

Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults

Elizabeth M. Ryan*

ABSTRACT: Minors and young adults who engage in sexting face serious, and often unanticipated, psychological and reputational consequences. While the current state response to sexting between minors and between young adults is inappropriate, the state can intervene in several innovative ways to educate minors and young adults about the consequences of primary and secondary sexting, impose appropriate penalties on minors who engage in primary and secondary sexting, and recognize and support appropriate remedies for minors and young adults who are victims of secondary sexting.

I. INTRODUCTION.....	359
II. THE BASIS FOR STATE INTERVENTION	362
A. <i>THE STATE SHOULD INTERVENE TO PREVENT MINORS AND YOUNG ADULTS FROM FACING THE UNINTENDED CONSEQUENCES OF SEXTING</i>	362
B. <i>THE STATE MAY INTERVENE TO CURB PRIMARY AND SECONDARY SEXTING BETWEEN MINORS AND SOME INSTANCES OF PRIMARY AND SECONDARY SEXTING BETWEEN YOUNG ADULTS BASED UPON TRADITIONAL FIRST AMENDMENT JURISPRUDENCE</i>	365
C. <i>THE STATE MAY INTERVENE TO CURB SECONDARY SEXTING BETWEEN YOUNG ADULTS BY RECOGNIZING CERTAIN TORT CLAIMS</i> ...	369
III. THE CURRENT STATE RESPONSE TO SEXTING	370
A. <i>THE CURRENT STATE RESPONSE TO PRIMARY AND SECONDARY SEXTING BETWEEN MINORS IS INAPPROPRIATE</i>	370

* J.D. Candidate, The University of Iowa College of Law, 2011; B.A., The University of Michigan, 2007. I would like to thank my fiancé, Nick, my parents, and my five older sisters for their encouragement both throughout the publication of my Note and throughout my life. I would also like to thank the editors and student writers of Volumes 95 and 96 of the Iowa Law Review for their patience, support, and dedication.

1.	Prosecuting Sexting Under Child-Pornography Statutes Is Contrary to Legislative Intent.....	371
2.	Prosecuting Sexting Under Child-Pornography Statutes Is Inconsistent with Current Statutory Language	372
3.	Prosecuting Sexting Under Child-Pornography Statutes Results in Excessive Punishment.....	373
B.	<i>THE CURRENT STATE RESPONSE TO SECONDARY SEXTING BETWEEN YOUNG ADULTS IS INAPPROPRIATE BECAUSE IT LEAVES ADULT VICTIMS OF SECONDARY SEXTING WITHOUT MEANINGFUL REMEDIES</i>	375
IV.	THREE INNOVATIVE STATE RESPONSES TO SEXTING BETWEEN MINORS AND BETWEEN YOUNG ADULTS	376
A.	<i>THE STATE SHOULD IMPLEMENT EDUCATION PROGRAMS TO DETER PRIMARY AND SECONDARY SEXTING BETWEEN MINORS AND BETWEEN YOUNG ADULTS.....</i>	376
B.	<i>THE STATE SHOULD REVISE EXISTING STATUTES OR IMPLEMENT NEW STATUTES THAT SPECIFICALLY ADDRESS PRIMARY AND SECONDARY SEXTING BETWEEN MINORS.....</i>	379
1.	Sexting Statutes Should Create Juvenile Diversion Programs for Minors Who Engage in Primary Sexting	379
2.	Sexting Statutes Should Impose Juvenile or Criminal Penalties on Minors Who Engage in Secondary Sexting and Some Instances of Primary Sexting	380
C.	<i>THE STATE SHOULD RECOGNIZE AND SUPPORT TORT CLAIMS FOR MINOR AND ADULT VICTIMS OF SECONDARY SEXTING</i>	381
V.	CONCLUSION	382

I. INTRODUCTION

In June 2009, thirteen-year-old Hope Witsell took a topless photo of herself with the camera feature of her cell phone and sent the photo via text message to a boy she liked.¹ The boy then sent the photo via text message to additional recipients who distributed the photo via their cell phones to recipients at Witsell's middle school and a nearby high school.² Students at Witsell's middle school bullied her about the photo in person and over the Internet.³ Witsell began cutting herself and journaling about the harassment, and in September 2009, she committed suicide.⁴

In March 2008, eighteen-year-old Jessica Logan went on a spring-break trip to Florida with friends.⁵ While on vacation, Logan took a nude photo of herself with the camera feature of her cell phone and sent the photo via text message to her eighteen-year-old boyfriend, Ryan Salyers.⁶ After Logan and Salyers ended their relationship, Salyers sent the photo via text message to additional recipients who distributed the photo via their cell phones to students at four different high schools.⁷ Students at the four schools incessantly harassed Logan about the photo, calling her a "slut," "whore," and other names in person, over the phone, and over the Internet.⁸ Logan became depressed, and on July 3, 2008, she committed suicide.⁹

Eighteen-year-old Phillip Alpert and his sixteen-year-old girlfriend dated for over two years in high school.¹⁰ During their relationship, Alpert's girlfriend sent him e-mails containing nude photos that she took of herself

1. Colleen Carroll Campbell, Editorial, 'Sexting' Suicides Should Serve as Wake-Up Calls: Porn-Saturated Culture Misleads Teens into Believing that Exhibitionism Is Empowering, ST. LOUIS POST-DISPATCH, Dec. 10, 2009, at A17.

2. *Id.*

3. *Id.*

4. *Id.*

5. Complaint at 2, Logan v. Salyers, No. A0904647 (Ct. Com. Pl. Hamilton County, Ohio May 8, 2009) [hereinafter Logan State Complaint].

6. Complaint at 4, Logan v. Sycamore Cmty. Sch. Bd. of Educ., No. 1:09-cv-885 (S.D. Ohio Dec. 2, 2009) [hereinafter Logan Federal Complaint]; Logan State Complaint, *supra* note 5, at 2.

7. Logan Federal Complaint, *supra* note 6, at 4-5; Logan State Complaint, *supra* note 5, at 2-3.

8. Logan Federal Complaint, *supra* note 6, at 7-8; Logan State Complaint, *supra* note 5, at 6-7; Mike Celizic, *Her Teen Committed Suicide over 'Sexting': Cynthia Logan's Daughter Was Taunted About Photo She Sent to Boyfriend*, TODAYSHOW.COM (Mar. 6, 2009), <http://www.msnbc.msn.com/id/29546030/>.

9. Logan Federal Complaint, *supra* note 6, at 8; Logan State Complaint, *supra* note 5, at 4; Celizic, *supra* note 8.

10. Deborah Feyerick & Sheila Steffen, 'Sexting' Lands Teen on Sex Offender List, CNN.COM, Apr. 8, 2009, <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html>.

with a digital camera.¹¹ In a fit of anger following an argument with his girlfriend, Alpert signed onto her e-mail account and sent the photos to dozens of his girlfriend's friends and members of her family.¹² The local police arrested Alpert and charged him with distributing child pornography.¹³ A judge sentenced Alpert to five years of probation and forced him to register as a sex offender pursuant to Florida law.¹⁴ Alpert must continue to register as a sex offender until he is forty-three.¹⁵

These stories illustrate the unintended consequences and startling realities of "sexting," a new social phenomenon among minors and young adults.¹⁶ Sexting is "the practice of sending . . . sexually suggestive text messages and images," including semi-nude or nude photographs, "via the text-message or photo-send function" of a cell phone or posting such messages or images on social-networking websites like Facebook or MySpace.¹⁷ Sexting generally falls into three categories. The first category, as illustrated by Hope Witsell's story,¹⁸ includes sexting between minors. The second category, as illustrated by Jessica Logan's story,¹⁹ includes sexting between young adults.²⁰ The third category, as illustrated by Phillip Alpert's story,²¹ includes sexting between a minor and a young adult.

Every sexting image involves four different roles: (1) the subject of the photo, (2) "the person who *took* the photo," (3) "the *distributor(s)* of the

11. Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 8 (2009); Feyerick & Steffen, *supra* note 10.

12. Richards & Calvert, *supra* note 11, at 8; Feyerick & Steffen, *supra* note 10.

13. Richards & Calvert, *supra* note 11, at 8; Feyerick & Steffen, *supra* note 10.

14. Richards & Calvert, *supra* note 11, at 9; Feyerick & Steffen, *supra* note 10.

15. Don Corbett, *Let's Talk About Sext: The Challenge of Finding the Right Legal Response to the Teenage Practice of "Sexting"*, J. INTERNET L., Dec. 2009, at 3, 3; Richards & Calvert, *supra* note 11, at 9.

16. This Note focuses on state responses to sexting between minors and between young adults.

17. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009) (citing Complaint at 5, *Miller*, 605 F. Supp. 2d 634 (No. 3:09cv540) [hereinafter *Skumanick Complaint*]). While sexting may include text or images, this Note focuses on sexting images.

18. See *supra* notes 1-4 and accompanying text (discussing Hope Witsell, a minor from Florida who sent a sexting image to another minor).

19. See *supra* notes 5-9 and accompanying text (discussing Jessica Logan, a young adult from Ohio who sent a sexting image to another young adult).

20. Over the past year, the news media has featured sexting scandals involving several adult celebrities, including baseball player Grady Sizemore of the Cleveland Indians, golf pro Tiger Woods, and pop star Rihanna. Tamara Ikenberg, *OMG! Sexting Leaves Awkward Digital Trails*, COURIER-J. (Louisville, Ky.), Dec. 15, 2009, 2009 WLNR 25310112.

21. See *supra* notes 10-15 and accompanying text (discussing Phillip Alpert, a young adult from Florida who received a sexting image from his minor girlfriend).

photo,” and (4) “the recipient(s) of the photo.”²² In some cases, one actor may assume more than one role,²³ while in other situations multiple actors may assume a single role.²⁴ Sexting also takes two different forms. “Primary sexting” occurs where the subject of the photo is the distributor of the photo.²⁵ “Secondary sexting” occurs where the distributor of the photo receives the photo from the subject or another distributor and then distributes the photo to one or more additional recipient(s).²⁶

The social and technological implications of sexting are startling, but sexting is also a controversial legal issue because prosecutors do not agree on whether and how to prosecute minors and young adults who engage in primary and secondary sexting.²⁷ Many prosecutors are trying to deter sexting between minors by using their discretion²⁸ to charge minors who engage in primary (and some instances of secondary) sexting with child-pornography offenses.²⁹ This approach is largely inappropriate, especially for minors who engage in primary sexting. This approach also leaves minor victims of secondary sexting without meaningful remedies. Conversely, prosecutors have not taken any steps to deter sexting between young

22. *Policy Statement on Sexting*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN (Sept. 21, 2009), http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130.

23. For example, the subject of the photo may also take and distribute the photo. *Id.*

24. For example, multiple individuals may receive the photo. *Id.*

25. 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 CONSP'CTUS 1, 30 (2009). For example, in the three stories discussed at the beginning of this Note, Hope Witsell, Jessica Logan, and Phillip Alpert's girlfriend engaged in primary sexting.

26. *Id.* For example, in the three stories discussed at the beginning of this Note, the boy to whom Hope Witsell sent her topless photo; Ryan Salyers; and Phillip Alpert engaged in secondary sexting.

27. Richards & Calvert, *supra* note 11, at 3 (citing Editorial, *Flirting with 'Sexting' Remedy*, LANCASTER NEW ERA, Apr. 3, 2009, at A8); see also W. Jesse Weins & Todd C. Hiestand, *Sexting, Statutes, and Saved by the Bell: Introducing a Lesser Juvenile Charge with an "Aggravating Factors" Framework*, 77 TENN. L. REV. 1, 2 (2009) (discussing how some prosecutors and commentators support “complete decriminalization” of sexting while others support “equal criminalization” with child-pornography offenses). It is worth noting that sexting has become such a controversial legal issue that Law & Order: Special Victims Unit aired an episode that dealt with the unintended consequences of sexting in May 2009. *Law & Order: Special Victims Unit: Crush* (NBC television broadcast May 5, 2009).

28. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”). Prosecutors may even opt for more severe charges because they afford prosecutors a better opportunity to make deals with defendants. Weins & Hiestand, *supra* note 27, at 48.

29. Hannah Geyer, *Sexting—The Ineffectiveness of Child Pornography Laws*, JUV. JUST. E-NEWSL. (Am. Bar Ass'n Criminal Justice Section, Wash., D.C.), June 2009, available at <http://www.abanet.org/crimjust/juvjust/newsletterjune09/june09/sexting.htm>.

adults.³⁰ While this approach is legally permissible for young adults who engage in primary sexting, this approach leaves adult victims of secondary sexting without meaningful remedies.

The state should intervene to deter primary and secondary sexting between minors and between young adults. The state should also impose appropriate penalties on minors who engage in primary and secondary sexting and recognize and support appropriate remedies for minors and young adults who are victims³¹ of secondary sexting. This Note consists of three substantive parts. Part II discusses why the state should intervene to curb primary and secondary sexting between minors and between young adults. Part III discusses the current state response to primary and secondary sexting between minors and between young adults and why the current response is inappropriate. Finally, Part IV discusses three viable state responses to sexting.

II. THE BASIS FOR STATE INTERVENTION

A. *THE STATE SHOULD INTERVENE TO PREVENT MINORS AND YOUNG ADULTS FROM FACING THE UNINTENDED CONSEQUENCES OF SEXTING*

A recent study conducted by The National Campaign to Prevent Teen and Unplanned Pregnancy and CosmoGirl.com (“*Sex and Tech Study*”) found that thirty-three percent of young adults ages twenty to twenty-six have sent semi-nude or nude pictures or videos of themselves via text message or posted them on the Internet.³² Sexting is also becoming popular among

30. Rose Afrivie, *The Trouble with “Sexting” Coverage*, FEMINISTING (Jan. 14, 2010, 16:36), <http://classic.feministing.com/archives/019580.html>.

31. This Note uses the phrase “victims of secondary sexting” to describe minors and young adults who voluntarily appear in a sexting image, distribute the image to one or more recipient(s) through primary sexting, and then learn that a recipient of the primary sexting image distributed the image to additional unintended recipients without the consent of the subject of the photo.

32. THE NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1 (2008) [hereinafter *SEX AND TECH STUDY*], available at http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf. TRU, a “global leader” in research on teens and young adults, conducted this survey of males and females ages thirteen to twenty-six; TRU fielded the survey online to a total of 1280 respondents—653 minors (ages thirteen to nineteen) and 627 young adults (ages twenty to twenty-six)—between September 25, 2008, and October 3, 2008. *Id.* at 1, 5. It is worth noting that since the survey places eighteen and nineteen-year-old respondents (legal adults) in the “minor” rather than the “young adult” category, the teen statistics may be slightly overstated and the young adult statistics may be slightly understated.

Among young adults who have sent or posted sexually suggestive content, 83% of women and 75% of men sent or posted this content to a boyfriend or girlfriend while 15% of women and 23% of men sent or posted this content to someone they “only knew online.” *Id.* at 2. Additionally, 46% of young adults have received a semi-nude or nude picture or video from someone, 17% have shared a semi-nude or nude picture or video with someone other than the one for whom it was originally intended, and 32% have had a semi-nude or nude picture or video “originally meant to be private” shared with them. *Id.* at 11.

minors as more and more minors use cell phones—especially phones with built-in cameras.³³ One study discovered that forty-four percent of surveyed teen boys had seen at least one nude photo of a female classmate.³⁴ Similarly, the *Sex and Tech Study* found that twenty percent of minors ages thirteen to nineteen have sent semi-nude or nude pictures or videos of themselves via text message or posted them on the Internet.³⁵

The fact that minors and young adults are exploring their sexuality is nothing new.³⁶ However, now minors and young adults can instantly transmit the fruits of their exploration to an unlimited number of recipients via cell phones and the Internet, leaving the subject of such images “susceptible to humiliation” on a much larger scale.³⁷ To make matters worse, once an individual transmits an image via cell phone or over the Internet, it is virtually impossible to remove it.³⁸

Even when minors and young adults willingly engage in primary sexting, their sexting images may still reach unintended recipients as a result of secondary sexting. For example, investigators report that one-fourth of the 2100 identified victims of online child pornography sent the initial image him- or herself.³⁹ Similarly, many young adults have been the victims of “revenge porn,” an example of secondary sexting in which a young adult’s

33. SAFE Internet Act, S. 1047, 111th Cong. § 2(a)(2) (2009) (“Eighty percent of teens 13 through 17 . . . use cell phones, most of which have built-in cameras.”).

34. Alexandra Marks, *Charges Against ‘Sexting’ Teenagers Highlight Legal Gaps*, CHRISTIAN SCI. MONITOR, Mar. 31, 2009, 2009 WLNR 6045278.

35. SEX AND TECH STUDY, *supra* note 32, at 1. Among minors who have sent or posted sexually suggestive content, 71% of teen girls and 67% of teen boys sent or posted this content to a boyfriend or girlfriend, while 15% of these minors sent or posted this content to someone they “only knew online.” *Id.* at 2. Additionally, 31% of minors have received a semi-nude or nude picture or video from someone, 14% have shared a semi-nude or nude picture or video with someone other than the one for whom it was originally intended, and 29% have had a semi-nude or nude picture or video “originally meant to be private” shared with them. *Id.* at 11. A more recent study conducted by the Associated Press and MTV found that nearly one in three minors and young adults ages fourteen to twenty-four have “sent or received nude photos on their cell phones or online.” Campbell, *supra* note 1.

36. See Karina Bland, *Seduced by ‘Sexting,’* ARIZ. REPUBLIC, Aug. 27, 2009, 2009 WLNR 16705696 (arguing that “[y]oung people have been taking sexually provocative pictures since the Polaroid”).

37. *Id.*

38. NCMEC Offers “Sexting” Cautions, WIRELESS & MOBILE NEWS (Sept. 22, 2009, 11:51 AM), http://www.wirelessandmobilenews.com/2009/09/ncmec_offers_sexting_cautions.html; see also Mary Graw Leary, *The Right and Wrong Responses to “Sexting,”* PUB. DISCOURSE (May 12, 2009), <http://www.thepublicdiscourse.com/2009/05/227> (describing how children who willingly take semi-nude, nude, or sexually explicit photos of themselves are “likely to experience depression, anxiety, [and] low self-esteem” after learning that the images “will be circulating forever”).

39. Bland, *supra* note 36; see also Kibret Markos, *Teenage Indiscretion or Child Pornography? A Federal Court May Soon Decide the Legality of SEXTING*, REC. (Hackensack, N.J.), Feb. 3, 2010, 2010 WLNR 4681820 (stating that law-enforcement officials say that sexting images “attract child predators”).

scorned ex-boyfriend or ex-girlfriend sends, via text message or posts on the Internet, semi-nude, nude, or sexually explicit photos or videos that the two parties shared or created during their relationship.⁴⁰

In addition to the danger of exposure to a larger and often unintended audience shortly after a minor or young adult creates a sexting image, semi-nude and nude images can continue to affect a minor or young adult's reputation years after he or she creates and distributes the image. A sexting image that an individual created when he or she was thirteen may influence his or her ability to gain admission to college or gain employment years later.⁴¹ For example, a recent study revealed that colleges and universities use social-networking websites—a medium that commonly features primary and secondary-sexting images—to help evaluate applicants.⁴² Similarly, about half of human-resource professionals conduct an Internet background check on potential candidates before extending a job offer.⁴³ In a 2009 CareerBuilder.com survey, thirty-five percent of reporting employers stated that they had found content on social-networking sites that “caused them not to hire [a] candidate,” citing “provocative or inappropriate photographs or information” as the top example of such content.⁴⁴

While it is often valuable for minors and young adults to make mistakes and learn from the consequences of their actions, it is unclear whether minors and young adults truly understand the consequences of sexting. The *Sex and Tech Study* revealed that nearly seventy-five percent of the teens polled and nearly seventy-one percent of the young adults polled understood that sexting could lead to “serious negative consequences,” but they remained undeterred from engaging in sexting.⁴⁵ Another survey

40. Richard Morgan, *Revenge Porn: Filmed Lovers Are Posting Sex Tapes on the Web—and Their Exes Want Justice*, DETAILS (Sept. 30, 2008), <http://www.details.com/sex-relationships/porn-and-perversions/200809/revenge-porn>. According to one source, “the average revenge-porn perpetrator is a 23- to 28-year-old man.” *Id.*

41. NCMEC Offers “Sexting” Cautions, *supra* note 38.

42. Lindsey Anderson, *To Friend or Not To Friend? College Admissions in the Age of Facebook*, USA TODAY, Sept. 18, 2009, http://www.usatoday.com/news/education/2009-09-16-facebook-admissions_N.htm.

43. *To Google or Not To Google: That Is the Question for Hiring Managers*, LEDDY GROUP NEWSL. (The Leddy Group), Oct. 2008, at 1, available at http://www.leddygroup.com/uploadedFiles/Knowledge_Center/Newsletters/October08_1.pdf.

44. Press Release, CareerBuilder, Forty-five Percent of Employers Use Social Networking Sites To Research Job Candidates, CareerBuilder Survey Finds (Aug. 19, 2009), http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr519&sd=8/19/2009&ed=12/31/2009&siteid=cbpr&sc_cmp1=cb_pr519_.

45. SEX AND TECH STUDY, *supra* note 32, at 4. Similarly, one teen in a more recent study conducted by the Pew Research Center stated, “[sexting] happens a lot, my friends do it all the time, it’s not a big deal,” and another teen in the same study stated, “[It’s not a big deal because] we are not having sex, we are sexting.” AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, TEENS AND SEXTING: HOW AND WHY MINOR TEENS ARE SENDING SEXUALLY SUGGESTIVE NUDE OR NEARLY NUDE IMAGES VIA TEXT MESSAGING 7, 8 (2009), <http://www.pewinternet.org/>

demonstrated that minors may not understand that they can face criminal charges for sexting.⁴⁶ All of these statistics indicate that sexting is pervasive among minors and young adults and that individuals who engage in sexting face significant short- and long-term consequences which frequently go unrecognized.

*B. THE STATE MAY INTERVENE TO CURB PRIMARY AND SECONDARY SEXTING
BETWEEN MINORS AND SOME INSTANCES OF PRIMARY AND
SECONDARY SEXTING BETWEEN YOUNG ADULTS BASED UPON
TRADITIONAL FIRST AMENDMENT JURISPRUDENCE*

While the state has many resources at its disposal to discourage undesired behavior,⁴⁷ the state may not intervene every time a potentially threatening social phenomenon emerges.⁴⁸ Once private social pressures fail to effectively curb a harmful activity, the next inquiry is whether the state has the authority to intervene and propose a useful solution to the underlying problem. Sexting is an example of undesired behavior, and private social pressures have been unsuccessful in deterring this behavior to date.⁴⁹ Most importantly, the state has the authority to intervene and curb

~/media//Files/Reports/2009/PIP_Teens_and_Sexting.pdf [hereinafter TEENS AND SEXTING STUDY] (alteration in original).

46. See Bland, *supra* note 36 (discussing how an Ohio judge ordered eight minors ages thirteen to seventeen to ask their peers whether they knew sexting was a crime; only thirty-one of the 225 teens polled knew that they could face criminal charges for sexting).

47. See SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 129 (8th ed. 2007) (discussing how the state may attempt to discourage undesired behavior by its citizens by taxing the behavior; providing for civil or criminal liability for individuals who engage in the behavior; establishing an agency to govern the behavior through “licenses, rules, and regulations”; or allowing “private social pressures” to address the behavior).

48. For example, if an individual is an alcoholic, the state generally lacks the authority to intervene to curb this behavior unless the individual’s alcohol consumption violates a specific law (e.g., driving while intoxicated). Since the consumption of alcohol by an individual twenty-one years of age or older is permissible by law, the state generally leaves issues of alcohol abuse to private family and community intervention even when alcoholism may negatively affect the physical and emotional health of the alcoholic and countless other individuals.

Similarly, if a bully teases a child on the playground at school, the state generally lacks the authority to intervene to curb this behavior unless the bully’s taunts violate a specific law (e.g., assault). As with alcoholism, the state generally leaves issues of bullying to private school and family intervention even when bullying may negatively affect the physical and emotional health of the taunted child.

49. Parents and school faculty and administrators remain largely uneducated about sexting between minors, and even when they learn about sexting, they often lack the technological “savvy” to effectively discourage the behavior. Corbett, *supra* note 15, at 7; Matthew Bandyk, *Entrepreneurs Take On Sexting and Child Safety Online*, U.S. NEWS & WORLD REP., Dec. 16, 2009, 2009 WLNR 25404411. One prosecutor recently observed, “I think most prosecutors . . . would prefer that the schools and the parents take care of [sexting]. But a lot of times, they can’t, or they are the ones bringing it to our attention.” *Talk of the Nation: ‘Sexting’: Racy Teen Messaging Could Be Illegal* (NPR radio broadcast Feb. 18, 2009), transcript available at <http://www.npr.org/templates/transcript/transcript.php?storyId=100826247>.

primary and secondary sexting between minors and some instances of primary and secondary sexting between young adults based upon the categorical exclusion of obscenity and child pornography from First Amendment protection.

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”⁵⁰ Generally, when the state imposes a content-based restriction on an individual’s speech, the restriction is “presumptively unconstitutional,” and the reviewing court must apply strict scrutiny to the restriction.⁵¹ Under strict scrutiny, the content-based restriction must be “narrowly tailored” to promote a “compelling” state interest using the “least restrictive alternative.”⁵² However, some categories of speech fall outside of First Amendment protection, including obscenity⁵³ and child pornography.⁵⁴ When a category of speech falls outside of First Amendment protection, the reviewing court must only apply rational basis scrutiny to the restriction.⁵⁵

A sexting image is not speech per se. However, a sexting image may qualify as protected expressive conduct. For a sexting image to qualify as expressive conduct, the subject of the photo must intend to “convey a particularized message” through the image and, considering the circumstances surrounding the transmission of the sexting image, it must be likely that “the message would be understood by those who viewed [the image].”⁵⁶ If the sexting image fails to meet these two criteria, the image falls outside of First Amendment protection. If the image meets these two criteria, the image constitutes protected expressive conduct unless the image constitutes unprotected obscenity or child pornography.⁵⁷

Based upon the test developed in *Miller v. California*,⁵⁸ a sexting image is obscene if the image, “taken as a whole,” appeals to “the prurient interest in sex,” portrays “sexual conduct in a patently offensive way,” and lacks any

50. U.S. CONST. amend. I. This Note includes only a very cursory discussion of the First Amendment implications of sexting behavior between minors and between young adults; for a more comprehensive discussion, see generally John A. Humbach, ‘Sexting’ and the First Amendment, 37 HASTINGS CONST. L.Q. 433 (2010).

51. United States v. Playboy Entm’t Grp., Inc., 529 U.S. 803, 813 (2000) (citing *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)); Humbach, *supra* note 50, at 474.

52. *Playboy*, 529 U.S. at 813 (citing *Sable*, 492 U.S. at 126).

53. *Roth v. United States*, 354 U.S. 476, 483 (1957).

54. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

55. Humbach, *supra* note 50, at 475.

56. *Spence v. Washington*, 418 U.S. 405, 411 (1974).

57. See Calvert, *supra* note 25, at 43 (“To the extent that the taking of a photograph by a minor with a cell phone is a speech act . . . laws restricting minors’ ability to engage in sexting must be measured and balanced against the constitutional speech rights of minors . . .” (footnote omitted)).

58. 413 U.S. 15 (1973).

“serious literary, artistic, political, or scientific value.”⁵⁹ A court could find that sexting images similar to the nude photo that Jessica Logan sent to her boyfriend are obscene. The subject of a nude photo generally sends the image to evoke a sexual response from the recipient of the image. Additionally, the nude photo commonly lacks any serious literary, artistic, political, or scientific value. Depending upon how the subject of the image poses and what he or she does in the photo, the image may also portray sexual conduct in a patently offensive way. If a sexting image meets the criteria outlined in the *Miller* test, the state may restrict the creation and distribution⁶⁰ of the obscene sexting image between minors and between young adults so long as the restriction passes rational basis scrutiny. However, even if a sexting image fails the *Miller* test, the image may still constitute child pornography.⁶¹

Like obscenity, child pornography falls outside of First Amendment protection. Whether an image constitutes child pornography largely turns upon whether the image depicts a minor “engaged in sexual conduct,” or whether the image constitutes a lewd depiction of a minor.⁶² Many state and several federal courts⁶³ determine whether an image constitutes a lewd depiction of a minor by applying the factors set forth in *United States v. Dost*,⁶⁴ including (1) whether the “focal point” of the image is the minor’s genitals or pubic area, (2) whether the setting of the image is “sexually suggestive,” (3) whether the minor appears in an “unnatural pose” or in “inappropriate attire,” (4) whether the minor is semi-nude or nude, (5) whether the image suggests “sexual coyness,” and (6) whether the image is “intended or designed to elicit a sexual response in the viewer.”⁶⁵ An image need not meet all of the factors to constitute a lewd depiction of a minor,⁶⁶ and at least one court has held that a lewd image does not necessarily need to depict a minor in a state of nudity.⁶⁷

59. *Id.* at 24.

60. *See* 50 AM. JUR. 2D *Lewdness, Indecency, and Obscenity* § 19 (2010) (stating that an adult may still possess an obscene image in the privacy of his or her home unless the image constitutes child pornography).

61. For purposes of this Note, the child pornography discussion is only applicable to sexting between minors because sexting between young adults would never constitute child pornography.

62. Weins & Hiestand, *supra* note 27, at 17.

63. *See, e.g.*, *United States v. Overton*, 573 F.3d 679, 686 (9th Cir. 2009); *United States v. Rivera*, 546 F.3d 245, 249–50 (2d Cir. 2008); *United States v. Rubio*, 834 F.2d 442, 448 (5th Cir. 1987); *State v. Saulsbury*, 498 N.W.2d 338, 344 (Neb. 1993).

64. 636 F. Supp. 828 (S.D. Cal. 1986), *aff’d sub nom.* *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987).

65. *Id.* at 832.

66. *Id.*

67. *United States v. Knox*, 32 F.3d 733, 745–46 (3d Cir. 1994).

A court could find that sexting images similar to the topless photo that Hope Witsell sent to the boy she liked qualify as child pornography where the subject of the photo intended to elicit a sexual response from the recipient. If a sexting image meets one or more of the criteria outlined in *Dost*, the state may restrict the creation, distribution, and possession of the image as child pornography so long as the restriction passes rational basis scrutiny.

When a sexting image qualifies as protected expressive conduct but does not constitute obscenity or child pornography, the state may still be able to curb primary and secondary sexting by imposing content-based restrictions that survive strict scrutiny. U.S. Supreme Court precedent demonstrates that the state has a compelling interest in safeguarding the physical and psychological well-being of minors.⁶⁸ The Court has used this compelling interest to uphold legislation that limits both protected and unprotected speech.⁶⁹ For example, in *New York v. Ferber*, the Court held that the state could rely upon this compelling interest to regulate the creation and distribution of child pornography that did not otherwise rise to the level of unprotected obscenity because such images were “harmful to the psychological, emotional, and mental health of [children].”⁷⁰ Similarly, in *Osborne v. Ohio*, the Court held that the state could rely upon this compelling interest to regulate the possession of child pornography even when, under traditional First Amendment jurisprudence, “depictions of nudity, without more, constitute[d] protected expression.”⁷¹

68. See *Osborne v. Ohio*, 495 U.S. 103, 109 (1990); *New York v. Ferber*, 458 U.S. 747, 756–57 (1982); *Ginsberg v. New York*, 390 U.S. 629, 640 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1943); see also L. Steven Grasz & Patrick J. Pfaltzgraff, *Child Pornography and Child Nudity: Why and How States May Constitutionally Regulate the Production, Possession, and Distribution of Nude Visual Depictions of Children*, 71 TEMP. L. REV. 609, 626 (1998) (explaining why the protection of children is a compelling state interest and that the restrictions upheld in *Ferber* and *Osborne* should apply to child nudity). State courts have recognized similar compelling interests. For example, a Florida court held that the state has a compelling interest in regulating minors’ creation of sexually explicit photos because minors lack the maturity to make rational decisions that consider the possible negative consequences of their actions, including “psychological trauma” and damage to minors’ “careers or personal lives.” *A.H. v. Florida*, 949 So. 2d 234, 238–39 (Fla. Dist. Ct. App. 2007).

69. *Ferber*, 458 U.S. at 757. For example, in *Ferber* the Court described how it used this compelling interest to uphold limits on speech:

In *Prince v. Massachusetts*, the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute’s effect on a First Amendment activity. In *Ginsberg v. New York*, we sustained a New York law protecting children from exposure to nonobscene literature. Most recently [in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)], we held that the Government’s interest in the “well-being of its youth” justified special treatment of indecent broadcasting received by adults as well as children.

Id. (citations omitted).

70. *Id.* at 756–58.

71. 495 U.S. at 112 (citing *Ferber*, 458 U.S. at 765 n.18).

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.”⁷² This paternalistic view of minors allows the state to regulate both primary and secondary sexting between minors based upon its compelling interest in safeguarding the physical and psychological well-being of minors, even when doing so limits minors’ First Amendment rights.⁷³ While young adults who engage in sexting face the same psychological and reputational consequences as minors who engage in sexting, the state probably does not have a corresponding compelling interest in safeguarding the physical and psychological well-being of young adults because the law presumes that adults are able to make fully informed, responsible decisions and predict the consequences of such decisions once they reach the age of majority.⁷⁴

C. *THE STATE MAY INTERVENE TO CURB SECONDARY SEXTING BETWEEN YOUNG ADULTS BY RECOGNIZING CERTAIN TORT CLAIMS*

When sexting images qualify as protected expressive conduct, the First Amendment prevents the state from regulating sexting between young adults without a compelling interest. It seems unlikely that the state could develop a compelling interest that would justify its regulation of primary sexting between two consenting adults. However, the state may be able to bypass the compelling-interest requirement and intervene to curb secondary sexting between young adults by recognizing and supporting tort claims initiated by adult victims of secondary sexting. The U.S. Supreme Court has recognized intentional-infliction-of-emotional-distress claims⁷⁵ “even when

72. *In re T.A.J.*, 73 Cal. Rptr. 2d 331, 336 (Ct. App. 1998) (quoting *Stanford v. Kentucky*, 492 U.S. 361, 395 (1989) (Brennan, J., dissenting)) (internal quotation marks omitted). The court illustrated this point by highlighting that “laws have established various age restrictions for voting, driving motor vehicles, purchasing alcoholic beverages, and the like.” *Id.*

73. See *Grasz & Pfaltzgraff*, *supra* note 68, at 625 (“Nude photographs of children tend to make children more acceptable as objects of abuse, neglect, and mistreatment, especially sexual abuse and exploitation.”); see also discussion *supra* Part II.A (discussing the unintended short-term and long-term psychological and reputational consequences of sexting). A teen participant in a recent Pew Research Center study described how she felt psychologically coerced into sexting, stating that “I felt like if I didn’t [engage in sexting] [my boyfriend or someone I really liked] wouldn’t continue to talk to me.” TEENS AND SEXTING STUDY, *supra* note 45, at 8. Additionally, MTV recently launched its “A Thin Line Campaign” which highlights the “connection between sexting and higher rates of sexual activity and suicidal feelings among teens.” Campbell, *supra* note 1.

74. See *Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997) (stating that “the government may have a compelling interest in protecting minors from certain things that it does not for adults”).

75. According to the Restatement (Second) of Torts, “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress.” RESTATEMENT (SECOND) OF TORTS § 46 (1965). Emotional distress includes “unpleasant mental reactions, such as fright, horror, grief, shame,

the sole source of the [plaintiff's] distress [was] a speech act."⁷⁶ Similarly, state and federal courts have awarded damages based upon invasion-of-privacy claims against private individuals who disclosed information that constituted protected speech.⁷⁷ Thus, the state may use such tort actions to curb secondary sexting between young adults even when the state could not otherwise intervene to regulate, under the First Amendment, the protected expressive conduct depicted in the sexting images.

III. THE CURRENT STATE RESPONSE TO SEXTING

A. *THE CURRENT STATE RESPONSE TO PRIMARY AND SECONDARY SEXTING BETWEEN MINORS IS INAPPROPRIATE*

Many prosecutors are trying to deter sexting between minors by charging minors who engage in primary and some instances of secondary sexting with child-pornography crimes. For example, in Florida, the state at the center of the Hope Witsell and Phillip Alpert sexting scandals, a prosecutor charged minors who engaged in sexting with producing,

humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." *Id.* § 46 cmt. j.

76. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 817 (16th ed. 2007). *See generally* *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (supporting a cause of action for intentional infliction of emotional distress initiated by a private citizen who worked as a behavioral scientist after a U.S. Senator and his legislative assistant publicly criticized the man's research).

77. SULLIVAN & GUNTHER, *supra* note 76, at 820–21. *See generally* *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984) (recognizing a woman's cause of action for invasion of privacy after a neighbor broke into her home, stole several nude photos that the woman took for her husband, and submitted the photos to *Hustler Magazine* without the woman's consent); *Pohle v. Cheatham*, 724 N.E.2d 655 (Ind. Ct. App. 2000) (recognizing a woman's cause of action for "intentional invasion of privacy" after her ex-husband publicly distributed nude photos that the woman took during the course of their marriage).

Ohio state and federal courts have an opportunity to demonstrate how the state can intervene to curb secondary sexting between young adults by recognizing and supporting the emotional-distress and invasion-of-privacy claims initiated by Jessica Logan's family following her untimely death. Her parents initiated two separate lawsuits. The Logans filed the first lawsuit in state court to hold Ryan Salyers; seven other minors; the City of Montgomery, Ohio; Sycamore High School; two Sycamore High School employees; and two unnamed defendants responsible for the untimely death of their daughter. Logan State Complaint, *supra* note 5. In their Complaint, the Logans stated seven causes of action including: (1) menacing by stalking, (2) district policy prohibiting harassment, (3) dissemination of private material, (4) intentional infliction of emotional distress, (5) negligence, (6) breach of expectations of privacy and violations of civil rights, and (7) wrongful death. *Id.* at 4–10. The Logans filed the second lawsuit in federal court to hold the Sycamore Community School Board of Education; a Sycamore High School employee; the City of Montgomery, Ohio; Ryan Salyers; and four other minors responsible for the untimely death of their daughter. Logan Federal Complaint, *supra* note 6. In their Complaint, the Logans stated four causes of action including: (1) right to be free from discrimination on the basis of sex in federally funded education programs and activities, (2) Fourteenth Amendment violations, (3) infliction of emotional distress, and (4) invasion of privacy. *Id.* at 9–10.

directing, or promoting a photograph or representation known to include the sexual conduct of a child and with possession of child pornography.⁷⁸ In Pennsylvania, the state at the center of the nation's first federal sexting case, a prosecutor charged several minors who engaged in sexting with distributing child pornography and criminal use of a communication facility.⁷⁹ Under Pennsylvania law, these crimes are felonies and carry a minimum seven-year prison term and registration as a sex offender for at least ten years.⁸⁰

1. Prosecuting Sexting Under Child-Pornography Statutes Is Contrary to Legislative Intent

The current state response to sexting, which charges minors who engage in sexting with child-pornography crimes, is inappropriate because state legislatures enacted child-pornography laws to protect children from exploitation by sexual predators.⁸¹ Specifically, legislators created such laws to protect defenseless victims that adults manipulated and forced to participate in "graphic sexual [activities]" against their will.⁸² This legislative intent does not logically translate to sexting where minors who appear in sexting images were, "at least at one point," willing subjects of the sexting image.⁸³ Although a minor may later regret posing for a sexting image, especially if he or she faces the unintended psychological and reputational consequences of primary or secondary sexting, his or her experience is drastically different from victims of traditional child pornography.⁸⁴ While juvenile or criminal penalties may be appropriate for some minors who engage in primary or secondary sexting, it is contrary to legislative intent for prosecutors to use child-pornography statutes to criminalize a minor's intentional "self-exploitive" conduct.⁸⁵

78. See generally *A.H. v. Florida*, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007) (convicting a Florida teen of producing, directing, or promoting a photograph or representation she knew to include the sexual conduct of a child after she and her teen boyfriend took photos of themselves engaged in a sex act).

79. See generally *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009) (granting a temporary restraining order to prevent a Pennsylvania district attorney from filing felony child-pornography charges against three Pennsylvania minors after their classmates disseminated photos of the girls without the girls' consent).

80. Skumanick Complaint, *supra* note 17, at 6–8.

81. *A.H.*, 949 So. 2d at 241 (Padovano, J., dissenting); Richards & Calvert, *supra* note 11, at 12; Weins & Hiestand, *supra* note 27, at 3.

82. Corbett, *supra* note 15, at 6.

83. *Id.*

84. Weins & Hiestand, *supra* note 27, at 26.

85. See Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 529 (2007) (arguing that minors who voluntarily produce self-exploitive pornography should not be considered "victims"); see also Brief of Juvenile Law Center as Amici [sic] Curiae in Support of Appellees at 14, *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010) (No. 09-2144), *aff'g* *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009),

2. Prosecuting Sexting Under Child-Pornography Statutes Is Inconsistent with Current Statutory Language

The current state response to sexting is also inappropriate because some state child-pornography statutes do not cover sexting photos that depict minors in a state of nudity, and most statutes do not impose liability on all sexting actors.⁸⁶ The nation's first federal sexting case illustrates both of these shortcomings.

In October 2008, school-district officials in Tunkhannock, Pennsylvania, seized several students' cell phones and discovered photos of "scantily clad, semi-nude and nude teenage girls."⁸⁷ The school district delivered the cell phones to George Skumanick, the local district attorney.⁸⁸ Skumanick sent a form letter⁸⁹ to the parents of several students stating that the prosecutor's office identified their children in an investigation involving the "possession and/or dissemination of child pornography."⁹⁰ Skumanick promised the parents that he would not file felony child-pornography charges against their children if each child completed a program focused on "education and counseling."⁹¹ The vast majority of the implicated minors opted to participate in the program, but the parents of the three girls who appeared in the photos refused to enroll their daughters in the program and sought an injunction to prevent Skumanick from filing felony charges against their daughters.⁹²

The U.S. District Court for the Middle District of Pennsylvania issued an injunction to prevent Skumanick from filing charges against the three

available at <http://www.jlc.org/files/briefs/JLC-Amicus-Miller-v-Skumanick.pdf> (arguing that sexting "generally involves only normal adolescent self expression without the exploitive circumstances that are implicit in the production of conventional child pornography").

86. Richards & Calvert, *supra* note 11, at 13-14. See generally *supra* notes 22-24 and accompanying text (discussing the four roles in every sext).

87. *Skumanick*, 605 F. Supp. 2d at 637 (citing Skumanick Complaint, *supra* note 17, at 6).

88. *Id.*

89. The language of the form letter is reprinted in the opinion written by the U.S. Third Circuit Court of Appeals. *Miller*, 598 F.3d at 143-44. Note that the case name changed on appeal after Jeff Mitchell defeated George Skumanick in the election of November 2009 to become District Attorney of Wyoming County, Pennsylvania. *Id.* at 145.

90. *Skumanick*, 605 F. Supp. 2d at 638 (citing Skumanick Complaint, *supra* note 17, at 8).

91. *Id.*

92. *Id.* at 640 (citing Skumanick Complaint, *supra* note 17, at 14). In their initial complaint, the plaintiffs brought three causes of action including (1) "retaliation in violation of the minors' First Amendment right to free expression" (the expression being the content of the sexting images), (2) "retaliation in violation of the minors' First Amendment right to be free from compelled speech" (the compelled speech being the education program's essay requirements), and (3) "retaliation in violation of the parents' Fourteenth Amendment substantive due process right to direct their children's upbringing" (the interference being the education program's curriculum). *Mitchell*, 598 F.3d at 147-48. The district court based its decision only on the second and third claims, and the court of appeals only considered the second and third claims in its review of the district court's decision. *Id.* at 148.

girls.⁹³ The district court found that the plaintiffs presented a reasonable argument that the images did not fall within the language of the Pennsylvania child-pornography statute and that the three girls did not disseminate the images.⁹⁴ After the Third Circuit Court of Appeals affirmed the district court's decision,⁹⁵ the district court entered an order barring the new district attorney from filing criminal charges against the three girls.⁹⁶

Had the federal courts denied the injunction request, the prosecution of the Pennsylvania minors would have been inappropriate for two reasons. First, the language of the Pennsylvania child-pornography statute⁹⁷ did not apply to the content of the Tunkhannock sexting photos. The first photo showed two girls "from the waist up" wearing "white, opaque bra[s]," one "speaking on the phone" and the other "making the peace sign,"⁹⁸ and the second photo showed a girl "wrapped in a white, opaque towel . . . just below her breasts."⁹⁹ Neither of the photos depicted any sexual activity, genitalia, pubic areas, or "nudity . . . for the purpose of sexual stimulation or gratification" as required by the relevant child-pornography statute.¹⁰⁰ Second, Skumanick did not use the child-pornography statute to impose liability on all of the sexting actors. He only threatened to charge the subjects of the photos and recipients of the photos; he did not threaten to charge all of the students who "disseminated the images."¹⁰¹ Both of these shortcomings demonstrate that some existing child-pornography statutes do not adequately address sexting between minors.

3. Prosecuting Sexting Under Child-Pornography Statutes Results in Excessive Punishment

Perhaps most importantly, the current state response to sexting is inappropriate because charging minors who engage in primary and most instances of secondary sexting with child-pornography offenses results in punishment that is significantly disproportionate to the minor's offense. This excessive punishment, therefore, is unlikely to meet the "narrowly

93. *Skumanick*, 605 F. Supp. 2d at 647.

94. *Id.* at 645-46. The court also found that the plaintiffs demonstrated a reasonable probability of success on the merits of their claims, that the denial of the temporary restraining order would likely cause irreparable injury to the plaintiff teenage girls, that the order would not result in greater harm to the prosecutor, and that granting the motion would be in the public interest. *Id.* at 643-47.

95. *Mitchell*, 598 F.3d 139.

96. Erin L. Nissley, *Charges Will Not Be Filed Against Wyoming County Girls in Sexting Case*, TIMES-TRIB. (Scranton, Pa.), May 1, 2010, <http://thetimes-tribune.com/news/charges-will-not-be-filed-against-wyoming-county-girls-in-sexting-case-1.753585>.

97. 18 PA. CONS. STAT. § 6312 (2009).

98. *Skumanick*, 605 F. Supp. 2d at 639 (citing Skumanick Complaint, *supra* note 17, at 2).

99. *Id.* (citing Skumanick Complaint, *supra* note 17, at 2).

100. Skumanick Complaint, *supra* note 17, at 14 (citing § 6312).

101. *Skumanick*, 605 F. Supp. 2d at 638 (citing Skumanick Complaint, *supra* note 17, at 8).

tailored” and “least restrictive alternative” requirements of strict scrutiny when such images do not constitute obscenity or child pornography.¹⁰²

A recognized principle of criminal law states that the value of punishment “must not be less . . . than what is sufficient to outweigh that of the profit of the offence.”¹⁰³ However, a complementary principle states that if an offender receives punishment that greatly exceeds the severity of his or her offense, other members of society may forget about the underlying crime and think only about the offender’s disproportionate punishment.¹⁰⁴ This troubling outcome exists in the context of sexting as several national sexting scandals have sparked heated debates over the appropriateness of charging minors who engage in sexting with child-pornography offenses, but they have failed to spark debate about the psychological and reputational consequences of sexting.

Individuals who manufacture, possess, or distribute child pornography face “some of the most severe [criminal penalties] outside of crimes like murder.”¹⁰⁵ The state labels such individuals as sex offenders¹⁰⁶ and limits where they can live and work, and the types of relationships that they may create and maintain with others.¹⁰⁷ The current state response to sexting

102. See discussion *supra* Part II.B (discussing the First Amendment implications of sexting images).

103. JEREMY BENTHAM, PRINCIPLES OF PENAL LAW (1788), reprinted in 1 THE WORKS OF JEREMY BENTHAM 365, 399 (Russel & Russel Inc. 1962) (1838).

104. A.C. Ewing, *Punishment as Viewed by the Philosopher*, 21 CANADIAN B. REV. 102, 115–16 (1943). According to A.C. Ewing, when this happens, society frequently views the offender as “a victim of cruel laws, and the whole process, instead of reaffirming the law and intensifying men’s consciousness that the kind of act punished is wrong, will have the opposite effect of casting discredit on the law and making the action of the lawbreaker appear excusable.” *Id.* at 115.

105. Richards & Calvert, *supra* note 11, at 12.

106. Depending on the crime, a prosecutor may charge a sex offender with a “misdemeanor or a felony; a convicted sex offender may serve jail or prison time, pay punitive and compensatory fines, and incur a number of other penalties.” *Sex Offender*, CRIM. L. LAW. SOURCE, <http://www.criminal-law-lawyer-source.com/terms/sex-offender.html> (last visited Oct. 6, 2010).

107. Geyer, *supra* note 29. In many states, community-notification requirements restrict where sex offenders can live or require all sex offenders to wear electronic monitors. Dan Gunderson, *When Getting Tough Backfires: Sex Offender Laws Have Unintended Consequences*, MINN. PUB. RADIO (June 18, 2007), <http://minnesota.publicradio.org/display/web/2007/06/11/sex-offender1/>; *Sex Offender*, *supra* note 106 (“Most state sex offender laws require a sex offender to register in their place of residence within the first week or two of relocation or release, every time they move to another home, county, or state, for the rest of their lives. Many sex offender laws also require a sex offender to notify their employer of their sex offender status.”). Additionally, state laws may prohibit sex offenders from having contact with minors generally and the offender’s victim or victim’s family specifically, entering “places where minors congregate,” viewing and possessing materials that are sexual in nature, frequenting establishments where “alcohol is a major revenue source,” or engaging in “romantic relationships with someone who has kids.” *Id.* For example, in a recent interview, Phillip Alpert, a young adult who engaged in sexting (mentioned at the beginning of this Note), discussed

places minors in the same category as individuals convicted of rape, incest, and virtually any crime against children.¹⁰⁸ When the state adds a sexting minor to its sex-offender registry, it becomes very difficult for the public to determine which registered offenders are truly dangerous.¹⁰⁹ These consequences demonstrate that charging minors who engage in sexting with child-pornography offenses violates principles of proportional punishment and detracts from the more important goal of raising awareness about the dangers of sexting.

B. THE CURRENT STATE RESPONSE TO SECONDARY SEXTING BETWEEN YOUNG ADULTS IS INAPPROPRIATE BECAUSE IT LEAVES ADULT VICTIMS OF SECONDARY SEXTING WITHOUT MEANINGFUL REMEDIES

Prosecutors have not taken any steps to deter sexting between young adults. This response is legally permissible with respect to primary sexting because the First Amendment largely protects such conduct. However, the current state response to secondary sexting between young adults is inappropriate because it leaves adult victims without meaningful remedies. The Jessica Logan sexting incident¹¹⁰ illustrates the shortcomings of the current approach.

Logan engaged in primary sexting when she sent a nude photo of herself to her eighteen-year-old boyfriend, Ryan Salyers.¹¹¹ Salyers engaged in secondary sexting without Logan's consent after they ended their relationship.¹¹² When Logan learned that many of her classmates and students at local high schools received the image that she sent to Salyers, she tried to file a report with her school's guidance counselor.¹¹³ The guidance counselor referred Logan to the School Resource Officer who had previously mediated a sexting incident involving a tenth-grade student—and

how one of his teachers informed his classmates of his sex-offender status and how he endured ridicule and isolation that caused him to skip school and miss his high-school graduation; he also described how his sex-offender status restricts where he can live and work. Richards & Calvert, *supra* note 11, at 20–21.

108. *Sex Offender*, *supra* note 106.

109. *See* Richards & Calvert, *supra* note 11, at 23, 36. Maureen Kanka—mother of Megan Kanka, the seven-year-old girl who a convicted sex offender raped and murdered and the namesake of Megan's Law—has publically criticized sex-offender registration for sexting minors. *Id.* at 36.

110. *See supra* notes 5–9 and accompanying text (discussing Jessica Logan, a young adult from Ohio who sent a sexting image to another young adult).

111. Logan Federal Complaint, *supra* note 6, at 4; Logan State Complaint, *supra* note 5, at 2.

112. Logan Federal Complaint, *supra* note 6, at 4–5; Logan State Complaint, *supra* note 5, at 2.

113. Logan Federal Complaint, *supra* note 6, at 5; Logan State Complaint, *supra* note 5, at 2.

presumably a minor—at Logan’s high school.¹¹⁴ In that previous incident, the Officer had “opened a criminal investigation, investigated the complaint . . . , and [mediated the dispute between the various parties and their parents].”¹¹⁵ However, he did not offer any of these options to Logan or her parents; instead, he told Logan that there was “nothing he could do” because “there was no law to protect her since she was eighteen years old, and sent the photo under her own volition.”¹¹⁶

Logan started to skip school, and her grades suffered.¹¹⁷ Students “threw objects at [her]” during her high school graduation ceremony and “at graduation parties,” “hurled sexual epithets at her,” and “continued to harass her by phone and online.”¹¹⁸ Neither school nor law-enforcement authorities offered Logan any recourse, even though she faced the same psychological and reputational consequences as a younger victim of secondary sexting at her high school. The current state response, which does not regulate the conduct of young adults and offers neither counseling nor support for victims, is inappropriate because it leaves adult victims without meaningful remedies and fails to raise awareness about the dangers of sexting between young adults.

IV. THREE INNOVATIVE STATE RESPONSES TO SEXTING BETWEEN MINORS AND BETWEEN YOUNG ADULTS

The current state response to sexting between minors and between young adults is inappropriate. However, several possible state solutions exist to educate minors and young adults about the dangers of primary and secondary sexting, to punish minors who engage in primary and secondary sexting under certain circumstances, and to provide appropriate remedies for minors and young adults who are victims of secondary sexting.

A. *THE STATE SHOULD IMPLEMENT EDUCATION PROGRAMS TO DETER PRIMARY AND SECONDARY SEXTING BETWEEN MINORS AND BETWEEN YOUNG ADULTS*

State intervention typically involves legislation and litigation, but states may also intervene to deter undesired conduct by allocating resources to prevention programs. Accordingly, the state’s first line of defense against primary and secondary sexting between minors and between young adults should be funding preventative education programs for minors, young adults, parents, and school faculty and administrators.

114. Logan Federal Complaint, *supra* note 6, at 6; Logan State Complaint, *supra* note 5, at 2.

115. Logan Federal Complaint, *supra* note 6, at 6 (citation omitted).

116. *Id.*; Logan State Complaint, *supra* note 5, at 2.

117. Logan Federal Complaint, *supra* note 6, at 7.

118. *Id.* at 8.

Recent studies suggest that minors and young adults may not fully understand the short-term and long-term psychological and reputational consequences of sexting.¹¹⁹ Understanding consequences frequently deters minors and young adults from engaging in reckless behavior.¹²⁰ Therefore, elementary schools, middle schools, high schools, and colleges and universities¹²¹ should educate minors and young adults during annual student orientations about the potential consequences of sexting.¹²² If minors and young adults receive education about the psychological and reputational consequences of sexting, they may refrain from sexting in the first place.

Elementary schools, middle schools, and high schools should also offer preventative programs and written resources to educate parents about sexting between minors. Parents should learn how to set limits on their minors' use of cell phones and the Internet. For example, preventative programs can teach parents how to control the number of cell-phone minutes or text messages available to their children on a monthly basis.¹²³ Preventative programs can also teach parents how to install cell-phone applications that enable parents to monitor who calls and texts their children and who their children call and text and to flag text messages that refer to "sex or drugs."¹²⁴ If parents receive education about the psychological and reputational consequences of sexting as well as effective methods for monitoring such behavior, they can also discourage minors from sexting.

Some states and individual school districts have recently implemented programs that strive to educate minors, parents, and school faculty and administrators about the dangers of sexting. For example, Indianapolis Public Schools is implementing a formal policy to ban sexting and educate parents about its dangers.¹²⁵ The Pennsylvania Attorney General's Office recently launched a new educational program aimed at preventing

119. See *supra* notes 45–46 and accompanying text (presenting evidence that minors and young adults may not truly understand the consequences of sexting).

120. Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 42–43 (2007).

121. Colleges and universities should implement preventative programs because of the high percentage of college-age minors and young adults who engage in sexting. See discussion *supra* Part II.A (discussing the prevalence of sexting between minors and between young adults).

122. Corbett, *supra* note 15, at 7.

123. *Id.* A recent study conducted by the Pew Research Center found that "[t]eens with unlimited text messaging plans" are more likely to report sexting than minors with "limited plans" or minors who "pay per message." TEENS AND SEXTING STUDY, *supra* note 45, at 6.

124. Bandyk, *supra* note 49.

125. Andy Gammill, *IPS Wants To Put End to Students' Sexting*, INDIANAPOLIS STAR, Aug. 19, 2009, 2009 WLNR 16150058.

cyberbullying that will also address sexting.¹²⁶ The Pennsylvania program will educate “students, parents, and teachers across the state.”¹²⁷ The Attorney General could also offer similar programs to public colleges and universities to deter sexting between young adults who attend such institutions.

At the national level, several federal agencies recently released “Net Cetera,” a booklet designed to help parents and teachers discuss Internet and cellphone safety with minors.¹²⁸ The booklet provides talking points on issues such as “cyberbullying, sexting, mobile phone safety, and protecting the family computer.”¹²⁹ This booklet may be a helpful resource for school districts that wish to implement educational programs. Additionally, a new Senate bill—the SAFE Internet Act of 2009—offers grants to school districts and nonprofit organizations to enable them to implement “age-appropriate, research-based program[s] that encourage[] safe, ethical, and responsible use of the Internet . . . and new media,” including cell phones.¹³⁰ If this bill passes, it may be an excellent way for states, individual school districts, and colleges and universities to access the resources they need to implement sexting education programs.

126. Press Release, Office of Pa. Att’y Gen. Tom Corbett, Attorney General Corbett Announces Launch of New Educational Program Aimed at Preventing Cyberbullying (Oct. 14, 2009), <http://www.attorneygeneral.gov/press.aspx?id=4755>. The District Attorney of Berkshire County in Massachusetts recently launched a similar initiative. See Press Release, Office of Berkshire Cnty. Dist. Att’y David F. Capeless, District Attorney Holds Press Conference on Problem of “Sexting” in Berkshire County (Mar. 3, 2009), http://www.mass.gov/?pageID=bermodulechunk&L=1&Lo=Home&sid=Dber&cb=terminalcontent&f=nu_2009_0303_sexting_press_conference&csid=Dber (describing the district attorney’s plan to provide presentations to schools and communities on topics such as bullying, cyberbullying, internet safety, and sexting).

127. Press Release, Office of Pa. Att’y Gen. Tom Corbett, *supra* note 126.

128. Press Release, FTC, Cybersafety Booklet for Parents and Kids Now Available (Dec. 16, 2009), <http://www.ftc.gov/opa/2009/12/netcetera.shtm>.

129. ONGUARD ONLINE, NET CETERA: CHATTING WITH KIDS ABOUT BEING ONLINE 19 (2009), <http://www.onguardonline.gov/pdf/teco4.pdf>. On the specific issue of sexting, the booklet recommends to parents, “Tell your kids not to do it. In addition to risking their reputation and their friendships, they could be breaking the law if they create, forward, or even save this kind of message.” *Id.*

130. SAFE Internet Act, S. 1047, 111th Cong. § 3(5) (2009). Under this bill, eligible entities may receive a two-year grant from the Director of the Bureau of Justice Assistance to do such things as “identify, develop, and implement Internet safety education programs”; “provide professional training to elementary and secondary teachers, administrators, and other staff on Internet safety and new media literacy”; “educate parents about teaching their children how to use the Internet and new media safely”; and “help parents identify and protect their children from risks relating to use of the Internet and new media.” *Id.* § 4(d).

B. *THE STATE SHOULD REVISE EXISTING STATUTES OR IMPLEMENT NEW STATUTES THAT SPECIFICALLY ADDRESS PRIMARY AND SECONDARY SEXTING BETWEEN MINORS*

In addition to implementing preventative education programs, states should revise existing statutes or implement new statutes that address primary and secondary sexting between minors.¹³¹ These sexting statutes should create juvenile-diversion programs for minors who engage in primary sexting and appropriate juvenile or criminal penalties for minors who engage in secondary sexting and some instances of primary sexting.

Sexting statutes should include language that clearly and specifically addresses sexting behavior. For example, the statutes should discuss the culpability of each sexting actor.¹³² The statutes should also distinguish between primary and secondary sexting and impose more severe penalties on minors who engage in secondary sexting. The statutes should also specifically address sexting behavior that the state has the authority to regulate but does not violate existing obscenity or child-pornography laws.¹³³ Additionally, the legislative materials associated with the sexting statutes should reflect specific legislative intent to target sexting behavior.

1. *Sexting Statutes Should Create Juvenile Diversion Programs for Minors Who Engage in Primary Sexting*

The state has the authority to intervene to curb both primary and secondary sexting between minors, but minors who engage in primary sexting are less culpable than minors who engage in secondary sexting because their conduct is usually consensual and commonly takes place in the

131. The federal government may also consider revising existing statutes or implementing new statutes that address primary and secondary sexting between minors because minors who send sexting images across state lines may face charges in federal court.

132. See *supra* notes 22–24 and accompanying text (discussing the four roles in every sext). For an example of such language, see H.B. 2189, 2009–2010 Gen. Assemb., Reg. Sess. (Pa. 2010) (Printer’s No. 4008), which revises an existing child-pornography statute and provides that a minor who distributes or possesses a depiction of him- or herself or another minor “engaging in sexually explicit conduct” may face second-degree misdemeanor charges rather than felony charges. *Id.* The bill defines “sexually explicit conduct” as a “lewd or lascivious exhibition of the [minor’s] genitals, public area, breasts or buttocks” or “nudity if the nudity is depicted for the the purpose of sexual stimulation [of the viewer].” *Id.* The bill does not apply to images that depict “sexual intercourse,” “deviate sexual intercourse,” “masturbation,” or “sadism or masochism” involving a minor; minors who distribute or possess such images may face felony child-pornography charges. *Id.*

133. For an example of such language, see a recent New Jersey bill, introduced before both the General Assembly and the Senate, which states that an “eligible offense” includes “the creation, exhibition or distribution . . . of a photograph depicting nudity as defined [by state law] through the use of an interactive wireless communications device or a computer.” Gen. Assemb. 4069, 213th Leg., Reg. Sess. (N.J. 2009); S.B. 2926, 213th Leg., Reg. Sess. (N.J. 2009).

context of a committed relationship.¹³⁴ Juvenile diversion programs enable minors to avoid traditional juvenile or criminal proceedings, and prosecutors commonly refer minors to diversion programs when a minor's behavior is "socially disruptive (but not criminal)" or when a minor's behavior "has not created major or serious consequences."¹³⁵ Sexting statutes should create juvenile diversion programs to educate and rehabilitate minors who engage in primary sexting, with certain limited exceptions.¹³⁶

Some states have already implemented juvenile diversion programs for minors who engage in sexting. For example, in Montgomery County, Ohio, minors who engage in sexting must, for a minimum of six months, live under court supervision and participate in community service and an educational program that "will focus on the legal ramifications, the effects on the victim, establishing age appropriate sexual boundaries, and responsible use of the Internet, cell phones and other communication devices."¹³⁷ Upon successful completion of the program, prosecutors will dismiss pending charges against the minor; however, if the minor fails to successfully complete the program, the prosecutor will file charges in juvenile court.¹³⁸ Similarly, a New Jersey bill creates juvenile diversion programs for minors charged with sexting; if the minor completes the program, he or she will not face criminal charges.¹³⁹ Both the Ohio and New Jersey diversion programs are great models that other states may follow when they revise existing statutes or implement new statutes to address primary and secondary sexting between minors.

2. Sexting Statutes Should Impose Juvenile or Criminal Penalties on Minors Who Engage in Secondary Sexting and Some Instances of Primary Sexting

Given the greater culpability of minors who engage in secondary sexting, sexting statutes should impose juvenile or criminal penalties on

134. See SEX AND TECH STUDY, *supra* note 32, at 2 (discussing how the vast majority of minors and young adults who engage in sexting send such content to their boyfriend or girlfriend).

135. *Miller v. Mitchell*, 598 F.3d 139, 146 (3d Cir. 2010) (quoting *Commonwealth v. J.H.B.*, 760 A.2d 27, 32 (Pa. Super. Ct. 2000)) (internal quotation marks omitted).

136. Under certain circumstances, it may be appropriate for the state to impose harsher penalties on minors who engage in primary sexting. These situations may include instances where the teen already completed or failed to complete a juvenile diversion program designed to discourage the teen from engaging in primary sexting or instances where the teen coerced the subject of the photo to take or disseminate the photo.

137. Mathias H. Heck, *Sexting and Charging Juveniles—Balancing the Law and Bad Choices*, PROSECUTOR, Jan.–Mar. 2009, at 28, 29.

138. *Id.*

139. Gen. Assemb. 4069, 213th Leg., Reg. Sess. (N.J. 2009); S.B. 2926, 213th Leg., Reg. Sess. (N.J. 2009).

minors who engage in secondary sexting and, in limited circumstances, primary sexting.¹⁴⁰ To date, no state has revised existing statutes or introduced new statutes that attempt to distinguish between primary and secondary sexting. However, some states have revised existing statutes or introduced new statutes that impose more severe punishments on minors who engage in primary or secondary sexting after their first offense. For example, a Florida bill introduced in response to the Hope Witsell and Phillip Alpert sexting incidents imposes noncriminal and criminal offenses for sexting.¹⁴¹ The bill provides that a minor who distributes¹⁴² a nude depiction of him- or herself may face court-ordered community service or a sixty-dollar fine for a first offense, second-degree misdemeanor charges for a second offense, first-degree misdemeanor charges for a third offense, and third-degree felony charges for a fourth offense.¹⁴³ While current sexting statutes represent a step in the right direction, they fail to impose greater penalties on the most culpable minors—those who engage in secondary sexting.

C. THE STATE SHOULD RECOGNIZE AND SUPPORT TORT CLAIMS FOR MINOR AND ADULT VICTIMS OF SECONDARY SEXTING

The state does not have the same authority to regulate primary and secondary sexting between young adults as it does to regulate primary and secondary sexting between minors. However, the state may recognize and support intentional-infliction-of-emotional-distress¹⁴⁴ and invasion-of-privacy¹⁴⁵ claims initiated by minor and adult victims of secondary sexting without infringing upon the First Amendment rights of minors or young adults.

Some state and federal courts have recognized intentional-infliction-of-emotional-distress and invasion-of-privacy claims for adults in circumstances that resemble secondary sexting. For example, an Indiana court recognized

140. See *supra* note 136 (discussing such limited circumstances).

141. S.B. 2560, 2010 Leg., Reg. Sess. (Fla. 2010).

142. Note that there is no punishment for a minor who receives and merely possesses the image. *Id.*

143. *Id.*

144. Interestingly, one of the illustrations of a cause of action for intentional infliction of emotional distress that the Restatement (Second) of Torts provides is a situation in which a man invites a woman to a swimming party and gives the woman a bathing suit that the man knows will dissolve in water; the bathing suit dissolves once the woman enters the water, “leaving her naked” in the presence of the other guests; and she suffers “extreme embarrassment, shame, and humiliation.” RESTATEMENT (SECOND) OF TORTS § 46 cmt. d, illus. 3 (1965). This scenario is analogous to secondary sexting in which a recipient of a semi-nude or nude sexting image shares the photo with unintended recipients without the consent of the subject of the photo.

145. Current privacy doctrine protects “anything occurring in a space designated as ‘private,’” including “sexual details and intimate communications.” Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 17 (2007).

a woman's cause of action for invasion of privacy and intentional infliction of emotional distress after her ex-husband made photocopies of nude photos that the woman took during the course of their marriage and posted them in several locations near the woman's home.¹⁴⁶ In another case, the U.S. Court of Appeals for the Fifth Circuit recognized a woman's cause of action for invasion of privacy after a neighbor broke into her home, stole several nude photos that the woman took for her husband, and submitted the photos to *Hustler Magazine* without the woman's consent.¹⁴⁷ Both of these cases present fact patterns that closely resemble recent sexting incidents. For example, the facts of the Indiana case are very similar to the facts of the Jessica Logan sexting incident in which Logan took a nude photo of herself, shared it with her boyfriend in the context of a committed relationship, and faced severe psychological and reputational consequences after her boyfriend publically disseminated the image.

These cases suggest that the state may effectively use tort claims both to deter secondary sexting between young adults and between minors, and to offer meaningful relief for victims of secondary sexting when the state cannot or does not offer other remedies.¹⁴⁸ The facts of the recent sexting cases may even present a stronger argument in favor of tort claims than these two cases because the recent sexting cases implicate the physical and psychological well-being of minors and young adults rather than grown women and because the use of new technology such as cell phones leaves victims of secondary sexting vulnerable to humiliation on a much larger scale.

V. CONCLUSION

It is always difficult to strike the right balance between placing limits on an individual's behavior and allowing him or her to make—and learn from—his or her mistakes. Sexting between minors and between young adults presents yet another example of this dilemma. However, if properly designed and implemented, preventative education programs, revised or new statutes that specifically address sexting, and tort actions are excellent ways to achieve such a balance and also deter sexting between minors and

146. *Pohle v. Cheatham*, 724 N.E.2d 655, 657–58 (Ind. Ct. App. 2000). The court also dismissed the woman's ex-husband's affirmative defense of waiver, stating that:

We cannot agree . . . that Cheatham consented to the publication of the photographs. Rather, it is clear that . . . she simply consented to being privately photographed by her husband. From such limited consent, it certainly cannot legitimately be inferred that Cheatham intended to waive her right to complain about the public distribution of the photographs.

Id. at 661.

147. *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1085–86 (5th Cir. 1984).

148. See Calvert, *supra* note 25, at 63 (discussing how victims of secondary sexting may have a civil law remedy against the person who forwarded his or her image without permission).

between young adults. If society bands together to adequately deter and, when appropriate, punish sexting, minors and young adults may be able to avoid the dangerous consequences of this trend and rethink a moment of indiscretion that can lead to a lifetime of unintended consequences.