Oklahoma Law Review

Volume 63 | Number 2

2011

Sex-Cells: Evaluating Punishments for Teen "Sexting" in Oklahoma and Beyond

John M. Krattiger

Sex-*Cells*: Evaluating Punishments for Teen "Sexting" in Oklahoma and Beyond

I. Introduction

How different would modern society be without cellular phones? The ability to communicate instantly with any person from nearly any place in the world has affected the business and personal lives of millions of people. Text messaging services have increased the public's connectivity even more. Text services provide a user with the ability to communicate through brief messages typed using a phone's keypad, in situations where talking is inappropriate, impossible, or simply undesirable.[1] Cellular service providers have also developed the capability to send pictures from one phone to another in the same manner that text messages are transmitted.[2] But with this most recent development, a problem has emerged among teenagers with cellular devices capable of picture messaging–"sexting."

"Sexting" is the popular portmanteau of the words "sex" and "texting," used to denote the exchange of nude or semi-nude digital photographs through the use of cellular multimedia messaging services (MMS).[3] Although not inherently illegal when such images are privately sent between consenting adults,[4] sexting poses a problem when minors take part in the exchanges. Federal and state child pornography laws, enacted well before any legislator was familiar with the idea of sexting, contain language that makes the electronic exchange of these photographs the criminal equivalent of other forms of child pornography creation and dissemination.[5] The end result for those caught has too often been the actual or threatened prosecution of

---

1. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1790 (Joseph Pickett ed., 4th ed. 2006).

2. *Id.*

3. *See* 2009 Nat'l Conf. of State Leg., *The Vexing Issue of 'Sexting'*, STATE LEGISLATURES, July–Aug. 2009, at 12, [hereinafter *Vexing*].

4. *Cf.* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that two consenting adults had the right to engage in private sexual conduct without government intervention under the Due Process clause of the Fifth and Fourteenth Amendments).

5. Child pornography is but one of the many offenses that would land a convict on a sex offender registry. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified in scattered sections of titles 18 and 42 U.S.C.); 57 OKLA. STAT. §§ 581-590.1 (2001 & Supp. 2007). This comment will focus on child pornography laws, at the expense of other sex registry eligible offenses, because the act of sexting most closely relates to the acts of producing and distributing child pornography. *See generally* Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D. Pa. 2009), *aff'd sub nom.* Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010).

hormone-fueled teenagers as sexual offenders on par with the predators that child pornography laws were originally created to abate.[6]

Recent studies have explored the trend of sexting and the problematic level of participation by teenagers. A survey performed by the "tween"[7] marketing group AK Tweens found that among the 300 girls aged nine to fifteen years old who were questioned, 30% had sent or received sexual messages or photos, with girls as young as ten years old participating.[8] In 2008, The National Campaign to Prevent Teen and Unplanned Pregnancy conducted what is now the most cited survey on the topic by polling 653 teenagers aged thirteen to nineteen about their sexual habits relating to technology.[9] The survey found that 20% of all teenagers, 22% of teenage girls, 18% of teenage boys, and 11% of young teen girls (those between the ages of thirteen and sixteen) had electronically sent or posted nude or semi-nude pictures of themselves online.[10] The survey found that of those teens who had participated in sexting, 71% of teenage girls and 67% of teenage boys had sent the pictures to a boyfriend or girlfriend.[11] More worrisome is that 21% of teenage girls and 39% of teenage boys claimed to have sent sexually suggestive pictures to someone with whom they sought to date or "hook-up" with in the future, and 15% of all teenagers that had sent suggestive pictures did so to someone they had only met online.[12]

This comment argues that an inherent problem exists when teenagers involved in juvenile sexting incidents are prosecuted under current laws. In

---

6. *See* Deborah Feyerick & Sheila Steffen, *'Sexting' Lands Teen on Sex Offender List*, CNN (Apr. 8, 2009), http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html?iref=newssearch (discussing several recent consequences for teenagers who engaged in sexting).

7. "A child between middle childhood and adolescence, usually between 8 and 12 years old." AMERICAN HERITAGE, *supra* note 1, at 1861.

8. *See* Leah Zerbe, *New Survey: Sexting Happens Among Pre-Teens, Too*, RODALE (Apr. 22, 2009), http://www.rodale.com/kids-and-sexting.

9. *See* THE NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1 (2009) [hereinafter NAT'L CAMPAIGN], *available at* http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf. *But see* PEW INTERNET & AM. LIFE PROJECT, TEENS AND SEXTING 2 (2009) [hereinafter PEW PROJECT], *available at* http://www.pewinternet.org/~/media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf (stating that in a nationally represented survey of 12-17 year olds that own cell-phones, only 4% of teenagers have sent sexually suggestive images via text messaging and only 15% of teenagers have received sexually suggestive images via text messaging).

10. *See* NAT'L CAMPAIGN, *supra* note 9, at 1. *But see* Carl Bialik, *Which is Epidemic -- Sexting or Worrying About It?*, WALL ST. J. ONLINE, at A9 (Apr. 8, 2009), http://online.wsj.com/article/SB123913888769898347.html (questioning the methodology of the "Sex and Tech" survey because of its reliance on teenagers responding to its online survey, citing research that teens responding to an online survey are more likely to participate in sexting than other teens).

11. *See* NAT'L CAMPAIGN, *supra* note 9, at 2.

12. *Id.*

sexting prosecution scenarios, the minor being charged as a child pornographer or other type of sex offender is also a member of the statutorily defined class that federal and state sex offense laws seek to protect from those types of crime. Although this reasoning certainly does not apply to all examples of minors committing crimes against other minors, the unique circumstances surrounding most sexting incidents require a different solution than what is currently available under most jurisdictions' laws. Eliminating punishments such as criminal child pornography prosecution and sex offender registration for consensual teen sexting is the primary issue that needs to be addressed by the federal and state governments. There are means of dealing with the problem of teen sexting that do not involve treating these young people the same way the law treats violent sex criminals.

Part II of this comment begins by examining federal and Oklahoma child pornography and sex offender registration laws. Sex offense laws have understandably developed relatively swiftly and with the severe consequences that this range of offenses requires, but this comment shows that sexting has inadvertently been encompassed by this otherwise indispensable legislation. Part III looks at the recent case of *Miller v. Skumanick*,[13] which first brought to light the issue of using current laws to prosecute teenagers for sexting. This case provides insight into how other sexting prosecutions might develop if this issue is not resolved. Part IV analyzes several recent legislative developments in other states that directly relate to sexting among teenagers. These laws, both enacted and proposed, provide good examples to those states seeking to modify the manner in which their laws apply to sexting. Part V of this comment provides a recommendation for Oklahoma and other states on how to address sexting. This part evaluates how alternative juvenile punishment theories should apply to any punishments for sexting, suggests methods by which punishments for sexting can be modified, and briefly comments on the continued need to prosecute some nonconsensual sexting activities and other juvenile sex crimes. Part VI concludes.

II. The Development of Federal and Oklahoma Child Pornography Statutes

A. Federal Law

Federal laws on child pornography, sex offender registration, and the Supreme Court cases that helped shape them must be understood not only in light of how states such as Oklahoma have crafted their laws, but also for how these laws apply to sexting. The fact that these laws were not intended to

13. 605 F. Supp. 2d 634 (M.D. Pa. 2009), *aff'd sub nom.* Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010).

apply to teenage sexting serves to underscore the importance of understanding their conception and application.[14]

1. Federal Child Pornography Legislation

The Protection of Children Against Sexual Exploitation Act of 1977 (Act of 1977) was the first federal statute to specifically address child pornography.[15] The Act of 1977's language allowed for punishment only if a person "employ[ed], use[d], persuade[d], induce[d], entice[d], or coerce[d]" a minor to participate in acts with the intention of depicting the minor engaged in sexually explicit conduct.[16] Even if a person was found guilty of depicting a minor engaged in explicit conduct, the only way *creators* of child pornography could be punished under the Act of 1977 was if they intended or knew that the visual or print medium created would be transported in foreign or interstate commerce, or mailed intrastate.[17] This piece of legislation also criminalized the *distribution* of print or visual materials where minors were induced to engage in sexually explicit conduct, but only if they were obscene.[18] The Supreme Court's view that obscene materials were not protected by the First Amendment was incorporated directly into this law.[19] Unlike in future acts, the Act of 1977 used the terms "minor engaging in sexually explicit conduct" and "obscene" interchangeably.[20] Later legislation would add several types of impermissible conduct to that originally restricted by the Act of 1977.[21]

---

14. Many of these statutes were enacted before the concept of sexting was ever contemplated. The first known mention of sexting in the press occurred in 2005. Yvonne Roberts, *The One and Only*, SUNDAY HERALD SUN MAG. (MELBOURNE), July 31, 2005, at 22.

15. *See* Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified at 18 U.S.C. §§ 2251-2253 (2006)).

16. *Id.*

17. *Id.*

18. *Id.*; *see* Richard Bernstein, Note, *Must the Children Be Sacrificed: The Tension Between Emerging Imaging Technology, Free Speech, and Protecting Children*, 31 RUTGERS COMPUTER & TECH. L.J. 406, 410-11 (2005).

19. *See* Roth v. United States, 354 U.S. 476, 492 (1957) (defining obscene as "offensive to decency and morality"). The scope of the obscenity exception has been limited "to protect explicit material that has social value." United States v. Williams, 553 U.S. 285, 288 (2008) (citing Miller v. California, 413 U.S. 15, 23-24 (1973)). The Supreme Court defined a performance, production, or form of media as obscene when "the work, taken as a whole, appeals to the prurient interest," is "patently offensive" in light of community standards, and "lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24.

20. *See* Act of 1977, § 2, 92 Stat. at 7.

21. *See, e.g.*, Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified at various parts of 18 U.S.C. §§ 2251-2253 (2006)); Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4485, 4487 (codified at 18 U.S.C. § 2257 (2006)); Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, §

The Act of 1977 was enacted after it came to the attention of the U.S. Senate that interstate trafficking of pornographic materials containing images of children was becoming a substantial problem.[22] Some of the materials even contained explicit images of children as young as three years old.[23] A Senate finding that the exchange had grown into an unregulated, multimillion-dollar industry and Senate acknowledgment of the severe harm caused to the victims and society as a whole laid the groundwork for all future child pornography legislation.[24] The volume of original and amended legislation that built upon the Act of 1977 illustrates that the problem of child pornography altered over time, due to a combination of changes in the methods for creating pornography and First Amendment challenges to the laws.[25]

Adopting nearly identical findings, the next major piece of legislation enacted by Congress was the Child Protection Act of 1984 (Act of 1984), which removed the requirement from the Act of 1977 that the explicit images be obscene.[26] Enacted as a result of the Supreme Court's ruling in *New York v. Ferber*[27]–which held that child pornography does not have to meet the definition of obscenity in order to be regulated[28]–the law enhanced the power of the Act of 1977. This was accomplished not only by eliminating the obscenity requirement, but by adding a provision that would greatly affect underage sexters decades in the future. That provision increased the federal age of minority from sixteen to eighteen years of age.[29]

323, 104 Stat. 4816, 4818 (codified at various parts of titles 18 and 42 U.S.C.); Child Pornography Prevention Act of 2006, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 (codified in scattered sections of 18 U.S.C. (2006)); PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18, 28 and 42 U.S.C.).

22. *See* S. REP. NO. 95-438, pt. III, at 4 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 41.

23. *Id.*, 1978 U.S.C.C.A.N. at 41.

24. *Id.* at 5, 1978 U.S.C.C.A.N. at 42-43.

25. *See* sources cited *supra* note 21.

26. *See* Act of 1984, § 4, 98 Stat. at 204; *see also* Bernstein, *supra* note 18, at 411.

27. 458 U.S. 747 (1982).

28. *See id.* at 764-65. The Supreme Court ruled that child pornography is such a unique issue, with social and political repercussions, that it does not have to meet the definition of obscenity to be regulated by Congress. The *Ferber* court found that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 757. The Supreme Court cited several precedential cases, including one on the issue's judicial standard, holding that "a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Id.* at 756-57 (quoting Globe Newspaper Co. V. Superior Court, 457 U.S. 596, 607 (1982)). Citing the fact the every state legislature in the country had previously determined that subjects of child pornography suffered physiological, emotional and mental harm, the Court affirmed that a state's compelling interest in banning the practice easily outweighed an individual's First Amendment right. *Id.* at 755 n.7.

29. *See* Bernstein, *supra* note 18, at 411.

As scholars and government officials continued to develop ways to address the growing child pornography problem, legislation became increasingly specialized and narrow. Much of it simply amended language from the Acts of 1977 and 1984. One specialized piece of legislation that remains in effect today is the Child Protection and Obscenity Enforcement Act of 1988 (Act of 1988), which requires producers of legal pornographic material to maintain age and other identification records of their performers.[30] Law enforcement is better able to identify child pornographers when the strict requirements of this statute are not followed. This is because pornographers without proper records of their performers are more likely to illegally involve minors in their pornography.[31]

In 1990, the Supreme Court extended the reach of its *Ferber* decision, upholding a statute challenged in *Osborne v. Ohio*[32] that criminalized the mere possession or viewing of child pornography.[33] Another law, entitled the Child Protection Restoration and Penalties Enhancement Act of 1990 (Act of 1990), applied these judicial findings to make mere possession and viewing of visual child pornography punishable by five years imprisonment.[34] This law in particular could be inappropriately harsh on those teenagers involved in romantic relationships who share images with each other as a prelude to, or in lieu of, actual sexual activity.[35]

The next round of legislation (post-Act of 1990) was important because it dealt with evolving technologies and child pornography–specifically the ability to digitally create or modify images to make them appear as though children were engaging in sexually explicit acts ("morphed child pornography").[36] This Act was known as the Child Pornography Prevention Act of 1996 (Act of 1996).[37] The Act of 1996, however, was directly

30. *See* Pub. L. No. 100-690, § 7513, 102 Stat. 4485, 4487 (1988) (codified at scattered sections of 18 U.S.C. (2006)).

31. *Id.*

32. 495 U.S. 103 (1990).

33. *See id.* at 111. The defendant argued that the Ohio statute should not apply to him because of *Stanley v. Georgia*, which held that mere private possession of obscene matter cannot constitutionally be made a crime. *See id.* at 108-10 (referencing 394 U.S. 557, 559 (1969)). The Court made it very clear that the *Stanley* rule did not apply to child pornography because a state's interest in protecting children is greater than an interest in preventing possession of obscene materials depicting adults. *See id.* at 110.

34. *See* Pub. L. No. 101-647, § 323, 104 Stat. 4816, 4818 (1990) (codified at various parts of titles 18 and 42 U.S.C.).

35. *See* PEW PROJECT, *supra* note 9, at 6.

36. *See* Bernstein, *supra* note 18, at 412-13.

37. *See* Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-3026 (1996) (codified at scattered sections of 18 U.S.C. (2006)).

challenged and ultimately deemed unconstitutionally overbroad by *Ashcroft v. Free Speech Coalition*,[38] which took a distinct step toward protecting speech in cases concerning possession of pornographic material.[39] The Supreme Court determined that the Act of 1996's restriction on "virtual" child pornography was overbroad in the types of pornographic materials that it restricted, and therefore was unconstitutional.[40] This ruling led to the creation of the most recent federal child pornography legislation.

The PROTECT Act, or Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003,[41] corrected the overbroad language of the Act of 1996, and currently prevents the dissemination of explicit material containing minors, both real and "virtually indistinguishable" as such.[42] The Supreme Court has thus far upheld that the "indistinguishable" language meets the compelling state interest standard that the "appears to be" language from the Act of 1996 did not.[43] The PROTECT Act has the most bearing on sexting because it is the only legislation to use the word "digital" in its enumerated restricted forms of media. This law even encompasses any digital images of children that have been modified to make an originally innocent image into one intended to be sexually explicit.[44]

More recently, Congress has enacted laws to help prevent the exploitation of children by being proactive, rather than solely by punishing offenders. The Protect Our Children Act of 2008 (Act of 2008) was enacted with the goal of creating various task forces and increasing the resources available to those agencies tasked with protecting our nation's children from predators.[45] Among other things, this law codified the federal government's involvement with the National Center for Missing and Exploited Children (NCMEC) to help combat the proliferation of digital child pornography.[46] The irony is that this organization has come out with statements against the prosecution of teenagers who sext. For example, the NCMEC stated that it "does not believe that a blanket policy of charging all youth [sic] with juvenile or criminal violations

38. 535 U.S. 234 (2002).

39. *See id.* at 251.

40. *Id.* at 258.

41. *See* Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18, 28 and 42 U.S.C.)

42. *See* Bernstein, *supra* note 18, at 414.

43. *But see id.* at 425-27 (arguing that the PROTECT Act will be found unconstitutional).

44. Pub. L. No. 108-21, §§ 502-503, 117 Stat. at 678; *see also* Bernstein, *supra* note 18, at 423.

45. *See* Pub. L. No. 110-401, § 101, 122 Stat. 4229, 4230 (2008) (codified at various parts of titles 18 and 42 U.S.C.).

46. *See* 18 U.S.C. §§ 2258C-2258D (Supp. 2008).

will remedy the problem of sexting."[47] Rather, the NCMEC believes that increased education and law enforcement's use of prosecutorial discretion are the best solutions to the problem.[48] The primary challenge for prosecutors, says the NCMEC, is determining the point at which teenagers should be held accountable.[49] This is because "[a] permanent record, juvenile or criminal, for any sex-related charge, can have serious lifetime consequences for both the child/youth and parent, so considerable thought should be given before any filing of juvenile or criminal charges."[50] It is hard to imagine that the Congress, which has given statutory acknowledgment to the NCMEC's role in protecting children from sexual exploitation, would intend to apply the Act of 2008 against children the NCMEC suggests should be protected from such prosecution.

Under current federal child pornography laws, creation and dissemination of visual depictions of child pornography is prohibited, and mere possession of these materials is illegal.[51] Sexual images of children do not have to be "obscene" to be restricted.[52] Additionally, morphed child pornography and digital child pornography fall into the prohibited visual depiction category.[53] The language of these federal laws directly applies to sexting because the very definition of the act contemplates the exchange of sexually explicit images of children through digital networks.[54] Although these laws technically apply to sexting, there is no evidence that Congress contemplated the application of these child pornography laws to juvenile offenders when they were enacted.

2. Federal Sex Offender Registry Legislation

Violators of any of the federal child pornography statutes must also comply with the Federal Sex Offender Registration and Notification Act (SORNA).[55] SORNA requires that a producer or distributor of child pornography register as a Tier II sex offender.[56] The registration and update requirements of

47. NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, POLICY STATEMENT ON SEXTING (Sept. 21, 2009), http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130.

48. *Id.*

49. *Id.*

50. *Id.*

51. *See* Bernstein, *supra* note 18, at 417-18.

52. Ashcroft v. Free Speech Coal., 535 U.S. 234, 240 (2002).

53. *See* Bernstein, *supra* note 18, at 414.

54. *See Vexing*, *supra* note 3, at 12.

55. *See* Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified in scattered sections of titles 18 and 42 U.S.C.).

56. *See* 42 U.S.C. § 16911(3)(B)(iii) (2006) (also known as the Adam Walsh Child Protection and Child Safety Act of 2006). Tier II sex offenders are those who commit offenses

SORNA concern the offender's personal information–which is stored in a public internet database–and last for at least twenty-five years for a Tier II offender.[57] Tier II offenders become classified as Tier III offenders for any additional offense that occurs during their Tier II classification.[58] The registration period for Tier III offenders is for the life of the offender.[59]

The rigid requirements of SORNA are a major problem faced by teenage sexters. The intentions behind SORNA do not support the application of SORNA to teenage sexting.[60] Congress stated that the law was intended "to protect the public from sex offenders and offenders against children, and in response to . . . vicious attacks by violent predators," and it included an enumerated list of seventeen victims of repeat sex offenders in the codified law.[61]

In his press conference to sign the bill, President George W. Bush stated that the purpose of enacting the Adam Walsh Child Protection and Safety Act of 2006, of which SORNA is a major part, was to prevent predators from committing *violent* sexual crimes and exploiting children.[62] The President stated that this law would help protect children from these types of crimes in several important ways.[63] Two of these justifications, expanding the National Sex Offender Registry and increasing federal penalties for crimes against children, were intended to "prevent sex offenders from evading detection by moving from one State to the next," and to help states institutionalize sex offenders who cannot be reformed.[64] No evidence exists that either Congress or the President contemplated teenagers' inclusion in this category of offenders.[65] Nothing in SORNA stated an intent to protect children from themselves by punishing them as harshly as the offenders listed. If the true intent behind the act was to counteract *violent*, sexual exploitation of children by repeat offenders, then no justification exists to apply it in cases of nonviolent, consensual teenage sexting.

---

that are "punishable by imprisonment for more than [one] year" and that are comparable to a list of enumerated violations in the statute. *See id.* § 16911(3).

57. *See id.* § 16915(a)(2).

58. *See id.* § 16911(4)(C).

59. *See id.* § 16915(a)(3).

60. *See id.* § 16901.

61. *Id.*

62. *See* Remarks on Signing the Adam Walsh Child Protection and Safety Act of 2006, 42 WEEKLY COMP. PRES. DOC. 1395 (July 27, 2006).

63. *Id.* at 1396.

64. *Id.*

65. *See id.*

B. Oklahoma Law

Although federal child pornography laws are often used to prosecute offenders, Oklahoma has its own laws which address child pornography and other sexual offenses against minors.[66] Many of these laws have been enacted or amended as a result of federal mandates and U.S. Supreme Court decisions on the constitutionality of federal laws.[67]

1. Oklahoma Child Pornography Legislation

Child pornography offenses in Oklahoma are covered by the Oklahoma Law on Obscenity and Child Pornography.[68] Within these statutes, child pornography is broadly defined as any form of electronic, print media, or live performance,

> wherein a minor under the age of eighteen (18) years is engaged . . . in any lewd exhibition of the uncovered genitals in the context of masturbation or other sexual conduct, or where the lewd exhibition of the uncovered genitals, buttocks or, if such minor is a female, the breast, has the purpose of sexual stimulation of the viewer, or wherein a person under the age of eighteen (18) years observes such acts or exhibitions.[69]

Additionally, the Oklahoma Law on Obscenity and Child Pornography defines obscenity as any form of media that contains

> (a) depictions or descriptions of sexual conduct which are patently offensive as found by the average person applying contemporary community standards, (b) taken as a whole, have as the dominant theme an appeal to prurient interest in sex as found by the average person applying contemporary community standards, and (c) a reasonable person would find the material or performance taken as a whole lacks serious literary, artistic, educational, political, or scientific purposes or value.[70]

Like its federal counterpart, the Oklahoma legislature has clearly made the distinction that child pornography does not have to meet the definition of

66. *See* Oklahoma Law on Obscenity and Child Pornography, 21 OKLA. STAT. §§ 1021-1040.77 (2001).

67. *See supra* Part I.

68. §§ 1021-1040.77.

69. *Id.* § 1024.1(A), *amended by* 2009 Okla. Sess. Laws 2408.

70. *Id.*

obscenity to be deemed illegal.[71] In fact, the statute clearly states that "[t]he standard for obscenity applied in this section shall not apply to child pornography."[72] Although it is explicitly stated that child pornography does not have to be obscene to be illegal, it is unlikely that this distinction has any actual applicability except in the rarest of circumstances where Oklahoma's broad definition of obscenity is found not to apply to pornographic material containing children.

Recent studies of the motives behind teenage sexting show that most instances of the photographic exchanges fit squarely into Oklahoma's requirement that the images be for the "purpose of sexual stimulation of the viewer."[73] Teenagers reported that they often sent these pictures to be fun or flirtatious, as a sexy present for a boyfriend or girlfriend, in response to receiving similar pictures from other people, as a joke, to feel sexy, or because they felt pressured to send sexual images.[74] Thus, this statute not only leaves those teenagers who consensually engage in private exchanges of messages open to punishment, but also those dealing with typical teenage pressures to conform to their peers' expectations. This seems especially harsh considering expert studies on teenage brain development which show that, despite potentially severe consequences, many teens are more likely to make rash, regrettable decisions during their formative years.[75]

Another pertinent section of the Oklahoma Law on Obscenity and Child Pornography specifically states that any person who "photographs . . . otherwise prepares, publishes, sells, distributes . . . knowingly downloads on a computer, or exhibits any obscene material or child pornography" can be fined up to $20,000 or imprisoned for ten years for committing this felony.[76] This section defines "downloading on a computer" as "electronically transferring an electronic file from one computer or electronic media to another computer or electronic media."[77] This language from section 1021 directly encompasses the practice of sexting because the act requires the use of electronic media. Although no official documents exist which discuss the legislative intent behind this statute,[78] public comments by several legislators

71. *See id.* § 1024.1(B)(1).

72. *Id.*

73. *Id.*

74. *See* NAT'L CAMPAIGN, *supra* note 9, at 7.

75. *See* Donna Leinwand, *Survey: 1 in 5 Teens 'Sext' Despite Risks*, USA TODAY, June 24, 2009, at 3A.

76. *See* 21 OKLA. STAT. § 1021(A)(3) (Supp. 2007).

77. *Id.* § 1021(D).

78. *See* OKLA. DEP'T OF LIBRARIES, RESOURCES REGARDING OKLAHOMA'S LEGISLATIVE MEASURES (2008), http://www.odl.state.ok.us/lawinfo/billinfo.htm ("The only official legislative history for Oklahoma legislative measures is a procedural one. Official legislative

show that the bill was written to "target[] predators who seek out children younger than [twelve]."[79] Additionally, title 21, section 1021 was created before sexting among teenagers became a growing public issue.[80] It is problematic that this statutory language encompasses activities not originally considered during the law's crafting and that it could be applied to teenage sexting despite lack of intention to do so when it was written.

The Oklahoma Law on Obscenity and Child Pornography also specifically prohibits individuals from procuring minors to participate in the creation of child pornography; violation of this statute results in a felony charge carrying a punishment of up to $25,000 and/or twenty years in prison.[81] Consent of a minor is not a defense to this action.[82] It is clear that this statute could bring trouble for a teenager asking a boyfriend or girlfriend for nude pictures. Amended by the highly publicized H.B. 1760,[83] title 21, section 1021.2 now requires offenders to register as Tier II sex offenders, which brings forth the aforementioned punishment specified for all Tier II offenders in addition to requiring new post-sentence supervision intended to protect the public from dangerous offenders.[84] Again, this punitive legislation is problematic because it encompasses sexting despite the complete lack of evidence that its authors contemplated its application in that manner.

Oklahoma's child pornography law even goes so far as to bring the parents of teenagers into the fray, by making it an equally punishable felony under title 21, section 1021.2 if a parent or guardian "knowingly permits or consents to the participation of a minor in any child pornography."[85] Therefore, if a parent was aware that his child was engaged in a relationship where sexting was involved, and did not prevent her from doing so, then that parent also faces

---

intent is rare. Committee reports, minutes, and hearings are not published.").

79. *See* Press Release, Okla. State Senate, State Senate Approves 'Jessica's Law' (May 17, 2007), *available at* http://www.oksenate.gov/news/press_releases/press_releases_2007/pr20070517b.html.

80. *See* Roberts, *supra* note 14, at 22 (noting the first known use of of the term "sexting" occurred in 2005). The earliest legal cases concerning sexting occurred in 2008, with most appearing in 2009. *See* Martha Irvine, *Porn Charges for 'Sexting' Stir Debate*, MSNBC, Feb. 4, 2009, http://www.msnbc.msn.com/id/29017808/. ; Ting-Yi Oei, *My Students. My Cellphone. My Ordeal.*, WASH. POST, Apr. 19, 2009, at B1, B3.

81. *See* 21 OKLA. STAT. § 1021.2 (2001 & Supp. 2007).

82. *Id.*

83. *See* Act of June 2, 2007, ch. 261, 2007 Okla. Sess. Laws 1183-84 (enacting legislation to bring Oklahoma's sex offender registration program into compliance with the Adam Walsh Child Protection and Safety Act).

84. *See* HOUSE STAFF, OKLA. HOUSE OF REPRESENTATIVES, SESSION OVERVIEW: FIRST REGULAR SESSION OF THE 51ST LEGISLATURE 7 (June 15, 2007), *available at* http://www.okhouse.gov/Documents/2007SessionOverview.pdf.

85. *See* 21 OKLA. STAT. § 1021.3 (Supp. 2007).

severe punishment.[86] This language puts parents in the distasteful position of choosing between concealing their daughter's actions, and thereby opening themselves up to a punishment of twenty years in prison or a $25,000 fine, or reporting their daughter to authorities and heaping the potential punishment upon their own child.[87] These unpleasant options do not seem to correspond with the legislature's original intent behind the passage of the Oklahoma Law on Obscenity and Child Pornography.[88]

In addition to restricting the creation and dissemination of child pornography, Oklahoma law also makes it illegal to buy, procure, or possess child pornography.[89] The maximum penalty for violating this statute is five years in prison and/or a $5,000 fine.[90] The statute, however, does not deem these actions felonious.[91] Although the punishment for violation of this statute is much less severe than the punishment for creating child pornography[92] or procuring a minor to create child pornography,[93] a teenager could face five years in prison and a $5,000 fine for keeping sexual images of a girlfriend on his cell phone, as this act would put him in violation of the statute's "possess" clause.[94]

One specific section in the Oklahoma Law on Obscenity and Child Pornography is by far the most on point and potentially punitive towards those teenagers that engage in sexting.[95] The statute reads:

> It is unlawful for any person to facilitate, encourage, offer or solicit sexual conduct with a minor . . . by use of any technology, or to engage in any communication for sexual or prurient interest with any minor . . . by use of any technology. For purposes of this subsection, "by use of any technology" means the use of any telephone or cell phone . . . computer, computer network or system . . . e-mail address . . . text messaging or paging device, any video, audio, photographic or camera device of any . . . cell phone, any other electrical, electronic, computer or mechanical device, or any other device capable of any transmission of any written or text message, audio or sound message, photographic, video, movie,

86. *Id.*
87. *See id.*
88. *See* Press Release, *supra* note 79.
89. *See* 21 OKLA. STAT. § 1024.2 (2001).
90. *Id.*
91. *Id.*
92. *See* 21 OKLA. STAT. § 1021(A)(3) (2001 & Supp. 2007).
93. *See* 21 OKLA. STAT. § 1021.2 (Supp. 2007).
94. *See id.* § 1024.2.
95. *See* 21 OKLA. STAT. § 1040.13a (Supp. 2007).

> digital or computer-generated image, or any other communication of any kind by use of an electronic device.[96]

Punishment for violation of this statute is $10,000, ten years in prison, or both, and "*each communication shall constitute a separate offense*."[97] In addition, any person who accesses an electronic device within the state, regardless of the jurisdiction where the violator resides, is bound by these terms.[98] Not only does this language apply to a person of any age, but it creates an enormous potential problem for a couple that frequently sends explicit messages. This statute's applicability to teenage sexting should worry those who want to prevent harsh punishments for teenagers.

2. Oklahoma Sex Offender Registry Legislation

Oklahoma also has its own Sex Offenders Registration Act, which requires a person convicted of violating the above statutes to register as a sex offender, depending on the severity of the violation.[99] The Oklahoma legislature justified its codification because sex offenders that commit "predatory acts against children and persons who prey on others as a result of mental illness pose a high risk of re-offending after release from custody."[100] Additionally, the legislature found that protecting privacy interests of sex offenders is less important than providing for the safety of the general public from sex offenders.[101]

This broad act (which has been recently amended)[102] provides that any person living, working, or attending school in the state of Oklahoma, who has been convicted of violating any of the Oklahoma laws on obscenity and child pornography, or any crimes in other jurisdictions that would meet the Oklahoma standard for that crime, is bound by its terms.[103] As dictated by the federal SORNA, a panel comprised of law enforcement and social workers determines the level of danger (Tier I to Tier III) an offender poses to society and informs her of her statutorily required duties as a member of that class.[104]

---

96. *Id.* § 1040.13a(A).

97. *See id.* § 1040.13a(D) (emphasis added).

98. *See id.* § 1040.13a(E).

99. *See* 57 OKLA. STAT. §§ 581-590.2 (2001 & Supp. 2009). This fairly specific coverage of Oklahoma sex offender registration requirements should be analyzed as to their effect on a teenager or high school student forced to go through this process.

100. *Id.* § 581(b).

101. *Id.*

102. *See* Act of Nov. 1, 2009, ch. 404, 2009 Okla. Sess. Laws 1949-63. All amendments to the Oklahoma Sex Offenders Registry Act went into effect on November 1, 2009. *Id.*

103. *See* 57 OKLA. STAT. § 582 (2001 & Supp. 2009).

104. *See* 57 OKLA. STAT. § 582.5 (Supp. 2009). Part II(A)(2) of this comment discusses

Re-registration upon an offender's decision to move or reside at a new address for seven days or longer is another requirement, and must be completed within three days of the move.[105] Not only is the amount of information required likely tedious to obtain,[106] but if "false or misleading information" is provided,[107] a violator faces a maximum of a $5,000 fine and/or five years imprisonment.[108] These requirements would seemingly create a chilling effect on an offender's desire to change residences.

The harshest penalty for a teenager in the Oklahoma sex offender registry statutes is the restriction on where she could live.[109] Registered Oklahoma sex offenders are generally not allowed to live within a two-thousand-foot radius of a public or private school, educational institution, playground, park, or state-licensed child-care center.[110] Most teenagers live with their parents because they cannot provide their own housing. Additionally, most teenagers under the age of eighteen attend the very same schools near which they would be statutorily prohibited from residing. Applying these laws to teenagers is not justified, as none of the act's goals would be met by imposing these hardships on teenagers caught sexting.

The codification of a "Romeo and Juliet" law in Oklahoma's 2009 legislative session shows that the legislature is conscious of the problem with applying sex offender laws to children.[111] In general, Romeo and Juliet laws are those that reduce or eliminate the penalty of statutory rape in cases where the couple's age difference is negligible and the sexual act is considered rape only because of the lack of legal consent.[112] Oklahoma's Romeo and Juliet law allows for a juvenile to petition for removal from a sex offender registry upon

---

these classes in depth.

105. *See* 57 OKLA. STAT. § 583 (2001 & Supp. 2009).

106. *See id.* § 584 (Information required includes the person's name, all aliases, "a complete description of the person," photograph, fingerprints, "a blood or saliva test" to create a DNA profile, if requested, a list of specified offenses, where the offense occurred, the final judgment of the crime, the name under which the person was convicted or sentenced, identification of each hospital or prison where the person was detained for each offense, the location and length of the person's current and former residence, as well as the length of time the person expects to stay at his current residence and in the county and state).

107. 57 OKLA. STAT. § 586 (2001).

108. *See* 57 OKLA. STAT. § 587 (2001 & Supp. 2009).

109. *See id.* § 590.

110. *See id.* § 590(A).

111. *See* HOUSE COMM. STAFF, OKLA. HOUSE OF REPRESENTATIVES, 2009 SESSION IN REVIEW 10 (2009) [hereinafter HOUSE COMM.], *available at* http://www.okhouse.gov/Documents/2009SessionOverview.pdf

112. *See* John Gramlich, *New Laws Take 'Romeo' Into Account*, STATELINE (July 16, 2007), http://www.stateline.org/live/details/story?contentId=224279.

meeting certain qualifications.[113] Oklahoma's law, however, applies only to minors who have been convicted of statutory rape and are not more than four years older than a victim who is fourteen years of age or older.[114] Therefore, the legislature has provided a defense for teenagers actually having sexual intercourse,[115] yet current laws maintain that teenagers swapping sexually oriented pictures could be required to register as sex offenders.[116] This issue needs to be addressed with a little common sense, and the law needs to be amended to allow teenagers involved in sexting to similarly use the affirmative defense that is available to their sexually active peers.

III. Miller v. Skumanick–*A Challenge to Sexting Prosecutions*

Because sexting prosecutions are a fairly recent legal development in the United States, very little case law has been published on the topic. Prosecutions for violating various state and federal statutes, however, are undoubtedly occurring.[117] Despite this dearth of cases, one has come to the forefront of the debate about proper punishment for teenagers caught sexting–*Miller v. Skumanick*.[118]

The result in *Miller* was that three Pennsylvania teenagers were granted a temporary restraining order preventing a county district attorney from bringing child pornography charges against them for refusing a punishment scheme he devised in response to their sexting activities.[119] What is more important than the result, however, is that the development of the case and decisions made by the parties provide insight into how future sexting prosecutions might develop.

In October 2008, school administrators in Tunkhannock, Pennsylvania, confiscated the cellular phones of a group of students.[120] An examination of the phones revealed that they contained digital pictures of teenage girls under eighteen in different stages of undress.[121] Upon discovering that male students were trading the pictures among their cell phones, the administrators made the

113. *See* 57 OKLA STAT. § 590.2 (Supp. 2009).

114. *Id.*

115. *See id.*

116. *See supra* Part II.B.

117. *See* Kathleen Kennedy Manzo, *Administrators Confront Student 'Sexting,'* EDUC. WEEK, June 17, 2009, at 8 ("Students in California, Florida, Massachusetts, Pennsylvania, and other states have been arrested and charged with a range of offenses related to sexting, including child pornography and other sex crimes.").

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

119. *Id.* at 647-48.

120. *Id.* at 637.

121. *Id.*

decision to turn the phones over to George Skumanick, the District Attorney of Wyoming County, Pennsylvania.[122] Skumanick immediately began a criminal investigation into the matter and made a public announcement that any individual who possessed the images could be charged with violating various sections of the Pennsylvania code relating to child pornography possession and distribution.[123]

Skumanick sent letters to the students and parents involved, proposing an offer which would allow the students to submit to a six- to nine-month education and counseling program, probation, and drug testing.[124] The only other option was to face criminal child pornography charges.[125] The education program was to be divided between girls' and boys' programs.[126] It was "designed to teach the girls to 'gain an understanding of how their actions were wrong,' 'gain an understanding of what it means to be a girl in today's society, both advantages and disadvantages,' and 'identify nontraditional societal and job roles.'"[127] Homework for the program included writing assignments requiring the girls to state "[w]hat [they] did" and "[w]hy it was wrong."[128] Several parents of the girls challenged the contents of this program as compelled speech, among other things, since their daughters had not been convicted of committing any crime.[129] Additionally, the parents felt that requiring the girls to write on topics outside of the scope of the alleged sexting incident infringed upon their rights "to control the upbringing of their children."[130]

The images in question included one picture depicting two girls in white, opaque bras, and another picture depicting a girl wrapped in a towel that left her breasts exposed.[131] It was later argued that the pictures were not even taken by the girls or sent to other parties with permission of the girls, but the district attorney still believed the girls could be charged as accomplices to the production of child pornography.[132] All of the students and their parents agreed to the terms of the offer except for the three females in the pictures,

122. *Id.*
123. *Id.* at 637.
124. *Id.* at 638, 640.
125. *Id.* at 638.
126. *Id.*
127. *Id.*
128. *Id.* (alteration in original) (internal citation omitted).
129. *Id.* at 640.
130. *Id.*
131. *Id.* at 639.
132. *Id.*

whose parents objected to the district attorney's claim that the pictures were pornographic because the girls were "provocatively" posed.[133]

Rather than accepting Skumanick's offer to enroll the girls in the re-education program, serve six months of probation, and agree to drug testing, the plaintiffs filed a lawsuit seeking a temporary restraining order against Skumanick.[134] The plaintiffs claimed that the photographs did not constitute child pornography and were therefore constitutionally protected activity.[135] Skumanick agreed to withhold from pressing charges until the court rendered a decision.[136]

The plaintiffs in *Miller* made interesting statutory interpretation arguments concerning the Pennsylvania child pornography statute. The statute applied by the district attorney states that "'prohibited sexual act' means sexual intercourse . . . masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction."[137] The term "provocative" is not in the statute, as Skumanick claimed.[138] Additionally, the plaintiffs questioned whether the terms of the statute even applied to the minor subjects of a picture.[139]

The parents and their daughters were ultimately granted a temporary restraining order enjoining Skumanick from initiating criminal charges against the plaintiffs because the court found that they were reasonably likely to succeed on their claim.[140] On May 26, 2009, both parties consented to a court order indefinitely extending the enjoinment of Skumanick unless otherwise ordered by the court in the future.[141] Although Skumanick has since lost re-election,[142] on Friday, January 15, 2010, the prosecutor who replaced him argued against the Middle District's original ruling before the U.S. Court of

133. *Id.* at 639-40.

134. *Id.* at 640.

135. *Id.*

136. *Id.*

137. 18 PA. CONS. STAT. § 6312 (Supp. 2009) (amended by H.B. 843, 2009 Gen. Assem., Reg. Sess. (Pa. 2009)).

138. *Miller*, 605 F. Supp. 2d at 639, 645.

139. *Id.* at 645.

140. *Id.* at 643, 646-47; *see also* Michael Rubinkam, *Federal Judge Blocks Charges in Pa. 'Sexting' Case*, ASSOCIATED PRESS, Mar. 30, 2009, http://seattletimes.nwsource.com/html/nationworld/2008921376_apsextinglawsuit.html (last visited 9/15/2010).

141. *See* Order, Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D. Pa. 2009) (No. 3:09cv540).

142. George Skumanick lost his November 2009 re-election bid for District Attorney of Wyoming County, with his "shocked" opponent citing the "media circus" surrounding the prosecution of these teenagers as having potentially played a role in the voters' choice. Josh McAullife, *Wyoming County District Attorney Falls in Election,* TIMES-TRIBUNE (Scranton) (Nov. 4, 2009), http://www.scrantontimes.com (accessible through archive search).

Appeals for the Third Circuit, which recently affirmed the district court's decision.[143] This marks the first time that a case on sexting has been appealed to the circuit courts.[144]

Although *Miller* settled no law, it is an enlightening example of what problems might be associated with future teenage prosecutions for sexting. First, as discussed above, child pornography and sex offender laws were not created to address sexting between teenagers.[145] Second, overzealous prosecutors might take advantage of these laws and apply them in ways that were not intended.[146] Because of these two problems, a third problem–backlash from parents defending their children–should not be unexpected.[147] At one point, one of the parents in *Miller* understandably claimed that her child "was the victim" and had not done anything wrong by appearing in the photographs in the first place.[148] Although parental satisfaction is not a priority of the criminal justice system, making a mockery of the process by provoking outspoken parents serves no beneficial purpose. If the problems of erroneous applications of the law and overzealous prosecutions were properly addressed, however, this final potential problem would conveniently correct itself.

---

143. Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010) *aff'g* 605 F. Supp. 2d 634 (M.D. Pa. 2009); *see* Jon Hurdle, *Court Asked to Allow Prosecution for "Sexting*," REUTERS (Jan. 15, 2010), http://www.reuters.com/article/idUSTRE60E51A20100115. One of the judges questioned the district attorney's desire to prosecute the girls by saying that "[i]f that's your goal -- to protect them -- then why threaten [them], by prosecuting them, putting a permanent blot on their escutcheon, for life?" Shannon P. Duffy, *3rd Circuit Panel Mulls if Teen 'Sexting' Is Child Pornography*, LAW.COM (Jan. 19, 2010), http://www.law.com/jsp/article.jsp?id=1202439023330&rd_Circuit_Panel_Mulls_if_Teen_Sexting_Is_Child_Pornography_.

144. *See* Hurdle, *supra* note 143.

145. *See supra* Part II.

146. *See, e.g. Miller*, 605 F. Supp. 2d 634.

147. *See, e.g.*, *id*. at 638, 643-44. Some of the parents at the meeting with Skumanick had a hostile attitude toward his accusations, questioned him about why he got to decide whether the pictures were "provocative," and disregarded his timeframe for enrollment in the program before charges were filed. *Id*. at 638-39. Additionally, a large part of the plaintiffs' claims revolved around the "right 'to be free from state interference with family relations'" and "'[c]hoices about marriage, family life, and the upbringing of children [being] among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.'" *Id*. at 643 (internal citation omitted).

148. *Id*. at 644.

IV. State Legislatures Begin to Address "Sexting"

Although many state and federal statutes still contain language that encompasses underage sexting, some states have started the process of amending this legislation to reduce criminal penalties and establish programs that specifically address the problem.[149] Other states have amended or passed new legislation that increases punishments for sexting, or explicitly criminalizes sexting for the first time. Finally, some states have addressed the issue through proposed legislation and resolutions, but have not yet enacted any new laws.

A. States Which Have Reduced or Eliminated the Penalties for Sexting

Nebraska is one state that has created a law to eliminate penalties for sexting.[150] Although Nebraska maintained its child pornography statutes, Nebraska's legislature appeared to target teen sexting with new language in both its possession and creation laws. The Nebraska *possession* law now states,

> It shall be an affirmative defense to a charge made pursuant to this section that: (a) The visual depiction portrays no person other than the defendant; or (b)(i) The defendant was less than nineteen years of age; (ii) the visual depiction of sexually explicit conduct portrays a child who is fifteen years of age or older; (iii) the visual depiction was knowingly and voluntarily generated by the child depicted therein; (iv) the visual depiction was knowingly and voluntarily provided by the child depicted in the visual depiction; (v) the visual depiction contains only one child; (vi) the defendant has not provided or made available the visual depiction to another person except the child depicted who originally sent the visual depiction to the defendant; and (vii) the defendant did not coerce the child in the visual depiction to either create or send the visual depiction.[151] By providing an affirmative defense to the possession of self-produced child pornography, the statute effectively legalizes consensual one-on-one sexting between teenagers over the age of fifteen in Nebraska.[152]

149. *See* NAT'L CONF. OF STATE LEGS., 2009 LEGISLATION RELATED TO "SEXTING" (last updated Feb. 22, 2010), http://www.ncsl.org/?tabid=17756 [hereinafter NAT'L CONF.].

150. *See* NEB. REV. STAT. § 28-813.01(3) (2009).

151. *Id.*

152. *See id.*

Nebraska has similarly provided affirmative defenses for its child pornography *creation* laws by adding a defense for children under the age of eighteen who take pornographic pictures of themselves, so long as the child pictured is alone.[153] An additional affirmative defense for the *distribution* of child pornography was created to apply when the defendant was under the age of eighteen, the defendant was pictured alone, the defendant reasonably believed that when the picture was sent to another that the recipient was willing, and the recipient was at least fifteen years old when the creator sent the picture.[154]

Nebraska's intent to punish teenagers only when necessary is obvious. Nebraska's attorney general co-sponsored the unanimously passed bill, citing the need to create the new law because the state did not "want to treat childish behavior as criminal activity."[155] Representatives from community organizations in Nebraska have spoken highly of the new law, celebrating the potential limitation of felony charges in situations where teenagers send sexually explicit photos to others, as "[t]hese scenarios are not what child pornography laws were intended to prohibit."[156] The bill is equally popular because, in addition to providing affirmative defenses for teen sexting, it creates law enforcement tools to monitor adult sex offenders who use online means to prey on children, those people whom these laws were originally intended to target.[157]

Vermont is another state that has recently enacted a law that reduces the penalties for sexting, yet it makes sexting among minors illegal.[158] Despite its seemingly punitive intent, the actual effect of the law is to reduce the potential penalties for an offending minor.[159] The maximum penalty for an offending minor under the new law is to be adjudicated delinquent after a hearing in family court.[160] Delinquency in Vermont comes with the possibility of probation, changes in parental custody, or transfer to state custody.[161] Although this is a tough penalty for the act of sexting, it is far less severe than

153. *Id.* § 28-1463.03(5).

154. *Id.* § 28-1463.03(6).

155. *See* Paul Hammel, *Bill Goes After Sexual Predators, Goes Easy on 'Sexters,'* OMAHA WORLD-HERALD, Apr. 23, 2009, at 1, *available at* 2009 WLNR 7564809.

156. *See* Nebraska Domestic Violence Sexual Assault Coal., *"Sexting" in Nebraska*, IN TOUCH 2 (2009), http://www.ndvsac.org/pages/InTouchMayJune09.pdf (noting that these protections are not afforded to teenagers who share the images with third parties).

157. *See* Hammel, *supra* note 155, at 1.

158. *See* VT. STAT. ANN. tit. 13, § 2802b (2009).

159. *See id.*

160. *Id.*

161. *See id.* § 5232(b).

the penalty of up to ten years in prison and/or a fine of $20,000, that a minor would face under Vermont's child pornography laws.[162] The statute makes it clear that the minor will not be charged for sexually exploiting children or be required to register as a sex offender, but may be referred to the juvenile diversion program in the district where the action is filed.[163] Repeat violators face the harsher penalty of being charged for sexually exploiting children in family court, but are not required to register as sex offenders.[164] Also, the record of the minor is completely expunged upon reaching the age of eighteen regardless of how many times charged.[165] The penalty for a person over the age of eighteen who receives images without attempting to destroy them is a fine of $300 and/or six months in jail.[166]

Vermont's law contains more detail in its penalty provisions than other states that have legislatively addressed sexting. This law is not overly harsh to those convicted under it, however, because sex offender registration is never a requirement and minors adjudicated delinquent under the statute have their records expunged upon reaching the age of majority. A law modeled on New Hampshire's, rather than Nebraska's, would probably be more appealing to states wanting to maintain the illegality of the sexting because it reduces criminal punishments to a level that is not overly harsh to teenagers while allowing law enforcement to pursue the abolition of sexting and other forms of child pornography through traditional means.

B. States Which Have Increased Penalties for Sexting

Other states have acknowledged the problem of sexting but have either added sexting to previously existing criminal laws or criminalized the act itself in new legislation.[167] What is interesting about some of these states is that even though they have criminalized aspects of sexting, they have also limited the application of some penalties as well.[168]

Oregon's governor signed a bill into law that now includes text messaging as a method by which one can commit an online crime with a child.[169] Oregon's definition of a child, however, includes only those individuals a

162. *See* VT. STAT. ANN. tit. 13, § 2825 (1999).
163. *See* VT. STAT. ANN. tit. 13, § 2802b (2009).
164. *Id.* § 2802b(b)(3).
165. *Id.* § 2802b(b)(4).
166. *Id.* § 2802b(c).
167. *See* OR. REV. STAT. § 163.431 (2009); UTAH CODE ANN. §76-5a-3 (2009); N.D. CENT. CODE § 12.1-27.1-01 (Supp. 2009); COLO. REV. STAT. § 18-3-405.4(1) (2009).
168. *See* OR. REV. STAT. § 163.431; N.D. CENT. CODE § 12.1-03.3.
169. *See* OR. REV. STAT. § 163.431.

person reasonably believes to be under the age of sixteen,[170] thus making the laws applicable to fewer teenagers than other similar state laws.

Utah did not do much to change its law as it affects underage sexting, but it did add the act of viewing child pornography to its definition of sexual exploitation of a child, which is a second degree felony.[171] The act of sexting meets this definition, because the simple act of possessing or viewing a nude image of a child on a cellular phone is encompassed by the language of this statue.[172]

North Dakota is another state that has recently criminalized certain aspects of sexting.[173] Rather than making it a misdemeanor for two people to consensually send explicit pictures to each other, however, North Dakota only makes it a misdemeanor to create or possess a sexually expressive image of a person without that person's written consent.[174] It is also a misdemeanor to distribute or publish the image without the consent of the party depicted in the image, or to do so with the intent to harm the person in the image.[175] Although this law punishes certain aspects of sexting, it does not punish consensual sexting.[176] Only sexting where one party has the intent to harm the other by sharing potentially embarrassing pictures is violative of the statute.[177] This law is problematic because it specifically does not apply to images that violate North Dakota's definition on child pornography.[178]

Colorado recently enacted a statute that redefines its definition of the sexual exploitation of a child.[179] The definition now includes sexual communications through telephone and cellular data networks.[180] Punishment for this crime remains a felony in Colorado.[181] This law's basic purpose is to include sexting in Colorado's list of crimes against children without providing for a reduced penalty or defense.

C. States Which Have Proposed Sexting Legislation

Although some states have signed legislation into law, these are not the only states that are aware of the potential problems of sexting. Several other states

170. *Id.*
171. *See* UTAH CODE ANN. § 76-5a-3.
172. *Id.*
173. *See* N.D. CENT. CODE § 12.1-27.1-03.3.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *See* N.D. CENT. CODE §§ 12.1-27.1-01, 12.1-27.2-01 (Supp. 2009).
179. *See* COLO. REV. STAT. § 18-3-405.4 (2009).
180. *Id.*
181. *Id.*

have pending legislation, or at a minimum have acknowledged that they need to study and address the problem.[182] Some of this preliminary legislative activity provides good insight and ideas into how future sexting legislation can be crafted and enacted.

The Indiana Senate passed a resolution in April 2009 urging the Senate sentencing policy committee to examine the criminal punishments for children sending explicit text messages to each other.[183] The resolution was filed due to the general concern that "the mental and sexual development of individuals as related to criminal offenses must be studied in depth to ensure that [the] criminal justice system remains fair and equitable."[184] As it relates to sexting, the Senate urged a study of the difference in psychological and sexual development between children and adults.[185] The resolution urges the sentencing committee to specifically readjust its sentencing policies relating to juvenile sexting if the studies reflect that change is necessary.[186] Although the Indiana Senate passed the resolution and the sentencing committee recommended its findings, no bill was authored.[187]

New Jersey recently introduced several bills that directly address sexting.[188] The first proposed bill is proactive in attempting to prevent sexting at its source.[189] It would require all public and private cellular phone retailers to provide a brochure that explains consequences of sexting every time a phone is sold or a contract renewed.[190] The brochure would also provide contact

182. *See* S. Res. 90, 116th Gen. Assem., First Reg. Sess. (Ind. 2009), *available at* http://www.in.gov/legislative/bills/2009/PDF/SRESF/SR0090.pdf; S.B. 2925, 213th Leg., Reg. Sess. (N.J. 2009), *available at* http://www.njleg.state.nj.us/2008/Bills/S3000/2925_I1.pdf; S.B. 2923, 213th Leg., Reg. Sess. (N.J. 2009), *available at* http://www.njleg.state.nj.us/2008/Bills/S3000/2923_I1.PDF; S.B. 2926, 213th Leg., Reg. Sess. (N.J. 2009), *available at* http://www.njleg.state.nj.us/2008/Bills/S3000/2926_I1.PDF; Assem. B. 8622, 232nd Leg. Sess., 2009-10 Reg. Sess. (N.Y. 2009), *available at* http://assembly.state.ny.us/leg/?bn=A08622&sh=t; H.B. 132, 128th Gen. Assem., Reg. Sess. (Ohio 2009), *available at* http://www.legislature.state.oh.us/BillText128/128_HB_132_I_Y.pdf.

183. *See* Ind. S. Res. 90.

184. *Id.*

185. *See id.*

186. *Id.*

187. *See* Action List: Senate Resolution 0090, http://www.in.gov/apps/lsa/session/billwatch/billinfo?year=2009&request=getActions&doctype=SR&docno=0090 (last visited Sept. 15, 2010).

188. *See* S.B. 2925, 213th Leg., Reg. Sess. (N.J. 2009), *available at* http://www.njleg.state.nj.us/2008/Bills/S3000/2925_I1.pdf; S.B. 2923, 213th Leg., Reg. Sess. (N.J. 2009), *available at* http://www.njleg.state.nj.us/2008/Bills/S3000/2923_I1.PDF; S.B. 2926, 213th Leg., Reg. Sess. (N.J. 2009), *available at* http://www.njleg.state.nj.us/2008/Bills/S3000/2926_I1.PDF.

189. *See* N.J.S.B. 2925.

190. *Id.*

information to the Institute for Responsible Online and Cell Phone Communication if people have legal questions about sexting.[191] Although this program has not yet been implemented, this proactive legislation shows New Jersey's desire to address the problem of sexting outside of the criminal justice system when possible.

The second bill would require all school districts to annually distribute information to their students and their families regarding the dangers of disseminating sexually explicit pictures to other people through electronic means.[192] The schools would be free to distribute this information by any realistic means that they would deem appropriate.[193] This is yet another example of New Jersey attempting to prevent sexting through preemptory educational methods, rather than waiting to address the problem after it occurs.

The final New Jersey Senate Bill proposes an educational program as an alternative punishment to be used at the discretion of county prosecutors in instances where they deem more harsh criminal penalties for sexting unnecessary.[194] The educational program would only be available to juveniles who distributed the explicit photographs without malicious intent, had not previously been adjudicated delinquent under New Jersey law, were not aware that their actions constituted a crime, would be harmed by facing criminal charges, and would likely be deterred from engaging in similar conduct upon completion of the educational program.[195]

Although this proposed educational program sounds similar to the punishment questioned by both parents and the court in *Miller v. Skumanick*,[196] it differs in important ways. First, New Jersey's proposed program would focus on federal and state statutes applicable to sexting by specifically informing the teenagers of the exact legal consequences of their actions.[197] Second, the program would address the potential community ramifications, such as the loss of educational and employment opportunities.[198] Although this section might seem especially similar to the district attorney's challenged program in *Miller*, this program differs because these lessons would focus on civil responsibilities rather than personal parental decisions on how to raise

191. *Id.*

192. *See* N.J.S.B. 2923.

193. *Id.*

194. *See* S.B. 2926, 213th Leg., Reg. Sess. (N.J. 2009), *available at* http://www.njleg.state.nj.us/2008/Bills/S3000/2926_I1.PDF.

195. *Id.*

196. *See* 605 F. Supp. 2d 634, 638, 643-44 (M.D. Pa. 2009), *aff'd sub nom.* Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010).

197. *See* N.J.S.B. 2926.

198. *Id.*

their children. Third, the statute makes no mention of required writings, which parents challenged as government imposed speech in *Miller*.[199] Finally, the fact that this program would be codified gives it a sense of legitimacy that District Attorney Skumanick did not have, as his proposal to the parents and children in *Miller* was unilaterally created by him in response to the incident.[200] The New Jersey legislature seems to have devised a plan that children and parents dealing with sexting issues would want to take part in, rather than face prosecution under the state's child pornography laws. Although New Jersey is addressing this problem proactively, they have not indicated that they are planning to address the criminal consequences of sexting in situations where their educational programs are ignored by teens or their parents.

New York is also in the preliminary stages of developing legislation to educate children on the harms of sexting, among other problematic behaviors relating to teenagers inappropriately using technology.[201] In the memorandum accompanying the bill, the New York State Assembly stated that they were creating the educational outreach program to "address[] the issue of criminal prosecution of adolescent conduct that was not intended under certain criminal acts." [202] The proposed legislation would provide an affirmative defense to individuals who are less than four years apart when both parties consented to the exchange of sexually explicit photographs.[203]

Ohio has gone in the opposite direction by proposing legislation making sexting illegal and providing that a charge of delinquency comes with the crime, one "that would be a misdemeanor in the first degree if . . . committed as an adult."[204] One possible reason for this occurring in Ohio is that one of the more unfortunate outcomes of teen sexting occurred in the state—the suicide of a female high school senior brought about due to embarrassment from her nude pictures being distributed among classmates.[205] The parents of the teenager encouraged state lawmakers to pass a bill that would address the seriousness of sexting.[206]

---

199. *Id.*

200. *See Miller*, 605 F. Supp. 2d. at 644.

201. *See* Assem. B. 8622, 232nd Leg. Sess., 2009-10 Reg. Sess. (N.Y. 2009), *available at* http://assembly.state.ny.us/leg/?bn=A08622&sh=t.

202. *Id.*

203. *Id.*

204. *See* H.B. 132, 128th Gen. Assem., Reg. Sess. (Ohio 2009), *available at* http://www.legislature.state.oh.us/BillText128/128_HB_132_I_Y.pdf.

205. *See Ohio Parents Confront "Sexting" Among Teens*, ASSOCIATED PRESS (Mar. 24, 2009), http://www.wsbt.com/news/regional/41783557.html.

206. *Id.*

A trend of addressing sexting is occurring across America, although there is little consensus in the approaches taken. Most states fall into the group that is seeking to impose less harsh or alternative punishments for teenagers caught consensually sexting.[207] This is interesting, because it comes at a time when states are prosecuting juveniles for other crimes at a higher rate in order to "get tough" on violent crime.[208] Oklahoma and other states that have not yet addressed sexting should build upon this trend.

V. A Recommendation on How to Address Sexting in Oklahoma and Beyond

Whether reducing the punishment for consensual teenage sexting is accomplished through the actions of the federal government or the individual states, in legislatures, judiciaries, or prosecutors' offices, it is the most important step that needs to be taken on this issue. Reducing penalties for *consensual* teen sexting should be the priority for every state when ultimately addressing this problem.

This recommendation is divided into three parts. Part A discusses the need for the application of alternative punishments contrary to those that are currently available for use in consensual teenage sexting cases. This part also discusses critics of these alternative punishments, but concludes with a recommendation of specific modifications that need to be implemented. Part B addresses the different methods by which these alternative punishments might be enacted, with the exception of the important method of legislative revision, which has been discussed thoroughly above. These potential means of enactment include prosecutorial discretion, judicial remedies, and societal factors. Part C of this recommendation concludes by recognizing the reality that sex crimes are a tremendously serious problem that need to be addressed properly by all members of society. By properly categorizing consensual sexting as a social issue different from violent sex crimes, this section concludes that those offenders that need to be identified and reformed through traditional criminal justice methods can be more easily recognized and appropriately addressed.[209]

---

207. *See* NAT'L CONF., *supra* note 149.

208. *See* David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1560-61 (2004) (internal quotation marks omitted).

209. *See* Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, 27 DEV. MENTAL HEALTH L. 33, 41-42 (2008) ("Juvenile sex offenders are less likely to commit the more egregious, socially repulsive sexual offenses. For example, it is rare that a juvenile sex offender will meet the criteria to be classified as a pedophile, the group of sex offenders who arguably have been a primary motivating focus driving the enactment of Megan's Laws across the country.").

A. Applying Alternative Juvenile Punishment Theory to Sexting Penalties

In the early 1900s, a budding theory developed that juvenile criminals were different from adult criminals, and should be treated as such.[210] Thus, the idea of developing a justice system specifically for juveniles began to emerge.[211] Building on this idea, concerns for the privacy of juvenile offenders were thought to be especially important, and were one of the primary reasons that juvenile courts were originally established.[212] Combining these privacy concerns with a fresh understanding of the unique juvenile response to punishment, the juvenile court system adopted a theory of rehabilitation to apply to juvenile offenders, differing greatly from the retributive and deterrent aims of punishment used for adult offenders.[213] In more recent decades, however, the foundational philosophy of the juvenile justice system has switched from a theory of rehabilitation to one of retribution.[214] This change occurred because of problems with the juvenile court system, difficulties that states have faced in providing rehabilitative care to juvenile offenders, a rise in violent juvenile crimes, and an increase in the number of extremely troubled juvenile offenders committing horrific crimes.[215]

Despite this fundamental change in the juvenile justice system, teenagers who have done nothing but get involved in a sexting relationship should be punished no more severely than they would have been under the system's original aims. The prosecution of underage sexters as child pornographers and sex offenders causes more harm than good by denying the juvenile offender the benefits of privacy and true rehabilitation.[216] By putting pictures and personal information of youthful offenders on public registries, teenagers are not only opened up to ridicule by their neighbors and peers, but it becomes more likely that actual pedophiles would be able to identify teenagers with histories of sexual experimentation and more easily take advantage of them.[217] The goal of rehabilitating juvenile offenders is thwarted when personal

210. *See* Adam D. Kamenstein, Note, *The Inner-Morality of Juvenile Justice: The Case for Consistency and Legality*, 18 CARDOZO L. REV. 2105, 2111-12 (1997).

211. *See id.*

212. *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 71 (1998).

213. *See id.* at 71-72.

214. *See* Kristin L. Caballero, Note, *Blended Sentencing: A Good Idea for Juvenile Sex Offenders?*, 19 ST. JOHN'S J. LEGAL COMMENT. 379, 388 (2005).

215. *Id.* at 389-90.

216. *See generally* Susan L. Pollet, *Teens and Sex Offenses: Where Should the Law Draw the Lines?*, N.Y. L.J., Aug. 14, 2009, at col. 1 (discussing the problems associated with applying current law to minors, but noting the need for further research).

217. *See id.*

information and pictures of teenagers are made public, potentially harming these teenagers irreparably.[218] Sexually inappropriate behavior by children is wrong, but it requires a response that takes the differences between youth and adults into account to best serve both the interests of the child and the safety of the community.[219]

1. Critics of the Application of Alternative Punishments to Juvenile Sexters

At least one scholar has argued that juveniles who engage in consensual pornographic acts, such as sexting, should be subject to prosecution and the court system.[220] She argues that even consensual private sexting causes harm not only to the children involved, but to all other children who might possibly come in contact with the images.[221] Additionally, she believes that harm is caused to society as a whole because of the possibility of desensitization to child pornography and the creation of an unlawful industry.[222] She and those supporting traditional punishments argue that prosecution is the necessary response in order to deter, punish, and rehabilitate individual offenders by allowing the government to exercise its police and parens patriae powers, minimizing the harm to the participants and the rest of society.[223]

Some critics of alternative punishments have proposed dealing with violent juvenile sex-offenders in the traditional criminal justice system through blended sentencing.[224] Blended sentencing "is an innovative way to combine the original aims of the juvenile court system, namely rehabilitation, with the retributive goals of punishment."[225] These methods are less callous than purely traditional prosecution methods, but they are still excessive as a means of dealing with teenage sexting.[226] Although these blended sentencing methods

218. *See* Stacey Hiller, Note, *The Problem with Juvenile Sex Offender Registration: The Detrimental Effects of Public Disclosure*, 7 B.U. PUB. INT. L.J. 271, 291-92 (1998).

219. *See* NAT'L JUVENILE JUSTICE NETWORK, FACT SHEET ON YOUTH WHO COMMIT SEXUAL OFFENSES 1 (2007) [hereinafter NAT'L JUVENILE], http://njjn.org/media/resources/public/resource_626.pdf.

220. *See, e.g.*, Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1 (2007).

221. *See id.* at 41-42.

222. *Id.*

223. *Id.* at 42-48.

224. *See, e.g.*, Caballero, *supra* note 214, at 412-15.

225. *Id.* at 412 (arguing that this concept was proposed before sexting became an issue, and is only used to show alternative methods of punishment for juveniles, as this paper advocates not punishing consensual sexters as sex offenders in the first place).

226. Blended sentencing has five basic categories. *Id.* at 414. The Juvenile-Exclusive model allows prosecutions to take place in juvenile court, but the juvenile judge can impose the sentence as a juvenile or adult. *Id.* at 412. The Juvenile-Inclusive model allows a sentence

are less harsh than a standard criminal prosecution, they should not be used on first offenders, as the initial punishment for consensual teenage sexting should not involve any of the traditional punishments of the criminal justice system.

Other commentators support placing juvenile sex offenders on sex offender registries.[227] Although most of this scholarship, along with the proposal for blended sentencing above, deals with juveniles convicted of violent sex crimes such as molestation and rape, the act of sexting currently falls under the enumerated offenses that could lead to a teenager being prosecuted and labeled a sex offender.[228] This again demonstrates the ultimate problem, which is that teenage sexters can be required to register as sex offenders for a crime that is not equal to that of rape, molestation, or traditional child pornography creation and distribution.

The first argument for applying sex offender statutes to juvenile offenders is that legislative intent is satisfied by reading the clear language of the sex offender registry statutes.[229] Using a clear language standard, almost all sex offender registry laws would encompass underage sexters.[230] The problem with using a clear language standard is that the writers of the underlying criminal statutes encompassed by the sex offender registry laws did not anticipate that teenage sexting would meet the requirements for the enumerated sexual offenses at the time they were created.[231] Applying the clear language standard would lead to teenagers charged with sexting having laws applied to them in the same manner as those offenders charged with rape,

---

where a juvenile's time will be spent in both adult and juvenile correctional facilities. *Id*. The Juvenile-Contiguous Blend model allows a juvenile court to compel a sentence that extends beyond a juvenile obtaining the legal age of majority in the jurisdiction, allowing a court to decide whether the punishment should continue in an adult correctional facility. *Id*. The Criminal-Exclusive and Criminal-Inclusive models mirror their juvenile equivalents, except that the prosecution and sentencing of the juvenile takes place in the adult criminal court. *Id*. at 414-15.

227. *See, e.g.*, Joanna C. Enstice, Note, *Remembering the Victims of Sexual Abuse: The Treatment of Juvenile Sex Offenders in* In Re J.W., 35 LOY. U. CHI. L.J. 941, 997-1003 (2004); Leary, *supra* note 220, at 45-48.

228. *See* discussion *supra* Part II.

229. *See* Enstice, *supra* note 227, at 995. Applicable crimes listed in the pertinent Illinois statute include child pornography, aggravated child pornography, indecent solicitation of a child, sexual exploitation of a child, and exploitation of a child. 730 ILL. COMP. STAT. 150/2 (2009).

230. *See generally* Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 538-540 (1998) (noting, however, that "textualist statutory interpretation may actually decrease legislative power by reading the 'plain language' of a statute too narrowly or broadly in a way that thwarts the intent of most members of Congress").

231. *See supra* Part II.

traditional child pornography creation and distribution, and other violent sexual offenses. There exists a distinction between these crimes that is not addressed when clear language statutory interpretation is applied. The plain language of these statutes must be analyzed in conjunction with evidence of the legislative intent behind their enaction in order to fully understand the purpose behind them. After this analysis, the conclusion should be drawn that these statutes should not apply to teenage sexting.

The second proffered argument for applying sex offender registry laws to teenage sexters is that society benefits from requiring juveniles to register due to the prevalence of sexual abuse against children.[232] Again, the problem here is that consensual sexting between juveniles is a less serious offense than traditionally enumerated sex offenses, and needs to be addressed as such. The scholars supporting application of sex offender registry laws to juveniles rely on the argument that "the potential benefits achieved from the registration requirement . . . may save the life of a child."[233] Additionally, "[t]he registration requirement helps to curb this threat by aiding the law enforcement effort to keep track of previous sex offenders and prevent future sexual attacks against children."[234] This may hold true for violent, recidivist juvenile sex offenders, but this conclusion does not take into account the unique circumstances surrounding consensual teenage sexting. Sexting is not a violent crime, and any punishment imposed should be proportional to what it is–a nonviolent, consensual act between two parties. Juveniles who commit violent sexual offenses may very well deserve to be placed on sex offender registries, but teenagers who sext should not be treated in the same manner as these violent offenders.

Finally, there will always be state legislators and other government officials that fundamentally disagree with creating alternative punishments for teenage sexters.[235] To support their position, these officials can make arguments that teenagers suffer inherent harm simply by participating in the sexual act, and that society as a whole is harmed because of the possibility that the images could enter the public sphere.[236] The advent of Romeo and Juliet laws that protect sexually active teenagers from statutory rape prosecution in many states,[237] however, has weakened the legitimacy with which these officials can

232. *See* Enstice, *supra* note 227, at 997.

233. *Id.* at 1000.

234. *Id.*

235. Enacted legislation which concerns sexting has certainly not passed unanimously, and prosecutors continue to this day to charge teenage sexters using their state's criminal laws. *See supra* Part IV.

236. *See* Leary, *supra* note 220, at 40-44.

237. *See* HOUSE COMM., *supra* note 111.

proffer these types of arguments. The act of sexting alone does not even come close to the dangers teenagers face when having intercourse, which include teen pregnancy and the transmission of sexually transmitted diseases.[238]

These "harm" arguments are not alone enough to overcome the truth that when neither party in a consensual sexting relationship has his image used in a manner that he has not agreed to, the harm to society and the individual is minimal, even more so than the now often protected act of intercourse between teenagers. It makes no sense to label a teenager as a sex offender and ruin her life for harm that she causes only to herself. If a teenager did in fact suffer psychological and/or mental harm from a consensual sexting event, that is probably punishment enough, and traditional criminal procedures will not benefit the teenager, her partner, or society in any manner.

2. Alternative Punishments that States Should Enact to Address Juvenile Sexting

Alternative punishments are methods by which teenagers can be punished for sexting without hampering their development into upstanding members of society.[239] The fundamental reason behind employing alternative punishments is that consensual sexting generally takes place between two teenagers, and the only parties being exposed to the materials are the parties who have created them or willingly accepted them.[240] Another important reason that sexting punishments need to be reevaluated is that evidence exists that teenagers are slow to fully mentally develop, quick to make poor decisions, can learn from their mistakes, and are not likely to continue harmful behaviors if educated about them because they are in a constant mode of development, maturation, and learning.[241] Research by the National Institute of Health shows that the human brain continues to develop well into a person's mid-twenties.[242] Adolescents are also "dependent on adults to guide them in understanding the complexities of the world and appropriate sexual and social behaviors."[243] All

238. *See* CTRS. FOR DISEASE CONTROL AND PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT, SEXUAL AND REPRODUCTIVE HEALTH OF PERSONS AGED 10-24 YEARS – UNITED STATES, 2002-2007 7-13 (2009) [hereinafter CTR. DISEASE], http://www.cdc.gov/mmwr/PDF/ss/ss5806.pdf.

239. *See* Brink, *supra* note 208, at 1558 ("For obvious reasons, juveniles are more corrigible and educable than adults. . . . By mainstreaming juveniles with adult offenders and placing convicted juveniles in adult prison facilities, the trend to try juveniles as adults ignores the corrective rationale for a system of juvenile justice.").

240. *See Vexing*, *supra* note 3, at 12.

241. *See* NAT'L JUVENILE, *supra* note 219, at 1.

242. *See* Maggie Jones, *How Can You Distinguish a Budding Pedophile from a Kid with Real Boundary Problems?*, N.Y. TIMES, July 22, 2007, § 6 (Magazine), at 33.

243. *See* NAT'L JUVENILE, *supra* note 219, at 1.

of these factors show that teenagers are more receptive to rehabilitation and treatment when they violate the law.[244] Therefore, it makes no sense for society to cause a teenager irreparable harm when her actions can be corrected by other methods.

Lastly, alternative punishments should be used in cases of teenage sexting because criminal prosecution and sex offender registration is not only inappropriate, but harmful to teenagers. While sex offender registration helps the public identify convicted sex offenders, registration does nothing to address the problems of a juvenile offender.[245] This is concerning "given the fact that 60-80% of adult sex offenders start sex offending as juveniles, [and] experts deduce that without effective rehabilitation, the majority of juvenile sex offenders will inevitably continue their sex offending into adulthood."[246] These high percentages are worrisome because the harmful effects a teenager might potentially suffer by being placed on a registry are unknown, especially for a teenager who would never have been required to register but for being prosecuted for sexting. The legal response to adolescents who violate sexually oriented statutory law should acknowledge the developmental status of these teens and should not subject them to criminal prosecutions that will haunt them for the rest of their lives.[247] Alternative punishments have been shown to work for other crimes committed by teenagers, and should be used in instances of consensual sexting as well.[248] State officials, scholars, and other concerned individuals and organizations have proposed numerous alternative forms of punishment that Oklahoma and other states should consider when addressing this issue.[249]

Vermont is one state that has changed its laws from the traditional criminal penalty that would have applied to sexters to one that is more appropriate in dealing with this problem.[250] The state now provides that the maximum penalty for an offending minor is to be adjudicated delinquent,[251] which comes with the possibility of probation, changes in parental custody, or transfer to state custody.[252] This is not an ideal punishment because it makes no

244. *Id.*

245. *See* Hiller, *supra* note 218, at 291-92.

246. *Id.* at 292.

247. *Id.* at 292-93.

248. *See, e.g.*, Kamenstein, *supra* note 210, at 2105; Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505 (2008).

249. *See supra* Part IV. This paragraph will only focus on states that have proposed or enacted changes to their reactive punishments, and not those that dealt with proactive ways to prevent teenage sexting before it occurs.

250. *See* VT. STAT. ANN. tit. 13, § 2802b (2009).

251. *See id.*

252. *See id.* § 5232(b).

provisions for reforming the behavior through education or other means, but it is better than the alternative, which opens a teen up to steep fines and sex offender registration.

The Indiana legislature is another state that has started the process of implementing new forms of punishment to deal with teen sexting. The Indiana legislature has not passed any actual amendments to their law, but they have begun to investigate the need their state has to implement these changes.[253] If more states would dedicate a similar amount of time and resources to investigating means of reforming their corrective punishments, then it is likely that these alternative punishments could be enacted more quickly, thereby preventing a large number of teenagers across the country from being labeled as sex offenders and prosecuted like violent sex criminals.

The New Jersey legislature's proposed laws, previously discussed, should also be emulated. Its legislature recently proposed a Senate Bill that would create an educational program about sexting to be used as an alternative punishment at the discretion of county prosecutors.[254] The educational program would only be available in instances where prosecutors might deem more harsh criminal penalties for sexting unnecessary, and admission would be limited by strict yet obtainable requirements that most teenagers who consensually sexted and had no prior instances of sexual misconduct would meet.[255] This proposed law is an example of alternative punishment at its finest.

Although Vermont, Indiana and New Jersey have made strides in changing the harsh application of their criminal laws, the one state that the others should ideally strive to emulate is Nebraska. Nebraska recently passed a statute that provides an affirmative defense to the possession of self-produced child pornography that effectively legalizes one-on-one sexting between teenagers over the age of fifteen.[256] This would completely take the criminal justice system out of its current role of punishing sexting and allow families and other social organizations to take their rightful role and self-police this problem.

Oklahoma and other states should specifically look to implement laws similar to what these states have enacted and proposed with the support of reputable community officials, organizations, law enforcement personnel and scholars. If states do not want to go as far as effectively legalizing sexting, a "therapeutic punishment" theory should be used to create programs that use a

253. *See* S. Res. 90, 116th Gen. Assem., 1st Reg. Sess. (Ind. 2009), *available at* http://www.in.gov/legislative/bills/2009/PDF/SRESF/SR0090.pdf.

254. *See* S.B. 2926, 213th Leg., Reg. Sess. (N.J. 2009), *available at* http://www.njleg.state.nj.us/2008/Bills/S3000/2926_I1.PDF.

255. *Id.*

256. *See* NEB. REV. STAT. 28-813.01(3) (2009).

combination of legal education about the dangers of sexting and practical knowledge of the personal and social effects of this illicit sexual behavior instead of traditional criminal punishments.[257] This therapeutic approach, however, should be limited in scope to "minors whose only crime is the creation and dissemination of sexually explicit images of themselves."[258]

Potential methods of therapeutic punishment do not end in the classroom. One example would be to allow minors to help participate in the apprehension of pedophiles and other sexual predators by providing the names of people who have contacted them for sex.[259] Another example is using threats and "scared-straight" education methods to convince minors that their actions will be excused one time, but subsequent action will lead to prosecution.[260] Yet another possibility is to prosecute parents who are negligent or even supportive of their children engaging in this behavior, rather than punishing the juveniles who might not understand the ramifications of their actions.[261] If Oklahoma and other state legislatures decide to punish teenagers for consensual sexting, some form of education should play a large role in the statutory scheme so as to avoid creating "a whole new generation of felons" for an activity that can be addressed through education and rehabilitation.[262]

Overall, the goals of these therapeutic solutions are "to help minors who have made or disseminated sexually explicit images of themselves to reform their ways and get child pornography out of circulation as quickly as possible–and, above all, to protect the minors depicted in the images against future acts of sexual predation and bullying or harassment . . . ."[263] Although the first of these two goals might be accomplished by bringing child pornography charges against teenagers, the final goal would be undermined due to the stigma a teenager would face by being placed on a sex offender registry.

3. Inappropriate Forms of Alternative Punishment

Although educational and other social programs are appropriate methods of reforming many juvenile offenders, including some who commit sexual offenses, not all forms of alternative punishments specifically used for juvenile sexual offenders would be appropriate when dealing with teenage sexters.

257. *See* Smith, *supra* note 248, at 541.
258. *Id.*
259. *Id.*
260. *See id.* at 541-42.
261. *Id.* at 543.
262. *See* Barbara Hoberock, *Legislator Taking Aim at Teen 'Sexting,'* TULSA WORLD, Oct. 30, 2009, at A11.
263. *See* Smith, *supra* note 248, at 542.

Juvenile sexting meets the definition of a sexual offense, but it would be difficult to argue that its harm is equivalent to that in the statutorily defined sexual offenses that involve physical abuse. For violent juvenile sexual offenders, some methods have been used over time that would not be appropriate for juvenile sexting. These therapies include aversive conditioning, covert conditioning, masturbatory satiation, and pharmacotherapy.[264] Since sexting is not a violent sexual offense, the use of these intrusive methods would be offensive to the teenager, her family's right to raise her, and the entire criminal justice system.

On the other hand, model community-based treatment programs and possibly model residential treatment programs could be a positive approach to help teenagers who struggle with the adverse effects of sexting.[265] Although these programs should likely be a last resort for repeat-offenders and those youths struggling with other sexual development issues in addition to sexting, the specialized and individual treatment could be helpful in educating troubled youths on the potential problems of their anti-social sexual behavior.[266]

Despite the potential problems with some forms of alternative punishment, the benefits of proper alternative punishment combined with the inherent difference between sexting and the sex crimes originally contemplated by current law show that the punishment for sexting needs to be reevaluated. The biggest problem faced by those suggesting alternative punishments for teen sexting is that under current law, teenage sexting can and is being prosecuted using traditional criminal methods. Until the legislature or judiciary establishes an official policy regarding these prosecutions, recommendations and suggestions of law enforcement, concerned community officials, and scholars, will remain just that.

---

264. *See* Sander N. Rothchild, Note, *Beyond Incarceration: Juvenile Sex Offender Treatment Programs Offer Youths a Second Chance*, 4 J.L. & POL'Y 719, 747-750 (1996). The method of "[a]versive conditioning . . . presents participants with 'inappropriate sexual stimuli by means of slides, audiotapes, or videotapes followed by' negative stimulus such as electric shocks to the penis or foul odors such as ammonia or smelling salts." *See id.* at 749. The slightly different method of "[c]overt conditioning trains sex offenders to associate the pattern of behaviors that result in a sexual offense with situations 'involving extremely distasteful consequences, such as being arrested or being discovered by their parents'" *Id.* Then there is "[m]asturbatory satiation[, which] is a widely used and seemingly effective treatment for adult sex offenders which reinforces arousal to proper sexual cues while reducing arousal to deviant sexual cues." *Id.* at 749-50. Finally, "[p]harmacotherapy . . . involves the reduction of the male hormone testosterone to 'prepubertal levels' through the injection of Depo-Provera every seven to ten days." *Id.* at 750.

265. *See id.* at 750-55.

266. *See id.* at 751-53.

B. Methods of Enacting Alternative Punishments for Sexting

The simplest and most traditional method of changing the ways in which criminal laws apply to sexting is through legislative means. If the federal and state legislatures fail to address the problem, however, or do so in a way that is unsatisfactory, judicial and prosecutorial remedies might suffice to change the way in which laws are applied to sexting. Popular movements by parents and other concerned social groups are an additional method for spurring change. A realistic scenario is that support by all of these groups will spur legislatures to make the changes necessary to help children affected by sexting without unduly burdening them with excessive punishments.

1. Prosecutorial Methods

One of the simplest methods by which excessive sexting punishments could be addressed–besides changing the laws in the legislatures–would be if prosecutors used discretion in bringing child pornography charges against teen sexters.[267] This would be both efficient and proper, because one of the responsibilities of a prosecutor is to weigh the proportionality of a punishment.[268] As one supportive scholar stated:

> In a system, such as ours, . . . it is not enough for prosecutors simply to decide whether or not a suspect deserves to be prosecuted and convicted. In deciding whether a prosecution is in the interests of justice, prosecutors should also consider whether the grade of offense and the level of punishment authorized by applicable law "fits" the suspect's crime.[269]

One justification for this theory as it applies to sexting is that the statutory eighteen-year-old age limit for child pornography is "higher than the legal age for marriage in many states, as well as the age at which persons may consent to sexual relations."[270] Although sexting creates the potential for personal and social harm to minors, these dangers can hardly be considered more severe than those that can come from teenagers engaging in sexual intercourse.[271]

---

267. *See* Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion-Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 377-78 (2000) (arguing that one major reason prosecutors are granted discretion is to avoid prosecuting activities that are technically illegal, but which are difficult to enforce or subject to changing social mores).

268. *See* Smith, *supra* note 248, at 514.

269. *Id.*

270. Ashcroft v. Free Speech Coal., 535 U.S. 234, 247 (2002).

271. *See* CTR. DISEASE, *supra* note 238, at 1 ("In 2004, approximately 745,000 pregnancies occurred among U.S. females aged <20 years. In 2006, approximately 22,000 adolescents and young adults aged 10–24 years in 33 states were living with human immunodeficiency

Examples abound of district attorneys from all parts of the country speaking out on this issue, either within legislative enactments or in interviews concerning new laws, demonstrating that many states are realizing the problems associated with prosecuting teenagers for this activity.[272] For example, the Berkshire County, Massachusetts District Attorney made a clear statement that he would prefer not to use the criminal justice system to punish young people for making bad choices and hopes that awareness and education will be enough to combat the problem in his district.[273] The district attorney did, however, reserve the right to prosecute if it is appropriate and necessary.[274]

Another forward-looking prosecutor has already initiated a program in Dayton, Ohio, to allow prosecutorial discretion to play a role in punishing and educating teens without charging them criminally.[275] The factors to be considered include "any prior sexual offenses, whether any type of force or illicit substances were used to secure the photos, whether the juvenile has been involved in this particular diversionary program previously, [and whether] there is strong opposition by the victim or law enforcement to . . . involve[ment] in a diversionary program."[276] This prosecutor stated that "this type of activity must be addressed and stopped, and in many cases is best addressed by education and parental involvement."[277]

A statute or judicial decision definitively protecting consensual juvenile sexting without having to rely on the whimsical nature of prosecutorial discretion would be preferable. The lack of a statute or court ruling, however, does not rule out the potential positive effect that proper discretion could have on this issue. If more prosecutors came to the realization that criminal punishment for the act of sexting is disproportionate to the nature of the crime, more children would be able to see the error of their ways without being forced to enroll on public sex offender registries.

---

virus/acquired immune deficiency syndrome (HIV/AIDS), and approximately 1 million adolescents and young adults aged 10–24 years were reported to have chlamydia, gonorrhea, or syphilis.").

272. *See, e.g.*, Press Conference, David F. Capeless, Dist. Attorney, Problem of "Sexting" in Berkshire County (2009), *available at* http://www.mass.gov/?pageID=bermodulechunk&L=1&L0=Home&sid=Dber&b=terminalcontent&f=nu_2009_0303_sexting_press_conference&csid=Dber; Mathias H. Heck Jr., *Sexting and Charging Juveniles–Balancing the Law and Bad Choices*, PROSECUTOR, Jan. 2009, at 28.

273. *See* Capeless, *supra* note 272.

274. *Id.*

275. *See* Heck, *supra* note 272, at 28.

276. *Id.*

277. *Id.*

2. Judicial Methods

If legislatures fail to address sexting and prosecutors continue to charge teenagers as sex criminals, the state and federal judiciaries could use their power to limit problematic statutes' applicability to teen sexting. The main issue here is that courts can do very little under the plain text of current laws without being considered activist, especially in states that have specifically elected not to amend their laws to provide lighter penalties for teens. This method is possible, however, because the judiciary has applied this type of power and reasoning before, albeit for dissimilar issues. For example, the judiciary has historically restricted certain types of punishment because of society's "evolving standards of decency that mark the progress of a maturing society."[278] A similar mode of thinking could be applied to show that society does not want its children to be imprisoned and labeled sex offenders–an offense with the potential to ruin a promising life–for making a poor teenage decision to send nude pictures to a boyfriend or girlfriend. There is nothing either evolved or decent about legally classifying an uneducated hormonal teenager in the same manner as society would classify a child molester or rapist.

Another approach courts could take to limit the applicability of child pornography statutes to sexting is to consider the idea that consensual sexting between minors might be protected by a First Amendment challenge.[279] Depending on a state statute's definition of child pornography, "[if] the exchange of pictures by minors does not fit the definition of child pornography, and it is voluntary and non-commercial, it would arguably be protected under the First Amendment."[280] This certainly would have been the case in *Miller*, where one of the girls had pictures which did not contain nudity.[281] One exception to this would be if the exchange of photographs took place on school grounds, where several sexting cases have arisen. Student free speech rights at school are restricted when speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[282] Although a First Amendment challenge has merit for sexting incidents away from school, it is unlikely that a teenager sexting at school would win on a First Amendment challenge.

---

278. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958).

279. *See* John A. Humbach, *"Sexting" and the First Amendment*, 37 HASTINGS CONST. L.Q. 433 (2010); Robert H. Wood, *The First Amendment Implications of Sexting at Public Schools: A Quandary for Administrators Who Intercept Visual Love Notes*, 18 J.L. POL'Y 701 (2009).

280. Wood, *supra* note 279, at 31.

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

282. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

Although modification through the sole action of federal and state judiciaries is possible, it is probably the least likely method by which sexting law would be unilaterally altered. A significant segment of society would scream, "judicial activism!" This is because, in cases involving volatile social issues such as sexting, judges in a position to rule in favor of change often vehemently argue that when the Constitution is silent on an issue, "it [should be] left to be resolved by normal democratic means."[283] The judicial system, however, could lend an important supportive voice to the cause. Moreover, it could even be the source that spurs the legislatures to make the necessary changes if enough challenges to current law are brought, or if opportunistic prosecutors continue to bring these charges against teenagers.

3. Societal and Community Methods

Although legislatures, judges, and prosecutors certainly have the most influence to effect change, other segments of society certainly have the power to demand it, or at least bring the issue to the forefront of people's minds. Parents of teenagers are one of these groups, both because of their strength in numbers and the direct effect these laws could have on their children. This was seen partly in *Miller v. Skumanick*, when the parents would rather have enforced the punishment or education themselves without the help of the district attorney.[284] This would likely be the mindset of parents across the country faced with similar circumstances.

In situations where minors commit offenses that are arguably not criminal, there is something to be said for letting parents have the first opportunity to correct the bad behavior. The Supreme Court itself has recognized that the Fourteenth Amendment grants parents the fundamental right "to make decisions concerning the care, custody, and control of their children."[285] An example of a reasoned response to an incident would be simply informing parents that their child is sexting so that they can restrict her cellular phone usage. This is not to say that parents have the right to make these types of decisions in every criminal situation regarding their children. In a situation such as sexting, however, where the effect of currently available punishments is so debatable, letting parents teach their children right from wrong before they are saddled with a sex offender label is preferable.[286]

---

283. *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

284. *See* 605 F. Supp. 2d at 644.

285. Troxel v. Granville, 530 U.S. 57, 66 (2000).

286. This analysis does not work, however, when parents are complicit or uninvolved in their children's activities. For these children, it is even more vital that laws punishing sexting as criminal behavior are amended. These children would be subject to the consequences of the child pornography and sex offender registration law without any family support, and would

Although a parent's desire to prevent her child from being punished should not be taken into account in every circumstance, if a majority of the population supported the legally valid proposition that children should not be punished as child pornographers for sexting, it would seem that something should be done to change the form of punishment. The fact that consensual "sexting" is a victimless crime in certain circumstances bolsters this idea. This concept is not exactly modern: "The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."[287]

C. Maintaining Some Criminal Sanctions

Criminal sanctions for the nonconsensual dissemination of sexted pictures must continue to be implemented, albeit at a more limited level, so as to protect minors who have explicit pictures distributed without their approval. If the true goal of child pornography and sexting laws is to protect minors, this seems to be the best way to accomplish this goal without being overly harsh on the teenagers distributing the pictures.[288]

A recent case on this issue dealt with an eighteen-year-old who distributed nude pictures of his sixteen-year-old ex-girlfriend to a large group of his acquaintances "in a moment of anger."[289] Although the punishments for the eighteen-year-old boy were likely too severe, this is the type of action that sexting laws need to focus on.[290] An associated problem might concern the consensual exchange of explicit pictures between two teenagers, one being at least eighteen, and one being under eighteen. In many states, this would

---

likely have even less of a chance to navigate their newfound criminal status than those children who had a supportive family.

287. JOHN STUART MILL, ON LIBERTY 80-81 (David Bromwich & George Kateb, eds., Yale Univ. Press 2003) (1859).

288. At this point I find it important to note that I believe that sexting situations should all be analyzed according to the specific facts in each case. Obviously a person who obtains nude pictures of a peer and then distributes them with the intent to cause harm is more culpable than a person who receives a nude picture from an unknown source and continues to forward it to others. There are so many different ways that sexted pictures can be created, obtained and distributed that it would be preferable that any laws created were flexible enough to account for variations in the ways that teenagers make the mistake of sexting pictures.

289. *See* Kristin Tillotson, *Teens & Sexting – Risky Pictures*, MINNEAPOLIS STAR TRIB., Apr. 24, 2009, at 1E.

290. *See* 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 (2009) (The boy's punishment "included five years probation, semi-annual polygraphs and forced attendance at classes designed to ensure that he does not re-offend . . . [and] he would be required to register as a sex offender, a label he would have to carry at least until the age of 43").

constitute the exchange of explicit pictures between an adult and a minor, which would bring more traditional sex offender charges against the eighteen-year-old.[291] This hypothetical scenario must be addressed by legislatures because it will undoubtedly occur, if it has not already. It is more difficult to judge how legislatures should address this type of situation, because a line must be drawn as to what classes of teenagers will meet the exceptions to established child pornography laws, and society has justly determined that individuals over the age of eighteen are more accountable for their actions even if the results are sometimes harsh.

One solution is to make a similar exception as is made in some state Romeo and Juliet laws, which make an exception when one teenager is over eighteen so long as he is within a certain age of his girlfriend.[292] Oklahoma already has a Romeo and Juliet law that could easily be altered to include sexting.[293] Another possible solution would be to continue to label the sexted pictures as child pornography, but to carve out a very narrow exception for consensual sexting between a minor and a teenager who does not legally classify as a minor, so as to not decriminalize the procurement and trade of child pornography between minors and older adults. Either of these solutions would seem to address the goal of showing teenagers why their behavior is wrong without punishing them as if they were violent sex offenders.

VI. Conclusion

In a perfect world, teenagers would not sext. Teenagers would better understand the potential ramifications of caving to peer pressure and their hormonal desires, and society would not be faced with deciding how these children should be punished. But this is not a perfect world, and sexting is certainly not the first sexual activity that has gotten teenagers into trouble. Unfortunately, for those teenagers who do choose to sext, federal, Oklahoma, and other state laws on child pornography, as currently written, are undoubtedly applicable. This is true despite the fact that child pornography and sex offender registry statutes were originally created with the intent of protecting those teenagers, and all other children, by severely punishing those who create pornography and commit other acts of perversion at their expense. Now these

---

291. *See, e.g.*, Feyerick, *supra* note 6; Javier Lavagnino, *100 Year Sentence for Teen Sex Offender with 47 IQ: Concurrent Sentences Fair?*, FINDLAW (June 11, 2009), http://blogs.findlaw.com/blotter/2009/06/100-year-sentence-for-teen-sex-offender-with-47-iq-concurrent-sentences-fair.html; Gil Kaufman, *Sexting Leads to Teen Having to Register as a Sex Offender*, MTV (Feb. 11, 2010), http://www.mtv.com/news/articles/1631734/20100211/index.jhtml.

292. *See, e.g.*, 57 OKLA. STAT. § 590.2 (Supp. 2009).

293. *See id.*; HOUSE COMM., *supra* note 111, at 10.

same laws have the potential to, and sometimes are, being used to label teenagers in the same wretched way.

The state of Oklahoma has dealt with at least ten cases referred to its juvenile courts since 2005 which have involved teenagers possessing or distributing child pornography, three of which have involved the use of cell phones.[294] If current laws are not changed, a prosecutor could easily bring child pornography charges and create a similar unfortunate scenario as occurred in *Miller v. Skumanick*. Because of this possibility, Oklahoma should eliminate the criminal punishment for consensual sexting between two teenagers, institute an educational and community service based punishment system for certain classes of sexters, and criminalize only the nonconsensual dissemination of sexually explicit pictures to third parties. Parents should play a role if their child is caught in the act. Punishing classes of people unable to comprehend the harm caused by their actions is neither helpful nor desirable to anyone.

Since there exists no practical or realistic way to completely end the practice of teenagers using cellular phones–or any technology for that matter–for sexual purposes, society should always consider this: "[I]f we can imagine how we would build a system to address sexual [issues] if the victim was our daughter and the offender was our son, then we will be closer to the right response."[295]

John M. Krattiger

294. Tim Talley, *Oklahoma Hearing Aimed at Shaping 'Sexting' Measure*, ASSOCIATED PRESS (Oct. 30, 2009), http://www.cnsnews.com/news/article/56405. The Oklahoma Legislature seems to be finally addressing this issue, as it recently held a public hearing on the House floor to address the sexting problem in Oklahoma. *See* Barbara Hoberock, *Bill Legislator Taking Aim at Teen 'Sexting'*, TULSA WORLD, Oct. 30, 2009, at A11. Democratic Representative Anastasia Pittmann initiated the study, which she hopes will prevent the creation of "a whole new generation of felons." *Id.* Members of the District Attorney's Council are also on board with reanalyzing Oklahoma's potential sexting problem. *Id.* The Council cites current Oklahoma law on child pornography that could be used to prosecute teenagers who send sexually explicit photographs of themselves and unwilling recipients of those photographs if they fail to remove them from their phones. *Id.*

295. Brittany Enniss, Note, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 717 (2008) (citing the platform of The American Justice Foundation, http://www.amjf.org).