

## SEXTING AND THE FATE OF FIRST-TIME OFFENDERS IN FLORIDA

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### I. INTRODUCTION

Amanda and Jorge have been dating for some time.<sup>2</sup> Although they are minors, Amanda has consensually sent Jorge nude pictures of herself and of them engaging in sexual behavior over the course of their relationship.<sup>3</sup> Amanda sent Jorge the digital images by email from her home computer.<sup>4</sup> Now they are facing child pornography charges as juveniles for possessing these pictures, and may be required to register as sex offenders.<sup>5</sup> This is a reality for minors who are caught consensually “sexting.”<sup>6</sup>

Minors have been exposed to handheld technology at an exponential rate in recent years, especially with the proliferation of text messaging.<sup>7</sup> Abundant text messaging has resulted in rampant sexting.<sup>8</sup> Sexting is a

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1. Juris Doctor Candidate 2017, St. Thomas University School of Law, ST. THOMAS L. REV., Staff Editor; Bachelor of Science in Advertising, University of Florida 2013. I would like to thank Ana Perez-Dorrego for spending countless hours with me in the library and staying with me up until the submission deadline. A special thank you goes to Mickey McMahon for introducing me to this organization and for always greeting me with a smile. To my family, thank you for encouraging me throughout this arduous process— they had forgotten I existed until the end of the semester. Finally, I would like to thank the editors for devoting their time to each of my footnotes. I wish to particularly thank Maria Asencion for taking careful consideration in preserving my voice in the article. All errors are my own.

2. See generally *A.H. v. State*, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007) (holding that juveniles have no reasonable expectation of privacy in photographs, and the statute governing offenses of promotion of sexual performance by child does not violate the state constitutional right to privacy).

3. *Id.*

4. *Id.*

5. *Id.* at 235; see *infra* note 29.

6. See *infra* Part II (a), (c); see also *infra* note 19.

7. See Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RES. CTR., (2015), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/> (discussing the use of smartphones across the United States). Fifteen percent of young, American adults, ages eighteen to twenty-nine, are heavily dependent on a smartphone for online access. *Id.*

8. Eric Rice et al., *Sexting and Sexual Behavior Among Middle School Students*, PEDIATRICS, Apr. 2014, e21, e26–e27 (July 2014), <http://pediatrics.aappublications.org/content/pediatrics/early/2014/06/25/peds.2013-2991.full.pdf> (analyzing sexual behaviors among middle school students). This study provides that middle school students who text frequently and send and receive sexts are more likely to report that they are sexually active. *Id.*

colloquial term combining the words “sex” and “text.”<sup>9</sup> It defines the act of distributing sexually explicit or implicit messages or images by mobile device.<sup>10</sup> Although sexts are commonly sent through cell phones, minors also send sexts through social media platforms, emails, and interactive video game software.<sup>11</sup>

This comment addresses the discrepancy posed in Florida’s reorganized sexting legislation, Florida Statute section 847.0141, between the sanctions for first-time sexting offending minors and second-time offenders, and the limited resources available to deter minors from recommitting the same offense.<sup>12</sup> To begin, Part II introduces the pervasiveness of sexting among minors, cases of sexting and current sexting legislation in the United States, Florida’s stance on sexting between minors, and diversion programming for delinquent youth.<sup>13</sup> Next, Part III addresses Florida’s sexting legislation, as well as Florida’s different juvenile delinquency prevention programs.<sup>14</sup> Additionally, Part IV

9. See *Miller v. Mitchell*, 598 F.3d 139, 151 (3d Cir. 2010) (holding a parent was entitled to preliminary injunction on her First Amendment claim); see also Lawrence G. Walters, *How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, 9 FIRST AMEND. L. REV. 98 (2010) (discussing the concept of sexting as an exploratory phase of communication among juveniles). The prosecutor in the case threatened to file criminal charges against the minor if she did not participate in a rehabilitative program. *Miller*, 598 F.3d at 143. The minor’s mother challenged the prosecutor claiming that this violated the First Amendment because it was compelled speech. *Id.*

10. See FLA. STAT. § 847.0141(1) (2015) (defining sexting as a prohibited act). Florida law defines that sexting occurs when:

A minor commits the offense of sexting if he or she knowingly: (a) Uses a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another minor any photograph or video of any person which depicts nudity, as defined in s. 847.001(9), and is harmful to minors, as defined in s. 847.001(6). (b) Possesses a photograph or video of any person that was transmitted or distributed by another minor, which depicts nudity, as defined in s. 847.001(9), and is harmful to minors, as defined in s. 847.001(6).

FLA. STAT. § 847.0141(1).

11. See Dena Sacco et al., *Sexting: Youth Practices and Legal Implications*, THE BERKMAN CTR. FOR INTERNET & SOCIETY AT HARV. U., 3 (June 2010), <http://poseidon01.ssrn.com/delivery.php?ID=340072087113070000113092014081075010104011070078032074103064124066095066018082112089060006044043014123121113112105067000068120043009095008082113005078071068127023028039001117073005124079121064097105001020102026073124099098091119119000079085074068094&EXT=pdf> (addressing the legal and practical issues relating to sexting); see also Kaitlin Lounsbury, et al., *The True Prevalence of “Sexting,”* CRIMES AGAINST CHILD. RES. CTR., (Apr. 2011), [http://www.unh.edu/ccrc/pdf/Sexting%20Fact%20Sheet%204\\_29\\_11.pdf](http://www.unh.edu/ccrc/pdf/Sexting%20Fact%20Sheet%204_29_11.pdf) (critiquing studies that claim to report the prevalence of sexting). Minors use a variety of technological resources—web cameras, computers, digital cameras, etc.—to capture and send sexually explicit images. Sacco et al., *supra*.

12. See *infra* Part III–IV.

13. See *infra* Part II.

14. See *infra* Part III.

analyzes the changes to Florida's sexting statute, Florida's current cyber-safety education, and diversion programming effectiveness.<sup>15</sup> Moreover, Part V offers a practical solution to increase sanctions for first-time offenders to deter repeated offenses, while implementing cyber-safety education that hones in on consensual sexting.<sup>16</sup> Finally, Part VI requests that the Florida Legislature take the solutions into account and amend Florida Statute Section 847.0141.<sup>17</sup>

## II. BACKGROUND

### A. THE PREVALENCE OF SEXTING

Many teens between the age of fifteen and seventeen distribute sexts, while teens as young as thirteen have confessed to sexting with other minors.<sup>18</sup> Generally, these messages have become commonplace among teenagers when communicating with peers.<sup>19</sup> For the older age group, sexts are viewed as a means of flirting.<sup>20</sup> A 2012 *Pediatrics* study shows that 67.97 percent of participants have their own cell phone, and 20 percent said they have received sexually explicit pictures via text.<sup>21</sup>

However, as shown by more recent studies, there are several inconsistencies across newer studies where the researched age groups are overly broad.<sup>22</sup> These studies encompass more young adults than minors,

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15. See *infra* Part IV.

16. See *infra* Part V.

17. See *infra* Part VI.

18. See Rice et al., *supra* note 8, at e25 (explaining how more male participants indicated they receive sexts); Ryan Hoder, *Study Finds Most Teens Sext Before They're 18*, TIME (July 3, 2014), <http://time.com/2948467/chances-are-your-teen-is-sexting/> (reporting study findings and explaining how parents should approach talking to children about sexting); see also Steven Woda, *What is the Average Age That a Teen Starts Sexting?*, UKNOWKIDS.COM (June 25, 2012 at 12:15 PM), <http://resources.uknowkids.com/blog/bid/175248/What-is-the-Average-Age-That-a-Teen-Starts-Sexting> (listing the percentages of sexters within different age groups). Participants that sent more than one hundred texts a day reported to be sexually active. Rice et al., *supra* note 8, at e21. According to a 2009 study, nine percent of thirteen-year-olds sext, thirteen percent of fourteen-year-olds sext, and seventeen percent of fifteen-year-olds sext. Woda, *supra*.

19. Hoder, *supra* note 18 (interviewing the researcher of the sexting study). Minors thought that sexting was a standard way to interact with peers. *Id.*

20. *Id.*

21. See Rice et al., *supra* note 8, at e25 (conducting a study on middle school-aged children sexual behaviors). This study surveyed randomly selected middle school-aged children and gathered information on their sexual activity while focusing on what technological devices they have access to. *Id.*

22. See Lounsbury, et al., *supra* note 11, at 3 (explaining how several research studies are not truly representative of how prevalent sexting is among minors). The author indicates how the Sex & Tech survey included teens—ages eighteen and nineteen—inaccurately representing a

and use the term sexting too loosely.<sup>23</sup> Moreover, some media outlets exaggerate their findings and mix study results of minors who sext with adults, and minors who sext with their underage peers.<sup>24</sup> For example, a study from *Cyberpsychology, Behavior, and Social Networking* indicates statistics have increased only slightly in comparison to previous studies, but another 2015 Drexel University study specifies that sexting is more prevalent than ever among older teens.<sup>25</sup> Nevertheless, there is a general increasing trend for sexting among minors.<sup>26</sup>

In the eyes of the law, adolescents who engage in sexting are viewed as disseminators of self-produced child pornography.<sup>27</sup> At the inception of sexting legislation, prosecutors criminally charged juvenile sexters.<sup>28</sup> Minors were charged with distributing child pornography, and were ordered to register as sex offenders.<sup>29</sup> Registering as a sex offender meant minors would have a stigma attached to their name and their record.<sup>30</sup>

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survey pool of minors who were not really minors. *Id.* at 2.

23. *Id.* at 3.

24. *Id.* at 4.

25. See Alex McKechnie, *Majority of Minors Engage in Sexting, Unaware of Harsh Legal Consequences*, DREXELNOW (June 18, 2014), <http://drexel.edu/now/archive/2014/June/Sexting-Study/> (conducting a survey among undergraduate students to measure awareness of legal ramifications for sexting); MELISSA FLESCHLER PESKIN ET AL., 16 CYBERPSYCHOLOGY, BEHAV., & SOC. NETWORKING, 456–57, (Mary Ann Liebert, Inc., 2013) (reporting that the study differed from others because females were the main senders of sexts and males were the main recipients); see also Kelly Wallace, *Chances are, your teen has sexted*, CNN (Jan. 2, 2015, 2:40 PM), <http://www.cnn.com/2014/11/18/living/teens-sexting-what-parents-can-do/> (comparing study results on minors' sexting legal ramification awareness). The study shows that participants who sexted when they were minors would have forgone the activity had they known there were legal ramifications. McKechnie, *supra*. The article indicates how Diana Graber's study revealed that the participants, who are minors, knew what a sext was but none of them knew they could be charged in some states with possessing child pornography. Wallace, *supra*.

26. See Jim Bradley, *9 Investigates: Growing trend of sexting among teenagers*, 9 WSOC (May 6, 2015, 9:39 AM), <http://www.wsoctv.com/news/news/special-reports/9-investigates-growing-trend-sexting-among-teenage/nk9hK/> (referring to a study that shows how twenty-eight percent of minors have sent nude selfies). A thirteen-year-old boy was caught with nude pictures of a female minor on a file sharing account. *Id.* If convicted, the North Carolina boy could face registering as a sex offender. *Id.*

27. See Jennifer D. Hill, *The Teen Sexting Dilemma: A Look at How Teen Sexting Has Been Treated in the Criminal Justice System and Suggested Responses for Arizona*, 4 PHX L. REV. 561, 562 (2010) (“[Sexting], as defined by current federal and state laws, amount[s] to the production, possession, and distribution of child pornography”).

28. See *Miller*, 598 F.3d at 143 (affirming the preliminary injunction and remanded for further proceedings).

29. See *id.*; but see *U.S. v. Nash*, 1 F. Supp. 3d 1240, 1249 (N.D. Ala. 2014) (distinguishing Missouri law which makes juveniles become registered sex offenders); see generally Beth DeFalco, *NJ girl, 14, arrested after posting nude pics*, ASSOCIATED PRESS (Mar. 27, 2009), [http://www.foxnews.com/printer\\_friendly\\_wires/2009Mar27/0,4675,TeenChildPorn,00.html](http://www.foxnews.com/printer_friendly_wires/2009Mar27/0,4675,TeenChildPorn,00.html) (showing a 14-year-old girl was charged with child pornography and could face registering as a

## B. SEXTING CASES IN THE UNITED STATES

In 2010, a Pennsylvania prosecutor charged a group of teens with distributing child pornography after the teens had consensually sent and received several messages containing nude photos.<sup>31</sup> The prosecutor's belief was that the teens needed to understand the severity of their actions and should be sanctioned accordingly.<sup>32</sup> The Pennsylvania Legislature disagreed with the charge and indicated that new laws should be enacted to avoid grouping these teens with adult sexual predators.<sup>33</sup>

In *Miller v. Mitchell*, the United States Court of Appeals for the Third Circuit denied the state attorney's attempt to prosecute a sixteen-year-old for consensually sending "provocative" pictures of herself to peers if she failed to participate in an educational program.<sup>34</sup> The court found that the state attorney attempted to impose a sanction out of moral duty as opposed to legal duty.<sup>35</sup> The minor, M.M., argued that the state attorney could

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sex offender); see Alicia Fabbre, *Joliet teens in custody after sex video shows up on Twitter*, police say, THE CHICAGO TRIBUNE (Mar. 31, 2015), <http://www.chicagotribune.com/suburbs/joliet-romeoville/crime/ct-jlt-joliet-teens-twitter-sex-met-20150331-story.html> (describing an incident where teens face child pornography charges); Jenna Leventoff, *Teens Should Not Face Criminal Sanctions For "Sexting"*, EQUAL FUTURE (Apr. 18, 2015), <https://www.equalfuture.us/2015/04/08/teens-should-not-face-criminal-sanctions-for-sexting/> (reporting how four teens are involved in a sexting case after posting a sex video on Twitter and face felony child pornography charges). A young, New Jersey girl posted about thirty nude photos of herself on MySpace.com because she wanted her boyfriend to see them. DeFalco, *supra*. Four teens face the possibility of registering as sex offenders after posting a video of them having sex on Twitter. Fabbre, *supra*. Although not a minor, a twenty-two-year-old man was sentenced to register as a sex offender when provocative pictures of his sixteen-year-old girlfriend were found on his phone. *Nash*, 1 F. Supp. 3d at 1241. Nash's girlfriend had sent the pictures through text messages. *Id.*

30. See *In re C.P.*, 131 Ohio St. 3d 513, p. 45 (2012) (indicating that juvenile offenders have the stigma of a sex offender from the start of their adult life and will not be able to create a good self-image in the community); see generally Hill, *supra* note 27, at 574. "[A juvenile sex offender's] potential will be squelched before it has a chance to show itself." *In re C.P.*, 131 Ohio St. 3d, at p. 45.

31. Michelle Miller & Phil Hirschorn, "Sexting" Leads to Child Porn Charges for Teens, CBS NEWS (Jun. 5, 2010, 7:59 PM), <http://www.cbsnews.com/news/sexting-leads-to-child-porn-charges-for-teens/> (reporting the teens at Susquenita High were charged felony pornography charges).

32. See *id.* (indicating that the prosecutor believes that sexting is a form of child pornography).

33. See *id.* (reporting that the state representative wanted a commonsensical approach and suggested that minors should be charged with misdemeanors instead of felonies for sexting offenses).

34. *Miller v. Mitchell*, 598 F.3d 139, 144 (3d Cir. 2010) (finding a minor's First Amendment right to be free from compelled speech violated when a prosecutor's threat for potential charges was retaliatory in nature).

35. See *id.* at 150-51 ("We agree that an individual District Attorney may not coerce parents

neither interfere with her mother's parenting, nor prosecute the minor with child pornography charges.<sup>36</sup> Furthermore, M.M. contended she should not be held liable for a child pornography charge for merely appearing in the message.<sup>37</sup>

At the end of September 2015, a North Carolina teen appeared in court facing five child pornography charges after sexting with his girlfriend.<sup>38</sup> Four of the charges were for pictures he took of himself, and the last charge was for having a nude picture of his girlfriend on his phone.<sup>39</sup> The young lady also faced criminal charges.<sup>40</sup> According to an *Ars Technica* article, the charging information described the girl simultaneously as the victim and perpetrator.<sup>41</sup> The North Carolina juvenile court system only tries cases for juveniles up to seventeen years of age, and both teens could be tried in adult criminal court facing felony charges if the case continues.<sup>42</sup>

### C. SEXTING LEGISLATION IN THE UNITED STATES

Upon closer inspection of child pornography statutes, juvenile sexual offender statutes, and other sexting legislation, there is an overlap of

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into permitting him to impose on their children his ideas of morality and gender roles”).

36. *Id.*

37. *See id.* at 154 (explaining that the existence of a photograph is insufficient evidence to prove that a pornographic photograph was disseminated); *see also* Ashby Jones, *Third Circuit Bans 'Sexting' Prosecution Against Minors*, THE WALL STREET J. L. BLOG (Mar. 18, 2010, 5:14 PM), <http://blogs.wsj.com/law/2010/03/18/third-circuit-bans-sexting-prosecution-against-minors/> (reporting that three judges told a prosecutor that he could not charge a minor with disseminating child pornography for merely appearing in the image). The court held that the state attorney could not threaten or coerce the minor with participating in a violence education program with potential child pornography charges. Jones, *supra*.

38. Cyrus Farivar, *2 North Carolina teens hit with child porn charges after consensual sexting*, ARS TECHNICA (Sep. 3, 2015, 5:56 PM), <http://arstechnica.com/tech-policy/2015/09/busted-in-north-carolina-you-can-have-sex-at-16-but-you-cant-sext/> (describing how two dating minors consensually sent nude photos of themselves to each other but are now facing criminal charges). *But see* *6 juveniles charged after 'sexting' investigation*, MY FOX BOSTON (Jul. 9, 2015, 2:49 PM), <http://www.myfoxboston.com/story/29513040/6-juveniles-charged-after-sexting-investigation> (explaining how six juveniles were charged with sexting, including dissemination and possession of child pornography). This case involved teens harassing each other with graphic photos of the each other in order to coerce sexual behaviors versus other situations where teens knowingly and willingly consented to sending sexually graphic images to one another. *6 juveniles charged after 'sexting' investigation, supra*.

39. *See* Farivar, *supra* note 38.

40. *See id.* (indicating that no coercion or further distribution of the sext was found).

41. *See id.* (reporting that the young lady took a plea deal after originally being charged with two counts of exploitation of a minor).

42. *See id.*; *see also* Hoder *supra* note 18.

minors who are simultaneously considered criminals and victims.<sup>43</sup> As of 2013, twenty states—including Florida—have enacted sexting legislation.<sup>44</sup> For example, Georgia charges sexting minors with misdemeanors, while New York's legislation focuses on educating minors on the dangers of posting and distributing images of themselves.<sup>45</sup> Florida recently enacted a bill on sexting that became effective on July 1, 2015.<sup>46</sup> The statute now mandates state courts to forgo criminal charges against first-time juvenile sexting offenders.<sup>47</sup> The restructured statute requires juveniles to complete community service hours, pay a citation, or attend a local cyber-safety program, or any combination of the three within thirty days after receiving a citation.<sup>48</sup>

#### D. FLORIDA'S TAKE ON SEXTERS

In *A.H. v. State*, Florida's First District Court of Appeal ruled that two minors had no reasonable expectation of privacy when sharing nude photographs with one another because it was possible that these photographs could be disseminated.<sup>49</sup> A.H., sixteen years old, and J.G.W.,

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43. See Megan Sherman, *Sixteen, Sexting, and A Sex Offender: How Advances in Cell Phone Technology Have Led to Teenage Sex Offenders*, 17 B.U.J. SCI. & TECH. L. 138, 139 (2011) (indicating that there is no general consensus in the legal community for properly punishing juvenile sexters). There is a balance that prosecutors are trying to find when charging minors with sexting because the law is unclear. *Id.* at 139–40.

44. See Sameer Hinduja, Ph.D. & Justin W. Patchin, Ph.D., *State Sexting Laws*, CYBER BULLYING RES. CENTER, (created Feb. 2013), <http://cyberbullying.org/state-sexting-laws.pdf>. (listing many states that enacted sexting statutes tailored for minors as of 2013); see also 2010 Conn. Acts 10-191 (reg. Sess.) (showing how Connecticut no longer requires juveniles charged with sexting to register as sex offenders). Examples of states that have enacted sexting statutes for minors include: Arkansas, Georgia, Indiana, Maine, New York, Pennsylvania, Rhode Island, South Dakota, and West Virginia. See Hinduja & Patchin, *supra*.

45. Compare GA. CODE § 16-12-100.2(a) (referring to the legislation as the Computer or Electronic Pornography and Child Exploitation Prevention Act of 2007), [and] N.Y. SOC. SERV. § 458-l(4) (McKinney 2012) (describing an educational program on the consequences of sending sexually explicit images), with Hinduja & Patchin, *supra* note 44 (referring to all of the states that have recently enacted sexting legislation). Some states have made the crime a misdemeanor for minors while others have opted to develop educational programs. See Hinduja & Patchin, *supra* note 44. The programs are designed to be age-appropriate for minors who have committed sexting offenses. N.Y. SOC. SERV. § 458-l(4), *supra*.

46. See generally FLA. STAT. § 847.0141 (explaining Florida's definition of juvenile sexting); 2015 Fla. H.B. 133. (West) (detailing the enrolled law for juvenile sexting). The enrolled bill describes the court's role when sanctioning minors for first-time sexting offenses. 2015 Fla. H.B. 133. Except for one vote, both chambers voted in favor of the bill. *Id.*

47. See generally FLA. STAT. § 847.0141 (providing the court a few options when sanctioning first-time juvenile sexting offenders). First-time offenders commit a noncriminal violation and in lieu of going to court, the court may impose any of the three sanctions. See *id.*

48. See *id.* § 847.0141(3)(a).

49. See *A.H. v. State*, 949 So.2d 234, 238 (Fla. Dist. Ct. App. 2007) (holding that juveniles

seventeen years old, were dating at the time.<sup>50</sup> A.H. claimed that because her sexually explicit photos were never shared with a third party, Florida Statute section 827.071(3) did not apply to her.<sup>51</sup> Moreover, the court held that Florida Statute section 827.071(3) was meant to protect minors from the harms of distributing sexually explicit photographs.<sup>52</sup> The court explained since computers have the potential of being shared—or worse, hacked—the nude photographs could have been spread.<sup>53</sup> Lastly, the court recognized how the minors could face hardship in their personal lives and careers should these nude photographs become available to the public.<sup>54</sup>

In 2009, Phillip Alpert, a young man who had just turned eighteen, was forced to register as a sex offender after sending a picture of his naked sixteen-year-old ex-girlfriend to family and friends.<sup>55</sup> Although he sent the photo without consent, Alpert is among rapists and child molesters on the sex offender registry.<sup>56</sup> Joe Abruzzo, a Florida state representative who recently assisted in rewriting the sexting law, explained: “[t]he punishment [does] not fit the crime[.] [A]t the end of the day, [we are] not going to label you a sex offender. [The new law] gives parents and the school the opportunity to let them know this could become serious if you continue.”<sup>57</sup>

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have no reasonable expectation of privacy in photographs, and the statute governing offenses of promotion of sexual performance by a child does not violate the state constitutional right to privacy); *see also* FLA. STAT. § 827.071(3) (providing that an individual is guilty of promoting a child’s sexual performance where the individual produces, directs or promotes the sexual performance of a child under the age of eighteen).

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

51. *See id.*

52. *See id.* at 238 (“The fact that these photographs may have or may not have been shown in no way affects the minor’s reasonable expectation that there was a distinct and real possibility that the other teenager involved would at some point make these photos public.”).

53. *See id.* at 239 (noting how computers have long-term storage for information that could lead to future dissemination of the nude pictures).

54. *See id.* (explaining how the minors are not mature to make rational decisions and cannot comprehend the implications of making these videos).

55. *See* Deborah Feyerick & Sheila Steffen, ‘Sexting’ lands teen on sex offender list, CNN (Apr. 8, 2009, 10:50 AM), <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/> (explaining how an Orlando teen will be a registered sex offender until he is forty-three years old).

56. *See id.*

57. *See* 2011 Fla. H.B. 75 (proposing new legislation for first-time offending sexters); *see also* *Sexting Laws Change in Florida: New Law Gives Teens Lesser Punishment*, NEWS 4 JAX (Oct. 3, 2011, 3:52 PM), <http://www.news4jax.com/news/Sexting-Laws-Change-in-Florida/1940996> [hereinafter *Change*] (describing the changes in Florida’s new sexting law). Instead of a criminal charge, minors will receive a monetary penalty, community service project or participate in a cyber-safety program when caught sexting for the first time. *See* 2011 Fla. H.B. 75. Abruzzo addresses that changing the law will give parents and schools a better opportunity to learn about the repercussions of sexting. *See Change, supra*.

Abruzzo further discussed how the mental state of a registered sex offender is not the same as a first-time juvenile sexter.<sup>58</sup>

In 2011, a major shift in Florida juvenile sexting legislation took place so minors could no longer be convicted of felony charges, or be required to register as sex offenders when found sexting.<sup>59</sup> Florida Statute section 847.0141, defines a minor's distribution of messages depicting nudity and the potential charges against first-time offenders.<sup>60</sup> These charges are drastically different from the adult charges set out in Florida Statute section 775.082(4).<sup>61</sup> Florida Statute section 847.012(4) strictly prohibits the use and dissemination of child pornography.<sup>62</sup> The law also prohibits transmitting child pornography through any electronic device.<sup>63</sup> Moreover, in January 2015, the Fourth District Court of Appeal in Florida held that a juvenile did not commit a delinquent act when she sent a picture of her vagina to a thirteen-year-old classmate.<sup>64</sup> The court recognized that a first-time sexting offender has committed a noncriminal act under the Florida statute, and is thus not subject to delinquency proceedings.<sup>65</sup>

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58. *Change, supra* note 57; compare *Section 3: Common Characteristics of Sex Offenders, CTR. FOR SEX OFFENDER MGMT.*, [http://www.csom.org/train/etiology/3/3\\_1.htm](http://www.csom.org/train/etiology/3/3_1.htm) (last visited Feb. 29, 2016) (providing common characteristics of adult sex offenders) with Hoder, *supra* note 18 (describing how juveniles perceive sexting as casual, innocuous communication). Over time, researchers have noticed:

[S]ome sex offenders have interests in—or are aroused to—things that are considered to be outside the realm of healthy or appropriate sexual interests or behavior, including, but not limited to, the following: [e]ngaging in sexual contact with young children or adolescents; [h]aving sexual contact with others against their will or without their consent; [i]nflicting pain or humiliation on others; [p]articipating in or watching acts of physical aggression or violence; [e]xposing oneself in a public setting; and/or [s]ecretly watching others who are undressing, unclothed, or engaging in sexual activities.

*Section 3: Common Characteristics of Sex Offenders, supra.*

59. *See Change, supra* note 57.

60. *See generally* FLA. STAT. § 847.0141 (providing that first-time offenses are noncriminal violations).

61. *See generally id.*; but *see* FLA. STAT. § 775.082(4)(a) (explaining the punishment for a first-degree misdemeanor). The statute proffers a definite imprisonment term of no more than a year. *See* § 775.082(4)(a).

62. *See* FLA. STAT. § 847.012(4) (describing that a person may not produce or record anything that depicts a minor in a sexual activity).

63. *See* § 847.0241(1)(a); *see also* FLA. STAT. § 847.0137(1)(b) (defining “transmit” as sending or causing to send an image, information or data regarding sexual conduct of a minor).

64. *See State v. C.M.*, 154 So.3d 1177, 1179 (Fla. Dist. Ct. App. 2015) (indicating that the minor sent the picture to her thirteen-year-old classmate because she was bored).

65. *See id.* at 1179–80.

#### E. JUVENILE DELINQUENCY PREVENTION, DIVERSION, AND CYBER-SAFETY PROGRAMS

First-time offenders are considered low-risk juveniles because they commit noncriminal acts.<sup>66</sup> Generally, low-risk juveniles can be prevented from repeating similar offenses after participating in diversion programs.<sup>67</sup> In *The Effect of Youth Diversion Programs on Recidivism*, a meta-analysis<sup>68</sup> was conducted to compare the outcomes of several diversion programs varying from low-risk juveniles, to medium and high-risk juveniles.<sup>69</sup> As a result, programs directed towards low-risk juveniles who had not been criminally charged were more effective at deterring recidivism<sup>70</sup> than programs for low-risk juveniles who had been criminally charged.<sup>71</sup>

To combat problems like sexting, the Office of Juvenile Justice and Delinquency Prevention for the United States Department of Justice maintains a variety of prevention programs targeting at-risk youth.<sup>72</sup> These programs are available during after-school hours, while others are several months long, catering to more serious crime prevention.<sup>73</sup> Similar

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66. See Randall G. Shelden, *Detention Diversion Advocacy: An Evaluation*, JUV. JUST. BULLETIN 1, 1–2 (1999) (discussing the strengths of diversionary tactics for juveniles who do not commit serious crimes). Diversion programs facilitate the courts because they remove juvenile offenders who have committed non-serious crimes and reduce subsequent offenses. *Id.*

67. See Holly A. Wilson & Robert D. Hoge, *The Effect of Youth Diversion Programs on Recidivism*, 40 CRIM. JUST. & BEHAV. 497 (2013) [hereinafter *Youth Recidivism*] (comparing the outcomes of different juvenile delinquency diversion programs). Low-risk juveniles were compared across several studies to medium- and high-risk juveniles in terms of recidivism after diversion participation. *Id.*

68. See *Meta-analysis*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/meta-analysis> (last visited Feb. 29, 2016) (“A quantitative statistical analysis of several separate but similar experiments or studies in order to test the pooled data for statistical significance . . .”).

69. See *Youth Recidivism*, *supra* note 67, at 507 (indicating that factors such as program coordinators and agencies sponsoring the programs affected the outcome as well).

70. See *Recidivism*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[A] tendency to relapse into a habit of criminal activity or behavior.”).

71. *Youth Recidivism*, *supra* note 67, at 507.

72. See generally *Program Search Results*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, <http://www.ojjdp.gov/programs/ProgResults.asp> (last visited Feb. 29, 2016) (listing multiple resources for juvenile delinquency programs); *Authorizing Legislation*, OFF. OF JUV. JUST. & DELINQ. PREVENTION 1, <http://www.ojjdp.gov/about/legislation.html> (last visited Feb. 29, 2016) In 1974, Congress enacted the Juvenile Justice and Delinquency Prevention Act establishing Office of Juvenile Justice and Delinquency Prevention to support local and state efforts in preventing delinquency and improving the juvenile justice system. See *Authorizing Legislation*, *supra*.

73. See *Program Search Results*, *supra* note 72 (providing access to programs such as the Internet Crimes Against Children Task Force, Safe Start, and Gang Reduction Program). The programs vary in length according to the severity of the minor’s infraction. *Id.*

programs are available in other states.<sup>74</sup> For example, since 1995, the Oklahoma Association of Youth Services has run the First Time Offenders program, which targets first-time offending juveniles who have committed a non-violent misdemeanor or felony.<sup>75</sup> Moreover, the Denver District State Attorney's Office runs a juvenile diversion program for different needs, including family intervention and community service.<sup>76</sup> Additionally, national youth organizations like the Boy Scouts of America have recognized a need for these services, and have developed a comprehensive diversion program.<sup>77</sup>

Florida school districts also offer prevention initiatives and resources for students at school or for parent self-education.<sup>78</sup> The Office of Safe Schools, a Florida Department of Education task force, advocates school safety to students and their parents.<sup>79</sup> Also, the Florida juvenile courts utilize various rehabilitative measures to deter juveniles from committing acts that will impact their criminal record.<sup>80</sup> For example, the State Attorney's Office for the Fourth Judicial Circuit offers a variety of programs to juveniles for drug abuse and violent behavior.<sup>81</sup> These

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74. See generally *First Time Offenders Program*, PEOPLE INC., <http://www.peopleinc.org/Services/YouthFamilyServices/Counseling/FirstTimeOffendersProgram.aspx> (last visited Feb. 29, 2016) (indicating the program focuses on core subjects such as: self-awareness, coping skills, resolving conflict and preventative skills).

75. See *id.*

76. See *Juvenile Diversion*, DENVER DISTRICT ATT'Y, [http://www.denverda.org/Prosecution\\_Units/juvenile\\_diversion/juvenile\\_diversion.htm](http://www.denverda.org/Prosecution_Units/juvenile_diversion/juvenile_diversion.htm) (last visited Feb. 29, 2016) (discussing that the program is tailored to each minor, or client, and he or she must serve a minimum of thirty community service hours).

77. See *Juvenile Diversion Program*, BOY SCOUTS OF AMERICA [http://www.scouting.org/Home/Membership/Cultural\\_Marketing/JuvenileDiversion.aspx](http://www.scouting.org/Home/Membership/Cultural_Marketing/JuvenileDiversion.aspx) (last visited Feb. 29, 2016) (providing a list of resources and activities juveniles can participate in); see also *Girl Scouts Arizona Cactus-Pine*, GIRL SCOUTS OF AMERICA, (2014), <http://www.girlscoutsaz.org/content/dam/girlscoutsaz/documents/gsd-cfact-sheet.pdf> (describing the program for girls in the Arizona Cactus-Pine Girl Scouts region). Young girls who have been incarcerated may participate in a yearlong program that advocates practices such as healthy relationships and substance abuse diversion. See *Girl Scouts Arizona Cactus-Pine*, *supra*.

78. See *Safe Schools*, FLA. DEP'T OF EDUC., <http://www.fldoe.org/schools/safe-healthy-schools/safe-schools/index.shtml> (last visited Feb. 29, 2016) (offering parents different online brochures for education on cyber-safety, such as cyber-bullying).

79. See *id.* (listing all the resources available to parents and schools to promote safer environments for students). The Office of Safe Schools implements special programming on state, district, and school levels. *Id.*

80. See FLA. STAT. § 847.0141(3)(a); see also *Mission*, FLORIDA DEP'T OF JUV. JUST., <http://www.djj.state.fl.us/about-us/mission> (last visited Feb. 29, 2016) (providing the guiding principles of the Florida Department of Juvenile Justice). One part of the court system's mission is to strengthen judicial relationships with the department while reducing juvenile delinquency through effective programming. See *Mission*, *supra*.

81. See *Juvenile Intervention and Prevention Programs*, ST. ATT'Y'S OFF. FOR THE FOURTH JUD. CIR., <http://sao4th.com/how-we-can-help/alternatives-to-court/juvenile-intervention-and->

programs integrate school and parental participation to achieve positive results.<sup>82</sup> Miami-Dade County also offers a prevention program, Miami-Dade County Prevention Initiative, targeting different behaviors that could lead minors to getting arrested.<sup>83</sup>

### III. PROBLEM

#### A. CURRENT FLORIDA LEGISLATION ISSUES

The problem begins with the current legislation.<sup>84</sup> The current statute specifies that second-time offenders may be charged with a first-degree misdemeanor punishable by a fine or term of imprisonment.<sup>85</sup> There is a disparity between the punishment of a first-time offender and a second-time offender.<sup>86</sup> A first-time sexting offender is charged with a noncriminal offense, while the maximum sentence for a second-time offender is either a one-year term of imprisonment, or a thousand dollar fine.<sup>87</sup>

#### B. FLORIDA'S CURRENT PREVENTATIVE PROGRAMS

The government cannot interfere with the manner in which parents raise their children.<sup>88</sup> Legislation must reasonably relate to a purpose

prevention-programs/ (last visited Feb. 29, 2016) (listing programs such as the Program for At-Risk Students and Victim Impact Panels).

82. *See id.*

83. *See Prevention Services*, MIAMI-DADE COUNTY JUV. SERV. DEP'T, <http://www.miamidade.gov/juvenileservices/prevention-services.asp> (last visited Feb. 29, 2016) (cataloging the different issues the Miami-Dade County Prevention Initiative seeks to address).

84. *See* FLA. STAT. § 847.0141(3)(b).

85. *See id.*; *see also* FLA. STAT. § 775.083(1)(d) (indicating a \$1000 fine for a first-degree misdemeanor conviction); FLA. STAT. § 775.082(4)(a), *invalidated by* *Hurst v. Florida*, 136 S. Ct. 616 (Fla. 2016) (designating a definite term of imprisonment not exceeding a year for a first-degree misdemeanor conviction).

86. *See* FLA. STAT. § 847.0141(3)(a) (giving the judge the option to impose a civil penalty of \$60, require eight hours of community service, participate in a cyber-safety program or a combination thereof); *see also How Underage 'Sexting' Laws Have Evolved to Hold Juveniles Responsible . . . Or Have They?*, FOWLER L. GROUP (Feb. 29, 2015), <http://www.thefowlerlawgroup.com/blog/how-underage-sexting-laws-have-evolved-to-hold-juveniles-responsible-or-have-they/> (“[t]he first [-time offenders are] given the most lenient charge of a non-criminal citation, with a proverbial slap-on-the-wrist punishment . . .”).

87. *See* FLA. STAT. § 775.082(1)(d), *invalidated by* *Hurst v. Florida*, 136 S. Ct. 616 (Fla. 2016), 775.083(4)(a).

88. *See Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925) (holding that under the *Meyer* doctrine, the Act of 1922 unreasonably interferes with parents’ upbringing of their children); *see also Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (finding that states shall not unreasonably interfere with children’s education). The court found that, “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny

within the state's scope of power, without interfering with a parent's countervailing interests in raising their children.<sup>89</sup> The United States Supreme Court held in *Quilloin v. Walcott* that parents shall raise their children the way they see fit, and this right is guaranteed to them under the Fourteenth Amendment of the United States Constitution.<sup>90</sup> This is an issue because parents and their children cannot understand the legal consequences of sexting if they do not participate in cyber-education.<sup>91</sup>

The current legislation specifically targets teens engaging in consensual sexting among their age group.<sup>92</sup> Florida's reorganized sexting statute is designed to give the judge the discretion to mandate a citation payment, community service, or attendance to a cyber-safety program.<sup>93</sup> A percentage of the citations are scheduled to go to the county commissioner for cyber-safety programming.<sup>94</sup> Although eighty percent of civil fines go to cyber-safety programs, there is no guarantee that these programs are even available.<sup>95</sup> Nevertheless, cyber-safety programs in Florida are targeted towards awareness-building, cyber-bullying, and general information about sexual predators.<sup>96</sup> The programs that are currently

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have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*, 268 U.S. at 535.

89. See Francis C. Amendola, et al., *Rights of state—Limitations on state interference*, 67A C.J.S. PARENT & CHILD § 45 (2015) (indicating that even if the State is trying to protect the public interest, the legislature may not enact legislation arbitrarily).

90. See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (finding that the Fourteenth Amendment gives parents freedom to practice family values when raising children); see generally U.S. CONST. AMEND. XIV, § 1 (stating no state shall deny any citizen within its jurisdiction equal protection of the law). The court reinforced its position that the Fourteenth Amendment protects families to have the freedom of personal choice with matters concerning family life. *Quilloin*, 434 U.S. at 255.

91. See Carly DiFrancisco, *The "Sexting" Case: Teenage Sexting, The New Constitutional Dilemma*, 8 SETON HALL CIR. REV. 189, 207 (2011) (explaining the options to educate minors about the legal issues surrounding sexting). The author infers that parents may be skeptical about having their children participate in sexting education because it may not be aligned with their family ideals and beliefs. *Id.* Parents may retaliate against the idea claiming these courses impede on the manner in which they raise their children. *Id.*

92. See generally FLA. STAT. § 847.0141(1)(a)(b); compare FLA. STAT. § 847.0141(1) (providing that the focus of this legislation is for juvenile sexters), with FLA. STAT. § 775.21(3) (defining the role of adult sexual predators and sex offenders). The law defines a repeat offender's intent as preying on children while using physical violence to accomplish their crimes. § 775.21(3). The law distinguishes a minor with a first-time offense as committing a noncriminal violation. § 847.0141(3)(a).

93. See FLA. STAT. § 847.0141(3)(a).

94. See FLA. STAT. § 847.0141(6).

95. See generally *id.* ("[I]n lieu of appearing in court, the minor may . . . participate in a cyber-safety program if such a program is locally available.") (emphasis added).

96. See generally *Internet Safety*, POLK COUNTY PUBLIC SCH., <http://www.polk-fl.net/students/onlineresources/onlinesafety.htm> (last visited Feb. 29, 2016) (providing parents access to general cyber-violence resources).

available do not address the area the law seeks to remedy, namely, sexting.<sup>97</sup>

Furthermore, Florida's approach to preventative education falls short in two ways.<sup>98</sup> First, the cyber-safety programs do not have an emphasis on minors consensually sexting other minors.<sup>99</sup> Government entities, like county school boards, designed existing programs under the assumption that parents would understand, and expected parents to teach their children about the legal repercussions of sexting by using resources that cover the sexting concept too broadly.<sup>100</sup> Current programs focus on sexting between adults—usually sexual predators—and minors.<sup>101</sup> Little attention is given to the current legal repercussions of minor-to-minor sexting.<sup>102</sup> Second, there are limited resources for minors *after* they commit the offense.<sup>103</sup> Instead of advocating newer methods of communication, the available programs are overbroad in scope.<sup>104</sup> These programs are inadequate for

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97. *See id.* (providing parents and students general information about sexual predators).

98. *See Safe Schools*, *supra* note 78 (providing limited information on the legal effect of consensual minor-to-minor sexting).

99. *See id.* (listing parent resources for keeping their child's school environment safe); *see also Internet Safety*, FLORIDA DEP'T OF EDUC., <http://www.fldoe.org/schools/safe-healthy-schools/safe-schools/related-topics/internet-safety.stml> (last visited Feb. 29, 2016). The link for Internet safety provides information on cyberbullying and cyberstalking—two forms of nonconsensual communication. *See Internet Safety*, *supra*.

100. *See generally* Leonard Sax, *Leonard Sax: Blame Parents, Not Kids, for Sexting*, WALL STREET J. (Oct. 24, 2013), <http://www.wsj.com/articles/SB10001424052702303902404579147353596877282> (describing how parents are responsible for their child's actions); Perla Tabares Hantman, et. al., *Empowering Students to Engage in Positive Communication: A Guide to Combat Student Sexting*, MIAMI-DADE COUNTY PUBLIC SCH. PROC. MANUAL, <http://ehandbooks.dadeschools.net/policies/27.pdf>, 4 (providing teachers with resources when educating students about sexting). The guiding principles focus on preventing criminal prosecution for sexting associated with bullying and harassing behavior, not consensual. *See* Hantman et al, *supra*, at 5. The author points out that a parent is willing to supply his or her child with a cell phone but does little to monitor or warn the child of this new responsibility. Sax, *supra*.

101. *See Internet Safety*, *supra* note 99 (providing parents access to general cyber-violence resources regarding sexual predators and nonconsensual sexual communication); *see also* Walters, *supra* note 9, at 124 (providing that sexting statutes, such as Connecticut's no longer requires juveniles to register as sex offenders when caught sexting). Legislation such as Connecticut's indicates that legislatures have realized the need to differentiate sexting between an adult and a minor and sexting between two minors. *See* Walters, *supra*.

102. *See* Hantman et. al., *supra* note 100 at 14. (indicating that the current legal repercussions of sexting involve registering as a sex offender).

103. *See Prevention Services*, *supra* note 83 (listing all of the intervention services the juvenile system offers). The intervention programs focus on extreme behaviors such as drug experimentation, substance abuse, and truancy. *See id.*

104. *See* Leventoff, *supra* note 29 (interviewing an ACLU representative for their view on teens and criminal sexting charges); *see also Civil Citation*, MIAMIDADE.GOV, <http://www.miamidade.gov/juvenileservices/civil-citation.asp> (last visited Feb. 29, 2016)

first-time offenders because they are either designed to educate minors on avoiding sexual predators, or they target high-risk youth. Meanwhile, first-time offenders are considered to have committed non-criminal acts, and are thus deemed as low-risk youth.<sup>105</sup>

Programs that deter low-risk minors are critical because minors often become stigmatized when going through the juvenile court system.<sup>106</sup> Similar to the stigma juvenile sex offenders face, minors may still develop a stigma by the very virtue of having contact with the juvenile court system process that often leads to recidivism.<sup>107</sup> Furthermore, status offenders may be stigmatized in the same manner as juvenile delinquents, even though the offense was noncriminal in nature.<sup>108</sup>

#### IV. ANALYSIS

##### A. FLORIDA'S SEXTING LEGISLATION AND SEXUAL OFFENSES LEGISLATION: A COMPARISON

First-time sexting offenders are given the proverbial “slap on the wrist” under Florida Statute section 847.0141, because courts have the discretion to assign either community service hours, issue a fine, or require attendance to a cyber-safety course.<sup>109</sup> However, a second-time offender may face up to one year in prison.<sup>110</sup> The severity of punishment between each offense presents a drastic leap.<sup>111</sup> For example, the civil citation for first-time offenders is \$60, while a fine for second-time offenders is

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(offering first-time offenders a method to avoid arrest but still considering these minors at-risk youth). The program targets first-time offending minors who get arrested for misdemeanors. *Id.* The interviewee proposed that, “[T]eens need to be taught responsible behavior, and how to respect their own and others’ privacy. But that should be done by education, not threatening young people with criminal charges.” *See Leventoff, supra.*

105. *See Internet Safety, supra* note 99.

106. *See Shelden, supra* note 66, at 1 (discussing how diversion programs also help juveniles avoid being stigmatized as criminals and prevent delinquency that the juvenile system sometimes perpetuates).

107. *See id.* at 2.

108. *See Reyna Hardee Bomar, The Incarceration of the Status Offender*, 18 MEMPHIS ST. U. L. REV. 713, 726 (1988) (discussing how states circumvent the federal requirements for juvenile offenders institutionalization); *see also Status Offender*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A youth who engages in conduct that—though not criminal by adult standards—is considered inappropriate enough to bring a charge against the youth in juvenile court[.]”). Inherent with the contact to the juvenile court system is a stigma that will remain with the juvenile for the rest of his or her life. Bomar, *supra*.

109. *See* FLA. STAT. § 847.0141(6).

110. *See id.* § 775.082(4)(a).

111. *See generally id.* §§ 847.0141(6), 775.082(4)(a) (designating sanctions first-time and second-time misdemeanor offenders).

\$1,000.<sup>112</sup> While minors should be made aware of the severity of this conduct, they should not face the stigma attached to a criminal offense if they re-commit the offense.<sup>113</sup>

Ideally, a first-time offender should understand the legal ramifications of sexting after an initial encounter with the court system.<sup>114</sup> However, considering the prevalence of sexting among minors, it is more likely than not that a minor will repeat this behavior.<sup>115</sup> Generally, juvenile legislation focuses more on deterrence and rehabilitation than on punitive measures.<sup>116</sup> Nevertheless, juveniles do not possess the ability to process situations or the consequences of their actions the way adults do.<sup>117</sup> A \$60 fine may not convey the Florida Legislature's intent because it does not balance the nature of the offense with the punishment.<sup>118</sup> Minors rely on higher authority in society to gain perspective on how they should act.<sup>119</sup> Thus, the juvenile court system has the opportunity to represent a higher authority that a first-time offending minor may come to appreciate.<sup>120</sup> The court should impose a more costly fine for first-time offenders because the heavier sanction may force the minor to pay attention as a result of the

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112. See § 847.0141(3)(a); see also § 775.083(1)(d).

113. See Joanna L. Barry, *The Child as the Victim and Perpetrator: Laws Punishing Juvenile "Sexting"*, 13 VAND. J. OF ENT. & TECH. L. 129, 141 (2010) (summarizing child pornography legislation up to 2010 used to charge sexting minors). See generally *A.H. v. State*, 949 So.2d 234, 239 (Fla. Dist. Ct. App. 2007) (explaining how minors do not appreciate the gravity of sending nude photos). The court indicated that minors do not understand how sending nude pictures of themselves will affect their futures. See *A.H.*, 949 So. 2d. at 239.

114. See Sherman, *supra* note 43, at 157 (indicating that the purpose of sexting sanctions is to deter minors from this behavior); see also Brandon Gaille, *20 Juvenile Repeat Offender Statistics*, BRANDON GAILLE (Aug. 23, 2014), <http://brandongaille.com/20-juvenile-repeat-offenders-statistics/> (informing that environmental and family factors influence recidivism). Certain juveniles are more likely to repeat offenses when their parents are more permissive and less authoritative. Gaille, *supra*.

115. See Sherman, *supra* note 43, at 158.

116. See David E. Arredondo, *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & POL'Y REV. 13, 17–18 (2003) (describing how the term "rehabilitative" serves more than just deterrence, punishment, and control). Low-level juvenile offenders do not need the harshest punishments. *Id.* at 18. Instead, courts can impose narrower sanctions that will deter minors from committing the same offense. *Id.*

117. See *id.* at 15 (differentiating that juveniles are more impulsive than adults because of age difference). Juveniles use the limbic system, which causes them to react more quickly, while adults use their frontal cortex, making their thought process a bit more profound. *Id.*

118. See *id.* at 16 (describing how juveniles need a balance between punishment and permissiveness when the judicial system intervenes).

119. See Arredondo, *supra* note 116. ("From a child development perspective, the predictability and consistency of adult attention and responsiveness is often what is most important.")

120. See *id.* at 21 (discussing how juvenile courts should take culture, sex, and social circumstances when deciding sanctioning for minors).

heightened seriousness of the offense, which would hopefully deter the minor from repeated behavior in the future.<sup>121</sup>

#### B. FLORIDA PREVENTATIVE AND DIVERSION PROGRAMS: WHAT IS AVAILABLE FOR FIRST-TIME OFFENDERS

Although the legislative response to a second-time offender should be more stringent, considering that the minor is no longer ignorant to the law, it should remain rehabilitative in nature.<sup>122</sup> The programs currently in place are designed to deter minors from engaging in deleterious behavior.<sup>123</sup> For example, the State Attorney for Florida's Fourth Judicial Circuit runs the Truancy Arbitration Program ("TAP"), working with schools to insure that juveniles showing truant behaviors<sup>124</sup> increase school attendance through hearings conducted by TAP's team.<sup>125</sup> However, some of these programs do not specifically focus on the legal repercussions of consensual sexting.<sup>126</sup> Many of the programs place consensual sexting in the same category as cyber-bullying.<sup>127</sup> Moreover, these programs are not designed for minors who have committed noncriminal acts, such as sexting.<sup>128</sup>

Most of the sexting cases discussed above dealt with minors engaging in consensual sexting.<sup>129</sup> The sites and resources that are available to parents through the juvenile judicial system are limited in educational value because they refer to sexting as a nonconsensual act.<sup>130</sup> Also, many of

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121. See *id.* at 20 (comparing how long detentions for minors are counterproductive sanctions as opposed to making minors stay in on a Saturday night). A teenager would have a greater reaction to staying at home on a Friday or Saturday night because those are opportunities where he or she will miss out on being around their peers. *Id.* Should a parent punish the minor for months on end, the child may develop greater delinquent behavior and become immune to the punishment. *Id.*

122. See *id.* at 18 (explaining that rehabilitation is used to foster positive social developments within the youth).

123. See *supra* text accompanying notes 78–81.

124. See *Truancy*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining truancy as "willful and unjustified failure to attend school by one who is required to attend.").

125. See *Juvenile Intervention and Prevention Programs*, *supra* note 81 (describing that the program cautions parents that the program will take all measures to insure the child's school attendance).

126. See *supra* text accompanying note 99.

127. See *supra* text accompanying notes 92–93.

128. See *supra* text accompanying notes 78–81; see generally Wilson & Hoge, *supra* note 67, at 511 (reporting how medium to high-risk youth are less affected by rehabilitative programs because they have already experienced the juvenile justice system).

129. See *supra* text accompanying note 31; see also *supra* text accompanying note 34; *supra* text accompanying note 38; *supra* text accompanying note 49; *supra* text accompanying note 64.

130. See *Safe Schools*, *supra* note 78 (providing access to cyber-safety sites including how to detect sexual predators).

these resources focus on deterring minors from sexting with adults.<sup>131</sup> For example, the Safe Schools site from the Florida Department of Education provides parents with access to other resources, such as the Federal Bureau of Investigation's site for online safety.<sup>132</sup> This site gives a detailed explanation as to what signs to look for, and steps parents can take if they suspect their child is communicating with a sexual predator.<sup>133</sup> Moreover, parents can connect to various links through webpages such as *Internet Safety* from Polk County Public Schools, which lets parents access what teachers use when teaching students about disseminating information through cell phones and social media.<sup>134</sup> However, the vast majority of the links lead to pages that talk about plagiarism and cyber-bullying.<sup>135</sup> This is counterproductive because cyber-bullying encompasses nonconsensual communication where one peer is harassing or taking advantage of another peer.<sup>136</sup>

Miami-Dade County Public Schools ("MDCPS") has taken a better approach to handling sexting at the school-level.<sup>137</sup> In *Empowering Students to Engage in Positive Communication: A Guide to Combat Student Sexting* (the "Guide") teachers are provided with procedures to

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131. See *id.*; see also *Parent's Guide to Internet Safety*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/stats-services/publications/parent-guide> (giving parents advice on how to monitor their child's online activity). This resource explains how sexual predators often engage in nonconsensual sexual communications with children through chatrooms, phone calls, and sexually explicit photographs. *Parent's Guide to Internet Safety*, *supra*.

132. See *Safe Schools*, *supra* note 78; see also *Parent's Guide to Internet Safety*, *supra* note 99.

133. See *Parent's Guide to Internet Safety*, *supra* note 131 (listing what parents should be wary of if they suspect their child is communicating with a sexual predator). Parents should candidly speak with their children about their suspicions, revise their computer, or use caller identification. *Id.*

134. See *Internet Safety*, *supra* note 99 (explaining how teachers are using resources including videos, handouts, and other materials to teach students Internet Safety).

135. See *id.* (explaining to parents through online brochures how plagiarism is illegal); see also *Take charge of your online reputation*, POLK COUNTY PUBLIC SCH., 2, <http://www.polk-fl.net/students/onlineresources/documents/9-12/Takechargeofyouronlinereputation.pdf> (listing ideas for preserving a positive online identity). This online brochure gives students suggestions to be cautious about what they search for on the Internet. *Take charge of your online reputation*, *supra*. The brochure describes that minors should be wary about videos and content that they share and post on their social media accounts. *Id.*

136. See Todd A. DeMitchell & Martha Parker-Magagna, *Student Victims or Student Criminals? The Bookends of Sexting in a Cyber World*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 1, 20 (2011) (explaining how sexting may be a precursor to cyber-bullying).

137. See Hantman et. al., *supra* note 100, at 4 (discussing Miami-Dade County Public School's efforts to eliminate sexting among students). "The district-wide effort to eradicate sexting among students in K-12 public educational institutions is one critical objective in alignment with the district's overarching goal to maintain safe learning environments in all schools." *Id.* at 5.

detect and confront sexting among students.<sup>138</sup> MDCPS began a marketing campaign with the Guide in efforts to promote positive communication among juveniles, specifically targeted to deterring sexting.<sup>139</sup> According to the Guide, teachers are to monitor students who they reasonably believe are engaged in sexting and report it to school officials.<sup>140</sup> Although the Guide is clear that this behavior is inappropriate, it compares sexting to cyberbullying and harassment.<sup>141</sup> The goal of MDCPS is not to make consensual sexting an option to students, and therefore places sexting into a category of extreme behaviors associated with bullies, sexual predators, and sexual harassers.<sup>142</sup> Sexting may lead to these behaviors, but many of the cases coming before judges involve consensual behavior.<sup>143</sup> Although the Guide has a comprehensive method to deter sexting, it is still inadequate in describing the legal repercussions of consensual sexting, and steers the focus to the possibilities of what sexting may lead to.<sup>144</sup>

Furthermore, these resources mostly include information to deter minors from sexting.<sup>145</sup> What education does a first-time offender receive?<sup>146</sup> Similar to the gap in legislation between first-time juvenile sexting offenders and second-time juvenile sexting offenders, sexting *prevention* education does not generally discuss sexting as a consensual act, and the diversion programs available for first-time offenders cover offenses that are more egregious than consensual sexting.<sup>147</sup> Although programs conduct interventions in order evade the stigma of an arrest, there lacks an element of deterrence with the sanctions the court issues to first-time offenders.<sup>148</sup>

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138. *Id.*

139. *Id.* at 6 (explaining how the “marketing campaign” is used to influence students from sexting).

140. *Id.* at 11, 15–19.

141. *Id.* at 5.

142. See Hantman, et al., *supra* note 100, at 14.

143. *Id.* at 4 (discussing how minors may have to register as a sex offender should they be prosecuted for possessing child pornography). The Guide refers to internal sexting violation codes. *Id.* at 12. Sexting 1 violators may receive suspension from school for one to ten days and participate in school counseling. *Id.* This class of sexting offenders includes those who have engaged in one-on-one voluntary production and dissemination of sexts. *Id.*

144. *Id.* at 5.

145. See *Safe Schools*, *supra* note 78; see also *Parent’s Guide to Internet Safety*, *supra* note 131; Hantman, et. al., *supra* note 100 at 4.

146. See *supra* text accompanying notes 72–74.

147. See *supra* text accompanying notes 72–74, 80–83, 109–111.

148. See *Civil Citation*, *supra* note 104 (indicating that interventions are tailored to the minor’s needs without the stigma of an arrest); *supra* note 113 and accompanying text.

#### IV. SOLUTION

##### A. REVISITING FLORIDA SEXTING LEGISLATION

The Florida Legislature has the opportunity to deter first-time offenders by amending Florida Statute section 847.0141, and directly incorporating weightier fines and imprisonment terms within the statute without referring to Florida Statute sections 775.083(4)(a) and 775.082(4)(a).<sup>149</sup> Instead of imposing the unimpressible \$60 fine, the initial fine for a first-time juvenile sexting offender should be increased to \$500 without filing any formal charges.<sup>150</sup> This is half of what a second-time offender would pay, and the substantially higher amount would likely deter a first-time offender from becoming a second-time offender.<sup>151</sup> Moreover, by implementing an intensive diversion program for first-time offenders, legislatures should reserve the possibility of imprisonment for third-time offenders, and should eliminate the possibility of registering the minor as a sex offender, unless the conduct is egregious.<sup>152</sup> Furthermore, Florida courts should adopt the practice of combining all three remedies suggested in the statute, rather than just selecting one.<sup>153</sup> Therefore, all of the remedies should be used to achieve a greater result in deterring sexting.<sup>154</sup> By eliminating the formal charge, a minor participating in the cyber-safety program would have a decreased chance of recidivism.<sup>155</sup>

##### B. DIVERSION PROGRAMS TAILORED TO FIRST-TIME OFFENDERS

It is near certainty that first-time offenders may find themselves

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149. See *supra* note 85 and accompanying text; see also 48A FLA. JUR. 2D *Statutes* § 19 (2015) (indicating a Florida law is amended when the legislature specifically enacts a statute). It is presumed that the legislature intends to amend a statute when the statute is repealed or amends it. 48A FLA. JUR. 2D *Statutes* § 19.

150. See *supra* text accompanying notes 109–112.

151. See *supra* text accompanying notes 109–112.

152. See *supra* Part IV, Section b; see generally Walters, *supra* note 9, at 118 (discussing how Vermont law excludes any obligation for minors to register as a sex offender—even for repeat offenders—and permits expunction for any resulting record on the minor when they become of age).

153. See FLA. STAT. § 847.0141(3)(a) (allowing the court to impose a sixty dollar fine, require eight hours of community service, participate in a cyber-safety program or any combination of the three).

154. See *id.*; see also *supra* text accompanying note 121.

155. See *supra* text accompanying notes 70–72; see also *Civil Citation*, *supra* note 104 (indicating that first-time offenders that qualify for the program are eligible to “clean” their record).

tempted to send another sext.<sup>156</sup> In order to deter this behavior and prevent a second offense, existing programs should focus on consensual sexting and its legal repercussions, instead of the broad concept of cyber-safety.<sup>157</sup> Existing administrators for current diversion programs can delegate a specific group of individuals for this consensual sexting-specific education.<sup>158</sup> This program would eliminate the stigma that a minor might attain because of his or her first encounter with the juvenile system for a noncriminal act.<sup>159</sup>

The program would run for approximately three months, preferably during summer recess.<sup>160</sup> Each minor would be required to attend the program at a location designated by the county commissioner for two Saturdays in the month.<sup>161</sup> The program would be structured into several educational and counseling components, including education on sexting legislation, practicing positive communication skills, individual counseling, and listening to testimonials about minors who became second or third-time sexting offenders.<sup>162</sup> Minors would also learn the differences between

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156. See *supra* text accompanying notes 114–15; see generally Kristin C. Thompson & Richard J. Morris, *Predicting Recidivism Among Juvenile Delinquents: Comparison of Risk Factors for Male and Female Offenders*, 3 J. OF JUV. JUST. 1 (2013) (explaining how emotional and educational influences affect juveniles and can lead them to recidivism). Although the study was conducted on juvenile delinquents, these juveniles were considered status offenders. Thompson & Morris, *supra*.

157. See *supra* note 99 and accompanying text; but see *Miller v. Mitchell*, 598 F.3d 139, 152 (3d Cir. 2010) (explaining how minors are susceptible to external influences). The court indicates that if the juvenile court system and its administrators want minors to participate in rehabilitative programs then they should approach the minors with caution. *Miller*, 598 F.3d. at 152. Minors are vulnerable to external influences and may reject the idea of participating in rehabilitative programs. *Id.*

158. See *supra* text accompanying note 83.

159. See Shelden, *supra* note 66, at 12 (illustrating how preventative programs deter minors from recidivism especially when the intervention is initiated by a significant adult in their life). Often privileged youth have adults that are readily accessible to them and who are willing to help rehabilitate the minor. *Id.*

160. See generally *Alternative Programs*, MASS.GOV, <http://www.mass.gov/capeda/juvenile-justice/alternative-programs-generic.html> (last visited Feb. 29, 2016) (summarizing the six-month District Attorney's Juvenile Diversion Program for the Cape and Islands District in Massachusetts); *Juvenile Diversion*, MASS.GOV, <http://www.mass.gov/capeda/community-programs/juvenile-diversion/> (last visited Feb. 29, 2016) [hereinafter *Massachusetts*] (explaining the objectives of the District Attorney's Juvenile Diversion Program for the Cape and Islands District in Massachusetts). The juvenile diversion program for the Cape and Islands District in Massachusetts is designed for first-time offenders whom have committed noncriminal offenses. *Massachusetts, supra*. Upon completing the program, the juvenile will not be prosecuted and there will be no court record of the initial offense. *Id.*

161. See *Massachusetts supra* note 160 (describing how diversion programs take the burden off of the juvenile court system). The early intervention method deals with initial signs of delinquent behavior and works quickly to resolve them. *Id.*

162. See generally *Funded Program Directory 2014-2015*, CHILDREN SERV. COUNCIL OF

consensual and nonconsensual sexting, because differentiating these two concepts, while comparing their similar legal ramifications, will promote awareness and develop constructive communication among first-time offenders.<sup>163</sup> Holistically, the program should be more of a cautionary course than an intervention since cautionary programs among low-risk youth are less likely to result in recidivism, as opposed to interventions.<sup>164</sup>

Additionally, parents would be required to attend the last weekend of each month over the three-month course to evaluate the minor's progress.<sup>165</sup> Part of the program would require the parents to attend a mini-seminar discussing the legal repercussions of sexting between minors, and how to foster positive communication practices.<sup>166</sup> Upon completion, if the minor does not commit another offense within ten months, then the minor would have the first offense expunged from his or her record.<sup>167</sup> If a minor does commit a second offense, the court would sanction accordingly.<sup>168</sup> Moreover, funding for this newly focused program is already built into the statute.<sup>169</sup> The higher fines will adequately subsidize the new programming.<sup>170</sup>

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[http://cscbrowardpublic.webauthor.com/pub/file.cfm?item\\_type=xm\\_file&uuid=E81C4C2E-BA52-4B7A-853F-E8DD1258E159](http://cscbrowardpublic.webauthor.com/pub/file.cfm?item_type=xm_file&uuid=E81C4C2E-BA52-4B7A-853F-E8DD1258E159) (last visited Feb. 29, 2016) (listing multiple resources for juvenile diversion programming); Carma Henry, *Children Service's Council announces availability of 2.5 for New Diversion Alternatives for Youth (New DAY) Programs and Approximately \$312,000 for LAW 2014; Legal Advocacy Works Programs and Legal Hotline*, WESTSIDE GAZETTE (Jan. 21, 2014), <http://thewestsidegazette.com/childrens-services-council-announces-availability-of-2-5-for-new-diversion-alternatives-for-youth-new-day-programs-and-approximately-312000-for-law-2014-legal-advocacy-works-programs-an/> (explaining how the New DAY program focuses on juveniles who are low-risk offenders). The New Diversion Alternatives for Youth program combines individual counseling with parent education services to achieve optimal results for defeating delinquent behavior. Henry, *supra*.

163. See *supra* text accompanying notes 126–30.

164. See Wilson & Hoge, *supra* note 67, at 507 (“[L]ow-risk youth referred to caution programs were 2.44 times less likely to reoffend than the comparison group, whereas low-risk youth referred to intervention programs were only 1.49 times less likely to reoffend.”)

165. See Henry *supra* note 162.

166. *Id.* (elaborating on how legal services provide stable living for minors who are in the delinquency and dependency systems).

167. See *Massachusetts*, *supra* note 160.

168. See FLA. STAT. § 775.082(4)(a) (designating sanctions for second-time misdemeanor offenders).

169. See *id.* § 847.0141(6) (indicating that eighty percent of civil penalties will be sent to the county commission for cyber-safety programming).

170. See *id.* § 847.0141(6).

## V. CONCLUSION

The Florida Legislature should consider the foregoing suggestions for Florida Statute Section 847.0141, because there is an opportunity to bridge the gap between sanctions for first-time offenders and second-time offenders.<sup>171</sup> If amended, the statute would sufficiently deter first-time offenders from becoming second-time offenders, and the diversion program would rehabilitate the minors without imposing a criminal stigma.<sup>172</sup> It is paramount that the courts impose a penalty “sufficient, but not greater than necessary,” in order to achieve positive communication among minors.<sup>173</sup>

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171. *See supra* Part V, Section a.

172. *See supra* Part V, Section b.

173. *See* 18 U.S.C. § 3553 (2010).