This article explores the cultural phenomenon of sexting; the taking and sending of nude, digital pictures generally through the use of a cellphone; among teenagers and the possible legal consequences. It provides a history of the art of sexting, the origin of the Federal and Florida sex offenders registries and a case study of two Florida teenagers charged with creating and intent to distribute child pornography. Finally, it reviews previous amendments to child pornography laws in regards to teenage sexting and recommends a way forward for legislators to correct deficiencies in the law.
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I. Introduction

In the time it takes to attach a picture from your camera to a text message, or tweet an image to your Twitter® feed or send a snap, which will disappear in 8 seconds from your Snapchat®, a young life as we know it could be destroyed. It starts out innocently enough, one grabbing his or her smart phone, flip the camera to front facing so he or she can see the frame on the screen in front and then snap a “selfie.” The sweet sophistication and science of this art is best expressed in the hit song by The Chainsmoker’s, appropriately titled “#Selfie,” in which the lead female solicits advice for her selfie by asking her friends: “Can you guys help me pick a filter?, I don't know if I should go with XX Pro or Valencia, I wanna look tan, What should my caption be? I want it to be clever, How about "Livin' with my bitches, hash tag LIVE", I only got 10 likes in the last 5 minutes, Do you think I should take it down? LET ME TAKE ANOTHER SELFIE.” So how does this seemingly innocent and enjoyable act of expression produce permanently, negative, life-altering results? When you add the two ingredients that create a recipe for disaster: 1) nudity & 2) minors. The aforementioned combination is what transforms the everyday act of selfies and sexting, generally a perfectly legal act between consenting adults, into the lurid realm of child pornography and has brought this pop culture phenomena into the purview of police and prosecutors. Sexting has transcended from a mere passing craze and

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1 Twitter® and Snapchat® are registered trademarks by their respective trademark holders. Twitter see: Selfie Definition, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/selfie (last visited Nov. 1, 2014) (“A photograph that one has taken of oneself, typically one taken with a smartphone or webcam and uploaded to a social media website.”).
3 See generally Wendy Koch, Teens Caught sexting’ Face Porn Charges, USA TODAY (March 11, 2009), http://usatoday30.usatoday.com/tech/wireless/2009-03-11-sexting_N.htm (discussing how a growing number of teens are ending up in serious trouble for sending racy photos with their cellphones).
4 Id. Police have investigated more than two dozen teens in at least six states this year for sending nude images of themselves in cellphone text messages, which can bring a charge of distributing child pornography. Id.
become a mainstream reality for teens and adults worldwide. The growth in technology and shift in modesty and voyeur paradigms has left prosecutors reeling as they try to reconcile the current laws regarding child pornography because the laws that were intended to prevent the exploitation of children by adults did not anticipate the day that it might be a child consenting and committing the forbidden acts. Not only is this confusing for law enforcement, but teens are also receiving mixed messages regarding what is “normal” when they turn on the television only to see their favorite teen idols and Disney Pop Stars in the midst of a sexting scandal. Teens are inundated daily by sexual innuendo in media and in some cases are given instruction manuals of how to unleash the sexual potential of their cell phones. Although sexual suggestion is directed


8 See 18 U.S.C. § 2256(8) (2008). Child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. “Sexually explicit conduct” means--(I) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited; (II) masturbation; or (III) sadistic or masochistic abuse; or (III) graphic or simulated lascivious exhibition of the genitals or pubic area of any person.


10 See *The Sex Toy Hiding In Your Purse*, COSMOPOLITAN.COM (June 17, 2008, 3:13 PM),
towards adults in the furtherance of legal sexual activities, teens struggle to answer the question of “How wrong can it be if everyone is doing it?” as teens seem to be immersed in this ubiquitous activity that has now become commonplace among smart phone users.\textsuperscript{11} Most people can remember former New York City Congressman and former Mayoral candidate, Anthony Weiner, aka “Carlos Danger,” who made every major news headline in the country when the news of his sexting scandal broke and forced him to withdraw from the mayoral race.\textsuperscript{12} Fewer people have probably heard of the scandal at Etiwanda High School in Rancho Cucamonga, California, in which an unidentified 16-year-old boy was arrested when nude and semi-nude pictures of four girls between the ages of 15 and 16 years old from the high school appeared on his Twitter feed.\textsuperscript{13} Still, even fewer have probably heard of Phillip Alpert, a Florida teen who in the middle of the night, while in a sleeping pill induced stupor and emotionally reeling from a teenage love spat, forwarded a naked picture of his teenage girlfriend to her parents and family.\textsuperscript{14} This sexting story gone awry has one key distinction from the previous ones mentioned: this one ends with Alpert being convicted of distribution of child pornography, and as a result, Alpert was sentenced to five years probation and required by Florida Law to register and comply with the Florida Sex Offender’s registry until the age of 43.\textsuperscript{15} Although Alpert may still be in trouble

\begin{footnotesize}
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\item Erin Durkin & Jennifer Fermino, \textit{Anthony Weiner Falls in the Polls as he Admits to 3 Online Relationships After Exit from Congress}, NYDAILYNEWS.COM (July 25, 2013, 11:45 PM), http://www.nydailynews.com/news/politics/nude-photos-emerge-weiner-admits-online-relationships-article-1.1408741 . Former New York City Congressman Anthony Weiner was forced to resign from Congress in June 2011 after allegations surfaced of the six online sexual relationships he was maintaining. Weiner came under fire again in July 2013, after his May 2013 announcement for New York City Mayoral Candidacy, when new allegations of sexting with 23-year-old Sydney Leathers since July 2012 surfaced and forced him to drop from the mayoral race. \textit{Id.}
\item ‘Sexting’ Case at Etiwanda, Rancho Cucamonga High Schools: 16-year-old Arrested, ABCLOCAL.GO.COM (May 18, 2013, 12:00 AM), http://abclocal.go.com/kabc/story?id=9107234.
\item Deborah Feyerick & Sheila Steffen, \textit{‘Sexting’ Lands Teen on Sex Offender List}, CNN.COM (Apr. 8, 2009, 10:50
\end{enumerate}
\end{footnotesize}
because he forwarded the images to people beyond his girlfriend, many states are seeing disparate results in cases like Etiwanda High School and teens such as Phillip Alpert because the application of child pornography laws are not treated with strict liability across all offenders. The current Florida law that criminalizes “sexting” by and between teens has failed to keep in stride with today’s bounding technology and should be decriminalized for three distinct reasons: 1) the current law is cannibalizing the very class it sought to protect in the first place; 2) if left unchecked, continued convictions of teens could destroy the efficacy of the Sex Offender Registry by over saturation; and 3) as applied, the current law is being used to inhibit constitutionally protected activities.

II. Background

Most news media outlets would have you believe that sexting is some new demon of modern times come to rampage civilized society and take our children from us in the middle of the night, but a closer examination of human history will show that sexting is not a new concept by any means; rather, it is a concept that has been around since the earliest days of recorded human history and has received a technological upgrade for the 21st Century. Erotic images have been traced back as early as 30,000 B.C.E. in Paleolithic cave paintings; they have permeated art and sculpture throughout the greatest periods of art and culture and can even be found in the words of love letters written by famous poets such as James Joyce. As technology developed, so did the way in which humans communicated sexually.

A. Evolution of Sexting

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Most children at some point are lured by their curiosity into playing a game of “I’ll show you mine if you show me yours,” the premise of which is to compare their genitals. For some, it is mere curiosity, for some it is the thrill of its forbidden nature, and for some it is simply scopophilia, but what may start in childhood is a fascination that carries well into adulthood and possibly to the grave. Technology has been the biggest contributor in how we carry that behavior into adolescence and adulthood and technology has allowed the behavior to advance significantly from cave paintings. In 1948, Polaroid gave us the opportunity to take sexually charged photographs and have them developed at home with the use of the instant film cameras. Fast forward to the year 2000, when Sharp invented the first commercial camera phone on the J-SH04; then to the year 2002, when Multimedia Messaging Service (MMS) started becoming more prevalent, granting users the ability to send blurry, low resolution, digital photos from one cell phone to another. It was not long after that in 2007 when thirty-two Victorian teens in Australia were charged with various child pornography offenses when authorities discovered a teenage sexting ring within the school.

Although the moral majority still feels as though nudity is something that should be private, there is a minority which feels that it is not only prevalent but inevitable, despite

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21 Lamb, supra note 19, at 15.
22 Talking to Kids and Teens About Social Media and Sexting, AM. ACAD. OF PEDIATRICS (May 31, 2013), http://www.aap.org/en-us/about-the-aap/aap-press-room/news-features-and-safety-tips/pages/Talking-to-Kids-and-Teens-About-Social-Media-and-Sexting.aspx (“Technology use will vary by age. Tweens are likely to be using more instant messaging and texting, while teens use those technologies and also networking sites such as Facebook. (These tools often are referred to as ‘platforms’ for social networking.).
23 Knoblauch, supra note 18.
24 Multimedia Messaging Service is used to send text messages that include multimedia (i.e. digital pictures) to and from cellular phones.
25 Knoblauch, supra note 18.
widespread knowledge of the harmful repercussions.\textsuperscript{27} While “inevitability” may seem to provide some explanation of the increase in teen sexting, a more logical and factual based explanation centers around the advent of technology that makes sexting more efficient and the proliferation of cell phone access to a younger generation.\textsuperscript{28} With innovative new cell phone applications like Snapchat, iDelete and Between, in addition to regular Multimedia Messaging Systems, teenagers can turn their phones and other smart devices into a mobile pornography dispensary and these applications make it as simple as getting up from the dinner table, going to the bathroom, snapping some racy selfies, sending them to one or more recipients and be back at the dinner table before anyone notices you are missing.\textsuperscript{29} As if that was not easy enough, teenagers are also using the internet in combination with social media sites, such as Facebook, MySpace and Instagram, by directly uploading images to these sites from their phones.\textsuperscript{30} Technology combined with raging teenage hormones and an undeveloped, young brain, not suited for rational decision making, has not only brought the word sexting into the everyday English lexicon and our homes, but it has also created a legal scenario in the black and white realm of child pornography that the law has been unable to keep in stride with.\textsuperscript{31} “Sexting is a


\textsuperscript{28} Lenhart, \textit{ supra note Error! Bookmark not defined.}.

\textsuperscript{29} Jessica Booth, \textit{7 Apps to Help You Deal with Sexting if You Have No Idea What You’re Doing}, GURL.COM (Oct. 25, 2013), http://www.gurl.com/2013/10/25/sexting-apps-iphone-android-google-play/#1 (describing Snapchat as an application that automatically deleted images after a maximum of 10 seconds . . . . Snapchat users can take a snapshot of your image and although you'll be notified about it, they'll still have that image on your [sic] phone . . . . iDelete [is an application that] self-destructs images after a certain amount of time . . . . [T]here is an option to make sure people can't screenshot your image... and if they do, they'll only get a tiny portion of the image where your finger was . . . . It [also] gives users a window to decide to un-send the message - if they decide they just made a mistake with thatpic, they can cancel it. The user will still get a message, but it will just say that the pic was deleted . . . . Between is an [application] for couples [that is] a private messaging system between two people are [sic] dating. Not only can you use it to send pictures, but you can use it to share information and [set reminders]).


\textsuperscript{31} LiveScience, \textit{Teen Sex May Affect Brain Development, Study Suggests}, FOXNEWS.COM (Dec. 2, 2011),
post-modern form of flirting, a game of sexual show-&-tell; so far, it hasn’t involved sexual predators.”

B. History of Child Pornography in the United States

One of the earliest instances of child pornography laws examined by the Supreme Court involved not just the possession of images in a sexually explicit nature, but also the sale of such materials. Ferber, who owned a New York store which sold sexually explicit books and materials, sold two videos depicting underage boys masturbating to an undercover officer, in violation of New York law. The Court, therefore, had to analyze how to approach not just statutes dealing with obscenity, but the interplay of obscenity and children.

Ultimately, the Supreme Court upheld the New York statute, dismissing Ferber’s First Amendment arguments. The Court began its analysis by commenting that “[i]t is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is compelling.” According to the Court, the nation needs young people to fully mature into “healthy, well-rounded” people. Specifically, the New York law sought to prevent the sexual exploitation and abuse of children. And according to the Court, nearly every state has laws to guard against the proliferation of materials that could harm the psychological, emotional, and mental health of children, and that interest was compelling enough to limit certain First Amendment protections. However, as the Court referenced, those


34 Id. at 751-52.
35 Id. at 753.
36 Id. at 774.
37 Id. at 756-57 (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).
38 Id. at 757.
39 Ferber, 458 U.S. at 757.
40 Id. at 758.
laws were passed to prevent against the exploitation of children by adults and, in order to ensure the physical and mental well-being of children, the State may prevent the proliferation of sexually explicit images of children.\textsuperscript{41} The discussion the Court engaged in never contemplated instances of children actively choosing to take an image of oneself, without the involvement or encouragement of an adult, and causing that image to be introduced into the stream of commerce or the internet.

The Court was again confronted with this issue in \textit{Osborne v. Ohio}. In that case, Clyde Osborne was convicted of possessing four pictures of a young boy in sexually explicit poses.\textsuperscript{42} The law at issue, this time an Ohio statute, criminalized possession of any material that showed a minor who was not that person’s child in a state of nudity, with a minor being defined as one who was under the age of eighteen.\textsuperscript{43} Osborne attempted to argue that private possession of obscene material alone could not form the basis of criminal liability, citing to a Supreme Court case from 20 years earlier, \textit{Stanley v. Georgia}.\textsuperscript{44}

The Supreme Court ultimately upheld Osborne’s conviction.\textsuperscript{45} While the Court did not disturb the holding in \textit{Stanley}, it did note that Ohio law was targeting a legitimate state interest: “to protect the victims of child pornography” and “destroy [the] market for the exploitative use of children.”\textsuperscript{46} The Court reasoned that if possession of child pornography was criminalized, then as a result the market for those images would decrease because of the risk of mere possession of those images.\textsuperscript{47} According to the Court, the market for child pornography existed because there was a demand for it and the sale of those images provided an economic incentive to create

\begin{itemize}
  \item \textsuperscript{41} \textit{Id}.
  \item \textsuperscript{42} \textit{Osborne v. Ohio}, 495 U.S. 103, 107 (1990).
  \item \textsuperscript{43} \textit{Id.} at 106.
  \item \textsuperscript{44} \textit{Id.} at 108. \textit{See generally} \textit{Stanley v. Georgia}, 394 U.S. 557 (1969).
  \item \textsuperscript{45} \textit{Id.} at 125.
  \item \textsuperscript{46} \textit{Id.} at 109.
  \item \textsuperscript{47} \textit{Osborne}, 495 U.S. at 109-10.
\end{itemize}
exploitive pictures of children.\textsuperscript{48} However, such a view also does not adequately address the issue of children taking pictures of themselves when there is no intent to gain economically from the creation or distribution of the images. Most instances of teens and children being arrested or prosecuted for child pornography images had nothing to do with a sale of those images. Again, neither Supreme Court jurisprudence, nor State laws adequately address the issues presented by selfies or images teenagers take in their own intimate moments. While it is undeniably true that States have a legitimate and compelling interest in dissuading adult exploitation and sale of children images, no such argument advanced by the Court could be used to criminalize teenagers possessing images of themselves or classmates on their phones. The factual distinction of teen sexting was neither contemplated by the courts nor the legislation and is not appropriate in using the laws derived from them would produce an absurd result, as evidenced by previous cases.\textsuperscript{49}

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\textbf{C. History of the Florida Sex Offender’s Registry}
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As times became more sophisticated and laws were codified, sex crime laws continued to evolve and although they have been prevalent in the United States since the early 1900’s, the birth of our modern day sex offenders registration acts took place in 1994.\textsuperscript{50} For the first time, the Wetterling Act created a federal mandate that required the states to create a registration of sex offenders with state authorities; however, it did not mandate that this information be made available to or disseminated to the public.\textsuperscript{51} The law was majorly amended in 1996 when Congress supplemented the Violent Crime Control and Law Enforcement Act of 1994 by passing Megan’s Law.\textsuperscript{52} Megan’s Law was enacted in response to the brutal slaying of seven-year-old

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\textsuperscript{48} Id. at 110.
\textsuperscript{49} Feyerick & Steffen, supra note Error! Bookmark not defined.
\textsuperscript{50} Id.
\textsuperscript{52} 42 U.S.C. § 14071(e)(2) (Supp. IV 2007).
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Megan Nicole Kanka, who was lured to her neighbor’s bedroom by Jesse Timmendequas, with promises of seeing a new puppy.\(^{53}\) Instead, she was raped and strangled with a belt around her neck and a plastic bag over her head. Then, her body was abandoned in Mercer County Park because her neighbor, who had previously served six years in prison for aggravated assault and attempted sexual assault on a child,\(^{54}\) was afraid that he would get into trouble and go to jail.\(^{55}\) The parents of Megan Kanka said they “knew nothing about him” and felt that “if we had been aware of his record, my daughter would be alive today.”\(^{56}\) As a result of this tragedy, starting in 1996, every state, including the District of Columbia, enacted a form of “Megan’s Law” and this would pave the way for states to provide public dissemination of information in the form of state sex offender registries.\(^{57}\) Since 1996, there were several amendments and additive legislation that were passed in an effort to improve the efficacy of sex offender’s registries, but many offenders were able to exploit loopholes or avoid registering altogether.\(^{58}\)


\(^{56}\) *MEGANNICOLEKANKAFOUNDATION.ORG, supra note 55.*

\(^{57}\) Bowater, *supra* note 52. Megan’s Law provides the following: 1) Provided for the public dissemination of information from states’ sex offender registries; 2) Provided that information collected under state registration programs could be disclosed for any purpose permitted under a state law; 3) Required state and local law enforcement agencies to release relevant information necessary to protect the public about persons registered under a State registration program established under the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. *Id.*

\(^{58}\) Bowater, *supra* note 52. Below is brief history of this additive legislation. (1) 1996 - *The Pam Lychner Sex Offender Tracking and Identification Act of 1996* - Required the Attorney General to establish a national database (the National Sex Offender Registry or ‘NSOR’) by which the FBI could track certain sex offenders. 2) 1997 - *The Jacob Wetterling Improvements Act* - Passed as part of the Appropriations Act of 1998, the Jacob Wetterling Improvements Act took several steps to amend provisions of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, The Pam Lychner Sex Offender Tracking and Identification Act, and other federal statutes. This law changed the way in which state courts make a determination about whether a convicted sex offender should be considered a sexually violent offender to include the opinions not just of sex offender behavior and treatment experts but also of victims’ rights’ advocates and law enforcement representatives and required registered offenders who change their state of residence to register under the new
these loopholes, several bills were introduced by Members of Congress and after coming together in a comprehensive effort, gave birth to the Adam Walsh Child Safety and Protection Act of 2006, which was signed into law on July 27, 2006, in order to address the growing epidemic of sexual violence against children. Until now, the previous Acts had allowed the States to structure their own registries, but the Adam Walsh Child Safety and Protection Act of 2006, for the first time, created a new federally mandated minimum standard for all States to uphold. Also, the Act expanded the number of sex offenses that must be captured, while expanding the jurisdiction to include the 212 federally recognized Indian Tribes, of which 197 have implemented their own registry and alert systems, in addition to updates including electronic offenses and monitoring.

These Federal Statutes were the foundation that the State of Florida would use to build their own registry and alert system, and with an inordinately high sexual offender population, it only stands to reason that Florida would have one of the toughest sex offender registries in terms of state’s laws. 3) 1998 - Protection of Children from Sexual Predators Act - This Act prohibited federal funding to programs that gave federal prisoners access to the internet without supervision. 4) 2000 - The Campus Sex Crimes Prevention Act - Passed as part of the Victims of Trafficking and Violence Protection Act, the Campus Sex Crimes Prevention Act: Required any person who was obligated to register in a state's sex offender registry to notify the institution of higher education at which the sex offender worked or was a student of their status as a sex offender; and to notify the same institution if there was any change in his or her enrollment or employment status. Id.

Id. at 20-21.
of registration and compliance. In order to comply with the federal Wetterling Act, Florida enacted the Florida Public Safety Information Act on October 1, 1997 and immediately, there was palpable evidence of sexual offenses that were prevented by aiding law enforcement and elevating public awareness of sexual offenders. Nonetheless, like any groundbreaking technology, there were ways that the system could have been improved and in 1998, the state legislature augmented the registry with two primary pieces of legislature to increase the efficacy of the registry by fixing technical issues as well as expanding notification coverage. However, it wasn’t until 2006 when Florida decided to give some teeth to its sex offender’s registry by passing the Jessica Lunsford Act, poising Florida to have one of the toughest sex offender’s registries in the country. The act was passed, with unusual swiftness, in response to the brutal slaying of nine-year-old Jessica Lunsford of Homosassa, Florida by her neighbor and registered sex offender, John Couey. Couey entered the Lunford’s mobile home around 3:00 a.m. and rousted Jessica Lunsford from her bed, urging her to remain quiet, while he made her follow him back to his sister’s mobile home across the street. It was there in his sister’s single wide trailer that he repeatedly raped nine-year-old Jessica Lunsford and kept her alive and locked in his

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61 Biance, Heather. Sex Offender Registration History, WCTV.TV (Sept. 24, 2009), http://www.wctv.tv/home/headlines/61383177.html. In 2009 there were more than 39,000 sex offenders living in Florida, compared to the 11,000 in Georgia. Id.


bedroom closet for at least three days. As the search for Jessica Lunsford intensified, Couey became increasingly paranoid and instead of killing her, he double wrapped her in garbage bags and buried her in his backyard, in a shallow grave, while she was still alive. Right on the heels of this tragic case was the story of thirteen year old Sarah Lunde. Lunde disappeared from her home in Ruskin, Florida only to have her body discovered in a pond a few days later. She was found one week after she disappeared half a mile down the road with concrete blocks weighting down her decomposed body at an abandoned fish farm, with her bra pushed up and around her neck. It was later discovered that Sarah Lunde was killed by David Onstott, who previously dated Sarah’s mother, and Onstott received a life sentence without parole when he was convicted of second degree murder. David Onstott was a registered sex offender in the state of Florida and in addition to his drug and alcohol abuse, also had a violent past that included brutal assaults, domestic violence and rape. As a result of these horrible tragedies, Governor Jeb Bush signed the Jessica Lunsford Act on May 2, 2005, effectively making Florida one of the toughest states for sex offenders and bringing two major changes to the way Florida dealt with sex offenders.

Although the act is not codified in a single piece of legislation, it separately bolstered the Florida

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67 Bruno, supra note 65 ("Jessica's clothed body was found inside two tied plastic garbage bags. Her wrists were bound, but she had managed to poke two fingers through the plastic in an attempt to free herself.").
73 Vansickle, supra note 64.
statutes that control sexually based offenses and started with FL Stat § 800.04(5)(b) by making lewd or lascivious molestation of a victim less than 12 years of age by an offender 18 years of age or older a life felony, which carries a minimum sentencing of 25 years under the Florida sentencing statutes.\(^{74}\) Likewise, anyone convicted of the previous charge, will also be subjected life time electronic monitoring, subject to FL Stat § 947.1405 and would require lifetime probation following the imprisonment as well.\(^ {75}\) While these provisions maybe the teeth of the registry, the regular provisions of Florida’s Sexual Predators Act are equally stringent, starting with the registration requirements, which vary based on the conviction and makes failure to register a felony.\(^ {76}\) Florida also requires anyone moving into the state that has been adjudicated as a sex offender in another state to register here in Florida as well.\(^ {77}\) This accompanies the state’s residency restrictions that prohibit sex offenders from living within 1000 feet of a school, child care facility, park or a playground.\(^ {78}\) Sex offenders are also prohibited from working or even being physically near these types of facilities or in close proximity to children in general.\(^ {79}\) Currently, there are no restrictions on possessing and using a computer, using the internet, having and accessing an email account or owning and using a social networking account just

\(^{74}\) FLA. STAT. § 800.04 (2014). See also FLA. STAT. § 775.082(2014) A split sentence that is a term of not less than 25 years’ imprisonment and not exceeding life imprisonment, followed by probation or community control for the remainder of the person's natural life. Id. at § 775.082(3)(a)(4)(a)(II).

\(^{75}\) FLA. STAT. § 947.1405 (2014).

\(^{76}\) FLA. STAT. § 775.21 (2014).

\(^{77}\) FLA. STAT. § 943.0435 (2014)

\(^{78}\) FLA. STAT. § 775.215 (2014).

\(^{79}\) FLA. STAT. § 856.022 (2014).
because you are a sex offender. IF the offender is still under supervision, however, there may be limitations on the afore mentioned rights as set forth by a judge based on the nature of the offense committed. 80

In examining the sordid and violent history that lead to the current incarnation of the sex offenders registry, the government has made it clear that although some of these penalties may seem harsh (as they continue to punish after the sentence is served), they are well needed in order to stem the tide of the vicious attacks on children by violent sexual predators. 81 When dealing with offenders as vicious as the ones that inspired the legislation that shaped our system, tough legislation is more than warranted. When that legislation is applied to crimes that are not as severe as murder or sexual abuse, however, we achieve disparate results. Although there are many risks and negative consequences that can be associated with teen sexting, they pale in comparison with the monstrous instances that are responsible for the named acts that created the registry. In a worst case scenario, teen sexting ends with some personal embarrassment and harm to reputation, not death. 82 Even in extreme cases, where a death resulted from teen sexting gone awry, that death was a suicide and a personal choice by the victim to end their own lives, unlike the murders of young children who had no control of their situation. 83 These laws were designed to prevent the exploitation of children by adults, but because of developments in technology and shifts in social and cultural norms, what they are actually doing, via draconian application, is criminalizing consensual behavior between minors, that would not even be criminal if the parties

83 Cellzic, Mike, Her Teen Committed Suicide over ‘Sexting’, TODAY (March 6, 2009, 9:26 AM), http://www.today.com/id/29546030/ns/today-parenting_and_family/t/her-teen-committed-suicide-over-sexting/ Eighteen-year-old Jessica Logan committed suicide after her boyfriend forwarded nude pictures of her after their break up resulting in her constant torture and harassment at school. Id.
involved were of the age of majority. As the law currently stands, it makes criminals out of normal, law-abiding children, that would otherwise not be criminals. By doing so, the law places them at a higher risk of becoming actual criminals through recidivism after harmful exposure to things like the violence of the prison system, not being able to work or find a place to live as a result of being placed on the registry, and going back to prison for subsequent violation of their conditional release as sex offenders. The punishment is perpetual and continues well after any prison sentence or probation is served, and sets those on the registry up for failure—by eroding their support systems and limiting family interactions—due to the possibility of violating the limitations set forth by the registry and effectively isolating those individuals. These penalties are of the utmost severity and should be reserved for those that seek to harm the children we want to protect, not the children themselves. Perhaps more concerning than cannibalizing the class that we are seeking to protect is possibly causing the registry to fail its initial purpose of keeping public informed of dangerous threats. By placing low-risk or non-threatening offenders, such as teen sexters, on the sex offenders registries, the registries become bloated and lose their efficiency. Police officers have limited resources and by bloating the registry, they are unable to efficiently filter the low-risk from the high-risk offenders and with that, they lose

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85 Claire Gordon, Travis Iosue, Sex Offender Appearing On 'Our America with Lisa Ling,' Tries To Restart Life, HUFFINGTON POST (Aug. 7, 2012), http://www.huffingtonpost.com/2012/08/07/travis-iosue-sex-offender-lisa-ling_n_1745010.html. Travis Iouse accepted a plea deal for touching a girl’s breast which placed him on the sex offender’s registry in lieu of prison, but since then finding housing and a job are nearly impossible. In prison he “was a particularly vulnerable target. His nose was broken, and he can't breathe through it very well anymore. His front teeth were kicked out. His eye socket was broken, so he has a metal plate above his left eye to keep his eyeball in place. His right clavicle was broken, as was his right hand, and forearm, and shoulder.” He was also sent back to prison for violating his parole “by having an unscheduled birthday party at the halfway house where he resides.” Id.
86 Id.
87 Alseth, supra note 84.
the ability to give the public poignant and refined intelligence regarding true threats to their children and families.\textsuperscript{90}

III. Case Study

A. A.H. v. State, 949 So.2d 234 (2007) & How The Court Got It Wrong

A review of Florida case law as it relates to the issue of dissemination of child pornography images should start with the \textit{A.H.} case. In \textit{A.H. v. Florida}, two teens were engaged in a consensual, sexual relationship.\textsuperscript{91} Relevant to the issue at hand, these two teens, age 16 and 17, took approximately 117 sexually explicit photos of both of them naked and engaged in sexual acts.\textsuperscript{92} A.H., one of the minors in the case, was a 16 year old female who sent these images to her 17 year old boyfriend, J.G.W.\textsuperscript{93} When the relationship ended, A.H. contacted the police, concerned that J.G.W. might do something malicious with those images, including possibly distributing the photographs to third parties.\textsuperscript{94} However, as the court noted, no third party actually viewed the sexually explicit materials; rather, they were sent to a computer which third parties merely had access to.\textsuperscript{95} On this basis, both teens were charged with one count of violating section 827.071(3), Florida Statutes, by “producing, directing, or promoting a photograph or representation that they knew to include the sexual conduct of a child.”\textsuperscript{96} Both were adjudicated delinquent, as A.H. entered a \textit{nolo contendere} plea, but explicitly reserving her right to appeal the use of the Florida statute as applied in her case.\textsuperscript{97}

\begin{itemize}
  \item \textsuperscript{90} \textit{Id.}
  \item \textsuperscript{91} A.H. v. Florida, 949 So. 2d 234, 236 (Fla. Dist. Ct. App. 2007).
  \item \textsuperscript{92} \textit{Id.}
  \item \textsuperscript{93} \textit{Id.}
  \item \textsuperscript{94} \textit{Id.} at 238-39.
  \item \textsuperscript{95} \textit{Id.} at 235.
  \item \textsuperscript{96} \textit{Id.}
  \item \textsuperscript{97} A.H., 949 So.2d at 236.
\end{itemize}
The First District ultimately upheld the constitutionality of the statute as applied to A.H., and thus upheld her plea and sentence. The court began its analysis with whether there the statute ran afoul of the Florida Constitution, specifically, the right to privacy. The court correctly noted that because “Florida’s right to privacy is a fundamental right,” then the statute is analyzed “under a compelling state interest standard.” However, before the statute would be analyzed under that standard, a reasonable expectation to that right to privacy must exist. Therefore, if A.H. had no reasonable expectation of privacy, she cannot argue that the more stringent standard of review could apply in her case, and therefore a simple rational basis test would have been used by the court. The First District noted that “a number of factors” led them to the decision that A.H. had no reasonable expectation of privacy under these circumstances. First, A.H. made the decision “to take photographs and to keep a record that may be shown to people in the future.” To support this proposition, the court referenced a case out of the Southern District in California; however, in the Four Navy Seals case, the plaintiffs in that case specifically placed their photographs on the Internet, intending some persons on the Internet to be able to view them, but not the general public. In the A.H. case, there is no evidence presented that A.H. intended for any person on the Internet or any person at all, to view the images of her and J.G.W except for both of the parties involved in the photos. The Four Navy Seals case should be inapplicable to the court’s A.H. analysis because there was already that diminished expectation of privacy by publication with intent for distribution in the Four Navy

98 Id.
99 Id.
100 Id. at 235 (quoting Bd. of Cnty Comm’rs of Palm Beach Cnty. v. D.B., 784 So. 2d 585, 588 (Fla. 1st Dist. Ct. App. 2001).
101 Id.
102 Id.
103 A.H., 949 So.2d at 235 (emphasis added).
104 See id. at 237.
Seals case, which is completely lacking in the A.H. case. In fact, A.H. was attempting to prevent the type of dissemination, which occurred in the Four Navy Seals case, therefore the result should be the opposite of the Four Navy Seals case. In the end, the court relied on the Four Navy Seals case to determine that A.H. had no expectation of privacy.\(^\text{106}\)

The court next attempted to engage in a sort of sociological distinction between sexting with adults and sexting among minors. However, the court ultimately fails to adequately address issues, which point to an adult/minor distinction. First, the court noted “minors who are involved in a sexual relationship, unlike adults who may be involved in a mature committed relationship, have no reasonable expectation that their relationship will continue and that the photographs will not be shared with others intentionally or unintentionally.\(^\text{107}\) However, the court points to no empirical evidence that a relationship which begins as minors will not lead to marriage less than a relationship which begins at an adult level age.\(^\text{108}\) Further, adults do not necessarily have a reasonable expectation that their relationships will not end, as premarital agreements run rampant in society and the divorce rate still hangs above 50% nationally.\(^\text{109}\) Additionally, so called “revenge porn,” or the posting of images of former lovers naked which are placed on Internet to embarrass or harass, has presented a new set of legal challenges because the persons in the photographs were consenting adults, and some States have actually responded with legislative action.\(^\text{110}\) Therefore, the logic of the court does not hold up to scrutiny, as the same problems that are presented by children proliferating nude images (the uncertainty of the relationship and the

\(^{106}\) A.H., 949 So. 2d at 237.

\(^{107}\) Id.

\(^{108}\) Id. (“It is not unreasonable to assume that the immature relationship between the co-defendants would eventually end. The relationship has neither the sanctity of law nor the stability of maturity or length.”).

\(^{109}\) Marriage and Divorce, CENTERS FOR DISEASE CONTROL AND PREVENTION (June 19, 2014), http://www.cdc.gov/nchs/fastats/divorce.htm (stating that the marriage rate nationally is 6.8 per 1,000 people in total population, while the divorce rate is 3.6 per 1,000 people, among the 44 reporting States and the District of Columbia).

reasonable expectation that the images will not appear online) are also still problems for adults as well. The court’s rationale is illogically applied when confronted with empirical data and therefore should not form the basis for any legal codification of the concept that a child has no reasonable expectation of privacy in nude images sent to others or sexting, yet adults do have such an expectation.

Further, according to the court, “a number of teenagers want to let their friends know their sexual prowess.”\textsuperscript{111} Toward this end, the court reasons, teenagers are more likely to share sexually explicit photos to show this prowess. “Pictures are excellent evidence of an individual’s exploits.”\textsuperscript{112} While that may be true, videos are also excellent evidence of an individual’s exploits, and so-called “sex tapes” are incredibly ubiquitous among Hollywood stars, actors, athletes, musicians, etc. These sex tapes are also disseminated, often against the wishes of the prominent figure in the video.\textsuperscript{113} The Court draws a distinction between minors, who memorialize their sexual exploits on a transferrable medium, and thus authorizes punishment for those minors, and adults, who are theoretically more mature and more likely to engage in a permanent relationship, who memorialize their sexual exploits on a transferrable medium, who face no such risk of prosecution.

Even though the court held that A.H. had no reasonable expectation of privacy, the First District went on to analyze the case under a heightened level of scrutiny and still found the statute to pass constitutional muster. “Even assuming arguendo, that a reasonable expectation of

\textsuperscript{111} A.H., 949 So. 2d at 237.
\textsuperscript{112} Id.
\textsuperscript{113} See, e.g., Real Housewife of New Jersey Sues to Stop Release of Sex Tape, SHOPPINGBLOG.COM (June 24, 2009), http://www.shoppingblog.com/real-housewife-of-new-jersey-sues-to-stop-release-624098 (stating that Danielle Staub, of reality show “Real Housewives of New Jersey,” sued to stop an ex-lover from releasing a tape of their sexual acts); Farrah Abraham Tries to Block Second Sex Tape From Being Released, INQUISITR (Feb. 8, 2014), http://www.inquisitr.com/1125565/farrah-abraham-tries-to-block-second-sex-tape-from-being-released/ (stating that Farrah Abraham, who appeared on MTV’s reality show “16 and Pregnant,” sued to stop release of a second sex tape between her and a former lover).
privacy existed, the statute in the instant case serves a compelling state interest.” Even if the statute serves to curb child pornography, because of the expansive use of technology, the statute may capture more than just child pornography. However, even assuming that the statute is intended to protect solely against child pornography, the means must still be the least restrictive means available. While the court itself does not state that prosecution is the least restrictive means, the First District referred to the court order, which read in relevant part:

The Court further finds that prosecuting the child under the statute in question is the least intrusive means of furthering the State's compelling interest. Not prosecuting the child would do nothing to further the State's interest. Prosecution enables the State to prevent future illegal, exploitative acts by supervising and providing any necessary counseling to the child. However, the court does not properly analyze the “least restrictive means” requirement accurately. The purpose of the least restrictive means test is not to determine solely whether one should criminalize or not criminalize potentially protected speech, but rather whether the statute only criminalizes the proper speech without encompassing too much speech. For instance, the statute itself could still punish the unlawful dissemination of child pornography or even the dissemination of images with some type of malice; such a law would be less restrictive than the current Florida statute, while still allowing A.H. her freedom of speech and privacy. Therefore, the means chosen by the legislature were not the least restrictive, and the court’s analysis, even though it decided it did not have to analyze the statute under the higher standard, is flawed.

IV. The Way Ahead

Although the law has not fully caught up to sexting and minor revolution, legislatures have begun to take notice and some have event began taking steps in the right direction for

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114 A.H., 949 So. 2d at 238.
115 Id. at 236.
ensuring the well being of our children.116 Since 2009, the National Conference of State Legislatures began tracking sexting legislation and at least 20 states have passed legislation that deals with youth sexting.117 “In 2013, at least nine states introduced bills or resolutions aimed at "sexting"—where minors send sexually explicit or nude or semi-nude photos by cell phone. At least three states—Arkansas, Georgia and West Virginia—enacted legislation in 2013”.118

A. Recent Sexting Legislation

Looking more recently, in 2013 Arkansas passed legislation regarding procedures for their task force for abused and neglected children and revised their reporting procedures.119 Georgia made it a misdemeanor for a child at least 14 years old that willingly sent a sexually explicit photo to someone 18 so long as it was not for harassment or commercial reasons.120 Although West Virginia, by law, forbade teens from making and distributing naked images of minors, it created a diversionary program that would provide counseling for minors and serve as an informal means of resolution. More importantly though, it gave the courts the discretion to determine whether or not teens would be required to register as sex offenders. 121 In 2009, Vermont took progressive steps toward the future when it passed a comprehensive teen sexting bill that attempted to decriminalize sexting altogether.122 The state’s attempt at decriminalization was ill met by critics that believed that it would be too permissive and not afford the protection that children needed.123 In a compromise, the final version of the law would only decriminalize

118 Id.
123 Mary Graw Leary, The Right and Wrong Responses to “Sexting,” THE WITHERSPOON INSTITUTE, PUBLIC DISCOURSE: ETHICS, LAW, AND THE COMMON GOOD (May 12, 2009),
sexting for first time offenders only and although there were provisions of increased punishment, as long as the acts were confined to consensual teen to teen sexting, the matter would remain in juvenile court, which would preclude teens from having to register on the sex offenders registry.  

Although Vermont was unsuccessful at full decriminalization, Illinois, Connecticut and Florida tried to succeed where Vermont could not and publicly decriminalize teen sexting.  

In 2010, Florida attempted to pass a bill, that made it through both the House and the Senate, that would have made a first time sexting incident a non-criminal infraction and gradually increase punishment and penalties for repeat offenders, but the legislative efforts were unsuccessful because the final bill was never passed by the Governor.  

B. Progressive Proposed Legislation

The problem with current sex offender legislation is that it does not sufficiently carve out distinctions for different offenders and lumps a melting pot of sexual offenses into one registry.  

In order for the state of Florida to resume the goal of decriminalizing teen sexting, it will have to focus its legislative drafting in nine core areas:

(1) What age group should be covered by the law? Should the law make any distinctions between the relative ages of the defendant and the person depicted in the subject image, if those are different people?
(2) What specific activity or depictions should the law cover?
(3) Should the law address production, possession and/or dissemination of the images?
(4) If dissemination is included in the legislation, should the scope of the law be limited to dissemination of the images to minors, individuals believed to be minors, or both minors and adults?
(5) Should the law make any distinctions based on the consent, or lack thereof, by the individual(s) depicted in the subject image? If so, should the age of consent track the age of consent for sexual activity?
(6) Should the law make any distinctions between first offenses, and repeat offenses?

125 Walters, supra note 116, at 123.
126 H.B. 1335, 2010 Leg., 113th Reg. Sess. (Fla. 2010).
127 Feyerick & Steffen, supra note Error! Bookmark not defined.
(7) What is the appropriate range of penalties to be imposed by the legislation? Should a violation be considered a criminal offense, a juvenile offense or a non-criminal infraction? Should the penalties be increased for subsequent offenses?
(8) Should prosecutors be prohibited from using other potentially applicable child pornography laws if the offense meets the definition of “sexting?”
(9) Should defendants who engaged in “sexting” as defined by the new law, before it was adopted, be afforded any relief, including possible removal from the sex offender registry?128

By using this approach, the State could create a more risk based classification system that would rule out the behaviors that are non-threatening to the public at large, such as teen sexting, and prevent dilution of the sex offenders registry through over saturation with non-violent offenders, while also reducing those burdens on the penal system.129 While Florida should continue to strive for full decriminalization in teen sexting issues, it could at least get the ball rolling by reducing teen sexting to a misdemeanor and prevent teens from being added to the registry for non-violent or malicious offenses; the primary focus should be education and not retribution in these cases.130 Judges that have to deal with incidents of teen sexting should have legislation that allows them to assess each case individually, look at the individual factors and determine the reasons for the distribution of the images, which, in turn, would enable the judge to structure a resolution that centers around education and rehabilitation, in lieu of punishment with the potential to bring a lifetime of consequences with it.131 Sexting, by teens and adults, is here to stay and unless we desire to create an entire country of juvenile criminals, the law will have create a new way to deal with this new societal norm.132

129 Branch, supra note 89.
131 Id. at 14-15 (“[J]udges should consider any significant age differences among participants, the extent of distribution of the photos, the presence of abusive or coercive behavior, any prior incidents of sexting, the level of understanding by participants of the potential harms of sexting.”).
132 Brady, supra note Error! Bookmark not defined.
V. Conclusion

It can hardly be said that there was ever such a clear cut case of throwing the baby out with the bathwater. From the origin of the current state of our child pornography laws, to the birth and growth of our sex offenders registry, one truth has remained constant: we must protect our children from those who would harm them. It is almost ironic that in the face of the evolution of technology the law has failed to move forward with it and has now created a legal loophole as deep as a chasm ready to swallow the entire futures of our children that would stumble into it. The very laws that were set in place to protect the children are now placing the rest of their lives in jeopardy because it was never foreseeable that the very behavior that was once considered exploitation would one day become socially acceptable and normal. The only appropriate solution to the disparate results in the stories documented within is for the legislature to resume the daunting task of resuming its battle with sexting legislation and bring the law into the 21st century.

133 Throw the Baby out With the Bath Water Definition, THE FREE DICTIONARY, http://idioms.thefreedictionary.com/throw+the+baby+out+with+the+bath+water (last visited April 20, 2014) (“To get rid of the good parts as well as the bad parts of something when you are trying to improve it.”).
135 Koch, supra note Error! Bookmark not defined.