

**Sexting and Louisiana's Punishment for Children
the Law Intends to Protect from Prosecution Under Child Pornography Statutes**

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INTRODUCTION

In 2008, just twenty days after his eighteenth birthday, Phillip Alpert distributed nude photos of his sixteen-year-old ex-girlfriend following a heated argument.¹ Without considering the legal consequences, Alpert logged onto her email account and sent her friends and family nude photos she had previously taken of herself for him.² Following the incident, Alpert was arrested and charged with distributing child pornography.³ A judge sentenced him to five years of probation and Alpert was forced to register as a sex offender.⁴

Alpert's story illustrates that the advancement of communication technology has created several real life and legal consequences because teens are being prosecuted for sexting under child pornography statutes. The effects of prosecution are harsh consequences that include: registering as a sex offender, jail time, emotional disturbance, loss of employment, and denial into higher education programs. In response to this issue, Louisiana enacted a sexting law in the 2010 regular session.⁵ However, similar effects still occur even though the intent of the legislature was to protect children from being prosecuted under child pornography statutes. So, even with the creation of a sexting statute the legal effect for the minors, that the law intends to protect, still has troubling results.

For instance, the Louisiana legislature created a legal impossibility with Louisiana R.S. section 14:81.1.1 because section A(1), transmitting an indecent image from one minor to another, is technically not a delinquent act for which a minor could be adjudicated because it is a

¹ Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 8 (2009).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ La. Rev. Stat. Ann. § 14:81.1.1 (2010).

law for a person under the age of seventeen. However, to be a delinquent act under the Louisiana children's code the offense must be one that if committed by an adult, a person over the age of eighteen, would be a crime. Moreover, the sexting charge itself remains on a minor's record for life unless expunged, which most people do not know is not automatic. Even though the court record is confidential, if the minor needs a background check for school or employment it is likely the charge will be displayed. Further, the sanctions listed in the statute, such as fines, are not practical because minors typically do not earn income. Finally, the act gives the judge limited discretion at the disposition stage which conflicts with the Louisiana Children's Code and Constitution. As a result of Louisiana's legislature passing Louisiana R.S. section 14:81.1.1 one set of problems was eliminated; however, a completely new collection was created.

PART I: THE SEXTING TREND

The act of sexting is the practice of sending semi-nude or nude photos of oneself via text message.⁶ As a matter of public policy this behavior becomes a problem when the transmissions are sent by minors. Since generation Z⁷ has grown-up in a world of continually increasing technology such as Skype, Facebook, and iPhones, in which texting is easier than speaking, it was only a matter of time before these minors started to trade inappropriate images. In fact, sexting is so prevalent among teens that Apple patented 'anti-sexting' technology to counteract the problem.⁸

The National Campaign to Prevent Teen and Unplanned Pregnancy and CosmoGirl.com stated 20% of teens, ages 13-19, surveyed have sent nude or semi-nude photos to someone via

⁶ Isaac A. McBeth, *Prosecute the Cheerleader, Save the World?: Asserting Federal Jurisdiction Over Child Pornography Crimes Committed Through "Sexting"*, 44 U. RICH. L. REV. 1327, 1328 (2010).

⁷ Children born between the years of 1990 and 2000.

⁸ John D. Sutter, *Apple patents 'anti-sexting' technology*, CNN TECH, Oct. 13, 2010, http://articles.cnn.com/2010-10-13/tech/apple.sexting.patent_1_text-messages-sexting-apple?_s=PM:TECH (the technology has not been commercialized yet but prohibits a message with certain words from being transferred over the iphone. It further will use the child's grade level to filter content based on a child's grade level and pick up abbreviated words usually missed by other programs).

email, instant message, or text.⁹ Further, 39% of teens have sent sexually suggestive messages.¹⁰ Of the 39%, 71% of teen girls and 67% of teen boys sent these images to their boyfriend or girlfriend.¹¹

According to the Pew Research Center, 4% of teens ages 12-17 who own a cell phone, report they transferred “sexually suggestive nude or nearly nude images of themselves to someone else via text messaging.”¹² Moreover 15% of teens have received sexually suggestive, nude, or nearly nude images from someone they know.¹³ This survey revealed that there are three specific ways in which sexting occurs: 1) two people in a relationship trade images; 2) persons in a relationship send images to a third party; and 3) a person who wishes to be in a relationship with another person will send an image to that specific person who then forwards it to a third party.¹⁴

PART II: SEXTING LEGISLATION ENACTED IN AMERICA

In response to the sexting trend a number of states have enacted legislation.¹⁵ For example, Arizona established a class 2 misdemeanor for the offenses of transmitting or possessing sexual images of a minor using an electronic communication device.¹⁶ In Illinois the law “provides that a minor shall not distribute or disseminate an indecent visual depiction of

⁹ The Nat’l Campaign to Prevent Teen and Unplanned Pregnancy and Cosmogirl.com, *Sex and Tech, Results From A Survey Of Teens And Young Adults*, 1, www.thenationalcampaign.org/sextech/ (last visited 12/22/2010).

¹⁰ *Id.*

¹¹ *Id.* at 2.

¹² Amanda Lenhart, *Teens and Sexting*, Pew Internet & American Life Project, 2, http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf (last visited Feb. 6, 2011).

¹³ *Id.*

¹³ *Id.* See also *State v. Vezzoni*, 2005 WL 980588, slip op (Wash. Ct. App.) (Mr. Verroni took pictures of his then girlfriend, T.N., and after they broke up he took the pictures to school and showed them to several classmates).

¹⁴ 2009 “*Sexting*” Legislation, NATIONAL CONFERENCE OF STATE LEGISLATURES.COM, www.ncsl.org/default.aspx?tabid=17756 (last visited Feb. 4, 2011); 2010 “*Sexting Legislation*,” NATIONAL CONFERENCE OF STATE LEGISLATURES.COM, www.ncsl.org/default.aspx?tabid=19696 (last visited Feb. 4, 2011); see also app. 1.

¹⁶ Arizona Senate Bill 1266 amended Title 8, Chapter 3, Article 1, Arizona Revised Statutes, by adding section 8-309; also amending sections 13-1204, 13-3601 and 13-3602, Arizona Revised Statutes. Establishes, a class 2 misdemeanors for the offenses of using electronic images of minors that are sexual and also the possession of those images.

another minor through the use of a computer or electronic device.”¹⁷ Punishment for such crimes is to obtain counseling to address the sexting problem or community service.¹⁸ In Louisiana, the transmission or possession of an indecent visual picture of a minor is a crime.¹⁹

The intention of most legislators is to address the problem of sexting, but in a more lenient fashion than those who are prosecuted for child pornography.²⁰ However, in Louisiana not everyone drafting the bill agreed on which type of punishment would be appropriate for a sexting offense.²¹ For example, Senator A.G. Crowe²² said, “[A] distinction should be made for the age of the culprit [because] there is a difference between a second grader and eleventh grader sending an explicit message, the eleventh grader should know better.”²³ In contrast, Damon Baldone²⁴ wanted harsher penalties, such as jail time, for all offenders but compromised so the bill would pass in the 2010 regular session. Furthermore, on a national level, there is an ongoing debate regarding the nature of sanctions for sexting; should there be different sentences for someone who sends a nude photo to a boyfriend versus an image of another teen to a third

¹⁷ Illinois House Bill 4583 amended the Juvenile Court Act of 1987 by changing sections 3-1, 3-7, and 3-15 and by adding section 3-40. Provides that a minor may not transmit sexual images from an electronic communication device.

¹⁸ *Id.*

¹⁹ Louisiana House Bill 1357 amended the Louisiana Children’s Code article 804 to include Louisiana Revised Statute section 14:81.1.1(A)(2) as a delinquent act and created the crime of sexting in Louisiana Revised Statute section 14:81.1.1.

²⁰ Nathan Koppel and Ashby Jones, *Are ‘Sext’ Messages a Teenage Felony or Folly?*, WSJ.COM, Aug. 25, 2010, <http://online.wsj.com/article/SB10001424052748703447004575449423091552284.html>.

²¹ *Id.*

²² Senator A.G. Crowe, LOUISIANA STATE SENATE, <http://senate.legis.state.la.us/crowe/> (last visited Feb. 6, 2011) (Senator A.G. Crowe represents district 1, St. Tammany, St. Bernard, Plaquemines, Orleans. He graduated from F.T. Nichols High School and Southeastern Louisiana University with a B.A. in Business Administration).

²³ Michelle Millhollon, *Sexting punishment bill advances to the Senate floor*, THE ADVOCATE.COM, June 8, 2010, <http://www.theadvocate.com/blogs/politicsblog/95883999.html>

²⁴ Representative Damon Baldone, LOUISIANA HOUSE OF REPRESENTATIVES, http://house.louisiana.gov/h_reps/members.asp?id=53 (last visited Feb. 6, 2011) (Damon Baldone represents Lafourche and Terrebonne parishes. He graduated from Vanderbilt Catholic High School, furthering his education with a B.S. from Nicholls State University and a J.D. from Southern University Law Center).

party?²⁵ Consequently, Louisiana public officials generated more difficulty for the minors they intended to protect from prosecution under child pornography statutes.

PART III: LOUISIANA'S LEGISLATIVE RESPONSE

In the 2010 regular session, Louisiana legislators made an effort at reformation by passing a sexting law. On July 6, 2010, Governor Bobby Jindal signed House Bill 1357 Act No. 993 prohibiting the transmission of indecent visual depictions in certain circumstances.²⁶

Louisiana Revised Statute section 14:81.1.1 provides:

A.(1) No person under the age of seventeen years shall knowingly and voluntarily use a computer or telecommunication device to transmit an indecent visual depiction of himself to another person.

(2) No person under the age of seventeen years shall knowingly possess or transmit an indecent visual depiction that was transmitted by another under the age of seventeen years in violation of the provisions of Paragraph (1) of this Subsection.

B. For purposes of this Section:

(1) "Indecent visual depiction" means any photograph, videotape, film, or other reproduction of a person under the age of seventeen years engaging in sexually explicit conduct, and includes data stored on any computer, telecommunication device, or other electronic storage media which is capable of conversion into a visual image.

(2) "Sexually explicit conduct" means masturbation or lewd exhibition of the genitals, pubic hair, anus, vulva, or female breast nipples of a person under the age of seventeen years.

(3) "Telecommunication device" means an analog or digital electronic device which processes data, telephonic, video, or sound transmission as part of any system involved in the sending or receiving of voice, sound, data, or video transmissions.

(4) "Transmit" means to give, distribute, transfer, transmit, circulate, or disseminate by use of a computer or telecommunication device.

C.(1) For a violation of the provisions of Paragraph (A)(1) of this Section, the offender's disposition shall be governed exclusively by the provisions of Title VII of the Louisiana Children's Code.

²⁵ Koppel & Jones, *supra* note 19.

²⁶ 2010 Sexting Legislation, NATIONAL CONFERENCE OF STATE LEGISLATURES.COM, www.ncsl.org/default.aspx?tabid=19696 (last visited Feb. 4, 2011); LA. CHILD. CODE ANN. Art. 804(3) (2010); LA. REV. STAT. ANN. § 14:81.1.1 (2010).

(2)(a) For a first offense in violation of Paragraph (A)(2) of this Section, the offender shall be fined not less than one hundred dollars or more than two hundred fifty dollars, imprisoned for not more than ten days, or both. Imposition or execution of the sentence shall not be suspended unless the offender is placed on probation with a minimum condition that he perform two eight-hour days of court-approved community service.

(b) For a second offense in violation of Paragraph (A)(2) of this Section, the offender shall be fined not less than two hundred fifty dollars nor more than five hundred dollars, imprisoned for not less than ten days nor more than thirty days, or both. Imposition or execution of the sentence shall not be suspended unless the offender is placed on probation with a minimum condition that he performs five eight-hour days of court-approved community service.

(c) For a third or any subsequent offense in violation of Paragraph (A)(2) of this Section, the offender shall be fined not less than five hundred dollars or more than seven hundred fifty dollars, imprisoned for not less than thirty days or more than six months, or both. Imposition or execution of the sentence shall not be suspended unless the offender is placed on probation with a minimum condition that he performs ten eight-hour days of court-approved community service.²⁷

A. DIFFERENCES BETWEEN JUVENILE AND ADULT COURT

In order to understand the effects of the sexting law we must first ascertain the policy of the juvenile court system in Louisiana. First, in order to prosecute teenagers for sexting the Children's Code was amended to include the behavior listed under A(2), possession or transmission of indecent visual images. Further, like most states, Louisiana has adopted a separate legal process to deal with minors that are accused of committing adult crimes. The key distinction between adult and juvenile courts is the latter's emphasis on rehabilitation rather than punishment for the commission of proscribed behavior.²⁸ Louisiana law goes to great lengths to highlight this distinction.²⁹ For example, under article V, section 19 of the Louisiana

²⁷ LA. CHILD. CODE ANN. Art. 804(3) (2010); LA. REV. STAT. ANN. § 14:81.1.1 (2010).

²⁸ State v. Brown, 879 So. 2d 1276, 1286 (La. 2004) (this unique feature makes juvenile court more civil than criminal in its focus on rehabilitation than retribution).

²⁹ *Id.*

Constitution, “a child has the right to non-criminal rehabilitative treatment.”³⁰ Specifically, in lieu of a trial before a jury a juvenile will undergo an adjudication before a judge.³¹ The reasoning for the policy of rehabilitation instead of punishment is because a minor is not entitled to the same due process as an adult in a criminal proceeding.³² In particular, minors are not given the right to a jury trial where they can cross examine opponents. Thus, instead of being found guilty of a crime a juvenile is adjudicated to be delinquent by reason of the commission of a specified offense.³³

The emphasis on rehabilitation is most evident at sentencing, which is known as disposition according to the Louisiana Children’s Code article 899.³⁴ Under the Children’s Code article 801, these minors have a “right to a disposition that is least restrictive, and if removed from the home, care that is nearly as possible equivalent to that which the parents should have given him.”³⁵ The following characteristics distinguish juvenile disposition from adult conviction: First, a juvenile disposition is not criminal in nature and “focuse[s] on rehabilitation and individual treatment instead of punishment or retribution” like that of an adult conviction.³⁶ Second, diagnostic services are far superior to that which is available to adult prisoners.³⁷ The third difference is that a minor’s rehabilitation is “limited to the age of twenty one and accompanied by a right of early release to the least restrictive setting.”³⁸ Fourth, a disposition of a minor shall not include hard labor.³⁹ By offering non-criminal, rehabilitative treatment,

³⁰ LA. CONST. art. V., sec. 19; *In re C.B.*, 708 So. 2d 391, 396-97 (La. 1998).

³¹ LA. CHILD. CODE ANN. art. 882 (2010) (“The adjudication hearing shall be held before the court without a jury.”).

³² Steven A. Dixon, *The Worst of Both Worlds: Punishment and Procedures for Children in Louisiana*, 30 S.U. L. REV. 329, 337 (2003); *In re C.B.*, 708 So. 2d at 397, 400.

³³ Interview with Justin Hollister, Staff Attorney, Jefferson Parish Juvenile Court, in N.O., La. (Feb. 6, 2011).

³⁴ LA. CHILD. CODE ANN. art. 899 (2010).

³⁵ Dixon, *supra* note 87 at 334; LA. CHILD. CODE ANN. Art. 901 (2010); LA. CHILD. CODE ANN. Art. 801 (2010).

³⁶ *Brown*, 879 So. 2d at 1286; *In re C.B.*, 708 So. 2d at 399.

³⁷ *McKeiver v. Pennsylvania*, 403 U.S. 528, 539 (1971).

³⁸ Dixon, *supra* note 87 at 334; *McKeiver*, 403 U.S. at 552

³⁹ *In re C.B.*, 708 So. 2d at 399.

Louisiana increases the probability that minors who are adjudicated may become productive members of society, the overall intent of the juvenile court system.⁴⁰

Another distinction in Louisiana is title VII of the Children’s Code, articles 726 through 793.4, also known as Families in Need of Services (FINS).⁴¹ According to article 726, “[t]he purpose of this Title is to define self-destructive behaviors by the child . . . which warrant court intervention in the family's life so that appropriate services to remedy the family's dysfunction can be secured.”⁴² The legal basis for FINS is under article 730.⁴³ Fundamentally, FINS is designed to correct non-criminal behavior.⁴⁴ Procedurally, FINS is treated the same as delinquency, with an adjudication and disposition hearing.⁴⁵ However, because FINS does not deal with delinquent behavior at disposition the child cannot be placed in a secured facility such as juvenile jail.⁴⁶ It should also be noted that under Children’s code article 896.1 and 899 the judge has the discretion after the adjudication hearing in a delinquency matter to find the child or his family are more appropriate for the FINS program, thereafter the child’s disposition would be controlled by the FINS articles and not by the delinquency articles.⁴⁷

B. PROBLEMS WITH THE STATUTORY CRIME

Consequently because of the specificity in the Children’s Code with regard to adjudication of a minor Louisiana R.S. section 14:81.1.1 creates problems for procedural prosecution in the juvenile court system. First Louisiana R.S. section 14:81.1.1 classifies section A(1), transmitting an indecent visual image, and A(2), possession or transmitting an indecent visual image to a third party, as a delinquent act. In order for a minor to be adjudicated under

⁴⁰ Dixon, *supra* note 87, at 346.

⁴¹ LA. CHILD. CODE ANN. art. 726-793.4 (2010) (this is the totality of title seven).

⁴² LA. CHILD. CODE ANN. Art. 726 (2010).

⁴³ LA. CHILD. CODE ANN. art 730 (2010).

⁴⁴ Interview with Justin Hollister, Staff Attorney, Jefferson Parish Juvenile Court, in N.O., La. (Feb. 6, 2011).

⁴⁵ *Id.*

⁴⁶ LA. CHILD. CODE ANN. art. 781 (2010).

⁴⁷ LA. CHILD. CODE ANN. art. 896.1 (2010); LA. CHILD. CODE. ANN. art. 899 (2010).

delinquency, title VIII of the Louisiana Children’s Code, the offense must be a delinquent act.⁴⁸

A delinquent act is one that is “committed by a child of ten years of age or older which if committed by an adult is designated an offense under the statute or ordinances of this state.”⁴⁹

Interestingly, in addition to creating 14:81.1.1, Act 993 amended Children’s Code article 804 to specifically include A(2) , third party transmission or possession of a indecent image of a minor.⁵⁰ However, in excluding A(1), transmission of an indecent image from one minor to another, from the definition of a delinquent act in the Children’s Code, the legislature created a legal impossibility.⁵¹ By the plain language, the statute, Louisiana R.S. section 14:81.1.1A(1) is solely applicable to a person under the age of seventeen.⁵² However, in order to be a delinquent act according to the Children’s Code, the offense must be a crime capable of being committed by an adult.⁵³ An adult is defined as a person who has reached the age of majority, eighteen.⁵⁴ Therefore it is impossible for the offense of Louisiana R.S. section 14:81.1.1(A)(1) to be grounds for a delinquency petition because the law is only applicable to persons under the age of seventeen which technically cannot be a crime committed by an adult.

A similar argument was made by juveniles charged with possession of an illegal handgun.⁵⁵ In April of 2008 the state filed a delinquency petition in juvenile court charging two

⁴⁸ LA. REV. STAT. ANN. § 14:81.1.1A.(1) (“No person under the age of seventeen years shall knowingly and voluntarily use a computer or telecommunication device to transmit an indecent visual depiction of himself to another person.

A(2) No person under the age of seventeen years shall knowingly possess or transmit an indecent visual depiction that was transmitted by another under the age of seventeen years in violation of the provisions of Paragraph (1) of this Subsection.”).

⁴⁹ LA. CHILD. CODE ANN. Art. 804(3) (2010).

⁵⁰ Interview with Justin Hollister, Staff Attorney, Jefferson Parish Juvenile Court, in N.O., La. (Feb. 6, 2011).

⁵¹ *Id.*

⁵² LA. REV. STAT. ANN. § 14:81.1.1A(1) (2010).

⁵³ LA. CHILD. CODE ANN. art. 804(3) (2010).

⁵⁴ LA. CIV. CODE ANN. art. 29 (2010).

⁵⁵ State in rel D.J. c/w State in rel R.N., 5 So. 3d 923 (2009).

minors with illegal possession of a handgun as a violation of Louisiana R.S. section 14:95.8.⁵⁶ The two minors claimed that the offense, illegal possession of a handgun for a juvenile committed by a child under the age of 17, cannot be a delinquent act under 804(3)⁵⁷ because by definition it is not an offense that an adult, a person over the age of 18, could commit. Since no adult could be charged under section 14:95.8 and this particular statute was not listed in article 804 of the Louisiana Children's Code, there were no grounds to bring the action in juvenile court.⁵⁸ The Fourth Circuit Court of Appeal affirmed the trial court's grant of the minor's motion to quash.⁵⁹ In the case of a sexting charge under section A(1), a minor transmitting an indecent image to another minor, the same argument could be used with regard to Louisiana's sexting law, Louisiana R.S. section 14:81.1.1.

In response to the 4th circuit's decision the legislature amended Children's Code article 804 to include illegal possession of a handgun within the definition of a delinquent act.⁶⁰ This knowledge was ostensibly used by the legislature when it included Louisiana R.S. section 14:81.1.1A(2), possession or transmission to a third party of an indecent visual image of a minor, in the definition of a delinquent act.⁶¹ It is not clear why A(1), transmission from minor to minor, was excluded in light of the ruling in the 4th circuit which provides the grounds for a dismissal of a delinquency petition for a statute confined or applicable solely to those under the

⁵⁶ LA. REV. STAT. ANN. § 14:95.8(A) (2010) ("A. It is unlawful for any person who has not attained the age of seventeen years knowingly to possess any handgun on his person. Any person possessing any handgun in violation of this Section commits the offense of illegal possession of a handgun by a juvenile.").

⁵⁷ LA. CHILD. CODE ANN. art. 804(3) (a delinquent act means an act committed by a child of ten years of age or older which if committed by an adult is designated an offense under the statutes or ordinances of this state, or of another state if the act occurred in another state, or under federal law, except traffic violations. It includes a direct contempt of court committed by a child).

⁵⁸ Interview with Justin Hollister, Staff Attorney, Jefferson Parish Juvenile Court, in N.O., La. (Feb. 6, 2011).

⁵⁹ State ex rel. D.J., 5 So. 3d 923, 926 (2009).

⁶⁰ LA. CHILD. CODE ANN. art. 804(3) (2010).

⁶¹ Interview with Justin Hollister, Staff Attorney, Jefferson Parish Juvenile Court, in N.O., La. (Feb. 6, 2011).

age of seventeen.⁶² One possible explanation for this discrepancy is the disparate punishment under Louisiana R.S. section 14:81.1.1C(1)-(2), sanction for the crime of sexting.⁶³

C. PROBLEMS WITH THE SANCTIONS

There are several problems with the sanctions offered for each offense due to the language of the sexting law and technical requirements of adjudication in juvenile court. The punishment for the crime of sending an indecent visual image to another minor suggests that the legislature intended that section A(1) be non-criminal and governed by FINS; however, they did not amend title VII of the Louisiana Children's code to include Louisiana R.S. section 14:81.1.1A(1). When the legislature failed to amend title VII to include section A(1) it presumptively became a delinquent act, meaning that FINS cannot be the exclusive disposition of this offense.⁶⁴ As noted above technically Louisiana R.S. section 14:81.1.1A(1) cannot serve as the basis for a delinquency petition.⁶⁵ Therefore, in a practical sense a minor charged with Louisiana R.S. section 14:81.1.1A(1) will never reach the dispositional phase of a juvenile proceedings.⁶⁶ In contrast, a minor charged under Louisiana R.S. 14:81.1.1A(2), receiving or forwarding the transmission to a third party, may be charged and sanctioned via a delinquency proceeding.⁶⁷

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Children and Families – Families in Need of Services, THE LOUISIANA SUPREME COURT, http://www.lasc.org/court_managed_prog/FINS.asp (“Families in Need of Services (FINS), a legislatively created type of juvenile court proceeding, was enacted into law upon passage of the Louisiana Children's Code in 1991. The FINS title consolidated former Child in Need of Supervision and Parents in Need of Supervision jurisdiction as Title VII of the Code. FINS became effective in all courts having juvenile jurisdiction on July 1, 1994. In addition to formal court procedures, an informal process was added in which the court, through a court-appointed intake officer, facilitates the establishment of a voluntary family services plan between the family and the providers of needed services. FINS provides a unique opportunity for early judicial intervention to prevent delinquency and child abuse. The FINS process is designed to identify and integrate existing service providers, connect families to needed services, to promote the establishment of new services or programs where gaps in services have been identified.”) (last visited 1/13/2011).

⁶⁵ See *supra* section C. Problems with the Crime

⁶⁶ Interview with Justin Hollister, Staff Attorney, Jefferson Parish Juvenile Court, in N.O., La. (Feb. 6, 2011).

⁶⁷ *Id.*

Another problem is found in the sanctions for a violation of Louisiana R.S. section 14:81.1.1A(2), possession or transmission to a third party, because fines are not customarily assessed to minors in the disposition stage. Under Louisiana R.S. section 14:81.1.1C(2)(a)-C(2)(c)⁶⁸ there are specific fines that correlate to the number of offenses a minor has committed. However, as a matter of public policy and custom in Louisiana, which is considered law, there are no fines assessed to a minor in juvenile court usually because a child does not have a source of income.⁶⁹ Further, the Louisiana Children's Code is silent on the issue of fines as a form of disposition for delinquency.⁷⁰ So hypothetically, if a minor was assessed a fine it is likely that the court would order a parent or a tutor who is financially responsible for the child to produce payment.⁷¹ Finally, according to custom, a criminal fine, such as those within the statute, are not

⁶⁸ LA. REV. STAT. ANN. § 14:81.1.1(C)(1)(a)-(2)(c) (“For a first offense in violation of Paragraph (A)(2) of this Section, the offender shall be fined not less than one hundred dollars nor more than two hundred fifty dollars, imprisoned for not more than ten days, or both. Imposition or execution of the sentence shall not be suspended unless the offender is placed on probation with a minimum condition that he perform two eight-hour days of court-approved community service.

(b) For a second offense in violation of Paragraph (A)(2) of this Section, the offender shall be fined not less than two hundred fifty dollars nor more than five hundred dollars, imprisoned for not less than ten days nor more than thirty days, or both. Imposition or execution of the sentence shall not be suspended unless the offender is placed on probation with a minimum condition that he perform five eight-hour days of court-approved community service.

(c) For a third or any subsequent offense in violation of Paragraph (A)(2) of this Section, the offender shall be fined not less than five hundred dollars nor more than seven hundred fifty dollars, imprisoned for not less than thirty days nor more than six months, or both. Imposition or execution of the sentence shall not be suspended unless the offender is placed on probation with a minimum condition that he perform ten eight-hour days of court-approved community service.”).

⁶⁹ La. Civ. Code art. 1(2010); Interview with Justin H Hollister, Staff Attorney, Jefferson Parish Juvenile Court, in N.O., La. (Jan. 14, 2011) (this is not to say that a minor's parent could not be fined but because a minor is usually a dependent they are not assessed any fines in Juvenile Court).

⁷⁰ Jefferson Parish Court Rules available at <http://www.jpjc.org/WebContent/Downloads/JPJCCourtRules.pdf> (In Jefferson Parish the Court rule 48.2, a minor may be assessed traffic fines but there is no other rule that specifically states anything regarding fines for a delinquency disposition.); *Contra*. LA. CHILD. CODE ANN. art 899 (2010) (in contrast under article 899, a minor may be required to “make reasonable restitution to any victim for personal injury or property damage caused by the child in the commission of the delinquent act.”).

⁷¹ Interview with Justin M. Hollister, Staff Attorney, Jefferson Parish Juvenile Court, in N.O., La. (Jan. 21, 2011).

directly applicable to a civil juvenile delinquency proceeding due policy considerations of the juvenile court system which separates it from adult court.⁷²

The third problem is the language used in Louisiana R.S. section 14:81.1.1C(2)(a)-(2)(c) limits judicial discretion. The reformers who created the juvenile court system intended to give judges discretion to select from a number of dispositions under Louisiana Children's Code article 899.⁷³ However, Louisiana R.S. section 14:81.1.1C(2)(a)-(2)(c) states a minor *shall* be fined,

⁷² Interview with Justin M. Hollister, Staff Attorney, Jefferson Parish Juvenile Court, in N.O., La. (Jan. 21, 2011).

⁷³ LA. CHILD. CODE ANN. art. 899 (2010) ("Disposition after adjudication of a misdemeanor-grade delinquent act
A. After adjudication of a misdemeanor-grade delinquent act, the court may:

(1) Reprimand and warn the child and release him into the custody of his parents either unconditionally or subject to such terms and conditions as deemed in the best interests of the child and the public.

(2) Reprimand and warn the child and release him into the custody of some other suitable person either unconditionally or subject to such terms and conditions as deemed in the best interests of the child and the public.

The court shall, whenever practicable, select a person of the same religious faith as the child or his parents.

(3) Place the child on probation in the custody of his parents or other suitable person.

B. As conditions of probation, if ordered pursuant to Subparagraph A(3) of this Article:

(1) The court shall impose all of the following restrictions:

(a) Prohibit the child from possessing any drugs or alcohol.

(b) Prohibit the child from engaging in any further delinquent or criminal activity.

(2) The court may impose any other term and condition deemed in the best interests of the child and the public, including:

(a) A requirement that the child attend school, if the school admits the child.

(b) A requirement that the child or his parent or legal guardian perform court-approved community service activities. If feasible, the court-approved community service activities shall be conducted by the caretaker and child together.

(c) A requirement that the child make reasonable restitution to any victim for any personal or property damage caused by the child in the commission of the delinquent act.

(d) A requirement that the child participate in any program of medical or psychological or other treatment found necessary for his rehabilitation.

(e) A requirement suspending or restricting the child's driving privileges, if any, for all or part of the period of probation. In such cases, a copy of the order shall be forwarded to the Department of Public Safety and Corrections, which shall suspend the child's driver's license or issue a restricted license in accordance with the order of the court.

(f) A requirement prohibiting the child from possessing a firearm or carrying a concealed weapon.

(g) A requirement that the child pay a monthly supervision fee of not less than ten nor more than one hundred dollars per month, payable to the Department of Public Safety and Corrections or other supervising agency, to defray the cost of supervision. The court may order a parent, tutor, guardian, or other person who is financially responsible for the care of the child to be responsible for payment of all or part of any supervision fee imposed.

C. The court may commit the child to the custody of a private or public institution or agency. When commitment is to be made to a private institution or agency, the court shall:

imprisoned or both which “shall” not be suspended unless they are put on probation and complete a certain amount of community service.⁷⁴ When House Bill 1357 reached the Senate committee C, Senator Adley stated he wanted to amend the bill so that the “shall” would read as “may” “because some judges still may take the law literally and impose a sentence.”⁷⁵ To counter, Representative “Baldone, said the judge can still suspend the sentence.”⁷⁶ Nevertheless, the legislature’s law has left the judge with two options: send a child to the Department of Safety and Corrections to carry out a sentence or place them on probation with community service.⁷⁷ This statute directly conflicts with article 899 of the Louisiana Children’s Code and the purpose of the juvenile justice system, rehabilitation and not punitive sentencing.

Restrictive language within the sanctions leads to a fourth problem: there is no mandatory sentencing for a misdemeanor in juvenile court because the Louisiana Constitution grants rehabilitation as the sole policy for a minor.⁷⁸ According to Louisiana Children’s Code 901B, “the court should impose the least restrictive disposition” and if removed from the home, placed

(1) Select one that has been licensed under state law, if licensure is required by law for such an institution or agency.

(2) Whenever practicable, select an agency or institution of the same religious faith as the child or his parents.
D. If the child is thirteen years of age or older at the time of the commission of the delinquent act, the court may commit the child to the custody of the Department of Public Safety and Corrections, with or without a recommendation that the child be placed in alternative care facilities through the department's client placement process, or be referred to appropriate placement resources in the state available through other public or private agencies.

E. The court may impose but suspend the execution of the whole or part of any authorized order of commitment and place the child on probation subject to any of the terms and conditions authorized under Paragraph B of this Article.”).

⁷⁴ LA. REV. STAT. ANN. § 14:81.1.1(C)(2)(a)-(2)(c) (2010).

⁷⁵ Michelle Millhollon, *Sexting punishment bill advances to the Senate floor*, THE ADVOCATE, June 8, 2010, <http://www.theadvocate.com/blogs/politicsblog/95883999.html>.

⁷⁶ *Id.*

⁷⁷ LA. REV. STAT. ANN. § 14:81.1.1(C)(2)(a)-(2)(c) (2010).

¹⁰⁵ LA. CHILD. CODE ANN. art 897.1 (2010) (Under Children’s Code article 897.1 there are specific dispositional requirements for felony charges: In contrast, a judge “shall commit the child who is fourteen years or older at the time of the commission of the offense to the custody of the Department of Public Safety and Corrections to be confined in secure placement until the child attains the age of twenty-one” for a felony charge of first degree murder, second degree murder, aggravated kidnapping, or armed robbery.).

¹³¹ LA. CONST. art. V, § 19.

in care that is “as nearly as possible equivalent to that which the parents should have given him.”⁷⁹ So the language of “*shall*” makes mandatory what juvenile law, jurisprudence, and public policy considers restrictive and not the best interest of the child.

Finally, the statute creates harsh consequences for a minor who will thereafter have a record for sexting.⁸⁰ Although the minor’s juvenile record is confidential, Louisiana law does not require an automatic expungement, leaving the child’s records potentially accessible, for example through a criminal background check.⁸¹ Further, there are certain conditions that must be met in order to apply for an expungement.⁸² First, a minor must be at least 17 years old in order to even apply.⁸³ Second, “a misdemeanor adjudication may be expunged only if two or more years have elapsed since the person satisfied the most recent judgment against him.”⁸⁴

So hypothetically, if a child was charged with sexting when he or she was 17 years old and then went through the process of expungement he or she would be 19 or 20 years old when it would be granted. If the child needed a criminal background check for work or school during the two-year waiting period, the sexting charge would be listed on the person’s record. This scenario parallels the case of Phillip Alpert who could not obtain a job because every application asked if he had ever been charged with a felony⁸⁵ and the community college he was attending would not allow his continuance due to the sex offender status.⁸⁶ Thus, it is possible for a minor who committed a sexting offense while a teenager to have future problems obtaining an education or career because the sexting charge will follow the minor well into their adult life.

⁷⁹ Steven A. Dixon, *The Worst of Both Worlds: Punishment and Procedures for Children in Louisiana*, 30 S.U. L. REV. 329, 334 (2003); LA. CHILD. CODE ANN. Art. 901 (2010); LA. CHILD. CODE ANN. Art. 901B (2010).

⁸⁰ Interview with Justin H. Hollister, Staff Attorney, Jefferson Parish Juvenile Court, in N.O., La. (Sept. 15, 2010).

⁸¹ *Id.*

⁸² LA. CHILD. CODE ANN. Art. 917-922 (2010).

⁸³ LA. CHILD. CODE ANN. Art. 917 (2010).

⁸⁴ LA. CHILD. CODE ANN. Art. 918 (2010).

⁸⁵ Catherine Arcabascio, *Sexting and Teenagers: OMG R U Going 2 Jail?*, 16 RICH. J.L. & TECH. 10, 30 (2010).

⁸⁶ *Id.*

Thus, the teen’s record could possibly prevent him from being a productive member of society which was the intention of reformers in creating the juvenile court system.⁸⁷

In sum, under Louisiana R.S. section 14:81.1.1, a minor who sends an indecent picture will automatically receive the disposition of FINS, assuming it is procedurally possible, while a minor who receives the photo faces the possibility of paying a fine, going to juvenile jail or at least being required to complete community services.⁸⁸ This statutory scheme does not seem proportionate to the offense considering the minor who instigates the action receives a lesser punishment than a child who receives the image.⁸⁹

PART IV: PROPOSED AMENDMENTS TO SOLVE THE ISSUES WITH LOUISIANA’S SEXTING LAW

Assuming the legislature intended for Louisiana R.S. section 14:81.1.1A(1), transmission of an indecent visual depiction, to be a delinquent act, then Children’s Code article 804(3) should be amended to include Louisiana R.S. section 14:81.1.1(A)(1). This would establish Louisiana R.S. section 14:81.1.1A(1), sending an indecent image to another, as a delinquent act.

Accordingly, Louisiana R.S. section 14:81.1.1(A)(1) would be proper grounds for a complaint to be adjudicated in juvenile court. If on the other hand, leaving the offense of A(1) out of the title VIII of the Louisiana Children’s Code is the legislatures’ attempt to correct what it considers non-criminal behavior, then Louisiana Children’s Code article 726 should be amended to include Louisiana R.S. section 14:81.1.1A(1) and be treated as a family in need of services from its inception in juvenile court. Additionally, equity would favor the inclusion of Louisiana R.S.

⁸⁷ State v. Brown, 879 So. 2d 1276, 1285 (La. 2004) (“The juvenile court movement began near the end of the nineteenth century because ‘reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jail with hardened criminals.’”); *See also* In re Gault 387 U.S. 1, 15 (1967) (“The early reformers ‘believed that society’s role was not to ascertain whether the child was guilty or innocent, . . . [t]he child-essentially good, as they saw it-was to be made ‘to feel that he is the object of (the state’s) care and solicitude, not that he was under arrest or on trial.’”).

⁸⁸ LA. REV. STAT. ANN. § 14:81.1.1 (2010).

⁸⁹ Interview with Justin Hollister, Staff Attorney, Jefferson Parish Juvenile Court, in N.O., La. (Feb. 6, 2011).

section 14:81.1.1A(2), possession of an indecent image, as grounds for a FINS petition.

Therefore, without an amendment to section Louisiana R.S. section 14:81.1.1A(1), this statute remains open to attack.

Another amendment would create section Louisiana R.S. section 14:81.1.1A(3) for acts that include a minor forwarding an image to a third party that was sent to him by another child. At the current time this is included within A(2) of Louisiana R.S. 14:81.1.1, which also sanctions a minor who receives an image and knowingly maintains possession.⁹⁰ These two delinquent acts should be divided and sanctioned separately because there is a difference in culpability of a child who receives an image but keeps it private versus a minor who makes it public by forwarding it to a third party.

Third, the fines listed in Louisiana R.S. section 14:81.1.1C(2)(a)-(2)(c) should be modified.⁹¹ In Louisiana there is a policy fines are not assessed to minors. To account for the policy standard the court should either state that the parent, guardian, or tutor responsible for the child will be fined or the fines should be removed from the law. Refusal to assess fines as a sanction for a delinquent act is a matter of policy and custom in the state of Louisiana because minors are usually dependents without a source of income. Therefore, assessing fines directly to minors is contradictory to long standing history of Louisiana.

Finally, the “shall” listed in section Louisiana R.S. 14:81.1.1C(2)(a)-(2)(c) should be changed to “may.”⁹² The word “shall” makes the sanctions directly adverse to the Children’s

⁹⁰ LA. REV. STAT. ANN. §14:81.1.1A(2) (2010).

⁹¹ *Id* (matter of custom because it is not practical for a criminal fine to be assessed to a minor in a juvenile proceeding).

⁹² Committee C hearing on Sexting, THE LOUISIANA SENATE, <http://www.legis.state.la.us/billdata/streamdocument.asp?did=698447> (last visited Dec. 12, 2010) (Senator Adley made this recommendation in the senate hearing committee meeting when it was proposed, however the amendment was not added to the changes made while in the Senate.)

Code article 899, which list a multitude of dispositions a judge may choose from.⁹³ Currently, judges are limited to a jail sentence or probation with community service, and must forego the other choices available at disposition a child may receive.⁹⁴

⁹³ LA. CHILD. CODE ANN. art. 899 (2010) (“Disposition after adjudication of a misdemeanor-grade delinquent act
A. After adjudication of a misdemeanor-grade delinquent act, the court may:

- (1) Reprimand and warn the child and release him into the custody of his parents either unconditionally or subject to such terms and conditions as deemed in the best interests of the child and the public.
- (2) Reprimand and warn the child and release him into the custody of some other suitable person either unconditionally or subject to such terms and conditions as deemed in the best interests of the child and the public.

The court shall, whenever practicable, select a person of the same religious faith as the child or his parents.

- (3) Place the child on probation in the custody of his parents or other suitable person.

B. As conditions of probation, if ordered pursuant to Subparagraph A(3) of this Article:

- (1) The court shall impose all of the following restrictions:
 - (a) Prohibit the child from possessing any drugs or alcohol.
 - (b) Prohibit the child from engaging in any further delinquent or criminal activity.
- (2) The court may impose any other term and condition deemed in the best interests of the child and the public, including:
 - (a) A requirement that the child attend school, if the school admits the child.
 - (b) A requirement that the child or his parent or legal guardian perform court-approved community service activities. If feasible, the court-approved community service activities shall be conducted by the caretaker and child together.
 - (c) A requirement that the child make reasonable restitution to any victim for any personal or property damage caused by the child in the commission of the delinquent act.
 - (d) A requirement that the child participate in any program of medical or psychological or other treatment found necessary for his rehabilitation.
 - (e) A requirement suspending or restricting the child's driving privileges, if any, for all or part of the period of probation. In such cases, a copy of the order shall be forwarded to the Department of Public Safety and Corrections, which shall suspend the child's driver's license or issue a restricted license in accordance with the order of the court.
 - (f) A requirement prohibiting the child from possessing a firearm or carrying a concealed weapon.
 - (g) A requirement that the child pay a monthly supervision fee of not less than ten nor more than one hundred dollars per month, payable to the Department of Public Safety and Corrections or other supervising agency, to defray the cost of supervision. The court may order a parent, tutor, guardian, or other person who is financially responsible for the care of the child to be responsible for payment of all or part of any supervision fee imposed.

C. The court may commit the child to the custody of a private or public institution or agency. When commitment is to be made to a private institution or agency, the court shall:

- (1) Select one that has been licensed under state law, if licensure is required by law for such an institution or agency.
- (2) Whenever practicable, select an agency or institution of the same religious faith as the child or his parents.

D. If the child is thirteen years of age or older at the time of the commission of the delinquent act, the court may commit the child to the custody of the Department of Public Safety and Corrections, with or without a recommendation that the child be placed in alternative care facilities through the department's client placement

CONCLUSION

Due to rising popularity in social networking, cell phones, computers, and other technology, children have grown up in an age where texting is preferred over talking. Human nature tells us they will share images, even those which are intended to remain private due to the inappropriate content; hence, sexting was born. Now that sexting has become a growing trend, proven by recent reports in the media and pending litigation, the Louisiana legislature has responded by creating a law that on one hand is a legal impossibility and on the other hand creates harsh consequences for teenagers who share indecent images with others. The effect generated under Louisiana R.S. section 14:81.1.1A(1), one minor sending an image to another minor, is there are no grounds for filing a petition in juvenile court. If a complaint is filed using the offense under section A(2), possession with knowledge or transmission of an indecent image to a third party, the sexting charge remains on the child's records for life unless expunged, which is not automatic. Further, the crime and punishment for a child who sends the image is less than a minor who receives the image, even without requesting it.

In order to rectify what the Louisiana legislature has fashioned and in effect produce what they intended, there needs to be several amendments to Louisiana R.S. section 14:81.1.1 and Louisiana CHC 804(3). Specifically, the offense of A(1), transmission between two minors, needs to either be placed in title VII as a FINS or title VIII as a delinquent act. A separate offense should be created for a juvenile who forwards sexual images to third parties because the degree of culpability is greater than a minor who only receives an image. The restrictive

process, or be referred to appropriate placement resources in the state available through other public or private agencies.

E. The court may impose but suspend the execution of the whole or part of any authorized order of commitment and place the child on probation subject to any of the terms and conditions authorized under Paragraph B of this Article.”).

⁹⁴ See LA. CHILD. CODE ANN. art. 899 (2010) (complete list of dispositions).

language of “shall” should be removed from the sanctions allowing the judge full discretion at disposition. Finally, the fines should be redirected toward the responsible parties for minors adjudicated increasing the probability of payment. If amended Louisiana R.S. section 14:81.1.1 would serve the intended purpose of the Louisiana legislature without harmful effects similar to those of sexting prosecution under child pornography statutes.

APPENDIX 1

State	Statute
Arizona	Arizona Senate Bill 1266 amended Title 8, Chapter 3, Article 1, Arizona Revised Statutes, by adding section 8-309; also amending sections 13-1204, 13-3601 and 13-3602, Arizona Revised Statutes. Establishes, a class 2 misdemeanors for the offenses of using electronic images of minors that are sexual and also the possession of those images.
Colorado	Colorado H.B. 09-1163 amended 18-3-405.4, 18-6-403, 18-6-401, 18-6-403 of the Colorado Revised Statutes concerning crimes in which the victim is a child.
Connecticut	Connecticut House Bill 5533 created Public Act Number 10-191 of the general statutes enacting the law of sexting.
Georgia	Georgia amended code section 16-21-100.1 of the Code of Georgia as to include cellular telephone transmissions as prohibited methods of transmission.
Illinois	Illinois House Bill 4583 amended the Juvenile Court Act of 1987 by changing sections 3-1, 3-7, and 3-15 and by adding section 3-40. Provides that a minor may not transmit sexual images from an electronic communication device.
Louisiana	Louisiana House Bill 1357 amended the Louisiana Children's Code article 804 to include Louisiana Revised Statute section 14:81.1.1(A)(2) as a delinquent act and created the crime of sexting in Louisiana Revised Statute section 14:81.1.1.
Missouri	Missouri House Bill 62 expands the standard for the crimes of sexual exploitation of a minor, possession of child pornography, and public display of explicit sexual material from knowingly to knowingly or recklessly (Sections 573.023, 573.037, and 573.060).
Nebraska	Nebraska L.B. 97 amended sections 21-20,177, 21-20,179, 27-404,27-1103, 28-101, 28-311, 28-318, 28-319.01, 28-320.02, 28-813.01, 28-1010, 28-1463.02, 28-1463.03, 28-1463.04, 28-1463.05, 29-110, 29-4001, 29-4003, 29-4006, 29-4007, 29-4008, and 83-4,143 of revised statutes of Nebraska adopting new rules related to sexual offenses.
New Jersey	New Jersey enacted N.J.S.2C:24-4 creating a diversionary program for juveniles who are criminally charged with sexting or posting sexual images.
North Dakota	North Dakota House Bill 1186 created a new subsection to section 12.1-27.1-01 and 12.1-27.1-03.3 of the North Dakota Century Code. Provides a misdemeanor for a person who knowingly possesses, distributes or acquires a sexual image that is nude or nearly nude without consent.
Ohio	Ohio enacted section 2907.324 of the Revised Code to prohibit a minor, by use of a telecommunications device, from recklessly creating, receiving, exchanging, sending, or possessing a photograph or other material showing a minor in a state of nudity.
Pennsylvania	Pennsylvania amended Titles 18 (Crimes and Offenses) and 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, providing for the offense of dissemination of prohibited materials by

	minors; in criminal history record information, further providing for expungement and for juvenile records; and, in relation to summary offenses, further providing for the scope of the Juvenile Act, for inspection of court files and records and for conduct of hearings.
South Carolina	South Carolina created the offense of sexting by adding section 63-19-2470 to the Code of Laws of South Carolina (provides a fine and educational program for a person who commits the offense with expungement if the person completes the program satisfactorily).
Utah	H.B. 14 amended 76-10-1204 and 76-10-1206 of the Utah Code. Provides sanctions for minors who distribute pornographic material or images that are harmful to other minors.
Vermont	Vermont S.B. 125 created 13 V.S.A. § 2802b. Created the crime of sexting.

APPENDIX 2

