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PROSECUTING SEXTING AS CHILD PORNOGRAPHY: A CRITIQUE

Marsha Levick and Kristina Moon*

I. INTRODUCTION

Research on adolescent development suggests that teens have always found ways to explore their sexual identity and express themselves sexually. Sexting—the practice of “sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet”¹—is merely the newest form of doing this. Prosecuting sexting cases as child pornography is a gross misapplication of child pornography statutes by using them as a sword and not a shield to protect exploited child victims. Sending more youth into the juvenile delinquency system for behavior that is consistent with normative adolescent development unnecessarily exposes youth to the stigma and collateral consequences that flow from a delinquency adjudication, including possible sex offender registration. Moreover, alternatives to prosecuting sexting as child pornography do exist. Some jurisdictions have proposed creating a new offense to address sexting at the level of a misdemeanor or summary offense, while

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¹ In *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009), plaintiffs offered this definition of sexting in the complaint. Juvenile Law Center first addressed the issue of sexting through a request for *amicus* briefing from the American Civil Liberties Union of Pennsylvania in *Miller*, a case involving three teen girls who were threatened with felony child pornography charges by then-District Attorney George Skumanick, Jr. in Wyoming County, Pennsylvania. The ACLU-Pa, representing the teenagers, won a preliminary injunction in the United States District Court for the Middle District of Pennsylvania enjoining the District Attorney from initiating criminal charges. The District Court agreed with the ACLU that the DA’s threatened prosecution was retaliation for the exercise of the teens’ First and Fourteenth Amendment rights (their refusal to participate in the education program). The District Attorney appealed to the Third Circuit. On March 17, 2010, the Third Circuit affirmed the preliminary injunction and held that the District Attorney failed to show he had a legal basis for the child pornography charges because there was insufficient evidence to show the girls knowingly transmitted the photos. *Miller v. Mitchell*, No. 09-2144, 2010 WL 935776 (3d Cir. March 17, 2010). The court did not address the issue of whether the content of the photos constituted child pornography. *Id.* at *10. The court also agreed that the District Attorney’s attempt to force the youths to attend the program violated their parents’ constitutional right to raise their children as they see fit, *id.* at *8, and the girls’ constitutional right to be free from forced speech, *id.* at *9, but did not address the more general issue of whether the dissemination of the photos was protected by the First Amendment.

others have provided for the development of education and prevention programs targeting teens in schools. The felony offense of child pornography carries some of the most draconian and long lasting penalties of our criminal justice system, which makes it fundamentally inappropriate for teen sexting.

This Lecture offers a critique of the disturbing trend emerging in several states to treat sexting as a law enforcement problem, rather than a problem to be addressed by parents and educators. As prosecutors and policymakers consider the phenomenon of sexting, it is imperative that they ask themselves what benefits are derived by criminalizing and prosecuting this behavior in the juvenile justice system. Put another way, what do they expect the juvenile justice system to deliver in terms of services or risk management or public policy that parents, educators, pediatricians and mental health professionals cannot? Justice is better served by avoiding prosecution of youth who behave in normative ways and whose risks are more properly managed outside of law enforcement and the justice system.

II. ARGUMENTS CHALLENGING PROSECUTION OF SEXTING AS CHILD PORNOGRAPHY

Today many American teenagers engage in sexting. A study conducted in December 2008 by The National Campaign to Prevent Teen and Unplanned Pregnancy brought the phenomenon within the national spotlight and created media frenzy.² The most common scenario for sexting involves the teen subject taking a photograph of herself using a cell phone camera and sending that photo via text message to a boyfriend, who often indiscreetly shares the photo with others in the same manner.³ Often the photos are discovered on cell phones confiscated by school officials, who turn over the evidence to the police. It is representative of the typically short-sighted judgment of adolescents

² See THE NATIONAL CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS (2008), available at http://www.thenationalcampaign.org/SEXTECH/PDF/SexTech_Summary.pdf [hereinafter *Sex and Tech Survey*]; see, e.g., Stacey Garfinkle, *Sex + Texting = Sexting*, WASHINGTONPOST.COM, Dec. 10, 2008, <http://voices.washingtonpost.com/parenting/2008/12/sexting.html>; Ellen Goodman, *Is 'Sexting' Same as Porn?*, BOSTON GLOBE, Apr. 24, 2009, available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/04/24/is_sexting_same_as_porn/; *All Things Considered, Sexting: A Disturbing New Teen Trend?*, (National Public Radio broadcast Mar. 11, 2009).

³ See, e.g., *Sex and Tech Survey*, *supra* note 2, at 2 (reporting majority of teen girls and boys who have sent sexually suggestive content did so to a boyfriend or girlfriend); Garfinkle, *supra* note 2 (describing how photos were spread among classmates in high schools).

to take a digital photograph of oneself semi-nude and send it to another adolescent without considering the probability that the photograph will be shared with others not originally intended.

Overzealous prosecutors across the country have charged teen subjects and recipients of sext-messages with possession and distribution of child pornography.⁴ These prosecutors argue that sexting fits the literal definition of child pornography—a depiction of a nude minor. They rationalize that prosecuting sexting will deter this admittedly risky behavior. Yet, unwise juvenile behavior is not always criminal behavior and our justice system recognizes the difference. The Supreme Court of the United States has acknowledged that:

Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer

⁴ The Authors are aware of news reports of sexting prosecutions in Alabama, Florida, Indiana, Iowa, New Jersey, Ohio, Oregon, New York, Pennsylvania, Texas, Virginia, Washington, and Wisconsin, many of which began with child pornography charges against the youth involved. See, e.g., Alex Branch, *When is Sexting Just a Huge Mistake and When is it a Crime?*, MCLATCHY NEWSPAPERS (MCT), Dec. 28, 2009, available at http://www.philly.com/philly/living/When_is_sexting_just_a_huge_mistake_and_when_is_it_a_crime.html; Cell phone 'Sexting' Leads to Arrest of 2 Va. High School Students on Child Porn Charges, TIMESNEWS.NET, Mar. 11, 2009, available at <http://www.timesnews.net/article.php?id=9012350>; Children Charged for Cellphone 'Sexting', UPI, Jan. 28, 2010, available at http://www.upi.com/Top_News/US/2010/01/28/Children-charged-for-cellphone-sexting/UPI-51191264719374/; Beth Defalco, *NJ girl, 14, Arrested After Posting Nude Pictures*, SEATTLE TIMES, Mar. 27, 2009, available at http://seattletimes.nwsourc.com/html/nationworld/2008926952_aptteenchildporn.htm; Michelle Esteban, *3 Teens Arrested in 'Sexting' Case*, SEATTLE PI.COM, Jan. 28, 2010, available at http://www.seattlepi.com/local/414792_sexting28.html; Deborah Feyerick & Sheila Steffen, *'Sexting' Lands Teen on Sex Offender List*, CNN, Apr. 18, 2009, available at <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html>; Bonnie Hart, *Seven Charged in 'Sexting' Case*, PERRY COUNTY TIMES ONLINE, Oct. 7, 2009, available at <http://blog.perrycountytimes.com/?p=1788>; Tom Kerscher, *Teen Likely to be Sentenced Over Coerced Photos*, MILWAUKEE JOURNAL SENTINEL ONLINE, Jan. 11, 2010, available at <http://www.jsonline.com/news/milwaukee/81162542.html>; Wendy Koch, *Kids Caught 'Sexting' Face Porn Charges*, USA TODAY, Mar. 11, 2009, available at http://www.usatoday.com/tech/wireless/2009-03-11-sexting_N.htm; Bob McEwen, *'Sexting' in Newport: Dumb Prank or Child Porn?*, THE OREGONIAN, Mar. 28, 2009, available at http://www.oregonlive.com/news/index.ssf/2009/03/sexting_in_newport_dumb_prank.html; Grant Schulte, *Iowa Court Upholds 'Sexting' Conviction*, USA TODAY, Sept. 18, 2009, available at http://www.usatoday.com/news/nation/2009-09-18-iowa-sexting_N.htm; Gigi Stone, *'Sexting' Teens can Go Too Far*, ABC NEWS, Mar. 13, 2009, available at <http://abcnews.go.com/Technology/WorldNews/Story?id=6456834&page=1>; Paula Reed Ward, *DA's Case Over Teen 'Sexting' Draws Ire of Parents*, PITTSBURGH POST GAZETTE, Mar. 26, 2009, available at <http://www.post-gazette.com/pg/09085/958480-85.stm>; *Teen Gets Jail in 'Sexting' Case*, WPTZ.COM, Sep. 3, 2009, available at <http://www.wptz.com/news/20705763/detail.html>.

pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.⁵

Courts have increasingly relied on research about adolescent behavior and brain development to underscore the importance of juvenile court discretion. In *Roper v. Simmons*, the Supreme Court highlighted recent research on adolescent behavior that supported the view that child offenders were less culpable and more capable of reform than adults who committed similar crimes.⁶ The *Simmons* Court declared the juvenile death penalty unconstitutional in part because child offenders, as compared to adult criminals, were less culpable and more capable of reform. In arguing that adolescent offenders are less culpable, the Court cited research demonstrating that adolescents are generally more “impetuous” than adults and were thus “overrepresented statistically in virtually every category of reckless behavior.”⁷

The *Simmons* Court also recognized that “juveniles are more vulnerable or susceptible to negative influences and outside pressures,”⁸ and cited research demonstrating “juveniles have less control, or less experience with control, over their own environment.”⁹ Research shows that adolescents are generally less aware of risks because they have less knowledge and experience than adults, and they typically discount the long-term consequences of their decisions because of a developmental difference in temporal perspective.¹⁰

A. *Research Shows that Sexting Represents the Convergence of Technology with Adolescents’ Developmental Need to Experiment with their Sexual Identity and Explore their Sexual Relationships*

“[A] vital part of adolescence is thinking and experimenting with areas of sexuality. It is through experimentation and risk-taking that

⁵ *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion).

⁶ 543 U.S. 551 (2005).

⁷ *Id.* at 569 (citing J. Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992)).

⁸ *Id.* at 569 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982)).

⁹ *Id.* (citing Laurence D. Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

¹⁰ Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 304 (2000).

adolescents develop their identity and discover who they will be.”¹¹ As teens gradually become aware of their sexuality, they frequently feel the need to share information about their experiences with others.¹² Sexting is the result of a convergence between the well-recognized adolescent need for sexual exploration and new technology that allows teens to explore their sexual relationships via private photographs shared in real-time.

Technology allows teenagers to negotiate this important task of exploring their sexual identity while avoiding the embarrassment of doing so face-to-face. Just as teens have long used the telephone to investigate dating and sexuality because it allows interaction while concealing blushing or other physical reactions and body language, today’s youth are naturally adept at using recent technology, including text messages, for the same purposes.¹³

For today’s adolescents, technology is an inseparable part of their lives. These young people are the “first generation to be bathed in bits” – they have come to “view technology as just another part of their environment, and they soak[] it up along with everything else . . . as natural as breathing.”¹⁴ Teenagers are wired into multiple technologies every day, largely for the purpose of communicating and sharing with their peers.¹⁵ Technology infiltrates and colors everything that young people do, so when they express themselves – whether it is frustration about school or parents, excitement with friends, or developing intimacy with a partner – teens often do so through technological communication

¹¹ Lynn E. Ponton & Samuel Judice, *Typical Adolescent Sexual Development*, 13 CHILD ADOLESCENT PSYCHIATRIC CLINICS N. AM. 497, 508 (2004).

¹² *Id.* at 503.

¹³ See LINDA C. MAYES & DONALD J. COHEN, THE YALE CHILD STUDY CENTER GUIDE TO UNDERSTANDING YOUR CHILD: HEALTHY DEVELOPMENT FROM BIRTH TO ADOLESCENCE 532 (2003) (explaining significance of telephone for dating teens); J. Alison Bryant, et al., *IMing, Text Messaging, and Adolescent Social Networks*, 11(2) J. COMPUTER-MEDIATED COMM., available at <http://jcmc.indiana.edu/vol11/issue2/bryant.html> (“Young people’s use of technology to communicate with one another is certainly nothing new[] What has changed in the past decade, however, is the form that communication takes.”); Peter E. Cumming, Conference Paper presented at 78th Congress of the Humanities and Social Sciences at Carleton University: Children’s Rights, Children’s Voices, Children’s Technology, Children’s Sexuality 8–9 (May 26, 2009) (arguing sexting is similar to other generations’ sexual exploration when contextualized).

¹⁴ DON TAPSCOTT, GROWN UP DIGITAL: HOW THE NET GENERATION IS CHANGING YOUR WORLD 18 (2009) (analogizing that just as Baby Boomers do not marvel at TV, neither are today’s youth fascinated by the internet – they just surf it).

¹⁵ See Common Sense Media, *Is Social Networking Changing Childhood? A National Poll*, <http://www.commonsensemedia.org> (last visited Aug. 10, 2009) (reporting 22% of teenagers check social network sites like Facebook more than ten times a day, and 51% check more than once daily).

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venues, without worrying about the uniquely transferable nature of text messages or email precisely because it is not considered unique in their lives.

The cell phone is the most direct and most widely used mode of communication between young people. Seventy-one percent of teens own a cell phone (up from 63% in 2006) and 76% of teens have sent text messages—in fact, 25% of teens aged twelve to fourteen text daily and 51% of teens aged fifteen to seventeen text daily.¹⁶ Research shows it is common for adolescents to use cell phones and text messages as a form of relationship maintenance and day-to-day communication.¹⁷

Sexting generally occurs within the adolescent's own community of peers. Surveys conducted on the topic of sexting report that approximately 20% of teens have engaged in sexting.¹⁸ Most teen sexting is sent between partners in a relationship (i.e. between boyfriend and girlfriend), or to someone the sender is interested in dating. Seventy-one percent of teen girls and 67% of teen boys who have sexted say they sent this content to a boyfriend or girlfriend.¹⁹ Another 21% of teen girls and 39% of teen boys say they sent such content to someone they wanted to

¹⁶ PEW INTERNET & AMERICAN LIFE PROJECT, TEENS AND MOBILE PHONES OVER THE PAST 5 YEARS: PEW INTERNET LOOKS BACK 5, 8, 12 (2009); *see also* Kaiser Family Foundation, *Generation M2: Media in the Lives of 8 to 18 Year Olds*, 18–19, <http://www.kff.org/entmedia/mh012010pkg.cfm> (last visited Feb. 15, 2010) (reporting results of a similar study showing 66% of all eight- to eighteen-year-olds own their own phone, and 46% of those youth send text messages, at an average of 118 messages each day).

¹⁷ *See generally* Bryant, *supra* note 13.

¹⁸ The National Campaign to Prevent Teen and Unplanned Pregnancy's "Sex and Tech Survey" reported that 20% of teens aged thirteen to nineteen have sent or posted online nude or semi-nude pictures or video of themselves. *Sex and Tech Survey*, *supra* note 2, at 1. A survey by MTV and Associated Press conducted in September 2009 found that 24% of young people aged fourteen to seventeen have been involved in sending, receiving, or forwarding sext messages. MTV & Associated Press, *A Thin Line: 2009 AP-MTV Digital Abuse Study, Executive Summary*, http://www.athinline.org/MTV-AP_Digital_Abuse_Study_Executive_Summary.pdf (last visited Feb. 25, 2010). Cox Communications published a study in May 2009 reporting that 19% of teens have sent, received, or forwarded sext messages. COX COMMUNICATIONS, NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, & JOHN WALSH, TEEN ONLINE & WIRELESS SAFETY SURVEY: CYBERBULLYING, SEXTING AND PARENTAL CONTROLS 34 (2009), *available at* <http://www.scribd.com/doc/20023365/2009-Cox-Teen-Online-Wireless-Safety-Survey-Cyberbullying-Sexting-and-Parental-Controls>. The Pew Internet and American Life Project reported that 15% of cell-owning teens ages twelve to seventeen have received sext messages, and 4% have sexted images of themselves to someone else. 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://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf.

¹⁹ *Sex and Tech Survey*, *supra* note 2, at 2.

date.²⁰ Youths' responses highlight that the usual purpose and motivation of sexting is typical adolescent sexual exploration. Among teens that have sent nude or semi-nude text messages, 66% of girls and 60% of "boys say they did so to be 'fun or flirtatious[,]'" 52% of girls did so as a "'sexy present' for their boyfriend[,]'" 40% of girls said they sent sexually suggestive texts "as a 'joke'" and 34% did so "to 'feel sexy.'" ²¹

B. Sexting Prosecutions are an Abuse of Prosecutorial Discretion and are Inconsistent with the Juvenile Justice System's Underlying Purpose of Providing Rehabilitation and Treatment

Because sexting is only the most recent, technology-inspired expression of adolescent sexual exploration, the prosecution of it is contrary to the purpose of the juvenile justice system. The creation of a separate juvenile court was intended to promote the reformers' rehabilitative goal in two ways—by diverting child offenders from the criminal justice system and by intervening in the lives of child offenders to address the alleged causes of their delinquency.²² Diversion from the criminal justice system, in and of itself, was believed to promote the rehabilitation of juvenile offenders by providing them with "room to reform."²³

By diverting children from the criminal justice system, the juvenile court spared children from some of the features of the criminal justice system that would have disrupted or hampered their development. For example, the juvenile court has broad discretion to divert children from the juvenile justice system. When a child is referred to the juvenile court, an intake officer—typically a probation officer—can exercise significant discretion in deciding whether the child's case should be formally pursued or referred to a different system, such as the mental health system. The intake officer can choose to make this decision on the basis of a variety of factors, including the child's age, offense, attitude, and prior history.²⁴ While the criminal justice system has historically focused on punitive responses to crime, the juvenile system was developed in large part to facilitate the opportunity for juveniles to reform and

²⁰ *Id.*

²¹ *Id.* at 4. The opportunity for negative peer pressure is obvious and 12% of teen girls surveyed reported feeling "'pressured'" to send nude or semi-nude texts. *Id.* Unfortunately, this vulnerability to peer pressure is also consistent with typical adolescent sexual development, and more importantly, is not dependent on sexting or other technology.

²² See FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 34 (2005).

²³ See *id.* at 35-38, 62-64.

²⁴ See Robert G. Schwartz, *Juvenile Justice and Positive Youth Development*, in *YOUTH DEVELOPMENT: ISSUES, CHALLENGES AND DIRECTIONS* 233, 245 (2000).

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become productive citizens.²⁵ The court's rehabilitative focus is premised on the assumption that a juvenile's actions were primarily the function of his or her environment and therefore did not warrant a punitive response: "[r]eprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control. [A juvenile delinquent's] conduct is not deemed so blameworthy that punishment is required to deter him or others."²⁶

Moreover, by criminalizing conduct that is consistent with normal adolescent behavior, policymakers pervert the central purpose of child pornography laws and invoke them not as a shield but a sword. Prosecutors who choose to charge minors who have been involved in sexting with child pornography—a felony carrying serious and long term collateral consequences—abuse their discretion, disregard the purpose of the juvenile court, and ignore alternatives for addressing this behavior.

C. *Child Pornography Laws Are Intended To Protect Victims; Sexting Does Not Implicate the Compelling Child Protection Justification Prompting Criminalization of Child Pornography*

Preventing the sexual abuse of children is at the heart of laws proscribing the making or distribution of child pornography. In Pennsylvania, for example, the relevant child pornography statute is titled "Sexual abuse of children[.]"²⁷ Sexting, in comparison, generally occurs without the exploitative circumstances that are central to the production of conventional child pornography. Sexting usually entails the subject taking a photograph of herself or voluntarily asking a friend to take the photograph for her, and therefore lacks the exploitative element which drives the laws prohibiting child pornography. To charge sexting as child pornography, a prosecutor must blatantly disregard the obvious purpose and intent of the laws enacted to protect children from those who would exploit them. Legislatures and courts stress the harm that minors suffer when they are used in the creation of pornographic material, yet it is precisely this exploitative harm that is absent from the usual sexting scenario in which an adolescent voluntarily takes a photograph of herself (or asks another to do so) and shares the photograph with a boyfriend or girlfriend. The Supreme Court of the United States emphasized the harm to the "physiological,

²⁵ *In re Gault*, 387 U.S. 1, 15-16 (1967).

²⁶ *McKeiver v. Pennsylvania*, 403 U.S. 528, 551-52 (1971) (White, J., concurring).

²⁷ 18 PA. CONS. STAT. § 6312 (2009).

emotional, and mental health of the child[]” when categorically exempting child pornography from the First Amendment protection that adult pornography receives.²⁸ The Court has stated the reason possession of child pornography is prohibited is to “protect the *victims* of child pornography [and] . . . to destroy [the] market for the *exploitative* use of children.”²⁹

Recently, in *Ashcroft v. Free Speech Coalition*, the Court reaffirmed that it was the harm to children used in the production of child pornography that was the root of the *Ferber* exception to First Amendment protection.³⁰ In *Free Speech Coalition*, the Court rejected arguments supporting the prohibition of pornography that used virtual children or adults who appear to be minors, as inconsistent with *Ferber’s* child protection justification.³¹ The government argued that though no children were sexually abused in the making of the images, there remained a potential harm to children based on the possibility that the images might cause pedophiles to molest children or be used by pedophiles to groom children.³² The Court dismissed this as indirect because the harm “does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.”³³ The Court characterized the interests in prohibiting child pornography as “anchored . . . in the concern for the participants [in the production], . . . the ‘*victims* of child pornography.’”³⁴

²⁸ *New York v. Ferber*, 458 U.S. 747, 758 (1982). See also *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007) (citing *Ferber* for the harm caused to children in child pornography).

²⁹ *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (emphasis added); *Commonwealth v. Davidson*, 938 A.2d 198, 215 (Pa. Super. 2007) (finding the purpose of section 6312 is “plainly to protect children, end the abuse and exploitation of children, and eradicate the production and supply of child pornography”). The addition of an exploitative element—an adult or older minor coercing another to pose or take photographs of herself—may require a different analysis. In those circumstances, sexting looks more like merely a new tool for conventional child pornography and the child protection justifications may apply. In the case of a juvenile who widely disseminates a sext-message he received from the subject or a third party it is not the exploitative creation of child pornography but distribution that is at issue. In these cases it is more appropriate to address the issue as one of bullying or harassment by peers.

³⁰ 535 U.S. 234, 241–42 (2002); see Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL’Y & L. 505, 519 (2008).

³¹ *Free Speech Coalition*, 535 U.S. at 249.

³² *Id.* at 251–52.

³³ *Id.* at 250, 253.

³⁴ *Id.* at 250 (quoting *Osborne*, 495 U.S. at 110) (emphasis added). Federal courts are also moving away from punitive and draconian sentences where there is no actual harm to children in child pornography cases). See Amir Efrati, *Judges Trim Jail Time for Child Porn: Data Show Trend Toward Leniency for People Who View Images but Aren’t Molesters*, WALL ST. J., Jan. 20, 2010, at A2.

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The key element of exploitation is often absent in the practice of sexting. The youth voluntarily take and share photographic images of themselves with their peers—any prospective harm to youth would be indirect injury and dependent on “unquantified potential for subsequent criminal acts,” and therefore squarely outside the *Ferber* exception to First Amendment protection.

D. Even if Sexting did Qualify as Child Pornography, the Sexted Images Often do not Rise to the Level of Child Pornography Defined by the Statute

In all instances, the actual photograph captured in the sext-message must be scrutinized on a case-by-case basis to determine whether it constitutes child pornography under the relevant statute. Frequently, the sext-messages shared between teens will not reach the standard outlined in the law. The federal child pornography statute, for example, addresses the visual depiction of a minor engaged in “sexually explicit conduct” which is defined as (1) sexual intercourse, (2) “lascivious simulated sexual intercourse[,]” or (3) “graphic or simulated lascivious exhibition of the genitals or pubic area of any person[.]”³⁵ The technical definition of “lascivious exhibition” has been litigated copiously in the federal Courts of Appeals, but generally requires that the child be nude or partially clothed, with the focus of the depiction on the child’s genitals or pubic area and with the image intended to elicit a sexual response in the viewer.³⁶ Many sext-messages sent between teenagers would not meet this standard.

Most state statutes prohibiting child pornography similarly focus on the purpose of sexual gratification of the viewer. For example, Pennsylvania’s child pornography statute prohibits, *inter alia*, photographing, disseminating photographs or other images, and possessing material that depicts a child engaged in a “prohibited sexual act[.]”³⁷ The statute defines “prohibited sexual act” to include nudity, “if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.”³⁸

Like most images sent between sexting teenagers, the photographs at issue in *Miller v. Skumanick*³⁹—one depicting two girls from the torso up wearing opaque bras, and one showing a girl with bare breasts and a

³⁵ 18 U.S.C. § 2256 (2006 & Supp. 2008).

³⁶ See, e.g. *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999), *reh’g en banc denied*, 1999 U.S. App. LEXIS 23011, *cert. denied*, 529 U.S. 1029 (2000).

³⁷ 18 PA. CONS. STAT. § 6312 (2009).

³⁸ *Id.*

³⁹ 605 F. Supp. 2d 634 (M.D. Pa. 2009), *affirmed by Miller v. Mitchell*, No. 09-2144, 2010 WL 935776 (3d Cir. March 17, 2010).

towel wrapped around her waist—were firmly outside the statutory categories as they were defined by case law. There was no sexual activity of any kind portrayed in either photograph. The bare breasts visible in the photograph of the girl in a towel do not qualify as genitals under Pennsylvania case law.⁴⁰ The nudity provision of Pennsylvania’s child pornography law, with its qualifier, was the only category that required further discussion but it too failed to encompass the photographs in question.

The Supreme Court has concluded “that depictions of nudity, without more, constitute protected expression.”⁴¹ Pennsylvania’s statute narrowly limits nudity to that “depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.”⁴² The Pennsylvania

“General Assembly made clear that it did not seek to punish individuals for viewing or possessing innocent materials containing naked minors. . . . As the U.S. Supreme Court explained in *Osborne*, the purpose of such language is to allow the ‘possession or viewing of material depicting nude minors where that conduct is morally innocent.’”⁴³

It is clear “that the only conduct prohibited by the statute is conduct which is *not* morally innocent, i.e., the possession or viewing of the described material for prurient purposes.”⁴⁴ The images in *Miller* do not serve any prurient purposes and would therefore be outside the statute that the Pennsylvania Supreme Court affirmed “does not reach innocent family or artistic images of minors in a state of simple nudity[.]”⁴⁵

⁴⁰ Commonwealth v. Dewalt, 752 A.2d 915, 918 (Pa. Super. 2000) (defining genitals as “vagina, labia, or vulva”).

⁴¹ *Osborne v. Ohio*, 495 U.S. 103, 112 (1990) (citing *New York v. Ferber*, 458 U.S. 747, 765 (1982)).

⁴² 18 PA. CONS. STAT. § 6312(a).

⁴³ Commonwealth v. Davidson, 938 A.2d 198, 215 (Pa. Super. 2007) (quoting *Osborne*, 495 U.S. at 113 n.10).

⁴⁴ *Osborne*, 495 U.S. at 113 n.10.

⁴⁵ *Davidson*, 938 A.2d at 214. Pennsylvania courts have applied section 6312 in circumstances where the prurient intent of the photographer is clear, and thus radically different from the voluntary personal expressions of sexting. Section 6312 “permits the fact-finder to distinguish between depictions such as those in [*Commonwealth v. Savich*, where defendant videotaped multiple children changing and showering nude in a public bathhouse without their knowledge] . . . from nude depictions taken for legitimate scientific, medical or educational activities.” 716 A.2d 1251, 1256 (Pa. Super. 1998). The lines are clear— “[n]either law enforcement authorities nor the courts have discretion to charge or convict an individual for making [images] depicting child nudity for any purpose

Application of these principles to the sexting of images showing semi-nude girls make clear that the nudity provision of section 6312 does not apply. The girls in *Miller* had no prurient intent when creating the images of themselves, as is evident by the context surrounding their production—an innocent sleepover for two, and a private shower for the other. The subjective “intent of the photographer” controls,⁴⁶ and none of the girls intended for the images to serve for another’s sexual gratification. In contrast, the photographs were taken as an expression of normal adolescent sexual exploration, using available technology that is familiar to adolescents.

E. The Prosecution of the Subject of Sexting as an Accomplice to Child Pornography is not Supported by the Law and Would Deter Real Victims from Reporting their Abusers

At least one prosecutor—the District Attorney in *Miller*—has stepped even further off track by threatening prosecution of the *subjects* of the photographs sent via text message, effectively arguing that they acted as accomplices to child pornography. However, being the subject of an alleged pornographic image is not itself a crime under any child pornography statute and neither is prosecution sustained by most criminal accomplice statutes.⁴⁷

Child pornography laws seek to protect minors manipulated and abused in the creation of child pornography; this purpose is not served by prosecution of an adolescent’s consensual act of self expression via sexting. Rather, the threat of prosecution for appearing as a subject in alleged child pornography would serve to deter children who are real victims of exploitative sexual abuse in the production of video or photographic child pornography. In Pennsylvania, like many states, the accomplice-liability statute exempts one from liability if she is “a victim of [the] offense[,]” or if the offense as defined makes her conduct “inevitably incident” to the commission of the offense.⁴⁸ The youth depicted in child pornography is considered the victim of the offense, so it would be contrary to the statute to prosecute the victim-subject as an

other than sexual gratification... of the viewer.” *Id.* “[P]roof of [the] purpose of personal... gratification may be established by the circumstances surrounding the [creation of the image].” *Id.* at 1257.

⁴⁶ See *Savich*, 716 A.2d at 1256.

⁴⁷ See, e.g., 18 PA. CONS. STAT. § 6312 (prohibiting depicting a child in a prohibited sexual act, and disseminating or possessing images of the same); 18 PA. CONS. STAT § 306(f) (2009) (exempting liability for “victim” of the offense and those whose “conduct is inevitably incident” to the offense).

⁴⁸ 18 PA. CONS. STAT § 306(f).

accomplice.⁴⁹ The Supreme Court has recognized that the participation of a minor subject is “inevitably incident” to the offense of child pornography in its holding that pornography made with virtual minors did not qualify as child pornography.⁵⁰ Children-subjects, therefore, are exempt from accomplice liability under child pornography statutes.⁵¹

Further, exposing vulnerable children who have actually been exploited in the creation of child pornography to prosecution as accomplices to the atrocious crimes of their abusers serves no positive purpose and is instead likely to frighten children who might otherwise report the conduct into silence for fear of being criminally charged themselves. Children who have suffered the terrible ordeal of sexual abuse in the creation of child pornography are often silent about the experience, and may blame themselves for the crimes of their abusers.⁵² Developmental factors, including the natural egocentrism of children, may cause “children to assume responsibility for events in which they are involved, regardless of [their] role” under the circumstances.⁵³ This type of prosecution would only further blame victims and discourage reporting of abuse.

F. *The Prosecution of Sexting Cases will Needlessly Push More Youth into the Juvenile Justice System and Wrongfully Expose them to Possible Collateral Consequences*

1. Juvenile Adjudications of Delinquency Carry Far-Reaching Consequences, Varying by Jurisdiction

Although juvenile adjudications are not criminal convictions, records of juvenile court involvement can follow an individual through his or her adulthood. There are collateral consequences to a delinquency adjudication that may hinder a juvenile’s ability to productively reintegrate into society, impeding an individual’s future housing,

⁴⁹ *Id.* § 306(f)(1). See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (recognizing child as victim in the creation of child pornography); *Osborne*, 495 U.S. at 110 (same); *Davidson*, 938 A.2d at 215 (same).

⁵⁰ See *Free Speech Coalition*, 535 U.S. at 241.

⁵¹ See, e.g., 18 PA. CONS. STAT. § 306(f)(2).

⁵² Goodman-Brown, et al., *Why Children Tell: A Model of Children’s Disclosure of Sexual Abuse*, 27(5) CHILD ABUSE & NEGLECT 525, 528 (2003) (“For many reasons, children who have been sexually abused may come to believe that they are at least partially responsible for their own abuse [and delay disclosure].”).

⁵³ *Id.*

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education, and employment opportunities as well as impacting subsequent judicial matters.⁵⁴

An adjudication of delinquency may hinder a juvenile's future plans to seek higher education, obtain employment, or enlist in the military.⁵⁵ While historically juvenile adjudications have not been characterized as criminal convictions for purposes of employment applications, increasingly applications for employment, college admission, and financial aid include specific references to juvenile adjudications.⁵⁶ Juvenile adjudications of delinquency may also preclude eligibility for enlistment in the military. Based on the U.S. Army's classification system, juvenile delinquency adjudications qualify as criminal offenses.⁵⁷ A juvenile may request a moral waiver to enlist in the army; however, certain enumerated offenses render an applicant ineligible for waiver.⁵⁸

In addition to creating barriers to successful future plans, juvenile adjudications can also affect a youth's current livelihood.⁵⁹ A delinquency adjudication may have significant ramifications in subsequent judicial matters. A past juvenile adjudication "may affect sentencing in a future criminal proceeding[.]"⁶⁰ For example, the

⁵⁴ See JUVENILE DELINQUENCY RECORDS HANDBOOK AND EXPUNGEMENT GUIDE (Juvenile Court Judges' Commission 2008), available at http://www.pema.state.pa.us/portal/server.pt/directory/juvenile_delinquency_records_handbook_and_expungement_guide/6066?DirMode=1; JUVENILE RECORDS EXPUNGEMENT: A GUIDE FOR DEFENSE ATTORNEYS IN PENNSYLVANIA, (Juvenile Law Center 2007), available at <http://www.jlc.org/files/publications/expungeguide.pdf>.

⁵⁵ See Robert Sheperd, *Collateral Consequences of Juvenile Proceedings: Part II*, 15 CRIM. JUST. 41, 41-42 (Fall 2000), available at <http://www.abanet.org/crimjust/juvjus/cjmcollconseq1.html>.

⁵⁶ See *Id.* at 42. In Pennsylvania for example, law enforcement records maintained by the State Police are accessible to employers. 42 PA. CONS. STAT. § 6308 (2009). However, juvenile records may only be used for limited purposes by employers. The Crimes Code provides that felony and misdemeanor convictions may be considered by an employer only where they relate to the applicant's suitability for employment in the position for which s/he has applied. 18 PA. CONS. STAT. § 9125(b).

⁵⁷ Army Regulation 601-210(4-24).

⁵⁸ *Id.*

⁵⁹ In most juvenile courts, sentences are indeterminate, with no mandatory minimum or maximum sentences and no sentencing guidelines. This means, at least in theory, that whether criminal prosecutions for sexting are pursued as misdemeanors or felonies, this distinction is without meaning in the juvenile justice system. In the vast majority of states, a juvenile adjudicated delinquent for a misdemeanor charge is technically eligible for the same juvenile disposition (sentence) as a juvenile adjudicated delinquent for homicide or any other violent felony by the juvenile court.

⁶⁰ Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1115 (2006).

sentencing law in most states permits calculations of a prior record score to include juvenile adjudications of delinquency.⁶¹

2. Sexting Prosecutions May Require Registration Under SORNA

In addition to the negative consequences of a delinquency adjudication described above, a juvenile adjudicated delinquent for an offense categorized as a sexual offense or an offense that would require registration as a sex offender faces even more severe consequences. Adjudications of delinquency for sex-related offenses may preclude an individual from retaining custody of his or her minor child if a dependency court finds that return of the child to the parent is not best suited for the child's safety, protection, physical, or moral welfare.⁶² Certain types of adjudications may also preclude an individual from approval as a foster or adoptive parent or from having a job that requires working with children, including jobs in education, child care, and service.⁶³ The federal Adam Walsh Child Protection and Safety Act of 2006 (Walsh Act) specifically mandates that juveniles be included in sex offender registries.⁶⁴ According to the Walsh Act, all states must substantially comply with the Sex Offender Registration & Notification Act (SORNA) requirements of the Walsh Act or risk forfeiting 10% of the funds normally received from the federal Omnibus Crime Control and Safe Streets Act.⁶⁵ Under SORNA, child pornography statutes would likely be placed into a Tier II or Tier III categorization of sexual offenses requiring registration,⁶⁶ resulting in registration for twenty-five years to

⁶¹ See, e.g., CAL. PENAL CODE § 667(d) (2009) (including juvenile adjudications in California's Three Strikes sentencing enhancement); 204 PA. CONS. STAT. § 303.7(a)(4) (2009) (permitting juvenile adjudication in prior record score for adult sentencing); *State v. LaMunyon*, 911 P.2d 151, 158 (Kan. 1996) (holding that while a juvenile delinquency adjudication is not a criminal conviction, it may be considered when calculating an adult offender's criminal history); *State v. Kuhlman*, 144 P.3d 1214, 1217-18 (Wash. Ct. App. 2006) (holding that juvenile adjudications count as criminal convictions for purposes of calculating statutory penalties); see also Joseph B. Sanborn, Jr., *Striking Out on the First Pitch in Criminal Court*, 1 BARRY L. REV. 7, 18-20 (2000) (reporting that adult courts may consider juvenile adjudications at sentencing in all fifty states, plus the District of Columbia and federal court).

⁶² See e.g., 42 PA. CONS. STAT. § 6351(f)(1) (2009).

⁶³ See e.g., 23 PA. CONS. STAT. § 6344 (2009) (describing grounds for denying employment as child care personnel).

⁶⁴ Pub. L. No. 109-248, 120 Stat. 587, 593 (2006).

⁶⁵ 42 U.S.C. § 16925(a) (2006).

⁶⁶ See *id.* (mandating twenty-five years registration for a person convicted under section 6312). Ohio, for example, which is farthest along in its substantial compliance legislation with SORNA, has several typical child pornography statutes that would be placed in Tier II or III. See Letter from Laura Rogers, Director, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) to Nancy Rogers, Ohio

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life, and requiring in-person show-ups two to three times each year. Failing to register can subject the person to a maximum term of imprisonment greater than one year.⁶⁷

Registration pursuant to SORNA can result in restrictions on the individual's residency, employment, and higher education. For example, adjudications may disqualify juveniles from obtaining public housing.⁶⁸ Juveniles adjudicated delinquent for sexual offenses who are required to register as sex offenders may have their housing options further limited by community notification provisions. Sex offenders subject to community notification requirements may often find themselves with limited, undesirable housing options when community members mobilize to prevent registered sex offenders from moving into their neighborhoods.

Furthermore, a minor trying to readjust to normal life will experience extreme hardship because registration makes their name, picture and offense available to the public, including their classmates and the press via the internet. A minor who takes semi-nude images of herself is very likely to be subject to harassment and assault by other students.⁶⁹

Even if SORNA is not yet implemented in a youth's home state, teenagers adjudicated under child pornography statutes may still be required to register as sex offenders in other states pursuant to each state's SORNA-implementing legislation. If the juvenile's acts are deemed child pornography under other state statutes, and he or she moves into one of these states, they could be required to register as sex offenders.⁷⁰ This complicating risk is of particular relevance for youth because they are likely to move to neighboring states to attend college or pursue job opportunities.

Attorney General (Jan. 16, 2009), available at http://www.opd.ohio.gov/AWA_Information/AWA_SORNA_Compliance_Review.pdf.

⁶⁷ 42 U.S.C. §§ 16913(e), 16915, 16916 (2006).

⁶⁸ See generally Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities be Notified?*, 79 N.Y.U. L. REV. 520 (2004). Housing authorities routinely conduct background checks for adult applicants and may "investigate whether any member of the family unit, including a juvenile member, has been convicted of specific disqualifying offenses." Pinard, *supra* note 60, at 1114. While juvenile records are often inaccessible, "[t]here is evidence that some housing authorities attempt to screen for juvenile records despite state laws that limit or deny access." Henning, *supra*, at 570.

⁶⁹ Smith, *supra* note 30, at 537-38.

⁷⁰ For example, though Pennsylvania has not yet implemented SORNA legislation, neighboring states Ohio and Delaware have already passed legislation to be "in compliance" with SORNA and require juveniles adjudicated of a sex offense in another state to register as a sex offender. 29 OHIO REV. CODE ANN. § 2950.01(11) (2009) (requiring registration for violation of law from another state substantially similar to sex offenses in Ohio); 11 DEL. CODE ANN. tit. 11 § 4120(e)(1) (2009) (same).

III. ALTERNATIVES TO CHILD PORNOGRAPHY PROSECUTIONS

The serious and long lasting consequences of a felony charge of child pornography are so grossly disproportionate to the most common scenario of sexting between two consensual teenagers that prosecutors and other policymakers nationwide must look to alternatives for addressing this issue. Some jurisdictions are providing for prosecution of sexting as a lower-graded offense and others are choosing to address the issue with more education through a diversion program and community outreach. All are preferable to child pornography charges, but the best alternatives resist widening the net of the juvenile justice system and avoid criminalizing this adolescent sexual exploration expressed through new technology.

Several legislatures, uncomfortable with prosecutors charging youth with child pornography, have sought to create a new criminal offense to target sexting more specifically.⁷¹ In Pennsylvania, for example, two proposed bills would address sexting as the “dissemination of prohibited materials by minors via electronic communications.” Both bills prohibit a minor from knowingly transmitting a depiction of himself or herself or another minor between the ages of thirteen and eighteen in a state of nudity.⁷² The bills diverge on the classification—one makes sexting a misdemeanor of the second degree,⁷³ while the other classifies sexting as a summary offense.⁷⁴

The problems evident in Pennsylvania’s House Bill 2189 (making sexting a misdemeanor offense)⁷⁵ are indicative of the problems many states must confront in the nationwide rush to criminalize sexting. The bill broadly applies to any minor who transmits or disseminates, or merely *possesses*, an electronic communication with a depiction of a minor engaging in “sexually explicit conduct.”⁷⁶ H.B. 2189 does

⁷¹ See e.g. S.B. 1266, 49th Leg., 2d. Reg. Sess. (Ariz. 2010); 112th Reg. Sess. (Fla. 2010); H.B. 4583 (Ill. 2009); B. Res. 20, 2010 Leg., Reg. Sess. (Ky. 2010); H.B. 643, 2010 Reg. Sess. (Miss.); H.B. 1186, 61st Leg. Assem. (N.D. 2009); H.B. 132, 128th Gen. Assem., Reg. Sess. (Ohio 2009); H.B. 3321, 52d Leg., 2d Sess. (Okla. 2010); H.B. 2189, 2009–2010 Reg. Sess. (Pa.); H.B. 7778, Jan. Sess. (R.I. 2010); H.B. 4505, 118th Sess. (S.C. 2010); S.B. 125, 2009 Leg. Sess. (Vt. 2009).

⁷² See H.B. 2189, 194th Leg. Sess. (Pa. 2010); S.B. 1121, 194th Leg. Sess. (Pa. 2010).

⁷³ H.B. 2189, 194th Leg. Sess. (Pa. 2010).

⁷⁴ S.B. 1121, 194th Leg. Sess. (Pa. 2010).

⁷⁵ Comments here refer to H.B. 2189’s current version as of March 25, 2010, printer number 3372.

⁷⁶ The bill defines “sexually explicit conduct” as “lewd or lascivious exhibition of the minor’s genitals, pubic area, breasts or buttocks, or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.” This definition is broader than the federal child pornography statute, and constitutionally overbroad in this context. It is further problematic because it requires

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appropriately add language to the state's child pornography statute, prohibiting application of the child pornography law if the sexting offense applies. The bill does not so clearly protect the many teenagers involved in sexting from the serious and long-term collateral consequences of a juvenile record described in Part I.F, and in fact may do more harm than good by dragging more youth into the juvenile justice system than would have been reached through child pornography prosecutions.

Further, while H.B. 2189 proposes "adjudication alternatives" for sexting prosecutions, it does nothing to limit the existing discretion of the juvenile court at sentencing. The bill simply states that informal adjustments⁷⁷ and consent decrees⁷⁸ shall be considered "as appropriate to the circumstances."⁷⁹ Further, while H.B. 2189 does prohibit the use of a secure facility for detention pending adjudication and as a disposition commitment, the bill's language leaves open the possibility of detention and out-of-home placement in a non-secure facility. Without mandating a particular diversion program, or clearly prohibiting all out-of-home placement, there is no prohibition on judges ordering a child placed out of the home, incarcerated in a juvenile correctional facility, or holding a child under Juvenile Court supervision until they are twenty-one years old. Such outcomes are a manifestly inappropriate response to teenagers' normal adolescent sexual development using new technology.

When fashioning their response to sexting, state legislatures should take care not to create a new status offense with the potential disposition of secure detention or confinement that may conflict with federal mandates. A juvenile status offense is conduct by a minor that is deemed criminal or unlawful solely because of the minor's age; the same conduct is not considered a crime when committed by an adult. A central component of the federal Juvenile Justice and Delinquency Prevention Act (JJDP A) is Title II, the formula grant program that

the police and prosecutors to speculate about the intent of the sender. Further, the criminalization of mere possession of sexting messages broadens the number of youth covered by this offense to include those who were recipients of a mass dissemination but did not solicit or further forward the messages.

⁷⁷ An informal adjustment is a diversion mechanism that is offered prior to a petition alleging delinquency. There is no detention or placement commitment acceptable for informal adjustments. 42 PA. CONS. STAT. § 6323.

⁷⁸ A consent decree is an order of supervision after the petition alleging delinquency is filed. The child is given a set of terms and conditions to follow during the duration of the consent decree and may be eligible for expungement of records after six months of being discharged from court supervision. 42 PA. CONS. STAT. § 6340.

⁷⁹ Informal Adjustments and Consent Decrees are already available under the Juvenile Act in Pennsylvania. Significantly, a consent decree may be vetoed by the prosecutor so this option does not ensure diversion from adjudication.

conditions receipt of federal funds on the state's removal of status offenders from secure detention and development of community-based education and intervention programs for these youth.⁸⁰ Congress recognized that youth whose behavior would not be criminal if committed by an adult did not sufficiently raise societal protection concerns, and thus were "inappropriate clients for the formal police, courts and corrections process[.]"⁸¹ The JJDPDA recognized that detention was a severe and often traumatic response to a non-criminal act.⁸² Creating a new status offense permitting detention of these children with other alleged or adjudicated delinquents might potentially jeopardize a state's Title II funding; at a minimum, expansion of juvenile court jurisdiction to include sexting by juveniles would bump up against the country's longstanding commitment to treat status offenses outside the juvenile and criminal justice systems.

In contrast, other legislatures have focused on community education and diverting youth from the juvenile justice system. Proposed legislation in New Jersey targets both school districts and retail stores selling cell phones with requirements to provide information about the dangers of distributing sexually explicit images through electronic means.⁸³ A senate bill in Indiana proposes the legislature assign the issue of mental and sexual development of children as related to criminal offenses including sexting to the sentencing policy study committee.⁸⁴ Some state legislatures have created an affirmative defense to child pornography charges rather than creating a new offense for sexting, or expressly provided for limited dispositional orders outside the delinquency system. Nebraska's new law exempts a defendant under the age of eighteen where the photo is only of the defendant, and any recipient was at least fifteen years old and a willing recipient.⁸⁵ New York's bill would exempt from prosecution two people sexting with less than four years age difference where both acquiesced in the conduct and

⁸⁰ 42 U.S.C. § 5633 (2006).

⁸¹ S. REP. NO. 93-1011 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5287.

⁸² *Id.*; *see also* BARRY HOLMAN & JASON ZIEDENBERG, *THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES* (2005), *available at* http://www.cfjj.org/pdfs/116-JPI008-DOD_Report.pdf.

⁸³ *See* S.B. 2923, 213th Leg. Sess. (N.J. 2009) (school districts); S.B. 2925, 213th Leg. Sess. (N.J. 2009) (regarding cell phone retailers). *See also* A. B. 8622, 2009 Leg. Sess. (N.Y. 2009) (educating children on harms of electronically sending and posting sexual images of themselves).

⁸⁴ *See* S. REP. 90 (Ind. 2009) (urging the council to add to the sentencing policy study issues that concern mental health and sexting).

⁸⁵ *See* NEB. REV. STAT. § 28-1463.03(5), (6) (2009) (prohibiting the sending of any sexually explicit material of a minor electronically).

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the defendant did not profit.⁸⁶ The Illinois legislature is considering two bills that address sexting through a petition alleging the minor is in need of supervision, a non-delinquent status, and would limit the potential dispositions to counseling or community service.⁸⁷ This approach is preferable because it would keep teenagers out of the delinquency system, avoiding all of its attendant consequences, while providing for any necessary counseling or support services.

Still other jurisdictions have addressed the problem of sexting on a local level. The prosecutor's office in Montgomery County, Ohio recognized the unique circumstance of the voluntary involvement of the victim in sexting cases and noted that sexting in some cases can be "a result of our teens not understanding appropriate sexual boundaries and not thinking of the consequences of their actions."⁸⁸ A juvenile charged with sexting is screened by a diversion officer and is referred for a diversion program if they are determined to be a first time offender not likely to reoffend.⁸⁹ The diversion program includes education (covering the legal ramifications, effects on the victim, establishing age appropriate sexual boundaries, and responsible use of the internet and cell phones), supervision (a minimum of six months), and community service.⁹⁰ Youth must also relinquish their cell phones for a period of time. If the program is successfully completed, charges pending against the youth will be dropped or dismissed.⁹¹

IV. CONCLUSION

The fact that sexting represents a social and technological phenomenon that makes adults uncomfortable and prosecutors twitchy is not a justification for applying the very structure designed to *protect* children against child pornography, one of the most severe criminal structures in our system, *against* teenagers engaging in normal, consensual adolescent sexual exploration with the technology they all have at their fingertips.

⁸⁶ See A.B. 8622, 2009 Leg. Sess. (N.Y. 2009) (regarding the education of children on sexting).

⁸⁷ See H.B. 4583, 96th Leg. (Ill. 2009); S.B. 2513, 96th Leg. (Ill. 2010).

⁸⁸ Mathias H. Heck, Jr., *Sexting and Charging Juveniles – Balancing the Law and Bad Choices*, THE PROSECUTOR 28, 29 (Jan./Feb./Mar. 2009).

⁸⁹ *Id.* Youth are eligible for diversion if none of the following factors are present: prior sexual offenses, force or illicit substance used to secure the photos, previous involvement with this diversionary program, strong opposition by the victim or police. If any of the factors are present, the juvenile is referred for prosecution. *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*