

A VICTIMLESS SEX CRIME: THE CASE FOR DECRIMINALIZING CONSENSUAL TEEN SEXTING

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As teenagers' access to cellular phones and the internet has increased over the past two decades, so has their ability to harm themselves and others through misuse of new technology. One risky behavior that has become common among teenagers is "sexting"—the digital sharing of sexually suggestive images. To combat the dangers of teen sexting, many states have criminalized the act. Criminalization does not resolve the issue of teen sexting, however, and in many cases it may cause additional harm. This Note reviews existing state laws related to teen sexting, and critiques these laws on constitutional and policy grounds. It then proposes a model statute to decriminalize consensual teen sexting.

INTRODUCTION

With great power comes great responsibility.¹ The rapid development of cellular phone and Internet technology over the past two decades has given users unprecedented power to connect and share information through digital channels. Unfortunately, teenage users are not always prepared to use technology responsibly. Teenagers exploring new technological frontiers often lack firm guidance from parents and educators, who may not fully understand the new technologies or their attendant risks. Furthermore, legal controls over new technologies are often poorly defined or ill-adapted to deal with emerging challenges. One area where this is particularly true is sexting.

A product of the digital age, the word “sexting” may be confusing because it is newly coined² and inconsistently used.³ In colloquial

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1. See, e.g., *Tammany is Satisfied*, N.Y. TIMES, Nov. 15, 1892; STAN LEE, *AMAZING FANTASY* #15, 11 (1962).

2. Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues—Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL'Y & L. 486, 492 (2010) (noting that sexting is a word coined by the media that has been in frequent use since approximately 2008).

3. Florida's Criminal Code, for example, defines sexting by a minor as “Us[e of] a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another minor any photograph or video of any person which depicts nudity, . . . and is harmful to minors[,]” or possessing such an image. FLA. STAT. ANN.

use, sexting often refers to any sexually suggestive content sent via text message. Although messages containing only written text may sometimes create legal liability,⁴ the primary legal issue raised by teen sexting is liability for child pornography, which is limited to visual depictions.⁵ Although sexters often use a cellular phone, teenagers have also been prosecuted for transmitting sexual images through other digital media, such as e-mail.⁶

In this Note, the word “sexting” refers to the digital transmission of sexually suggestive or sexually explicit photographs or videos, intended for personal use, through a medium that affords a reasonable expectation of privacy, such as a text message or personal e-mail. The phrase “sexting image” refers to the sexually suggestive or sexually explicit photographs or video included in a sext. “Consensual sexting” refers to sexting that occurs with the consent of the subject of the sexting image, the sender of the image, and the recipient of the image.⁷

Studies indicate that sexting among teenagers is common. Although only a small minority of teenagers report having produced and sent sexually suggestive images,⁸ a higher percentage of

§ 847.0141(1)(a)–(b) (West 2000 & Supp. 2012). Urban Dictionary, an online dictionary that features user-generated definitions of slang terms, offers several definitions of sexting, including “the act of text messaging someone in the hopes of having a sexual encounter with them later; initially casual, transitioning into highly suggestive and even sexually explicit”; “When a guy and a girl send dirty text messages back and forth to eachother [sic]. Pictures may also be included, but only if you’re lucky”; and “Sending a text message so long that it becomes divided into six SMS (text) messages.” *Urb. Dictionary: Sexting*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=sexting> (last visited Oct. 27, 2012).

4. For example, text-based sexting can constitute sexual harassment. *See, e.g.*, Kurtts v. Chiropractic Strategies Grp., Inc., No. 09-0712-M, 2011 WL 833978, at *4 (S.D. Ala. Mar. 4, 2011) (holding that “[p]laintiff has demonstrated a prima facie case of hostile environment because of Dr. Morgan’s sexual harassment” by means of sexually suggestive text-only messages, but finding against plaintiff on other grounds).

5. *See* Leary, *supra* note 2, at 494 (citing *What Is Sexting? Why Is It a Problem? What Parents and Teens Need to Know*, THE NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN (Sept. 21, 2009), http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=41311).

6. *See, e.g.*, A.H. v. State, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007).

7. These may not all be different people. For example, it is common for sexters to create and send images of themselves. *See* Leary, *supra* note 2, at 499–501.

8. One study found that 4 percent of teenagers age twelve to seventeen who owned cellular phones reported sharing sexually suggestive images of themselves via text message. AMANDA LENHART, TEENS AND SEXTING: HOW AND WHY MINOR TEENS ARE SENDING SEXUALLY SUGGESTIVE NUDE OR NEARLY NUDE IMAGES VIA TEXT MESSAGING 2 (2009). Another study found that 20 percent of teenagers age thirteen to nineteen reported sending electronically or posting online nude or seminude images or video of themselves. NAT’L CAMPAIGN TO PREVENT TEEN & UNWANTED PREGNANCY, 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. Note that these surveys only include self-produced sexting images,

teenagers report having received such images.⁹ Sexting thus affects a substantial portion of the teenage population. Both sending and receiving sexting images can have serious social consequences for teenagers.¹⁰ In recent years, a number of states have attempted to resolve the issue, mostly by criminalizing teen sexting.¹¹ However, this solution is not a fair or effective means of tackling the problems associated with teen sexting.

This Note analyzes the current state of the law dealing with teen sexting and proposes reforms that are better adapted to tackling the problem in an appropriate manner. Part I provides an overview of the current legal status of teen sexting. Part II raises legal and policy objections to current laws concerning teen sexting. Part III advocates decriminalizing consensual teen sexting and offers a model statute that excludes consensual sexting from criminal liability while preserving the option of criminalizing nonconsensual or exploitative behavior. Part IV responds to potential objections to this reform.

I. TEEN SEXTING UNDER THE LAW

Because sexting is both a new social phenomenon and a new legal issue, current law on the subject is characterized by rapid change, uncertainty, and ad hoc application of laws that are poorly suited to protecting teenagers from the harms of sexting. In these circumstances, the need for reform is clear.

A. *The Social Issue of Teen Sexting*

The current generation of teenagers has grown up with an unprecedented level of digital access. Though it may be too soon to fully understand the long-term effects of teen sexting, it is clear that

not cases in which one teenager creates and shares an image of another, and thus do not account for all cases of teen sexting.

9. In Lenhart's study, 15 percent of teenagers age twelve to seventeen who owned cellular phones reported receiving sexually suggestive images of someone they knew via text message. LENHART, *supra* note 8, at 2.

10. See *infra* Part I.A.

11. See *infra* Part I.B. Laws dealing with teen sexting often apply to any minor who engages in the activity, not just minors age thirteen to seventeen, and children as young as twelve have been threatened with sexting prosecutions. See, e.g., *infra* note 36. However, cases involving younger minors are rare. This Note focuses on the minors age thirteen to seventeen, who are most likely to be involved in sexting, and uses the term "teen sexting" for simplicity.

sexting has the potential to cause a variety of problems for teenagers. These problems can be categorized as those that affect teenagers who appear in sexting images, those that affect teenagers who receive sexting images, and those that affect the general teenage population.

Teenagers who appear in sexting images face the risk of embarrassment and social stigma if their images are widely shared or published.¹² Because of the extreme ease with which digital images can be shared, stored, and reproduced, a sexting image intended for private use can quickly reach a wide audience through a single negligent transmission.¹³ A momentary indiscretion by the subject of a sexting image may result in a permanent digital record. Once sexting images are in circulation, they can damage a subject's reputation immediately or cause problems years later if, for example, potential employers discover the image.¹⁴

Sexting images may also provide a weapon for cyberbullies—bullies who torment their victims over digital channels.¹⁵ The consequences of cyberbullying can be severe. In the past five years, at least two teenagers have killed themselves after suffering cyberbullying that included unauthorized sharing of sexually suggestive images of them.¹⁶

The problems that sexting images pose for recipients are less severe, but can still be significant. Sexting images may be confusing or upsetting for teenagers who are not emotionally prepared to

12. See Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment*, 18 *COMMLAW CONCEPTUS* 1, 23–24 (2009).

13. Transmission is not only quick and easy, it may also be extremely difficult to track. See Nancy Rommelmann, *Anatomy of a Child Pornographer*, REASON, July 2009, at 31–37 (“That might have been the end of it, had the files not, as digital files will, leaked onto the Internet. Within a day after Alex[, the recipient of sexts,] saw them, so did [the mother of the girl who sent them.]”).

14. See Calvert, *supra* note 12, at 24.

15. See Elizabeth C. Eraker, Note, *Stemming Sexting: Sensible Legal Approaches to Teenagers' Exchange of Self-Produced Pornography*, 25 *BERKELEY TECH. L.J.* 555, 564 (2010); *What Is Cyberbullying Exactly?*, STOP CYBERBULLYING, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited May 1, 2012).

16. Jessica Logan, an eighteen-year-old from Ohio, hanged herself in 2008 after a nude photo she sent to her boyfriend was forwarded to other teenagers, exposing her to bullying. *Jessica Logan Suicide: Parents of Dead Teen Sue School, Friends over Sexting Harassment*, HUFFPOST TECH (Mar. 18, 2009, 6:12 AM EDT; updated May 25, 2011, 3:50 PM EDT), http://www.huffingtonpost.com/2009/12/07/jessica-logan-suicide-par_n_382825.html. In 2010, Tyler Clementi, an eighteen-year-old Rutgers freshman, killed himself after other students filmed him in a sexual encounter with another male and then shared the video on the Internet. John Schwartz, *Bullying, Suicide, Punishment*, N.Y. TIMES, Oct. 3, 2010 at WK1.

deal with them.¹⁷ In addition, studies indicate that exposure to sexual content may encourage sexual activity and sexual risk-taking by teenagers.¹⁸ Sexting images may therefore cause both emotional and physical harm to recipients. Even among adults, who are generally less sensitive to sexual imagery than minors, unwanted sexting constitutes sexual harassment.¹⁹ For teenagers, the harm caused by unwanted sexts may be all the more severe.²⁰

Sexting images may also pose problems even for minors who are not directly involved in sending or receiving sexts. Without information about the circumstances of their creation, some sexting images are indistinguishable from inherently exploitative adult-produced child pornography.²¹ A central concern related to child pornography is that adult child molesters may use it as a tool to convince children that abusive behavior is normal or acceptable.²² Although teenagers' consensually created sexting images are not themselves exploitative,²³ the concern remains that an increased number of sexually suggestive images of minors may provide additional material for would-be abusers.²⁴

17. Lisa Esposito, *Teen "Sexting" Common and Linked to Psychological Woes*, USA TODAY (Nov. 5, 2011, 8:00 AM), <http://www.usatoday.com/news/health/wellness/teen-ya/story/2011-11-05/Teen-sexting-common-and-linked-to-psychological-woes/51073214/1>.

18. REBECCA L. COLLINS, STEVEN C. MARTINO & REBECCA SHAW, INFLUENCE OF NEW MEDIA ON ADOLESCENT SEXUAL HEALTH: EVIDENCE AND OPPORTUNITIES 9 (2011), available at <http://aspe.hhs.gov/hsp/11/adolescentsexualactivity/newmedialitrev/index.pdf>.

19. See, e.g., *Kurtts v. Chiropractic Strategies Grp., Inc.*, No. 09-0712-M, 2011 WL 833978, at *4 (S.D. Ala. Mar. 4, 2011).

20. For a discussion of the particularly serious impact sexting has on youth, see Esposito, *supra* note 17.

21. Lawrence G. Walters, *How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, 9 FIRST AMEND. L. REV. 98, 114 (2010). See *infra* Part II.A for a discussion of the significant differences between consensual teen sexting and adult-produced child pornography.

22. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 241 (2002).

23. See, e.g., Eraker, *supra* note 15, at 583; but cf. Leary, *supra* note 2 at 534 ("In self-produced child pornography real children are exploited."). Leary's argument focuses on the idea of "self-exploitation." *Id.* at 498. She defines this term elsewhere as "the creation by a minor of visual depictions of that minor and/or other minors engaged in sexually explicit conduct, including the lascivious display of genitals." *Id.* Leary's choice to define "self-exploitation" as the production of sexually suggestive images by a minor does not prove that teen sexting is exploitative. Leary's use of the term departs from standard definitions of exploitation. See, e.g., *Exploitation*, MERRIAM-WEBSTER DICTIONARY ONLINE, <http://www.merriam-webster.com/dictionary/exploiting> (last visited Dec. 20, 2012) (defining exploit as "to make use of meanly or unfairly for one's own advantage"). Even if we accept that minors can exploit themselves by producing sexualized images, the resulting harm is different in both type and degree from that of adult-produced child pornography.

24. Cf. *Ashcroft*, 535 U.S. at 250–51 (finding unpersuasive the government's argument that a ban on virtual child pornography that contained no real children was justified because of the potential impact that any sexual depiction of children could have on real child abuse).

Despite these potential dangers, many teenagers are largely unconcerned with sexting.²⁵ Often, teenagers view it as common practice or just another form of flirting.²⁶ The widespread nonchalance about sexting among teenagers may stem, in part, from ignorance of the potential consequences. Of course, not every teenager involved in sexting is traumatized by the experience.²⁷ Nonetheless, teenagers need to be informed about sexting and its attendant risks, and teenagers who receive unwanted sexts deserve some degree of legal protection.

B. Teen Sexting Under State Law

Aware of the significant problems created by teen sexting, prosecutors, judges, and lawmakers have begun taking on the challenge of crafting a suitable legal response.²⁸ Nearly all such attempts to deal with teen sexting have been based in criminal law. Because general criminal law falls to the states as part of their police power,²⁹ laws dealing with teen sexting vary from state to state. This section surveys state laws dealing with teen sexting, looking at both prosecutions of minors under general child pornography laws and at new state criminal statutes drafted to deal specifically with teen sexting.

1. Prosecutions for Teen Sexting

Teen sexting images may be superficially indistinguishable from exploitative, adult-produced child pornography. In fact, teen sexting images that depict minors constitute child pornography under

25. See Esposito, *supra* note 17 (reporting that teen sexting is “common,” and that 13 percent of teenagers have received sexts and 10 percent have sent them); see generally Rommelmann, *supra* note 13 (telling the story of one teenager who did not understand the consequences of sexting); see also *id.* at 37 (reporting that to teenagers involved in sexting cases, sexting images “were not shocking or unusual”).

26. NAT’L CAMPAIGN TO PREVENT TEEN & UNWANTED PREGNANCY, *supra* note 8, at 4 (“66% of teen girls and 60% of teen boys [who have sexted] say they did so to be ‘fun or flirtatious.’”).

27. Esposito, *supra* note 17.

28. See *infra* Part I.B.1–2; see also, e.g., Eraker, *supra* note 15, at 566–82.

29. U.S. CONST. amend. X; see also *United States v. Darby*, 312 U.S. 100, 124 (1941) (“The amendment states but a truism that all is retained [by the states] which has not been surrendered [, as enumerated in the Constitution].”).

most state criminal laws,³⁰ unless those laws include exceptions written specifically to address teen sexting.³¹

Sexting can be undeniably harmful to teenagers.³² However, the potential harms that arise when teenagers and their peers consensually create and share their own sexting images are different in kind and degree from the harms that arise from adult production and distribution of child pornography.³³ Sexting images may be misused or become a source of regret, but their creation and dissemination are not as inherently exploitative as traditional child pornography.

Despite this essential difference, application of general child pornography laws to teen sexting is not purely hypothetical. Prosecutors in at least a dozen states have brought child pornography charges against teenagers for sexting.³⁴ Past teenage defendants included a couple who took photos of themselves engaged in sexual activity and e-mailed them from one personal computer to another,³⁵ two twelve-year-old girls who took photos of themselves in training bras at a slumber party,³⁶ and a sixteen-year-old boy who received unsolicited, partially nude photos of a fourteen-year-old female schoolmate.³⁷

Although all of these cases involved sexually suggestive images of minors, the nature of the images at issue was very different from exploitative, adult-produced child pornography. In all three cases, the images were produced not only with the consent of the minor subjects, but of their own initiative. The intended audiences were

30. See Megan Sherman, Note, *Sixteen, Sexting, and a Sex Offender: How Advances in Cell Phone Technology Have Led to Teenage Sex Offenders*, 17 B.U. J. SCI. & TECH. L. 138, 142 (2011) (“[U]nder a majority of current state laws, a teen who uses a cell phone to take, send, or keep a sexually explicit photo of a friend or significant other, who just so happens to also be a minor, may be charged with production, dissemination, and possession of child pornography.”). These charges are generally felonies, with penalties ranging from six months to life in prison. *Id.* at 143–44. Although my research has uncovered no examples of teenagers receiving long prison sentences for consensual sexting, prosecutors have used the threat of felony charges to push teenagers into diversion programs. See, e.g., *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

31. See *infra* Part I.B.2.

32. See *supra* Part I.A.

33. See Terri Day, *The New Digital Dating Behavior—Sexting: Teens’ Explicit Love Letters: Criminal Justice or Civil Liability*, 33 HASTINGS COMM. & ENT. L.J. 69, 85–86 (2010).

34. See Dahlia Lithwick, *Teens, Nude Photos, and the Law*, NEWSWEEK, Feb. 13, 2009, at 18.

35. *A.H. v. State*, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007) (“The State alleged that, while the photos were never shown to a third party, A.H. and J.G.W. e-mailed the photos to another computer from A.H.’s home.”). It is unclear from the case how the photos were discovered.

36. Associated Press, *Pa. Court Sees First US ‘Sexting’ Case*, BOS. GLOBE, Jan. 16, 2010, at A2, available at http://www.boston.com/news/nation/articles/2010/01/16/pennsylvania_court_sees_first_us_sexting_case/ [hereinafter *Pa. Court Sees First US ‘Sexting’ Case*].

37. See Rommelmann, *supra* note 13, at 32.

members of the subjects' peer groups whom they knew personally, not adults. In the case of the slumber party photo of girls in training bras, the image at issue was arguably not even pornographic—the mother of one of the girls “thought her daughter Marissa and friend Grace Kelly were being ‘goofballs’ in the 2007 slumber-party shot” and argued that “[y]ou’re going to see more provocative photos in a Victoria’s Secret catalog.”³⁸

The outcomes of teen sexting prosecutions vary widely, from mandatory participation in educational diversion programs,³⁹ to plea bargains,⁴⁰ convictions,⁴¹ or, in at least one case, an injunction against prosecution.⁴² A more consistent feature of these cases is that the sexting that triggered prosecution had caused minimal or no harm to others.⁴³ Another feature is the shock of the families of the involved children upon learning that consensual sexting could expose minors to criminal charges.⁴⁴ Prosecutors who pursue pornography charges against teen sexting may intend to deter such behavior by making an example of a few teenagers. Parents, legal commentators, and members of the community have reacted negatively to this strategy.⁴⁵ But in states without specialized teen sexting statutes, this approach is firmly within the letter of the law.

38. *Pa. Court Sees First US ‘Sexting’ Case*, *supra* note 36.

39. *See Miller v. Mitchell*, 598 F.3d 139, 143–45 (3d Cir. 2010).

40. Rommelmann, *supra* note 13.

41. *A.H. v. State*, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007). A.H. was convicted in juvenile court for “producing, directing or promoting a photograph or representation that she knew to include the sexual conduct of a child.” *Id.*

42. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 646 (M.D. Pa. 2009).

43. The only case among those mentioned above in which sexting arguably harmed someone other than the teenage defendant is the case of the sixteen-year-old boy who received photos from a classmate. The boy was charged after the photos leaked into wider distribution. The girl, who created and sent the images, was not charged. The girl was not interviewed for the article, but the author reports that, for the teenagers involved, the images “were not shocking or unusual.” Rommelmann, *supra* note 13, at 37. The boy said of their relationship after the case, “I see her . . . We don’t let it faze us.” *Id.*

44. *Cf. Mike Brunker, “Sexting” Surprise: Teens Face Child Porn Charges*, MSNBC.COM (Jan. 15, 2009, 8:03 PM), <http://www.msnbc.msn.com/id/28679588> (explaining that prosecuting sexting teenagers is beyond the intended purposes of child pornography statutes).

45. Rommelmann, *supra* note 13, at 36–37; *see also* Robert H. Wood, *The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint*, 16 MICH. TELECOMM. & TECH. L. REV. 151, 176 (2009) (commending those states that take a more measured approach to punishment for sexting); *‘Sexting’ Overkill: Prosecuting Teens for Sending Nude Photos Ignores the Fact that These Are Kids Doing a Pretty Common Thing*, INQUIRER, Apr. 6, 2009, http://articles.philly.com/2009-04-06/news/25286780_1_sexting-nude-photos-teens.

2. State Legislation

Prompted by high profile teen sexting cases in the courts, some state legislatures have realized that existing law is ill-equipped to handle teen sexting. Thirty-two states have enacted or proposed statutes specifically aimed at teen sexting that would otherwise qualify as child pornography.⁴⁶ These statutes uniformly provide for reduced penalties for teenagers who sext, relative to sentences under child pornography laws. However, they also preserve the possibility of prosecution, either in the juvenile justice system or in adult criminal court.⁴⁷

The criminal offense level of teen sexting varies from state to state. New laws enacted in Florida and Nevada and a law proposed in South Dakota all treat the first instance of sexting by a minor as a noncriminal offense, but subject a minor who reoffends to criminal prosecution.⁴⁸ Five states have reduced teen sexting to a

46. As of August 12, 2012, seventeen states have enacted laws dealing specifically with teen sexting. ARIZ. REV. STAT. ANN. § 8-309 (West Supp. 2011); CONN. GEN. STAT. ANN. § 53a-196h (West 2007 & Supp. 2011); FLA. STAT. ANN. § 847.0141 (West 2000 & Supp. 2012); S. 2222, 2012 Leg., Reg. Sess. (Haw. 2012); 705 ILL. COMP. STAT. ANN. 405/3-40 (West 2011); LA. REV. STAT. ANN. § 14:81.1.1 (Supp. 2011); MO. REV. STAT. § 589.400 (West 2011); NEB. REV. STAT. §§ 28-813.01, 28-1463.03-.05 (2011); NEV. REV. STAT. § 200.737 (2011); N.J. STAT. ANN. § 2A:4A-71.1 (West 2011); N.Y. SOC. SERV. LAW § 458-*l* (McKinney 2011); N.C. GEN. STAT. § 14-202.3 (2011) (criminalizing a narrow category of teen sexting in a statute aimed at older teenagers and adults); R.I. GEN. LAWS § 11-9-1.4 (Supp. 2011); S. 183, 88th Sess. (S.D. 2012); TEX. PENAL CODE ANN. § 3.261 (West 2011 & Supp. 2011); UTAH CODE ANN. §§ 76-10-1204, -1206 (LexisNexis 2008 & Supp. 2011); VT. STAT. ANN. tit. 13, § 2802b (2009).

Fifteen other states have proposed teen sexting legislation. H. 127, 27th Leg., 1st Reg. Sess. (Alaska 2011) (passed with sexting provisions removed); Assem. 321, 2011 Leg., Reg. Sess. (Cal. 2011), Assem. 1043, 2011 Leg., Reg. Sess. (Cal. 2011), S. 916, 2011 Leg., Reg. Sess. (Cal. 2011); S. 919, 2011 Leg., Reg. Sess. (Cal. 2011); H. 1042, 117th Gen. Ass., 1st Reg. Sess. (Ind. 2011); see also Charlotte Eby, *Changes to Teen 'Sexting' Laws Being Drafted*, WCF COURIER.COM (Jan. 8, 2010, 5:30 AM), http://wfcourier.com/news/local/govt-and-politics/article_50c481b2-fbec-11de-9710-001cc4c03286.html (describing the Iowa Attorney General's plan to propose new, more lenient teen sexting laws); S. 63, 2011 Leg. Reg. Sess. (Kan. 2011) (passed with sexting provisions removed); H. 57, 2010 Leg., 10th Reg. Sess. (Ky. 2010), H. 143, 2010 Leg., 10th Reg. Sess. (Ky. 2010); H. 643, 2010 Leg., Reg. Sess. (Miss. 2010); H. 1562, 2012 Gen. Assemb. Reg. Sess. (N.H. 2012); H. 53, 129th Gen. Ass., Reg. Sess. (Ohio 2011); H. 2006, 53rd Leg., 1st Sess. (Okla. 2011); S. 677, 76th Leg. Ass., Reg. Sess. (Or. 2011); H. 2189, 2010 Leg., Reg. Sess. (Pa. 2010); H. 4504, 118th Gen. Ass., Reg. Sess. (S.C. 2010); S. 179, 86th Leg., Reg. Sess. (S.D. 2011); H. 4483, 80th Leg., 2d Sess. (W.Va. 2012).

47. See *id.*

48. FLA. STAT. ANN. § 847.0141 (West 2000 & Supp. 2012); NEV. REV. STAT. § 200.737 (2011); S. 179, 86th Leg., Reg. Sess. (S.D. 2011).

misdeemeanor,⁴⁹ and seven others have proposed to do so.⁵⁰

Three states encourage referral of teen sexting cases to juvenile proceedings or family court,⁵¹ and four allow teenagers who sext to enter diversionary programs instead of facing other criminal sanctions.⁵² These reforms suggest an emerging trend away from criminal punishment for sexting. Nonetheless, five states have acted proactively to criminalize teen sexting, apparently regardless of consent or other factors, such as actual or potential harm to the teenagers involved.⁵³

Most states have provided for lesser penalties for teen sexting by leaving adult child pornography laws unchanged and creating new offenses with less severe penalties for minors who sext.⁵⁴ Nebraska's legislature has gone one step further. Leaving in place its existing child pornography law, it created an affirmative defense that entirely immunizes private, consensual sexting between minors over the age of fifteen and defendants under the age of nineteen from criminal liability.⁵⁵

Except Nebraska's, none of the other new teen sexting laws treats consensual and nonconsensual sharing of sexting images differently. As originally introduced, the statute proposed in Illinois distinguished offense levels based on a sharer's intentions in obtaining

49. ARIZ. REV. STAT. ANN. § 8-309 (West Supp. 2011); CONN. GEN. STAT. ANN. § 53a-196h (West 2007 & Supp. 2011); FLA. STAT. ANN. § 847.0141 (West 2000 & Supp. 2012); TEX. PENAL CODE ANN. § 43.261 (West 2011 & Supp. 2011); UTAH CODE ANN. §§ 76-10-1204, -1206 (LexisNexis 2008 & Supp. 2011).

50. H. 2189, 2010 Leg., Reg. Sess. (Pa. 2010); H. 53, 129th Gen. Ass., Reg. Sess. (Ohio 2011); H. 573, 2011 Leg., Reg. Sess. (Haw. 2011); H. 57, 2010 Leg., 10th Reg. Sess. (Ky. 2010); H. 143, 2010 Leg., 10th Reg. Sess. (Ky. 2010); H. 2006, 53rd Leg., 1st Sess. (Okla. 2011); S. 677, 76th Leg. Ass., Reg. Sess. (Or. 2011); H. 4504, 118th Gen. Ass., Reg. Sess. (S.C. 2010).

51. R.I. GEN. LAWS § 11-9-1.4 (Supp. 2011); VT. STAT. ANN. tit. 13, § 2802b (2009); H. 53, 129th Gen. Ass., Reg. Sess. (Ohio 2011). Absent specialized sexting provisions, teenagers facing child pornography charges can often be tried as adults. *See* Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context*, 115 PENN. ST. L. REV. 135, 139 (2010) (citing *A.H. v. State*, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007); *Washington v. A. Vezzoni*, 127 Wash. App. 1012 (Wash. Ct. App. 2005)). Many states automatically charge anybody age seventeen or older as an adult, and younger teenagers may also be tried in adult court. ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 4 (2008). Although this practice initially targeted violent offenders, "[o]f the more than 250,000 individuals under eighteen years of age who are tried as adults each year in the United States, only about half are accused of violent crimes." *Id.*

52. N.J. STAT. ANN. § 2A:4A-71.1 (West 2011); N.Y. SOC. SERV. LAW § 458-1 (McKinney 2011); VT. STAT. ANN. tit. 13, § 2802b (2009); H. 4504, 118th Gen. Assemb., Reg. Sess. (S.C. 2010).

53. N.C. GEN. STAT. § 14-202.3 (2011); TEX. PENAL CODE ANN. § 43.261 (West 2011 & Supp. 2011); VT. STAT. ANN. tit. 13, § 2802b (2009); H. 53, 129th Gen. Assemb., Reg. Sess. (Ohio 2011); H. 4504, 118th Gen. Assemb., Reg. Sess. (S.C. 2010).

54. *See, e.g.*, statutes compiled *supra* note 46.

55. NEB. REV. STAT. §§ 28-813.01, 28-1463.03-.05 (2011).

or sharing images.⁵⁶ By making only malicious sharing subject to increased penalty, the bill ensured that most consensual sexting, and all sharing of images depicting the sharer, would fit under the lesser offense. This distinction based on intent was valuable, but it did not go far enough—teenagers who engaged in consensual sexting remained liable for at least a misdemeanor, even for taking pictures of themselves.⁵⁷ Moreover, the bill was ultimately amended, and the statute as passed does not make a distinction based on intent.⁵⁸

Five of the new and proposed laws dealing with teen sexting exempt teenagers convicted of sexting-related offenses from sex offender registration.⁵⁹ State laws that reduce the level of offenses associated with teen sexting⁶⁰ or exempt teenagers from sex offender registration also allow the teenagers to avoid registration under the Adam Walsh Child Protection and Safety Act, a federal law that mandates sex offender registration following convictions for certain sexting-related offenses.⁶¹ Removing these registration requirements reduces the risk that teenagers who sext will face lifelong legal consequences. Taking steps such as reducing penalties and moving away from incarceration for teenagers who sext without

56. The bill made it a misdemeanor for minors either to knowingly disseminate nude images of minors—whether of themselves or of other minors—or to request that another minor disseminate such images. If a minor obtained images or published them online with the intent to harm another minor's reputation, the offense was raised to a felony. All of these offenses carried the risk of jail time. H.B. 4582, 97th Gen. Assemb., Reg. Sess. (Ill. 2010).

57. *Id.*

58. 720 ILL. COMP. STAT. 5/11-27 (2011).

59. NEV. REV. STAT. § 200.737 (2011); VT. STAT. ANN. tit. 13, § 2802b (2009); H. 53, 129th Gen. Ass., Reg. Sess. (Ohio 2011); S. 179, 86th Leg., Reg. Sess. (S.D. 2011); *cf.* MO. REV. STAT. § 589.400 (West 2011) (allowing minors to petition to be removed from the sex offender registry after two years).

60. For example, a state may lower a felony offense to a misdemeanor.

61. 42 U.S.C. §§ 16911-29 (2006). The Adam Walsh Child Protection and Safety Act, also known as the Sex Offender Registration and Notification Act (SORNA) is a federal statute that aims to standardize the system of sex offender registration throughout the United States. Registration requirements do not apply to all juvenile offenders. The act only mandates registration by juvenile offenders above the age of fourteen who are tried as adults and convicted of crimes classified as tier three offenses—the most severe category. *Id.* However, tier three juvenile offenders charged as adults, like tier three adult offenders, must register for life, must re-register every three months, and must have their registration posted publicly on the Internet. *Id.* Some sexting-related charges qualify as tier three offenses. *See* Stephanie Gaylord Forbes, *Sex, Cells, and SORNA: Applying Sex Offender Registration Laws to Sexting Cases*, 52 WM. & MARY L. REV. 1717, 1732 (2011). Thus, absent provisions exempting teenage sexters from registration, a criminal conviction for sexting can have lifelong legal consequences for teenagers as young as fourteen.

intent to harm others may also make sexting prosecutions less disproportionately harmful. However, teenagers who sext continue to face the threat of criminal prosecution in every state.⁶²

II. THE NEED FOR REFORM

Though some states have concluded that teen sexting is a legal challenge in need of a targeted solution, many states still do not have laws on the subject.⁶³ Even in states that have laws that address consensual teen sexting, the need for reform remains because, in every state, prosecution in adult or juvenile court remains a possibility for minors who sext.⁶⁴ The possibility of an adult criminal conviction or delinquency adjudication for teen sexting raises serious constitutional questions.⁶⁵ Furthermore, even if prosecution of teenagers for sexting is constitutional, there are a number of policy reasons to refrain from punishing consensual teen sexting.⁶⁶ This section examines the constitutional and policy rationales that demonstrate the need for further reform of teen sexting laws.

A. Constitutional Questions About Sexting Prosecutions

The United States Constitution includes protections for freedom of speech and expression,⁶⁷ sexual privacy,⁶⁸ and the right of parents to guide the upbringing of their children.⁶⁹ Teen sexting falls at the intersection of these three rights. As a result, there is a compelling argument that consensual teen sexting is a sphere of protected activity into which criminal law should not intrude.

62. Every state has laws criminalizing child pornography. 50 State Statutory Surveys: Child Pornography, 0030 SURVEYS 5 (Thompson Reuters/West 2009). The state laws discussed above carve out limited exceptions to the default child pornography law, but in every case they preserve the possibility of prosecution, though prosecution may be postponed until a teenager reoffends. *See supra* note 46.

63. *See supra* Part I.B.2.

64. *See supra* note 62.

65. *See infra* Part II.A.

66. *See infra* Part II.B.

67. *See infra* Part II.A.1.

68. *See infra* Part II.A.2.

69. *See id.*

1. The First Amendment

The First Amendment provides, in part, that “Congress shall make no law . . . abridging the freedom of speech”⁷⁰ This right has been incorporated against the states and is now understood to apply to any government actor.⁷¹ The First Amendment’s scope has been interpreted broadly.⁷² Not only spoken and written words but also art,⁷³ movies and broadcast media,⁷⁴ music,⁷⁵ and some forms of expressive conduct⁷⁶ fall under the umbrella of protected expression. Sexual imagery is considered a form of expression under the First Amendment and, thus, it too is generally protected.⁷⁷

The First Amendment’s scope is subject to a limited number of categorical exceptions.⁷⁸ Two of these exceptions are relevant to teen sexting: obscenity and child pornography. Obscenity has long been viewed as an exception to First Amendment protection.⁷⁹ The current standard for obscenity was declared in *Miller v. California*, in which the Supreme Court held that a state may criminalize works which, “taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”⁸⁰

The *Miller* standard has been applied narrowly, meaning that while some sexting images might rise to the level of obscenity under

70. U.S. CONST. amend. I.

71. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

72. *Roth v. United States*, 354 U.S. 476, 484 (1957) (“All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.”).

73. *Kaplan v. California*, 413 U.S. 115, 119–20 (1973)

74. *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) (“[M]otion pictures [and] programs broadcast by radio and television . . . fall within the First Amendment guarantee.”).

75. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“Music, as a form of expression and communication, is protected under the First Amendment.”).

76. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (holding that students wearing black armbands to school to protest the Vietnam War engaged in expressive conduct entitled to First Amendment protection).

77. *Sable Commc’ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (“Sexual expression which is indecent but not obscene is protected by the First Amendment.”).

78. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

79. *E.g., id.* at 572; *Roth v. United States*, 354 U.S. 476, 484 (1957).

80. 413 U.S. 15, 24 (1973).

this standard, sexually explicit images of teenagers do not automatically qualify as obscene.⁸¹ Teen sexting images mentioned in the sexting case law generally depict only nudity or partial nudity, rather than self-produced hardcore pornography.⁸² As such, most teen sexting images are not excluded from First Amendment protection under the *Miller* standard.

The First Amendment exception that is more likely to apply to teen sexting is the exemption for child pornography, first recognized in *New York v. Ferber*.⁸³ In *Ferber*, the Supreme Court held that states may criminalize child pornography that falls outside the *Miller* definition of obscenity.⁸⁴ The Constitution requires only that “the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. [Offenses must] be limited to works that *visually* depict sexual conduct by children below a specified age. The category of ‘sexual conduct’ proscribed must also be suitably limited and described.”⁸⁵ Under the plain language of *Ferber*, most teen sexting images may be criminalized as child pornography.

However, there is reason to believe that, despite *Ferber*, the First Amendment should protect consensual teen sexting, because consensual sexting does not implicate the core interests at stake in *Ferber*. Support for this argument comes from *Ashcroft v. Free Speech Coalition*, which held that the First Amendment protects virtual child pornography.⁸⁶ In so holding, *Ashcroft* narrowed the scope of *Ferber* in ways that are relevant to teen sexting.

In *Ashcroft*, the Supreme Court revisited the interests served by the *Ferber* exception, and noted that bans on production and distribution of child pornography were justified

81. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 235 (2002) (noting that “[p]ictures of what appear to be seventeen-year-olds engaging in sexually explicit activity do not in every case contravene community standards” and thus do not always rise to the level of speech that may be criminalized).

82. The Court in *Miller* implied that most or all “hard core pornography” could be criminalized as obscene. 413 U.S. at 27. However, the term “hard core pornography” does not have a precise legal definition. As Justice Douglas wryly noted in dissent, even when dealing with hard core pornography, “a true definition is lacking. It has indeed been said of that definition, ‘I could never succeed in (defining it) intelligibly,’ but ‘I know it when I see it.’” *Id.* at 39 (Douglas, J., dissenting) (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (Stewart, J., concurring)). However, at minimum, the language “sexual conduct” seems to imply some sexual activity that goes beyond sexually suggestive nudity. See *Miller*, 413 U.S. at 24.

83. 458 U.S. 747 (1982).

84. *Id.* at 764.

85. *Id.* (emphasis in original) (internal citation omitted).

86. 535 U.S. at 234, 256. Virtual child pornography consists of images “that appear to depict minors but were produced by means other than using real children, such as through the use of youthful-looking adults or computer-imaging technology.” *Id.* at 234.

because these acts were ‘intrinsically related’ to the sexual abuse of children in two ways. First, as a permanent record of a child’s abuse, the continued circulation itself would harm the child who had participated. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network.⁸⁷

The Court emphasized that “*Ferber’s* judgment about child pornography was based upon how it was made, not on what it communicated.”⁸⁸

Creating actual child pornography is an act of child abuse, and the continued existence of child pornography perpetuates the harm of that abuse. *Ashcroft* established that these are the legally relevant attributes that allow states to criminalize child pornography. Although other interests at stake in *Ferber* remained relevant to the virtual child pornography in *Ashcroft*,⁸⁹ the difference in how virtual child pornography is made was sufficient to render a ban on that material unjustified and prohibited under the First Amendment.⁹⁰

Like the virtual child pornography at issue in *Ashcroft*, consensually created teen sexting images are not records of child abuse, because the process of making them is not harmful or coercive. The continued circulation of these images may cause embarrassment or social stigma for their subjects but does not perpetuate the trauma of child abuse as adult-created child pornography does. In addition, teen sexting is not a commercial activity, so there can be no “economic motive for its production” that would generate a state interest in imposing a ban.⁹¹ Thus the factors that weighed in favor of First Amendment protection for virtual child pornography in *Ashcroft* also support the same protection for teen sexting.

While this argument is in line with the Supreme Court’s child pornography jurisprudence, precedents in other areas may weigh against it. As a general matter, states have greater constitutional leeway in regulating children than adults.⁹² In particular, there is precedent indicating that children’s speech rights are entitled to less

87. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 235 (2002) (internal citations omitted).

88. *Id.* at 236.

89. For example, the Court did not deny that virtual child pornography might be used by pedophiles to seduce children, but instead noted that this use of the materials was itself a crime, and the potential for misuse could not justify a blanket ban. *Id.*

90. *Id.* at 254–56.

91. *Id.* at 235.

92. *See Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (“The state’s authority over children’s activities is broader than over like actions of adults.”).

First Amendment protection than those of adults.⁹³ However, limitations on minors' speech rights have not generally involved criminal punishment of minors for expression. Instead, punishment is meted out to adult guardians who allow children's expression to put the children at risk.⁹⁴ Alternatively, minor speakers may receive less severe sanctions, such as in-school discipline.⁹⁵ Despite the broader allowance for constitutional limits on their speech rights, teenagers retain rights to freedom of expression that should not be infringed by criminal sanctions for sexting.

2. The Right to Privacy

In addition to freedom of speech, the Constitution protects the right to privacy through the Due Process clause of the Fourteenth Amendment.⁹⁶ This protection embraces substantial rights to sexual privacy, including the right of consenting adults to engage in same-sex sexual activity⁹⁷ and the right to access to birth control.⁹⁸ The latter right has been explicitly extended to minors.⁹⁹ Like the right to freedom of expression, the right to sexual privacy is also potentially implicated by laws that criminalize teen sexting.

Teen sexting is, under the definition adopted by this Note, sexual expression that is intended to be private. In *Lawrence v. Texas*, the Supreme Court announced: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."¹⁰⁰ Despite the Court's lofty language, the facts of *Lawrence* indicate that the protection of "overt expression in intimate conduct"¹⁰¹ extends to sexual activity outside the context of a committed relationship.¹⁰²

93. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) ("The First Amendment guarantees wide freedom in matters of adult public discourse. . . . It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.").

94. See *Prince*, 321 U.S. at 168 (upholding a Massachusetts law that penalized parents, custodians, and others who permit minors to sell magazines in streets or public places).

95. See *Fraser*, 478 U.S. at 682.

96. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684 (1977).

97. *Lawrence v. Texas*, 539 U.S. 558 (2003).

98. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

99. *Carey*, 431 U.S. at 678.

100. 539 U.S. at 567.

101. *Id.*

102. Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1478 (2004) (noting that one commentator believes that "[the *Lawrence* defendants] may have been occasional sexual partners, but were not in a long-term, committed relationship when they were arrested.").

Sexting, while not physical sexual activity, is another such “overt expression” of sexuality.

Given the ease with which digital images can be shared, the reasonableness of the expectation of privacy for sexting is an open legal question.¹⁰³ However, the fact that unauthorized sharing may put sexting images into broader circulation should not negate the privacy interest of teenagers who create or appear in those images.¹⁰⁴ Just as the presence of police officers in the house in response to a false report did not properly expose the *Lawrence* defendants to liability for private sexual conduct in the home,¹⁰⁵ teenagers should retain their constitutional privacy rights even if their messages are ultimately disseminated. In either case, it is not the actions of the people principally involved but rather misconduct by a third party that brings private behavior to official attention. Assuming that teenagers intend their sexts to be private and take reasonable steps to keep them so, their activities are largely similar to the private sexual activity protected in *Lawrence*.

Not all rights protected by the Fourteenth Amendment fully extend to minors. In fact, in *Lawrence* the Court specifically disclaimed that the right it enunciated applied to children.¹⁰⁶ However, given the general landscape of legal precedent in the area of sexual privacy, the *Lawrence* exclusion should not extend to teen sexting. As the Supreme Court stated in *Carey v. Population Services International*, “[s]tate restrictions inhibiting privacy rights of minors are valid only if they serve ‘any significant state interest that is not present in the case of an adult.’”¹⁰⁷ *Carey* further held that a state policy of discouraging sexual activity among minors did not justify invasion of minors’ Fourteenth Amendment privacy rights.¹⁰⁸

In *Lawrence*, the Court did not explain why it exempted minors from its holding. It may simply have wished to avoid reaching facts

103. In *A.H. v. State*, the majority found that there was no reasonable expectation of privacy in sexting. 949 So. 2d 234, 237 (Fla. Dist. Ct. App. 2007); *but see id.* at 240 (Padovano, J., dissenting) (“That the Internet is easily hacked, as the majority says, is not material. The issue is whether the child intended to keep the photos private, not whether it would be possible for someone to obtain the photos against her will and thereby to invade her privacy.”).

104. *Id.* at 240 (Padovano, J., dissenting)

105. See Carpenter, *supra* note 102, at 1485–87 (explaining that officers entered Lawrence’s house based on a report that “a black male was going crazy in the apartment and he was armed with a gun” but instead found two men engaged in sexual activity).

106. 539 U.S. 558, 578 (2003) (“The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.”).

107. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 693 (1977) (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976)).

108. See *Carey*, 431 U.S. at 694–95.

not presented in the case. *Carey* arguably dictates that if a teen sexting case reached the Supreme Court on privacy grounds, the activity would be protected, absent a significant state interest that is unrelated to suppression of sexual activity by minors. Such an interest might exist, but it is not obvious or easily defensible.

Another possible response to the reduced constitutional protection afforded to minors' sexual privacy is to argue that teen sexting implicates multiple rights at once, and that the combination of these interests obliges the state not to interfere. One commentator has crafted a novel argument of this sort at the intersection of teenagers' privacy rights and the rights of parents to direct their children's education and development.¹⁰⁹ Citing *Meyer v. Nebraska*¹¹⁰ and *Pierce v. Society of Sisters*,¹¹¹ he argues:

Absent a compelling state interest, many choices and decisions that affect children must be preserved for their parents regardless of how the state may judge the correctness of such decisions. Thus, it may be perfectly acceptable that the government would wish that the nation's teens would refrain from sexting, but it may lack the power to prohibit the activity through criminal sanction.¹¹²

He combines this interest with what he calls "*Lawrence's* seeming rational basis with bite" to argue that, together, the two interests weigh strongly against government interference in the realm of teen sexting.¹¹³

This argument draws connections between rights that have not intersected on the facts of previous Supreme Court cases, and it is unclear whether the argument would prevail in a judicial challenge to teen sexting laws. However, the doctrinal interests at issue are substantial. Parents' rights to guide their children's upbringing, along with teenagers' rights to sexual privacy and freedom of expression all counsel against criminalizing consensual teen sexting.

It is important to note that in finding that teen sexting may not be criminalized, a court need not recognize a fundamental "right to

109. Claudio J. Pavia, *Constitutional Protection of "Sexting" in the Wake of Lawrence: The Rights of Parents and Privacy*, 16 VA. J.L. & TECH. 189, 200 (2011).

110. 262 U.S. 390 (1923) (holding that a state statute that forbade instruction in a foreign language violated "the right of parents to engage [a teacher] to instruct their children [in German]").

111. 268 U.S. 510 (1925) (holding that a statute compelling attendance at public rather than private school infringed "the liberty of parents and guardians to direct the upbringing and education of children").

112. Pavia, *supra* note 109, at 198.

113. *Id.* at 202.

sext.” Commentators have disavowed this notion,¹¹⁴ and it is understandably unpalatable. But to recognize constitutional rights in this area is not to give teenagers license to misbehave. Other avenues for control and education remain.¹¹⁵ This Note argues only that sanctions in the criminal and juvenile justice systems have no place in efforts to protect teenagers from the self-imposed harm of consensual sexting.

B. Policy Reasons for Reform

Even if criminal prosecution of consensual teen sexting is held to be constitutional despite the concerns outlined above, there are also compelling policy concerns that weigh against criminalization and prosecution. This section argues that criminal prosecution of consensual teen sexting is fundamentally unfair because sexting does not constitute a wrong deserving of criminal punishment. It reinforces this claim by demonstrating that the traditional justifications for criminal punishment do not support criminal prosecution of teen sexting.

1. Consensual Sexting is not a Wrong Deserving of Punishment

The law generally distinguishes criminal punishment from a similar civil sanction by “the judgment of community condemnation which accompanies and justifies its imposition.”¹¹⁶ The hallmark of criminal law, then, is its ability not merely to punish but also to express the belief that the punished act was morally reprehensible. Once a punishable wrong is identified, the punishment dispensed should be proportionate to the crime.¹¹⁷ Criminal prosecution for consensual teen sexting is unjustified on both of these grounds. Sexting is not a wrong worthy of expressive condemnation. In the absence of such a wrong, no criminal punishment can be appropriate or proportionate.

114. *Is ‘Sexting’ a Teen’s Right?*, CNN (Mar. 30, 2009), <http://edition.cnn.com/video/#/video/bestoftv/2009/03/30/pn.sexting.right.cnn> (last visited Dec. 20, 2012).

115. See *infra* Part IV.

116. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 404 (1958).

117. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 86–88 (John Bowring ed., 1843). This limit is not only moral but also constitutional. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (holding that the Eighth Amendment requires that “the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering”).

Immanuel Kant argued that “[j]uridical punishment never can be administered merely as a means for promoting another [g]ood . . . , but must in all cases be imposed only because the individual on whom it is inflicted *has committed a [c]rime*.”¹¹⁸ To justify criminal sanction, the accused “must first be found guilty and *punishable*.”¹¹⁹ But what about teen sexting makes it a wrong that merits criminal condemnation?

A teenager who creates a personal sexting image and freely shares it with a willing recipient does not harm anyone else. This behavior may put the sexter at risk of reputational damage, but that *potential* harm depends on the wrongful act of another person who shares the image more widely than originally intended.¹²⁰ Even if we believe that the elevated risk is itself a harm, it is one that sexters inflict on themselves. Furthermore, consensual sexting is generally not intended to cause harm. Teenagers create and share sexting images to feel fun or flirty, not with the culpable aim of causing trouble or putting themselves at risk.

A teenager who possesses or shares a sexting image with the subject’s permission does no harm at all. On the other hand, a teenager who maliciously or negligently shares an image without the subject’s permission does cause harm, and does commit a wrong worthy of punishment. A sexter who subjects an unwilling recipient to unwanted messages should also be punished. These types of non-consensual sexting fall outside the scope of this Note’s proposed reform precisely because they may merit criminal condemnation. Consensual sexting is different. It may be distasteful, thoroughly foolish, and risky. However, because it is not malicious and does not harm others, it should not be criminally punishable.

118. IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 195 (W. Hastie trans., 1887) (emphasis in original).

119. *Id.* (emphasis in original).

120. The same argument applies to the worry that child molesters may use sexting images to groom minors for abuse. This is clearly a harm, but one caused not by sexting itself, but rather by the misuse of sexting images by a third party. See *supra* notes 104–05 and accompanying text.

2. The Insufficiency of Traditional Justifications for Punishment

Once a crime is committed, punishment may be justified by a number of policy considerations, including deterrence, incapacitation, reform, and retribution.¹²¹ However, these traditional justifications for criminal punishment do not legitimize punishment of consensual teen sexting.

Retribution justifies criminal punishment as a means of repaying one harm with another.¹²² As Kant argued, “it may be said: ‘[i]f you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself.’”¹²³ When a person inflicts harm on others, the state is justified in inflicting equivalent harm on the offender. But consensual sexting harms no one, with the possible exception of the subjects themselves. To punish a consensual sexter is to say “if you harm yourself, the state will harm you as well.” Rather than repaying a harm, the response simply increases it. With no wrongful harm, there can be no proper interest in retribution.

Incapacitation is focused on preventing repeated offenses and their attendant harms.¹²⁴ In nearly all cases, incapacitation through criminal punishment is focused on preventing future harm to society, rather than protecting criminal defendants from their own misbehavior.¹²⁵ Rare exceptions to this rule include drug laws and prohibitions on suicide.¹²⁶ Criminal bans on suicide have declined in recent years,¹²⁷ and drug laws are a response to very different interests from those involved in consensual teen sexting, such as concerns about addiction and the correlation between drug use and the commission of other crimes.¹²⁸ Drug laws thus seek to prevent serious harm to parties other than the defendant. Absent some

121. Kent Greenwalt, *Punishment*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1286–87 (Joshua Dressler ed., 2d ed. 2002).

122. Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 179–82 (Ferdinand Schoeman ed., 1988) (“The distinctive aspect of retributionism is that the moral desert of an offender is a *sufficient* reason to punish him or her.”).

123. See KANT, *supra* note 118, at 196.

124. See GREENWALT, *supra* note 121, at 1287.

125. *Id.* (noting that criminal punishment “puts convicted criminals out of general circulation”).

126. Cf. Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 230 (1998) (noting that drug laws are a form of paternalism); *Washington v. Glucksberg*, 521 U.S. 702, 711 (1997) (“[F]or over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.”).

127. See, e.g., Shelly A. Cassidy, Note, *To Die or Not to Die: The History and Future of Assisted Suicide Laws in the U.S.*, 2009 UTAH L. REV. 515, 521 (2009) (discussing increasing openness to physician-assisted suicide).

128. See Michael Tonry, *Research on Drugs and Crime*, 13 CRIME AND JUSTICE 1 (1990).

showing of acute concerns like these, sexting does not merit criminal sanctions under an incapacitation theory.

The remaining justifications are deterrence and reform. Deterrence is the interest in preventing people who have not committed crimes from doing so.¹²⁹ As related to teen sexting, even if we take an expansive view of deterrence, including prevention of both harm to society and self-harm to the offender, it is unclear that criminal law is the best tool for the job. We generally assume that people know the law and expect them to conform their behavior to it. This assumption is aspirational for any segment of the population, but all the more so for minors.¹³⁰ If teenagers are unaware of the law, criminal sanctions for sexting can have little deterrent effect.¹³¹

As applied to consensual teen sexting, both deterrence and the remaining justification, reform,¹³² can only be motivated by paternalism—the desire to prevent people from making choices that the law views as self-destructive. Paternalism is an accepted legal interest in the realm of legislation to protect minors.¹³³ However, it is not generally used to justify *criminal* punishment of minors who place themselves in danger. Instead, paternalism by the state may justify punishment of parents who allow their children to enter potentially harmful situations,¹³⁴ or it may motivate lesser sanctions for minors themselves, such as in-school discipline.¹³⁵ Criminal punishment is itself a harm,¹³⁶ and thus fits very poorly with the protective aims of paternalism.

Furthermore, it is unclear that criminal sanctions serve a state's paternalistic interest in preventing sexting. As Part IV of this Note argues, other methods may better advance the goal of prevention. Although states are not obligated to find perfect methods to solve

129. See GREENWALT, *supra* note 121, at 1286.

130. Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Response to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 533 (2008) ("Although the media has widely broadcast stories of minors being charged for creating and disseminating [sexting] images, minors continue to create such images, undeterred by the prospect of prosecution.").

131. One response to this is to educate teenagers about the law. However, there are two issues with this approach. First, criminalization of teen sexting is unjustified on other grounds, so this is only a partial solution to a larger problem. Second, a focus on criminalization of sexting by minors may merely encourage teenagers to postpone sexting until adulthood, when it is completely legal, but maintains the same risk of reputational harm.

132. See GREENWALT, *supra* note 121, at 1287.

133. See *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

134. *Id.* at 169–70.

135. See *Morse v. Frederick*, 551 U.S. 393, 405–07 (2007).

136. See GREENWALT, *supra* note 121, at 1283 ("Since punishment involves pain or deprivation that people wish to avoid, its intentional imposition by the state requires justification.").

social problems,¹³⁷ these practical concerns combine with the theoretical concerns outlined above to cast serious doubt on the utility of criminal sexting laws. Overall, criminalization of consensual teen sexting is not justifiable policy.

Moving sexting cases from the criminal to the juvenile justice system mitigates, but does not eliminate, these concerns. Historically, juvenile courts operated on “the principle that rehabilitation is a better response to delinquency than the punishment and stigma that generally accompany an adult conviction.”¹³⁸ Though this remains an important goal of the juvenile justice system, juvenile courts have taken on an increasingly retributivist philosophy over the past several decades.¹³⁹ Although designed to handle juvenile offenders in a more age-appropriate manner, juvenile proceedings are nonetheless a method of punishing wrongs. Even if the punitive harm of juvenile prosecution is less severe, purely paternalistic concerns cannot justify condemning teenage sexters in this way. The interest in proportionality still applies—if no punishment can be justified without culpable harm, then punishment without harm is unjustified whether the punishment is lenient or severe. Furthermore, relying on the juvenile justice system to curb teen sexting is impractical: with between 4 and 20 percent of teenagers involved in sexting,¹⁴⁰ funneling sexters into juvenile court could potentially create millions of new youthful offenders.

III. PROPOSED REFORM

As the foregoing demonstrates, teen sexting cases should be removed from the criminal and juvenile justice systems. States should reform their laws to stop criminal prosecution of teenagers for consensual sexting, and instead create programs designed to confront the issue outside of criminal courts. This section offers a proposal for decriminalizing consensual teen sexting.

137. As a constitutional matter, states are entitled to some judicial deference in their choice of criminal sanctions. See *Gregg v. Georgia*, 428 U.S. 153, 182–83 (1976); *Furman v. Georgia*, 408 U.S. 238, 251 (Powell, J., dissenting) (arguing that courts may not “invalidate a category of penalties because [they] may deem less severe penalties adequate to serve the ends of penology”). However, this deference is subject to limits. *Id.* at 183.

138. Kristin Henning, *What’s Wrong With Victims’ Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1112 (2009).

139. See *id.* at 1113.

140. See studies cited *supra* note 8.

Although there appears to be a growing consensus in the states that prosecution of teen sexting under child pornography laws designed for adults is inappropriate,¹⁴¹ current state law does not do enough to protect teenagers' rights and wellbeing.¹⁴² The ultimate goal of teen sexting law should be the protection of minors, both from harm at the hands of others and from the equally real threat of harm by an overly zealous justice system. The model statute below removes all criminal liability for consensual teen sexting while preserving the possibility of prosecution for harmful, nonconsensual activity.

A. Model Statute

1. Definitions

- a. "Sexting" shall be defined as the transmission of sexually explicit or sexually suggestive images or video, intended for private use, via a digital medium which affords a reasonable expectation of privacy, including but not limited to a personal cellular phone or e-mail account.
 - b. A "sexting image" shall be defined as a sexually explicit or sexually suggestive image or video, intended for private use, transmitted via a digital medium which affords a reasonable expectation of privacy, including but not limited to a personal cellular phone or e-mail account.
2. No minor shall be subject to criminal prosecution or equivalent juvenile proceedings for the creation or private possession of a sexually explicit or sexually suggestive digital image of himself or herself.
 3. No person shall be subject to criminal prosecution or equivalent juvenile proceedings for the creation or transmission via sexting of any sexting image, including sexting images depicting a minor, if the following criteria are met:
 - a. If the sexting image depicts only the sender:
 - i. The sender is a minor, or is no more than three years older than the recipient; and
 - ii. The sender reasonably believes the recipient is willing to receive the image.

141. See *supra* Part I.B.2.

142. See *supra* Part II.

- b. If the sexting image depicts a person other than the sender:
 - i. The image was created with the subject's knowledge and consent;
 - ii. The image was transmitted with the subject's knowledge and consent;
 - iii. The difference in age between the subject and the sender is no more than three years;
 - iv. The difference in age between the subject and the recipient is no more than three years; and
 - v. The sender reasonably believes the recipient is willing to receive the image.
4. No person shall be subject to criminal prosecution or equivalent juvenile proceedings for the private possession of a sexting image depicting a minor if:
 - a. The image was created with the subject's knowledge and consent;
 - b. The image was possessed with the subject's knowledge and consent; and
 - c. The difference in age between the subject and the possessor is no more than three years.
5. A minor who lawfully possesses a sexting image shall not be prosecuted as an adult for unlawfully sharing the image via sexting and, if convicted as a juvenile, shall not be required to register as a sex offender.
6. A minor who unlawfully possesses a sexting image shall not be prosecuted as an adult for this unlawful possession and, if convicted as a juvenile, shall not be required to register as a sex offender.
7. Nothing in this act shall be interpreted to:
 - a. Decriminalize the possession of commercial child pornography, the sale or publication in any publicly accessible forum of any sexually explicit image involving a minor, or the sexual exploitation of minors;
 - b. Prohibit the use of a legal sexting image as evidence in a prosecution for crimes unrelated to the use or possession of the image, including cases when the activity depicted in the image is alleged to be illegal; or
 - c. Reduce civil remedies available to a minor whose image is unlawfully created or shared.

B. Explanation

This statute aims to protect teenagers from the most serious potential harms of sexting while also preventing inappropriate legal interference in victimless teenage behavior. When sexting is consensual, the harm of prosecution, and especially of convictions carrying the possibility of jail time and sex offender registration, far outweighs the possibility of harm from the activity itself. The statute therefore exempts from prosecution nearly all instances of fully consensual sexting between minors. Sections three and four contain “Romeo and Juliet” provisions, which decriminalize sexting between minors and young adults, as long as the age difference between the parties is no more than three years.¹⁴³

The statute does not remove all teen sexting cases from the reach of the criminal law. Cases where sexting is not voluntary, either on the part of the subject or the recipient, remain subject to criminal sanction. This includes cases where the subject did not consent to the creation of the sexting image¹⁴⁴ and cases where the sender did not reasonably believe that the recipient would have consented to receive the image.¹⁴⁵ Because of the potential harm to minors’ reputations if sexting images are created and circulated without their consent, the statute requires affirmative consent by the subject to creation and sharing of any teen sexting image. On the other hand, teenagers often casually share sexting images, and the potential harm from receiving unwanted images from a sender who acts without malice is less than the harm of being photographed without consent. The sharing provisions therefore only require a reasonable belief that the recipient would have consented to receiving the images.¹⁴⁶ This provision aims to leave intact the possibility of prosecution for senders whose actions constitute intentional harassment.

The Romeo and Juliet provisions provide flexibility to the law’s application to sexting between older teenagers and young adults, but they also function as an important limitation on consent. These provisions make consent to sexting inapplicable in cases where the age difference between the subject of a sexting image and either the sender or the recipient of the image is greater than three years.

143. These provisions are common in statutory rape law and either decriminalize sex with a minor if the two parties are close in age or else reduce penalties in that situation. *See, e.g.*, CAL. PENAL CODE § 261.5 (West 2008) (reducing statutory rape penalties for sex between parties within three years of age). I have selected three years as a reasonable number with precedent in statutory rape law, but states could vary the permissible age difference.

144. Model statute § 3(b)(i).

145. Model statute §§ 3(a)(ii), 3(b)(v).

146. *Id.*

The goal of this limitation is to exclude situations where older peers pressure a young teenager or child into agreeing to sexting.

The model statute also maintains existing civil and criminal protections for minors when sexual images of them are either created or shared without their consent. It allows for the criminalization of any possession of a sexual image of a minor without the subject's consent,¹⁴⁷ and of any publication or sale of sexual images of a minor, regardless of consent.¹⁴⁸ It thus protects the subjects of sexting images from criminal liability for lapses in judgment, but also aims to minimize the negative consequences of those lapses by restricting the circulation of sexting images.

In cases where a sexting image depicts activity that is illegal under laws other than those dealing with child pornography, the statute ensures that teen sexting images may still be used in prosecution for that crime, but not criminalized in their own right.¹⁴⁹ The statute should have no effect on the ability of courts and prosecutors to punish traditional, exploitative child pornography. It ensures that exploitation of children by adults does not constitute protected activity through the consent requirement for creation, transmission, and possession of sexting images; the limitation on the permissible age difference between the subject of an image and any other party involved in sexting; and the exemption from protection for publication or sale of the images. If in practice the statute hampers prosecution of adults for child pornography, it should be revised.

The goal of the model statute is to create a complete exemption from criminal prosecution for consensual teen sexting, without providing legal amnesty for adult predators or increasing the general availability of child pornography. The statute is designed to work alongside existing criminal and civil law dealing with child pornography and sexual harassment, not to impair the availability of redress for minors whose images are shared without their consent.

147. Model statute § 4(b). Early readers of this Note have commented that a person who receives a sexting image from a sender other than the subject of the image may not know if they possess the image with the subject's consent, and may unwittingly commit a crime. This is true. It might be reasonable to exempt nonconsensual possession of teen sexting images from criminalization when the possessor has a good-faith belief that the subject has consented. However, that situation is not a form of consensual teen sexting and therefore falls outside the scope of this Note's reform. Absent such an exemption, prosecutors have discretion to decline to press charges against people who possess sexting images with a good-faith belief in the subject's consent.

148. Model statute § 7(b).

149. Model statute § 7(a).

IV. RESPONSE TO OBJECTIONS

The most likely objection to this Note's proposed reform is that decriminalizing teen sexting will make it more difficult to deter teens from engaging in this risky behavior. Critics might argue that decriminalizing teen sexting will remove the stigma associated with the activity, leading teenagers to believe that it is socially acceptable. They might also argue that the threat of criminal sanction is the only way to prevent more teenagers from engaging in sexting. However, there are means outside the criminal law to provide teenagers with both moral guidance and practical consequences for engaging in sexting.

While decriminalizing consensual teen sexting removes one tool in the effort to control the activity, it does not leave adults powerless to do so. Instead, the task properly falls to parents and educators to inform teenagers about the potential dangers of sexting and prevent the abuse of technology. Teachers and parents have both the ability and the broad legal authority to punish teenagers who cause harm or disruption through sexting. The states can reinforce the authority of teachers and parents by developing educational programs modeled on existing preventative programs that address other issues affecting teenagers, such as sex education, drug abuse, and bullying.

A. *The Role of Parents and Schools*

Leaving sexting prevention to parents and educators rather than to courts is both legally and socially appropriate. As a legal matter, courts have clearly affirmed the roles of parents and schools in guiding the moral upbringing of children.¹⁵⁰ Outside the courts, it is established social practice that schools and parents share a leading role in education and risk prevention in areas that are substantially similar to teen sexting.¹⁵¹

Subjects similar to teen sexting that are generally handled in homes or schools rather than courts include sexual education¹⁵²

150. See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

151. See *supra* notes 141–43 and accompanying text.

152. In a 1999 survey, 72 percent of fifth and sixth grade teachers reported that sexual education was taught at their schools in one or both of those grades. David J. Landry *et al.*, *Sexuality Education in Fifth and Sixth Grades in U.S. Public Schools, 1999*, 32 FAMILY PLANNING PERSPECTIVES 212, 213 (2000), available at <http://www.guttmacher.org/pubs/journals/3221200.html>.

and preventative programs dealing with drug abuse¹⁵³ and bullying.¹⁵⁴ While drug abuse prevention programs aim to prevent future criminal offenses by children and teenagers,¹⁵⁵ bullying and sexual education programs use education to protect minors from harms that generally do not rise to the level of crimes.¹⁵⁶ If consensual sexting were decriminalized, sexting prevention programs could largely resemble programs that target bullying and sex education. Sexting prevention programs should focus on providing teenagers with information on the potential hazards of sexting and strategies to avoid harm to themselves and others.

Teen sexting is an area that implicates teenagers' judgment as well as their developing sense of morality. In this sense, sexting is similar to drug use and sexual activity because the primary goal of preventative programs is not to keep teenagers from harming others,¹⁵⁷ but to provide them with the tools they need to protect themselves from harm.¹⁵⁸ This is a particularly valuable goal in the area of teen sexting. Under current constitutional law, consensual sexting may only be criminalized if it involves minors; however the harms implicated by sexting, including emotional distress and reputational damage, remain relevant to legal sexting among

153. Drug Abuse Resistance Education, a well-known youth anti-drug education program, is currently used in 75 percent of America's school districts. *About D.A.R.E.*, D.A.R.E., http://www.dare.com/home/about_dare.asp (last visited May 1, 2012).

154. *Key Components in State Anti-Bullying Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/index.html> (last visited May 1, 2012) (outlining responses to bullying that emphasize school intervention, preventative education, and family notification).

155. *The D.A.R.E. Mission*, D.A.R.E., <http://www.dare.com/home/THEDAREMISSION.asp> (last visited May 1, 2012) ("D.A.R.E. (Drug Abuse Resistance Education) is a collaborative program in which local law enforcement and local schools join together to educate students about the personal and social consequences of substance abuse and violence.").

156. In some cases, however, bullying and sexual activity may involve harms that are also crimes. For example, bullying may rise to the level of assault or harassment. *See 2 Middle School Bullies Charged, Released In Case Of Anti-Gay Assault That Left Victim Blind In One Eye*, CBS NEW YORK (July 13, 2012, 7:26 PM), <http://newyork.cbslocal.com/2012/07/13/2-middle-school-bullies-charged-released-in-case-of-anti-gay-assault-that-left-victim-blind-in-one-eye/> (reporting that a teenager was physically assaulted in an "anti-gay hate crime"); Charles Hack, *Bayonne mother files harassment charge against alleged bullies, charges school administration hasn't done enough to protect to her son, who has a heart ailment*, NJ.COM (Oct. 12, 2011; 7:16 AM), http://www.nj.com/jjournal-news/index.ssf/2011/10/bayonne_mother_files_harassmen.html. Sexual activity by minors may also be criminalized under statutory rape law. Smith, *supra* note 130, at 525–26 & nn.75–76. However, these cases are outliers, and educational programs on sexuality and bullying generally aim to prevent the broader category of harms rather than just those that rise to the level of crimes.

157. *See* McLaughlin, *supra* note 51 at 138–40 (noting that most teen sexting is not intended to cause harm to others).

158. *See* Smith, *supra* note 130, at 544 ("Minors who distribute pornographic images of themselves place may [sic] themselves at risk of being victimized by pedophiles or sexual predators and create potential problems for themselves among their peers.").

adults.¹⁵⁹ If fear of prosecution is the only thing that reinforces responsible behavior in this area, young adults may lack the information they need to avoid the other risks associated with sexting. If, on the other hand, adolescents learn that responsible technology use can have lifelong benefits, good habits may last into adulthood.

Of course, in cases where sexting is not consensual, it is harmful to people other than the sexter and may properly be criminalized. Thus, in addition to discussing the potential self-harm of consensual sexting, educators should emphasize both the moral duty to refrain from harming others through nonconsensual sexting and the fact that nonconsensual sexting is often subject to criminal sanctions.

Teen sexting also strongly resembles drug use, bullying, and sexual activity in that it impacts a large number of teenagers.¹⁶⁰ Effective preventative programs are therefore essential in all of these areas. Individualized responses to any of these issues, whether in the form of prosecution or case-by-case intervention, would be extremely resource-intensive.¹⁶¹ Without preventative programs in place to deal with sexting, local officials selectively prosecute the

159. Tyler Clementi, who committed suicide after video of him in a sexual encounter was shared without his consent, was eighteen years old at the time of the incident. Schwartz, *supra* note 16. That case is better understood as cyberbullying than sexting, since the video in question was maliciously created and shared without Mr. Clementi's knowledge. *See id.* However, the case demonstrates the power of sexual images over the lives of people who are no longer minors. Similarly, the risk of reputational harm remains whether the subject of a sexting image is a teenager or an adult.

160. In a 2003 study, 40.2 percent of respondents in grades nine to twelve had used marijuana at least once, and over 7.5 million teenagers reported having used some type of illegal drug in their lifetime. *How Significant is Teen Drug Use?*, NATIONAL DRUG INTELLIGENCE CENTER, <http://www.justice.gov/ndic/pubs11/12430/index.htm#significant> (last visited May 1, 2012). The American Psychological Association reports that 70 percent of middle school and high school students have experienced bullying at some point. *Bullying: A Module for Teachers*, AMERICAN PSYCHOLOGICAL ASSOCIATION, <http://www.apa.org/education/k12/bullying.aspx#> (last visited May 1, 2012). Finally, a 2011 study found that 43 percent of unmarried teenage girls and 42 percent of unmarried teenage boys had had sexual intercourse. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, *TEENAGERS IN THE UNITED STATES: SEXUAL ACTIVITY, CONTRACEPTIVE USE, AND CHILDBEARING, 2006–2010 NATIONAL SURVEY OF FAMILY GROWTH* (Oct. 2011), *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_031.pdf. *Cf.* SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS, *supra* note 8 (reporting that 20 percent of teenagers age thirteen to nineteen reported electronically sending or posting online nude or semi-nude images or video of themselves).

161. Diversion programs through juvenile courts are a relatively inexpensive individual response to teen misbehavior. Attendance in a diversion program costs, on average, \$936 per youthful offender. Peter Greenwood, *Prevention and Intervention Programs for Juvenile Offenders*, 18 *FUTURE OF CHILDREN* 185, 194 (2008), *available at* http://www.princeton.edu/futureofchildren/publications/docs/18_02_09.pdf. More resource-intensive options such as juvenile sex offender therapy cost up to \$33,000. *Id.* at 193. By comparison, school-based preventative programs may cost less than \$5 per student. *Our Products*, KEEP A CLEAR MIND, http://www.keepclearmind.com/our_products.php (last visited May 1, 2012).

tiny fraction of teenagers unlucky enough to be caught. This leaves hundreds of thousands of teenagers engaged in potentially harmful behavior, often unaware of the attendant risks. Educational programs can more effectively guide teenagers' behavior by targeting all teenagers rather than only the few who are prosecuted for sexting.

In addition to the more traditional spheres of sex education, drug abuse awareness, and bullying prevention, sexting also bears a number of similarities to another emerging misuse of technology by teenagers: cyberbullying.¹⁶² Like sexting, cyberbullying is a growing trend among teenagers, but may be all but invisible to parents and school authorities who are less familiar with new technology.

Cyberbullying has attracted attention in the past few years, largely due to a few high profile cases where it led to extreme and tragic results.¹⁶³ In response, many states have created or increased legal penalties for cyberbullying.¹⁶⁴ Federal law, meanwhile, mandates that schools receiving certain federal funds educate students about cyberbullying,¹⁶⁵ and a number of school districts have created educational programs designed to prevent the behavior and provide resources for victims.¹⁶⁶

Sexting and cyberbullying have a great deal in common, and, in some cases, nonconsensual sharing of sexting images may be a form of cyberbullying.¹⁶⁷ In areas where preventative educational programs dealing with cyberbullying are already a part of the curriculum, information about sexting should be added as a related unit. In school districts where no such program exists, information about sexting may be incorporated into life skills classes or programs dealing with any of the other issues teenagers commonly face.

Beyond guiding teenagers' behavior through education, schools may also properly deter sexting by punishing sexting that occurs in school or disrupts school activity. While it is canonical that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"¹⁶⁸ public school officials nonetheless enjoy broad discretion in the means they use to maintain an

162. " 'Cyberbullying' describes the use of the Internet to bully peers." Renee L. Servance, *Cyberbullying, Cyber-harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1218 (2003).

163. See, e.g., Schwartz, *supra* note 16.

164. See Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 858 (2010).

165. See *id.* at 881.

166. See *id.*

167. See Schwartz, *supra* note 16.

168. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

effective educational environment.¹⁶⁹ Thus, school discipline may, without legal impediment, target speech that falls outside the reach of the criminal law.¹⁷⁰ Schools' legal authority to discipline students for speech remains limited to circumstances that affect the school environment,¹⁷¹ meaning that school discipline cannot and should not reach all cases of teen sexting. Nonetheless, school discipline in conjunction with education about sexting is a useful, legal tool for combating teen sexting.

The authority of parents to combat teen sexting is even broader than that of schools. Because parents are not state actors, the Constitution places no limits on their authority over their children, and they may take any disciplinary action that does not run afoul of other laws.¹⁷² Furthermore, the power of the law to curtail parental authority is limited by constitutional doctrine that affords parents the right to guide the moral development of their children free from undue interference by the state.¹⁷³ Legally parents thus have the broadest power to combat sexting by their children. They also have a superior practical ability to do so by controlling children's access to technology and monitoring their usage.¹⁷⁴

However, parents may be less technologically savvy than their teenage children, and they may need assistance in knowing when and how to set boundaries. Therefore, effective sexting prevention programs will include not only education for teenagers, but also information for their parents on how to monitor and protect their children as they venture into the digital realm. The next section

169. See, e.g., *Bethel Sch. Dist. No. 3 v. Fraser*, 478 U.S. 675, 687 (1986) (Blackmun, J., concurring) (discussing "the discretion school officials have to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities").

170. *Id.* at 688 ("If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.").

171. See *Morse v. Frederick*, 551 U.S. 393, 401, 405–06 (2006) (noting that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents," but holding that school disciplinary reach extended at least to an off-campus school-sponsored event during school hours).

172. *Cf. Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) ("[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.").

173. See *supra* Part II.A.2.

174. FAMILY ONLINE SAFETY INSTITUTE, WHO NEEDS PARENTAL CONTROLS? A SURVEY OF AWARENESS, ATTITUDES, AND USE OF ONLINE PARENTAL CONTROLS 3, 10 (2011), available at http://www.fosi.org/images/stories/research/fosi_hart_survey-report.pdf (finding that 93 percent of parents surveyed had set rules for their children's technology use and that 82 percent of parents found it easy or fairly easy to supervise their children's use of the Internet).

briefly outlines ways in which states can support parents and school districts in their efforts to curb sexting.

B. State Support in Curbing Teen Sexting

While criminal sanctions are not an appropriate means by which to control teen sexting, state legislatures can still play a role in curtailing the activity by providing schools and parents financial support, information, and guidance on the implementation of preventative programs.

Recognizing the need for preventative programs aimed at teen sexting, a few states have begun establishing educational programs to target the practice.¹⁷⁵ Because these programs are all relatively new, no research exists yet as to what types of programs are effective in preventing teen sexting. There are, however, studies that help identify effective educational programs in areas such as sex education and drug and alcohol abuse prevention.¹⁷⁶ Schools and legislators can therefore model programs targeting sexting on effective youth education programs on other subjects.

State legislators seeking to prevent teen sexting can provide funding for preventative education programs and help to set the curriculum for these programs. Until more studies are conducted showing what types of programs are effective in stemming sexting, they should look to other programs that have seen success. Some of these programs have succeeded in preventing drug use and other dangerous behavior among teenagers by encouraging collaboration between families and schools. One successful program has parents attend trainings,¹⁷⁷ while another sends home educational activities for students to do with their parents.¹⁷⁸ When teenagers and their parents learn together about the potential harms of sexting, parents will have the tools to monitor their children's behavior more effectively, and teenagers will know that their parents are aware of the issue and can hold them accountable for inappropriate behavior.

175. *E.g.*, S. 407, 2011 Reg. Sess. (Tex. 2011); A08131, 2011 Reg. Sess. (N.Y. 2011); S. 2907, 214th Leg., Reg. Sess. (N.J. 2011); S. 0152, 2010 Reg. Sess. (Ind. 2010).

176. *See, e.g., Alternatives to the Failed DARE (Drug Abuse Resistance Education) Program*, ALCOHOL PROBLEMS AND SOLUTIONS, <http://www2.potsdam.edu/hanson/dj/Controversies/20070111184521.html> (last visited May 1, 2012).

177. *See Middle School FAST*, FAMILIES AND SCHOOLS TOGETHER INC., <http://www.familiesandschools.org/programs/middle-school-fast.php> (last visited May 1, 2012).

178. *See Our Products*, KEEP A CLEAR MIND, http://www.keepaclearmind.com/our_products.php (last visited May 1, 2012).

CONCLUSION

Technology use is an area in which teenagers need guidance concerning safe and appropriate behavior. It is both fair and prudent to subject teenagers who use cellular phones and the Internet to adult-set limits. However, the policy in many states of attempting to deter consensual teen sexting through criminal or juvenile prosecutions is not a proper response to the problem.

Prosecution of consensual teen sexting raises serious issues of both law and policy. Rather than threatening a few unlucky teenagers with severe punishment for a widespread and victimless activity, states should focus prosecutions on cases of nonconsensual sexting. Consensual sexting should be dealt with in a manner that respects teenagers' legal rights to free speech and privacy. Anti-sexting measures should encourage all teenagers to make informed choices when using technology, rather than simply punishing the small minority of teenage sexters who happen to get caught. Educational programs should not only reach out to teenagers but also enlist the support of parents and educators. If adults tasked with teenagers' wellbeing and moral development are informed about the risks of sexting, they can better guide teenagers' use of technology and prevent many of the harms of sexting without the heavy-handed and harmful interference of criminal law.