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Talkin' Bout My Generation: Sexting, Child Pornography, and Re-Education

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TALKIN' BOUT MY GENERATION: SEXTING, CHILD PORNOGRAPHY AND RE-EDUCATION

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I. INTRODUCTION

Disney pop-stars.[1] Professional athletes.[2] Everybody's doing it--and it's a classic formula for legal disaster. Combine hormone-riddled teenagers with image-transmitting technologies and online social media. Put them together in an oversexed media society rife with antiquated sex laws and a criminal justice system that never could have predicted or planned for such a convergence of forces. Coined by the media as "sexting," the portmanteau of sex and text messages involves "sending sexually explicit photos by cellphone,"[3] and is a growing trend among young people.[4] Recently, stories of sexting have aroused the attention of the mainstream media on a fairly consistent basis. The highly successful, well-known legal drama series, *Law & Order: Special Victims Unit*, aired an episode mirroring local and nationwide headlines.[5] Grown women rhapsodize sexting as a creative way to improve intimacy in serious, adult relationships;[6] best selling magazines such as Cosmopolitan offer women tips on how to use

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[1] *See* TMZ.com, Vanessa Hudgens Sues Over Nudie Pics, http://www.tmz.com/2009/12/24/vanessa-hudgens-sues-nude-pics-moejackson-butter-media-lawsuit-copyright-cell-phone/ (last visited April 24, 2010); TMZ.com, Cheetah Girl Hits Lawyer after Nudie Pics Hit Net, http://www.tmz.com/2008/11/10/cheetah-girl-hits-lawyer-after-nudie-pix-hit-net/6 (last visited April 24, 2010); Perez Hilton, http://perezhilton.com/2008-08-02-ooops-3 (Aug. 2, 2008, 03:38 EST); Reuters, Miley Cyrus Voted Worst Celebrity Influence of 2009, http://www.reuters.com/article/idUSTRE59R22M20091028?feedType=RSS&feedName=entertainmentNews (last visited April 24, 2010).

[2] Lukas I. Alpert, *Tiger Woods' Porn Mistress Bares His XXX-Rated Text Messages*, N.Y. POST, Mar. 19, 2010, *available at* http://www.nypost.com/p/news/national/tawdry_tiger_FUez9gMmuPdqrih9ijNf2O.

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

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

[5] *Law and Order: Special Victims Unit: Crush* (NBC Television Broadcast, May 5, 2009).

[6] Sarah Pierce, *Sexting for Adults*, HITCHED, http://hitchedmag.com/article.php?id=764 (last visited Mar. 13, 2010).

ordinary cellular phones as sex toys.[7] Popular teen idols are frequently in the news and all over the Internet for leaked "sexy" photos.[8] It should come as no surprise that teenage girls are getting mixed messages about their sexual expression.

Sexting has created a legal quandary because the law has not yet evolved to handle problems and issues raised by new forms of technology. In the past, legislatures and courts recognized that adults exploited and victimized children to generate child pornography. In response, child pornography laws were developed to prevent the exploitation of children used to create these graphic displays.[9] However, it is safe to assume that the drafters of these child pornography statutes did not anticipate that teenagers would generate and distribute their own form of pornography to one another—by using their cellular phones to take nude photographs of themselves and disseminating those photos via text message.

Part II provides a background for this discussion. Part II.A discusses sexting as a cultural phenomenon, and the popularity and widespread use of cellular phones and the Internet among teens. Part II.B focuses on the potentially negative after-effects of sexting, particularly when photographs or videos are distributed further than the initial intended viewer. Part II.C discusses child pornography laws, with an emphasis on their stated purpose to protect children from sexual assault by adults. Part II.D considers the "Romeo and Juliet" exceptions to the statutory rape laws, regarding consensual sexual behavior among minors close in age. Part III focuses on two cases, the facts and circumstances of which illustrate the need for a better, more realistic and understanding way of dealing with sexting among minors, rather than by using the child pornography laws to prosecute teens, or by mandating attendance at "re-education" classes that

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[7] Cosmopolitan.com, The Sex Toy Hiding in Your Purse, http://www.cosmopolitan.com/sex-love/tips-moves/The-Sex-Toy-Hiding-in-Your-Purse (last visited Mar. 13, 2010).
[8] *See* TMZ, Perez Hilton, *supra* note 1.
[9] *See* Part II.B, *infra*.

inform young women how to act. Part IV discusses that the justifications behind the child pornography laws, which serve to eradicate an industry that is literally sustained by the sexual assault and abuse of children, do not support their application to cases of sexting among minors. Part V.A discusses what is fundamentally wrong with re-education classes, that they propagate outmoded and injurious gender and sexual stereotypes harmful to young women, and furthermore, the author makes recommendations as to how sexting should be dealt with, and what kind of education middle and high school aged children should receive regarding it in light of the prevalence of sex in society. Finally, Part VI summarizes and concludes the article.

II. BACKGROUND / HISTORY

A. *A Changing Cultural Landscape and Phenomenon*

Sexting has been described as "a post-modern form of flirting, a game of show-&-tell [that], so far, hasn't involved sexual predators."[10] Sexual expression, like other cultural phenomena, changes and evolves generationally. David Rosen, in his sociological assessment of sexting, aptly described the ongoing metamorphosis of eroticism:

> Each generation re-imagines the erotic. In this process, notions of the pornographic or obscene are challenged and changed. And in the process, the generation is changed, its erotic sensibility remade, thus shifting the sexual landscape. The eroticism of teens is not the eroticism of their grandparents, let alone parents.[11]

Sexting is a product of today's digital culture, as "social networking opens communications to two-way exchanges, group associations and shared experiences [and] [s]exting extends the

[10] David Rosen, *Sexting: The Latest Innovation in Porn*, COUNTERPUNCH, Mar. 25, 2009, *available at* http://www.counterpunch.org/rosen03252009.html.
[11] *Id.*

functionality of mobile communications by adding images, and, in the process, expands popular erotic sensibility."[12]

Recently a nationwide survey highlighted the prevalence of sexting. The National Campaign to Prevent Teen and Unplanned Pregnancy released a study in 2008 called "Sex and Tech: Results from a Survey of Teens and Young Adults."[13] Of the 653 teens (aged thirteen to nineteen-years old), twenty percent indicated that they had sent or posted nude or seminude photos or videos of themselves, including twenty-two percent of teen girls and eighteen percent of teen boys.[14] Among the sexters, seventy-one percent of teen girls and sixty-seven percent of teen boys said that they had sent or posted the messages to a boyfriend or girlfriend.[15] In addition, twenty-one percent of teen girls and thirty-nine percent of teen boys said that they had transmitted "such content to someone they wanted to date or hook up with."[16]

A study released in December of 2009 indicates that sexting is on the rise among American teenagers. One researcher was quoted as explaining this phenomenon as follows, "[t]hese images are shared as part of or instead of sexual activity, or as a way of starting or maintaining a relationship with a significant other, and they are also passed along to friends for their entertainment value, as a joke or for fun."[17] Another study published in 2009 aptly observed that we live in a culture that "condones a media environment replete with sexual content,"[18] in which "the media have become important socialization agents."[19] The results of the study

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[12] *Id.*
[13] NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS (2008) [hereinafter SEX AND TECH REPORT].
[14] *Id.* at 1.
[15] *Id.* at 2.
[16] *Id.*
[17] Elizabeth Meyer, Ph.D., *'Sexting' and Suicide*, PSYCHOLOGY TODAY, http://www.psychologytoday.com/blog/gender-and-schooling/200912/sexting-and-suicide.
[18] Jane D. Brown & Kelly L. L'Engle, *X-Rated: Sexual Attitudes and Behaviors Associated with U.S. Early Adolescents' Exposure to Sexually Explicit Media*, 36 COMM. RES. 129, 130 (2009).
[19] *Id.*

showed that "by the end of middle school many young people have seen sexually explicit content on the Internet, in X-rated movies, or in magazines. Early exposure is related to subsequent attitudes about gender roles, personal sexual norms, sexual harassment, and sexual behaviors."[20] Given such widespread exposure to sexual material, including exposure over the Internet, it shouldn't come as a surprise that teens are sexting. At least one study found that "the Internet offers an alternative venue for identity exploration equal to that in real-life interactions."[21] In addition to facilitating a youth culture of self-discovery, the Internet is also a forum for self-disclosure. Popular "[s]ocial networking sites like Facebook, MySpace and Bebo encourage teens to share information about themselves."[22] Tandem with social networking sites online is the cellular phone;[23] "teens are the most consummate mobile telephone users [and] have made text messaging the most common form of interaction."[24] Cellular phones are "useful for teen lovers who can communicate behind the backs of…parents. The camera function can be used to share photos of potential love interests within the peer group in order to elicit evaluation."[25] Legal scholar Richard Posner cautions that this "new culture of transparency" is potentially harmful, as "the degree to which a disclosure of personal information inflicts harm on a person depends less on what information is disclosed than to whom and how many, and to what use it is put by the persons to whom it is disclosed."[26]

B. *Unintended Consequences*

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[20] *Id.*
[21] *Id.*
[22] Olivia Lichtenstein, *Generation Sex*, DAILY MAIL, Jan 28. 2009. Lichenstein states that "[w]hen one considers our society, it's no surprise that our children have lost all sense of modesty…when [teens] are not taking their clothes off, their role models are spilling their guts about their 'private' lives over the pages of every newspaper, magazine and on television."
[23] Cellular phones serve as a "technology of the self." Rachel Campbell, *Teenage Girls and Cellular Phones: Discourses of Independence, Safety and Rebellion*, 9 J. YOUTH STUDIES 195, 1999 (2006).
[24] Rich Ling, *Children, Youth and Mobile Communication*, 1 J. CHILDREN & MEDIA (2007).
[25] *Id.* at 62.
[26] Richard A. Posner, *Privacy, Surveillance and Law*, 75 U. CHI. L. REV. 245, 249 (2008).

The after-effects of sexting can be potentially grave, so it is not a far cry to see why lawmakers are concerned. Though it is not common, when photographs become further disseminated without the consent of the subject, the potential harms are much graver, stretching beyond sexual exploitation[27] and embarrassment[28] to commercial exploitation[29] and even death.[30] For instance, in Syracuse, New York, "several teenage girls who 'sexted' revealing poses to their boyfriends' phones discovered that another boy had collected them from the web and was selling a DVD of them."[31] More tragically, in the summer of 2008, eighteen-year-old Jessica Logan committed suicide after she "sent a nude picture of herself to her boyfriend that was later spread throughout her Cincinnati-area high school. She was harassed daily at school by a group of girls."[32] As MSNBC.com reported, "[t]he girls were harassing her, calling her a slut and a whore. She was miserable and depressed, afraid to even go to school."[33] In the spring of 2009, Jessica Logan's parents began lobbying efforts for a federal bill to address sexting.[34] The other potential harmful effect is to those minors who face child pornography charges for taking, sending, disseminating and/or possessing sexual images of themselves or other minors via cell phones. If convicted, these children could legally be labeled as sex offenders, a social stigma

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[27] For instance, it is not a far cry to say that pedophiles may use such images if they discover them. The District Attorney of Clearfield County, Pennsylvania, observed that once racy images that teens take of themselves "hit the Internet, you lose control…[a]nd they can show up anywhere, including sites designed for child pornography." Sara Ganim, *Police Take 'Sexting' Seriously*, CENTRE DAILY TIMES (State College, Pa.), Feb. 24, 2009, at A1.

[28] For instance, the Dean of Students at Perry Junior High School in New York described a teenage boy at school as being "embarrassed" and "harassed" by other students after he reportedly "took a picture exposing himself and sent it to a female classmate. She then forwarded the picture, which was then forwarded on to more students and on to an estimated 300 or more students." Rebecca Cronsier, *'Sexting' Investigated at N. Hartford School*, OBSERVER-DISPATCH (Utica, N.Y.), Feb. 27, 2009, at 1B.

[29] *See* infra, note 31.

[30] *See* infra, notes 32–33.

[31] Anna Veciana-Suarez, *Our Past Adolescent Antics Didn't Live on in Perpetuity*, MIAMI HERALD, June 14, 2008, at 1E.

[32] Jim Siegel, *Lawmaker Crafting a Bill to Set Penalty for Teens' 'Sexting,'* COLUMBUS DISPATCH, Mar. 27, 2009, at B3.

[33] Mike Celizic, *Her Teen Committed Suicide Over 'Sexting,'* MSNBC.COM, Mar. 6, 2009.

[34] Rep. Wasserman introduced the Adolescent Web Awareness Requires Education Act, on September 23, 2009. Adolescent Web Awareness Requires Education Act, H.R. 3630, 111th Cong. (2009).

that could haunt them throughout their lives, all for what one might consider a youthful, sophomoric act of indiscretion.[35] One survey seems to indicate that many teens do actually understand that the text messages they send to their peers might be forwarded or shown to others.[36] In other words, a number of teens are aware of the risk that sexually suggestive photographs of themselves might end up beyond control of themselves and the initial intended recipient. Such distribution is not uncommon, as the survey found that thirty-eight percent of teen girls and thirty-nine percent of teen boys "have had sexually suggestive text messages or emails—originally meant for someone else—shared with them.[37] The myriad and complex legal issues raised by sexting have highlighted the disconnect between child pornography laws and youth culture, as "[l]aw enforcement officials have been struggling to find ways to deal with young people 'sexting.'"[38]

C. *Child Pornography Laws*

Teen sexting may be viewed as child pornography, and thus unprotected by the First Amendment. It follows that Congress and state legislatures may impose criminal penalties for producing, disseminating or even merely viewing sexted images of minors.[39] Given the severity of the penalties, a careful consideration of the child pornography laws and their legislative purpose is warranted.

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[35] *See* Dane Stickney, *Teen Sext: Phone Fad Leads to Trouble*, OMAHA WORLD-HERALD, Feb. 22, 2009, at 1A ("Teens who text seemingly playful pictures to their boyfriend or girlfriend could face felony child pornography charges that would require them to register as sex offenders for as little as 10 years or as long as life."); Kelli Wynn, *Do U Know If UR Kids R Sexting?*, DAYTON DAILY NEWS (Ohio), Mar. 6, 2009, at RD4 (describing how a juvenile who sends photographs of a sexual nature via cell phones could be "labeled a sex offender.").

[36] SEX AND TECH REPORT, *supra* note 13, at 3 (providing that "44% of both teen girls and teen boys say it is common for sexually suggestive text messages to get shared with people other than the intended recipient.").

[37] *Id.*

[38] Kelly Heyboer, *When Does Nudity Become Pornography?*, STAR-LEDGER (Newark, NJ), Apr. 1, 2009, at E13.

[39] New York v. Ferber, 458 U.S. 747, 764–65 (1982) (upholding a ban on producing and distributing visual depictions of sexual conduct by minors, whether or not obscene).

The first seminal case regarding the distribution of nude or semi nude images of minors is *New York v. Ferber*. Prior to *Ferber,* such images would have had First Amendment protection unless deemed "obscene."[40] The *Ferber* Court carved out another exception to the First Amendment—"child pornography," whether obscene or not.

The *Ferber* decision arose from a Manhattan bookseller challenging his conviction under a New York statute prohibiting knowingly "promoting a sexual performance" by a minor child,[41] for selling an undercover police officer two films of young boys masturbating.[42] The challenge was unsuccessful and resulted in the categorical exclusion of child pornography from protected speech under the First Amendment.[43] The focus shifted from emphasis on the value of the expression to the actions underlying it.[44] The Court's rationale for categorically excluding child pornography from protected speech hinged on the fact that its production necessarily entails the sexual abuse of children by adults,[45] also noting that the production of child pornography is a "low profile, clandestine industry."[46] The *Ferber* Court noted the need to protect "the physical and emotional well-being of youth," noting that "[i]t has been found that sexually exploited children are unable to develop healthy affectionate relationships later in life, have sexual dysfunctions, and have a tendency to become abusers as adults.[47]

In response to the *Ferber* case, Congress passed the Child Protection Act of 1984, which expanded the definition of child pornography to include non-obscene but sexually suggestive pictures of children, raised the age of protection to eighteen, increased penalties, and removed

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[40] Obscenity is discussed and defined in *Miller v. California*, 413 U.S. 15 (1973).
[41] *Ferber*, 458 U.S. at 751.
[42] *Id.*
[43] *Id.* at 755–56.
[44] *Id.* at 758.
[45] *Id.* at 758 n.9. (citing S.REP. NO. 95–438, p. 5 (1977) ("[The] use of children as…subjects of pornographic materials is very harmful to both the children and the society as a whole.").
[46] *Id.* at 759–60.
[47] *Id.* at 758, n.9.

the requirement that for images to be criminalized, they must have been created for commercial purposes.[48] The Child Sexual Abuse and Pornography Act of 1986 banned interstate commerce advertisements and solicitations for child pornography shortly thereafter.[49] The advent of technology prompted Congress to pass the Child Protection and Obscenity Enforcement Act of 1988, which prohibited the use of computers to transport, distribute or receive child pornography.[50]

The Supreme Court in 1990 held that states could permissibly ban the possession of materials that contained child pornography.[51] Earlier in *Stanley v. Georgia,* the Court had held that in the absence of a proven intent to sell to distribute obscene material, the right to privacy protects a person from being convicted for simple possession.[52] In *Osborne,* the Court stated that in instances of child pornography, personal privacy rights are outweighed by a state's legitimate interest in preventing harm to children.[53] The Court in *Osborne* recognized that the legislature's aim was "to protect the victims of child pornography…to destroy a market for the exploitative use of children."[54] The Court's reasoning reiterated the *Ferber* justifications: links between child pornography and the sexual abuse of children, and child pornography as permanent record of sexual abuse.[55]

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[48] Child Protection Act of 1984, Pub. L. No. 98–292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251–54, 2256, 2516).
[49] Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 1350 (1986)
[50] Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4485 (1988) (codified as amended at 18 U.S.C. §§ 2251–52).
[51] Osborne v. Ohio, 495 U.S. 103 (1990).
[52] *See* Stanley v. Georgia, 394 U.S. 557 (1969).
[53] *Osborne*, 495 U.S. at 103 (holding that the *Stanley* right to private possession does not extend to child pornography involving actual children, because, unlike adult obscenity, it springs from a grievous harm to children).
[54] *Id.* at 109.
[55] *Id.* at 111 (stating that states have a compelling interest in protecting minors, and thus could decrease the demand for child pornography by proscribing its possession altogether).

Enforcement efforts increased the transaction costs to child pornography consumers in dealing these materials.[56] Emerging technology made it possible for child pornographers to make images of what appeared to be, but were not actually, children engaging in sexual acts ("virtual" child pornography).[57] Congress responded by enacting the Child Pornography Protection Act (CPPA), banning virtual child pornography. In *Ashcroft v. Free Speech Coalition*, the Supreme Court in a five-justice majority struck down the portion of the CPPA as unconstitutional that "extend[ed] the federal prohibition against child pornography to sexually explicit images that appear to depict minors but where produced without using any real children."[58] In rejecting the CPPA, the Court's reasoning centered around the fact that images that recorded no crime or harm could be criminalized under the statute, inconsistent with the *Ferber* ruling.[59]

In its 2008 upholding a federal statute analyzing the pandering and solicitation of child pornography, the Supreme Court in *United States v. Williams* observed that it had earlier rejected the virtual child pornography law at issue in *Free Speech Coalition* "because the child-protection rationale for speech restriction does not apply to materials produced without children."[60]

D. *Statutory Rape Laws*

Age also plays a part in the application of sex laws, and "should be taken into account by

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[56] *See* MONIQUE MATTEI FERRARO & EOGHAN CASEY, INVESTIGATING CHILD EXPLOITATION AND PORNOGRAPHY: THE INTERNET, LAW, AND FORENSIC SCIENCE 11 (2005).
[57] *Id.* at 236.
[58] *See* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002). The Court noted that productions of Shakespeare's "Romeo and Juliet" and films such as "Traffic" and "American Beauty" could be swept under the CPPA's purview, because they contain graphic depictions that "appear to be" of minors engaging in sexual activity. *Id.* at 246–47.
[59] *See generally id.*
[60] *Williams*, 553 U.S. 285, 289

the law when deciding how to deal with sexting."[61] Two minors close in age, i.e., sixteen and seventeen sexting is vastly different from a seventeen year old and a thirteen year old sexting. Statutory rape laws that recognize age difference as determinant of punishment are known as "Romeo and Juliet" laws.[62] Romeo and Juliet laws "cover consensual adolescent activity involving an adolescent below the age of consent when the sexual partner is another adolescent close in age."[63] Additionally, "[m]any states now stress the number of years that separate the parties; that is, the statutes criminalize sexual interaction between adults and adolescents that would not have been criminal between adolescents of similar ages."[64]

Professor Clay Calvert discusses Romeo and Juliet laws in his article, noting that "the law…recognizes that subtle variations of age do matter when it comes to matters affecting sex and minors."[65] He cites to several states' Romeo and Juliet exceptions to demonstrate how the law deals with the treatment of statutory rape defendants where the sexual encounter is consensual and the participants are minors that are close in age.[66]

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[61] Clay Calvert, *Sexting, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 28 (2009).
[62] Joanna S. Markman, *Community Notification and the Perils of Mandatory Juvenile Sex Offender Registration: The Dangers Faced by Children and Their Families*, 32 SETON HALL LEGIS. J. 261, 275 (2008). "Romeo and Juliet" laws are also referred to as "close in age exceptions." *Id.*
[63] *See* Calvert, *supra* note 61, at 29 (citing Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 198 (2008)).
[64] Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 314–15 (2003).
[65] Calvert, *supra* note 61, at 28.
[66] *Id.* "For instance, Alabama law provides that a person commits rape in the second degree if "[b]eing 16 years old or older, he or she engages in sexual intercourse with a member of the opposite sex *less than* 16 and *more than* 12 years old; *provided, however, the actor is at least two years older than the opposite sex." Id.* at 28, n.144. Calvert then cites Alaska's law: "An offender commits the crime of sexual abuse of a minor in the second degree if,…being 17 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age *and at least four years younger than the offender*, or aids, induces, causes or encourages a person who is 13, 14, or 15 years of age and at least four years younger than the offender to engage in sexual penetration of another person…." *Id.* at n.145. A third state, Colorado, employs the Romeo and Juliet exception in its statutory rape laws, finding that a sexual assault is committed if "[a]t the time of the commission of the act, the victim is less than fifteen years of age and the actor is at least four years older than the victim and it not the spouse of the victim," or if "at the time of the commission of the act, the victim is at least fifteen years of age but less than seventeen years of age and the actor is at least ten years older than the victim and not the spouse of the victim." *Id.* at n.146–47.

III. A TALE OF TWO CASES

Both of these cases illustrate the legal hole into which sexting falls, and the need for a realistic solution that takes into account the various forces at play—teens' apparent unawareness of their lack of privacy and the prevalence of sexting despite the very real risk of further distribution and dissemination of the photographs.

A. *A.H. v. State*

In *A.H. v. State,*[67] a sixteen-year old girl was charged with violating Florida's statute criminalizing the promotion of a sexual performance by a child[68] and was adjudicated delinquent.[69] A.H. and her boyfriend, seventeen-year old J.G.W., had employed a digital camera to take photos "of themselves naked and engaged in sexual behavior."[70] The photos were transmitted via email from one computer to another, but were never seen by anyone aside from the couple. A.H. argued that the chargers violated her privacy interests protected by the Florida Constitution[71] because the criminal prosecution did not further a compelling state interest by the least intrusive means.[72] The Florida court rejected this argument because the activity the teens engaged in, taking and emailing the photographs, was not recognized as private conduct.[73]

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[67] 949 So.2d 234 (Fla. Dist. Ct. App. 2007).
[68] Fla. Stat. Ann. § 827.071(3) (West 2006) ("A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a child less than 18 years of age.").
[69] *A.H.*, 949 So. 2d at 235.
[70] *Id.*
[71] *Id.*; *see* also FLA. CONST. art. I, § 23.
[72] *A.H.*, 949 So.2d at 235.
[73] *Id.* at 237.

The court distinguished the actual sexual activity of the teenagers, which may be private,[74] and the digitized photos of the activity.[75] That the photos even existed demonstrated the absence of a reasonable expectation of privacy, because of the chance that the photos would be shown to third parties for pecuniary profit, an attempt to gain bawdy social "bragging rights," or simply due to the young relationship's end.[76] The court found that even if a reasonable expectation of privacy *did* exist, the state had a compelling interest in ensuring that these types of materials weren't even created because teens lack the maturity to make intelligent, informed decisions that consider the possible repercussions of their actions.[77]

B. *Skumanick v. Miller*

In October of 2008, Tunkhannock Pennsylvania School District Officials confiscated several students' cellular phones, examined them and discovered photographs of "scantily clad, semi-nude and nude teenage girls," many of which were enrolled in the district.[78] Male students had been trading the images over their cell phones. The School District referred the phones to Skumanick, the District Attorney, who in turn began a criminal investigation.[79] The school's investigation revealed that the plaintiffs and approximately twenty other girls sent the images to their classmates and the boys traded the images amongst themselves.[80] Skumanick publicly stated that students in possession of inappropriate images of minors could be prosecuted under Pennsylvania law for possessing and distributing child pornography.[81]

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[74] *Id.*
[75] *Id.* at 237–39.
[76] *Id.* at 237.
[77] *Id.* at 237–38.
[78] Miller v. Skumanick, 605 F. Supp. 2d 634, 637 (D. Pa. March 30, 2009).
[79] *Id.*
[80] Skumanick's attorney, Michael J. Donahue, said of the investigation's findings, that "the boys, are theywont to do, were trading the pictures among themselves." Shannon P. Duffy, *3rd Circuit Panel Mulls if Teen 'Sexting' is Child Pornography*, Law.com (Jan. 19, 2010).
[81] *Miller*, 605 F. Supp. 2d at 637.

Skumanick sent letters to the students on whose cell phones the pictures were stored and to the girls show in the photos, but did not send the better to the boys who had disseminated the images.[82] The letter informed the parents that their child had been "identified in a police investigation involving the possession and/or dissemination of child pornography."[83] Additionally, the letter informed the parents that the charges would be dropped upon the child's successful completion of a six- to nine-month program focused on education and counseling, and warned that charges would be filed against non-participants.[84]

Skumanick held a meeting for the parents and children to discuss the matter, reiterating the program requirement.[85] When asked by a parent at the meeting why his daughter, depicted in a bathing suit, could face child pornography charges, Skumanick replied that the girl was posed "provocatively," which made her subject to the child pornography laws.[86] Plaintiff Marissa Miller's father asked Skumanick who got to decide what "provocative" meant, and Skumanick refused to answer and threatened the group that he could charge all of the minors that night.[87]

The photographs at issue were about two years old, and showed Miller and Plaintiff Grace Kelly from the waist up, each wearing a white, opaque bra.[88] Miller was speaking on a cell phone and Kelly was making a peace sign.[89] Both girls were thirteen years old at the time the photo was taken.[90] The other photographs involved another young girl wrapped in an opaque towel, wrapped around her body just below her breasts.[91]

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[82] *Id.* at 638.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 639.
[89] *Id.*
[90] *Id.*
[91] *Id.*

Skumanick threatened to bring child pornography charges against those who did not participate in the "re-education" program.[92] The "re-education" program divided the students by sex.[93] The stated goal of the girls' program was to teach the girls to "gain an understanding of how their actions where wrong," "*gain an understanding of what it means to be a girl in today's society, both advantages and disadvantages*," and "identify non-traditional societal and job roles."[94] The first session of the program required the girls to write "a report explaining why [they] were here," "[w]hat you did" and "[w]hy it was wrong." Further, in the report the girls were to answer the question, "[d]id you create a victim? If so, who?," and were further questioned how their actions 'affected the victim[,] the school [and] the community."[95] The first two sessions focused on sexual violence, and the third dealt with sexual harassment.[96] The fourth class was entitled "Gender Identity, Gender Strengths," and the fifth, "Self Concept," included the gender advantages and disadvantages exercise.[97]

The American Civil Liberties Union of Pennsylvania remarked, of the case and punishment:

> Child pornography is a terrible crime that involves the abuse and exploitation of children, neither of which exists here….In many states these charges would land these kids on Megan's Law databases, with their pictures on Internet registries for ten years or more, and prevent them from getting many types of jobs. That's a heck of a lesson for a kid who probably doesn't even realize she is doing something wrong.[98]

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93 *Id.* at 638.
94 *Id.* (emphasis added).
95 Miller v. Mitchell, 2010 U.S. App. LEXIS 5501, *5–6 (3d Cir. 2010).
96 *Id.* at *6.
97 *Id.*
98 Calvert, *supra* note 61, at 26.

District Attorney Skumanick stated that he "simply wanted to get across to [the girls] just how dangerous [sexting] really is….Once these [pictures] are out there, they don't go away."[99]

On appeal before the Third Circuit, the parents challenged the District Attorney's actions, arguing that the re-education program interfered with their substantive due process Fourteenth Amendment-guaranteed right "to raise their children without state interference."[100] The objecting parent argued that the "education program's lessons in why the minors' actions were wrong, [and] what it means to be a girl in today's society…contradict the beliefs she wishes to instill in her daughter."[101]

IV. WHY CHILD PORNOGRAPHY PROSECUTION IS INAPPROPRIATE

Those in favor of enforcing child pornography laws against minors caught sexting argue such because of the potential for immense social harm.[102] It is opined that even voluntary sexters inevitably will feel some sham because of their choice to share such intimate images of themselves.[103] Additionally, there is a chance that sexted images can fall into the hands of pedophiles that can peddle them to fellow pedophiles or utilize them to entice other minors to engage in sex acts.[104] It follows that because sexted images potentially may find themselves in the lecherous hands of pedophiles, the market for child pornography is furthered regardless of how or why the images were created.[105]

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[99] *Id.*
[100] *Id.* at *23.
[101] *Id.*
[102] *See generally* Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1 (2007).
[103] *Id.* at 40.
[104] *Id.* at 40–41.
[105] *Id.* at 41.

While preventing loss of dignity and errant pedophiliac contact certainly are legitimate goals and concerns, using the child pornography laws to punish minors engaged in sexting is an improper, overly harsh response to curtail this phenomenon.

Teens that engage in sexting often "think it's all in innocent, good, clean fun—or for some, part of a mating ritual,"[106] while the draconian application of child pornography laws can brand teens as sex offenders.[107] Child pornography falls outside the scope of First Amendment protection,[108] because of the injurious harms that befall the minors who are victimized by the adults that create it. The use of existing child pornography laws to prosecute teenagers who sext has been criticized by several widely read news media sources. For instance, a contributing editor for *Newsweek* stated on the subject:

> The argument that we must prosecute kids as the producers and purveyors of kiddie porn because they are too dumb to understand that their seemingly innocent acts can harm them goes beyond paternalism. Child-pornography laws intended to protect children should not be used to prosecute and then label children as sex offenders.[109]

The author aptly states that "[t]he real problem with criminalizing teen sexting as form of child pornography is that the great majority of these kids are not predators. They think they're being brash and sexy."[110] Similarly, the editorial board of the *Philadelphia Inquirer* criticized the idea of charging sexting minors with a criminal offense, stating that "[c]riminal charges for

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[106] Editorial, *Law, Civility Lag Behind 'Sexting,'* FLINT J. (Mich.), Apr. 29, 2009, at A8.
[107] *See* Editorial, *There are Sex Crimes, Then There's Sexting*, ROANOKE TIMES, Mar. 23, 2009, at A14 (asserting that "[s]exting among underage peers should not be classified as a sex offense" despite the fact that "[i]f the subject is under 18 years old, what they are doing is, by definition, producing, possessing and distributing child pornography, felonies that can brand them as sex offenders.").
[108] The Supreme Court has consistently held that the distribution and possession of child pornography is unprotected by the First Amendment. *See* United States v. Williams, 128 S. Ct. 1830, 1836 (2008) (stating that "[w]e have held that a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment" and that "we have held that the government may criminalize the possession of child pornography, even though it may not
[109] Dahlia Lithwick, *Teens, Nude Photos and the Law*, NEWSWEEK, Feb. 23, 2009, at 18.
[110] *Id.*

this brand of adolescent stupidity are the equivalent of going nuclear. Convict a teen under child porn laws and he or she will be branded a sex offender, forced to register under Megan's Law-style statutes, and basically scarred for life."[111]

In the 2002 *Free Speech Coalition* case, Justice Kennedy wrote, "*Ferber's* judgment about child pornography was based upon *how it was made, not on what it communicated.*"[112] The case reaffirmed that where the speech is *neither obscene nor the product of sexual abuse*, it does not fall outside the protection of the First Amendment.[113] To the extent that a sext is produced by a teenager, by his or her volition, it would not make sense to punish the producer at all. Such an image is not "the product of sexual abuse."[114] For instance, if a fifteen-year-old girl takes a picture of herself posing nude in her room and sends it to her boyfriend, she is likely not suffering physical abuse or emotional abuse when the photograph is being taken.

In *United States v. Williams*, the Court upheld a federal statute criminalizing the pandering and solicitation of child pornography observed that it had struck down virtual child pornography in *Free Speech Coalition* because "the child-protection rationale for speech restriction does not apply to materials produced without children."[115] While underage sexting is produced by and with children, the child-protection rationale could apply, operating under the assumption that children must be protected from their own actions; "this line of reasoning holds that children simply do not understand the potential self-inflicted harm that such images could cause when they are viewed by people for whom they were not originally intended."[116] In other words, that reasoning necessitates that children do not appreciate or know what is in their best

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[111] Editorial, *Sexting Overkill*, PHILADELPHIA INQUIRER, Apr. 6, 2009, at A10.
[112] Ashcroft v. Free Speech Coal., 535 U.S. 234, 250–51 (2002) (emphasis added).
[113] *Id.* (emphasis added).
[114] *Id.* at 251.
[115] *Williams*, 553 U.S. 285, 289.
[116] Calvert, *supra* note 61, at 48.

interests and the law must punish them in order to deter potentially injurious self-inflicted consequences.

This "save-them-from-themselves" argument is also inconsistent with statutory rape laws.[117] Statutory rape laws had been "premised upon girls' inability to give legally valid consent to sex"[118] and historically, rested on a "general assumption that, in sexual matters, just as in other adult matters, girls could not take care of themselves—that because of their immaturity and some adults' skills in playing to girls' insecurities, adolescent girls needed society to help take care of them."[119] Many of these paternalistic statutory rape laws "are created out of irrational fears that exist over minors and sexuality…reinforce outmoded gender stereotypes…[and fail to] recognize [minors] as fully human."[120]

The idea that teenagers would be creating child pornography themselves and distributing it to their peers was never contemplated at the time all of these child pornography laws were originally passed. Given the widespread prevalence of technology, young adults are welcoming technology into their sex lives.[121] Teenagers express themselves, whether it's anger, love, hate, excitement or intimacy, through technology. Electronic communication has become a stand-in for face-to-face communication. Facially, the definitions of child pornography laws seem to fit the concept of sexting: it is a photograph or video of a minor engaged in a sex act and it is being disseminated. However, child pornography laws weren't designed to deal with that type of

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[117] *See generally* Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by fraud as a Defense to Statutory Rape*, 101 N.W. U.L. REV. 75, 76 n.2 (2007) ("[t]he term 'statutory rape' commonly refers to the criminal offense of engaging in sexual intercourse with a person below a specified number of years of age, varying by jurisdiction, but typically below sixteen.").
[118] Michelle Oberman, *Turning Girls into Women: Re-Evaulating Modern Statutory Rape Law*, 8 DEPAUL J. HEALTH CARE L. 109, 114 (2004).
[119] *Id.*
[120] 12 AM. U. J. GENDER SOC. POL'Y & L. 483, 504 (2004).
[121] *See generally* Cosmopolitan, *supra* note 7.

conduct. They end up harshly punishing teenagers who are experimenting in their sex lives, just as they see adults and their peers do on television and in movies.

V. POLICY RECOMMENDATIONS

A. *Current Remedies Perpetuate Gender Stereotypes*

Remedies like the one proposed by District Attorney Skumanick[122] define the proper ways for girls and boys to act by strictly regulating the failure to adhere to the traits of one's prescribed gender. "Research shows that strong belief in the ideologies of masculinity and femininity makes for bad and unsafe sexual relations."[123] It follows that "[t]he ideal is taught through current methods of teaching about sex that fail to expand the definition of sex beyond intercourse and do not address issues of pleasure and desire in teenagers."[124] Remedies, legal and nonlegal, that fail to break down gender role stereotypes merely reinforce antiquated notions of what is like to be a male or female.[125] Skumanick's "re-education" class literally was designed to do just this—teach young women "what it means to be a girl in society."[126] Antiquated gender stereotypes perpetuate the placing of girls on "a pedestal of purity" and thus dichotomize women into one of two categories: the virgins and the whores.[127] Society needs to embrace the fact that girls do not inherently exist in such a polar dichotomy, and that they can be both sexual and intelligent.[128] The re-education classes articulated by District Attorney Skumanick were designed to make the young women believe that they had done something

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[122] *See* Part III.B, *supra*.
[123] Dana M. Northcraft, *Book Review: A Nation Scared: Children, Sex, and the Denial of Humanity: A Review on Judith Levine's Harmful to Minors: The Peril of Protecting Children from Sex*, 12 AM. U.J. GENDER SOC. POL'Y & L. 483, 508 (2004).
[124] *Id.*
[125] *Id.* at 509.
[126] *See* Part III.B., *supra*.
[127] Northcraft, *supra* note 123, at 510.
[128] *Id.*

wrong, that they had created a victim, and that they had somehow offended the school and community by expressing themselves sexually or, arguably, just were imitating their television and pop culture icons.[129]

Reeducation classes perpetuate injurious social practices such as "slut-bashing," characterized by a girl being harassed by her male and female classmates because she is perceived as a slut.[130] These judgments are even more damaging in light of the Internet and cellular phone-driven culture of sexting. A "good" girl, many would argue, would *never* take a photograph of herself naked and certainly would not be stupid enough to email it to anyone.[131] Therefore, if a girl engages in sexting and becomes known as a slut, because the boy to whom she sent her message or photo forwarded it to his friends, who forwarded it to their friends, who posted it on a site where everyone could see it—she has caused her own social demise and therefore has only herself to blame.[132]

Rather than admonishing young girls for expressing themselves sexually or mimicking their idols, the solution to the sexting dilemma lies in awareness. Given the popularity and prevalence of sexting, and schools' recognition that it is a potential problem among teenage students, educators should inform their students about what sexting is, and the potential risks, perhaps in sexual education classes. If young people are informed prior to making the decision to sext, they may be less likely to do so or may do it in such a manner as to minimize the chances of further distribution.

VI. CONCLUSION

[129] *See generally* Part I, *supra* notes 1–2.
[130] Leora Tanenbaum, *Girl-Bashing and Its Consequences*, Dec. 8, 2009.
[131] *Id.*
[132] *Id.*

Given the sexually charged society in which we live, the law needs to acknowledge and come to terms with the fact that teens are, and will continue to, have sex and find new ways to express themselves sexually. With technology continuing to grow, the potential for risk increases as well, and the law has an interest in deterring and preventing harm from occurring. The answer, however, is not in using the extremely harsh child pornography laws to punish consensual acts among teenagers. It certainly is not using "re-education" classes to perpetuate gender stereotypes and make young girls feel ashamed about themselves and their decisions. Rather, the answer lies in awareness and understanding.