Sexting: 21st-Century Statutory Rape

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SEXTING:
21ST-CENTURY STATUTORY RAPE

John Kip Cornwell*

ABSTRACT

The "cyberworld" in which we live has fundamentally and irrevocably changed the nature of human interaction. For many, electronic mail, texting, and social networking sites have significantly limited traditional face-to-face interaction. While the benefits of technological progress are self-evident, the ease with which people can share personal information virtually has also produced troubling byproducts. The transmission of sexually provocative images between teenagers, known colloquially as "sexting," is one such example. As suicides and other sexting-related tragedies multiply, jurisdictions coast-to-coast are searching frantically for ways to curb the practice.

Due to the harshness of existing criminal statutes, legislators have favored the creation of a separate sexting offense to address misconduct. Because these new laws vary greatly in both content and severity of prescribed penalties, some have argued that they are unprincipled. In light of contemporary societal disinterest in prosecuting consensual sexual activity between adolescents, critics also consider them misguided and anachronistic.

These allegations suffer from their failure to place anti-sexting initiatives in proper historical context. These laws represent a present-day manifestation of the protectionist and paternalistic impulses that motivated statutory rape laws in the 18th, 19th, and 20th centuries. Both anti-sexting and statutory rape laws share the same fundamental goal: avoiding reputational ruin and its untoward consequences. Whereas sexual intercourse was once the necessary catalyst, electronic devices used to disseminate sexually explicit material now create the risk. In today's virtual world, sexting represents a sort of statutory rape by proxy where cell phones, laptops, and iPads provide the violative act that can ruin lives. In sum, the campaign to outlaw sexting is neither misguided nor anachronistic. It reflects a widespread belief in the need to protect adolescents from sexting-related harm, coupled with a paternalistic desire to restore some of the moral innocence that is rapidly disappearing in the teenage cyberworld.

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I. INTRODUCTION

THE increasingly sophisticated and pervasive “cyberworld” in which we live has fundamentally and irrevocably changed the nature of human interaction. Before the 1980s, the vast majority of interpersonal communications were either face-to-face or telephonic through “land lines.” Some thirty years later, computers and cell phones have largely replaced these traditional forms of interaction with electronic mail, texting, and social networking sites that allow individuals to transmit information, both verbal and visual, with the click of a button. While the benefits of this rapid and revolutionary technological progress are self-evident, the ease with which people can share personal information virtually has also produced troubling byproducts. The transmission of sexually provocative images by and among young people, known colloquially as “sexting,” is one such example. Legislatures coast-to-coast are searching for ways to curb the practice.

Remedial efforts have varied greatly. In some instances, prosecutors have alleged that sexting violates child pornography laws and, as such, is a felony mandating incarceration and subsequent inclusion on sex offender registries. Concern about the severity of this approach has produced a panoply of proposed and enacted state laws in recent years that create a separate sexting offense with lesser penalties, ranging from civil
to criminal. Like the sanctions, the definition of sexting varies with respect to age, conduct, and state of mind requirements.

Critics have assailed this legislative and prosecutorial response to teenage sexting as unprincipled, misguided, and potentially unconstitutional. While I share some of these concerns, I believe that anti-sexting commentators have failed to place these laws in proper historical context. Anti-sexting laws are a present-day manifestation of the protectionist and paternalistic impulses that motivated statutory rape laws in the 18th, 19th, and 20th centuries. The physical and psychological danger an adolescent risks by sexting has replaced Victorian-era concerns about the loss of marital prospects that flowed from loss of virginity. However, anti-sexting and statutory rape laws share the same fundamental goal: avoiding reputational ruin and its untoward consequences. Whereas sexual intercourse was once the necessary catalyst, electronic devices used to disseminate sexually explicit material now create the risk. In today's virtual world, sexting represents a sort of statutory rape by proxy where cell phones, laptops, and iPads provide the means for the violative act that ruins lives.

This Article contains seven parts. Part I defines sexting and its associated dangers. Part II addresses the traditional criminal law offenses prosecutors have charged in the sexting context, most notably child pornography. Part III describes the range of anti-sexting initiatives that exist today, both proposed and enacted, focusing on the four principal parameters: age, conduct, state of mind, and penalties. Part IV travels the "road to sexting," from the common law to the present. It begins with the evolution and enforcement of statutory rape laws and finishes with a discussion of how modern prosecutorial disinterest in punishing consensual sexual behavior between adolescents as statutory rape fuels criticism of anti-sexting initiatives. Parts V and VI respond to the critics and argue that anti-sexting laws are neither arbitrary nor anachronistic. Instead, these laws represent a reinvigoration of the protectionism and paternalism that historically motivated the enforcement of the statutory rape laws. Part VII offers some concluding thoughts about the content of anti-sexting laws and their relationship to cyber-bullying in general.

II. SEXTING AND ITS DANGERS

The Concise Oxford English Dictionary defines "sexting" as "the sending of sexually explicit photographs or messages via mobile phone."1 While persons of all ages can sext,2 the practice is typically associated

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1. Concise Oxford English Dictionary 1320 (12th ed. 2011); see also Miller v. Skumanick, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009) (complaint defines sexting as "sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet").

with teenagers and young adults for whom sexting is commonplace. For example, the National Campaign to Prevent Teen and Unplanned Pregnancy found that 19% of respondents aged thirteen to nineteen had transmitted a sexually suggestive image of themselves electronically and 31% had received a nude or semi-nude picture or video. The incidence was even greater for adults aged twenty to twenty-six. While the study's methodology was flawed in certain respects, its results are generally consistent with those reported elsewhere.

The widespread use of sexting in the personal relationships of teenagers and young adults provides a recipe for disaster. Consider Jessica Logan. Jessica sent a nude photo of herself to her boyfriend. When they broke up, the boyfriend forwarded the cell phone photo to classmates. As news of the photo spread, Jessica's classmates threw things at her and abused her verbally, calling her "slut," "whore," and "skank." She appealed to the school guidance counselors and local police for help, but the harassment continued. In July 2008, one month after her high school graduation, Jessica hanged herself in her bedroom closet. Thirteen-year-old Hope Witsell's story is eerily similar and ends with the same tragic result.


4. 32% reported sending a picture or video and 46% reported receiving one. Id.

5. For example, Teenage Research Unlimited, which conducted the survey, did not use random sampling procedures. Instead, volunteers were self-selected through an online magazine's website. Id. at 1, 5.

6. See, e.g., Cox's New Survey on Cyber-Safety Finds Many Teens Going Online Wirelessly Without Limits or Controls, COX COMM'CS, INC. (May 14, 2009), http://www.harrisinteractive.com/vault/Client_News_CoxCommunications_NCMEC_2009_05.pdf. The Pew Internet and American Life Project reported less activity than the Sex & Tech Survey, finding that 15% of cell phone-owning teens ages twelve to seventeen had received sext messages. Only 4% had sexted images to someone else. See AMANDA LENSART, PEEW INTERNET & AMERICAN LIFE PROJECT TEENS AND Sexting: How and WHY Minor Teens Are Sending Sexually Suggestive Nude or Nearly Nude Images via Text Messaging 4-5 (2009), available at http://pewresearch.org/assets/pdf/teens-and-sexting.pdf. A recent survey of 1,560 youth reported even lower figures, finding that only 2.5% of participants had appeared in or received a nude or semi-nude photo or video. See Kimberly J. Mitchell et al., Prevalence and Characteristics of Youth Sexting: A National Study, 129 PEDiATRICS 1, 7 (2011).


8. Like Jessica, Hope endured ruthless taunts from classmates after a photo of her bare breasts that she sent to her boyfriend went viral. Sadly, she did not share her misery with her parents; they only learned of the extent of her pain and humiliation after she hung herself in September 2009. See Randi Kaye, How a Cell Phone Picture Led to Girl’s Suicide, CNN (Oct. 7, 2010), http://articles.cnn.com/2010-10-07/living/hope.witsells.story_1-photo-new-school-year-scarves.
While sexted images are usually sent to the original recipient intentionally and voluntarily, this is not always the case. On September 19, 2010, Rutgers University freshman Dharun Ravi used his computer webcam to surreptitiously film a sexual encounter between his roommate, Tyler Clementi, and another man. Ravi then streamed the video online. Clementi had not publicly acknowledged his homosexuality. When he learned what Ravi had done, he jumped to his death from the George Washington Bridge.9

While the tragic consequences of the foregoing incidents are exceptional, they illustrate the core harms associated with sexting. First, once placed into the virtual universe, sexted images can find their way into the mailboxes of a potentially infinite number of recipients. For example, after “tweeting” that he had secretly filmed Tyler Clementi “making out with a dude,” Dharun Ravi streamed the sexual encounter live on the internet for anyone to see.10 In the case of Hope Witsell, who sexted a topless photo the week before summer break, someone using the cell phone of the original recipient sent the photo to numerous third parties.11 In a matter of days, the distribution was so widespread that Hope’s friends escorted her between classes to protect her from a barrage of verbal abuse.12

Because of this potentially unbridled proliferation of adolescent sexts, some worry that these sexts will ultimately end up in the hands of adults who sexually exploit minors.13 Child pornographers have created an estimated fourteen million websites14 where some 20,000 images are posted each week.15 At present, this concern is largely speculative. If it proves accurate, legislative and prosecutorial action would be warranted in light of the serious nature of corresponding social harms.16


11. See Andrew Meacham, A Shattered Self-Image, ST. PETERSBURG TIMES, Nov. 29, 2009, at 1A.

12. Id.


15. See id.

16. While a lengthy discussion of the federal constitutional rights that sexting may implicate is beyond the purview of this article, courts have addressed constitutional defenses raised in this context. See generally Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D.
Potential infiltration by the child pornography industry is not, however, the only danger sexting poses to minors. Researchers have found that adolescents' lack of maturity can lead them to act impetuously, without considering the long-term consequences of their actions. Risk takers by nature, "adolescents are overrepresented statistically in virtually every category of reckless behavior." They are, in addition, more vulnerable than adults to negative influences and external pressure from peers.

Compared to adults, then, adolescents are more likely to engage in impulsive, risky behavior influenced by the desire to gain approval from peers, as opposed to meaningful consideration of potentially negative downstream consequences. Therefore, in a flight of fancy, a teenager may use his or her cell phone to take and transmit a sexually provocative photo in response to encouragement by friends or a potential suitor. While these actions take no more than a minute, errors in judgment can lead to a crisis that lasts much longer. Unfortunately, girls seem especially vulnerable to these risks.

The publication in 1982 of In a Different Voice, psychologist Carol Gilligan's groundbreaking study of female psychological development, in-
spurred a wealth of research into this previously unexplored area. The studies underscore the emotional distress that adolescent girls typically feel, fueled by an erosion of self-confidence and self-esteem far greater than that experienced by their male counterparts. Teenage girls also manifest disproportionately high rates of anxiety and depression and attempt suicide at twice the rate of boys of similar age. The loss of self-control that results from physical changes fosters self-doubt and anxiety. As their bodies mature, adolescent girls suddenly find that they are the subjects of male sexual desire. At the same time, popular culture bombards them with highly sexualized images of girls and young women designed to appeal to men. Adolescents tend to idolize celebrities and mimic their behavior, even when that behavior is risky or results in negative consequences.

In sum, adolescence is an emotional minefield for girls. In a relatively short space of time, everything around them changes: the way they look; academic expectations and performance; and social interactions, especially with boys who now view girls as potential partners in intimate relationships. As having a boyfriend becomes increasingly important and desirable, popular culture tells girls to dress and act in an appropriately "feminine" way. Once they enter an intimate relationship, girls must then strive to sustain it by keeping their boyfriend happy. This requires a balancing act of sorts as girls attempt to satisfy their partner's desire for


24. WELLESLEY COLLEGE CENTER FOR RESEARCH ON WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS: THE AAUW REPORT 2 (1992) [hereinafter AAUW REPORT].


26. See ELIZABETH DEBOLD ET AL., MOTHER DAUGHTER REVOLUTION: FROM GOOD GIRLS TO GREAT WOMEN 59 (1993) (noting that most girls do not experience maturational changes in body shape as empowering). Adolescent girls' eroding self-confidence also diminishes their academic achievement in middle and high school. AAUW REPORT, supra note 24.

27. For example, the music industry's most popular female performers—including Lady Gaga, Rihanna, and Katy Perry—typically wear extremely revealing clothing, sing songs with overt sexual content, and use sexually-charged choreography in live performances and music videos. Television programs popular among adolescent girls, such as Jersey Shore and Glee, likewise feature sexually active teenage girls and young women who dress and behave in a sexually provocative manner to attract men and boys.

28. Studies show that the sexual activities of celebrities, when widely covered by the media, influence teenagers' sexual behavior and attitudes. See Rebecca L. Collins et al., Watching Sex on Television Predicts Adolescent Initiation of Sexual Behavior, 114 PEDIATRICS e280, e287 (2004) (longitudinal study showing "substantial associations between the amount of sexual content viewed by adolescents and advances in their sexual behavior during the subsequent year").

29. Adolescent girls tend to equate femininity with "niceness," which leads to reluctance to voice their opinions or communicate their desires. DEBOLD ET AL., supra note 26, at 53, 93-94; AAUW REPORT, supra note 24, at 3.
sexual contact without appearing too “loose” or “easy,” labels that often lead female peers to ostracize or shun them.\textsuperscript{30}

The decision whether to accede to a boyfriend’s request for sexual intercourse looms large in this context. On the one hand, adolescent girls are mindful of possible reputational harm, pregnancy, and disease,\textsuperscript{31} and many are not motivated by their own sexual desire or enjoyment of the experience.\textsuperscript{32} On the other hand, in battling the insecurities and diminished self-concept that plague most teenage girls, they look to boyfriends to affirm their desirability and satisfy their need for emotional attachment.\textsuperscript{33} If agreeing to have sex is necessary to gain a boyfriend’s allegiance, it is a condition many girls are willing to accept.\textsuperscript{34}

That said, recent data indicate that adolescent girls are becoming less likely to engage in sexual intercourse. A longitudinal study, published in October 2011 by the National Center for Health Statistics (NCHS), measured the percentage of teenagers aged fifteen through nineteen who had ever had sex.\textsuperscript{35} Researchers divided the respondents into two age groups: fifteen to seventeen and eighteen to nineteen.\textsuperscript{36} They compiled data from 2006 to 2010 and compared their results to those obtained in similar surveys in 2002, 1995, and 1988.\textsuperscript{37} With respect to girls, the percentages of sexually active fifteen- to seventeen-year-olds declined from 1995 to 2002 (38.0% to 30.3%) and continued to do so in 2006 to 2010 (27.0%). For older teens, after showing virtually no change from 1995 to 2002 (68.0% to 68.8%), percentages declined in 2006 to 2010 (62.7%).\textsuperscript{38}

Some attribute the decrease in sexual activity to the success of pro-

\textsuperscript{30} See Kate Sutherland, From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities, 9 WM. & MARY L. WOMEN & L. 313, 345 (2003) (noting that the fear of being labeled a “slut” dissuades adolescent girls from having too much sex).

\textsuperscript{31} Elizabeth S. Scott et al., Evaluating Adolescent Decision Making in Legal Contexts, 19 LAW & HUM. BEHAV. 221, 230 (1995) (noting that adolescents are highly averse to social ostracism).


\textsuperscript{33} See Michelle Fine, Sexuality, Schooling, and Adolescent Females: The Missing Discourse of Desire, 58 HARV. EDUC. REV. 29, 36–37 (1988). See generally DEBOLD ET AL., supra note 26 (girls are motivated by the desire to give pleasure to others).

\textsuperscript{34} See, e.g., Tolman, supra note 32, at 328–29 (discussing Rochelle who first had sex during her sophomore year to please her boyfriend whom she needed to make her life complete).

\textsuperscript{35} It is lamentable that adolescent girls face this decision at a time when their psychosocial development compromises self-confidence in identifying and declaring physical boundaries. As Michelle Oberman notes, “the implications of this convergence of bodily maturity and moral dispossession are particularly disturbing because male sexual initiative remains a societal norm.” Michelle Oberman, Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law, 85 J. CRIM. L. & CRIMINOLOGY 15, 59 (1994) [hereinafter Oberman, Turning Girls into Women].

\textsuperscript{36} NAT’L CTR. FOR HEALTH STATS., TEENAGERS IN THE UNITED STATES: SEXUAL ACTIVITY, CONTRACEPTIVE USE AND CHILDBEARING, 2006–2010 SURVEY OF FAMILY GROWTH 14 (2011) [hereinafter NCHS REPORT].

\textsuperscript{37} Id. at 21.

\textsuperscript{38} Id. at 14.

\textsuperscript{39} Id.
grams that encourage abstinence.40 Others disagree, noting the absence of conclusive proof of the efficacy of such programs.41 Regardless of whether and to what extent these programs are effective, their overall impact on national data is necessarily limited since 50% of states have refused federal funding for abstinence education.42

A closer look at the NCHS report suggests a different theory. While sexual experience among eighteen- and nineteen-year-old boys decreased significantly from 1995 to 2002 (75.4% to 64.3%), it has since leveled off (63.9% in 2006–2010).43 For girls of the same age, the opposite trend emerges. While the percentage who were sexually active was basically unchanged from 1995 to 2002 (68.0% and 68.8%, respectively), that figure has decreased in the most recent data (62.7%).44 During this same period, technological advances and a sharp spike in cell phone ownership among American adolescents made texting the norm and sexting commonplace.45 Perhaps, then, teenage girls who were having sex to please their boyfriends are discovering a “virtual” way to satisfy their partners’ desire for sexual activity.46

While most would applaud an adolescent girl’s decision to delay sexual intercourse, the sexting alternative presents its own risks and dangers. In the Sex & Tech Survey, one-fourth of the girls stated that nude or semi-nude images intended for someone else were shared with them, and 36% considered this practice “common.”47 Thus, when girls send a sexually provocative image, many expect that it will be shared with unintended third parties. Given this recognition of the sender’s ultimate lack of control over distribution, it is not surprising that 75% of teens acknowledged

40. See, e.g., Christine Kim & Robert Rector, Evidence on the Effectiveness of Abstinence Education: An Update 2 (Feb. 19, 2010), http://www.heritage.org/research/reports/2010/02/evidence-on-the-effectiveness-of-abstinence-education-an-update (concluding that abstinence education produces statistically significant, positive results, such as delayed sexual initiation and reduced levels of early sexual activity).
42. See Accuracy, Efficacy and Ethics of Abstinence-Only Programs Questioned by Public Health Experts, SCIENCE DAILY 2 (Sept. 19, 2008), http://www.sciencedaily.com/releases/2008/09/080916143912.htm (noting that, as of August 2008, twenty-five states had refused federal funding for abstinence programs because of concerns about their accuracy and efficacy).
43. NCHS REPORT, supra note 36.
44. Id.
46. In the Sex & Tech Survey, of the 22% of teenage girls who reported sexting nude or semi-nude pictures of themselves, 71% sent these images to a boyfriend. Sex & Tech Survey, supra note 3, at 1–2.
47. Id. at 3.
that sending sexually suggestive content "can have serious negative consequences." 48

For adolescent girls, the risk of psychological trauma is especially acute. When sexually explicit images are made public, girls are far more likely than boys to face vilification and rejection by peers. 49 When added to the depression, anxiety, and diminished self-confidence many adolescent females experience, this social isolation and verbal abuse can create feelings of worthlessness leading to a variety of self-destructive behaviors. 50 While there is as yet no formal body of research addressing adolescent sexting victimization, psychologists have reported symptoms associated with post-traumatic stress disorder similar to those experienced by rape victims. 51

The details of documented cases of sexting abuse powerfully illustrate the potential for severe psychological dislocation. As in the Jessica Logan and Hope Witsell tragedies, 52 victims' stories typically begin with the transmission of a sexually explicit photo to a boyfriend and end with the distribution of that image to numerous unintended parties after the relationship ends. Sometimes, responsibility for the disclosure rests squarely with the former partner. For example, after Alex Phillips's sixteen-year-old girlfriend broke up with him, the seventeen-year-old posted on his MySpace account two nude photos she had sent him some months earlier. 53 The first presented full frontal nudity and the second, the vaginal and anal area. 54 While the pictures were eventually removed, Phillips refused a request by local police to do so, notwithstanding the victim's emotional distress. 55

Typically, where sexting occurs in the context of a relationship, the sender and recipient also have in-person contact, like Phillips and his victim. 56 However, in today's cyberworld, this is not strictly necessary. Con-

48. Id.
49. See supra text accompanying notes 31–32. That there is no male equivalent for "slut" is a ready example of the disparate way in which society regards male and female sexual expression. See Sol Saporta, Language in a Sexist Society, in STUDIES IN DESCRIPTIVE AND HISTORICAL LINGUISTICS 209, 211 (Paul Hopper ed., 1977) ("Interestingly enough, male whore and male slut are a little incongruous in most dialects.").
52. See supra text accompanying notes 7–8.
56. Id.
sider, for example, the story of a Georgia teenager whom I will refer to as “Beth.” Beth’s odyssey began in the seventh grade, when she started spending time in online chat rooms. At first, her new “friends” persuaded Beth to post her artwork and some photos of herself. Eventually, a male, who had taken a special interest in her, convinced fourteen-year-old Beth to post nude and semi-nude photos. Beth posted additional photos, but stopped doing so after getting her driver’s license and a “live” boyfriend. Refusing to accept her decision, Beth’s online admirer began blackmailing her, threatening to send the photos to her friends and to “ruin” her parents. In the end, when Beth was seventeen, a fellow student found the nude photos online and notified school personnel. By this time, dozens of classmates possessed the images.

Beth now realizes that these photos will exist forever in cyberspace. For now, she has to endure immature freshman looking at her and laughing. By publicizing her story, she hopes others will learn from her mistakes and avoid the pain that she is suffering.

Finally, while Alex Phillips and Beth’s online suitor acted unilaterally in making the offending photos public, the original recipient is not always directly responsible when widespread dissemination to third parties results. In Lacey, Washington, when fourteen-year-old Margarite was dating Isaiah, also fourteen, she sent him a naked photo of herself. When they broke up, Isaiah forwarded the photo to a female friend. That classmate then proceeded to distribute it to the entire list of contacts on her cell phone. She included the following message: “Ho Alert! If you think this girl is a whore, then text this to all your friends.” Soon, hundreds, “possibly thousands,” of students had received the photo. By the following day, it was “as if Margarite . . . had sauntered naked down the hallways of the four middle schools . . . .” Looking for a fresh start,

57. The foregoing details regarding “Beth’s” story were reported by the Atlanta Journal Constitution. See Bo Emerson, Sexting ‘A Shadow’ over Teenager, ATLANTA J.-CONST. (May 12, 2011), http://www.ajc.com/lifestyle/sexting-a-shadow-over-teenager/nQtlKh/.
58. Id.
59. James, supra note 53.
60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
65. Emerson, supra note 57; James, supra note 53.
67. Id.
68. Id.
70. Hoffman, supra note 66; see also Michelle Esteban et al., 3 Teens Arrested in ‘Sexting’ Case, Charges Expected After Photos of Naked Girl, 14, Sent to Teens at 4 Middle Schools, SEATTLE POST-INTELLIGENCER (Jan. 27, 2010), http://www.seattlepi.com/local/article/3-teens-arrested-in-sexting-case-893413.php.
Margarite transferred to a different school district. Unfortunately, it was not long before the photo began circulating among students there, and vicious taunts from female classmates soon followed. In the end, Margarite transferred back to her original school district where she still had friends.

That the adolescent victims discussed thus far are disproportionately female is not meant to exclude boys from the equation. While fewer in number, there are documented cases of victimization of adolescent males through sexting. However, in contrast to girls, the dissolution of an intimate relationship is typically not the catalyst for the distribution of the sexually explicit image in these cases.

For example, a teenager targeted by eighteen-year-old Matthew Bean never even met his tormenter. Searching on 4chan, an “imageboard” launched in 2003 where people can post photos and discuss a variety of topics, Bean found sexually explicit photos of a twelve- or thirteen-year-old boy posted five years earlier. Working with others in his “web group,” Bean discovered the boy’s identity. Posing as a school parent concerned about the “beastly behavior” depicted in the photos, Bean then forwarded the photos to teachers and administrators at the teenager’s Philadelphia-area high school. The web group also posted taunts about the victim, hoping to drive him to commit suicide. Fortunately, their plan was unsuccessful.

Adolescent males may also be victims of “sextortion,” typically by participating in a fraudulent scheme in which they are duped into sending nude photos to a sexual predator posing as an attractive female. For example, in Putnam County, Tennessee, a seventeen-year-old boy, posing as a girl, persuaded eighty boys, aged eleven to seventeen, to send him nude photos. Once they did, he would threaten to tell the police unless they sent more.

Nineteen-year-old Anthony Stancl’s predatory activity went even further. Posing as a female classmate on Facebook in 2008, Stancl convinced more than thirty high school boys in New Berlin, Wisconsin to send na-

71. Hoffman, supra note 66.
72. Id.
73. Id.
76. Of course, girls can also fall prey to sextortion, as “Beth’s” sexually charged online relationship with a friend-turned-blackmailer illustrates. See supra text accompanying notes 56–64.
78. Id.
ked photos of themselves. Stancl then used the photos to blackmail the senders unless they agreed to engage in sexual activity with him. At least seven boys aged fifteen to seventeen acquiesced, submitting to repeated acts of oral and anal copulation. Stancl recorded those incidents.

Because male sexual promiscuity does not create reputational harm, the association between the dissemination of nude photos and psychological trauma is far weaker for boys than it is for girls. However, when the images depict homosexual activity, as in the Tennessee and Wisconsin cases, that distinction disappears. The strong link between status and perceived masculinity encourages stereotypically male behavior, like showing sexual interest in girls. Viewed as feminine, same-sex conduct directly undermines this ideal. As a result, boys who engage in this behavior face a serious risk of rejection by male peers. Notwithstanding increasing public acceptance of same-sex lifestyles, especially among teenagers and young adults, homophobia remains "a central organizing principle of our cultural definition of manhood."

Viewed collectively, the foregoing discloses that, for teenagers and young adults, sexting has become a relatively commonplace form of interaction in interpersonal relationships. While the sender typically intends for the image to be viewed solely by the object of his or her affection, the risk of dissemination to third parties increases when intimate relationships sour or the recipient turns out to be an imposter seeking to extort sex from the sender. While sexting victims can be male or female, the heightened psychosocial vulnerability of adolescent girls exacerbates the potential for serious, consequential harm.

III. "TRADITIONAL" CRIMINAL LAW OPTIONS

In the absence of laws that address sexting specifically, prosecutors have relied on existing criminal statutes in areas such as child pornogra-

82. Washington, supra note 77.
84. See Frank Newport, For First Time, Majority of Americans Favor Legal Gay Marriage, GALLUP (May 20, 2011), http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx (stating that 70% of those aged eighteen to thirty-four support legalizing gay marriage).
86. See supra notes 45–48 and accompanying text.
87. See supra notes 53–55 and accompanying text.
88. See supra notes 22–27 and accompanying text.
phy and child enticement to address this conduct. These serious charges are appropriate in cases where sexting is secondary to the defendants' egregious, predatory conduct. For example, Anthony Stancl, who extorted sex from a number of juvenile males, was charged with multiple felonies, including sexual assault, child enticement, and possession of child pornography. As part of a plea agreement, he ultimately pleaded "no contest" to two sexual assault charges for which the judge sentenced him to fifteen years in prison followed by thirteen years of extended supervision.

Likewise, Matthew Bean, the young man who sent naked pictures of a teenage boy to teachers and administrators at the boy's high school, was indicted for federal child pornography offenses. After prosecutors agreed to dismiss the indictment in exchange for the twenty-year-old's guilty plea to stalking, the judge sentenced him to forty-five days in federal prison. Additionally, in 2012, a jury convicted Dharun Ravi, the college freshman who secretly streamed online his roommate's homosexual encounters in their dorm room, of multiple charges including bias intimidation, a hate crime punishable by up to ten years in prison. The judge sentenced Ravi to thirty days in jail and three years probation, commenting that incarceration is generally inappropriate in the absence of violence.

For other defendants, the imposition of felony charges seems excessive in light of the offenders' age and the less pernicious quality of their actions. Unlike Stancl, Bean, or Ravi, these defendants are not predators, nor is their misconduct calculated or habitual. For example, while Alex Phillips should be held accountable for impulsively posting naked pictures of his sixteen-year-old ex-girlfriend on his MySpace account, the filing of felony charges for child pornography and sexual exploitation of a minor is harsh. The latter charge alone carries a potential twelve-year

90. Complaint, supra note 80.
91. See Walker, supra note 81.
92. Liebowitz, supra note 89.
94. Kate Zernike et al., Jury Finds Spying in Rutgers Dorm Was a Hate Crime, N.Y. TIMES, Mar. 17, 2012, at A1. To activate the webcam used to spy on his roommate, Ravi used the computer of another student, Molly Wei, with her permission and her knowledge of what Ravi planned to do. Charged with invasion of privacy, Wei was allowed to enter a pretrial intervention program that requires her to testify at Ravi's trial, perform community service, and participate in counseling. If she complies fully, prosecutors will drop all charges against her. See Nate Schweber, In Fallout of Suicide by Student, a Plea Deal, N.Y. TIMES, May 7, 2011, at A18.
96. See, e.g., Complaint, supra note 54.
97. Id.
98. Id.
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Likewise, eighteen-year-old Phillip Alpert was charged with possession and distribution of child pornography, as well as a host of other offenses, for e-mailing nude photos of his sixteen-year-old girlfriend to her entire contact list of friends and family following an argument.\(^\text{99}\) Sentenced to five years probation after pleading “no contest” to the distribution charge, Alpert must now register as a sex offender until he turns forty-three.\(^\text{100}\) Jorge Canal faces similar probationary and registration requirements following his conviction for “knowingly disseminating obscene material to a minor.”\(^\text{102}\) Canal, then eighteen, sent a fourteen-year-old girl a photo of his erect penis, captioned “I love you,” in response to her repeated requests for naked pictures.\(^\text{103}\)

Serious charges have been lodged against younger offenders as well.\(^\text{104}\) In the Washington case involving the widespread distribution of a naked photo of fourteen-year-old “Margarite,”\(^\text{105}\) prosecutors filed a felony charge of dissemination of child pornography against three individuals: fourteen-year-old Isaiah, who sent the picture to one other person, and two thirteen-year-old girls, who distributed the photo more broadly.\(^\text{106}\) If convicted, they, like Alpert and Canal, would be required to register as sex offenders.\(^\text{107}\)

Some alleged child pornography cases do not even involve the distribution of a sexual image to an unintended third party. In Wyoming County, Pennsylvania, a high school principal confiscated students’ cell phones and, upon discovering photos of “scantily clad, semi-nude[,] and nude teenage girls[,]” turned the phones over to the district attorney.\(^\text{108}\) After conducting an investigation, the district attorney identified approximately twenty students who either owned a cell phone with a sexually provocative image or were the subject of said image.\(^\text{109}\) He threatened all of them with the filing of child pornography charges unless they agreed to complete an education and counseling program.\(^\text{110}\) The parents of three of the girls moved to enjoin the filing of criminal charges against their chil-

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99. See James, supra note 53.
102. State v. Canal, 773 N.W.2d 528, 529 (Iowa 2009).
104. See supra notes 66–73 and accompanying text.
105. See supra notes 66–73 and accompanying text.
106. See Hoffman, supra note 66.
107. See Esteban et al., supra note 70. Ultimately, prosecutors agreed to drop the child pornography charge in exchange for their guilty plea to telephone harassment, a gross misdemeanor. See Hoffman, supra note 66.
109. Id. at 638.
110. Id. at 640.
The relevant photos depicted two of the girls, filmed from the waist up, wearing opaque brassieres; the third girl was wrapped in a towel, positioned just below her breasts. The district court issued a temporary restraining order against the district attorney, which the U.S. Court of Appeals for the Third Circuit affirmed.

More recently, prosecutors in Portage, Indiana charged a fifteen-year-old high school freshman with juvenile possession of child pornography “for having naked pictures of two teenage girls on his phone.” There was no allegation that the youth transmitted the photos to anyone else. In addition, before the charge was filed, one of the two girls acknowledged that she sexted the defendant (and others) voluntarily.

To charge minors, especially younger adolescents, with serious sex-related offenses for impulsive sexting misconduct seems unfair since they lack the maturity to fully control their actions or to appreciate downstream consequences. The justification is even more tenuous in the Pennsylvania and Indiana cases where any resultant harm is speculative at best, since there was no evidence of transmission to unintended third parties. While the prosecution may ultimately negotiate a deal that allows the minors to plead to lesser charges, fear of the harsh penalties prescribed for child pornography and related offenses pressures defendants to accept whatever the prosecution offers. “Rolling the dice” with so much at stake is a risk most will not want to take. Moreover, as the tenacity with which the district attorney pursued charges against the minor plaintiff in *Skumanick* demonstrates, prosecutors are not always willing to deal. In *A.H. v. State*, the appellee defended the decision to charge A.H., a sixteen-year-old minor, with “promoting a sexual performance by a child” for posting photos of herself engaged in sexually explicit conduct with her seventeen-year-old boyfriend. The court agreed that prosecution for this second-degree felony was justified, even though the photos were never transmitted to, nor viewed by, third parties. The statutory objective of preventing the exploitation of minors is the same, the court reasoned, whether the person

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111. *Id.*
112. *Id.* at 639.
113. *Miller v. Mitchell*, 598 F.3d 139, 143 (3d Cir. 2010). While the appeal was pending, the district attorney decided not to pursue charges against two of the three minor plaintiffs. The Third Circuit upheld the issuance of the temporary restraining order against the third, concluding that “any prosecution would not be based on probable cause that [the minor] committed a crime, but instead in retaliation for [her] exercise of her constitutional rights not to attend the education program.”
114. *Id.*
115. *See id.*
116. *Id.*
117. *See supra* notes 108–16 and accompanying text.
118. *See supra* notes 108–16 and accompanying text.
120. *Id.* at 235–36. He was additionally charged with “possession of child pornography.”
121. *Id.*
inducing and promoting the performance is an adult, a minor, or, apparently, the victim. Clark v. Roccanova presented the analogous issue of whether federal child pornography laws could apply to minors. In Roccanova, the three fourteen-year-old defendants produced "a sexually explicit video" in which they "coerced, enticed, and persuaded" the fourteen-year-old plaintiff to participate. The plaintiff sued for civil damages, claiming that the defendants' conduct constituted "exploitation of a minor child" in violation of 18 U.S.C. §§ 2251 and 2252. The defendants argued that, because they were minors, the statutes could not apply to them. The court disagreed, finding no indication that the harm that flows from child pornography "could be done only by adult perpetrators." The judge also noted that, while this case presented a novel context, the "relatively recent rapid emergence of 'sexting' by minors" has fueled prosecutions elsewhere.

This burgeoning use of child pornography laws to address such a wide range of sexting and sexting-related cases not only fosters injustice, but distorts an offense category whose purpose is to protect, not prosecute, children. Minors manipulated into performing sexual acts for profit suffer negative consequences later in life, including difficulty fostering intimate relationships, "sexual dysfunctions, and . . . a tendency to become sexual abusers." Accordingly, child pornography laws target those who produce and distribute child pornography to prevent the sexual exploitation of minors. By contrast, an adolescent who voluntarily creates and sends a naked or semi-naked photo of him or herself to someone else in the context of an intimate relationship is not exploited or abused. Thus, there is no reason to expect the same kind of tragic downstream effects experienced later in life by minors lured into the pornography industry.

While sexting in the context of an intimate relationship may not victimize the parties involved, the introduction of a sexually provocative image into cyberspace may prospectively exploit other minors if it ends up in the

122. Id. at 238.
123. Id. Likewise, in State v. Vezzoni, No. 22361-2-III, 2005 WL 980588, at *1 (Wash. Ct. App. Apr. 28, 2005), the sixteen-year-old defendant appealed his convictions for dealing in and possessing depictions of a minor engaged in sexually explicit conduct. The depictions at issue were naked photographs of Vezzoni's sixteen-year-old girlfriend which he had shown to friends after the couple broke up. Rejecting his appeal, the court disputed Vezzoni's contention that "the legislature did not intend for child pornography statutes to apply in situations where teenagers, who are capable of consenting to sexual activity, take nude photographs of each other." Id.
125. Id. at 846-47.
126. Id.
127. Id. at 847-48.
128. Id. at 847.
129. Id. at 847-48.
130. Cf. id. at 847.
132. See id. at 759.
hands of the wrong people.\textsuperscript{133} "[P]edophiles use child pornography," the Supreme Court has noted, "to seduce other children into sexual activity."\textsuperscript{134} Thus, to the extent that criminalizing possession impedes the availability of these materials for those with "prurient purposes," it is good public policy.\textsuperscript{135} But, as discussed earlier, the extent to which pedophiles are able to access juvenile sexts remains to be seen.\textsuperscript{136}

In sum, then, the emergence of anti-sexting initiatives reflects public concern over the rapid proliferation of sexting and its potential dangers to children, balanced against the concomitant recognition that the significant penalties specified under current child pornography and obscenity laws are inappropriate for otherwise innocent minors.\textsuperscript{137} Reacting to charges filed against two fifteen-year-olds when a nude photo of one was found on the cell phone of the other, a sponsor of Ohio's juvenile sexting proposal commented: "They did something stupid, but I don't think anyone wants for them to be called sex offenders."\textsuperscript{138}

Given the factual context of most sexting tragedies, one would expect that legislative initiatives would focus on the transmission of sexted images to unintended third parties. To the extent that the criminal law is used for this purpose, it should be reserved for egregious offenders whose misconduct is habitual, fraudulent, excessive due to widespread distribution, or undertaken with a desire to cause harm. For others, noncriminal sanctions, such as education, counseling, and community service, may be a more appropriate response.

As we will see in the next section, some states have enacted or proposed laws that adopt this approach by focusing primarily on education-based intervention for sexting offenses.\textsuperscript{139} Others, however, go further, imposing criminal penalties not only on those who disseminate sexted images to third parties but also on those who possess the image without regard to its distribution to unintended parties.\textsuperscript{140} The most aggressive initiatives go one step further, punishing the sexter him or herself for creating and transmitting the image in the first place.\textsuperscript{141}

\textsuperscript{133} See supra notes 75–81 and accompanying text.
\textsuperscript{134} Osborne v. Ohio, 495 U.S. 103, 111 (1990).
\textsuperscript{135} Id. at 113 n.10 (quoting State v. Young, 525 N.E.2d 1363, 1367–68 (Ohio 1988)).
\textsuperscript{136} See supra text accompanying notes 13–15.
\textsuperscript{137} See supra notes 117–23 and accompanying text.
\textsuperscript{139} See infra notes 197–99 and accompanying text.
\textsuperscript{140} See infra notes 159–84 and accompanying text.
\textsuperscript{141} See infra notes 159–84 and accompanying text.
IV. ANTI-SEXTING INITIATIVES

According to data gathered by the National Conference of State Legislatures, at least thirty-three states and U.S. territories have considered sexting-related legislation in the past three years. Roughly half have enacted laws that address sexting. As indicated above, legislative efforts to curb sexting vary widely in approach and content. Therefore, to appreciate the picture that these laws collectively paint, it is more useful to focus on prevailing themes than to attempt a state-by-state comparison. To that end, viewing current anti-sexting proposals and enactments as a whole, liability for sexting is a function of four key variables: the participants’ age, their state of mind, the nature of their conduct (e.g., transmission, possession, or distribution), and the sanctions imposed on them. I will address each in turn.

A. AGE

While adults can be victims of sexting-related misconduct, legislative interest has revolved principally around minors. Explaining this focus on adolescents, the California legislature found that sexting “has become a pervasive problem for many school districts” whose student victims suffer psychological harm from its unforeseen consequences. Likewise, in a statement accompanying its sexting proposal, the New Jersey Assembly recognized the dangers inherent in the “sexting or posting” of sexual images by juveniles. “The teenage practices of sexting and posting sexual images online,” the bill concluded, “are nationwide problems that have perplexed parents, school administrators, and law enforcement officials.”

In accordance with these sentiments, anti-sexting initiatives uniformly apply age-based restrictions to the subject of the sext; none of the statutes address sexually provocative images depicting someone eighteen or older. In fact, most focus exclusively on minors in all respects. For example, in South Dakota, the offense of sexting would apply only to mi-

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144. See discussion supra Part II.
145. See infra notes 149–54 and accompanying text.
148. Id.
nors who create, transmit, or distribute sexually provocative images.\textsuperscript{150} Ohio and Florida’s statutes include only minors who transmit or distribute nude images to other minors.\textsuperscript{151} Some are even more narrow.\textsuperscript{152} Connecticut’s “Act Concerning Sexting” targets only thirteen-to-seventeen year-olds.\textsuperscript{153} Louisiana goes further yet, applying sexting penalties only to minors sixteen and younger.\textsuperscript{154}

While a relatively uncommon feature, some statutes include adults involved in sexting relationships with minors. For example, a bill introduced in Oklahoma would allow criminal penalties for any person soliciting sexts from minors.\textsuperscript{155} Vermont, one of the first states to enact anti-sexting legislation, also imposes criminal sanctions on adults who possess “indecent visual depiction[s]” of minors.\textsuperscript{156}

The general exclusion of adults is not surprising for two reasons. First, the tragedies reported in the press have typically involved sexts created, transmitted, received, and distributed by minors alone.\textsuperscript{157} Second, child pornography laws, which generally provide harsher criminal sanctions than the anti-sexting initiatives, are an available and more appropriate vehicle to address the conduct of adults who solicit and share sexually provocative images of minors.\textsuperscript{158}

\section*{B. Conduct}

To appreciate the range of conduct anti-sexting laws can prohibit, it is useful to consider South Dakota’s proposal because of its broad application.\textsuperscript{159} Under this formulation, minors commit the crime of “juvenile sexting” if they use “any electronic or computerized device” to “create, produce, distribute, present, transmit, post, exchange or possess” any sexually explicit “visual depiction of a minor.”\textsuperscript{160} It is no defense, moreover, “that the minor’s visual depiction is of himself or herself alone.”\textsuperscript{161}

By virtue of its impressive breadth, this standard seemingly would subject any juvenile involved in sexting to criminal prosecution, provided the visual depiction is of a minor. Minors who create the sext are expressly liable. Minors who transmit the sext are also liable, even if the sexual-

\textsuperscript{152} See, e.g., CONN. GEN. STAT. § 53a-196h(a)(1) (2012).
\textsuperscript{153} Id.; see also H.B. 3130, 119th Sess. Gen. Assemb., 2nd Reg. (S.C. 2011) (proposed sexting statute would apply to minors aged twelve to seventeen only).
\textsuperscript{155} H.B. 3321, 52nd Leg., 2nd Sess. (Okla. 2009).
\textsuperscript{156} VT. STAT. ANN. tit. 13, § 2802b(a)(1), (a)(2), (c) (West Supp. 2012).
\textsuperscript{157} See, e.g., supra notes 52–73 and accompanying text.
\textsuperscript{158} See supra Part II.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
ized image is only of the sender. Recipients are liable if they are minors since they "possess" the image, even if they do not forward the sext to anyone else. If, at the time of arrest, minors have deleted the image and thus no longer "possess" it, they are still liable if they "presented" or distributed the image to a third party before deleting it. Third-party minor recipients could also be liable for possessing the image and for transmitting it to someone else. Finally, minors who "post" the image on the web are liable, as are minors who "exchange" sexts depicting a minor with other individuals.

While less expansive in their wording, other initiatives ultimately cover much of the same ground. This breadth of prohibited conduct is curious since most of these acts are not directly related to extant harms. For example, in none of the cases reported thus far has victimization resulted simply from the voluntary creation of a sext in which the creator alone is depicted or from its subsequent transmission to and possession by the intended recipient. Yet, while statutes very rarely enjoin the creation of the sext, many prohibit both its transmission by the creator and its possession by the intended recipient. Of course, if preventing widespread distribution is the ultimate goal, then impeding the introduction of the subject image into virtual space certainly promotes that objective.

163. Id.

164. Id.

165. See id. Because the statutes typically do not define "possession," it is unclear if a minor would be liable if he deleted the sext soon after receiving it. In the child pornography context, courts have generally found sufficient evidence of possession of digital images where the defendant is able to exercise control over them by, for example, deleting them. See, e.g., United States v. Romm, 455 F.3d 990, 1000-01 (9th Cir. 2006); United States v. Tucker, 305 F.3d 1193, 1197, 1203-05 (10th Cir. 2002). Cf. United States v. Mason, 233 F.3d 619, 624-25 (D.C. Cir. 2000) (allowing "innocent possession" defense to federal firearms charge where defendant's contact with the weapon was innocent and transitory). Texas focuses instead on the temporal aspect of the possession, providing a defense where the recipient destroys the sext "within a reasonable amount of time." Tex. Penal Code Ann. § 43.261(f)(3) (West Supp. 2013).


167. See supra notes 115-16 and accompanying text.

168. Among the states that have enacted anti-sexting laws, only New Jersey proscribes the creation of a sexually explicit image. N.J. Stat. Ann. § 2A:4A-71.1(c)(1) (West Supp. 2013) (prohibiting "the creation, exhibition or distribution of a photograph depicting nudity") (emphasis added).


In response, perhaps, to the extensive reach of most sexting initiatives, some provide an affirmative defense to possession. Vermont removes criminal liability where an individual takes "reasonable steps, whether successful or not, to destroy or eliminate the visual depiction." Vermont removes criminal liability where an individual takes "reasonable steps, whether successful or not, to destroy or eliminate the visual depiction." Texas, Arizona, and Nevada require, in addition, that the individual did not solicit the sext. In the most rigorous formulation, Florida requires: (1) no solicitation; (2) no transmission to a third party; and (3) "reasonable steps" by the possessor to report the sext to his or her guardian, law enforcement, or a school official.

South Dakota's proposal also expressly prohibits the "present[ing]" and "exchang[ing]" of the image. Other statutes tend not to include these terms, perhaps because it is unclear what either adds to the general prohibition on transmission. By sending an image electronically, someone necessarily "presents" and "exchanges" it with the recipient. One can make the same argument with respect to the "posting" of the image. This superfluity likely explains why "posting" is generally excluded as a separate category of prohibited conduct.

However, this exclusion is a mistake. Because "posting" suggests broader third-party access than transmission to a single cell phone or e-mail account, including it as a separate category of conduct seems wise to remind adolescents of the dangers inherent in placing a compromising image in cyberspace. Even if a photo is originally posted for private viewing by one party, its placement in a domain frequented by others introduces a heightened risk of future access by third parties. We have already discussed, in this regard, the tragedy that befell Beth, the Georgia teenager who posted nude photos of herself in a chat room when she was fourteen. Those photos surfaced three years later and ended up in the mailboxes of her high school classmates. The delay was even longer with Matthew Bean's victim. The teenager was seventeen when Bean sent naked photos of him, taken four to five years earlier, to teachers and administrators at the victim's high school.

The final conduct issue relevant to sexting is consent. North Dakota's law, as amended in 2011, prohibits the creation and possession of sexts only if their production was surreptitious "without written consent from each individual who has a reasonable expectation of privacy in the im-

172. VT. STAT. ANN. tit. 13, § 2802b(a)(2).
176. None of the other initiatives include "presenting" and only Ohio's proposed statute mentions "exchang[ing]." See supra notes 57-64 and accompanying text.
177. See supra notes 57-64 and accompanying text.
178. See supra note 74 and accompanying text.
179. See supra note 74 and accompanying text.
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age.” Similar legislation is currently pending in Pennsylvania and Kentucky. By virtue of its involuntary nature, this sort of misconduct differs from that of typical sexting cases where the victim knowingly creates and transmits the sexual image. Because the two contexts are meaningfully distinct, it is not surprising that sexting statutes generally do not address surreptitious creation, possession, and distribution. To this end, North Dakota’s statute addresses only involuntary conduct while Pennsylvania’s proposed separate law—one concerning sexting, and the other, discussed here—created the offense of “[c]yberbullying by minors.”

C. STATE OF MIND

All anti-sexting laws contain state of mind requirements. The most common is “knowingly,” which requires the prosecutor to prove that the defendant knew that he or she was transmitting or was in possession of a sexually explicit image of a minor. Guam is unique in allowing liability based on recklessness, whereas North Dakota requires “willful[ness]” for possession.

Several statutes specify a more malevolent state of mind. For example, in North Dakota, Alaska, and California, proof of intent to humiliate or harass is necessary for liability. Conversely, in Texas, the “intent to harass, annoy, alarm, abuse, torment, embarrass or offend” subjects the defendant to a higher-level offense. Because these provisions require evil motive, they focus squarely on those individuals who disseminate sex-

181. Passed by the Pennsylvania Senate, the bill creates criminal liability when a minor, without consent, “photographs, videotapes, depicts on a computer or films” another minor “in a state of nudity” or “transmits, distributes, publishes or disseminates” the “visual depiction” so created. S.B. 850, 195th Gen. Assemb., Reg. Sess. (Pa. 2011).
182. Passed by the Kentucky House, this proposal would expand the definition of the crime of “voyeurism” by adding computers and cell phones to the list of electronic devices that may not be used to record a sexually explicit image of another person without his or her consent. H.B. 126, 2011 Leg., Reg. Sess. (Ky. 2011).
183. It is more akin to the actions of Dharun Ravi, the New Jersey college students who secretly recorded and then streamed on the internet a sexual encounter between his roommate and another man. See supra text accompanying notes 9–12.
186. See 9 Guam Code Ann. § 28.100(a) (2012). Under Guam’s culpability standards, derived from the Model Penal Code, a person is reckless with respect to the result of his conduct when he is aware “of a substantial risk . . . that his conduct will cause [that result]” and unjustifiably disregards that risk, which “constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation.” Id. § 4.30(c) (2012).
187. N.D. CENT. CODE § 12.1-27.1-03.3(1)(a).
188. Id. § 12.1-27.1-03.3(1)(b) (“intent to cause emotional harm or humiliation”); H.B. 127, 27th Leg., First Sess. (Alaska 2011) (“intent to annoy or humiliate”); S.B. 919, 2011 Leg., Reg. Sess. (Cal. 2011) (as amended, June 2011) (intent to “humiliate or harass”).
189. Tex. Penal Code Ann. § 43.261(c) (Class C versus Class B misdemeanor).
ually explicit images to cause emotional harm to the person(s) pictured therein. To that end, in its findings of fact accompanying the sexting bill, California notes that involvement in sexting subjects students to "long-term social, emotional, and psychological harms as a result of harassment and bullying." 190

There are certainly instances of cyberabuse that began with a sext, voluntarily created by a minor, which is subsequently sent to another minor with whom the sender was or hoped to be in an intimate relationship. 191 For example, when Alex Phillips's sixteen-year-old girlfriend sent him naked pictures, she never imagined that, months later, angry over their break-up, he would post them on the internet with the caption "You tell me this bitch deserves [sic] this!!!!!!!!" 192 Nor could fourteen-year-old Margarite have imagined that a topless photo she sent to a classmate whom she liked would find its way into the mailboxes of countless strangers when, after the break-up, the boy sent it to a girl in their class who hated Margarite. 193

Conditioning liability on distribution of the sext with an intent to cause emotional or psychological distress will, at the same time, exclude other sexting cyberbullies. Predators like Anthony Standl, who coerced numerous teenage boys into engaging in sex acts, often only threaten to send the sexually explicit images to third parties; they never actually carry out the threats. 194 Even if they did, their intent was not, strictly speaking, to humiliate or harass their victims. Rather, it was to generate fear so that the boys they targeted would comply with their demands. 195

In the end, the fact that Anthony Standl and others like him may be beyond the reach of some anti-sexting statutes is no cause for concern. These defendants typically face a host of serious criminal charges that adequately address the gravity of their criminal behavior. Such substantial penalties stand in stark contrast to those specified in the sexting statutes. While sexting sanctions vary, they are generally modest, in recognition of the fact that "[c]hildren often act without fully contemplating the . . . consequences of their actions." 196 Accordingly, legislators are endeavoring to deter future misconduct without creating a record that may compromise future educational and job prospects.

191. See supra notes 53–55 and accompanying notes.
192. See supra notes 53–55 and accompanying notes.
193. See supra notes 53–55 and accompanying notes.
194. See supra notes 53–55, text accompanying, and text accompanying notes 80–82.
195. See supra text accompanying notes 79–81.
D. PENALTIES

Recognizing the failure of adolescents to appreciate the potential long-term harm associated with sexting, several statutes allow minors who commit sexting offenses to complete an educational program in lieu of criminal prosecution. Most impose content requirements to that end, requiring instruction on the consequences of sharing sexually “suggestive” or “explicit” materials, including the “loss of educational and employment opportunities” and being barred or removed from school programs and extracurricular activities. If a minor successfully completes the program, some states expunge all records relating to his or her offense.

While not quite as generous to juvenile offenders, many other laws also provide alternatives to criminal prosecution. In a novel approach, California would not involve the courts at all. Its proposal assigns school districts the responsibility for investigating and responding sexting allegations that are “related to school activity or attendance.” After investigating specific complaints, superintendents and principals would have the authority, based on their findings, to suspend or expel students for their misconduct.

Statutes in other jurisdictions operate outside the school system. Several specify noncriminal sanctions, often supervised by family courts. The most permissive declare certain offenders to be minors “in need of supervision” and order counseling and other supportive services to address their misconduct. Others deem the minor guilty of a noncriminal

197. Some of the statutes also apply to adults who possess or transmit sexually explicit images of minors. This article does not address those provisions.


200. This standard incorporates conduct that occurs on school grounds, during school-sponsored activities, when travelling to or from school, and during lunch whether on or off campus. S.B. 919 § 5(t), 2010 Leg., Reg. Sess. (Cal. 2011) (as amended June 28, 2011).

201. Id.


204. See, e.g., 705 ILL. COMP. STAT. 405 / § 3-40(c) (2012); LA. REV. STAT. ANN. § 14:81.1.1(C)(1) (family “in need of services” under Title VII of the Louisiana Children's Code); NEV. REV. STAT. § 200.737(4)(a)(1) (“child in need of supervision”).

205. See, e.g., 705 ILL. COMP. STAT. 405 / § 3-40(d) (allowing court to order supportive services, including counseling, as well as community service); LA. CHILD. CODE ANN. art. 779 (2004 & Supp. 2012) (giving the court broad authority to order available community-based services, including psychological treatment); NEV. REV. STAT. § 62E.410(1)(c) (juvenile court can order community-based services for “counseling, behavior modification and social adjustment.”).
“violation”\textsuperscript{206} or impose a finding of delinquency.\textsuperscript{207} In certain states, the records pertaining to the delinquency adjudication are subject to expungement when the minor turns eighteen.\textsuperscript{208}

While indicative of a desire for restraint in punishing minors for sexting violations, the foregoing does not constitute a rejection of the criminal law in this context. In fact, many statutes provide criminal penalties, either exclusively or in combination with civil remedies. Where criminal, a minor’s first sexting violation is usually no greater than a misdemeanor or “petty offense.”\textsuperscript{209} However, in most jurisdictions, the severity of the sanction increases for subsequent violations. While later offenses usually do not exceed the misdemeanor level,\textsuperscript{210} some statutes allow felony convictions.\textsuperscript{211} Some also adjust the penalty in light of the egregiousness of the act. This determination considers the nature of the conduct,\textsuperscript{212} the actor’s state of mind,\textsuperscript{213} and the number of recipients.\textsuperscript{214}

E. Summary and Conclusions

Negotiating the torturous path of the numerous and varied anti-sexting statutes—enacted, pending, and proposed—allows certain conclusions. First, legislative interest is decidedly focused on minors. Lawmakers seem content, for the most part, to allow prosecution of adult sexters under existing child pornography and obscenity statutes which classify most offenses as felonies.\textsuperscript{215} Likewise, sexting laws that include adults tend to assign significantly harsher penalties to them than to minors for the same

\textsuperscript{206} See, e.g., FLA. STAT. § 847.0141(3)(a) (2012); KY. REV. STAT. ANN. § 635.060 (West 2006).


\textsuperscript{208} VT. STAT. tit. 13, § 2802b(b)(4); H.B. 573, 26th Leg., Reg. Sess. (Haw. 2011).

\textsuperscript{209} See, e.g., ARIZ. REV. STAT. ANN. § 8-309(D), (E) (Supp. 2012) (West) (petty offense or class 3 misdemeanor); CONN. GEN. STAT. § 53a-196h(c) (2012) (class A misdemeanor).


\textsuperscript{211} See, e.g., FLA. STAT. § 847.0141(3)(c) (felony of the third degree for third violation); VT. STAT. tit. 13, §§ 2802b(3), 2827(c)(1) (Second violation can result in incarceration for up to two years for “sexual exploitation of children.”).


\textsuperscript{213} See N.D. CENT. CODE § 12.1-27.1-03.3(1)–(2) (2012) (“[I]ntent to cause emotional harm or humiliation” is higher-level misdemeanor); TEX. PENAL CODE § 43.261(c)(1)(A) (mandating that intent to “harass, annoy, alarm, abuse, torment, embarrass or offend” converts Class C misdemeanor to Class B).

\textsuperscript{214} See ARIZ. REV. STAT. § 8-309(D), (E) (converting petty offense into a misdemeanor for display of visual image to more than one party).

\textsuperscript{215} See, e.g., NEB. REV. STAT. § 28-813.01(2) (2012) (stating that adults who “knowingly possess any visual depiction of sexually explicit conduct” involving minors commit a felony); UTAH CODE ANN. § 76-10-1206(1), (2)(a) (West 2004 & Supp. 2013) (stating that adults who deal in “material harmful to a minor” commit a felony).
conduct, often designating the adults’ offenses as felonies.\textsuperscript{216}

With respect to conduct, all statutes prohibit the transmission of sexual images. But, while dissemination to third parties is usually the catalyst for tragedy, the statutes often apply equally to the initial transmission by the creator of the sext. Because “possession” is also pervasively included, the intended recipient is also liable. Some states provide an affirmative defense to possession but, to qualify, the recipient generally must have attempted to delete the sext or reported it to an authority figure. Therefore, in a typical sexting scenario, where a teenage boy retains on his cell phone a sext sent by his girlfriend, the defense would be unavailable.

The state of mind requirement, included in virtually all of the anti-sexting initiatives, provides little protection for charged minors. Proof that an individual acted “knowingly,” the most common requirement, will not trouble prosecutors since logic suggests that minors are rarely unaware that they are sending or possessing a sexually explicit image. Establishing “intentional” or “willful” conduct is not problematic for the same reason, unless the intent must be to “humiliate” or “harass.” Using this more malicious mental state shrinks the law’s reach. Relatively few states have embraced it, perhaps because it would exempt too many sexting participants. Even where this standard exists, its associated penalty is not very stringent, ranging from expulsion from school to a misdemeanor conviction. In Texas, for example, an intent to “abuse” or “torment” merely enhances the offense level from a Class C to a Class B misdemeanor, which adds up to 180 days of confinement and $1,500 in fines.\textsuperscript{217}

To draw so little distinction between teenagers who voluntarily send and receive sexts of each other while dating and those who broadly disseminate sexual images of a third party to cause that person significant emotional harm seems unjust. It reflects, however, a general agreement among the states that low-level sanctions are appropriate for all sexting offenses, regardless of context. Thus, in states that impose stricter penalties for the transmission of a third-party image versus that of oneself, the sanction remains fairly modest. Even repeat offenders very rarely face anything greater than misdemeanor liability.

\section*{V. THE ROAD TO SEXTING}

Based on the foregoing, most would argue that the anti-sexting craze has produced an unprincipled, and often misguided, morass of laws.\textsuperscript{218} To

\begin{itemize}
\item \textsuperscript{216} See, e.g., VT. STAT. tit. 13, § 2802b(b), (c) (delinquency adjudication for minor; jail time of up to six months for adult); H.B. 573, 26th Leg., Reg. Sess. § 1(5) (Haw. 2011) (family court adjudication for minor; felony for adult); H.B. 126, Reg. Sess. §§ 4, 5, 11 (Ky. 2011) (felony for adult; “violation” for minor). But see N.D. CENT. CODE § 12.1-27.1-03.3(1), (2) (same misdemeanor liability for all persons).
\item \textsuperscript{217} TEx. PENAL CODE §§ 12.22, 12.23.
\item \textsuperscript{218} While the depth and content of criticism varies, commentators have uniformly found fault with the legislative treatment of sexting. See, e.g., Catherine Arcabascio, Sexting and Teenagers: OMG R U Going 2 Jail?, 16 RICH. J.L. & TECH. 10 (2010); Henry F. Fradella & Marcus A. Galeste, Sexting: The Misguided Penal Social Control of Teenage Sexual Behavior in the Digital Age, 47 CRIM. L. BULL. 438 (2011); Mary Graw Leary, Sext-
the extent that we attempt to justify these initiatives solely by their relationship to cognizable harms gleaned from documented cases, this seems a fair, if not inevitable, conclusion. Sexting legislation does not exist, however, in a historical vacuum. The state has prosecuted consensual sexual activity for hundreds of years through the crime of statutory rape. Next, we will consider this evolutionary progression to see if it offers an explanation for the legislative frenzy surrounding sexting.

A. The Origins of Statutory Rape

First codified into English law in 1275, the offense of statutory rape prohibited sexual relations with females under the age of twelve.\textsuperscript{219} While the desire to shield pre-pubescent girls from the sexual intentions of men seems unimpeachable, the law supported an equally powerful financial motivation. Because the loss of chastity compromised girls’ marital prospects, fathers had a vested interest in ensuring their daughters’ purity to avoid a greatly diminished dowry or, worse yet, no marriage at all.\textsuperscript{220} In an era when females were considered property, first of their fathers and then of their husbands, chastity was a precious commodity and those who stole it deserved punishment.\textsuperscript{221}

Statutory rape in the United States initially mirrored that of the English common law.\textsuperscript{222} During the nineteenth century, however, the age of consent rose dramatically and averaged sixteen by the early twentieth century.\textsuperscript{223} The Women’s Christian Temperance Movement and its allies were instrumental in this effort, motivated by sharp increases in the number of females entering the workplace through industrialization. Joined by “Social Purity” reformers, female activists believed that working girls needed protection from “manipulative men” who would seduce them, bringing disgrace to their families and compromising the girls’ marital prospects.\textsuperscript{224} Removing “the presumption of permissible seduction”\textsuperscript{225} by raising the age of consent was the only way to change male sexual behav-

\textsuperscript{219} Rita Eidson, Comment, The Constitutionality of Statutory Rape Laws, 27 UCLA L. REV. 757, 762 n.35 (1980) (citing Statute of Westminster I, 1275, 3 Edw.. 1, c. 13 (Eng.) (“[T]he King prohibiteth that none do ravish, nor take away with force, any Maiden within Age.”)).


\textsuperscript{223} Jane E. Larson, “Even a Worm Will Turn at Last”: Rape Reform in Late Nineteenth-Century America, 9 Yale J.L. & Human. 1, 2 (1997).


\textsuperscript{225} Id.
ior and shield females from "cultural values that threatened their well-being." 226

Ironically, the campaign to raise the age of consent in the United States and England brought together two groups not accustomed to working together: feminists and "repressive moralists." 227 While their motivations were quite different, 228 the two groups shared a general recognition that sexuality is "a vehicle of power that in complex ways has kept women subordinated in society." 229 Accordingly, both wanted to protect naive adolescent girls from male sexual coercion and exploitation. In providing a means to this end, statutory rape laws served both a protective and a patriarchal function. 230

B. STATUTORY RAPE IN THE 20TH CENTURY

The twentieth century saw decreased enthusiasm for enforcing statutory rape laws. By the 1920s, as progressives replaced social purists, the image of the vulnerable adolescent girl was replaced by that of the seductress, preying upon married men and their families. 231 This change engendered a corresponding shift in state-sponsored programs from prosecution of men to education of female "sexual delinquents." 232 The 1935 introduction of federal funding for fatherless children in need of financial assistance promoted this change in perception. Whereas almost half of the recipients were widows in the program's early years, 233 by the early 1960s they were replaced by women who were abandoned, divorced, or never married. 234

During this mid-twentieth century period, the principal originators of information regarding statutory rapes were welfare agencies in search of "deadbeat dads" who had failed to provide child support to the underage women whose children they fathered. 235 As prosecutors decided whether to file criminal charges against the adult male, local law enforcement often referred the underage mother to juvenile authorities, believing her

228. For example, the social purity movement warned of "undifferentiated male lust," while the feminists complained of gender-based double standards and the general hostility of the law towards women. Judith R. Walkowitz, The Politics of Prostitution, 6 Signs 123, 129, 131 (1980) (quoting Jeffrey Weeks, Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present 18 (1977)).
231. Levine, supra note 224, at 1062–63.
235. Levine, supra note 224, at 1067–68.
to be at risk "of leading an 'idle, dissolute, lewd or immoral life.'" No longer the vulnerable innocent depicted by social purists half a century earlier, statutory rape victims were now undisciplined delinquents, dependent on public funds, and in need of oversight and rehabilitation to become righteous and productive members of society.

The advent of the sexual revolution of the late 1960s and 1970s removed the taboos associated with premarital sex and the denigration of those whose pregnancy exemplified it. Best-selling books celebrated sexual intercourse, openly embracing female sexuality and sexual satisfaction for the first time. As attitudes towards sex changed, states modified statutory rape laws to reflect new public sensibilities. Most made the crime gender-neutral with respect to perpetrators and victims. At the same time, they required a specific difference in age between defendants and their younger victims. Some lowered the age of consent, while many adjusted the penalty based on the age of the victim, the perpetrator, or both.

As legal standards changed, the enforcement of statutory rape laws became somewhat "sporadic[ ]" until the end of the twentieth century, when

236. Id. at 1069 (quoting J. Richard Woodworth, The Administration of Statutory Rape Complaints: A Sociological Study (1964) (unpublished Master's Thesis, University of California, Berkeley)).


240. See, e.g., Mich. Comp. Laws Ann. § 750.520b (West Supp. 2013) (up to life in prison if the victim is under thirteen; S.C. Code Ann. § 16-3-655 (2013) (up to thirty years if the victim is under eleven; up to twenty years if between eleven and fourteen); Wis. Stat. Ann. §§ 939.50, 948.02 (West 2005) (up to forty years if the victim is under thirteen; up to twenty-five years if under sixteen).

241. See, e.g., Colo. Rev. Stat. Ann. § 18-3-402 (West 2013) (two to six years if the victim is under fifteen and the perpetrator is at least four years older; one to two years if the victim is fifteen or sixteen and the perpetrator is at least ten years older); Me. Rev. Stat. tit. 17-A, §§ 253(1)(B), 254(1) (2006) (up to forty years if the victim is under fourteen; up to five years if the victim is fourteen or fifteen and the perpetrator is at least ten years older; up to one year if the victim is fourteen or fifteen and the perpetrator is at least five years older); Mo. Ann. Stat. §§ 566.032(1), .034(1) (West 2012) (five years to life if the victim is under fourteen; up to seven years if the victim is under seventeen and the perpetrator is at least twenty-one); N.J. Stat. Ann. § 2C:14-2 (West 2005) (ten to twenty years if the victim is under thirteen; five to ten years if the victim is thirteen to sixteen and the perpetrator is at least four years older); N.Y. Penal Law §§ 130.30, .35 (McKinney 2009) (five to twenty-five years if the victim is under thirteen and the perpetrator is eighteen or older; up to seven years if the victim is under fifteen and the perpetrator is at least eighteen and at least four years older).
interest sparked dramatically.\textsuperscript{242} After a series of studies indicated that adult men fathered a disproportionate number of babies born to teenage mothers,\textsuperscript{243} the federal government exhorted state and local governments to “aggressively enforce statutory rape laws” in its comprehensive welfare reform act in 1996.\textsuperscript{244} The following year, the American Bar Association’s Center on Children and the Law weighed in on the issue, emphasizing the impropriety of sexual relationships between girls fifteen and younger and men twenty and older.\textsuperscript{245}

Reflecting these concerns, law enforcement focused predominately on relationships in which the perpetrator was at least ten years older than the victim, including those where the adult male had authority over, or a familial connection to, the victim, such as teachers, coaches, stepfathers and mothers’ boyfriends.\textsuperscript{246} This pursuit of those who prey upon much younger, impressionable victims is commendable. At the same time, narrowing the enforcement of statutory rape in this way fails to protect girls harmed by sexual relationships with individuals closer in age who may not occupy a special position of trust. That the risk of interpersonal manipulation may be greater with older adults, especially those whom an adolescent respects or admires, does not suggest that sexual contact between similarly-aged teenagers is necessarily voluntary. As Michelle Oberman aptly notes, “peers may be differently situated with respect to their capacity to exploit others.”\textsuperscript{247}

One need only consider the sexual exploits of the teenage boys dubbed “Spur Posse” in Lakewood, California, to illustrate the point. Engaged in a competition to see who could have sexual relations with the most girls, this band of twenty to thirty popular high school boys each had sexual contact with “20 to 73[ ] girls,” ranging in age from ten to sixteen.\textsuperscript{248} The gang had a reputation for violence and several victims told the police “they submitted to sexual acts because they were afraid.”\textsuperscript{249} Nonetheless, the Los Angeles County District Attorney’s Office concluded that there was insufficient evidence of coercion and dropped all charges against eight of the nine boys they had arrested.\textsuperscript{250} This decision reflected an

\begin{itemize}
\item \textsuperscript{242} Oberman, Girls in the Master’s House, supra note 220, at 808.
\item \textsuperscript{243} Levine, supra note 224, at 1078–82 (discussing studies).
\item \textsuperscript{244} 42 U.S.C. § 14016 (2006).
\item \textsuperscript{245} SHARON G. ELSTEIN & NOY S. DAVIS, ABA CTR. ON CHILDREN & THE LAW, SEXUAL RELATIONSHIPS BETWEEN ADULT MALES AND YOUNG TEEN GIRLS: EXPLORING THE LEGAL AND SOCIAL RESPONSES 1–5 (1997).
\item \textsuperscript{246} Michelle Oberman, Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape, 48 BUFF. L. REV. 703, 748 (2000) [hereinafter Oberman, Regulating Consensual Sex with Minors]. During this period, a number of commentators also expressed concern about the dangers posed by these types of perpetrators. See, e.g., ALAN W. McEVoy & EDSEL L. ERICKSON, YOUTH AND EXPLOITATION (1990); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 168–227 (1998).
\item \textsuperscript{247} Oberman, Regulating Consensual Sex with Minors, supra note 246, at 770.
\item \textsuperscript{248} Oberman, Turning Girls into Women, supra note 35, at 109 & nn.1, 3, 5.
\item \textsuperscript{249} Id. at 110 & n.10.
\item \textsuperscript{250} The victim of the sixteen-year-old charged with lewd and lascivious behavior was a ten-year-old. Janet Wiscombe, An American Tragedy: One Spur Posse Mother Struggles to
\end{itemize}
internal office policy against prosecuting "consensual sex between teenagers," even though the boys' conduct clearly established their guilt under California law which does not require proof of coercion.\textsuperscript{251}

The Los Angeles district attorney's office is not alone in their reluctance to file charges against teenagers for sexual contact with peers. In Illinois, an individual under the age of seventeen commits criminal sexual abuse, punishable by up to one year in prison, when he or she sexually "penetrate[s]" someone aged nine to seventeen.\textsuperscript{252} Notwithstanding the breadth of this definition, a review of statutory rape data in Illinois disclosed that sexual intercourse in the context of a consensual, intimate relationship where the parties were less than ten years apart in age accounted for a mere 1\% of all statutory rape charges, far less even than the national average of 7\%.\textsuperscript{253} A supervisory state's attorney in Chicago was not surprised by these findings, noting the relative paucity of complaints filed under these circumstances\textsuperscript{254} and, as in Los Angeles, a pervasive lack of interest in prosecuting consensual intercourse among peers.\textsuperscript{255}

C. STATUTORY RAPE AND 21ST CENTURY SENSIBILITIES

When sexting entered public consciousness in 2005,\textsuperscript{256} several states continued to make sexual intercourse between adolescents of similar age a criminal offense.\textsuperscript{257} For the most part, however, district attorneys remained disinterested in prosecuting consensual sex between teenagers. In stark contrast to these prevailing norms, prosecutors in Georgia filed felony charges against seventeen-year-old Genarlow Wilson for having consensual oral sex with a fifteen-year-old girl at a party in 2003. Found guilty of aggravated child molestation in February 2005,\textsuperscript{258} Wilson, a high


251. In California, sexual intercourse with someone under eighteen is a misdemeanor, unless the perpetrator is more than three years older than the victim, in which case it can be a felony. \textit{See Cal. Penal Code} § 261.5(b)-(d) (West 2008).

252. 720 ILL. COMP. STAT. ANN. 5 / 11-1.50b (West 2002).

253. Oberman, \textit{Regulating Consensual Sex with Minors, supra} note 246, at 749.

254. She noted, in this regard, that they tend to arise only in the context of "unplanned pregnancy, a sexually transmitted disease, physical violence, and/or parental intervention." \textit{Id.}

255. \textit{Id.} at 750.

256. The term "sexting" first appeared in a 2005 newspaper article. \textit{See} Yvonne Roberts, \textit{The One and Only, Sunday Tel. Mag.} (Australia), July 31, 2005, at 22, \textit{available at} 2005 WLNR 12011881 ("Following a string of extramarital affairs and several lurid 'sexting' episodes, Warne has found himself home alone, with Simone Warne taking their three children and flying the conjugal coop.").


258. Then-existing Georgia law provided that "[a] person commits the offense of aggravated child molestation when such person commits an offense of child molestation which act . . . involves an act of sodomy." \textit{Ga. Code Ann.} § 16-6-4(c) (2005). Sodomy, in turn, includes "any sexual act involving the sex organs of one person and the mouth or anus of another." \textit{Id.} § 16-6-2(a)(1).
school athlete and homecoming king, received a ten-year prison sentence with no opportunity for parole, in accordance with statutory requirements.259 His conviction would also require him to register as a sex offender upon his release.260

Newspaper editorials261 and national news media262 assailed Wilson’s treatment while public figures, outraged at the severity of Wilson’s sentence, pledged their support. To secure Wilson’s release while his habeas corpus appeal was pending, “[e]leven businessmen[ ] offered to post a $1 million cash bond.”263 Georgia state senators, joined by the pastor of the historic Ebenezer Baptist Church, hand-delivered letters to the office of the governor, urging him to intervene in the case.264 And President Jimmy Carter, a lifelong Georgia resident and former governor, personally wrote to the state attorney general urging him to void Wilson’s conviction due to the extremely unjust nature of the punishment.265

On October 26, 2007, the Georgia Supreme Court vacated Wilson’s sentence, finding that it was “grossly disproportionate to [the] crime” and, as such, “constitute[d] cruel and unusual punishment under both the Georgia and [U.S.] Constitutions.”266 The justices ordered his immediate release from custody.267 Hours later, after more than two years behind bars,268 Wilson was set free.

That Wilson’s ten-year sentence was considered so excessive as to constitute cruel and unusual punishment underscores the sharp limits that presently exist nationally on the criminalization of consensual sexual behavior between adolescents of similar age. Under the so-called “Romeo and Juliet” exception, sexual conduct between minors is criminal in most states only if there is a significant age difference between the perpetrator

259. At that time, aggravated child molestation required incarceration “for not less than ten nor more than [thirty] years,” without the possibility of parole. Id. § 16-6-4(d)(1), § 1.
260. Id. § 42-1-12. In addition, as a sex offender, Wilson could not live or work within 1,000 feet of any child care facility, church, or area where minors congregate. Id. § 42-1-15.
267. Id. at 511.
and the victim.269 In other jurisdictions, closeness in age operates as a mitigating factor. For example, in 2006, Georgia reclassified Genarlow Wilson's conduct as a misdemeanor since he was less than four years older than his victim.270

Moreover, as discussed previously, prosecutors are reluctant to charge teenagers who have sex with other teens even when they have the authority—both legally and morally—to do so.271 Consider the Spur Posse case.272 Unlike most sexual contact between teenagers, these acts did not take place in the context of an ongoing, intimate relationship.273 The girls were merely conquests, quick encounters designed to facilitate the accrual of "points."274 "We tell a girl," one gang member commented, "we don't want to waste time romancing."275 Sometimes this lack of affection became even more insidious, involving degradation and cruelty that call into question the voluntariness of the victim's participation.276 In one such instance, a group of boys who had taken a girl's clothing refused to return it until she had sex with them. They relented only when she cried for help.277

The Spur Posse's own account of what transpired would have arguably justified the filing of forcible rape charges, at least with respect to certain incidents. Instead, the district attorney did not file any charges against seven of the eight boys, even though California is one of a minority of jurisdictions without a Romeo and Juliet exception to its statutory rape law.278 The lone prosecution involved sexual contact between a sixteen-year-old boy and a ten-year-old girl, the youngest victim.279 Sadly, the sexual abuse of an eleven-year-old who had been the first to speak publicly about her ordeal was considered insufficiently egregious to merit


270. Under the 2006 statutory amendment, a person commits the crime of misdemeanor aggravated child molestation by engaging in sodomy with a victim who "is at least 13 but less than 16 years of age," provided the perpetrator is "18 years of age or younger and is no more than four years older than the victim." GA. CODE ANN. § 16-6-4(d)(2) (West 2009) (amended 2006); see also ALASKA STAT. § 11.41.440(A) (2010) (at least three years ); LA. REV. STAT. ANN. § 14:80 (2012) (at least two years); MD. CODE ANN., CRIM. LAW § 3-304(6) (LexisNexis 2012) (same); N.C. GEN. STAT. § 14-27.2(a)(1) (West Supp. 2012) (at least four years); N.J. STAT. ANN. § 2C:14-2(a) (West Supp. 2013) (same).

271. See supra text accompanying notes 252-55.
272. See supra text accompanying notes 248-51.
273. See supra text accompanying notes 248-51.
276. See supra text accompanying notes 248-51.
278. FALUDI, supra note 275.
279. Id.
criminal action. Emboldened by the acquiescence of the district attorney’s office, neither their arrest nor public scrutiny of their conduct humbled the Spur Posse. On the contrary, they savaged their victims in interviews, referring to them as “whores” who complained after-the-fact because they were embarrassed by what they had done.

D. Sexting Hysteria

The previous section makes clear that interest in punishing consensual sexual behavior between adolescents has been at an extremely low ebb for at least twenty years. The avoidance of such cases is commonplace and accepted, so much that the publicly-elected district attorney of Los Angeles County refused to file potential charges against the Spur Posse in 1997 when state law favored prosecution and national media had given voice to young victims. When a Georgia prosecutor challenged these norms by charging a teenager in accordance with state law in 2003, both the public and the state’s highest court repudiated his efforts, declaring the teenager’s sentence “cruel and unusual.”

With researchers reporting in 1998 that fifty percent of adolescents had engaged in sexual intercourse by the age of sixteen, law enforcement’s general indifference to teenage sexuality seems a sensible reaction to changes in social mores. Since twenty-first century adolescents live in a digital cyberworld, it seems equally logical that permissive attitudes towards sexual relations would find expression through electronic media; sexting is simply the inevitable expression of that synergy. Accordingly, one would expect the same sort of acquiescence by public officials to consensual sexting that presently exists for statutory rape. Nothing, of course, could be further from the truth.

Unsurprisingly, this national “war on sexting” has engendered widespread criticism. Commentators have assailed the application of child pornography laws in this context and condemned new laws targeting sexting on a variety of fronts, including overbreadth; unbridled

281. Id.
282. Ferrell, supra note 274.
283. Sengupta, supra note 280.
284. See supra text accompanying 266–67.
287. Eric S. Latzer, Comment, The Search for a Sensible Sexting Solution: A Call for Legislative Action, 41 SETON HALL L. REV. 1039, 1067–68 (2011) (advocating differential treatment of consensual and nonconsensual sexting); see also Megan Myers, Technology
prosecutorial discretion;\textsuperscript{288} the stigmatization of youth;\textsuperscript{289} excessive punishment;\textsuperscript{290} and interference with fundamental constitutional rights.\textsuperscript{291} Reflecting the decidedly negative reaction to sexting initiatives, scholarship in this area has focused on resolving these problems and providing a uniform,\textsuperscript{292} balanced response to youthful sexual indiscretion.\textsuperscript{293}

These remedial proposals proceed from a common belief that some provisions in anti-sexting laws are too tenuously linked to the harms that flow from this activity. Among the most frequently cited statutory excesses are the imposition of serious sanctions, such as sex offender registration, and the inclusion of "lovebirds" who only exchange sexually explicit images of themselves. Critics have also lodged normative objections, arguing in particular that criminal sanctions are inappropriate for behavior consistent with healthy adolescent development.\textsuperscript{294} Noting the present disinclination to prosecute consensual adolescent sexual activity as statutory rape, Megan Myers concludes that, because victimization does not result from a teenager's creation and transmission of a sext to only one other person, such conduct "is not worthy of a criminal sanction."\textsuperscript{295}

While several of the changes proposed by Myers and others seem sensible,\textsuperscript{296} the suggestion that the prosecution of consensual sexting is some sort of arbitrary anachronism misses the mark. A more coherent picture

\begin{footnotesize}

\textsuperscript{289} Fradella \& Galeste, supra note 218 (raising First and Fourteenth Amendment concerns relating to free expression, self-determination, privacy, and autonomy); Walters, supra note 218, at 125–26 (arguing that sexting laws turn teens into "branded criminals" who will be unable to find gainful employment and form meaningful friendships and intimate relationships).

\textsuperscript{290} Leary, supra note 218, at 515–20 (arguing against mandatory sentencing minimums and sex offender registration for minors engaged in sexting); Stephanie Gaylord Forbes, Note, Sex, Cells and SORNA: Applying Sex Offender Registration Laws to Sexting Cases, 52 Wm. \& Mary L. Rev. 1717, 1741 (2011) (arguing that consensual sexting should not result in sex offender registration).

\textsuperscript{291} Pavia, supra note 15, at 198–200 (discussing parental rights regarding the upbringing of their children and the right to privacy in matters of sexual intimacy).

\textsuperscript{292} Some have proposed model legislation. See, e.g., Weins \& Hiestand, supra note 288, at 48–55; Latzer, supra note 287, at 1063–69.

\textsuperscript{293} Some believe, for example, that the filing of criminal charges for sexting is never appropriate. See Levick \& Moon, supra note 286, at 1051; Richards \& Calvert, supra note 286, at 37–38. Others would allow it, but only for those who distribute images to third parties involuntarily. See Fradella \& Galeste, supra note 218 (adding a further requirement of "intent to harm, embarrass, harass, humiliate, or demean the person pictured in the image"); Myers, supra note 287, at 219 (advocating "whatever punishment the state deems fit" for those who transmit the sexted image to multiple parties to exploit or ridicule its creator).

\textsuperscript{294} Fradella \& Galeste, supra note 218; Levick \& Moon, supra note 225, at 1035–36.

\textsuperscript{295} Myers, supra note 287, at 217.

\textsuperscript{296} For example, requiring individuals who commit sexting violations to register as sex offenders seems disproportionate on its face, as does the imposition of felony liability in the absence of aggravating circumstances, such as "sextortion." Id. at 209, 212.
\end{footnotesize}
emerges if we view sexting through a broad, historical lens that looks past the Spur Posse and the public condemnation of the Genarlow Wilson case. In an era where technological innovation has fundamentally altered patterns of communication and undermined privacy, the campaign against sexting attempts to safeguard vulnerable youth, particularly females, from novel and potentially dangerous forms of sexual expression. The protectionism and paternalism that fueled the enforcement of statutory rape laws in the 18th, 19th, and early 20th centuries have returned in the 21st.

VI. PAST AS PROLOGUE: PROTECTIONISM REVISITED

Because adolescents lack maturity in judgment, prosecutors have relied on statutory rape laws to shield them from sexual exploitation and coercion by unscrupulous individuals who might cause them harm. This protection has been especially important for teenage girls due to the risk of pregnancy. Their age-related impulsivity fuels sexual risk-taking and the failure to take proper precautions. Teenage girls' association of contraceptive use and promiscuity further frustrates the exercise of good judgment in this context. In sum, teenage girls face unique and "profound physical, emotional, and psychological consequences of sexual activity."

Sexting can also be dangerous for unwary adolescents, especially girls. However, whereas statutory rape laws target only the victim's sexual partner, anti-sexting statutes include a range of participants in the proscribed behavior. To evaluate the protective function of sexting sanctions appropriately, we must distinguish these individuals from each other, addressing how each individual's conduct contributes to the potential harms.

A. NONCONSENSUAL DISTRIBUTION TO THIRD PARTIES

Punishing individuals who distribute sexually explicit images of others non-consensually clearly implicates protectionist principles. As the Logan, Witsell, and Phillips cases tragically illustrate, serious emotional and psychological harm is virtually inevitable for the adolescent subject of the

298. Id. at 740.
299. See id. at 714–17 (discussing adolescents’ tendency to engage in risky sexual behavior that produces negative consequences).
301. Michael M. v. Super. Ct. of Sonoma Cnty., 450 U.S. 464, 471–72 (1981). Researchers have also reported that the earlier adolescents engage in sexual intercourse, the more likely they are to experience force or coercion in a sexual encounter. Patricia Donovan, Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy?, 29 Fam. Plan. Persp. 30, 30 (1997).
302. See supra text accompanying notes 22–35.
disseminated image. It is not surprising, therefore, that all statutes, both enacted and proposed, target persons who engage in this sort of misconduct. While the breadth of anti-sexting initiatives varies, widespread agreement over the importance of deterring online harassment and bullying makes inclusion of nonconsensual third-party distribution critical.303

B. POSSESSION OF A SEXUALLY EXPlicit IMAGE

It is common for sexting statutes to prohibit the possession of a sext, even if the possessor was the intended recipient. Possession implicates protectionist principles if the possessor acquired the image coercively. Compulsion may be overt, such as threatening to do something that would humiliate or embarrass the sender if he or she does not comply. In the context of an intimate relationship, however, coercion is likely to be more oblique and gender-specific. In the Sex and Tech Survey, only girls reported that they had been pressured personally to sext304 while more than half of all respondents listed “pressure from a guy” as a reason that girls sext in general.305 These data suggest that, although a boy’s conduct may not constitute coercion as a matter of law,306 an adolescent girl’s acquiescence to his request307 for a sexually explicit photo may be less voluntary than it seems. But, because possession does not require proof of coercion, the boyfriend is guilty just the same.

By prosecuting male adolescents who persuade female peers to engage in “consensual” sexual activity, anti-sexting laws achieve implicitly, and perhaps unintentionally, what statutory rape laws have not: recognition of the imbalance of power in sexual negotiation between the sexes. This inequity is a function of adolescent girls’ greater psychological vulnerability

303. Noting that sexting is “an extremely complex issue,” The National Center for Missing and Exploited Children (NCMEC) acknowledges that providing guidance to law enforcement is challenging. Nat’l Ctr. for Missing & Exploited Children, Policy Statement on Sexting, NEWS & EVENTS (Sept. 21, 2009), http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=EN_US&PageId=4130. They recommend the use of a “severity scale,” informed by some fourteen factors, to determine accountability in each case and whether the imposition of criminal sanctions is warranted. Id. Notwithstanding this general difficulty in line-drawing, the NCMEC identifies two scenarios as depicting “clearly illegal” conduct. Id. One involves a quid pro quo wherein a junior boy tells a freshman girl who wants to go to the prom that he will take her only if she first sends him a partially nude photo, which she does. Id. The second involves nonconsensual third party transmission: A disgruntled teenage girl, upset that her boyfriend broke up with her, transmits to all her friends a sexually explicit photo of the boyfriend that he had sent to her while they were dating. Id.

304. While male respondents did not report pressure to sext from their partner, twelve percent of girls did. SEX & TECH SURVEY, supra note 3, at 4.

305. By contrast, only eighteen percent of teenage boys listed pressure from a girl as a reason for sexting. Id.

306. In the context of sexual assault, for example, nonphysical coercion generally requires abuse of authority or a threat to retaliate or expose the victim to public humiliation or disgrace. See Patricia J. Falk, Rape by Fraud and Rape by Coercion, 64 BROOK. L. REV. 39, 177–78 (1998).

307. Possession of a sexually explicit image is unlawful in some states even if it is not the product of a request from the recipient. Further, some states include solicitation as a separate category of misconduct.
vis-à-vis their male counterparts. For example, the tendency towards self-doubt, insecurity, and depression that leads girls to look to boys for validation also makes them more likely to exercise poor judgment with respect to sexual activity.³⁰⁸ Thus, when a teenage girl agrees to send a nude photo to a male peer, her actions may be less voluntary than acquiescent to the overtures of a more confident male, whose approval she values. Seen in this light, her consent is less an expression of free choice than a surrender in the hope of achieving emotional and psychological well-being.³⁰⁹

Recognizing this disparity in power, feminist scholars have long urged legal reforms to protect women’s autonomy in sexual decision making.³¹⁰ Unfortunately, gender-based distinctions in empowerment have little resonance in the present-day enforcement of the nation’s statutory rape laws.³¹¹ With respect to adolescents of similar age, this deficit has left girls on an uneven playing field where they face consequences that are serious and long-lasting.³¹² Ironically, while lack of maturity is a sword that restricts the decision making authority of adolescents in a number of contexts, it provides no shield to teenage girls who engage in conduct that is decidedly adult.³¹³

Anti-sexting laws do not diminish the dangers that flow from physical sexual conduct, but they do provide significant protection from sexual abuse perpetrated virtually. The breadth of their reach is especially note-

308. See supra text accompanying notes 22–28 (discussing psychological profile of teenage girls).

309. Catharine MacKinnon makes a similar argument in the forcible rape context. Believing that women are oppressed victims of unbridled male power, MacKinnon describes their consent to sexual intercourse as simply a mechanism for survival, “the despairing response [of] hopelessness to unequal odds.” CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 168 (1989).


312. Oberman, Turning Girls into Women, supra note 35, at 68.

313. Id. at 42–43. For example, contract and tort law generally presume that minors are not legally accountable for their actions, due to their lack of maturity and insight. Additionally, in the health care context, courts have been reluctant to allow adolescents—even those close to the age of majority—to make decisions regarding serious treatment, due to minors’ limited ability to understand fully the nature of such procedures and their attendant risks. See Lawrence Schlam & Joseph P. Wood, Informed Consent to the Medical Treatment of Minors: Law and Practice, 10 HEALTH MATRIX 141, 150–55 (2000).
worthy. Considering the source of harm in documented cases, legislators could have focused solely on nonconsensual distribution to multiple parties. By choosing instead to include the possession of sexual images without proof of consent or coercion, sexting prohibitions vindicate harm that is more speculative in nature and is much more likely, if realized, to affect female than male adolescents.314 As such, these provisions echo 19th-century efforts to raise the age of consent to protect females entering the industrialized workplace. Like the cyber-revolution today, technological progress in the late 19th and early 20th centuries challenged traditional patterns of interaction between the sexes. In the face of this uncertainty, the law intervened to assist young women by deterring male conduct that could expose females to harm that their youth and inexperience prevented them from anticipating.

Jurisdictions that elect education-based remedies for first-time offenders achieve a further benefit: the promotion of a normative dialogue about sexual autonomy in the changing landscape of modern adolescent relationships. As social media erodes traditional understandings of privacy, this conversation is necessary to identify boundaries within relationships that preserve dignity and self-respect, especially for girls. To this end, New York and New Jersey require that their diversionary programs address the “non-legal consequences” of sexting, including its impact on relationships315 and its possible link to bullying and cyber-bullying.316

C. Transmission of a Sext by Its Creator

The previous section argues that the prosecution of individuals who possess a sexually explicit image furthers the protectionist principles that informed statutory rape laws historically. By contrast, prosecuting adolescents who transmit an image depicting only themselves achieves the very opposite, because it punishes those whom anti-sexting laws are designed to protect for participating in the very conduct that endangers them in the first place. This result is fundamentally inconsistent with the enforcement of statutory rape laws which have never imposed criminal sanctions on underage victims.

Punishing transmission under these circumstances also contravenes the criminal law principle that offense victims are members of a protected

314. While less common, adolescent males have also suffered sexting-related harms. However, as discussed earlier, see supra text accompanying notes 80–82, the misconduct in these cases tends to be more egregious and depraved, as in Anthony Stancl's "sextortion" of numerous victims and Dharun Ravi's surreptitious streaming of a homosexual encounter between his college roommate and another man. In these instances, felony prosecution under existing criminal statutes obviates the need to charge these defendants with minor sexting violations, such as possession of a sexually explicit image.


class immune from prosecution. Following this principle, the federal Protection of Children Against Sexual Exploitation Act of 1977 targets individuals who transport, ship, receive, distribute, or reproduce child pornography, but excludes minors who engage in the sexually explicit conduct because they are the victims of the proscribed activity. Thus, a teenager who appears in pornographic films is not subject to penalty, even if she falsely claims to be an adult. By contrast, an adolescent of similar age who e-mails a topless photo to her boyfriend may face criminal or quasi-criminal sanctions, including delinquency adjudication.

In addition to this troubling inequity, punishing those who transmit or possess sexual images raises substantive due process concerns. Generally speaking, to satisfy constitutional requirements, criminal statutes should disclose a rational connection between the proscribed conduct and the harm such conduct is meant to redress. In this regard, legislators have emphasized the prevention of bullying, cyberbullying, and the potential loss of educational and employment opportunities as the primary goals of anti-sexting legislation. The connection between these harms and the nonconsensual dissemination of sexual images to third parties is manifest. However, when applied to individuals who merely send or possess sexually provocative material that does not implicate third parties, the link is far more tenuous. While we have seen an exchange of nude photos between two people involved in an intimate relationship result in tragedy, given the pervasiveness of sexting among adolescents—one out of

317. See, e.g., United States v. Holte, 236 U.S. 140, 145 (1915) (noting that, as the victim of the offense, a woman cannot commit the substantive crime of abortion).
320.See supra text accompanying notes 159–71.
321. In Leary v. United States, 395 U.S. 6 (1969), the Supreme Court noted, to this end, that the requisite nexus does not exist “if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.” Id. at 33. Thus, in Proctor v. State, 176 P. 771 (Okla. 1918), the Oklahoma Criminal Court of Appeals struck down a Prohibition-era statute, finding that the requisite statutory act of “keeping a place” was insufficiently linked to the statutory purpose of furnishing intoxicating liquor. Id. at 773. By contrast, a Washington appellate court upheld a statutory presumption of criminal intent for individuals in possession of burglary tools. See State v. Palmer, 471 P.2d 118, 121 (Wash. App. 1970). Because the legislature included an exception for one who is “a mechanic, artificer or tradesman at his established shop or place of business,” a rational connection existed “between the fact allowed to be inferred and the fact proved.” Id.
323. In fact, most of the highly publicized disasters related to sexting began in this way. See supra text accompanying notes 52–53.
every five, according to the *Sex & Tech Survey*—the relative paucity of such extreme consequences indicates that they are decidedly the exception, not the rule. Thus, prohibiting private, consensual transmission exposes teenagers in vast numbers to the specter of criminal or quasi-criminal sanctions based on highly speculative assumptions of future harm.

To justify this result, proponents may argue that, even if few in number, sexting-related disasters usually begin with images sent in the context of a personal relationship. It is appropriate, therefore, to prohibit the initial transmission of the sext to eliminate the possibility of negative downstream consequences. While this may be true, legislators could tailor the laws more narrowly to achieve the same result by, for example, forbidding distribution to anyone other than the original intended recipient. Because this alternative allows the creation and transmission of the image, statutes must aggressively deter distribution to third parties, in light of the potential for harm to the individuals depicted and the risk of child pornographers gaining access to it. To this end, anti-sexting laws should impose substantial penalties for any unconsented broadcast to third parties and provide for escalating sanctions based on the nature and extent of the disclosure. In some circumstances—such as where the sender transmits a sext to multiple parties with the intent to embarrass or humiliate—even felony liability may be appropriate for minors close to the age of majority.

In sum, then, protectionist impulses explain the inclusion of nonconsensual third party distribution and coercive possession in anti-sexting laws but provide a far weaker justification for prohibitions on the transmission of self-depicting nude or semi-nude images to an intimate partner. Constitutional concerns and inconsistencies with criminal law principles further erode the tenuous connection between this sort of sexual conduct and the harms the laws are meant to redress. Thus, protectionism provides only part of the foundation for these laws. As with statutory rape, paternalism supplies the missing ingredient, reformulated in the sexting context to address public morality challenges in the 21st century.

VII. PATERNALISM REDEFINED FOR THE 21ST CENTURY

Paternalism assumes that, because children are not yet able to exercise appropriate judgment, adult authority is necessary to shield them from their "cognitive and volitional wantonness." Historically, in the statu-

324. Specifically, 20% of teens reported sending or posting nude or semi-nude pictures or videos of themselves. *Sex & Tech Survey*, supra note 3, at 1.
325. An individual's liability should also take account of other factors, including whether he or she is a repeat offender and the defendant's age. With respect to the latter, developmental differences in decisional maturity and insight would make it unfair to apply the same standard to a fourteen-year-old eighth grader like Isaiah and a seventeen-year-old high school senior like Alex Phillips. *See supra* text accompanying notes 145–58.
Sexting: 21st Century Statutory Rape

tory rape context, paternalistic impulses manifested primarily in efforts to preserve the virginity of young women.\textsuperscript{327} For adult males, safeguarding young women's marital prospects was a primary motivation.\textsuperscript{328} By contrast, in fighting to raise the age of consent, social purity reformers of the late 19th and early 20th centuries emphasized the erosion in cultural and moral values that they believed was endangering young women in a rapidly changing, industrialized society.\textsuperscript{329} However different their motivations, the groups shared a common goal: the avoidance of reputational ruin for young women.\textsuperscript{330}

For today's anti-sexting crusaders, concern about physical and psychological harm has replaced the Victorian focus on chastity. Notwithstanding this distinction, the primary objective of the two groups of sex-offense reformers is the same: prevention of the disastrous consequences that flow from unbridled sexual expression. In pursuit of this goal, statutory rape laws traditionally targeted males who unscrupulously robbed unsuspecting and naïve adolescent girls of their innocence. Anti-sexting laws include, analogously, individuals who possess sexually provocative images of girls that may prove compromising down the road.

Many anti-sexting statutes, however, go much further. Whereas statutory rape laws historically regarded females as passive victims immune from prosecution, there is no corresponding exemption for girls who engage in sexting. This assignment of criminal responsibility to females may seem profoundly nonpaternalistic; in reality, it is not. It is a strong dose of legislative "tough love" that recognizes the need to include adolescent girls to protect them from the potentially dire consequences of their own impulsive behavior.

Such bold—even revolutionary—action reflects widespread concern about sexual immorality among the nation's teenagers. According to sociologist Kathleen Bogle, the public views adolescents as increasingly wild and sexually promiscuous: "out of control" teenagers caught in a downward moral spiral\textsuperscript{331} who are unable to process the risk that flows from their actions.\textsuperscript{332} A recent study by the National Center for Health Statis-

\begin{itemize}
\item \textsuperscript{327} See supra text accompanying notes 219–21.
\item \textsuperscript{328} This economic self-interest renders these efforts suspect at best. In fact, Michelle Oberman argues that male motivations were so "sinister" that they create "considerable ambivalence regarding [statutory rape laws'] relevance to contemporary society." Oberman, \textit{Girls in the Master's House}, supra note 220, at 800.
\item \textsuperscript{329} \textit{Id.} at 803.
\item \textsuperscript{330} \textit{Id.} at 819.
\item \textsuperscript{331} Tara Parker-Pope, \textit{The Myth of Rampant Teenage Promiscuity}, \textit{N.Y. Times}, Jan. 27, 2009, at D6.
\item \textsuperscript{332} In short, teenagers "simply do not and often cannot think before they act." Brett Buckner, \textit{Boundless Consequences: With "Sexting," a Seemingly Innocent Decision Can Lead to a Lifetime of Regret}, \textit{Anniston Star} (Ala.), July 5, 2009 (quoting David Walsh, founder of the National Institute of Media and the Family and author of \textit{Why Do They Act That Way? A Survival Guide to the Adolescent Brain for You and Your Teen}).
\end{itemize}
tics reporting a rise in teenage births bolsters such beliefs. Commenting on the reversal of a fourteen-year trend, the study’s co-author regarded the shift as “quite noteworthy and a cause for concern.”

Alarmist media reports about sexting have also exacerbated fears about unforeseen, negative consequences. In perhaps the most evocative example, a Wichita newspaper reported in 2011 how pimps have turned that small city in America’s heartland into a center for the juvenile commercial sex trade. Posing as teenage boys on Facebook, pimps befriend girls as young as twelve, eventually soliciting sexually provocative photos. Once the girls comply with the request, the blackmail begins, resulting ultimately in a demand for a face-to-face meeting. At that meeting, the pimps lure the girls into the sex trade with lavish gifts, replaced soon thereafter by violence and intimidation to ensure compliance.

One might assume that the pimps limit their focus to girls from financially distressed or otherwise troubled homes. In fact, their reach is far broader and includes children from stable families and affluent neighborhoods. Moreover, to be at risk, minors do not need to be trolling the internet for sex. All they need is a cell phone, a camera, and an adolescent desire to explore their sexuality.

Technological advances in communication provide the final catalyst for perceived adolescent promiscuity, as parents discover the ease with which children can access inappropriate, sexually-charged material on myriad mobile devices. For example, the popular textPlus application installed on the Ipad Touch and many cell phones links to chat rooms bearing names like “Hothornyandbi” where visitors are encouraged to “talk dirty” and “send nudes.” Likewise, Snapchat, a free iPhone application that warns of sexual content and nudity, allows users to send provocative photos while controlling the amount of time the image remains visible. Before the image vanishes, any recipient can preserve it by using another

335. See, e.g., Katya Cengel & Matt Frassica, Sexting Is Often Scandalous to Public Figures, a Disaster to Relationships, COURIER J. (Louisville), June 13, 2011 (discussing 2009 survey by the Associated Press and MTV that found that “24 percent of 14 to 17 years olds had engaged in some form of naked sexting”); Jan Peterson, Today’s Teenagers Hang Out in Network Neighborhoods, NEWS-LEADER (Springfield), Aug. 21, 2011, at C1 (noting the potential peril of sexting); Casey Woods, THE MOMMY POLITIC: “Sexting” Another Nightmare for Parents, MIAMI HERALD, Apr. 10, 2010 (discussing surveys of the frequency of sexting among adolescents).
336. See generally Ron Sylvester, Wichita a Key Spot for Rescuing Kids in Sex Trade, WICHITA EAGLE, Sept. 17, 2011.
337. Id.
338. Id.
The foregoing underscores the challenges inherent in preserving some modicum of moral innocence in a digital world that many adults struggle to comprehend. In an environment where sexting is “relationship currency” for adolescents, it is not surprising that society is striving to safeguard intimacy and “keep our worst excesses from public view.” The assault on sexting is attempting to draw a proverbial line in the sand to combat the loss of innocence in a culture saturated with sexually explicit images, where lyrics from popular songs beseech scantily-clad women to send “a dirty picture.”

An effective solution to the sexting problem must include all participants. It is clear, in this regard, that females figure prominently in the creation, transmission, and possession of sexually explicit images. Even if their sexual bargaining power is not fully commensurate with that of male partners, adolescent girls no longer suffer from the disempowerment implicit in their exemption from 18th- and 19th-century enforcement of statutory rape laws. By virtue of their greater autonomy, female teens must share responsibility for the perceived erosion in prevailing moral standards. As such, their inclusion in any proposed remedy is justified and necessary.

VIII. CONCLUDING THOUGHTS

In the end, the assault on sexting is not as novel as it might seem. It attempts to achieve in the 21st century what statutory rape laws did in the 18th, 19th, and early 20th centuries: regulating public morality and protecting the vulnerable. To entertain any hope of success, anti-sexting statutes must target both male and female adolescents and prohibit a broad range of conduct, including both the transmission and possession of sexual images. With respect to penalties, teenage developmental immaturity and the desire not to foreclose later educational and employment opportunities suggest that modest sanctions are appropriate in most cases. Diversionary programs focused on education seem a particularly good option for first-time offenders whose misconduct is not egregious.

In public pronouncements linked to sexting proposals, legislators identify the deterrence of bullying and cyberbullying as primary goals of anti-

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343. Id. (discussing the views of psychologist Rollo May).
344. E.g., TAIO CRUZ & KE$HA, DIRTY PICTURE (Universal Island Records 2010).
345. Pamela Paul, He Sexts, She Sexts More Report Says, N.Y. TIMES, July 17, 2011, at 6 (citing a recent study finding that women are more likely than men to send nude photographs and sexually explicit text messages).
346. See supra text accompanying notes 32–35.
sexting initiatives.\textsuperscript{347} While events like the Logan and Witsell suicides underscore the importance of this mission, it is important to remember, at the same time, that sexting is a relatively small part of the nation's bullying and cyber-bullying problem. Teenagers are bullied every day for a host of other reasons,\textsuperscript{348} sometimes with tragic results. For example, in 2006, thirteen-year-old Megan Meier killed herself after "Josh," a sixteen-year-old whom she had met online, severed their relationship and told Megan "the world would be a better place without her." "Josh" was, in fact, a fictitious creation of the mother of an acquaintance, designed to manipulate Megan emotionally.\textsuperscript{349} Likewise, fifteen-year-old Phoebe Prince, a transfer student from Ireland, hanged herself after months of unrelenting physical and verbal abuse from classmates at school and online.\textsuperscript{350} Sadly, there are many other victims with similar stories and outcomes.\textsuperscript{351}

Given the breadth of the cyberbullying challenge, the focus on sexting seems oddly disproportionate, unless there are other considerations at play. I strongly suspect that there are. The need to protect children from sexting-related harm is coupled with a desperate, paternalistic effort to restore the moral innocence that is rapidly disappearing in the cyberworld where most adolescents live. We cannot eliminate our children's ability to transmit and receive sexually explicit material; however, imposing sanctions on this activity should promote better choices.


\textsuperscript{348} The Cyberbullying Research Center estimates that one in five middle school students experiences cyber-bullying. See What is Cyberbullying?, NAT'L CRIME PREVENTION COUNCIL, http://www.ncpc.org/topics/cyberbullying/what-is-cyberbullying (last visited Apr. 17, 2012).

\textsuperscript{349} See generally Christopher Maag, A Hoax Turned Fatal Draws Anger but No Charges, N.Y. TIMES, Nov. 28, 2007, at A23.

\textsuperscript{350} See generally Erik Eckholm & Katie Zezima, Court Documents Detail a Teenage Girl's Final Days of Fear and Bullying, N.Y. TIMES, Apr. 9, 2010, at A12.