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## The Child as Victim and Perpetrator: Laws Punishing Juvenile "Sexting"

Joanna L. Barry

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# The Child as Victim and Perpetrator: Laws Punishing Juvenile “Sexting”

## ABSTRACT

*As penalties for child pornography increase in severity across the United States, new technologies and teenage ingenuity are creating problems that legislatures never considered. In response to the “sexting” phenomenon, prosecutors are charging minors under traditional child pornography laws—originally intended to punish adult behavior—with creating, possessing, and distributing child pornography. These charges carry severe penalties, including sex offender registration, and unfairly punish impulsive juveniles.*

*Some states, conscious of prosecutors’ and parents’ struggle to respond to this behavior, are proposing new legislation, such as supplementing traditional child pornography charges with a new offense for sexting and allowing prosecutors to choose from among the charges. Other states recognize the harshness of that approach, however, and protect teenagers from traditional child pornography laws by defining a lesser offense for sexting that precludes the more serious charges.*

*This Note analyzes the various aspects of any legislative approach to sexting, including why sexting is a legal issue; why it should be adjudicated in juvenile court; and why the recently enacted statutes of some states fail to adequately protect juveniles from the harsh penalties available under child pornography statutes. Ultimately, this Note proposes that states modify their child pornography laws to specifically address sexting and that such laws should include provisions that retain juvenile jurisdiction, provide educational programs, and shield juveniles from the most severe penalties available under the traditional statutes.*

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Two girls, twelve or thirteen years old, are hanging out and taking photographs of each other on their cell phones. One girl is photographed talking on her phone and the other is flashing a peace sign. The pictures show the girls in sports bras, but they think nothing of it—they are just goofing off. Later, they show the pictures to some school friends, prompting a teacher to confiscate their phones—but they still think little of the incident. Shortly thereafter, their parents are called into school because the girls are facing child pornography charges, and the innocent pictures of them standing in their sports bras are being labeled “provocative” and “semi-nude” by the District Attorney.

In 2008, this surreal drama played out in a Pennsylvania town.<sup>1</sup> The girls, Marissa Miller and Grace Kelly, subsequently filed suit, along with another female classmate, to obtain a temporary restraining order (“TRO”).<sup>2</sup> The TRO, granted in 2009, enjoined the District Attorney from initiating criminal charges against them.<sup>3</sup>

During that same year, an Ohio girl committed suicide after her ex-boyfriend sent nude pictures of her to other students at her school.<sup>4</sup> In a Florida courtroom, in 2009, an eighteen-year-old boy pled guilty to child pornography charges for accessing his sixteen-year-old girlfriend’s email account and sending more than seventy people nude

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1. Miller v. Skumanick, 605 F. Supp. 2d 634, 637–39 (M.D. Pa. 2009) (granting the temporary restraining order) *aff’d sub nom.* Miller v. Mitchell, 598 F.3d 139, 143–44 (3d Cir. 2010) (affirming the district court decision in *Miller v. Skumanick* on First and Fourteenth Amendment grounds and remanding for further proceedings on the merits).

2. *Id.*

3. *Id.*

4. Mike Celizic, *Her Teen Committed Suicide over ‘Sexting,’* TODAYSHOW.COM (Mar. 6, 2009), <http://www.msnbc.msn.com/id/29546030/>.

photographs she had once sent him.<sup>5</sup> The media has seized upon these and other incidents as the public grapples with the new issue of teenage sexting.<sup>6</sup>

Sexting, derived from "sex" and "texting," includes many different practices. However, sexting is best summarized as "the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs via cellular telephones or over the Internet."<sup>7</sup> Sexting takes place in several different scenarios, but the most common include: (1) a teenage couple sharing photographs taken together or separately; (2) one member of the couple forwarding pictures of the other, either before or after a break-up; and (3) friends exchanging photographs with one another.<sup>8</sup>

Teenagers, not recognizing the consequences of their actions, are increasingly sending racy pictures over the Internet and via text message.<sup>9</sup> According to a survey conducted by Pew Internet and American Life Project, 71% of all teenagers own a cell phone, and among fifteen- to seventeen-year-olds that number reaches 83%.<sup>10</sup> Another study, conducted by The National Campaign to Prevent Teen and Unplanned Pregnancy concluded that a significant number of teenagers engage in sexting.<sup>11</sup> The survey found that 20% of respondents—or one in five teenagers—have "electronically sent, or posted online, nude or semi-nude pictures or video of themselves."<sup>12</sup> Additionally, 48% of teenagers report having received such a message.<sup>13</sup>

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5. Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 8–9 (2009) (discussing the case of 18 year-old Phillip Alpert).

6. See Donna St. George, *Sending of Explicit Photos Can Land Teens in Legal Fix*, WASH. POST, May 7, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/06/AR2009050604088.html>; Mike Brunker, *'Sexting' Surprise: Teens Face Child Porn Charges*, MSNBC.COM (Jan. 15, 2009), <http://www.msnbc.msn.com/id/28679588/>; Penny Spiller, *Alarm Bells Ring over 'Sexting,'* BBC NEWS (May 15, 2009), <http://news.bbc.co.uk/2/hi/americas/8043490.stm>.

7. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009); see also Isaac A. McBeth, *Prosecute the Cheerleader, Save the World?: Asserting Federal Jurisdiction over Child Pornography Crimes Committed Through "Sexting,"* 44 U. RICH. L. REV. 1327, 1328 (2010).

8. See McBeth, *supra* note 7, at 1328–29.

9. Deborah Feyerick & Sheila Steffen, *'Sexting' Lands Teen on Sex Offender List*, CNN.COM (Apr. 8, 2009), <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html>.

10. AMANDA LENHART, PEW RESEARCH CTR., TEENS AND MOBILE PHONES OVER THE PAST FIVE YEARS: PEW INTERNET LOOKS BACK 7 (2009), available at <http://www.pewinternet.org/~media/Files/Reports/2009/PIP%20Teens%20and%20Mobile%20Phones%20Data%20Memo.pdf>.

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

12. *Id.*

13. *Id.*

Many of these teenagers do not appreciate the very serious legal consequences that can result from sending such photographs. The reality is that prosecutors are using traditional child pornography laws to charge minors who engage in sexting with creating, possessing, and distributing child pornography and related offenses such as sexual exploitation of a minor.<sup>14</sup> Certainly, the prevalence of teenage sexting is an alarming phenomenon because nude photos, once transmitted, are no longer controlled by the minor depicted.<sup>15</sup> Nevertheless, child pornography prosecutions are not the proper response.<sup>16</sup> Instead, states should focus on educating teenagers about the consequences of sexting and impose a punishment that is proportionate to the crime.

Furthermore, the juvenile and adult justice systems exist independently because society recognizes that juveniles and adults should be treated differently. Research analyzing brain development shows that adolescents “tend to be more intensely emotional, impulsive, and willing to take risks” and that adolescents make decisions using a different part of their brains than do adults.<sup>17</sup> In *Roper v. Simmons*, the United States Supreme Court recognized that juveniles are less criminally responsible than adults, and held that imposing the death penalty on anyone under the age of eighteen violates the Eighth Amendment’s prohibition of “cruel and unusual punishment.”<sup>18</sup>

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14. See *Miller v. Skumanick*, 605 F. Supp. 2d 634, 639–40 (M.D. Pa. 2009); see also *A.H. v. State*, 949 So. 2d 234, 235–36 (Fla. Dist. Ct. App. 2007) (affirming the adjudication of a minor as delinquent where the juvenile possessed photographs of herself and another minor engaging in sexual activity).

15. Phillip Alpert’s vindictive distribution of his girlfriend’s nude photos in Florida and Jessica Logan’s death after her photo was transmitted around her school in Ohio demonstrate the lack of control that teenagers have over these photos and the sometimes tragic consequences. See Celizic, *supra* note 4; Richards & Calvert, *supra* note 5. Sexting also presents other dangers because photographs on the Internet could resurface when employers conduct a background check or end up on websites frequented by sexual predators. See Amy S. Clark, *Employers Look at Facebook, Too*, CBSNEWS.COM, (June 20, 2006), <http://www.cbsnews.com/stories/2006/06/20/eveningnews/main1734920.shtml>

16. Child pornography charges lead to the stigma of being labeled a sex offender, which can require registration relocation away from a school or church, and employment limitations. See Maggie Jones, *How Can You Distinguish a Budding Pedophile from a Kid with Real Boundary Problems?*, N.Y. TIMES MAGAZINE, July 22, 2007, <http://www.harmonyadoptions.org/uploads/pdf/Juvenile%20Sex%20Offenders.pdf>.

17. “Adolescents tend to process emotionally charged decisions in the limbic system, the part of the brain charged with instinctive (and often impulsive) reactions. Most adults use more of their frontal cortex, the part of the brain responsible for reasoned and thoughtful responses.” David E. Arredondo, *Child Development, Children’s Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & POL’Y REV. 13, 15 (2003).

18. *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (finding juveniles less criminally culpable than adults due to their immaturity, transitory identity, and susceptibility to peer and environmental influences).

Sexting is the newest expression of teenagers' urge to examine their developing sexual identity; in essence, "a modern variation on 'playing doctor or spin-the-bottle.'"<sup>19</sup> Natural sexual behavior for children as young as seven includes "playing doctor," "look[ing] at nude pictures," and becoming "interested in the opposite sex."<sup>20</sup> Moreover, with roughly 47% of teenagers in ninth to twelfth grade reporting at least one instance of sexual intercourse, it seems natural that teenagers would engage in other forms of sexual expression.<sup>21</sup> Teenagers have turned to "sexts" as that new form of expression. As the Juvenile Law center noted in an amicus brief to the Third Circuit Court of Appeals, "sexting is the result of a unique combination of the well-recognized adolescent need for sexual exploration and the new technology that allows teens to explore their sexual relationships via private photographs shared in real-time."<sup>22</sup>

Even setting aside the major differences that exist between juvenile and adult criminals, prosecutors should not rely on child pornography laws to combat sexting because state legislatures had much more sinister actions in mind when they enacted those laws.<sup>23</sup> Juveniles were not the intended targets of these laws; rather, they were the vulnerable class that legislators intended to protect.<sup>24</sup> In fact, when the Attorney General's Commission on Pornography conducted an exhaustive review of the child pornography problem in America, it "did not even mention the possibility that minors might

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19. Michel Comte, *'Sexting' No Worse than Spin-the-Bottle: Study*, PHYSORG.COM (May 26, 2009), <http://www.physorg.com/news162579483.html>; Kristen Schorsch, *Sexting May Spell Court for Children: Kids Trading Photos Seen as Child Porn, Which is a Felony*, CHI. TRIB.(Jan. 29, 2010), [http://articles.chicagotribune.com/2010-01-29/news/1001280853\\_1\\_sexting-cell-phones-nude](http://articles.chicagotribune.com/2010-01-29/news/1001280853_1_sexting-cell-phones-nude) ("Children played doctor long before grade school students were armed with cell phones capable of snapping photos. They just didn't record an image of the offense. But technology has created a trail of evidence.").

20. NAT'L CENTER ON SEXUAL BEHAV. OF YOUTH, NO. 4, NCSBY FACT SHEET: SEXUAL DEVELOPMENT AND SEXUAL BEHAVIOR PROBLEMS IN CHILDREN AGES 2-12, at 2 (2004), available at <http://www.ncsby.org/pages/publications/Sexual%20Development%20of%20Children.pdf>.

21. See HENRY J. KAISER FAM. FOUND., U.S. TEEN SEXUAL ACTIVITY 1 (Jan. 2005), available at <http://www.kff.org/youth/hivstds/upload/U-S-Teen-Sexual-Activity-Fact-Sheet.pdf>.

22. Catherine Arcabascio, *Sexting and Teenagers: OMG R U Going 2 Jail???*, 16 RICH. J.L. & TECH. 10, ¶ 13 (2010) (citing Brief for Juvenile Law Center as Amici Curiae Supporting Appellees at 6, *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. Mar. 17 2010), available at <http://www.jlc.org/files/briefs/JLC-Amicus-Miller-v-Skumanick.pdf>).

23. For example, in its Congressional Findings for the Child Pornography Prevention Act of 1996, Congress explained that it was concerned about the potential for adult exploitation of children and the connection between child pornography materials and child sexual abuse. Child Pornography Prevention Act, Pub. L. No. 104-208, § 121(1), 110 Stat. 3009, 3009-26 to -27 (1996).

24. Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 517 (2008).

produce sexually explicit images of themselves.”<sup>25</sup> Child pornography concerns state legislatures because of its effects on the children depicted—children who are often molested, raped, or sexually abused at the hands of adults.<sup>26</sup> In contrast, sexting involves photographs that are often self-produced or taken during a relationship between teenagers.<sup>27</sup> Thus, the grave harm inflicted by child pornography greatly exceeds that of sexting, and legislatures did not contemplate punishing juveniles as perpetrators when they enacted the statutes.<sup>28</sup>

This Note examines the law regarding juvenile sexting and suggests that states treat “child pornography” produced by juveniles as distinct from that created by adults.<sup>29</sup> Part I analyzes the potential liability of teenage sexters under the child pornography laws and relates how states have begun to modify their child pornography statutes to address the reality of juvenile sexting. Part II analyzes whether juvenile or adult courts should adjudicate sexting cases, why the problem requires a solution beyond parental involvement, and how recently enacted laws still fail to adequately protect juveniles. Part III proposes that states modify their child pornography laws to specifically address sexting and advocates some specific provisions that should be part of any state law on this subject.

## I. IS SEXTING CHILD PORNOGRAPHY?

### *A. Current Child Pornography Statutes Fail to Differentiate Between Adult and Minor Perpetrators*

In many states, child pornography laws recognize no distinction between juveniles and adults in either the definitions or punishments of child exploitation cases.<sup>30</sup> Indeed, as one state’s attorney has noted, legislators never contemplated “children sharing images of themselves,”<sup>31</sup> even though teenage sexting “might squeeze

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25. *Id.*

26. *See* Smith, *supra* note 24, at 516 (“With this conventional sort of child pornography, children are subject to unspeakable harm—sexual, emotional, and often physical.”).

27. *See supra* notes 1–5.

28. *See* Richards & Calvert, *supra* note 5, at 35; St. George, *supra* note 6.

29. This Note will focus exclusively on the application of state child pornography laws to juveniles and for this purpose the terms “juvenile” or “teen” refers to individuals between twelve and seventeen years old. For a discussion of implications of sexting for federal law, including the Protection of Children Against Sexual Exploitation Act of 1977, *see* McBeth, *supra* note 7.

30. Spiller, *supra* note 6 (“[A]t least 20 prosecutions . . . have been undertaken or threatened in a number of US states in recent months.”). Federal statutory law also does not distinguish between the two and defines child pornography as “any visual depiction” which involves a minor engaged in sexually explicit conduct. *See* 18 U.S.C.A. § 2256 (West 2010).

31. St. George, *supra* note 6.

into the literal definition of child pornography."<sup>32</sup> The laws of Virginia and Florida typify this indiscriminate approach.

Virginia's child pornography law states that, "*a person* shall be guilty of production of child pornography," if that person "produces or makes or attempts or prepares to produce or make child pornography."<sup>33</sup> The law defines child pornography as "sexually explicit visual material which utilizes or has as a subject an identifiable minor."<sup>34</sup> By defining child pornography as something committed by "*a person*"—rather than a person over the age of eighteen—prosecutors can easily charge a juvenile under this statute for sending a sexually explicit picture. Moreover, because the statutory language flatly prohibits all sexually explicit pictures of minors, teenagers who take sexually explicit pictures of themselves clearly fall within its scope. The Virginia State Crime Commission frankly recognized this possibility after conducting an examination of Virginia law as applied to sexting.<sup>35</sup> One commissioner explained that Virginia law imposes an absolute prohibition: "[T]he way the laws are written right now, if you're in possession of a naked picture of a child, you're personally guilty of child pornography."<sup>36</sup>

The Crime Commission concluded that potential criminal penalties for violating child pornography statutes include a term of imprisonment ranging from one to twenty years, or five to thirty years if the victim is younger than fifteen.<sup>37</sup> However, a juvenile is unlikely to receive such a lengthy sentence unless tried as an adult.<sup>38</sup> Furthermore, a juvenile over the age of thirteen may be forced to register as a sex offender in Virginia, although the law does not require automatic registration.<sup>39</sup> In Stafford County alone, police conducted twenty-two sexting investigations between 2007 and 2009,

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

33. VA. CODE ANN. § 18.2-374.1(b)(2) (2010) (emphasis added).

34. *Id.* § 18.2-374.1(a).

35. VA. ST. CRIME COMM'N, SEXTING (2009), available at <http://vscv.virginia.gov/Sexting.pdf>.

36. Olympia Meola, *Legislators Look into How Va. Laws Cover 'Sexting,'* RICHMOND TIMES-DISPATCH, May 20, 2009, [http://www2.timesdispatch.com/news/2009/may/20/sext20\\_20090519-223511-ar-42939/](http://www2.timesdispatch.com/news/2009/may/20/sext20_20090519-223511-ar-42939/).

37. VA. ST. CRIME COMM'N, *supra* note 35.

38. *Id.*

39. *Id.* Although the Sexual Offender Registration and Notification Act ("SORNA") recently passed by Congress requires sex offender registration for juveniles adjudicated delinquent in certain instances, it does not appear that the law would require registration for sexting. Adam Walsh Child Safety and Protection Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (§ 111(8)) provides that delinquency adjudications count as convictions "only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse.").

demonstrating the seriousness with which police view the application of child pornography laws to juveniles.<sup>40</sup>

Florida has enacted a similar child pornography law, which states that “a person” may be guilty of “sexual performance by a child,” if, “knowing the character and content thereof, he or she produces, directs or promotes any performance which includes sexual conduct by a child less than 18 years of age.”<sup>41</sup> It is also 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.”<sup>42</sup> Both production and possession are felonies<sup>43</sup> and, again, the statutory language allows for the prosecution of juveniles, even when teenagers take pictures of themselves.

Indeed, Florida prosecutors have, in at least a few instances, prosecuted cases where minors have taken photographs of themselves. In *A.H. v. State of Florida*, a sixteen-year-old juvenile challenged her adjudication of delinquency for taking nude pictures of herself and her seventeen-year-old boyfriend.<sup>44</sup> Even though A.H. was younger than her alleged victim—her boyfriend—and neither defendant ever showed the pictures to a third party, both A.H. and her boyfriend were prosecuted.<sup>45</sup> The majority upheld the constitutionality of the statute as applied to A.H.<sup>46</sup> Similarly, in *State of Florida v. A.R.S.*, the First District Court of Appeal of Florida reversed the dismissal of two counts of a delinquency petition charging a juvenile for videotaping himself and another minor engaged in sexual foreplay.<sup>47</sup> Although the Florida juvenile court system adjudicated both *A.H.* and *A.R.S.* and those cases resulted in delinquency findings rather than criminal convictions, the law does not preclude prosecution in criminal court.<sup>48</sup>

These statutes demonstrate that state child pornography laws written in overly broad language allows prosecutors to file charges against minors who engage in sexting. Furthermore, the state of Florida has, in fact, applied such statutes to punish juveniles.

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40. *Cyber-Dating Out...Sexting In*, VA. ASS'N OF CHIEFS OF POLICE (Feb. 11, 2009), [http://www.vachiefs.org/news/item/cyber\\_dating\\_out\\_sexting\\_in/](http://www.vachiefs.org/news/item/cyber_dating_out_sexting_in/).

41. FLA. STAT. ANN. § 827.071(3) (West 2010) (emphasis added).

42. *Id.* § 827.071(5) (emphasis added).

43. *See id.* §§ 827.071(3), (5).

44. *A.H. v. State*, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007) (finding a compelling state interest in preventing the production of the photographs at issue and that the juvenile enjoyed no reasonable expectation of privacy).

45. *Id.* (noting that A.H.'s boyfriend was also charged with one count of possession of child pornography under § 827.071(5)).

46. *Id.* at 239.

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

48. *See* §§ 827.071(3), (5).

Leveraging child pornography statutes in this way ignores the prolific use of technology by teenagers, and leads to an undesirable outcome.

*B. Recent Modifications: Acknowledging the Sexting Problem*

A number of states have responded to concerns regarding sexting by amending their child pornography laws.<sup>49</sup> Other states are investigating how their laws apply to sexting and what changes, if any, they should make.<sup>50</sup>

A bill introduced in the Ohio Senate in April 2009 specifically addressed sexting by prohibiting a minor from using a telecommunications device and from recklessly "creating, receiving, exchanging, sending, or possessing" a photograph or other material which shows a minor in a state of nudity.<sup>51</sup> This offense would qualify as a delinquent act, rather than a criminal act, when committed by a juvenile,<sup>52</sup> but a first-degree misdemeanor if committed by an adult.<sup>53</sup> Although this bill specifically prohibits sexting, it does not explicitly preempt existing child pornography laws, which could criminalize the same conduct, and lead to more severe penalties.<sup>54</sup> The Legislative Service Commission's Bill Analysis lists six other provisions that could apply to sexting, most of which constitute varying degrees of felonies.<sup>55</sup>

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49. *Sexting Legislation 2009*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/?tabid=17756> (last updated Sept. 1, 2010) ("In 2009, lawmakers in at least 10 states introduced legislation aimed at 'sexting.'"); see also *Sexting Legislation 2010*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/?tabid=19696> (last updated Sept. 4, 2010) ("In 2010, at least 16 states have introduced or are considering bills or resolutions aimed at 'sexting.'").

50. See S. Res. 90, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); see also Tim Talley, *Oklahoma Hearing Aimed at Shaping 'Sexting' Measure*, CNSNEWS.COM, Oct. 30, 2009, <http://www.cnsnews.com/news/article/56405>.

51. S. 103, 128th Gen. Assemb., 2009–2010 Sess. (Ohio 2009), available at [http://www.legislature.state.oh.us/analysis.cfm?ID=128\\_SB\\_103&hf=analyses128/s0103-i-128.htm](http://www.legislature.state.oh.us/analysis.cfm?ID=128_SB_103&hf=analyses128/s0103-i-128.htm). The bill was moved to the Senate Committee on the Judiciary and Criminal Justice on April 21, 2009 and no further action has been taken. See Status Report of Legislation, 128th Gen. Assemb., 2009–2010 Sess. (Ohio 2009), available at <http://lsc.state.oh.us/coderev/sen128.nsf/Senate+Bill+Number/0103>.

52. *Id.* A delinquent act is adjudicated through the juvenile justice system rather than in criminal court. OHIO REV. CODE ANN. § 2152.02(c)(6) (2010).

53. Ohio S. 103.

54. *Bill Analysis*, 128TH OHIO GENERAL ASSEMBLY (April 9, 2009), [http://www.legislature.state.oh.us/analysis.cfm?ID=128\\_SB\\_103&hf=analyses128/s0103-i-128.htm](http://www.legislature.state.oh.us/analysis.cfm?ID=128_SB_103&hf=analyses128/s0103-i-128.htm) (stating that "[t]he bill does not specify that any of the existing prohibitions . . . no longer would apply to conduct of the type described" in the new prohibition). The Bill Analysis was developed by the Legislative Service Commission (LSC), which is a nonpartisan agency providing drafting, fiscal, research, training, and other technical services to the General Assembly. See Ohio Legislative Service Commission, *About Us*, <http://www.lsc.state.oh.us/about/default.htm>.

55. *Id.* (including "disseminating matter harmful to juveniles," "pandering obscenity involving a minor," "pandering sexually oriented matter involving a minor," "illegal use of a

This bill would provide an avenue for prosecutors to charge minors with a lesser offense, while still leaving open the option to charge juveniles with more serious crimes.

In 2009, Colorado enacted a similar law which proscribed transmissions over telephone networks (including text messaging) as a means of committing “computer dissemination of indecent material to a child,” “internet luring of a child,” “internet exploitation of a child,” and “harassment.”<sup>56</sup> The new law expands the reach of existing laws intended to protect children by adding new offenses, but does not shield juveniles from harsh penalties by distinguishing them from adults. The result is that juveniles can now face prosecution under the new law, as well as other Colorado laws not specifically aimed at sexting. One Colorado District Attorney’s Office explained in an educational brochure that “in Colorado . . . a juvenile could be charged with Sexual Exploitation of a Child . . . a class 3 felony if committed by an adult, or Sexual Exploitation of a Child . . . a class 6 felony if committed by an adult.”<sup>57</sup> The pamphlet emphasizes the serious consequences of juvenile adjudication and warns that conviction of Sexual Exploitation of a Child requires registration as a sex offender under Colorado law.<sup>58</sup>

In New Jersey, legislators responded to incidents of sexting by proposing a bill that would provide juveniles with an opportunity to avoid prosecution.<sup>59</sup> The new law would allow for diversion to an educational program for a juvenile who (1) has not committed a previous sexting offense; (2) was unaware that his or her actions constituted an offense; (3) would be harmed by criminal sanctions; and (4) would likely be deterred from engaging in criminal conduct.<sup>60</sup> The educational program, which would be developed by the Attorney General and Administrative Office of the Courts, would explain to juveniles the legal and non-legal consequences of their action.<sup>61</sup> In

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minor in a nudity-oriented material or performance,” “contributing to the unruliness or delinquency of a child,” and “endangering children”).

56. H.R. 1132, 67th Gen. Assemb., 1st Reg. Sess. (Colo. 2009). This bill was signed into law on June 1, 2009. *Sexting Legislation 2009*, *supra* note 49.

57. FIRST JUDICIAL DIST. ATTORNEY’S OFFICE, *SEXTING: BALANCING THE LAW, TEENS, TECHNOLOGY AND BAD CHOICES*, available at [http://www.co.jefferson.co.us/jeffco/da\\_uploads/Sexting\\_and\\_the\\_Law.pdf](http://www.co.jefferson.co.us/jeffco/da_uploads/Sexting_and_the_Law.pdf) (last visited Sept. 17, 2010).

58. *Id.*

59. Elise Young, *N.J. Assemblywoman Pamela Lampitt Pushes Bills to Deal with Teen ‘Sexting,’* NJ.COM (July 20, 2009), [http://www.nj.com/news/index.ssf/2009/07/trenton\\_nj\\_ap\\_like.html](http://www.nj.com/news/index.ssf/2009/07/trenton_nj_ap_like.html) (“Young people need to understand the ramifications of their actions, but they shouldn’t necessarily be treated as criminals.”).

60. Assemb. 4069, 213th Leg., 2d Sess. (N.J. 2008). The bill was sent to the Assembly Committee on the Judiciary on June 11, 2009 and has not been enacted yet. *Sexting Legislation 2009*, *supra* note 49.

61. N.J. Assemb. 4069.

this way, New Jersey seeks to provide an alternative to prosecution under the child pornography laws for juveniles charged with sexting.

Pennsylvania also focused on developing an educational program to deal with sexting in the wake of *Miller v. Skumanick*.<sup>62</sup> As discussed above,<sup>63</sup> the District Attorney in *Miller* threatened three adolescent girls with felony prosecution for child pornography for photographs depicting two of the girls in sports bras and another girl in a towel.<sup>64</sup> This case, which garnered national media attention, highlights the dangers of prosecutorial discretion under a statutory framework not designed to address this novel problem. In reaction, the Pennsylvania legislature created a new summary offense,<sup>65</sup> Dissemination of Prohibited Materials by a Minor, which prohibits the knowing transmission or distribution of an image of another minor who is at least thirteen-years-old "in a state of nudity."<sup>66</sup> When juveniles are convicted under this provision, the judge may order them to participate in an educational program developed by the county, which would focus on the consequences of sexting.<sup>67</sup>

Finally, in Vermont, the state legislature enacted a provision that proscribes a minor from electronically disseminating indecent material to another person.<sup>68</sup> Juveniles who violate the provision face delinquency adjudications in family court, which may refer them to a juvenile diversion program.<sup>69</sup> This unique law specifically exempts first-time offenders from prosecution under state "sexual exploitation of children" statutes and from sex offender registration

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62. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 647 (M.D. Pa. 2009) (granting a temporary restraining order to three teenage girls who were threatened with child pornography charges by the county prosecutor).

63. *See supra* notes 1–3 and accompanying text.

64. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 639–40 (M.D. Pa. 2009).

65. Summary offenses are not criminal convictions, are less serious than a misdemeanor, and are expungable. Brian Zeiger, *Summary Offenses in Pennsylvania*, CRIM. DEF. L. BLOG (Jan. 22, 2009, 10:44 PM), <http://www.criminallawyerphiladelphia.com/blog/2009/01/22/summary-offenses-in-pennsylvania/>. There are two basic categories: (1) traffic and (2) non-traffic offenses. *Id.*

66. S. 1121, 193d Gen. Assemb. (Pa. 2009). The exception only applies to sexting where the minor depicted is over thirteen. *Id.* Presumably, this is because the legislature only wanted to be lenient where the activity was truly voluntary and had concerns about consent with younger children. It would seem that "sexting" between older teenagers and extremely young children would involve the same concerns as image distribution involving adults and minors. The bill was sent to the Senate Committee on the Judiciary on October 19, 2009 and has not yet been enacted. *Sexting Legislation 2009*, *supra* note 49.

67. Pa. S. 1121.

68. S. 125, 2009–2010 Leg. Sess. (Vt. 2009).

69. Vt. S. 125. Diversion is "an attempt to divert, or channel out, youthful offenders from the juvenile justice system." *Diversion Programs: An Overview*, NAT'L CRIM. JUST. REFERENCE SERVICE (Sept. 1999), <http://www.ncjrs.gov/html/ojdp/9909-3/div.html>.

requirements.<sup>70</sup> However, prosecutors may still decide to charge such juveniles with other, less serious, offenses.<sup>71</sup>

These statutes, whether proposed or enacted, demonstrate that many states recognize the difficulty of addressing sexting with current child pornography laws, and that legislators are acting affirmatively to confront the issue.

## II. EXISTING CHILD PORNOGRAPHY LAWS HARSHLY PENALIZE JUVENILE SEXTERS

Teenagers are immature risk-takers who do not fully comprehend the consequences of their actions.<sup>72</sup> They are, in a word, “juvenile.” As such, the juvenile system is best designed to address the consequences of teenage sexting. The potential harm generated by teenagers exchanging nude photographs does not justify punishing them with the severe penalties typical of child pornography laws. The label “child pornography” prompts graphic images of adults sexually abusing and exploiting young children, conduct that carries appropriately severe penalties. In contrast, sexting is a less sinister activity and does not warrant the same level or type of punishment.

Currently, the law is a blunt instrument, which has created unintended consequences. Legislatures, intent on protecting children from abuse and exploitation, created overly broad statutes that have ensnared the comparatively innocuous behavior of immature adolescents.<sup>73</sup> Prosecutors, in turn, faced with a new technological phenomenon having dangerous implications, have applied the laws available to send a message that such activities will not be tolerated.<sup>74</sup> Now it is time to fill the gap by amending existing laws to ensure that juvenile sexting among peers is addressed with appropriately tailored judicial diversion programs, and not with felony charges or sex offender registration.

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70. *Id.*

71. *Id.*

72. *See Arredondo, supra* note 17.

73. *See Arcabascio, supra* note 22, at ¶ 27 (“In essence, . . . the government has a simultaneous compelling state interest in both protecting and convicting children in child pornography cases despite the fact that those same children . . . lack the ‘foresight and maturity’ to ‘make intelligent decisions about engaging in sexual conduct and memorializing it.’”).

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

*A. Sexting Offenses Should be Handled in the Juvenile System, Not Adult Courts*

The appropriate forum for the prosecution of charges related to teenage sexting lies in the juvenile justice system, which can provide remedies that convey to juveniles the seriousness of their actions while avoiding the stigma of criminal conviction. The state, acting through its police power and under the doctrine *parens patriae*,<sup>75</sup> can often protect children from self-destructive behavior in juvenile court.<sup>76</sup> By ordering rehabilitative treatment rather than penal incarceration, juvenile courts properly focus on the roots of delinquent behavior and help the juvenile to develop into a productive citizen.<sup>77</sup>

In most cases, child pornography offenses properly carry felony penalties to protect children from rape, molestation, and exploitation by adults.<sup>78</sup> Yet, felony charges are a blunt instrument to wield against teenagers, especially those who take photographs of themselves<sup>79</sup> or innocently receive such images of others.<sup>80</sup> These unnecessary penalties overly punish sexting because teenagers self-produce and self-distribute the photographs as part of their exploration of sex and sexual identity.<sup>81</sup> While very serious consequences can stem from the distribution of these photos, the teen depicted suffers the harm—the very person subject to prosecution. Furthermore, peers engage in this activity—teenagers are exploring their sexual identity with other teenagers. Adults would not face such severe criminal penalties for the same conduct, and teenagers who

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75. The legal doctrine of *parens patriae* refers to “the State as parent” and has been used to describe “the power of the state to act *in loco parentis* [in place of the parent] for the purpose of protecting the property interests and person of the child.” BARRY C. FELD, *CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION* 22 (3d ed. 2009).

76. Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 26 (2007).

77. *In re D.F.*, 138 N.J. Super. 383, 389 (Juv. Dom. Rel. Ct. 1975).

78. See *supra* notes 33, 34, 41–42, and accompanying text.

79. Although some teenagers involved in sexting may have malicious intentions, they should still be dealt with in the juvenile system. However, those juveniles should probably face more stringent consequences. See *infra* Part III.

80. “A conviction for sexting can do far more than teach a lesson — it can ruin a life. Teenagers found to have committed a felony or labeled a sex offender could be barred from certain jobs and educational programs, required to register for years with local law enforcement and have restrictions on where they may live.” Press Release, ACLU of Ohio, *ACLU Urges Prosecutors, St. Legislators to Treat Children with Compassion* (Apr. 2, 2009), available at <http://www.acluohio.org/pressreleases/2009pr/2009.04.02.asp>.

81. In 2003, the Henry J. Kaiser Family Foundation found that 47% of 9th through 12th graders reported having had sex. HENRY J. KAISER FAM. FOUND., *supra* note 21.

engage in sexual conduct but do not document it are not likely to be prosecuted.<sup>82</sup>

Recognizing the severity of criminal prosecution, many prosecutors have filed sexting charges in juvenile courts,<sup>83</sup> but they are not *required* to do so in many circumstances.<sup>84</sup> Prosecutors often retain the option of bringing the charges elsewhere by transferring the juvenile to criminal court, to face the same penalties as adults, or by imposing criminal penalties in juvenile courts.<sup>85</sup> Even in the juvenile system, states should ensure that laws explicitly bar attempts to charge juveniles with felonies for sexting offenses or force those who engage in sexting to register as sex offenders. As one skeptical judge asked, if the goal is to protect children from the consequences of their actions, then “why threaten, by prosecuting them, [to put] a permanent blot on their escutcheon, for life?”<sup>86</sup>

Sex offender registration is especially problematic for juveniles and is just one of the devastating collateral consequences that child pornography convictions often entail. Public notification of sex offender status stigmatizes and isolates juveniles more than adults, because registration cuts juveniles off from their peer group.<sup>87</sup> Registered juvenile sex offenders struggle to return to schools, face

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82. See *A.H. v. State*, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007) (Padovano, J. dissenting) (noting that minors could not be charged with unlawful sexual intercourse with a minor for sexual conduct because of privacy concerns but could be charged under child pornography laws for photographing such an act and calling it a “distinction without a difference.”).

83. See *supra* notes 4, 44, 47, and accompanying text.

84. Juveniles can be transferred to adult court through three different mechanisms: legislative exclusion—where the legislature excludes certain offenses from the juvenile system, judicial waiver—where a juvenile court judge makes an individual determination to transfer a juvenile to adult court, and prosecutorial waiver or direct file—where juvenile and adult courts have concurrent jurisdiction over certain offenses and the prosecutor can bring charges in either court. FELD, *supra* note 76. About 15 states have prosecutorial waiver, including Colorado, Florida, Vermont, and Virginia. U.S. Dep’t of Justice, *All States Allow Juveniles to be Tried as Adults in Criminal Court Under Certain Circumstances*, 1999 NAT’L REPORT SERIES: JUVENILE JUSTICE BULLETIN (Dec. 1999), [http://www.ncjrs.gov/html/ojjdp/9912\\_2/juv5.html](http://www.ncjrs.gov/html/ojjdp/9912_2/juv5.html).

85. *Juvenile Justice: Basic Statistics*, PUB. BROADCASTING SERVICE, <http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/basic.html> (last visited Sept. 17, 2010) (showing that “[n]ationwide, it is becoming easier to try juveniles in adult criminal court. Between 1992 and 1997, 44 states and the District of Columbia passed laws making it facilitating the transfer of juveniles to the adult system [sic].”).

86. Shannon P. Duffy, *3rd Circuit Panel Mulls if Teen ‘Sexting’ is Child Pornography*, LAW.COM (Jan. 19, 2010), <http://www.law.com/jsp/article.jsp?id=1202439023330> (responding to the state’s argument that juveniles need to be protected).

87. Hanna Ingber Win, *Is Ricky Really a Sex Offender?*, L.A. CITYBEAT (Mar. 1, 2008), <http://www.informationliberation.com/?id=24923/>; see Jones, *supra* note 16 (“In dozens of interviews, therapists, lawyers, teenagers and their parents told me similar stories of juveniles who, after being discovered on a sex-offender registry, have been ostracized by their peers and neighbors, kicked out of extracurricular activities or physically threatened by classmates.”).

ridicule from other children, and may need to relocate due to residency restrictions.<sup>88</sup> Some juvenile offenses may warrant such severe penalties, but sexting is not among them. Compared to sexual offenses involving physical harm, such as molestation or rape, sexting is much less severe, especially since most sexting materials are self-produced.

### B. Why Criminalize Sexting?

Of course, sexting need not implicate the legal system at all. Courts could treat sexting in much the same way that some jurisdictions handle sex between minors—as protected conduct under a federal or state right to privacy.<sup>89</sup> Legislators could also decriminalize sexting between teenagers of certain age ranges. Where teenagers are close in age but only one has reached the age of consent, statutory rape laws present prosecutors with a dilemma: bring charges for relatively innocuous behavior or ignore laws on the books.<sup>90</sup> Some states have responded by enacting “Romeo and Juliet” laws, which create a safe-haven for consensual conduct between young people of the same peer group.<sup>91</sup> One commentator has justified these laws as an appropriate means to “prohibit sexual intercourse (and most sexual contact) with prepubescent [children],” while allowing older adolescents “the freedom to experiment sexually with their peers.”<sup>92</sup> Legislators could take a similar approach to sexting: The production and exchange of sexually explicit photographs of and by teenagers within a certain age group would not subject them to legal penalties.

By decriminalizing sexting, the burden of regulating teen conduct would fall to parents and schools. Sexting often takes place in the school environment, and school officials commonly discover sexts

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88. Win, *supra* note 87.

89. A.H. v. State, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007) (Padovano, J., dissenting) (citing B.B. v. State, 659 So. 2d 256 (Fla. 1995) (holding that a minor has a right of privacy and that a statute prohibiting unlawful carnal intercourse is unconstitutional as applied to a minor)); State v. Vezzoni, No. 22361-2-III, 2005 WL 980588, at \*1 (Wash. Ct. App. Apr. 28, 2005) (minor arguing that he was not subject to child pornography laws because his conduct was protected under a right to privacy and attempting to rely on court decisions stating that “minors have the right to engage in private sexual activity”).

90. “Special, lenient exemptions for sex among teenage peers are commonly referred to as ‘Romeo and Juliet’ laws, in recognition of the fact that to stand in the way of a relationship that might blossom into true love would indeed be a tragedy of Shakespearean proportions.” Stephen F. Smith, *supra* note 24, at 527 n.79 (citing State v. Limon, 122 P.3d 22, 24 (Kan. 2005) (describing the Kansas statute as a “Romeo and Juliet” law)).

91. *Id.*

92. Britton Guerrina, Comment, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1252 n.5 (1998).

on student cell phones.<sup>93</sup> If sexting were decriminalized, then schools would need to watch for harassment through sexting, and parents would need to monitor their teenagers' every text. Some commentators advocate parental involvement as a panacea for teenage sexting, preaching that "parents must be on the frontlines controlling inappropriate behaviors."<sup>94</sup>

However, such reasoning presumes sufficient awareness and motivation on the part of parents to prevent their children from engaging in these behaviors. Many parents will be unaware of the harm that sexting poses,<sup>95</sup> or that their children are even involved. Without this knowledge, schools and parents cannot meaningfully deter such behavior. Furthermore, schools must be wary about their response because parents will scrutinize any action taken, which could expose the school to liability.<sup>96</sup> Teachers and other school officials must also be careful not to inadvertently subject themselves to child pornography charges by improperly handling confiscated cell phones containing sexts.<sup>97</sup>

While the dangers posed by sexting fall mostly on the juveniles depicted in them, leaving the regulation of this media to parents and

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93. See, e.g., *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637–38 (M.D. Pa. 2009) (dealing with photos discovered by school officials on confiscated cell phones); Celizic, *supra* note 4. (describing sexting incident where photographs were distributed around teen's school); Lauren Lee, *Sexting Invades Schools*, MY FOX MEMPHIS (May 19, 2009), [http://www.myfoxmemphis.com/dpp/news/local/051909\\_Sexting\\_Invades\\_Schools](http://www.myfoxmemphis.com/dpp/news/local/051909_Sexting_Invades_Schools) (describing how sexts are distributed across high schools either through forwarding or sharing and the disruptions that it can cause); *Teen 'Sexting' Worries Parents, Schools*, CBS NEWS, Feb. 4, 2009, <http://www.cbsnews.com/stories/2009/02/04/tech/main4776708.shtml> (describing school administrators' concerns over sexting).

94. See Arcabascio, *supra* note 22, at 46.

95. Parents also may not care about whether their children send or receive such pictures, and would, therefore, leave society's interest in halting the production of such images unenforced. Despite a national drinking age of 21, many parents allow their children to drink and help them actively circumvent the law because of their own beliefs surrounding alcohol consumption. See National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158 (2006); see also Amy Graff, *Study Says Parents Shouldn't Drink with Their Teens*, S.F. CHRON. Feb. 1, 2010, [http://www.sfgate.com/cgi-bin/blogs/sfmoms/detail?entry\\_id=56416](http://www.sfgate.com/cgi-bin/blogs/sfmoms/detail?entry_id=56416); Press Release, The Governor's Prevention Partnership, *Despite High Profile Arrests, Parents Still in the Dark About House Party Law* (Apr. 25, 2007), available at [http://www.preventionworksct.org/docs/Newsroom/Prom\\_and\\_Graduation\\_Drinking\\_Risks.pdf](http://www.preventionworksct.org/docs/Newsroom/Prom_and_Graduation_Drinking_Risks.pdf) ("I've had conversations with parents who seem to think it's still okay to host underage alcohol drinking parties"). Sexting provides an analogous situation where some parents would help alleviate societal concerns whereas others would be uninvolved.

96. See, e.g., Chana Joff-Walt, *'Sexting': A Disturbing New Teen Trend?*, NAT'L PUB. RADIO (Mar. 11, 2009), <http://www.npr.org/templates/story/story.php?storyId=101735230> (describing Brooke Nielson and her parents' suit against Bothel High School in Seattle after a sexting incident).

97. See, e.g., Kim Zetter, *'Sexting' Hysteria Falsely Brands Educator as Child Pornographer*, WIRED (Apr. 3, 2009), <http://www.wired.com/threatlevel/2009/04/sexting-hysteri/> (describing an assistant principal who was charged with possession of child pornography after conducting an inconclusive sexting investigation).

schools cannot adequately address larger social ramifications. Even children not themselves exploited in the production of child pornography,<sup>98</sup> as well as society as a whole, suffer harm from these images and their prevalence on Internet websites.<sup>99</sup> The state appellate court in *A.H.* found that "a reasonably prudent person would believe that if you put this type of material in a teenager's hands that, at some point either for profit or bragging rights, the material will be disseminated to other members of the public."<sup>100</sup> Yet teenagers may fail to foresee the obvious danger of sexting: A spurned partner may reveal an intimate picture after the couple breaks up. The trial court in *A.H.*, while holding that two minors could be prosecuted for photographing themselves engaged in sexual behavior, explained that the state interest in these cases is best furthered through prosecution.<sup>101</sup> The court found that "prosecution enables the State to prevent future illegal, exploitative acts by supervising and providing any necessary counseling to the child."<sup>102</sup> Moreover, as recognized by the National Center for Missing and Exploited Children ("NCMEC"), "exempting the behavior could have the unintended consequence of immunizing genuine sexual predators from prosecution."<sup>103</sup>

State involvement emphasizes the seriousness of this behavior; however, the response should be measured and proportional. Legislatures should move beyond visceral reactions to teenage nudity and help teenagers understand the repercussions of their actions.<sup>104</sup> States need to protect juveniles from prosecution in criminal court.

### *C. New Statutes Relating to Sexting Do Not Properly Protect Juveniles*

Most of the statutes that states have proposed or enacted to address the problem direct courts—presumably juvenile courts—to treat sexting crimes as delinquent acts or lesser offenses. However, some state statutes provide more protection than others, and most of

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98. See Leary, *supra* note 76, at 13 ("Child sexual abuse images are used by offenders for sexual gratification; to groom children to be sexually molested . . . to decrease the inhibitions of potential victims; to demonstrate to victims how to sexually please a sexual offender; to entrap or control victims; for barter/exchange on the Internet; and for profit.").

99. See *id.* at 17 ("[T]he sexualization and eroticization of minors . . . encourage[s] societal perceptions of children as sexual objects leading to further sexual abuse and exploitation...[and] creates an unwholesome environment").

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

101. *Id.* at 236–38.

102. *Id.* at 236.

103. *States Consider New 'Sexting' Laws*, ESCHOOL NEWS (Apr. 17, 2009), <http://www.eschoolnews.com/2009/04/17/states-consider-new-sexting-laws/>.

104. *Teen 'Sexting' Worries Parents, Schools*, *supra* note 94 ("We don't want to throw these kids in jail, but we want them to think.").

them do not fully insulate teenagers from adult prosecution, severe penalties, and sex offender registration.<sup>105</sup>

While the legislatures in Ohio and Colorado proposed statutes that create alternative, less severe penalties for sexting, they did so without removing sexting from the category of offenses subject to the traditional penalties available for child exploitation crimes. Both of these states merely sought to expand the options available without providing any definite protection to teen offenders. The Ohio bill would partially shield juveniles from the stigma of felony charges by allowing prosecutors to choose a less severe alternative.<sup>106</sup> Still, the possibility of felony charges would remain, because the law would leave intact other provisions that carry heavier penalties and may apply to sexting.<sup>107</sup> Colorado's new law suffers a similar defect and leaves sexting juveniles vulnerable to sex offense registration.<sup>108</sup> Both statutes insufficiently protect juveniles from the heavy penalties attached to felony convictions, which are too severe to address sexting, especially when the prosecution targets the teen depicted. Relying on prosecutors to refrain from charging juveniles with serious child pornography charges is a mistake, because few standards constrain the discretion of prosecutors, who work under immense public pressure to solve the sexting problem.<sup>109</sup>

Pennsylvania, New Jersey, and Vermont have all proposed diversionary programs to help juveniles avoid prosecution for felonies under child pornography statutes. Other states should follow this approach, which would insulate juveniles from harsh child pornography punishments. New Jersey and Pennsylvania both sought to provide educational programs designed to raise teenagers' awareness of the law and the consequences of sexting.<sup>110</sup> Subject to

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105. See, e.g., *supra* notes 51, 56, 60, 66, 68.

106. See *supra* note 51.

107. *Id.*

108. See *supra* notes 56–57.

109. See Arcabascio, *supra* note 22, at 40 (“Unfortunately, the *Skumanick* and *A.H.* cases are excellent examples of the concerns regarding the breadth of prosecutorial discretion in sexting cases.”). As Vermont State Senator John Campbell explains, “we found that it would be best for us to exclude certain circumstances from prosecution. It would be easy for us to have just walked away and let all these cases be handled by prosecutors, but we believe that it is incumbent upon us as legislators to deal with the issue directly.” Mike Celizic, *Vermont Moves to Reduce Teen ‘Sexting’ Charges*, TODAYSHOW.COM (Apr. 15, 2009), <http://today.msnbc.msn.com/id/30224261/>.

110. The New Jersey law proposes that the Attorney General, in conjunction with the Administrative Office of the Courts, develop an educational program for juveniles who commit an eligible offense. See Assemb. 4069, 213th Leg., 2d Sess. (N.J. 2008). The educational program will focus on: (1) the legal consequences of and penalties for sharing sexually suggestive or explicit materials; (2) the non-legal consequences of sharing sexually suggestive or explicit materials including, but not limited to, the effect on relationships, loss of educational and employment

certain eligibility criteria, New Jersey's program would provide an alternative to any kind of prosecution, while Pennsylvania would impose its program either as a sentence or as a diversion.<sup>111</sup> Both programs strike the right balance by focusing on educating juveniles without unduly damaging their future prospects with a criminal conviction or sex offender registration.

Nevertheless, neither statute makes educational programs the exclusive punishment for juvenile sexting. In fact, the New Jersey statute would exclude juveniles from the program who engaged in distribution with malicious intent, set other conditions for admission and allow prosecutors to decide whom to admit.<sup>112</sup> While this proposal provides qualifying juveniles with an opportunity to learn from their mistakes, the bill also exposes juveniles ineligible for the educational program to the much harsher penalties that flow from child endangerment charges.<sup>113</sup> The Pennsylvania statute enables prosecutors to charge juveniles with a summary offense,<sup>114</sup> which is less serious than a misdemeanor and includes special protections for public viewing and expungement for cases tried before a magistrate judge rather than a juvenile court judge.<sup>115</sup>

In Vermont, legislators also worried about the harsh punishments available to prosecute teenagers for sexting.<sup>116</sup> The bill passed by the Vermont legislature contains measures that protect juveniles from the most serious punishments otherwise available for crimes of child exploitation.<sup>117</sup> The crime of a "minor electronically disseminating indecent material to another person" provides that

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opportunities; (3) how the unique characteristics of cyberspace and the Internet, including searchability, replicability, and infinite audience, can produce long-term and unforeseen consequences; (4) the connection between bullying and cyber-bullying and juveniles sharing sexually suggestive or explicit materials. *Id.* The proposed Pennsylvania law would have the District Attorney and School Districts of the County work together to create a diversionary educational program that would focus on substantially the same factors as those listed in the New Jersey statute. S. 1121, 193d Gen. Assemb. (Pa. 2009). This is similar to the six- to nine-month educational program that District Attorney George Skumanick, Jr. offered the juveniles involved in *Miller v. Skumanick* as an alternative to prosecution. *See Miller v. Skumanick*, 605 F.Supp.2d 634, 638 (M.D. Pa. 2009). However, the proposed educational program in *Miller* would focus on "what it means to be a girl in today's society" and "identify[ing] non-traditional societal and job roles." *Id.* at 640.

111. *See* N.J. Assemb. 4069; Pa. S. 1121.

112. N.J. Assemb. 4069.

113. *Id.*; N.J. STAT. ANN. § 2C:24-4 (West 2010).

114. Zeiger, *supra* note 65.

115. Pa. S. 1121.

116. *See States Consider New 'Sexting' Laws*, *supra* note 104 ("We felt that it's poor behavior and it's not something that we want to give our OK to . . . [b]ut at the same time, do we want a kid in jail? Do we want them tagged as a sex offender for the rest of their lives? And the answer is no.")

117. S. 125, 2009-2010 Leg. Sess. (Vt. 2009).

juveniles charged with this conduct, who have not been previously adjudicated delinquent under the section, *shall not* be prosecuted under sexual exploitation of children laws and *shall not* be subject to the requirements of sex offender registration.<sup>118</sup> Even juveniles who have previously been adjudicated for an offense under the section *shall not* be subject to sex offender registration, although they may be charged with sexual exploitation of a minor and subject to its penalties.<sup>119</sup> Additionally, the Vermont statute protects not only juveniles who have taken pictures of themselves but also persons who received such depictions.<sup>120</sup> Prosecutors may still charge juveniles with lewd and lascivious conduct, voyeurism, or disturbing the peace; however, juveniles are protected from more serious sexual exploitation charges and shielded from sex offender registration.<sup>121</sup>

### III. A SENSIBLE SOLUTION TO SEXTING

States contemplating new child pornography and child sexual exploitation laws should combine the best parts of the New Jersey bill, with the Pennsylvania and Vermont statutes. States should change their laws to prohibit prosecution of minors for sexting under child pornography or child exploitation statutes, and exempt them from sex offender registration. Additionally, states should focus on education and rehabilitation when developing programs to address juveniles adjudicated delinquent. Using the system to teach juveniles about the seriousness of their actions will deter similar behavior without permanently stigmatizing the juvenile as a convicted felon and sex offender. Finally, states should craft statutes that differentiate among the various categories of possible offenders—juvenile creators of sexting images; innocent recipients; those who merely forward images; juveniles who maliciously distribute them; and teenage recipients only slightly past the age of majority.

The Vermont statute, which shields first-time offenders from prosecution for sexual exploitation of a minor, adequately protects juveniles who are merely exploring their sexuality, unaware of the legal consequences of their behavior.<sup>122</sup> The statutory prohibitions

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118. *Id.* (providing: if a person took reasonable steps to eliminate the pictures then there would be no violation at all; if minors did not eliminate the pictures then they would be protected in the same way as the producer of the image; and adults who did not eliminate such photographs could be subject to fines not more than \$300 or imprisoned for not more than six months or both).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

that prosecutors *shall not* charge juveniles with the most serious offenses for sexting or subject them to sex offender registration are necessary to curb overzealous prosecution and ensure that sexting does not result in undeservedly severe penalties.<sup>123</sup> This prohibition provides juveniles with maximum protection against abuse of prosecutorial discretion by eliminating the option of charging juveniles with certain offenses and removing the threat of sex offender registration. States should follow Vermont's lead by providing that these actions "shall be filed in family [or juvenile] court."<sup>124</sup> This type of provision further limits the punishments available and ensures that prosecutors do not charge juveniles in adult court for sexting offenses.<sup>125</sup>

The Pennsylvania and New Jersey bill also strikes the right balance by focusing on rehabilitation and education. All juvenile first-time violators of sexting laws should participate in similar educational programs,<sup>126</sup> which will deter future sexting conduct without obstructing the successful transition to adulthood. Understanding the risks of sexting will decrease the likelihood that juveniles will participate in sexting activities in the future. The NCMEC also advocates a response to sexting that includes education.<sup>127</sup> Any response to sexting must include "Internet safety education," detailing the "risks and consequences of inappropriate behavior online."<sup>128</sup>

Judicial officers and prosecutors should also work with school administrators to prevent the creation of such images in the first place by teaching juveniles about the consequences of their actions.<sup>129</sup> Although society should not rely on schools and parents to *redress* the repercussions of sexting, these adults—with whom children spend much of their time—must lead the prevention effort. With roughly 50% of twelve- and thirteen-year olds and more than 70% of fourteen-

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123. *Id.*

124. *Id.*

125. Even prosecutors who have filed criminal charges against older teenagers agree that juveniles should not be sent to criminal courts. See Dave Gram, *Teens Accused of Sexting May Not Face Child Porn Charges in Vermont*, CNSNEWS.COM, Apr. 14, 2009, <http://www.cnsnews.com/news/article/46587> (quoting a Vermont State's Attorney who agreed with backers of sexting legislation that "volunteering to take and send racy photos of oneself shouldn't result in criminal charges.").

126. See *supra* note 110.

127. Nat'l Ctr. for Missing & Exploited Children, *Policy Statement on Sexting*, MISSINGKIDS.COM (Sept. 21, 2009), <http://www.missingkids.com/missingkids/servlet/NewsEventServlet?PageId=4130>.

128. *Id.*

129. *Sexting*, AM. ASS'N OF SCH. ADMIN., <http://www.aasa.org/content.aspx?id=3390> (last visited Sept. 17, 2010).

to seventeen-year olds owning cell phones,<sup>130</sup> parents need to be vigilant about monitoring their children's texting.<sup>131</sup> Like lawmakers, school officials must account for the risks of sexting by modifying their student handbooks and disciplinary policies, training staff, and working with law enforcement personnel to inform students of the risks.<sup>132</sup> By combining protections against serious criminal charges and sex offender registration with a campaign of education, states can avoid severe punishments for less serious conduct while adequately addressing child exploitation concerns.

Juveniles who create or distribute sexts of themselves, as well as those who innocently receive such photographs, should benefit from the full protection of these laws. Society should recognize that juveniles who distribute their own photographs are mostly hurting themselves and require education rather than punishment. Additionally, juveniles who innocently receive pictures sent to them should be granted the same protections as the juveniles who self-produced the photographs. These recipients should be treated similarly to the producers because, presumably, they did not choose to receive the photographs and merely failed to delete them. Even recipients who forward the images to others, although not as blameless, should still not suffer severe punishment for merely passing on the photographs they did not create.

However, teenagers can also share sexts as a way of bullying the person depicted, which can result in tragic consequences.<sup>133</sup> States should follow the lead of New Jersey and condition leniency on a lack of malicious intent.<sup>134</sup> This would ensure that adolescents who viciously distribute sexts for the purpose of tormenting a peer will subject themselves to more severe penalties, reflecting the more severe nature of their behavior. However, juveniles who maliciously distribute sexts still do not deserve the most severe penalties possible

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130. LENHART, *supra* note 10, at 5–6.

131. Experts suggest that parents discuss online and cell phone usage, set rules for using technology, and know what their children are doing. *How Parents Can Monitor Child's Sexting*, UNITED PRESS INT'L (May 8, 2009), [http://www.upi.com/Health\\_News/2009/05/08/How-parents-can-monitor-childs-sexting/UPI-92801241761844/](http://www.upi.com/Health_News/2009/05/08/How-parents-can-monitor-childs-sexting/UPI-92801241761844/).

132. See *Sexting*, *supra* note 129; see also Elisabeth Hulette, *Officials Warn Teens, Parents About Sexting*, THE CAPITAL (Baltimore), Jan. 31, 2010, <http://www.hometownannapolis.com/news/nbh/2010/01/31-59/Officials-warn-teens-parents-about-sexting.html>.

133. Celizic, *supra* note 4 (describing the suicide of 18 year old Jessica Logan following the distribution of nude photographs by her ex-boyfriend); Michael Inbar, *'Sexting' Bullying Cited in Teen Girl's Suicide*, TODAYSHOW.COM (Dec. 2, 2009), [http://today.msnbc.msn.com/id/34236377/ns/today-today\\_people/](http://today.msnbc.msn.com/id/34236377/ns/today-today_people/) (describing the suicide of 13 year old Hope Witsell after she sent a topless photograph of herself to a boy who she liked and he subsequently passed the photograph out to other classmates).

134. See Assemb. 4069, 213th Leg., 2d Sess. (N.J. 2008).

under child pornography laws. For the reasons discussed previously,<sup>135</sup> sex offender registration overly penalizes even this type of deplorable conduct. State laws addressing juvenile sexting should treat this type of cyber-bullying more strictly than forwarding sexts without malice, but not so strictly as to require sex offender registration.<sup>136</sup>

Although this Note focuses on conduct by juveniles, states contemplating anti-sexting legislation follow the framework of Romeo and Juliet laws when considering whether to subject older teenagers and young adults to punishment. The same logic that supports reduced penalties for older teenagers that have consensual sexual relations also supports reduced penalties for consensual sexting between a juvenile and a young adult only a few years over eighteen but close in age. For example, in Colorado, consensual activity only qualifies as Sexual Assault when, at the time of the commission of the act, "the victim is less than fifteen years of age *and the actor is at least four years older than the victim*" or "the victim is at least fifteen years of age but less than seventeen years of age *and the actor is at least ten years older than the victim.*"<sup>137</sup>

Just as these laws have upper age limits on the actors involved in sexual conduct, adults over the age of eighteen who create or direct juveniles to create photographs of nude juveniles should not receive leniency because this resembles the more traditional child pornography concerns. When juveniles send sexts to young adults, however, courts should hesitate to convict those young adults under child pornography charges—just as Romeo and Juliet laws provide safe harbors for acts between consenting older teenagers. The statute enacted in Vermont takes account of these concerns by providing that adults charged with possessing a visual depiction of a juvenile transmitted by that juvenile shall be fined not more than \$300 or imprisoned for not more than six months or both.<sup>138</sup> This provision recognizes the more serious nature of the images when in the

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135. See *supra* Part II.A. Even in these circumstances, the under-developed nature of the adolescent brain, stigmatism resulting from registration, and the simple fact that this use of child pornography laws is contrary to the legislative intent, should prevent the application of child pornography to cyber-bullying through sexting. See *supra* pp. notes 17–28 and accompanying text.

136. Studies suggest that 29% of youths experience online bullying and that number may jump to as high as 43% when cell phones and other technology are included. John Timmer, *Studies Highlight Difficulties in Defining, Dealing With Cyberbullying*, ARSTECHNICA (Nov. 29, 2007), <http://arstechnica.com/old/content/2007/11/studies-highlight-difficulties-in-defining-dealing-with-cyberbullying.ars> (citing 41 J. ADOLESCENT HEALTH 6 (Supp. Dec. 2007)).

137. COLO. REV. STAT. § 18-3-402(d)-(e) (2010) (emphasis added).

138. S. 125, 2009–2010 Leg. Sess. (Vt. 2009).

possession of adults, but avoids severe punishments the adult merely received—but did not create—the photograph.

#### IV. CONCLUSION

Over the past few years, state governments, in particular, have strengthened their child pornography laws by imposing more severe punishments, including sex offender registry requirements.<sup>139</sup> However, this flood of legislation has swept up behavior that legislators never meant to punish: children taking and distributing photographs of themselves.<sup>140</sup>

States should amend their laws prohibiting child pornography and sexual exploitation of minors to exempt juveniles from felony prosecution.<sup>141</sup> By definition, juveniles are less mature than adults and are not as criminally responsible for their decisions.<sup>142</sup> Furthermore, sexting among teenagers does not portend the grave danger associated with salacious communiqués between adults and children, which child pornography laws sought to prohibit.<sup>143</sup>

Specifically, state laws should ensure that juveniles who sext are adjudicated within the juvenile system, exempted from child pornography charges, and excluded from sex offender registries. These new laws should contain an educational program to inform juveniles of the serious consequences of sexting and apply not only to those who produce photographs of themselves, but also those who receive or distribute such texts. Although several states are beginning to move in this direction, they still have a long way to go.<sup>144</sup>

Additionally, legislatures should recognize different categories of potential offenders. Juveniles who produce and distribute pictures of themselves, as well as those who innocently receive or distribute such images, should receive the most lenient treatment. They should learn the harmful effects of their conduct, and states should insulate them from any stigma that would haunt their futures. Cyberbullies and minors who engage in malicious distribution of photographs should be subject to a wider range of possible punishments—but not sex offender registration. Furthermore, states should anticipate cases involving young adults who have recently passed the age of majority, but who are still within the peer group of juveniles. States should

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139. See Gram, *supra* note 125 (“State legislatures, including Vermont’s, have been cracking down on sexual predators in recent years.”).

140. See Smith, *supra* note 24.

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

142. See *supra* notes 17–18.

143. See *supra* note 23.

144. See discussion *supra* Part II.C.

adapt Romeo and Juliet laws for statutory rape to sexting conduct. By adding these provisions to existing child pornography laws, states can protect children, both from adults and from themselves, without undue stigma under criminal laws.

As technology develops, the law must evolve to address new and unforeseen issues; however, while child pornography laws may technically apply to sexting, they should not apply to conduct less serious than what legislatures sought to deter. While the exchange of nude photographs by teenagers *should* concern parents, and *may* concern society, it *must not* concern the criminal courts or burden children with sex offender registration.<sup>145</sup>

Joanna L. Barry\*

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145. See Schorsch, *supra* note 19 ("[T]wo middle school students in Valparaiso, Ind., were caught sending nude pictures of themselves to each other on their cell phones. The students were caught when the 13-year-old girl's cell phone rang in class. . . . The girl cried that she would get in trouble because a 12-year-old boy sent her a 'dirty picture.' . . . The students have been charged with child exploitation and possession of child pornography, both felonies.").

\* J.D. Candidate, Vanderbilt University Law School, 2011; B.S., Industrial and Labor Relations, Cornell University, School of Industrial and Labor Relations, 2008. The author would like to thank the editorial staff of the VANDERBILT JOURNAL OF ENTERTAINMENT AND TECHNOLOGY LAW for suggestions and assistance during the preparation of this Note. In addition, the author wishes to thank Carol Logan and her parents, Patrick and Michele Barry, for their help and suggestions.

