

## Sexting Juveniles: Neither Felons nor Innocents

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*Abstract: The law often has difficulty keeping up with technological advances, and the use of cell phones is no exception. Modern technology in the hands of minors is not necessarily a bad thing. Cell phones allow children to be connected to their parents and to keep them informed of their whereabouts. However, when technology is used inappropriately, it can have devastating consequences. Today's cell phones make it possible for children to take digital sexually suggestive and nude photographs of themselves and transmit them at the speed of light. These images can be infinitely reproduced and sent to those who were never meant to be recipients.*

*Minors are often unaware that they can be charged with felony possession or dissemination of child pornography as a result of sexting. Child pornography is not protected by the First Amendment, so the government may constitutionally regulate sexting by minors that meets the definition of child pornography. This Note argues that a combination of parental, community, and governmental involvement—in the form of statutes that proscribe sexting but treat it as a lesser offense with the possibility of some punishment—is the suitable response to curbing sexting by a minor.*

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## INTRODUCTION

The act of sexting involves sending a photograph that is “sexually suggestive,”<sup>1</sup> “sexually explicit,”<sup>2</sup> “revealing,”<sup>3</sup> “nude,”<sup>4</sup> or “nearly nude”<sup>5</sup> via cell phone or email.<sup>6</sup> While people of every age can, and do, sext, this Note is confined to discussing the consequences of sexting between two minors.<sup>7</sup> When minors engage in sexting, they unwittingly expose themselves to harsh consequences, including potential criminal liability and the wide-scale dissemination of their photos. Child pornography is not protected by the First Amendment;

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<sup>1</sup> Cox Commc'ns, *Cox's New Survey on Cyber-Safety Finds Many Teens Going Online Wirelessly Without Limits or Controls*, [http://ww2.cox.com/wcm/en/aboutus/datasheet/takecharge/archives/2009-wireless-parental-controls.pdf?campcode=takecharge-archive-link\\_wireless-parental-controls\\_0511](http://ww2.cox.com/wcm/en/aboutus/datasheet/takecharge/archives/2009-wireless-parental-controls.pdf?campcode=takecharge-archive-link_wireless-parental-controls_0511) (last visited Aug. 31, 2011).

<sup>2</sup> The Nat'l Ctr. for Missing & Exploited Children, *Policy Statement on Sexting*, [http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en\\_US&PageId=4130](http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130) (last visited Aug. 31, 2011) [hereinafter NCMEC].

<sup>3</sup> Common Sense Media, *Common Sense Tips: Sexting*, [www.ssfs.org/tech/downloads/sexting.pdf](http://www.ssfs.org/tech/downloads/sexting.pdf) (last visited Aug. 31, 2011).

<sup>4</sup> Brian Kane & Brett T. Delange, *A Tale of Two Internets: Web 2.0 Slices, Dices, and is Privacy Resistant*, 45 IDAHO L. REV. 317, 340 n.183 (2009).

<sup>5</sup> Pew Research Ctr., *Teens and Sexting*, at 1, [http://www.pewinternet.org/~media/Files/Reports/2009/PIP\\_Teens\\_and\\_Sexting.pdf](http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf) (last visited Aug. 31, 2011).

<sup>6</sup> Cox Commc'ns, *supra* note 1. Thus far, only a handful of reported court opinions have mentioned or defined sexting. *See, e.g.*, *Miller v. Mitchell*, 598 F.3d 139, 143 (3d Cir. 2010) (quoting *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009)) (“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”); *United States v. Broxmeyer*, 616 F.3d 120, 123 (2d Cir. 2010) (“the exchange of sexually explicit text messages, including photographs, via cell phone”); *United States v. Vann*, 620 F.3d 431, 451 (4th Cir. 2010) (“texting of sexually suggestive pictures”); *Iowa v. Canal*, 773 N.W.2d 528, 529 (Iowa 2009) (“the practice of sending nude photographs via text message.”); *Attorney Grievance Comm’n of Md. v. Marcalus*, 996 A.2d 350, 365 (Md. 2010) (“sexually suggestive electronic text messages”). *See also* *Logan v. Sycamore Cmty. Sch. Bd. of Educ.*, No. 1:09-CV-00885, 2011 WL 382559 (S.D. Ohio 2011) (“the act of sending sexually explicit messages or photographs, primarily between mobile phones”).

<sup>7</sup> The National Center for Missing & Exploited Children distinguishes sexting from online enticement, which involves an adult encouraging a teenager to send him nude photos. *See* NCMEC, *supra* note 2.

thus, the government may constitutionally regulate teen sexting that fits the definition of child pornography. This Note argues that turning a generation of teenagers into felons who must register as sex offenders is not an appropriate social or legal response.

Part I of this Note will discuss several real stories involving sexting minors. It will point out that sexting is not an innocuous activity, but can rather lead to harmful consequences, even suicide. Part II will analyze sexting with respect to free speech protections of the First Amendment. Part III will examine the possible legal approaches to sexting minors, including a comprehensive discussion of what various state legislatures have proposed. Finally, Part IV will conclude that a combination of parental and community involvement, education, and updated statutes that specifically address sexting as a lesser offense is a more appropriate strategy to protect teenagers from themselves.

## I. THE DANGERS OF SEXTING

Thirteen-year-old Hope Witsell sent a photograph of herself with her breasts exposed to attract the attention of a boy that she liked.<sup>8</sup> Hope got more attention than she bargained for when the photo spread to neighboring schools.<sup>9</sup> Hope's friends recount the nightmare that she went through, as classmates shouted "whore" and "slut" at her as she walked through the halls of her school.<sup>10</sup> On September 11, 2009, counselors noticed what appeared to be self-inflicted wounds on Hope's legs.<sup>11</sup> Hope signed a "no-harm contract," meaning that she would contact an adult if she felt that she would harm herself.<sup>12</sup> The very next day, her mother walked into Hope's bedroom to find that her daughter had hanged herself on the canopy of her bed with a pink scarf.<sup>13</sup> Hope became the second known suicide associated with sexting.<sup>14</sup>

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<sup>8</sup> Today, "Sexting" Bullying Cited in Teen's Suicide, [http://today.msnbc.msn.com/id/34236377/ns/today-today\\_people](http://today.msnbc.msn.com/id/34236377/ns/today-today_people) (last visited Aug. 31, 2011).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* As a result of this incident, the family of Hope Witsell has filed a federal lawsuit against the school district. Tanya Arja, *Parents File Lawsuit over Teenager's Suicide*, MY

Not all sexting situations end with a loss of life, but they can still lead to painful consequences. For example, fifteen-year-old Katelyn sent a nude photo using a cell phone to her sixteen-year-old boyfriend Dillon.<sup>15</sup> After they broke up, Katelyn noticed that fellow students were giggling about her at school.<sup>16</sup> Dillon had forwarded the photos to others, and several students from the school had seen them. Consequently, Katelyn was subjected to teasing and ridicule from her classmates.<sup>17</sup>

An estimated 90 percent of teens and young adults have online access.<sup>18</sup> Fifty-eight percent of twelve-year-olds and 83 percent of seventeen-year-olds own a cell phone.<sup>19</sup> Recent surveys reveal that between 4 and 20 percent of teenagers admit to sexting.<sup>20</sup> These

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FOX TAMPA BAY, Apr. 13, 2011,  
<http://www.myfoxtampabay.com/dpp/news/local/hillsborough/parents-file-lawsuit-over-teenagers-suicide-04132011>.

<sup>14</sup> Today, *supra* note 8. Jessica Logan committed suicide after her nineteen-year-old boyfriend forwarded the nude photos that she sent to him when she was eighteen-years-old via cell phone after they broke up. Parry Aftab, *Sexting Can Lead to Death . . . The Story of Jessie Logan*, PARRY AFTAB'S BLOG (Mar. 8, 2009, 19:36 EDT), <http://parryaftab.blogspot.com/2009/03/sexting-can-lead-to-deaththe-story-of.html>. As with Hope, classmates hurled insults at Jessica, such as "porn queen." As a result, she could no longer handle the pressure. *Id.* She, too, hanged herself. *Id.* Because both Jessica and her boyfriend were legally adults, the analysis is different than in a case where two teenagers under eighteen sext each other. *Id.* The fact that this is beyond the scope of this Note is not intended to downplay the dangers of sexting by anyone of any age or the tragedy of any suicide.

<sup>15</sup> Mathias H. Heck, Jr., *Sexting and Charging Juveniles—Balancing the Law and Bad Choices*, 43 PROSECUTOR 28, 28.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> The Nat'l Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults*, at 5, [http://thenationalcampaign.org/sextech/PDF/SexTech\\_Summary.pdf](http://thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf) (last visited Aug. 31, 2011) [hereinafter Nat'l Campaign].

<sup>19</sup> Pew Research Ctr., *supra* note 5, at 2.

<sup>20</sup> The National Campaign to Prevent Teen and Unplanned Pregnancy, in association with Cosmogirl.com, conducted a survey of 653 teenagers aged thirteen through nineteen. Nat'l Campaign, *supra* note 18, at 1, 11. Twenty percent of these teens admitted to having sent or posted a nude or semi-nude photo or video of themselves. *Id.* at 1. Cox Communications, partnered with the National Center for Missing & Exploited Children and John Walsh, host of America's Most Wanted, performed a survey of teenagers ages thirteen through eighteen. Cox Comm'ns, *supra* note 1. Nineteen percent of those surveyed admitted to

numbers may be underinflated because some teenagers may not wish to confess to sexting.<sup>21</sup> This indicates how widespread the problem of sexting has become. Even so, only 2 percent of parents believe that their children have posted naked or semi-naked material of themselves online.<sup>22</sup> Eighty percent of parents who know that their children use their phones to go online provide no limits or controls over their use of the technology.<sup>23</sup> This suggests that parents are unaware—or perhaps naïve—that their children are sexting, and that at least some turn a blind eye to its dangers.

As Hope's story demonstrates, a potentially great danger lies when sexts are sent to unintended recipients. Thirty-six to 39 percent of teenagers say that sexts commonly get shared with those who were not the intended recipients of the material.<sup>24</sup> Twenty-five to 33 percent say that they have had material intended for another person shared with them.<sup>25</sup> In fact, 14 percent of teens admit to having shared material with people who were not the intended recipients.<sup>26</sup> Thus, sexting "is a crime of perpetuity where every time an image is distributed the victim is revictimized."<sup>27</sup>

By their own admissions, teenagers are aware, at least in principle, of the potential consequences of sexting. Seventy-five percent of teenagers concede that sending sexual material "can have serious negative consequences."<sup>28</sup> Sixty-seven percent of teens surveyed agree

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having engaged in sexting. *Id.* According to the Pew Research Center, "4% of cell-owning teens ages 12-17 say they have sent sexually suggestive nude or nearly nude images of themselves to someone else via text messaging." Pew Research Ctr., *supra* note 5, at 2.

<sup>21</sup> Pew Research Ctr., *supra* note 5, at 4 n.10.

<sup>22</sup> Common Sense Media, *Is Social Networking Changing Childhood?: A National Poll*, [http://cdn2.d6www.common sense media.org/sites/default/files/csm\\_teen\\_social\\_media\\_080609\\_final.pdf](http://cdn2.d6www.common sense media.org/sites/default/files/csm_teen_social_media_080609_final.pdf) (last visited Aug. 31, 2011).

<sup>23</sup> Cox Commc'ns, *supra* note 1.

<sup>24</sup> Nat'l Campaign, *supra* note 18, at 3.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 11.

<sup>27</sup> Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 10 (2007).

<sup>28</sup> Nat'l Campaign, *supra* note 18, at 3.

that sexting is dangerous.<sup>29</sup> Seventy-four percent of teenagers admit that sexting could hurt their reputation.<sup>30</sup> Thirty-nine percent of teens that had posted something online later regretted it.<sup>31</sup>

Despite these dangers, why, then, do teenagers sext? Perhaps they are not fully capable of recognizing the dangers associated with sexting. The use of cell phones may be a means for asserting one's independence or a display of rebellion.<sup>32</sup> Teenagers may want "to show interest in someone, or to prove commitment."<sup>33</sup> They possibly want to initiate a dating relationship, or to take it to the next level by engaging in sexual relations with a boyfriend or girlfriend. Peer pressure also plays a role.<sup>34</sup> Teenagers may want to "show off"<sup>35</sup> or sext for "bragging rights."<sup>36</sup> One boy compiled photos of girls who had sexted onto a DVD and offered it for sale,<sup>37</sup> demonstrating that profit sometimes may be another motive.

How, then, should teenagers be prevented from being hurt by sexting? Some states consider felony child pornography prosecutions when juveniles sext amongst themselves. For example, in Massachusetts, six boys between the ages of twelve and fourteen were threatened with such prosecution after one of the boys forwarded a nude photo of his thirteen-year-old girlfriend to others.<sup>38</sup> Three

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<sup>29</sup> *Id.* at 10.

<sup>30</sup> *Id.* at 14.

<sup>31</sup> Common Sense Media, *supra* note 22.

<sup>32</sup> Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 *COMMLAW CONSPPECTUS* 1, 16–17 (2009).

<sup>33</sup> Common Sense Media, *supra* note 3.

<sup>34</sup> Nat'l Campaign, *supra* note 18, at 4.

<sup>35</sup> Common Sense Media, *supra* note 3.

<sup>36</sup> *A.H. v. Florida*, 949 So. 2d 234, 237 (Fla. Dist. Ct. App. 2007).

<sup>37</sup> Calvert, *supra* note 32, at 4.

<sup>38</sup> Aaron Gouveia & Jessica Heslam, *Hang-Up for 'Sexting' Boys: Six Middle-Schoolers May Face Kid Porn Rap*, *BOS. HERALD*, Feb. 11, 2009, <http://bostonherald.com/news/regional/view.bg?articleid=1151414>. Annie Winston wrote a book detailing the case. ANNIE WINSTON, *A FATHER'S SEXTING TEEN: THE BRIAN HUNT STORY* (2010).

juveniles have similarly been referred to the Oklahoma Office of Juvenile Affairs for child pornography charges for sexting.<sup>39</sup> Is this an appropriate—or an even legal—response? Part II of this Note will examine whether juvenile sexting is protected by the First Amendment. It will then discuss the appropriateness of applying child pornography laws to sexting teenagers.

## II. FIRST AMENDMENT IMPLICATIONS OF SEXTING

The U.S. Supreme Court's First Amendment jurisprudence is the critical starting point when describing the appropriate regulation of sexting. Although children have some free speech rights,<sup>40</sup> child pornography is not protected by the First Amendment.<sup>41</sup> Even its mere possession may be regulated.<sup>42</sup> Thus, when sexting falls under the definition of child pornography, it is not protected by the First Amendment.<sup>43</sup>

Pornography that depicts minors does not have to be obscene to be proscribed.<sup>44</sup> Lower courts have held that even child nudity without any depiction of the genitals may be considered child pornography.<sup>45</sup>

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<sup>39</sup> Barbara Hoberock, *Parents Have Responsibility to Stop "Sexting," Attorney Says*, TULSA WORLD, Oct. 29, 2009, available at 2009 WLNR 21619189.

<sup>40</sup> See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.")

<sup>41</sup> *New York v. Ferber*, 458 U.S. 747, 764 (1982).

<sup>42</sup> *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

<sup>43</sup> Moreover, obscenity enjoys no First Amendment protections. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). The U.S. Supreme Court created a three-prong test for identifying an obscene work: (1) "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest," (2) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific [social] value." *Miller v. California*, 413 U.S. 15, 24 (1973) (internal quotations omitted). Probably in part because not all sexting easily meets all three prongs outlined in *Miller*, prosecutors have turned to child pornography laws, which require no similar findings, making their cases easier to prosecute. For discussion on sexting and obscenity, see John A. Humbach, *"Sexting" and the First Amendment*, 37 HASTINGS CONST. L.Q. 433, 439–46 (2010).

<sup>44</sup> See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002).

<sup>45</sup> See Humbach, *supra* note 43, at 435 n.16 (citing cases).

Under federal law, child pornography is “(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct.”<sup>46</sup> An example of sexually explicit conduct is “sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex.”<sup>47</sup> It also includes “(iii) bestiality; (iv) masturbation; (v) sadistic or masochistic abuse; or (vi) lascivious exhibition of the genitals or pubic area of any person.”<sup>48</sup> Any person who possesses, receives, or distributes child pornography violates federal law.<sup>49</sup> In addition, every state has laws making child pornography illegal.<sup>50</sup> Undoubtedly, some sexting minors inadvertently violate current child pornography laws.

#### A. REASONS FOR CRIMINALIZING CHILD PORNOGRAPHY

The reasoning behind the U.S. Supreme Court’s decision to uphold legislation outlawing child pornography can be extended to sexting. In *New York v. Ferber*, the Court unanimously upheld New York’s anti-child pornography statute.<sup>51</sup> The New York statute criminalized child pornography even if it was not obscene.<sup>52</sup> The Court reasoned that: “States are entitled to greater leeway in the regulation of pornographic depictions of children.”<sup>53</sup> Concerned with the “physiological, emotional, and mental health of the child,”<sup>54</sup> the Court noted that the

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<sup>46</sup> 18 U.S.C.A. § 2252A(a)(3)(B)(i) and (ii) (West 2000 & Supp. 2010). A minor under federal law is “any person under the age of eighteen years.” 18 U.S.C.A. § 2256(1) (West 2000).

<sup>47</sup> 18 U.S.C.A. § 2256(2)(A)(i) (West 2000 & Supp. 2010).

<sup>48</sup> 18 U.S.C.A. § 2256(2)(A)(ii)–(v) (West 2000 & Supp. 2010).

<sup>49</sup> 18 U.S.C.A. §§ 2252A(a)(2) & (a)(5)(B) (West 2000 & Supp. 2010).

<sup>50</sup> See Shannon Shafron-Perez, *Average Teenager or Sex Offender?: Solutions to the Legal Dilemma Caused by Sexting*, 26 J. MARSHALL J. COMPUTER & INFO. L., 431,437–38 n.35 (2009).

<sup>51</sup> *New York v. Ferber*, 458 U.S. 747, 774 (1982).

<sup>52</sup> *Id.* at 751 n.2. This law is still in effect. N.Y. PENAL LAW § 263.05 (McKinney 2008).

<sup>53</sup> *Ferber*, 458 U.S. at 756.

<sup>54</sup> *Id.* at 758.



“prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”<sup>55</sup>

One harm that results when children are depicted in pornographic photographs is that the pictures become “a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”<sup>56</sup> Because of this potential harm, child pornography enjoys no First Amendment protection.<sup>57</sup> Justice Brennan reiterated, “the State has a special interest in protecting the well-being of its youth.”<sup>58</sup>

The Court took it a step further in *Osborne v. Ohio*, stating that it is constitutional for the state to make it illegal to possess and view child pornography.<sup>59</sup> In *Osborne*, the Court again recognized the problem of the permanent record resulting from child pornography.<sup>60</sup> The Ohio Supreme Court, the lower court in *Osborne*, construed the Ohio child pornography statute to apply only to nudity that “constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.”<sup>61</sup> The U.S. Supreme Court endorsed this standard, saying that the limitation by the Ohio Supreme Court saved the statute from being impermissibly overbroad.<sup>62</sup>

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<sup>55</sup> *Id.* at 757.

<sup>56</sup> *Id.* at 759.

<sup>57</sup> *Id.* at 763.

<sup>58</sup> *Id.* at 776 (Brennan, J., concurring).

<sup>59</sup> *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

<sup>60</sup> *Id.*

<sup>61</sup> *State v. Young*, 525 N.E.2d 1363, 1368 (Ohio 1988).

<sup>62</sup> *Osborne*, 495 U.S. at 113–14. Justice Brennan complained that the Ohio Supreme Court did not give a definition of “lewd” or “lewd exhibition of nudity.” *Id.* at 132–39 (Brennan, J., dissenting). Justice Stewart famously explained that while he could not describe hard-core pornography, “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). In much the same way, it may be difficult to define lewdness, but lewdness is apparent when it is seen.

## B. SEXTING AS CHILD PORNOGRAPHY

At least one commentator has said that it would be “quite a stretch” to say that *Ferber* extends to teenagers who take nude photographs of themselves.<sup>63</sup> If sexting is “harm-free,” the *Ferber* reasoning that was meant to protect children would not apply to sexting.<sup>64</sup> Following this analysis, applying child pornography laws to sexting minors harms those that these laws were enacted to protect.<sup>65</sup> Furthermore, the focus of *Ferber* is on the power aspect of those who create child pornography, exploiting children who are “made”<sup>66</sup> to be in the photographs.<sup>67</sup> When teenagers take photographs of themselves, “on their own initiative for their own purposes,” there is no power disparity, “no invasion of autonomy and no attacks on dignity,” until the government gets involved.<sup>68</sup>

Sexting, however, is *not* harm-free. Taking a digital photograph results in the immediate loss of control of the image.<sup>69</sup> There is no way to prevent a photograph from going viral. Dissemination of a private or embarrassing image can result in shame and has even led some to commit suicide.<sup>70</sup> Most of the time, a prosecutor would never see sexting images come across her desk until they were already widely disseminated.<sup>71</sup>

Some call sexting “juvenile self-exploitation,”<sup>72</sup> which can turn into exploitation of others. Justin Berry was thirteen-years-old when he

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<sup>63</sup> See Humbach, *supra* note 43, at 465.

<sup>64</sup> *Id.* at 458.

<sup>65</sup> *Id.* at 439.

<sup>66</sup> *New York v. Ferber*, 458 U.S. 747, 753 (1982).

<sup>67</sup> See Humbach, *supra* note 43, at 465.

<sup>68</sup> *Id.* at 466.

<sup>69</sup> Common Sense Media, *supra* note 3.

<sup>70</sup> See *supra* text accompanying notes 8–17.

<sup>71</sup> Interview with Rachel Hutzal, Warren County (Ohio) Prosecutor, in Lebanon, Ohio (Jan. 7, 2010).

<sup>72</sup> Leary, *supra* note 27, at 6. Not all agree that “self-exploitation” is appropriate terminology, arguing that this becomes “a mere metaphor for a lack of good judgment and deficit of appropriate personal discipline” and removes the negative connotation of someone taking advantage of another person. See Humbach, *supra* note 43, at 466 n.186.

first took off his shirt in front of a webcam for \$50.<sup>73</sup> He received escalating requests, eventually “undressing, showering, masturbating, and even having sex.”<sup>74</sup> Justin eventually became a porn star, making hundreds of thousands of dollars in the process.<sup>75</sup> He crossed the line from victim to exploiter, recruiting other boys to do what he did.<sup>76</sup> While Justin’s webcam performances are not strictly considered sexting, it shows the “ripple effect of a juvenile’s self-exploitive actions.”<sup>77</sup> The Court used the word “exploit” over twenty times in *Ferber*,<sup>78</sup> and self-exploitive harm is analogous to the exploitation of children that the Court intended to prevent by outlawing child pornography.

In *Ashcroft v. Free Speech Coalition*, the U.S. Supreme Court held that the Child Pornography Prevention Act of 1996 (“CPA”) was overbroad and unconstitutional.<sup>79</sup> The CPA prohibited child pornography that appeared to depict minors but actually used young-looking adults or computer imaging. The Court reasoned that no direct causal link between virtual child pornography and sexual abuse of children existed.<sup>80</sup> The harm “depends upon some unquantified potential for *subsequent criminal acts*.”<sup>81</sup> Thus, *Ashcroft* rejected the notion that child pornography can be prohibited to prevent “future harms.”<sup>82</sup>

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Instead, a better word is “autopornography,” which refers to the self-recording and documentation of one’s own sexual conduct and nudity. *Id.* at 438.

<sup>73</sup> Kurt Eichenwald, *Through His Webcam, a Boy Joins a Sordid Online World*, N.Y. TIMES, Dec. 19, 2005, at A1, available at 2005 WLNR 20454147.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Leary, *supra* note 27, at 39.

<sup>78</sup> Humbach, *supra* note 43, at 464.

<sup>79</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002).

<sup>80</sup> *Id.* at 250.

<sup>81</sup> *Id.* (emphasis added).

<sup>82</sup> Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL’Y & L. 505, 519–20 (2008).

However, a distinction may be made between the emphasis on crimes in *Ashcroft v. Free Speech Coalition* and the emphasis on harm to children in *Ferber*.<sup>83</sup> The Court did not expressly abandon the *Ferber* “harm” rationale in *Ashcroft*. It said only that virtual child pornography—pornography that does not involve images of actual people—“do[es] not involve, let alone harm, any children in the production process.”<sup>84</sup> The Court distinguished virtual pornography from morphed images—alterations of pictures of real children—because the latter images “implicate the interests of real children and are in that sense closer to the images in *Ferber*.”<sup>85</sup> [P]ornography produced with real children” is not protected speech.<sup>86</sup> Juvenile sexting involves real children and implicates their interests. Thus, it is consistent with the Supreme Court’s First Amendment jurisprudence and analysis to consider such sexting to be child pornography.<sup>87</sup>

### III. LEGAL RESPONSES TO SEXTING

#### A. USING EXISTING CHILD PORNOGRAPHY LAWS

Although sexting may amount to child pornography, it does not automatically follow that sexting juveniles should be charged under child pornography laws designed to punish adults and protect children. After all, the juvenile justice system exists because of the differences between juveniles and adults.<sup>88</sup> Delinquency laws, for

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<sup>83</sup> Humbach, *supra* note 43, at 464.

<sup>84</sup> *Ashcroft*, 535 U.S. at 241 (emphasis added).

<sup>85</sup> *Id.* at 242 (emphasis added). The Court did not consider the constitutionality of criminalizing morphed images because it was not challenged. *Id.*

<sup>86</sup> *Id.* at 245–46 (emphasis added).

<sup>87</sup> Compare Sarah Wastler, *The Harm in “Sexting”? Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J.L. & GENDER 687, 698–701 (2010) (arguing that sexting is not child pornography because it does not involve sexual abuse of children) with Susan Hanley Duncan, *A Legal Response is Necessary for Self-Produced Child Pornography: A Legislator’s Checklist for Drafting the Bill*, 89 OR. L. REV. 645, 654–63 (2010) (noting that child pornography laws punish even when there is no abuse).

<sup>88</sup> See 47 AM. JUR. 2D *Juvenile Courts, Etc.* § 4 (2010). For an in-depth description of the juvenile court system as well as a proposal to adopt these rationales when dealing with

example, provide safety to the public and serve to rehabilitate and protect children.<sup>89</sup> Because child pornography laws do not specifically exempt minors who sext from prosecution, the severe punishment that would befall a minor convicted under a child pornography statute should be considered.<sup>90</sup> Punishment under the federal child pornography law ranges from five to twenty years of incarceration, depending on whether the crime is possession, receipt, or distribution.<sup>91</sup> These substantial minimum sentences under federal law could apply regardless of how a particular state punishes child pornography. Applying child pornography laws to juvenile sexting does not adequately take into account the differences between juveniles and adults, providing no protection to those persons these laws are supposed to protect.

At least one court has opened the door to punishing sexting juveniles as child pornographers. The Florida First District Court of Appeal upheld a conviction for child pornography under state law when a sixteen-year-old girl and her seventeen-year-old boyfriend took digital pictures of themselves having sex.<sup>92</sup> The court said that the state has a compelling interest in preventing the production of *any* photographs depicting sexual conduct of minors.<sup>93</sup> It reasoned that “the reasonable expectation that the material will ultimately be disseminated is by itself a compelling state interest for preventing the production of this material.”<sup>94</sup>

In Pennsylvania, Wyoming County District Attorney George Skumanick threatened to bring felony charges against a group of thirteen-year-old girls for sexting unless they agreed to certain terms, such as six months of probation, an education program, and drug testing.<sup>95</sup> He also required successful completion of a counseling

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sexting, see Jordan J. Szymialis, *Sexting: A Response to Prosecuting Those Growing Up with a Growing Trend*, 44 IND L. REV 301, 303–08, 322–39 (2010).

<sup>89</sup> See *id.* § 1.

<sup>90</sup> Smith, *supra* note 82, at 513–14.

<sup>91</sup> 18 U.S.C.A. § 2252A(b)(1)–(2) (West 2000 & Supp. 2009).

<sup>92</sup> A.H. v. Florida, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007).

<sup>93</sup> *Id.* at 238.

<sup>94</sup> *Id.*

<sup>95</sup> Kim Zetter, *ACLU Sues Prosecutor Over “Sexting” Child Porn Charges*, WIRED, Mar. 25, 2009, <http://www.wired.com/threatlevel/2009/03/aclu-sues-da-ov>.

program at the cost of \$100.<sup>96</sup> His actions resulted in a lawsuit by the ACLU.<sup>97</sup> In *Miller v. Skumanick*, a federal judge sided with the ACLU.<sup>98</sup> The court said, “the threat of a felony prosecution would deter an ordinary person from exercising her constitutional rights.”<sup>99</sup> Thus, it issued a temporary restraining order enjoining Skumanick from filing charges based on the photographs.<sup>100</sup>

The Skumanick story illuminates the difficulty of applying existing laws to the new phenomenon of sexting. While Skumanick’s prosecution of the sexting teenagers has been characterized as “prosecutorial abuse,”<sup>101</sup> he did offer the teenagers an *alternative* to harsh charges in “a reasonable and balanced way to curb a dangerous behavior without overkill.”<sup>102</sup> In fact, fourteen of seventeen students facing charges opted to take this route.<sup>103</sup> The ACLU may have muddied the waters by getting involved in a “noble attempt to protect free speech rights but a misguided assault on common sense.”<sup>104</sup> It is ironic that while the ACLU has demanded education instead of

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<sup>96</sup> Perry A Zirkel, *All a Twitter about Sexting*, PHI DELTA KAPPAN, Oct. 1, 2009, at 76, available at 2009 WLNR 22132681.

<sup>97</sup> Zetter, *supra* note 95.

<sup>98</sup> *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009), *aff’d sub nom. Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

<sup>99</sup> *Id.* at 645.

<sup>100</sup> *Id.* at 647. The United States Court of Appeals for the Third Circuit affirmed the temporary restraining order in this case, which is considered the first challenge to the constitutionality of charging sexting teenagers under child pornography statutes. *Miller v. Mitchell*, 598 F.3d 139, 155 (3d Cir. 2010). The Third Circuit declined to address whether the girls had a First Amendment right to express themselves in the photographs. *Id.* at 148. The lower court subsequently permanently enjoined the prosecutor from bringing charges against the girls. *Miller v. Mitchell*, No. 3:09cv540, 2010 WL 1779925, at \*6 (M.D. Pa. Apr. 30, 2010). In November 2009, Skumanick lost his reelection bid for what would have been his sixth term as district attorney. Josh McAuliffe, *Wyoming County District Attorney Falls in Election*, SCRANTON TIMES, Nov. 4, 2009, available at 2009 WLNR 22010323. One possible reason for his defeat was his threat of punishing juvenile sexters with felonies. *Id.*

<sup>101</sup> Vivian Berger, *Stop Prosecuting Teens for “Sexting,”* THE NAT’L L. J., July 27, 2009, <http://www.vberger-mediator.com/other/sexting.html>.

<sup>102</sup> Dom Giordano, Opinion, *Teen “Sexting” No One’s Business?*, PHILLY.COM, Jan. 26, 2010 (on file with author).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

punishment as a method to combat sexting,<sup>105</sup> in this case it rejected education when it was on the table.

A number of teens are likely guilty of receiving, distributing, or possessing child pornography because they have forwarded or retained sexts on their cell phones.<sup>106</sup> CBS News legal analyst Lisa Bloom suggested that prosecuting sexters as child pornographers could entail “lock[ing] up 20 percent of America’s teens.”<sup>107</sup> More likely, because it is impossible to charge all sexters, a selective application of child pornography laws could harshly punish only a few offenders while “turn[ing] a blind eye to millions of violators.”<sup>108</sup> It is not certain that punishing sexting teenagers under child pornography laws would create the desired deterrent effect.<sup>109</sup>

## B. DOING NOTHING

Another option is to decriminalize sexting altogether. One argument is that because sexting does not ordinarily involve a criminal enterprise and is, rather, a purely social interaction, law enforcement involvement is unnecessary.<sup>110</sup> Some teenagers believe

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<sup>105</sup> The ACLU of Ohio sent a letter to Ohio prosecutors asking them to not prosecute teens for sexting, because “it can ruin a life.” Letter from Jeffrey M. Gamso, Legal Director, Am. Civ. Liberties Union of Ohio, to all Ohio County prosecutors (Apr. 2, 2009), *available at* [http://www.acluohio.org/issues/juvenilejustice/lettertoohioprossecutors\\_sexting2009\\_0402.pdf](http://www.acluohio.org/issues/juvenilejustice/lettertoohioprossecutors_sexting2009_0402.pdf). The ACLU said that a sexting teenager may be “arguably harmed,” but that this “harm is not the same as that inflicted by those ordinarily charged with child pornography or labeled as sex offenders.” *Id.* The ACLU also acknowledged that Ohio needs new laws so that sexting teens “are not subjected to felony sex offense charges,” but says that “[t]hreatening teens with criminal prosecution” is not the answer. *Id.* Instead, the solution is to “work[] with parents and educators to teach young people to respect their own dignity and privacy and the dignity and privacy of others.” *Id.* If the same letter were sent in Pennsylvania, it appears that both threats of prosecution and education would be off the table, effectively leaving Skumanick with no options to deal with the sexters. *See also infra* text accompanying notes 146–61.

<sup>106</sup> *See* Humbach, *supra* note 43, at 437.

<sup>107</sup> “Sexting” Shockingly Common Among Teens, CBSNEWS, <http://www.cbsnews.com/stories/2009/01/15/national/main4723161.shtml> (last visited Aug. 31, 2011).

<sup>108</sup> Humbach, *supra* note 43, at 438.

<sup>109</sup> Smith, *supra* note 82, at 532.

<sup>110</sup> Berger, *supra* note 101.

that sexting is “not that serious” and that we should just “let teenagers be teenagers.”<sup>111</sup> Even some adults have dismissive attitudes towards sexting activities, considering sexting a harmless version of “you show me yours, I’ll show you mine,”<sup>112</sup> or a “post-modern form of flirting, a game of sexual show-&-tell.”<sup>113</sup> When a sixteen-year-old boy was caught sexting, a police officer said to the boy’s father: “Tom, when we were that age, we snuck a look at our dad’s *Playboy* and passed it around. What do they expect?”<sup>114</sup> Sexting may not even be considered harmful enough to teens “to outweigh the teens’ own interests in expressing themselves as they wish.”<sup>115</sup> This argument ignores the potential harms of sexting.<sup>116</sup>

In the 1950s, fears that comic books polluted the minds of children led to strict anti-comic book regulations.<sup>117</sup> The negative reaction to sexting has been likened to this treatment of comic books as “many adults are reacting apoplectically to bits of technology or culture with which they have little familiarity.”<sup>118</sup> The answer, this analysis suggests, is not “to shovel the blame for ageless teen behaviors on sexting.”<sup>119</sup> However, this analogy is unpersuasive. Reading a comic book cannot realistically be compared to sexting. Even assuming as true that reading a comic book pollutes the reader’s mind and leads to anti-social behavior, the act of reading a comic book is not itself harmful without further action. Sexting, on the other hand, does not require additional conduct to be harmful because it is the destructive action.

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<sup>111</sup> Ahmina James, Opinion, *Criminalizing “Sexting” Sends Wrong Message*, SAN. FRAN. CHRON., Mar. 22, 2009, [http://articles.sfgate.com/2009-03-22/opinion/17214775\\_1\\_sexting-teens-high-school-students](http://articles.sfgate.com/2009-03-22/opinion/17214775_1_sexting-teens-high-school-students).

<sup>112</sup> Nancy Rommelmann, *Anatomy of a Child Pornographer*, REASON MAG., July 2009, <http://reason.com/archives/2009/06/04/anatomy-of-a-child-pornographe>.

<sup>113</sup> David Rosen, *Sexting: The Latest Innovation in Porn*, COUNTERPUNCH, Mar. 25, 2009, <http://www.counterpunch.org/roseno3252009.html>.

<sup>114</sup> Rommelmann, *supra* note 112.

<sup>115</sup> Humbach, *supra* note 43, at 467.

<sup>116</sup> See *supra* text accompanying notes 8–17.

<sup>117</sup> Jesse Singal, *Panic Over Teen “Sexting” Eclipses Bigger Threat*, BOSTON GLOBE, Jan. 8, 2010, at 15, available at 2010 WLNR 383057.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*



Doing nothing is not an adequate response because sexting is not childlike behavior; it is adult behavior mimicked by children.<sup>120</sup> Alan Sears, the executive director of the Attorney General's Commission on Pornography under President Reagan, finds it "unbelievable" that, absent government regulation, "young people living in a culture awash with hypersexualized imagery, language, programming, fashion and entertainment and given instant and unlimited access to technology, will deliberately discipline themselves not to send 'sext' messages or lewd pictures of themselves and others over their cell phones, laptops and home computers."<sup>121</sup> Just as with child pornography, the government cannot afford to stay out of the area of sexting. The potential harms to children are too great.<sup>122</sup>

### C. CREATING STATUTES THAT SPECIFICALLY TARGET SEXTING

Some states have sought middle ground between ignoring the problem of sexting and charging children with a felony by making sexting a misdemeanor. As Warren County, Ohio Prosecutor Rachel Hutzel stated: "I don't believe that these teenagers are felons or sex offenders, but these are illegal and dangerous actions and must be stopped."<sup>123</sup> According to the National Conference of State Legislatures, at least sixteen states considered bills that targeted sexting in 2010 alone.<sup>124</sup> State governors in Arizona,<sup>125</sup> Connecticut,<sup>126</sup>

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<sup>120</sup> Interview with Rachel Hutzel, *supra* note 71.

<sup>121</sup> Alan Sears, *Why Enable Pornographers?*, WASH. TIMES, Nov. 1, 2009, at B03, available at 2009 WLNR 21869746.

<sup>122</sup> See *supra* text accompanying notes 8–17.

<sup>123</sup> Rosen, *supra* note 113.

<sup>124</sup> Nat'l Conference of State Legislatures, *2010 Legislation Related to Sexting*, <http://www.ncsl.org/default.aspx?tabid=19696> (last visited Aug. 31, 2011). For an updated list of state legislation in the rapidly changing area of sexting, see Nat'l Conference of State Legislatures, *2011 Legislation Related to "Sexting"*, <http://www.ncsl.org/default.aspx?tabid=22127> (last visited Aug. 31, 2011). Cf. Nathan Koppel & Ashby Jones, *Are "Sext" Messages a Teenage Felony or Folly?*, WALL ST. J., Aug. 25, 2010, [http://online.wsj.com/article\\_email/SB10001424052748703447004575449423091552284-lMyQjAxMTAwMDIwNTEyNDUyWj.html](http://online.wsj.com/article_email/SB10001424052748703447004575449423091552284-lMyQjAxMTAwMDIwNTEyNDUyWj.html) (summarizing enacted and introduced legislation regarding sexting).

<sup>125</sup> S.B. 1266, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (signed by governor, May 7, 2010). See also *Bill Targets "Sexting" Among Juveniles*, ARIZONA REPUBLIC, Feb. 4, 2010, at B1, available at 2010 WLNR 2333752.

Louisiana,<sup>127</sup> and Utah<sup>128</sup> have already signed bills making sexting a misdemeanor offense. Ohio, South Carolina, and Texas are likewise considering bills that would make sexting among juveniles a misdemeanor.<sup>129</sup> The essential purpose behind making sexting a misdemeanor is to relieve minors convicted of sexting from having to register as sex offenders. Bills in Vermont, South Carolina, Rhode Island, and Nevada make explicit that those convicted of sexting will not have to join the sex offender registry.<sup>130</sup>

Some states are also attempting to anticipate and address sexting's corollary problems. The Ohio bills are limited to minors' use of telecommunication devices; thus, they would not apply to works of art involving nude adults or adult pornography, as some free speech advocates fear.<sup>131</sup> In Arizona, juveniles do not violate the law if they did not solicit the sext, took reasonable steps to destroy the image, and did not forward it.<sup>132</sup> In New Jersey, Pennsylvania, and Arizona, diversion programs would apply to sexting offenses.<sup>133</sup> The records of

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<sup>126</sup> H.B. 5533, Gen. Assemb., Feb. 2010 Sess., Pub. Act No. 10-191 (Conn. 2010) (signed by governor, June 8, 2010). When the Connecticut bill was introduced, the express purpose was "[t]o protect children from the dangers and consequences of inappropriate use of technology." See Raised H.B. 5533, Gen. Assemb., Feb. 2010 Sess. (Conn. 2010).

<sup>127</sup> H.B. 1357, 2010 Reg. Sess. (La. 2010) (signed by governor, July 6, 2010) (codified as amended at LA. REV. STAT. ANN. art. 14:81.1.1 (West 2004 & Supp. 2010)).

<sup>128</sup> H.B. 14, 2009 Gen. Sess. (Utah 2009) (signed by governor, Mar. 30, 2009) (codified as amended at UTAH CODE ANN. § 76-10-1206 (2008 & Supp. 2009)).

<sup>129</sup> S.B. 103, 128th Gen. Assemb., Reg. Sess. (Ohio 2009); H.B. 132, 128th Gen. Assemb., Reg. Sess. (Ohio 2009); H.B. 473, 128th Gen. Assemb., Reg. Sess. (Ohio 2010); H.B. 4504, 118th Sess. (S.C. 2010); S.B. 407, 82d Leg., Reg. Sess. (Tex. 2011). Two other bills addressing sexting were introduced in the 119th Session of the General Assembly of South Carolina. H.B. 3130, 119th Sess. (S.C. 2010); S. 296, 119th Sess. (S.C. 2010).

<sup>130</sup> S.B. 125, 2009–2010 Leg. Sess. (Vt. 2009) (signed by governor, June 1, 2009) (codified as amended at VT. STAT. ANN. tit. 13, § 2802b (2009)); S.C. H.B. 4504; S. 2635, 2010 Leg. Sess. (R.I. 2010); H.B. 7778, 2010 Leg. Sess. (R.I. 2010); S.B. 277, 76th Sess. (Nev. 2011).

<sup>131</sup> Letter from Rachel Hutzler, Warren County Prosecutor, to Tim Grendell, Ohio Senator, Chairman of the Senate Judiciary–Criminal Justice Comm. (on file with author).

<sup>132</sup> S.B. 1266, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

<sup>133</sup> S.B. 2926, 213th Leg. (N.J. 2009) (if both the "creator and subject of the photo . . . were juveniles at the time of its making," and there was no malicious intent in its exhibition or distribution); H.B. 815, Gen. Assemb., Reg. Sess. 2011–2012 (Pa. 2011); S.B. 2700, 214th Leg. (N.J. 2011); Ariz. S.B. 1266.

juveniles convicted of sexting can later be expunged in Vermont, South Carolina, and Pennsylvania.<sup>134</sup>

States have found other creative ways to handle sexting. A bill introduced in Illinois provided for suspension of use of a telecommunication device for six months.<sup>135</sup> Proposals in South Carolina would restrict the driving privileges of sexting minors in certain situations.<sup>136</sup> One Pennsylvania Senate bill simply made sexting a “summary offense.”<sup>137</sup> Senator Stewart Greenleaf says that a teen charged with a summary offense would still appear before a district justice, driving home the gravitas of the situation, while making it easier to have the charge expunged.<sup>138</sup> Rhode Island considered enacting bills that make sexting a status offense to be referred to family court.<sup>139</sup> Similarly, a bill in Arkansas would make it a “violation” for those under eighteen to sext.<sup>140</sup> A New Jersey proposal would require retailers to provide information about sexting to customers before selling cell phones to them.<sup>141</sup>

Some states that have not specifically addressed sexting nevertheless have recently enacted laws to combat closely related problems. Colorado has enacted legislation that tackles the use of text messages to send nude photos.<sup>142</sup> While this has been recognized as an attempt to curtail sexting, the language targets predators; thus,

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<sup>134</sup> Vt. S.B. 125; S.C. H.B. 4504; Pa. H.B. 815.

<sup>135</sup> H.B. 4583, 96th Gen. Assemb. (Ill. 2009). This provision was removed in the enrolled version of the bill. Enrolled H.B. 4583, 96th Gen. Assemb. (Ill. 2010).

<sup>136</sup> H.B. 3130, 119th Sess. (S.C. 2010); S. 296, 119th Sess. (S.C. 2010).

<sup>137</sup> S.B. 1121, Gen. Assemb., Reg. Sess. 2009–2010 (Pa. 2009).

<sup>138</sup> Jeff Frantz, *York County DA Backs Sexting Reform: With Two Proposals in Harrisburg, Legislators are Hopeful the Law Could be Changed this Year*, YORK DAILY RECORD, Jan. 10, 2010, available at 2010 WLNR 524350.

<sup>139</sup> S. 2645, 2010 Leg. Sess. (R.I. 2010); H.B. 7778, 2010 Leg. Sess. (R.I. 2010).

<sup>140</sup> S.B. 741, 88th Gen. Assemb., Reg. Sess. 2011 (Ark. 2011).

<sup>141</sup> S.B. 2699, 214th Leg. (N.J. 2011). For further discussion on innovative responses to sexting, see Elizabeth M. Ryan, *Sexting: How the State can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 376–82 (2010).

<sup>142</sup> H.B. 09-1132, 67th Leg., 1st Reg. Sess. (Colo. 2009) (signed by governor, June 1, 2009).

whether sexting teens will be charged under this law is unknown.<sup>143</sup> Both houses of the Massachusetts legislature passed a bill that addresses cyberbullying.<sup>144</sup> Sexting was covered by the spirit of the bill when it was introduced, according to Massachusetts Senator James Eldridge.<sup>145</sup>

Enthusiasm for sexting legislation, however, is not universal. In Indiana, the ACLU opposed a bill, arguing that even a misdemeanor conviction could have negative consequences for teenagers.<sup>146</sup> Juvenile Law Center official Marsha Levick said that such a law would be “like using a hammer to kill a flea.”<sup>147</sup> As a result of this opposition, the version of the Indiana bill that passed only mentions sexting to the effect that school officials may offer education on the topic.<sup>148</sup> Others warn that the heavy coverage of sexting by the media “should not fan the flames of legislation and result in misguided public policy outcomes.”<sup>149</sup> Members of the Virginia State Crime Commission refused to recommend sexting legislation in Virginia.<sup>150</sup> Executive director of the ACLU of Arizona, Alessandra Soler Meetze, opposed the Arizona bill, saying, “We’re jailing kids for exercising poor judgment.”<sup>151</sup> She further stated that children need education, not incarceration.<sup>152</sup> Rhode Island ACLU Executive Director Steven Brown

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<sup>143</sup> Russell Haythorn, *Lawmakers Try to Curtail “Sexting”*, THE DENVER CHANNEL.COM, Jan. 16, 2009, <http://www.thedenverchannel.com/technology/18498850/detail.html>.

<sup>144</sup> S.B. 2404, 186th Sess. (Mass. 2010) (signed by governor, May 3, 2010).

<sup>145</sup> Nancy Reardon, “*Sexting*” Crackdown Bills Before State Legislature, ENTERPRISE, Jan. 14, 2010, <http://www.enterpriseneews.com/news/x1530318823/-Sexting-crackdown-bills-before-state-Legislature>; H.B. 483, 186th Sess. (Mass. 2009); S.B. 228, 186th Sess. (Mass. 2009).

<sup>146</sup> Tom Barnes, *Authorities Differ on Making “Sexting” a Criminal Offense: Bill Would Make it a Misdemeanor*, PITTSBURGH POST-GAZETTE, Feb. 5, 2010, available at 2010 WLNR 2507888.

<sup>147</sup> *Id.*

<sup>148</sup> S.B. 224, 2010 Leg., 2d Reg. Sess. (Ind. 2010) (signed by governor, Mar. 24, 2010) (codified as amended at IND. CODE ANN. § 20-30-6-16 (West 2008 & Supp. 2010)).

<sup>149</sup> Calvert, *supra* note 32, at 22.

<sup>150</sup> Dena Potter, *No “Sexting” Law Recommendations*, DAILY PRESS, Dec. 16, 2009, at A12, available at 2009 WLNR 25344714.

<sup>151</sup> *Bill Targets “Sexting” Among Juveniles*, *supra* note 125.

<sup>152</sup> *Id.*

denounced the Rhode Island bill, declaring that education is key, and that taking sexting children to court is “a strange way of showing you care for them.”<sup>153</sup>

While opponents of the original Indiana bill criticized it by arguing that education should be increased instead of criminalizing juveniles,<sup>154</sup> that version of the bill specifically provided for mandatory education for the parent and the sexting child.<sup>155</sup> South Carolina, Pennsylvania, New York, and Texas are also looking into education as an alternative punishment for sexting offenders.<sup>156</sup> Movement likewise exists on the federal level to address the dangers of sexting through education. For example, Representative Debbie Wasserman-Schultz introduced the Adolescent Web Awareness Requires Education (“AWARE”) Act.<sup>157</sup> Another version of the bill recognizes that sexting juveniles in many states would be subjected to felony child pornography charges and sex offender registration.<sup>158</sup> These bills would provide federal grants to educational agencies and non-profit organizations to educate children about the dangers of the Internet.<sup>159</sup> Senator Robert Menendez introduced a similar bill in the Senate, the School and Family Education (“SAFE”) about the Internet Act of 2009, which would provide federal money for purposes of Internet education for children.<sup>160</sup> On December 14, 2010, the Federal Communications Commission held *Generation Mobile*, “a forum bringing together teens, parents, educators, and experts to discuss the

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<sup>153</sup> Talia Buford, *Bill Would Ease Penalty for “Sexting,”* PROVIDENCE J. BULL., Mar. 2, 2010, at A, available at 2010 WLNR 4362355.

<sup>154</sup> Editorial, *Sexting Teens Don’t Fit into Criminal Category*, INDIANAPOLIS STAR, Jan. 9, 2010, at A11, available at 2010 WLNR 795627.

<sup>155</sup> Introduced S.B. 224, 2010 Leg., 2d Reg. Sess. (Ind. 2010).

<sup>156</sup> H.B. 4504, 118th Sess. (S.C. 2010); H.B. 3130, 119th Sess. (S.C. 2010); S. 296, 119th Sess. (S.C. 2010); S.B. 1121, Gen. Assemb., Reg. Sess. 2009-2010 (Pa. 2009); S.B. 5253, 2011-2012 Reg. Sess. (N.Y. 2011); S.B. 407, 82d Leg., Reg. Sess. (Tex. 2011). In early 2010, Representative Seth Grove introduced a bill in the House, with the education aspect missing, saying that an educational program should not be required without counties being given funding. H.B. 2189, Gen. Assemb., Reg. Sess. 2009-2010 (Pa. 2010); Frantz, *supra* note 138.

<sup>157</sup> H.R. 3630, 111th Cong. (2009).

<sup>158</sup> H.R. 3222, 111th Cong. (2009).

<sup>159</sup> H.R. 3630; H.R. 3222.

<sup>160</sup> S. 1047, 111th Cong. (2009).

opportunities and challenges around mobile technology use, including . . . sexting.”<sup>161</sup>

State legislatures that have introduced sexting legislation face an uphill battle. Ohio drafted bills addressing sexting in April 2009.<sup>162</sup> Prosecutor Hutzel pushed for this legislation.<sup>163</sup> However, when the bills had not progressed by the beginning of 2010, Prosecutor Hutzel lamented that “[t]he failure of the leadership in the House to allow the legislature to move on the ‘sexting’ legislation continues to tie the hands of law enforcement across the state as we try to protect our youth.”<sup>164</sup> The Mississippi legislature’s attempt to make sexting a misdemeanor died in committee.<sup>165</sup> Bills in Florida and Kentucky that would have made the first sexting offense a violation and subsequent offenses misdemeanors, also failed.<sup>166</sup>

But a failed bill does not necessarily mean that legislators are opposed to new sexting legislation. The Kentucky bill failed in part because some legislators were concerned that the bill did not provide harsh enough consequences.<sup>167</sup> New bills may also take the place of older ones that failed. A new bill was introduced in Florida, for example, after the first one failed.<sup>168</sup> After the original sexting bills in

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<sup>161</sup> Press Release, Federal Communications Commission, FCC Announces Program for ‘Generation Mobile’ Forum (Dec. 13, 2010), available at [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db1214/DOC-303566A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1214/DOC-303566A1.pdf). Video of the event is available online. FCC VIDEO ARCHIVE, <http://reboot.fcc.gov/video-archives> (follow “Generation Mobile Forum” hyperlink under “December 2010”) (last visited Aug. 31, 2011).

<sup>162</sup> S.B. 103, 128th Gen. Assemb., Reg. Sess. (Ohio 2009); H.B. 132, 128th Gen. Assemb., Reg. Sess. (Ohio 2009).

<sup>163</sup> Interview with Rachel Hutzel, *supra* note 71.

<sup>164</sup> Ed Richter, *State Rep Asks: Why so Slow on “Sexting” Bill? Local Lawmaker wants Misdemeanor Designation*, DAYTON DAILY NEWS, Jan. 8, 2010, at A5, available at 2010 WLNR 422098.

<sup>165</sup> H.B. 643, 2010 Reg. Sess. (Miss. 2010) (died in committee).

<sup>166</sup> H.B. 1335, 2010 Leg. Sess. (Fla. 2010) (died in committee); S.B. 2560, 2010 Leg. Sess. (Fla. 2010) (died in messages); H.B. 143, 2010 Reg. Sess. (Ky. 2010). Florida Representative Joseph Abruzzo subsequently filed another bill that would prohibit sexting among minors, and this bill passed in the House. H.B. 75, 2011 Leg. Sess. (Fla. 2010).

<sup>167</sup> *Key Bills Died Along With State Budget*, COURIER-J., Apr. 18, 2010, available at 2010 WLNR 8024753.

<sup>168</sup> Fla. H.B. 75.

Ohio failed to gain traction, the Ohio House subsequently passed a different bill defining sexting as a misdemeanor.<sup>169</sup>

Despite the setbacks and criticisms, state legislatures continue to work toward enacting sexting legislation. Two Virginia legislators asked the Virginia Division of Legislative Services to draft bills regarding sexting for the 2010 General Assembly.<sup>170</sup> Oklahoma legislators are concerned that the state's laws have the potential of "creating a whole generation of new felons," and thus decided to look into the matter of teen sexting.<sup>171</sup> Although Rhode Island did not pass the proposed sexting bills, it created a special commission "to study and make recommendations to the Senate relating to the problem of . . . sexting."<sup>172</sup>

#### IV. THE SOLUTION: STRIKING A PROPER BALANCE

The National Center for Missing and Exploited Children ("NCMEC") has said that "a blanket policy of charging all youth with juvenile or criminal violations" is not an appropriate solution to the problem of sexting.<sup>173</sup> NCMEC advocates prosecutorial discretion, parental involvement, and increased education. It has outlined several factors to consider in sexting situations, such as whether the materials were self-produced, whether they were produced under duress, and what kind of pressure was exerted on the individual engaged in sexting.<sup>174</sup> This solution appropriately represents the middle ground position by recognizing that not every sexting scenario is the same and thus it allows the law to take that into account. This approach does not preclude punishment for sexting juveniles, but rather removes particularly harsh punishment and eliminates the stigma associated with sex offender registration for all but the most egregious acts of sexting. The approach taken by the NCMEC lends weight to the argument that the government is justified in enacting specific legislation addressing sexting to protect juveniles. Importantly, by

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<sup>169</sup> H.B. 473, 128th Gen. Assemb., Reg. Sess. (Ohio 2010).

<sup>170</sup> Potter, *supra* note 150.

<sup>171</sup> Hoberock, *supra* note 39.

<sup>172</sup> S.B. 2871, 2010 Leg. Sess. (R.I. 2010).

<sup>173</sup> NCMEC, *supra* note 2.

<sup>174</sup> *Id.*

including parents, professionals, and the local community as a part of the solution, the responsibility is not placed exclusively on the government to solve the problem.

#### A. EDUCATION AND PARENTAL INVOLVEMENT

While parental vigilance alone cannot cure the sexting problem,<sup>175</sup> parents and other adults have a responsibility to take proactive measures to dissuade minors from sexting, and if sext images do exist, to remove them.<sup>176</sup> Encouraging involvement from parents and schools are also ways to deal with sexting.<sup>177</sup> Community involvement may include awareness campaigns. For example, the Asotin County, Idaho, sheriff's office recently presented sexting information to several county schools.<sup>178</sup> Several helpful resources exist on the Internet to raise awareness of the dangers of sexting.<sup>179</sup>

Parents have a special responsibility in the digital age to recognize the possible uses of cell phones and to protect the privacy of their children.<sup>180</sup> Only 9 percent of teens who sext have parents who restrict the number of text messages they can send, while 28 percent of teens who chose not to sext have limits set by their parents.<sup>181</sup> Thus, parents may discourage their children from sexting by simply setting texting limits.

Parents can also use technology to combat sexting. SMobile Systems Security Shield Parental Controls was a software system that allowed parents to track their children via GPS, to monitor calls and

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<sup>175</sup> Leary, *supra* note 27, at 39. See also Duncan, *supra* note 87, at 666–69.

<sup>176</sup> Smith, *supra* note 82, at 521.

<sup>177</sup> Calvert, *supra* note 32, at 34.

<sup>178</sup> Brandon Macz, *School Parents Hear About Internet, Sexting Dangers: Presentations at Heights Elementary is a Learning Experience*, LEWISTON MORNING TRIB., Feb. 10, 2010, available at 2010 WLNR 2812754.

<sup>179</sup> See, e.g., A THIN LINE, <http://www.athinline.org/> (last visited Aug. 31, 2011); *Net Cetera: Chatting With Kids About Being Online*, ONGUARD ONLINE, <http://www.onguardonline.gov/topics/net-cetera.aspx> (last visited Aug. 31, 2011).

<sup>180</sup> Kane & Delange, *supra* note 4, at 341.

<sup>181</sup> Pew Research Ctr., *supra* note 5, at 10.



text messages, and to view their contacts.<sup>182</sup> This software was honored with the “2009 Outstanding Product” award by Disney’s iParenting.com.<sup>183</sup> Another software option is Net Nanny, which has similar capabilities.<sup>184</sup>

Child-safe cell phones are another practical solution.<sup>185</sup> If a parent does not want to buy a special phone, major wireless companies offer options to make cell phones safe for teenagers. With AT&T Smart Limits, parents can restrict the number of text messages that their child may receive, and with whom their child may exchange texts.<sup>186</sup> Verizon Usage Controls similarly allows parents to restrict the text messages of their child, in addition to giving parents the power to limit calls.<sup>187</sup>

Granted, some of these options are geared towards younger children; most teenagers are not going to readily accept these limitations.<sup>188</sup> Teenagers, however, would probably rather submit to

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<sup>182</sup> Juniper Networks recently acquired SMobile Systems Inc., and the new software name is Junos Pulse. Although the new software still has monitoring and control functionality, specific mention of parental monitoring has been removed for reasons unknown to the author. See MOBILE SECURITY SUITE, <http://www.juniper.net/us/en/products-services/software/junos-platform/junos-pulse/mobile-security> (last visited Aug. 31, 2011).

<sup>183</sup> *Disney’s iParenting.com Selects SMobile Systems Security Shield Parental Controls Edition as a “2009 Outstanding Product,”* MENTAL HEALTH WKLY. DIG., Aug. 24, 2009, available at 2009 WLNR 16250209.

<sup>184</sup> NET NANNY MOBILE, <http://www.netnanny.com/mobile> (last visited Aug. 31, 2011).

<sup>185</sup> For example, since discontinued, the LG Migo VX1000 allowed parents to set only four contacts that their child is allowed to call from that phone. THE KID-FRIENDLY PHONE, <http://www.lg.com/us/mobile-phones/LG-VX1000.jsp> (last visited Aug. 31, 2011).

<sup>186</sup> AT&T SMART LIMITS FOR WIRELESS, <http://www.wireless.att.com/learn/articles-resources/parental-controls/smart-limits.jsp> (last visited Aug. 31, 2011).

<sup>187</sup> VERIZON WIRELESS USAGE CONTROLS, [https://wbillpay.verizonwireless.com/vzw/nos/uc/uc\\_home.jsp](https://wbillpay.verizonwireless.com/vzw/nos/uc/uc_home.jsp) (last visited Aug. 31, 2011).

<sup>188</sup> This may change as the popular Apple iPhone may one day also provide parental control, as indicated by a patent that the U.S. Patent and Trademark Office recently issued to Apple. Text-based Commc’n Control for Pers. Commc’n Device, U.S. Patent No. 7,814,163 (filed Jan. 3, 2008) (issued Oct. 12, 2010). The true purpose of this patent is not without controversy. Some refer to this as the “anti-sexting” patent, while others say that this claim is misleading. See, e.g., John D. Sutter, *Apple Patents ‘Anti-Sexting’ Technology*, CNN, Oct. 13, 2010, [http://articles.cnn.com/2010-10-13/tech/apple.sexting.patent\\_1\\_text-messages-sexting-apple?\\_s=PM:TECH](http://articles.cnn.com/2010-10-13/tech/apple.sexting.patent_1_text-messages-sexting-apple?_s=PM:TECH); John C. Dvorak, *Apple’s Anti-Sexting Patent is Misleading*, PCMAG.COM, Oct. 13, 2010, <http://www.pcmag.com/article2/0,2817,2370709,00.asp>.

these restrictions than to have their cell phones taken away completely as some have suggested.<sup>189</sup> Taking cell phones away is not always a practical solution in today's society when communication is essential to busy families. Still, some line should be drawn. Unfortunately, there are likely to be some teenagers for whom parental line-drawing will not make an impact. In such cases, the government should step in.

#### B. GOVERNMENT IS JUSTIFIED IN LEGISLATING JUVENILE SEXTING

The government may legitimately intervene to punish minors for sexting based on the doctrine of *parens patriae*.<sup>190</sup> *Parens patriae* is the "doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, [especially] on behalf of someone who is under a legal disability to prosecute the suit,"<sup>191</sup> such as a minor. The U.S. Supreme Court has acknowledged that parental rights are not absolute, and that the state can act on behalf of a minor as *parens patriae*.<sup>192</sup>

Opponents of punishment for juvenile sexting offenders turn to the evolution of child prostitution laws for support.<sup>193</sup> Child prostitutes, although involved in self-destructive behavior, were once treated as offenders.<sup>194</sup> Today, however, modern law treats them as victims of sexual exploitation.<sup>195</sup> This analogy does not extend to self-created sexts, however, because the sole victim in child prostitution situations is the child.<sup>196</sup> When juveniles engage in sexting, whether or not coerced to do so, at least two parties are victimized by the practice.

Another argument against prosecuting sexting claims is that sexual intercourse is not illegal if both teenagers engaged in sexual

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<sup>189</sup> See *I don't Think the way to Stop Teen Sexting is to Make it a Crime*, MERRILLVILLE POST-TRIB., Feb. 4, 2010, at 10, available at 2010 WLNR 2661014.

<sup>190</sup> See Leary, *supra* note 27, at 26.

<sup>191</sup> BLACK'S LAW DICTIONARY 1221 (9th ed. 2009).

<sup>192</sup> See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944). See also *Troxel v. Granville*, 530 U.S. 57, 88 (Stevens, J., dissenting) (citing cases).

<sup>193</sup> Leary, *supra* note 27, at 28.

<sup>194</sup> *Id.* at 28–29.

<sup>195</sup> *Id.* at 29.

<sup>196</sup> *Id.* at 31.

activities are between the ages of sixteen and eighteen, depending on the state.<sup>197</sup> Because of this, there is “no underlying crime at all,”<sup>198</sup> thus there should be no punishment.<sup>199</sup> If teenagers are old enough to decide to have consensual sex, they should be able to decide whether to document their own sexual encounters via sexting.<sup>200</sup> This conclusion ignores a major demographic engaged in sexting: children under sixteen.<sup>201</sup> In almost every state, children under the age of sixteen cannot legally consent to having sexual intercourse.<sup>202</sup> The statutory rape laws that provide punishment for sexual activity between minors are analogous to proscribing sexting among juveniles.<sup>203</sup> Because both minors engaged in sexual intercourse commit the crime of statutory rape, either child or both children may be charged with the crime.<sup>204</sup> If the sexual activities of teenagers under the age of consent are illegal and they can be criminally charged for engaging in those activities, it follows that documenting that activity via sexting may be proscribed.<sup>205</sup>

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<sup>197</sup> Humbach, *supra* note 43, at 470. *See also Worldwide Ages of Consent*, AVERT, <http://www.avert.org/age-of-consent.htm> (last visited Aug. 31, 2011).

<sup>198</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 254 (2002).

<sup>199</sup> Humbach, *supra* note 43, at 470.

<sup>200</sup> Smith, *supra* note 82, at 525, 525 nn.73–74.

<sup>201</sup> *See, e.g., supra* text accompanying notes 8–17, 38, 92, 95.

<sup>202</sup> *Worldwide Ages of Consent, supra* note 197.

<sup>203</sup> Leary, *supra* note 27, at 32.

<sup>204</sup> *Id.* The U.S. Supreme Court upheld the conviction of a male for statutory rape, even when *both* teenagers engaging in sex were under the age of consent. *Michael M. v. Superior Court*, 450 U.S. 464, 475–76 (1981). Justice Stewart noted that the female could also be charged with aiding and abetting. *Id.* at 477 n.5 (Stewart, J., concurring).

<sup>205</sup> Sexual activity between two minors may go unprosecuted in some states. Even so, the statutory rape laws remain on the books for use by prosecutors when necessary. The same should be true with regard to sexting laws. For a brief synopsis of the various types of statutory rape laws in the United States, see Smith, *supra* note 82, at 525 n.75.

## C. SOME PUNISHMENT SHOULD BE PERMITTED

Because sexting situations vary widely, states need a flexible approach.<sup>206</sup> Prosecutors bear the onus to act responsibly, carefully exercising discretion when needed.<sup>207</sup> According to Lawrence Walters, a Florida attorney, “prosecutorial discretion and simple humanity” are called for with respect to sexting.<sup>208</sup>

Discretion is also appropriate from a prosecutor’s standpoint. When deciding whether to prosecute a teenager for sexting, Prosecutor Hutzel considers factors such as whether the minor sexted pictures of themselves on their own volition, the relative ages of the parties, and the purpose for sending the pictures.<sup>209</sup> Genesee County, Michigan, prosecutor David Leyton said, “I’m not looking to criminalize each and every person who [sexts]. But there are some instances where we would issue criminal charges.”<sup>210</sup> Leyton further stated, “Turning a juvenile into a criminal is a big step. I’d rather get them back on the right track. If I have to charge them as a criminal to do that, then I will.”<sup>211</sup> Enacting legislation specifically addressing sexting will give prosecutors the tools that they need to adequately protect juvenile sexters from themselves.

Since the juvenile offender model indicates success in the areas of rehabilitation and lower recidivism rates, there is some initial optimism that juvenile accountability for sexting will also work.<sup>212</sup> States are on the right track in enacting non-felony legislation to address sexting. In the meantime, prosecutors should continue to be creative. For example, Montgomery County, Dayton, Ohio prosecuting attorney Mathias H. Heck, Jr. implemented a diversion program for juvenile sexting offenders in which the juvenile offender must

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<sup>206</sup> Calvert, *supra* note 32, at 61.

<sup>207</sup> *Id.* at 63.

<sup>208</sup> Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 13 (2009).

<sup>209</sup> E-mail from Rachel Hutzel, Warren County Prosecutor, to author (Oct. 13, 2009, 14:02 EST) (on file with author). *See also* Calvert, *supra* note 32, at 27–32.

<sup>210</sup> RoNeisha Mullen, *Fad or Felony? Sexting a Troubling—and Growing—Trend*, FLINT JOURNAL, Apr. 17, 2009, at A1, available at 2009 WLNR 7351195.

<sup>211</sup> *Id.*

<sup>212</sup> Leary, *supra* note 27, at 44–45.

temporarily surrender his or her cell phone, perform community service, and attend education directed at responsible use of technology and communication devices.<sup>213</sup> Also in Ohio, two teenagers charged with sexting nude photos using their cell phones were sentenced to 100 hours of community service, counseling, and forced to relinquish their cell phones for thirty days.<sup>214</sup> Prosecutor Hutzel approved of the sentence, saying, "It sends a message to the teens of Warren County that this is not a joke, this is a serious issue that can have long lasting consequences."<sup>215</sup>

### CONCLUSION

Not all teenagers view sexting as harmless fun. Garrett Godsey wrote a song at the age of thirteen with his father to raise awareness of the problem of sexting.<sup>216</sup> The song, entitled "Digital Demon,"<sup>217</sup> portrays the problem of dissemination and loss of control of a single photograph: "Just one pic / she never should have sent / meant only for him / but he shared it with his friends / an unknown consequence / a loss of innocence."<sup>218</sup> As a result, the young lady in the song is

<sup>213</sup> Heck, *supra* note 15.

<sup>214</sup> *Mason Teens Sentenced for "Sexting,"* CINCINNATI ENQUIRER, May 11, 2009, [http://news.cincinnati.com/article/20090511/NEWS0107/305110014/Mason-teens-sentenced-for-\-sexting\-](http://news.cincinnati.com/article/20090511/NEWS0107/305110014/Mason-teens-sentenced-for-\-sexting\-.).

<sup>215</sup> *Id.*

<sup>216</sup> E-mail from Scott Godsey to author (Jan. 7, 2010 16:51 EST) (on file with author); Charlee Beasor, *Local Teens Take on "Sexting" with Video: Get REAL inC to Premier Finished Product in April*, HENDRICKS COUNTY FLYER, Dec. 23, 2009, available at 2009 WLNR 25826898. As an aside, when the author contacted Garrett Godsey on MySpace, Garrett's father replied, informing the author that he was proactive in monitoring his son's social networking activities and text messages. E-mail from Scott Godsey to author (Jan. 7, 2010 16:51 EST) (on file with author).

<sup>217</sup> GARRETT GODSEY & SCOTT GODSEY, *Digital Demon* (2009). As an avid music fan, the author is impressed with the song and Garrett's talent, and encourages readers to view a video of Garrett performing the song. DIGITAL DEMON BACK TO SCHOOL BASH 2009, <http://www.youtube.com/watch?v=DPAm7srC5EY> (last visited Aug. 31, 2011). The song is also available for download on iTunes. iTUNES, <http://itunes.apple.com/us/album/digital-demon/id348378031> (last visited Aug. 31, 2011). In addition, Get REAL inC produced a music video of the song. See FOR TEENS – BY TEENS, <http://www.thedigitaldemon.com/www.thedigitaldemon.com/Home.html> (last visited Aug. 31, 2011).

<sup>218</sup> GARRETT GODSEY & SCOTT GODSEY, *Digital Demon* (2009).

“haunted both day and night / by this digital demon.”<sup>219</sup> This song encourages teenagers to “stand up and fight / the digital demon.”<sup>220</sup> Even though the song is not necessarily about her, it was written after the tragic suicide of Jessica Logan to caution teenagers against making the same mistake.<sup>221</sup>

The arts provide one method that teenagers can use to influence their peers and deter them from sexting. Parents also need to be aware of the dangers that exist through their child’s use of cell phones. In addition, education and community involvement are keys to raising awareness of the potential consequences of sexting. Unfortunately, sometimes even these elements will not be enough. Legislation that specifically addresses sexting is needed both to avoid creating a whole generation of registered sex offenders and to prevent the tragic harms caused by the dissemination of sexual images by children. All of these components working in conjunction are a step in the right direction toward protecting children from potentially harming themselves.

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> E-mail, *supra* note 216; Beasor, *supra* note 216.