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Criminal Law—Teenage Sexting in Arkansas: How Special Legislation Addressing Sexting Behavior in Minors Can Salvage Arkansas's Teens' Futures

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CRIMINAL LAW—TEENAGE SEXTING IN ARKANSAS: HOW SPECIAL LEGISLATION ADDRESSING SEXTING BEHAVIOR IN MINORS CAN SALVAGE ARKANSAS'S TEENS' FUTURES

I. INTRODUCTION

Sexting: the sending of sexually explicit images or messages via cellular phone.[1] It is pervading our culture at all levels. Sexting was the focus of the infamous Congressman Weiner scandal during the summer of 2011,[2] has been talked about in pop culture on shows like *Glee*[3] and in magazines like *Cosmopolitan*,[4] and was even added to the *Oxford Dictionary* as a 2011 New Word.[5] While many find the practice questionable, it is perfectly legal behavior when it occurs between consenting adults over the age of majority.[6]

But what about when this behavior takes place between minors? Sexting has become a fairly common practice amongst teenagers. An August 2011 study by MTV and the Associated Press found that seven percent of teens between the ages of fourteen and seventeen had sent a sext.[7] Twenty-one percent of the teens and young adults surveyed said they had received a nude or semi-nude photo or video from someone else.[8] The abundance of technology at teens' disposal combined with teenage hormones seems to be

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1. *Sexting Definition*, OXFORD DICTIONARIES, http://oxforddictionaries.com/definition/sexting?region=us (last visited Oct. 28, 2012).

2. Chris Cuomo, Chris Vlasto & Devin Dwyer, *Rep. Anthony Weiner: 'The Picture Was of Me and I Sent It,'* ABC NEWS (Jun. 6, 2011), http://abcnews.go.com/Politics/rep-anthony-weiner-picture/story?id=13774605.

3. Mary Kay, *Sexting Goes Mainstream*, YOURSPHERE FOR PARENTS (Nov. 17, 2010), http://internet-safety.yoursphere.com/2010/11/sexting-goes-mainstream.html.

4. *The Sex Toy Hiding in Your Purse*, COSMOPOLITAN, http://www.cosmopolitan.com/sex-love/tips-moves/The-Sex-Toy-Hiding-in-Your-Purse?click=main_sr (last visited Mar. 8, 2012).

5. Cooper Smith, *'Sexting,' 'Retweet,' 'Cyberbullying,' Added to Concise Oxford English Dictionary*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2011/08/18/sexting-retweet-cyberbullying-concise-oxford-english-dictionary_n_930347.html (last updated Oct. 18, 2011); *see Sexting definition*, *supra* note 1.

6. The Arkansas Code has no provision against self-distribution of nude images between adults. For the purposes of determining whether an act constitutes child pornography, a "child" is defined as any person under the age of eighteen. ARK. CODE ANN. § 5-27-302(1) (LEXIS Supp. 2011).

7. Janice Gatti, *Executive Summary: 2011 AP-MTV Digital Abuse Study*, A THIN LINE, http://www.athinline.org/pdfs/MTV-AP_2011_Research_Study-Exec_Summary.pdf (last visited Mar. 8, 2012).

8. *Id.*

a perfect cocktail for sexting. However, there are often many consequences that teenagers do not consider.[9]

Beyond the risks of ridicule from peers, punishment by parents or schools, and the long-term effects of the existence of any pictures (because, in reality, digital content has an eternal lifespan), teens are also at risk of suffering harsh legal consequences when they engage in sexting.[10] These consequences vary by state and have been handled in different ways. For instance, some states have classified such actions by teens as felony child pornography offenses.[11] A guilty verdict can leave those teens labeled as convicted felons and sometimes require them to register as sex offenders.[12] Such consequences can devastate the future of a teenager by affecting college acceptances and career choices. Other states have chosen to enact special statutes with lessened sentences to handle sexting by minors.[13] These statutes offer the serious legal consequences needed to deter this behavior while alleviating the opportunity-crushing consequences that result from being a convicted felon and a sex offender at age fifteen.

Unlike these states, Arkansas has not enacted legislation to lessen the sentence for minors found guilty of sexting.[14] Teens who engage in sexting in Arkansas will face Class B felony charges[15] and will be considered for sex-offender status.[16] At this time, there has not been an impactful case in Arkansas involving minors and sexting, but the prevalence of the trend makes the possibility almost inevitable.

This note seeks to explore the consequences of sexting by those who, due to their age, are unable to understand the consequences of their actions

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9. Eric E. Harrison, *Cyber Stupidity: Exposing kids to the pitfalls of inappropriate online posts*, ARKANSAS DEMOCRAT-GAZETTE, Sept. 14, 2011, at 1E.

10. *Id.*

11. Minors may face felony child pornography charges in states where the criminal statutes include charges for possession, distribution, or production of child pornography (in the case of self-produced pictures). *See, e.g.*, Miller v. Skumanick, 605 F. Supp. 2d 634, 645 (M.D. Pa. 2009) (charging pursuant to 18 PA. CONS. STAT. § 6312 (2008)), *aff'd sub nom.* Miller v. Mitchell, 598 F.3d 139 (3rd Cir. 2010); A.H. v. State, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007) (charging pursuant to FLA. STAT. ANN. § 827.071(3) (LexisNexis 2005)); State v. Canal, 773 N.W.2d 528, 529 (Iowa 2009) (charging pursuant to IOWA CODE § 728.2 (2005)).

12. *See* discussion *infra* Part II.

13. *See, e.g.*, R.I. GEN. LAWS § 11-9-1.4 (2011), discussed *infra* Part III.A.3.; TEX. PENAL CODE ANN. § 43.261 (West 2011), discussed *infra* Part III.A.4.

14. The only Arkansas law that has been proposed in relation to "sexting" was an anti-stalking law to protect minors from adult predators seeking sexual relations. S.B. 741, 88th Gen. Assemb., Reg. Sess. (Ark. 2011). This bill was not passed and was adjourned sin die on April 27, 2011. *Bill Status History: SB741*, ARKANSAS STATE LEGISLATURE 88TH GENERAL ASSEMBLY, http://www.arkleg.state.ar.us/assembly/2011/2011R/Pages/BillInformation.aspx?measureno=sb741 (last visited Mar. 9, 2012).

15. ARK. CODE ANN. § 5-27-303 (Repl. 2006).

16. *Id.* § 12-12-905.

and seeks to recommend a solution to reduce unduly long lasting consequences while still imposing punishment to offenders in order to deter the behavior. First, this note will first discuss two cases in which teens were prosecuted under child pornography laws and the issues raised therein.[17] Then, it will consider the current law in Arkansas and the consequences of prosecution under that law.[18] Next, this note will analyze responsive sexting legislation enacted in other states in 2011, apply the statutes to test cases, and critique their effectiveness.[19] Those critiques will be used to create a checklist for the Arkansas legislature to consider when creating special sexting legislation for Arkansas.[20] The note will conclude with a summation of why Arkansas needs special legislation to address sexting and what type of legislation would prove most beneficial for Arkansas's youth.[21]

II. BACKGROUND

A. Prosecution of Sexting Teenagers Under Current Child Pornography Laws: First Amendment Issues, Questions About the Right to Privacy, and Overly Harsh Punishments Ensue

As teenage sexting became more common, law enforcement and the judicial system were forced to address this issue. At first, prosecutors typically looked to existing law for the tools necessary to charge teenagers for sexting in an attempt to curb such behavior.[22] Suppressing this risky behavior was important to prosecutors due to the concern that once a digital image was shared, whether self-produced or otherwise, it could be disseminated as obscene child pornography.[23] Many current child pornography laws carry long-lasting punishments to deter adults from preying on children; however, when the same sentence is applied to a teenager, it can devastate his or her future. Additionally, such charges against minors under existing law have been challenged on constitutional grounds of the teenagers' rights to expression[24] and privacy.[25]

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17. *See infra* Part II.A.
18. *See infra* Part II.B.
19. *See infra* Part III.A.
20. *See infra* Part III.B.
21. *See infra* Part IV.
22. Lynn Neary, TALK OF THE NATION: *'Sexting': Racy Teen Messaging Could Be Illegal*, NPR (Feb. 18, 2009), http://www.npr.org/templates/transcript/transcript.php?storyId=100826247.
23. *Id.*
24. Miller v. Skumanick, 605 F. Supp. 2d 634, 640 (M.D. Pa. 2009), *aff'd sub nom.* Miller v. Mitchell, 598 F.3d 139 (3rd Cir. 2010).
25. A.H. v. State, 949 So. 2d 234, 236 (Fla. Dist. Ct. App. 2007).

No cases involving teenage sexting have been reported in Arkansas. Therefore, the following cases, *Miller v. Skumanick*[26] and *A.H. v. State*,[27] will be used to demonstrate how teens have been charged under child pornography laws in other states and to explain the constitutional arguments advanced by the teens.

1. Miller v. Skumanick

In October 2008, Pennsylvania's Tunkhannock School District confiscated several students' cell phones and discovered photos of scantily clad and semi-nude teenage girls.[28] The girls involved were also students in the school district.[29] The teenage boys had texted photos of the scantily clad girls between themselves and to other boys.[30] The school district turned the photos over to the prosecuting attorney, George Skumanick, Jr.,[31] who said he would prosecute the students involved if they did not attend a counseling and education program.[32] On February 12, 2009, Skumanick held a meeting with the students' parents where he threatened criminal charges if the parents did not consent to the students' enrollment in the counseling program.[33] All but one parent denied consent.[34]

Instead of consenting, several parents contested the program and the allegations against their children by seeking an injunction from the court.[35] The parents asserted that there were no grounds for dissemination charges against their daughters because the girls insisted that they were not the disseminators of the photos and that the photos were shared without their permission.[36] The parents also contended that the photographs in question did not meet the statutory definition of child pornography.[37]

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26. 605 F. Supp. 2d 634.
27. 949 So. 2d 234.
28. *Miller*, 605 F. Supp. 2d at 637.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 638.
33. *Id.*
34. *Miller*, 605 F. Supp. 2d at 638.
35. *Id.* at 640.
36. *Id* at 639.
37. *Id.* The court stated that it was reasonably likely that the plaintiffs would win their argument that the photographs of Marissa Miller, Grace Kelly, and Nancy Doe, the plaintiffs in this case, did not fall under the child pornography statute because they did not depict a "prohibited sexual act," a requisite statutory element of child pornography under the statute. *Id.* at 645. Pennsylvania's Sexual Abuse of Children statute defines "prohibited sexual act" for the purposes of defining child pornography as "sexual intercourse . . . masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person

The parents then filed a complaint against Skumanick alleging "they [were] being compelled—through threat of a prosecution that clearly lacks any basis—to participate in a 'reeducation' program with which they disagree."[38] The court found that the State was threatening prosecution in retaliation to the plaintiffs' decision to exercise their constitutional rights to abstain from the program: the students' First Amendment freedom from government-compelled speech and the parents' Fourteenth Amendment right to rear and educate their children as they saw fit.[39] The court ordered a temporary restraining order against Skumanick to enjoin him from threatening baseless prosecution of the teens.[40]

Had the parents not filed the complaint, and had the court not issued the temporary restraining order, Skumanick would have proceeded with the charges.[41] Although the charges seemed to be baseless,[42] if the girls had been charged under Pennsylvania's existing laws, they could have each been found guilty of a felony in the second degree for "[p]hotographing, videotaping, depicting on computer or filming sexual acts" and a felony in the third degree for the "[d]issemination of photographs, videotapes, computer depictions and films."[43] Any individual found guilty of either crime is required by Pennsylvania law to register as a sex offender for a period of ten years.[44] Two of the plaintiffs, Marissa Miller and Grace Kelly, would have been registered sex offenders until age twenty-five and convicted felons for life if prosecutions were successful under Pennsylvania's existing child pornography laws.[45]

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who might view such depiction." *Id.* at 645 (quoting 18 PA. CONS. STAT. § 6312(a) (2008)). The photograph with Miller depicted the girl in an opaque bra. *Id.* at 639. The photograph with Doe showed her wrapped in a towel with exposed breasts. *Id.* Because neither girl was depicted in a sexual act or with exposed genitals, it was reasonably likely that neither image met Pennsylvania's statutory requirement. *Id.* at 645.

38. *Id.* at 643.

39. *Id.* at 643–44. The re-education program required that all students involved write an essay explaining what they did wrong. Because the students felt they did not do anything wrong, to force them to say otherwise would be government-compelled speech. *Id.* at 644.

40. *Miller*, 605 F. Supp. 2d at 647.

41. *Id.* at 638. Skumanick threatened to charge the teens many times. *Id.* Other than the plaintiffs in this case, all of the other parents and students involved signed the "informal adjustment" to the charges. *Id.* at 640. Skumanick only "temporarily deferred" prosecution of the plaintiffs in this case until their attorneys could investigate the matter. *Id.*

42. *Id.* at 645–46.

43. 18 PA. CONS. STAT. § 6312 (2008).

44. *Id.* § 9795.1.

45. *Miller*, 605 F. Supp. 2d at 638. Miller and Kelly were fifteen-years-old at the time Skumanick was threatening prosecution. *Id.* at 639. Doe's age was not listed in the opinion.

2. A.H. v. State

This 2007 case involved a Florida teen's appeal of her adjudication of delinquency for a violation of Florida Statutes section 827.071(3): producing, directing or promoting a photograph or representation that she knew included sexual conduct of a child.[46] On March 25, 2004, A.H., age sixteen at the time of appeal, and her boyfriend, J.G.W., age seventeen at the time of the appeal, took photographs of themselves while naked and engaged in sexual behavior.[47] A.H. and J.G.W. took the photographs with a digital camera and emailed the photographs to another computer from A.H.'s home.[48] Neither teen showed the photographs to a third party.[49]

A.H. and J.G.W. were each charged with one count of producing, directing or promoting a photograph or representation that she or he knew included sexual conduct of a child.[50] A.H. filed a motion to dismiss the charge and argued that the statute used to support the charge was unconstitutional as it applied to her because it violated her privacy rights.[51] The motion was denied, and A.H. entered a nolo contendere plea three weeks later.[52] A.H. then appealed.[53]

On appeal, A.H. asserted that the trial court erred in denying her motion to dismiss and argued that the child pornography statute was unconstitutional as applied to her.[54] Relying on *B.B. v. State*,[55] A.H. argued that when she engaged in sexual conduct, her privacy rights under Florida's constitution were activated.[56] Once her privacy rights were activated under Florida's constitution, her sexual conduct could only be regulated after a showing of a compelling state interest and that the regulation is furthering the interest in the least intrusive manner.[57]

A.H. argued that because she and her boyfriend were close in age and because neither party showed the pictures to a third party, the only interest the government could have was "the protection of the co-defendants from engaging in sexual behavior until their minds and bodies had matured."[58]

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46. A.H. v. State, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007).
47. *Id.*
48. *Id.*
49. *Id.* The photographs were discovered when A.H. voiced concern to law enforcement personnel about the possibility of J.G.W. disseminating the images. *Id.* at 237–38.
50. *Id.* at 235.
51. *Id.*.
52. *A.H.*, 949 So. 2d at 236.
53. *Id.*
54. *Id.*
55. B.B. v. State, 659 So. 2d 256 (Fla. 1995).
56. *A.H.*, 949 So. 2d at 236.
57. *Id.*
58. *Id.*

A.H. then argued that prosecuting her under child pornography laws was not the least intrusive way to further this interest.[59]

The court disagreed with A.H.; instead, it stated that the compelling state interest was not to prevent the teens from having sex, but rather was "to protect minors from exploitation by anyone who induces them to appear in a sexual performance and shows that performance to other people."[60] The court did not believe that privacy rights could be invoked because the very act of memorializing the sexual encounter indicated that the parties were not likely to keep the photographs private forever, especially because the parties involved were minors and could not expect their relationship to endure a lifetime.[61] The court reasoned that "if you put this type of material in a teenager's hands[,]. . . at some point either for profit or bragging rights, the material will be disseminated to other members of the public,"[62] and that would violate the State's compelling interest.[63]

A.H. asserted that the State only had a compelling interest if the images were viewed by a third party; the court rejected this immediately by citing the legislature's language in the statute prohibiting any *production* of child pornography, even before viewing.[64] The compelling State interest was that the images never be produced.[65]

A.H. received probation at the entering of her nolo contendere plea.[66] Despite a lack of jail time, the nolo contendere plea made A.H. a convicted felon.[67]

B. Existing Law in Arkansas and the Consequences Arkansas's Teens May Face as a Result of Sexting

1. *Existing Arkansas Law*

While there have been no reported cases involving teenagers and sexting in Arkansas, it is possible to predict what the outcome of cases similar to *Miller v. Skumanick* and *A.H. v. State* would be by examining Arkansas's current laws. Arkansas has no existing legislation pertaining to sexting

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59. *Id.*

60. *Id.* at 236–37 (quoting State v. A.R.S., 684 So. 2d 1383, 1387 (Fla. Dist. Ct. App. 1996)). The court also noted that teenagers do not have an express right to have sex with each other, a premise A.H. implicitly relied on in her argument. *Id.* at 237.

61. *Id.*

62. *A.H.*, 949 So. 2d at 237.

63. *Id.* at 238.

64. *Id.*

65. *Id.* at 239.

66. *Id.* at 236.

67. FLA. STAT. ANN. § 827.071(3) (LexisNexis 2011). Anyone who violates this subsection is guilty of a second-degree felony. *Id.*

specifically, so the existing child pornography statutes and punishments are the laws that would apply in a case involving teenage sexting where the teen is charged as an adult.

The applicable provisions of the Arkansas Code are section 5-27-303[68] and section 5-27-304.[69] Section 5-27-303 outlines the crime of producing child pornography; it classifies the offense as a Class B felony for the first offense and a Class A felony for any subsequent offense.[70] Section 5-27-304 outlines the crimes of distribution and possession of child pornography; it classifies the first offense as a Class C felony and any subsequent offense as a Class B felony.[71] It is important to note that knowingly receiving, possessing, or viewing an image depicting a child participating or engaging in sexually explicit conduct qualifies under the language of this section.[72] It is also important to note that "[l]ewd exhibition of . . . [t]he breast of a female" falls within the definition of "sexually explicit conduct" in section 5-27-302, the definition section for the child pornography statutes.[73]

When reading these statutes together, one can easily foresee the outcome of the following hypothetical situation. Suppose a teenage girl, Grace Girlfriend, texted a picture of her exposed breasts to her teenage boyfriend, Brad Boyfriend. If charged as an adult, she would be guilty of a Class B felony for production of child pornography, a Class C felony for distributing the photo, and possibly an additional charge if she kept the image on her phone after texting him the photo.[74] If Brad asked for the photo, he would be delinquent of a Class C felony just by receiving the photograph. If he keeps it, he could possibly face an additional charge. If he forwards the photo, that would likely result in yet another charge. Within the few minutes needed to take the photograph, send it as a multimedia message, and receive it, two teenagers could be facing up to six felony charges between them, even if no one ever sees the image.[75]

To continue the hypothetical, assume Grace and Brad break up a few weeks later (after all, this is the tenth grade, and relationships do not last too long). Brad, upset that Grace broke up with him, forwards the image to his friends. That act creates an additional felony charge for Brad, as well as

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68. ARK. CODE ANN. § 5-27-303 (Repl. 2006).
69. *Id.* § 5-27-304.
70. *Id.* § 5-27-303.
71. *Id.* § 5-27-304.
72. *Id.*
73. *Id.* § 5-27-302 (Supp. 2011).
74. For the purposes of this hypothetical, the author assumes that all teenagers involved will be charged as adults.
75. Like FLA. STAT. ANN. § 827.071 in *A.H.*, third-party involvement is not necessary to trigger a violation of the child pornography statute.

felony charges for anyone who receives the message. If any of Brad's friends forward the message, more charges ensue.

Further, assume that Grace and Brad are prosecuted as adults for the felony charges. If found guilty, the teens will face jail time, fines, or probation. In addition, they will be labeled as "convicted felons" for the rest of their lives. They would also likely be registered as sex offenders under the Sex Offender Registration Act of 1997.[76] This Act provides that any person adjudicated guilty of section 5-27-303, among others, will be registered as a sex offender.[77] If Grace and Brad were adjudicated guilty under Arkansas's existing child pornography laws, they would be required to register as sex offenders.[78]

2. *The Consequences of Adding "Convicted Felon" and "Sex Offender" to a Teen's Résumé*

While the immediate legal consequences of sexting are scary enough, there are also long-lasting consequences when teens are labeled as convicted felons or registered sex offenders. A person that is registered as a sex offender in Arkansas may apply to terminate his obligation to register, but that is not an available option until fifteen years after release from incarceration or fifteen years after having been placed on probation.[79] The court will grant termination of the obligation to register if the sex offender shows by a preponderance of the evidence that he has been released or on probation for at least fifteen years and that he is no longer a threat to the safety of others.[80] During a convicted teen's time on the registry, she must inform law enforcement ten days before any move or change in employment, education, or training.[81] Considering the frequency with which young people move, all of the registry requirements could become quite burdensome, especially when the punishment is considerable: failure to follow these guidelines will result in additional felony charges.[82]

As a convicted felon, the teen loses voting and jury-duty rights before she even gets them, faces lawful discrimination when seeking employment, and faces general stigma. Convicted felons in Arkansas are not permitted to vote while incarcerated or on parole.[83] This will not affect teenage convicted

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76. ARK. CODE ANN. § 12-12-901 *et seq.* (Repl. 2009).
77. *Id.* § 12-12-905.
78. *See id.*
79. *Id.* § 12-12-919(b)(1)(A)(i).
80. *Id.* § 12-12-919(b)(2).
81. *Id.* § 12-12-906(c)(1)(A)(ii).
82. ARK. CODE ANN. § 12-12-904 (Repl. 2009).
83. *Voter Registration Information*, ARKANSAS SECRETARY OF STATE, http://www.sos.arkansas.gov/elections/Pages/voterRegistration.aspx (last visited Feb. 25,

felons at first, but it will have an impact as the teens reach voting age and for a number of years after, depending on the individual's sentence. Arkansans with felony convictions are also barred from jury duty.[84] This bar is never removed and affects the felon's right to both state and federal jury duty.[85] In addition to being stripped of the fundamental rights of democracy, convicted felons endure lawful discrimination while applying for employment when they are forced to check "the box"—the box indicating a prior felony conviction.[86] Once "the box" has been checked, employers in both the private and public sector in Arkansas may discriminate against anyone with a criminal record, regardless of the applicant's qualifications.[87]

Even in the face of all of this adversity, some convicted felons and registered sex offenders have found the "lifetime of shame, contempt, scorn, and exclusion" that follows the actual sentence to be the most difficult aspect of their conviction.[88] The stigma of the label "convicted felon" can seem like a "badge of inferiority [that] remains with you for the rest of your life, relegating you to a permanent second-class status."[89] Registered sex offenders often face "social pariah status" and can have a hard time finding a place to live or part-time employment once their status is known.[90]

Stripping teens of democratic rights, erecting roadblocks to their future careers, and subjecting them to a "lifetime of shame" is not consistent with the central aim of the juvenile justice system: rehabilitation.[91] The juvenile justice system struggles with finding a balance between the societal demand of accountability and the State's interest in rehabilitating young adults.[92]

2012). A convicted felon may be registered to vote after he has provided proof to the county clerk that he has been discharged from probation or satisfied the terms of his imprisonment and has paid all fees, fines, court costs, and restitution. ARK. CONST. amend. 51, § 11(d)(2).

84. ARK. CODE ANN. § 16-31-102(a)(4); *Arkansas Juror's Web Guide*, ARKANSAS JUDICIARY, https://courts.arkansas.gov/jury/Jury%20Duty%20Web%20Guide.cfm#faq (last visited Feb. 25, 2012).

85. ARK. CODE ANN. § 16-31-102(a)(4); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 119 (9th ed. 2010). A convicted felon may regain his right to jury duty if he is pardoned. ARK. CODE ANN. § 16-31-102(a)(4).

86. ALEXANDER, *supra* note 85, at 146.

87. *After Prison: Roadblocks to Reentry*, LEGAL ACTION CENTER, http://lac.org/roadblocks-to-reentry/upload/reportcards/8_Image_Arkansas%20final.pdf (last visited Feb. 25, 2012).

88. ALEXANDER, *supra* note 85, at 139.

89. *Id.*

90. David Koon, *Sympathy for the Devil: Police and Other Experts Say Some of Our Laws on Sex Offenders May Be Doing More Harm Than Good*, ARKANSAS TIMES (Jan. 25, 2012), http://www.arktimes.com/gyrobase/sympathy-for-the-devil/Content?oid=2033742&showFullText=true.

91. Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777, 778–79 (2002).

92. *Id.* at 778.

Where the crime is of a non-violent nature, as with sexting, does the need for accountability rise so far that it should overwhelm rehabilitation? Prosecuting sexting under Arkansas's current child pornography laws would have that effect. Introducing new legislation with a lesser sentence tailored for minors would punish teens, hold them accountable, and allow them to emerge from punishment with intact democratic rights and a still-promising future.

III. AN ALTERNATIVE TO APPLYING CHILD PORNOGRAPHY LAWS TO JUVENILE SEXTING: QUIT PUTTING OUR TEENS IN JAIL

A. Laws in Other States and Their Effectiveness

Some states were dissatisfied with holding their youth out as felons and sex offenders due to the mistakes they made as teens.[93] Such states have created special legislation applying to sexting as an alternative to the harsh punishments provided by existing child pornography laws.[94] Rather than saddling teens with a harsh punishment and a lifelong label, these states have chosen to scale back the charges imposed on minors for producing, possessing, or distributing nude or semi-nude photos of themselves or other minors.[95] Each of the seventeen jurisdictions that have enacted legislation has taken a different approach to the problem and codified punishments that it considered fair.[96] Objectively analyzing some of the most recently passed statutes and applying them to several hypothetical cases will reveal the advantages and disadvantages to each approach.

1. *Test Suites for Statutory Analysis*

A 2009 article published in the Tennessee Law Review examined the earliest legislation on sexting.[97] The article looked at proposed sexting stat-

93. Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context*, 115 PENN ST. L. REV. 135, 150 (2010).

94. *Id.* at 159.

95. *See infra* Part III.A.2–4, discussing the legislative responses of Florida, Rhode Island, and Texas.

96. Pam Greenberg, *2009 "Sexting" Legislation,"* NAT'L CONFERENCE OF STATE LEGISLATURES (Sept. 1, 2010), http://www.ncsl.org/issues-research/telecom/sexting-legislation-2009.aspx; Pam Greenberg, *2010 Legislation Related to "Sexting,"* NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 4, 2011), http://www.ncsl.org/issues-research/telecom/sexting-legislation-2010.aspx [hereinafter *2010 Sexting Legislation*]; Pam Greenberg, *2011 Legislation Related to "Sexting,"* NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 23, 2012), http://www.ncsl.org/default.aspx?tabid=22127 [hereinafter *2011 Sexting Legislation*].

97. W. Jesse Weins & Todd C. Hiestand, *Sexting, Statutes, and Saved by the Bell: Introducing a Lesser Juvenile Charge with an "Aggravating Factors" Framework*, 77 TENN. L.

utes from four states and applied each statute to five test suites using characters from the early 1990s teen show *Saved by the Bell*.[98] This method allowed the reader to assess the coverage of the statute to determine where it was effective and where it was lacking. This note will use the same factual scenarios from the Tennessee article to examine the 2011 legislation. The test suites are as follows:

> **Case 1:** Kelly Kapowski engages in "lovebird sexting" by using her cell phone to take and send a nude image of herself to her boyfriend, Zack Morris.[99]
>
> **Case 2:** Zack, after the couple's breakup a few weeks later, decides to send the same image to some friends.[100]
>
> **Case 3:** One of Zack's friends forwards the message to A.C. Slater, who opens it without knowing its contents. After seeing it, Slater promptly forgets about it, along with the rest of the messages he receives, and it remains on his phone.[101]
>
> **Case 4:** "Screech" Powers finally convinces Lisa Turtle to have sex with him. During sex, unbeknownst to Lisa, Screech records a portion of the event with his cell phone. Later, he sends the video to some friends.[102]
>
> **Case 5:** Jessie Spano, wanting some quick cash, uses her cell phone to take and send a nude image of herself to a middle-aged man for $1,000.[103]

The article also discussed the relative culpability of the actors. This is an important consideration because "ideally, in a just system, the punishment we potentially inflict for violations of the law should only occur if, first, the wrongdoer caused harm to society, and second, he or she morally deserves to be punished."[104]

REV. 1, 33–49 (2009). Only three states had enacted legislation at the time of the article's publication: Vermont, Nebraska, and Utah. *Id.* at 34–45. The authors also examined a piece of proposed legislation from Ohio that was never passed. *Id.* at 45–47. The same bill was proposed in the 2010 and 2011 sessions as well, but was last reported as being in the state's House Committee on Criminal Justice. Greenberg, *2010 Sexting Legislation*, *supra* note 96; Greenberg, *2011 Sexting Legislation*, *supra* note 96; Pam Greenberg, *2012 Sexting Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES (Oct. 26, 2012), http://www.ncsl.org/issues-research/telecom/sexting-legislation-2012.aspx.

98. Weins & Hiestand, *supra* note 97, at 34–47.

99. *Id.* at 30.

100. *Id.*

101. *Id.* at 30–31.

102. *Id.* at 31.

103. *Id.*

104. Joshua Dressler, *The Wisdom and Morality of Present-Day Criminal Sentencing*, 38 AKRON L. REV. 853, 854 (2005).

Based on the scenarios described above, Slater seems to be the least culpable of the actors, as he received an unsolicited image that he neglected to delete.[105] Kelly and Zach would be next on the spectrum of culpability.[106] Kelly did produce, possess, and distribute an inappropriate image, but she was motivated by her affection for Zack rather than any intent to inflict harm.[107] Zack's distribution of the image makes it much more likely that the image will become widespread amongst peers or that it may even be used as child pornography.[108] His motivation to spite Kelly after their failed relationship is common amongst teens.

There is a shift between the culpability levels of Slater, Kelly, and Zack, and that of Screech or Jessie Spano.[109] Screech is more culpable because he produced and distributed the video without Lisa's consent.[110] This could be considered bullying or cyberbullying because it is such a betrayal of trust and is likely to affect Lisa's reputation and self-esteem.[111] Screech is also more culpable because he, like Zack, spread the image and increased the likelihood that it will be passed to others.[112]

Jessie is highly culpable because she exploited her body for money;[113] there was no intimacy between her and the buyer of the picture. The man who purchased the picture did so illegally and now possesses the image illegally.[114] He is also likely to distribute the image to others who will use the image for child pornography.[115]

By applying the recently enacted sexting legislation from Florida, Rhode Island, and Texas to these test suites, it is possible to evaluate whether the results are consistent with societal views on culpability. Analysis of existing statutes also reveals the strengths and potential weaknesses of the respective statutes and provides the best means of highlighting provisions for consideration in new legislation regarding teenage sexting. Taking into account the strengths and weaknesses of enacted statutes would fortify special sexting legislation written for Arkansas.

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105. Weins & Hiestand, *supra* note 97, at 31.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 31–32.
111. For general information on cyberbullying and a discussion of responsive Arkansas legislation, see Leah M. Ward, Comment, *Suspended on Saturday? The Constitutionality of the Cyberbullying Act of 2007*, 62 ARK. L. REV. 783 (2009) (discussing ARK. CODE ANN. § 6-18-514 (Repl. 2007)).
112. Weins & Hiestand, *supra* note 97, at 32.
113. *Id.*
114. *Id.*
115. *Id.*

2. *Florida*

The governor of Florida signed H.B. 75, Offense of Sexting, into legislation on June 21, 2011.[116] The bill was codified as Florida Statute section 847.0141 and became effective on October 1, 2011.[117]

This statute addresses both distribution and possession of nude images and provides for graduated punishments that increase in severity with the frequency of the crime.[118] A minor commits the distribution offense of sexting under section 847.0141(1)(a) if she "[u]ses a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another minor any photograph or video of any person which depicts nudity . . . and is harmful to minors . . . ."[119] A minor commits the possession offense of sexting under section 847.0141(1)(b) if she "[p]ossesses a photograph or video of any person that was transmitted or distributed by another minor which depicts nudity . . . and is harmful to minors . . . ."[120] The minor may raise an affirmative defense to possession if he (1) did not solicit the image, (2) took reasonable steps to tell his parents or a school official about the image, and (3) did not forward the image to anyone else.[121]

Florida Statute section 847.0141 subsequently provides a basis of punishment that increases with each finding of guilt under plea, trial, or adjudicatory hearing.[122] The first offense is noncriminal with eight hours of community service and a $60 fine; the second offense is a first-degree misdemeanor, punishable by up to one year of jail time; and the third offense is a third-degree felony, punishable by up to five years of jail time.[123]

The new legislation is silent regarding the production of an image, so production of the nude image of a minor may still fall under Florida's child pornography laws.[124] Florida's child pornography statute provides that "promoting a sexual performance by a child" is a second-degree felony punishable by up to fifteen years of imprisonment.[125]

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116. Greenberg, *2011 Sexting Legislation*, *supra* note 96.

117. FLA. STAT. ANN. § 847.0141 (LexisNexis 2011).

118. *Id.*

119. *Id.* § 847.0141(1)(a).

120. *Id.* § 847.0141(1)(b).

121. *Id.* § 847.0141(b)(1)–(3). The statute does not include an affirmative defense for distribution. *Id.*

122. *Id.* Multiple offenses committed within a twenty-four-hour period, however, are treated as only one count of the crime. *Id.* § 847.0141(2)(a).

123. FLA. STAT. ANN. § 847.0141; *id.* § 775.082 (LexisNexis 2011) (setting out Florida's sentencing guidelines).

124. *Id.* § 847.0141.

125. *Id.* § 827.071 (LexisNexis 2011); *id.* § 775.082 (setting out Florida's sentencing guidelines).

Applying this statute to the test suites yields the following results:

Case 1: Kelly's transmission of an image falls under section 847.0141(1)(a).[126] Because she created the image and it was not transmitted to her, Kelly does not fall within the bounds of possession under section 847.0141(1)(b).[127] However, creation of the image is outside the scope of section 847.0141 and may qualify as "promoting a sexual performance by a child."[128]

Result: Kelly would likely be found guilty of noncriminal distribution under section 847.0141(1)(a) because this is her first time facing adjudication under this statute.[129] She will also face second-degree felony charges under the child pornography statute for producing the image.[130]

Case 2: Zack was in possession after he received the transmitted image of Kelly, and, because he transmitted it to a third party, he does not have an affirmative defense to a possession charge under section 847.0141(1)(b).[131] When Zack transmitted the image to a third party, he committed distribution under section 847.0141(1)(a).[132]

Result: Zack would face two counts of sexting, one of which would be noncriminal and one of which would be a first-degree misdemeanor.[133]

Case 3: Slater received an unsolicited image that he did not transmit to anyone. However, because Slater did not take reasonable steps to report the image to a parent or school authority, he has no affirmative defense to possession under section 847.0141(1)(b).[134]

Result: Slater faces a noncriminal charge of possession under section 847.0141(1)(b) because this is his first offense.[135]

Case 4: Screech, like Kelly, created and transmitted an image, but he did not receive a transmitted image. Unlike Kelly, however, the image Screech created depicted sexual conduct and excitement so it will not fall within the limitations of section 847.0141.[136]

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126. *See id.* § 847.0141(1)(a).
127. *See id.* § 847.0141(1)(b).
128. *See id.* § 827.071.
129. *See* FLA. STAT. ANN. § 847.0141(3)(a).
130. *See id.* § 847.071.
131. *See id.* § 847.0141(1)(b).
132. *See id.* § 847.0141(1)(a).
133. *See id.* § 847.0141(3)(b). Zach faces two counts of sexting because he received the image a few weeks before he transmitted it. Had Zach transmitted the image within twenty-four hours of receiving it, his actions would have constituted one count of sexting. *See id.* § 827.071(2)(a).
134. *See id.* § 847.0141(1)(b).
135. *See* FLA. STAT. ANN. § 847.0141(3)(a).
136. *Id.* § 847.0141(4).

> **Result:** Screech will likely face a second-degree felony charge for "promoting a sexual performance by a child" and another second-degree felony charge for "possession with intent to promote," which is Florida's charge for distribution of child pornography.[137]
>
> **Case 5:** Jessie's transmission of an image falls under section 847.0141(1)(a).[138] Because she created the image and it was not transmitted to her, Jessie does not fall within the bounds of possession under section 847.0141(1)(b).[139] However, creation of the image is outside the scope of section 847.0141 and qualifies as "promoting a sexual performance by a child."[140]
>
> **Result:** Jessie would likely be found guilty of noncriminal distribution under section 847.0141(1)(a) because this is her first time being adjudicated under this statute.[141] She would also likely face second-degree felony charges for producing the image under section 827.071.[142]

This analysis illustrates that under Florida Statute section 847.0141, most sexting situations would likely be punished in a way that is consistent with society's ideas regarding the culpability of the minors in each factual scenario.[143] The main exception to this is that production of an image is always a felony, regardless of the content of the image, if the minor produces the image himself, if anyone else is in the image, if everyone in the image consented, or if the use of the image is within the bounds of the sexting legislation. This results in Kelly facing the same charges as Jessie and nearly the same charges as Screech, despite each teenager having different levels of culpability. It would also be beneficial to include a provision that would seek to prevent producing images for profit, as Jessie did, because her actions resulted in distribution directly to a predator and her image will likely be distributed beyond him.

3. *Rhode Island*

The governor of Rhode Island signed H.B. 5094 into legislation on July 12, 2011.[144] The bill was codified as Rhode Island General Law section 11-9-1.4.[145] The statute is straightforward: "No minor shall knowingly and vol-

137. *See id.* § 847.071.
138. *See id.* § 847.0141(1)(a).
139. *See id.* § 847.0141(1)(b).
140. *See id.* § 847.071.
141. *See* FLA. STAT. ANN. § 847.0141(3)(a).
142. *See id.* § 847.071.
143. *See supra* Part III.A.1.
144. Greenberg, *2011 Sexting Legislation*, *supra* note 96.
145. R.I. GEN. LAWS § 11-9-1.4 (2011).

untarily and without threat or coercion use a computer or telecommunication device to transmit an indecent visual depiction of himself or herself to another person."[146]

The only situation provided for is the original transmission.[147] While brevity would seem to make things clearer, it actually leaves room for questions because so little is explained. Transmitting the "indecent visual depiction" is an offense, but there is no sentencing recommendation or level of offense provided in the statute; it merely states that it is a status offense and shall be referred to family court.[148] Additionally, it is not exactly clear whether producing the depiction is an offense as well. Without explicit inclusion of production, it must be assumed that production of the image falls outside the bounds of the new legislation, but that seems contrary to legislative intent.

The statute also has no provision for a minor's possession of an image or the distribution of sexually indecent images of other minors.[149] The exclusion appears to be purposeful, and therefore, production, possession, and most distribution would fall under the child pornography statute. There is an exception written into section 11-9-1.4 that no minor adjudicated under the sexting law shall be charged under the child pornography laws or made to register as a sex offender.[150] Therefore, those minors who transmit indecent images of themselves get a pass for production and possession, while those who receive an image of another minor and keep it or pass it on may be charged under the general child pornography law.[151]

Under Rhode Island's child pornography statute, production, transmission, and reproduction of child pornography all carry a $5,000 fine, a maximum of fifteen years of imprisonment, or both.[152] Possession results in a $5,000 fine, a maximum of five years of imprisonment, or both.[153] Those with sexting cases may find the affirmative defense to possession useful: an individual who possesses less than three items of pornography and either destroys the images or reports them to authorities will not be held responsible for possession.[154]

Applying this statute to the test suites yields the following results:

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146. *Id.* § 11-9-1.4(b). The statute defines "indecent visual depiction" as "a digital image or digital video of the minor engaging in sexually explicit conduct . . . ." *Id.*

147. *Id.*

148. *Id.*

149. *See id.*

150. *Id.* § 11-9-1.4(d).

151. *See* R.I. GEN. LAWS § 11-9-1.3–1.4.

152. *Id.* § 11-9-1.3.

153. *Id.*

154. *Id.*

Case 1: Kelly's transmission of the image to Zack will fall within the bounds of the new legislation.[155] Because Kelly's transmission of the image of herself is within the bounds of the new legislation, she cannot be charged for production or possession under the child pornography statute.[156]

Result: Kelly will face a status offense under Rhode Island's sexting statute for transmitting the image.[157]

Case 2: The image that Zack transmitted was not of himself, so he will not get the benefit of the new legislation and will bear the brunt of the existing child pornography statute.[158] Zack's possession of the image is also in violation of the child pornography statute.[159]

Result: Zack will face two felony charges, one for transmitting a nude image of a minor and one for possession.[160] He faces up to $10,000 in fines and a maximum of twenty years in prison.[161]

Case 3: Slater did not transmit the image at all and would not be considered under the sexting legislation.[162] His receipt of the image, although unsolicited, would still qualify as possession under the child pornography statute.[163] Slater would not be able to use the affirmative defense because he did not destroy the image or report it to an authority figure.[164]

Result: Slater would face one felony charge for possession of child pornography, punishable with a $5,000 fine, five years in prison, or both.[165]

Case 4: Although Screech transmitted an image of himself, the image includes Lisa as well. It is not clear from reading the statute whether the transmitter of an image receives the benefit of the special sexting legislation if another person is in the image.[166] It is possible that Screech will benefit from the new legislation, and he will be exempt from production and possession charges under section 11-9-1.4(d). But if his actions fall

155. *See id.* § 11-9-1.4(b).
156. *See id.* § 11-9-1.4(d).
157. *See* R.I. GEN. LAWS § 11-9-1.4(c).
158. *See id.* § 11-9-1.3.
159. *See id.*
160. *See id.*
161. *See id.*
162. *See id.* § 11-9-1.4(b).
163. *See* R.I. GEN. LAWS § 11-9-1.3.
164. *See id.* § 11-9-1.3(d)(2).
165. *See id.* § 11-9-1.3(b)(1).
166. *See id.* § 11-9-1.4(d).

outside its bounds, Screech will be charged with production, possession, and transmission of child pornography.[167]

Result: If Screech's actions fall within the bounds of the new legislation, Screech will be charged with a status violation and exempt from production and possession charges. If Screech is charged under the child pornography statute, he will face three felony charges: production, transmission, and possession of child pornography.[168] This will result in $15,000 in fines, up to forty-five years in prison, or all of the above.[169]

Case 5: Jessie transmitted an image of herself, consistent with the new sexting legislation.[170] It does not matter that Jessie transmitted the image to an adult rather than another minor, or that she transmitted the image for monetary profit.[171] Because she meets the requirements of the new sexting legislation, she cannot be prosecuted for production or possession under the child pornography law.[172]

Result: Jessie will face a lesser, unlisted charge for the transmission of the image and cannot be charged for production or possession under the child pornography statute.[173]

After analysis of the statute as applied to the test cases, it is clear that the statute is fairly ineffective. The original transmitter will have a lesser sentence, but other, less culpable actors were unaffected by the new legislation. Zach and Slater, two actors easily considered less culpable than self-exploited Jessie, incurred felony charges with severe punishments, while Jessie received a minor status offense; this does not correlate with the societal standards of culpability. Additionally, the statute is ambiguous to a situation like Screech and Lisa's. Overall, the results were unclear or unworkable. If new legislation carves out a misdemeanor exception for minors, it would likely be more effective if it encompassed all aspects of sexting and created exclusions for teens exploiting themselves or others.

167. *See id.* § 11-9-1.3. If Screech's video does not fall within the bounds of the new legislation because Lisa is depicted in the video as well, even his transmission could be charged under the child pornography statute. *Id.*

168. *See id.*

169. *See* R.I. GEN. LAWS § 11-9-1.3.

170. *See id.* § 11-9-1.4(b).

171. *Id.*

172. *See id.* § 11-9-1.4(d).

173. *See id.* § 11-9-1.4.

4. *Texas*

The governor of Texas signed S.B. 407 into legislation on June 17, 2011.[174] The bill was codified in the Texas Penal Code as section 43.261 and became effective on September 1, 2011.[175]

The Texas sexting statute is relatively complex, but, as a result, is quite successful. The statute creates offenses for promotion and possession while including an aspect of production in each. Under section 43.261(b)(1), a minor commits promotion if he, "by electronic means promotes to another minor visual material depicting a minor, including the actor, engaging in sexual conduct, if the actor produced the visual material or knows that another minor produced the visual material."[176] A minor commits possession under section 43.261(b)(2) if he "possesses in an electronic format visual material depicting another minor engaging in sexual conduct, if the actor produced the visual material or knows that another minor produced the visual material."[177]

The formatting of the Texas statute is different than that of the Rhode Island statute because an element of production is included in the offense.[178] Additionally, the statute provides that the minor must transmit the image to another minor.[179] The inclusion of the language that a minor must have produced the promoted or possessed image further strengthens the Texas statute.[180] When read together, the statute is very clear that the lessened charge is only available when everyone involved in the sexting is a minor. The heightened child pornography charge applies if any party involved is an adult, which is aimed at deterring predatory adults from engaging in sexting with minors.[181]

The statute provides an affirmative defense to either charge if the sexting was exclusively between two people within two years of age in a dating relationship or between two people in a married relationship.[182] This likely squelches any arguments against the charges based on First Amendment rights of privacy or self-expression, because sexting in the context of a private relationship is no longer criminal. The statute also provides an af-

174. Greenberg, *2011 Sexting Legislation*, *supra* note 96.
175. TEX. PENAL CODE ANN. § 43.261 (West 2011).
176. *Id.*
177. *Id.*
178. *Id.* The Rhode Island sexting statute does not address production specifically. *See* R.I. GEN. LAWS § 11-9-1.4 (2011).
179. TEX. PENAL CODE ANN. § 43.261.
180. *Id.*
181. *Id.* § 43.26.
182. *Id.* § 43.261.

firmative defense to possession if the image was unsolicited, received from another minor, and destroyed within a reasonable amount of time.[183]

With regard to sentencing guidelines, the statute gives an incremental basis that increases in severity.[184] The possession charge increases from a Class C misdemeanor to a Class B misdemeanor after one conviction and from a Class B misdemeanor to a Class A misdemeanor after a second conviction.[185] The promotion charge works the same way, but also increases if the offender promoted the image with the "intent to harass, annoy, alarm, abuse, torment, embarrass, or offend another," basically if the promoter intended to bully another.[186] The first offense is a Class C misdemeanor but increases to a Class B if accompanied by the intent to bully.[187] The second offense is a Class B misdemeanor if the minor was previously convicted of a Class C misdemeanor or is a Class A misdemeanor if the minor was previously convicted of a Class B misdemeanor because of bullying.[188] A third conviction will always be a Class A misdemeanor.[189]

Another interesting addition to this statute provides that if a teen's action fit the requirements of this statute and another, the minor may be charged "under this section, the other law, or both."[190] Such a provision allows for prosecutorial and judicial latitude.

Applying this statute to the test suites yields the following results:

> **Case 1:** Kelly promoted an image that she knew was produced by a minor to another minor, which is within the bounds of the new legislation.[191] Kelly also meets the requirements of the affirmative defense because she promoted the image only to someone with whom she was in a dating relationship.[192]
>
> **Result:** Kelly will not face criminal charges because she meets the affirmative defense requirements.[193]
>
> **Case 2:** Zack received an image from another minor whom he was dating and knew the image was produced by another minor. However, because Zack promoted the image to a third party, he is not provided the

183. *Id.*
184. *Id.*
185. TEX. PENAL CODE ANN. § 43.261.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *See* TEX. PENAL CODE ANN. § 43.261(b)(1).
192. *See id.* § 43.261(e). For the purposes of this example, the author assumes that Zack and Kelly are the same age and that they meet the two-year age-range requirement of the affirmative defense.
193. *See id.*

affirmative defense.[194] Also, it is likely, or at least could be construed, that Zack forwarded the image with the intent to harass, annoy, alarm, abuse, torment, embarrass, or offend Kelly after their break up. This implicates a possible increase in sentencing because the statute provides additional punishment to teens transmitting images to bully other minors.[195] Zack meets the requirements of both promoting an image of a minor, produced by a minor, to other minors, and possession of an image of a minor produced by a minor.

Result: Because Zack is facing two counts of sexting, one for promotion and one for possession, and because one of those involves bullying, it is possible for Zack to face one Class B misdemeanor charge and one Class A misdemeanor charge.[196] His charges will be elevated if a court determines Zack intended to bully Kelly.[197]

Case 3: Slater received an unsolicited image, produced by a minor, from another minor. Unfortunately for Slater, he will not meet the affirmative defenses because he was not in a relationship with Kelly and did not destroy the image.[198]

Result: If this is Slater's first conviction, he will be charged with a Class C misdemeanor.[199]

Case 4: Screech promoted the video of himself and Lisa, which he knew to be produced by a minor, to other minors. He does not meet the affirmative defense for promotion because the video was promoted to a third party.[200] Also, because Lisa did not know the video was being created, it is likely that Screech will have an increased charge based on his intent to harass, annoy, alarm, abuse, torment, embarrass, or offend Lisa.[201]

Result: Screech will be charged with a Class B misdemeanor if this is his first offense under this statute because there was bullying involved.[202]

Case 5: Jessie promoted an image of a minor that she knew to be produced by a minor, but she promoted it to an adult. This means her actions will not be within the bounds of the new legislation and will be prosecuted as promoting child pornography under the child pornography statutes.[203]

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194. *See id.*
195. *See id.* § 43.261(c).
196. *See id.*
197. *See* TEX. PENAL CODE ANN. § 43.261(c).
198. *See id.* § 43.261(e).
199. *See id.* § 43.261(c).
200. *See id.* § 43.261(e).
201. *See id.* § 43.261(c).
202. *See id.*
203. *See* TEX. PENAL CODE ANN. §§ 43.26, 43.261.

> **Result:** Jessie will be guilty of a second-degree felony for promotion of child pornography.[204]

After analysis of the statute as applied to the test cases, it is clear that the Texas statute was carefully written to provide justice in almost any situation involving minor-to-minor sexting. The sending of images between minor boyfriends and girlfriends is completely decriminalized.[205] Teens possessing unsolicited messages are exonerated for deleting them.[206] Other, more serious sexting behavior is punished, and the punishment increases when teens repeatedly engage in this conduct.[207] Bullying is punished with a heightened charge.[208] Adult predators are prevented from any involvement in teen sexting without harsh punishment for the teen when the new statute covers the teen's behavior.[209] Additionally, prosecutors and judges still maintain some latitude if the conduct is punishable under another statute in addition to the sexting statute.[210] Overall, the Texas legislature got it right when it provided for nearly every foreseeable situation.

B. Creating New Legislation for Arkansas after the Lessons Learned from Other States' Legislation

After examining legislation from other states, a checklist emerges that may prove helpful to Arkansas's legislature when considering enacting special sexting legislation. This checklist considers the result of the practical application in a variety of factual situations and will provide the Arkansas State Legislature with a panoramic view of what has been successful, and less successful, in other jurisdictions. In light of the serious consequences that face Arkansas teens under the current laws, this checklist may be the difference between a prosperous future and a life full of barricades resulting from a teenage mistake. The statutory analysis above has illustrated that these factors work:

- A lesser sentence for teens, perhaps on an increasing-incremental basis
- Clear guidelines defining what is included within the scope of the legislation and what is not

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204. *See id.* § 43.26.
205. *Id.* § 43.261.
206. *Id.*
207. *Id.* Repetition of sexting increases the charge, and sexting an adult pushes the activity out of the bounds of the special sexting legislation and back to the child pornography punishments. *Id.*
208. *Id.*
209. TEX. PENAL CODE ANN. § 43.26.
210. *Id.* § 43.261.

- Lesser consequences for teens who receive an unsolicited image, especially if they report the image to a parent or authority figure
- Exclusion for teens sending messages to adults or putting an age range limit on who teens may send to and still receive the lesser sentence
- Harsher punishment when the teen exploits herself or another
- Inclusion of all actions involved with sexting: production of an image, transmission of an image, and reception or possession of an image
- Clear guidelines on what range of nudity or conduct is covered by the sexting legislation
- Clear indication of the charge or sentencing guidelines

Learning from other states' mistakes of under- or over-inclusiveness will ensure that Arkansas enacts effective legislation to protect its teens the first time. There is no need to carelessly label teens as felons and sex-offenders. By carefully crafting a statute to address every situation fairly, the Arkansas Legislature can protect the bright futures of Arkansas's teens, even when they have momentary lapses in judgment.

IV. CONCLUSION

Arkansas teens would benefit from the addition of legislation addressing sexting by minors. The Arkansas State Legislature has the power to create such legislation and to consider these guidelines. The main problem other states have faced has been one of over- or under-inclusiveness. By carefully considering the consequences of each provision, the Arkansas legislature can ensure that each teen facing prosecution for sexting will be treated fairly and justly. This will also ensure that teens do not destroy their opportunities with a moment's poor decision. Arkansas's teens need to be taught right from wrong, but not at the expense of their futures.

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