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I. Introduction

In American high schools, students have started a trend which has grabbed national headlines and ruined teenager’s lives. “Sexting” is the act of sending and receiving nude images over cell phones.\(^1\) In high schools, girls and boys under age eighteen are sending “sexts” to each other resulting in child pornography charges for those possessing the images. The harsh criminal law reaction to the problem is not without explanation. The consequences of sexting for teenagers was displayed on the worst level in 2009 when Jesse Logan, an eighteen year old high school girl, sent a nude picture of herself to her boyfriend who then distributed the picture to other students in the school when they broke up.\(^2\) Jesse was tortured by the other students who called her a “whore” and a “slut”.\(^3\) She feared going to school.\(^4\) She eventually stopped attending school, became withdrawn, and eventually committed suicide after months of harassment.\(^5\) States have attempted to prevent similar occurrences by imposing harsh criminal penalties. In one example, Philip Albert, from Florida, received seventy nude images of his girlfriend while they were dating.\(^6\) After a “nasty break-up”, Albert sent the pictures to his friends, and everyone else he could think of, including his ex-girlfriend’s grandparents.\(^7\) He was sentenced to probation and required to register as a sex offender, which is a label he will carry for twenty-five years.\(^8\) The girl was not charged.\(^9\)

\(^{3}\) Id.
\(^{4}\) Id.
\(^{5}\) Id.
\(^{7}\) Id.
\(^{8}\) Id.
\(^{9}\) Id.
The first problem in applying child pornography laws to teenagers is that the purpose of the laws is not followed. The law is meant to protect minors, not to punish them. The long term adverse effects of the laws are far too harsh to impose on minors who are willing participants in the activity.

Another problem with the application of criminal law against teenagers for child pornography is that, as the studies show, teenagers do not have the ability to comprehend the consequences of their actions in the long term. The result is that they are susceptible to engaging in high risk activity even if they know that the activity is contrary to their moral values.

The problems related to sexting, and which have given rise to sexting, are not limited to teenagers. Privacy on the internet does not exist in the way privacy exists in the real world. Adults have yet to understand that differences in privacy as is evident in workplace privacy actions where employees use their workplace computers for non-work related, and sometimes criminal, purposes. Yet, if adults were to send nude images of themselves to other adults, they would not face the same charges as teens. To apply harsh criminal laws against teenagers when adults do not understand the issues themselves shows that the policies as it stands will not solve the problem.

The purpose of this paper is to explore the law of child pornography and its implications when used against the people it was supposed to protect – minors. The statistics regarding the problem are difficult to discern and range from as low as 11% to high as 20% of teens.

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participating in the act of sexting.\textsuperscript{15} As inconsistent as the statistics are, states law is just as inconsistent.\textsuperscript{16} But harsh penalties are not the answer. Instead, common sense education must be used to prevent young people from engaging in these actions. Beyond sexting, however, is a culture filled with social media which has brought a level of misunderstanding over boundaries of privacy for users. There may be solutions for privacy matters as well if technology can be used to prevent the spread of nude images.

II. Harsh Consequences of Sex Offender Laws

The consequences of being labeled a sex offender are drastic and have a crippling impact on the person labeled. The consequences of registration are intended to stay with the registrant in order to provide a deterrent effect and to provide an added level of safety from sex offenders.\textsuperscript{17} However, while the purpose of the laws is to provide a deterrent effect, the intended targets of the law were not meant to be teenagers receiving or sending images of nude classmates where the picture was taken without force. Rather it was the predatory and often violent sex offender who was the object of the legislature’s ire.\textsuperscript{18} As a result, the consequences of registration are too severe and should not be used against these students.

In 2006, the Adam Walsh Sex Offender Registry was created and “provides for mandatory community notification laws in response to an increase in sexual violence against

\textsuperscript{15}Carl Bialik, \textit{Which Is the Epidemic: Sexting or Worrying About It?}, Wall Street Journal (April 9, 2009) available at: http://online.wsj.com/article/SB123913888769898347.html?mod=djemnumbers#printMode (last accessed Oct. 29, 2009) (discussing the problems in polling teens) (this will be discussed more later)

\textsuperscript{16}Compare, Vt. Stat. Ann. tit. 13, §2802b(a)(1)-(2) (2009) and Fla. Stat. Ann. §827.071 (1983) (The Vermont statute is a recently enacted sexting statute and will be discussed later in this paper. The Florida statute is an older child pornography statute under which Phillip Albert was convicted).

\textsuperscript{17}Richard Tewksbury and Matthew B. Lees, \textit{Sex Offenders on Campus: University Based Sex-Offender Registries and the Collateral Consequences of Registration}, 70-DEC FED. PROBATION 50 (Dec. 2006) (“The expressed goals of sex offender registries are to reduce recidivism and promote public safety. It is anticipated that such registries will increase community awareness, making sex offenders feel more susceptible to the risks associated with offending.”).

\textsuperscript{18}See Adam Walsh Act, supra note 10.
children.” The purpose of the Sex Offender Registry, as stated in the Public Law is “to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators.” While sexting may have serious consequences, the stated purpose of the laws used against the offenders is to protect the public against the “violent predator.” There is no violence associated with sending nude images, even where the receiver distributes them. Nevertheless, it is possible for sexting to fall within the purview of the Sex Offender Registry. Under the expanded definition of a sex offender the statute includes “Possession, production, or distribution of child pornography.” This language is the essential problem. States have been adopting the stance that the pictures themselves represent child pornography which, in fact, may be perfectly acceptable from a definitional standpoint. Under Federal law, child pornography is a “visual depiction involv[ing] . . . a minor engaging in sexually explicit conduct.” In Virginia, the definition is “sexually explicit visual material which utilizes or has as a subject an identifiable minor.” There is no provision regarding who actually takes the picture, and, as a result, the statutes are applicable, definitionally, to sexting cases. Therefore, possessing these pictures and disseminating the same falls under the Adam Walsh Act which leaves teens in the position that Philip Albert is in. Furthermore, the registration requirements under a Tier II sex offense results in twenty-five years on the registry.

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20 Adam Walsh Act, supra note 10.
21 Id. at §112(7)(g).
24 VA. CODE ANN. §18.2-374.1(a).
26 Adam Walsh Act supra note 10, at §115(a).
But the consequences of registration go deeper than registration. In 2000, the Campus Sex Crimes Prevention Act\(^27\) went into effect requiring “every state-registered sex offender to notify any college or university where he or she is an employee, student or carries out a vocation.”\(^28\) There can be little doubt that being labeled a sex offender would make it nearly impossible to get into a college, but even if a person were to gain admission, they would have to register on campus as well. Schools have a policy which may be labeled “Student Right-to-Know and Campus Security Act.”\(^29\) Under the policy, schools distribute crime statistics and the policy concerning security issues on campus.\(^30\) The effect of such registration is not entirely clear.\(^31\) However, colleges are a small community and exposure of the information could be greater than that of a state registry.\(^32\) It would be difficult to argue that the social development of the registrant is not adversely affected by the registration. In fact, in universities, students who are registered sex offenders (RSO’s) are far more likely than university employees to suffer negative consequences associated with the registration.\(^33\) The negative consequences include failure to gain employment or being fired, “denied a promotion at work”, “Lost a friend who discovered status as RSO”, “Harassment” on and off campus, among other things.\(^34\) Some also report that they “have been discouraged about pursuing . . . academic goals.”\(^35\) Furthermore, in a study of RSO’s and in response to an open question about their feelings about being listed in the sex offender registry, the overwhelming response was that they had “feelings of frustration and a

\(^{28}\) Tewksbury and Lees, 70-DEC FED. PROBATION at 51.  
\(^{30}\) Id.  
\(^{31}\) Tewksbury and Lees, 70-DEC. FED. PROBATION at 51 (“Research is needed to assess the consequences that may accompany such a sanction.”).  
\(^{32}\) Id.  
\(^{33}\) Id. at 54 (Table 2).  
\(^{34}\) Id.  
\(^{35}\) Id. (Table 3).
view that ‘everyone’ thinks all RSOs are ‘predators,’ ‘rapists,’ or ‘pedophiles.’ Because of these concerns, respondents severely criticize the structure of many sex offender registries that fail to distinguish between ‘minor’ and ‘heinous’ offenders.”

While it does not appear that sexting should involve application of the sex offender laws, it would be disingenuous to argue that there is no harm associated with the dissemination of the picture. As stated above, the psychological consequences can be damaging to the point that suicides have occurred, as was the case for Jesse Logan story. The resulting suicide, however, has as much to do with the torment from other students as with the act of dissemination itself. The fact is that the person who might be held liable was only partially responsible for the end result, and to bring the entirety of the law upon him would be unfair.

The social consequences of sex offender registration go well beyond the immediate punishment. The value of sex offender registration may be questionable as a whole, but, certainly in the area of sexting. Registration causes collateral consequences that are not easily repaired and can only serve to isolate the registrant. In these cases, that registrant is only a teenager who should not be labeled a “violent predator.”

III. The Problem of Juvenile Sex Offenders

There are problems particular to the use of criminal law against minors. Children have differences in their psychological make-up as compared to adults because their mental development is still on-going. This interferes with their ability to understand the consequences of their actions. While this is a problem in criminal law as a whole, the use of sex offender laws to deter or protect against sexting poses particular problems.

A. Children in Criminal Law

\[36\] Id. at 54.
In recent years, there has been a clear push toward harsher penalties for criminal offenses committed by minors.\textsuperscript{37} In response to the increase in violent crimes committed by youths, the criminal justice system has created harsher penalties for youth offenders.\textsuperscript{38} The possible cause of harsher penalties for children is a fear of adolescent behavior coupled with the ignorance of the development of children.\textsuperscript{39}

Lawmakers and law enforcement use the criminal law against children partially out of fear of adolescent activity. There is little understanding for why teenagers do the things they do, but, “we are quick to extrapolate, either from our own experiences or from media portrayals, that uncontrollable hormonal fluctuations make adolescent conduct at best unpredictable and at worse dangerously violent.”\textsuperscript{40} “[F]ear and vengeance” take control and we seek justice against those who wronged society without regard the age of the accused.\textsuperscript{41}

The use of the law to punish adolescents as adults ignores the development of children. Studies in developmental psychology indicate that “[a]dolescents often experience difficulty contemplating the meaning of a consequence, particularly a long-term one, and have less capacity to anticipate harm as an unintended result of their actions.”\textsuperscript{42} While it could be argued that this makes them more dangerous, the criminal law imposes harsher penalties where an actor intends a consequence rather than acts recklessly or negligently.\textsuperscript{43} Furthermore, “Psychologists have found that when adolescents feel cornered, their immaturity may impede their ability to see

\textsuperscript{38} Taylor-Thompson, 14 STAN. L. & POL’Y REV. at 143 (“between 1992 and 1995 forty jurisdictions moved to extend adult court jurisdiction over juvenile offenders by reducing the minimum age for prosecution in criminal court, and twelve states now have no minimum-age requirement for transfers to adult court for prosecution.”).
\textsuperscript{39} Id. at 144.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Compare, McKinney's Penal Law §125.25 (second degree intentional murder) and McKinney's Penal Law §125.20 (First degree manslaughter. Note this provision applies where the actor “intends to cause serious physical injury” which results in death).
an alternate course of action and prod them into making a decision inconsistent with their moral values.” As a result, adolescents are likely to make poor decisions without regard for, or in spite of, known consequence because they can be easily pressured by their peers. With age, adolescents should develop the ability to cope with that pressure and becomes less dangerous to society, or to themselves.

While much of the shift in criminal prosecution focuses on violent offenders, it is not difficult to see the connection to sexting. Society does not understand why teenagers act the way they act, but there is a fear among parents and among society that sexual activity for teens is dangerous to their lives. The fact is that parents and law enforcement see and understand the consequences of the teen’s activity, while the teen does not. The long term consequence of taking a nude picture may not be clear to a 16 or 17 year old girl, just as the consequences for receiving, keeping, and even disseminating the same is unclear for a boy. Nevertheless, the criminal law has moved in the direction of harsh enforcement to combat the problem. The laws result in prison and enlistment on the SOR. The stigma associated with that penalty cannot be made clear to a teenager. For this reason, children pose a peculiar problem for legislatures and for law enforcement. Criminal punishment is partially used for its deterrent effect, but where the “criminals” cannot fully understand the consequences, deterrence cannot work.

B. Children and the Enforcement of Morals

Common agreement on societal morality is difficult to find in contemporary American culture because the country is so heterogeneous, comprised of people from many different lands

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44 Taylor-Thompson, 14 STAN. L. & POL’Y REV. at 153.
45 Id. at 153-154.
and backgrounds. Law has become a moral battle ground and legislatures, and even courts, have attempted to use the law to enforce morals.\textsuperscript{46}

The most relevant comparison to sexting is the application of statutory rape laws to consensual sex between minors. In the case of consensual teen sex, prosecutors have used the statutory rape laws to enforce their moral judgments on teenagers.\textsuperscript{47} This is similar to sexting laws because rape laws, which were designed to protect minors against the coercive and violent acts of adults, and are based solely on age of the victim, are being used to punish consensual activity.\textsuperscript{48}

The original purpose of statutory rape laws has no application today. The first application of what Americans call “statutory rape” laws was in England in the case \textit{The Queen v. Prince}.\textsuperscript{49} In that case, Prince “took” a girl under the age of sixteen without the consent of her father.\textsuperscript{50} The crux of the case was whether the offender’s knowledge of the girl’s age was of any importance because, as the court notes, she told Prince that she was eighteen years old.\textsuperscript{51} Justice Bramwell’s description of what constitutes the crime clearly shows the intention of the law at the time:

[The statute] supposes that there is a girl - it does not say a woman, but a girl something between a child and a woman – it supposes she is in the possession of her father or mother . . . and it supposes there is a taking, and that that taking is \textit{against the will of the person in whose possession} she is . . . No argument is necessary to prove this; it is enough to state the case.\textsuperscript{52}

\begin{footnotes}
\item[Siji A. Moore, \textit{Out of the Fire and Into the Frying Pan: Georgia Legislature’s Attempt to Regulate Teen Sex Through the Criminal Justice System}, 52 How. L.J. 197, 226 (2008).]
\item[\textit{Id.} at 230.]
\item[\textit{Id.}]
\item[\textit{The Queen v. Prince}, L.R. 2 C.C.R. 154, 80 All E.R. 881 (1875).]
\item[\textit{Id.} at 883 (The statute stated: “Whosoever shall unlawfully take . . . any unmarried girl being under the age of sixteen years, out of the possession and against the will of her father or mother, or any other person have the lawful care or charge of her, shall be guilty of a misdemeanor.”).]
\item[\textit{Id.} at 887.]
\item[\textit{Id.} at 884 (emphasis added) (Bramwell concurring).]
\end{footnotes}
The majority decision given by Justice Blackburn is similar: “[W]e must take it as proved that the prisoner knew that the girl was in the possession of her father, and that he took her knowing that he trespassed on the father’s rights and had no colour of excuse for so doing.” 53

While the girl appears to have consented to the sexual conduct, the statute is not at all concerned with her consent. Instead, it is clear that the court is only concerned about the consent of the one who possesses her. The intention of rape laws today is protect children as opposed to protecting a parent’s property. To illustrate the point even further, Justice Denman states,

The belief that she was eighteen would be no justification to the defendant for taking her out of [her father’s] possession and against his will. By taking her, even with her own consent, he must at least be guilty of aiding and abetting her in doing an unlawful act – viz., in escaping against the will of her natural guardian from his lawful care and charge. 54

The Queen v. Prince shows that the original purposes of statutory rape laws, generally, are no longer applicable. That is not to say that such laws should be entirely abolished, since they do hold a purpose for preventing harm to children, but that cases of consensual sexual conduct between adolescents do not strip a parent of property rights such that a teenage boy should be charged with a crime. The Prince case should be viewed as a court enforcing the Victorian Era’s morals on the young man which seem antiquated today. 55

Contemporary legal thinking supports leniency in applying statutory rape laws. Commentators suggest that the Model Penal Code has emerged in supporting the idea “that matters of adult sexual autonomy and teenage sexual experimentation among peers should be treated as matters of private morality, not enforced by criminal laws.” 56

53 Id. at 885.
52 Id. at 896 (Justice Denman concurring).
56 Siji, 52 How. L.J. at 226.
the Model Penal Code note the problem of the offender’s incapacity in statutory rape cases and states, “It seems necessary, therefore, to recognize that immature males may themselves be victims of adolescence rather than engaged in exploiting the inexperience of others.” \(^{57}\) The drafters required “a substantial age differential” between the victim and the offender in order to find liability. \(^{58}\) Nevertheless, not all states have changed their laws to reflect the changing views. \(^{59}\)

While there can be little doubt that teenage sex is not a desirous activity for society, preventing it through criminal enforcement does not appear to work.

Enforcing morals in this way creates problems:

(1) excessive unchecked discretion in enforcement officials, (2) inevitable disparity among similarly situated persons, (3) potential for abuse by enforcement officials, (4) potential to undermine other important values and elude important procedural protections, and (5) misapportionment of scarce resources (opportunity costs). \(^{60}\)

In the case of sexting, there is no consistent application of the law across the country, and, since almost no law deals particularly with the situation, the states grant prosecutorial discretion. \(^{61}\) The result in the case of young people engaged in a new experimental trend is that prosecutors are free to pursue their own moral beliefs rather than acknowledging the change in youth culture. \(^{62}\)

As teenage sex increases in schools, the pressure for teens to gain acceptance will push them into making decisions that may contradict their moral beliefs. They may feel cornered. Harsh and inconsistent laws are not going to prevent teenagers from acting out in rebellion when

\(^{57}\) Model Penal Code §213.1 cmt 8(b) at 340-341 (1980).

\(^{58}\) Id. at 341.

\(^{59}\) Siji, 52 How. L.J. at 226.

\(^{60}\) Id. at 226-227.

\(^{61}\) Moore, 52 How. L.J. at 227 (referring to moral enforcement).

\(^{62}\) Id. (“Laws that criminalize what has become commonplace behavior among teenagers open the door for prosecutors to go on personal vendettas or to pursue their own agendas.”).
psychological studies show that they cannot comprehend the consequences. The pressure to become sexually active at an early age is greater than ever, and sexting is the latest example of how teens are exploring.  

IV. Teens and Social Media

The rise in sexting might go beyond the mere rise in the use of cell phones or cell phone technology which has permitted teenagers to send pictures of themselves rapidly to other students without the use of a computer. It also may go beyond “sexual exploration” which has become increasingly risqué. Instead, it might be linked to the rise in social networking and inability to understand online privacy. In other words, there is an aspect about the life of a teenager that is not contained in the real world, but in the virtual world. In the virtual world, however, privacy is far more difficult to maintain. In relation to sexting, the rise of social networking may play a role in how teens understand, or misunderstand, privacy and the consequences for their electronic lives.

Social media or social networking can be defined as “any website whose main purpose is to act as a connector among users. Online socializers create personalized profiles within a ‘community.’ These profiles represent the individual in cyberspace and interact with the profiles of other users.” The social networks that are most prevalent are Facebook and MySpace. The use of these networks has presented problems involving cyber-bullying and stalking. However, the key problem today is understanding why so many people place private

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63 Id. at 220 (discussing sexual experimentation in teenage society which has resulted in a permissive view of oral sex and the beginning of “rainbow parties” which is a “social gatherings where several girls wearing different colors of lipstick would take turns performing oral sex on their male classmates until their lipstick traces formed a ‘rainbow’ of rings.”).
64 Id.
65 Levin and Abril, 11 VAND. J. ENT. & TECH. L., at 1017.
66 Id. at 1023.
67 Id. at 1018.
information, from problems at work, to salacious images, into electronic form and permit others to see them.68

There are three reasons posited for why young people post private material online. First, young people simply do not understand the problem because they do not have the mental capacity, or do not understand the technology.69 Second, the term “friend” on a social networking site has little connection to the definition in the real world, which means that people who are not really a friend, have access to a person’s private data.70 Third, the social network itself is the intellectual property owner of everything posted on its site and, being that they are businesses, there is no incentive for the site to protect user privacy.71 These three points are not exhaustive, and the third is beyond the scope of this paper. However, the first two points can be taken together in order to establish what teens understand about privacy and the technology they are using.

In a survey conducted by Vanderbilt University, in conjunction with Ryerson University and the University of Miami [Vanderbilt Study], researchers sought to understand the expectations of roughly college aged people regarding “personal information protection and expectations of privacy on online social networks.”72 The survey involved “[a]pproximately 2,500 young adults between the ages of 18 and 24 were surveyed about the personal information they post online, the measures they take to protect such information, and their concerns, if any, regarding their personal information.”73

68 See generally, id. at 1001 (discussing problems arising from lowered privacy online).
69 Id. at 1018.
70 Id.
71 Levin and Abril, 11 VAND. J. ENT. & TECH. L. at 1018.
72 Id. at 1001.
73 Id.
The survey was conducted using hypothetical scenarios. In one scenario, most appropriate to this paper, was the “Relationship Breakup”, wherein the hypothetical was posed: “‘You have just broken up with your significant other. You are shocked to see that the day after the breakup, your previous significant other posted compromising and what you thought were very private pictures of you on the social network.’” Interestingly, only three percent (3%) of respondents claimed that this had happened to them.75

Furthermore, the surveyors summed their results regarding social media privacy expectations this way:

The data demonstrates that respondent online socializers have a penchant for disclosure. However, they are aware of the risks involved in online socialization and cherish the ability to shield their multiple social personae and communicate with only intended audiences. Though seemingly incompatible with their behavior, this contradiction could reflect the young cohort’s lack of work and life experience. This purported contradiction could be also indicative of an emerging notion of privacy online, one rooted more in dignity than in control over personal information.76

Nevertheless,

[T]he inability to control personal information does not figure prominently among the major concerns of [social networking] members. Online socializers are, unsurprisingly, interested in socialization to the point that they are willing to take on acknowledged privacy risks. They are highly cognizant that they are relinquishing control over their information and its destination. Few believed that they could take appropriate steps to control what is posted about them and almost half reported feeling helpless about protecting their character on [social networking sites].77

The results show a strange relationship between social networking users and their idea of privacy. While users claim to understand the nature of privacy, and the need to protect their

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74 Id. at 1021-1022.
75 Id. at 1028.
76 Id. at 1045.
77 Id.
privacy, they engage in risky behavior because they are more interested in “socialization”.

As the authors state, the results seem contradictory. However, they point out that social network privacy is a carryover from real world privacy. The disconnect is that, in the real world, private communications can be kept to those real “friends” as opposed to being spread to the remaining online community of pseudo-friends. The social norms are “more difficult to enforce” in the online world. To put it bluntly, the conclusion is that young people do not understand that the world changes online, and that those things in life that are meant to be private should not be posted for the world to see.

While the survey showed that only three percent of participants had been involved in the “Relationship Breakup” scenario, there are lessons to be learned for sexting. First, the problem simply might not be as big as the media makes it out to be. The Wall Street Journal reported that some surveys found that “[s]ome 22% of teenage girls said they shared nude or semi-nude photos, but just 11% of girls ages 13 to 16.” However, the polling itself is difficult due to the fact that high schoolers probably are not going to answer truthfully to whether they have taken such pictures to a pollster calling on their parent’s home telephone. The results are skewed based on methods and language. While the report done by Vanderbilt involved a survey of 18 to 24 year olds, the results might be relevant here and should be considered. If only 11% of girls aged 13-16 have taken and shared salacious pictures, it is quite probable that only 3% of girls

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78 “Learning the customs, attitudes, and values of a social group, community, or culture. Socialization is essential for the development of individuals who can participate and function within their societies, as well as for ensuring that a society’s cultural features will be carried on through new generations. Socialization is most strongly enforced by family, school, and peer groups and continues throughout an individual’s lifetime.” “socialization.” The American Heritage® New Dictionary of Cultural Literacy, Third Edition. Houghton Mifflin Company, 2005. 11 Nov. 2009. <Dictionary.com>

79 Levin and Abril, 11 Vand. J. Ent. & Tech. L. at 1046.

80 Id.

81 Bialik, supra note 15.

82 Id.

83 Id. (for example, there is no clear definition of “semi-nude”).

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have those images disseminated. On the other hand, the 3% figure could possess no value here because older people are more likely to understand the consequences of disseminating a nude picture. A twenty year old is more likely to keep a nude picture private than a 15 year old. Therefore, the Vanderbilt survey results might be artificially low if applied to a younger group. Unfortunately, there is no way to be certain right now as to the prevalence of sexting among under aged teens. If the numbers establish anything, it is that using the criminal law to enforce child pornography charges against these teens is likely an over reaction until better data can be collected.

The second lesson to glean from the Vanderbilt study is that the inability to understand the lack of privacy on the internet, and in electronic communications in general, has partially brought on the rise of sexting. The lack of understanding of internet privacy is not limited to teenagers, however. The problem persists in workplaces as well, where the privacy policies and the consequences are stated to employees. Despite the universal lack of understanding, teens are actually held to a higher criminal standard than adults.84

Similar to social media sites, workplaces have electronic privacy policies which set forth the policies and proper use of company computers.85 Despite the stated policies of the employer, employees engage in risky behavior on their work computers. For example, in U.S. v. Simmons, the Foreign Bureau of Information Services (FBIS) had a policy which stated that the computer

84 While teens can be said to have a greater ability to use technology, the ability to use technology has nothing to do with understanding consequences of its use. For example, the Pew Research Center and the Pew Internet and American Life Project find that “internet-savvy” students are those who “have been online for five or six years already; they are technologically literate; and they maintain multiple email addresses and instant messaging (IM) identities. While online, they frequently are multitasking: conducting research for a paper, printing an online study guide for a book they are reading, downloading music, instant messaging simultaneously with dozens of friends, emailing other friends, and preparing a PowerPoint presentation for class the next day.” Pew Research Center, The Digital Disconnect, The Widening Gap Between Internet Savvy Students and Their Schools, http://www.pewinternet.org/Reports/2002/The-Digital-Disconnect-The-widening-gap-between-Internetsavvy-students-and-their-schools/Part-II/1-The-Schooling-of-Internet-Savvy-Students.aspx?r=1. There is nothing in their definition that indicates that the students have an understanding of responsibility on the internet, or the consequences of their internet use despite their “savviness.”

system had a mechanical audit system which automatically recorded a variety of user activities. The activities related to sending and receiving email, log in and log outs, file transfers, and web sites visited. Simons was employed at FBIS and had inputted a search for the word “sex” which was flagged by the electronic audit and came to the attention of the network manager. A search of the network resulted in discovering over one thousand nude images downloaded on Simons’ computer. It was later determined that some of the images, were, in fact, child pornography. The Fourth Circuit determined that Simons’ expectation of privacy had not been violated because, inter alia, of the employer’s policy. Clearly, possessing child pornography is a criminal offense of the most heinous variety, but what is most perplexing is that an employee would download any form of pornography on a workplace computer when the employee is made aware of the employer’s policy of auditing employee internet use.

While an employee of a government agency might not be entirely capable of understanding the policies in place, it is difficult to argue that an attorney advocating against free use of the internet in workplaces should not understand the purpose and effect of such policies. Nevertheless, such an attorney working for a computer company engaged in a discussion at a bar association meeting wherein he “stridently advocated against the concept that employees should be permitted to use workplace computers for personal use.” However, “in response to a question, the company’s attorney freely admitted that he used his own workplace computer for personal purposes.” As stated by a commentator, “[T]he inherent contradiction in the

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87 Id.
88 Id. at 396.
89 Id.
90 Id.
91 Id. at 399.
92 William Herbert, 12 EMP. RTS. & POL’Y J. 49, 100 (2008).
93 Id.
attorney’s comments is emblematic of the confused state of expectations in the electronic workplace.”  

What the case and the commentary show is that the electronic world has created a gap in the understanding of privacy, yet sexting cases show that teens are held to a higher standard of understanding. Misunderstanding information privacy is not localized to teenagers with cell phones, or rank and file employees, but the problem extends to the people making the policy, i.e. the lawyer. Nevertheless, if adults were to engage in sexting, there would be no crime. As a result, while neither teens, nor adults really understand privacy in the wake of technological advancement, the law is holding teens “to a higher standard than adults.”

The Vanderbilt study and the workplace issues relate to sexting because of the misunderstanding of privacy and the need to engage in “socialization” or, in the case of possessing child pornography, possibly anti-socialization activities despite the consequences. If the consequences of this kind of activity are not foreseeable for adults acting in a workplace environment where they are explicitly told what the privacy policy is, why should law enforcement place harsh punishments on teens who, as it has been shown, lack the ability to foresee the consequences? The use of criminal law against teens engaged in sexting is not going to change their behavior. Instead, some other policy has to be put in place to not only effect change the behavior of teens, but to mold a generation to understand the problems associated with electronic privacy.

94 Id.
95 Richards, 32 HASTINGS COMM. & ENT L.J. at 18 (Attorney for Phillip Albert stating: “When adults send pictures of themselves engaged in sexual activity to each other--a common thing--there's no crime committed, it's commonplace, it's enjoyable and everybody goes on. Kids do exactly the same thing with other kids--they have the same desires and the same erotic feelings--but they're held to a higher standard. All of a sudden, it's this horrible crime. It strikes me as odd that we're holding kids to a higher standard than adults.”).
96 Id.
V. Solutions

In the battle against sexting new ideas have already blossomed, but not without their own issues. The use of the criminal law to deter and punish teens is not the only method, and will likely prove to have been the wrong method in the future. Instead, some states are starting educational programs. This section will examine the beginnings of the educational approach from Pennsylvania, and Ohio. Additionally, Vermont has passed a law which addresses two problems with applying current laws to sexting. Last, a possible solution to the problems of internet and technology privacy will be considered.

A. Pennsylvania – No Good Deed Goes Unpunished

In October of 2008, at a small high school in Pennsylvania, a girl spotted a class mate scrolling through pictures on his cell phone and noticed that one of the pictures was of her nude.\(^\text{97}\) She notified school officials who confiscated the phone and then turned it over to the district attorney’s office.\(^\text{98}\) It ended up on the desk of District Attorney George Skumanick Jr.\(^\text{99}\) School officials turned up several other cell phones with pictures of other nude teenagers.\(^\text{100}\) However, not all were nude. In one case, a 12 year old girl was photographed at a slumber party wearing what the girl described as “‘an old grandma bra. Nothing skimpy.’”\(^\text{101}\) In that instance, the girl was not sure how the picture ended up being disseminated, and neither she nor her parents found it provocative.\(^\text{102}\) In other cases, the picture was never sent to anyone.\(^\text{103}\) Skumanick, meanwhile, had set a controversial precedent. In response to a parent’s question he

\(^{98}\) Id.
\(^{99}\) Id.
\(^{100}\) Id.
\(^{101}\) Id.
\(^{102}\) Id.
\(^{103}\) Searcy, supra note 97 (“The girl, who took the photos herself, was debating whether to send them to her boyfriend when a teacher took the phone.”).
answered “that -- yes -- a girl in a bathing suit could be subjected to criminal charges because she was posed ‘provocatively.’”\footnote{Id.} Instead of pressing charges, he decided to develop an educational program to help teens understand the problems related to sexting by working with youth officials.\footnote{Id.} His method of convincing the students to participate in the program, however, also proved to be controversial. He issued the students and their parents an ultimatum, either take the class, or face child pornography charges.\footnote{Id.} While the District Attorney’s office believed the option to be “‘progressive’”, some parents, and the American Civil Liberties Union, believed that Skumanick had set a dangerous precedent for what constitutes child pornography and sued Skumanick for interference with the right to raise a child and freedom of speech.\footnote{Id.} In fact, when asked by a father what “‘provocative’” meant, the District Attorney replied “that he refused to argue the question and reminded the crowd that he could charge all the minors that night . . . He told [the parent] that ‘these are the rules. If you don’t like them, too bad.’”\footnote{Id.} The District Court of Pennsylvania awarded a temporary restraining order to the plaintiffs.\footnote{Id. at 647.}

What the exact design the program would have taken is not entirely clear. Court documents state

The program is designed to teach the girls to “gain an understanding of how their actions were wrong,” “gain an understanding of what it means to be a girl in today's society, both advantages and disadvantages,” and “identify nontraditional societal and job roles.” Included in the “homework” for the program is an assignment including “[w]hat you did” and “[w]hy it was wrong.” The program was initially purported to last six to nine months, but was eventually reduced to two hours per week over five weeks.\footnote{Id. at 638 (citations omitted).}
Whether any of the students actually underwent the class is not clear either. In any event, it is not for one prosecutor to guess at how teens express themselves sexually, as opposed to simply taking a picture at a slumber party. States need to develop a clearer view as to how to handle sexting issues. Nevertheless, Skumanick’s plan was progressive even if he approached the problem in the wrong way by forcing the students into submitting to his class and by charging those with questionably “provocative” pictures. Interestingly enough, Skumanick lost in the most recent election for District Attorney mainly because of the media attention paid to this incident. The winner of the election ran on the platform of education for victims of sexting which appears similar to the plan proposed by Skumanick.

B. Montgomery County, Ohio’s Juvenile Diversion Program

In March of 2009, Montgomery County, Ohio Prosecuting Attorney Mathias Heck announced a plan to create a Prosecutor’s Juvenile Diversion Program in response to the rise in sexting. Ohio’s sex offender statute does not distinguish between age of the offender and conviction can “range from a fifth degree felony up to a second degree felony, depending on the circumstances, could also include designation as a Tier I or Tier II sex offender requiring registration for 10 or 20 years.” The purpose of the program “is to address first time offenders who engage in this behavior, but are unlikely to re-offend after being educated on the legal ramifications and the possible long term affects on the victim.” Under the new program, teens who are charged with sexting will be “screened by a diversion officer of the Montgomery County Prosecutor’s Office to determine if diversion from traditional juvenile court proceedings

112 Id.
115 Heck, 43-MAR. PROSECUTOR at 28.
is appropriate.” The determination is based on a negative response to the following four factors:

1. whether the juvenile has any prior sexual offenses;
2. whether any type of force or illicit substances were used to secure the photos;
3. whether the juvenile has been involved in this particular diversionary program previously, or;
4. if there is strong opposition by the victim or law enforcement to the juvenile being involved in a diversionary program.

If accepted into the program, then the juvenile will be under supervision for six months “agree to relinquish their cell phone for a period of time, perform community service and attend at least four hours of appropriate and specific education . . . focusing on the legal ramifications, the effects on the victim, establishing age appropriate sexual boundaries, and responsible use of the Internet, cell phones and other communication devices.” Failure to fulfill the requirements will result in the filing of criminal charges.

The Juvenile Diversion Program is new and the data on the efficacy of the program is not available. Furthermore, there have not been any challenges to the authority to place a juvenile into the program, as there was in Pennsylvania. Of course, it may be that no challenge will come. In Pennsylvania, the winner of the District Attorney election stated “‘I don’t think people were against the program, but I think they were displeased that the incident generated so much attention from the media,’” and said “that he did not feel that many necessarily disagreed with Skumanick’s decision.” In Ohio, having a set policy prior to implementing the program could go a long way. Skumanick basically made up the rules as he went along, which can be fraught with difficulty.

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116 Id.
117 Id.
118 Id.
119 Id.
120 Rapp, supra note 109.
In any event, it remains to be seen whether the Montgomery County program works. At the least, it appears to be a step in the right direction.

C. Vermont

While Pennsylvania and Ohio have left the policy of how to deal with sexting to prosecutors, Vermont has taken a more formal approach by passing a law which sets forth its new standards for prosecuting sexting cases. The new Vermont statute provides a response to some of the problems arising in sexting cases.

Vermont’s obscenity laws have now been updated to make sexting illegal for both the person sending the picture and the receiver.\textsuperscript{121} The law carves out penalty exceptions for minors by requiring that a minor who violates the statute must be “adjudicated delinquent.”\textsuperscript{122} The action “shall be filed in family court and treated as a juvenile proceeding . . . and may be referred to the juvenile diversion program of the district in which the action is filed.”\textsuperscript{123} Furthermore, the statute requires that first time offenders cannot be prosecuted for “sexual exploitation of children” and the minor will not be subject to the sex offender registry.\textsuperscript{124} However, minors who have previously violated the statute may be prosecuted for sexual exploitation of children.\textsuperscript{125}

Vermont’s sexting law only went into effect on July 1, 2009\textsuperscript{126}, and its utility is yet to be determined. Nevertheless, it appears to accomplish similar goals that the Montgomery County, Ohio prosecutor and Skumanick seek to accomplish: a more lenient version of the sex laws which will prevent drastic consequences from being exerted on minors.

\textsuperscript{121}VT. STAT. ANN. tit. 13, §2802b(a)(1)-(2).
\textsuperscript{122}Id. at (b)(1).
\textsuperscript{123}Id.
\textsuperscript{124}Id. at (b)(2).
\textsuperscript{125}Id. at (b)(3).
\textsuperscript{126}VT. STAT. ANN. tit. 13, §2802b (see Credits).
The statute also addresses two particular problems in using the current criminal statutes against teens. First, the new law keeps undeserving offenders off the sex offender registry, and, second, the law does not force morality on teens to the degree that the current law does.

As discussed above, the sex offender registry carries secondary consequences that will only continue to bring punishment on those convicted of sexting. The Vermont statute provides that offenders cannot be placed on the sex offender registry. Even where the offender has been convicted previously, he cannot be subject to registration. The provision appears to properly comply with the intentions of sex offender registration which were to protect society against violent sexual deviants, rather than those participating in consensual sexual exploration.

The law also removes the problem of forced morality by prosecutors. Since *The Queen v. Prince* first explored statutory rape, authorities have enforced societal morality in whatever way they deemed fit. Adolescent sex has been prevalent for a long time, and different methods have been used to combat it. In the 1870’s that meant girls were property, not to be taken without permission. Today, that means adolescents must be protected by enforcing harsh criminal punishment. The Vermont statute does not follow that trend. Instead, where the activity is consensual, the teen will be sent to a diversion program. The value is that the teen will get some education and can learn about the consequences of sexting without the long lasting consequences of most sex offender laws.

D. Improved Technology

While the law needs to be updated, and it appears that sexting statutes are progressing, it may also be appropriate to improve the technology. A simple way of handling the spread of

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127 Id. at (b)(3).
128 Id.
sexting might be to add a technology to cell phones that already exists on computers to protect private information: Active Directory Rights Management Services (AD RMS).

AD RMS would not stop teens from taking nude pictures, and would not prevent sexting to a single person, but it could prevent the unauthorized spread of the image. According to Microsoft, “Applications such as word processors, [and] e-mail clients . . . can be AD RMS-enabled to help safeguard sensitive information[.] Users can define who can open, modify, print, forward, or take other actions with the information.”\(^\text{130}\) While the technology is certainly more complex than can be explained in this paper,\(^\text{131}\) the technology would allow someone taking a picture to send it to only one person but with a lock so that it could not be re-texted, emailed, forwarded, etc. Again, it would not stop the practice of sexting, but it could prevent another girl from going through what Jesse Logan went through because the picture could not be sent around to an entire school. Furthermore, the enhanced technology addresses the problems associated with teens and internet privacy. By providing teens with a tool to protect themselves from the lack of privacy on the internet, the harsh effects of sexting can be mitigated.

VI. Conclusion

Harsh criminal punishment and sex offender registration is not the answer to the sexting problem. Teens today face a new world of electronic media and access to communication devices that can send and receive information before the user has a chance to contemplate the consequences. The speed of communication, adolescent development and the inability to truly understand privacy in electronic communications makes sexting a new problem that cannot be solved by old methods. By looking toward the new law in Vermont and the policies in other


\(^{131}\) See, id.
jurisdictions, it is clear that the proper direction is leniency for minors whose lives should not be decimated by the harsh penalties imposed by the criminal law. Furthermore, by enhancing privacy technology on cell phones, the effects of sexting on victims could be greatly reduced.