

SEXTING AND SUBSIDIARITY: HOW INCREASED
PARTICIPATION AND EDUCATION FROM
PRIVATE ENTITIES MAY DETER THE
PRODUCTION, DISTRIBUTION, AND POSSESSION
OF CHILD PORNOGRAPHY AMONG MINORS

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INTRODUCTION

Modern communication technology has introduced unprecedented opportunities for family, friends, and businesses to keep in touch. Whether through electronic mail, social-networking websites, or mobile phones, in general, people are able to communicate with each other more easily and frequently today than ever before. This modern development has brought with it an obvious result: in order for the public to “stay connected,” people must have the available means to communicate. Accordingly, adults and children require access to cell phones and computers. The ability to contact many people at the press of a button, however, carries with it, great responsibility.

Consider, for example, the functions of the modern mobile phone. The device’s most basic function allows an individual to make a simple phone call. In recent years, however, the cell phone has advanced to provide the ability to send and receive typed,¹ as well as, picture² messages. Of greater importance, the modern mobile phone provides internet access, thus providing its user access to the wonders of the World Wide Web. Essentially, cell phones have become

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1. These types of messages are commonly referred to as “text” messages. A text message is usually prepared through the dial pad on the phone.

2. Modern mobile phones sometimes come equipped with a camera for picture and video recording. The camera function allows the user to store recorded images or videos on the phone’s memory, as well as share the pictures and videos via a message format.

convenient mass communication tools that, although providing remarkable features, require careful use, especially by children.³

Of the numerous problems associated with juveniles possessing mobile phones,⁴ one in particular has recently attained substantial notoriety. Prosecutors, legislators, and the media are all too familiar with the multimedia phenomenon known as “sexting.” Sexting refers to “the practice of sending sexual images or messages to someone’s mobile phone.”⁵ This act, although typically legal among consenting adults, may result in criminal liability when engaged in by minors. The possession or distribution of a sexually suggestive picture of a child, in most instances,⁶ violates child pornography statutes. Therefore, when a teenager sends a sexually explicit image of him/herself to another teenager via his/her cell phone, both the sender and receiver may be charged with a crime.⁷

The anomaly of self-produced child pornography has presented the law enforcement community with the difficult task of charging children engaged in sexting with the possession and dissemination of obscenity. Objectively, when a prosecutor discovers a sexually suggestive image on a minor’s phone, he is simply doing his job when he charges the child with possession of child pornography. Some commentators argue the inappropriateness of prosecuting minors for sexting under child pornography statutes because “[t]hese

3. For purposes of this Note, the words “child,” “children,” “juvenile,” “teenager,” “teen,” “minor,” or any variation of those words, refer specifically to a person under the age of eighteen, unless otherwise indicated.

4. Some problems might include higher cell phone bills due to excessive use, greater risk of loss or damage to the device, or potential access to mature content through a phone’s internet function.

5. *Sexting Definition*, MACMILLAN DICTIONARY, <http://www.macmillandictionary.com/dictionary/american/sexting> (last visited Mar. 4, 2012) (providing the American English definition of sexting).

6. *Compare* *New York v. Ferber*, 458 U.S. 747 (1982) (permitting the states to regulate photographs and films depicting sexual activity of actual minors because such material has little social value, and proscription of this material serves the states’ interest in protecting the welfare of children), *with* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (striking down a federal statute prohibiting “virtual” child pornography because such material did not actually depict sexual activity of minors, and therefore, proscription against it violated the First Amendment).

7. *See, e.g.*, *Miller v. Mitchell*, 598 F.3d 139, 143 (3d Cir. 2010) (describing the facts of that case, where a Pennsylvania district attorney threatened to charge a group of high school girls under two Pennsylvania statutes for “possession or distribution of child pornography,” or “criminal use of a communication facility,” when sexually explicit images of the girls were discovered on several male students’ cell phones); *A.H. v. State*, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007) (affirming a trial court decision finding that a teenage girl had violated Florida’s law banning the promotion of a sexual performance by a child when she and her boyfriend exchanged naked pictures of themselves via electronic mail).

laws . . . were written and intended for adults who sexually exploit children, not the children themselves.”⁸ Others argue “that existing child pornography statutes are unconstitutional to the extent that they proscribe the voluntary production and dissemination of self-produced pornographic images.”⁹ A strict reading of the applicable federal statute pertaining to child pornography,¹⁰ however, would suggest that a self-produced sexually suggestive picture message of a minor would constitute child pornography. In either event, this Note will demonstrate that juvenile sexters are engaging in dangerous behavior that must be controlled—either by the government, or more appropriately, by the private sector.

This Note argues that criminal penalties, based on either child pornography statutes or specific legislation criminalizing sexting, should be implemented and enforced for the purpose of preventing the exchange of child pornography and protecting the welfare of minors. Part I addresses the necessity of criminal prosecutions aimed at preventing and penalizing juvenile sexters. When the dangerous consequences of minors engaged in sexting are considered, government involvement in the deterrence of the act appears essential.

Part II of this Note addresses the constitutional implications of sexting. An evaluation of the United States Supreme Court’s decisions concerning the denial of First Amendment protection to child pornography would seem to suggest that the production, exchange, and possession of sexually explicit images of minors, among minors, deserves no First Amendment protection. Sexting can involve the sexual exploitation of children. Consistent with the “harm principle,”¹¹ when an activity involves the sexual abuse of children, it

8. W. Jesse Weins & Todd C. Hiestand, *Sexting, Statutes, and Saved By The Bell: Introducing a Lesser Juvenile Charge with an “Aggravating Factors” Framework*, 77 TENN. L. REV. 1, 3 (2009).

9. Sarah Wastler, Student Article, *The Harm in “Sexting”?: Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J.L. & GENDER 687, 688 (2010).

10. 18 U.S.C. § 2256 (2010). In that statute, it states:

“[C]hild 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 . . . the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct

Id. § 2256(8). It is important to note that this statute is not age-specific, in that it does not identify a particular age that applies or does not apply.

11. *See infra* Part I and note 58.

should be excluded from constitutional protection. Nevertheless, absent direct, definite harm to a minor who voluntarily produces and distributes a sexually suggestive image to another consenting minor, mere speculation of potential harm “cannot bring sexting images within the definition of child pornography.”¹² Ultimately, Part II addresses the constitutional debate concerning minors engaged in sexting for the purpose of demonstrating the obligation of both public and private intervention.

Notwithstanding the importance of prosecuting sexting by minors, Part III illustrates the problematic task of pursuing criminal charges against sexting in light of child pornography statutes upon which prosecutors rely. Because sexting is a contemporary cultural phenomenon, specific legislation aimed at its prevention is either nonexistent or undergoing state and federal legislative approval. Arbitrary enforcement against sexting among minors and disproportionate penalization for engaging in the act have resulted, posing a real threat to notions of justice.

Finally, in accordance with the facts and arguments presented in the aforementioned parts of this Note, Part IV provides a unique approach to the problem of minors engaged in the production and distribution of child pornography. The deterrence of sexting among minors does not depend on governmental intervention. Rather, due to the problems associated with the prosecution of minors engaged in the act, non-governmental entities may be both in a better position to prevent minors from sexting, and do so more efficiently.

At the core of the notion of permitting the private sector to address the problem of sexting is the concept of “subsidiarity.” Pursuant to the theological component of that principle, when a decentralized entity—such as the family or a private institution—can effectively address a social concern, the sovereign State should allow it to proceed.¹³ As will be demonstrated in this Note, no other entity can better communicate values and moral human development than the family, particularly, the parents. Additionally, because many private organizations have already begun addressing and actively participating in the prevention of sexting by minors, parental cooperation with the approaches of these organizations may appropriately deter the growing trend of sexting among minors.

12. Wastler, *supra* note 9, at 700.

13. *See infra* Part IV.A. and note 98.

I. THE APPROPRIATENESS OF PROSECUTING JUVENILE SEXTERS

In a 2008 survey conducted by the National Campaign to Prevent Teen and Unplanned Pregnancy, twenty percent of the overall teens surveyed indicated that “they have sent/posted nude or semi-nude pictures or video of themselves.”¹⁴ Additionally, thirty-nine percent of the surveyed teenagers indicated that they had “sen[t] or post[ed] sexually suggestive messages.”¹⁵ Finally, the survey noted that “48% of teens say they have received such messages.”¹⁶

A more recent survey conducted by Music Television (“MTV”) and the Associated Press (“AP”), the initiative known as *A Thin Line*,¹⁷ provided “an in depth look at the prevalence of digital abuse among young people today. . . . designed to quantify how young people are affected by and respond to issues like sexting, digital harassment and digital dating abuse.”¹⁸ Approximately one-third of the respondents reported engaging in “sexting related activities.”¹⁹ Twenty-four percent of minors, ages fourteen to seventeen, reported involvement in “some type of naked sexting.”²⁰ In addition, “1 in 10 [young people] ha[ve] shared a naked image of themselves.”²¹ Finally, the most staggering of the findings included that “[s]exts often have unintended viewers and are often forwarded as a form of social currency by those looking to show off or be funny.”²² The

14. NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1 (2008), http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf. For purposes of the survey, the National Campaign to Prevent Teen and Unplanned Pregnancy provided that “teen” refers to individuals “ages 13–19.” *Id.* Additionally, the report notes that 653 teens were surveyed for the study. *Id.* at 5.

15. *Id.* at 1.

16. *Id.*

17. MTV NETWORKS & ASSOCIATED PRESS, A THIN LINE: 2009 AP-MTV DIGITAL ABUSE STUDY (2009), http://athinline.org/MTV-AP_Digital_Abuse_Study_Executive_Summary.pdf.

18. *Id.* at 1.

19. *Id.* at 2. MTV and AP’s findings consisted of responses from a sample of “1,247 respondents, ages 14 to 24.” *Id.* at 1.

20. *Id.* at 2.

21. *Id.*

22. *Id.* at 3. The study noted:

Nearly 1 in 5 sext recipients (17%) report that they have passed the images along to someone else. More than half (55%) of those who passed the images to someone else say they shared them with more than one person. The most popular reasons given for forwarding sexts include the assumption that others would want to see them (52%), a desire to show off (35%), and boredom (26%).

Id.

findings from both reports show a relatively high frequency of minors engaged in the act of sexting. But these statistics alone do not demonstrate the consequential harm that occurs when teenagers send or receive sexually explicit messages through their mobile phones.

In July 2008, an Ohio high school student named Jessica Logan committed suicide following extensive and repetitive humiliation due to sexting.²³ Jessica sent nude pictures of herself to her boyfriend, who in turn, sent the images to other high school girls when he and Jessica broke up.²⁴ After the sexts had been circulated, Jessica began skipping school.²⁵ She then experienced harassment from her peers, such as when they began “calling her vicious names” and “even throwing objects at her.”²⁶

Jessica’s mother, Cynthia, noted that the high school administration failed to properly intervene despite knowledge of the ridicule Jessica experienced.²⁷ The school’s guidance counselor told Jessica that “he could ask the students to delete the photo from their cell phones, but there was nothing else he could do.”²⁸ Nevertheless, the guidance counselor advised Jessica to submit to a television interview for the purpose of discussing sexting.²⁹ Following the airing of the interview, the harassment upon Jessica increased.³⁰ One day, Jessica returned to her home after attending the funeral of a friend who had committed suicide.³¹ Cynthia soon discovered Jessica’s body hanging in her room, with her cell phone laying on the middle of the floor.³²

The tragic story of Jessica Logan illustrates the inherent danger of sexting among minors. Adolescence can be a difficult period for any teenager. The immature decisions and actions associated with growing and learning do not always have favorable outcomes. Unfortunately, sexting has become a growing trend among minors,

23. Mike Celizic, *Her Teen Committed Suicide Over ‘Sexting’*, TODAY.COM (Mar. 6, 2009, 9:26 AM), <http://www.today.msnbc.msn.com/id/29546030>.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Logan v. Sycamore Cmty. Sch. Bd. of Educ.*, No. 1:09-CV-00885, 2011 U.S. Dist. LEXIS 10505, at *3 (S.D. Ohio Feb. 3, 2011).

29. *Id.*

30. *See id.* Cynthia Logan alleged that after the interview was televised, “[s]tudents . . . chastised [Jessica] with epithets and derogatory remarks, threw things at her while at school and at school-sponsored events, harassed her by phone and online, and even threw things at her during her graduation ceremony.” *Id.*

31. Celizic, *supra* note 23.

32. *Id.*

and although Jessica's story portrays an extreme consequence of children engaging in the transmission of sexually explicit messages, other serious outcomes³³ can have a potential "Scarlet Letter" effect. Consider, for example, the case of *Miller v. Skumanick*,³⁴ where a Pennsylvania district attorney, after receiving several high school students' cell phones containing images of nude and semi-nude teenage girls, threatened to charge the girls appearing in the pictures with violations of Pennsylvania's "law for possessing or distributing child pornography."³⁵ The district attorney noted that "these charges were felonies that could result in long prison terms and would give even juveniles a permanent record," and "if found guilty of these crimes [the teenage girls] would probably be subject to registration as sex offenders under Pennsylvania's Registration of Sexual Offenders Act ("Megan's Law"), for at least ten years and have their names and pictures displayed on the state's sex-offender website."³⁶

Although the appropriateness of mandating sex-offender registration on minors who engage in sexting is questionable, the possibility of such a penalty demonstrates prosecutors' belief of the seriousness of the offense. When repercussions include embarrassment, verbal and physical abuse, and possible death, the government has a responsibility to take preventive steps to deter the transmission of child pornography among minors. Teenagers do not necessarily understand the consequences of sexting. "Young people who receive nude/semi-nude images and sexually suggestive texts and emails are sharing them with other people for whom they were never intended."³⁷ Furthermore, minors may not consider the fact that what they transmit will not remain private since a sext message can easily be circulated.³⁸ Finally, and of particular relevance for law enforcement, "[n]early one in five young people who send sexually

33. See, e.g., Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 *COMMLAW CONSPICUOUS* 1, 4 (2009) (describing an incident in Syracuse, New York, where several teenage girls discovered that revealing poses they had "sexted" to their boyfriends' phones had been taken from the internet by another boy and sold to others on DVD).

34. 605 F. Supp. 2d 634 (M.D. Pa. 2009), *aff'd sub nom.* *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

35. *Skumanick*, 605 F. Supp. 2d at 637.

36. *Id.* at 638 (internal citation omitted).

37. NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, *supra* note 14, at 3 (stating that "38% of teen girls and 39% of teen boys say they have had sexually suggestive text messages or emails—originally meant for someone else—shared with them").

38. *Id.* at 2 (noting that "40% of teens and young adults say they have had a sexually suggestive message (originally meant to be private) shown to them and 20% say they have shared such a message with someone other than the person for whom [it] was originally meant").

suggestive messages and images, do so to people they only know online.”³⁹ Accordingly, prosecutors must not only be concerned with the consequences surrounding minor-to-minor sexting, but also sexts sent between juveniles and adults.

It should come as no surprise that an adult who solicits sex from, or exchanges sexually explicit images with, a minor (who is legally incapable of providing consent) through a communication device will face criminal charges. Prosecution of an adult who sends sexually suggestive images to a child meets less resistance than prosecuting events involving just minors because an adult soliciting sex from a minor specifically involves the victimization of children. Situations involving adult and minor sexting do occur, nevertheless.⁴⁰ Prosecuting minors for sexting, therefore, may work as a general deterrent to prevent not only the exchange of child pornography among minors, but also between minors and adults.

Consideration of the harmful effects of sexting (e.g., potential interaction with child predators, humiliation from peers, etc.) warrants criminal prosecution of minors engaged in the act. Many teenagers have sent or received sexually explicit images or messages either intended for them or others. The potential stigma placed on minors who sext, by their peers and by the misfortune of serious criminal penalties, can have a devastating and long-lasting effect. Additionally, engaging in the transmission of child pornography poses serious risks when the minor is unaware of the actual recipient of the material. Ultimately, the criminalization of sexting among minors remains a vital preemptive approach in combating and deterring the possession and distribution of child pornography.

II. JUVENILE SEXTING AS PROTECTED SPEECH? THE FIRST AMENDMENT DEBATE

The United States Supreme Court has not addressed the minor-to-minor sexting phenomenon. It was only recently, in fact, that the

39. *Id.*

40. *See, e.g.*, *United States v. Broxmeyer*, 616 F.3d 120, 122–23 (2d Cir. 2010) (discussing the case where a male adult high school field hockey coach was charged under 18 U.S.C. §§ 2251 and 2252—federal statutes pertaining to the production and possession of child pornography—when he received and distributed sexts involving a female minor whom he was involved with sexually); *State v. Canal*, 773 N.W.2d. 528, 529 (Iowa 2009) (describing a situation where an adult male was charged under an Iowa statute for “knowingly disseminating obscene material to a minor” when he sent a sext containing an image of his erect penis to a fourteen-year-old girl).

Court decided a case indirectly involving sexting.⁴¹ Because juvenile sexting resembles child pornography, however, the responsibility of addressing the issue is properly reserved to the states: “What constitutes child pornography is a matter of state law, subject to federal constitutional limitations.”⁴² Therefore, until a question reaches the Supreme Court concerning whether minors exchanging sexually explicit material among each other is constitutionally protected speech, states are within their police powers to control the act. In the interim, Supreme Court precedent relating to the constitutional implications of child pornography provides some insight as to where the Court would stand on the issue of juvenile sexting. The following discussion of the constitutional debate supporting and discouraging First Amendment protection for sexting bears particular importance to this Note because if the Supreme Court decides that minor-to-minor sexting is protected speech, government action restricting the act will be limited.⁴³

In *Chaplinsky v. New Hampshire*,⁴⁴ the Court stated, “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene”⁴⁵ The Court went on to note that “[i]t has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”⁴⁶ This line of reasoning conveys the idea that certain classes of speech clearly deserve no constitutional protection simply because they do not encompass, nor offer, any reasonable social value, and permitting unrestricted expression of that class could only threaten the moral and structural welfare of society. Accordingly, the Court espoused the idea that the

41. See *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) (discussing employee privacy rights where sexually explicit messages were discovered on an Ontario police officer’s paging device).

42. Robert H. Wood, *The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint*, 16 MICH. TELECOMM. & TECH. L. REV. 151, 170 (2009) (providing additionally that “a state can assert a significant interest in preventing the dissemination of . . . photographs to child pornographers, which may be a sufficient justification for intrusion into teens’ sexual privacy”).

43. If the Supreme Court so decides, then the suggestions mentioned in Part IV.B. present an even more practical approach to control juvenile sexting because they strictly involve private action.

44. 315 U.S. 568 (1942).

45. *Id.* at 571–72 (footnote omitted).

46. *Id.* at 572.

prohibition of blatant obscenity presents no constitutional issue, even though such proscription restricts the otherwise inalienable freedom of expression.

The First Amendment protects some forms of pornography, nonetheless. In accordance with the principles enunciated in *Chaplinsky*, the Supreme Court has identified “obscenity” to be the determining factor: protection is afforded to pornography that is not obscene.⁴⁷ Because pornography has been designated as a form of speech, if its First Amendment protection is questioned or denied via government action, the Court will use a balancing process to determine if the content represents constitutionally protected speech. This procedure remains vital in preventing government-compelled censorship of expression, and has been summarized as such:

When faced with a content-based regulation, the Court has, among other aspects in its analysis, balanced the individual’s First Amendment rights against any compelling interest of the government. It has allowed limited forms of speech to be regulated and others to be unprotected by the First Amendment. Those that have no protection include, but are not limited to, child pornography . . . and obscene speech, which have been described, inter alia, as lacking meaningful social value.⁴⁸

When specific content is categorized as child pornography, the states have an interest in its restriction. In *New York v. Ferber*,⁴⁹ the Supreme Court examined the constitutionality of a New York statute criminalizing the knowing promotion of a sexual performance by a child through distribution of material portraying the performance.⁵⁰

47. See Mary G. Leary, *Mulieris Dignitatem: Pornography and the Dignity of the Soul—An Exploration of Dignity in a Protected Speech Paradigm*, 8 AVE MARIA L. REV. 247, 272 (2010) (discussing how the Court’s decision in *Roth v. United States*, 354 U.S. 476 (1975), “has become very much a double-edged sword”). Professor Leary continued, stating:

On the one hand, it explicitly excludes obscene speech from First Amendment protection. On the other hand, it frames the discussion of pornography regulations within a discussion of speech and expression. By defining obscene material as unprotected speech, it conceded that it is in fact speech. By implication, nonobscene sexually explicit material is presumed protected speech. In essence, therefore, *Roth* placed pornography squarely within the realm of traditional First Amendment analysis.

Leary, *supra*, at 272 (internal citation omitted).

48. *Id.* at 270–71 (internal citations omitted).

49. 458 U.S. 747 (1982).

50. *Id.*

In *Ferber*, the proprietor of an adult bookstore was charged under the statute when he sold films depicting young boys masturbating to an undercover police officer.⁵¹ This being the first case before the Court concerning State action targeting child pornography, the Court provided five specific reasons for the constitutionality of restricting child pornography and the appropriateness of State action in regulating its possession and distribution.

First, the Court noted that the states have an obvious and compelling interest in “safeguarding the physical and psychological well-being of a minor.”⁵² Second, the Court discussed how the “distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children.”⁵³ Third, “[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.”⁵⁴ For the fourth reason, the Court stated, “The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.”⁵⁵ The Court believed “it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or . . . educational work.”⁵⁶ Finally, the Supreme Court indicated that it did not deviate from its precedent by denying child pornography constitutional protection.⁵⁷

The concerns surrounding the balance between First Amendment and child protection interests similarly resonate in the debate over sexting. The opposition central to the debate surrounds the idea of sexual exploitation of children. On one hand, lies the application of the “harm principle,” which British philosopher John Stuart Mill defined as follows:

51. *Id.* at 751–52.

52. *Id.* at 756–57 (internal quotations omitted).

53. *Id.* at 759.

54. *Id.* at 761.

55. *Id.* at 762.

56. *Id.* at 762–63.

57. *Id.* at 763. The Court elaborated on this point by providing that “[w]hen a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production, . . . the balance of competing interests is clearly struck and . . . it is permissible to consider these materials as without the protection of the First Amendment.” *Id.* at 764.

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. *That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.*⁵⁸

On the other hand, proponents of constitutional protection for sexting argue that the harm principle is inapplicable, contending, for instance, that sexts are comparable to virtual child pornography,⁵⁹ and therefore do not encompass a direct relationship to the sexual abuse of children. Thus, a sexually suggestive self-produced image of a minor does not fall within “the child pornography category of speech because the government interest in protecting the victims of child sexual abuse is no longer present and cannot justify the wholesale exclusion from First Amendment protection.”⁶⁰ In addition, proponents stress the voluntary and consensual nature inherent in most teen sexting as the distinguishing factor between self-produced sexually suggestive images, and the harm suffered by victims of actual child pornographers.⁶¹

To the contrary, advocates against First Amendment protection of self-produced sexually explicit material by minors argue—pursuant to the harm principle—that although the immediacy of the consequences in engaging in sexting may not be apparent, the minor may be victimized at some future time, and therefore, there exists a societal interest in its prevention.⁶² “The harm the child does herself

58. JOHN STUART MILL, ON LIBERTY 12 (Forgotten Books 2008) (1859) (emphasis added).

59. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 242 (2002) (defining virtual child pornography as computer-morphed images; under which, “[r]ather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity”).

60. Wastler, *supra* note 9, at 698 (noting also that minors “taking nude or scantily clad photos of themselves or recording their consensual sexual encounters does not suffer the immediate psychological, physical, and emotional harm of the kind suffered by child abuse victims”).

61. See *id.* at 698–99.

62. See Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL’Y & L. 1, 39 (2007) (stating that when a minor “engages in the production or dissemination of child pornography through either self-exploitation or the distribution of self-exploitative images, society must respond in a manner befitting the social harm caused”).

cannot be minimized. . . . That a minor lacks the understanding of the destructiveness of her actions at the time of the crime does not mean she forfeits the harm she will more tangibly experience when she realizes the permanency of her actions.”⁶³

The above contention conforms with established legal doctrine regarding child pornography. For example, the Supreme Court in *Ferber* provided two reasons for why child pornography inherently relates to the sexual abuse of children. First, the Court acknowledged that sexually explicit images of minors serve as a “permanent record of the children’s participation” in its production.⁶⁴ Furthermore, the circulation of such material exacerbates this harm.⁶⁵ Second, the Court stated that “the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.”⁶⁶

Although this idea of future potential harm to the child victim remains a valid argument in opposition to providing constitutional protection to child pornography, it tends to undermine the existing harm that occurs at the moment pornography is produced. “[P]ornography is the separation of sex from life and the reduction of sex to an exercise in self-gratification.”⁶⁷ Moreover, similar to the use of contraceptives, pornography diminishes the dignity afforded to each individual: “[M]an, growing used to the employment of anti-conceptive practices, may finally lose respect for the woman and, no longer caring for her physical and psychological equilibrium, may come to the point of considering her as a mere instrument of selfish enjoyment”⁶⁸

In either event, however, the harm existing at the time a minor creates a sext, and the harm occurring later in life when he/she acknowledges the effects of the production and/or distribution, present a compelling case for the classification of self-produced child pornography as content outside the purview of First Amendment protection. When a child engages in sexting—either in association with another child or an adult—the transferred sexually suggestive image becomes a permanent capsule of a poor and immoral decision.

63. *Id.* at 40.

64. *New York v. Ferber*, 458 U.S. 747, 759 (1982).

65. *Id.*

66. *Id.*

67. CHARLES RICE, 50 QUESTIONS ON THE NATURAL LAW 311 (rev. ed. 1999).

68. *Id.* (quoting Pope Paul VI, *Humanae Vitae* [Encyclical Letter on the Regulation of Birth] ¶ 17 (1968)). Additionally, Rice discusses Pope Paul VI’s warning that “contraception would cause women to be viewed as sex objects.” RICE, *supra* note 67, at 311.

The Supreme Court in *Ferber* noted in a footnote that child pornography is even more threatening to a child than sexual abuse or prostitution.⁶⁹ “Because the child’s actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. . . . [The child] . . . must go through life knowing that the recording is circulating within the mass distribution system for child pornography.”⁷⁰ Moreover, in light of the dangerous consequences associated with sexting discussed earlier,⁷¹ when a minor sends a sext to an intended recipient, and that recipient forwards the material to unintended viewers, the minor’s knowledge of “publication of the visual material increases the emotional and psychic harm suffered by the child.”⁷² The unintended viewers may also aggravate this harm by directly abusing the producer of the sext.⁷³ Finally, notwithstanding the gender of the minor engaged in the production and transmission of a self-produced sexually explicit image, pornography degrades the value of human life. Whether voluntarily or coercively produced, child pornography objectifies the human body and demonstrates a lack of respect for human dignity to and from the creator and viewer of the material.

III. SEXTING LEGISLATION: THE PROBLEMS OF NEW AND OLD LAWS TARGETING SEXTING

According to the National Conference of State Legislatures (“NCSL”), “[i]n 2010, at least 16 states and Guam introduced or . . . consider[ed] bills or resolutions aimed at ‘sexting.’”⁷⁴ “The legislation generally aims to educate young people about the risks of sexting, deter them from the practice and apply appropriate penalties to those who do engage in sexting.”⁷⁵ The Pennsylvania State Senate, for example, introduced an amendment to the “Crimes and Offenses”

69. *Ferber*, 458 U.S. at 759 n.10.

70. *Id.*

71. *See supra* Part I.

72. *Ferber*, 458 U.S. at 759 n.10 (quoting Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REFORM 295, 301 (1979)) (internal quotations omitted).

73. *See, e.g., supra* Part I. (describing the physical and mental abuse directed upon Jessica Logan in response to several of her sexts inadvertently sent to other students of her high school).

74. *2010 Legislation Related to “Sexting”*, NCSL, <http://www.ncsl.org/?tabid=19696> (last updated Jan. 4, 2011). Specifically, these states and territory include: Arizona, California, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Mississippi, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Guam. *Id.*

75. *Id.*

category of its consolidated statutes, titled, "Dissemination of prohibited materials by minors."⁷⁶ This proposed amendment specifically applies to a minor involved in sexting.⁷⁷ In addition, a violation of the proposed bill is graded as a summary offense.⁷⁸ Finally, as a distinguishing feature of the amendment, "a person . . . convicted of a violation . . . may [be] order[ed] . . . to participate in an educational program."⁷⁹

Similarly, Texas has just recently proposed legislation concerning minor-to-minor sexting.⁸⁰ In accordance with the current legislative trend noted by the NCSL, Texas officials stated that "the change in the law would not go easy on sexting but would instead focus prevention and education efforts on teenagers who might not otherwise know how dangerous and harmful the practice is."⁸¹ Furthermore, a minor's violation of the proposed law would be punishable by a year in the county prison, along with the imposition of a substantial fine.⁸² An important component of the anticipated legislation, however, applies to first-time offenders, where probation and limited cell phone usage would be the penalty.⁸³

76. S. 1121, Reg. Sess. (Pa. 2009) (amending "Title[] 18 (Crimes and Offenses) . . . of the Pennsylvania Consolidated Statutes, in minors, providing for the offense of dissemination of prohibited materials by minors").

77. The proposed amendment states:

No person under 18 years of age shall use a computer or a telecommunications device to knowingly transmit or distribute a photograph or other depiction of himself or herself or of another minor who is at least 13 years of age, in a state of nudity, to another person who is not more than four years younger or more than four years older than the person transmitting or distributing the photograph or other depiction.

Id. § 1(a).

78. *Id.* § 1(c). A summary offense is defined as "[a]n offense (such as a petty misdemeanor) that can be prosecuted without an indictment." BLACK'S LAW DICTIONARY 507 (3d pocket ed. 1996).

79. Pa. S. 1120 § 1(e). The educational program requires that the district attorney and school officials work together in consultation towards its development. *Id.* § 1(g). Furthermore, the program must include information relating to "[t]he legal consequences of and penalties for" involvement in sexting; "[t]he nonlegal consequences of [sexting] . . . including the effect on relationships, loss of educational and employment opportunities and the potential for being barred or removed from school programs"; and how irresponsible internet use "can produce long-term and unforeseen consequences from sharing sexually suggestive or explicit material." *Id.* § 1(g)(1)–(3).

80. Mike Ward, *Texas Officials Propose 'Sexting' Legislation*, DALLASNEWS.COM (Nov. 10, 2010, 9:13 AM), http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/DN-sexting_10tex.ART.State.Edition1.fcb7c6.html.

81. *Id.*

82. *Id.*

83. *Id.*

Even though several states have engaged in altering or proposing legislation designed to tackle the sexting phenomenon, many states are still without specific legislation aimed at the juvenile sexting trend. As noted previously, such states “prosecut[e] teens who created and shared [sexts] under laws generally reserved for producers and distributors of child pornography.”⁸⁴ A problematic consequence of this practice is not that juvenile sexters are being improperly categorized as child pornographers; but rather, the penalties reserved under child pornography statutes fail to effectively address and deter sexting.⁸⁵

Violations of child pornography laws appropriately carry serious consequences.⁸⁶ The obvious penalties include fines and imprisonment, both significantly increasing in amount and length based on prior offenses and/or recidivistic activity.⁸⁷ Violators of child pornography statutes could also face mandated sex-offender registration. The Pennsylvania district attorney in *Skumanick* threatened these penalties against the teenage sexters in that case.⁸⁸ However, when the purpose of the juvenile justice system is considered,⁸⁹ both imprisonment and registration as a sex-offender fail to serve the best interest of a child engaged in sexting.⁹⁰ Rather, education and rehabilitation programs,

84. Wastler, *supra* note 9, at 689 (quoting AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, TEENS AND SEXTING 3 (2009), available at <http://www.pewinternet.org/Reports/2009/Teens-and-Sexting.pdf>).

85. See Wood, *supra* note 42, at 154 (concluding that the “prosecution of teenagers for sexting is a tremendous waste of judicial resources: jail is not the place for children who have used modern technology to engage in the time-honored adolescent practice of ‘I’ll show you mine if you show me yours’”).

86. See, e.g., 18 U.S.C. § 2251(e) (2006); 18 U.S.C. § 2252A(b) (2006).

87. See 18 U.S.C. § 2251(e); 18 U.S.C. § 2252A(b).

88. See *supra* Part I.

89. See NAT’L RESEARCH COUNCIL & INST. OF MED., JUVENILE CRIME JUVENILE JUSTICE 154 (Joan McCord et al. eds., 2001) (providing that “[a] separate juvenile justice system was established in the United States . . . with the goal of diverting youthful offenders from the destructive punishments of criminal courts and encouraging rehabilitation based on the individual juvenile’s needs”).

90. See Leary, *supra* note 62, at 46. Professor Leary provides that

when the sex offender registration is applied to juveniles, issues regarding cognitive ability, mental illness, and development are not considered. Yet, these play large roles in juvenile offending. Additionally . . . the role of denial in juvenile sex offending is unique. Most juvenile sex offenders do not understand their behavior, and they must overcome that denial and work through that fear to create behavioral changes. One of the largest fears is that the reaction of the community and sex offender registration validates that fear, allowing the juvenile to believe there is no possibility of change.

Id. On the contrary, Professor Leary also notes:

in conformity with the new sexting legislative trend, would appear to better deter the act.

Another significant issue apparent in the prosecution of minors engaged in sexting under child pornography laws is that prosecutors are permitted to determine whether a certain image falls within the definition of child pornography. Although exercised discretion remains a vital part of a prosecutor's occupation, the unrestrained ability to characterize a particular picture as obscenity is an exceptional privilege that must be utilized with great care. In *Skumanick*, the parents of the girls discovered possessing and distributing the sexually explicit images were instructed that an alternative to criminal prosecution—a "six- to nine-month program focused on education and counseling"—was available.⁹¹ Nevertheless, the district attorney threatened to prosecute those children who would not submit to the probationary program.⁹² Subsequently, one parent, whose daughter had appeared in an image wearing a bathing suit, inquired into how that photograph constituted child pornography.⁹³ The district attorney "replied that the girl was posed 'provocatively,' which made her subject to the child pornography charge."⁹⁴

The arbitrary discretion allowed to prosecutors to determine what is sexually suggestive or provocative obviously raises concerns regarding whether some images transmitted between minors are, in fact, properly categorized as child pornography. The Supreme Court, in *Erznoznik v. Jacksonville*,⁹⁵ stated that, "[c]learly all nudity cannot be deemed obscene even as to minors."⁹⁶ However, so long as juvenile sexters are prosecuted under child pornography statutes,

[S]tructured prosecutorial discretion does not support juvenile sex offender registration for either sexting or self-produced child pornography cases. Notwithstanding this unequivocal statement, many automatically assume governmental response means a child must register as a sex offender. For the juvenile of concern to many, this is not necessarily the case. Where it is the case, legislators are free to and indeed should exempt juveniles from such a requirement.

Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialogue Continues—Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL'Y & L. 486, 515 (2010) (internal citations omitted).

91. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 638 (M.D. Pa. 2009), *aff'd sub nom.* *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

92. *Id.*

93. *Id.*

94. *Id.*

95. 422 U.S. 205 (1975).

96. *Id.* at 213.

unfettered discretion to categorize content as child pornography will continue. Moreover, without specific sexting legislation, states will continue to administer disproportionate and ineffective penalties in accordance with child pornography laws.

IV. SUBSIDIARITY AND ALTERNATIVES TO PROSECUTION

The prosecution of minors engaged in sexting raises questions regarding the efficiency and adequacy of deterring the activity when the use of disproportionate penalties, and not to mention, valuable public resources, present a dysfunctional preventative process. As previously established, however, the criminalization of the transmission of sexually explicit images or messages between minors remains a valuable procedure when considering the harmful effects of sexting. In addition, some of the states identified by the NCSL that have adopted or are considering adopting sexting legislation, propose a beneficial governmental approach designed to educate and prevent minors from sexting. However, unless and until the majority of states pursue a similar initiative, the previously demonstrated problems will continue.

Permitting a non-governmental individual or institution to prevent the production, possession, and distribution of child pornography is a more appropriate alternative than waiting around for the remaining states to make the first move. Inherent in this approach is the absence of two fundamental limitations to the effective deterrence of juvenile sexting that the government (not private entities) employs and is subject to: criminal prosecution and punishment, and constitutional limitations on restricting speech. Private action limiting the freedom of expression is not subject to constitutional scrutiny because of the lack of governmental intervention.⁹⁷ The absence of this restraint places non-governmental individuals or organizations in a favorable position to respond to social concerns, because their methods can exceed the government's constitutionally permitted capabilities.

97. See U.S. CONST. amend. I (providing that "Congress shall make no law . . . abridging the freedom of speech"); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (stating that the freedom of expression, guaranteed by the First Amendment, is a "fundamental personal right[] and 'libert[y]' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

A. *An Explanation of Theological Subsidiarity in Relation to Preventing Juvenile Sexting*

The concept of allowing the private sector the opportunity to manage social concerns is known as “subsidiarity.” Subsidiarity essentially “holds that the lowest body that can address a problem effectively should be empowered to do so.”⁹⁸ A development of both Catholic social teaching and political theory, subsidiarity maintains that “nothing should be done by a larger and more complex organization which can be done as well by a smaller and simpler organization. In other words, any activity which can be performed by a more decentralized entity should be.”⁹⁹ As Pope Pius XI noted:

Just as it is wrong to withdraw from the individual and commit to the community at large what private enterprise and industry can accomplish, so too, it is an injustice, a grave evil, and a disturbance of right order for a larger and higher organization to arrogate to itself functions which can be performed efficiently by smaller and lower bodies.¹⁰⁰

Subsidiarity embraces different meanings, nonetheless, and for purposes of this Note, the traditional or theological connotation of the principle will be discussed regarding the prevention of sexting among minors. “In its theological meaning, subsidiarity is understood as a structural principle concerning the relationship between the society and the state or the individual and the state.”¹⁰¹ It refers to “the right and duty of the public authority to intervene in social and economic affairs.”¹⁰² Accordingly, “the highest or most centralized level should only take actions if and insofar as a subordinate level cannot achieve the same goal in a better or equally sufficient way.”¹⁰³

An argument in favor of restricted governmental intrusion and increased response from private individuals and organizations, leads to the conclusion that the private entity should strive to achieve the

98. Robert K. Vischer, *Professional Identity and the Contours of Prudence*, 4 U. ST. THOMAS L.J. 46, 54 (2006).

99. David A. Bosnich, *The Principle of Subsidiarity*, 6 RELIGION & LIBERTY, no. 4, 1996 at 9, 9.

100. Pope Pius XI, *Quadragesimo Anno* [Encyclical Letter on Reconstruction of the Social Order] ¶ 79 (1931).

101. Christoph Henkel, *The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity*, 20 BERKELEY J. INT’L L. 359, 362 (2002).

102. *Id.*

103. *Id.*

best outcome with the common good always in mind. In his encyclical, *Centesimus Annus*, Pope John Paul II stated:

[A] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, *always with a view to the common good*.¹⁰⁴

Therefore, acting to achieve one's personal agenda, if that motive was contrary to the common good, would substantially frustrate the theological purpose of subsidiarity. The principle "does not issue a blank check to individuals and intermediary associations. One must always be wary . . . that 'intelligence and dedication to the common good [may be] mixed with selfishness and folly.'"¹⁰⁵

A valid argument for the exercise of prosecutorial restraint pertaining to sexting and the increased participation of non-governmental associated entities in deterring the activity requires that those entities prevent the transmission of child pornography among minors equally or more effectively than the government. Concededly, private individuals or organizations cannot perform certain functions that the government must—either because of limited resources, or lack of authorization by law. Nevertheless, non-governmental agencies may have a better opportunity to combat sexting because they can go where the government cannot, particularly, inside the home.

In accordance with the traditional meaning of subsidiarity, respect should be accorded to "sub-political communities in the exercise of their proper functions when they take the initiative and assume responsibility in pursuit of the self-constitution of their members."¹⁰⁶ Therefore, when a private entity, such as the family, attempts to involve itself in the pursuit of the common good of its community, or of specific individuals of that community, such involvement should be honored by the sovereign State. In the words of Pope John Paul II, in his *Letter to Families*, this principle was described as so:

104. Pope John Paul II, *Centesimus Annus* [*Encyclical Letter on the Hundredth Anniversary of Rerum Novarum*] ¶ 48 (1991) (emphasis added).

105. Peter Widulski, Bakke, Grutter, and the Principle of Subsidiarity, 32 HASTINGS CONST. L.Q. 847, 856 (2005) (quoting JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 233 (1980)) (alterations in original).

106. *Id.* at 857.

Parents are the first and most important educators of their own children, and they also possess a fundamental competence in this area: they are educators because they are parents. They share their educational mission with other individuals or institutions, such as the Church and the state. But the mission of education must always be carried out in accordance with a proper application of the principle of subsidiarity. This implies the legitimacy and indeed the need of giving assistance to the parents, but finds its intrinsic and absolute limit in their prevailing right and their actual capabilities. The principle of subsidiarity is thus at the service of parental love, meeting the good of the family unit. For parents by themselves are not capable of satisfying every requirement of the whole process of raising children, especially in matters concerning their schooling and the entire gamut of socialization. Subsidiarity thus complements paternal and maternal love and confirms its fundamental nature, inasmuch as all other participants in the process of education are only able to carry out their responsibilities in the name of the parents, with their consent and, to a certain degree, with their authorization.¹⁰⁷

The prevention of the production, distribution, and possession of child pornography among minors can, therefore, be properly performed at the family level. As Pope John Paul II noted above, parents encompass the role of the educator, and are responsible for teaching their children. "Since they have conferred life on their children, parents have the original, primary and inalienable right to educate them; hence they must be acknowledged as the first and foremost educators of their children."¹⁰⁸ Additionally, only through the cooperation of government can the family successfully provide individual guidance and direction in the lives of their children. Pope John Paul II stated in his Encyclical, *Evangelium Vitae*, "A family policy must be the basis and driving force of all social policies. For this reason there need to be set in place social and political initiatives capable of guaranteeing conditions of true freedom of choice in matters of parenthood."¹⁰⁹

Nevertheless, although parents remain the most significant source of influence on their children, working with other members of the public—including both governmental and non-governmental

107. Pope John Paul II, *Gratissimam Sane* [*Letter to Families*] ¶ 16 (1994) (emphasis omitted).

108. Pontifical Council on the Family, *Charter of the Rights of the Family*, Art. 5 (1983), reprinted in RICE, *supra* note 67, at 333, 335.

109. Pope John Paul II, *Evangelium Vitae* [*Encyclical Letter on the Value and Inviolability of Human Life*] ¶ 90 (1995) (emphasis omitted).

individuals and institutions—can provide helpful support in the education of their children. One area of obvious importance that could effectively provide the assistance parents need in educating their children is the actual educational system. Schools—composed of teachers, counselors, and other parents—provide a valuable service in all areas of child development. Many benefits occur when parents and educational institutions come together and employ educational strategies designed to help students grow mentally and spiritually.¹¹⁰

The following examples illustrate how private organizations are attempting to deter the possession and transmission of sexually explicit material among minors. The approaches taken by these organizations appeal both directly and indirectly to the familial principles previously outlined. Parents, being the primary educators of their children, should explore the approaches of these organizations, and implement the practices that apply. Active participation, support, and cooperation from families and the community will undoubtedly affect the trend of minors engaged in sexting.

B. *How Private Entities Are Effectively Combating Sexting*

Whether through simple brochures, parental control software, or even humorous videos designed to educate minors of the dangers associated with digital abuse, private organizations have actively engaged in the sexting preemptive process. For example, the National Center for Missing & Exploited Children (“NCMEC”), a private, nonprofit organization, devoted to providing information and resources concerning the victimization of children, developed a program called *NetzSmartz*,¹¹¹ designed to educate teens about cell phone and internet safety. Pursuant to this initiative, the NCMEC developed a simple brochure titled, “Tips to Prevent Sexting.”¹¹² The pamphlet offers five simple tips for minors to consider before sending a sext. These include contemplating the consequences of

110. Although the importance of parental education is emphasized and discussed throughout this Note, it should be noted that not all parents act in the best interest of their children. Therefore, the various professionals making up the composition of a school may offer effective alternatives to a child victim of poor parenting. Accordingly, educators, as well as parents, should employ the soon-to-be-mentioned methods designed to curtail sexting.

111. NSTEENS, <http://www.nsteens.org> (last visited Mar. 4, 2012).

112. NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, TIPS TO PREVENT SEXTING (2009), available at <http://www.doj.state.wi.us/news/files/SextingPrevention.pdf>.

sexting¹¹³ before one engages in the act, and reporting any sexually explicit material one receives. An even more practical and attractive preventive device developed by the NCMEC includes a webpage designed exclusively for classroom education of digital safety.¹¹⁴ The webpage includes numerous videos, and even a powerpoint presentation, illustrating realistic examples of the harm and issues resulting from inappropriate cell phone and internet use.

LG Electronics (“LG”), a mobile phone and entertainment technology manufacturing company, also engaged in a program designed to deter the transmission of sexually suggestive images and messages among minors. LG already provides any customer viewing its mobile phone services online with information concerning sexting.¹¹⁵ Of greater distinction, however, the company partnered with the famous host of *Inside the Actors Studio*, James Lipton, in its *Give It a Ponder* project. The campaign featured different commercials involving teenagers about to engage in irresponsible activity with their cell phones.¹¹⁶ Each commercial, narrated by and featuring Lipton, depicted him removing his beard and placing it on the teen’s face before he or she could send a text message. Thereafter, the teen would stroke his or her newly-acquired beard while Lipton would explain the potential consequences of the text message, followed by stating, “Before you text, give it a ponder.”

Apple Computer, Inc. has offered a technological product exemplifying how a private organization can literally control sexting. “Apple has been awarded a patent that could be used to block people from sending and receiving sexually explicit text messages”¹¹⁷ This technology, although exclusively available to Apple products (particularly the iPhone) and “not yet on the market, would allow the phone’s administrator to block it from sending or receiving texts containing ‘objectionable material.’”¹¹⁸ The patent exhibits Apple

113. The NCMEC notes in the brochure that sexually explicit images sent to another minor may be viewed by family members, teachers, and employers. *See id.* at 1. Additionally, the NCMEC states that once a sext is sent, the sender has no control over where the sext ends up next. *Id.* Finally, the brochure specifies that sexting may result in severe criminal penalties. *Id.*

114. *Teaching Materials*, NSTEENS, <http://www.nsteens.org/TeachingMaterials> (last visited Mar. 4, 2012).

115. *See* Dr. Charles Sophy, *The Download on Sexting*, TEXTED, <http://www.lg.com/us/mobile-phones/text-education/articles/the-download-on-sexting.jsp> (last visited Mar. 4, 2012).

116. *See GiveItaPonder’s Channel*, YOUTUBE, <http://www.youtube.com/user/GiveItaPonder> (last visited Mar. 4, 2012).

117. Simon Doggett, *Apple Patents ‘Anti-Sexting’ Technology*, FOXNEWS.COM (Oct. 13, 2010), <http://www.foxnews.com/scitech/2010/10/13/apple-patents-new-anti-sexting-technology>.

118. *Id.*

Computer's consistent approach to exclude sexually explicit material from its products.¹¹⁹ Co-founder and CEO, the recently deceased Steve Jobs, stated that other mobile phone providers allow access to pornography.¹²⁰ "You can download porn, your kids can download porn. That's a place we don't want to go"¹²¹

In conformity with Apple's approach to curtail irresponsible cell phone and other communication technology use by teenagers through directly inhibiting the device, other companies have developed similar technology with broader application. For instance, SocialShield, a company that provides internet tracking software, allows parents to download their software (at a cost, of course) and use it to monitor their children's internet activity on social networking websites.¹²² The software compiles all of the information, photos, and discussions on a particular individual's social network account(s), screens that material for inappropriate language or conversations, and presents the information in an easy-to-read report for the parent's convenience.¹²³

Another example—one that focuses directly on the problem of sexting and cyberbullying via various brands of mobile phones—offers a filtering program designed to restrict inappropriate messages sent to children. MouseMail, a program available for free to parents, "will let parents track both questionable e-mails and cellphone text messages."¹²⁴ Similar to the way SocialShield operates, MouseMail filters a child's text or email messages for inappropriate language, and forwards any suspicious material to a parent.¹²⁵ For those families without Apple products, the program is available for free on most major smartphones.¹²⁶ "The system is designed to help a parent manage their child's relationship with the Internet and their relationship, in turn, [with] their child."¹²⁷

The aforementioned examples provide classic illustrations of a practical application of subsidiarity to the problem of sexting among minors. At this point, it should be evident that the principle of

119. *Id.*

120. *Id.*

121. *Id.*

122. See *How SocialShield Works*, SOCIALSHIELD, www.socialshield.com/company/how-it-works (last visited Mar. 4, 2012).

123. *Id.*

124. Mike Snider, *MouseMail Filtering Program Traps Kids' Cyberbullies*, USATODAY.COM (Jan. 5, 2011, 11:41 AM), http://www.usatoday.com/tech/news/internetprivacy/2011-01-05-1Acyberbully05_ST_N.htm.

125. *Id.*

126. *Id.*

127. *Id.* (internal quotations omitted).

subsidiarity requires balance among the citizens and the sovereign. If the government has no business intervening in a matter properly reserved for private individuals or organizations, then it should respect its boundaries and desist. On the contrary, if a lower community cannot effectively maintain the responsibilities of a particular initiative, the government should assist, but only to the extent necessary to foster the impractical duties of the decentralized entity. Finally, when the private entity embarks on a task that it can efficiently and more appropriately handle, it must always act in pursuit of the common good. The harmonious approach to social issues of limited governmental intrusion, along with active participation and assistance from the private sector, illustrates the central component of theological subsidiarity.

CONCLUSION

This Note demonstrates that some social concerns should not be exclusively managed by the government. Various examples and arguments have been presented that portray both the problems associated with governmental prevention of juvenile sexting, and at the same time, the government's obligation to be involved. Juvenile sexting is a dangerous practice, and is therefore properly categorized as a crime. It involves the production, distribution, and possession of child pornography when engaged in between minors, or minors and adults. Rightfully so, the government needs to prosecute some cases of sexting to prevent its actual and potentially harmful consequences. It is, however, irresponsible of the community to rely on total government control of this problem.

Private individuals and organizations can combat the dangerous effects associated with the transmission of sexually explicit material among minors. Parents embrace a God-given duty to be the first to educate their children as to matters of sexuality and morality. As suggested throughout this Note, when parents willingly use the resources of private institutions to prevent children from sexting, accompanied by their personal approach to familial education, they are effectively performing a task appropriately within their control, not one solely reserved for the government.