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## Education Is the Most Appropriate Response to the Phenomenon of Voluntary Teen Sexting

The Erin Levitas Initiative for Sexual Assault Prevention

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# EDUCATION IS THE MOST APPROPRIATE RESPONSE TO THE PHENOMENON OF VOLUNTARY TEEN SEXTING

February 10, 2020

The Erin Levitas Initiative for Sexual Assault Prevention<sup>1</sup>

## I. UNDERSTANDING THE PHENOMENON OF SEXTING

### A. Sexting is a Prevalent Practice Among Teens

Since the advent of cellphones—and smartphones in particular—sexting has become relatively common among adolescents. For most adolescents who sext, it is one way they explore their sexuality, trust, boundaries, and intimacy.<sup>2</sup> In 2019, 95% of teens had access to cellphones, and 97% used at least one of the seven major online platforms.<sup>3</sup> A recent meta-analysis published in the *Journal of the American Medical Association* (JAMA) reveals that approximately 15% of adolescents ages 11-17 have sent a sext, and over a quarter of adolescents have received a sext (27.4%).<sup>4</sup> An even more recent 2019 study reports that at least 18.5% of middle and high schoolers report receipt of sexually explicit videos or images on their phones or computers.<sup>5</sup> Because the phenomenon of sexting is fairly new, there are multiple definitions of sexting. Many of these definitions overlap in some way, usually describing sending and receiving sexual messages via

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<sup>1</sup> This White Paper was a collaborative effort of members of the Erin Levitas Initiative for Sexual Assault Prevention at University of Maryland Carey School of Law, namely Levitas Fellow Jenna Balaban, J.D. '19, Emma Duncan J.D. '20, Jason Christie J.D. '21, Ignacio Atlas Brown J.D. '21, and Kathryn Lawryszak J.D. '21, under the guidance of Levitas Initiative Director C. Quince Hopkins, JD, LL.M., JSD.

<sup>2</sup> *What Is Sexting?*, KIDS HELP PHONE, <https://kidshelpphone.ca/get-info/what-sexting> (last visited Aug. 3, 2020).

<sup>3</sup> MONICA ANDERSON & JINGJING JIANG, PEW RESEARCH CENTER, TEENS' SOCIAL MEDIA HABITS AND EXPERIENCES (Nov. 28, 2018), [https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2018/11/PI\\_2018.11.28\\_teens-social-media\\_FINAL4.pdf](https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2018/11/PI_2018.11.28_teens-social-media_FINAL4.pdf) (cited in *In re* S.K., 466 Md. 31, 42 n.7, 215 A.3d 300, 307 n.7 (2019)).

<sup>4</sup> Sheri Madigan et al., *Prevalence of Multiple Forms of Sexting Behavior Among Youth: A Systematic Review and Meta-analysis*, 172 JAMA PEDIATRICS 327 (2018).

<sup>5</sup> *In re* S.K., 466 Md. 31, 43 n.11, 215 A.3d 300, 307 n.11 (2019).

technology.<sup>6</sup> Black’s Law Dictionary defines sexting as “the creation, possession, or distribution of sexually explicit images via cellphones.”<sup>7</sup>

Most teens with access to their own smartphone do not sext.<sup>8</sup> Of those who do sext, there are a number of demographic breakdowns to be aware of. Boys and girls are equally as likely to send a sext (27.8% of boys and 27.5% of girls).<sup>9</sup> However, boys are more likely than girls to ask someone to send a sext (46% of boys vs. 21% of girls), and girls are more likely than boys to be asked to send a sext (68.4% of girls vs. 42.1% of boys).

While sexting is often casually talked about as a single concept, there are in fact multiple types of sexting requiring different legal responses.<sup>10</sup> Sexting can be divided into primary and secondary sexting. With primary sexting, one teen sends an explicit message of themselves to another teen (usually consensually).<sup>11</sup> Secondary sexting occurs when an individual sends explicit images of another person to their friends, posts it online, or otherwise shares it without the depicted person’s consent.<sup>12</sup> There is also a distinct difference between voluntary and coerced sexting.<sup>13</sup> Voluntary sexting is the voluntary transmission of explicit images between two people—this often occurs between people in a relationship as a form of flirtation. Coerced sexting occurs when one

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<sup>6</sup> *Sexting: Facts, Information and Advice on the Consequences*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/teens/bullying-safety-privacy/all-about-sexting> (last visited Aug. 3, 2020); *What Is Sexting?*, KIDS HELP PHONE, <https://kidshelpphone.ca/get-info/what-sexting> (last visited Feb 4, 2020); Elana Pearl Ben-Joseph, *Sexting: What Parents Need to Know (for Parents)*, KIDSHEALTH FROM NEMOURS (2018), <https://kidshealth.org/en/parents/2011-sexting.html> (last visited Aug. 3, 2020).

<sup>7</sup> *Sexting*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>8</sup> Eric Rice et al., *Sexting and Sexual Behavior Among Middle School Students*, 134 PEDIATRICS e21–e28 (2014), <https://pediatrics.aappublications.org/content/134/1/e21>.

<sup>9</sup> Jeff R. Temple et al., *Teen Sexting and Its Association with Sexual Behaviors*, 166 ARCH. PEDIATRIC ADOLESCENT MED. 828 (2012).

<sup>10</sup> Jamie L. Williams, *Teens, Sexes, & Cyberspace: The Constitutional Implications of Current Sexting & Cyberbullying Laws*, 20 WM. & MARY BILL RTS. J. 1017, 1030 (2012).

<sup>11</sup> Rosario Del Rey et al., *Sexting Among Adolescents: The Emotional Impact and Influence of the Need for Popularity*, 10 FRONTIERS PSYCH. 1828 (2019).

<sup>12</sup> *Id.*

<sup>13</sup> Poco D. Kernsmith et al., *Online, Offline, and Over the Line: Coercive Sexting Among Adolescent Dating Partners*, 50 YOUTH & SOC’Y 891 (2018).

party puts pressure on the other to send the images. Pressure can include threats of social ostracism, rumor-spreading, or a breakup.

According to one survey, 70% of teens surveyed felt some form of pressure or coercion to sext.<sup>14</sup> Twelve percent of surveyed teens “always” felt pressure or coercion to send a sext, and 58% “sometimes” felt full or partial pressure or coercion to send a sext.<sup>15</sup> Only half as many girls as boys who sexted indicated that they “always” voluntarily sexted (25% of girls vs. 48% of boys).<sup>16</sup> All of the students who said they “always felt pressured or coerced” to sext were girls.<sup>17</sup> Only 30% of the students said that they always sexted voluntarily.<sup>18</sup> This data shows that sexting is not consistently voluntary for any demographic surveyed.

Intense fear and serious threats are the most common types of pressure or coercion. Twenty-three percent of those students who never sexted voluntarily said they felt “seriously threatened or scared” and that is why they sexted.<sup>19</sup> However, only 7% and 9% of the “partially pressured” groups indicated that they were seriously threatened or afraid.<sup>20</sup> Many of the sexters who felt pressured to sext were mostly female, and indicated that they sent sexts to a *potential* boyfriend.<sup>21</sup> Voluntary sexters, by contrast, were more likely to send sexts to a *current* boyfriend or girlfriend.

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<sup>14</sup> Elizabeth Englander, *Coerced Sexting and Revenge Porn Among Teens*, BULLYING, TEEN AGGRESSION & SOCIAL MEDIA, Mar./Apr. 2015, at 19–21.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

### ***B. There is Mixed Evidence on Whether There is a Connection Between Sexting and Risky Behavior***

Digital technology is an increasingly popular form of exploration of identity and of adult romantic relationships.<sup>22</sup> It is common for teens to look refer to their peers to understand what is considered normal and as such, sharing their sexual desires through digital communication is more typical than atypical today of this day and age.<sup>23</sup> However, due to their youth, teens are not always aware of the risks they take when choosing to sext. During adolescence, the brain undergoes numerous changes. Even at the end of this transition to adulthood, adolescents' brains are not fully developed. Most importantly, the prefrontal cortex—the area of the brain involved in decision-making and self-control—does not develop until early adulthood.<sup>24</sup> Because of this, researchers have begun to explore whether teenage sexting can lead to other types of risky sexual behavior. The research is not clear on whether there is a definite correlation between sexting and risky behavior. According to some research, there is a correlation between sexting and risky sexual behaviors—but only for girls.<sup>25</sup> However, other researchers have found that sexting is not related to sexual risk behavior or psychological well-being.<sup>26</sup> More research is needed in this area to further investigate whether sexting leads to risky behavior, or if sexting is a normal behavior part of teen sexual exploration.

### ***C. Secondary Sexting and Prosecution are Both Harms Associated with Sexting***

Harm from sexting arises most often from secondary sexting, and involuntary or coerced primary sexting.<sup>27</sup> As mentioned previously, secondary sexting occurs when the person who

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<sup>22</sup> April Gile Thomas & Elizabeth Cauffman, *Youth Sexting as Child Pornography? Developmental Science Supports Less Harsh Sanctions for Juvenile Sexters*, 17 NEW CRIM. L. REV. 631 (2014).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Temple et al., *supra* note 9.

<sup>26</sup> Deborah Gordon-Messer et al., *Sexting Among Young Adults*, 52 J. ADOLESCENT HEALTH 301 (2013).

<sup>27</sup> Englander, *supra* note 14.

receives the sext from the primary sexter then forwards that sext to others without permission.<sup>28</sup> It is secondary sexting that causes the most harm, especially to the primary sexter. Two incidences of secondary sexting are illustrative, one involving an 18-year-old named Jessica Logan and a 13-year-old named Hope Whitsell. Both were primary sexters who had their nude photos circulated by their boyfriends; both were severely bullied and harassed; and both committed suicide as a result of the harassment.<sup>29</sup> Even for primary sexters who are not bullied to the point of suicide, the harassment and humiliation they face can have severe psychological consequences, including anxiety and depression.<sup>30</sup>

In addition to the harassment that primary sexters—who are usually young women—face when their sexts are circulated by secondary sexters, they also face the possibility of prosecution in the unfortunate event that their sexts become public. The most recent example of such prosecution is *In re S.K.*, a Maryland case involving a sixteen year old who sent a sext to her friends, who then engaged in secondary sexting by forwarding it to others. She was arrested and later adjudicated delinquent for the acts of distributing child pornography and displaying an obscene item to a minor (i.e. to her friends).<sup>31</sup> Authors LiJia Gong and Alina Hoffman discuss why this kind of prosecution is so harmful for a young person, who ends up being both the respondent and the victim.<sup>32</sup> Particularly in instances when the victim of secondary sexting is a young woman, prosecution for primary sexting, they argue, is a form of slut-shaming—shaming women and girls for expressing their sexuality.<sup>33</sup> According to Gong and Hoffman, slut-shaming of any kind can

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<sup>28</sup> Williams, *supra* note 10, at 1030.

<sup>29</sup> Thomas & Cauffman, *supra* note 22.

<sup>30</sup> *Id.*

<sup>31</sup> *In re S.K.*, 466 Md. 31, 215 A.3d 300 (2019).

<sup>32</sup> LiJia Gong & Alina Hoffman, *Sexting and Slut-Shaming: Why Prosecution of Teen Self-Sexters Harms Women*, 13 GEO. J. GENDER & L. 577 (2012).

<sup>33</sup> *Id.*

cause significant emotional distress and lead to social isolation, and victims of slut-shaming may be more likely to be targets of future sexual aggression.<sup>34</sup> In situations like these, the result is even worse; a juvenile adjudicated delinquent for distributing child pornography may have to register as a sex offender for life.<sup>35</sup> However, state responses to the phenomenon of sexting, legislative and otherwise, are wide-ranging and have undergone significant evolution since the inception of sexting in the current digital age. It is most useful to look at their individual development over time, and to that end, this paper discusses several state trends and approaches in response to sexting.

## II. U.S. STATE RESPONSES TO TEEN SEXTING

Currently, some states prosecute teen sexting through their existing child pornography statutes, while others have adopted a spectrum of statutes that offer reduced criminal penalties or provide educational and restorative alternatives.

Maryland's proposed HB 501 pulls inspiration from several sources.<sup>36</sup> At the court's discretion, first-time minor-offenders will partake in educational alternatives.<sup>37</sup> Alternately, malicious or habitual offenders may find themselves facing more serious criminal offenses for their repeated conduct.<sup>38</sup>

### A. *States Initially Turn to Pre-existing Child Pornography Statutes*

States' early responses to teen sexting were through state child pornography laws. Beginning around 2009, charges and convictions against teen sexters arose in states across the

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<sup>34</sup> *Id.*

<sup>35</sup> Thomas & Cauffman, *supra* note 22.

<sup>36</sup> Compare with Colorado's alternative approaches, *infra* notes 53-58, see also one-bite-at-the-apple predecessors: N.J. STAT. § 2A:4A-71.1; VT. STAT. ANN. tit. 13, § 2802b.

<sup>37</sup> H.B. 501, 2020 Leg., 441st Sess. (Md. 2020), <http://mgaleg.maryland.gov/2020RS/bills/hb/hb0501f.pdf>.

<sup>38</sup> *Id.*

country.<sup>39</sup> Successful prosecution yielded substantial consequences for implicated teen actors. Specifically, teens convicted under state child pornography laws could expect such possible outcomes as felony jail sentences, permanent criminal records, and requirements to register as a sex offender.<sup>40</sup>

In response, legal challenges to these child pornography prosecutions for sexting emerged. In *State v Canal*, the Supreme Court of Iowa issued one of the first appellate rulings on the validity of child pornography prosecutions for teen sexting. In *Canal*, an eighteen-year-old high schooler emailed two nude pictures to a fourteen-year-old girl classmate.<sup>41</sup> Though the boy only sent the photos after repeated prompting from the girl, the court upheld the conviction, which required the boy to register as a sex offender.<sup>42</sup> A number of higher courts in other states followed suit in teen sexting cases brought under their own states' laws.<sup>43</sup>

Perhaps most concerning, higher courts' validations of child pornography prosecutions for teen sexting have led to legislative inertia in some statehouses. Harsh outcomes, like that of *Canal*, have not prompted some states to respond with new statutory guidelines more finely tuned to address the circumstances of teen sexting. Like twenty-five other states, Iowa continues to prosecute teen sexting through child pornography laws.<sup>44</sup> Maryland itself remains entrenched in

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<sup>39</sup> See Kimberlianne Podlas, *The "Legal Epidemiology" of the Teen Sexting Epidemic: How the Media Influenced a Legislative Outbreak*, 12 PITT. J. TECH. L. & POL'Y 1 (2011) (detailing 2009 examples in PA, IN, OH, NJ, CA, NJ, NY and FL).

<sup>40</sup> Though the county prosecutor's office was eventually enjoined from bringing charges, *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009), offers a great example of potential consequences, as the prosecutor in the case threatened the teens at issue with all three outcomes.

<sup>41</sup> *State v. Canal*, 773 N.W.2d 528 (Iowa 2009). One of the photos was of the male's face and one was of his erect genitals.

<sup>42</sup> *Id.*

<sup>43</sup> *A.H. v. State*, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007); *People ex rel. T.B.*, 2019 CO 53, 445 P.3d 1049 (2019).

<sup>44</sup> Sameer Hinduja & Justin W. Patchin, *State Sexting Laws: A Brief Review of State Sexting and Revenge Porn Laws and Policies*, CYBERBULLYING RSCH. CTR. (updated Nov. 2018), <https://cyberbullying.org/state-sexting-laws.pdf>.



this camp. As mentioned in the previous section, Maryland’s highest court upheld the conviction of a female minor for sexting with friends under child pornography laws in 2019.<sup>45</sup>

***B. Alternative Routes Applying the Harsh Penalties of Child Pornography Statutes Gives Some States Pause***

Not all states have followed Iowa’s lead. With sexting’s growing prevalence as a means of expression for teenagers, some states have responded by revising their child pornography statutes or creating new statutes that specifically address teen sexting. In her analysis of Idaho’s recently enacted statutes on sexting, Kacey Jones offers a comprehensive synopsis of the spectrum of options in other states that have chosen alternative routes:

Generally, states that have drafted sexting statutes or revised their existing child pornography statutes consider the following factors: the age of the sender and recipient, the conduct involved, voluntariness and state of mind, and the penalty structure. Some state statutes specifically use the term “sexting.” Some statutes address sending a sext but not receiving one, while other statutes address both. Some statutes impose misdemeanor or felony penalties while others impose diversionary or informal sanctions. Some statutes provide for affirmative defenses and others still allow for sex-offender registry. . . . [P]rogressive states are examining “new laws providing informal punishments to underage youths such as counseling, community service, and Internet safety education, perhaps without any juvenile record of the misdemeanor offense as long as coercion, blackmailing and other serious offenses aren’t involved.”<sup>46</sup>

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<sup>45</sup> *In re S.K.*, 466 Md. 31, 215 A.3d 300 (2019).

<sup>46</sup> Kacey Jones, Note, *Teenage Sexting Statutes: A Critical Examination of Idaho Code 18-1507a and an Argument Against the Criminalization of Consensually Shared Sexts*, 54 IDAHO L. REV. 643, 652–53 (2018).

As the overview suggests, statutes can be as idiosyncratic as the states in which they have been enacted. Within this menagerie of options, however, a spectrum emerges. As an example of how different the conclusions of lawmakers can be on these issues, we next examine two states as a contrast in styles, options, and consequences.<sup>47</sup>

1. The Incrementalism of Blanket Felony Prosecution and Affirmative Defenses Offers a Path Still Too Similar to the Status Quo

In Nebraska, all sexting offenses are treated as felonies.<sup>48</sup> Recent revisions to the code have made an exception for minors who make a “visual depiction” solely of themselves.<sup>49</sup> However, this exception would not be extended to, for instance, a minor that took a consensual photo of another minor or with another minor. Under Nebraska law, such photos could meet the standard of “sexually explicit” if they depict anything in a range from “real or simulated intercourse” all the way to simply “erotic nudity.”<sup>50</sup> As a counter measure of sorts, Nebraska, along with eight other states, allows the accused a set of affirmative defenses.<sup>51</sup> Shifting the burden of proof, those on trial can attempt to prove additional factors, such as if the images were shared consensually or that the sender and receiver of an image have a close proximity in age.<sup>52</sup> The affirmative defense model offers an opportunity for defendants to make their case. Yet forcing such minor-defendants to prove elements before the court can lead to drawn-out litigation, additional court and legal fees and the further trauma such extended uncertainty can cause.

2. Limiting Charges and Exploring Alternatives to Criminal Prosecution Provides Minor-Offenders a Chance to Live and Learn

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<sup>47</sup> As the examples below show, even sharing a similar geographic location and border can give no hint to the stark differences from one state to the next.

<sup>48</sup> NEB. REV. STAT. ANN. § 28-1463.04.

<sup>49</sup> NEB. REV. STAT. ANN. § 28-1463.03.

<sup>50</sup> NEB. REV. STAT. ANN. § 28-1463.02(5).

<sup>51</sup> Hinduja & Patchin, *supra* note 44.

<sup>52</sup> See Jones, *supra* note 46, at 644 n.7.

Sharing a border with Nebraska, but few of its inclinations on teen sexting, Colorado stands as a stark contrast to its northeastern neighbor. Enacting new legislation to deal specifically with teen sexting in 2017, Colorado deals with every type of potential situation as either a civil infraction or misdemeanor.<sup>53</sup> While malicious distribution or coercion can lead to a more serious misdemeanor charge, the statute also asks the court to assess the appropriateness of restorative justice practices as part of any decision.<sup>54</sup> Such services can be made available to both the victim and defendant.<sup>55</sup> Further, Colorado law outlines a gamut of options under its restorative justice definition that gives courts broad discretion to partner with the parties to “right-size” strong alternatives to traditional criminal law responses.<sup>56</sup>

Colorado’s law also accounts for the terrible potential consequences of burdening a minor with a criminal record. All case records are kept in the custody of the court.<sup>57</sup> If offenders complete their sentence and/or alternative program, forty-two days later their sexting offense is expunged from their record.<sup>58</sup>

Colorado’s revisions contemplate an exciting alternative to traditional methods of addressing teen sexting behavior. But for legislators in other states who would delay action on the

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<sup>53</sup> COLO. REV. STAT. § 18-7-109.

<sup>54</sup> COLO. REV. STAT. § 18-1-901 (o.5).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* The definition reads in full: “Restorative justice practices’ means practices that emphasize repairing the harm caused to victims and the community by offenses. Restorative justice practices include victim-offender conferences, family group conferences, circles, community conferences, and other similar victim-centered practices. Restorative justice practices are facilitated meetings attended voluntarily by the victim or victim’s representatives, the victim’s supporters, the offender, and the offender’s supporters and may include community members. By engaging the parties to the offense in voluntary dialogue, restorative justice practices provide an opportunity for the offender to accept responsibility for the harm caused to the victim and community, promote victim healing, and enable the participants to agree on consequences to repair the harm, to the extent possible, including but not limited to apologies, community service, reparation, restoration, and counseling. Restorative justice practices may be used in addition to any other conditions, consequences, or sentence imposed by the court.”

<sup>57</sup> COLO. REV. STAT. § 18-7-109 (6).

<sup>58</sup> *Id.* For a less progressive predecessor, see also VT. STAT. ANN. tit. 13, § 2802b (b)(4), which allows for expungement when an offending minor turns eighteen.

teen sexting front, Colorado’s history also serves as a reminder and a warning. While pending legislation continued its trek to enactment in 2016, a teen sexting case slowly made its way up to the appellate state courts of Colorado. In *People ex rel. T.B.*, a juvenile texted a nude photo of his erect penis to two underage girls, getting them to reciprocate by sending nude photos of themselves.<sup>59</sup> When prosecutors brought charges against the boy, they did so with child pornography laws that would soon be replaced for incidences of sexting. In 2019, the Supreme Court of Colorado sat *en banc* and found the “erotic nudity” of the sent photos meant the boy’s conviction could be upheld. While the court stated that some would find its holding “unfair, especially given the recent changes in the law addressing juvenile sexting behavior,” it also acknowledged that if child pornography laws were their only route of analysis, “we must apply the law in effect at the time of . . . [the] conduct.”<sup>60</sup> We urge the Maryland legislature to adopt a nuanced and education-based statute to handle teen sexting and put a stop to the harms caused by the current system of delinquent adjudication and possible sex offender registration for minors who sext.

### **III. EDUCATION FOR TEENS ABOUT THE PHENOMENON OF SEXTING**

Bearing in mind the consequences of various approaches to adjudicating incidences of teen sexting discussed in the previous section, states and legislators have grappled with the best approach to achieve the appropriate level of deterrence, while protecting victims of coerced or secondary sexting from harm. As teenage brains are not fully developed and can be greatly harmed through criminal prosecution or delinquency adjudication, education is a more appropriate response to sexting for the reasons detailed below.

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<sup>59</sup> *People ex rel. T.B.*, 2019 CO 53, 445 P.3d 1049 (2016).

<sup>60</sup> *Id.*

***A. As education has many benefits and little to no harm, it should be the primary means to address sexting.***

There are a great number of benefits to educating minors in lieu of prosecuting them or adjudicating them delinquent for voluntary, non-coerced sexting. As explained in section two, research has shown that education is the best solution to the problem and that other solutions—such as prosecution or delinquency adjudication—cause harm. Not only does education reduce the instance of sexting, but it also improves the outcomes of the teens who are referred to educational programs instead of prosecuted or adjudicated. Education is also the only proven way to avoid the reputational harms that teens may face from secondary sexting in which teens' sexts are disseminated to others without their consent, or legal sanctions. Further, most adolescents do not know about the possible personal or legal ramifications for sexting. We assert from our own experience that an educational program is the most effective approach to teen sexting, harms the teens less, and would likely have a large deterrent effect on the behavior itself. Finally, the law should consider the differences between primary and secondary sexting, and between voluntary and coerced sexting, and react accordingly—with education being the primary remedy for primary and voluntary sexting and possible criminal sanctions being a more appropriate remedy for coerced or secondary sexting.

Education has been proven to deter the act of sexting.<sup>61</sup> Regardless of the type of sexting at issue, a reduction in sexting reduces the risk of harm to teens be it prosecutorial, reputational, or otherwise. Further, the current deterrents of prosecution or delinquency adjudication and resulting sanctions fail to effectively address sexting.<sup>62</sup> Worse yet, prosecution of teens who sext

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<sup>61</sup>Joseph Paravecchia, Note, *Sexting and Subsidiarity: How Increased Participation and Education from Private Entities May Deter the Production, Distribution, and Possession of Child Pornography Among Minors*, 10 AVE MARIA L. REV. 235, 242–48 (2011); Williams, *supra* note 10, at 1042–43.

<sup>62</sup> Paravecchia, *supra* note 61.

has been proven to cause irreparable harm to the teens involved. As discussed in both previous sections, teenagers who sext may be charged with a misdemeanor, felony, or be required to register as sex offenders.<sup>63</sup> Requiring teenagers who voluntarily send text messages as a means of flirtation with their significant other to register as sex offenders can carry life-long consequences of isolation and ostracism for the teens involved.<sup>64</sup> Early criminal “labelling” often has a negative psychological impact on teenage offenders.<sup>65</sup> None of these outcomes works towards the goal of protecting minors from distribution of sexual images of them, nor do they benefit the teenagers involved in any measurable way, which is why education is crucial in these circumstances.

Further, as discussed in section one, the teenage brain is not as capable of appreciating long-term consequences as the adult brain and therefore, most teens cannot grasp the myriad possible harms of sexting while engaging in the behavior. The prefrontal cortex—responsible for decision-making and conscious thought organization—begins to develop in early adolescence, but does not fully develop until age 25.<sup>66</sup> The teen frontal lobe, responsible for logic and planning, thus isn’t fully “online”.<sup>67</sup> It follows that teenagers, even if they are aware of the possible consequences of sexting, are not able to fully process the long-term harms that could result from the behavior. As teenagers cannot comprehend the long-term effects of their behavior, we have a responsibility to educate them, not punish them, for their developmentally appropriate risk-taking behaviors.

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<sup>63</sup> Angela D. Minor, *Sexting Prosecutions: Teenagers and Child Pornography Laws*, 60 HOW. L.J. 309 (2016); *In re S.K.*, 466 Md. 31, 52, 215 A.3d 300, 312 (2019) (citing MD. CODE ANN., CRIM. PROC. § 11-704(c)(1)).

<sup>64</sup> Minor, *supra* note 63.

<sup>65</sup> *Id.*

<sup>66</sup> Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449 (2013).

<sup>67</sup> *Id.*

Finally, we have experienced the difference that education can make in attitudes towards sexting first-hand. We taught our ERIN Talk curriculum—a series of facilitated modules on healthy boundaries, communication, and gender—with seventh grade students at a middle school in Baltimore City in the spring and again in the fall of 2019. We teach a module on sexting, focusing on *In re S.K.* in particular, and we discuss the impact sexting can have on the futures of the students we teach should the outcome of that case remain the law in Maryland. During the session in the spring of 2019, the seventh graders were horrified to learn that a behavior they see regularly could get them prosecuted, jailed, and registered as sex offenders for life. From their reactions it was clear that they had no idea that these were the possible consequences—to them sexting was just something a lot of kids did for fun, like a riskier form of social media. We were able to educate them on these potential consequences, but they were clear in their befuddlement that the young person in *In re S.K.* was both a victim (of secondary sexting), and yet was also the one penalized. The following fall we taught the same module with the same case, but the responses were vastly different. When we asked the students what possible harms could occur from sending sexual text messages, they responded with everything from “they should think of their parents first” to “things like that never go away.” It turned out that in between our spring session and the session held the following fall, a sexting scandal involving one of their then-sixth grade classmates had occurred at the school. In reaction to the scandal, the school had educated these students on the possible harms of sexting. When we spoke with these now-seventh graders, it was clear that they now understood the possible consequences and that they should think twice before sending explicit text messages. It is clear from our experience that education about the consequences of sexting works, and that it can take as little as one session to help youth understand the problems that can occur and make smart choices for themselves and their futures.

***B. The law should focus on education for primary sexting and prosecution for secondary sexting, as well as voluntary versus coerced sexting, as they are distinctly different crimes with vastly different outcomes for those involved.***

While education is appropriate for voluntary primary sexting, both secondary and involuntary or coerced sexting should be treated differently by the legislature. Sanctions, like those discussed above, are more appropriate for sexting cases where the action is not consensual or where the image is distributed without the consent of the person whose image it is. Legislation that takes a different approach to different types of sexting will serve the dual purposes of protecting minors from exploitation by way of pornography while still allowing those who voluntarily send photos of themselves to get an education on the possible repercussions of their actions before they end up in the juvenile justice system. We urge the legislature to consider whether criminal penalties are appropriate for primary voluntary sexting offenses. In considering this point, we urge the legislature to take into account the possible long-term ramifications an encounter with the juvenile justice system will have on the futures of these children.

#### **IV. CONCLUSION**

Despite its recent development, sexting is a statistically common behavior among young people today. Unless the sexting results from pressure or coercion, or is involuntary secondary sexting, it has become a new iteration of a normal suite of behavioral tendencies and issues that are part and parcel of adolescence. The law should acknowledge that normal teen behavior, but instead Maryland law treats them as child pornographers. Education is a proven alternative deterrent, and one the Levitas Initiative has seen at work firsthand. Limiting harm to young people should be a central goal of the law, and implementing an educational response is the most appropriate avenue to address the phenomenon of voluntary consensual sexting.