

SEXTING EDUCATION: AN EDUCATIONAL APPROACH TO SOLVING THE MEDIA FUELED SEXTING DILEMMA

JESSICA SABBAH-MANI*

I. INTRODUCTION

Consider the tales of Carol and Dave, A.H. and J.G.W., and Mr. Williams. Eighteen-year-olds Carol and Dave, who are in a relationship, decided to take photos of themselves engaged in sexual behavior and send them to each other from Dave's cell phone.¹ On the same night, A.H., a sixteen-year-old girl, and her seventeen-year-old boyfriend, J.G.W., took nude photos of themselves engaging in sexual behavior in the confines of A.H.'s bedroom.² They emailed the photos to another computer from A.H.'s home, but never showed them to anyone else.³ Thirty-five-year-old Mr. Williams, on the other hand, was on an internet chat room posting "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam."⁴ Further, he engaged in a conversation during which he claimed that he has photos of men molesting his four-year-old daughter.⁵ Attempting to prove he was not lying, Mr. Williams then posted a hyperlink leading to seven photos of children aged five to fifteen engaging in sexual conduct.⁶ Later, both couples and Mr. Williams were caught for their respective behaviors. What results? Carole and Dave are not charged because their actions are not even "plausibly criminal."⁷ They enjoy a First Amendment right to create and share photos of themselves engaging in

* Class of 2015, University of Southern California Gould School of Law; B.S. Business Administration 2011, University of Southern California Marshall School of Business; Senior Copy Editor, *Southern California Interdisciplinary Law Journal*, Volume 24. The author would like to thank the staff and executive editorial board of Volume 24 of the *Southern California Interdisciplinary Law Journal* for all of their hard work on this Note.

1. Dawn C. Nunziato, *Romeo and Juliet Online and in Trouble: Criminalizing Depictions of Teen Sexuality, (c u l8r: g2g 2 jail)*, 10 NW. J. TECH. & INTELL. PROP. 57, 57 (2012).

2. A.H. v. State, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007).

3. *Id.*

4. United States v. Williams, 553 U.S. 285, 291 (2008).

5. *Id.*

6. *Id.*

7. Nunziato, *supra* note 1, at 57.

sexual activity to which they have legally consented.⁸ However, A.H., J.G.W., and Mr. Williams are convicted for creating, possessing, and disseminating child pornography.⁹ The difference between Carol and Dave's case and that of A.H. and J.G.W. is that A.H. and J.G.W. are minors, and Carol and Dave are adults. Even though Mr. William's actions seem far more repugnant and deserving of the harsh consequences imposed by the Federal Child Pornography Statute given that he exploited young children to fulfill his pedophilic desires, A.H. and J.G.W.'s privately held consensual picture still falls under the same category of child pornography. To prevent teens like A.H. and J.G.W. from being subject to the draconian consequences of child pornography laws, a new solution must be issued to address teens' use of technology to sexually express themselves. Therefore, even though there is some risk of exploitation in certain reckless sexting scenarios, it is a problem best solved by education. Only through education can the reputational harms to teens be avoided.

Part II of this Note provides background information regarding sexting activity, defines the contours of teen sexting, and describes how the term came into existence as well as how the term will be used for the purpose of this Note. It also argues that teen sexting can be benign and describes the circumstances in which the activity can become harmful such as second-hand dissemination and coercion.

Part III argues that the media created a sexting epidemic that depicts sexting as more dangerous and prevalent than it actually is. It delineates the media's role in creating an unwarranted sexting scare by portraying the inexistence of safe sexting. It also compares the results of the headlined CosmoGirl survey to those of a self-conducted survey. Section A illustrates how the media distorted the facts of an adult's suicide to make it appear as if the adult was a teen and that the death was related to a proximate sexting incident. Section B describes how the media popularizes sexual photos of celebrity teens, making average teens want to replicate celebrities' behavior.

Part IV begins by explaining the Federal Child Pornography Statute and its scope, the consequences that occur from being charged under the statute, and the intent of Congress in passing the statute. Section B criticizes the prosecution of teen sexting under federal and state child pornography laws. It contends that although sexting fits the definition and

8. *Id.* at 58.

9. *See* A.H. v. State, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007). *Williams*, 553 U.S. at 292.

justifications for the Federal Child Pornography Statute, sexting should not be prosecuted under such a statute because it causes the same reputational harm to minors that the statute is deemed to prevent. Further, Section B uses a self-conducted survey of teens to emphasize the lack of knowledge that teens have as to the consequences of sexting and evince that the use of such harsh penalties does not serve as effective deterrent.

Part V presents and counters the different legal solutions, other than charging the teens under Child Pornography Statute, that have been offered to address the harm associated with sexting. First, it attacks the possibility of leaving sexting in the hands of the civil system without having any other legal ramifications. Then, Part V critiques some of the enacted sexting legislation. Primarily, it focuses on the praised Vermont sexting statute and the New Jersey and New York educational sexting statutes. Part V further argues that in-school action cannot be an independently viable solution to constrain the egregious sexting cases.

Finally, Part VI argues that the most effective solution would be to enact a narrow sexting-specific statute to address the most harmful sexting scenarios, amend the Federal Child Pornography Statute to exclude sexting by minors, and educate teens about what is illegal under the statute, the dangers of sexting, and the possible precautions they can take to avoid harming themselves. It urges Congress to amend Section 2952 of the Patient Protection and Affordable Care Act to include an educational program as part of the requirement for the federally funded comprehensive sex education program. Part VI also addresses the possible Fourteenth Amendment challenges that may be raised against adding a sexting section to sex education courses and how those challenges can be overcome.

II. BACKGROUND

Before being able to understand why sexting should not be prosecuted as child pornography, it is important to understand what constitutes sexting and the possible harms that may arise in sexting incidents. The media has emphasized certain aspects of sexting that made it legislatively attractive to prosecute initially consensual behavior under child pornography laws.

A. DEFINING TEEN SEXTING

Much confusion has arisen as to the meaning of the term “sexting,” and a variety of definitions have been offered for it. The term “sexting” is

not a legal term, but rather a media label used to describe a diverse range of behaviors.¹⁰ The Third Circuit in *Miller v. Mitchell* accepted the definition of sexting to be “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.”¹¹ However, for the scope of this Note, the term “sexting” will only refer to sending or posting sexually suggestive images. Child pornography must be visual and thus cannot include text messages independent of an image.¹² It is also important to note that this definition of sexting does not include the involvement of adults in taking, disseminating, or even possessing such images. However, as this Note will explain, it may include the participation of young adults. Thus, sexting includes behavior such as (1) a minor sending a sexually suggestive photo to a significant other, prospective significant other, or a friend;¹³ (2) a minor taking or disseminating a picture of himself, herself, or others engaging in sexual activity;¹⁴ and (3) a minor “extensively forwarding” a sexually suggestive photo of another minor.¹⁵ For some teens, sexting has become a form of “relationship currency”¹⁶ or a form of entertainment. Such images have been used to maintain, start, or add excitement to a sexual relationship.¹⁷ They have also been sent as jokes, games, or for other entertainment purposes.¹⁸

B. HOW SEXTING MAY BECOME HARMFUL

Not all sexting is harmful; rather, sexting could be viewed as a way for teens to express their sexual agency.¹⁹ Most teens do not believe they are doing anything wrong when they sext. Instead, they see it as just

10. Mary G. Leary, *Sexting or Self-Produced Child Pornography? The Dialogue Continues—Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL’Y & L. 486, 492 (2010).

11. See *Miller v. Mitchell*, 598 F.3d 139, 143 (3d Cir. 2010); JENNA R. MINOR, NOT THE NEW PORNOGRAPHERS: PROTECTING SEXTING TEENS FROM OVERZEALOUS PROSECUTORS AND THEMSELVES 4 (2012), available at http://scholarship.shu.edu/student_scholarship/68.

12. Leary, *supra* note 10, at 492.

13. *Id.*

14. *Id.*

15. *Id.*

16. Nunziato, *supra* note 1, at 59.

17. *Id.*

18. *Id.*

19. See generally Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001).

another way to flirt²⁰ or to explore their sexuality or even their identity.²¹ Studies have found that “the Internet offers an alternative venue for identity exploration equal to that in real-life interactions.”²² What we must remember is that teens today live in a “culture that embraces exhibitionism via the mass media.”²³ The notions of privacy have changed. The emergence of reality television and social media websites have made teens willing and able to share the most private aspects of their lives with the public domain.²⁴ This is simply the result of technology “extending an activity or action that young people have engaged in for years, if not beyond that.”²⁵

Further, some sexting incidents remain private between two consenting teens or a small group of friends. The law is not designed to address either of these sexting scenarios. Even in instances where a sext is disseminated, sexting is still “tamer” than other sexual activities that result in pregnancy or STDs²⁶ as some teens even engage in sexting instead of sexual activity.²⁷ Teens should not be “universally prohibited” from capturing their experiences when no harm is caused.²⁸ That is not to say that all sexting is completely benign and should be left alone; rather, it is to argue that if practiced safely and privately, it may be favorable in comparison to other sexual activities in which teens engage to explore their sexual identities.

On the other hand, some sexting incidents give rise to a variety of harms that are true causes for concern and must be controlled. For instance, a case in which a photo is disseminated beyond the original recipients.²⁹ This can occur for many reasons such as an ex-significant other releasing

20. KIMBERLIANNE PODLAS, THE ‘LEGAL EPIDEMIOLOGY’ OF THE TEEN SEXTING EPIDEMIC: HOW THE MEDIA INFLUENCED A LEGISLATIVE OUTBREAK 5 (2011), available at http://works.bepress.com/kimberlianne_podlas/6.

21. Clay Calvert, *Sex, Cellphones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMM.LAW CONSPECTUS 1, 14 (2009).

22. *Id.*

23. *Id.* at 17.

24. *Id.*

25. *Id.* at 20.

26. PODLAS, *supra* note 20, at 5.

27. *Id.* at 21.

28. Kath Albury & Kate Crawford, *Sexting, Consent and Young People’s Ethics: Beyond Megan’s Story*, 26 CONTINUUM: J. OF MEDIA & CULTURAL STUD. 463, 471 (2012), available at <http://dx.doi.org/10.1080/10304312.2012.665840>.

29. Nancy E. Willard, *Sexting and Youth: Achieving a Rational Response*, 6 J. SOC. SCI. 542, 552 (2010).

the photo after a bad break-up or posting the picture on revenge porn sites—or just from the inability of teens to keep their “impulses in check,” resulting in teens sending out sexts to all of their friends for no particular reason.³⁰ Another instance is when a recipient of the sexted image blackmails the person in the image with a threat of disclosure.³¹ The blackmail can sometimes include performing sexual services.³² Even worse is when the image makes its way into the child pornography market, and the minors in the image become commercially exploited or become the object of enticement for predators.³³ The damage that results from these and similarly harmful sexting incidents can harm the minor through mental anguish from the embarrassment and humiliation of the photo being disseminated,³⁴ harassment from being the target of bullying for being in the picture,³⁵ economic harm if a potential employer or college recruiter sees the image when vetting the applicant,³⁶ school expulsion or suspension if the school has a policy forbidding such a practice,³⁷ or criminal punishment and social stigma associated with being forced to register as a sex offender.³⁸ Sexting alone does not cause any of these harms, but they may arise if a sext is mishandled, with the result that it is disseminated to a large audience, facilitates blackmail, or creates a target of bullying.

For these reasons, the law must only assist in these and similar incidents, but should still recognize that not every sexting incident is one that will implicate these harms.³⁹

III. THE MEDIA’S ROLE IN FRAMING THE SEXTING PHENOMENON

Teens started sexting much earlier than 2009, but it was only during that year that sexting became a cause for concern necessitating a legal remedy other than child pornography laws.⁴⁰ The media functions as a key participant in the “cultural production of knowledge” and influences our

30. PODLAS, *supra* note 20, at 11.

31. *Id.*

32. *Id.*

33. Leary, *supra* note 10, at 566.

34. Calvert, *supra* note 21, at 23.

35. *Id.*

36. *Id.* at 24.

37. *Id.*

38. *Id.*

39. *See id.* at 25.

40. PODLAS, *supra* note 20, at 39–40.

opinions on such information.⁴¹ The media can transform an unimportant issue into a nationwide concern by what it chooses to focus on.⁴² In 2009, the media began focusing on teen sexting—specifically on the dangers and the epidemic proportion of teens engaging in sexting.⁴³ The so-called “teen sexting epidemic” refers to the newly held common belief that sexting is prevalent and proliferating as a “pathogen infecting teens.”⁴⁴ The media’s overinflation of teen sexting statistics is evidenced by considering a few facts. The media most commonly cites a survey conducted by the National Campaign to Prevent Teen and Unplanned Pregnancy and CosmoGirl Magazine, which claimed that 20 percent of teens were sexting.⁴⁵ The survey was initially conducted and released in 2008, but at that time the fact that 20 percent of teens were sexting was not an issue critical to society.⁴⁶ It was not until 2009, when the media began covering teens being prosecuted for sexting that the survey came to light.⁴⁷ Despite the survey’s numerous methodical errors, such as having a sample group that was more likely to “shar[e] information and [put] themselves out there online when compared to the broader population”⁴⁸ and combining responses from eighteen to nineteen-year-olds, the survey became the “authoritative source of data about teen sexting.”⁴⁹

Today, the most authoritative source is the Pew Research Center’s Internet and American Life Project’s survey.⁵⁰ This survey found that only 4 percent of teens had sexted such images and 15 percent had received one.⁵¹ This survey also has its fair share of criticism, with some suggesting the data includes responses of ten-year-olds to thirteen-year-olds, which deflated the number.⁵² The discrepancy in survey results led me to conduct my own survey. I surveyed fourteen teens in the Los Angeles area between the ages of fourteen and seventeen-years-old. The survey was completely anonymous and I had no personal relationship with any of the teens surveyed. Besides the small sample size, my survey could be criticized for

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Calvert, *supra* note 21, at 21.

49. PODLAS, *supra* note 20.

50. *Id.*

51. *Id.*

52. Adler, *supra* note 19.

only reaching a primarily white middle to upper socioeconomic class that consisted of primarily seventeen-year-old females. Nevertheless, given the unreliability of the published surveys, the information I obtained may be useful in discerning whether the figure is closer to 20 percent or 4 percent. The survey results suggest that about 86 percent of the teens surveyed knew of someone who has sent or received a sext. Only two out of the fourteen teens (14.29 percent) sent a sexually suggestive image. Although this number comes closer to the 20 percent figure, it is likely that a greater sample size would have produced a smaller percentage. What is important to learn from this self-conducted study is that sexting does occur, but sexting may not be as prevalent as the media makes us think it is.

The media has played a roll in altering facts to deceive the public into thinking sexting is a more dangerous activity than it really is and simultaneously has played a roll in influencing teens' desires to publicly expose their sexual identities. A comprehensive solution combining education with an accompanying sexting-specific statute is the only way to correct the distortions the media has caused.

A. THE MEDIA'S ALTERATION OF FACTS TO CREATE HARMFUL SEXTING

Further, the media only focuses on the negative aspects of sexting, preaching that there is no such thing as safe-sexting.⁵³ The New York Times, the Washington Post, and the Wall Street Journal have each featured articles implying that parents, prosecutors, educators, and law enforcement agencies are in a state of panic in attempting to solve the growing sexting problem.⁵⁴ Most media reports share an alarmist negative tone, creating a fear in parents and legislators about the ramifications of teen sexting.⁵⁵ The media only exhibits the worst possible consequences such as criminal prosecution, psychic trauma, shame, harassment, loss of career and educational prospects, and even suicide.⁵⁶ For example, the media has cited and recited the notorious suicide of Jessica Logan to imply that sexting leads to death.⁵⁷ Rather than use it as such, I will use Jessica Logan's tragic death to illustrate how the media recounts her story to make sexting seem more catastrophic than it actually is.

53. Steven Angelides, *Technology, Hormones, and Stupidity: The Affective Politics of Teenage Sexting*, 16 *SEXUALITIES* 665 (2013), available at <http://sex.sagepub.com/content/16/5-6/665>.

54. *Id.* at 666.

55. *Id.* at 673–74, 666.

56. *Id.* at 668.

57. PODLAS, *supra* note 20, at 35–36.

The coverage of Jessica Logan's story only hit the press a year after its occurrence, suggesting it was not powerful enough to independently attract attention.⁵⁸ Sadly, at the time it occurred, it was likely just another teen suicide.⁵⁹ However, when the sexting fury began, Logan's story became representative of the ultimate harm that could result from sexting.⁶⁰ But, when the story was retold a few facts were omitted to evoke a more powerful message. First, Jessica Logan was eighteen-years-old when she sent the sext.⁶¹ According to both current applicable laws and knowledge gained from other media reports, an eighteen-year-old is an adult and immune from prosecution for sexting. Thus, the cautionary tale that teen sexting leads to suicide is based on a story that does not even involve a teen sexter. Nevertheless, it is not difficult to imagine that it could have happened to a younger teen. Second, there were intervening events between the sext and the suicide.⁶² Logan participated in several interviews, one with a local reporter and another with the *Today Show*, to discuss her sexting incident.⁶³ This not only increased the number of people who knew about it, making it more probable that harassing would occur, but also may have come off as a call for attention on her part.⁶⁴ Third, she killed herself a month after graduating, plausibly suggesting that in-school harassment was not the root of the problem.⁶⁵ The media, therefore, created a causal chain linking the sext to the harassment to the psychic trauma, and then to the suicide.⁶⁶ But, any teen suicide can be linked in that manner.

Steven Angelides proposed comparing her story to an alternative scenario.⁶⁷ A seventeen-year-old girl goes to a bar, wearing a mini-skirt and a revealing top, and is confronted by a group of her school friends who start calling her a "slut."⁶⁸ She escapes to the bathroom where she is followed by a group of guys who rape her.⁶⁹ This situation may be even more prevalent than sexting, yet there is no overbearing amount of information warning

58. *Id.* at 37.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 38.

64. *Id.*

65. *Id.*

66. Angelides, *supra* note 53, at 673.

67. *Id.*

68. *Id.*

69. *Id.*

against the dangers of wearing slutty clothes.⁷⁰ This is not to suggest that Jessica Logan's story should not be shared because it could be representative of what could plausibly occur, but rather to show how far the media went in portraying sexting as the ultimate evil. The media even made use of a teen role model, Tyra Banks, whose career as a model hinged on her ability to publicly sexualizing herself, to shame girls and their decisions to sext.⁷¹ This evinces that the media's "Techno-Panic-heightened level of concern" about teen sexting is disproportionate to the actual degree of risk.⁷²

B. MEDIA'S ROLE IN ENCOURAGING TEENS TO BE SEXUAL FIGURES

While increasing the level of concern for sexting, the media simultaneously has increased the appeal of teen sexting. First, the media has portrayed adult sexting as an activity to spice up a love life.⁷³ Some teens reading these magazines may see no difference between their relationship and an adult relationship and use sexting as "a strategy to hold on to boyfriends."⁷⁴ A small minority of media coverage refers to teen sexting as "modern-day Spin the Bottle" or "high-tech flirting."⁷⁵ But what is really drawing the appeal to sexting is the culture the media has created of "hypersexualized girls."⁷⁶ There is prevalent sexualization of teens in popular culture, marketing for consumer goods, and other advertisements targeting teens.⁷⁷ Teen celebrities such as Miley Cyrus and Vanessa Hudgens have become more popular and acquired the media's attention after taking nude photos which were later circulated on the Internet.⁷⁸ Teens may simply be mimicking the behavior of their idols.⁷⁹ In addition, today teens are much more involved with fashion and other activities, such as social networks like Facebook and Instagram, that "encourage them to

70. *Id.*

71. Lara Karaian, *Lolita Speaks: 'Sexting,' Teenage Girls and the Law*, 8 CRIME MEDIA CULTURE 57 (2012), available at <http://cmc.sagepub.com/content/8/1/57>.

72. Willard, *supra* note 29, at 547.

73. *Id.* at 542.

74. Calvert, *supra* note 21, at 15.

75. Karaian, *supra* note 71, at 67.

76. Calvert, *supra* note 21, at 15.

77. Lawrence G. Walters, *How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, 9 FIRST AMEND. L. REV. 98, 106 (2010–2011).

78. *Id.*

79. *Id.*

flirt with a decidedly grown-up eroticism and sexuality.”⁸⁰ Sexting might just be an “objective manifestation of such flirtation.”⁸¹

IV. HOW SEXTS BECOME CHILD PORNOGRAPHY

Recall the case of A.H. and J.G.W., the two seventeen-year-olds prosecuted under child pornography laws for photographing themselves engaged in sexual conduct and sending the picture to each other.⁸² How did their behavior result in the same consequences as Mr. Williams’ pedophilic behavior? Does preventing their conduct really serve the same goal as the legislator’s envisioned when enacting the Federal Child Pornography Statute? These questions have fueled a legal debate about how to address minors’ sexting activities.⁸³ While most have recognized that prosecuting teen sexters under current child pornography laws is unjust, many teens like A.H. have been and continue to be convicted under such laws.

Because the Federal Child Pornography Statute is dedicated to clear cases of exploitation and the psychological injury stemming from that exploitation, it is ill suited for sexting cases despite indicative language in the statute that suggests it could cover sexting.

A. THE SCOPE OF THE FEDERAL CHILD PORNOGRAPHY STATUTE

Before addressing why a new solution to sexting must be implemented, it is necessary to explain the scope of the Federal Child Pornography Statute and the justifications for its creation and implementation.

1. The Power and Breadth of the Federal Child Pornography Statute

First Amendment violations rarely form the basis for challenging child pornography laws.⁸⁴ In 1982, the Supreme Court in *New York v. Ferber* considered for the first time the issue of child pornography, creating a distinct constitutional category for child pornography⁸⁵ and declaring it “unprotected by the First Amendment.”⁸⁶ Since this case, child pornography law has expanded greatly.⁸⁷ Courts have been reluctant to

80. Calvert, *supra* note 21, at 15.

81. *Id.*

82. See *A.H. v. Florida*, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007).

83. Calvert, *supra* note 21, at 7.

84. Adler, *supra* note 19, at 236.

85. *Id.* at 236–37.

86. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

87. Adler, *supra* note 19, at 237.

define child pornography; rather, courts have been consistently accepting legislative enactments expanding the scope of child pornography law.⁸⁸ Currently, 18 U.S.C. Section 2252A makes it a crime for any person who “knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography” or

... knowingly receives or distributes any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or any material that contains child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer.⁸⁹

For the purpose of this statute, a “minor” is defined as any person under the age of eighteen,⁹⁰ which was originally any person under the age of sixteen.⁹¹ Under the statute, “child pornography” is defined as:

Any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct. . . .⁹²

The definition of “sexually explicit conduct” was further broadened in *United States v. Knox* to include any “lascivious exhibition of the genitals or pubic area” regardless of the existence of nudity.⁹³ Due to the expansion of the definition, courts have had trouble determining what constitutes a lascivious exhibition.⁹⁴ Most lower courts have addressed the issue by adopting the *Dost* test, a list of six factors that are relevant in determining a lascivious exhibition.⁹⁵ This test becomes of vital importance for advocates

88. *Id.* at 238.

89. 18 U.S.C. § 2252A (2012).

90. 18 U.S.C. § 2256(1) (2008).

91. Adler, *supra* note 19, at 237.

92. 18 U.S.C. § 2256(8) (2008).

93. *United States v. Knox*, 977 F.2d 815, 825–26 (1992) (holding that focusing on children in ballet outfits was a lascivious exhibition).

94. Adler, *supra* note 19, at 240.

95. *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986). There are six factors listed: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, such as in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire,

of prosecuting consensual teen sexting under existing child pornography laws, because it expands the category of lascivious exhibition to include conduct that is almost always found in sexting.⁹⁶ Lastly, in *Osborne v. Ohio*, the court upheld the criminalization of mere possession, as opposed to distribution or production of child pornography.⁹⁷ This illustrates the near complete discretion legislators and prosecutors have in deciding which cases will be prosecuted under the Federal Child Pornography Statute. Given the expanded scope of child pornography law, it is unsurprising that teen sexting is now being prosecuted.

2. *The Policy Reasons for Enacting Child Pornography Laws*

Congress enacted the Federal Child Pornography Statute primarily to prevent the “use of children as subjects of pornographic materials [which is] harmful to psychological, emotional, and mental health of the child.”⁹⁸ In interpreting this statute, the Supreme Court has held on numerous occasions that the permanent recording of a child’s image is a cause of psychological trauma to the child. The child will be “haunted for a lifetime” knowing that the offensive photograph or film is accessible by the masses.⁹⁹ This permanent record may be more threatening to the psychological wellbeing of the child than either physical sexual abuse or child prostitution.¹⁰⁰ By enacting the statute, Congress also sought to dry up the market for child pornography in order to prevent future sexual abuse to children.¹⁰¹

The Supreme Court in *New York v. Ferber* found that the most effective method to control the child pornography market is by imposing “severe criminal penalties”¹⁰² on those involved in this large-scale criminal market.¹⁰³ Such penalties include a mandatory minimum sentence of five years in prison for any first offense.¹⁰⁴ In addition, those convicted are

considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. *Id.*

96. See Calvert, *supra* note 21, at 54–55.

97. Adler, *supra* note 19, at 243.

98. *New York v. Ferber*, 458 U.S. 747, 758 (1982).

99. *United States v. Knox*, 977 F.2d 815, 821 (3d Cir. 1992) *vacated*, 510 U.S. 939 (1993).

100. *Ferber*, 458 U.S. 747, 759 (1982).

101. *Id.* at 760.

102. *Id.*

103. JENNA R. MINOR, NOT THE NEW PORNOGRAPHERS: PROTECTING SEXTING TEENS FROM OVERZEALOUS PROSECUTORS AND THEMSELVES (2012), available at http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1061&context=student_scholarship.

104. Nunziato, *supra* note 1, at 66.

typically required to register as sex offenders.¹⁰⁵ Federal violation also provides for severe maximum penalties ranging from twenty years for a first offense to forty years for repeat offenders.¹⁰⁶ These penalties seem justified when considering a terrible crime that implicates the abuse and exploitation of children; however, as discussed below, not all acts prosecuted under this statute have such implications.¹⁰⁷ In contrast, state supreme courts seem to focus specifically on sexual abuse committed by pedophiles¹⁰⁸ and the need to curtail their ability to wet their appetites on such images. Such policies are not furthered by prosecuting juveniles who have been sexting.

B. SEXTING FITS THE DEFINITION BUT SHOULD NOT BE TREATED AS SUCH

Most sexted images fit the definition of child pornography under a strict reading of the Federal Child Pornography Statute.¹⁰⁹ As discussed earlier, many courts look to the *Dost* test to define lascivious exhibition. The sixth *Dost* factor, “whether the visual image is intended or designed to elicit a sexual response in the viewer,”¹¹⁰ increases the likelihood that a court would find a sexted image to be a lascivious exhibition.¹¹¹ As previously mentioned, teens mostly use sexting to flirt or to entice a significant other. Thus, in these cases the purpose of the sext is clearly to elicit a sexual response in the viewer.¹¹² Furthermore, it is common for joke sexts to focus on male genitalia, which also falls within the Federal Child Pornography definition. In addition to the definition, most sexting triggers the same policy considerations underlying the statute, including the psychological, emotional, and mental harm that results from the transfer and permanent recording of an image of a child in a sexual manner.¹¹³ The other main policy rationale for the statute is the need to close the distribution channels of the child pornography market.¹¹⁴

105. *Id.*

106. *Id.*

107. Calvert, *supra* note 21, at 60.

108. Calvert, *supra* note 21, at 47. *See also* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 248–49 (2002).

109. Joseph Paraveccia, *Sexting and Subsidiarity: How Increased Participation and Education from Private Entities May Deter the Production, Distribution, and Possession of Child Pornography Among Minors*, 10 Ave Maria L. REV. 235, 237 (2012).

110. United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986).

111. Calvert, *supra* note 21, at 54.

112. *Id.* at 55.

113. Paraveccia, *supra* note 109, at 242, 248.

114. *Id.*

Some sexting activities more closely match these justifications than others.¹¹⁵ They include sexting images that are taken by force through coercion or duress and the non-consensual distribution of images to a large number of recipients or to revenge porn sites.¹¹⁶ The psychological, emotional, and mental harm articulated by the *Ferber* court was never limited to the physical harm suffered at the time the image was produced. Indeed, “[c]hildren do not have to be raped for the images to harm them.”¹¹⁷ Rather, the harm can come from either the circulation of the image or the child’s mere knowledge that the image exists and can resurface at any time.¹¹⁸ This harm can be further aggravated when recipients abuse or harass the producer of the sext,¹¹⁹ damaging the producer’s reputation and putting the producer at risk of being contacted by an online predator.¹²⁰ Additionally, these images may become available to adults. Pedophiles will not be able to differentiate between a self-produced sext and one forcefully produced by an adult for the child pornography market.¹²¹ “The end product is the same” and will continue to be circulated just as any other child pornographic image would be.¹²² Thus, the categorical prohibition of sexting images is warranted because, as the court in *Ferber* explained, the evil outweighs any interests that may be at stake.¹²³

On the other hand, it seems illogical to categorize sexting images as child pornography as defined by the federal statute. The harm the child suffers from the draconian penalties for violating child pornography statutes parallels the psychological, emotional, or mental, harm already suffered by the child from the knowledge that the image may be publicly disseminated. Some argue that because there is no direct relationship to sexual abuse in a consensual or self-produced sexted image, such images are akin to virtual pornography, which is constitutionally protected.¹²⁴

115. Walters, *supra* note 77, at 115.

116. *Id.* at 115–16.

117. Leary, *supra* note 10, at 523.

118. *Id.* at 522.

119. Paraveccia, *supra* note 109, at 248.

120. Willard, *supra* note 29, at 546.

121. Walters, *supra* note 77, at 126.

122. *Id.*

123. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

124. Paraveccia, *supra* note 109, at 246.

First, as academics have pointed out, the child pornography laws were not intended for teens, but for adult sexual offenders.¹²⁵ In the Supreme Court case of *Ashcroft v. Free Speech Coalition*, the Court focused on its concern for sexual abuse committed by pedophiles, not minors. Since these laws were meant to target intergenerational sex crimes, it makes little sense to read into them the criminalization of consensual peer-to-peer activities.¹²⁶

Second, while sexted images can be harmful, they do not equate to the type of harm experienced by victims of sexual abuse who were exploited in the production of child pornography.¹²⁷ Rather, the images at most capture teen sexual activity, a recording that is legal under federal law.¹²⁸ More importantly, there is only an “unquantified potential for subsequent harm” if the image is later forwarded to a large group of people.¹²⁹ Because there is no child abuse, repeated victimization, or predation, consensual teen sexting should not be classified as child pornography, especially in cases lacking malicious or wrongful intent to harm the individual depicted in the image.¹³⁰

Third, teens are being severely harmed by a statute designed to protect them. One argument for preventing these images is that they will harm a teen’s reputation and his or her ability to find a job or be admitted to college if a recruiter stumbles upon the circulated image. However, prosecuting minors under child pornography laws labels them as sex offenders. This stigma will follow them for the rest of their lives and will make finding a home particularly difficult.¹³¹ A criminal record harms a teen’s future educational and career prospects.¹³² Furthermore, teens that are actually being abused in the production of the images will be discouraged from reporting the incident for fear of being prosecuted for their participation.¹³³

Fourth, penalties for violating child pornography laws fail to effectively deter and address sexting.¹³⁴ In my self-conducted survey, only

125. Leary, *supra* note 10, at 513.

126. Angelides, *supra* note 53, at 675.

127. See Leary, *supra* note 10, at 544.

128. Nunziato, *supra* note 1, at 58.

129. Calvert, *supra* note 21, at 47.

130. See Paraveccia, *supra* note 109, at 246.

131. Calvert, *supra* note 21, at 5.

132. Angelides, *supra* note 53, at 671.

133. Willard, *supra* note 29, at 556.

134. Paraveccia, *supra* note 109, at 250.

30 percent of teens between the ages of fourteen and seventeen-years-old knew that sexting could be criminally prosecuted. In comparison, 86 percent thought sexting could result in humiliation. This demonstrates that prosecuting teens under child pornography laws does not curtail the practice.

Lastly, penalties under child pornography laws are disproportionate to the act of sexting.¹³⁵ It is impractical to ruin a teenager's life and lengthen the sex-offender registry with people who pose no risk of harm to other youths, all due to an act that the teen did not realize was illegal.¹³⁶ Though some punishment may be reasonable, the extent of the penalty imposed by child pornography statutes is not. Additionally, recidivism rates regress rapidly for this type of activity, suggesting it does not require long-term punishment to effectively rehabilitate perpetrators.¹³⁷ Just because a teen can be prosecuted under child pornography laws for sexting does not mean that the teen should be.

V. A SELECTION OF PREVIOUSLY PROPOSED SOLUTIONS

Although this Note argues sexting should not be subjected to the penalties under child pornography laws, sexting can still harm minors and can only be sufficiently deterred by the law.¹³⁸ According to the National Conference of State Legislature (NCSL), in 2013 alone, nine states introduced resolutions or bills aimed at sexting, with three states enacting such legislation.¹³⁹ Since 2009, twenty states and Guam have enacted sexting bills. Some bills have been effective at preventing some of the draconian consequences of child pornography convictions; however, they still fall short of being a comprehensive solution. This portion of the Note will go through some, but not all, of the previously proposed solutions, and show that the proposed solutions fail not because they are flawed, but because a more comprehensive solution is better.

135. *Id.* at 252.

136. Calvert, *supra* note 21, at 5, 27.

137. Willard, *supra* note 29, at 549.

138. Calvert, *supra* note 21, at 25.

139. Nat'l Conference of State Legislatures, *Sexting Legislation in 2013* (Oct. 30, 2013), <http://www.ncsl.org/research/telecommunications-and-information-technology/2013-sexting-legislation.aspx>.

A. RELYING ON THE CIVIL SYSTEM

Some have suggested relying on the tort system to encompass sexting acts. These advocates suggest imposing liability through branches of the invasion of privacy tort and through the emotional infliction of emotional distress tort. Under the Publicity Given to Private Life tort,¹⁴⁰ one is subject to liability for invasion of privacy if one publicized a matter concerning the private life of another that would be “highly offensive to a reasonable person” and is not a matter that is of legitimate concern to the public. Under this tort, a person who sends a photo of another engaged in sexually explicit conduct, with or without nudity, would be liable if the person did not obtain consent before hand.¹⁴¹ The depicted person would then be able to sue the disseminator for injunctive relief or damages. The main issue with this tort is defining a minor’s ability to consent. Further, injunctive relief may not be effective if the photo has already been widely disseminated. Accordingly, it would be difficult to prove who the disseminator really was if there was a chain of disseminators.

Under the intentional infliction of emotional distress (“IIED”) tort, a plaintiff would have to prove that a defendant’s conduct (1) was extreme and outrageous, (2) was intentional or reckless, and (3) caused “severe” emotional distress.¹⁴² If left to this tort alone, a plaintiff would be successful only if the plaintiff could prove that the defendant’s dissemination of the sext constituted extreme and outrageous conduct beyond all possible bounds of decency.¹⁴³

As evidenced by these two possible claims, the tort route is not effective because it would only impose liability on very few egregious cases. Even in those cases, the victim plaintiff would have to bear the cost of proving every element of the respective tort.

B. PREVIOUSLY PROPOSED SEXTING-SPECIFIC STATUTES

Others have pushed state legislators to enact sexting-specific legislation, rather than relying on the civil system. The following are examples of those pushes.

140. RESTATEMENT (SECOND) OF TORTS, §652D (Tentative Draft No. 13, 1966).

141. Nunziato, *supra* note 1, at 85; RESTATEMENT (SECOND) OF TORTS, § 652D.

142. RESTATEMENT (SECOND) OF TORTS, § 46 (1965).

143. Calvert, *supra* note 21, at 41.

I. Vermont and Nevada's Self-Produced Sexting Statute

Vermont is often cited as having the exemplary sexting statute.¹⁴⁴ A minor violates this statute when the minor “knowingly and voluntarily” sends an “indecent” photo of “himself or herself to another person.”¹⁴⁵ Any person can also violate this statute by possessing a photo of a minor that was voluntarily sent to that person, unless the person takes “reasonable steps” to destroy the image.¹⁴⁶ The consequences for minors who violate this statute are determined in juvenile court; the minors are exempt from any required child sex offender registration, and the court may allow the record to be expunged when the minor reaches adulthood.¹⁴⁷ Vermont’s statute is effective to the extent that it gives juvenile courts discretion and flexibility while at the same time limiting the severity of the punishment according to the concerns raised earlier in this Note.¹⁴⁸ It also recognizes the difference between a voluntary and involuntary sext.¹⁴⁹

However, there are many concerns the statute does not address. First, it only protects self-produced images, thus making a teen who takes a consensual photo of another teen subject to Vermont’s child pornography laws rather than the state’s sexting laws.¹⁵⁰ Second, it does not protect teens who forward the image to a small group of friends with the consent of the creator.¹⁵¹ Lastly, a person still violates the statute for capturing legal private consensual conduct, and would still be liable in a case like A.H.’s, discussed earlier in this Note. It would have, however, reduced the penalty A.H. would have faced.

Similarly, Nebraska distinguishes between minors who send their own photos and minors who subsequently disseminate photos.¹⁵² In the latter scenario, the minor is still subject to child pornography convictions and sex offender registrations.¹⁵³ Another important distinction is that Nebraska confines the statute to minors who send a sext to someone who is “at least fifteen years of age.”¹⁵⁴ This suggests that a fifteen-year-old who sends a

144. PODLAS, *supra* note 20, at 43.

145. 13 VT. STAT. ANN. tit. 13, § 2802b (2009).

146. *Id.*

147. Walters, *supra* note 77, at 118.

148. Leary, *supra* note 10, at 556.

149. *Id.*

150. Walters, *supra* note 77, at 118.

151. *See* Leary, *supra* note 10, at 556.

152. Walters, *supra* note 77, at 119.

153. *Id.*

154. *Id.*

sext to his or her fourteen-year-old significant other would be convicted under child pornography laws. States such as New Jersey and New York have taken a more educational approach to their sexting statutes.

2. *New Jersey's Diversion Program*

New Jersey requires a juvenile to enroll in a diversionary program for the “creation, exhibition of distribution” of a sext through the use of technology.¹⁵⁵ This statute only applies when the creator and the person depicted are or were minors at the time the picture was taken.¹⁵⁶ Thus, this statute does not take into account a scenario in which an eighteen-year-old boy takes a picture of his seventeen-year-old girlfriend with her consent. The minor charged with violating the statute must pay the costs of the diversionary program, with the exception of families who would be unable to pay for the minors.¹⁵⁷ Any program or counseling that is designed to increase the minor’s awareness of (1) the legal consequences and penalties for sexting; (2) the non-legal consequences, such as embarrassment, education and employment opportunities, and lost relationships; (3) the long-term consequences of posting sexts on the internet; and (4) the connection between sexting and cyber-bullying can be used to satisfy the diversionary program requirement.¹⁵⁸ This program is far better than the program offered by Skumanick,¹⁵⁹ which emphasized gender rolls.¹⁶⁰

From the results of my self-conducted survey, discussed above, it is evident that although teens often do not know sexting is illegal, they still recognize humiliation as a serious consequence of sexting.¹⁶¹ The New Jersey program would fix this gap in awareness, but it does not take into account many other types of behavior. For example, the New Jersey statute does not address the consequences of when a minor is coerced into sending a sext to an adult in order to feed the child pornography market. Giving such a lenient punishment for these cases may encourage adults to use

155. N.J. STAT. ANN. 2A: 4A-71.1 (2012) (remedial education and counseling programs for certain internet sex-related offenses; fees; program requirements).

156. *Id.*

157. *Id.*

158. Minor, *supra* note 11, at 13–14.

159. Skumanick was the District Attorney in the *Miller v. Mitchell* case who designed an education program that divided females and males into two different groups. The females’ curriculum was based on gaining “an understanding of what it means to be a girl in today’s society, both advantages and disadvantages.” This program is discussed in more detail later in this Note.

160. *See Miller v. Mitchell*, 598 F.3d 139, 152 (3d Cir. 2010).

161. Only five out of the fourteen high school students surveyed knew there could be criminal sanctions for sending a sext.

teens to obtain these images rather than deter them because the teens would only be given a slap on the wrist. Although the New Jersey statute still has more areas to consider, its diversionary program should be a model for other states taking a more educational approach to sexting.

3. *New York's Educational Sexting Statute*

Similar to New Jersey, New York's sexting statute is aimed at increasing awareness of the harms of sexting.¹⁶² New York's statute enlists the coordination of public and private efforts to provide educational outreach programs to minors and their parents.¹⁶³ The statute goes on to express the specific mediums that may be used for such programs such as outreach campaigns on print, television, and radio; public service announcements; community information forums; and distribution of materials through educators, mentors, and the public.¹⁶⁴ The main concern with such a program is that it is very similar to the information that has saturated the media for the past few years. Despite the media's efforts in providing such information, as suggested above, the media has just made sexting more popular, a way to "spice up" a sex life as well as an activity that cannot be done safely.¹⁶⁵ When teens do engage in the activity safely, it is likely they will see these campaigns as over exaggerations and hoaxes. This will also cause them to believe that all sexting is safe and allow their impulsive teen behaviors to take over and have them engage in sexting furies.¹⁶⁶ While this will not be how every teen will respond to such information, it is likely that these efforts would just add to the media's effect rather than supplant it.

C. EDUCATIONAL PROGRAMS AND IN-SCHOOL ACTION

Another solution that has been offered is to remove the sexting issue from legislators all together and put it in the hands of school officials. The Supreme Court has held that school officials have the authority and responsibility to monitor on-campus and off-campus behavior that may directly impact students' ability to obtain an education.¹⁶⁷ The process of educating the youth does not rest solely in textbooks and planned curricula;

162. B. A01203, 1203rd Gen. Assemb., Reg. Sess. (NY 2013), available at <http://legiscan.com/NY/text/A01203/id/676258>.

163. *Id.*

164. *Id.*

165. Willard, *supra* note 29, at 542.

166. Adler, *supra* note 19.

167. Willard, *supra* note 29, at 553.

rather, schools must also teach the young “civilized social order.”¹⁶⁸ In *Bethel v. Fraser*, the Supreme Court held that a public school had the authority to take disciplinary action against a student for giving a speech with sexual references even though that speech would otherwise be protected by the First Amendment.¹⁶⁹ This suggests that photos containing sexual exhibitions would likely fall under a school system’s regulatory authority. The Supreme Court claimed schools have a need to impose a wide array of sanctions on unforeseen conduct, as long as it is disruptive to the educational process.¹⁷⁰ Displaying a nude or sexually suggestive photo of another student via cell phone, school computer system, or other electronic device, during school can not only violate the pictured student’s privacy rights, subjecting the student to humiliation and stigmatization, but is also likely to cause chaos and disruption to that student’s and other students’ ability to focus on academics.¹⁷¹

Thus, proponents of in-school action want to shift the burden of regulating sexting from the legislators to the school authorities, using suspensions and expulsions as tools to contain the behavior. Although school authorities should have some role in confining certain egregious sexting incidents, it would be difficult to prove how off-campus sexting affects students’ educational pursuits in the classroom.¹⁷² Furthermore, school enforcement would only be functional in cases in which the school officials become aware of the sexting.¹⁷³ For instance, it would likely have a minimal effect on a student who has been blackmailed and coerced into sending a sext. That student would likely not want to go to school authorities in fear of making the matter more public or bringing it to the attention of the student’s family.

VI. THE SEXTING EDUCATION SOLUTION

To serve the best interest of minors, it is essential to prevent long prison sentences and sex-offender registrations.¹⁷⁴ However, sexting still has some harmful consequences and must be regulated to some extent. First and foremost, minors must be made aware of the legal and non-legal

168. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

169. *Id.* at 685–86.

170. *Id.* at 683.

171. Calvert, *supra* note 21, at 36.

172. *See id.*

173. *Id.*

174. Paraveccia, *supra* note 109, at 250.

consequences of sexting and told how to practice safe sexting. Simultaneously, state legislatures must enact a sexting-specific statute, such as the one proposed below, and amend their child pornography laws to preclude teen sexting. Respectively, the federal child pornography law must also be amended. Only when these actions are taken by a majority of the states can we feel comfortable that our minors' futures will not be taken away by the draconian child pornography convictions and know that their private choices will be respected by others.

A. SEXTING EDUCATION WITHIN THE COMPREHENSIVE SEX EDUCATION CURRICULUM

1. The Comprehensive Sex Education Legislation: The Passage and Requirements

Under the Patient Protection and Affordable Care Act, Congress provides funds to enable states to adopt a comprehensive sex education program.¹⁷⁵ This act eliminated two-thirds of the federal funding for abstinence-only-until-marriage programs that proved to be ineffective in preventing teenage pregnancies and replaced them with about \$190 million in funding for evidence-based programs that are comprehensive in scope, based on medically-accurate information, and age-appropriate.¹⁷⁶ One hundred million dollars were reserved for competitive contracts and grants to private and public entities to create such a program and \$25 million were allocated to testing, researching, and improving the effectiveness of those programs.¹⁷⁷ The funds are distributed from President Obama's newly established Office of Adolescent Health (OAH), whose purpose is to coordinate health education and information, disease prevention, health promotion, and health services activities.¹⁷⁸ Further, through the creation of the Personal Responsibility Education Program (PREP), \$55 million is reserved for state grants.¹⁷⁹ Each state that enrolls in the program is allocated a minimum of \$250,000 with additional funding available. To receive the grant, the state is required to fund programs that teach about

175. 42 U.S.C. § 713 (2010).

176. SEXUAL INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES, A BRIEF HISTORY OF FEDERAL FUNDING FOR MORE COMPREHENSIVE APPROACHES TO SEX EDUCATION AND RELATED PROGRAMS, *available at* <http://www.siecus.org/index.cfm?fuseaction=page.viewPage&pageID=1341&nodeID-1>.

177. *Id.*

178. *Id.*

179. *Id.*

both abstinence and contraception as well as address three of enumerated “adulthood preparation subjects.” These include

(1) Healthy relationship, such as positive self-esteem and relationship dynamics, friendships, dating, romantic involvement, marriage and family interactions; (2) Adolescent development, such as the development of healthy attitudes and values about adolescent growth and development, body image, racial and ethnic diversity, and other related subjects; (3) Financial literacy; (4) Parent-child communication; (5) Educational and career success, such as developing skills for employment preparation, job seeking, independent living, financial self-sufficiency, and workplace productivity; (6) Healthy life skills, such a goal-setting, decision making, negotiation, communication and interpersonal skills, and stress management.¹⁸⁰

The last requirement for the program is that it must focus on the needs of both sexually active youth by educating them on responsible sexual behavior with respect to contraception¹⁸¹ and those who are not sexually active by emphasizing abstinence.¹⁸²

2. Amending the Legislation to Include Education on Sexting

The program is an attractive vehicle for educating minors about sexting because it covers a variety of disciplines, informing the children of possible health risks implicated with engaging in certain sexual behaviors and, at the same time, helping build self-esteem, accumulating respect for the family, and preventing sexual abuse.¹⁸³ The program begins in kindergarten and continues into high school; reaching the vast majority of minors through the public school system is relatively inexpensive because schools can buy a sex education curriculum and train any of their teachers to teach that curriculum.¹⁸⁴ Sexting is also clearly in the purview of the OAH’s authority because it would provide health information about the reasons not to sext and how to sext safely if a minor chooses to sext.

The Act should thus be amended to include sexting. The amendment would require a state that satisfied the requirements detailed in the previous section to add a sexting section to its curriculum in order to continue

180. 42 U.S.C. § 713(C)(i)–(vi) (2010).

181. *Id.* § 713(B)(iii).

182. *Id.* § 713(B)(iv).

183. Barbara Dafoe Whitehead, *The Failure of Sex Education*, THE ATLANTIC ONLINE (Oct. 1994), <http://www.theatlantic.com/past/politics/family/failure.html>. The Atlantic Online.

184. *Id.*

receiving federal funds or to apply for new funds after the funding-period has ended. The proposed amendment would be a variation of the following.

The program includes activities to educate youth who are transmitting sexually suggestive photos via electronic devices regarding responsible disseminations and creation of the photos with respect to both not creating the images and using automatic deletion technology to send those photos, as well as the particular legal consequences the youth may face for engaging in this activity.

It would also require sending information home to parents about available technologies to monitor the possibility of their children engaging in such activities and strategies to talk to the children about ways to ensure they are not harmed in the long run. The amendment could propose some non-mandatory suggestions of available technology that can be used for safe sexting and provide examples of materials that can be sent home to parents. For instance, teens can use “Snapchat,” a cell phone application that sends timed self-destructing images to send sexts, rather than using a more permanent text message or email format.¹⁸⁵ Snapchats are deleted from the Snapchat server immediately after they are opened.¹⁸⁶ If they are not opened, the “snaps” are kept on the servers until they are deleted.¹⁸⁷ However, there is still potential for harm, which must be emphasized when proposing the use of this technology; the recipient can take a screenshot of the message or take a picture of his or her phone.¹⁸⁸ The screenshot will notify the sender, which gives the creator and original sender an ability to know that a permanent record has been created, but taking a picture of the phone would not.¹⁸⁹ A possible fix could be to minimize the time frame the photo is available in order to reduce the potential for such occurrences.

Technologies that can be offered to parents to prevent such behavior include a new Apple feature called “MouseMail.” Apple has a patent on a technology that would allow the account administrator, usually the parent, to prevent an Apple phone from sending or receiving sexually explicit text messages.¹⁹⁰ The technology is not yet available on the market, and will

185. Nicole A. Poltash, *Snapchat and Sexting: A Snapshot of Baring Your Bare Essential*, 19 *Rich. J. L. & Tech.* 14, 2 (2013), available at <http://jolt.richmond.edu/v19i4/article14.pdf>.

186. *Who Can View My Snaps and Stories*, SNAPCHAT (Oct. 14, 2013), available at <http://blog.snapchat.com/post/64036804085/who-can-view-my-snaps-and-stories>.

187. *Id.*

188. Poltash, *supra* note 185, at 9.

189. *Id.*

190. Paraveccia, *supra* note 109, at 258.

only be able to work on Apple products.¹⁹¹ MouseMail is a program that goes through a child's email and text messages, and forwards any questionable material to the parents.¹⁹² The main concern with such technology is that may seriously inhibit the trust and confidence between a parent and child; however, it would seem to be a better alternative than having their child face legal ramifications.

The success of this program will mainly hinge on the number of states that apply and implement such a program and the enactment of an accompanying sexting-specific statute. A sexting statute is necessary because we must recognize that, even if teens are made aware of the harms and legal consequences, some sexting activities will still occur. In these instances, the child pornography laws should not apply.

B. PROPOSED SEXTING-SPECIFIC STATUTE

The sexting statute proposed below should be altered to fit the particular state and be specifically adjusted depending on whether the state adopts the comprehensive sexting education described in part A of this section. If the state decides not to adopt the comprehensive sexting education, then the diversionary program required by this statute should be modeled after New Jersey's educational program discussed earlier.

- I. Definition of teen sexting
 - a. A Teen Sexting Image is an image
 - i. That is of one or more persons between the age of 13 and 18 or those over 18 that qualify under Section IV;
 - ii. Captured and is in any way fixed either by use of technology, traditional, or digital photographic or video format;¹⁹³
 - iii. In which the person is engaged in sexually explicit conduct,¹⁹⁴ or portraying a sexual suggestion with or without nudity.
- II. Permitted Conduct
 - a. Teens between the ages of 13 and 18 may voluntarily create and privately possess a Teen Sexting Image as long as

191. *Id.*

192. *Id.*

193. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

194. The reason I chose to use "sexually explicit conduct" is because if not the picture would not be subject of child pornography laws.

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they do not violate Section III and there is no more than a three-year difference between the depicted and the creator or recipient.

III. Violation

a. A person between the age of 13 and 18, except as provided in section IV, commits a delinquent act if the teen recklessly,

i. Creates a Teen Sexting Image through the use of coercion, manipulation, blackmail, fraud, without the depicted's knowledge of the image taken, or the use of any other force;

ii. Comes into possession of a Teen Sexting image created under subsection (i) or with the knowledge that he or she was not an intended recipient due to the minimal relationship he or she has with the depicted; or

iii. The actor:

1. Distributes or electronically shares a Teen Sexting Image in which he or she is not depicted;

2. Gives publicity to the Teen Sexting Image;¹⁹⁵

3. Posts on a public webpage a Teen Sexting Image;¹⁹⁶ or

4. Is otherwise transmitted to or for an adult that does not qualify under Section IV.

IV. Safe-Harbor¹⁹⁷

a. If an adult meets the following requirements, the adult shall be punished according to this statute and not federal or state child pornography laws:

i. An adult that would not otherwise be convicted under the state's statutory rape laws;¹⁹⁸

195. RESTATEMENT (SECOND) OF TORTS, §652D (defines giving publicity as the communication to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge).

196. Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context* 49 (Jan. 2010), http://works.bepress.com/julia_mclaughlin/1/.

197. S.B. 256, 118th Gen. Assemb., Reg. Sess. (Ind. 2013) (Indiana proposed excluding all person under 22-years-old from being convicted under child exploitation laws for sexting conduct).

198. An example of such a statute would be Ga. CODE ANN. §16-6-3 (2006) which excludes liability when the adult is less than four years apart from the victim. This is consistent with making the capturing of what would otherwise be legal activity also legal.

- ii. An adult that is in an intimate relationship with the depicted and is not more than three years older than the depicted;
 - iii. The adult did not take or secure the photo using his or her control or power over the depicted or use of any other force described in section (a)(i).
- V. The consequences of statutory violation shall be determined based on the offense:
- a. If the actor recklessly¹⁹⁹ creates, or distributes a Teen Sexting Image to Teen or Adult that qualifies under section IV and it is the actor's first offense, the actor:
 - i. Shall be adjudicated delinquent;
 - ii. Shall be placed on probation for a reasonable time, with phone and internet usage monitored;
 - iii. Shall be required to complete a reasonable amount of community service hours
 - iv. Shall not be tried as an adult;
 - v. Shall not be required to register as a sex offender.
 - b. If the actor recklessly creates or distributes a Teen Sexting Image to Teen or adult that qualifies under section IV and it is the actor's second offense, the actor:
 - i. Shall be adjudicated delinquent;
 - ii. Shall be required to pay a reasonable penalty and court costs;²⁰⁰
 - iii. Shall be expelled from school and the information about the delinquency adjudication shall be sent to the next school if they choose to transfer;
 - iv. Shall be placed on probation for a reasonable time, with phone and internet usage monitored;²⁰¹
 - v. Shall be required to complete a reasonable amount of community service hours;
 - vi. Shall not be tried as an adult;
 - vii. Shall not be required to register as a sex offender.

199. Recklessness is the level of scienter required in order to make this statute apply less narrowly—that is apply to more than just intentional conduct, and, less broadly, by not including negligent conduct.

200. PA-JIDAN, *Pennsylvania Juvenile Collateral Consequences Checklist* (May 2010), <http://www.pajuvdefenders.org/file/checklist.pdf>.

201. McLaughlin, *supra* note 196, at 50.

- VI. Subsequent violation of this Statute by the same teen or if the actor recklessly creates, or distributes a Teen Sexting Image to adults excluded from section IV under this Statute, the actor shall be convicted as misdemeanors with up to one year of jail sentence.
- VII. The involvement of a person under the age of 13 will require that the matter be referred to the state agency designated to supervised children in need of services.²⁰²
- VIII. Teen Sexting Images under this Statute are to be excluded from the state and federal child pornography law and any record shall be expunged upon the actor's eighteenth birthday²⁰³ or three years after the offense was committed, whichever comes first.²⁰⁴
- IX. Each County within this State that has not adopted the cumulating sexting education program shall create a preventative education program and a diversionary program, in which enrollment shall be added as a consequence under Section V.²⁰⁵
- X. This statute shall not apply if:
- a. The actor uses the photo for any commercial or profit-generating motive;²⁰⁶
 - b. The actor was acting with the purpose to facilitate an adult's access to the image or person depicted in the image and the actor was not excluded by Section IV.²⁰⁷

202. *Id.* at 48.

203. *Id.* at 51.

204. The reason I chose for records to be expunged after the minor becomes eighteen or three years have passed is because that is usually the age in which a teenager begins college. The goal would be to expunge records before a college applicant would need to declare it in order to reduce the long-lasting consequences, and promote educational opportunities. The passage of three years seems to be reasonable and would increase the fairness for say a 13-year-old, who will only have a record for three years instead of five years, where as a 17-year-old will only have a record for one year.

205. This diversionary program would be modeled after the New Jersey program discussed earlier, but will provide for a broader scope similar to the sexting education program proposed in the previous section.

206. McLaughlin, *supra* note 196. *See also* H.B. 156 Gen. Assemb. Reg. Sess. (GA 2013–2014).

207. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

C. DEFEATING POSSIBLE FOURTEENTH AMENDMENT CHALLENGES TO SEXTING EDUCATION

Whether a state chooses to implement the comprehensive sex education with sexting amendment or adopts the proposed statute requiring a diversionary program for those who do not adopt such an education program, parents will likely raise Fourteenth Amendment challenges to oppose such education. For instance, in *Miller v. Mitchell*, parents brought a successful Fourteenth Amendment claim against a District Attorney who gave their daughters two options: attend an education program designed by him and two other agencies or face felony child pornography charges.²⁰⁸ The education program divided females and males into two different groups.²⁰⁹ The females' curriculum was based on gaining "an understanding of what it means to be a girl in today's society, both advantages and disadvantages." A parent refused to have her child participate in the program and claimed the educational program violated the parent's substantive due process right to direct her child's upbringing, arguing that certain items in the educational program fell within the domain of the parents.²¹⁰ The mother in this case believed that the education program offered by the district attorney imposed ideas of morality and gender roles, contradicting the beliefs she wanted to instill in her daughter.²¹¹ The court made a fine distinction between the authority of school officials to control the school environment, behavior, and curriculum, during school hours and on school grounds, and the authority of a district attorney to enforce public laws, not impose education.²¹² By implementing sexting education within a school approved comprehensive sex education course, the Fourteenth Amendment challenge presented in this case would not succeed.

However, other Fourteenth Amendment challenges may be raised by parents who do not want their children exposed to sexting in a sex education course or diversionary programs. In order to withstand all possible constitutional violations of parental rights, it would seem necessary to allow parents to opt out.²¹³ The parental right is not absolute,

208. *Miller v. Mitchell*, 598 F. 3d 139, 153 (3d Cir. 2010).

209. *Id.* at 144.

210. *Id.* at 150.

211. *Id.* at 151.

212. *Id.*

213. Miranda Perry, Comment, *Kids and Condoms: Parental Involvement in School Condom-Distribution Programs*, 63 U. CHI. L. REV. 727, 731-33 (1996) (referring to Fourteenth Amendment challenges to in-school condom distribution programs).

but it is a fundamental right grounded in the Due Process Clause of the Fourteenth Amendment whose abridgement is analyzed under strict scrutiny.²¹⁴ Accordingly, the state regulation should be allowed to limit parental rights only if it is narrowly tailored to a compelling state interest.²¹⁵

Here, the compelling state interests are “safeguarding the physical and psychological well-being of a minor”²¹⁶ and uniformly educating all children.²¹⁷ The question thus becomes whether an educational program that teaches children both not to engage in sexting and how to sext safely is narrowly tailored to the state’s interests. Some parents may feel that providing resources for their children to sext safely is the same as the state encouraging a sexual activity that they oppose.²¹⁸ Most sex education curriculums solve similar concerns by instituting an opt-out provision, which places the burden on parents to affirmatively act to remove their children from the course.

Another option would be to require parents’ consent before allowing their children to enroll in the course. However, because both the diversionary and educational programs are based on a premise of providing information, rather than providing the means through which to engage in sexual activity such as condoms and contraceptives,²¹⁹ an opt out provision is sufficient to withstand Fourteenth Amendment challenges by parents and would be a narrowly tailored solution to the state’s compelling interest of uniformly educating the youth and safeguarding their wellbeing.

VII. CONCLUSION

Teen sexting is not as harmful as the media has led us to believe it is. The real danger is a child pornography conviction for a teenager who was either exploring different means of sexual experiences or made the foolish, reckless mistake of sharing that sexual experience with others. Nevertheless, the reputational harm to minors that child pornography laws seek to prevent can arise in certain sexting activity. The creation of a permanent record and the psychological and emotional trauma that can occur upon an image being widely disseminated are not unforeseen

214. *Id.* at 727–28.

215. *Id.* at 728.

216. *United States v. Knox*, 977 F.2d 815, 821 (3d Cir. 1992) *vacated*, 510 U.S. 939 (1993).

217. *Perry*, *supra* note 213.

218. *Id.*

219. *Id.*

consequences of sexting. However, the child pornography law was not meant to address this new method of teen sexual expression; rather, it was aimed at constraining pedophilic desires, capturing of the adults who take advantage of children, and eliminating the market for child pornography. The magnitudes of harm are not equal and their penalties should not be either. Our judicial system is based on protecting our youth and expecting lower standards of conduct of them matched by a lower level of punishment. There are only certain situations in which minors are treated as adults, and this should not be one of them. In these cases, we are creating drastic sanctions for minors who engage in conduct that would not be punishable for adults. The hardest statistic to believe is that a majority of teens do not even know that they are engaging in illegal conduct when they sext.

For this reason, a combination of an education program mirrored with a sexting-specific statute must be implemented in every state. The most effective way of informing teens of the legal and non-legal consequences of sexting, as well as the methods of practicing safe-sexting, would be to incorporate such a program within an established comprehensive sex education curriculum. This would reach the greatest number of teenagers through the public school system and would withstand almost all Fourteenth Amendment challenges by virtue of its opt-out provision. Gender roles would be irrelevant and the curriculum would only focus on the medically accurate and scientifically proven facts as required by the Patient Protection and Affordable Care Act. Education is necessary, but it cannot independently reach or convince all students. Thus, a sexting-specific statute must be implemented for those students who decide to engage in the activity regardless of the known legal consequences. Unlike most of the previously enacted sexting statutes, the proposed sexting statute does not just apply to the creator, but also to the disseminator. It is also able to reach a broad array of circumstances by imposing liability on reckless conduct, rather than purely intentional behavior. With the combination of a statute and an educational program, state and federal legislators can comfortably amend child pornography laws so they do not apply to peer-to-peer teen sexting.