

When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case

by
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I. Introduction

It seems that in 2009, the definitive way one knows a legal issue in the United States is important is when it is featured on one of those “ripped-from-the-headlines”¹ episodes of Dick Wolf’s highly successful legal drama series, *Law & Order: Special Victims Unit*.²

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1. See Don Kaplan, *A Change in the ‘Law’: Wolf’s ‘Sex Crimes’ Morphs Into ‘Special Victims Unit,’* N.Y. POST, May 17, 1999, at 78 (quoting Dick Wolf for the proposition that *Law & Order: Special Victims Unit* “will deal with issues against women, against children and adults There are going to be certain *stories ripped from the headlines* and certain stories that are generated just by criminal topics that we want to explore. It’s all going to be topical, contemporary, hard-hitting and intelligent.”) (emphasis added).

2. See generally Lisa M. Cuklanz & Sujata Moorti, *Television’s “New” Feminism: Prime-Time Representations of Women and Victimization*, 23 CRITICAL STUD. IN MEDIA COMM. 302, 302–03 (2006) (describing the show as “a scripted series devoted to crimes of sexual assault and rape,” noting that “with its ‘ripped from the headlines’ storylines *SVU* centers on cases undertaken by a police unit modeled after the New York Police Department’s Special Victims Unit,” and contending that “*SVU* is both similar to and different from the original title series, *Law & Order*, which combines the genres of the cop

Such was the case with sexting, described by the *Washington Post* recently as “sending sexually explicit photos by cellphone”³ and “the growing trend among young people of sending sexually explicit photos and text messages.”⁴ *Law & Order: Special Victims Unit* aired an episode focusing on sexting in May 2009.⁵

There certainly were many real-life headlines—headlines with sometimes sensational stories and editorials below them about a steamy combination of teens, sex and cell phones—in major newspapers across the country in early 2009 from which the writers of *Law & Order: Special Victims Unit* could pen an episode. These articles included: *The New York Times*: “Pennsylvania: Judge Blocks Charges in Cell Phone Case”⁶ and “Students Sue Prosecutor in Cellphone Photos Case,”⁷ *USA Today*: “To Deal with ‘sexting,’

show and the legal drama” because “SVU episodes rarely include a trial and although most of its narratives end with the positive identification of the perpetrator, some conclude with the criminal still at large.”).

3. Donna St. George, *Sending of Explicit Photos Can Land Teens in Legal Fix*, WASH. POST, May 7, 2009, at A1.

4. Erica Garman, *Here's a New Way To Get Into Serious Trouble*, WASH. POST, Apr. 5, 2009, at Extras LZ3.

5. *Law & Order: Special Victims Unit: Crush* (NBC television broadcast May 5, 2009). Twenty different recaps of this episode are available on the NBC website, with the first recap available at http://www.nbc.com/Law_and_Order_Special_Victims_Unit/about/recaps.shtml#cat=10&mea=10020&ima=64900 (last visited Sept. 11, 2009). A clip of this episode is available on the NBC website at http://www.nbc.com/Law_and_Order_Special_Victims_Unit/video/clips/crush-505-clip-2/1096565 (last visited Sept. 11, 2009); Mike McGinley, *TV Show Mirrors Area Local Headlines*, TIMES LEADER (Wilkes-Barre, Pa.), May 7, 2009, available at http://www.timesleader.com/news/TV_show_mirrors_area_legal_headlines_05-07-2009.html (last visited Sept. 11, 2009) (describing the episode in question as bringing “to mind the recent controversy in Tunkhannock involving the seriousness of ‘sexting,’” and noting that, in real life, “Wyoming County District Attorney George Skumanick Jr. recently threatened to press felony charges against 20 Tunkhannock Area High School students for appearing in or trading provocative cellphone photos that were eventually sent to classmates.”); Emily Yahr, *Television*, WASH. POST, May 5, 2009, at C6 (reporting that it “looks like the producers of ‘Law & Order: SVU’ (Channel 4 at 10) saw the headlines about the ‘sexting’ trend, because this episode centers on a teenage girl charged with distributing child pornography after sending naked pictures of herself via text message.”).

6. Sean D. Hamill, *Pennsylvania: Judge Blocks Charges in Cell Phone Case*, N.Y. TIMES, Mar. 31, 2009, at A15 (reporting that “a federal judge in Scranton issued a temporary order preventing the Wyoming County district attorney from filing criminal charges against three teenage girls accused of sending nude or seminude photos on a cellphone, or ‘sexting’” after “the girls and their mothers, represented by the American Civil Liberties Union of Pennsylvania, sued the district attorney, George P. Skumanick, arguing that by threatening to prosecute the girls for being in photos he considered ‘provocative’ he was violating their constitutional rights.”).

7. Sean D. Hamill, *Students Sue Prosecutor in Cellphone Photos Case*, N.Y. TIMES, Mar. 26, 2009, at A21 (reporting, in a sensational first paragraph, that “when a high school cheerleader in northeastern Pennsylvania learned that she might face criminal charges

XXXtra discretion is advised”⁸ and “Teens caught ‘sexting’ face porn charges,”⁹ *Chicago Tribune*: “The Perils of Teen Sext,”¹⁰ *Philadelphia Inquirer*: “‘Sexting’ Overkill,”¹¹ *Pittsburgh Post-Gazette*: “Sexting... and other stupid teen tricks,”¹² and *San Francisco Chronicle*: “Are lots of teens ‘sexting’? Experts doubt it.”¹³

What makes sexting so ripe for legal discussion is that it represents a social and technological phenomenon that has outstripped the law, as “there seems to be little or no agreement among authorities on how to proceed when sexting cases cross their desks.”¹⁴ Like trying to jam square pegs into round holes, some prosecutors are attempting to apply traditional child pornography laws¹⁵—laws ostensibly designed to protect minors from sexual abuse

after investigators reported finding a nude photo of her on someone else’s cellphone, she was more confused than frightened at being caught up in a case of ‘sexting’ . . .”).

8. Ben O’Brien, Editorial, *To Deal with ‘Sexting,’ XXXtra Discretion is Advised*, USA TODAY (McLean, Va.), May 5, 2009, at 10A (opining that “for a disturbingly large minority of teenagers, the combination of technology, hormones and stupidity has led to a practice called ‘sexting,’ the cellphone texting of sexually explicit photos, often of themselves.”).

9. Wendy Koch, *Teens Caught ‘Sexting’ Face Porn Charges*, USA TODAY (McLean, Va.), Mar. 11, 2009, at 1A (reporting that “a growing number of teens are ending up in serious trouble for sending racy photos with their cellphones,” and adding that “police have investigated more than two dozen teens in at least six states this year for sending nude images of themselves in cellphone text messages, which can bring a charge of distributing child pornography. Authorities typically are notified by parents or schools about ‘sexting.’”).

10. Editorial, *The Perils of Teen Sext*, CHI. TRIB., Apr. 20, 2009, at News 24 (noting that “for a teen, the consequences can go well beyond the embarrassment of appearing naked on every cell phone in physics class. A nude image loose in cyberspace can torpedo a college application or a job search; worse, it can end up in the hands of a sexual predator.”).

11. Editorial, *‘Sexting’ Overkill*, PHILA. INQUIRER, Apr. 6, 2009, at A10 (noting that “fully one-fifth of teenagers and a third of young adults in their early 20s have told pollsters that they have sent sexually suggestive text messages—so-called *sexting*—or posted nude or seminude photos of themselves on the Web.”).

12. Sally Kalson, *Sexting... and Other Stupid Teen Tricks*, PITTSBURGH POST-GAZETTE, Mar. 29, 2009, at G-3 (asserting that “[i]t’s long past time for parents to teach their kids about the responsible use of technology from a young age, and for schools to institute mandatory courses on the subject,” and contending that “when adults discover teens sending around racy pictures of themselves anyway, they ought to use all their brain cells before moving to criminalize it.”).

13. Justin Berton, *Are Lots of Teens ‘Sexting’? Experts Doubt It*, S.F. CHRON., Mar. 21, 2009, at A1.

14. Editorial, *Flirting With ‘Sexting’ Remedy*, LANCASTER NEW ERA (Pa.), Apr. 3, 2009, at A8.

15. Under federal statutory law, child pornography is defined as:

any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or

committed by adults¹⁶—to charge minors themselves with creating, possessing, and disseminating child pornography.¹⁷ For instance, in January 2009, three high-school girls from Westmoreland County, Pennsylvania, “were charged with manufacturing and disseminating or possessing child pornography after they allegedly sent nude or seminude cell phone pictures of themselves to three male classmates. The boys, ages 16 and 17, were charged with possession of child pornography for having the images on their phones.”¹⁸

The application of child pornography laws to sexting cases involving teenagers, although perhaps technically permissible under the letter of those laws,¹⁹ has led, in some instances, to backlash

produced by electronic, mechanical, or other means, of sexually explicit conduct, where (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

18 U.S.C. § 2256 (2006 & Supp. 2008).

The term “sexually explicit conduct” used within this federal statutory definition of child pornography means:

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited; (ii) graphic or lascivious simulated; (I) bestiality; (II) masturbation; or (III) sadistic or masochistic abuse; or (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person.

Id.

16. See Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL’Y & L. 505, 517 (2008) (observing that in the context of a law journal article that never uses the term “sexting,” that “the legislatures which authorized severe penalties for production and distribution of child pornography did not have in mind cases in which minors produce pornographic images of themselves.”).

17. See Monitor’s Editorial Board, Editorial, ‘*Sexting*’ *overreach*, CHRISTIAN SCI. MONITOR (Boston, Mass.), Apr. 28, 2009, at 8 (observing that “legal action on sexting is moving rapidly. At least 20 prosecutions have been undertaken or threatened in recent months—some involving criminal child-pornography laws that could list convicted teens as sex offenders.”) (emphasis added).

18. Chris A. Courogen et al., *Police Call 3 Teen Girls’ ‘Sexted’ Photos ‘Dumb Stuff,’* PATRIOT-NEWS (Harrisburg, Pa.), Jan. 30, 2009, at A1.

19. See Smith, *supra* note 16, at 513 (noting that most child pornography laws “clearly do not exempt cases where minors produce or disseminate pornographic images of themselves. They plainly apply to any pornographic depictions of a minor. It makes no difference, from a definitional standpoint, whether or not the child pornography was produced by the minor featured in the images[.]” and observing that “minors who create

against prosecutors.²⁰ That is because, as the editorial board of one newspaper recently observed, teens that engage in sexting often “think it’s all in innocent, good, clean fun—or for some, part of a mating ritual,”²¹ while the draconian application of child pornography laws can brand teens as sex offenders.²² Child pornography, of course, falls outside the scope of First Amendment²³ protection,²⁴ namely because of the harms that befall the minors who are victimized by the adults that create it.²⁵

Many teens seem to be engaging in sexting. One survey, conducted on behalf of both ComsoGirl.com magazine and the National Campaign to Prevent Teen and Unplanned Pregnancy, found that 20 percent of the 653 teenagers surveyed had engaged in

or distribute pornographic images of themselves can be convicted of child pornography offenses, no less than adults who traffic in such images of minors.”).

20. See Courtney Blanchard, *Sexting flashes across nation, tri-states*, TELEGRAPH HERALD (Dubuque, Iowa), Apr. 21, 2009, at A6 (describing a “backlash against prosecuting sexting under child pornography laws[.]” and noting that “[s]exting isn’t defined in law, so prosecutors look at a range of different codes from harassment to child pornography laws. Those who go with the latter charge might spark controversy when they delegate juveniles to the sex offender registry.”).

21. Editorial, *Law, civility lag behind ‘sexting,’* FLINT J. (Mich.), Apr. 29, 2009, at A8.

22. See Editorial, *There are Sex Crimes, Then There’s Sexting*, ROANOKE TIMES, Mar. 23, 2009, at A14, available at LEXIS 196194860 (asserting that “[s]exting among underage peers should not be classified as a sex offense[.]” despite the fact that “[i]f the subject is under 18 years old, what they are doing is, by definition, producing, possessing, and distributing child pornography, felonies that can brand them as sex offenders.”).

23. The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than eight decades ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

24. The U.S. Supreme Court has held that the distribution and possession of child pornography is not protected by the First Amendment. See *United States v. Williams*, 128 S. Ct. 1830, 1836 (2008) (writing that “[w]e have held that a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment[.]” and that “we have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults.”).

25. See *New York v. Ferber*, 458 U.S. 747, 756–59 (1982) (noting that “prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance[.]” observing that the “distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children[.]” and concluding that “[t]he legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.”).

sexting.²⁶ With so many teens sexting, the legal problem becomes, as one recent law journal article asserted, that “[p]rosecutors and law enforcement, battling the misuse of emerging technology by teenagers, must find a way to balance the need to eliminate the harms of child pornography and punish the people who create it with the need to protect offending teenagers from unwittingly committing a serious and punishable offense.”²⁷ Some states, in fact, in 2009 were considering legislation to address the sexting phenomenon.²⁸

To provide a better and unique perspective on sexting and the legal issues it raises for teenagers, this article provides an inside and in-depth examination of one sexting case. In particular, it addresses the case of a Floridian named Phillip Alpert, who “was convicted of child pornography charges for, in a moment of anger, distributing nude images of his ex-girlfriend, 16. He was 18 at tha [sic] time, and is now a registered sex offender.”²⁹ The official “Sexual Offender/Predator Flyer” of Alpert created by the Florida Department of Law Enforcement, replete with a color photo of Alpert and available online for anyone to see, describes his offense as sending child pornography.³⁰ The article is based on exclusive, in-person interviews conducted by the authors with both Alpert and his current attorney, Lawrence Walters,³¹ in Altamonte Springs, Florida, on May 8, 2009, at Walters’ office.³²

26. NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1 (2008), http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf (last visited Sept. 11, 2009).

27. Jesse Michael Nix, Study Note, *Unwholesome Activities in a Wholesome Place: Utah Teens Creating Pornography and the Establishment of Prosecutorial Guidelines*, 11 J. L. & FAM. STUD. 183, 185 (2008) (note that this student note, while addressing the sending of images via cell phones, never uses the term sexting).

28. See, e.g., *Digest Government*, ST. LOUIS POST-DISPATCH, May 14, 2009, at A3 (noting that in Missouri, “[s]exting” could become a misdemeanor for minors—With almost no debate, the Missouri Senate attached an amendment outlawing ‘sexting’ among minors to an omnibus crime bill . . .”); St. George, *supra* note 3, at A1 (reporting that “[i]n Vermont and Ohio, lawmakers have drafted sexting-related bills.”).

29. Kristin Tillotson, *Risky Pictures*, STAR TRIB. (Minneapolis, Minn.), Apr. 25, 2009, at 1E.

30. Phillip Michael Alpert, Florida Department of Law Enforcement - Sexual Offender/Predator Flyer, <http://offender.fdle.state.fl.us/offender/flyer.do?personId=60516> (last visited Sept. 11, 2009).

31. Firm Bio, Lawrence G. Walters, Managing Partner, Weston, Garrou, Walter & Mooney, available at <http://www.firstamendment.com/qualifications.php3> (last visited Sept. 11, 2009). In his official biography on his law firm’s website, Walters is described as a partner in the national law firm of Weston, Garrou, Walters & Mooney, which maintains offices in Orlando, Los Angeles, San Diego, and Salt Lake City. Mr. Walters has developed an outstanding reputation for representing the interests of the online

The interview with Alpert and Walters was recorded with Marantz, broadcast-quality recording equipment on an audiotape using a tabletop microphone. The tape was then transcribed by the authors and reviewed for accuracy. The authors made a few very minor changes for syntax in some places but did not alter the substantive content or material meaning of any of their responses. Some portions of the interview were omitted as extraneous, redundant, or simply beyond the scope or the purpose of this article, but the authors did not change the sequence in which questions and answers were posed and addressed. The authors have added footnotes in some portions of the interview where they feel those notes are relevant to elaborate on particular cases, concepts or ideas discussed. The authors retain possession of the original audio recording of the interview.

Importantly for purposes of objectivity, neither Alpert nor Walters had an advance opportunity to review or preview any of the questions they were asked, thus allowing for greater spontaneity and immediacy of responses. In addition, neither Alpert nor Walters reviewed either the raw transcript of the interview or any of the drafts of this article before it was submitted for publication. Furthermore, the interviewees were neither paid nor otherwise compensated by the authors for their time and comments.

Part II of this article provides initial background on the case of Phillip Alpert.³³ Part III then sets forth, in question-and-answer format, the interview conducted by the authors with Alpert and his attorney, Lawrence Walters.³⁴ Part IV then concludes with the authors' analysis and observations drawn from the interview.³⁵

II. The Legal and Social Nightmare of Phillip Alpert's Sexting Activity

Shortly after his 18th birthday, Phillip Alpert made a hasty online decision that would embroil him in a tangled legal morass usually

entertainment community, as well as other, more traditional industries. He has practiced law for over two decades, concentrating in the areas of constitutional, gaming, and Internet law. He is recognized as a national expert on legal issues pertaining to Free Speech and the Internet, and frequently contributes to television news programs on networks such as NBC, ABC, BBC, CBC, Fox News Channel, MSNBC, CNBC, and CNN.

32. Interview with Lawrence Walters, Managing Partner, Weston, Garrou, Walters & Mooney, and Phillip Albert, Walters' client, in Altamonte Springs, Fla. (May 8, 2009).

33. See *infra* notes 36–41 and accompanying text.

34. See *infra* notes 42–67 and accompanying text.

35. See *infra* notes 68–88 and accompanying text.

reserved for the sordid side of society.³⁶ He had been battling his 16-year-old girlfriend for some time when she left him an angry voicemail in the middle of the night, and he decided to exact revenge. To that end, he signed into her email account—she previously gave him her password—and accessed nude photographs of the girl that she had stored online—photos she, in fact, had once sent to Alpert.³⁷ He then hit “select all” and distributed the photographs to some seventy individuals that his girlfriend had set up as part of her personal email list.³⁸ In that moment, he was transformed, in the eyes of the law, from a foolishly behaving teenager to a child pornographer and sex offender.³⁹

When the recipients opened their email, they found the nude photographs that were seemingly sent by the girl herself. 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. Unfortunately, for him, that is how events began to unfold in the aftermath of that night’s events.

The Alpert family home was subjected to a police search and seizure of all electronic devices capable of storage. He cooperated with authorities who, at the time, suggested they recognized the 18-year-old was not the type of suspect that ordinarily would face the serious offense of child pornography. Yet, despite those intimations, that is precisely what happened.

36. The description in this part of the article is drawn primarily from the comments of Phillip Alpert and Lawrence Walters set forth later in Part III of this article, thus explaining the paucity of footnotes in this part of the article.

37. See Editorial, *All parents need to actively monitor their children’s Internet, cell-phone behaviors to avoid sexting*, STUART NEWS (Fla.), May 13, 2009, at A6 (writing that after breaking up “with his 16-year-old girlfriend, Alpert sent a naked photo of the girl—a photo she previously had taken of herself and sent to him—to dozens of friends and family members. Alpert, who had just turned 18, was arrested, charged[,] and convicted of sending child pornography.”).

38. See *Text lands teen on sex offender list*, My Fox Orlando, Mar. 10, 2009, http://www.myfoxorlando.com/dpp/news/031009_Text_lands_teen_on_sex_offender_list (last visited Sept. 11, 2009) (writing that “[a] year ago, after breaking up with his 16-year-old girlfriend, he got angry. He emailed a nude picture of her to more than seventy people, including her parents. He said she sent him the picture while they were dating.”).

39. See Renee Bookout, *OMG! Latest teen craze is sexting*, PENSACOLA NEWS J. (Fla.), Apr. 22, 2009, at 2E (reporting that “Alpert was charged with sending child pornography, sentenced to five years probation[,] and required by Florida law to register as a sex offender.”).

After charges were filed against Alpert, the prosecution warned him that, if he did not accept the plea offer, he would likely spend most of his life in prison. Technically, prosecutors could charge Alpert under the provisions of the child pornography statute, and each person he sent the photographs to could separately result in two charges—one for possession and one for distribution, making him face some 140 counts. Indeed, he had possessed and distributed sexually explicit images of a minor, albeit not in a fashion that typifies child pornography charges. Confused and scared, Alpert accepted the deal. What he had not factored into the legal equation, which included five years probation, semi-annual polygraphs and forced attendance at classes designed to ensure that he does not re-offend, was that he would be required to register as a sex offender, a label he would have to carry at least until the age of 43.

Perhaps more than the lengthy probationary period and the sex offender classes, the registry has proven to be a particularly difficult impediment to living a somewhat normal life for a teenager.

Alpert was forced out of the community college he attended and has found it impossible to secure employment. His new attorney, Lawrence Walters, hopes to help his client reclaim some of the opportunities ordinarily available to teenagers.

Together with Alpert, Walters has taken his story to the mass media in the hope of making the public aware of what can happen to teenagers who engage in sexting and perhaps to gain support from the general public who may feel that the punishment experienced by Alpert does not fit the crime.⁴⁰

Alpert does not dispute that he caused harm to his then 16-year-old girlfriend, nor does he believe that he should escape all punishment for his behavior. He also does not feel, however, that he should be labeled a sex offender and essentially precluded from gaining an education or earning a living because he made a foolish, late-night mistake shortly after reaching the age of majority.

40. See, e.g., *Today Show* (NBC television broadcast, Mar. 10, 2009) (telling host Matt Lauer that “a kid sending a racy picture is a very different behavior than a pedophile forcing a toddler to perform a sex act on camera. And that’s really what these child porn laws were designed to address.”); *Good Morning America* (ABC television broadcast, Apr. 15, 2009) (Alpert describing his sentence with host Diane Sawyer: “I was only in jail for a few days. Just while they were holding me. But I’m on probation. If I violate the probation, I go to prison for a very long time.”).

Walters made it clear in this interview and in others⁴¹ that sexting merits a social response rather than the criminal prosecution his client faced. Solutions to the problems raised by sexting, according to the Altamonte Springs, Florida-based attorney, should include education and the involvement of community stakeholders like religious leaders and counselors.

In the next part of this article, Attorney Walters and Alpert discuss their views about teenage sexting and the efforts by prosecutors to charge such behavior under child pornography laws, subjecting those individuals to the harsh penalties required by law. Alpert provides specific details about how his life has changed since entering a plea in his case and what the future may hold for him. Additionally, Walters and Alpert talk about how their case may provide a useful conduit for changing the way teenagers behave, how the law responds to such behavior, and why it is important to inform the public and the legal community about the realities of sexting and child pornography laws.

III. The Interview

This part of the article contains the transcript of the exclusive interview conducted by the authors with Phillip Alpert and Lawrence Walters. It is set forth in question-and-answer format, with all comments and queries posed by the authors designated by the word QUESTION in small capitals. To identify who is responding to a question, the last name of the respondent is identified in small capitals (for example, WALTERS or ALPERT).

QUESTION: At the risk of sounding like a conspiracy theorist, it almost seems that some of the nation's prosecutors have collaborated and decided that charging teenagers who are "sexting" as child pornographers is an efficient way to deal with this problem. Why does it seem that the issue has surfaced all at once?

WALTERS: As with any development in the law or legal trend, it takes a while before the activity occurs to such an extent that the law notices. While this was occurring for a while, the activity of sexting is now becoming fairly widespread. That fact is coupled with the fact that students are losing constitutional rights—the right to privacy and their expectation of privacy on school grounds. Their cell phones are

41. See *Today Show*, *supra* note 40 (suggesting "[t]his problem needs to be solved as a social problem, not a criminal problem.").

getting seized more often and inspected,⁴² and these pictures are being found. School officials think nothing of saying, “Give me that cell phone,” and paging through it. The courts aren’t doing much about it. Every once in a while you’ll have a brave judge that will stand up and say, “That’s wrong.” The information is coming to light more often as those constitutional rights are being whittled away.

It also has something to do with coincidence. There seems to be a rash of these kinds of cases coming to light right now.⁴³ Phillip Alpert’s case occurred a year ago, but it’s being talked about now in light of the fact that there’s media exposure and discussion of it. And we’re also taking some actions that are making it newsworthy. Those things combined tend to force these things into the news.

QUESTION: How much do you think the media attention being paid to the issue right now fans the flames, so to speak? It’s obviously an interesting combination of elements that would attract the media—minors, sex, new technologies. Is that why the issue is getting the attention of legislators and prosecutors?

WALTERS: It is a perpetuating thing that snowballs to the extent it is being discussed. Then, you have more authority figures in schools looking for it. More police and prosecutors realize it’s an option to charge these kids in this way. On the flip side, some people are realizing such prosecutions aren’t the right thing to do. Groups like the ACLU see it as a hot issue, and then they stand up and try to protect people that are in this situation.⁴⁴

42. See Deb Kollars, *Student Wins Fight Over Cell Phone Privacy*, SACRAMENTO BEE, Apr. 18, 2008, at A1 (reporting that “in schools across the country, cell phones go on and cell phones get confiscated, often on a daily basis. Students may lose their beloved phone for the rest of the school day.”); Valerie Olander, *Charges unclear in photo case*, DETROIT NEWS, Oct. 17, 2008, at 3B (describing the seizure and confiscation of students’ cell phones at Pinckney Community High School in Michigan “in the case of a 14-year-old Pinckney girl who sent a nude cell phone photo of herself to friends that was then passed around to 200 others.”).

43. See, e.g., Dane Stickney, *RACY PICS Teen Sext*, OMAHA WORLD-HERALD, Feb. 22, 2009, at 1A (describing how teens in Pennsylvania, Indiana, Ohio and Michigan are facing felony charges for sexting).

44. For instance, the American Civil Liberties Union of Pennsylvania filed a lawsuit “against the Wyoming County district attorney for threatening three high school girls with child pornography charges over digital photos in which they appear topless or in their underwear.” Press Release, American Civil Liberties Union of Pennsylvania, *ACLU Sues Wyoming County D.A. for Threatening Teenage Girls With Child Pornography Charges Over Photos of Themselves* (Mar. 25, 2009), available at <http://www.aclupa.org/pressroom/aclusueswyomingcountydafor.htm> (last visited Sept. 11, 2009). On March 30, 2009, a federal judge issued a temporary restraining order stopping the prosecution of the girls. See Memorandum & Order, *Miller v. Skumanick*, No. 3:09cv540 (M.D. Pa. Mar. 30, 2009),

The media coverage does a couple of things. It shines a light on the issue, which can be good and bad. It can result in more of these charges, but it can also result in more people stepping up in defense.

QUESTION: What is the problem with charging sexting minors under child pornography laws?

WALTERS: The answer is several-fold. Child pornography laws were designed to address and punish a very different behavior than kids sending racy photos of themselves to each other. Child pornography laws are very strict, very draconian, and the punishments are some of the most severe known in the law outside of crimes like murder.⁴⁵ They were designed to address pedophilic behavior, usually by older men forcing toddlers or pre-teens to engage in sex acts on camera. That's the typical child pornography case.

The idea that teens and kids would be creating child pornography themselves and distributing it by cell phone was never contemplated at the time all of these laws were originally passed. Now, with the influx of technology, we have kids doing things that they were not doing before—creating content, creating pictures, and sending pictures—and, frankly, allowing that technology to be a part of their lives to the extent where it's even a part of their sex lives. Kids in our current culture allow technology to infiltrate everything they do. They express themselves, whether it's anger, love, hate, or intimacy, through technology. Face-to-face communication, for better or worse, is dropping off in favor of more electronic communication. When teens want to express themselves erotically, they often do so through technology—unaware of the consequences.

When you look at the facial definition of these child pornography laws, they seem to apply to the concept of sexting. It is a picture of a kid in a sex act and it is being distributed. If you look at it from the cold application of the elements of the law, then you can squeeze the behavior into the law.⁴⁶ But these laws weren't designed for that kind of thing. They end up punishing kids who are just starting out, experimenting in their lives and making bad decisions. They're

available at <http://www.aclupa.org/downloads/MillerTROorder33009.pdf> (last visited Sept. 11, 2009).

45. For instance, federal law provides that a person convicted as a first-time offender of knowingly disseminating and/or distributing child pornography shall be fined and "imprisoned not less than 5 years and not more than 20 years." 18 U.S.C. § 2252(b)(1) (2006 & Supp. 2008).

46. See *supra* note 19 (describing how minors who create their own sexually explicit images are not exempt from child pornography laws).

supposed to learn from their behavior. These laws are so draconian and the punishment goes on for so long, however, that these kids end up being punished for decades as a result of a mistake they made that, in any other rational circumstance, would have resulted in a more justified punishment—they would get grounded, get suspended, and then they would live their life. Now, they’ve got a criminal record for twenty or thirty years.

QUESTION: Are there any other laws out there that this behavior could be charged under that would seem more fitting?

WALTERS: No question about it. A lot of this is a problem with prosecutorial discretion and simple humanity. There are statutes like disorderly conduct, harassment, and stalking—catch-all provisions that police officers and prosecutors always use when they don’t what to charge somebody with when there’s a new behavior at issue. There’s an annoying communication law in Florida.⁴⁷ Certainly, there are numerous other options out there for law enforcement. A number of states are looking at creating more specific options for sexting-type behavior where the punishment better fits the crime.

There is no reason for the knee-jerk reaction of, “Let’s punish the kid with the most serious possible crime and charge each image as a separate count,” thereby stacking up a hundred child pornography charges against some kid for doing what half the kids are probably doing in the schools.

QUESTION: Back to the actual application of the child pornography laws. Obviously, it would have to be decided on a case-by-case basis whether any actual photograph constituted child pornography. To the extent that some girl simply appears topless, and under the federal statute, it has to be a lascivious exhibition of the genitals or pubic area,⁴⁸ many of the photographs in question probably do not even amount to child pornography. Is that true?

WALTERS: I think that’s absolutely true. We’re largely dealing with erotic-type photos, topless photos, sometimes girls covering their breasts. That’s a lot of what you see coming out with celebrities today as well. The pure sex photos do exist and they do get circulated, which is unfortunate, but I don’t think that’s the majority of it. The

47. See FLA. STAT. § 784.048 (2009) (criminalizing the act of cyberstalking and defining it as engaging “in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.”).

48. See *supra* note 15 (setting forth the relevant provisions of the federal statute governing child pornography).

anecdotal evidence suggests that the majority of photos wouldn't even meet the federal standard.

The problem that you have, and this was borne out in the Tunkhannock, Pennsylvania, case,⁴⁹ is that of a photo of a topless, 14-year-old topless girl is so shocking that the police just assume it's a crime. They assume that it has to be a very serious crime. They don't look at the definitions or at the actual application of the statute. People end up getting charged and, much of the time, end up entering pleas because they are so terrified of the tremendous punishment that could be imposed. They say, "This cop or this judge must know what they're talking about." Unless they have an attorney who specializes in this area and really knows the defenses and the factors that go into determining whether these pictures really are child pornography, the attorneys themselves are caught off guard. They say, "Wow, this must be a terrible crime. It's a topless, fourteen-year-old girl." In reality, in most states, it's probably not a crime. In those states where it is a crime, that's probably unconstitutional.

QUESTION: You mentioned that some lawmakers are looking into new laws to specifically govern these situations. Is that a viable way of addressing this problem or should we, as a society, be handling it differently?

WALTERS: In my ideal world, we would have a social response to the social problem of sexting. We would have education. We would have kids going out and speaking to other kids, saying, "I did this, and it's a bad idea." We would have counselors and religious leaders getting involved—people who make a difference in these kids' lives—providing proper examples and helping them lead their lives and learn from bad decisions.

In my experience, when you get the criminal justice system involved in anything having to do with kids, it usually spins out of control. This is a circumstance where that has happened. I don't know if creating more laws is the best answer; it is one answer. At least it shines a light on the fact that child pornography laws aren't

49. See generally Alexandra Marks, *Charges against 'sexting' teenagers highlight legal gaps*, CHRISTIAN SCI. MONITOR (Boston, Mass.), Mar. 31, 2009, at 25 (providing background on this case in which Wyoming County (Pa.) District Attorney George Skumanick threatened to charge several young girls "with child pornography charges for sending seminude photos of themselves via cellphone to their friends."); Tony Norman, *'Sexting' and the Single-Minded Prosecutor*, PITTSBURGH POST-GAZETTE, Mar. 27, 2009, at A-2 (describing the case and noting that "the girls are charged with the possession, manufacture and distribution of child pornography via cell-phone text messaging. It doesn't even matter that other than the exposed breasts of one of the girls, no genitalia or sexual behavior is seen in the cell-phone images.").

the answer. Importantly, it also provides another option for the knee-jerk reaction, i.e., this is a sexting crime, so we must use the sexting statute—the robotic application of the law. At least there would be something there to take the prosecutor out of the direction of a child pornography statute to a new direction.

Ideally, this should be treated as a social problem, not a criminal problem. It's a social classic problem, just as the Florida Supreme Court, to its credit, determined that teenagers having consensual sex with each other is not statutory rape.⁵⁰ There needs to be the same kind of decision-making with respect to sexting—where images of teens, shared with other teens, is not a criminal violation. It is a social problem that needs to be addressed by the social machinery, not the criminal justice system.

QUESTION: Is it possible to draft a one-size-fits-all sexting statute, given there are multiple variations of the activities involved in sexting? There are, for instance, some situations where two teens consensually trade photographs. Then, there's the downstream scenario where the photographs are forwarded to others. Then, there are differences in ages of the participants.

WALTERS: Phillip Alpert's case is a perfect example because he turned 18 a few days before he sent the pictures. All of a sudden, it took him out of what most people think the sexting statute ought to look like, so there is no one-size-fits-all solution, to be sure. We can take baby steps. We can try to group the majority of this kind of activity into something that makes sense and that provides some education and some community service perhaps—clearly something that is less draconian than the “sex offender” label.

What typically happens is that kids are sending this material to other kids. Adults aren't sent it. Adults don't see it unless there's a search of the kids' phones. Maybe we start there with a statute.

50. See *B.B. v. State of Florida*, 659 So. 2d 256, 258–60 (Fla. 1995) (considering the issue of “whether a minor who engages in ‘unlawful’ carnal intercourse with an unmarried minor of previous chaste character can be adjudicated delinquent of a felony of the second degree in light of the minor’s right to privacy guaranteed by the Florida Constitution[]” and holding the statute in question “unconstitutional as applied to this 16-year-old as a basis for a delinquency proceeding.”). In a subsequent decision, the Florida Supreme Court emphasized the narrowness of its decision in *B.B.*, writing that the statute in question in *B.B.* was “unconstitutional *as applied* to the unique facts of that case, including the fact that both the charged defendant and the alleged consenting victim were aged sixteen.” *J.A.S. v. State of Florida*, 705 So. 2d 1381, 1384 (Fla. 1998). In addition, the statute at issue in *B.B.*—Section 794.05 of the Florida Statutes—has since been “completely revised” and, as the Florida high court wrote in *J.A.S.*, “no longer exists in the same form we considered in *B.B.*” *Id.* at 1385, n.11.

Overall, this really needs to be addressed through the social mechanism, and there is no one-size-fits-all statute.

QUESTION: Let's turn to your case, Phillip. How common do you think the practice is of minors trading sexually provocative photographs with each other?

ALPERT: I would say that it is very common. I know a lot of people who have done the same thing. I guess the reason it came into my head on the night I sent the pictures is because other people have been doing the same thing. It's not something I associate myself with doing, but in the middle of the night, that thought was in my head. The reason it was there is because a lot of other kids I know have done the same thing—sending photos to other kids in their school or just to each other.

QUESTION: When you sent those photos in the middle of the night, did you think you were committing a crime?

ALPERT: I wasn't thinking at all. Had I thought about it, I might have realized this is probably illegal, but I certainly wouldn't have known all the ramifications of it. I wouldn't have thought that, one year later, I would be considered a sex offender.

You might assume it was illegal, but you don't really know. Kids don't go to a library and research it.

QUESTION: Sexting might be considered a type of high-tech flirting.⁵¹ Is this part of the attraction to it? What are the reasons kids do it?

ALPERT: Our generation is built on now. We want the fastest cars. We want cell phones where we can send text messages right away. E-mail is better than mail because it's instant. The same thing happens when you want to be sexual with someone. It's right then and there, as opposed to having to wait until the weekend to see your girlfriend. It's instant sexual gratification.

QUESTION: Do you think if older generations had this kind of technology, they would have been doing the same thing? In other words, minors aren't any different today than in the past, but the technology makes it possible for them to find ways to express themselves sexually.

51. See Ellen Goodman, *'Is 'sexting' same as porn?*, BOSTON GLOBE, Apr. 24, 2009, at 15 (quoting Danah Boyd of Harvard's Berkman Center for Internet and Society for the proposition that "[i]f you look at the reasons why they share naked content, one is a form of flirting. Another is a way of brokering trust, a guy saying, 'You don't trust me? You won't send me a naked picture?'").

ALPERT: I would imagine that would be the case in the past. I've seen things on television. I've heard stories. Basically, Polaroids are the same thing. Those get passed around school. It's just easier now. Everyone has a camera on their phone and everyone has the ability to send those pictures to someone.

QUESTION: Were you still in high school when you were charged in connection with the sexting incident or had you graduated?

ALPERT: I was still in high school. It was just one month after I had turned 18. I was a senior.

QUESTION: If you would, please, walk us through what happened that resulted in your arrest.

ALPERT: I was 17 years old, and my girlfriend at the time was 16. We had been dating for about two years at this point. She took pictures of herself and sent them to me. I didn't request the pictures—not that I said no to them. She sent them over e-mail. It wasn't anything massively explicit. She wasn't doing anything in the photos. She was standing there and not wearing any clothing. I just kept them in my e-mail—now they're deleted. It was a few months before I sent the pictures out.

It never crossed my mind when I got them to send them to other people. It was something that she privately sent to me. It was appealing at the time. She was thirty miles away from where I was, and all we had was the Internet. I didn't have to wait to see it.

Kids are so much more intense about what we want to do. We want everything right away. I was at home, my parents were asleep, and I wasn't going to take the car out to see her. It was late at night, so it was the best medium for expressing the way we felt at the time.

QUESTION: So, there came a time when your feelings toward each other changed.

ALPERT: Basically, things had been bad for a few months. She kind of messed with me. Eventually, she got to the point where she decided it would be more fun to screw with my head rather than just say that she didn't want to be with me anymore.

She called me in the middle of the night and said some really nasty things in a voicemail, and that's when I guess I did it. I don't specifically remember sending the pictures, but her calling me in the middle of the night, I guess, is what drove me to do it.

QUESTION: What were the specifics, in terms of where the photos were sent and how many photos were at issue?

ALPERT: I honestly don't know how many pictures. What I did was, I guess, I went to her e-mail address and I had her password.

She had given me her password a long time ago. I went in, hit “select all,” and then “send.”

QUESTION: To how many people did the photos go?

ALPERT: I don’t know exactly, something like seventy. There was a “select all” button, so it went to everyone in her e-mail address book.

QUESTION: So, when those photos arrived in the recipients’ e-mail inboxes, it looked as though she had sent out the photographs.

ALPERT: That’s right.

QUESTION: How did it come to the attention of law enforcement officials?

ALPERT: I’m assuming that her father decided to call the police on me. I don’t really know, however, because I haven’t spoken to her since then.

QUESTION: Let me ask a question to your attorney. Isn’t that the way that most statutory rape cases come forward—that is, from a disgruntled parent or someone?

WALTERS: It happens really in two ways. One is when an authority figure, like a parent or a teacher, finds out about the relationship and then goes to law enforcement. The other way is when one or the other of the participants in the relationship ends it and then the other says, “I can get back at this person because I can now report that he was over age and punish him for breaking up with me.” We see that scenario sometimes.

QUESTION: Do the same principles at play there—that the minor doesn’t understand the consequences of having sex—apply in a sexting case? In other words, the girl did not understand that when she sends photos of herself, they could get out.

WALTERS: I don’t see why it wouldn’t. We hold adults to a higher standard when it comes to the law. In this case—and this is kind of a hair-splitting analysis—I think we’re holding kids to a higher standard for similar behavior than we do adults. When adults send pictures of themselves engaged in sexual activity to each other—a common thing—there’s no crime committed, it’s commonplace, it’s enjoyable and everybody goes on. Kids do exactly the same thing with other kids—they have the same desires and the same erotic feelings—but they’re held to a higher standard. All of a sudden, it’s this horrible crime. It strikes me as odd that we’re holding kids to a higher standard than adults.

QUESTION: Essentially, if you and your girlfriend had both been eighteen, then there would not have been a problem, correct?

ALPERT: Right. Because there was that extra month between me being 17 and 18, I was charged much more than I would have been had I been 17 at the time—as if that one month gave me all this extra knowledge and maturity, which obviously it didn't or I wouldn't have done this.

QUESTION: What happened next? Did a police officer come to your house?

ALPERT: It was actually a couple of days later. I hadn't spoken to her. We were playing that "you-ignore-me, I'll-ignore-you" kind of game. I was walking home from school. My mom usually picked me up, but she didn't so I called her, and she said that the police had stormed the house with a search warrant. It kind of came back to me—almost like a dream where you don't remember it until something in the real world happens and it reminds you of it.

QUESTION: So you weren't at home. What did your mother think?

ALPERT: She was not happy. She was very angry with me.

QUESTION: Did the police inform your mother what they were after in the search?

ALPERT: I guess. They explained what had happened.

QUESTION: Did the police seize your computer?

ALPERT: They took everything—anything that you could put digital memory on, from my disks to my iPod to my computer. Everything. They brought me outside and said, "Look, we realize this isn't that big of a deal. If you cooperate and are honest with us, then we're not going to arrest you. But we want you to come down to the station." So they drove me down to the station.

I was honest with them and cooperated, and then they arrested me. The police were being nice. They had said they weren't going to arrest me. My biggest fear was being arrested, so I did what they said. I was honest. It hurt me later—besides the fact that I got arrested—because, in court, the state's attorney said if I didn't plead to what they offered me, if I actually went to trial, they would charge me with as many counts as they possibly could, which would have been over a hundred or some insane number.

WALTERS: That's because they could hit him for possession for each image and transmission of each image. That would have been about 140 counts.

ALPERT: They also said they would charge me with some physical-contact type of law because at one point, she was 15 and I was 16, which I guess is illegal.

QUESTION: Do you mean they were going to charge you for actual sexual conduct, too?

ALPERT: If we went to trial.

WALTERS: I don't think that would have held up, but kids don't know when they are being threatened with those kind of charges.

ALPERT: All I knew was that I was going to spend the rest of my life in jail if I didn't agree to what they were offering.

QUESTION: Were you represented by counsel at that time?

ALPERT: Yes, unfortunately the lawyer that I had at the time might have messed up, in my opinion, which is why I'm on the [sex offender] registry right now. With what I pled to, he told me I was going to have five years of probation that couldn't be cut short and take a class with other sex offenders, but he never said that I would have to be registered. I didn't find out that I had to register until I went to see my probation officer the first day. He told me that I had to register within forty-eight hours. I called my attorney back and he said, "No. That's not right." He called me back a few hours later and said, "I messed up."

We went back to court. He did some motion to extend the plea. I'm not sure exactly because I was not there. But we had the option to withdraw the plea and plead to something else, assuming that the judge, the state's attorney and the victim said it's okay. The state attorney and the judge both said it's okay, but her father said no. Knowing her, I think she would have been pissed, but I don't think she would have made me get on the [sex offender] list. I haven't spoken with her.

WALTERS: He can't speak with her.

QUESTION: How has this situation affected your life?

ALPERT: First, three or four days after I was officially registered [as a sex offender], one of my teachers informed the students in my class—I had three classes with these same kids, and they were my friends until they found out about this. Then, they made fun of me everyday for it, to the point that I would miss school because I didn't want to go and face this. I had one day with one class with them and one day with two classes with them. On days that I had two classes with them, I would call in sick, you know, to try to get out of it. After a while, my mom just let me. She understood it was really rough on me. I didn't even go to my graduation. I graduated high school, but I didn't go to the ceremony because I didn't want to be around them.

QUESTION: What does sex offender registration entail? Do you need to register any time you move anywhere?

ALPERT: Any time I move, I have to register. There are also a lot of places I can't move to. My father's house, for example. I would be living with him right now, which would save a lot of money and frustration, but, unfortunately, he lives too close to a high school. Ironically, it is the high school I attended.

WALTERS: He was allowed to go to the high school, but he can't live near it.

ALPERT: I can't live with my dad because of that, so I live about thirty minutes away from him. I live on my own, which is expensive. Fun, but expensive. I guess it has helped me mature but, at the same time, it's very difficult as well because, especially now, I don't have a job.

QUESTION: If you apply for a job, what are you required to tell the employer?

ALPERT: Most employers don't have that checkbox that asks, "Have you been convicted of a felony?" They now say, "Have you been arrested for a felony?" So I have to check yes, although I'm not a felon.

I have gotten two interviews out of the fifty or so places I have applied to—both of which I told that I was on probation. They both said, "We'll call you" and, of course, they never did. The interview was basically over once I said this. You know, I'm a 19-year-old kid, I have very little experience and I'm not in school, so I'm not being trained for anything right now. I don't have a whole lot of anything backing me up, other than I have a determination to work. There's no real reason to hire me other than for a base-level job that anyone can do. The way the economy is today, it's hard enough to find that job. Then, being on probation doesn't help. If there's another 19-year-old kid who has the same qualifications—or lack thereof—as me, and he's not on probation, then they're going to pick him every time. Why would they pick me?

QUESTION: The news media reported that you must be on the sex offender registry until you're 43 years old,⁵² is that correct?

ALPERT: Sort of. At forty-three, I'm allowed to petition the court to get off the list. I don't just automatically get off the list.

QUESTION: You were talking about the residence restrictions. Are you allowed to go to parks?

52. See Deborah Feyerick & Sheila Steffen, 'Sexting' lands teen on sex offender list, CNN.COM, Apr. 7, 2009, <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html> (last visited Sept. 11, 2009) (describing Alpert's case and reporting that "[a]s for Alpert, life is not easy as a registered sex offender, a label he will carry until the age of 43.>").

ALPERT: I'm allowed to go there. Luckily, it doesn't say anything about me having to stay away from minors. There are some sex offenders that have to do that. Luckily, I don't have to do that. I guess part of that is because I was in high school at the time.

WALTERS: And he is also not considered a sexual predator because there was no physical activity involved.

ALPERT: If I were to violate the terms of my probation—leave the county to go to the beach or visit my lawyer—[interrupted by Walters]

WALTERS: We're in Orange County [Florida].

ALPERT: If I were to violate my probation in any way, I would probably go to jail for a very long time. I'm not sure if this is true or not, but if I violate my probation, I've heard that I could be considered a sexual predator, if I left the county.

QUESTION: Do you want to go back to school?

ALPERT: Absolutely. The reason I got expelled from the college I was attending was because they found that I was registered. They sent me a letter the day after my birthday and said, "Sorry, but you can't come back." I guess I can go back on the property, but that doesn't help if I can't take classes. I have been fighting with Valencia Community College⁵³ for a long time now to get an interview because I believe if I got an interview, they would allow me to come back to their school. They didn't answer my calls for a long time. The reason I got them to finally call me back is that I threw his [Walters] name out there. The next day, they called me right back. Now, they want three people who are going to give me good references. Those people are my probation officer, my counselor from my weekly sex-offender classes and a former employer. I have all those people lined up, except for the counselor. He won't give me any recommendation unless I take a \$500 test to see how likely it is that I'll re-offend. Not having the money for that makes it difficult. I called the guy who is supposed to administer the test, and he won't give me the test unless I take this other \$300 polygraph test.

QUESTION: It sounds like a money-making scheme.

ALPERT: Absolutely.

QUESTION: Let me ask your attorney, is there anything you can do to get him off the sex offender registry?

53. See Valencia Community College website, <http://valenciacc.edu/> (last visited Sept. 11, 2009).

WALTERS: That's what we're focused on now and why I'm involved. In addition to just feeling terrible about the situation, I think there is something that needs to be rectified here and some new precedent established in this area for kids who get caught up in this unnecessarily. There is a very narrow window that we can try to squeeze in. We have seen precedent for getting off the list if "the ends of justice require it." It's not a well-established test, but there is precedent for it. We're looking at that. We're looking at getting some psychological reports and consulting with as many people as possible so that we can show that there's a consensus out there that Phillip doesn't need to be on the list and shouldn't be on the list. He's not a typical sex offender. He doesn't meet the criteria. He has no likelihood of re-offending, if he ever offended in the first place. We're hoping to get him off the list.

ALPERT: The list itself is designed so that you know who around your area—living in your neighborhood—could be a danger to you or your children. If you saw me on that list, you would see, as my offense, the sending of child pornography. You would think, therefore, to keep your children away from me. But I'm not a threat to your children. That's not something I do. I am not going to target anyone specifically. It was a one-time, stupid mistake. But I'm up there on that list with other people that you do have to watch out for. If they're going to charge everyone like me, there are going to be lots of sex offenders on that list. Almost everyone has done something that should get them on this list.

WALTERS: That's a very good point that I've tried to make. You really dilute the importance of all of these offender registrations if you start putting people like Phillip on the list. The judges, the prosecutors and everybody involved start to see these things as less serious. It's like when these questionable date-rape cases start going into the criminal justice system. All of a sudden, all rapes are questioned. It's the same thing: We have to be careful, we have to identify the problem individuals as the exception and we cannot lump everybody in like him so that people don't take it seriously.

QUESTION: Phillip, have you given any thought to talking at schools, to help educate young people about the problems associated with sexting? Is that something that could help get you off the registry?

ALPERT: With the media I have been on already, I feel I have done that to an extent. As far as the high schools are concerned, I would like to do that. I really don't know where to start. If anyone called me and asked, I would say absolutely. I would like to tell my

story and help other people at the same time. I would like other kids to understand. The TV appearances I have done so far are mostly directed toward parents. High school kids typically don't watch those type of shows—mostly because they're on in the middle of the day when high school kids are at school.

WALTERS: We're looking at those opportunities, though. I'm starting to work with Wired Safety,⁵⁴ and they've asked that Phillip and I start creating some educational materials for them to go to high schools. They're going to create an entire online presentation for kids to understand the dangers of sexting. His case, while tragic, is also an incredible learning experience for kids. We're trying to get something good out of it and show that, for good or for worse, the law is that you could be a sex offender. This is what happened to a real person. Watch out and don't do it. It will at least be a learning experience.

ALPERT: I believe the law still has to change, though. If I talk to thirty kids, how many of those kids will say, "Hey, I'm not going to do that?" Teenagers do what they do because it's fun, and they don't care if it is illegal. They'll say, "I'll be more careful with it or I just won't get caught." Sometimes that's the appeal to it. High school kids who are 18 are three years away from drinking legally, but they're still going to drink while they're in high school. It's illegal, but that's part of the fun. I know kids who do all sorts of drugs, even though friends of theirs are now in prison for doing those kinds of drugs and selling them. But they do them anyway. They think that every time someone gets arrested that it's cool that they didn't. The laws must change.

QUESTION: Is charging sexting offenses under child pornography statutes diluting those laws as well?

WALTERS: It's exactly the same thing as diluting the sex offender registry. There are some really bad child pornographers out there that enlist their children into sex rings, photograph them and trade pictures. That is becoming a more serious problem in the United States. It used to be more of an overseas—Russia, Ukraine,

54. This organization describes itself on its website as "the largest online safety, education and help group in the world. We are a cyber-neighborhood watch and operate worldwide in cyberspace through our more than 9,000 volunteers worldwide." About Us, Wired Safety website, http://www.wiredsafety.org/information/about_us.html (last visited Sept. 11, 2009). It "is headed by Parry Aftab (also a volunteer), a mom, international cyberspace privacy and security lawyer and children's advocate. Parry is the author of *The Parent's Guide to Protecting Your Children in Cyberspace* (McGraw-Hill), which has been adapted and translated around the world." *Id.*

Thailand—kind of thing, but it's migrating and it's a serious problem that people need to address. To the extent that you start lumping sexting cases in with that, everybody involved takes all of them less seriously, and we really can't have that happen.

QUESTION: Phillip, what is the one piece of advice that you would give 14- or 15-year-old guys?

ALPERT: I guess I would say, "Don't ask for the pictures." I'm sure there are a few girls out there that would still send the pictures. For the most part, the guys ask the girls for it, although sometimes the girl asks the guy.

"Don't ask for them," I'd tell them. If no one is asking for it, very few people are going to get them.

QUESTION: Does peer pressure play a role here? For instance, if one guy's girlfriend sends him a photo, then does the next guy want one from his girlfriend, and so forth?

ALPERT: Take this situation: two people break up and they know that the girl in the relationship sent pictures to the guy. The next person to date that girl wants the pictures, too. If the girl won't send them, then the guy who has the photos will send them out and those pictures will be sent to someone else. If you think a girl will do this with one guy, then she will do it with anyone. The problem is if she doesn't want to take them for everybody, the pictures are still out there. Someone still has them.

QUESTION: In the past, people might streak or flash someone, but with sexting there's a permanent record.

WALTERS: That's true, but I also think that, as Phillip's generation gets older and there are more people who grow up with this type of behavior being more commonplace, having that permanent record out there is going to be less significant. Every mayor and every cop is going to have had that in their past. It's not going to be a big deal. Today, however, to most of the adults out there, it's just shattering. It's going to change eventually.

ALPERT: It's going to lose its luster, as well. As our generation gets older, the next generation is going to see that it's been done before. The kids of the next generation are going to find ways to do new things. When I have kids, my kids are not going to want to take pictures and send them to each other because that's what their dad did. That's not cool.

QUESTION: Do you think that there would be a public backlash if people knew Phillip's story? Is the court of public opinion on his side?

WALTERS: I think we're getting there already. Every expert, commentator and TV personality who has heard Phillip's story recognizes that this is a miscarriage of justice. He doesn't belong on a sex offender list. He isn't a sex offender. This is taking the law too far. Everybody is concerned with the concept that kids are sharing these photos and there is this permanent record. But when you take it to these lengths, the public that we've interacted with so far, and it has been fairly large because of the TV programs he's been on, has been favorable. The e-mails say, "This kids does not belong on a sex offender registry. The punishment does not fit the crime." We're seeing that already.

QUESTION: Could there be a backlash against prosecutors who pursue these kinds of cases under child pornography statutes?

WALTERS: It could happen. There was one brave federal judge in Pennsylvania who put a stop to it,⁵⁵ and I hope that's the beginning of a trend. The average person, to the extent that there is one, would be offended by treating kids in this manner. We were all kids once and we remember making mistakes. This is not the kind of thing where kids should be made to pay for the rest of their lives. I don't think there is massive public support for imposing child pornography punishments on kids that do this. Parents see this as a behavior that should be corrected. In terms of what Phillip has to go through in his life, no one should be exposed to that for this kind of mistake.

ALPERT: I would even say there has to be a punishment for it. I have never said that what I did does not deserve punishment. I'm saying that kicking me out of college, putting me on this list, making me go to a weekly class with other sex offenders to learn how not to re-offend, having to pay almost \$1800 a year for it, between polygraphs and the price of the class itself, and the psychological toll is too much. I have to pay \$25 per week for the class, and every six months I have to take a \$300 polygraph.

QUESTION: Without naming names, can you please give us some examples of the crimes that some of the others in the class have committed? Who are your classmates, so to speak?

ALPERT: I've got one guy who raped his 12-year-old nephew. I have another guy who has had eleven victims, all under the age of 10, but he only got charged for three of them. He's my least favorite. In

55. See Memorandum & Order, *supra* note 44. This is an apparent reference to U.S. District Judge James M. Munley's March 2009 order granting a temporary restraining order preventing Wyoming County (Pa.) District Attorney George Skumanick from initiating criminal charges against three minor girls—Marissa Miller, Grace Kelly and Nancy Doe—in a sexting incident.

one class, he was describing the taste of a particular body part of a 3-year-old girl. I felt sick. I'm not going to go into what he said, but he was so detailed about it. He picked items and he referenced them. It was awful.

QUESTION: At times you must just say, "What am I doing here?" It must be like an incredible recurring nightmare.

ALPERT: At some point, it actually starts to turn into "I belong here." I am told every time I go there that I belong there. Every time I go there, I have to relive everything that happened. I can't forget this incident, I can't move and I can't make anything of my life because I can't go to college. I'm stuck doing nothing all day, and it's driving me crazy. But when you go to this class, they start to make you think that you're a horrible person, and you've done something so deviant that you're lucky you're not in jail for the rest of your life. I don't think I don't belong here because they make me think that I do.

QUESTION: Do they give you strategies for improving your life? What typically goes on at these meetings?

ALPERT: I imagine that it's what Alcoholics Anonymous would be like. You stand up and say, "My name is Phillip." Then, you tell your story, what you did. The next person goes, etc. After that, they give us these homework assignments. I just finished one of the modules the other day—my relapse prevention module. One of the things it says in that module is that if you're having an urge, say it aloud. I'm now working on my dating module, which is designed to teach me how to start dating again: you meet a girl at a public place for no more than an hour, she drives so that she can get away if she needs to, and no movies because those are in dark places. Things like that.

QUESTION: And you have to take polygraphs every six months. How many have you taken so far?

ALPERT: Just one, and I failed miserably. I am twitchy, nervous, and move a lot when I talk. He had me sit in the chair [in a stilted position] and I was twitching like crazy. The machine was going crazy. He asked me if it's Monday, and the thing spikes—and it was Monday. The problem is that they say because I failed it, I am lying about something. I had nothing to lie about. I have been honest the whole time. I made the mistake once. I was honest during the polygraph, but I was just twitchy and nervous.

QUESTION: How often do you check in with the probation officer?

ALPERT: Once a month. No big deal.

QUESTION: CAN you get permission to leave the county?

ALPERT: I can get permission to leave the county.

WALTERS: For instance, when we did these television shows, we had to start about a week beforehand and talk to multiple supervisors who had to check with the state. We had to wait and wait and wait. Ultimately, if you're lucky, by the time you need to get on your flight, you can get the paperwork and go.

ALPERT: I'm lucky because the probation officer I have now is really nice about it. She's really cool about everything. The one I had before her wouldn't give me permission to go anywhere. If I were to get a new one who doesn't like what I did, he or she could really mess up my life. That's a big fear of mine: if a probation officer finds a violation, I could be in jail for a couple of months before I get to see a judge.

WALTERS: There is no right to a bond when you are awaiting a hearing on a probation violation.

ALPERT: Anything can happen. The police were called on me about a week ago. I dropped a friend of mine off [at a supermarket] near the high school I used to attend. Someone, who I guess recognized me from TV, called the police and said I was in the back seat of my car, ducking down under the windows with a minor near the school. The cop came to my house. We talked about it. I gave him the girl's number. I talked to her about it, and she said, "This is stupid. That's not what happened." I dropped her off at school. I'm allowed to be around minors. I've known this girl for years. She told the police officer that, too.

WALTERS: That's the kind of stuff he has to deal with everyday.

QUESTION: The ACLU has been active in a couple of the Pennsylvania sexting cases. Has it been active here in Florida?

WALTERS: No, they haven't picked up too much on the issue here. By the same token, there hasn't been that much activity here, other than Phillip's case. I don't know if they'll get involved in that one. That's certainly a possibility, particularly if there is an actual pending motion to take him off the registry that gets denied. Perhaps, at the appellate level, they would get more involved. To the extent that a case comes up, we have a pretty good and active ACLU around here.

QUESTION: Let's talk about the seizing of cell phones in schools. Under the Fourth Amendment,⁵⁶ school officials don't need to have

56. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

probable cause, but they at least must have a reasonable suspicion.⁵⁷ Are you suggesting that principals are now just grabbing these phones and going through them?

WALTERS: They can do random searches. There's a students' rights search case going up to the Supreme Court this term as well,⁵⁸ so we may get some more clarification.

I believe that there's a fundamental difference in cell phones and computers as compared to just about anything else. They really are an extension of the mind. You have a lot of private data. There really is an expectation of privacy in your computer and your cell phone, which is now, basically, a mini-computer. That should be treated differently from what you might have in your pocket or what you might have in your locker. Your most private communications are in these devices. There's the Stored Communications Act,⁵⁹ which might come into play with communications that are stored in a cell phone or on a computer. There are additional rights that should attach before seizing and looking at communications or pictures in a cell phone.

QUESTION: Are you saying there's a First Amendment right that attaches here, compared to when searching, for example, for drugs or some other contraband?

WALTERS: That's right. It's all communications, data, and expression that should be protected by the First Amendment. To the extent that it is seized, there is a prior restraint issue because you cannot use your communicative device anymore. There are different

be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

57. See *New Jersey v. T.L.O.*, 469 U.S. 325, 340–41 (1985) (holding that although the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials, "school officials need not obtain a warrant before searching a student who is under their authority[]" and that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.").

58. In April 2009, the U.S. Supreme Court heard oral argument in the case of *Safford Unified School District v. Redding* involving a 13-year-old student at Safford Middle School in Arizona named Savana Redding was strip-searched by school officials in search of ibuprofen. See Adam Liptak, *Court Debates Strip Search of Student*, N.Y. TIMES, Apr. 22, 2009, at A13 (writing that the nation's high court heard argument in the case of Savana Redding, who "had been subjected to a strip search in 2003 by school officials in Safford, Ariz. She was 13 and in eighth grade at the time[,] and noting that the school "officials were acting on a tip from another student and were looking for prescription-strength ibuprofen, a painkiller. They made Ms. Redding strip to her underwear, shake her bra and pull aside her panties. The officials, both female, found no pills.").

59. 18 U.S.C. §§ 2701–2712 (2006 & Supp. 2008).

factors that would militate in favor of treating cell phones and computers differently for seizure purposes in a school. But we're seeing rampant abuses of this. Any time somebody uses a cell phone in class, that's technically a violation of the school policy and that gives them the reasonable suspicion to seize it. Then, they go the extra step of looking through the cell phone, and I think that's where they violate the law. But those cases just haven't made it up the appellate ladder yet and we don't have clarification on it, but it's happening.

ALPERT: If I had used the calculator on my phone at my high school, they could have seized the phone and looked through the pictures.

QUESTION: Were there any conditions of probation regarding your use of technology?

ALPERT: I'm not allowed to be on the Internet unless it's for school or work, of which I have neither at the moment. The phone I have now would be great if I could go on the Internet now, but I can't.

WALTERS: I can't communicate with Phillip by e-mail. I have to send things to his dad. It's just crazy.

QUESTION: That must be tough because the Internet today is part of just about everyone's life.

WALTERS: And there is law out there that says restricting Internet use as a condition of probation, unless there is a clear tie between the crime and the Internet, is a violation of your liberty rights because you are so dependent on the Internet. You can't get a plane ticket, hardly, or do anything without the Internet. There has to be a good reason before you take someone's Internet access away. It used to be that was just a consequence of doing anything wrong. Now, judges are starting to realize that you can't do that to people without a showing that they have abused their Internet privileges. Sending e-mail perhaps is enough of a tie, I don't know, but to restrict somebody for five years seems excessive.

QUESTION: Some of the boys in the Greensburg, Pennsylvania, case are being charged with possessing child pornography merely because somebody sent it to them.⁶⁰ Is this part of the big picture now?

60. See Paula Reed Ward, *DA's Case Over Teen 'Sexting' Draws Ire of Parents*, PITTSBURGH POST-GAZETTE, Mar. 26, 2009, at A-1 (reporting that "[t]hree boys from Southmoreland High School in Greensburg were charged this year in juvenile court with possession of child pornography after the school discovered racy pictures of girls on a

ALPERT: You have to show intent that you want it. If it comes into your mailbox and you just delete it, from what I've heard, that won't get you in trouble.

WALTERS: There are several cases on that point. The most recent California case that I read suggested that reading of that statute—it's a matter of statutory intent—says if the material is in your computer at all, without any evidence that you've even seen it, that constitutes possession.⁶¹ In fact, the defense in that case said, "This material was in my cache, some virus downloaded it and I never saw it." But that defense didn't work.

A number of Circuit Courts of Appeals have found that, under the federal statute, there needs to be an element of criminal intent to the knowing possession. And it needs to be shown that it was accessed intentionally long enough to realize what it is and keep it as opposed to realize what it is and delete it. That's a reasonable reading of a statute. Florida's law⁶² hasn't been clarified, but it certainly could be read as prohibiting any possession, no matter how brief and no matter how unintentional. To the extent that somebody sent you the picture, that's enough for possession. Now, how many of these kids realistically are going to delete that picture of the hot 16-year-old? It's unrealistic to think they will. Yet, they're going to be treated the same way as someone who is making their kid engage in a sex act on camera.

ALPERT: You walk around the mall with your attractive girlfriend and you want people to see her. You want to say, "This is the girl I am dating." It's the same thing. There's just a little more of her in the photo. Technically, the hot 16-year-old girl that you get the

confiscated cell phone. Three girls in the photos were charged with possession, manufacture or distribution of child pornography.").

61. See *Tecklenburg v. Superior Court*, 87 Cal. Rptr. 3d 460, 470 (Cal. Ct. App. 2009) (describing "a developing area of the law regarding whether a defendant knowingly possesses child pornography on a computer when the computer automatically downloads those images into computer's cache.").

62. Florida law provides, in relevant part, "It is unlawful for any person to possess with the intent to promote any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any sexual conduct by a child. The possession of three or more copies of such photograph, motion picture, representation, or presentation is prima facie evidence of an intent to promote." FLA. STAT. § 827.071(4) (2009).

In addition, Florida law states, in relevant part, "It is unlawful for any person to knowingly possess a photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child. The possession of each such photograph, motion picture, exhibition, show, representation, or presentation is a separate offense." FLA. STAT. § 827.071(5) (2009).

picture of also possesses it and she made child pornography. My lawyer told me that, in my case, we could go after my “victim,” which is what I have to address her as in my class.

To be fair, I did hurt her. I did something pretty bad to her. This girl could have been charged with child pornography—sending and creating child pornography. I said, “There’s no reason for that. What good does that do anybody?” It certainly doesn’t help me at all and it makes her life worse for no reason.

WALTERS: Child pornography laws are understandably strict, but this is a different age that we’re living in now. Kids have access to the creation and sending of those materials. We have to look at what we are doing with these laws and ask whether they are being applied in the correct manner. Part of the problem is that all these schools have these school resource officers—cops on campus—so every incident becomes a criminal matter when it used to be a school punishment like suspension. Now, the criminal justice system gets involved: there’s an arrest, a delinquency proceeding and it just spins out of control sometimes.

QUESTION: You’ve framed this in terms of a social issue. We live in this world of sexualization of minors,⁶³ from Britney Spears appearing in a school-girl outfit⁶⁴ to a sheet-draped Miley Cyrus in *Vanity Fair*.⁶⁵ It almost seems ironic that we are going after these kids. What do we expect?

63. See generally M. GIGI DURHAM, *THE LOLITA EFFECT: THE MEDIA SEXUALIZATION OF YOUNG GIRLS AND WHAT WE CAN DO ABOUT IT* 27 (Overlook Hardcover 2008) (contending that “our media and our culture have produced a gathering of ‘prostitots’—hypersexualized girls whose cultural presence has become a matter of heated public controversy[.]” and noting that “[t]oday more than ever, the sexy girl is at the center of a storm.”).

64. See generally Richard L. Eldridge, *Concert Review: Spears is a capable ringmaster*, ATLANTA J.-CONST., Mar. 7, 2009, at E5 (describing how fans of Spears appeared at one of her recent concerts “dressed in everything from her Catholic school girl video outfit to her awards show snake charming session.”); Joe Williams, *Act Your Age!*, ST. LOUIS POST-DISPATCH, May 18, 2003, at F3 (asserting that “[t]he real revolution in feminine archetypes is at the teen and preteen level. Anyone who’s been to a mall lately has seen the spawn of Britney Spears, who famously proclaimed in a video, ‘I’m not that innocent,’ while ripping away layers of her school-girl uniform.”).

65. See generally Lorena Blas, *Miley photos: ‘Artsy’ or embarrassing?*, USA TODAY (McLean, Va.), Apr. 28, 2008, at 1D (describing the June 2008 issue of *Vanity Fair* magazine in which the then 15-year-old singer and actress “posed for celebrity photographer Annie Leibovitz” and featuring “[o]ne waist-up shot [that] shows Cyrus looking provocatively over her right shoulder, her back nude and breasts covered by her arms and shimmery fabric.”); Tara Dooley, *Cyrus shots get a cold shoulder*, HOUSTON CHRON., Apr. 29, 2008, at Star 1 (describing the controversial photograph as “taken by icon-maker Annie Leibovitz” and showing “Cyrus, 15, draped in a silk sheetlike covering, apparently topless underneath.”).

WALTERS: It's a dangerous argument to make, yet it's one that makes perfect sense. But, as a society, we're schizophrenic. On the one hand, we will sexualize our teens and they'll be all over advertising and entertainment. At the same time, we love to condemn it and it's horrible. We like to judge it. If you're on the wrong end of it, God help you. The wrath of society will come down and blame you for everything that's happening.

QUESTION: Clearly, there's a disconnect between what the law is now and how it can be applied to newer technologies. Are you at all confident that the law will catch up with technology so that the disconnect will disappear?

WALTERS: Yes, but it's going to take time. These things don't move as quickly as they should and there are going to be more people like Phillip who are going to be caught up in this before the states start passing laws and the judges and prosecutors realize this isn't the proper reaction to it. The law moves very slowly and the technology always outpaces the law. Unfortunately, just when we finally catch up to this problem, there will be a new problem that's much more significant that kids are doing. We can predict it.

QUESTION: In terms of using prosecutorial resources in a tough economy today, isn't this a waste of time on the part of law enforcement when there are far more serious offenses to pursue?

WALTERS: The amount of child pornography that is being produced in the United States is significantly on the rise. If you look at some of the statistics that the ASACP⁶⁶ has put together, privately made child pornography, through trading clubs and so forth, is increasing significantly. If anything, that's where the law enforcement resources should be devoted—to infiltrating those groups and punishing people who are using their kids in such a heinous way. To spend the kind of time, effort, and money that it took to bring Phillip's case to justice and to send him to these classes, oversee him in probation—all the efforts and resources—is just crazy. If you look at the kind of time and effort the state has to spend just for him to be

66. This is a reference to the Association of Sites Advocating Child Protection (ASACP), which describes itself on its website as “a non-profit organization dedicated to eliminating child pornography from the Internet. ASACP battles child pornography through its CP reporting hotline, and by organizing the efforts of the online adult industry to combat the heinous crime of child sexual abuse. ASACP also works to help parents prevent children from viewing age-inappropriate material online.” Mission, Association of Sites Advocating Child Protection website, <http://www.asacp.org> (last visited Sept. 11, 2009).

able to go to New York for a TV show,⁶⁷ it's just absurd. We have limited resources, and we need to focus on what's important. Sexting cases are a social problem and there are adequate social mechanisms in place to address them and, in my view, the justice system doesn't have a place in it.

IV. Conclusion

Without question, child pornography is a serious and growing crime in the United States⁶⁸ that merits the expenditure of prosecutorial resources to punish the offenders. When Congress and state legislatures drafted child pornography statutes,⁶⁹ they recognized the vile nature of those who use and exploit minors in the production of sexually explicit materials. The U.S. Supreme Court similarly has made it clear that child pornography, produced by using actual minors engaged in sexual acts,⁷⁰ is criminal and enjoys none of the protections afforded to other expression under the First Amendment.⁷¹

67. See Today Show, *supra* note 40.

68. As the United States Department of Justice's Child Exploitation and Obscenity Section stated on its website in May 2009, "[p]roducing child abuse images has now become easy and inexpensive. The Internet allows images and digitized movies to be reproduced and disseminated to tens of thousands of individuals at the click of a button. The distribution and receipt of such images can be done almost anonymously. As a result, child pornography is readily available through virtually every Internet technology (web sites, email, instant messaging/ICQ, Internet Relay Chat (IRC), newsgroups/bulletin boards, and peer-to-peer). The technological ease, lack of expense, and anonymity in obtaining and distributing child pornography has resulted in an explosion in the availability, accessibility, and volume of child pornography." Child Pornography, Child Exploitation and Obscenity Section, U.S. Dep't of Justice website, <http://www.usdoj.gov/criminal/ceos/childporn.html> (last visited Sept. 11, 2009).

69. See, e.g., *supra* note 15.

70. *Cf. Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002) (striking down a federal law criminalizing virtual child pornography as distinguished from sexually explicit material that uses actual minors in its production).

71. As the United States Supreme Court wrote more than twenty-five years ago, "The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." *New York v. Ferber*, 458 U.S. 747, 764 (1982). See also Brian G. Slocum, *Virtual Child Pornography: Does It Mean the End of the Child Pornography Exception to the First Amendment?*, 14 ALB. L.J. SCI. & TECH. 637, 639 (2004) (writing that in "*New York v. Ferber*, the Supreme Court held that the government's interest in safeguarding children from sexual abuse was so powerful that it justified an exception to the First Amendment allowing the government to proscribe sexually explicit images of minors without having to prove that the images are obscene.").

Penalties for the production, distribution and even possession of child pornography are strict and often include long prison terms⁷² designed to keep offenders off the streets and playgrounds where they could inflict further harm on children. While sexting teenagers' behavior might squeeze into the literal definition of child pornography under various state and federal laws,⁷³ it defies logic to suggest that lawmakers enacting child pornography laws envisioned teenagers voluntarily exchanging photographs of themselves in various states of undress or other sexually provocative positions when crafting the laws in place today. Indeed, "the purposes of the federal and state statutes that prohibit possession of child pornography are largely the same. The statutes focus on preventing pedophiles and sexual abusers from stimulating their appetites, protecting children, and encouraging the elimination of existing contraband."⁷⁴

Several problems emerge from lumping sexting teens into the same category as depraved criminals who inflict harm on minors. First, and perhaps most obvious, teenagers engaged in sexting are not knowingly harming minors in the same way that traditional child pornographers do. Indeed, in many of these instances, teens are sending photographs of themselves in a playful manner—a high-tech form of flirting—using a forum that has become synonymous with their generation.⁷⁵ Second, the draconian penalties that stem from child pornography convictions can decimate a teenager's life—making it all but impossible for the teen to become a productive member of society. While penalties vary, the sentences often entail prison time, long periods of probation and a lifetime listing on the sex

72. See 18 U.S.C. § 2251 (2006 & Supp. 2008) (providing that a first-time offender convicted under federal child pornography laws for creating and producing child pornography shall be "imprisoned not less than 15 years nor more than 30 years"; that a second-time offender shall be "imprisoned for not less than 25 years nor more than 50 years"; and that a person with two or more prior convictions for creating and producing child pornography shall be "imprisoned not less than 35 years nor more than life."); 18 U.S.C. § 2252(b)(1) (2006 & Supp. 2008) (providing that a first-time offender convicted under federal child pornography laws for the possession, distribution and/or receipt of child pornography shall be "imprisoned not less than 5 years and not more than 20 years," while repeat offenders shall be "imprisoned for not less than 15 years nor more than 40 years.").

73. See *supra* notes 15–17 and accompanying text.

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

75. See generally, Marks, *supra* note 49 (describing sexting cases as "the latest sign of the disconnect between the legal system and an increasingly sexualized adolescent cyberculture . . .").

offender registry. Finally, the stigma⁷⁶ attached to being labeled a child pornographer is lasting. Few crimes carry such a pejorative marker, and members of the public often link child pornography with pedophilia and other heinous crimes—sometimes for good reason.⁷⁷

The teens enveloped in these cases are not the only ones suffering harm. Society at large pays a hefty price. Forcing teenagers who get caught sexting and are criminally prosecuted to register as sex offenders severely dilutes the importance and utility of the sex offender registry. Maureen Kanka, mother of Megan Kanka, the 7-year-old girl raped and murdered by a twice-convicted sex offender and the child after whom “Megan’s Law” was named, has publicly decried the registration of sexting teens.⁷⁸ The concept behind the sex-offender registry is to alert citizens when a convicted sex offender moves into their community.⁷⁹ As a result, parents can take measures to ensure that their children avoid contact with particular individuals.

If sexting teens are required to register, the sex offender registry may lose its impact by diluting its importance. Certainly, a teenager who sent a nude photograph of herself to her boyfriend is not a threat to the community in the way that a convicted child molester is, but if such prosecutions are permitted, both are treated equally under the law. To put it bluntly, a caring mother of a 5-year-old girl wants to know when a pedophile has moved into the neighborhood; she probably doesn’t care at all whether the 16-year-old girl down the street is sending nude photos of herself to her 16-year-old boyfriend.

Phillip Alpert’s case is a classic example of how the child pornography laws can be stretched beyond their logical utility. A now 19-year-old man must endure weekly classes with traditional sex offenders and remain on the registry at least until he reaches middle age and possibly beyond. The impact on his life has been stark and

76. See generally LAWRENCE M. FRIEDMAN, *LAW AND SOCIETY: AN INTRODUCTION* 118 (Prentice Hall College Division 1977) (defining stigma as “a label attached to a person, which stimulates punishing reactions from people in surrounding society[]” that may be manifested when “an employer refuses to give a convict a job; people next door refuse to be friendly; someone rejects the convict’s friendship.”).

77. See generally, Robert D. Richards & Clay Calvert, *Untangling Child Pornography from the Adult Entertainment Industry: An Inside Look at the Industry’s Efforts to Protect Minors*, 44 CAL. W. L. REV. 511, 516 (detailing how “[s]ome people arrested for child pornography are child predators.”).

78. Beth DeFalco, *NJ Girl, 14, arrested after posting nude pics*, ASSOC. PRESS NEWS, Mar. 26, 2009 (suggesting “[t]he teen needs help, not legal trouble . . .”).

79. See generally, *Conn. Dept. of Public Safety v. Doe*, 538 U.S. 1, 7–8 (2003) (upholding states’ rights to post on a website the names of sex offenders required to register under Megan’s Law).

devastating.⁸⁰ No longer able to attend college because he is a registered sex offender, the Orlando, Florida, teen's movements are monitored, requiring permission from the state before he can leave the county. His five-year probationary sentence has impeded his ability to secure employment. Undoubtedly, his ability to contribute to society in any meaningful way has been seriously curtailed and perhaps will be for life. Unfortunately, Alpert's case is not unique. Overzealous prosecutors are ramping up criminal cases in other parts of the country as well.⁸¹

Prosecutors in Pennsylvania, for example, have charged sexting teenagers with "manufacturing, disseminating or possessing child pornography."⁸² These prosecutions, and others like them across the country, threaten to not only unravel and dilute the nation's child pornography laws but also to dry up resources that could be used to pursue more serious criminal activity. Alternatives to prosecuting under child pornography laws do exist. Myriad less serious criminal statutes—disorderly conduct and harassment by communications laws⁸³ among them—are available in most states, if prosecutors choose to use them. Additionally, lawmakers now are looking to create other statutes that specifically address sexting activity.⁸⁴

Although new laws that remove sexting behavior from the narrow confines of child pornography statutes are a step in the right direction, they still do not address the issue of sexting from a more systemic approach. As attorney Lawrence Walters has suggested, sexting is a social, rather than criminal, issue. A successful solution

80. See *supra* note 52 and accompanying text. See also St. George, *supra* note 3, at A1 (noting that "after being classified as a sex offender, Alpert was kicked out of community college He cannot live with his father, whose home is too close to a school. He is required to attend weekly group counseling sessions with sex offenders.").

81. See e.g., Martha Irvine, *Teens who 'sext' racy photos charged with porn*, ASSOC. PRESS, Feb. 4, 2009 (discussing prosecutions in Indiana and Pennsylvania); Edward D. Murphy, *'Sexting': New risky behavior for teens*, PORTLAND PRESS HERALD (Me.), Mar. 15, 2009, at A5 (noting criminal charges for sexting in Virginia and recent criminal investigations over sexting in Maine).

82. See Courogen et al., *supra* note 18, at A01.

83. For a state-by-state listing of harassing communications statutes, see Freedom Forum "Cyberstalking" website, available at <http://www.freedomforum.org/packages/first/cyberstalking/stateharassmentlaws.htm> (last visited May 28, 2009).

84. See, e.g., H.B. 132, 128th Gen. Assem., Reg. Sess. (Oh. 2009) (prohibiting a "minor, by use of a telecommunications device . . . [from] recklessly creat[ing], receiv[ing], exchange[ing], send[ing] or possess[ing] a photograph, video, or other material that shows a minor in a state of nudity."), and S.B. 125, 70th Biennial Sess. (Vt. 2009) (prohibiting minors from transmitting indecent visual depictions of themselves, but exempting those who have not previously violated the law from prosecution for sexual exploitation of children and sex offender registration).

requires more education, and the criminal justice system is a woefully inadequate educator. Whereas education serves as an enabler—moving people forward toward productive futures—the Alpert case serves as a stark reminder that treating sexting behavior as a crime stifles productivity by removing the individual from traditional social growth. To what end? Do sexting teens pose a threat to society? To the extent that someone is harmed by sexting behavior, are there better alternatives than securing child pornography convictions that require registration as a sex offender? These are all questions with which the legislators and prosecutors now must grapple.

Opinion leaders, such as those found on the editorial pages of the nation's newspapers, have stepped to the forefront to answer the latter question with a resounding yes. Many editorials and op-eds have suggested that states do a disservice to society by imposing draconian punishment on their young people.⁸⁵

In one sense, this may turn out to be a problem that evaporates over time. As Attorney Walters observed, when this generation, a group so comfortable with technology and less concerned about privacy issues, assumes its place as leaders, what adults now find unconscionable will be commonplace.

Nonetheless, as Walters suggested, new behaviors likely will emerge in the future that will shock that generation. When that occurs, the point that Walters so aptly made during the interview undoubtedly will ring true again: “As with any development in the law or legal trend, it takes a while before the activity occurs to such an extent that the law notices.”⁸⁶

This certainly now is the situation with child pornography laws. Back in 2001, Professor Amy Adler of New York University School of Law wrote that “[c]hild pornography law is the *least* contested area of First Amendment jurisprudence.”⁸⁷ She could not have envisioned

85. See Deborah Jacobs & Peter G. Verniero, Editorial, *Sexting Does Not Merit Child Endangerment Charges*, STAR-LEDGER (Newark, NJ), Apr. 9, 2009, at 15 (prompting “policymakers to rethink the law’s future application and whether we, as a society, want to jail a generation of young people for engaging in poor judgment.”); Editorial, *A Problem, not a crime: Teenage ‘sexting’ should lead to life-ruining criminal prosecution*, BUFF. NEWS (N.Y.), Apr. 6, 2009, at A10 (suggesting that “the law needs to catch up to technology and make clear that a case such as the Pennsylvania one is a problem but not a life-ruining crime.”); Op-Ed, *Some penalties too high for teen mistakes*, PATRIOT-NEWS (Harrisburg, Pa.), Apr. 5, 2009, at F03 (observing that “[a]pparently the penalties for being young and doing stupid things depend on where you live.”).

86. Section III, *supra*, at 110.

87. Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 210 (2001) (emphasis added).

that, less than a decade later, that statement would be cast into serious doubt by the phenomenon of sexting, as it is no longer always correct that the “production of child pornography depicts the practice of child sexual abuse.”⁸⁸

88. Jeffrey M. Bryan, *Sexual Morality: An Analysis of Dominance Feminism, Christian Theology, and the First Amendment*, 84 U. DET. MERCY L. REV. 655, 672 (2007).

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