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SEXTING AND TEENAGERS: OMG R U GOING 2 JAIL???

By Catherine Arcabascio *

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INTRODUCTION

[1] Sexting is a relatively recent practice engaged in by the young, and sometimes not-so-young, and foolish.¹ “Sexting” is “the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet.”² While sexting can and does occur between and among people of any age, the real concerns are with teenagers who are sexting.³

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¹ Apparently, sexting knows no age limits. The American Association of Retired Persons (“AARP”) reports that seniors are sexting too. Jessica Leshnoff, *C*U*2nite: Sexting Not Just for Kids*, AARP, Nov. 2009, http://www.aarp.org/family/love/articles/sexting_not_just_for_kids.html.

² *Miller v. Mitchell*, No. 09-2144, 2010 WL 935766, at *1 (3d Cir. Mar. 17, 2010). For this article, the author refers to sexting as it primarily relates to the use of cellular phones to transmit digital images.

³ The author has chosen to discuss this subject in terms of how it affects high school aged teenagers. She has used the word teenager or teen rather than juvenile, minor, or child because the sexting cases that have been reported are almost always between and among high school aged teenagers. As one of the cases discussed in this article shows, there are

[2] According to a 2008 study by The National Campaign to Prevent Teen and Unplanned Pregnancy, 20% of teens between the ages of thirteen and nineteen have sent or posted nude or semi-nude digital photos of themselves.⁴ Of the 22% of teen girls that reported doing so, 11% of these girls were between the ages of thirteen and sixteen.⁵ When asked whether they have seen nude or semi-nude photos that were not intended to be shared with them, 25% of teen girls and 33% of teen boys answered this question affirmatively.⁶

[3] Recently, law enforcement officers in several states have arrested teenagers who have sent sexually explicit photographs of themselves, as well as the recipients of those photographs.⁷ These teenagers have been either charged or threatened with charges of child pornography,⁸ and

sometimes serious differences in the treatment of those teenagers who may still be, for example, in their senior year of high school, but already have reached the age of eighteen. *See infra* Part II.C. Thus, for purposes of this article, the term teenager refers to those aged thirteen to eighteen. In other words, it reflects the general age group of those that attend high school.

⁴ THE NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1 (2008), http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf [hereinafter SEX AND TECH SURVEY].

⁵ *Id.* Of those reporting that they have sent or posted nude or semi-nude photographs, "71% of teen girls and 67% of teen guys . . . say they have sent/posted this content to a boyfriend/girlfriend." *Id.* at 2.

⁶ *Id.* at 3.

⁷ *See* Mike Galanos, *Commentary: Is 'Sexting' Child Pornography?*, CNN, Apr. 8, 2009, <http://www.cnn.com/2009/CRIME/04/08/galanos.sexting/> (referring to cases in Ohio, Florida, and Pennsylvania); Judith Levine, *What's the Matter with Teen Sexting?*, THE AMERICAN PROSPECT, Feb. 2, 2009, http://www.prospect.org/cs/articles?article=whats_the_matter_with_teen_sexting (citing arrests in Alabama, Connecticut, Florida, New Jersey, New York, Michigan, Ohio, Pennsylvania, Texas and Utah); Margaret Miceli, *'Sexting' Not Cause for Legal Intervention*, THE DAILY COLLEGIAN ONLINE, Mar. 30, 2009, http://www.collegian.psu.edu/archive/2009/03/30/sexting_not_cause_for_legal_in.aspx (referring to cases in New Jersey and Pennsylvania).

⁸ *See supra* note 8; *see also* Miller, 2010 WL 935766, at *1-2 ; State v. Canal, 773 N.W.2d 528 (Iowa 2009).

appellate courts have upheld convictions against teenagers on these charges.⁹ Consequently, some of those teens have been required to register as sex offenders, a status that will stay with them for decades.¹⁰ This result leads to serious questions about the intent of child pornography statutes, the breadth of prosecutorial discretion, and the potential erroneous use of the criminal justice system to address what some believe would be better handled through educational programs and better parenting.

[4] It goes without saying that this behavior should not be condoned. It is safe to assume that parents do not want their teenage children to send nude or semi-nude photos of themselves or others. It follows that parents would not want their teen to forward any inappropriate photos they received to another person. That being said, traditional notions of fairness, both societal and legal, require a more suitable response to the issue than convicting or threatening to convict those same teenagers of child pornography and labeling some of them as sex offenders.

[5] As with most legal and societal issues, finding a workable solution to the problem is not always easy. A “one size fits all” solution to sexting may not work. For example, are there any circumstances in which the law should never consider a teenager’s sexting to be criminal? Are there other cases that warrant some sort of criminal charge that does not carry the everlasting label of pornographer and/or sex offender? And finally, are there other teenagers who ought to be treated as child pornographers because their behavior is consistent with an adult pornographer’s? When considered in combination with who is best-equipped to handle these issues and it becomes readily apparent why so many are scrambling to find a workable solution to sexting.

⁹ See, e.g., *A.H. v. State*, 949 So. 2d 234, 234 (Fla. Dist. Ct. App. 2007).

¹⁰ See Bianca Prieto, ‘Sexting’ Teenagers Face Child-Porn Charges, *ORLANDO SENTINEL*, Mar. 8, 2009, <http://www.orlandosentinel.com/news/local/orl-asec-sexting-030809,0,938390,full.story>; see also Florida Sexual Offenders and Predators, <http://offender.fdle.state.fl.us/> (last visited Mar. 14, 2010); Florida Supervised Population Information Search, <http://www.dc.state.fl.us/ActiveOffenders/> (last visited Mar. 14, 2010).

[6] Part I of this article discusses the potential roots of this behavior between and among teenagers. It discusses youth, the technology that makes this behavior possible, and the natural tendencies of teenagers. Part II illustrates different types of cases that have resulted in either prosecutions or threats of prosecution under state pornography statutes. Part III discusses various issues surrounding the controversial prosecution of teenagers for sexting, including the treatment of teenagers as pornographers, the breadth of prosecutorial discretion in charging determinations, and the role of parents, schools, and the media. Part IV reviews and critiques recent legislative responses to sexting and provides suggestions for future legislation. It maintains that while there is no perfect “one size fits all” solution to sexting, punishing teenagers who sext as child pornographers is not the solution. Rather, some of these teens do not deserve to be punished criminally for their behavior. Finally, if legislators are intent on creating a criminal offense, they should only criminalize the unlawful dissemination of the digital photos to others. Arguably, there are teenagers who may be actual pornographers that should be charged with child pornography, but these criminals are not the focus of this article and will not be discussed in any detail.

I. THE PERFECT STORM: YOUTH, TECHNOLOGY, AND SEXUAL EXPLORATION

[7] Any parent of a teenager will tell you that, no matter how smart their teenager is, odds are that he or she will have lapses in judgment during those hormone-driven, development years. In short, the fact that they are young is a problem in and of itself. That teenagers survive and actually make it to adulthood intact really is an amazing feat. In *Roper v. Simmons*,¹¹ the United States Supreme Court noted the “impetuous and ill-considered actions and decisions” of adolescents,¹² who are “overrepresented statistically in virtually every category of reckless behavior.”¹³ According to Harvard Medical School Neurology Professor,

¹¹ 543 U.S. 551 (2005).

¹² *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

¹³ *Id.* (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339 (1992)).

Frances E. Jensen: “The teenage brain is not just an adult brain with fewer miles on it, . . . [i]t’s a paradoxical time of development. These are people with very sharp brains, but they’re not quite sure what to do with them.”¹⁴ Research also indicates that the rapid growth and development of young brains “leaves teens easily influenced by their environment and more prone to impulsive behavior, even without the impact of souped-up hormones and any genetic or family predispositions.”¹⁵

[8] And then there is technology. Computers and cellular phones have forever changed the way people interact. E-mail, blogging, texting, and tweeting impact our lives in ways we probably have not yet come to comprehend. Even septuagenarians are climbing on board the texting train, realizing that it is the only way to get a quick response from their grandchildren.

[9] It is unlikely that today’s teenagers recognize or recall a world without cellular phones and texting. As an integral part of their lives, teens do not give these modes of communication or the way they are used a second thought. Some teens may even be more comfortable communicating in these ways. With the press of a button, whatever it is that they are thinking or viewing can be sent at lightning speed and with little reflection.

[10] Moreover, technology and new modes of communication must be enticing to teens. Because of an explorative and inquisitive nature, teens always seem to be on technology’s cutting edge. While the rest of society believes that blogging is still hip, teens are busy “tweeting.”¹⁶ Teens do not need to be reminded that their phones actually have cameras, they can take and send digital photos of anything and everything in under a minute.

¹⁴ Debra Bradley Ruder, *The Teen Brain: A Work in Progress*, HARVARD MAGAZINE, Sept.-Oct. 2008, at 8, available at <http://harvardmag.com/pdf/2008/09-pdfs/0908-8.pdf>.

¹⁵ *Id.*

¹⁶ See generally Martha Irvine, *Is Blogging a Slog? Some Young People Think So*, BOSTON.COM, Feb. 3, 2010, http://www.boston.com/news/education/higher/articles/2010/02/03/is_blogging_a_slog_some_young_people_think_so/ (noting decrease in blog usage among teens).

Indeed, *Life* magazine editors in the 1970s certainly understood youth's fascination with technology. A cover of *Life* magazine in 1972 showed a "cluster of children grasping after a photograph whizzing out of the new [Polaroid] SX-70."¹⁷ In a way, the instant photograph is an ancestor of sorts to a digital image sent by camera phone. Instant photography allowed pictures to be taken whenever and wherever, and to be shared immediately, without ever having to send it out to a third party for developing.

[11] When Edwin Land, founder of the Polaroid Corporation, first unveiled his instant camera, he probably never thought about how it could liberate society's less inhibited members.¹⁸ Undoubtedly people used instant cameras to document all sorts of activities: some innocent, some not so innocent. For example, a racy instant photograph given to a friend could then be shared with others by passing it along by hand. But fast forward to the twenty-first century and say goodbye to the single instant photograph being shared by physically passing it around. Add modern communication technology, and the result is "sharing" on steroids.

[12] Today, approximately sixteen million children have cell phones.¹⁹ 83% of all cell phones sold in the United States in 2008 have built-in cameras.²⁰ Even young children take photos with their cellular phones and

¹⁷ Polaroid Corporation, Company History, <http://www.fundinguniverse.com/company-histories/Polaroid-Corporation-Company-History.html> (last visited Mar. 14, 2010).

¹⁸ *See id.*

¹⁹ Laura Petrecca, *Cell Phone Marketers Calling All Preteens*, USA TODAY, Sept. 5, 2005, http://www.usatoday.com/tech/products/gear/2005-09-05-preteen-cell-phones_x.htm.

²⁰ Ki Mae Heussner, *Should Silent Camera Phones Be Illegal?*, ABC NEWS, Jan. 28, 2009, <http://abcnews.go.com/Technology/story?id=6750825&page=1> (last visited Feb. 15, 2010). A recent survey on digital abuse conducted by MTV and the Associated Press found that of 1247 respondents aged under twenty-five, 81% have telephones with cameras. KNOWLEDGE NETWORKS, THE ASSOCIATED PRESS-MTV POLL DIGITAL ABUSE SURVEY CONDUCTED BY KNOWLEDGE NETWORKS 2 (2009), http://surveys.ap.org/data/KnowledgeNetworks/AP_Digital_Abuse_Topline_092209.pdf.

send them to others.²¹ It is no wonder that when you combine the natural state of a teenager with technology, something like “sexting” is born. What teens do not seem to grasp, however, is that sending an inappropriate photo of themselves or of anyone else, not only invites criticism, ridicule, and abuse by their peers, but may also result in child pornography convictions that subject them to harsh penalties.²²

[13] Attorneys Marsha L. Levick and Riya S. Shah, in an amicus brief submitted on behalf of the Juvenile Law Center to the Third Circuit Court of Appeals in the sexting case *Miller v. Mitchell*,²³ note that “[s]exting is the result of a unique combination of the well-recognized adolescent need for sexual exploration and the new technology that allows teens to explore their sexual relationships via private photographs shared in real-time.”²⁴ Adolescents develop their identities and discover themselves by “thinking and experimenting with areas of sexuality.”²⁵

²¹ Some camera phones are particularly “kid-friendly.” Herb Weisbaum, *Stay Connected: Best Cell Phones for Children*, MSNBC, Dec. 16, 2006, <http://www.msnbc.msn.com/id/16044093/>.

²² See *infra* Part II.

²³ No. 09-2144, 2010 WL 935766 (3d. Cir. Mar. 17, 2010)

²⁴ Brief of Juvenile Law Center as Amici Curiae in Support of Appellees at 6, *Miller v. Mitchell*, No. 09-2144 (3d Cir. Sept. 25, 2009), available at <http://www.jlc.org/files/briefs/JLC-Amicus-Miller-v-Skumanick.pdf> [hereinafter Brief of Juvenile Law Center]. It should be noted that, pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, District Attorney Jeff Mitchell was substituted as appellant after defeating former District Attorney George Skumanick in a November 2009 election (while the case was on appeal). See *Miller*, 2010 WL 935766, at *3.

²⁵ *Id.* (quoting Lynn E. Ponton & Samuel Judice, *Typical Adolescent Sexual Development*, 13 CHILD ADOLESCENT PSYCHIATRIC CLINIC N. AM. 497, 508 (2004)). Also, 66% of teen girls and 60% of teen boys claimed that they sent sexually suggestive content to be “fun and flirtatious.” SEX AND TECH SURVEY, *supra* note 4, at 4. The survey specifically defines the term “sexually suggestive pictures/video” and the term “sexually suggestive messages.” *Id.* at 5. The question referred to above discusses “sexually suggestive content,” which is not defined, but appears to encompass both of those categories. *Id.* at 4. Conversely, 52% of teen girls said they sent it as a “sexy present” for their boyfriend. *Id.*

[14] Although sexual activity rates actually decreased from 1991 to 2007, there are quite a few sexually active teenagers.²⁶ In fact, the Center for Disease Control reported that 47.8% of high school students had engaged in sexual intercourse.²⁷ Given these statistics, it is not surprising that individuals in this age group would share nude or semi-nude photographs of themselves with their girlfriend or boyfriend, the most common recipient of such photographs.²⁸ A study by MTV and the Associated Press found that 45% of those who reported having sex within the past week also reported at least one “sexting related activity.”²⁹

[15] The media also has an effect on teens’ attitudes and beliefs about sex, as well as their behavior.³⁰ According to Professor Victor C. Strasburger: “There are dozens of studies that show that the media function essentially as a super peer group, making teenagers believe that everyone out there is having sex but them”³¹ Internet dissemination of nude photos of Disney’s *High School Musical* star Vanessa Hudgens after she apparently sent them via cell phone to her co-star, Zac Efron, is just one example.³²

²⁶ CTRS. FOR DISEASE CONTROL & PREVENTION, TRENDS IN THE PREVALENCE OF SEXUAL BEHAVIORS 1 (2007), http://www.cdc.gov/HealthyYouth/yrbs/pdf/yrbs07_us_sexual_behaviors_trend.pdf.

²⁷ *Id.*

²⁸ See SEX AND TECH SURVEY, *supra* note 4, at 2.

²⁹ ASSOCIATED PRESS & MUSIC TELEVISION, A THIN LINE 2 (2009), http://www.athinline.org/MTV-AP_Digital_Abuse_Study_Executive_Summary.pdf.

³⁰ Victor C. Strasburger, *Anything Goes! Teenage Sex and the Media*, J. OBSTETRICS & GYNAECOLOGY CAN., Feb. 2008, at 109, 109, available at http://www.sogc.org/jogc/abstracts/full/200802_Editorial_1.pdf.

³¹ *Id.* at 109–10.

³² See Bianca Prieto, *Teens Learning There Are Consequences to “Sexting,”* SEATTLE TIMES, Mar. 11, 2009, http://seattletimes.nwsourc.com/html/nationworld/2008845324_sexting12.html. See generally Amy Harrington, *Celebrity Sex Tape Scandals*, FOXNEWS.COM, Aug. 28, 2009, <http://www.foxnews.com/entertainment/>

II. THREE SEXTING CASES

[16] There are many different ways to charge a teen with “sexting” under existing child pornography laws.³³ First, a teen sending a nude or semi-nude photo to another person can be charged with possession or dissemination of child pornography.³⁴ Second, the recipient of such a photo can be charged with possession of child pornography simply because the digital image is on his or her phone.³⁵ Third, the initial recipient can be charged with child pornography if he or she forwards the digital image to anyone else.³⁶ Depending on the state in which they live and the crime with which they are charged, some minors run the risk of being placed on their state’s sex offender registry.³⁷

2009/08/28/celebrity-sex-tape-scandals/ (listing fifteen celebrities involved in sex tape scandals).

³³ The definition child of pornography varies from state to state. Melissa Wells et al., *Defining Child Pornography: Law Enforcement Dilemmas in Investigations of Internet Child Pornography Possession*, 8 POLICE PRAC. & RES. 269, 270 (2007). As the focus of this article is not to challenge the language of every statute, but rather to challenge the use of child pornography statutes for prosecuting teenage sexters, the author only generally refers to child pornography. The sections of this article that discuss actual cases or legislative efforts to curb sexting refer to the specific statutory definitions in the particular state under discussion.

³⁴ See, e.g., 18 PA. CONS. STAT. ANN. § 6312(c)(1) (West Supp. 2010).

³⁵ See, e.g., *id.* § 6312(d)(1).

³⁶ See, e.g., *id.* § 6312(c)(1).

³⁷ The Adam Walsh Child Protection and Safety Act (“Act”) requires that minors be subjected to sex offender registry requirements. See Brief of Juvenile Law Center, *supra* note 25, at 27–28. The Act requires that all states substantially comply with the requirements of the Sex Offender Registration and Notification Act (“SORNA”) or risk losing funding from the Omnibus Crime Control and Safe Streets Act. *Id.* at 28. As of February 1, 2009, no state had been certified to be in substantial compliance with the Act. See S. 125, 2009-2010 Gen. Assem., Reg. Sess. (Vt. 2009), available at <http://www.leg.state.vt.us/docs/2010/Acts/ACT058.pdf>. See generally Brief of Juvenile Law Center, *supra* note 25, at 27–30 (providing a detailed discussion of SORNA).

[17] In contrast, imagine a factual scenario involving an underage defendant that warrants a child pornography charge. For example, a sixteen or seventeen-year-old who abuses or exploits a child by taking sexually explicit photographs and distributing them for profit as a child pornographer. In this scenario, there is no significant difference between an adult and a minor pornographer. The purpose of enacting child pornography laws was to protect children from that type of exploitive predator, regardless of the predator's age. Thus, these teenagers should be prosecuted as child pornographers.³⁸

A. Case One: "Victims" and "Child Pornographers"?

[18] Now imagine two different scenarios regarding the transmittal of the following photos via cell phone: (1) a photo of two teens wearing opaque bras and (2) a photo of one teen wearing a towel around her torso, with her breasts exposed. Should either of those scenarios constitute child pornography, and should prosecutors charge the teens in those digital photographs accordingly? In the opinion of a Pennsylvania prosecutor, the answer was a resounding "yes."³⁹

[19] In early 2009, George Skumanick, Jr., the District Attorney of Wyoming County, Pennsylvania, threatened to charge a number of teenagers with child pornography.⁴⁰ School officials in the Tunkhannock, Pennsylvania, School District had confiscated several student cell phones

³⁸ The author does not propose a lesser punishment for minors whose behavior causes the type of harm child pornography laws seek to prevent. Therefore, this article does not discuss the merits of charging such minors with child pornography crimes.

³⁹ See *Miller*, 2010 WL 935766, at *1–2. In his brief to the Third Circuit Court of Appeals, appealing the grant of a temporary restraining order against his office, Skumanick reversed his decision to seek prosecution of the two teens photographed while wearing opaque bras. See Brief of Appellant at 4, *Miller v. Skumanick*, No. 09-2144 (3d Cir. June 29, 2009) ("After a full review of the factual circumstances of the case, District Attorney Skumanick has determined he will bring no criminal charges against [the two teens who were photographed wearing opaque bras].") The Third Circuit Court of Appeals determined that the issues as they related to the two teens were moot. See *Miller*, 2010 WL 935766, at *5.

⁴⁰ *Miller*, 2010 WL 935766, at *1–2.

and found digital photos of nude and semi-nude teenage girls, some of whom attended schools in the same school district.⁴¹ One photograph showed two teen girls, “from the waist up, wearing white, opaque bras.”⁴² One girl was on the phone, and the other was making the peace sign.⁴³ A different photograph showed a teenager with a towel wrapped around her torso just below her exposed breasts.⁴⁴ She appeared to have just come out of the shower.⁴⁵ Skumanick stated that the photographs of the teenagers in such provocative poses were in violation of Pennsylvania’s child pornography statute.⁴⁶ When asked by the parents to provide a definition of the word “provocative,” Skumanick refused to do so.⁴⁷ He did, however, state to newspaper reporters that students who possess “inappropriate” digital photos of minors expose themselves to possible prosecution for possessing or distributing child pornography, which is a felony.⁴⁸

[20] The threat of prosecution was directed at both the girls in the photos as well as the teens whose phones contained the digital photos.⁴⁹ Skumanick informed all the potential defendants and their parents that he would drop the charges if the teens successfully completed a six to nine

⁴¹ *Id.* at *1.

⁴² *Id.* at *2.

⁴³ *Id.*

⁴⁴ *Id.* at *3.

⁴⁵ *Id.*

⁴⁶ *Id.* at *2. The Pennsylvania statute to which Skumanick referred was 18 PA. CONS. STAT. ANN. § 6312 (West Supp. 2010).

⁴⁷ *Miller*, 2010 WL 935766, at *2. Interestingly, § 6312(g) of the Pennsylvania statute defines a “[p]rohibited sexual act” as including “lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.” 18 PA. CONS. STAT. ANN. § 6312(g) (West Supp. 2010). The statute does not ban all nude photos. *See id.* § 6312(b).

⁴⁸ *Miller*, 2010 WL 935766, at *1.

⁴⁹ *Id.*

month program of education and counseling.⁵⁰ The District Attorney's Office sent a letter to the teens and their parents that also warned that failure to participate or failure to complete the program successfully would result in felony charges being filed against the teens.⁵¹ At a subsequent face-to-face meeting, the prosecutor again reiterated the threat and stated that the teens would be on probation and would have to pay a \$100 fee for the program.⁵²

[21] The parents of three of the girls filed a Civil Rights Act section 1983 complaint first, claiming retaliation in violation of their First Amendment right to free expression.⁵³ In a second cause of action, the girls claimed retaliation in violation of their First Amendment right to be free from compelled expression for requiring them to write a paper indicating that what they had done was wrong.⁵⁴ A third cause of action claimed retaliation against the parents for exercising the Fourteenth Amendment substantive due process right to direct their children's upbringing.⁵⁵

[22] "Skumanick pointed out that these charges were felonies that could result in long prison terms and would give even juveniles a permanent record," contending that a finding of guilty would likely subject the three teenage girls "to registration as sex offenders under Pennsylvania's Registration of Sexual Offenders Act ('Meghan's Law'), 42 P.S. § 9791, for at least ten years and have their names and pictures displayed on the

⁵⁰ *Id.* at *1-2.

⁵¹ *Id.*

⁵² *Id.* at *2.

⁵³ *Miller v. Skumanick*, 605 F. Supp. 2d 634, 640 (M.D. Pa. 2009). The two girls wearing opaque bras and the girl wearing a towel around her torso with her breasts exposed and their parents filed the section 1983 complaint. *Id.* at 639.

⁵⁴ *Id.* at 640.

⁵⁵ *Id.*

state's sex-offender website."⁵⁶ But in March 2009, the United States District Court for the Middle District of Pennsylvania granted a temporary restraining order against the District Attorney of Wyoming County, Pennsylvania during the pendency of the section 1983 claim.⁵⁷ Less than a year later, the Third Circuit Court of Appeals heard arguments in this case, which appears to be the first sexting-related case in a federal appellate court.⁵⁸ On March 17, 2010, the Third Circuit affirmed the lower court's decision, holding that the plaintiffs were entitled to preliminary injunctive relief.⁵⁹

⁵⁶ *Id.* at 637–638. Even though the court stated that the *defendant* contended that the plaintiffs could be placed on the sex offender registry, it appears that the court might have erroneously attributed that statement to the defendant and instead it actually was referring to a statement made by the plaintiffs in paragraph seventeen of the plaintiff's section 1983 complaint. *See id.* at 638. The current laws in Pennsylvania do not require minors to register as sex offenders. *See* 42 PA. CONS. STAT. ANN. § 9795.1 (West 2007).

⁵⁷ *Skumanick*, 605 F. Supp. 2d at 647.

⁵⁸ *See generally* ACLU of Pennsylvania, *Miller, et al. v. Skumanick*, <http://www.aclupa.org/legal/legaldocket/millertalvskumanick.htm> (last visited Mar. 15, 2010).

⁵⁹ *Miller*, 2010 WL 935766, at *12. The Third Circuit held that any future prosecution in this case would be a retaliatory act. *Id.* at *7. First, it agreed with the District Court that the plaintiffs showed a “reasonable likelihood of establishing that coercing Doe’s participation in the education program violated (a) Jane Doe’s Fourteenth Amendment right to parental autonomy and (b) Jane Doe’s First Amendment right against free speech.” *Id.* Specifically, the Third Circuit held that the District Attorney could not “coerce parents into permitting him to impose on their children his ideas of morality and gender roles” by threatening prosecution. *Id.* at *8. According to the court, while educators have a secondary responsibility in the upbringing of children, the “District Attorney is not imbued with that same ‘secondary responsibility.’” *Id.* The court also held that Nancy Doe could establish that having to write an essay describing why her actions were wrong (in order to successfully complete the education program) would violate her First Amendment freedom against compelled speech. *Id.* at *9. Second, it held that responding to the appellants’ exercise of their constitutional rights by threatening prosecution was a retaliatory act. *Id.* at *10. Third, the court also determined that there was a causal link between the constitutionally protected activity and the retaliation. *Id.* Specifically, the District Attorney’s motive in prosecuting the appellant was likely retaliatory because, not only was there direct explicative evidence of his threats to prosecute, but there was also insufficient evidence of probable cause. *Id.* The record did

B. Case Two: Underage Couple Take Nude
Digital Photos of Themselves

[23] In *A.H. v. State*,⁶⁰ a Florida appellate court upheld the adjudication of delinquency of a sixteen-year-old girl, A.H., under Florida’s child pornography statute, for sexting her seventeen-year-old boyfriend, J.G.W.⁶¹ Although A.H. and J.G.W. took photos of themselves engaged in sexual conduct, they never sent them to a third party. Both A.H. and J.G.W. faced charges of producing, directing, or promoting a photograph that contained sexual conduct in violation of Florida Statutes section 827.071(3).⁶² J.G.W. also was charged with one count of possession of child pornography under section 827.01(5).⁶³

not establish that the appellant ever possessed or distributed the photograph in question. *Id.*

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

⁶¹ *See id.* at 239.

⁶² The relevant portion of the statute reads:

(1) As used in this section, the following definitions shall apply:

....

(b) “Performance” means any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience.

(c) “Promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do the same.

....

(g) “Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to

[24] A.H. filed a motion to dismiss, claiming that section 827.071(3) was unconstitutional in its application to her case, that her privacy interests were implicated, that she was younger than her alleged victim, her boyfriend, and that prosecution was not the least intrusive means of furthering a compelling state interest.⁶⁴ The lower court denied the motion on the basis of a compelling state interest in protecting children from sexual exploitation and found A.H. delinquent.⁶⁵

arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct."

(h) "Sexual performance" means any performance or part thereof which includes sexual conduct by a child of less than 18 years of age.

....

(3) A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a child less than 18 years of age. Whoever violates this subsection is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

FLA. STAT. § 827.071 (2009).

⁶³ *A.H.*, 949 So. 2d at 235 n.1. This statute provides:

It is unlawful for any person to knowingly possess a photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child. The possession of each such photograph, motion picture, exhibition, show, representation, or presentation is a separate offense. Whoever violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 827.071(5).

⁶⁴ *A.H.*, 949 So. 2d at 235.

⁶⁵ *Id.* at 235.

[25] The First District Court of Appeal affirmed the lower court's decision.⁶⁶ The appellate court noted that the state's compelling interest applies whether the defendant is a child or an adult.⁶⁷ It reasoned that prosecuting A.H. under the child pornography statute is the least restrictive means of furthering that compelling state interest because it "enables the State to prevent future illegal, exploitative acts by supervising and providing any necessary counseling to the child."⁶⁸

[26] Although the court reasoned that, in Florida, "the law relating to a minor's right of privacy to have sex with another minor is anything but clear," even assuming that the right existed under the Florida Constitution, this right did not extend to "memorializing" the act in photographs.⁶⁹ The court held that no reasonable expectation of privacy existed in this case, because "the decision to take photographs and to keep a record that may be shown to people in the future weighs against a reasonable expectation of privacy."⁷⁰ In addition, the court determined that the photos were e-mailed to "another computer" from A.H.'s house.⁷¹ The court stated that there was no reasonable expectation of privacy because A.H. and J.G.W. had shared the photos with each other without any assurance that a third party would not be shown the photos.⁷² "[U]nlike adults who may be involved in a mature committed relationship," a sixteen-year-old and a seventeen-year-old could have no "expectation that their relationship will continue and that the photographs will not be shared either intentionally or

⁶⁶ *Id.* at 239.

⁶⁷ *See id.* at 238.

⁶⁸ *Id.* at 236.

⁶⁹ *Id.* at 237–39.

⁷⁰ *Id.* at 237 (citing *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136 (S.D. Cal. 2005)).

⁷¹ *Id.* at 235. The dissent clarified this somewhat technologically imprecise statement by the majority, explaining that A.H. apparently e-mailed the photos to her boyfriend's personal e-mail address. *See id.* at 240 (Padovano, J., dissenting).

⁷² *A.H.*, 949 So .2d at 237.

unintentionally.”⁷³ The court concluded that without “the sanctity of law [or] the stability of maturity or length,” distribution of the photographs was likely.⁷⁴ In support of its conclusion, the court surmised that motives for dissemination could be profit based on the market value of the photographs or based on a teenager’s interest in bragging about their sexual exploits.⁷⁵

[27] Even assuming that a reasonable expectation of privacy existed, the court held that the statute served a compelling state interest furthered in the least restrictive manner.⁷⁶ Finding the interest in preventing exploitation to be the same “whether the person inducing the child to appear in a sexual performance and then promoting that performance is an adult or a minor,”⁷⁷ the court reasoned that “the statute was intended to protect minors like appellant and her co-defendant from their own lack of judgment.”⁷⁸ This rationale is troubling at best. The court’s opinion relied heavily on the notion that the two children involved were immature and required protection from themselves, and yet, it upheld a conviction against them on felony pornography charges.⁷⁹ In essence, the court found that the government has a simultaneous compelling state interest in both protecting and convicting children in child pornography cases despite the fact that those same children, by the court’s own definition, lack the

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *See id.* at 238.

⁷⁷ *Id.* (including the interestingly worded rationale that “[t]he state’s purpose in this statute is to protect minors from exploitation by anyone who induces them to appear in a sexual performance and shows that performance to other people”).

⁷⁸ *Id.*

⁷⁹ *See id.* at 241 (Padovano, J., dissenting).

“foresight and maturity” to “make an intelligent decision about engaging in sexual conduct and memorializing it.”⁸⁰

[28] In dissent, Judge Padovano stated that applying the statute in this case did violate A.H.’s right to privacy.⁸¹ Judge Padovano relied on *B.B. v. State*,⁸² which held that a statute prohibiting unlawful carnal intercourse was unconstitutional as applied to a minor,⁸³ in stating that he was “not able to reconcile” what he called “a distinction without a difference.”⁸⁴ According to Judge Padovano: “If a minor cannot be criminally prosecuted for having sex with another minor, as the court held in *B.B.*, it follows that a minor cannot be criminally prosecuted for taking a picture of herself having sex with another minor.” As noted by Judge Padovano, the only difference in A.H.’s case was that the minors photographed their sexual act.⁸⁵

[29] Judge Padovano correctly pointed out that speculative risk of potential disclosure should not be the gauge by which we determine whether the child had a reasonable expectation of privacy.⁸⁶ Although a risk of disclosure always exists, Judge Padovano drew a distinction between those cases in which the images are shared with third parties and those in which they are not. He also noted that the intention of the statute is to protect children from abuse by others.⁸⁷ Judge Padovano hypothesized that if a child had a printed photograph rather than a digital one, whether the photo is put in a purse that is subsequently stolen or put

⁸⁰ *Id.* at 238 (majority opinion).

⁸¹ *Id.* at 239 (Padovano, J., dissenting).

⁸² 659 So. 2d 256 (Fla. 1995).

⁸³ *A.H.*, 949 So. 2d at 239 (Padovano, J., dissenting).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See id.*

⁸⁷ *Id.* at 239.

in the mail box, a third person could have seen it.⁸⁸ According to Judge Padovano, there is always a risk that a third party may see a photo, regardless of whether it is a digital image or not, or whether it is on someone's computer or in someone's purse.⁸⁹

C. Case Three: Angry Boyfriend Sends Photos of His Girlfriend to Others

[30] In another Florida case, Phillip Alpert, then a high school senior, had an argument with his high school sweetheart.⁹⁰ Alpert had just turned eighteen and his girlfriend was sixteen, and they had been dating for two and one-half years.⁹¹ After the argument, Alpert sent a nude photo of his girlfriend, which she had taken herself and sent to him, to more than seventy of her friends and family members.⁹² According to Alpert, he "was upset and tired and it was the middle of the night" when he sent the photo.⁹³ Nevertheless, Alpert was charged and convicted of sending child pornography.⁹⁴ In addition to five years probation, Alpert was required to register as a sex offender in the State of Florida.⁹⁵

⁸⁸ *Id.* at 240.

⁸⁹ *Id.*

⁹⁰ Deborah Feyerick & Sheila Steffen, 'Sexting' Lands Teen on Sex Offender List, CNN, Apr. 8, 2009, <http://www.cnn.com/2009/CRIME/04/07/sexting.busts>. During Phillip Alpert's interview on MTV's "Sexting in America" program, he stated that this occurred one month after he turned eighteen and that his then girlfriend was seventeen. See A Thin Line, Sexting in America (Part 1), <http://www.athinline.org/videos/17-sexting-in-america-part-1> (last visited Mar. 15, 2010).

⁹¹ Feyerick & Steffen, *supra* note 91.

⁹² *Id.*; see also Prieto, *supra* note 34.

⁹³ *Id.*; see also Prieto, *supra* note 34.

⁹⁴ Feyerick & Steffen, *supra* note 91. Alpert was charged under Florida Statute § 847.0137(2), but the Florida legislature currently is considering a bill that creates a new and separate offense of sexting: Florida Statute § 847.0146. See House of Representatives Staff Analysis of CS/HB 1335 at 4, available at <http://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?FileName=h1335b.PSDS.doc&DocumentType=Analysis&BillNumber=1335&Session=2010> (last visited March 31, 2010). The bill, pending before the Criminal and Civil Justice Appropriations

[31] As a registered sex offender, Alpert's photo is currently on display on the Florida Department of Law Enforcement's Sexual Offender website.⁹⁶ In addition to his probationary status, his Department of Corrections number, date of birth, and his physical description, the website provides his address, along with a map indicating exactly where he lives.⁹⁷ The website also provides an abbreviated title of the crime, "Send Child Porn," and the specific statute violated, F.S. 847.0137(2).⁹⁸

Committee, punishes the act of sexting when a minor "knowingly uses computer or other device to transmit or distribute photograph or video of himself or herself which depicts nudity and is harmful to minors, or knowingly possesses such photograph or video to minor from another minor." H.R. 1335, 2010 Leg., Reg. Sess. (Fl. 2010). The distribution, transmission or possession of multiple photographs would be considered a single offense if the distribution or transmission occurred within the same 24 hour period. *Id.*

The first violation of the statute would be a "non-criminal violation," which would be punishable by 8 hours of community service and a \$25 fine. *See* House of Representatives Staff Analysis of CS/HB 1335 at 4, *available at* <http://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?FileName=h1335b.PSDS.doc&DocumentType=Analysis&BillNumber=1335&Session=2010> (last visited March 31, 2010). The minor also could be ordered to attend "suitable training or instruction" instead of community service. *Id.* A second violation would be considered a 2d degree misdemeanor punishable by up to 60 days in jail and a \$500 fine. *Id.* A third violation would be considered a 1st degree misdemeanor punishable by up to one year in jail and a \$1,000 fine. *Id.* Finally, a fourth or further violation would be a 3rd degree felony punishable by up to five years in prison and a \$5,000 fine. *Id.*

Interestingly, the House of Representatives Staff Analysis Report for the bill references Phillip Alpert's case twice. *See Id.* However, a similar outcome would result under the proposed statute because an 18-year-old high school student is not considered a minor. *See* FLA. STAT. § 847.001(8) (2008) (defining a minor as any person under the age of 18).

⁹⁵ *Id.*

⁹⁶ Florida Department of Law Enforcement, Phillip Michael Alpert – Florida Sexual Offender, <http://offender.fdle.state.fl.us/offender/flyer.do?personId=60516> (last visited Mar. 15, 2010).

⁹⁷ *Id.*

⁹⁸ *Id.*

As a condition of his probation, a photo and similar information about Alpert is on the Florida Department of Corrections website as well.⁹⁹

[32] Unless Alpert receives a pardon or his conviction set aside, he will remain on the sex offender registry for decades.¹⁰⁰ Even after he is released from probation, the statute requires that Alpert remain on the registry for a minimum of twenty-five years.¹⁰¹ After the twenty-five year period has elapsed, however, he may be able to petition the court to remove his information from the sex offender registry.¹⁰² Thus, Alpert will be on the sex offender registry until he is approximately forty-three years old.

III. THE ISSUES SURROUNDING SEXTING

A. Are Sexters Pornographers?

[33] While possessing or sending child pornography clearly is and should be a punishable offense,¹⁰³ the act of voluntarily sending or receiving nude or semi-nude photos, without threat or coercion, should not be considered a punishable offense. As a voluntary act, sexting should not fall within the punishable acts contemplated by modern child pornography statutes. Nor should a teenager's voluntary forwarding of nude or semi-nude photos, sent without threat or coercion, be punished as a child pornography offense. But using these statutes to punish this group of misguided teens goes beyond the contemplated purpose and intent of those laws and can ultimately cause a lifetime of harm.¹⁰⁴ In essence,

⁹⁹ Florida Department of Corrections, Supervised Population Information Detail, <http://www.dc.state.fl.us/ActiveOffenders/detail.asp?Bookmark=1&From=list&SessionID=755638431> (last visited Mar. 15, 2010).

¹⁰⁰ See FLA. STAT. § 943.0435(11) (2009).

¹⁰¹ See *id.* § 943.0435 (11)(a)(1).

¹⁰² See *id.* If Alpert is arrested for any felony or misdemeanor offense, he will be ineligible to petition for his information to be removed. *Id.*

¹⁰³ See 18 U.S.C. § 2252 (2006).

¹⁰⁴ See *United States v. Mento*, 231 F.3d 912, 918–919 (4th Cir. 2000).

prosecutors are obtaining, and courts are upholding, convictions against those whom these statutes are supposed to protect.¹⁰⁵

[34] The purpose of child pornography statutes is to shield children from the abuse that occurs in the production of the photo.¹⁰⁶ In *Ashcroft v. Free Speech Coalition*, the Supreme Court found that prohibitions in the Child Pornography Prevention Act of 1996 were overbroad and unconstitutional.¹⁰⁷ The decision in *Free Speech Coalition* found unconstitutional the expansion of the Child Pornography Prevention Act (“CPPA”) to include “virtual” child pornography.¹⁰⁸ The Court held that the CPPA violated the First Amendment’s freedom of speech provision.¹⁰⁹

[35] While the underlying facts of *Free Speech Coalition* are markedly different than those presented in sexting cases, the Court in *Free Speech Coalition* reiterated several relevant principles underlying the rationale for punishing child pornography,¹¹⁰ enunciated previously in *New York v. Ferber*¹¹¹ and *Osborne v. Ohio*.¹¹² These basic principles should apply equally to any attempt to use pornography statutes to charge teenagers who voluntarily send, receive, or disseminate nude or semi-nude photos while sexting.

[36] The Court in *Ferber* was concerned with the exploitation of children, stating that “the use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of

¹⁰⁵ See *id.* at 919.

¹⁰⁶ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249 (2002).

¹⁰⁷ *Id.* at 258.

¹⁰⁸ *Id.* at 256.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 249–50.

¹¹¹ 458 U.S. 747 (1982).

¹¹² 495 U.S. 103 (1990).

the child.”¹¹³ “The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”¹¹⁴ In upholding New York’s child pornography statute, the Court in *Ferber* linked the distribution of photographs that contained sexual activity by juveniles to the sexual abuse of children.¹¹⁵ According to the Court, the pornographic materials would be “a permanent record” of the child’s participation in the exploitative act and the harm would be “exacerbated by their circulation.”¹¹⁶ The critical issue always has been “whether a child has been physically or psychologically harmed in the production of the work.”¹¹⁷ In addition, the Court determined the only way to effectively control “the production of material which requires the sexual exploitation of children” was to tackle the distribution network of child pornography.¹¹⁸

[37] The Court in *Free Speech Coalition* stated that “*Ferber*’s judgment about child pornography was based upon how it was made, not on what it communicated.”¹¹⁹ In *Free Speech Coalition*, the Court once again linked the abuse of children to the validity of laws prohibiting child pornography by stating: “Where the images are themselves the product of child sexual abuse . . . the State had an interest in stamping it out without regard to any judgment about its content.”¹²⁰ That statement should not be broadly construed to suggest that the state’s interest in “stamping out” child pornography should be able to stand alone. As noted by the Court, a charge of child pornography requires a proximate link to a crime, i.e. the

¹¹³ *Ferber*, 458 U.S. at 758.

¹¹⁴ *Id.* at 757.

¹¹⁵ *Id.* at 759.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 761.

¹¹⁸ *Id.*

¹¹⁹ *Free Speech Coal.*, 535 U.S. at 250–51.

¹²⁰ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002).

child abuse in the production of the pornographic image.¹²¹ Thus, where no crime occurs in the taking of the picture, the distribution argument cannot stand alone and must fail.¹²² Moreover, the threat of a future harm from some speculative potential circulation of the photo, either through phones or the Internet, cannot not serve as a proper rationale for finding such a statute, or its use, constitutional.¹²³

[38] Although other courts have employed this principle in child pornography cases, the outcome is not always identical to that of *Free Speech Coalition*.¹²⁴ Despite the conclusion of the Florida District Court of Appeals that the victim in *A.H.* was guilty of child pornography, it nonetheless utilized language consistent with the language used in *Ferber* and *Free Speech Coalition*.¹²⁵ The Florida court stated that Florida's interest lies "in protecting children from exploitation."¹²⁶ The language in *A.H.* also indicates that the government is intent on avoiding exploitation that arises from the inducing of a child to pose in a provocative way.¹²⁷

[39] But not all situations involving nude photography fall within the purview of child pornography statutes identified in *Ferber*, *Osborne v. Ohio*, and *Free Speech Coalition*. For instance, consider the hypothetical, yet common, situation where a teenage girl voluntarily sends a nude picture of herself to her boyfriend. Under these circumstances, the exchange of nude photography should not be considered exploitation or child abuse. As such, the girl should not be treated as a disseminator of

¹²¹ *Id.* at 236.

¹²² *See id.* at 235.

¹²³ *See id.* at 253.

¹²⁴ *See generally* *Ferber*, 458 U.S. 747; *A.H. v. State*, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).

¹²⁵ *See A.H.*, 949 So. 2d at 237.

¹²⁶ *Id.* at 238.

¹²⁷ *See id.* at 238. However, the court reasoned that potential future circulation constituted a compelling government interest. *Id.*

child pornography and her boyfriend should not be prosecuted as a possessor of child pornography.

B. The Breadth of Prosecutorial Discretion

[40] Unfortunately, the *Skumanick* and *A.H.* cases are excellent examples of the concerns regarding the breadth of prosecutorial discretion in sexting cases. It is apparent from these cases that prosecutors across the country are dealing with sexting cases in an inconsistent way.¹²⁸ Some prosecutors, like Mr. Skumanick in Pennsylvania, are threatening to charge the females in the transmitted photos and create for them an unconstitutional Hobson's choice.¹²⁹ Other prosecutors are charging the senders, disseminators, and the recipients.¹³⁰ Still others are choosing not to prosecute these teens at all.¹³¹ Without clear guidance from state legislatures, prosecutors will continue to struggle with these charging decisions.

[41] Prosecutors in the United States have broad discretion in criminal prosecutions.¹³² "So long as there is probable cause to believe that the accused has committed an offense, the decision to prosecute is within the prosecutor's discretion."¹³³ There are, of course, exceptions to this statement.¹³⁴ A prosecutor who acts in bad faith or violates the constitution by initiating or pursuing charges has strayed beyond the latitude that he is

¹²⁸ See generally *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009); *A.H.*, 949 So. 2d 234; Feyerick & Steffen, *supra* note 91.

¹²⁹ See, e.g., *Miller*, 2010 WL 935766, at *10.

¹³⁰ See, e.g., Feyerick & Steffen, *supra* note 91.

¹³¹ See, e.g., *Teens Avoid Detention in Sexting Case*, SEATTLE P.I., Feb. 17, 2010, http://www.newsrunner.com/display-article/?eUrl=http%3A%2F%2Fwww.seattlepi.com%2Flocal%2F415555_sexting28.html%3Fsource%3Drss&eSrc=Seattle+Post-Intelligencer+-+Seattle+WA&eTitle=Teens+avoid+detention+in+sexting+case.

¹³² *Prosecutorial Discretion*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 219, 219 (2009).

¹³³ *Id.*

¹³⁴ *Id.* at 223.

given.¹³⁵ Nonetheless, it is rare for the judiciary to intervene in the decision-making process of the prosecutor.¹³⁶

[42] Two of the most important determinations made by a prosecutor are whether to charge a person with a crime and which charges to bring against the person.¹³⁷ The American Bar Association's Criminal Justice Standards articulate the function of the prosecutor.¹³⁸ Standard 3-1.2(c) states that "[t]he duty of the prosecutor is to seek justice, not merely to convict."¹³⁹ Thus, the question with respect to the prosecution of sexting cases should be framed in terms of justice.

[43] The true meaning of justice in this context, however, remains opaque. Black's Law Dictionary defines "justice" as "[t]he fair and proper administration of laws."¹⁴⁰ According to Webster's Dictionary, the definition of just, as in a just result, is "having a basis in or conforming to fact or reason."¹⁴¹ Webster's also defines it as "acting or being in conformity with what is morally upright or good."¹⁴²

¹³⁵ *Id.* at 223–24.

¹³⁶ Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 645 (2002). *But see Miller*, 2010 WL 935766, at *12.

¹³⁷ *See generally* AM. BAR ASS'N, CRIMINAL JUSTICE SECTION STANDARDS § 3-1.2 (1993), available at http://www.abanet.org/crimjust/standards/pfunc_blk.html.

¹³⁸ *Id.* These standards "are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending on all the circumstances." *Id.* § 3-1.1.

¹³⁹ *Id.* § 3-1.2.

¹⁴⁰ BLACK'S LAW DICTIONARY 942 (9th ed. 2009).

¹⁴¹ MERRIAM-WEBSTER COLLEGIATE DICTIONARY, 636 (10th ed. 1999).

¹⁴² *Id.*

[44] Prosecutorial discretion goes beyond merely establishing probable cause.¹⁴³ Probable cause is a threshold requirement for all criminal prosecutions.¹⁴⁴ If probable cause were the sole factor taken into consideration in determining whether to charge, then there would be no need for prosecutorial discretion at all. Having discretion requires the prosecutor to go further and to ask whether filing charges would further justice. In most cases, the answer to that singular question is likely to come easily. In reality, it is not one question asked, but rather a series of questions, that ultimately leads to the conclusion that furthering justice requires bringing charges against a particular individual:

- 1) Is there a valid purpose to the prosecution and does this prosecution support the legislative intent of the statute?
- 2) Is there an individual or class of individuals that the law seeks to protect and does this prosecution further that interest?
- 3) Is there an individual or class of individuals that the law seeks to punish and does this prosecution further that interest?
- 4) Does the prosecution of this person do more good than harm to society?¹⁴⁵

Before making the determination to proceed with such a serious offense as child pornography, prosecutors who consider charging teenagers should carefully consider each of these questions. In cases of sexting, perhaps the answer to at least a few of those questions will be “no.”

¹⁴³ *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

¹⁴⁴ *Id.*

¹⁴⁵ *See generally* Krug, *supra* note 138.

C. The Role of Parents, Schools, and the Media

[45] While sexting prosecutions are popping up across the country, there is nothing to suggest that there is a sexting “epidemic.” This is not to say that sexting does not have the potential to become a bigger problem in the future without some sort of action now. Regardless of how states choose to tackle sexting, their efforts will likely be less fruitful without assistance from parents, schools, and the media.

[46] As with all problems involving children, parents must be on the frontlines controlling inappropriate behaviors. Controlling and monitoring the use of a teenager’s cell phone or computer is clearly within the power of a parent. A parent has the ability to take away a teenager’s phone or simply to remove texting abilities on that phone.

[47] Parents, schools, and the media can also play a critical role in educating teens about sexting and other bullying offenses. In fact, there are school districts across the country required by law to have either bullying or cyberbullying policies.¹⁴⁶ These policies ought to include an educational component that covers sexting.

[48] The media also can play a part in the education of teenagers. For example, MTV aired a program called “Sexting in America: When Privates Go Public” as part of a larger outreach effort called “A Thin Line.”¹⁴⁷ To its credit, MTV created “A Thin Line” as part “of a multi-year initiative . . . aimed at stopping the spread of abuse in the form of sexting, cyberbullying and digital dating abuse. The goal of the initiative is to empower America’s youth to identify, respond to and stop the spread of the various forms of digital harassment.”¹⁴⁸ Reaching teenagers with a

¹⁴⁶ See National Conference of State Legislatures, *Cyberbullying: State Legislation*, <http://www.ncsl.org/default.aspx?tabid=12903> (last visited Mar. 15, 2010).

¹⁴⁷ See *A Thin Line*, <http://www.athinline.org/> (last visited Mar. 15, 2010).

¹⁴⁸ *MTV Launches ‘A Thin Line’ To Stop Digital Abuse*, MTV, Dec. 3, 2009, <http://www.mtv.com/news/articles/1627487/20091203/story.jhtml>. For this initiative, MTV partnered with Facebook, MySpace, the Family Violence Prevention Fund, WiredSafety, the Anti-Defamation League, Blue Shield of California Foundation, LoveIsRespect.org, the National Teen Dating Abuse Helpline, the National Network to

message from a source that they can relate to seems like a step in the right direction. But the success of this type of outreach remains to be seen.

D. The Punishment Does Not Fit the Act

[49] A teen that voluntarily takes or sends a nude or semi-nude photo of him or herself and any other teen who receives that same photo should not be charged with child pornography possession or distribution. And a child pornography charge is also inappropriate for the teen that subsequently forwards that photo.

[50] According to Professor Joshua Dressler, “lawmakers must ascertain not only what conduct is wrongful, but they must determine which persons may properly be held accountable for their wrongful conduct. And, when punishment is deemed appropriate, legislators must decide *what* and *how much* punishment fits the offense and the offender.”¹⁴⁹

[51] Consider Phillip Alpert’s case. It should not have been prosecuted as a child pornography case. Although Alpert’s dissemination of an otherwise private photograph of his ex-girlfriend was wrong,¹⁵⁰ the more appropriate question is what crime, if any, did Alpert commit and how should the court punish him.

[52] By his own admission, Alpert was upset at his ex-girlfriend and in that angry thoughtless moment did a despicable thing; he sent nude photos of his girlfriend to her friends and family.¹⁵¹ He intentionally transmitted those digital photos to hurt and humiliate her.¹⁵² This behavior may have

End Domestic Violence, Liz Claiborne Inc., DoSomething.org, Break the Cycle, Ruder Finn, Teenangels, and PBS’s “Frontline.” See MTV’s A Thin Line: About the Campaign, <http://www.athinline.org/about> (last visited Mar. 15, 2010).

¹⁴⁹ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 11 (5th ed. 2009).

¹⁵⁰ See Feyerick & Steffen, *supra* note 91.

¹⁵¹ *Id.*

¹⁵² See *id.*

been many things, including criminal in nature, but it was not the act of a child pornographer. Assuming that states want to regulate and punish some of these behaviors, then behavior such as Alpert's should be punished for what it is: a twenty-first century version of bullying or harassment rather than the sex offense of "sending child pornography."¹⁵³

[53] The National Crime Prevention Council describes cyberbullying as the "use [of] the Internet, cell phones, or other devices to send or post text or images intended to hurt or embarrass another person."¹⁵⁴ In general, most of the cyberbullying statutes require repeated abuse.¹⁵⁵ Cyberbullying is becoming more and more common and can be a serious offense with serious consequences, both for the victim and the defendant.¹⁵⁶ Approximately nineteen states have addressed cyberbullying through a variety of laws that either criminalize behavior and/or require schools to take action.¹⁵⁷ Sexting and other types of online bullying are being categorized by the media under the umbrella term "digital abuse."¹⁵⁸

[54] Cyberbullying in the form of sexting can have a devastating impact on some teenagers.¹⁵⁹ One Ohio high school senior, Jesse Logan, sent a

¹⁵³ See generally NAT'L CRIME PREVENTION COUNCIL, 21ST CENTURY BULLYING: CRUELER THAN EVER 1 (2010), <http://www.npc.org/resources/files/pdf/bullying/21st%20Century%20Bullying%20-%20Crueler%20Than%20Ever.pdf> (last visited Mar. 15, 2010).

¹⁵⁴ National Crime Prevention Council, Cyberbullying FAQ for Teens, <http://www.npc.org/topics/cyberbullying/cyberbullying-faq-for-teens> (last visited on Mar. 15, 2010).

¹⁵⁵ See National Conference of State Legislatures, *supra* note 165 (noting, for example, that Idaho's statute requires the act to be "sufficiently severe, persistent or pervasive").

¹⁵⁶ See Laura Crimaldi, *Teens May Face Criminal Charges in Cyberbullying Case*, BOSTONHERALD.COM, Feb. 12, 2010, <http://www.bostonherald.com/news/regional/view.bg?articleid=1232335>.

¹⁵⁷ See National Conference of State Legislatures, *supra* note 165.

¹⁵⁸ See, e.g., *MTV Launches 'A Thin Line' To Stop Digital Abuse*, *supra* note 167.

¹⁵⁹ See, e.g., Mike Celizic, *Her Teen Committed Suicide over 'Sexting,'* TODAY, Mar. 6, 2009, <http://today.msnbc.msn.com/id/29546030>.

nude photo of herself to her boyfriend.¹⁶⁰ After they broke-up, he sent the digital photo to hundreds of others.¹⁶¹ As a result, Logan became the victim of continued bullying and abuse.¹⁶² Girls at school began calling her a slut and a whore.¹⁶³ The boyfriend's act of sending the photos set off a chain reaction of harassment so great that Logan did not want to go to school anymore.¹⁶⁴ Tragically, several months later, she hung herself.¹⁶⁵

[55] Even though this exemplifies the potentially devastating result of cyberbullying, neither Logan's ex-boyfriend nor Philip Alpert is a pornographer. They are, however, bullies of the worst kind. Both violated the trust and privacy of someone with whom they had an intimate relationship to humiliate and degrade that person.¹⁶⁶ Accordingly, they deserve to be punished for their actions. But these actions are not related to child pornography.

IV. THREE NEW SEXTING LAWS: CRITIQUE AND RECOMMENDATIONS

[56] States are struggling to determine the proper response to the issues that have arisen in prosecuting children for child pornography.¹⁶⁷ As of this writing, twelve states have introduced legislation related to sexting.¹⁶⁸

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*; see also *Teenage Girl Hanged Herself After Bullying over 'Sexting,'* TELEGRAPH, Mar. 18, 2009, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/5010361/Teenage-girl-hanged-herself-after-bullying-over-sexting.html>.

¹⁶⁶ See Celizic, *supra* note 161; Feyerick & Steffen, *supra* note 91.

¹⁶⁷ See National Conference of State Legislatures, *Sexting Legislation 2009*, <http://www.ncsl.org/default.aspx?tabid=17756> (last visited Mar. 15, 2010).

¹⁶⁸ *Id.* These include Colorado, Florida, Indiana, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Utah, and Vermont. *Id.* Of these, only six have

Vermont, Nebraska, and North Dakota, have approached the issue in three very different ways.¹⁶⁹

A. Vermont

[57] Legislators in Vermont chose to criminalize the act of sexting for minors.¹⁷⁰ Vermont's new sexting law went into effect in July of 2009.¹⁷¹ The most important aspect of the law is that it removes the criminal behavior from the grasp of pornography-type statutes and thereby avoids the requirement of registration on the state's sex offender list.¹⁷²

[58] Section 2802b(a)(1) of the Vermont Criminal Code states that “[n]o minor shall knowingly and voluntarily and without threat or coercion use a computer or electronic communication device to transmit an indecent visual depiction of himself or herself to another person.”¹⁷³ In

been passed and are currently in effect: Colorado, Nebraska, North Dakota, Oregon, Utah, and Vermont. Two others, Pennsylvania and Kentucky, “are expected to consider legislation.” *Id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See* VT. STAT. ANN. tit. 13, § 2802b (2009).

¹⁷¹ *Legislature Examines ‘Sexting’; Underage Callers Swap Nude Photos*, ALLBUSINESS, Aug. 28, 2009, <http://www.allbusiness.com/government/government-bodies-offices-legislative/12769717-1.html>.

¹⁷² *See id.*

¹⁷³ Vt. Stat. Ann. tit. 13, § 2802b(a)(1). There is no definition of “indecent visual depiction” in the statute nor in section 2801, which contains definitions for Vermont’s obscenity laws. *See id.*; *id.* § 2801. However, indecent material, as used in sections 2802 and 2802a, includes a picture “of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.” *Id.* §§ 2802, 2802a. The definition of nudity under section 2801 of the Vermont Statutes is:

[T]he showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

addition, section 2802b(a)(2) states that “[n]o person shall possess a visual depiction transmitted to the person in violation of subdivision (1) of this subsection. It shall not be a violation of this subdivision if the person took reasonable steps, whether successful or not, to destroy or eliminate the visual depiction.”¹⁷⁴

[59] Subsection (a)(1) seeks to punish a minor who sends an indecent photo of himself or herself, and subsection (a)(2) punishes any person, adult or minor, who receives and remains in possession of an indecent visual depiction.¹⁷⁵ The punishment of minors under either of these subsections is the same.¹⁷⁶ The charges under subsection (a) are brought in family court as a “juvenile proceeding,” where the court has discretion to refer a first time offender to a “juvenile diversion program.”¹⁷⁷

[60] Additionally, if no court has previously adjudicated the minor under subsection (a) of the statute, the present court cannot adjudicate him under Vermont’s sexual exploitation of children statute or require him to register as a sex offender.¹⁷⁸ If a court has previously adjudicated a minor under subsection (a), the court may adjudicate the minor in family court or he may be prosecuted in Vermont’s district court for sexual exploitation of children.¹⁷⁹ Most importantly, however, he still will not be required to

Id. § 2801(2). Because the titles of sections 2802, 2802a, and 2802b all refer to “indecent material,” it appears that the intent of the drafters was to have all of the statutes cover the same type of materials.

¹⁷⁴ *Id.* § 2802b(a)(2).

¹⁷⁵ *See id.* §§ 2802b(a)(1)–(2).

¹⁷⁶ *Id.* § 2802b(b).

¹⁷⁷ *Id.* § 2802b(b)(1).

¹⁷⁸ *Id.* § 2802b(b)(2).

¹⁷⁹ *Id.* § 2802b(b)(3).

register as a sex offender.¹⁸⁰ Moreover, if a minor is adjudicated, his records will be expunged once he reaches eighteen years of age.¹⁸¹

[61] Interestingly, a person eighteen years of age or older who is in possession of indecent photos of a minor in violation of this statute may be fined up to \$300 or be imprisoned for more than six months or both.¹⁸² Thus, it appears from the language of this statute that an adult will be charged only with a misdemeanor if he is in possession of an “indecent visual depiction” of a minor, so long as the minor sent the photograph or image knowingly and voluntarily and without threat or coercion.

[62] Vermont’s statute is a step in the right direction because it does not allow prosecutors to charge minors with pornography offenses for first offenses and does not require registry on the sex offender site.¹⁸³ This statute, however, seems to provide a safeguard for the receiver of the photograph as long as the receiver takes reasonable steps to destroy or eliminate the visual depiction.¹⁸⁴ For example, if a boyfriend strongly encourages, but does not “threaten or coerce” his girlfriend into sending an indecent photograph, so long as he deletes it after viewing it, it will not be considered a violation of the statute.¹⁸⁵ In contrast, it will always be a violation for the sender.¹⁸⁶

[63] Although a step in the right direction, it does not go far enough in protecting all high school aged teenagers, especially those that turn eighteen before graduating. Even in states with enrollment cutoffs, such as

¹⁸⁰ *Id.*

¹⁸¹ *Id.* § 2802b(b)(4).

¹⁸² *Id.* § 2802b(c).

¹⁸³ *See id.* §§ 2802b(b)(1)–(2).

¹⁸⁴ *Id.* § 2802b(a)(2).

¹⁸⁵ *See id.* §§ 2802b(a)(1)–(2).

¹⁸⁶ *Id.* § 2802b(a)(1).

Florida, which require that a child be born before September,¹⁸⁷ or like California and Michigan that use December,¹⁸⁸ many teens turn eighteen while they are still in high school. Unfortunately, no magic “adult” switch goes off in the middle of their senior year. Because there is no age switch to trip, the social environment for students that turn eighteen in high school does not change. Thus, in the typical case arising from boyfriends and girlfriends sending sext messages, states like Vermont will continue to treat teenagers differently. Consider, for example, a teenager who is turning eighteen while still in high school and is dating someone in their own grade who is seventeen. Although the two may be less than a year apart, only the seventeen year old is considered a minor under these statutes.¹⁸⁹ One possible remedy for this problem is to include age provisions similar to those used in some statutory rape statutes, sometimes referred to as “Romeo and Juliet” statutes.¹⁹⁰ These statutes identify age gaps between the individuals in order to determine whether the action of the older individual is criminal.¹⁹¹

¹⁸⁷ FL. STAT. §§ 1003.21(1)(a)–(b) (2009).

¹⁸⁸ *See, e.g.*, CAL. EDUC. CODE § 48000(a) (West 2006); MICH. COMP. LAWS ANN. § 380.1147(2) (West 2005).

¹⁸⁹ It is unclear from section 2802b whether someone eighteen or older who has been convicted of section 2802b is eligible for the sex offender registry. *See* Vt. Stat. Ann. tit. 13, § 2802b(c). On the one hand, the statute explicitly excludes minors from registration on the sex offender list but this language does not appear in subsection (c), which criminalizes the behavior of a person eighteen or older as a misdemeanor. *Id.* §§ 2802b(b)(2), (c). On the other hand, section 5401 of the Vermont Statutes that governs the sex offender registry does not include section 2802b as a triggering offense. *Id.* § 5401(10)(A)–(B).

¹⁹⁰ *See, e.g., id.* § 3252(c)(2) (creating an exception for consensual acts between parties less than nineteen and older than fifteen).

¹⁹¹ *Id.* §§ 3252(c)(2), (f)(1)–(2), (g).

B. Nebraska

[64] Nebraska has taken a different approach.¹⁹² The Nebraska Criminal Statutes criminalize possession of “any visual depiction of sexually explicit conduct.”¹⁹³ Section 28-1463.02(5) defines sexually explicit conduct as:

(a) Real or simulated intercourse, whether genital-genital, oral-genital, anal-genital, or oral-anal between persons of the same or opposite sex or between a human and an animal or with an artificial genital; (b) real or simulated masturbation; (c) real or simulated sadomasochistic abuse; (d) erotic fondling; (e) erotic nudity; or (f) real or simulated defecation or urination for the purpose of sexual gratification or sexual stimulation of one or more of the persons involved.¹⁹⁴

[65] There are two ways a defendant can avail himself of an affirmative defense to this charge.¹⁹⁵ The first is straightforward. Pursuant to section

¹⁹² See generally NEB. REV. STAT. § 28-813.01 (Supp. 2009) (outlining the criminality of visual depictions of sexually explicit conduct).

¹⁹³ *Id.* § 28-813.01(1). Visual depiction is defined as:

[L]ive performance or photographic representation and includes any undeveloped film or videotape or data stored on a computer disk or by other electronic means which is capable of conversion into a visual image and also includes any photograph, film, video, picture, digital image, or computer-displayed image, video, or picture, whether made or produced by electronic, mechanical, computer, digital, or other means.

Id. § 28-1463.02(6).

¹⁹⁴ *Id.* § 28-1463.02(5).

¹⁹⁵ See *id.* § 28-813.01(3) (outlining the requirements to meet the affirmative defense for visual depictions of sexually explicit conduct).

28-813.01(3), the defendant will have an affirmative defense if the visual depiction portrays no person other than the defendant.¹⁹⁶

[66] The second requires the defendant to satisfy seven elements before he can qualify for an affirmative defense:

(i) The defendant was less than nineteen years of age; (ii) the visual depiction of sexually explicit conduct portrays a child who is fifteen years of age or older; (iii) the visual depiction was knowingly and voluntarily generated by the child depicted therein; (iv) the visual depiction was knowingly and voluntarily provided by the child depicted in the visual depiction; (v) the visual depiction contains only one child; (vi) the defendant has not provided or made available the visual depiction to another person except the child depicted who originally sent the visual depiction to the defendant; and (vii) the defendant did not coerce the child in the visual depiction to either create or send the visual depiction.¹⁹⁷

[67] Thus, under Nebraska law, someone under the age of nineteen who disseminates or makes the photo “available” to another would not be entitled to this affirmative defense under any circumstances.¹⁹⁸ The statute, as written, is broad enough to encompass the act of showing someone else a sexually explicit picture on the accused’s phone.¹⁹⁹ The defense also is unavailable for the minor who receives a sexually explicit photo, knowingly generated by someone fifteen years of age or older and voluntarily sent without coercion by the defendant, that contains more than one child.²⁰⁰ For example, if a seventeen-year-old girl voluntarily

¹⁹⁶ *Id.* § 28-813.01(3)(a).

¹⁹⁷ *Id.* § 28-813.01(3)(b).

¹⁹⁸ *Id.* §§ 28-813.01(3)(b)(i), (vi).

¹⁹⁹ *See id.*

²⁰⁰ *Id.* §§ 28-813.01(3)(b)(ii)–(v).

sends her eighteen-year-old boyfriend a photograph in which she and one of her girlfriends appear, and the photograph contains sexually explicit conduct as defined by the statute, the older boyfriend will not be entitled to this affirmative defense, despite the fact that the number of people and content in the picture are completely out of his control.²⁰¹

[68] That being said, Nebraska's affirmative defense does take into account many of the legitimate concerns raised in this article.²⁰² For example, it does take into consideration that eighteen-year-olds ought to have the same protection as other teenagers and does define the age group as "fifteen years of age or older" to under nineteen.²⁰³ It also distinguishes between possession and dissemination by offering the defense only to those who do not disseminate the photographs.²⁰⁴

[69] In 2009, Nebraska also amended an existing statute that criminalizes the making, publishing, creating, generating, or providing of a visual depiction of sexually explicit conduct or generating in any manner a visual depiction of sexually explicit conduct.²⁰⁵ It is an affirmative defense to that section of the statute if the sexually explicit image only includes the defendant, who must have been younger than eighteen at the time of the depiction.²⁰⁶ If a person is charged with distributing the depiction, it is an affirmative defense if:

- (a) the defendant was less than eighteen years of age, (b) the visual depiction of sexually explicit conduct includes no person other than the defendant, (c) the defendant had a reasonable belief at the time the visual depiction was sent to another that it was being sent to a willing recipient, and

²⁰¹ *See id.* §§ 28-813.01(3)(b)(i)–(vi).

²⁰² *See generally id.* § 28-813.01(3).

²⁰³ *Id.* §§ 28-813.01(3)(b)(i)–(ii).

²⁰⁴ *Id.* § 28-813.01(3)(b)(vi).

²⁰⁵ *Id.* § 28-1463.03(1).

²⁰⁶ *See id.* §§ 28-1463.03(5)–(6).

(d) the recipient was at least fifteen years of age at the time the visual depiction was sent.²⁰⁷

A person also has an affirmative defense if the sexually explicit image only includes the defendant, who was younger than eighteen at the time of the depiction.²⁰⁸

C. North Dakota

[70] North Dakota has passed a law that specifically criminalizes the dissemination of a “sexually expressive image,” which is defined by statute as “a photograph or visual representation that exhibits a nude or partially denuded human figure.”²⁰⁹ North Dakota targets individuals who disseminate such “sexually expressive images” with a specific intent.²¹⁰ Under the North Dakota statute, “[a] person is guilty of a class A misdemeanor if, knowing of its character and content,” he or she “[d]istributes or publishes, electronically or otherwise, a sexually expressive image with the intent to cause emotional harm or humiliation to any individual depicted in the sexually expressive image.”²¹¹

[71] This law is a bit more expansive in that it criminalizes the behavior of minors and adults alike.²¹² Thus, anyone who disseminates a sexually expressive image with the intent to cause emotional harm or humiliation to the person in the image commits a class A misdemeanor by doing so.²¹³

²⁰⁷ *Id.* § 28-1463.03(6).

²⁰⁸ *See id.* § 28-1463.03(5).

²⁰⁹ N.D. CENT. CODE § 12.1-27.1-01(13) (Supp. 2009).

²¹⁰ *See id.* § 12.1-27.1-03.3(1)(b).

²¹¹ *Id.*

²¹² *See id.* § 12.1-27.1-03.3(1).

²¹³ *See id.* § 12.1-27.1-03.3(1)(b). North Dakota’s statute also contains a provision, although oddly written and which may wind up being a loophole for deviant parents who are sex offenders, that appears to protect parents who may send partially nude, yet entirely innocent, photos of their young children. *See id.* § 12.1-27.1-03.3(3). It states that

Unlike the other laws, it specifically targets the dissemination of photographs and includes a specific intent component.²¹⁴ The person who disseminates the image also must have “the intent to cause emotional harm or humiliation.”²¹⁵

[72] While identifying specific intent makes this statute sounder in some ways, an obvious concern for prosecutors is the increased difficulty in proving the crime. On the one hand, these photos could be disseminated with the specific intent to humiliate and cause emotional harm, like Phillip Alpert. On the other hand, if the disseminator of a nude photo could establish that his intent was to “share” the photo with friends, rather than to humiliate or cause harm, then a conviction certainly would be more difficult to obtain.²¹⁶

D. Finding the Proper Response

[73] The question of whether to file criminal charges against and punish teenagers who participate in consensual sexting remains problematic. Currently there is neither a universal response to sexting, nor a consistent approach in legislation dealing with sexting.²¹⁷

[74] Sexting between or among teens certainly is not behavior that the rational adult condones, but to treat sexters as pornographers flies in the face of reason. One thing is clear: high school teenagers who sext should

“[t]his section does not authorize any act prohibited by any other law. If the sexually expressive image is of a minor and possession does not violate section 12.1-27.2-04.1, a parent or guardian of the minor may give permission for a person to possess or distribute the sexually expressive image.” *Id.*

²¹⁴ *See id.* § 12.1-27.1-03.3(1)(b).

²¹⁵ *Id.*

²¹⁶ This is because the North Dakota statute requires as a material element of sexting the specific “intent to cause emotional harm or humiliation.” *Id.*; *see also* Don Corbett, *Let’s Talk About Sext: The Challenge of Finding the Right Legal Response to the Teenage Practice of “Sexting,”* 13 J. INTERNET LAW 3, 6 (2009) (stressing the intent and context behind sending sexually explicit images).

²¹⁷ *See supra* Parts IV.A–C .

not face charges under pornography statutes. The harm caused to teenagers greatly outweighs any benefit to society. It is incomprehensible to treat a teenager like a pedophile, rapist, or pornographer, and subject him or her to almost a lifetime classification as a sex offender for sexting.

[75] Certainly, there is a valid argument that teenagers will be generally deterred from engaging in this behavior if prosecutors continue to file charges against them, and the media continues to report it.²¹⁸ But general deterrence may not be effective at curbing the behavior of teenagers. “Minors tend to be less capable of making mature judgments about their behavior choices”²¹⁹ Indeed, “[t]eens seem to be more fearful of being punished by their parents or of being the target of disapproval from their friends than they are of the police.”²²⁰

[76] On the one hand, 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. Parents and educators are in a better position to deal with misguided behavior that should remain as private as possible.²²¹ Thus, legislators should work to protect teens from pornography prosecutions that will cause them irreparable harm.

[77] On the other hand, the teenage sexter who forwards nude photographs may deserve punishment. But, the punishment should not include naming him as a sex offender and causing him to endure decades of being on a sex offender registry.

²¹⁸ According to Joshua Dressler, a person “will avoid criminal activity if the perceived potential pain (punishment) outweighs the expected potential pleasure” the person obtains from the act. DRESSLER, *supra* note 151, at 14–15. Underlying this theory is the goal of general deterrence. A person will be punished so that others in the community will think twice before committing a crime.” *Id.*

²¹⁹ LARRY J. SIEGAL & JOSEPH J. SENNA, *JUVENILE DELINQUENCY: THEORY, PRACTICE, AND LAW* 86 (7th ed. 2000).

²²⁰ *Id.*

²²¹ See generally Post of Stacey Garfinkle to On Parenting, <http://voices.washingtonpost.com/parenting/> (Dec. 10, 2008, 07:00 EST).

[78] In punishing the sexter who forwards or further publicizes to third parties digital photos voluntarily sent to him, there are several factors that state legislators ought to take into consideration if they intend on addressing sexting as a crime.²²² First, legislators can certainly use the North Dakota model and identify a specific intent as a part of the crime.²²³ However, as mentioned above, attaching a specific intent may open the door to a failure to prove the crime.²²⁴ An alternative would be to craft a statute that criminalizes the dissemination of digital photos through the use of cellular phones or computers with the intent to cause harm or humiliation to a third party, and to include that dissemination to more than a certain number of people creates a rebuttable presumption of intent to cause harm or humiliation.

[79] Finally, if legislators decide to address sexting by criminalizing the electronic transmission of digital images of minors, they should consider drafting laws that treat those under the age of nineteen the same as their high school peers.²²⁵ Those teens that do not disseminate the photographs to third parties should be provided educational alternatives in diversionary programs and should have the charges dismissed and all records expunged upon successful completion of the program, provided that it is a first offense.

[80] For teenage sexters that disseminate nude or semi-nude photos, the charge should, at most, be a misdemeanor, and the court should offer first time offenders an educational program rather than any jail time.

²²² See Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 *COMMLAW CONSPECTUS* 1, 41–42 (2009).

²²³ See N.D. CENT. CODE § 12.1-27.1-03.3(1)(b) (Supp. 2009).

²²⁴ See *supra* note 218 and accompanying text.

²²⁵ States also may choose to criminalize the dissemination, by cellular phone or computer, of any nude or semi-nude digital image that is done without the express consent of the person depicted. As in North Dakota, the age of the person in the photo would not matter. See § 12.1-27.1-03.3(1).

CONCLUSION

[81] The underlying problem in sexting is not actually in the technology that is used, but instead, in the misguided choice the teen made when he or she first sent or forwarded the nude photo. Parents should have the primary responsibility of educating their children and monitoring their behavior when it comes to sexting.

[82] Although criminalizing the behavior may be appropriate in certain sexting cases involving the dissemination of nude photos, the task of educating teens about the consequences of sexting is best left to parents rather than prosecutors. Parents have a duty to protect their children and are in the best position to punish them accordingly. Thus, even though it will not prevent a teen from using someone else's phone, parents can make sexting more difficult by removing or restricting texting capabilities on their children's phones. They can also monitor computer use. Schools and the media can also play a role in the education of teenagers and thereby assist parents in their responsibilities.

[83] Teenagers who engage in voluntary sexting are not child pornographers, even if they forward photos to others. Thus, prosecuting them under laws designed to protect children from exploitation is not reasonable. In cases where intervention by the state is justified, legislators should carefully craft legislation that will properly reflect society's concerns about its teens but does not expose them to disproportionate punishment for their acts.