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Sexting: Youth Practices and Legal Implications

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I. Introduction

This document addresses legal and practical issues related to the practice colloquially known as sexting. It was created by Harvard Law School's Cyberlaw Clinic, based at the Berkman Center for Internet & Society, for the Berkman Center's Youth and Media Policy Working Group Initiative.¹ The Initiative is exploring policy issues that fall within three substantive clusters emerging from youth's information and communications technology practices: Risky Behaviors and Online Safety; Privacy, Publicity and Reputation; and Youth Created Content and Information Quality. The Initiative is funded by the John D. and Catherine T. MacArthur Foundation and is co-directed by danah boyd, Urs Gasser, and John Palfrey. This document was created for the Risky Behaviors and Online Safety cluster, which is focused on four core issues: (1) sexual solicitation and problematic sexual encounters; (2) Internet-related bullying and harassment; (3) access to problematic content, including pornography and self-harm content; and (4) youth-generated problematic content, including sexting. The Initiative's goal is to bring the best research on youth and media into the policy-making debate and to propose practical interventions based upon that research.

This document is intended to provide background for the discussion of interventions related to sexting. It begins with a definition of sexting, and continues with overviews of research and media stories related to sexting. It then discusses the statutory and constitutional framework for child pornography and obscenity. It concludes with a description of current and pending legislation meant to address sexting.

¹ For information on the Cyberlaw Clinic, see <http://cyber.law.harvard.edu/teaching/clinical>. For information on the Initiative, see <http://cyber.law.harvard.edu/research/digitalnatives/policy>. For information on the Berkman Center for Internet & Society, see <http://cyber.law.harvard.edu>.

II. Definition of Sexting

There is no consistent definition of sexting in law or research. According to the National Center for Missing and Exploited Children (“NCMEC”), the term refers to the practice of “youth writing sexually explicit messages, taking sexually explicit photos of themselves or others in their peer group, and transmitting those photos and/or messages to their peers.”² This definition is not intended to include “situations in which young people send sexually explicit images of themselves to adults.”³ As NCMEC notes, however, “this distinction becomes more difficult based upon the age difference between the two parties,”⁴ for example when an 18-year-old high school student is involved. It also is not meant to include those situations in which images are sent under “duress, coercion, blackmail, or enticement,”⁵ although determining whether any of these exist in a given incident can be complicated.

Youth use various technological tools to take and distribute sexually explicit images, including cell phones, computers, web cameras, digital cameras, and video game systems.⁶ While sexting is perceived as a relatively new trend, it is important to recognize that young people have been taking sexually provocative photographs since the Polaroid.⁷ The difference now is that such images can be produced, transmitted, reproduced, and

² Nat’l Ctr. for Missing & Exploited Children, *Policy Statement on Sexting*, Sept. 21, 2009, http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See, e.g., Karina Bland, *Seduced by ‘sexting’*, ARIZ. REPUBLIC, Aug. 27, 2009, Ariz. Living, at 1, available at <http://www.azcentral.com/arizonarepublic/arizonaliving/articles/2009/08/27/20090827sexting0827.html>; Aaron Gouveia, *Cape youths face charges for ‘sexting’*, CAPE COD ONLINE, Feb. 11 2009, <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20090211/NEWS/902110317>.

retransmitted with ease, without the subject's approval or even knowledge, and quickly can reach a much wider audience.

III. Research on Sexting

To date, four surveys have been conducted on sexting among teens and young adults in the United States.⁸ The most recent, released by the Pew Research Center in December 2009, focuses on teens ages 12-17 who report sending or receiving "sexually suggestive nude or nearly nude images via text messaging" on their cell phones. According to the survey, 4% of teens between the ages of 12 and 17 have sent sexually provocative images of themselves to someone else via text message, while 15% have received such images from someone they know. The Pew data indicates that older teens are much more likely to engage in such behavior, with 8% of 17-year-olds having sent a nude or semi-nude image by text and 30% having received such an image.

Pew's focus groups reveal three main scenarios in which sexting tends to occur: (1) exchanges of images solely between two romantic partners; (2) exchanges between romantic partners that are then shared with others outside the relationship; and (3) exchanges where at least one person would like to start a romantic relationship. Pew's data suggests that sexting has become a form of "relationship currency," with girls in particular sometimes feeling pressure to send images.

⁸ Nat'l Campaign to Prevent Teen & Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults*, 2008, www.thenationalcampaign.org/SEXTECH/PDF/SexTech_Summary.pdf [hereinafter Sex and Tech Survey]; Cox Commc'ns, *Teen Online & Wireless Safety Survey: Cyberbullying, Sexting, and Parental Controls*, May 2009, <http://www.cox.com/takecharge/safe-teens-2009/media/2009-teen-survey-internet-and-wireless-safety.pdf> [hereinafter Cox Survey]; ASSOCIATED PRESS & MTV, *A Thin Line: Digital Abuse Study*, 2009, [hereinafter A Thin Line Survey]; Pew Internet & Am. Life Project, *Teens and Sexting: How and why minor teens are sending sexually suggestive nude or nearly nude images via text messaging*, 2009, <http://www.pewinternet.org/Reports/2009/Teens-and-Sexting.aspx> [hereinafter Pew Survey]. An additional survey has been published in the United Kingdom. See Andy Phippen, *Sharing Personal Images and Videos Among Young People*, South West Grid for Learning, 2009, <http://www.swgfl.org.uk/Staying-Safe/Sexting-Survey>.

The three earlier surveys indicate higher levels of sexting involvement among teens and young people than does the Pew survey, ranging from 20-24%. This discrepancy is likely based on two factors. First, the Pew study focuses on teens between the ages of 12 and 17, whereas the other studies focus on older teens and young adults. Second, the Pew survey asks only about nude or nearly nude images sent or received via text messaging. The other surveys are framed more broadly, asking respondents whether they have “shared”⁹ such images, “sent/posted”¹⁰ such images, or sent such images in “emails or text messages.”¹¹

For example, the 2008 sexting survey conducted by the National Campaign to Prevent Teen and Unplanned Pregnancy reports that 20% of teens (ages 13-19) and 33% of young adults (ages 20-26) have “sent/posted nude or semi-nude pictures or video of themselves.” It also indicates that the vast majority of teen sexters (71% of teen girls and 67% of teen boys) have shared these images with a boyfriend or girlfriend. While teens generally send these images to a specific intended recipient, it appears that they are often shared with others, with around 38% of teens saying that they have had sexually suggestive text messages or emails that were meant for someone else shared with them. The survey also reveals that 51% of teen girls believe that “pressure from a guy” is a reason girls send “sexy messages or images,” whereas only 18% of teen boys cite pressure from girls as a reason for sexting.

The 2009 Cox Teen Online & Wireless Safety Survey reports similar levels of sexting among teens, finding that about one in five teens between the ages of 13 and 18 has sent,

⁹ A Thin Line Survey, *supra* note 8.

¹⁰ Sex and Tech Survey, *supra* note 8.

¹¹ Cox Survey, *supra* note 8.

received, or forwarded “sexually suggestive nude or nearly nude photos through text message or email,” while over a third of teens know of a friend who has done so. Like the National Campaign to Prevent Teen and Unplanned Pregnancy’s survey, it indicates that most (60%) of teens who send such images send them to their boyfriends or girlfriends. However, it also reports that about one in ten senders say that they have sent images to people they do not know. Additionally, while nine in ten senders report no negative consequences as a result of sexting, three in ten friends of senders say that the images were forwarded to someone other than the intended recipient.

Finally, the AP-MTV survey, conducted in September 2009, indicates that 24% of 14-17-year-olds and 33% of 18-24-year-olds have been involved in “some type of naked sexting.” This survey reports that females between the ages of 14 and 24 are slightly more likely to have shared a naked photo or video of themselves than males (13% vs. 9%), while males in this age group are more likely to report receiving a naked photo or video of someone else that has been “passed around” (14% vs. 9%). While the majority of images are sent to a boyfriend, girlfriend, or romantic interest, 29% of 14-24-year-olds who have engaged in sexting report sending these images to people they only know online and have never met in person. Nearly one in five sext recipients (17%) reports having passed the images along to someone else, with more than half (55%) of those who passed the images to someone else sharing them with more than one person. The survey also reports that nearly half (45%) of currently sexually active young people have been involved in at least one sexting-related activity, and that sexually active young people are twice as likely to have shared naked photos of themselves as non-sexually active young people (17% vs.

8%). Moreover, the survey indicates that 61% of sexters have experienced pressure to send these images.

IV. Sexting Investigations and Prosecutions in the Media

News articles report that prosecutors in various parts of the country are using criminal investigations and prosecutions under state child pornography laws in an attempt to control the growing practice of sexting. Some cases involve investigation or prosecution of girls who took or posted pictures of themselves. For instance, a 14-year-old girl in New Jersey faced child pornography charges and potential sex offender registration after posting 30 nude pictures of herself on MySpace.com.¹² In Pennsylvania, a prosecutor threatened girls who sent nude or semi-nude photos of themselves and male classmates who received and traded the photos with state child pornography charges.¹³

Additional articles report cases in which boys were investigated or charged based on images they received and/or solicited from girls. In Ohio, a 13-year-old boy was charged after school officials found a sexually explicit image of an eighth grade girl engaged in sexual activity on his cell phone.¹⁴ In Massachusetts, a group of six boys aged 12-14 were under investigation after one of them took a picture of his naked 13-year-old girlfriend and sent it to the others electronically.¹⁵ Also in Massachusetts, police were considering criminal charges after an eighth grade girl sent pictures of herself to her eighth

¹² *Girl posts nude pics, is charged with kid porn*, ASSOCIATED PRESS, Mar. 27, 2009, available at <http://www.msnbc.msn.com/id/29912729/>.

¹³ Mike Brunker, *'Sexting' surprise: Teens face child porn charges*, MSNBC.COM, Jan. 15, 2009, <http://www.msnbc.msn.com/id/28679588/>.

¹⁴ Jennifer Baker, *Ohio bill tackles 'sexting' among teens*, ENQUIRER COMTY. PRESS & CINCINNATI.COM, Mar. 26, 2009, <http://news.cincinnati.com/article/20090326/NEWS01/303260045/Ohio-bill-tackles-sexting-among-teens>.

¹⁵ Bland, *supra* note 7.

grade boyfriend, who then sold the images to other children for \$5.¹⁶ In Virginia, two male high school students, aged 15 and 18, were charged with possession of child pornography and electronic solicitation for nude and semi-nude images of minor girls contained on cell phones after they actively solicited the photos from younger female students for trade among themselves.¹⁷

Other cases reportedly involve couples recording sexual activity. In Florida, two teenagers were convicted in state court of “producing, directing, or promoting a photograph featuring the sexual conduct of a child” after they photographed themselves naked and engaged in sexual behavior and emailed the photographs to one another.¹⁸

Some reports have highlighted a relationship between sexting and cyberbullying, harassment, or even dating violence. In Florida, for example, an 18-year-old high school senior who had recently broken up with his 16-year-old girlfriend emailed everyone on his ex-girlfriend’s email contact list nude images that she had originally emailed only to him.¹⁹ He was convicted under state child pornography law and required to register as a sex offender.²⁰ In Wisconsin, a 17-year-old boy was charged with possession of child pornography after posting naked pictures of his 16-year-old ex-girlfriend online with

¹⁶ Christian Schiavone & Brad Petrishen, *Belmont Police Investigating ‘Sexting’ Incident at Middle School*, BELMONT CITIZEN-HERALD, Mar. 5, 2010, <http://www.wickedlocal.com/winchester/newsnow/x2034405094/Belmont-police-investigating-sexting-issue-at-middle-school>.

¹⁷ Bill Starks, *Two Spotsylvania Students Arrested for Child Porn, in Latest ‘Sexting’ Case*, 9 NEWS NOW, Mar. 2009, available at <http://www.wusa9.com/news/local/story.aspx?storyid=82608&catid=188>.

¹⁸ *A.H. v. State*, 949 So. 2d 234, 236 (Fla. Dist. Ct. App. 2007). The girl appealed, arguing that her right to privacy rendered the statute under which she had been convicted unconstitutional as applied to her. *Id.* at 235. The state appeals court upheld the conviction, finding that no constitutional right to privacy was at stake because the minor had no reasonable expectation of privacy in the photographs. *Id.* at 236.

¹⁹ Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 8 (2009); see also *Text lands teen on sex offender list*, MY FOX ORLANDO, Mar. 10, 2009, http://www.myfoxorlando.com/dpp/news/031009_Text_lands_teen_on_sex_offender_list.

²⁰ Richards & Calvert, *supra* note 19, at 9; *Text lands teen on sex offender list*, *supra* note 19; *OMG! Latest teen craze is sexting*, PENSACOLA NEWS J., Apr. 22, 2009, at 2E, <http://pqasb.pqarchiver.com/pnj/access/1685473341.html?FMT=ABS>.

captions like “this bitch deserves this!!!!” and “see how big her hole Is! Its from me!”²¹ Also in Wisconsin, an 18-year-old was sentenced to 15 years in prison for an extortion scheme in which he tricked male classmates into sending him nude photos of themselves and then blackmailed them with exposure if they refused to have sex with him.²²

As these stories demonstrate, sexting takes place in many different contexts. Whatever the context, however, the minors involved risk being investigated for and charged with child pornography offenses. If convicted, they could be subject to the same types of punishments as adults who traffic in such images, including felony convictions, lengthy prison sentences, and sex offender registration.²³

V. Legal Issues Surrounding Sexting

The growing trend of sexting creates a challenge for society as it struggles to craft an appropriate response. Signs of this challenge include the investigations and prosecutions described above, as well as the flurry of state legislation discussed in Section VI below.

Schools and other institutions face a host of issues relating to the First and Fourth Amendment rights of students, as well as potential criminal and civil liability for staff

²¹ G.G. Stone, ‘Sexting’ Teens Can Go Too Far, ABC NEWS, March 13, 2009, <http://abcnews.go.com/Technology/WorldNews/sexting-teens/story?id=6456834&page=2> For a copy of the complaint, see <http://www.thesmokinggun.com/archive/years/2008/0521081myspace2.html>

²² Kim Zetter, *Wisconsin Teen Gets 15 Years for Facebook Sex-Extortion Scam*, WIRED.COM, Feb. 25, 2010, <http://www.wired.com/threatlevel/2010/02/teen-gets-15-years-for-sex-extortion/>.

²³ See Stephen F. Smith, *Jail for Juvenile Child Pornographers? A Reply to Professor Leary*, 15 VA. J. SOC. POL’Y & L. 505, 513-15 (2008); see also *8 Teens Charged with Possession of Child Pornography*, WGAL NEWS, Oct. 1, 2009, <http://www.wgal.com/news/21177435/detail.html> (Pennsylvania teens convicted of child pornography offenses could have to register as sex offenders); Wendy Koch, *Teens caught ‘sexting’ face porn charges*, USA TODAY, Mar. 11, 2009, http://www.usatoday.com/tech/wireless/2009-03-11-sexting_N.htm (teens face child pornography charges that could result in up to ten years in prison and sex offender registration); Emily Friedman, *Sexting Teens May Face Child Porn Charges*, ABC NEWS, Feb. 12, 2009, <http://abcnews.go.com/US/story?id=6864809&page=1> (Massachusetts teens caught sexting face felony charges); Kimberly Brandt, *The X Factor: Child Porn Laws Ensnare Vengeful Teen*, THELEGALITY.COM, June 11, 2008, <http://www.thelegality.com/2008/06/11/the-x-factor-child-porn-laws-ensnare-vengeful-teen/> (Wisconsin 17-year-old faces up to 12 ½ years in prison and a fine of up to \$25,000 for posting sexually explicit photographs of his ex-girlfriend).

responding to sexting incidents. Some of those issues will be addressed in a companion document to be published by the Youth and Media Policy Initiative at a later time.²⁴ The primary legal question addressed in this paper centers on whether a sexted image constitutionally can provide the basis for a child pornography or obscenity prosecution.²⁵

A. Background on Child Pornography Statutes

The term “child pornography” generally refers to the rape and molestation of children captured by camera.²⁶ Although child pornography laws vary in different jurisdictions, the statutes typically prohibit the knowing production, receipt, distribution, and possession of sexually explicit images of minors.²⁷ This includes both still images and videos, as well as “data which is capable of conversion into a visual image.”²⁸ Federal law defines the term “sexually explicit” to include actual or simulated: “(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person” under eighteen.²⁹

Some state laws have broader definitions of child pornography. For example, under Massachusetts law, prohibited images include “lewd exhibition” of the genitals, pubic area,

²⁴ Harvard Law student Kelly Tallon is working on a document addressing these issues with Dena Sacco in the Harvard Law School’s Cyberlaw Clinic, based at the Berkman Center.

²⁵ See, i.e., 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 (2007) (arguing that prosecution is a necessary response in at least some sexting cases); *Smith, supra* note 23 (opposing child pornography prosecutions for minors who are self-producing images).

²⁶ See Mary Graw Leary, *Child Pornography Must Not be Flippantly Downplayed as Pictures of ‘Kiddie Porn,’* 30 LEGAL TIMES 51 (December 17, 2007).

²⁷ See, e.g., 18 U.S.C. §§ 2251, 2252, and 2252A (2008).

²⁸ 18 U.S.C. § 2256(5)(2008).

²⁹ 18 U.S.C. § 2256(2)(a) (2008).

buttocks, or the fully or partially developed breasts of any minor.³⁰ Pennsylvania law refers to "nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction."³¹ All of these broader state definitions must abide by the Supreme Court's holding that "nudity, without more is protected expression."³² As a result, there may be questions as to whether state statutes that regulate this type of partial nudity as child pornography are constitutional, although this paper does not address that topic.³³

Child pornography laws generally require both that the defendant knowingly produced, received, distributed, or possessed the image, and that he or she knew or should have known that the individual depicted in it was under 18.³⁴ In addition, the laws may contain defenses that the defendant may raise, known as "affirmative defenses." Under federal law, for example, a defendant charged with possession of child pornography can raise an affirmative defense if he possessed less than three images, promptly reported the images to law enforcement, allowed only law enforcement access to the images, and took reasonable steps to destroy the images.³⁵

The penalties for violating child pornography statutes are significant. Under federal law, the mandatory minimum prison terms for first time offenders range from 5-15 years

³⁰ MASS. GEN. LAWS ANN. ch. 272, § 29C (2000).

³¹ 18 PA.CON.S. STAT. ANN. § 6312 (2009).

³² *New York v. Ferber*, 458 U.S. 747, 766 (1982).

³³ The United States Court of Appeals for the Third Circuit recently was faced with a case involving an image of a girl with bare breasts that had been distributed in the context of sexting, but did not rule on whether the image could appropriately fall under the Pennsylvania statute's definition. *Miller v. Mitchell*, 2010 U.S. App. LEXIS 5501 (3d Cir. Mar. 17, 2010). For a discussion of this issue, see W. Jesse Weins & Todd Hiestand, *Sexting, Statutes, and Saved by the Bell: Introducing a Lesser Juvenile Charge With an "Aggravating Factors" Framework*. 77 TENN. L. REV. 1 (2009).

³⁴ See 18 U.S.C. §§2251, 2252, 2252A (2008).

³⁵ See 18 U.S.C. §2252A(d).

for receipt, transportation, and production of child pornography.³⁶ There also are lengthy sentences for possession.³⁷ In addition, defendants convicted of child pornography crimes typically are required to register as sex offenders and to pay restitution to the victims depicted in the images.³⁸

Until the recent state legislation described in Section VI below, child pornography statutes on their face usually did not exempt images that were produced and disseminated by minors themselves.³⁹ In general, courts have found that, provided a given image meets the statutory definition for child pornography, minors can be prosecuted under child pornography statutes unless the statute specifies otherwise.⁴⁰

B. The Constitutional Issue

The First Amendment to the United States Constitution “bars the government from dictating what we see, or read or speak or hear.”⁴¹ There are, however, a small number of exceptional categories of speech that have such “slight social value” that the government may freely regulate them in order to advance “the social interest in order and morality.”⁴² These categories include child pornography and obscenity.

As discussed above, depending on its content, a sexted image may meet the definition of child pornography in federal and/or state child pornography statutes. It is, however, not clear that the reasons articulated by the Supreme Court for exempting child pornography from First Amendment protection apply to sexted images. Thus, using child

³⁶ See 18 U.S.C. §§2251, 2252, 2252A.

³⁷ See 18 U.S.C. §§2252, 2252A; see also The 2009 United States Sentencing Commission Guidelines Manual.

³⁸ See 42 U.S.C. §16901 *et seq.* (sex offender registration); 18 U.S.C. §2259 (mandatory restitution).

³⁹ Smith, *supra* note 23, at 516.

⁴⁰ Leary, *supra* note 25, at 42 (citing *State v. Vezzoni*, No. 22361-2-III, 2005 WL 980588, at *6 (Wash. App. 2005) (upholding conviction of 16-year-old relating to pictures of his 16-year-old girlfriend)).

⁴¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).

⁴² *Ferber*, 458 U.S. at 754 (citations omitted).

pornography statutes to prosecute minors who appear in sexted images, or even to prosecute minors or adults who receive, possess or disseminate such images, may be contrary to the First Amendment.⁴³ Only the courts can resolve this issue as cases come before them, guided by the Supreme Court precedent described below. Regardless of how the courts rule on this issue, however, some sexted images still could be prosecuted as obscenity, as described in Section 3 below.

1. **The Child Pornography Framework**

a. *The Landmark Cases*

In *New York v. Ferber* in 1982, the Supreme Court established a categorical exclusion from First Amendment protection for sexually explicit visual depictions of minors.⁴⁴ In so doing, the Court noted that “the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance,” and that child pornography “bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it that it is permissible to consider these materials as without the protection of the First Amendment.”⁴⁵

In *Ferber*, which involved a bookstore owner who sold films, the Court found that “the distribution network for child pornography must be closed if the production of

⁴³ In 2010, the United States Court of Appeals for the Third Circuit was faced with but did not address this question. *Mitchell*, 2010 U.S. App. LEXIS at 5501. In that case, a district attorney had threatened to bring child pornography charges against several minors involved in sexting unless they agreed to submit to an education program. One of the images at issue showed a girl with a towel wrapped below her breasts; the others showed girls in opaque bras. The Third Circuit held that the threatened prosecution represented impermissible retaliation in response to the girls’ exercising their right not to attend the program. It pointedly did not address whether the Pennsylvania statute constitutionally could be applied to the minors appearing in the images or whether the images themselves qualified as child pornography under the statute.

⁴⁴ *Ferber*, 458 U.S. at 747.

⁴⁵ *Id.* at 764.

material which requires the sexual exploitation of children is to be effectively controlled.”⁴⁶ In *Osborne v. Ohio* in 1990, the Supreme Court extended that reasoning to find constitutional a state statute prohibiting the possession of child pornography.⁴⁷ The Court noted that the state was “attempting to stamp out this vice at all levels of the distribution chain,” something necessary because “much of the child pornography market has been driven underground.”⁴⁸

Both *Ferber* and *Osborne* involved images of young boys masturbating and/or posed lasciviously, without any adults in sight.⁴⁹ In *Ferber*, the Supreme Court identified two forms of harm associated with child pornography. First, the Court focused on the harm in the production of child pornography, finding that “the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child,” and that “the materials produced are a permanent record” of that harm.⁵⁰ Second, the Court found that “the harm to the child is exacerbated by” the circulation of the materials.⁵¹ The Court in *Osborne* reiterated these harms and raised a third harm, that

⁴⁶ *Id.* at 759.

⁴⁷ *Osborne v. Ohio*, 495 U.S. 103 (1990).

⁴⁸ *Id.* at 111.

⁴⁹ *Ferber*, 458 U.S. at 752 (conviction based on two films “devoted almost exclusively to depicting young boys masturbating”); *Osborne*, 495 U.S. at 103, n.1 (conviction based on four photographs: “[t]hree photographs depict the same boy in different positions: sitting with his legs over his head and his anus exposed; lying down with an erect penis and with an electrical object in his hand; and lying down with a plastic object which appears to be inserted in his anus. The fourth photograph depicts a nude standing boy; it is unclear whether this subject is the same boy photographed in the other pictures because the photograph only depicts the boy’s torso”).

⁵⁰ *Ferber*, 458 U.S. at 759-60

⁵¹ *Id.* The Court cited an authority explaining that “[p]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child’s actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography” *Id.* at 759, n.10 (quoting David P. Shoumlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)).

“evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.”⁵²

b. *Ashcroft v. Free Speech Coalition*

The Supreme Court revisited the issue of child pornography in 2002. In *Ashcroft v. Free Speech Coalition*, a group representing the adult pornography industry claimed that the Child Pornography Prevention Act of 1996 unconstitutionally criminalized certain practices of the adult pornography industry.⁵³ Specifically, the group argued that the statute’s prohibition of “any visual depiction” that “is, or appears to be, of a minor engaging in sexually explicit conduct” was unconstitutionally overbroad because it would criminalize protected speech that appeared to depict children in a pornographic manner but did so in a way that did not involve real children.⁵⁴

In a highly fractured opinion, a majority of the Justices on the Supreme Court agreed.⁵⁵ While reiterating the categorical exclusion for sexually explicit images of real minors, the Court struck down the portion of the statute containing the “appears to be” language as unconstitutionally overbroad. The Court noted that the prohibition did “not depend at all on how the image is produced” and therefore would “capture a range of depictions” from computer-generated images to “a Renaissance painting depicting a scene from classical mythology” to “Hollywood movies, filmed without any child actors.”⁵⁶ While stating that “the sexual abuse of a child is a most serious crime and an act repugnant to the

⁵² *Osborne*, 495 U.S. at 111.

⁵³ *Free Speech Coalition*, 535 U.S. at 243.

⁵⁴ *Id.* at 241.

⁵⁵ Justice Kennedy wrote the majority opinion, in which Stevens, Souter, Ginsburg and Breyer joined. Justice Thomas filed an opinion concurring in the judgment. Justice O’Connor filed an opinion concurring in part and dissenting in part, in which Justices Rhenquist and Scalia joined as to part. Justice Rhenquist filed a dissenting opinion in which Justice Scalia joined, except for one paragraph.

⁵⁶ *Id.* at 241.

moral instincts of a decent people,”⁵⁷ the Court found that computer-generated child pornography “records no crime and creates no victims by its production” and is therefore “not ‘intrinsically related’ to the sexual abuse of children.”⁵⁸

The Court recognized that “pedophiles may use virtual child pornography to seduce children,” but found that “[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed at some indefinite future time.”⁵⁹ It also rejected the government’s arguments that virtual images must be banned to eliminate the market for child pornography because they are indistinguishable from real ones, and that virtual images must be banned because their existence makes prosecuting based on images of real children difficult.⁶⁰

c. Open Legal Questions Relating to Sexted Images

The Court’s holding in *Free Speech Coalition* suggests that child pornography is exempt from First Amendment protection only because there is harm to a child at the moment of production. One could argue, then, that when a sexted image is voluntarily self-produced by a minor for minors, there is no harm in production and the image is protected by the First Amendment. The answer, however, is not that simple. Instead, there are several ambiguities in the *Free Speech* decision itself, as well as in later cases, that make it difficult to determine exactly how sexting fits into the Court’s child pornography framework.

First, in *Free Speech Coalition*, the Court suggested in dicta that its reason for recognizing First Amendment protection for computer-generated images would not extend

⁵⁷ *Id.* at 244.

⁵⁸ *Id.* at 250.

⁵⁹ *Id.* at 253.

⁶⁰ *Id.* at 254.

to images that involve real children. The Court mentioned a provision in the legislation prohibiting photographs of real children that are digitally manipulated to look pornographic.⁶¹ The Court noted that although these images “may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*.”⁶² This language implies that sexted images, which certainly “implicate the interests of real children,” may not be protected by the First Amendment in the same way that virtual images are protected.

Second, the Court in *Free Speech Coalition* found the affirmative defense provided in the legislation “incomplete and insufficient” because it did “not apply to possession or to images created by computer imaging.”⁶³ While it expressed concern about the constitutionality of imposing on a defendant “the burden of proving his speech is not unlawful,” it said that it “need not decide . . . whether the government could impose this burden on a speaker.”⁶⁴ Thus, as one Justice noted, “[t]he Court does leave open the possibility that a more complete affirmative defense could save a statute’s constitutionality.”⁶⁵ It is possible, then, that a definition of child pornography broad enough to encompass sexted images could be saved from unconstitutionality by a robust affirmative defense, at least for minors who voluntarily engage in sexting.

Finally, the Court left open the possibility that it would be constitutional to criminalize even computer-generated child pornography when technology develops to the point that such images become “virtually indistinguishable” from images of real children.

⁶¹ *Id.* at 242.

⁶² *Id.*

⁶³ *Id.* at 256.

⁶⁴ *Id.*

⁶⁵ *Id.* at 259 (Thomas, J., concurring).

The majority of the Court rejected the government’s argument that virtual images should be outside the protection of the First Amendment because they are indistinguishable from real images.⁶⁶ The Court’s reasoning, however, seemed to assume that virtual images do not very closely resemble real ones (and because the case did not involve any actual images, this assumption was never tested).⁶⁷ Several of the Justices, on the other hand, suggested that the “appears to be” language at issue would be constitutional if it were interpreted or re-written to criminalize images that are “virtually indistinguishable” from real images.⁶⁸ One Justice remarked that the Court might have to revisit the issue because “technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children.”⁶⁹ Another noted: “[o]f even more serious concern is the prospect that defendants indicted for the production, distribution, or possession of actual child pornography may evade liability by claiming that the images attributed to them are in fact computer-generated.”⁷⁰

After *Free Speech Coalition*, Congress changed the statute to encompass not only images depicting real children but also those that are “indistinguishable” from images of real children.⁷¹ The Supreme Court has not yet ruled on the constitutionality of the new

⁶⁶ *Id.* at 254.

⁶⁷ *Id.* (noting that the hypotheses that virtual images promote trafficking in real images “is somewhat implausible,” because “[i]f virtual images were identical to illegal child pornography, the illegal images would be driven from that market by the indistinguishable substitutes.”)

⁶⁸ *Id.* at 263–265 (O’Connor, J., concurring in part and dissenting in part, joined by Scalia, J. and Rehnquist, C.J.), 267 (Rehnquist, C.J., dissenting, joined by Scalia, J.).

⁶⁹ *Id.* at 259 (Thomas, J., concurring).

⁷⁰ *Id.* at 263 (O’Connor, J., concurring in part and dissenting in part).

⁷¹ 18 U.S.C. § 2256(8)(B) (2008). The new definition section clarifies that “the term ‘indistinguishable’ used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.” 18 U.S.C. § 2256.

language, nor have any federal appellate courts.⁷² This language has particular significance for sexted images. Taken out of context, there is no way to differentiate a pornographic image created voluntarily by a minor for another minor from one produced by a minor at the behest of an adult or by an adult abusing a child. The images in *Ferber* and *Osborne* themselves are an example of this, as they depicted boys masturbating and posing sexually, alone.⁷³ In this sense, sexted images are almost certainly “indistinguishable” from conventional child pornography. Thus, concern of some of the Justices in *Free Speech Coalition* that it may “become impossible to enforce actual child pornography laws” because the defendants will have a defense that the images are constitutionally protected applies equally to sexted images.

d. *The Supreme Court’s Most Recent Rulings*

Just how the Court’s child pornography precedent should be applied to sexted images is further complicated by the two most recent Supreme Court cases addressing child pornography, *United States v. Williams* and *United States v. Stevens*.

After *Free Speech Coalition*, as part of The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act, Congress created a “pandering” provision authorizing punishment for anyone who “advertises, promotes, presents, distributes . . . any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe” that the material is a sexually explicit visual

⁷² One district court addressing the statute stated “the court expresses no opinion on the constitutionality of punishing the possession of a pornographic image that does not depict an actual minor, but is merely ‘indistinguishable from’ an actual minor. However, the court finds that § 2256(8)(B) is best interpreted as a forward-looking provision, to be applied, if at all, if and when technology exists to create images that are ‘indistinguishable from’ actual minors.” *United States v. Dean*, 670 F. Supp. 2d 1285 (M.D. Ala. 2009).

⁷³ See *supra*, note 49.

depiction of an actual minor.⁷⁴ In 2008, the Supreme Court upheld the constitutionality of that provision in *United States v. Williams*.⁷⁵ The Court found that even though the statute penalizes pandering of “purported” as well as actual child pornography, the law’s language requires a subjective belief that the material is child pornography or a subjective intent to cause others to so believe.⁷⁶ The Court’s decision in *Williams* that the prosecution need not prove that an image depicts a real child in the context of a pandering charge could represent a willingness to expand on *Free Speech Coalition*’s focus on harm in production.

More recently, in *United States v. Stevens*, the Court held unconstitutional a federal statute criminalizing the creation, sale and possession of depictions of “animal cruelty” for commercial gain.⁷⁷ The statute defined a depiction of animal cruelty “as one ‘in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,’ if that conduct violates federal or state law ‘where the creation, sale or possession takes place.’”⁷⁸ The Court rejected the government’s argument that, like child pornography, “the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment.”⁷⁹

The Court noted that there are “a few limited categories of speech” that are outside First Amendment protection, all of which are “historic and traditional.”⁸⁰ The Court stated that its decision in *Ferber* to include child pornography among these categories “presented a special case: the market for child pornography was ‘intrinsically related’ to the underlying abuse, and was therefore ‘an integral part of the production of such materials,

⁷⁴ 18 U.S.C. § 2252A (2009).

⁷⁵ *United States v. Williams*, 553 U.S. 285 (2008).

⁷⁶ *Id.*

⁷⁷ *United States v. Stevens*, 2010 WL 1540082, *4 (U.S. April 20, 2010)(quoting 18 U.S.C. Section 48(a))

⁷⁸ *Id.* (quoting 18 U.S.C. Section 48(c)(1)).

⁷⁹ *Id.* at *5.

⁸⁰ *Id.*

an activity illegal throughout the Nation.”⁸¹ It also cited *Free Speech Coalition* for the proposition that the “distribution and sale” of child pornography “were intrinsically related to the sexual abuse of children,’ giving the speech ‘a proximate link to the crime from which it came.’”⁸² While the Court clearly maintained an exclusion from First Amendment protection for child pornography, its apparent focus on the crime of sexual abuse as the basis for the exclusion may have implications for sexting cases, as discussed below. The Court’s discussion of child pornography was brief, however, and it did not elaborate on why or how child pornography is different from other categories of speech.⁸³

2. Possible Responses to Sexting Cases

In light of these ambiguities, it is impossible to determine exactly how sexted images fit into the constitutional framework for child pornography set out by the Supreme Court. There are at least three different approaches an analysis of sexting could take, each with different implications for sexting cases and for conventional child pornography cases.

a. *Re-defining Child Pornography to Exclude Sexted Images*

At one extreme, it can be argued that sexted images, unlike images of children being sexually abused, are protected by the First Amendment. In *Free Speech Coalition*, the

⁸¹*Id.* at *7 (quoting *Ferber*, 458 U.S. at 759, 761).

⁸²*Id.* (quoting *Free Speech Coalition*, 535 U.S. at 249-50). Similarly, in the lone dissent, Justice Alito stated that in his view the most important factor in *Ferber* “was that child pornography involves the commission of a crime that inflicts severe personal injury to the ‘children who are made to engage in sexual conduct for commercial purposes.’” *Id.* at *20 (Alito, J. dissenting).

⁸³The Court then subjected the statute to traditional constitutional analysis, holding that it was overly broad and invalid on its face, because it would criminalize images that were not necessarily cruel and/or were illegal in one state but not another. *Id.* at **8-10. As an example, the Court noted that the statute would make it illegal to sell hunting magazines in the District of Columbia, even if the magazines were created in a state in which hunting is legal. *Id.* at *10. The Court rejected the government’s argument that the statute could be saved by its exceptions clause, which exempted “any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.” *Id.* at *11 (quoting 18 U.S.C. Section 48(b)).

Supreme Court focused on the harm that takes place in the production of an image,⁸⁴ and the Court seemed to reiterate that emphasis in *Stevens*. One could argue that sexted images, assuming they are voluntarily produced, are protected by the First Amendment because their production does not involve the sexual abuse of a child or the same type of harm as the production of conventional child pornography. Recognizing First Amendment protection for sexted images would prevent prosecution of minors for sexting. It could, however, protect images that actually do involve harm to children, as discussed in Section b below. It also could severely hinder the prosecution of many adults who possess and trade child pornography.

Once it is out of the hands of the minors involved, a sexted image is indistinguishable from any other sexually explicit image of a minor. Many child pornography images that are produced in abusive situations show children with no adult in sight, either masturbating or posing lasciviously (like the images in *Ferber* and *Osborne*), or engaged in sexual activity with one another. Some of these images have been taken by an adult, while others involve children who are coerced by an adult into self-producing images, for example using a web camera so that the adult can get immediate access.⁸⁵ Generally, courts do not look at the context in which an image was taken to determine

⁸⁴ The Court actually stated that *Ferber* had “reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.” *Free Speech Coalition*, 535 U.S. at 251. The Court, however, was focused on distinguishing images produced using real children from images produced entirely without real children, not on distinguishing among sexually explicit images that all involved real children. Similarly, the passage of *Ferber* that it cited stated that “the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children” and that “the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performances or photographic or other visual reproduction of live performances, retains First Amendment protection.” *Ferber*, 458 U.S. at 764-65.

⁸⁵ See, e.g., *People v. Gourlay*, 2009 WL 529216 (Mich. App. March 3, 2009) (13-year-old boy used web camera to broadcast images of himself engaging in pornographic acts to adult males over the Internet).

whether it qualifies as child pornography, because exploitation is assumed from the sexually explicit content of the image.⁸⁶

Protecting sexted images under the First Amendment could fundamentally alter this presumption of exploitation, and therefore of illegality. Every adult who possesses or trades in child pornography could claim that the images are protected by the First Amendment, unless the government can prove they were not taken voluntarily by minors, for minors. This is somewhat similar to the requirement under *Free Speech Coalition* that the government must prove that each image depicts a real child.⁸⁷ The government generally meets this burden of proof in one of three ways: (1) the jury decides for itself whether an image is computer-generated based on how the image looks;⁸⁸ (2) the government offers testimony from an expert on whether an image depicts a real child or was computer-generated;⁸⁹ or (3) the government relies on one of the limited number of images for which the child victim has been identified⁹⁰ and calls a law enforcement officer to testify that the child is real based on having met the child.⁹¹ None of these approaches, however, would be effective in distinguishing abuse images from sexted ones. This is because the question with regard to sexting is not about the content of the image, but rather about the context in which it was taken.

⁸⁶But see *United States v. Frabizio*, 459 F.3d 80, 89-90 (1st Cir. 2006) (noting that “it is arguable that a jury should not be precluded from considering” evidence of the circumstances of the production of an image in determining whether the image meets the statutory definition of “lascivious exhibition of the genitals,” but not deciding the issue).

⁸⁷ See *United States v. Marchand*, 308 F. Supp. 2d 498 (D.N.J. 2004) (holding that government met its burden under *Free Speech Coalition* of proving that images depicted real children).

⁸⁸ See, e.g., *United States v. Rodriguez-Pacheco*, 475 F.3d 434, 439 (1st Cir. 2007).

⁸⁹ See *id.*

⁹⁰The National Center for Missing and Exploited Children’s Child Victim Identification Program maintains a database of child pornography and assists prosecutors with determining whether a defendant has images in which the victim has been identified. See

http://www.ncmec.org/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2444

⁹¹ See, e.g., *Marchand*, 308 F. Supp. 2d at 504 (government called law enforcement officers to testify that they had interviewed children depicted in the images defendant was charged with possessing).

There are perhaps two types of images the government might be able to prove were not sexted. First, it may be possible to prove that some images were taken in an abusive context just by looking at the content of the image. This category presumably would include any image in which an adult is depicted with children. In addition, assuming that Congress and courts conclude that infants and toddlers cannot sext, sexually explicit images of very young children may not be protected by the First Amendment.⁹²

Second, the government may be able to prosecute based on some images for which the child victims have been identified. For these, however, having a law enforcement officer testify that she has met a child (which can prove that the child is real) is unlikely to suffice to prove that an image was created in an abusive context. Accordingly, the government may have to call the victims depicted in the images as witnesses at trial. Presenting victim testimony about the circumstances of the underlying sexual abuse in child pornography cases could prove to be impossible. Many victims live across the world, have become mentally unstable or institutionalized due to the abuse they suffered, or for other reasons would be unable to testify in case after case about the circumstances of the abuse.⁹³ Certainly, requiring victims to testify to meet the burden of proof in child pornography cases would be a dramatic change in the way such cases currently proceed.

Putting these two categories of images aside, for any other sexually explicit image of a child, proving that it was not taken in the context of voluntary sexting likely would be impossible. If the government were required to offer such proof, trading in images of

⁹² Yet, the age at which children are using technology like cell phones is getting younger and younger, making it hard to know just where the line should be drawn. See, e.g., Jacque Wilson, *What to Know Before Buying Your Kid a Cell Phone*, CNN.com, August 11, 2008, <http://www.cnn.com/2008/TECH/ptech/08/11/cellphones.kids/index.html>

⁹³ In most sex abuse cases, the victims need only testify against one defendant in one proceeding. In child pornography cases, however, the victim could be needed to testify against many different defendants in many different cases, all of which involve an image of that victim.

children being sexually abused technically would remain illegal, but many adult perpetrators could evade prosecution.⁹⁴

b. *Sexted Images as Child Pornography*

At the other extreme, one could argue that sexted images, like conventional child pornography, are exempt from First Amendment protection because the production and dissemination of such images cause harm to real children. In *Stevens*, the Court clearly cabined off child pornography from other types of speech, suggesting that it will continue to make sure that at least conventional child pornography remains outside the purview of the First Amendment.⁹⁵ Moreover, while it noted that “[o]ur decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment,” it did “not foreclose the future recognition of such additional categories.”⁹⁶ There are at least three different ways in which one could argue that sexting, like conventional child pornography, involves harm to real children and therefore is outside the scope of the First Amendment.

First, harm takes place in the production of at least some number of sexted images. Reports suggest that some instances of sexting involve outright bullying, coercion, or abuse. In other cases, sexting may result from peer pressure and a social environment that may be construed as harmful.⁹⁷ Various media stories and some of the research indicate

⁹⁴ For additional analysis of this issue, see Mary Graw Leary, *Self-Produced Child Pornography or "Sexting?"-The Dialogue Continues*, University of Virginia Journal of Social Policy and the Law, Vol. 17 (Forthcoming Spring 2010).

⁹⁵ *Stevens*, 2010 WL 1540082 at *7.

⁹⁶ *Id.* at *8.

⁹⁷ For examples of such coercive behavior by teens, see Ned Potter, *Teen Allegedly Hijacked Facebook Pages, Demanded Nude Pics as Ransom*, ABC NEWS, July 8, 2009, <http://abcnews.go.com/Technology/story?id=8026596&page=1> (sixteen-year-old boy “accused of taking over the MySpace and Facebook pages of two young women he knew and promising to return control if they sent him nude pictures of themselves.”); Kim Zetter, *Wisconsin Teen Gets 15 Years for Facebook Sex-Extortion*

that girls feel pressure to send sexual images of themselves to boys, suggesting that in some cases sexual harassment, dating violence, or other gender inequality issues are at play.⁹⁸ Some images depict sexual activity between minors that is illegal under state laws, such as those governing statutory rape.⁹⁹ Like conventional child pornography, these images record a crime that society has deemed harmful to minors. Similarly, some images may involve younger children pressured by older teens into posing sexually or engaging in sexual activity—a situation that can constitute sexual abuse more clearly than other sexting scenarios. The diagnostic criteria for pedophilia, for example, require that the person being diagnosed “is at least 16 years of age and at least 5 years older” than his victims.¹⁰⁰

Even when none of these circumstances are present, some have argued that “a minor lacks the understanding of the destructiveness of her actions at the time of the crime,” which “does not mean she forfeits the harm she will more tangibly experience when she realizes the permanency of her actions.”¹⁰¹ Under this theory, the initial harm is a latent one, inflicted at the time of production but not felt until the onset of maturity.¹⁰² As in other contexts—such as the regulation of driving and alcohol consumption—the very immaturity of minors can be seen as creating the potential for real harm and might further justify government intervention to protect this vulnerable population.¹⁰³

Scam, WIRED.COM, Feb. 25, 2010, <http://www.wired.com/threatlevel/2010/02/teen-gets-15-years-for-sex-extortion/> (“A Wisconsin teenager was sentenced to 15 years in prison Wednesday for an extortion scheme that had him tricking male classmates into sending them nude photos of themselves, then blackmailing them with exposure if they didn’t have sex with him.”).

⁹⁸ See Pew and AP-MTV surveys, *supra* note 8.

⁹⁹ See, e.g., OLR Research Report, Statutory Rape Laws by State, available at www.cga.ct.gov/2003/olrdata/jud/rpt/2003-R-0376.htm

¹⁰⁰ American Psychiatric Association: *Diagnostic and Statistical Manual for Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

¹⁰¹ Leary, *supra* note 25.

¹⁰² *Id.*

¹⁰³ Leary notes that the longstanding doctrine of *parens patriae* gives the government the “right and responsibility to protect persons deemed incapable of caring for themselves” when their immediate

Second, the circulation of a sexted image causes harm to the child depicted in it. This harm is potentially serious—several teen suicides have been blamed on the distribution of sexted images beyond what the subject of the image contemplated and the bullying that followed.¹⁰⁴ In the context of conventional child pornography, the Supreme Court has recognized that “the pornography’s continued existence causes the child victims continuing harm by haunting the children in years to come.”¹⁰⁵ The same can be true for sexted images.¹⁰⁶ Coupled with the Court’s suggestion in *Free Speech Coalition* that an image is outside the scope of First Amendment protection when it “implicate[s] the interests of real children,” this sort of harm could fit within the Court’s existing conception of child pornography.¹⁰⁷

Third, the prevalence of sexted images may necessitate recognition of the harm that child pornography causes not just to the children depicted in it, but also to other children, particularly when it is used to groom children for sexual abuse. Like conventional child pornography, adults can use sexted images to seduce children to engage in sexual activity and to encourage them to produce sexually explicit images for adult entertainment. In *Osborne*, the Supreme Court clearly recognized the harm caused by the use of child pornography in this way.¹⁰⁸ As Justice O’Connor noted in her opinion in *Free Speech Coalition*, even virtual images “whet the appetite of child molesters, who may use the

guardians are not able to offer such protection. *Id.* at 26.

¹⁰⁴ See, e.g., Kim Zetter, *Parents of Dead Teen Sue School over Sexting Images*, WIRED.COM, Dec. 8, 2009, <http://www.wired.com/threatlevel/2009/12/sexting-suit>; Michael Inbar, ‘Sexting’ Bullying Cited in Teen Girl’s Suicide, MSNBC, Dec. 2, 2009, http://today.msnbc.msn.com/id/34236377/ns/today-today_people.

¹⁰⁵ *Osborne*, 495 U.S. at 111.

¹⁰⁶For a discussion of issues related to the creation of a digital dossier among youth, and how this might impact their adult life, see *Youth and Media Policy Initiative: Youth, Privacy, and Reputation: Literature Review*, <http://cyber.law.harvard.edu/research/digitalnatives/policy>. For a broader discussion of such issues, see JOHN PALFREY & URS GASSER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* (2008).

¹⁰⁷ *Free Speech Coalition*, 535 U.S. at 242.

¹⁰⁸ *Osborne*, 495 U.S. at 111.

images to seduce young children.”¹⁰⁹ While the majority in that case found such harm alone insufficient to render a ban on computer-generated child pornography constitutional, it did not find such harm irrelevant.¹¹⁰ Such a broad reading of harm could require that the Supreme Court reinterpret or even overturn parts of *Free Speech Coalition*, but *Williams* may indicate the Court’s willingness to loosen *Free Speech*’s strict harm-based approach for child pornography. The Court may be more willing to do so now that there are two types of images—virtual and sexted—both of which may be indistinguishable from images of actual child sexual abuse, both of which may be used to groom children for sexual abuse, and both of which may hamper prosecution of adult defendants who prey on children.

c. *A Middle Path*

Rather than argue for either extreme, one could argue that sexted images can be covered by child pornography statutes if the statutes provide an affirmative defense for minors who voluntarily self-produce and transmit such images to other minors. The affirmative defense could protect all minors involved in sexting from prosecution, or could protect only minors who self-produce images and some minors who receive them, for example if they can show that they did not exert pressure on the producer and did not further distribute the images.

This approach would facilitate effective prosecution of adult offenders while protecting the interests of the minors who are depicted in the images. One theory for this approach could be that there is not sufficient harm in the production of a sexted image to justify an exemption from First Amendment Protection, so that the minor who produced the image cannot be prosecuted. Once an image is in circulation, however, the minor

¹⁰⁹*Free Speech Coalition*, 535 U.S. at 263 (O’Connor, J., concurring in part and dissenting in part).

¹¹⁰Leary, *supra* note 94.

depicted suffers additional significant harm, taking it outside the realm of First Amendment protection and making it appropriate to prosecute individuals who transmit, receive, or possess the image down the line.

As discussed above, relying on harm in circulation, rather than on harm in production, could require revisiting the *Free Speech* decision. Moreover, in *Free Speech* the Court found the affirmative defense at issue to be “incomplete and insufficient,”¹¹¹ and noted “serious constitutional difficulties” with “seeking to impose on the defendant the burden of proving his speech is not unlawful.”¹¹² Yet, the Court did not preclude that a robust affirmative defense could save a statute’s constitutionality.¹¹³ Moreover, the Court was addressing the issue of images produced using youthful adult actors, and expressed particular concern that “where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors.”¹¹⁴ This concern would not exist for sexted images, because the minors entitled to raise the affirmative defense necessarily would be familiar with the circumstances in which the image was created. On a practical note, an affirmative defense for sexted images likely would reduce efforts to prosecute minors in the first place.

3. **The Obscenity Framework**

Whether or not they can be treated as child pornography, some sexted images might qualify as obscenity. Unlike child pornography, in which the focus is on harm to the child depicted, the Supreme Court has held that obscenity is not protected by the First

¹¹¹ *Id.* at 256.

¹¹² *Id.* at 255-256.

¹¹³ *Id.* at 259 (Thomas, J., concurring).

¹¹⁴ *Id.*

Amendment because of its undesirable effects on viewers.¹¹⁵ Thus, whether an image is obscene does not depend on how it was produced.

Obscenity includes communications that “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.”¹¹⁶ To determine whether a given image meets these criteria, the jury relies on “contemporary community standards” to guide its judgment.¹¹⁷ This famously vague test is summed up by Supreme Court Justice Stewart’s comment that though unable adequately to define obscenity, “I know it when I see it.”¹¹⁸ Because the standard is so flexible, whether a sexted image is obscene will depend on the given image and the particular jury considering the case.¹¹⁹ Typically, however, it will apply only to more sexually graphic images and videos.

It is illegal to produce, distribute, and receive obscenity, as well as to possess it with intent to distribute.¹²⁰ Federal law specifically criminalizes obscene images of minors under Section 1466A of Title Eighteen of the United States Code. Unlike general state and

¹¹⁵ *Miller v. California*, 413 U.S. 15, 19 (1973); see also *Stanley v. Georgia*, 394 U.S. 557 (1969).

¹¹⁶ *Miller v. California*, 413 U.S. at 24.

¹¹⁷ *Id.*

¹¹⁸ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

¹¹⁹ The issue of community standards is particularly problematic in cases involving the Internet, which brings together individuals from very different geographic and social contexts. This in turn raises the question of whose community standards should govern. See Marjorie Heins, *Not in My Backyard*, 38 No. 1 INDEX ON CENSORSHIP 96 (Feb. 2009). Addressing this issue, the Ninth Circuit has held that “a national community standard must be applied in regulating obscene speech on the Internet, including obscenity disseminated via email. *United States v. Kilbride*, 584 F.3d 1240, 1254 (9th Cir. 2009). Justices O’Connor and Breyer, writing concurrences in *Ashcroft v. ACLU*, also called for a national community standard. 535 U.S. 564 (U.S. 2002). The Eleventh Circuit, however, has held that the *Miller v. California* local community standards rule still applies in Internet cases. *United States v. Little*, 2010 U.S. App. LEXIS 2320 (11th Cir. Fla. Feb. 2, 2010). This issue has yet to be resolved by the Supreme Court.

¹²⁰ *Stanley v. Georgia*, 394 U.S. 557, 565 (1969); see also 18 U.S.C. § 1466A (2003).

federal obscenity statutes, § 1466A carries the same strict penalty structure as federal child pornography laws.¹²¹

Importantly, private possession of obscenity is constitutionally protected due to privacy concerns and therefore is not illegal.¹²² Ironically, then, if sexted images cannot be treated as child pornography under the First Amendment, a minor who produces, distributes, or receives a sexted image still could be prosecuted under obscenity statutes, while an adult who is later found to possess the same image could not be prosecuted.¹²³

VI. Legislative Responses

As described in the media section above, in some states, prosecutors have used existing child pornography laws in an attempt to address sexting. As set out on the chart attached as Appendix A, however, some states have enacted legislation, or are in the process of doing so, in order to deal with this type of activity in a different way. Of course, none of these changes in state law have an effect on federal child pornography laws.

The most common legislative response thus far has been to modify criminal laws by downgrading certain child exploitation-related felony offenses to misdemeanors or status offenses when committed in the context of sexting. These provisions generally call for less severe punishments, exclusion from sex offender registries, and expungement of juvenile

¹²¹ 18 U.S.C. § 1466A (2006).

¹²² *Stanley*, 394 U.S. at 565.

¹²³ In the event that prosecuting adults trading in child pornography becomes difficult due to First Amendment protection for sexted images, using obscenity statutes would not be a particularly effective alternative. It could not, for example, address possession of images, which make up a large number of child pornography cases. Moreover, unlike child pornography, in which the images are *per se* illegal, an obscene image is only illegal if a given jury unanimously agrees that it is obscene. Thus, whether a particular sexually explicit image of a child is considered obscene could vary across the country. This means that obscenity laws simply would not have the same deterrent effect as child pornography laws, under which producing, distributing, receiving and possessing any sexually explicit image of a child is illegal. Finally, while child pornography laws focus on the harm to victims in the images, obscenity laws focus on poisoning the minds of viewers. Shifting to an obscenity framework could impact not only the viability of prosecutions, but also society's view of the importance of such prosecutions in protecting children from sexual predation.

records where the subject, possessor, and sender of the sexually explicit image are minors close in age. At least four states, including Colorado, Missouri, Utah, and Vermont, have modified their criminal laws in this manner. Others, including Arizona, Connecticut, Florida, Illinois, Kentucky, Mississippi, Ohio, Pennsylvania, Rhode Island, and Illinois are currently considering such measures. The Illinois and Mississippi legislation also would reduce penalties for adults who receive sexted images, with no requirement that they be close in age to the minor.

A similar legislative response, passed in Nebraska and proposed in New York and Indiana, is to build an affirmative defense into existing child pornography statutes. These defenses generally provide that if the accused minor is the only subject of the image at issue, or if the possessor or distributor of the image is a minor close in age to the depicted minor and the depicted minor consented to the production of the image, the accused is not guilty of violating the child pornography laws.

Others states have focused on educational responses to sexting. New Jersey and South Carolina, for example, are currently considering bills that would create diversionary educational programs for juveniles who are criminally charged for sexting. New Jersey is also considering two other education-based bills, one of which would require school districts to provide students and parents with information on sexting, and another of which would prohibit the sale of cell phones in retail stores that do not provide pamphlets on sexting to customers. New York is considering a bill that calls for the creation of an educational outreach program on the potential harms of sexting. Indiana has introduced a bill that would authorize schools to offer classes, instruction, or other educational programs regarding the risks and consequences of sexting.

Still other states have focused on sexting as a cyberbullying or dating violence issue, calling for penalties where sexually explicit images are sent or posted without the subject's consent and with the intent to injure the subject's reputation or cause emotional harm. North Dakota recently passed legislation addressing this issue, and Illinois is currently considering such a bill. Similarly, the California Assembly recently acknowledged that sexting has become a "new frontier[] for teen dating abuse."

The constitutionality of each of these statutes, and the implications they carry for conventional child pornography prosecutions, is yet to be explored.

VII. Conclusion

As this document suggests, much work is still needed to determine the full scope and nature of the sexting phenomenon and to identify the best interventions for addressing sexting. The Youth and Media Policy Working Group Initiative is making this document available online now to provide a background and legal framework for the discussion of such interventions. The Initiative will hone in more specifically on these and related issues as its work progresses.

APPENDIX A: STATE LEGISLATION RELATED TO SEXTING

State	Description of Legislation	Status of Legislation
Arizona	<p>House Bill 1266 makes it a class 2 misdemeanor for a juvenile to intentionally or knowingly use an electronic communication device to transmit or possess a sexual visual depiction of a minor. A juvenile shall not be charged for possession of such a depiction where the juvenile did not solicit it, took reasonable steps to destroy it, and did not provide it to another person.</p> <p>http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=1266&image.x=2&image.y=10</p>	<p>Referred to House Rules and Judiciary Committees on March 23, 2010</p>
Colorado	<p>House Bill 1163 provides that in order to be charged with Internet sexual exploitation of a child (a class 4 felony), the offender must have known or believed that the child was younger than 15 years old at the time of the offense and the offender must have been at least 4 years older than the child.</p> <p>http://www.leg.state.co.us/clics/clics2009a/csl.nsf/fs_billcont/696B2655CB57A18B8725753C0059CF16?Open&file=1163_enr.pdf</p>	<p>Signed into law by Governor, effective July 1, 2009</p>
Connecticut	<p>House Bill 5533 makes it a class A misdemeanor for minors between the ages of 13 and 18 to knowingly possess or transmit any visual depiction of child pornography with a subject between the ages of 13 and 18. The bill provides two affirmative defenses: First, that the defendant possessed fewer than three such depictions, did not knowingly purchase, procure, solicit, or request such visual depictions, and promptly and in good faith – without allowing any other non-law-enforcement person to access it – took reasonable steps to destroy it; second, that the defendant possessed such a depiction of a person under the age of 16 for a bona fide artistic, medical, scientific, educational, religious, governmental, or judicial purpose.</p>	<p>Referred to Joint Committee on Judiciary on March 16, 2010</p>

	http://www.cga.ct.gov/asp/cgbillstatus/cgbillstatus.asp?selBillType=Bill&bill_num=HB05533&which_year=2010	
Florida	<p>House Bill 1335 provides that minors commit the status offense of sexting if they knowingly use a computer or other device to transmit or possess photographs or videos of themselves or other minors depicting nudity harmful to minors. The bill provides that transmission or possession of multiple photographs or videos is a single offense if such depictions were transmitted in the same 24-hour period. The bill also makes clear that it does not prohibit prosecution of a minor for conduct relating to material that includes depiction of sexual conduct, sexual excitement or for stalking.</p> <p>http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=44113&SessionId=64</p>	<p>Referred to Criminal & Civil Justice Appropriations Committee on March 28, 2010</p>
	<p>Senate Bill 2560 provides that minors commit the status offense of sexting if they knowingly use a computer or other device to transmit or possess any photograph or video of themselves or another minor depicting nudity harmful to minors.</p> <p>http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=44188&SessionId=64</p>	<p>Referred to Senate Criminal Justice, Judiciary, and Criminal and Civil Justice Appropriations Committees on March 4, 2010</p>
Illinois	<p>Senate Bill 2513 prohibits minors from knowingly and voluntarily using a computer or electronic communication device to transmit indecent visual depictions of themselves to others, and prohibits anyone from knowingly possessing such an image. Recipients who take reasonable steps to destroy the images within a reasonable time are not guilty of violating this provision. The bill provides that minors who transmit such images shall be adjudicated delinquent for their first offense, with automatic expungement of records, but may be criminally prosecuted for subsequent offenses. It also provides that a person over the age of 18 who</p>	<p>Referred to House Rules Committee on March 18, 2010</p>

	<p>knowingly possesses such an image is guilty of a Class B misdemeanor.</p> <p>http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2513&GAID=10&DocTypeID=SB&LegID=49124&SessionID=76&GA=96</p>	
	<p>House Bill 4583 prohibits minors from distributing indecent visual depictions of another minor through the use of a computer or electronic communication device. The bill provides that minors who violate this provision may be adjudged minors in need of supervision, and thereby ordered to obtain counseling or to perform community service. The bill also makes clear that it does not foreclose prosecution for disorderly conduct, public indecency, child pornography, harassment, etc.</p> <p>http://www.ilga.gov/legislation/billstatus.asp?DocNum=4583&GAID=10&GA=96&DocTypeID=HB&LegID=48264&SessionID=76</p>	<p>Referred to Senate Assignments Committee on March 12, 2010</p>
<p>Indiana</p>	<p>Senate Resolution 90 urges the Legislative Council to assign to the Sentencing Policy Study Committee the following issues for its consideration: (1) the use of cell phones – especially by children – to send explicit photos and videos, (2) the psychology of sexuality and sexual development, (3) the psychology of sexual deviants and deviancy, and (4) the mental development of children and young adults as it relates to their ability to make certain judgments.</p> <p>http://www.in.gov/legislative/bills/2009/SRESE/SR0090.html</p>	<p>Passed the Senate on April 29, 2009</p>
	<p>House Bill 1276 requires the Sentencing Policy Study Committee to study and make recommendations regarding the sending of sexually suggestive or sexually explicit material over the Internet or by use of a cellular telephone or similar device, including whether school corporations should adopt policies regarding this topic.</p>	<p>Referred to Senate Committee on Corrections, Criminal, and Civil Matters on February 8, 2010</p>

	<p>http://www.in.gov/legislative/bills/2010/HB/HB1276.2.html</p>	
	<p>House Bill 1115 provides that a school corporation may offer classes, instruction, or programs regarding the potential risks and consequences of creating and sharing sexually suggestive or sexually explicit materials through cellular telephones, social networking web sites, computer networks, and other digital media.</p> <p>The bill also creates a defense to prosecution under the state's child pornography statutes where (1) a cellular telephone, another wireless or cellular communications device, or a social networking web site was used to possess, produce, or disseminate the image; (2) the defendant is not more than four (4) years older or younger than the person who is depicted in the image or who received the image; (3) the relationship between the defendant and the person who received the image or who is depicted in the image was a dating relationship or an ongoing personal relationship (not including a family relationship); (4) the crime was committed by a person less than 21 years of age; and (5) the person receiving the image or who is depicted in the image acquiesced in the defendant's conduct.</p> <p>http://www.in.gov/apps/lisa/session/billwatch/billinfo?year=2010&session=1&request=getBill&doctype=HB&docno=1115</p>	<p>Referred to House Committee on Public Policy on January 11, 2010; Withdrawn</p>
	<p>Senate Bill 152 authorizes a school corporation to provide education concerning the potential risks and consequences of creating and sharing sexually suggestive or explicit materials through cell phones, over a computer, or through other digital media.</p> <p>The bill also creates a new defense to a charge of displaying to minors material that is harmful to minors or obscene, where the defendant was less than 4 years older than the minor who received</p>	<p>Referred to Senate Committee on Corrections, Criminal, and Civil Matters on January 5, 2010</p>

	<p>or accessed the matter harmful to minors and the minor expressly or implicitly acquiesced in the defendant's conduct.</p> <p>http://www.in.gov/legislative/bills/2010/IN/IN0152.1.html</p>	
Kentucky	<p>House Bill 57 prohibits persons under the age of 18 from electronically transmitting or possessing nude images of a minor – themselves included – as a violation for the first offense and a Class B misdemeanor for each subsequent offense. It also exempts these offenses from sex offender registration.</p> <p>http://www.lrc.ky.gov/record/10rs/hb57.htm</p>	<p>Referred to House Committee on Judiciary on January 5, 2010</p>
	<p>House Bill 143 prohibits persons under the age of 18 from possessing or transmitting to another minor via computer or other electronic means a nude image of themselves or another minor, making it a violation for the first offense and a class B misdemeanor for each subsequent offense. The bill provides for juvenile court jurisdiction and includes fines and community service as possible sanctions. It also prohibits sex offender registration.</p>	<p>Re-referred to the Senate Judiciary Committee on March 24, 2010</p>
Mississippi	<p>House Bill 643 makes it a misdemeanor for persons of any age to use a cell phone or other electronic communication device to knowingly create, receive, exchange, send or possess a photograph or video depicting a child under the age of 18 – themselves included – in a state of nudity.</p> <p>http://billstatus.ls.state.ms.us/2010/pdf/history/HB/HB0643.xml</p>	<p>Died in House Judiciary Committee on February 2, 2010</p>
Missouri	<p>Senate Amendment 9 to House Bill 62 (an omnibus crime bill) prohibits a minor from using a telecommunications device knowingly or recklessly to create, receive, exchange, send or possess sexually explicit images of a minor – themselves included – as a class B misdemeanor</p>	<p>Amendment adopted on May 13, 2009 / Bill signed into law by Governor, effective August</p>

	<p>for a first violation and a class A misdemeanor for any subsequent violation. It also exempts these offenses from sex offender registration.</p> <p>http://www.house.mo.gov/content.aspx?info=/bills091/bills/hb62.htm</p>	<p>28, 2009</p>
<p>Nebraska</p>	<p>Legislative Bill 97 makes it a class IV felony for persons under the age of 19 to knowingly possess any visual depiction of sexually explicit conduct that has a child as one of its participants or portrayed observers, providing two affirmative defenses to the charge: (1) the visual depiction portrays no person other than the defendant, <i>or</i> (2) (a) the defendant was less than nineteen years of age; (b) the visual depiction of sexually explicit conduct portrays a child who is fifteen years of age or older; (c) the visual depiction was knowingly and voluntarily generated by the child depicted therein; (d) the visual depiction was knowingly and voluntarily provided by the child depicted in the visual depiction; (e) the visual depiction contains only one child; (f) the defendant has not provided or made available the visual depiction to another person except the child depicted who originally sent the visual depiction to the defendant; <i>and</i> (g) the defendant did not coerce the child in the visual depiction to either create or send the visual depiction.</p> <p>The bill also prohibits the creation or distribution of any visual depiction of sexually explicit conduct involving a child as a participant or portrayed observer, providing two similar affirmative defenses to these charges: (1) the defendant charged with <i>creating</i> the image was less than eighteen years of age at the time the visual depiction was created and includes no person other than the defendant, <i>or</i> (2) the defendant charged with <i>distributing</i> the image (a) was less than eighteen years of age, (b) the visual depiction of sexually explicit conduct includes no person other than the defendant, (c) the defendant had a reasonable belief at the time the visual depiction was sent to another that it</p>	<p>Signed into law by Governor, effective May 20, 2009</p>

	<p>was being sent to a willing recipient, and (d) the recipient was at least fifteen years of age at the time the visual depiction was sent.</p> <p>http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=6401</p>	
New Jersey	<p>Assembly Bill 1560 (previously Senate Bill 2923) requires school districts annually to disseminate information to students in grades 6 through 12 and their parents or guardians on the dangers of distributing sexually explicit images through electronic means, including a description of the practice and its legal, psychological, and sociological implications.</p> <p>http://www.njleg.state.nj.us/2008/Bills/S3000/2923_11.HTM</p>	<p>Referred to Assembly Education Committee on January 12, 2010</p>
	<p>Assembly Bill 1561 (previously Senate Bill 2926) calls on the Attorney General to develop a diversionary educational program for juveniles who are charged with creating, exhibiting, or distributing sexual images of a minor, providing that admission to the program in lieu of criminal penalties shall be limited to juveniles who: (1) have not previously been convicted of a criminal offense under Title 2C of the state Statutes or the laws of the US, (2) were not aware that their actions could constitute and did not have the intent to commit a criminal offense, (3) may be harmed by the imposition of criminal sanctions, and (4) would likely be deterred from engaging in similar conduct in the future by completing the program.</p> <p>http://www.njleg.state.nj.us/2008/Bills/S3000/2926_11.HTM</p>	<p>Referred to Assembly Judiciary Committee on January 12, 2010</p>
	<p>Assembly Bill 1562 (Senate Bill 2925) prohibits retail stores from selling cell phone equipment or service contracts unless stores provide customers with information on sexting, including an explanation of the types of criminal penalties that may be imposed on an individual who</p>	<p>Referred to Assembly Consumer Affairs Committee on January 12, 2010</p>

	<p>engages in sexting, as well as a list of the names, telephone numbers, and addresses of groups qualified and available to answer sexting-related questions.</p> <p>http://www.njleg.state.nj.us/2008/Bills/S3000/2925_I1.HTM;</p>	
New York	<p>Assembly Bill 8622 calls for the creation of an educational outreach program that provides information to young people about the potential harms of sending or posting provocative or nude images of themselves on the Internet. The bill also amends the penal law to provide an affirmative defense to certain acts by young persons where the defendant is less than four years older than the individual who received, sent, or posted an image at issue in a criminal charge and where that individual expressly or implicitly acquiesced in the defendant's conduct.</p> <p>http://assembly.state.ny.us/leg/?bn=A08622&sh=t</p>	<p>Referred to the Assembly Committee on Ways and Means on March 9, 2010</p>
Ohio	<p>Senate Bill 103 prohibits minors from using a telecommunications device to create, receive, exchange, send, or possess material showing any minor – themselves included – in a state of nudity as a misdemeanor of the first degree.</p> <p>http://www.legislature.state.oh.us/bills.cfm?ID=128_S_B_103</p>	<p>Referred to House Committee on Criminal Justice April 23, 2009</p>
Oklahoma	<p>House Bill 3321 provides that the existing penalties for facilitating or soliciting sexual conduct with a minor by use of any technology shall not apply where (1) one of the persons is 18 years of age or older and is currently dating the other person, who is not under the age of 14, or (2) both persons are not under the age of 14 but are under the age of 18.</p> <p>Where a person falling into one of these categories violates the provision by transmitting, distributing, publishing, printing or reproducing a consensual text message that includes nude, semi-nude, or erotic images or video, the bill</p>	<p>Referred to House Judiciary Committee on February 2, 2010</p>

	<p>provides that a first offense constitutes a misdemeanor punishable by incarceration up to 6 months, a fine up to \$500.00, or both. A second violation shall be a misdemeanor punishable by incarceration up to 1 year, a fine not to exceed \$1,000.00, or both. A third and subsequent violation shall be a felony, punishable by incarceration up to 18 months, or a fine up to \$2,000.00, or both. The bill also provides that an offender under this section shall not be required to register as a sex offender.</p> <p>http://www.lsb.state.ok.us/</p>	
Pennsylvania	<p>Senate Bill 1121 makes it a summary offense for persons under the age of 18 to use a computer or other telecommunications device to knowingly transmit or distribute a nude image of themselves or of another minor age 13 or over to a person whose age is within four years of the offending minor's age. The bill does not apply to images of sexual intercourse or masturbation. A judge may refer an offender to an educational program as a sentence for or in lieu of conviction. Records of the offense may be expunged.</p> <p>http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2009&sind=0&body=S&type=B&BN=1121</p>	Referred to Senate Judiciary on October 19, 2009
	<p>House Bill 2189 makes it a misdemeanor of the second degree for minors to knowingly transmit in an electronic communication a depiction of themselves or another minor age 13 or over in a state of nudity (as defined in the state's obscenity provision). The bill does not apply to images of sexual intercourse.</p> <p>http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2009&sessInd=0&billBody=H&billTyp=B&billNbr=2189&pn=3051;</p>	Referred to House Judiciary Committee on January 5, 2010
Rhode Island	<p>House Bill 7778 makes it a status offense for a minor to knowingly and voluntarily and without threat or coercion use a computer or telecommunication device to transmit an</p>	Referred to House Judiciary Committee on February 25, 2010

	<p>indecent visual depiction of himself or herself engaging in sexually explicit conduct to another person. It provides that a minor who violates this provision shall not be subject to sex offender registration.</p> <p>http://www.rilin.state.ri.us/billtext10/housetext10/h7778.htm</p>	
	<p>Senate Bill 2636 likewise makes it a status offense for a minor to knowingly and voluntarily and without threat or coercion use a computer or telecommunication device to transmit an indecent visual depiction of himself or herself engaging in sexually explicit conduct to another person, with the same prohibition on sex offender registration.</p> <p>http://www.rilin.state.ri.us/BillText/BillText10/SenateText10/S2635.htm</p>	<p>Senate Judiciary Committee recommended measure be held for further study on March 23, 2010</p>
South Carolina	<p>House Bill 4504 makes sexting a misdemeanor offense, for which offenders are subject to a fine and mandatory enrollment in an educational program that explains the legal and non-legal consequences of sexting, including its relationship with cyberbullying. Sexting is defined as the use of telecommunications devices by minors ages 12-17 to knowingly transmit or distribute to other minors photographs, text messages with photo attachments, or other transmitted materials depicting themselves or another minor in a state of sexual activity or sexually explicit nudity. The bill provides that minors who successfully complete the educational program may have their records expunged. The offense is not subject to sex offender registration.</p> <p>http://www.scstatehouse.gov/sess118_2009-2010/bills/4504.htm</p>	<p>Referred to House Committee on Judiciary on February 2, 2010</p>
Utah	<p>UTAH CODE ANN. §§ 76-10-1204, 76-10-1206 (previously House Bill 14) carves out three specific levels of punishment for distribution of pornographic materials based on the age of the offender, making the offense a third degree</p>	<p>Signed into law by Governor on March 30, 2009</p>

	<p>felony for offenders who are 18 years of age and older, a class A misdemeanor for offenders who are 16 or 17 years of age, and a class B misdemeanor for offenders under the age of 16.</p> <p>http://le.utah.gov/%7E2009/bills/hbillenr/hb0014.htm</p>	
Vermont	<p>13 VT. STAT. ANN. §2802b (previously Senate Bill 125) provides for delinquent adjudication and subsequent record expungement of minors who knowingly and voluntarily and without threat or coercion use a computer or electronic communication device to transmit an indecent visual depiction of themselves to another person, as well as for those who possess such transmitted images without taking reasonable steps, whether successful or not, to destroy or eliminate the images. The law applies only to first-time offenders; subsequent offenses will be prosecuted as sexual exploitation of children.</p> <p>http://www.leg.state.vt.us/database/status/summary.cfm?Bill=S.0125&Session=2010</p>	Signed into law by Governor on June 1, 2009

**OTHER RELEVANT STATE LEGISLATION
RELATED TO CYBERBULLYING & DATING VIOLENCE**

State	Description of Legislation	Status of Legislation
California	<p>Assembly Concurrent Resolution 100 encourages all Californians to observe National Teen Dating Violence Awareness and Prevention Month, noting that digital abuse and sexting are becoming new frontiers for teen dating abuse.</p> <p>http://www.assembly.ca.gov/acs/acsframeset2text.htm</p>	Adopted by Assembly on February 4, 2010
Illinois	<p>House Bill 2537 makes it a class A misdemeanor for a person to upload on the Internet or otherwise to disseminate an electronic nude image or video recording of another person</p>	Re-referred to House Rules Committee on August 16, 2009

	<p>without the written consent of the person who appears in the image or video and with the intent to injure that person's reputation or to cause emotional distress. The bill does not apply to images of infants or toddlers that are not child pornography; nor does it apply to non-obscene images in museums or places of worship.</p> <p>http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=76&GA=96&DocTypeId=HB&DocNum=2537&GAID=10&LegID=45041&SpecSess=&Session</p>	
North Dakota	<p>House Bill 1186 makes it a class A misdemeanor for a person, knowing its character and content, to (1) surreptitiously create or willfully possess a surreptitiously created sexually expressive nude or nearly nude image without written consent from each individual in the image, <i>or</i> to (2) distribute such an image with the intent to cause emotional harm or humiliation to any individual depicted or after being given notice by a depicted individual or his or her parent/guardian of non-consent to distribution.</p> <p>The bill also makes it a class B misdemeanor for a person, knowing of its character and content, to acquire and knowingly distribute any sexually expressive image that was created without the consent of the subject of the image.</p> <p>http://www.legis.nd.gov/assembly/61-2009/bill-index/bi1186.html</p>	<p>Signed into law by Governor, effective April 24, 2009</p>