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Texas Legislative Implications for Minors Accused of Sexting.

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COMMENT

TEXAS LEGISLATIVE IMPLICATIONS FOR MINORS ACCUSED OF SEXTING

MALLORY N. MYERS*

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I. BACKGROUND

A recent teen phenomenon is shocking both parents and state officials nationwide.¹ Due to increased accessibility to and dependence on technology, teenagers have found new ways to express themselves sexually amongst their peers.² This new type of social communication is known as “sexting.”³ Sexting is often the result of “short-sighted judgment of adolescents to take a digital photograph of oneself semi-nude and send it to another adolescent without considering the probability that the photograph will be shared with others.”⁴

One of the major issues concerning the prosecution of minors who engage in sexting is whether the sexting is consensual or involuntary.⁵

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1. See Elizabeth C. Eraker, Note, *Stemming Sexting: Sensible Legal Approaches to Teenagers' Exchange of Self-Produced Pornography*, 25 BERKELEY TECH. L.J. 555, 560 (2010) (emphasizing the prevalence amongst teens in using text messages “to send highly personal photos” including nude photos); Stephanie Gaylord Forbes, Note, *Sex, Cells, and Sorna: Applying Sex Offender Registration Laws to Sexting Cases*, 52 WM. & MARY L. REV. 1717, 1721 (2011) (noting that not only an age gap, but a gender gap exists for those who engage in sexting).

2. See, e.g., Terri Day, *The New Digital Dating Behavior—Sexting: Teens' Explicit Love Letters: Criminal Justice or Civil Liability*, 33 HASTINGS COMM. & ENT. L.J. 69, 74 (2010) (opining that sextors usually share some romantic interest); Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035, 1039 (2010) (“Sexting is the result of a convergence between the well-recognized adolescent need for sexual exploration and new technology that allows teens to explore their sexual relationships via private photographs shared in real-time.”); Antonio M. Haynes, Note, *The Age of Consent: When Is Sexting No Longer “Speech Integral to Criminal Conduct”?*, 97 CORNELL L. REV. 369, 375–76 (2012) (“Teachers and school administrators have also taken note of the phenomenon, and have begun confiscating students’ cell phones and giving presentations detailing the dangers associated with sexting.” (citations omitted)).

3. The sexting epidemic is causing an uproar for educators and parents alike on how to handle the situation. Stephanie Gaylord Forbes, Note, *Sex, Cells, and Sorna: Applying Sex Offender Registration Laws to Sexting Cases*, 52 WM. & MARY L. REV. 1717, 1721 (2011) (noting the competing mindsets regarding whether to punish kids who engage in inappropriate texting or to let them make their own mistakes).

4. Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035, 1036–37 (2010); see also Francisca Ortega, *Mom Houston: UTMB Study Finds Texas Teens Are Sexting a Lot*, HOUS. CHRON. BLOG (July 2, 2012), <http://blog.chron.com/momhouston/2012/07/utmb-study-finds-texas-teens-are-sexting-a-lot/> (defining sexting as a modern form of quid pro quo).

5. See, e.g., Megan Sherman, Note, *Sixteen, Sexting, and a Sex Offender: How Advances in Cell Phone Technology Have Led to Teenage Sex Offenders*, 17 B.U. J. SCI. & TECH. L. 138, 144–45 (2011) (“[S]exting may be considered a consensual act where the teenager willingly takes and sends the nude photograph of him or herself to another teenager who willingly accepts it. However, if an image received through a consensual sext is later forwarded to a third party, the act is no longer consensual.”).

Often, the initial sextor is simply trying to garner the attention of a crush with an inappropriate photograph and is completely unaware of any legal ramifications.⁶ There are various definitions for the exchange of these types of sexually-illicit messages.⁷ For example, a nationally accepted definition of sexting is “the act of sending nude or sexually explicit photographs electronically, either through a picture text message using a cellular telephone or through posting a picture on the Internet.”⁸ However, the Texas definition of what constitutes sexting is significantly broader.⁹ In Texas, “[s]exting includes any possession and/or electronic transmission by a minor (age 17 and under) of visual material capturing a minor engaged in sexual conduct—which includes still photographs of genitals and breasts.”¹⁰

Prior to the passage of Texas Senate Bill 407, Texas prosecuted minors accused of sexting with ill-suited child pornography statutes.¹¹ The prosecution of a minor accused of sexting under child pornography laws was significantly flawed,¹² and the long-term consequences of such convictions were excessively harsh, potentially stigmatizing children for

6. See Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 26 (2009) (noting that an individual who sends even a seemingly inoffensive text may be sought out by an aggressive prosecutor even if that individual is not aware of the extent of child pornography laws).

7. See Terri Day, *The New Digital Dating Behavior—Sexting: Teens’ Explicit Love Letters: Criminal Justice or Civil Liability*, 33 HASTINGS COMM. & ENT. L.J. 69, 73 (2010) (“Sexting is the new form of flirting—an explicit love letter.”); Antonio M. Haynes, Note, *The Age of Consent: When Is Sexting No Longer “Speech Integral to Criminal Conduct”?*, 97 CORNELL L. REV. 369, 375 (2012) (comparing sexting to streaking or sending a flirtatious note).

8. Megan Sherman, Note, *Sixteen, Sexting, and a Sex Offender: How Advances in Cell Phone Technology Have Led to Teenage Sex Offenders*, 17 B.U.J. SCI. & TECH. L. 138, 139 (2011) (citation omitted); see also Terri Day, *The New Digital Dating Behavior—Sexting: Teens’ Explicit Love Letters: Criminal Justice or Civil Liability*, 33 HASTINGS COMM. & ENT. L.J. 69, 70 (2010) (defining sexting as a combination of technology with sexually explicit subject matter).

9. See *Sexting Scenario*, REGION 10 EDUC. SERV. CTR., available at <http://www.region10.org/ciss/documents/sextingbrochure.pdf> (defining sexting generally).

10. *Id.*

11. Texas Senate Bill 407 amended section 43.26 and added section 43.261 to the Texas Penal Code to include appropriate punishment measures for sexting in Texas. Act of June 17, 2011, 82d Leg., R.S., ch. 1322, § 3, Tex. Sess. Law Serv. 3825, 3825–26 (West) (codified at TEX. PENAL CODE ANN. § 43.261 (West Supp. 2012)); see also Mike Ward, *Texas Officials Propose ‘Sexting’ Legislation*, DALLAS MORNING NEWS (Nov. 10, 2010, 9:13 AM), <http://www.dallasnews.com/news/politics/state-politics/20101110-Texas-officials-propose-sexting-3358.ece> (citing recent cases from Texas where a minor who sent an explicit photo to a sixteen-year-old was charged with a felony and another minor was sent to jail for doing the same).

12. See Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035, 1035 (2010) (“Prosecuting sexting cases as child pornography is a gross misapplication of child pornography statutes by using them as a sword and not a shield to protect exploited child victims.”).

the rest of their lives.¹³ In response, many state legislatures, including Texas, amended their laws to reflect more appropriate punishments for sexting offenses.¹⁴

This Comment will evaluate several aspects of recent sexting legislation and its implications within Texas. Part I of this Comment will examine the underlying causes of sexting and its prevalence. It will shed light on the pitfalls of applying child pornography laws to sexting cases, and Part I will summarize current federal sexting repercussions and their impact on states. Part II will deconstruct Texas Senate Bill 407 by analyzing each of the bill's components, including elements, defenses, parental involvement requirements, educational programs, and the public's response to the bill. Part III will explain the tangible ramifications of the sexting epidemic by evaluating the nationwide response and the significant effects of recent legislation on Texas practitioners.

A. *Causes of Sexting*

A possible cause of the skyrocketing number of teenagers involved in inappropriate sexual conduct via smartphones is "society's overt sexualization of girls and women" combined with modern society's dependence on instant gratification.¹⁵ In today's world, the media consistently portrays women and teenage girls as sexual beings.¹⁶ A result of this perception is that men and women are increasingly unable to relate to one another in non-sexual ways.¹⁷ Sexting scandals involving celebrities, such as Brett Favre and Vanessa Hudgens, have drawn

13. *See id.* at 1036 (emphasizing the draconian penalties of being convicted as a child pornographer).

14. *See, e.g., id.* at 1035–36 (2010) ("Some jurisdictions have proposed creating a new offense to address sexting at the level of a misdemeanor or summary offense, while others have provided for the development of education and prevention programs targeting teens in school.").

15. Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context*, 115 PENN. ST. L. REV. 135, 142 (2010) (explicating the potential causes of the sex-crazed teen culture responsible for the increased transmission of sexually explicit photographs). *See generally* American Psychological Association, *Report of the APA Task Force on the Sexualization of Girls* (2007), <http://www.apa.org/pi/women/programs/girls/report-full.pdf> (last visited Oct. 28, 2013) (examining the evolution and effects of the oversexualization of women in today's society on the development of youth).

16. *See* Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context*, 115 PENN. ST. L. REV. 135, 142 (2010) (finding society has overly sexualized girls and women).

17. *See id.* ("The harm is not confined to girls and women, but also extends to men and boys. If girls and women are seen exclusively as sexual beings rather than complicated people with many interests, talents, and identities, boys and men may have difficulty relating to them[.]") (quoting American Psychological Association, *REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS* 29 (2007), <http://www.apa.org/pi/women/programs/girls/report-full.pdf> (last visited Oct. 28, 2013)).

attention to the pervasiveness of the issue.¹⁸ This cultural shift to the open expression of sexuality drastically affects today's youth and impairs their ability to socialize in gender-mixed settings without sexual promiscuity.¹⁹ This type of behavior is consistent with Professor Durham's explanation of the "Lolita Effect" currently affecting young girls' interpretations of sexuality in today's society.²⁰ Girls use sexting "as a way of gaining [a member of the opposite sex's] attention and favor" by playing into the "sexual beings" model that the media defines for females.²¹

The rise of sexting is also attributed to the recent prevalence of smartphones.²² Cell phones have become a social requirement for nearly every teenager regardless of socioeconomic status.²³ As a result of this trend, smartphones are replacing face-to-face interaction among teens.²⁴

18. See Mallory M. Briggs, Case Note, "Send Me a Picture Baby, You Know I'd Never Leak It": The Role of *Miller v. Mitchell* in the Ongoing Debate Concerning the Prosecution of Sexting, 19 VILL. SPORTS & ENT. L.J. 169, 171 (2012) (highlighting how sexting is promoted in popular music, such as lyrics by the artist Ludacris that encourage a girl to send him a provocative picture of herself).

19. See, e.g., Stephanie Gaylord Forbes, Note, *Sex, Cells, and Sorna: Applying Sex Offender Registration Laws to Sexting Cases*, 52 WM. & MARY L. REV. 1717, 1723 (2011) ("In addition to the privacy concerns associated with sexting, teens whose pictures are spread among their peers often suffer severe emotional trauma.").

20. See M. GIGI DURHAM, THE LOLITA EFFECT: THE MEDIA SEXUALIZATION OF YOUNG GIRLS AND WHAT WE CAN DO ABOUT IT (2008) (explaining the Lolita Effect—the media's glorification of sex without a meaningful, intimate relationship); see also Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 12 (2009) ("[G]irls who take sexually explicit cell phone pictures of themselves and send them to their boyfriends . . . are engaging in self-sexualization via a medium and technology with which they are intimately familiar.").

20. Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 25 (2009).

21. *Id.*

22. See Martha Irvine, *Parent Alert: 'Sexting' Is Alarming Teen Trend*, DESERT NEWS (Feb. 8, 2009, 12:01 AM), <http://www.deseretnews.com/article/705380061/Parent-alert-Sexting-is-alarming-teen-trend.html?pg=all> (proclaiming that "the laws have not caught up to technology" with regard to prosecuting minors accused of sexting); Matthew Lasar, *A Kinder, Gentler Response to Adolescent 'Sexting'*, ARS TECHNICA (Apr. 23, 2009, 11:52 AM), arstechnica.com/tech-policy/2009/04/a-kinder-gentler-response-to-sexting/ (emphasizing the difficulty in controlling access to devices).

23. See, e.g., Megan Sherman, Note, *Sixteen, Sexting, and a Sex Offender: How Advances in Cell Phone Technology Have Led to Teenage Sex Offenders*, 17 B.U. J. SCI. & TECH. L. 138, 140 (2011) ("Advancements in cell phone and Internet technology have created a new forum for social interaction where people no longer talk, but rather text." (citation omitted)); see also Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035, 1040 (2010) (showcasing the statistics of teen texting).

24. See Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035, 1040 (2010) ("Research shows it is common for adolescents to use cell phones and text messages as a form of relationship maintenance and day-to-day communication." (citation omitted)).

In addition, the taking and sending of pictures on cell phones has become easier than ever before, and most minors do not stop to consider the possible ramifications of sending a single photograph.²⁵

B. *Sexting Statistics*

Sexting is rampant amongst teens across the country, and Texas is no exception.²⁶ According to an educational pamphlet from the Texas Attorney General's office, "39% of all teens have sent sexually suggestive texts," and "48% of teens say they have received such messages."²⁷ Additionally, "71% of teen girls and 67% of teen boys who have sent or posted sexually suggestive content say they have sent [or] posted this content to a boyfriend [or] girlfriend."²⁸ While "21% of teen girls and 39% of teen boys say they have [intentionally] sent such content to someone they wanted to date or hook up with," "38% of teens say they have had sexually suggestive text messages, originally meant for someone else, shared with them."²⁹

Clearly, these statistics demonstrate the need for lawmakers to address

25. See, e.g., Megan Sherman, Note, *Sixteen, Sexting, and a Sex Offender: How Advances in Cell Phone Technology Have Led to Teenage Sex Offenders*, 17 B.U. J. SCI. & TECH. L. 138, 141 (2011) (equating the prevalence of sexting with the relative ease of texting and sending photos with smartphones); see also Stephanie Gaylord Forbes, Note, *Sex, Cells, and Soma: Applying Sex Offender Registration Laws to Sexting Cases*, 52 WM. & MARY L. REV. 1717, 1722 (2011) (denoting the technological capabilities available to intended recipients of sexually explicit photos, including the ability to forward sexts to others).

26. See Elizabeth C. Eraker, Note, *Stemming Sexting: Sensible Legal Approaches to Teenagers' Exchange of Self-Produced Pornography*, 25 BERKELEY TECH. L.J. 555, 560 (2010) (illustrating the popularity of sexting with younger generations as compared to their parents and grandparents). But see Kimberlianne Podlas, *The "Legal Epidemiology" of the Teen Sexting Epidemic: How the Media Influenced a Legislative Outbreak*, 12 U. PITT. J. TECH. L. & POL'Y 1, 19–20 (2011) ("Therefore, despite teen sexting's popularity in the media, its prevalence in the real world is uncertain Some people use these statistics to prove that sexting is rampant . . . while others use them to show that it is not (because eighty percent do not sext)." (internal citations omitted)).

27. *Sexting Scenario*, REGION 10 EDUC. SERV. CTR., available at <http://www.region10.org/r10website/assets/File/sextingbrochure.pdf>. The Region 10 website indicates that the sexting brochure is from the Office of the Attorney General of Texas. *Counselor Initiative and Student Support: Resources/Links*, REGION 10 EDUC. SERV. CTR., <http://www.region10.org/ciss-counselors-initiative-student-support/links/resourceslinks/> (last visited Nov. 21, 2013).

28. *Sexting Scenario*, REGION 10 EDUC. SERV. CTR., available at <http://www.region10.org/r10website/assets/File/sextingbrochure.pdf>; *Sex and Tech*, THE NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY 2, available at http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf (last visited Oct. 28, 2013).

29. *Sexting Scenario*, REGION 10 EDUC. SERV. CTR., available at <http://www.region10.org/r10website/assets/File/sextingbrochure.pdf>; *Sex and Tech*, THE NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY 2–3, available at http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf (last visited Oct. 28, 2013).

sexting.³⁰ Unfortunately, the nature of this issue is inherently volatile, and there is “no consensus in the legal community” about the appropriate legal ramifications of teen sexting.³¹ Texas Attorney General Greg Abbott recognized the need to address the rise of teen sexting, but was concerned with the laws in place at the time.³² Before the passage of Texas Senate Bill 407, which amended the Texas Penal Code, teens convicted of sexting were subject to child pornography standards with possible sexual offender registration requirements.³³

C. *The Dangers of Former Law Application*

The potential downfalls associated with prosecuting sexting under old child pornography laws are illustrated in the Florida case, *A.H. v. State*.³⁴ Here, a minor was convicted of “producing, directing, or promoting a photograph or representation that she knew included sexual conduct of a child in violation” of Florida child pornography laws.³⁵ A.H. and her boyfriend took pictures while engaging in sexual conduct and shared these pictures with one another through their home computers.³⁶ These

30. See Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 18 (2012) (noting existing laws are not well-suited to handling sexting offenses); see also Terri Day, *The New Digital Dating Behavior—Sexting: Teens’ Explicit Love Letters: Criminal Justice or Civil Liability*, 33 HASTINGS COMM. & ENT. L.J. 69, 76 (2010) (explaining that treating sexting teenagers as child pornographers does little to deter sexting offenders and instead “stigmatizes the sextor well into his adult life”).

31. See Megan Sherman, Note, *Sixteen, Sexting, and a Sex Offender: How Advances in Cell Phone Technology Have Led to Teenage Sex Offenders*, 17 B.U. J. SCI. & TECH. L. 138, 139–40 (2011) (“Technological advancements and the resulting misuse by teens have forced prosecutors and legislatures across the country to strike a balance between protecting children from the harms of child pornography and the need to avoid imposing severe punishments on teenagers for unintentionally engaging in criminal behavior.”); cf. Ed Pilkington, *Sexting Craze Leads to Child Pornography Charges*, THE GUARDIAN (Jan. 14, 2009, 1:46 AM), <http://www.guardian.co.uk/world/2009/jan/14/child-pornography-sexting> (emphasizing the discrepancy between current case law and technology).

32. See Cristina Blackwell, *Attorney General Abbott Introduces New Sexting Legislation*, LA PRENSA 7-C (Nov. 21, 2010) (“We want to address this problem in the State of Texas and offer common-sense solutions that will help protect young Texans,” stated Abbott.”).

33. See *id.* (citing the punishment under former Texas law, including up to a 20-year prison sentence and registration as a sex offender); OFFICE OF THE ATTORNEY GENERAL OF TEXAS, <https://www.oag.state.tx.us/oagnews/release.php?id=3627> (last visited Oct. 28, 2013) (explaining how teens were subject to felony charges prior to the passage of Texas Senate Bill 407).

34. See *A.H. v. State*, 949 So. 2d 234, 236 (Fla. Dist. Ct. App. 2007) (noting that minors do not have a reasonable expectation of privacy involving the transmission of sexually explicit material, thus avoiding a Fourth Amendment complaint).

35. *Id.* at 235.

36. *Id.*

photographs were never disseminated to a third party.³⁷ However, the State argued it had a “compelling state interest in preventing the production of these photographs[,] and criminal prosecution was the least intrusive means of furthering the State’s compelling interest.”³⁸ A.H. argued her privacy rights were compromised, and her severe punishment failed to promote the state interest.³⁹ Nonetheless, the *A.H.* court held that while the Florida statute was not created specifically to discourage sexting, “the [s]tate has a compelling interest in seeing that material which will have such negative consequences is never produced.”⁴⁰

In *State v. Canal*,⁴¹ an eighteen-year-old was also surprised by harsh punishment for sexting with a minor.⁴² In *Canal*, the defendant and the minor were friends, but were not in a romantic relationship.⁴³ However, C.E., the minor, solicited Canal to send her a picture of his penis.⁴⁴ In response, Canal e-mailed C.E. two photographs: one of Canal’s erect penis and another of Canal’s face with the message, “I love you.”⁴⁵ C.E.’s mother later retrieved the photographs from her daughter’s e-mail trash folder and forwarded the e-mail to C.E.’s father.⁴⁶ Her father turned over the obscene photographs to the police.⁴⁷ An Iowa jury convicted Canal “of knowingly disseminating obscene material to a minor.”⁴⁸ He was sentenced to probation and required to register as a sex offender for the

37. *See id.* (recognizing the digital images were never intended to reach anyone other than the defendant’s boyfriend).

38. *Id.* (“The crux of the State’s interest in an adult-minor situation is the prevention of exploitation of the minor by the adult.”).

39. *See A.H.*, 949 So. 2d at 236 (arguing that a minor’s right to privacy extends to sexting). *But see State v. A.R.S.*, 684 So. 2d 1383, 1387 (Fla. Dist. Ct. App. 1996) (deciding that the State failed to further its compelling interest of protecting the minor’s “health and quality of life” in the least intrusive manner possible).

40. *A.H.*, 949 So. 2d at 236 (emphasizing the likelihood of sexual photos being distributed to unknown third parties). *But see id.* at 240 (Padovano, J. dissenting) (realizing that sexting and the distribution of such inappropriate images are often nothing more than an innocent, consensual exchange between minors who have no concept of the potential consequences).

41. *State v. Canal*, 773 N.W.2d 528 (Iowa 2009).

42. *State v. Canal*, 773 N.W.2d 528, 529 (Iowa 2009) (requiring Canal to register as a sex offender, pay a \$250 fine, and be placed on probation for one year).

43. *Id.*

44. *Id.*

45. *Id.* (determining that C.E. sent the photo after prodding by the minor).

46. *Id.* (noting the photograph was on the family computer, and the mother accessed it after the minor “thought she deleted it”).

47. *Id.*

48. *Id.*; *see also Miller v. California*, 413 U.S. 15, 24 (1973) (holding that obscenity was determined by whether the “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value”).

remainder of his life.⁴⁹ Canal appealed his conviction on the grounds that the evidence was insufficient to prove the photographs were obscene.⁵⁰ The Iowa Supreme Court held that juries have the right to decide what constitutes obscenity by their own community standards, and therefore it upheld Canal's conviction.⁵¹

Both of these cases illustrate the exceptionally harsh levels of punishment administered to teens involved in sexting.⁵² Requiring minors to register as a sex offenders for the rest of their lives is too high of a price to pay.⁵³ State legislatures around the country have recognized this inappropriate penalty and, consequently, are developing new legislation to ensure punishment for sexting is more appropriately suited to the crime.⁵⁴

D. *Federal Sexting Repercussions*

In order to understand the implications of Texas Senate Bill 407, it is important to address the limitations placed on Texas by federal

49. *See Canal*, 773 N.W.2d at 529 (sentencing Canal to “register as a sex offender and order[ing] that an evaluation take place to determine if treatment was necessary as a condition of his probation”).

50. Canal argued that minors were entitled to First Amendment rights and that his photographs were not obscene. *Id.* at 531; *see also* *Gilmour v. Rogerson*, 117 F.3d 368, 371 (8th Cir. 1997) (explaining that the “constitutional *mens rea* requirement is satisfied if the defendant knows the contents of the obscene materials and their ‘character and nature’”).

51. *Canal*, 773 N.W.2d at 531 (arguing unsuccessfully that the pictures he sent were not obscene as “the jury instruction recognizes that the obscenity test as to minors is different from the test as to adults”). However, the Third Circuit granted a preliminary injunction in favor of parents and their children after a district attorney threatened prosecution. *Miller v. Mitchell*, 598 F.3d 139, 142 (3d Cir. 2010). Unless the children attended an educational program, the district attorney threatened to prosecute the children, without probable cause, for “provocative” pictures. *Id.* The lack of probable cause stemmed from the district attorney’s inability to define what constitutes “provocative.” *Id.* at 144. The district attorney claimed a picture was provocative because the young girls were “shown from the waist up wearing white, opaque bras.” *Id.* (rejecting a prosecutor’s ability to arbitrarily define what is “provocative” without probable cause).

52. *See, e.g.*, Fla. Stat. Ann. § 827.071(4) (West Supp. 2013) (“It is unlawful for any person to possess with the intent to promote any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any sexual conduct by a child.”). *See generally* Stephanie Gaylord Forbes, Note, *Sex, Cells, and Sorna: Applying Sex Offender Registration Laws to Sexting Cases*, 52 WM. & MARY L. REV. 1717, 1725 (2011) (“The most widespread concern over sexting is the prosecution of sexters under state and federal pornography laws.”).

53. *See, e.g.*, Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035, 1047–48 (2010) (arguing that classifying juveniles as sex offenders substantially hinders their ability to successfully integrate into society).

54. *See, e.g.*, Supplemental Brief of Appellant at 3, *Miller v. Skumanick*, 598 F.3d 139 (3d Cir. 2010) (No. 09-2144), 2010 WL 300289, at *3 (“Moreover, the laws of our Commonwealth and United States recognize the inherent vulnerability, immaturity, and incompetence of minors. The entire juvenile system is designed with this premise in mind.”).

restrictions.⁵⁵ Federal child pornography laws are designed to protect children from “actual child pornography . . . typically involving possession, creation, or distribution of images of young children by older male sexual predators, as well as involving or constituting sexual abuse of children[.]”⁵⁶ Applying child pornography laws to minors convicted of a sexting offense imposes a disproportionate punishment to the crime.⁵⁷

Under federal law, juveniles convicted of certain sexual offenses are mandated to register as sex offenders.⁵⁸ The Adam Walsh Child Protection and Safety Act of 2006 (Walsh Act) requires minors convicted of sexual offenses to register as sex offenders.⁵⁹ States must comply with the requirements of the Walsh Act and the Sex Offender Registration & Notification Act (SORNA) to receive federal funding for crime control within their respective states.⁶⁰ Registration with SORNA can have a significant life-changing impact on individuals and will considerably limit their ability to fully function as members of society.⁶¹ For example, minors required to comply with SORNA are limited in regard to future housing and employment options, and they may have difficulty attending college in a neighboring state.⁶²

Under SORNA, juveniles and adults are divided into three tiers based on the sexual offense conviction.⁶³ Determining factors include the type

55. See, e.g., Stephanie Gaylord Forbes, Note, *Sex, Cells, and Sorna: Applying Sex Offender Registration Laws to Sexting Cases*, 52 WM. & MARY L. REV. 1717, 1725 (2011) (noting the legal hurdles of prosecuting sexting offenders under pornography laws).

56. Dawn C. Nunziato, *Romeo and Juliet Online and in Trouble: Criminalizing Depictions of Teen Sexuality (c u l8r: g2g 2 jail)*, 10 NW. J. TECH. & INTELL. PROP. 57, 66 (2012).

57. See *id.* (“However, to the extent such laws are extended to incidents of teen sexting, the penalties are disproportionately harsh and unconstitutional as applied.”).

58. See Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035, 1049–50 (2010) (describing the registration requirements under federal law).

59. *Id.* at 1049.

60. See *id.* (forcing states to comply with these acts or forfeit federal funding).

61. See *id.* (“Certain types of adjudications may also preclude an individual from approval as a foster or adoptive parent or from having a job that requires working with children, including jobs in education, child care, and service.” (citation omitted)); Leifert & Leifert, *New Sexting Laws Take Over in West Palm Beach, Statewide*, FLA. CRIM. LAW. BLOG (Oct. 7, 2011), www.florida-criminal-lawyer-blog.com/sexting/ (“Many teens lost an opportunity to attend college, earn scholarships[,] or have any kind of positive future after being convicted of a felony, sent to prison[,] and labeled a sex offender.”).

62. See Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035, 1050 (2010) (noting the difficulties registered sex offenders face with regard to employment, education, and even housing).

63. Stephanie Gaylord Forbes, Note, *Sex, Cells, and Sorna: Applying Sex Offender Registration Laws to Sexting Cases*, 52 WM. & MARY L. REV. 1717, 1731 (2011). Tier I is a catchall tier that covers offenders who do not fit into either Tier II or III. *Id.* Tier II and III require possible imprisonment to exceed one year, which is common for child pornography offenses. *Id.*

of sexual act and the length of possible imprisonment.⁶⁴ Each tier coincides with a length of required registration.⁶⁵ Minors prosecuted for sexting who are convicted of possessing or distributing child pornography typically fall under Tier II or Tier III.⁶⁶

In addition to SORNA, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), enacted by Congress in 1993 and modified in 1996 and 2000, holds all states to a standard of community notification.⁶⁷ Such community notification requires all sexual offender registrants to report their status as a sex offender to their employers, universities, and colleges.⁶⁸ The Wetterling Act is designed to alert the public of sex offenders within their communities; however, such notification is often misplaced and excessive in its application to minors convicted for sexting.⁶⁹

The Walsh Act also provides all law enforcement officials with the most current state information regarding state sex offenders,⁷⁰ specifically identifying which acts committed by minors require compliance with sex offender registration requirements.⁷¹ This Act seems to comply more closely with the realities of juvenile relationships and does not require minors who engage in consensual sexual acts between two minors to register.⁷²

Furthermore, the federal sex-offender registration requirements are not

64. The three SORNA tiers have specific requirements concerning the amount of time on the sex-offender registry. *See id.* (“These tiers determine the amount of time the offender is required to register and the minimum amount of prison time served before the offender may petition to be removed from the registry.”).

65. *See id.* (explaining the purpose of the tiered system for sex offender registration).

66. *Id.*

67. *See* Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CALIF. L. REV. 163, 166 (2003) (allowing Congress to create the Wetterling Act to develop requirements “that states would have to adhere to in order to receive their share of about \$100 million of federal crime-prevention funds”).

68. *See id.* at 167 (requiring states to enforce community notification to receive federal funding resulted in “[e]very state legislature [passing] a sex-offender registration law with a community-notification component by the end of 1996”).

69. *See, e.g., id.* at 173 (finding that legislation focuses little on crimes that are actually perpetrated and instead includes more “politically and morally ambivalent offenses”).

70. *See* Joanna S. Markman, *Community Notification and the Perils of Mandatory Juvenile Sex Offender Registration: The Dangers Faced by Children and Their Families*, 32 SETON HALL LEGIS. J. 261, 278 (2008) (enforcing stricter federal sex offender registration requirements).

71. *See id.* (“Juveniles must be at least fourteen years old or older at the time the offense was committed, and the act committed must be ‘comparable to or more severe than aggravated sexual abuse.’” (citation omitted)).

72. *See id.* at 279 (noting an exception for victims younger than thirteen and when the age difference between the perpetrator and minor victim is more than four years).

consistent within each state.⁷³ Some states impose strict notification requirements, while other states are silent on the issue.⁷⁴ In light of the technology-driven increase in minors accused of sexual offenses and the ability of sexting to cross state lines, it is imperative for the nation to reach a consensus on sex offender registration.⁷⁵

II. TEXAS SENATE BILL 407

Texas Senate Bill 407,⁷⁶ which ultimately was codified in Texas Penal Code sections 43.26 and 43.261,⁷⁷ was proposed in reaction to the rise of sexting among Texas teens.⁷⁸ Under Texas law prior to the bill, any offender who transmitted explicit images of a minor was subject to “felony charges of possessing or trafficking child pornography.”⁷⁹ Texas Attorney General Greg Abbott and State Senator Kirk Watson recognized the severity of these criminal repercussions and drafted the new legislation to provide “legal provisions for these youthful offenses, so minors are punished for improper behavior but do not face life-altering charges.”⁸⁰ The bill ultimately addressed “the creation of the offense of electronic transmission of certain visual material depicting a minor” and initiated educational programs to promote awareness and prevent such acts.⁸¹ The Eighty-Second Texas Legislature adopted Texas Senate Bill 407 in June of 2011, and the bill took effect on September 1, 2011.⁸²

73. *Id.* at 280.

74. *See id.* at 280–81 (recognizing inconsistencies such as “Alaska, Louisiana, Kentucky, and Maine, [which] are all silent as to whether or not juveniles are required to register, unless they are adjudicated as adults”).

75. Joanna S. Markman, *Community Notification and the Perils of Mandatory Juvenile Sex Offender Registration: The Dangers Faced by Children and Their Families*, 32 SETON HALL LEGIS. J. 261, 284 (2008) (emphasizing the severity of sex offender registration and its ability to put a minor in a position where he or she will have difficulty securing a job).

76. Act of June 17, 2011, 82d Leg., R.S., ch. 1322, § 3, Tex. Sess. Law Serv. 3825, 3825–26 (West) (codified at TEX. PENAL CODE ANN. § 43.261 (West Supp. 2012)).

77. TEX. PENAL CODE ANN. § 43.26 (West 2011); *id.* § 43.261 (West Supp. 2012).

78. *See, e.g.*, Cristina Blackwell, *Attorney General Abbott Introduces New Sexting Legislation*, LA PRENSA 7-C (Nov. 21, 2010) (“Improvements in cell phone technology over the years has dramatically expanded young Texan’s access to mobile telephones that can transmit sexual photographs and videos, which is why the problem is so increasingly prevalent.”).

79. *Id.* (highlighting the prior penalty for offenders charged with sexting).

80. *Id.* (recognizing the seriousness of sexting ramifications and the need to eliminate sexting among teenagers).

81. Act of June 17, 2011, 82d Leg., R.S., ch. 1322, § 3, Tex. Sess. Law Serv. 3825, 3825–26 (West) (codified at TEX. PENAL CODE ANN. § 43.261 (West Supp. 2012)).

82. *See* TEX. PENAL § 43.26 (West 2011) (citing the “Possession or Promotion of Child Pornography” change to the Texas Penal Code); *id.* § 43.261 (West Supp. 2012) (citing the “Electronic Transmission of Certain Visual Material Depicting Minor,” which defined specific

A. *Elements*

Texas Penal Code section 43.26, entitled “Possession or Promotion of Child Pornography,” must be read in conjunction with Texas Penal Code section 43.261, entitled “Electronic Transmission of Certain Visual Material Depicting Minors,” to understand the full implications of current Texas sexting law.⁸³ Section 43.26(a) states that an offense is committed “if (1) the person knowingly or intentionally possesses visual material that visually depicts a child younger than 18 years of age at the time the image of the child was made who is engaging in sexual conduct; and (2) the person knows that the material depicts the child”⁸⁴

To appreciate the effects of the current law, it is necessary to understand certain key words and their respective legislative meaning. Section 43.26(b) specifically defines three important components to this statute: “promote,” “sexual conduct,” and “visual material.”⁸⁵ For example, “promote” is defined by section 43.25 as “means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do any of the above.”⁸⁶ Furthermore, the definition of “sexual conduct” is cited in section 43.25 as “sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.”⁸⁷

Section 43.261 amended Texas Penal Code section 43.26 by adding the transmission of an electronic message of a child; this section was specifically geared toward addressing minors accused of sexting.⁸⁸ In addition to the meanings of “promote,” “sexual conduct,” and “visual material,” section 43.261(a) defines “dating relationship,” “minor,” and

components of section 43.26); *Attorney General Abbott Applauds Governor Perry for Signing Sexting Prevention Legislation into Law*, CBS 7 (June 21, 2011), www.cbs7kosa.com/news/details.asp?ID=26615 (“Texas Attorney General Greg Abbott today thanked Gov. Rick Perry for signing Senate Bill 407 into law on Friday.”).

83. TEX. PENAL § 43.26 (West 2011); *id.* § 43.261 (West Supp. 2012).

84. *Id.* § 43.26 (West 2011).

85. *Id.*

86. *See id.* § 43.25 (West 2011) (citing specific legislative definitions applicable to “Sexual Performance by a Child”).

87. *See id.* (listing the possible acts recognized by the Texas legislature as “sexual conduct”).

88. *See, e.g.*, Act of June 17, 2011, 82d Leg., R.S., ch. 1322, § 3, Tex. Sess. Law Serv. 3825, 3825–26 (West) (codified at TEX. PENAL CODE ANN. § 43.261 (West Supp. 2012)) (explaining that the purpose behind the addition of the new section is to address teens convicted of sexting in Texas).

“produce.”⁸⁹ According to section 43.261, two minors engaged in a “dating relationship” is defined by Texas Family Code section 71.0021.⁹⁰ Section 71.0021 states that a “dating relationship” “means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature.”⁹¹ This type of relationship should be evaluated based on the length, nature, frequency, and type of interaction of the two persons involved in the relationship.⁹² Section 71.0021(c) expresses that “a casual acquaintanceship or ordinary fraternization in a business or social context” does not constitute a “dating relationship” recognized by section 43.261.⁹³ Additionally, section 43.261 states a “minor” is any person under the age of eighteen, and it defines “produce” as “any conduct that directly contributes to the creation or manufacture of the [visual] material.”⁹⁴

Section 43.261(b) expressly added sexting, as it applies between minors, to the Texas Penal Code.⁹⁵ The sexting offense is separated into two main components: promotion and possession.⁹⁶ First, “a minor commits an offense if the person intentionally or knowingly by electronic means [namely a text message or e-mail] promotes to another minor visual material depicting a minor . . . if the actor produced the visual material or knows that another minor produced the visual material.”⁹⁷ In regard to mere possession, “a minor commits an offense if the person intentionally or knowingly possesses in an electronic format visual material depicting another minor engaging in sexual conduct”⁹⁸

Texas Senate Bill 407 revised the consequences for minors convicted of a sexting offense.⁹⁹ The adopted bill replaced potential felony charges with a graduated misdemeanor system based on repeat offenders.¹⁰⁰ According to section 43.261, the first time a minor is found to have intentionally or knowingly produced or possessed a piece of sexually

89. See TEX. PENAL § 43.261(a) (West Supp. 2012) (specifying key words within the statute).

90. *Id.*

91. See TEX. FAM. CODE ANN. § 71.0021(b) (West Supp. 2012) (citing the elements of “dating violence” and defining what constitutes a “dating relationship” in Texas).

92. *Id.*

93. *Id.* § 71.0021(c).

94. TEX. PENAL § 43.261(a) (West Supp. 2012).

95. *Id.* § 43.261(b).

96. *Id.*

97. *Id.*

98. *Id.*

99. Act of June 17, 2011, 82d Leg., R.S., ch. 1322, § 3, Tex. Sess. Law Serv. 3825, 3825–26 (West) (codified at TEX. PENAL CODE ANN. § 43.261 (West Supp. 2012)).

100. *Id.*

explicit visual material, the offense is classified as a Class C misdemeanor, the grade of a traffic violation.¹⁰¹ The Class C misdemeanor is promoted to a Class B misdemeanor “if it is shown on the trial of the offense that the actor: (A) promoted the visual material with intent to harass, annoy, alarm, abuse, torment, embarrass, or offend another; or (B) . . . has been previously convicted one time of any offense under this section”¹⁰² The Class B misdemeanor is enhanced to a Class A misdemeanor “if it is shown on the trial of the offense that the actor has previously been convicted one or more times” of promoting sexually explicit material with inappropriate intentions, such as harassment, embarrassment, abuse, etc.¹⁰³ The Class B misdemeanor is also promoted to a Class A misdemeanor “if it is shown on the trial of the offense that the actor has previously been . . . convicted two or more times of any offense” in section 43.261.¹⁰⁴

B. *Defenses*

Section 43.261 provides both affirmative defenses and defenses for a defendant accused of producing or promoting sexually explicit visual material, such as sexting.¹⁰⁵ It is an affirmative defense to prosecution if the minor can prove at trial “that the visual material depicted only the actor or another minor . . . who is not more than two years older or younger than the actor and with whom the actor had a dating relationship at the time of the offense; or who was the spouse of the actor[.]”¹⁰⁶ These affirmative defenses are based on the accused’s ability to prove that he or she was in a “dating relationship” or was a spouse to the other minor, and the accused’s capacity to prove “that the visual material was promoted or received only to or from the actor and the other minor.”¹⁰⁷

101. TEX. PENAL § 43.261(c).

102. *Id.*

103. *Id.*

104. *Id.* Furthermore, Texas Senate Bill 407 amends article 45.0216 of the Texas Code of Criminal Procedure to include expunction provisions for minors over the age of seventeen. TEX. CODE CRIM. PROC. ANN. art. 45.0216 (West Supp. 2012) (requiring that “[t]he person must make a written request to have the records expunged” and submit a personal statement concerning other related indiscretions); Mike Little, *Should Parents Be Responsible for Teen Sexting?*, THE VINDICATOR (March 23, 2011, 10:00 AM), www.thevindicator.com/police/article_581f6524-555e-11e0-b011-001cc4c002e0.html (“The application for expunction must be filed with the court in which the conviction took place[,] and the application cannot be filed until the convicted person has reached their 18th birthday.”).

105. TEX. PENAL § 43.261(e)–(f).

106. *Id.* § 43.261(e).

107. *Id.*

Section 43.261(f) provides a defense if “the actor (1) did not produce or solicit the visual material; (2) possessed the visual material only after receiving the material from another minor; and (3) destroyed the visual material within a reasonable amount of time after receiving the material from another minor.”¹⁰⁸ This defense is aimed toward protecting an unsuspecting minor who receives a sexually explicit photograph from another minor without any type of solicitation.¹⁰⁹ Thus, Texas has no interest in convicting such a person if that person took reasonable steps within a reasonable amount of time to destroy the inappropriate visual material.¹¹⁰ Section 43.26(h) also provides a defense for an actor who is a law enforcement officer or a school administrator.¹¹¹ However, a law enforcement officer or a school administrator must only possess the explicit material in “good faith.”¹¹² Section 43.261 allows other law enforcement or administrators to view the material as much as appropriately necessary to carry out their functions, but requires them to take reasonable steps to destroy the explicit material within a reasonable amount of time given the circumstances.¹¹³ This provision is designed to protect Texas police officers and school administrators who possess inappropriate material of minors for the sole purpose of punishing the minors.¹¹⁴

108. *Id.* § 43.261(f).

109. *Id.*

110. TEX. PENAL § 43.261(e)–(f) (West Supp. 2012). Texas Senate Bill 407 amended section 37.09 of the Texas Penal Code to include a defense to the “tampering with or fabricating physical evidence” offense. Section 37.09(c-1) was added to provide a defense to the prosecution if a minor destroyed evidence of explicit sexual material in compliance with section 43.261. *Id.* § 37.09 (West Supp. 2012).

111. TEX. PENAL § 43.26(h) (West 2011).

112. *Id.*

113. *Id.* Texas Senate Bill 407 amended section 37.09 of the Texas Penal Code to include a defense to the “tampering with or fabricating physical evidence” offense in cases where a police officer or school administrator destroyed evidence of explicit sexual material in compliance with section 43.261. *Id.* § 37.09(c-1).

114. *Id.* § 43.26. Due the nature of their profession, law enforcement officers are often protected under the doctrine of qualified immunity. *See Logan v. Sycamore Cmty. Sch. Bd. of Educ.*, 780 F. Supp. 2d 594, 597 (S.D. Ohio 2011) (discussing the doctrine of qualified immunity). This doctrine is designed to balance “two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223 (2009)). It is counterintuitive to punish law enforcement officers or school administrators who possess sexually explicit visual material for investigation and evidence collection purposes. *See id.* (describing the state interest in protecting law enforcement officers from civil liability).

C. Parental Involvement

In addition to providing Texas prosecutors with appropriate standards to punish minors accused of sexting, Texas Senate Bill 407 was designed to make parents aware of the risks and consequences of sexting and to create preventative, educational programs.¹¹⁵ Attorney General Abbott believed that good character and appropriate behavior begins in the home with “active parenting.”¹¹⁶ Abbott urged parents to take an aggressive role in parenting and to have tough conversations with their teens about the realities and long-term consequences of sexting.¹¹⁷

To create a legal means to essentially force parents to become involved in their children’s lives, Texas Senate Bill 407 amended chapter 6 of the Texas Code of Criminal Procedure.¹¹⁸ The amendment provides that “[t]he judge of a county court: (1) must take the defendant’s plea in open court; and (2) shall issue a summons to compel the defendant’s parent¹¹⁹ to be present” for both the plea and all other proceedings.¹²⁰ The requirement of parental presence at the proceedings encourages responsibility and emphasizes the severity of the offense.¹²¹ In addition

115. See Act of June 17, 2011, 82d Leg., R.S., ch. 1322, § 3, Tex. Sess. Law Serv. 3825, 3825–26 (West) (codified at TEX. PENAL CODE ANN. § 43.261 (West Supp. 2012)) (addressing the parent’s role in these matters).

116. Cristina Blackwell, *Attorney General Abbott Introduces New Sexting Legislation*, LA PRENSA, Nov. 21, 2010, at 7-C (encouraging parents to take an involved role in the lives of their teens to prevent them from making devastating decisions); see *Editorial: Talk to Kids about Sexting*, HOUS. CHRON., (July 5, 2012), <http://www.chron.com/opinion/editorials/article/Talk-to-kids-about-sexting-3687005.php> (asserting that better parental communication will help teens understand the consequences of sexting and hopefully reduce the behavior); see also Erin Cox, *Sexting Hits Connecticut Schools*, NEWS 8, May 19, 2009, www.wtnh.com/dpp/news/news_wtnh_waterbury_texting_sexual_images_200905182351_rev1#.UOmwtGt5mK0 (emphasizing the vital role parents play in educating their children about the consequences of sexting).

117. See Cristina Blackwell, *Attorney General Abbott Introduces New Sexting Legislation*, LA PRENSA, Nov. 21, 2010, at 7-C (recommending that parents discuss with their children how photos and texts can damage their future education and job prospects).

118. Formerly codified under article 6.09, the provisions were subsequently redesignated as article 6.10. Act of May 13, 2013, 83d Leg., R.S., ch. 161 § 22.001(5), Tex. Sess. Law Serv. 200, 201 (West) (codified at TEX. CRIM. PROC. art. 6.10 (West Supp. 2013)).

119. Article 6.10 of the Texas Code of Criminal Procedure defines “parent” as “a natural or adoptive parent, managing or possessory conservator, or legal guardian. The term does not include a parent whose parental rights have been terminated.” TEX. CRIM. PROC. art. 6.10(a) (West Supp. 2013).

120. *Id.* art. 6.10(c).

121. See *id.* (including a parental component to a section 43.261 offense); see also *Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000) (declaring parents, not the government, are responsible for raising their children). *But see Miller v. Skumanick*, 605 F. Supp. 2d 634, 643 (M.D. Pa. 2009) (criticizing the government’s intrusion into a parent’s ability to exercise discretion about the upbringing of their own children).

to a parent's presence at the official proceedings, article 6.10(d) states that a minor convicted of a 43.261 offense may be required "to attend and successfully complete an educational program described by [s]ection 37.218 . . . [of the] Education Code, or another equivalent educational program."¹²² Furthermore, if the judge orders the minor to fulfill an educational component to his or her punishment, then the minor or the parent, if financially able, is required to pay for the cost of the program.¹²³

D. *Educational Programs*

Section 37.218 of the Education Code mandates that the Texas School Safety Center, in conjunction with input from the attorney general, must develop educational programs for school districts.¹²⁴ These programs include information concerning the gravity of the criminal ramifications and other possible consequences of sexting.¹²⁵ For example, a sexting conviction can have a negative impact on a relationship, limit employment opportunities, and may result in the student's removal from certain extracurricular activities.¹²⁶ These programs are constructed to educate teenagers about the realities of the Internet.¹²⁷ Many teenagers do not understand the permanency of a viral message and the likelihood that their message will be replicated or shown to others.¹²⁸ Additionally, these programs are designed to teach students about the dangers of bullying and cyber harassment associated with sexting.¹²⁹ The passage of Texas Senate Bill 407 provided the judiciary with an additional form of punishment—community supervision of minors convicted under section 43.261.¹³⁰ A

122. TEX. CRIM. PROC. art. 6.10(d) (West Supp. 2013).

123. *Id.* art. 6.10(e).

124. Act of June 17, 2011, 82d Leg., R.S., ch. 1322, § 3, Tex. Sess. Law Serv. 3825, 3825–26 (West) (codified at TEX. PENAL CODE ANN. § 43.261 (West Supp. 2012)) (citing the amendment to include educational programs for a section 43.261 offense).

125. *See* TEX. EDUC. CODE ANN. § 37.218 (West 2011) (describing the consequences that educational programs should address); Mark Seguin, "A Look into Senate Bill 407—What Are Schools Required to Do?", MARK SEGUIN BLOG (Dec. 3, 2012), markseguin.com/2012/a-look-into-senate-bill-407-what-are-schools-required-to-do/ (summarizing the goals of the sexting education programs).

126. TEX. EDUC. § 37.218(b)(2).

127. *Id.* § 37.218(b)(3).

128. *See* Cristina Blackwell, *Attorney General Abbott Introduces New Sexting Legislation*, LA PRENSA, Nov. 21, 2010, at 7-C (addressing the need for parents to prevent children from sexting because children may not fully understand the consequences).

129. TEX. EDUC. § 37.218; Tex. S. Jurisprudence Comm. Minutes 3, 82d Leg., R.S. (May 24, 2011) (listing the purposes of the educational programming, such as addressing legal consequences, emotional consequences, education and employment limitations, the vast reach of the Internet, and sexting's connection to bullying and harassment).

130. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 13H (West 2006); Act of June 17, 2011, 82d

judge may grant community supervision for a defendant who is either charged with, or convicted of transmitting sexually explicit visual material.¹³¹ As a condition of the community supervision, the judge may additionally require the minor to attend an educational program.¹³² The educational component provides the judiciary with a remedy for both reprimanding the minor and preventing future indiscretions.¹³³

E. *Public Response*

As expected, the passage of Texas Senate Bill 407 has elicited a mixed response.¹³⁴ The positive impacts of the recent change include more appropriate punishments, parental involvement, and educational programs.¹³⁵ Proponents of the bill are pleased with the graduated misdemeanor system designed to punish repeat offenders.¹³⁶ The graduated system provides first-time offenders with a reprimand, such as Class C misdemeanor, without life-altering consequences.¹³⁷ In addition to the classification shift from felony to misdemeanor, proponents of the bill champion the parental component of the revised section 43.261, which allows judges to demand parental presence at the sentencing of their child.¹³⁸ By requiring parents to be present at their child's sentencing, proponents hope that parents will take a more active role in preventing future incidents.¹³⁹ The educational programming component of the new

Leg., R.S., ch. 1322, § 3, Tex. Sess. Law Serv. 3825, 3825–26 (West) (codified at TEX. PENAL CODE ANN. § 43.261 (West Supp. 2012)).

131. TEX. CRIM. PROC. art. 42.12 (citing the amendment to article 42.12 of the Texas Code of Criminal Procedure, which reflects community supervision for the addition of an offense under section 43.261).

132. *Id.* art. 42.12 § 13H(b).

133. *Id.* art. 6.10 (West Supp. 2013); Act of June 17, 2011, 82d Leg., R.S., ch. 1322, § 3, Tex. Sess. Law Serv. 3825, 3825–26 (West) (codified at TEX. PENAL CODE ANN. § 43.261 (West Supp. 2012)).

134. *Compare* Prince v. Massachusetts, 321 U.S. 158, 441 (1944) (citing the narrow authority of the government “[t]o make accommodation between these freedoms [such as religion or sexual expression] and an exercise of state authority” over a parent’s right to determine appropriate punishments), *with* Tex. S. Jurisprudence Comm. Minutes 5–7, 82d Leg., R.S. (May 24, 2011) (containing a summary of arguments put forth by both supporters and opponents of the legislation).

135. *See* Tex. S. Jurisprudence Comm. Minutes 4, 82d Leg., R.S. (May 24, 2011) (“SB 407 would create a new legal response to sexting that would not carry the life-altering consequences of a felony conviction and would help prevent sexting through education.”).

136. *Id.* at 5 (approving of the graduated misdemeanor system).

137. *See id.* at 2 (proposing a less harsh penalty scheme for minors convicted of sexting).

138. *Id.* at 3 (noting the requirement of parental presence at proceedings related to sexting charges).

139. *See id.* at 5 (stressing the importance of parental involvement in preventing serious consequences for repeat offenses).

law also supplements the parental component in a combined effort to educate students about the dangers and emotional consequences associated with sexting, such as harassment or embarrassment.¹⁴⁰ It is important to note that Texas Senate Bill 407 gives individual school districts freedom to decide which grade level is most appropriate for preventative education classes.¹⁴¹ Moreover, proponents of the bill believe the defenses included in section 43.261 are essential to protect Texas law enforcement and school administrators.¹⁴² The inclusion of these defenses gives professionals the confidence to properly investigate sexting offenses without the fear of misplaced prosecution.¹⁴³

There are several groups of opponents to the new law.¹⁴⁴ Some believe the reduced punishment is too low, and thereby fails to provide a proper disincentive to prevent teens from sexting.¹⁴⁵ Other opponents believe that minors charged with sexting should not face any criminalization and that true transformation is achieved only through education.¹⁴⁶ These opponents likened recent sexting legislation to the anti-comic book regulations of past generations.¹⁴⁷ They believe that not only is criminalization of sexting unnecessary, but also that the criminal justice system is ill-equipped to handle the inevitable increase in sexting cases.¹⁴⁸

140. Tex. S. Jurisprudence Comm. Minutes 4, 82d Leg., R.S. (May 24, 2011) (“The educational requirements of SB 407 would emphasize the criminal, emotional, and psychological consequences associated with the crime before kids engaged in the harmful activity.”).

141. *See id.* (establishing the flexibility of sexting education classes as a tool to protect communities from unnecessary sexual deviance).

142. *Id.* at 5 (explaining the need to protect “law enforcement officers and school administrators in possession of a sext”).

143. *See id.* (providing an affirmative defense for law enforcement officers and school administrators possessing a sext for investigative purposes).

144. *See id.* at 5–7 (highlighting various opponent positions to Texas’s sexting legislation).

145. *See* Tex. S. Jurisprudence Comm. Minutes 6, 82d Leg., R.S. (May 24, 2011) (“This is child pornography[.] so the equivalent of a traffic ticket is grossly inappropriate given the content of some of these images.”).

146. *See id.* at 5–6 (promoting education as the best tool to prevent sexting); Todd A. Fichtenberg, Note, *Sexting Juveniles: Neither Felons nor Innocents*, 6 I/S: J. L. & POL’Y FOR INFO. SOC’Y 695, 709 (2011) (suggesting that the criminalization of sexting is unnecessary because it is ordinarily purely social rather than criminal).

147. *See* Todd A. Fichtenberg, Note, *Sexting Juveniles: Neither Felons nor Innocents*, 6 I/S: J. L. & POL’Y FOR INFO. SOC’Y 695, 710 (2011) (“In the 1950s, fears that comic books polluted the minds of children led to strict anti-comic book regulations. The negative reaction to sexting has been likened to this treatment of comic books . . .”) (footnotes omitted); Marsha Levick, *Sexting Bill Victimized Pennsylvania Teens*, PATRIOT NEWS, (Oct. 23, 2012), http://www.pennlive.com/opinion/index.ssf/2012/10/sexting_bill_victimizes_pennsylvania_teens.html (justifying sexting as harmless and “the 21st century version of the 20th century Polaroid”).

148. *See* Tex. S. Jurisprudence Comm. Minutes 2, 82d Leg., R.S. (May 24, 2011) (advocating that education and parental involvement are better tools for preventing sexting). Some parents see

Other opponents of recent sexting laws argue that sexting should not be criminalized because it is a form of protected speech under the First Amendment.¹⁴⁹ However, sexting is not the type of speech that the Constitution was designed to protect.¹⁵⁰ “[S]ome categories of speech fall outside of First Amendment protection, including obscenity and child pornography.”¹⁵¹

The final group of Texas Senate Bill 407 opponents argues that the reduction in punishment is too drastic.¹⁵² Such opponents believe that a Class C misdemeanor, essentially the equivalent of a regular traffic violation, does not adequately deter sexting among teenagers in today’s society.¹⁵³

III. IMPLICATIONS OF THE SEXTING EPIDEMIC

Many states are making a concerted effort to discourage minors from engaging in promiscuous behavior on their cell phones.¹⁵⁴ New sexting legislation is imperative to give prosecutors guidance for indictments and plea agreements for minors.¹⁵⁵ As demonstrated below by the sampling

sexting as a child’s expression of his or her personality, and any issue should be resolved with parental punishment at home. *See Miller v. Skumanick*, 605 F. Supp. 2d 634, 638, 643 (M.D. Pa. 2009) (enjoining the district attorney from initiating any action that would force a child to attend a “re-education program” because it would infringe the parents’ right to oversee the moral upbringing of their children).

149. Tex. S. Jurisprudence Comm. Minutes 6, 82d Leg., R.S. (May 24, 2011) (warning of possible First Amendment challenges to Texas Senate Bill 407); *see also* U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

150. Todd A. Fichtenberg, Note, *Sexting Juveniles: Neither Felons nor Innocents*, 6 I/S: J. L. & POL’Y FOR INFO. SOC’Y 695, 701 (2011) (“[C]hild pornography is not protected by the First Amendment.”) (footnote omitted).

151. Elizabeth M. Ryan, Note, *Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 366 (2010); *see also* Antonio M. Haynes, Note, *The Age of Consent: When Is Sexting No Longer “Speech Integral to Criminal Conduct”?*, 97 CORNELL L. REV. 369, 379 (2012) (categorizing child pornography as constitutionally unprotected speech); Megan Sherman, Note, *Sixteen, Sexting, and a Sex Offender: How Advances in Cell Phone Technology Have Led to Teenage Sex Offenders*, 17 B.U. J. SCI. & TECH. L. 138, 151 (2011) (identifying areas of free speech not protected by the First Amendment, including child pornography).

152. Tex. S. Jurisprudence Comm. Minutes 6, 82d Leg., R.S. (May 24, 2011) (“While SB 407 is a step in the right direction, a class C misdemeanor is too low a punishment for a 17-year-old.”).

153. *Id.* (arguing that a Class C conviction is an inadequate deterrent for Texas teens).

154. *See, e.g.*, Elizabeth C. Eraker, Note, *Stemming Sexting: Sensible Legal Approaches to Teenagers’ Exchange of Self-Produced Pornography*, 25 BERKELEY TECH. L.J. 555, 573 (2010) (“In response to prosecutors’ aggressive pursuit of child pornography charges in sexting cases, state legislatures across the country have crafted a range of more tailored responses to sexting.”).

155. *Id.*

of recent state legislation, the implications of Texas Senate Bill 407 are consistent with new legislation in other states.¹⁵⁶

A. *State Action*

Arizona: ARIZ. REV. STAT. ANN. Section 8-309

In 2010, Arizona “reduce[d] the sexting offense from a felony to either a petty offense or a misdemeanor.”¹⁵⁷ The Arizona law classifies intentional possession of a sext as a petty offense, while repeat offenses are considered misdemeanors.¹⁵⁸ It is important to note the new Arizona charge is based on “whether the image was sent to one person or more than one person.”¹⁵⁹ Additionally, it is an affirmative defense if the minor did not solicit the picture and took “reasonable steps” to destroy the inappropriate content.¹⁶⁰ The major difference between Arizona and Texas law is that a first-time offense in Arizona is a “petty offense” while a first-time offense is a Class C misdemeanor in Texas.¹⁶¹

Connecticut: CONN. GEN. STAT. Section 53a-196h

In 2011, Connecticut chose to revise its sexting law based on age limitations.¹⁶² For example, the law reduced “the offense of sexting from a felony to a [C]lass A misdemeanor based on the minor’s age and whether the minor is the sender or the recipient.”¹⁶³ However, in Connecticut, a

156. See Kara Rowland, *‘Sexting’ Is Thorny Legal Issue*, THE WASH. TIMES (Jun. 23, 2009) <http://www.washingtontimes.com/news/2009/jun/23/sexting-is-thorny-legal-issue/> (“Vermont is not alone. Lawmakers across the country face the dilemma of trying to discourage the activity while making a distinction between a youthful mistake and a criminal act of child pornography.”).

157. Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 22 (2012); see ARIZ. REV. STAT. § 8-309 (LexisNexis 2010) (“A. It 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. B. It 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.”).

158. ARIZ. REV. STAT. § 8-309; see Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 22 (2012) (reviewing the revised Arizona sexting legislation).

159. Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 22 (2012).

160. ARIZ. REV. STAT. § 8-309(D); see Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 22 (2012) (pointing out the affirmative defenses to sexting).

161. ARIZ. REV. STAT. § 8-309(D); TEX. PENAL CODE ANN. § 43.261(c) (West Supp. 2012); see also Alia Beard Rau, *Arizona Senate Panel Endorses ‘Sexting’ Bill*, AZ CENTRAL (Feb. 4, 2010, 12:00 AM), www.azcentral.com/news/articles/2010/02/03/20100203sexting-bill-arizona.html (reporting that the Arizona law would reduce the sentence for a sexting offense).

162. CONN. GEN. STAT. ANN. § 53a-196h (West 2012).

163. Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 22 (2012); see CONN. GEN. STAT. § 53a-196h (regulating who may be in possession of visual depictions of child pornography by age); see also Ros Krasny, *Connecticut Bill Would Lessen Teen ‘Sexting’ Charge*, REUTERS, (Mar. 22, 2010, 5:23 PM), www.reuters.com/article/2010/03/22/us-

minor over the age of fifteen can still be charged with a felony for the intentional transmission of sexually explicit images.¹⁶⁴ The new Connecticut law, unlike Texas law, is premised on age.¹⁶⁵ In Texas, all minors under the age of eighteen are treated the same.¹⁶⁶ Because of the age aspect of the revised Connecticut law, many minors in that state remain vulnerable to child pornography convictions for consensual pictures sent between individuals in a dating relationship.¹⁶⁷

Florida: FLA. STAT. Section 847.0141

Florida's legislation in 2011 added a formal legal definition of sexting.¹⁶⁸ Under Florida law, sexting is defined as "a minor's transmission, distribution, or possession of an image, either a photo or video, that depicts nudity and that is harmful to minors."¹⁶⁹ The severity of punishment for sexting in Florida increases with the number of repeat offenses to deter further inappropriate behavior.¹⁷⁰ For example, a minor's first offense is classified as a noncriminal violation with either community service or a small fine, typically under \$100.¹⁷¹ A minor's second offense is charged as a misdemeanor, followed by a felony for the third offense.¹⁷² Like Texas, Florida utilizes a graduated offense system.¹⁷³ However, Florida's graduations, which vary from a

connecticut-sexting-idUSTRE62L4VK20100322 (investigating Connecticut lawmakers' efforts to reduce the severity of charges for sexting offenses between minors).

164. CONN. GEN. STAT. § 53a-196h; see also Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 22 (2012) (explaining the age limitations in the statute).

165. CONN. GEN. STAT. § 53a-196h; TEX. PENAL CODE ANN. § 43.261 (West Supp. 2012).

166. TEX. PENAL § 43.261(a)(2).

167. Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 22 (2012).

168. FLA. STAT. ANN. § 847.0141 (West 2013).

169. *Id.*; see also Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 22 (2012) (citing the 2011 sexting statute from Florida).

170. Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 22 (2012); see FLA. STAT. § 847.0141(3) (outlining three different levels of punishment based on the number of offenses committed).

171. FLA. STAT. § 847.0141(3)(a); see Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 22 (2012) (indicating the monetary punishments associated with sexting offenses). "[A] first offense for teen sexting is non-criminal and is punishable by up to 8 hours of community service or a 60 dollar fine." *Sexting Laws Change in Florida*, LOCAL 10 (Oct. 12, 2011, 3:39 PM), www.local10.com/news/Sexting-Laws-Change-in-Florida/-/1717324/3072184/-/116mvz/-/index.html. "The second offense is a misdemeanor[,] and the third becomes a felony . . . with a maximum 5-year prison sentence." *Id.*

172. FLA. STAT. § 847.0141(3)(b), (c) (West 2013); see Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 22 (2012) (explaining the progression of sexting charges from a noncriminal offense to a felony).

173. Compare FLA. STAT. § 847.0141 (describing three different levels of punishment for the number of offenses committed), with TEX. PENAL CODE ANN. § 43.261 (West Supp. 2012) (outlining

noncriminal violation to a felony, are more drastic than Texas's graduated system, which ranges from a Class C to a Class A misdemeanor.¹⁷⁴

Louisiana: LA. REV. STAT. ANN. Section 14:81.1.1

Louisiana's sexting laws apply to minors under the age of seventeen and are located in the Louisiana Children's Code.¹⁷⁵ The statute provides that "first-time offender[s] [are] fined \$100 to \$250, and/or imprisoned for not more than 10 days; probation and community service are available alternatives."¹⁷⁶ Similar to other state legislation, the level of punishment increases for repeat offenders in Louisiana.¹⁷⁷ Louisiana and Texas have similar statute provisions; however, Louisiana's legislation applies to minors under the age of seventeen while Texas's law protects minors seventeen and under.¹⁷⁸

Rhode Island: R.I. GEN. LAWS ANN. Section 11-9-1.4

Rhode Island lawmakers made a unique distinction in recent sexting legislation by classifying sexting as "indecent visual depictions" and displays of "sexually explicit conduct."¹⁷⁹ Rhode Island also extended the protection of the law to all minors under the age of eighteen.¹⁸⁰ Furthermore, "[c]harged minors will not be required to register as sex offenders."¹⁸¹ Similar to Texas law, Rhode Island's sexting legislation

different classes of misdemeanors for the various number of offenses committed).

174. FLA. STAT. § 847.0141; TEX. PENAL § 43.261.

175. LA. REV. STAT. ANN. § 14:81.1.1 (2012); see Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 23 (2012) (citing the sexting protocol in Louisiana).

176. Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 23 (2012); see also LA. REV. STAT. § 14:81.1.1C(2)(a) (providing the reason for the fines); Ed Anderson, 'Sexting' Law Approved by House with No Dissent, THE TIMES-PICAYUNE (May 13, 2010, 10:58 PM), www.nola.com/politics/index.ssf/2010/05/sexting_law_approved_by_house.html ("The length of the [community] service would be up to the judge and based on the nature of the alleged violation[.]").

177. LA. REV. STAT. § 14:81.1.1C (defining three levels of fines). However, this type of increased punishment based on repeat offenses may not be an effective incentive. Often times, judges and prosecutors are unable to convey the severity of future consequences to juveniles. Courts recognize that children and adults process information differently based on their differing cognitive abilities. See *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (holding that teenagers are more likely to give in to emotion and peer pressure than adults); Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1120–21 (2006) (referring to studies that show juveniles have a diminished capacity to understand the stages of the criminal process).

178. LA. REV. STAT. § 14:81.1.1; TEX. PENAL § 43.261 (West Supp. 2012).

179. R.I. GEN. LAWS § 11-9-1.4 (West 2012); see Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 24 (2012) (citing the Rhode Island law defining sexting).

180. R.I. GEN. LAWS § 11-9-1.4(a)(1); see Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 24 (2012) (describing the age requirement in the Rhode Island statute).

181. Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18,

focuses on the precise definitions of what constitutes “sexually explicit conduct” to provide prosecutors with tangible definitions for prosecution purposes.¹⁸²

Vermont: VT. STAT. ANN. tit. 13, Section 2802b

In Vermont, all sexting violations involving minors are handled in juvenile court.¹⁸³ This provision of the Vermont law protects minors from “being subject[ed] to sexual exploitation laws and sex offender registration requirements.”¹⁸⁴ Moreover, the Vermont law is constructed to expose sexual predators and deter minors from engaging in inappropriate sexual communication.¹⁸⁵ In contrast to Texas law, Vermont sexting provisions usher all minors charged with sexting offenses into juvenile court.¹⁸⁶ While most Texas minors are prosecuted in juvenile court, such a provision is not included in the Texas Penal Code.¹⁸⁷

B. *Effects of Texas Senate Bill 407 on Texas Practitioners*

The passage of Texas Senate Bill 407 substantially impacts Texas prosecutors, defense attorneys, and judges.¹⁸⁸ The law provides prosecutors with the proper resources to appropriately charge minor defendants accused of transmitting sexually explicit electronic material.¹⁸⁹

24 (2012); R.I. GEN. LAWS § 11-9-1.4(d).

182. R.I. GEN. LAWS § 11-9-1.4(a)(5); TEX. PENAL § 43.25(a)(2) (West 2011).

183. VT. STAT. ANN. tit. 13, § 2802b(b)(1) (West 2009) (describing the penalties assessed to minors who commit sexting offenses); see Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 25 (2012) (citing the Vermont sexting statute).

184. Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 25 (2012); VT. STAT. tit. 13, § 2802b(b)(2) (explaining the reasoning behind having minors tried in juvenile court).

185. VT. STAT. tit. 13, § 2802b; see Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 24 (2012) (emphasizing Vermont’s interest in exposing children predators); see also Mike Celizic, *Vermont Moves to Reduce Teen ‘Sexting’ Charges*, TODAY (Apr. 15, 2009, 9:31 AM), http://www.today.com/id/30224261/ns/today-parenting_and_family/t/vermont-moves-reduce-teen-sexting-charges/#.UaV9LJwo7IU (“As Vermont’s and most states’ laws are written, there is no distinction made between pedophiles who possess sexually explicit images of minors and underage teens who consensually exchange images of themselves.”) “As more minors are being prosecuted as adults and being branded sex offenders for life, Vermont is among the first to consider legislation to separate what teens do among themselves from adult crimes.” *Id.*

186. TEX. PENAL § 43.261 (West Supp. 2012); VT. STAT. tit. 13, § 2802b.

187. TEX. PENAL § 43.261; VT. STAT. tit. 13, § 2802b.

188. See, e.g., Tex. S. Jurisprudence Comm. Minutes 2–6, 82d Leg., R.S. (May 24, 2011) (detailing the implications of Texas Senate Bill 407).

189. *Id.*; see also Eric S. Latzer, Comment, *The Search for a Sensible Sexting Solution: A Call for Legislative Action*, 41 SETON HALL L. REV. 1039, 1070 (2011) (commenting on the problems with current legislation in punishing sexting offenses).

The new legislation also gives Texas defense attorneys the ability to advocate zealously on behalf of their clients by using statute-authorized defenses and affirmative defenses.¹⁹⁰ Moreover, Texas judges are able to assess suitable punishments, such as community supervision and educational programs.¹⁹¹

For Texas prosecutors, it is imperative to understand the vast implications of the bill.¹⁹² In order for the graduated system to function properly, prosecutors must be tough on first-time offenders.¹⁹³ While defense attorneys will likely push to dismiss a first offense, prosecutors should be strict and demand a conviction when the facts make it appropriate.¹⁹⁴ Then during the sentencing phase, prosecutors should ask the judge to advise the defendant of the increased repercussions for future offenses.¹⁹⁵ If offenders do commit future sexting offenses, it is critical for prosecutors to punish these subsequent offenses aggressively to deter more offenses.¹⁹⁶ Even if prosecutors fail to secure a sexting conviction,

190. See Tex. S. Jurisprudence Comm. Minutes 2, 82d Leg., R.S. (May 24, 2011) (“An affirmative defense to prosecution would be created for sexting between minor spouses or between minors within two years of age of each [other] and [who] were dating at the time of the offense.”).

191. See *id.* at 5 (supporting Texas Senate Bill 407 for its multifaceted approach to dealing with sexting offenders).

192. For Texas prosecutors to effectively prosecute teens who are charged with a sexting offense, they must fully understand the scope and requirements of defenses and affirmatives defenses created by Texas Senate Bill 407. *Id.* at 2.

193. See Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 42–43 (2008) (advocating for an aggressive approach to prosecuting minors accused of sexting). While it is important to prosecute minors for sexting offenses, it is equally imperative to remove the sexual material from the Internet and social media sites to prevent further harm and exposure. See Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 521 (2008) (sanctioning a limited role for law enforcement in dealing with minors accused of sexting that would include removing the sexually explicit images from circulation).

194. See Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 42–43 (2008) (urging harsher penalties for juvenile sext offenders because of the deterrent value in such penalties). *But see* Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 529 (2008) (differentiating sexting offenses as minor compared to the distribution of child pornography for profit, and thus advocating lesser penalties for the relatively harmless and common teen activity of sexting); cf. Jacob Gershman, *Lawmakers Propose Teen ‘Sexting’ Law*, WALL ST. J., (June 6, 2011), <http://online.wsj.com/article/SB10001424052702304474804576367960734408624.html> (reporting on New York’s proposed sexting law that would give district attorneys the option of recommending mandatory training programs for first time offenders rather than criminal penalties).

195. See Tex. S. Jurisprudence Comm. Minutes 1–2, 82d Leg., R.S. (May 24, 2011) (specifying an increase in penalties depending on the minor’s intent, whether the minor simply possessed the material or intended to promote it, and whether the minor had been previously convicted of a similar offense).

196. There is a growing concern that teens who engage in sexually-promiscuous activities as

they should recommend educational prevention classes in the interest of upholding the purpose of the statute¹⁹⁷—to both punish sexting offenses and to prevent sexting offenses from escalating into even greater sexual deviance later in life.¹⁹⁸

Texas defense attorneys must also be well-versed in the affirmative defenses and defenses now available to their clients.¹⁹⁹ In certain cases, defense attorneys should be prepared to collect and present evidence during trial to show their client was dating the minor who the client committed the sexting offense against.²⁰⁰ In other situations, defense attorneys should be prepared to produce evidence that the inappropriate material was completely unsolicited, and their client received such material by accident.²⁰¹ This defense will likely be a challenge for defense attorneys and could result in more defendants taking the stand to offer their accounts of what happened.²⁰²

In addition to fervently defending minors accused of sexting, defense attorneys might also defend law enforcement and school administrators who are charged with possessing inappropriate, sexually explicit

children are more prone to participate in inappropriate sexual behaviors as adults. *See* Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 15 (2007) (“Professionals are concerned that accessing pictures and text with sexual content may adversely impact the current or future sexual or emotional development of children, or act as a catalyst to engage in a sexually problematic way with a child or children.”). As with the child pornography industry, the government must make a concerted effort to reduce the amount of lewd photographs depicting children. *See generally* *Osborne v. Ohio*, 495 U.S. 103 (1990) (upholding a state’s need to regulate the child pornography industry to reduce the amount of inappropriate images in the market).

197. *See* Tex. S. Jurisprudence Comm. Minutes 4, 82d Leg., R.S. (May 24, 2011) (“The educational requirements of SB 407 would emphasize the criminal, emotional, and psychological consequences associated with the crime before kids engaged in the harmful activity.”).

198. *See id.* at 5 (recommending more education regarding problems with sexting rather than punishment); *see also* Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 39–42 (2007) (surveying the harm caused by sexting and advocating a prosecutorial model to punish and deter the behavior).

199. *See* Tex. S. Jurisprudence Comm. Minutes 2, 82d Leg., R.S. (May 24, 2011) (including defenses such as “if the actor did not produce or solicit the visual material,” or the minor “destroyed the visual material within a reasonable amount of time after receiving it”).

200. *Id.* The Texas Family Code may provide some guidance as to what constitutes a dating relationship. *See* TEX. FAM. CODE ANN. § 71.0021 (West Supp. 2012) (defining a dating relationship as between individuals with a “continuing relationship of a romantic or intimate nature” and noting the factors to be considered in making this determination, which include the length and nature of the relationship as well as the frequency of interaction between the individuals).

201. Tex. S. Jurisprudence Comm. Minutes 5, 82d Leg., R.S. (May 24, 2011) (creating a defense for minors who receive an unsolicited sext when said minors destroy the sext after receiving it).

202. In some circumstances, a defense attorney will need a defendant’s testimony to convince a jury that a “dating relationship” existed. TEX. FAM. § 71.0021.

photographs of minors.²⁰³ In these cases, defense attorneys will have greater leverage to bargain with prosecutors on behalf of their clients and possibly avoid trial.²⁰⁴ Unless foul play is involved, juries are unlikely to convict law enforcement officers or school administrators with a sexting offense.²⁰⁵ As in all of their cases, defense attorneys should advise their clients to preserve and share as much evidence as possible to verify their defense.²⁰⁶

Texas judges have an essential role in the success of Texas Senate Bill 407.²⁰⁷ The law gives judges the power to demand parental involvement and to impose preventative educational programming.²⁰⁸ It allows judges to require a parent's presence during the plea phase.²⁰⁹ During this phase, judges have the opportunity to exercise their judicial discretion and encourage parents to take an active role in parenting their minors.²¹⁰ By requiring a parental presence, the law forces parents to take notice of the situation and their child's inappropriate behavior.²¹¹ In addition to the parental component, judges, with or without the prosecution's recommendation, can require minors to attend educational programs regarding sexting.²¹²

203. Tex. S. Jurisprudence Comm. Minutes 5, 82d Leg., R.S. (May 24, 2011) (requiring defense attorneys to prove up the circumstances surrounding the law enforcement officer's involvement in the sexting investigation).

204. *See id.* (protecting law enforcement officers and school administrators who possess explicit content for the purposes of destruction or investigation).

205. Texas Senate Bill 407 is not designed to prosecute law enforcement officers or school administrators who possess sexually explicit material in their official capacity. *Id.*

206. *See* Tex. S. Jurisprudence Comm. Minutes 4, 82d Leg., R.S. (May 24, 2011) ("A court would have to allow discovery of property and material on the basis of sexting in the same way discovery of materials related to child pornography was allowed."). "A court could not disclose evidence to the public that was the basis of a sexting criminal proceeding." *Id.*

207. *See id.* at 5 (acknowledging the importance of a proactive judge).

208. *See id.* at 3 (creating authority "to issue a summons to compel the defendant's parent to be present during" all sentencing proceedings).

209. *Id.*

210. *See id.* (calling for parents to monitor their children's cell phone use and to hold their children accountable).

211. *See* Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 22 (2007) (encouraging judges to scold parents about the dangers of sexting).

212. Tex. S. Jurisprudence Comm. Minutes 3-4, 82d Leg., R.S. (May 24, 2011) (granting judges the authority to require educational programming financed by the minor's parents). *But see* Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000) ("It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights.").

IV. CONCLUSION

When teenagers realize that “just one moment of anger, pleasure, curiosity, peer pressure, or simple bad judgment” in a decision to send or save a sexual text message can drastically change the course of their lives, they are overwhelmingly stunned.²¹³ Teenagers are constantly inundated by sexually-saturated messages from the media.²¹⁴ Unable to ascertain the consequences of a brief lustful moment, minors are engaging more regularly in the inappropriate transmission of sexually explicit material.²¹⁵

Prior to the reform of state legislation, antiquated child pornography statutes were applied to prosecute minors who engaged in sexting.²¹⁶ The corresponding punishments inappropriately placed minors on sex offender registration lists.²¹⁷

In reaction to such life-altering consequences, many states like Texas have responded by amending child pornography statutes to reduce the level of punishment in these situations.²¹⁸ The goal is to protect minors from criminal prosecution and to develop appropriate punishments for

213. Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18, 18 (2012); see Mike Brunker, ‘Sexting’ Surprise: Teens Face Child Porn Charges, MSNBC (Jan. 15, 2009, 8:03 PM), <http://www.msnbc.msn.com/id/28679588/> (listing the consequences of sexting while reporting about six Pennsylvania high school students who were convicted under state child pornography laws for disseminating nude photos via cell phones).

214. See, e.g., Mallory M. Briggs, Case Note, “Send Me a Picture Baby, You Know I’d Never Leak It”: The Role of *Miller v. Mitchell* in the Ongoing Debate Concerning the Prosecution of Sexting, 19 VILL. SPORTS & ENT. L.J. 169, 171 (2012) (“The practice of teen sexting is not surprising, considering the behavior modeled and promoted by celebrities, athletes, and politicians.”).

215. See, e.g., *id.* at 170 (examining the impulsiveness of teens and their focus on instant gratification).

216. See generally Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18 (2012) (analyzing state responses to sexting and noting states are making an effort to prevent minors from being prosecuted under child pornography laws).

217. See Matthew Lasar, *A Kinder, Gentler Response to Adolescent “Sexting”*, ARS TECHNICA (Apr. 23, 2009, 11:52 AM), <http://arstechnica.com/tech-policy/2009/04/a-kinder-gentler-response-to-sexting/> (describing the efforts of lawmakers and lobbyists to lessen the punishment for sexting offenses as criminalization and mandatory sex offender registration are too harsh); see also Terri Day, *The New Digital Dating Behavior—Sexting: Teens’ Explicit Love Letters: Criminal Justice or Civil Liability*, 33 HASTINGS COMM. & ENT. L.J. 69, 76 (2010) (criticizing legislation that brands minors convicted of sexting as sex offenders).

218. See generally Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, 27 CRIM. JUST. 18 (2012) (examining various state responses to sexting that aim to protect minors from harsh legal consequences, such as sex offender registration). State legislatures have struggled to find appropriate punishments because sexting is an atypical sexual offense in the sense that it is usually self-induced. See Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POLY & L. 505, 521–22 (2008) (distinguishing between sexting and child pornography and arguing because the former is “self-produced,” it is not a sexual offense in the same vein as child pornography).

minors involved in sexting.²¹⁹ Texas Senate Bill 407 is an aggressive approach to handling the sexting epidemic among minors; its effectiveness and the breadth of its implications might not be realized for generations to come.²²⁰

219. See Emily Shaaya, *States Address the Disconnect*, 27 CRIM. JUST. 18, 18 (2012) (“Existing child pornography laws, intended to punish adults who exploit children, are not well-suited to deal with sexting issues.”); Megan Sherman, Note, *Sixteen, Sexting, and a Sex Offender: How Advances in Cell Phone Technology Have Led to Teenage Sex Offenders*, 17 B.U. J. SCI. & TECH. L. 138, 157 (2011) (“Although teenagers should not be charged under the existing child pornography statutes for sexting, it does not mean that states should completely decriminalize the behavior.”).

220. Act of June 17, 2011, 82d Leg., R.S., ch. 1322, § 3, Tex. Sess. Law Serv. 3825, 3825–26 (West) (codified at TEX. PENAL CODE ANN. § 43.261 (West Supp. 2012)).