

THE NEED FOR SEXTING LAW REFORM: APPROPRIATE PUNISHMENTS FOR TEENAGE BEHAVIORS

ALEXANDRA KUSHNER*

INTRODUCTION TO THE SEXTING PHENOMENON

Sexting is a social trend that has become a great cause for concern among American teenagers, young adults, parents, educators, and lawmakers. The practice of sending naked or sexually explicit photographs via text message, email, Twitter, Facebook, Instagram, or other electronic forms of communication has become widely practiced by teenagers, college students, and young adults alike.¹ Although some teenagers and scholars contend sexting also includes sending sexually explicit text-only messages, this paper will analyze sexting only as the sending of sexually explicit photographs.

Sexting has become common among teenagers and young adults. One recent survey found that more than twenty percent of U.S. teens had participated in sexting;² another study put the number at twenty-nine percent;³ and yet a third study found that forty-four percent of teens were aware that their peers were sending sexts.⁴ It has also been reported that one in five sext-recipients forward the photo on to someone else.⁵ On college campuses the phenomenon is even more pervasive; a study completed by professors at Rhode Island University found that fifty-six percent of college students have sent and received sexually explicit images via text messages, and seventy-three percent of those sexts were sent to a relationship partner.⁶

In many high schools and across college campuses, sexting is considered typical flirtation or an expected part of a romantic relationship.⁷ However, sexting has led to the bullying of many teenagers and young adults, which has even led some involved to commit suicide, including thirteen-year-old Hope Witsell and eighteen-year-old, Jessica Logan, both in 2009.⁸

*Associate, Winston & Strawn, LLP; J.D., The University of Pennsylvania Law School.

¹ Elizabeth M. Ryan, *Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 359, 360 (2010).

² NAT'L CAMP. TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS I (2008), available at http://www.thenationalcampaign.org/sextech/pdf/sextech_summary.pdf [hereinafter SEX AND TECH].

³ *Sexting in America: When Privates Go Public* (MTV television broadcast Feb. 14, 2010), available at <http://crimeprevention.crimereports.com/2010/02/17/a-thin-line-between-flirting-and-sexting/> [hereinafter *Sexting in America*].

⁴ Vicki Mabrey & David Perozzi, 'Sexting': Should Child Pornography Laws Apply?, ABC NEWS (Apr. 1, 2010), <http://abcnews.go.com/Nightline/phillip-alpert-sexting-teen-child-porn/story?id=10252790#.UVeEXoIetvB>.

⁵ *Sexting in America*, supra note 3.

⁶ Shane Donaldson, *New Sexting Laws Put College Students at Risk*, UNIV. R.I. NEWS (July 21, 2011), <http://www.uri.edu/news/releases/?id=5911>.

⁷ See generally *Sexting in America*, supra note 3.

⁸ Michael Inbar, 'Sexting' Bullying Cited in Teen's Suicide, MSNBC NEWS (Dec. 2, 2009), http://today.msnbc.msn.com/id/34236377/ns/today-today_news/t/sexting-bullying-cited-teens-suicide/.

There have also been instances where images of teenagers who have been sexually assaulted have been distributed, resulting in two additional teenage girls to commit suicide in 2013.⁹ Sexting situations often begin by one teenager consensually sending a naked or sexually explicit picture of himself or herself to someone they are in an exclusive relationship with as a symbol of their intimacy. Other times, the teenager will send the photo to someone that they are not dating but on whom they have a crush.¹⁰ When the person in the image is also the initial sender of the photo, he or she has been labeled the “primary sexter.”¹¹

In sexting exchanges, the recipient of the picture will sometimes keep the photo and the exchange completely private.¹² Other times, the recipient will send the photo of the primary sexter to others—that individual is labeled the “secondary sexter.”¹³ The secondary sexter sometimes immediately forwards the photos along to classmates and friends, not intending harm but acting thoughtlessly. Other times, the secondary sexter may send the photo as a conscious way to humiliate the primary sexter.¹⁴ In other cases, the secondary sexter keeps the photo until there is turmoil in the relationship, and then sends the photos to friends, classmates, and sometimes family as a form of retaliation against the primary sexter.¹⁵ Once other people receive the photo, even if they do not know the subject of the photo, they often become additional secondary sexters by further forwarding the photo to other contacts—in some cases propelling the photo throughout entire towns or counties.¹⁶ While male and female teens and young adults text images of themselves equally as often, females’ pictures are more widely circulated, and females are more frequently bullied as a result of these photos.¹⁷

On the other hand, there are also sexting instances where an individual does not consent to being photographed or videotaped, but another person or group of people photograph or videotape the individual naked or in the midst of a suggestive or sexual act.¹⁸ These sexting incidents can be motivated by a bias against the photographed or videotaped person’s sexual orientation, for example, as a form of LGBT harassment or cyberbullying.¹⁹ These videos have

⁹ Emily Bazelon, *Another Sexting Tragedy*, SLATE MAGAZINE (Apr. 12, 2013), http://www.slate.com/articles/double_x/doublex/2013/04/audrie_pott_and_rehtaeh_parsons_how_should_the_legal_system_treat_nonconsensual.html.

¹⁰ SEX AND TECH, *supra* note 2, at 12.

¹¹ Ryan, *supra* note 1, at 361.

¹² *Sexting in America*, *supra* note 3.

¹³ Ryan, *supra* note 1, at 361.

¹⁴ *See Sexting in America*, *supra* note 3.

¹⁵ *Id.*

¹⁶ *See id.*

¹⁷ Jan Hoffman, *A Girl’s Nude Photo, and Altered Lives*, N.Y. TIMES (Mar. 26, 2011), <http://www.nytimes.com/2011/03/27/us/27sexting.html?pagewanted=all> [hereinafter Hoffman, *A Girl’s Nude Photo*].

¹⁸ *See, e.g.*, Jeneba Ghatt, *Dharun Ravi Verdict in Clementi Suicide: Stop Cyberbullying Now*, WASH. TIMES (Mar. 16, 2012), <http://communities.washingtontimes.com/neighborhood/politics-raising-children/2012/mar/16/dharun-ravi-verdict-clementi-murder-stop-cyberbull/>; *see also* Schellene Clendenin, *Student Punished for Webcam Misuse*, THE DAILY BAROMETER (Nov. 25, 2002), <http://www.dailybarometer.com/news/student-punished-for-webcam-misuse-1.2360432> (explaining that Oregon State student used a webcam without his roommate’s permission to stream his roommate and his roommate’s girlfriend having intercourse. The student enabled others to watch on his website, which received thousands of hits per day while it was available).

¹⁹ *See, e.g.*, David Ariosto, *Guilty Verdict in Rutgers Webcam Spying Case*, CNN.COM (Mar. 17, 2012), <http://www.cnn.com/2012/03/16/justice/new-jersey-rutgers-trial>.

been openly posted through online forums for others to watch, heightening the shame associated with the incident.²⁰

Regardless of the reasons for the secondary sexter's actions, and whether or not the photo was initially obtained consensually and then sent along against the primary sexter's will, there are often dire consequences once the photo or video is circulated.²¹ Peers often mock and torment the primary sexter about the photo or video through verbal and physical intimidation.²² This unrelenting bullying has led some victims to skip classes and perform worse academically, to become depressed, and even to take their own lives.²³

While the after-effects of sexting have become a serious societal problem for high school and college students, national and state laws are being written or retooled to address this issue and prosecute the persons involved in these incidents. Many states initially prosecuted sexters for the distribution, production, or possession of child pornography; some states continue that practice.²⁴ However, many state legislators realize that child pornography statutes are an inappropriate way to stop sexting, and are in the process of developing new laws to address sexting when juveniles are involved.²⁵ In addition, prosecutors have turned to existing hate crime laws to bring charges of harassment where the targets of sexting incidents have been LGBT juveniles and adults.²⁶

Many of the young adults and teenagers that have been the culprits in sexting incidents have received draconian criminal penalties for behavior that was not commensurate with the actions they perpetrated.²⁷ For example, one eighteen-year-old sexter, Phillip Alpert, was prosecuted for distributing child pornography and forced to register as a sex offender.²⁸ Dharun Ravi, another eighteen-year-old sexter, was convicted of intimidation bias,²⁹ a charge with the potential of a ten years prison-sentence.³⁰

While secondary sexting is morally egregious, charging sexters under child pornography laws and placing them on a sex offender registry is inappropriate. Although many legislators and scholars realize that teenagers and young adults who sext should not be charged with child pornography violations, the legal responses to sexting currently being devised may be generally

²⁰ See, e.g., Ghatt, *supra* note 18; see also Clendenin, *supra* note 18.

²¹ *Sexting in America*, *supra* note 3.

²² *Id.*

²³ See generally *id.*

²⁴ Susan Hanley Duncan, *A Legal Response Is Necessary for Self-Produced Child Pornography: A Legislator's Checklist for Drafting the Bill*, 89 OR. L. REV. 645, 649 (2010).

²⁵ Jan Hoffman, *States Struggle with Minors' Sexting*, N.Y. TIMES (Mar. 26, 2011), <http://www.nytimes.com/2011/03/27/us/27sextinglaw.html> [hereinafter Hoffman, *States Struggle*].

²⁶ Kate Zernicke, *Jury Finds Spying in Rutgers Dorm Was a Hate Crime*, N.Y. TIMES (Mar. 17, 2012), <http://www.nytimes.com/2012/03/17/nyregion/defendant-guilty-in-rutgers-case.html?pagewanted=all&r=0>.

²⁷ Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 9-13 (2009).

²⁸ *Id.* at 9.

²⁹ Emily Bazelon, *Dharun Ravi Found Guilty*, SLATE MAGAZINE (Mar. 16, 2012, 1:13 PM), http://www.slate.com/articles/news_and_politics/crime/2012/03/rutgers_spying_verdict_dharun_ravi_found_guilty_of_invading_the_privacy_of_tyler_clementi.html.

³⁰ Emily Bazelon & Kevin Lerner, *Dharun Ravi Should Cut a Deal*, SLATE MAGAZINE (Feb. 14, 2012, 5:31 PM), http://www.slate.com/articles/news_and_politics/crime/2012/02/dharun_ravi_the_rutgers_student_who_spied_on_tyler_clementi_should_accept_the_plea_deal_from_new_jersey_authorities_single.html.

ineffective in curbing teen sexting and lack important nuances to adequately address the practice. Many new sexting laws unnecessarily punish consensual underage sexters, equally punish all teens involved despite varying levels of culpability, and unjustly criminalize teens for both normal sexual experimentation and impulsive behaviors characteristic of teenage psychosocial development. Ultimately, in order to effectively address the bullying that ensues after sexting images are circulated, our society should refrain from overly criminalizing young people and must instead determine how to teach teenagers to treat one another with respect and compassion.

In Part I of this paper, I explain why child pornography laws are an inappropriate response to sexting. In Part II, I argue that sexting laws should be reconsidered generally, as it is unclear what benefit they have for juveniles or our greater society. In Part III, I argue for a nuanced approach to sexting laws that would refrain from criminalizing consensual primary sexters or secondary sexters without malicious intent, but would criminalize those who use sexting as a form of bullying or in conjunction with sexual assault. Finally, in Part IV, I conclude that education-based initiatives are necessary to teach children both the risks of sexting and the importance of treating one another with respect.

Even though other authors have discussed the inadequacy of charging sexters under child pornography laws, my analysis questions the need to make sexting illegal and differs from other articles that assert that sexting must be made illegal amongst minors to protect them. While other authors argue for different penalties depending on the culpability of the sexters, my approach to sexting laws is unique in its focus on the sexter's intent, rather than sexters' actions as other articles center on, when determining how and when to punish sexters. My argument also emphasizes the importance of punishments that are commensurate with the maturity of the actor, his intent, and the action. Finally, my discussion attempts to look at the sexting issue from the youth perspective to evaluate how law will have an effect on their actions.

I. CHILD PORNOGRAPHY AND SEX OFFENDER REGISTRATION FOR SEXTERS

In 2008, Phillip Alpert was a college bound teenager with a longtime, steady girlfriend.³¹ He was leading a normal teenage life, and he was considered to be a “good person.”³² Just after turning 18, his girlfriend left him a combative voice message in the middle of the night, because they were fighting.³³ At 3:28 AM, half asleep and possibly coming out of a sleeping pill induced slumber, Alpert made a choice that will have a lasting impact on the rest of his life. He decided to email naked and suggestive photographs of his then girlfriend, who was sixteen at the time, to seventy of her email contacts, including her parents and her grandparents.³⁴ Alpert had access to these photos because she had decided to send them to him earlier in their relationship.³⁵

At the time, Alpert did not methodically think through the situation or consider the potential repercussions of his actions, as he did not believe what he was doing would generate monumental consequences. As Alpert explains, “I forgot I did it,” and “I was barely awake when I did it and I didn’t even remember [I did it].”³⁶ Nevertheless, the police charged him with

³¹ *Sexting in America*, *supra* note 3.

³² Mabrey & Perozzi, *supra* note 4.

³³ Richards & Calvert, *supra* note 27, at 7-8.

³⁴ *Sexting in America*, *supra* note 3.

³⁵ *Id.*

³⁶ Mabrey & Perozzi, *supra* note 4.

seventy-two charges, which included lewd and lascivious battery, possession of child pornography, and distribution of child pornography.³⁷ His ex-girlfriend who photographed herself and sent her pictures to him was not charged with the production of child pornography or any other offenses.³⁸

Alpert pled guilty to possession and distribution of child pornography, which has impeded his ability to lead a normal life.³⁹ Alpert's guilty plea led the judge to place him on probation for five years, and he will be pictured on the sex offender registry until he is forty-three years old.⁴⁰ Unfortunately, the college Alpert was going to attend has told him that he cannot matriculate because of his sex offender status, and he is unable to enroll in another college or find employment.⁴¹ Since he cannot live or work near a school, he cannot live with his father because his father lives too close to a school and instead lives alone.⁴² Additionally, Alpert has to go to weekly group therapy meetings with convicted child molesters and rapists,⁴³ which is an inappropriate penalty for his actions or state of mind.

Alpert's sexting incident, a sophomoric teenage act, does not warrant sex offender registry placement because that is too severe of a penalty with consequences that last too far into his adulthood. In addition, forcing Alpert, who is not a pedophile, to attend group therapy sessions with pedophiles is useless, and perhaps even harmful for his development into a mature adult. Furthermore, Professor Christopher Ferguson, who studies the effect of media and technology on youth at Texas A&M International University, explains that this punishment does not fit the crime because "[s]exting is not a sign of deviance or a future indicator that teens will become sex offenders."⁴⁴

Alpert is not the only young adult or teenager to receive charges for distribution of child pornography for sexting. Across the country, many prosecutors have charged both juveniles under eighteen and young adults who have sexted with the crime of production or distribution of child pornography when the subject of the photograph in the sext is a minor.⁴⁵ In Alabama, four middle school students were arrested for consensually exchanging nude photographs of themselves.⁴⁶ In Iowa, an eighteen-year-old boy, Jorge Canal, who sent a naked photo of himself to a fifteen-year-old girl, was also forced to register as a sex offender.⁴⁷ In Rochester, New York, a sixteen-year-old boy sent a naked photo of his fifteen-year-old girlfriend to his friends, and he was charged with distribution of child pornography and could face as long as seven years in prison.⁴⁸ Three high school teenage boys were charged with possessing child pornography for

³⁷ *Id.*

³⁸ *Id.*

³⁹ Richards & Calvert, *supra* note 27, at 9.

⁴⁰ *Sexting in America*, *supra* note 3.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ James R. Marsh, *Sexting Students Strike Back*, CHILDLAW BLOG (Mar. 26, 2009, 11:21 AM), <http://www.childlaw.us/2009/03/sexting-students-strike-back.html>.

⁴⁵ Mabrey & Perozzi, *supra* note 4.

⁴⁶ Gigi Stone, 'Sexting' Teens Can Go Too Far, ABC NEWS (March 13, 2009), <http://abcnews.go.com/Technology/WorldNews/sexting-teens/story?id=6456834>.

⁴⁷ Mabrey & Perozzi, *supra* note 4.

⁴⁸ Stone, *supra* note 46.

keeping photos of their female underage classmates on their phones, even though they did not request these photos.⁴⁹

In 2009, *Miller v. Skumanick*, 605 F.Supp.2d 634 (M.D. Pa. 2009), illuminated the perils of charging sexters with child pornography violations. In this case, middle school teachers in Wyoming County, Pennsylvania discovered sexted images on a few teens' phones and reported it to school-district officials, who then confiscated all of the middle schoolers' phones.⁵⁰ The school-district authorities found sexted images on seventeen students' phones (four males' phones and thirteen females' phones),⁵¹ including one photo that contained a girl in a bathing suit,⁵² and gave these phones to the area's district attorney, George Skumanick. He contacted these students' parents and threatened to charge the students with pictures stored on their phones with production, possession, or dissemination of child pornography unless they agreed to let their children attend a six to nine-month program that focused on education and counseling.⁵³ He did not contact the parents of the children who actually disseminated these photos, but instead contacted "the students on whose cell phones the photos were stored."⁵⁴

While the majority of the students' parents agreed to allow their children to attend the re-education program, the parents of three thirteen-year-old girls did not want their daughters to be charged for producing child pornography.⁵⁵ These three thirteen-year-old girls had images of themselves on their phones but no images of other students on their phones.⁵⁶ While two of these girls posed in their bras and photographed themselves from the waist up, one of the girls posed in a towel with her breasts exposed.⁵⁷ According to Skumanick, these images were found on boys' cell phones, but he refused to inform the parents who these boys were.⁵⁸ However, the girls claimed that they did not disseminate these images to other students.⁵⁹

In *Miller v. Skumanick*, the American Civil Liberties Union (ACLU) represented the girls' parents in an action to obtain declaratory and injunctive relief so that Skumanick could not bring child pornography charges against their daughters if they refused to allow them to participate in the re-education program.⁶⁰ The United States District Court for the Middle District of Pennsylvania issued a preliminary injunction that barred the District Attorney from pressing criminal charges against the teenage girls.⁶¹ The court declared:

⁴⁹ Richards & Calvert, *supra* note 27, at 30-31.

⁵⁰ Natasha K. Segool & Tony D. Crespi, *Sexting in the Schoolyard*, NASP COMMUNIQUÉ (June 2011), available at <http://www.nasponline.org/publications/cq/39/8/sexting-in-the-schoolyard.aspx>.

⁵¹ Marsh, *supra* note 44.

⁵² Complaint at 10, *Miller v. Skumanick*, 605 F.Supp.2d 634 (M.D. Pa. 2009) (No. 540), available at <http://www.childlaw.us/documents/Miller%20v%20Skumanick%20Complaint.pdf>.

⁵³ *Id.* at 8.

⁵⁴ *Id.*

⁵⁵ Segool & Crespi, *supra* note 50 at 3.

⁵⁶ Complaint, *supra* note 52, at 2.

⁵⁷ *Id.*

⁵⁸ *Id.* at 12.

⁵⁹ *Id.* at 16.

⁶⁰ See *Miller v. Skumanick*, 605 F. Supp. 2d 634, 639-640 (M.D. Pa. 2009), *aff'd sub nom.* *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

⁶¹ *Id.* at 647.

The fact that the [District Attorney] continues to promise persecution if the girls refuse to participate [in the program] indicates that the charges are retaliation for their refusal to engage in compelled speech. In the case of the parents, this threat is an attempt to compel them to abandon their Fourteenth Amendment right to control their child's upbringing.⁶²

In the District Attorney's appeal in 2010, *Miller v. Mitchell*, the Third Circuit affirmed the district court opinion and found "no indication from th[e] record that the District Attorney had any evidence that [the teenager] ever possessed or distributed the photo."⁶³ The Third Circuit "agree[d] with the District Court that . . . coercing [the teen's] participation in the education program violated (a) [her] Fourteenth Amendment right to parental autonomy and (b) [her mother's] First Amendment right against compelled speech."⁶⁴ On remand, the district court judge ordered that the District Attorney was "permanently enjoined from initiating criminal charges" against the girls in relation to the photographs.⁶⁵

Phillip Alpert's story and other similar situations and the holding of *Miller v. Skumanick* have made many acutely aware of how unsuitable child pornography charges are for sexters.⁶⁶ It has been argued that charging teenagers and young adults who sext with child pornography violations is an "abuse of prosecutorial discretion"⁶⁷ that is contradictory to the legislative intent of child pornography laws that are aimed to protect children from pedophiles.⁶⁸ Additionally, child pornography statutes often include requirements that do not apply to sexting.⁶⁹ For example, in the *Miller v. Skumanick* case, the girls did not expose pubic areas or display sexual activity, nor did they produce the photographs "for the purpose of sexual stimulation or gratification," which is required by the Pennsylvania child pornography statute.⁷⁰

Scholars and policymakers have also been objecting to the practice of putting teens and young adults on the sex offender registry for sexting, viewing it as an overly harsh punishment that will have a destructive impact on their lives.⁷¹ Critics also posit that placing sexters on the sex offender registry will render it a useless database, as the general public will start to question who on the sex offender registry is actually dangerous.⁷² Labeling sexting a child pornography issue has also created concern that regulating the free expression on all persons' phones, including juveniles, is a First Amendment violation.⁷³

⁶² *Id.* at 645.

⁶³ *Miller v. Mitchell*, 598 F.3d 139, 154 (3d Cir. 2010). The court further clarified the prosecutor's lack of probable cause: "[A]ppearing in a photograph provides no evidence as to whether the person possessed or transmitted the photo." *Id.*

⁶⁴ *Id.* at 150.

⁶⁵ *Miller v. Mitchell*, 2010 WL 1779925, at 5 (M.D. Pa. 2010).

⁶⁶ Richards & Calvert, *supra* note 27, at 26.

⁶⁷ *Miller v. Skumanick*, JUVENILE LAW CTR., <http://www.jlc.org/legal-docket/miller-v-skumanick> (last visited April 5, 2013) [hereinafter *Miller v. Skumanick Summary*].

⁶⁸ Ryan, *supra* note 1, at 371.

⁶⁹ *Id.* at 373.

⁷⁰ *Id.*

⁷¹ *Miller v. Skumanick Summary*, *supra* note 67.

⁷² Richards & Calvert, *supra* note 27, at 24-25.

⁷³ Nathan Koppel & Ashby Jones, *Are 'Sext' Messages a Teenage Folly or Felony?*, WALL ST. J., (Aug. 25,

II. A RECONSIDERATION OF SEXTING LAWS: ANTITHETICAL TO TEENS' BEST INTERESTS

It is beneficial for young adults and teenagers that lawmakers, scholars, and policymakers have begun to understand the inappropriate nature of including teenage and young adult sexting under child pornography charges. Recognizing the unique nature of sexting, legislators are devising new laws to target sexting specifically when a juvenile is involved. Twenty states, including Pennsylvania, New York, Hawaii, South Dakota, Arizona, Illinois, Nebraska, North Dakota, Utah, Vermont, Florida, Rhode Island, Louisiana, Missouri, Texas, New Jersey, and Connecticut, have already enacted laws to address sexting.⁷⁴ In 2012, at least thirteen states introduced bills or resolutions targeting sexting.⁷⁵ However, as sexting laws are becoming prolific across states, it is important to consider whether it is necessary or valuable to criminalize sexting at all, for any of its participants; and if so, it is crucial to determine which actors in sexting incidents require a criminal penalty. For the remainder of this section, I will argue that sexting should not be criminalized at all for teenagers who consent to it and keep the exchange private. I will highlight why criminalizing sexting can harm teenagers and be ineffective in addressing the sexting issue.

Sexting incidents should not be criminalized for consenting teenagers who keep the exchange private. Involving more juveniles and young adults in the juvenile or adult court system should be avoided, whenever possible, as it can gravely affect a juvenile's life. According to the Pennsylvania Juvenile Indigent Defense Action Network, the short term and long term consequences of juvenile adjudications of delinquency may limit access to higher education, employment opportunities, or the ability to enlist in the military.⁷⁶

Criminal acts should be behaviors that our society has deemed universally egregious and dangerous. Sexting does not fit into this definition because it is not always harmful if the sexters both consent to it and if they keep the pictures confidential; in these instances, sexting should not warrant criminal penalties or police involvement. For example, in Florida in 2005, a sixteen-year-old girl and seventeen-year-old boy were charged with the production of child pornography after consensually taking photographs of themselves during a sexual act after these photographs were discovered by adults, even though neither passed the photographs on to anyone else.⁷⁷ They should not have been charged at all because they were not harming each other or anyone else by taking and keeping these pictures.

Furthermore, sexting laws criminalize typical adolescent experimentation and expression, underscoring that consensual sexting should not be criminalized. According to medical research, "adolescence is a time of self-discovery and physical, as well as cognitive, development" and sexual "curiosity and experimentation are normal."⁷⁸ Since technology is so deeply embedded in the lives of teenagers, it should be expected that typical adolescent sexual

2010), <http://online.wsj.com/article/SB10001424052748703447004575449423091552284.html>.

⁷⁴ *Id.*

⁷⁵ Hoffman, *States Struggle*, *supra* note 25.

⁷⁶ PENNSYLVANIA JUVENILE INDIGENT DEFENSE ACTION NETWORK, THE PENNSYLVANIA JUVENILE COLLATERAL CONSEQUENCES CHECKLIST 2-3 (2010).

⁷⁷ Segool & Crespi, *supra* note 50 at 3.

⁷⁸ Jennifer Feldmann & Amy B. Middleman, *Adolescent Sexuality and Sexual Behavior*, 14 CURRENT OPINION IN OBSTETRICS & GYNECOLOGY 489, 489 (2002).

expression might be recorded and saved or sent along to others. Sexting has become a symbol of affection and intimacy between teens. During a focus group session with teenagers about sexting conducted by the *New York Times*, an eighteen-year-old participant explains, “[Sexting] is a way to express your feelings. If a guy and a girl are in love, instead of saying it face to face, they can say it through technology.”⁷⁹ Also, criminalizing sexting denies that sexting can be merely playful—or perhaps even a welcome sexual alternative instead of other sexual acts—for some teens. Another participant in the *New York Times* focus group elaborated, “There’s a positive side to sexting. You can’t get pregnant from it, and you can’t transmit S.T.D.’s. It’s a kind of safe sex.”⁸⁰

Although criminalizing sexting implies that it is a new phenomenon, it is really a variation on adolescent sexual behavior that has been occurring for generations. Susan Hanley Duncan, a professor at the Brandeis School of Law at the University of Louisville, argues sexting is significantly different than past generations’ sexual expression because “[t]he accessibility and popularity of the Internet and cell phones among teens makes self-produced [pornography] cheap, easy, and unlike any type of dating behavior teens engaged in during prior decades.”⁸¹ I disagree with this analysis. Though sexting may be a more convenient way to take and disseminate sexual photos than was available in the past, the actions and form of sexting do not substantially differ from those of a current juvenile’s “parents . . . exchang[ing] Polaroid pictures 30 years ago.”⁸²

The Juvenile Law Center agrees that our society should “avoid criminalizing reasonable and normative adolescent behaviors,” which include consensual sexting.⁸³ Even though teen sexting is riskier than other forms of teen flirtation, the possibility of danger is not a compelling enough reason to warrant universally criminalizing sexting for all juveniles. Intercourse among teens is also extremely risky: teens can become pregnant and face exposure to sexually transmitted diseases.⁸⁴ Yet, while many laws make statutory rape illegal, many states do not deem it illegal for two near peer teenagers to have consensual sexual relations with one another,⁸⁵ despite facing risks that are arguably higher than those of sexting.

Not only would making sexting illegal unnecessarily criminalize normal teenage behavior, but outlawing sexting by minors across the board would be an ineffective tactic. Sexting has become a mainstay of teenage and young adult culture. It is glorified in popular music by artists who youth admire, like Britney Spears and Trey Songz,⁸⁶ and is regularly referenced in television shows like *90210* and *Gossip Girl*, which target the young adult demographic.⁸⁷ Celebrities ranging from Miley Cyrus to Rihanna have been caught in sexting

⁷⁹ *What They’re Saying About Sexting*, N.Y. TIMES, March 26, 2011, at A20, available at <http://www.nytimes.com/2011/03/27/us/27sextingqanda.html?ref=us>.

⁸⁰ *Id.*

⁸¹ Duncan, *supra* note 24, at 663-64.

⁸² *Teens and Technology*, JUVENILE LAW CENTER (Jan. 2013), available at <http://www.jlc.org/current-initiatives/minimizing-court-and-systems-involvement/teens-and-technology>.

⁸³ *Id.*

⁸⁴ See generally Feldmann & Middleman, *supra* note 78, at 489-94 (analyzing findings and discussing trends in sexual activity and non-coital activities among teenagers).

⁸⁵ Sutherland, Kate, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 314-315 (2002-2003).

⁸⁶ Mallory Briggs, Casenote, *Send Me A Picture Baby, You Know I’d Never Leak It: The Role Of Miller v. Mitchell in the Ongoing Debate Concerning the Prosecution Of Sexting*, 19 VILL. SPORTS & ENT. L. J., 169, 169 (2012).

⁸⁷ *Sexting in America*, *supra* note 3.

incidents.⁸⁸ Approximately a “third of all young adults . . . and twenty percent of teens have admitted to posting or sending nude photos or videos of themselves [to others].”⁸⁹ In an interview with the New York Times, one student asserted that at his suburban Philadelphia high school “about three photos go viral each year and a third of the school sees them.”⁹⁰

In youth culture, some students have remarked that sexting is generally perceived to be a standard practice that is not seen as “that big of a deal,” but rather, a relatively common exchange.⁹¹ High schools students have also remarked that sexting is a more frequent occurrence in middle schools than high schools, but does still happen often in high schools.⁹² In MTV’s documentary *Sexting in America: When Privates go Public*, many teens did not know exactly how to define sexting; some thought flirtatious texting was sexting, whereas others isolated it to sending naked or suggestive photos.⁹³ This suggests that teen culture has neither come to a conclusion about how sending naked images differs from sending explicit text messages nor placed a collective value judgment on the practice. However, none of the teens interviewed in the documentary appeared to believe that sexting was noteworthy when it came to others, but were fearful of incurring the repercussions of it themselves.⁹⁴ Further, while many asserted they would forward a sext they received on to one of their friends, all of the teens in the documentary seemed to agree that they would be mortified if a sexted image of themselves were circulated throughout their schools and that they would want to transfer schools immediately.⁹⁵ In addition, seventy-three percent of teens surveyed said they “knew sending sexually suggestive content ‘can have serious negative consequences.’”⁹⁶ This disconnect that teens fear a sexted image of themselves being forwarded, but are willing to forward an image of someone else, explains why secondary sexting is so prolific and will be difficult to eradicate.

The growing entrenchment of sexting in youth culture supports that it is futile to believe teenagers will simply stop sexting because the practice is illegal. Making sexting illegal would likely result in a lack of general compliance with anti-sexting provisions, akin to what has happened in states where sodomy is illegal. Sodomy is a prevalent and broadly accepted intimate sexual activity; consequently, laws banning the practice are “virtually unenforced.”⁹⁷ Outlawing sexting would similarly prove unenforceable. Even though many school districts have prohibited sexting and permit principals to search students’ cell phones,⁹⁸ principals cannot enforce that

⁸⁸ *Id.*

⁸⁹ See Sharon Jayson, *Study Shows Many Teens, Young Adults Share Nude Images*, ABC NEWS (Dec. 9, 2008), available at <http://abcnews.go.com/US/story?id=6433047&page=1> (reporting the results of a survey conducted by the National Campaign to Prevent Teen and Unplanned Pregnancy among others).

⁹⁰ *What They’re Saying About Sexting*, *supra* note 79.

⁹¹ See, e.g., *id.* (Farah, 17, also a student at Lower Merion High School outside Philadelphia stated of sexting that “[p]eople don’t think its that big of a deal anymore.”).

⁹² See, e.g., *id.* (William, 18, another student at Lower Merion remarked that “[p]hoto sexting is done more in middle school when you just get this technology and you’re horny.”).

⁹³ *Sexting in America*, *supra* note 3.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Jayson, *supra* note 89.

⁹⁷ Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 644, 648 (2001).

⁹⁸ See Hoffman, *A Girl’s Nude Photo*, *supra* note 17.

policy after the school day ends. Once students become aware that principals have the authority to search their phones students will likely adapt, for instance, by sexting after school, emailing photos to themselves, and then erasing the photos from their phones. Sexting is pervasive enough phenomenon that a principal may choose to turn a blind eye to it, rather than reprimand the majority of the student body. As one youth in the *New York Times* focus group said, “How would you catch somebody (sexting) when everyone does it?”⁹⁹

As time passes sexting will seem increasingly typical and become even less likely to be legally enforced. For example, as Phillip Alpert’s lawyer, Lawrence Walters, posited that when the current generation becomes adults and sexting becomes “more commonplace,” sexting will seem “less significant” to all adults, even law enforcement officials.¹⁰⁰ He asserts, “[e]very mayor and every cop is going to have had that in their past. It’s not going to be a big deal.”¹⁰¹

Furthermore, as new forms of technology are created, there will be even more avenues for sexting, which will lead to increased difficulty in policing and outlawing sexting. For example, the phone application Snapchat, which was released in 2011 and has been rapidly growing in popularity on high school and college campuses, enables teenagers to text pictures to one another that are supposedly automatically deleted by the application after two to ten seconds, creating a seemingly ideal medium for sexting without getting caught by adults.¹⁰² However, Snapchat users have figured out ways to take screen shots of the images and save and share photographs without the initial sender being notified.¹⁰³ For example, in March 2013, two teenage girls in Ridgewood, New Jersey sent naked photos of themselves to two teenage boys using Snapchat.¹⁰⁴ The teenage boys then posted the photographs on Instagram, an application that permanently shares photographs with friends, enabling many teenagers in the town to see the photographs.¹⁰⁵ Posting the photograph online has provided law enforcement an opportunity to prosecute those parties who are in possession of the photograph.¹⁰⁶ However, if the teenage boys saved the photographs and then sent them to friends through Snapchat, the same harm would have been executed but it would become much more difficult for law enforcement to prove that the teenage boys had sent the photographs or to identify who else had seen them.

In addition, making sexting illegal may even make it a more desirable activity to teenagers and actually increase instances of teen sexting. According to Phillip Alpert, making sexting illegal won’t stop it; rather, from the adolescent perspective, making it illegal will make teens think, “I’ll be more careful with it or I just won’t get caught.”¹⁰⁷ As they do with underage drinking or drug use, he believes that kids recognize, “It’s illegal, but that’s part of the fun,”

⁹⁹ *What They’re Saying About Sexting*, *supra* note 79.

¹⁰⁰ Richards & Calvert, *supra* note 27, at 25.

¹⁰¹ *Id.*

¹⁰² Chris Harris & Colleen Diskin, *Nude Photos Circulating at Ridgewood High School are Meant to Vanish, but Impact Remains*, NORTHJERSEY.COM (Mar. 13, 2013 11:22 PM), http://www.northjersey.com/news/Nude_photos_circulating_through_Ridgewood_High_School_under_investigation.html?page=all.

¹⁰³ Dr. Claire McCarthy, *Why Snapchat is Dangerous (It’s Not Just Because of Sexting)*, BOSTON.COM (Feb. 20, 2013 10:47 AM), http://www.boston.com/lifestyle/health/mdmama/2013/02/why_snapchat_is_dangerous_its_not_just_because_of_sexting.html.

¹⁰⁴ Harris & Diskin, *supra* note 102.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Richards & Calvert, *supra* note 27, at 24.

which could increase the appeal of sexting if it were to become illegal.¹⁰⁸

Finally, anti-sexting laws may violate the First Amendment freedom of speech. Between two consenting adults, sexting is among the “garden variety” of protected speech and has not been made illegal.¹⁰⁹ Sexting amongst teenagers or between an adult and a minor is more controversial. There are many who believe that sexting is protected under the First Amendment, including leaders of the ACLU.¹¹⁰ On the other hand, many others believe that the state has increased power to enact laws relating to the best interests of juveniles, and can therefore make sexting illegal amongst youths or amongst a juvenile and a legal adult.¹¹¹

III. FLAWED SEXTING LAWS: THE NEED FOR A MORE NUANCED APPROACH

While I argued in the last section that sexting generally should be rethought as a criminal offense between two consenting teenagers or young adults, I will assert in this section that current laws on sexting should be refocused to target the morally culpable actors in sexting incidents. In these laws, primary sexters, who send pictures of themselves with the recipient’s consent and with no intention to bully, should have no penalty nor criminal justice system involvement because their actions are innocent and free of harm to anyone. Juvenile secondary sexters, who send nude photographs to others without the primary sexter’s consent, should not incur criminal penalties; they should, however, be mandated to do community service for their first offense, in most instances through juvenile diversion programs. This penalty would be appropriate because sending a secondary sext is usually an act of immaturity, not a vicious act intended to hurt the primary sexter. On the other hand, secondary sexters’ penalties should increase if they repeat this behavior, as it would demonstrate that they did not learn from their initial mistake.

Secondary sexters who are instead bullying the primary sexter and send the photo along to others with the intent to harass the primary sexter should become involved in the justice system, as should persons who bully the primary sexter after the photo is released. This behavior warrants juvenile criminal penalties, as it intentionally inflicts distress and pain on another person and needs to be immediately addressed. While some of the state laws proposed or enacted target the sexting actors in the aforementioned structure, the laws that punish all sexting actors uniformly without regard to intent should be amended. In addition, sexters who commit sexual assault and sext images of the assault should receive juvenile criminal punishments, as sexts in conjunction with sexual assault can vastly increase the seriousness and the harm of the act.

Not only should consensual sexting that remains private not be criminalized, but in addition, primary sexters, who sent the photo to a consensual partner and expected the photo to stay private, should also not be criminalized either. States vary on the way that they approach this issue. While Rhode Island and Nebraska do not criminalize primary sexters, Ohio and other states criminalize both parties.¹¹² Even though primary sexters opened themselves up for exhibition, they did not hurt anyone in the process, even if the photo becomes circulated, except possibly themselves. Additionally, primary sexters often become the victims of privacy violations

¹⁰⁸ *Id.*

¹⁰⁹ Hoffman, *A Girl’s Nude Photo*, *supra* note 17.

¹¹⁰ Koppel & Jones, *supra* note 73.

¹¹¹ *Id.*

¹¹² Hoffman, *States Struggle*, *supra* note 25.

and subsequent bullying when the picture becomes viral.¹¹³

In these instances, the primary sexter has suffered humiliation and torment, so it seems bizarre to punish him or her further. For example, in the suburbs of Olympia, Washington in 2011, county prosecutor Rick Peters declined to charge Margarite, a thirteen-year old who had sent her then-boyfriend a naked photo of herself even though he charged all the other middle-schoolers involved in the dissemination of the picture. Mr. Peters reasoning was this: Margarite had sent the picture to her boyfriend who then sent the picture to an ex-friend of Margarite, who then disseminated it across four middleschools.¹¹⁴ Mr. Peters explained his decision as follows: “She’s a victim. What good would come from prosecuting her? What lesson could we teach her that she hasn’t already learned now 1,000 times over?”¹¹⁵ However, when people in Olympia learned of this situation, they were appalled that Mr. Peters was charging the other children involved but not Margarite, since she began the series of events altogether.¹¹⁶ The Olympia residents’ reaction shows that the question of who should be charged in sexting situations is a contentious issue. However, it ultimately seems unjust to criminally charge a teenager who had no ill intentions in her actions.

While primary sexters should usually not be criminally charged at all, regardless of whether or not the photo ends up being circulated, juvenile secondary sexters should be initially placed in diversion programs that enable them to do ample community service as a penalty for their actions. First-time secondary sexting should not be viewed as a criminal offense and should not be listed on a youth’s criminal record. Even though secondary sexters often end up compromising the integrity of the primary sexter after they send his or her photo around, they often do not intend to harm anyone. Secondary sexting can often start as an impulsive decision made by teenagers, like Phillip Alpert’s rash decision in the middle of the night to email his then girlfriend’s nude photo,¹¹⁷ as teenagers are more prone as an age group to reckless and thoughtless actions.¹¹⁸

In addition, many middle school children may not fully understand what the repercussions of their secondary sexting will be. For example, Isaiah, the thirteen-year-old who sent Margarite’s photo to her ex-friend, explained, while crying, “I was in shock that I was in trouble.”¹¹⁹ Even though over time the media will continue to report on sexting cases and raise awareness of the consequences of sexting, middle school students are young enough that the dangers of sexting may not fully register for them when they are in the midst of a sexting exchange. Social scientists and psychologists have proven that teenagers’ potential flawed reasoning is part of normal adolescent development by demonstrating that teenagers’ brains are not fully developed in the prefrontal cortex, the decision-making region, which can inhibit their ability to make responsible decisions.¹²⁰

¹¹³ *Sexting in America*, *supra* note 3.

¹¹⁴ Hoffman, *A Girl’s Nude Photo*, *supra* note 17.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Mabrey & Perozzi, *supra* note 4.

¹¹⁸ See Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAVIORAL SCIENCES AND THE LAW 741-760 (2000).

¹¹⁹ Hoffman, *A Girl’s Nude Photo*, *supra* note 17.

¹²⁰ See Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAVIORAL SCIENCES AND THE LAW 741-760 (2000).

Therefore, teenagers are less culpable for making ill-advised choices and should be given an opportunity to learn from their mistakes, while also productively giving back through community service. As NYU Law Professor Amy Adler, an expert on child pornography, articulated, “I would say a lot of these cases shouldn’t be heard in court at all. These are cases where teens are engaging in bad judgment, which teens have always done, and suddenly finding themselves caught in the web of the criminal law.”¹²¹ As an alternative, community service seems like a punishment that is both commensurate with secondary sexters’ actions and also provides them with a meaningful growing experience. Luckily, many states adhere to this idea and allow community service to be part of a juvenile sexter’s penalty, including Florida and Illinois.¹²²

The specifics of the community service requirement could be determined on a case-by-case basis that is suitable for the secondary sexter’s age, offense, and maturity. One aspect of the community service mandate should be related to the specific harm that has occurred. For example, in the Olympia, Washington sexting situation, the secondary sexters involved in the case created “public service material about the hazards of sexting” to distribute to their classmates as part of their community service requirement.¹²³ In some situations, the community service penalty could also be used to show the teenager why secondary sexting and other violations of another person’s sexual prerogatives are wrong. For example, secondary sexters could be mandated to volunteer at a rape crisis center or hotline. However, that type of community service may be inappropriate for some secondary sexters, especially middle school aged students. In those situations, the additional community service could be disconnected from the sexting offense, as long as it involves an opportunity for the teenager to develop emotionally and give up a substantial amount of his or her free time as a form of punishment.

While community service seems like a beneficial punishment for first-time secondary sexting, placing first-time secondary sexters in re-education programs, court supervision, and counseling programs is debatable as an effective repercussion for secondary sexting. Some states’ allowance of heightened state involvement in teenagers’ lives violates teenagers’ freedoms and infringes on their parents’ ability to rear their children as they please. For example, in Montgomery County, Ohio, juveniles who are caught sexting are mandated “to turn in their cellphones, perform community service, and receive education about age-appropriate sexual behavior and the legal and social consequences of sexting” for six months.¹²⁴ As of 2011, sixty juveniles had attended this sexting program.¹²⁵ In Pennsylvania and other parts of Ohio, juveniles who have “sent or received and distributed sexy photos” have been sentenced “to curfew. . . or no cell phone or Internet usage for a few months.”¹²⁶

The power of these re-education programs to define acceptable sexual norms for teenagers and to overly restrict teenagers’ cell phone and internet use directly conflicts with the holding of *Miller v. Mitchell*, which ruled that similar re-education programs used in Wyoming

¹²¹ Mabrey & Perozzi, *supra* note 4.

¹²² *Sexting Laws Change in Florida*, NEWS4JAX.COM (Oct. 3, 2011, 3:52 PM), <http://www.news4jax.com/news/Sexting-Laws-Change-in-Florida/-/475880/1940996/-/t3jhwvz/-/index.html>; Press Release, Illinois Government News Network, Governor Quinn Signs Legislation to Improve Public Safety, (July 18, 2010), *available at* <http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=8650>.

¹²³ Hoffman, *A Girl’s Nude Photo*, *supra* note 17.

¹²⁴ Hoffman, *States Struggle*, *supra* note 25.

¹²⁵ *Id.*

¹²⁶ Mabrey & Perozzi, *supra* note 4.

County, PA after sexting incidents “violated [the mother’s] Fourteenth Amendment right to parental autonomy and [the daughter’s] First Amendment right against compelled speech.”¹²⁷ On the other hand, some of the proposed education programs seem more reasonable and objective, like New York’s proposed idea, which would “teach children the potential legal consequences” for their behaviors and how their naked images could end up on the internet and effect their career prospects later in life.¹²⁸ While these re-education programs do provide a punishment that is connected to the sexting offense, it does not seem necessary for the state to impose its own conceptions of sexuality and morality on teenagers after an isolated secondary sexting occurrence. The sexual and ethical norms that children internalize should be a parent’s choice. Also, the requirement of ample community service should be enough of a penalty to provide justice for the first-time secondary sexter’s victim.

While community service without a re-education program should be sufficient for juvenile first-time secondary sexters, secondary sexters who reoffend should be subject to increased penalties. As first-time secondary sexting can be viewed as the result of adolescent immaturity, a teenager who does not learn from the first time and chooses to secondary sext again is likely intentionally inflicting harm on someone else and requires more drastic punishment to deter this behavior.

Florida’s sexting law, passed in 2011, could be a model for other states to implement because it maintains reasonable, graduated penalties for repeat sexting offenders.¹²⁹ Juvenile sexters receive “court-ordered community service or a sixty-dollar fine for a first offense, second-degree misdemeanor charges for a second offense, first-degree misdemeanor charges for a third offense, and third-degree felony charges for a fourth offense.”¹³⁰ Florida’s law also does not target juveniles who possess a naked or suggestive image on his or her phone who do not send it along to others,¹³¹ which seems fair, as those teenagers are not violating anyone’s trust or distributing images. However, the one problematic aspect of Florida’s law is that it targets both primary and secondary sexters;¹³² it should be amended to solely address secondary sexters. Vermont’s sexting law also allows first time sexters to complete a diversionary program before incurring criminal prosecution,¹³³ which could be emulated by other states.

However, under no circumstances should the use of handcuffs and placement in juvenile detention center be a punishment for secondary texting, even for repeat secondary-sext offenders. For example, after Isaiah and Margarite’s sexting incident became publicized, Isaiah and two of the other girls who secondary sexted Margarite’s photo were removed from school in handcuffs and had to spend a traumatizing night in a secure juvenile facility.¹³⁴ Some new state sexting laws, such as the sexting provisions in Louisiana, Arizona, and Connecticut, include the potential

¹²⁷ Miller v. Mitchell, 598 F.3d 139, 150 (3d Cir. 2010).

¹²⁸ Jacob Gershman, *Lawmakers Propose Teen Sexting Law*, WALL ST. J., June 6, 2011, available at <http://online.wsj.com/article/SB10001424052702304474804576367960734408624.html>.

¹²⁹ See Ryan, *supra* note 1, at 381 (describing the law when it was a bill in the Florida legislature).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Reshma Kirpalani, *Teen Sexting Ring Busted In Vermont*, ABC NEWS (Aug. 19 2011), <http://abcnews.go.com/Technology/teen-sexting-ring-busted-vermont/story?id=14341089#.UVpc5YVXvws>.

¹³⁴ Hoffman, *A Girl’s Nude Photo*, *supra* note 17.

of time in a juvenile facility, with longer periods of incarceration for adult offenders.¹³⁵

Punishing sexters by placing them in juvenile detention centers is a penalty that is not commensurate with the harm of sexting, as sexting is not sufficiently dangerous to warrant removing juveniles from their families. Furthermore, placing young people in juvenile detention centers is potentially harmful to both themselves and the community at large, so juveniles should not be sent to juvenile detention facilities for unnecessary offenses, including sexting. For example, juveniles placed in juvenile detention and correctional facilities “are at risk of potential assault or abuse and may be more vulnerable to suicide,”¹³⁶ and studies have shown that placing juveniles in detention facilities “may increase the odds that [they] will recidivate.”¹³⁷ Juveniles who engage in sexting do not deserve to be placed in such a potentially harmful atmosphere, and juvenile detention centers may make teenage sexters more apt to engage in actual criminal activity, rather than helping them mature or grow. Sexters who are legal adults also should not be incarcerated as a punishment for their sexting incidents, as their outcomes will be equally as harmful to themselves and our overall society as outcomes for juvenile sexters who are placed in detention centers.

In addition, youth who engage in sexting that is not connected to bullying or sexual assault should not be expelled or suspended from school. In an era where students are being expelled and suspended from school at problematically high rates,¹³⁸ sexting should not be used as a reason to force students out of school, as research has shown that suspension and expulsion have many detrimental consequences, including “alienation and often early involvement with the juvenile justice system.”¹³⁹ For example, in 2010, the New York City Department of Education passed a ban on sexting both during school hours and after school hours.¹⁴⁰ In 2011, 500 schools in New York City suspended students for sexting violations, with Edward B. Shallow Junior High School in Brooklyn alone suspending 32 students for sexting.¹⁴¹ However, advocates at civil rights organizations in New York City, such as the New York Civil Liberties Group, have publically disapproved of this sexting ban because it “impacts expression outside of school.”¹⁴² Ultimately, schools should not intervene in students’ behavior outside of school that does not have any bearing on the school day, as suspension or expulsion for sexting is an excessive, harmful penalty.

¹³⁵ Koppel & Jones, *supra* note 73.

¹³⁶ NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, PREVENTION OF JUVENILE SUICIDE IN CORRECTIONAL SETTINGS (Oct. 14, 2007), *available at* http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf.

¹³⁷ BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 2-3 (2006), *available at* http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf.

¹³⁸ Daniel J. Losen & Russell J. Skiba, *Suspended Education Urban Middle Schools in Crisis*, SOUTHERN POVERTY LAW CENTER, http://www.splcenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf.

¹³⁹ Patricia Leigh Brown, *Opening Up, Students Transform a Vicious Circle*, N.Y. TIMES (Apr. 3, 2013), <http://www.nytimes.com/2013/04/04/education/restorative-justice-programs-take-root-in-schools.html>.

¹⁴⁰ Michael Gartland & Susan Edelman, *Brooklyn junior high school racks up most suspensions in city for sexting*, NEW YORK POST (Dec. 18, 2011) http://www.nypost.com/p/news/local/brooklyn/sext_education_5Hj7msotvYZ3XAEKUXiiJN?CMP=OTC-rss&FEEDNAME=.

¹⁴¹ *Id.*

¹⁴² Bensonhurst Junior High School Suspended 32 for Sexting, THE HUFFINGTON POST (Dec. 19, 2011), http://www.huffingtonpost.com/2011/12/19/bensonhurst-junior-high-s_n_1157764.html.

While other articles have claimed that secondary sexters are the “most culpable minors” in sexting scenarios and argue that they should face the harshest criminal penalties,¹⁴³ I disagree. The most egregious actors in sexting incidents are the teenagers who either secondarily sext with the intent to torment the primary sexter, or the teenagers who bully the primary sexter after the photo is released. In criminal law, acting with intent to cause harm usually increases the severity of the punishment that a person receives. Therefore, being cognizant of the deleterious effects of secondary sexting and choosing to do so to purposefully hurt another person reflects a very different mentality than not understanding the repercussions of the secondary sexting and expressing remorse afterward that one’s actions harmed someone else. The sexting laws need to be amended to give harsher penalties to persons who intentionally bully others through secondary sexting or after the pictures are circulated to curb this troubling problem.

For example, a highly publicized recent sexting incident occurred in 2010 when Dhuran Ravi, a college freshman at Rutgers University, set up a webcam to film his homosexual freshman roommate, Tyler Clementi, having a sexual encounter with another man.¹⁴⁴ Ravi claims he initially set up the webcam because he was fearful that Clementi’s visitor would steal his iPad.¹⁴⁵ However, because Ravi created an electronic platform so that other college students could watch Clementi’s sexual activity, and because he tweeted about it,¹⁴⁶ Ravi’s actions seem to be a premeditated attempt to humiliate Clementi.

Two days after Clementi learned about that his sexual experience was available for view by his fellow classmates, he committed suicide by jumping off the George Washington Bridge.¹⁴⁷ Ravi was subsequently convicted of bias intimidation, a hate crime, along with tampering with witnesses and evidence that could have resulted in a jail sentence of ten years.¹⁴⁸ Many commentators believe that charging Ravi with a hate crime was too extreme for what they deem a sophomoric prank¹⁴⁹ that should not be cited as the reason for Clementi’s suicide because it is unknown why Clementi took his life.¹⁵⁰ However, the jury concluded that Ravi should be convicted for his actions because Clementi “had reason to believe that he was being targeted because he was gay” and “Mr. Ravi had known that Mr. Clementi would feel intimidated by his actions.”¹⁵¹

While sentencing Ravi to ten to fifteen years in prison, the standard sentence for bias intimidation, would have been overly draconian given his actions, Ravi ultimately received a fair sentence of thirty days in jail, three years of probation, mandatory completion of three hundred hours of community service, forced attendance at “counseling programs for cyber-bullying and alternative lifestyles,” and a \$10,000 assessment to the probation department in increments of

¹⁴³ See Ryan, *supra* note 1, at 380-381.

¹⁴⁴ Kate Zernicke, *Jury Finds Spying in Rutgers Dorm Room Was a Hate Crime*, N.Y. TIMES, Mar. 16, 2012, at A1, available at <http://www.nytimes.com/2012/03/17/nyregion/defendant-guilty-in-rutgers-case.html?pagewanted=all>.

¹⁴⁵ Bazelon, *supra* note 29.

¹⁴⁶ Zernicke, *supra* note 144.

¹⁴⁷ Bazelon & Lerner, *supra* note 30.

¹⁴⁸ *Id.*

¹⁴⁹ Ian Parker, *The Story of A Suicide*, THE NEW YORKER (Feb. 2, 2012), http://www.newyorker.com/reporting/2012/02/06/120206fa_fact_parker?currentPage=all.

¹⁵⁰ Bazelon & Lerner, *supra* note 30.

¹⁵¹ *Tyler Clementi*, N.Y. TIMES (Mar. 16, 2012), http://topics.nytimes.com/top/reference/timestopics/people/t/tyler_clementi/index.html.

\$300 per month.¹⁵² I do not believe that sentencing Ravi to thirty days in jail was necessary, as I do not think that juvenile or young adult sexters should be penalized with incarceration as aforementioned. Ravi also withdrew from Rutgers University,¹⁵³ will have difficulties being admitted to others universities in the future, and has faced extreme public shame, so his life will never be the same after undergoing a lengthy trial and negative publicity. Ultimately, since Ravi's sexting incident was a calculated scheme to mortify Clementi amongst his peers and appears to be motivated at least in part by Clementi's sexual orientation, Ravi justly received a more severe punishment than other sexters.

North Dakota's sexting bill effectively holds ill-intentioned sexters accountable because it "increase[s] sanctions for someone who circulated a photo with the intention to humiliate the minor,"¹⁵⁴ which other states could mirror. Similarly, Pennsylvania's sexting law has a "tiered system" to address this problem, as its law states that using a sexted image to "harass or cyberbully is a second-degree misdemeanor," whereas solely passing along the photo without the intention to bully is a third-degree misdemeanor.¹⁵⁵ As mentioned earlier, at least two teens have committed suicide after they were bullied intensively after their naked photos went viral, and many other teens have been horrifically tormented after such photos were circulated.¹⁵⁶ While all states have enacted anti-bullying laws except for South Dakota and Montana, only eleven states have proposed adding cyberbullying provisions to these anti-bullying laws, and only six of these states' proposals address cyberbullying off school grounds.¹⁵⁷ This hole in existing anti-bullying laws increases the need for sexting laws to effectively acknowledge and punish persons who bully the primary sexter either through secondary sexting or after the picture is released.

However, it might be difficult in certain instances to differentiate the secondary sexter who is intending to torment the primary sexter from those who act impetuously with no malicious intent. On the other hand, the secondary sexter's actions in the aftermath of sending the picture could demonstrate his or her intentions, which helps to distinguish between the two types of secondary sexters. Some secondary sexters demonstrate guilt for their actions and are surprised that the photo becomes widely circulated, which suggests no intent to humiliate the primary sexter.¹⁵⁸ However, other secondary sexters contribute to the bullying after the photo is circulated,¹⁵⁹ which implies that their initial motivation was to inflict harm, necessitating a more severe punishment.

In addition, sexting laws should be clear that only bullying or harassment through secondary sexting or by others after the primary sexter's photo has been circulated is the only aspect of the sexting scenario that is criminalized. The current sexting laws that equally villify all

¹⁵² Michael Koenigs, Candace Smith, & Christina Ng, *Rutgers Trial: Dharun Ravi Sentenced to 30 Days in Jail*, ABC NEWS (May 21, 2012), <http://abcnews.go.com/US/rutgers-trial-dharun-ravi-sentenced-30-days-jail/story?id=16394014>.

¹⁵³ *Dharun Ravi and Molly Wei Withdraw After Rutgers Suicide*, THE HUFFINGTON POST (Oct. 29, 2012), http://www.huffingtonpost.com/2010/10/29/dharun-ravi-and-molly-wei_n_775808.html.

¹⁵⁴ Hoffman, *States Struggle*, *supra* note 25.

¹⁵⁵ Kathy Bocella, *On youth sexting, Pa. and other states act to prosecute, not persecute*, PHILLY.COM (Oct. 20, 2012), http://articles.philly.com/2012-10-20/news/34585481_1_nude-pictures-greensburg-salem-high-school-juvenile-program.

¹⁵⁶ *Sexting in America*, *supra* note 3.

¹⁵⁷ Ghatt, *supra* note 18.

¹⁵⁸ *Sexting in America*, *supra* note 3.

¹⁵⁹ *Id.*

parties who sext equally have the adverse effect of making teenagers who sext and their families fearful of contacting law enforcement when they need help after sexting situations become full-blown bullying and harassment. Teenagers and their families who realize that sexting is illegal are afraid that they will get themselves (or their children) or the secondary sexter who sexted without anticipating the consequences in criminal trouble if they go to the police about the harassment.¹⁶⁰

For example, Ali, a New Jersey teenager who was a sixteen in 2008, sent a topless photo of herself to her ex-boyfriend after he said that he would get back together with her if she did so.¹⁶¹ However, he instead sent the photo to his entire contact list, and the image was circulated around her high school.¹⁶² Afterward, according to Ali, “The kids at school were really brutal and terrible to me.”¹⁶³ The girls at school verbally bullied her endlessly by calling her a “whore, slut, and ho” in texts and in person, and girls constantly threatened her with physical assault.¹⁶⁴ Finally, a group of teens rolled a tire into Ali’s house aimed at her glass front door that left a mark on her parents’ property.¹⁶⁵ However, when Ali’s mother was interviewed in MTV’s documentary about sexting, *Sexting in America: When Privates Go Public*, she said that her family did not contact the police about Ali’s harassment because “we didn’t know if Ali would get in trouble” for sexting once law enforcement became involved.¹⁶⁶ Also, Ali’s mom explains, “I didn’t want her ex-boyfriend, as angry as I was at him, to go to jail or anything like that. He was still young too.”¹⁶⁷ Ali’s situation demonstrates that teenagers and parents can be afraid to notify law enforcement of bullying, even when they really need their help, because of the way sexting laws are structured. This reinforces the need to absolve primary sexters and first-time secondary sexters of criminal penalties so that law enforcement officials can address bullying behavior.

Many sexting laws classify sexting as a misdemeanor or an even more minimal offense when a minor is the perpetrator. However, sexting laws applied to a situation involving a minor and a legal adult can still mandate that the legal adult be indicted for child pornography charges, a felony in many states. For example, in Rhode Island, legal adults who “possess or forward sexual images of anyone younger than 18 may be charged under the state’s child pornography laws.”¹⁶⁸ This can create a huge problem for college students, as some freshmen or sophomores may be underage themselves or in a consensual relationship with someone underage while being unaware that legal penalties for sexting differ depending on age.¹⁶⁹

On the other hand, adult victims who are bullied or harassed through sexting have no criminal legal recourse because no state has attempted to make sexting illegal among two or more consenting adults because it is protected speech under the First Amendment.¹⁷⁰ Some have

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Sexting in America*, *supra* note 3.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Donaldson, *supra* note 6.

¹⁶⁹ *Id.*

¹⁷⁰ Ryan, *supra* note 1, at 369-75.

argued that adults could sue one another for intentional infliction of distress under tort law to deal with adult sexting incidents that spiral out of control.¹⁷¹ However, there should be a criminal penalty for engaging in sexting bullying or other harassment relating to sexting to help victims of this behavior regardless of their ages. For example, Jessica Logan, who was eighteen when she sexted a naked image of herself and was cruelly tormented after the sext was circulated, tried to seek help from the police, but they failed to intervene and stop the bullying, which led her to commit suicide.¹⁷² While legal adults who sext with sixteen or seventeen year old minors (who cannot legally consent to sexual relations) should not be penalized at all, legal adults who torment or bully through sexting or harass others after the photo is released should face criminal penalties.

Sexting not only has been used to bully, it has also recently devolved into a troubling aspect of highly publicized teenage sexual assault incidents, which require criminal penalty along with the sexual assault. There have been recent instances where images of victims of sexual assault are disseminated after the assault, increasing the humiliation for the victim and the severity of the sexted image. For example, in the spring of 2013, two teenage girls, Rehtaeh Parsons and Audrie Pott, both alleged that they were sexually assaulted by teenage boys.¹⁷³ Shortly thereafter these incidents, both girls were further traumatized after sexual photos of them were sent around to their peers online, and sadly, both girls committed suicide.¹⁷⁴ In addition, in Steubenville, Ohio, two teenage boys were convicted of sexual assault after they assaulted a sixteen-year-old girl at a party and then posted photos of the victim when she was naked, unconscious, and “being dragged by her hands and feet.”¹⁷⁵ In these instances, sexting images of these victims should be considered part of the sexual assault and should have criminal consequences, as these images perpetuate the harm and public shame for the victim.

Ultimately, sexting is a very complicated phenomenon involving various actors and scenarios. As Andrew Harris, a criminology professor at the University of Massachusetts who is currently conducting a study on adolescent sexting said, “I hate the word ‘sexting’. We’re talking about a lot of different behaviors and a lot of different motivations.”¹⁷⁶ To try to write laws addressing sexting is a complex endeavor that must be thoughtfully embarked upon. The only just way to address sexting is to write detailed statutes that allow for normal teenage behavior, while also providing penalties for the most blameworthy actors in these situations—the people who mercilessly bully and torture others.

IV. CONCLUSION: ENCOURAGING TEENAGERS TO TREAT THEIR PEERS WITH RESPECT AND TOLERANCE

Ultimately, sexting incidents require effective education to help resolve the issues plaguing our society’s teenagers and young adults. Punitive measures, such as placing a sexter in

¹⁷¹ *Id.* at 382.

¹⁷² *Id.* at 375-6.

¹⁷³ Emily Bazelon, *Another Sexting Tragedy*, SLATE MAGAZINE (Apr. 12, 2013), http://www.slate.com/articles/double_x/doublex/2013/04/audrie_pott_and_rehtaeh_parsons_how_should_the_legal_system_treat_nonconsensual.html.

¹⁷⁴ *Id.*

¹⁷⁵ Amanda Hess, *Steubenville Rape Case Judge Warns Teens to Watch What They Tweet*, SLATE MAGAZINE (March 18, 2013), http://www.slate.com/blogs/xx_factor/2013/03/18/steubenville_rape_case_judge_advises_teens_to_watch_how_they_record_things.html.

¹⁷⁶ Hoffman, *A Girl’s Nude Photo*, *supra* note 17.

a registry of sex offenders, or imposing sentences in juvenile detention facilities or prisons, will not address the fundamental problem at hand—teenagers and young adults are failing to treat one another with dignity and respect, especially through electronic communication. Our society desperately needs to instill in teenagers the values of kindness and empathy through educational programs, which hopefully would help curb some of the rampant teenage bullying incidents through sexting.

These educational programs should be designed to speak the teenage language and connect with teens and young adults in a way that will be meaningful. Teenagers should be educated on the risks of sexting, including the possibility that their trusted partners will eventually distribute their photos, which could cause the photos to end up on the internet indefinitely and could lead to mocking by their peers. However, these educational programs should not emulate re-education programs, such as the one in Montgomery, Ohio, that imbues teenagers with adult law enforcements' conceptions of morality and appropriate sexuality. Rather, community-based organizations, teenagers, and young adults themselves should develop these educational programs, as peer-on-peer education has proven to be an important tool for connecting with teenagers about deleterious behaviors.¹⁷⁷ As scholars have seen with sex education, abstinence-based education has been proven ineffective by many studies in helping teens.¹⁷⁸ Rather, teaching teens safe sex practices through pregnancy prevention programs and “comprehensive, factual, and science-based” programs has been proven in studies to be significantly more beneficial in assisting teens in making more careful decisions.¹⁷⁹ With these studies in mind, education relating to sexting should not mandate that teens completely refrain from the practice; rather, it should explain what the risks of the behavior are and how to sext as safely as possible. Community-based organizations and teenagers should continue to be the educators for other teenagers on why bullying through sexting is wrong and inhumane.

Fortunately, there are state and federal legislative initiatives to provide funding for education about sexting and the cyberbullying. In Ohio, the Jessica Logan Act was passed, which requires schools to educate students about sexting and anti-bullying policies that cover events occurring on and off school grounds (provided that they have the funding).¹⁸⁰ In the federal arena, proposed legislation called the School and Family Education About the Internet Act (SAFE Internet Act) would “give a proposed \$175 million in federal funding to the Bureau of Justice Assistance (BJA) to make grants for schools, state agencies and non-profits to help provide research-based Internet safety education programs that feature sexting as an important topic.”¹⁸¹ In the LGBT cyberbullying context, federal legislation has been proposed in Tyler Clementi's honor titled the Tyler Clementi Higher Education Anti-Harassment Act. This act would “require colleges that receive federal aid to prohibit harassment,” including cyberbullying, that is “based on certain characteristics, including sexual orientation,” and would provide funds for educating students about the perils of harassing others because of their sexual orientation and other protected traits, such as gender, race, and religion.¹⁸² While these plans have great promise, the

¹⁷⁷ *Peer Education*, United Nations Office on Drugs and Crime, http://www.unodc.org/pdf/youthnet/action/message/escap_peers_01.pdf.

¹⁷⁸ Liza Doubossarskaia, *Abstinence-Until-Marriage Doesn't Work*, NATIONAL ORGANIZATION FOR WOMEN (Mar. 22, 2010), available at <http://www.now.org/issues/abortion/032210abonly.html>.

¹⁷⁹ *Id.*

¹⁸⁰ H.R. 116, 129th Leg. (Oh. 2012)

¹⁸¹ Miranda Jolicoeur & Edwin Zedlewski, *Much Ado About Sexting*, NATIONAL INSTITUTE OF JUSTICE 1, 11.

¹⁸² William Creeley, *Why the Clementi Act Threatens Free Speech on Campuses*, THE CHRONICLE OF HIGHER

success of the programs depends on their messaging. If they are overly patronizing or paternalistic, they are unlikely to reach youth; however, if they communicate with youth in a way that engages them, these programs could have beneficial results.

Hopefully, effective educational programs will help teenagers make more informed sexting decisions and will curb cyberbullying. However, it is likely that teenagers will still harass one another through sexting and after sexted images are circulated. Sexting laws should take a more nuanced approach in order to punish sexters based on their intent to inflict harm. Therefore, consensual primary sexting should be criminalized under no circumstances, as it is normal adolescent sexual experimentation, and secondary sexters should receive community service for their first offense, with increased punishments if they repeat this behavior. Secondary sexters and others who bully in sexting situations should be punished based on their intent to humiliate their peers and the extent of their harassment of their peers. Sexters who commit sexual assault and sext images after the assault or in connection to the assault should receive criminal penalties.

However, draconian sentences, including incarceration, should be avoided at all costs, as it is detrimental to a youth's development and does not make our society any less dangerous. As the Juvenile Law Center explains, "youth accused of lower-level offenses are often referred to the juvenile justice system when school or community-based resources could better address the youth's needs as well as public safety."¹⁸³ As a society, we can effectively address sexting, and many other issues, by committing to helping our youth become productive, compassionate adults through effective educational programs.

EDUCATION (Apr. 10, 2011), <http://chronicle.com/article/Why-the-Tyler-Clementi-Act/127062/>.

¹⁸³ *Minimizing Court and Systems Involvement*, JUVENILE LAW CENTER, <http://www.jlc.org/current-initiatives/improving-outcomes-court-involved-youth> (last visited April 3, 2013).