010) (mem.); *A.H. v. State*, 949 So.2d 234, 235 (Fl. Dist. Ct. App. 2007); *Vezzoni*, 2005 WL 980588 at *1.

162. *Skumanick*, 605 F. Supp. 2d at 639; *A.H.*, 949 So.2d at 235; *Vezzoni*, 2005 WL 980588 at *1.

163. *Skumanick*, 605 F. Supp. 2d at 639; *A.H.*, 949 So.2d at 236; *Vezzoni*, 2005 WL 980588 at *2.

164. *Skumanick*, 605 F. Supp. 2d at 639; *Vezzoni*, 2005 WL 980588 at *1.

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

The most important factual difference among the three cases was the extent of publication. In the Florida case, the images were loaded onto two home computers, but not further published.¹⁶⁶ In the Pennsylvania case, the three teen women had not consented to the publication of the images to fellow classmates and, were in fact, victimized by the non-permissive publication.¹⁶⁷ In the Washington case, dissemination among fellow classmates occurred after the teens had broken up and without the permission of the individual pictured.¹⁶⁸ Because permission to take and intent to protect as private teen sexting images are not elements under the child pornography laws of the applicable states, the courts did not consider these two factors, arguably the most relevant factors in every teen sexting case.

In addition to ignoring relevant and determinative factual differences, the prosecutors also failed to consider whether the policy underlying the child pornography law would be furthered by prosecuting the teens. The *Ferber* court, as previously noted, identified the following three public policy interests in support of modifying the *Miller* formula to include child pornography: 1) It interferes with a child's ability to form healthy attachments later in life;¹⁶⁹ 2) It is an intrinsic form of child abuse;¹⁷⁰ and 3) It is a permanent record of the abuse and continues the harm to the child through distribution.¹⁷¹

A review of the foregoing cases tried in Pennsylvania, Florida and Washington demonstrates that the policy goals underlying the state child pornography laws are not even implicated, much less advanced, by charging teens in these cases. With respect to the first element, absent evidence of psychological trauma associated with the depictions or publications at issue, there is no reason to conclude that sexting interferes with a teen's ability to form healthy attachments later in life.¹⁷² Similarly, absent evidence of fraud, misrepresentation or duress, in matters where the image was self-taken or voluntarily and consensually created, there is no evidence that creating the image is an intrinsic form of child abuse.¹⁷³ Additionally, absent nonconsensual impermissible publication, there is no evidence that the permanent record continues the harm to the child through distribution.¹⁷⁴ Finally, the age differential between the individual capturing the image and the minor pictured in

166. *Id.*

167. *Skumanick*, 605 F. Supp. 2d at 644.

168. *Vezzoni*, 2005 WL 980588 at *1.

169. *New York v. Ferber*, 458 U.S. 747, 758 (1982).

170. *Id.* at 759.

171. *Id.*

172. *Id.* at 758.

173. *Id.* at 759.

174. *Id.*

most child pornography cases is absent in teen sexting cases, thus the element of sexual predation is also missing. Thus, it seems highly unlikely that legislators intended to capture teen sexters within the class of child pornographers and legislative reform is due.

The poor fit between the legislative intent underlying child pornography law and teen sexting conduct is also evidenced in the recent Iowa Supreme Court decision in *State v. Canal*.¹⁷⁵ In 2006, an Iowa jury convicted an eighteen-year-old high school senior under the state child pornography statute prohibiting “knowingly disseminating obscene material to a minor,”¹⁷⁶ sentenced the teen to one-year probation, a \$250 fine and required him to register as a sex offender.¹⁷⁷ In *Canal*, upon the request of his 14-year-old high school friend, the senior sent an electronic photo of his nude erect penis to her, along with a picture of his face and the words, “I love you.”¹⁷⁸ The jury conviction was recently affirmed on appeal.¹⁷⁹ The Iowa Supreme Court upheld the jury determination that the photo of defendant’s nude penis was obscene.¹⁸⁰ The jury instructions adopted the *Miller* community standard language further modified by the fact that the photo was distributed to a minor.¹⁸¹ The jury instructions defined obscene material as

any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sadomasochistic abuse which the average person, taking the material as a whole *and applying contemporary community standards with respect to what is suitable material for minors*, would find appeals to the prurient interest and is

175. *State v. Canal*, 773 N.W.2d 528, 528 (2009).

176. Under Iowa law:

[a]ny person, other than the parent or guardian of the minor, who knowingly disseminates or exhibits obscene material to a minor, including the exhibition of obscene material so that it can be observed by a minor on or off the premises where it is displayed, is guilty of a public offense and shall upon conviction be guilty of a serious misdemeanor.

IOWA CODE ANN. § 728.2 (West 2006). Obscene material in relationship to the dissemination to minors law is defined as:

“Obscene material” is any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sadomasochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable material for minors, would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political or artistic value.

IOWA CODE ANN. § 728.1 (West 2006).

177. *Canal*, 773 N.W.2d at 529-30.

178. *Id.*

179. *Id.* at 532.

180. *Id.*

181. *Id.* at 530-31.

patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political, or artistic value.¹⁸²

Thus, while constituting “mere nudity”¹⁸³ under the adult standard, given the “suitable material for minors” standard, the e-mailed photo was deemed obscene. By adhering to the statute designed to encompass and punish adult pedophilia, the court ignored many important facts. The image was self-created by a male minor, at the request of a female minor, three years his junior, was not further published, and was not sent with any desire to harm or embarrass the recipient. Thus, tried as an adult, Jorge Canal, a high school senior, paid a heavy price for what some might describe as a youthful indiscretion.¹⁸⁴

B. State Legislative Responses

In response to the prosecution of teens for sexting under the existing child pornography laws, some states have already begun the process of statutory reformation to address teen sexting. Three states, Utah, Nebraska and Vermont, have passed teen sexting reform when this article was finalized in May, 2010.

On March 31, 2009 Governor Gary R. Herbert signed Utah House Bill 14 into law.¹⁸⁵ The revision to Utah Code Section 76-10-1204 entitled, “Distributing Pornographic Material,” reduces the penalty related to possession and distribution of pornography¹⁸⁶ from a third degree felony¹⁸⁷ to a class A misdemeanor for minors aged 16 and 17 and

182. *Id.*

183. *Id.* at 533.

184. A similar price was paid by Phillip Alpert, *see infra*, notes 234-235 and accompanying text.

185. UTAH CODE ANN. § 76-10-1204 (2009) (formerly Utah H.B. 14), Materials Harmful to Minors Amendments 2009 General session *available at* <http://www.le.state.ut.us/~2009/bills/hbillint/HB0014.htm> (last visited on July 20, 2009). The bill, sponsored by Representative Sheryl Allen, modified Utah law to treat teen sexting as a misdemeanor.

186. Under Utah law:

Any material or performance is pornographic if:

- (a) The average person, applying contemporary community standards, finds that, taken as a whole, it appeals to prurient interest in sex;
- (b) It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sadomasochistic abuse, or excretion; and
- (c) Taken as a whole it does not have serious literary, artistic, political or scientific value.

UTAH CODE ANN § 76-10-1204 (2009). This definition tracks the definition of obscenity set forth in *Miller*.

187. A third degree felony is punishable by imprisonment up to five years. UTAH CODE ANN. § 76-10-1204 (2009). A class A misdemeanor is punishable by imprisonment not exceeding one year and a class B misdemeanor is punishable by imprisonment not exceeding six months. UTAH CODE ANN. § 76-3-204 (2009).

to a class B misdemeanor for minors under the age of 16.¹⁸⁸ The Utah statute adopts the *Miller* obscenity standard, and thus, arguably protects the depiction of non-obscene adolescent sex from prosecution under the Utah pornography statute.¹⁸⁹ Additionally, if the image is deemed pornographic, the legislature has recognized that teen conduct is less blameworthy than similar adult conduct. Thus, the penalty is reduced from a felony to misdemeanor.¹⁹⁰

On May 27, 2009, Nebraska's Governor Heineman signed an omnibus criminal bill that included revisions aimed at teen sexting.¹⁹¹ The Nebraska Child Pornography Prevention Act makes it "unlawful for a person to knowingly possess any visual depiction of sexually explicit conduct . . . which has a child . . . as one of its participants or portrayed observers."¹⁹² One of the amendments to this section treats adult violators more severely than minor violators.¹⁹³ Additionally, the

188. *Id.* (formerly Utah H.B. 14, Materials Harmful to Minors Amendments 2009 General session available at <http://www.leg.state.ut.us/~2009/bills/hbillint/HB0014.htm> (last visited on July 20, 2009)).

189. UTAH CODE ANN. § 76-3-204 (2009). It remains possible that teens might be prosecuted for sexting under different Utah statutes dealing with lewd or lascivious conduct. Thus, sexting teens remain potential targets of prosecution under the Utah statute.

190. Similarly, the Arizona Senate is considering Senate Bill 1266, which makes it a misdemeanor for a minor to "intentionally or knowingly use an electronic communication defense to transmit a visual depiction of a minor that depicts explicit sexual material." See National Conference of State Legislatures, *2010 Legislation Related to "Sexting"* (2010), <http://www.ncsl.org/default.aspx?TabId=19696>; South Carolina House Bill No. 4504, introduced on February 2, 2010, available at www.scstatehouse.gov/sess118_2009-2010/bills/4504.htm. Kentucky is also considering a teen sexting statute that defines the conduct as a misdemeanor, exempts the teen from adult prosecution and requires that the adjudication of delinquency be expunged when the teen attains the age of 18. National Conference of State Legislatures, *2010 Legislation Related to "Sexting"* (2010), <http://www.ncsl.org/default.aspx?TabId=19696>. Pennsylvania likewise has legislation pending to treat the act of teen sexting as a misdemeanor or alternatively a summary offense. See House Bill No 2189 and Senate Bill No 1121 available at National Conference of State Legislatures, *2010 Legislation Related to "Sexting"* (2010), <http://www.ncsl.org/default.aspx?TabId=19696>.

191. Nebraska Legislative Bill 97, approved by the Governor May 27, 2009, available at http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=6401 (last visited on July 15, 2009).

192. "Sexually explicit conduct" is defined as "(a) Real or simulated intercourse . . . ; (b) real or simulated masturbation; (c) real or simulated sadomasochistic abuse; (d) erotic fondling; [or] (e) erotic nudity. . . ." NEB. REV. STAT. § 28-1463.02 (2010). It is probable that most teen sexting falls into the category of erotic nudity.

193. According to NEB. REV. STAT. ANN. § 28-813(2), adults in violation of this section are guilty of a class III felony, while those under 19 are guilty of a class IV felony. NEB. REV. STAT. 28-813(2) (a)-(bb) (2010). A class IV felony is punishable by one to five years imprisonment and or a \$10,000 fine. A class IV felony has no minimum jail time and a maximum time of five years imprisonment and/or a fine of \$10,000. NEB. REV. STAT. § 28-303 (2010).

amendment creates an affirmative defense.¹⁹⁴ The Indiana House is currently considering legislation that provides a similar affirmative defense to minors.¹⁹⁵

The third and final state to have taken some legislative action is Vermont. On June 1, 2009, Governor James Douglas signed into law a comprehensive teen sexting law.¹⁹⁶ The Vermont legislation creates a new crime to prohibit teen sexting and exempts first time teen offenders from prosecution under Vermont Title 64, entitled Sexual Exploitation of Children.¹⁹⁷ The legislation creates a specific offense for juvenile sexting as follows:

(a)(1) No minor shall knowingly and voluntarily and without threat or coercion use a computer or electronic communication device to transmit an indecent visual depiction of himself or herself to another person.

194. NEB. REV. STAT. § 28-813.01(3)(a-b); *accord* Leg. 97, 1999 Leg., 101st Sess. (Neb. 1999), *available at* <http://nebraskalegislature.gov/FloorDocs/Current/PDF/Slip/LB97.pdf> (last visited on July 1, 2010). NEB. REV. STAT. § 28-813.01(3)(a-b) provides:

It shall be an affirmative defense to a charge made pursuant to this section that:

- (a) The visual depiction portrays no person other than the defendant; or
- (b) (i) The defendant was less than nineteen years of age;
- (ii) the visual depiction of sexually explicit conduct portrays a child who is fifteen years of age or older;
- (iii) the visual depiction was knowingly and voluntarily generated by the child depicted therein;
- (iv) the visual depiction was knowingly and voluntarily provided by the child depicted in the visual depiction;
- (v) the visual depiction contains only one child;
- (vi) 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; and
- (vii) the defendant did not coerce the child in the visual depiction to either create or send the visual depiction.

Under the Nebraska statute, the affirmative defense is available only to defendants under 19 years of age who can establish that the image is a self-image or the image is of one other individual who is 15 years of age or older, the image was knowingly and voluntarily provided by the individual pictured to the defendant, and that the defendant has not disseminated the image. Therefore, while some teen sexting conduct may qualify as an affirmative defense, if the image of the child was created by the defendant with the child's consent or the image contains more than one child, the affirmative defense is not available. Additionally, Nebraska teens that share images that fall within the broad definition of child pornography face conviction of a Class IV felony without regard to whether the legislature intended this consequence or whether the policy goals underlying the child pornography law are furthered.

195. H.R. 1115, 116th Gen. Assem., 2d Reg. Sess. (Ind. 2010), *available at* www.in.gov/legislative/bills/2010/IN/IN1115.1.html (last visited on July 2, 2010).

196. The act was signed on June 1, 2009 and became effective on July 2, 2009.

197. VT. STAT. ANN. tit.13, § 2802 (2010).

(2) No person shall possess a visual depiction transmitted to the person in violation of subdivision (1) of this subsection. It shall not be a violation of this subdivision if the person took reasonable steps, whether successful or not, to destroy or eliminate the visual depiction.¹⁹⁸

The penalties are expressly limited to juvenile court for first time offenders,¹⁹⁹ and the legislation envisions the creation of a diversion program.²⁰⁰ The statute expressly provides:

A minor who violates subsection (a) of this section and who has not previously been adjudicated in violation of that section shall not be prosecuted under chapter 64 of this title (Sexual Exploitation of Children), and shall not be subject to the requirements of subchapter 3 of chapter 167 of this title, entitled Sex Offender Registration.²⁰¹

The penalty excludes prosecution for sexual exploitation of a minor for first-time offenders, mandates juvenile court, and exempts the minor from the duty to register as a sex offender. However, should a minor reoffend, the minor may be prosecuted under Chapter 64 of Title 13 in district court.²⁰² If convicted of sexual exploitation of a child, the minor may be imprisoned for up to 10 years and fined up to \$20,000.²⁰³ Finally, the statute provides that “the record of a minor adjudicated delinquent under this section shall be expunged upon reaching the age of majority.”²⁰⁴

The Vermont statute applies to self-created images, but it fails to extend any protection to teens who create images of another teen with that teen’s consent. Additionally, the statute fails to afford constitutional

198. *Id.* § 2802b(a)(1). Thus, the Vermont Legislature recognized that unwelcome emails are impossible to avoid and created an exception to the criminal statute in cases when the minor attempts to destroy the offending image.

199. *Id.* § 2802b(b)(1).

200. *Id.* “Except as provided in subdivision (3) of this subsection, a minor who violates subsection (a) of this section shall be adjudicated delinquent. . . . [A]nd may be referred to the juvenile diversion program of the district in which the action is filed.”

201. *Id.* § 2802b(b)(2). Although first offenders are exempt from prosecution under the statute prohibiting sexual exploitation of children, prosecution for disturbing the peace, lewd and lascivious conduct, voyeurism remains available. *Id.* § 2802b(b)(4).

202. *Id.* § 2802b(b)(2).

203. *Id.* § 2825(a). For example, VT. STAT. ANN. tit. 13, § 2824 continues to encompass teen sexting conduct whenever one teen takes a photo of another and shares it electronically if the photo captures sexual conduct of a minor. The statute reads, “[n]o person may, with knowledge of the character and content, promote any photograph, film or visual recording of sexual conduct by a child, or of a lewd exhibition of a child’s genitals or anus.” *Id.* “Sexual conduct” is defined as acts of masturbation, homosexuality, intercourse, or physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks or . . . breast.” *Id.* § 2801(3) (2010). Even if so prosecuted, the minor shall not be required to register as a sex offender. *Id.* § 2802b(b)(3).

204. *Id.* § 2802b(b)(3).

protection to images of non-obscene adolescent sex or sexually suggestive conduct.

Other jurisdictions²⁰⁵ are in the midst of the legislative drafting process. Among these jurisdictions are Illinois, New Jersey and Ohio. The Illinois House of Representatives drafted House Bill No. 4583 related to teen sexting.²⁰⁶ Under the Illinois statute as originally drafted,²⁰⁷ violations ranged from Class B misdemeanors to a Class 4 felony.

The Illinois original draft legislation also permitted the court to order the minor convicted under the provision to participate in a fee-based diversion program.²⁰⁸ The statute created three different levels of culpability for minors under 17 years of age.²⁰⁹ This age distinction left many high school seniors, aged 17-19, exposed to felony prosecution under the existing child pornography law. The first section prohibited a minor under 17 years of age from knowingly disseminating any material that depicts nudity or other sexual conduct of the person or of a third-party and classifies it as a Class B misdemeanor.²¹⁰ The second section prohibited a minor under the age of 17 years of age from requesting that a third-party to violate the first section and distribute that image to third-

205. See, e.g., C.S/H.B. 1335, Reg. Sess. 2010 (Fla. 2010), (creating a status offense of sexting) available at <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=44113&BillText=SExing&HouseChamber=B&SessionId=64&>. This bill died in the Criminal & Civil Justice Appropriations Committee on April 30, 2010.

206. The Illinois House of Representatives is currently considering House Bill No. 4583. H.R. 4583, 96th Gen. Assem. (Ill. 2010), available at <http://www.ilga.gov/legislation/96/hb/09600HB4583.htm> (last visited June 16, 2009). The bill provides:

(a) It is unlawful 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.

(b) It is unlawful for a minor under 17 years of age to knowingly request another minor under 17 years of age to violate subsection (a) and distribute that image or images to another person or persons.

(c) It is unlawful for a minor under 17 years of age to knowingly obtain an image in violation of subsection (a) or (b) 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.

207. If Illinois House Bill No. 4583 is approved, the statute's citation will be 705 ILL. COMP. STAT. 405/3-40 (2010). Under Illinois law, a Class B misdemeanor carries a penalty of 30 days to 6 months imprisonment, a Class A misdemeanor carries a penalty of 6 months to one year, and a Class 4 felony may result in one year of imprisonment. *Id.* 5/4.5-85 (2009).

208. 720 ILL. COMP. STAT. 5/11-27(d)(4) (2009).

209. *Id.* 5/11-27(a)-(c) (2009).

210. *Id.* 5/11-27(a).

parties and classifies it as a Class A misdemeanor.²¹¹ The final section made it a Class 4 felony to disseminate images on an Internet Webpage accessible to third parties for a period of at least 24 hours when the images are obtained in violation of the preceding two sections and the posting is made with the intent to injure the reputation or cause emotional distress of the individual depicted.²¹² Thus, the most serious offense under the language initially proposed was the intentional and malicious posting of the image of a minor who is nude or engaged in sexual conduct.

As the legislative process continued, the Illinois Juvenile Justice Reform Committee substantially revised the statute to include all minors, to create the status offense of sexting (thus eliminating the gradations of culpability and punishment contained in the initial draft legislation), and providing to the state the discretion to adjudicate any minor engaged in sexting as an “individual in need of services.”²¹³ Additionally, the statute expressly preserved the state’s right to prosecute a minor engaged in sexting under child pornography law.²¹⁴ The legislation, as currently revised, does not create a separate offense for minors and fails to distinguish between the acts of creating the image, posting the image, and posting the image with a malicious intent. Finally, the proposed statute fails to shield minors from child pornography prosecution.²¹⁵

Legislation is also pending in Ohio. The proposed Ohio statute provides:

Sec. 2907.324.

(A) No minor, by use of a telecommunications device, shall recklessly create, receive, exchange, send, or possess a photograph, video, or other material that shows a minor in a state of nudity.

(B) It is no defense to a charge under this section that the minor creates, receives, exchanges, sends, or possesses a photograph, video, or other material that shows themselves in a state of nudity.

(C) Whoever violates this section is guilty of illegal use of a telecommunications device involving a minor in a state of nudity, a

211. *Id.* 5/11-27(b).

212. *Id.* 5/11-27(c).

213. See Amendment to H.B. 4583, 96th Gen. Assem., (Il. 2010), available at <http://www.ilga.gov/legislation/fulltext.asp?DocName=09600HB4583ham002&GA=96&SessionId=76&DocTypeId=HB&LegID=48264&DocNum=4583&GAID=10&Session=> (last visited July, 8, 2010).

214. *Id.* at Sec. 3-40(e) (2010).

215. *Id.*

delinquent act that would be a misdemeanor of the first degree if it could be committed as an adult.²¹⁶

The accompanying legislative comment expressly notes that the statute outlawing sexting by minors and recognizing it as a delinquent act does not eliminate the other criminal charges available to the district attorney.²¹⁷ Additionally, “[t]he Montgomery County Prosecutor’s Office in Ohio has also developed a juvenile diversion program that focuses on education to protect first-time offenders who are unlikely to reoffend from prosecution under the criminal felony statutes.”²¹⁸ Thus, Ohio has enacted a law to treat teen sexting as a delinquent status offence, rather than as child pornography.

The New Jersey Legislature is also currently considering a law creating a discretionary diversionary program for teens who sext. The proposed law provides:

a. As used in this act, “eligible offense” means an offense under N.J. STAT. ANN. § 2C:24-4²¹⁹ in which:

(1) the facts of the case involve the creation, exhibition or distribution without malicious intent of a photograph depicting nudity²²⁰ as defined in that section through the use of an interactive wireless communications device or a computer; and

216. See H.B. 132, 128th Gen. Assem., Reg. Sess. (Ohio 2009) (emphasis added).

217. For example, other existing crimes include: OHIO REV. CODE ANN. § 2907.31 (prohibiting a person from recklessly directly delivering to a “juvenile” any material that is “obscene” or “harmful to juveniles”); OHIO REV. CODE ANN. § 2907.321 (prohibiting a person from creating, reproducing, or publishing any obscene material that has a minor as one of its participants); OHIO REV. CODE ANN. § 2907.322 (prohibiting a person from creating, recording, photographing, filming, developing, reproducing, or publishing any material that shows a minor participating or engaging in “sexual activity,” masturbation, or bestiality); OHIO REV. CODE ANN. § 2907.323(A)(1) (prohibiting a person from photographing any minor who is not the person’s child or ward in a state of nudity. . . .).

218. Mathias H. Heck, Jr., *Sexting and Charging Juveniles—Balancing the Law and Bad Choices*, 43 PROSECUTOR 28 (2009). House Speaker Chris Benge of the Oklahoma House of Representatives approved studies on teen sexting during the summer of 2009. See Julie Delcour, *Study Hall*, TULSA WORLD, Nov. 1, 2009, <http://www.allbusiness.com/government/government-bodies-offices-legislative/13367640-1.html>.

219. A bill to enact section 2907.324 of the Revised New Jersey Code. N.J. STAT. ANN. § 2C:24-4 is entitled “Endangering Welfare of Children” and it expressly provides:

[A]ny person who photographs or films a child in a prohibited sexual act or in the simulation of such an act or who uses any device, including a computer, to reproduce or reconstruct the image of a child in a prohibited sexual act or in the simulation of such an act is guilty of a crime of the second degree.

N.J. STAT. ANN. § 2C:24-4 (2009).

220. N.J. STAT. ANN. § 2C:24-4 defines “nudity” as a prohibited sexual act if “depicted for the purpose of sexual stimulation or gratification of any person who may

(2) the creator and subject of the photograph are juveniles or were juveniles at the time of its making.

b. The Attorney General, in consultation with the Administrative Director of the Administrative Office of the Courts, shall develop an educational program for juveniles who have committed an eligible offense as defined under the provisions of subsection a. of this section. The county prosecutor shall determine whether a juvenile shall be admitted to the program. A juvenile who successfully completes the program shall have the opportunity to avoid prosecution for the eligible offense.²²¹

The pending New Jersey approach creates a diversionary program in which prosecutors may steer minors engaged in sexting who lack malicious intent²²² if the minor has not been previously adjudicated delinquent, lacked the intent to commit a criminal offense, may be harmed by the imposition of criminal sanctions, and would be deterred from reoffending. The program provides an alternative to prosecution or adjudication under the child endangerment statute.

The legislation does not address the consequences of sexting in the context of cyber-bullying, but rather leaves this matter to existing child endangerment law and tort law. In designing the diversionary educational program, the Attorney General is charged to provide information concerning the existing laws, the effect on relationships and employment, and the connection between sexting and cyber-bullying.

More recently, both Pennsylvania and Florida introduced legislation to address this issue. Pennsylvania House Bill 2189, introduced on January 5, 2010, created a new status offense designed to redress teen sexting and treats the crime as a misdemeanor.²²³ The legislation does

view such depiction. *Id.* § 2C:24-4(b)(i). “Any act of sexual penetration or sexual contact . . .” is also defined as a prohibited act. *Id.* § 2C:24-4(b)(j).

221. New Jersey Senate Bill, S. 2926, 2009 Leg., 213th Sess. (N.J. 2009) introduced on June 15, 2009 and New Jersey Assembly Identical Bill, H.B. A4069, 213th Gen. Assem., Reg. Sess. (N.J. 2009) introduced on June 11, 2009, *available at* http://www.njleg.state.nj.us/2008/Bills/A4500/4069_I1.PDF (last visited July 15, 2009).

222. New Jersey Senate Bill, S. 2926, 2009 Leg., 213th Sess. (N.J. 2009), Section 1.2 is pending in the New Jersey legislature.

223. H.B. 2189, 2010 Gen. Assem., Reg. Sess. (Pa. 2010) (providing “Any minor who knowingly transmits in an electronic communication . . . , a depiction of himself or herself or of another minor engaging in sexually explicit conduct . . . commits a misdemeanor of the second degree.”). *Id.* The Juvenile Law Center, located in Philadelphia, Pennsylvania, has written an open letter to the Chairperson of the House Judiciary Committee, and the body is currently considering the legislation. *See* Juvenile Law Center, *available at* <http://www.jlc.org/news/32/teleconference/> (last visited July 2, 2010). The Juvenile Law Center identifies six weaknesses of the Pennsylvania legislation:

1. Criminalizes normal adolescent behavior;

not address education or diversion programs, nor does it consider a minor's right to create and possess "autpornography."²²⁴ In contrast, Florida has adopted a more measured approach to teen sexting. The proposed law, currently pending in the house, defines teen sexting as:

A minor commits the offense of sexting if he or she knowingly:

- (a) Uses a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another person any photograph or video of himself or herself which depicts nudity and is harmful to minors; or
- (b) Possesses a photograph or video that was transmitted or distributed by another minor as described in paragraph (a).²²⁵

The Florida approach employs a graduated scale and treats the first offense as a noncriminal violation, punishable by 8 hours of community service and a \$25 fine.²²⁶ A second offense is treated as a misdemeanor, with each subsequent offense resulting in a more serious punishment, up to a third degree felony for more than three offenses.²²⁷

The state legislative responses to the question of whether and to what extent child pornography laws should apply to teen sexting conduct are tentative. Yet, some themes emerge. Application of child pornography laws to teen sexting conduct leaves legislators and the public uneasy. Although none of the legislation expressly addresses why reform is needed, clearly lawmakers should consider the child pornography laws, as drafted, capture conduct that, in fact, encompasses

-
2. Effectively creates a new status offense that undermines this country's commitment, since the 1970's, to remove status offenders from the juvenile justice system and may run afoul of the federal Juvenile Justice and Delinquency Prevention Act;
 3. Pushes more youth into the juvenile justice system, which has increasingly greater consequences;
 4. Neither meets the intended purpose of protecting youth, nor deters youth from engaging in these behaviors;
 5. Is an unnecessarily harsh step while many states are engaging in education programs and alternative legislation to address this issue; and
 6. Raises constitutional questions under the First Amendment protections of freedom of expression.

Id.

224. John A. Humbach, "Sexting" and the First Amendment, 37 HASTINGS CONST. L.Q. 433 (2010).

225. C.S/H.B. 1335, Reg. Sess. 2010 (Fla. 2010).

226. *Id.*

227. *Id.*

protected speech.²²⁸ Additionally, legislators should be somewhat uneasy about criminalizing the creation of content alone, without regard to intent and context.²²⁹ Finally, the legislators might be troubled by the consequences of mandatory sex-offender registration as applied to teens specifically,²³⁰ or more generally, by the consequences of applying adult criminal statutes to adolescent conduct.²³¹

When the teen images at issue are not obscene and have been voluntarily created with the permission of those pictured, and have not been published without consent, such conduct and content should be considered protected expression. Each state must struggle with the same question: Assuming teen sexting falls outside the category of child pornography, how should legislatures balance the rights of teens against society's interest in protecting children from the ills associated with child pornography?

V. CONSTRUCTING A MEASURED RESPONSE TO TEEN SEXTING

This part is further divided into two sections. The first section explores the existing scholarship. The scholarly articles addressing teen sexting specifically appeared for the first time in 2008. The second section proposes a model teen sexting statute. The proposed statute is informed by the prevalence of teen sexting, the scope of constitutional rights possessed by teens, existing relevant precedent, legislation, both passed and pending, and the relevant scholarship to date.

A. *Scholarship Review*

Research revealed eight articles expressly addressing teen sexting,²³² all published relatively recently. In his article, Professor

228. Brian Glass, *Protecting Children and Expression: Towards Better Tailored Child Pornography Laws*, 9 VA. J. SOC. POL'Y & L. 471, 480 (2001).

229. For example, the Illinois statute creates three levels of culpability that permit the conviction of a minor for a variety of crimes that range from a misdemeanor to a felony depending on the severity of the conduct. *See supra* notes 206-07 and accompanying text.

230. Both the Vermont statute, as passed, and New Jersey statute, as proposed, exempt the offender from the Adam Walsh sex offender registration rule. *See supra* notes 197-204, 219-22 and accompanying text.

231. For example, the New Jersey and Vermont legislation expressly channel the legal consequences through the juvenile justice system. The Ohio legislation provides a delinquency option, while retaining the existing child pornography rules in relationship to teen sexting. *See supra* notes 216-17 and accompanying text.

232. *See* Catherine Arcabascio, *Sexting and Teenagers: OMG R U Going 2 Jail???*, 16 RICH. J.L. & TECH. 10 (2010); Humbach, *supra* note 224; W. Jesse Weins & Todd C. Hiestand, *Sexting, Statutes, and Saved by the Bell: Introducing a Lesser Juvenile Charge With an "Aggravating Factors" Framework*, 77 TENN. L. REV. 1 (2009); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child*

Calvert²³³ places teen sexting within the American culture of exhibitionism.²³⁴ Calvert surveys the existing law and suggests that legal reform should consider the age of the teen sexters, whether the sexting is primary or secondary and whether the sexting is volitional.²³⁵ Professor Calvert also teamed with Professor Richards to write a summary of their interview with Phillip Alpert, the Florida teen who plead guilty to child pornography charges arising out of a sexting mistake.²³⁶ Professor Corbett also writes about the Phillip Alpert sexting case and urges law enforcement to “assess and interpret existing criminal and civil legal doctrines in such a way that a balance between sensibility and punishment can be adequately attained.”²³⁷ Finally, J.D. candidate Jesse Michael Nix argued that Utah prosecutors “must have the discretion to give lesser charges” to teenagers, “rather than charging them with felonies.”²³⁸

One author has addressed the issue of the “self-produced child pornography.”²³⁹ In her article Professor Leary defines self-exploitation of a minor as “the creation by a minor of visual depictions of that minor and/or other minors engaged in sexually explicit conduct, including the lascivious display of genitals.”²⁴⁰ Thus, it seems Professor Leary is addressing what might be described as pornography rendered illegal as a result of the age of those pictured. Some, but clearly not all sexting, might fall into this category. In the cases discussed, some of the images

Pornographers and the Lolita Effect Undermines the Law, 18 COMMLAW CONSPICUOUS 1 (2009) [hereinafter Calvert, *Sex Cell Phones and Privacy*]; Don Corbett, *Let's Talk About Sext: The Challenge of Finding the Right Legal Response to the Teenage Practice of "Sexting"*, 13 No. 6 J. INTERNET L. 3 (2009); 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); Robert H. Wood, *The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint*, 16 MICH. TELECOMM. & TECH. L. REV. 151 (2009); Jesse Michael Nix, *Unwholesome Activities in a Wholesome Place: Utah Teens Creating Pornography and the Establishment of Prosecutorial Guidelines*, 11 J.L. & FAM. STUD. 183 (2008).

233. Calvert, *Sex, Cell Phones and Privacy*, *supra* note 232.

234. *Id.* at 17.

235. *Id.* at 28-33.

236. Richards and Calvert, *supra* note 232, at 1.

237. Corbett, *supra* note 232, at 3.

238. Nix, *supra* note 232, at 192.

239. Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1 (2007). Professor Leary's article followed the highly publicized congressional testimony of Justin Berry, a minor who sold self-created pornography over the internet. *See id.* at 4 n.9 (citing Sexual Exploitation of Children Over the Internet: What Parents, Kids and Congress Need to Know About Child Predators: Hearing Before the Subcomm. on Oversight and Investigations, 109th Cong. 75 (2006) (testimony of Justin Berry) (“For 5 years, beginning when I was 13 years old, I operated a pornographic website featuring images of myself fluttered on the Internet by webcams.”)).

240. Leary, *supra* note 239, at 19.

at issue were of teens in bras or topless emerging from the shower.²⁴¹ These images seemingly fall short of Leary's definition of self-exploitation. Although Leary acknowledges teen immaturity²⁴² as a consideration, nevertheless, she advocates juvenile prosecution and reviews three models related to juvenile crime that might be adopted.²⁴³

The first model she explores is the child prostitution model. In this model, the child prostitute is treated as the victim of commercial child sexual exploitation and alternatives other than criminal punishment are imposed.²⁴⁴ However, instead of likening the sexter to the child prostitute, she likens the sexter to the pimp, "in that the producer of these images encourages others to become involved in the child exploitation industry."²⁴⁵ In most sexting cases, there is no evidence that the teen views her image as exploitive.²⁴⁶ Moreover, it is shared for reasons identified with maturation and individuation, not pedophilia or profit.

The second model she explores is the statutory rape model.²⁴⁷ This model allows the state to charge one or both minors with statutory rape based upon the definition of a delinquent act, that is one illegal if performed by an adult.²⁴⁸ Prosecution of a minor to protect the minor is supported by statutory rape law and precedent.²⁴⁹ This approach is unhelpful, given the movement away from prosecuting consenting minors for statutory rape.²⁵⁰

The last model she explores is the juvenile sex-offender model.²⁵¹ These programs hold the offender responsible and focus on rehabilitation.²⁵² For teens motivated by the desire for love and

241. See, e.g., *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

242. Leary, *supra* note 239, at 39.

243. *Id.* at 28.

244. *Id.* at 30.

245. *Id.* at 31.

246. This raises the difficult question of at what age a minor is able to consent to the creation and dissemination of nude images. If the age of age of 15 is deemed the age of consent to prevent the prosecution of teens under state statutory rape laws, it seems sensible that these teens also enjoy the right to consent to the creation and dissemination of nude images among age appropriate peers. Some might argue that the permanency of the electronic record is lost upon teens. However, the permanence of parenthood is an even more serious responsibility assumed by teens deemed mature enough to consent to sex. See Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers*, 12 CORNELL J.L. & PUB. POL'Y 373, 390 (2003) (In 38 states voluntary sexual activity between teens of comparable age does not constitute statutory rape.).

247. Leary, *supra* note 239, at 32.

248. *Id.*

249. *Id.*

250. See Phipps, *supra* note 246, at 390.

251. *Id.* at 33.

252. *Id.* at 44.

acceptance,²⁵³ the label and punishment associated with teen sexual offenders seems an ill fit. Leary suggests that prosecution is a necessary response, despite immaturity and victimization, “there are also components of profit, exploitation of others, and the creating of child pornography which harms other children.”²⁵⁴ Leary advocates the adoption of an approach similar to the juvenile sexual offender approach.²⁵⁵ She advocates a discretionary model, in which the prosecutor may determine whether to prosecute based upon specific criteria related to the offender and the crime.²⁵⁶

According to Leary, the state should assess the cause behind the juvenile engaging in this activity, the age of the juvenile, the presence or absence of a support network to prevent re-offending, the juvenile’s amenability to rehabilitation, the frequency of the exploitation and the likelihood of rehabilitative success.²⁵⁷ Regarding the crime itself, the prosecutor should look to the circumstances surrounding the exploitation, whether the offender involved other juveniles, the role of this juvenile in the production, whether the production was commercial, whether it was for profit, the extent of the dissemination, the theme of the images, and the severity of the content.²⁵⁸

Leary’s approach makes the most sense when offending teens have knowingly profited from the distribution of obscene images; however, the majority of teen sexting cases typically lack the degree of lascivious exposure and the resulting harm to those pictured required to justify prosecution. Additionally, most teen sexting is among teens interacting with other teens, not teens seeking to profit based on the commercial market for child pornography. Nevertheless, absent a specific teen sexting exemption, state laws define child pornography so broadly that teen sexters face prosecution as child porn purveyors.²⁵⁹

Additionally, Leary’s discussion does not address the threat of cyber-bullying that arises when teen sexting messages are distributed to

253. See Lithwick, *supra* note 11; see also Koch, *supra* note 11.

254. Leary, *supra* note 239, at 39.

255. *Id.* at 45.

256. *Id.* at 48.

257. *Id.* at 49. Professor Susan Hanley Duncan adopts the same term of art, ‘self-produced child pornography,’ in her paper addressing the appropriate legislative response to “self produced child pornography which only encompasses images that depict sexually explicit conduct specifically defined by statutes in all states.” See Susan Hanley Duncan, *A Legal Response is Necessary for Self Produced Child Pornography: A Legislator’s Checklist for Drafting the Bill* 3, http://works.bepress.com/cgi/viewcontent.cgi?article=1021&context=susan_kosse.

258. Leary, *supra* note 239, at 49.

259. See *supra* notes 94-95 and accompanying text.

other teens with the intent to harm the individual pictured.²⁶⁰ Leary's suggested approach of juvenile prosecution with the twin goals of holding the teen accountable and rehabilitating the teen makes sense, but only when the teen profits from the sale of the images or intends to harm the reputation of the individual pictured.²⁶¹ The bulk of teen texting falls far short of this definition.

In reply to Professor Leary's child self-pornography article,²⁶² Professor Stephen Smith rejects criminal prosecution of self-pornography because the sentences associated with criminal prosecution are disproportionate to the crime, there is no assurance that teens will be sheltered through juvenile court jurisdiction from prosecution as an adult under existing child pornography law and consensual sex among teens over the legal age of consent is legal, thus criminalizing the digital capture of the act is illogical.²⁶³

Smith notes that even if the child is initially adjudicated delinquent in juvenile court, there is no guarantee that the case will remain in juvenile court.²⁶⁴ Prosecutors can always request transfer to adult court.²⁶⁵ In some states prosecutors have the ability to file charges against a minor directly in adult court.²⁶⁶ Some jurisdictions have reduced the age of minority to 15 for purposes of juvenile court jurisdiction, thus sending teens 16 and older directly to adult court.²⁶⁷ Additionally, many juvenile court judges may impose adult sentences or blended sentences.²⁶⁸ Thus, reliance on the rehabilitative role of the juvenile justice system is not well placed.

Smith also notes that the sentences associated with the creation, possession and distribution of child pornography are among the most

260. Much has been written about criminalizing cyberbullying. *See, e.g.*, Susan W. Brenner & Megan Rehberg, "Kiddie Crime"? *The Utility of Criminal Law in Controlling Cyberbullying*, 8 FIRST AMEND. L. REV. 1 (2009).

261. Some scholars have noted that the virtual world has expanded the scope and reach of individual speech and may require the redefinition of privacy law. The controversy surrounding sexting reinforces this observation. The question of privacy is particularly relevant when the issue of non-consensual publication is raised, for example when the intended recipient publishes a private sexting message without the consent of the individual pictured. *See* Patricia Sánchez Abril, *Recasting Privacy Torts In a Spaceless World*, 21 HARV. J.L. & TECH. 1 (2007).

262. Leary, *supra* note 239.

263. Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505 (2008).

264. *Id.* at 533-34.

265. *Id.* at 534.

266. *Id.*

267. *Id.*

268. *Id.* at 535.

draconian.²⁶⁹ The policy undermining child pornography law is to punish and deter the abuse of minors assaulted by adults in the process of creating the images and to eliminate the market for images of children being sexually abused.²⁷⁰ The consensual and voluntary nature of teen self-pornography, made by sexually active teens, is not the type of child pornography envisioned by the legislators.²⁷¹ Including the images voluntarily created by sexually active teens within the scope of child pornography does not further the legislative intent of the drafters.²⁷² Smith concludes that criminal prosecution should be reserved for cases where teens are exploiting other minors, or where minors remain recalcitrant after education or a warning to stop the conduct.²⁷³

B. Recognizing a Zone of Teen Privacy

Teen sexting prosecutions call attention to the need for legislators and courts to begin to fashion a theory of expanding children's rights in accord with existing Supreme Court case law and to guide courts and legislators in deciding matters of first impression. Children possess a variety of constitutional rights that evolve as the child matures.²⁷⁴ Legislation has historically adjusted the statutory age of majority within a jurisdiction to achieve state interests. Although minority typically extends until the age of 18, teens as young as 12 have the right to marry;²⁷⁵ in 38 states, teens between 15-17 may consent to sex with age appropriate partners;²⁷⁶ teens 15 and over may obtain contraception;²⁷⁷ testing for sexually transmitted diseases²⁷⁸ and abortions, all without

269. *See id.* at 538. Additionally, many local governments have increased the area of buffer zones created under state law, limiting the areas in which under sexual offenders who have been released from state custody may legally live. *See, e.g.,* Irimi Aleksander, *Sex Offender City*, ATLANTIC MAGAZINE, March 2010, available at <http://www.theatlantic.com/magazine/archive/2010/03/sex-offender-city/7907>.

270. *Id.* at 522.

271. *Id.* at 534.

272. *Id.* at 517.

273. *Id.* at 541.

274. *See* Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 74 (1976).

275. MASS. GEN. LAWS ANN. ch. 207, §§ 7, 25 (West 2010). *See also* Parton v. Harvey, 67 Mass. 119 (Mass. 1854) (females over 12 and males over 14 may enter a valid marriage with parental consent).

276. *See* Phipps, *supra* note 246, at 441.

277. *See* Carey v. Population Services Int'l, 431 U.S. 678, 694 (1977.)

278. Janine P. Felsman, *Eliminating Parental Consent and Notification for Adolescent HIV Testing: A Legitimate Statutory Response to the AIDS Epidemic*, 5 J.L. & POL'Y 339, 342 (1996). *See, e.g.,* CONN. GEN. STAT. ANN. § 19A-582(d) (West 2010) (stating that "[t]he consent of a parent or guardian shall not be a prerequisite to testing of a minor"); FLA. STAT. ANN. § 384.30 (West 2010) (stating that the consent of a parent or guardian is not required for examination or treatment of a sexually transmitted disease); MICH. COMP. LAWS ANN. § 333.5127 (West 2010) (allowing minor to consent to

parental consent.²⁷⁹ As teens engage in adult conduct, adult rights and responsibilities are extended to them. It follows that if teens have a privacy right to use birth control,²⁸⁰ to engage in sex,²⁸¹ to marry, to have children and to choose abortion,²⁸² they also have a right to create and possess images of themselves and their partners engaged in sex or posed in sexually suggestive positions.

Given the existing inconsistent treatment of the evolving rights of teens as they mature and the poor fit between child pornography law and teen sexting conduct, a law directed specifically at teen sexting is required to distinguish this conduct from that of pedophiles and the purveyors of child pornography. This law should be guided by the standard set forth in *Miller* which reaches an accommodation between the “sensibilities of unwilling recipients” from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based law.²⁸³ Like obscenity statutes, laws directed at the dissemination of child pornography “run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy.”²⁸⁴ Arguably, application of the child pornography statute to teen sexting conduct is one example of the censor’s heavy hand reaching protected teen expression. Therefore, teen sexting should be subject to the *Miller* obscenity test before it is punishable as a crime. Additionally, federal law should be amended to exclude teen sexting conduct in deference to state law. Child pornography law is designed to protect children from the physiological, emotional, and mental health trauma associated with the creation and distribution of the material.²⁸⁵ None of these policy objectives are achieved by criminalizing non-obscene teen sexting conduct.²⁸⁶

treatment for venereal disease or HIV infection); OHIO REV. CODE ANN. § 3701.242 (West 2010) (requiring minor to give informed consent for HIV testing except if physician “determines the test is necessary for providing diagnosis and treatment” to a test subject).

279. *Bellotti v. Baird*, 443 U.S. 622, 643 (1979).

280. *See Aid for Women v. Foulston*, 327 F. Supp. 2d 1273, 1286-87 (D. Kan. 2004) (stating that a minor’s right to informational privacy extends to personal sexual matters and outweighs the state’s interest in mandating the reporting of child abuse).

281. *Cf. Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976) (“[C]onstitutional rights do not mature and come into being magically upon when one attains the state-defined age of majority. Minors as well as adults are protected by the Constitution and possess constitutional rights.”).

282. *Id.*

283. *Miller v. California*, 413 U.S. 15, 19 (1973).

284. *New York v. Ferber*, 458 U.S. 747, 756 (1982).

285. *See id.* at 760.

286. *See Glass, supra* note 228, at 483.

C. *Creating a Teen Sexting Legal Framework*

Drafting a proposed teen sexting statute is a daunting task because there are so many relevant factual variables including: the degree of sexual conduct captured in the image, the age of those pictured, the age of the recipients, whether the image was captured with consent, the agreement between the parties as to whether there would be any further publication or dissemination of the image, and the intent of the party who further publishes the images without the consent of the individual or individuals depicted. Clearly, not all sexting is equally blameworthy or equally harmful. Moreover, individual state legislators may refine model statutory law to reflect community standards by expanding or narrowing the content and scope of the statutory criteria.

Clearly, each state should address the existing scope of child pornography law in an effort to exempt non-obscene teen sexting conduct from prosecution.²⁸⁷ Legislation should consider the age of the parties involved, the utility of assigning the matter to juvenile court, the creation of a diversionary program, the expectation of privacy of the individuals depicted, the intent of the parties involved, the degree of publication, if any, and the content of the photos.

Based upon the pervasive practice of teen sexting, sociological research and the developmental stage of teens, a proposed teen sexting statute might follow this form:

D. *Proposed Teen Sexting Statute*

Teen Sexting Conduct

1. Statutory Intent

- i. The intent of this statute is to:

287. The need for legislative guidance is pressing. The National Association of Attorneys General convened in Philadelphia on May 12 and 13, 2009. The summit entitled, "The Year of the Child: Protecting and Empowering the Next Generation," will focus on the latest developments, research and future steps necessary to keep children safe while online. Topics of discussion include MySpace and Facebook updates, cyberbullying and the dangers of peer-to-peer file sharing networks and current trends in online safety technology. Press Release, National Associations of Attorneys General, Attorneys General Convene to Discuss Kids and Cyberbullying, Sexting, Sexual Predators, Social Networks and E-safety (May 12, 2009), *available at* <http://www.naag.org/attorneys-general-convene-to-discuss-kids-and-cyberbullying-sexting-sexual-predators-social-networks-and-e-safety.php>.

- a) exempt Teen Sexting Images from the state and federal definition²⁸⁸ of child pornography;
- b) to create a consistent legal response;
- c) to educate teens regarding the creation, possession, and distribution of Teen Sexting Images;
- d) to promote early intervention;
- e) to create a diversionary program to educate teens who create and share Teen Sexting Images without the intent to harm those depicted;
- f) to punish and deter teens who create, possess, or distribute Teen Sexting Images with the intent to cause emotional harm, to embarrass, or to stigmatize those depicted; and
- g) to require that Teen Sexting is redressed within the juvenile justice system.

2. Definition of a Teen Sexting Image

- i. A “Teen Sexting Image” is an image:
 - a) that is of one or more individuals between the ages of 13 and 18, including self-images (depicted person or persons);
 - b) that is captured in a traditional or digital photographic or video format;
 - c) that, if shared, is shared among teens between the ages of 13 and 18; and
 - d) that is not obscene as defined under applicable state and federal law.

3. Permitted Conduct.

288. This goal will require companion federal legislation recognizing this exception to the federal sex offender registration rules.

-
-
- i. Teens between the ages of 15 and 18 may voluntarily create and privately possess Teen Sexting Images so long as they do not violate Section IV of this Statute.
 - ii. Teens between the ages of 13 and 14 may voluntarily create and privately possess Teen Sexting Images so long as they do not violate Section IV of this Statute. However, the court shall have the discretion to direct the state agency designated to supervise children in need of services or deemed dependant to initiate an investigation regarding the need for supervision.²⁸⁹
4. Violation.
- i. A person who is between the ages of 13 and 18²⁹⁰ commits a delinquent act if, the teen recklessly and without the consent²⁹¹ of any depicted person:
 - a) Creates a Teen Sexting Image;
 - b) Possesses a Teen Sexting Image; or
 - c) Distributes a Teen Sexting Image:
 - A. to a person not depicted;
 - B. by posting it on a public web page;

289. The distinction between older teens and younger teens is designed to recognize the increasing role of teen autonomy and creates a zone of absolute privacy for teens between the ages of 15 and 18 who have the ability to consent to sex in a majority of the states within the United States. For younger teens, the legislation expressly recognizes the court's discretion to order state oversight if there is a concern regarding knowing consent, maturity and the teen's ability to comprehend the long-term consequences of the conduct.

290. Legislators must decide whether to exempt all minors from sex-offender prosecution or only those who possess images of minors deemed old enough to participate voluntarily and knowingly in the conduct pictured. I identified the age of 13, the age most minors enter 7th grade, and the average age minors reach sexual maturity, as the appropriate age. Additionally, this statute extends juvenile court jurisdiction to 18 year-old-teens who create, possess, or distribute teen sexting images because many high school seniors do not graduate until after they reach age 18.

291. The term "consent" raises a host of definitional problems because verbal consent may not be freely given. Thus, a teen who consents does so verbally and is supported by the objective conduct of the minor. Phipps, *supra* note 246, at 377.

-
-
- C. by electronically sharing it with a person or persons not depicted; or
 - D. by otherwise sharing it with a person or persons not depicted.²⁹²
5. The consequences of statutory violation shall be determined based on the mens rea involved.
- i. If the actor intentionally²⁹³ creates, possesses, or distributes a Teen Sexting Image without the consent of the depicted person or persons, the actor:
 - a) Shall be enrolled in a mandatory diversion program;
 - b) Shall not be adjudicated delinquent; and
 - c) Shall not be required to register as a sex offender.
 - ii. If the actor creates, possesses, or distributes a third-party Teen Sexting Image with or without the consent of the depicted person or persons, and with the intent to cause emotional harm, to embarrass, or to stigmatize any depicted person or persons, the actor:
 - a) Shall be adjudicated delinquent;
 - b) Shall have phone and internet use monitored for a reasonable period of time;
 - c) Shall undergo education regarding privacy rights, the internet, and the legal meaning and importance of consent in relationship to matters of sexual intimacy;
 - d) Shall not be tried as an adult; and
 - e) Shall not be required to register as a sex offender.²⁹⁴

292. This portion of the statute is designed to deter negligent publication of third-party Teen Sexting Images and to educate teens regarding the potential consequences of this conduct.

293. This standard assumes “that all tortious conduct can be placed on a scale of unreasonableness, comprised of ordinary negligence, a middle tier of recklessness, and intentional conduct.” Edwin H. Byrd, III, *Reflections on Willful, Wanton, Reckless, and Gross Negligence*, 48 LA. L. REV. 1383, 1400 (1988).

294. Legislators must decide whether to exempt all minors from sex-offender prosecution or only those who possess images of minors deemed old enough to

-
-
6. Subsequent violations of this Statute by the same teen shall be handled by the judge in juvenile court under Section IV (B).
 7. If the teen actor is under the age of 13 or the depicted person is under the age of 13, then the matter shall be referred to the state agency designated to supervise children in need of services or deemed dependant to determine the appropriate action to be taken.
 8. If the actor is 19 years old or older, this statute no longer applies and the matter shall be determined according to applicable law.
 9. Teen Sexting Images are excluded from the state and federal definition of child pornography and any record of adjudication under this section shall be expunged upon the actor's nineteenth birthday.
 10. Each County within the State shall create and implement a preventative education program and a diversionary program to carry out the intent of this statute.
 11. This statute shall not apply if:
 - i. The Teen Sexting Image is obscene;
 - ii. The actor is under the age of 13 or over the age of 18;
 - iii. The actor profits financially or through extortion from the creation or distribution of the Teen Sexting Image; or
 - iv. The Teen Sexting Image is created without the consent of those depicted.

The purely private creation and possession of non-obscene teen sexting images by teens between the ages of 15 and 18 does not constitute child pornography, even if stored on private computers or privately exchanged through email or by other electronic or non-electronic means. This conduct does not trigger the societal concerns related to child abuse, repeated victimization, and predation. Purely

participate voluntarily and knowingly in the conduct pictured. I identified the age of 13, the age most minors enter 7th grade and the average age minors reach sexual maturity as the appropriate age.

private and consensual teen sexting should not be categorized as child pornography, nor punished absent malicious or wrongful intent to harm the depicted person. This conforms with the understanding of the teen's expanding rights of personhood and autonomy protected under the Constitution.

If a Teen Sexting Image is captured or published without the consent of those pictured, an injury has occurred. The extent of the injury may depend upon the content of the image and the extent to which it is published. Thus, even negligent capture or publication results in harm and the older teen who invades the privacy of those pictured has acted recklessly. Such a teen should be placed in a mandatory juvenile diversion program designed to educate the teen regarding issues related to consent, privacy and the viral threat of internet publication of teen sexting images.

If an image is published with the intent to cause emotional harm, embarrass or stigmatize, then the teen should be adjudicated delinquent, the teen's phone and internet use should be monitored for a reasonable period, and the teen should undergo education regarding privacy rights, the internet and the legal meaning and importance of consent in relation to matters of sexual intimacy.

No teen who creates, possesses or distributes a teen sexting image should be prosecuted under state or federal child pornography law, nor be required to register as a sexual offender.²⁹⁵

Application of the proposed statute to the three principal cases from Florida, Pennsylvania and Washington would lead to dramatically different results for each teen. In the Florida case, the teens would not be in violation of the applicable state or federal law. The purely private creation and possession of teen sexting images by teens would be protected within the teen zone of sexual privacy. In the Pennsylvania case, the teens depicted at the age of 13 would be treated as victims, not as potential defendants or delinquents. Additionally, absent evidence of intent to harm, the teens who recklessly published the teen sexting images without the permission of those pictured would be required to attend a mandatory diversionary program, would not be adjudicated delinquent or prosecuted as child pornographers and would not be required to register as sex offenders. In the Washington case, the creation and possession of the Teen Sexting Images was originally permissive under the proposed statute; however, the subsequent

295. This section arguably violates the Adam Walsh Act; however, some courts have held the registration rule unconstitutional. See generally Anne Marie Atkinson, *The Sex Offender Registration and Notification Act (SORNA): An Unconstitutional Infringement of States' Rights under the Commerce Clause*, 3 CHARLESTON L. REV. 573, 591-600 (2009).

publication occurred without consent and raised the question of whether the actor intended to harm, embarrass or stigmatize the older teen depicted. Thus, the proposed statute is designed to be flexible enough to consider the age of the actor, the age of the person depicted, the intent of the actor, the degree of publication and to protect a limited zone of teen sexual privacy.

CONCLUSION

Sexting is pervasive among American teens. Adults are complicit in this trend because society glorifies sex and youth and uses both as a marketing tool in the media. Given the characteristics of adolescence, developing brain function, susceptibility to peer pressure, attraction to risky behavior and lack of self-regulating skills, teens are particularly vulnerable to the harms associated with sexting. While child pornography laws serve a compelling purpose by protecting children from sexual predation and the lasting harm of digital abuse, child pornography and sexual offender registration laws are not intended to encompass teen sexting and should be amended to correct this overbreadth. Teens, as persons, are within the protection of the Constitution and enjoy some degree of sexual privacy and autonomy already recognized in the abortion, birth control access and right to medical treatment cases previously decided by the Supreme Court. Supreme Court precedent creates a zone of privacy enjoyed by older teens. Arguably, it embraces older teens' rights to create and possess sexually explicit photos, so long as the images are consensually created and privately shared and so long as they are not obscene. This article proposes a model statute to guide legislators in the struggle to isolate and differentiate the harm related to teen sexting from the harm associated with true child pornography. Thus, by considering age, content, consent and intent, the statute seeks to isolate problematic teen sexting, adjudicate only teens engaged in such conduct as delinquent and redress the harm entirely within the juvenile justice system.