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# Teens, Technology, and Sex: Finding the Appropriate Balance and Symmetry when Seeking to Punish the Modern Child Predator

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TEENS, TECHNOLOGY, AND SEX: FINDING THE  
APPROPRIATE BALANCE AND SYMMETRY WHEN  
SEEKING TO PUNISH THE MODERN CHILD  
PREDATOR

*By Melody Sabedra*

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## INTRODUCTION

Technological advancements continue to evolve and enhance methods of communication at a rate that far surpasses the necessary changes in criminal law.<sup>1</sup> Child pornography was once considered a limited problem; however, the advent of technology and the Internet have provided a gateway that allows child pornography to be more readily available to all who wish to view it.<sup>2</sup> More recently, teens have voluntarily created and disseminated “self-produced child pornography” as a result of such technological advancements.<sup>3</sup> This practice has become known as “sexting.”<sup>4</sup> Although texting is not exactly a “new” technological advancement, sending “sext” messages is a new phenomenon.<sup>5</sup> Sexting is the transmission of pictures or video of a person, usually the sender, in various states of indecency, usually by cell phone.<sup>6</sup> Sexting is now considered a popular custom among teenagers and young adults.<sup>7</sup> Most of the sexually suggestive images constituting sext messages are sent by a teen to their significant other.<sup>8</sup> However, it has also become a common practice among teenagers for the intended recipient of a

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<sup>1</sup> See *Infra* Part I.

<sup>2</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, 3 (2007).

<sup>3</sup> *Id.* at 4. The self-exploitation by teens occurs when teens (1) send an image to a limited audience; (2) producing sexually explicit images on the Internet or a social networking site; and (3) recording sexual experiences with people. *Id.*

<sup>4</sup> See *Infra* Part I and accompanying text.

<sup>5</sup> Richard D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of Teen Sexting Cases*, 32 HASTINGS COMM. & ENT. L.J. 1, 1-2 (2009) (emphasizing that T.V. networks making shows about teen sexting proved that it was an important and emerging legal issue in the U.S.).

<sup>6</sup> Don Corbett, *Let’s Talk About Sext: The Challenge of Finding the Right Legal Response to the Teenage Practice of “Sexting”*, 13 No. 6 J. INTERNET L. 3, 3 (2009).

<sup>7</sup> *Id.*; see also The National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results From a Survey of Teens and Young Adults*, Fall 2008, available at [http://www.thenationalcampaign.org/sexttech/pdf/SexTech\\_summary.pdf](http://www.thenationalcampaign.org/sexttech/pdf/SexTech_summary.pdf) (last visited, Jan. 22, 2010) (hereinafter The National Campaign). The National Campaign to Prevent Teen and Unplanned Pregnancy conducted a survey of individuals between the age of 13-26 and discovered that twenty percent of teenagers aged 13-19 admitted to sending and/or posting nude photos or video of themselves through text messages, email, or popular social network sites. *Id.*

<sup>8</sup> The National Campaign, *supra* note 7, at 2 (stating that seventy-one percent of teen girls and sixty-seven percent of teen guys have sent or posted sexually explicit messages or images to a significant other).

sex message to share those images or messages with persons who were not originally intended to see them.<sup>9</sup>

In some cases, the showing of such images or messages is for purposes of getting back at an ex-significant other or someone with whom the recipient is currently fighting with.<sup>10</sup> Despite the popularity of sending sext messages among teens, such messages are causing much controversy in the context of criminal law due to the fact that technology has “outstripped” the law.<sup>11</sup> Specifically, some states are prosecuting teenagers for transmitting, receiving, or possessing child pornography, either of themselves or of others, under draconian child pornography statutes.<sup>12</sup> Application of traditional child pornography laws to teen sexting has caused much debate about whether such prosecutions fit within the policy and purpose behind child pornography laws.<sup>13</sup>

As a result of being prosecuted for taking, sending, disseminating, or possessing child pornography, either of themselves or of other minors, some teens have either been required to, or threatened to be required to, register as a sex offender like all other pedophiles.<sup>14</sup> Opponents of prosecuting teens for sexting argue that such punishments are too harsh for children engaging in “innocent” acts.<sup>15</sup> Specifically, such opponents argue that child pornography laws were not intended to apply to children, but rather, were intended to protect children from pedophile adults who force them to engage in sexual

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<sup>9</sup> *Id.* at 3 (noting that thirty-eight percent of teen girls and thirty-nine percent of teen boys have admitted to seeing sexually explicit images or messages intended for someone else).

<sup>10</sup> *See Infra* Part II.

<sup>11</sup> Richards & Calvert, *supra* note 5, at 3.

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

<sup>13</sup> *Id.*; *see also Infra* Part III.

<sup>14</sup> Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 5 (2009).

<sup>15</sup> *Id.*

acts.<sup>16</sup> Thus, many opponents argue that such prosecutions are an abuse of prosecutorial discretion.<sup>17</sup>

The challenge with the sexting epidemic among teenagers is finding the appropriate balance and symmetry between allowing teens to learn from their mistakes and disciplining them for their bad acts. Although some sext messages may be innocent at heart, malicious sexting practices do occur whereby the intended recipient forwards the sexually explicit image to an unintended beneficiary for purposes of embarrassment, harassment, or harm to the original sender. Such sext messages should be treated differently than those lacking the malicious intent of the forwarder, and should be punished more swiftly and harshly than those who consent to sending those images of themselves. However, the question becomes whether it is ever appropriate to bring child pornography charges against a teen for sexting when the crime does not fit within the law's intended purpose.

This paper suggests that although punishment may be desired and necessary for punishing teenage sexters, bringing child pornography charges should not be the first step taken by prosecutors. Rather, states should seek to adopt statutes reflecting the ever-increasing advancements of technology and the recent trend of sexting. When drafting statutes specifically aimed at addressing teen sexting, the state legislature should distinguish between those teens sending the sext message for malicious purposes as opposed to those who lack such a malicious purpose. Additionally, the punishment required for a violation of the proposed statute should reflect the need to rehabilitate the teens rather than simply impose a punishment to the same degree as the criminal justice

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<sup>16</sup> See *Infra* Part III.

<sup>17</sup> See *Infra* Section III.C.

system. Because child pornography laws are extremely outdated, failing to reflect the current advancements in technology, the result has been the punishment of children rather than the protection of children. In addition to implementing sexting statutes, state legislatures should look to change their current child pornography statutes to address the fact that they are to apply to adult sexual conduct with children, rather than minors sending explicit images of themselves. This will help to limit prosecutorial discretion with regards to whether or not to prosecute minors under traditional state child pornography laws or the newly enacted sexting laws. State legislatures have a responsibility to ensure that their children are not being wrongfully punished, and should create laws reflecting the new sexting trend.

#### I. TECHNOLOGY AND SEX: THE MODERN TEENAGE COMMUNICATION

Today's teenagers are consumed in a world of technological communications that make it easier and faster to communicate with friends and catch up on the latest gossip.<sup>18</sup> For people of all ages, including teens, social networking sites have become the trendiest place to get in touch and hang out with friends without having to leave the comfort of home.<sup>19</sup> The number of teens using social networking sites and other technology to communicate is growing.<sup>20</sup> As a result of teens being part of the technology age, teens have been more likely than adults to post or reveal personal images and information about themselves by use of such technology.<sup>21</sup>

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<sup>18</sup> Corbett, *supra* note 6, at 3.

<sup>19</sup> See *Infra* Section I.A.

<sup>20</sup> See Patricia L. Garcia, *Dangerous "Friends," Unintended Consequences*, 73 TEX. B.J. 132, 133 (2010) (stating that teens are less likely to filter themselves when using social networking sites than adults).

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

## A. Teen Use of Technology

An extremely popular method of communication utilized by teens is the cell phone, which seventy-one percent of teens from ages twelve to seventeen own.<sup>22</sup> The percentage of teens owning cell phones has dramatically increased since 2004, when only forty-five percent of teens owned cell phones.<sup>23</sup> Of the teens surveyed in a 2008 study, sixty-seven percent communicated with their friends by using their cell phone, and fifty-eight percent of those teens send text messages to their friends as a primary method of communicating.<sup>24</sup> With teen use of cell phones on the rise, it has been suggested that such use most likely exceeds the original intended use of the cell phone by its original creators.<sup>25</sup> Specifically, fifty-two percent of the teens indicated that their cell phones are a source of entertainment rather than just a means of communication.<sup>26</sup>

Entertainment aside, one of the most popular and used functions of the cell phone is the text message.<sup>27</sup> Texting allows teens to send short and brief messages to their friends without requiring an actual phone call or verbal communication.<sup>28</sup> Because text messaging is likely the most popular feature on a teen's cell phone due to the ability to take and send pictures, video, and messages, texting is the primary source of teen

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<sup>22</sup> Amanda Lenhart, "Teens and Social Media: An Overview," PEW INTERNET & AMERICAN LIFE PROJECT, Apr. 10, 2009, available at <http://www.pewinternet.org/presentations/2009/17-Teens-And-Social-Media-An-Overview.aspx>

<sup>23</sup> *Id.*

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

<sup>25</sup> Corbett, *supra* note 6, at 4 (referencing CTIA, Press Release, "National Study Reveals How Teens Are Shaping and Reshaping Their Wireless World," Sept. 12, 2008, available at <http://www.ctia.org/media/press/body.cfm/prid/1774>).

<sup>26</sup> CTIA, Press Release, "National Study Reveals How Teens Are Shaping and Reshaping Their Wireless World," Sept. 12, 2008, available at <http://www.ctia.org/media/press/body.cfm/prid/1774>.

<sup>27</sup> Corbett, *supra* note 6, at 4.

<sup>28</sup> *Id.* (says that text messages "fit nicely within the short attention span of teens.").

sexting.<sup>29</sup> The fact that cell phones allow pictures, videos, and messages to be sent increases teen use of cell phones for sexting purposes, as teens who own their cell phone or pay their own cell phone bills are more likely to send sext messages than those teens that do not.<sup>30</sup>

Another extremely popular method of teen communication is the Internet, and more specifically, social networking sites. A social networking site allows users to create a profile and share information with others online.<sup>31</sup> In 2006, sixty-one percent of teens surveyed reported having a personal profile on a social networking site, with at least half of those surveyed admitting that they have posted pictures of themselves online.<sup>32</sup> Generally, as teens get older they are more likely to use social networking sites as a method of communication.<sup>33</sup> Over the past few years, social networking sites have become more than just a place to visit, and are now part of a daily activity that engages millions of users.<sup>34</sup> A recent study found that forty-eight percent of teens using social networking sites visit them daily.<sup>35</sup> The skyrocketing use of social networking sites has generated a concern among government leaders, school officials, and parents as to how to

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<sup>29</sup> *See Id.* (stating that texting is the “centerpiece” for teen sexting practice).

<sup>30</sup> John D. Sutter, *Survey: Fifteen Percent of Teens Get Sexual Text Messages*, CNN, Dec. 15, 2009, available at <http://www.cnn.com/2009/TECH/12/15/pew.sexting.survey/index.html?iref=allsearch>.

<sup>31</sup> Amanda Lenhart & Mary Madden, *Social Networking Websites and Teens*, PEW INTERNET AND AMERICAN LIFE PROJECT, Jan. 7, 2007, available at <http://www.pewinternet.org/Reports/2007/Social-Networking-Websites-and-Teens.aspx>.

<sup>32</sup> The survey was conducted by the National Center for Missing and Exploited Children and Cox Communication, and involved teens ages thirteen to seventeen. Garcia, *supra* note 20 133; *see also* Lenhart & Madden, *supra* note 31, at 1 (conducted a similar survey, finding that fifty-five percent of youths ages twelve to seventeen actually use online networking sites). The survey conducted by Lenhart and Madden was conducted by phone using a national sample of 935 teens ages twelve to seventeen. *Id.* at 3.

<sup>33</sup> Lenhart & Madden, *supra* note 31, at 3 (emphasizing that girls are more likely to use such sites the older they are). Specifically, seventy percent of girls age fifteen to seventeen visited social networking sites compared to only fifty-four percent of boys the same age. *Id.*

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

<sup>35</sup> *Id.* The study also found that twenty-six percent of teens only visit such sites once a day, while twenty-two percent visit such sites more than once a day. *Id.*

protect teens using such sites.<sup>36</sup> With so many teens using social networking sites, concerns regarding safety often arise and challenge lawmakers to the same extent as cell phones.<sup>37</sup>

#### B. Teen Sexting on the Rise?

It has been argued by attorneys for the Juvenile Law Center that sexting “represents the convergence of technology with adolescents’ developmental need to experiment with their sexual identity and explore their sexual relationships.”<sup>38</sup> But is sexting really a serious problem that is on the rise? One study by the National Campaign to Prevent Teen and Unplanned Pregnancy (hereinafter “The National Campaign”) suggests that sexting is in fact a common practice among teens that is on the rise through increased use of technology.<sup>39</sup> The study suggests that thirty-nine percent of teens surveyed admitted to having sent explicit text messages to others.<sup>40</sup> Nearly twenty percent of the teens who own cell phones have in fact received nude or semi-nude images through text messages.<sup>41</sup> The study indicated that seventy-one percent of teen girls who have posted such photos say that they have posted or sent them to a boyfriend, while sixty-seven percent of teen boys who have posted such photos say that they have sent them to a girlfriend.<sup>42</sup>

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

<sup>37</sup> See *Infra* Part II and accompanying text discussing teens distributing child pornography through social networking sites.

<sup>38</sup> Shannon F. Duffy, *Sexting Case Goes Before 3rd Circuit: Panel Hears Arguments on Whether Teens’ Nude Self Portraits Are Child Pornography*, PENNSYLVANIA LAW WEEKLY, Jan. 18, 2010, available at 2010 WLNR 1052632.

<sup>39</sup> The National Campaign, *supra* note 7.

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

<sup>41</sup> *Id.* at 1; see also John D. Sutter, *Survey: Fifteen Percent of Teens Get Sexual Text Messages*, CNN, Dec. 15, 2009, available at <http://www.cnn.com/2009/TECH/12/15/pew.sexting.survey/index.html?iref=allsearch> (states that the survey conducted by the National Campaign confirms fears that teens are sending and receiving sexually explicit sext messages).

<sup>42</sup> The National Campaign, *supra* note 7.

In a conflicting study, the Pew Internet and American Life Project stated that only four percent of teens aged twelve to seventeen that own cell phones actually sent sexually suggestive pictures of themselves to someone in a text message.<sup>43</sup> This study indicated that fifteen percent of teens between the ages of twelve and seventeen had received such sexually explicit text messages.<sup>44</sup> Although the study indicated that the amount of sexts sent and received increases with age, the study found that only eight percent of seventeen year olds owning cell phones sent sexually suggestive sext messages.<sup>45</sup> Whether or not sexting is in fact on the rise, it is clear that laws have not advanced as fast as the communicative technology. As a result, teens in certain jurisdictions are being prosecuted like adults for acts not originally contemplated by those who enacted child pornography statutes.

## II. STATE RESPONSES TO TEENAGE SEXTING

Junior high and high school relationships are often categorized as tumultuous and painful. Oftentimes the young adolescents have never been in a relationship before and are experiencing a variety of new emotions and heartaches. This is surely a time in most everyone's life where a breakup sent one's entire world crashing down. Such a breakup likely leaves those involved feeling vulnerable and insignificant. A particularly bad breakup could lead to hatred towards an ex or even lead to thoughts of revenge. With the advent of new technology, those adolescents taking part in relationships have different avenues of revenge than most adults had in their youth.<sup>46</sup> Devices such as the cell phone, the Internet, social networking sites, and online chatting now allow teens to bash their ex

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<sup>43</sup> Lenhart, *supra* note 22, at 2.

<sup>44</sup> *Id.*

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

<sup>46</sup> *See Supra* Part I.

in the confines of their own home while the effects are felt everywhere and the harm can be permanent.<sup>47</sup>

#### A. Sexters Charged Under Child Pornography Statutes

Phillip Alpert was much like the teens described above in a tumultuous adolescent relationship. Phillip's name appeared on the Florida sex offender's list when he was eighteen after engaging in a sexting revenge plot against his sixteen-year-old ex-girlfriend.<sup>48</sup> After Phillip's ex-girlfriend left a nasty message on his voicemail, he responded by logging into her email account and sending multiple nude photos of her to others in her email list.<sup>49</sup> After being charged with possessing and distributing child pornography, the prosecution warned Phillip that if he did not accept their plea deal he may spend a majority of his life behind bars.<sup>50</sup> The charges and possibility of being sent to prison came as a shock, as Phillip was not your typical child predator charged under child pornography laws.<sup>51</sup> Phillip accepted the plea deal, which placed him on probation for five years, and required him to submit to random polygraph tests, attend classes aimed at ensuring that he did not re-offend, and register as a sex offender until the age of forty-three.<sup>52</sup> Phillip's attorney, along with many others, argued that teen sexting should merit a social response rather than a criminal punishment.<sup>53</sup>

In Florida, a sixteen-year-old female was prosecuted for the promotion of sexual performance by a child for emailing her boyfriend pictures of the two engaging in sexual

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

<sup>48</sup> Garcia, *supra* note 20, at 132.

<sup>49</sup> *Id.* (noting that the photo was also sent to the ex-girlfriends family); Richards & Calvert, *supra* note 5, at 8. Although most sexting occurs via cell phone, this case involved sexting over the internet. *Id.*

<sup>50</sup> Richards & Calvert, *supra* note 5, at 9. The prosecution told Phillip that he could be charged with one-hundred and forty charges altogether for all messages sent. *Id.*

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

<sup>52</sup> *Id.* As a result of the plea deal and having to register as a sex offender, Phillip was kicked out of community college and has found it nearly impossible to find work. *Id.*

<sup>53</sup> *Id.* at 10.

activity.<sup>54</sup> A Florida court rejected an argument that the prosecution violated the girl's privacy interest, and found that emailing pictures was not considered to be private conduct.<sup>55</sup> Additionally, the court found that even if such activity were to be considered private, the state had a compelling interest to ensure that juveniles who lack the requisite maturity to make such important, life changing decisions did not create images of this nature.<sup>56</sup> Although the images were never revealed to a third party, the court emphasized the state's compelling interest in seeing that any image of a minor engaging in sexual activity is never produced. It is the reasonable expectation that the image may eventually be disseminated that creates a sufficient compelling interest to ensure that the production of such an image is prevented. Therefore, although the image was never distributed, and although the teens were relatively close in age, the court upheld the decision of the trial court holding the minor to be delinquent for producing an image known to portray a minor engaging in sexual activity.

#### B. States Respond to Sexting Prosecutions

Although many states have responded to the sexting craze by filing criminal charges against those teens caught sending sexually suggestive or explicit messages to others, a proposed New Jersey law would allow prosecutors to place teens in a diversionary program rather than prosecuting them under state child pornography laws.<sup>57</sup> Supporters of the proposed bill argued that teens engaging in sexting practices do so out of "psychological vulnerability," and further argue that punishment of teens engaging in

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<sup>54</sup> A.H. v. State, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007). The pictures of the two were emailed on the computer, but were never seen by anyone other than the couple. *Id.*

<sup>55</sup> *Id.* at 237.

<sup>56</sup> *Id.*

<sup>57</sup> Jane E. Kirtley, *Privacy Protection, Safety and Security*, 987 PLI/PAT 15, 90 (2009).

sexting should reflect their lack of criminal intent.<sup>58</sup> Under the proposed bill, prosecutors would be permitted to place teens charged in sexting cases into an educational program focusing on the harms caused by sexting, more specifically, on the harms caused to relationships and future employment as a result of sexting.<sup>59</sup> Additionally, another proposed bill would require schools to distribute information to their students specifying the harms caused by sexting, thereby attempting to address and prevent the problem before it starts.<sup>60</sup>

In Colorado, prosecutors were more lenient with regard to sexting charges when they required a seventeen-year-old teen boy and his fifteen-year-old girlfriend to attend counseling after being caught sending pictures of them engaging in sexual intercourse.<sup>61</sup> Prosecutors sent the teens to counseling despite the fact that teens engaging in sexting under Colorado law would technically be required to spend time in jail or register as a sex offender for knowingly creating, distributing, or possessing sexually explicit material of minors.<sup>62</sup>

Similarly, Ohio has not yet fully prosecuted teens for distributing, creating, or possessing child pornography.<sup>63</sup> In a tragic ending to a teen sexting drama, Cincinnati teen Jessica Logan hung herself after being tormented by her fellow classmates over

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<sup>58</sup> Charles Toutant, *N.J. Legislation Would Decriminalize 'Sexting' by Teens*, NEW JERSEY LAW JOURNAL, July 23, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202432466455>.

<sup>59</sup> *Id.*; Kirtley *supra* note 57, at 90.

<sup>60</sup> See A.B. 4068, 213th Leg., 2d Sess. (N.J. 2009); S.B. 2923, 213th Leg., 2d Sess. (N.J. 2009); Kirtley, *supra* note 57, at 91.

<sup>61</sup> Lance Benzel, *Teens Won't Face Trial for Cell Phone Sex Photos*, GAZETTE (COLORADO SPRINGS), Apr. 10, 2009, available at <http://www.gazette.com/articles/children-51546-office-case.html?referrer=digg>; Shannon Shafron-Perez, *Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting*, 26 J. MARSHALL J. COMPUTER & INFO. L. 431, 440 (2009).

<sup>62</sup> Shafron-Perez, *supra* note 61, at 441; COLO. REV. STAT. ANN. § 18-3-405 (West 2009).

<sup>63</sup> *Id.* at 442.

naked pictures sent to them by her boyfriend.<sup>64</sup> The teens responsible for sending the sext messages and for tormenting Jessica did not receive a punishment under child pornography laws by the judge presiding over the case.<sup>65</sup> As a response to the possibility that teen sexting could be considered a felony under Ohio law, State Senator Bob Schuler and others introduced a bill that, if approved, would change underage sexting from a felony to a misdemeanor.<sup>66</sup>

In Vermont, rather than prosecuting teens for engaging in sexting, the state legislature redrafted the penalties applicable to teens.<sup>67</sup> The law was changed so that minors engaging in sexting will only be charged as juveniles, and therefore, not required to register as sex offenders under state child pornography laws.<sup>68</sup> The Vermont law, entitled “Minor Electronically Disseminating Indecent Material to Another Person,” provides that a minor cannot knowingly use a device to send an indecent photo of themselves to another person, and another person cannot possess such an image.<sup>69</sup> As a result of the change in the law, minors in Vermont caught engaging in sexting practices will not be branded a sex offender for the rest of their lives.<sup>70</sup>

With sexting on the rise, it is clear that states are attempting to deal with the new dilemma and are also attempting to draft new laws to help rehabilitate teens caught in sexting scandals. Although some states have sought to draft new legislation directly dealing with the issue of sexting, some states prosecuted teens under traditional state

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<sup>64</sup> *Id.* (Jessica had sexted the nude photos to her boyfriend).

<sup>65</sup> *Id.*; Wendy Koch, *Teens Caught ‘Sexting’ Face Porn Charges*, USA TODAY, Mar. 11, 2009, at 1A, available at [http://www.usatoday.com/tech/wireless/2009-03-11-sexting\\_N.htm](http://www.usatoday.com/tech/wireless/2009-03-11-sexting_N.htm).

<sup>66</sup> Shafron-Perez, *supra* note 61, at 443.

<sup>67</sup> Shafron-Perez, *supra* note 61, at 445.

<sup>68</sup> *Id.*; VT. STAT. ANN. tit. 13 § 2802(b) (West 2009).

<sup>69</sup> VT. STAT. ANN. tit. 13 § 2802(b) (West 2009).

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

child pornography laws. Whichever approach is taken, it is clear that states are not in agreement as to whether teens should be prosecuted under child pornography laws.

### III. CHILD PORNOGRAPHY LAWS

Child pornography is often described as the depiction of minors engaging in “sexually explicit conduct.”<sup>71</sup> Prosecution for child pornography was originally governed under the *Miller* obscenity standard created in *Miller v. California*,<sup>72</sup> which held that obscene material was not protected under the First Amendment.<sup>73</sup> However, the Supreme Court announced a standard less than that required under the *Miller* obscenity test in order to criminalize and deter production and circulation of child pornography.<sup>74</sup> All states now have their own laws proscribing child pornography in addition to the federal law prohibiting the possession, sale, distribution and production of child pornography.<sup>75</sup>

#### A. Policy and Purpose

The Supreme Court specified five reasons for allowing a lesser standard to be applied to child pornography, articulating that (1) the state has a compelling interest in protecting children; (2) such materials serve as a permanent record and harm to the children in them; (3) such a rule would lessen the incentives to distribute child pornography altogether; (4) the value of child pornography as an art or educational form

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<sup>71</sup> 18 U.S.C. § 2256(8) (2003 & Supp. 2008). This definition includes children engaged in “actual or simulated i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; ii) bestiality; iii) masturbation; iv) sadistic or masochistic abuse; or v) lascivious exhibition of the genitals or pubic area of any person.” *Id.* at (2)(a).

<sup>72</sup> 413 U.S. 15 (1973).

<sup>73</sup> *Id.* at 23; Shafron-Perez, *supra* note 61, at 436.

<sup>74</sup> *New York v. Ferber*, 458 U.S. 747, 764 (1982) (stating that a “trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.”). In *Ferber*, a bookstore owner who sold films of young boys engaging in masturbation was convicted under a statute that did not require the films to be obscene. *Id.* at 751-52. The statute only required the state to prove that the film portrayed “actual or simulated sexual intercourse, deviate sexual intercourse, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals . . .” of a minor. *Id.* (citing N.Y. PENAL LAW 263.15 (McKinney 1980)).

<sup>75</sup> Shafron-Perez, *supra* note 61, at 439; 18 U.S.C. §§ 2251 – 60 (2006).

is de minimis; and (5) the evil restricted under such a law clearly outweighs any benefit of expression.<sup>76</sup> As stated in *Ferber*, states have a compelling interest in the protection of children, including their psychological, emotional, and physical well-being.<sup>77</sup> Criminalization of child pornography relates to the state's interest in child abuse and curtailing the economic incentives driving the production and distribution of child pornography altogether.<sup>78</sup> Prohibition of child pornography ensures that children are not tortured and harmed by the permanent record of their sexual abuse.<sup>79</sup> Therefore, child pornography laws were enacted to protect children from both the immediate and long-term harms that the crime causes.<sup>80</sup>

Child pornography laws were also aimed at protecting children not actually depicted in the images.<sup>81</sup> Rather, child pornography laws serve to notify the public that the exploitation of young children by adults is not a normal and accepted practice, and should not be copied by adults viewing the pornographic images.<sup>82</sup> Child pornography laws are often considered extremely strict and draconian, requiring punishments more

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<sup>76</sup> *Ferber*, 458 U.S. at 762-64.

<sup>77</sup> *Ferber*, 458 U.S. at 747.

<sup>78</sup> *Id.* at 759-61.

<sup>79</sup> Leary, *supra* note 2, at 9.

<sup>80</sup> *Id.* (noting that every time an image of a victim is distributed, the child is re-victimized).

<sup>81</sup> *Id.* at 12-17.

<sup>82</sup> *Id.* at 12-17. One study found that twenty-two percent of minor sexual abuse cases began with the abuser viewing child pornography. Mimi Halper Silbert, *The Effects on Juveniles of Being Used for Pornography and Prostitution*, in *Pornography: Research Advances and Policy Considerations* 215, 224-25 (Dolf Zillman & Jennings Bryant eds., 1989).

severe that almost all crimes other than murder.<sup>83</sup> Such laws are aimed at deterring the accused from committing such acts again and addressing pedophilic behavior.<sup>84</sup>

## B. Does Punishing Teens for Sexting Fit Within Child Pornography Laws?

When looking at child pornography laws, the act of sexting most certainly fits within the plain definition. Specifically, sexting involves a picture of a minor engaging in a sex act or pictures of the minor in an indecent state, and that picture is being possessed and distributed by an individual.<sup>85</sup> Most child pornography laws do not exempt teens sending pictures of themselves or receiving pictures of their significant other; rather, the laws apply to *any* depiction of a minor regardless of who sends it or receives it.<sup>86</sup> However, the question becomes whether the prosecution of teens engaging in sexting is in line with the purpose behind child pornography laws, or whether prosecutors are going too far when prosecuting teens for sexting.

### *1. Arguments in Favor of Prosecuting Teens Under Child Pornography Laws*

In an article promoting the punishment of teens engaging in self-exploitation, Mary Graw Leary argues that such punishment is justified due to the harm caused to the minors in the picture in addition to the harm caused to minors who are not in the picture.<sup>87</sup> Specifically, it is argued that allowing such pictures to be posted on the Internet or circulated between people allows the promotion of an inappropriate relationship

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<sup>83</sup> See Richards & Calvert, *supra* note 1, at 12 (Phillip's attorney is being interviewed); see also as an example of the harsh punishments 18 U.S.C. § 2252(b)(1) (2006 & Supp. 2008) (requiring a first time offender convicted of knowingly disseminating or distributing child pornography to be fined and imprisoned for no less than five years).

<sup>84</sup> Andrew K. Block, *A Back and a Look Forward: Legislative and Regulatory Highlights for 2008 and 2009 and a Discussion of Juvenile Transfer*, 44 U. RICH. L. REV. 53, 61 (2009); Richards & Calvert, *supra* note 5, at 12.

<sup>85</sup> Richards & Colvert, *supra* note 5, at 12.

<sup>86</sup> Stephen F. Smith, *Jail For Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 517 (2008).

<sup>87</sup> Leary, *supra* note 1, at 9-14.

between adults and children, and increases the harm caused by persons engaging in unlawful acts with minors.<sup>88</sup> Such harm is a result of the fact that child sexual abuse images, or images of minors in indecent states, are often used by offenders for sexual gratification and help perpetuate acceptance of child-adult abuse relationships.<sup>89</sup>

Leary additionally argues that government intervention to prevent and punish self-exploitation is permitted under two distinct doctrines.<sup>90</sup> First, the doctrine of *parens patriae* allows the government to intervene in the lives of children when the persons responsible for caring for the child are incapable of doing so.<sup>91</sup> Second, Leary argues that the state may intervene in the lives of children under its police powers in order to promote the public health, safety, and general welfare.<sup>92</sup> It is argued that under *parens patriae* the state should intervene in child pornography cases to protect children, even if the state is protecting the children from themselves.<sup>93</sup> Furthermore, because the harm caused to children is significant, the state has the power to respond under its police powers in order to promote the safety and welfare of the children within the state.<sup>94</sup>

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<sup>88</sup> *Id.* at 12-13.

<sup>89</sup> *Id.* at 13. Leary also argues that the presence of child pornography harms the children who are sexually abused because their offenders are exposed to these images on a continual basis. *Id.*

<sup>90</sup> *See Infra* Subsection II.B.1.

<sup>91</sup> Leary, *supra* note 2 (noting that this doctrine formed the basis of the juvenile justice system and the child protection movement), at 26; *Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 57 (1890) (“This prerogative of *parens patriae* is inherent in the supreme power of every State ....[I]t is a most beneficent function, and often necessary to be exercised in the interest of humanity, and for the prevention of injury for those who cannot protect themselves.”).

<sup>92</sup> Leary, *supra* note 2, at 27; *See Chicago, B & O Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1906) (“We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety.”); *Gibbons v. Ogden*, 22 U.S. 1, 203-04 (1824) (describing police powers as “that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves,” and specifically mentioning, by way of example, “[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State.”).

<sup>93</sup> Leary, *supra* note 2, at 27-28.

<sup>94</sup> *Id.* at 28.

Lastly, Leary emphasizes that the juvenile justice system requires state intervention and prosecution in child pornography cases, even if it is the result of self-exploitation.<sup>95</sup> Leary argues that the juvenile justice system is intended to rehabilitate teens, and look to their problems to try and find a solution.<sup>96</sup> Specifically, taking responsibility for one's actions and being treated as a sex offender is necessary to promote proper treatment of the juvenile.<sup>97</sup> Despite the arguable negative effects of requiring a minor to register as a sex offender, Leary argues that there are many positives, including preventing re-offending and decreased access to additional child victims.<sup>98</sup> Essentially, Leary argues that juvenile prosecution should be left open as an option, although it may not be necessary in every case.<sup>99</sup> Rather, jurisdictions should develop standards to determine which self-exploitation cases should in fact be prosecuted and how that jurisdiction will go about prosecuting the teen involved.<sup>100</sup>

## *2. Arguments Against Punishing Teens For Sexting*

In a response to Leary's article, Stephen Smith addresses Leary's arguments and argues that prosecution of teens is not an ideal method of punishment. One of the biggest arguments of those against criminalizing sexting to the same extent as those engaged in child sexual exploitation is the fact that teen sexting was not originally considered when passing child pornography laws.<sup>101</sup> In arguing this, Smith emphasizes that punishment under child pornography laws in the criminal justice system does not fit the crime

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<sup>95</sup> *Id.* at 42-48.

<sup>96</sup> *Id.* at 43-44 (contrasting this with the criminal justice system that simply punishes for crimes committed).

<sup>97</sup> *Id.* at 45.

<sup>98</sup> *Id.* at 47.

<sup>99</sup> *Id.* at 48.

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

<sup>101</sup> Smith, *supra* note 86, at 514-16.

committed when the crime is sexting by a teen.<sup>102</sup> Opponents of punishment argue that minors sending sext messages should be considered victims in need of help to turn their life around, or at least not completely deserving of punishment given to pedophiles.<sup>103</sup> To justify not punishing teens for sexting, opponents argue that such pornographic images do not support the purposes of child pornography laws.<sup>104</sup> Specifically, the teens in the sexually explicit messages are not harmed in the same way that children subjected to sexual abuse for pornographic purposes are.<sup>105</sup> Along the same lines, opponents argue that it would be ridiculous to punish teens for sending explicit images of themselves or receiving such images, when the teens that are being prosecuted are old enough to consent to sex or get married under state law.<sup>106</sup>

Smith argues that the purpose of the juvenile justice system was to bring minors out of the criminal justice system in order to intervene in the child's life and determine the cause for the child's delinquency.<sup>107</sup> Removing juvenile offenders from the criminal justice system was intended to promote the rehabilitation of the offender, aimed at allowing juveniles to reform rather than simply being punished for their crime.<sup>108</sup> The actions of a juvenile were not considered to be a result of a cognizant and understanding choice, but rather, were a result of environmental pressure or forces outside of their control.<sup>109</sup> After considering the purpose of the juvenile justice system, children advocates argue that punishing teens for sexting under child pornography laws

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<sup>102</sup> *Id.* (arguing that the "heavy hand of the criminal law should not be brought to bear against minors who make or distribute pornographic images of themselves).

<sup>103</sup> *Id.* at 516.

<sup>104</sup> *Id.*

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

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

<sup>107</sup> FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 34 (2005).

<sup>108</sup> *See In re Gault*, 387 U.S. 1, 15-16 (1987).

<sup>109</sup> *McKeiver v. Pennsylvania*, 403 U.S. 528, 551-52 (1971) (White, J., concurring).

completely throws the teens into the criminal justice system without attempting to rehabilitate them.<sup>110</sup>

An additional problem often addressed by opponents of prosecution in such cases is that prosecuting teens under child pornography laws may often result in a requirement that the teen register as a sex offender.<sup>111</sup> The Adam Walsh Child Protection and Safety Act of 2006 requires those persons possessing, producing, or distributing child pornography to register as a sex offender.<sup>112</sup> Smith argues that requiring a teen to register as a sex offender will have obvious societal, educational, and other harms that are not justified by the offense.<sup>113</sup> Rather than punishing teens for sexting, Smith argues that proactive measures should be taken to prevent further criminal conduct.<sup>114</sup>

#### IV. A PROPOSED STATE RESPONSE

The first step in determining whether a state wants to prosecute teens who engage in sexting is to determine whether the act of sexting and the punishment of the teens fit within the state's current child pornography statute, or whether a different statute should be drafted to better reflect this new phenomenon. Most child pornography statutes currently in effect were not drafted with the intent that teens would be sending pictures of themselves to other individuals using modern technology.<sup>115</sup> Rather, child pornography laws were enacted to punish pedophiles and prevent those convicted under such laws from re-offending.<sup>116</sup> Thus, child pornography laws were not enacted with the idea that minors would be harming themselves, and as a result, could potentially be punished as

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<sup>110</sup> Miller v. Skumanick, 2009 WL 5538635 (C.A. 3rd Circuit) (Appellate Brief).

<sup>111</sup> Smith, *supra* note 86, at 536 (stating that self-exploitation should not be enough to require a teen to register as a sex offender).

<sup>112</sup> 42 U.S.C. 16911(7) (2006).

<sup>113</sup> Smith, *supra* note 86, at 535-37.

<sup>114</sup> *Id.*

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

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

harshly as adults.<sup>117</sup> States that view current child pornography laws as not applying to teens in sexting cases next need to consider how the state is going to deal with the problem and prevent further sexting occurrences in addition to considering what level of punishment is appropriate.

Although there is much debate regarding the issue of prosecuting teens under child pornography laws, the bottom line is that teens engaging in malicious sexting acts need to face state intervention or some form of punishment. A state looking to add an additional law reflecting the sexting trend, rather than punishing teens under draconian child pornography laws, should encourage the state legislature to enact a statute reflecting the maliciousness of the teen's action, and draft an appropriate remedy that correlates to the requisite maliciousness. Focusing on the malicious actions of the teen will ensure that those with a more malicious intent will be punished harsher than those who completely lack any criminal intent. After enacting a statute correlating to the teen's actions, the state legislature should determine the punishment and rehabilitation process for teens having malicious intent as compared to those teens lacking such intent. In addition to enacting statutes specifically focused on sexting, state legislatures should seek to amend current child pornography laws to only allow for the prosecution of adults possessing or distributing sexually explicit photos or images of minors, rather than permitting the prosecutor to have the discretion to charge a teen sexter under either child pornography laws or the newly enacted sexting laws.

#### A. Looking to the Malicious Intent of the Teen

When determining whether or not to prosecute teens engaging in sexting, states should focus on the malicious intent of the teen in addition to looking to whether the act

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<sup>117</sup> *Id.*

was intentional. A teen forwarding an image of another with the intent to embarrass or harm the individual in the picture should be punished more swiftly and harshly than a teen that innocently sends an image without such intent. Requiring the prosecutor to distinguish between malicious sexting and non-malicious sexting will ensure that those teens having a culpable intent be punished differently than those teens lacking such intent. It would be wise for state legislatures to draft separate statutes addressing sexting with malicious intent and sexting without malicious intent in order to properly identify the punishment to be imposed.

#### 1. *Sexting With Malicious Intent*

It is important to consider the intent of the teen when seeking to determine the appropriate punishment for the teen involved. Specifically, states should focus on the differences between teens that send pictures of themselves to a significant other and those teens that use such a picture to forward to unintended viewers in order to embarrass or harm the individual in the picture. The first instance should merit a lesser punishment than the latter, as the latter is an example of a teen engaged in sexting with malicious intent rather than innocently sending another teen an indecent photo of themselves. Punishing the teen that innocently sends an image of themselves to another would be contrary to the policy behind child pornography laws, and would not help protect the victim at all, as the victim would be the one causing harm to themselves. Punishing the teen that innocently sends a sexually explicit image to another in the same way as a teen with a malicious intent would require the state to punish the victim rather than protect the victim. A teen sending a sexually explicit image is not intentionally and maliciously seeking to cause harm to themselves, rather, the teen is likely sending the image because

they feel insecure or need sexual reassurance. Such intent can easily be distinguished from a teen that sends an image of another individual to multiple persons for purposes of harming the individual in the picture.

A state should seek to adopt a statute similar to the following:

**State Juvenile Statute § 101.00: Minors With Malicious Intent to Create, Possess, or Distribute Sexually Explicit Images of Other Minors**

**(a) Liability under § 101.00**

Any person under the age of eighteen who knowingly creates, possesses, or distributes, or helps another to create, possess, or distribute, a sexually explicit image, photo, or video of another person under the age of eighteen for purposes of humiliation, embarrassment, harassment, or harm to the individual depicted in the image may be punished as required under state law, and such punishment may be classified as a juvenile misdemeanor. To be found guilty for a juvenile misdemeanor, the individual must have intended the image, photo, or video to be possessed or distributed for such malicious purposes.

**(b) Punishment under § 101.00**

Any person found guilty under (a) of this statute may be subject to the following punishment: (1) the court may impose a protective order requiring the minor who created, possessed, or distributed the sexually explicit image, photo, or video to delete and destroy such image, photo, or video, and if such image, photo, or video is not deleted or destroyed, the person may be subject to additional harsh criminal punishments; (2) the court may place the minor on probation for a period of six months or more; or (3) the minor may be placed in a diversionary program requiring attendance at counseling and educational classes for a period of six months or more.

**(c) Violation of Punishment Imposed under § 101.00(b)**

If the minor found guilty under §101.00(b) violates any required punishments given by the court under (b), the court may impose additional punishments listed under (b), or require the minor to be placed in a juvenile detention center for a minimum of one month.

### **Comments § 101.00**

- (1) The term “sexually explicit” includes any image depicting a minor engaging in a sexual act, any image with the minor naked, and any other image portraying the minor in an indecent state as defined by state law.
- (2) In seeking to determine the appropriate punishment, a court should consider: (1) the age of the victim; (2) the maliciousness of the act of possessing or forwarding the image, photo, or video; (3) the consequences of the possession or forwarding, and the harm caused to the victim; and (4) whether the victim’s harm is long-term or short-term.
- (3) Long-term harm to the victim will merit a harsher punishment than short-term harm.
- (4) The act must be intentional for a minor to be found delinquent under this statute. When seeking to determine intent, the court should consider (1) how the teen came into possession of the photo or image; (2) whether the teen knew they were sending or forwarding the photo or image to others; and (3) whether the teen intended others to actually see the photo or image.
- (5) When seeking to prosecute a minor thought to have violated §101.00(a), the prosecutor must first appear before a judge and present evidence tending to show that the minor has committing a sexting violation. After presenting such evidence, the judge must allow the minor to present additional evidence tending to negate the allegations of a sexting violation. The judge must then weigh the evidence presented and determine whether the prosecutor may formally file charges against the minor.
- (6) If the minor found guilty violates the required punishment given by the court, the court may seek to impose additional punishments requiring the minor to (1) remain on probation, (2) serve juvenile detention, (3) participate in community service; or (5) attend additional counseling sessions.
- (7) If there is a subsequent violation by a minor already charged under §§ 100.00 and 101.00, and judge may increase the penalty from a misdemeanor to felony, and may impose additional punishments from Comment (4) as it sees necessary.

The proposed statute would allow for the harsher punishment of teens sexting with the intent to maliciously harm another individual. Additionally, the statute would require a

court to consider the maliciousness of the teen's acts before imposing any punishment. This requirement would provide an additional barrier between the teen charged and the punishment imposed to ensure that only those cases requiring harsh punishment receive such punishment. The proposed statute provides a list of punishments ranging from moderate to severe, and also allows the court to impose any additional punishments as the judge sees fit. This allows the court and the justice system to be more involved in helping it's youth to ensure that teens charged do not continue to be involved in the criminal justice system in the future.

This statute is a happy medium between those who want to punish teens for sexting and those who do not want to subject teens to such punishment. Although a teen may be subject to prosecution, the statute's comments require the presiding judge to hear the prosecutor's claim before allowing the prosecutor to file charges. This will help protect the minor from the humiliation of being wrongly charged. The statute will help courts and prosecutors to find the appropriate punishment for teens, and will allow the punishment to better reflect the intent of the modern child predator. Additionally, the punishments listed would require the teen to take steps to ensure that such an event does not occur again, but would leave open the possibility for harsher punishment if an additional sexting violation occurs in the future. Therefore, although harsh punishment cannot be sought at the forefront, a teen may be subject to additional punishment for failing to properly comply with court orders. This will help to uphold the integrity of the justice system and ensure that teens learn from their mistakes

The proposed statute is in line with the purpose of the juvenile justice system, which promotes the idea of rehabilitation over punishment. Additionally, the proposed

statute does not list registering as a sex offender as a possible punishment even for malicious sexting. Although Leary suggested possible benefits of requiring teens to register as a sex offender, requiring such action could potentially cause more harm than good. The sex offender registry is in place to inform people exactly where pedophiles live in their community. This allows people, especially parents with young children, to ensure that the area they are living in is safe. Thus, requiring teens engaging in sexting, which is vastly different than sexual abuse of a minor, could clog the registry with information the average person does not care about. It is not necessary for one's neighbor to know that their neighbor sent a sexually explicit image of themselves to a significant other. Furthermore, teens engaging in malicious sexting are not "sex offenders;" but rather, should be considered bullies seeking to harm, humiliate, or harass their peers. The sex offender registry has never been about notifying the community about where the neighborhood bully lives. Therefore, the benefits of requiring a teen to register as a sex offender for sexting violations do not outweigh the harms.

## *2. Sexting With a Lack of Malicious Intent*

To properly address the issue of teen sexting without the malicious intent discussed above, state legislatures need to enact a separate statute. This statute could include the teen that sends an image of themselves to their significant other, but could also include the teen that distributed a picture of another minor, including an image of themselves, without the intent to harm or humiliate. For example, if a teen girl sends her boyfriend a sexually explicit photo, and that boyfriend in turn shows his friends because he is excited, and not for purposes of harming his girlfriend, he would not be subject to punishment under the malicious sexting statute. However, the boyfriend could face a

penalty under the statute addressing a lack of malicious intent on the part of the sexter. Punishing teens that are themselves the victim, especially when they likely lacked any malicious intent, goes against the very purpose and policy behind child pornography laws. In such cases, the crime will likely not justify the punishment. As a result, punishment of innocent acting teens will make the prosecutor seem as if he is using the law as a sword rather than a shield.

In seeking to distinguish between malicious and non-malicious acts, a state legislature may seek to adopt a statute similar to the following:

**State Juvenile Statute § 102.00: Minors Lacking Malicious Intent to Create, Possess, or Distribute Sexually Explicit Images of Other Minors or Themselves**

**(a) Liability under § 102.00**

Any minor under the age of eighteen who knowingly creates, possesses, or distributes, or helps another to create, possess, or distribute, a sexually explicit image, photo, or video of a person under the age of eighteen without intending to humiliate, embarrass, harass, or harm the individual depicted in the image, photo, or video may be punished as required under state law, which shall only rise to the level of a juvenile misdemeanor.

**(b) Punishment under § 102.00**

Any minor found guilty under (a) of this statute may be subject to the following punishment imposed by the court: (1) educational and counseling classes focused on teaching the harms caused by sexting; (2) community service; (3) speaking to other students about the dangers of sexting; and (4) imposing a protective order requiring the individual who possessed or distributed the image, photo, or video to delete and destroy such image, photo, or video, and if such image, photo, or video is not deleted or destroyed, the person may be subject to additional harsh criminal punishments not exceeding the level of a juvenile misdemeanor.

**(c) Violation of Punishment Imposed Under § 102.00 (b)**

If the minor found guilty under (a) violates any required punishments given by the court under (b), the court may add additional time to the original punishments given.

**Comments § 102.00**

- (1) In seeking to determine the appropriate punishment, a court should consider (1) the age of the victim; (2) the maliciousness of the act of possessing or forwarding the image, photo, or video; (3) the consequences of the possession or forwarding, and the harm caused to the victim; (4) whether the victim's harm is long-term or short-term; (5) whether the victim was the individual possessing or distributing the photo; and (6) the reasons for the possession or distribution of the photo.
- (2) Long-term harm to the victim may result in more severe punishment.
- (3) When a minor found guilty under (a) violates the required punishment imposed by the court, the additional punishment may not include juvenile detention or jail time under either the juvenile or criminal justice system, subject to the requirements in (4).
- (4) If a minor found guilty under (a) is subsequently found guilty of § 101.00(a), juvenile detention may be imposed by the court.

By adopting this proposed statute focusing on the lack of malicious intent to harm the individual in the picture, the prosecutor would be able to seek different punishment than the teen that sexts with malicious intent. The punishments under this statute are more focused on teaching and rehabilitating than actually punishing the teen. Requiring the teen engaging in sexting to learn the harms of sexting and speak to their peers about such harms will help to promote the idea that sexting is in fact harmful. The proposed statute follows the method taken by other states refusing to prosecute teens, such as New Jersey, by seeking to reform and rehabilitate the teen rather than seeking to apply the act of sexting within the meaning and requirements of draconian child pornography statutes.

### C. Limiting Prosecutorial Discretion

The prosecutor acts as the gatekeeper between a juvenile charged with a crime and the criminal justice system.<sup>118</sup> Prosecutors exercise an enormous amount of discretion that usually goes unchecked.<sup>119</sup> It is the prosecutor who decides whether or not to bring the juvenile into the criminal justice system by charging the juvenile as an adult.<sup>120</sup> In recent sexting cases, many lashed out at prosecutors who decided to prosecute teens under traditional child pornography statutes, arguing that it was an abuse of prosecutorial discretion. The problem arose as a result of laws not reflecting the fast-paced change in technology and the new crimes being committed as a result. Thus, prosecutors were left with the decision of whether to prosecute sexting crimes under old laws or let the alleged sexters go free. Prosecutors were essentially stuck between a rock and a hard place, causing some prosecutors to attempt to fit the newly emerging crime of sexting into the traditional child pornography statutes despite the fact that those statutes were adopted to protect minors and not punish them.

To better enforce the purpose and policy behind child pornography laws, and to allow minors to make mistakes without ruining the rest of their lives, prosecutors should have a limited discretion in determining whether or not a minor can be punished for engaging in sexting. State legislatures should revise their current child pornography

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<sup>118</sup> See James C. Backstrom, *The Role of the Prosecutor in Juvenile Justice: Advocacy in the Courtroom and Leadership in the Community*, 32 WM. MITCHELL L. REV. 963, 969 (2006).

<sup>119</sup> JOHN L. WORREL & M. ELAIN NUGENT-BORAKOVE, *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 17 (2008). A prosecutor's discretion is not checked by the government or constitution. *Id.* at 53-54. The decision to file a case against an individual begins with the prosecutor's "threshold of evidence, which is largely a matter of office policy." *Id.* at 54. See also *Berger v. United States*, 295 U.S. 78 (1935) (stating that while the prosecutor is allowed to "strike hard blows, he may not strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

<sup>120</sup> HOWARD ABADINSKY, *DISCRETIONARY JUSTICE: AN INTRODUCTION TO DISCRETION IN CRIMINAL JUSTICE* 62 (1984) (stating that it is the prosecutor that is the most powerful person in the criminal justice system because prosecutors generally make all decisions regarding the prosecution of crimes).

statutes to reflect the fact that only those over the age of eighteen may be prosecuted under them. This would require the prosecutor to bring charges against teens engaged in sexting under the enacted state sexting statutes rather than allowing the prosecutor to have the discretion to charge the teen under either state child pornography statutes or under the state sexting statute. Rather than adopting a new statute specifically requiring prosecutors to charge teens engaged in sexting under the state sexting statute, simply modifying the current child pornography statute to reflect that it is to be applied to those older than eighteen would be a better method of limiting prosecutorial discretion. This would result in a more clear intent to limit the charging of minors engaged in sexting cases to be charged under the sexting statute.

Limiting prosecutorial discretion will ensure that those minors capable of being punished under the proposed statutes for sexting shall not be prosecuted under traditional child pornography laws simply because the prosecutor thinks a harsher punishment should be given. This will help to promote the rehabilitation model of criminal justice by ensuring that teens charged with sexting violations have the ability to attend rehabilitative programs and learn from their mistakes. Additionally, limiting prosecutorial discretion will allow the judge to play a larger role in rehabilitating the teen, and further allow the judge to ensure that the teen is in fact rehabilitated at the end of the process. Lawmaking is not the job of the prosecutor, rather, the prosecutor is required to apply the law to cases and seek the punishment as required by law. Thus, when the law limits the ability of a prosecutor to have free discretion, the law and the minor will be better protected.

## CONCLUSION

As technological advancements increase the likelihood of teen sexting, states need to address the gap in the law and attempt to enact statutes aimed at protecting minors rather than punishing them. Although teen sexters should not be subjected to the same punishment as adult pedophiles, teen sexters need to face some state intervention and punishment aimed at rehabilitation. To meet this goal, state legislatures should enact statutes reflecting the modern child predator by implementing statutes specifically addressing teen sexting. The enactment of sexting statutes will ensure that the punishment of teens engaging in sexting matches the crime. Therefore, teens that sext with a lack of malicious intent to harass or embarrass the victim should not be subject to the same punishment as those teens that actually sext with a malicious intent. In attempting to find the appropriate balance between the crime committed and the punishment received, those teens engaging in sexting with a malicious intent to embarrass or harm the individual depicted in the image should receive a harsher punishment than those that innocently sext an image of themselves to another minor. To ensure that such punishments as required under state law are abided by, and to further ensure that teens do not get charged under draconian child pornography statutes, state legislatures should seek to limit prosecutorial discretion by charging the current child pornography laws to reflect the fact that they apply only to those over the age of eighteen. Whatever one's opinion is on the matter of punishment for teen sexting, it is clear that the law has not caught up with the advancing technology and that states carry the burden of addressing this problem.