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ON TEENAGE 'SEXTING' AND THE LAW

Rayeed Ibtesam

Technology has improved our lives in unimaginable ways. Fifty years ago it would have been unthinkable to video chat with someone from the other end of the globe. The speed of communication and dispersion of information has increased drastically over the last few decades. But the advent of technology and digital communication have also brought bad news with them. One such problem is 'sexting'. The word 'sexting' is a colloquial term for the exchange and dissemination of sexually explicit pictures and/or texts primarily through text messages and email. Sexting occurs when someone sends via text message or posts on the internet sexually charged messages or images, including nude or semi-nude pictures. Although not limited to younger people, a growing number of teenagers continue to engage in sexting and consequently, the issue has become a source of widespread discussion among parents, lawmakers, and society generally.¹ Fundamentally, teenage sexting is a product of sexual curiosity, poor judgment, and a modern trend in which teenagers utilize electronic file sharing as their primary method of communication. Sexting is commonplace among teenagers. The National Campaign to Prevent Teen and Unplanned Pregnancy found that 19% of respondents aged thirteen to nineteen had transmitted a sexually suggestive image of themselves electronically and 31% had received a

¹ See Riva Richmond, Sexting May Place Teens at Legal Risk, Gadgetwise, N.Y. Times (Mar. 26, 2009, 12:00 PM), [http:// gadgetwise.blogs.nytimes.com/2009/03/26/sexting-may-place-teens-at-legal-risk/](http://gadgetwise.blogs.nytimes.com/2009/03/26/sexting-may-place-teens-at-legal-risk/).

nude or semi-nude picture or video.² Other than the widespread popularity of sexting among teenagers, the severe outcomes of sexting is also what makes it deserving of legal attention. On one end of the spectrum lies the humiliating and emotionally devastating repercussions to a victim of sexting while on the other end lies the overly harsh legal ramifications for sexting perpetrators. Presently, potential criminal penalties for sexting vary widely, both in terms of their severity and the circumstances to which they are or are not applicable. In a most extreme scenario, under current federal sentencing guidelines, a sixteen-year-old girl could receive life in prison as punishment for electronically sending sexually explicit pictures to a boy her age. Non-criminal ramifications for sexting may also occur, including instances of in-school bullying, which often necessitate a societal response that is beyond the purview of criminal laws.³

One must appreciate the social harms caused by child pornography and the breadth of the victimization. Child exploitation has expanded in our society to be nearly commonplace, and the minors who comprise these images number in the hundreds of thousands.

The driving force behind the social, legislative, and judicial movement to aggressively combat child pornography is the universal recognition of the breadth and depth of the social harms caused by the mere existence of child pornography. These include harm to the children depicted, to other children exposed to child

² See The Nat'l Campaign to Prevent Teen & Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults 11 (2008)* [hereinafter *Sex & Tech Survey*], available at http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf.

³ See, *supra* note 1

pornography or sexually assaulted because of the offender's exposure, and to society as a whole.

There have been instances, of leakage of sexually explicit pictures, plaguing middle and high schools all across the nation. For example, 18-year old Jesse Logan from Florida committed suicide after a disgruntled boyfriend leaked her naked pictures to other high school peers.⁴ After catching wind of the explicit pictures, Logan's high school peers constantly tormented and harassed her until she decided to end her own life.⁵ Another devastating example is 13-year old Hope Witsell. She committed suicide after a naked picture of her went viral and started the onslaught of endless humiliation and hatred.⁶ In situations of teenage sexting, the typical scenario consists of a teenage girl sending a sexually explicit picture of herself to a boyfriend or a boy in hopes of impressing him, later on once the relationship between the two turns sour the photo is leaked to others which leads to immense humiliation for the girl. Although in the typical scenario the girl is the primary sender of the picture, there are instances where the roles are reversed. 18-year old by the name of Jorge Canal sent a nude picture of himself to one of the girls in his high school.⁷ The consequences of the lawsuit against Canal depict the disproportionately harsh consequences of sexting. Canal was found guilty of knowingly disseminating obscene material to a minor and was required to register as a sex offender.

⁴ Mike Celizic, Her Teen Committed Suicide Over 'Sexting,' MSNBC.com (Mar. 6, 2009),

⁵ *Id.*

⁶ <http://www.cnn.com/2010/LIVING/10/07/hope.witsells.story/>

⁷ *State v. Canal*, 773 N.W.2d 528, 529 (Iowa 2009).

The up rise of sexting and the prosecution of teenage participants of sexting put forward two large concerns. First one is that the leakage of sexts has been the source of immense humiliation, reputational suicide, and social alienation for minors. The effects range from depression to public humiliation and can reach to even suicide in extreme cases.⁸ The second concern is that teenage sexting perpetrators are getting prosecuted under child pornography laws. Perhaps most importantly in the context of sexting, “technology and mores are changing so rapidly that they have outstripped the ability of . . . the law, parents, and prosecutors to keep up.”⁹ And in what has become a disturbing trend, prosecutors around the country have chosen to criminalize these teenage indiscretions by employing harsh child pornography laws, including some that require teenage offenders to register as sex offenders

Section I gives a brief historical overview of how the issue of sexting has come to light and prominence. Section II compares currently existing sexting statutes in different states in order to reveal the loopholes in these various statutes and provide clue for future legislation. Section III does a case law review of the different lawsuits based on sexting. Section IV delves into issue of sexting in Minnesota specifically. It looks into instances of dissemination of sexts among teenagers in Minnesota and the way state courts are handling the issue. The section also argues for statutes addressing teenage sexting and provides some helpful pointers that should be kept in mind when legislating sexting laws.

⁸ <https://www.psychologytoday.com/blog/teen-angst/201207/the-dangers-teen-sexting>

⁹ Editorial, *Sexting and the Single Girl*, 195 N.J.L.J. 934, 950 (2009).

Section V contains a brief conclusion of this topic and recommendations for Minnesota.

I. HISTORICAL OVERVIEW

The problem of sexting has arisen along with the advent of technology and digital communication. Mix raging teenage hormones, poor judgment, and technology that allows you to send pictures through your phone and you've got a perfect cocktail for teenage indiscretion that will have personal and legal ramifications for a long time after the fact. Minors, without the grooming or coercion of adult offenders, are voluntarily creating and distributing self-produced child pornography. This "self-exploitation" occurs in countless circumstances including "commercial production, producing with the intent that there will be a limited audience, self-posting of sexually explicit images on a web page or social networking site, producing for fee, making images of oneself and distributing or posting them on the Internet for recognition, attention, or profit, recording sexual encounters by a minor with another, and others."¹⁰ Whatever the circumstances, because this activity is the production of child pornography, these children face significant criminal penalties.

¹⁰ Jane Brady, *Prosecution Responses to Internet Victimization*, 76 *Miss. L.J.* 623, 632 (2007) (discussing phenomenon of teens posting sexually exploitive, partially nude, pictures of themselves on social networking sites without regard that "once a person downloads it, it is there potentially forever"); Kurt Eichenwald, *Through His Webcam, A Boy Joins a Sordid Online World*, *N.Y. Times*, Dec. 19, 2005, at A1 (describing the self-produced pornography distributed by Justin Berry).

As an example, the Hearst Corporation has conducted a poll in which 20% of teens admitted that they have sent sexually explicit photos of themselves through text messages.¹¹ In addition, wired-safety.org, a non-profit organization dedicated to internet safety, conducted research that indicates that 44% of teen boys said they have seen at least one naked picture of a female classmate. Sexting is a growing problem that a large portion of teenagers are exposed to. The problem is two folds. Firstly, a teenager sends a sexually explicit text or picture to another teenager in the hopes that the picture or text will be kept personal by the recipient. Secondly, the sext is disseminated or distributed often without permission of the primary sender, to other third/subsequent parties. While the first rung may show indiscretion on the part of the primary sender, it is typically the second rung that causes humiliation for the primary sender.¹²

The reason behind sexting can be found in teenage psychology. Teenage girls are more likely to send sexually explicit pictures than teenage boys.¹³ Part of the reason is peer pressure. Sexting has become more acceptable among teenagers and therefore teenage girls may be pressured to conform to the trend.¹⁴ Another reason is pressure from someone they are or want to be in a relationship with.¹⁵ Age also has an impact on the proclivity for sexting with older teens than younger teens sending these racy pictures. The disparity among age groups seems logical,

¹¹ Parental Controls Help Guard Against Sexting, WISN.com (July 28, 2009), <http://www.wisn.com/news/20207767/detail.html>.

¹² Michael Nix, *Unwholesome Activities in a Wholesome Place: Utah Teens Creating Pornography and the Establishment of Prosecutorial Guidelines*, 11 J.L. & Fam. Stud. 183, 187 (2008)

¹³ Eric Latzer, *The Search for a Sensible Sexting Solution: A Call for Legislative Action*, 41 Seton Hall L. Rev. 1039 (2011).

¹⁴ *Id.*

¹⁵ *Id.*

as most types of sexual experimentation, on the whole, increase with age. Responsibility for one's own cell phone bill also increased the likelihood that a teenager had sent nude or semi-nude pictures via text message, with 17% of those teenagers reporting sending sexually suggestive picture messages as opposed to only 3% of teenagers who were not responsible for the cost of their cell phone bills, possibly demonstrating an awareness on the part of adolescents that this practice is somewhat suspect.

However, the prosecution of teenagers under child pornography laws for the distribution of such pictures are not proportionate to the crime. Sexting among teenagers should not be labeled a sex crime, it is damaging in a way that adolescents cannot even comprehend.¹⁶ The usage of child pornography law to address the distribution of sexts shows a disconnect between the legal system and an increasingly sexualized adolescent cyber culture.¹⁷ Prosecution under laws against possession or distribution of child pornography carries sentences that can go up to decades in prison and require registration as a sex offender.¹⁸ But the harms are even more long lasting, registration as a sex offender can do serious damage to future job or college prospects for the teenager. Other than that, it can also lead to difficulty having future intimate relationships and sexual dysfunctions.¹⁹

¹⁶ Editorial, *There are Sex Crimes, Then There's Sexting: Sexting Among Young Friends Requires a New Look at Legal Standards*, ROANOKE TIMES (Va.), Mar. 23, 2009, at A14.

¹⁷ Robert Richards, *WHEN SEX AND CELL PHONES COLLIDE: INSIDE THE PROSECUTION OF A TEEN SEXTING CASE*, 32 *Hastings Comm. & Ent L.J.* 1 (2009).

¹⁸ Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 *Val. U. L. Rev.* 1035 (2010).

¹⁹ *Id.*

When teenagers are sexting, there is no direct unfair coercion/exploitation of the minors in taking the sexually explicit picture because sexts are most often voluntarily sent to someone who the primary sender is or is hoping to be in an intimate relationship.²⁰ The imposition of felony charges seems excessive in light of the offenders' age and the less pernicious quality of their actions.²¹ Also teenage participants of sexting are not sexual predators and their conduct is not calculated or habitual.²² Most of the time, it is impulsive as teenagers generally send sexts in a moment of leap in judgment. Child pornography laws were enacted to prosecute adults who coerced and exploited teenagers to engage in sexual acts, but when teenagers are sexting there is no such sexual exploitation involved.²³ Also in the traditional case of child pornography, the sexual exploitation happens for commercial gains but even teenagers disseminate sexts to third parties, there is no commercial motivation. The current state where teenage participants of sexting are prosecuted under child pornography laws displays inept of the legal system to timely come up with proper solutions to new and emerging problems. Prosecuting under child pornography laws defeats the legislative intent behind those laws and results in extremely harsh consequences.²⁴

II. STUDY OF CURRENTLY EXISTING *SEXTING* STATUTES

²⁰ Sarah Wastler, THE HARM IN “SEXTING”? ANALYZING THE CONSTITUTIONALITY OF CHILD PORNOGRAPHY STATUTES THAT PROHIBIT THE VOLUNTARY PRODUCTION, POSSESSION, AND DISSEMINATION OF SEXUALLY EXPLICIT IMAGES BY TEENAGERS, 33 Harv. J. L. & Gender 687 (2010).

²¹ *Id.*

²² See *supra* note 6.

²³ See *supra* note 16

²⁴ *Id.*

Governmental intervention is compelled by both the doctrine of *parens patriae* as well as governmental police powers. With regard to children and the state, the government has two main doctrinal bases for interference in children's lives. The first is the doctrine of *parens patriae*. This doctrine originated in Great Britain and gave the crown the right and responsibility to protect persons deemed incapable of caring for themselves. American jurisprudence retained this doctrine as the basis for government intervention in the lives of children who were exposed to danger because of the failure of those responsible for the children's safety to protect them.²⁵ Parents have a fundamental right to raise their children, but these interests have never been seen to be without limits. The limitations on a parent's right "have arisen, not simply out of the definition of parenthood itself, but because of [the Supreme Court's] assumption that a parent's interest in a child must be balanced against the State's long-recognized interests as *parens patriae*."²⁶ This doctrine formed a basis of the child protection movement as well as the juvenile court system. The second source of governmental regulation of juvenile behavior is the police powers. This source encompasses the state's power to promote public health, safety, and general welfare

²⁵ *Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 57 (1890) ("This prerogative of *parens patriae* is inherent in the supreme power of every State[I]t is a most beneficent function, and often necessary to be exercised in the interest of humanity, and for the prevention of injury for those who cannot protect themselves."); Joseph Story, *Commentaries on Equity Jurisprudence* 1314 (3d. ed. 1843) ("Parents are entrusted with the custody ... of their children[;] yet this is done upon the natural presumption that the children will be properly taken care of But, whenever ... a father ... acts in a manner injurious to the morals or interests of his children in every such case, the court of chancery will interfere").

²⁶ *Troxel*, 530 U.S. at 87 (Stevens, J., dissenting) (citing *Reno v. Flores*, 507 U.S. 292, 303-04 (1993); *Santosky v. Kramer*, 455 U.S. 745, 766 (1982); *Parham v. J.R.*, 442 U.S. 584, 605 (1979); *Prince v. Massachusetts*, 321 U.S. at 158, 166 (1944)).

When a juvenile engages in the production or dissemination of child pornography through either self-exploitation or the distribution of self-exploitative images, society must respond in a manner befitting the social harm caused. These social harms are not diminished when the producer happens to be another juvenile or the juvenile herself. Because of the vast harm caused by this material, juvenile prosecution is a befitting response.

The harm the child does herself cannot be minimized. One might argue that, because these images are not a product of a forceful sexual assault, the social harm of these images is less. However, the Supreme Court rather insightfully articulated one harm of child pornography as the creation of a “permanent record of [the child's] participation.”²⁷ The use of the word “participation” is significant. That word includes both voluntary and involuntary participation. That a minor lacks the understanding of the destructiveness of her actions at the time of the crime does not mean she forfeits the harm she will more tangibly experience when she realizes the permanency of her actions. In upholding prosecution in such circumstances, courts recognize the compelling state interest in protecting children from sexual exploitation. This compelling interest exists whether the person sexually exploiting the child is an adult or minor.

Very few states have so far enacted statutes that specifically address sexting between teenagers. This means that teenage participants of sexting in majority of states are still at threat of being prosecuted under child pornography

²⁷ *Ferber*, 458 U.S. 759 (1892)

laws and potentially be required to register as a sex offender. States have approached or are in the process of legislating the issue of teenage sexting from various angles. Many states have bills pending in their legislatures that reduce the offense to misdemeanors, the time to be served, or handle teen sexting participants through diversion programs that are outside the criminal justice system.²⁸ States such as California have pending bills that reduce the sentence that can be given to first time juvenile sexting participants but include other forms of punishments such as community service and mandatory participation in a counseling session.²⁹ A proposed legislation in Alaska has somewhat taken off the burden of prosecution from the shoulders of under 16 primary senders of sexts since Alaskan teenagers under 16 who distributes sexually explicit pictures of themselves will not be prosecuted under the proposed legislation.³⁰ Other states such as Illinois and Hawaii have reduced the offense of teenage sexting to a misdemeanor and dispensed with the requirement of registering as a sex offender. A proposed legislation in Illinois would lighten the sentence for the teenage sexting participants upon the showing that the images were created voluntarily, the primary sender and receiver were within 4 years of age difference and were in a relationship.³¹ Such a statute however does not lighten the sentences of subsequent senders and receiver and therefore leaves a large portion of the problem unsolved.³² Few states have attempted to ameliorate the problem of sexting between subsequent receivers by proposing legislation that makes it an

²⁸ State Sexting Laws, *available at* <http://cyberbullying.org/state-sexting-laws/>

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

affirmative defense if the receiver did not ask for the image, mentioned the authorities, did not distribute the image further down the line, and took steps to delete the sext.³³

The following illustrates the sexting laws in effect in Vermont, Nebraska, and New Jersey:

a. Vermont Model

In 2009, the legislators in Vermont passed a law that prevented minors who are caught sexting for the first time to avoid prosecution under the State's child pornography laws.³⁴ Upon the minor's first offense, the minor will be treated as a juvenile and the case will be diverted from the court system.³⁵ The minor will generally be required to complete a diversion program as established by the State and upon completion the case will be dropped. In general, in a diversion program a probation officer will be assigned to the case and explain the program to the minor. In general, in a diversion program a probation officer will be assigned to the case and explain the program to the minor.³⁶ The program will usually require the minor to participate in a certain amount of community service, and may also require restitution to the victim and educational classes. Upon completion of the program, the case will be dropped by the State.³⁷

The clear improvement provided by this statute are that minors are not required to register as a sex offender and that their record gets expunged on their

³³ *Id.*

³⁴ Vt. Stat. Ann. tit. 13, § 2802 (2009).

³⁵ See *supra* note 6

³⁶ *Id.*

³⁷ *Id.*

18th birthday. Unless a minor has violated this law on a prior occasion, the statute requires that the action be filed in family court and that the minor merely be adjudicated delinquent. In addition, the statute allows the minor to be referred to a juvenile diversion program, the successful completion of which will expunge the matter from the minor's record.³⁸ However the statute still wrongly focuses on the primary sender than on the subsequent senders and receivers who are the main cause of the embarrassment and harassment of the primary sender.³⁹

b. Nebraska Model

In 2009, the State of Nebraska passed a law making it a crime to send sexually explicit images of a minor by way of text messaging.⁴⁰ In general, under Nebraska law individuals under the age of 18 will not be prosecuted for receiving a sexually explicit image of a minor 15 years of age or older, provided that, the image was taken voluntarily by the subject of the image and the recipient of the image does not distribute the image to anyone else.⁴¹

The hallmark of the Nebraska model is that it shifts the blame from the primary sender of the sext to the subsequent senders.⁴² The statute addresses subsequent senders who act with malicious intent when distributing the sext. The central provision of the statute makes it illegal for a person to knowingly possess any visual depiction of sexually explicit conduct by a child. The statute then prescribes different levels of felony charges, based upon the age and relevant

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Neb. Rev. Stat. § 28-813.01 (2006).

⁴¹ *Id.*

⁴² *See supra* Note 6

criminal record of the accused.⁴³ The statute does an excellent job at respecting sexting between teenagers that respect each other's privacy but at the same time targeting the ones that act irresponsibly.⁴⁴ It allows sexting between 15 and 18 year old teenagers provide that the sext was sent voluntarily and not shared with anyone it was not intended for.⁴⁵ This shows that the legislators were aware of the realities of the situation that involves hormonally charged teenagers and technology. Nevertheless, it ensures that teenagers who irresponsibly distributed the sext or pressured the sender to send the sext do not escape through the loopholes of the statute.

c. New Jersey Model

Under the New Jersey statute, teenagers who are caught sending sexually explicit images with their cell phones will not be subject to the State's child pornography laws with respect to their first offense.⁴⁶ In general, minors caught sexting would have to attend a state sponsored program where he or she would learn about the potential state and federal legal consequences and penalties associated with sexting, which technically amounts to distribution of child pornography.⁴⁷ Teens who are not minors or if it is not a teenager's first offense will generally not be eligible for the educational program.⁴⁸

The state's legislature has made an important contribution to the sexting discussion by proposing preventative and rehabilitative measures as corollaries to

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 2008 NJ A.B. 4068; 2008 NJ A.B. 4069; 2009 NJ A.B. 4070.

⁴⁷ See supra note 6

⁴⁸ *Id.*

the criminal response. The preventative components of the legislation focus on education-both for children and for parents.⁴⁹ One bill requires school districts to annually disseminate information on the dangers of distributing sexually explicit images through electronic means to students in grades six through twelve and to the parents or guardians of those students.⁵⁰ The other preventative bill turns its attention primarily to parents in an attempt to close the technology gap that often exists between parents and their adolescent children. Under this supplement to New Jersey's Consumer Fraud Act, it will be illegal for any retail establishment to sell a cell phone or cell phone service contract to any individual, or to renew a contract for cell service with an individual, unless the store encloses with such equipment or contract a brochure that informs the individual about the dangers of sexting.

d. Case Law Review

One tough issue perplexing courts is that there is not a lot of case law on sexting because most juvenile records are sealed. The closest charge to child pornography is distribution of obscene material to minors.⁵¹ Teenage sexting came under the spotlight after the case of *Miller v. Skumanick*, where a local prosecutor in Pennsylvania, Skumanick, sought to compel several teenagers involved in a sexting incident to complete educational and counseling session.⁵² Skumanick told the parents of teenagers that if the teenagers did not complete the session than they would be charged under the state's child pornography laws and

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Miller*, 605 F. Supp. 2d. 638

be required to register as a sex offender.⁵³ The parents brought a § 1983 suit and sought a temporary restraining order against Skumanick.⁵⁴ The court ruled in favor of the parents.⁵⁵ The appellate court affirmed ruling that Skumanick's take-it-or-leave-it offer was more retaliatory than a good faith effort to enforce the law.⁵⁶ The Miller case highlights the dangers of prosecutorial discretion when it comes to bringing suits against teenage sexting participants in most states which only have child pornography laws as the only weapon available to prosecutors.⁵⁷ Skumanick abused his prosecutorial discretion when he threatened to charge the teenagers under child pornography laws if they did not complete the counseling session in order to make an example out of them.⁵⁸ However in most instances, courts have affirmed prosecutorial discretion when it comes to charging sexting teenagers.

One of the seminal cases included that of Jorge Canal. A 14-year old female received two nude pictures from an 18-year old male from her high school.⁵⁹ The jury found Canal to knowingly disseminate obscene material to a minor and required him to register as a sex offender.⁶⁰ In another case in Florida, a teenager, A.H., was found guilty of distributing obscene material after she took pictures of her and her boyfriend naked and having sex.⁶¹ The A.H. case involved

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 639

⁵⁷ Todd Fichtenberg, *SEXTING JUVENILES: NEITHER FELONS NOR INNOCENTS*, 6 I/S: J. L. & Pol'y for Info. Soc'y 695 (2011).

⁵⁸ Miller, 605 F. Supp. 2d. at 640

⁵⁹ State v. Canal, 773 N.W.2d 528, 529 (Iowa 2009).

⁶⁰ *Id.* at 530.

⁶¹ A.H. v. State, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007).

consensual sexting between teenagers that lead to no dissemination of the pictures among subsequent parties, however the court ruled that the FL legislature had an interest in preventing further production of such pictures and was worried that consensual sexting would evolve into non-consensual sexting.⁶² The court also found that the subject of the sext had no expectation of privacy when she sent the picture to a teenage boy since it can be reasonably be found that a teenage in possession of a sexually explicit picture will eventually show or distribute such pictures

III. *SEXTING* IN MINNESOTA (ARGUMENT SECTION):

Interestingly, Minnesota has not created a separate statute for teenage sexting crimes.⁶³ Therefore, a minor who is caught creating, distributing or possessing a sexually explicit image of a minor (including themselves) could be charged under the State's child pornography statutes.⁶⁴ If the minor is convicted they will generally need to register as a sex offender.⁶⁵ Disseminating sexts is a felony and can result in up to 7 years in prison regardless of whether the person disseminating is a minor or not.⁶⁶ Possession of sexts is also a felony and can result in up to 5 years in prison with harsher punishment for second time violators.

One of the problems using the child pornography statute to prosecute cases of sexting is that often teenagers would receive sexts from their classmates

⁶² *Id.* at 238

⁶³ State Sexting Laws, *available at* <http://cyberbullying.org/state-sexting-laws/>

⁶⁴ *Id.*

⁶⁵ Minn. Stat. §§ 617.247

⁶⁶ *Id.*

without soliciting them. Therefore in the absence of a sexting that provides for a defense when the teenager has received the sext without soliciting for them, has not distributed it further down the line, and has informed the authorities, teenagers who arguably had no hand in creating or distributing the sext can be punished under the law.⁶⁷ The existence of child pornography laws as the lone weapon to address sexting means that prosecutors have broad discretion to pursue cases.⁶⁸ Therefore there is the chance that there might be abuse of such broad discretion as illustrated in the *A.H.* case. The cases discussed in Section III illustrate that there has not been much judicial sympathy towards sexting teenagers. The cases also elucidate some other important features including consent, privacy, and prosecutorial discretion. They show that regardless of the consent and privacy concerns of the minors, the state has an incentive to police the dissemination of sexts. The cases show the problems of giving too much discretion to prosecutors. This is a major concern since most instances of teenage sexting are handled based on prosecutorial discretion.⁶⁹ Also the many of the sexting statutes that are in congress waiting to be enacted also give a lot of discretion to prosecutors and thus provide ample opportunity for abuse.

Minn Stat. § 617.247 states that it is the policy of the legislature in enacting this section to protect minors from the physical and psychological damage caused by their being used in pornographic work depicting sexual

⁶⁷ Jeff Frantz, *York County DA Backs Sexting Reform: With Two Proposals in Harrisburg, Legislators are Hopeful the Law Could be Changed this Year*, York Daily Record, Jan. 10, 2010, available at 2010 WLNR 524350

⁶⁸ Tom Barnes, *Authorities Differ on Making "Sexting" a Criminal Offense: Bill Would Make it a Misdemeanor*, Pittsburgh Post-Gazette, Feb. 5, 2010, available at 2010 WLNR 2507888

⁶⁹ See supra note 6

conduct which involves minors.⁷⁰ However in cases of sexting where the sext has been kept strictly between the primary sender and receiver, there is no physical or psychological trauma for the subject of the sext since the sext was not distributed to anyone unintended.⁷¹ Therefore, Minn. Stat. § 617.247 goes beyond the legislative intent when applied to sexting cases.⁷² Lastly, the requirement of registration as a sex offender is disproportionately harsh since it means that the teenager's chances of getting proper education or employment is seriously reduced or made impossible.⁷³ The argument of disproportionate punishment administered by the requirement of sex offender registration ties into the second of the two concerns listed in the introduction section. The second concern illustrated that the law is always lagging behind technology. Had there been proper uniform sexting laws then prosecutors would not have had to resort to child pornography laws, which is the only weapon in their arsenal at the time. Child pornography laws were created to protect minors from sexual exploitation by adults. However, there is nothing to stop these laws from getting used for the self-defeating purpose of prosecuting the very group of people that it was initially enacted to protect.⁷⁴ It is foolish to rationalize that minor participants of sexting should be required to serve serious time in prison and/or required to register as a sex offender. Although sexting reflects poor judgments, the current draconian laws impose disproportionately cruel punishments for teenage indiscretion.

⁷⁰ Minn. Stat. §§ 617.247

⁷¹ Corey Yung, *THE TICKING SEX-OFFENDER BOMB*, 15 J. Gender Race & Just. 81 (2012)

⁷² Minn. Stat. §§ 617.247

⁷³ See supra note 6

⁷⁴ Corey Kamin, *Unsafe Sexting: The Dangerous New Trend and the Need for Comprehensive Legal Reform*, 9 Ohio St. J. Crim. L. 405 (2011).

Proper legislation must also be made in order to provide proper reparation for the victim of sexting. Teenagers often feel very justified in their actions but when sexting backfires it can take an emotional toll on them especially if the pictures land in the hands of the wrong persons. This leads us to the bigger problem of bullying; teenagers would be forced to live in a harsh world where they are constantly bullied.

I argue that there needs to be proper legislation that addresses sexting between teenagers. The rationale being that since current child pornography laws provide unusually harsh punishments, laws that are more befitting of the situation needs to be enacted. I also argue that although there are currently enacted sexting laws, such statutes do not completely address the problem of teenage sexting.

Therefore, another central aspect of my thesis is to explore different legislation options so as to make sure that other than the primary sender and recipient of the sext, subsequent senders and receivers are also brought into the purview of the law. This is an important step because dissemination of the sext to subsequent parties is the precise source of humiliation and embarrassment for the primary sender. Aside from that I look at avenues for change other than the criminal justice system to address the issue of sexting.

Incidents of teenage sexting have come up in various regions of Minnesota over the last few years. Hastings Police are investigating two separate cases involving four children ranging in age from 12 to 15 years old.⁷⁵ There were pictures of themselves in various stages of undress that were sent via text message to another person. The first case involves a 12 and 13-year-old sending naked

⁷⁵ Hastings Police Investigating 4 teens in 2 ‘Sexting’ Incidents, CBS Minnesota, Oct. 27, 2011

photos to each other. The other involves a middle school girl sending photos to her boyfriend. In another case Students at Century Middle School in Lakeville are being investigated after they allegedly shared an inappropriate photo of another student electronically.⁷⁶ The images were taken with cell phones in the girls' locker room at Century Middle School while the girls were undressing. The matter started as a game. Two boys, ages 13 and 14, created the game by photographing the buttocks of fully clothed girls in school hallways. But the game escalated when the boys each paid \$5 to a 14-year-old girl and gave her a can of soda to take photos and video in the locker room. A second 14-year-old girl also took a photo. The images were electronically spread to more than 40 students in the school. The boys and the first girl were charged in Dakota County Juvenile Court with conspiracy to commit interference with privacy and criminal defamation, all gross misdemeanors. The second girl was charged with interference with privacy. Although parents and students in Lakeville are on the fence since they can't decide whether they support the decision to file criminal charges against four middle school students accused of taking and sending inappropriate photos and video of two classmates.

In yet another case, a 12-year old Michaela Snyder was pressured to send a sext to her then boyfriend.⁷⁷ After her friends assured her that it's normal and acceptable to send such pictures, Michaela shared a picture of herself in her undergarments with her then boyfriend. Later on after her parents checked her

⁷⁶ Maricella Miranda, Lakeville: Century Middle School Students Accused of Sharing Inappropriate Photo, *twincities.com*, May 24th 2012

⁷⁷ Ruben Rosario, *After Sharing 'Sexting' Story, Woodbury Teen Hears Chorus of Support—Mostly*, *twincities.com*, Oct. 21st 2014

phone and discovered the picture, Michaela decided to come forward with her story to encourage others of her age not to make the same mistake.

Broadly speaking, a proper societal response to sexting focuses on two competing interests. First, as evidenced by both state and federal legislative responses, society has taken a very forceful approach to combat child pornography. Child pornography offenders--no matter their ages--are punished under very stringent criminal penalties. Working counter to this first interest of eliminating child pornography and punishing offenders is society's recognition that minors often engage in destructive behavior, such as sexting, but they are not mature enough to appreciate the social harm that is a product of such behavior. Accordingly, these minors should not face criminal law punishment for sexting. The harms that result from sexting include the possibility that the sexted content can ultimately end up in the possession of a child pornographer. An additional concern is that material that is initially consensually sexted may later be forwarded without the photo subject's consent.

To neutralize these competing interests, one researcher has proposed a relatively comprehensive prosecutorial protocol. Although she has not utilized the "sexting" moniker, Mary Graw Leary, a former deputy director for the Office of Legal Counsel at the National Center for Missing and Exploited Children and the former director of the National Center for the Protection of Child Abuse, has explored the issue of child "self-exploitation" in great detail. Leary argues that prosecutors should assess a number of factors to determine whether juvenile

prosecution is appropriate in a particular sexting case.⁷⁸ She divides the factors into two overarching categories: offender specific and crime specific. For the offender-specific considerations, Leary argues that prosecutors should assess why the juvenile engaged in the activity, the frequency of the juvenile's activity, and the juvenile's age and support network. As for the second factor, the crime itself, Leary suggests that prosecutors consider “the circumstances around the exploitation, whether or not other youths are brought into the production, the role of this particular youth in the production, whether it was for commercial purposes, or profit motive, the extent of the distribution, the theme of the images, and the severity of the images.”⁷⁹ By assessing these factors, the state can determine if prosecution is required or another approach is more appropriate.

In contrast to Leary's juvenile prosecution option, another researcher has countered that juvenile punishment under the “heavy hand” of the criminal law is not an appropriate response. Stephen Smith, a professor at the University of Virginia School of Law, equates sexting prosecutions to the prosecution of suicide attempts.⁸⁰ He argues that in both instances, the person is calling out for help, and as such, “[t]he proper response of a compassionate society is to help people in those situations, not to add legal troubles and incarceration to their list of woes.”⁸¹ Smith adds that society needs a realistic approach under which prosecutors must recognize a distinction between conventional child pornography and self-

⁷⁸ 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).

⁷⁹ *Id.*

⁸⁰ See Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 *Va. J. Soc. Pol'y & L.* 505, 513 (2008).

⁸¹ *Id.*

produced child pornography; the harsh punishments were created for the former. As such, Smith argues that in sexting cases, prosecutorial implementation of harsh criminal laws is not wise and accordingly, Leary's prosecutorial guidelines are unnecessary.

Following a similar approach, other researchers have broadly criticized the criminalization of sexting.⁸² Several satellite offices of the American Civil Liberties Union (ACLU) have also urged lawmakers to eliminate criminal-law solutions to sexting.

On the other hand, advocates for harsh penalties make two main arguments. For one, legislatures purposefully did not make age distinctions when they passed child pornography laws. Accordingly, because the Supreme Court has recognized that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance,” a court or even a prosecutor refusing to apply a child pornography statute--even one with harsh attendant consequences--to a minor who engages in nonconsensual sexting would be inappropriate.⁸³ Related to this assertion is the fact that, no matter the age of the perpetrator, the existence of child pornography is harmful to the children depicted, to other children exposed to the child pornography, and to society as a whole. Punishment proponents can therefore argue that prosecutors should utilize child pornography statutes, even those with harsh attendant punishments, in an

⁸² Nonconsensual sexting has also been referred to as “malicious” sexting. See Peggy O’Crowley, *The Sexting Generation*, Inside Jersey (Sept. 21, 2009, 3:34 PM), http://www.nj.com/insidejersey/index.ssf/2009/08/the_sexting_generation.html

⁸³ Ferber at 757

effort to deter any circulation of child pornography. Although this Comment recognizes the potential life-changing circumstances that can result from nonconsensual sexting, it nonetheless urges legislators to update or adopt laws to more sensibly address and deter such sexting

Upon study of the sexting laws in effect in other states and in consideration of the concerns at hand with the situation now, some guidelines for the enacting of sexting laws or other preventative measures in Minnesota are as follows:

1. Clarity in Legislative Intent: Lawmakers must clarify the legislative intent behind child pornography statutes by updating laws or creating new ones that are applicable in both consensual and nonconsensual sexting circumstances. Legislators probably did not anticipate that prosecutors would utilize child pornography laws against the very same people whom the laws were designed to protect.⁸⁴

The reason why child pornography laws are being used to prosecute cases of teenage sexting is because the legislative intent behind child pornography laws was not cleared out.⁸⁵ Although child pornography laws were enacted to protect minors from sexual exploitation by adults that intent has been ignored when prosecutors have used the statute to prosecute the group that it intended to protect.⁸⁶ The same should not be done with teenage sexting statutes. Also prosecuting sexting teenagers

⁸⁴ Eric Latzer, THE SEARCH FOR A SENSIBLE SEXTING SOLUTION: A CALL FOR LEGISLATIVE ACTION, 41 Seton Hall L. Rev. 1039 (2011).

⁸⁵ 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).

⁸⁶ Id.

under child pornography laws makes them both the perpetrator and the victim of the act of sexting since the primary sender would be prosecuted for dissemination of child pornography and at the same time be a victim for sexual exploitation.⁸⁷ Therefore prosecution under child pornography laws yields absurd results. The Minnesota legislature should make the statutes such that it is clear that the purpose of the laws is to address teenage indiscretion. The level of crime and degree of punishment from such laws should make it clear that the laws are for prosecution of teenagers.

2. Consensual Sexting: In the *A.H.* case the sexts were sent between consenting minors.⁸⁸ But the court disregarded the defendant's argument for right to privacy and ruled that the legislature had an interest in curbing dissemination of sexts and that consensual sexting can turn into non-consensual sexting.⁸⁹ The court failed to understand that there is no embarrassment or psychological harm when in the absence of any coercion the sext is kept between intended parties and not distributed to unintended parties.⁹⁰ It is nor the government's job to speculate on the consequences of consensual sexting and impose its own moral reservations on teenagers. Therefore, the sexting statute in Minnesota should be mindful of consensual teenage sexting and should not

⁸⁷ Id.

⁸⁸ *A.H.*, 949 So. 2d 234, 239

⁸⁹ Id.

⁹⁰ Id.

criminalize teenage sexting when it is done without any sort of coercion and the sexts is strictly kept between the intended parties.

3. Prosecutorial Discretion: Without proper legislative action, prosecutors will continue to wield considerable discretion in determining how to combat sexting.⁹¹ When discretion in sexting cases rests solely with a prosecutor, he or she typically acts in a manner designed to send a message to the sexting offenders.⁹² Sometimes the message is harsh. Other times, the prosecutorial message is more reasonable. No matter the severity of the ultimate message sent, many prosecutors are clearly intent on limiting sexting.

Currently prosecutors have a lot of discretion when it comes to charging sexting teenagers under child pornography statutes. This is a very dangerous situation because without adequate legislative intent to guide prosecutors, such wide discretion may be abused. In the *Miller* case, the prosecutor clearly abused his discretion when, instead of making a good faith effort to enforce the rule of law, he was adamant about making the teenagers choose between the completion of a counseling session and facing charges of child pornography. The case illustrates that prosecutors sometime choose to make examples out of sexting teenagers and send out a harsh message. Therefore, legislative guidance should be provided to ensure that the administration of law is uniform and there are no unreasonable charges dished out.

⁹¹ See supra note 71

⁹² Id.

4. Preventative Education: Due to the sensitive nature of teenage sexting, the criminal justice system is not the only body that should be used to address it.⁹³ Taking lessons from the New Jersey model various other modes such as schools, parents, and the media can be used to let teenagers know about the dangers of sexting.⁹⁴ Schools may be required to have mandatory discussions about the legal and personal consequences of sexting. Also parents also need to come into grasp with the realities of the technological era we live in. Parents need to understand that cell phones and other technologies can be used in ways that can potentially very harmful for the teenager. Therefore, the dialogue between parents and children needs to be more updated than a simple discussion about the birds and the bees. Parents need to explain to their children the serious ramification of teenage sexting. Since today's teenagers shape a large portion of their lives and lifestyle decisions based on popular culture, the media can be used as a way to increase awareness about the dangers of teenage sexting.
5. Registration as Sex Offender: Lawmakers must eliminate sex-offender registration requirements for teens in all sexting circumstances Legislators can easily accomplish this task by punishing nonconsensual sexting offenders with misdemeanor charges. Under current child pornography laws, if convicted the teenager needs to register as a sex offender. But this punishment is disproportionate to the offense of sending sexts. Besides Juvenile sex-offender registration can trigger harsh

⁹³ See supra note 71

⁹⁴ Id.

consequences. They may have to drop out of school and/or lose future job prospect. Many researchers find sex offender registries problematic because they are not effective in preventing further sexual crimes; they give the public a false sense of safety, and they damage the lives of juvenile sexual offenders.⁹⁵ Researchers Longo and Calder make the most persuasive argument against the use of sex offender registration with juveniles. They note that when the sex offender registration is applied to juveniles, issues regarding cognitive ability, mental illness, and development are not considered.⁹⁶ Yet, these play large roles in juvenile offending. Additionally, Calder notes the role of denial in juvenile sex offending is unique. Most juvenile sex offenders do not understand their behavior, and they must overcome that denial and work through that fear to create behavioral changes. One of the largest fears is that the reaction of the community and sex offender registration validates that fear, allowing the juvenile to believe there is no possibility of change. Thus the requirement for registration as sex offender needs to be eliminated, at least in cases where there is no malice.

6. Media: Over the past few decades, the direct influence of radio, film, magazines, and television on adolescents' sexual attitudes and behaviors is noteworthy. Where sexting is concerned, it seems reasonable to speculate

⁹⁵ Robert E. Longo & Martin C. Calder, *The Use of Sex Offender Registration with Young People Who Sexually Abuse*, in *Children and Young People Who Sexually Abuse* 334 (Martin C. Calder ed., 2005) (noting that “conservatively, this means that over 150,000 juvenile sex offenders appear on sex offender registries”).

⁹⁶ *Id.*

that the media will have an even stronger influence on adolescent perceptions, as confusion surrounding the issue is stifling input from other sources. Although some media outlets have attempted to disseminate a responsible message, it is unclear how effective these efforts will be, especially in contrast to the multitude of competing-and likely more alluring-information. One of the most promising media initiatives has come from MTV, a television network with a predominantly teenage audience. The network developed a campaign called “A Thin Line,” which is designed to empower adolescents to identify, respond to, and stop the spread of digital abuse. It is based on the understanding that there is “a ‘thin line’ between what may begin as a harmless joke and something that could end up having a serious impact” on the life of an adolescent.⁹⁷ In addition to the campaign's website, MTV has aired various public service announcements regarding sexting and other forms of digital abuse as well as an MTV news special called “Sexting in America: When Privates Go Public.”⁹⁸ The special documents the stories of teenagers who have been caught up in sexting scandals-both those who were prosecuted and those who were fortunate enough to escape criminal sanctions-and details the emergence of sexting in various forms of pop culture, from popular television shows to hit songs to celebrities who have quite literally been caught with their pants down. The final portion of the special discusses the potential criminal implications of sexting. It is difficult to estimate the

⁹⁷ A Thin Line, <http://www.athinline.org/about> (last visited Dec. 14, 2015).

⁹⁸ Sexting in America: When Privates Go Public, A Thin Line <http://www.athinline.org/videos/17-sexting-in-america-part-1> (last visited Dec. 14, 2015).

type of impact that this campaign will have but-if the nearly twelve thousand people connected with “A Thin Line” on Facebook are any indication-MTV is, at the very least, getting a positive message out there. The fact remains, though, that not every message churned out by the media is quite as helpful. Just as it is confusing for adolescents “to be encouraged on the one hand via cultural messages to experiences the joys of sex, and then to be told on the other that sexual abstinence and saying no is the only acceptable course,” it is likely that mixed messages from the media will only serve to obscure the real risks of sexting. Though Microsoft has been accused of supporting sexting in advertisements for its Kin phone, the makers of the iPhone seem to have walked away unscathed despite the highly suggestive (and deceptively named) “Safe Sexting” application (or “app”). The app allows iPhone users to take nude photographs and then select from four boxes (one of which is translucent) to cover up one's most private areas.⁹⁹ What proponents of this feature fail to mention, however, is that it may not actually be safe at all, especially for teenagers. Though the criminal penalties vary from state to state, many child pornography laws allow adolescents to be prosecuted-though they are not entirely nude-if the picture on which the charges are based is sufficiently provocative. While the adage “sex sells” means that the media will likely never exhibit an entirely proper message with regards to sexting, media outlets have a responsibility to their audience to, at the very

⁹⁹ See Jennifer van Grove, *Safe Sexting? There's an App for That, Too*, Mashable: The Social Media Guide (Dec. 23, 2009), <http://mashable.com/2009/12/23/safe-sexting/>.

least, get the facts straight and, because highly impressionable adolescents are involved, think twice about the messages they are sending.

Most juvenile sex offenders do not understand their behavior, and they must overcome that denial and work through that fear to create behavioral changes. One of the largest fears is that the reaction of the community and sex offender registration validates that fear, allowing the juvenile to believe there is no possibility of change

IV. CONCLUSION

The law as it is right now has lots of contradictions.¹⁰⁰ It prosecutes the same group of people, which was intended to be protected by it. It labels the same person as the victim and the perpetrator. There should be avenue, other than the criminal justice system, that can be used to address the issue of sexting. It is not rational to give sentences up to 7 years in prison and requiring teenagers to register as sex offenders, not at least in the absence of any malice. It is time that law caught with the pace of the technology and the legislature enacted statutes that correctly address the target group and provide appropriate punishments.

¹⁰⁰ Robert 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 (2010).