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# Not the New Pornographers: Protecting Sexting Teens from Overzealous Prosecutors and Themselves

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**Not the New Pornographers:**  
**Protecting Sexting Teens from Overzealous Prosecutors and Themselves**

Jenna Rae Minor

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## I. Introduction

With new technology come new risks. With new risks come new opportunities for teenagers to confuse and terrify their parents. The latest technology to keep parents up at night is the camera phone, which allows a teen to snap a photo and send it to hundreds of their closest friends, or post it on the internet nearly instantly.<sup>1</sup> While most adults are mindful that once they send a picture they lose all control of where it will turn up, many teens do not understand the consequences of their actions; notably, that sending out a racy photo could lead to bullying, extortion, or, in the most unfortunate situations, criminal prosecution.

There has been significant media attention to “sexting,” the distribution of nude or nearly-nude sexually suggestive photos.<sup>2</sup> However, statistics suggest that fewer teens are engaging in the practice than the media reports would suggest.<sup>3</sup> While some of the media frenzy is likely a result of the scandalous nature of the stories, much focuses on the prosecution of teens under statutes which criminalize the possession and distribution of child pornography. Thus, prosecutions of teens under these statutes have forced legislatures to address the issue of sexting. Recent legislation supports the assertion that states have begun to question whether deterrence of the practice by threatening harsh criminal penalties is the best method to protect teens from themselves.

The response of state legislatures to sexting thus far suggests that they are not quite sure how to respond to this practice. While it is evident that they are conflicted regarding whether they believe juveniles should be prosecuted for sexting, most agree that prosecuting juveniles

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<sup>1</sup> *Teens and Mobile Phones*, PEW RESEARCH, 86 (Apr. 20, 2010)

<http://pewinternet.org/~media/Files/Reports/2010/PIP-Teens-and-Mobile-2010-with-topline.pdf>.

A Pew Research study found the major risks implicated in teen cell phone use are distracted driving, sexting and bullying. Talking while driving is the most common risky behavior teens report, with 52% of teens admitting the behavior. Thirty-four percent have texted while driving and 24% have experienced bullying via text.

<sup>2</sup> *Id.* at 87.

<sup>3</sup> *Id.* at 86.

under child pornography statutes for sending images of themselves to their peers is excessive. At this time, however, most states retain some criminal sanctions for sexting. In preserving criminal sanctions, legislatures rely on three reasons. First, they wish to deter teens from sexting by imposing criminal liability. Second, they are concerned with the promotion of child pornography, fearing that these images may get into the wrong hands. Finally, they wish to use the threat of conviction as a way to require teens to participate in educational programs. The New Jersey legislature appears to base its proposed legislature on the third line of reasoning.

This Note analyzes the New Jersey Senate Bill 2926 (“the Bill”), which would create a diversionary educational program for juveniles charged criminally for sexting or posting sexual images on the Internet.<sup>4</sup> The Bill would require a prosecutor to determine whether a juvenile charged under N.J. STAT. ANN. § 2C:24-4, the state child endangerment statute, should be allowed to avoid criminal charges if they successfully participate in a state-developed educational program.<sup>5</sup> This Note will evaluate the New Jersey Bill and other states’ responses to the “problem”<sup>6</sup> of sexting between two consenting juveniles.

The New Jersey State Senate introduced S.B. 2926 in 2009 in response to situations in other states where prosecutors abused their discretion by threatening criminal prosecution under child pornography statutes.<sup>7</sup> Seemingly, the legislature was concerned that similar abuse of discretion may happen in New Jersey. With this Bill, the legislature would give a juvenile who did not know their actions were criminal a “get out of jail free” card, while still allowing the

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<sup>4</sup> S.B. 2926, 213th Leg. (N.J. 2009). This Note reviews the Bill as it was first introduced in 2009.

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

<sup>6</sup> The New Jersey Assembly Statement with the Bill proposal notes, “The teenage practices of sexting and posting sexual images online are nationwide problems that have perplexed parents, school administrators and law enforcement officials.” *Id.* Even assuming the most drastic statistics are valid (up to 15% of teens participating), it does not seem that sexting is prevalent enough to constitute a “problem” any more than other reckless teenage behavior. *Teens and Mobile Phones*, PEW RESEARCH, 87 (April 20, 2010) <http://pewinternet.org/~media/Files/Reports/2010/PIP-Teens-and-Mobile-2010-with-topline.pdf>.

<sup>7</sup> In its Statement, the Assembly notes that prosecutors in other states have charged sexting teens under child porn statutes. S.B. 2926. Abuse of prosecutorial discretion will be discussed in Part II-B *infra*.

possibility of a criminal charge, if the prosecutor so chooses.<sup>8</sup> However, instead of giving prosecutors specific factors which would require a prosecutor to divert a juvenile to the educational program, the Bill designates specific objective and subjective factors a prosecutor must consider in their decision of whether to admit a defendant to the diversionary program.<sup>9</sup> Hence, the possibility of prosecutors abusing their discretion is still present.

This Note argues that the legislative intent of N.J. STAT. ANN. § 2C:24-4 could be better served by instead providing an affirmative defense to the child endangerment statute. Similar to the approach taken by the Nebraska legislature, the defense would establish specific conditions that, if met, would exclude the acts of possession and transmission of less controversial images by consenting juveniles from the child endangerment statute.<sup>10</sup> When creating the defense, the legislature must be sure to establish specific provisions regarding the ages of the parties involved,<sup>11</sup> the subject of image, the sender of the image, the recipient of the image and whether the subject and recipient of the image consented to the transmission. Additionally, the legislature should consider the intent of the sender, and the defense should only be available to non-malicious persons. Finally, this Note argues that explicit images sent with malice are best covered under a separate cyber-bullying statute.<sup>12</sup>

Part II of this Note will establish the background necessary to understand the issue. It will provide a definition of “sexting” and explain its prevalence. Next, it will discuss the legislative

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<sup>8</sup> S.B. 2926, 213th Leg. (N.J. 2009).

<sup>9</sup> *Id.*

<sup>10</sup> See NEB. REV. STAT. ANN. § 28-1463.03 (LexisNexis 2009).

<sup>11</sup> In this Note I will assert that the ages of the sexting parties are relevant in determining the appropriate legislative response. However, the issues surrounding sexting between an adult and a juvenile are beyond the scope of this Note. These issues will only be mentioned in passing, as necessary to illustrate specific points.

<sup>12</sup> For example, on September 29, 2010, Tyler Clementi, a New Jersey college student, committed suicide following his roommate broadcasting him having sex over the internet. *Tyler Clementi's Family says Rutgers freshman committed suicide after video of sexual encounter*, NJ.com, September 20, 2010 [http://www.nj.com/news/index.ssf/2010/09/tyler\\_clementis\\_family\\_confirm.html](http://www.nj.com/news/index.ssf/2010/09/tyler_clementis_family_confirm.html) (last visited October 23, 2010). In response, the New Jersey Legislature has proposed a Bill that will upgrade “harassment” charges in some situations as well as restrict cyber-bullies’ access to the internet. See N.J. ASSEM. B. 3328, 214th Leg. (N.J. 2010) .

intent of N.J. STAT. ANN. § 2C:24-4, the New Jersey child endangerment statute, and explain what conduct it prohibits. It will then illustrate how sexting currently constitutes a violation of N.J. STAT. ANN. § 2C:24-4, including the example of a 14-year-old New Jersey girl who was charged under the child pornography statute. Additionally, it will summarize cases where juveniles in other states were charged under child pornography statutes. Finally, it will note what other statutes may be implicated when a juvenile sends an explicit image to another juvenile.

Part III will summarize S.B. 2926, and look at alternatives provided by other states, specifically Nebraska, Vermont and North Dakota. It will also suggest other means of responding to the phenomenon of teen sexting. Part IV will conclude by revisiting the recommendation that New Jersey should follow the example of Nebraska and provide an affirmative defense to N.J. STAT. ANN. § 2C:24-4, and will also identify issues beyond the scope of this Note.

## **II. Background**

In *Miller v. Mitchell* (hereinafter “*Miller*”),<sup>13</sup> the Third Circuit accepted the Plaintiff’s definition of “sexting” as “the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet.”<sup>14</sup> The percentage of teenagers who have stated that they have engaged in sexting varies greatly from survey to survey.<sup>15</sup> Until recently, most articles relied on a poll taken by the National Campaign to Prevent Teen and Unplanned Pregnancy, along with CosmoGirl.com,

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<sup>13</sup> *Miller v. Mitchell*, 598 F.3d 139, 143 (3d Cir. 2010). Some, including CNN, may consider the practice of sending sexually explicit text messages, without pictures, “sexting”, but this Note refers specifically to messages with images. Thus, Apple’s new technology which prevents an iPhone user from sending certain words via text message is not of much use to a parent who is concerned about their teen sending questionable images with their phone. See *Apple patents ‘anti-sexting’ technology*, CNN, (Oct. 12, 2010), [http://articles.cnn.com/2010-10-13/tech/apple.sextling.patent\\_1\\_text-messages-sextling-apple?\\_s=PM:TECH](http://articles.cnn.com/2010-10-13/tech/apple.sextling.patent_1_text-messages-sextling-apple?_s=PM:TECH).

<sup>14</sup> *Id.* at 143.

<sup>15</sup> Nathan Koppel and Ashby Jones, *Are ‘Sext’ Messages a Teenage Felony or Folly?*, WALL ST. J., August 25, 2010, at D1.

which put the numbers of teen girls who stated they have shared photos at around 11 percent.<sup>16</sup> A more recent Pew Research study conveyed similar results.<sup>17</sup> Researchers have criticized the polling used to determine the number of teenagers engaging in sexting, asserting that the sample is self-selected and that teens are likely to lie about this sensitive subject.<sup>18</sup> Regardless of the actual number of sexters, the occasional excessive prosecutorial response requires the legislature to address the issue in order to ensure adequate protection of juvenile rights.

#### **A. An Overview of N.J. STAT. ANN. § 2C:24-4**

N.J. STAT. ANN. § 2C:24-4 defines a “child” as a person under the age of 16.<sup>19</sup> The statute makes it unlawful to photograph a child in a “prohibited sexual act,” specifically “nudity, if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction.”<sup>20</sup> Additionally, it is unlawful to possess images of a child engaged in a “prohibited act,” including nudity as defined above.<sup>21</sup> Finally, it is unlawful to transmit images of a child engaged in a “prohibited act” including nudity as defined above.<sup>22</sup>

The New Jersey legislature passed N.J. STAT. ANN. § 2C:24-4 in 1978,<sup>23</sup> shortly after Congress passed the Protection of Children Against Sexual Exploitation Act of 1977.<sup>24</sup> When enacting this legislation, Congress found that the creation of child pornography was a large-scale criminal industry that exploited large numbers of youth, and that the use of children to create

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<sup>16</sup> Carl Bialik, *Which Is Epidemic--Sexting or Worrying About It?*, WALL ST. J., April 8, 2009, at A9.

<sup>17</sup> *Teens and Mobile Phones*, *supra*, note 1 at 86.

<sup>18</sup> Bialik points out that it is problematic that the teens polled are a small sample of self-selected individuals. Bialik, *supra*, note 17.

<sup>19</sup> N.J. STAT. ANN. § 2C:24-4(b)(1) (2010).

<sup>20</sup> *Id.* § 2C:24-4(b)(1)(i).

<sup>21</sup> *Id.* § 2C:24-4(b)(5)(b).

<sup>22</sup> *Id.* § 2C:24-4(b)(5)(a).

<sup>23</sup> *Id.* § 2C:24-4.

<sup>24</sup> 18 U.S.C. §2251. Not surprisingly, the federal child pornography statute faced numerous constitutional challenges, causing numerous amendments since its enactment in 1986. *See e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 234 (2002) (finding statute overbroad as an overbroad ban “virtual” child pornography).

pornographic material was physically and emotionally damaging to them.<sup>25</sup> The statute was created with the intention of protecting children from predators.<sup>26</sup> At the time, many states passed similar legislation.<sup>27</sup> Therefore, one could infer that the New Jersey legislature had similar intentions when enacting N.J. STAT. ANN. § 2C:24-4. Any supplemental legislation must be viewed with the intention of protecting children as a contextual backdrop.

Currently, several sexting scenarios constitute a violation of N.J. STAT. ANN. § 2C:24-4. Since any person who photographs a child in a prohibited sexual act could be found guilty under N.J. STAT. ANN. § 2C:24-4(b)(4),<sup>28</sup> juveniles who photograph themselves could be found guilty of this provision of the statute. Additionally, juveniles who photograph their juvenile partner or friend could be found guilty under this provision of the statute.<sup>29</sup>

Any person who possesses an image of a child engaging in a prohibited sexual act, including nudity, is guilty under N.J. STAT. ANN. § 2C:24-4(b)(5)(b).<sup>30</sup> Therefore, juveniles who possess a nude image of themselves, or their juvenile significant others/friends, are guilty under this provision of the statute. One of the most unfortunate situations covered by this statute is the unwilling recipient of a nude image of another juvenile. Under the statute as it stands, this person would be guilty under N.J. STAT. ANN. § 2C:24-4(b)(5)(b), as the mens rea for the crime is “knowingly” rather than “purposely.”

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<sup>25</sup> H.R.J. Res. 738, 99th Cong. (1986).

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

<sup>27</sup> States that have passed legislation related to sexting include Arizona, California, Colorado, Connecticut, Illinois, Louisiana, Missouri, Nebraska, North Dakota, Oregon, Rhode Island, Utah, and Vermont. *See* National Conference of State Legislatures, Sexting Legislation 2010, <http://www.ncsl.org/default.aspx?tabid=19696> (last visited Jan. 14, 2011); National Conference of State Legislatures, Sexting Legislation 2009, <http://www.ncsl.org/default.aspx?tabid=17756> (last visited Jan. 14, 2011).

<sup>28</sup> N.J. STAT. ANN. § 2C:24-4(b)(4) (2010).

<sup>29</sup> Thus, if a group of high school girls at a slumber party take some risqué photos of each other, they are technically guilty under *Id.* § 2C:24-4(b)(4).

<sup>30</sup> *Id.* § 2C:24-4(b)(5)(b).



Under N.J. STAT. ANN. § 2C:24-4(b)(5)(a), any person who sends via cell phone, email or Internet post, an image of a person under the age of 16 engaged in a prohibited sexual act is guilty.<sup>31</sup> Therefore, juveniles who send or post a nude image of themselves, significant others or friends are guilty under this provision of the statute. While some scenarios encompassed by this section of the statute could be harmful, they certainly do not rise to the level of harm as that experienced by children exploited and victimized in the production of child pornography.<sup>32</sup> In proposing the Bill with lower penalties, the legislature acknowledges that any harm that may be caused by sexting is not as significant as in the traditional child pornography scenario.

### **B. Teens Charged Under Child Pornography Statutes**

While media attention focuses on sexting nationwide, only one New Jersey teen has been charged under N.J. STAT. ANN. § 2C:24-4. A prosecutor in Passaic County charged a Trenton 14-year-old under the child endangerment statute for posting 30 “explicit nude pictures of herself” on MySpace.<sup>33</sup> The girl claimed she posted the pictures because she wanted her boyfriend to see them.<sup>34</sup> Eventually, the Prosecutor’s Office dropped the child endangerment charges.<sup>35</sup> In lieu of prosecution, the Prosecutor’s Office required the girl to successfully complete six months of probation and undergo counseling, after which all charges would be dropped.<sup>36</sup> This case alone, in which a New Jersey prosecutor charged a teen under N.J. STAT. ANN. § 2C:24-4 for her

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<sup>31</sup> *Id.* § 2C:24-4(b)(5)(a)

<sup>32</sup> In *New York v. Ferber*, 458 U.S. 747, 756-61 (U.S. 1982), the Supreme Court reviewed a First Amendment challenge to New York’s child pornography statute. The Court upheld the statute finding that the social value of child pornography is *de minimis* and therefore did not outweigh the state’s compelling interest in protecting children from exploitation. *Id.* Citing the results of a study undertaken by the Journal of the American Academy of Child Psychiatry, the Court reasoned that children’s participation in the creation of pornography is harmful to society as well as the children themselves, because children who have been exploited in this way are likely to become sexually abusive or have substance abuse problems later in life. *New York v. Ferber*, 458 U.S. at 761 n.9.

<sup>33</sup> *Girl posts nude pics, is charged with kid porn*, MSNBC, (Mar. 27, 2009), <http://www.msnbc.msn.com/id/29912729/>.

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

<sup>35</sup> *New Jersey Girl Posts Nude Photos of Herself, Gets Probation*, HUFFINGTON POST, (June 23, 2009), [http://www.huffingtonpost.com/2009/06/23/new-jersey-girl-posts-nud\\_n\\_219896.html](http://www.huffingtonpost.com/2009/06/23/new-jersey-girl-posts-nud_n_219896.html).

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

foolish acts shows the necessity of an affirmative defense to the charges of child pornography. If an unsympathetic prosecutor chose to prosecute the girl under the child endangerment statute and succeeded, the teenager would have been required to register as a sex offender.<sup>37</sup>

Juveniles in other states have been charged under child pornography statutes for sexting with less favorable results. *Miller*, the most infamous case, comes out of the Third Circuit in Pennsylvania.<sup>38</sup> In October of 2008, the school district of Tunkhannock, PA found images of semi-nude and nude teenage girls in several students' cell phones, and discovered that male students were trading the images.<sup>39</sup> The school district turned the phones over to the Wyoming County District Attorney's office, and then-District Attorney George Skumanick, began an investigation.<sup>40</sup> Skumanick announced in the newspaper that teenagers could be prosecuted for child pornography if found to be sending or possessing such photos using their cell phones.<sup>41</sup> Several students were informed they would be prosecuted if they did not participate in an "education program."<sup>42</sup> Two of the girls threatened with prosecution sent a picture where one posed in an opaque bra and the other shown wrapped with a towel underneath her breasts. The parents of these two girls, in addition to the parents of another girl, refused to force their

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<sup>37</sup> *Id.* Additionally, requiring juveniles to register as sex offenders has complicated implications, considering that the sex offender registries were created for the protection of children. *See generally*, Mark J. Swearingen, Comment, *Megan's Law As Applied To Juveniles: Protecting Children At The Expense Of Children?*, 7 SETON HALL CONST. L. J. 525 (1997).

<sup>38</sup> *Miller v. Mitchell*, 598 F.3d 139, 143 (3d Cir. 2010).

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

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

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

<sup>42</sup> *Miller*, 598 F.3d at 143. The DA developed the education program in conjunction with two agencies. *Id.* In the program, girls and boys would be separated. *Id.* The syllabus for the girl's group noted that one of the main objectives would be to discuss "what it means to be a girl in today's society," including "the advantages and disadvantages." *Id.* They would also be required to write a report explaining why they were in the program, how their actions affected others, if they "created a victim and, if so, who?" *Id.* Other sections focused on sexual violence, sexual harassment and gender identity. *Id.*

daughters to participate in the educational program, and sought a temporary restraining order prohibiting Skumanick from instituting a criminal trial against their daughters.<sup>43</sup>

The parents, with the support of the American Civil Liberties Union,<sup>44</sup> sought an immediate restraining order prohibiting the District Attorney from imposing criminal sanctions on their children.<sup>45</sup> The parents claimed, Skumanick had retaliated against their children, thus violating 18 U.S.C. § 1983.<sup>46</sup> They parents asserted Skumanick infringed on their Fourteenth Amendment right to raise their children without undue interference, and violated the girls' First Amendment rights to free expression and to be free from compelled speech.<sup>47</sup> The district court agreed with the parents' First Amendments "compelled speech" and Fourteenth Amendment arguments and issued a temporary restraining order while determining whether to issue a permanent injunction.<sup>48</sup> In the meantime, Skumanick filed an interlocutory appeal.<sup>49</sup>

The Third Circuit agreed with the parents and affirmed the district court, stating that a District Attorney "may not coerce parents into permitting him to impose on their children his ideas of morality and gender roles,"<sup>50</sup> and that the education program would "likely violate [the girls'] First Amendment freedom against compelled speech."<sup>51</sup>

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<sup>43</sup> *Miller*, 598 F.3d at 143.

<sup>44</sup> The ACLU recently testified in Ohio regarding Ohio House Bill 473, which would create a misdemeanor offense for sexting. The ACLU asserts that it agrees that the legislation is well-intentioned, but any attempt to criminalize sexting is misguided and serves only to stigmatize the involved parties. *ACLU Calls On Legislators to Keep Sexting Teens Out of Criminal Courts*, ACLU, (May 18, 2010) <http://www.aclu.org/free-speech/aclu-calls-legislators-keep-sexting-teens-out-criminal-courts>.

<sup>45</sup> *Miller*, 598 F.3d at 145.

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

<sup>47</sup> *Id.* at 151 (citing *Turner Broad. Sys., Inc. v. Fed. Comm'n's Comm'n*, 512 U.S. 622, 641 (1994) (recognizing that "[g]overnment action that . . . requires the utterance of a particular message favored by the Government . . . contravenes th[e] essential right" to refrain from speaking protected by the First Amendment)).

<sup>48</sup> *Id.* at 145.

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

<sup>50</sup> *Miller*, 598 F.3d at 150-51.

<sup>51</sup> *Id.* at 152. While the "educational program" suggested by the New Jersey legislature may have interesting First and Fourteenth Amendment implications, I will not discuss these issues in this Note.

*Miller* demonstrates that statutes must specifically address sexting,<sup>52</sup> since the potential for abuse of prosecutorial power is great when a prosecutor may rely on child pornography statutes alone. In the aftermath of *Miller*, the Pennsylvania legislature proposed a bill that is very similar to the New Jersey Bill, but has yet to enact it.<sup>53</sup>

Another troubling case came out of Iowa in 2009. In *State v. Canal*,<sup>54</sup> the Court reviewed the case of an 18-year-old who sent pictures of his penis to his 14-year-old girlfriend who requested the pictures.<sup>55</sup> When the girl's mother found the picture, she became upset and told the girl's father to contact some of his friends in the police department regarding the situation.<sup>56</sup> Although both parties agreed to the transmission, Iowa state prosecutors charged Canal with violating IOWA CODE § 728.2, for "knowingly disseminating obscene material to a minor."<sup>57</sup>

At trial, the instruction the Court gave to the jury defined "obscene" as material that depicts or describes "the genitals, sex acts, masturbation, excretory functions, or sadomasochistic abuse" which an average person, reviewing the material as a whole with respect to what is suitable for minors under "contemporary community standards," would find appeals to the prurient interest<sup>58</sup> and is "patently offensive."<sup>59</sup> On appeal, the Supreme Court of Ohio held that a reasonable jury, using "contemporary community standards" could have found the image of Canal's erect penis to be "obscene" under the definitions above.<sup>60</sup> Thus, the Court affirmed

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<sup>52</sup> Catherine Arcabascio, Article: *Sexting and Teenagers: OMG R U Going 2 Jail???*, 16 RICH. L.J. & TECH. 10 (Spring 2010).

<sup>53</sup> National Conference of State Legislatures, *Sexting Legislation 2010*, <http://www.ncsl.org/default.aspx?tabid=19696> (last visited Sept. 22, 2010).

<sup>54</sup> *State v. Canal*, 773 N.W.2d 528, 529 (Iowa 2009).

<sup>55</sup> *Id.* at 529.

<sup>56</sup> *Id.*

<sup>57</sup> IOWA CODE § 728.2.

<sup>58</sup> The instruction defined "prurient interest": "a shameful or morbid interest in nudity, sex, or excretion." *Canal*, 773 N.W.2d at 530.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 532.

Canal's conviction.<sup>61</sup> In this situation, the prosecution and conviction of Canal was certainly more harmful than the transmission of the image.

A Florida case, *A.H. v. State*,<sup>62</sup> is a prime example of why the legislature must create specific laws regarding juveniles who send images of themselves, as opposed to images of others. In this case, a 16-year-old girl and her 17-year-old boyfriend took digital pictures of themselves naked and engaging in consensual sexual behavior, and emailed the images to each other.<sup>63</sup> The teens never showed the images to a third party.<sup>64</sup>

Prosecutors read the statute strictly and found that it fell under the child pornography statute.<sup>65</sup> As a result, both teenagers were charged with one count of “producing, directing or promoting a photograph or representation that they knew to include the sexual conduct of a child” in violation of FLA. STAT. § 827.071(3).<sup>66</sup> A.H. was adjudicated delinquent for “producing, directing or promoting a photograph or representation that she knew included sexual conduct of a child,” in violation of the statute.

In her appeal, A.H. asserted that the statute was unconstitutional, as applied to her, because it violated her right to privacy under the state Constitution.<sup>67</sup> Even though the statute for which the state prosecuted A.H. falls under the heading “Abuse of Children” and A.H. was clearly not “abused”, the court found the state had a compelling interest in prohibiting the “memorializing”<sup>68</sup> of juveniles’ sexual acts.<sup>69</sup>

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<sup>61</sup> *Id.* at 533.

<sup>62</sup> *A.H. v. State*, 949 So.2d 234, 235 (Fla. Dist. Ct. App. 1st Dist. 2007)

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

<sup>64</sup> *Id.* The opinion, unfortunately, does not explain who found the pictures that lead to the prosecution.

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

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 235.

<sup>68</sup> *A.H.*, 949 So.2d at 236.

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

Finally, a recent Hew Hampshire case illustrates how a child endangerment statute may be properly utilized by prosecutors in the sexting context. Eighteen- year-old Ryan Brassard threatened a 15-year-old girl into sending him nude photos of herself through extortion.<sup>70</sup> Brassard found out at school that the girl sent explicit pictures to her friend.<sup>71</sup> He then emailed her stating that if she did not send new, specific pictures to him, he would distribute the original pictures.<sup>72</sup> Threatened, the girl sent him 15 pictures.<sup>73</sup>

Brassard ultimately demanded that the girl meet him to have sex.<sup>74</sup> However, instead of finding her in the meeting place, Brassard found the police and was arrested and charged with six counts of child endangerment and one count of attempted aggravated sexual assault.<sup>75</sup>

Here, the victim was not charged with any crime, and still almost certainly learned a lesson about the consequences of sexting. Brassard, on the other hand, was prosecuted for violating child endangerment statutes, and additionally could have been prosecuted for extortion. While the final outcome of this case is unknown, a conviction here seems more reasonable than in any of the above cited cases.

### **III. Analysis**

#### **A. The New Jersey Bill and Its Implications**

##### **1. Overview of the Bill as Currently Written**

S.B. 2926 creates a diversionary program for juveniles who are charged under N.J. STAT. ANN. § 2C:24-4. Juveniles charged under the child endangerment statute may be considered for the program and possibly avoid prosecution when the case involves creating, exhibiting or

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<sup>70</sup>Albert McKeon & Andrew Wolfe, *Felony Charges Result From Sexting*, NASHUA TELEGRAPH, (Sept. 25, 2010), <http://www.nashuatelegraph.com/news/862206-196/teen-charged-in-sexting-case.html>.

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

<sup>72</sup>*Id.*

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

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

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

distributing a photograph depicting nudity,<sup>76</sup> without malicious intent, through the use of a cell phone or a computer.<sup>77</sup>

Section (1)(c) of the Bill limits who may be diverted to the educational program to juveniles who fulfill all of the conditions therein.<sup>78</sup> Diversion is limited to those juveniles who fulfill certain conditions.<sup>79</sup> First, they are disqualified if they have ever been adjudicated delinquent or convicted of any New Jersey or United States criminal statute.<sup>80</sup> Second, they must not have been aware that their actions were criminal, nor could they have intended to commit a crime.<sup>81</sup> Third, the prosecutor must find that the juvenile “may be harmed by the imposition of criminal sanctions.”<sup>82</sup> Finally, the prosecutor must find that if the juvenile completed the program, they would be deterred from similar conduct in the future.<sup>83</sup> The common theme in all of these factors suggests that the legislature wishes to provide an exception from prosecution for those teens who generally do not get into trouble and whose otherwise bright futures could be seriously devastated by prosecution under N.J. STAT. ANN. § 2C:24-4. Basically, the legislature does not appear to want “good kids” to suffer the consequences of prosecution under the child endangerment statute.

In section (1)(d) the Bill details the scope of the educational program.<sup>84</sup> The program would educate juveniles regarding “the legal consequences of and penalties for sharing sexually suggestive or explicit materials, including applicable federal and State statutes.”<sup>85</sup> It would also

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<sup>76</sup> “Nudity...if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction.” N.J. STAT. ANN. § 2C:24-4(b)(1)(i).

<sup>77</sup> S.B. 2926(1)(a).

<sup>78</sup> *Id.* 2926(1)(c)(1).

<sup>79</sup> *Id.* 2926(1)(c).

<sup>80</sup> *Id.* 2926(1)(c)(1).

<sup>81</sup> *Id.* 2926(1)(c)(1).

<sup>82</sup> *Id.* 2926(1)(c)(3).

<sup>83</sup> S.B. 2926(1)(c)(4).

<sup>84</sup> *Id.* 2926(1)(d)(1).

<sup>85</sup> *Id.* 2926(1)(d)(1).

address the non-legal consequences of sharing these types of images including “the effect on relationships, loss of educational and employment opportunities, and being barred or removed from school programs and extracurricular activities.”<sup>86</sup> The program would advise juveniles that the Internet makes images easily replicable and searchable, and “can produce long-term and unforeseen consequences for sharing sexually suggestive or explicit materials.”<sup>87</sup> Finally, it would address the link between bullying and the sharing of sexually suggestive images.<sup>88</sup> The legislature’s proposals for the educational program suggest that its primary concern is to ensure teens are aware of the risks of sexting.

## 2. Positive Aspects of the Bill

The Bill addresses some of the important issues at stake in sexting cases. Most importantly, the Bill focuses on education instead of prosecution.<sup>89</sup> Often, juveniles who are ensnared under a state’s child pornography statute have not given much thought to the consequences of their actions.<sup>90</sup> The Bill also distinguishes photos sent “without malicious intent” and those sent maliciously.<sup>91</sup> This provision would allow the state to prosecute bullies who send photos acquired without the consent of the subject.<sup>92</sup> Cyber-bullying is a serious

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<sup>86</sup> *Id.* 2926(1)(b).

<sup>87</sup> *Id.* 2926(1)(d)(3).

<sup>88</sup> *Id.* 2926(1)(d)(4).

<sup>89</sup> S.B. 2926(1)(d)(2).

<sup>90</sup> Florida charged an 18 year old under the state’s child pornography statute after forwarding sexually explicit images of his girlfriend in order to “get a reaction.” He was convicted and required to register as a sex offender. *Sexting Leads To Teen Having To Register As A Sex Offender*, MTV, (Feb. 11, 2010), <http://www.mtv.com/news/articles/1631734/20100211/story.jhtml>.

<sup>91</sup> S.B. 2926(1)(a)(1). While the Florida teen mentioned in note 91, *supra*, may not be saved by the “malice” requirement, the teens convicted in *A.H. v. State* who sent nude pictures to each other would be protected. *See also Sexting Leads To Teen Having To Register As A Sex Offender, supra*, note 91. <http://www.mtv.com/news/articles/1631734/20100211/story.jhtml>; *see also A.H. v. State*, 949 So. 2d 234, at 235 (Fla. Dist. Ct. App. 1st Dist. 2007).

<sup>92</sup> However, it may be more appropriate to charge bullies under N.J. STAT. ANN. § 2C:33-4, a petty disorderly persons offense, which states that a person is guilty of harassment if they “[Engage] in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.”



problem,<sup>93</sup> but it should not be equated with the transmission or possession of child pornography.<sup>94</sup> Finally, the Bill allows prosecution for the transmission of unsolicited sext messages,<sup>95</sup> which, again, recognizes the difference between consenting and non-consenting parties.

The Bill takes a step in the right direction regarding limiting the possibility of prosecution of teens for sending explicit images. Nevertheless, it has three major shortcomings. First, the conditions set forth in section (1)(c) leave too much discretion to the county prosecutor. Second, in some aspects the Bill is too broad. Finally, in other aspects the Bill is too narrow.

### **3. Problematic Aspects of the Bill**

The most serious problem with the Bill is that it vests too much discretion in the county prosecutor, because it does not specify the burden the county prosecutor must meet when determining whether to divert the juvenile to the program. As established in section (1)(c) of the Bill, the prosecutor determines if the juvenile has fulfilled the conditions.<sup>96</sup> While a prosecutor can objectively determine whether a juvenile has fulfilled factor (1)(c)(1),<sup>97</sup> the other factors all require a subjective determination. This leaves a prosecutor vulnerable to public pressure to prosecute for “immorality” or to prove a point. Additionally, the regulation suggests that a juvenile may still be subject to further penalties even if they fulfill the requirements of the

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<sup>93</sup> See note 13, *supra*.

<sup>94</sup> The harms associated with cyber-bullying (depression, suicides, etc.) are different than those associated with child pornography (exploitation of children, the creation of future exploiters, etc.), and thus, the crimes should be prosecuted differently. See note 33, *supra*.

<sup>95</sup> S.B. 2926(1)(a)(1).

<sup>96</sup> *Id.* 2926(1)(a)(1). Additionally, the Bill does not specify whether the prosecutor’s decision is subject to judicial review. Even if the decision would be subject to judicial review, the likely standard of review would be the extremely deferential “abuse of discretion” standard.

<sup>97</sup> Whether a juvenile has previously been charged under the New Jersey criminal code. *Id.* 2926(1)(c)(1).

educational program, however, it does not state what factors should be considered when making the determination.<sup>98</sup>

The second problem is that the Bill is too broad in two respects, while too narrow in another. First, it is too broad because it automatically disqualifies any juvenile with a past criminal conviction or finding of delinquency.<sup>99</sup> The conditions necessary for diversion indicate that the legislature wants to ensure that “good kids”<sup>100</sup> do not have their lives ruined by prosecution under the child endangerment statutes. This suggests the legislature wants to leave room for the prosecution of “bad kids.”<sup>101</sup> However, it is possible, or even likely, that juveniles who have been convicted of other crimes or adjudicated delinquent were not aware that the act of sending a sexually suggestive photo to a friend is a crime, and are not actually acting with bad intentions or malice under the circumstances. Therefore, this provision of the Bill too broadly excludes from the diversionary program teens who have a criminal record, but did not know they were committing a crime and did not act with malice, but whose lives would nevertheless be devastated by prosecution under N.J. STAT. ANN. § 2C:24-4. While preclusion of some teens with criminal records may be appropriate, a *per se* exclusion is too harsh, especially considering the apparent intent of the legislature of educating teens about the risks of sexting.<sup>102</sup>

Second, the Bill is too broad because it only considers the age of the sender/subject as “juvenile” and does not consider the age of the recipient.<sup>103</sup> While perhaps not the most intelligent act, the sending of explicit pictures between juveniles of a similar age is certainly far

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<sup>98</sup> *Id.* 2926(1)(b) (“A juvenile who successfully completes the program *shall have the opportunity* to avoid prosecution for the eligible offense.”) (emphasis added).

<sup>99</sup> *Id.* 2926(1)(c)(1).

<sup>100</sup> Those who have never been found guilty of any crime or adjudicated delinquent, who did not know they were committing a crime, did not intend to commit a crime, were not acting maliciously, etc. *Id.* 2926(1)(c).

<sup>101</sup> Those teens who have been found guilty of any crime or adjudicated delinquent, who knew their act was criminal, who acted with malice, etc. S.B. 2926(1)(c)(1).

<sup>102</sup> *Id.* 2926(1)(d)(1). *See also* Part II-A-1, *supra*.

<sup>103</sup> S.B. 2926(1)(a)(1).

removed from the exploitation and victimization with which legislatures have been concerned when prohibiting the possession and distribution of child pornography.<sup>104</sup> Conversely, it may be more appropriate to preclude diversion if the sender is significantly older, and theoretically more mature, than the recipient. In such a scenario, the possibility of exploitation and victimization of the recipient is more likely.<sup>105</sup> The issue of ages of the parties is addressed in more depth in Part III-C *infra*.

Finally, the Bill is too narrow, because it only applies to distribution “without malicious intent.”<sup>106</sup> Thus, cyber-bullies, who arguably send images “with malicious intent,” may still be punished under the child pornography statute, even though punishment is more appropriate under harassment statutes.<sup>107</sup> This Note will offer drafting solutions to address these problems in Part III-C *infra*.

## **B. Examining the Alternatives<sup>108</sup>**

### **1. Affirmative Defenses**

One option is to create an affirmative defense to the statute with which prosecutors are charging juveniles. An affirmative defense allows a defendant to assert that there are additional facts that, if considered, will exculpate him. Thus, affirmative defenses eliminate the stigma associated with criminal charges, since they establish that the questioned conduct was not actually “wrong” under the circumstances.

Nebraska has provided affirmative defenses for two of its “sexually explicit conduct” statutes.<sup>109</sup> The first statute addresses possession of child pornography.<sup>110</sup> The possession statute

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<sup>104</sup> See *New York v. Ferber*, 458 U.S. 747, 756-61 (U.S. 1982).

<sup>105</sup> The issue of ages of the parties is addressed in depth in Part III-C *infra*.

<sup>106</sup> S.B. 2926(1)(a)(1).

<sup>107</sup> See Part III-A-2, *supra*.

<sup>108</sup> There are several states with pending legislation. See *National Conference of State Legislatures, Sexting Legislation 2010*, <http://www.ncsl.org/default.aspx?tabid=19696> (last visited Sept. 22, 2010) (*listing* Illinois, New York, Ohio, Pennsylvania, and South Carolina as states with pending sexting legislation). This Note will only focus on states that have already passed legislation in response to sexting.

provides an affirmative defense if the image the defendant possesses is of himself.<sup>111</sup> The defense is also available if the defendant is up to 19 years old and possesses an explicit photo of a person who is at least 15 years old, so long as the person in the photo knowingly and voluntarily provided the photo.<sup>112</sup> In a separate statute, the Nebraska legislature addresses the creation and distribution of child pornography.<sup>113</sup> Under this statute, an affirmative defense is afforded to defendants who are 18 years old or younger and send an explicit photo of themselves to willing recipients who are at least 15 years old.<sup>114</sup>

There are three important positive aspects to the Nebraska approach. First, prosecutors cannot punish juveniles who send merely “provocative” photos.<sup>115</sup> By making this exception, most sexts sent by teens will be afforded the defense.<sup>116</sup> Second, it addresses the ages of all involved parties including the subject of the photo, the sender and the recipient.<sup>117</sup> By addressing the ages of the parties, the statute allows for prosecution in situations where it is more likely that

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<sup>109</sup> NEB. REV. STAT. ANN. § 28-1463.01 (2009). NEB. REV. STAT. ANN. § 28-1463.03 (2009). “Sexually explicit conduct” is defined in NEB. REV. STAT. ANN. § 28-1463.02(5) as “(a) Real or simulated intercourse, whether genital-genital, oral-genital, anal-genital, or oral-anal between persons of the same or opposite sex or between a human and an animal or with an artificial genital; (b) real or simulated masturbation; (c) real or simulated sadomasochistic abuse; (d) erotic fondling; (e) erotic nudity; or (f) real or simulated defecation or urination for the purpose of sexual gratification or sexual stimulation of one or more of the persons involved.”

<sup>110</sup> “It shall be unlawful for a person to knowingly possess any visual depiction of sexually explicit conduct, as defined in section 28-1463.02, which has a child...as one of its participants or portrayed observers.”<sup>110</sup> NEB. REV. STAT. ANN. § 28-1463.01(1).

<sup>111</sup> NEB. REV. STAT. ANN. § 28-813.01(3)(a)-(b).

<sup>112</sup> *Id.* § 28-813.01(3)(a)-(b).

<sup>113</sup> NEB. REV. STAT. ANN. § 28-813.01.

<sup>114</sup> NEB. REV. STAT. ANN. § 28-813.03(6).

<sup>115</sup> *Id.* § 28-813.03. In *Miller v. Skumanick*, 605 F. Supp. 2d 634, 638 (M.D. Pa. 2009), the district court noted that the images sent by the plaintiff probably did not raise to the level of being “sexually explicit.”

<sup>116</sup> As explained in Part II, *supra*, sexting is the sending of nude or semi-nude images, which are not necessarily “explicit” as defined in the Nebraska statute. Professor Peter E. Cumming Associate Professor of Children’s Studies at York University in Toronto, Canada notes “One of the major problems with public reactions to “sexting” is a complete conflation of nudity with sexuality and pornography.” PETER E. CUMMING, CHILDREN’S RIGHTS, CHILDREN’S VOICES, CHILDREN’S TECHNOLOGY, CHILDREN’S SEXUALITY: ROUNDTABLE ON YOUTH SEXUALITY, TECHNOLOGY JOINT SESSION OF ASSOCIATION FOR RESEARCH IN CULTURES OF YOUNG PEOPLE (ARCYP) AND ASSOCIATION OF CANADIAN COLLEGE AND UNIVERSITY TEACHERS OF ENGLISH (ACCUTE) CONGRESS OF THE HUMANITIES AND SOCIAL SCIENCES 2009, Carleton University, Ottawa (May 26, 2009) (*available at* <http://www.yorku.ca/cummingp/documents/TeenSextingbyPeterCummingMay262009.pdf>).

<sup>117</sup> NEB. REV. STAT. ANN. § 28-813.

the younger person involved has been exploited or victimized by the older person.<sup>118</sup> Finally, the statute addresses the issue of consent, allowing the prosecution of a person who sends an explicit image to an unwilling recipient.<sup>119</sup>

While the Nebraska affirmative defense more adequately addresses the issues involved in juvenile sexting cases than the New Jersey Bill, there is still room for more careful drafting. First, a teen who is the unwilling, third-party recipient of sexually explicit visual depiction is not protected if the subject of the image did not volunteer it.<sup>120</sup> For example, if a girl sends her boyfriend a picture and he sends it to his friends (third-parties) who have not solicited the photo, the friends could be found guilty because they “knowingly possess” the image. Thus, the friends must immediately, and successfully, delete the image to be afforded the protection of the affirmative defense.

Secondly, the defense is too narrow for a number of reasons. First, the “possession” age restriction is too narrow. The defendant can be up to 18 years old, but subject of the visual depiction must be at least 15.<sup>121</sup> Thus, a 14 year old could send an image of herself to her 14-year-old boyfriend and the boyfriend would not be afforded the defense. While it is troubling to think that children this young are sending images of sexually explicit conduct, it is more troubling to think that they could be prosecuted under Nebraska child pornography statutes because of this behavior. It would appear to be more appropriate to consider the ages of all parties involved in relation to one another to ensure that parties who the legislature sought to protect with the affirmative defense are afforded its use. For example, the statute could state that

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<sup>118</sup> In situations where the age disparity is great, it is more likely that a child has been exploited – the primary concern of child pornography statutes. *See* note 33, *supra*.

<sup>119</sup> NEB. REV. STAT. ANN. § 28-813.01.

<sup>120</sup> NEB. REV. STAT. ANN. § 28-813.03(3)(b)(iv) (*stating* “the visual depiction was knowingly and voluntarily provided by the child depicted in the visual depiction.”) The sender, however, would be guilty under the creation and distribution statute. *Id.* § 28-813.03(2).

<sup>121</sup> NEB. REV. STAT. ANN. § 28-813.01(3)(b)(ii).

the defense would be afforded to those juveniles who send an image to another who is no more than three years older or younger than the sender.

Additionally, the defense is too narrow because a person may only possess an image of a sole person as its subject, even if multiple subjects consented to be in the image.<sup>122</sup> Therefore, any boy who possessed an image of the two girls in *Miller*<sup>123</sup> would not be protected, despite the fact that both girls consented to sending the image. A similar problem arises in the transmission setting because the defense only covers defendants who transmit images of themselves.<sup>124</sup> Therefore, if a girl takes a picture of herself with a friend and sends the picture she is not afforded the defense, regardless of her friend's consent to the transmission.

## **2. Misdemeanor Alternatives and Exceptions**

By establishing a misdemeanor exception or alternative to a particular statute, the legislature is basically making two assertions. First, the legislature assumes the conduct is something that should be punishable. Second, the legislature finds the conduct to not be so wrong as to carry jail time or other extreme penalties. While certainly preferable for a defendant, a misdemeanor still carries the stigma of a criminal conviction as well as other negative consequences.<sup>125</sup>

Vermont created a statute to specifically address sexting as a misdemeanor. The statute is entitled “Minor electronically disseminating indecent material to another person,”<sup>126</sup> and prohibits minors from knowingly and voluntarily transmitting an “indecent visual depiction” of themselves to another person.<sup>127</sup> Additionally, it prohibits possession of an image in violation of section (a)(1).<sup>128</sup> All minors who violate the statute are to be adjudicated in family court.<sup>129</sup>

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<sup>122</sup> *Id.* § 28-1463.01(3)(b)(v).

<sup>123</sup> *Miller*, 598 F.3d at 144.

<sup>124</sup> NEB. REV. STAT. ANN. § 28-1463.03(6)(b).

<sup>125</sup> A misdemeanor must generally be reported when a person applies to law schools, for instance.

<sup>126</sup> 13 V.S.A. § 2802b (2009).

<sup>127</sup> *Id.* § 2802b(a)(1).

<sup>128</sup> *Id.* § 2802b(a)(2).

There are many positive aspects to the Vermont approach. First, minors who are first time offenders do not face a “sexual exploitation of children” charge.<sup>130</sup> Repeat offenders may either be adjudicated in family court,<sup>131</sup> or prosecuted under the sexual exploitation of children statute.<sup>132</sup> Additionally, neither first time offenders nor repeat offenders are required to register as sex offenders.<sup>133</sup> Furthermore, the State will expunge the records of juveniles charged under this statute at age 18.<sup>134</sup> Finally, the misdemeanor protects the unwilling recipient of a prohibited image, unlike the Nebraska defense.<sup>135</sup>

However, there are a number of troubling aspects of the Vermont law. First, while it protects juveniles from being charged under the “sexual exploitation of children” statute, they still face the misdemeanor charge for their consensual acts and could be stigmatized by their peers.<sup>136</sup> Second, the law protects the receiving party more adequately than the sending party.<sup>137</sup> Thus, one party could coerce another to send an image,<sup>138</sup> receive the image, view it and delete it and face no charges while the sender would still be in violation of the statute.<sup>139</sup> While the sender is arguably a more culpable party due to their active participation in the act, the example above

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<sup>129</sup> *Id.* § 2802b(b)(1). Adjudication in family court is more favorable to teens than criminal court because emphasize rehabilitation instead of punishment and thus avoid the stigma of criminal punishment. MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION* 185 (3d ed. 2007).

<sup>130</sup> 13 V.S.A. § 2802b(b)(2).

<sup>131</sup> Thus treated as if they were first time offenders. *Id.* § 2802b(b)(3).

<sup>132</sup> The statute does not specify any criteria for determining how a repeat offender will be charged, thus it is likely to be determined by the prosecutor. *Id.* § 2802b(b)(3).

<sup>133</sup> *Id.* § 2802b(b)(2).

<sup>134</sup> *Id.* § 2802b(b)(4).

<sup>135</sup> *Id.* § 2802b(a)(2) (*stating* “it shall not be a violation of this subdivision if the person took reasonable steps, whether successful or not, to destroy or eliminate the visual depiction”).

<sup>136</sup> 13 V.S.A. § 2802b (2009). See *ACLU Calls On Legislators to Keep Sexting Teens Out of Criminal Courts*, ACLU, (May 18, 2010) <http://www.aclu.org/free-speech/aclu-calls-legislators-keep-sexting-teens-out-criminal-courts>.

<sup>137</sup> 13 V.S.A. § 2802b(a)(1)-(2) (2009).

<sup>138</sup> This would be similar to the extortion case in New Hampshire. Albert McKeon & Andrew Wolfe, *Felony Charges Result From Sexting*, NASHUA TELEGRAPH, (Sept. 25, 2010), <http://www.nashuatelegraph.com/news/862206-196/story.html>.

<sup>139</sup> Catherine Arcabascio, *Article: Sexting and Teenagers: OMG R U Going 2 Jail???*, 16 RICH. L.J. & TECH. 10 (Spring, 2010).

demonstrates that there are scenarios involving coercion where a sending party's culpability is less clear.

N. D. CENT. CODE § 12.1-27.2-04.1 prohibits the creation, possession and dissemination of sexually expressive images.<sup>140</sup> However, the state has created a misdemeanor exception to the felony statute, which downgrades a class C felony charge<sup>141</sup> to a Class A or B misdemeanor.<sup>142</sup> The exception focuses on images sent without the subject's consent or with malicious intent.<sup>143</sup> The North Dakota statute's focus on consent aids in the prosecution of cyber-bullies and those who send images as a form of harassment, while declining to equate these crimes with the possession or creation of child pornography.<sup>144</sup> In order to ensure that child pornographers are not excepted from a felony charge, the statute notes that it "does not authorize any act prohibited by any other law."<sup>145</sup>

There are several positive aspects to this law. First, the statute clearly explains that a defendant who "surreptitiously creates or willfully possesses an image that was surreptitiously created" is guilty of a Class A misdemeanor.<sup>146</sup> This distinction implies that the legislature's primary concern is the consent of the subject of the image not the total eradication of any sexually explicit image.

Second, the law prohibits the distribution of "a sexually expressive image with the intent to cause emotional harm to any individual depicted [therein] or after being given notice by an individual or parent...that the individual...does not consent to the distribution of the sexually

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<sup>140</sup> The class C felony "Possession of certain materials prohibited" statute penalizes a person who "knowing of its character and content...knowingly possess any motion picture, photograph, or other visual representation that includes sexual conduct by a minor." N.D. CENT. CODE § 12.1-27.2-04.1 (2007).

<sup>141</sup> *Id.* § 12.1-27.2-04.1.

<sup>142</sup> N.D. CENT. CODE § 12.1-27.1-03.3 (2009).

<sup>143</sup> *Id.* § 12.1-27.1-03.3.

<sup>144</sup> *Id.* § 12.1-27.1-03.3(b).

<sup>145</sup> *Id.* § 12.1-27.1-03.3(b)(3).

<sup>146</sup> *Id.* § 12.1-27.1-03.3(a).



expressive image.”<sup>147</sup> Thus, if a person obtains and, with the intent to cause harm or humiliation, distributes an image without the subject’s consent, that person would be guilty of a Class A misdemeanor. If the person distributed the same image without the intent to do harm, they would be guilty of a Class B misdemeanor. This aspect of the law again indicates that the legislature is more concerned with harm done by malicious acts than the harms associated with explicit images existing for society to see.

Finally, this provision is the only one of its kind to address a parent’s role. The statute explains that a person who distributes a sexually expressive image, after being notified by an individual or their parent that the individual depicted in the image does not consent to its distribution will be guilty of a Class A misdemeanor.<sup>148</sup> Thus, the North Dakota law allows a parent to either consent to the distribution of an image of their child, or withdraw their child’s consent to the distribution of the image.<sup>149</sup> By deferring to parents, the legislature removes the issue from a matter for the courts to one that can be handled in the home.

The North Dakota legislature’s prudent focus on consent and family involvement sets a great example for other states’ legislatures that wish to protect teens from the harms of sexting while still leaving room for prosecution of actual child pornographers when necessary. However, some aspects of the law that could have been more carefully drafted.

First, as a misdemeanor exception to the North Dakota child pornography statute, it is, by definition, still a crime for a teen to share an image with a consenting teen if a parent refuses to consent.<sup>150</sup> Additionally, the law seemingly allows a parent to consent to their child’s possession

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<sup>147</sup> *Id.* § 12.1-27.1-03.3(1)(b).

<sup>148</sup> N.D. CENT. CODE § 12.1-27.1-03.3(1)(b).

<sup>149</sup> *Id.* § 12.1-27.1-03.3(3).

<sup>150</sup> *Id.* § 12.1-27.1-03.3(3).

of an image of another juvenile that was acquired without the subject's consent.<sup>151</sup> Finally, the statute fails to provide a definition for the phrase "sexually expressive image" to guarantee that prosecutors charge appropriately.

## C. Suggestions for the New Jersey Legislature

### 1. Revising the Bill

After reviewing the approaches taken by Nebraska, Vermont and North Dakota, it appears that an affirmative defenses to N.J. STAT. ANN. § 2C:24-4 would best serve the legislative purpose of protecting children from harm. This approach would ensure that the possession or transmission of inappropriate sext messages<sup>152</sup> would be crime, while sexting under certain conditions would be protected as private conduct.<sup>153</sup> The Nebraska affirmative defense combined with the language of the North Dakota misdemeanor exception provides a basic foundation of where to start when drafting the legislation. The legislature should lay out several factors which must be met for a defendant to be afforded the defense. All of these factors should focus on the possible harm to juveniles. I will discuss these factors in detail below.

The most important factor is the consent of the parties.<sup>154</sup> In any potentially eligible offense, there are at least two parties involved: the sender and the recipient. However, if the subject of image transmitted is not the sender or the recipient, there may be many parties

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<sup>151</sup> *Id.* § 12.1-27.1-03.3(3).

<sup>152</sup> For example, those sent with malice or without the consent of any party involved.

<sup>153</sup> In *Griswold v. Connecticut*, 381 U.S. 479, 515 (U.S. 1965), the Supreme Court established that the right to privacy is guaranteed under several amendments in the Bill of Rights (stating "Various guarantees create zones of privacy. The right of association contained in the penumbra of the *First Amendment* is one, as we have seen. The *Third Amendment* in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The *Fourth Amendment* explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The *Fifth Amendment* in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The *Ninth Amendment* provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."").

<sup>154</sup> It is often unlikely that teenagers have actually verbalized their consent to partake in sexting. However, a jury should usually be able to determine whether there was consent by evaluating the totality of the circumstances.

involved. When evaluating whether the defense should apply, courts must consider whether all involved parties consented to the transmission.

First, the defense should only apply if the image's subject consented to being in the photo. In a situation where one person surreptitiously takes a photo of another, neither the person who purposely sends the involuntarily created image nor the person who knowingly possesses the involuntarily created image should be afforded the defense.<sup>155</sup> Nor should the sender be afforded the defense in a case where the sender has obtained the image through a third-party.<sup>156</sup> For example, if A sends an image to B for B's eyes only, and B then sends the image to C without A's consent, B would not be afforded the defense.

Additionally, the recipient of the photo must consent to the transmission of the photo. If a person sends an explicit image to an unwilling recipient, the sender should not be afforded the defense, regardless of whether the subject of the image is the sender. For example, if A sends a picture of herself to B, and B did not consent to the transmission, B (the innocent, unwilling recipient) should be afforded the defense. In this situation A would not be afforded the defense. Requiring consent will compel a jury to make a fact-intensive determination. However, the challenging nature of the determination should not detract from requiring a defendant to establish consent in her defense. After all, courts often demand that juries determine consent in other types of criminal proceedings.

The legislature should also consider the ages of the parties involved. It is useful to review the ages the New Jersey legislature set forth in the grading for aggravated sexual assault under N.J. STAT. ANN. § 2C:14-2 to determine if parties can legally consent. Using those guidelines

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<sup>155</sup> This mirrors the provision in the North Dakota class A misdemeanor exception language. *See* N.D. CENT. CODE § 12.1-27.1-03.3(1).

<sup>156</sup> This language mirrors the North Dakota class B misdemeanor exception language. *See* N.D. CENT. CODE § 12.1-27.1-03.3(2).

minimizes the risk of exploitation of children, as the legislature intended when enacting the child endangerment statute. As with the N.J. STAT. ANN. § 2C:14-2, a person who sends an image to, or possesses an image of, a juvenile who is less than 13 years old should not be afforded the defense if the person sending or possessing is at least 4 years older than the subject or recipient of the image.<sup>157</sup> A person who sends an image to, or possesses an image of, a juvenile who is at least 13 years old but less than 16 years old should not be afforded the defense if the person sending or possessing is at least 4 years older than the subject or recipient of the image.<sup>158</sup> Where the age difference is greater, it is likely that the younger child was not acting voluntarily when agreeing to be in the photo. This scenario more closely resembles the victimization and exploitation with which the child endangerment statute is concerned. Additionally, the logical correlation of these age requirements with the grading for aggravated sexual assault would be more understandable for both teens and law enforcement.

Finally, in addition to the age requirements, the legislature should allow a parent to consent on behalf of a juvenile in any case outside of the age guidelines delineated above, if paired with the consent of the other parties involved. For instance, if a 14 year old possesses an image of a 12 year old the defense would ordinarily not apply. However, if the parents of both children consent to the image (most likely as a means of keeping their kids out of the criminal justice system), the defense would be allowed. Allowing a parent to step in and remove the situation from the criminal realm is beneficial as it places less strain on the criminal justice system and gives parents a chance to take a more active role in their children's lives. Again, this

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<sup>157</sup> N.J. STAT. ANN. § 2C:14-2(b) (Aggravated sexual assault, first degree, is a crime if “An actor commits an act of sexual contact with a victim who is less than 13 years old and the actor is at least four years older than the victim.”).

<sup>158</sup> N.J. STAT. ANN. § 2C:14-2(c)(4) (Sexual assault, second degree is an “...act of sexual penetration [when]...the victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim.”).

would often not be an ideal situation, however it is better to take that time to educate the kids on the risks of their actions than punish them for behavior that they did not realize was risky.

## 2. Educating Teens

The legislature had good intentions when suggesting the creation of an educational program. Teens should be taught about the possible risks of sexting,<sup>159</sup> and it would be wise for public schools to address these matters before a teen is facing criminal charges.<sup>160</sup> The legislature could propose that public schools present the material that would have provided in the diversionary program, as it clearly believes that teens should know this information.

In the past, when the government has failed to adequately educate teens,<sup>161</sup> the media has stepped in. As with other crises teens have faced in the MTV era,<sup>162</sup> MTV and other media outlets have a role in educating teens on the risks involved in sexting. MTV has recently reported on the legal consequences faced by some teens recently due to sexting.<sup>163</sup> Additionally, MTV has partnered with media outlets, non-profits and social networking sites to create

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<sup>159</sup> ACLU of Ohio Legislative Counsel Carrie Davis noted, "Legislators must look beyond the courtroom and into our classrooms and living rooms if we hope to truly prevent sexting. Parents and educators should create open and honest dialogue around these issues and inform teens about issues like respect for their peers, privacy, and the responsibility of using electronic media." *ACLU Calls On Legislators to Keep Sexting Teens Out of Criminal Courts*, ACLU, (May 18, 2010) <http://www.aclu.org/free-speech/aclu-calls-legislators-keep-sexting-teens-out-criminal-courts>.

<sup>160</sup> Carrie Davis also noted, "By seeking solutions outside of the criminal justice system, legislators will be better able to prevent sexting in the future and not just penalize those who have already showed poor judgment." *Id.*

<sup>161</sup> For example, MTV was instrumental in publicizing information about HIV/AIDS in the 1980s when the Regan administration refused to address the issue. See David Salyer, *Ronald Reagan and AIDS*, THE BODY, (Sept./Oct., 2004) <http://www.thebody.com/content/art32196.html> (noting that Reagan was unjustifiably silent about HIV/AIDS). MTV began reporting on the HIV epidemic, dispelling myths, soon after its first broadcast in 1981. *HIV-AIDS in the Media*, AIDS IN THE MODERN WORLD, <http://aidsinthemodernworld.wikidot.com/hiv-aids-in-the-media> (last visited Oct. 29, 2010).

<sup>162</sup> The MTV "Think" project was launched to provide information to teens about various social and political issues. Currently, information is available regarding, among many other subjects, relationships & sex, politics, crime and poverty. The project also offers information to parents to aid in their discussions with their children about difficult issues. MTV, THINK, <http://think.mtv.com> (last visited Oct. 29, 2010).

<sup>163</sup> *Sexting Leads To Teen Having To Register As A Sex Offender*, MTV, (Feb. 11, 2010), <http://www.mtv.com/news/articles/1631734/20100211/story.jhtml>.

www.athinline.org.<sup>164</sup> This campaign was developed to empower teens by educating them of the risks posed by communicating in the digital age, with the goal of reducing “digital abuse.”<sup>165</sup> MTV also aired a special in February 2010 showing stories of criminal prosecution for sexting, as well as other negative results from the practice.<sup>166</sup> Clearly the media, and MTV specifically, are addressing the issue to teens in a significant way. Thus, the media will continue to play a large role in educating teens. In fact, it may be the best way to reach teens who may be embarrassed to talk about these issues with their parents or disregard information given to them at school.

#### **IV. Conclusion**

It is unlikely that teens will stop engaging in thoughtless behavior, including sexting, any time soon. As with any other risky behavior, the best way to protect individuals is by thoroughly educating them of the risk they are taking, well in advance of their actual participation in the behavior. Parents, schools and the media all must take responsibility for educating teens about the risks involved with sexting if we wish to protect them from harmful consequences.

The legislature must ensure that one of the harmful consequences of innocent, albeit irresponsible, juvenile behavior is not a criminal penalty. While teens who send explicit images to unwilling recipients or who harass others via text should be held responsible for their actions, consenting teens should not be harmed by the imposition of criminal sanctions.

For all of these reasons, the New Jersey legislature must reconsider Senate Bill 2926. While well intentioned, the Bill fails to accomplish the legislative intent of protecting children from harm. To accomplish its goal, the legislature should adopt an affirmative defense to N.J.

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<sup>164</sup> Some of the parties include Common Sense Media, Frontline, The Anti-Defamation League, Facebook and Wired Safety. A THIN LINE, <http://www.athinline.org/about> (last visited Oct. 29, 2010).

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

<sup>166</sup> *Sexting in America: When Privates Go Public* (MTV television broadcast Feb. 14, 2010).

STAT. ANN. § 2C-24:4. This approach will guarantee that children are not harmed from the exploitation of child pornographers nor will they be harmed by overreaching criminal penalties. Finally, educational programs in public schools discussing the risks of sexting will better deter teens from participating in risky behavior, than educational programs and criminal penalties after a teen has already been swept into the criminal justice system.