

# Round Up the Usual Suspects: Advocating for Leniency on Consensual, Teenage Sext Offenders

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## Recommended Citation

Jaclyn A. Machometa, *Round Up the Usual Suspects: Advocating for Leniency on Consensual, Teenage Sext Offenders*, 14 U. Md. L.J. Race Relig. Gender & Class 303 (2015).

Available at: <http://digitalcommons.law.umaryland.edu/rrgc/vol14/iss2/5>

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**ROUND UP THE USUAL SUSPECTS:<sup>1</sup>**  
**ADVOCATING FOR LENIENCY ON CONSENSUAL,**  
**TEENAGE SEXT OFFENDERS**

Jaclyn A. Machometa<sup>2</sup>

“Twenty-first century technology has transformed human relations,”<sup>3</sup> and teenagers are at the forefront of this revolution. Among American teens, ages twelve to seventeen, one study found that 75% have cell phones and 72% prefer text message as their method of communication.<sup>4</sup> Additionally, most importantly for our purposes, 83% of teens report using their phones to take pictures.<sup>5</sup> These statistics illustrate the natural progression of technological human interaction and how, if teens communicate most frequently via text, typical occurrences in teenage relations such as talking, flirting and courting may occur via these mediums, as well.

One manifestation of this behavior is “sexts” or sexually explicit text and images exchanged via electronic mediums. Teenage sexting appears to be an increasingly pervasive problem for school administrators and parents to address and, because the content of these messages include sexually explicit imagery of minors, legislators and prosecutors have begun to sweep sexting within the ambit of state child pornography laws. Unbeknownst to most ill-informed teens, sexting can lead to very serious legal consequences.

Remember age sixteen when you thought you were in love?  
Just the mere thought of one’s companion led to the most

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<sup>1</sup>Adapted from the famous line in the movie *Casablanca* spoken by Officer Renault. See generally *CASABLANCA* (Hal B. Wallis Production 1942).

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<sup>3</sup> Terri Day, *The New Digital Dating Behavior—Sexting: Teens’ Explicit Love Letters: Criminal Justice or Civil Liability*, 33 HASTINGS COMM. & ENT. L.J. 69, 70 (2010).

<sup>4</sup> Amanda Lenhart et al., *Teens and Mobile Phones*, PEW RESEARCH INSTITUTE (April 20, 2010), <http://www.pewinternet.org/2010/04/20/teens-and-mobile-phones/>.

<sup>5</sup> *Id.*

uncomfortable yet addicting butterflies. The novelty of those emotions led to memorializing behaviors such as saving movie ticket stubs, saving receipts from dates, or taking pictures whenever the moment felt worth remembering.

Akin to those normal experiences adolescents have, A.H. thought she was in love. To “appreciate” the moment, when she and her boyfriend engaged in legal, consensual sexual conduct, she sought to memorialize the act by taking pictures.<sup>6</sup> Now, while the appropriateness of her act is questionable, the consequences that ensued from A.H. subsequently sending those pictures to her boyfriend is anything but. For her act, A.H. was charged with violating Florida’s child pornography law where, ironically, she was both victim and offender.<sup>7</sup> While charging teenagers with dissemination of child pornography may be appropriate in outlier situations involving nonconsensual or exploitative sexting, charging teenagers for consensual sexting, especially in instances where the teenager is both offender and the victim, does little to support the justice our legal system seeks to attain. Particularly, this dual victim/offender charge creates a paradox of finding culpability based upon age while simultaneously disregarding how age contributes to said culpability.

As sexting is both a novel social and legal issue, current law on the subject continues to undergo rapid change, uncertainty and *ad hoc* application. From these circumstances and cases like in *A.H.*, the need for reform is clear. While the harms of sexting such as, the risk of embarrassment, social stigma, or victimization by cyber bullies may be clear to adults, the consequences, as science suggests, are less clear to the ever-maturing adolescent mind. Almost all of us can attest to using the phrase, “If only I knew then what I know now.” Aside from our personal experiences, psychology and neuroscience continue to produce empirical data to prove that adolescent minds differ immensely from those of adults.<sup>8</sup> Thus, the question remains as to the justness of criminalizing minors’ conduct under laws created with the purpose and intent of protecting minors from the abuse of predatory adults. Unless legislators, prosecutors, and judges can answer this question in the affirmative and point to evidence that these charges

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<sup>6</sup> *A.H. v. State*, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007).

<sup>7</sup> *Id.* at 235–36.

<sup>8</sup> *See infra* Part II.D.

successfully deter teenage sexting, criminalization of teenage sext offenders appears wholly unjust and causes more harm than good.

Part I of this Comment will define common terminology used in sexting cases and will identify the prevalence of teenage sexting in today's technologically driven world. Part II will explore the road leading to the creation of "teenage sext offenders" by addressing relevant legal background. In Part III, I will argue that criminalization is the wrong response to consensual, teenage sexting because it fails to (1) consider how age affects behavior as evidenced by scientific research, (2) align with the purpose and intent behind legislating against child pornography, and (3) meet the goal of deterrence which it seeks to achieve. In Part IV, I will argue that the better response to teenage sexting is a two-tiered solution: (Tier I) decriminalization of teenage sexting by state legislatures through statutes that allow for selective intervention and (Tier II) prevention through school-based education – tying sexting awareness to anti-bullying initiatives under the subset of cyber bullying (as most adults feel sexting leads to exploitation) which can be used by school administrators and parents to teach awareness, promote good decision-making and effectively discourage the unwanted consequences of teenage sexting. Finally, in Part V, I will highlight potential counterarguments to my analysis and the two-tiered approach and in Part VI, I conclude with some aspirations for comparable issues in the future.

## I. LET'S TALK ABOUT SEXT

### A. *Defining Sexting*

In colloquial use, a "sext" refers to any sexually suggestive content sent via an electronic medium including but not limited to text messages or e-mails.<sup>9</sup> Although messages containing only written text may sometimes create legal liability,<sup>10</sup> the primary source of criminal

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<sup>9</sup> Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues – Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL'Y & L. 487, 492–94 (2010) (noting that sexting is a word coined by the media that has been frequently used since 2008).

<sup>10</sup> For example, text-based sexting can constitute sexual harassment. *See, e.g.,* Kurtts v. Chiapratric Strategies Grp., Inc., No. 09-0712-M, 2011 WL 833978, at \*4 (S.D. Ala. Mar. 4, 2011) (holding that "[p]laintiff has demonstrated a prima facie case of hostile work environment because of Dr. Morgan's sexual harassment" by means of

liability for child pornography arises out of visual depictions – text messages containing sexually explicit photos.<sup>11</sup> “Sexting” refers to any digital transmission of sexually suggestive or explicit photographs or videos intended for personal use.<sup>12</sup> “Sexting image” refers to a sexually suggestive or explicit photograph or video included in the sext. Sexting involves five parties: (1) the creator of the image (2) the subject of the image, (3) transmitter or disseminators of the image (this could be anyone listed thus far or a third-party), (4) the intended recipient of the image, and (5) any unintended, third-party recipients. In many sexting cases, these categories frequently overlap causing great confusion on how to appropriately address the issue.

Sexting also occurs in various types of situations.<sup>13</sup> “Consensual sexting” occurs with the consent of the subject of the sexting image, the transmitter of the image, and the recipient of the image.<sup>14</sup> In many instances of consensual sexting, the creator, the subject, and the transmitter and/or disseminator are all the same person.<sup>15</sup> I will refer to situations like this as “auto-pornography.”

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sexually suggestive text-only messages, but finding against the plaintiff on other grounds.”)

<sup>11</sup> Joanna R. Lampe, *A Victimless Sex Crime: The Case for Decriminalizing Consensual Teen Sexting*, 46 U. MICH. J.L. REFORM 703, 704 (2013).

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

<sup>13</sup> The November 2014 issue of *The Atlantic*, “Why Kids Sext And What to Do About It,” by Hanna Rosin, provides the perfect illustration of the complexity of party relationships that often overshadow most media-highlighted cases of teenage sexting. Hanna Rosin, *Why Kids Sext and What to Do About It*, THE ATLANTIC (Nov. 2014) 64. Rosin’s article provides an in-depth look into a mixed consensual and non-consensual/exploitative scandal that overtook Louisa County, Virginia this past year. *Id.* After a 15 year-old female self-reported to police that she had found her self-taken, sexually explicit image on an Instagram page, county officials soon learned that nearly every teenager in the county had partaken and/or been affected by this scandal. *Id.* “The girls on the Instagram page came from ‘all across the board – every race, religion, social, and financial status in town. . . if she was a teenager with a phone, she was on [the Instagram page].”” *Id.* at 67. Deputy Lowe, the primary investigator on the case, quickly discovered that the majority of the internet-published sexts originated through auto-pornography between two consenting teenagers with the purpose and intent of flirtation and emotional expression. What the participating sext offenders failed to foresee was the dissemination of their sexts amongst peers – some of which had exploitative intent – creating a prime medium for cyber-bullying. *Id.* at 64–77.

<sup>14</sup> Lampe, *supra* note 11, at 704.

<sup>15</sup> *E.g.*, *A.H.*, 949 So. 2d at 235.

Conversely, “non-consensual” or “exploitative sexting” occurs without the consent of either the subject of the sexting image, the sender of the image, and/or, in some cases, the recipient of the image. Within the subset of non-consensual or exploitative sexting, three additional situations emerge: predator-induced sexting,<sup>16</sup> non-consensual transmission to third parties,<sup>17</sup> and cyber-bullying.<sup>18</sup> This Comment will argue for decriminalization of consensual, teenage sexting and advocate for an education-based remedy. However, I will use some examples of cases that fall into the category of non-consensual or exploitative sexting to better draw distinctions on why decriminalization should occur for the former category.

### *B. Identifying the Prevalence of Teenage Sexting*

Studies indicate that sexting among teenagers is prevalent, but why do teens sext? According to one study, 51% of teen females report they do it because they feel pressure from the male, while only 18% of teen males state the reason for sexting is pressure from the female. For both genders, the most cited reason for sexting is to be “fun or flirtatious,”<sup>19</sup> with a majority of sexts occurring in consensual circumstances (71% of teen females and 67% of teen males report sexting their boyfriends or girlfriends).<sup>20</sup> Contrariwise, 36% of teen

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<sup>16</sup> Where the individual depicted in the image was coerced to participate and send the sexting image for fear of retaliation or blackmail invoking what typically is defined as “exploitation.” See Complaint at 4-5, *State v. Stancl*, No. 2008WK010779 (Wis. Cir. Ct. Feb. 4, 2009), available at [http://www.wired.com/images\\_blogs/threatlevel/files/redactedstancl.pdf](http://www.wired.com/images_blogs/threatlevel/files/redactedstancl.pdf).

<sup>17</sup> Typically where the recipient of the sext then proceeds to transmit the sext to third parties without consent of the subject-sender. See *Miller v. Mitchell*, 598 F.3d. 139, 143 (3d Cir. 2010) (discussing that students were trading sexually explicit pictures over their cell phones).

<sup>18</sup> Akin to instances where there is a “transmission to third parties” with the additional requirement of the transmission being sent to a population of individuals with the malicious intent to harm, embarrass and or bully the sender-subject of the sexting image. Randi Kaye, *How a Cell Phone Picture Led to a Girl’s Suicide*, CNN (Oct. 7, 2010), <http://www.cnn.com/2010/LIVING/10/07/hope.witsells.story/>.

<sup>19</sup> The National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults*, at 4 (2008), available at [http://thenationalcampaign.org/sites/default/files/resource-primary-download/sex\\_and\\_tech\\_summary.pdf](http://thenationalcampaign.org/sites/default/files/resource-primary-download/sex_and_tech_summary.pdf).

<sup>20</sup> *Id.* at 2.

females and 39% of teen males report that it is common to share sext images with third parties beyond the intended recipient.<sup>21</sup> Additionally, 25% of teen females and 33% of teen males say they themselves have shared sext images with others. Finally, in an effort to gauge these teens' values, the study asked "How teens...feel about sending/posting sexually suggestive content?"<sup>22</sup> Seventy-five percent of teens said that sending sexts can have seriously negative consequences, yet still 59% of these teens engage in the practice.<sup>23</sup>

Most importantly, these statistics indicate that (1) sexting is prevalent, regardless of the reason why participants engage in the activity and (2) while 75% of study participants indicated sexting can lead to "serious negative consequence," only 16% appeared to be deterred from engaging the behavior. Why does knowledge of serious consequences fail to deter teen sexting? Knowledge of these consequences most likely fails to promote deterrence because the majority of sexting teens feel they are being "fun and flirtatious" which apparently outweighs any potential negative outcomes that may arise from their behavior. Unfortunately, for these teens, under federal and many current state laws, this activity constitutes a serious crime.

## II. LEGAL BACKGROUND: THE ROAD TO CREATING TEENAGE SEXT OFFENDERS

### A. *Child Pornography Statutes: Purpose and Intent*

Under the federal child pornography statute, a maximum sentence of 30 years in prison is warranted for:

"[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person...with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct."<sup>24</sup>

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<sup>21</sup> *Id.* at 3.

<sup>22</sup> *Id.*

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

<sup>24</sup> 18 U.S.C. § 2251, commonly known as the "Child Protection Act."

In drafting the Child Protection Act, Congress' stated concerns were: (1) child pornography has developed into a highly organized, multi-million dollar industry which operates on a nationwide scale; (2) thousands of children, including large numbers of runaway and homeless youth, are exploited in the production and distribution of pornographic materials; and (3) the use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the individual child and to society.<sup>25</sup>

Since its passage, the Supreme Court has issued many decisions explaining the purpose of the Child Protection Act.<sup>26</sup> In *New York v. Ferber*, the Court stated § 2251 was created to prevent the "sexual exploitation and abuse of children," highlighting multiple studies that document "the harmful effect of sexual exploitation on children later in life and link children's participation in pornographic materials to molestation by adults."<sup>27</sup> In *Ferber*, the Court identified the State's interest in the creation of child pornography laws as safeguarding the physical and psychological well-being of minors which outweighed the alleged freedom of speech claim. Moreover, the Court noted that the activity involved in child pornography constituted an illegal act itself (child sexual abuse).<sup>28</sup>

Later in *Osborne v. Ohio*, the Court again held that possession of child pornography could be criminalized under the rationale that child pornography images resulted from child sexual abuse.<sup>29</sup> And, more recently, in *Ashcroft v. Free Speech Coalition*, the Court clarified *Ferber* and *Osborne* by more explicitly linking child pornography to the underlying nature of its illegal activities and stating child pornography has an "intrinsic" relationship to the sexual abuse of children making it unprotected speech. Thus these cases illustrate that exploitation is central to the statutory definition of child pornography. According to Merriam-Webster's Dictionary, exploit means "to make

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> The Court used the word "exploit" or its synonyms over twenty times in the opinion. 458 U.S. 747, 757–62 (1982).

<sup>28</sup> *Id.* at 761.

<sup>29</sup> 495 U.S. 103, 109–11 (1990).

use of meanly or unfairly for one's own advantage."<sup>30</sup> By using the word exploit, the Court and state statutes seem to be implicitly concerned with adults' misuse of power over a child that results in the loss of dignity.<sup>31</sup>

In the absence of laws explicitly addressing sexting, prosecutors rely upon state child pornography statutes to criminalize teenage sexting. The seriousness of these charges, in some cases with an imprisonment term of thirty years<sup>32</sup> or registration as a sex offender,<sup>33</sup> arguably are appropriate in cases where sexting is exploitative and secondary to the defendant's predatory conduct.

For example, Anthony Stancl (age 19), extorted sex from 31 juvenile males, aged 15-17, after posing as a female on Facebook and convincing them to sext him. Prosecutors charged Stancl with multiple felonies, including sexual assault, child enticement and possession of child pornography.<sup>34</sup> In his plea agreement, he pled "no contest" to two

<sup>30</sup> Merriam-Webster Online Dictionary, *Exploit*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/exploit>, (last visited Dec. 6, 2013).

<sup>31</sup> John A. Humbach, *'Sexting' and the First Amendment*, 37 HASTINGS CONST. L.Q. 443, 464-65 (2010).

<sup>32</sup> *See, e.g.*, 18 U.S.C. § 2251(e): "Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and **imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction** under this chapter... or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and **imprisoned for not less than 25 years nor more than 50 years**" (emphasis added).

<sup>33</sup> Title I of the Adam Walsh Act, 42 U.S.C. § 16912, enacted the Sex Offender Registration and Notification Act (SORNA), which requires all jurisdictions to create a sex offender registry compliant with federal standards with the purpose of creating a "seamless web of public sex offender database." *See* Press Release, Department of Justice, Office of Justice Programs, Justice Department Announces First Two Jurisdictions To Implement Sex Offender Registration and Notification Act (Sept. 23, 2009), *available at* <http://www.ojp.usdoj.gov/newsroom/pressreleases/2009/SMART09154.htm> [hereinafter DOJ, SORNA Implementation].; The jurisdictions subject to SORNA include all fifty states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, the Northern Mariana Islands, and federally recognized Native American tribes. *See* 42 U.S.C. § 16911(10).

<sup>34</sup> *See supra* note 16, at 1-3.

sexual assault charges and thus was sentenced to fifteen years in prison and thirteen subsequent years on extended supervision.<sup>35</sup> In Stancl's case, not only was exploitation clearly present – in the sense than he misused his power over children resulting in their loss of dignity – but he also committed illegal acts of child sexual abuse that coincided directly with what Congress and the Supreme Court sought to prevent.

*B. Child Pornography Laws As Applied to Consensual, Teenage Sexting*

Dissimilar to Stancl's case, the notion of exploitation is harder to identify in the case of A.H. (age 16) who took photographs of herself and her boyfriend (age 17) engaged in lawful sexual conduct.<sup>36</sup> For her role in taking the pictures, A.H. was convicted of a second-degree felony for violating Florida's child pornography statute prohibiting "producing, directing or promoting a photograph or representation that she knew to include the sexual conduct of a child."<sup>37</sup>

When A.H. appealed alleging a violation of her constitutional right to privacy, a Florida appellate court reasoned that "[m]inors who are involved in a sexual relationship, unlike adults who may be involved in a mature committed relationship, have no reasonable expectation that their relationship will continue and that the photographs will not be shared with others intentionally or unintentionally."<sup>38</sup> The court went on to explain its reading of the statute's purpose and intent as applied to this case:

[T]he statute is not limited to protecting children only from sexual exploitation by adults, nor is it intended to

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<sup>35</sup> Laurel Walker, *Stancl Gets 15 Years in Prison in Facebook Coercion Case*, MILWAUKEE J. SENTINEL (Feb. 24, 2010), available at <http://www.jsonline.com/news/waukesha/85252392.html>.

<sup>36</sup> *B.B. v. State*, 659 So. 2d 256, 259–60 (Fla. 1995) (holding that the state constitutional right of privacy prevented prosecution of sexual activities between minors and criticizing the prosecution's theory under which the law would have been utilized not "as a shield to protect a minor, but rather... as a weapon to adjudicate a minor delinquent.").

<sup>37</sup> A.H., 949 So. 2d at 235.

<sup>38</sup> *Id.* at 237.

protect minors from engaging in sexual intercourse. The state's purpose in this statute is to protect minors from exploitation by anyone...The State's interest in protecting children from exploitation in this statute is the same regardless of whether the person inducing the child to appear in a sexual performance and then promoting that performance is an adult or a minor.<sup>39</sup>

The court continued by clarifying that A.H. “was simply too young to make an intelligent decision about engaging in sexual conduct and memorializing it.”<sup>40</sup> On the first point of statutory interpretation, the majority and dissent agreed that the statute’s intent was “to protect minors from exploitation by anyone who induces them to appear in a sexual performance.”<sup>41</sup> However, on the second point, the majority and dissent disagreed on whether the term “anyone” included A.H. “exploiting” herself.<sup>42</sup> If child pornography statutes are meant to protect minors from *abuse by others*, then statutes should not apply to minors who voluntarily create and transmit sexts of themselves to others.

Moreover, if more than one minor consensually participates in the creation and transmission of a sext, did they exploit themselves individually, each other concurrently, or both? Has exploitation even occurred at all? Can someone “meanly or unfairly mak[e] use [of something they consented to] for their own personal advantage?”<sup>43</sup> These inquiries demonstrate the ambiguity that arises out of attempting to answer whether self-created or “auto-pornographic” sexts involve exploitation at all.<sup>44</sup>

In another auto-pornographic case, *Miller v. Mitchell*,<sup>45</sup> a high school principal confiscated students’ cell phones, and upon discovering photos of “scantily clad, semi-nude and nude teenage

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<sup>39</sup> *Id.* at 238.

<sup>40</sup> *Id.* at 238–39.

<sup>41</sup> *Id.* at 238.

<sup>42</sup> *Id.* at 239 (Padovano, J., dissenting) (explaining that the statute was not meant to protect the abuse by others nor to punish the teen sexter for her own mistake).

<sup>43</sup> *See supra*, note 30.

<sup>44</sup> *See supra*, Part II.A.

<sup>45</sup> *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009), *aff’d sub nom.* *Miller v. Mitchell*, 598 F.3d 129 (3d Cir. 2010).

girls,” turned the phones over to the district attorney. The district attorney subsequently conducted an investigation and threatened approximately twenty-five students with filing child pornography charges unless they agreed to complete a counseling-diversion program.<sup>46</sup>

In *Miller*, the creators, subjects and disseminators of the two sexts were the same individuals. The parents of the girls moved to enjoin the filing of criminal charges alleging infringement on their constitutional right to raise their children autonomously if their children were forced to attend an education program they inherently disagreed with.<sup>47</sup> The relevant photos depicted two of the girls, photographed from the waist up, wearing opaque bras; the third girl was wrapped in a towel, positioned just below her breasts.<sup>48</sup>

The district court issued a temporary restraining order against the district attorney’s office.<sup>49</sup> While the appeal was pending, the district attorney decided to forgo the charges against two of the three minor plaintiffs. The Third Circuit upheld the issuance of the temporary restraining order against the third plaintiff concluding that “any prosecution would not be based on probable cause that [the] minor committed a crime, but instead in retaliation for her exercise of her constitutional rights not to attend the education program.”<sup>50</sup>

In light of cases like *A.H.* and *Miller*, and the heightened incidence of teenage sexting, some states have proposed or enacted anti-sexting initiatives to explicitly address the issue, while others leave their laws untouched.<sup>51</sup> A discussion of these anti-sexting initiatives follows.

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<sup>46</sup> *Id.* at 638.

<sup>47</sup> *Id.* at 640.

<sup>48</sup> *Id.* at 639.

<sup>49</sup> *Miller*, 598 F.3d at 145.

<sup>50</sup> *Id.* at 155.

<sup>51</sup> *A.H.*, 949 So. 2d at 235; *Miller*, 598 F.3d at 143.

*C. States' Responses to Teenage Sext Offenders: Anti-Sexting Initiatives*

According to data gathered by the National Conference of State Legislatures, at least thirty-three states and U.S. territories have considered sexting related legislation in the past three years, and in January of 2014, approximately twenty states and Guam have in fact passed laws explicitly addressing sexting.<sup>52</sup>

Those in support of these initiatives say the purpose of the legislation is protection and deterrence. “Teenagers need to get the message that sending a nude photo – even of themselves – is a [punishable] crime.”<sup>53</sup> These legislative actions to curb teenage sexting vary widely in approach and content. Three common types of statutes have emerged thus far. Some initiatives impose criminal liability for (1) the creation and transmission of sexts, even if the image only portrays the creator him or herself. Other states impose criminal penalties (2) not only on those who distribute or disseminate sexts, but also on those who merely possess the image; and finally, a few states (3) focus primarily on education-based interventions in lieu of criminal sanctions.<sup>54</sup>

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<sup>52</sup> See National Conference of State Legislatures, *Sexting Legislation in 2013*, NCSL <http://www.ncsl.org/research/telecommunications-and-information-technology/2013-sexting-legislation.aspx>; see also National Conference of State Legislatures, *Sexting Legislation in 2012*, NCSL, <http://www.ncsl.org/research/telecommunications-and-information-technology/sexting-legislation-2012.aspx>; National Conference of State Legislatures, *Sexting Legislation in 2011*, NCSL <http://www.ncsl.org/research/telecommunications-and-information-technology/sexting-legislation-2011.aspx>; Nat'l Conf. of State Legislatures, *Sexting Legislation in 2010*, <http://www.ncsl.org/research/telecommunications-and-information-technology/sexting-legislation-2010.aspx>; Nat'l Conf. of State Legislatures, *Sexting Legislature in 2009*, <http://www.ncsl.org/research/telecommunications-and-information-technology/sexting-legislation-2009.aspx>.

<sup>53</sup> Quote by Pennsylvania State Representative Seth Grove. *Grove Introduces Legislation to Address Risky Teen Texting*, (Jan 4, 2010), <http://www.repgrove.com/NewsItem.aspx?newsID=4755>.

<sup>54</sup> John Kip Cornwell, *Sexting: 21<sup>st</sup> Century Statutory Rape*, 66 SMU L. REV. 111, 128 (2013). Some examples of these statutes are displayed comparatively in chart format in Appendix A, *infra*.

Just by reflecting on this small sample of recent anti-sexting initiatives, one can see much inconsistency when it comes to articulating what type of sexting conduct state legislatures deem worthy of criminal sanctions. While category (1) appears to be primarily concerned with the actual “transmission” of the sexts, only the proposed Ohio statute, in (1)(C), included the *mens rea* of “recklessness” and the explicit prohibition of “creating, receiving, exchanging or sending” (all verbs that seemingly describe the acts of transmission, distribution and dissemination) and “possessing” materials.<sup>55</sup>

Conversely, states with category (2) statutes seem more concerned with the act of sharing sexually explicit images with others by prohibiting “distribution/dissemination” – verbs typically used in the context of materials being circulated amongst several people, as opposed to just one person.<sup>56</sup> Additionally, the Missouri statute leaves much to be questioned when using the terminology of “public display” along with its prohibition of “possession.”<sup>57</sup>

Though harder to come by, category (3) statutes seem to take a more equitable approach allowing for education or diversion programs in lieu of criminal sanctions; however, when considering the outcome in *Miller*, these statutes may be vulnerable to claims alleging infringement on parents’ constitutional rights.<sup>58</sup> Consequently, while state legislatures seek to remedy the sexting pandemic through creation of new laws to explicitly address sexting in an effort to protect and deter, no one state appears to have the answer on how best to tailor their statutes to meet their ultimate goals. If only state legislatures could turn to other disciplines that study the brain and behavior and know of methods to employ for successful behavior modification.

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<sup>55</sup> OHIO REV. CODE § 2907.324 (introduced, but failed to pass committee stage in 2011).

<sup>56</sup> “Merriam-Webster Online Dictionary, *Distribute*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/distribute>, (last visited Jan. 19, 2015); *see also*, “Disseminate,” MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/disseminate>, (last visited Jan 19, 2015).

<sup>57</sup> MO. REV. STAT. §§ 573.023, 573.037, 573.060.

<sup>58</sup> *Miller*, 598 F.3d at 143; *see supra* Part II.A.2.

*D. Neuroscience, Psychology, and the Culpability of Minors*

The notion that scientific evidence yields insight into adolescent decision-making has influenced several debates on the amount of autonomy adolescents should be given in differing legal contexts. In regards to sexting, however, neuroscience, psychology, and legal precedent lessening adolescent culpability have been completely disregarded by state legislatures and judges alike.

Youth advocates argue adolescents deserve lesser punishment in the criminal justice system because they are less mature than adults, while others disagree.<sup>59</sup> Prior to the creation of a separate juvenile justice system, adults and children who committed crimes were treated identically.<sup>60</sup> As views shifted towards protecting youth, the concept of *parens patriae*, meaning “parent of the country,” allowed states to step in and provide control over whomever they deemed delinquent which typically constituted authority-questioning adolescents.<sup>61</sup> While the value driving the creation of juvenile courts was primarily rehabilitative, emphasis on rehabilitation slowly declined due to an increase in juvenile crime and violence during the late 1970s.<sup>62</sup> State legislatures responded by imposing tougher laws on juveniles,<sup>63</sup> marking nationwide movement towards retribution – embodying what

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<sup>59</sup> See *infra* Part III.A.1. compared to Brief of the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia as Amici Curiae Supporting Petitioner, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-622). The states argue that 16 and 17 year-olds who commit heinous crimes should be placed in adult court and subject to the death penalty. *Id.* at 3–4. The notion that juveniles deserve different treatment than adults in the criminal justice system has existed for little over a century. RICHARD LAWRENCE & MARIO HESSE, *JUVENILE JUSTICE: THE ESSENTIALS*, 13 (2010).

<sup>60</sup> *Id.* at 14. The first juvenile courts were the product of the “child-saving” movement during the 19<sup>th</sup> century, proponents of which believed that rehabilitating youth would benefit the greater good of society. *Id.* at 16.

<sup>61</sup> *Id.* at 12.

<sup>62</sup> One can hypothesize this increase in juvenile crime correlates with the controversy over the Vietnam War. *Id.* at 21–22.

<sup>63</sup> *Id.*

would later be understood by interchangeable metaphors like “hard on crime.”<sup>64</sup>

More recently, youth advocates share the same ideals that underpinned the creation of a juvenile justice system and continue to fight for mitigated criminal responsibility using neuroscience and psychology to scientifically support their arguments.<sup>65</sup> For example, scientific literature studying a common adolescent risk of mixing drugs and alcohol with driving has influenced policy makers to create “graduated licensing” legislation that lengthens the process of obtaining a driver’s license. These statutes gradually increase juvenile exposure to high-risk conditions to better prepare them to make good decisions on the road.<sup>66</sup> Systems like this support the premise that, in certain legal contexts, adolescents deserve different treatment than adults.

The imposition of the death penalty on minors has been another area of law in which neuroscience and psychology have played a large role in shaping. In three recent Supreme Court decisions, the Court invoked developmental research to hold harsh adult sentences for juveniles (death penalty and life imprisonment) unconstitutional under the Eighth Amendment’s prohibition of “cruel and unusual punishment.”<sup>67</sup> In these opinions, the Court emphasized reduced culpability of minors due to their developmental immaturity, their diminished decision-making capacity, their vulnerability to external pressures (including peer pressure), and their unformed characters.<sup>68</sup>

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<sup>64</sup> See generally MAURICE PUNCH, ZERO TOLERANCE POLICING 22 (Mike Hough & Paul Turnbull eds., 2007).

<sup>65</sup> Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, 22 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 2, 158, 160 (2013). This developmental research, accompanied by brain research, has played an increasing role in shaping policies relating to adolescent risk-taking when using drugs, alcohol or recklessly driving in an effort to insulate the risk-taking population’s bad judgment from the grasps of the law. *Id.* at 159.

<sup>66</sup> *Id.* Such conditions include, nighttime driving or driving with other teenage passengers. *Id.*

<sup>67</sup> Bonnie & Scott, *supra* note 65, at 160.

<sup>68</sup> *Id.*

In 2005, the Court in *Roper v. Simmons* held it unconstitutional for juveniles to receive the death penalty, relying heavily upon an amicus brief submitted by the American Psychological Association (APA) to render its final decision.<sup>69</sup> Akin to *Roper*, in *Graham v. Florida*<sup>70</sup> and *Miller v. Alabama*<sup>71</sup> the Court pointed to neurological science in striking down sentences of life imprisonment without parole for juveniles. In *Miller*, the Court held that the research provided evidence of “fundamental differences between juvenile and adult minds” in “parts of the brain involved in behavioral control.”<sup>72</sup>

These repeated invocations of developmental neuroscience and psychology utilized by the Supreme Court are powerful signals of the strong impact this research has had on legal regulation of juvenile crime. The message that immature brain functioning contributes to teenage offending, making youth offenders less culpable than adults, has recently resonated with politicians, the media, and the greater public.<sup>73</sup> In light of the monumental attention sexting has received, one would think neuroscience and psychology would be consulted to best explain the recent phenomenon prior to instigating the nationwide redress via criminalization. However, by reflecting on the number of states with anti-sexting initiatives that criminalize the behavior, even in consensual situations, this has obviously not occurred.<sup>74</sup>

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<sup>69</sup> 543 U.S. 551 (2005). In an amicus brief, the APA argued that “developmentally immature decision-making, parallel[ed] by immature neurological development, diminishes an adolescent’s blameworthiness. Brief for Am. Psychological Ass’n & Mo. Psychological Ass’n. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551, (2005) (No. 03-633), U.S. S.Ct. Briefs LEXIS 437, at \*26. The APA relied heavily on a study which demonstrated that adolescents performed much worse than adults in their decision-making competencies and were less likely to identify or even consider alternative choices to their decisions. *Id.* at \*21 (citing Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Dev. Psychol. 257, 268 (2001). See also *id.* (citing Halpern-Felsher & Cauffman at 271) (concluding that an adolescent’s competence to make mature decisions develops during the later stages of adolescence).

<sup>70</sup> 560 U.S. 48, 69 (2010).

<sup>71</sup> 132 S. Ct. 2455, 2464 (2012).

<sup>72</sup> *Graham*, 560 U.S. at 68.

<sup>73</sup> Bonnie & Scott, *supra* note 65, at 160.

<sup>74</sup> *Id.* at 161.

### III. THE WRONG ANSWER TO TEENAGE SEXTING: CRIMINALIZATION

#### A. *Where Science and Law Disagree*

While social scientists recognize adolescence as a distinct life-stage during which teenagers proceed through on their path from childhood to adulthood, the law generally does not.<sup>75</sup> Instead, lawmakers draw binary age classifications between “minors,” who are presumed to be vulnerable, dependent, and incompetent to make decisions, and “adults,” who are viewed as autonomous, responsible and entitled to exercise their legal rights and privileges in a variety of situations.<sup>76</sup> This plays a large role in the difficulty with addressing teenage sexting. Although adolescent’s inevitability become legal adults for most purposes at age eighteen, the threshold of defining adult status in the legal context is anything but uniform.<sup>77</sup> Policy considerations for creating diverse age classifications reflect several principles such as, convenience, parental rights, child welfare, economic interests and public interest – as well as the widespread social assumption that youths, at a certain age, will become sufficiently mature as a class to be treated like adults for particular statutory purposes.<sup>78</sup>

In the sexting context, binary age classifications fail to consider the most prominent stage of development an individual proceeds through on their path from childhood to adulthood and its impact on their whole being – physically, physiologically, mentally, emotionally and socially. Therefore, by addressing sexting through criminalization, the law fails to consider, as it has in past situations of adolescent criminal activity,<sup>79</sup> how simply being a teenager increases the likelihood of being a teenage offender. This unjustly draws an

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<sup>75</sup> Bonnie & Scott, *supra* note 65.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* This age typically provides most adolescence with the right to vote and the responsibility of selective military service. *See, e.g.*, MD. ELECTION LAW CODE ANN. § 3-102 (2013) or MD. TRANSPORTATION CODE ANN. § 12-304 (2013). For example, in many states, driving privileges are extended to minors at age sixteen while the right to purchase alcohol will not be extended until age twenty-one. OHIO REV. CODE § 4507.01 (A) and OHIO REV. CODE § 4301.20 (N) (5).

<sup>78</sup> Bonnie & Scott, *supra* note 65.

<sup>79</sup> *See supra* Part II.D.

invisible line between what constitutes “normal” and what constitutes “criminal” behavior.

1. Science says Teenage Sexting is Normal, Risk-taking, Reward and Sensation-Seeking Behavior<sup>80</sup>

Teenagers, or “adolescents,” ages twelve through seventeen, as science explains, undergo physical and mental maturation processes where several dramatic changes occur.<sup>81</sup> Professor Laurence Steinberg, a well-known researcher on adolescent cognitive development, proposes that these changes occur under two systems: socioemotional and cognitive control.<sup>82</sup> According to Steinberg, the socioemotional system processes emotions and balances rewards versus punishments in the context of decision-making.<sup>83</sup> The cognitive control system, on the other hand, is attributed to higher executive functioning activities such as impulse control, future thought orientation and deliberation.<sup>84</sup> The interplay between these two systems influences adolescent risk-taking.<sup>85</sup>

From a neurological perspective, this adolescent risk-taking can be best blamed upon the timing of developments in the brain’s structure and function. The research indicates that the prefrontal cortex, the area encompassing the two systems Steinberg describes, matures gradually and this maturation extends over the *entire course of adolescence into early adulthood*.<sup>86</sup> And, as this region controls the brain’s higher executive functions employed in planning and impulse control, it can be best identified as where “maturity” lies in the brain.<sup>87</sup> Maturation between the prefrontal cortex and other regions of the brain also occurs gradually, resulting in *better improvement* over those

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<sup>80</sup> See *infra* Part III.A.1.

<sup>81</sup> Charles Geier & Beatriz Luna, *The Maturation of Incentive Process and Cognitive Control*, 93 PHARMACOLOGY, BIOCHEMISTRY, & BEHAV., 212, 212 (2009).

<sup>82</sup> Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 47, 54 (2009).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Albert K. Chein, L. O’Brien, K. Uckert & L. Steinberg, *Peer Increase Adolescent Risk Taking by Enhancing Activity in the Brain’s Reward Circuitry*, 14 DEVELOPMENTAL SCIENCE F1, F1–F2 (2011).

cognitive functions *over time*.<sup>88</sup> In contrast to the prefrontal cortex, changes in the limbic system around puberty result in an increase of emotional, or for our purposes “sexual,” arousal and in reward and sensation-seeking behaviors.<sup>89</sup> This gap between early increases in sensation-seeking to satisfy newly found sexual desires and later development of emotional and behavioral controls has been described by one scientist as “starting engines without a skilled driver,”<sup>90</sup> and further, may shed light on teenage risk-taking in the sexting context. Sexual desire, arousal functions and behaviors have been long understood to be emotional, reward and sensation-seeking constructs.<sup>91</sup>

If teenagers’ primary reasons for sexting are to be “fun and flirtatious,” as current research sets forth,<sup>92</sup> then their lack of inhibitions can be best blamed upon their changing limbic systems but gradually maturing prefrontal cortex – or using the same analogy – their “revved-up engines lacking skilled drivers.”<sup>93</sup>

In short, the neurobiological hypothesis suggests that teenagers are most attracted to novel and risky activities, like teenage sexting, at a period in their development where *they lack judgment to exercise self-control and to consider the future consequences of their actions*.<sup>94</sup> How appropriate, then, would it be punish teenagers for lacking clear-judgment when their incomplete, neurobiological development caused their risky behavior in the first place?

Research has also documented the social pressure of conformity among peers as well as the pleasure of experimenting with risks, which underpin risk-taking behavior.<sup>95</sup> While irresponsible risks should be avoided, science articulates that risk-taking is also a key developmental process through which adolescents can learn coping

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<sup>88</sup> *Id.* at F7.

<sup>89</sup> *Id.* at F2.

<sup>90</sup> Ronald Dahl, *Affect Regulation, Brain Development and Behavioral/Emotional Health in Adolescence*, 6 CNS SPECTRUM 60, 69 (2001).

<sup>91</sup> *Id.*

<sup>92</sup> *See supra* Part II.B.

<sup>93</sup> *See* Dahl, *supra* note 90, at 69.

<sup>94</sup> *See* Chein et al., *supra* note 87.

<sup>95</sup> Murray Lee et al., ‘*Let’s Get Sexting*’: *Risk, Power, Sex and Criminalisation in the Moral Domain*, 2 INT. J. OF CRIME AND JUSTICE 35, 42 (2013).

mechanisms, independence and self-imposed responsibility.<sup>96</sup> As Steinberg articulates,

Adolescence is often a period of especially heightened vulnerability as a consequence of potential disjunctions between the developing brain, behavioral and cognitive systems that mature along different timetables and under the control of both common and independent biological processes. Taken together, these developments reinforce the emerging understanding of adolescence as a critical or sensitive period for a reorganization of regulatory systems, a reorganization that is fraught with both risks and opportunities.”<sup>97</sup>

If Steinberg’s premise is correct, then there is an argument to be made that imposing criminal sanctions on teenagers during their most vulnerable period of maturation and brain development could be even more detrimental than the risk-taking behavior of sexting itself. More often than not, the focus of public attention and intervention around teenage sexuality has been modes in which adults can suppress risk-taking behaviors of youth.<sup>98</sup> While the ultimate goal of suppression is to preserve the youth virtue, criminalization, resulting in prosecution and potential stigmatization arising out of conviction, could yield feelings of shame – internalized feelings of guilt imposed on an individual by the judgments of others. This shame can lead to actual ‘risk-imposing’ factors such as, alienation, internalized emotional distress, and unhealthy repressive lifestyles.<sup>99</sup>

Additionally, these scientific explanations clearly demonstrate that teenagers physiologically lack the ability to control the risk-taking behaviors they partake in, like sexting, to attain their reward and sensation-seeking desires. As the law would articulate, they lack the capacity to understand the implications of sexting, or as the court in

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<sup>96</sup> *Id.*

<sup>97</sup> Lawrence Steinberg, *Cognitive Affective Development in Adolescence*, 9 TRENDS IN COGNITIVE SCIENCES 69, 69 (2005).

<sup>98</sup> *See* Dahl, *supra* note 90.

<sup>99</sup> *Id.*

*A.H.* put it, minors are simply “too young to make an intelligent decision about engaging in sexual conduct and memorializing it.”<sup>100</sup>

In other words, teenagers just do not understand, appreciate, or know the potential harm involved in sexting, such as mental anguish, harassment, parental punishment, in-school punishment, criminal punishment, or social stigmatization.<sup>101</sup> However, “according to society’s standards, what they are, in most cases, are normal teenagers...fixated on sex, who are making poor judgments – sometimes carelessly cruel or self-destructive.”<sup>102</sup>

To demonstrate this notion, consider a case in Wisconsin, where a seventeen-year-old boy was charged with a series of offenses for sending, without considering the consequences, a nude photo of his ex-girlfriend (age 16) that she had taken of herself and sent to him, to everyone in her e-mail contact list.<sup>103</sup> In a similar case, a fourteen-year-old minor in New Jersey posted “nearly thirty explicit nude pictures of herself on MySpace.com – charges that could force her to register as a sex offender if convicted.”<sup>104</sup> These sext offenders did not know their actions constituted any crime, let alone child pornography, and further, did not think of future consequence prior to acting. Unfortunately for them, criminalization under child pornography laws

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<sup>100</sup> *A.H.*, 949 So. 2d at 238–39.

<sup>101</sup> Robert Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 6–9 (2009).

<sup>102</sup> Clay Calvert, *Sex, Cell Phones, Privacy and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMM. LAW CONSPECTUS 1, 5 (2010); see also, Elizabeth M. Ryan, *Sexting: How the State Can Prevent a Moment of Indiscretion From Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 369 (2010) (“The law often protects minors to a greater degree than it protects adults because ‘juveniles...[lack] the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life.’”).

<sup>103</sup> Richards & Calvert, *supra* note 101, at 8; see also Deborah Feyerick & Shelia Steffen, “*Sexting*” lands teen on the sex offender list, CNN (April 7, 2009), <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html?iref=allsearch> (stating that Phillip Alpert must register as a sex offender until he turns forty-three because as an eighteen-year-old, he was charged with possession and distribution of child pornography and sentenced to five years’ probation).

<sup>104</sup> Beth DeFalco, *Girl, 14, Faces Porn Charges Over Nude MySpace Photos*, VIRGINIAN-PILOT, Mar. 27, 2009 at A5.

or anti-sexting initiatives fails to allow for their obvious lack of capacity.

If teenagers appreciated future consequences of sexting, such as criminal charges and reputational damage, it could conceivably deter them from engaging in this type of behavior.<sup>105</sup> However, as these examples and scientific explanations demonstrate, most teenagers do not possess the level of maturity required to make informed decisions on whether to sext or not. Therefore, the argument that criminalization leads to deterrence fails. In order to truly insulate teenagers from harm, reformation must eliminate the ability for teenagers to be charged under laws that fail to take their obvious lack of capacity – as science so clearly demonstrates – into consideration.

## 2. The Law Says Sexting is Child Pornography – But is It?

Depending on how broad or narrow one defines child pornography, different answers emerge when asking whether sexting constitutes child pornography. From a plain text reading, “*any person*”<sup>106</sup> would include minors as well as adults and link sexting, even if the creator is also the transmitter, to what the law considers a crime so egregious that no protection exists under any U.S. law. However, if one consults Congress’ legislative intent, sexting appears to be a caveat and a necessary exception to child pornography laws. To illustrate, recall Congress’ stated concerns prior to enacting the federal statute.<sup>107</sup>

In applying Congress’ legislative intent to consensual, teenage sexting, many would argue that the Child Protection Act<sup>108</sup> was not created with the intent to punish children for being, well, children. Those in support of this premise might argue that, (1) consensual teenage sexting has not developed into a highly organized, multi-million dollar industry; (2) while any minor, including runaways and homeless youth, can engage in sexting, the consensual nature of the

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<sup>105</sup> Mary Graw Learly, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitations*, 15 VA. J. SOC. POL’Y & L.I., 42-43 (2007).

<sup>106</sup> 18 U.S.C. § 2251.

<sup>107</sup> See *supra* Part II.A.

<sup>108</sup> 18 U.S.C. § 2251.

relationship destroys the notion of exploitation – if exploitation is taken to mean “to make use of meanly or unfairly for one’s own advantage”;<sup>109</sup> and finally, (3) while teenagers who sext may experience harm to their physiological, emotional and mental health § 2251 was created to prevent the “sexual exploitation and abuse of children.”<sup>110</sup> This is also not the case in consensual sexting situations, especially when the creator and transmitter are one in the same. Would self-harm then parallel laws addressing involuntary commitment based on mental illness or suicide which have been long abandoned through prosecutorial direction?<sup>111</sup> I think not; just look at the amount of teens being prosecuted for sexting.<sup>112</sup>

If anything, the physiological, emotional and mental health harms Congress fears would more likely result from having to stand trial for seemingly thoughtless, arguably normal teenage behavior, judged, not by a panel of peers, but rather adults (prosecutors, judges and/or juries) who must adjudicate over a behavior they no longer physiologically understand. For example, the court’s reasoning in *A.H.* illustrates the belief that, teenagers, unlike adults, do not have monogamous, mature relations that last, and thus are too naive to expect their sexually explicit pictures to be kept between themselves.<sup>113</sup> In its own words, the First District Court of Appeals of Florida explicitly articulates that teenagers are not and do not act like adults. Also, in each of the opinions used to end death penalty and life imprisonment sentencing on minors, the Supreme Court continually emphasized the need to reduce culpability for juveniles due to their developmental immaturity, their diminished decision-making capacity, their vulnerability to external pressures, and their unformed characters.<sup>114</sup>

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<sup>109</sup> Merriam-Webster Online Dictionary, *supra* note 30.

<sup>110</sup> *See supra* Part II.A.

<sup>111</sup> Kristin Carr, *The Right to Self-Harm: Legal Issues Concerning Involuntary Psychiatric Commitment for Self-Injury*, 4–5 (May 2004) (unpublished Honors Capstone paper, American University) (on file with professor at <http://www.szasz.com/undergraduate/carrcapstone.pdf>).

<sup>112</sup> *See generally*, Wendy Walsh, Janis Wolak, & David Finkelhor, *Sexting: When are State Prosecutors Deciding to Prosecute?: The Third National Juvenile Online Victimization Study*, CRIMES AGAINST CHILDREN RESEARCH CENTER (NJOV-3), 1 (2013).

<sup>113</sup> *A.H.*, 949 So. 2d at 237.

<sup>114</sup> *Id.*

If science can explain innate differences between adolescents and adults and the law can recognize these differences, as it has in other areas of criminal conduct, why then is this vulnerable class of adolescents considered as culpable as adults? While few state sexting statutes account for minors' lack of capacity by offering education or diversion programs in lieu of criminal sanction, the majority of these newly enacted statutes criminalize sexting the same way child pornography statutes do. They find culpability based on age, but then disregard how age, or lack of brain maturation and control over decision-making processes, contributes to minor culpability. While these statutes are enacted with the primary purpose of deterrence – criminalization, as it currently stands, cannot be the appropriate answer. As the earlier discussed study results demonstrated, 75% percent of teens acknowledge that sending sexts can have “serious negative consequences,” yet still 59% of these teens engage in the practice.<sup>115</sup> Unless the nation is content with a 16% success rate, other remedies must be explored.

#### IV. THE RIGHT ANSWER: A TWO-TIERED APPROACH – SELECTIVE INTERVENTION AND PREVENTION THROUGH EDUCATION

##### *A. Tier I: Decriminalization Allowing For Selective Intervention*

Consensual teenage sexting cases should be removed from the criminal and juvenile justice systems because criminalization (1) fails to consider how age implicates behavior, (2) fails to align with the purpose and intent behind legislating against child pornography, and (3) fails to deter teenagers from engaging in the criminalized behavior. States must reform their laws to stop criminal prosecutions of teenagers for consensual sexting, and instead create programs designed to confront the issue outside of criminal courts. Although there appears to be a growing consensus in the states that prosecution of teenage sexting under either child pornography laws or recently enacted sexting statutes serves as the ideal remedy to address the problem, this response remains wholly inappropriate as it fails to

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<sup>115</sup> National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults*, (2009) 1, 4, [http://www.thenationalcampaign.org/sexttech/pdy/sexttech\\_summary.pdf](http://www.thenationalcampaign.org/sexttech/pdy/sexttech_summary.pdf).

consider scientific evidence that rationalizes consensual sexting as normal, not criminal, behavior.<sup>116</sup>

The ultimate goal of teenage sexting law should be protecting minors, both from the harm at the hands of others and from the equal threat of harm from an overzealous justice system. This sample statute, very closely modeled off of the one proposed by Joanna R. Lampe in *A Victimless Sex Crime: The Case for Decriminalizing Consensual Teen Sexting*,<sup>117</sup> decriminalizes the act of consensual teenage sexting

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<sup>116</sup> See National Conference of State Legislatures, 2011 Legislation Related to “Sexting,” (2012), <http://www.ncsl.org/research/telecommunications-and-information-technology/sexting-legislation-2011.aspx>.

<sup>117</sup> Lampe *supra* note 11, at 726–27 [hereinafter, Lampe’s Statute] (“Model Statute:

1. Definitions:

- a. “Sexting” shall be defined as the transmission of a sexually explicit or sexually suggestive image or video, intended for private use, via digital medium, including but not limited to a personal cellular phone or e-mail account.
  - b. A “sexting image” shall be defined as a sexually explicit or sexually suggestive image or video, intended for private use, transmitted via a digital medium, including but not limited to a personal cellular phone or e-mail account.
  - c. “Minor” shall be defined as any individual ages [insert age range here analogous with the state’s legal definition of a minor].
2. No Minor shall be subject to a criminal prosecution or equivalent juvenile proceedings for the creation, or private possession of a sexually explicit or sexually suggestive digital image of himself or herself.
3. No Person shall be subject to a criminal prosecution or equivalent juvenile proceedings for the creation or transmission via sexting of any sexting image, including sexting images depicting a minor, if the following criteria are met:
- a. If the sexting images depicts only the sender; and
    - i. The sender is a minor as outlined by the state’s legal definition of a ‘minor’; and
    - ii. The sender reasonably believes the recipient is willing to receive the image.
  - b. If the sexting image depicts a person other than the sender:
    - i. The image was created and transmitted with the subject’s knowledge and consent;
    - ii. The sender is a minor as outlined by the state’s legal definition of a ‘minor’; and
    - iii. The subject of the sexting image is a minor as outlined by the state’s legal definition of a ‘minor’; and
    - iv. The sender reasonably believes the recipient is willing to receive the image.

while allowing for charges to be brought in nonconsensual or exploitative situations.<sup>118</sup>

In agreement with Lampe's explanation, "[t]his statute seeks to protect teenagers from the most serious potential harms of sexting while also preventing inappropriate legal interference in victimless teenage behavior." When sexting is consensual, the harm of prosecution, especially of convictions carrying the possibility of jail time and sex offender registration, far outweighs the possibility of

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4. No Person shall be subject to criminal prosecution or equivalent juvenile proceedings for the private possession of a sexting image depicting a minor if:
- a. The image was created with the subject's knowledge and consent;
  - b. The image was possessed with the subject's knowledge and consent
  - c. The subject and possessor are both minors as outlined by the state's legal definition of a 'minor'.
- i. A Minor who lawfully possesses a sexting image shall not be prosecuted as an adult for unlawfully sharing the image via sexting and, if convicted as a juvenile, shall not be required to register as a sex offender.
  - ii. A Minor who unlawfully possesses a sexting image shall not be prosecuted as an adult for this unlawful possession and, if convicted as a juvenile, shall not be required to register as a sex offender.
  - iii. Nothing in this act shall be interpreted to:
    - a. Decriminalize the possession of commercial child pornography, the sale or publication in any publicly accessible forum of any sexually explicit image involving a minor, or sexual exploitation of minors;
    - b. Reduce civil remedies available to a minor whose image is unlawfully created, or transmitted without consent").

<sup>118</sup> See Lampe's Statute, *supra* note 117. My proposed modifications to Lampe's Model Statute include: changing "images to "image" in 1(a); the deletion of "which affords a reasonable expectation of privacy" in both 1(a) and 1(b); the addition of a legal definition of "minor" now 1(c); the addition of "and" following the phrase in 3(a); the deletion of "or is no more than three years older than the recipient in 3(a)(i); the change from "The difference in age between the subject and the sender is no more than three years;" to "The sender and the subject are both minors; and" now 3(b)(iii); the deletion of "The difference in age between the subject and the recipient is not more than three years;" formerly 3(b)(iv); making the former 3(b)(v) "The sender reasonably believes the recipient is willing to receive the image now 3(b)(iv); changing 4(c) "The difference in age between the subject and the possessor is no more than three years" to "The subject and possessor are both minors;" the deletion of 7(b) "Prohibit the use of a legal image as evidence in a prosecution for crimes unrelated to the use or possession of the image, including cases when the activity depicted in the image is alleged to be illegal; or" making formerly 7(c) "Reduce civil remedies available to a minor whose image is unlawfully created or shared" now 7(b).

harm from the activity itself.”<sup>119</sup> This statute prohibits prosecution for nearly all circumstances of fully consensual sexting between minors. It does not, however, remove all teen sexting cases from the reaches of criminal law. Cases where sexting is not voluntary, either on the part of the subject or the recipient, remain subject to criminal sanctions and thus allows for selective legal intervention. This includes cases where the subject did not consent to the creation of the sexting image<sup>120</sup> and cases where the sender did not reasonably believe that the recipient would have consented to receiving the image.<sup>121</sup>

The statute would have no effect on the ability of courts and prosecutors to punish traditional, exploitative child pornography that depicts what courts have frequently described as portrayals of actual child sexual abuse.<sup>122</sup> It ensures that exploitation of children by adults does not constitute protected activity through the consent requirement for the creation, transmission and possession of sexting images. Also, the statute limits the permissible conduct to be between only what the state legally defines as “minors” and further exempts from protection any publication or sale of images by any individual regardless of age.<sup>123</sup>

The goal of the model statute is to create a complete exemption from criminal liability for consensual teen sexting, without providing legal amnesty for adult predators or increasing the general availability of child pornography.<sup>124</sup> The statute is designed to work together with criminal and civil law in dealing with child pornography and sexual harassment, and not to impair the availability of redress for minors whose images are created and transmitted without their consent.<sup>125</sup> While decriminalization will prevent the imposition of unwarranted harms on what scientists do and the law should consider, typical teenage behavior, it does not have a self-executing ability to

<sup>119</sup> See Lampe, *supra* note 11, at 728.

<sup>120</sup> Lampe’s Statute, *supra* note 117, § 3(b)(i).

<sup>121</sup> Lampe’s Statute, *supra* note 117, §§ 3(a)(ii), 3(b)(v).

<sup>122</sup> Lampe’s Statute, *supra* note 117, §§ 4(a–c).

<sup>123</sup> Lampe’s Statute, *supra* note 117, §§ 3–4, 7(a). Had this statute been enacted in Virginia during the 2014 scandal in Louisa County, this section would allow for prosecution of the teenager(s) who were found responsible for the actual publication of the sexts on the Instagram account. See *supra* note 13.

<sup>124</sup> See Lampe, *supra* note 11, at 728.

<sup>125</sup> *Id.* at 728–29.

completely eradicate the problem. Thus, selective legal intervention must be coupled with robust prevention efforts to address the concerns society has with teenage sexting.

*B. Tier II: Prevention Through School-Based Education*

Teenagers spend the majority of their childhood and adolescence in school, and are required to do so by state-specific legal mandates for school attendance.<sup>126</sup> Between the actual school day and extracurricular activities, students regularly interact with school officials and spend significant time in school buildings. From the ages of five to eighteen years old, school plays one of the most influential roles in an individual's life. Therefore, schools have a critical role in the education and protection of teenagers, specifically in regards to prevention of teenage sexting. By incorporating sexting education into their curricula or even programs already in place to address health, wellness, or more appropriately bullying, schools can serve as the primary source of effective deterrence for sexually curious teens. Tying sexting to anti-bullying initiatives would address and appease the primary adult concerns that sexting leads to exploitation.

Primarily, anti-sexting programs in the school settings should be tied to already successful anti-bullying initiatives to lessen the uncomfortable nature of discussing youth sexuality for both educators and students.<sup>127</sup> “Advocates...claim that greater education about the web will teach children and teenagers about the ‘dangers of predators, cyber bullies and sexting’ and will make them think twice about sending out risqué photos of themselves or others.”<sup>128</sup> Sexting lessons would be just one subset of a broader topic of bully prevention – that can and frequently occurs through the use of technology. The lessons should be tailored for the students based on their age, and should be

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<sup>126</sup> See, e.g., MO. REV. STAT. § 167.031 (2013).

<sup>127</sup> Hazelden Foundation, *Violence Prevention Works!: OLWEUS Bullying Prevention Program*, (December 11, 2013), <http://www.violencepreventionworks.org/public/bullying.page>.

<sup>128</sup> Anne Oblinger, *Congress to Push for Education on ‘Sexting,’* CNN POLITICAL TICKER BLOG, (May 13, 2009, 4:05 PM), <http://politicalticker.blogs.cnn.com/2009/05/13/congress-to-push-for-education-on-sexting/?fbid=PhHeKmusAVI>.

initiated in middle school and continue throughout high school.<sup>129</sup> Sexting lessons would educate students on the dangers of sexting, including the potential social and legal ramifications of participating in the behavior.<sup>130</sup>

Curricula should also include information on how to handle the pressures to sext, what to do when receiving unsolicited sexts, and offer ample channels of communication in which students can seek adult counsel without fear of discipline or criminal sanctions.<sup>131</sup> Contrarily, school policies that discipline children for seeking help to deal with sexting could “chill” the likelihood of reports and create a sense of distrust between students and educators. If students feel educators seek to discipline them, something they typically equate with harm, students will be less likely to consider sexting lessons as an effort to protect them and prevent actual harm. Instead, educators should reward students for choosing to seek guidance in dealing with sexting issues to increase the likelihood that students will continue to seek advice and be dissuaded to sext.<sup>132</sup>

Schools should also hold assemblies where community-based education occurs. During these assemblies students could watch short films on the dangers of bullying, cyber-bullying and sexting and through a show of hands to report how they have been negatively impacted by similar situations and regret the choice they made to engage in sexting. Such communal involvement would likely yield students’ realization that sexting is not only a pervasive problem, but also that it negatively affects their peers who, like them, regret the

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<sup>129</sup> See Benjamin Herold, *Miami-Dade Plans to Confront ‘Sexting’ Problem*, EDUCATION WEEK’S DIGITAL EDUCATION BLOG, (July 15, 2009), [http://blogs.edweek.org/edweek/DigitalEducation/2009/07/miamidade\\_school\\_board\\_approve.html](http://blogs.edweek.org/edweek/DigitalEducation/2009/07/miamidade_school_board_approve.html).

<sup>130</sup> See *infra* Appendix B. Allen frames her lesson around various self-knowledge methods complemented by using YouTube, an internet site where anyone is free to post content within the site’s terms of agreement, as the technological medium for her lesson. This seemingly echoes the technology behind sexting while concurrently providing the illustration that positive educational messages can also be found in “cyber-space.”

<sup>131</sup> See *infra* Appendix B.

<sup>132</sup> B.F. Skinner, *Are theories of learning necessary?*, 57 PSYCHOL. REV. 193, 193 (1950) (stating that positive reinforcement results in lasting behavior modification whereas as punishment merely changes behavior temporarily and may present detrimental side effects to healthy adolescent development).

choice to engage in sexting. This self-awareness could allow positive peer influence opposed to negative peer pressure. Additionally, in remembering that sexting can yield true victims; school districts should provide counseling in circumstances where the sexually explicit photo of a student is leaked and/or disclosed to unintended recipients.<sup>133</sup> The counseling would be specifically designed to assist the student in dealing with the emotional trauma associated with the subsequent distribution of his or her picture.<sup>134</sup>

School districts should also work to educate parents about sexting by providing them with literature on how to address the issue of sexting with their children. Specifically, parents should learn to recognize the warning signs of teen sexting and/or cyber-bullying.<sup>135</sup> Although these signs could signal other issues, parents should talk to their children if they display any sort of behavioral or emotional changes.<sup>136</sup> Many times adolescents will not ask for help, so it is important that parents know what to look for; if parents feel their child is sexting or at immediate risk of harming themselves or others, schools should provide literature to on how parents can get immediate help.<sup>137</sup> Several online resources exist to assist schools and parents with anti-sexting prevention efforts and can aid schools in creating a student and parent curriculum to ensure sexting prevention.<sup>138</sup> Schools could write their own materials or simply create a list of online resources parents can choose explore themselves. Regardless of what methods schools choose to use, integrated prevention efforts between school and home will create a united front against teenage sexting and yield more successful, preventative results.<sup>139</sup>

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<sup>133</sup> See Herold, *supra* note 129.

<sup>134</sup> *Id.*

<sup>135</sup> Elaina Verhoff, *Spotting the Signs of Sexting: Sexting Warning Signs*, SHE KNOWS LIVING, (Aug. 1, 2011), <http://www.sheknows.com/living/articles/836487/spotting-the-signs-of-sexting>.

<sup>136</sup> *Id.*

<sup>137</sup> Sarah Theodore, *An Integrated Response to Sexting: Utilization of Parents and Schools in Deterrence*, 27 J. CONTEMP. HEALTH L. & POL'Y 365, 389–90 (2013).

<sup>138</sup> *Id.* at 390.

<sup>139</sup> *Id.* at 388–89.

## V. ADDRESSING COUNTERARGUMENTS TO MY TWO-TIERED APPROACH

A. *Reliance on Science*

The first likely objection to this Comment's argument is my reliance on neuroscience and psychology to delve deeper into understanding the teenage mind. While I acknowledge that courts shy away from evaluating scientific data in rendering decisions because "...[g]iven the nuances of scientific methodology and conflicting views, courts – which can only consider the limited evidence on the record before them – [consider themselves]...ill-equipped to determine which view of science is the right one."<sup>140</sup> Nevertheless, the Supreme Court has also held that, "legislatures also 'are better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'"<sup>141</sup> In other words, even the highest court in the land would agree that legislatures are best equipped to and should consider the relevant scientific and statistical data upon enacting legislation to remedy social problems they seek to address. As the pervasiveness of teenage sexting continues to spread, causing harm by both the offender and an intrusive legal system, this should constitute an instance where legislatures defer to science for guidance on the best remedy. Common sense dictates that, in order to modify an undesired behavior, one must understand the root of that behavior first. Thus, legislatures ought to defer to the experts prior to enacting a potentially superfluous law that runs the risk of harming those in which they seek to protect.

B. *Decriminalization Eradicates Deterrence*

A second likely objection to this Comment's proposed remedy is that decriminalization will make it more difficult to deter teens from engaging in this risky behavior. Critics might argue that decriminalizing teenage sexting will remove the stigma associated with the activity, leading teenagers to believe that this is socially acceptable. They might also argue that the threat of criminal sanction is the only way to prevent more teenagers from engaging in sexting. However, this view is in grave error for two reasons: (1) relying on

<sup>140</sup> *Roper*, 543 U.S. at 618 (quoting *McCleskey v. Kemp*, 481 U. S. 279, 319 (1987)).

<sup>141</sup> *Id.*

science, positive reinforcement outweighs punishment for successful modification of unwanted behaviors, thus arguing punishment is best to instigate behavior modification is incorrect,<sup>142</sup> and (2) relying on the law, the repeated incidence of teen sexting cases currently flooding the courts all have the same facts in common – the culpable minor failed to consider the ramifications of his or her actions. As repeatedly stated, while 75% percent of teens say sending sexts can have seriously negative consequences, 59% of these teens engage in the practice.<sup>143</sup> Again, unless the nation is content with a 16% success rate, other remedies, like my two-tiered approach, must be explored.<sup>144</sup>

## VI. CONCLUSION

It is undeniable that today's media runs rampant with sex, violence, and profanity. Thus, it seems almost laughable to expect teenagers to ignore, disengage or shun the blatant sexuality present all around them. While "do as I say, not as I do," may work in a few contexts, convincing teenagers that sexuality is only meant for adults while it presents itself at every turn is unfounded. And yet, the reaction to teenage sexting appears to convey "societal shock" that warrants immediate action by way of criminalization. What the recent creation of teenage sext offenders represents is a clear example of what can happen when laws built on past cultural values are employed to address unanticipated social phenomena. As technology increasingly becomes intertwined in our everyday lives, future advancements will inevitably create a variety of legal issues the current state of the law will be ill-equipped to handle. We can only hope that the next time technological advancement surpasses the law, statutes designed to protect America's most vulnerable class of people will not be used to criminalize them for what science understands as normal – not criminal – behavior. This would allow the justice system to avoid replicating the miscarriage of justice exemplified here by the creation the teenage sext offenders.

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<sup>142</sup> See Skinner, *supra* note 132.

<sup>143</sup> See Walsh, *supra* note 112, at 1–3.

<sup>144</sup> See *supra* Part I.B.

**Appendix A**  
(Referred to in Part II.C)

A Side-by-side Comparison of Recent State Anti-Sexting Initiatives

	<u>(A)</u>	<u>(B)</u>	<u>(C)</u>	
<u>(1)</u> <b>Creation and/or Transmission</b>	<p><b>ILL. JUV. CT. ACT of 1987 § 3-1,3-7,3-15,3-40</b></p> <p>Provides that a minor may not <u>transmit</u> sexual images from an electronic communication device.</p>	<p><b>GA. STAT. § 16-21-100.1</b></p> <p>Includes cellular telephone transmission as prohibited methods of <u>transmissions</u>.</p>	<p><b>Ohio Rev. Code § 2907.324</b></p> <p>Prohibits a minor by use of a telecommunications device from recklessly <u>creating, receiving, exchanging, sending</u> ...</p> <p>or <u>possessing</u> a photograph or other material showing a minor if a state of nudity.</p> <p>↓ ↓</p>	
<u>(2)</u> <b>Distribution/ Dissemination and/or Possession</b>	<p><b>UTAH CODE §§ 76-10-1204, 76-10-1206</b></p> <p>Provides sanctions for minors who <u>distribute</u> pornographic material or images that are harmful to others.</p>	<p><b>MO. REV. STAT. §§ 573.023, 573.037, 573.060</b></p> <p>Expands the standard for the crimes of sexual exploitation of a minor, <u>possession of</u> child pornography, and <u>public display</u> of explicit sexual material from just “knowingly” to “knowingly or recklessly.”</p>	<p><b>N.D. Cent Code §§ 12.1-27.1-01, 12.1-27.1-03.3</b></p> <p>Provides a misdemeanor for a person who knowingly <u>possesses, distributes or acquires</u> a sexual image that is nude or nearly nude without consent.</p>	<p style="text-align: center;"><u>(D)</u></p> <p><b>PA. CONS. STAT. tits. 18, 42</b></p> <p>Creates the offense of <u>dissemination</u> of prohibited materials by minors.</p>
<u>(3)</u> <b>Education- Based Interventions</b>	<p><b>N.J. STAT. § 2 C: 24-4</b></p> <p>Creates a <u>diversionary program</u> for juveniles who are criminally charged with sexting or posting sexual images.</p>	<p><b>S.C. CODE §§ 63-19-2470</b></p> <p>Created the offense of sexting, provides a fine and <u>educational program</u> for a person who commits the offense with the option of expungement if the person completes the program satisfactorily.</p>	<p><b>N.Y. Pen. Law §60.37; N.Y. Soc. Services Law §458-I</b></p> <p>A <u>diversion program</u> may be used in lieu of criminal prosecutions for dissemination of nude or obscene images if the sender and recipient of the image are younger than 20 but no more than five years apart.</p>	

## **Appendix B**

*(Referred to in Part IV.B)*

### Sample Lesson Plan to Address Teenage Sexting and Cyber bullying

Written by Jennifer Allen, LPC, M.Ed.

#### **1. Title of the Lesson: Sexting**

Objectives: Students will be able to a) Define sexting and b) Discuss the legal and personal consequences of sexting.

American School Counselor Associations Standards:

#### **PS:B1 Self-knowledge Application**

PS:B1.1 Use a decision-making and problem-solving model

PS:B1.2 Understand consequences of decisions and choices

PS:B1.3 Identify alternative solutions to a problem

Materials for the Lesson:

- Computer Lab
- Pencil or pen
- Notebook paper

Description:

In this session, students will watch YouTube videos from [thatsnotcool.com](http://thatsnotcool.com) and learn how sexting is considered a form of digital dating abuse, what constitutes sexting, and the legal and personal ramifications if students choose to sext.

Procedure

1. Allow students to brainstorm a definition for sexting using their current knowledge. Elaborate on their definition to include; sexting is sending nude, seminude or provocative pictures or video of yourself or others via cell phone.
2. Ask students to share reasons someone might choose to sext during different points in a dating relationship such as; **before** (to try to attract someone), **during** a relationship (to show how much they love and trust each other, as an alternative to sexual contact, or as a way to try to keep a dating partner), and **after** (to ruin someone's reputation or just get revenge for being dumped). Ask students to share other ways to demonstrate attraction and trust in a relationship.
3. Have students watch each link provided on [thatsnotcool.com](http://thatsnotcool.com). First, students will watch "Beeping" and "Show Me Your Battery" under the "Have Your Say" tab. Have students write down their own responses to the questions asked in each video. These will be collected. Then, discuss answers to each video as a group.

4. After watching the videos, have students click on “Games.” Have students play the “Safe Text” and Textual Harassment.” Ask students to share how they chose their responses and any other thoughts about the game.

5. Ask students to brainstorm any legal and personal ramifications from sexting. Watch [http://www.youtube.com/watch?v=uFKAfo\\_etkE](http://www.youtube.com/watch?v=uFKAfo_etkE). After watching the video, have students state the ramifications the students and adults discussed in the video.

6. If time allows, have students explore the [thatsnotcool.com](http://thatsnotcool.com) website.

Assessment: After the video, have students verbally name one legal and one personal ramification they may receive from making the choice to sext.