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Teenage Sexting Statutes: A Critical Examination of Idaho Code 18-1507a and an Argument Against the Criminalization of Consensually Shared Sexts

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TEENAGE SEXTING STATUTES: A CRITICAL EXAMINATION OF IDAHO CODE 18-1507A AND AN ARGUMENT AGAINST THE CRIMINALIZATION OF CONSENSUALLY SHARED SEXTS

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ABSTRACT

Child pornography statutes were enacted to target and prohibit adult exploitation of children. However, these laws came before the advent of smart phones, social media, and before sexting. Nowadays, teens are taking sexually explicit pictures of themselves and sending them to other teens. The problem? Their auto-pornography falls into the definition of child pornography and teens can and are being prosecuted for the creation, possession, and distribution, leading to felony convictions and sex-offender registration. In response to this, many states have enacted specific legislation to address teenage sexting and remove it from falling under the child pornography umbrella. In 2016, Idaho passed such a statute: Idaho Code 18-1507A. While this statute succeeds in separating teen sexting from child pornography, it results in overcriminalization and raises serious potential constitutional and policy issues.

I. INTRODUCTION

The prevalence of cell phone use and social media networking has and is continuing to change the way individuals in society interact and communicate. While teenage years have been recognized as a period of developing maturity and sexual exploration, new technology has created new challenges. When teenagers use cell phones or social media to create or share sexual messages and images, laws come in to play that were not intended to handle this type of conduct. Child pornography laws intended to protect minors from sexual exploitation are now being used to prosecute those same minors for pictures taken and shared consensually.[1] And while these laws also extend to images taken or shared non-consensually, that criminalization structure leaves senders of self-created images at a disadvantage by disincentivizing reporting due to sender liability and severe potential penalties, including jail time, monetary fines, and sex-offender registration requirements.[2] Because sexting is outside of the scope of conduct contemplated in the framing of traditional child pornography laws, many states have begun to reform their child pornography statutes to account for teenage sexting while other states have enacted separate and independent sexting legislation.[3] However, such reformations have been inconsistent in their approach and scope and often still result in harsh penalties and overcriminalization.

In February 2016, Idaho House Bill 555 was proposed to address the issues associated with prosecuting teens under these statutes.[4] House Bill 555 sought to create new legislation to specifically and independently address teenage sexting and remove such conduct from falling under the umbrella of other laws, such as child pornography statutes.[5] In April 2016, the bill passed and was codified into law as Idaho Code Section 18-1507A.[6] While this new law has succeeded in creating independent and separate legislation directed specifically at teenagers sharing sexual images of themselves with others, its penalty structure has fallen short of its original purpose.

Part II of this Article will examine sexting generally as a behavior and practice as well as its prevalence today, specifically among teenagers.[7] This Part will also briefly discuss the specific dangers of sexting among teenagers.[8] Part III will examine the legal responses to teenage sexting by discussing teenage prosecution under traditional child pornography statutes, as well as the various approaches to this issue that states are currently taking.[9] Part IV will critically examine Idaho's new sexting

1. *See infra* Section III.A.
2. *See infra* Section III.A.
3. *See infra* Section III.B.
4. H. 555, 63d Leg., 2d Reg. Sess. (Idaho 2016).
5. *Id. See also* Associated Press, *Idaho Lawmakers Approve Bill to Lessen Sexting Charges*, KTVB (Mar. 3, 2016), http://www.ktvb.com/news/local/capitol-watch/idaho-lawmakers-approve-bill-to-lessen-sexting-charges/66613647; Staff Reports, *Idaho Lawmaker Introducing Bill Addressing "Sexting,"* LOCAL NEWS 8 (Feb. 15, 2016), http://www.localnews8.com/news/kifi-top-story/idaho-lawmaker-introduces-bill-addressing-sexting/58657165.
6. IDAHO CODE § 18-1507A (2016).
7. *See infra* Part II.
8. *See infra* Part II.
9. *See infra* Part III.

statute and address its inconsistency when viewed alongside other Idaho criminal statutes.[10] Part V will briefly discuss the potential constitutional issues that could arise under First Amendment, Equal Protection and Due Process challenges.[11] Lastly, Part VI will examine policy issues with Idaho's current statute and address how this criminal structure fails to adequately and appropriately address the issues raised by teenage sexting.[12]

II. THE RISE OF TEENAGE SEXTING

> *"[S]exting . . . has become today's new first base. In other words, it's becoming a part of growing up."*[13]

A. Sexting Statistics

Technology has had an increasingly prevalent role in our society, particularly in the lives of teenagers. In 2008, the average child in the U.S. got his or her first cell phone around the age of ten or eleven.[14] As of 2010, 75% of teenagers in the United States between the ages of twelve and seventeen owned cell phones.[15] This number has continued to rise over the last half decade.[16] The prevalence of smartphones with internet access has resulted in an overwhelmingly teenage presence on social media sites and applications such as Facebook, Twitter, Snapchat, and Instagram.[17] Over 90% of teens report going online daily.[18] Cell phone use has shifted from merely making phone calls to texting to sharing virtually any aspect of a person's life.[19] Teenage years are characterized as a period of maturing, growth, and often sexual exploration.[20] It is not surprising that teenagers have taken to their cell phones and social media in these respects as well.

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10. *See infra* Part IV.
11. *See infra* Part V.
12. *See infra* Part VI.
13. Amy Joyce, *Yes, Even Your Child: New Study Shows Sexting is the New First Base. But Don't Panic Yet*, WASH. POST (Oct. 6, 2014), https://www.washingtonpost.com/news/parenting/wp/2014/10/06/sexting-is-the-new-first-base-yes-maybe-even-your-child/?utm_term=.627ba37c1bdd.
14. Maryam F. Mujahid, Note, *Romeo and Juliet – A Tragedy of Love by Text: Why Targeted Penalties that Offer Front-End Severity and Back-End Leniency are Necessary to Remedy the Teenage Mass-Sexting Dilemma*, 55 HOW. L.J. 173, 179 (2011).
15. *Id.*
16. Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, PEW RES. CTR.: INTERNET & TECH. (Apr. 9, 2015), http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/.
17. *Id.* 71% of teens ages thirteen to seventeen report using Facebook, 52%use Instagram, 41% use Snapchat, 33% use Twitter, 33% use Google+, 24% use Vine, 14% use Tumblr, and 11% use a different social media site. *Id.* Over 70% of teenagers in this age group use more than one social media networking site. *Id.*
18. *Id.*
19. *Id.*
20. *See* Mujahid, *supra* note 14, at 175.

Sexting is, by its most general definition, the act of sending sexual messages, often through the use of cell phones.[21] While this can technically include merely sexually suggestive text messages, the term most often refers to an individual sharing nude or semi-nude photos of themselves with an intended recipient, either by cell phone or through social media.[22] Sexting is not conduct that is limited to teenage folly and indiscretion.[23] "While the convention may be popular among text-savvy teens, sexting has become more prevalent among older generations, as one in 10 baby boomers surveyed admitted to sending or receiving explicit photos."[24] Even celebrities have been public about their own sexting practices, from Anna Kendrick, to Snoop Dogg, to Martha Stewart.[25] Celebrities have been vocal about engaging in the conduct, as well as the public sting that follows when such sexts are made public.[26] However, sexting does not carry criminal liability when it is engaged in privately by consenting adults. Teenagers are sexting in much higher numbers than adults and are often not considering the full spectrum of real consequences that could arise from their actions, both by virtue of the inherent risks of sexting and laws prohibiting sexting involving minors.

Sexting is increasingly prevalent among teenagers, with one study finding that nearly 25% of teenagers have engaged in sexting.[27] A 2008 study by the National Campaign to Prevent Teen and Unplanned Pregnancy found that around 20% of teenagers had posted or sent semi-nude pictures or videos of themselves.[28] Nearly 70% of teenagers who sext do so with their boyfriend or girlfriend.[29] Just under 40% of teenagers reported that it is common for such photos to be shared with people other than the intended recipient.[30] While 17% of teenagers report that they have

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21. *See* Xiyin Tang, *The Perverse Logic of Teen Sexting Prosecutions (And How to Stop It),* 19 B.U.J. SCI. & TECH. L. 106, 118 (2013); *see also* LUCY SALCIDO CARTER, EFFECTIVE RESPONSES TO TEEN SEXTING: A GUIDE FOR JUDGES AND OTHER PROFESSIONALS 2 (Jennifer L. White & Michael W. Runner eds. 2012) [hereinafter CARTER]; 11 Facts about Sexting, DOSOMETHING.ORG (last visited Feb. 13, 2018), https://www.dosomething.org/us/facts/11-facts-about-sexting [hereinafter *11 Facts about Sexting*].

22. CARTER, *supra* note 21, at 2.

23. *See* Sara Gates, *Adult Sexting on the Rise: 1 in 5 Americans Send Explicit Text Messages, Poll Finds*, HUFFINGTON POST (June 8, 2012), https://www.huffingtonpost.com/2012/06/08/adult-sexting_n_1581234.html.

24. *Id.*

25. On an episode of Ellen, guests Anna Kendrick, Snoop Dogg, and Martha Stewart played a round of "Never Have I Ever." *The Ellen Show*, *Never Have I Ever with Martha Stewart, Snoop Dog, and Anna Kendrick*, ELLENTUBE (Oct. 25, 2016), https://www.ellentube.com/video/never-have-i-ever-with-martha-stewart-snoop-dogg-and-anna-kendrick.html. In response to the question "Have you ever sexted?" all three guests responded affirmatively: "I have." *Id.*

26. Vanessa Hudgens, Scarlett Johansson, and Jennifer Lawrence are just a few celebrities who have come into the national spotlight when personal sexually explicit photographs were shared with the public. *See* Jessica Valenti, *The Jennifer Lawrence Nude Photo Hack Response is the End of the 'Shamed Starlet'*, GUARDIAN (Oct. 8, 2014), https://www.theguardian.com/commentisfree/2014/oct/08/jennifer-lawrence-naked-photo-response-vanity-fair-interview.

27. *See* Joyce, *supra* note *13*; *11 Facts about Sexting*, *supra* note 21.

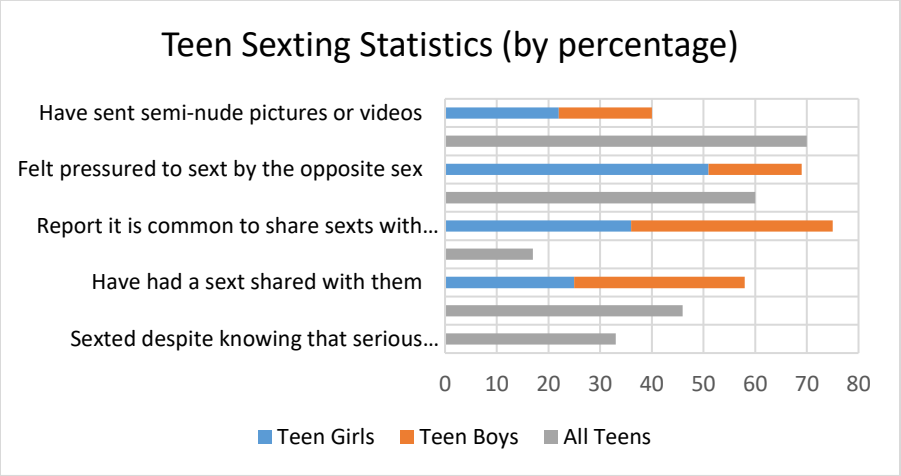
28. Specifically, 22% of teenage girls and 18% of teenage boys. *Sex and Tech: Results From a Survey of Teens and Young Adults*, NAT'L CAMPAIGN PREVENT TEEN & UNPLANNED PREGNANCY 1 (Dec. 2008), http://apo.org.au/node/17127 [hereinafter *Sex and Tech*].

29. *11 Facts about Sexting*, *supra* note 21.

30. Specifically, 36% of teenage girls and 39% of teenage boys. *Sex and Tech*, *supra* note 28, at 3.

shared sexts they received with others, around 55% of those that share sexts do so with more than one person.[31] Around 30% of teenagers reported having personally had such an image, originally meant for someone else, shared with them.[32]

These statistics are somewhat alarming but made even more so by the fact that social pressure to engage in sexting seems to play a strong role. According to one study, 51% of teenage girls and 18% of teenage boys reported pressure from the opposite sex to share nude or semi-nude images of themselves.[33] Another study found that over 60% of teenagers who had sent nude images were pressured to do it at least once.[34]



Of additional concern is that most teenagers are not aware that sexting could be considered criminal or prosecuted as child pornography.[35] One study found that 54% of high school students did not consider getting in trouble with the law a concern when sending or posting sexually explicit pictures or videos of themselves.[36] Conversely, one-third of high school students who sent a sexually explicit image did so "despite knowing that, if they were apprehended for the picture, serious legal consequences would follow."[37] Teenagers often lack awareness of the potential consequences and fail to recognize sexting as an inherently risky act. Sexting has

31. *11 Facts about Sexting*, *supra* note 21.

32. Specifically, 25% of teenage girls and 33% of teenage boys. *Sex and Tech*, *supra* note 28, at 3.

33. *Id. See also* CARTER, *supra* note 21, at 4 (stating that around 50% of teens who send sexually explicit photos of themselves felt pressure to do so and that this occurs more predominately among teenage girls than among boys).

34. *11 Facts about Sexting*, *supra* note 21.

35. Kelly Wallace, *Chances are, Your Teen Has Sexted*, CNN (Jan. 2, 2015), http://www.cnn.com/2014/11/18/living/teens-sexting-what-parents-can-do/.

36. Reid McEllrath, *Keeping Up with Technology: Why a Flexible Juvenile Sexting Statute is Needed to Prevent Overly Severe Punishment in Washington State*, 89 WASH. L. REV. 1009, 1015 (2014).

37. *Id.*

not been linked to other risky behavior in teenagers.[38] "[T]eens who sexted were not more likely to have multiple sexual partners, use drugs or alcohol before sex or not use birth control."[39] Teenagers who engage in sexting are often well-functioning and are "not having problems."[40]

B. The Dangers of Teenage Sexting

Sharing sexually explicit images of one's self carries with it inherent risks and potential consequences. However, the particular nature of sharing such images in the digital mediums of text message or social media[41] is that the images can be saved, stored, and shared beyond what may have been originally intended. The reported rate at which such images are being shared, especially when taking into account the heightened pressure that may be motivating teenagers to take and send these pictures, illustrates the presence of an environment rife and ready for cyberbullying, exploitation, and extortion *of* teenagers *by* teenagers. "[W]hen nude pictures sent initially between possible or actual romantic partners get spread much more widely involving *adolescents,* it sometimes leads to disastrous consequences, like cyberbullying, threats, extortion, and suicide."[42] This environment is more than theoretical. There have already been examples of this phenomenon and they have had tragic endings.[43]

One such example is the story of a thirteen-year-old teenage girl, "Hope."[44] Hope sent a topless picture of herself to a fellow teenage student.[45] The student then mass-texted and shared the picture, without Hope's permission or consent.[46] Hope became the victim of vicious ridicule and cyberbullying from students and friends because of the photo.[47] Ultimately, as a result of the bullying, Hope hanged herself.[48] The story of teenager Jessica Logan is all too similar.[49] Jessica sent a nude picture to her then-boyfriend.[50] After the two broke up, he shared the picture without her consent with students in their high school as well as a nearby high school.[51] Jessica, too, became the victim of intense cyberbullying.[52] As a result of the bullying, her grades began to suffer and she experienced very real emotional damages before taking her own life.[53]

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38. *See* Wallace, *supra* note 35.
39. *Id.*
40. *Id.*
41. *Sex and Tech*, *supra* note 28; *11 Facts about Sexting*, *supra* note 21; CARTER, *supra* note 21, at 4; McEllrath, *supra* note 36 at 1015.
42. *What Jennifer Lawrence Can Teach Us about Sexting Among Teens*, CYBERBULLYING RES. CTR. (Oct. 8, 2014), http://cyberbullying.org/jennifer-lawrence-can-teach-us-sexting-among-teens#.
43. *See* Mujahid, *supra* note 14, at 183–84.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *See* Mujahid, *supra* note 14, at 183–84.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*

These stories, while tragic and perhaps not the commonplace result of sexting indiscretions, do illustrate the real dangers that may arise from sexting between teenagers that lack the maturity to comprehend and cope with such consequences. Idaho is not immune to this behavior:

> Idaho's school suicide rate is 49 percent above the national average. According to State Department of Education figures, one in 10 students have either switched schools or dropped out due to bullying; one of seven students has seriously considered suicide and one in fourteen students has attempted to take his or her own life.[54]

Teenagers are not as capable as adults of perceiving and considering the potential consequences of their actions.[55] With regard to sexting in particular, such lack of consideration extends beyond the practical and social consequences to potential legal consequences. However, at their developmental stage, teenagers are ill-equipped to deal with these situations. As the above stories indicate, teenagers lack maturity that leads to both the bullying conduct and the sometimes-tragic reaction.

III. LEGAL RESPONSES TO TEENAGE SEXTING

> *"[U]nderage sexting in America can have vastly different legal implications depending on the state in which it occurs."*[56]

A. Prosecution Under Child Pornography Statutes

The prevalence and normalcy of sexting makes deterrence an unlikely result of the criminalization of teenage sexting, especially when the sexts are consensually shared. However, until recently (and still currently, in some states), teen sexting specific laws did not exist.[57]

> The law lags behind the technology . . . Sexting is treated as child pornography in almost every state and it catches teens completely offguard because this is a fairly natural and normal thing for them to do. It is surprising to . . . parents, but for teens it's part of their culture.[58]

"In the absence of laws that address sexting specifically, prosecutors have relied on existing criminal statutes in areas such as child pornography . . . to address

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54. Kevin Richert, *New Anti-Bullying Law Signed*, IDAHOEDNEWS (Apr. 6, 2015), https://www.idahoednews.org/news/new-anti-bullying-law-becomes-law/.

55. McEllrath, *supra* note 36, at 1014; John Kip Cornwell, *Sexting: 21st-Century Statutory Rape*, 66 SMU L. REV. 111, 126 (2013).

56. Greg Botelho & Michael Martinez, *DA: No Charges Against Colorado Students in Sexting Scandal*, CNN (Dec. 9, 2015), http://www.cnn.com/2015/12/09/us/colorado-sexting-scandal-canon-city/.

57. *See* Cornwell, *supra* note 55, at 123–24. These state statutes will be addressed in more detail in Section II.B.

58. Deborah Feyerick & Sheila Steffen, *'Sexting' Lands Teen on Sex Offender List*, CNN (Apr. 8, 2009), http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html?iref=nextin.

this conduct."[59] When teenage sexting conduct is criminalized under traditional child pornography statutes, the results are often overly harsh, unfair, inconsistent, and left largely up to individual prosecutors' discretion.[60] "While sending and receiving sexually explicit photographs of underage children is illegal everywhere in the U.S., most states fail to distinguish between truly evil, predatory behavior . . . and teens who are basically the same age participating in consensual relationships . . . ."[61] Prosecution of teenage sexting under child pornography statutes can potentially lead to fines, jailtime, and even sex-offender registry.[62] "The burgeoning use of child pornography laws to address such a wide range of sexting and sexting-related cases not only fosters injustice, but distorts an offense category whose purpose is to protect, not prosecute, children."[63]

There have been several well-discussed instances of prosecution for teenage sexting-related offenses.[64] In *State of Iowa v. Canal*, the Iowa Supreme Court upheld the conviction of an eighteen-year-old boy for sending a sexually explicit picture of himself to a fourteen-year-old girl.[65] This conviction required the teenager to register as a sex offender, despite the fact that the girl who received the picture had repeatedly requested that he send her the picture.[66] Likely, the boy will be branded as a sex offender for the rest of his life as a result. This was the first higher state court case of this nature, and the precedent it established is troubling.[67]

In *A.H. v. State*, a Florida appellate court upheld the conviction of a teenage girl for emailing her boyfriend pictures of the two engaged in sexual intercourse.[68] The email and pictures were found inadvertently rather than shared with a third party by either the girl or her boyfriend.[69] Again, this case illustrates an issue with the prosecution of sexting under child pornography statutes.

In another particularly harsh example of teenage prosecution under child pornography statutes, an eighteen-year-old teenage boy was prosecuted for possessing five pictures of a thirteen-year-old girl he met online.[70] The pictures showed the girl in her underwear but contained no nudity and her face was not included in the images.[71] She had sent him the pictures voluntarily and he did not share them

59. *See* Cornwell, *supra* note 55, at 123–24.

60. *See* Tang, *supra* note 21, at 122; *see also* McEllrath, *supra* note 36, at 1019.

61. Robby Soave, *Perverting Teen Sexting Laws: Column*, USA TODAY (Jan. 10, 2016), http://www.usatoday.com/story/opinion/2016/01/10/perverting-teen-sexting-laws-criminal-felony-abbott-copening-column/77745364/.

62. CARTER, *supra* note 21, at 3.

63. Cornwell, *supra* note 55, at 127. *See also* CARTER, *supra* note 21, at 3 (arguing that laws intended to protect children are being used to punish them).

64. *See* State v. Canal, 773 N.W.2d 528 (Iowa 2009); A.H. v. State, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007); CARTER, *supra* note 21, at 6; Feyerick & Steffen, *supra* note 58.

65. *Canal*, 773 N.W.2d at 533.

66. *Id.* at 529.

67. *Id.*; CARTER, *supra* note 21, at 6.

68. *See A.H.*, 949 So. 2d at 235.

69. *Id.*

70. Douglas Berman, *Hard-to-Believe Harshness in Prosecution of Virginia Teen Receiving Underage Pics*, SENT'G L. & POL'Y (Feb. 14, 2017), http://sentencing.typepad.com/sentencing_law_and_policy/2017/02/hard-to-believe-harshness-in-prosecution-of-virginia-teen-receiving-underage-pics.html.

71. *Id.*

but was prosecuted for possession of child pornography.[72] "He faced a choice between a possible (though unlikely) maximum sentence of 350 years in prison, or lifetime on the sex-offender registry as a 'sexually violent offender' – even though he never met the girl in person."[73]

Phillip Alpert's case is factually, and significantly, different.[74] When he was eighteen, Phillip Alpert received naked pictures from his sixteen-year-old girlfriend.[75] After a fight, Alpert forwarded one such picture to over seventy people, including his girlfriend's family members.[76] "'It was a stupid thing I did because I was upset and tired and it was the middle of the night and I was an immature kid,' says Alpert."[77] Alpert was convicted under a child pornography statute, sentenced to five years' probation, and required to register as a sex offender.[78]

Alpert's case differs from the aforementioned cases because of one very important fact: Alpert, rather than his girlfriend in the picture, shared the images. Alpert did so without her permission or consent in an attempt to embarrass and hurt his girlfriend.[79] This type of malicious intent and exploitative conduct is fundamentally different than the consensual sharing of sexual images between senders and recipients. Accordingly, it should be treated differently in the eyes of the law.

B. Varied State Law Approaches to Sexting-Specific Legislation

In 2015, in Colorado, a student sexting ring was discovered at a high school that involved hundreds of explicit photographs of students, some as young as eighth grade.[80] A majority of the photographs were both taken and shared by the students in the images.[81] The question of the students' criminal liability became of serious concern.[82]

> [The District Attorney] said he would charge students only if absolutely necessary, but warned that consent is not a factor when dealing with nude photographs of children under the age of 18. "It doesn't matter if it was

72. *Id.*

73. *Id.* (quoting Lenore Skenazy, *Teen Girl Sent Teen Boy 5 Inappropriate Pictures. He Faced Lifetime Registry as a 'Violent Sex Offender' or 350 Years in Jail*, REASON: HIT & RUN BLOG (Feb. 14, 2017), http://reason.com/blog/2017/02/14/teen-girl-sends-teen-boy-5-pix-of-self-i). The teenage boy was also charged for trying to arrange a sexual meeting with the girl in addition to possessing the pictures. Berman, *supra* note 70.

74. CARTER, *supra* note 21, at 6 (citing Feyerick & Steffen, *supra* note 58).

75. CARTER, *supra* note 21, at 6 (citing Feyerick & Steffen, *supra* note 58).

76. *Id.*

77. Feyerick & Steffen, *supra* note 58.

78. *Id.*

79. *Id.*

80. *Sexting Ring Uncovered at Colorado High School*, SKYNEWS (Nov. 7, 2015), http://news.sky.com/story/sexting-ring-uncovered-at-colorado-high-school-10340395.

81. *Id.*

82. *Id.*

> consensual . . . There is no distinction according to Colorado state statutes."[83]

Ultimately, no students were criminally prosecuted in the instance, although many faced suspensions and other school-imposed penalties.[84] Because Colorado does not have a law to address teenage sexting,[85] these students would have been prosecuted under Colorado's child pornography statute and faced serious felony charges, but for the District Attorney's use of prosecutorial discretion.[86] Colorado is one of almost thirty states that do not have sexting legislation and still rely on child pornography statutes to address teenage sexting.[87] "The result [highlights the fact] that underage sexting in America can have vastly different legal implications depending on the state in which it occurs" and the individual prosecutor's discretion.[88]

As sexting has grown increasingly prevalent, the prosecution of teenagers under child pornography statutes has called states to reexamine their statutes.[89] "States are scrambling to update laws in response to this growing phenomenon. To date, 20 states have laws specifically criminalizing sexting."[90] The approaches taken by states vary widely in their structure, penalties, and coverage.[91] Generally, states that have drafted sexting statutes or revised their existing child pornography statutes consider the following factors: the age of the sender and recipient, the conduct involved, voluntariness and state of mind, and the penalty structure.[92] Some state statutes specifically use the term "sexting."[93] Some statutes address sending a sext but not receiving one, while other statutes address both.[94] Some statutes impose misdemeanor or felony penalties while others impose diversionary or informal sanctions.[95] Some statutes provide for affirmative defenses and others still allow for sex-offender registry.[96] These broad considerations have led to a diverse set of statutory schemes.

States that rely on child pornography statutes or have expressly declined to create lesser penalties for teenage sexting impose punishments up to felony imprisonment and sex-offender registration.[97] On the other end of the spectrum, more

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83. *Id.*

84. Botelho & Martinez, *supra* note 56.

85. In response to this incident, a bill was proposed in Colorado to enact sexting legislation. *See Why Proposed Sexting Law is Facing Pushback in Colorado*, CBS NEWS (Mar. 31, 2016), http://www.cbsnews.com/news/colorado-bill-proposal-to-downgrade-sexting-to-misdemeanor-faces-pushback/.

86. Botelho & Martinez, *supra* note 56.

87. *Id.*; *Teen Sexting on the Rise: What This Could Mean for Your Child*, TEENSAFE (Apr. 21, 2016), https://www.teensafe.com/blog/teen-sexting-rise-mean-child/ [hereinafter TEENSAFE].

88. Botelho & Martinez, *supra* note 56.

89. TEENSAFE, *supra* note 87.

90. *Id.*

91. *See generally* Sameer Hinduja & Justin W. Patchin, *State Sexting Laws: A Brief Review of State Sexting and Revenge Porn Laws and Policies*, CYBERBULLYING RES. CTR. (July 2015), https://cyberbullying.org/state-sexting-laws.pdf.

92. *See* Cornwell, *supra* note 55, at 129.

93. *See generally* Hinduja & Patchin, *supra* note 91.

94. *Id.*

95. *Id.*

96. *Id.*

97. Botelho & Martinez, *supra* note 56.

progressive states are examining "new laws providing informal punishments to underage youths such as counseling, community service, and Internet safety education, perhaps without any juvenile record of the misdemeanor offense as long as coercion, blackmailing and other serious offenses aren't involved."[98] In fact, California has proposed a statute that would grant significant power to schools to respond to sexting offenses, allowing them to go so far as to expel students who violate the sexting law, in lieu of criminal liability.[99]

Many states fall in between these two extremes. Louisiana, for example, imposes a fine and allows for up to ten days imprisonment for a first offense.[100] Of the states with sexting legislation,[101] eleven states classify the offense as a misdemeanor and impose diversion remedies and informal sanctions.[102] These diversion remedies and informal sanctions include supervision, community service, participation in counseling or an educational program, and referral to family court.[103] Four states allow for felony charges to be brought, but even these states approach this differently.[104] Florida and Utah allow felony charges to be brought for repeat offenders, while Georgia makes this determination on a factual case-by-case basis.[105] Nebraska is an outlier as the only state with sexting legislation that makes all sexting offenses a felony.[106]

Nebraska is one of eight states whose statutes provide for affirmative defenses based on certain factors, such as (1) if the images were shared consensually, (2) if they were not distributed to others, and (3) if the ages of the sender and recipient do not fall outside specific age ranges.[107] Of these states, six have an affirmative defense for the teenager who receives the sext but no affirmative defense for the sender.[108] Only two states, Nebraska and Texas, currently have an affirmative defense available to both the sender and receiver.[109]

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98. *Id.*

99. *See* Sonali Kohli, *A New California Bill Would Let Schools Expel Kids for Sexting*, L.A. TIMES (Mar. 5, 2016), http://www.latimes.com/local/education/la-me-edu-schools-sexting-bill-20160304-story.html.

100. TEENSAFE, *supra* note 87.

101. According to the article, the states with sexting laws are: Arizona, Arkansas, Connecticut, Florida, Georgia, Hawaii, Illinois, Louisiana, Nebraska, Nevada, New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, and West Virginia. Botelho & Martinez, *supra* note 56. However, more states have adopted sexting legislation, such as Idaho, or are in the process of proposing sexting-specific legislation. *See* CAL. EDUC. CODE § 48900(r)(2)(A)(iii) (West 2017); *see also* IDAHO CODE ANN. § 18-1507A (West 2016).

102. Bothelo & Martinez, *supra* note 56.

103. *See generally* Hinduja & Patchin, *supra* note 91.

104. Bothelo & Martinez, *supra* note 56.

105. *Id.*

106. *Id.*

107. Nebraska's affirmative defense applies to teenagers age eighteen and under who engaged in sexting with a minor at least fifteen-years-old. *Id.*; *see also* McEllrath, *supra* note 36, at 1020-21.

108. These states are Arizona, Arkansas, Florida, Hawaii, Nevada, and Vermont. *See* McEllrath, *supra* note 36, at 1022.

109. *Id*.

While these statutes or statutory revisions represent the much-needed shift from teenage prosecution for sexting under traditional child pornography statutes, the wide spectrum and diversity of varied approaches has not ultimately provided for a resolution. Nearly every aspect of the laws is different from state to state, from what constitutes a sext that will implicate the law to the ages covered by the statute.[110] Additionally, prosecution under these statutes is still dependent on prosecutorial discretion. The result is that teenagers are facing drastically different criminal liability for the same action depending on which state they are in. This is of even greater concern when the nature of the conduct is mobile and occurs through cell phones or social media that extend beyond and outside of clearly defined state borders.

The chart below includes states that have adopted sexting legislation and shows the conduct covered and penalty imposed:[111]

State	Addresses under 18 sending	Addresses under 18 receiving	Penalty: Diversion	Penalty: Informal	Penalty: Misdem.	Penalty: Felony
Arizona	X	X			X	
Arkansas	X	X		X		
Connecticut	X	X			X	
Florida	X	X	X	X	X	X
Georgia	X	X			X	X
Hawaii	X	X			X	
Idaho	X	X			X	X
Illinois	X		X	X		
Louisiana	X	X	X	X		
Nebraska	X	X				X
Nevada	X	X	X	X	X	
New Jersey	X	X	X	X		
New York	X	X	X	X		
North Dakota	X	X			X	
Pennsylvania	X	X	X	X	X	
Rhode Island	X		X	X		
South Dakota	X	X			X	
Texas	X	X	X	X	X	
Utah	X	X			X	X
Vermont	X	X	X			
West Virginia	X	X	X			

IV. IDAHO'S STATUTORY SCHEME

> *"The purpose of this legislation is to remove minors who [sext] from statutes codified to target sexual predators[.]"*[112]

110. *See generally* Cornwell, *supra* note 55; Mujahid, *supra* note 14; Hinduja & Patchin, *supra* note 91.

111. This table has been edited from the source table to only include states with sexting statutes as of the date the original table was created (2013). This table was recreated to include only relevant columns. *See* Hinduja & Patchin, *supra* note 91; *see also* IDAHO CODE ANN. § 18-1507A (West 2017).

112. H. 555, 63d Leg., 2d Reg. Sess. (Idaho 2016).

A. Idaho House Bill 555

Idaho Code 18-1507 sets forth Idaho's child pornography statute.[113] The statute states that a person commits sexual exploitation of a child if he knowingly and willfully possesses or accesses sexually exploitative material,[114] or plays a role in the process by which the material is made or distributed.[115] Possession or access of such material results in a felony, punishable by up to ten years in prison and a fine up to $10,000.[116] Any other conduct, such as inducement, production, or distribution of the material results in a felony punishable by up to thirty years in prison and a fine of up to $50,000.[117] The statute defines a child as a person under the age of eighteen.[118] Without revision or sexting legislation, teenagers under eighteen who were sexting each other were in violation of this statute and faced long prison sentences, fines, and sex-offender registry.[119] In response to this, Idaho House Bill 555 was proposed.[120]

Idaho House Representative Greg Chaney proposed the bill in February 2016, in an effort to set forth new sexting legislation that would specifically address teenage conduct and would also differentiate between acts of initial sexting and the subsequent use of those sexts by others to exploit or bully the sender.[121] Central to the bill's purpose was the aim to lessen criminal penalties on teenagers consensually engaging in sexting each other, while maintaining a more harsh criminal structure targeted to teenagers using consensually sent sexual images as a means of

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113. IDAHO CODE ANN. § 18-1507 (West 2017).

114. "Sexually exploitative material" is defined as:

> [A]ny image, photograph, motion picture, video, print, negative, slide, or other mechanically, electronically, digitally or chemically produced or reproduced visual material which shows a child engaged in, participating in, observing, or being used for explicit sexual conduct, or showing a child engaging in, participating in, observing or being used for explicit sexual conduct, in actual time, including, but not limited to, video chat, webcam sessions or video calling.

§18-1507(1)(j) (Westlaw). *See also* § 18-1507(1)(c)–(i) (Westlaw) (providing definitions for behaviors also prohibited under this statute).

115. (2) A person commits sexually exploitation of a child if he knowingly and willfully:
(a) Possesses or accesses through any means including, but not limited to, the internet, any sexually exploitative material; or
(b) Causes, induces or permits a child to engage in, or be used for, any explicit sexual conduct for the purpose of producing or making sexually exploitative material; or
(c) Promotes, prepares, publishes, produces, makes, finances, offers, exhibits or advertises any sexually exploitative material; or
(d) Distributes through any means including, but not limited to, mail, physical delivery or exchange, use of a computer or any other electronic or digital method, any sexually exploitative material.

§ 18-1507(2) (Westlaw).

116. § 18-1507(3) (Westlaw).

117. § 18-1507(4) (Westlaw).

118. § 18-1507(1)(b) (Westlaw).

119. H. 555, 63d Leg. 2d Reg. Sess. (Idaho 2016).

120. *Id.*

121. *Id.;* Associated Press, *supra* note 5; Staff Reports, *supra* note 5.

blackmail, extortion, or cyberbullying against the original sender, typically the teenager in the photo.[122]

The purpose of this legislation is to remove minors who self-produce and distribute sexually exploitative material (commonly known as 'sexting') from statutes codified to target sexual predators, thereby eliminating the risk that 'sexting' results in registering as a sex offender and reserving felony status for cases of repeated mass-distribution. The act also creates a clear differentiation between the act of the initial 'sext' and the extortive behavior that often follows – to the great trauma of the sender. The intent of the legislation is to create an environment where the sender of a 'sext' feels more comfortable seeking help if he/she is being extorted by declaring that, as an operation of the law, the act of extortion is a greater evil.[123]

The proposed law underwent various revisions, and the third draft passed through the Idaho Senate unanimously, before being adopted into law.[124] However, the final product was adopted without Idaho State Governor Butch Otter's signature.[125] While Governor Otter agreed with the bill's stated purpose, he felt the criminal penalties of the law were still too harsh.[126] Addressing the bill, Governor Otter stated that the legislature should have "[found] a way to address the concerns surrounding sexting without the draconian outcomes associated with misdemeanor or felony punishments."[127] Governor Otter's final messages about the bill were hopeful, but not optimistic: "I hope this bill will serve as a deterrent to teens sending or receiving sexts, but I am also not so naïve nor do I believe any law will stop this conduct."[128] Ultimately, the bill was adopted into law and codified as Idaho Code Section 18-1507A – Sexual Exploitation of a Child By Electronic Means.[129]

B. Idaho's Teen Sexting Statute: Idaho Code 18-1507A

Idaho Code Section 18-1507A created separate and specific legislation to address teenage sexting conduct, and prevent it from falling under the child pornography umbrella. However, the statute falls short of achieving its goals and leaves many questions unanswered. Each provision of the statute will be examined in detail below.[130]

The first provision, Section 18-1507(1) states:

> (1) A minor child who, without being induced by coercion, manipulation or fraud, creates or causes to be created any photographic, electronic or video content of said minor child that would be characterized under any of

122. H. 555, 63d Leg. 2d Reg. Sess. (Idaho 2016).

123. *Id.*

124. *Id.*; *see also* George Prentice, *Idaho Senate Approved Rewrite of Sexting Penalties for Juveniles*, BOISE WEEKLY (Mar. 21, 2016), http://www.boiseweekly.com/boise/idaho-senate-approves-rewrite-of-sexting-penalties-for-juveniles/Content?oid=3747901.

125. Letter from C.L. "Butch" Otter, Governor, Idaho, to Lawrence Denny, Sec'y of State, Idaho (Apr. 8, 2016), https://gov.idaho.gov/mediacenter/Bills/H555a.pdf.

126. *Id.*

127. *Id.*

128. *Id.*

129. IDAHO CODE ANN. § 18-1507A (West 2017).

130. Section 18-1507A(7) will not be discussed because it is jurisdictional in nature, rather than substantive. § 18-1507A(7) (Westlaw).

> the classifications defined in section 18-1507(1)(c) through (j), Idaho Code,[131] and knowingly and willfully distributes it to another person or persons through electronic or other means or causes it to appear in a form where the distributing minor has reason to believe another recipient will view it is guilty of a misdemeanor provided that the image was communicated in a form that there was a single recipient.[132]

This provision makes it a misdemeanor for a minor to create sexually explicit material of themselves and send or share it with a single recipient.[133] Mere possession of self-created images will not result in criminality.[134] This provision does not contain language requiring that the sender sent or shared the images without the consent or solicitation of the recipient.[135] However, the requirement that the image was not "induced by coercion, manipulation or fraud"[136] could give rise to issues, in light of the pressure that motivates many teens to sext. Over half of teens who sext say they have felt pressure to do so at least one time that they did sext, and over half of teen girls in particular feel pressure from teen boys to sext in general.[137] When does pressure become coercion? It is not clear how this will be addressed under this provision.

The second provision states:

> (2) A minor child who, without being induced by coercion, manipulation or fraud, creates or causes to be created any photographic, electronic or video content of said minor child that would be characterized under any of the classifications defined in section 18-1507(1)(c) through (j), Idaho Code,[138] and knowingly and willfully distributed it in such a way and through such a medium that the minor intended or had reason to believe that multiple parties would receive or have access to the image:
>
> (a) is guilty of a misdemeanor on the first adjudicated offense; and
>
> (b) is guilty of a felony on the second or subsequent adjudicated offense.[139]

This provision makes it a crime for a minor to create sexually explicit material of themselves and send or share it with multiple people.[140] The first offense is a misdemeanor, and any subsequent offenses are felonies.[141] This provision, like the

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131. Idaho Code 18-1507(1) subsections (c) through (j) set forth the definitions for the following: erotic fondling, erotic nudity, explicit sexual conduct, masturbation, sadomasochism, sexual excitement, sexual intercourse, and sexually exploitative material. § 18-1507(1)(c)–(j) (Westlaw).

132. § 18-1507A(1) (Westlaw).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. CARTER, *supra* note 21, at 3.

138. §§ 18-1507(1)(c)–(j) (Westlaw).

139. § 18-1507A(2) (Westlaw).

140. *Id.*

141. *Id.*

last, could give rise to issues of coercion and peer pressure. Additionally, issues could arise in determining whether the minor "had reason to believe that multiple parties would receive or have access to the image[.]"[142] Statistics show that over one third of teens report that it is common for sexts to be shared with people other than the original recipient, with only slightly less teens reporting that they themselves have had such a sext shared with them personally.[143] Does this lead to a minor's "reason to believe" that the image will be shared? In the digital age, when images are sent and never truly erased, does this language lend itself to a broad or narrow interpretation? It is not clear.

The third provision states:

> (3) A minor who is found to be in knowing and willful possession of the content created and sent as described in subsection (1) or (2) of this section is guilty of a misdemeanor if the content depicts a minor who is not greater than three (3) years younger than the minor who is found to be in possession. A minor who is found to be in knowing and willful possession of content described in this subsection that depicts a minor greater than three (3) years younger than themselves is guilty of a violation of section 18-1507(2)(a) [144], Idaho Code.[145]

This provision criminalizes a minor's possession of sexually explicit material created and sent by the minor in the image.[146] Because the provision specifies that this applies to images "created and sent as described" in the prior subsections, this does not extend criminal liability to the possession of the images that were not sent by the minor in the image.[147] While this provision requires that the image was not "induced by coercion, manipulation or fraud," it does not contain any requirement that the receiving minor did not solicit the image.[148]

This provision also includes internal age divisions.[149] If the possessing minor is not more than three years older than the minor in the materials, the possessing minor is guilty of a misdemeanor.[150] If the possessing minor is more than three years older than the minor in the materials, the possessing minor is guilty of a felony under the general child pornography statute.[151] This age-gap distinction only works in one direction and are not duplicated for the sending minor.[152] A teen will be subjected to higher criminal liability for receiving a sext from a younger teen; however, the sending teen is not subject to any additional criminal liability based on an age

142. *Id.*
143. *Sex and Tech*, *supra* note 28, at 3.
144. "A person commits sexual exploitation of a child if he knowingly and willfully[ ] (a) [p]ossesses or accesses through any means including, but not limited to, the internet, any sexually exploitative material[.]" § 18-1507(2)(a) (Westlaw).
145. § 18-1507A(3) (Westlaw).
146. *Id.*
147. *Id.*
148. *See also* § 18-1507A(1) (Westlaw).
149. § 18-1507A(3) (Westlaw).
150. *Id.*
151. *Id.*
152. *Id.*; *see* §§ 18-1507A(1)–(2) (Westlaw).

gap, whether the sext is sent to a much younger or older teen.[153] The penalty that results from possessing such a sext from a minor over three years younger is astoundingly harsh, considering that the conduct of receipt or possession is passive, and there is no requirement of non-solicitation.

Subsection 4 of the statute provides:

> (4) A minor who is found to be in possession of the content described in subsection (1) or (2) of this section who knowingly and willfully transmits or displays the image to one (1) or more third parties:
>
> (a) is guilty of a misdemeanor on the first adjudicated offense; and
>
> (b) is guilty of a felony on any second or subsequent adjudicated offense.[154]

This provision makes it a crime for a minor to possess such sexually explicit material and share it with one or more third parties.[155] The first offense is a misdemeanor and any subsequent offense is a felony.[156] This specific provision refers to content that is created by the minor as described in subsections 1 and 2, but does not also require that it have been sent as described in those subsections.[157] The effect is that this provision includes both the intended recipients of sexts and unintended recipients. While this provision does not specifically target bullying or extortive behavior, it does not include any language that would indicate that the sharing of the image occurs with any level of consent or knowledge from the minor in the image[158]. Interestingly, the penalty structure set forth under this provision is the same as that set forth for the minor who creates the image and sends it with the intent or reason to believe that multiple people will receive or access it.[159] This seems to directly contradict the legislature's stated intent to "create[] a clear differentiation between the act of the initial sext and the extortive behavior that often follows."[160]

Subsection 5 of this statute deals specifically with exploitative behavior. It states:

> (5) A minor who receive[d] content under circumstances described in subsection (1) or (2) of this section and distributes or threatens to distribute the image for the purposes of coercing any action, causing . . . embarrassment or otherwise controlling or manipulating the sender is guilty of a felony.[161]

153. § 18-1507A(3) (Westlaw).
154. § 18-1507A(4) (Westlaw).
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*; *see also* § 18-1507A(2) (Westlaw).
160. H. 555, 63d Leg., 2d Reg. Sess. (Idaho 2016).
161. § 18-1507A(5).

This provision makes it a felony for a minor who received sexually explicit material from the original sender to share or threaten to share the image for the purposes of manipulation, exploitation, or embarrassment.[162] The language of this provision differs slightly from the other possession provisions in that it specifically refers to content received by the minor under subsections 1 and 2.[163] This is unlike the language of the previous subsection that covered content defined in those subsections, but not necessarily received as described therein.[164] Because this provision specifically applies to minors who have *received* content from a sending minor, it does not apply to minors who receive the images in a different way, such as from the teen sender in the previous subsection.[165] The practical effect is that this subsection only prohibits the conduct of the original recipient and leaves subsequent recipients free from this heightened liability.

Subsection 6 provides an affirmative defense:

> (6) A minor who receives content under circumstances described in subsection (1) or (2) of this section and distributes the image to a parent, guardian, one having custody of the minor or a law enforcement official for the purposes of reporting the activity is not guilty of a crime under the provisions of this section.[166]

This subsection grants an affirmative defense to minors who receive the sexually explicit material from the original sender, if they share the image with a parent, guardian, or law enforcement officer.[167] Like the previous subsection, this is specific to those who receive the content from the sender, rather than from other recipients.[168] This affirmative defense does not require that the minors did not solicit the content and does not extend to minors who delete the images but do not turn them over to an adult.[169] This provision does not include language requiring that the minor have not shared the image to others prior to turning it over to an adult.[170] It is not clear if subsequently doing so will remove the minor from full criminal liability in the event the minor may be guilty of an offense under this subsection beyond mere possession. The statute does not provide any affirmative defense for the original sender.[171]

This provision may also create problems for the parents, guardians, or custodians of teenagers that are engaging in sexting. While the provision grants a defense to the minors for distributing the image to these adults, the statute does not expressly describe what duty this places on them.[172] Additionally, the statute does not

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162. *Id.*
163. *Id.*; *but see* § 18-1507A(3), (4) (Westlaw).
164. *Compare* § 18-1507A(5) (Westlaw), *with* § 18-1507A(1)–(4) (Westlaw).
165. § 18-1507A(5) (Westlaw).
166. § 18-1507A(6) (Westlaw). Subsection (7) of the statute, omitted above, provides: "Proceedings for a violation of the provisions of this section shall fall under the jurisdiction of the juvenile corrections act pursuant to section 20-505(1), Idaho Code." § 18-1507A(7) (Westlaw).
167. § 18-1507A(6) (Westlaw).
168. *Id.*
169. *Id.*
170. *Id.*
171. *See generally* § 18-1507A (Westlaw).
172. *See id.*

create a carve out in the general child pornography penalty for parents or guardians who have received child pornography from their children.[173] The result is that parents may themselves become guilty of possessing child pornography by receiving this content from their children, thereby passing the criminal liability from the teen to the adult and effectively raising the stakes. Alternatively, parents who receive these images and immediately turn them over to the police may be removed from liability, although not expressly, but at the cost of essentially turning in the minor in the image.

The bill also added a provision to the preceding statutory section defining child pornography generally:

> (5) Notwithstanding any other provisions of this section, a person eighteen (18) years of age or older who is found to be in knowing and willful possession of content created and distributed under circumstances defined in section 18-1507A(1) or (2), Idaho Code, is guilty of a misdemeanor provided that:
>
> (a) The minor depicted in the content distributed the content in such a way that the minor intended the person found to be in possession to receive it;
>
> (b) The minor depicted in the content is not greater than three (3) years younger than the person found to be in possession; and
>
> (c) The person found to be in possession of the content did not use coercion, manipulation or fraud to obtain possession of the content.[174]

The practical effect of this first provision is to reduce the penalty from a felony to a misdemeanor for adults aged eighteen to twenty who receive sexually explicit materials from a minor aged fifteen to seventeen, respectively, provided that the adult was the intended recipient and did not use coercion, manipulation, or fraud.[175] This mirrors the requirements and penalties set forth in subsection 3 of the statute, dealing with minor recipients.[176]

The cumulative effect of this statute is that senders have broad criminal liability while inconsistencies in the language of the statute provides for loopholes that leave many recipients, distributors, and extorters uncovered. While the intent of the statute was to "create an environment where the sender of a 'sext' feels more comfortable seeking help if he/she is being extorted,"[177] the practical result of the statute is likely to be a chilling in any reporting of such extortive behavior due to the sender's own liability and lack of any affirmative defenses. The statute achieved its goal of removing teen sexting from falling under the child pornography umbrella but it did so heavy-handedly and the final product still leaves teens subject to over-criminalization.

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173. *See* § 18-1507 (Westlaw); § 18-1507A (Westlaw).
174. § 18-1507(5) (Westlaw).
175. *Id.*
176. *Compare* § 18-1507(5) (Westlaw), *with* § 18-1507A(3) (Westlaw).
177. H. 555, 63d Leg., 2d Reg. Sess. (Idaho 2016).

C. Inconsistencies Among Idaho Statutes That Regulate Sexual Conduct on the Basis of Age

Idaho's sexting statute becomes even more concerning when it is examined in conjunction with other Idaho legislation. While this is Idaho's first statutory law directed specifically at teenage sexting, it is not Idaho's first law to regulate sexual conduct on the basis of age.[178] When examined together, the statutes are inconsistent in their language, coverage, and underlying policy rationales. The cumulative effect of these statutory schemes is that the criminal structure sets forth harsher penalties and more criminal liability for sharing sexual images than for engaging in sexual conduct, and this new statute is a shift from child and teen protection to punishment.

Idaho law has the following statutory definition of rape on the basis of age: "(1) Where the victim is under the age of sixteen (16) years and the perpetrator is eighteen (18) years of age or older. (2) Where the victim is sixteen (16) or seventeen (17) years of age and the perpetrator is three (3) years or more older than the victim."[179] Effectively, this age-based definition of rape has created a carve out of decriminalization for teenagers within the age ranges to have legal, consensual sex.[180]

Idaho's sexual battery law also has age-based restrictions on conduct.[181] This statute criminalizes a broad range of sexually explicit actions and communications between sixteen or seventeen-year-olds and adults at least five years older, regardless of consent.[182] While Idaho has separate sex-offender registries for adults and minors,[183] even the adult registry contains a carve out on the basis of the age of the adult offender: eighteen-year-olds who are guilty of a statutory rape are not required to register as a sex offender.[184]

These laws set forth age-based restrictions with purpose, but without consistency. A five year age gap will result in criminality where the adult engages in lewd communications with a sixteen-year-old, but a three year age gap is required for criminality when the adult has consensual sex with that same sixteen-year-old.[185] A nineteen-year-old can legally have sex with a seventeen-year-old but will be required to register as a sex offender for having consensual sex with a sixteen-year-old.[186] An eighteen-year-old who has sex with a fifteen-year-old will have vio-

178. *See* § 18-1508A (Westlaw) (originally enacted by H. 580, 51st Leg., 2d Reg. Sess. (Idaho 1992)); § 18-6101(1) (Westlaw) (originally enacted in 1972); § 18-6101(2) (Westlaw) (originally enacted by S. 1385, 60th Leg., 2d Reg. Sess. (Idaho 2010)); § 16-1602 (Westlaw) (originally enacted in 1976).

179. § 18-6101(1)–(2) (Westlaw).

180. *See id.*

181. *See* § 18-1508A(1) ((Westlaw).

182. *Id.*

183. *See* §§ 18-8304(1), -8403 (Westlaw).

184. *See* § 18-8304(1)(a) (Westlaw). ("The provisions of this chapter shall apply to any person who […] is convicted of the crime, or an attempt, solicitation, or a conspiracy to commit a crime provided for in […] 18-6101 (rape, but excluding 18-6101(1) where the defendant is eighteen years of age)[.]").

185. *See* §§ 18-1508A(1), -6101(2) (Westlaw).

186. *See* §§ 18-6101(2), -8304(1)(a) (Westlaw).

lated Idaho law but not be required to register as a sex offender; however, a nineteen-year-old who has sex with a sixteen-year-old will also be required to register.[187]

These discrepancies have some logical basis: the younger the minor, the more protection they may need and the more serious the conduct, the more restrictions may be necessary. However, when the new Idaho sexting statute is added to the mix, the results make much less sense. Under this new sexting statute, a nineteen-year-old that can legally have sex with a seventeen-year-old will be guilty of a misdemeanor for possessing a sext sent voluntarily from that seventeen-year-old.[188] Sixteen and seventeen-year-olds who can legally engage in consensual sex with each other will be guilty of misdemeanors for sharing consensually taken sexual images of themselves with each other.[189] A twenty-year-old will be subject to a felony conviction and sex-offender registration for possessing a sext sent voluntarily by a sixteen-year-old but would not be guilty for engaging in sexual acts (short of intercourse) with that same minor.[190] The law is essentially approving engaging in sexual conduct over sexting within the age gaps specified.

V. POTENTIAL CONSTITUTION CONCERNS

> *"Absent restraint, minors may lose faith in the government's commitment to the freedoms guaranteed by the Constitution."*[191]

"Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[192] However, the government has the right to regulate the behavior and conduct of minors to a greater extent than that of adults.[193] Sexting legislation implicates freedom of expression, equal protection, and due process concerns.[194] Of these concerns, freedom of speech seems to be the strongest basis for which to challenge sexting statutes. However, until such challenges are made, we can only speculate as to the outcome. While these constitutional issues deserve a thorough in-depth analysis, for the purpose of this article, only a brief discussion of the issues is presented.

A. Freedom of Speech

First Amendment challenges to sexting statutes as a violation of the freedom of speech and expression seem to be the strongest argument. Child pornography

187. *See* §§ 18-6101(1), -8304(1)(a) (Westlaw).
188. *See* § 18-1507(5) (Westlaw).
189. *See* §§ 18-6101(2), -1507A(1) (Westlaw).
190. *See* §§ 18-1508A(1), -1507A (Westlaw).
191. Julia Halloran McLaughlin, *Exploring the First Amendment Rights of Teens in Relationship to Sexting and Censorship*, 45 U. MICH. J.L. REFORM 315, 347 (2012).
192. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).
193. Carey v. Population Servs. Int'l, 431 U.S. 678, 692 (1977).
194. *See* JoAnne Sweeny, *Do Sexting Prosecutions Violate Teenagers' Constitutional Rights?*, 48 SAN DIEGO L. REV. 951, 963 (2011).

has been recognized as an unprotected category of speech, therefore punishable and falling outside the bounds of the First Amendment, since the 1982 Supreme Court decision of *New York v. Ferber*.[195] In *Ferber*, the Court made clear that child pornography could be prohibited without the requirement that it satisfy the *Miller* obscenity test, emphasizing the compelling interest in safeguarding the physical and psychological well-being of minors.[196] This category was extended to mere possession and viewing by *Osborne v. Ohio* in 1990.[197] The Court explained that its reason for prohibiting possession of child pornography was "to protect the victims."[198] It is on this constitutional basis that states and the federal government have been able to broadly prohibit and criminalize child pornography.

However, these cases arose before the advent of Facebook, Snapchat, and unlimited texting and data smartphone plans. Accordingly, there is debate as to whether the rationales set forth in the cases that support the broad prohibition on child pornography support an equally broad ban on teenage sexting and auto-pornography.[199] A conservative reading of *Ferber* lends support to the argument that the Court was defining the constitutionally unprotected category of child pornography on the basis of its content, underage sexual materials, as opposed to its potential harms, exploitation of minors.[200] However, some argue that the Supreme Court's refusal to extend child pornography prohibition to pornography that appeared to use children without actually involving real children in *Ashcroft* contradicts such an interpretation.[201] The Court in *Ashcroft* struck down the virtual pornography ban, reasoning that it "prohibit[ed] speech that records no crime and creates no victims by its production."[202] While *Ashcroft* dealt with virtual depictions of children and the teens in sexts are real, the argument is that this case focused on actual harm as opposed to content.[203]

While the Supreme Court has yet to rule on the constitutionality of teenage sexting statutes,[204] it seems clear that sexting statute provisions that criminalize the sharing or exploitation of a minor through the use of a sext will be upheld. This clearly falls within circumstances in which the minor participating has been harmed by their involvement, as well as exploited.

It is less clear that provisions criminalizing consensual sending and receiving will be upheld. Without a discernable harm, it is not clear whether the *Ferber* or

195. New York v. Ferber, 458 U.S. 747, 773 (1982).

196. *Id.* at 764–65. Under the *Miller* test, materials are considered obscene if the "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973).

197. Osborne v. Ohio, 495 U.S. 103, 147 (1990).

198. *Id.* at 109.

199. *See, e.g.*, John A. Humbach, *'Sexting' and the First Amendment*, 37 HASTINGS CONST. L.Q. 433 (2010).

200. *Id.* at 458. *See also Ferber*, 458 U.S. at 762.

201. Humbach, *supra* note 199, at 460; Ashcroft v. Free Speech Coal., 535 U.S. 234, 239 (2002).

202. *Ashcroft*, 535 U.S. at 250.

203. Humbach, *supra* note 199, at 460; *Ashcroft*, 535 U.S. at 234.

204. *See* Sweeny, *supra* note 194, at 972.

Ashcroft rationale will win out.[205] In such cases, the argument is that there is no "victim." When a minor is the creator and sender of the sexually explicit image, the inherent power imbalance that exists with an adult involved has been removed.[206] Some argue that the act may actually sexually empower the minor.[207] Accordingly, such statutes may fail when reviewed under scrutiny for their chilling effect on minors who wish to engage in such sexual self-expression by burdening "substantially more speech than necessary" to further the government's interest in protecting minors from exploitation.[208]

B. Equal Protection

The Equal Protection clause of the Fourteenth Amendment may be implicated when a law treats individuals differently based on arbitrary or suspect characteristics.[209] This "constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective."[210] The Supreme Court has held age is not a suspect classification and therefore laws that differentiate on the basis of age are subject to rational basis review.[211] State law "may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."[212]

However, challenges to teenage sexting cases brought under child pornography statutes have repeatedly failed.[213] Courts have held that such statutes survive the low bar of the rational basis test in large part because child pornography is unprotected speech under the First Amendment.[214] Clearly, teenage sexting statutes draw a distinction on the basis of age.[215] The statute removes minors from the child pornography umbrella but, in doing so, criminalizes consensual sharing of sexting, conduct that is not criminalized for adults.[216] Additionally, the inconsistency among Idaho's sexual conduct statutes' age-restrictions provides support for the argument that the age distinctions are in fact arbitrary.[217] While sexting challenges to date have dealt with teenage prosecution under child pornography statutes as opposed to age-based sexting legislation, caselaw does not support a prediction that challenges on this basis would be successful. In Nebraska, an equal protection challenge

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205. *See generally* New York v. Ferber, 458 U.S. 747 (1982); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).
206. Sweeny, *supra* note 204, at 972.
207. *Id.*
208. *Id.* at 976 (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 27 (2010)).
209. *See* U.S. CONST. amend. XIV; Sweeny, *supra* note 194, at 976.
210. McGowan v. Maryland, 366 U.S. 420, 425 (1961).
211. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000).
212. *Id.* at 83.
213. *See* Sweeny, *supra* note 194, at 977.
214. United States v. Freeman, 808 F.2d 1290, 1293 (8th Cir. 1987).
215. *See supra* Part III; *see also* IDAHO CODE ANN. §§ 18-1507(5), -1507A (West 2017).
216. *Id.*
217. *See supra* Section IV.B.

to a teenage sexting-specific statute was brought.[218] The defense argued that the statute determined culpability on the basis of age, without a rational basis for the distinction.[219] However, the court rejected the challenge, stating that "age-based differences in the law are not new, especially in the area of sex crimes," and finding that the distinctions between the individuals were sufficiently relevant.[220] Because exploitation of minors is a compelling interest and states are given broader leeway in the regulation of minor's conduct, it is unlikely that sexting statutes will be struck down under rational basis scrutiny.

C. Due Process Right to Privacy

The Supreme Court has recognized a constitutionally protected right to privacy in personal activities including marriage, procreation, contraception, family relationships, and child rearing.[221] The Court has also recognized a right to sexual intimacy between consenting adults.[222] While the right to privacy applies to minors, states have greater latitude to regulate a minor's conduct and can inhibit these privacy rights if the regulation serves "any significant state interest . . . that is not present in the case of an adult."[223]

The Supreme Court has yet to hear a challenge on this issue brought by teenagers prosecuted under sexting statutes for consensually sexting.[224] However, a Florida appellate court heard a privacy challenge by teens consensually sexting who were prosecuted under a child pornography statute and found that privacy interests were not implicated, in large part because the teenagers' relative immaturity precluded a reasonable expectation that the images would not be shared, either intentionally or unintentionally.[225] "The court concluded that even if a right to privacy did exist, the statute served a compelling state interest in preventing the creation of sexually explicit images of minors, no matter who created them."[226]

VI. POTENTIAL POLICY PROBLEMS

> *"I hope this bill will serve as a deterrent to teens sending or receiving sexts, but I am also not naïve nor do I believe any law will stop this conduct."*[227]

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218. Lori Pilger, *Judge Rejects Challenge to Teen's Sexting Case*, LINCOLN J. STAR (Mar. 30, 2012), http://journalstar.com/news/local/911/judge-rejects-challenge-to-teen-s-sexting-case/article_0b37e1d9-f6ac-5bb7-83b2-f0f62173cbd3.html.

219. *Id.*

220. *Id.*

221. Sweeny, *supra* note 194, at 978. *See also* Roe v. Wade, 410 U.S. 113, 152–53 (1973).

222. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

223. Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977).

224. Sweeny, *supra* note 194, at 978.

225. A.H. v. State, 949 So. 2d 234, 237 (Fla. Dist. Ct. App. (2007)). This case is discussed *supra* in Section III.A.

226. Sweeny, *supra* note 194, at 982; *A.H.*, 949 So. 2d at 239.

227. C.L. Butch Otter, *supra* note 125.

A. Non-Culpable Behavior

House Bill 555's original goal was to punish teenagers who use sexts to extort or blackmail other teenagers, rather than punish consensual conduct.[228] In fact, the legislative statement of purpose specifically refers to creating a "clear differentiation between the act of the original sext and the extortive behavior that follows," by "declaring that, as an operation of law, the act of extortion is a greater evil."[229] However, the effect of Idaho Code 18-1507A is to criminalize teenage sexting far more broadly than necessary, and this goal will likely not be achieved as a result.

As written, the law criminalizes the acts of sending a sext, receiving a sext, sharing a sext, and using that sext to "caus[e] embarrassment or otherwise control[] or manipulat[e] the sender."[230] Criminal liability exists for all levels of conduct, with penalties up to felony punishment existing for both the sender and the extorter.[231] Additionally, the law provides an affirmative defense, but it is available only to teenage recipients, leaving the teenage sender of the sext out as the only unprotected party.[232] Under this law, it does not matter whether the recipient requested the image or if the sender and recipient were involved in a consensual relationship; the sender is unprotected from liability and the recipient need only turn the image over to a parent or law enforcement officer to remove themselves from criminal liability.

The practical impact of this criminalization structure is that the law will chill reporting of conduct that actually should be criminalized because it is criminalizing conduct that should not be. Society has much less concern about a teenager sending a sext to another teenager consensually than it has about a teenager using a sext to extort another teenager. However, the law puts the sender in the worst position by not providing any affirmative defenses which will result in senders being less likely to come forward if or when they are being harassed or bullied. This is in direct conflict with the bill's stated purpose to "create an environment where the sender or a sext feels comfortable seeking help if he/she is being extorted."[233] While the criminal penalties associated with the conduct reflects that extortion is a greater evil, the criminal and defense structure of the statute operates to say that the original sending of the sext is the more unforgivable evil.

The real issue arises when images and sexts are not shared consensually, such as when an image is shared by a recipient with others without the original sender's consent or when that image is used to extort or bully the sender. In that instance, the action at issue is bullying and extortion; the behavior at issue is culpable. Bullying and extortion, unlike sexting, are not behaviors that become lawful and acceptable upon reaching the statutory age of adulthood. Accordingly, these are the behaviors that should be focused on and criminalized.

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228. *See* H. 555, 63d Leg., 2d Reg. Sess. (Idaho 2016).
229. *Id.*
230. IDAHO CODE ANN. § 18-1507A (West 2017).
231. *Id.*
232. § 18-1507A(6) (Westlaw).
233. H. 555, 63d Leg., 2d Reg. Sess. (Idaho 2016).

The basis for discouraging teenage sexting is widely understood. However, the basis for criminalization of the same conduct is lacking. Are these kids taking on some risk? Sure. Should their parents and teachers caution them against sexting? Absolutely. But arresting them, expelling them from school, smearing their names in the news media and placing them on sex-offender registry are all punishments vastly disproportionate to the "crime." Funneling teens into the criminal justice system for expressing sexual interest in other teens is simply much more harmful to them than sexting is.[234]

Criminal liability does not exist when adults consensually share sexts or other sexually explicit materials. However, an adult can be criminalized for extorting or blackmailing another adult. As a society, we have decided that one behavior is culpable and another is not. While this same conduct may be discouraged among minors and teenagers, it should not, by the virtue of their age alone, make it culpable.

B. Criminalization of Teenage Sexting is an Ineffective Deterrent

The criminalization structure of sexting, in general, has questionable efficacy as a supposed deterrent. "As related to teen sexting, even if we take an expansive view of deterrence, including prevention of both harm to society and self-harm to the offender, it is unclear that criminal law is the best tool for the job."[235] Adults do it, celebrities do it. Sexting is not a behavior that is criminalized in other contexts and is largely normalized in society.[236] "Proponents of deterrence believe that people choose to obey or violate the law after calculating the gains and consequences of their actions."[237] For this reason, deterrence relies significantly on the individuals being deterred to actually know what the is law and its legal consequences.[238] While this is aspirational in general, it is highly unlikely to be the case when those individuals are teenagers.[239]

Generally, the idea of deterrence is that people will be less likely to engage in an act if the punishment for that act is swift, certain, and severe.[240] Here, sexting laws, and Idaho's statute, in particular, satisfies the severity component by setting forth harsh criminal penalties for engaging in teen sexting. However, the swiftness and certainty of that punishment are lacking. Studies have shown that the certainty and predictability of punishment are more important in effective deterrents than the severity of the punishment.[241] Because this predictability is lacking, the statute and its criminal structure will be ineffective as a deterrent.

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234. Robby Soave, *supra* note 61.

235. Joanna R. Lampe, *A Victimless Sex Crime: The Case for Decriminalizing Consensual Teen Sexting*, 46 U. MICH. J.L. REFORM 703, 724 (2013).

236. *See supra* Part II.

237. Ihekwoaba D. Onwudiwe et al., *Deterrence Theory*, *in* ENCYCLOPEDIA OF PRISONS & CORRECTIONAL FACILITIES 233, 233 (Mary Bosworth ed., 2005).

238. Lampe, *supra* note 235.

239. Over half of the teens involved in the study were unaware that sexting could potentially carry legal consequences. *See* McEllrath, *supra* note 36, at 1015.

240. *See generally* Onwudiwe et al., *supra* note 237, at 235.

241. Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, SENT'G PROJECT (2010), www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf; *see Five Things About Deterrence*, NAT'L INST. JUSTICE (June 6, 2016), https://www.nij.gov/five-things/pages/deterrence.aspx.

The legal system, in general, is not a swift machine and necessarily the temporal space between the actual act of a crime and the actual receipt of the punishment is usually large. This is especially the case when the crime is teenage sexting. There is not a victim of consensual sexting and accordingly it is not likely that someone is reporting the conduct when it is occurring privately between consenting parties. At this time, there aren't apps on teenagers' phones that are detecting and reporting this conduct in real time when it is occurring. This means that sexts in violation of this statute are only being brought to the attention of law enforcement after the fact, potentially far removed from the actual conduct of sending or receiving. Because there is no tool for quick discovery or reporting of this conduct, and the legal system is inherently slow-moving, the swiftness factor is lacking.

Certainty is also not present. Because sexts are shared privately and not easily detected and reported, there is a very low chance that a teen who sends a sext will have that fact made known to law enforcement. And, even if that fact is shared, it is up to prosecutorial discretion as to whether any criminal charges will be filed against the teen. As seen in the Colorado sexting ring, prosecutors have been hesitant to bring charges against teenagers for consensual sexting, largely because of the harsh penalties.[242]

VII. CONCLUSION

Sexting is happening. Adults are doing it and teenagers are too. While society may have an interest in discouraging minors from engaging in this conduct, it has also demonstrated an interest in protecting minors from the consequences. Sexting statutes are addressing the problems of prosecuting teen sexting under child pornography statutes, but they are doing so by sending minors down the same path: criminalization. Idaho's statute, in particular, over-criminalizes teen sexting conduct, and does so inconsistently and incoherently. Protection, not punishment, is needed and education, not criminalization, is the key to achieving that goal.

242. *See* Botelho & Martinez, *supra* note 56.