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SEXUAL HEALING: SOLVING THE TEEN TO TEEN SEXTING PROBLEM IN VIRGINIA

*Samuel T. Bernier**

INTRODUCTION

Imagine that on a crisp fall Friday evening Janie, a fourteen-year-old high school freshman, and several of her girlfriends gather at the home of Janie's parents for a slumber party. Both of Janie's parents are present in the home and the girls adhere to two strict rules: no alcohol and no boys. Sometime during the evening, while playing truth or dare, one of the girls dares Janie to take a risqué picture of herself with her cell phone camera and send the picture to the boy she likes. Janie, feeling the effects of peer-pressure, accepts the dare and sends a picture of herself topless to Roger. Roger, a sixteen-year-old junior at Janie's high school, is surprised when he receives Janie's picture and generally impressed with himself for attracting that kind of attention. To celebrate his new found popularity he decides to forward this picture on to the rest of the high school cross country team, of which he is a member.

The activity that Janie, Roger, and the cross country team have been engaging in is commonly known as "sexting."¹ Sexting is defined as "youth writing sexually explicit messages, taking sexually explicit photos of themselves or others in their peer group, and transmitting those photos and/or messages to their peers."² Sexting may seem relatively harmless to the teenagers involved but when this activity is analyzed against the backdrop of Virginia's child pornography laws, it has potentially grave implications.

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1. Info. Brief from Va. Dep't of Educ., Office of Educ. Tech., *Sexting: Implications for Schools* (Oct. 2009) (on file with author) [hereinafter DOE].

2. *Id.*

In this hypothetical scenario, both Janie and Roger have committed multiple felony violations of Virginia's child pornography statutes.³ Janie has produced child pornography (by taking the picture of herself), has distributed child pornography (by sending the picture to Roger) and is in possession of child pornography (the picture in the phone's memory).⁴ Roger has distributed child pornography (by sending the picture on to the cross country team) and is in possession of child pornography (the picture in the phone's memory).⁵ Even the members of the cross country team who did not immediately delete the picture can be charged with a felony – possession of child pornography.⁶ It is not too difficult to imagine the damage a felony conviction for child pornography could do to any one of these teens' lives, but the consequences of this Friday night game of truth or dare may not end there. Any of these teens could also be required to register as a sex offender for at least twenty-five years.⁷

The hypothetical scenario laid out here has become all too real in recent times. In Pennsylvania, three teenage girls who allegedly sent nude or semi-nude cell phone pictures of themselves to three of their male classmates were formally charged with child pornography offenses.⁸ The girls were charged with manufacturing, disseminating or possessing child pornography.⁹ Their male classmates were charged with possession.¹⁰ In Ohio, two juveniles, one male and one female, were charged with contributing to the delinquency of a minor after a nude photo of a fifteen-year-old girl was found on a cell phone.¹¹ Under the current Ohio law, these two teens could have been charged with felonies and forced to register as sex offenders.¹²

A more extreme example is the case of Phillip Alpert, an eighteen-year-old Florida man whose sixteen-year-old girlfriend of two and a half years

3. Announcement to the Citizens of Amherst County, Va., (Sept. 8, 2009) (on file with author), available at <http://www.countyofamherst.com/egov/docs/1252419660970.htm>.

4. *Id.*

5. *Id.*

6. *Id.*

7. VA. STATE CRIME COMM'N, *SEXTING 12* (2009), www.rsolvirginia.org/VCC%20Sexting%20Report.ppt [hereinafter COMM'N].

8. *High Schoolers Accused of Sending Naked Pictures To Each Other*, WPXI.COM, Jan 13, 2009, <http://www.wpxi.com/news/18469160/detail.html>.

9. *Id.*

10. *Id.*

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

12. *Id.*

sent him a naked photo of herself.¹³ After an argument, Alpert did “a stupid thing” and forwarded the photo to dozens of her friends and family.¹⁴ Alpert was arrested and charged with distributing child pornography, a felony, to which he pled no contest and was convicted.¹⁵ Alpert was sentenced to five years’ probation and is now required by Florida law to register as a sex offender until he is age forty-three.¹⁶ He has been expelled from college, he cannot travel outside of his home county without making arrangements with a probation officer, and he has been having trouble finding a job because of his status as a convicted felon.¹⁷

Even here, in the confines of the Old Dominion, Commonwealth’s Attorneys and teens are struggling with the consequences of sexting. In March 2009 two teenage boys in Spotsylvania County allegedly solicited teenage girls to take explicit pictures of themselves with their cell phones.¹⁸ The boys then asked the girls to send the pictures to them by text message.¹⁹ After pictures of naked girls were found on their cell phones the two boys were arrested and charged with soliciting and possessing child pornography.²⁰

Sexting is a growing problem among the teenage population.²¹ A Pew Research Center report completed in December of 2009 indicates that four percent of cell-owning teens have sent nude or nearly nude images of themselves to someone else via text messaging.²² The same survey found that fifteen percent of teens have received a nude or nearly nude image or video of someone they know.²³ Other studies claim that the percentage of teens that have engaged in sexting may be as high as twenty percent.²⁴

13. Deborah Feyerick and Sheila Steffen, ‘*Sexting*’ Lands Teen on Sex Offender List, CNN.COM, Apr. 8, 2009, <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html>.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Spotsylvania Teens Arrested in County’s First Sexting Case*, ABC7NEWS, March 10, 2009, <http://www.wjla.com/news/stories/0309/602574.html>.

19. *Id.*

20. Stevie Smith, *Virginia Teens Busted for Phone ‘Sexting’*, THE TECH HERALD, Mar. 12, 2009, <http://www.thetechherald.com/article.php/200911/3200/Virginia-teens-busted-for-phone-sexting>.

21. AMANDA LENHART, TEENS AND SEXTING 3 (Pew Research Center 2009).

22. *Id.* at 5.

23. *Id.*

24. Darryl Wells, *Cyber-Dating Out . . . “Sexting” In*, VA. ASS’N OF CHIEFS OF POLICE, Feb. 11, 2009, http://www.vachiefs.org/news/item/cyber_dating_out_sexting_in/.

Here in Virginia, the current legal framework of the Virginia Code provides little specific guidance to Commonwealth's Attorneys seeking to address teen-to-teen sexting in their jurisdictions.²⁵ It is left to prosecutorial discretion whether to take a hard line approach and charge minors as adult sex offenders in circuit courts in an effort to discourage sexting, or to charge them as minors in an effort to insulate them from broader consequences.²⁶

Members of the General Assembly have been studying Virginia's laws and how they address the teen-to-teen sexting phenomenon.²⁷ Some members are not sure whether the current statutes adequately address the practice of sexting among teens who may not grasp the consequences of their actions.²⁸ The General Assembly could determine that current laws are adequate to allow Commonwealth's Attorneys to address all forms of sexting, they may amend current law, or they may create a new class of crimes to more appropriately address teen-to-teen sexting.²⁹

This comment analyzes how teen-to-teen sexting is presently addressed under the Code of Virginia. It also addresses the statutes under which Janie and her friends may be convicted for their various indiscretions as well as some of the long term consequences of those convictions. Additionally, it addresses the recent Virginia State Crime Commissions report on teen-to-teen sexting.

The General Assembly may soon seek to adjust the Code of Virginia to better address teen-on-teen sexting. The second part of this comment will consider the options put forth by the Virginia State Crime Commission report and at different legislative "fixes" that have been proposed or enacted in some of Virginia's sister states.

II. TEEN-TO-TEEN SEXTING IN VIRGINIA

Imagine our high school freshman, Janie, her "crush", Roger, and the rest of the members of the cross country team are all Virginia residents. The jig

25. Olympia Meola, *Creating 'Sexting' Policies is Urged*, RICH. TIMES DISPATCH, Dec. 26, 2009, at B1.

26. *Sexting: Pornography or High Tech Flirting?*, LAWYERS.COM, <http://criminal.lawyers.com/juvenile-law/Sexting-Pornography-or-High-Tech-Flirting.html>.

27. Olympia Meola, *Officials Consider Minors' 'Sexting'*, RICH. TIMES DISPATCH, May 20, 2009, at A1.

28. *Id.*

29. *Id.*

is up! Someone's parents found the picture, the story has come out, and the lot of them have been arrested. How will the Commonwealth's Attorney address this matter and what will be the consequences of the teens' actions?

A. Addressing Sexting Using the Code of Virginia

Assume that the Commonwealth's Attorney in Janie's jurisdiction wants to prosecute these teenagers. She has decided use this case to send a message to other would-be sexters in her jurisdiction. When the Commonwealth's Attorney seeks guidance from the Code of Virginia she will find that Janie can be charged with at least three felonies under two separate Code sections.³⁰ She will also find that Roger can be charged with multiple felonies under a single Code section and that the members of the cross country team can be charged with a single felony offense each.³¹

First, Janie can be charged under Va. Code § 18.2-374.1 for producing child pornography.³² Section 18.2-374.1(B) states that, "[A] person shall be guilty of production of child pornography who:... (2) Produces or makes or attempts or prepares to produce or make child pornography."³³ Section 18.2-374.1(A) defines child pornography as:

[S]exually explicit visual material which utilizes or has a subject an identifiable minor. An identifiable minor is a person who was a minor at the time the visual depiction was created, adapted, or modified; or whose image as a minor was used in creating, adapting, or modifying the visual depiction; and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and shall not be construed to require proof of the actual identity of the identifiable minor.³⁴

The definition of sexually explicit visual material includes, among other things, digital images depicting lewd exhibitions of nudity.³⁵ Nudity is defined in the Virginia Code to mean:

[A] state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the

30. VA. CODE ANN. §§ 18.2-374.1, 374.1:1 (2009).

31. *Id.*

32. VA. CODE ANN. § 18.2-374.1 (2009).

33. *Id.*

34. *Id.*

35. *Id.*

female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.³⁶

In our scenario the topless picture that Janie took of herself clearly falls within the definition of nudity.³⁷ However, Janie may still believe that she's off the hook. The Court of Appeals of Virginia has stated that a photograph showing only exposed nipples is not, without more, a lewd exhibition of nudity sufficient to support a conviction under Code § 18.2-374.1.³⁸ "More" in the context of a lewd exhibition of nudity entails "a state of mind that is eager for sexual indulgence, desirous of inciting to lust or of inciting sexual desire or appetite."³⁹ Therefore, if the Commonwealth can convince the trier of fact that Janie intended to incite Roger's sexual desire by sending him a picture of herself topless the Commonwealth will have carried its burden.⁴⁰ Because of Janie's age in the photo, fourteen, the violation of Va. Code § 18.2-374.1 is an unclassified felony punishable by five to thirty years' imprisonment.⁴¹

Janie can be charged with a second felony under Va. Code § 18.2-374.1:1 for distribution of child pornography.⁴² Assuming that the trier of fact finds that Janie's topless picture of herself is child pornography, then her distribution of it to Roger through her cell phone is a violation of subsection (C).⁴³ A violation of this subsection is also an unclassified felony, a conviction for which could land Janie in prison for five to twenty years.⁴⁴

Roger can also be charged under subsection (C) of § 374.1:1 for distributing child pornography.⁴⁵ However, unlike Janie, Roger has not engaged in an isolated act of distribution. Roger has distributed this picture multiple times, forwarding the picture of Janie to all of the members of his high school cross-country team. Roger can now be charged for each individual act of distribution.⁴⁶ The first message that Roger sends out

36. VA. CODE ANN. §18.2-390(2) (2009).

37. *Foster v. Commonwealth*, 6 Va. App. 313, 329, 369 S.E.2d 688, 698 (Ct. App. 1988).

38. *Id.*

39. *Id.* (quoting *Dickerson v. Richmond*, 2 Va. App. 473, 479, 346 S.E.2d 333, 336 (Ct. App. 1986)); *Asa v. Commonwealth*, 17 Va. App. 714, 718, 441 S.E.2d 26, 29 (Ct. App. 1994).

40. *Foster*, 6 Va. App. at 328, 369 S.E.2d at 328; *Asa*, 17 Va. App. at 718, 441 S.E.2d at 29.

41. VA. CODE ANN. § 18.2-374.1 (2009); COMM'N, *supra* note 7, at 7.

42. VA. CODE ANN. § 18.2-374.1:1(C) (2009).

43. *Id.* (Criminalizing reproduction of child pornography "by any means, including . . . distribu[tion].").

44. *Id.*

45. COMM'N, *supra* note 7, at 7.

46. *Id.* at 8. Roger may decide to dispute this by claiming that multiple charges for forwarding the same

containing Janie's photo exposes him to the same criminal liability that Janie has been exposed to for sending the picture to him—five to twenty years' imprisonment.⁴⁷ For every subsequent copy of the same photo that Roger distributes to his teammates he may be punished by imprisonment for five to twenty years with a mandatory minimum sentence of five years' imprisonment.⁴⁸

Assuming that none of our young ne'er-do-wells immediately deleted Janie's picture from their phones' memory banks, Janie, Roger, and every member of the cross country team can each be charged with one count of possession of child pornography under Va. Code § 18.2-374.1:1(A).⁴⁹ Possession of child pornography under § 374.1:1(A) is a Class 6 felony⁵⁰ for the first violation and a Class 5 felony⁵¹ for any second or subsequent violation.⁵²

Let's change our hypothetical scenario so that Roger sends Janie a text message first. Roger expresses his interest in Janie and requests that she send him a topless photo.⁵³ Now, in addition to his aforementioned felonious behavior, Roger has also used a communications system to solicit and procure child pornography, a violation of Virginia Code § 18.2-374.3(B).⁵⁴ This violation is also a Class 6 felony.⁵⁵

Despite the gravity of felony convictions, unless Janie, Roger, and the members of the cross country team are tried as adults in circuit court, they would almost certainly not receive lengthy prison sentences.⁵⁶ The Commonwealth's Attorney prosecuting them would have the discretion to

photo violates his constitutional right to be protected from double jeopardy. Case law, however, sides with the Commonwealth. The court will most likely find that each separate text to each separate member of the cross country team constitutes a distinct violation. *See Slavek v. Hinkle*, 359 F. Supp. 2d 473, 496-7 (E.D. Va. 2005).

47. VA. CODE ANN. § 18.2-374.1:1(C) (2009); COMM'N, *supra* note 7, at 8.

48. VA. CODE ANN. § 18.2-379.1:1 (C) (2009).

49. VA. CODE ANN. § 18.2-374.1:1(A) (2009); COMM'N, *supra* note 7, at 8.

50. A Class 6 felony is punishable by one to five years' imprisonment or, at the discretion of the trier of fact, by confinement in jail for not more than twelve months and a fine of not more than \$2,500.00, either or both. VA. CODE ANN. § 18.2-10(f) (2009).

51. A Class 5 felony is punishable by one to ten years' imprisonment or, at the discretion of the trier of fact, by confinement in jail for not more than twelve months and a fine of not more than \$2,500.00, either or both. VA. CODE ANN. § 18.2-10(e) (2009).

52. VA. CODE ANN. § 18.2-374.1:1(A) (2009); COMM'N, *supra* note 7, at 7-8.

53. The rest of the hypothetical scenario remains the same post solicitation. Janie would then produce the photo and distribute it to Roger who then distributes it to the rest of the cross country team.

54. VA. CODE ANN. § 18.2-374.3(B) (2009); COMM'N, *supra* note 7, at 10.

55. VA. CODE ANN. § 18.2-374.3(B) (2009); VA. CODE ANN. § 18.2-10(f) (2009).

56. COMM'N, *supra* note 7, at 7.

either try them in Juvenile and Domestic Relations Court (“JDR Court”) or make a motion to transfer jurisdiction to the appropriate circuit court.⁵⁷ If Janie and her classmates were tried and convicted in JDR Court then, as an alternative to the minimum sentences mandated for adults, their sentences could range anywhere from deferred disposition⁵⁸ to probation, public service, fines, incarceration, or any combination thereof.⁵⁹

Registration as a sex offender is not mandatory following a conviction in JDR Court.⁶⁰ Even so, if the juvenile is over thirteen years of age the court may, upon a motion by the Commonwealth’s Attorney, require that the juvenile register as a sex offender.⁶¹ However, if our hypothetical teenagers are tried in a circuit court, registration as a sex offender would be mandatory.⁶²

B. Virginia’s Registration Requirements for Convicted Sex Offenders

The Code of Virginia requires that any person convicted of certain enumerated offenses, including juveniles tried in circuit courts, whether sentenced as an adult or juvenile, register on the Sex Offender and Crimes against Minors Registry (“SOR”).⁶³ Among those enumerated offenses are production and/or distribution of child pornography,⁶⁴ possession of child

57. VA. CODE ANN. § 16.1-269.1(A) (2009). Upon a motion to transfer by the Commonwealth’s Attorney a hearing would be held in JDR Court to determine the appropriateness of the transfer. *See id.*

58. Deferred disposition would involve placing the juvenile under court described terms and condition which, if fulfilled, would result in a dismissal of the charge. THE BENCHBOOK COMMITTEE, VIRGINIA CRIMINAL BENCHBOOK FOR JUDGES AND LAWYERS § 13.03[3] (2009–2010 Ed., Matthew Bender 2009).
59. *Id.*

60. VA. CODE ANN § 9.1-902 (2009).

61. When determining if a juvenile should register on the SOR the court must consider:

- (i) the degree to which the delinquent act was committed with the use of force, threat, or intimidation, (ii) the age and maturity of the complaining witness, (iii) the age and maturity of the offender, (iv) the difference in the ages of the complaining witness and the offender, (v) the nature of the relationship between the complaining witness and the offender, (vi) the offender’s prior criminal history, and (vii) any other aggravating or mitigating factors relevant to the case.

VA. CODE ANN § 9.1-902(G) (2009 & Supp. 2010).

62. COMM’N, *supra* note 7, at 11.

63. VA. CODE ANN. § 9.1-901 (2009).

64. VA. CODE ANN. § 18.2-374.1 (2009).

pornography,⁶⁵ and use of a communications system to solicit a minor.⁶⁶ The time period for which the convicted offender must register begins after release from custody.⁶⁷

Continuing with the original hypothetical scenario, we shall assume that all of our young culprits were tried in circuit court. The members of the cross country team, having been convicted of possession of child pornography, must register on the SOR for a period of fifteen years.⁶⁸ At the end of that period, they may petition the circuit court to remove their names and information from the SOR.⁶⁹

Roger will be required to register and reregister on the SOR for his entire life.⁷⁰ Roger's convictions on multiple offenses requiring registration will bar him from ever being able to petition the circuit court for removal from the SOR.⁷¹ Had Roger been convicted of only one count of distributing child pornography (and not been convicted of possession) he would be required to register for twenty-five years before he would be eligible to petition for his removal.⁷² In our alternative hypothetical, wherein Roger solicits Janie to send him a topless picture, his conviction on that count alone would require him to register on the SOR for fifteen years.⁷³

Janie will also be required to register and reregister on the SOR for her entire life. Like Roger, her multiple convictions for offenses requiring registration will bar her from petitioning for removal from the SOR.⁷⁴ In addition, Janie has been convicted of production of child pornography, which is considered to be a sexually violent offense.⁷⁵ The Code of Virginia requires that persons having been convicted of a sexually violent offense register on the SOR for life.⁷⁶

65. VA. CODE ANN. § 18.2-374.1:1 (2009).

66. VA. CODE ANN. § 18.2-374.3 (2009); VA. CODE ANN. § 9.1-902 (2009) (listing offenses for which registration on the SOB is required).

67. VA. CODE ANN. § 9.1-908 (2009).

68. VA. CODE ANN. § 9.1-910 (2009).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. VA. CODE ANN. § 9.1-902 (2009).

76. VA. CODE ANN. § 9.1-908 (2009).

Virginia's registration requirements are in compliance with the current Federal requirements for sex offender registration.⁷⁷ On July 27, 2006, President Bush signed into law a bill known as the Adam Walsh Act.⁷⁸ The Adam Walsh Act, which incorporates the Sex Offender Registration and Notification Act, effectively makes it mandatory for states to impose registration requirements on anyone fourteen-years-old or older who is convicted as an adult of producing or distributing child pornography.⁷⁹

The Adam Walsh Act requires that the mandatory minimum time period of registration for these offenses be twenty-five years.⁸⁰ As seen in our hypothetical situation, Virginia imposes a lifetime registration requirement for producers of child pornography and a twenty-five year minimum requirement for distributors.⁸¹ The Adam Walsh Act does not, however, require juveniles who are adjudicated delinquent of a sex offense to be automatically placed on a sex offender registry.⁸² These juveniles must only register if they were fourteen-years-old or older at the time of the offense and the offense was comparable to "aggravated sexual abuse," defined in relevant part as engaging in a sexual act that involves actual touching.⁸³ It is this current framework for the treatment of teen-to-teen sexting offenses, the Code of Virginia and the Adam Walsh Act, which the Virginia State Crime Commission recently decided to study.⁸⁴

C.Recent Analysis by the State Crime Commission

In May 2009 the Virginia State Crime Commission ("the Commission") endeavored to study whether or not teen-to-teen sexting could be adequately dealt with using the current Code of Virginia.⁸⁵ Members of the Commission were concerned that the Code in its current form would not be adequate to address teenagers, such as Janie, who did not grasp the consequences of their actions.⁸⁶The Commission also sought to study the

77. COMM'N, *supra* note 7, at 13.

78. Office of the Ohio Pub. Defender, *Adam Walsh Act*, http://www.opd.ohio.gov/AWA_Information/Adam_Walsh.htm (last visited Dec. 4, 2010).

79. John A. Humback, "*Sexting*" and the First Amendment, PACE L. FAC. PBL'NS, 2009 at 4, <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1594&context=lawfaculty>; COMM'N, *supra* note 7, at 14.

80. COMM'N, *supra* note 7, at 12.

81. VA. CODE ANN. § 9.1-910 (2009).

82. COMM'N, *supra* note 7, at 14.

83. *Id.*

84. Meola, *supra* note 27.

85. *Id.*

86. Dena Potter, *No 'Sexting' Law Recommendation*, DAILYPRESS.COM, Dec. 16, 2009,

difficulties involved in changing the current Code without lessening Commonwealth's Attorneys' abilities to prosecute true pedophiles.⁸⁷

On December 15, 2009 the Commission, after receiving a staff report on the subject, decided not to endorse any changes in the Code of Virginia's treatment of teen-on-teen sexting.⁸⁸ The Commission did, however, direct its staff to draft a letter asking the state Board of Education to inform parents, students and school staff of the illegality and consequences of sexting.⁸⁹ The proposed letter would supplement the Department of Education information brief about sexting that was issued in October of 2009.⁹⁰

Leaving the "status quo" of Virginia's child pornography laws unchanged was only one of three options offered by the Commission's staff report.⁹¹ Other options included the creation of a new misdemeanor offense specifically dealing with teen-to-teen sexting (thus exempting offenders from the sex offender registration laws) and increasing mandatory education in public schools on the consequences of sexting.⁹²

Concerns that a "stupid teenage mistake" could be turned into a felony conviction, dooming an unwary teen to decades, perhaps even a lifetime, of exigency on a sex offender registry, are rightfully balanced by concerns that genuine offenders could benefit from loopholes in the law by receiving nominal punishments for serious predatory behavior.⁹³ States throughout the country are struggling with similar problems and many different solutions have been proposed.⁹⁴

<http://hamptonroads.com/2009/12/crime-agency-wont-push-legislation-sexting>. The Commission is made up of members of the General Assembly and serves to study and recommend legislation. *Id.*

87. *Id.*

88. Frank Green, *Changes Urged to Cut Disparities in Juvenile Justice*, RICH. TIMES DISPATCH, Dec. 16, 2009, at B1.

89. *Id.*

90. See DOE, *supra* note 1.

91. COMM'N, *supra* note 7, at 15.

92. *Id.*; Potter, *supra* note 86.

93. Potter, *supra* note 86.

94. Staff Report, *States consider new 'sexting' laws*, ESCHOOLNEWS, Apr. 17, 2009, <http://www.eschoolnews.com/2009/04/17/states-consider-new-sexting-laws/>.

III. LEGISLATING A SOLUTION TO TEEN-TO-TEEN SEXTING

Struggles over what to do about teen-to-teen sexting are certainly not unique to Virginia.⁹⁵ The Virginia State Crime Commission's decision not to recommend changes to the current law, continuing to leave the severity of child pornography charges to the discretion of the prosecutor, is likewise not unique.⁹⁶ Alternatively, other states have chosen to address teen-to-teen sexting in creative ways ranging from adjusting current laws to creating new misdemeanors for teens involved in sexting.⁹⁷ Some states have decided to leave their child pornography statutes untouched, but mandate education regarding the consequences of teen-to-teen sexting.⁹⁸ Still others have taken a more holistic approach by combining different approaches.⁹⁹ Any of these options could prove to be a viable solution to the teen-to-teen sexting problem in Virginia.

A. Prosecutorial Discretion: Leaving the Code of Virginia Unchanged

Proponents of leaving Virginia's current system unchanged say that altering the Code of Virginia, to mandate lesser charges for teens involved in sexting thereby reducing prosecutorial discretion, could result in disaster.¹⁰⁰ They argue that removing discretion from Commonwealth's Attorneys could result one teen being punished for an unwise indiscretion while another more serious offender receives a lighter sentence.¹⁰¹ Many also argue that the current system, giving prosecutors the option to try teens in juvenile or circuit court, allows for the flexibility needed to protect incidental offenders.¹⁰²

Opponents of the status quo argue that new laws are necessary to insure that sexting is dealt with uniformly throughout the Commonwealth.¹⁰³ They claim that prosecutorial discretion itself, not code changes, is more likely to result in irregular sentences for similar actions—one county branding minors as sex offenders for life, while another county gives minors the

95. *See id.*

96. *See id.*; Potter, *supra* note 86.

97. Nat'l Conference of State Leg., 2009 "Sexting" Legislation, <http://www.ncsl.org/?tabid=17756> (last visited Dec. 4, 2010) [hereinafter NCSL].

98. *Id.*

99. *Id.*

100. Potter, *supra* note 86.

101. *Id.*

102. *Id.*

103. *Id.*

proverbial slap on the wrist.¹⁰⁴ Those opposed to inaction also argue that requiring teens convicted of child pornography offenses for sexting to register on the SOR undermines the registry itself by listing incidental offenders alongside serious pedophiles.¹⁰⁵

Currently, there is no consensus among Commonwealth's Attorneys in Virginia on how sexting cases should be dealt with.¹⁰⁶ Even within the smaller confines of the Greater Richmond Metropolitan Area there are different views on how to address sexting.¹⁰⁷ As late as May of 2009 the Henrico County Commonwealth's Attorney, Wade Kizer, had not yet decided how to handle sexting incidents.¹⁰⁸ In Chesterfield County, Commonwealth's Attorneys have been reportedly "reluctant" to prosecute teenagers for sexting where no criminal intent is present.¹⁰⁹ In Hanover County, a teenage girl was investigated for allegedly sending nude or semi-nude photos to others who may have forward them along to more people but charges were never brought.¹¹⁰ Henrico County has yet to express any stance on sexting.¹¹¹

If the General Assembly is reluctant to wade into the "total minefield" of changing child pornography statutes, there are other ways to address teen-to-teen sexting.¹¹² Prosecutors throughout the Commonwealth could create uniform guidelines for use. The General Assembly could also choose to pass new legislation mandating education that would highlight the dangerous consequences of sexting.¹¹³

B. Legislative Mandates for Sexting Education

Bills that would mandate education about the dangers of sexting have been introduced in both New Jersey and New York.¹¹⁴ In New York, the proposed legislation would require the establishment of an educational outreach program for "text message, email and internet awareness... and an

104. Editorial, *Teach Teens Sexting's Risks*, ROANOKE TIMES, Dec. 18, 2009, available at <http://www.roanoke.com/editorials/wb/230094>.

105. *Id.*

106. Meola, *supra* note 27.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. Potter, *supra* note 86.

113. Editorial, *supra* note 104.

114. NCSL, *supra* note 97.

educational campaign about the harm that may arise... [from sexting].”¹¹⁵ The program would seek to increase minors’ awareness of “potential long-term harm” through print, radio and television announcements as well as community information forums.¹¹⁶ This legislation would also authorize the distribution of information about sexting through “educators, mentors, and community members.”¹¹⁷

A similar bill was introduced in the New Jersey State Legislature in June 2009.¹¹⁸ The proposed legislation in New Jersey would require school districts to disseminate information about sexting to all students in grades six through twelve as well as their parents and guardians.¹¹⁹ The information disseminated by the schools would be required to include a description of sexting as well as a list of legal, psychological, and sociological consequences.¹²⁰

Another bill proposed in New Jersey, also in June 2009, would prohibit the sale of cellular phones, cell phone equipment, or service contracts without an accompanying information brochure on the dangers of sexting.¹²¹ The law would apply to all retailers who provide cell phones or

115. S.A. 08622, 2009 Leg., (N.Y. 2009), *available at*

http://assembly.state.ny.us/leg/?default_fld=&bn=+A08622%09%09&Summary=Y&Text=Y.

In addition, S.A. 08622 would create an affirmative defense to child pornography charges that would be available if:

[T]he defendant was less than four years older than the other person at the time of the act, the depiction or description was not obtained . . . [by unlawful surveillance], such other person expressly or impliedly acquiesced in the defendant’s conduct, and the defendant did not intend to or profit from such conduct.

Id.

116. *Id.*

117. *Id.* On Jan. 6, 2010, S.A. 08622 was referred to the Committee on Codes. NY State Assembly Website,

http://assembly.state.ny.us/leg/?default_fld=&bn=+A08622%09%09&Summary=Y&Actions=Y (last visited on Dec. 4, 2010).

118. A. 4068, 2009 Leg., 213th Sess. (N.J. 2009), *available at* http://www.njleg.state.nj.us/2008/Bills/A4500/4068_II.PDF. This bill has been referred to the Assembly Education Committee on June 11, 2009. NJ State Legislature Website, <http://www.njleg.state.nj.us/bills/BillView.asp> (follow “Bills 2008-2009” hyperlink; then follow “Bill Number” hyperlink; search “Search by Bill Number” for “A4068” then follow “A4068” hyperlink) (last visited on Dec. 4, 2010).

119. A. 4068, 2009 Leg., 213th Sess. (N.J. 2009), *available at*

http://www.njleg.state.nj.us/2008/Bills/A4500/4068_II.PDF.

120. *Id.*

121. A. 4070, 2009 Leg., 213th Sess. (N.J. 2009), *available at*

http://www.njleg.state.nj.us/2008/Bills/A4500/4070_II.PDF. This bill was referred to Assembly Consumer Affairs Committee on June 11, 2009. NJ State Legislature Website, <http://www.njleg.state.nj.us/bills/BillView.asp> (follow “Bills 2008-2009” hyperlink; then follow “Bill Number” hyperlink; search “Search by Bill Number” for “A4070” then follow “A4070” hyperlink) (last

cell phone equipment to individuals as well as those who provide or renew cell phone service contracts to individuals.¹²² The information brochure would be required to include an explanation of the types of criminal penalties that could result from sexting as well as a list of names, telephone numbers, and addresses of groups qualified to answer sexting related questions.¹²³

Informing students about the dangers of sexting is a good idea even if accompanied by no other action. Surveys have shown that most teens have no idea that teen-to-teen sexting may be illegal.¹²⁴ One survey, conducted by a group of Ohio teens as their punishment for sexting, showed that out of 225 teens surveyed, only thirty-one knew that sexting could be a crime.¹²⁵

Here in Virginia, in view of the current statewide budget crisis, a new mandate to public schools may be ill timed. The General Assembly may want to address teen-to-teen sexting in a way that does not affect state or local budgets. One way to accomplished this, and at the same time give prosecutors more flexibility, is to create a new misdemeanor offense for certain types of teen-to-teen sexting incidents and/or exempt some teen offenders from SOR registration requirements.

C.Making Teen-to-Teen Sexting a Misdemeanor

Several of Virginia's sister states have chosen to address teen-to-teen sexting by creating new misdemeanor offenses for some types of sexting.¹²⁶ New legislation proposed in Ohio in April of 2009 details a relatively simple solution to the problem. The proposed law in Ohio first criminalizes minors creating, receiving, exchanging, sending or possessing nude pictures of minors. The law next prohibits teens from using the fact that the picture they possess is of themselves as a defense.¹²⁷ Finally, the proposed bill states that a violator of the law is guilty of the first degree misdemeanor,

visited on Dec. 4, 2010).

122. A. 4070, 2009 Leg., 213th Sess. (N.J. 2009), available at http://www.njleg.state.nj.us/2008/Bills/A4500/4070_I1.PDF.

123. *Id.*

124. 'Sexting' Laws Stir Up Controversy In The Legal System,

<http://www.impactlab.com/2009/03/16/sexting-laws-stir-up-controversy-in-the-legal-system/> (Mar. 16, 2009, 9:43EST).

125. *Id.*

126. NCSL, *supra* note 97.

127. H.R. 132, 128th Gen Assem., Reg. Sess. (Ohio 2009), available at

http://www.legislature.state.oh.us/bills.cfm?ID=128_HB_132. H.B. 132 was referred to the Criminal Justice Committee upon its introduction and no further action has been taken. *Id.*

“illegal use of a telecommunications device involving a minor in a state of nudity.”¹²⁸ Because teens convicted under this statute would be guilty of a misdemeanor, separate from the felony adult offense, they would not be required to register as sex offenders.¹²⁹

Similar legislation, equally simple, was introduced in the General Assembly of Pennsylvania in January of 2010.¹³⁰ The Pennsylvania bill proposes to make sexting a second degree misdemeanor.¹³¹ The new misdemeanor would cover minors who transmit nude pictures of themselves or of another minor thirteen-years-old or older but would not apply to pictures that depict sexual intercourse, however slight.¹³² The bill is designed to make the law current with technology without creating a loophole for pedophiles.¹³³ Prosecutors in Pennsylvania support downgrading teen-to-teen sexting from a felony to a misdemeanor.¹³⁴

In June of 2009 the Governor of Vermont signed legislation that created a new misdemeanor offense for teens engaging in sexting.¹³⁵ The new Vermont statute criminalizes the practice of minors “transmit[ing] an indecent visual depiction of himself or herself to another person,” but exempts teens who take “reasonable steps, whether successful or not,” to destroy inappropriate images of themselves.¹³⁶ The new law provides that a teen who has not previously been convicted of the offense shall be tried in juvenile court and, after being adjudged delinquent, may be referred to a diversion program.¹³⁷ Minors who are first offenders under the new law may not be prosecuted under Vermont’s felony sexual exploitation of children laws and are exempt from sex offender registration.¹³⁸ Prosecutors

128. *Id.*

129. McClelland, *supra* note 11.

130. H.R. 2189, Gen. Assem., Reg. Sess. (Pa. 2010), available at <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2009&sessInd=0&billBody=H&billTyp=B&billNbr=2189&pn=3051>. This bill was referred to the Judiciary Committee upon introduction. *Id.*

131. *Id.*

132. *Id.*

133. Christina Kauffman, *State Rep. Grove Introduces Sexting Legislation*, YORK DISPATCH (York Co., Pa.), Jan. 5, 2010.

134. *Id.*

135. S.B. 125, 2009 Leg., Sess., (Vt. 2009), available at <http://www.leg.state.vt.us/docs/2010/Acts/ACT058.pdf>.

136. *Id.*

137. *Id.* The sexting must be consensual. A teen snapping an unauthorized picture of another and sending it on could still face felony charges. *Id.*

138. S.B. 125, 2009 Leg., Sess., (Vt. 2009), available at <http://www.leg.state.vt.us/docs/2010/Acts/ACT058.pdf>.

are given discretion to charge minors who have previously been found guilty of violating the new law either with felony sexual exploitation of children or with the misdemeanor again.¹³⁹ However, even repeat offenders are exempt from sex offender registration.¹⁴⁰

Some opponents of Vermont's new law claim that it sends the wrong message to teens and others think that it is unnecessary.¹⁴¹ Conversely, supporters argue that it protects frivolous actions of teens from serious prosecution while still allowing prosecutors the leeway to adequately address cases of "voyeurism, lewd and lascivious conduct with a child, [and to use] other criminal provisions that could be applied if the facts are appropriate."¹⁴²

Still, none of these proposed or enacted laws would have helped the unfortunate Mr. Alpert of Florida who distributed nude pictures he received from his sixteen-year-old girlfriend.¹⁴³ Alpert was eighteen at the time of his offense and so could not have benefitted by any statute designed to protect a minor from felony prosecution.¹⁴⁴ However, legislation has been proposed in New York and Pennsylvania that would provide lesser penalties for sexting between young adults and minors whose age difference is four years or less.¹⁴⁵

Teen-to-teen sexting is becoming a more widespread phenomenon every day and a legislative solution will eventually become necessary. Legislators in Virginia should be aware of the different types of legislative solutions being proposed and enacted around the country. Our Commonwealth should be able to carefully craft a legislative solution that can adequately provide for the competing concerns of those who would protect unwise teens and those who would punish sex offenders.

139. *Id.*

140. *Id.*

141. Keagan Harsha, *Vt. Lawmakers Grapple with Sexting Bill*, WCAX.COM, Apr. 15, 2009, <http://www.wcax.com/Global/story.asp?S=10190912>.

142. *Id.*

143. Feyerick, *supra* note 13.

144. *Id.*

145. N.Y. S.A. 08622, Reg. Sess. (2009) available at

<http://assembly.state.ny.us/leg/?defaultld=&bn=A08662&Summary=Y&Test=Y>; S.B. 1121, Gen.

Assem., Reg. Sess. (Pa. 2009) available at

<http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2009&sessInd=0&billBody=S&billTyp=B&billNbr=1121&pn=1500>. Pa. S.B. 1121 would exempt young people engaged in sexting who are within four years-of-age of one another from some penalties in certain situations. *Id.*

IV. CONCLUSION

Neither Janie nor Roger nor the cross-country team deserve to be convicted as felons and required to register as sex offenders for their transgressions. Every proposed solution to the teen-to-teen sexting problem seems to recognize this. A similar theme seems to run through all of the discussions on this subject: this theme is present in the arguments of those who would leave Virginia's laws unchanged as well as those who would attempt a legislative solution – protect our young people from both dangerous predators and themselves.