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## THE SEARCH FOR A SENSIBLE SEXTING SOLUTION: A CALL FOR LEGISLATIVE ACTION

Eric S. Latzer\*

### I. INTRODUCTION

In March 2009, a federal district judge sitting in Pennsylvania effectively quashed a local prosecutor's efforts to punish teens for an increasingly widespread phenomenon called sexting.<sup>1</sup> The case, *Miller v. Skumanick*,<sup>2</sup> garnered nationwide attention and sparked a flurry of sexting media coverage.<sup>3</sup> Sexting occurs when someone sends via text message or posts on the internet sexually charged messages or images, including nude or semi-nude pictures.<sup>4</sup> Although not limited to younger people, a growing number of teenagers continue to engage in sexting<sup>5</sup> and consequently, the issue has become a source of widespread discussion among parents, lawmakers, and society generally. Fundamentally, teenage sexting is a product of sexual curiosity, poor judgment, and a modern trend in which teenagers utilize electronic file sharing as their primary method of communication.<sup>6</sup>

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<sup>1</sup> See *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009), *aff'd sub nom. Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., Editorial, *Protect Kids from Dangers of Sexting*, DETROIT FREE PRESS, Jan. 3, 2010, at D5, available at 2010 WLNR 134747.

<sup>4</sup> *Miller*, 605 F. Supp. 2d at 637.

Typically, the subject takes a picture of him- or herself with a digital camera or cell phone camera, or asks someone else to take that picture. That picture is stored as a digitized image and then sent via text-message or the photo-send function on a cell phone, transmitted by computer through electronic mail, or posted to an internet website like Facebook or Myspace.

*Id.*

<sup>5</sup> See *infra* Part II.A.

<sup>6</sup> See Riva Richmond, *Sexting May Place Teens at Legal Risk*, GADGETWISE, N.Y. TIMES (Mar. 26, 2009, 12:00 PM), <http://gadgetwise.blogs.nytimes.com/2009/03/26/sexting-may-place-teens-at-legal-risk/>.

Perhaps most importantly in the context of sexting, “[t]echnology and mores are changing so rapidly that they have outstripped the ability of . . . the law, parents, and prosecutors to keep up.”<sup>7</sup> And in what has become a disturbing trend, prosecutors around the country have chosen to criminalize these teenage indiscretions by employing harsh child pornography laws, including some that require teenage offenders to register as sex offenders under Megan’s Law.<sup>8</sup> When lawmakers adopted child pornography laws, they were designed to prevent adult abuses of minors; in sexting prosecutions, though, prosecutors often attempt to punish “the very victims these laws were designed to protect.”<sup>9</sup> In fact, prosecutors routinely target minors who create or distribute sexually explicit photographs, including pictures that depict the offenders themselves.<sup>10</sup> Often, these prosecutors are concerned that the explicit photographs will circulate beyond the intended recipients and that a child pornographer will ultimately come into their possession.<sup>11</sup>

In the wake of *Miller* and several other well-publicized prosecutions,<sup>12</sup> a debate has occurred regarding the appropriate societal and legal response to teenage sexting. Presently, potential criminal penalties for sexting vary widely, both in terms of their severity and the circumstances to which they are or are not applicable. In a most extreme scenario, under current federal sentencing guidelines, a sixteen-year-old girl could receive life in prison as punishment for electronically sending sexually explicit pictures to a boy her age.<sup>13</sup> Non-criminal ramifications for sexting may also occur,<sup>14</sup> including instances of in-school bullying, which often necessitate a societal response that is beyond the purview of criminal laws.

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<sup>7</sup> Editorial, *Sexting and the Single Girl*, 195 N.J.L.J. 934, 950 (2009).

<sup>8</sup> *Id.*

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

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

<sup>11</sup> *See, e.g.*, *A.H. v. State*, 949 So. 2d 234, 238 (Fla. Dist. Ct. App. 2007).

<sup>12</sup> *See infra* Part II.B.1.

<sup>13</sup> Richmond, *supra* note 6. According to Mark Rasch, a former cybercrime prosecutor, if the girl was eventually released, she might have to register as a sex offender. *Id.* Rasch said, “The combination of poorly drafted laws, new technologies, draconian and inflexible punishments, and teenage hormones make for potentially disastrous results.” *Id.*

<sup>14</sup> *See, e.g.*, Dick Russ, *Ohio to Address ‘Sexting’ Laws*, WKYC (Apr. 14, 2009, 7:22 AM), <http://www.wkyc.com/print.aspx?storyid=111478> (detailing an Ohio story, in which an eighteen-year-old from Cincinnati committed suicide after she sexted a naked picture of herself which was subsequently forwarded to nearly every one of her high school classmates).

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COMMENT

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This Comment will explore the numerous manifestations<sup>15</sup> of teenage sexting<sup>16</sup> with a broad focus on consensual and nonconsensual sexting. Consensual sexting includes situations in which two or more juveniles transmit photos of one or both people to each other, and each juvenile participates knowingly and willfully.<sup>17</sup> Alternatively, nonconsensual sexting essentially entails situations in which the pictures or messages are sent or displayed without the consent of the subject.<sup>18</sup> The Comment will ultimately urge lawmakers to pass anticipatory laws that directly address both consensual and nonconsensual sexting. Such legislative action will curtail current prosecutorial application of child pornography statutes to sexting.

Part II will broadly detail sexting with a focus on statistics and notable judicial responses to sexting in which courts have assessed novel prosecutorial applications of mostly antiquated child pornography laws. Part II will also include perspectives on the proper societal response to sexting, including two competing—albeit broad—scholarly approaches. Part III will detail recent state responses to sexting, including proposed and passed legislation. The author will highlight the potential effects of such laws, while additionally noting that most state legislatures have thus far remained silent about sexting. Even among states that have addressed sexting, responses have typically ignored the controversial realm of nonconsensual sexting.

Finally, Part IV proposes a legislative response. Specifically, it will argue that, once equipped with a proper understanding of the many manifestations of sexting, lawmakers should decriminalize certain types and provide for a more sensible response to others. More generally, this Comment's proposed solutions will allow legislatures to pass laws that are consistent with the legislative purpose behind child pornography laws and in accord with public policy goals. The proposed laws will further seek to limit prosecutorial discretion and

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<sup>15</sup> The author recognizes that it is nearly impossible to anticipate *all* of the circumstances in which sexting may evolve. With this in mind, this Comment will strongly emphasize two overarching manifestations of sexting: consensual and nonconsensual.

<sup>16</sup> Unless otherwise noted, this Comment will focus on sexting that involves teens, *including* eighteen and nineteen-year-olds, who are legally considered adults, but nonetheless relevant in analyzing teenage sexting.

<sup>17</sup> The concept extends to when a teen knowingly posts photos of himself or herself on the internet.

<sup>18</sup> Nonconsensual sexting has also been referred to as “malicious” sexting. See Peggy O’Crowley, *The Sexting Generation*, INSIDE JERSEY (Sept. 21, 2009, 3:34 PM), [http://www.nj.com/insidejersey/index.ssf/2009/08/the\\_sexting\\_generation.html](http://www.nj.com/insidejersey/index.ssf/2009/08/the_sexting_generation.html).

eliminate disproportional penalties, including sex-offender registration, for teenage sexting offenders.

## II. SCRUTINIZING SEXTING: FROM STATISTICS TO JUDICIAL AND SCHOLARLY RESPONSES

### A. *The Statistics Behind Sexting*

Although fairly limited, research indicates that a substantial number of teenagers engage in sexting.<sup>19</sup> The primary source for statistics on sexting is a 2008 survey conducted by the National Campaign to Prevent Teen and Unplanned Pregnancy and Cosmogirl.com (“the survey”).<sup>20</sup> Between September 25, 2008, and October 3, 2008, the survey makers polled approximately 1,280 teens and young adults.<sup>21</sup> For purposes of this Comment, the pertinent statistics focus on 653 of these participants who were teenagers between the ages of thirteen and nineteen.<sup>22</sup> Among the 653 teens, 75% said they knew that sending sexually suggestive content, whether messages or images, would have “serious negative consequences.”<sup>23</sup> Still, despite their awareness of these potential ramifications, 20% of the teens said that they had electronically sent or posted on the internet nude or

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<sup>19</sup> See THE NAT’L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY & COSMOGIRL.COM, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1 (2008), available at [http://www.thenationalcampaign.org/sextech/PDF/SexTech\\_Summary.pdf](http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf) [hereinafter CAMPAIGN]. According to its creators, the survey was the first public one of its kind to assess the number of teens who engage in sexting. *Id.* at 5.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 5.

<sup>22</sup> Under applicable statutes, pictures of teens ages eighteen and nineteen do not amount to child pornography. See, e.g., 18 PA. CONS. STAT. § 6312(d)(1) (2010) (“Any person who intentionally views or knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a *child under the age of 18 years* engaging in a prohibited sexual act or in the stimulation of such commits an offense.” (emphasis added)). But if an eighteen or nineteen-year-old forwards such pictures to a minor, the eighteen or nineteen-year-old may be prosecuted for disseminating such material to a minor. See, e.g., State v. Canal, 773 N.W.2d 528, 529 (Iowa 2009) (upholding the conviction of defendant for knowingly disseminating obscene material to a minor under Iowa Code § 728.2 (2005)). With this in mind, an important statistic from the National Campaign to Prevent Teen and Unplanned Pregnancy and Cosmogirl.com research is that among the 653 teens, eleven percent were *young* teen girls, between thirteen and sixteen, who said they had engaged in sexting. CAMPAIGN, *supra* note 19, at 1 (emphasis added).

<sup>23</sup> CAMPAIGN, *supra* note 19, at 3. The survey-makers do not define “serious negative consequences.” *Id.*

semi-nude pictures or videos of themselves.<sup>24</sup> This nonchalance is also evidenced in mainstream media explorations of sexting.<sup>25</sup>

The statistics garnered from the survey are widely cited by mainstream media sources.<sup>26</sup> Although one researcher has questioned the survey's veracity,<sup>27</sup> other polls also indicate that sexting is pervading teenage culture. As an example, the Hearst Corporation has conducted a poll in which 20% of teens admitted that they have sent sexually explicit photos of themselves through text messages.<sup>28</sup> In addition, wired-safety.org, a non-profit organization dedicated to internet safety, conducted research that indicates that 44% of teen boys said they have seen at least one naked picture of a female classmate.<sup>29</sup> Not surprisingly, statistics also indicate that sexting is not limited to teenagers in this country.<sup>30</sup> As the foregoing research indicates, sexting appears to be a pervasive phenomenon in teen culture.

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<sup>24</sup> *Id.* at 1.

<sup>25</sup> See O'Crowley, *supra* note 18. O'Crowley describes an otherwise typical North Jersey teen who posts nude pictures of herself on Facebook despite knowing that it is "inappropriate" and that she "can get into deep trouble and cause embarrassment for herself and her family." *Id.* The author additionally cites a survey conducted by Susan Lipkins, a New York psychologist who works with children and adolescents. *Id.* Lipkins said that about half of her survey recipients "posted suggestive or erotic images even though they already realized the material could get them in trouble at school or work. Most also [said] they were aware it could cause them potential personal and family embarrassment." *Id.*

<sup>26</sup> See, e.g., Donna Leinwand, *Survey: 1 in 5 Teens Sext Despite Risks*, U.S.A. TODAY, June 25, 2009, at A3; Rachel Simmons, *The Sext Generation*, HUFFINGTON POST (June 18, 2009), [http://www.huffingtonpost.com/rachel-simmons/the-sext-generation\\_b\\_217715.html](http://www.huffingtonpost.com/rachel-simmons/the-sext-generation_b_217715.html).

<sup>27</sup> See PETER E. CUMMING, CHILDREN'S RIGHTS, VOICES, TECHNOLOGY, SEXUALITY 1, 6 (May 26, 2009), available at <http://www.arts.yorku.ca/huma/cummingp/documents/TeenSextingbyPeterCummingMay262009.pdf>. Cumming, criticizing the survey, has said that it was conducted exclusively online, the survey makers "no doubt have vested interests in the results," and that "the very broad category of 'nude or semi-nude' photos used in the survey questions recognizes no distinctions between nudity, sexuality, and pornography." *Id.* at 6.

<sup>28</sup> *Parental Controls Help Guard Against Sexting*, WISN.COM (July 28, 2009), <http://www.wisn.com/news/20207767/detail.html>.

<sup>29</sup> Alexandra Marks, *Charges Against 'Sexting' Teens Highlight Legal Gaps*, CHRISTIAN SCI. MONITOR, Mar. 31, 2009, at 25.

<sup>30</sup> In the UK, for example, Beatbullying, a British charity devoted to preventing bullying in school settings, conducted its own sexting research. See generally BEATBULLYING, <http://www.beatbullying.org/> (last visited Mar. 22, 2011). Survey recipients included 2,000 teenagers, ages eleven to eighteen-years old. *Truth of Sexting Amongst UK Teens*, BEATBULLYING (Aug. 4, 2009), [http://www.beatbullying.org/dox/media-centre/news-archive/August%2009/truth\\_of\\_sexting.html](http://www.beatbullying.org/dox/media-centre/news-archive/August%2009/truth_of_sexting.html). Of the teens surveyed, 38% stated they had received a sexually explicit or distressing text or email. *Id.* Out of the 38% that received messages, 70% of the teens said they knew the sender of the message, 45% of the sexually explicit messages were from a peer, and

*B. Beyond Statistics: How to Combat Sexting*

Against this statistical backdrop, it is important to realize that sexting manifests itself in a variety of circumstances. To fully understand the debate surrounding both the appropriate societal response to sexting and the impact of several judicial rulings, one must be cognizant of two overarching sexting manifestations: consensual sexting and nonconsensual sexting.<sup>31</sup> As this Comment will illustrate, most societal discussion and legislative responses<sup>32</sup> focus on consensual sexting.

*1. Prosecutorial and Judicial Responses to Sexting*

Many prosecutors nationwide have attempted to curb teenage sexting.<sup>33</sup> In doing so, the prosecutors have utilized antiquated child pornography statutes by charging children under the same statutes originally designed to protect them.<sup>34</sup> In *Miller*—which has become one of the most recognized sexting cases—a local prosecutor in Pennsylvania sought to compel several teenagers involved in a sexting incident at a local school to complete a program focused on education and counseling.<sup>35</sup> The district attorney, George Skumanick, told the parents of the sexting teens that any teen who refused to complete the program would be charged under the state's child pornography laws and forced to register as a sex offender.<sup>36</sup> Skumanick's primary targets were the girls who had taken and were depicted in the pictures.<sup>37</sup> The pictures in question included one in which two girls were shown in suggestive poses and another that showed one of

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23% were from a current boyfriend or girlfriend. *Id.* One should note that this survey broadly states that the content distributed between and among teens was “sexually explicit or distressing.” *Id.* Unlike the previous survey conducted by the National Campaign to Prevent Teen and Unplanned Pregnancy and Cosmogirl.com, which differentiated between sexually suggestive messages and messages containing nude or semi-nude photos, this survey does not undertake such a specific inquiry. Accordingly, for purposes of analyzing the potential criminality of sexting participants, this survey is not as instructive.

<sup>31</sup> See *supra* notes 15–18 and accompanying text.

<sup>32</sup> See *infra* Part III.

<sup>33</sup> See, e.g., Richmond, *supra* note 6 (highlighting sexting prosecutions in Pennsylvania, Ohio, and Wisconsin).

<sup>34</sup> *Id.*

<sup>35</sup> See *Miller v. Skumanick*, 605 F. Supp. 2d 634, 638 (M.D. Pa. 2009), *aff'd sub nom. Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010). The program was created to teach the girls to “gain an understanding of how their actions were wrong[,] . . . gain an understanding of what it means to be a girl in today's society, both advantages and disadvantages, and . . . identify nontraditional societal and job roles.” *Id.*

<sup>36</sup> *Id.* at 639.

<sup>37</sup> *Id.*

the girls with a towel wrapped around her body just below her breasts.<sup>38</sup> The children's parents ultimately brought suit under 42 U.S.C. § 1983 and alleged that Skumanick's take-it-or-leave-it counseling offer constituted a violation of the children's rights under the First and Fourteenth Amendments.<sup>39</sup> The plaintiffs filed a motion for a temporary restraining order against Skumanick to preclude him from filing criminal charges against the girls.<sup>40</sup> In ruling for the plaintiffs, the court took the "extraordinary" step of granting the temporary restraining order against Skumanick.<sup>41</sup>

Following the court's issuance of a temporary restraining order, Skumanick said that he would appeal the order but only pursue charges against Nancy Doe,<sup>42</sup> the girl pictured with a towel below her breasts.<sup>43</sup> On appeal, despite Skumanick's concession, the Third Circuit affirmed the issuance of the temporary restraining order as applied to Nancy Doe.<sup>44</sup> It noted that although prosecutors routinely and permissibly present defendants with pre-indictment offers of leniency, Skumanick's take-it-or-leave-it counseling offer was "likely retaliatory, rather than a good faith effort to enforce the law, [as shown] by the lack of evidence of probable cause" against Nancy Doe.<sup>45</sup> Specifically, the court noted that even assuming the state's child pornography laws applied to the photo in question—an issue upon which the court expressly did not rule—Skumanick failed to present any evidence that Doe ever possessed or distributed the photo, two alternative requirements under the statute.<sup>46</sup> In fact, at oral argument, the district attorney's office only pointed to evidence of the existence of the photograph itself and the fact that it had appeared on classmates' cell phones.<sup>47</sup> As the court noted, "[A]ppearing in a photograph provides no evidence as to whether

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<sup>38</sup> *Id.* The suggestive picture showed two girls "from the waist up, each wearing a white opaque towel." *Id.*

<sup>39</sup> *Id.* at 640.

<sup>40</sup> *Id.*

<sup>41</sup> *Miller*, 605 F. Supp. 2d at 641 (citing *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 375 (2008) (calling an injunction an "extraordinary remedy" that is never awarded as of right)).

<sup>42</sup> The district court in *Miller* allowed the girl, Nancy, and her mother, Jane, to proceed under pseudonyms. *Id.* at 639 n.2.

<sup>43</sup> Dionne Searcey, *A Lawyer, Some Teens and a Fight Over 'Sexting'*, WALL ST. J., Apr. 21, 2009, at A17.

<sup>44</sup> *Miller v. Mitchell*, 598 F.3d 139, 147 (3d Cir. 2010).

<sup>45</sup> *Id.* at 153.

<sup>46</sup> *Id.* at 153–54.

<sup>47</sup> *Id.* at 154.

that person possessed or transmitted the photo.”<sup>48</sup> Accordingly, the court affirmed the lower’s court’s issuance of a temporary restraining order.<sup>49</sup> It noted, however, that the district attorney could later move to vacate the injunction upon a showing of probable cause.<sup>50</sup>

Given this option, should the current district attorney, Jeff Mitchell,<sup>51</sup> decide to bring charges against Nancy Doe, he will likely utilize Pennsylvania’s child pornography statute and its severe attendant punishments.<sup>52</sup> If the statute is applied literally, and the State can prove that Doe either possessed or distributed the photo, Mitchell’s prosecution may prove successful. The State would have to prove beyond a reasonable doubt that the girl’s nudity was “depicted for the purpose of sexual stimulation or gratification of any person who might view [the] depiction” of a child under age eighteen.<sup>53</sup> Ultimately, without any legislative guidance and despite the ruling in *Miller*, the prosecutor’s discretion could control, no matter how absurd the result.

The *Miller* case is also notable for several reasons. Significantly, the case illustrates the dangers of prosecutorial discretion. In *Miller*, one of the charged plaintiffs was wrapped in a towel.<sup>54</sup> Despite this fact, Skumanick reasoned that any girl dressed “provocatively” was subject to harsh criminal sanctions.<sup>55</sup> Convinced that he could employ plainly inapplicable laws, Skumanick abused his prosecutorial discretion by seeking to make examples of the sexting participants. Skumanick threatened to charge the children under the state’s child pornography law, which prohibits one from “knowingly possess[ing]” a picture “depicting a child under the age of eighteen years engaging in a prohibited sexual act.”<sup>56</sup> The Act defines a “prohibited sexual act” to include “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>57</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 155.

<sup>50</sup> *Miller*, 598 F.3d at 154.

<sup>51</sup> District Attorney Skumanick lost to Mitchell in a November 2009 election. *Id.* at 145.

<sup>52</sup> See 18 PA. CONS. STAT. § 6312(d)(1) (2010).

<sup>53</sup> § 6312(a).

<sup>54</sup> *Miller v. Skumanick*, 605 F. Supp. 2d 634, 639 (M.D. Pa. 2009), *aff’d sub nom. Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

<sup>55</sup> See Searcey, *supra* note 43.

<sup>56</sup> § 6312(d)(1).

<sup>57</sup> § 6312(g).

As further evidence of such prosecutorial indiscretion, Skumanick created his own rules, and in doing so, he afforded parents a rigid take-it-or-leave-it offer. When questioned about his mandate that children could only avoid criminal charges if they completed the counseling and education program, he flatly told the accused children's parents that "these are the rules [and] [i]f you don't like them, too bad."<sup>58</sup> Ultimately, and most importantly, the federal judge in *Miller*, in a ruling affirmed by the Third Circuit, did not "like" Skumanick's "rules."<sup>59</sup> Although the *Miller* case has garnered significant mainstream media coverage,<sup>60</sup> several other judicial responses to sexting are noteworthy in that the courts have in large part been unsympathetic to the sexting teens and accordingly allow prosecutorial discretion to control.<sup>61</sup> In fact, the courts are content to affirm prosecutorial applications of child pornography statutes to sexting participants. Despite the result in *Miller*,<sup>62</sup> and as the subsequent cases illustrate, little debate typically surrounds the application of child pornography laws in most sexting cases.<sup>63</sup>

In *A.H. v. State*, a Florida appeals court upheld the conviction of two juveniles charged with violating a Florida child pornography law.<sup>64</sup> The prosecutor filed charges after the juveniles, who were boyfriend and girlfriend, took pictures of themselves naked and engaged in sexual behavior.<sup>65</sup> As in a typical consensual sexting situation, the juveniles emailed the photos to each other, but the photos never circulated to a third party.<sup>66</sup> On appeal, the defendant, A.H., argued

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<sup>58</sup> *Miller*, 605 F. Supp. 2d at 638.

<sup>59</sup> *Id.*

<sup>60</sup> See, e.g., Michael Rubinkam, *Judge Blocks Charges in Teen 'Sexting' Case*, MSNBC (Mar. 30, 2009, 8:20 PM), <http://www.msnbc.msn.com/id/29964324/>.

<sup>61</sup> See, e.g., *A.H. v. State*, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007); *State v. Canal*, No. 07-1051, 2009 WL 3051556, at \*1 (Iowa Sept. 18, 2009); *State v. Vezzoni*, No. 22361-2-III, 2005 Wash. App. LEXIS 864, at \*2 (Wash. Ct. App. Apr. 28, 2005).

<sup>62</sup> Notably, the district court in *Miller*, in issuing the temporary restraining order, highlighted that the prosecutor sought to pursue charges against two of the girls who were merely pictured "provocatively." See Searcey, *supra* note 41.

<sup>63</sup> See Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 513 (2008). Smith noted that child pornography laws "clearly do not exempt cases where minors produce or disseminate pornographic images of themselves. They plainly apply to *any* pornographic depictions of a minor. It makes no difference, from a definitional standpoint, whether or not the child pornography was produced by the minor featured in the images." *Id.*

<sup>64</sup> 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007).

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

<sup>66</sup> *Id.*

that the Florida statute<sup>67</sup> was unconstitutional as applied to her.<sup>68</sup> Specifically, A.H.'s primary contention was that the application of the statute violated her state constitutional right to privacy.<sup>69</sup> The court disagreed and first stated that "[t]he State's interest in protecting children from exploitation in this statute is the same regardless of whether the person inducing the child to appear in a sexual performance and then promoting that performance is an adult or a minor."<sup>70</sup> The court added that A.H. had no reasonable expectation of privacy when she and her boyfriend took the pictures and subsequently emailed them to each other.<sup>71</sup> Interestingly, the court—citing the Florida legislature's desire to prevent further production of such images—was concerned that the consensual sexting would evolve into nonconsensual sexting.<sup>72</sup> In fact, the likelihood that the exchanged photos *might* become public, ultimately compelled the court to rule in favor of the State.<sup>73</sup>

More recently, the Iowa Supreme Court affirmed another consensual sexting prosecution and upheld the conviction of the defendant in *State v. Canal*.<sup>74</sup> Canal was eighteen when he sent a photo of his erect penis to his friend C.E., who at the time was fourteen.<sup>75</sup> Canal and C.E. admitted that Canal sent the picture as a joke and on-

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<sup>67</sup> See FLA. STAT. ANN. § 827.071(3) (West 2006).

A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a child less than 18 years of age. Whoever violates this subsection is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

*Id.*

<sup>68</sup> *A.H.*, 949 So. 2d at 235.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 238.

<sup>71</sup> *Id.* at 237.

<sup>72</sup> *Id.* at 238.

Appellant asserts that the State only has a compelling interest when the photograph or video is shown to a third party. The Legislature has, however, recognized a compelling interest in seeing that the videotape or picture including "sexual conduct by a child of less than 18 years of age" is never produced.

*Id.*

<sup>73</sup> *Id.* ("The fact that these photographs may have or may not have been shown in no way affects the minor's reasonable expectation that there was a distinct and real possibility that the other teenager involved would at some point make these photos public.")

<sup>74</sup> 773 N.W.2d 528, 529 (Iowa 2009).

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

ly upon C.E.'s request.<sup>76</sup> Despite this fact, after C.E.'s mother checked her daughter's email, found the photograph, and subsequently turned it over to the police, Iowa authorities charged Canal under Iowa Code section 728.2<sup>77</sup> for knowingly disseminating obscene material to a minor.<sup>78</sup>

Canal urged the court to set aside the conviction and argued that insufficient evidence supported the jury's conclusion that the photograph he sent to C.E. was obscene.<sup>79</sup> He contended that the picture that he sent "only appealed to a natural interest in sex" and was thus not obscene.<sup>80</sup> Notably, Canal, not seeking to challenge the statute as applied to him,<sup>81</sup> made no argument that such application ran counter to the legislature's intent when it passed the child pornography law or to the state's overarching public policy considerations. As such, the court did not address these issues. Ultimately, in affording considerable deference to the jury's verdict, the court disagreed with Canal and upheld his conviction.<sup>82</sup>

In 2005, state prosecutors in Washington successfully pursued a nonconsensual sexting conviction, which a state appellate court ultimately upheld. In *State v. Vezzoni*, the defendant, a sixteen-year-old, took pictures of his girlfriend, also sixteen, which depicted her unclothed breasts and genitals.<sup>83</sup> Without her consent, the defendant

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

<sup>77</sup> IOWA CODE § 728.2 (2010) ("Any person, other than the parent or guardian of the minor, who knowingly disseminates or exhibits obscene material to a minor, including the exhibition of obscene material so that it can be observed by a minor on or off the premises where it is displayed, is guilty of a public offense and shall upon conviction be guilty of a serious misdemeanor.").

<sup>78</sup> *Canal*, 773 N.W.2d 528 at 529.

<sup>79</sup> *Id.* at 530. Obscenity is defined as any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sadomasochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable material for minors, would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political, or artistic value.

*Id.* at 530–31.

<sup>80</sup> *Id.* at 532.

<sup>81</sup> Presumably, this may have been because Canal was eighteen, an adult, at the time of his conviction. *See id.* at 529.

<sup>82</sup> *Canal*, 773 N.W.2d 528 at 532 (holding that "the jury could find, by applying its own contemporary community standards with respect to what is suitable material for minors, that the material appealed to the prurient interest, was patently offensive, and lacked serious literary, scientific, political, or artistic value").

<sup>83</sup> No. 22361-2-III, 2005 Wash. App. LEXIS 864, at \*2 (Wash. Ct. App. Apr. 28, 2005).

later showed the pictures to his classmates after he and his girlfriend broke up.<sup>84</sup> In appealing his conviction, the defendant argued that the statute was unconstitutional as applied to a minor in that it infringed on his right to privacy.<sup>85</sup> The court, though, did not find this argument persuasive. Citing the state's interest in protecting children from sexual exploitation as well as the legislature's decision *not* to create age-based distinctions for potential offenders under the state's child pornography statutes, the court affirmed the defendant's conviction.<sup>86</sup> As these cases illustrate, little judicial sympathy has arisen for teenage sexting offenders. The courts mechanically apply child pornography laws, and in doing so, they destroy child defendants' lives. The time is ripe for legislatures to act appropriately.

## 2. Scholarly Responses

Many question whether any criminal response, let alone the harsh consequences that stem from criminal liability under child pornography statutes,<sup>87</sup> is appropriate for sexting offenses. Broadly speaking, a proper societal response to sexting focuses on two competing interests. First, as evidenced by both state and federal legislative responses, society has taken a very forceful approach to combat child pornography.<sup>88</sup> Child pornography offenders—no matter their ages—are punished under very stringent criminal penalties.<sup>89</sup> Working counter to this first interest of eliminating child pornography and punishing offenders is society's recognition that minors often engage in destructive behavior, such as sexting, but they are not mature enough to appreciate the social harm that is a product of such behavior.<sup>90</sup> Accordingly, these minors should not face criminal law punishment for sexting. The harms that result from sexting include the possibility that the sexted content can ultimately end up in the pos-

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* Vezzoni asserted that because case law provides that minors have a constitutional right to engage in private sexual activity, the state was precluded from regulating minors who take and possess pornographic photographs. *Id.* at \*3.

<sup>86</sup> *Id.* at \*4–6.

<sup>87</sup> *See, e.g.*, 18 U.S.C. § 2252(b)(1) (2006) (stating that a first-time offender found guilty of knowingly disseminating or distributing child pornography “shall be fined under this title and imprisoned not less than 5 years and not more than 20 years”).

<sup>88</sup> *Discussion on the Protocols Needed in Online Child Self-Exploitation Cases*, VA. J. SOC. POL'Y & L. (Feb. 5, 2008), [mms://wms.edgecastcdn.net/000184/podcast/streaming/news/0708/child\\_exploit.wma](https://wms.edgecastcdn.net/000184/podcast/streaming/news/0708/child_exploit.wma) [hereinafter *Child Self-Exploitation Cases Podcast*].

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

session of a child pornographer.<sup>91</sup> An additional concern is that material that is initially consensually sexted may later be forwarded without the photo subject's consent.<sup>92</sup> In a high school setting, for instance, some students have used nonconsensual sexting as a form of revenge, a means to humiliate the photo subject.<sup>93</sup>

To neutralize these competing interests, one researcher has proposed a relatively comprehensive prosecutorial protocol. Although she has not utilized the "sexting" moniker,<sup>94</sup> Mary Graw Leary, a former deputy director for the Office of Legal Counsel at the National Center for Missing and Exploited Children and the former director of the National Center for the Protection of Child Abuse, has explored the issue of child "self-exploitation" in great detail.<sup>95</sup> Leary argues that prosecutors should assess a number of factors to determine whether juvenile prosecution is appropriate in a particular sexting case.<sup>96</sup> She divides the factors into two overarching categories: offender specific and crime specific.<sup>97</sup> For the offender-specific considerations, Leary argues that prosecutors should assess why the juvenile engaged in the activity, the frequency of the juvenile's activity, and the juvenile's age and support network.<sup>98</sup> As for the second factor, the crime itself, Leary suggests that prosecutors consider "the circumstances around the exploitation, whether or not other youths are brought into the production, the role of this particular youth in the production, whether it was for commercial purposes, or profit motive, the extent of the distribution, the theme of the images, and the severity of the images."<sup>99</sup> By assessing these factors, the state can determine if prosecution is required or another approach is more appropriate.<sup>100</sup>

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<sup>91</sup> See O'Crowley, *supra* note 18. The author quotes John Shehan, the director of Exploited Child Division of the National Center for Missing and Exploited Children, who said, "These [child pornographers] collect these images like your average citizen collects baseball cards. . . . The content can live out there forever." *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (describing the story of an anonymous New Jersey high school teacher who said a student at her school was suspended for such "revenge" sexting).

<sup>94</sup> Leary refers to the sexting content as "self-produced child pornography." Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1 (2007).

<sup>95</sup> *Id.*

<sup>96</sup> See Child Self-Exploitation Cases Podcast, *supra* note 88.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

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

<sup>100</sup> See Leary, *supra* note 95, at 50.

Leary's perspective is notable in that she recognizes, albeit fleetingly, that sexting is manifested in many ways. Still, Leary urges a prosecutorial protocol that would inevitably greatly enhance prosecutorial discretion. Although Leary outlines a comprehensive approach, the ultimate authority in each sexting case would still lie exclusively with the prosecutor, who would be tasked with balancing the factors and subsequently determining an appropriate course of action. Accordingly, the prosecutor would retain considerable discretion, an approach of which this Comment is skeptical.

In contrast to Leary's juvenile prosecution option, another researcher has countered that juvenile punishment under the "heavy hand" of the criminal law is not an appropriate response.<sup>101</sup> Stephen Smith, a professor at the University of Virginia School of Law, equates sexting prosecutions to the prosecution of suicide attempts.<sup>102</sup> He argues that in both instances, the person is calling out for help, and as such, "[t]he proper response of a compassionate society is to help people in those situations, not to add legal troubles and incarceration to their list of woes."<sup>103</sup> Smith adds that society needs a realistic approach under which prosecutors must recognize a distinction between conventional child pornography and self-produced child pornography;<sup>104</sup> the harsh punishments were created for the former.<sup>105</sup> As such, Smith argues that in sexting cases,<sup>106</sup> prosecutorial implementation of harsh criminal laws is not wise and accordingly, Leary's prosecutorial guidelines are unnecessary.<sup>107</sup>

As Leary does, Smith asserts that prosecutorial discretion should ultimately control; unlike Leary, though, Smith proposes a different end result.<sup>108</sup> Equipped with such discretion, Smith argues that prosecutors should refrain from filing charges and should first utilize child protective services to rehabilitate children and educate them about the dangers of sexting.<sup>109</sup> According to Smith, prosecutors

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<sup>101</sup> See Child Self-Exploitation Cases Podcast, *supra* note 88; see also Smith, *supra* note 63.

<sup>102</sup> See Child Self-Exploitation Cases Podcast, *supra* note 88.

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

<sup>104</sup> See Smith, *supra* note 63, at 516 (describing conventional child pornography as that involving the "rape and molestation of children, captured on film or in other visual formats").

<sup>105</sup> See *id.*

<sup>106</sup> Smith does not use the term sexting and instead utilizes "self-produced child pornography," a phrase that Leary employs. *Id.* at 506; see Leary, *supra* note 95.

<sup>107</sup> See Child Self-Exploitation Cases Podcast, *supra* note 88.

<sup>108</sup> Smith, *supra* note 63, at 507.

<sup>109</sup> *Id.*

should only apply criminal laws under very limited circumstances.<sup>110</sup> For one, he suggests that the criminal law should be used as a means to entice minors to cooperate with law enforcement officers who seek to eradicate pedophiles and sexual predators.<sup>111</sup> And he says that prosecutors should also consider using the criminal law to convince uncooperative minors “who have made or distributed pornographic images of themselves in the past to cease and desist and help remedy the situation they created.”<sup>112</sup>

Following a similar approach, other researchers have broadly criticized the criminalization of sexting.<sup>113</sup> Several satellite offices of the American Civil Liberties Union (ACLU) have also urged lawmakers to eliminate criminal-law solutions to sexting.<sup>114</sup> Still, while these researchers, including Smith and the ACLU, are adamant that the criminal law is not an appropriate remedy to combat sexting, they do not address instances of nonconsensual sexting.

### 3. A Response to Nonconsensual Sexting

With many researchers and lawmakers failing to delineate between consensual and nonconsensual sexting, most states have unsurprisingly neither proposed nor passed laws addressing nonconsensual sexting.<sup>115</sup> Instead, they are seemingly content to equip prosecutors with the discretion to apply antiquated child pornography laws. Despite silence from lawmakers, a Florida nonconsensual

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<sup>110</sup> *Id.* at 541.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 541–42.

<sup>113</sup> *See, e.g.*, Child Self-Exploitation Cases Podcast, *supra* note 88. Anne Coughlin, a professor from the University of Virginia School of Law, questioned whether sexters are “troubled” children. *Id.* She said,

Nobody fits into school when they’re 15 to 17. Everybody these days turns to the internet and to Facebook, that’s where they live, that’s where they talk. . . . The fact that a child is turning to the internet is not a sign that they’re a troubled child. . . . [Sexting] is a serious social question.

*Id.* She added that society cannot trust quick criminal fixes by local prosecutors. *Id.*; *see also* Vivian Berger, *Stop Prosecuting Teens for ‘Sexting,’* 197 N.J. L.J. 409, 419 (2009) (arguing that sexting “is a social, not a criminal problem, to whose solution law enforcement has nothing positive to contribute”).

<sup>114</sup> *See* O’Crowley, *supra* note 18. “We think this is appropriately addressed within the family structure.” *Id.* (quoting Edward Barocas, the legal director of the ACLU of New Jersey); *see also* Letter from Jeffrey M. Ganso, Legal Director, American Civil Liberties Union of Ohio, to members of the Ohio General Assembly (Apr. 2, 2009), *available at* [http://www.acluohio.org/issues/JuvenileJustice/LetterToOGA\\_Sexting2009\\_0402.pdf](http://www.acluohio.org/issues/JuvenileJustice/LetterToOGA_Sexting2009_0402.pdf).

<sup>115</sup> *See infra* Part III.

sexting case has garnered considerable mainstream media attention and evidences why a legislative response to nonconsensual sexting is necessary.<sup>116</sup> At the age of eighteen, Philip Alpert, was convicted of felony child pornography charges and was required to register as a sex offender after he forwarded pictures of his then sixteen-year-old girlfriend to her friends and family without her consent.<sup>117</sup> Alpert decided to forward the pictures after he and his girlfriend got into a fight.<sup>118</sup>

Alpert's case illustrates the steep criminal ramifications for non-consensual sexting when prosecutors utilize child pornography laws. As a registered sex offender, Alpert is listed "next to people who have raped children" and "molested kids."<sup>119</sup> Alpert insists that his situation exemplifies the incompatibility of child pornography laws in the context of sexting.<sup>120</sup>

Despite the consequences that have stemmed from Alpert's prosecution, punishment proponents argue that this sort of unforgiving prosecutorial response is appropriate. They cite a recent Ohio case in which a teen committed suicide after she and her boyfriend engaged in consensual sexting, and the boyfriend forwarded the girl's pictures upon their breakup.<sup>121</sup> Ridiculed by her high school classmates about the pictures, the girl, Jessica Logan, ultimately hanged and killed herself in her bedroom, when she was just eighteen-years-old.<sup>122</sup> As Logan's situation demonstrates, when teens engage in nonconsensual sexting, the ramifications can be life-changing not just for the offender but for the victim as well.<sup>123</sup> Thus, punish-

<sup>116</sup> See, e.g., Deborah Feyerick & Sheila Steffen, 'Sexting' Lands Teen on Sex Offender List, CNN (Apr. 7, 2009, 10:50 AM), [http://articles.cnn.com/2009-04-07/justice/sexting.busts\\_1\\_phillip-alpert-offender-list-offender-registry?\\_s=PM:CRIME](http://articles.cnn.com/2009-04-07/justice/sexting.busts_1_phillip-alpert-offender-list-offender-registry?_s=PM:CRIME).

<sup>117</sup> See *id.* (noting that Alpert pleaded no contest to the charges but was later convicted).

<sup>118</sup> *Id.*; 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, 16 (2009). The author quotes Alpert as saying, "I wasn't thinking at all. Had I thought about it, I might have realized this is probably illegal, but I certainly wouldn't have known all the ramifications of it." *Id.*

<sup>119</sup> Feyerick & Steffen, *supra* note 116.

<sup>120</sup> See *id.* The article quotes Alpert as saying, "You think child pornography, you think six-year-old, three-year-old little kids who can't think for themselves, who are taken advantage of. That really wasn't the case." *Id.*

<sup>121</sup> Mike Celizic, *Her Teen Committed Suicide Over 'Sexting.'* MSNBC.COM (Mar. 6, 2009, 9:26 AM), <http://www.msnbc.msn.com/id/29546030>.

<sup>122</sup> *Id.*

<sup>123</sup> See Andrea Slane, *Sexting, Teens and a Proposed Offence of Invasion of Privacy*, IP OSGOODE (Mar. 16, 2009), <http://www.iposgoode.ca/2009/03/sexting-teens-and-a-proposed-offence-of-invasion-of-privacy>.

ment proponents can argue that severe criminal ramifications are necessary to combat nonconsensual sexting.

Advocates for harsh penalties can make two additional, related arguments. For one, legislatures purposefully did not make age distinctions when they passed child pornography laws.<sup>124</sup> Accordingly, because the Supreme Court has recognized that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance,”<sup>125</sup> a court or even a prosecutor refusing to apply a child pornography statute—even one with harsh attendant consequences—to a minor who engages in nonconsensual sexting would be inappropriate.<sup>126</sup> Related to this assertion is the fact that, no matter the age of the perpetrator, the existence of child pornography is harmful to the children depicted, to other children exposed to the child pornography, and to society as a whole.<sup>127</sup> Punishment proponents can therefore argue that prosecutors should utilize child pornography statutes, even those with harsh attendant punishments, in an effort to deter *any* circulation of child pornography. Although this Comment recognizes the potential life-changing circumstances that can result from nonconsensual sexting, it nonetheless urges legislators to update or adopt laws to more sensibly address and deter such sexting.<sup>128</sup>

### III. LEGISLATIVE RESPONSES TO SEXTING

In the midst of very well-publicized sexting prosecutions throughout the country, a number of state legislatures have ad-

<sup>124</sup> *Id.*

<sup>125</sup> *New York v. Ferber*, 458 U.S. 747, 757 (1982).

<sup>126</sup> As the court stated:

[T]he legislature is well aware of how to create different degrees of criminal liability on the basis of a specific age disparity between the offender and the victim.” When the legislature declines to make the distinctions based on age in the statute, “[t]here is no room for judicial interpretation . . . beyond the plain language of the statute.” The legislature did not intend to exclude juvenile offenders from the child pornography statutes.

*Vezzoni*, No. 22361-2-III, 2005 Wash. App. LEXIS 864, at \*6 (Wash. Ct. App. Apr. 28, 2005) (quoting *State v. D.H.*, 9 P.3d 253, 256–57 (Wash. Ct. App. 2000)).

<sup>127</sup> See Leary, *supra* note 94, at 9. “Children’s exposure to [child] pornography can undermine their capabilities to avoid, resist, or escape sexual victimization, thereby making them more vulnerable to sexual victimization.” *Id.* at 14 (quoting Diana E.H. Russell & Natalie J. Purcell, *Exposure to Pornography as a Cause of Sexual Victimization*, in *HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE* 59, 66 (Nancy E. Down, Dorothy G. Singer & Robin Fretwell Wilson eds., 2006)).

<sup>128</sup> See *infra* Part IV.

dressed or continue to address sexting.<sup>129</sup> At minimum, these lawmakers are laudably attempting to distinguish child pornography laws from sexting laws. Still, legislative action has thus far been primarily limited to consensual sexting situations.<sup>130</sup> Not surprisingly, state responses typically occur after a local sexting prosecution prompts public outcry.

A. *Proposals: New Jersey, New York, and Ohio*

When it comes to sexting, lawmakers in several states are only in the preliminary stages of modernizing their states' criminal codes. Thus, even in the handful of states that have recognized sexting, there is not always legislative finality.

New Jersey legislators were drawn to sexting after an incident involving a Passaic County juvenile.<sup>131</sup> The fourteen-year-old girl was arrested and faced child pornography charges after she posted nearly thirty nude pictures of herself on MySpace.<sup>132</sup> In response to this story and out-of-state sexting prosecutions, a New Jersey lawmaker took a progressive approach to sexting. In June 2009, Assemblywoman Pamela Lampitt, a Democrat from Camden, New Jersey, sponsored three bills in which she sought to provide for "education and forgiveness before arrest and prosecution."<sup>133</sup> The bills, however, have sat idle since their introduction and still await a full assembly vote.<sup>134</sup>

Lampitt's primary bill creates a diversionary program for juvenile sexting offenders who could avoid criminal charges if they agreed to attend an educational program, which would highlight

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<sup>129</sup> See *The Vexing Issue of 'Sexting,'* NAT'L CONFERENCE OF STATE LEGISLATURES, [http://www.ncsl.org/Portals/1/Documents/magazine/articles/2009/SL0709\\_Trends.pdf](http://www.ncsl.org/Portals/1/Documents/magazine/articles/2009/SL0709_Trends.pdf) (last visited Mar. 22, 2011) (stating that there are "hundreds of news stories" focused on sexting and that legislatures "in at least nine states have introduced legislation this year aimed at deterring teens from sexting and preventing legal loopholes that would allow sexual predators to escape prosecution").

<sup>130</sup> As noted, consensual sexting situations are those in which two or perhaps more juveniles transmit photos of themselves and each juvenile participates knowingly and willfully. See *supra* notes 15–17 and accompanying text. The concept extends to instances in which one of the teens posts the photos of himself or herself on the internet. *Id.*

<sup>131</sup> *Girl in Nude Photos Case Will Undergo Counseling*, HERALD NEWS (New Jersey), June 24, 2009, at B1.

<sup>132</sup> *Id.* The article notes that the prosecutor agreed to drop the charges when the girl stated she would undergo counseling during her six months of probation. *Id.*

<sup>133</sup> Elise Young, *N.J. Assemblywoman Pamela Lampitt Pushes Bills to Deal with Teen 'Sexting,'* NJ.COM (July 20, 2009, 5:45 PM), [http://www.nj.com/news/index.ssf/2009/07/trenton\\_nj\\_ap\\_like.html](http://www.nj.com/news/index.ssf/2009/07/trenton_nj_ap_like.html).

<sup>134</sup> See *id.*

both the legal and non-legal consequences of sexting.<sup>135</sup> Notably, the bill limits the program to juveniles who created, exhibited, and distributed sexually explicit photos “without malicious intent.”<sup>136</sup> Apparently, the bill would protect from criminal prosecution juveniles who send or create *either* provocative photos of themselves or others or photos of a sexually explicit nature.<sup>137</sup> Moreover, by limiting the bill’s reach to teens who acted “without malicious intent,”<sup>138</sup> the bill is unlikely to protect teens from nonconsensual sexting prosecutions. Lampitt’s proposed bill additionally provides for significant prosecutorial discretion.<sup>139</sup> It states that the “county prosecutor shall determine whether a juvenile shall be admitted to the program.”<sup>140</sup>

In New York, the assembly has proposed a bill that, although less specifically tailored than New Jersey’s, attempts to achieve similar underlying goals with a focus on education and criminal-punishment leniency for some teen sexters.<sup>141</sup> First, the bill would require the state to create an educational outreach program that would highlight the dangers of sexting.<sup>142</sup> Second, the bill would amend the penal law to “provide an affirmative defense to young persons for certain acts with regard to possession and dissemination of such images and photographs of themselves.”<sup>143</sup> The defense would only apply where the defendant was at least four years younger than the “individual who received, sent or posted an image or photograph at issue in a criminal charge *and* where that individual expressly or implicitly acquiesced in the defendant’s conduct.”<sup>144</sup> As such, the bill would pre-

<sup>135</sup> See Assemb. B. 4069, 213th Gen. Assemb., 2nd Sess. (N.J. 2009).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* This point is notable because the prosecutor in *Miller* sought to charge even the teenagers who were pictured “provocatively.” *Miller v. Skumanick*, 605 F. Supp. 2d 364 (M.D. Pa. 2009). See *supra* note 55 and accompanying text.

<sup>138</sup> See Assemb. B. 4069.

<sup>139</sup> *Id.*; see also *supra* notes 54–59 and accompanying text; *infra* Part IV.B.

<sup>140</sup> Assemb. B. 4069 § (1)(b).

<sup>141</sup> See Assemb. B. 8622, 232nd Gen. Assemb., Reg. Sess. (N.Y. 2009).

<sup>142</sup> *Id.* The lawmakers cited the potential long-term harm to juvenile privacy that may result from sexting.

Specifically, the bill would direct: [T]he office of children and family services to establish an educational outreach program to promote the awareness of text messaging, emailing and internet posting among adolescents, and create a campaign to address the potential long-term harm that may arise as a result of adolescents sending, receiving or posting on the internet images and photographs of themselves that include, but are not limited to, provocative or nude images.

*Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (emphasis added).

sumably only provide a defense in consensual sexting situations, including those where the photos in question included nudity and would thus ordinarily be criminalized under child pornography statutes.<sup>145</sup> Importantly, though, the affirmative defense would not apply when individuals forward pictures of third-party teens even with their consent.<sup>146</sup> Significantly, as in New Jersey, the bill awaits a vote from the full assembly.<sup>147</sup>

In Ohio, lawmakers were drawn to sexting following a very well-publicized and tragic sexting incident involving Jessica Logan, an eighteen-year-old who ultimately committed suicide.<sup>148</sup> As in New Jersey and New York, though, Ohio's proposed law awaits further action.<sup>149</sup> As currently drafted, the Ohio bill would create a misdemeanor punishment for a minor who, "by use of a telecommunications device . . . recklessly create[s], receive[s], exchange[s], send[s], or possess[es] a photograph, video, or other 'material' that shows a minor in a state of 'nudity.'"<sup>150</sup> The proposed law explicitly provides no defense for the minor if he/she was pictured in the content.<sup>151</sup> Under these guidelines, a consensual sexter clearly would face misdemeanor charges even when the content in question involved only pictures of himself or herself.<sup>152</sup> Additionally, a sexter would apparently fall under the bill's ambit in an instance where the sexter forwarded pictures of a third party with that third party's consent.<sup>153</sup> Further, lawmakers appear to intend to punish nonconsensual sexters under this bill as well.<sup>154</sup> For example, if a minor intentionally or knowingly forwarded nude pictures of his ex-girlfriend to her friends without her consent, he would be deemed to have "recklessly" sent such photography and would thus fall under the proposed law.<sup>155</sup>

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<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

<sup>147</sup> Assemb. B. 8622 (stating that the bill was referred to the assembly's Ways and Means Committee on June 10, 2009).

<sup>148</sup> See Russ, *supra* note 14.

<sup>149</sup> H.B. 132, 128th Gen. Assemb., Reg. Sess. (Ohio 2009).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* ("It is no defense to a charge under this section that the minor creates, receives, exchanges, sends, or possesses a photograph, video, or other material that shows [himself or herself] in a state of nudity.").

<sup>152</sup> See *id.*

<sup>153</sup> See *id.*

<sup>154</sup> See *id.*

<sup>155</sup> This situation arose in *State v. Vezzoni*, No. 22361-2-III, 2005 Wash. App. LEXIS 864, at \*2 (Wash. Ct. App. Apr. 28, 2005). See *supra* note 83-85 and accompanying text.

2. From Proposals to Laws: Vermont, Nebraska,  
and Illinois

Some states have gone beyond mere proposals and turned ideas into laws. In Vermont, lawmakers considered a similar approach to that proposed in New Jersey<sup>156</sup> but ultimately took a different route.<sup>157</sup> Sparked by a mother's testimony before the state's judiciary panel in which the mother feared that her daughter could face child pornography charges after having unwillingly received a seminude video depiction of another minor,<sup>158</sup> the legislature reduced, but did not eliminate, the penalties under the applicable child pornography laws.<sup>159</sup> Specifically, the law provides that "[n]o minor shall . . . use a computer or electronic communication device to transmit an indecent visual depiction of himself or herself to another person."<sup>160</sup> And under the law, a minor is prohibited from possessing any such visual depiction.<sup>161</sup> Any minor found guilty under this provision will now face misdemeanor juvenile charges.<sup>162</sup> As such, the law creates a reduced punishment<sup>163</sup> in consensual sexting situations where a minor sends an "indecent" photo of "himself or herself."<sup>164</sup> Accordingly, the law clearly does not provide lesser penalties for nonconsensual sexters. Moreover, it presumably does not provide more lenient punishment in a consensual sexting situation in which a teen forwards a picture of a third party even with that third party's consent. Thus, it appears such an offender could be prosecuted under child pornography laws. The meaning of "indecent" and whether it attaches to merely provocative photos under the law is also unclear. As a thorough review of the statute indicates, apparently but unsurprisingly, judicial clarification is needed.

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<sup>156</sup> See *Vermont Considers Legalizing Teen 'Sexting'*, FOX NEWS (Apr. 13, 2009), <http://www.foxnews.com/story/0,2933,514875,00.html> (detailing that lawmakers were considering decriminalizing consensual sexting between those thirteen to eighteen years old but that "[p]assing along such images to others would remain a crime").

<sup>157</sup> See Kara Rowland, *'Sexting' Is Thorny Legal Issue*, WASH. TIMES, June 23, 2009, at B1, available at 2009 WLNR 11991138.

<sup>158</sup> See *id.*

<sup>159</sup> See VT. STAT. ANN. tit. 13 § 2802b (2010).

<sup>160</sup> § 2802b(a)(1).

<sup>161</sup> *Id.* The law absolves a teen from prosecution if he/she "took reasonable steps, whether successful or not, to destroy or eliminate the visual depiction." *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Previously, sexting offenders falling under the provision of this law were charged as felons and forced to register as sex offenders. See Rowland, *supra* note 157.

<sup>164</sup> See § 2802b.

In Nebraska, the legislature also recently updated the state's child pornography statute to address sexting.<sup>165</sup> Concerned with criminalizing the immature behavior of children, the state enacted two affirmative defenses to felony child pornography charges.<sup>166</sup> The first affirmative defense is applicable to a teen under eighteen years of age who "create[s] . . . or in any manner generate[s]" a sexually explicit picture of himself or herself.<sup>167</sup> The second affirmative defense provides, in part, that a teenager eighteen-years-old or younger who sends a sexually explicit image of himself or herself to a willing recipient who is at least fifteen-years-old can avoid felony charges.<sup>168</sup>

Importantly, under these guidelines, even assuming that the affirmative defenses do not apply, a prosecutor could not seek to punish children who sext mere provocative photos.<sup>169</sup> This is notable because the prosecutor in *Miller*, utilizing his vast discretionary powers, sought to charge the teenagers for posing in a provocative nature.<sup>170</sup> Still, the Nebraska affirmative defenses are apparently somewhat limited, as neither defense protects teens who possess nonconsensually sexted photos.<sup>171</sup> Thus, although lawmakers should be lauded for addressing sexting, Nebraska's law is incomplete at best, and as such, it tasks law enforcement officials with the discretion to apply antiquated laws in many future sexting circumstances.

In Utah, legislators focused on the distribution element of sexting. Under Utah law, juveniles who are prosecuted under the state's child pornography-distribution statute<sup>172</sup> or the "[d]ealing in material

<sup>165</sup> NEB. REV. STAT. § 28-1463.03 (2010).

<sup>166</sup> See Ben Schwartz, *Technology Moves Faster than the Law*, N. PLATTE BULL. (July 26, 2009), <http://www.northplattebulletin.com/index.asp?show=news&action=readStory&storyID=16958&pageID=3&sectionID=3>. The article quotes the state's attorney general, Jon Bruning, "We don't want to treat childish behavior as criminal activity." *Id.*

<sup>167</sup> § 28-1463.03(1),(6).

<sup>168</sup> *Id.* § 28-1463.03(6). In addition, the defense is only applicable where "the visual depiction . . . includes no person other than the defendant" and where "the defendant had a reasonable belief at the time the visual depiction was sent to another that it was being sent to a willing recipient." § 28-1463.03(6)(b),(c).

<sup>169</sup> See *id.* § 28-1463.03. Sexting becomes criminal only when the visual depiction is one of "sexually explicit conduct . . . which has a child as one of its participants or portrayed observers." *Id.* Sexually explicit conduct is defined in part as "real or simulated intercourse" and "erotic nudity." *Id.* § 28-1463.02(5).

<sup>170</sup> See *Miller v. Skumanick*, 605 F. Supp. 2d 634, 638 (M.D. Pa. 2009), *aff'd sub nom. Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

<sup>171</sup> § 28-1463.03.

<sup>172</sup> UTAH CODE ANN. § 76-10-1204 (Lexis Nexis 2010).

harmful to a minor” statute<sup>173</sup> can now only be charged with a misdemeanor as opposed to a felony.<sup>174</sup> Specifically, the statute states that juveniles who are sixteen or seventeen years old can be charged with a class A misdemeanor,<sup>175</sup> which is punishable by up to one year in jail and a fine of no more than \$2,500.<sup>176</sup> Juveniles younger than age sixteen can only be charged with a class B misdemeanor,<sup>177</sup> which is punishable by up to six months in jail and a fine of no more than \$1,000.<sup>178</sup> In passing the bill, Utah legislators recognized the inherent sexting problem around the country and the controversy surrounding harsh juvenile punishments.<sup>179</sup> Moreover, whether intentional or otherwise, the Utah bill seems to provide leniency in *both* consensual and nonconsensual sexting situations<sup>180</sup> but only as far as the sender is

<sup>173</sup> *Id.* § 76-10-1206.

<sup>174</sup> H.B. 14, 58th Leg., Gen. Sess. (Utah 2009).

<sup>175</sup> *Id.*

<sup>176</sup> UTAH SENTENCING COMM’N, PENALTY DISTRIBUTION FOR SELECTED CRIMES I (2008), *available at* <http://www.sentencing.utah.gov/Penalty%20Distribution/PenaltyDistributionBooklet.pdf> [hereinafter UTAH SENTENCING COMM’N].

<sup>177</sup> H.B. 14, 58th Leg., Gen. Sess. (Utah 2009).

<sup>178</sup> UTAH SENTENCING COMM’N, *supra* note 176.

<sup>179</sup> “[Juveniles] are less likely to recognize inherent risks and consider long-term consequences of their choices.” H.B. 14, 58th Leg., Gen. Sess. (Jan. 27, 2009) (statement of Rep. Sheryl Allen), *available at* <http://le.utah.gov/asp/audio/index.asp?Sess=2009GS&Day=2&House=H>. “If we can get these young people into court, they can be counseled and assisted.” *Id.*

<sup>180</sup> UTAH CODE ANN. § 76-10-1206 (Lexis Nexis 2010). In regard to dealing in material harmful to a minor:

(1) A person is guilty of dealing in material harmful to minors when, knowing or believing that a person is a minor, or having negligently failed to determine the proper age of a minor, the person intentionally:

- (a) distributes or offers to distribute, exhibits or offers to exhibit, to a minor or a person the actor believes to be a minor, any material harmful to minors;
- (b) produces, performs, or directs any performance, before a minor or a person the actor believes to be a minor, that is harmful to minors; or
- (c) participates in any performance, before a minor or a person the actor believes to be a minor, that is harmful to minors.

UTAH CODE ANN. § 76-10-1204 (Lexis Nexis 2010) provides that in regard to distributing pornographic material:

(1) A person is guilty of distributing pornographic material when the person knowingly:

- . . . (c) distributes or offers to distribute, or exhibits or offers to exhibit, any pornographic material to others.

concerned.<sup>181</sup> Thus, a teen in receipt of sexted content could presumably still face felony charges even if the pictures were consensually sent. In contrast, a teen who nonconsensually sexted pictures would only face *misdemeanor* charges under the updated provision.

Illinois lawmakers have also focused on the distribution aspect of sexting. Under its recently updated law, Illinois provides that a minor who “distribute[s] or disseminate[s] an indecent visual depiction of another minor” using a cell phone or a computer “may be[] ordered to obtain counseling” or “perform community service.”<sup>182</sup> As with Utah’s sexting legislation, the Illinois law affords lesser punishment in both consensual and nonconsensual sexting situations but only for the sender.<sup>183</sup> Therefore, as in Utah, a teen in possession of sexted material could conceivably still face felony charges even if the pictures were consensually sexted.<sup>184</sup> Nevertheless, a teen who sexted pictures, even nonconsensually, would apparently face considerably lesser charges under the state’s updated law.

In contrast to the abovementioned legislatures, most state lawmakers remain silent about sexting.<sup>185</sup> Silence even emanates from states that have prosecuted sexting offenders, including the Iowa and Florida where teens were prosecuted in *A.H.* and *Canal*, respectively.<sup>186</sup> Even in states that have addressed the issue, many bills remain pending, and, as the above examples illustrate,<sup>187</sup> current laws often do not account for the many aspects of sexting, including both the possession and distribution elements. The importance of finding an appropriate and all-encompassing solution to sexting cannot be understated, as “[t]he sexual development of both youth (victims and

<sup>181</sup> Notably, the lawmakers did not lessen the penalties under UTAH CODE ANN. § 76-5a-3, which provides in part, “[A] person is guilty of sexual exploitation of a minor . . . when the person knowingly . . . possesses . . . child pornography.” *Id.* § 76-5a-3.

<sup>182</sup> 705 ILL. COMP. STAT. 405/3-40(b)-(d) (2) (2010).

<sup>183</sup> *See id.*

<sup>184</sup> Illinois’ child pornography statute punishes anyone who, “with the knowledge of the nature or content thereof, . . . possesses with intent to disseminate” an image of a child “depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed or transparently clothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast of the child or other person.” 720 ILL. COMP. STAT. 5/11-20.1(2), (1)(vii) (2010).

<sup>185</sup> Notably, however, as of this Comment’s publication date, additional states were continuing to address sexting. *See 2010 Legislation Related to ‘Sexting,’ NAT’L CONF. OF STATE LEGS.*, <http://www.ncsl.org/default.aspx?tabid=19696> (last updated Jan. 4, 2011).

<sup>186</sup> *See State v. Canal*, 773 N.W.2d 528, 529 (Iowa 2009); *A.H. v. State*, 949 So. 2d 234, 241 (Fla. Dist. Ct. App. 2007).

<sup>187</sup> *See supra* notes 180–83.

2011]

COMMENT

1063

offenders) is underway and if these incidents are not handled appropriately both . . . may be harmed[] developmentally.”<sup>188</sup> Moreover, this Comment strongly urges that without a proper legislative response, prosecutorial discretion will govern, perpetuating unpredictable and at times undesirable results.<sup>189</sup>

#### IV. THE PROPER LEGISLATIVE SOLUTION TO SEXTING

The term “sexting” is importantly an all-encompassing word.<sup>190</sup> Without a thorough consideration of the numerous circumstances in which sexting cases arise, however, society cannot properly respond. As the examples above illustrate, lawmakers have struggled to develop one all-encompassing response to sexting.<sup>191</sup> Still, with sexting manifestations widespread, legislators must draw lines and prepare appropriate anticipatory laws under the following guidelines.

##### A. Clarify the Legislative Intent

Lawmakers must clarify the legislative intent behind child pornography statutes by updating laws or creating new ones that are applicable in both consensual and nonconsensual sexting circumstances. Legislators probably did not anticipate that prosecutors would utilize child pornography laws against the very same people whom the laws were designed to protect.<sup>192</sup> In passing child pornography laws, lawmakers clearly aimed to eradicate any and all child pornography. But laws must keep pace with technology. Consensual sexting offenders should not face punishment under child pornography statutes merely because the exchanged pictures may circulate

<sup>188</sup> See Leary, *supra* note 94, at 26 (citing Roberta Lynn Sinclair & David Sugar, The Nat'l Child Exploitation Coordination Ctr. (NCECC) Strategic Operations Support Servs., *Internet Based Sexual Exploitation of Children and Youth: Environmental Scan* 7, 25 (2005)) (internal quotations omitted).

<sup>189</sup> See, e.g., *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009), *aff'd sub nom.* *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010); see also *infra* Part IV.

<sup>190</sup> See *supra* note 16 and accompanying text.

<sup>191</sup> See *supra* Part III.

<sup>192</sup> Kim Zetter, *Child Porn Laws Used Against Kids Who Photograph Themselves*, WIRED.com (Jan. 15, 2009, 9:50 AM), <http://www.wired.com/threatlevel/2009/01/kids/>. Mark Rasch, a former federal cybercrime prosecutor, said, “The problem is that the child porn laws were really designed for a situation where an adult abuses a minor by forcing that minor . . . psychologically as well as physically . . . into taking these pictures.” *Id.* When these laws are applied to sexting, Rasch argues, this “turns the whole statute on its head.” *Id.*; see Smith, *supra* note 63 and accompanying text; see also Berger, *supra* note 113 (asserting that child pornography laws were passed to bring to justice “the grown-up perverts”).

publicly.<sup>193</sup> Moreover, prosecutorial application of child pornography laws to nonconsensual sexters is also inappropriate because the harsh punishments are disproportional to the sexting conduct.

As an impetus to update laws to ensure that they are consistent with the legislative intent behind child pornography laws, at least in the context of consensual sexting, legislators should consider a recent Utah Supreme Court case. In *State ex. rel. Z.C.*, prosecutors charged a child under the state's sexual abuse statute after the child engaged in consensual sex with another minor.<sup>194</sup> Ruling for the defendant-minor, the court held that to treat the defendant "as both a victim and a perpetrator of child sex abuse for the same act leads to an absurd result that was not intended by the legislature."<sup>195</sup> The court further stated that, at least in the context of sexual-assault crimes, no other prosecution could produce such an undesirable result.<sup>196</sup>

Applied to the consensual-sexting context, this ruling is instructive.<sup>197</sup> In many sexting prosecutions, the "State treats both children as perpetrators of the same act."<sup>198</sup> As such, the state is not protecting any "discernable victim."<sup>199</sup> And as with the sexual assault case in *Z.C.*, a consensual-sexting prosecution produces an undesirable result contrary to the legislative intent behind the child pornography laws.

As a separate parallel to sexting and the need for legislators to update or clarify the legislative intent behind child pornography laws, legislators should also consider the prosecutorial decision to punish

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<sup>193</sup> Such prosecution may even constitute criminalization of conduct that is protected by a constitutional right to privacy. See *A.H. v. State*, 949 So. 2d 234, 241 (Fla. Dist. Ct. App. 2007) (Padovano, J., dissenting). In criticizing the majority ruling, in which the court upheld two consensual-sexting convictions under the state's child pornography laws, the dissent argued that "[t]he statute at issue was designed to protect children, but in this case the court has allowed the state to use it against a child in a way that criminalizes conduct that is protected by constitutional right of privacy." *Id.*

<sup>194</sup> *State ex rel. Z.C.*, 165 P.3d 1206, 1206 (Utah 2007). In part, the statute holds that "[a] person commits sexual abuse of a child" if the person "touches the anus, buttocks, or genitalia of any child, the breast of a female child, or otherwise takes indecent liberties with a child." UTAH CODE ANN. § 76-5-404.1 (LexisNexis 2010).

<sup>195</sup> *Z.C.*, 165 P.3d at 1206.

<sup>196</sup> *Id.* at 1212 ("We know of no other instance in which the State has attempted to apply any sexual assault crime to produce such an effect.")

<sup>197</sup> See Jesse Michael Nix, Note, *Unwholesome Activities in a Wholesome Place: Utah Teens Creating Pornography and the Establishment of Prosecutorial Guidelines*, 11 J.L. & FAM. STUD. 183, 187 (2008) (arguing that "[s]ince the [*Z.C.*] court ruled that sexual assault crimes presuppose a perpetrator and a victim, the court likely would view teenagers trading nude photos of themselves to each other in the same way").

<sup>198</sup> *Z.C.*, 165 P.3d at 1212.

<sup>199</sup> *Id.*

2011]

COMMENT

1065

statutory rape.<sup>200</sup> The 1996 California case *In re Meagan R.*<sup>201</sup> proves instructive in this context. There, the court held that the defendant, a fourteen-year-old girl who had sex with a twenty-two-year-old man, could not be punished under the state's statutory rape law,<sup>202</sup> which provides that "[u]nlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor."<sup>203</sup> Because the defendant was the victim, the court held that the legislative intent behind the law was such that she could not be charged with conspiracy, aiding and abetting, or as an accomplice to her own statutory rape.<sup>204</sup> Applying this reasoning to sexting, a consensual sexter should not fall victim to child pornography statutes.<sup>205</sup>

These prosecutorial parallels and judicial analyses provide concrete reasons why child pornography statutes are inapplicable in consensual-sexting prosecutions. Further legislative clarification of child pornography laws is also necessary for nonconsensual-sexting prosecutions. By clarifying that the laws that were designed to eliminate child pornography to *protect* children and not punish them, legislators should concede that they in *no way* anticipated the application of such laws to nonconsensual sexting situations involving teenagers. Even assuming that legislators are intent on eliminating any and all child pornography—surely a desirable and necessary goal—and not just the conventional variety,<sup>206</sup> they cannot accomplish this task at the risk of severely criminalizing teenage indiscretion.

#### B. *Limit Prosecutorial Discretion*

Without proper legislative action, prosecutors will continue to wield considerable discretion in determining how to combat sexting. When discretion in sexting cases rests solely with a prosecutor, he or she typically acts in a manner designed to send a message to the sext-

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<sup>200</sup> See Clerk: *Child Self-Pornography*, DE NOVO (Apr. 12, 2004, 10:59 AM), <http://www.blogdenovo.org/archives/169.html>.

<sup>201</sup> *In re Meagan R.*, 49 Cal. Rptr. 2d 325 (Cal. Ct. App. 1996).

<sup>202</sup> *Id.*

<sup>203</sup> CAL. PENAL CODE § 261.5 (Deering 2010).

<sup>204</sup> *Meagan R.*, 49 Cal. Rptr. at 328.

<sup>205</sup> See Eugene Volokh, *Child Prosecuted for Child Pornography—of Herself*, VOLOKH CONSPIRACY (Mar. 31, 2004, 9:38 AM), [http://volokh.com/2004\\_03\\_28\\_volokh\\_archive.html](http://volokh.com/2004_03_28_volokh_archive.html) (“[I]t hardly seems to be much of a service to [the alleged sexting offender]—who is after all the supposed victim as well as the perpetrator—or to the fight against child porn more broadly.”).

<sup>206</sup> See Smith, *supra* note 63 (arguing that the child pornography laws were designed to combat “conventional” child pornography).

ing offenders.<sup>207</sup> Sometimes the message is harsh.<sup>208</sup> Other times, the prosecutorial message is more reasonable.<sup>209</sup> No matter the severity of the ultimate message sent, many prosecutors are clearly intent on limiting sexting.<sup>210</sup>

Even legislatures have recognized that prosecutorial discretion sometimes leads to questionable results in sexting cases. In Nebraska, during legislative debates regarding the state's sexting bill,<sup>211</sup> an assistant attorney general promised that he would never misuse his discretion.<sup>212</sup> He moreover expressed confidence that his prosecutorial colleagues would utilize the same caution before charging juveniles under child pornography statutes.<sup>213</sup> Still, a Nebraska senator, recognizing the high number of sexting prosecutions across the country, cautioned that legislative action is clearly necessary to limit prosecutorial discretion.<sup>214</sup>

Indeed, as the Nebraska senator recognized, not all prosecutors appropriately exercise their discretion in sexting cases. The actions of the district attorney in *Miller*, who asserted that he could utilize the state's child pornography laws to punish children pictured in mere provocative photos, properly illustrate this assertion, and thus, the

<sup>207</sup> See, e.g., *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009), *aff'd sub nom. Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

<sup>208</sup> See, e.g., *A.H. v. State*, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007); *State v. Canal*, 773 N.W.2d 528, 529 (Iowa 2009).

<sup>209</sup> In Newark, Ohio, for instance, a fifteen-year-old girl was arrested and charged under the state's child pornography statutes after she sent racy photos of herself to classmates. Martha Irvine, *Porn Charges for 'Sexting' Stir Debate*, MSNBC (Feb. 4, 2009, 4:00 PM), <http://www.msnbc.msn.com/id/29017808/>. Prosecutors ultimately agreed to drop the charges, provided that the girl abides by a curfew, has no cell phone use, and has no unsupervised internet access over the next few months. *Id.*

<sup>210</sup> "Hopefully we'll get the message out to these kids," said Michael McAlexander, a prosecutor in Allen County, Indiana, where a teenage boy is facing obscenity charges for allegedly sending pictures of his genitals to classmates. James Merriweather & Ira Porter, *TeXt-Rated Teens*, NEWS.J. (Wilmington, Del.), Feb. 6, 2009, at A1, available at 2009 WLNR 18256595. "We don't want to throw these kids in jail. But we want them to think." *Id.*

<sup>211</sup> See *supra* Part III.

<sup>212</sup> *Hearing on L.B. 97 Before the S. Comm. on the Judiciary*, 101st Leg., 1st Sess. 6 (Neb. 2009) (statement of Corey O'Brien, Assistant Attorney General) ("I personally would never charge someone where they were going to face [felony] penalties for [sexting], because that, again, is not a pedophile").

<sup>213</sup> *Id.* O'Brien added, "I guess I have a lot of confidence in my brethren in the prosecution field that they would feel the same way I do . . . ." *Id.*

<sup>214</sup> *Id.* Senator Brenda Council said, "[P]erhaps it's something that needs to be addressed [by this legislature], and I appreciate the confidence you express in the county attorneys in the state of Nebraska, but . . . clearly, that's not the wave across the nation." *Id.*

2011]

COMMENT

1067

case evidences the need for legislators to corral prosecutorial discretion in sexting cases.<sup>215</sup>

The *Miller* case stands as one of several examples of prosecutorial indiscretion.<sup>216</sup> Indeed, a new sexting story seemingly develops each day.<sup>217</sup> Without guidance from legislators, prosecutorial responses will remain at best inconsistent and at worst unforgiving and unreasonable.

C. *Address the Two Broad Categories of Sexting: Consensual and Nonconsensual*

1. Consensual Sexting

Lawmakers must entirely decriminalize consensual sexting of mere provocative pictures. When photos do not rise to the level of child pornography, but sexting offenders are nonetheless prosecuted under child pornography statutes, questions arise about whether such prosecution infringes on the offender's rights to free speech and privacy. While a specific discussion of such implications is beyond the scope of this Comment, the *Miller* case makes clear that courts may not sit idly when the government potentially infringes the constitutionally protected rights to free speech and privacy.<sup>218</sup> Regardless of the potential free speech and privacy implications, consensual sexting of merely provocative pictures is an issue reserved for parents and schools to discuss with children—including the associated consequences. With respect to consensual sexting of merely provocative photos, though, such consequences *should not* include criminal sanctions.

States should also lighten penalties for consensual sexting of sexually explicit material. Lawmakers must create a statutory framework in which consensual sexting offenders are punished in the juvenile justice system and offered counseling for their indiscretions. Perhaps most importantly, parental intervention is vital. Parents must communicate with their children “about issues of sexuality, privacy and appropriate boundaries *long before* they come across seminude

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<sup>215</sup> See *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009), *aff'd sub nom. Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010); see *supra* Part II.

<sup>216</sup> See, e.g., *A.H. v. State*, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).

<sup>217</sup> See, e.g., Michelle Esteban et al., *3 Teens Arrested in Sexting Case*, SEATTLE POST-INTELLIGENCER (Jan. 28, 2010, 10:14 PM), [http://www.seattlepi.com/local/414792\\_sexting28.html](http://www.seattlepi.com/local/414792_sexting28.html).

<sup>218</sup> See *Miller*, 605 F. Supp. 2d at 643–47.

pictures on their kids' social networking pages."<sup>219</sup> Under this approach, teenage indiscretion will not create any significant criminal implications. And proper guidance will hopefully deter teens from engaging in future sexting entirely.

## 2. Nonconsensual Sexting

Legislatures thus far either do not truly grasp, or alternatively choose to ignore, the broad category of nonconsensual sexting. The time is ripe, however, for legislators to confront it. States should utilize misdemeanor charges to punish those who forward sexted pictures with the intent to cause emotional harm or distress to the pictured juvenile. Punishment should be reserved for the senders, not the juvenile recipient of the photos unless such recipient coerced the sender into forwarding the photos or later forwarded the photos himself to a third party.

### D. Eliminate Sex-Offender Registries

Lawmakers must eliminate sex-offender registration requirements for teens in all sexting circumstances.<sup>220</sup> Legislators can easily accomplish this task by punishing nonconsensual sexting offenders with misdemeanor charges. As the Alpert story best illustrates,<sup>221</sup> juvenile sex-offender registration can trigger harsh consequences. As a registered sex offender, Alpert was forced to leave his community college before graduating and is now unable to find a job.<sup>222</sup> In addition, he cannot live with his own father, whose house is situated too close to a high school—an area where sex offenders are prohibited.<sup>223</sup>

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<sup>219</sup> O'Crowley, *supra* note 18 (quoting John Shehan, director of the Exploited Child Division of the National Center for Missing and Exploited Children) (emphasis added).

<sup>220</sup> Because some young adults, such as Phillip Alpert, have fallen victim to sex-offender registration for sexting offenses, this Comment further notes that legislatures should consider protecting young adults from such sex-offender registration provided that they have had a relationship with the sexting subject and are of a similar age. See Email from Lawrence G. Walters, Attorney at Law, Walters Law Group, to author (Jan. 8, 2010) (on file with author) (suggesting such a solution for young adults).

<sup>221</sup> See *supra* notes 117–20 and accompanying text. Alpert was eighteen when he was convicted under the state's child pornography statute and forced to register as a sex offender. *Id.* As such, he was considered an adult under the applicable criminal statutes. *Id.* Still, Alpert's story is illustrative because the same consequences stemming from sex-offender registration would apply to a juvenile, as well. *Id.*

<sup>222</sup> See Richards & Calvert, *supra* note 118, at 9.

<sup>223</sup> *Id.* at 21.

More generally, researchers have found juvenile sex-offender registration problematic in that it does not consider juvenile cognitive ability, mental illness, or child development.<sup>224</sup> These three factors nonetheless play a crucial role in juvenile offending.<sup>225</sup>

Most juvenile sex offenders do not understand their behavior, and they must overcome that denial and work through that fear to create behavioral changes. One of the largest fears is that the reaction of the community and sex offender registration validates that fear,<sup>226</sup> allowing the juvenile to believe there is no possibility of change.

Without prompt, one state supreme court recently made reference to sex-offender registration for juvenile sexting offenders.<sup>227</sup> It too recognized, although impliedly, that such sex-offender registration should be eliminated.<sup>228</sup> In oral arguments before the Utah Supreme Court in a case regarding the state's sex-offender registry, the Chief Justice implied that such a penalty was too harsh for sexting offenders.<sup>229</sup> In response to the Chief Justice's question, the attorney representing the state replied that "[t]aking dirty [photos] with a cell phone hardly seems like an offense deserving such a punishment."<sup>230</sup>

Legislators should follow the Chief Justice's lead and recognize that any sexting punishment must be proportional to the act. When sex-offender registration consequences stem from sexting, the punishment far outweighs the act. This is true even in nonconsensual sexting circumstances, such as Philip Alpert's, where youthful indiscretion should not trigger a punishment that forever alters the offender's life.

## V. CONCLUSION

As technology evolves, lawmakers have a duty to make certain that criminal laws keep pace. Without proper legislative attention,

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<sup>224</sup> See Leary, *supra* note 95, at 46 (citing Robert E. Longo & Martin C. Calder, *The Use of Sex Offender Registration with Young People Who Sexually Abuse*, in CHILDREN AND YOUNG PEOPLE WHO SEXUALLY ABUSE 334 (Martin C. Calder ed., 2005)).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> See Nix, *supra* note 197, at 187 (citing Audio recording: Utah Supreme Court Oral Arguments before Utah Supreme Court in State v. Briggs, No. 20070186 (Utah Oct. 31, 2008), <http://www.utcourts.gov/courts/sup/streams/index.cgi?mon=20084> (click "Listen" next to "State v. Briggs 20060671"))).

<sup>228</sup> See *id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* (citing Geoffrey Fattah, *Parents Fear Kids Will Be on Sex List*, DESERET MORNING NEWS, Apr. 5, 2008, at B1, available at 2008 WLNR 6417638).

prosecutors are compelled to apply antiquated statutes to unintended circumstances, commonly resulting in undesirable consequences. The context of teenage sexting perfectly illustrates this principle; in recent years, prosecutors have employed child pornography statutes with harsh attendant circumstances to target immature teens making questionable decisions.

Now, more than ever, with statistics indicating that sexting is prevalent among teens, legislatures must take action. Even recognizing that one cannot predict *all* potential sexting circumstances, and as such, it would be largely impossible for lawmakers to create one all-encompassing law, legislative inaction is inexcusable. To start, lawmakers should reference legislative solutions from other states, including Utah and Illinois, and even mere proposals, such as those discussed in New Jersey.

Although largely flawed, the statutes provide lawmakers with necessary background guidance to address an issue of utmost public importance. Notably, proper legislative action would help curtail future unsympathetic judicial rulings.<sup>231</sup> Moreover, and perhaps most importantly, lawmakers must act to prevent further prosecutorial indiscretions, which were apparent in *Miller v. Skumanick*.<sup>232</sup> By establishing guidelines that directly address both consensual and nonconsensual sexting, lawmakers can assure that teenage indiscretion does not in turn result in *prosecutorial* indiscretion. With an understanding that harsh criminal consequences, including sex-offender registration, are inappropriate for teens even in the context of nonconsensual sexting, lawmakers can properly uphold public policy goals relating to *both* the elimination of child pornography *and* proportional punishments for teens. If legislatures fail to act properly, or worse, sit idly, prosecutors will continue to act blindly and inconsistently, and America's teens will suffer the consequences.

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<sup>231</sup> See, e.g., *A.H. v. State*, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).

<sup>232</sup> See *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009), *aff'd sub nom.* *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).