

# **HOW TO FIX THE SEXTING PROBLEM: AN ANALYSIS OF THE LEGAL AND POLICY CONSIDERATIONS FOR SEXTING LEGISLATION\***

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## **I. INTRODUCTION**

*“We shouldn’t be labeling our children sexual predators from this type of behavior.”<sup>1</sup>*

—Florida State Representative Joseph Abruzzo (D – Wellington), on prosecuting children for sexting under child pornography laws.

Legal regulation is often the routine, knee-jerk response to emerging societal concerns. However, imposing harsh, punitive restrictions on human behavior is not always the answer to these social problems and often makes matters worse. And so it is with the phenomena of teenage “sexting.” Technology has once again outpaced the law, resulting in juveniles being publicly branded as

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1. John Frank, *House Bill Eases Up on Penalties for ‘Sexting,’* ST. PETERSBURG TIMES, Mar. 23, 2010, at 1B, available at 2010 WLNR 6041553.

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sex offenders for relatively commonplace high school behavior. The use of stringent child pornography laws to punish children for activity that was never contemplated by lawmakers is ill-advised and has the potential to turn a generation of the growing population against ordered society.

Sexting, a combination of the words “sex” and “texting,” is the term coined to describe the activity of sending nude, semi-nude, or sexually explicit depictions in electronic messages, most commonly through cellular phones.<sup>2</sup> While this behavior is perfectly legal and accepted among consenting adults, teenagers who similarly experiment with this communicative outlet are often dragged into the judicial system by police officers, prosecutors, and judges. They reflexively categorize the activity as a child pornography offense and proceed to utilize the strict laws designed to *protect* children as devastating weapons *against* them. Often, juveniles prosecuted for this behavior end up being included on the public sex offender registry alongside the worst child molesters and pedophiles.

This disturbing trend has generated some of the most notorious cases involving juveniles in recent years.<sup>3</sup> Young girls and boys have faced the wrath of police, prosecutors, and judges when their private pictures become exposed to the world of adults. In representing various individuals involved in sexting, the author has attempted to understand why sexting is so prevalent among teens, even in light of the serious legal and social consequences that may result. Recent statistics suggest that 39% of all teens have sent or posted a “sexually suggestive message” and that 48% of all teens have “received such messages.”<sup>4</sup> Given the obvious hesitancy to

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2. *Miller v. Mitchell*, 598 F.3d 139, 143 (3d Cir. 2010).

3. *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009), *enforced sub nom.* *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010); *State v. Canal*, 773 N.W.2d 528 (Iowa 2009); *A.H. v. State*, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007); *State v. Phillip Michael Alpert*, No. 07-CF-0016350-O (Fla. Cir. Ct. 2008). For more discussion on the facts of these cases, see *infra* Section II.

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

admit such behavior, the actual percentages are likely to be much higher. In reviewing the relevant literature and interacting with teens affected by this recent phenomenon, it has become apparent that eroticism is just one category of emotion that is communicated electronically by teens. The advent of efficient, powerful digital communication devices has resulted in a generation of teens that prefer to communicate *all* of their thoughts, feelings and emotions electronically; love, anger, friendship, jealousy, pride, joy — and yes, lust — are all transmitted digitally by teens, more often than face-to-face interaction.

Seventy-five percent of twelve to seventeen year-olds carry cell phones these days, as compared to 45% in 2004.<sup>5</sup> Eighty-three percent of teens use their cell phones to take pictures, and 64% admit to sharing those pictures with others.<sup>6</sup> A frequently quoted statistic indicates that the average American has more than 200 friends, as compared to less than twenty-five friends, in the previous generation.<sup>7</sup> Teens communicate with their large group of friends electronically, through texts, e-mails and social networking sites.<sup>8</sup> They are more likely to text a friend using a cell phone, than to talk to him or her face-to-face in the same room.<sup>9</sup> Facebook “status updates” have taken the place of in-person social visits and conversation. Since their entire lives are described, captured and uploaded to the digital world, it should perhaps not be surprising that all shades of human emotion — including sexuality — are

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5. AMANDA LENHART ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, TEENS AND MOBILE PHONES 2 (2010), <http://www.pewinternet.org/~media/Files/Reports/2010/PIP-Teens-and-Mobile-2010-with-topline.pdf>.

6. *Id.* at 5.

7. Influential Marketing Blog, <http://www.rohitbargava.com/2010/05/verizon-asks-are-we-really-friends-with-our-friends.html> (May 26, 2010, 01:33).

8. Eighty-five percent of teens communicate electronically, and most do not consider such communications to be in “writing.” AMANDA LENHART ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, WRITING, TECHNOLOGY AND TEENS ii (2008), [http://www.pewinternet.org/~media/Files/Reports/2008/PIP\\_Writing\\_Report\\_FINAL3.pdf](http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Writing_Report_FINAL3.pdf).

9. LENHART ET AL., *supra* note 5 at 44. Fifty-four percent of teens communicate with their friends daily through text messages as compared to 33% who communicate face-to-face outside of school. *Id.*

shared through these communication devices that adults provide to their children. But in the eyes of the law, the exchange of these modern electronic love notes, known as sexting, is viewed (by most states) as vile child pornography, even though the “victim” depicted in the image is often also considered a perpetrator, as a producer of the illegal imagery.

This article explores the issue of sexting, not as a juvenile crime epidemic warranting adult hysteria, but as a form of self-exploratory communication among teens that is going to continue to occur irrespective of the label or the consequences that the law places on the behavior. The urgent question thus becomes: What should be done about it? Developing a viable solution to the sexting problem requires careful evaluation of the competing policy considerations, the rights of juveniles to engage in intimate relationships, the underlying rationale for child pornography statutes, and the complicated, interrelated puzzle of state and federal laws regulating sexting behavior and associated criminal penalties.

Section II of this article looks at several recent sexting cases, illustrating the various judicial responses of courts as sexting has evolved from a source of parental panic to one of social outrage at the drastic penalties imposed on “offenders.” Section III discusses the historical legal and policy grounds for criminalizing child pornography, and contrasts those justifications with typical sexting behavior. Section IV examines pending state sexting legislation, some of which has already been signed into law. Section V proposes language for a model sexting statute, along with suggested amendments to existing sex offender registration statutes. Finally, Section VI identifies the last piece of the puzzle necessary to address the sexting problem: amendment of federal sex offender registration laws, which require conformity by the states.

## II. ILLUSTRATIVE CASES

Late one night, after having a fight with his girlfriend, Phillip Alpert — who had just turned eighteen — made an irrational decision with far-reaching consequences, and like most teenagers, those consequences never entered his mind. During their

romantic relationship, Alpert's ex-girlfriend had sent him unsolicited, private nude images that she created when she was sixteen years old.<sup>10</sup> After an argument, in an ill-conceived effort to gain his ex-girlfriend's attention, Alpert woke up in the middle of the night, signed into her email account with the password she had given him, and with one click he emailed the nude photographs to everyone in her contacts list, which included over seventy email addresses belonging to the girl's friends and even family.

In that moment, he was transformed, in the eyes of the law, from a foolishly behaving teenager to a child pornographer and sex offender.

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By hitting the send button that night, Alpert could little imagine that he would be charged with child pornography—possession and distribution—potentially face a protracted prison sentence, and be forced to wear the label of “sex offender” for quite possibly the rest of his life.<sup>11</sup>

Although caused by a relatively new means of socio-technological communication, situations such as the one confronting Phillip Alpert have become increasingly common. A few years ago, a Florida teen was adjudicated as a delinquent after being convicted under Florida's statute prohibiting sexual performance by a child.<sup>12</sup> The teen, A.H., and her boyfriend took several pictures of themselves “naked and engaged in sexual behavior,” and although the images were transmitted through

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10. Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 6-8 (2009).

11. *Id.* at 8. Alpert was later sentenced to five years of probation and required by Florida law to register as a sex offender. *Id.* at 9.

12. *A.H. v. State*, 949 So. 2d 234, 235, 239 (Fla. Dist. Ct. App. 2007).

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several different electronic devices, they were never seen by anyone but the two teens depicted.<sup>13</sup>

A.H. defended her actions by stating that the charges brought against her violated her constitutionally protected privacy interests.<sup>14</sup> The court rejected that argument, holding there was “no reasonable expectation of privacy” for the activities engaged in by the teens, including the creation and transmission of the images.<sup>15</sup> While the court observed that sexual activity among teenagers may, in fact, be covered by privacy rights in the eyes of the law,<sup>16</sup> the court concluded that taking photographs of those same sexual activities diminishes any reasonable expectation of privacy. The court explained that once the image is reduced to a permanent or semi-permanent medium, the likelihood of a third party seeing it escalates exponentially.<sup>17</sup> The court went on to hold that even if a reasonable expectation of privacy had existed, “[t]he State has a compelling interest in seeing that material which will have such negative consequences is never produced” because teens lack the maturity to foresee the disastrous consequences arising from their actions.<sup>18</sup> Accordingly, A.H. was convicted of “producing, directing, and promoting” child pornography.<sup>19</sup>

In a recent sexting case that garnered national attention, the parents of three teenage girls sued the District Attorney of Wyoming County, Pennsylvania, in federal court for civil rights violations, in response to his threat to charge the teens with “possessing or distributing child pornography” for a sexting incident.<sup>20</sup> In October 2008, school officials confiscated several students’ cell phones containing depictions of the female students in

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13. *Id.* at 235.

14. *Id.* A.H. argued that “criminal prosecution was not the least intrusive means of furthering a compelling state interest.” *Id.*

15. *Id.* at 237.

16. *Id.* (citing FLA. CONST. art. I, § 23).

17. *Id.*

18. *Id.* at 239.

19. *Id.* at 235, 239.

20. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009).

bath towels or in their underwear.<sup>21</sup> The school informed District Attorney George Skumanick of the situation, and he promptly initiated a criminal investigation into the matter.<sup>22</sup> Skumanick made a public statement declaring that the teens possessing the confiscated images and the teens depicted in the images may have violated Pennsylvania's child pornography laws.<sup>23</sup> Although the images did not involve nudity or sexual activity, the district attorney claimed they were illegal because of their "provocative" nature.<sup>24</sup> Because of this violation, Skumanick threatened to charge all of the juveniles involved with felonies. If convicted, the teens could be sentenced to lengthy prison terms and, potentially, to sex offender registration requirements.<sup>25</sup>

Subsequently, Skumanick sent letters to the parents of the teens whose cell phones stored the images and the teen girls depicted in the images, stating that the teens had been identified in a criminal child pornography investigation and that the charges would be dropped should the minors in question agree to complete

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21. *Id.* It is uncertain whether such confiscation violated the Fourth Amendment or privacy rights of the cell phone owners, as that issue was not raised in the litigation.

22. *Id.*

23. *Id.* The district attorney specifically asserted that students could be charged with violations of 18 PA. CONS. STAT. ANN. § 6312 (2009) ("Sexual abuse of children") and 18 PA. CONS. STAT. ANN. § 7512 (2009) ("Criminal use of communication facility"). The first image was approximately two years old at the time the suit was brought. *Skumanick*, 605 F. Supp. 2d at 639. It depicted two thirteen-year-old girls wearing opaque bras. *Id.* One of the girls was on the phone while the other was flashing a peace sign at the camera. *Id.* The second image was more than a year old at the time the suit was brought, and it depicted one of the girls appearing to have just come out of the shower and wearing only a towel that was wrapped around her body just below her breasts. *Id.*

24. *Skumanick*, 605 F. Supp. 2d at 638. When plaintiff Marissa Miller's father asked Skumanick who decided what "provocative" meant, Skumanick refused to answer and reminded his audience he could charge all of the minors with felonies, but that he was opting to offer the education program. *Id.* "He told Mr. Miller that 'these are the rules. If you don't like them, too bad.'" *Id.*

25. *Id.* at 637-38. *See also* 42 PA. CONS. STAT. ANN. § 9791(b) (2010) ("It is hereby declared to be the intention of the General Assembly to protect the safety and general welfare . . . by providing for registration and community notification regarding sexually violent predators . . .").

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a six- to nine-month education and counseling program designed by Skumanick to teach the girls, among other things, “what it means to be a girl in today’s society.”<sup>26</sup> In response, the parents filed a lawsuit for civil rights violations against Skumanick based on his interference with the child-rearing rights of the parents, as well as the expressive rights of the minors. The suit requested injunctive relief, thereby prohibiting him from filing charges against the three girls, claiming that the mandatory counseling program violated their Fourteenth Amendment rights to parent as they see fit, and that the threatened prosecution was in retaliation for their daughters’ exercise of their First Amendment rights.<sup>27</sup>

The United States District Court issued a temporary restraining order that the appellate court characterized as “in effect a preliminary injunction.”<sup>28</sup> Skumanick appealed the injunction, and a panel of Third Circuit judges decided unanimously against the new district attorney, Jeffrey Mitchell.<sup>29</sup> While the appellate

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26. *Skumanick*, 605 F. Supp. 2d at 638. The program was “divided between girls’ and boys’ programs. The program is designed to teach the girls to ‘gain an understanding of how their actions were wrong,’ ‘gain an understanding of what it means to be a girl in today’s society, both advantages and disadvantages,’ and ‘identify non-traditional societal and job roles.’” *Id.* (internal citations omitted).

27. *Id.* at 640. The parents of the teen girls filed a §1983 claim, asserting that the district attorney’s conduct violated their Fourteenth Amendment right to control the upbringing of their children by specifically directing the education of their minor children, as the girls would be forced to participate in the sexting diversionary program. Additionally, the students of the diversionary program would be required to write a paper discussing, “how their actions were wrong.” The parents, citing the First Amendment, claimed this obligation violated the girls’ right to be free from compelled expression and as the pictures did not violate the law, the girls’ right to freedom of expression was impacted as well. *Id.*

28. *Miller v. Mitchell*, 598 F.3d 139, 145 (3d Cir. 2010).

29. *Id.* at 143. Jeffrey Mitchell took office in January 2010. *Id.* at 145. The court explained, “[w]e agree with the parties that the order titled a temporary restraining order by the District Court (a generally non-appealable order) was in effect a preliminary injunction (an appealable order) because it was entered for an indeterminate period of time after notice to the defendant and an adversary hearing.” *Id.* See also *id.* at 155 (“At this preliminary stage we conclude that plaintiffs have shown a likelihood of success on their claims that any prosecution would not be based on probable cause that Doe committed a

court did not address the issue of whether the sexting images in question were constitutionally protected, the court noted that Skumanick did not have probable cause for pursuing the child pornography charges.<sup>30</sup> The opinion stated that “appearing in a [sexting] photograph provides no evidence as to whether that person possessed or transmitted the photo.”<sup>31</sup> Notably, this is the first case where a state prosecutor was forced to back down from threats of prosecuting sexting using child pornography laws.

One significant consideration militating against harsh criminal punishment against teens for sexting is the concern that teens often do not know they are violating the law when sexting, let alone committing serious child pornography offenses. This grave disconnect may be partially explained by the pervasive sexualization of teens (particularly females) in popular culture and advertising. Miley Cyrus,<sup>32</sup> Vanessa Hudgens,<sup>33</sup> and other celebrity teens have made headlines by taking nude photos which later appeared on the Internet. The attention these images generate may spur other young girls to engage in similar behavior.<sup>34</sup>

Further complicating the situation is the lack of uniformity in state law addressing sexual activity of minors. Research reveals substantial differences in the age of consent for sexual activity throughout the nation. Only twelve of the fifty states in the country, and the District of Columbia, have a single age of consent.<sup>35</sup> This

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crime, but instead in retaliation for Doe’s exercise of her constitutional rights not to attend the education program. Therefore, we affirm the grant of a preliminary injunction and remand for further proceedings.”).

30. *Id.* at 154. To establish the aforementioned retaliation claim, the petitioner proved that: (1) they engaged in constitutionally protected activity; (2) the government responded with retaliation; and (3) the protected activity caused the retaliation. *Id.* at 147 (citation omitted).

31. *Id.* at 154.

32. Dan Herbeck, *Exposed Stars Send Wrong Message*, BUFFALO NEWS, Jan. 25, 2009, at A1, available at 2009 WLNR 1516379.

33. *Vanessa Hudgens Sent Nude Photo to Drake Bell*, PEOPLE, Sept. 8, 2007, <http://www.people.com/people/article/0,,20055444,00.html>.

34. Kevin Giles, *Teens Use E-Nudity to Get Noticed*, STAR TRIB., May 5, 2008, at 1B, available at 2008 WLNR 8759123.

35. ASAPH GLOSSER ET AL., THE LEWIN GROUP, STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS 7 (2004), <http://www.lewin.com/content/publications/3068.pdf>.

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means that any person below that specified age lacks the legal capacity to consent to sexual acts under any circumstances.<sup>36</sup> The remaining thirty-nine states allow other factors to affect the consent issue in sexual circumstances: the type of sexual activity at issue, the age differential between the victim and the accused, and the minimum ages of both the victim and the accused individual.<sup>37</sup>

In twenty-seven “states that do not have a single age of consent, statutes specify the age below which an individual cannot legally engage in sexual intercourse regardless of the age of the defendant . . . [and] [t]he minimum age requirements . . . range from 10 to 16 years of age.”<sup>38</sup> Accordingly, the ability of an individual to legally have sexual relations with a person reaching the minimum age requirement but still below the age of consent is “dependent on the difference in ages between the two parties and/or the age of the defendant.”<sup>39</sup> For example, New Jersey law states that the age of consent is sixteen, but children as young as thirteen can legally engage in sexual activity with someone as long as that individual is less than four years older than the victim.<sup>40</sup> However, in twelve states, “the legality is based *solely* on the difference between the ages of the two parties.”<sup>41</sup> For instance, in the District of Columbia, sexual intercourse with a minor under the age of sixteen is illegal only if the defendant is four or more years older than the victim.<sup>42</sup> Although extremely uncommon, some states like Washington, allow the statutory age differentials to vary depending on the age of the victim such that intercourse with a teen who is between the ages of fourteen and sixteen is illegal if the accused is four or more years older than the victim.<sup>43</sup> However, the

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36. *Id.*

37. *Id.* at 7-9.

38. *Id.* at 7.

39. *Id.* at 7-8.

40. *Id.* at 8. In New Jersey it is illegal to engage in specifically sexual penetration with an individual who is less than thirteen years old, regardless of the age of the accused. However, other sexual contact with someone who is less than thirteen years old is legal under certain circumstances. *Id.* at 7 n.10.

41. *Id.* at 8.

42. *Id.*

43. *Id.*

law allows this age differential to decrease to three years in situations where the victim is less than fourteen and decrease even further to a two-year age difference where the victim is under twelve years old.<sup>44</sup> Thus, depending on the state law at issue, minors can legally consent to sexual activity, with adults at ages well below the age of majority.<sup>45</sup>

Even the courts struggle with interpretation of their own states' laws pertaining to teen sexual activity. One Florida appeals court, in upholding a conviction of a juvenile for possession and/or creation of child pornography, observed that the "law relating to a minor's right of privacy to have sex with another minor is anything but clear."<sup>46</sup> In another case, the Florida Supreme Court held that a statute prohibiting carnal intercourse with an unmarried minor was unconstitutional as applied to a sixteen-year-old adjudicated of delinquency for having sex with another minor.<sup>47</sup>

Age of consent laws complicate the sexting problem. Initially, these laws often fail to recognize that minors do, in fact, have constitutional rights, including privacy rights to engage in intimate relations.<sup>48</sup> Accordingly, the laws on the books may not actually apply to exploration of sexual activity with other juveniles. To the extent the laws do accommodate the juveniles' rights to intimate sexual activity by establishing an age of consent, the age varies from state to state between ten and eighteen,<sup>49</sup> and it is fair

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44. *Id.*

45. *Id.* In the state of South Dakota, "[e]ngaging in sexual penetration with someone who is at least 10 years of age and less than 16 years of age is legal under certain circumstances." *Id.* at 7 n.11 (emphasis omitted).

46. *A.H. v. State*, 949 So. 2d 234, 237 (Fla. Dist. Ct. App. 2007).

47. *B.B. v. State*, 659 So. 2d 256, 260 (Fla. 1995).

48. *Id.* See also, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (recognizing that minors' freedom of expression is constitutionally protected); *Ginsberg v. State of New York*, 390 U.S. 629 (1968) (same).

49. Originating from statutory rape laws, exceptions to sex offenses based on age, known as "Romeo and Juliet" exceptions, have developed. These exceptions are applied when the parties to the sexual act in question are so close in age, that criminal prosecution is rendered unwarranted. States have implemented Romeo and Juliet exceptions to protect teens from prosecution by potentially overzealous prosecutors, where the activity is consensual, and no true victim exists. In some instances, however, the exceptions themselves have created constitutional concerns. See, e.g., *State v. Limon*, 122 P.3d 22

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to say that most minors do not conduct legal research regarding the proper interpretation of their state's consent laws before engaging in sexual activity or sexting. Moreover, these age of consent laws often set the threshold below the age of majority. Teens are understandably mystified when they are told that they can freely engage in sexual intercourse with an adult at, say, age sixteen, but that they cannot send a nude picture to their juvenile boyfriend under penalty of serious felony charges. A minor has the right to be nude in a private place, but the act of capturing either nudity or sexual activity on cell phone cameras triggers application of stringent child pornography penalties, including sex offender registration. Thus, the minor is punished for recording activity that is often legal and may be constitutionally protected.<sup>50</sup>

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(Kan. 2005) (holding that the Kansas "Romeo and Juliet" statute violated the equal protection clause because it protected opposite sex parties, close in age, engaged in voluntary sexual activity, from criminal prosecution, but not same sex parties engaged in the same behavior).

50. *See, e.g.,* Schmitt v. State, 590 So. 2d 404, 410 (Fla. 1991) (explaining that it is not a crime "in Florida for a parent simply to appear unclothed in front of a child in the family home, or a child in front of a parent, with no lewd or abusive intent . . . Thus, in such matters, families have a legitimate privacy interest . . ."). Minors also have rights to bodily and personal privacy in other contexts. *See* Safford Unified Sch. Dist. v. Redding, 557 U.S. \_\_\_, \_\_\_, 129 S. Ct. 2633, 2637-38 (2009) (finding an in-school search of a student's bra and underwear violated her personal privacy under the Fourth Amendment); *Carey v. Population Serv. Int'l*, 431 U.S. 678, 693 (1977) (noting that the right to privacy extends to minors making decisions about procreation and explaining that "[s]tate restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult[]'" (internal quotation and citation omitted); *Gruenke v. Seip*, 225 F.3d 290, 303 (3d Cir. 2000) (finding a minor student-athlete has an individual right to privacy under the due process clause to her pregnancy status); *Rhoades v. Penn-Harris-Madison Sch. Corp.*, 574 F. Supp. 2d 888, 899 (N.D. Ind. 2008) (noting that minors have a right to privacy in non-disclosure of personal information "[a]lthough the nature and scope of the zone of privacy protected by the Constitution are, like most of the Constitutional issues discussed herein, quite amorphous, the Supreme Court appears to have recognized that the liberty protected by the Fourteenth Amendment creates an 'individual interest in avoiding disclosure of personal matters' (internal quotation and citation omitted); *Merriken v. Cressman* 364 F. Supp. 913, 918-19 (E.D. Pa. 1973) (noting "[t]he fact that the students are juveniles does not

The hodgepodge of varying state regulations and complex court decisions contributes to the understandable confusion suffered by minors who are forced to differentiate between their ability to engage in sexual activity with other minors, and the prohibitions on recording that same behavior using their cell phone cameras. One act may be completely outside the scope of legitimate governmental regulation, while the other can result in prosecution using some of the harshest laws known to the criminal justice system. It is therefore not hard to fathom why many teens are shocked to learn that sexting equates to child pornography in almost all states.

This confused state of affairs cries out for curative legislation to fairly balance the privacy and associational rights of teens to engage in some degree of intimate exploration and communication while coming of age with the governmental interest in deterring teens from making poor decisions that can embarrass and adversely impact them forever. Prosecutors, police and judges are in need of a viable alternative to child pornography laws — with attendant sex offender registration upon conviction — to redress sexting incidents. At the same time, some attention must be paid to the teens who have already been caught up in the judicial system and labeled as sex offenders for this increasingly commonplace, albeit foolish, behavior.

Failure to address these issues on an expedited basis puts more teens at risk of overkill prosecutions using laws designed to punish pedophiles. As a former Department of Justice cybercrime prosecutor explained, “The combination of poorly drafted laws, new technologies, draconian and inflexible punishments, and teenage hormones make for potentially disastrous results.”<sup>51</sup>

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in any way invalidate their Constitutional right to privacy” in rejecting a school’s attempt to ask highly personal family relationship questions).

51. Riva Richmond, *Sexting May Place Teens at Legal Risk*, *Gadgetwise* (Mar. 26, 2009, 12:00 PM), <http://gadgetwise.blogs.nytimes.com/2009/03/26/sexting-may-place-teens-at-legal-risk>.

### III. CHILD PORNOGRAPHY RESTRICTIONS – LAW & POLICY

Child pornography is one of the few categories of unprotected speech carved out by the Supreme Court.<sup>52</sup> In 1982, the Court rendered its landmark decision, *New York v. Ferber*,<sup>53</sup> holding that the government could ban child pornography even if it did not meet the obscenity standards laid out in *Miller v. California*.<sup>54</sup> However, very specific and limited grounds supported the compelling governmental interest necessary to justify the creation of this new category of unprotected speech.

First, the Court focused on the sexual exploitation and abuse of children that occurs during the actual production of pornographic materials.<sup>55</sup> The Court found a compelling state interest in “safeguarding the physical and psychological well-being of a minor.”<sup>56</sup> Holding that the “prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance,” the Court cited to both academic and legislative data showing that the use of children as subjects of pornography was harmful to the “physiological, emotional, and mental health of the child.”<sup>57</sup> Second, the Court found that the distribution of materials depicting sexual activity by minors is

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

53. *Id.*

54. *Miller v. California*, 413 U.S. 15, 24 (1973). The *Miller* Court set forth a three-prong test for obscenity:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* (citations omitted).

55. *Ferber*, 458 U.S. at 757.

56. *Id.* at 756-57 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

57. *Id.* at 757-58, n.9.

fundamentally correlated with the sexual abuse of children.<sup>58</sup> The images produced serve as a “permanent record” of the sexual abuse, “and the harm to the child is exacerbated by . . . circulation” of the images.<sup>59</sup> Furthermore, the Court explained that “the distribution network for child pornography must be closed” in an effort to effectively control the production of this material.<sup>60</sup> Finally, the Court, acknowledging that the protection of speech “often depends on the content of the speech,” weighed the value of the images against the resulting harms.<sup>61</sup> The Court concluded that the categorical prohibition of any depictions of children engaging in sexual activity or lewd display of genitals was justified because “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake[.]”<sup>62</sup>

The decision in *New York v. Ferber*<sup>63</sup> allowed the government to prosecute the creation and subsequent distribution of child pornography, but a few years later, the Court approved a statute criminalizing the mere possession of child pornography.<sup>64</sup> In upholding the ban on possession, the Court in *Osborne v. Ohio* sought to “protect the victims of child pornography [in] hopes to destroy a market for the exploitative use of children.”<sup>65</sup> The Court in *Osborne* concluded that if the objective is to prevent ongoing or future harm to the child victims, laws against the possession of these materials will eventually influence possessors to cease purchasing the materials or to dispose of the materials they already own.<sup>66</sup>

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58. *Id.* at 759.

59. *Id.*

60. *Id.* The Court discussed two other justifications for recognizing this category of unprotected speech: (1) that “enforceable production laws would leave no child pornography to be marketed” and (2) that there are only very rare occasions where “live performances and photographic reproductions” would be necessary, without an acceptable alternative, for literary or artistic purposes. *Id.* at 762.

61. *Id.* at 763 (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976)).

62. *Id.* at 763-64.

63. *Id.*

64. *Osborne v. Ohio*, 495 U.S. 103 (1990).

65. *Id.* at 109.

66. *Id.* at 111.

Therefore, the state was permitted to enforce the prohibition on the private possession of child pornography, in an effort to “decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.”<sup>67</sup>

The policy reasons underlying the prohibition on child pornography were clarified by the Supreme Court in *Ashcroft v. Free Speech Coalition*,<sup>68</sup> a 2002 case challenging an amendment to the federal child pornography statute prohibiting “virtual child pornography” that involves depictions of individuals that appear to be under eighteen, even if they were really adults.<sup>69</sup> In *Ashcroft*, the Court noted that the images prohibited by the statute “do not involve, let alone harm, any [real] children.”<sup>70</sup> In striking down the statute on First Amendment grounds, the Court discussed the limited nature of the exception from constitutional protection carved out by *Ferber*: “Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content.”<sup>71</sup>

Distinguishing the governmental interests identified in *Osborne*, the Court explained: “The Court, however, anchored its holding in the concern for the participants, those whom it called the ‘victims of child pornography.’ It did not suggest that, absent this concern, other governmental interests would suffice.”<sup>72</sup>

Finally, in invalidating the statute, the court noted: “In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the [statute] prohibits speech that records no crime and creates no victims by its production.”<sup>73</sup>

Any doubts as to the limits of *Ferber* and *Osborne*, pertaining to the policy justifications for child pornography

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67. *Id.* at 109-10. The Court also determined that the Ohio law at issue was not overbroad, relying on a narrowing interpretation of the law the Ohio Supreme Court had adopted in prior proceedings in the case. *Id.* at 111-15.

68. 535 U.S. 234 (2002).

69. *Id.* at 241.

70. *Id.*

71. *Id.* at 249.

72. *Id.* at 250 (citation omitted).

73. *Id.*

prohibitions, were laid to rest by the recent Supreme Court decision in *U.S. v. Stevens*,<sup>74</sup> where the Court made it clear that child pornography laws cannot be constitutionally applied in circumstances where no actual minor is sexually abused during the production of the material.<sup>75</sup> Accordingly, child pornography can only be stripped of its constitutional protection if it records actual sexual abuse of child victims.

One issue is whether common sexting behavior constitutes a record of child sexual abuse and whether the person depicted can be legitimately characterized as a victim. Instead of a pedophile coercing a child to engage in sexual activity on film, sexting usually involves a teenage couple exchanging nude or explicit images of each other as a means of flirtation or enticement.<sup>76</sup> Sometimes the images are sent as a joke or given as “gifts” by one partner seeking the intimate attention of another.<sup>77</sup> The images are rarely coerced, but instead involve willing participants.<sup>78</sup> Often, the producer and the recipient are close in age — both in their teens.<sup>79</sup> Such circumstances are vastly at odds with the common perception of child pornography production involving a pedophile forcing a young child to perform sex acts on camera. Particularly in the case of self-produced sexting images, there is no “sexual abuse” and no “victim” as those terms are commonly understood. While child pornography laws broadly prohibit any image depicting a minor engaged in the displaying of his or her genitals or in sexual activity, the underlying legal and policy justifications for imposing a blanket

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74. 599 U.S. \_\_\_, 130 S. Ct. 1577 (2010).

75. *Id.* at \_\_\_, 130 S.Ct. at 1586. Though *Stevens* was about animal cruelty, the Court discussed child pornography in the context of the Court’s refusal to create a First Amendment exception for videos depicting animal cruelty on the same rationale as the child pornography exception. *Id.*

76. SEX & TECH, *supra* note 4, at 4. “66% of teen girls and 60% of teen boys say they [sent sexting messages] to be ‘fun or flirtatious.’” *Id.*

77. *Id.* “40% of teen girls said they sent [the sexting messages] as ‘a joke’” and “52% [sent them] as a ‘sexy present’ for their boyfriend.” *Id.*

78. *Id.* Only 12% of teen girls claimed that sexting messages were sent because they felt “pressured.” *Id.* However, “[m]ore than 40% of teens and young adults . . . say ‘pressure from guys’ is a reason girls and women send and post sexually suggestive messages and images.” *Id.* at 2.

79. *Id. passim.*

ban on the production, possession, and transmission of such images are essentially absent with sexting behavior. Certainly, the lawmakers that passed child pornography statutes in the wake of *Ferber* and *Osborne* could not have anticipated a circumstance where the “victim” of the activity is contemporaneously the willing, sole “producer” of the material. Cell phones were the toys of the rich and famous at the time of these decisions. They did not have cameras or Internet access and were not routinely carried by teenagers. The advances in technology have leapfrogged over the law as it pertains to teen sexting.

One could legitimately argue that a sexting image is facially indistinguishable from “traditional” child pornography to the objective observer. But that analysis begs the question of who should be the objective observer of such images? Sexting images are created by teens, for teens, and not for adults or pedophiles. The dissemination of such images to, or the possession, reproduction, or redistribution by adults, might well be treated differently by the law than where such activity involves only teens. Just as teens have the privacy and associational rights to engage in sexual activity with other minors but not adults (in most circumstances) an argument can be made that teens should have the right to capture and share depictions of such activity with other teens but not with adults. Making these images generally available to the world of adults may give rise to a legitimate concern, given the desire to dry up the marketplace for child pornography as discussed in *Osborne*. But where the sexting images are consensually produced and shared exclusively with other teens, the policy concerns cited by the Supreme Court fail to materialize.

However, some activity that might be considered within the realm of sexting generates concerns that more closely match the justifications underlying child pornography laws. Sexting images that are produced through secret filming, duress, or coercion, and images that are intentionally distributed to adults, involve a different category of behavior than is found in the typical sexting case, and may need to be addressed through traditional child

pornography laws, harassment, or anti-voyeurism statutes.<sup>80</sup> A more nuanced question arises in the context of non-consensual distribution of sexting images to other teens. Such behavior is more common in sexting cases and involves primarily a breach of trust by the original recipient of the material. Such instances do not warrant the full force of child pornography sanctions but may justify an enhanced penalty or aggravated sexting offense.

#### IV. SEXTING LEGISLATION

According to the National Conference of State Legislatures, by September 2010, at least sixteen states and Guam had introduced or voted on, legislation reducing the penalties associated with sexting behavior by teens or decriminalizing the activity outright.<sup>81</sup> Additionally, at least five states, Vermont, Nebraska, Utah, Illinois, and Connecticut, had passed laws in response to the sexting phenomenon.<sup>82</sup> This legislative reform effort appears to be in direct response to recent prosecutions against teens using stringent child pornography laws — often resulting in sex offender registration upon conviction. This harsh, punitive approach in dealing with relatively ubiquitous juvenile behavior has caught the attention of child protection advocates,<sup>83</sup> legal experts,<sup>84</sup> media

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80. See, e.g., FLA. STAT. § 810.145 (2009) (defining “video voyeurism,” and prohibiting an individual from viewing, broadcasting, or recording “a person, without that person’s knowledge and consent, who is dressing, undressing, or privately exposing the body, at a place and time when that person has a reasonable expectation of privacy”).

81. NAT’L CONFERENCE OF STATE LEGISLATURES, 2010 LEGISLATION RELATED TO “SEXTING,” (2010), <http://www.ncsl.org/default.aspx?tabid=19696> [hereinafter STATE LEGISLATURES].

82. For a discussion of the Illinois and Connecticut laws, see *id.* For a discussion of the Vermont, Nebraska, and Utah laws, see *infra* pp. 116-121.

83. Online child safety advocate, Parry Aftab, Executive Director of WiredSafety.org, has called for a uniform federal law dealing with sexting behavior, calling existing laws “too hot or too cold.” *Lawyer Wants Federal Sexting Law*, UPI, Apr. 1, 2009, [http://www.upi.com/Top\\_News/2009/04/01/Lawyer-wants-federal-sexting-law/UPI-79331238644351/](http://www.upi.com/Top_News/2009/04/01/Lawyer-wants-federal-sexting-law/UPI-79331238644351/).

84. 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 (2009).

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personalities,<sup>85</sup> and politicians<sup>86</sup> across the country, who are beginning to recognize that existing child pornography laws go too far in punishing teen sexting. Even the victim in a sexting case, who was harassed and bullied over a risqué image sent to her boyfriend, agreed that sex offender registration is too harsh a penalty for sexting.<sup>87</sup> Slowly, the evolution of public perception of the sexting issue is forcing the law to catch up with the technology.

On June 1, 2009, James Douglas, the governor of Vermont, signed into law a wide-ranging teen sexting bill.<sup>88</sup> The original incarnation of the bill created quite a stir among lawmakers and the public, as it sought to completely decriminalize sexting.<sup>89</sup> However, after vast public outcry, believing the law to be too lenient, Vermont legislators amended the original bill to create an exception to state child pornography laws instead of total decriminalization of sexting.<sup>90</sup> The law now decriminalizes the act of sexting for first time offenders only.<sup>91</sup> The Vermont sexting statute specifies that a minor who “knowingly and voluntarily . . . use[s] a computer or electronic communication device to transmit an indecent visual depiction of himself or herself to another person,” shall not be prosecuted for sexual exploitation of a child

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85. Geraldine Sealey, What Gets Whoopi Goldberg Upset: Sexting!, SMITTEN (April 9, 2010, 3:49 PM), <http://www.glamour.com/sex-love-life/blogs/smitten/2010/04/what-gets-whoopi-upset-sexting.html>). Whoopi Goldberg admitted that she “got very upset” about sexting and the case involving Phillip Alpert, a convicted sex offender as a result of a sexting incident. *Id.*

86. See, e.g., John Frank, *House Bill Eases Up on Penalties for ‘Sexting,’* ST. PETERSBURG TIMES, Mar. 23, 2010, at 1B, available at 2010 WLNR 6041553. Florida state representative Joseph Abruzzo stated: “We shouldn’t be labeling our children sexual predators from this type of behavior.” *Id.*

87. *The View* (ABC television broadcast Feb. 16, 2010) (a victim of sexting, and guest on the show, commenting on the punishment imposed by Florida authorities on Phillip Alpert for sexting).

88. VT. STAT. ANN. tit. 13, § 2802b (2009).

89. See Mary Graw Leary, *The Right and Wrong Responses to “Sexting,”* THE WITHERSPOON INSTITUTE, PUBLIC DISCOURSE: ETHICS, LAW, AND THE COMMON GOOD, May 12, 2009, <http://www.thepublicdiscourse.com/2009/05/227>.

90. Calvert, *supra* note 84, at 57.

91. tit. 13, § 2802b(b).

nor subject to sex offender registration.<sup>92</sup> If a minor knowingly and voluntarily transmits indecent visual depictions a second time, then he or she may be prosecuted for sexual exploitation of a child.<sup>93</sup> Most importantly, the Vermont law mandates that sexting offenses be handled in the juvenile court system; excludes any obligation to register as a sex offender (even for repeat offenders); and allows for expunction of any resulting record upon the minor coming of age.<sup>94</sup> Upon a subsequent charge, juveniles may receive some form of increased punishment, however, the juvenile will never be required to register as a sexual offender, so long as their actions fall under traditional sexting acts.<sup>95</sup>

Importantly, the prosecution protection of the Vermont statute only applies to auto-pornographic (i.e., self-produced) images.<sup>96</sup> Therefore, if a teen produces an image which depicts another individual, even with the consent of all parties, Vermont's child pornography laws may be utilized. While Vermont's law addresses one aspect of sexting, self-production, it does not address other common sexting behaviors such as productions involving others or transmission of the images.

In 2009, Nebraska responded to the sexting phenomenon by passing an expansive criminal bill that included provisions relating to juvenile sexting.<sup>97</sup> The Nebraska sexting statute, much like Vermont's, carves out narrow exceptions to provide leniency to sexting teens. However, seemingly unintentionally, the law does not apply in cases that most commonly arise, and amplifies penalties when unnecessary.

Sexting typically involves two scenarios: Often a teenager creates and then shares a nude, semi-nude, or explicit image or

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92. tit. 13, § 2802b.

93. tit. 13, § 2802b(b)(3).

94. tit. 13, § 2802b(b)(2)-(4).

95. tit. 13, § 2802b(b)(3).

96. tit. 13, § 2802b(a)(1).

97. NEB. REV. STAT. § 28-1463 (Supp. 2009). The criminal bill, originally Legislative Bill 97, was signed into law by Governor Dave Heineman on May 27, 2009.

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video, usually with a romantic partner.<sup>98</sup> The other circumstance involves the distribution of images, such as those referenced above, with third parties — commonly after a break-up or dispute.<sup>99</sup> The Nebraska statute makes a clear distinction between those two scenarios, and precludes criminal liability for a teen (under eighteen) who sends an explicit photo of himself or herself to a recipient who is at least fifteen years of age.<sup>100</sup> However, if that recipient later shares the sexting image(s) with others, he or she could face criminal prosecution under traditional child pornography or obscenity laws.<sup>101</sup> Thus, Nebraska has drawn an important legal distinction between self-produced images sent to a willing viewer, and subsequent distribution of those images to third parties. In the latter circumstance, the child could still face felony charges under existing child pornography statutes, ultimately resulting in possible imprisonment and sex offender registration.<sup>102</sup>

Nebraska's approach illustrates the legal and conceptual difficulty facing lawmakers in many states considering sexting legislation. Where is the line to be drawn between teen folly and willful, malicious embarrassment to the individual depicted at the hands of one originally in consensual possession of a sexting image? Cases such as the one involving Jessica Logan, who committed suicide after being harassed about a sexting image she sent to her

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98. Nancy Willard, *TEACHING INTERNET SAFETY IN SCHOOL*, Nancy Willard's Weblog, Mar. 20, 2010, <http://csriu.wordpress.com/2010/03/20/teaching-internet-safety-in-school/>; *see also* Nancy Willard, *Sexting Investigation and Intervention Protocol*, CENTER FOR SAFE AND RESPONSIBLE INTERNET USE, [http://www.csriu.org/documents/sextinginvestigationandintervention\\_000.pdf](http://www.csriu.org/documents/sextinginvestigationandintervention_000.pdf) (last visited Oct. 31, 2010).

99. *Id.*

100. NEB. REV. STAT. § 28-1463.03 (Supp. 2009).

101. *Id.*

102. NEB. REV. STAT. § 28-813.01(3) (Supp. 2009) (creating an affirmative defense to a charge of possession of child pornography); NEB. REV. STAT. § 28-1463.03(5)-(6) (Supp. 2009) (creating an affirmative defense to a charge of creation and distribution of child pornography). However, Nebraska law does not provide an affirmative defense to a person who "knowingly possess[es] with intent to rent, sell, deliver, distribute, trade, or provide to any person any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers." NEB. REV. STAT. § 28-1463.05 (Supp. 2009).

boyfriend,<sup>103</sup> force lawmakers to consider the potentially dangerous consequences associated with some sexting behavior, thus militating in some level of punishment to deter such behavior in teens.

This same struggle played out in the numerous revisions of Utah's House Bill 14, entitled "Materials Harmful to Minors," prior to it becoming law.<sup>104</sup> Utah legislators ultimately decided on a simpler route, opting to amend the already-in-place penalties for offenses dealing in materials harmful to a minor. Under the amendment, any person over eighteen years old, committing the prohibited acts (including sexting) would be subject to felony charges, whereas the minors who violate these laws are subject to only misdemeanors.<sup>105</sup> The statute requires that minors sixteen to seventeen years old be charged with a Class A misdemeanor if caught sexting or distributing pornographic material or dealing in material harmful to a minor.<sup>106</sup> For the same actions, minors under sixteen years of age can be charged with a Class B misdemeanor.<sup>107</sup> Notably, Utah statutes use the *Miller*<sup>108</sup> obscenity test in defining both "harmful materials"<sup>109</sup> and "pornography."<sup>110</sup> Therefore,

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103. Mike Celizic, *Her Teen Committed Suicide Over "Sexting,"* PARENTING ON TODAY, Mar. 6, 2009, <http://today.msnbc.msn.com/id/29546030>.

104. H.B. 14, 2009 Leg., Gen. Sess. (Utah 2009), *available at* <http://www.leg.state.ut.us/~2009/bills/hbillint/HB0014.htm>.

105. UTAH CODE ANN. § 76-10-1206 (Supp. 2010).

106. *Id.*

107. *Id.*

108. *Miller v. California*, 413 U.S. 15, 24 (1973) (creating the "Miller test").

109. UTAH CODE ANN. § 76-10-1206(1) (Supp. 2010). The code states:

A person is guilty of dealing in material harmful to minors when, knowing or believing that a person is a minor, or having negligently failed to determine the proper age of a minor, the person intentionally: (a) distributes or offers to distribute, or exhibits or offers to exhibit, to a minor or a person the actor believes to be a minor, any material harmful to minors; (b) produces, performs, or directs any performance, before a minor or a person the actor believes to be a minor, that is harmful to minors; or (c) participates in any performance, before a minor or a

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Utah, in theory, exempts non-obscene sexting images from prosecution.

Most other states that considered sexting legislation used the aforementioned sexting laws as examples for their own statutory language.<sup>111</sup> Two states, Colorado and Oregon, decided to

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person the actor believes to be a minor, that is harmful to minors.

*Id.*

110. *Id.* The code defines pornography:

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

111. *Id.* See, e.g., STATE LEGISLATURES, *supra* note 81. Oklahoma, Connecticut, Kentucky, Mississippi, Pennsylvania, Rhode Island, and South Carolina are all in the process of drafting some form of sexting legislation. *Id.* Kentucky considered a teen sexting statute that defined the conduct as a misdemeanor and exempted the teen from adult prosecution. See H.B. 57, 2010 Leg., Reg. Sess. (Ky. 2010), available at <http://www.lrc.ky.gov/record/10RS/HB57.htm>. Pennsylvania has legislation pending to treat the act of teen sexting as a misdemeanor or alternatively a summary defense. See S.B. 1121, 2009 Gen. Assem., Reg. Sess. (Pa. 2009), available at

<http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2009&sind=0&body=H&type=B&BN=2189>. South Carolina has legislation pending to treat teen sexting as a misdemeanor and to require completion of an educational program. See H.B. 4504, 2010 Gen. Assem., 118th Sess. (S.C. 2010), available at [http://www.scstatehouse.gov/sess118\\_2009-2010/bills/4504.htm](http://www.scstatehouse.gov/sess118_2009-2010/bills/4504.htm). Once the program has been successfully completed, the offender's record will be expunged. *Id.* States like Ohio, Indiana, Arizona, and North Dakota have partially passed sexting laws or the laws have been chaptered and are waiting for governor approval to be signed into law. See, e.g., STATE LEGISLATURES, *supra* note 81. The applicable Ohio bill is as follows: Sec. 2907.324:

(A) No minor, by use of a telecommunications device, shall recklessly create, receive, exchange, send, or possess a photograph, video, or other material that shows a minor in a state of nudity. (B) It is no defense to a charge under this section that the minor creates, receives, exchanges, sends, or possesses a photograph, video, or other material

take the route followed by Utah and simply amend their existing criminal code to include sexting behavior as a new offense.<sup>112</sup> Other states, such as California and Indiana, appear to be more hesitant to take a definite stance on the sexting controversy.<sup>113</sup> Instead, these states chose the more neutral route of acknowledging the sexting problem among teens and calling on legislators to recognize this in various ways ranging from sentencing study committees to educational programs but stopped short of drafting law on the subject.<sup>114</sup>

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that shows themselves in a state of nudity. (C) Whoever violates this section is guilty of illegal use of a telecommunications device involving a minor in a state of nudity, a delinquent act that would be a misdemeanor of the first degree if it could be committed as an adult.

H.B. 132, 128th Gen. Assem., Reg. Sess. (Ohio 2009), *available at* [http://www.legislature.state.oh.us/bills.cfm?ID=128\\_HB\\_132](http://www.legislature.state.oh.us/bills.cfm?ID=128_HB_132). Arizona's Senate is considering Senate Bill 1266 which makes it a misdemeanor for a minor to, "intentionally or knowingly use an electronic communication device to transmit or display a visual depiction of a minor that depicts explicit sexual material." S.B. 1266, 49th Leg., 2nd Reg. Sess. (Ariz. 2010), *available at* <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/sb1266s.htm>. North Dakota passed a bill making it a misdemeanor to "surreptitiously create[] or willfully possess[] a sexually expressive image that was surreptitiously created" or to disseminate a sexually expressive image with either "the intent to cause emotional harm or humiliation" or after being given notice that the subject or the subject's parents do not consent to dissemination of the image. N.D. CENT. CODE § 12.1-27.1-03.3 (Supp. 2009).

112. COLO. REV. STAT. §§ 18-3-306, 18-3-405.4 (2009); OR. REV. STAT. §§ 163.431- 163.434 (2010).

113. *See e.g.*, A.C.R. 100, 2010 Assem., Leg. Sess. (Cal. 2010), *available at* [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_0051-0100/acr\\_100\\_bill\\_20100201\\_amended\\_asm\\_v98.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0051-0100/acr_100_bill_20100201_amended_asm_v98.html); A.B. 8622, 2009 Assem., Reg. Sess. (N.Y. 2009), *available at* <http://assembly.state.ny.us/leg/?bn=A08622>;

A.B. 1560, Gen. Assem., 214th Leg. Sess. (N.J. 2010), *available at* [http://www.njleg.state.nj.us/2010/Bills/A2000/1560\\_I1.HTM](http://www.njleg.state.nj.us/2010/Bills/A2000/1560_I1.HTM); A.B. 1561, Gen. Assem., 214th Leg. Sess. (N.J. 2010), *available at* [http://www.njleg.state.nj.us/2010/Bills/A2000/1561\\_I1.HTM](http://www.njleg.state.nj.us/2010/Bills/A2000/1561_I1.HTM); A.B. 1562, Gen. Assem., 214th Leg. Sess. (N.J. 2010), *available at* [http://www.njleg.state.nj.us/2010/Bills/A2000/1562\\_I1.HTM](http://www.njleg.state.nj.us/2010/Bills/A2000/1562_I1.HTM); S.R. 90, 116th

Gen. Assem., Reg. Sess. (Ind. 2009), *available at* <http://www.in.gov/legislative/bills/2009/SRESF/SR0090.html>.

114. *Id.*

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Other recent bills pushed the ball further down the field, picking up where Vermont left off by completely decriminalizing sexting acts when committed by minors. Initially, there were three states, Illinois, Connecticut, and Florida, vying to be the first to publicly decriminalize sexting behavior. While both the Florida House and Senate passed a proposed sexting law in spring 2010, a final bill never made its way to the Governor for signature.<sup>115</sup> The Florida bills would have made a first time sexting offense by a minor a non-criminal infraction, punishable by a small fine and a few hours of community service. Subsequent offenses would carry misdemeanor, and, ultimately, felony, penalties.<sup>116</sup> Although the Florida legislative efforts failed in the 2010 Session, Illinois and Connecticut were successful in their reform efforts.

On March 3, 2010, an Illinois sexting bill was passed by the House and Senate,<sup>117</sup> and on July 19, 2010, the bill was signed into law by Governor Pat Quinn.<sup>118</sup> Illinois Senator Ira Silverstein called the new legislation a much-needed intervention, saying, “Sometimes these kids don’t understand what they’re doing, make

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115. See H.B. 1335, 2010 Leg., 113th Reg. Sess. (Fla. 2010), available at [http://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?FileName=\\_h1335\\_.docx&DocumentType=Bill&BillNumber=1335&Session=2010](http://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?FileName=_h1335_.docx&DocumentType=Bill&BillNumber=1335&Session=2010); S.B. 2560, 2010 Leg., 113th Reg. Sess. (Fla. 2010), available at [http://www.flsenate.gov/Session/index.cfm?Mode=Bills&SubMenu=1&Tab=session&BI\\_Mode=ViewBillInfo&BillNum=2560&Chamber=Senate&Year=2010&Title=-%3EBill%2520Info%3AS%25202560-%3ESession%25202010](http://www.flsenate.gov/Session/index.cfm?Mode=Bills&SubMenu=1&Tab=session&BI_Mode=ViewBillInfo&BillNum=2560&Chamber=Senate&Year=2010&Title=-%3EBill%2520Info%3AS%25202560-%3ESession%25202010). Even after unanimous approval by the House Public Safety and Domestic Security Committee, the Florida sexting bill died in committee in the House of Representatives and died in messages in the Senate. *Id.* See also Op-Ed., ‘Sexting’ isn’t child porn: Florida law should make the distinction., PALM BEACH POST, Mar. 24, 2010, available at <http://www.palmbeachpost.com/opinion/editorials/sexting-isnt-child-porn-florida-law-should-make-440494.html>.

116. *Id.*

117. See H.B. 4583, 96th Gen. Assem., Reg. Sess. (Ill. 2010), available at <http://www.ilga.gov/legislation/96/HB/PDF/09600HB4583lv.pdf>; S.B. 2513, 96th Gen. Assem., Reg. Sess. (Ill. 2010), available at <http://www.ilga.gov/legislation/96/SB/PDF/09600SB2513lv.pdf> (amending the 1961 Criminal Code).

118. See Kevin Lee, *Quinn Signs “Sexting” Law*, ILL. STATEHOUSE NEWS, July 29, 2010, <http://illinois.statehousenewsonline.com/3699/quinn-signs-sexting-law/>.

a mistake, and it follows them for life. So we don't want that in their record."<sup>119</sup> The bill aimed at minors who use electronic devices to share nude or semi-nude images of other teens. If found guilty under this statute, the minor faces no criminal charges but will receive mandatory juvenile court supervision, most likely resulting in counseling or some form of community service. Furthermore, the statute focuses on subsequent distribution of the sexting images, specifically to individuals not romantically linked to the depicted individual. Lawmakers say the bill was never intended to contradict so-called "Lovebird" exceptions to sexting, affecting minors who send or receive sexting images between themselves.<sup>120</sup> The Illinois legislature has made it clear that the primary focus of the legislation is on third party distribution of sexting images.

Following the lead of Illinois, the Connecticut legislature passed a sexting bill that was signed by Governor M. Jodi Rell and went into effect on October 1, 2010.<sup>121</sup> The law, titled "An Act Concerning Sexting," is as clear-cut as its name. The new law provides prosecutors with an alternative to using child pornography laws when the offense involves teens under the age of eighteen who commit acts of sexting.<sup>122</sup> Under pre-existing Connecticut law, as with most other states, sending or receiving messages that include sexual images falls under the purview of the state's general child pornography statutes.<sup>123</sup> Persons convicted under such laws, including juveniles, are required to register with the state's sex

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119. Michele Manchir, 'Sexting' Students Would Earn Scolding Under State Measure, CHI. TRIB., Mar. 18, 2010, [http://newsblogs.chicagotribune.com/clout\\_st/2010/03/sexting-students-would-earn-scolding-under-state-measure.html](http://newsblogs.chicagotribune.com/clout_st/2010/03/sexting-students-would-earn-scolding-under-state-measure.html).

120. See *Sexting: The Ineffectiveness of Child Pornography Laws*, JUV. JUST. E-NEWSL. (Am. Bar Ass'n Crim. Just. Sec., Chicago, Ill.) June 2009, available at <http://www.abanet.org/crimjust/juvjust/newsletterjune09/june09/sexting.htm> (noting that "Romeo and Juliet" exceptions to laws, also known as "Lovebird" exceptions, are provisions that allow juveniles of roughly the same age to sext legally).

121. H.B. 5533, Reg. Sess. 2010 (Conn. 2010), available at <http://cga.ct.gov/2010/FC/2010HB-05533-R000567-FC.htm>.

122. See *id.* at § 1.

123. See Ros Krasny, *Bill Would Lessen Teen Sexting Charge*, REUTERS, Mar. 23, 2010, <http://www.reuters.com/article/idUSTRE62M35L20100323>.

offender registry. Connecticut's new law allows teens to be charged with a misdemeanor when the sexting involves individuals over thirteen years of age but under eighteen years of age.<sup>124</sup>

Here, sexting images are still categorized as child pornography under state law. However, the law now provides an affirmative defense if the defendant's offense involved sexting via the "electronic transmission or possession of child pornography by persons 13 to 17 years old."<sup>125</sup> The law creates a class A misdemeanor offense for the depiction and the transmission of child pornography, so long as the sender is the subject of the depiction and both the sender and recipient are thirteen to seventeen years old.<sup>126</sup> Importantly, juvenile defendants convicted of sexting in Connecticut do not have to register as sex offenders.<sup>127</sup> Although state sexting laws all vary in one manner or another, numerous states have keyed in on the need for legislative reform. Legislators are starting to see the unjust result of disproportionately harsh laws applied in the sexting context. Child pornography laws were drafted to address the serious problem of child sex abuse, not teen sexting. Other states are encouraged to take notice of the societal change unfolding before them — it is no longer acceptable for prosecutors to apply criminal sanctions meant for adults to adolescent sexting conduct.

## V. MODEL SEXTING LAW

The current prevailing practice of prosecuting teen sexting as sex offenses transforms the laws designed to protect children into potent weapons against them. Society cannot justify turning one in five teenagers into sex offenders, simply because of the way that

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124. *See* H.B. 5533, 2010 Gen. Assem., Reg. Sess. (Conn. 2010) (enacted).

125. *Id.* (noting in the Bill Summary that "[w]hile the bill provides that the misdemeanor applies to 13- to 17- year olds, by law, child pornography involves children under age 16").

126. *See id.*

127. *See id.*

they communicate their intimate emotions.<sup>128</sup> Continuing that practice will leave us with a generation of branded criminals who are unable to find employment, engage in normal friendships and romantic relationships, or raise families. Even those teens who are not involved with sexting behavior will develop a distrust — possibly a hatred — of law enforcement and a judicial system that has turned on their friends and intimate partners with tremendous force and brutality. Alienating a substantial portion of the developing population will take a significant toll on the socio-economic structure of this country as this disenfranchised segment of the population ages into adulthood. Teens should be allowed to make mistakes and learn from those mistakes by suffering appropriate consequences. However, punishing juveniles for engaging in sexting by treating them as sex offenders and child pornographers exacts an excessive and unnecessary punishment that is inconsistent with the rehabilitative goal of the juvenile justice system.

On the other hand, society in general and law enforcement, in particular, has a legitimate interest in stemming the distribution of child pornography, which has become rampant on the Internet — particularly via peer-to-peer networks.<sup>129</sup> Pedophiles will not necessarily discern any difference between a self-produced image of a minor originally intended for an intimate partner and one resulting from force, coercion, and abuse by an adult. The end product is the same, thus justifying some effort to deter the production in the first instance and to discourage the dissemination of these images — particularly in cyberspace. In the hands of an unscrupulous adult, the images can be circulated and reproduced as readily and endlessly as any other child pornographic image.

Therefore, the development of model legislation addressing sexting requires a careful balancing of these various competing concerns. Where a choice must be made, lawmakers must err on

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128. *SEX & TECH*, *supra* note 4, at 2 (finding that 20% of teens “say they have sent/posted nude or semi-nude pictures or videos of themselves”).

129. *See* LINDA D. KOONTZ, COMM. ON GOV’T REFORM, FILE-SHARING PROGRAMS: CHILD PORNOGRAPHY IS READILY ACCESSIBLE OVER PEER TO PEER NETWORKS 2 (2003), *available at* <http://www.gao.gov/new.items/d03537t.pdf>.

the side of protecting the interests of the potential juvenile defendant. While the effort to stem the production and market for child pornography is laudable, that goal must give way where accomplishing it requires turning common teenage folly into sex offenses and thus bringing potentially devastating, lifelong punishment. The need for adopting sexting laws as an alternative to prosecution under existing child pornography statutes is evident, but the scope and consequences set forth in such legislation are issues that will confront more and more lawmakers as their constituents recognize the urgent necessity of reform.

The typical sexting bill defines the act of “sexting” and provides an alternative to reliance on child pornography laws, thus precluding sex offender treatment or registration obligations. But, as always, the devil is in the details.

Several specific concerns present themselves when drafting sexting legislation. These include the following:

1. What age group should be covered by the law? Should the law make any distinctions between the relative ages of the defendant and the person depicted in the subject image, if those are different people?
2. What specific activity or depictions should the law cover?
3. Should the law address production, possession and/or dissemination of the images?
4. If dissemination is included in the legislation, should the scope of the law be limited to dissemination of the images to minors, individuals believed to be minors, or both minors and adults?
5. Should the law make any distinctions based on the consent, or lack thereof, by the individual(s) depicted in the subject image? If so, should the age of consent track the age of consent for sexual activity?

6. Should the law make any distinctions between first offenses, and repeat offenses?
7. What is the appropriate range of penalties to be imposed by the legislation? Should a violation be considered a criminal offense, a juvenile offense or a non-criminal infraction? Should the penalties be increased for subsequent offenses?
8. Should prosecutors be prohibited from using other potentially applicable child pornography laws if the offense meets the definition of “sexting?”
9. Should defendants who engaged in “sexting” as defined by the new law, before it was adopted, be afforded any relief, including possible removal from the sex offender registry?

Each of these factors will be discussed individually:

*Age Group:*

The intuitive position regarding the age group to be covered by any new sexting legislation is any minor under the age of eighteen. However, this may not be broad enough, as many eighteen year olds are still in high school and regularly associating with minors in the same way as their underage acquaintances. Accordingly, sexting laws should apply to teens who are eighteen or younger. Another consideration in connection with age is the potential disparity in age between the defendant and the individual(s) depicted in the subject image. The “Romeo and Juliet” exemption used by the federal child sex offender registry<sup>130</sup>

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130. The federal sex offender registry in its current state was implemented under the Sex Offender Registration and Notification Act. Sex Offender Registration and Notification Act, 42 U.S.C. § 16902 (2008). SORNA, as it is often called, is Title I of the Adam Walsh Child Protection and Safety Act of 2006. Adam Walsh Child Protection & Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections

provides that the defendant may seek removal from the sex offender list only if the defendant is no more than four years older than the “victim” of the offense.<sup>131</sup> This provides a workable structure for imposition of different penalties based on age disparity restrictions in model sexting laws.

*Covered Images/Content:*

As a starting point, any model sexting legislation should cover images that involve the lascivious display of a minor’s genitals or pubic area or which depict actual sexual conduct, tracking the definition of “child pornography” under federal law.<sup>132</sup> Images of minors which do not involve genital nudity or sexual activity are not illegal under federal law and any attempt to ban such depictions under state law would be constitutionally suspect under the First Amendment.<sup>133</sup> Therefore, to adequately and constitutionally address the continuum of activity commonly depicted in sexting images, the legislation should cover both genital nudity and consensual sexual activity, utilizing the definition of “sexual conduct” under federal law.<sup>134</sup>

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of 42 U.S.C.). SORNA provides a comprehensive set of minimum standards for sex offender registration and notification in the United States. *See infra* notes 147-59 and accompanying text.

131. 42 U.S.C. § 16911(5)(C) (2006). Under this exemption, the victim must be at least thirteen years old. *Id.*

132. *See* 18 U.S.C. § 2256(2) (2006) (defining “sexually explicit conduct” as “actual or simulated: (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person”).

133. *See* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239 (2002) (holding that a law that “extend[ed] the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children” was unconstitutionally overbroad); *see also* *New York v. Ferber*, 458 U.S. 747, 764 (1982) (“There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment.”).

134. *See* § 2256(2).

*Production, Possession & Dissemination:*

One of the most difficult issues that lawmakers confront when drafting sexting legislation is whether to include both production and distribution (i.e., transmission) of the sexting image within the scope of the covered conduct. Self-production should certainly fall within the ambit of the bill, as there is no true “victim” with self-produced material. The same is true where the material is produced by another minor and both parties consent. While consent is discussed more fully below, limiting the coverage of production to consensual production would exempt images that are surreptitiously acquired, or those where the individual depicted is forced or compelled to pose for the photography. While consensually-produced images may fall within the traditional notion of child pornography, no child sexual abuse is recorded in the production of the material, as required by relevant Supreme Court precedent carving out child pornography from the protection of the First Amendment.<sup>135</sup> This, coupled with the degree of privacy rights enjoyed by minors in connection with intimate relationships,<sup>136</sup>

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135. *Cf.* *United States v. Stevens*, 599 U.S. \_\_\_, \_\_\_, 130 S.Ct. 1577, 1586 (2010) (finding that child pornography falls outside the protection of the First Amendment); *Ashcroft*, 535 U.S. at 250 (observing that there is a relationship between the production and possession or purchase of child pornography and harm to children); *Ferber*, 458 U.S. at 758 (holding that participation in the production of pornography causes sufficient damage to the emotional, psychological and mental health of a child so as to be proscribed under the First Amendment).

136. While the Supreme Court has not directly decided the issue, several cases point to the notion that there is a constitutional protection for minors to engage in intimate relationships. *See supra* note 50 (discussing minors’ rights to bodily and personal privacy); *see also* *Ginsberg v. New York*, 390 U.S. 629, 637-39 (1968) (discussing when government restrictions distinguishing minors from adults may be constitutionally permissible, but noting that minors do have constitutional rights that are balanced against the rights of parents and the interests of the state); *B.B. v. Florida*, 659 So. 2d 256, 259 (Fla. 1995) (finding that the right to privacy in the Florida constitution encompasses the right of minors to engage in intimate relationships); *cf.* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that adults’ decisions to engage in private, consensual sexual activity are liberty interests protected under the due process clause, but noting that this holding does not apply to minors); *Tinker v. Des*

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militates in favor of treating self-produced material as something different than child pornography. Outright decriminalization may not be the appropriate answer but neither is punishment as child pornography.

Simple possession by minors who are not the person depicted is the next step in the analysis. Private possession of self-produced images should be covered by the sexting legislation for the same reasons that production is covered. As sexting cases often arise from the creation and sharing of erotic images by and between individuals in a romantic relationship with each other, covering possession by these individuals would make logical sense if the sexting law is designed to address typical sexting behavior. Unfortunately, a definitional problem arises in any attempt to describe the class of persons whose possession would be covered by the statute. Teenage relationships, often called “hook-ups,” can be fleeting and difficult to categorize.<sup>137</sup> Attempting to limit the scope of possession under sexting laws to those involved with some type of intimate relationship would be a losing battle and subject to vagueness challenges under the due process clause of the Fourteenth Amendment. Accordingly, any attempt to limit the categories of persons covered by the statute, based on their involvement in some sort of relationship with the person depicted in the image, should be discarded in favor of simple age restrictions outlined above. Again, where a judgment call is to be made, the legislature should err in favor of protecting teens from inordinate punishment under sex offender laws.

Restrictions on transmission or dissemination are the most difficult of the three activities discussed in this section. In order for the usual sexting scenario to be effectively addressed, the model statute should cover some degree of transmission, because at a

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Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506-07 (1969) (recognizing First Amendment rights for minors in public schools and noting that the regulations must be “consistent with fundamental constitutional safeguards”).

137. The “hook up” culture prevalent among young people is characterized by lack of structure or rules. *See generally* LAURA SESSIONS STEPP, UNHOOKED: HOW YOUNG WOMEN PURSUE SEX, DELAY LOVE AND LOSE AT BOTH (2007) (discussing the “hook up” culture prominent among teens and college students today).

minimum, the sexting image will likely have been transmitted from the producer to his or her intimate partner. A more complicated question arises when the images are transmitted to friends, acquaintances, contact lists, or even the public at large. Some of the ultimate recipients may be adults or individuals who have no relationship with the producer or the producer's initial intended recipient. In other instances, the sender may not know the age(s) of the recipient(s) or may believe the recipient to be a minor, when the recipient is in fact an adult. Including an unlimited range of recipients within model sexting legislation may result in adult pedophiles using minors as the source of child pornography, since the minor would be insulated from prosecution under child pornography laws and the pedophile could thereby acquire child pornography with limited risks to the minor. However, the minor being manipulated by the pedophile should not be punished more harshly in this circumstance than in other sexting circumstances, and may actually be less at fault. Moreover, the focus of the punishment in such instance should be on the pedophile, not the minor, and the pedophile's activity would almost certainly be covered by existing child pornography laws relating to aiding and abetting or conspiracy.<sup>138</sup> Importantly, the nature of online communications renders the ability to gain actual knowledge of the identity or age of a recipient difficult if not impossible, unless the sender knows that individual personally. All of these considerations require a balanced approach to the issue, where the minor's intent is taken into consideration and penalties are enhanced if sexting images are willfully sent to adults.

*Consent:*

Consent becomes relevant in two distinct ways. The first inquiry is whether the individual depicted in the image consented to its production. Examples of lack of consent include secretly-filmed material or images that are the result of force or coercion by the photographer or a third party. The second inquiry is whether the individual depicted in the sexting image consented to its

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138. See 18 U.S.C. §§ 2, 371 (2006).

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dissemination, if dissemination is the offense at issue. The usual sexting case does not involve images that are surreptitiously produced. The appropriate law or penalty for such behavior is beyond the scope of this article, however, it may be that such behavior by teens should also be handled in the juvenile justice system, and a separate statute may be required given the distinct considerations applicable to such behavior. For purposes of a model sexting statute, the production should be consensual. Determining whether the production is consensual may be problematic since minors are generally not permitted to provide legal consent to filming<sup>139</sup> and cannot consent to sexual activity until they have reached a certain age, which varies from ten to eighteen, depending on the state law and the specific sexual activity involved.<sup>140</sup> Importantly, not all sexting images involve sexual activity, as some are limited to nudity or partial nudity. At some point, however, minors would be too young for any valid consent to be provided for explicit photography. Although no bright line can be drawn for consent in every circumstance and each state may decide to address this consent cutoff differently, depending on the applicable age of consent for sexual activity, for purposes of developing a model statute that is protective of both the potential defendants facing sex offender charges and the individuals photographed in the images, 'consent' (for purposes of triggering sexting laws) can be provided by minors over the age of thirteen. Since the model sexting law calls for some penalties for sexting behavior, consent does not form a defense to all culpability but instead triggers application of the sexting statute as opposed to harsh child pornography laws.

*Repeat Offenses:*

Minors involved in a first-time sexting offense may well have misapprehended the potential seriousness of their activity under traditional child pornography laws. They may not even have

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139. See *Lane v. MRA Holdings, L.L.C.*, 242 F. Supp. 2d 1205, 1216-19 (M.D. Fla. 2002) (discussing the capacity of a minor to consent to filming for a *Girls Gone Wild* video under Florida law).

140. See GLOSSER ET AL., *supra* note 35, at 6-7.

realized that the sexting behavior was illegal before getting caught. But after first-time penalties, whatever they may be, are imposed, the equities change with respect to subsequent offenses. The juvenile can no longer claim that he or she was ignorant of the illegality of the sexting activity. The penalties for repeat offenses should be increasingly strict but should never trigger sex offender treatment or registration.

*Penalties:*

Perhaps the most controversial issue facing state legislators is the range of appropriate penalties to impose on minors engaging in sexting behavior. Reasonable individuals can differ as to what constitutes an effective deterrent for teens and how dramatically those penalties should be increased for repeat offenses. While outright decriminalization has been considered or adopted by some states for certain sexting behavior, imposing no penalty ignores the need to deter the creation of the material in the first instance so that it does not enter the marketplace for consuming pedophiles or cause the damage and embarrassment that can potentially result if an image intended for private consumption by teen couples is released to third parties, including friends and family. Accordingly, the model sexting law should impose some non-criminal consequence focused on educating and deterring first-time offenders with repeat offenders suffering increasingly serious penalties.

*Preemption of Child Pornography Laws:*

The model sexting law provides an alternative vehicle for dealing with sexting behavior by teens. However, minors may still be exposed to prosecution for child pornography violations and attendant sex offender registration unless prosecutors and judges are required to proceed under the sexting law if applicable conditions regarding consent and age are met. In fact, as noted by some commentators, creation of new sexting offense statutes (without some attendant preemption on application of child pornography laws) could make matters worse, since children could

be subject to charges for a new crime while continuing to be exposed to prosecution for child pornography offenses, thereby widening the net and potentially resulting in more juveniles being charged and ending up with a criminal record. The intent of sexting legislation should be to protect children from overzealous prosecutors and law enforcement officers, so that they are not processed by the criminal justice system as pedophiles and subject to having their futures devastated by lengthy terms of incarceration, probation, and registration. The passage of voluntary sexting laws may have little or no impact if police and prosecutors march down the traditional road of using child pornography statutes. Some may not even be aware of the law's adoption or may philosophically disagree with it for personal reasons. In this instance, prosecutorial discretion should be limited, and the sexting law should preempt application of child pornography laws. Sexting statutes are adopted to address a specific offense committed by teens and should be the exclusive choice for law enforcement when pursuing a charge involving teen sexting.

*Removal for Sex Offender Registry for Convicted Juveniles:*

The fact that the law did not catch up with society and technology for several years should not work to the detriment of teens already prosecuted and convicted of sexting offenses. It would be manifestly unfair to provide legislative relief to juveniles on a go-forward basis while leaving those juveniles convicted of sexting under child pornography laws to struggle with the undeserved brand of "sex offender" for decades or even for the rest of their lives. Any meaningful reform will require the model sexting law to amend existing state sex offender registration laws to relieve juveniles who were forced to register due to sexting behavior of the continuing registration obligation. Such amendment would not constitute an unconstitutional retroactive application of the law, since registration requirements involve a continuing duty to re-

register and any amendment would apply only to the obligation of prospective re-registration.<sup>141</sup>

Based on the above considerations, the following Model Sexting Statute is proposed:

### **An Act Relating To Sexting by Juveniles**

#### **I. Definitions:**

A. “Sexting Image” as applied to this statute is an image, video or other graphic media:

1. That involves one or more actual human beings under the age of eighteen (18);
2. Engaging in consensual, actual sexually explicit conduct as defined by Title 18 U.S.C. § 2256.

B. “Teen” for purposes of this statute is a person who is aged eighteen (18) years or younger.

#### **II. Offenses**

A. “Sexting” for the purposes of this statute occurs when a Teen:

1. Uses a computer, cellular phone, or any other electronic device capable of data transmission or distribution, to create, produce, distribute to, or exchange with, another person, any photograph, video or other graphic media containing a Sexting Image; or

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141. *See* United States v. Clayton, 372 F. App'x 296, 298 (3d Cir. 2010) (noting that the focus of the federal sex offender registration law is prospective); *see also* Givens v. Florida, 851 So. 2d 813, 814 (Fla. Dist. Ct. App. 2003) (holding that retroactive application of an amendment to sex offender registration requirements is constitutional).

2. Possesses, distributes or transmits a Sexting Image that was transmitted or distributed by another person believed to be a Teen.

A. “Aggravated Sexting” occurs when:

1. A Teen transmits or distributes a Sexting Image to another person believed to be a Teen, without the consent of the person depicted in the Sexting Image; or,

2. A Teen produces, transmits or distributes a Sexting Image of another Teen who is more than four (4) years younger than the Teen offender.

A. Penalties

1. A Teen who violates Section II(A) of this statute:

a. For a first offense, commits a non-criminal infraction punishable by community service and a mandatory diversionary program, which shall include fines in the amount of up to \$100; an educational program approved by the state regarding cyber safety and harassment; and community service up to eight (8) hours.

b. For a second offense, commits a (petit/second degree/lowest) misdemeanor offense punishable pursuant to state law.

c. For a third and subsequent offense, commits a (first degree/highest) misdemeanor punishable pursuant to state law.

2. A Teen who violates Section II(B) of this statute:

a. For a first offense, commits a (petit/second degree/lowest)misdemeanor.

b. For a second offense, commits a (first degree/highest) misdemeanor offense punishable pursuant to state law.

c. For a third and subsequent offense, commits a (third degree/petit/lowest) felony punishable pursuant to state law.

3. It is the intent of the Legislature that prosecution of minors for violations of this statute occur in juvenile court; that any discretion be exercised in favor of prosecution in juvenile court; and that the juvenile court retain broad discretion in imposing appropriate penalties including an adjudication of delinquency, where warranted by the facts and circumstances of the case.

4. Where a sexting offense meets the definition of this statute, it is the intent of the Legislature to preempt applicability of, and prosecution under, other statutes [cite appropriate sections of state law] dealing with child pornography, obscenity, or harmful material.

5. A Teen prosecuted or convicted under this statute shall not be subject to the sex offender registration requirements of [cite state registration statute].

### III. Impact on Prior Convictions and Registration Obligations

Any person who was required, prior to the effective date of this statute, to register as a sexual offender or predator based on conduct meeting the definition of sexting or aggravated sexting under Section II and who was eighteen (18) years or younger at the time of the offense shall be relieved of any

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continuing obligation to register or re-register as a sex offender pursuant to [cite state law registration statute]. A person meeting the requirements of this section shall further be permitted to petition the court which imposed the original conviction and sentence for an order requiring the Department [reference applicable state agency] to immediately remove the Teen from the sex offender registry. The Department shall expeditiously comply with all orders relating to removal of qualifying Teens from the sex offender registry, and file with the court, within ten (10) days of its receipt of such order, a certificate of removal confirming timely compliance.

The model sexting statute permits consideration of intent, scope of distribution, consent of the person depicted, and the relative ages of the individuals involved in determining both the substantive charge and the penalties to be imposed on the offender. The statute seeks to strike a balance between the need to deter sexting behavior among teens through imposition of some consequence for first-time offenders (including an educational requirement so offenders can learn the state of the law and what is likely to happen if they repeat the offense) and the goal of tempering the reaction of the judicial system to increasingly commonplace teen behavior. The proposed law intends to allow first-time offenders to avoid a criminal conviction while still educating them that the behavior is illegal and must not be repeated. Subsequent offenses will carry criminal penalties including conviction and potential incarceration. Through this graduated approach, teens may be more likely to curb their behavior while not suffering disastrous legal consequences that may prevent them from functioning as productive members of society for years to come. At the same time, the model statute recognizes that real harm can come from non-consensual transmission of intimate images shared between couples, or from older teens taking

advantage of substantially younger minors, and imposes immediate criminal sanctions in such circumstances.

Changing the law regulating sexting in all fifty states is a herculean effort, but this reform is off to an admirable start. As more lawmakers, judges, parents, and legal scholars begin to understand the reality of teenage communication and sexual expression in the Digital Age, additional states will pass legislation designed to strike an appropriate balance. The proposed statute is certainly not the only solution, and lawmakers may experiment with some that are better and worse as they struggle to address this vexing social problem. However, a call to action is imperative to prevent more children from ending up like Phillip Alpert of Florida, who will be a registered sex offender at least until he is forty-three and possibly for life. According to risk-prevention practitioners, using “fear-based” approaches in attempts to curtail teenage behavior like sexting simply does not work.<sup>142</sup> Thus, the arguments for continuing to rely on outdated child pornography laws to deter teens from sexting, and thereby punishing behavior that the laws were never intended to address, lack merit. Teens will not avoid sexting, despite the life-shattering penalties associated with a child pornography conviction. As responsible stewards of the law, legislators cannot allow more teens to suffer eternal consequences for a teenage mistake.

## VI. THE FEDERAL PROBLEM

Before meaningful legislative reform can occur at the state level, a concern with federal law must be addressed. Failure to do so will forever sentence those juveniles already convicted as sex offenders under child pornography to a lifetime of shame and misery.

In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, commonly known as the Jacob Wetterling Act, which conditions

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142. ONLINE SAFETY AND TECH. WORKING GROUP, YOUTH SAFETY ON A LIVING INTERNET 16 (2010), *available at* [http://www.ntia.doc.gov/reports/2010/OSTWG\\_Final\\_Report\\_060410.pdf](http://www.ntia.doc.gov/reports/2010/OSTWG_Final_Report_060410.pdf).

federal law enforcement funding on states' adoption of mandatory sex offender registration laws.<sup>143</sup> By 1996, every state had enacted some kind of sex offender registration procedure to comply with the requirements of the Jacob Wetterling legislation, including so-called "Megan's Law" public notification provisions.<sup>144</sup> In response to several high-profile cases involving sex offenders, Congress revised the statute to intensify the registration requirements for sexual offenders.<sup>145</sup> On July 27, 2006, "without empirical data, sound statistics, reasoning, or research,"<sup>146</sup> the Adam Walsh Child Protection and Safety Act (AWA) was signed into law.<sup>147</sup>

As discussed below, the AWA contains troublesome provisions pertaining to the determination of which defendants are to be labeled as sex offenders. While the impact of these restrictions may be unintentional, since sexting was not a prevalent concern when the law was passed, portions of the AWA categorically prohibit those convicted of sexting offenses from even seeking to be

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143. See 42 U.S.C. § 14071 (2008); see also *Smith v. Doe*, 538 U.S. 84, 89–90 (2003) (discussing the Jacob Wetterling Act and the states' adoption of sex offender registration laws). The Jacob Wetterling Act requires every state to implement federal sex offender registration requirements. § 14071(a)(1). States that do not meet the federal standard of compliance risk losing a percentage of the federal funding provided to state and local law enforcement. § 14071(g)(2).

144. See *Smith*, 538 U.S. at 89–90.

145. See Lori McPherson, *Practitioner's Guide to the Adam Walsh Act*, UPDATE (Nat'l Ctr. for Prosecution of Child Abuse, Alexandria, Va.), 2007, at 1, available at [http://www.ojp.usdoj.gov/smart/pdfs/practitioner\\_guide\\_awa.pdf](http://www.ojp.usdoj.gov/smart/pdfs/practitioner_guide_awa.pdf).

146. Brittany Enniss, Note, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 702 (2008) (citing Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 6–7 (2008)).

147. Adam Walsh Child Protection & Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 42 U.S.C.); see also Enniss, *supra* note 146, at 702 n.49 ("Upon signing the comprehensive piece of legislation, President Bush echoed the purpose of the Act in stating, '[o]ur society has a duty to protect our children from exploitation and danger. By enacting this law we're sending a clear message across the country: those who prey on our children will be caught, prosecuted and punished to the fullest extent of the law.'").

removed or excluded from the registration list. Absent an amendment of this federal statute, the states will be unable, as a practical matter, to effectively address the harsh punishments doled out to children already convicted of sexting offenses under traditional child pornography laws.

The AWA includes numerous provisions relating to child sex abuse.<sup>148</sup> Most relevant to the sexting issue is Title I of the Act, which creates the Sex Offender Registration and Notification Act (SORNA).<sup>149</sup> SORNA calls for a national sex offender registry that requires convicted offenders to provide their name, address, date of birth, place of employment, and a photograph to be publicly posted on the Internet.<sup>150</sup> SORNA also develops a three-tiered sex offender classification system based on nature of the offense, without consideration of the societal risks or past criminal history, and does not differentiate between violent and nonviolent offenders.<sup>151</sup> Tier 3, the most serious tier, requires offenders to

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148. See Adam Walsh Child Protection & Safety Act § 1.

149. Sex Offender Registration and Notification Act, 42 U.S.C. § 16902 (2008).

150. 42 U.S.C. § 16914(a). § 16914(a) requires the sex offender to provide information to the appropriate official. *Id.* However, SORNA also requires the jurisdiction that the sex offender registers in to include the following information in the sex offender registry:

- (1) A physical description of the sex offender.
- (2) The text of the provision of law defining the criminal offense for which the sex offender is registered.
- (3) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.
- (4) A current photograph of the sex offender.
- (5) A set of fingerprints and palm prints of the sex offender.
- (6) A DNA sample of the sex offender.
- (7) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.
- (8) Any other information required by the Attorney General.

§ 16914(b).

151. See 42 U.S.C. § 16911(1)-(4) (2008) (replacing the previous sex offender registration system that was based on the offender's risk of re-offense).

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update their whereabouts every three months<sup>152</sup> with lifetime registration requirements.<sup>153</sup> Tier 2 offenders must update their information every six months<sup>154</sup> with twenty-five years of registration.<sup>155</sup> Tier 1 offenders, which includes juveniles as young as fourteen years old,<sup>156</sup> must update their whereabouts every year<sup>157</sup> with fifteen years of registration.<sup>158</sup> Additionally, SORNA obligates offenders to make periodic in-person appearances to verify certain information they provide.<sup>159</sup> Failure to register and update information as an offender belonging to any tier is a separate felony.<sup>160</sup>

To assist the federal government in its execution of SORNA, Congress established the SMART Office.<sup>161</sup> SMART was created to administer the particular set of national standards created by SORNA for sexual offender registration and notification and to assist jurisdictions in their implementation of these requirements.<sup>162</sup> Despite the government's well-intentioned actions in the creation of the AWA, the law has received more than its share of criticism. According to one law review author, the AWA with SORNA "was created by emotion, not logic; by celebrities, not

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152. 42 U.S.C. § 16916(3) (2008).

153. 42 U.S.C. § 16915(3) (2008).

154. § 16916(2).

155. § 16915(2).

156. § 16911(8); *see also* Enniss, *supra* note 146, at 704 (noting "[t]his means juveniles, fourteen and older, that 'engage in genital, anal or oral-genital contact with children younger than 12' will be convicted and 'listed on community notification registries which alert the public to the names, addresses and other identifying information of convicted sex offenders and predators" (quoting Editorial, *Juvenile Justice; Issue: State Law Now Requires Young Teens Convicted of Sex Crimes to Register as Offenders*, SUN-SENTINEL, Aug. 15, 2007, at 30A)).

157. § 16916(1).

158. § 16915(1).

159. *See* § 16916.

160. 18 U.S.C. §2250(a) (2008).

161. *See generally* SMART: Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, <http://www.ojp.usdoj.gov/smart> (last visited Oct. 31, 2010) (describing the SMART office).

162. *See id.* (follow "About SMART" link).

lawmakers; by fancy rhetoric, not sound reasoning; and by the fear of being seen as soft on child predator crime.”<sup>163</sup>

The primary concern with SORNA, as it pertains to sexting, is the severe set of restrictions imposed on anyone seeking to be excluded or removed from a state (or federal) sex offender registry. The Act allows defendants to petition for removal from a registry only if: (1) the offense involved “consensual sexual conduct;” (2) the victim was an adult; or (3) the victim was at least thirteen years old and the offender was not more than four years older than the victim.<sup>164</sup> Congress made it clear that it intended to provide an exception for consensual conduct among youth engaging in sexual activities – the so-called “Romeo and Juliet” offenders.<sup>165</sup>

The above-referenced exemption becomes problematic when applied to a sexting offense. Pushing a button on a cellular phone or keyboard is not likely considered to be “consensual sexual conduct” as it is not “sexual conduct” at all. One federal appeals court, in upholding the required registration of a sex offender, held that the digital transfer of illegal material (in that case, obscenity) did not involve “consensual” sexual activity under the meaning of the SORNA exemption.<sup>166</sup> Therefore, sexting offenders charged with child pornography production, possession, or distribution will not be permitted to seek removal or exclusion from the state or federal sex offender registries until this provision of SORNA is amended to include *all* consensual activity, including sexting as defined in the Model Sexting Statute,<sup>167</sup> not just consensual *sexual* activity.<sup>168</sup> Even if a state were to adopt new legislation permitting a defendant to seek removal from the sex offender registry for a

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163. Enniss, *supra* note 146, at 702 n.50.

164. 42 U.S.C. § 16911(5)(C) (2008) (defining “consensual sexual conduct” that is not a sex offense).

165. *See id.*

166. *See* United States v. Crain, 321 F. App’x 329, 333-34 (4th Cir. 2009) (unpublished per curiam decision) (upholding the district court’s use of discretion in requiring the defendant to register as a sex offender rather than requiring registration pursuant to SORNA).

167. Notably, non-consensual production of sexting images is excluded from the scope of the Model Statute proposed above. *See supra* p. 136.

168. *See* § 16911(5)(C).

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sexting offense, federal law would preempt the judge's discretion in allowing such removal.<sup>169</sup> This illustrates the necessity of addressing both state and federal law before complete relief can be afforded to juveniles forced to register for sexting behavior.

Notably, at least one federal appeals court found that requiring juveniles to register based on pre-SORNA conduct was unconstitutional, particularly given excessive punishment imposed on juveniles forced to register, thus suggesting that these provisions of the AWA are vindictive with respect to juveniles.<sup>170</sup> Indeed, the court in that case observed: "As a society, we generally refuse to punish our nation's youth as harshly as we do our fellow adults, or to hold them to the same level of culpability as people who are older, wiser, and more mature."<sup>171</sup> This basic principle of the juvenile justice system is subverted when laws such as SORNA impose severe punishment on juvenile offenders for conduct which, if it involved adults, would constitute harmless flirtation at best, and at worst a civil violation of the victim's publicity or privacy rights. Many adults routinely exchange risqué messages, including images of themselves and others, via electronic devices. When adults engage in that activity no criminal offense occurs, while similar conduct by juveniles often results in the harshest punishments reserved only for the worst child molesters and pedophiles.<sup>172</sup>

The AWA could be unconstitutional in an even more disturbing way, as a violation of the juvenile's right to not be

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169. *See Miller v. Florida*, 17 So. 3d 778, 779 (Fla. Dist. Ct. App. 2009). Although removal from the state sex offender registry was a possibility under Fla. Stat. 943.04354 (2007), defendant, Brian Miller, was denied his petition. *Id.* The Fifth District Court of Appeals found that removing the defendant from the sex offender registration list would conflict with federal law (SORNA). *Id.*

170. *United States v. Juvenile Male*, 590 F.3d 924, 938 (9th Cir. 2010). The circuit court held that "the retroactive application of SORNA's juvenile registration and reporting requirement violated the Ex Post Facto Clause of the United States Constitution." *Id.* at 942.

171. *Id.* at 926.

172. Non-obscene, sexually-explicit images of adults have historically been treated as constitutionally-protected speech. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002); *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

subject to cruel and unusual punishment.<sup>173</sup> A significant constitutional concern under the Eighth Amendment's prohibition on cruel and unusual punishment is generated by applying SORNA to minors. A similar concern was recently addressed by the Supreme Court in *Graham v. Florida*, which held that sentencing an individual to life imprisonment without parole for a non-homicide crime committed before that individual reached the age of eighteen violates the Eighth Amendment of the Constitution.<sup>174</sup> Parallels can be drawn between this decision and the application of SORNA to sexting behavior. SORNA prohibits any sexting offender (whether juvenile or adult) from seeking removal from the sex offender registry because the crime did not involve sexual conduct. This leads to the absurd result of punishing those defendants who pushed a button on a cell phone more harshly than those who penetrated a minor's sex organ. Disproportion of this magnitude could rise to the level of cruel and unusual punishment under the *Graham* decision.

In sum, the registration provisions of the AWA are manifestly unfair and illogical when applied to sexting by teen offenders. Teens who have been convicted of child pornography offenses arising from this behavior are forced to register as sex offenders, in some cases for life. While the individual states may be able to amend their sex offender registration laws to provide some prospective relief for teens who are forced by existing statutes to register and re-register on a regular basis,<sup>175</sup> such legislative reform will not provide true relief unless the nationwide registration requirements and restrictions imposed by federal law are addressed.

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173. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

174. *Graham v. Florida*, 560 U.S. \_\_\_, \_\_\_, 130 S. Ct. 2011, 2034 (2010).

175. The registration requirements under SORNA and similar state laws are prospective in nature, since re-registration is required on an ongoing basis. Accordingly, amending the registration requirements to allow previously convicted juveniles to petition for removal from the sex offender registry would not implicate any retroactivity concerns. *See United States v. Clayton*, 372 F. App'x 296, 298 (3rd Cir. 2010).

As noted above, the AWA was passed in 2006, when image capture by the average cell phone was in its infancy. The term “sexting” had not made it into the common vernacular yet. Restricting the “Romeo and Juliet” exception to consensual sexual behavior may have made some degree of sense at the time, but much has changed since 2006. Juveniles now commonly communicate through powerful, complex handheld devices that are increasingly used to send pictures and video, thus enhancing the depth of their erotic messages. Amending SORNA is entirely reasonable given the advances in technology and the change in social norms surrounding teen communication; this can be done simply by including sexting within the existing exemptions contained in SORNA. So the final piece of the puzzle that fixes the sexting problem is amending federal law to allow teens to petition for removal from the sex offender list in any state where sexting laws are passed, if their offense involved sexting behavior as defined in the Model Sexting Statute.

## VII. CONCLUSION

While judges, prosecutors, police officers, and parents may have been shocked when they first heard that teens use their cell phones to send intimate pictures of themselves to each other, Americans became more astounded when they learned that these juveniles were being prosecuted as sex offenders, imprisoned, and forced to register as sex offenders for much, if not all, of their adult life. This overreaction by the judicial system has received appropriate national attention and has resulted in a collective plea for reason and balance in addressing this new teenage trend. Lawmakers in many states will be called upon to weigh the many considerations that enter into the drafting of appropriate legislation to address sexting behavior. Traditional child pornography laws were not intended to punish kids for taking risqué pictures of themselves and sharing the pictures with their boyfriends and girlfriends. The penalties associated with such laws, particularly the lengthy sex offender registration obligations, harm our children far more than they help. The proposed solution outlined in this article results from a careful weighing of the many factors that arise in

sexting cases. While outright decriminalization of some aspects of sexting activity may be an option to be considered, an appropriate middle ground can be found by imposing non-criminal penalties for first-time offenders with no aggravating circumstances, and punishing repeat offenders, offenders substantially older than the “victim,” and offenders who distribute images without the consent of the person(s) depicted with harsher sanctions. In no event should those penalties include sex offender registration for juveniles.

While emerging social problems are never easy to fix, the roadmap set forth in this article provides the basis for a reasoned approach to a complicated issue. Until these or similar steps are taken at the state and federal levels, our children continue to be exposed to life-destroying criminal prosecutions for increasingly commonplace behavior.