

Student #2-

I think you have a good start on your memo - good examples to illustrate the problem and some good data to support the prevalence of the behavior that could result in prosecution but I wanted more information (or maybe just more clear explanation of) “all the potential issues and outcomes” of some of the sexting statutes that have been enacted in other jurisdictions. I made comments in your document – most of them my reactions/questions as I read.

### *Large-Scale Organization*

I always look at this first – to see if I can figure out the big picture. Your headings & sub-headings don’t follow standard outline formatting – maybe because you are letting Word do your outlining for you based on your keystrokes. Your main sections are:

#### I. The Problem

1. Nevada Law

#### II. The Solution

1. Summary assessment of responsive legislation
2. SB15’s Legislative Response- Nevada’s Solution

#### III. Opposition

#### IV. Conclusion

### *General Comments*

- Identify the problems more clearly – you provide examples but never really say what the problems are
- Consider moving the hypos up – right after the first paragraph about the survey. That way you start w/info about how prevalent “sexting” is; then examples of what can happen to kids who do it; then ID the legal problems – need for different levels of offenses, limiting prosecutorial discretion
- Be careful not to use too much vague language when you discuss problems with other states’ statutes – “unintended negative consequences” & “bar intervention where it is especially necessary” in paragraph about Vermont & Nebraska’s statutes
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**Comment [JW1]:** I would make the first subsection part of “I” because you seem to be saying the responses in other jurisdictions don’t do the trick; then you could make “II” be about Nv’s solution – which is the REAL answer.

**Comment [JW2]:** I wouldn’t separate this out – address opposing arguments within yours – just like you do in an appellate brief.



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## I. The Problem

A 2008 survey indicated that 39% of all teens have sent or posted sexually suggestive messages using personal texts messages, email, IMs, etc.<sup>i</sup> This survey also found out a fact even more alarming - 20% of all teens have sent or posted online, nude or semi-nude pictures or video of themselves.<sup>ii</sup> This act is commonly known as “sexting”. A logical presumption is that these numbers have increased since 2008 due to the increasing ubiquitous nature of cellphone and internet usage. Sexting falls into a legal grey area. Some states have begun charging teens caught sending or possessing nude photos of themselves or other teens with violation of anti-child pornography laws. These laws were traditionally meant to stop child predators from the abuse and exploitation of minors. However, now at least one in five teens may be considered a child pornographer for sexting, risking life in prison and registration as a sex offender, for taking and distributing pictures of themselves.<sup>iii</sup> This statement, although seemingly ridiculous on many levels, is dreadfully true.

It is illegal under federal and most state child-porn laws to create, distribute or possess explicit images of a minor. These laws were drafted to address adult abuse of minors. These laws do not exempt minors who create and distribute explicit images, even if they pictures are of themselves. In fact police and prosecutors in several states are now charging teens who exchange nude images via text messaging or other devices with violation of anti-child pornography laws. The implications are significant. Most states impose serious punishment for violation of these laws, including registration as a sex offender and a very lengthy prison sentence. Teens who send or receive nude or semi-nude photos of themselves or another teen are now being faced with these punishments.

**Comment [JW3]:** b/c survey was in 2008, should say “had sent”

**Comment [JW4]:** Not a good idea to end a sentence w/ this – especially the first sentence of a persuasive document. Are there more ways to send these kinds of messages? If yes, describe them – e.g. and other electronic communication.

**Comment [JW5]:** Use Arabic numbers for your endnotes – these get too long

**Comment [JW6]:** punctuation

**Comment [JW7]:** It seems like you are starting a new idea here – about the consequences, not describing the conduct.

**Comment [JW8]:** Not sure what you mean here – try to be more specific; you could even add a hyphen and a rhetorical question – is it child pornography or is it permissible consensual communication?

**Comment [JW9]:** Although . . .

**Comment [JW10]:** . . . enacted . . .

**Comment [JW11]:** . . . abusing & exploiting . . .

**Comment [JW12]:** I’d take this out and combine this with dependent clause for more persuasive effect

**Comment [JW13]:** “could be charged with child pornography. . .”?

**Comment [JW14]:** “lifetime”

**Comment [JW15]:** Redundant - as long as you have defined sexting as this, no need to say it again.

**Comment [JW16]:** Redundant – you said this in previous paragraph. And there are more statements in this paragraph that seem to be repeating things you have already said

A teen who willingly sends a nude photo to his or her girlfriend or boyfriend can be charged with child pornography and be required to register as a sex offender for the rest of his or her life - a label that typically is associated with the most serious crimes including rape and sexual assault and abuse of children.

In Iowa in 2009, an eighteen-year-old boy was found guilty of dissemination and exhibition of obscene material to a minor.<sup>iv</sup> Specifically, the boy was convicted for sending a picture of his erect penis to a fourteen-year-old female classmate and friend.<sup>v</sup> The girl testified that she had asked the boy to send the picture several times before the boy acquiesced to her requests.<sup>vi</sup> Even though the exchange between the teenagers was consensual, the boy was forced to pay a fine of \$250, sentenced to one-year of probation, and is required to register as a sex offender.<sup>vii</sup>

In a similar case, a fourteen-year-old girl from New Jersey was arrested and charged for violating the state's child pornography law after she posted nearly thirty explicit nude pictures of herself on MySpace.com.<sup>viii</sup> The girl posted the photos because she wanted her boyfriend to see them.<sup>ix</sup> Investigators charged the girl with possession and distribution of child pornography.<sup>x</sup> Despite the fact the pictures that were self-produced, and theoretically there was no victim, if convicted, New Jersey law would require the young girl to register as a sex offender.<sup>xi</sup>

In Washington, state officials charged two students, ages thirteen and fourteen, with child pornography after they allegedly sent a naked picture of another student from their cell phones.<sup>xii</sup> The fourteen-year-old boy received a cell phone picture from his fourteen-year-old girlfriend.<sup>xiii</sup> After the two split up, the boy began to transmit the picture to other students.<sup>xiv</sup> The thirteen-year-old girl was also being charged because she

**Comment [JW17]:** I don't have a sense for what the legal problems are yet – you need to clearly ID them here. Later you talk about prosecutorial discretion & disproportionate penalties for kids who are engaging in youthful indiscretions rather than hurtful and dangerous conduct.

assisted in the dissemination of the photo to other students.<sup>xv</sup> Prosecutors ended up dropping the child pornography charges against the students, and instead filed charges of telephone harassment, which is a misdemeanor.<sup>xvi</sup> Apparently, prosecutors were leery of charging the young teens with pornography charges.

The issues of sexting and self-produced child pornography have yet to confront Nevada in a legal sense. However, there can be no doubt that Nevada teens are actively transmitting self-produced pornography or sexting. It is prudent that Nevada address the inequity in its laws to avoid the pitfalls that have beset many other states.

### 1. Nevada Law

Similar to other states throughout the U.S., Nevada’s obscenity and child pornography laws do not distinguish the illegal conduct of an adult from that of a minor. Nevada law make it a crime for **any** person to (1)<sup>xvii</sup> use a minor in producing pornography or as a subject of sexual portrayal;<sup>xviii</sup> (2) to distribute obscene or harmful material to a minor;<sup>xix</sup> and (3) to sexually exploit a minor.<sup>xx</sup> The consequences for violating these laws are fundamentally the same regardless whether perpetrator is and adult or a minor – registration as a sex offender and prison or jail time. Thus, the law’s failure in discerning between adults and minors can easily create a potentially unjust result similar to other states.

**Comment [JW18]:** No “1” w/o a “2” and be sure to follow standard outline format – Use capital Roman numerals for main sections; capital letters for next layer; Arabic numbers for next layer; etc.

## II. The Solution

### 1. Summary Assessment of Responsive Legislation

Many other states have attempted to address the issue of sexting through new legislation. However, this legislation has failed to address all of the potential issues and outcomes of implementing a sexting statute.

**Comment [JW19]:** I’m not sure why you set this apart – why not lump NV into the description of existing laws under which kids could be prosecuted for sexting

**Comment [JW20]:** This heading makes it sound you are going to talk about how to fix the problem but the fist sub-section describes things that have been tried but don’t work as well as they should. So I’d make this heading more accurately describe what is in this section

**Comment [JW21]:** Ditto Cmt 15 AND I would make this a more persuasive subheading – it seems like what you do in this part is talk about efforts to deal with sexting that don’t solve the problem

Vermont and Nebraska attempt to carve out a narrow exception for juvenile couples who participate in consensual sexting with each other, often known as “love-bird sexting”. However, this legislation has unintended, negative consequences.<sup>xxi</sup> The legislation may bar intervention where it is especially necessary and heighten charges where they are least appropriate. Moreover, when trying to determine the intended outcomes, the narrow exceptions in these two states are ambiguous or conflict with other statutory sections.

**Comment [JW22]:** Like what?

**Comment [JW23]:** What kind of intervention? When is it necessary? You need to be more specific about that the problems are

**Comment [JW24]:** Ditto

**Comment [JW25]:** Like what? Why is that a problem?

Utah and Ohio take the alternative approach by providing prosecutors options for violation sexting, including the option of charging the minor with a misdemeanor rather than a felony.<sup>xxii</sup> However, these states retain traditional child pornography felonies and do not prevent prosecution based on those statutes. This approach has the benefit of implementing proper levels of intervention where they are necessary or helpful, based on the prosecutor's discretion. Yet, unlimited prosecutorial discretion was largely what the responsive legislation was intended to combat in the first place.

**Comment [JW26]:** Prosecution of whom? I think you mean juveniles, right? Be more specific and precise.

**Comment [JW27]:** How do we know that was the intent? I don't think you mentioned it as part of the "problem"

It is argued that prosecutors in these two states will follow the legislature's intent in creating the new charges and now prosecute juveniles solely with sexting misdemeanors. This is far from certain, however, since the legislature could have limited the statutory charges and only subjected minors to sexting misdemeanors if it so desired, especially when Vermont and Nebraska did just that. Furthermore, it is well known that when choosing between a lower and higher charge, prosecutors often opt for the higher charge because it provides more power in plea bargaining and satisfies their obligation to enforce state law to its full extent.

**Comment [AB28]:** Maybe take this out??

**Comment [JW29R28]:** I think this information is useful but I am not sure it belongs here – I'd incorporate it into previous paragraph because it IDs the reason the fix they have implemented is not much better than regular pornography statutes.

A better legislative framework would provide levels of prosecution based on the specific type of sexting, without the unlimited prosecutorial discretion of Utah and Ohio. SB215 attempts to avoid the issues with current state sexting statutes by combining an aggravating circumstances framework<sup>xxiii</sup> as well as affirmative defenses. The design of SB215 provides [REDACTED] -level juvenile charge, with aggravating factors that could raise the charge for more serious related behaviors. [REDACTED]

**Comment [JW30]:** AHA! Here is what you think the fix will be but you should ID the opposites of these in the section where you ID the problems.

## 2. SB15’s Legislative Response – Nevada’s Solution

SB 215 proposes a new section of the NRS which is specific to minors and sexting. SB215 begins with a catchall sub-section that prohibits a minor from “using any electronic or computerized device to purposefully, knowingly, or recklessly create, produce, distribute, exchange, or possess an image, video, or other material that shows a minor involved in (i) sexually explicit conduct or (ii) a lewd-exhibition of nudity.”

A subsection follows that provides the general penalty for the catch-all offense. A minor who violates this section the first time is deemed a delinquent in need of supervision and would be sent to a related diversionary program. A court would deem a second offense a delinquent act, a misdemeanor, and the court could order detention of the minor.

To recognize the great differences between forms of sexting, the next subsection provides a list of aggravating factors that elevate particularly serious sexting activities to the level of a felony in juvenile court: {ENTER SUBSECTION}??

SB215 includes a section to ensure that minors are not charged with traditional child pornography offenses, instead of, or in addition to, the sexting prohibitions. SB215 also

includes a section that exempts a minor from Nevada’s sex offender registration requirements absent extenuating circumstances for serious and egregious acts as set forth in the bill.

SB215 also includes affirmative defenses to remove any other potential unintended consequences occurring in various other state legislation.

Under these approaches, the sexting statute with aggravating factors framework, prosecutors are suitably guided and limited in their choice of possible charges. Unlike Ohio and Utah, prosecutors cannot choose an “either/or” approach, or for that matter, a “both/and” approach for traditional child pornography felonies and sexting misdemeanors. Appropriate consequences are fixed according to behavior, but in a manner that covers all situations more sensibly and fairly than the narrow exceptions of Vermont and Nebraska.

*[Or I could do a bulleted list of what the statute does instead of doing this in paragraph form???*

### III. Opposition

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### IV. Conclusion

Teen sexting is clearly an issue that must be addressed, however Nevada’s child pornography statute should not be the solution. Because the images, motivations, and harms of sexting vary substantially, something unique is needed to address the issue. Using SB215’s lesser charge with the aggravating factor framework and affirmative defenses provides a coherent and balanced approach for the juvenile system. SB215 minimizes the unintended consequences of overly narrow sexting exceptions, by

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including its aggravating factors framework as well as affirmative defenses. SB215 limits prosecutorial discretion, and protects teens who engage in sexting from the grave consequences of sex offender registration.

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<sup>i</sup> Sex and Tech Results From a Survey of Teens and Young Adults. The National Campaign to Prevent Teen and Unplanned Pregnancy (2008), available at [www.thenationalcampaign.org/sextech/PDF/SexTech\\_Summary.pdf](http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf)

<sup>ii</sup> Id.

<sup>iii</sup> Id.

<sup>iv</sup> State v. Canal, 773 N.W.2d 528, 529 (Iowa 2009)

<sup>v</sup> Id.

<sup>vi</sup> Id.

<sup>vii</sup> Generally, registration in Iowa ranges from 10 years to life depending on the type and number of offenses the defendant is convicted of. Moreover, Iowa law does not permit a juvenile judge to remove or suspend the minor's requirements to register. [http:// www.iowasexoffender.com/faq/content](http://www.iowasexoffender.com/faq/content) (last visited April 1, 2011).

<sup>viii</sup> Beth DeFalco, 14-year old girl arrested after posting nude pics. Associated Press (Mar. 27, 2009), [www.netlingo.com/more/Girl\\_arrested.pdf](http://www.netlingo.com/more/Girl_arrested.pdf) (last visited April 1, 2011).

<sup>ix</sup> Id.

<sup>x</sup> Id.

<sup>xi</sup> Id. (The teen girl was eventually sentenced to probation and counseling).

<sup>xii</sup> Two teens charged with child pornography after sexting. Associated Press (January 29, 2010) [www.kirotv.com/news/22379142/detail.html](http://www.kirotv.com/news/22379142/detail.html) (last visited April 1, 2011).

<sup>xiii</sup> Id.

<sup>xiv</sup> Id.

<sup>xv</sup> Id.

<sup>xvi</sup> Child porn charges dropped in teen 'sexting' case. Associated Press (February 17, 2010) [www.kirotv.com/news/22590980/detail.html](http://www.kirotv.com/news/22590980/detail.html) (last visited April 1, 2011)

<sup>xvii</sup> **NRS 200.710** Unlawful to use minor in producing pornography or as subject of sexual portrayal in performance.

1. A person who knowingly uses, encourages, entices or permits a minor to simulate or engage in or assist others to simulate or engage in sexual conduct to produce a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750.

2. A person who knowingly uses, encourages, entices, coerces or permits a minor to be the subject of a sexual portrayal in a performance is guilty of a category A felony and shall be punished as



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provided in NRS 200.750, regardless of whether the minor is aware that the sexual portrayal is part of a performance.

<sup>xviii</sup> **NRS 200.700** Definitions. As used in NRS 200.700 to 200.760, inclusive, unless the context otherwise requires:

1. "Performance" means any play, film, photograph, computer-generated image, electronic representation, dance or other visual presentation..
2. "Promote" means to produce, direct, procure, manufacture, sell, give, lend, publish, distribute, exhibit, advertise or possess for the purpose of distribution.
3. "Sexual conduct" means sexual intercourse, lewd exhibition of the genitals, fellatio, cunnilingus, bestiality, anal intercourse, excretion, sado-masochistic abuse, masturbation, or the penetration of any part of a person's body or of any object manipulated or inserted by a person into the genital or anal opening of the body of another.
4. "Sexual portrayal" means the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value.

<sup>xix</sup> **NRS 201.265** Unlawful acts; penalty. Except as otherwise provided in NRS 200.720 and 201.2655, and unless a greater penalty is provided pursuant to NRS 201.560, a person is guilty of a misdemeanor if the person knowingly:

1. Distributes or causes to be distributed to a minor material that is harmful to minors, unless the person is the parent, guardian or spouse of the minor.
2. Exhibits for distribution to an adult in such a manner or location as to allow a minor to view or to have access to examine material that is harmful to minors, unless the person is the parent, guardian or spouse of the minor.
3. Sells to a minor an admission ticket or pass for or otherwise admits a minor for monetary consideration to any presentation of material that is harmful to minors, unless the minor is accompanied by his or her parent, guardian or spouse.
4. Misrepresents that he or she is the parent, guardian or spouse of a minor for the purpose of:
  - (a) Distributing to the minor material that is harmful to minors; or
  - (b) Obtaining admission of the minor to any presentation of material that is harmful to minors.
5. Misrepresents his or her age as 18 or over for the purpose of obtaining:
  - (a) Material that is harmful to minors; or
  - (b) Admission to any presentation of material that is harmful to minors.

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6. Sells or rents motion pictures which contain material that is harmful to minors on the premises of a business establishment open to minors, unless the person creates an area within the establishment for the placement of the motion pictures and any material that advertises the sale or rental of the motion pictures which:

(a) Prevents minors from observing the motion pictures or any material that advertises the sale or rental of the motion pictures; and

(b) Is labeled, in a prominent and conspicuous location, "Adults Only."

**NRS 201.257** "Harmful to minors" defined. "Harmful to minors" means that quality of any description or representation, whether constituting all or a part of the material considered, in whatever form, of nudity, sexual conduct, sexual excitement or sado-masochistic abuse which predominantly appeals to the prurient, shameful or morbid interest of minors, is patently offensive to prevailing standards in the adult community with respect to what is suitable material for minors, and is without serious literary, artistic, political or scientific value.

<sup>xx</sup> **NRS 432B.110** "Sexual exploitation" defined. "Sexual exploitation" includes forcing, allowing or encouraging a child:

1. To solicit for or engage in prostitution;
2. To view a pornographic film or literature; and
3. To engage in:

(a) Filming, photographing or recording on videotape; or

(b) Posing, modeling, depiction or a live performance before an audience,

Ê which involves the exhibition of a child's genitals or any sexual conduct with a child, as defined in NRS 200.700.

<sup>xxi</sup> See Neb. Rev. Stat. Ann. § 28-1463.03; Vt. Stat. Ann. Tit. 133, § 2802b(a)

<sup>xxii</sup> Utah Code Ann. § 76-10-1204(4)(b)-(c) (Supp. 2009); H.B. 132, 128th Gen. Assem., Reg. Sess. (Ohio 2009).

<sup>xxiii</sup> 77 Tenn.L.Rev. 1