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# AVERAGE TEENAGER OR SEX OFFENDER? SOLUTIONS TO THE LEGAL DILEMMA CAUSED BY SEXTING

SHANNON SHAFRON-PEREZ\*

## I. INTRODUCTION

Play “Name That Curve.” Using your cell camera, take shots that show just a hint of different curves on your body — your hips, breasts, butt, etc. — and then send them to your guy.<sup>1</sup> Type a little note, and ask him to guess what part of your anatomy is in each photo.<sup>2</sup> This tip explaining how to use an ordinary camera phone as a sex toy is readily available at [www.cosmopolitan.com](http://www.cosmopolitan.com), the website for one of America’s top selling magazines.<sup>3</sup> Women of all ages (including underage teenage girls) turn to *Cosmopolitan* for advice on fashion, sex, and dating.<sup>4</sup> In the above column, *Cosmopolitan* promotes a new pop culture phenomenon known as “sexting” – the marriage of text messaging and sexuality.

Adults commonly tout this form of sexual communication as a crea-

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\* J.D. expected 2010, University of La Verne College of Law. Thank you to my wife, Natalie, and Evelyn Park for all the long nights, constructive criticism, and good laughs. My deepest gratitude to Professor Victoria J. Haneman for her amazing feedback and encouragement. Finally, thank you to my parents who have supported me every step of the way.

1. These photographs will be sent by text message (also sometimes referred to as picture message).

2. *Cosmopolitan.com*, *The Sex Toy Hiding in Your Purse*, <http://www.cosmopolitan.com/sex-love/tips-moves/The-Sex-Toy-Hiding-in-Your-Purse> (last visited July 22, 2009).

3. According to *MagazineCost.com*, *Cosmopolitan* is the 15th best selling magazine. *MagazineCost.com*, *Most Popular Magazines: Best Selling Magazines*, <http://www.magazinecost.com/popular-magazines/> (last visited July 22, 2009). *Cosmopolitan* touts itself for being “[t]he best selling magazine in its category [. . . and] one of the most dynamic brands on the planet.” *Cosmopolitan.com*, *Media Kit*, <http://www.cosmmediakit.com/r5/home.asp> (last visited July 22, 2009).

4. The website defines itself as “The Online Women’s Magazine for Fashion, Sex Advice, Dating Tips, and Celebrity News- *Cosmopolitan*.” *Cosmopolitan.com*, <http://www.cosmopolitan.com> (last visited July 22, 2009).

tive means to “improve intimacy.”<sup>5</sup> The First Amendment protects this type of private conduct among adults.<sup>6</sup> Sending and receiving nude photos via text message is not obscene,<sup>7</sup> but even if these messages were deemed obscene, they would still fall squarely within the protection of the First Amendment.<sup>8</sup> In striking contrast, this behavior possibly becomes criminal when an underage teenager is the one sending or receiving such a message.<sup>9</sup>

Earlier this year, a thirteen-year-old middle school student in Ohio took nude photographs of herself with her cell phone.<sup>10</sup> In a desperate attempt to rekindle the flame with her ex-boyfriend, she sent him the photos via text message.<sup>11</sup> The ex-boyfriend, also thirteen, forwarded the photos to a friend. The friend showed the “sext” messages to the Assistant Principal at the students’ middle school, and in turn, the Assistant Principal notified the authorities.<sup>12</sup> While the police and the district attorney have yet to decide whether to charge the minors, the teens could face felony charges for illegal use of a minor in nudity-oriented material.<sup>13</sup>

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5. Sarah Pierce, *Sexting for Adults*, HITCHED, <http://www.hitchedmag.com/article.php?id=764> (last visited July 22, 2009); see Chuck Altmix, *Sexting 101: Sending a Naughty Message Can Make Their Day*, EXAMINER, July 19, 2009, <http://www.examiner.com/x-3357-Indianapolis-Marriage-and-Sex-Examiner-y2009m7d19-Sexting-101—Sending-naughty-messages-can-make-their-day>.

6. The First amendment provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. It is well established that expressive conduct outside of speech such as nudity is also protected by the First amendment. See *Texas v. Johnson*, 491 U.S. 397, 435 (1989) (holding that flag burning is protected speech under the First amendment).

7. Nudity is protected by the first amendment. *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (finding the film “Carnal Knowledge” not be obscene and stating “nudity alone is not enough to make material legally obscene under the Miller standards.”).

8. Furthermore, even obscene material, when possessed for personal use, cannot subject the possessor to criminal penalty. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding “that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.”). Sexting is usually nothing more than a nude picture being sent to someone’s private cell phone or email. Since nudity is not obscene, the first amendment protects these images, especially when possessed for private personal use only.

9. For the purposes of this Comment, the term teenager will be used to refer to anyone who is less than 18 years of age.

10. Gina Mace, *Police Report Students Caught ‘Sexting’ Authorities Deciding Whether Barberton Teens Face Charges*, AKRON BEACON J. (Ohio), May 15, 2009, at B1.

11. *Id.*

12. *Id.*

13. *Id.* Luckily for these teens, even if the police do go forward with prosecution and they are found guilty, they will not be required to register as sex offenders because in Ohio, under the age of 14, there is no registration requirement. *Id.*

In recent years, similar stories have attracted the attention of mainstream media on a fairly regular basis. It is becoming commonplace for sexually explicit prose and photographs, by and from teenagers, to be widely disseminated by text message. Culturally, this raises a number of disconcerting issues. A teenager is unable to control or limit downstream distribution of a text message; in effect, the teenager sends the message to one intended recipient, but has no control over the persons to whom that message is later distributed. Graphic messages are passed from teenager to teenager, usually without the permission of the subject in the photograph.<sup>14</sup> These pictures are not simply a source of terrible shame and embarrassment, but can also prevent those pictured in the photos from later being able to obtain college scholarships or certain types of employment.<sup>15</sup>

In a different vein, teenage sexting has created a legal dilemma because the law has not evolved to accommodate problems raised by new forms of technology.<sup>16</sup> In decades past, adults exploited and victimized children to generate child pornography. In response, child pornography laws were developed to prevent the exploitation of children used to create these graphic displays.<sup>17</sup> However, it is safe to assume that the drafters of these child pornography statutes did not anticipate that teenagers would generate and distribute their own form of pornography – by using their cellular phones to take naked pictures of themselves, and disseminating those photos via text message.

Modern child pornography statutes are outmoded, and in some instances, may injure the children that the statutes were designed to pro-

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14. See, e.g., Mike Celizic, *Her Teen Committed Suicide over 'Sexting,'* MSNBC.MSN.COM, available at <http://www.msnbc.msn.com/id/29546030/> (last visited July 22, 2009). This paper will not address the legal response to the act of disseminating these photographs without the subject's permission.

15. Jessica Logan hanged herself after having nude pictures of her disseminated to her peers by an ex-boyfriend. See Celizic, *supra* note 14. Prospective employers may do a Google search on an applicant's name. If the search yields a nude photograph of the applicant, this may cost the applicant the position. See *Sexting: Racy Teen Messaging Could Be Illegal*, (NPR radio broadcast Sept. 11, 2009), available at <http://www.npr.org/templates/player/mediaPlayer.html?action=1&t=1&islist=false&id=100826247&m=100826242> [hereinafter *Teen Messaging*].

16. See *'Sexting' and the Law, The Challenge: Distinguish Between Child Pornography and Teenage Indiscretion*, DAILY PRESS (Newport, Va.), May 28, 2009, at A16 [hereinafter *'Sexting' and the Law*]; Jacqui Seibel, *Police Seek Charges in Teen 'Sexting' Case Disorderly Conduct Charges Sought for Four 15-Year-Olds*, MILWAUKEE J. SENTINEL, Apr. 2, 2009, at B3, available at <http://www.jsonline.com/news/waukesha/42289307.html>; Jim Siegel, *Lawmaker Crafting Bill To Set Penalty for Teens' 'Sexting,'* COLUMBUS DISPATCH, Mar. 27, 2009, available at [http://www.dispatch.com/live/content/local\\_news/stories/2009/03/27/sexting.ART\\_ART\\_03-27-09\\_B3\\_6JDCANA.html](http://www.dispatch.com/live/content/local_news/stories/2009/03/27/sexting.ART_ART_03-27-09_B3_6JDCANA.html).

17. See *New York v. Ferber*, 458 U.S. 747 (1982).

tect.<sup>18</sup> While jurisdictions vary in the wording of their child pornography laws, every state prohibits the acts of creating, possessing and distributing images of minors posed in the nude or in a sexually provocative manner.<sup>19</sup> These laws do not have exceptions to criminal culpability when the person creating, possessing or distributing the material is a minor.<sup>20</sup> Child pornography involves child abuse – viz. exploitation of a minor by an adult – that is typically not present in a teenage sext message. Yet, both fall under child pornography statutes, without regard to this important distinction and thus, minors who engage in sexting can be found criminally liable for child pornography violations.<sup>21</sup> A small minority of states have attempted to tackle the legal issues raised by teenage sexting by creating exemptions for minors, while others have turned a blind-eye, refraining from prosecution when a teenager is involved.<sup>22</sup> A third group of states have gone forward with child pornography prosecutions for sexting.<sup>23</sup>

This Comment broadly considers the failure of the law to adapt to developments in technology and communication, untangles the different approaches taken by a sample of states, and considers which legal remedy is most appropriate. This discussion primarily focuses on the criminal aspects of: (1) minors who voluntarily create and disseminate nude text messages of themselves; and (2) minors who receive nude photographs of other minors.<sup>24</sup> Part II traces the development of sexting.

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18. There are also many other lesser and ancillary crimes that these teens could potentially be charged with such as “felony obscenity; being declared an ‘unruly child’; contributing to the delinquency of a minor; ‘sexual abuse of children. . . or open lewdness;’ possessing and distributing material of a child in a sexual act; and disseminating indecent material to a minor and endangering the welfare of a child.” Peter Cumming, York University, Presentation at the Roundtable on Youth, Sexuality, Technology: Children’s Rights, Voices, Technology, Sexuality 4 (May 24, 2009), *available at* <http://www.arts.yorku.ca/huma/cummingp/research.html> (internal citations omitted). For the purposes of narrowing this comment, and because a vast majority of the hysteria surrounding sexting has focused on child pornography, this comment will also focus on child pornography.

19. *See infra* note 34.

20. *See infra* Part IV.

21. By way of example, Colorado explains its reasons behind prohibiting child pornography:

That the sexual exploitation of children constitutes a wrongful invasion of the child’s right of privacy and results in social, developmental, and emotional injury to the child; that a child below the age of eighteen years is incapable of giving informed consent to the use of his or her body for a sexual purpose; and that to protect children from sexual exploitation it is necessary to prohibit the production of material which involves or is derived from such exploitation and to exclude all such material from the channels of trade and commerce. COLO. REV. STAT. ANN. § 18-6-403 (West 2009).

22. *See infra* Part IV.

23. *See infra* Part IV.

24. This article does not undertake a discussion regarding the legal consequences of minors disseminating nude photographs of other minors without their consent. This article

Part III describes the history and rationale behind prohibiting child pornography. In Part IV, this article examines the application of child pornography laws to sexting cases in five jurisdictions. Finally, Part V reviews the varying approaches to dealing with sexting and concludes that states should amend their child pornography laws to create a misdemeanor offense to prosecute sexting.

## II. WHAT IS SEXTING?

Sexting is a newly created term used to describe “nude photos taken by teens and posted or sent to others over the Internet or cell phone.”<sup>25</sup> The term is derived from a combination of the words “sex” and “texting,” as in text messaging.<sup>26</sup> A 2008 survey found that as many as twenty percent of teens engage in sexting.<sup>27</sup> While it is unclear whether teenage sexting is as prevalent as this survey suggests, it has become a media favorite and has even made its way into the fictional realm, with a recent *Law and Order: Special Victims Unit* episode addressing the controversial issue.<sup>28</sup>

Most of the hysteria surrounding the issue of sexting has arisen not because minors are actually and frequently being charged with creating, possessing or distributing child pornography, but because these minors could face such charges under existing law, should prosecutors and law enforcement feel like pursuing them.<sup>29</sup> From the attendant circumstances, two questions arise. First, is this conduct properly categorized as child pornography?<sup>30</sup> Second, if this conduct should not be considered

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also does not consider the legal remedies available for those minors who create these images for profit.

25. Judith Newman, *Porn Has gone interactive-and Your Kids Are at Risk. From Sexting to Video Chats, how to Fight Back*, READER'S DIG., May 09, 2009, at 120, available at <http://www.rd.com/living-healthy/parent-alert-teens-and-porn/article125454.html>.

26. *Cumming*, *supra* note 18, at 2.

27. THE NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS (2008) available at [http://www.thenationalcampaign.org/sextech/PDF/SexTech\\_Summary.pdf](http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf). This survey is actually useless from a legal perspective. *Id.* Aside for glaring flaws that would be expected in any data derived solely from a voluntary survey conducted solely on the Internet, the statistic splashed across numerous headlines that proclaims that 20% of teens are sexting, is not a legally significant subgroup. *Id.* The teen classification as used in the survey includes 13 to 19 year olds. *Id.* However, the conduct of 19 year-olds has no bearing on the issue of child pornography or the transmission of nude photographs by minors. *Id.*

28. *Law and Order: Special Victims Unit, Crush* (NBC television broadcast May 5, 2009). A teen girl is charged with child pornography after she is brutally beaten by an individual in connection with a nude photo that she had text messaged to peers. *Id.*

29. See *'Sexting' and the Law*, *supra* note 16; Seibel, *supra* note 16; Siegel, *supra* note 16.

30. This comment will address only limited types of conduct. The author strongly believes that any person, including a minor, who creates sexually explicit material with the

child pornography, what is the appropriate legal course of action?

### III. HISTORY AND RATIONALE BEHIND CHILD PORNOGRAPHY LAWS

Before the 1970s, obscenity laws were used to prosecute the production and distribution of child pornography.<sup>31</sup> During this period, child pornography needed to meet the Miller obscenity standard in order to be subject to criminal punishment, meaning that some child pornography fell within the protection of the First Amendment and could not be banned.<sup>32</sup> Since then, State and Federal laws have been enacted that specifically target child pornography. The Supreme Court subsequently sanctioned the criminalization of child pornography, deeming it a separate category of material outside the protection of the First Amendment.<sup>33</sup> The Court announced a lesser standard that child pornography must meet in order to fall outside the protection of the First Amend-

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use of minors for the purposes of profit should be charged with violations of child pornography laws. The conduct discussed in this article lacks that criminal culpability. Conduct covered by this article includes minors photographing themselves naked and transmitting these photographs to other minors and minors receiving these nude photos of other minors.

31. Giannina Marin, Note, *Possession of Child Pornography: Should You Be Convicted when the Computer Cache Does the Saving for You?*, 60 FLA. L. REV. 1205, 1208 n.22 (2008). See Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847, 855 (2008).

32. See Rogers, *supra* note 31, at 855. This comment does not attempt to relay the law of obscenity and child pornography. For an excellent discussion of the development of the law of obscenity and its relation to child pornography law. See also MATHEW D. CLARK, *OBSCENITY, CHILD PORNOGRAPHY AND INDECENCY* (Novinka Books 2002). In brief, in *Roth v. United States*, the Supreme Court held that obscenity did not fall within the protection of the First Amendment. 354 U.S. 476, 485 (1957). After announcing a series of unworkable standards for classifying material as obscene, the Supreme Court, in *Miller v. California*, created a three-prong test that is still the law today. 413 U.S. 15 (1973). This Miller test for obscenity allowed pornographic materials meeting the following requirements to be banned, as they fell outside the protection of the first amendment:

- (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. *Id.* at 24 (internal citations omitted).

Finding child pornography to be an especially heinous evil, several states enacted laws that provided for criminal punishment for the production of non-obscene child pornography. *Ferber*, 458 U.S. at 749 n.2. The Supreme Court agreed with these state laws and held that child pornography could be criminalized without meeting the Miller obscenity test. *Id.* at 778. The Court modified the Miller standard as follows: "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 patently offensive manner; and the material at issue need not be considered as a whole." *Id.* at 764.

33. *Ferber*, 458 U.S. at 763.

ment.<sup>34</sup> Today, every state has its own laws proscribing child pornography.<sup>35</sup> Additionally, the Federal government has enacted a series of

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34. “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 patently offensive manner; and the material at issue need not be considered as a whole.” *Id.* at 764.

35. Alabama (ALA. CODE § 13A-12-190 (2006); ALA. CODE § 13A-12-191 (2006); ALA. CODE § 13A-12-192 (2006); ALA. CODE § 13A-12-193 (2006); ALA. CODE § 13A-12-194 (2006); ALA. CODE § 13A-12-195 (2006); ALA. CODE § 13A-12-196 (2006); ALA. CODE § 13A-12-197 (2006); ALA. CODE § 13A-12-198 (2006).) Alaska (ALASKA STAT. § 11.41.455 (2008); ALASKA STAT. § 11.61.125 (2008); ALASKA STAT. § 11.61.127 (2008); ALASKA STAT. § 11.61.129 (2008).) Arizona (ARIZ. REV. STAT. ANN. § 13-3551 (2001); ARIZ. REV. STAT. ANN. § 13-3552 (2001); ARIZ. REV. STAT. ANN. § 13-3553 (2001); ARIZ. REV. STAT. ANN. § 13-3554 (2001); ARIZ. REV. STAT. ANN. § 13-3555 (2001); ARIZ. REV. STAT. ANN. § 13-3556 (2001); ARIZ. REV. STAT. ANN. § 13-3557 (2001); ARIZ. REV. STAT. ANN. § 13-3559 (2001).) Arkansas (ARK. CODE ANN. § 5-27-301 (West 2008); ARK. CODE ANN. § 5-27-302 (West 2008); ARK. CODE ANN. § 5-27-304 (West 2008); ARK. CODE ANN. § 5-27-401 (West 2008); ARK. CODE ANN. § 5-27-402 (West 2008); ARK. CODE ANN. § 5-27-403 (West 2008); ARK. CODE ANN. § 5-27-404 (West 2008); ARK. CODE ANN. § 5-27-405 (West 2008); ARK. CODE ANN. § 5-27-601 (West 2008); ARK. CODE ANN. § 5-27-602 (West 2008); ARK. CODE ANN. § 5-27-603 (West 2008); ARK. CODE ANN. § 5-27-604 (West 2008); ARK. CODE ANN. § 5-27-605 (West 2008); ARK. CODE ANN. § 5-27-607 (West 2008); ARK. CODE ANN. § 5-27-608 (West 2008).) California (CAL. PENAL CODE § 311.1 (West 2008); CAL. PENAL CODE § 311.2 (West 2008); CAL. PENAL CODE § 311.3 (West 2008); CAL. PENAL CODE § 311.4 (West 2008); CAL. PENAL CODE § 1054.10 (West 2008); CAL. PENAL CODE § 1170.71 (West 2004); CAL. PENAL CODE § 11165.1 (West 2000).) Colorado (COLO. REV. STAT. ANN. § 18-6-403 (West 2004).) Connecticut (CONN. GEN. STAT. ANN. § 53a-193 (West 2007); CONN. GEN. STAT. ANN. § 53a-196a (West 2007); CONN. GEN. STAT. ANN. § 53a-196b (West 2007); CONN. GEN. STAT. ANN. § 53a-196c (West 2007); CONN. GEN. STAT. ANN. § 53a-196d (West 2007); CONN. GEN. STAT. ANN. § 53a-196e (West 2007); CONN. GEN. STAT. ANN. § 53a-196f (West 2007); CONN. GEN. STAT. ANN. § 53a-196g (West 2007).) Delaware (DEL. CODE ANN. tit. 11, § 1103 (2007); DEL. CODE ANN. tit. 11, § 1108 (2007); DEL. CODE ANN. tit. 11, § 1109 (2007); DEL. CODE ANN. tit. 11, § 1111 (2007).) Florida (FLA. STAT. ANN. § 775.0847 (West Supp. 2008); FLA. STAT. ANN. § 827.071 (West 2006); FLA. STAT. ANN. § 847.001 (West 2000); FLA. STAT. ANN. § 847.002 (West Supp. 2008); FLA. STAT. ANN. § 847.012 (West 2000); FLA. STAT. ANN. § 847.0135 (West 2000); FLA. STAT. ANN. § 847.01357 (West Supp. 2008); FLA. STAT. ANN. § 847.0137 (West Supp. 2008); FLA. STAT. ANN. § 847.0138 (West Supp. 2008); FLA. STAT. ANN. § 847.0139 (West Supp. 2008).) Georgia (GA. CODE ANN. § 16-12-100 (West 2009); GA. CODE ANN. § 16-12-100.2 (West 2009).) Hawaii (HAW. REV. STAT. ANN. § 707-750 (LexisNexis 2007); HAW. REV. STAT. ANN. § 707-751 (LexisNexis 2007); HAW. REV. STAT. ANN. § 707-752 (LexisNexis 2007); HAW. REV. STAT. ANN. § 707-753 (LexisNexis 2007); HAW. REV. STAT. ANN. § 712-1210 (LexisNexis 2007); HAW. REV. STAT. ANN. § 712-1211 (LexisNexis 2007); HAW. REV. STAT. ANN. § 712-1218 (LexisNexis 2007); HAW. REV. STAT. ANN. § 712-1218.5 (LexisNexis 2007); HAW. REV. STAT. ANN. § 712-1219 (LexisNexis 2007); HAW. REV. STAT. ANN. § 712-1219.5 (LexisNexis 2007).) Idaho (IDAHO CODE ANN. § 18-1507 (2004); IDAHO CODE ANN. § 18-1507A (2004).) Illinois (720 ILL. COMP. STAT. ANN. 5/11-20.1 (West 2002); 720 ILL. COMP. STAT. ANN. 5/11-20.1A (West 2002); 720 ILL. COMP. STAT. ANN. 5/11-20.3 (West Supp. 2009); 720 ILL. COMP. STAT. ANN. 5/11-23 (West 2002); 720 ILL. COMP. STAT. ANN. 5/14-3 (West 2003).) Indiana (IND. CODE ANN. § 34-24-1-1 (West 1999); IND. CODE ANN. § 35-42-4-4 (West 2004); IND. CODE ANN. § 35-42-4-12 (West Supp. 2008).) Iowa (IOWA CODE ANN. § 710.10 (West 2003); IOWA CODE ANN. § 728.1 (West 2003); IOWA CODE ANN. § 728.12 (West Supp. 2009).) Kansas (KAN. STAT. ANN. § 21-3516 (2008).) Kentucky (KY. REV. STAT.



ANN. § 15.900 (West 2006); KY. REV. STAT. ANN. § 531.300 (West 2006); KY. REV. STAT. ANN. § 531.310 (West 2006); KY. REV. STAT. ANN. § 531.320 (West 2006); KY. REV. STAT. ANN. § 531.330 (West 2006); KY. REV. STAT. ANN. § 531.335 (West 2006); KY. REV. STAT. ANN. § 531.340 (West 2006); KY. REV. STAT. ANN. § 531.350 (West 2006); KY. REV. STAT. ANN. § 531.360 (West 2006); KY. REV. STAT. ANN. § 531.370 (West 2006.) Louisiana (LA. REV. STAT. ANN. § 14:81.1 (2004).) Maine (ME. REV. STAT. ANN. tit. 17-A, § 259 (2006); ME. REV. STAT. ANN. tit. 17-A, § 281 (2006); ME. REV. STAT. ANN. tit. 17-A, § 282 (2006); ME. REV. STAT. ANN. tit. 17-A, § 283 (2006); ME. REV. STAT. ANN. tit. 17-A, § 284 (2006); ME. REV. STAT. ANN. tit. 17-A, § 285 (2006).) Maryland (MD. CODE ANN., CRIM. LAW § 3-602 (West 2002); MD. CODE ANN., CRIM. LAW § 11-201 (West 2002); MD. CODE ANN., CRIM. LAW § 11-207 (West 2002); MD. CODE ANN., CRIM. LAW § 11-208 (West 2002); MD. CODE ANN., CRIM. LAW § 11-208.1 (West Supp. 2008).) Massachusetts (MASS. GEN. LAWS ANN. ch. 272, § 29A (West 2000); MASS. GEN. LAWS ANN. ch. 272, § 29B (West 2000); MASS. GEN. LAWS ANN. ch. 272, § 29C (West 2000).) Michigan (MICH. COMP. LAWS ANN. § 750.145c (West 2004); MICH. COMP. LAWS ANN. § 750.145d (West 2004).) Minnesota (MINN. STAT. ANN. § 617.246 (West 2009); MINN. STAT. ANN. § 617.247 (West 2009).) Mississippi (MISS. CODE ANN. § 97-5-31 (West 2005); MISS. CODE ANN. § 97-5-33 (West 2005); MISS. CODE ANN. § 97-5-35 (West 2005).) Missouri (MO. ANN. STAT. § 573.010 (West 2003); MO. ANN. STAT. § 573.023 (West 2003); MO. ANN. STAT. § 573.025 (West 2003); MO. ANN. STAT. § 573.035 (West 2003); MO. ANN. STAT. § 573.037 (West 2003); MO. ANN. STAT. § 573.038 (West Supp. 2009); MO. ANN. STAT. § 573.050 (West 2003); MO. ANN. STAT. § 573.052 (West Supp. 2009).) Montana (MONT. CODE ANN. § 45-5-625 (2007).) Nebraska (NEB. REV. STAT. § 28-707 (2003); NEB. REV. STAT. § 28-1463.01 (2003); NEB. REV. STAT. § 28-1463.02 (2003); NEB. REV. STAT. § 28-1463.03 (2003); NEB. REV. STAT. § 28-1463.04 (2003); NEB. REV. STAT. § 28-1463.05 (2003).) Nevada (NEV. REV. STAT. ANN. § 200.508 (West 2007); NEV. REV. STAT. ANN. § 200.700 (West 2007); NEV. REV. STAT. ANN. § 200.710 (West 2007); NEV. REV. STAT. ANN. § 200.720 (West 2007); NEV. REV. STAT. ANN. § 200.725 (West 2007); NEV. REV. STAT. ANN. § 200.730 (West 2007); NEV. REV. STAT. ANN. § 200.735 (West 2007).) New Hampshire (N.H. REV. STAT. ANN. § 649-A:1 (2007); N.H. REV. STAT. ANN. § 649-A:2 (2007); N.H. REV. STAT. ANN. § 649-A:3 (2007); N.H. REV. STAT. ANN. § 649-A:4 (2007); N.H. REV. STAT. ANN. § 649-A:5 (2007).) New Jersey (N.J. STAT. ANN. § 2C:24-4 (West 2005).) New Mexico (N.M. STAT. ANN. § 30-6A-1 (West 2003); N.M. STAT. ANN. § 30-6A-2 (West 2003); N.M. STAT. ANN. § 30-6A-3 (West 2003).) New York (N.Y. PENAL LAW § 263.00 (McKinney 2008); N.Y. PENAL LAW § 263.05 (McKinney 2008); N.Y. PENAL LAW § 263.10 (McKinney 2008); N.Y. PENAL LAW § 263.11 (McKinney 2008); N.Y. PENAL LAW § 263.15 (McKinney 2008); N.Y. PENAL LAW § 263.16 (McKinney 2008); N.Y. PENAL LAW § 263.20 (McKinney 2008); N.Y. PENAL LAW § 263.25 (McKinney 2008).) North Carolina (N.C. GEN. STAT. ANN. § 14-190.6 (West 2000); N.C. GEN. STAT. ANN. § 14-190.13 (West 2000); N.C. GEN. STAT. ANN. § 14-190.16 (West 2000); N.C. GEN. STAT. ANN. § 14-190.17 (West 2000); N.C. GEN. STAT. ANN. § 14-190.17A (West 2000).) North Dakota (N.D. CENT. CODE § 12.1-27.2-01 (1997); N.D. CENT. CODE § 12.1-27.2-02 (1997); N.D. CENT. CODE § 12.1-27.2-03 (1997); N.D. CENT. CODE § 12.1-27.2-04 (1997); N.D. CENT. CODE § 12.1-27.2-04.1 (1997); N.D. CENT. CODE § 12.1-27.2-04.2 (1997); N.D. CENT. CODE § 12.1-27.2-05 (1997); N.D. CENT. CODE § 12.1-27.2-06 (1997).) Ohio (OHIO REV. CODE ANN. § 2907.01 (West 2006); OHIO REV. CODE ANN. § 2907.321 (West 2006); OHIO REV. CODE ANN. § 2907.322 (West 2006); OHIO REV. CODE ANN. § 2907.323 (West 2006).) Oklahoma (OKLA. STAT. ANN. tit. 21, § 1021 (West 2002); OKLA. STAT. ANN. tit. 21, § 1021.1 (West 2002); OKLA. STAT. ANN. tit. 21, § 1021.2 (West 2002); OKLA. STAT. ANN. tit. 21, § 1021.3 (West 2002); OKLA. STAT. ANN. tit. 21, § 1021.4 (West 2002); OKLA. STAT. ANN. tit. 21, § 1024.1 (West 2002).) Oregon (OR. REV. STAT. ANN. § 163.665 (West 2003); OR. REV. STAT. ANN. § 163.670 (West 2003); OR. REV. STAT. ANN. § 163.676 (West 2003); OR. REV. STAT. ANN. § 163.682 (West 2003); OR. REV. STAT. ANN. § 163.684 (West 2003); OR. REV. STAT. ANN. § 163.686 (West 2003); OR. REV. STAT. ANN.

laws prohibiting the sale, possession, production and distribution of child pornography.<sup>36</sup>

The rationale behind prohibiting child pornography was explicated by the Supreme Court of the United States in *New York v. Ferber*.<sup>37</sup> States have a compelling interest in the protection of children, including their physical, psychological, and emotional well-being.<sup>38</sup> Child pornography is intrinsically related to child abuse and is a commercial enterprise that provides economic incentive for the continued exploitation of minors.<sup>39</sup> Therefore, to protect children, states have a compelling interest in banning child pornography in every respect. In sum, states and the Federal government have criminalized all aspects of child pornogra-

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§ 163.687 (West 2003); OR. REV. STAT. ANN. § 163.688 (West 2003); OR. REV. STAT. ANN. § 163.689 (West 2003); OR. REV. STAT. ANN. § 163.690 (West 2003); OR. REV. STAT. ANN. § 163.693 (West 2003.) Pennsylvania (18 PA. CONS. STAT. ANN. § 6312 (West 2000).) Rhode Island (R.I. GEN. LAWS § 11-9-1 (2002); R.I. GEN. LAWS § 11-9-1.1 (2002); R.I. GEN. LAWS § 11-9-1.3 (2002); R.I. GEN. LAWS § 11-9-2 (2002).) South Carolina (S.C. CODE ANN. § 16-15-335 (2003); S.C. CODE ANN. § 16-15-375 (2003); S.C. CODE ANN. § 16-15-395 (2003); S.C. CODE ANN. § 16-15-405 (2003); S.C. CODE ANN. § 16-15-410 (Supp. 2009); S.C. CODE ANN. § 16-15-445 (2003).) South Dakota (S.D. CODIFIED LAWS § 22-22-24.3 (Supp. 2003); S.D. CODIFIED LAWS § 22-24A-1 (2008); S.D. CODIFIED LAWS § 22-24A-2 (2008); S.D. CODIFIED LAWS § 22-24A-3 (2008); S.D. CODIFIED LAWS § 22-24A-4 (2008).) Tennessee (TENN. CODE ANN. § 39-17-1001 (West 2002); TENN. CODE ANN. § 39-17-1002 (West 2002); TENN. CODE ANN. § 39-17-1003 (West 2002); TENN. CODE ANN. § 39-17-1004 (West 2002); TENN. CODE ANN. § 39-17-1005 (West 2002); TENN. CODE ANN. § 39-17-1008 (West Supp. 2009).) Texas (TEX. PENAL CODE ANN. § 43.21 (Vernon 2003); TEX. PENAL CODE ANN. § 43.25 (Vernon 2003); TEX. PENAL CODE ANN. § 43.26 (Vernon 2003); TEX. PENAL CODE ANN. § 43.27 (Vernon Supp. 2007).) Utah (UTAH CODE ANN. § 76-5a-1 (West 2008); UTAH CODE ANN. § 76-5a-2 (West 2008); UTAH CODE ANN. § 76-5a-3 (West 2008); UTAH CODE ANN. § 76-5a-4 (West 2008).) Vermont (VT. STAT. ANN. tit. 13, § 2821 (1998); VT. STAT. ANN. tit. 13, § 2822 (1998); VT. STAT. ANN. tit. 13, § 2823 (1998); VT. STAT. ANN. tit. 13, § 2824 (1998); VT. STAT. ANN. tit. 13, § 2825 (1998); VT. STAT. ANN. tit. 13, § 2826 (1998); VT. STAT. ANN. tit. 13, § 2827 (Supp. 2008).) Virginia (VA. CODE ANN. § 18.2-370 (West 2001); VA. CODE ANN. § 18.2-374.1 (West 2001); VA. CODE ANN. § 18.2-374.1:1 (West 2001).) Washington (WASH. REV. CODE ANN. § 9.68A.001 (West 2009); WASH. REV. CODE ANN. § 9.68A.011 (West 2009); WASH. REV. CODE ANN. § 9.68A.040 (West 2009); WASH. REV. CODE ANN. § 9.68A.050 (West 2009); WASH. REV. CODE ANN. § 9.68A.060 (West 2009); WASH. REV. CODE ANN. § 9.68A.070 (West 2009); WASH. REV. CODE ANN. § 9.68A.080 (West 2009); WASH. REV. CODE ANN. § 9.68A.120 (West 2009).) West Virginia (W. VA. CODE ANN. § 61-8C-1 (West 2002); W. VA. CODE ANN. § 61-8C-2 (West 2002); W. VA. CODE ANN. § 61-8C-3 (West 2002); W. VA. CODE ANN. § 61-8C-4 (West 2002); W. VA. CODE ANN. § 61-8C-5 (West 2002).) Wisconsin (WIS. STAT. ANN. § 948.01 (West 2005); WIS. STAT. ANN. § 948.05 (West 2005); WIS. STAT. ANN. § 948.051 (West Supp. 2008); WIS. STAT. ANN. § 948.07 (West 2005); WIS. STAT. ANN. § 948.12 (West 2005); WIS. STAT. ANN. § 948.14 (West Supp. 2009).) Wyoming (WYO. STAT. ANN. § 6-4-301 (2009); WYO. STAT. ANN. § 6-4-303 (2009).

36. 18 U.S.C. §§ 2251-2260 (2006).

37. *Ferber*, 458 U.S. at 747. .

38. *Id.* at 757.

39. *Id.* at 759-61.

phy to protect children from child abuse.<sup>40</sup>

#### IV. A SAMPLING OF CHILD PORNOGRAPHY LAWS

This article does not undertake a fifty state survey of child pornography laws. Rather, this section focuses on the child pornography laws in the following five states that have been highly publicized for incidents of underage sexting: Colorado, New Jersey, Ohio, Pennsylvania and Vermont.<sup>41</sup>

##### A. COLORADO

In Colorado, prosecutors have been compassionate toward minors caught sexting, despite the law's proscription of such behavior. A seventeen-year-old boy and his fifteen-year-old girlfriend were remanded to counseling, instead of "hard time," after they were caught exchanging cell phone images of themselves engaged in sexual intercourse.<sup>42</sup> Two other teens were similarly ordered into a counseling program after the girlfriend's mother found nude pictures of the boyfriend on her daughter's cell phone, and turned the images over to the police.<sup>43</sup> The feeling among some law enforcement is that child pornography laws were not intended to apply in the sexting context.<sup>44</sup> Thus far, law enforcement has not commenced criminal prosecution in any underage sexting case, even though such action remains a possibility.<sup>45</sup>

Colorado would classify underage sexting as child pornography under its law prohibiting the "Sexual Exploitation of Minors."<sup>46</sup> The law prohibits knowingly creating, distributing or possessing sexually exploi-

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40. Another justification offered by the government for banning child pornography has been that pedophiles could use child pornography to seduce children. *Ashcroft v. Free Speech Coal.*, 535, U.S. 234, 251 (2002). The Court found this justification to be insufficient where the government tried to convict an individual of possessing virtual child pornography (no child was used in the production) stating, "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.'" *Id.* at 253 (citing *Stanley v. Georgia*, 394 U.S. 557, 566 (1969)).

41. Utah has also modified its laws and has made sexting for minors a misdemeanor offense. H.B. 14, 2009 Gen. Assem., Gen. Sess. (Ut. 2009). For an excellent discussion on the legal developments of sexting in Utah, see Jesse Michael Nix, *Unwholesome Activities in a Wholesome Place: Utah Teens Creating Pornography and the Establishment of Prosecutorial Guidelines*, 11 J. L. & FAM. STUD. 183 (2008).

42. Lance Benzel, *Teens Won't Face Trial for Cell Phone Sex Photos*, GAZETTE (Colorado Springs), Apr. 10, 2009, available at <http://www.gazette.com/articles/children-51546-office-case.html?referrer=digg>.

43. Rick Sallinger, *Sexting Outpaces Colorado Law*, CBS, Jul. 13, 2009, <http://cbs4denver.com/local/sexting.law.Colorado.2.1084109.html>.

44. *Id.*

45. *Id.*

46. COLO. REV. STAT. ANN. § 18-6-403 (West 2009).

tive material of children such as images of erotic nudity.<sup>47</sup> A minor who takes a picture of herself topless and texts the image to her boyfriend has just distributed sexually exploitive material of a child. Despite the possibility that minors could be convicted of this class three felony,<sup>48</sup> there have been no efforts made to amend the law to create a lesser crime.

## B. NEW JERSEY

In March 2009, New Jersey had its fifteen minutes of sexting fame when the Passaic County Sheriff's Office arrested a fourteen-year-old girl for posting nearly thirty nude photographs of herself on MySpace.<sup>49</sup> The photographs had been posted for her boyfriend's viewing pleasure, but were discovered and handed over to local authorities by the state police child-pornography task force.<sup>50</sup> The minor was charged with possession and distribution of child pornography, and if convicted could face sex offender registration for fifteen years.<sup>51</sup>

Under New Jersey law, the statute prohibiting child pornography is categorized under "Endangering Welfare of Children."<sup>52</sup> It states that it is a crime to cause or permit a minor to engage in a prohibited sexual act if the person knows or intends that the act will be photographed or filmed.<sup>53</sup> One such sexual act would be "[n]udity, if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction[.]"<sup>54</sup> Under this provision, a person can also be criminally liable if he or she knowingly films, possesses, or distributes such prohibited sexual material.<sup>55</sup>

In early July 2009, Assemblywoman Pamela Lampitt submitted three bills in an attempt to disentangle sexting from the crime of endangering the welfare of children.<sup>56</sup> One of the bills proposes that teens

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47. *Id.* Interestingly, a 2009 amendment to a section relating to "Internet Sexual Exploitation of a Child" adds the requirement that an actor be more than 4 years older than the "child" they are communicating with (and enticing to engage in sexual activity) and that the "child" be under 15 years of age. COLO. REV. STAT. ANN. § 18-3-405 (West 2009), amended by H.B. 09-1163.

48. COLO. REV. STAT. ANN. § 18-6-403 (West 2009).

49. Mary Pat Gallagher et al., *Child Pornographer*, 195 N.J. L.J. 935, 935 (2009); Gregory Sullivan, *By Any Other Name, It's Still Child Pornography*, TIMES (Trenton, N.J.), Apr. 3, 2009, at A13.

50. Gallagher, *supra* note 49, at 935.

51. *Id.* It should be noted that MySpace has removed the photographs from its website. *Id.*

52. N.J. STAT. ANN. § 2C:24-4 (West 2005).

53. *Id.*

54. *Id.*

55. *Id.*

56. Bruce Shipkowski, *Legislator Pushes for Program to Fight 'Sexting' with Learning*, PRESS ATLANTIC CITY, July 20, 2009 at C5.

caught sexting be sent to an education program in lieu of criminal charges.<sup>57</sup> Of the two other bills introduced, one would require schools to educate parents and students about the dangers of sexting, and the other would require cell phone retailers to create brochures detailing the legal consequences of sexting.<sup>58</sup> New Jersey, however, has not yet moved forward with this legislation. Therefore, if the fourteen-year-old MySpace user goes to trial in the near future, she may indeed be found guilty on the child pornography charges and become a registered sex offender.

### C. OHIO

Ohio has gained significant notoriety over the past few years for its incidents involving sexting. Most famously, Cincinnati teen Jessica Logan hanged herself in 2008 after being relentlessly taunted by peers for sexting.<sup>59</sup> Her peers had received nude photographs of her from her boyfriend after she had sexted them to him.<sup>60</sup> Also in Ohio, eight teens, ranging from ages fourteen to seventeen, were sentenced to community service after being caught trading nude pictures of each other via cell phone.<sup>61</sup> Luckily for these teens, the judge was lenient – as a child pornography conviction would have resulted in the teens being registered sex offenders.<sup>62</sup> A fifteen-year-old Newark girl has also been fortunate to avoid criminal prosecution after sending racy cell phone photos to her classmates.<sup>63</sup> If during the next few months the teen keeps curfew, does not use a cell phone, and does not use the Internet unsupervised, charges against her will be dropped.<sup>64</sup>

Sexting currently falls under Ohio's law prohibiting the "illegal use of a minor in nudity-oriented material or performance."<sup>65</sup> In pertinent part, the statute provides:

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57. *Id.*

58. *Id.*

59. Celizic, *supra* note 14. This is a very tragic story of teen bullying gone too far. *Id.* Jessica Logan was 18 when she sent her photos so there was no law governing her actions, but one must wonder, had she been 17, would charging her with creating child pornography have helped the situation?

60. *Id.*

61. Wendy Koch, *Teens Caught 'Sexting' Face Porn Charges*, USA TODAY, Mar. 11, 2009, at 1A, available at [http://www.usatoday.com/tech/wireless/2009-03-11-sexting\\_N.htm](http://www.usatoday.com/tech/wireless/2009-03-11-sexting_N.htm).

62. *Id.* If convicted, the 17-year-old would have to register as a sex offender for 20 years. *Id.*

63. Martha Irvine, *Teens Who Text Racy Photos Charged with Porn*, CHIC. TRIB., Feb. 4, 2009, at A26, available at <http://archives.chicagotribune.com/2009/feb/04/nation/sns-ap-teen-text>.

64. *Id.*

65. OHIO REV. CODE ANN. § 2907.323 (West 2009).

[n]o person shall . . . (1) Photograph any minor who is not the person's child or ward in a state of nudity, or create, direct, produce, or transfer any material or performance that shows the minor in a state of nudity . . . [or] (3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity[.]<sup>66</sup>

The statute makes the violation of section (1) a second-degree felony, and the violation of section (3) a fifth-degree felony.<sup>67</sup> Notably, there is currently no exception made for minors who create or possess nudity-oriented material of a minor for personal use. Therefore, the teens above could have been found guilty of felony offenses.

In response to this statute, State Senator Bob Schuler, State Representative Ron Magg, and Warren County Prosecutor Rachel Hutzel have introduced Senate Bill 103, which if approved, would change underage sexting from a felony to a first degree misdemeanor.<sup>68</sup> This reduction would eliminate the possibility of sex offender registry if the minor were convicted.<sup>69</sup> No final decision has been reached on this bill, and the current statute remains the controlling law on the subject of underage sexting.

#### D. PENNSYLVANIA

Pennsylvania is the home of the first federal case involving sexting.<sup>70</sup> In October 2008, Tunkhannock School District officials confiscated cell phones from several students and found photographs of nude and seminude teen girls that had been traded by several male students.<sup>71</sup> The district turned the phones with the photos over to District Attorney Skumanick ("D.A. Skumanick") of Wyoming County.<sup>72</sup> One of the confiscated photographs pictured two thirteen-year-old girls in bathing suits; one making a peace sign and the other talking on a phone.<sup>73</sup> A second picture depicted a minor female, who appeared to have just exited the shower, wearing a white towel "wrapped around her body, just below

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66. *Id.*

67. *Id.*

68. WCPO.com, *Sexting Bill Introduced in Ohio House and Senate*, <http://www.wcpo.com/content/news/saywhat/story/Sexting-Bill-Introduced-In-Ohio-House-Senate/lwrPr0co5E2JQVDMzsjw.csp> (last visited July 22, 2009).

69. Dick Russ, *Ohio to Address Sexting Laws*, WCKY.COM, Apr. 14, 2009, [http://www.wkyc.com/news/local/news\\_article.aspx?storyid=111478&catid=3](http://www.wkyc.com/news/local/news_article.aspx?storyid=111478&catid=3).

70. The author has searched hundreds of news articles and none make any mention of another Federal District Court hearing any sexting cases. This is likely due to the fact that child pornography, although criminalized also at the federal level, remains a state law issue.

71. *Miller v. Skumanick*, 605 F.Supp.2d 634, 637 (M.D. Pa. 2009).

72. *Id.*

73. *Id.*

her breasts.”<sup>74</sup>

D.A. Skumanick proceeded with a criminal investigation and made public statements warning that students who possessed “inappropriate” photographs of minors could be charged with possession or distribution of child pornography.<sup>75</sup> In February 2009, D.A. Skumanick mailed letters inviting the parents of those students whose phones had been confiscated, and of those students pictured in the inappropriate photos, to a meeting at the county courthouse.<sup>76</sup> At the meeting, D.A. Skumanick threatened “to prosecute [the children] unless the children submitted to probation, paid a \$100 program fee and completed [a] [re-education] program successfully.”<sup>77</sup> After the parents of several of the girls refused to sign the “plea agreement,” the ACLU brought suit seeking a temporary restraining order to enjoin D.A. Skumanick from filing charges against the teens.<sup>78</sup> The Honorable James M. Munley granted the temporary restraining order, finding that the parents and ACLU had a sufficient likelihood of success on their claims that forcing the students to attend the re-education program would be compelled speech, violating the First Amendment, and that the minors would not successfully be prosecuted under Pennsylvania law.<sup>79</sup>

The law that D.A. Skumanick threatened to prosecute with is entitled “Sexual Abuse of Children.” The statute makes it a second-degree felony to cause or knowingly permit a minor to be filmed or photographed engaging in prohibited sexual conduct including, “lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.”<sup>80</sup> The dissemination and possession of such images are also prohibited, constituting a third-degree felony for a first offense, and a second-degree felony for any subsequent offense.<sup>81</sup> As with the laws of many states, minors do not receive differential treatment when they are the perpetrators. While the parents and children in *Skumanick* may have won the temporary restraining order, it remains to be seen whether they will succeed in a case on the merits. The matter is now on appeal to the Third Circuit Court of Appeals.<sup>82</sup>

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74. *Id.*

75. *Id.* at 637.

76. *Skumanick*, 605 F.Supp.2d at 638.

77. *Id.* (The re-education program was a six to nine month counseling and education program).

78. *Id.* at 639.

79. *Id.* at 644-47.

80. 18 PA. CONS. STAT. ANN. § 6312 (2009).

81. *Id.*

82. Peter Hall, *Justices: Internet Child Porn Search is Constitutes 'Knowing Possession,'* LEGAL INTELLIGENCER, May 28, 2009, at 1, available at <http://www.law.com/jsp/article.jsp?id=1202431023464>.

## E. VERMONT

Vermont made headlines after the state legislature took it upon itself to redraft the penalties applicable to minors who engage in sexting.<sup>83</sup> After a mother testified at a judiciary hearing about her daughter's run-in with sexting (the minor had received a video of somebody in a semi-nude state), the State Senate added sexting to their discussion on expanding their current sex offender laws.<sup>84</sup>

The child pornography laws of Vermont prohibited the possession,<sup>85</sup> promotion,<sup>86</sup> or use of a minor in "a performance which contains a lewd exhibition of the genitals, anus, or breasts of a child[.]"<sup>87</sup> These laws provided for penalties of between two and ten years of incarceration, fines between \$5,000 and \$10,000, and the possibility of registering as a sex offender.<sup>88</sup>

Fortunately for minors in Vermont, the laws have been changed so that minors caught sexting will be tried as juveniles and will not face the possibility of being on the sex offender registry.<sup>89</sup> On June 1, 2009, Governor Jim Douglas signed into law section 4 of VT. STAT. ANN. tit. 13, § 2802b, entitled "Minor Electronically Disseminating Indecent Material to Another Person," which provides:

(a)(1) No minor shall knowingly and voluntarily and without threat or coercion use a computer or electronic communication device to transmit an indecent visual depiction of himself or herself to another person. (2) No person shall possess a visual depiction transmitted to the person in violation of subdivision (1) of this subsection. It shall not be a violation of this subdivision if the person took reasonable steps, whether successful or not, to destroy or eliminate the visual depiction.

(b) Penalties; minors.

(1) Except as provided in subdivision (3) of this subsection, a minor who violates subsection (a) of this section shall be adjudicated delinquent. An action brought under this subdivision (1) shall be filed in family court and treated as a juvenile proceeding pursuant to chapter 52 of Title 33, and may be referred to the juvenile diversion program of the district in which the action is filed. (2) A minor who violates subsection (a) of this section and who has not previously been adjudicated in violation of that section shall not be prosecuted under chapter 64 of this title (sexual exploitation of children), and shall not be subject to the

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83. Kara Rowland, 'Sexting' is Thorny Legal Issue, WASH. TIMES, June 23, 2009, at B01, available at <http://www.washingtontimes.com/news/2009/jun/23/sexting-is-thorny-legal-issue/>.

84. *Id.*

85. VT. STAT. ANN. tit. 13, § 2827 (West 2009).

86. *Id.* at § 2824.

87. *Id.* at § 2822.

88. *Id.* at § 2825.

89. *Id.* at § 2802b.



requirements of subchapter 3 of chapter 167 of this title (sex offender registration). (3) A minor who violates subsection (a) of this section who has previously been adjudicated in violation of that section may be adjudicated in family court as under subdivision (b)(1) of this section or prosecuted in district court under chapter 64 of this title (sexual exploitation of children), but shall not be subject to the requirements of subchapter 3 of chapter 167 of this title (sex offender registration). (4) Notwithstanding any other provision of law, the records of a minor who is adjudicated delinquent under this section shall be expunged when the minor reaches 18 years of age.<sup>90</sup>

Now teens in Vermont may sext without fear of becoming registered sex offenders.<sup>91</sup>

#### F. SUMMARY OF THE LEGAL DEVELOPMENTS IN THE SAMPLE STATES

After a brief review of the preceding five states, several comments can be made. Prior to 2009, the laws of these five states were all nearly identical. All these laws could be applied to minors who either possessed or took nude photographs of themselves or other minors.<sup>92</sup> None of these statutes provided exceptions for child actors, meaning that a person of any age could be convicted of creating, distributing, or possessing child pornography.

Despite the striking similarities in these laws, these states have taken vastly different approaches to dealing with sexting. In 2009, Vermont created an exception to its child pornography laws so that a conviction for underage sexting will not require sex offender registration.<sup>93</sup> Ohio is in the process of doing the same.<sup>94</sup> In the middle ground, Colorado prosecutors have opted for counseling as the punishment for first-time offenders, showing that while their laws are written one way, law enforcement feel the penalties, including the sex offender registry, are too harsh.<sup>95</sup> On the other side of the spectrum, New Jersey<sup>96</sup> and Pennsylvania have begun prosecuting teens for sexting, showing that in these

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90. *Id.* The statute also provides:

(c) Penalties; adults. A person 18 years of age or older who violates subdivision (a)(2) of this section shall be fined not more than \$300.00 or imprisoned for not more than six months or both.

(d) This section shall not be construed to prohibit a prosecution under section 1027 (disturbing the peace by use of telephone or electronic communication), 2601 (lewd and lascivious conduct), 2605 (voyeurism), or 2632 (prohibited acts) of this title, or any other applicable provision of law. *Id.*

91. *Id.*

92. COLO. REV. STAT. ANN. § 18-6-403 (West 2004); OHIO REV. CODE ANN. § 2907.323 (West 2009); 18 PA. CONS. STAT. ANN. § 6312 (as amended in 2009); VT. STAT. ANN. tit. 13, § 2827 (West 2009).

93. *See supra* Part IV Vermont.

94. *See supra* Part IV Ohio.

95. *See supra* Part IV Colorado.

states, enforcing the law and sending a message are a top priority, outweighing concerns about the negative implications that a conviction would have on these teens.<sup>97</sup>

## V. WHAT IS THE BEST LEGAL APPROACH TO SEXTING?

### A. A FEDERAL REMEDY?

Currently, the Federal government has several laws that regulate child pornography.<sup>98</sup> However, the Federal government has yet to prosecute a minor for sexting. In response to the lack of Federal enforcement and the varying approaches states have taken in dealing with sexting, Jessica Logan's<sup>99</sup> parents have joined efforts with New York attorney Parry Aftab, in pursuit of creating a Federal law that would standardize penalties for minors caught sexting.<sup>100</sup> While there has been little word on the success of those efforts, it is unlikely that such a law will come to fruition as the health and safety of children has historically been an area regulated by state police powers.<sup>101</sup>

Senator Robert Mendez of New Jersey has sponsored the SAFE Internet Act, an alternative Federal remedy for sexting.<sup>102</sup> The act would allocate \$175 million to funding the program and authorize the Director of the Bureau of Justice Assistance to make grants to schools, state agencies and non-profit organizations to assist in providing research-based Internet safety education programs.<sup>103</sup> Sexting would be one of the

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96. If New Jersey makes progress with its recently introduced sexting bills, prosecutions like the one described above may cease.

97. See *supra* Part IV New Jersey & Pennsylvania.

98. 18 U.S.C. §§ 2251-2260 (2006).

99. See *supra* Part IV Ohio (describing the unfortunate suicide of a teen who hanged herself to escape the ridicule by her peers arising from the distribution of her sext messages).

100. Bob Stiles, *Effort Begins to Standardize Sexting Penalties*, TRIB. REV. (Pittsburgh), Apr. 1, 2009, available at [http://www.pittsburghlive.com/x/pittsburghtrib/news/mostread/s\\_618696.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/mostread/s_618696.html). Although this article does not expressly say so, the proponents of a uniform penalty are seeking a federal law that would preempt state laws that currently cover sexting.

101. *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). One alternative to a federal law would be to condition receipt of federal funds, such as the ones that would be made available to states through the SAFE Internet Act, upon states enacting certain standardized penalties for sexting crimes. See SAFE Internet Act, S. 1047, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:S.1047>. The federal government has been successful with this tactic in the area of setting a minimum drinking age. The Secretary is required to withhold 10 percent of a state's annual federal highway funding until the state sets its minimum drinking age to 21. 23 U.S.C. § 158 (2006).

102. Elise Young, *New Tack in Fight Against Teen 'Sexting' a Lawmaker seeks Kids in Need of Help*, STAR LEDGER (New Jersey), July 21, 2009, at 17; SAFE Internet Act, *supra* note 101.

103. SAFE Internet Act, *supra* note 101.

safety topics discussed in these education programs.<sup>104</sup>

The SAFE Internet Act, if passed, will provide an excellent resource for states or local governments to provide education for minors on the dangers of sexting. The most promising feature of this Act is that it will enable recipients to address sexting in a context specific manner, leaving states or agencies with the autonomy to decide how to best reach these teens.<sup>105</sup> Sexting is a community problem, as such it is best to deal with it at the community level, and the SAFE Internet Act advocates this approach.

#### B. ENFORCE CHILD PORNOGRAPHY LAWS AGAINST SEXTING MINORS?

One commentator has argued that enforcement of child pornography laws against sexting minors is necessary because the social harm of these images is immense.<sup>106</sup> Even voluntary participants in the creation of this “child pornography” later feel great amounts of shame and victimization because of their involvement in the production of these sext messages.<sup>107</sup> Additionally, once these materials fall into the hands of pedophiles, they can be used to groom victims and may even be used by pedophiles to foster their sexual desire toward minors.<sup>108</sup> Finally, it furthers the market for child pornography because the material may end up in the hands of pedophiles, despite how the image was actually made.<sup>109</sup> Therefore, the argument is made that such material should be criminalized.<sup>110</sup>

While these are legitimate concerns arising from sexting, there are equally strong responses to these concerns that counsel against prosecuting such conduct under child pornography laws. First, consider whether it would have helped Jessica Logan to be prosecuted for creating child

104. *Id.*

105. *See Id.* (stating one of the purposes of the act as, “establish[ing] a competitive grant program for State educational agencies, local educational agencies, and nonprofit organizations to promote Internet safety education in the community”).

106. *See generally* Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Response to Juvenile Self- Sexual Exploitation*, 15 VA. J. SOC. POL’Y & L. 1 (2007).

107. *Id.* at 40.

108. *Id.* at 40-41. There is some correlation between possession of child pornography and pedophilia. *Id.* The author concludes that producers of child pornography must be penalized in order to end the supply of material to pedophiles. *Id.* From this conclusion, it appears that the author feels that the relationship between possession of child pornography and pedophilia is a causal one. *Id.* However the data the author relies upon merely asserts that possession of child pornography is an indicator for pedophilia, not a cause. *Id.* Ultimately, unless child pornography can be shown to cause pedophilia, eliminating such material, while perhaps hampering a pedophile’s grooming of children, will not actually reduce the number of pedophiles at large. *Id.*

109. *Id.* at 41.

110. *See Id.*

pornography, on top of all of the taunting she received at school.<sup>111</sup> Minors who are convicted of sexting are punished criminally, in addition to being chastised by their peers and tortured by internal shame and regret. Criminalizing this conduct is only compounding the pain for the minors involved.

Second, the argument made above is that the law must punish minors engaged in sexting because the sexted images could fall into the hands of pedophiles. However, the solution is to prosecute the adults who possess this material.<sup>112</sup> Finally, the argument that sexting contributes to the market for child pornography is flawed. Sexting, as discussed in the context of this article, refers to consensual, uncompensated conduct between minors, via cell phone and the Internet. The odds of a pedophile gaining access to these photographs from a cell phone are slim because only an incorrectly dialed telephone number, coincidentally belonging to a pedophile, would produce this result. The same pedophile would also need to spend a significant amount of time scanning through MySpace to find these messages. Even then, the pedophile might not be able to view them because the MySpace user always has the option of setting his or her profile to private. Thus, it is highly unlikely that these sext messages are significantly impacting the market for child pornography.<sup>113</sup>

Additionally, sexting is not the type of criminal conduct that child pornography laws were intended to prevent. The Supreme Court has held that conduct cannot be criminalized under the guise of child pornography if such conduct does not arise from the same evils that justified the creation of child pornography laws.<sup>114</sup> In 2002, the Court held a provision of the Child Pornography Prevention Action unconstitutional due to overbreadth.<sup>115</sup> The provision provided a criminal penalty for possessing virtual child pornography.<sup>116</sup> As part of the Court's reasoning, Justice Kennedy explained:

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111. *Celizic*, *supra* note 14. Jessica Logan actually could not have been prosecuted because she was 18 and her boyfriend was 19 at the time she sent the nude photographs. *Id.*

112. *See* COLO. REV. STAT. ANN. § 18-6-403 (West 2009). Child pornography laws are silent to the child's willingness to participate in the production because it is assumed that all child pornography is made through the abuse of children. *Id.*

113. Even if sexted images were coming into the possession of pedophiles, such images would likely decrease the market for traditional child pornography, because it generally requires payment. Sext messages, on the other hand, would be free, and thus the more economically desirable option.

114. *See Ashcroft*, 535 U.S. at 249-50.

115. *Id.* at 257.

116. *Id.* at 241. Virtual child pornography is created using adult actors, whose images are then modified using imaging software to make them appear to be children. *Id.* at 239-40.

[w]here the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content<sup>117</sup>. . . In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not “intrinsically related” to the sexual abuse of children, as were the materials in *Ferber*.<sup>118</sup> While the Government asserts that the images can lead to actual instances of child abuse, . . . the causal link is contingent and indirect.<sup>119</sup>

Just as with virtual child pornography, no crime is being committed when a teen takes a nude photograph of herself. Nudity alone is not criminalized, even among minors.<sup>120</sup> Moreover, sexting does not create victims at the time of its production.<sup>121</sup> Participants willingly create or receive these images. Furthermore, sexting is not intrinsically related to the sexual abuse of children as none of these teens are being coerced into sexual activity by oppressive child pornographers. Thus, just as virtual child pornography could not be made criminal, neither should sexting.

Lastly, the penalties for child pornography crimes are too harsh for the conduct that sexting entails. Individuals convicted of creating or possessing child pornography may be subject to sex offender registry.<sup>122</sup> The purpose of sex offender registry is to inform the public of the risk that sex offenders living in the community may re-offend.<sup>123</sup> When the public truly is at risk, the restrictions and negative stigma that attach to registered sex offenders are justified. However, teens who sext are not offenders in the way that the registry defines sex offenders. Minors who engage in sexting are not likely to be repeat offenders. As they become adults, the very same actions of sending or possessing nude photographs of their peers become protected speech under the First Amendment.<sup>124</sup> Therefore, labeling these minors as sex offenders does not help protect the community. Rather, the only consequences of sex offender registry

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117. *Id.* at 249.

118. *Id.* at 250.

119. *Ashcroft*, 535 U.S. at 250.

120. CAROLYN E. COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAW IN THE UNITED STATES* 29-64 (2004). Even though sexual contact between minors is criminalized, this conduct, unless perpetrated by force or among parties with significantly disparate ages, is at most, a misdemeanor. *Id.* Nudity is a significantly less sexual act. *Id.* Additionally, many high school and middle school students shower naked with peers during gym class. *Id.* This is socially acceptable. *Id.*

121. Sexted photos are generally taken voluntarily. However, if the images are later forwarded without the “creator’s” permission, the creator does become a victim. That conduct falls outside the scope of this paper, and so it is not addressed in the above argument.

122. 42 U.S.C. § 14071 (2000). This statute is commonly known as Megan’s Law.

123. *Id.*

124. *See Miller*, 413 U.S. at 24.

for these minors will be the restrictions placed on them as sex offenders and negative social stigma that attaches.

C. THE COLORADO APPROACH: DON'T CHANGE THE LAWS BUT ALSO DON'T PROSECUTE?

In Colorado, prosecutors have been hesitant to charge sexting minors with child pornography, opting instead to send these youths to counseling.<sup>125</sup> However, they have not made efforts to reform existing child pornography laws to create exceptions for minors. The problem with this approach is apparent; there is the potential for a prosecutor to abuse the laws or actually prosecute a minor for sexting.

Consider D.A. Skumanick's actions in Pennsylvania.<sup>126</sup> Because the laws of Pennsylvania, like the laws of Colorado, do not create exceptions for the sexting phenomenon, D.A. Skumanick was able to bully parents into agreeing to pay fines and send their children to sexting education programs, just to avoid having their children charged with child pornography crimes.<sup>127</sup> Even worse, had the ACLU not interceded with their lawsuit on behalf of the parents and minors, D.A. Skumanick may have actually succeeded with his plans, obtaining plea agreements from individuals who had arguably violated no law at all.<sup>128</sup> The simplest way to avoid this type of abuse of discretion is to amend current child pornography laws, as Vermont has already done, so that minors engaged in sexting are charged with misdemeanor offenses.<sup>129</sup>

D. AMEND CHILD PORNOGRAPHY LAWS TO CREATE EXCEPTIONS FOR SEXTING?

Vermont has transformed sexting convictions into nothing more than a slap on the wrist.<sup>130</sup> The law prohibits minors from being required to register as sex offenders and allows for records of any such convictions to be expunged upon attaining the age of 18.<sup>131</sup> This means that these minors will not have to carry around the stigma of a conviction once they become adults.

There are many reasons to agree that this lesser penalty is preferable to a potential felony conviction. It has been argued that sexting is

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125. Sallinger, *supra* note 43.

126. *See supra* Part IV Pennsylvania.

127. *Skumanick*, 605 F.Supp.2d at 638.

128. One of the girls threatened with charges was wearing a bathing suit. *Id.* at 639. Whether or not other threats we viable, that one clearly is not. Otherwise, most family photos from a trip to the beach would be considered child pornography.

129. VT. STAT. ANN. tit. 13, § 2802b (as amended 2009).

130. *Id.* (making sexting a misdemeanor).

131. *Id.*

actually a safer alternative to teenage sexual expression.<sup>132</sup> Professor Peter Cumming of York University recently participated at a roundtable on youth, sexuality and technology, where he explained that sexting is just the most modern way for teens to express their budding sexuality.<sup>133</sup> He likens sexting to playing spin the bottle and argues that sexting is actually much safer than traditional exploration of sexuality in that there is no physical contact between sexters.<sup>134</sup> This decreases the likelihood of teen pregnancy and the transmission of sexually transmitted infections.<sup>135</sup> When analyzing sexting from this perspective, it is clear that the conduct is hardly criminal at all.

Nevertheless, local law enforcement are going to encounter sexted images,<sup>136</sup> and as part of their duty to catch and convict individuals who create, possess, and distribute child pornography, they will need to investigate into the origins of these images to ensure that they are not the product of child abuse. Perhaps as a part of the penalty for a misdemeanor conviction for sexting, minors could be assessed a fine. The funds earned from these fines could be used to fund education programs directed at preventing teens from engaging in sexting. This fine would serve as a deterrent for teens to engage in sexting because teens have a limited ability to earn money, and they would much rather spend their cash on something else.<sup>137</sup>

## VI. CONCLUSION

While minors are clearly exercising poor judgment when they engage in sexting, this is not the type of conduct that child pornography laws were enacted to prohibit.<sup>138</sup> The media hysteria around sexting and the potential for minors to be charged with child pornography violations signals a need to analyze the different approaches states are taking to combat the sexting phenomenon. Of the three approaches taken by the five states examined in this Comment, the best solution is reclassifying sexting as a separate offense that carries a misdemeanor charge. By doing this, states like Vermont have decreased the penalty for sexting and eliminated the possibility that minors charged with sexting viola-

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132. *Cumming*, *supra* note 18, at 4.

133. *Id.*

134. *Id.*

135. *Id.* at 9.

136. The New Jersey teen currently facing child pornography charges was only discovered after the state police child-pornography task force discovered them on MySpace. *Gallagher*, *supra* note 49, at 935.

137. The author was a teenager once. She knows all about the financial struggles of unemancipated minors.

138. *See* COLO. REV. STAT. ANN. § 18-6-403 (West 2009).

tions will face sex offender registry.<sup>139</sup> This punishment is appropriate for the ill-conceived and foolish activity of sexting.

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139. VT. STAT. ANN. tit. 13, § 2802b (as amended 2009); H.B. 14, 2009 Gen. Assem., Gen Sess. (Ut. 2009).



