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# SEX, CELL PHONES, PRIVACY, AND THE FIRST AMENDMENT: WHEN CHILDREN BECOME CHILD PORNOGRAPHERS AND THE LOLITA EFFECT UNDERMINES THE LAW

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## I. INTRODUCTION

It is a sure-fire recipe for legal trouble: combine hormone-raging teens with image-transmitting technologies, and then stir them together in a sex-saturated society replete with outdated laws and a criminal justice system that never could have anticipated such a combustible confluence of forces. Signs and symptoms of this salacious problem are cropping up across the United States:

- In March 2009, a fourteen-year-old boy in Brooksville, Florida, was arrested and “accused of sending a picture of his genitalia” to the cell phone of a female high school classmate.<sup>1</sup>

- That same month, a fourteen-year-old girl from Passaic County, New Jersey, faced child pornography charges “after posting nearly 30 explicit nude pictures of herself on MySpace.com—charges that could force her to register as a sex offender if convicted.”<sup>2</sup>

- In January 2009, three high school girls from Westmoreland County, Pennsylvania “were charged with manufacturing and disseminating or possess-

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<sup>1</sup> *Boy Accused of Texting Sexually Explicit Photo*, ST. PETERSBURG TIMES (Fla.), Mar. 3, 2009, at Hernando Times 3.

<sup>2</sup> Beth DeFalco, *Teen Charged with Child Porn After She Posts Nude Shots of Herself on MySpace*, VIRGINIAN-PILOT (Norfolk, Va.), Mar. 27, 2009, at A5.

ing child pornography after they allegedly sent nude or seminude cell phone pictures of themselves to three male classmates. The boys, ages 16 and 17, were charged with possession of child pornography<sup>3</sup> for having the images on their phones.<sup>4</sup> The girls involved were even younger, just fourteen and fifteen years of age.<sup>5</sup>

These events and the resulting legal actions are, quite disturbingly, far from uncommon.<sup>6</sup> Since 2008, numerous similar situations involving minors taking sexually explicit images of themselves or others and then transmitting them to other minors via cell phones or posting them on the Internet have been reported

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<sup>3</sup> Under federal statutory law, child pornography is defined as: any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—  
 (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;  
 (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or  
 (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

18 U.S.C. § 2256 (8) (Supp. 2009).

The term “sexually explicit conduct” used within the above-referenced federal statutory definition of child pornography is defined as:

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;  
 (ii) graphic or lascivious simulated;  
 (I) bestiality;  
 (II) masturbation; or  
 (III) sadistic or masochistic abuse; or  
 (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person.

18 U.S.C. § 2256 (2)(B) (Supp. 2009).

Under the Pennsylvania statute that would be relevant in this particular case, child pornography is defined as “material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act,” with prohibited sexual acts defined as “sexual intercourse . . . masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.” 18 PA. CONS. STAT. ANN. § 6312 (Supp. 2009).

<sup>4</sup> Chris A. Courogen, Lara Brenckle & Daniel Victor, *Police Call 3 Teen Girls’ ‘Sexted’ Photos ‘Dumb Stuff,’* PATRIOT-NEWS (Harrisburg, Pa.), Jan. 30, 2009, at A1.

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

<sup>6</sup> The *Christian Science Monitor* reported in late April of 2009 that “[l]egal action on sexting is moving rapidly. At least 20 prosecutions have been undertaken or threatened in recent months—some involving criminal child-pornography laws that could list convicted teens as sex offenders.” Editorial, *‘Sexting’ Overreach*, CHRISTIAN SCI. MONITOR, Apr. 28, 2009, <http://www.csmonitor.com/2009/0428/p08s03-comv.html>.

nationwide.<sup>7</sup> When these incidents center on the transmission of such photographs via cell phones, the process is dubbed “sexting,”<sup>8</sup> the so-called “naughty twin”<sup>9</sup> of text messaging. The sexted images, in turn, are sometimes further forwarded by the initial recipient, without the consent or permission of the

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<sup>7</sup> See, e.g., Jack Minch & Kris Pisarik, *Cell-phone Photo of Nude Girl Spurs Billerica Police Probe*, SUN (Lowell, Mass.), Jan. 31, 2009, available at 2009 WLNR 1878831 (describing a police investigation of reports of “[a] nude or seminude picture of a 14-year-old Marshall Middle School girl circulating through the community by cell-phone text messages” and noting that local police are classifying the photo as child pornography); Leslie Brody, *Porn Gets Students Booted; Used Cellphones to Trade Photos of Girls*, RECORD (Bergen County, N.J.), June 10, 2008, at A-1, available at 2008 WLNR 10937828 (reporting that “[s]even ninth-graders at Pascack Valley High School have been suspended for the rest of the school year for distributing racy photos of middle school girls via cellphones and school-issued laptops,” adding that “[t]he girls were seen from the waist up in various states of undress, typically with bare breasts,” and noting that it was “unclear whether the shots were self-portraits or snapped by others”); Melinda Rogers, *Teens Face Charges for Trading Nude Photos*, SALT LAKE TRIB., Mar. 14, 2008, at B1 (describing the situation in Davis County, Utah, where police and school officials were investigating “several Farmington Junior High teenagers who traded nude photos of themselves over cell phones”); Jacqui Seibel & Erin Richards, *Girl’s Nude Photo Circulates; District Urges Phone Checks*, MILWAUKEE J. SENTINEL, Feb. 18, 2009, at 1B (describing an incident in which a 14-year-old girl in Waukesha, Wisconsin, sent a nude photo of herself “to her boyfriend, but when the couple broke up, he forwarded it to other students using his cell phone” and the photo ultimately “ended up in the hands of hundreds of area high school students”); Lori Tobias, *‘Sexting’: Dumb Prank or Child Porn?*, SUNDAY OREGONIAN (Portland, Or.), Mar. 29, 2009, at B1 (describing an incident in which “a 17-year-old Oregon girl faces years in prison after using her cell phone at a drunken party in Newport last year to record, for a minute or less, a 16-year-old girl involved in crude sexual activity”); Leanne Smith, *Students Suspended Over Revealing Cell Phone Photo*, ANN ARBOR NEWS (Mich.), Oct. 24, 2008, at A1, available at 2008 WLNR 20625025 (reporting the suspension of several students at Pinckney Community High School in Michigan for “receiving or transmitting a revealing photo a 14-year-old girl took of herself with a cell phone and sent to her friends,” and noting that “the photo of the Pinckney girl, which showed her genitals and her face, has reportedly been transmitted to at least 200 students throughout Livingston County and beyond”); Dave Wedge, *3 Teens Suspended in Topless Photo Flap*, BOSTON HERALD, Feb. 14, 2009, at 2 (reporting that “six Cape Cod boys, ages 12 to 14, were caught in a ‘sexting’ scandal for allegedly messaging nude pictures of a 13-year-old girl via cell phone. The six are facing possible child pornography charges”).

<sup>8</sup> See Jennifer Baker, *Law Would Cover ‘Sexting’: Teens’ Nude Images a New Problem*, CINCINNATI ENQUIRER, Mar. 27, 2009, at B1 (describing “sexting” as “minors sending nude photographs and videos of themselves and others through cell phones”); Dan Herbeck, *Texting + Sex = Teens Flirting with Porn: ‘Sexting’ Youth Exposing Themselves to Greater Dangers Than They Realize*, BUFFALO NEWS, Jan. 25, 2009, at A1 (defining “sexting” as the practice of “using a cell phone’s text message function to send lewd pictures or messages to others,” and noting that “[i]n most cases, young girls willingly send provocative pictures of themselves to boyfriends. But sometimes, the pictures wind up on the Internet and in the possession of sexual predators”); Jeff Wiehe, *Racy ‘Sexting’ Photos Piquing Police Interest: 2 Juveniles at Local Schools Facing Charges*, J. GAZETTE (Fort Wayne, Ind.), Jan. 11, 2009, at 1A (identifying “sexting” as “sending explicit pictures or videos by cell phone”).

<sup>9</sup> Maria Puente, *Relationships in a Twist over Twitter: Glued to Your Gadget? You May Be Losing Human Link*, USA TODAY, Apr. 15, 2009, at 1D.

original sender and/or person in the photograph.<sup>10</sup> These forwarded photos can—in the parlance of the day—go “viral,”<sup>11</sup> reaching large audiences as they spread wildly from minor to minor.

The harms that ultimately may arise from seemingly innocent acts of sexual exuberance and teen spirit are quite real, stretching beyond sexual exploitation<sup>12</sup> and embarrassment<sup>13</sup> to commercial exploitation<sup>14</sup> and even death.<sup>15</sup> For instance, in Syracuse, New York, “several teenage girls who ‘sexted’ revealing poses to their boyfriends’ phones discovered that another boy had collected them from the web and was selling a DVD of them.”<sup>16</sup> Much more tragically, in the summer of 2008, eighteen-year-old Jessica Logan, committed suicide after she “sent a nude picture of herself to her boyfriend that was later spread throughout her Cincinnati-area high school. She was harassed daily at school by a group of girls.”<sup>17</sup> As MSNBC.com reported, “[t]he girls were harassing her, calling her a slut and a whore. She was miserable and depressed, afraid even to go to school.”<sup>18</sup> In the spring of 2009, Jessica Logan’s parents began to lobby for a federal law to address sexting.<sup>19</sup>

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<sup>10</sup> See, e.g., Courtney Blanchard, *Local Officials Confront ‘Sexting’ Case*, TELEGRAPH HERALD (Dubuque, Iowa), Feb. 21, 2009, at A1, available at LEXIS, News & Business Library (describing a recent case in Dubuque, Iowa in which a female high school student “sent a nude picture of herself from the waist-up to her boyfriend via cell phone, and he forwarded the picture to others without her permission”).

<sup>11</sup> Viral videos involve “[p]ass-alongs” of what is “often user-created” content that spreads “rapidly, widely and organically.” *Video Search Terms*, ADVERTISING AGE, July 11, 2005, at S-7.

<sup>12</sup> Pedophiles, for instance, might use such images once they discover them. Bill Shaw Jr., the district attorney in Clearfield County, Pennsylvania, recently observed that once the racy images that teens take of themselves “hit the Internet, you lose control . . . [a]nd they can show up anywhere, including sites designed for child pornography.” Sara Ganim, *Police Taking ‘Sexting’ Seriously*, CENTRE DAILY TIMES (State College, Pa.), Feb. 24, 2009, at A1.

<sup>13</sup> For instance, the Dean of Students at Perry Junior High School in New York described a teenage boy at that school as being “embarrassed” and “harassed” by other students after he reportedly “took a picture exposing himself and sent it to a female classmate. She then forwarded the picture, which was then forwarded on to more students and on to an estimated 300 or more students.” Rebecca Croniser, *‘Sexting’ Investigated at N. Hartford School*, OBSERVER-DISPATCH (Utica, N.Y.), Feb. 27, 2009, at 1B.

<sup>14</sup> Ana Veciana-Suarez, *Our Past Adolescent Antics Didn’t Live on in Perpetuity*, MIAMI HERALD, June 14, 2008, at 1E.

<sup>15</sup> Jim Siegel, *Lawmaker Crafting Bill to Set Penalty for Teens’ ‘Sexting,’* COLUMBUS DISPATCH, Mar. 27, 2009, at B3.

<sup>16</sup> Veciana-Suarez, *supra* note 14.

<sup>17</sup> Siegel, *supra* note 15.

<sup>18</sup> Mike Celizic, *Her Teen Committed Suicide Over ‘Sexting,’* MSNBC.COM, Mar. 6, 2009, <http://www.msnbc.msn.com/id/29546030>.

<sup>19</sup> Bob Stiles, *Effort Begins to Standardize Sexting Penalty*, TRIB. REV. (Greensburg, Pa.), Apr. 1, 2009, available at 2009 WLNR 6108054. Rep. Wasserman introduced such a bill, the Adolescent Web Awareness Requires Education Act, on Sept. 23, 2009. Adolescent Web Awareness Requires Education Act, H.R. 3630, 111th Cong. (2009).

The other primary sexting harm, of course, is to those minors who face child pornography charges for taking, sending, disseminating, and/or possessing sexual images of themselves and/or other minors via cell phones. If convicted, these children could be legally labeled as sex offenders,<sup>20</sup> a stigma<sup>21</sup> that could haunt them throughout their lives, all for what one might consider a youthful, sophomoric indiscretion.<sup>22</sup> Some observers, such as the editorial board of the *Roanoke Times*, have opined that such punishment is too severe. In March 2009, it succinctly summed up a layperson's argument against branding minors who sext as child pornographers, writing:

We have a name for it: sexting. But the law hasn't caught up to the technology that's given rise to the phenomenon: teenagers gone wild taking and sending nude photos of themselves, their friends and ex-friends on their cell phones or other digital devices.

If the subject is under 18 years old, what they are doing is, by definition, producing, possessing and distributing child pornography, felonies that can brand them as sex offenders.

That's according to the law. According to society's standards, what they are, in most cases, are normal teenagers: adolescents fixated on sex who are making poor judgments—sometimes carelessly cruel or self-destructive. They may be deserving of punishment, to be sure.

But child pornographers they are not.

It's time the law caught up with the technology, in Virginia and every other state. Sexting among underage peers should not be classified as a sex offense. It's dumb and damaging in ways that adolescents cannot fully understand, despite parental warnings—risky behavior that might come back to haunt.<sup>23</sup>

This view may be a manifestation of what journalist Alexandra Marks calls “the disconnect between the legal system and an increasingly sexualized adolescent cyberculture.”<sup>24</sup> Some argue that sexting arises within a youth culture

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<sup>20</sup> Editorial, *supra* note 6.

<sup>21</sup> See LAWRENCE M. FRIEDMAN, *LAW AND SOCIETY: AN INTRODUCTION* 118 (1977) (defining stigma as “a label attached to a person, which stimulates punishing reactions from people in surrounding society” that may be manifested when “an employer refuses to give a convict a job; people next door refuse to be friendly; someone rejects the convict's friendship”).

<sup>22</sup> See Dane Stickney, *Teen Sext: Phone Fad Leads to Trouble*, OMAHA WORLD-HERALD, Feb. 22, 2009, at 1A (“Teens who text seemingly playful pictures to their boyfriend or girlfriend could face felony child pornography charges that would require them to register as sex offenders for as little as 10 years or as long as life.”); Kelli Wynn, *Do U Know If UR Kids R Sexting?*, DAYTON DAILY NEWS (Ohio), Mar. 26, 2009, at RD4 (describing how a juvenile who sends photographs of a sexual nature via cell phones could be “labeled a sexual offender”).

<sup>23</sup> Editorial, *There are Sex Crimes, Then There's Sexting: Sexting Among Young Friends Requires a New Look at Legal Standards*, ROANOKE TIMES (Va.), Mar. 23, 2009, at A14.

<sup>24</sup> Alexandra Marks, *Charges Against 'Sexting' Teenagers Highlight Legal Gaps*, CHRISTIAN SCI. MON., Mar. 30, 2009, <http://features.csmonitor.com/innovation/2009/03/30/charges-against-sexting-teenagers-highlight-legal-gaps/>.

that normalizes “the public sharing of every private thought and act.”<sup>25</sup>

With this background in mind, this article raises and examines, for one of the first times in the context of a law journal article,<sup>26</sup> the myriad and complex legal issues raised by sexting. Sexting constitutes a technologically-driven social phenomenon among minors that tests the boundaries of minors’ First Amendment<sup>27</sup> speech rights,<sup>28</sup> as well as long-standing laws and judicial opinions that prohibit the manufacture, distribution, and possession of child pornography as a category of speech that, like obscenity,<sup>29</sup> is not protected by the First Amendment.<sup>30</sup> It is particularly relevant because, as one newspaper re-

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<sup>25</sup> Sally Kalson, *Sexting . . . And Other Stupid Teen Tricks: What’s Stupider, Though, Are Adults Who Criminalize Youthful Indiscretions*, PITT. POST-GAZETTE, Mar. 29, 2009, at G-3.

<sup>26</sup> On May 1, 2009, the author of this article searched the “Law Reviews” portion of the LexisNexis Academic database for all law review articles containing the word “sexting.” The search returned no articles including the word “sexting.” A subsequent review in August of 2009 uncovered one brief mention of “sexting,” but the article did not discuss the issue in-depth. *See Summary, Recent Court Decisions and Legislation Impacting Juveniles*, 13 U.C. DAVIS J. JUV. L. & POLICY 416 (2009) (featuring a summary of H.B. 09-1132, titled “Use of Messaging Systems to Commit Unlawful Activity,” which was introduced during the 2009 Colorado First Regular Legislative Session).

<sup>27</sup> The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than eight decades ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>28</sup> *See Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 576–77 (7th Cir. 2001) (citations omitted). The court observed that “[c]hildren have First Amendment rights” and furthermore

[since] eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise. And since an eighteen-year-old’s right to vote is a right personal to him rather than a right to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either.

*Id.*

<sup>29</sup> Obscenity is not protected by the First Amendment’s guarantee of free speech. *See Roth v. United States*, 354 U.S. 476, 485 (1957). The modern test for obscenity, which was established by the U.S. Supreme Court in *Miller v. California* more than thirty-five years ago, focuses on:

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

*Miller v. California*, 413 U.S. 15, 24 (1973) (internal citation omitted).

<sup>30</sup> The U.S. Supreme Court has held that the distribution and possession of child pornography is not protected by the First Amendment. *See United States v. Williams*, 128 S. Ct. 1830, 1836 (2008) (“We have held that a statute which proscribes the distribution of all

cently reported, “[l]aw enforcement officials have been struggling to find ways to deal with young people ‘sexting.’”<sup>31</sup> To put it differently, technology and teens—the latter, quite literally, in some sexting cases—have outstripped child pornography laws and their intent.

This article has two primary goals. First, it attempts to identify and raise questions posed by sexting that might affect and influence how the law treats it. Second, it seeks to address these questions in ways that help to provide a framework for analyzing sexting cases that makes key distinctions between variations of the act of sexting that could (or should) impact a court or legislature’s treatment of it. However, it would be presumptuous to definitively answer all of these questions, given that the legal debate on sexting is only now beginning to emerge.

Part II of this article poses and addresses legal questions raised by sexting by embedding those queries within a larger, macro-level context of cultural and legal battles over sexuality, privacy, and media content. It also points out that some instances of sexting probably do not fall within the federal definition of child pornography, thus suggesting that much of the discussion today about treating sexting as child pornography may be overblown. Part III then synthesizes the questions and analysis set forth in Part II in order to provide a framework of key considerations for courts and legislative bodies to evaluate when determining how to address the issue of sexting.

Before going further, however, it is necessary to provide a working definition of sexting, as that term is employed in the rest of this article. In particular, as used here, sexting includes not only the use of cell phones by minors to take and disseminate photographs of themselves and/or other minors in various stages and states of undress and/or engaging in sexually explicit conduct, but it also encompasses instances where those images are posted on the Internet by minors. Importantly, this article’s definition of sexting does not include adults who take or disseminate sexual images of either themselves or minors to other

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child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment . . . [and] we have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults.”); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (“As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does *not* embrace certain categories of speech, including defamation, incitement, obscenity, and *pornography produced with real children.*”) (emphasis added); *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (upholding, against a First Amendment challenge, an Ohio law banning the possession of child pornography); *New York v. Ferber*, 458 U.S. 747, 758 (1982) (“[L]egislation proscribing the production of or otherwise combating ‘child pornography’ . . . easily passes muster under the First Amendment.”).

<sup>31</sup> Kelly Heyboer, *When Does Nudity Become Pornography?*, STAR-LEDGER (Newark, N.J.), Apr. 1, 2009, at Editorial 13, available at 2009 WLNR 6178288.

children;<sup>32</sup> these scenarios would raise substantially different issues about sexual predators, child pornography, and harassment by communication.<sup>33</sup>

## II. SEXTING AND THE QUESTIONS IT RAISES FOR THE LAW

How should the legal system address and regulate—or, perhaps, not regulate—the practice of sexting? The answer to that question depends on how one reasons through and answers some much more foundational and fundamental questions in eight different areas. Those eight areas are as follows:

- **Prevalence and Perspective:** *Is sexting so widespread and prevalent that it necessitates new legislative action in order to be adequately addressed by the legal system? If sexting is widespread, should that be cause for panic, so as to justify either the creation of new laws specifically designed to regulate it or the application of existing laws targeting child pornography? And if sexting is widespread, why should the legal system be alarmed and react to it by severely punishing teens, particularly if sexting merely is reflective of (and a manifestation or symptom of) a sex-saturated social and cultural reality in which children today in the United States are increasingly sexualized?*

- **Injury/Harm:** *Is the practice of sexting sufficiently harmful, injurious, and dangerous enough to necessitate new legislative action? If it is injurious, then what are the harms that it may cause?*

- **Victims:** *If sexting actually is a widespread phenomenon and one that is harmful and injurious, such that it may require legislative action, then who are the individuals potentially harmed and injured by sexting?*

- **Variations of Sexting:** *Are there different forms and variations of sexting that may necessitate different treatment and levels of regulation by the crimi-*

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<sup>32</sup> For instance, a thirty-two-year-old Florida middle-school teacher named Christy Lynn Martin was charged in 2009 with “transmitting pornographic images through an electronic device and transmitting material harmful to a minor” after she allegedly sent via her cell phone sexually explicit images of herself to an eighth-grade boy. Curtis Krueger, *Teacher, Teen Boy Intimate in School*, ST. PETERSBURG TIMES (Fla.), Apr. 14, 2009, at 3B, available at 2009 WLNR 6961630.

<sup>33</sup> For example, a twenty-four-year-old man from Virginia Beach, Virginia, was sentenced to one year in prison in February 2009 for soliciting nude photographs of a minor after he sent a sixteen-year-old girl a nude photo of himself and asked her for one of herself. See Reed Williams, *Man Sentenced for ‘Sexting’ with Girl*, RICHMOND TIMES-DISPATCH (Va.), Feb. 24, 2009, at B3. Similarly, a nineteen-year-old man was arrested in March 2009 in Johnson County, Indiana, and was charged with “sexual misconduct with a minor, furnishing alcohol to a minor and contributing to the delinquency of a minor” after police claimed “he hosted a party where teenagers allegedly videotaped two underaged teens having sex, then distributed the video via text message.” *Nineveh Man Arrested in Sexting Case*, ASSOC. PRESS STATE & LOCAL WIRE, Mar. 19, 2009, available at LEXIS, News & Business Library.



*nal or juvenile justice systems? In other words, should all acts of sexting be treated alike under one-size-fits-all statutes?*

- *Alternative Remedies/Sanctions: Are there methods and remedies other than the intervention of the criminal and/or juvenile justice systems that can be applied to adequately address problems and harms caused by the practice of sexting? For instance, is intervention at either the level of the public school system via school punishment or through tort remedies via the civil justice system sufficient to handle whatever problems may be caused by the practice of sexting?*

- *First Amendment Concerns: What are the First Amendment interests at stake when minors engage in sexting?*

- *Current Laws & Proposed Laws: Should extant criminal statutes targeting child pornography be applied to regulate instances of sexting rather than creating new and separate laws specifically addressing it? As alternatives to child pornography laws, what legislative proposals or law enforcement initiatives have been taken so far to address sexting?*

- *Enforceability/Deterrence: Would criminal laws targeting the practice of sexting be enforceable in a clear and consistent manner? Would such laws have a deterrent effect on minors sufficient to reduce the prevalence of sexting?*

These questions are addressed below. It is not, however, the goal of this article to definitively resolve and answer these questions, but rather to suggest that they must be asked and analyzed by legislative bodies and the legal system as a whole when deciding how to address the practice of sexting. Where possible, the article contextualizes these questions with real-world data and studies, rather than viewing them in a legal vacuum.

#### A. Prevalence of Sexting: Putting It All Into Perspective

If sexting is rare, then its scarcity would seem to mitigate the need to create new laws specifically designed to handle and address those instances of it that do arise. After all, why establish new laws if sexting really is not a widespread problem? And if sexting is rare, then why not just leave it to local prosecutors to handle on a case-by-case basis?

In spring 2009, when sexting started to gain traction in the news media, there was only one survey addressing sexting's prevalence. The National Cam-

paign to Prevent Teen and Unplanned Pregnancy<sup>34</sup> released a study in late 2008 called “Sex and Tech: Results from a Survey of Teens and Young Adults.”<sup>35</sup> Of the 653 teens (ages thirteen to nineteen-years-old) surveyed, twenty percent said that they had sent or posted nude or seminude pictures or video of themselves, including twenty-two percent of teen girls and eighteen percent of teen boys surveyed.<sup>36</sup> Among those who had actually engaged in this practice, seventy-one percent of teen girls and sixty-seven percent of teen boys said that they had sent or posted this content to a boyfriend or girlfriend.<sup>37</sup> In addition, twenty-one percent of teen girls and thirty-nine percent of teen boys said that they had transmitted “such content to someone they wanted to date or hook up with.”<sup>38</sup>

Do these figures mean that sexting is sufficiently widespread to warrant the creation of new laws to address it? The answer to that question obviously rests in the hands of lawmakers, not the authors of law journal articles. The word “widespread” may mean different things to different people. But in answering the question above, lawmakers would be wise to view this data in a larger social context, taking into account what those who engage in texting actually understand about the practice, as well as information regarding the sexualization and sex practices of minors in the United States.

For instance, the National Campaign to Prevent Teen and Unplanned Pregnancy survey revealed that many teens do, in fact, understand that the sext messages they send to a person might be forwarded by that person to others.<sup>39</sup> Put differently, a number of teens apparently are aware of the risk that sexually suggestive images of themselves might proliferate beyond the control of themselves and the initial recipient. Such downstream distribution is fairly common, as the survey found that thirty-eight percent of teen girls and thirty-nine per-

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<sup>34</sup> This organization describes its mission in its official website as seeking: to improve the lives and future prospects of children and families and, in particular, to help ensure that children are born into stable, two-parent families who are committed to and ready for the demanding task of raising the next generation. Our specific strategy is to prevent teen pregnancy and unplanned pregnancy among single, young adults. We support a combination of responsible values and behavior by both men and women and responsible policies in both the public and private sectors.

Our Mission, The National Campaign to Prevent Teen and Unplanned Pregnancy, <http://www.thenationalcampaign.org/about-us/our-mission.aspx> (last visited Aug. 20, 2009).

<sup>35</sup> NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS (2008) [hereinafter SEX AND TECH REPORT], available at [http://www.thenationalcampaign.org/sextech/PDF/SexTech\\_Summary.pdf](http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf).

<sup>36</sup> *Id.* at 1.

<sup>37</sup> *Id.* at 2.

<sup>38</sup> *Id.*

<sup>39</sup> *See id.* at 3 (providing that “44% of both teen girls and teen boys say it is common for sexually suggestive text messages to get shared with people other than the intended recipient”).

cent of teen boys “have had sexually suggestive text messages or emails—originally meant for someone else—shared with them.”<sup>40</sup>

### 1. “Oh, She’s Just Being Miley”<sup>41</sup>

Should the legal system be surprised by figures like those in the National Campaign to Prevent Teen and Unplanned Pregnancy survey or do they merely reflect the values of a highly sexualized society, particularly when it comes to mediated and cultural images of girls and women? It is difficult, at this point, not to think about the controversy raised by the June 2008 *Vanity Fair* photo spread of then fifteen-year-old starlet and singer Miley Cyrus.<sup>42</sup> As the editors of *Maclean’s* magazine wrote:

Celebrity photographer Annie Leibovitz shot Miley for the June issue of *Vanity Fair*. The most striking picture has the 15-year-old naked to the waist with a satin sheet tucked under her arm and chest. Her disheveled hair and knowing stare suggests she is not just waiting to be tucked in. That the photo presents a sexualized view of the under-aged actress is unquestionable. So much for Miley the role model.<sup>43</sup>

Miley Cyrus would later end up in her own sexting scandal, when “[p]rovocative, but not nude, pictures of Cyrus wound up on the Internet last year after a hacker accessed her e-mail account. Cyrus had sent the pictures to a boyfriend, according to media reports.”<sup>44</sup> Such photos of teen starlets arguably can influence other young girls to engage in similar practices.<sup>45</sup> In our ce-

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

<sup>41</sup> See MILEY CYRUS, *See You Again*, on HANNAH MONTANA 2/MEET MILEY CYRUS (Disney 2007).

<sup>42</sup> See John Anderson, *You Grow, Girl; ‘Hannah Montana’ Star Miley Cyrus Wants the Best of Both Worlds as she Moves from Child Star to Adult Actress*, NEWSDAY, Apr. 5, 2009, at C6, available at LEXIS, News & Business Library (providing general background on Miley Cyrus and describing the *Vanity Fair* photos as “[f]ar from salacious, but certainly suggestive”); see also *Behind the Scenes with Miley Cyrus*, VANITYFAIR.COM, Apr. 28, 2008,

[http://www.vanityfair.com/culture/features/2008/06/miley\\_slideshow200806#slide=15](http://www.vanityfair.com/culture/features/2008/06/miley_slideshow200806#slide=15).

<sup>43</sup> Editorial, *A Plea for Decency in the Age of Celebrity*, MACLEAN’S, May 12, 2008, at 2.

<sup>44</sup> Dan Herbeck, *Exposed Stars Send Wrong Message*, BUFFALO NEWS, Jan. 25, 2009, at A1.

<sup>45</sup> As one newspaper, quoting an expert in this area, reported:

More teenagers today are feeling pressure to create larger identities for themselves like the celebrities they see depicted in national media, said Laurie Ouellette, a communication studies professor and reality TV expert at the University of Minnesota. In an era where teens aim to increase their list of “friends” on social networking sites, that can mean flashing nudity in an effort to compete for attention.

Kevin Giles, *Teens Use E-Nudity to Get Noticed*, STAR TRIB. (Minneapolis, Minn.), May 5, 2008, at B1.

lebrity-saturated culture, these girls may be seeking their own fifteen minutes of Warholian fame—even if that fame is just online, via cell phone or in school.<sup>46</sup> When young teen girls sext racy images of themselves to their boy-friends or people with whom they would like to hook up, they may simply be imitating their celebrity role models; nothing more and nothing less.

## 2. *Self-Sexualization and Self-Exploitation*

The American Psychological Association found in its 2007 “Report of the APA Task Force on the Sexualization of Girls” (“APA Report”)<sup>47</sup> that:

As girls participate actively in a consumer culture (often buying products and clothes designed to make them look physically appealing and sexy) and make choices about how to behave and whom to become (often styling their identities after the sexy celebrities who populate their cultural landscape), they are, in effect, sexualizing themselves. Keen observers of how social processes operate, girls anticipate that they will accrue social advantages, such as popularity, for buying into the sexualization of girls (i.e., themselves), and they fear social rejection for not doing so.<sup>48</sup>

The APA Report refers to this concept as “self-sexualization,”<sup>49</sup> in which “[g]irls may treat and experience themselves as sexual objects”<sup>50</sup> based on a type of reward system that holds, as its premise, that “[i]f girls learn that sexualized behavior and appearance are approved of and rewarded by society and by the people (e.g., peers) whose opinions matter most to them, they are likely to internalize these standards, thus engaging in self-sexualization.”<sup>51</sup>

Under this notion, then, girls who take sexually explicit cell phone pictures of themselves and send them to their boyfriends or potential boyfriends are engaging in self-sexualization via a medium and technology with which they are intimately familiar. If they perceive there are social advantages and rewards

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<sup>46</sup> Andy Warhol claimed that in the future everyone will have fifteen minutes of fame. See Reni Celeste, *Screen Idols: The Tragedy of Falling Stars*, J. POPULAR FILM & TELEVISION, Spring 2005, at 29, 31 (writing that “Warhol, in his famous credo that in the future everyone will have fifteen minutes of fame, points to this democracy of stardom, its shifting roles, and the way its pleasures have themselves become a commodity that could be marketed in a utopian future”); Abe Novick, *Isn't 15 Minutes Long Enough?*, MEDIAWEEK, Mar. 25, 2002, at 11 (writing that Warhol “coined the phrase, ‘In the future, everyone will be famous for 15 minutes’”).

<sup>47</sup> AMERICAN PSYCHOLOGICAL ASSOCIATION, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS (2007) [hereinafter REPORT OF THE APA TASK FORCE], available at <http://www.apa.org/pi/wpo/sexualizationrep.pdf>.

<sup>48</sup> *Id.* at 18.

<sup>49</sup> *Id.* at 3.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

from such conduct—in this scenario, the attention and affection of a boy or boys—then perhaps we should not be surprised at all by the twenty percent figure regarding the prevalence of sexting among teens.<sup>52</sup>

That minors are interested in the opposite sex, of course, should also come as no surprise to adults, as a recent study found that “36% of 13-year-olds, 53% of 15-year-olds, and 70% of 17-year-olds report having had a ‘special’ romantic relationship in the previous 18 months. By middle adolescence, most individuals have been involved in at least one romantic relationship.”<sup>53</sup> Sexting may thus only be a high-tech invitation to, or a prurient part of, such courtships and relationships—at least when one minor voluntarily sends a sexually explicit image of himself or herself to another minor. In fact, the survey conducted on behalf of the National Campaign to Prevent Teen and Unwanted Pregnancy found that twenty-nine percent of teens surveyed “believe those exchanging sexually suggestive content are ‘expected’ to date or hook up”<sup>54</sup> and that thirty-eight percent believe that “exchanging sexually suggestive content makes dating or hooking up with others more likely.”<sup>55</sup>

Twenty percent of minors may engage in sexting, but that percentage pales in comparison to studies that have found that “more than half of American teenagers ages 15 to 19 have engaged in oral sex, with females and males reporting similar levels of experience.”<sup>56</sup> Oral sex can be dangerous in ways that make the prevalence of teen sexting seem somewhat meaningless.<sup>57</sup> This is especially true because studies have suggested that teens do not understand the risks of disease contraction from oral sex.<sup>58</sup> This raises the question of whether

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<sup>52</sup> See SEX AND TECH REPORT, *supra* note 35, at 1.

<sup>53</sup> W. Andrew Collins et al., *Adolescent Romantic Relationships*, 60 ANN. REV. PSYCHOL. 631, 633 (2009).

<sup>54</sup> SEX AND TECH REPORT, *supra* note 35, at 3.

<sup>55</sup> *Id.*

<sup>56</sup> Laura Sessions Stepp, *Oral Sex Prevalent Among Teens: Majority of Those 15–19 Engage in Practice, U.S. Study Finds*, WASH. POST, Sept. 16, 2005, at A7. See Press Release, Guttmacher Institute, Perception That Teens Frequently Substitute Oral Sex for Intercourse a Myth (May 20, 2008), available at <http://www.guttmacher.org/media/nr/2008/05/20/index.html> (describing a Guttmacher Institute study as finding that “[s]lightly more than half (55%) of 15–19-year-olds have engaged in heterosexual oral sex”).

<sup>57</sup> Centers for Disease Control and Prevention, Can I Get HIV From Oral Sex?, <http://www.cdc.gov/hiv/resources/qa/qa19.htm> (last visited Apr. 5, 2009) (observing that “it is possible for either partner to become infected with HIV through performing or receiving oral sex”).

<sup>58</sup> See Press Release, University of California, Teens Believe Oral Sex is Safer, More Acceptable to Peers (Apr. 4, 2005), available at <http://www.universityofcalifornia.edu/news/article/7038> (describing the results of a “survey of 580 ethnically diverse Northern California ninth-graders . . . investigat[ing] adolescents’ perceptions of the consequences of having oral sex as opposed to vaginal sex” and finding that “one in seven participants thought that the risk of STDs from oral sex would be zero”).

society and the legal system really need to be so concerned about sexting when there are far greater sexual problems, from sexually transmitted infections to unplanned pregnancies, that teens must confront.

A more recent study, published in 2009, observed that we live in a culture that “condones a media environment replete with sexual content,”<sup>59</sup> in which “the media have become important sexual socialization agents.”<sup>60</sup> The results of the study showed that “by the end of middle school many young people have seen sexually explicit content on the Internet, in X-rated movies, or in magazines. Early exposure is related to subsequent attitudes about gender roles, personal sexual norms, sexual harassment, and sexual behaviors.”<sup>61</sup>

Given such exposure to sexually explicit material, including via technologies like the Internet with which today’s children have grown up, it may not be startling to learn that kids are sexting. Perhaps legislators should view it almost as a natural course of events today, fueled by evolving technologies, rather than react to it with shock and outrage. When minors post their own cell phone-captured images on the Internet, it may just be a part of their own sexual self-exploration. At least one study found that “the Internet offers an alternate venue for identity exploration equal to that in real-life interactions.”<sup>62</sup> In fact, another study found that “[p]readolescents between 9 and 12 years of age were found to be significantly more likely to use the Internet for identity exploration than 13- to 18-year-olds.”<sup>63</sup> If adolescents and pre-adolescents experiment with their identities on the Internet by creating websites for themselves,<sup>64</sup> then it probably is not too much of a stretch to find that they would experiment with cell phones and the sexting of images as well.

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<sup>59</sup> Jane D. Brown & Kelly L. L’Engle, *X-Rated: Sexual Attitudes and Behaviors Associated With U.S. Early Adolescents’ Exposure to Sexually Explicit Media*, 36 COMM. RES. 129, 130 (2009).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 144.

<sup>62</sup> Kelly L. Schmitt et al., *Personal Homepage Construction as an Expression of Social Development*, 44 DEV. PSYCHOL. 496, 497 (2008).

<sup>63</sup> *Id.*

<sup>64</sup> *See id.* at 504 (finding that “[c]hildren who create personal homepages have strong feelings of mastery and use personal homepages to express to others who they are. The nature of the medium provides them with an outlet for expressing who they are in a way that may be more comfortable than telling people face-to-face” and noting that “given the similarities between personal homepages and social networking sites, one may assume these findings may generalize to social networking sites”).

### 3. *The Lolita Effect*

In her 2008 book, *The Lolita Effect*,<sup>65</sup> M. Gigi Durham of the University of Iowa<sup>66</sup> writes that children today in the United States are “getting the message that sexual behavior is appropriate at very early ages. As they enter the ‘tween years—eight to twelve—many of them begin to engage in sexual activity. But even before that, sexualized behaviors are becoming more evident.”<sup>67</sup>

Sexting, perhaps, merely is one of those behaviors, and we should not be shocked by it or over-react by applying child pornography laws to the children who engage in it. After all, Durham points out, “our media and our culture have produced a gathering of ‘prostitots’—hypersexualized girls,”<sup>68</sup> and “very young girls are becoming involved in a sphere of fashion, images, and activities that encourage them to flirt with a decidedly grown-up up eroticism and sexuality . . . .”<sup>69</sup> When young girls sext, it simply may be a symptom or objective manifestation of such flirtation with eroticism and sexuality. As Amy Kossoff Smith, founder of The Business of Motherhood, recently wrote, sexting for teenage girls may simply represent “a strategy to hold onto boyfriends.”<sup>70</sup>

Professor Durham writes that “[t]he idea of the sexy little girl is a potent one in the adult imagination, and in recent years has become insistently present in mainstream, as well as alternative media.”<sup>71</sup> She cites the example of Britney Spears, who posed in 1998 wearing a school-girl uniform, to illustrate this point.<sup>72</sup> Should the legal system, then, really be shocked by sexting, with little girls trying to be sexy for their boyfriends or prospective boyfriends? Should society try to prosecute those girls as child pornographers and treat them like pedophiles when they are no more than budding Britneys?

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<sup>65</sup> M. GIGI DURHAM, *THE LOLITA EFFECT: THE MEDIA SEXUALIZATION OF YOUNG GIRLS AND WHAT WE CAN DO ABOUT IT* (2008). Durham defines the Lolita Effect as “the distorted and delusional set of myths about girls’ sexuality that circulates widely in our culture and throughout the world, that works to limit, undermine, and restrict girls’ sexual progress.” *Id.* at 12. She adds that “[t]he Lolita Effect promises sex without strings attached: it’s a purely pleasurable, consumerist fantasy that reaps profits for the media industries, but pays no heed to the real world that girls inhabit.” *Id.* at 203–04. The ultimate impact of the Lolita Effect is society’s acceptance of the notion “that young girls’ bodies are an appropriate element of sexual commerce.” *Id.* at 205.

<sup>66</sup> Biography of Meenakshi Gigi Durham, School of Journalism and Mass Communication, University of Iowa, [http://www.uiowa.edu/jmc/faculty/durham\\_g.html](http://www.uiowa.edu/jmc/faculty/durham_g.html) (last visited Aug. 21, 2009).

<sup>67</sup> DURHAM, *supra* note 65, at 48.

<sup>68</sup> *Id.* at 27.

<sup>69</sup> *Id.* at 21.

<sup>70</sup> Amy Kossoff Smith, *Sexting: How Parents Can Keep Kids Safe*, MONITOR (McAllen, Tex.), May 4, 2009, available at LEXIS, News & Business Library.

<sup>71</sup> DURHAM, *supra* note 65, at 114.

<sup>72</sup> *Id.* at 114–15.

#### 4. *The Medium is the Message*

Another factor that the legal system should take into account is the medium used to sext. The cellular phone, for example, is “the single-most popular consumer electronic device.”<sup>73</sup> It is a medium with which teens are intimately familiar and comfortable; as sociologist Rich Ling<sup>74</sup> recently wrote, “[t]eens are, perhaps the most consummate mobile telephone users. Teens have made text messaging into a common form of interaction.”<sup>75</sup> Implicitly addressing sexting, Ling notes that the cell phone is “useful for teen lovers who can communicate behind the backs of their—perhaps rightfully—anxious parents. The camera function can be used to share photos of potential love interests within the peer group in order to elicit their evaluation.”<sup>76</sup> Without explicitly mentioning sexting, Ling points out that “[t]he mobile telephone has also found a role in different nefarious activities among teens. Picture messages have led to certain amount of photographic chicanery.”<sup>77</sup>

One communications scholar recently observed that cell phones, at least for teen girls, provide a potential vehicle “for independence from parental rules.”<sup>78</sup> Cell phones can, in brief, create “a space, however small, for escape and evasion of the family.”<sup>79</sup> Thus, although the cell phone can serve as “a tool of security”<sup>80</sup> for minors—keeping them in touch with their parents when they leave home—it also serves as a “technology of the self.”<sup>81</sup> Sexting certainly would

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<sup>73</sup> Prashant Krishnamurthy, *Cell Phones*, in 3 COMPUTER SCI. 32, 35 (Roger R. Flynn ed., 2002).

<sup>74</sup> See generally Rich Ling, <http://www.richardling.com> (last visited Oct. 15, 2009).

<sup>75</sup> Rich Ling, *Children, Youth, and Mobile Communication*, 1 J. CHILDREN & MEDIA 60, 60 (2007).

<sup>76</sup> *Id.* at 62.

<sup>77</sup> *Id.* at 63 (internal citations omitted).

<sup>78</sup> Rachel Campbell, *Teenage Girls and Cellular Phones: Discourses of Independence, Safety and 'Rebellion'*, 9 J. YOUTH STUDIES 195, 199 (2006).

<sup>79</sup> *Id.* at 209.

<sup>80</sup> *Id.* at 202.

<sup>81</sup> *Id.* at 209. See Jeff Gammage, *Connected and Cut Off*, PHILADELPHIA INQUIRER, Feb. 21, 2006, at D1 (writing that “layered atop” of the turbulence of the teen years “are technological advances that give kids real power to assert their independence. Mom and Dad may insist on keeping the family computer in the living room, but a text-messaging conversation can be conducted anytime from anywhere through a cell phone.”); Sharon Gold-Steinberg, Op-Ed., *Other Voices: Take Steps to Stop Cyberbullying*, ANN ARBOR NEWS (Mich.), Apr. 22, 2009 (writing, from her perspective as the coordinator of Strong Moms Strong Girls program, a collaboration between the University of Michigan Center for the Child and the Family and the Junior League of Ann Arbor, that “[t]eens gravitate to communication via



seem to represent one form of rebellion and expression of the self on this medium. In addition, just like any other form of technology, the cell phone itself is not the problem; as the *New York Times* reported in May 2009, minors are using cell phones and texting to learn valuable information about the dangers and implications of sex from services such as those provided by the Adolescent Pregnancy Prevention Campaign in North Carolina, which operates “The Birds and Bees Text Line.”<sup>82</sup>

### 5. *A Culture of Exhibitionism and Contested Notions of Privacy*

Legislators seeking to address teen sexting also would be wise to consider that we live today within a culture that embraces exhibitionism via the mass media.<sup>83</sup> This embrace of exhibitionism is reflected in the popularity of reality television programs, where the underlying premise “requires that individuals place themselves on public display, thus forfeiting all claims to personal privacy for the sake of transient fame and the possibility of monetary compensation.”<sup>84</sup> Reality television “capitalizes on current negotiations between what is public and viewable and what is private and closed to outside view, succeeding best when it manages to forcibly exteriorize the interior.”<sup>85</sup>

Minors involved in sexting thus have grown up in a world of reality television in which adults seem ready and willing to place private aspects of their lives out in full public view, perhaps for a chance for fame or love, even as they risk humiliation in the process.<sup>86</sup> Fans of ABC’s *The Bachelor* witnessed

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electronic technology, in part, because of the relative privacy from adult supervision.”).

<sup>82</sup> Jan Hoffman, *When the Cellphone Teaches Sex Education*, N.Y. TIMES, May 3, 2009, at ST1.

<sup>83</sup> See CLAY CALVERT, *VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE* 45–49 (2000) (providing an overview of how exhibitionism exists in media content today).

<sup>84</sup> Zizi Papacharissi & Andrew L. Mendelson, *An Exploratory Study of Reality Appeal: Uses and Gratifications of Reality TV Shows*, 51 J. BROADCASTING & ELECTRONIC MEDIA 355, 355 (2007).

<sup>85</sup> June Deery, *Reality TV as Advertainment*, 2 POPULAR COMM. 1, 2 (2004).

<sup>86</sup> Cf. Tom Leonard, *Reality Television Generation Suffering from ‘Truman Show’ Syndrome: It Is the Perfect Illness for the Reality Television Generation—A Paranoid Fear of Being Stuck in a TV Show*, THE TELEGRAPH (London), Nov. 25, 2008, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/3521150/Reality-television-generation-suffering-from-Truman-Show-Syndrome.html> (“The self-exposure culture peddled by reality shows, internet sites such as Facebook and YouTube has provided a ‘perfect storm’ for delusional people, encouraging them to put their fantasies on a global stage, say researchers.”).

this in 2009, when bachelor Jason Mesnick had a sudden change of heart and dumped Melissa Rycroft after initially picking her to be his bride.<sup>87</sup> Despite the initial humiliation, Rycroft gained popular fame and public sympathy after the incident, thus transforming the typically private experience of being dumped—most people are not jilted by an ostensible lover on national television—into a public spectacle that she parlayed into an appearance on *Dancing with the Stars*.<sup>88</sup>

Viewed in this light, the sexual exhibitionism embodied in sexting arguably is a recasting of expectations regarding what is private behavior and what is publicly accessible. A new generation of minors seems willing to take what many adults might still consider private aspects of the themselves—parts of their bodies that they otherwise would not expose in public—and, via the medium of the cell phone, transform them into potentially permanent images that are easily turned into public displays of exhibitionism. This is true even if the initial photo-taker never intended for the pictures to be forwarded, as it is reasonably foreseeable that such larger dissemination could happen. Television producer and director Olivia Lichtenstein observed in January 2009:

When one considers our society, it's no surprise that our children have lost all sense of modesty. Not only do social networking sites like Facebook, MySpace and Bebo encourage teens to share information about themselves; but when they are not taking their clothes off, their role models are spilling their guts about their 'private' lives all over the pages of every national newspaper, magazine and on television.<sup>89</sup>

Judge Richard A. Posner recently made a cogent point about what he calls “this new culture of transparency”<sup>90</sup>—a point that, although not explicitly addressing sexting, relates directly to sexting and the harms that arise from it. In particular, Posner astutely observes that today, “the degree to which a disclosure of *personal information* inflicts harm on a person depends less on *what information* is disclosed than *to whom* and *to how many*, and *to what use* it is put by the persons to whom it is disclosed.”<sup>91</sup>

This is precisely the case—and the problem—with minors' notions of privacy when it comes to sexting. In the case of sexting, the *what information* part of Posner's equation constitutes *personal information* about minors' bodies and sexuality: what they look like topless, naked and posed provocatively in various stages of undress. Many minors seem quite willing to give up this per-

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<sup>87</sup> See Eric Degans, *Fans of 'The Bachelor' Charge Manipulation*, VIRGINIAN-PILOT (Norfolk, Va.), Mar. 8, 2009, at E9, available at 2009 WLNR 4438944.

<sup>88</sup> See Verne Gay, *'Bachelor' Castoff Readies to Dance*, NEWSDAY (N.Y.), Mar. 9, 2009, at A10 (describing Rycroft's appearance on *Dancing with the Stars*).

<sup>89</sup> Olivia Lichtenstein, *Generation Sex*, DAILY MAIL (London), Jan. 28, 2009, at 22, available at LEXIS, News & Business Library.

<sup>90</sup> Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245, 249 (2008).

<sup>91</sup> *Id.* (emphasis added).

sonal information to their boyfriends and girlfriends. They apparently see no harm in this initial interaction.

The degree to which this information “inflicts harm,”<sup>92</sup> as Posner would put it, is dependent on the use to which “it is put by the persons to whom it is disclosed”<sup>93</sup>—in this case, the boyfriends and girlfriends to whom the sexted images are initially sent. To the extent that the boyfriends and girlfriends who receive sexted images keep them to themselves and do little more than ogle them in private, there is comparatively little harm from sexting—at least from the perspective of the minors who originally took the images of themselves and then sent them to their boyfriends and girlfriends.

The harm only occurs if the boyfriends and girlfriends who initially receive the photos later use them for nefarious reasons. If, for instance, there is a break-up in a relationship, then the person who possesses the sexted images has the power to harm the person who took them by forwarding the images to many people. Possession of information and the threat of dissemination translate to power in the sexting phenomenon. This relates to Posner’s notion that injury is inflicted by the disclosure of personal information depending on “*to whom*” and “*to how many*”<sup>94</sup> people it is disclosed.

Minors who engage in sexting thus assume this risk of harm from the malicious forwarding of their provocative sexual images far beyond the individual or individuals for whom the images were intended. Whether they are aware of such risks and appreciate the potential harm, however, is a different question.

### 6. Putting It All Into Context

The discussion of this larger context—teen sexuality, mediated content, the influence of teen celebrities like Miley Cyrus, technology, and contested notions of public and private—is critical for understanding sexting. Specifically, it suggests that while sexting appears to be somewhat common and perhaps frightening to adults who were previously oblivious to it, the legal system probably should not be surprised by it, nor should it overreact to it. As Professor Durham writes, “[s]exual activity is rapidly becoming a reality of childhood and adolescence; sexual awareness and activity are occurring at earlier and earlier ages. We need to face the facts.”<sup>95</sup> Put bluntly, we cannot understand the legal issues raised by sexting in a jurisprudential vacuum.

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

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> DURHAM, *supra* note 65, at 45.

For example, adults who do not play or understand violent video games may believe that those games should be censored because they worry that playing video games leads to real-world violence.<sup>96</sup> Likewise, adults who are unfamiliar with sexting (not to mention texting itself) may believe that the practice should be censored because it will lead to an unsavory and sordid world of deviant sex. If sexting merely amounts to a new form of sexual expression, self-exploration, and high-tech foreplay and flirting,<sup>97</sup> then severely punishing minors who engage in it with child pornography laws seems overly harsh.

According to Christopher Ferguson,<sup>98</sup> a psychology professor at Texas A&M International University, sexting may be a “normal way”<sup>99</sup> for teens to interact, observing that “[y]ou combine unwise teenagers with sex drives and this technology, and that’s what you get.”<sup>100</sup> Ferguson puts it all into perspective, exposing a generational gap in the process, when he calls sexting a “normative, not wise, sexual behavior on the part of these kids. We would have done it, too, if we would have had the cool phones. We didn’t do it because we didn’t have the technology.”<sup>101</sup> Echoing Ferguson’s sentiment is Amanda Lenhart, a senior researcher with the Pew Internet & American Life Project, who has stated that “this is merely another case of technology extending an activity or action that young people have engaged in for years, if not beyond that.”<sup>102</sup>

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<sup>96</sup> Douglas Lowenstein, then-president of the Entertainment Software Association, a leading trade association for the video game industry, responded with the following statement during a March 2005 interview when asked why video games are such a popular target for the legislative wrath of politicians:

Video games are new media, so it’s partly generational. We have people in the political power structure in this country today who typically are in their 40s, 50s and 60s. They’re just outside the video game generation and are, instead, part of the passive media generation. As has been the case in past eras, the generation in power tends to react with hostility to the media of the younger generation coming behind them. So, I think that’s part of it—it’s just a visceral reaction to something new that is not of their world. Clay Calvert & Robert D. Richards, *Free Speech & the Entertainment Software Association: An Inside Look at the Censorship Assault on the Video Game Industry*, 32 J. LEGIS. 22, 32 (2005).

<sup>97</sup> See Ellen Goodman, *It’s Not About Sex; Sexting Is Really About Trust, and the Violation Thereof*, PITT. POST-GAZETTE, Apr. 24, 2009, at B-5, available at LEXIS, News & Business Library (quoting Danah Boyd of Harvard’s Berkman Center for Internet and Society for the proposition that “[i]f you look at the reasons why they share naked content, one is a form of flirting. Another is a way of brokering trust, a guy saying, ‘You don’t trust me? You won’t send me a naked picture?’”).

<sup>98</sup> See Christopher J. Ferguson, Professional Profile, Social Psychology Network, <http://christopher.ferguson.socialpsychology.org> (last visited Aug. 23, 2009).

<sup>99</sup> Andrew Shaw, *Psychology Professor Says ‘Sexting’ is ‘Normal,’* YORK DISPATCH (Pa.), Mar. 30, 2009.

<sup>100</sup> *Id.*

<sup>101</sup> Paula Reed Ward, *DA’s Case Over Teen ‘Sexting’ Draws Ire of Parents*, PITT. POST-GAZETTE, Mar. 26, 2009, at A-1, available at 2009 WLNR 5651200.

<sup>102</sup> Martha Irvine, *Parent Alert: ‘Sexting’ is Alarming Teen Trend*, DESERET NEWS (Salt Lake City, Utah), Feb. 8, 2009, at A1.

### 7. *The Media Frenzy Over Sexting: Fanning the Flames of Legislation?*

It also is important to remember that the survey conducted on behalf of the National Campaign to Prevent Teen and Unwanted Pregnancy is simply that—it is only *one* survey, and other data on the prevalence of sexting were not readily available when this article was written. The National Campaign’s sexting survey seemed to create a news media feeding frenzy about the issue, as it was widely cited in mainstream news media articles.<sup>103</sup> As Carl Bialik of the *Wall Street Journal* wrote in April 2009, there has been a “a flurry of sexting stories in the news media,”<sup>104</sup> and the National Campaign’s survey’s data that twenty percent of teens have sexted “has become a fixture in articles about ‘sexting’ and its social and legal implications.”<sup>105</sup> Importantly, Bialik’s article suggests that there may be methodological flaws with the National Campaign’s survey, in particular that the use of an online panel to gather information may skew the resulting data by drawing from a subsection of the population that is more likely to “shar[e] information and [put] themselves out there online” when compared to the broader population).<sup>106</sup>

National newspapers such as *The New York Times* and *USA Today* covered the issue of sexting in March 2009.<sup>107</sup> *The Wall Street Journal* addressed it in April 2009, and the *Washington Post* ran a front-page story about sexting in May 2009.<sup>108</sup> On television, *The Early Show* on CBS ran a feature on sexting in

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<sup>103</sup> See, e.g., Cindy Kranz, *Teens Bare All on Phones*, CINCINNATI ENQUIRER, Jan. 13, 2009, at A1 (citing the survey early in a lengthy article about sexting); Bianca Prieto, *Is This Teenager a Sex Offender?: Due to ‘Sexting,’ Some Face Life-Changing Judgments*, RICHMOND TIMES DISPATCH (Va.), Mar. 15, 2009, at A-4 (providing data from the survey); Siegel, *supra* note 15, at 3B (placing prominently in the second paragraph of the article data from the survey); Stickney, *supra* note 22, at A1.

<sup>104</sup> Carl Bialik, *Which is Epidemic—Sexting or Worrying About It?: Cyberpolls, Relying on Skewed Samples of Techno-Teens, Aren’t Always Worth the Paper They’re Not Printed On*, WALL ST. J., Apr. 8, 2009, at A9.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See Sean D. Hamill, *Students Sue Prosecutor in Cellphone Photos Case*, N.Y. TIMES, Mar. 26, 2009, at A21 (describing a legal case involving sexting in Pennsylvania); Wendy Koch, *More Teens Caught Up in ‘Sexting,’: Many Don’t Realize Porn Charges Can Be Attached*, USA TODAY, Mar. 12, 2009, at 1A (discussing sexting in a front-page story).

<sup>108</sup> See Dionne Searcey, *A Lawyer, Some Teens and a Fight Over ‘Sexting,’* WALL ST. J., Apr. 21, 2009, at A17 (describing the efforts of George Skumanick Jr., the district attorney in Wyoming County, Pennsylvania, to crack down on sexting at Tunkhannock High School); Donna St. George, *Sending of Explicit Photos Can Land Teens in Legal Fix*, WASH. POST, May 7, 2009, at A1 (reporting that “the sexting phenomenon, which has alarmed parents and educators, is also raising an array of practical questions about how

early 2009,<sup>109</sup> as did *Nightline* on ABC<sup>110</sup> and *Today* on NBC.<sup>111</sup>

Even the normally sedate and staid *All Things Considered* program on National Public Radio aired a feature on sexting in March 2009,<sup>112</sup> noting that “in at least three states, sexting kids are facing charges of child pornography.”<sup>113</sup> To top it all off, *Law & Order: Special Victims Unit* even aired a ripped-from-the-headlines episode on sexting in May 2009.<sup>114</sup>

Media hysteria about a subject that, with its provocative combination of sex and kids, makes for interesting reading and viewing should not fan the flames of legislation and result in misguided public policy outcomes. As Professor Durham writes in *The Lolita Effect*, “[b]eing horror-stricken by children’s natural curiosity about sex is a dysfunctional response to a complex reality that calls for intelligent, proactive engagement on the part of involved adults.”<sup>115</sup> Once the media buzz of 2009 about sexting fades, then legislators can step back to determine whether or not the problem is sufficiently widespread, given the context of a sex-saturated society and the normal proclivities of teenagers, so as to justify new statutes regulating it. In the meantime, as prosecutors become accustomed to dealing with sexting cases, they may develop practices for addressing it that obviate the need for legislation, even if one considers the twenty percent prevalence figure now bandied about to be sufficiently high to warrant action.<sup>116</sup>

Ultimately, this section suggests that legislators and prosecutors across the country might be wise to consider the slogan inside Larry Flynt’s Hustler Hollywood retail store in West Hollywood, California: “Relax, It’s Just Sex.”<sup>117</sup> Many of the minors who engage in the practice of sending sexually explicit photos of themselves to other minors probably wish that their elders would

police and prosecutors should respond and what the long-term fallout could be for children.”).

<sup>109</sup> *The CBS Early Show: Dangers of Teen ‘Sex-ting’* (CBS television broadcast Jan. 15, 2009), available at <http://www.cbsnews.com/video/watch/?id=4723169n> (last visited Aug. 23, 2009).

<sup>110</sup> *Nightline: Sex and Teens; The Sexting Dilemma* (ABC television broadcast Mar. 31, 2009).

<sup>111</sup> *Today: Perils of “Sexting”: Teens Face Child Porn Charges* (NBC television broadcast Mar. 10, 2009).

<sup>112</sup> *All Things Considered: Sexting: A Disturbing New Teen Trend?* (National Public Radio broadcast Mar. 11, 2009).

<sup>113</sup> *Id.*

<sup>114</sup> See *Television*, WASH. POST, May 5, 2009, at C6 (remarking that it “[l]ooks like the producers of ‘Law & Order: SVU’ . . . saw the headlines about the ‘sexting’ trend, because this episode centers on a teenage girl charged with distributing child pornography after sending naked pictures of herself via text message”).

<sup>115</sup> DURHAM, *supra* note 65, at 46.

<sup>116</sup> SEX AND TECH REPORT, *supra* note 35, at 1.

<sup>117</sup> Nita Lelyveld, *Hustler Goes Hollywood With a New Place for Porn*, PHILADELPHIA INQUIRER, Dec. 5, 1998, at A3.

heed a similar maxim: *Relax, It's Just Sexting*. Similarly, many minors probably feel there should be no punishment at all for engaging in consensual sexting between a boyfriend or a girlfriend.

## B. Injuries and Harms from Sexting

The 2008 National Campaign to Prevent Teen and Unwanted Pregnancy survey discussed in Part II.A found that seventy-five percent of teens surveyed agreed with the statement that “sending sexually suggestive content ‘can have serious negative consequences.’”<sup>118</sup>

What might those negative consequences be? An understanding of the injuries from sexting will help lawmakers better address it. In the opinion of the author of this article, there appear to be several types of harms and consequences, including:

- *Mental anguish*, in the form of embarrassment and humiliation,<sup>119</sup> to minors who sext photographs of themselves to others when those photos later, and without their permission, are disseminated beyond the person or people for whom they were originally intended. As the Introduction of this article noted, sometimes such mental anguish can even cause a minor to take his or her own life.<sup>120</sup>

- *Harassment*, especially when minors bully or target for abuse those individuals who took sexually provocative pictures of themselves. Dr. Rina Shah, a pediatrician in the San Francisco Bay Area, recently noted, “in the wrong hands, the pictures can spread like a bad case of the flu. From one teen to another, from one school to another. After the pictures are sent and resent, the photographed child can be left exposed often evolving into a victim of bullying

<sup>118</sup> SEX AND TECH REPORT, *supra* note 35, at 3.

<sup>119</sup> As syndicated newspaper columnist Ellen Goodman recently observed, “It’s mostly girls’ pictures that get passed around. It’s often boyfriends—or ex-boyfriends—who hold the trump photo. It’s girls who pay a social price in humiliation. It’s girls who get tagged in the mean-girl lingo as ‘sluts.’” Goodman, *supra* note 97.

A recent newspaper article illustrates the typical scenario for such embarrassment and humiliation:

At least twice a week, Andy Marun said she saw the same scenario play out at Spanish River High School in Boca Raton, Fla.: A younger girl sending nude images of herself to an older boy in an attempt to win his attention. And it always played out the same way. “The boys would usually show the pictures (to their friends) and at lunch the girls would be crying,” said Marun, 18, who graduated from Spanish River in May.

Missy Diaz, *In Florida, ‘Sexting’ Can Have Legal Consequences for Sender and Receiver*, SOUTH FLORIDA SUN-SENTINEL (Fort Lauderdale, Fla.), July 29, 2009, at 1A, available at 2009 WLNR 14478865.

<sup>120</sup> See *supra* notes 15–18 and accompanying text.

and cyberbullying.”<sup>121</sup>

- *Economic harm*, in the form of possible job loss or inability to obtain employment, if sexually explicit images that minors have sexted of themselves are later viewed by employers or prospective employers. With a generation of children weaned on sexting, there well could be damning photographs that pop up later in their lives, coming back to haunt them.<sup>122</sup> Otherwise stated, the permanence of a sexted image could lead to permanent economic harm.

- *Parental punishment*, for those minors whose parents discover their sexting practices and take actions against them, such as confiscating their cell phones.<sup>123</sup>

- *In-School punishment*, such as suspension or expulsion, for those minors whose sexting activities occur while on campus or whose sexting activities target or harass other students in the form of so-called cyberbullying.<sup>124</sup>

- *Criminal punishment*, for those minors who are prosecuted for sexting under current child pornography laws.<sup>125</sup>

- *Social stigma*, for those minors who are convicted for their sexting activities under child pornography laws and then must carry the burden of being labeled as a sex offender for the rest of their lives.<sup>126</sup>

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<sup>121</sup> Rina Shah, *Readers' Forum: Sexting Equals Teens, Sex and Pictures*, CONTRA COSTA TIMES (Cal.), Apr. 18, 2009, at Opinion, available at LEXIS, News & Business Library.

<sup>122</sup> As Bill Albert, a spokesperson for the National Campaign to Prevent Teen and Unplanned Pregnancy, put it, teens who sext “recognize that having a naked photo out there might impact the next boyfriend or application for college or having a job 10 years hence. They recognize that, but are saying, ‘That won’t happen to me.’” Edward D. Murphy, *Sexting: New Risky Behavior for Teens*, PORTLAND PRESS HERALD (Me.), Mar. 15, 2009, at A5 (emphasis added).

<sup>123</sup> See Rick Ruggles, *Parents Advised to Monitor Children's Internet Activities*, OMAHA WORLD-HERALD, Mar. 22, 2009, at 4B (attributing to “Scott Poland, a psychologist and national expert in violence prevention and crisis response,” the advice that “[i]f a parent discovers children ‘sexting,’ or sending naked photos of themselves, their cell phones should be taken away”).

<sup>124</sup> The Health Resources and Services Administration, a unit of the U.S. Department of Health and Human Services, refers to cyberbullying as “online social cruelty or electronic bullying” and notes that cyberbullying may take place through “[t]ext or digital imaging messages sent on cell phones” and include “[s]ending mean, vulgar, or threatening messages or images.” Health Resources and Services Administration, Stop Bullying Now, <http://stopbullyingnow.hrsa.gov/adults/cyber-bullying.aspx> (last visited Aug. 23, 2009). The Center for Safe and Responsible Internet Use defines cyberbullying as “sending or posting harmful or cruel text or images using the Internet or other digital communication devices.” Center for Safe and Responsible Internet Use, <http://www.cyberbully.org/cyberbully> (last visited Aug. 23, 2009). See generally Shannon L. Doering, *Tinkering with School Discipline in the Name of the First Amendment: Expelling a Teacher's Ability to Proactively Quell Disruptions Caused by Cyberbullies at the Schoolhouse*, 87 NEB. L. REV. 630 (2009) (providing a very timely and excellent overview of the free-speech issues and First Amendment issues raised by public schools' effort to punish students who engage in cyberbullying).

<sup>125</sup> See *supra* notes 20–22 and accompanying text.

<sup>126</sup> See *supra* notes 20–22 and accompanying text; see also Prieto, *supra* note 103.



• *Self-Exploitation* a term used by Professor Mary Graw Leary to describe the “destructive behavior”<sup>127</sup> that occurs when minors produce their own child pornography (what she calls “self-produced child pornography”<sup>128</sup>). Leary admits the phenomenon “lacks a clear definition.”<sup>129</sup> The harms that flow from it, however, are multiple and real, according to Professor Leary, who contends that “[o]nce those images are created, they create vast social harm as they are used by offenders to sexually assault children, they aid in the creation of juvenile sex offenders, and they further support the sexualization and eroticization of children.”<sup>130</sup>

This last form of injury, which obviously is difficult to objectively measure or quantify, taps into Professor Durham’s thesis in *The Lolita Effect* discussed earlier.<sup>131</sup> In particular, girls who sext images of themselves to boys may be treating their own sexuality and identity in a way that comports with the Lolita Effect as “a construction of sexuality that both exploits and limits sexual expression and agency, and is deliberately focused on young girls.”<sup>132</sup> If this is the case—that girls sext explicit images of themselves to members of the opposite sex as a way of gaining their attention and favor—then they may have unwittingly fallen prey to the Lolita Effect and the parade of horrors that supposedly stems from it. As Professor Durham writes:

The Lolita Effect is a sexual Venus flytrap, seducing unwary victims with promises of nectar, then devouring them.

The Lolita Effect has toxic side effects that are manifested in girls’ everyday lives. From eating disorders and body image issues to dating violence, teen pregnancy, sexual abuse, and sexual exploitation, girls everywhere grapple with the fallout from the Lolita Effect.<sup>133</sup>

This does not, of course, mean that sexting *causes* these harms. Rather, when taken to its logical extreme, it suggests that sexting should be stopped by the force of law because it is a practice that is an indicator of such harms. To allow it to exist and go unpunished is to ratify it, validate it, and sanction it and, in so doing, to endorse a culture that exploits girls’ sexuality. This, then, would be an argument for punishing all those who engage in sexting. With these harms in mind, this part now turns to the victims who may sustain them.

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<sup>127</sup> Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL’Y & L. 1, 22 (2007).

<sup>128</sup> *Id.* at 4.

<sup>129</sup> *Id.* at 20.

<sup>130</sup> *Id.* at 50.

<sup>131</sup> See discussion *supra* Part II.A.3.

<sup>132</sup> DURHAM, *supra* note 65, at 34.

<sup>133</sup> *Id.* at 218.

### C. The Victims of Sexting

There may be several potential victims involved in any incident of sexting. They are identified below:

- *The Initial Sexter*: Minors who take sexually provocative photographs of themselves and send them to others can be victims of sexting when those photographs are further disseminated to other people without their permission. This can happen when teens “send a photo to a boyfriend or girlfriend . . . [b]ut the relationship sours a few weeks later, and the spurned boyfriend or girlfriend retaliates by sending the photo to dozens of friends. And once the image leaves the sender’s cell phone, all control over where it goes is gone.”<sup>134</sup>

Those forwarded sexts could also end up on the Internet and later harm the initial sexter as he or she applies to college or for a job. Jayne Hitchcock, a cyber-crime expert, notes “that images posted on networking sites like Facebook and MySpace are perused by college admissions officers and human resources departments looking to hire workers.”<sup>135</sup> Years from now, of course, as those teens who once engaged in sexting become adults and rise to positions of power and authority, they may not care about whether prospective college admittees or employees once sexted.

The initial sexter, unaware of child pornography laws, also might be a victim of those laws if he or she is prosecuted by an aggressive prosecutor, even if the photographs are seemingly innocuous or relatively tame. For instance, in 2009, George Skumanick, the district attorney for Wyoming County, Pennsylvania, attempted to prosecute three teenage girls at Tunkhannock High School under Pennsylvania law for possessing or distributing child pornography.<sup>136</sup> The images at issue, however, were two photos depicting three teenage girls. One showed Marissa Miller and Grace Kelly from the waist up wearing white bras. The other depicted Nancy Doe (a pseudonym used to protect the girl’s real identity) standing outside a shower with a bath towel wrapped around her body beneath her breasts. Neither of the two photos depicted sexual activity or reveals anything below the waist.<sup>137</sup>

The American Civil Liberties Union of Pennsylvania sued Skumanick to stop the prosecution, with Witold Walczak, Legal Director for the ACLU of

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<sup>134</sup> Murphy, *supra* note 122, at A5.

<sup>135</sup> *Id.*

<sup>136</sup> See Memorandum at 2–4, *Miller v. Skumanick*, Case No. 3:09cv540 (M.D. Pa. Mar. 30, 2009), available at <http://howappealing.law.com/MillerVsSkumanickTRO033009.pdf>.

<sup>137</sup> Press Release, American Civil Liberties Union of Pennsylvania, ACLU Sues Wyoming County D.A. for Threatening Teenage Girls with Child Pornography Charges Over Photos of Themselves (Mar. 25, 2009), available at <http://www.aclupa.org/pressroom/aclusueswyomingcountydafor.htm>.

Pennsylvania, remarking:

Child pornography is a terrible crime that involves the abuse and exploitation of children, neither of which exists here. . . . In many states these charges would land these kids on Megan's Law databases, with their pictures on Internet registries for ten years or more, and prevent them from getting many types of jobs. That's a heck of a lesson for a kid who probably doesn't even realize she is doing something wrong.<sup>138</sup>

District Attorney Skumanick, on the other hand, said he "simply wanted to get across to them just how dangerous this really is. . . . Once these [pictures] are out there, they don't go away."<sup>139</sup>

- *The Unwilling Recipient*: What if the recipient of the sexted photo does not want to receive it? What if the recipient is offended by nudity? What if the sender transmits the photograph to harass the recipient?

These questions suggest that the harm from sexting lies not just with the taker-sexter, but also with the unwilling recipient.

- *Girls in General*: Given the work of Professor Gigi Durham in *The Lolita Effect*,<sup>140</sup> a somewhat strong argument can be made that the self-exploitation that occurs in any single instance of sexting by a young girl harms all girls generally. Sexting suggests to boys that girls are little more than sex objects for their boyfriends' (or potential boyfriends') pleasure. It is not too difficult to speculate that a sexted image of a topless fourteen-year-old girlfriend becomes masturbation material for a fourteen-year-old boyfriend. If a boy learns that someone else's girlfriend is sexting, then he may ask another girl—his own girlfriend, perhaps—to sext him an image of herself. Indeed, boys might well come to expect their girlfriends to engage in self-exploitation by sexting provocative photographs of themselves. If those girlfriends refuse to do so, however, they could risk social isolation or ostracization.<sup>141</sup>

#### D. Variations of Sexting

One of the difficulties in legislating acts of sexting is that the behavior comes in multiple variations. Legislators and prosecutors should keep the following factors in mind when deciding how to address any individual instance of sexting. The variables are framed by the questions they raise, and each question adds a layer of complexity and nuance to the one that came before it.

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<sup>138</sup> *Id.*

<sup>139</sup> Reed Ward, *supra* note 101, at A-1.

<sup>140</sup> See DURHAM, *supra* note 65 and accompanying text.

<sup>141</sup> See SEX AND TECH REPORT, *supra* note 35, at 4 (noting that some teen girls felt "pressured" to send sexually suggestive messages or images.).

### 1. *How Old Are the Minors Involved?*

The ages of the minors who take, transmit, or receive sexted images should be taken into account by the law when deciding how to deal with an incident of sexting. Eleven-year-old minors who sext with each other surely raise different concerns than a pair of sixteen-year-old minors who sext with each other.<sup>142</sup> Likewise a seventeen-year-old boy who sexts a nude image of himself to a twelve-year-old girl surely is more problematic than a seventeen-year-old boy who sexts a nude image of himself to a sixteen-year-old girl that he is dating.

The law, in fact, recognizes that subtle variations of age do matter when it comes to matters affecting sex and minors. In particular, laws regarding statutory rape and the sexual abuse of minors often treat defendants differently, depending upon the ages of both the perpetrator and the victim.<sup>143</sup> For instance, Alabama law provides that person commits rape in the second degree if “[b]eing 16 years old or older, he or she engages in sexual intercourse with a member of the opposite sex *less than 16 and more than 12 years old; provided, however, the actor is at least two years older than the member of the opposite sex.*”<sup>144</sup> Similarly, Alaska law provides, in relevant part,

An offender commits the crime of sexual abuse of a minor in the second degree if, . . . being 17 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age *and at least four years younger than the offender*, or aids, induces, causes, or encourages a person who is 13, 14, or 15 years of age *and at least four years younger than the offender* to engage in sexual penetration with another person . . . .<sup>145</sup>

In Colorado, proximity in age also matters in defining the crime of sexual assault, as sexual assault is committed if “[a]t the time of the commission of the act, the victim is less than fifteen years of age *and the actor is at least four years older than the victim* and is not the spouse of the victim”<sup>146</sup> or if “at the time of the commission of the act, the victim is at least fifteen years of age but less than seventeen years of age *and the actor is at least ten years older than the victim* and is not the spouse of the victim.”<sup>147</sup> In Connecticut, sexual assault in the second degree occurs “when such person engages in sexual intercourse with another person and . . . [s]uch other person is thirteen years of age or old-

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<sup>142</sup> See Loretta Haroian, *Child Sexual Development*, 3 ELECTRONIC J. HUM. SEXUALITY (Feb. 1, 2000), <http://www.ejhs.org/volume3/Haroian/body.htm> (pointing out that eleven-year-olds are in the second stage of childhood and adolescence while sixteen-year-olds are in the fourth stage, with differing hormonal and emotional characteristics associated with each stage).

<sup>143</sup> See *infra* notes 144–48 and accompanying text.

<sup>144</sup> ALA. CODE § 13A-6-62 (2005) (emphasis added).

<sup>145</sup> ALASKA STAT. § 11.41.436 (2008) (emphasis added).

<sup>146</sup> COLO. REV. STAT. § 18-3-402(1)(d) (2008) (emphasis added).

<sup>147</sup> COLO. REV. STAT. § 18-3-402(1)(e) (2008) (emphasis added).

er but under sixteen years of age *and the actor is more than three years older than such other person.*"<sup>148</sup>

In legal terms, the emphasized portions of each of these statutes are known as "'Romeo and Juliet' laws" or "close in age exceptions."<sup>149</sup> They typically "cover consensual adolescent sexual activity involving an adolescent below the age of consent when the sexual partner is another adolescent close in age."<sup>150</sup> As Professor Kate Sutherland wrote in 2003 in surveying age-of-consent laws across the United States, "[m]any states now stress the number of years that separate the parties; that is, the statutes criminalize sexual interaction between adults and adolescents that would not be criminal between adolescents of similar ages."<sup>151</sup> In fact, Professor Catherine Carpenter observes a "trend to decriminalize, in certain circumstances, peer-on-peer underage sexual activity."<sup>152</sup>

If legislative bodies are to create new laws designed to address sexting, then it would seem wise to follow such a trend and to take into account the ages of the individuals both who send sexted messages and who receive them. Younger minors probably are less likely to understand the consequences of their sexting practices than are older minors.<sup>153</sup> The younger the minors involved, the less need there is to punish them as sex offenders, scarring them both legally and emotionally for the rest of their lives. Instead, the goal, either through parental or legal intervention, simply should be to stop them from engaging in sexting—an activity that could have long-term, damaging consequences.

On the other hand, instances of sexting involving much younger minors,

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<sup>148</sup> CONN. GEN. STAT. § 53a-71 (2008) (emphasis added).

<sup>149</sup> Joanna S. Markman, *Community Notification and the Perils of Mandatory Juvenile Sex Offender Registration: The Dangers Faced by Children and Their Families*, 32 SETON HALL LEGIS. J. 261, 275 (2008).

<sup>150</sup> Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 198 (2008).

<sup>151</sup> Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 314–15 (2003).

<sup>152</sup> Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 313 (2006). She adds:

Perhaps because of a dawning recognition that the threat of criminal prosecution was not a realistic deterrent to peer-on-peer high school sexual activity, some states have retreated from this type of prosecution or have statutorily prescribed lower penalties. In certain circumstances, including where the sexual activity is believed to be voluntary and where the victim is close to the age of consent, states have either required the prosecuted actor to be at least eighteen years of age, and/or have included age differentials between the actor and the underage partner, which necessarily require the actor to be at least eighteen years of age. For states that do prosecute underage actors, some have considered their youth at sentencing.

*Id.* at 313–14.

<sup>153</sup> See *supra* notes 144–54, and accompanying text (noting laws drawing the distinction between actions of younger versus older minors).

even if consensual, cannot be completely ignored by the law. Rather, they should be addressed by the legal system because those images, once made public, could be used by pedophiles to whet their sexual appetites.<sup>154</sup> This would be a compelling government interest in stopping such sexting that arguably fuels the market for child pornography and sexual molestation.

Young minors who sext, however, probably are unaware that they are taking part in the supply side of the child pornography equation that sustains the needs of some sexual deviants. Punishing the suppliers (the young minors who sext) rather than the recipients (the pedophiles who consume the images) makes little sense. Indeed, it would be a sad irony to prosecute these young minors as sex offenders and thereby to lump them in the same category with the sex offenders who feasted on their images.

## 2. *Is the Sexting Incident Primary or Secondary?*

This question calls for the law to make a fundamental distinction between *primary* and *secondary* sexting. Primary (or initial) incidents of sexting are those in which the minor who took the sexted image in question is the same person who both appears in the image and who sends it out. In contrast, secondary (or downstream) incidents of sexting are those in which the sender is not the same person who took and initially transmitted the image in question but, instead, is a person who received it from someone else and then forwards it on to others.

The potential for harm seems greater in secondary or downstream incidents of sexting, as the initial taker/sender loses all control and power over the image in question. The harm may be greater, in part, because the scope of dissemination—the number of people who receive and view the sexted image in question—is likely to be more extreme with instances of secondary sexting. In a primary sexting incident, for instance, Minor A may have wanted only Minor B to see a photograph that she took of herself. Minor A therefore only transmitted the photograph of herself to Minor B. However, in the secondary or downstream sexting of that photograph by Minor B to numerous friends of his

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<sup>154</sup> Cf. John Grant Emeigh, *Seduction of Sexting: Innocent Flirting? Hardly. Phenomenon has Legal, Psychological Impacts*, MONTANA STANDARD (Butte), Apr. 26, 2009, at A1 (quoting Samm Cox, the deputy county attorney of Butte-Silver Bow, for the proposition that sexted images can be “posted on the internet to be viewed by every pedophile in the world”); Bob Stiles, *‘Sexting’ Happening ‘More and More,’* TRIB.-REV. (Greensburg, Pa.), Feb. 2, 2009, available at LEXIS, News & Business Library (quoting Fayette County Assistant District Attorney Phyllis Jin as saying that “pedophiles prize” sexted images of minors).

(perhaps in an effort to show them how beautiful or “hot”<sup>155</sup> his girlfriend is), Minor A might suffer humiliation and embarrassment from this additional exposure.

It is possible, however, that the primary taker/transmitter, Minor A, does not object to the primary recipient, Minor B, sending the image downstream to one or two friends (Minors C and D). Such an act may give her satisfaction and an ego boost to know that her boyfriend (Minor B) thinks she is pretty and wants to show her off to his friends—her fifteen minutes of fame, as it were.<sup>156</sup> In this case, such secondary sexting is mutually consensual among all four individuals and the harm from it may be minimal, provided that Minors C and D—already second-hand recipients of the image—don’t further forward it without Minor A’s consent.

But the inquiry does not end here, as there still can be harm in the primary sexting incident, as described below.

### 3. *Is the Sexting Volitional?*

The answer to this question necessarily depends on the state of mind of both the person who transmits the sexted image and the person who receives it. The question is crucial because, in some instances, a minor (Minor A) may freely and of her own volition, take a provocative photograph of herself and sext it to a friend (Minor B) who desires to receive the image. In this particular primary instance of sexting, which the law might think of as *primary, mutually volitional sexting*, it would seem that little or no harm has occurred to either the sender or the recipient, and the need for intervention by the criminal or juvenile justice system is minimal. The law thus should take account of: 1) whether or not the minor who took the initial photograph of herself did so voluntarily; 2) whether she transmitted it voluntarily to a person or persons; and 3) whether those individuals who received it were willing recipients.

If Minor B, however, is not a willing recipient of Minor A’s photograph and objects to it, Minor A’s transmission may constitute harassment by communication, requiring the law to take some action against Minor A, especially if the

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<sup>155</sup> Professor Durham observes that “[t]he goal of hotness is pervasive in girl culture” and “[m]iddle-school girls—and boys—quickly identify ‘a hot body’ as a marker of ideal femininity.” DURHAM, *supra* note 65, at 63.

<sup>156</sup> See Herbeck, *supra* note 44 and accompanying text (suggesting the possibility that minors might engage in sexting because famous celebrity roles models, like Miley Cyrus, also engage in the practice).

Minor A repeatedly sends images to Minor B over Minor B's objections.<sup>157</sup> For instance, under Alabama law, "[a] person commits the crime of harassing communication if, with intent to harass or alarm another person, he or she . . . [c]ommunicates with a person, anonymously or otherwise, by telephone, telegraph, mail, or any other form of written or electronic communication, in a manner likely to harass or cause alarm."<sup>158</sup> Such harassment might arise in a scenario where Minor A seeks the affection of Minor B by sending sexual images of herself via a cell phone, but is rebuffed and rejected in the process. Minor B may not like Minor A or Minor B might simply be offended and disgusted by the images in question. Spurned Minor A, in turn, might be angered by the rejection and continue to send Minor B images simply to harass Minor B.

But volition alone does not resolve the matter of how to treat sexting, because a secondary sender of a sexted image—for instance, Minor B, who initially received the sexted image—may voluntarily and freely send it to other people (Minors C, D and E) who want to receive it. Even though both the sender and recipients in the secondary sexting want to see the image and willingly do so, there still may be harm to Minor A (the primary sexting sender) if she does not consent to the secondary sexting.

#### 4. Overview

When all of these variables are taken into account, legal intervention probably is least necessary in cases of:

- *primary, volitional sexting among two older minors of approximately the same age.* For instance, Minor A, who is sixteen-years-old, willingly takes and transmits a photograph of herself to Minor B, who is seventeen-years-old, who willingly receives it.

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<sup>157</sup> Under Pennsylvania law, for instance, a person commits the crime of harassment if, among other things, he or she, "with intent to harass, annoy or alarm another" either "communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures" or simply "communicates repeatedly" in another manner with the other person. 18 PA. CONS. STAT. ANN. § 2709 (2000). Sexted images may be considered lewd and lascivious under this language.

<sup>158</sup> ALA. CODE § 13A-11-8 (2005). Similarly, under Arizona law, harassment occurs when a person "with intent to harass or with knowledge that the person is harassing another person, the person . . . [a]nonymously or otherwise contacts, communicates or causes a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses. ARIZ. REV. STAT. ANN. § 13-2921 (2001).



• *secondary, volitional sexting by older minors of approximately the same age in which the primary taker/sender of the image consents to the downstream sexting to willing recipients.* For instance, Minor A, who is sixteen-years-old, willingly takes and transmits a photograph of herself to Minor B, who is seventeen-years-old, who willingly receives it. Minor B, with Minor A's approval, then forwards the photograph to his friends, Minors C and D, both of whom are sixteen-years-old and who ask to see the image after Minor B tells them he has a nude or topless photograph of his girlfriend, Minor A.

In contrast, legal intervention seems most necessary in cases of:

• *secondary, non-volitional sexting.* The minor who initially took a photograph of herself and then transmitted it to a friend for that friend's use only later finds out the photograph was forwarded without her permission by the supposed friend to others. Here the focus would seem to be on punishing the individual who did the forwarding without the permission of the minor who took the image of herself.

• *primary, volitional sexting involving substantial age disparity.* A young minor (for instance, an eleven-year-old girl) voluntarily takes and sends a sexually provocative image of herself to an older minor (for instance, a seventeen-year-old boy) who wants to receive the photograph and who has specifically asked the minor to take an image of herself and to send it to him. Here the focus is on punishing someone who is preying on a much younger person for that older person's sexual desires by luring them into the activity. This approaches the type of reprehensible conduct already regulated by laws targeting the luring and soliciting of minors for purposes sexual exploitation.<sup>159</sup>

#### E. Beyond Criminal Statutes: Alternative Ways of Dealing With Sexting

Rather than only having the criminal and juvenile justice systems address the issue of sexting through the application of existing statutes or the creation of new ones, there are other potential mechanisms and strategies for dealing

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<sup>159</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-3554 (2001) (providing, under Arizona law, that "a person commits luring a minor for sexual exploitation by offering or soliciting sexual conduct with another person knowing or having reason to know that the other person is a minor"). Also, under Maine law,

[a] person is guilty of sexual exploitation of a minor if . . . [k]nowing or intending that the conduct will be photographed, the person intentionally or knowingly employs, solicits, entices, persuades, uses or compels another person, not that person's spouse, who is in fact a minor, to engage in sexually explicit conduct.

ME. REV. STAT. ANN. tit. 17-A, § 282 (2006).

with the phenomenon that could be just as effective in mitigating and reducing its prevalence. They are described below.

### 1. *Parents*

Instead of legislators creating new laws that address sexting or prosecutors using current child pornography statutes to charge sexting minors with a criminal offense, an alternative remedy is for the tens of thousands of parents across the United States who purchase cell phones for their children (and often pay their cell phone bills) to actually pay better attention to what their children are doing with those devices. As Errol Louis recently wrote in the *Daily News*, charging kids who sext with criminal offenses “carries an unmistakable echo of those fraught, hysteria-filled months in 1692 when magistrates in colonial Massachusetts arrested and charged more than 150 people with the crime of witchcraft.”<sup>160</sup> The solution, he suggests, is for “parents, teachers, clergy and counselors—not prosecutors—to steer our kids through the hormone-soaked confusion of adolescence with all the love, understanding and forgiveness we owe them.”<sup>161</sup>

The intervention of parents who vigilantly monitor their children’s cell phone and text-message usage would seem to be a preferred remedy since it keeps the government out of the issue of sexting and away from the intimate (and often embarrassing) activities of minors who are under parental control. As the editorial board of the *Christian Science Monitor* opined, “[p]arents . . . need to realize how common this behavior is, learn what photo transmitting equipment is in the house and how it works. They must discuss sexting with their kids, monitor what they’re doing, and if necessary, restrict access to equipment.”<sup>162</sup>

### 2. *Education*

If minors knew about and recognized the possible unfortunate and negative

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<sup>160</sup> Errol Louis, *Sexting Spawns New Witch Hunt*, DAILY NEWS (N.Y., N.Y.), Apr. 23, 2009, at 31.

<sup>161</sup> *Id.*

<sup>162</sup> Editorial, *supra* note 6.

consequences of their sexting behavior, then perhaps they would not engage in it as frequently or recklessly and, in turn, the need for legal intervention would be reduced. That seems to be at least part of the theory behind the United Way of Greater Milwaukee's campaign, launched in 2009, that centers on the catchy, pun-intended message "Please practice safe text."<sup>163</sup> The *Milwaukee Journal Sentinel* reported in March 2009, that this slogan, "followed by the message 'Protect yourself. And your reputation. Never send nude photos to anyone,' was set to be plastered on dozens of bus stop shelters near high schools . . . ."<sup>164</sup> The campaign was launched by the non-profit agency after "a group of Waukesha West High School students was investigated for spreading a photo of a naked 14-year-old peer to hundreds of other students' cell phones."<sup>165</sup>

Such incidents may serve as so-called teachable moments<sup>166</sup> when the otherwise inappropriate actions of minors make for propitious pedagogical opportunities to teach them about the real-world consequences of their behaviors. The teachable moment has been described as "the interweaving nature of learning lived through experiences"<sup>167</sup> and the "type of learning that happens at times that are more memorable and dramatic because people learn what they need to know when they need to know it."<sup>168</sup> It also has been suggested that "[w]hen current issues identified by the student are discussed first, attention is captured immediately, and the teachable moment is created."<sup>169</sup> Clearly, those teachable moments need not transpire solely in the classroom, as the United Way's efforts in Milwaukee demonstrate. Given the massive media attention now being paid to sexting,<sup>170</sup> as well as the high-profile prosecutions of minors on child pornography charges for sexting, now would seem to make for a perfect teachable moment about the dangers of the practice.

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<sup>163</sup> See Erin Richards, 'Safe Text' A Sign of Times: United Way Sponsors Billboards Urging Teens Not to Send Nude Photos via Phones, MILWAUKEE J. SENTINEL, Mar. 5, 2009, at 5B.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See Carolyn Snider & Jacques Lee, YOUTH VIOLENCE SECONDARY PREVENTION INITIATIVES IN EMERGENCY DEPARTMENTS: A SYSTEMATIC REVIEW, 11 J. OF CANADIAN ASS'N OF EMERGENCY PHYSICIANS, 161, 162 (2009) (describing a "teachable moment" as "an event that motivates an individual to reduce risk-taking behaviours").

<sup>167</sup> Eunsook Hyun & J. Dan Marshall, *Teachable-Moment-Oriented Curriculum Practice in Early Childhood Education*, 35 J. CURRICULUM STUD. 111, 112 (2003).

<sup>168</sup> *Id.*

<sup>169</sup> P. Susan Wagner & Katherine L. Ash, *Creating the Teachable Moment*, 37 J. NURSING EDUC. 278, 278 (1998).

<sup>170</sup> See *supra* notes 104–14 and accompanying text (providing examples of such mainstream news media coverage from 2009).

### 3. Schools

To the extent that sexted photos are either taken or displayed on a public school campus during the school day, school administrators appear to have jurisdiction to punish those students.<sup>171</sup> Sexted images that are neither obscene nor amount to child pornography would generally be a form of protected expression under the First Amendment.<sup>172</sup> The U.S. Supreme Court, however, made it clear four decades ago in *Tinker v. Des Moines Independent Community School District*<sup>173</sup> that the speech rights of public school students can be abridged when actual facts<sup>174</sup> exist that might reasonably lead “school authorities to forecast substantial disruption of or material interference with school activities”<sup>175</sup> or when the speech “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”<sup>176</sup> Displaying a nude image of another student on a cell phone during the school day clearly could cause disorder and, even more likely, invade the rights of the student whose nude image is displayed by exposing her to ridicule, scorn, and contempt such that she cannot proceed with the rest of the school day. In brief, her right to an education in an environment free from such harassment would be violated.<sup>177</sup> Sexted images displayed at school could materially disrupt the educational atmosphere by diverting attention away from academics and classroom lessons.

In addition, the U.S. Supreme Court has held that schools can punish students who engage in sexually lewd and vulgar expression while on campus.<sup>178</sup>

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<sup>171</sup> See CAL EDUC. CODE § 32261 (West 2009). The code provides that [i]t is the intent of the Legislature in enacting this chapter to encourage school districts . . . to develop and implement strategies . . . that will . . . reduce school crime and violence . . . including bullying committed personally or by means of an electronic act.

*Id.*

<sup>172</sup> See *infra* Part II.F. (describing the First Amendment speech rights of minors).

<sup>173</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>174</sup> The Court in *Tinker* wrote that an “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Id.* at 508.

<sup>175</sup> *Id.* at 514.

<sup>176</sup> *Id.* at 513.

<sup>177</sup> See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (considering the issue of “whether a private damages action may lie against the school board in cases of student-on-student harassment,” and holding that such an action can exist “where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities” and when the harassment “is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”); *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001) (finding that “preventing discrimination in the workplace – and in the schools – is not only a legitimate, but a compelling, government interest”).

<sup>178</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). The *Bethel* case involved a high-school student who gave a speech loaded with sexual innuendoes in the captive-audience setting of a student assembly, the high court held:

The First Amendment does not prevent the school officials from determining that to

Logic dictates that if a school can punish a student for making a speech rife with sexual innuendoes, as the Supreme Court said it could in *Bethel School District No. 403 v. Fraser*,<sup>179</sup> then it can punish a student for displaying a sexually explicit image. One federal district court, in upholding a school's censorship of two t-shirts conveying sexual innuendos (one reading "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick" and the other emblazoned "Coed Naked Band; Do It To the Rhythm"<sup>180</sup>), put it this way:

In sum, on the question of when the pungency of sexual foolery becomes unacceptable, the school board of South Hadley [Mass.] is in the best position to weigh the strengths and vulnerabilities of the town's 785 high school students. The First Amendment does not compel the court into this arena.<sup>181</sup>

It would seem, in the author's opinion, that sexting would constitute such "sexual foolery"<sup>182</sup> in the mind of many judges today, leaving it to schools and courts to determine when they can stop it and punish the protagonist. The nudity in sexting is far different than that which might appear in a biology book or one about human sexuality. There is no pedagogical reason, in other words, to protect the nudity in sexting as a form of expression if a sexted image is displayed or taken on campus.

Given this apparent ability of schools to squelch sexting, it may be that allowing them to deal with the problem, rather than the criminal or juvenile justice systems, makes more sense. As Jackson County, Iowa, Attorney Chris Raker recently stated, "[t]here's a desire to handle this in a less formalistic way. Do we use the laws on the books to stop this, or turn to the schools and parents to intervene?"<sup>183</sup>

Increasingly, courts also are giving public school officials the ability to punish students for speech that they create on new technologies while off campus but that targets classmates, teachers and/or administrators.<sup>184</sup> This might pro-

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permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. *Id.* at 685. The court added that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Id.* at 683.

<sup>179</sup> See 478 U.S. at 684.

<sup>180</sup> *Pyle v. S. Hadley Sch. Comm.*, 861 F. Supp. 157, 161–62 (D. Mass. 1994).

<sup>181</sup> *Id.* at 170.

<sup>182</sup> *Id.*

<sup>183</sup> Courtney Blanchard, *Sexting Flashes Across Nation, Tri-States*, TELEGRAPH HERALD (Dubuque, Iowa), Apr. 21, 2009, at A6, available at LEXIS, News & Business Library.

<sup>184</sup> See, e.g., *Wisniewski ex rel. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39–40 (2d Cir. 2007), cert. denied, 128 S. Ct. 1741 (2008). The Court held that the fact that an eighth-grade student's creation and transmission of an instant messaging icon targeting a teacher "occurred away from school property does not necessarily insulate him from school discipline," 494 F.3d at 39, and determined that such off-campus-created, high-tech speech can be punished by schools if it "poses a reasonably foreseeable risk that [it] would come to the attention of school authorities and that it would 'materially

vide schools with the authority to punish minors who disseminate, while off campus, previously sexted images of another student to a large number of fellow students. In other words, consider a scenario in which Minor A and Minor B both attend the same high school. Minor A, while away from campus, takes and texts a nude photograph of herself to Minor B, hoping to win Minor B's affection. Instead, however, Minor B disseminates the photo, without Minor A's permission, to dozens of classmates. Even if Minor B disseminates that photo while Minor B is off campus, the school still may be able to punish Minor B if the sexted image causes a substantial disruption on campus, per *Tinker*.

In addition, schools are cracking down on cyberbullying,<sup>185</sup> which has been described as a “faceless form of bullying [that] uses e-mail, Web pages and cell phones to harass or harm others. Because of the use of electronic devices, cyberbullying can occur anywhere or any time—far beyond the schoolyard.”<sup>186</sup>

State lawmakers are increasingly providing school authorities with new tools to address cyberbullying.<sup>187</sup> The National Conference of State Legislatures, which describes cyberbullying as “the willful and repeated use of cell

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and substantially disrupt the work and discipline of the school,” *Id.* at 38–39 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)) (emphasis added); *J.S. ex rel Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, at \*1 (M.D. Pa. Sept. 11, 2008) (upholding the in-school punishment of an eighth-grade student who created, while off campus and during non-school hours, a fake MySpace profile of her principal that suggested the principal was “a pedophile and a sex addict”). See generally Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027 (2008) (providing an excellent overview of the issues surrounding the off-campus First Amendment speech rights of public school students, and examining recent cases and controversies of such speech communicated on digital technologies).

<sup>185</sup> See, e.g., Donna Winchester, *Cyberbullying Is On the Rise: Anyone with Access to a Cell Phone or Computer Could Be a Victim, School Officials Say*, ST. PETERSBURG TIMES (Fla.), Mar. 3, 2009, at 1B (describing how two school districts in Florida have “gone to extra lengths this year to crack down on cyberbullying, sometimes referred to as online social cruelty or electronic bullying”).

<sup>186</sup> Linda T. Sanchez, Op-Ed., *The New Bullying Technology: Gone are the Days When Coming Home from School Was a Refuge for Kids*, ST. LOUIS POST-DISPATCH, Apr. 5, 2009, at A17, available at LEXIS, News & Business Library (emphasis added). See *supra* note 124 and accompanying text (providing definitions of cyberbullying).

<sup>187</sup> See, e.g., KAN. STAT. § 72-8256 (West through 2009) (providing that bullying includes cyberbullying; defining cyberbullying as “bullying by use of any electronic communication device through means including, but not limited to, e-mail, instant messaging, text messages, blogs, mobile phones, pagers, online games and websites”; and mandating that the “board of education of each school district shall adopt a policy to prohibit bullying on or while utilizing school property, in a school vehicle or at a school-sponsored activity or event”); OR. REV. STAT. § 339.356 (West through 2009) (providing that “[e]ach school district shall adopt a policy prohibiting harassment, intimidation or bullying and prohibiting cyberbullying” and encouraging those policies to include “[a] statement of the consequences and appropriate remedial action for a person who commits an act of harassment, intimidation or bullying or an act of cyberbullying”).

phones, computers, and other electronic communication devices to harass and threaten others,”<sup>188</sup> identified nineteen states that had enacted some form of cyberbullying legislation by the end of April 2009.<sup>189</sup>

For example, in California, a new law went into effect in 2009 that provides schools with the “authority to suspend or expel students for bullying fellow students over the Internet, in text-messaging or by other electronic means.”<sup>190</sup> In particular, Assembly Bill 86 amended California Education Code Section 48900<sup>191</sup> to expand the definition of bullying to include “bullying committed by means of an electronic act.”<sup>192</sup> In a press release trumpeting signage of the bill into law by California Governor Arnold Schwarzenegger, the bill’s sponsor, Ted Lieu observed that bullying is “not just physical attacks on the playgrounds. Students can torment each other by sending hateful messages with their *cell phones*, laptops and school computers.”<sup>193</sup>

In the scenario mentioned above, Minor B’s dissemination of the image of Minor A to a large number of students might just constitute such harassment. More on point for cyberbullying, however, is a different scenario: Minor C repeatedly takes and sexts nude images of himself to a classmate, Minor D. Minor D tells Minor C to stop, but Minor C continues to send the nude images to Minor D. This would seem to constitute cyberbullying.

In addition to enacting laws requiring schools to adopt policies against cyberbullying, states are now focusing on educating both students and parents about cyberbullying. The state of Washington requires public schools to adopt anti-harassment and bullying policies that “shall include a requirement that

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<sup>188</sup> National Conference of State Legislatures, *Cyberbullying: State Legislation*, <http://www.ncsl.org/programs/educ/cyberbullying.htm> (last visited Aug. 24, 2009).

<sup>189</sup> *Id.*

<sup>190</sup> Peter Hecht, *Schools Gain a Tool to Halt Online Cruelty*, SACRAMENTO BEE, Dec. 28, 2008, at A1.

<sup>191</sup> A.B. 86, 2007-2008 Reg. Sess. (Cal. 2008) (amending §§ 32261 and 48900 of the California Education Code, relating to pupil safety).

<sup>192</sup> CAL. EDUC. CODE § 48900 (2009). In addition, California Education Code Section 32261 was amended to read:

It is the intent of the Legislature in enacting this chapter to encourage school districts, county offices of education, law enforcement agencies, and agencies serving youth to develop and implement interagency strategies, in-service training programs, and activities that will improve school attendance and reduce school crime and violence, including vandalism, drug and alcohol abuse, gang membership, gang violence, hate crimes, bullying, *including bullying committed personally or by means of an electronic act*, teen relationship violence, and discrimination and harassment, including, but not limited to, sexual harassment.

*Id.* § 32261 (emphasis added).

<sup>193</sup> Press Release, California Assembly Member Ted Lieu, *Lieu Cyberbullying Bill Signed by Governor* (Oct. 1, 2008) (emphasis added), *available at* <http://democrats.assembly.ca.gov/members/a53/Pressroom/Press/20081001AD53PR02.aspx>

materials meant to educate parents and students about the seriousness of cyberbullying be disseminated to parents or made available on the school district's web site."<sup>194</sup> Indiana law also requires school boards to adopt materials to help teach students about cyberbullying.<sup>195</sup> Sexting would be a natural topic to include under the auspices of a lesson or lessons on cyberbullying.

Finally, public schools often adopt policies that prohibit cell phone usage on their campus except in emergency situations or under other enumerated circumstances.<sup>196</sup> Such policies, often contested by parents who want access to their children,<sup>197</sup> do not eliminate sexting, but merely reduce the incidents of it that arise on campus or that come to the attention of administrators.

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<sup>194</sup> WASH. REV. CODE ANN. § 28A.300.285 (West 2009).

<sup>195</sup> IND. CODE ANN. § 20-30-5.5-3 (2008).

<sup>196</sup> See Vaishali Honawar, *Cell Phones in Classrooms Land Teachers on Online Video Sites*, 27 EDUC. WEEK 1, Nov. 7, 2007 ("Most districts require students to turn cell phones off in the classrooms. Some, New York City among them, go as far as outright barring students from bringing cell phones into classrooms."); Denise Crosby, *Turn It Off or Go Home*, CHI. SUN-TIMES, Sept. 29, 2008, at 6 (examining cell phone policies at schools in the Chicago area, and noting that "many schools once banned cell phones entirely—until a rash of campus shootings proved how valuable they are in emergencies. These days, most policies allow kids to take phones to school; they just can't have them on during classroom hours or until they are out of the building").

The San Diego Unified School District policy on cell phones, for instance, provides:

Student possession and use of cellular phones, pagers and other electronic signaling devices on school campuses and school buses, at school-sponsored activities and while under the supervision and control of school district employees is permitted under the circumstance described herein.

All students may use these devices on campus before school begins and after school ends. Students in high school grade 9–12 also may use such devices during the lunch period.

These devices must be kept out of sight and turned off during the instructional program. Unauthorized use of such devices disrupts the instructional program and distracts from the learning environment. Therefore unauthorized use is grounds for confiscation of device by school officials, including classroom teachers. Repeated unauthorized use of such devices may lead to disciplinary action.

Policy 6980, San Diego Unified School District, available at <http://www.sandi.net/staff/principals/resources/articles/policy6980.pdf> (last visited Aug. 25, 2009).

<sup>197</sup> As one publication devoted to educational issues described the controversy:

The debate over whether cell phones are a necessity for students and their families or a distraction for teachers and school administrators has continued in the wake of school tragedies. Likewise, the popularity of text messaging and the dawn of phones that serve as cameras and video players has heightened school administrators concerns over students using their cell phones for improper purposes, such as cheating or inappropriately filming teachers or other students.

Kelley R. Taylor, *Still Trying to "Make the Call" on Student Cell Phones*, PRINCIPAL LEADERSHIP, Feb. 2008, at 62, 64.



#### 4. *Civil Law Remedies*

Some abusive sexting practices may be addressed effectively by civil lawsuits. Consider the scenario where Minor A takes and texts nude photos of herself to her boyfriend, Minor B, after they have been dating for several months. Minor B is a willing recipient of the photos and keeps them to himself. Two months later, however, Minor A breaks off the relationship with Minor B. Minor B, who is angered at Minor A's dumping him, seeks revenge to hurt her feelings and make her upset by widely disseminating to his buddies all the nude images of Minor A that she had sent to him. He also posts some of the images online. Minor A is very upset by Minor B's actions, which cause her to be teased mercilessly and labeled a 'slut' by the students at her school.

Minor A might consider filing a lawsuit against Minor B based on the tort of intentional infliction of emotional distress ("IIED").<sup>198</sup> To succeed in a cause of action for IIED, a plaintiff typically must prove four elements: 1) the defendant's conduct was either intentional or reckless; 2) the defendant's conduct was outrageous and extreme; 3) there was a causal connection between the defendant's conduct and the emotional distress suffered by the plaintiff; and 4) the emotional distress suffered by the plaintiff was severe.<sup>199</sup> As defined by the *Restatement (Second) of Torts*, a plaintiff will prevail for IIED if the defendant's conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"<sup>200</sup> However, the *Restatement* provides that liability does not "extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."<sup>201</sup> The *Restatement's* language on IIED is embraced by most state

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<sup>198</sup> See RESTATEMENT (SECOND) OF TORTS § 46 (1965) (describing the tort of intentional infliction of emotional distress and providing that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm").

<sup>199</sup> See, e.g., *Christensen v. Superior Court*, 820 P.2d 181, 202 (Cal. 1991) (quoting *Davidson v. City of Westminster*, 32 Cal.3d 197, 209 (1982)) (setting forth the four elements of the tort of IIED as recognized in California); *Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733, 740 (Idaho 2003) (setting forth the four elements of the tort of IIED as recognized in Idaho); *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 796 (Tex. 2006) (setting forth the four elements of the tort of IIED as recognized in Texas); *Harris v. Kreutzer*, 624 S.E.2d 24, 33 (Va. 2006) (setting forth the four elements of the tort of IIED as recognized in Virginia).

<sup>200</sup> RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

<sup>201</sup> *Id.*

courts.<sup>202</sup>

A key issue for a jury to decide in Minor A's IIED case would be whether Minor B's widespread dissemination of nude photographs of his former girlfriend—photographs that were intended for his eyes only—constitutes extreme and outrageous conduct beyond the bounds of decency in a civilized society. As noted earlier in this article,<sup>203</sup> at least one real-life minor took her own life as a result of such an incident:

Last year, Jessica Logan, a high school senior, sent a nude photo of herself to her boyfriend via cell phone. It was meant for him alone. But the trust she placed in him was betrayed. Before the end of the school year it was in the hands of hundreds of her peers. She was subjected to taunting and tormenting, name-calling and insults in person, by text message and on MySpace and Facebook, wherever she went, wherever she looked. By July, Jessica was dead by her own hand.<sup>204</sup>

To date, there are no published legal opinions involving a cause of action for IIED that stem from a sexting incident.<sup>205</sup> It thus would be a novel legal approach, but one that might work in front of a sympathetic jury. If successful, then tort law could provide one mechanism for policing and thwarting the more egregious abuses that occur with sexting. As Professor Robert Post observes, the IIED tort functions—from a sociological point of view—“to penalize those defendants who breach civility rules.”<sup>206</sup> The actions of Minor B in the hypothetical above clearly are uncivil; the question, however, for the IIED tort is whether they amount to an extreme and outrageous violation of those rules of civility.

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<sup>202</sup> See *Leithead v. Am. Colloid Co.*, 721 P.2d 1059, 1066 (Wyo. 1986) (“The tort of intentional infliction of mental distress as described in § 46 of the Restatement can be safely characterized as the general rule in the United States.”). See also John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 806 (2007) (writing that “[a]ll states have recognized intentional infliction of emotional distress as an independent tort and have adopted Restatement (Second) of Torts section 46 in some form”).

<sup>203</sup> See *supra* notes 17–19 and accompanying text.

<sup>204</sup> Joe Burns, Commentary, *Teen Sexting Can Have Deadly Consequences*, PATRIOT LEDGER (Quincy, Mass.), Apr. 3, 2009, at 4, available at 2009 WLNR 6449082.

<sup>205</sup> But see Kimball Perry, *Lawsuit Filed Over ‘Sexting’ Suicide*, CINCINNATI ENQUIRER, May 12, 2009, at News, available at LEXIS, News & Business Library (highlighting an instance where a lawsuit alleging intentional infliction of emotional distress was filed in a case involving sexting); see also Jenell Walton, *Parents File Lawsuit After Teen Commits Suicide*, WCPO.COM, May 12, 2009, [http://www.wcpo.com/content/news/neighborhoods/blue\\_ash/story/Parents-File-Lawsuit-After-Teen-Commits-Suicide/tNyacpxqkKtet9\\_Oep6Uw.csp](http://www.wcpo.com/content/news/neighborhoods/blue_ash/story/Parents-File-Lawsuit-After-Teen-Commits-Suicide/tNyacpxqkKtet9_Oep6Uw.csp) (providing further insight on the Jessica Logan sexting case).

<sup>206</sup> ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 133 (1995).

## F. First Amendment Speech Rights of Minors

Seemingly lost amidst all of the media hype about the nexus between sexting and child pornography are the First Amendment speech rights of minors. As Judge Richard Posner and the United States Court of Appeals for the Seventh Circuit observed in 2001, “[c]hildren have First Amendment rights.”<sup>207</sup> Those rights extend to minors even when they are on public school campuses.<sup>208</sup> The U.S. Supreme Court observed four decades ago that

[s]tudents in school as well as out of school are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.<sup>209</sup>

To the extent that the taking of a photograph by a minor with a cell phone is a speech act, and the image constitutes a form of artistic expression and self-realization of identity through that expression,<sup>210</sup> laws restricting minors’ ability to engage in sexting must be measured and balanced against the constitutional speech rights of minors<sup>211</sup>—provided those images do not constitute child pornography, which falls outside the scope of First Amendment protection.<sup>212</sup>

On the other hand, in *Ginsberg v. New York*, the U.S. Supreme Court upheld

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<sup>207</sup> *Am. Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001).

<sup>208</sup> *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”).

<sup>209</sup> *Id.* at 511.

<sup>210</sup> *Cf. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY* 9 (1992) (observing that free speech can be “an end itself, an end intimately intertwined with human autonomy and dignity,” and noting that the “freedom to speak without restraint provides the speaker with an inner satisfaction and realization of self-identity essential to individual fulfillment”); ROBERT TRAGER & DONNA L. DICKERSON, *FREEDOM OF EXPRESSION IN THE 21ST CENTURY* 101 (1999) (observing that “[b]ecause expression is how we define ourselves as unique humans, all expression is an act of self-fulfillment,” and contending that people “need to be able to think about not only all of the possibilities of life available to us, to imagine the future and to reflect on the past, but we also need to be able to express openly those possibilities through words, clothing, dance, decoration, architecture, music, art, literature”).

<sup>211</sup> *See Entertainment Software Ass’n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006) (affirming a permanent injunction prohibiting an Illinois law restricting minors’ access to sexually explicit video games, and noting that one of the implications of the fact that children have First Amendment rights is that the U.S. Constitution “requires us to ask whether legislation unduly burdens the First Amendment rights of minors”).

<sup>212</sup> *See infra* notes 227–33 and accompanying text (describing how the production, dissemination, and possession of child pornography falls outside the reach of First Amendment protection).

a state statute prohibiting the sale to minors of sexually explicit materials.<sup>213</sup> In that case, the sexually explicit materials were deemed harmful to minors even though the magazines at issue were “not obscene for adults.”<sup>214</sup> The Court in *Ginsberg* had to decide whether “it was constitutionally impermissible for New York . . . to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors.”<sup>215</sup> In reaching this conclusion, the high court reasoned that New York has “an independent interest in the well-being of its youth”<sup>216</sup> and concluded that it was “not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors.”<sup>217</sup> Taken to its extreme, this would suggest that a state permissibly could ban the sexting by minors to other minors of sexually explicit images of themselves that do not rise to the level of either child pornography or obscenity.

Does this same logic hold up, however, in the context of the consensual sexting of nude photographs between minors? For instance, is it really harmful for a fifteen-year-old boy to be exposed to a nude photograph of his fifteen-year-old girlfriend that she has sexted to him? The images at issue in *Ginsberg*, on the other hand, were taken from “some so-called ‘girlie’ magazines.”<sup>218</sup> Is looking at a copy of a naked woman in *Hustler* magazine different from looking at a friend or classmate naked on a cell phone?<sup>219</sup> Should this make a difference in how the law handles sexting or whether the reasoning in *Ginsberg* can stretch to squelch sexting? Subsequent to *Ginsberg*, the Supreme Court held unconstitutional in *Erznoznik v. City of Jacksonville*<sup>220</sup> an “ordinance that prohibits showing films containing nudity by a drive-in movie theater when its screen is visible from a public street or place.”<sup>221</sup> In the process of declaring that law invalid, the court rejected the argument that the ban was permissible because it was designed to protect children from nudity, writing:

Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a

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<sup>213</sup> See *Ginsberg v. New York*, 390 U.S. 629, 633 (1968).

<sup>214</sup> *Id.* at 634.

<sup>215</sup> *Id.* at 636–37.

<sup>216</sup> *Id.* at 640.

<sup>217</sup> *Id.* at 641.

<sup>218</sup> *Id.* at 631.

<sup>219</sup> Cf. Zachary Gappa, “Sexting,” *Teen Maturity and Parental Responsibility*, CENTER FOR A JUST SOCIETY, Mar. 1, 2009, <http://www.crosswalk.com/parenting/teens/11600943/> (asserting that “[s]exting is more akin to a perfumed letter or midnight make-out session than a copy of *Hustler*”).

<sup>220</sup> *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

<sup>221</sup> *Id.* at 206, 217–18.

legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.<sup>222</sup>

This logic would seem to protect the First Amendment right of minors to engage in speech dissemination when they consensually sext to each other images of themselves that are merely nude and that are not sufficiently explicit to constitute child pornography.<sup>223</sup> Both *Ginsberg* and *Erznoznik*, however, are now more than three decades old; whether courts choose to modify their precedential value and reasoning to apply to modern-day sexting remains to be seen. Regardless, these two cases probably will play some role in legislative efforts to regulate and punish the sexting practices of minors.

#### G. Current Laws on Child Pornography: Too Harsh to Apply to Sexting?

The use of existing child pornography laws to prosecute minors who engage in sexting has been criticized by several mainstream news media commentators. For instance, Dahlia Lithwick, a contributing editor for *Newsweek* and a senior writer for *Slate*, blasted the idea in a February 2009 column, writing:

The argument that we must prosecute kids as the producers and purveyors of kiddie porn because they are too dumb to understand that their seemingly innocent acts can harm them goes beyond paternalism. Child-pornography laws intended to protect children should not be used to prosecute and then label children as sex offenders.<sup>224</sup>

She adds that “[t]he real problem with criminalizing teen sexting as a form of child pornography is that the great majority of these kids are not predators. They think they’re being brash and sexy.”<sup>225</sup> Similarly, the editorial board of the *Philadelphia Inquirer* criticized the idea of charging sexting minors with a criminal offense, opining that “[c]riminal charges for this brand of adolescent stupidity are the equivalent of going nuclear. Convict a teen under child porn laws and he or she will be branded as a sex offender, forced to register under Megan’s Law-style statutes, and basically scarred for life.”<sup>226</sup>

Indeed, the U.S. Supreme Court’s reasoning behind its decision not to provide First Amendment protection for child pornography suggests that laws targeting child pornography are not the appropriate method for addressing most incidents of sexting. In its 1982 decision in *New York v. Ferber*, the Court up-

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<sup>222</sup> *Id.* at 213–14 (internal citation omitted).

<sup>223</sup> See *New York v. Ferber*, 458 U.S. 747, 765 n.18 (1982) (noting how mere nudity alone does not cut off First Amendment protection).

<sup>224</sup> Dahlia Lithwick, *Teens, Nude Photos and the Law*, NEWSWEEK, Feb. 23, 2009, at 18.

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

<sup>226</sup> Editorial, ‘Sexting’ Overkill, PHILADELPHIA INQUIRER, Apr. 6, 2009, at A10.

held a New York statute banning the production and distribution of child pornography.<sup>227</sup> In doing so, the Supreme Court justified government-sanctioned censorship of child pornography largely on the grounds that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”<sup>228</sup> The *Ferber* court noted the need to protect “the physical and emotional well-being of youth,”<sup>229</sup> pointing out that “[i]t has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults.”<sup>230</sup>

More recently, Justice Anthony Kennedy wrote in the 2002 case of *Ashcroft v. Free Speech Coalition* that “*Ferber’s* judgment about child pornography was based upon *how it was made, not on what it communicated*. The case reaffirmed that where the speech is *neither obscene nor the product of sexual abuse*, it does not fall outside the protection of the First Amendment.”<sup>231</sup>

To the extent that a sexting image is made by a minor, voluntarily and of his or her own free will, there would seem to be little reason to punish the creator at all. Such sexted images are not “the product of sexual abuse.”<sup>232</sup> For instance, if a fourteen-year-old girl snaps a picture of herself posing naked and lying on her own bed while alone in her bedroom, she likely is not suffering either physical abuse or emotional abuse when the image is being captured. To use Justice Kennedy’s language in *Free Speech Coalition*, there is no harm to the girl based upon “how it was made.”<sup>233</sup>

In *Free Speech Coalition*, a five-justice majority of the court held unconstitutional a portion of the Child Pornography Prevention Act of 1996 (“CPPA”)<sup>234</sup> that “extend[ed] the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children.”<sup>235</sup> In striking down this law targeting virtual child pornography, the majority reasoned that “the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child por-

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<sup>227</sup> *Ferber*, 458 U.S. at 773. Writing for the Court, Justice White wrote that “it is permissible to consider these materials as without the protection of the First Amendment” and reasoning that “[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions.” *Id.* at 764.

<sup>228</sup> *Id.* at 757.

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

<sup>230</sup> *Id.* at 758 n.9.

<sup>231</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250–51 (2002) (emphasis added).

<sup>232</sup> *Id.* at 251.

<sup>233</sup> *Id.*

<sup>234</sup> Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009-26, *partially invalidated by* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

<sup>235</sup> *Free Speech Coal.*, 535 U.S. at 239.

nography is not ‘intrinsically related’ to the sexual abuse of children, as were the materials in *Ferber*.<sup>236</sup> Justice Kennedy observed for the majority that, when it comes to virtual child pornography, “[t]he harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.”<sup>237</sup>

Much the same can be said about sexting when a minor voluntarily takes a photograph of herself and freely sends it to another minor, like a boyfriend or girlfriend. There is no harm in the actual taking and capture of the speech (namely, the photographic image), and the action itself is not intrinsically related to the sexual abuse of children. The image only holds an “unquantified potential for subsequent”<sup>238</sup> harm should it later be forwarded and more widely disseminated beyond the person for whom it was originally intended. It is speculative and conjectural to try to guess whether or not any particular sexting image ever will cause harm sometime in the future to the minor who took it. It may be that a sexted photo goes no further than the cell phone of its intended recipient.

It is important to note that in *Free Speech Coalition*, the Court seemed particularly concerned with sexual abuse committed by pedophiles. As Justice Kennedy wrote, “[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people. In its legislative findings, Congress recognized that there are subcultures of persons who harbor illicit desires for children and commit criminal acts to gratify the impulses.”<sup>239</sup> Sexting, as defined in this article,<sup>240</sup> does not involve any such “subcultures of persons who harbor illicit desires for children;”<sup>241</sup> rather it is seemingly normal minors themselves<sup>242</sup> who partake in the activity on their own volition.

In the aforementioned scenario involving a fourteen-year-old girl who snaps a picture of herself, the potential harms only occur *after* the capture of the image, when it might be forwarded to others without the girl’s permission, thus exposing her to ridicule and embarrassment or loss potential employment. Of course, such harms are speculative, as the image may never be forwarded or otherwise disseminated by the individual recipient for whom it originally was intended.

The only language from *Ferber*, in fact, that seems to support applying child

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<sup>236</sup> *Id.* at 250.

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

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

<sup>239</sup> *Id.* at 244–45.

<sup>240</sup> *See supra* pp. 7–8.

<sup>241</sup> *Free Speech Coal.*, 535 U.S. at 245.

<sup>242</sup> *See supra* notes 98–102 and accompanying text (describing how sexting seems to be a normal activity for teenagers, given both their sexual desires and the available technologies).

pornography laws to instances of sexting by minors is the Court's statement that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."<sup>243</sup> As discussed earlier,<sup>244</sup> a sexted image that a minor takes of herself could become a permanent record that comes back to haunt her; the image may be forwarded to others against her will, posted on a publicly-accessible website, and later discovered by a university to which she is applying or by a company from which is seeking employment. What might have seemed like an innocent image at the time—one that did not involve either physical or emotional abuse when it was taken—leaves a potentially permanent record of the individual's participation in behavior that a university or employer might find scandalous or otherwise reprehensible. A fourteen-year-old girl probably would not appreciate or understand such potentially detrimental, long-term consequences when she snaps a sexually provocative photograph of herself and sends it to a boyfriend.

In its 2008 opinion upholding a federal statute affecting the pandering and solicitation of child pornography, the U.S. Supreme Court in *United States v. Williams*<sup>245</sup> observed that it had earlier struck down the virtual child pornography law at issue in *Free Speech Coalition* "because the *child-protection rationale* for speech restriction does not apply to materials produced *without children*."<sup>246</sup> While sexting done by minors clearly is produced by and with children—children take, capture, and disseminate images of themselves to others—the only child-protection rationale for punishing it is this: *children must be protected from themselves*. This line of reasoning holds that children simply do not understand the potential self-inflicted harm that such images could cause when they are viewed by people for whom they were not originally intended. Put more bluntly, children do not appreciate or know what is in their own best interests and the law therefore must step in to punish them when they engage in sexting in order to deter the harmful activity.

This argument, of course, underlies another area of jurisprudence related to sex and minors—namely, statutory rape laws.<sup>247</sup> These laws had long been "premised upon girls' inability to give legally valid consent to sex"<sup>248</sup> and, historically, rested on a "general assumption that, in sexual matters, just as in oth-

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<sup>243</sup> *New York v. Ferber*, 458 U.S. 747, 759 (1982).

<sup>244</sup> See *supra* note 122 and accompanying text.

<sup>245</sup> *United States v. Williams*, 128 S. Ct. 1830, 1845–47 (2008).

<sup>246</sup> *Id.* at 1836 (emphasis added).

<sup>247</sup> See Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U.L. REV. 75, 76 n.2 (2007) (providing that "[t]he term 'statutory rape' commonly refers to the criminal offense of engaging in sexual intercourse with a person below a specified number of years of age, varying by jurisdiction, but typically below sixteen.").

<sup>248</sup> Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 8 DEPAUL J. HEALTH CARE L. 109, 114 (2004).



er adult matters, girls could not take care of themselves—that because of their immaturity and some adults’ skills in playing to girls’ insecurities, adolescent girls needed society to help take care of them.”<sup>249</sup> Since the early 1970s, however, many of those laws have been relaxed or jettisoned,<sup>250</sup> such that “[t]he presumption underlying modern law governing adolescent girls’ sexuality is that girls are mature enough to make autonomous decisions regarding sexuality.”<sup>251</sup> But in a 2004 article reviewing the history of statutory rape laws and the changes with them that have transpired in recent decades, Professor Michelle Oberman contends that

the growing body of research on female adolescence calls into question the presumption that girls are fully capable of protecting themselves. That is, researchers consistently have found that for girls, adolescence is a time of acute crisis, in which self-esteem, body image, academic confidence, and the willingness to speak out decline precipitously. Such evidence reveals a significant likelihood that girls are vulnerable in sexual encounters—vulnerable in precisely the manner which the common law of statutory rape anticipated and sought to remedy.<sup>252</sup>

If this is correct, then perhaps the argument that children—specifically, young girls—should be protected from themselves when it comes to otherwise seemingly consensual sexting activity makes sense. The 2007 opinion of a Florida appellate court in *A.H. v. Florida* exemplifies this logic.<sup>253</sup> The court in *A.H.* allowed the government to go forward with the prosecution of a sixteen-year-old girl, A.H., on a child pornography charge<sup>254</sup> based on photos that she and her seventeen-year-old boyfriend took “of themselves naked and engaged in sexual behavior.”<sup>255</sup> Although the photos were never sent to a third party, the

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<sup>249</sup> *Id.* It should be emphasized that some adult women do sexually exploit young boys, with cases involving female teachers often garnering media attention. See, e.g., Richard Roeper, *Female Teacher Sex Isn’t “Hot for Teacher” – It’s Rape*, CHI. SUN, Apr. 6, 2006, at 11 (describing “the seemingly endless run of stories about female teachers seducing or sexually assaulting underage students,” and focusing on the case of 34-year-old teacher named Rachel Holt at Claymont Elementary School in Delaware who was charged with having sex with a 13-year-old male student 28 times during a single week). In 2009, for instance, a 24-year-old female teacher at a Holyoke, Massachusetts elementary school named Lisa Lavoie was accused of fleeing Massachusetts and running off to a West Virginia motel with a 15-year-old male student. *Teacher Pleads Not Guilty to Enticing Teen*, LOWELL SUN (Mass.), Mar. 7, 2009, at News, Local, available at LEXIS, News & Business Library..

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 116.

<sup>252</sup> *Id.*

<sup>253</sup> See *A.H. v. Florida*, 949 So. 2d 234, 238–39 (Fla. Dist. Ct. App. 2007).

<sup>254</sup> See FLA. STAT. ANN. § 827.071(3) (Supp. 2009) (“A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a child less than 18 years of age. Whoever violates this subsection is guilty of a felony of the second degree . . .”).

<sup>255</sup> *A.H.*, 949 So. 2d at 235.

young couple had emailed them “to another computer from A.H.’s home.”<sup>256</sup>

The defendant minor in *A.H.* moved to dismiss the child pornography charge on the grounds that Florida’s child pornography statute was unconstitutional as applied to her “given the lack of a significant age difference or of any allegation that the pictures were shown to a third party . . . .”<sup>257</sup> The appellate court rejected her argument, and wrote:

Appellant was simply too young to make an intelligent decision about engaging in sexual conduct and memorializing it. Mere production of these videos or pictures may also result in psychological trauma to the teenagers involved.

Further, if these pictures are ultimately released, future damage may be done to these minors’ careers or personal lives. These children are not mature enough to make rational decisions concerning all the possible negative implications of producing these videos.<sup>258</sup>

Such logic smacks of government paternalism,<sup>259</sup> playing to the same concern that animates statutory rape laws—that minors do not know or understand what is best for them.<sup>260</sup>

In a recent law journal article that does not specifically address sexting, but does directly deal with the topic of child pornography created by minors, Professor Stephen F. Smith of the University of Virginia captures the argument against trying to apply traditional child pornography laws to minors who create such content:

To funnel into the criminal or juvenile justice systems cases of self-produced child pornography—material that, at its root, steps from the undeniable fact that today’s teenagers are sexually active well before they turn eighteen—is unjustified. To do so would expose minors to the severe stigma and penalties afforded by child pornography laws. It would also cause minors to be branded as registered sex offenders and to incur the onerous legal disabilities and restrictions that were passed with sexual predators in mind, not minors engaged in consensual sex with their peers.<sup>261</sup>

Professor Smith notes that “child pornography is typically produced through

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 236.

<sup>258</sup> *Id.* at 238–39.

<sup>259</sup> Kathleen Sullivan, former dean of Stanford Law School, contends that in the United States “we have an anti-paternalism principle for government telling us what to think and say.” Ronald K.L. Collins et al., *Thoughts on Commercial Speech: A Roundtable Discussion*, 41 LOY. L.A. L. REV. 333, 338 (2007). *Black’s Law Dictionary* defines paternalism as a “government’s policy or practice of taking responsibility for the individual affairs of its citizens, [especially] by supplying their needs or regulating their conduct in a heavy-handed manner.” BLACK’S LAW DICTIONARY 1241 (9th ed. 2009).

<sup>260</sup> As criminal law philosopher Joel Feinberg has argued, paternalism “suggests the view that the state stands to its citizens . . . as if they were children.” 3 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* 4 (1986). Likewise, Blake Morant, current dean of the Wake Forest University School of Law, has written that paternalism, in contract law, sometimes “is designed to protect the bargainer from herself.” Blake D. Morant, *Law, Literature, and Contract: An Essay In Realism*, 4 MICH. J. RACE & L. 1, 14 (1998).

<sup>261</sup> Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL’Y & L. 505, 544 (2008).

the sexual abuse of children.”<sup>262</sup> In stark contrast, sexting, as defined in this article, is not produced through any sexual abuse of minors.

#### H. Is It Really Even Child Pornography?

Even when child pornography laws are applied by some prosecutors to typical incidents of sexting in which a minor sends nude or topless pictures of herself to a boyfriend, there is a further question that must be asked: *Are the images really even child pornography in the first place?*

The answer to this threshold question requires a fact-intensive inquiry and will vary from case to case, depending upon what actually is depicted in any given photograph. Federal child pornography law defines prohibited sexually explicit conduct depicting a minor as either:

- one of several specifically enumerated sexual acts;<sup>263</sup> or
- a “lascivious exhibition of the genitals or the pubic area.”<sup>264</sup>

This federal definition of child pornography, with the former part focusing on actual sex acts and the latter centering on the image of the minor even if he or she is not engaged in a sex act, is similar to that used in many state statutes.<sup>265</sup> Some states use the term “lewd exhibition”<sup>266</sup> of the genitals or other-

<sup>262</sup> *Id.* at 514.

<sup>263</sup> See 18 U.S.C. §§ 2251, 2256(2)(A)(i—iv) (2006) (prohibiting actual or simulated “sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex,” as well as bestiality, masturbation, and “sadistic or masochistic abuse”).

<sup>264</sup> 18 U.S.C. § 2256(2)(A)(v).

<sup>265</sup> See, e.g., CONN. GEN. STAT. ANN. § 53a-193 (2007) (defining, in relevant part, child pornography under Connecticut law as “any visual depiction . . . of sexually explicit conduct, where the production of such visual depiction involves the use of a person under sixteen years of age engaging in sexually explicit conduct . . .” and, in turn, defining “sexually explicit conduct” as “(A) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal physical contact, whether between persons of the same or opposite sex, or with an artificial genital, (B) bestiality, (C) masturbation, (D) sadistic or masochistic abuse, or (E) lascivious exhibition of the genitals or pubic area of any person”); R.I. GEN. LAWS § 11-9-1.3 (Supp. 2008) (setting forth Rhode Island’s child pornography statute and defining forbidden visual depictions of “sexually explicit conduct” involving a “minor” as “(i) Graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, or lascivious sexual intercourse where the genitals, or pubic area of any person is exhibited; (ii) Bestiality; (iii) Masturbation; (iv) Sadistic or masochistic abuse; or (v) Graphic or lascivious exhibition of the genitals or pubic area of any person”); WYO. STAT. ANN. § 6-4-303 (2009) (setting forth Wyoming’s child pornography statute and defining forbidden visual depictions of “explicit sexual conduct” involving a “child” as “actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between persons of the same or opposite sex, bestiality, masturbation, sadistic or masochistic abuse

wise specified body parts rather than “lascivious exhibition,” but this difference seems rather trivial.

If a child depicted in a sexted image is engaging in a proscribed sex act as enumerated by a federal state statute, that would seem to constitute child pornography. The much more difficult question involves sexted photos that do not show actual sexual acts but merely are still photos and poses. What, then, does it take for a nude or topless photograph that a minor takes of herself and sexts to a friend to constitute or amount to child pornography under the “lascivious exhibition of the genitals or pubic area”<sup>267</sup> prong of the federal definition?

First, the finder of fact must determine whether a given depiction is lascivious, while “the meaning of ‘lascivious exhibition of the genitals’ is an issue of

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or lascivious exhibition of the genitals or pubic area of any person”). Utah’s child pornography statute also includes specific sex acts, as well as certain images regardless of whether they involve actual conduct, but it sweeps up more acts and images than under federal law by defining forbidden “sexually explicit conduct” involving a “minor” as:

actual or simulated: (a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (b) masturbation; (c) bestiality; (d) sadistic or masochistic activities; (e) lascivious exhibition of the genitals or pubic area of any person; (f) the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person; (g) the fondling or touching of the genitals, pubic region, buttocks, or female breast; or (h) the explicit representation of the defecation or urination functions.

UTAH CODE ANN. § 76-5a-2(8) (2008).

<sup>266</sup> See, e.g., ALASKA STAT. § 11.41.455(a)(6) (2008) (defining, for purposes of Alaska’s laws against child pornography and exploitation, forbidden sexual activity to include, among other things, “the *lewd exhibition* of the child’s genitals”) (emphasis added); 720 ILL. COMP. STAT. 5/11-20.1(a)(1)(vii) (Supp. 2009) (defining, for purposes of Illinois’ laws against child pornography, the creation of any image in which a minor is, among other things, “depicted or portrayed in any pose, posture or setting involving a *lewd exhibition* of the unclothed or transparently clothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast of the child or other person”) (emphasis added); N.H. REV. STAT. ANN. § 649-A:2(III) (LexisNexis Supp. 2008) (defining, for purposes of New Hampshire’s recently revised laws against child pornography, forbidden “sexually explicit conduct” to include, among other things, “*any lewd exhibitions* of the buttocks, genitals, flagellation, bondage, or torture”) (emphasis added); N.Y. PENAL LAW § 263.00(3) (McKinney 2008) (defining, for purposes of New York’s laws against child pornography, forbidden “sexual conduct” to include, among other things, “actual or simulated sexual intercourse, oral sexual conduct, anal sexual conduct, sexual bestiality, masturbation, sado-masochistic abuse, or *lewd exhibition* of the genitals”) (emphasis added); OKLA. ST. ANN. tit. 21, § 1024.1 (West 2002) (setting forth Oklahoma’s child pornography statute and encompassing within that definition, among other things, visual depictions “where the *lewd exhibition* of the uncovered genitals has the purpose of sexual stimulation of the viewer,” and defining forbidden “sexual conduct” to include “acts of exhibiting human genitals or pubic areas”) (emphasis added); and WIS. STAT. ANN. § 948.01(7)(e) (West 2008) (setting forth Wisconsin’s child pornography statute and encompassing within that definition, among other things, visual depictions of “sexually explicit conduct” including the “*lewd exhibition* of intimate parts”) (emphasis added).

<sup>267</sup> 18 U.S.C. § 2256(2)(A)(v) (2006).

law.”<sup>268</sup>

Second, there is a critical difference between a complete frontal nudity photograph of a young girl and one that merely shows her breasts. As noted above, the federal definition of child pornography only applies to lascivious images of the genital or pubic area, not to the breasts.<sup>269</sup> On the other hand, a state law targeting child pornography might include images of the female breasts.<sup>270</sup> Nebraska, for instance, provides within the context of its child pornography laws that “[e]rotic nudity means the display of the human male or female genitals or pubic area, *the human female breasts*, or *the developing breast area of the human female child*, for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved.”<sup>271</sup>

Third, as one federal appellate court recently observed, “more than nudity is required to make an image lascivious; the focus of the image must be on the genitals or the image must be otherwise sexually suggestive.”<sup>272</sup> Emphasizing this point, another federal appellate court wrote:

No one seriously could think that a Renoir painting of a nude woman or an innocuous family snapshot of a naked child in the bathtub violates the child pornography laws. Nudity must be coupled with other circumstances that make the visual depiction lascivious or sexually provocative in order to fall within the parameters of the statute.<sup>273</sup>

Fourth, while federal law, on the one hand, requires more than nudity to be “lascivious,” an “exhibition,” on the other hand, does not require nudity at all. As one federal appellate court wrote “the scantily clad genitals or pubic area of young girls can be ‘exhibited’ in the ordinary sense of that word.”<sup>274</sup> That court also noted that an exhibition may occur in images of “children whose genital areas are barely covered.”<sup>275</sup>

Fifth, some federal courts apply the so-called “six *Dost* factors,”<sup>276</sup> which

<sup>268</sup> *United States v. Rayl*, 270 F.3d 709, 714 (8th Cir. 2001).

<sup>269</sup> 18 U.S.C. § 2256(2)(a)(v) (2006).

<sup>270</sup> *See, e.g.*, KY. REV. STAT. ANN. § 531.300(4) (Lexis 2008) (defining “[s]exual conduct by a minor” to include “[t]he exposure, in an obscene manner, of the unclothed or apparently unclothed human male or female genitals, pubic area or buttocks, or *the female breast*, whether or not subsequently obscured by a mark placed thereon, or otherwise altered . . .”).

<sup>271</sup> NEB. REV. STAT. ANN. § 28-1463.02(3) (LexisNexis 2003) (emphasis added).

<sup>272</sup> *United States v. Griesbach*, 540 F.3d 654, 656 (7th Cir. 2008).

<sup>273</sup> *United States v. Knox*, 32 F.3d 733, 750 (3d Cir. 1994).

<sup>274</sup> *Id.* at 745 (“Although the genitals are covered, the display and focus on the young girl’s genitals or pubic area . . . provides considerable interest and excitement for the pedophile observer . . .”).

<sup>275</sup> *See id.* at 752.

<sup>276</sup> In *United States v. Grimes*, the Fifth Circuit wrote that “this circuit, when determining whether a visual depiction of a minor constitutes a ‘lascivious exhibition of the genitals or pubic area’ under § 2256(2)(E), applies the six-factor test of *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff’d*, 813 F.2d 1231 (9th Cir. 1987).” *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001). More recently, the factors were applied by U.S. District Judge Denny Chin in New York in *United States v. Levy*. Judge Chin wrote “I charged the

were articulated more than two decades ago by United States District Judge Thompson in *United States v. Dost*,<sup>277</sup> when trying to determine whether a particular exhibition of the genitals or pubic area is lascivious. Those factors include:

1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.<sup>278</sup>

Judge Thompson made it clear, however, that these factors are not the only ones to be considered, as he wrote that the trier of fact should consider them "among any others that may be relevant in the particular case."<sup>279</sup> Indeed, as one federal appellate court wrote thirteen years after the *Dost* decision, "these factors are neither comprehensive nor necessarily applicable in every situation. Although *Dost* provides some specific, workable criteria, there may be other factors that are equally if not more important in determining whether a photograph contains a lascivious exhibition. The inquiry will always be case-specific."<sup>280</sup> More recently, the United States Court of Appeals for the First Circuit observed that while the *Dost* factors may be used by juries, "they are not the equivalent of the statutory standard of 'lascivious exhibition' and are not to be used to limit the statutory standard."<sup>281</sup>

It would seem, then, that not all nude photographs—and certainly not all topless photographs—that a minor sexts of herself to another minor would constitute child pornography. Applying the *Dost* factors, prosecutors considering charging a girl who sexts with child pornography should first consider whether the image in question focuses closely on the genitals or pubic area of the girl, the pose in which the girl is positioned and what, if anything, she is wearing. Perhaps the most troubling *Dost* factor when it comes to sexting, however, is number six: "whether the visual depiction is intended or designed to elicit a sexual response in the viewer."<sup>282</sup> Why is this troubling? Because if most teens who sext with one another view it as a form of flirting or an invita-

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jury to consider what are known as the *Dost* factors in making its determination as to whether the photographs were 'lascivious.'" *United States v. Levy*, 594 F. Supp. 2d 427, 443, n.8 (S.D. N.Y. 2009).

<sup>277</sup> *Levy*, 636 F. Supp. at 832.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *United States v. Amirault*, 173 F.3d 28, 32 (1st Cir. 1999). *See also United States v. Hill*, 459 F.3d 966, 972 (9th Cir. 2006), *cert. denied*, 549 U.S. 1299 (2007) (writing that the *Dost* "factors are neither exclusive nor conclusive").

<sup>281</sup> *United States v. Frabizio*, 459 F.3d 80, 90 (1st Cir. 2006).

<sup>282</sup> *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986).

tion to have sexual relations,<sup>283</sup> then, almost by definition, any sexted photo sent by a girl, for instance, to a boyfriend or prospective boyfriend is designed to elicit a sexual response in the viewer. This factor would seem likely to increase the chances of a finding of lascivious exhibition of the genitals or public area in many sexting cases.

In response to the concerns that punishing sexting minors as felons and sex offenders under current child pornography laws is too drastic, several initiatives have been undertaken in 2009 by law enforcement agencies and legislative bodies. For instance, in Kettering, Ohio, the county prosecutor announced in March 2009 the creation of a “Juvenile Diversion Program for first-time offenders who have consensually sent pictures of a sexual nature via cell phone and/or other communications devices.”<sup>284</sup> Julie Bruns, chief of the Montgomery County Prosecutor’s Juvenile Division, told a local reporter that “[i]t’s our belief that the kids are engaging in conduct that they don’t understand the legal ramifications of . . . Ignorance of the law is not a defense . . . However, we think in order to alleviate the problem, our best line of defense is educating them.”<sup>285</sup>

Some prosecutors simply exercise their own judgment about how to handle sexting cases on a case-by-case basis. For instance, David Leyton, a prosecutor in Genesee County, Michigan, stated in April 2009, “I’m not looking to criminalize each and every person who does this. . . . But there are some instances where we would issue criminal charges.”<sup>286</sup> Other prosecutors take a much more hard-line approach, such as Jeffrey Boyles, the first assistant district attorney in York County, Pennsylvania, who told a group of high school parents in April 2009 that “[a] nude picture of a child being created and disseminated is a crime . . . . There is [sic] no ifs, ands or buts about it.”<sup>287</sup>

Allowing the prosecution of minors who engage in sexting, while reducing the punishment and consequences for such a crime to something less than a felony, is one tactic for dealing with the problem. For instance, in April 2009, two Ohio lawmakers introduced companion bills that “would make sending, receiving and viewing electronically transmitted nude pictures of juveniles by juveniles a misdemeanor. The same acts would still be a felony for adults.”<sup>288</sup>

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<sup>283</sup> See Goodman, *supra* note 97.

<sup>284</sup> Kelli Wynn, *County Creates Juvenile Program for ‘Sexting,’* DAYTON DAILY NEWS (Ohio), Mar. 26, 2009, at RD1.

<sup>285</sup> Wynn, *supra* note 22, at RD4.

<sup>286</sup> RoNeisha Mullen, *Fad or Felony? Sexting a Troubling—and Growing—Trend,* FLINT JOURNAL (Mich.), Apr. 17, 2009, at A1.

<sup>287</sup> Editorial, *Forget Phones, Focus on Felonies,* YORK DISPATCH (Pa.), Apr. 21, 2009, at A4.

<sup>288</sup> Rachel Dissell, *Teen ‘Sexting’ Penalties Too Harsh, Lawmakers Say: Bills Hold Juveniles Accountable Without Labeling Them Sex Offenders,* PLAIN DEALER (Cleveland, Ohio), Apr. 14, 2009, at A1.

House Bill 132 provides that:

(A) No minor, by use of a telecommunications device, shall recklessly create, receive, exchange, send, or possess a photograph, video, or other material that shows a minor in a state of nudity.

(B) It is no defense to a charge under this section that the minor creates, receives, exchanges, sends, or possesses a photograph, video, or other material that shows themselves in a state of nudity.

(C) Whoever violates this section is guilty of illegal use of a telecommunications device involving a minor in a state of nudity, a delinquent act that would be a misdemeanor of the first degree if it could be committed as an adult.<sup>289</sup>

Explaining his intent as the primary sponsor of the Senate version of the bill,<sup>290</sup> Senator Bob Schuler of Sycamore Township stated that “[t]he legislation brings needed balance to Ohio law to hold teenagers accountable for their actions without having to charge them as sexual offenders . . . .”<sup>291</sup> Were the twin bills to become law and were, in turn, teens to be convicted of violating that law, the *Plain Dealer* reported they “would more likely face probation or be placed in an education program, though a judge could still sentence them to a short stint in a local juvenile facility. But they would not be labeled a sex offender.”<sup>292</sup> Ohio Representative Ronald Maag, the sponsor of the House version of the bill, stated that that “[l]ocal prosecutors have brought to my attention that under current Ohio law these teens could be charged with a felony and classified as sex offenders . . . [t]here is concern that this may not be appropriate for these minors . . . what these teens need is education about how this type of behavior could affect their lives.”<sup>293</sup>

The Ohio bills, which were both proposed in April 2009, may have arisen, at least in part, as the result of a pair of April 2, 2009 letters sent by Jeffrey M. Gamso, legal director of the American Civil Liberties Union of Ohio, one of which was directed to all members of the Ohio General Assembly<sup>294</sup> and the

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<sup>289</sup> H.B. No. 132, 128th Gen. Assem., Reg. Sess. (Ohio 2009).

<sup>290</sup> See S.B. No. 103, 128th Gen. Assem., Reg. Sess. (Ohio 2009), available at [http://www.legislature.state.oh.us/BillText128/128\\_SB\\_103\\_I\\_N.html](http://www.legislature.state.oh.us/BillText128/128_SB_103_I_N.html) (providing the Senate version of House Bill No. 132 and using the same language as the House version).

<sup>291</sup> Dissell, *supra* note 288.

<sup>292</sup> *Id.*

<sup>293</sup> Jennifer Baker, *Law Would Cover ‘Sexting’*, CINCINNATI ENQUIRER, Mar. 27, 2009, at 1B, available at LEXIS, News & Business Library.

<sup>294</sup> Letter from Jeffrey M. Gamso, Legal Dir., American Civil Liberties Union of Ohio, to All Members of the Ohio General Assembly (Apr. 2, 2009), available at [http://www.acluohio.org/issues/JuvenileJustice/LetterToOGA\\_Sexting2009\\_0402.pdf](http://www.acluohio.org/issues/JuvenileJustice/LetterToOGA_Sexting2009_0402.pdf) [hereinafter Gamso Letter to General Assembly]. This letter called on Ohio legislators to “[c]larify that criminal offenses relating to taking or sending nude photos do not apply to adolescents who naively take and send their own picture (i.e., the ‘sexting’ sender)” and to “[c]larify that criminal and delinquency offenses relating to possession of nude photos of a minor do not apply to adolescents who just happened to receive a nude photo from another minor (i.e., the ‘sexting’ recipient).” *Id.*



other which was sent all Ohio county prosecutors.<sup>295</sup> The latter letter provided, in pertinent part, that:

There are better ways to discourage this behavior than by lashing out and criminalizing the victims for what they have done to themselves. Teens need to be taught the risks and potential consequences of sending nude photos. But that should be done by education, not prosecution. Prosecuting teens who send photos of themselves, in an attempt to protect them from themselves or to serve as a warning to others, could have dire and unintended consequences on these kids.<sup>296</sup>

Gamso argued in the letters that “[a] conviction for sexting does far more than teach a lesson—it can ruin a life,”<sup>297</sup> as he pointed out that “[t]he child who foolishly sends a photo of herself or receives a photo (and frankly, even the one who maliciously shares it with friends) can be labeled a ‘sex offender.’”<sup>298</sup> Gamso concluded the letter to the Ohio General Assembly by “calling on the [Ohio] General Assembly to clarify the law so that teens caught ‘sexting’ are not subjected to felony sex offense charges . . . .”<sup>299</sup>

Similarly, in Vermont in April 2009 a bill moved through the legislature that “would carve out an exemption from prosecution for child pornography for 13- to 18-year-olds on either the sending or receiving end of sexting messages, so long as the sender voluntarily transmits an image of himself or herself.”<sup>300</sup> Senate Bill 125<sup>301</sup> provides, in relevant part, that the state’s laws targeting sexual offenders “shall not apply if the person is less than 19 years old, the child is at least 13 years old, and the child knowingly and voluntarily and without threat or coercion used an electronic communication device to transmit an image of himself or herself to the person.”<sup>302</sup>

Senator Richard Sears, chairman of the Vermont Senate Judiciary Committee, explained the motive behind the measure, stating “[w]e felt that it’s poor behavior and it’s not something we want to give our OK to . . . . But at the same time, do we want a kid in jail? Do we want them tagged as a sex offender for the rest of their lives? And the answer is no.”<sup>303</sup> Similarly, Vermont State Senator John Campbell stated that “[w]e have to understand that there is certainly a difference between bad behavior and bad decision making and criminal

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<sup>295</sup> Letter from Jeffrey M. Gamso, Legal Dir., American Civil Liberties Union of Ohio, to All Ohio County Prosecutors (Apr. 2, 2009), available at [http://www.acluohio.org/issues/JuvenileJustice/LetterToOhioProsecutors\\_Sexting2009\\_0402.pdf](http://www.acluohio.org/issues/JuvenileJustice/LetterToOhioProsecutors_Sexting2009_0402.pdf).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> Gamso Letter to General Assembly, *supra* note 295.

<sup>300</sup> Dave Gram, *Vt. Aims to Ease Penalties for ‘Sexting,’* YORK DISPATCH (Pa.), Apr. 15, 2009, at A1.

<sup>301</sup> S. 125, Reg. Sess. (Vt. 2009).

<sup>302</sup> *Id.* §2.

<sup>303</sup> Gram, *supra* note 300.

behavior.”<sup>304</sup>

In Utah, House Bill 14<sup>305</sup> passed the legislature and was signed into law by Governor Jon Huntsman on March 30, 2009.<sup>306</sup> That bill, which was sponsored by Representative Sheryl L. Allen and amended Utah’s criminal code,<sup>307</sup> affected the penalty for minors who engage in sexting by making it a class A misdemeanor for minors who are sixteen- or seventeen-years-old to distribute pornographic material or deal in material harmful to a minor.<sup>308</sup> Minors younger than sixteen years of age are guilty of a class B misdemeanor for distributing such material to another minor.<sup>309</sup> In contrast to these sanctions for minors, “[p]eople 18 and older who solicit a younger person to send pornographic or harmful material could be charged with a third-degree felony.”<sup>310</sup> In brief, Utah’s bill took the same tack as that being considered in Ohio<sup>311</sup> by reducing the penalty for sexting among minors from a felony to a misdemeanor.

Rather than propose legislation, some communities are holding forums on the issue of sexting, inviting local law enforcement officials and politicians to describe the laws that they believe will or should apply to acts of sexting. This was the case in Pennsylvania, where the Spring Grove Area School District scheduled such a meeting “after two freshman girls sent nude photos of each other to students at Spring Grove Area High School and Spring Grove Area Intermediate School.”<sup>312</sup>

Beyond the application of statutes targeting child pornography and child exploitation, are there other criminal laws already on the books that might apply to instances of sexting? The answer may be yes, depending on the nature of the sexting that occurs.

For instance, a minor who repeatedly texts nude photographs of herself to a boy (or who sends them via the Internet to the boy) who has told her not to do

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<sup>304</sup> Mike Celizic, *Vermont Moves to Reduce Teen ‘Sexting’ Charges: New Law Would Carve Out an Exemption from Prosecution for Child Porn*, MSNBC.COM, Apr. 15, 2009, <http://www.msnbc.msn.com/id/30224261>.

<sup>305</sup> H.B. 14, Gen. Sess. (Utah 2009).

<sup>306</sup> *Id.* The status of the bill, including all actions taken on it, is found online at the Utah State Legislature’s website at <http://le.utah.gov/~2009/status/hbillsta/hb0014.htm>.

<sup>307</sup> Two sections of the criminal code were amended as a result of the bill. See UTAH CODE ANN. § 76-10-1204 (2008) (setting forth the penalties for distributing pornographic material) and UTAH CODE ANN. § 76-10-1206 (2008) (setting forth the penalties for dealing with material harmful to a minor).

<sup>308</sup> H.B. 14, Gen. Sess. (Utah 2009).

<sup>309</sup> *Id.*

<sup>310</sup> Editorial, *Educate Youths on Tech Etiquette*, DESERET NEWS (Salt Lake City, Utah), Apr. 19, 2009 (discussing H.B. 14, Gen. Sess. (Utah 2009)).

<sup>311</sup> See *supra* notes 290–301 and accompanying text (addressing Ohio legislation).

<sup>312</sup> Andrew Shaw, *Spring Grove Hosts Talk on ‘Sexting’ Wednesday*, YORK DISPATCH (Pa.), Apr. 14, 2009, available at 2009 WLNR 6965178.

so might be subject to laws targeting cyberbullying,<sup>313</sup> harassment by electronic communication<sup>314</sup> or cyberharassment.<sup>315</sup>

#### H. Enforceability and Deterrent Effect of Laws Targeting Sexting

In criticizing the application of laws targeting child pornography to minors who engage in sexting, the editorial board of the *Philadelphia Inquirer* observed in April 2009 that the “practice apparently is more widespread than jaywalking.”<sup>316</sup> Indeed, if twenty percent of teens really do sext, it would take a massive deployment of law enforcement resources to address the practice and to effectively enforce laws targeting it. And unlike jaywalking or speeding on a highway—another very common practice—sexting does not take place in public view where law enforcement officials can easily detect it and take action against it.

One must also consider whether expenditure of taxpayer dollars to enforce laws against sexting is a judicious use of scarce economic resources. Lawmakers, prosecutors and police must ask themselves whether there are more serious offenses—illegal drug sales, child prostitution, and child pornography created by adults through the actual physical and mental abuse of minors, for instance—to target.

The reality would seem to be that the overwhelming amount of sexting by minors would go undetected by law enforcement, even in the presence of criminal laws targeting it. Given that the Fourth Amendment<sup>317</sup> generally would

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<sup>313</sup> See *supra* notes 185–97 and accompanying text (discussing cyberbullying laws).

<sup>314</sup> To describe one state’s example of a law prohibiting harassment by electronic communication, Iowa’s statute defines electronic communications as “any communication involving the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means . . . [which] includes but is not limited to communication via electronic mail, internet-based communications, pager service, cell phones, and electronic text messaging.” Iowa Code § 280.28 (2008). See also *Cyberbullying and Electronic Harassment Statutes, Current Through March 2009*, National Center for Prosecution of Child Abuse, The National District Attorneys Association, available at [http://www.ndaa.org/pdf/cyberbullying\\_mar\\_09.pdf](http://www.ndaa.org/pdf/cyberbullying_mar_09.pdf) (last visited Aug. 27, 2009) (providing a list of all such statutes across the United States).

<sup>315</sup> Cyberharassment “typically occurs when an individual or group with no legitimate purpose uses a form of electronic communication as a means to cause great emotional distress to a person.” Sarah Jameson, Comment, *Cyberharassment: Striking A Balance Between Free Speech and Privacy*, 17 *COMMLAW CONSPECTUS* 231, 235 (2008).

<sup>316</sup> Editorial, *supra* note 226.

<sup>317</sup> The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

require probable cause on the part of police before they could search a minor's cell phone for allegedly illegal images, the only cases that would ever seem to come to the attention of law enforcement likely are those where one minor (Minor A) is aggrieved by another minor's (Minor B) forwarding of Minor A's sexted image to others without Minor A's permission. Even then, however, Minor A might not be willing to approach the police about targeting Minor B for forwarding the image because Minor A herself might be charged with creating and disseminating the image.

### III. MAKING SENSE OF SEXTING: A SENSIBLE APPROACH FOR ADDRESSING THE ISSUE

While the debate about how to address minors' sexting proclivities is far from settled and has left prosecutors, parents, and lawmakers grappling for solutions to what they perceive as problematic behavior, several points should be very clear at this point. Although each of these points of clarity raises its own question or questions, they nonetheless provide a rather comprehensive six-point framework for both understanding and addressing sexting by minors when viewed collectively.

- First, as journalist Sharma Howard recently put it, “[u]nless cell phones go away, which seems improbable, sexting is here to stay.”<sup>318</sup> The fact that sexting is not some passing teenage fad means, of course, that society—parents, schools and the legal system, included—must deal with sexting and cannot ignore it. And unless police are going to search the cell phones of every minor for evidence of sexting, legal measures are not by themselves going to stop sexting. The issue, of course, is just how to deal with it.

- Second, there is a profound and troubling irony in prosecuting minors who are sexting with child pornography charges; child pornography laws, after all, are meant to protect minors from sexual abuse, not to punish them.<sup>319</sup> This is an

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issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

However, in Kansas, a district court recently ruled that a defendant has no privacy rights in the list of phone numbers stored inside his or her cell phone. *United States v. Fierros-Alvarez*, 547 F. Supp. 2d 1206, 1214 (D. Kan. 2008).

<sup>318</sup> Sharma Howard, ‘*Sexting*’ is *This Generation’s Streaking, Skinny-Dipping*, NORWICH BULLETIN (Conn.), May 4, 2009, at D1.

<sup>319</sup> Cf. Editorial, *supra* note 6 (arguing that “[m]isguided teens should not be punished with laws meant to protect them—as child pornography laws are supposed to do.”).

area where teens and technology have moved far faster than the law; teen sexting simply cannot be comfortably cabined within the confines of current child pornography statutes. As the *Atlanta Journal-Constitution* reported in May 2009, “[t]welve states so far have arrested and charged teenagers with felony child pornography as a result of ‘sexting,’ which is a complete subversion of the child pornography laws, and a waste of the few and dwindling resources we need to battle the actual adult sexual predators who exploit children.”<sup>320</sup> If child pornography laws, which could permanently label minors as sex offenders for otherwise innocent acts of teenage tomfoolery, do not provide the appropriate avenue of legal redress and retribution for sexting minors, then is new legislation needed to address sexting that is less punitive but nonetheless teaches minors the lesson that sexting is wrong?

- Third, sexting takes place in a mass-mediated culture that privileges and prizes teen beauty and hyper-sexualizes minors.<sup>321</sup> Sexting, the author of this article contends, is merely a sad symptom and randy reality of this culture. The question raised by this is what—if anything—can the law do about the deeper problems (if one believes they are, in fact, problems) that underlie sexting? The law, standing alone, cannot change this social situation, nor should legislators or parents expect it to. The law can only do so much and, unfortunately, what it can do only takes place *after* an incident of sexting occurs and comes to the attention of authorities. It will be up to parents, educators and minors themselves to mitigate and reduce the prevalence of sexting behavior; all the law can do is punish the behavior once it transpires.

It also is important for lawmakers to understand that many children who sext really do not mean to cause harm when they take a provocative picture of themselves and send it to a friend or suitor. Their behavior, in fact, may seem natural to them, given their familiarity with cell phones and texting, as well as the sexualized society in which they live.

- Fourth, it should be clear that all incidents of sexting are not alike.<sup>322</sup> This raises the question: Is it really possible to create a one-size-fits-all sexting statute when the permutations and nuances of sexting vary along factors such as the age of the participants (both sender and receiver), the explicitness of the images, the scope of the dissemination of the images and the volition/permission regarding dissemination? The answer would seem to be no.

- Fifth, in the typical sexting scenario in which a girl or boy takes a sexually provocative photo of herself or himself, it is clear that no minor actually is harmed physically or emotionally in the actual taking of the photograph or in

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<sup>320</sup> Vicki Griffin, *Teen ‘Sexting’ Shouldn’t be Treated as Porn*, ATLANTA J.-CONST., May 2, 2009, at 13A.

<sup>321</sup> See *supra* Part II.1.

<sup>322</sup> See *supra* Part II.D.

its initial transmission to a willing, intended recipient. All harms—embarrassment, shame, and loss of a potential job or educational opportunity, for instance—that flow from sexting arise only upon the further dissemination of the image to others beyond those for whom it was originally intended. The question raised by this is whether it is ever appropriate for the legal system to punish either the sender-minor, who takes the photograph and initially transmits it of her own volition, or the willing and intended recipient-minor, who merely keeps the image to himself (i.e., the *primary, mutually volitional sexting* scenario described earlier<sup>323</sup>). It would seem that the answer would generally be no and that any punishment should be left to the discretion of parents, unless perhaps there was a great disparity in the age between the two sexters, where the recipient is older and actively solicits the photo or asks the taker-sender to send him one (a eleven-year-old taker-sender, for instance, and a sixteen-year-old recipient who asks for the photo).

Where the law should be involved, then, typically would be in cases of *secondary, non-volitional sexting*.<sup>324</sup> Here the law should target the individuals who forward sexually provocative images of minors downstream without the permission of the initial transmitter of the photograph. These forwarders cause the harm by sharing the photographs with others for whom the images were not intended. This is where the brunt of the injuries to the sexter, such as emotional distress and humiliation, arise. If the spurned and angry former boyfriend is the one who forwards sexual images of his former girlfriend out to his classmates without her permission, then he would be the individual the law should punish.

It certainly is true that no harm to the initial taker-sender of the photograph would ever have occurred had she not taken a photograph of herself in the first place and then voluntarily sent it to another person. That sexted image clearly is the speech in question that has potential to cause harm; without a photograph, obviously, there would be no harm in sexting. But it is the downstream sender of the speech, not the creator of the speech, that does the damage to the taker-sender by placing it before the eyes of individuals—potentially both minors and adults—for whom it was not intended. As Judge Posner makes clear, “the degree to which a disclosure of *personal information* inflicts harm on a person depends less on *what information* is disclosed than *to whom* and *to how many*, and *to what use* it is put by the persons to whom it is disclosed.”<sup>325</sup> In other words, the degree to which the disclosure of the personal information (the sexted photograph of minor’s body) causes harm to the minor whose information is revealed depends directly on: 1) how it is used by the recipient; and 2) to whom and to how many people the recipient forwards it.

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<sup>323</sup> See *supra* Part II.D.2–3.

<sup>324</sup> See *supra* Part II.D.4.

<sup>325</sup> Posner, *supra* note 90, at 249 (emphasis added).

If lawmakers and prosecutors accept the argument that very young minors—an age that lawmakers would need to decide on and specifically define,<sup>326</sup>—cannot understand the long-term, potentially negative consequences of taking and transmitting nude photographs of themselves,<sup>327</sup> then it makes little sense for the law to punish them for their actions. That should be left to parents, if they so choose.

It is important to recall that a minor whose image is forwarded by others without her permission may have a civil law remedy—at least against the person who forwards her image without her permission in an attempt to cause her mental anguish, through an intentional infliction of emotional distress lawsuit.<sup>328</sup> This may reduce or mitigate the need for a criminal penalty—on top of civil liability—for a minor who engages in downstream forwarding without the permission or consent of the photographed minor.

- Sixth, given the multiple variations and permutations of sexting behavior, the best approach for dealing with sexting as a whole is a comprehensive one, requiring efforts by more than just the legal system to regulate it. Parents and schools need to be involved, and swift in-school punishment of sexting activity may reduce the need for criminal intervention. For example, the suspension or expulsion of a minor for sexting the image of a female classmate to other students without that female classmate's permission may be all of the punishment necessary to prevent such behavior in the future. When the minors involved in a sexting incident are very young, the wrath of parents may be just as effective as the wrath of an overzealous prosecutor insistent on making an example of the minors in court.

Ultimately, even if new laws are created that are specifically designed to deal with sexting, prosecutors will need to exercise careful, sound judgment and discretion in deciding whether to actually use those laws in any given case. Leaving a particular case of sexting to parents and schools may not only save prosecutorial resources for more important matters, but also prevent public backlash against the legal system and prosecutor. As the editorial board of *USA Today* put it in May 2009, “authorities should use discretion, and most teen sexting needn’t turn into a federal case. As with other issues involving adolescent behavior, parents and school officials are the first line of defense. They need to set rules, have those awkward conversations about dangers and consequences, and teach about respect and protection in the digital age.”<sup>329</sup>

In the fall of 2009, with legislators and police continuing to grapple with the

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<sup>326</sup> As seen in the shifting ages of the Romeo and Juliet statutory rape laws described earlier. *See supra* Part II.D.1.

<sup>327</sup> *See supra* notes 22, 122 and accompanying text.

<sup>328</sup> *See supra* Part II.E.3.

<sup>329</sup> Editorial, *To Deal with ‘Sexting,’ XXXtra Discretion is Advised*, USA TODAY, May 5, 2009, at 10A.

sexting problem, schools were starting to take the issue into their own hands, adopting different policies and strategies for addressing it.<sup>330</sup> These policies suggest zero tolerance for the practice. For instance, the 2009-2010 Code of Student Conduct in Manatee County, Florida includes the following provision on sexting:

If you post, send or forward to anyone else a nude or sexually revealing photo of a person through the internet or text message, or if you show such photos to other people, you will be suspended from school and you may be recommended for expulsion. You may also be subject to arrest for violation of child pornography laws if the student in the photo is a minor.<sup>331</sup>

Similarly, the 2009-2010 Code of Student Conduct for the Houston Independent School District now includes a statement providing that a student may be suspended for up to three days for:

“Sexting” or using a cell phone or other personal communication device to send text or e-mail messages or possessing text or e-mail messages containing images reasonably interpreted as indecent or sexually suggestive while at school or at a school-related function. In addition to any disciplinary action, phones will be confiscated and students should be aware that any images suspected to violate criminal laws will be referred to law-enforcement authorities.<sup>332</sup>

Notable here, beyond the obvious vagueness problems in both policies—what exactly constitutes a “sexually revealing photo” or a “sexually suggestive” one?—is that both policies suggest the possibility that students who sext could face real-world consequences in the criminal justice system. The problem, of course, is that the criminal justice system is still ill-equipped to deal with sexting and some of the minors who the schools turn over to authorities could well face child pornography charges.

Instead of turning minors over to the criminal justice system, schools should be teaching them about the dangers of sexting itself. As Professor Robert D. Richards recently argued, “rather than focus on how best to punish the minors involved in sexting or how to terrify them into thinking they’ll be behind bars until they reach middle age, a better approach would be to educate them about the harms they are bringing on themselves.”<sup>333</sup> Richards adds that schools “should focus on the harms to the kids themselves caused by having these images—this ‘permanent record’—floating throughout cyberspace for the rest of their lives to be seen by their peers, teachers, potential employers and ulti-

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<sup>330</sup> The First Amendment issues raised by school regulation of sexting are addressed earlier in this article. See *supra* notes 171–182 and accompanying text.

<sup>331</sup> MANATEE COUNTY PUBLIC SCHOOLS, CODE OF STUDENT CONDUCT, 2009-2010 12, available at [http://www.manatee.k12.fl.us/parents/pdfs/Code\\_of\\_Student\\_Conduct\\_Current.pdf](http://www.manatee.k12.fl.us/parents/pdfs/Code_of_Student_Conduct_Current.pdf)

<sup>332</sup> HOUSTON INDEPENDENT SCHOOL DISTRICT, CODE OF STUDENT CONDUCT, 2009-2010, available at [http://www.houstonisd.org/HISDConnectEnglish/Images/PDF/Code\\_Eng.pdf](http://www.houstonisd.org/HISDConnectEnglish/Images/PDF/Code_Eng.pdf).

<sup>333</sup> Robert D. Richards, Op-Ed., *Combating ‘Sexting,’* BALTIMORE SUN, Aug. 14, 2009, at 19A.



mately their own kids.”<sup>334</sup>

At this stage, the only thing that certainly will hold true in the not too distant future, no matter what the legal system does today about sexting, is that inventive minors, using the latest technologies, will find new ways to scare their parents, principals, and police by engaging in a type of conduct that will be completely foreign to them. But as the late Justice Brandeis famously opined about another controversial form of speech more than eighty years ago, “[m]en feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.”<sup>335</sup> We cannot fear sexting—or the next similar sexual movement that comes down the pike—and burn children with child pornography laws.

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<sup>334</sup> *Id.*

<sup>335</sup> *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

