Sexting: Risky or [F]risky? An Examination of the Current and Future Legal Treatment of Sexting in the United States

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I. Introduction

The lonely underage teen sulks in her bedroom, mourning the lost relationship with her true love. She doesn’t want it to be over. She loves him. She’ll do anything to keep him in her life. She’s got it. She knows what will make him stay with her. She removes her clothing and pulls out her cellphone. She snaps a self-portrait to send to the boy. “See what you’re missing?” She taps on the tiny keypad before sending it off to her boyfriend. The underage boy receives the picture on his cell phone. He can’t believe what he sees. Amazed, he forwards it to several friends. They forward it to more friends. Before long, most of the school sees the image of the minor girl trying to lure back her ex-boyfriend. ¹

Katelyn was fifteen years old and in love with her sixteen-year-old boyfriend, Dillon. So when Dillon asked her to take a naked picture of herself with his cell phone, she didn’t think twice. She thought this would be something just the two of them could share. She wanted to show him how much she loved him. But when Dillon broke up with her three weeks later, she started noticing kids at school giggling behind her back. When two of her best friends showed her their cell phones, she realized why everyone was giggling. Dillon had forwarded her picture to his friends, and almost everyone in school had now seen the photo and had it on their phone.

¹ David Trinko, Sexting: Area teens could be charged with felonies for sending nude photos by phone, THE LIMA NEWS (Ohio), May 17, 2009 (page unavailable).
She was called printable names like slut, whore, and easy. Katelyn was devastated. Her grades dropped. She no longer wanted to go to school or socialize with other kids.\(^2\)

While hanging out one afternoon, fourteen-year-old Heather asked her sixteen-year-old boyfriend, John, to take a picture with her cell phone of her performing oral sex on him. Heather sent a copy of the picture only to John. John was discrete enough not to share that picture with anyone else. He wanted to keep the picture on his phone so he could always look at the love of his life. John took the cell phone to school and was caught text messaging during class in violation of school policy. The cell phone was confiscated and school personnel believed it was necessary to look through the phone when they found Heather’s picture. School authorities decided to report the matter to the police and to contact John’s parents. His parents wanted the police to also investigate whether charges should be filed against Heather as the picture was taken at her request, with her cell phone.\(^3\)

The above scenarios, provided by *The Lima News* and Mathias H. Heck, Jr., respectively, exemplify the nature of “sexting.”\(^4\) The term “sexting” refers to the practice of sending or posting sexually suggestive text messages and images, via cellular phones or over the Internet.\(^5\) Typically, a person will take the nude or semi-nude picture of him or herself with a digital camera or a cell phone camera.\(^6\) Sometimes, the person will ask another to take the sexually suggestive picture.\(^7\) That picture is then stored as a digitized image and sent via a text message

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\(^3\) *Id.*

\(^4\) *Id.*; Trinko, *supra* note 1.


\(^6\) *Id.*

\(^7\) *Id.*
or picture message on a cell phone, emailed by computer, or posted to an Internet website like Facebook or MySpace.⁸ Although virtually anyone can transmit sexually explicit photographs, the issue of sexting has gained public attention because of the conduct of underage teens.⁹

Sexting is a practice that has become popular among teenagers in recent years and seems to have no geographic boundaries.¹⁰ Reported studies show that approximately twenty to forty percent of American teens have been involved in some type of nude sexting.¹¹ In the fall of 2008, The National Campaign to Prevent Teen and Unplanned Pregnancy conducted a survey of teens and young adults to explore the proportion of teens and young adults sending or posting sexually suggestive text and picture messages.¹² This online survey had 1,280 participants—653 teens (ages thirteen to nineteen) and 627 young adults (ages twenty to twenty-six)—between September 25, 2008 and October 3, 2008.¹³ The survey revealed that twenty percent of teens have sent or posted nude or semi-nude pictures or videos of themselves.¹⁴ Thirty-eight percent of teen girls and thirty-nine percent of teen boys say that they have had sexually suggestive text messages or emails—originally meant for someone else—shared with them.¹⁵ Among sexting recipients, twenty percent say they have shared such a message with someone other than the person for whom it was originally meant.¹⁶ Those surveyed and involved in sexting describe the activity as “flirty,” “hot,” “exciting,” and “trusting.”¹⁷

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⁸ Id.
¹⁰ See Sex and Tech Survey, supra note 9; see also Heck, Jr., supra note 2.
¹¹ See Sex and Tech Survey, supra note 9.
¹² Id.
¹³ Id.
¹⁴ Id.
¹⁵ Id.
¹⁶ Id.
¹⁷ Id.
However, sexting has proven to be more than simple erotic behavior.\textsuperscript{18} Pursuant to child pornography laws, the act of sexting, or sending nude or semi-nude photographs of a teenager, constitutes criminal behavior.\textsuperscript{19} In fact, prosecutors in at least 16 states have charged—or threatened to charge—teenagers with serious misdemeanors and felonies, including production, possession, distribution, and receipt of child pornography.\textsuperscript{20}

In this paper, I examine several aspects of the sexting trend. Part II discusses who can be punished for sexting and how they can be punished. Part III analyzes how the states currently approach sexting cases. Part IV is an in-depth analysis of why the current punishment is disproportional to the act. Part V examines the possibility of charging teens for sexting under statutes that may provide a more proportional punishment compared to the current application of child pornography laws. Part VI addresses current legislative solutions proposed by the states. Part VII promotes the need for a federal sexting bill by emphasizing the notion that the current punishment for sexting is disproportionate to the act and substantially deviates from state-to-state.

\textbf{II. Sexting Punishment – Who can be Punished for Sexting? How can they be Punished?}

\textsuperscript{18} \textit{Id.}; Trinko, \textit{supra} note 1.
\textsuperscript{19} Ron Sylvester, ‘Sexting’ by Teens a Punishable Offense, THE WICHITA EAGLE, April 11, 2009, at a1.
Pursuant to federal and state child pornography laws, it is illegal to create, possess, or distribute explicit images of a minor.\textsuperscript{21} Regardless of the reason, sexually explicit images constitute child pornography and can lead to state or federal prosecution.\textsuperscript{22} The current child pornography laws – state or federal – do not establish a minimum age for the offender; they simply state the applicable ages of the victim.\textsuperscript{23} Accordingly, anyone, including minors, can be charged for committing an act prohibited by the child pornography laws.\textsuperscript{24} Moreover, in sexting cases, the victim, the receiver, the forwarder, and the saver can be prosecuted equally under state or federal child pornography laws.\textsuperscript{25}

Federally, sexting behavior can be prosecuted under 18 U.S.C. §§ 2251, 2252A(a)(2), 2257A.\textsuperscript{26} 18 U.S.C. § 2251 requires the punishment of individuals who produce child pornography.\textsuperscript{27} Accordingly, § 2251 may be applied to prosecute the initial minor who decided to take a nude picture of him or herself.\textsuperscript{28} Generally, the minor does not simply take a nude picture of him or herself; they send it to another minor. By sending the nude picture to another party, the “victim” has subjected him or herself to prosecution under § 2252A(a)(2) for knowingly distributing child pornography.\textsuperscript{29} As such, by simply taking that nude image of him

\begin{thebibliography}{9}
\bibitem{21} Sexting and the Single Girl, 195 N. J. L. J. 950 (March 30, 2009).
\bibitem{22} Dan Hereck, ‘Sexting’ Youth Exposing Themselves to Greater Dangers Than They Realize, THE BUFFALO NEWS, January 25, 2009, at A1; Alex Branch, When is Sexting Just a Huge Mistake, and When is it a Crime?, FORT WORTH STAR-TELEGRAM, December 23, 2009 (page unavailable). Some states have followed a different route from the typical prosecution under child pornography laws by prosecuting teens under obscenity laws. Here, we will focus on the prosecution of teens under child pornography laws; specifically, the federal child pornography laws because they establish a minimum standard of compliance for the states.
\bibitem{23} Heck, Jr., supra note 2 (noting that under Ohio law, there is no distinction concerning the age of the “offender” or circumstance, sending such erotic photos of underage minors is typically a felony crime).
\bibitem{24} Brett Buckner, Boundless Consequences: With Sexting, a Severely Innocent Decision Can Lead to a Lifetime of Regret, THE ANNISTON STAR (Alaska), July 5, 2009 (page unavailable).
\bibitem{25} RoNeisha Mullen, Fad or Felony? Sexting a Troubling—and Growing—Trend, FLINT JOURNAL, April 17, 2009, at 1; see also Buckner, supra note 24; Heck, Jr., supra note 2.
\bibitem{27} Id. § 2251.
\bibitem{28} Id.
\end{thebibliography}
or herself and sending it to a “friend,” that minor has easily subjected herself to prosecution under two federal statutes.\textsuperscript{30} The prosecution for sexting does not stop there. The individual who receives the image and then distributes the image to another is also subject to two charges - 18 U.S.C. § 2252A(a)(2)—for receiving the image and for distributing child pornography.\textsuperscript{31} Alternatively, even if the receiver does not forward the image, but simply forgets to delete the image from his phone or computer, he or she is still subject to federal statute 18 U.S.C. § 2257A for the dissemination of child pornography.\textsuperscript{32}

The above description of the application of federal child pornography statutes begins to exemplify the complications of applying child pornography laws to sexting. For instance, most laws have a clear victim and a clear perpetrator; however, with sexting, the perpetrator is usually the “victim” for whom the law was designed to protect.\textsuperscript{33} Secondly, a teen that unwillingly and unknowingly receives a nude image of a teen friend, but simply fails to delete the stored image, may also be prosecuted federally.\textsuperscript{34}

III. Current Treatment of Sexting

As mentioned above, sexting is a widespread phenomenon among American teens.\textsuperscript{35} Nevertheless, there are few laws addressing “sexting” among these teenagers; therefore, prosecutors must work within the existing laws.\textsuperscript{36} Based upon their respective child pornography laws—that must comply with the federal statutory scheme—the states are all treating sexting

\textsuperscript{30} Heck, Jr., supra note 2.
\textsuperscript{31} Heck, Jr., supra note 2.
\textsuperscript{32} Keith Paradise, Chambersburg Area School District’s Student Sexters May Wear “Sex Offender” Label Through Adulthood, PUBLIC OPINION (Chambersburg, PA), October 7, 2009 (page unavailable).
\textsuperscript{34} Corbett, supra note 9.
\textsuperscript{35} Miller v. Skumanick, Jr., 605 F.Supp.2d 634 (M.D. Pa. 2009).
cases slightly differently. Sexting cases have thus far been prosecuted in the following states: Pennsylvania, Connecticut, North Dakota, Ohio, Utah, Virginia, Vermont, Indiana, Wisconsin, California, Michigan, Alabama, Florida, New York, New Jersey, and Texas.

In 2009, a seventeen-year-old in Wisconsin was charged with possessing child pornography after posting online the naked pictures his sixteen-year-old ex-girlfriend sent him. In March 2008, four Alabama middle school students were arrested for exchanging nude photos with each other. These students were charged with possession of material harmful to minors.

In Rochester, New York, a sixteen-year-old boy is facing up to seven years in prison for forwarding a nude photo of his fifteen-year-old girlfriend to his friends.

In New Jersey, two fourteen-year-old girls separately transmitted nude pictures. One of the teens posted nearly thirty nude pictures of herself on MySpace, a social networking site because she wanted her boyfriend to see them. The teen was arrested and charged with possession and distribution of child pornography. If convicted of these charges, the teen could have been forced to register as a sex offender under Megan’s Law. The teen also would have faced up to seventeen years in jail. Ultimately, the girl caught sexting was ordered to complete six months of counseling. The other New Jersey teen simply got a slap on the wrist. Police

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37 See generally supra Part III.
38 Malan & Sussman, supra note 20; DeFalco, supra note 20; Heck, Jr., supra note 2.
40 Pollet, supra note 39.
41 Buckner, supra note 24.
42 Pollet, supra note 39.
43 Martin Tsai, New Gig, Same Beat: He May Be in LA, but Max Weinberg is Still in a Jersey State of Mind, THE STAR LEDGER (Newark, N.J.), September 1, 2009, at M027.
44 Pollet, supra note 39; see also DeFalco, supra note 20.
45 Pollet, supra note 39.
46 DeFalco, supra note 20.
47 Id.
48 Tsai, supra note 47.
told students who had received her nude picture on their cell phones to delete it. The district then held assemblies on cyber awareness for middle school and high school students.

Philip Alpert, an eighteen-year-old student in Florida, was charged for sexting. After an argument with his sixteen-year-old ex-girlfriend, Alpert remembered the nude photo she had sent him while they were dating. Alpert impulsively decided to take revenge by e-mailing the photo of his ex-girlfriend to her friends and family. When he acted, it is highly unlikely that Alpert ever thought that he would wind up on anyone’s list of sex offenders. A few days after Alpert sent the nude images, however, he was arrested and charged with transmitting child pornography, a third-degree felony in the state. If Alpert had not accepted a plea agreement, prosecutors could have charged him under the provisions of the child pornography statute. Thus, each time he sent the photos to a person could have independently resulted in two charges—one for possession and one for distribution—making him face some 140 counts. Alpert’s punishment increased drastically because he committed the act of sexting one month after he turned eighteen. Today, Alpert is serving a five-year probation for the crime, and is required to register as a sex offender until at least the age of 43. As a registered sex offender, Alpert must notify local law enforcement about various details such as when he changes jobs,

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49 Id.
50 Id.
51 Id.
52 Bianca Prieto, ‘ Sexting ’ Teens Hit with Harsh Adult Laws, SUNDAY GAZETTE MAIL (Charleston, WV), March 15, 2009, at 8B.
53 Id.
54 Id.
55 Corbett, supra note 9.
56 Prieto, supra note 56.
57 Richards & Calvert, supra note 33.
58 Id.
59 Id.
60 Prieto, supra note 56; see also Don Savage, Savage Love, 54 VILLAGE VOICE 72 (April 15, 2009); Richards & Calvert, supra note 33.
where he goes to college, and when he changes his email address. Moreover, in order to ensure that he does not re-offend, Alpert must submit to semi-annual polygraphs, regularly attend sex offender classes —with others who have raped children, and molested kids—and cannot live or attend school in certain locations.

In another Florida case, Bruce Dixon, an eighteen-year-old teen, was jailed for forwarding a cell phone picture of his sixteen-year-old ex-girlfriend’s breasts to another teen. The ex-girlfriend had allowed the photo to be taken while the two were dating. The judge set Dixon’s bond at $140,000 for the transmission of child pornography and other similar charges he faced. If Dixon had been convicted, he would have faced a possible thirty years in prison, and because of how the statute reads, he would have been required to register as a sex offender. Dixon was able to avoid the prison sentence by accepting a plea agreement for a one-year probation and other requirements.

In Greensburg, Pennsylvania, three high school girls were sentenced to curfews and community service after being charged for sending sexually explicit images of themselves to their boyfriends. The boyfriends were also sentenced to curfew and community service for receiving the images. In another Pennsylvania case, an overzealous prosecutor attempted to protect children from sexual exploitation by sending a letter to the parents of about twenty students, threatening them with criminal felony charges if they did not agree to be placed on probation and participate in a counseling program he had devised because they were involved in

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61 Corbett, supra note 9.
62 Richards & Calvert, supra note 33.
63 Prieto, supra note 56
64 Id.
65 Id.
66 Id.
67 Not Innocent Fun, supra note 40.
69 Id.
sexting.\textsuperscript{70} One of the photos showed two young girls from the waist up, lying side by side in their bras, with one talking on the telephone and the other making a peace sign.\textsuperscript{71} The photos did not depict any sexual activity.\textsuperscript{72} However, the prosecutor exercised his prosecutorial discretion in proceeding to the federal court because he deemed the photos “provocative.”\textsuperscript{73}

In Virginia, two boys, ages fifteen and eighteen, were charged with solicitation and possession of child porn with intent to distribute for seeking nude pictures from several female students.\textsuperscript{74} Among the girls were a sixteen-year-old, a thirteen-year-old, and a twelve-year-old.\textsuperscript{75} The girls were asked to take explicit images of themselves and text them to the two boys, who then texted the images to others.\textsuperscript{76}

In Vermont, minors charged with sexting are not dealt with in juvenile court.\textsuperscript{77} Instead, minors face sexual exploitation charges and are required to register as sex offenders.\textsuperscript{78} For instance, Isaac Owusi, an eighteen-year-old student, was sentenced to a ninety-day prison term after pleading guilty to sexual assault charges involving two female students at his high schools.\textsuperscript{79} The charges resulted from sexting-related events.\textsuperscript{80} Owusi had exchanged sexually explicit images of himself with four different teenage girls via cellular phone.\textsuperscript{81} Because two of the girls were too young to legally consent to sexual activity, Owusi faced the possibility of a

\textsuperscript{70} Shannon P. Duffy, \textit{ACLU Sues DA Over Threat to Prosecute ‘Sexting’ Teens}, \textit{THE RECORDER} (San Francisco), March 27, 2009, at 2.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Teens Caught ‘Sexting’ Face Porn Charges, Asbury Park Press, March 13, 2009, at C.
\textsuperscript{76} Id.
\textsuperscript{77} Branch, \textit{supra} note 22.
\textsuperscript{78} Id.
\textsuperscript{79} Corbett, \textit{supra} note 9.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
term of life in prison. However, because the Vermont legislature recently passed a law decriminalizing sexting, those charges were dropped, and Owusi pled guilty to the reduced sexual assault charges in a plea bargain.

In May 2005, a fourteen-year-old female in Iowa received two photographs from an eighteen-year-old male friend. One photograph was of the friend’s erect penis; the other was a photo of his face. A text message attached to the photo of his face said, “I love you.” The two were only friends. The male sent the erect penis image only after the girl asked him to send it three or four times during the same phone call. The girl received the photo on her email account, viewed it, and thought she had deleted it. She stated that she only wanted the image as a joke. However, the fourteen-year-old teen’s parents did not find this amusing. Her parents contacted an officer they knew and charged the male with knowingly disseminating obscene material to a minor. After a jury trial, the male was guilty of knowingly disseminating obscene material to a minor. The court imposed a deferred judgment, a civil penalty of $250, probation with the department of corrections for one year, and mandatory registration as a sex offender. Additionally, the male was to take an evaluation to determine if treatment was necessary as a condition of his probation.

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82 Id.
83 Id.
84 State v. Canal, 773 N.W.2d 528 (Iowa 2009).
85 Id.
86 Id.
87 Id.
88 Id.
89 Id.
90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
IV. How is Sexting Disproportionately Punished? Why is Sexting Disproportionately Punished? What is the Problem with Charging Sexting Minors under Child Pornography Laws?

The examples of prosecutions of sexting cases provided above demonstrate the proverbial problem of “fitting the square peg of technology into the round hole of existing laws, most of which were drafted long before today’s scientific feats were even conceivable.” Because of the potential harm involved, the behavior of sexting seems to warrant some type of punishment; however, is this behavior something that requires punishment that follows teens around for the rest of their lives?

A balance must be struck so that appropriate consequences result from sexting behavior amongst teens—a balance that is avoided by the nonsensical idea of using child pornography laws and treating these kids like adults. The teens need to pay a price for their actions, but that price should not ruin their lives. The current methods of prosecuting teens for sexting can be best described as “criminalizing immaturity.” Criminalizing immaturity in this manner is simply irresponsible and out of proportion with the action.

Punishing teens under the child pornography statute creates disproportionate sentences in several ways. The disproportionate sentencing of teens for sexting is best exemplified by the sheer fact that no two states have found identical means of handling the situation. Additionally, teens engaged in sexting are not knowingly harming minors in the same way that traditional child pornographers do. Many of the teens engaged in sexting are sending sexually

95 Corbett, supra note 9.
96 Branch, supra note 22.; Laura Smitherman, New Laws for Drivers, Police: O'Malley Also Signs Bills That Deal with Child Pornography, 'Silver Alert' and Domestic Abuse, BALTIMORE SUN, May 20, 2009, at 3A.
97 Buckner, supra note 24.
99 Buckner, supra note 24.
100 See generally supra Part III.
101 Richards & Calvert, supra note 33.
explicit photos in a hi-tech playful manner of flirting that has become synonymous with their generation.\textsuperscript{102} Third, the draconian penalties that result from child pornography convictions can ruin a minor’s life.\textsuperscript{103} The penalties for child pornography charges vary; however, the sentences often entail prison time, long periods of probation, and a lifetime listing on the sex offender registry.\textsuperscript{104} Finally, the stigma associated with a “sex offender” label is lasting.\textsuperscript{105}

A. Legislative Intent of Child Pornography Laws

Since the sexting trend is still so new, the sexting cases have been treated as child pornography, and teens and minors are being prosecuted under child pornography statutes—for distribution, possession, production, and dissemination of child pornography.\textsuperscript{106} Facialy, the child pornography laws seem to apply to the concept of sexting.\textsuperscript{107} Sexting constitutes the distribution of a nude photo of a child.\textsuperscript{108} However, the child pornography statutes were not designed for this type of teenage behavior.\textsuperscript{109}

In drafting the child pornography statutes, Congress and state legislatures “recognized the vile nature of those who use and exploit minors in the production of sexually explicit materials.”\textsuperscript{110} Similarly, the United States Supreme Court emphasized that the production of child pornography, by using actual minors engaged in sexual acts, is criminal and is not entitled to any of the protections afforded by the First Amendment.\textsuperscript{111} The purpose of the federal and state prohibiting possession of child pornography is largely the same.\textsuperscript{112} The child pornography

\textsuperscript{102}\textit{Id.}  
\textsuperscript{103}Mullen, \textit{supra} note 25.  
\textsuperscript{104}Richards & Calvert, \textit{supra} note 33.  
\textsuperscript{105}\textit{Id.}  
\textsuperscript{106}\textit{Learn the Law Now or Learn it Later}, Danville Register & Bee, May 29, 2009 (page unavailable).  
\textsuperscript{107}Richards & Calvert, \textit{supra} note 33.  
\textsuperscript{108}\textit{Id.}  
\textsuperscript{109}\textit{Id.}  
\textsuperscript{110}\textit{Id.}  
\textsuperscript{111}\textit{Id.}  
\textsuperscript{112}\textit{Id.}
statutes were drafted to target adult abuse of minors.\footnote{Sexting and the Single Girl, supra note 21.} Specifically, the child pornography laws were aimed to prosecute and penalize adults who victimize children, not to criminalize juveniles’ inappropriate conduct.\footnote{Addressing Sexting, 35 CONN. L. TRIB., 26 (June 8, 2009).} Existing child pornography laws are very strict, very draconian, and the punishments are some of the most severe known in the law, outside of crimes like murder.\footnote{Richards & Calvert, supra note 33.} The statutes focus on “preventing pedophiles and sexual abusers from stimulating their appetites, protecting children, and encouraging the elimination of existing contraband,” “not on punishing kids for being dumb.”\footnote{Rachel Dissell, Teen Sexting Penalties Too Harsh, Lawmakers Say: Bills Hold Juveniles Accountable Without Labeling Them Sex Offenders, CLEVELAND PLAIN DEALER, April 14, 2009, at A1.}

B. Registration Requirements

The application of child pornography laws to sexting cases involving teenagers is facially permissible under the statutory language of those laws, however the harsh application of child pornography laws for such behavior can brand teens as sex offenders for behavior that they deem as being “all in innocent, good, clean fun – or for some, part of a mating ritual.”\footnote{Richards & Calvert, supra note 33.} The concern is that the behavior of sexting does not really fit the category of someone who is a “sex offender.”\footnote{Trinko, supra note 1.} A sex offender label lasts for a lifetime.\footnote{Id.} The label is reserved for those who sell child pornography.\footnote{Id.} Penalties for the production, distribution, and even possession of child pornography are strict and often include long prison terms designed to keep offenders off the streets and playgrounds where they could inflict further harm on children.\footnote{Richards & Calvert, supra note 33.}
C. Felony vs. Misdemeanor (Deviation in Charges from State-to-State)

The child pornography statutes are intended for those who traffic in such images, but in actuality, those who take and send the photo can be charged with felony distribution of child pornography. For instance, in Alaska, anyone, including a minor, who shares photographs of a sexual nature with someone under the age of seventeen, has committed a class B felony. That could mean two to twenty years in prison. Contrarily, in some states a minor caught sexting could be charged with a misdemeanor or even a slap-on-the-wrist.

D. Child Sex Offenders Are Less Blameworthy

According to the National Juvenile Justice Network (NJJN), “children charged with sexual offenses are different from adult sex offenders. Sexually inappropriate behavior by children is wrong; however, it is necessary to account for the differences between youths and adults when determining the interests of the child and the prosecution interests of the community.” The NJJN’s information exemplifies that scientific literature distinguishes the behavior of juveniles from adults on the following bases. This scientific literature establishes that (1) youth sex offenders have a low recidivism rate; (2) youth sex offenders have a number of risk factors—many that are similar to other juvenile delinquents; (3) youth sex offenders constitute a low percentage of total sex offenses committed; and (4) youths are significantly and negatively impacted by registration and community notification laws.

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122 Emeigh, supra note 30.
123 Buckner, supra note 24.
124 Id.
125 Addressing Sexting, supra note 114.
126 Pollet, supra note 39.
127 Id.
128 Id.
129 Id.
Moreover, research indicates that juveniles are less blameworthy.\textsuperscript{130} Research by the National Institute of Health has been cited to show that “human brains continue to develop well into a person’s mid-20’s,” and that “unlike adult sex offenders, who often seduce young victims methodologically, juvenile sex offenders tend to act impulsively in an effort to explore their sexuality.”\textsuperscript{131} Other research indicates that “adolescents are in a constant state of development and flux, and that if a juvenile sex offender has not committed another sex offense within five years of his first offense he is unlikely to commit a sexual offense ever again.”\textsuperscript{132}

E. No Deterrent Effect

Traditional theorists who support criminal prosecution of teens under the existing child pornography laws focus on the justification of “deterrence.”\textsuperscript{133} They will argue that severe punishment for their actions will prevent teens from engaging in such behavior in the future.\textsuperscript{134} However, these arguments are unconvincing in the sexting scenario for several reasons.

First, the adults who are typically prosecuted under these child pornography laws are being punished for images that they manipulated or images that they created by kidnapping children and then forcing them to participate in graphic sexual activity.\textsuperscript{135} Conversely, the victims of these sexually explicit text messages are generally willing participants in the initial transmission of the messaging.\textsuperscript{136} Accordingly, the intent and context behind the production of “child pornography” in the sexting scenario is vastly different from that of other (typical) child pornography.\textsuperscript{137}

\textsuperscript{130} Id.  
\textsuperscript{131} Id.  
\textsuperscript{132} Id.  
\textsuperscript{133} Id.  
\textsuperscript{134} Id.  
\textsuperscript{135} Id.  
\textsuperscript{136} Id.  
\textsuperscript{137} Id.
Additionally, much of society’s justifiable outrage at purveyors of child pornography can be traced to the power dynamic between adult and child because the adult uses his or her maturity and experience to lure children into pornographic settings for exploiting.\textsuperscript{138} However, teens who send sexually suggestive text messages via cell phones often occupy both the role of the victim and the perpetrator, eliminating the power dynamic that makes so much child pornography possible.\textsuperscript{139}

Moreover, the practice of applying adult punishments in identical fashion to juveniles is of questionable value.\textsuperscript{140} Unlike adults, juveniles who commit sex offenses are unlikely to re-offend.\textsuperscript{141} For instance, in Virginia, the Department of Juvenile Justice (DJJ) has reported that between the fiscal years of 2002 and 2006, 513 juvenile sex offenders were released from DJJ facilities.\textsuperscript{142} By the conclusion of the 2007 fiscal year, only thirteen of those released had been convicted of a new sex offense.\textsuperscript{143}

As Don Corbett eloquently stated, “a successful prosecution of a young person like Mr. Alpert\textsuperscript{144} is not terribly likely to provide a disincentive for other teens similarly situated to cease and desist, especially given the inherent attraction adolescents have for risky situations, whether it is driving too fast, drinking too much, or sexting.”\textsuperscript{145} Research from the National Campaign to Prevent Teen and Unplanned Pregnancy shows that seventy-five percent of the teens polled understood that sending sexually explicit text messages, emails, or instant messages, or videos

\begin{enumerate}
\item Id.
\item Id.
\item 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 (2009).
\item Id.
\item Id.
\item Id.
\item Id.
\item See supra notes 56–65 and accompanying text.
\item Corbett, supra note 9.
\end{enumerate}
could engender a negative outcome.\textsuperscript{146} However, the possibility of negative outcomes was not enough of a deterrent to preclude teens from engaging in such behavior.\textsuperscript{147} In fact, twenty percent of teens say they have sexted, even though the majority knows it could be a crime.\textsuperscript{148}

F. Kids Being Kids

It’s an easy lure for teens to express their affections for one another via text messages simply because it’s the way they communicate virtually everyday.\textsuperscript{149} Part of that transition from adolescence to adulthood comes from being connected with and evaluated by their peers. Texting is a way of quantifying just how connected they are with each other.\textsuperscript{150}

G. Diluting Child Pornography Laws

The prosecution of sexting teens under child pornography laws often results in the same consequences that occur with traditional sex offenders under the child pornography laws.\textsuperscript{151} Accordingly, all of these sex offenders are subject to sex offender registration, amongst other penalties.\textsuperscript{152} Subjecting teens to sex offender registration in turn will dilute the importance of these sex offender registrations.\textsuperscript{153} By lumping sexting cases with these other crimes, everyone involved will start taking the registries less seriously.\textsuperscript{154} Maureen Kanka, mother of Megan Kanka, the seven-year-old after whom “Megan’s Law” was named, has publicly denounced the registration of teens for sexting.\textsuperscript{155} The concept behind the sex-offender registry is to alert citizens when convicted sex offenders move into their community so that they may act

\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Mullen, supra note 25.
\textsuperscript{149} Buckner, supra note 24.
\textsuperscript{150} Id.
\textsuperscript{151} Richards & Calvert, supra note 33.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
appropriately to ensure that their children avoid contact with these sex offenders.\textsuperscript{156} If teens are required to register for sexting, the sex offender registry may lose its impact by diluting its importance.\textsuperscript{157} A teenager who sent a nude photo of herself to her boyfriend is not a threat to the community in the way that a convicted child molester is, but if such prosecutions under child pornography laws are permitted, both are treated equally under law.\textsuperscript{158} Frankly, a caring mother of a five-year-old girl wants to know when a pedophile has moved into the neighborhood, but probably does not care that the sixteen-year-old girl down the street sent nude photos of herself to her sixteen-year-old boyfriend.\textsuperscript{159}

Additionally, the consequences of sex offender registration are so severe that they make this punishment for sexting teens unfitting for the crime.\textsuperscript{160} Many sex offenders are limited in employment and housing opportunities.\textsuperscript{161} Registered sex offenders cannot become teachers, doctors, or nurses.\textsuperscript{162} Also, registered sex offenders often are required to attend special classes designed to ensure that they do not re-offend.\textsuperscript{163}

V. Are There any other Laws under Which this Behavior Could Be Charged that Would Seem More Fitting?

Most sexting cases are being prosecuted under child pornography laws; however, some states offer other laws that may provide more proportional sentencing.\textsuperscript{164} There are statutes such as disorderly conduct, harassment, and stalking that can be used to address sexting problems.\textsuperscript{165} For instance, in Waukesha, Wisconsin, police are recommending juvenile disorderly conduct

\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Richards & Calvert, supra note 33.
\textsuperscript{161} Id.
\textsuperscript{162} Trinko, supra note 1.
\textsuperscript{163} Not Innocent Fun, supra note 40.
\textsuperscript{164} Richards & Calvert, supra note 33.
\textsuperscript{165} Id.
charges for four 15-year-old teens accused of sharing a nude photo of a girl on their cell phones.166 Florida has a communications law that also may be more proportional to acts of sexting than the current usage of child pornography laws.167

VI. Current Legislative Solutions by the States

In light of the recent trend, four states have attempted to address the problem of sexting through legislative means: New Jersey, Colorado, Ohio, and Utah.168

During the 2009 First Legislative Session, the Colorado Legislature introduced House Bill 09-1132.169 This House Bill “amends existing statutes prohibiting the dissemination of offensive material to children, harassment, stalking, Internet luring, and sexual exploitation of children to include the use of telephone and data networks.”170 House Bill 09-1132 does not explicitly address the issue of sexting; however, it was motivated by the recent trend.171 Pursuant to HB 09-1132, a person may be convicted of disseminating indecent material to a child via computer, telephone, data network, instant messaging, or text messaging if the person knew the character and content of the communication and if the communication is with one he or she believes is a child.172 As this statute does not address the necessary age of the perpetrator, this statute may be used in prosecuting a minor for sending sexting messages to another minor.173

In 2009, Utah lawmakers passed House Bill 14, which reduces the penalties for minors seventeen years and younger for sexting.174 Pursuant to House Bill 14, minors seventeen years

166 Malan & Sussman, supra note 20.
167 Richards & Calvert, supra note 33.
168 Sexting Laws are currently pending in Nebraska and Oregon. Indiana and Virginia have ordered research regarding the issue of sexting.
170 Id.
171 Id.
172 Id.
173 Id.
174 The Vexing Issue of “Sexting”, STATE LEGISLATURES, July 1, 2009, at 12.
and younger will face a misdemeanor, while those eighteen years and older may still face felony charges for sexting.\textsuperscript{175}

In April 2009, the Vermont Legislature grappled with Senate Bill 125, under which minors charged with sexting would be dealt with in juvenile court, rather than being subject to child pornography laws and sex offender registration requirements.\textsuperscript{176} Another approach was to reduce the crime from a felony to a misdemeanor for the teen’s first offense, handle it through a diversionary program of education classes and community service, and eliminate the requirement of sex offender registration.\textsuperscript{177}

Similarly, in 2009, New Jersey passed three bills as part of a package to deal with the recent dilemma of sexting and the exchange of sexually explicit images between minors.\textsuperscript{178} New Jersey bill A-4069 creates a diversionary program, by which minors who are charged with the creation, distribution, or exhibition of nude photos can avoid prosecution by completing a course focusing on the consequences of such acts.\textsuperscript{179} Only juveniles who have no prior record, were unaware that their actions constituted a criminal offense, and are likely to be deterred from future offenses by completing the program would be eligible.\textsuperscript{180} New Jersey bill A-4068 requires schools to annually disseminate, by whatever means they deem appropriate, information to students in grades 6 through 12 on the hazards of electronic dissemination of sexually explicit images.\textsuperscript{181} New Jersey bill A-4070 requires stores of cell phones or phone contracts to provide brochures about sexting to purchasers.\textsuperscript{182}

\begin{flushright}
\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\end{flushright}
VII. The Need for a Federal Sexting Law

As demonstrated above, current state sexting laws are either “too hot” or “too cold.”

The punishment for sexting varies drastically from state-to-state, ranging from a felony to a misdemeanor to a slap-on-the-wrist. In some states, kids are treated as pedophiles and prosecuted under child pornography laws to the harshest extent possible. They are sentenced to prison and are required to register as sex offenders. In others, they are told to attend a counseling session or simply never to send another sexually explicit image. For instance, the behavior that subjected eighteen-year-old Philip Alpert to five years probation and registration as a sex offender until the age of forty-three, after a plea agreement, would probably have resulted in a slap-on-the-wrist in states like New Jersey. In New Jersey, Philip Alpert probably would have had to enter into diversionary program focusing on the consequences of his actions.

Philip Alpert was unaware that his acts constituted a criminal offense and had no prior convictions; however, in Florida, he was lucky to have gotten a plea agreement with five years probation and registration as a sex offender.

The current punishment for sexting does not fit the crime. First, the disproportional sentences for sexting are triggered by the mere fact that minors can easily be prosecuted federally for sending these sexually explicit images to others over the Internet or through text messages. Although no federal sexting prosecutions have taken place yet, it is very easily

\[183\] UPI.com, Lawyer Wants Federal Sexting Law, http://www.upi.com/Top_News/2009/04/01/Lawyer-wants-federal-sexting-law/UPI-79331238644351 (last visited March 29, 2010); see also supra Section III.
\[185\] Id.
\[186\] Bianca Prieto, ’Sexting’ Teens Hit with Harsh Adult Laws, SUNDAY GAZETTE MAIL (Charleston, WV), March 15, 2009, at 8B.
\[187\] Tsai, supra note 47.
\[188\] Toutant, supra note 178.
\[189\] Prieto, supra note 56; see also Don Savage, Savage Love, 54 VILLAGE VOICE 72 (April 15, 2009). See also Richards & Calvert, supra note 33.
possible that an overzealous prosecutor can make the case and sentence a minor to a minimum sentence of five to fifteen years.\textsuperscript{190} All sexting cases, whether through the Internet or cell phone transfer, can be prosecuted federally through the interstate commerce clause because the signals for these mechanisms almost always cross state boundaries. Secondly, the child pornography laws were enacted to protect minors from pedophiles who abuse them by taking pornographic photos that are later exchanged over the Internet like trading cards.\textsuperscript{191} These statutes were not enacted to prosecute children from using a technologically savvy mechanism for flirting with each other. As aforementioned, research demonstrates that the intent of the minors in exchanging their risqué images is not the same as the intent that was targeted by the child pornography laws. However, with the current prosecution of minors under these child pornography laws, minors are facing long prison sentences, and possible sex offender registration that could prevent them from obtaining certain employment and living opportunities for the rest of their lives.\textsuperscript{192} With these prosecutions, as a society, we are also diluting the importance of the sex offender registrations in that they were meant to highlight potential dangers in the community, not to notify the community of teens who decided to send their nude photo a boyfriend or girlfriend.\textsuperscript{193}

The United States prides itself on justice, equality, and fairness. With the notions of fairness and justice in mind, it is disheartening to realize that one teen’s sentence for criminal behavior could change so drastically depending on where he lives in the country. It is unfair and truly un-American to have the same individual’s punishment for the same behavior drastically change from state-to-state. Although the states are not completely uniform in all aspects, there is

\textsuperscript{190} Malan & Sussman, \textit{supra} note 20.  
\textsuperscript{191} Trinko, \textit{supra} note 1. 
\textsuperscript{192} Richards & Calvert, \textit{supra} note 33. 
\textsuperscript{193} \textit{Id.}
a foundation established for the punishment that an individual can be subjected to, depending on the type of crime. For instance, the federal sentencing guidelines were established for this very purpose – to create uniformity and to ensure that no two Americans were being treated drastically differently for the same or very similar behavior. The stakes are too high – the current punishments are haunting youths for the rest of their lives.

The current treatment of sexting within the states warrants the enactment of a federal bill addressing the issue of sexting. The federal government needs to enact a bill that deals with sexting related issues so that all minors across the country are treated equally and proportionately to the “crime” they committed by sexting. Leaving this type of regulation up to the states is resulting in too many deviant and disproportionate sentences.

The federal government needs to enact a bill to create uniformity in dealing with sexting cases. As the research conducted by The National Campaign to Prevent Teen and Unplanned Pregnancy and CosmoGirl.com demonstrates, sexting is a widespread technological trend that is affecting today’s teens.194 Accordingly, the federal government should enact three bills to address the problem of sexting. Similarly, to the New Jersey Bill A-4068, the federal government should require schools to annually disseminate, by whatever means they deem appropriate, information to students in grades 6 through 12 on the hazards of electronic dissemination of sexually explicit images. The second bill should require stores of cell phones or phone contracts to provide brochures about sexting to purchasers. The third bill should require states to enact a Juvenile Diversion Program for Kids in each municipality. Under this Program, kids charged with sexting would go through an initial screening process to assess whether they should go through traditional juvenile proceedings or be diverted to the Program. The assessment would consider factors such as, prior offenses, prior participation in the program,

194 See Sex and Tech Survey, supra note 9.
whether drugs or alcohol were used to procure the images, awareness of their acts constituting a criminal offense, and possible deterrence from committing similar future offenses. If the minor is admitted into the Diversion Program based on these factors, then the student would be required to participate in educational programs that focus on the consequences of his or her acts, with his or her parents, and community service. The focus of the Diversionary Program would be to integrate common sense, punishment, and the community-at-large in addressing this technologically advanced social problem. This bill should aim to preclude states from prosecuting teens for sexting under child pornography laws and subjecting them to sex offender registration for sexting, as such punishment is not shown to have a deterrent effect and could potentially haunt the minor for the rest of his or her life.

VIII. Conclusion

The federal government must step forward and minimize the proverbial problem of “fitting the square peg of technology into the round hole of existing laws” by creating a federal bill that deals with the twentieth century’s technologically advanced way of flirting—sexting. Sexting is not a fad that will dissipate without any repercussions. As the survey conducted by The National Campaign to Prevent Teen and Unplanned Pregnancy demonstrates, sexting is a phenomenon that occurs between twenty to forty percent of teenagers. The population of teenagers affected has shown no geographic boundaries. Essentially, this means that each and every single one of the twenty to forty percent of the United States’ population of minors, could face prosecution under child pornography laws and be subjected to sex offender registration requirements that haunt them for the rest of their lives.

195 Corbett, supra note 9.
196 See Sex and Tech Survey, supra note 9.
197 Id.
As such, the prosecution of minors under child pornography laws for sending sexually explicit images to one another is a problem that must be addressed; however, “criminalizing immaturity” under the current system creates negative repercussions for the prosecution of traditional pornography, ruins the lives of the prosecuted children, and provides no long-term benefits for society.\textsuperscript{198} The current treatment of sexting cases dilutes the impact of the child pornography laws and undermines the foundation of the American justice system.\textsuperscript{199} Applying traditional child pornography laws to sexting does nothing but blur the distinction between an adult who kidnaps a child and manipulates sexually explicit images of the child and teens who flirt and sexually explore by sending their naked pictures to each other over text messages.\textsuperscript{200}

Moreover, the federal child pornography laws were enacted to deal with individuals who possess, produce, distribute, and disseminate material of sexually exploited children.\textsuperscript{201} The states’ child pornography laws were established to comport with these federal child pornography laws and address similar issues. However, the current application of the states’ child pornography laws contradicts this principle of uniformity in that each state is currently applying its child pornography laws in a different manner to address sexting cases.

\textsuperscript{198} Berger, supra note 98.
\textsuperscript{199} Richards & Calvert, supra note 33.
\textsuperscript{200} Corbett, supra note 9.
\textsuperscript{201} Heck, Jr., supra note 2. See also supra note 20.