

What's in a Sext?: Regulating Teen Sexters

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Sexting is ubiquitous in mainstream media and culture. Recently, this contemporary form of communication became a matter of first impression for the Supreme Court in *City of Ontario v Quon*.¹ The issue at hand in this case is whether police officers are entitled to an expectation of privacy when they send sexually explicit text messages from phones that are issued by the city.² The Justices, however, were first tasked with wrapping their heads around the type of communication that was being sent. The lack of understanding regarding the underlying technology was made apparent by numerous queries, including Justice Kennedy's need for clarification about whether senders of text messages would receive a type of busy signal if the person they were texting was simultaneously texting someone else.³ Inquiries such as this highlight the fact that not only our forefathers, but current law and policy makers never considered how the mobile Internet would intersect with our civil rights.

While privacy is at the center of *Quon's* sexting quandary, this paper focuses on a separate but equally complex sexting topic; freedom of expression, and more specifically, how to regulate teen sexters. For the purposes of this paper, sexting refers to messages sent over mobile phones that contain sexually explicit images rather than merely textual information. This distinction is important when examining the actions of teenagers, because as current federal law stands, sexually explicit images of minors⁴ are categorized as child pornography.⁵ Such imagery is

¹ *City of Ontario v Quon*, --- U.S. ----, 2010, 78 USLW 3579, U.S., April 05, 2010 (NO. 08-1332).

² *Id.*

³ Kimberly Atkins, *Technical Difficulties at the Supreme Court*, Lawyers USA Online, April 19, 2010, <http://lawyersusaonline.com/dcdicta/2010/04/19/technical-difficulties-at-the-supreme-court-2/>.

⁴ The age of majority varies from state to state and from charge to charge. The term "minor" as used in this paper refers to juveniles under the age 18, the federal age of majority for child sexual exploitation.

⁵ 18 U.S.C. §2256 (2003).

regarded by the courts as “obscene speech.”⁶ It is said to “violate fundamental notions of decency” and falls outside the protections of the First Amendment.⁷ Thus, every time a hormonally charged teenager snaps a nude photograph of herself with her 5 megapixel camera phone and pushes send, she is guilty of producing and distributing child pornography. Likewise, her similarly hormonally charged boyfriend finds himself in possession of child pornography the moment he views the image. Said boyfriend also becomes a distributor when he forwards this sext to his classmate, who becomes a possessor. This pattern continues ad nauseum.

In an effort to combat this atrocity, this paper argues against prosecuting minors for consensually taking, sending, or possessing sexts. When minors forward sexts to third parties without consent, they should be adjudicated in juvenile court under a sexting statute. Those minors who are found guilty should be placed on a blacklist, monitored by Telecommunications carriers, who would restrict them from sending or receiving images on or from their cellular devices.⁸ The first part of this paper examines the case of Philip Alpert (a teenager who became a convicted sex offender under Florida’s child pornography statutes), and rejects arguments for the criminal prosecution of minors under child pornography statutes. Part II examines what forces influence the regulation of teen sexters through Lawrence Lessig’s four modalities of regulation – law, norms, markets and architecture.⁹ Finally, part III contends that intermediaries are the best way to control underage sexting and details how Telecommunications companies will be able to enforce regulation.

I. The Case of Philip Alpert

⁶ Miller v. California, 413 U.S. 15, 18-19 (1973).

⁷ Miller v. California, 413 U.S. 15, 18-19 (1973).

⁸ This paper, while acknowledging that email and social networking sites allow juveniles to post and share images, focuses solely on imagery taken and sent using the camera function on mobile phones.

⁹ See generally, Lawrence Lessig, Code and Other Laws of Cyberspace (2000).

Phillip Alpert received numerous text messages from his high-school sweetheart while they were dating. One of those messages changed his life. It contained a nude photograph that his girlfriend had taken of herself; this image-based form of communication is commonly referred to as a “sext.” Many adults engage in “sexting,” and perhaps to the dismay of myriad parents, teenagers do so as well. Phillip Alpert was now a recipient of a sext, and rather than deleting the message, he did what any red-blooded teenage male would do, he kept the image in his inbox.¹⁰

Phillip Alpert did not think about the image, now saved on his phone, as child pornography. He thought about this unsolicited photograph as being an awesome photo of his girlfriend. Likewise, he did not picture himself as sex offender who was guilty of possessing child pornography. Rather, he simply saw himself as one lucky dude. Unfortunately for Phillip Alpert, his luck was about to run out.

Phillip’s girlfriend ended their relationship. After this happened, he tried unsuccessfully one night to get her attention. At 3 A.M., he awoke in a haze from a brief stint of sleeping pill induced slumber. In a moment of anger and frustration he picked up his phone and forwarded the now infamous image to a long list of names that included not only his friends, but teachers, parents and grandparents as well.¹¹

“I’m extremely sorry for what I did,” is what the now 20-year old young man said in a recent interview with MTV.¹² And what he did was deplorable, but the punishment does not fit the crime. Shortly after Phillip hit send, he was charged and convicted of transmitting child pornography, a transgression that the state of Florida categorizes as a third-degree felony. With

¹⁰ Gil Kaufman, *Sexting Leads to Teen Having to Register As a Sex Offender*, MTV News, Feb, 2010 <http://www.mtv.com/news/articles/1631734/20100211/index.jhtml>.

¹¹ *Id.*

¹² *Id.*

this conviction came a sentence of five years probation and a spot on the sex offender registry, where he will remain until he is forty-three.¹³

The consequences of being placed on the sex offender registry are dire. Phillip is prohibited from living with his father, because Phillip's father lives too close to a school.¹⁴ Phillip's photo appears next to his name on the registry, which can be accessed by anyone, along with information that describes his physical features, his crime, a link to the definition of the law he broke, and his exact address.¹⁵ Consequently, neighbors knock on his door to meet him so they may then determine whether it's safe for their children to play in the neighborhood.¹⁶ He has had difficulty obtaining work and his college refused to allow him on campus.¹⁷ However, for Phillip, the most painful element of being labeled a sex offender is the weekly treatment session that he is forced to attend. Phillip is made to endure these group sessions with violent sex offenders.¹⁸ The lessons being taught and discussed include topics such as "why it is bad to rape someone."¹⁹

The actions of Phillip Alpert should not be taken lightly.²⁰ However, to say his punishment is a poor fit would be an understatement. While cases of this nature remain remote, they are

¹³ Notably, Alpert's ex-girlfriend was not charged with the production of child pornography. However, these charges were brought against three girls in Pennsylvania for taking nude self-portraits and sending them to three boys, who were charged with possessing child pornography. Ed Pilkington, *Sexting craze leads to child pornography charges* Guardian, January 14, 2009, <http://www.guardian.co.uk/world/2009/jan/14/child-pornography-sexting>.

¹⁴ Gil Kaufman, *Sexting Leads to Teen Having to Register As a Sex Offender*, MTV News, Feb, 2010 <http://www.mtv.com/news/articles/1631734/20100211/index.jhtml>.

¹⁵ Florida Department of Law Enforcement – Sexual Offender/Predator Flyer, "Phillip Michael Alpert", <http://offender.fdle.state.fl.us/offender/flyer.do?personId=60516>.

¹⁶ Gil Kaufman, *Sexting Leads to Teen Having to Register As a Sex Offender*, MTV News, Feb, 2010 <http://www.mtv.com/news/articles/1631734/20100211/index.jhtml>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ While it has resulted in no criminal prosecution to date, Jessica Logan sent nude pictures to

growing in number.²¹ Yet, Mary Leary, visiting professor of law at Catholic University and Senior Policy Advisor at the National Center for Missing and Exploited Children, remains a vocal advocate for the prosecution of minors in these circumstances, insisting that prosecution is a necessary response.²²

Professor Leary contends that while minors *producing* the sexual images complicates notions of child pornography, “[t]he fact of self-harm...cannot justify a refusal to prosecute juveniles for self-exploitation.”²³ Leary asserts that while prosecution may not be mandatory, it should be a viable option for prosecutors based on the *parens patriae* doctrine and under state police powers. The doctrine of *parens patriae* says that protecting the best interest of the child is the most important concern of the courts. Since Leary feels that all child pornography, even self-produced images, hurts all children, prosecutors should be able to enforce their ability to prosecute juveniles who take, send or receive sexts under the state police power to protect all children. Even if in doing so, they ruin the lives of the children they prosecute.

her then-boyfriend. After the couple broke up, her boyfriend sent the pictures of her to several other girls in the school, who then allegedly began a pattern of harassment and bullying against her. The isolation, anguish, and stress proved to be too much for Logan, who committed suicide in May 2008. She was 18-years-old. Her mother believes that her death was causally connected to the treatment she received when the pictures were distributed. See “Her Teen Committed Suicide over Texting,” Mike Celizic (March, 2009) *available at* <http://www.msnbc.msn.com/id/29546030/>.

²¹ In early 2009, authorities in Alabama arrested four middle-schoolers who sent nude photos of themselves to each other. See Mike Perrin, “Teens’ ‘Sexting’ Infiltrating State Schools” (June 2009) *available at* http://blog.al.com/living-news/2009/06/teens_sexting_infiltrating_sta.html. A teenage boy in Rochester, New York, sent a photograph of his 15-year-old girlfriend and faced up to seven years in prison for distributing the image. See Gigi Stone. “‘Sexting’ Teens Can Go Too Far” (March, 2009) *available at* <http://abcnews.go.com/Technology/WorldNews/sexting-teens/story?id=6456834>.

²² Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 Va. J. Soc. Pol’y & L. 1 (2007).

²³ *Id.*, at 50.

In Leary's effort to solve one problem – the production and dissemination of child pornography – she actually produces another: disproportionate sentences for adjudicated minors. Since the purpose of child pornography laws are to protect children from predators, prosecuting minors who produce sexually explicit images on their own and of themselves falls far from actually meeting this purpose. The consequences faced by teen sexters under Leary's regime are exemplified by the experience of Phillip Alpert. The far-reaching consequences of his actions have resulted in both his employment and educational opportunities being quashed; his future prospects are grim.

Leary asserts that the goal of prosecuting juveniles under child pornography laws is rehabilitation;²⁴ however, Alpert's sentence stretches well beyond any attempt at education and re-integration. By forcing him to live as an outcast, the court has taken away any opportunity he would have had at being a gainfully employed, contributing member of society. By prosecuting minors in like circumstances, we do not rehabilitate them. Instead, we risk trying them as adults, we risk forcing them to register as sex offenders, and we risk both traumatizing and stigmatizing them by forcing them to submit to the criminal process.

The damage caused to Alpert by his disproportionate sentence could be avoided if we refuse to prosecute minors under similar conditions. Our legislation must be amended to acknowledge that a distinction exists between conventional child pornography (coerced by adults) and that which is self-produced. The remainder of this paper will examine the forces that should be considered when re-forming the regulations for teen sexters and offers a solution that more effectively diminishes the transmission of sexts by teenagers to third parties over mobile phones.

²⁴ *Id.*

II. A *Minor* Problem

In his book, *Code & Other Laws of Cyberspace*, Lawrence Lessig laid out a model for analyzing four factors that interact to either strengthen or weaken a right or regulation; social norms, markets, architecture and law.²⁵ In Leary's approach to the problem of self-produced child pornography, she fails to take into consideration the interplay between these four factors and how they influence the effectiveness of her proposed model of regulation. Even Leary's most noted critic, Steven Smith, who penned, "Jail for Juvenile Child Pornographers?: A Reply To Professor Leary," only countered Leary's regulatory model by suggesting instead that child protective services should get involved.²⁶ It seems that no one has put serious thought into how social norms, markets and architecture interact with the law in this context. By examining the interplay between these four factors, which Lessig asserts, "either constrained or, alternatively, enable"²⁷ those who are being regulated, it becomes easier to uncover a more effective solution--one that both deters activity and is tailored to punish in proportion to the wrong committed.

A. Social Norms

The first and most important thing to consider when crafting regulation of this nature is the target audience. How many young folks have cellular phones? How many sext? How often? Fortunately, three large studies were recently conducted. The Pew Research Center published results in December 2009 from a survey on teens and sexting.²⁸ MTV, in partnership with the Associated Press, partnered with Cox Communications and the National Center for Missing and

²⁵ See generally, Lawrence Lessig, *Code and Other Laws of Cyberspace* (2000).

²⁶ Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply To Professor Leary*, 15 Va. J. Soc. Pol'y & L. 505 (2008).

²⁷ Lawrence Lessig, *Free Culture: How Big Media Uses Technology And The Law To Lock Down Culture and Control Creativity* 120 (2004).

²⁸ Amanda Lenhart, *Teens and Sexting*, Pew Research, Dec., 2009, <http://pewresearch.org/pubs/1440/teens-sexting-text-messages>.

Exploited Children and Harris Interactive to conduct a nationwide survey on the same topic in March 2009.²⁹ Lastly, The National Campaign to Prevent Teen and Unplanned Pregnancy Conducted their own study in 2008 in conjunction with Cosmogirl.³⁰ The results of these three studies vary only slightly, and all three point to the fact that the figures are rising for the number of teens who own cellular phones, as well as the frequency of their texting and sexting.

The Pew Study found that cell phone ownership for teens has grown dramatically since they first started tracking this statistic.³¹ Current figures show that 75% of all teens ages 12-17 own a cellular phone. In 2004, only 18% of 12-year-olds owned one, and by 2009, that number had grown to 58%.³² Similarly, in 2004, 64% of 17-year-olds owned one, but by 2009, the rate had jumped to 83%.³³ Of those teens who own cell phones, 4% say they sent a sext, and 15% said that had received a sext.³⁴ As age increased, teens were more likely to have engaged in this behavior, and teenagers who pay their own bill are more than five times as likely to have sent a sext.³⁵ Through their focus group, the center was able to pin down the three chief scenarios for sexting: “1) exchange of images solely between two romantic partners; 2) exchanges between partners that are shared with others outside the relationship and 3) exchanges between people who are not yet in a relationship, but where at least one person hopes to be.”³⁶ These studies reveal that teens have shifted from simply using their phones for calling, to surfing the Internet, playing video games, and sending and receiving picture and text messages.³⁷

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

The fact that teens have the ability to transmit sexts at the push of a button is notable because studies and development psychologists show that teens are *not* risk averse. Recently, a study conducted by scientists at the University College of London provided the first lab based evidence that adolescents are indeed risk-takers.³⁸ Researchers had children, adolescents and adults chose between making risky and safe decisions when playing a gambling game.³⁹ Dr. Stephanie Burnett from the Institute of Cognitive Neuroscience explains the results, “teenagers are good at weighing up the pros and cons of their decisions (unlike children) but take risks because they enjoy the thrill of a risky situation.”⁴⁰ Understanding why minors take risks is important to shaping public policy.

A second relevant factor is the decision-making capacity of young people. Scientific studies have long shown that minors differ from adults in terms of being able to understand the long-term consequences of their actions. In 2005, however, the Supreme Court of the United States added weight to this notion. The Court had previously held in *Thompson v Oklahoma* that children under the age of 16 could not be sentenced to the death penalty.⁴¹ In *Roper v Simmons*, the Court went a step further and held that it was unconstitutional to impose capital punishment for crimes committed under the age of 18.⁴² Justice Kennedy, writing for the majority, referenced a comprehensive study conducted by psychologists that was composed of both sociological and scientific research.⁴³ The study indicates that for minors, their level of maturity

³⁸ See “Teenagers Programmed To Take Risks” (March 2010) *available at* <http://www.sciencedaily.com/releases/2010/03/100324211144.htm>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Thompson v. Oklahoma*, 487 US 815 (1988).

⁴² *Roper v. Simmons*, 543 U.S. 551 (2005).

⁴³ *Id.*

and sense of responsibility is far less than what adults possess.⁴⁴ Acknowledging this disparity, the Court went on to highlight how this inability to understand consequences is why juveniles are denied the right to vote, serve on juries, and marry without the consent of their parents.⁴⁵ Recognizing this gap in comprehension between minors and adults is crucial for the successful regulation of these young kids' behavior.

Another issue that factors into the decision-making process of minors has to do with their relationships. In a panel entitled "Teen Sexting: The Problematic Prosecution of Teens under Child Pornography Laws," Ian Bysshe Harris of Day One NY explained that, "relationships for young people are really important because a lot of their identity formation is built through the relationships they keep."⁴⁶ He added that, "if young people see others doing things that help them with relationships, they are going to want to do that."⁴⁷ Harris also noted that based on his experiences working with teens, the actual number of teen sexters is far higher than the statistics reported.⁴⁸

This monkey-see monkey-do behavior exhibited by teenagers supports the notion that the percentage of teen sexters is only going to increase as the practice of sexting becomes even more normative. This is because teens are either failing to recognize the consequences of their actions, or because they feel it is worth the risk. As the previously discussed statistics suggest, any

⁴⁴ See Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003).

⁴⁵ *Roper* 543 U.S. at 183.

⁴⁶ Ian Bysshe Harris, Day One NY Staff Attorney, Remarks at Brooklyn Law School Panel Discussion: Teen Sexting: The Problematic Prosecution of Teens under Child Pornography Laws (April 14, 2010).

⁴⁷ *Id.*

⁴⁸ *Id.*

restrictions imposed through legal standards, such as prosecution under child pornography laws, will likely be undermined by teen's accessibility to cell phones and their own bodies.

B. Markets

A stark difference exists between conventional child pornography and images that are self-produced. Making this distinction is crucial to understanding how each type is created. Likewise, the clientele also differs dramatically between those who are consuming conventional child pornography and those who are receiving and in possession of self-made images.

Conventional child pornography is produced by adults exploiting minors. The 1986 report of Attorney General Edwin Meese III's Commission on Child Pornography made these findings about the children who are used in the production of conventional child pornography:

Children used in pornography seem to come from every class, religion, and family background; a majority are exploited by someone who knows them by virtue of his or her occupation, or through a neighborhood, community, or family relationship. Many are too young to know what has happened; others are powerless to refuse the demand of an authority figure; some seem to engage in the conduct 'voluntarily,' usually in order to obtain desperately needed adult affection. Adolescents used in pornography are often runaways, homeless youth or juvenile prostitutes who may feel with some justice that they have little choice but to participate.⁴⁹

The materials produced in this setting are usually not made for commercial purposes. Most often, they are created for the personal use of the predator, but are also traded with other child molesters.⁵⁰

⁴⁹ Final Report of the Attorney General's Commission on Pornography 135 (1986).

⁵⁰ *Id.*

The creation of conventional child pornography involves the *abuse* and *exploitation* of a real child. The Supreme Court, in *Ashcroft v. Free Speech Coalition*,⁵¹ narrowed the Child Pornography Prevention Act of 1996 by striking down two provisions as overbroad. In their landmark decision, the Court held that “virtual child pornography” (computer generated images), as well as “any sexually explicit image that was advertised, promoted, presented, described, or distributed in such a manner that conveys the impression it depicts a minor engaging in sexually explicit conduct,” are outside the boundaries of child pornography.⁵² Their reasoning for protecting both forms of speech in both instances was that the creation of these materials, “records no crime and creates no victims by its production.”⁵³

In contrast to conventional child pornography, self-produced images that are shared between minors involve neither abuse nor exploitation. As previously discussed, the three main scenarios involve teens exchanging images with their actual or desired partners. Unlike the scenarios that occur in the production of conventional child pornography, these adolescents are acting of their own volition. Instead of being exploited, these teenagers are simply exploring their sexuality through a modern form of flirtation. The act of flirting is generally understood as something that is both fun and free.

For teen sexters, the market constrains their action only via access. If they do not own a mobile phone, they cannot send picture messages. Therefore the only production cost is a phone that has the ability to take pictures and a plan that enables their transmission. According to the Pew Study, approximately 75% of teens have phones and most teens are provided with this

⁵¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

⁵² *Id.*

⁵³ *Id.*

mobile phone through parents.⁵⁴ Phones that are being marketed to teens emphasize their social networking capabilities. The new Microsoft Kin advertisement created a stir when it showed an of-age male playfully snapping a photo of his bare chest.⁵⁵ Though Microsoft eventually edited that segment out of the commercial, it is both salient and telling that it was included to begin with.⁵⁶ Teens are going to sext, and companies like HTC, Microsoft and Apple set a fair market value for a product that enables such behavior.

C. Architecture

Due to the nature of modern communication, it takes approximately 5 seconds for someone to send a sext. Studies show that a third of U.S. teenagers with cell phones send more than 100 texts a day, and half of them can send a message with their eyes closed.⁵⁷ Teens are so connected to their phones, that 87 percent of those who text said that they sleep with, or next to, their phone.⁵⁸ The nature of the mobile Internet makes it so that information is sent and consumed instantaneously. A symptom of this instant communication is a lack of forethought. Architecture places absolutely no constraints on teen sexters because the underlying technology facilitates the “click and send” environment in which teens are entrenched.

⁵⁴ Amanda Lenhart, *Teens and Sexting*, Pew Research, Dec., 2009, <http://pewresearch.org/pubs/1440/teens-sexting-text-messages>.

⁵⁵ See “Overly Sensitive Populace Leads Microsoft to Kill “Sexting” Kin Ad” (April, 2010) available at <http://gizmodo.com/5519860/overly-sensitive-populace-leads-microsoft-to-kill-sexting-kin-ad>.

⁵⁶ *Id.*

⁵⁷ See “Cell Phones Key to Teens’ Social Lives, 47% Can Text with Eyes Closed” (Dec. 2008) available at <http://www.marketingcharts.com/interactive/cell-phones-key-to-teens-social-lives-47-can-text-with-eyes-closed-6126/>.

⁵⁸ See “Third of U.S. Teens with Phones Text 100 Times A Day” (April, 2010) available at http://news.yahoo.com/s/nm/20100420/od_nm/us_teens_texting_odd.

C. Law

States have begun promulgating laws to specifically regulate the act of teen sexting. Approximately 15 States have or are in the process of tailoring legislation. In Vermont, the legislature recently passed a law decriminalizing sexting. In Ohio, lawmakers have proposed a law that if approved, would reduce the crime of sexting to a misdemeanor from a felony.⁵⁹ In Utah, lawmakers have done exactly that, and reduced sexting crimes for minors to a misdemeanor.⁶⁰ Connecticut is considering similar measures. A Kentucky law that was just approved will allow Judges to merely fine first-time offenders \$100, sentence them to community service, and attempt to work with the child's parents. However, if a second offense occurs, that minor will be charged with violating child pornography laws.⁶¹

Even within these 15 States, all proposed or adopted legislation still makes the act of consensual sexting between teens criminal conduct. Because this is a form of communication that is only going to increase⁶² it does not make sense to ruin a promising teen's future simply because s/he was exploring his/her sexuality, or because s/he made a poor judgment call. As it stands, of the four modalities of regulation, the law is what constrains teens the most. Yet, it has had little effect on deterring their behavior.

⁵⁹ Dick Russ, *Ohio to Address 'Sexting' Laws*, April, 2009
http://www.wkyc.com/news/local/news_article.aspx?storyid=111478&catid=3.

⁶⁰ See "Utah Lawmakers OK Bill on 'Sexting'" (March, 2009) *available at*
<http://www.ksl.com/?nid=148&sid=5823252>.

⁶¹ See "Kentucky: New Sexting Legislation" (March, 2010) *available at*
<http://puresight.com/online-child-safety-news-23031003.html>.

⁶² See "U.S., SMS Text Messaging Tops Mobile Phone Calling" (September, 2008) *available at*
http://blog.nielsen.com/nielsenwire/online_mobile/in-us-text-messaging-tops-mobile-phone-calling/.

III. Telcos and Gatekeeper Liability

Currently, a bill that would regulate teen sexting has been proposed in New York.⁶³ It is comprised of two different prongs, the first gives teen sexters an affirmative defense against charges with regard to posting, possessing and disseminating sexually explicit images where the act has been consensual and where the actors are within 4 years of each other.⁶⁴ The second part is an educational component. The Office of Children and Family Services is tasked with creating an outreach program to educate and raise awareness about potential long-term consequences and loss of privacy when teenagers share provocative images of themselves.⁶⁵ Again, the problem with this legislation is that it still makes sexting criminal, leaving adolescents open to prosecution, mandatory sentences, and sex offender status.

Rather than have each state consider creating an affirmative defense, I propose that Congress draft legislation exempting minors, as well as anyone consorting with a minor who is within four years of their age, from prosecution under child pornography laws. If we continue to amend laws on a state-by-state basis, we will end up creating a situation that places liability on the receiver of a sext, but not on a sender, or vice-versa, where the two teens live across state lines. While states certainly do serve as incubators for more progressive policies, our citizens who are under the age of 18 are rarely able to move to the state of their choice.

I recognize the significant difference between sending a sext consensually and forwarding a sext without the permission of the individual in the image. I propose that Congress, in conjunction with the exemption it creates for minors who sext, promulgate a regulation that holds teens accountable for forwarding sexts to third-parties without the consent of the teen

⁶³ AO 8622, Assem., Reg. Sess. (Ny. 2010) (unenacted).

⁶⁴ *Id.*

⁶⁵ *Id.*

pictured in the sext. Under such circumstances, those underage senders can and should be adjudicated in juvenile court for their offense. However, if found guilty, that teen will be punished by being placed on a “blacklist.” Congress shall anoint the Telecommunications companies as gatekeepers and force teens who are found guilty to register immediately with their current service provider to restrict their communications abilities. Once registered, teens will only be able to use their phones for making and receiving traditional phone calls. In order to ensure this, they will have to trade in their current phone for a basic model. If someone who has been blacklisted seeks outside help in acquiring a different phone, as well as being hit with fraud charges, that ‘helper’ will also be penalized under the sexting bill by being placed on the “blacklist.”

Telecommunications companies such as Verizon, Sprint, and AT&T, are in the best and most effective position to serve as intermediaries for regulating teen sexting. First, they are easy to identify. Every teen that has a phone has a phone service provider. Therefore, it is easy for these intermediaries to monitor the conduct of the end user. This measure saves the government huge sums of money because by enlisting the Telecommunications companies vis-à-vis an unfunded mandate, a) it does not have to pay for immense amounts of litigation,⁶⁶ and b) information costs are reduced, since the companies themselves can easily and cheaply monitor the listed teens.

Technology is rapidly changing the way we communicate and socialize. Rather than penalize our teens for quickly adopting new technology, we should adapt our regulations. By harnessing the influence and knowledge of Telecommunications companies, we can help to ensure that teens

⁶⁶ While the Pew study only showed the 4% of teens with cell phones text, other studies have found as high as 20% of teens sext. This would amount to millions of trials and millions more in court costs. *See* “Sex and Tech: Results From A Survey Of Teens And Young Adults” (October, 2008) *available at* www.TheNationalCampaign.org/sexttech.

are safer sexters by actually motivating them to behave consensually. As a windfall, we can save our government millions of dollars by lightening court dockets. Most importantly, we won't be jeopardizing the future of our youth. Instead, we will be protecting their freedom of expression.