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## ROMEO AND JULIET: TRAGEDY IN THE INFORMATION AGE

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### I. Introduction

Today's youngest generation, known colloquially as "Generation Z," has never known a life without technology. While demographers might disagree on when this generation actually began, marketers and trend forecasters characterize this group as those who were born during the fifteen year span from 1996 through 2011.<sup>2</sup> Since the first generation of iPhones hit the market in 2007,<sup>3</sup> "Generation Z is the first generation to be raised in the era of smartphones," and many from this generation "do not remember a time before social media."<sup>4</sup> If Generation Y<sup>5</sup> has been described as

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<sup>2</sup> Alex Williams, *Move Over, Millennials, Here Comes Generation Z*, NY TIMES (Sept. 18, 2015), [http://www.nytimes.com/2015/09/20/fashion/move-over-millennials-here-comes-generation-z.html?\\_r=0](http://www.nytimes.com/2015/09/20/fashion/move-over-millennials-here-comes-generation-z.html?_r=0).

<sup>3</sup> The iPhone revolutionized the cellular phone market, but was not the first of its kind. The precursor to the modern smartphone made its debut in 1993. It was called the "Simon Personal Communicator," retailed for approximately \$899, weighed approximately eighteen ounces, had little battery life, had a calendar, could take notes, send emails, messages, and of course, make phone calls. Ira Sager, *Before iPhone and Android Came Simon, the First Smartphone*, BLOOMBERG BUSINESS (June 29, 2012), <http://www.bloomberg.com/bw/articles/2012-06-29/before-iphone-and-android-came-simon-the-first-smartphone>.

<sup>4</sup> Williams, *supra* note 2.

<sup>5</sup> Those in "Generation Y" are also known as "the Millennials," and are described as those born roughly between the early-to-mid 1980's and the early-to-mid 1990's. *Generation Y Characteristics*, GENERATIONY.COM, <http://www.generationy.com/about-generation-y-in-the-workforce/characteristics/> (last visited Nov. 13, 2015).

being “constantly plugged into technology,”<sup>6</sup> then the next generation, where the average age for cell phone usage is six years old, is only more comfortable in the digital world.<sup>7</sup> The newer generations of smartphones have the capability to take, send, and receive photographs,<sup>8</sup> and open up a new realm of dangers for unwary users. Given that these devices are taken for granted, does Generation Z actually appreciate the risks associated with their picture taking and information sharing? The unfortunate answer is very little, if at all.

Let’s begin with a hypothetical, but all too real, scenario. Mary<sup>9</sup> is a fourteen-year-old girl, and a freshman in high school. She just started dating her first boyfriend, George, who is sixteen, and a junior in high school. They had a normal teenage relationship, until George asks Mary for a nude picture via text message. Trusting in her boyfriend, Mary thinks nothing of taking a nude “selfie”<sup>10</sup> and sending it in a reply text message. Maybe Mary is hesitant and uses Snapchat,<sup>11</sup> where theoretically the picture disappears after ten seconds.

What possible scenarios can result from this exchange? In the first and best case scenario, George is honorable, and keeps the photograph for himself forever, or deletes it, and arguably no one is hurt. In the second and worst case scenario, George shares the photograph with other people, either

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<sup>6</sup> *Id.*

<sup>7</sup> *Study Finds Average age of Kids when they get First Cell Phone is Six*, ABC7CHICAGO.COM (Apr. 7, 2015), <http://abc7chicago.com/technology/study-53%-of-kids-get-a-cell-phone-at-age-6/637197/>.

<sup>8</sup> A study done in 2004 found that, despite being new to the market, approximately 36% of phones at that time had the capability of taking photographs. It further predicted that this percentage would rise to 55% in 2005 and to 87% in 2009. Birgitta Forsberg, *Restrictions Placed on Camera Phones/More Places say they may Violate Privacy, security*, SFGATE.COM (May 23, 2005, 4:00 AM), <http://www.sfgate.com/business/article/Restrictions-placed-on-camera-phones-More-2633131.php>.

<sup>9</sup> All names used in this note are fictional. It should also be noted that the actions (and consequences) described in this note are not limited to performance by males, nor are the crimes committed only against females.

<sup>10</sup> As used in this note, the term “selfie” is used to describe a photograph which one takes of oneself, typically with a smartphone or webcam, and either sent to another person or shared on social media. Selfies can be of more than one person, though the picture-taker must be in the photograph, and not all selfies are explicit. See Adrienne LaFrance, *When Did Group Pictures Become ‘Selfies’?*, THE ATLANTIC (Mar. 25, 2014), <http://www.theatlantic.com/technology/archive/2014/03/when-did-group-pictures-become-selfies/359556/>.

<sup>11</sup> Snapchat is a mobile application which allows for the sending of photographs, videos, and messages. In theory, the sender of the photograph can choose how long the receiver can see the picture (up to 10 seconds). See *Support*, SNAPCHAT.COM, <https://support.snapchat.com/en-US/about/snaps> (last visited Feb. 26, 2016); See also Larry Magrid, *What is Snapchat and Why do Kids Love It and Parents Hate It?*, FORBES (May 1, 2013), <http://www.forbes.com/sites/larrymagrid/2013/05/01/what-is-snapchat-and-why-do-kids-love-it-and-parents-fear-it/#705193d72551>.

by posting it on social media or by forwarding the picture via text message. Even Snapchat would not protect Mary's privacy, since users can screenshot Snapchat messages and save them to their phone.<sup>12</sup>

What penalties can George face? What consequences will Mary suffer? This note will answer those questions by discussing the effectiveness and the long-term consequences of criminal prosecutions for teenagers who engage in the distribution of nude photographs using smartphones or social media.

Part II of this note will describe the phenomenon known as "sexting," including the long-term effects of the scenario described above. Part III will discuss the current approaches to prosecution both at the federal level and the state level, the consequences of sex offender registration, and its applicability to juveniles. Part IV of this note will compare the approaches of Arizona, Virginia, and New Jersey, and expose a loophole that could subject the juvenile actor to criminal liability in New Jersey. Part V of this note will argue that those who fall through the loophole should be prosecuted, but under a statute which is appropriate for adolescents, and will also propose the statute that New Jersey should ultimately adopt in order to address this phenomenon. Finally, part VI of this note will conclude my arguments and stress the importance of the role that parents and educators can play in supplementing an appropriate statute.

## II. What is "Sexting" & Why is it a Problem?

The earliest known occurrence of the term "sexting" occurred in 2005, when it was utilized in a United Kingdom news article.<sup>13</sup> The term is now widely used to describe "the sending of sexually explicit photos, images, text messages, or emails by using a cell phone or other mobile device."<sup>14</sup> The

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<sup>12</sup> The Snapchat guidelines warn of this possibility, and even go so far as to warn users away from taking certain types of photographs, especially when one or both users is a minor. Penalties are possible for those who send these photographs, but there is nothing that the app can do if another user screenshots a picture. *Community Guidelines*, SNAPCHAT.COM (last visited Nov. 13, 2015), <https://support.snapchat.com/a/guidelines>.

<sup>13</sup> Tracy Adams, *Inquiry into Cyber-Safety: A Submission to the Joint Select Committee on Cyber-Safety Parliament of Australia*, BOYSTOWN (June 25, 2010), <https://boystown.com.au/downloads/rep/BT-Submission-Cyber-Safety.pdf>.

<sup>14</sup> *Sexting*, DICTIONARY.COM, <http://www.dictionary.com/browse/sexting> (last visited Feb. 28, 2016, 11:03 PM); *Sexting*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=sexting> (last visited Mar. 12, 2016); *The*

combination of smartphones and social media means that sexting can occur in many different forms.<sup>15</sup> When performed by adults, it is an increasingly common and generally accepted form of intimate communication, as long as all involved parties have given consent.<sup>16</sup> A study conducted at Drexel University found a correlation between sexting and sexual satisfaction, and found that among the adults surveyed online between the ages of eighteen and eighty-two, 88% reported having sexted at least once, and 82% reported sexting in the past year.<sup>17</sup> Of that same survey sample, 74% said that they sexted in the context of a committed relationship, and 43% said they sexted in the context of a casual relationship.<sup>18</sup> This survey was conducted in an attempt to change the dominant view of sexting as a “risky activity among teens” to being viewed as “a potential positive force in a relationship and a way to potentially enhance open sexual communication.”<sup>19</sup>

While sexting between adults is generally socially acceptable behavior, when minors engage in this behavior, the consequences are often not considered or are simply disregarded, and can have life-altering results. Although individual variation is possible, the average brain is not fully developed by

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*Definition of Sexting*, TEACHTHOUGHT.COM (Feb. 18, 2013), <http://www.teachthought.com/the-future-of-learning/digital-citizenship-the-future-of-learning/the-definition-of-sexting/>.

<sup>15</sup> Snapchat is an especially popular platform for sexting activities. Advertised as an app that can send photos that self-destruct after between 1 to 10 seconds. However, in 2013 a forensic examiner in Utah proved that Snapchats do not really disappear when he was able to pull dozens of supposedly deleted photographs from phones. When combined with the rather commonplace fact that a receiver with quick fingers can screenshot a Snapchat, this platform no longer seems to be such a secure method of sexting. Kashmir Hill, *Snapchats Don't Disappear: Forensics Firm Has Pulled Dozens of Supposedly-Deleted Photos from Android Phones*, FORBES (May 9, 2013), <http://www.forbes.com/sites/kashmirhill/2013/05/09/snapchats-dont-disappear/>; See also Kashmir Hill, *FTC Tells Snapchat To Stop Lying About Photos Disappearing*, FORBES (May 8, 2014), <http://www.forbes.com/sites/kashmirhill/2014/05/08/government-tells-snapchat-to-stop-lying-about-photos-disappearing/>.

<sup>16</sup> One way that sexting between adults can go wrong is known as “revenge porn.” Revenge porn is when a partner posts or shares pictures of an ex-partner without their permission. New Jersey has criminalized this behavior as harassment, or possibly invasion of privacy. In certain circumstances, the victim can obtain a restraining order against the harasser. In all circumstances, victims can press charges. However, there is no guarantee that the victim will be able to undo the damage caused by the dissemination of these pictures or videos. *What is Revenge Porn and How Can I Protect Myself?*, LEG. SVCS. OF N.J., <http://www.lsnjlaw.org/Family-Relationships/Domestic-Violence/NJ-Laws-DV/Pages/What-Is-Revenge-Porn.aspx#.Vka0LLerTDc> (last reviewed Sept. 21, 2016).

<sup>17</sup> Emanuella Grinberg, *Online survey finds 8 in 10 adults have engaged in sexting*, CNN (Aug. 8, 2015, 7:11 PM), <http://www.cnn.com/2015/08/08/health/sexting-adults-online-survey-feat/>.

<sup>18</sup> See *id.*

<sup>19</sup> Rachel Zimmerman, *Sexting Among Adults May Be More Common Than You Think, Survey Suggests*, WBUR.ORG (Aug. 14, 2015), <http://www.wbur.org/commonhealth/2015/08/14/sexting-adults-relationships>.

the age of eighteen.<sup>20</sup> The pre-frontal cortex is one of the last areas of the brain to develop, and is not fully developed until twenty-five years of age.<sup>21</sup> The prefrontal cortex is responsible for decision-making, impulse control, and risk management.<sup>22</sup> Teenagers are more likely to engage in risky behavior without considering the long-term ramifications of those actions due to their undeveloped prefrontal cortexes.

A study conducted by the National Campaign to Prevent Teen and Unplanned Pregnancy found that 22% of teen<sup>23</sup> girls and 18% of teen boys had “sent or posted online, nude or semi-nude pictures or videos of themselves.”<sup>24</sup> The first mistake that these teenagers make is to assume that everything they send will remain private.<sup>25</sup> However, there is no guarantee that the recipients will not pass on these pictures to unintended third parties, who could be complete strangers. These images could end up on the internet, creating a digital record that can be uncovered by future employers or schools.

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<sup>20</sup> “In the past, many experts believed that the brain may have been completely developed by the mid to late teens. Then along came some evidence to suggest that development may last until at least age twenty. These days, a consensus of neuroscientists agree that brain development likely persists until *at least* the mid-twenties – possibly until the thirties . . . . [This] means that ‘legal adults’ (those age 18+) are allowed to make adult decisions, without fully mature brains.” *At What Age is the Brain Fully Developed?* MENTAL HEALTH DAILY, <http://mentalhealthdaily.com/2015/02/18/at-what-age-is-the-brain-fully-developed/> (last visited Sept. 8, 2015).

<sup>21</sup> Mariam Arain et al., *Maturation of the adolescent brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 453 (Apr. 2, 2013), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/pdf/ndt-9-449.pdf>.

<sup>22</sup> *At What Age is the Brain Fully Developed?* MENTAL HEALTH DAILY, <http://mentalhealthdaily.com/2015/02/18/at-what-age-is-the-brain-fully-developed/> (last visited Sept. 8, 2015); “The prefrontal cortex offers an individual the capacity to exercise good judgment when presented with difficult life situations. The prefrontal cortex, the part of the frontal lobes lying just behind the forehead, is responsible for cognitive analysis, abstract thought, and the moderation of correct behavior in social situations.” *Arain et al.*, *supra* note 21, at 453.

<sup>23</sup> “Teen” was defined in this survey as being those between the ages of thirteen through nineteen. *Sex and Tech: Results from a Survey of Teens and Young Adults*, THE NAT’L CAMPAIGN TO PREVENT TEEN & UNWANTED PREGNANCY (2008), [https://thenationalcampaign.org/sites/default/files/resource-primary-download/sex\\_and\\_tech\\_summary.pdf](https://thenationalcampaign.org/sites/default/files/resource-primary-download/sex_and_tech_summary.pdf) [hereinafter *Sex & Tech*].

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

<sup>25</sup> The same study found that 25% of teen girls and 33% of teen boys had nude or semi-nude images, which were originally meant for someone else, shared with them. The study also reported that 36% of teen girls and 39% of teen boys said that it was common for nude or semi-nude photos to get shared with people other than the intended recipient. This apparent acceptance of the risk is baffling when faced with the statistic that 75% of teens agree that sending sexually suggestive content “can have serious negative consequences.” *Id.*

Let's go back to the hypothetical world in which Mary has sent George a nude picture in response to his request.<sup>26</sup> To her dismay, George did not follow the honorable path, and has sent the picture to a few of his friends, and before long, it is all over the school. Mary has even heard rumors that the picture has been spotted on the internet. What lies in store for Mary?

### ***A. A Victimless Crime?***

Some commentators and legal reform advocates argue for the decriminalization of some sexting behavior, believing that “the key is to distinguish between voluntarily sharing a photo and having it shared without your consent.”<sup>27</sup> A victimless sexting occurs when a juvenile shares a photograph of themselves knowingly and without coercion with one other person, and that photograph stays with the recipient.

Seventeen-year-old Cormega Copening and his sixteen-year-old girlfriend Brianna Denson, both of Fayetteville, North Carolina, provide a textbook example of the above assertion.<sup>28</sup> While “investigating another incident,”<sup>29</sup> Copening’s phone was seized and searched, and multiple nude photographs of both himself and a girl, who later turned out to be his girlfriend, were found by the police.<sup>30</sup> No evidence was ever found that the photographs were distributed to anyone else besides the intended parties.<sup>31</sup> Both teenagers were arrested, and slapped with felony charges.<sup>32</sup> Denson was originally charged with two felony counts of sexual exploitation of a minor, and the warrant had her

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<sup>26</sup> This is not to say that these messages are only sent in response to outside pressure. The *Sex & Tech* study found that when speaking to teen girls, 66% have sent sexually suggestive content to be “fun or flirtatious,” 52% reported doing so as a “sexy present” for their boyfriend, 44% said they sent sexually suggestive messages or images as “a joke,” and 34% say they sent/posted sexually suggestive content to “feel sexy.” *Id.*

<sup>27</sup> Joanna R. Lampe, Note, *A Victimless Sex Crime: The Case for Decriminalizing Consensual Teen Sexting*, 46 *U. MICH. J. L. REFORM* 703 (2013); Hanna Rosin, *Why Kids Sext*, THE ATLANTIC (Nov. 2014), [http://www.theatlantic.com/magazine/archive/2014/11/why-kids-sext/380798/?single\\_page=true](http://www.theatlantic.com/magazine/archive/2014/11/why-kids-sext/380798/?single_page=true).

<sup>28</sup> Kelly McLaughlin, *High school quarterback and his girlfriend both CHARGED by cops for privately sharing nude photos of themselves*, DAILYMAIL.COM (Sept. 5, 2015, 4:35 PM), <http://www.dailymail.co.uk/news/article-3223533/North-Carolina-hgh-school-quarterback-girlfriend-charged-adults-exchanging-nude-photos.html>.

<sup>29</sup> The article did not mention what this incident was. *Id.*

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

<sup>31</sup> Robby Soave, *These Teens Kept Their Sexting Private, But Cops Found Out. Now They Face Sex Offender Registry, Jail*, REASON.COM (Sept. 1, 2015, 2:40 PM), <http://reason.com/blog/2015/09/01/these-teens-kept-their-sexting-private-b>.

<sup>32</sup> *McLaughlin*, *supra* note 28.

listed as both the offender and the victim of the crime.<sup>33</sup> She eventually accepted a deal, which allowed her to plea to a misdemeanor charge and was sentenced to a year's probation with a condition that she does not own a cell phone for the duration of probation.<sup>34</sup> If she were convicted of the original charges, she would have been required to register as a sex offender and could have served prison time.<sup>35</sup> Copening was charged with two counts of second-degree sexual exploitation of a minor, and three counts of third-degree sexual exploitation of a minor, and if convicted, he would have been required to register as a sex offender and could have served prison time.<sup>36</sup> Luckily, he was also given a year's probation in exchange for pleading guilty to two misdemeanor counts of disseminating harmful material to minors.<sup>37</sup> If both students abide by the terms of their probation, their misdemeanor charges will be dropped at the end of the year and they will both walk away with clean slates.<sup>38</sup> However, they will not have clean slates, since it is doubtful that they will ever forget this experience, and their names and faces were in the news for months. While the actions of Copening and Denson might have been "victimless," there is no way that the sender can guarantee the integrity of the receiver, and very quickly the victimless crime can turn into a tragedy. This behavior must be attacked at the source, which includes criminalizing the consensual sending of these messages. Before we address the necessary remedy, let us first look at what kind of tragedy can result from sexting.

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<sup>33</sup> Paul Woolverton, *NC Law: Teens who take nude selfie photos face adult sex charges*, FAYOBSERVER.COM (Sept. 2, 2015), [http://www.fayobserver.com/news/local/nc-law-teens-who-take-nude-selfie-photos-face-adult/article\\_ce750e51-d9ae-54ac-8141-8bc29571697a.html](http://www.fayobserver.com/news/local/nc-law-teens-who-take-nude-selfie-photos-face-adult/article_ce750e51-d9ae-54ac-8141-8bc29571697a.html).

<sup>34</sup> The misdemeanor charge was for "disseminating harmful material to minors." *Id.*

<sup>35</sup> *See id.*

<sup>36</sup> [McLaughlin](#), *supra* note 28.

<sup>37</sup> Greg Barnes, *Fayetteville Teen Takes Deal in Sexting Case*, ABC11.COM (Sept. 11, 2015), <http://abc11.com/news/fayetteville-teen-takes-plea-deal-in-sexting-case/980261/>.

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

## ***B. Possible Consequences***

Sexting has been linked to post traumatic stress disorder (hereinafter “PTSD”) by “numerous cases in which victims of sexting have suffered similar psychological responses as those of rape victims.”<sup>39</sup> “Some psychological symptoms experienced by teen sexting victims include flashbacks, isolation, self-destructive behaviors, and sleep disturbance” and the trauma of “victimization can have a lasting impact.”<sup>40</sup> For adolescent girls, this risk is critical. When combined with the normal hormonal and social stresses that come with puberty, the fact that girls are more likely to be vilified and tormented by peers for the publication of sexually explicit images can “create feelings of worthlessness leading to a variety of self-destructive behaviors.”<sup>41</sup>

In 2009, a thirteen-year-old Florida resident Hope Witsell was in middle school.<sup>42</sup> During the spring, she had sexted a photograph of her breasts to her boyfriend.<sup>43</sup> Another classmate had sent the photograph to other students from six different schools in the area, and before long the photo went viral.<sup>44</sup> She soon became the target of vicious bullying and taunting at school, with friends reportedly having to escort her in the halls so that she would not be hit or pushed into lockers by her tormentors.<sup>45</sup> Her parents eventually found out about the photograph from the school and gave her a talk about the dangers of sex and technology.<sup>46</sup> Unfortunately, she did not confide in her parents about the true extent of the bullying and how she was feeling, and she hung herself in September of 2009.<sup>47</sup> Horrifyingly enough, the abuse did not stop there, as her sister reported reading vicious comments on

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<sup>39</sup> Elizabeth Donovan, *How the Social Network is Changing Teen Victimization*, PSYCHOLOGY TODAY (May 2, 2011) <https://www.psychologytoday.com/blog/youth-and-tell/201105/how-the-social-network-is-changing-teen-victimization>.

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

<sup>41</sup> John K. Cornwell, *Sexting: 21st-Century Statutory Rape*, 66 SMU L. REV. 111, 120 (2013).

<sup>42</sup> See Randy Kaye, *How a cell phone led to girl's suicide*, CNN (Oct. 7, 2010, 3:51 PM), <http://www.cnn.com/2010/LIVING/10/07/hope.witsells.story/>.

<sup>43</sup> There was no information given on how the classmate got the photograph, only that she had somehow “got her hands on it.” *Id.*

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

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

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

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



Hope's Myspace and Facebook pages even after her death.<sup>48</sup> Just the year before, Jessica Logan of Ohio, who was eighteen and a senior in high school, suffered the same fate, under chillingly similar circumstances.<sup>49</sup> While on spring break in 2008, Jessica sent a nude photograph to her boyfriend.<sup>50</sup> When they broke up, he promptly forwarded the pictures to other girls in the school.<sup>51</sup> After months of being attacked and tortured at school, she hung herself in July of 2008.<sup>52</sup>

While suicide may be a rather extreme result in these situations, the consequences can take several other forms. Once a photograph is in circulation on the internet, a permanent digital record is created, and the social stigma that results from a sexting scandal can follow the victim for life. A growing number of employers are utilizing social media to investigate potential employees.<sup>53</sup> A study conducted by CareerBuilder in 2012 found that 37% of employers use social networking sites to screen potential employees.<sup>54</sup> These numbers increased in 2015, when a new survey for CareerBuilder found that 42% of employers use social networking sites to research candidates.<sup>55</sup> College recruiters also utilize the internet to screen applicants; while teachers, coaches, and even strangers can find the photographs with startling ease.<sup>56</sup>

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

<sup>49</sup> Mike Celizic, *Her Teen Committed Suicide Over Sexting*, TODAY (Mar. 9, 2009, 9:26 AM), <http://www.today.com/parents/her-teen-committed-suicide-over-sexting-2D80555048>.

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

<sup>51</sup> *Id.*

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

<sup>53</sup> Jacquelyn Smith, *How Social Media Can Help (Or Hurt) Your Job Search*, FORBES (Apr. 16, 2013, 4:20 PM), <http://www.forbes.com/sites/jacquelynsmith/2013/04/16/how-social-media-can-help-or-hurt-your-job-search/>.

<sup>54</sup> When CareerBuilder asked employers why they utilize social media to research employees, 65% said they do it to see if the job seeker presents himself or herself professionally; 51% want to know if the candidate is a good fit for the company culture; and 45% want to learn more about his or her qualifications. *Id.*

<sup>55</sup> Olivera Perkins, *More than half of employers now use social media to screen job candidates, poll says; even send friend requests*, CLEVELAND.COM (May 14, 2015, 12:42 PM), [http://www.cleveland.com/business/index.ssf/2015/05/more\\_than\\_half\\_of\\_employers\\_no\\_1.html](http://www.cleveland.com/business/index.ssf/2015/05/more_than_half_of_employers_no_1.html).

<sup>56</sup> See *Sex & Tech*, *supra* note 23.

### III. Methods of Prosecution

Given that the average age of consent in the United States is sixteen years old, minors can be engaging in legal sexual activity, but the minute that activity occurs in picture form, it becomes illegal.<sup>57</sup> In the past, juveniles have been prosecuted under existing state laws for sexting behavior. One area of prosecution has fallen under existing child pornography laws, since under Federal law, child pornography is defined as “any visual depiction of sexually explicit conduct involving a minor.”<sup>58</sup> In this context, “sexually explicit conduct” does not require the minor to be engaging in sexual activity, and so a naked picture of a minor qualifies.<sup>59</sup> The penalties that accompany these charges, however, are thought to be unusually harsh.<sup>60</sup> For example, Wisconsin in 2008, filed charges against seventeen-year-old Alex Phillips for possession of child pornography, sexual exploitation of a child by filming, and defamation.<sup>61</sup> He had posted naked pictures of his sixteen-year-old ex-girlfriend on Myspace, and refused to take them down when warned by the police that he could face criminal charges.<sup>62</sup> He faced three and a half years for the possession charges, twelve and a half years for the exploitation charges, nine months for the defamation charges, and steep fines for all three.<sup>63</sup> To make matters worse, a juvenile convicted of a sex offense in Wisconsin may be required to register as a sex offender.<sup>64</sup> While Alex’s actions were wrong and certainly deserving of punishment, the consequences of his childish

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<sup>57</sup> *Legal Age of Consent by State*, AGE OF CONSENT BY STATE, <https://www.age-of-consent.info/> (last visited Oct. 22, 2016).

<sup>58</sup> U.S. DEPT. OF JUSTICE, CITIZEN’S GUIDE TO U.S. FEDERAL LAW ON CHILD PORNOGRAPHY (2015), <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-pornography> [hereinafter CITIZEN’S GUIDE] (last updated July 6, 2015); See Sarah Thompson, Comment, *Sexting Prosecutions: Minors as a Protected Class from Child Pornography Charges*, 48 U. MICH. J. L. REFORM CAVEAT 11-12 (2014), [http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1039&context=mjlr\\_caveat](http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1039&context=mjlr_caveat) (arguing that prosecutors should be unable to bring child pornography charges against minors).

<sup>59</sup> CITIZEN’S GUIDE, *supra* note 58.

<sup>60</sup> See *Cornwell*, *supra* note 41, at 124.

<sup>61</sup> Complaint at 1, *State v. Phillips*, No. 08CF309 (Wis. Cir. Ct. May 20, 2008), <http://www.thesmokinggun.com/file/teen-nabbed-naked-myspace-photos?page=1>.

<sup>62</sup> See *id.* at 2.

<sup>63</sup> *Id.* at 1.

<sup>64</sup> Monica Steiner, *Teen Sexting in Wisconsin*, NOLO, <http://www.criminaldefenselawyer.com/resources/teen-sexting-wisconsin.htm> (last visited Nov. 15, 2015).

actions and subsequent refusal of the police's request could have followed him for the rest of his life. Alex's story luckily does not end in tragedy. In return for pleading guilty to causing mental harm to a child, a Class F felony under Wisconsin state law,<sup>65</sup> the state dropped the other charges.<sup>66</sup> Alex was ultimately sentenced to three years of probation and 100 hours of community service.<sup>67</sup>

A similar situation arose in New Jersey in 2009, when a fourteen-year old girl was arrested and charged with possession and distribution of child pornography.<sup>68</sup> She had posted nearly thirty explicit nude photographs of herself on Myspace, intended for her boyfriend.<sup>69</sup> While this is not a case where photographs were sent without her permission to third parties, it helps to illustrate the nationwide trend of prosecuting nude photographs taken by minors under unnecessarily harsh laws.<sup>70</sup> In the end, she was ordered to undergo at least six months of counseling and complete probation.<sup>71</sup> The agreement stated that if she successfully completed the probation, all charges would be dropped.<sup>72</sup> If convicted of the original charges, she faced up to seventeen years in prison, and could have been required to register as a sex offender.<sup>73</sup> While her actions were foolish and ill-advised, sex offender

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<sup>65</sup> WIS. STAT. §§ [939.50\(3\)\(f\)](#), [948.04 \(2001\)](#); A Class F felony is punishable by a fine not above \$25,000 and/or not more than twelve years and six months in prison.

<sup>66</sup> Sarah L. Rankin, *Statutory Rape and Teen "Sexting" Laws: The Consequences of Poorly Crafted Legislation*, 7 INQUIRIES J., no. 4, 2015, <http://www.inquiriesjournal.com/articles/1027/statutory-rape-and-teen-sexting-laws-the-consequences-of-poorly-crafted-legislation>.

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

<sup>68</sup> The young girl's name was not released in any news article, since she was a minor. *Passaic teen faces child porn charges for posting nude pics of herself on MySpace*, NJ.COM,

[http://www.nj.com/news/index.ssf/2009/03/passaic\\_14yearold\\_arrested\\_for.html?date\\_links=](http://www.nj.com/news/index.ssf/2009/03/passaic_14yearold_arrested_for.html?date_links=) (Mar. 27, 2009)

[hereinafter *Passaic teen*]; See also *Nude Myspace Teen Gets Probation*, NBCNEWYORK.COM,

<http://www.nbcnewyork.com/news/local/Nude-MySpace-Teen-Gets-Probation.html> (last visited Nov. 15, 2015).

<sup>69</sup> *Passaic teen*, *supra* note 68.

<sup>70</sup> In Fayetteville, North Carolina, two 16-year-old sweethearts were caught exchanging nude photographs. They were charged with exploiting a minor, which could have bought them years in prison and decades on the sex offender registry. An outcry led them to eventually be allowed to plead to misdemeanors, and they were both placed on a year's probation. Erik Eckholm, *Prosecutors Weigh Teenage Sexting: Folly or Felony?*, NEW YORK TIMES (Nov. 13, 2015), <http://www.nytimes.com/2015/11/14/us/prosecutors-in-teenage-sexting-cases-ask-foolishness-or-a-felony.html? r=0>.

<sup>71</sup> *Passaic teen*, *supra* note 68.

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

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

registry has wide-ranging and harsh long term consequences which are inappropriate in its application to most juveniles.<sup>74</sup>

### ***A. Sex Offender Registration***

Under federal law, registration is mandated by the Sex Offender Registration and Notification Act (hereinafter “SORNA”),<sup>75</sup> and it applies to both adults and juveniles.<sup>76</sup> Under SORNA, juveniles who are at least fourteen years of age and are adjudicated delinquent for a crime comparable to or more severe than an aggravated sexual abuse crime as defined in federal law are required to register as sex offenders.<sup>77</sup>

Federal registration includes a total of fourteen pieces of information to be provided either by the offender, or by the jurisdiction.<sup>78</sup> The offender is required to provide, to each jurisdiction in which they are either living, working, or going to school, (1) their name, (2) their social security number, (3) their residential address, (4) the address at which they are employed, (5) the address at which they are a student, (6) their license plate number, and (7) a description of their vehicle.<sup>79</sup> They must keep this registration current, and must inform the jurisdiction of any changes to this information within three days after the change occurs.<sup>80</sup> The jurisdiction in which the offender registers, must ensure that (1) a physical description, (2) the criminal history of the offender, (3) a current photograph, (4) current

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<sup>74</sup> See Eli Lehrer, *Juveniles Don't Belong on the Sex Offender Registry*, THE DAILY CALLER (Mar. 9, 2016, 12:47 PM), <http://dailycaller.com/2016/03/09/juveniles-dont-belong-on-the-sex-offender-registry/>.

<sup>75</sup> 42 U.S.C. § 16901 (2012).

<sup>76</sup> *The negative impact of registries on youth: Why are youth different from adults?*, JUSTICE POLICY INSTITUTE, [http://www.justicepolicy.org/uploads/justicepolicy/documents/08-08\\_fac\\_sornakidsaredifferent\\_jj.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/08-08_fac_sornakidsaredifferent_jj.pdf) (last visited Oct. 22, 2016); While this information is interesting for comparison purposes to state approaches, juveniles are only required to register under federal law if they qualify as Tier III offenders. 42 U.S.C. § 16911 (2012).

<sup>77</sup> *Juvenile Sex Offender Registration & SORNA*, NAT'L CONF. OF ST. LEG. (May, 2011), <http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-sex-offender-registration-and-sorna.aspx>.

<sup>78</sup> In the context of SORNA, “jurisdiction” is defined as a State, the District of Columbia, the five United States territories (Puerto Rico, Guam, American Samoa, Northern Mariana Islands, United States Virgin Islands), and federally recognized Native American tribes. 42 U.S.C. §§ 16911, 16914 (2012).

<sup>79</sup> The statute is open ended, providing that the offender must also provide “any other information required by the Attorney General.” § 16914(b)(8).

<sup>80</sup> § 16913(c).

fingerprints, (5) current palm prints, (6) a DNA sample, and (7) a photocopy of a valid driver's license or other identification card, are included in the registry for the offender.<sup>81</sup> Each state is required to keep such a registry, and the Attorney General is responsible for issuing the guidelines and regulations governing them.<sup>82</sup>

It is possible for sexting to be a crime under federal law. In order to be subjected to federal registration laws, a juvenile must be classified as a Tier III offender.<sup>83</sup> Tier III offenders are those who commit an offense such as sexual abuse or aggravated sexual abuse, abusive sexual contact against a minor under the age of thirteen; or those whose sex offenses involved the kidnapping of a minor; or those whose sex offenses occur after the offender becomes a tier II sex offender.<sup>84</sup> Since Tier II offenders<sup>85</sup> do include those convicted of possession or distribution of child pornography, it is possible for a juvenile to be subject to registration for sexting behavior. In the event that a juvenile is adjudicated delinquent under federal law as a Tier II offender, and the juvenile reoffends and is prosecuted again under federal law, they would then be a Tier III offender and would be subject to registration.<sup>86</sup> However, federal prosecution of juveniles for sexting is unlikely, since the Federal Juvenile Delinquency Act (hereinafter "FJDA") provides that, where possible, juveniles should be prosecuted in state courts.<sup>87</sup>

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<sup>81</sup> [§ 16914\(b\)](#).

<sup>82</sup> [§ 16912](#).

<sup>83</sup> [§ 16911](#).

<sup>84</sup> This exempts "kidnapping[s] of a minor" committed by a parent or guardian. [§ 16911\(4\)](#).

<sup>85</sup> Tier II offenders are those whose offense is committed (includes attempt and conspiracy) against a minor, when the offense is comparable or more severe to: sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, abusive sexual contact, or involves the use of a minor in a sexual performance, the solicitation of a minor to practice prostitution, or the production and distribution of child pornography. [§ 16911\(3\)\(A\)-\(B\)](#).

<sup>86</sup> See [§ 16911\(8\)](#).

<sup>87</sup> In order to be prosecuted in federal court, the Attorney General must certify that (1) the juvenile court does not have jurisdiction or refuses jurisdiction, (2) the State does not have available programs to deal with juveniles, or (3) the juvenile is charged with a crime of violence under the Controlled Substances Import and Export Act and there is a substantial Federal interest in the case. [18 U.S.C. § 5032 \(2012\)](#).

In addition to the federal registry, the Jacob Wetterling Act, and its subsequent amendments,<sup>88</sup> mandate that the states create and maintain their own systems of registration, and maintain them in compliance with SORNA.<sup>89</sup> All fifty states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, the Northern Mariana Islands, and some Native American Tribes currently maintain sex offender registries.<sup>90</sup> There is much variation among the state registries and what they require from registrants, which produces uncertainties and difficulties for lawmakers when trying to implement SORNA.<sup>91</sup> The three main ways that the states can vary are in the extent to which states distinguish among registrants, the criteria used to classify registrants, and the systems and processes used to establish designations.<sup>92</sup> For juvenile registration requirements, the variation is no less drastic. As of 2011, at least thirty-seven states<sup>93</sup> require juveniles adjudicated delinquent of certain offenses<sup>94</sup> to register as a sex offender. In the remaining fifteen states,<sup>95</sup> no juvenile who is adjudicated delinquent is required to register.

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<sup>88</sup> The full name of the original statute was Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, [42 U.S.C. § 14071](#). Enacted in 1994, it was amended by Megan’s Law in 1996, which required public notification of sex offenders in the community, and later in 2006 by the Adam Walsh Child Protection and Safety Act (AWA). One of the most significant aspects of the AWA is the creation of SORNA. RICHARD G. WRIGHT, *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS* 57-60 (2nd ed. 2015). The Jacob Wetterling Act was repealed, and the AWA took its place. [42 U.S.C. § 16901 et. seq.](#)

<sup>89</sup> The statute conditions funding to the states upon their implementation of SORNA. [42 U.S.C. § 16925\(a\) \(2012\)](#). In general, they had three years after the enactment of the Act in 2006, or one year after the software to be used was available, whichever was later. [42 U.S.C.S. § 16924\(a\) \(2012\)](#); *See also* Andrew J. Harris, Christopher Lobanov-Rostovsky, & Jill S. Levenson, *Widening the Net: The Effects of Transitioning to the Adam Walsh Act’s Federally Mandated Sex Offender Classification System*, 37 CRIM. JUST. & BEHAV. 503 (May, 2010) <http://www.ilvoices.com/media/ea99d28960ec776bffff84baffffe415.pdf>.

<sup>90</sup> *Sex Offender Registry Websites*, FBI, <https://www.fbi.gov/scams-safety/registry> (last visited Mar. 10, 2016).

<sup>91</sup> [Harris et al.](#), *supra* note 89 at 505-06.

<sup>92</sup> *Id.*

<sup>93</sup> These states are: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin and Wyoming. *Id.*

<sup>94</sup> In at least 27 states, sex offender registration law requires that juvenile who is adjudicated delinquent must register if they commit a sex offense “for which an adult in the same jurisdiction would be required to register.” In 10 other states (Arizona, Indiana, Massachusetts, North Carolina, Oklahoma, Rhode Island, Utah, Virginia, Washington and Wisconsin) give courts discretion to weigh fact-specific circumstances to determine whether registration will be required of an adjudicated juvenile. *Id.*

<sup>95</sup> These states are: Alaska, Connecticut, Georgia, Hawaii, Maine, Nebraska, New Mexico, New York, Pennsylvania, Tennessee, Vermont, West Virginia, District of Columbia, Guam and Puerto Rico. *Id.*

#### IV. Compare & Contrast State Approaches

The states of Arizona and Virginia represent the two extreme ends of the spectrum for laws used to prosecute sexting, and New Jersey falls somewhere in the middle. Arizona has a statute which is specifically tailored to deal with sexting, and there is no chance for a juvenile to end up on a sex offender registry as a result. On the other hand, Virginia has no dedicated law, and juveniles whose sexting behavior ends up before authorities can only be prosecuted under child pornography laws, or not prosecuted at all. In this section, I will first describe New Jersey's current approach, then explain Arizona's and Virginia's for comparison.

##### *A. New Jersey*

New Jersey's current statutory scheme addressing teen sexting behavior falls under what has been appropriately referred to as the "learn about sexting" approach.<sup>96</sup> This is a rehabilitative approach to handling minors who engage in sexting behavior, and it involves educating the minor about the possible dangers and consequences of sexting.<sup>97</sup>

The use of diversionary programs as an alternative to the formal court system has a long history in the United States. The precursor to our modern diversionary program was the creation of juvenile courts in 1899, which "soon encompassed all children who violated local or state laws or who were physically or morally neglected or abused . . . [and] status offenders: juveniles who commit offenses applicable only to children that would not be considered crimes if committed by adults."<sup>98</sup> From the very start, the goal was to rehabilitate the juveniles in question, not to punish them.<sup>99</sup> While the system was certainly not perfect,<sup>100</sup> it marked an acknowledgment of the fact that the adult court

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<sup>96</sup> Ronak Patel, *Taking it easy on teen pornographers: States respond to Minor's Sexting*, [13 J. HIGH TECH. L. 574, 604 \(2013\)](#).

<sup>97</sup> *See id.* at 604-05.

<sup>98</sup> S'Lee Arthur Hinshaw II, Comment, *Juvenile Diversion: An Alternative to Juvenile Court*, [1993 J. DISP. RESOL. 305, 306 \(1993\)](#) (internal citations omitted).

<sup>99</sup> *See id.* at 307.

<sup>100</sup> Juries and lawyers were generally excluded from juvenile proceedings, and transparency was severely limited. It was not until the late 1960's and 1970's that the Supreme Court issued decisions which extended due process rights to

system was not an appropriate venue to decide the fate of minors. By the late 1960's, pre-trial diversionary programs had become a popular notion among scholars, and had evolved into a "major correctional movement," and by the late 1970s, hundreds of diversionary programs were in use across the country.<sup>101</sup> In 1953, the New Jersey Supreme Court created juvenile conference committees to deal with juvenile behavior that was "neither harmful enough for formal adjudication nor innocuous enough to be overlooked by the community."<sup>102</sup> The original committees dealt only with first time offenders charged with minor infractions,<sup>103</sup> but later evolved to include the handling of juveniles charged with fourth degree minor offenses.<sup>104</sup> In 1994, Governor Christine Whitman established the Juvenile Justice Commission (JJC) by Executive Order 10,<sup>105</sup> and it was signed into law in 1995,<sup>106</sup> when the Governor's Advisory Council "reported a lack of centralized authority for planning, policy development and service provision in the juvenile justice system."<sup>107</sup> Under the statute, the JJC was responsible for

operating State services and sanctions for juveniles . . . developing a Statewide plan for effective provision of juvenile justice services and sanctions . . . establish a State/Community Partnership Grant Program through which the State will provide incentives to county and local governments to encourage the provision of services and sanctions for juveniles adjudicated or charged as delinquent and programs for the prevention of juvenile delinquency, and . . . establish[ing] county youth services commissions responsible for planning and implementing the Partnership at the local level.<sup>108</sup>

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minors in juvenile court proceedings, and guaranteed the right to advance notice of charges, the right to a fair and impartial hearing, the right to assistance of counsel, the opportunity to confront and cross-examine witnesses, and the privilege against self-incrimination. *See id.* at 307-09.

<sup>101</sup> *Id.* at 311-12.

<sup>102</sup> EKPOANWAN ERETE ONYILE, THE PERFORMANCE OF JUVENILE DIVERSION PROGRAMS IN THE SUPERIOR COURT OF NEW JERSEY, ESSEX VICINAGE, SUPERIOR COURT OF NEW JERSEY, ESSEX VICINAGE 1-2 (2010), <http://www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2010/Juvenile%20Diver%20Programs.ashx>.

<sup>103</sup> Some examples of crimes handled by the committees were truancy, trespassing, minor thefts, and public disturbance. *Id.*

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

<sup>105</sup> N.J. Exec. Order No. 10 (Mar. 17, 1994), <http://www.state.nj.us/infobank/circular/ew10.htm>.

<sup>106</sup> N.J. STAT. ANN. § 52:17B-169 (West 2016).

<sup>107</sup> *History of the JJC*, THE ST. OF N.J., DEPT. OF LAW AND PUB. SAFETY, OFF. OF THE ATT'Y GEN., [http://www.nj.gov/lps/jjc/aboutus\\_history.html](http://www.nj.gov/lps/jjc/aboutus_history.html) (last visited Oct. 22, 2016).

<sup>108</sup> N.J. Stat. Ann. § 52:17B-169(k) (West 2016).



In March of 2011, the New Jersey Assembly, in a unanimous vote, extended the use of diversionary programs by passing a bill<sup>109</sup> aimed at “addressing the growing teen pastime of ‘sexting’” and would allow first-time offenders to complete a diversionary program and avoid prosecution as sex offenders.<sup>110</sup> In June, the bill cleared the Senate,<sup>111</sup> was signed by Governor Christie, and enacted in 2012.<sup>112</sup> This bill provides that if the courts approve diversion, the juvenile must participate in, and bear the cost of,<sup>113</sup> a remedial education or counseling program.<sup>114</sup> In order for the program to qualify as appropriate, the program must satisfy four requirements.<sup>115</sup> Under the statute, the program must increase the juvenile’s awareness of:

- (1) **the legal consequences and penalties** for sharing sexually suggestive or explicit materials, including applicable federal and State statutes;
- (2) **the non-legal consequences** of sharing sexually suggestive or explicit materials including, but not limited to, the effect on relationships, loss of educational and employment opportunities, and being barred or removed from school programs and extracurricular activities;
- (3) **the potential, based upon the unique characteristics of cyberspace and the Internet, of long-term and unforeseen consequences** for sharing sexually suggestive or explicit materials; and
- (4) the possible connection between **bullying and cyber-bullying** and juveniles sharing sexually suggestive or explicit materials.<sup>116</sup>

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<sup>109</sup> The Bill was sponsored by Assemblywoman Pamela R. Lampitt, and stated that “the teenage practices of sexting and posting sexual images online are nationwide problems that have perplexed parents, school administrators, and law enforcement officials. Prosecutors in several states have charged teenagers who have engaged in these 46 behaviors with criminal offenses, including distribution of child 47 pornography” when giving their reasoning. Assemb. 1561, 214th Leg., Reg. Sess. (N.J. 2010), [http://www.njleg.state.nj.us/2010/Bills/A2000/1561\\_I1.PDF](http://www.njleg.state.nj.us/2010/Bills/A2000/1561_I1.PDF).

<sup>110</sup> *NJ Assembly Approves ‘Sexting’ Bill Allowing Teens to Avoid Charges*, CBS (Mar. 14, 2011), <http://newyork.cbslocal.com/2011/03/14/bill-lets-sexting-teens-avoid-charges/>.

<sup>111</sup> Statehouse Bureau Staff, *Action in Trenton: ‘Sexting’ bill, bath salt crackdown, DNA testing, June primary date*, NJ.COM (Jun. 30, 2011), [http://www.nj.com/news/index.ssf/2011/06/action\\_in\\_trenton\\_sexting\\_bill.html](http://www.nj.com/news/index.ssf/2011/06/action_in_trenton_sexting_bill.html).

<sup>112</sup> Ave Mince-Didier, *Teen Sexting in New Jersey*, CRIMINALDEFENSELAWYER.COM, <http://www.criminaldefenselawyer.com/resources/teen-sexting-new-jersey.htm> (last visited Nov. 20, 2015).

<sup>113</sup> The Court does take into consideration the ability of the juvenile’s parents or guardian to pay. N.J. STAT. § 2A:4A-71.1(a) (West 2016).

<sup>114</sup> The Court also takes into consideration the availability of a formalized program in the area in which the juvenile resides. Where appropriate, the juvenile can be permitted to participate in alternative programs, if they satisfy the requirements. § 2A:4A-71.1 (2)(a).

<sup>115</sup> § 2A:4A-71.1 (2)(b).

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

An eligible offense is one in which the facts of the case “involve the creation, exhibition or distribution of a photograph depicting nudity . . . through the use of an electronic communication device, an interactive wireless communications device, or a computer” and “the creator and subject of the photograph are juveniles or were juveniles at the time of its making.”<sup>117</sup>

In general, every complaint filed against a juvenile is reviewed by court intake services, who decide whether it should be dismissed, diverted to an appropriate educational program, or referred to the court system.<sup>118</sup> When the complaint filed against a juvenile “alleges a crime which, if committed by an adult, would be of the first, second, third, or fourth degree,” the statute dictates that unless the prosecutor consents to diversion of the complaint, all complaints must be referred for court action.<sup>119</sup> Whether diversion is recommended by court intake service depends on eleven factors, but whether diversion will be granted is within the prosecutor’s discretion. The factors to be considered are:

- (1) the **seriousness of the alleged offense** or conduct and the **circumstances** in which it occurred;
- (2) the **age and maturity** of the juvenile;
- (3) the **risk** that the juvenile presents as a **substantial danger** to others;
- (4) the **family circumstances**, including any history of drugs, alcohol abuse or child abuse on the part of the juvenile, his parents or guardian;
- (5) the **nature and number of contacts with court intake services** and the court that the juvenile or his family have had;
- (6) The **outcome of those contacts**, including the services to which the juvenile or family have been referred and the results of those referrals;
- (7) The **availability of appropriate services** outside referral to the court;

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<sup>117</sup> The language of the statute does not mention how to deal with mere possession of the photographs created in such a way, but it does not preclude third parties, or those who are neither the creator of the photographs, nor the original receiver, from falling under the purview of the statute. This creates a gray area, in which such a third party could merely possess a photo created in this way, and face uncertainty if prosecuted. [§ 2A:4A-71.1 \(2\)\(c\)\(1-2\)](#).

<sup>118</sup> [§ 2A:4A-71 \(2\)\(b\)](#).

<sup>119</sup> Despite this provision, which appears to mandate court action, the statute actually vests considerable discretion in the prosecutor, stating that the prosecutor can consent to send the minor to a diversionary program. *Id.*

- (8) Any **recommendations expressed by the victim or complainant**, or arresting officer, as to how the case should be resolved;
- (9) Any **recommendation** expressed by the **county prosecutor**;
- (10) The **amenability of the juvenile to participation** in a remedial education or counseling program that satisfies the requirements . . . and
- (11) Any information relevant to the offense in any case where the juvenile is charged with an act which if committed by an adult would constitute prostitution in violation of N.J.S.2C:34-1 or any offense which the juvenile alleges is related to the juvenile being a victim of human trafficking.<sup>120</sup>

Diversionary programs are an essential resource, and recent studies have shown them to be more effective in reducing recidivism than conventional juvenile interventions.<sup>121</sup> Additionally, recent research shows that recidivism increases as youths progress further into the juvenile justice system.<sup>122</sup> Besides the benefits to the youth, which include a “reduction in premature involvement in the ‘deep end’ of the juvenile delinquency system, a reduction in out-of-home placements . . . [and] maintaining youth connectedness and engagement in the community . . .”, there are also benefits to the community in the form of reduction in court costs and a reduction in the caseload before the courts.<sup>123</sup> However, it is important to ensure that juveniles do not fall through loopholes in laws allowing youth diversion.

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<sup>120</sup> *Id.*

<sup>121</sup> Holly A. Wilson & Robert D. Hoge, *The Effect of Youth Diversion Programs on Recidivism, A Meta-Analytic Review*, 40 *CRIM. JUSTICE & BEHAV.* 497, 504-05 (2013); *Diversion Programs: An Overview*, THE CENTER ON JUVENILE & CRIMINAL JUSTICE (Sept. 1999), <https://www.ncjrs.gov/html/ojdp/9909-3/div.html>.

<sup>122</sup> *Id.*

<sup>123</sup> *Diversion Programs*, YOUTH.GOV, <http://www.youth.gov/youth-topics/juvenile-justice/diversion-programs> (last visited Oct. 27, 2016).

### i. New Jersey Child Pornography Statutes

What happens when a juvenile is not a first-time offender,<sup>124</sup> does not qualify for the diversionary program for other reasons,<sup>125</sup> or fails to complete the diversionary program successfully? In these scenarios, there are three general choices: (1) prosecution under existing child pornography laws, (2) no prosecution at all, or (3) prosecution under a statute such as invasion of privacy, which is inappropriate because it does not provide for educational programs.<sup>126</sup>

Under New Jersey law, an offender has committed a second degree crime if they:

- (i) **knowingly distributes**<sup>127</sup> an item depicting the sexual exploitation or abuse of a child<sup>128</sup>;
- (ii) **knowingly possesses**<sup>129</sup> an item depicting the sexual exploitation or abuse of a child with the intent to distribute that item; or

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<sup>124</sup> While the statute does not state explicitly that only first-time offenders are eligible for diversion, it is implied. First, the “nature and number of contacts with court intake services and the court that the juvenile [has] had” and the outcome of those contacts are factors to be considered in recommending or not recommending diversion, and second, it is the stated policy of the Juvenile Justice Commission that this be applicable to first time and maybe second time offenders. [§ 2A:4A-71\(2\)\(b\)\(5-6\)](#); *Moving through the JJC System*, OFFICE OF THE ATT’Y GEN, [http://www.nj.gov/oag/jjc/thru\\_system.htm](http://www.nj.gov/oag/jjc/thru_system.htm) (last visited Oct. 27, 2016).

<sup>125</sup> Again, the prosecutor has considerable discretion to either approve or deny diversion of a complaint.

<sup>126</sup> Though not explored in this note, invasion of privacy laws, which is a third-degree crime punishable by fines up to \$30,000, can be used in these situations. New Jersey’s invasion of privacy statute provides that:

An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person’s consent and under circumstances in which a reasonable person would not expect to be observed.

[§ 2C:14-9\(b\)](#).

<sup>127</sup> “Distributes” is defined under the statute as follows: “to sell, or to manufacture, give, provide, lend, trade, mail, deliver, publish, circulate, disseminate, present, exhibit, display, share, advertise, offer, or make available via the Internet or by any other means, whether for pecuniary gain or not. The term also includes an agreement or attempt to distribute.” [§ 2C:24-4\(b\)\(1\)](#) (Serving as the child pornography statute, the statute nevertheless is titled “Endangering welfare of children”).

<sup>128</sup> “Item depicting the sexual exploitation or abuse of a child” is defined under the statute as: “a photograph, film, video, . . . an image stored or maintained in a computer program or file or in a portion of a file, or any other reproduction or reconstruction which depicts a child engaging in a prohibited sexual act or in the simulation of such an act” where a prohibited sexual act includes “nudity, if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction.” *Id.*

<sup>129</sup> To “possess” is defined as including “receiving, viewing, or having under one’s control, through any means, including the Internet.” [§ 2C:24-4\(b\)\(5\)\(a\)](#).

(iii) **knowingly stores or maintains** an item depicting the sexual exploitation or abuse of a child using a file-sharing program which is designated as available for searching by or copying to one or more other computers.<sup>130</sup>

An offender convicted of a second degree crime under this statute, where the offense involved twenty five or more images, can be sentenced to serve a minimum of five years in prison.<sup>131</sup> Mere possession of these images is a third degree crime,<sup>132</sup> and is punishable by between three and five years.<sup>133</sup> Convictions for subsequent offenses subjects the offender to an extended term of imprisonment,<sup>134</sup> turning the sentence for a second degree offense into ten to twenty years, and for a third degree offense into five to ten years.<sup>135</sup>

Any person convicted under New Jersey's child pornography laws is subject to sex offender registration.<sup>136</sup> These offenders must register with law enforcement in any municipality in which they reside, law enforcement in the municipality in which they go to school,<sup>137</sup> and law enforcement in the municipality in which they are employed.<sup>138</sup> They are also required to notify those same law enforcement agencies of any changes in address.<sup>139</sup>

The statute does provide an exception for a certain class of juveniles,<sup>140</sup> which does include those convicted of some sexting behaviors. Under the registration laws, an adjudication of delinquency for endangering the welfare of a child will not require registration, if the offender demonstrates that:

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<sup>130</sup> [\*Id.\*](#)

<sup>131</sup> [\*Id.\*](#)

<sup>132</sup> [§ 2C:24-4\(b\)\(5\)\(b\).](#)

<sup>133</sup> [§ 2C:43-6\(a\)\(3\).](#)

<sup>134</sup> [§ 2C:24-4\(b\)\(5\)\(b\).](#)

<sup>135</sup> [§ 2C:43-7\(a\)\(4\).](#)

<sup>136</sup> [§ 2C:7-2\(a\)\(1\).](#)

<sup>137</sup> This includes secondary schools, trade schools, colleges or universities, or graduate schools of any kind. [§ 2C:7-2\(c\).](#)

<sup>138</sup> [\*Id.\*](#)

<sup>139</sup> [\*Id.\*](#)

<sup>140</sup> This exemption was signed into effect in 2014. *Gov. Chris Christie signs bill that shields sexting minors*, ABC (Jan. 22, 2014), <http://6abc.com/archive/9403182/>; John Reitmeyer, *Assembly approves changes to Megan's Law that exclude 'sexting' teens*, NORTHJERSEY.COM (Nov. 18, 2013), <http://www.northjersey.com/news/assembly-approves-changes-to-megan-s-law-that-exclude-sexting-teens-1.615626>.

- (a) the facts of the case are limited to the creation, exhibition or distribution of a photograph depicting nudity . . . through the use of an electronic communications device, an interactive wireless communications device, or a computer;
- (b) the creator and subject of the photograph are juveniles or were juveniles at the time of its making; and
- (c) the subject of the photograph whose nudity is depicted knowingly consented to the making of the photograph.<sup>141</sup>

This means that two types of potential offenders are exempted from registration laws: the creator of the image, and the original receiver who does not pass on the image to third parties. However, when the image is transmitted on to third parties, the subject of the photograph very likely did not consent to the subsequent transmittal, even though he or she consented to the making of the photograph. Although subsection (a) does provide for distribution of a photograph, it says nothing about whether this distribution is with the consent of the subject.<sup>142</sup> This leaves open the possibility that juveniles could be charged under the child pornography laws and subjected to sex offender registration.

Choosing to not prosecute juveniles who engage in this behavior is no better of an option than prosecuting under unnecessarily harsh laws such as child pornography. There needs to be consequences for these actions, and the statute enacted by the Arizona legislature, described below, provides almost the perfect balance between penalties and education.

### ***B. Arizona Statute***

The approach adopted by Arizona has been termed by some as the “Jail-Time Misdemeanor Approach,” which stems from the fact that even though jail time could result from the regulated behavior, the highest class of offense is a misdemeanor.<sup>143</sup> The bill that made sexting a misdemeanor in Arizona was termed SB 1266, and was passed in July of 2010.<sup>144</sup> With this bill, Arizona joined a

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<sup>141</sup> [§ 2C:7-2\(b\)\(4\)](#).

<sup>142</sup> *Id.*

<sup>143</sup> See [Patel](#), *supra* note 96, at 604.

<sup>144</sup> *From Policy to Practice, “Sexting” and SB 1266: Why the Law Matters for Families and Youth*, FRANCES MCCLELLAND INSTITUTE FOR CHILDREN, YOUTH, AND FAMILIES (2011),

wave of states that adopted specific legislation for this behavior.<sup>145</sup> In 2010, it was reported that at least sixteen states either considered or adopted legislation, and that since 2009, statutes have been passed in ten states.<sup>146</sup>

Currently, consequences in Arizona for sexting depend entirely on the circumstances of the incident, and there are no allowances for any prosecution under child pornography laws, if the actor is under the age of eighteen.<sup>147</sup> The statute defines sexting explicitly, and first criminalizes the creation of the images by stating that “[i]t is unlawful for a juvenile to intentionally or knowingly use an electronic communication device to transmit or display a visual depiction of a minor that depicts explicit sexual material”<sup>148</sup>. Sexually explicit material is further defined as “material that depicts human genitalia or that depicts nudity, sexual activity, sexual conduct, sexual excitement . . .”<sup>149</sup> The statute separately criminalizes the possession of these images by stating; “[i]t is unlawful for a juvenile to intentionally or knowingly possess a visual depiction of a minor that depicts explicit sexual material and that was transmitted to the juvenile through the use of an electronic communication device.”<sup>150</sup>

Most notably, the statute explicitly exempts juvenile possessors from prosecution if they “did not solicit the visual depiction” or if they “took reasonable steps to destroy or eliminate the visual depiction or report the visual depiction to the juvenile’s parent, guardian, school official or law enforcement official.”<sup>151</sup> This sort of provision is conspicuously absent from the New Jersey statutory

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[https://mcclellandinstitute.arizona.edu/sites/mcclellandinstitute.arizona.edu/files/From%20Practice%20to%20Policy\\_Sexting.pdf](https://mcclellandinstitute.arizona.edu/sites/mcclellandinstitute.arizona.edu/files/From%20Practice%20to%20Policy_Sexting.pdf).

<sup>145</sup> See *Trends & Transitions: July/August 2009*, NAT’L CONF. OF STATE LEG., <http://www.ncsl.org/bookstore/state-legislatures-magazine/trends-and-transitions-july-august-2009.aspx> (last visited Oct. 27, 2016).

<sup>146</sup> Vallery Brown, *3 Face Charges in Texhoma ‘sexting’*, NEWSOK.COM (July 29, 2010), <http://newsok.com/article/3480534>.

<sup>147</sup> See *Ariz. Rev. Stat. § 8-309 (West 2016)*, Arizona law defines a juvenile as “an individual under the age of eighteen years.” [§ 8-201](#).

<sup>148</sup> [§ 8-309](#).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

scheme, and provides a much needed protection against the type of damage that can result from the sort of mass-distribution common in these sorts of cases involving high school students.<sup>152</sup>

This exemption is not available, however, for the creators of such images. From here, the statute proceeds like a staircase, which the penalty attached to each step becoming a bit more severe. On the first level, a juvenile who either possesses an image or sends it to only one other person has committed a petty offense.<sup>153</sup> Under Arizona law, the only authorized punishment for a petty offense is a maximum fine of \$300.<sup>154</sup> The next step comes when the juvenile who has created the image transmits or displays the image to more than one person, at which point it becomes a Class 3 misdemeanor.<sup>155</sup> A Class 3 misdemeanor is the least serious misdemeanor possible in Arizona, and the sentence can include up to thirty days in jail and fines not exceeding \$500.<sup>156</sup> Multiple offenders, which includes those juveniles diverted through a program,<sup>157</sup> and those previously convicted under the statute, have committed a Class 2 misdemeanor.<sup>158</sup> A Class 2 misdemeanor in Arizona is punishable by no more than four months in jail, and up to \$750 in fines.<sup>159</sup> There are no escalations in penalties for juveniles with no prior adjudications, who possess more than one image.<sup>160</sup> Juveniles convicted

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<sup>152</sup> David Chang, *1 Adult, 19 Teens Arrested in High School Sexting Scandal*, NBCPHILADELPHIA (May 27, 2015), <http://www.nbcphiladelphia.com/news/local/Cape-May-High-School-Sexting-Arrests-New-Jersey-305065161.html>; Agamoni Ghosh, *Sexting scandal rocks high school in Colorado, students may face criminal charges*, INT'L BUS. TIMES (Nov. 7, 2015), <http://www.ibtimes.co.uk/sexting-scandal-rocks-high-school-colorado-students-may-face-criminal-charges-1527642>; Brenda Waters, *Nude Photo Investigation at Peters Township Middle School*, CBS PITTSBURGH (Feb. 4, 2016), <http://pittsburgh.cbslocal.com/2016/02/04/police-investigating-nude-photo-scandal-at-peters-township-middle-school/>; Selena Hill, *Officials Arrest and Charge 4 Boys Involved in Middle School Sexting Scandal*, LATIN POST (Nov. 14, 2015), <http://www.latinpost.com/articles/94818/20151114/officials-arrest-and-charge-4-boys-involved-in-middle-school-sexting-scandal.htm>.

<sup>153</sup> [§ 8-309\(D\)-\(E\)](#).

<sup>154</sup> [§ 13-105\(31\)](#); [§ 13-802\(D\)](#).

<sup>155</sup> [§ 8-309\(D\)](#).

<sup>156</sup> [§ 13-707\(A\)\(3\)](#); [§ 13-802\(C\)](#).

<sup>157</sup> Arizona uses diversionary programs similar to those in New Jersey, and they will be discussed later in this section. See *infra* 163.

<sup>158</sup> [§ 8-309\(F\)](#).

<sup>159</sup> [§ 13-707\(A\)\(2\)](#); [§ 13-802\(B\)](#).

<sup>160</sup> Clay Calvert, Kara Carnley Murrhee, & Jackie Marie Steve, *Playing Legislative Catch-Up in 2010 with A Growing, High-Tech Phenomenon: Evolving Statutory Approaches for Addressing Teen Sexting*, 11 Pitt. J. Tech. L. & Pol'y 1, 28 (2010), <https://tlp.law.pitt.edu/ojs/index.php/tlp/article/view/58/58>.



under Arizona’s sexting statute are not explicitly exempted from sex offender registration,<sup>161</sup> but the sexting statute is comprehensive enough that there is no avenue where a juvenile could be prosecuted for sexting under child pornography laws.<sup>162</sup>

Arizona’s juvenile diversionary system is very similar to that used by New Jersey.<sup>163</sup> When a juvenile commits a “delinquent”<sup>164</sup> or “incorrigible”<sup>165</sup> act, the county attorney has discretion to divert the prosecution to an appropriate program, before a petition is filed or any hearings are held.<sup>166</sup> Once the county attorney has decided to divert the prosecution, the juvenile has a personal interview with a juvenile probation officer, and at this interview the minor must acknowledge responsibility for the act.<sup>167</sup> If they do not acknowledge responsibility, the case goes back to the county attorney for further determinations.<sup>168</sup> If the adolescent accepts responsibility, the juvenile probation officer can require them to: (1) participate in community service, (2) participate in family counseling, (3) participate in educational programs aimed at preventing further delinquent behavior, (4) participate in a drug education program, (5) participate in an outpatient rehabilitation or supervision program, (6) payment of restitution to the victim, and (7) payment of fines.<sup>169</sup> The probation officer can assign one or more of these to the juvenile, and the juvenile must comply with all conditions, or the case will go back to the county attorney.<sup>170</sup> If the juvenile successfully completes the program, the case is dropped.<sup>171</sup> There

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<sup>161</sup> [§ 13-3821](#).

<sup>162</sup> [§ 8-309](#).

<sup>163</sup> However, the Arizona statute is much more detailed and structured, when compared to New Jersey. [§ 8-321](#); [N.J. STAT. § 2A:4A-71.1 \(West 2016\)](#).

<sup>164</sup> A juvenile is delinquent as defined by Arizona if they have committed a delinquent act, where a delinquent act is an act by a juvenile which would be a criminal offense or petty offense if committed by an adult, or a violation of a law that can be violated only by a minor. [Ariz. Rev. Stat. § 8-201\(11\)-\(12\) \(West 2016\)](#).

<sup>165</sup> A juvenile is considered “incorrigible” if they refuse to “obey the reasonable and proper orders of a parent,” is habitually truant from school, is a runaway, habitually endangers or injures themselves or others, commits an act which can only be committed by a minor and is not a delinquent act, and fails to obey a court order. [§ 8-201\(19\)\(a\)-\(f\)](#).

<sup>166</sup> [§ 8-321\(A\)](#).

<sup>167</sup> [§ 8-321\(F\), \(H\)](#).

<sup>168</sup> At this point, the county attorney can either commence juvenile proceedings, or decline to prosecute, at which time the case returns to the juvenile probation department. [§ 8-321\(P-Q\)](#).

<sup>169</sup> [§ 8-321\(F\)\(1\)-\(7\)](#).

<sup>170</sup> [§ 8-321\(F\), \(P\)](#).

<sup>171</sup> [§ 8-321\(G\)](#).

is no petition filed in the court, and the program’s resolution is not an adjudication of delinquency and cannot be used in any future proceeding.<sup>172</sup> The program’s resolution does not deprive the juvenile of any current or future rights, such as the right to vote or hold a driver’s license, and does not disqualify them from any civil service application or appointment.<sup>173</sup>

### ***C. Virginia Statute***

Providing a stark contrast to the tailored approach taken by Arizona, the state of Virginia currently has no statute specifically dedicated to addressing sexting. Prosecutors have little choice, and have to either prosecute juveniles for sexting under either child pornography laws, or badly fitting statutes such as invasion of privacy, or indecent exposure.<sup>174</sup> A juvenile who sexts a photograph to another has committed three separate felonies under Virginia law: production of child pornography, possession of child pornography, and distribution of child pornography.<sup>175</sup>

#### **i. Child Pornography Charges**

Under Virginia law, child pornography is defined as “sexually explicit visual material which utilizes or has as a subject an identifiable minor,”<sup>176</sup> and anyone who produces, attempts to produce, prepares to produce, or takes part in producing such material, has committed a felony.<sup>177</sup> Sexually explicit material includes pictures, digital images, and three or more images or videos stored in a computer’s temporary internet cache.<sup>178</sup> If the subject of the image is less than fifteen years old, the

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

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

<sup>174</sup> Monica Steiner, *Teen Sexting in Virginia*, NOLO, <http://www.criminaldefenselawyer.com/teen-sexting-virginia.html> (last visited Sept. 19, 2016); Luke Nichols, *Virginia Sexting and Child Pornography Laws*, AVVO (Oct. 4, 2010) <http://www.avvo.com/legal-guides/ugc/virginia-sexting-and-child-pornography-laws>.

<sup>175</sup> Adrienne Helms, *Press Release: Juvenile Sexting Case Update*, MASASSAS CITY POLICE DEPT. (Aug. 1, 2014), <http://media.nbcwashington.com/documents/Juvenile+Sexting+Case+Update+8.1.14.pdf>; Nichols, *supra* note 174.

<sup>176</sup> “Identifiable” only means that they must be recognizable as an actual person, and the person need only be a minor at the time the image was created. VA. CODE ANN. § 18.2-374.1(A) (2015).

<http://law.justia.com/codes/virginia/2006/toc1802000/18.2-374.1c1.html>

<sup>177</sup> § 18.2-374.1:1.

<sup>178</sup> § 18.2-374.1(A).

minimum sentence is five years in a state correctional facility, and if the subject is between the ages of fifteen and eighteen, the minimum sentence is one year in a state correctional facility.<sup>179</sup>

There is no explicit definition of “possession” specific to child pornography materials. However, in application, possession is defined very liberally: intentions do not matter (although the possession must be knowing),<sup>180</sup> and it occurs when “you have the ability to retrieve or view the images by nearly any means.”<sup>181</sup> A conviction for possession of child pornography is a class 6 felony,<sup>182</sup> which is punishable by either a minimum of one year in prison, or at the discretion of the judge, a maximum of twelve months in prison.<sup>183</sup> Any subsequent conviction is for a class 5 felony,<sup>184</sup> which is still punishable by a minimum of a year in prison, but the maximum sentence increases from five years to ten years.<sup>185</sup> Possession with intent to distribute, reproduction and distribution of these images is punishable by a minimum of five years and a maximum of twenty years in prison.<sup>186</sup> Reproduction can be accomplished by any means, and distribution can include selling, displaying, or transmitting such images.<sup>187</sup>

Each of these statutes provides that the sentences must run consecutively, which means that they run back to back, as opposed to concurrently, where they can run at the same time. For example, a fourteen-year-old who is convicted of creating and sending just one sexually explicit image in violation of these statutes faces a potential total sentence of eleven years in a state correctional facility (five for production, one for possession, and five for distribution). Each additional image is another violation, which carry additional charges. The statutes do not provide any exceptions for the age of

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<sup>179</sup> [§ 18.2-374.1\(C1\),\(C2\)](#).

<sup>180</sup> [§ 18.2-374.1:1\(A\)](#).

<sup>181</sup> [Nichols](#), *supra* note 174.

<sup>182</sup> [§ 18.2-374.1:1\(A\)](#).

<sup>183</sup> [§ 18.2-10\(f\)](#).

<sup>184</sup> [§ 18.2-374.1:1\(B\)](#).

<sup>185</sup> [§ 18.2-10\(e\)](#).

<sup>186</sup> [§ 18.2-374.1:1\(C\)\(i\)](#).

<sup>187</sup> [§ Id.](#)

the creator or the receiver that could be utilized in order to exempt juveniles engaging in sexting behavior. The statutes do not provide for any affirmative defenses, such as taking reasonable steps to destroy the images, or non-solicitation of the images.

## ii. Other Possible Charges

Statutes governing invasion of privacy, or indecent exposure, provide another avenue of prosecution. In Virginia, such statutes include “[u]nlawful creation of image of another,” which makes it a misdemeanor to “knowingly and intentionally create any videographic or still image by any means whatsoever of any non-consenting person” where that person has a “reasonable expectation of privacy.”<sup>188</sup> While a class 1 misdemeanor is punishable only by a maximum of twelve months in jail,<sup>189</sup> the statute provides that if the subject of the photograph is a minor, it becomes a class 6 felony.<sup>190</sup> The statute does require that the person be non-consenting, which is a rare occasion in the situations where this behavior occurs. Another Virginia statute prohibits the “[u]nlawful dissemination or sales of images of another,” and this could be applied to those passing on nude images to unintended third parties.<sup>191</sup> The penalty for a violation of this statute is a class 1 misdemeanor, and does not make any special provisions for the subject being a minor.<sup>192</sup> Indecent exposure could be used to prosecute the creators of these images, since the Virginia statute makes it a class 1 misdemeanor for a “person [to] intentionally make[] an obscene display or exposure of his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself.”<sup>193</sup>

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<sup>188</sup> [§ 18.2-386.1\(A\)](#).

<sup>189</sup> [§ 18.2-11\(a\)](#).

<sup>190</sup> Remember that a class 6 felony is punishable by between one and five years in a state correctional facility. [§ 18.2-10\(f\)](#).

<sup>191</sup> [§ 18.2-386.2\(a\)](#).

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

<sup>193</sup> [§ 18.2-387](#).

Since this requires either a public place or others to be present, it is likely not very useful in these situations, with most of this behavior occurring in private.<sup>194</sup>

The sentence for a misdemeanor falls in line with those in the regulatory scheme of the Arizona sexting laws, but these statutes do not provide for the education that is necessary to combat this behavior. For this reason, prosecution under invasion of privacy and indecent exposure statutes is an inadequate remedy.

### iii. Application & Effects

Virginia's lack of a dedicated regulatory scheme addressing sexting results in uncertainty for offenders, parents, and prosecutors. Prosecutors are forced to choose between unnecessarily harsh sentences, or no prosecution at all. Parents are forced to constantly worry about the actions of their teenagers, and teenagers are generally not aware of or do not care about the problem at all.<sup>195</sup> For instance, in 2014, seventeen-year-old Trey Sims was arrested and charged with manufacturing and distributing child pornography.<sup>196</sup> He had been accused of sending his fifteen-year-old girlfriend a video of his genitals.<sup>197</sup> In the end, Sims was given one year of probation, and a declaration of guilt or innocence was delayed for the duration.<sup>198</sup> In order to have the charges dismissed, Sims must abide by several conditions of probation. He must avoid texting, the internet, or social media, perform community service, and he cannot contact his ex-girlfriend or her family.<sup>199</sup> He also was able to avoid the sex offender registration.<sup>200</sup> While the outcome of the case was satisfactory, the process was

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<sup>194</sup> See [Rosin](#), *supra* note 27.

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

<sup>196</sup> *Va. Teen Could Be Jailed for "Sexting" Girlfriend*, NBCWASHINGTON (Jul. 3, 2014), <http://www.nbcwashington.com/news/local/Va-Teen-Could-be-Jailed-for-Sexting-Girlfriend-265770831.html>.

<sup>197</sup> Mark Segraves, *Detective in "Sexting" Case Suing Lawyer for Defamation*, NBCWASHINGTON (Nov. 13, 2014), <http://www.nbcwashington.com/news/local/Detective-in-Sexting-Case-Suing-Lawyer-Northern-Va-Manassas-Trey-Simms-282638851.html>.

<sup>198</sup> *'Sexting' Teen Given One Year Probation; No Declaration of Guilt or Innocence*, NBCWASHINGTON (Aug. 1, 2014), <http://www.nbcwashington.com/news/local/Trial-for-Teen-Accused-of-Sexting-Begins-Friday-269521611.html>.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

traumatic. During the course of the investigation, prosecutors filed for a warrant to obtain nude photographs of Sims “in an aroused state” to compare against the photographs he had sent to his girlfriend.<sup>201</sup> There was enormous public outcry at this request, and while the warrant was issued, it was never used.<sup>202</sup>

Even if the police department claims that they have never sought sex offender status for teens in connection with this behavior,<sup>203</sup> the fact remains that for the better part of a year, Trey Sims’ was in the news with his name in the same sentences as “sex offender” and “child pornography.” He had to undergo invasive and humiliating procedures, and now faces college and adult life with a mandate to avoid social media. We can only assume that Sims has learned his lesson from this experience, but there are better ways of reprimanding minors while at the same time educating them on the consequences of their actions.

## V. Proposed Statute for New Jersey

The current New Jersey statute is a good start, but does not reach far enough. It only applies to first time offenders, which leaves juveniles who commit a subsequent offense in an uncertain position. Education regarding consequences is only provided for first and maybe second time offenders, when it should be provided in all circumstances.<sup>204</sup> Those who do not qualify for the diversionary program or who have prior offenses under the sexting statute should not be prosecuted under adult laws, since the consequences are harsh and long-lasting.

The statute should begin by criminalizing sexting behavior in a general fashion, by defining sexting as “using an electronic device to create, transmit, or display a visual depiction of sexually

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<sup>201</sup> David Culver, *Police Drop Plan to Take Graphic Photos of Va. Teen as Evidence in Sexting Case*, NBCWASHINGTON (Jul. 10, 2014), <http://www.nbcwashington.com/news/local/Police-Drop-Plan-To-Take-Graphic-Photos-of-Va-Teen-as-Evidence--266600001.html>.

<sup>202</sup> *Id.*

<sup>203</sup> See Helms, *supra* note 175.

<sup>204</sup> N.J. REV. STAT. § 2A:4A-71.1(b) (2015).

explicit material when the subject is a minor.” The possession of the photograph should be criminalized as well as the distribution of a photo described above.

Sentencing should proceed on a sliding scale, with the first offense for the sender and receiver subjecting the juveniles to counseling in a diversionary program such as the ones currently used in New Jersey, and maybe a nominal fine. Someone who was previously diverted for sending or receiving photographs should be classified as having committed a petty disorderly person offense,<sup>205</sup> which is punishable under New Jersey law by fines not to exceed \$500 and/or not more than ninety days in jail.<sup>206</sup> Subsequent violations should subject the offenders to a disorderly persons offense, which is punishable by not more than 364 days in jail and not more than \$1,000 in fines.<sup>207</sup>

If the juvenile who received the original depiction distributes it to unintended third parties, the penalties should start out harsher, while still being limited in nature. First time offenders should have to attend an educational diversionary program, pay fines, and have some probationary period where their usage of technology is restricted. After a certain number of offenses, it would be appropriate to prosecute these under current criminal statutes. However, it is essential to make it explicit that no juvenile adjudicated delinquent under this statute can ever be subjected to registration laws. The statute should contain an affirmative defense, to protect those who did not solicit the images and took reasonable steps to destroy or eliminate the depictions. It would be appropriate to contain a requirement, such as in the Arizona statute, that the juvenile report the image to an authority, such as a parent, a teacher, a school administrator, or the police, in order to assert this defense.<sup>208</sup>

Whatever the actual form of the statute adopted by New Jersey, one thing must be emphasized. The primary aim of the law, should be rehabilitation, not punishment. Rehabilitation would result in

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<sup>205</sup> New Jersey does not classify their crimes as “felony” and “misdemeanor,” but instead use the terms “indictable crimes” (would be a felony in other states), disorderly person offenses, and petty disorderly person offenses (these would be misdemeanors in other states). [§ 2C:43-1](#).

<sup>206</sup> [§ 2C:43-2](#); [§ 2C:43-3](#).

<sup>207</sup> [§ 2C:43-2](#); [§ 2C:43-3](#).

<sup>208</sup> ARIZ. REV. STAT. [§ 8-309\(C\)\(2\)](#).

educating juveniles, while still reprimanding them for this behavior. Having the primary goal of rehabilitation would allow the offenders to be exempted from laws meant to address predatory crimes committed by adults.

## VI. Conclusion

Decriminalization of sexting behavior is not a viable choice, because there must be consequences for ill-conceived actions, especially when there exists real potential for drastic long-term effects on their lives and the lives of others. Juveniles, by their very brain chemistry, are prone to risk-taking behavior, and cannot be trusted to always make the right decisions.<sup>209</sup> However, not all risk-taking behavior is negative, and “risk-taking behavior plays a significant role in adolescent development,”<sup>210</sup> since “adolescents take risks to test and define themselves”<sup>211</sup> and can “lead to situations where new skills are learned and new experiences can prepare them for future challenges in their lives.”<sup>212</sup> This is why the laws that define the proper punishment need to strike a balance between punishment and education, while avoiding unduly harsh and long-term side effects, such as those that go along with sex offender registration.

Another facet to the problem makes the assistance of parents and educators essential. In order for these laws to be effective, juveniles need to be aware of their existence. After the Arizona statute was signed into effect in 2010, local news spoke with teenagers at a local high school who were “surprised to hear teens could get into trouble for sexting.”<sup>213</sup> The American Academy of Pediatrics released a public service notice about the subject, giving parents advice on how to talk to their

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<sup>209</sup> [Arain et al.](#), *supra* note 21, at 453-54.

<sup>210</sup> [Id.](#) at 454.

<sup>211</sup> [Id.](#)

<sup>212</sup> [Id.](#)

<sup>213</sup> Heather Moore, *Teen sexting arrests in Payson raise awareness across Arizona*, AZFAMILY (Nov. 20, 2015) <http://www.azfamily.com/story/30565855/teen-sexting-arrests-in-payson-raise-awareness-across-arizona>.



teenagers about social media and sexting.<sup>214</sup> First, they suggest that parents “emphasize that everything sent over the Internet or a cell phone can be shared with the entire world” and that they “use good judgment in sending messages and pictures.”<sup>215</sup> For sexting specifically, it exemplifies how important it is that parents begin the conversation with their children about the dangers, making sure that they are aware of the criminal and social consequences of their actions.<sup>216</sup> Together with educators, parents can assist law enforcement and lawmakers in ensuring that adolescents are making fully informed decisions, and that they bear appropriate consequences for doing so.

Meanwhile, states like Virginia and Wisconsin need to move forward with adopting age-specific legislation aimed at sexting behavior, which strikes a fair balance between punishment and education. States, such as New Jersey,<sup>217</sup> who have sexting laws that do not stretch far enough, need to find a way to ensure that their laws do not leave juveniles in limbo or allow them to slip through the cracks into adult felony territory.

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<sup>214</sup> *Talking to Kids and Teens About Social Media and Sexting*, AMERICAN ACADEMY OF PEDIATRICS (June 2009), <https://www.aap.org/en-us/about-the-aap/aap-press-room/news-features-and-safety-tips/Pages/Talking-to-Kids-and-Teens-About-Social-Media-and-Sexting.aspx#sthash.JCNKS4qW.dpuf>.

<sup>215</sup> *Id.*

<sup>216</sup> *See id.*

<sup>217</sup> *Patel*, *supra* note 96, at 587-588, 599 (“[comparing and contrasting] the differences between penalties enforced by the states from the most severe approaches to the states that are more lenient towards sexting minors”).