

Unsafe Sexting: The Dangerous New Trend and the Need for Comprehensive Legal Reform

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I. INTRODUCTION

It is a hot summer night. You and your girlfriends are lying on the grass in the backyard, trading gossip and attempting to plan out your outfits for the first day of high school. Even with the cool grass against your back and legs, the humidity is overbearing. Your shirt is clinging to you like a second skin. You sit up and peel off your shirt, then stand and let your shorts drop to the ground. It is still incredibly hot, but you do not feel quite as sticky and disgusting in just your bra and undies as you did just a moment ago. Seeing the relief on your face, your friends quickly follow suit. Just then a phone rings, and from the look on your friend's face as she looks down at the light emanating from the screen, you can tell it is a boy. She walks away a little bit before answering, and, giggling, you tip-toe behind her. Sensing your presence, she turns toward you—half annoyed, half amused—and gives you an exasperated smirk. Your other friend holds up her cell phone and instructs you both to smile. Still on the phone, your friend shakes her head and purses her lips as you playfully stick out your tongue and flash a peace sign. The flash of the camera phone goes off.¹

You are a child pornographer.

And you are not alone. In fact, an astounding 20% of teens admitted to taking and distributing nude or semi-nude photographs of themselves.² This practice, commonly known as “sexting,” can have drastic—and incredibly long-lasting—consequences. Federal and state child pornography laws make it illegal to create, possess, or distribute explicit images of a minor.³ Although the purpose of

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¹ Adapted from the facts of *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009). See also *Sexting Girls Facing Porn Charge Sue D.A.*, CBS NEWS (Mar. 27, 2009), <http://www.cbsnews.com/stories/2009/03/27/earlyshow/main4896577.shtml>.

² See NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS, 11 (2008), available at http://www.thenationalcampaign.org/SEXTECH/PDF/SexTech_Summary.pdf [hereinafter SEX AND TECH].

³ Riva Richmond, *Sexting May Place Teens at Legal Risk*, N.Y. TIMES BLOGS (Mar. 26, 2009, 12:00 PM), <http://gadgetwise.blogs.nytimes.com/2009/03/26/sexting-may-place-teens-at-legal-risk/>.

enacting these laws was to prevent “the sexual abuse of children by ‘dirty old men in raincoats,’”⁴ there is nothing in the language of most current statutes that prohibits the prosecution of minors—even those minors who knowingly and voluntarily take pictures of themselves. Child pornography laws, as drafted, envisioned the children who appeared in sexually explicit photographs to be the victims, but as we bumble through prosecutions under laws that do not quite fit the technology or the trend, the “victims” have become the perpetrators. Under current laws, these foolish children could serve life sentences in federal prison or be required to register as sex offenders.⁵ Though naïve, irresponsible, and perhaps even stupid, teenagers who take and send pictures of themselves should not necessarily face such harsh penalties for what many seem to perceive as nothing more than a “fun and flirty”⁶ exploit.

Rather than continue to respond to this perceived epidemic by wielding laws that have not quite caught up with the technology, this Note proposes a solution—a new criminal law, which takes into account the realities of teenage sexuality in the twenty-first century. Under this model statute, neither an adolescent who takes and sends a picture of herself nor the adolescent who initially receives that image will face criminal punishment, absent some malicious intent or evidence of coercion. Criminal sanctions will hinge upon the intent of the accused, generally arising when the initial recipient of a “sext” message distributes the picture to others.

Part II of this Note will delve deeper into the trend of sexting, exploring the many forms it may take and attempting to elucidate both the psychological motivations and implications of sexting and the more tangible consequences of the practice. Part III will address the tremendous discretion held by prosecutors in dealing with sexting cases by considering the laws under which teens can be prosecuted and the ways in which those laws are a forced fit for this problem. Finally, in Part IV, I will recommend a more appropriate way to address the sexting trend—a combination of potential criminal consequences and preventative education—and propose an idea about where to draw the line that will trigger legal action. In addition to this collaborative recommendation, I will propose a model criminal law specifically tailored to create a uniform standard under which prosecutors should handle sexting cases. As it stands now, “[t]he combination of poorly drafted laws, new technologies, draconian and inflexible punishments, and teenage hormones make for potentially disastrous results.”⁷ We must make more of an effort to include “social, psychological, and sexual sciences in the legislative procedure in order to better estimate the reality of social problems involved” and

⁴ Mike Bruner, ‘Sexting’ Surprise: Teens Face Child Porn Charges, MSNBC.COM (Jan. 15, 2009, 8:03 PM), http://www.msnbc.msn.com/id/28679588/ns/technology_and_science_tech_and_gadgets/.

⁵ Richmond, *supra* note 3.

⁶ SEX AND TECH, *supra* note 2, at 2.

⁷ Richmond, *supra* note 3.

the likelihood that criminal sanctions will appropriately address the problem.⁸ As those charged with ensuring that justice is done, it is our responsibility to make certain that the law quickly catches up with a technology that, “through its ability to instantly gratify, has created a class of youthful felons who likely were never considered the targets of the original legislation enacted to target sex offenders.”⁹

II. LET’S TALK ABOUT SEXT, BABY

A. *The More Provocative Form of Texting*

According to the Pew Internet & American Life Project, sexting is “the creating, sharing and forwarding of sexually suggestive nude or nearly nude images by minor teens.”¹⁰ Generally, there are three scenarios in which teenage sexting occurs: (1) exchanges of images between teens involved in a romantic relationship; (2) exchanges of images between teens not involved in a relationship, where at least one party hopes to enter such a relationship; and (3) exchanges between two people of images that are subsequently shared with others.¹¹ The statistics vary widely, perhaps demonstrating that we have yet to ascertain the full extent of this problem (or that we may be overestimating the extent of teenagers’ involvement in the practice). In a study performed by Cox Communications, only 9% of teenagers aged thirteen to eighteen admitted to having sent a nude or semi-nude photograph via cell phone or e-mail, while 17% of these same teenagers said that they had received such a picture.¹² A study conducted just a few months prior to the Cox study, however, noted that 19% of teenagers aged thirteen to nineteen had sent a nude or semi-nude picture of themselves and 31% of those teenagers

⁸ Lorenz Böllinger, *Adolescence, Sexual Aggression and the Criminal Law*, in *ADOLESCENCE, SEXUALITY, AND THE CRIMINAL LAW: MULTIDISCIPLINARY PERSPECTIVES* 89, 102 (Helmut Graupner & Vern L. Bullough eds., 2004).

⁹ Brian Kane & Brett T. Delange, *A Tale of Two Internets: Web 2.0 Slices, Dices, and Its Privacy Resistant*, 45 *IDAHO L. REV.* 317, 340 (2008).

¹⁰ PEW INTERNET & AMERICAN LIFE PROJECT, *TEENS AND SEXTING: HOW AND WHY MINOR TEENS ARE SENDING SEXUALLY SUGGESTIVE NUDE OR NEARLY NUDE IMAGES VIA TEXT MESSAGING* 3 (2009), available at <http://pewresearch.org/assets/pdf/teens-and-sexting.pdf> [hereinafter *TEENS AND SEXTING*]. While adults may certainly engage in this type of behavior as well, teenage sexting will be the focus of this Note as teenage sexting implicates more complex legal issues and has generated much more concern—among both law enforcement officials and society as a whole. See Jessica Leshnoff, *Sexting Not Just for Kids*, AARP, http://www.aarp.org/relationships/love-sex/info-11-2009/sexting_not_just_for_kids.html (last updated June 2011); *Sexting: Not Just for Teens Anymore*, *TEXT MESSAGE BLOG* (Apr. 12, 2009, 10:30 AM), <http://www.textmessageblog.mobi/2009/04/12/sexting-adults/>.

¹¹ *TEENS AND SEXTING*, *supra* note 10, at 2, 6–8.

¹² *TEEN ONLINE & WIRELESS SAFETY SURVEY*, COX COMMUNICATIONS, 34 (2009), available at http://www.cox.com/takecharge/safe_teens_2009/media/2009_teen_survey_internet_and_wireless_safety.pdf.

had received a nude or semi-nude picture from the person who appeared in it.¹³ That study also revealed that 29% of teenagers had received a nude or semi-nude picture that was originally meant to be private, the component of the sexting trend that makes the best case for legal consequences.¹⁴ Regardless of what the true numbers may be, the discrepancies in the number of adolescents who have reported sending pictures as compared to those who have received them sheds light on the larger problem—many adolescents may be sending what were meant to be private photographs to unintended third parties. This component of the trend is most well-suited for criminal consequences due to the involuntary distribution. If a teenager knowingly and voluntarily sends a lascivious image to another minor, we can rightly consider that to be an alternate form of sexual experimentation—and may punish it privately, if we so desire. When an adolescent so brazenly violates the privacy of another by forwarding an image that was intended by the creator to be private, that distribution begins to more closely resemble the type of act that the criminal law is meant to penalize.

Regardless of the intent issue, there are certain demographic characteristics that seem to have an effect on one's proclivity to engage in sexting, though some characteristics do not have the effect that many assume they would. While a sizeable majority of teenagers believes that sexting is more common among girls than among boys¹⁵, for example, the Pew Internet survey data shows no difference in the frequency of sexting as between female and male teenagers.¹⁶ Age does seem to have an impact on the proclivity for sexting, though, with more older teens than younger teens sending these racy pictures.¹⁷ Though the consistency across genders may surprise people—especially in light of the perceived sexual double-standard between the sexes—the disparity among age groups seems logical, as most types of sexual experimentation, on the whole, increase with age. Responsibility for one's own cell phone bill also increased the likelihood that a teenager had sent nude or semi-nude pictures via text message, with 17% of those teenagers reporting sending sexually suggestive picture messages as opposed to only 3% of teenagers who were not responsible for the cost of their cell phone bills,¹⁸ possibly demonstrating an awareness on the part of adolescents that this practice is somewhat suspect.

When it comes to receiving nude or semi-nude pictures, the same trends hold true for both gender and age, but a higher overall percentage of teens—15% of those aged twelve to seventeen—report having received a sexually suggestive picture of someone they know on their cell phone.¹⁹ Teens with unlimited text

¹³ SEX AND TECH, *supra* note 2, at 11.

¹⁴ *Id.*

¹⁵ *Id.* at 8.

¹⁶ TEENS AND SEXTING, *supra* note 10, at 4.

¹⁷ *Id.*

¹⁸ *Id.* at 4–5.

¹⁹ *Id.* at 5.

messaging plans are also much more likely to report receiving sexually suggestive text messages than are those with limited plans or those who pay per message.²⁰ Furthermore, a greater percentage of those who have received sexually explicit messages on their phones than those who have not report both that they use their phones to combat boredom and that they never turn their cell phones off unless explicitly required to do so.²¹ Perhaps a greater dependency on this technology further lessens the perceived impact of the practice.

The large majority of teenagers who have sent sexually suggestive messages and images have sent the content to a boyfriend or girlfriend.²² Approximately one in five teenage girls and nearly two in five teenage boys, though, have sent sexually suggestive content to someone with whom they were not in a relationship, but with whom they simply wanted to “hook up” or date.²³ Even more frightening, 15% of teens who have sent sexually suggestive messages or images have done so to someone they knew only through the Internet.²⁴ However disturbing it might be to consider, teenagers seem to be sending sexual messages and images to one another in large numbers—but why?

B. Psychological Motivations and Implications

1. Attitudes

“‘Yeah, naked pictures,’ said one teen. ‘When a guy’s trying to get at a girl, or a girl’s trying to get at a guy,’ said another.”²⁵ It is this nonchalant perception that sexting is nothing but a “cool, great way to get noticed by a guy or girl”²⁶ that likely drives teenagers to participate in this potentially life-changing activity. While there are certainly teenagers who are cognizant of the possible negative ramifications of sexting, many view it as “a safer alternative to real life sexual activity” that is “no big deal because [they] get [sexts] a lot.”²⁷

Teenagers also express misguided notions about the line of impropriety. One younger high school boy who participated in the Pew Internet survey did not feel that sexting was “a big deal” if the transmitted image was “just a topless photo,” but stated that the issue became “a lot more serious” when the image also depicted

²⁰ *Id.* at 6.

²¹ *Id.*

²² SEX AND TECH, *supra* note 2, at 2.

²³ *Id.*

²⁴ *Id.*

²⁵ Russell Haythorn, *Lawmakers Try to Curtail ‘Sexting’*, THE DENVER CHANNEL (Jan. 16, 2009, 4:00 PM), <http://www.thedenverchannel.com/technology/18498850/detail.html> (last updated January 16, 2009, 6:54 PM).

²⁶ *Id.*

²⁷ TEENS AND SEXTING, *supra* note 10, at 8.

someone from the waist down.²⁸ A young teenage girl participating in the survey made a similarly naïve distinction when she wrote that she had only sent “slutty” images, but “NEVER [had] and never [would]” send naked pictures.²⁹ It seems that teenagers as a group are just “not mature enough to make rational decisions concerning all the possible negative implications” of sexting.³⁰

Compounding these often casual attitudes about sexting is the pressure—both explicit and implicit—to send these racy photographs. One psychotherapist appearing on CNN shared her finding that “a lot of girls are doing this because they’re hoping it will help them get or keep a boyfriend.”³¹ In fact, 51% of girls in one recent survey say that “pressure from a guy” is a reason that girls engage in sexting.³² Even without direct pressure, sexting has become somewhat of a “relationship currency.”³³ When a boyfriend or someone for whom a girl has romantic feelings makes a request for a nude or semi-nude picture message, many girls seem to feel that refusing to submit to the request will diminish the relationship.³⁴

At least one adolescent psychiatrist believes, however, that the act of sexting can actually damage a relationship, especially after the relationship has ended, when explicit images could be forwarded to others due to bad feelings surrounding the break-up.³⁵ It is difficult for teenagers to understand the reality that something that now feels like it could last forever may actually be more temporary than that.³⁶ Combine this with “a typical adolescent’s lack of impulse control and underdeveloped empathy skills” and the results could be incredibly damaging.³⁷ Take Phillip Alpert, for example; he was an eighteen-year-old boy who forwarded a naked picture of his sixteen-year-old girlfriend to dozens of people after the high school sweethearts had an argument.³⁸ In a mere instant, Alpert became a

²⁸ *Id.* at 9.

²⁹ *Id.*

³⁰ A.H. v. State, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007).

³¹ Mike Galanos, *Commentary: Is ‘Sexting’ Child Pornography?*, CNN (Apr. 8, 2009), http://articles.cnn.com/2009-04-08/justice/galanos.sexting_1_sexting-phillip-alpert-six-teens?_s=PM:CRIME.

³² SEX AND TECH, *supra* note 2, at 4.

³³ TEENS AND SEXTING, *supra* note 10, at 8.

³⁴ *Id.*

³⁵ Martha Irvine, *Porn Charges for ‘Sexting’ Stir Debate*, MSNBC.COM (Feb. 4, 2009), http://msnbc.msn.com/id/29017808/ns/technology/_and_science-tech_and_gadgets/.

³⁶ *See id.*

³⁷ *See* Amy Harmon, *Internet Gives Teenage Bullies Weapons to Wound From Afar*, N.Y. TIMES (Aug. 26, 2004), <http://www.nytimes.com/2004/08/26/education/26bully.html?scp=1&sq=Internet%20Gives%20Teenage%20Bullies%20Weapons%20to%20Wound%20From%20Afar&st=cse&pagewanted=1>.

³⁸ *See* Deborah Feyerick & Sheila Steffen, *‘Sexting’ Lands Teen on Sex Offender List*, CNN (Apr. 7, 2009), http://articles.cnn.com/2009-04-07/justice/sexting.busts_1_phillip-alpert-offender-list-offender-registry?_s=PM:CRIME.

criminal, arrested and charged with distribution of child pornography, a felony of which he was later convicted.³⁹ Though Alpert was fortunate not to receive any jail time, he was sentenced to five years of probation and required to register as a sex offender.⁴⁰

This is certainly more than a childish mistake, as teenagers arguably should know better than to so flagrantly disrespect the sanctity of the human form. Obviously, however, many teenagers do not comprehend just how serious this is, largely due to the technological component of the trend. Sexting is not exactly the same as passing around a naked Polaroid of your girlfriend during homeroom—there is “something about the medium that has a coarsening effect.”⁴¹ This is obviously not something many teenagers consider in the few seconds it takes to send a sext, but much of the problem stems from the fact that “the ability to press ‘send’ and watch it disappear makes it seem less real.”⁴²

2. Repercussions

In juxtaposition to the cavalier attitudes that many adolescents have expressed about sexting are the potential, serious ramifications of the practice. On the simplest level, it is possible that problems result because teenagers are not always able to perceive relationships in a realistic manner. For example, Doctor Terri Randall, an adolescent psychiatrist in Philadelphia, has mentioned the need to remind her young patients that “[e]ven though it seems like fun and so exciting right now, that person may not always feel the same way about you. And you may not feel the same way about that person either.”⁴³ Without this basic understanding, it would be difficult to imagine that someone you once liked and trusted could betray you by distributing private photos out of spite, for instance, or even mere adolescent cruelty.⁴⁴

One particularly callous example of this type of betrayal occurred nearly a decade ago at Horace Mann School in the Riverdale section of the Bronx. An eighth-grade girl there sent a digital video of herself masturbating to a male classmate on whom she had a crush. Shortly thereafter, this boy used the technology at his disposal to place the video on a file-sharing network that teenagers most often use to trade music, thus making the video—in which the girl’s face was clearly visible—available not only to hundreds of New York private school students, but also to a worldwide audience of millions.⁴⁵

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See* Harmon, *supra* note 37.

⁴² *See id.*

⁴³ Irvine, *supra* note 35.

⁴⁴ *See id.* *See also* Harmon, *supra* note 37.

⁴⁵ *See* Harmon, *supra* note 37.

While mere production of these videos or pictures could cause embarrassment or other psychological trauma to the teenagers involved,⁴⁶ the unexpected dissemination of this type of media can lead to much more serious emotional scars than one might anticipate. In fact, clinical psychologists are now beginning to see girls involved in sexting presenting with many of the same psychological symptoms as those who have been raped.⁴⁷ In a manner frighteningly similar to the ways in which rape victims experience post-traumatic stress following their attacks, sexting incidents can lead those involved to withdraw from the world, to suffer from flashbacks, and to become overwhelmed by an inability to get their lives back in order.⁴⁸ It is precisely this type of severe trauma—coupled with society’s inability or stubborn refusal to understand the full extent of the psychological implications of sexting—that may lead some teenagers to the ultimate consequence: suicide. Jesse Logan, a teenager in Cincinnati, Ohio, sent nude photographs of herself to a boyfriend who, upon the dissolution of the relationship, sent the pictures to other high school girls.⁴⁹ Facing constant harassment, disparaging comments, and even physical attacks, Logan became increasingly depressed and fearful even of going to school.⁵⁰ Though Logan went public with her story in an attempt to save others from having to experience her pain, the trauma she was experiencing became too much to handle only two months after she told her story. In July 2008, Logan hanged herself in her closet—her cell phone in the middle of the floor.⁵¹

C. Real World Consequences

The detrimental psychological impact that sexting may have on adolescents will likely be exacerbated by some of the more tangible consequences of the trend. In addition to being subject to ridicule at school or in the community in the midst of a sexting scandal, an adolescent who succumbs to the allure of sexting will likely face much more devastating consequences in the future, many of which may not be apparent at the moment he or she hits “send.” As much as technology has provided us with tremendous advantages, it can also become an enormous liability.

While grades, test scores, and extracurricular involvement used to be the most significant things about which prospective college students had to worry, college admissions officers have begun using social networking sites to evaluate

⁴⁶ See *A.H.*, 949 So. 2d at 239. .

⁴⁷ Blythe Seiner, *For Some Girls Sexting is ‘Like Rape,’* SUNSHINE COAST DAILY (July 27, 2009), <http://www.sunshinecoastdaily.com.au/story/2009/07/27/some-girls-sexting-rape/>.

⁴⁸ *Id.*

⁴⁹ See Mike Celizic, *Her Teen Committed Suicide Over ‘Sexting,’* MSNBC.COM (Mar. 6, 2009), <http://today.msnbc.msn.com/id/29546030>.

⁵⁰ See *id.*

⁵¹ See *id.*

prospective candidates.⁵² In fact, a survey conducted almost two years ago found that nearly 10% of admissions officers at the nation's top 500 colleges admitted to making use of online information when evaluating prospective candidates.⁵³ Though high school students may consider information posted on social networking sites to be private, it is important that they keep in mind that "with every click of the mouse on the Internet, the expectation of privacy diminishes and a voyeuristic society expands."⁵⁴ Even with the new privacy settings available on these types of sites, damaging information often has a way of getting out.⁵⁵ Though the government and website providers can help the situation by ensuring that the proper privacy tools are in place, "the ultimate guardian of privacy is the individual."⁵⁶ Particularly when the individual is an adolescent, though, privacy is often willingly and eagerly sacrificed because it is nearly impossible for them to understand that a post—or anything else transmitted electronically—that was intended for a small network of friends can easily be viewed by millions around the world.⁵⁷ Similar concerns arise when it comes time for these former adolescents to enter the working world. Many people consider Internet information—whether found on a social networking site or elsewhere—to be a significant threat during a job search.⁵⁸ Even when an individual has a job, information easily discoverable on the Internet could lead to termination, depending upon the nature of the job and the level of impropriety.⁵⁹ Essentially, it is crucial that adolescents be made aware that—unlike a roll of film or the picture that results from it—a sexually explicit image transmitted electronically can never be destroyed. Whether or not one intends for such an image to become public, electronic dissemination establishes that risk, and, whatever right to privacy one expected, that right is seriously tempered when an individual has placed himself or herself into the public eye.⁶⁰

Devastating as the impact on one's privacy may be, sexting can negatively affect something even more fundamental—one's freedom. While it is unlikely that

⁵² John Hechinger, *College Applicants, Beware: Your Facebook Page is Showing*, WALL ST. J., Sept. 18, 2008, at D1, available at <http://online.wsj.com/article/SB122170459104151023.html>.

⁵³ *Id.*

⁵⁴ Kane & Delange, *supra* note 9, at 347.

⁵⁵ Hechinger, *supra* note 52.

⁵⁶ Kane & Delange, *supra* note 9, at 345.

⁵⁷ See Kane & Delange, *supra* note 9, at 332 (quoting Sander J.C. van der Heide, Note, *Social Networking and Sexual Predators: The Case for Self-Regulation*, 31 HASTINGS COMM. & ENT. L.J. 173, 178 (2008)).

⁵⁸ See Kane & Delange, *supra* note 9, at 333 (referencing Alan Finder, *When a Risky Online Persona Undermines a Chance for a Job*, N.Y. TIMES, June 11, 2006, at 1); see also Hechinger, *supra* note 52.

⁵⁹ Kane & Delange, *supra* note 9, at 333 n. 129; see *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 298–99 (D. Conn. 2008).

⁶⁰ Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 18 (2007).

a teenager would spend time in prison for a sexting-related offense, many of the laws under which children are currently being prosecuted do allow for that form of punishment.⁶¹ Even if an individual escapes a prison sentence, though, mandatory registration laws could require a teenager implicated in a sexting incident to register as a sex offender.⁶² Recall Alpert, the Florida teenager who sent a naked photograph of his sixteen-year-old girlfriend (which she had taken herself and willingly sent to him) to dozens of her friends and family members after an argument.⁶³ After being convicted for sending child pornography, Alpert was sentenced to five years of probation and required to register as a sex offender—a label he will bear until he is well into adulthood.⁶⁴ Though Alpert had just turned eighteen at the time of his offense, thirty-eight states include juvenile sex offenders in their sex offender registries.⁶⁵ Like the humiliation that comes from a private picture being widely distributed, being labeled a sex offender is not something one can easily escape.

III. A SQUARE PEG IN A ROUND HOLE

A. *Child Pornography*

As the law struggles to conform to the relatively new phenomenon of sexting, prosecutors are left with tremendous discretion when deciding how to charge adolescents involved in these incidents. The most common—or at least most publicized—way in which prosecutors have chosen to respond to this trend is by way of our child pornography laws. Though each state has its own statutory prohibition against child pornography, the fundamentals of child pornography laws, in general, may be most easily illustrated by way of the federal child pornography laws. Under Section 2251 of Title 18 of the United States Code:

(a) Any person who...persuades, induces, entices, or coerces any minor to engage in,...with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce..., if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or

⁶¹ See, e.g., 18 U.S.C. § 2251(e) (2006 & Supp. V 2011); Fla. Stat. § 775.082 (2008); Ohio Rev. Code Ann. § 2929.14 (West 2006).

⁶² See, e.g., Fla. Stat. § 775.21(4) (2008); 42 Pa. Cons. Stat. Ann. § 9795.1(a) (2008).

⁶³ Feyerick & Steffen, *supra* note 38.

⁶⁴ *Id.*

⁶⁵ *Id.*

affecting interstate or foreign commerce by any means, including by computer...

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter,...such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter,...such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.⁶⁶

For the purposes of this statute, “minor” means any person under the age of eighteen and “sexually explicit conduct” encompasses sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person.⁶⁷ “Child pornography” is defined as a visual depiction of any minor engaged in sexually explicit conduct, which depiction includes photographs and videotapes, as well as electronic data that can be converted into a visual image.⁶⁸ Though federal prosecutors enforce these and related laws prohibiting the production, receipt, possession, or distribution of child pornography only so far as it affects interstate commerce, technological advancements have greatly increased the boundaries of this restriction. For example, it would be illegal under federal child pornography laws to send an e-mail containing child pornography to someone within his or her state, so long as the computer server that generated the e-mail was located in a different state.⁶⁹ It would even be a violation of federal law if, though the image never crossed state lines, the materials used to create the image traveled in interstate commerce.⁷⁰

Though it is probably more likely that an adolescent who engaged in sexting would be prosecuted under state as opposed to federal law, the technological component of the practice and the loose definition of interstate commerce could lead to federal prosecution and, as a result of the minimum sentence prescribed in 18 U.S.C. § 2251(e), extremely harsh penalties.⁷¹ Using this law to prosecute

⁶⁶ 18 U.S.C. § 2251 (2006 & Supp. V 2011).

⁶⁷ 18 U.S.C. § 2256 (2006 & Supp. V 2011).

⁶⁸ *Id.*

⁶⁹ CITIZEN’S GUIDE TO UNITED STATES FEDERAL CHILD EXPLOITATION LAWS, U.S. DEP’T OF JUSTICE, CHILD EXPLOITATION AND OBSCENITY SECTION, available at http://www.justice.gov/criminal/ceos/citizensguide_porn.html (last accessed Oct. 14, 2011).

⁷⁰ *Id.*

⁷¹ See 18 U.S.C. § 2251(e) (2006 & Supp. V 2011).

adolescents who engage in sexting, the eighth-grade girl from Horace Mann who e-mailed a video in which she was masturbating to another teenager—had she been prosecuted—would have received a minimum sentence of fifteen years in a federal prison.⁷² This is obviously not the result Congress intended when it enacted these laws. According to congressional findings, Congress was concerned with children as victims, noting that “child pornography is a permanent record of a child’s abuse and the distribution of child pornography images revictimizes the child each time the image is viewed.”⁷³ Congress further recognized the compelling governmental interest in “protecting children from those who sexually exploit them,” requiring “stamping out the vice of child pornography at all levels in the distribution chain.”⁷⁴ If the child appearing in the pornographic images is to be considered a victim, prosecution of an adolescent who produces an image of herself simply does not fit the spirit of the law—however much one may bend the situation to fit the strict constraints of the text. It would certainly be difficult—if not impossible—to sexually exploit oneself, at least in such a way as Congress envisioned when enacting these laws. Furthermore, it is highly unlikely that an adolescent who sends a sext to another adolescent will feel exploited by the person to whom she sent her self-produced image—and it is even more unlikely that the recipient of the image will feel as if he is sexually exploiting the teenager portrayed in the image. Regardless of the subjective understanding of the situation by those involved, which is almost never considered in criminal prosecution, an objective observer would likely concur that private sexting between consenting adolescents does not fit within the spirit of the child pornography laws.

While federal child pornography laws encompass a rather liberal construction of interstate commerce, many state child pornography laws are more expansive than the federal law in defining what constitutes child pornography. Pennsylvania law, for example, defines a “prohibited sexual act” that could lead to felony child pornography charges to include, among other things, “nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.”⁷⁵ This broad definition allows for an entirely subjective determination on the part of the prosecutor as to whether the picture in question is sufficiently stimulating to merit filing charges against the adolescent depicted. In one recent case, George Skumanick, Jr.—the District Attorney of Wyoming County, Pennsylvania—threatened to prosecute approximately twenty minors under the state’s child pornography laws unless the children submitted to

⁷² See Amy Harmon, *Internet Gives Teenage Bullies Weapons to Wound From Afar*, N.Y. TIMES, Aug. 26, 2004, at A23; see also 18 U.S.C. § 2251(e) (2006 & Supp. V 2011).

⁷³ Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110–358, § 102, 122 Stat. 4001.

⁷⁴ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, § 501, 120 Stat. 587.

⁷⁵ For a survey of state child pornography statutes, see *infra*, Appendix A.

probation and participated in an educational program at a cost of \$100 each.⁷⁶ While most of the adolescents initially involved in this incident eventually acquiesced to the prosecutor's deal, three adolescents and their parents brought suit against Skumanick, seeking an order from the court enjoining the prosecutor's office from initiating charges against the girls.⁷⁷ One of the photographs involved depicted plaintiffs Marissa Miller and Grace Kelly—both thirteen years old at the time the picture was taken—from the waist up, each wearing a white, opaque bra.⁷⁸ This photograph served as the inspiration for the story at the beginning of this article and, innocent as the scenario may have appeared, Skumanick alleged that this image met the statutory definition of child pornography merely because the girls were posed "provocatively," though he refused to elaborate upon that judgment.⁷⁹ The other photograph giving rise to this suit showed the third adolescent plaintiff, Nancy Doe, with a white, opaque towel wrapped around her body, just below her exposed breasts.⁸⁰ All of the plaintiffs emphasized that neither of these images depicted any sexual activity nor did they display the girls' genitals or pubic area.⁸¹ The girls further insisted that they did not disseminate the pictures, that someone else distributed them without their permission (though this may have been a moot point, as the complaint made clear that the only basis for the threatened prosecution was that the girls allowed themselves to be photographed).⁸²

The plaintiffs' complaint regarding the threatened prosecution raised three causes of action—all filed pursuant to 42 U.S.C. § 1983—for violation of constitutional rights: Count I alleged retaliation in violation of the girls' First Amendment right to free expression; Count II alleged retaliation in violation of the girls' First Amendment right to be free from compelled expression; and Count III alleged retaliation against the adult plaintiffs, the girls' parents, for exercising their Fourteenth Amendment substantive due process right as parents to direct the upbringing of their children.⁸³ Though the trial court did not rule on the merits of the case, it found that both the parents and the children involved had "asserted constitutionally protected activity sufficient to meet the standard that they [were] reasonably likely to succeed on the merits. . . ."⁸⁴ The court further found that the disputed images did not appear to qualify as depictions of prohibited sexual acts and that the threat of felony prosecution would likely deter an ordinary person

⁷⁶ *Skumanick*, 605 F. Supp. 2d. at 638 (M.D.Pa. 2009).

⁷⁷ *Id.* at 640.

⁷⁸ *Id.* at 639.

⁷⁹ *Id.* at 638–39.

⁸⁰ *Id.* at 639.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 640.

⁸⁴ *Id.* at 644.

from exercising her constitutional rights.⁸⁵ Since the court found that each of the factors requisite to granting a temporary restraining order weighed in favor of granting the order and that the public interest would be served by issuing a temporary restraining order to protect the constitutional rights of the plaintiffs, the motion for a temporary restraining order was granted and the prosecutor's office was enjoined from initiating charges against the plaintiffs for the two photographs at issue in the case.⁸⁶ While the case was on appeal, the District Attorney determined that he would not file criminal charges against either Miller or Kelly. However, with regard to Doe, the Third Circuit Court of Appeals agreed with the District Court's analysis, and on March 17, 2010, it affirmed the grant of a preliminary injunction against prosecution.⁸⁷ Since the District Court based its grant of injunctive relief only on the second and third claims, and the plaintiffs did not brief the first claim in the Court of Appeals, only the second and third claims were considered on appeal.⁸⁸

Though the District Court granted the temporary injunction on the basis that the prosecutor's threatened prosecution itself was a retaliatory act, the Court of Appeals found a timing problem with this theory—as the prosecuting attorney threatened to prosecute Doe *before* her refusal to participate in the education program—and affirmed on the alternative ground that any future prosecution would serve as a retaliatory act.⁸⁹ The Court of Appeals' reasoning was founded, in part, upon the distinction between law and morality, in that it discerned a fundamental difference in the proposed education program—which would have required Doe to explain, as a matter of morality, why her actions were wrong—and the “oft-used and constitutionally sound requirement in pre-indictment or pre-trial diversion programs that a potential defendant acknowledge responsibility for his or her criminal conduct or admit wrongdoing.”⁹⁰ Though the court acknowledged the potential benefits of *certain* educational or rehabilitative programming for minors, it also recognized the special dangers these programs could cause to that often easily influenced subset of society were officials allowed to exercise too much discretion in creating them.⁹¹ Furthermore, the Court of Appeals found that allegations of a retaliatory motive in bringing prosecution were bolstered by the lack of evidence of probable cause.⁹² While the court declined to issue any opinion about whether the sexual abuse of children law would even apply to a minor depicted in an allegedly pornographic photograph or whether the photograph in

⁸⁵ *Id.* at 644–45.

⁸⁶ *Id.* at 647.

⁸⁷ *Miller v. Mitchell*, 598 F.3d 139, 155 (3d Cir. 2010).

⁸⁸ *Id.* at 148.

⁸⁹ *Id.* at 148–50.

⁹⁰ *Id.* at 152.

⁹¹ *Id.*

⁹² *Id.* at 153–54.

this case could constitute a prohibited sexual act, it seemed to suggest that evidence of either possession or distribution would be required to substantiate allegations of any violation of the law—in other words, that Doe’s mere appearance in the photograph would not be enough.⁹³ Although that analysis seems to favor Doe and others similarly situated, the Court of Appeals did note that, were the District Attorney to secure probable cause, the injunction could be vacated and Doe could face prosecution.⁹⁴ In spite of the fact that the girls involved with this case were ultimately able to avoid prosecution, at least for the time being, the case exposed many of the flaws in the way in which these situations are currently handled, especially the likelihood that strict application of standard child pornography laws will enable the criminal justice system to punish the “victims” as perpetrators.

B. Case Law Review

There is not a tremendous amount of information upon which prosecutors dealing with sexting cases may model their action, especially because most juvenile cases are sealed, but even those few published cases directly dealing with the issue of sexting land at the extremes of the law and fail to make the legal standards any clearer. Closest to child pornography offenses on the spectrum of available charges is the charge of knowingly disseminating obscene material to a minor. In a recent Iowa case, a fourteen-year-old female received two photographs via e-mail from Jorge Canal, an eighteen-year-old male who attended the same high school as the girl to whom he sent the photographs.⁹⁵ One of the photographs showed Canal’s erect penis, while the other was a photograph of his face with the text “I love you” written below.⁹⁶ Though Canal and the recipient of the photographs were friends and the girl testified both that she had asked for such a photograph and that it was sent only as a joke, the jury in the initial trial found Canal guilty of knowingly disseminating obscene material to a minor.⁹⁷ In addition to imposing a civil penalty and one year of probation, the trial court instructed Canal that he was required to register as a sex offender.⁹⁸ On appeal from his conviction, Canal claimed that the material he disseminated was not obscene, but his conviction was ultimately affirmed.⁹⁹ Though the initial jury instructions recognized that the depiction of a person’s genitals is not in and of itself obscene,¹⁰⁰ the definition of obscenity has always been somewhat vague and

⁹³ *Id.*

⁹⁴ *Id.* at 154.

⁹⁵ *State of Iowa v. Canal*, 773 N.W.2d 528, 529 (Iowa 2009).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 531, 533.

¹⁰⁰ *Id.* at 533.

may be even more so with regard to minors. Our Supreme Court jurisprudence has articulated that the obscenity test as to minors is different than the test with respect to adults,¹⁰¹ but it has also recognized that minors are still entitled to significant First Amendment protection and that nudity is not *per se* obscene, even as to minors.¹⁰² Even this ambiguity—and the special circumstances of the facts giving rise to the charge—did not keep the Supreme Court of Iowa from affirming Canal's conviction, demonstrating a need to adapt the community standards test to the realities of teenage sexting so that immature teenagers are not charged with such a serious offense under relatively harmless circumstances.¹⁰³

Even at the lowest end of the spectrum—adjudication of juvenile delinquency—there is need for reform. A Florida teenager, A.H., unsuccessfully challenged her adjudication of delinquency for producing, directing, or promoting a photograph or representation that she knew included the sexual conduct of a child.¹⁰⁴ She alleged that, because the photographs she and her boyfriend had taken of themselves naked and engaging in sexual behavior were not distributed to a third party and because both participants were minors, her right to privacy was implicated and criminal prosecution was not the least intrusive means of furthering a compelling state interest.¹⁰⁵ The court determined that there was a compelling state interest in protecting children from sexual exploitation, whether the person sexually exploiting the child was an adult or a minor, and that the privacy provision of the state constitution did not protect a minor's right to engage in sexual intercourse, nor did it protect the right to memorialize that act through pictures or video.¹⁰⁶ Furthermore, the court held that there was no reasonable expectation of privacy because “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.”¹⁰⁷ In articulating this concern about dissemination as waiver of privacy, the court also articulated that the pertinent statute was intended to protect minors from their own lack of judgment.¹⁰⁸ In addition to illustrating the wide variety of punishments from which prosecutors may choose, this case also makes clear the rather paternalistic way in which many courts seem to view this type of adolescent behavior.

¹⁰¹ *Ginsberg v. New York*, 390 U.S. 629, 636–37 (1968).

¹⁰² *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–13 (1975).

¹⁰³ *See Miller v. California*, 413 U.S. 15, 27 (1973).

¹⁰⁴ *A.H.*, 949 So. 2d at 235.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 236.

¹⁰⁷ *Id.* at 237.

¹⁰⁸ *Id.* at 238.

C. The Need for a Uniform Standard

While some adolescents face harsh criminal sanctions for sexting, others are prosecuted for misdemeanors or are not prosecuted at all. Of course, the decision whether to prosecute an individual always lies with the particular prosecutor, but the lack of any uniform standards and the absence of laws that are precisely on point make prosecutorial discretion in sexting cases especially dangerous. Without any explicit direction, it is possible that prosecutors attempting to fit old laws to a new phenomenon will either fail to prosecute those deserving criminal punishment or, more likely, will impose punitive criminal sanctions on adolescents in order to make a statement about a “hot-button” issue. Especially with laws involving an already subjective and ambiguous legal standard, it is crucial that prosecutors are given some appropriate direction.¹⁰⁹ Rather than leaving the protective parenting up to the legislature and the courts—and the decision whether to metaphorically either send a child to his room or ground him for a period of months to the prosecutor—we should work to promulgate a multi-disciplinary and clear-cut standard under which to deal with sexting.

IV. RECOMMENDATION

This type of unique problem can only be appropriately addressed with an equally distinctive solution. While it may be easier to simply attempt to fit these adolescents’ bad decisions within the framework of existing law, doing so will neither further the goals of the laws on the books nor will it properly educate the youth of this nation about the real dangers of sexting. Though the plain text of many child pornography statutes encompasses the practice of teenage sexting, it feels far too Draconian to inflict such a damaging label upon one who was never meant to come within the confines of such a law. Instead, difficult as it might be to create a law that sufficiently responds to the innumerable variations of the sexting trend among teenagers, we must encourage the legislature to design a criminal statute that is cognizant of the adolescent psychology behind this practice as well as of the technology that has made sexting so simple.

It is not enough, though, to create laws designed to respond to this concern—especially in the face of such extensive media attention and widespread confusion regarding the subject. Like premarital sex and underage drinking, this is not a problem that will simply go away if adults take a strong stance against it. Rather than attempt to stamp out the activity entirely, we must educate people about sexting so that the instances in which legal action is necessary begin to decrease. Of course, this education must begin with the legal community, so that those charged with upholding the law properly understand the issue and are able to deal with it in a more constructive manner. We also must ensure that teenagers have as

¹⁰⁹ Obscenity laws are often considered in light of the amorphous “I know it when I see it” standard. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

clear an understanding as possible of not only the legal consequences of sexting but also the real-world implications of engaging in such risqué behavior. Perhaps most importantly, though, we must educate parents, as they will serve as the most effective preventative tool at our disposal. Apart from the “not-my-kid” attitude that is often so appealing to parents when it comes to these types of unsavory issues, the technological divide between parents and adolescents has almost certainly contributed to the problem. So while the legislature attempts to customize more sexting-specific criminal laws, we may want to encourage parents to modify their discussion of “the birds and the bees” to include a warning about the new confines of privacy in the twenty-first century.

A. *Narrowly Tailored Law*

Prosecutors have always had a tremendous amount of discretion—it is simply a reality of the legal system and a part of the job. When it comes to sexting, though, the wide variety of punishments seems less the result of discretion than the aftermath of utter confusion. Over the past couple of years, dozens of states have proposed and passed legislation attempting to resolve the problem.¹¹⁰ In so doing, however, many states have failed to deviate enough from the stringent standards imposed when prosecutors apply child pornography laws to sexting cases, while other states seem to have allowed the negative media attention surrounding child pornography prosecution in sexting cases to push their proposed statutes too far adrift from the most effective and appropriate type of legislation. The three state statutes that stand out amidst the flurry of sexting legislation—mostly for their demonstrated understanding of the real issues and for unique legal approaches suggested—are those of Vermont, Nebraska, and New Jersey.

¹¹⁰ See COLO. REV. STAT. § 13-21-1002 (2009) (adding telephone networks, data networks, text messages, and instant messages as means to commit computer dissemination of indecent material to a child, internet luring of a child, internet sexual exploitation of a child, and harassment); N.D. CENT. CODE § 12.1-27.1-01 (2009) (relating to sexually expressive images and providing for a class C felony offense for a person who knowingly acquires, possesses, or distributes any photograph or visual representation that exhibits a nude or partially denuded figure without the person’s consent); OR. REV. STAT. § 163.431 (2009) (modifying definition of online communication for purposes of online sexual corruption of child); UTAH CODE ANN. §§ 76-10-1204 and 76-10-1206 (2009) (providing penalties for minors who distribute pornographic material or deal in material harmful to a minor and providing that a non-minor who solicits a person younger than eighteen to distribute pornographic material or deal in material harmful to a minor is guilty of a third degree felony and is subject to specified penalties); see also *2010 Legislation Related to “Sexting”*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 4, 2010), <http://www.ncsl.org/default.aspx?TabId=19696> (last visited Oct. 14, 2011).

1. The Vermont Model¹¹¹

Under the new Vermont statute regulating the dissemination of indecent material by minors—signed into law on June 1, 2009—it is a crime for a minor to knowingly and voluntarily use a device such as a computer or cell phone to transmit an indecent visual depiction of himself or herself to another person.¹¹² It is also illegal under this statute for any person to possess such a visual depiction unless that person took reasonable steps to erase it.¹¹³ While a minor will be free from prosecution if he or she was threatened or coerced to send such a picture, and an individual who receives a picture of this nature will not be prosecuted unless he or she fails to make a reasonable effort to destroy the picture,¹¹⁴ this subsection of the Vermont law does very little to address the current unease surrounding prosecution of teenagers for what many view as childish imprudence. In fact, the law continues to punish the victim/creator just as prosecution under child pornography laws has done, and it fails to address the more culpable individuals who forward these indecent visual depictions against the will of the minor depicted therein.

In spite of the misguided focus of this first subsection of the law, however, the portion of the Vermont statute prescribing penalties proves to be a step in the right direction. Rather than enforcing the harsh sentences and mandatory sex offender registration imposed by many of the laws under which adolescents are currently prosecuted for sexting incidents, the new Vermont law mandates that most offenses that fall within its confines be adjudicated as a juvenile matter and that minors found guilty of violating the statute will not be subject to the requirements of the state's sex offender registration laws.¹¹⁵ Unless a minor has violated this law on a prior occasion, the statute requires that the action be filed in family court and that the minor merely be adjudicated delinquent—a far cry from the felony convictions sought under much of the relevant existing law.¹¹⁶ In addition, the statute allows the minor to be referred to a juvenile diversion program, the successful completion of which will expunge the matter from the minor's record.¹¹⁷ Even if the minor does not participate in a diversion program, the statute specifically mandates that the records of a minor adjudicated delinquent under this law will be expunged when the minor reaches eighteen years of age.¹¹⁸ If the

¹¹¹ VT. STAT. ANN. tit. 13, § 2802 (2009).

¹¹² *Id.* at (a)(1).

¹¹³ *Id.* at (a)(2).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at (b).

¹¹⁶ *Id.*

¹¹⁷ VT. STAT. ANN. tit. 3, § 163 (2010); *see also* *Juvenile Restorative Probation Program, VALLEY COURT DIVERSION PROGRAMS*, <http://www.vcdp.org/programs/juvenile-restorative-probation-program> (last visited Oct. 15, 2011).

¹¹⁸ VT. STAT. ANN. tit. 13, § 2802(B)(b)(4) (2009).

minor in question has violated this law in the past, the law allows for prosecutorial discretion in deciding whether to bring the case in family court or district court, but it still keeps the minor from the requirements of the sex offender registration laws.¹¹⁹ Adults in violation of the possession component of the law are subject to more severe penalties: a fine of no more than \$300, imprisonment for a maximum of six months, or both.¹²⁰

As much as this law represents a step towards urging uniformity in an ambiguous legal area, though, the final subsection of the statute pushes us two steps backwards. In spite of the mandatory language of the statute's penalties section, the final clause makes clear that the statute is not to be construed as prohibiting prosecution for crimes such as disturbing the peace by use of telephone or electronic communication, lewd and lascivious conduct, voyeurism, or any other applicable provision of law.¹²¹ So, while there is a spirit of therapeutic jurisprudence surrounding this law, the punishment is still focused on the wrong people and the legal response proposed is too flexible to make any appreciable difference in enhancing adolescent understanding of the dangerous repercussions of sexting.

2. The Nebraska Model¹²²

The relevant statute signed into law in Nebraska on May 20, 2009, goes even further than the Vermont statute in properly addressing the issue of sexting. Rather than punishing the minor who knowingly and voluntarily takes a picture of himself or herself or the recipient of such an image, the Nebraska law focuses on punishing those with some sort of malicious intent, albeit not in those specific words. The central provision of the statute makes it illegal for a person to knowingly possess any visual depiction of sexually explicit conduct by a child.¹²³ The statute then prescribes different levels of felony charges, based upon the age and relevant criminal record of the accused.¹²⁴ Most interesting about this portion of the law is that, rather than drawing the line at age eighteen, the traditional age of majority, the Nebraska law proposes less severe penalties for individuals under the age of *nineteen*.¹²⁵ While not explicit in the language of the statute, this subtle distinction suggests that the Nebraska legislature was particularly cognizant of the demographic of potential offenders and presumably did not feel comfortable penalizing the many high school seniors who have reached the age of eighteen before graduation more strictly than their seventeen-year-old counterparts.

¹¹⁹ *Id.* at (b)(3).

¹²⁰ *Id.* at (c).

¹²¹ *Id.* at (d).

¹²² NEB. REV. STAT. § 28-813.01 (2006).

¹²³ *Id.* at (1).

¹²⁴ *Id.* at (2).

¹²⁵ *Id.*

Though this recognition of the real-life practice behind the law is essential, the most important portion of the Nebraska statute is the third subsection, which provides affirmative defenses to charges made pursuant to this law under the following circumstances:

- (a) the visual depiction portrays no person other than the defendant; or
- (b) (i) the defendant was less than nineteen years of age; (ii) the visual depiction of sexually explicit conduct portrays a child who is fifteen years of age or older; (iii) the visual depiction was knowingly and voluntarily generated by the child depicted therein; (iv) the visual depiction was knowingly and voluntarily provided by the child depicted in the visual depiction; (v) the visual depiction contains only one child; (vi) the defendant has not provided or made available the visual depiction to another person except the child who originally sent the visual depiction to the defendant; and (vii) the defendant did not coerce the child in the visual depiction to either create or send the visual depiction.¹²⁶

This provision would allow for the transmission of sexually explicit photographs between willing adolescents but would not save from harsh sanctions one who coerced another teenager into sending such images nor would it protect an adolescent who distributed the original picture to others. Though the requirement that the child depicted in the picture be fifteen years of age or older seems somewhat arbitrary, especially in light of the increasingly young age at which children are given cell phones, this portion of the law does an excellent job of punishing abhorrent conduct while giving great deference to the realities of the situation.

3. New Jersey Model¹²⁷

Though the New Jersey legislation describing the contours of the criminal response to sexting does little to improve the way in which these cases are usually handled, the state's legislature has made an important contribution to the sexting discussion by proposing preventative and rehabilitative measures as corollaries to the criminal response. The preventative components of the legislation focus on education—both for children and for parents. One bill requires school districts to annually disseminate information “on the dangers of distributing sexually explicit images through electronic means” to students in grades six through twelve and to the parents or guardians of those students.¹²⁸ While the school district may use any methods it deems appropriate to deliver this information, the bill requires that the

¹²⁶ *Id.* at (3).

¹²⁷ 2008 NJ A.B. 4068; 2008 NJ A.B. 4069; 2009 NJ A.B. 4070.

¹²⁸ 2008 NJ A.B. 4068.

information include, at a minimum, a description of the practice of sexting, as well as the legal, psychological, and sociological repercussions of engaging in the activity.¹²⁹ The other preventative bill turns its attention primarily to parents in an attempt to close the technology gap that often exists between parents and their adolescent children. Under this supplement to New Jersey's Consumer Fraud Act, it will be illegal for any retail establishment to sell a cell phone or cell phone service contract to any individual, or to renew a contract for cell service with an individual, unless the store encloses with such equipment or contract a brochure that informs the individual about the dangers of sexting.¹³⁰ These brochures must at least contain an explanation of the types of criminal penalties that may result from engaging in sexting as well as detailed contact information for organizations that are "qualified and available to answer questions related to 'sexting.'"¹³¹ Perhaps if parents are better informed about the capabilities of cell phones and the serious implications of misusing the technology, they will be better able to take a strong stance against sexting before the legal system is forced to become involved.

The New Jersey legislature also recognized that, notwithstanding even the most dedicated efforts at educating the public about the dangers of sexting, some juveniles will inevitably face criminal prosecution as a result of the practice. Rather than impose harsh criminal sanctions in all situations, though, the new legislation establishes an educational program that is intended to be an alternative to prosecution for juveniles who are charged with a criminal offense as a result of sexting.¹³² The county prosecutor will be responsible for deciding whether a minor is eligible to be admitted into the program, but once an admitted juvenile successfully completes the program, he or she will have the opportunity to avoid criminal prosecution.¹³³ Admission to the program, however, is not subject entirely to the discretion of the prosecutor. The Act specifically limits eligibility to juveniles charged with offenses where "the facts of the case involve the creation, exhibition or distribution *without malicious intent* of a photograph depicting nudity . . . through the use of an interactive wireless communications device or a computer and the creator and subject of the photograph . . . were juveniles at the time of its making."¹³⁴ In addition to limiting admittance to the program based on the charged offense, the Act also limits admission to juveniles who (1) have never been adjudicated delinquent for or convicted of a criminal offense; (2) were not aware that their acts were illegal and did not have the necessary intent to commit a criminal offense; (3) could be harmed by a criminal conviction; and (4) would likely be deterred from engaging again in conduct similar to that for which they

¹²⁹ *Id.*

¹³⁰ 2008 NJ A.B. 4070

¹³¹ *Id.*

¹³² 2008 NJ A.B. 4069.

¹³³ *Id.*

¹³⁴ *Id.* (emphasis added).

were charged as a result of completing the program.¹³⁵ In effect, because these limits are so expansive and would apply to most adolescents caught up in the sexting trend, this Act seems to temper the rather harsh criminal sanctions set forth in the general New Jersey law regarding sexting. The program's admission requirements essentially would allow for almost all but those with some sort of malicious intent to go through the diversionary program rather than face true criminal sanctions. Though the putative victim of sexting will still face some punishment under the proposed New Jersey law, a result which seems anomalous to the purpose behind criminal sanctions, the Act creating an educational program for these types of offenders provides a healthier type of restricted discretion for prosecutors, allowing for varying degrees of punishment based more specifically on the facts of each individual case.

B. Proposed Model Criminal Statute

An amalgamation of the most logical components of the aforementioned state models, the following proposed statute serves as an attempt to demonstrate a deeper understanding of adolescent sexting and to mete out criminal sanctions with this more comprehensive awareness in mind. In formulating a statute based on a realistic understanding of sexting, the legal system will only be implicated when its punitive and rehabilitative objectives would actually be furthered by holding an adolescent criminally responsible for his or her actions.

Sexting; Minor Disseminating Indecent Material.

(1) It shall be unlawful for a person to knowingly create, possess, or distribute any visual depiction of sexually explicit conduct, as defined in subsection (4), which has a child, as defined in such section, as one of its participants or portrayed observers.

(2) Sanctions.

(a) Any person who is under nineteen years of age at the time he or she violates this section shall be guilty of a Class IV felony for each offense; such a person shall not, however, be subject to the sex offender registration requirements.

(b) Any person who is nineteen years of age or older at the time he or she violates this section shall be guilty of a Class II felony for each offense; such a person may be subject to the sex offender registration requirements if he or she displayed malice, as used in the Model Penal Code, in violating the section.

(c) Any person who violates this section and has previously been convicted of a violation of this section, or any other sexually-motivated crime against a child, shall be guilty of a Class I felony for each offense.

¹³⁵ *Id.*

(3) It shall be an affirmative defense to a charge made pursuant to this section that:

- (a) the visual depiction portrays no person other than the defendant; or
- (b) the defendant had a reasonable belief at the time the visual depiction was sent to another that it was being sent to a willing recipient; or
- (c) (i) the defendant was less than nineteen years of age; (ii) the visual depiction of sexually explicit conduct portrays a child who is thirteen years of age or older; (iii) the visual depiction was knowingly and voluntarily generated by the child depicted therein; (iv) the visual depiction was knowingly and voluntarily provided by the child depicted therein; (v) the visual depiction contains only one child; (vi) the defendant has not provided or made available the visual depiction to another person except the child depicted who originally sent the visual depiction to the defendant; and (vii) the defendant did not coerce the child in the visual depiction to either create or send the visual depiction.

(4) Definitions.

- (a) "Child" means any person under the age of nineteen years;
- (b) "Visual depiction" means any photograph, film, video, picture, digital image, or computer-displayed image, video, or picture, whether made or produced by electronic, mechanical, computer, digital, or other means that may be transmitted via cellular telephone, electronic mail, or any other electronic means;
- (c) "Sexually explicit conduct" means (i) real or simulated sexual intercourse, whether genital-genital, oral-genital, anal-genital, or oral-anal between persons of the same or opposite sex or between a human and an animal or with an artificial genital; (ii) real or simulated masturbation; (iii) real or simulated sadomasochistic abuse; (iv) real or simulated defecation or urination for the purpose of sexual gratification or sexual stimulation of one or more of the persons involved; (v) erotic fondling; or (vi) erotic nudity;
- (d) "Sadomasochistic abuse" means flagellation or torture by or upon a nude person or a person clad in undergarments, a mask, or a costume, or the condition of being fettered, bound, or otherwise physically restrained, when performed predominantly for the purpose of sexual gratification or sexual stimulation of one or more of the persons involved;
- (e) "Erotic fondling" means touching a person's clothed or unclothed genitals or pubic area, breasts if the person is a female, or developing breast area of the person is a female child, for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved; and
- (f) "Erotic nudity" means the display of the human male or female genitals or pubic area, the human female breasts, or the developing

breast area of the human female child, for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved.

This statute ensures that teens will not be punished for merely appearing in a photograph, nor will adolescents who distribute a photograph to a willing recipient, such as a boyfriend or a girlfriend, face criminal penalties. Rather, the proposed statute endeavors to involve the criminal law only when the image becomes something other than a private means of adolescent sexual expression. For instance, an individual who sends indecent visual depictions to another as a means of harassment, or one who, while the intended recipient of an image, distributes that image to others without the permission of the child appearing in the photograph, will face harsh sanctions under this proposed law. Those are not cases of sexual experimentation, but rather of a malicious desire to harm a minor. Dangerous as sexting may be, even in a seemingly harmless exchange of pictures between willing participants, it is when the practice shows malevolent intent—as opposed to merely foolish disregard for potential negative consequences—that the criminal justice system must intervene.

C. Preventative Education

Apart from this legal response to sexting, the delicate nature and potentially devastating consequences of sexting necessitate a swift and effective response by various implicated constituencies. The salacious nature of this trend has created somewhat of a media frenzy, provoking a tremendous amount of chatter and conflicting opinions. As a result of the public awareness and interest created by all of this attention, the media has perhaps a greater responsibility to ensure that the information presented to the public is both accurate and appropriately serious in nature. In fact, in this highly media-driven and technologically-focused age, it will be much more difficult for teenagers to fully understand the gravity of sexting—regardless of warnings from other sources—if the media continues to send mixed messages. Whatever facts or opinions are highlighted by the media, though, it is crucial that those most directly involved with this issue—schools, cell phone companies, and parents—make a dedicated effort to properly understand the motivations behind sexting as well as its potential consequences so that they can properly admonish adolescents before it is too late.

1. Parents

Coupled with parents' fundamental right to care, custody, and control of their children, which has been recognized by the Supreme Court for decades, is the "high duty" to prepare those children for additional obligations.¹³⁶ Ostensibly, this

¹³⁶ *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

includes the obligations that children have to themselves—to respect themselves, to be confident enough to do what is right in the face of tremendous pressure to do otherwise, and to put themselves in positions to have as bright a future as possible. Though the conversation varies slightly in each household, this preparation most often includes a discussion of sex and the lessons about propriety and self-respect that go with it. In light of the severe technological dependency of today's society—especially that of the adolescent population—and the current sexting trend, a simple discussion of the birds and the bees may no longer be sufficient. Most of the underlying lessons are equally as applicable to sexting as they are to traditional sexual activity, but the consequences have been expanded such that specific warnings about the risks of pressing “send” may be in order.

If this updated discussion is truly to be effective, parents must understand both their children and the relevant technology. It is important not to ignore the fact that “most adolescents have sex before their teenager years are over, regardless of the society's norm with regard to abstinence.”¹³⁷ Though adults often attempt to cultivate social norms against premarital sex, adolescents often receive this message as a hypocritical attempt to enforce a “utopian norm.”¹³⁸ When considered in contrast with competing social norms received from peer groups, adolescents often view the norms received from their adolescent counterparts as more persuasive and certainly more significant in terms of future retribution.¹³⁹ The high value placed on the approval of one's peers, especially with regards to sexual behavior, may stem from the fact that “sanctions from parents are less likely to be felt than sanctions from the peer group.”¹⁴⁰ Especially because communication between parents and adolescents regarding sexual behavior is often limited, it will generally be the peer group that either accepts or rejects an individual adolescent's sexual activity.¹⁴¹ With these generally accepted truths in mind, parents may feel inconsequential in terms of their influence on their children's sexual behavior. This, however, is no excuse to limit the discussion, but rather it should inform the way in which parents frame the conversations they have with their children regarding sexual behavior. Particularly with regard to an activity like sexting, which easily can become widely publicized among an adolescent's peer group, parents might consider using social reprisal as the starting point for a cautionary discussion with their children. If a child feels that sexting is the acceptable norm within her social circle, it may make the practice more enticing. If a parent, however, points out the vicious response that could arise should a “private” picture be circulated throughout the child's school, for example,

¹³⁷ Jan E. Trost, *Social Support and Pressure and Their Impact on Adolescent Sexual Behavior*, in *ADOLESCENCE AND PUBERTY* 173, 178 (John Bancroft & June Machover Reinisch eds., 1990).

¹³⁸ *Id.*

¹³⁹ *Id.* at 174.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

it may be more likely that the child will at least think twice before sexting. Parents must not stop after the discussion of the social consequences, however, as many teenagers seem to think of sexting as a safer alternative to sexual intercourse—without the risk of sexually transmitted diseases or pregnancy.¹⁴² Though the fear of social reprisal may be enough to deter some adolescents from the practice, it is crucial that parents specifically delineate the more long-lasting consequences of a sexting scandal, the most significant among them being criminal prosecution. Ignorance of the law may not be a defense but, where sexting is concerned, ignorance on the part of adolescents may represent, in part, a failure on the part of parents.

In addition to having an appropriately-framed conversation about sexting with their children, it is the duty of parents to inform themselves about the technology their children are using and to act accordingly. As one of the most significant forces in protecting children's privacy, "parents must recognize that cell phones can be used not only for phone calls, but also to send text messages, access the Internet, and take and send pictures."¹⁴³ The issue of teenagers creating self-made pornography is certainly not new; it is, rather, the newly technological component that has turned a long-standing practice into a modern catastrophe.¹⁴⁴ With only the click of a button, a picture that may have been intended to be private easily can be transmitted to hundreds of people in an instant. Perhaps a simple but overlooked solution would be "for parents to permit cell phone use, but only allow children to have scaled down versions of service plans without web access, photo capability, and other trouble-inducing features."¹⁴⁵ Though growing up with this type of technological capability is foreign to many current parents of adolescents, it may help to think of cell phone and internet privileges as comparable to any other privilege that is gradually dispersed as development and maturity dictate. The transition from childhood to adulthood is generally considered a gradual process marked by a relatively concurrent transition from dependence to independence, as children "learn new skills and gradually acquire greater degrees of competence in caring for themselves and making their own decisions."¹⁴⁶ Just as no responsible parent would teach a child to drive by tossing him the keys to the Porsche and telling him to take a spin around the block, parents must learn how to grant cell phone privileges in increments, increasing the technological capabilities afforded to their children as they see fit based on age and maturity and removing

¹⁴² Suzanne Choney, *Nearly 1 in 3 older teens gets 'sexting' messages*, MSNBC.COM (Dec. 15, 2009, 12:03 PM), http://www.msnbc.msn.com/id/34422197/ns/technology_and_science-tech_and_gadgets (quoting TEENS AND SEXTING, *supra* note 10).

¹⁴³ Kane & Delange, *supra* note 9, at 341.

¹⁴⁴ Kim Zetter, *Child Porn Laws Used Against Kids Who Photograph Themselves*, WIRED (January 15, 2009), www.wired.com/threatlevel/2009/01/kids/.

¹⁴⁵ Kane & Delange, *supra* note 9, at 341 n.184.

¹⁴⁶ Hyman Rodman, *Legal and Social Dilemmas of Adolescent Sexuality*, in ADOLESCENCE AND PUBERTY 254, 257 (John Bancroft & June Machover Reinisch eds., 1990).

them when the child demonstrates any inability to handle the privilege. After all, access to this type of technology should be just that—a privilege, not a right.

2. Cell Phone Companies

In order for parents to be as educated as possible when it comes to the technology that allows for sexting, it is crucial that cell phone companies take the lead in disseminating information about the various capabilities of cellular technology and the options parents have for limiting access to certain cell phone features. Even in states where there is no law regulating the distribution of this information, such as the new legislation proposed in New Jersey, cell phone companies should take it upon themselves to inform customers of phone features in such a way that ensures that parents understand the risks of the technology.

While legislation may be an inevitable step in ensuring that parents are properly informed—as cell phone companies could lose money by encouraging parents to think twice about activating text messaging, picture messaging, and Internet capabilities on their teenagers' phones—the decision by cell phone companies to accurately advise parents who are purchasing plans for their children may actually be a responsible business decision in the long run. First, though it may not provide as much revenue as enabling the risky features, there is generally a charge to disable certain cell phone capabilities. Most cell phone companies, for example, charge about \$5 per month to block the transmission of images for specific phone lines.¹⁴⁷ Second, and potentially more protective of companies' customer attrition rates, informing parents about the risks of certain cell phone features and educating them about the ways in which they may more easily monitor their children's cell phone use will likely help create the type of socially responsible public image that will attract new customers and keep current customers from changing providers. LG, for example, has created the "Give It A Ponder" campaign in an attempt to encourage teenagers to consider the consequences of their actions before texting.¹⁴⁸ The "ponder before you text" idea is displayed through "teen-targeted webisodes, cinema spots, digital out-of-home billboards, and social media applications."¹⁴⁹ Though this campaign is targeted at adolescents rather than their parents and its effectiveness is yet to be tested, it represents recognition by at least one cell phone provider that those who make sexting—and other cell phone misuse—possible should take some responsibility in curtailing the activity. It would likely be more helpful if states began to follow New Jersey's lead in mandating that cell phone companies inform purchasers

¹⁴⁷ Steven Reinberg, 'Sexting' by Kids Begets Fretting by Parents, U.S. NEWS & WORLD REPORT, December 17, 2009, available at <http://health.usnews.com/health-news/family-health/brain-and-behavior/articles/2009/12/17/sexting-by-kids-begets-fretting-by-parents>.

¹⁴⁸ GIVE IT A PONDER, <http://www.giveitaponder.com> (last visited Oct. 14, 2011).

¹⁴⁹ Mireille Hakkenberg, *Give It A Ponder*, VIRAL BLOG (Dec. 2, 2009), <http://www.viralblog.com/social-media/lg-give-it-a-ponder/>.

about the dangers of sexting so that parents may choose to limit their children's access to certain features, but any effort by cell phone providers to address the issue is certainly a step in the right direction.

3. Schools

As the educators of the nation's youth, schools should be on the front lines when it comes to sexting education. New Jersey has created an adequate model that will require schools to disseminate information about sexting; other states would be wise to follow, though it might be more prudent for state legislatures to allow the schools slightly less discretion. For example, while presenting the information in an assembly may be a comparatively inexpensive and simple choice, the effectiveness of such gatherings could vary dramatically depending on the speakers chosen and even the demographics of the school. Most everyone can look back on their high school years and vaguely recall a barrage of required assemblies, none of which made any particular impact. Even if a prosecutor were to stand up in front of an auditorium of high school students and describe the seemingly harmless pictures that could result in felony child pornography charges, it is more likely than not that a majority of those in attendance would take an "it couldn't happen to me" sort of stance and quickly dismiss the entire thing. Teenagers simply do not seem to identify with criminal charges the way adults do, as starkly exemplified by a group of teenage girls in Florida who were recently arrested for beating up a classmate and spent the trip to jail laughing and wondering if their hair would look good on camera.¹⁵⁰ While it may help to instead have teenagers who have been prosecuted or otherwise faced the devastating consequences that may result from sexting speak at school assemblies, no speaker will have much of a long-term effect unless schools back up the information with changes to school rules.

Schools tend to focus on problems that occur on their property, but even harassment that begins via text messaging or the Internet can have appreciable negative effects within the school environment. In addition to banning cell phones on school grounds, school policies should specifically state that if a student is found in violation of a relevant rule, a teacher or school administrator has the authority both to confiscate the phone and, potentially, to examine its contents. Though the Fourth Amendment still applies in the public school context, school officials need not comply with the strict requirements of probable cause; rather, they need only a reasonable suspicion that a student has violated either school rules or the law to justify the search of a student.¹⁵¹ The search of a student's personal property certainly implicates rights to privacy but, so long as a school official has reasonable grounds to believe that the student whose cell phone has been confiscated has violated either school rules or the law, a search of the contents of

¹⁵⁰ Zetter, *supra* note 144.

¹⁵¹ *New Jersey v. T.L.O.*, 469 U.S. 325, 326 (1985).

the phone seems entirely within the bounds of Fourth Amendment jurisprudence.¹⁵² If there is an explicit policy in place, students found in possession of sexually explicit photographs on their cell phone will have less of a leg to stand on when challenging the right of a teacher or administrator to have searched the phone in the first place. This will enable school officials to more easily get to the root of the problem when a student is being harassed at school due to a sexting-related incident. This type of vigilance and these strict guidelines, coupled with schools notifying parents when there is even a suspicion of involvement on either side of a sexting scandal could help make schools feel safer for students and may even save lives.¹⁵³

4. Popular Media

Over the past few decades, “numerous scholars have noted the direct influence of radio, film, magazines, and television on adolescents’ sexual attitudes and behaviors.”¹⁵⁴ Where sexting is concerned, it seems reasonable to speculate that the media will have an even stronger influence on adolescent perceptions, as confusion surrounding the issue is stifling input from other sources. Although some media outlets have attempted to disseminate a responsible message, it is unclear how effective these efforts will be, especially in contrast to the multitude of competing—and likely more alluring—information.

One of the most promising media initiatives has come from MTV, a television network with a predominantly teenage audience. The network developed a campaign called “A Thin Line,” which is designed to empower adolescents to identify, respond to, and stop the spread of digital abuse. It is based on the understanding that there is “a ‘thin line’ between what may begin as a harmless joke and something that could end up having a serious impact” on the life of an adolescent.¹⁵⁵ In addition to the campaign’s website, MTV has aired various public service announcements regarding sexting and other forms of digital abuse as well as an MTV news special called “Sexting in America: When Privates Go

¹⁵² See *id.*

¹⁵³ Jesse Logan, a teenager in Cincinnati, Ohio, sent nude pictures of herself to a boyfriend and, when they broke up, he sent them to other high school girls. Logan became increasingly fearful and depressed as girls at school constantly taunted her, calling her a slut and a whore and even throwing objects at her. Eventually, the taunting became too much to handle and, only months after the harassment began, Logan hanged herself in her bedroom—at the age of eighteen. After her death, Logan’s mother initiated a legal battle against school officials, alleging that they were aware of the severe harassment, but did not take sufficient action to stop it. See Celizic, *supra* note 51.

¹⁵⁴ A. Chris Downs & Lisa Scarborough Hillje, *Historical and Theoretical Perspectives on Adolescent Sexuality: An Overview*, in 5 ADOLESCENT SEXUALITY 1, 18 (Thomas P. Gullotta, Gerald R. Adams & Raymond Montemayor eds., 1993).

¹⁵⁵ A THIN LINE, <http://www.athinline.org/about> (last visited Oct. 14, 2011).

Public.”¹⁵⁶ The special documents the stories of teenagers who have been caught up in sexting scandals—both those who were prosecuted and those who were fortunate enough to escape criminal sanctions—and details the emergence of sexting in various forms of pop culture, from popular television shows to hit songs to celebrities who have quite literally been caught with their pants down.¹⁵⁷ The final portion of the special discusses the potential criminal implications of sexting. It is difficult to estimate the type of impact that this campaign will have but—if the nearly twelve thousand people connected with “A Thin Line” on Facebook are any indication—MTV is, at the very least, getting a positive message out there.¹⁵⁸

The fact remains, though, that not every message churned out by the media is quite as helpful. Just as it is confusing for adolescents “to be encouraged on the one hand via cultural messages to experiences the joys of sex, and then to be told on the other that sexual abstinence and saying no is the only acceptable course,” it is likely that mixed messages from the media will only serve to obscure the real risks of sexting.¹⁵⁹ Though Microsoft has been accused of supporting sexting in advertisements for its Kin phone,¹⁶⁰ the makers of the iPhone seem to have walked away unscathed despite the highly suggestive (and deceptively named) “Safe Sexting” application (or “app”). The app allows iPhone users to take nude photographs and then select from four boxes (one of which is translucent) to cover up one’s most private areas.¹⁶¹ The “Safe Sexting” feature was even touted in a recent issue of *Cosmopolitan* magazine in an article titled “50 More Things to Do Naked.”¹⁶² What proponents of this feature fail to mention, however, is that it may

¹⁵⁶ *Sexting in America: When Privates Go Public, A THIN LINE* <http://www.athinline.org/videos/17-sexting-in-america-part-1> (last visited Oct. 14, 2011).

¹⁵⁷ In 2007, a naked photograph of *High School Musical* star Vanessa Hudgens surfaced on the Internet after she reportedly e-mailed the picture to Nickelodeon actor Drake Bell. A year earlier, full frontal photographs of *Fall Out Boy* front man Pete Wentz also appeared on the Internet. In response to the ensuing media attention, Wentz told *Elle* magazine that, at the time, he “wanted to find a cave and hang out there for the rest of [his] life.” Bill Hewitt, *The Dangers of ‘Sexting,’* PEOPLE MAGAZINE, Mar. 30, 2009, at 112, available at <http://www.people.com/people/archive/article/0,,20271181,00.html>.

¹⁵⁸ *A Thin Line*, FACEBOOK, <http://www.facebook.com/athinline> (last visited Oct. 14, 2011). This seemingly significant response, however, must be taken in context. While “A Thin Line” was “liked” by 12,522 people on Facebook as of early 2011, at that time an incredible 22,106,214 individuals “liked” Justin Bieber. *Justin Bieber*, FACEBOOK, <http://www.facebook.com/#!/JustinBieber> (last visited Apr. 9, 2011). This clearly demonstrates the stark contrast between the attention surrounding socially responsible media and that of merely enjoyable media.

¹⁵⁹ See Stephen R. Jorgensen, *Adolescent Pregnancy and Parenting*, in 5 ADOLESCENT SEXUALITY 103, 136 (Thomas P. Gullotta, Gerald R. Adams & Raymond Montemayor eds., 1993).

¹⁶⁰ See Nick Farrell, *Microsoft accused of supporting sexting*, TECHEYE.NET (Apr. 15, 2010), <http://www.techeye.net/mobile/microsoft-accused-of-supporting-sexting>.

¹⁶¹ See Jennifer van Grove, *Safe Sexting? There’s an App for That, Too*, MASHABLE: THE SOCIAL MEDIA GUIDE (Dec. 23, 2009), <http://mashable.com/2009/12/23/safe-sexting/>.

¹⁶² Number eight on the list, under the “Try These with Your Guy” subheading, was a test run of the “Safe Sexting” iPhone app. *Cosmo* suggested to readers: “Take pics of each other with your

not actually be safe at all, especially for teenagers. Though the criminal penalties vary from state to state, many child pornography laws allow adolescents to be prosecuted—though they are not entirely nude—if the picture on which the charges are based is sufficiently provocative.¹⁶³ While the adage “sex sells” means that the media will likely never exhibit an entirely proper message with regards to sexting, media outlets have a responsibility to their audience to, at the very least, get the facts straight and, because highly impressionable adolescents are involved, think twice about the messages they are sending.

V. CONCLUSION

The law as currently utilized is rather disingenuous, alleging that it is meant to protect adolescents when in fact it intends to control them. Furthermore, it is simply contradictory that the law is able to conceive of adolescents as both offenders and victims for the same offense. Rather than attempt to punish with a law that does not fit the crime, we must create a criminal law that takes into account the realities of the sexting trend and the legal impossibility of a crime where the perpetrator and the victim are one and the same. That is not to say that sexting should be legal in all circumstances—only that it should be legal when the exchange occurs knowingly and voluntarily between two individuals under the age of nineteen. It is only when there is some sort of malicious intent behind the distribution of a sexually explicit image by cell phone that it seems reasonable for the criminal law to step in. Otherwise, we should deal with sexting like any other form of teenage sexual experimentation: privately. Relevant parties, such as schools, cell phone companies, and especially the media, should work to help educate teenagers and parents about the dangers of sexting, but that initiative will be extremely difficult before the legislature creates a uniform standard. While ignorance of the law is no excuse, it is difficult for the public to be anything but ignorant when even prosecutors do not know how exactly to deal with the issue. Thus, the first step must be legislative adaptation in the form of a criminal statute that both appropriately addresses the technology and the psychology behind sexting and that puts in place methods to ensure that the law matures as the technology develops.¹⁶⁴ As this legal reform is in progress, though, it largely will be up to the media and to the schools to properly inform adolescents about the risks of sexting and its potentially life-changing consequences. More than

phone, then use the app to choose different size boxes to censor your lady parts and his package.” Mina Azodi, *50 More Things to Do Naked*, COSMOPOLITAN MAGAZINE, Apr. 2010, at 174; see also *Cosmo Recommends Safe Sexting App In '50 More Things to Do Naked'*, KRAPPS.COM (Mar. 24, 2010), <http://krapps.com/2010/03/24/cosmopolitan-safe-sexting-iphone-app/>.

¹⁶³ See *Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009).

¹⁶⁴ In fact, it could be useful to task a multi-disciplinary organization to oversee the progress of the comprehensive legal reform that must take place with regard to sexting. In doing so, legislatures could ensure both that the laws will not break down as they are evaluated and implemented and that the reform does not become entirely centered on criminal-law responses.

anything, though, parents will need to be the first line of defense with regards to sexting by implementing more technological safeguards and having increasingly relevant discussions about sex and all related forms of adolescent experimentation. While the giggles that ring out as teenagers snap pictures on an oppressively hot summer night are fleeting, a naked picture on a cell phone—and the horrible labels that can easily come with it—last forever.

APPENDIX A

18 PA. CONS. STAT. ANN. § 6312(g) (West 2010); *see also* ARK. CODE ANN. § 5-27-401 (2006) (defining “sexual conduct” to include “lewd exhibition of the genitals or pubic area of any person or a breast of a female”); DEL. CODE ANN. tit. 11, § 1103 (2007) (defining “prohibited sexual act” to include “nudity, if such nudity is to be depicted for the purpose of the sexual stimulation or the sexual gratification of any individual who may view such depiction”); FLA. STAT. § 827.071 (2008) (making it a felony in the second degree to use a child in a sexual performance, which may include “actual physical contact with a person’s clothed or unclothed genitals, pubic area, or buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party”); GA. CODE ANN. § 16-12-100 (2007) (defining “sexually explicit contact” to include “physical conduct in an act of apparent sexual stimulation or gratification with any person’s unclothed genitals, pubic area, or buttocks or with a female’s nude breasts”); 720 ILL. COMP. STAT. § 5/11-20.1 (2010) (including as “child pornography” a photograph or other similar depiction or reproduction of a child “depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed or transparently clothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast of the child”); IOWA CODE ANN. § 728.1 (2010) (defining “prohibited sexual act” to include “nudity of a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a depiction of the nude minor”); KAN. STAT. ANN. § 21-3516 (2008) (defining “sexually explicit conduct” to include “exhibition in the nude” as well as “lewd exhibition of the genitals, female breasts or pubic area of any person”); KY. REV. STAT. ANN. § 531.300 (LexisNexis 2008) (defining “sexual conduct by a minor” to include “the exposure, in an obscene manner, of the unclothed or apparently unclothed human male or female genitals, pubic area or buttocks, or the female breast, whether or not subsequently obscured by a mark placed thereon, or otherwise altered, in any resulting motion picture, photograph or other visual representation”); MD. CODE ANN., CRIM. LAW § 11-101 (LexisNexis 2002) (defining “sexual conduct” to include “whether alone or with another individual or animal, any touching of or contact with the genitals, buttocks, or pubic areas of an individual, or breasts of a female individual”); MINN. STAT. § 617.246 (2010) (defining “sexual conduct” to include “physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification”); MISS. CODE ANN. § 97-5-31 (2006) (defining “sexually explicit conduct” to include “fondling or other erotic touching of the genitals, pubic area, buttocks, anus or breast”); MO. REV. STAT. § 568.060 (2010) (defining “prohibited sexual act” to include “nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction”); MONT. CODE ANN. § 45-5-625 (2010) (defining “sexual conduct” to mean “lewd exhibition of the genitals, breasts, pubic or rectal area, or other intimate parts of any person” as well as “depiction of a child in the nude or in a state of partial undress with the purpose to abuse, humiliate, harass, or degrade the child or to arouse or gratify the person’s own sexual response or desire or the sexual response or desire of any person”); NEV. REV. STAT. § 200.700 (2006) (defining “sexual portrayal” as “the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value”); N.J. STAT. ANN. § 2C:34-3 (West 2005) (“obscene material” as distributed to a person under the age of eighteen including depictions of “less than completely and opaquely covered human genitals, pubic region, buttock or female breasts below a point immediately above the top of the areola” as well as depictions of “human male genitals in a discernibly turgid state, even if covered”); OHIO REV. CODE ANN. § 2907.323 (West 2006) (outlining a felony conviction for illegal use of a minor in a nudity-oriented material or performance for creating, directing, producing or transferring an image of a minor in a state of nudity); OR. REV. STAT. § 163.665 (2007) (defining “sexually explicit conduct” to include “lewd exhibition of sexual or other intimate parts”); TENN. CODE ANN. § 39-17-1002 (2010) (defining “sexual activity” to include “lascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area of any person”); TEX. PENAL CODE ANN. § 43.25 (Vernon 2001) (defining “sexual conduct” to include “lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the

areola”); UTAH CODE ANN. § 76-5a-2 (2008) (defining “sexually explicit conduct” to include “the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person”); VT. STAT. ANN. tit. 13, § 2801 (1973) (defining “nudity” to include “the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state”); WIS. STAT. ANN. § 948.01 (2005) (defining “sexually explicit conduct” to include “lewd exhibition of intimate parts”).

