

A NEW STATUTORY REGIME DESIGNED TO ADDRESS THE HARMS OF MINORS SEXTING WHILE GIVING A MORE APPROPRIATE PUNISHMENT: A MARRYING OF NEW REVENGE PORN STATUTES WITH TRADITIONAL CHILD PORNOGRAPHY LAWS

BY: WHITNEY STRACHAN*

ABSTRACT

There has been much controversy in the legal community over how to deal with the new phenomenon of minors sexting. Some states have addressed minors sexting by charging and convicting under child pornography laws. However, convicting under child pornography laws has led to harsh results and questions about whether the application of child pornography laws is appropriate. Other states have come up with alternative solutions to convicting under child pornography laws such as education, while other states have amended legislation to specifically address sexting. A more recent phenomenon, which is linked to sexting and has been designed to address adults, is the criminality of revenge porn. This Note argues that a new statutory regime that is based primarily on revenge porn statutes while including the intent aspects of child

* J.D. Candidate, University of Southern California Gould School of Law, 2015; B. Com., University of British Columbia, 2012. Special thanks to Professor Camille Gear Rich for her invaluable guidance and advice throughout the writing process, and to the editors of the Southern California Review of Law and Social Justice for their hard work and thoughtful edits.

pornography laws can address the harms of minors sexting while giving a more appropriate punishment. Specifically, the new statutory regime encompasses minors, applies to all forms of media distribution, pertains to all types of victims, and, specifically for minors, does not require a specific intent or the victim to suffer severe emotional distress.

TABLE OF CONTENTS

I. INTRODUCTION	268
II. PHENOMENON OF SEXTING.....	272
A. HOW DID THE SEXTING PHENOMENON BEGIN?.....	272
B. WHAT IS SEXTING?.....	273
C. THE HARMS OF SEXTING AND WHAT SOCIETY IS TRYING TO PROTECT	275
III. SEXTING AND THE LAW: CHILD PORNOGRAPHY.....	277
A. SUMMARY OF FEDERAL LAW.....	277
B. SUMMARY OF STATE CHILD PORNOGRAPHY LAWS AND SEXTING.....	278
IV. REVENGE PORN: A NEW MOVEMENT.....	281
A. WHAT IS REVENGE PORN?	281
B. HOW HAVE REVENGE PORN VICTIMS TRIED TO REMEDY THEIR PROBLEM?.....	282
C. REVENGE PORN STATUTES.....	284
V. A NEW STATUTORY REGIME TO ADDRESS THE HARMS OF MINORS SEXTING THAT IS BASED PRIMARILY ON REVENGE PORN STATUTES WHILE ENCOMPASSING ASPECTS OF CHILD PORNOGRAPHY LAWS.....	288
A. PROPOSED ATTRIBUTES OF NEW STATUTORY REGIME.....	288
B. NEW STATUTORY REGIME ADDRESSES TEEN SEXTING HARMS	292
C. EDUCATIONAL AWARENESS OF THE NEW STATUTORY REGIME IS NECESSARY AT THE HIGH SCHOOL LEVEL	293
VI. CONCLUSION.....	294

I. INTRODUCTION

When Jessica Logan, an ordinary Ohio teenager, decided to take a nude photo of herself and send it to her boyfriend, she did not expect that

those actions would eventually end her life.¹ What seemed like a fun flirtatious act at the time, turned for the worst after Jessica broke up with her boyfriend, who, in turn, sent the photos to other high school girls.² The girls who received the photos rapidly circulated them.³ Jessica then began having troubles at school.⁴ For instance, as the pictures started to circulate, Jessica began skipping classes and losing focus in her studies.⁵ The problems at school worsened when children began harassing Jessica and throwing objects at her. Jessica's mother became concerned when she was alerted to the problem and asked the high school administration to intervene.⁶ However, the school chose not to get involved.⁷ Jessica reached out to the school's guidance counselor who informed her that "he could ask the students to delete the photo from their cell phones, but there was nothing else he could do."⁸ The guidance counselor did, however, take the opportunity to ask Jessica to submit to an interview to inform others about the dangers of sexting.⁹ Following the interview, the harassment from students increased rather than decreased.¹⁰ After the continued harassment, Jessica committed suicide.¹¹

This story illustrates how some teen sexting scenarios involve an ambiguous intent, and the harmful consequences that can occur long after the initial sext is sent. Do we have adequate statutes to address the problem of minors sexting? What do we make of Jessica Logan's story? Is it child pornography? Is it revenge porn? Or is another statute needed to address the harms of minor's sexting?

Sexting has puzzled the legal community.¹² With the increased capabilities of cell phones and their becoming a primary method of

¹ Joseph Paravecchia, Note, *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, 240 (2011).

² *Id.*

³ *Id.*

⁴ *Id.* at 243.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*; Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPPECTUS 1, 2 (2009).

¹² Paravecchia, *supra* note 1, at 243.

communication, the act of sexting has dramatically increased resulting in unforeseen consequences.¹³ Sexting is the act of sending sexually explicit photos through cell phones.¹⁴ It involves four aspects: the subject of the photo, the photographer, the distributor, and the recipient of the photo.¹⁵ It has notable harms, including: effects on one's reputation, job security, and friendships; subjection to harassment and exploitation; risk of conviction under child pornography laws; and impacts on general emotional well-being.¹⁶ The legal system has struggled with how to address the issue of sexting and what law is most appropriate.¹⁷ Federal law has made the production and distribution of child pornography illegal and without protection of the First Amendment.¹⁸ States have largely had flexibility in defining their child pornography laws.¹⁹ Some states have charged and convicted under child pornography; however, many states have felt that the punishment under child pornography laws is too harsh for sexting.²⁰ For instance, Philip Alpert, a Florida teenager, sent nude photos of his ex-girlfriend to his friends after a breakup, and as a result, he was convicted under child pornography laws and had to register as a sex offender.²¹ To avoid such harsh punishment for sexting, some states have chosen not to convict but to instead resolve the situation with non-legal solutions, others have amended current laws to better reflect sexting and still others have proposed altogether new sexting legislation.²² States are looking for alternative solutions to charging under child pornography.

¹³ *Id.*; Maryam F. Mujahid, *Romeo and Juliet—A Tragedy of Love by Text: Why Targeted Penalties That Offer Front-end Severity and Back-end Leniency Are Necessary to Remedy the Teenage Mass-Sexting Dilemma*, 55 HOW. L.J. 173, 179 (2011).

¹⁴ 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, 494 (2010).

¹⁵ Elizabeth M. Ryan, *Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 360–61 (2010).

¹⁶ Nancy E. Willard, *Sexting and Youth: Achieving a Rational Response*, 6 J. SOC. SCI. 542, 544 (2010); Calvert, *supra* note 11, at 23–25.

¹⁷ Paravecchia, *supra* note 1, at 243.

¹⁸ Shannon Shafron-Percz, *Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting*, 26 J. MARSHALL J. COMPUTER & INFO. L. 431, 436 (2009).

¹⁹ *Id.*

²⁰ *Id.* at 440.

²¹ Mallory M. Briggs, "Send Me a Picture Baby, You Know I'd Never Leak It": *The Role of Miller v. Mitchell in the Ongoing Debate Concerning the Prosecution of Sexting*, 19 VILL. SPORTS & ENTMT. L.J. 169, 182 (2012).

²² Paravecchia, *supra* note 1, at 249.

Other states have turned to “revenge porn” statutes to address the harms of sexting. Revenge porn generally refers to the act of a person sharing photos of a person that they once were in a relationship with as revenge, similar to what Alpert did.²³ As the act of distributing photos without one’s permission has, for the most part, not been criminalized, people have had to turn to civil remedies to try to compensate for their damages. Recently, however, both New Jersey and California have passed legislation aimed at revenge porn.²⁴ Both pieces of legislation have been met with criticism and there is opportunity to develop this legislation.²⁵ Although revenge porn statutes have addressed some of the harms of adults sexting, they have not been applied to minors because, traditionally, minors sexting has fallen under child pornography laws.²⁶

However, this Note proposes that when dealing with minors, a new statutory regime that parallels revenge porn statutes, but does not require specific intent similar to child pornography laws, would better address the harms of minors’ sexting while giving a more appropriate punishment. Although nude photos are prolific, and therefore there is a chance they may not surface; nonetheless, the permanency of the Internet presents a cognizable risk that photos will surface and cause harm to a minor. Further, this Note’s proposed solution provides a more appropriate punishment because child pornography laws were designed to protect against pedophiles, while sexting images are taken for the child’s own purposes and the primary distribution is consensual. Therefore, a pedophile and a minor that secondarily distributes a sext, should not have the same punishment as they do not pose the same threat or cause the same harm.²⁷

This Note specifically addresses cases of sexting where a minor sends

²³ Heather Kelly, *New California ‘Revenge Porn’ Law May Miss Some Victims*, CNN TECH (Oct. 3, 2013, 3:01 PM), <http://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california/>.

²⁴ Debra Cassens Weiss, *How to Battle Revenge Porn? Calif. Lawmakers Pass Law; Prof Sees No-Nude Photo Solution*, ABA JOURNAL (Sept. 25, 2013, 10:45 AM), http://www.abajournal.com/news/article/how_to_battle_revenge_porn_calif._lawmakers_pass_law_law_profs_debate_social/; Julia Dahl, *“Revenge Porn” Law in California a Good First Step, but Flawed, Experts Say*, CBS NEWS, (Oct. 3, 2013, 11:54 AM), <http://www.cbsnews.com/news/revenge-porn-law-in-california-a-good-first-step-but-flawed-experts-say/>.

²⁵ Jessica Roy, *California’s New Anti-Revenge Porn Bill Won’t Protect Most Victims*, TIME (Oct. 3, 2013), <http://nation.time.com/2013/10/03/californias-new-anti-revenge-porn-bill-wont-protect-most-victims/>.

²⁶ Paravecchia, *supra* note 1, at 243.

²⁷ Lina Mathew, *Online Child Safety from Sexual Abuse in India*, 1 J. INFO. L. & TECH. 21 (2009).

a photo to another with an expectation of privacy, and the recipient of the photo engages in a secondary sending of the sext without the consent of the original sender. This Note proceeds in five parts. Part II provides the background understanding of the phenomenon of sexting. In this part, the Note discusses how sexting began, what sexting is, and what the harms of sexting are. Part III discusses the current legislative attempts to deal with sexting, including a look at both federal and state child pornography laws, and, further states' amendments to deal with sexting specifically. Part IV discusses the phenomenon of revenge porn. In this part, the Note discusses what revenge porn is, how victims have addressed the problems in the civil system, and the current legislation criminalizing revenge porn. Finally, in Part V, the Note proposes that a new statutory regime be developed which is based primarily on revenge porn legislation while incorporating the intent aspects of child pornography laws which specifically address the harms of minors sexting, while giving an appropriate punishment to the person who distributes the photo without the consent of the person depicted. Specifically, the proposed statutory regime should be applicable to minors, encompass all forms of distribution, pertain to both victims who originally took their photo or had their photo taken, and not require an intent by the distributor or require victims to have suffered severe emotional distress at the time of conviction. Further, in addition to the legislation, educational programs should be conducted to educate minors about sexting and the new statutory regime.

II. PHENOMENON OF SEXTING

To understand the legal ramifications of sexting, it is vital to have an understanding of the sexting phenomenon including: how sexting began, what the definition of sexting is, and what the harms associated with sexting are against which society is trying to protect.

A. HOW DID THE SEXTING PHENOMENON BEGIN?

Recently, new technology has proliferated to allow younger and younger minors to have access to cell phones. This proliferation has caused new ways to communicate and, along with that, harmful consequences that current laws do not adequately reflect. Research has shown that as early as 2004, "[45] percent of teenagers owned cell

phones.”²⁸ This number is significant as “most Americans of any age did not own cell phones prior to the turn of the twenty-first century.”²⁹ Further, only six years later, in 2010, the percentage of teenagers who owned a cell phone rose to 75 percent.³⁰ With teenagers spending a majority of time in school or with their parents, texting on cell phones has become a primary method of communication amongst the younger population.³¹ To illustrate the importance of texting to teenagers, in 2010, 88 percent of teenagers used the texting function on their cell phone.³² Further, roughly “[50] percent of teens send about 1,500 texts per month.”³³ Additionally, as cell phone technology developed, inclusion of a camera became the norm. Studies have shown that 39 percent of teens have used the camera function to take and send pictures in a text message.³⁴ Therefore, texting on cell phones has become an essential aspect of a teenager’s life, both socially and functionally.³⁵ However, some minors have used the camera and text function to participate in an activity called sexting, by which an individual sends sexually explicit photos by cell phone.³⁶ The problems with text messaging are that a text can be sent in mere seconds, the information cannot be retracted, and the text can be preserved. Therefore, sexting has caused much controversy within the legal community.

B. WHAT IS SEXTING?

The word sexting is a blend of the words “sex” and “texting.”³⁷ Sexting is not a legal term; however, Oxford English Dictionary has recognized the word as meaning “the sending of sexually explicit texts and

²⁸ Mujahid, *supra* note 13, at 179.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 180.

³³ *Id.*

³⁴ Megan Myers, *Technology and Teen Sex: The Need for Legislative Action in Response to ‘Sexting’*, 46 TULSA L. REV. 191, 197 (2010).

³⁵ Mujahid, *supra* note 13; Kath Albury & Kate Crawford, *Sexting, Consent and Young People’s Ethics: Beyond Megan’s Story*, 26:3 CONTINUUM: J. MEDIA & CULTURAL STUD. 463, 466 (2012).

³⁶ Lcary, *supra* note 14, at 492–94.

³⁷ Todd A. DeMitchell & Martha Parker-Magagna, *Student Victims or Student Criminals? The Bookends of Sexting in a Cyber World*, 10 CARDOZO PUB. L. POL’Y & ETHICS J. 1, 4 (2011).

pictures by cell phone.”³⁸ More clearly, the National Center for Missing and Exploited Children (“NCMEC”) defined sexting as “writing sexually explicit messages, taking sexually explicit photos of themselves or others in their peer group, and transmitting those photos and/or messages to their peers.”³⁹ Every sext involves “four different roles: (1) the subject of the photo, (2) ‘the person who took the photo,’ (3) ‘the distributor(s) of the photo,’ and (4) ‘the recipient(s) of the photo.’”⁴⁰ Sexting can occur between two minors, between a minor and an adult, or between two adults.⁴¹

Kath Albury and Kate Crawford, in *Sexting, Consent and Young People’s Ethics: Beyond Megan’s Story*, state that there are three main contexts of sexting: sharing exclusively between two people in a romantic relationship, between two people in a relationship and with others, and between two people where at least one hopes that a relationship will begin.⁴² Moreover, sexting involves both primary and secondary actions.⁴³ Primary sexting is when a person takes a photo of himself and sends the photo to another person, the intended recipient. Secondary sexting occurs when the intended recipient distributes the photo to others.⁴⁴ The three contexts of sexting, whether primary or secondary, are important to understand as the law has reacted to each differently. For instance, prosecutors have traditionally not charged and, if charged, courts have not convicted girls who initiated the distribution of photos which were then secondarily distributed.⁴⁵ However, in most cases, secondary distributors of photos who distributed them without the initial sender’s consent have been charged and convicted.⁴⁶ This Note will specifically focus on sexting involving minors and how the harms of secondary sexting can be reduced.

In 2008, The National Campaign to Prevent Teen and Unplanned Pregnancy administered a survey to teens and young adults to gain an accurate perspective of the impact of sexting.⁴⁷ The survey indicated that 22 percent of females and 18 percent of males sent or posted nude photos

³⁸ Leary, *supra* note 14, at 494.

³⁹ *Id.*

⁴⁰ Ryan, *supra* note 15, at 360–61.

⁴¹ *Id.* at 360.

⁴² Albury & Crawford, *supra* note 35, at 470.

⁴³ Ryan, *supra* note 15, at 361.

⁴⁴ *Id.*

⁴⁵ Briggs, *supra* note 21, at 180.

⁴⁶ *Id.* at 182.

⁴⁷ DeMitchell & Parker-Magagna, *supra* note 37, at 7.

of themselves.⁴⁸ Further, approximately 70 percent of those who sent the sexual text messages sent them to a significant other.⁴⁹ Teens have described the process of sending sexts as a common “fun and flirtatious” activity in a technology-based world.⁵⁰ Many have described the process as a type of “mating ritual” used to court or attract the other sex.⁵¹ To illustrate why minors sext, *CosmoGirl* conducted a survey which found that sexts were sent as a “sexy present” to significant others, and that many considered the activity “flirty.”⁵² Although many of the participants in the survey recognized that “sexting can have negative consequences,” it is still a growing phenomenon done with “some regularity.”⁵³ Many teachers in schools have noted that students are not aware of the ramifications of sexting.⁵⁴

C. THE HARMS OF SEXTING AND WHAT SOCIETY IS TRYING TO PROTECT

Because sexting can be completed at the push of a button and control can be lost at the point of sending, sexting can cause much harm. There are numerous harms that can affect the subject of the photo, who is normally the person who took the photo.⁵⁵ First, sexting can cause harm to one’s reputation and can especially affect potential job opportunities.⁵⁶ For instance, employers often will do an online search looking for any inappropriate photos or videos online before hiring an individual.⁵⁷ Therefore, one photo could potentially affect a career twenty or thirty years down the road. However, it could be argued that because of the Internet and new digital era of photos, the prolific amount of photos may reduce the chance of one inappropriate photo surfacing on an Internet search. Also, many job recruiters or employers may not conduct a search looking for sexually explicit photos. Nonetheless, because the Internet can

⁴⁸ *Id.* at 8; Lara Karaian, *Lolita Speaks: ‘Sexting,’ Teenage Girls and the Law*, 8 CRIME MEDIA CULTURE 57, 65 (Feb. 22, 2012).

⁴⁹ DeMitchell & Parker-Magagna, *supra* note 37, at 8.

⁵⁰ *Id.*; Karaian, *supra* note 48, at 65.

⁵¹ Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1 (2009).

⁵² Karaian, *supra* note 48, at 65.

⁵³ *Id.*; DeMitchell & Parker-Magagna, *supra* note 37, at 8; Calvert, *supra* note 11, at 2.

⁵⁴ DeMitchell & Parker-Magagna, *supra* note 37, at 8.

⁵⁵ Calvert, *supra* note 11, at 5.

⁵⁶ Nicole A. Poltash, *Snapchat and Sexting: A Snapshot of Baring Your Bare Essentials*, 19 RICH. J.L. & TECH. 14, 30 (2013); Calvert, *supra* note 11, at 24.

⁵⁷ Calvert, *supra* note 11, at 24.

preserve photos, and, with enough search terms, identify a person, it is a distinct possibility that a precise search could recover a sexual photo posted on the Internet. Additionally, even if certain lower, entry-level jobs may not conduct the same type of search as high level positions, the photo could surface years after the photo was taken and affect one's career.

Second, teens who have sexted could face exploitation, harassment, and bullying caused by the widespread distribution of the sent photo.⁵⁸ For example, recipients of the photo could threaten to send the photo out to other people if their demands are not met by the sender.⁵⁹ Although this form of blackmail could occur within a relationship, it most commonly happens after the relationship has ended acrimoniously. In either situation, blackmail results in harm to the minor.⁶⁰ Further, psychological and emotional harm can continue throughout the life of an individual affected by a sext because of the permanency of the photo.⁶¹ The victim can be re-victimized after every re-posting of the photo.⁶² There have been far too many suicides resulting from a child who has faced the embarrassment of a sexual photo being released to people other than the intended recipient.⁶³

Third, an additional harm to sexting, which is at the forefront of the legal community, is that it could encourage the child pornography market.⁶⁴ Once the images have been distributed, proliferation can be hard to control, and if the child pornography market acquires the photo, the child could potentially be re-victimized over a lifetime.⁶⁵ Also, the person who receives the photo and sends the photo to one or more people can be subject to the harm of being charged under child pornography laws.⁶⁶ If convicted, these minors can be labeled as sex offenders and be subject to a stigma that can affect their life in many ways.⁶⁷

Because of all the notable harms associated with sexting, the legal community recognizes the need to address sexting. However, the legal community has struggled to determine whether existing laws should

⁵⁸ Willard, *supra* note 16, at 544; Calvert, *supra* note 11, at 2.

⁵⁹ Willard, *supra* note 16, at 544.

⁶⁰ *Id.*

⁶¹ *Id.* at 545.

⁶² Poltash, *supra* note 56, at 30.

⁶³ See Weiss, *supra* note 24 (discussing Tyler Clementi's suicide); Dahl, *supra* note 24.

⁶⁴ Poltash, *supra* note 56 at .

⁶⁵ *Id.*

⁶⁶ Calvert, *supra* note 11, at 5, 24.

⁶⁷ *Id.*

address sexting or whether new laws should be adopted.⁶⁸

III. SEXTING AND THE LAW: CHILD PORNOGRAPHY

The question of how the law should address minors' sexting has not reached the United States Supreme Court, and therefore, states have struggled to confront sexting under the current law.⁶⁹ Because the act of sexting resembles child pornography, many states have been addressing the issue under child pornography laws.⁷⁰ However, some states have dealt with the phenomenon by creating amendments to existing law or by proposing sexting-specific legislation.⁷¹

A. SUMMARY OF FEDERAL LAW

Before the 1970s, child pornography was regulated by "obscenity" laws, which had to pass the *Miller* obscenity standard to be subject to criminal liability.⁷² To determine whether the material qualified as obscene, the *Miller* test evaluated:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.⁷³

Because the *Miller* obscenity standard was fairly narrow, some child pornography was able to fall within the protections of the First Amendment.⁷⁴ To address this problem, the Supreme Court subsequently "sanctioned the criminalization of child pornography, deeming it a separate category of material outside the protection of the First Amendment."⁷⁵ The Court enacted a lesser standard: "A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a

⁶⁸ *Id.* at 7.

⁶⁹ Paravecchia, *supra* note 1, at 243.

⁷⁰ *Id.*

⁷¹ *Id.* at 249.

⁷² Shafron-Percz, *supra* note 18, at 436.

⁷³ *Id.* at 436 n.32 (quoting *Miller v. California*, 413 U.S. 15, 24 (1973) (internal citations omitted)).

⁷⁴ *Id.* at 436.

⁷⁵ *Id.*

patently offensive manner; and the material at issue need not be considered as a whole.”⁷⁶

Additionally, the First Amendment does not protect images of child pornography.⁷⁷ Federal law under § 2256 of Title 18 of the United States Code “defines child pornography as any visual depiction of sexually explicit conduct involving a minor.”⁷⁸ For an image to constitute child pornography, it does not have to depict the child engaging in a sexual activity, but rather, it can be a naked image of a child that is sexually suggestive.⁷⁹ Further, the Federal Government created laws “prohibiting the sale, possession, production, and distribution of child pornography.”⁸⁰

The rationale behind prohibiting child pornography was decided in *New York v. Ferber*.⁸¹ The policy behind child pornography laws is to protect the child.⁸² Child pornography, as noted in *New York v. Ferber*, “is intrinsically related to child abuse and is a commercial enterprise that provides economic incentive for the continued exploitation of minors.”⁸³ Therefore, states have been encouraged to protect children by preventing child pornography in any form that it may be portrayed.⁸⁴ Because child pornography is “in fact [a record] of a crime being committed,” violations of federal law can be severe.⁸⁵ For instance, under 18 U.S.C. § 2251, a first time offender can face fifteen to thirty years in prison, in addition to fines.⁸⁶ In addition to federal law, the individual states have freedom to create their own laws on what constitutes child pornography.⁸⁷

B. SUMMARY OF STATE CHILD PORNOGRAPHY LAWS AND SEXTING

When minors take a sexual picture of themselves and send it to another, both the producer and the recipient are at risk of being charged under a state’s child pornography laws. For instance, recall the Philip

⁷⁶ *Id.* at 437 n.34 (quoting *New York v. Ferber*, 458 U.S. 747, 764 (1982)).

⁷⁷ *Child Exploitation & Obscenity Section*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/criminal/ccos/citizensguide/citizensguide_porn.html (last visited March 20, 2015).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Shafron-Perez, *supra* note 18, at 437–39.

⁸¹ *Id.* at 439.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 436.

⁸⁵ U.S. DEP’T OF JUSTICE, *supra* note 77; Mathew, *supra* note 27, at 8 n.26 (citation omitted).

⁸⁶ 18 U.S.C. § 2251 (2012).

⁸⁷ U.S. DEP’T OF JUSTICE, *supra* note 77.

Alpert case in Florida, in which the eighteen-year-old e-mailed nude pictures of his sixteen-year-old girlfriend to approximately seventy people.⁸⁸ Alpert was charged under Florida's child pornography laws.⁸⁹ He was convicted and was required to register as a sex offender.⁹⁰ As a result, Alpert was asked to leave the college he was attending, had troubles maintaining a job, and had restrictions on where he could live.⁹¹ Due to the harshness of the result that Alpert faced, the legal world became skeptical as to whether applying child pornography laws was the appropriate punishment and appropriate means of addressing the harms of sexting.⁹²

For instance, Dahlia Lithwick, a contributor to *Newsweek*, illustrated the view that child pornography is too harsh of a result by stating that:

The argument that we must prosecute kids as the producers and purveyors of kiddie porn because they are too dumb to understand that their seemingly innocent acts can harm them goes beyond paternalism. Child-pornography laws intended to protect children should not be used to prosecute and then label children as sex offenders.⁹³

Moreover, it has been argued that the purpose of child pornography laws is not in line with sexting.⁹⁴ The United States Supreme Court discussed the policy behind child pornography laws, including protection against "the harmful effects of the production of child pornography at the hands of an adult."⁹⁵ Unlike child pornography cases in which an adult is taking the photo, minors in a sexting case are not harmed in the immediate production of the image when they send it to a romantic partner.⁹⁶ Proponents of child pornography laws not being applied to sexting cases, support their argument that sexting does not meet the harm principle by making sexting analogous to virtual child pornography where children are not harmed in the production and, therefore, would be entitled to First Amendment protection.⁹⁷ In summary, many states have taken the position that "charging teens with child pornography offenses for the producing of sexting images serves to victimize them, not protect them" and the

⁸⁸ Briggs, *supra* note 21, at 182.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*; Calvert, *supra* note 11, at 61.

⁹³ Calvert, *supra* note 11, at 45.

⁹⁴ Myers, *supra* note 34, at 202.

⁹⁵ *Id.* at 203.

⁹⁶ *Id.*

⁹⁷ Paravaccchia, *supra* note 1, at 246.

majority of the teen sexters are not the predators child pornography laws are designed to protect children from.⁹⁸

Because the application of child pornography laws to sexting cases caused harsh punishment, many states became reluctant to convict individuals under child pornography laws for primary or secondary sexting. For instance, in Colorado, a boyfriend and girlfriend who were sixteen and fifteen, respectively, engaged in sexual intercourse and took phone images of the acts.⁹⁹ Although Colorado would have classified this sexting as child pornography, the state remanded the couple to counseling instead of applying the harsh result of child pornography laws.¹⁰⁰ The state contended “the feeling among some law enforcement is that child pornography laws were not intended to apply in the sexting context.”¹⁰¹

Another instance of a state not convicting for sexting was in Ohio.¹⁰² A fifteen-year-old girl took sexual photos of herself on her cell phone and sent the images to some of her classmates.¹⁰³ Even though her actions would have been sufficient to be convicted under Ohio’s child pornography laws, the girl avoided criminal prosecution on the condition that she abide by a curfew, avoid cell phones, and be supervised during Internet activity.¹⁰⁴ The state did not convict under their child pornography laws because it would have created a harsh result in which the minor would have been subject to a felony conviction and sex offender registration.¹⁰⁵

Therefore, it is clear that although states could find a way to have sexting fit within their child pornography statutes, many felt that the child pornography laws were not appropriate in addressing the phenomenon.¹⁰⁶

As a result, some states turned to amending current child pornography statutes, proposing sexting legislation, or using non-legal solutions such as education.¹⁰⁷ For instance, Ohio has since introduced a program specifically aimed at juvenile sexting offenders.¹⁰⁸ The six-month

⁹⁸ Myers, *supra* note 34, at 205; Calvert, *supra* note 11, at 45.

⁹⁹ Shafron-Perez, *supra* note 18, at 440.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 442.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 443.

¹⁰⁶ Myers, *supra* note 34, at 205.

¹⁰⁷ *Id.* at 207–08.

¹⁰⁸ *Id.* at 207.

program requires “teen participants of sexting to relinquish their cell phones, participate in community service, and take four hours of educational courses concerning the appropriate and legal use of the Internet and related topics.”¹⁰⁹ Additionally, “Vermont moved minor adjudication for sexting to juvenile court to avoid sex offender registration.”¹¹⁰ Moreover, some states have considered passing bills aimed at dealing with sexting specifically.¹¹¹ This legislation is generally aimed at using education as a solution.¹¹² Judging by the varied legal responses to sexting and the inconsistent application of child pornography laws, there is a need for an alternative solution to address sexting that is not encompassed by the child pornography laws.

IV. REVENGE PORN: A NEW MOVEMENT

Consider Alex Phillips, a seventeen-year-old boy in Wisconsin who was in a loving relationship with his girlfriend.¹¹³ After a breakup, Phillips posted, without his ex-girlfriend’s consent, two nude photos of her that she had sent to him during the course of their consensual relationship.¹¹⁴ This teen’s vengeful actions resulted in the state charging Phillips with child pornography—but is this the best course of action? Could aspects of revenge porn statutes provide a better solution?

A. WHAT IS REVENGE PORN?

Generally, “non-consensual pornography is the distribution of sexually graphic images of individuals without their consent.”¹¹⁵ Non-consensual photography includes pictures initially obtained both with consent and without consent.¹¹⁶ More specifically, revenge porn has been used to describe when a person, who was once in a consenting relationship, shares nude or partially nude photos of their once significant other without consent and with the intent to cause harm.¹¹⁷ Often, the

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 202.

¹¹¹ Paravecchia, *supra* note 1, at 249.

¹¹² *Id.*

¹¹³ Willard, *supra* note 16, at 545.

¹¹⁴ *Id.*

¹¹⁵ Mary Anne Franks, *Criminalizing Revenge Porn: A Quick Guide*, END REVENGE PORN, http://www.endrevengeporn.org/main_2013/?page_id=656 (last visited Oct. 7, 2014).

¹¹⁶ *Id.*

¹¹⁷ Kelly, *supra* note 23.

process of vengeful sharing of photos starts with sexting.¹¹⁸ Secondary sexting, which can be a form of revenge porn distribution, occurs when the original intended recipient shows or sends the photo to other unintended recipients without the consent of the original sender.¹¹⁹ Since sexting and the act of vengeful sharing is a relatively new phenomenon, some website developers have even created specific websites to promote the activity.¹²⁰ Websites for revenge porn “feature explicit photos posted by ex-boyfriends, ex-husbands and ex-lovers, often accompanied by disparaging descriptions and identifying details, such as where the women live and work, as well as links to their Facebook pages.”¹²¹ These websites have generally been immune to criminal liability.¹²²

The effects of revenge porn have included victims losing their jobs or having trouble securing employment, being harassed by strangers, being stalked, being sexually assaulted, losing contact with their friends and family, being forced to change schools, and suffering general emotional consequences.¹²³ For instance, Ms. Taschinger, a twenty-three-year-old woman, describes her revenge porn experience as making her want to “get into a fetal position and cry.”¹²⁴ Often, when victims call the police, they are told there is not much to be done.¹²⁵ However, this is now changing.

B. HOW HAVE REVENGE PORN VICTIMS TRIED TO REMEDY THEIR PROBLEM?

In the past, revenge porn victims have threatened to sue website developers, which in some cases has caused them to remove the photos.¹²⁶ However, the photos often show up on other websites or soon show up again on the same website.¹²⁷ Revenge porn, historically, has not been a criminally sanctioned action, and therefore, victims have had to find civil

¹¹⁸ Willard, *supra* note 16, at 545.

¹¹⁹ Ryan, *supra* note 15, at 361.

¹²⁰ Erica Goode, *Victims Push Laws to End Online Revenge Posts*, N.Y. TIMES, Sept. 23, 2013, <http://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html?pagewanted=all>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

remedies.¹²⁸ Some victims have sued under their state's invasion of privacy statute.¹²⁹ For instance, the Restatement of Law, Second, Torts, section 652D states:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of the kind that (a) would be highly offensive to a reasonable person and (b) is not legitimate concern to the public.¹³⁰

This statute has been applied to instances when an image is reproduced of a person partially or fully nude and was taken in a place where privacy is expected.¹³¹ However, privacy cases generally involve more in-depth breaches of privacy to be effective.¹³²

Another legal alternative that victims have tried to use to address revenge porn is false light claims.¹³³ The Restatement of the Law, Second, Torts, section 652E has described false light as:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person and (b) the actor had knowledge of or acted in reckless disregard to the falsity of the publicized matter and the false light in which the other would be placed.¹³⁴

The rationale behind a false light claim is to prevent damages to a person's reputation by depicting them in behavior that they ordinarily would not or have not participated in.¹³⁵

Additionally, victims of revenge porn could sue under a tort action of intentional infliction of emotional distress ("IIED").¹³⁶ For a victim to succeed under IIED, they must show four elements: "(1) the defendant's conduct was either intentional or reckless; (2) the defendant's conduct was outrageous and extreme; (3) there was a causal connection between the defendant's conduct and the emotional distress suffered by the plaintiff;

¹²⁸ Willard, *supra* note 16, at 552.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Mary Anne Franks, Combating Non-Consensual Pornography: A Working Paper 4 (Oct. 2013) (unpublished manuscript).

¹³³ Willard, *supra* note 16, at 552.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Calvert, *supra* note 11, at 41.

and (4) the emotional distress suffered by the plaintiff was severe.”¹³⁷ However, suing under IIED is more of a “novel” approach and it would be hard to satisfy the “outrageous” element.¹³⁸

Finally, victims have also attempted suing under copyright laws to address the nonconsensual sharing of a photo online.¹³⁹ However, under the Communications Decency Act, section 230, “internet service providers are broadly immunized from liability for harms caused by online content that these companies host and these companies do not generally have any legal obligation to assist the injured party.”¹⁴⁰ Therefore, it is hard for victims to fulfill the elements of copyright actions.¹⁴¹ Additionally, victims who have turned to federal and state harassment and stalking laws have been hindered in that they must show a “pattern,” which can be troublesome in a one-time revenge post by a person.¹⁴²

In addition to these civil remedies not being specifically created to address revenge porn, civil lawsuits can be expensive for plaintiffs to bring and most people involved in revenge porn are young individuals who generally do not care about civil suits because they do not have many assets.¹⁴³ Further, seeking a civil remedy is a tremendous burden on victims.¹⁴⁴ Revenge porn has been hard to prosecute as it does not fit within the established law, and alternative remedies such as civil claims do not specifically address the harms of revenge porn.¹⁴⁵ Therefore, states have started to consider revenge porn statutes.

C. REVENGE PORN STATUTES

As of 2013, there have only been two Acts enacted by state legislatures that address revenge porn.¹⁴⁶ New Jersey was the first to pass a revenge porn law, and in October of 2013, California was the second state

¹³⁷ *Id.*

¹³⁸ *Id.* at 42.

¹³⁹ See generally Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1 (2012) (discussing copyright law and types of pornography).

¹⁴⁰ *Id.* at 44.

¹⁴¹ *Id.*

¹⁴² Franks, *supra* note 115.

¹⁴³ Weiss, *supra* note 24.

¹⁴⁴ Franks, *supra* note 115.

¹⁴⁵ Willard, *supra* note 16, at 545.

¹⁴⁶ Roy, *supra* note 25.

to pass such a law.¹⁴⁷ Both statutes were introduced primarily to address adults distributing revenge porn, leaving children participating in revenge porn to continue to be dealt with under child pornography laws.¹⁴⁸ Although minors distributing sexts falls under the definition of child pornography, we have seen that child pornography laws do not adequately address the situation and many states do not have a uniform approach.¹⁴⁹ Therefore, there is an opportunity to utilize aspects of revenge porn statutes in developing a new statutory regime to address minors sexting.

The first revenge porn statute—the New Jersey law—punished the distribution of revenge porn after a university student, who was not a minor, committed suicide because his roommate posted a video of him engaging in a sexual act that was caught on a webcam.¹⁵⁰ The statute made the action of sharing a nude image of a person without their consent a felony.¹⁵¹

In California, Governor Jerry Brown signed a California bill that would address a “subset of online pornography comprised of graphic images or videos posted to the web without the subject’s consent.”¹⁵² More specifically, it states:

This bill provides that any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress, is guilty of disorderly conduct and subject to that same punishment.¹⁵³

Further, the law makes the action a misdemeanor, which could be “punishable by up to six months in jail or a \$1,000 fine.”¹⁵⁴

Although the California statute was only recently passed, it has already been attacked by many critics who argue that the bill does not go

¹⁴⁷ *Id.*

¹⁴⁸ THE EDITORIAL BOARD, *Fighting Back Against Revenge Porn*, N.Y. TIMES, Oct. 12, 2013, http://www.nytimes.com/2013/10/13/opinion/sunday/fighting-back-against-revenge-porn.html?_r=0.

¹⁴⁹ Myers, *supra* note 34, at 205; Calvert, *supra* note 11, at 45.

¹⁵⁰ Weiss, *supra* note 24.

¹⁵¹ *Id.*

¹⁵² Roy, *supra* note 25.

¹⁵³ Disorderly conduct: invasion of privacy, 2013 Cal. Legis. Serv. Ch. 466 (SB 255).

¹⁵⁴ Roy, *supra* note 25.

far enough,¹⁵⁵ though the general feeling is that the statute is a step in the right direction.¹⁵⁶ Critics raise a number of arguments to support the position that the bill does not go far enough, the first of which is that the bill only protects a minority of victims.¹⁵⁷ For instance, it states that the person who subsequently distributes the photo must have taken the photo of another.¹⁵⁸ Therefore, it only protects victims of revenge porn in which the images were taken by another person and not individuals that take photos of themselves and send them to their significant others.¹⁵⁹ As shown by sexting statistics for teens, 20 percent of teens took nude or partially nude photos of themselves and sent them to other people.¹⁶⁰ Further, "a survey conducted by the Cyber Civil Rights Initiative, a non-profit that confronts abuse online, found that 80 percent of photos published in recent porn cases were self-taken shots, so the California law would only protect a minority of victims."¹⁶¹

Second, the California revenge porn statute requires that the person who distributed the images had an "intent to cause serious emotional distress."¹⁶² However, critics feel that the act itself is sufficiently malicious.¹⁶³ For instance, Emily Bazelon, a Yale Law Fellow and Slate Senior Editor, notes that intent should not be considered because "treating the act of posting a sexual photo without consent [is] an objectively harmful invasion of privacy."¹⁶⁴

Finally, another criticism of the California bill is that it is not enough that the victim is concerned, embarrassed, or stressed about the dissemination of the photographs.¹⁶⁵ Rather, the bill reads that the victim must "suffer serious emotional stress."¹⁶⁶ Therefore, the bill protects only a select few individuals who can show this type of serious hardship.¹⁶⁷

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Disorderly conduct: invasion of privacy, 2013 Cal. Legis. Serv. Ch. 466 (SB 255).

¹⁵⁹ Roy, *supra* note 25.

¹⁶⁰ Willard, *supra* note 16, at 542.

¹⁶¹ Roy, *supra* note 25.

¹⁶² *Id.*

¹⁶³ Dahl, *supra* note 24.

¹⁶⁴ *Id.*

¹⁶⁵ Arthur Weinreb, *California Enacts Senate Bill 255: Distributing Photos After Breakup Now Illegal*, DECODED SCIENCE (Oct. 3, 2013), <http://www.decodedscience.com/california-enacts-new-law-revenge-porn/37652>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

Additionally, in response to revenge porn legislation, there has been an on-going debate as to whether revenge porn infringes upon the First Amendment.¹⁶⁸ The American Civil Liberties Union (“ACLU”) argues that a bill that addresses revenge porn infringes on the First Amendment rights of individuals.¹⁶⁹ The ACLU stated “the posting of otherwise lawful speech or images even if offensive or emotionally distressing is constitutionally protected.”¹⁷⁰ Further, the ACLU noted “the speech must constitute a true threat or violate another otherwise lawful criminal law, such as a stalking or harassment statute, in order to be made illegal.”¹⁷¹ In response to First Amendment concerns, legislators of the California bill narrowed its scope.¹⁷² Florida has proposed similar legislation to that of California and New Jersey to protect against revenge porn, however, the bill did not pass because of concerns that it would violate the First Amendment.¹⁷³

Eric Goldman, a Santa Clara University law professor, and Mary Anne Franks, a University of Miami law professor, held a notable debate on the subject.¹⁷⁴ Goldman believes there is no need to change the law to create liability for people in regard to revenge porn, and people should just refrain from taking naked photos of themselves.¹⁷⁵ However, Franks believes in criminalizing revenge porn.¹⁷⁶ Additionally, Franks contends that the criminalization of revenge porn does not infringe upon the First Amendment.¹⁷⁷ Franks notes: “there is no constitutionally protected right to consume or distribute sexually graphic images of private individuals without their consent any more than there is a constitutionally protected right to distribute obscenity or to engage in threats, harassment, or defamation.”¹⁷⁸ Although there are critics of the current legislation and there are First Amendment concerns, states are actively proposing bills to

¹⁶⁸ Weiss, *supra* note 24; Dahl, *supra* note 24.

¹⁶⁹ Philip A. Janquart, *California Senate Stands Against Revenge Porn*, COURTHOUSE NEWS SERVICE (Aug. 21, 2013), <http://www.courthousenews.com/2013/08/21/60479.htm>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Maria De La O, *California Joins One Womans Crusade Against 'Revenge Porn'*, THE WASHINGTON POST (Oct. 2, 2013), <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/10/02/california-joins-one-womans-crusade-against-revenge-porn/?print=1>.

¹⁷³ *Id.*

¹⁷⁴ Weiss, *supra* note 24; Dahl, *supra* note 24.

¹⁷⁵ De La O, *supra* note 172.

¹⁷⁶ Weiss, *supra* note 24; Dahl, *supra* note 24.

¹⁷⁷ De La O, *supra* note 172.

¹⁷⁸ Franks, *supra* note 115.

address revenge porn.¹⁷⁹

V. A NEW STATUTORY REGIME TO ADDRESS THE HARMS OF MINORS SEXTING THAT IS BASED PRIMARILY ON REVENGE PORN STATUTES WHILE ENCOMPASSING ASPECTS OF CHILD PORNOGRAPHY LAWS

As revenge porn statutes are just now being proposed and passed, a door is being opened for a possible solution to address the harms of minors sexting by creating a new statutory regime primarily based on ideas put forth in the current revenge porn statutes while utilizing aspects of child pornography laws to provide a more appropriate solution than merely charging under child pornography. Specifically, because revenge porn has been used for adults and requires a specific intent to harm the victim, this Note will utilize the intent aspects of child pornography to adequately address the protection of minors who participate in sexting. Further, this Note's proposed features for a new statutory regime will address the problems that critics of current revenge porn statutes have highlighted. As some states have yet to enact legislation relating to sexting, there is an opportunity for both state and federal legislation to reflect this proposal.

A. PROPOSED ATTRIBUTES OF NEW STATUTORY REGIME

To address the harms of minors sexting, important attributes based primarily on revenge porn statutes should be included in the statutory regime. First, the proposed legislation should address minors exclusively. The present revenge porn legislation does not address minors because states have been addressing minors who secondary sext by charging them under child pornography laws.¹⁸⁰ Therefore, revenge porn statutes have generally addressed adults because other laws address children. However, because there have been unsettling results with convictions under child pornography laws, there is an opportunity to address minors specifically in a new statutory regime based primarily on revenge porn statutes.

The harm that arises from sexting occurs, not at the point of sending to another intended recipient, but when that intended recipient sends or shows the photo to one or more persons without the consent of the person

¹⁷⁹ Goode, *supra* note 120.

¹⁸⁰ *Id.*

who sent the photo originally.¹⁸¹ As Clay Calvert notes in *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, “the harm only occurs if the boyfriends and girlfriends who initially receive the photo later use them for nefarious reasons.”¹⁸² Therefore, revenge porn statutes can be used to address the main link in the harm of minors sexting, which is secondary sexting.¹⁸³ While child pornography laws allow for charges against both the primary and secondary sender, the initial or primary sender is traditionally not charged or convicted because many states feel conflicted with charging and convicting the victim.¹⁸⁴ In keeping with this approach, revenge porn legislation actively focuses on punishing the secondary distributor. Similarly, the new statutory regime should address the main harm contributor—the secondary sexter.

Further, unlike the California revenge porn legislation, which only protects a subset of victims, the new statutory regime should protect minors who both took the initial photo and those who had their photo taken.¹⁸⁵ This attribute would address and reflect the criticism of the current revenge porn legislation that the statute does not protect all victims.¹⁸⁶ As mentioned above, a majority of victims of secondary sexting are those who self-produced the image.¹⁸⁷ The harm occurs regardless of who took the photo and the statute should reflect this. Because the new statutory regime is designed to protect minors, the protection should be broader than revenge porn statutes that are aimed specifically to punish adults. Adults have more cognitive development than minors and can foresee more undesirable consequences than minors can see at the time of taking a photo. Therefore, including secondary distribution of self-taken photos as a criminal act would address one of the main critiques of the current revenge porn statutes while addressing minors.¹⁸⁸

As noted above, revenge porn is the act of a person, who was once in a consenting relationship, sharing sexual photos without the consent of the

¹⁸¹ Myers, *supra* note 34, at 203.

¹⁸² Calvert, *supra* note 11, at 19.

¹⁸³ Ryan, *supra* note 15, at 361.

¹⁸⁴ Leary, *supra* note 14, at 491.

¹⁸⁵ Disorderly conduct: invasion of privacy, 2013 Cal. Legis. Serv. Ch. 466 (SB 255).

¹⁸⁶ Roy, *supra* note 25.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

original sender.¹⁸⁹ The new statutory regime should therefore include an aspect of distributing the photo without such consent of the original sender. Consent is an important aspect to address.¹⁹⁰ In regard to minors, it has been argued that consent is a vital aspect of sexting, as teens feel punishment should turn on consent.¹⁹¹ However, consent is hard to address as “young people under the age of [eighteen] cannot legally consent to appear in images of a sexual nature.”¹⁹² Therefore, the aspect of consent is still applicable to revenge porn and, as minors cannot give consent, the person distributing the photo can never obtain consent.

Further, the only way for one to obtain consent would be from the minor’s parents. Few parents would consent to sexually explicit photos being disseminated and under 18 U.S.C. § 2251, “any parent, legal guardian, or person having custody or control of a minor” who knows or allows their children to participate in images that constitute child pornography are subject to charges under the law.¹⁹³ Minors’ inability to consent contributes to addressing the harms associated with sexting.¹⁹⁴ Further, the statute should explicitly say that minors cannot give consent to the type of pictures that are being addressed by revenge porn statutes so that minors have not only clarity, but awareness of this aspect.

Next, the new statutory regime should apply to all forms of distribution, not just posting online, which current revenge porn statutes have focused on.¹⁹⁵ Harm to a minor occurs regardless of whether the photo is shown in person or whether the photo is posted online. Therefore, the legislation should encompass all forms of harmful distribution and include varying degrees of punishment for different types of distribution. For instance, posting the photo online should carry the highest punishment, as it is permanent and can be reproduced, which creates the potential of the victim being re-victimized time after time.¹⁹⁶ This type of distribution should be subject to both a potential fine up to \$1,000 and up to five years of jail time, as California has implemented.¹⁹⁷ Further, photos that are shown by the intended recipient to other unintended people should

¹⁸⁹ Kelly, *supra* note 23.

¹⁹⁰ Albury & Crawford, *supra* note 35, at 464.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ 18 U.S.C. § 2251 (2012).

¹⁹⁴ *Id.*

¹⁹⁵ Disorderly conduct: invasion of privacy, 2013 Cal. Legis. Serv. Ch. 466 (SB 255).

¹⁹⁶ Poltash, *supra* note 56, at 31.

¹⁹⁷ Disorderly conduct: invasion of privacy, 2013 Cal. Legis. Serv. Ch. 466 (SB 255).

have a lesser penalty, as the harm is still great but not as permanent as being posted online. For this type of distribution, the legislation should impart only a fine on the perpetrator of up to \$1,000 with no jail time, such as in California's bill.¹⁹⁸

Further, there must be an aspect of criminal intent in order to be convicted under the statute. For instance, the California bill passed to address revenge porn required the distributor to have an "intent to cause serious emotional distress."¹⁹⁹ However, the act of showing the photo is what produces the harm. Additionally, minors are different than adults. The revenge porn statute has, as its name suggests, an aspect of revenge. However, a minor distributing a photo secondarily could be doing the act vengefully or negligently. Whether the person showed the photo to a few friends, or posted it online, their intent is irrelevant as the harm is done solely by the act. Therefore, because children are not as cognitively developed as adults, the new statutory regime should, for purposes of the intent of the distributor, reflect child pornography laws rather than revenge porn legislation. Child pornography laws do not require an intent to cause serious emotional distress of the child.²⁰⁰ However, § 2251 of 18 U.S.C. subjects a person to liability if they engage in the "production, distribution, reception, and possession of an image of child pornography" regardless of their intent toward the victim.²⁰¹ This proposed intent attribute will not only deter secondary sexting but address critics' concerns with the current revenge porn legislation.²⁰²

Moreover, the proposed statutory regime should not stipulate that the victim suffer severe emotional distress as current revenge porn legislation requires.²⁰³ Again, this attribute should more accurately reflect child pornography laws rather than revenge porn legislation. Although many of the sexting harms are relatively immediate after the sexting, there are some harms that may not occur until a future time.²⁰⁴ For instance, a minor who sends a nude photo to their significant other, who subsequently sends the photo to their friends, may not be directly affected by the distribution until a job interview screening check where the photo surfaces. Therefore, the act itself causes harm that may be realized immediately or at a future

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ 18 U.S.C. § 2251 (2012).

²⁰¹ *Id.*

²⁰² Roy, *supra* note 25.

²⁰³ Disorderly conduct: invasion of privacy, 2013 Cal. Legis. Serv. Ch. 466 (SB 255).

²⁰⁴ Poltash, *supra* note 56, at 30; Calvert, *supra* note 11, at 24.

time. Often, it has been described in child pornography cases that the fact that a “minor lacks the understanding of the destructiveness of [their] actions at the time of the crime does not mean [they] [forfeit] the harm [they] will more tangibly experience when [they] [realize] the permanency of [their] actions.”²⁰⁵ Similarly, there should not be a requirement that the minor victim presently suffers serious emotional distress in a secondary sexting case. Having this broad protection will allow more victims to be protected and will prevent the harms of sexting. Further, this attribute will address critics’ concerns with the California revenge porn statute.

With respect to First Amendment concerns and a new statutory regime, because minors are involved, there should be no constitutional protection for images produced of minors that are nude or partially nude, similar to the constitutional exception for child pornography.²⁰⁶ Further, as similar to the California revenge porn statute, the photos protected should be those “under circumstances where the parties agree or understand that the image shall remain private,” constituting a reasonable expectation of privacy.²⁰⁷ In the event a reasonable expectation of privacy cannot be established, the secondary distributor would risk being charged under child pornography laws rather than the new regime. A majority of sexts have an expectation of privacy as they are sent as a way to “flirt” or “liven” up a current relationship.²⁰⁸ Therefore, having this expectation of privacy requirement will address the majority of sexting instances.²⁰⁹

B. NEW STATUTORY REGIME ADDRESSES TEEN SEXTING HARMS

The proposed statutory regime would most importantly address the harms of minors sexting. The first minor sexting harm that society is trying to prevent is damage to job security and future employment opportunities.²¹⁰ By applying the proposed statutory regime based primarily on revenge porn statutes, the distributor will be discouraged from showing or sending the photo to unintended recipients. Further, many people do not know that their actions can be charged under child pornography and therefore, a statutory regime based around the concept of

²⁰⁵ Paravecchia, *supra* note 1, at 247.

²⁰⁶ Hulia Halloran McLaughlin, *Exploring the First Amendment Rights of Teens in Relationship to Sexting and Censorship*, 45 U. MICH. J.L. REFORM 315, 318 (2012).

²⁰⁷ Disorderly conduct: invasion of privacy, 2013 Cal. Legis. Serv. Ch. 466 (SB 255).

²⁰⁸ DeMitchell & Parker-Magagna, *supra* note 37, at 8.

²⁰⁹ *Id.*

²¹⁰ Poltash, *supra* note 56, at 30.

revenge porn is more readily understandable as a potential repercussion to their action than the foreign idea of being charged with child pornography.²¹¹

The next sexting concern is that minors could face harassment, exploitation, and bullying from widespread distribution of nude images to unintended recipients.²¹² In terms of harassment and bullying, a statutory regime based primarily on revenge porn legislation would reduce this harm as it would curb the incentive for the intended recipient to send the image to other people. For exploitation, many minors who produced the photo themselves and sent it to an intended recipient can be subject to exploitation by the recipient because there is no recourse for them if the photo is distributed.²¹³ However, with the new statutory regime, there would be a clear ramification, and therefore, victims will be less likely to be exploited by the recipient of the photo as there are known consequences.

Additionally, a main harm of sexting that the legal community is trying to avoid is the photo getting into the child-pornography market.²¹⁴ The new statutory regime would, similar to a revenge porn statute, reduce the distribution of photos.²¹⁵ Therefore, predators in the child pornography market would not have an opportunity to gain access to the photo as it would not be as readily distributed.

Finally, addressing sexting harms will not only address the harms to the primary sexting actor, but also provide a fair punishment to the secondary sexting actor. In many cases, teens who have been prosecuted under child pornography laws, like Philip Alpert, were subjected to registering as sex offender.²¹⁶ Charging and convicting those who distribute pictures vengefully against the consent of the producer, should be exposed to criminal punishment, but an appropriate one, which is the proposed statutory regime based primary on revenge porn statutes.

C. EDUCATIONAL AWARENESS OF THE NEW STATUTORY REGIME IS NECESSARY AT THE HIGH SCHOOL LEVEL

Although a new statutory regime based primarily on revenge porn

²¹¹ DeMitchell & Parker-Magagna, *supra* note 37, at 11.

²¹² Willard, *supra* note 16, at 559; Calvert, *supra* note 11, at 23.

²¹³ Willard, *supra* note 16, at 557.

²¹⁴ *Id.*

²¹⁵ Disorderly conduct: invasion of privacy, 2013 Cal. Legis. Serv. Ch. 466 (SB 255).

²¹⁶ Briggs, *supra* note 21, at 182.

legislation can directly address the harms of sexting, there must be education at the high school level to effectively reduce the incidents of sexting. Schools have “an important role to play in the prevention and deterrence” of sexting.²¹⁷ Empirical evidence has shown that educational programs in school, such as D.A.R.E.—a drug education program—have been successful in reducing drug incidents.²¹⁸ Similarly, a program can be introduced to reduce the harms of sexting and educate about the new statutory regime. Schools should make students aware of the consequences of sexting and how the new statutory regime can affect their actions.²¹⁹ Students should first be educated about sexting generally and have a clear understanding of what constitutes sexting, and then be educated on the harms related to sexting.²²⁰

Educating about sexting generally will reduce the amount of sexting by individuals or primary sexting because minors will be more aware of the associated harms.²²¹ Further, because the new regime is based primarily on revenge porn, which is a recent legislative response that has generally been focused on adults, minors most likely are unaware of what constitutes revenge porn and the legislation in response to revenge porn. If minors are aware that they could be criminally charged, it will likely reduce the amount of secondary texting. By implementing an educational initiative to combat sexting and educating about potential charges, students will be more aware that their actions have consequences and the number of incidents of sexting among minors will be reduced.

VI. CONCLUSION

There has been much controversy over how to deal with the new phenomenon of sexting and the confusion has been evident in the legal system.²²² Some states have addressed the phenomenon by charging and convicting under child pornography laws, and some states have charged under child pornography laws but come up with alternative solutions to convicting such as education, while other states have amended legislation

²¹⁷ Jamie L. Williams, *Teens, Sexs & Cyberspace: The Constitutional Implications of Current Sexting & Cyberbullying Laws*, 20 WM. & MARY BILL RTS. J. 1017, 1046 (2012).

²¹⁸ *Id.* at 1047.

²¹⁹ Jordan J. Szymialis, *Sexting: A Response to Prosecuting Those Growing up with a Growing Trend*, 44 IND. L.J. 300, 338 (2010).

²²⁰ *Id.*

²²¹ *Id.*

²²² Paravecchia, *supra* note 1, at 243.

to specifically address sexting.²²³ A more recent phenomenon, which is linked to sexting and has been designed to address adults, is the criminality of revenge porn. The proposed solution to address the harms of minors sexting is a new statutory regime based primarily on revenge porn statutes while including the intent aspects of child pornography laws. Specifically, the new statutory regime encompasses minors, applies to all forms of media distribution, pertains to all types of victims, and, specifically for minors, does not require a specific intent or the victim to suffer severe emotional distress. This gives states an opportunity to address the harms of minors sexting while giving a more appropriate punishment.

²²³ *Id.*