

## NOTES & COMMENTS

### CRUEL TO BE KIND: THE SOCIETAL RESPONSE TO TECHNOLOGY AND YOUTH SEXUAL EXPRESSION

by

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*The sending and receiving of explicit images via cellular phone—popularly referred to as “sexting”—has emerged as a common method of sexual expression in the digital age. Though sexting is a relatively accepted practice among adults, society views sexting among minors as a significant threat to the health and well-being of young people. In an effort to curb the practice, many states have sought to prosecute minors engaged in sexting under existing child pornography laws. Subjecting children to far-reaching social, professional, and psychological harms at the hands of the criminal justice system is justified, proponents argue, because we must protect children from their own lack of judgment. Prosecuting children as child pornographers, however, has proven to be an ineffective and overly punitive remedy for a problem that is*

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*but a symptom of wider societal issues. Consequently, a comprehensive effort among parents, policymakers, prosecutors, and other adult stakeholders is needed to develop a remedy that furthers policy goals while protecting the interests of the child.*

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## INTRODUCTION

The proliferation of digital communication technologies has vastly changed how people, particularly young people, connect and interact with the world around them. Historically, cellular phones and “smartphones” possessing advanced connectivity and computing capabilities have been considered something of a luxury, but almost three-quarters of teens aged 13 to 17 currently own or have access

to a smartphone.<sup>1</sup> Today's youth, sometimes referred to as "digital natives"<sup>2</sup> or "digitally empowered kids,"<sup>3</sup> have embraced smartphones and other digital technologies as indispensable tools in the cultivation of personal identity and the development and management of peer-to-peer relationships. Indeed, digital natives place heavy reliance on technology as a means "to express emotional experience and navigate developmental demands."<sup>4</sup> Young people consequently handle the daily workings of their lives in the public sphere, navigating the twists and turns of adolescence while publishing the gritty details to friends, peers, and casual observers on social media.<sup>5</sup> This widespread integration of sophisticated communications technology into everyday life has thus made young people "accustomed to seeing, and being seen, on a scale that was unimaginable by their parents and teachers."<sup>6</sup>

Modern technology's pervasive reach has invariably resulted in its transformation into an instrumentality of human sexual expression. The exchange of sexually explicit photos via cell phone, often referred to as "sexting" by the mainstream media, is one such byproduct of the digital age and is a common practice among adults.<sup>7</sup> However, when young people engage in sexting, specifically minors

<sup>1</sup> Amanda Lenhart et al., *Teens, Social Media & Technology Overview 2015*, PEW RES. CTR. (April 9, 2015), <http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/>.

<sup>2</sup> "Digital natives" are youths who have "spent their entire lives surrounded by and using computers, videogames, digital music players, video cams, cell phones, and all the other toys and tools of the digital age." For a detailed analysis of how constant exposure to technology has transformed the way digital natives think, analyze information, and learn, see Marc Prensky, *Digital Natives, Digital Immigrants*, 9 ON THE HORIZON 1 (2001), <https://www.marcprensky.com/writing/Prensky%20Digital%20Natives,%20Digital%20Immigrants%20-%20Part1.pdf>.

<sup>3</sup> The name "digitally empowered kids" specifically addresses the advantage of growing up with "digital expertise . . . [that] can better position and 'empower' [young people] to succeed in a future of evolving technologies." SHAHEEN SHARIFF, *SEXTING AND CYBERBULLYING: DEFINING THE LINE FOR DIGITALLY EMPOWERED KIDS* 6 (2015).

<sup>4</sup> Abigail M. Judge, "Sexting" Among U.S. Adolescents: *Psychological and Legal Perspectives*, 20 HARV. REV. PSYCHIATRY 86, 87 (2012).

<sup>5</sup> See Perri Klass, M.D., *Teenagers Are Sexting—Now What?*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/well/family/teens-are-sexting-now-what.html>.

<sup>6</sup> Del Siegle, *Cyberbullying and Sexting: Technology Abuses of the 21st Century*, 32 GIFTED CHILD TODAY 14 (2010).

<sup>7</sup> A 2015 Drexel University study was presented at the American Psychological Association's annual convention that enlisted 870 heterosexual adults between the ages of 18 and 82 to complete a survey about their sexting habits. Of those surveyed, 88% had sexted at least once, while 82% had texted in the last year. 96% of those who participated in sexting voiced support for the practice. Emily C. Stasko & Pamela A. Geller, *Reframing Sexting as Positive Relationship Behavior*, AM. PSYCH. ASSOC. (2015), <http://www.apa.org/news/press/releases/2015/08/reframing-sexting.pdf>; Rachel Zimmerman, *Sexting Among Adults May Be*

under the age of 18, the practice is often associated with an assortment of dire consequences that include psychological harm, bullying, and suicide.<sup>8</sup> To protect young people from these harms, many states seek to deter sexting among juveniles through criminal prosecution under existing child pornography laws.<sup>9</sup> Proponents of charging juveniles engaged in sexting as child pornographers argue that extreme measures are necessary to shield young people from the irreparable harm that sexting may cause; that in order to save them from the permanent scars of one harm, we must inflict and make them live with the permanent scars of another, potentially more devastating harm.<sup>10</sup> Thus, society's response to the perceived ills that may flow from peer-to-peer sexting is to bring the hammer of the criminal justice system down on juveniles in order to protect them "from their own lack of judgment."<sup>11</sup> In other words, we must be cruel to be kind.

But how effective is the criminalization of peer-to-peer sexting in deterring young people from engaging in the practice? Has prosecuting those who are caught participating somehow saved them from a lifetime of disastrous consequences that would have otherwise ruined any chance of success as adults? Is a legal response really necessary to remedy a problem that is often described simply as a "combination of technology, hormones, and stupidity?"<sup>12</sup> Is there not a better

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*More Common Than You Think, Survey Suggests*, WBUR 90.9 (Aug. 14, 2015), <http://www.wbur.org/commonhealth/2015/08/14/sexting-adults-relationships>.

<sup>8</sup> The media has fixated on several suicides involving the exchange of sexually explicit photographs between young people. Prominent examples include the story of Canadian teen Amanda Todd who committed suicide after an adult lured her into posing semi-nude in front of a webcam. The man sent the photo to her family and friends, and she was relentlessly bullied before drinking bleach in 2012. SHARIFF, *supra* note 3, at 38–39; Jessica Logan, a teenager from Ohio, was similarly bullied by her peers after an ex-boyfriend shared nude photos she had sent him during their relationship. She hanged herself in her bedroom weeks after appearing on national television to share her story and anti-bullying message. Mike Celizic, *Her Teen Committed Suicide Over "Sexting,"* TODAY (Mar. 6, 2009), <https://www.today.com/parents/her-teen-committed-suicide-over-sexting-2D80555048>.

<sup>9</sup> See, e.g., *Miller v. Mitchell*, 598 F.3d 139, 143 (3d Cir. 2010) (in which a prosecutor threatened to charge two teenage girls with felony child pornography crimes when photos were circulated in which they were wearing an opaque bra and a bathing suit); *A.H. v. State*, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007) (in which A.H. and her boyfriend, both of whom were minors, were convicted of possession of child pornography for exchanging photos of themselves engaged in sexual conduct that were kept private and never shared with a third person).

<sup>10</sup> See Radley Balko, *We Must Destroy the Children in Order to Save Them*, WASH. POST (July 11, 2014), [https://www.washingtonpost.com/news/the-watch/wp/2014/07/11/we-must-destroy-the-children-in-order-to-save-them/?noredirect=on&utm\\_term=.094ff2b8f4a7](https://www.washingtonpost.com/news/the-watch/wp/2014/07/11/we-must-destroy-the-children-in-order-to-save-them/?noredirect=on&utm_term=.094ff2b8f4a7).

<sup>11</sup> *A.H.*, 949 So. 2d at 238.

<sup>12</sup> Ben O'Brien, *To Deal with 'Sexting,' XXXtra Discretion is Advised*, USA TODAY (May 5, 2009), <https://www.pressreader.com/usa/usa-today-us-edition/20090505/281698315695360>.

way to avoid the pitfalls that may accompany new technology, the advancement of digital culture, and the ever-evolving ways in which young people explore their emerging sexuality?

In this Note, I attempt to answer these questions by exploring the practice, motivations, and consequences commonly associated with peer-to-peer sexting. Part I explains the various definitions applied to the term “sexting,” and explores the different views among the various stakeholders in this issue of what behaviors constitute sexting. Part II identifies youths’ motivations to engage in sexting and explains why young people choose to take the risk. Part III outlines the various consequences that adults and the media popularly associate with sexting, which serve as the basis for legal intervention. Part IV describes the legal response to sexting, including the various strides made at the state level to specifically address the behavior as practiced by minors. Part V will briefly summarize why the current framework is an ineffectual remedy for a poorly understood problem. Finally, in Part VI, I make suggestions to improve the handling of peer-to-peer sexting moving forward.

## I. SEXTING: IN SEARCH OF A DEFINITION

Sexting is an international phenomenon,<sup>13</sup> but popular recognition and adoption of the term “sexting” is widely considered to be a product of mainstream media usage.<sup>14</sup> It first appeared in the United States in a 2005 *Los Angeles Times* article that dubbed the new trend of using a cell phone to send sexually suggestive photos “sext-messaging.”<sup>15</sup> In 2009, news outlets like the *New York Times*, *CBS*, and *NPR* scandalized a national audience by publishing reports that teenagers had been caught sexting in various locales around the country.<sup>16</sup> The increased media attention on young people’s participation in the practice and the attendant public furor prompted *Time Magazine* to name “sexting” the 2009 buzzword of the year.<sup>17</sup> The term has since been cemented into common culture and embraced in everyday vernacular by its addition to *Merriam-Webster’s Collegiate Dictionary* in 2012.<sup>18</sup>

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<sup>13</sup> Underage sexting has been reported as an issue of serious concern in Canada, Australia, China, and the United Kingdom. Judge, *supra* note 4, at 87.

<sup>14</sup> *Id.*

<sup>15</sup> Eli Rosenberg, *In Weiner’s Wake, a Brief History of the Word ‘Sexting,’* THE ATLANTIC (June 9, 2011), <https://www.theatlantic.com/national/archive/2011/06/brief-history-sexting/351598/>.

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

<sup>17</sup> Siegle, *supra* note 6, at 15.

<sup>18</sup> Leanne Italie, *F-Bomb Makes it Into Mainstream Dictionary*, WASH. TIMES (Aug. 13,

*Webster's* defines sexting as "the sending of sexually explicit messages or images by cell phone."<sup>19</sup> *Webster's* basic definition sufficiently describes sexting as it applies in the context of adult behavior, but it oversimplifies the broader range of behaviors that parents, prosecutors, policymakers, and the media often associate with sexting when the actors involved are minors.<sup>20</sup> When sexting occurs between juveniles, adult stakeholders tend to see past the act itself—the simple exchange of risqué photos—to an array of legal, social, and psychological harms that are presumed to result.<sup>21</sup> Consequently, adult stakeholders often include, and seek to punish, a variety of behaviors that extend beyond what is included in the basic definition of sexting in order to protect children from those perceived harms.<sup>22</sup> To be sure, the term "sexting" can be somewhat amorphous conceptually—including or excluding various actors, behaviors, technologies, and motives depending on the context.<sup>23</sup> A simplistic definition, like that advanced by *Webster's*, thus "fails to dis-

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2012), <https://www.washingtontimes.com/news/2012/aug/13/f-bomb-makes-it-mainstream-dictionary/>.

<sup>19</sup> *Sexting*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/sexting>.

<sup>20</sup> See, e.g., Jan Hoffman, *States Struggle with Minors' Sexting*, N.Y. TIMES (Mar. 26, 2011), <http://www.nytimes.com/2011/03/27/us/27sextinglaw.html> (describing the varied outcomes in states that have attempted to define what constitutes a sexting offense); see generally JUDITH DAVIDSON, *SEXTING: GENDER AND TEENS* (2014) (comparing and contrasting how male teens, female teens, and adults define sexting).

<sup>21</sup> See, e.g., *Miller v. Mitchell*, 598 F.3d 139, 144 (3d Cir. 2010) (teenagers engaged in sexting were subject to criminal prosecution under child pornography laws); see also Susan Hanley Duncan, *A Legal Response Is Necessary for Self-Produced Child Pornography: A Legislator's Checklist for Drafting the Bill*, 89 OR. L. REV. 645, 648 (2010).

<sup>22</sup> Compare, e.g., the National School Boards Association's Council of School Attorneys' definition of sexting: "the practice by which teens forward sexually explicit images of themselves or their peers via text messaging." Lisa E. Soronen et al., *Sexting at School: Lessons Learned the Hard Way*, NAT. SCH. BOARD ASS'N (2010), <https://www.bcbe.org/site/handlers/filedownload.ashx?moduleinstanceid=2699&dataid=3497&FileName=Sexting%20at%20School%20Lessons%20Learned%20the%20Hard%20Way.pdf>; with the definition promulgated by national law firm Fisher Phillips defining sexting as "when young people take nude pictures or video images of themselves or others, using cell phones or webcams, and share them with others via text message, email, social-media post, or similar internet dissemination." Fisher Phillips, *Student Sexting: A Serious Issue in Need of a Thoughtful Response*, EDUC. LAB. UPDATE (Jan. 6, 2014), <https://www.fisherphillips.com/pp/newsletterarticle-student-sexting-a-serious-issue-in-need-of-a-thoughtful-response.pdf>.

<sup>23</sup> Judge, *supra* note 4, at 87 (noting that "sexting" describes a wide range of behaviors, including "the exchange of sexual images by different media (e.g., cell phone or Internet), between people of various ages (e.g., between minors, or between minors and adults), or in situations that involve a range of motives (e.g., consensual or coercive). Thus, the term *sexting* is extraordinarily broad and inclusive, which tends to confuse an already poorly understood

tinguish among the range of scenarios, motivations, and potential risks associated with this behavior” when practiced by minors.<sup>24</sup>

In a study published by Judith Davidson, in-depth focus group discussions in three regions of the United States revealed key differences in how sexting is defined and understood by youths, parents, and adults involved in the guidance and stewardship of young people.<sup>25</sup> Recognizing and understanding these differences is a necessary step to accurately determine the frequency with which these behaviors actually occur, whether peer-to-peer sexting provides any utility or only detriment to those who participate, and identifying the best approach to minimizing the harms that may flow from engagement. Indeed, understanding the differences in how various stakeholders perceive peer-to-peer sexting is *essential* to addressing the problem—if the act of sexting itself is the behavior most in need of a remedy in the first place.

#### A. *Youths’ Definitions*

Davidson’s teen focus groups<sup>26</sup> revealed considerable confusion among both female and male youths in articulating a single definition of sexting.<sup>27</sup> The young women participants comprehended sexting in the abstract, loath to conceptualize the practice “too rigidly in terms of relationships, morality, or danger.”<sup>28</sup> The young men also experienced difficulties nailing down an authoritative definition, able to identify acts they considered individual components of peer-to-peer sexting, but “hard put to create a definition . . . from those pieces.”<sup>29</sup> Both sexes struggled to find a way to consolidate “a diversity of viewpoints across individuals and social groups.”<sup>30</sup>

The inability of young people to articulate a single definition could be explained, at least in part, by the fact that young people generally do not use the

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phenomenon.”).

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

<sup>25</sup> *See generally* DAVIDSON, *supra* note 20.

<sup>26</sup> The teen focus groups included in Davidson’s study were comprised of 123 teen participants. All were attending high school, and the median participant age was 17, indicating that some participants were at least 18. As explained in Section VI, *infra*, including teens that are 18 or older limit the conclusions that can be drawn about sexting among minors. However, the information compiled from the focus groups is still a helpful gauge of how high school-age youth perceive and handle this issue.

<sup>27</sup> DAVIDSON, *supra* note 20, at 23, 41 (“In definitional discussions about sexting, there were probably as many questions as there were statements.”).

<sup>28</sup> *Id.* at 24.

<sup>29</sup> *Id.* at 41.

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

term “sexting” when referring to the exchange of sexually explicit photos among their peers.<sup>31</sup> Youths do not mirror adult tendencies to group various independent deeds under the single act of “sexting,” instead compartmentalizing their behavior into “actual practices such as forwarding and sharing.”<sup>32</sup> As one young participant from South Carolina commented, “We don’t really call it sexting, we just say—Hey! Look at this picture.”<sup>33</sup>

The conversations among Davidson’s focus groups revealed that, for young people, the word “sexting” seems to be reserved for “the issue of outside [adult] sexual predators;” a cognizable, if not distant, fear for both sexes.<sup>34</sup> Indeed, many youths feel that sexting’s criminal penalties, as applied to minors, are too harsh if not completely unnecessary, but believe laws should be in place to protect them from dangerous adult predators.<sup>35</sup> Drawing this distinction seems to indicate that youths perceive “sexting,” which they associate with child victimization by dangerous adults, and the exchange of sexually explicit photographs among their peers, as conceptually separate and distinct. This divergence suggests that youths consider only immediate, tangible consequences that might originate within the microcosm of their own social group and stop short of appreciating the possibility of more far-reaching effects that might flow from creating, sharing, storing, or posting sexually explicit photographs for others to see.

#### *B. Parents and Caregivers’ Definitions*

Many parents struggle to understand, accept, and handle the evolving societal “norms, values, and practices” that have emerged as technology has advanced.<sup>36</sup> Significantly, Davidson’s focus groups revealed that parents often rely on what they see in popular television shows or what they hear in anecdotes to understand and define sexting.<sup>37</sup> In searching for a clear definition, parents also tend to rely on their own memories of how previous technologies, such as Xerox machines and pagers, were used to express sexuality.<sup>38</sup> Such memories, perhaps, can explain the

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<sup>31</sup> *Id.* at 33.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 41.

<sup>34</sup> *Id.* at 33, 52.

<sup>35</sup> *Id.* at 52.

<sup>36</sup> *Id.* at 71.

<sup>37</sup> Davidson found that knowledge and understanding of sexting varied among the parents and caregivers interviewed. Parental knowledge ran the gamut from “did not know, heard about it at church, or saw a movie about it on TV, to knew about an incident at school, heard about a suicide related to sexting, or had a child involved in online sexual activities.” *Id.* at 69.

<sup>38</sup> “These reminiscences included beepers (numbers stood for sexual acts), butts on Xerox machines (taking a photocopy of your nude bottom to share with others), the telephone party



reasons parent and caregiver participants raised “few positive associations” in discussions about sexting, and their focus on sexting’s broader implications concerning the role of evolving technology in an over-sexualized society.<sup>39</sup> Settling on concrete parameters for which behaviors fall under the umbrella of sexting therefore seems to be less important to parents and caregivers than understanding what sexting means in the context of wider societal changes.

Many concerns stem from the degree to which technology has been integrated into everyday life, and many parents fear they cannot keep pace with the technological skill and knowledge of their children.<sup>40</sup> In parents’ view, technological illiteracy means they cannot protect their children from new threats that may emerge as technology continues to evolve.<sup>41</sup> These fears seem to represent a significant portion of parental animus toward peer-to-peer sexting, and may color how a parent or caregiver would approach their own child’s involvement.

Such concerns are not entirely without merit. For example, in 2017, school administrators in the affluent Massachusetts town of Duxbury discovered that male high school students had created an account on Dropbox, an online storage and collaboration space, to store and access sexually explicit photos of their female classmates.<sup>42</sup> Rather than keeping the photos in readily accessible, and thus potentially searchable, areas of their cell phones, the young men of Duxbury used the Dropbox app to post and exchange the photos undetected.<sup>43</sup> By the time adults realized the rules of the game had changed, photos of at least 50 female students had been uploaded and shared.<sup>44</sup> As the Duxbury scandal demonstrates, young people are capable and prepared to take advantage of emerging technologies to evade adult interference, and significant damage can be done before adults are any the wiser.

Parents also expressed concern about the over-sexualized society in which their children live, noting that “sex is no big deal to kids now days,” making modern courtship “more cut to the chase.”<sup>45</sup> As illustrated by a mother from Ohio, a

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line (listening in to the conversations of young or older couples), [and] the male locker room (sharing photographs of females).” *Id.* at 70.

<sup>39</sup> *Id.* at 71–73.

<sup>40</sup> *Id.* at 71.

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

<sup>42</sup> Sue Scheff & Melissa Schorr, *A Cautionary Tale About High School Sexting—From Duxbury*, BOS. GLOBE (Oct. 6, 2017), <https://www.bostonglobe.com/magazine/2017/10/06/cautionary-tale-about-high-school-sexting-from-duxbury/V1LmUr8qZeYIsULcdXAvyO/story.html>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> DAVIDSON, *supra* note 20, at 72.

generational gap exists when it comes to understanding sexual expression in the digital age:

I guess I don't clearly understand the definition of sexting, if it's just like nudity, or very explicit language in text messages, or can it be something that's very suggestive. There was a picture of a girl out there that we know, and she was just bent over with a pair of sweatpants on that had a hole, and there was another young lady with her finger in the hole of the sweatpants. Now I don't know if that's considered sexting. I thought it was very, very suggestive. . . . I thought it was inappropriate, but the kids I think would think, oh that's funny, you know.<sup>46</sup>

Parents in Davidson's focus group were particularly fixated on changes in the way young women dress, act, and portray themselves on social media.<sup>47</sup> Specifically, many parents perceived "changes in technology [as] synonymous with the increased sexual nature of society," and identified such changes as having a disproportionately negative influence on young women.<sup>48</sup>

Parental focus on sexting's wider implications suggests that, for many, the rise of peer-to-peer sexting signals a breakdown of "family values" and traditional notions of decency.<sup>49</sup> By defining sexting in light of broader technological and cultural changes, it becomes a point of uncertainty and concern about the state of society as a whole, and may thus loom large and unmanageable from the perspective of parents and caregivers. Such a view may prevent parents from effectively understanding the issues their children face, from giving their children the support they need, and from providing guidance in handling sexting issues if they arise.

### C. Adult Stakeholder Definitions

Other adult stakeholders, such as school administrators, community leaders, and policymakers, typically perceive and understand youth behavior as it relates to the requirements of their profession.<sup>50</sup> School administrators, for example, have no shortage of professional development materials dedicated to handling peer-to-peer sexting when it surfaces in the academic environment.<sup>51</sup> Because these stakeholders

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

<sup>47</sup> *Id.* at 72–73.

<sup>48</sup> *Id.* at 76.

<sup>49</sup> *Id.* at 71.

<sup>50</sup> *Id.* at 85.

<sup>51</sup> See, e.g., Soronen et al., *supra* note 22, at 3 (providing a step-by-step guide for handling sexting between students); Kelly Tallon, *Addressing Sexting in Schools*, 30 CHILD. LEGAL RTS. J. 1 (2010) (explaining the legal and constitutional issues that should be considered in drafting a school sexting policy); Nancy Willard, *School Response to Cyberbullying and Sexting: The Legal*

primarily view sexting through a professional lens, there is a broader awareness of and emphasis on the legal consequences of peer-to-peer sexting. Consequently, adult stakeholders understand that sexting may include multiple facets of behavior and motivations, but like parents and youths, they struggle to define it.<sup>52</sup>

Adult stakeholders view sexting in light of individual actions such as forwarding, sharing, or receiving.<sup>53</sup> This group's confusion about what may constitute sexting thus is not focused on pinpointing the behaviors themselves but rather identifying when those behaviors cross the line from benign to something more worrisome. As illustrated by an adult stakeholder from Ohio:

[T]he obvious examples are easy to find for me—that are obvious. You know, the pictures . . . Where I fall down a little bit is appropriate versus inappropriate, you know, exactly what is that definition. Does it go down to certain words? I mean does that cover flirting and what is over the line with flirting? And so it gets a little bit confusing on those areas for me.<sup>54</sup>

Despite the confusion over the degree to which certain behaviors are appropriate, adult stakeholders are more attuned to “the complexity of the practice; that is, the ways sexting is embedded in a context that includes one and often more people, in a variety of acts that can vary over time and make use of different media.”<sup>55</sup>

Much like parents and caregivers, however, most adult stakeholders struggle to understand and accept sexting in the context of wider societal changes.<sup>56</sup> Because adults live with one foot in the past before these technologies emerged, defining sexting without contemplating its broader implications on society and youth culture as a whole is likely an impossible task. Therefore, approaching peer-to-peer sexting in the context of professional and legal obligations may be a more manageable approach for adult stakeholders than attempting to tackle the deeper issues that might be raised.

#### *D. The Need for Common Ground*

Fears related to peer-to-peer sexting have been exacerbated by commonly cited statistics indicating that sexting among minors is a widespread problem. The

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*Challenges*, 2011 BYU EDUC. & L.J. 75, 76–78 (2011) (discussing the parameters of school officials' responsibility and authority to identify and punish sexting in and outside of school).

<sup>52</sup> DAVIDSON, *supra* note 20, at 85.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 86.

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

<sup>56</sup> *See id.* at 87 (noting that “the social upheavals of the 20th century (the civil rights movement and women's movement, for instance) may not be as momentous . . . as the social upheaval [felt] from the presence of the Internet.”).

most commonly cited, a 2008 study by *CosmoGirl.com* and the National Campaign to Prevent Teen and Unplanned Pregnancy, reported that 20% of teens had posted or sent nude or nearly-nude photos of themselves online.<sup>57</sup> The numbers were shocking, and the *CosmoGirl* survey has continued to be relied upon by law enforcement, the media, and academics in the years since its release.<sup>58</sup>

The study, however, was flawed. The researchers administered the survey to 653 “teens” which included 18 and 19-year-olds, individuals that may legally sext whomever they please so long as the recipient is not a minor.<sup>59</sup> This inclusion muddled the data, rendering it impossible to accurately predict the true prevalence of minors engaging in peer-to-peer sexting. Moreover, the study failed to limit the sexting definition to the type of images that are legally problematic, i.e., those that could qualify as child pornography. Instead the survey was irreparably overbroad, asking respondents whether they had sent or received “sexually suggestive,” “nearly nude,” or “semi-nude” photos.<sup>60</sup> Consequently, respondents who answered “yes” may have answered in the affirmative for sending images that were “no more revealing than what someone might see at a beach.”<sup>61</sup> Many other studies face similar deficiencies, preventing researchers, policymakers, law enforcement, parents, and the media from understanding the true prevalence of sexting among minors and the kinds of harm that actually result.<sup>62</sup>

<sup>57</sup> *Sex and Tech: Results from a Survey of Teens and Young Adults*, COSMOGIRL.COM & THE NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY 1 (2008), <https://powertodecide.org/sites/default/files/resources/primary-download/sex-and-tech.pdf>. According to a recent survey of 39 sexting studies, the total number of children sending sexually explicit photos seems to be decreasing while simultaneously rising with age. Researchers found that 14.8% of participants had sent photos, while 27.4% had received photos. The mean age of participants in the study was 15.16 years old. Sheri Madigan et al., *Prevalence of Multiple Forms of Sexting Behavior Among Youth: A Systematic Review and Meta-Analysis*, 172 JAMA PEDIATRICS ONLINE E1, E4 (2018).

<sup>58</sup> Art Bowker & Michael Sullivan, *Sexting: Risky Actions and Overreactions*, 79 FBI L. ENFORCEMENT BULL. 7, 31 (2010); Kaitlin Lounsbury et al., *The True Prevalence of “Sexting”*, CRIMES AGAINST CHILDREN RES. CTR. 4 (2011) [http://unh.edu/ccrc/pdf/Sexting%20Fact%20Sheet%204\\_29\\_11.pdf](http://unh.edu/ccrc/pdf/Sexting%20Fact%20Sheet%204_29_11.pdf).

<sup>59</sup> Kimberly J. Mitchell et al., *Prevalence and Characteristics of Youth Sexting: A National Study*, 129 PEDIATRICS 13, 14 (2012).

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

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

<sup>62</sup> *See id.* (describing how many studies fail to distinguish between “taking and sending an image of oneself as opposed to receiving or disseminating an image of another youth,” and noting that some studies include explicit text messages involving no pictures in their definitions of sexting).

As discussed above, children, parents, and adult stakeholders are similarly in the dark, and there is an essential disconnect between youth and adult perceptions of which behaviors constitute sexting and the degree of sexual suggestion that is acceptable before crossing the line into something of consequence. The same disconnect extends to the ways youths and adults perceive the motivations to engage in such behavior and its associated consequences.<sup>63</sup> The inability of adults to fully grasp the parameters of the issue as understood and experienced by young people hinders their ability to dispense meaningful guidance and support for juveniles confronting sexting in their everyday lives.<sup>64</sup> Without a common understanding defining what peer-to-peer sexting is, and what it is not, the attainment of accurate research outcomes, the advancement of intelligent policy, and the understanding of contemporary youth culture is inevitably hampered.<sup>65</sup>

## II. A DOUBLE-EDGED SWORD: YOUTH MOTIVATIONS TO ENGAGE IN PEER-TO-PEER SEXTING

### A. *For Better or Worse, Youth Actors Perceive Utility in Peer-to-Peer Sexting*

Though adults perceive sexting to be a gross deviation from desirable juvenile behavior, male and female youths have recognized that peer-to-peer sexting is a normalized part of their lives.<sup>66</sup> Motivations to participate in sexting somewhat

<sup>63</sup> See Sections II and III, *infra*; see generally DAVIDSON, *supra* note 20 (providing a detailed overview of how male teens, female teens, and adults define sexting and perceive youth motivations for participating in such behavior).

<sup>64</sup> Alyce McGovern et al., *Media, Legal and Young People's Discourses Around Sexting*, 6 GLOB. STUD. CHILDHOOD 428, 429 (2016) (noting that adults "debate the options and responses to sexting, [but] young people themselves are often left out of the conversation," thus "simplif[y]ing and even misrepresent[ing] the issues as they are experienced and understood by young people.").

<sup>65</sup> See Kaitlin Lounsbury et al., *There Are No Trustworthy Statistics on the Prevalence of Sexting*, in SEXTING 29–34 (Lauri S. Scherer ed., 2013) (providing an overview of several studies about youth sexting that are inaccurate in part because a consistent definition is not used); see also Sonya Ziaja, *Sexting Should Not Be a Crime*, in SEXTING 76–77 (Lauri S. Scherer ed., 2013) (stressing that "by specifically defining sexting as a criminal activity, state legislatures are rushing to stop a form of sexual expression without first trying to understand it.").

<sup>66</sup> DAVIDSON, *supra* note 20, at 24, 42 (girls "considered sexting to be a fairly common practice among teens, though participation may vary widely from individual to individual," and most boys "were of the belief that sexting was common within their age group and in their schools."); Nicky Stanley et al., *Pornography, Sexual Coercion and Abuse and Sexting in Young People's Intimate Relationships: A European Study*, 33 J. INTERPERSONAL VIOLENCE 2919, 2934 (Mar. 6, 2016) (several survey participants "emphasized that sending sexual pictures was 'common' and 'normal,' even when such transactions had gone wrong for them . . ."); see also SHARIFF, *supra* note 3, at 62–63 (discussing the results of a teen focus group in which

overlap between the sexes, but the weight given to those motivations in the decision-making process can vary between boys and girls.<sup>67</sup> For both sexes, however, the creation and sharing of sexually explicit photographs can serve as important tools in the creation and maintenance of intimate relationships, the exercise of social mobility, and the exploration of burgeoning sexual desire.<sup>68</sup> Peer-to-peer sexting may thus provide utility for those youths who decide to participate.

From youths' perspective, sexting among peers can be used in all phases of a romantic relationship—particularly as a means to identify potential romantic interests, to build trust between romantic partners, or to ward off potential romantic rivals.<sup>69</sup> A 2009 study by the Pew Research Center confirmed that youths use the sending and receiving of racy images as a form of “relationship currency,” where such images are exchanged as a means to ignite a romantic relationship.<sup>70</sup> For example, sexting can be utilized to eschew the limitations placed on adolescent relationships by physical distance and spotty access to transportation. In such situations, “sexually tinged encounters by phone or Internet can serve as a kind of relationship glue.”<sup>71</sup> How peer-to-peer sexting is used in the context of intimate relationships thus may vary, but for many, it “may not be so very strange or different than the kisses and hugs . . . with which one signs a letter to a romantic partner.”<sup>72</sup>

Peer-to-peer sexting can also be used as a mechanism for increasing a youth's social status.<sup>73</sup> For girls, peer-to-peer sexting is often “embedded in critical social negotiations within their world.”<sup>74</sup> Such behavior may be used to signal maturity, to increase a girl's popularity, or to jockey for rank within a peer group.<sup>75</sup> As one focus group participant in Ohio observed:

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participants described various sexting scenarios as “standard” and as situations they had “seen over and over again”). *But see* Mitchell, et al., *supra* note 59, at 13 (in a study based on a telephone survey of 1560 internet users between the ages of 10 and 17, the authors found “the data suggest[ed] that appearing in, creating, or receiving sexual images is far from being a normative behavior for youth.”).

<sup>67</sup> See DAVIDSON, *supra* note 20, at 24–32, 42–48; *see also, generally*, SHARIFF, *supra* note 3, at 36–74.

<sup>68</sup> *See generally* DAVIDSON, *supra* note 20.

<sup>69</sup> *Id.*

<sup>70</sup> Amanda Lenhart, *Teens and Sexting*, PEW RES. CTR. (Dec. 15, 2009), <http://www.pewinternet.org/2009/12/15/teens-and-sexting/>.

<sup>71</sup> DAVIDSON, *supra* note 20, at 26.

<sup>72</sup> *Id.* at 41–42.

<sup>73</sup> *Id.* at 28.

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

<sup>75</sup> *Id.* at 29.

[A] lot of what I say is going to tie in with like confidence and stuff, but definitely competition, because a lot of girls you know, if you like get—like there's, you know, a list going on, you know [a] list, so you're like seeing this girl all the time, this girl is hot, and then you know, you might think to yourself you know like oh, I'm way hotter than her, so I'm going to take a picture of myself provocatively and post it, or send it to people via sexting. And then you know, it's a competition.<sup>76</sup>

For boys, navigating social relations and negotiating standing with their peers is one of the primary advantages of peer-to-peer sexting.<sup>77</sup> Specifically, the practice can be an effective means of establishing sexual prowess and overall superiority to other males.<sup>78</sup> Boys may thus use sexting to “demonstrate [their] ability to acquire sexual photos from girls. . . . or . . . to receive sexual photos from girls who are deemed desirable by the social group.”<sup>79</sup> A photo souvenir memorializing a desired female's attention adds “social capital to the receiving male's account,”<sup>80</sup> and may present boys with a way to “[join] a certain social crowd, [look] cool, or [fit] in.”<sup>81</sup>

Most importantly, peer-to-peer sexting can be an invaluable outlet for sexual expression as youths attempt to navigate the daunting and confusing waters of budding sexual desire.<sup>82</sup> Both male and female youths recognize, for example, that sharing explicit photos is a particularly effective means of fostering some degree of sexual satisfaction without engaging in sexual intercourse or being exposed to the risks attendant to sexual activity, specifically pregnancy and sexually transmitted diseases.<sup>83</sup> Additionally, sexting—when substituted for the physical act—can provide young girls with a method of resisting pressure and delaying intercourse until they feel ready.<sup>84</sup> Peer-to-peer sexting may thus offer an attractive alternative “for kids who are sort of interested in sexuality but might not be ready for actual sex.”<sup>85</sup>

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

<sup>77</sup> *Id.* at 44.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 45.

<sup>82</sup> *Id.* at 31.

<sup>83</sup> *Id.* at 32; see also Jody M. Ross et al., *Sexting Coercion as a Component of Intimate Partner Polyvictimization*, J. INTERPERSONAL VIOLENCE 1, 5 (2016) (noting that sexting “is generally not associated with a broader pattern of deviant behavior or other sexual risk behaviors”); Nicky Stanley et al., *supra* note 66, at 2934 (a study conducted with European teens mirrored the sentiment that sexting provided “a ‘safe’ means of relieving sexual tension”).

<sup>84</sup> DAVIDSON, *supra* note 20, at 32.

<sup>85</sup> Klass, *supra* note 5.

Most male youths, however, perceive peer-to-peer sexting as an entrenched component in attaining sexual intimacy—“from curiosity and identification of a potential partner to teasing, flirting, and testing, to various levels of trusting and sexual acts.”<sup>86</sup> Sex often serves as a motivator for boys,<sup>87</sup> increasing the likelihood that young men may be compelled to create and share sexually explicit photos with the person they desire, believing that “showing their body parts [via sexting can] induce sexual interest in girls, leading to a greater likelihood of sexual fulfillment.”<sup>88</sup>

Peer-to-peer sexting is consequently “not just an issue between two individuals, . . . [but rather] a tool in the arsenal of young people who are striving to socially define themselves by rank and status.”<sup>89</sup> Sexting affords young people a mechanism for developing romantic relationships, increasing their social mobility, and exploring their emerging sexuality. Accordingly, the behaviors that are encompassed by peer-to-peer sexting are perceived by young people—at least in some ways—as a normal and practical part of life.

The perceived utility of peer-to-peer sexting is somewhat tempered, however, by its negative aspects or consequences—specifically peer pressure, the possibility of non-consensual forwarding or sharing, bullying, and the cultivation and perpetuation of sexist attitudes and practices. The negative characteristics can render peer-to-peer sexting a double-edged sword, capable of both supplementing and decimating a person’s social and sexual stock.<sup>90</sup> In this way, youth perceptions of peer-to-peer sexting is internally focused, almost wholly defined and regulated by youth cultural dynamics and social structure. As a result, youths generally seem to struggle to conceptualize the negative aspects of peer-to-peer sexting beyond the context of their own social group, and adult involvement is perceived as a vague and improbable risk.<sup>91</sup> Consequently, youths that engage in such behaviors must calculate and accept the risk of social and reputational fallout that may result should they chose to engage in peer-to-peer sexting.

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<sup>86</sup> DAVIDSON, *supra* note 20, at 44.

<sup>87</sup> *Id.* at 42 (“boys frequently pointed first to sex . . .” as a motivator driving participation in peer-to-peer sexting).

<sup>88</sup> *Id.* at 43.

<sup>89</sup> *Id.* at 39.

<sup>90</sup> *See id.* at 49.

<sup>91</sup> *See, e.g.,* Megan Maas, *8 Reasons to Rethink Teens & Sexting*, HUFFINGTON POST BLOG (Sept. 22, 2016), [https://www.huffingtonpost.com/megan-maas/8-reasons-to-rethink-teen\\_b\\_12051534.html](https://www.huffingtonpost.com/megan-maas/8-reasons-to-rethink-teen_b_12051534.html) (noting that many teens feel that sexting frequently occurs without outside consequences, thereby diminishing the credibility of adults who warn of such outcomes).



*B. Pressure: A Constant Component of Peer-to-Peer Sexting*

In addition to the interpersonal utility that may be garnered from peer-to-peer sexting, pressure is a particularly prevalent and powerful motivator for youth to engage in sexting. Male and female youths are subject to various social, societal, and cultural pressures that encourage the practice, but pressure is primarily exerted on youths through media exposure espousing societal norms and expectations.<sup>92</sup> For both sexes, the publicized prevalence of sexting among adults,<sup>93</sup> particularly among celebrities and public figures whom they admire, normalizes and encourages the behavior and provides young people with examples from which to model their own conduct.<sup>94</sup> As one male focus group participant observed,

[I]t's like, how we've had these huge, like, three or four scandals with sexting [in] this past, like, week, so I think that the kids see that, and they're like, 'Well, if these guys are doing it, and look how much attention ...' . . . . [Y]ou know, 'let me do it and I'll get attention,' you know. If movie stars are doing it and I want to be a movie star, then why can't I do it? So, I think motivation comes from the older people.<sup>95</sup>

The female participants echoed the male perspective that the media plays a large role in influencing youth behavior, "[a]lso, yeah, I agree the media, especially with celebrities. Celebrities are a role model to young people, so whatever they do teens will want to reoccur. Like their actions."<sup>96</sup> In today's cultural climate, young people have no shortage of highly publicized celebrity sexting scandals to enthrall them. With the 24-hour news cycle, youths can watch the exploits of stars like Vanessa Hudgens,<sup>97</sup> Rihanna,<sup>98</sup> and even sports heroes like Draymond Green<sup>99</sup> and Tiger Woods<sup>100</sup> regularly unfold.

<sup>92</sup> See DAVIDSON, *supra* note 20, at 38, 47.

<sup>93</sup> Sexting plays a large role in contemporary adult relationships. For example, a Google search of the term "sexting" returns several articles encouraging the practice as a way to start or improve (adult) relationships, including: Vanessa Marin, *50 Example Sexting Ideas You Can Use Right Now*, BUSTLE (Dec. 29, 2015), <https://www.bustle.com/articles/131300-50-example-sexting-ideas-you-can-use-right-now> (presenting sexting as a way to nurture relationships and improve sexual satisfaction); Karley Sciortino, *Breathless: Mastering the Art of Sexting*, VOGUE (May 11, 2015), <https://www.vogue.com/article/breathless-karley-sciortino-sexting> (noting that sexting "is an important life skill" that can be the difference "between a Tinder match that goes nowhere and being able to actually touch a person in real life"). Note that such articles are generally geared toward women.

<sup>94</sup> See DAVIDSON, *supra* note 20, at 38.

<sup>95</sup> *Id.* at 47.

<sup>96</sup> *Id.* at 39.

<sup>97</sup> The *High School Musical* star was only 18 years old when her nude photos were leaked online in 2007. *Vanessa Hudgens' Nude Photos Were 'The Worst Moment' of Her Career*,

In addition to providing a window into the personal lives of their heroes, movies, books, music, and television influence young people by placing a “huge emphasis on sexual relationships and boy-girl interactions.”<sup>101</sup> The media at large therefore serves as a primary source of information from which youths shape their understanding of sexuality and their values concerning acceptable sexual expression and social interaction.<sup>102</sup> Consequently, the over-sexualized society that adults fear may condone and encourage peer-to-peer sexting seems to be rooted in the proliferation of sex-obsessed media in its many forms.

In addition to cultural pressure, peer pressure is also a significant motivator for young men and women to engage in sexting. A recent study showed that, for young women in particular, the pressure from young males to send sexually explicit photographs can be intense.<sup>103</sup> Several participants in the study admitted to sexting as a result of male coercion “in the form of persistent requests, anger and threats.”<sup>104</sup> For many young women, “[t]he ability to stand up and say no, and [the willingness] to have whatever is threatened be done [to them]” is simply too tall of

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HUFFINGTON POST (Feb. 21, 2013), [https://www.huffingtonpost.com/2013/02/21/vanessa-hudgens-nude-photos-worst-moment\\_n\\_2735668.html](https://www.huffingtonpost.com/2013/02/21/vanessa-hudgens-nude-photos-worst-moment_n_2735668.html).

<sup>98</sup> Rihanna has been exceedingly public about her sexting habits, stating in an interview that “[w]hen you’re not with the person you want to be intimate with, a picture is the next best thing. Well, Skype is safer. But a picture lasts a long time. . . . pictures can be very handy.” *Excerpts from Rihanna’s Rolling Stone Cover Story*, ROLLING STONE (Mar. 30, 2011), <http://www.rollingstone.com/music/pictures/excerpts-from-rihannas-rolling-stone-cover-story-20110330/the-truth-is-rihanna-is-unattached-0231218>.

<sup>99</sup> In 2016, the Golden State Warriors’ star forward accidentally sent a picture of his genitals to all of his followers on social media app Snapchat. The photo was online for 10 minutes before a cryptic message stating “hacked . . .” was posted in its place. There were no professional or reputational repercussions that generally accompany such scandals. Instead, after his nudes went public, Mr. Green was offered \$100,000 to star in a pornographic film. Jen Vaidis, *In Defense of Draymond Green’s Dick Pic*, ROLLING STONE (Aug. 3, 2016), <http://www.rollingstone.com/sports/draymond-greens-snapchat-dick-pic-w432448>.

<sup>100</sup> Sexting was a significant component of Tiger Woods’ highly publicized affairs in 2010. One of his mistresses, a former adult film star, posted his texts and photos on her website. *20 Raunchy Text Messages Tiger Woods Sent to His Mistress Joslyn James*, BUS. INSIDER (Mar. 18, 2010), <http://www.businessinsider.com/16-raunchy-text-messages-tiger-woods-sent-to-joslyn-james-2010-3>.

<sup>101</sup> DAVIDSON, *supra* note 20, at 49.

<sup>102</sup> *See id.*

<sup>103</sup> *See* Sara E. Thomas, “What Should I Do?”: Young Women’s Reported Dilemmas with Nude Photographs, 16 SEXUALITY RES. & SOC. POL’Y 192, 192, 203 (2017) (finding girls are often “overwhelmed, confused, tired, and bombarded” by requests for nude photos).

<sup>104</sup> *Id.* at 192.

an order.<sup>105</sup> Even those who can resist the persistent pressure from their peers sometimes fail to escape unscathed. For example, several of the fifty young women whose pictures were recovered in the Duxbury scandal refused multiple requests for photos, “but out of frustration or vindictiveness, someone doctored up nude photos with their name or face and posted [them] anyway.”<sup>106</sup>

Young men are also prone to peer pressure that encourages sexting. As described in Davidson’s focus groups, young men are acutely aware of pressure “to belong, to shine, and to achieve social rank,” goals which can all be furthered by engaging in sexting.<sup>107</sup> Furthermore, in at least one study, 18% of boys surveyed reported they had been pressured by females to send nude or sexually explicit photographs.<sup>108</sup> Though pressure in the context of peer-to-peer sexting is almost always presented as one-sided solicitation of young women by hormone-driven young men, there is evidence that both sexes exert pressure on the other to participate, even if disproportionately.<sup>109</sup>

A distinction should be drawn, however, between aggravated pressure involving criminal or abusive tactics, and the somewhat normalized sexual exploration which can be attendant, in one form or another, to youthful romantic entanglements. Because “[s]exual interest, energy, and drives typically peak during adolescence . . . demarcating the boundaries of typical and atypical sexual behavior during adolescence is notoriously difficult.”<sup>110</sup> To put it simply, pressure to engage in sexting may sometimes be little more than an earnest conversation between young paramours about whether to engage in sexual activity, and it can be difficult to gauge when such pressure crosses the line from experimental to coercive. Even the more benign forms of pressure, however, beg the question: “[T]o what extent do youth freely participate in these behaviors, or do so because they feel that, based on interpersonal and social norms, it is expected?”<sup>111</sup>

### III. THE (SOMETIMES) REAL CONSEQUENCES OF PEER-TO-PEER SEXTING

Since sexting first emerged, the media has reported that sexting between young people results in diabolical consequences. Though young people rarely look beyond the consequences that may manifest within the confines of their own peer

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<sup>105</sup> Scheff & Schorr, *supra* note 42.

<sup>106</sup> *Id.*

<sup>107</sup> DAVIDSON, *supra* note 20, at 45.

<sup>108</sup> Judge, *supra* note 4, at 88.

<sup>109</sup> *Id.* at 88, 90.

<sup>110</sup> *Id.* at 90.

<sup>111</sup> *Id.*

group, parents and adult stakeholders look to the possibility of the worst-case scenario often profiled by the popular press.<sup>112</sup> While each of the following represent an outcome that is possible in the realm of peer-to-peer sexting, for the most part, the more serious consequences are relatively rare when one considers the frequency with which sexting allegedly occurs among young people. Because of the panic-inducing combination of teens, technology, and sex, most harms documented here are simply more visible in the media—and thus more alarming to parents and adult stakeholders—rather than more prevalent in everyday life.<sup>113</sup>

*A. Bullying & Psychological Harm*

Bullying has long been a touchstone of the adolescent experience, but the instant and unlimited connection provided by contemporary technology is “particularly suited to nonviolent types of bullying such as name-calling[,]” stalking, harassment, and online denigration.<sup>114</sup> A 2009 study surveyed the prevalence of digital harassment and abuse—known popularly as cyberbullying—among seventh and eighth graders, finding that one-in-five had been victims of cyberbullying and one-in-five had perpetrated some form of online abuse.<sup>115</sup> Another 2009 survey also produced equally worrisome results, finding that 47% of teenage respondents had been victims of cyberbullying on at least one occasion.<sup>116</sup> The pervasiveness of cyberbullying among young people can perhaps be explained by the fact that bullying no longer requires direct, face-to-face contact. Instead, digital technologies have “democratized bullying [where perpetrators] don’t have to be able to physically overpower [the] victim—a person can simply log on, create a new identity, and bully away . . . .”<sup>117</sup>

A sexually explicit photo sent within the confines of a trusting relationship can ultimately serve as the basis for cyberbullying if it is forwarded and shared. Once a private photo enters the public environment, the sender is “at the mercy of anyone with access to the image[,]” and may be subjected to “harsher, farther-reaching, anonymous, and unpredictable” bullying online.<sup>118</sup> In this respect, youth norms permit “the most outrageous comments and insults, and [the dissemination

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<sup>112</sup> See Sections I & II, *supra*.

<sup>113</sup> Balko, *supra* note 10.

<sup>114</sup> Siegle, *supra* note 6, at 14.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 15.

<sup>117</sup> *Id.*

<sup>118</sup> Reid McEllrath, *Keeping Up with Technology: Why a Flexible Juvenile Sexting Statute Is Necessary to Prevent Overly Severe Punishment in Washington State*, 89 WASH. L. REV. 1009, 1013 (2014).

of] humiliating photographs of others” online because youths perceive the sender as having “[done] something that deserves blame.”<sup>119</sup> Because such harassment is digital, cyberbullying is inescapable and can follow young people wherever they have cell service.

More often, sexting leads to the bullying of young women. Though popular culture often applauds freedom and openness when it comes to sexual expression, there exists “the alternate forces of male hegemony, misogynist attitudes, sexual objectification of women, and a thriving male culture that attempts to regain power over women through sexual violence, embarrassment, and victim blaming known as ‘slut-shaming.’”<sup>120</sup> In such cases, a young woman might be “dehumanized and . . . labeled as a ‘slut’ . . . [to] justif[y] the vitriol that follows.”<sup>121</sup> Girls, therefore, must carefully balance the extent of their own sexual expression<sup>122</sup> because “[t]oo much, and they are perceived as ‘sluts.’ Too little, and they become isolated from the popular peer group.”<sup>123</sup> If the proper balance is not struck, young women are exposed to bullying from not only their male classmates, but also from female peers “who are afraid to support them for fear of being harassed themselves.”<sup>124</sup>

Bullying can lead to isolation, depression, and, in extreme cases, suicide.<sup>125</sup> For example, in 2012, a 15-year-old high school student named Audrie Pott was sexually assaulted by three of her classmates at a party.<sup>126</sup> The perpetrators recorded the event with their cellphones while Audrie lay unconscious, and the photographs spread through her high school like wildfire.<sup>127</sup> Despite clear evidence that she had been the victim of sexual assault, Audrie became the target of endless ridicule, and

<sup>119</sup> SHARIFF, *supra* note 3, at 47.

<sup>120</sup> *Id.* at 47–48.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 46–47.

<sup>123</sup> *Id.* at 47.

<sup>124</sup> *Id.* at 46.

<sup>125</sup> Michael Inbar, ‘Sexting’ Bullying Cited in Teen’s Suicide, TODAY (Dec. 2, 2009), <https://www.today.com/news/sexting-bullying-cited-teens-suicide-1C9013027> (reporting the suicide of a female middle schooler after a topless photo was forwarded around her middle school).

<sup>126</sup> Nina Burleigh, *Sexting, Shame, and Suicide: A Shocking Tale of Sexual Assault in the Digital Age*, ROLLING STONE (Sept. 17, 2013), <https://www.rollingstone.com/culture/news/sexting-shame-and-suicide-20130917>; Julia Prodis Sulek, *Audrie Pott: Boys Admit Sexually Assaulting Saratoga Teen Who Committed Suicide*, MERCURY NEWS (Jan. 14, 2014), <https://www.mercurynews.com/2014/01/14/audrie-pott-boys-admit-sexually-assaulting-saratoga-teen-who-committed-suicide/>.

<sup>127</sup> *Id.*

she eventually committed suicide in the bathroom of her California home.<sup>128</sup> Audrie's story—and others like it—have featured prominently in the popular press as cautionary tales to warn youths and parents of the bullying and psychological harm that may result from peer-to-peer sexting.<sup>129</sup>

The media often portrays sexting as the “problem” or the “danger” in this context, but bullying, rather than the act of sexting itself, is the root of the deeper psychological and social harm.<sup>130</sup> When sexting occurs privately in the context of an adolescent relationship, subsequent bullying or psychological harm is significantly more attenuated and speculative. It is thus important to note that sexting seems to be simply one component of a society-wide bullying problem that has flourished in response to the proliferation of instant communication devices and the rise of social media.<sup>131</sup>

### B. *A Picture Lasts Forever*

Many adults view the consequences of peer-to-peer sexting with an eye to the future.<sup>132</sup> Parents, especially, worry that digital documentation of uninhibited teen behavior never goes away, lingering online indefinitely to ruin college hopes, future job prospects, and even the ability to enlist in the armed forces.<sup>133</sup> Many emphasize the need to stay vigilant about the content posted online, noting that “with the touch of a button—you can take down your career [or] you can ruin a relationship—romantic or otherwise.”<sup>134</sup> Indeed, the presumed permanence of

<sup>128</sup> *Id.*

<sup>129</sup> See, e.g., Michelle Dean, *The Story of Amanda Todd*, NEW YORKER (Oct. 18, 2012), <https://www.newyorker.com/culture/culture-desk/the-story-of-amanda-todd> (recounting the cyberbullying and subsequent suicide of Amanda Todd, a fifteen-year-old Canadian girl whose photos were distributed to her family and classmates).

<sup>130</sup> Steven Angelides, ‘Technology, Hormones, and Stupidity’: *The Affective Politics of Teenage Sexting*, 16 SEXUALITIES 665, 673 (2013).

<sup>131</sup> For proof that bullying has infected the highest levels of our society, examples can be found on the President's Twitter. For a complete list of the people, places, organizations, and events that have been the subject of those tweets, see Jasmine C. Lee & Kevin Quealy, *The 487 People, Places and Things Donald Trump Has Insulted on Twitter: A Complete List*, N.Y. TIMES (last updated July 10, 2018), <https://www.nytimes.com/interactive/2016/01/28/upshot/donald-trump-twitter-insults.html>.

<sup>132</sup> See DAVIDSON, *supra* note 20, at 77.

<sup>133</sup> See *id.*

<sup>134</sup> Meredith Fineman, *What We Post Online is Forever, and We Need a Reminder*, INC. (Nov. 24, 2014), <https://www.inc.com/meredith-fineman/what-we-post-online-is-forever-and-we-need-a-reminder.html>.

photos that have been shared or posted on the internet has been used as a justification in upholding the criminal convictions of young people caught sexting.<sup>135</sup>

The doom and gloom often propagated concerning indefinite internet notoriety, however, is shifting. With the rise of Facebook, “embarrassing Internet pictures [have] become a normal part of being online.”<sup>136</sup> According to experts, for a photograph to remain easily discoverable through an internet search, “someone on the Internet has to exert a minimum of effort in order to keep it around.”<sup>137</sup> Though the effort required is minimal, “pictures are huge—they take up a lot of bytes on a hard drive—so if the site goes away, the consolidation that keeps a lot of things current can also cause a lot of things to vanish all at once, when the effort is no longer applied.”<sup>138</sup> Because the internet “lives on moments” through content that is viral *right now* rather than content from years past, “your naked pictures from 10 years ago are nowhere near as appealing as someone else’s new naked pictures, which will be forgotten tomorrow anyway.”<sup>139</sup> The lesson is simple: photos may last forever, but over time, they can become increasingly difficult, if not impossible, to find.

### C. Sextortion

Prosecutors have dubbed one of the most nefarious trends associated with sexting as “sextortion.”<sup>140</sup> Sextortion is a form of blackmail in which the perpetrator is “typically [seeking] images of a sexual nature, sexual favors, or money, from a person by . . . [t]hreatening to release or distribute . . . sexually explicit images, videos, e-mail, and text messages.”<sup>141</sup> Sextortion thus is not merely “a matter of

<sup>135</sup> See, e.g., *A.H. v. State*, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007) (Affirming the conviction of two young people who had exchanged sexually explicit photos but had not shared them with a third party. The court’s reasoning included that “if these pictures are ultimately released, future damage may be done to these minors’ careers or personal lives.” The majority neglected to address the future damage that would be inflicted by the conviction itself.).

<sup>136</sup> Patrick Di Justo, *Naked on the Internet Is Not Forever*, ATLANTIC (Feb. 7, 2014), <https://www.theatlantic.com/technology/archive/2014/02/naked-on-the-internet-is-not-forever/283650/>.

<sup>137</sup> *Id.* (discussing how a photo could be lost into obscurity with Jon Kleinberg, computer science professor at Cornell University).

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

<sup>139</sup> *Id.*

<sup>140</sup> Benjamin Wittes, et al., *Sextortion: Cybersecurity, Teenagers, and Remote Sexual Assault*, BROOKINGS INST. (May 11, 2016), <https://www.brookings.edu/research/sextortion-cybersecurity-teenagers-and-remote-sexual-assault/>.

<sup>141</sup> U.S. DEPT. JUSTICE, FBI, *Sextortion of Children in the United States: A Fact Sheet for Parents and Children* (July 2015), <https://www.fbi.gov/file-repository/stop-sextortion-brochure.pdf/view>.

playful consensual sexting,” but rather a “form of sexual exploitation, coercion, and violence.”<sup>142</sup>

The special threat posed to minors by sextortion is recognized by the Department of Justice, which noted that “sextortion cases tend to have more minor victims per offender than all other child sexual exploitation offenses.”<sup>143</sup> Though victims of sextortion can be persons of any sex, class, or age, “sextortion is by far the most significantly growing threat to children . . . .”<sup>144</sup> Empirical data seems to confirm this contention—a 2016 study by the Brookings Institution reviewed 78 recent sextortion cases and found that, in 71% of cases, the victims were exclusively minors.<sup>145</sup>

The higher incidence of child victimization could be attributed to the fact that minors are typically easy targets.<sup>146</sup> For example, sextortion is sometimes accomplished through the remote hacking of personal computers and the commandeering of webcams or ransacking of personal photo stores.<sup>147</sup> Young internet users—the very softest of cybersecurity targets—often fail to use robust cybersecurity measures such as strong passwords and two-step verification.<sup>148</sup> Once an online predator bypasses weak security devices, he is free to remotely download stored photos or to create new photos by commandeering the victim’s webcam.<sup>149</sup> Some perpetrators’ computer coding skills are so advanced they are capable of remotely accessing and controlling dozens or even hundreds of computers at once.<sup>150</sup>

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<sup>142</sup> Wittes et al., *supra* note 140, at 5.

<sup>143</sup> DEP’T OF JUSTICE, NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS – APRIL 2016, at 75 (2016).

<sup>144</sup> *Id.*

<sup>145</sup> Wittes et al., *supra* note 140, at 12.

<sup>146</sup> *See id.* (highlighting the deficiencies in cybersecurity measures taken by teenagers and young adults and noting the common practice of sexting).

<sup>147</sup> *Id.* at 17.

<sup>148</sup> *Id.* at 3.

<sup>149</sup> *See, e.g., id.* at 2 (discussing the case of Luis Mijangos who used malware to gain full access to the computers and its files of at least 44 minors. The program also “allowed him to, at will, turn on any web camera and microphone attached to the computer, a capability he used to watch, listen, and record his victims without their knowledge.” Upon arrest, investigators discovered Mijangos possessed “more than 15,000 webcam-video captures, 900 audio recordings, and 13,000 screen captures on his computers.”).

<sup>150</sup> *See, e.g.,* Nate Anderson, *How an Omniscient Internet “Sextortionist” Ruined the Lives of Teen Girls*, ARS TECHNICA (Sept. 7, 2011), <https://arstechnica.com/tech-policy/2011/09/how-an-omniscient-internet-sextortionist-ruined-lives/> (discussing how Luis Mijangos wrote his own malware program that was eventually installed on 129 computers and allowed him to victimize 230 people, including 44 minors); *see also Sextortion of Children*, *supra* note 141 (discussing the crimes of Jared James Abrahams, a computer science student, who obtained photos of “dozens



Because peer-to-peer sexting participants often “share material with other teenagers whose cyberdefense practices are even laxer than their own,” sextortion can be a relatively easy scheme “that often does not require more than malicious guile.”<sup>151</sup>

The most common method sextortionists use to acquire exploitive material involves a “deliberately slow and calculated campaign of deception on social platforms.”<sup>152</sup> In such a scenario, perpetrators pose as a trusted friend or attractive confidant and engage prospective victims online, often going to great lengths creating and maintaining meticulously detailed social media profiles in order to “give off the impression of authenticity.”<sup>153</sup> Accepting a sextortionist’s friend request on any number of social media platforms gives the perpetrator unfettered access to the victim’s whole life, providing him or her with details that can later be used to develop trust and an emotional bond.<sup>154</sup> Once a trusting relationship has been cultivated by weeks or months of constant chatting, perpetrators will urge the victim to send sexually explicit images.<sup>155</sup> Hesitation or resistance is often overcome by providing the victim with a nude photo—frequently taken at random from the internet—to encourage an “I showed you mine, now you show me yours” dynamic.<sup>156</sup>

In whatever way sextortionists acquire sexually explicit material from their targets, once in malicious hands, the photos or videos become a bargaining chip—leverage for demanding more explicit photos, sexual acts, or money from a victim that is determined to prevent their release.<sup>157</sup> Such schemes are repeatedly successful because sextortion victims are often too ashamed to report the situation to an adult or to police.<sup>158</sup>

Perpetrators of this crime, however, are not exclusively faceless adults—minors have also been victims of sextortion perpetrated by their own peers.<sup>159</sup> For example, Anthony Stancel, a socially awkward high schooler from Wisconsin, fabricated several online personas and elicited sexually explicit images from nearly 30 of

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of victims around the globe” using malicious software to secretly operate the victims’ webcams); Wittes et al., *supra* note 140, at 3 (describing Luis Mijangos as “a talented 32-year-old proficient in multiple computer languages.”).

<sup>151</sup> Wittes et al., *supra* note 140, at 3.

<sup>152</sup> Carrie Goldberg, *Social Media + Sextortion: What Kids and Parents Need to Know*, THORN (Oct. 3, 2017), <https://www.wearethorn.org/blog/social-media-sextortion/>.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

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

<sup>156</sup> *See id.*

<sup>157</sup> *Id.*

<sup>158</sup> See Robby Berman, *Someone You Know May Be a Victim of Sextortion*, BIG THINK (Oct. 4, 2017), <http://bigthink.com/robbey-berman/someone-you-know-may-be-a-victim-of-sextortion>.

<sup>159</sup> *See, e.g.,* Anderson, *supra* note 150.

his male classmates in 2009.<sup>160</sup> Posing as “Kayla,” an attractive female classmate, Stancl threatened to disseminate the photos of the young men unless they engaged in sexual conduct with him and documented the act with photos to provide “Kayla” with proof.<sup>161</sup> Of 31 students that fell prey to one of Stancl’s personas, 7 were coerced into sexual contact in order to prevent the distribution of their private photos.<sup>162</sup>

Stancl’s predatory behavior made international headlines,<sup>163</sup> but “[w]hat happened [in New Berlin] is shocking because it was not all that shocking.”<sup>164</sup> The scandal exposed a consequence—albeit an extreme one—that flowed naturally from a culture where “the majority of [the victims] thought little of saying yes” to a request for nude photos.<sup>165</sup> Sextortion is thus one outcome among many in “a chain of unpredictable, unknowable consequences [that can be] set in motion” by sexting among minors.<sup>166</sup> It is notable, however, that sextortion is an issue that plagues adults as well as minors, and sexting is merely a facet, rather than the cause, of this behavior.

#### D. Dating Abuse

The facilitation and perpetuation of dating abuse is a concerning, but often disregarded byproduct of adolescent relationships. Abuse can take a variety of forms, generally “mim[ing] the patterns of abuse seen in abusive adult relationships and often involv[ing] emotional abuse.”<sup>167</sup> As “one of the most hidden and most detrimental forms of abuse,” emotional abuse is more easily carried out through the use of technology.<sup>168</sup> Text messaging, for example, allows young people to exchange messages privately, preventing adult observation and intervention

<sup>160</sup> Michael Joseph Gross, *Sextortion at Eisenhower High*, GQ (June 30, 2009), <https://www.gq.com/story/wisconsin-high-school-sex-scandal-online-facebook>.

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

<sup>162</sup> *Id.*

<sup>163</sup> See, e.g., *Facebook Sex-Scam US Teenager Convicted*, BBC NEWS (Dec. 23, 2009), <http://news.bbc.co.uk/2/hi/americas/8427559.stm>; Carrie Antlfinger, *Anthony Stancl Accused of Sick Sex Blackmail on Facebook*, DAILY TELEGRAPH (Feb. 4, 2009), <http://www.dailytelegraph.com.au/anthony-stancl-accused-of-sick-sexblackmail-on-facebook/news-story/1e9aadd87135563490c8c3fdfea4023a>.

<sup>164</sup> Gross, *supra* note 160.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Jennifer McDonald, *Sexting and Excessive Texting: Symptoms of Teen Dating Violence?* 30 CHILDREN’S L. RTS J. 19, 21 (2010).

<sup>168</sup> *Id.* at 22.

should those communications become abusive.<sup>169</sup> Indeed, “the most common form of online harassment (which is related to, but distinct from, cyberbullying) occurs via cell phones/text messages.”<sup>170</sup>

Because dating partners now have multiple ways to keep in contact at all times, young people have a digital arsenal of tools “to continually harass, control and abuse their dating partners through technological means.”<sup>171</sup> Adults often overlook abuse among young people because they do not believe adolescent relationships are serious,<sup>172</sup> leading many adults to minimize or deny the existence of teen dating violence.<sup>173</sup> Dating abuse among young people affects both sexes and can be found among every race, ethnic group, sexual orientation, and socioeconomic class.<sup>174</sup> The emotional and physical effects are immediately felt, but many young people carry the emotional scars of such relationships into the future, facing increased risk of “substance abuse, eating disorders, sexual risk behavior, pregnancy and suicide.”<sup>175</sup> Young people themselves tend to deny problems associated with dating abuse, feeling too isolated, ashamed, and afraid of the possible consequences should they seek help.<sup>176</sup>

Abusive relationships among young people “often include behaviors of coercion and control,” and abusers can sometimes coerce their partners to engage in sexting as a means to “emotionally abuse, control and humiliate.”<sup>177</sup> Once sexually explicit photos are in the hands of an abuser, they can be used to exert control in the relationship or punish a partner who does not comply with the abuser’s demands. For example, a spurned lover will often retaliate for an unwanted breakup by forwarding privately shared explicit photos to outside parties.<sup>178</sup> The boys in Davidson’s focus groups confirmed this practice, casually admitting the dark turn peer-to-peer sexting might take in the demise of a romantic relationship. As one participant explained:

[A]nother way you’d get [photos] out to other people, is like they break up, or they start disliking each other. Oh I don’t like you, so to the Internet you go . . . . [Y]ou’re trying to hurt the person’s feelings . . . . You might not

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<sup>169</sup> *Id.*

<sup>170</sup> Judge, *supra* note 4, at 88.

<sup>171</sup> McDonald, *supra* note 167, at 19.

<sup>172</sup> *Id.* at 21.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 22.

<sup>178</sup> *Id.* at 19.

think of it afterwards, you're like, oh I really didn't need to do that out of pure anger, but it's just, you're doing it because the relationship is over, and you're angry.<sup>179</sup>

As illustrated here, peer-to-peer sexting, even when begun consensually in the context of a relationship, can potentially devolve into an abusive practice that is used to wreak havoc on former romantic partners. Much like sextortion, however, sexting in the context of dating abuse is but a symptom of a larger problem.

#### IV. PROTECTION THROUGH PUNISHMENT: THE LEGAL RESPONSE TO PEER-TO-PEER SEXTING

The breakneck speed with which technology and digital culture have evolved has resulted in a legal response that is both reactionary and severe. As technology and the ways in which it is used has continued to grow and expand, legislatures have failed to keep pace, and prosecutors in many jurisdictions have resorted to charging juveniles caught sexting under child pornography laws.<sup>180</sup> Convictions under such statutes often bring harsh penalties that can follow a young person into adulthood, including registration as a sex offender and a felony record.<sup>181</sup> Several states have enacted less strict, sexting-specific laws to address sexting between minors, but across the nation the response is the same: the criminal justice system is being used "to 'fix' the sorts of problems once addressed by families, schools, religious organizations, and other civic institutions."<sup>182</sup>

Many laws designed to protect children from the harms stemming from the creation and distribution of child pornography were enacted prior to the onset of contemporary digital culture.<sup>183</sup> "[G]iven that the growing utility and changing abilities of technology have created problems in applying child pornography statutes," it is likely that legislators did not anticipate cases involving sexting, and it can be argued that sexting in the confines of a consensual relationship was not intended to be offending behavior.<sup>184</sup> Moreover, such statutes were intended to protect children from dangerous adult predators and reduce the availability of child

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<sup>179</sup> DAVIDSON, *supra* note 20, at 46.

<sup>180</sup> McEllrath, *supra* note 118, at 1010.

<sup>181</sup> *Id.* at 1012.

<sup>182</sup> Balko, *supra* note 10.

<sup>183</sup> Julia Saladino, *Hold the Phone: The Incongruity of Prosecuting Sexting Teenagers Under the Prosecutorial Remedies and Other Tools to End Exploitation of Children Act of 2003*, 10 WHITTIER J. CHILD & FAM. ADVOC. 317, 326 (2010).

<sup>184</sup> *Id.*

pornography, not to prevent young people from sending each other sexually explicit images.<sup>185</sup>

Child pornography statutes are often relatively broad, prohibiting distribution and possession of explicit photos of minors generally.<sup>186</sup> Because child pornography statutes do not differentiate between adult and minor perpetrators, prosecutors have wide discretion to determine what images may constitute child pornography and what punishment is appropriate in juvenile sexting cases.<sup>187</sup> For example, in 2010, a prosecutor in Pennsylvania threatened a group of nearly 20 teenagers with criminal prosecution under child pornography laws when photos of young women in various stages of undress circulated among the students of a local school.<sup>188</sup> The photos included one featuring a girl in a bathing suit and another showing two girls from the waste up in opaque white bras. Some of the parents challenged the appropriateness of the possible charges—particularly as applied to the young women in the photos involving no nudity—but the prosecutor believed the girls’ provocative poses crossed the line into child pornography.<sup>189</sup> Though the parties disagreed about the nature of the photos, the prosecutor maintained his interpretation of the images and threatened to charge the young women unless they attended an educational program about the dangers of sexting.<sup>190</sup> As this case illustrates, as long as there is probable cause that a statutory violation has occurred, a prosecutor is free to determine whether or not to prosecute the offense and what charges to file against the accused.<sup>191</sup>

When children are prosecuted under state child pornography or sexual abuse statutes, state courts have been loath to look beyond the plain text of such statutes when evaluating the convictions of minors caught sexting. For example, the Washington Court of Appeals upheld the conviction of a juvenile with Asperger’s Syndrome for sending an adult woman a photo of his penis, a behavior the court determined qualified as dealing in depictions of a minor engaged in sexually explicit

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<sup>185</sup> *Id.* at 327; McEllrath, *supra* note 118, at 1012.

<sup>186</sup> In Oregon, for example, a person commits the crime of possessing materials depicting sexually explicit conduct of a child if the person: “[k]nowingly possesses, accesses or views a visual depiction of sexually explicit conduct involving a child or a visual depiction of sexually explicit conduct that appears to involve a child” and either uses or intends to use the image to induce the child to engage in sexual conduct. OR. REV. STAT. § 163.688 (2017).

<sup>187</sup> McEllrath, *supra* note 118, at 1019.

<sup>188</sup> *Miller v. Mitchell*, 598 F.3d 139, 144 (3d Cir. 2010).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Note, however, that prosecutors may not choose a remedy in lieu of prosecution that interferes with parents’ rights to raise their children as they see fit. *See id.* at 151.

activity.<sup>192</sup> Under that statute, a person is prohibited from creating, possessing, or distributing material “that depicts a minor engaged in an act of sexually explicit conduct.”<sup>193</sup> The court rejected the juvenile’s argument that he could not be both the victim of the offense and the perpetrator, reasoning that nothing in the statutory language required “proof of any specific ‘victim’ status as an element of the offense.”<sup>194</sup> Declining to consider the strong policy arguments for not including cases involving sexting between minors under the statute, the court noted that “if this statute needs to be amended . . . to address the problem . . . then the legislature is the body that must act . . . policy arguments are best addressed to that body.”<sup>195</sup>

Legislatures nationwide have slowly begun to address sexting between minors with 20 states having adopted legislation specifically punishing the practice.<sup>196</sup> Though each state’s sexting statute varies in its specificity,<sup>197</sup> several states include language directed toward bullying and coercion.<sup>198</sup> Only eight states, however, provide for an affirmative defense—six of which only allow affirmative defenses to be used by the receiver of the image.<sup>199</sup> The affirmative defenses available in those

<sup>192</sup> State v. E.G., 377 P.3d 272, 274 (Wash. Ct. App. 2016).

<sup>193</sup> WASH. REV. CODE § 9.68A.050(2)(a)(i) (2017).

<sup>194</sup> E.G., 377 P.3d at 278.

<sup>195</sup> *Id.*

<sup>196</sup> For a complete list of states addressing sexting, see Sameer Hinduja & Justin W. Patchin, *State Sexting Laws: A Review of State Sexting and Revenge Porn Law and Policies*, CYBERBULLYING RES. CTR. (July 2015), <https://cyberbullying.org/state-sexting-laws.pdf>.

<sup>197</sup> Compare, e.g., ARK. CODE ANN. § 5-27-609 (2015) (prohibiting “sexting” involving a juvenile and defining nudity in “sexually-explicit digital material” to include in any photo, digital image, or visual depiction:

- (A) Showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering;
- (B) Showing of the female breast with less than fully opaque covering of any portion of the female breast below the top of the nipple; or
- (C) Depiction of covered male genitals in a discernably turgid state);

with R.I. GEN. LAWS § 11-9-1.4 (2012) (prohibiting the knowing and voluntary use of “a computer or telecommunication device to transmit an indecent visual depiction of himself or herself to another person” engaged in sexual acts or including “graphic focus on or lascivious exhibition of the nude genitals or pubic area of the minor.”).

<sup>198</sup> See, e.g., PA. CONS. STAT. § 6321 (making sexting a misdemeanor in the second degree when it is done “with the intent to coerce, intimidate, torment, harass, or otherwise cause emotional distress to another minor”).

<sup>199</sup> These states are Arizona, Arkansas, Florida, Hawaii, Nevada, and Vermont. Arkansas, for example, created an affirmative defense for juveniles who received a sexually explicit image when he or she did not solicit the image, did not share the image, and deleted the image upon receipt. ARK. CODE ANN. § 5-27-609.

states suggest that “states find juveniles less culpable when they do not have the intent to further distribute the image or when the sexting is consensual.”<sup>200</sup> The majority of states, however, have not passed legislation specific to the issue, and still continue to rely on child pornography laws.<sup>201</sup>

Despite the slow progress being made at the state level, a bill recently passed the House of Representatives and has moved on to the Senate that would bring harsher penalties for young people convicted under federal law.<sup>202</sup> The *Protecting Against Child Exploitation Act of 2017* would amend existing federal child pornography law—which requires a 15-year minimum sentence for first time offenders—to expand the culpability of the would-be child pornographer, regardless of age.<sup>203</sup> If signed into law, “not just sexting—actually sending or receiving sexts [is punishable] . . . Your kid could get 15 years for *attempting* to send or receive a sext . . . [or be] forced to take a plea deal offered by an overzealous prosecutor: probation, community service, and having to register as a sex offender for the rest of their life.”<sup>204</sup>

Though the law is making small strides to catch up with evolving technology and new digital norms, the legal response to sexting has been harsh and overly punitive. Indeed, the current legal framework punishes the very people it’s intended to protect and inflicts severe penalties that can have grave long-term effects.

## V. AN INEFFECTIVE REMEDY

### A. Severe Punishment Serves Little Purpose in the Context of Sexting

Studies show juveniles lack the ability to fully grasp the consequences of their actions because they “lack psychosocial maturity and future-oriented thinking.”<sup>205</sup> This is due to the fact that the human brain continues to develop until the age of 25, and the prefrontal cortex, which is responsible for advanced reasoning and im-

<sup>200</sup> McEllrath, *supra* note 118, at 1022.

<sup>201</sup> *Id.* at 1010–11.

<sup>202</sup> H.R. 1761, 115th Cong. (2017).

<sup>203</sup> Specifically, the language in H.R. 1761 includes sexually explicit photos: “(1) that the person knows or has reason to know that such visual depiction will be (A) transported or transmitted using any means or facility of interstate or foreign commerce; (B) transported or transmitted in or affecting interstate or foreign commerce; or (C) mailed.” *Id.*

<sup>204</sup> Janet Burns, *House Passes Bill That Could Have Teens Facing 15 Years for Trying to Sext*, FORBES (June 2, 2017), <https://www.forbes.com/sites/janetwburns/2017/06/02/house-passes-bill-that-could-jail-teens-15-years-for-sexting/#319771e74cf6>.

<sup>205</sup> Robin D’Antona, *Sexting, Texting, Cyberbullying and Keeping Youth Safe Online*, 6 J. SOC. SCI. 523, 524 (2010); McEllrath, *supra* note 118, at 1014.

pulse control, is the final portion of the brain to develop.<sup>206</sup> For adolescents, this means decision-making and reasoning skills are diminished, and that short-term rewards are more influential than possible long-term consequences.<sup>207</sup> Psychological immaturity also renders young people more responsive to peer pressure, making them “less likely to rely on the possible consequences of their actions when making decisions and . . . more likely to consider only immediate rewards like peer approval.”<sup>208</sup> Thus, to a certain degree, children lack culpability because they cannot properly weigh the costs and benefits of their behavior.<sup>209</sup>

Though it has yet to address the propriety of punishing juvenile sexting under child pornography laws, the Supreme Court has recognized juveniles’ diminished ability to fully appreciate the gravity of their actions. For example, in *Thompson v. Oklahoma*, a plurality of the Court determined that executing a person who committed the crime when he was under the age of 16 offended “civilized standards of decency.”<sup>210</sup> Justice Stevens emphasized that “[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.”<sup>211</sup> Holding immature and impulsive minor offenders to the same standard of culpability as adults, Justice Stevens argued, is an inappropriate form of retributive punishment because it was unlikely juveniles engaged in a cost-benefit analysis that included the possible consequences of their actions.<sup>212</sup> The Court determined that such severe punishment holds little deterrent value for juveniles, and is thus inappropriate to inflict on young people.<sup>213</sup>

The Court further differentiated juvenile from adult offenders in *Roper v. Simmons*, ruling the death penalty unconstitutional under the Eighth Amendment when the perpetrator of a capital crime was under the age of 18 at the time of its commission.<sup>214</sup> Justice Kennedy, writing for the majority, explained that three general differences exist between juveniles and adults that negate the culpability necessary to be “among the worst offenders” deserving of death. First, immaturity and “an undeveloped sense of responsibility” are prevalent and accepted qualities of young people, “often result[ing] in impetuous and ill-considered actions and deci-

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<sup>206</sup> *Id.* at 1014.

<sup>207</sup> *Id.* at 1014–15, 1027.

<sup>208</sup> *Id.* at 1015.

<sup>209</sup> *Id.*

<sup>210</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).

<sup>211</sup> *Id.* at 835.

<sup>212</sup> *Id.* at 837.

<sup>213</sup> *Id.* at 838.

<sup>214</sup> *Roper v. Simmons*, 543 U.S. 551, 568 (2005).



sions.”<sup>215</sup> This diminished capacity, Justice Kennedy noted, serves as the basis for denying juveniles the right to vote, the right to serve on a jury, and the right to marry without parental consent.<sup>216</sup> Second, juveniles are particularly “vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”<sup>217</sup> Third, a juvenile’s character is more malleable than that of an adult because it is not fully formed.<sup>218</sup> In light of these differences, Justice Kennedy determined that, morally, “it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”<sup>219</sup>

The differences outlined by Justice Kennedy apply with equal force in the context of sexting, particularly in light of the fact that the behavior is sought to be deterred only until the age of 18. The nature of the offense thus makes punishment for retributive or rehabilitative purposes ineffective. Retributive punishment, for example, is based on the guilt of the offender.<sup>220</sup> Because young people are less culpable than adult offenders, severe punishments are less likely to be proportionate and appropriate. Rehabilitation is equally ineffective in this context because rehabilitative punishment is designed to improve the offender’s character deficiencies to ensure he or she can be a productive member of society and avoid recidivism.<sup>221</sup> Unlike other crimes such as theft, assault, or murder, sexting is only illegal until the juvenile comes of age. Once a child turns 18, he or she is free to sext other adult persons at will. Because sexting is not an illegal practice into the future, there is little societal interest in rehabilitating young people caught sexting.<sup>222</sup>

None of the oft relied-on principles of punishment adequately justifies the use of criminal sanctions in the context of consensual peer-to-peer sexting. Furthermore, “the same characteristics that render juveniles less culpable than adults suggest that juveniles will be less susceptible to deterrence.”<sup>223</sup> Because young people cannot appreciate and adjust their behavior, criminal prosecution is ineffective in deterring sexting among minors, rehabilitating perpetrators, or inflicting a punishment proportional to the offense.

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<sup>215</sup> *Id.* at 569 (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

<sup>218</sup> *Id.* at 570.

<sup>219</sup> *Id.*

<sup>220</sup> McEllrath, *supra* note 118, at 1018.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Roper*, 543 U.S. at 571.

*B. Destroying Lives to Save Them*

As many have pointed out, there is little sense in prosecuting children for peer-to-peer sexting under laws designed to protect them from adult predators because prosecution often inflicts greater mental and social harm than the act of sexting itself.<sup>224</sup> Even in states that have enacted their own sexting laws in order to avoid prosecuting young people as child pornographers, sexting is generally still punished as a misdemeanor, entangling young people in the criminal justice system at an early age.<sup>225</sup> Though the names of youth perpetrators are not released, sexting incidents that result in criminal charges are reported in the media, and a simple internet search can publicly reveal the details of the crime and the identity of the offender.<sup>226</sup> Youth arrests can “often signal serious problems to friends, families, neighbors, and bring with it a social stigma,”<sup>227</sup> and those who receive a criminal label early in life have been shown to suffer adverse effects that include low self-esteem and a warped self-perception.<sup>228</sup> Especially in cases where young people are convicted and required to register as sex offenders, the psychological, social, and reputational damage that results is far greater than the relatively isolated consequences that may be realized without adult interference.<sup>229</sup> After all, If a person “is too young to send a picture of [his or her] own body, is [he or she] not also too young to be made a social pariah?”<sup>230</sup>

<sup>224</sup> See *State v. Gray*, 402 P.3d 254, 262 (Wash. 2017) (McCloud, J., dissenting) (“The majority’s interpretation punishes children who text sexually explicit depictions of their own bodies to adults far more harshly than it punishes adults who do the same thing. It punishes children who text such depictions of their own bodies to adults even more harshly than adults who text such sexually explicit photos to children. It even punishes the child who is groomed and led into taking such photos and forwarding them to the grooming adult!”); see also *A.H. v. State*, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007) (Padovano, J., dissenting) (“Section 827.071(3) Florida Statutes was designed to protect children from abuse by others, but it was used in this case to punish a child for her own mistake.”).

<sup>225</sup> Arizona, Connecticut, and Illinois, for example, all make it a misdemeanor for minors to engage in sexting. Young people charged in these states could still face jail time, steep fines, and counseling. See Jessica Thieffels, *Teen Sexting Laws in Your State*, NET NANNY (Nov. 12, 2017), <https://www.netnanny.com/blog/teen-sexting-laws-in-your-state/>.

<sup>226</sup> Conor Friedersdorf, *The Moral Panic Over Sexting*, THE ATLANTIC (Sept. 2, 2015), <https://www.theatlantic.com/politics/archive/2015/09/for-sexting-teens-the-authorities-are-the-biggest-threat/403318/>.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* (noting that in a case of teens caught sexting and charged under child pornography statutes in North Carolina, the photos were private, had been kept private, and would have remained private if not for adult intervention).

<sup>230</sup> Robby Soave, *These Teens Kept Their Sexting Private, But Cops Found Out. Now They*

The severe legal repercussions that have been inflicted on a handful of unlucky teens reveals the lengths society is willing to go to “protect” children from the harms associated with sexting. For example, when police in Virginia investigated allegations that 17-year-old Trey Sims sent sexually explicit photos to his 15-year-old girlfriend, investigators obtained a warrant authorizing police to photograph Sims’ erect penis to compare to photos found on the girl’s phone.<sup>231</sup> When executing the warrant, the lead investigator and two uniformed officers ordered Sims to “manipulate his penis” to obtain an erection.<sup>232</sup> When that failed, a second warrant was obtained, and Sims was threatened with an “erection-producing injection” if he did not comply.<sup>233</sup>

In a blistering opinion, the Fourth Circuit ruled the search violated the Fourth Amendment and admonished the police and the prosecutor’s office, noting the court could not “perceive any circumstance that would justify a police search requiring an individual to masturbate in the presence of others.”<sup>234</sup> What the court failed to articulate—in addition to the impunity with which investigators violated the constitution—was that “[t]he commonwealth of Virginia was prepared to create child porn in order to prosecute a 17-year-old kid for sending videos of himself to his then-girlfriend.”<sup>235</sup>

Authorities in Florida were similarly prepared to go to great lengths in the name of child protection when a 16-year-old girl and 17-year-old boy were convicted under Florida’s child pornography laws for emailing sexually explicit photos of themselves to each other.<sup>236</sup> Though sexual intercourse itself was not illegal between minors under Florida law, the Florida District Court of Appeal upheld the convictions, confirming that documenting the act violated the law and deserved punishment.<sup>237</sup> The court reasoned that even though the teens never shared the photos with a third party, “[m]ere production of these videos or pictures may. . . result in psychological trauma to the teenagers involved” who “are not mature enough to make rational decisions concerning all the possible negative implications of producing these videos.”<sup>238</sup> The court emphasized the irreparable damage

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*Face Sex Offender Registry, Jail: Is It Possible for Two Teens to Sexually Exploit Each Other?*, HIT & RUN BLOG (Sept. 1, 2015), <http://reason.com/blog/2015/09/01/these-teens-kept-their-sexting-private-b>.

<sup>231</sup> Sims v. Labowitz, 877 F.3d 171, 174 (4th Cir. 2017).

<sup>232</sup> *Id.* at 174–75.

<sup>233</sup> *Id.* at 176.

<sup>234</sup> *Id.* at 179.

<sup>235</sup> Balko, *supra* note 10.

<sup>236</sup> A.H. v. State, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007).

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

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

the photos could have theoretically done to the young people's lives and careers if released, and determined that the State of Florida had a compelling state interest "in seeing that material which will have such negative consequences is never produced."<sup>239</sup> However, the court failed to acknowledge that convicting the teens as child pornographers did not prevent the photos from being released, and had instead inflicted even greater damage by saddling the teens with felony convictions.<sup>240</sup>

The most alarming example of states "protecting" children from harm related to sexting by using criminal prosecution is the story of Corey Walgren. In 2017, the 16-year-old honor-roll student from Illinois was questioned by a school administrator and a police officer about allegations that he had recorded a sexual encounter with a female classmate and shared the video with his peers.<sup>241</sup> The adults allegedly accused Corey of possessing child pornography, an offense they warned was punishable by registration as a sex offender.<sup>242</sup> Less than two hours later, Corey jumped to his death from the roof of a nearby parking garage.<sup>243</sup> Though Corey took his own life immediately following this interrogation, the school district and the city attorney both agreed the officials had acted appropriately.<sup>244</sup> Indeed, even when faced with a teen's suicide, adults perceive criminal prosecution, and the severe harms it may bring, as the appropriate and necessary way to protect young people from the possible harms of sexting.

As these cases illustrate, society is willing and eager to destroy children, violate the constitution, and break the law in order to save young people from whatever harm they may inflict on themselves by engaging in peer-to-peer sexting. Despite the adult view that criminal prosecution will deter children from sexting, the issue has been alive and well for over a decade, and there is no indication the trend is slowing. As discussed in Parts I & II, *supra*, young people are motivated to engage in sexting for a variety of reasons and do not contemplate prosecution to be a realistic possibility worthy of consideration in their decision-making. Criminal prosecution of peer-to-peer sexting is thus an ineffectual remedy, destroying young lives and failing to deter similar behavior in the future.

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Suicide of Teen Who Made Sex Tape Presents Dilemma for Schools*, CBS (Sept. 13, 2017), <https://www.cbsnews.com/news/corey-walgren-suicide-sex-tape-dilemma-for-schools-chicago/>.

<sup>242</sup> Stacy St. Clair, *Family of Naperville Teen Who Committed Suicide Sues School, Police*, CHI. TRIB. (May 25, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-naperville-north-suicide-lawsuit-20170524-story.html>.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

## VI. MOVING FORWARD: STEPS FOR THE FUTURE

Peer-to-peer sexting is a complex issue. There is no catch-all remedy that could address the many concerns that are raised by sexting among minors. Moving forward, a concerted effort will be necessary to remedy the various social ills that have surfaced as part of the digital culture, including sexting. Understanding, patience, honesty, and concern for young people's well-being are needed by all involved to minimize harms and ensure positive outcomes in the future.

A. *Changing the Narrative*

As evidenced by the media panic, parental concerns, and the strong legal reaction to sexting, society has responded to the rapid evolution of technology and digital youth culture with alarm. Societal tendencies to wax alarmist when it comes to changing youth norms—also referred to as “juvenoia”<sup>245</sup>—can lead to overreactions, poor policy decisions, and a failure to understand and adapt to social changes as they occur. Though sexting has been portrayed by the media, lawmakers, and educational officials “as yet another sign of the hypersexualization of youth,” sexual activity among young people is in decline.<sup>246</sup> This suggests that sexting is not a harbinger of radical changes in youth sexuality; rather, public panic and media focus on sexting may simply make youth sexual expression more visible to adults.<sup>247</sup>

Though sexting is not indicative of an uptick in sexual activity among young people, recent studies show 41% of high-schoolers have engaged in sexual intercourse.<sup>248</sup> Sexting, for better or worse, can thus be viewed as one way today's young people express sexuality, “reflecting a long-documented trend of teens ‘using whatever technology is at hand to express themselves and share their behavior with the world.’”<sup>249</sup> Adults, therefore, should “step back for a minute from the alarmist nature of the word ‘sexting’ and think about developmentally appropriate foolish romantic things teenagers do,” perhaps by recalling their own experiences navigating pubescent relationships.<sup>250</sup> Focusing on the worst-case scenarios that could stem from young people's engagement in sexting leads adults to overlook the more common issues, such as forwarding images without the consent of the

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<sup>245</sup> Mitchell, et al., *supra* note 59, at 19.

<sup>246</sup> *Id.* (decline in sexual activity is evidenced by lower teen pregnancy rates and fewer young people reporting having multiple sexual partners).

<sup>247</sup> *Id.*

<sup>248</sup> Klass, *supra* note 5.

<sup>249</sup> Elizabeth C. Eraker, *Stemming Sexting: Sensible Legal Approaches to Teenagers' Exchange of Self-Produced Pornography*, 25 BERKELEY TECH. L.J. 555, 563 (2010).

<sup>250</sup> Klass, *supra* note 5.

sender or bullying, that can be addressed through honest discussion and education.<sup>251</sup>

Changing the popular narrative that sexting is a dangerous and unnatural behavior<sup>252</sup> is necessary to properly address the possible negative aspects of the practice. By acknowledging sexting between young people as a natural extension of youth sexual expression that can occur in the context of healthy relationships, adults are able to engage with youth honestly about issues that may arise and are encouraged to be more thoughtful in developing policy. If the failure of abstinence-only sexual education classes<sup>253</sup> taught us anything, it is that minors need honest, straightforward information about sexuality in all of its forms. To approach this issue in any other way is to ensure that children nonetheless continue to engage in sexting and do so without the knowledge and skills necessary to participate safely and respectfully.

### B. Education

One of the most significant problems with legal intervention in the context of peer-to-peer sexting is that society is punishing the wrong conduct. While sexting is often determined to be the root cause of a variety of harms, the acts that actually inflict the harm—cyberbullying, unauthorized forwarding of private images, sextortion, and the like—are not addressed by prosecuting minors caught sexting. Hence, those who engage in peer-to-peer sexting are still vulnerable to the destructive behaviors that are the proximate cause of the harm.

To address these behaviors, schools, parents, and society at large should seek to educate young people about a variety of topics including consent, respect, healthy sexual expression, and digital citizenship: “the quality of habits, actions, and consumption patterns that impact the ecology of digital content and communities.”<sup>254</sup> Because “drawing the line between offline and online is becoming close to impossible,” emphasizing appropriate and respectful behaviors in person and in

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<sup>251</sup> *Id.*

<sup>252</sup> Michael Levin, *Sorry New York Times, Sexting is NOT Normal for Teens, and Should Not be Celebrated*, FOX NEWS (Mar. 26, 2018), <http://www.foxnews.com/opinion/2018/03/26/sorry-new-york-times-sexting-is-not-normal-for-teens-and-should-not-be-celebrated.html>.

<sup>253</sup> See Sarah McCammon, *Abstinence-Only Education Is Ineffective and Unethical, Report Argues*, NPR (Aug. 23, 2017), <https://www.npr.org/sections/health-shots/2017/08/23/545289168/abstinence-education-is-ineffective-and-unethical-report-argues> (discussing findings that abstinence-only education does nothing to reduce teen pregnancy or STD rates by failing to provide young people with information about how to protect themselves when engaging in sexual activity).

<sup>254</sup> Terry Heick, *The Definition of Digital Citizenship*, TEACHTHOUGHT, <https://www.teachthought.com/the-future-of-learning/the-definition-of-digital-citizenship/>.

the digital space, as well as ensuring children understand how to protect themselves online, could improve how young people interact with each other and the outside world using digital technology.<sup>255</sup>

### C. Decriminalization and Prosecutorial Discretion

At least 20 states have sexting-specific laws, but sexting between young people is still considered a criminal offense nationwide.<sup>256</sup> Classifying sexting between juveniles as a criminal offense is intended to protect children from sexting's harmful effects by deterring the behavior, but young people are unable to fully appreciate the possible legal ramifications, and ultimately many experience greater harm at the hands of the criminal justice system. Because criminal prosecution has proven to be an ineffectual and harmful remedy to address the more sinister outcomes related to sexting, decriminalization is appropriate moving forward.

Even if sexting among teens remains classified as criminal conduct, prosecutors should exercise discretion to avoid bringing charges against young people caught sexting. Criminal convictions of young people engaged in this activity have proven to be an ineffective way to deter the practice, and prosecutorial resources could be better spent focusing on the truly alarming issues, such as sextortion, that require legal intervention. Young people engaging in consensual sexting could otherwise benefit from mercy, understanding, and honest education about respect, consent, and responsibility.

## CONCLUSION

Sexting is a complex issue that can produce an array of problematic outcomes, the most problematic of which is society's attempt to remedy the issue through the use of criminal sanctions. The issue must be studied and understood, and adults need to acknowledge the technological divide that separates us from the digital natives. If we continue to deny and resist the changing norms that have shaped our new digital society rather than adapting to the challenges they bring, young people will continue to bear the consequences while we are left to dream of a simpler time.

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<sup>255</sup> SONIA LIVINGSTONE & MARIYA STOILOVA, GLOBAL KIDS ONLINE: CHILDREN'S RIGHTS IN THE DIGITAL AGE 3 (2015), <http://eprints.lse.ac.uk/71359/1/InceptionReport.pdf>.

<sup>256</sup> Thieffels, *supra* note 225.