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NOTE

SEXTING: A RESPONSE TO PROSECUTING THOSE GROWING UP WITH A GROWING TREND

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INTRODUCTION

Hope liked a boy and sent him a photo showing her breasts.¹ The photo eventually made its way around Hope's entire school.² The school suspended Hope, and she returned to school to face a barrage of insults as students called her a "'whore' and [a] 'slut.'"³ Three months later, Hope's mother found her daughter dead, all of thirteen years old, after "Hope [hung] herself in her bedroom."⁴

Like Hope's tragic story, the debate over how to respond to "sexting" has headlined news outlets over the past several years.⁵ A minor creates a "sext" message by "tak[ing] a picture of him- or herself with a digital camera or cell phone camera, or ask[ing] someone else to take that picture."⁶ In a high school class of one hundred students, perhaps as many as twenty of these students will have sent sexually explicit images to each other by cell phone.⁷ Prosecutors

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1. Andrew Meacham, *A Shattered Self-Image*, ST. PETERSBURG TIMES, Nov. 29, 2009, at 1A, available at 2009 WLNR 24167487.

2. *Id.*

3. *Id.*

4. *Id.* While not as tragic in their endings, many stories surrounding incidents of sexting follow similar fact patterns. See, e.g., Mathias H. Heck, Jr., *Sexting and Charging Juveniles—Balancing the Law and Bad Choices*, 43 PROSECUTOR 28, 28 (Mar. 2009).

5. 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, 1-3 (2009).

6. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 647 (M.D. Pa. 2009), *aff'd sub nom. Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

7. See NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1 (2008), available at <http://www>.

threaten legal action,⁸ and students' peers ridicule teens⁹ appearing in the images.

The law has failed to adapt quickly enough to teens sending these images. In response to sexting, prosecutors have utilized laws originally intended for child predators,¹⁰ such as child pornography statutes.¹¹ Many of these statutes define the prohibited acts using broad language. For example, Pennsylvania's child pornography statute, the statute under which teens could be prosecuted for sending sext messages, prohibits depictions of minors "engag[ed] in a prohibited sexual act."¹² Nudity is included in the definition of a "prohibited sexual act" if the depiction is sexually stimulating.¹³ For parents and teens facing an aggressive prosecutor, this takes the phrase "in the eye of the beholder" to a whole new level. A conviction under a child pornography statute, "even in juvenile court," may require classification and registration as a sex offender for the juvenile.¹⁴ This registration includes "community notification requirements."¹⁵ In Oregon, a judge analogized a sexting conviction to *The Scarlet Letter*'s Hester Prynne and stated that the "sex offender label" could "brand[] [the letter] 'A' on [a teen's] forehead for the rest of [her] life."¹⁶

Part I of this Note details the history and rationale governing the juvenile justice system, as well as recent changes to the system. Part II looks at child pornography laws, the justifications behind them, and recent cases discussing how to address juveniles who create pornography. Part III details the recent phenomenon of sexting and surveys several state bills adopted or considered across the country. Finally, Part IV proposes changes to state laws and attempts

thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf. But see Robert H. Wood, *The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint*, 16 MICH. TELECOMM. & TECH. L. REV. 151, 154 (2009) (arguing that the survey does not accurately portray the true scope of the problem); Carl Bialik, *Which Is Epidemic—Sexting or Worrying About It?*, WALL ST. J., Apr. 8, 2009 (criticizing the survey's procedure in gathering its sample).

8. Richards & Calvert, *supra* note 5, at 3-5.

9. Kevin Turbert, Note, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 656 n.24 (2009).

10. See Shannon P. Duffy, 'Sexting' Case to Take Center Stage at 3rd Circuit, LEGAL INTELLIGENCER, Jan. 14, 2010, at 1, available at 2010 WLNR 752642 (discussing *Miller v. Skumanick* and the prosecutor's appeal of the district court's injunction to prevent opportunity to bring prosecution under child pornography laws).

11. See *Skumanick*, 605 F. Supp. 2d at 637-38 (observing that conviction under child pornography law could "give even juveniles a permanent record").

12. 18 PA. CONS. STAT. ANN. § 6312(b) (West, Westlaw through 2010 legislation).

13. *Id.* § 6312(g).

14. Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 535-36 (2008) (citing Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 46-47 (2007)).

15. *Id.*

16. Lori Tobias, *Teenager Gets Jail in 'Sexting' Case*, OREGONIAN, Oct. 17, 2009, available at 2009 WLNR 20589470.

to merge the strengths of adopted or proposed state bills and rationales underlying the juvenile court system and child pornography laws.

I. EXPLANATION OF THE JUVENILE COURT SYSTEM

Prior to 1899, states tried children in adult courts, and a child's lone defense was to rely on the "common law infancy defense . . . as the only protection" from adult sentences.¹⁷ In 1899, Illinois passed a statute creating a court for juveniles, which every other state soon imitated.¹⁸ States derived their power to regulate juvenile offenses from the doctrine of *parens patriae*,¹⁹ which asserts that states provide "protection to those unable to care for themselves."²⁰ The doctrine seemingly gave states the right to withhold procedural due process safeguards to protect children's rights because the states did not view children as needing those safeguards.²¹ States could also interfere with parents' "fundamental" but limited rights "to raise their children"²² if the parents failed and the child was deemed "delinquent."²³

Proponents for a separate system for juveniles based their arguments on rehabilitating juveniles and "sav[ing] [them] from a downward career."²⁴ Thus, theoretically, "[t]he avowed priority of our juvenile justice system . . . has, historically, been rehabilitation rather than retribution."²⁵ An emphasis on rehabilitation has also led the juvenile court system to be primarily private in nature.²⁶ Contrary to the rationale of public adult hearings, the prevailing view in juvenile law has been that children need protection from "any public

17. Courtney P. Fain, *What's in a Name? The Worrisome Interchange of Juvenile "Adjudications" with Criminal "Convictions,"* 49 B.C. L. REV. 495, 498 (2008) (citing BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 47 (1999)).

18. See *In re Gault*, 387 U.S. 1, 14-15 (1967).

19. Leary, *supra* note 14, at 26 (arguing that the state's police power and the doctrine support intervention and defining the "doctrine as the basis for government intervention in the lives of children who were exposed to danger because of the failure of those responsible for the children's safety to protect them") (citing *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890)).

20. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

21. *In re Gault*, 387 U.S. at 17.

22. Leary, *supra* note 14, at 26-27 (citing *Troxel v. Granville*, 530 U.S. 57, 87 (2000) (Stevens, J., dissenting)).

23. *In re Gault*, 387 U.S. at 17.

24. *Id.* at 15 (quoting Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909)).

25. *United States v. Juvenile Male*, 581 F.3d 977, 978 (9th Cir. 2009), *amended and superseded by* 590 F.3d 924 (9th Cir. 2010), *and certifying questions to* 130 S. Ct. 2518 (2010).

26. Fain, *supra* note 17, at 500 (citing David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* 42, 61 (Margaret K. Rosenheim et al. eds., 2002)).

humiliation and stigmatization that might otherwise hamper rehabilitation.”²⁷ This notion of privacy promotes rehabilitation through “‘clinical’ procedures ‘rather than punitive’ ones.”²⁸ Without this confidentiality, the “stigma” of being adjudicated as a delinquent could limit a child’s future opportunities in his educational and professional life.²⁹

Juvenile courts have also justified imposing punishment based on the traditional rationales of deterrence, incapacitation, and retribution.³⁰ As it stands, the juvenile court system can work to deter juveniles from committing future acts that would require them to be adjudicated as delinquents.³¹ Critics of the system, however, have questioned whether the rehabilitation and deterrence methods can coexist.³² Their concern rests on the idea that reduced punishments aimed at rehabilitation may not provide enough of a deterrent effect against future criminal activity.³³

Over the past forty years, legislatures, prosecutors, and shifts in public opinion have moved juvenile courts closer to the retribution model.³⁴ The retribution model inherently holds that juveniles must be responsible for their actions.³⁵ Proponents of rehabilitation, though, have criticized more severe responses because the likelihood of repeat offenses decreases as juveniles mature.³⁶ Critics also point to additional societal costs and occasional severe sentences that seem inherently unfair in a system founded on the concept of treatment.³⁷

As juvenile courts have become more sophisticated, the Supreme Court has added additional procedural safeguards to protect juveniles. In *Kent v. United States*, due process and fairness required that a juvenile was “by [federal] statute entitled to certain procedures and benefits as a consequence of his statutory right to the ‘exclusive’ jurisdiction of the [j]uvenile [c]ourt.”³⁸ The Court also noted that the state’s unique relationship with minors in its *parens patriae* capacity did

27. *Id.*

28. *Juvenile Male*, 581 F.3d at 984 (quoting *In re Gault*, 387 U.S. at 15-16).

29. See Joanna S. Markman, *Community Notification and the Perils of Mandatory Juvenile Sex Offender Registration: The Dangers Faced by Children and Their Families*, 32 SETON HALL LEGIS. J. 261, 272 (2008).

30. ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 737 (5th ed. 2005).

31. *Id.* at 742.

32. See *id.* at 742-44.

33. *Id.* at 743.

34. Andrew R. Strauss, Note, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1554 (2002).

35. MNOOKIN & WEISBERG, *supra* note 30, at 745.

36. *Id.* at 743-45.

37. *Id.* at 744.

38. *Kent v. United States*, 383 U.S. 541, 557 (1966).

not give the state the right to exercise “procedural arbitrariness.”³⁹ In *In re Gault*, the Court held that a juvenile was entitled to the same procedural due process safeguards he would have received outside of juvenile court.⁴⁰ Writing for the majority, Justice Fortas stated that “the condition of being a boy does not justify a kangaroo court.”⁴¹

Historically, the Court has left juvenile court punishments to the states.⁴² The Court has, however, acknowledged that juveniles are different from adults.⁴³ This basic age difference permits the juvenile court system to view delinquents as “changeable and to some extent malleable entit[ies].”⁴⁴ Therefore, the central question is “[w]hen should a person be treated as an adult?”⁴⁵ Although as a society, our answer to this seems to be “consistent . . . [only in] our inconsistency,” the Court has slightly illuminated our inquiry.⁴⁶ Furthermore, legal scholars have pointed to scientific research illustrating that teenagers are different from adults in terms of “psychosocial, physical, and neurological traits.”⁴⁷

Recent research indicates that teenagers adopt others’ “attitudes, values, and behaviors” to form their “individual identity, autonomy, interpersonal intimacy, sexuality and personal achievement.”⁴⁸ In *Roper v. Simmons*,⁴⁹ the Court cited

39. *Id.* at 555.

40. *In re Gault*, 387 U.S. 1, 13, 29 (1967).

41. *Id.* at 28.

42. Adam Liptak, *Supreme Court Set to Hear Appeals on Life in Prison for Youths Who Never Killed*, N.Y. TIMES, Nov. 8, 2009, at A24, available at 2009 WLNR 22359769.

43. See Elisa Poncz, *Rethinking Child Advocacy After Roper v. Simmons: “Kids Are Just Different” and “Kids Are Like Adults” Advocacy Strategies*, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 273, 277 (2008) (discussing various instances when child advocates should argue that “kids are just different”).

44. FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING 150 (2004); see also Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues—Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL’Y & L. 486, 488 (2010) (discussing 2007 article by author that identified two jurisprudence lines of conflict with sexting, including “juvenile law’s recognition that juveniles are often less aware of the social harms their illegal behavior can cause and are less culpable”).

45. Catherine Rampell, *How Old is Old Enough?*, N.Y. TIMES, Nov. 15, 2009, at WK5, available at 2009 WLNR 22970554.

46. *Id.*

47. Jennifer Ann Drobac, *I Can’t to I Kant: The Sexual Harassment of Working Adolescents, Competing Theories, and Ethical Dilemmas*, 70 ALB. L. REV. 675, 679 (2007).

48. Jennifer Ann Drobac, *“Developing Capacity”: Adolescent “Consent” at Work, at Law, and in the Sciences of the Mind*, 10 U.C. DAVIS J. JUV. L. & POL’Y 1, 27 (2006).

49. 543 U.S. 551 (2005). Although *Roper* addressed death penalty sentences for juveniles, the Court recently addressed another case dealing with juvenile life sentences that some see as “the *Brown v. Board of Education* of juvenile law.” Liptak, *supra* note 42; see also Catherine Arcabascio, *Sexting and Teenagers: OMG R U Going 2 Jail???*, 16 RICH. J.L. & TECH. 1, 4-5

evidence that children are different from adults in terms of maturity, vulnerability to “negative influences and outside pressures,” and the fact that their personalities are less developed than those of adults.⁵⁰ As an adolescent ages, his brain continues to grow and mature, refining the ability to reason, rely on “‘gut’ responses,”⁵¹ rationalize, and assess risky situations.⁵² This process continues well into a person’s twenties.⁵³ Furthermore, a teenager’s neurological features are also less developed than those of a person in his twenties.⁵⁴ The younger the individuals are, the less able they are to grasp risks or comprehend the result of taking those risks.⁵⁵ Older teens face outside influences on their judgment, such as “peer and parental influence, temporal perception and risk perception,” that affect them more than they would affect similarly situated adults.⁵⁶ This discrepancy leads to a tendency for teenagers to favor thinking about their immediate circumstances and “demonstrate a preference for sensation-seeking.”⁵⁷

Research, however, has not provided a clear marker of when children become adults.⁵⁸ Indeed, studies have confirmed what “[a]ny parent of a teenager will tell you that, no matter how smart [his or her] teenager is, odds are that he or she will have lapses in judgment during those hormone-driven, development years”⁵⁹ and that some teens grow up faster than others. Of note is the finding that children and adults possess more similar cognitive abilities than previously thought.⁶⁰ Cognitive ability alone, however, is not the only factor in juvenile decisionmaking.⁶¹ The other decisionmaking skills that separate and illustrate different priorities of juveniles and adults also help to explain why teens may be

(2010), available at <http://jolt.richmond.edu/v16i3/article10.pdf> (discussing *Roper* and teenage brain development); Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035 (2010) (referencing *Roper* and stating that the courts have looked towards juvenile scientific research and found that “child offenders [are] less culpable and more capable of reform”).

50. *Roper*, 543 U.S. at 569-70.

51. Drobac, *supra* note 48, at 15 (quoting Sarah Spinks, *One Reason Teens Respond Differently to the World: Immature Brain Circuitry*, in *INSIDE THE TEENAGE BRAIN*, FRONTLINE, available at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/onereason.html>).

52. *Id.* at 12-19.

53. *Id.* at 19.

54. *See id.* at 16-18 (discussing new research findings regarding the maturation process of individuals’ neurological development).

55. *Id.* at 25-26.

56. *Id.* at 26-27 (quoting Jennifer L. Woolard, *Capacity, Competence, and the Juvenile Defendant*, in *CHILDREN, SOCIAL SCIENCE, AND THE LAW* 270 (Bette L. Bottoms et al. eds., 2002)).

57. Drobac, *supra* note 47, at 715 (citing Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1773 (1995)).

58. Rampell, *supra* note 45.

59. Arcabascio, *supra* note 49, at 4-5.

60. Drobac, *supra* note 47, at 714 (citing Cauffman & Steinberg, *supra* note 56, at 1768).

61. *Id.*

more willing to engage in what many adults would define as risky behavior.⁶²

Notwithstanding this research, the idea that “kids are just different”⁶³ does not permeate all state and federal statutes. This is especially true in terms of registering juveniles as sex offenders. Critics of juvenile registration point out that this practice conflicts with the privacy and rehabilitation goals of the juvenile court system.⁶⁴ Nevertheless, a trend of grouping juvenile and adult sex offenders exists in recent state law provisions.⁶⁵ Before the Adam Walsh Child Protection and Safety Act of 2006 (“Adam Walsh Act”)⁶⁶ passed, “[thirty-two] states required youth adjudicated in juvenile court to register” if convicted of a sex offense.⁶⁷ However, these statutes vary significantly from state to state.⁶⁸ Notably, not all of the states have required juvenile information to be made available to the general public.⁶⁹

Recent federal enactments have altered juvenile registry requirements. Specifically, the Adam Walsh Act placed adult and juvenile offenders on the same registries.⁷⁰ Prior to the Adam Walsh Act, juveniles were only required to register if they were “prosecuted and convicted as adults.”⁷¹ Title I of the Adam Walsh Act, the Sex Offender Registration and Notification Act (SORNA),⁷² applies the term “convicted” to adjudicated delinquency; it only applies “if the offender is at least fourteen years old and the offense adjudicated is comparable or more severe than the federal crime of aggravated sexual assault, or if the offender made an attempt or was involved in a conspiracy to commit such a crime.”⁷³ The guidelines define “aggravated sexual abuse” according to 18

62. *Id.* at 714-15.

63. *See* Poncz, *supra* note 43, at 273.

64. Markman, *supra* note 29, at 283-84.

65. *Id.* at 280.

66. 42 U.S.C. § 16901 (2006 & Supp. 2008).

67. CTR. FOR SEX OFFENDER MGMT., *Section 7: The Legal & Legislative Response, in THE EFFECTIVE MANAGEMENT OF JUVENILE SEX OFFENDERS IN THE COMMUNITY* (on file with author).

68. Britney M. Bowater, Comment, *Adam Walsh Child Protection and Safety Act of 2006: Is There a Better Way to Tailor the Sentences of Juvenile Sex Offenders?*, 57 CATH. U.L. REV. 817, 830 (2008) (citing Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 177-79 (2003)).

69. CTR. FOR SEX OFFENDER MGMT., *supra* note 67.

70. Neil F. Wilson, Note, *No Child Left Behind: The Adam Walsh Act and Pennsylvania Juvenile Sex Offenders*, 70 U. PITT L. REV. 327, 336 (2008); *see also* Leary, *supra* note 14, at 45-46 (discussing Adam Walsh Act and arguing that it should not prevent a juvenile court response when juveniles transmit images).

71. CTR. FOR SEX OFFENDER MGMT., *supra* note 67.

72. 42 U.S.C. § 16911 (2006); SORNA, OFFICE OF JUSTICE PROGRAMS, <http://www.ojp.usdoj.gov/smart/sorna.htm> (last visited July 25, 2010); *see also* Arcabascio, *supra* note 49, at 9 n.37 (discussing Adam Walsh Act).

73. Wilson, *supra* note 70, at 332 (citing 42 U.S.C. § 16911).

U.S.C. § 2241.⁷⁴ According to the United States Code, aggravated sexual abuse is performed through force, by rendering the victim unconscious, or by committing a sexual act on a child under the age of twelve.⁷⁵ It is important to note, though, that SORNA merely “defines minimum standards.”⁷⁶ Furthermore, it requires registration for juveniles who are convicted in adult court for a sexual offense,⁷⁷ such as “offenses whose gravamen is creating or participating in the creation of sexually explicit visual depictions of persons below the age of 18, making such depictions available to others, or having or receiving such depictions.”⁷⁸

II. CHILD PORNOGRAPHY LAWS AND THE ISSUE OF JUVENILES CREATING PORNOGRAPHY

Child pornography is outlawed everywhere in the United States.⁷⁹ Tragically, the volume of child pornography in existence has been growing over the past two decades.⁸⁰ The Internet has clearly facilitated this disturbing trend, as evidenced by the thousands of child pornography images uploaded to the Web.⁸¹

A. *The Supreme Court’s Response to Child Pornography Statutes*

The First Amendment generally provides broad protection to speech, but the Supreme Court has acknowledged a number of exceptions to this protection.⁸² Specifically, the Court has held that the First Amendment does not protect obscene material.⁸³ In *Miller v. California*, the Court determined that material was obscene if it met three requirements.⁸⁴ Previously, the Court had held that a state could not “mak[e] mere private possession of obscene material a crime.”⁸⁵

74. Lori McPherson, *Practitioner’s Guide to the Adam Walsh Act*, 20 NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE UPDATE, nos. 9-10, at 2-3 (2007), available at http://www.ojp.usdoj.gov/smart/pdfs/practitioner_guide_awa.pdf.

75. 18 U.S.C. § 2241 (2006 & Supp. 2009).

76. OFFICE OF JUSTICE PROGRAMS, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION 1, 16, available at http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf (last visited Sept. 29, 2010).

77. *Id.* at 15-16.

78. *Id.* at 20.

79. ZIMRING, *supra* note 44, at 20.

80. Leary, *supra* note 14, at 8 (citing *Internet Porn ‘Increasing Child Abuse,’* THE GUARDIAN (Jan. 12, 2004), <http://society.guardian.co.uk/children/story/0,1074,1121332,00.html>).

81. *Id.*; Leary, *supra* note 44, at 520-21.

82. See Kyle Duncan, *Child Pornography and First Amendment Standards*, 76 MISS. L.J. 677, 679-686 (2007) (discussing the Supreme Court’s First Amendment exceptions).

83. *Miller v. California*, 413 U.S. 15, 23 (1973).

84. *Id.* at 24 (stating that the image must “appeal to the prurient interest in sex . . . in a patently offensive way . . . and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value”).

85. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

The Supreme Court first tackled child pornography laws in *New York v. Ferber*.⁸⁶ In *Ferber*, the Court held that the First Amendment did not protect child pornography.⁸⁷ Two decades after *Ferber*, in *Ashcroft v. Free Speech Coalition*, the Court held that “virtual” child pornography and pornography involving actors who look like minors is constitutionally protected because it “records no crime and creates no victims by its production.”⁸⁸ The Court also reiterated the need for child pornography statutes in both *Ferber* and *Free Speech Coalition*.⁸⁹

In *Free Speech Coalition*, the Court stated that “*Ferber* upheld a prohibition on the distribution and sale of child pornography” because it was “a permanent record of a child’s abuse” and “each new publication of the speech would cause new injury to the child’s reputation and emotional well-being.”⁹⁰ Additionally, the Court noted that “the State had an interest in closing the distribution network” in order to “dry up the market for this material.”⁹¹ Distinguishing the two cases, the Court stated that *Ferber* had refused to afford child pornography First Amendment protection not because of the content of the communication, but because of how it was created.⁹² Additionally, the Court rejected the government’s argument that this material could be banned because it “whets the appetite of pedophiles and encourages them to engage in illegal conduct.”⁹³ The Court reiterated that legislatures could not base statutes on the appeal of banning certain thoughts⁹⁴ and that child pornography laws lie outside the scope of First Amendment protection because of the recorded crime and harm to the victim.⁹⁵

B. Minors Producing Pornography

Although sexting is a new legal phenomenon,⁹⁶ at least two academics have addressed the value, if any, of charging juveniles with child pornography crimes prior to the term gaining widespread use.⁹⁷ Those advocating a “therapeutic approach”⁹⁸ acknowledge that state child pornography laws “apply to any pornographic depictions of a minor” and “do not exempt cases where minors

86. 458 U.S. 747 (1982).

87. *Id.* at 764.

88. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002).

89. *Id.* at 244-45; *Ferber*, 458 U.S. at 756-57.

90. *Free Speech Coal.*, 535 U.S. at 249.

91. *Id.* at 252.

92. *Id.* at 251-52.

93. *Id.* at 253.

94. *Id.* (quoting *Stanley v. Georgia*, 394 U.S. 577, 566 (1969)).

95. *See Smith*, *supra* note 14, at 518-21 (discussing the Supreme Court’s reasoning for upholding child pornography laws that cause visual harm and criminal acts).

96. Richards & Calvert, *supra* note 5, at 1-4.

97. Compare Leary, *supra* note 14, with Smith, *supra* note 14.

98. Smith, *supra* note 14, at 541.

produce or disseminate pornographic images of themselves.”⁹⁹ The laws are often separated into “creation,”¹⁰⁰ “possession,”¹⁰¹ and “distribution”¹⁰² categories.¹⁰³ These statutes prohibit material involving minors that is obscene¹⁰⁴ or depicts sexual conduct,¹⁰⁵ abuse,¹⁰⁶ nudity,¹⁰⁷ or child pornography.¹⁰⁸ The statutory

99. *Id.* at 513.

100. *See, e.g.*, GA. CODE ANN. § 16-12-100(b)(1) (2010) (“It is unlawful for any person knowingly to employ, use, persuade, induce, entice, or coerce any minor to engage in or assist any other person to engage in any sexually explicit conduct for the purpose of producing any visual medium depicting such conduct.”).

101. *See, e.g., id.* § 100(b)(8) (“It is unlawful for any person knowingly to possess or control any material which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct.”).

102. *See, e.g., id.* § 100(b)(6) (“It is unlawful for any person knowingly to advertise, sell, purchase, barter, or exchange any medium which provides information as to where any visual medium which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct can be found or purchased.”).

103. Shannon Shafron-Perez, Comment, *Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting*, 26 J. MARSHALL J. COMPUTER & INFO. L. 431, 434 (2009).

104. *See, e.g.*, ALA. CODE § 13A-12-197 (2006 & Supp. 2010). This portion of the Alabama Code provides that

[a]ny person who knowingly films, prints, records, photographs or otherwise produces any obscene matter that contains a visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct shall be guilty of a Class A felony.

105. *See, e.g.*, IND. CODE § 35-42-4-4(c) (2010). This section of the Indiana Code provides that

[a] person who knowingly or intentionally possesses: (1) a picture; (2) a drawing; (3) a photograph; (4) a negative image; (5) undeveloped film; (6) a motion picture; (7) a videotape; (8) a digitized image; or (9) any pictorial representation; that depicts or describes sexual conduct by a child who the person knows is less than sixteen (16) years of age or who appears to be less than sixteen (16) years of age, and that lacks serious literary, artistic, political, or scientific value commits possession of child pornography, a Class D felony.

106. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.145c(m) (West, Westlaw through 2010 legislation). This section of the Michigan Code defines “child sexually abusive material” as any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act; a book, magazine, computer, computer storage device, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated

language may differ slightly,¹⁰⁹ but it still encompasses “self-produced child pornography.”¹¹⁰ Conviction under child pornography statutes carries severe penalties.¹¹¹ Creating, distributing, and possessing child pornography may result in jail time and may also require registration on the applicable state sex offender registry, a penalty that could potentially prevent future rehabilitation.¹¹²

Over the past several years, prosecutors have more frequently focused their efforts on offenders who are minors when handling child pornography cases.¹¹³ “Self-exploitation” images of children appeared online more frequently with the advent of computer cameras.¹¹⁴ Similarly, state laws have subjected teens to penalties for sending pornographic videos of themselves to other people. For example, the language of Florida’s pornography laws is neither unique nor varied compared to other states.¹¹⁵ In *A.H. v. State*,¹¹⁶ a case extensively discussed in recent articles addressing sexting,¹¹⁷ a sixteen-year-old girl and her seventeen-

image, or picture, other visual or print or printable medium, or sound recording.

107. See, e.g., OHIO REV. CODE ANN. § 2907.323(A)(1) (West, Westlaw through 2010 legislation) (“No person shall . . . [p]hotograph any minor who is not the person’s child or ward in a state of nudity, or create, direct, produce, or transfer any material or performance that shows the minor in a state of nudity . . .”).

108. See, e.g., OKLA. STAT. ANN. tit. 21, § 1021(A)(3) (West, Westlaw through 2010 legislation) (“Every person who willfully and knowingly either . . . [w]rites, composes, stereotypes, prints, photographs, designs, copies, draws, engraves, paints, molds, cuts, or otherwise prepares, publishes, sells, distributes, keeps for sale, knowingly downloads on a computer, or exhibits any obscene material or child pornography . . .”).

109. Shafron-Perez, *supra* note 103, at 434.

110. Smith, *supra* note 14, at 512-13 (acknowledging that Professor Leary’s article, *supra* note 14, correctly points out that minors in a “cell phone porn” case had violated child pornography laws).

111. *Id.* at 508.

112. *Id.* at 536-37; see also 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, 28-29 (2009) (agreeing with Professor Smith’s assessment of the issue).

113. Amy F. Kimpel, *Using Laws Designed to Protect as a Weapon: Prosecuting Minors Under Child Pornography Laws*, 34 N.Y.U. REV. L. & SOC. CHANGE 299, 301-02 (2010).

114. See Leary, *supra* note 14, at 18-19.

115. FLA. STAT. ANN. § 827.071 (West, Westlaw through 2010 legislation) (“A person is guilty of the use of a child in a sexual performance if, knowing the character and content thereof, he or she employs, authorizes, or induces a child less than 18 years of age to engage in a sexual performance or, being a parent, legal guardian, or custodian of such child, consents to the participation by such child in a sexual performance”); see also Weins & Hiestand, *supra* note 112, at 4.

116. 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).

117. See Arcabascio, *supra* note 49, at 15-19; Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMM.LAW CONSP. 1, 49 (2009); John A. Humbach, *‘Sexting’ and the First Amendment*, 37 HASTINGS CONST. L.Q. 433, 433-34 (2010); Kimpel, *supra* note 113, at

year-old boyfriend faced child pornography charges because they created digital photos of themselves nude and engaged in sexual behavior.¹¹⁸ The court held that the state had a compelling interest “in preventing the production of these photographs and criminal prosecution was the least intrusive means of furthering the [s]tate’s compelling interest.”¹¹⁹ Furthermore, the court stated that the distribution of the photographs eliminated the minors’ reasonable expectation of privacy.¹²⁰ A decade earlier, another Florida appellate court held that the state’s compelling interest in protecting minors was different when two minors had consented to sexual intercourse.¹²¹ In that case, *State v. A.R.S.*, the fifteen-year-old male minor had created, possessed, and shown to a third person a sexually explicit videotape of himself and a female minor.¹²² The court reversed the trial court’s dismissal of the charges and reasoned that the statute’s purpose was “to protect minors from exploitation from anyone,” including other minors.¹²³

Legislative policy has relied heavily on stereotypes when addressing how to handle sex offenders.¹²⁴ This practice has created legislative constructions utilizing broad terms that encompass a wide variety of conduct.¹²⁵ The stereotypes and broad language also reinforce the notion that states should punish a juvenile sex offender under the same rationale as an adult offender, even if empirical or scientific evidence does not support similar types of punishments.¹²⁶

C. Addressing Age of Consent and Child Pornography Laws

As illustrated, prosecutors have generally not extended the rationale that because “two teenagers of comparable age [may] engage in an act of voluntary sexual intercourse,”¹²⁷ they can therefore legally record, photograph, or visually

300; Leary, *supra* note 14, at 4; Smith, *supra* note 14, at 513 n.32; Weins & Hiestand, *supra* 112, at 4-5; Wood, *supra* note 7, at 170; Jesse Michael Nix, Study Note, *Unwholesome Activities in a Wholesome Place: Utah Teens Creating Pornography and the Establishment of Prosecutorial Guidelines*, 11 J.L. & FAM. STUD. 183, 188-89 (2008); Sarah Wastler, Student Article, *The Harm in “Sexting”? Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images*, 33 HARV. J.L. & GENDER 687, 694-95 (2010).

118. *A.H.*, So. 2d at 235.

119. *Id.*

120. *Id.* at 237; *see also* Weins & Hiestand, *supra* note 112, at 4-5.

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

122. *Id.* at 1384.

123. *Id.* at 1387 (citing *Schmitt v. State*, 590 So. 2d 404, 412 (Fla. 1991)).

124. ZIMRING, *supra* note 44, at xiii.

125. *See id.* at 11-13 (discussing juvenile state statutes that closely parallel adult statutes and statutes worded broadly that capture unintended conduct).

126. *See id.* at xiii; *cf.* Smith, *supra* note 14, at 514-15 (discussing severe punishments minors may face if prosecuted under child pornography statutes).

127. Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers*, 12 CORNELL J.L. & PUB. POL’Y 373, 390 (2003).

document it.¹²⁸ Federal law makes it illegal for anyone to send depictions of any person under the age of eighteen engaged in sexual acts “across state lines.”¹²⁹ Seemingly, the United States Code makes child pornography statutes applicable to legally consenting teens who document their sexual activities.¹³⁰

At least one state court, however, has reached a different decision when faced with an age of consent law that is inconsistent with the definition of a minor or child in its child pornography laws. In Indiana, one defense to sexual misconduct with a minor is if the accused believed that the individual was at least sixteen years old.¹³¹ The statute prohibiting the provision of obscene matter or child pornography to minors through electronic means, however, defines a child as less than eighteen years old.¹³² The Indiana Court of Appeals addressed this dichotomy in *Salter v. State*, a case in which an adult male defendant sent “pictures of his genitals” to a sixteen-year-old female minor who had sent him thirty-eight images of herself in various stages of nudity.¹³³ The court held that the “dissemination of matter harmful to minors” statute was too vague because it did not afford the defendant fair notice that the images would be harmful to a sixteen-year-old minor when read in light of the age of consent law.¹³⁴

Similarly, in Pennsylvania, the age of consent is sixteen,¹³⁵ but the state still defines a child as anyone under the age of eighteen.¹³⁶ In *Commonwealth v. Kitchen*, the trial court convicted an adult male under Pennsylvania’s child pornography laws and sentenced him to serve two to five years for each count of taking and possessing nude photographs of his sixteen-year-old girlfriend.¹³⁷ The defendant argued that because he and the victim had legally lived together for eighteen months and had a child together, the application of the child

128. *Contra* Smith, *supra* note 14, at 524-25; Weins & Hiestand, *supra* note 112, at 50 n.345.

129. Michael Reynolds, Note, *Depictions of the Pig Roast: Restricting Violent Speech Without Burning the House*, 82 S. CAL. L. REV. 341, 380 (2009) (citing 18 U.S.C. § 2252 (2006 & Supp. 2008)).

130. *Id.*

131. IND. CODE § 35-42-4-9(c) (2008).

132. *Id.* § 35-49-3-3(b)(3).

133. *Salter v. State*, 906 N.E.2d 212, 214, 221 (Ind. Ct. App. 2009). The court found that because “Indiana’s possession of child pornography statute only extends to children under sixteen,” the defendant could not be found guilty of possession of child pornography. *Id.* at 221. This case example illustrates the problem of interpreting age of consent laws that conflict with child pornography laws, but it does not stand for the proposition that penalties should be lessened when an adult is involved. See, e.g., Leary, *supra* note 14, at 507 (stating that adults involved in producing images of minors “is an example grooming the child for sexual exploitation at a minimum”).

134. *Salter*, 906 N.E.2d at 223.

135. 18 PA. CONS. STAT. ANN. § 3122.1 (West, Westlaw through 2010 legislation).

136. *Id.* § 6312.

137. *Commonwealth v. Kitchen*, 814 A.2d 209, 211 (Pa. Super. Ct. 2002), *aff’d*, 839 A.2d 184 (Pa. 2003); see also Leary, *supra* note 44, at 546 n.253 (discussing case for support that “children do not have the ability to consent to being exploited”).

pornography law to any minor under eighteen was overbroad and should not apply.¹³⁸ Nevertheless, the Pennsylvania Superior Court disagreed, holding that the legislature had “determined that children need to be protected from being victimized through child pornography” and affirmed the defendant’s judgment of sentence.¹³⁹

III. SEXTING

The advance of technology, and especially the proliferation of cell phones and text messaging, has changed the way individuals interact, date, and court.¹⁴⁰ Cameras on cell phones have greatly increased the ability for individuals to take pictures, including explicit ones.¹⁴¹ In the last half-decade, cell phone ownership in the adolescent population has skyrocketed. Between 2004 and 2009, the number of twelve-year-old children owning cell phones jumped from eighteen percent to fifty-eight percent.¹⁴² Furthermore, sixty-six percent of teens that own cell phones send text messages.¹⁴³ Among juveniles, surveys indicate that somewhere between four¹⁴⁴ and twenty¹⁴⁵ percent of adolescents have sent sexually suggestive images via cell phone.

Polls show that teenage recipients of sext messages usually get these messages from people they know.¹⁴⁶ Generally, sexting occurs in three situations.¹⁴⁷ First, sexting can occur between “two romantic partners.”¹⁴⁸ Second, images of the first scenario may be distributed to persons not in the relationship.¹⁴⁹ Third, teenagers may exchange images as a form of flirtation or in hopes of beginning a relationship.¹⁵⁰ Within each of these scenarios is a wide spectrum of possible behavior ranging from sending images as a joke to demanding images as a form of peer pressure or worse.¹⁵¹

Adults often enter the situation when a school administrator, teacher, or adult

138. *Id.* at 212.

139. *Id.* at 214.

140. David Brooks, *Cell Phones, Texts and Lovers*, N.Y. TIMES, Nov. 3, 2009, at A29, available at 2009 WLNR 21915638.

141. Leary, *supra* note 14, at 24; *see also* Arcabascio, *supra* note 49, at 6-7.

142. AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, TEENS AND SEXTING 2 (2009), available at <http://pewresearch.org/assets/pdf/teens-and-sexting.pdf>.

143. *Id.*

144. *Id.* at 4.

145. NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, *supra* note 7, at 1.

146. *See* LENHART, *supra* note 142, at 2 (stating that fifteen percent of teens have received such images from someone they know).

147. *Id.* at 6-8.

148. *Id.* at 6.

149. *Id.* at 7.

150. *Id.*

151. *Id.*

guardian or supervisor discovers the images.¹⁵² School administrators may be required to report the images to authorities under possession of child pornography statutes if they confiscate any phone or image.¹⁵³ Once the image is confiscated, the issue becomes who to punish. Some parents push to have other participants in the images punished¹⁵⁴ along with those who distribute the images.¹⁵⁵ Teenagers may find that their pictures quickly spread throughout the school population, and they may face relentless ridicule from their peers.¹⁵⁶ In the past two years, stories of teens sending such “explicit text messages . . . created a media frenzy, parental panic, and ultimately a moral conundrum for the educational system and the courts.”¹⁵⁷

In response to the media uproar, schools have attempted to create policies prohibiting sexting.¹⁵⁸ Some of these schools, however, have no procedures in place to discipline students who are caught sexting.¹⁵⁹ Therefore, they may simply resort to contacting local law enforcement to address incidents.¹⁶⁰ Schools with sexting policies may also suspend or expel students¹⁶¹ and contact law enforcement due to concern that the image is child pornography.¹⁶²

Once law enforcement is involved in a sexting situation, prosecutors have been known to take or threaten legal action against teens for transmitting explicit images of themselves.¹⁶³ As with school procedures, many states prosecuting

152. See, e.g., Kathleen Kennedy Manzo, *Administrators Confront Student ‘Sexting’: Schools Urged to Develop Policies and Programs to Curb the Practice*, EDUC. WK., June 17, 2009, at 8, available at 2009 WLNR 12479375; Meacham, *supra* note 1, at 1A.

153. See Ting-Yi Oei, *My Students. My Cellphone. My Ordeal.*, WASH. POST, Apr. 19, 2009, at B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/17/AR2009041702663.html> (recounting incident where school principal faced potential charges for not alerting law enforcement after finding image on cell phone and temporarily storing it on his cell phone).

154. See Heck, *supra* note 4, at 29.

155. Mary McCarty, *Grieving Parents Want Appropriate Sexting Penalty*, DAYTON DAILY NEWS, Apr. 26, 2009, at A8, available at 2009 WLNR 8089092.

156. See *id.* (reporting on an Ohio eighteen-year-old who committed suicide after weeks of being tormented by other students when a nude picture of her circulated throughout her high school).

157. Sara Jacobson, *The Ramifications of Criminalizing Teen Sexting*, UPON FURTHER REVIEW (Phila. Bar Ass’n, Phila., Pa.), July 7, 2009 (on file with author).

158. Manzo, *supra* note 152.

159. *Id.*

160. *Id.*

161. *Id.*

162. Andrea Billups, *School Districts Hope Students Get the Picture About ‘Sexting’ Dangers*, WASH. TIMES, July 23, 2009, at A1, available at 2009 WLNR 14048151 (discussing Florida school district’s warning that students may be suspended from school and arrested under child pornography laws).

163. Jennifer Golson, *A Debate Swirls over Teens’ Lurid Pictures: Should Self-Portraits Draw Harsh Penalties?*, STAR-LEDGER, March 29, 2009, at 1, available at 2009 WLNR 5911079.

teens still do not have laws to address teens who privately send photographs to one another¹⁶⁴ or are still in the process of developing statutory language.¹⁶⁵ Judges struggle with how the punishment found in child pornography laws fits what justice requires.¹⁶⁶ Rationales for prosecutorial intervention of teens creating self-exploitation images of themselves include harm to children in images,¹⁶⁷ harm to children not in images,¹⁶⁸ harm to society and children generally,¹⁶⁹ and deterrence against future sexting.¹⁷⁰ Specifically, in instances of further distribution, intervention is warranted because harm in the form of “emotional distress and humiliation” results when the images are sent to those who were never intended to see them.¹⁷¹

A. Sexting Charges

Recent law enforcement cases addressing sext messages have varied considerably in their approaches. This variation is largely because teens caught sexting rarely fit a specific profile.¹⁷² In addition, punishments differ across jurisdictions and do not necessarily correlate with the teens’ culpability or any intent they exhibited.

In one of the most publicized sexting cases, a Pennsylvania district court prevented a prosecutor from pursuing charges against three teenage girls for possessing or distributing child pornography.¹⁷³ The school discovered photographs on cell phones of the girls depicting them as “scantily clad, semi-nude, and nude.”¹⁷⁴ The prosecutor insisted that this was child pornography¹⁷⁵

164. *Id.*; see also NAT’L CONFERENCE OF STATE LEGISLATURES, 2010 LEGISLATION RELATED TO “SEXTING” [hereinafter 2010 LEGISLATION], <http://www.ncsl.org/default.aspx?TabId=19696> (last visited July 26, 2010); NAT’L CONFERENCE OF STATE LEGISLATURES, 2009 “SEXTING” LEGISLATION [hereinafter 2009 LEGISLATION], <http://www.ncsl.org/default.aspx?tabid=17756> (last visited July 26, 2010).

165. See 2010 LEGISLATION, *supra* note 164.

166. Robin Fretwell Wilson, *Sex Play in Virtual Worlds*, 66 WASH. & LEE L. REV. 1127, 1162-63 n.197 (2009).

167. Leary, *supra* note 14, at 9-11; see also Nix, *supra* note 117, at 184-85.

168. Leary, *supra* note 14, at 12-17.

169. *Id.* at 17-18.

170. Leary, *supra* note 14, at 42-43; Weins & Hiestand, *supra* note 112, at 29; see also Golson, *supra* note 163.

171. Calvert, *supra* note 117, at 62.

172. *Id.* at 61.

173. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 647 (M.D. Pa. 2009), *aff’d sub nom. Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

174. *Id.* at 637.

175. Two of the girls wore bras as one made a peace sign with her hand and another spoke on the phone. *Id.* at 639. The other girl was photographed with a “towel . . . wrapped around her body, just below her breasts.” *Id.*

“because the girls were posed ‘provocatively.’”¹⁷⁶ He also gave the girls’ parents an ultimatum directing the girls either to attend his education program designed to teach “what it means to be a girl in today’s society” or face charges.¹⁷⁷ The court held that the girls and their parents had “asserted constitutionally protected activity”¹⁷⁸ with sufficient likelihood to succeed on the merits and issued a temporary restraining order enjoining the prosecutor from pursuing sexting charges against the minors.¹⁷⁹ The court, however, did not address whether the state’s child pornography statute applied.¹⁸⁰ The parents argued that the statute was inapplicable because the minors were the subjects of the photographs and the “victims of the crime.”¹⁸¹ In response to the prosecutor’s appeal, the Third Circuit Court of Appeals affirmed the grant of preliminary injunction¹⁸² and stated that because the prosecutor was requiring a minor to state why her actions were morally wrong, as opposed to legally wrong, she would likely prevail on “her First Amendment freedom against compelled speech” argument.¹⁸³

Charges would not have been unprecedented. Prior to *Miller v. Skumanick*, six Pennsylvania students faced charges for possession, manufacture, and distribution of child pornography.¹⁸⁴ Three male students faced possession charges after school officials found “racy” pictures of three girls on a cell phone; the three girls were also charged.¹⁸⁵ Each student pled to misdemeanor charges in juvenile court.¹⁸⁶ By pleading, the students likely avoided more serious charges that could have resulted if they had been prosecuted in adult court.

Sexting has resulted in threatened jail time when an adult was involved in two other states. In Oregon, a sixteen-year-old female took sexually explicit video of another female minor with the encouragement of a thirty-one year-old adult male.¹⁸⁷ The juvenile defendant had shown the video to others.¹⁸⁸ Through a plea

176. *Id.*

177. *Id.* at 638-40.

178. *Id.* at 644. The plaintiffs filed a complaint for “violation of plaintiffs’ First Amendment right to free expression . . . contend[ing] that the photographs in question [were] not in violation of any obscenity law.” *Id.* at 640. The plaintiffs also alleged that their “First Amendment right to be free from compelled expression” and the parents’ “Fourteenth Amendment substantive due process right as parents to direct their children’s upbringing” had been violated. *Id.*

179. *Id.* at 644, 647.

180. *Id.* at 645-46. The court noted that even if the depictions were “prohibited sexual acts,” the plaintiffs were reasonably likely to succeed on the merits because there was no evidence the teens had disseminated the images. *Id.*

181. *Id.* at 645.

182. *Miller v. Mitchell*, 598 F.3d 139, 155 (3d Cir. 2010).

183. *Id.* at 152.

184. Paula Reed Ward, *DA’s Case over Teen ‘Sexting’ Draws Ire of Parents*, PITTSBURGH POST-GAZETTE, MARCH 26, 2009, AT A1, available at 2009 WLNR 5651200.

185. *Id.*

186. *Id.*

187. Tobias, *supra* note 16.

188. *Id.*

deal, the sixteen-year-old served two months in a state prison, received counseling, and did not have to register as a sex offender.¹⁸⁹ In Vermont, the court allowed an eighteen-year-old high school student to plead guilty to lesser charges after asking “two teenage girls” to “perform[] sex acts and send him the results.”¹⁹⁰ The lesser charges entailed a “five-year deferred sentence.”¹⁹¹

Two instances in Wisconsin illustrate a more pernicious situation: minors engaged in predatory conduct.¹⁹² In February 2009, a high school student “was accused . . . of using the Facebook [website] to coerce male schoolmates into sexual encounters” after deceiving over thirty male classmates into sending nude pictures of themselves to him by posing online as a female classmate.¹⁹³ The then-eighteen-year-old student threatened to distribute the pictures if his classmates did not perform sex acts with him.¹⁹⁴ The court sentenced him to prison for fifteen years.¹⁹⁵ In another Wisconsin case, a fourteen-year-old high school student threatened at least seven girls into sending him explicit photos of themselves.¹⁹⁶ This was only several months after he was adjudicated for “second-degree sexual assault of a child.”¹⁹⁷ The school expelled the boy, and he faced charges in the children’s court.¹⁹⁸

B. State Legislative Responses to Sexting

In 2009, twelve states introduced or passed legislation addressing sexting.¹⁹⁹ As of September 2010, sixteen states had either “introduced or [were] considering” sexting bills.²⁰⁰ The proposals and enacted laws have been

189. *Id.*

190. John Curran, *Vt. Teen Pleads in Sex Case*, THE TIMES, Sept. 4, 2009, at A11, available at 2009 WLNR 17378056. The plea deal was in response to action from the Vermont legislature to prevent felony charges from being sought against minors in sexting cases. *Id.*

191. *Id.*

192. Leary, *supra* note 44, at 541.

193. Tom Kertscher, *Whitnall Student Accused of Coercing Girls to Send Nude Photos Has Prior Record*, MILWAUKEE JOURNAL SENTINEL, Oct. 14, 2009, available at 2009 WLNR 20301834.

194. Susan Saulny, *Sex Predator Accusations Shake a Wisconsin Town*, N.Y. TIMES (Nov. 1, 2009), <http://www.nytimes.com/2009/02/11/world/americas/11iht-11wisconsin.20101124.html>.

195. Laurel Walker, *New Berlin Teen Gets 15-Year Prison Term in ‘Sexting’ Case: Stancil Posed as Girl, Tricked Victims into Sex*, MILWAUKEE JOURNAL SENTINEL, Feb. 25, 2010, at 1, available at 2010 WLNR 3949470.

196. Kertscher, *supra* note 193.

197. *Id.*

198. *Id.*

199. 2009 LEGISLATION, *supra* note 164.

200. 2010 LEGISLATION, *supra* note 164.

questioned,²⁰¹ criticized,²⁰² and applauded.²⁰³

Initially, several legislators proposed steps that focused more on age than conduct by suggesting age gap provisions.²⁰⁴ An age gap provision provides a window in which two minors relatively close in age will avoid criminal charges or else face “substantially reduced” punishment.²⁰⁵ In a proposed Pennsylvania bill, “no person under [eighteen]” could transmit images depicting nudity to another person four years younger or older than the person transmitting or distributing the image.²⁰⁶ Minors who transmit nude images outside the age gap provisions could otherwise have been adjudicated in an alternative program and ordered to attend “an educational program.”²⁰⁷ Similarly, Vermont’s legislature proposed a bill in 2009 that included an age gap provision.²⁰⁸ Ultimately, however, most states, including Vermont,²⁰⁹ have chosen not to follow the age gap path. Absent a deterrent force within the legislation, state governments are likely concerned that the number of sexting juveniles, as well as the number of images created, would increase.²¹⁰

201. See Calvert, *supra* note 117, at 58-60 (questioning whether laws addressing sexting can be enforced in a fair way and suggesting other applicable laws); Wood, *supra* note 7, at 164-65 (applauding Indiana for simply creating a study commission to look into just responses to sexting).

202. See Arcabascio, *supra* note 49, at 31-40 (critiquing Vermont, Nebraska, and North Dakota responses to sexting and advocating that states incorporate age gap provisions to include eighteen-year-old high school students in sexting legislation); Nix, *supra* note 117, at 190-92 (criticizing a Utah bill that focused on age distinctions rather than conduct distinctions); Weins & Hiestand, *supra* note 112, at 33-48 (discussing Vermont, Nebraska, Utah, and Ohio legislative responses to sexting and finding inequities in applying them to a variety of situations).

203. See Arcabascio, *supra* note 49, at 32 (finding that “[t]he most important aspect of the [Vermont] law [was] that it remove[d] the criminal behavior from the grasp of pornography-type statutes and thereby avoid[ed] the requirement of registration on the state’s sex offender list”).

204. See S.B. 1121, 193d Gen. Assemb., Reg. Sess. (Pa. 2009) (stating that no person under the age of eighteen could transmit an explicit image by computer or telecommunications device to another minor “who is not more than four years younger or more than four years older”); S.B. 125, 2009 Leg., Reg. Sess. (Vt. 2009); see also Nix, *supra* note 117, at 190-92 (criticizing one approach in Utah that would only account for age differences but not differences in conduct); Weins & Hiestand, *supra* note 112, at 34-37 (discussing Vermont’s original bill).

205. Daryl J. Olszewski, Comment, *Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform*, 89 MARQ. L. REV. 693, 706 (2006).

206. S.B. 1121, 193d Gen. Assemb., Reg. Sess. (Pa. 2009).

207. *Id.*

208. S.B. 125, 2009 Leg., Reg. Sess. (Vt. 2009); see also Calvert, *supra* note 117, at 57-58 (discussing Vermont bill that exempted “13- to 18-year-olds” from child pornography prosecution); Leary, *supra* note 44, at 555-57 (discussing the evolution of Vermont’s response to sexting).

209. See VT. STAT. ANN. tit. 13, § 2802b(b)(1) (2010) (“a minor who violates subsection (a) of this section shall be adjudicated delinquent”).

210. See Mary Graw Leary, *The Right and Wrong Responses to “Sexting”*, WITHERSPOON INST. (May 12, 2009), <http://www.thepublicdiscourse.com/2009/05/227> (arguing that the images will be obtained by pedophiles and provide a “built-in defense” that they were legally obtained).

As of September 2010, four states have passed laws that specifically address sexting.²¹¹ These states—Arizona,²¹² Connecticut,²¹³ Illinois,²¹⁴ and Louisiana²¹⁵—punish any first-time sexting offense, but they do so in slightly different ways. Louisiana’s statute takes a different approach to age and governs minors sixteen and under.²¹⁶ In contrast, Illinois²¹⁷ and Arizona²¹⁸ statutes govern minors seventeen and under. Connecticut’s law reduces the child pornography penalty for minors between the ages of thirteen and seventeen years old when they possess images of minors between the ages of thirteen and fifteen years old that were knowingly and voluntarily transmitted.²¹⁹ The largest differences may come from how each state handles a sexting incident. For example, Arizona provides a defense if the minor did not ask for the image, attempted to destroy or delete it or reported it to a parent or school official, and did not further distribute it.²²⁰ In contrast, Louisiana law makes it an offense if the minor distributed an image of themselves, but it permits courts to “imprison[]” minors for up to ten days if they possess or distribute an image of another.²²¹ Each statute, though, increases punishment if the minors engage in additional conduct other than simply possessing a sexually explicit image of a minor.²²²

Other states have also provided teens with defenses or lessened the penalties for sexting. Nebraska’s signed bill provides a defense for minors in possession of sexually explicit images of one other child, age fifteen or older, not taken through coercion, and not further distributed.²²³ Utah,²²⁴ Ohio,²²⁵ and New Jersey²²⁶ have proposed or signed bills that either make a sexting offense a

211. See 2010 LEGISLATION, *supra* note 164.

212. ARIZ. REV. STAT. ANN. § 8-309 (2010).

213. H.R. 5533, 2010 Leg., Reg. Sess. (Conn. 2010).

214. H.R. 4583, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2010).

215. H.R. 1357, 2010 Leg., 36th Reg. Sess. (La. 2010).

216. *Id.*

217. H.R. 4583, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2010).

218. ARIZ. REV. STAT. ANN. §§ 8-201, 8-309 (2010).

219. H.R. 5533, 2010 Leg., Reg. Sess. (Conn. 2010).

220. ARIZ. REV. STAT. ANN. § 8-309(C) (2010).

221. See H.R. 1357, 2010 Leg., 36th Reg. Sess. (La. 2010) (containing provision to suspend the sentence if the court allows the juvenile to perform eighty hours of community service).

222. See *e.g.*, ARIZ. REV. STAT. ANN. § 8-309(D) (2010) (deeming it a Class 3 misdemeanor if a minor distributes an image received to a third party); H.R. 5533, 2010 Leg., Reg. Sess. (Conn. 2010) (requiring a voluntary act to have been committed in order to be classified as “sexting”); H.R. 4583, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2010); H.R. 1357, 2010 Leg., 36th Reg. Sess. (La. 2010) (requiring a voluntary act as well as increasing the penalty for additional offenses).

223. NEB. REV. STAT. §§ 28-813.01, -1463.03, -1463.05 (Supp. 2009); *see also* Arcabascio, *supra* note 49, at 36-39 (discussing Nebraska statute).

224. UTAH CODE ANN. §§ 76-10-1204, -1206 (West, Westlaw through 2010 legislation); *see also* Calvert, *supra* note 117, at 58 (discussing Utah law).

225. H.R. 473, 128th Gen. Assemb., Reg. Sess. (Ohio 2010).

226. Assemb. B. 1561, 214th Leg., 1st Ann. Sess. (N.J. 2010)); *see also* S.B. 2926, 213th Leg.,

misdemeanor or create a diversionary program for minors. In Florida, a house bill has been proposed that makes the first violation “noncriminal” and requires payment of a twenty-five dollar fine and community service.²²⁷ The bill, however, does not exclude a minor from being prosecuted under “the depiction of sexual conduct or sexual excitement, and [it] does not prohibit the prosecution of a minor for stalking;” furthermore, it punishes juveniles with misdemeanor and felony penalties for subsequent offenses.²²⁸ States have varied in the options left available to prosecutors; some states allow prosecutors to choose whether the sexting or child pornography statute should apply.²²⁹

Additionally, some proposed bills offer educational programs for minors before they encounter trouble.²³⁰ A New Jersey bill would have required retail stores selling cell phones to include informational brochures describing the dangers of sexting.²³¹ A New York bill would have created an educational program through the New York State Office of Children and Family Services in order to promote awareness of publicly posting or distributing “provocative” depictions of themselves.²³²

Finally, several other states are still questioning whether legislation can effectively address sexting. After contemplating new sexting legislation, these states have decided not to take any action.²³³ In Missouri, a provision that would have completely barred juvenile sexting was dropped from a crime bill.²³⁴ Among the legislators’ likely concerns is that sexting is simply a fad that will fade away but leave needless statutory language behind.²³⁵ Others have expressed concern that if sexting is truly a widespread problem, it will not be possible to enforce punishments effectively.²³⁶ It is less likely that laws will be followed or

2d Ann. Sess. (N.J. 2009) (identical state senate bill).

227. H.R. 1335, 2010 Leg., 112th Reg. Sess. (Fla. 2010).

228. *Id.*

229. See Weins & Hiestand, *supra* note 112, at 47-48 (discussing legislative differences among Nebraska, Ohio, Utah, and Vermont statutory schemes).

230. Assemb. B. 8622, 223d Leg., Reg. Sess. (N.Y. 2010); Assemb. B. 4070, 213th Leg., 2d Ann. Sess. (N.J. 2009).

231. Assemb. B. 4070, 213th Leg., 2d Ann. Sess. (N.J. 2009).

232. See Assemb. B. 8622, 223d Leg., Reg. Sess. (N.Y. 2010).

233. Tom Fahey, *Ad Hoc Panel: ‘Sexting’ Does Not Warrant Legislation*, UNION LEADER, Sept. 10, 2009, at 8; *Missouri General Assembly: What Passed, What Failed*, COLUMBIA DAILY TRIB. (May 16, 2009), <http://www.columbiatribune.com/news/2009/may/16/missouri-general-assembly-what-passed-what-failed/>.

234. *Missouri General Assembly: What Passed, What Failed*, *supra* note 233.

235. See 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, 8 (2009) (suggesting that sexting will go the way of “acid-washed jeans, big hair, and Nintendo”).

236. See Arcabascio, *supra* note 49, at 41 (acknowledging the deterrent effect of charging juveniles with crimes but arguing that they may be more deterred by punishment from parents or “disapproval from their friends”); Calvert, *supra* note 117, at 59-60 (discussing the problem of enforcing sexting laws and their potential difficulty in being a suitable deterrent tool against

justly imposed on the few caught if the laws cannot be effectively enforced.²³⁷ Yet regardless of whether sexting diminishes or laws are somewhat more difficult to enforce, the legal and social responses to sexting must be forward-looking and address potentially unjust consequences.²³⁸

IV. PROPOSAL: ADHERING TO RATIONALES EMPLOYED BY JUVENILE COURTS

Based on the totality of the circumstances, states should pass legislation addressing the excessive penalties and consequences against teens caught sexting.²³⁹ Unchanged statutes represent rationales that “focus on preventing pedophiles and sexual abusers from stimulating their appetites, protecting children, and encouraging the elimination of existing contraband.”²⁴⁰ Although any move to address minors’ sexual activity “stumbles into a host of related issues that complicate an already difficult subject,”²⁴¹ states should amend their laws to address recent changes in technology and juvenile conduct.²⁴²

A. Distinguish Between Intent and Actions of Minors

Preventing minors from initially creating and distributing sexually explicit images should be the ultimate goal of any piece of sexting legislation because it reduces the scale of the issue.²⁴³ In pursuit of this goal, however, legislatures should consider the role rehabilitation has played in juvenile law.²⁴⁴

Although much more research of juvenile sex offenders²⁴⁵ and how they compare to sexting teenagers is needed to reach any firm conclusions,²⁴⁶ initial surveys on sexting suggest that a majority of incidents result from a lack of maturity and judgment,²⁴⁷ not malicious intent. For example, none of the Pew

sexting).

237. See Calvert, *supra* note 117, at 59-60 (discussing the limited situations in which prosecutions may be brought).

238. *Id.* at 60-61.

239. Cf. Leary, *supra* note 44, at 510-11 (arguing that teens caught sexting should be adjudicated in juvenile court if prosecution is necessary because it will permit rehabilitation).

240. Ty E. Howard, *Don't Cache Out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files*, 19 BERKELEY TECH. L.J. 1227, 1238 (2004).

241. Phipps, *supra* note 127, at 374.

242. But see Calvert, *supra* note 117, at 7 (arguing that it is too early to answer the question of how society should address sexting).

243. See *id.* at 29; Leary, *supra* note 44, at 42-43.

244. See, e.g., Leary, *supra* note 44, at 551 (advocating for structured prosecutorial discretion with adjudications in juvenile court focusing on rehabilitation); Weins & Hiestand, *supra* note 112, at 29 (advocating a juvenile court response that aims to rehabilitate teenagers who sext).

245. See ZIMRING, *supra* note 44, at 117-18 (arguing for more research of juvenile sex offenders in general).

246. See Humbach, *supra* note 117, at 435, 482 n.258.

247. See Calvert, *supra* note 117, at 29-30 (discussing different understandings of sexting

Research Center's categories of typical sexting include teens actively looking to exploit other teens.²⁴⁸ Instead, a number of students view sexting as a substitute for sexual activity.²⁴⁹ Additionally, teens appear more likely to engage in sexting as they mature.²⁵⁰ Many teens view sexting as having potentially harmful consequences, but they appear more concerned with getting in trouble at school than with punishment by law enforcement.²⁵¹ Another survey showed that ninety percent of teens "somewhat" or "strongly" agreed that it was "dangerous to send" the images, but only fifty-five percent acknowledged the likelihood of legal consequences.²⁵² The same survey also found that sexting teens most often send these messages because someone asked them to or to have fun.²⁵³ As stated above, objective evidence indicates that teens are less likely than adults to understand the risks they are taking.²⁵⁴

Over time, the juvenile justice system's chief goal may have shifted toward punishment and away from its initial goal of rehabilitation.²⁵⁵ However, the core idea of rehabilitation remains.²⁵⁶ If the purpose of child pornography laws is to punish those who victimize persons depicted in the images,²⁵⁷ the same justification does not apply to a sexting image voluntarily²⁵⁸ sent between a teenage couple close in age.²⁵⁹ In that situation, it is less likely that exploitation occurred or commercial activity was involved,²⁶⁰ and the potential for harm would be lower unless the image was "more widely disseminated."²⁶¹

The lack of predatory or exploitative intent further illustrates that teens

between younger and older minors); LENHART, *supra* note 142, at 2 (stating that "[o]lder teens are much more likely to send and receive these images" with thirty percent of seventeen-year-old teenagers having received a "nude or nearly nude image on their phone").

248. See LENHART, *supra* note 142, at 2.

249. *Id.* at 8.

250. *Id.* at 2.

251. See *id.* at 6-8.

252. *Teen Online & Wireless Safety Survey: Cyberbullying, Sexting, and Parental Controls*, COX COMM'NS 43 (May 2009), available at http://www.cox.com/takecharge/safe_teens_2009/media/2009_teen_survey_internet_and_wireless_safety.pdf.

253. *Id.* at 37.

254. See discussion *supra* Part I.

255. Joanna S. Markman, *In re Gault: A Retrospective in 2007: Is It Working? Can It Work?*, 9 BARRY L. REV. 123, 140 (2007) (concluding that the juvenile justice system has become primarily concerned with the punishment, rather than the rehabilitation, of juvenile offenders).

256. See e.g., Weins & Hiestand, *supra* note 112, at 29 (proposing a sexting solution that aims to deter and rehabilitate minors).

257. Leary, *supra* note 210.

258. Weins & Hiestand, *supra* note 112, at 51, 52 n.356 (proposing that an aggravating factor in a more severe penalty or charging a minor under child pornography laws be whether material was involuntarily obtained).

259. Calvert, *supra* note 117, at 32-33, 47.

260. Humbach, *supra* note 117, at 465.

261. Calvert, *supra* note 117, at 47.

should not be subject to adult penalties if they lack the intent that child pornography statutes were designed to prohibit,²⁶² a view adopted by recent commentaries.²⁶³ Teens that may legally consent to sexual relations because of age gap provisions should not face the harshness of child pornography charges when they record that legal activity.²⁶⁴ Jurisdictions that place sexting teens alongside sex offenders who legitimately deserve to be on the sex offender registry because of their abuse and exploitation of children only dilutes the registry's importance and utility.²⁶⁵ The registry allows residents to better understand the people living in their immediate surroundings and enables them to more thoroughly weigh the need for extra vigilance.²⁶⁶ However, the registry becomes less useful to residents when persons on the registry differ too widely in their potential threats to the community.²⁶⁷

The distribution of sext images by anyone and possession of them by third parties²⁶⁸ greatly complicates potential legislative action.²⁶⁹ Therefore, legislatures cannot fully provide a solution to sexting relying solely on age differences.²⁷⁰ Legislatures must consider the conduct²⁷¹ and intent²⁷² an individual exhibited when distributing these images. Minors who prey on other minors should not be eligible to receive the same reduced consequences for

262. See discussion *supra* Part II.A and *infra* notes 337-41 and accompanying text.

263. See Arcabascio, *supra* note 49, at 41 (proposing that “teenage sexters who voluntarily and without coercion sext each other, without disseminating the photos to a third party, should not be charged with a crime”); Calvert, *supra* note 117, at 62 (advocating that the law should be involved “in cases of secondary, non-volitional sexting”); Levick & Moon, *supra* note 49, at 1051 (stating that a “lower-graded offense” is “preferable to child pornography charges” but arguing that “the best alternatives resist widening the net of the juvenile justice system”); Weins & Hiestand, *supra* note 112, at 52-53 (proposing statutory language that enhances sexting punishment when material was obtained involuntarily); Julie Hilden, *How Should Teens’ “Sexting”—the Sending of Revealing Photos—Be Regulated?*, FINDLAW (Apr. 28, 2009), <http://writ.news.findlaw.com/hilden/20090428.html>.

264. See Smith, *supra* note 14, at 524-25; Weins & Hiestand, *supra* note 112, at 50 n.345.

265. Richards & Calvert, *supra* note 5, at 36.

266. *Id.*

267. *Id.* at 36-37.

268. See *infra* notes 269, 277-78 and accompanying text.

269. See Julie Hilden, *Why Sexting Should Not Be Prosecuted as “Contributing to the Delinquency of a Minor,”* FINDLAW (May 13, 2009), <http://writ.news.findlaw.com/hilden/20090513.html> (stating that “[t]eens’ nonconsensual forwarding of other teens’ photos, of course, is a much harder scenario”).

270. See, e.g., Nix, *supra* note 117, at 190-92 (proposing that Utah adopt penalties that address minors’ conduct rather than solely relying on age distinctions).

271. *Id.*

272. See Nix, *supra* note 117, at 192 (advocating for a statute that looks to the intent in sending the images); cf. Calvert, *supra* note 117, at 41-42 (suggesting that civil law remedies in the form of intentional infliction of emotional distress may be used to address sexting).

minors who consent to creating or receiving such images.²⁷³ Nebraska's statute, for example, contains language that addresses coercion and forwarding or unwanted distribution of sexting images.²⁷⁴ Circumstances like these create a true victim and can potentially be a form of cyberbullying or worse.²⁷⁵ Furthermore, the act of a minor "voluntarily" giving an image to an adult should not exempt that adult from prosecution under child pornography laws.²⁷⁶

State legislatures should also ensure that legislation still punishes and deters adults²⁷⁷ from obtaining minor's sexting images and that the "marketplace" of images does not grow.²⁷⁸ Certainly, most of us understand or are coming to understand that anything sent electronically can more quickly and easily become available to the general public.²⁷⁹ That fact, however, should not prevent angry boyfriends, third-party high school student recipients, or child predators from facing different tiers²⁸⁰ of consequences for distributing these images.²⁸¹ Nebraska's law eliminates the affirmative defense it created for individuals under nineteen if the defendant distributes the "visual depiction to another person except the child depicted who originally sent the visual depiction to the defendant."²⁸² This provision acknowledges that some sexting is likely to occur between teenagers but does not open the market to anyone else obtaining these images.

B. Appropriate Penalties for Sexting Teens

Sexting is not victimless.²⁸³ It potentially increases the amount of child

273. Calvert, *supra* note 117, at 33 ("legal intervention seems most necessary in cases of" a minor distributing an image without permission or a minor "preying on a much younger person"); Weins & Hiestand, *supra* note 112, at 51, 52 n.356, 53 (proposing enhanced punishment when material is obtained involuntarily and reiterating that a sexting statute should not absolve minors who remain guilty under child pornography laws).

274. NEB. REV. STAT. § 28-813.01 (Supp. 2009).

275. *See supra* note 258 and accompanying text.

276. *Id.*

277. Calvert, *supra* note 117, at 60-61.

278. *See, e.g., id.* at 62 (stating that how much a minor is harmed by sexting "depends directly on: 1) how it is used by the recipient; and 2) to whom and to how many people the recipient forwards it"); Weins & Hiestand, *supra* note 112, at 55 (examining the application of a proposed sexting bill to a situation in which a minor sells a self-image to an adult).

279. Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES MAG., July 25, 2010, at MM30, available at http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?_r=1&ref=magazine.

280. This is not to suggest that angry boyfriends, third-party student recipients, and child predators should face equal punishments.

281. *See, e.g.,* Weins & Hiestand, *supra* note 112, at 50-53 (proposing a model sexting statute with aggravating factors).

282. NEB. REV. STAT. § 28-813.01 (Supp. 2009).

283. Calvert, *supra* note 117, at 4, 26-27. *But see* Humbach, *supra* note 117, at 466 (arguing

pornography that has continued to rise despite law enforcement efforts.²⁸⁴ Additionally, sexting can lead to situations where teens threaten other teens to obtain the photographs, where the photographs are maliciously or deliberately distributed and teens are humiliated, or where adults actively seek out the images.²⁸⁵ It is unlikely that states can fully deter an action that fifty-five percent of its potential participants do not view as having serious legal consequences.²⁸⁶ State legislatures, however, can take steps to avoid the inequitable results that currently exist under their laws²⁸⁷ and create some deterrent effect.²⁸⁸

1. *Content of Images.*—The prosecution of “borderline”²⁸⁹ images in *Skumanick* illustrates the need for legislation to address the actual content of the sexting images. For example, in *Skumanick*, the prosecutor was offering the sexting teens an educational alternative to being charged under the state’s child pornography laws, but the content of the images may not have met the definition of child pornography.²⁹⁰ The potential situation that a prosecutor would pursue charges against teens clad in underwear²⁹¹ illustrates the need for specific language that ensures the content does not warrant First Amendment protection.²⁹²

Professor Clay Calvert recently wrote that the question of whether borderline images are child pornography is a “threshold question [and] requires a fact-intensive inquiry.”²⁹³ The key inquiry, according to Calvert, is whether the

that protecting people from “their own youthful silliness . . . hardly seems an interest ‘of surpassing importance’”) (quoting *New York v. Ferber*, 458 U.S. 747, 757 (1982)).

284. See discussion *supra* Part II.

285. See discussion *supra* Part III.A.

286. COX COMM’NS, *supra* note 252, at 43.

287. Weins & Hiestand, *supra* note 112, at 29.

288. Leary, *supra* note 14, at 42-43.

289. See Weins & Hiestand, *supra* note 112, at 8, 24-25 (stating that “the Supreme Court has left open issues regarding whether borderline materials depicting children are protected by the First Amendment”); see also Calvert, *supra* note 117, at 51-55 (discussing how different statutory language determines how an image will be defined based on its content).

290. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 645-46 (M.D. Pa. 2009), *aff’d sub nom. Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

291. See *id.*

292. This Note assumes that most sexting instances that are handled by law enforcement and the juvenile justice system will not be protected by the First Amendment. Determining which cases are protected is still an area of debate. See, e.g., Humbach, *supra* note 117, at 482-85 (stating that “the constitutional status of teen sexting and other autopornography remains uncertain”); Kimpel, *supra* note 113, at 338 (advocating that “we serve children better by acknowledging their rights and allowing their speech rather than silencing expressions of their sexuality”); Wood, *supra* note 7, at 177 (suggesting that “it is time for society to recognize at least a limited right to sexual privacy for minors under the mature minor standard . . . subject to the right of parents to control the upbringing of their children”).

293. Calvert, *supra* note 117, at 51.

“depiction is lascivious.”²⁹⁴ His article points to the difficulty presented by differing definitions of child pornography under federal and state laws.²⁹⁵ Borderline images may meet the definition of child pornography if the state requires “exhibition” as opposed to “lascivious” conduct.²⁹⁶ As another recent law review article stated, however, lasciviousness is a question for the jury, which invites “the same problems and criticisms” as when “jurors are asked to define community standards for obscenity prosecutions.”²⁹⁷

In *Skumanick*, the Third Circuit Court of Appeals “appeared poised” to rule that sext images, including one exhibiting a female minor’s breasts, were protected by the students’ First Amendment rights²⁹⁸ before reaching a narrower holding.²⁹⁹ This type of ruling would arguably have been closer to applying the “lascivious” standard rather than an “exhibition” one.³⁰⁰ The implications of a ruling that acknowledges a juvenile’s First Amendment right to individually take or appear in such a picture does not greatly affect the debate on punishing teens who sext but do not distribute. Individuals are generally not prohibited from viewing and documenting their own self-images.³⁰¹ Finding that the further distribution of most images are protected under the First Amendment presents potential problems. In *Skumanick*, some of the images discovered in the school district’s investigation were photographs of a fourteen-year-old girl who was “naked from the waist up” that were sent to a since-arrested adult male who had planned on visiting her.³⁰² Allowing minors to take and distribute the images could increase the marketplace for them and potentially prevent the state from taking action against juveniles who actively distribute these images.³⁰³ The best target for the most severe prosecution in that instance, however, is the adult who was victimizing the juvenile.³⁰⁴

2. *A Juvenile Court Response.*—State legislatures can circumvent many of

294. *Id.* at 52.

295. *Id.* at 53.

296. *See id.* (stating that under federal law, an image constitutes child pornography if it shows “lascivious images of the genital or pubic area, not to the breasts”). States may use language such as “exhibition” rather than “lascivious,” which increases the likelihood that a court will interpret a borderline image to be child pornography. *Id.*

297. Weins & Hiestand, *supra* note 112, at 25.

298. Shannon P. Duffy, *Panel Mulls If Teen ‘Sexting’ Is Child Pornography*, LEGAL INTELLIGENCER, Jan. 19, 2010, available at 2010 WLNR 1116394.

299. *See supra* notes 173-83 and accompanying text.

300. *See supra* notes 290-96 and accompanying text.

301. Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. (forthcoming Dec. 2010), available at <http://ssrn.com/abstract=1553920>; cf. Kimpel, *supra* note 113, at 333 (stating that “[n]o case has addressed the absurdity of applying child pornography laws to minors’ uncoerced self-portraits”).

302. Reply Brief of Appellant at 10-11, *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010) (No. 09-2144), available at 2009 WL 5538636.

303. *See id.*

304. Shafron-Perez, *supra* note 103, at 449.

the inequities that have surrounded charging sexting juveniles with possession or distribution of child pornography by ensuring that the average case is resolved in juvenile court.³⁰⁵ Recent commentaries have followed this approach.³⁰⁶ Vermont and Utah have attempted to ensure that teens caught sexting do not face life-changing charges.³⁰⁷ Vermont adjudicates these juveniles as delinquents.³⁰⁸ Applying a similar philosophy, Utah charges sexting by persons seventeen and under as a misdemeanor.³⁰⁹ Laws and bills in Arizona,³¹⁰ Illinois,³¹¹ Kentucky,³¹² Mississippi,³¹³ and South Carolina³¹⁴ would make sexting by juveniles a misdemeanor. A Rhode Island bill took a similar approach by making juvenile sexting a status offense and referring juveniles to family court.³¹⁵ These measures reflected the notion that regardless of the results of their actions, teens have neither the ability to completely understand their actions nor the culpability of adults or predatory minors who target others.³¹⁶

At most, juveniles who voluntarily create and distribute sexually explicit images of themselves or possess analogous images of other minors voluntarily obtained from said minors should, under “average” circumstances, be adjudicated as delinquents in juvenile court.³¹⁷ Legislatures should also require juvenile courts to consider several other factors in sexting instances to understand the scope of the circumstances.³¹⁸ In Ohio, a prosecutor took this approach by implementing a program that considers (1) “whether the juvenile has any prior

305. See VT. STAT. ANN. tit. 13, § 2802b (2010).

306. See Calvert, *supra* note 117, at 60-61; Corbett, *supra* note 235, at 6-7; Leary, *supra* note 44, at 551-52; Weins & Hiestand, *supra* note 112, at 52; *cf.* Arcabascio, *supra* note 49, at 42 (advocating for a maximum of a misdemeanor charge); Nix, *supra* note 117, at 192 (advocating law that allows discretion to determine misdemeanor charge “based on . . . conduct, not age”); Shafron-Perez, *supra* note 103, at 451-52 (stating that the best proposal to address sexting is a “separate offense” that charges teens with misdemeanors).

307. Shafron-Perez, *supra* note 103, at 452-53 n.139. *But see* Weins & Hiestand, *supra* note 112, at 34-37, 41-45 (arguing that Vermont and Utah have not prevented prosecutors from charging sexting juveniles under child pornography laws).

308. VT. STAT. ANN. tit. 13, § 2802b(b)(1) (2010).

309. UTAH CODE ANN. §§ 76-10-1204(1)-(4)(c), -1206(1)-(2)(c) (West, Westlaw through 2010 legislation).

310. ARIZ. REV. STAT. ANN. § 8-309 (2010).

311. H.R. 4583, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2010).

312. H.R. 57, 2010 Leg., Reg. Sess. (Ky. 2010).

313. H.R. 643, 2010 Leg., 125th Reg. Sess. (Miss. 2010).

314. H.R. 4504, 118th Gen. Assemb., 2d Reg. Sess. (S.C. 2010).

315. H.R. 7778, 2010 Leg., Reg. Sess. (R.I. 2010).

316. See discussion *supra* Part II and note 254 and accompanying text.

317. See Arcabascio, *supra* note 49, at 42 (advocating for a maximum of a misdemeanor charge); Nix, *supra* note 117, at 192 (advocating law that allows discretion to determine misdemeanor charge “based on a [teenager’s] conduct, not age”).

318. See Weins & Hiestand, *supra* note 112, at 48 (advocating a “low, base-level juvenile charge, with aggravating factors for more serious behaviors”).

sexual offenses;” (2) whether “force or illicit substances were used;” (3) whether the juvenile had sexted and been through the program before; and (4) whether the “victim or law enforcement[’s]” concerns regarding the diversionary program had been taken into account.³¹⁹

In more severe cases, the juvenile could be waived to criminal court³²⁰ if the juvenile repeatedly coerced or threatened other minors to sext or engage in sexual acts while documenting that activity.³²¹ In that scenario, a “waiver to criminal court” would ensure that the level of punishment meets the severity of the crime – something more severe than “juvenile courts properly are empowered to impose.”³²² Aside from the abovementioned Ohio factors, state sexting statutes should only consider registration if the actions are severe enough. For example, the Adam Walsh Act places adjudicated teenagers on the sex offender registry if their actions closely parallel aggravated sexual abuse.³²³ Aggravated sexual abuse occurs when a person engages in a sex act with another by force, by threat, rendering the person unconscious or through involuntarily drugging, or when a person engages in a sex act with a person under twelve years old.³²⁴ Even in rare and severe cases, the court should have discretion to examine the totality of the circumstances to find the most equitable outcome for all parties.³²⁵ Under this scheme, it appears more appropriate to seek enhanced penalties because of a significantly large age gap between the teens³²⁶ and evidence of exploitation.³²⁷

3. *Question of Prosecutorial Discretion.*—Prosecutors currently have less severe statutes than child pornography laws at their disposal that could address sexting if state legislatures choose not to pass sexting legislation.³²⁸ Potential options include laws covering obscenity,³²⁹ “disorderly conduct, harassment, and

319. Heck, *supra* note 4, at 29.

320. See Weins & Hiestand, *supra* note 111, at 52 n.356, 55 (arguing that states’ waiver laws may require statements that sexting cases should only be brought in juvenile court but stating that sexting laws should not lessen punishment for minors that create, possess, or distribute child pornography).

321. Heck, *supra* note 4, at 29.

322. ZIMRING, *supra* note 44, at 140.

323. See Bowater, *supra* note 68, at 828, 846-50 (discussing the Adam Walsh Act and criticizing it for requiring juveniles to register for sex offenses when “convicted” in juvenile court).

324. U.S. DEP’T OF JUSTICE, JUVENILE OFFENDERS REQUIRED TO REGISTER UNDER SORNA: A FACT SHEET, available at http://www.ojp.usdoj.gov/smart/pdfs/factsheet_sorna_juvenile.pdf (last visited Oct. 3, 2010).

325. Weins & Hiestand, *supra* note 112, at 29, 52-53 (cautioning against placing juveniles on the sex offender registry “given the gravity of the consequences”).

326. See Hilden, *supra* note 263 (stating that teens close in age should have a “safe harbor” to send sext messages and not be deemed criminals).

327. Calvert, *supra* note 117, at 33.

328. Richards & Calvert, *supra* note 5, at 13; see also Arcabascio, *supra* note 49, at 25-27 (discussing prosecutorial discretion); Leary, *supra* note 44, at 551-55 (arguing for a juvenile court response that is based on “structured prosecutorial discretion”).

329. Corbett, *supra* note 235, at 7.

stalking,”³³⁰ “annoying communication,”³³¹ and cyberbullying.³³² Using these statutes to address sexting would allow states to take action against teens who sext without affixing the inherent sexual predator label that child pornography statutes carry.³³³ Furthermore, it would prevent minors who created or possessed sexting images without coercion from being placed on the sex offender registry. Examining the sexting cases thus far, however, suggests that a specific statute would serve both the community and juveniles better than potentially unpredictable prosecutions.³³⁴

4. *A Sexting-Specific Statute.*—The policy implications surrounding sexting require serious consideration and deliberation.³³⁵ The potential ramifications for juveniles, however, are too dramatic and long-lasting for legislatures not to provide guidance.³³⁶ Punishing juvenile offenders as “stereotypical sexual predators” creates a perception that the juvenile offenses are “more dangerous and serious than they actually are.”³³⁷ Protecting the victims of adult offenders and other circumstances surrounding punishing child pornographers both firmly justify harsher penalties.³³⁸ Adult sex offenders typically use force to manipulate, coerce, or kidnap children.³³⁹ The adults’ intent is solely to exploit these children.³⁴⁰ In contrast, sexting among juveniles tends to lack that degree of coercion.³⁴¹ Furthermore, prosecutors are still threatening to charge children and teenagers under child pornography statutes for sexting³⁴² nearly two years after

330. Richards & Calvert, *supra* note 5, at 13.

331. See FLA. STAT. ANN. § 784.048 (West, Westlaw through 2010 legislation). This statute criminalizes the act of cyberstalking and defines it as engaging “in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.” *Id.*

332. Calvert, *supra* note 117, at 38-40, 58-59.

333. Richards & Calvert, *supra* note 5, at 13.

334. See Shafron-Perez, *supra* note 103, at 451 (addressing Colorado’s reliance on prosecutorial discretion and the potential for prosecutorial abuse).

335. See, e.g., Jon Seidel, ‘Sexting’ Bill Headed for Study, MERRILLVILLE POST-TRIB., Feb. 17, 2010, at 9, available at 2010 WLNR 3336671 (discussing Indiana lawmakers’ postponing the passage of a sexting bill until policy considerations are further studied).

336. See, e.g., Kristen Schorsch, *Sexting May Spell Court for Children: Kids Trading Photos Seen as Child Porn, Which Is a Felony*, CHI. TRIB., Jan. 29, 2010, at 17, available at 2010 WLNR 1912762 (discussing a twelve-year-old boy and thirteen-year-old girl who had been supposedly charged in Indiana with child exploitation and possession of child pornography after trading nude images of themselves on their cell phones two years after stories of charging juveniles with felonies for sexting became widespread).

337. ZIMRING, *supra* note 44, at 116.

338. Corbett, *supra* note 235, at 6.

339. *Id.*

340. *Id.*

341. *Id.*

342. See, e.g., Schorsch, *supra* note 336.

sexting entered the mainstream media's conversation.

If sent between two consenting teenagers, sexting is not just another version of the First Amendment child pornography exception.³⁴³ *Ferber's* rationale may not be applicable if the average sext message does not document a record of abuse.³⁴⁴ The rationale for taking any type of action against teenagers for sexting, therefore, must reside in the notion that the government is acting to protect a teen from victimizing and harming himself – even if he does not realize it – and protect society from harm.³⁴⁵

Teen sexting can result in humiliation and exploitation.³⁴⁶ While some sexting teens may find that no repercussions result from their actions,³⁴⁷ the state's *patria potestas* role gives each state the ability to protect teens.³⁴⁸ Sexting images are not necessarily likely to “decrease the market for traditional child pornography.”³⁴⁹ The fact that teenagers may initially forward or send the images in a non-commercial context does not mean the images will not enter a commercial setting or increase demand.³⁵⁰ Furthermore, accidentally sending them to an unknown person is not the only way pedophiles can receive these images.³⁵¹ For example, sexting images that teenage girls sent their boyfriends ended up on the Internet when another teenager acquired the images and sold a DVD of the

343. Calvert, *supra* note 117, at 47-48.

344. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002) (“*Ferber* upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were ‘intrinsically related’ to the sexual abuse of children in two ways” related to the “permanent record of a child’s abuse” and the state’s interest in closing the child pornography market) (citing *New York v. Ferber*, 458 U.S. 747, 759 (1982)); Arcabascio, *supra* note 49, at 24 (stating that “where no crime occurs in the taking of the picture, the distribution argument cannot stand alone and must fail” when charging child pornography); Calvert, *supra* note 117, at 47-48 (stating that the initial “sexting image” is generally not a record of abuse and the only support from *Ferber* for “applying child pornography laws to instances of sexting” is because the images are permanent records that can be distributed).

345. See Calvert, *supra* note 117, at 48; Leary, *supra* note 14, at 6; Weins & Hiestand, *supra* note 112, at 30.

346. See Calvert, *supra* note 117, at 4 (stating that sexting “stretch[es] beyond sexual exploitation and embarrassment to commercial exploitation and even death”).

347. See COX COMM’NS, *supra* note 252, at 38 (reporting that ninety percent of “sext senders” stated that none of the “bad things” listed in the poll had occurred when they had sent a sext message).

348. Leary, *supra* note 14, at 26-27.

349. See Shafron-Perez, *supra* note 103, at 449 n.113.

350. Kimpel, *supra* note 113, at 321 (stating that “the market rationale does justify the prosecution of children for consuming child pornography produced by a third party because children consuming child pornography do create an increased market demand”).

351. Shafron-Perez, *supra* note 103, at 449 (stating that pedophiles are unlikely to possess sexting images unless a minor “incorrectly” and “coincidentally” dials the phone number of a pedophile).

images.³⁵² Once located in a digital form, the image has access to the Internet, which “allows for unprecedented voyeurism, exhibitionism and inadvertent indiscretion.”³⁵³ And on the Internet, “these images . . . make their way to the newsgroups, peer-to-peer file-sharing networks, and email of those who use these images to validate their own sexual proclivities for children.”³⁵⁴

The rationale for a distinction punishing juveniles and not adults, or on a different level than adults, is not new.³⁵⁵ As Justice Kennedy recently restated in *Graham v. Florida*, “[i]t remains true that ‘[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.’”³⁵⁶ The status of being a juvenile results in different prohibitions that do not apply to adults.³⁵⁷ We do not allow juveniles to drink alcohol before they turn twenty-one years old.³⁵⁸ We do not allow juveniles to purchase cigarettes before they turn eighteen years old.³⁵⁹ As a society, we have recognized that allowing juveniles to drink or smoke before they have matured harms them in ways we wish to avoid. Conversely, many states avoid prosecuting teens who engage in sexual activity³⁶⁰ and allow certain sexual activity between teenagers.³⁶¹ Rationales exist for regulating these activities as well. Certainly, negative consequences exist for teens who become pregnant before they are ready to become parents. The punishable difference between teens sexting and engaging in sexual activity may be due to a lack of psychological drive that exists for teens to document their sexual activity.³⁶² Teenagers do not have the same biological urge to sext that they do with regard to sexual activity. Therefore, controlling sexting is more closely aligned to the rationales of not allowing teens to smoke or drink before a certain age.³⁶³ It is a right they eventually gain but not one they possess as

352. Calvert, *supra* note 117, at 2.

353. Rosen, *supra* note 279.

354. Leary, *supra* note 210.

355. See Weins & Hiestand, *supra* note 112, at 27 n.220 (explaining that sexting could be a status offense because it involves an activity “which is legal for an adult”).

356. *Graham v. Florida*, 130 S. Ct. 2011, 2026-27 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

357. See Weins & Hiestand, *supra* note 112, at 27 n.220.

358. Leary, *supra* note 44, at 544 n.246.

359. *Cf. id.* (stating that we do not decriminalize illegal narcotics simply because a large number of minors ingest them).

360. See Olszewski, *supra* note 205, at 706 (stating that “[s]exual conduct involving persons close in age is either non-criminal or punished at a substantially reduced level” in a majority of states).

361. See Calvert, *supra* note 117, at 48-49 (discussing statutory rape laws).

362. But see Levick & Moon, *supra* note 49, at 1038-39 (stating that “[s]exting is the result of a convergence between the well-recognized adolescent need for sexual exploration and new technology that allows teens to explore their sexual relationships” and “technology is an inseparable part of their lives”).

363. Leary, *supra* note 44, at 544 n.246.

teens.³⁶⁴

States addressing sexting juveniles should create a specific and separate statute.³⁶⁵ It is not uncommon for a state statute to punish minors less than adults for the same conduct. In Indiana, for example, a minor attempting to sneak into a bar with a fake form of identification will face a C misdemeanor charge under the false statement of age statute,³⁶⁶ which the legislature recently increased from an infraction.³⁶⁷ An adult possessing a fake ID would face a class B misdemeanor or a D felony charge if he knowingly filled out false information to obtain the identification.³⁶⁸ Although punishments under child pornography laws are justified to protect children from pedophiles and other sexual abusers,³⁶⁹ this rationale does not support applying the same punishments to sexting teens.³⁷⁰ Being a “‘juvenile’ carries a shield from publicity, protection against extended pre-trial detention and post-conviction incarceration with adults,” and more limited detention.³⁷¹

A sexting statute that carries a less ominous title would help to ensure that anyone gaining access to the juvenile’s past history, even if expunged, would not assume that the juvenile belongs in the same category as the worst offenders. Furthermore, the state must have the ability to punish the worst offenders with more serious crimes while allowing the “typical” sexting case to be handled by the juvenile court.³⁷² A primary focus of the statute may be to look at the intent of the minor and number of times a minor has dealt with the justice system.³⁷³ Penalties based simply on “hoarding” or the number of images possessed could end in more severe penalties than is necessary.³⁷⁴ For example, a statute that creates an additional penalty out of possessing ten images³⁷⁵ may unfairly target a teenage couple that, however inappropriate, has engaged in sexting over a period of time if it does not address the intent of the minors. Furthermore, a penalty increased for a first-time offense because material was sent to five people, rather than just three to four, seems like an arbitrary cutoff.³⁷⁶ In the fickle world

364. See Leary, *supra* note 14, at 44.

365. Weins & Hiestand, *supra* note 112, at 48-52. But see Levick & Moon, *supra* note 49, at 1036 (describing law enforcement’s involvement in sexting as a “disturbing trend”).

366. IND. CODE § 7.1-5-7-1(a) (2010).

367. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 42 IND. L. REV. 937, 938 (2009).

368. IND. CODE § 9-24-16-12.

369. Richards & Calvert, *supra* note 5, at 35.

370. See *supra* notes 245-54, 337-41 and accompanying text.

371. *In re M.D.N.*, 493 N.W.2d 680, 683 (N.D. 1992).

372. See, e.g., Weins & Hiestand, *supra* note 112, at 50-53 (advocating that the highest charge brought against juveniles for sexting be “a felony in juvenile court” and that a state may wish to prevent waiver to criminal court).

373. See *id.* at 51.

374. *Id.* at 51.

375. *Id.*

376. But see *id.*

of high school relationships, a teenager could have five “long-term” relationship over the course of five months, yet still be charged with a more severe penalty for sending explicit images to his or her five significant others over the course of a year. Looking at the intent of the sender might more accurately reflect a just response.³⁷⁷ For instance, a teenager who has sent ten unrequested images is probably more deserving of punishment than the teenage couple.³⁷⁸ States should also have the option of punishing minors who repeatedly harass and threaten other minors but fail to obtain explicit material.³⁷⁹

The purpose of ensuring that a sexting statute relegates nearly all sexting instances to juvenile court is magnified as states become compliant with SORNA.³⁸⁰ The possibility of placing juveniles on sexual offender registries, even for a short period of time,³⁸¹ leaves much less hope that a juvenile could be rehabilitated.³⁸² The federal guidelines take steps to require adjudicated juvenile delinquents to register only under more rare and egregious circumstances.³⁸³ SORNA, however, does not create any exception for juveniles prosecuted as adults.³⁸⁴ Two states, New York and North Carolina, currently permit sixteen- and seventeen-year-olds to be tried as adults.³⁸⁵ Where states have made sexting a misdemeanor but have not ensured that cases are brought in juvenile court or are not charged under child pornography statutes, a sexting offense may still lead to registration on the sex offender list in compliance with SORNA. Possession, creation, or distribution of child pornography, without any age clarifiers, is a registerable offense under SORNA.³⁸⁶ Given this statutory scheme, the minority

377. *But see id.* at 51 n.350 (stating the authors “see no reason that [bright line numerical rules] are particularly inappropriate here”).

378. *Compare* Nix, *supra* note 117, at 191, *with* Weins & Hiestand, *supra* note 112, at 30-31 (proposing examples where a teen sends unrequested and presumably unwanted images compared to a scenario where a teenage couple potentially faces charges for exchanging images).

379. *See* Richards & Calvert, *supra* note 5, at 13 n.47; *see also* Arcabascio, *supra* note 49, at 29-31 (discussing cyberbullying laws).

380. *See supra* notes 72-78 and accompanying text; *see also* Leary, *supra* note 44, at 515-18 (discussing SORNA and possible implications when addressing sexting); Levick & Moon, *supra* note 49, at 1049-50 (same).

381. *See* Rosen, *supra* note 279.

382. Smith, *supra* note 14, at 535-40.

383. *See* U.S. DEP’T OF JUSTICE, *supra* note 324; *see also* Leary, *supra* note 44, at 515-17 (discussing SORNA and noting that its construction does not require juveniles to register for all sex offenses but only for “particularly serious sexually assaultive crimes”).

384. OFFICE OF JUSTICE PROGRAMS, *supra* note 72, at 16. *But see* Leary, *supra* note 44, at 517 (discussing SORNA and arguing that the question is not “whether a state allows juvenile sex offender registration, but whether it does so for child pornography adjudications” in juvenile court). Professor Leary further states, however, that her structured prosecutorial discretion proposal limits prosecutions to juvenile court. *Id.* at 519 n.135.

385. *See* Tamar R. Birkhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 1443, 1445 (2008).

386. OFFICE OF JUSTICE PROGRAMS, *supra* note 72, at 20.

of states allowing prosecution of sixteen or seventeen-year olds as adults will face the possibility of adding two seventeen-year-old high school sweethearts to the registry even after the creation of a reduced-penalty sexting statute.

The following proposed sexting statute is molded from recent bills passed or proposed by state legislatures, as well as recent commentaries on sexting.³⁸⁷ Its design attempts to ensure that consensual sexting is addressed within the juvenile justice system and works to punish more egregious conduct. It states:

**PROHIBITION ON MINORS ELECTRONICALLY
DISSEMINATING IMPROPER MATERIAL**

It is not a violation of this statute if a minor³⁸⁸ took reasonable steps to delete, destroy, or eliminate the visual depiction. This is not applicable to a minor who sends the depiction with embedded code, software, or other electronic means that deletes, destroys, or eliminates the visual depiction meant to harass, coerce, or threaten another minor.

This statute does not cover³⁸⁹ possession, creation, or distribution of images or depictions by any person eighteen years of age or older.

- (a) A minor may not knowingly use electronic devices or computers³⁹⁰ to send or distribute to another minor an image, photograph, or other depiction of himself or herself in a state of nudity or engaged in

387. The statutes and bills included and looked to for the model language include FLA. STAT. ANN. § 827.071 (West, Westlaw through 2010 legislation); NEB. REV. STAT. § 28-813.01 (Supp. 2009); VT. STAT. ANN. tit. 13, § 2802b (2010); H.R. 5533, 2010 Leg., Reg. Sess. (Conn. 2010); H.R. 1335, 2010 Leg., 112th Reg. Sess. (Fla. 2010); H.R. 4583, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2010); H.R. 57, 2010 Leg., Reg. Sess. (Ky. 2010); H.R. 1357, 2010 Leg., 36th Reg. Sess. (La. 2010); H.R. 643, 2010 Leg., 125th Reg. Sess. (Miss. 2010); H.R. 7778, 2010 Leg., Reg. Sess. (R.I. 2010); H.R. 4504, 118th Gen. Assemb., 2d Reg. Sess. (S.C. 2010); Legis. B. 285, 101st Leg., 1st Reg. Sess. (Neb. 2009); Assemb. B. 4069, 213th Leg., 2d Ann. Sess. (N.J. 2009); S.B. 1121, 193d Gen. Assemb., Reg. Sess. (Pa. 2009).

388. Legislators may find it necessary to find compliance between the state's age of consent law and its sexting law. See Weins & Hiestand, *supra* note 112, at 50 n.345 (citing Smith, *supra* note 14, at 524-25).

389. This Note and proposed statute do not address images created, obtained, and distributed by minors for commercial purposes. Legislators, however, will likely need to address the issue in whatever manner they deem appropriate. Compare Weins & Hiestand, *supra* note 112, at 32-33 nn.253-58 (detailing difficulty of determining criminal justice response where commercial purposes were involved but concluding that many minors will benefit from the rehabilitative resources of the juvenile justice system and that cases should be determined on an individual basis), with Shafron-Perez, *supra* note 103, at 435 n.30 (stating that "[t]he author strongly believes that any person, including a minor, who creates sexually explicit material with the use of minors for the purposes of profit should be charged with violations of child pornography laws").

390. Weins & Hiestand, *supra* note 112, at 50 n.346.

sexually explicit conduct.

- (b) A minor may not possess an image, photograph, or other depiction of another minor in a state of nudity or engaged in sexually explicit conduct.
- (c) A minor who knowingly, voluntarily, and without malicious intent possesses, transmits, or distributes an image, photograph, or other depiction of himself or herself, or of another minor, at least thirteen years of age, in a state of nudity or in sexually explicit conduct will be adjudicated to the juvenile diversionary program.
- (d) Offenders of subsection (c) will be adjudicated delinquent and face additional penalties if the minor has
 - i. been adjudicated delinquent under this section before;
 - ii. distributed depictions of other minors;
 - iii. created or transferred depictions in order to humiliate another minor;³⁹¹
 - iv. exhibited malicious intent; or
 - v. distributed more than five unrequested images.
- (e) Minors adjudicated delinquent under subsection (c) and not waived to criminal court will have their records expunged upon their eighteenth birthday.³⁹²
- (f) A minor adjudicated under this section may be waived to criminal court if he or she has previously been adjudicated two or more times under this statute and has a prior unrelated sexual offense.
- (g) Minors adjudicated under this section in juvenile court shall not be charged under the state's child pornography or obscenity laws.³⁹³
- (h) Minors adjudicated under this section in juvenile court shall not face

391. A fine line may exist between an intent to humiliate and malicious intent. It is under these "cyberbullying" circumstances where an inquiry into the number of distributions made might indicate a more malicious intent versus a more isolated, immature bullying incident.

392. See Levick & Moon, *supra* note 49, at 1047-49.

393. See *supra* notes 372-79 and accompanying text; see also Weins & Hiestand, *supra* note 112, at 52-54 (advocating for provision that exempts teens adjudicated for sexting from being prosecuted under the state's child pornography laws).

registration “in the state’s registration program.”³⁹⁴

- (i) This statute does not cover, replace, or prevent any prosecution of a minor for images created, transferred, possessed, or obtained
 - i. through
 - i. threats;
 - ii. coercion; or
 - iii. involuntary means;
 - ii. with malicious intent.
- (j) This statute does not prevent the prosecution of a minor for willfully, maliciously, or repeatedly attempting to obtain an image, photograph, or other depiction of another minor through coercion or threats, even if unsuccessful.³⁹⁵

Diversiónary program. The adjudication alternative program shall be restricted to a person under eighteen years old who is in violation of sections (a)-(d), does not have a prior sexual offense, did not use coercion, “force or illicit substances,” and is a first- or second-time offender under this statute.³⁹⁶ Additionally, concerns of law enforcement and the victim should be taken into account.³⁹⁷ The education portion will include the legal ramifications of sexting, the social impact it can have on their lives, as well as ten eight-hour days of community service. Third-time offenses shall be misdemeanors in the juvenile court³⁹⁸ and subject to the appropriate penalty.³⁹⁹

Definitions. Under this statute, nudity is defined as “lascivious exhibition of the genitals or pubic area of any person.”⁴⁰⁰ Sexually

394. Weins & Hiestand, *supra* note 112, at 53-54 (cautioning against adding juvenile sexters to the state’s sex offense registry).

395. See Richards & Calvert, *supra* note 5, at 13 n.47 (citing FLA. STAT. ANN. § 784.048 (West, Westlaw through 2010 legislation)).

396. Heck, *supra* note 4, at 28-29.

397. *Id.* at 29.

398. Weins & Hiestand, *supra* note 112, at 52.

399. If obtained voluntarily, this penalty would ideally be based on some form of an escalating home detention penalty with a prohibition on accessing the Internet and having a cell phone with texting ability. For example, a third offense might involve a ten-day home detention with no access to the Internet or a cell phone that could text, while a fourth offense could require a thirty-day home detention with no access to the Internet or a cell phone that could text. See, e.g., Levick & Moon, *supra* note 49, at 1052-53.

400. See Calvert, *supra* note 117, at 53 (citing the federal definition of child pornography at 18 U.S.C. § 2256(2)(A)(v) (2006)).

explicit conduct “means actual or stimulated (i) sexual intercourse, including genital-genital, oral genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; [or] (iv) sadistic or masochistic abuse.”⁴⁰¹

5. *Educating Teens and Parents.*—Finally, parents and educators must do

more to ensure that juveniles are aware of the consequences that may result from their actions.⁴⁰² Successfully educating teens and their parents alleviates the need for any state action.⁴⁰³ Parents can preemptively act by increasing their supervision and control over their children’s digital behavior.⁴⁰⁴ The ultimate role parents take must involve more than occasionally talking to their children or rifling through their teens’ cell phone pictures. Teens are no less likely to engage in sexting when their parents actively monitor their cell phones’ content.⁴⁰⁵ Teens, however, cannot enter into a cell phone contract without a parent’s consent, and parents have the ability to limit the features available on cell phones.⁴⁰⁶ At least one survey has shown that reducing a cell phone’s texting abilities appears to decrease the likelihood that a teen will send sext messages.⁴⁰⁷

Additionally, schools should make students aware of the consequences of sexting.⁴⁰⁸ Schools could prohibit images causing substantial school disruption⁴⁰⁹ should courts find that teens have a First Amendment right to send and receive certain images⁴¹⁰ or that these images are “neither obscene nor amount to child pornography.”⁴¹¹ Furthermore, schools can educate students on the dangers of sexting.⁴¹² Teens adjudicated delinquent should also attend classes that primarily focus on the legal implications as well as the non-legal implications of sexting.⁴¹³

It is not clear whether independent educational sources of information would be as effective. New Jersey, for example, had proposed to place informational packets in purchased cell phones.⁴¹⁴ It is doubtful, though, that inserting these

401. 18 U.S.C. § 2256(2)(A) (2006).

402. Leary, *supra* note 44, at 559-63.

403. *Id.*

404. Calvert, *supra* note 171, at 34-35.

405. LENHART, *supra* note 142, at 10.

406. Corbett, *supra* note 235, at 7.

407. *Cf.* LENHART, *supra* note 142, at 10 (observing that only nine percent of teens who engaged in sexting had parents who restricted their cell phones’ text messaging capabilities).

408. Meacham, *supra* note 1.

409. Calvert, *supra* note 117, at 34-35.

410. *See supra* notes 292-303 and accompanying text.

411. Calvert, *supra* note 117, at 36.

412. *See* H.R. 1115, 116th Gen. Assemb., 2d Reg. Sess. (Ind. 2010) (a bill that would allow schools to offer education regarding sending “sexually suggestive or explicit material”); *see also* Calvert, *supra* note 117, at 40 n.195 (referencing Indiana law requiring that students learn about cyberbullying).

413. S.B. 1121, 193d Gen. Assemb., Reg. Sess. (Pa. 2009).

414. Assemb. B. 4070, 213th Leg., 2d Ann. Sess. (N.J. 2009).

packets with cell phone sales, regardless of how edifying they might be, would make a significant impression on juveniles or their parents. If placed with the manual materials, the packets would be ineffective because most people know how to use a cell phone without consulting a manual. If placed with the receipt, the packets would be ineffective because purchasers tend to set receipts aside. In either scenario, parents are likely to overlook potentially valuable educational materials. The television network MTV, however, has created an educational campaign called “A Thin Line” that addresses “sexting, cyberbullying, and digital dating abuse.”⁴¹⁵ It is unclear whether the campaign has made measurable progress,⁴¹⁶ but ultimately, society’s answer to sexting will require a multifaceted approach utilizing both public and private efforts.⁴¹⁷

CONCLUSION

States currently have the opportunity to address sexting meaningfully as they work to become compliant with the Adam Walsh Act. The history of our juvenile justice system has primarily relied on rehabilitation, a policy justification that can continue when addressing sexting. Over the past several years, juveniles have found themselves in various forms of legal trouble as they have faced prosecution under child pornography laws for recording and often sending what can seem like legal acts. The Supreme Court has struck down certain child pornography laws, however, on the basis that the perpetrators have not recorded an actual crime or created a specific victim.

Nevertheless, states should deter sexting because it is in a state’s interest to ensure that sexual images depicting minors do not proliferate as the Internet and cell phone communications continue to advance. But teenagers, who are by nature exploring their sexuality, should not face the life-altering prospect of ending up on a sex offender registry for an ill-advised, hormone-driven mistake.

For the vast majority of sexting incidents, the solution should be to continue in the tradition of the juvenile court system and focus on rehabilitation. Focusing on the rehabilitation approach ensures that teens who sext will receive the necessary education and treatment for their offenses without having their lives turned upside down in the process. Additionally, although this approach prevents a teen from facing the same consequences as an adult predator, it still allows states to deter this undesirable behavior by allowing some form of punishment. It also gives parents an incentive to actively educate, monitor, and control their children’s activities. In conclusion, a pragmatic and moderate step taken by state legislatures in addressing sexting will provide states an option to address sexting that neither condones nor takes the most egregious step of charging shortsighted or immature juveniles under child predator laws.

415. *MTV Launches ‘A Thin Line’ To Stop Digital Abuse*, MTV.COM (Dec. 3, 2009, 9:17 A.M.), <http://www.mtv.com/news/articles/1627487/20091203/story.jhtml>.

416. Arcabascio, *supra* note 49, at 28-29.

417. *See, e.g.,* Calvert, *supra* note 117, at 32-42 (discussing multiple legal and non-legal ways of addressing sexting).