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I. INTRODUCTION

Sexting is the modern term given to "the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet."[1] Since 2009, teenage sexting has been featured in the news repeatedly. Most prominent of these articles are those reporting that teenagers—both high school and middle school students—are being arrested for child pornography-related charges because those teens have traded or passed on images of either themselves or a peer of a similar age. Most media reports have described these situations with outrage,[2] and that is understandable because the so-called victim of child pornography is being treated as the perpetrator.[3] Despite the fact that child pornography laws are designed to protect minors, these teens can be convicted of felonies and even forced to register as child pornographers for transmitting their own image to another teen. Some have suggested a "Romeo and Juliet" exception to child pornography laws that would protect teenagers who consensually transmit images of themselves to each other.[4] This exception is used in many states for statutory rape offenses.

State legislators have responded to teen sexting in different ways. As of 2010, at least sixteen states have introduced or are considering bills or resolutions aimed at sexting.[5] Some states have amended their child

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1. Miller v. Mitchell, 598 F.3d 139, 143 (3d Cir. 2010) (internal quotation marks omitted).

2. *See, e.g.*, Nancy McKenna, *'Sexting'—Navigating Through Muddy Waters*, COMPUTER CRIME & TECH. L. ENFORCEMENT, May 2010, at 1, 1–3; Robert H. Wood, *The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint*, 16 MICH. TELECOMM. & TECH. L. REV. 151, 176 (2009); Shannon Shafron-Perez, Comment, *Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting*, 26 J. MARSHALL J. COMPUTER & INFO. L. 431, 452 (2009). *But see* Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 45–48 (2007) (arguing that sexting teens should be required to register as sex offenders).

3. According to one commentator, "[i]t is a venerable common law principle that the class of persons a statute is meant to protect should not be subject to punishment under the statute." Wood, *supra* note 2, at 171. Unlike "victimless crimes" that are not intended to protect a certain class of persons, child pornography laws were drafted to protect children from adults, not from themselves.

4. Catherine Arcabascio, *Sexting and Teenagers: OMG R U Going 2 Jail???*, 16 RICH. J.L. & TECH., Spring 2010, at 1, 35, http://jolt.richmond.edu/v16i3/article10.pdf; *see also* W. Jesse Weins & Todd C. Hiestand, *Sexting, Statutes, and* Saved by the Bell*: Introducing a Lesser Juvenile Charge with an "Aggravating Factors" Framework*, 77 TENN. L. REV. 1, 48–54 (2009) (creating model statutory language).

5. *See 2010 Legislation Related to "Sexting,"* NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=19696 (last updated Jan. 4, 2011). There is currently no federal sexting legislation; however, Colorado, Nebraska, North Dakota, Oregon, Utah, and Vermont have already passed sexting legislation. *Id.*; *2011 "Sexting" Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/default.

pornography statutes to create sexting exceptions, and others have created additional misdemeanor offenses that prosecutors can use for minors that will keep them in juvenile court and off the sex offender registry.[6] For example, Vermont has added a statute that states that a minor who uses "a computer or electronic communication device to transmit an indecent visual depiction of himself or herself to another person" will be tried as a juvenile and will not face the possibility of being required to register as a sex offender.[7] The Utah Criminal Code now gives felony convictions only to people aged eighteen years and over for sexting-related offenses; teens aged seventeen years and younger can receive a misdemeanor at most.[8] Most recently, Arizona has enacted a statute that establishes as Class 2 misdemeanors the offenses of juveniles' using an electronic communication device to possess or transmit images of minors that depict explicit sexual material.[9] The statute also provides defenses to minors who receive such images but did not solicit them and who make a good faith effort to destroy them.[10]

These statutory attempts have been lauded as a good start, but none appears to wholly address the problem of age of consent inconsistencies.[11] There have been multiple cases in which the parties prosecuted for sexting could legally be sexually active with each other.[12] Under federal

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aspx?tabid=22127 (last updated June 22, 2011); *2009 "Sexting" Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=17756 (last revised Sept. 1, 2010).

6. *See* Amber Ellis, *Bill Would Clarify 'Sexting' Law*, CINCINNATI ENQUIRER, Apr. 14, 2009, at B2, *available at* 2009 WLNR 16840705; Brett Kelman, *'Sexting' a Serious Offense*, PAC. DAILY NEWS (Guam), May 10, 2010, at A1, *available at* 2010 WLNR 9656017; McKenna, *supra* note 2, at 3.

7. VT. STAT. ANN. tit. 13, § 2802b(a)–(b)(2) (2009). Schools have also taken it upon themselves to adopt policies and strategies for dealing with their sexting students. Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 63–64 (2009).

8. UTAH CODE ANN. § 76-10-1204(4)(a)–(c) (LexisNexis Supp. 2010).

9. ARIZ. REV. STAT. ANN. § 8-309 (Supp. 2010).

10. *Id.*

11. *See* Weins & Hiestand, *supra* note 4, at 34–48.

12. *See, e.g.*, Jeremy Pawloski, *Teens' 'Sexting' Charges Likely Will Be Dismissed*, OLYMPIAN, Feb. 18, 2010, http://www.theolympian.com/2010/02/18/1142122/teens-sexting-charges-likely-will.html (discussing two thirteen-year-old girls and a fourteen-year-old boy who sent pictures of a fourteen-year-old girl); Jared Taylor, *Questions Arise in La Joya Schools 'Sexting' Case*, MONITOR, May 5, 2010, http://www.themonitor.com/articles/palmview-38189-school-charge.html (discussing a seventeen-year-old boy with a photo of a sixteen-year-old girl).

and most state law, the child pornography age is under eighteen[13] even though thirty-nine states have an age of consent of seventeen years or younger.[14] When Romeo and Juliet exceptions to statutory rape law are examined, almost every state allows sexual relations between young people and teens who are close in age. Additionally, in some federal statutes, the age of consent is sixteen.[15] This disparity indicates a disconnect between legislators' beliefs in the sexual maturity of teens: they should be allowed to have sexual relationships with their peers without fear of prosecution, but these same teens cannot take photos of these exploits or share them with each other.[16] Moreover, another inconsistency exists because teens are charged with child pornography offenses due to their status as minors but are then prosecuted in adult criminal court and threatened with adult sentences.[17]

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13. 18 U.S.C. §§ 2251–2252 (2006 & Supp. III 2010); *see, e.g.*, CAL. PENAL CODE § 311.3 (West 2008); COLO. REV. STAT. § 18-6-403 (2010); GA. CODE ANN. § 16-12-100 (2010); IND. CODE ANN. § 35-42-4-4 (West 2004); WIS. STAT. ANN. § 948.05 (West 2010).

14. ALA. CODE § 13A-6-70(c)(1) (LexisNexis 2005) (age 16); ALASKA STAT. § 11.41.436 (2008) (age 16); ARK. CODE ANN. § 5-14-127(a)(1)(A)(i) (2010) (age 16); COLO. REV. STAT. § 18-3-402(1)(e) (2010) (age 17); CONN. GEN. STAT. ANN. § 53a-71(a)(1) (West 1958) (age 16); GA. CODE ANN. § 16-6-3(a) (2007) (age 16); HAW. REV. STAT. § 707-730(1)(c) (Supp. 2007) (age 16); 720 ILL. COMP. STAT. ANN. § 5/12-15(b)–(c) (West 1993) (age 17); IND. CODE ANN. § 35-42-4-9(a) (West 2004 & Supp. 2010) (age 16); IOWA CODE ANN. § 709.4(2)(c)(4) (West 2003) (age 16); KAN. STAT. ANN. § 21-3503(a) (2007) (age 16); KY. REV. STAT. ANN. § 510.120(1)(b) (LEXIS through 2010 Extraordinary Sess.) (age 16); LA. REV. STAT. ANN. § 14:80(A)(1) (2004 & Supp. 2009) (age 17); ME. REV. STAT. ANN. tit. 17-A, § 254(1)(A) (2006) (age 16); MD. CODE ANN., CRIM. LAW § 3-307(a)(3)–(5) (LEXIS through 2010 Reg. Sess.) (age 16); MASS. GEN. LAWS ANN. ch. 265, § 23A (West 2008) (age 16); MICH. COMP. LAWS ANN. § 750.520b(1)(b) (West 2004 & Supp. 2010) (age 16); MINN. STAT. ANN. § 609.345(1)(b) (West 2003 & Supp. 2008) (age 16); MISS. CODE ANN. § 97-3-95(1)(c) (West, Westlaw through 2010 Reg. Sess.) (age 16); MO. ANN. STAT. § 566.034(1) (West 1999) (age 17); MONT. CODE ANN. § 45-5-502(3) (2009) (age 16); NEB. REV. STAT. § 28-319.01(1)(c) (Supp. 2010) (age 16); NEV. REV. STAT. § 200.364(5)(a)–(b) (2009) (age 16); N.H. REV. STAT. ANN. § 632-A:3(II) (LexisNexis 2007 & Supp. 2010) (age 16); N.J. STAT. ANN. § 2C:14-2(a)(2) (West 2005) (age 16); N.M. STAT. ANN. § 30-9-11(G)(1) (LexisNexis Supp. 2010) (age 17); N.Y. PENAL LAW § 130.25(2) (McKinney 2009) (age 17); N.C. GEN. STAT. § 14-27.7A (2009) (age 16); OHIO REV. CODE ANN. § 2907.04(A) (West 2006) (age 16); OKLA. STAT. ANN. tit. 21, § 1111(A)(1) (West 2002 & Supp. 2011) (age 16); 18 PA. CONS. STAT. ANN. § 3122.1 (West 2000) (age 16); R.I. GEN. LAWS § 11-37-6 (2002) (age 16); S.C. CODE ANN. § 16-3-655(B)(2) (Supp. 2010) (age 16); S.D. CODIFIED LAWS § 22-22-7 (2006 & Supp. 2010) (age 16); TEX. PENAL CODE ANN. § 22.011(c)(1) (West 2003 & Supp. 2010) (age 17); VT. STAT. ANN. tit. 13, § 3252(c) (2009) (age 16); WASH. REV. CODE ANN. § 9A.44.079(1) (West 2009) (age 16); W. VA. CODE ANN. § 61-8B-5(a)(2) (LexisNexis 2005) (age 16); WYO. STAT. ANN. § 6-2-316(a)(iv) (2009) (age 16).

15. 18 U.S.C. § 2243 (2006).

16. *See* Amy F. Kimpel, *Using Laws Designed To Protect as a Weapon: Prosecuting Minors Under Child Pornography Laws*, 34 N.Y.U. REV. L. & SOC. CHANGE 299, 301 (2010).

17. *Id.* at 302.

These disparities have raised several constitutional law claims at the state and federal level. Although the Court has not yet ruled upon First Amendment claims of sexting, defendants have argued that prosecuting teens who are over the age of consent under child pornography laws violates these teens' rights under equal protection, freedom of privacy, and due process.[18] In only one of these cases has the defendant been successful with a due process claim.[19] The vast majority of these cases involved adults who recorded their sexual encounters with minors under the age of eighteen. However, one case in Florida involved sexting between teens, and the defendant teen's privacy rights claim was rejected.[20] The Supreme Court has yet to rule on the issue and lower courts have given inconsistent rulings. The law in this area is therefore still undecided.

This Article will focus primarily on sexting cases and scenarios that involve the transmission of nude or sexually explicit photographs between teens who are both above the age of consent or who would be exempt from prosecution if they had sexual intercourse due to the relevant state's Romeo and Juliet exception to its statutory rape statute.[21] Part II will look at real-life examples of sexting prosecutions to see how the juveniles in question would have fared if they had simply engaged in sexual intercourse. In Part III, this Article will compare sexting prosecutions with the rationale behind statutory rape laws and their corresponding Romeo and Juliet exceptions. Part IV will analyze the probability of success of four potential constitutional challenges to sexting prosecutions: freedom of expression, equal protection, right to privacy, and due process. In Part V, this Article will propose a Romeo and Juliet exception to sexting that emphasizes consent.

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18. *Id.* at 331. In a related matter, the Third Circuit upheld a § 1983 action against a Wyoming county district attorney, alleging the attorney's threat of potential charges against teenage girls for sending sexually suggestive text messages was retaliatory in violation of their First Amendment right to be free from compelled speech. *See* Miller v. Mitchell, 598 F.3d 139, 154–55 (3d Cir. 2010). The district attorney had threatened prosecution unless the teens went to an education and counseling program that required them to write an essay as to why their sexting behavior was wrong. *Id.* at 144.

19. *See* Salter v. State, 906 N.E.2d 212, 221–23 (Ind. Ct. App. 2009).

20. A.H. v. State, 949 So. 2d 234, 237 (Fla. Dist. Ct. App. 2007).

21. This Article will not consider text messages without attached images because these kinds of texts are not being prosecuted under child pornography statutes and are more likely to be protected under the First Amendment. *See* John A. Humbach, *'Sexting' and the First Amendment*, 37 HASTINGS CONST. L.Q. 433, 455 (2010).

II. EXAMPLES OF SEXTING PROSECUTIONS

Sexting prosecutions and the media response beg the question as to whether and why sexting is a serious issue. Despite widespread media attention and parental outrage, experts say that sexting is normal teenage behavior.[22] Teens are simply using technology to fuel their natural and hormone-driven curiosity.[23] However, teens have also been shown to have poorer impulse control and risk assessment abilities, which means that they may post or send images without thinking of the legal and social consequences.[24]

Some argue that sexting is not that common and therefore is not worthy of so much attention from legislators and the media.[25] One study that the media has used repeatedly shows that, in a 2008 survey, 22% of girls and 18% of boys said that they had sexted.[26] However, that study has been criticized for having skewed results because it was a voluntary survey and the subjects were not randomly selected.[27] Another more reliable survey from the Pew Research Center's American Life Project showed that only 4% of twelve- to seventeen-year-olds surveyed had sent images and 15% had received images.[28] For seventeen-year-olds, those numbers increased to 8% sending pictures and 30% receiving them, indicating that as teens age, they are more likely to send and receive sexting photos.[29] The Pew study is more methodologically reliable because it consists of a random national sample, but the researchers have

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22. Ellee Kladzyk, *'Sexting'—What's the Big Deal, Kids Wonder*, WASHTENAW VOICE, May 11, 2009, http://voice.kellekinser.com/15/17/sexting.html; Peter E. Cumming, Address to the Roundtable on Youth, Sexuality, Technology at the Congress of the Humanities and Social Sciences: Children's Rights, Voices, Technology, Sexuality (May 26, 2009), *available at* http://www.yorku.ca/cummingp/documents/TeenSextingbyPeterCummingMay262009.pdf.

23. *See* Calvert, *supra* note 7, at 20; Brent Dean, *Sexting: Is It Really Hurting Teens?*, COMPUTER CRIME & TECH. L. ENFORCEMENT, May 2010, at 1, 2; Cumming, *supra* note 22, at 8.

24. Arcabascio, *supra* note 4, at 7; Brett Buckner, *Boundless Consequences: With 'Sexting,' a Seemingly Innocent Decision Can Lead to a Lifetime of Regret*, ANNISTON STAR, July 5, 2009, http://www.annistonstar.com/view/full_story/2886683/article-Boundless-consequences--With--sexting--a-seemingly-innocent-decision-can-lead-to-a-lifetime-of-regret; Claudia Feldman, *Message Is Out on Sexting*, HOUS. CHRON., Apr. 2, 2009, at 1, *available at* 2009 WLNR 6517995.

25. *See Sociologist: Few Teens 'Sexting,'* UNITED PRESS INT'L, Jan. 11, 2009, http://www.upi.com/Top_News/2009/01/11/Sociologist-Few-teens-sexting/UPI-78141231654189/; Cumming, *supra* note 22, at 6.

26. *Addressing Sexting*, CONN. L. TRIB., June 8, 2009, http://www.ctlawtribune.com/printarticle.aspx?ID=34004.

27. Calvert, *supra* note 7, at 21 (citing Carl Bialik, *Which Is Epidemic—Sexting or Worrying About It?*, WALL ST. J., Apr. 8, 2009, at A9).

28. Amanda Lenhart, *Teens and Sexting*, PEW RESEARCH CTR. 2 (Dec. 15, 2009), http://www.pewinternet.org/Reports/2009/Teens-and-Sexting.aspx.

29. *Id.*

acknowledged that their sample may have underreported sexting behavior due to fear of social disapproval.[30] Indeed, some commentators have stated that sexting is far more prevalent than most people realize.[31]

The cases that have been reported in the media provide a clear picture of how teens are being prosecuted. In the news, there have been several examples of teenagers who have been charged with or prosecuted for child pornography even though they could not have been charged under their state's statutory rape law. In Texas, a seventeen-year-old boy was caught with a naked picture of a sixteen-year-old girl on his phone.[32] The girl reported to the school principal that she sent the naked picture to him because he threatened to pass around a topless photo she had previously sent.[33] Photos of at least five other girls were found on his phone.[34] Although the age of consent in Texas is seventeen, Texas's Romeo and Juliet exception to its statutory rape law would have protected the boy if the couple had engaged in sex instead of trading photographs because he was less than three years older than the girl.[35] However, under current child pornography laws, the boy may face child pornography charges as if he were an adult.[36]

Other states have shown similar results.[37] Two Illinois middle school students were charged with child pornography for sending naked pictures of themselves to each other.[38] In New York, a sixteen-year-old boy may face seven years in jail after forwarding naked pictures of his fifteen-year-old girlfriend to classmates.[39] In Ohio, a thirteen-year-old boy was arrested on a felony charge after school officials found an

30. *See id.* at 4 & n.10.
31. Buckner, *supra* note 24; Kladzyk, *supra* note 22.
32. Taylor, *supra* note 12.
33. *Id.*
34. *Id.*
35. TEX. PENAL CODE ANN. § 22.011(e)(2)(A) (West 2011).
36. Taylor, *supra* note 12. As of August 21, 2010, the boy has not been indicted, but it is possible that he may still be indicted in the future.
37. Due to anonymity concerns, most of these cases have been reported with little identifying detail, making it difficult to determine whether the teens in question have actually faced indictment or trial. The Author continues to follow up with these stories and uses case records when possible; however, the dearth of reported cases, despite the relatively large number of reported arrests, indicates that many of these cases may be disposed of without a formal indictment.
38. Kristen Schorsch, *Sexting May Spell Court for Children*, CHI. TRIB., Jan. 29, 2010, at C17.
39. Buckner, *supra* note 24. There has apparently been no further movement on this case since it was first reported.

image of an eighth-grade girl engaging in sexual activity on his phone.[40] As in Texas, the states of Indiana, New York, and Ohio have Romeo and Juliet exceptions to their statutory rape laws, which would have spared these teens prosecution if they had engaged in sexual activity instead of sexting.[41] Similarly, in Washington, prosecutors offered to drop criminal charges against three thirteen- and fourteen-year-old middle school students who sexted if they attended a diversion program.[42] Washington's statutory rape laws would have given the teenagers a defense to prosecution if they had been engaged in sexual activity without photographing it.[43]

Two of the most controversial cases have come out of Florida. The first involves "A.H.," a sixteen-year-old girl, and her seventeen-year-old boyfriend who were charged with producing, directing, or promoting child pornography in Florida because they took photos of themselves engaging in sexual activity.[44] The teens e-mailed the photos to another computer but did not share the images with anyone.[45] One of the teens pleaded nolo contendere and was given probation but appealed the conviction as violating her right to privacy.[46] Her appeal failed, and the Florida Supreme Court declined her petition for review.[47] Also in Florida is the famous case of Phillip Alpert who, when he was eighteen years old, was convicted on child pornography charges for forwarding a picture of his sixteen-year-old ex-girlfriend to her e-mail contacts.[48] As a result of his conviction, Alpert was placed on probation but also had to register as a sex offender, was expelled from college, and has been unable to find work.[49] Even odder, Alpert is not permitted to live with his father because his father's house is too close to a school, the very high school Alpert attended even after he was convicted.[50] Both A.H. and Alpert would have been immune from statutory rape prosecution for actually engaging in sexual activity. Although Florida's age of consent is eighteen,

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40. Ellis, *supra* note 6.

41. IND. CODE ANN. § 35-42-4-9(e)(2) (West Supp. 2010); N.Y. PENAL LAW § 130.25(3) (McKinney 2010); OHIO REV. CODE ANN. § 2907.04(B)(2) (West 2006).

42. Pawloski, *supra* note 12.

43. WASH. REV. CODE ANN. § 9A.44.030(3)(a) (West 2009). This case is distinguishable from the other cases mentioned because the fourteen-year-old boy sent a picture of a fourteen-year-old girl to a thirteen-year-old girl, who then sent it to another thirteen-year-old girl without the fourteen-year-old girl's consent. Pawloski, *supra* note 12.

44. A.H. v. State, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007).

45. *Id.*

46. *Id.*

47. *Id.* at 234, *cert. denied*, 959 So. 2d 715 (Fla. 2007). The court's reasoning will be discussed more fully below.

48. 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, 6 (2009).

49. *Id.* at 6, 21–22.

50. *Id.* at 21.

its Romeo and Juliet law decriminalizes sexual activity between a minor aged sixteen or older and an adult aged twenty-three or younger.[51]

The facts of these cases show the lack of fit between sexting and child pornography, especially because sexting teens almost invariably would have been protected from statutory rape charges. Statutory rape and child pornography legislation have many similarities, particularly in their shared goal of protecting children from sexual exploitation. Statutory rape laws have already adapted to increased teenage sexuality and therefore provide a blueprint for how child pornography laws can similarly adapt.

III. COMPARISON WITH STATUTORY RAPE LAWS

Statutory rape laws have a long history in American jurisprudence. They were imported from the English common law and have evolved steadily over time.[52] Originally, the age of consent was ten years old, but states gradually raised it to as high as eighteen or twenty-one.[53] Early statutory rape laws were clearly concerned with protecting young girls; all laws criminalized sex only with young females, and many contained harsher penalties if the male was an adult but lesser penalties if he was younger than the girl.[54] Today, most states have gender-neutral statutory rape laws, and almost all states have added Romeo and Juliet exceptions for sex between two young people who are similar in age. Statutory rape laws are rarely enforced, with some evidence that prosecutors and judges prefer cases where the victim is perceived as a "chaste" female even though consent is not relevant to the offense.[55]

Like statutory rape, sexting involves sexual activity between two minors, and that has been made illegal. Both statutory rape and child pornography statutes prohibit sexual contact with minors in order to protect them from unscrupulous adults who may abuse them.[56] Also,

51. FLA. STAT. ANN. § 794.05(1) (West 2007).

52. Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 8 DEPAUL J. HEALTH CARE L. 109, 119–22 (2004).

53. *Id.* at 119; Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 403–04 (1984).

54. Oberman, *supra* note 52, at 119–20.

55. *Id.* at 132–39.

56. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 757 (1982) (recognizing that the purpose of child pornography statutes is to prevent child exploitation and abuse); Victoria Snyder, *Romeo and Romeo: Coming Out from Under the Umbrella of Sexual Abuse*, 8

when enforcing both statutes, prosecutors have had to repeatedly confront the situation in which minors themselves are committing the illegal act. As one commentator has noted, with regard to statutory rape, "[s]ociety has had to address the situation of two minors engaging in sexual intercourse with one another and whether, because both are committing statutory rape, it is appropriate to charge one, (or both) with that crime."[57] For that reason, even before Romeo and Juliet exceptions mitigated the impact of statutory rape laws on teens, courts were interpreting these laws to ameliorate their negative effects on sexually active teens.[58]

Sexting and statutory rape are also similar because school officials or parents usually report the sexting to the police.[59] As with statutory rape, the sexting teens involved rarely report themselves. Accordingly, both sexting and statutory rape between minors raise issues of harm and victimization. It is unclear whether there is any actual harm in teens' engaging in this activity, and if there is harm, it is arguably not the kind legislators envisioned when drafting the relevant child pornography statutes.[60] For example, the federal child pornography statute, 18 U.S.C. § 2251, was enacted in 1978.[61] At this time, sexting was not even technologically feasible, so legislators could not have anticipated the trend. Moreover, the legislative history of § 2251 indicates that Congress

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WHITTIER J. CHILD & FAM. ADVOC. 237, 246 (2009) ("Historically statutory rape laws have been intended to protect girls from adult men.").

57. Leary, *supra* note 2, at 32.

58. *See, e.g.*, B.B. v. State, 659 So. 2d 256, 260 (Fla. 1995) (holding that the state failed to demonstrate the compelling interest to justify an application of the statutory rape statute to two teens, and noting that the statute was "not being utilized as a shield to protect a minor, but rather . . . as a weapon to adjudicate a minor delinquent"); State *ex rel.* Z.C., 2007 UT 54, ¶ 17, 165 P.3d 1206, 1211 (refusing to apply a child sex abuse statute to a twelve- and thirteen-year-old couple engaged in consensual sexual intercourse because doing so would produce an absurd result that "the legislature could not possibly have intended"); *In re* G.T., 758 A.2d 301, 308 (Vt. 2000) (narrowing the reach of a broadly worded statutory rape statute so that it did not affect a teen couple in order to make the statute consistent with other statutes and to avoid serious questions of constitutionality).

59. *See, e.g.*, Wendy Koch, *More Teens Caught Up in 'Sexting,'* USA TODAY, Mar. 12, 2009, at 1A, *available* at 2009 WLNR 4679528; Jeffrey Simmons, *Another 'Sexting' Investigation Under Way*, WYTHEVILLE ENTERPRISE, June 8, 2010, http://www.swvatoday.com/news/article/another_sexting_investigation_under_way/7643/.

60. Some sexting cases do not involve nonconsensual sharing of images; teens often send or post images in response to requests or spontaneously and are still subject to child pornography prosecutions. As discussed below, even cases that do involve nonconsensual transmission are dissimilar from traditional child pornography cases because of the intent of the sender and the reaction of the recipient.

61. 18 U.S.C. § 2251 (2006).

enacted § 2251 specifically to prevent child abuse and abduction by adults.[62]

Despite these similarities, unlike the trend in statutory rape cases, penalties for sexting appear to be getting worse. Although almost every state has enacted legislation to decriminalize sexual activity between consenting teenagers, even states that have created such legislation are still, almost invariably, maintaining (lesser) criminal penalties for sexting.[63] Even those states that have acknowledged that sexting teens should not be prosecuted under child pornography laws still treat sexting as criminal and punish it in some way.[64] This disparity is confusing on its face: why are legislators willing to allow teens to engage in sexual activity but not to record it?

The most obvious reason for prosecuting sexting teens under child pornography laws is that prosecutors are simply enforcing criminal statutes. This reason seems disingenuous because the vast majority of teens are not sentenced like traditional child pornographers and many are never formally indicted.[65] Another possible rationale is that legislators and prosecutors fear that the images will be used by pedophiles. Certainly, there is a greater risk of that than in statutory rape cases. However, most images are sent between teens and are never made public or available to adults.[66] Official statements made by prosecutors indicate that they are punishing sexting teens to send a message to other adolescents, not

62. H.R. REP. NO. 98-536, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 492, 492 ("The creation and proliferation of child pornography is no less than a national tragedy. Each year tens of thousands of children under the age of 18 are believed to be filmed or photographed while engaging in sexually explicit acts for the producer's own pleasure or profit. The Protection of Children Against Sexual Exploitation Act of 1977 was designed to address this inexcusable abuse of children."); S. REP. NO. 95-438, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 40, 42 (noting evidence taken by two convicted child pornographers and a seventeen-year-old boy who was coerced into prostitution and pornography, among other witness testimony).

63. *E.g.*, ARIZ. REV. STAT. ANN. § 8-309 (2010); UTAH CODE ANN. § 76-10-1204 (LexisNexis Supp. 2010).

64. John Curran, *Vt. Teen Gets Reduced Sentence in 'Sexting' Case*, ASSOCIATED PRESS, Sept. 3, 2009, http://www.msnbc.msn.com/id/32681970/ns/technology_and_science-tech_and_gadgets/; Pawloski, *supra* note 12; Taylor, *supra* note 12.

65. Chris A. Courogen et al., *Police Call 3 Teen Girls' 'Sexted' Photos 'Dumb' Stuff*, PATRIOT-NEWS, Jan. 30, 2009, at A01; Koch, *supra* note 59; *Teens Avoid Detention in Sexting Case*, SEATTLE POST INTELLIGENCER, Feb. 18, 2010, *available at* 2010 WLNR 3402125.

66. *See, e.g.*, Buckner, *supra* note 24; Ellis, *supra* note 6; Pawloski, *supra* note 12; Schorsch, *supra* note 38; Taylor, *supra* note 12.

to potential pedophiles.[67] Prosecutors and judges have also stated that they are trying to protect teens from themselves.[68] Courts and prosecutors have noted that sexted images may be sent to others, which could humiliate the subjects.[69] On the other hand, if courts are attempting to protect teens from the stigma resulting from their own poor judgment, why add a criminal conviction to that shame?[70] As one commentator noted, a criminal prosecution requires that multiple adults—prosecutors, police, judges, judicial staff, and jurors—see the images in question, not just a few peers.[71] Any teens who are forced to register as sex offenders will undoubtedly be socially stigmatized even more and for much longer.[72]

Instead of these stated reasons, the answer may be that adults are simply uncomfortable with adolescent sexuality and, though unwilling to criminalize it when they cannot see it, are still willing to criminalize the photographs of it that they do see.[73] Even when statutory rape is reported, police officers and district attorneys do not have to witness it, but sexting prosecutions necessarily involve a video confirmation of adolescent sexual activity.

Whatever the reason for these prosecutions, the disparity between permissible sexual activity and impermissible photography of that activity exists. This disparity has already led to several constitutional challenges to child pornography, and this number can only increase as sexting prosecutions increase. There are four potential challenges to teenage sexting prosecutions where the teens are legally permitted to engage in sexual activities: freedom of expression, equal protection, right to privacy,

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67. Kimpel, *supra* note 16, at 314–16; *see also* Ellis, *supra* note 6 ("These kids are not sex offenders. But they need to understand the consequences of their actions." (internal quotation marks omitted)); *More Sexting Charges Highlight Problem Among Teens*, PATRIOT LEDGER, Jan. 14, 2010, http://www.patriotledger.com/news/cops_and_courts/x1530318815/More-sexting-charges-highlight-problem-among-teens ("The [district attorney's] office holds workshops at schools to inform students about technology safety, including sexting, as administrators recognize the need to show teens that the behavior is illegal.").

68. A.H. v. State, 949 So. 2d 234, 238–39 (Fla. Dist. Ct. App. 2007).

69. *See, e.g.*, *id.* at 239; Janice Morse, *'Sexting' Leads to 2 Arrests*, CINCINNATI ENQUIRER, Mar. 5, 2009, at B3, *available at* 2009 WLNR 16847788 ("[T]he students should face some type of charge, to send the message that sharing such images is unacceptable and could have 'lasting implications.'").

70. Lawrence v. Texas, 539 U.S. 558, 575 (2003) (noting the stigma a criminal conviction imposes, even for misdemeanors).

71. Kimpel, *supra* note 16, at 315.

72. Richards & Calvert, *supra* note 48, at 6.

73. Kimpel, *supra* note 16, at 310–12 (discussing American society's discomfort with adolescent sexuality). There is also anecdotal evidence that some politicians are uncomfortable with nudity generally, as demonstrated by John Ashcroft's famous covering of the female Spirit of Justice statue in the Department of Justice. *Drapes Removed from Justice Department Statue*, USA TODAY, June 24, 2005, http://www.usatoday.com/news/washington/2005-06-24-doj-statue_x.htm.

and due process. Some of these claims are more likely to succeed than others.

IV. CONSTITUTIONAL CHALLENGES

According to the Supreme Court, "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights."[74] Both the Fourteenth Amendment and the Bill of Rights protect the rights of minors, such as freedom of speech, equal protection, right to privacy, and due process in criminal proceedings.[75] On the other hand, the state does have the right to control the acts of minors to a greater extent than the acts of adults.[76] The differences in the power of the state to regulate minors and adults have been resolved on a case-by-case basis.

The rights that are implicated in teenage sexting prosecutions are the rights to freedom of expression, equal protection, privacy, and due process. The Supreme Court has dealt only with freedom of expression challenges to child pornography statutes and has not ruled on a sexting case. Other courts have applied all of the rights listed above to child pornography statutes, usually in cases involving adults as well as teens. Most of the cases did not involve two teenagers, and almost all of the cases rejected the constitutional challenge.

A. First Amendment Challenge—Freedom of Expression

1. Standard of Review

Courts have generally given substantial weight to First Amendment challenges to statutes due to their concern with chilling speech.[77] Despite this, the Supreme Court has repeatedly found that child pornography laws do not violate the First Amendment because of the compelling state interest in preventing child pornography. In *Ferber*, the Supreme Court explicitly excluded the category of child pornography

74. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

75. Carey v. Population Servs. Int'l, 431 U.S. 678, 692–93 & n.14 (1977). The United Nations Convention on the Rights of the Child also has "freedom of expression" and "right to privacy" provisions. *See* Cumming, *supra* note 22, at 10.

76. *Carey*, 431 U.S. at 692.

77. For example, a person can challenge the constitutionality of a statute on First Amendment grounds even if the statute could lawfully be applied to his or her conduct. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985).

from First Amendment protection.[78] This categorical exclusion has been recognized in subsequent Supreme Court decisions.[79] However, as shown by *Free Speech Coalition*, the images must involve harm to an actual child for them to be part of this categorical exclusion.[80] Virtual child pornography that does not harm children and is not obscene deserves First Amendment protection.

The Supreme Court has never stated which standard of review to use when analyzing First Amendment claims against child pornography laws, which has led to confusion among the lower courts. For example, citing *Ferber*, the Illinois Supreme Court has applied strict scrutiny,[81] and the Eighth Circuit has applied the "rational basis" test.[82] Most courts have held that because *Ferber* stated that child pornography is criminalized because of the harm to its subjects and not because of the content of its message, child pornography statutes cannot be classified as content-based.[83] Accordingly, these courts have applied intermediate scrutiny.[84]

According to the Supreme Court, under intermediate scrutiny, "content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[85] Moreover, "[u]nder intermediate scrutiny, the Government may employ the means of its choosing 'so

78. Humbach, *supra* note 21, at 448–49.

79. United States v. Williams, 553 U.S. 285, 288 (2008) ("Over the last 25 years, we have confronted a related and overlapping category of proscribable speech: child pornography." (citing Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002); Osborne v. Ohio, 495 U.S. 103 (1990); New York v. Ferber, 458 U.S. 747 (1982))).

80. *Free Speech Coal.*, 535 U.S. at 249–50. *But see* Benjamin A. Mains, Note, *Virtual Child Pornography, Pandering, and the First Amendment: How Developments in Technology and Shifting First Amendment Jurisprudence Have Affected the Criminalization of Child Pornography*, 37 HASTINGS CONST. L.Q. 809, 825 (2010) (arguing that *Free Speech Coalition* changed *Ferber*'s focus from harm to criminal acts).

81. People v. Alexander, 791 N.E.2d 506, 510 (Ill. 2003) (citing *Ferber*, 458 U.S. at 756–59).

82. United States v. Bach, 400 F.3d 622, 629 (8th Cir. 2005) (citing United States v. Freeman, 808 F.2d 1290, 1293 (8th Cir. 1987)). At least one commentator has agreed that because child pornography is excluded from First Amendment protection, it should be scrutinized using the rational basis test. *See* Humbach, *supra* note 21, at 475–76.

83. Ctr. for Democracy & Tech. v. Pappert, 337 F. Supp. 2d 606, 653 (E.D. Pa. 2004) (citing *Ferber*, 458 U.S. at 757, 763–65); *see also* Connection Distrib. Co. v. Holder, 557 F.3d 321, 328–29 (6th Cir. 2009).

84. *Connection Distrib. Co.*, 557 F.3d at 329; Free Speech Coal. v. Gonzales, 406 F. Supp. 2d 1196, 1205–06 (D. Colo. 2005); *Pappert*, 337 F. Supp. 2d at 653; Am. Library Ass'n v. Thornburgh, 713 F. Supp. 469, 476–77 (D.D.C. 1989), *vacated*, Am. Library Ass'n v. Barr, 956 F.2d 1178 (D.C. Cir. 1992).

85. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723 (2010) (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997)) (internal quotation marks omitted).

long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation' and does not 'burden substantially more speech than is necessary to further' that interest."[86] According to *American Library Ass'n v. Thornburgh*:

> The key in determining the constitutionality of a law that "spills over" from a legitimate governmental interest—such as the effort against child pornography—onto protected material is whether the legislation is 'narrowly drawn' to avoid as much interference with protected material as possible while furthering the legitimate governmental interest.
>
> Courts must be especially vigilant in scrutinizing broad legislative efforts that clearly burden protected First Amendment material in the name of attacking things not constitutionally protected.[87]

2. Application of First Amendment to Sexting Prosecutions

For child pornography laws to satisfy intermediate scrutiny, or any kind of scrutiny, the government's interest in enacting the statute must be examined. Every state in the United States and the federal government have enacted child pornography statutes.[88] Although the terms may differ slightly, the same basic behavior is criminalized. The creation, distribution, and possession of sexually explicit images of children are subject to lengthy criminal sentences and, usually, registration on a sex offender list.[89] As noted by one commentator, the penalties are particularly harsh for child pornography because the law is generally very punitive towards pedophiles and pedophiles are the targets of child pornography statutes.[90]

A few states provide a reason for their child pornography statutes in the statutes themselves. These rationales all emphasize protecting minors from being victimized. For example, section 617.247 of the Minnesota Statutes states that

> [i]t is the policy of the legislature in enacting this section to protect minors from the physical and psychological damage caused by their being used in pornographic work depicting sexual conduct which involves minors. It is therefore the intent of the legislature to penalize possession of pornographic work depicting sexual conduct which involve minors or appears to involve

86. *Turner Broad. Sys.*, 520 U.S. at 213–14 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994)) (internal quotation marks omitted).
87. *Am. Library Ass'n*, 713 F. Supp. at 476–77.
88. Shafron-Perez, *supra* note 2, at 437–39 & n.35.
89. *See generally id.* at 436–41 (providing a detailed history of child pornography laws).
90. Kimpel, *supra* note 16, at 309.

> minors in order to protect the identity of minors who are victimized by involvement in the pornographic work, and to protect minors from future involvement in pornographic work depicting sexual conduct.[91]

Idaho is particularly interested in "commercial sexual exploitation of children" because it "constitutes a wrongful invasion of the child's right of privacy and results in social, developmental, and emotional injury to the child."[92] For that reason, "to protect children from commercial sexual exploitation it is necessary to prohibit the production for trade or commerce of material which involves or is derived from such exploitation and to exclude all such material from the channels of trade and commerce."[93] Like Minnesota, Idaho criminalizes possession of child pornography "in order to protect the identity of children who are victimized by involvement in the photographic representations, and to protect children from future involvement in photographic representations of sexual conduct."[94] Colorado's child pornography laws are premised on preventing "sexual exploitation of children" because that exploitation "constitutes a wrongful invasion of the child's right of privacy and results in social, developmental, and emotional injury."[95] Colorado is also concerned with preventing child pornography from entering the market and "has a compelling interest in outlawing the possession of any sexually exploitative materials in order to protect society as a whole, and particularly the privacy, health, and emotional welfare of its children."[96]

With regard to § 2251, Congress's stated concerns with child pornography are:

> (1) child pornography has developed into a highly organized, multi-million-dollar industry which operates on a nationwide scale;
> (2) thousands of children including large numbers of runaway and homeless youth are exploited in the production and distribution of pornographic materials; and
> (3) the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society.[97]

The Supreme Court has issued multiple decisions that explain the purpose behind § 2251. First, *Ferber* stated that § 2251 was created to

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91. MINN. STAT. ANN. § 617.247(1) (West 2003 & Supp. 2008).
92. IDAHO CODE ANN. § 18-1507(1) (2004 & Supp. 2010).
93. *Id.*
94. *Id.* § 18-1507A(1).
95. COLO. REV. STAT. § 18-6-403(1) (2010).
96. *Id.* § 18-6-403(1.5).
97. Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. § 2251 (2006)).

prevent the "sexual exploitation and abuse of children."[98] The Court in *Ferber* highlighted the multiple studies that document "the harmful effects of sexual exploitation on children later in life and link[] children's participation in pornographic materials to molestation by adults."[99]

According to *Ferber*, the state's interest in the creation of child pornography laws is to safeguard the physical and psychological well-being of minors.[100] Child pornography statutes accomplish this by deterring the abuse of children and the images that are created, which can repeatedly harm the child through their circulation, and by closing the distribution network of child pornography.[101] The Supreme Court noted that because the activity involved with child pornography is itself illegal, it does not offend the First Amendment to criminalize the advertisement and selling of this illegal act.[102] It was for these reasons that the Supreme Court found that most child pornography is not protected by the First Amendment. In *Osborne*, the Supreme Court held that possession of child pornography could be a crime even though it had already ruled that the possession of obscenity could not be criminalized.[103] One of the Court's main rationales for this holding was preventing child victims from being "haunt[ed]" by their participation in child pornography.[104] The Court assumed that the child pornography images were the result of sexual abuse of the child.[105]

Second, *Ashcroft v. Free Speech Coalition* clarifies *Ferber* and *Osborne* by more explicitly linking child pornography's exclusion from First Amendment protection to the illegal nature of the underlying activities.[106] In *Free Speech Coalition*, the Supreme Court further emphasized that it is child pornography's "intrinsic[]" relationship to the

98. *See* New York v. Ferber, 458 U.S. 747, 757 (1982). Indeed, the Court used the word *exploit* or its derivatives over twenty times in the decision. *See* Humbach, *supra* note 21, at 464.
99. Mains, *supra* note 80, at 817–18.
100. *Ferber*, 458 U.S. at 756–57.
101. *Id.* at 759 & n.10.
102. *Id.* at 761–62 ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (internal quotation marks omitted))); *see also* Osborne v. Ohio, 495 U.S. 103, 110 (1990).
103. *Osborne*, 495 U.S. at 109–10.
104. *See id.* at 111.
105. *See id.*
106. *See* Humbach, *supra* note 21, at 461.

sexual abuse of children that makes it unprotected speech.[107] *Free Speech Coalition* also noted that circulation of child pornography can reinjure a child's reputation and emotional well-being with each new publication.[108] The Supreme Court also found that child pornography laws' aim to "dry up the market" showed that the speech had a "proximate link to the crime from which it came."[109]

As these cases and statutes show, exploitation is a key component of states' child pornography statutes. Indeed, many states' child pornography statutes have the phrase *child exploitation* or *exploitation of a minor* in their titles.[110] State courts have also construed the intent of their child pornography statutes as, among other things, "rooting out the sexual exploitation of children."[111] According to *Merriam-Webster*, *exploit* means "to make use of meanly or unfairly for one's own advantage."[112]

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107. Ashcroft v. Free Speech Coal., 535 U.S. 234, 249 (2002) (quoting *Ferber*, 458 U.S. at 759) (internal quotation marks omitted). *But see* Mains, *supra* note 80, at 825, 828 (arguing that *Free Speech Coalition* changed *Ferber*'s focus from harm to criminal acts involving actual children).

108. *Free Speech Coal.*, 535 U.S. at 249 (citing *Ferber*, 458 U.S. at 759 & n.10).

109. *Id.* at 249–50 (quoting *Ferber*, 458 U.S. at 760) (internal quotation marks omitted).

110. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3553 (2010) ("Sexual exploitation of a minor"); CAL. PENAL CODE § 311.3 (West 2008 & Supp. 2011) ("Sexual exploitation of child"); COLO. REV. STAT. § 18-6-403 (2010) ("Sexual exploitation of a child"); DEL. CODE ANN. tit. 11, § 1108 (2007 & Supp. 2010) ("Sexual exploitation of a child"); GA. CODE ANN. § 16-12-100 (2007 & Supp. 2010) ("Sexual exploitation of children"); IDAHO CODE ANN. § 18-1507 (2004 & Supp. 2010) ("Sexual exploitation of a child"); IND. CODE ANN. § 35-42-4-4 (West 2004 & Supp. 2010) ("Child exploitation"); IOWA CODE ANN. § 728.12 (West 2003 & Supp. 2010) ("Sexual exploitation of a minor"); ME. REV. STAT. ANN. tit. 17-A, § 282 (2006 & Supp. 2010) ("Sexual exploitation of minor"); MISS. CODE ANN. § 97-5-31 (West 2010) ("Exploitation of children"); MO. ANN. STAT. § 573.023 (West 2003 & Supp. 2011) ("Sexual exploitation of a minor"); N.C. GEN. STAT. § 14-190.16 (2009 & Supp. 2010) ("First degree sexual exploitation of a minor"); S.C. CODE ANN. § 16-15-395 (2003 & Supp. 2010) ("First degree sexual exploitation of a minor defined"); TENN. CODE ANN. § 39-17-1003 (2006) ("Offense of sexual exploitation of a minor"); UTAH CODE ANN. § 76-5a-3 (LexisNexis 2003 & Supp. 2010) ("Sexual exploitation of a minor"); WASH. REV. CODE ANN. § 9.68A.040 (West 2010) ("Sexual exploitation of a minor"). Federal child pornography law also uses the phrase *sexual exploitation of children* in its title. 18 U.S.C. § 2251 (2006).

111. Schmitt v. State, 590 So. 2d 404, 410 (Fla. 1991); *see also* McFadden v. State, No. CR-07-1923, 2010 WL 2562269, at *8 (Ala. Crim. App. June 25, 2010) (relying on *Ferber* and *Free Speech Coalition*); State v. Watts, 2009-0912, p. 14 (La. App. 4 Cir. 6/16/10); 41 So. 3d 625, 636 ("Through its enactment of La. R.S. 14:81.1, the legislature intended to prevent any child from ever being victimized by punishing equally any of four types of offenders for each action that contributes to that child's sexual exploitation . . . . Simply stated, preventing any child from being sexually victimized is the end to be achieved, and punishing both producers and consumers of child pornography equally is the legislature's chosen means by which to achieve this end." (quoting State v. Fussell, 06-2595, pp. 19–20 (La. 1/16/08); 974 So. 2d 1223, 1235)).

112. *Exploit*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/exploit (last visited Aug. 8, 2011).

By using the word *exploit*, the Court and state statutes are implicitly concerned with an adult's misuse of power over a child that results in the child's loss of personal dignity.[113]

In order to ascertain whether sexting teens can claim their behavior has First Amendment protection, it is necessary to see whether their images contain the same harms as traditional child pornography or whether, like virtual child pornography, they are "victimless."[114] In any event, in order for child pornography laws to be properly applied to sexting cases, the rationale behind these laws, as discussed by the Supreme Court, must apply. Based on this case law, it is clear that, according to the Supreme Court, the rationales behind child pornography laws—and the reasons child pornography does not have First Amendment protection—are (1) preventing harm to the child, (2) preventing the child from being "haunted" by his or her participation in the child pornography, and (3) "drying up the market" for child pornography.

a. Exploitation of Children

The most important goal of child pornography laws is to prevent the exploitation and abuse of children. For that reason, "where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment."[115] Even if the images could be used to harm other children, the Supreme Court found that this harm was too "contingent and indirect . . . . [because the] harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts."[116] Due to the lack of proximate cause, *Free Speech Coalition* held that "[v]irtual child pornography" was

113. Humbach, *supra* note 21, at 464–65.

114. One researcher has created a list of potential harms of sexting: mental anguish, harassment from other teens, economic harm if employers see the photos, parental punishment, school punishment, criminal punishment, and social stigma. *See* Calvert, *supra* note 7, at 23–25. However, these harms are all contingent upon the images' being leaked to others aside from the teens engaged in the acts that are photographed. Forwarded images also raise elements of lack of consent and what is known as cyberbullying, which, as discussed below, could be dealt with as a separate issue. *See id.* at 58–59; Arcabascio, *supra* note 4, at 30–31.

115. Ashcroft v. Free Speech Coal., 535 U.S. 234, 251 (2002).

116. *Id.* at 236; *see also id.* at 245 ("The prospect of crime, however, by itself does not justify laws suppressing protected speech."); *id.* at 253 ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.").

protected by the First Amendment because it "records no crime and creates no victims by its production."[117] More specifically,

> [t]he evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.[118]

The key inquiry into whether purported child pornography is protected by the First Amendment depends "upon how it was made, not on what it communicated."[119] Even if the images look like actual child pornography, they may not be criminalized unless actual children were used to make the images because "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."[120] Without this causal link to criminal activity, the images are protected by the First Amendment unless they are legally obscene, which means they must satisfy specific criteria.[121] For example, "depictions of nudity, without more, constitute protected expression,"[122] and "speech may not be prohibited because it concerns subjects offending our sensibilities."[123]

The Supreme Court used this criminal link requirement to refuse to extend its classification of unprotected speech, such as child pornography, to images of animal abuse.[124] The Court noted that child pornography is a unique category "of unprotected speech" in which "'the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required,' because 'the balance of competing interests is clearly struck.'"[125] Therefore,

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117. *Id.* at 250.

118. *Id.* at 252–53. This language affects *Ferber*'s holding that children are also harmed by invasion of their privacy. New York v. Ferber, 458 U.S. 747, 759 n.10 (1982).

119. *Free Speech Coal.*, 535 U.S. at 251.

120. *Id.* at 255; *see* United States v. Williams, 553 U.S. 285, 297 (2008) (emphasizing the link to unlawful action).

121. Kaplan v. California, 413 U.S. 115, 119–20 (1973) (holding that "pictures, films, paintings, drawings and engravings . . . have First Amendment protection" if determined to be not obscene); *see also* Massachusetts v. Oakes, 491 U.S. 576, 591 (1989) (Brennan, J., dissenting) (discussing protection of photographs); State v. Bonner, 61 P.3d 611, 614 (Idaho Ct. App. 2002) (summarizing Supreme Court protection of various media). For a discussion as to why sexting may or may not be legally obscene, see Humbach, *supra* note 21, at 444–47. For the purposes of this Article, the sexting images in question will be presumed not legally obscene.

122. Osborne v. Ohio, 495 U.S. 103, 112 (1990).

123. *Free Speech Coal.*, 535 U.S. at 245.

124. *See* United States v. Stevens, 130 S. Ct. 1577, 1585–86 (2010).

125. *Id.* at 1586 (quoting New York v. Ferber, 458 U.S. 747, 763–64 (1982)). *Stevens* also noted that the speech must be "used as an integral part of conduct in

according to *Ferber*, *Osborne*, and *Free Speech Coalition*, child pornography is not protected by the First Amendment because it is intrinsically related to the exploitation and abuse of children. It is this direct harm to the victims of sexual abuse that removes any First Amendment protection from child pornography. Both state and federal courts have therefore construed *Free Speech Coalition* to require that child pornography statutes have a causal link between the images and either child abuse or criminal activity.[126]

Some states have used the reasoning in *Free Speech Coalition* and other Supreme Court cases such as *Osborne* to strike down other "virtual" child pornography statutes. For example, in *State v. Bonner*, an Idaho appellate court struck down a statute on First Amendment grounds because the statute was not

> focused to proscribe only photographs and recordings that harm the child subjects; it sweeps within its prohibition even photographs of innocuous content which are taken without the child's knowledge and which are not distributed or otherwise used

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violation of a valid criminal statute." *Id.* (quoting *Ferber*, 458 U.S. at 761–62) (internal quotation marks omitted). *But see Williams*, 553 U.S. at 304–05 (focusing on the intent of the solicitor of child pornography, not on how it was created).

126. *See, e.g.*, United States v. Irving, 452 F.3d 110, 120 (2d Cir. 2006) (noting that *Free Speech Coalition* struck down the virtual child pornography statute because it "did not restrict the definition of child pornography to obscene material or to material that was itself the product of sexual abuse"); *Bonner*, 61 P.3d at 615 ("In child pornography, the Court said, 'the images are themselves the product of child sexual abuse,' and its distribution and sale, as well as its production, may be banned because those acts are intrinsically related to the sexual abuse of children and exacerbate the harm to the child victims." (citing *Free Speech Coal.*, 535 U.S. at 249)); State v. Tooley, 114 Ohio St. 3d 366, 2007-Ohio-3698, 872 N.E.2d 894, at ¶ 19 ("The court held that these provisions were unconstitutionally overbroad because they criminalized material that was neither obscene under *Miller* nor sufficiently related to the abuse of a minor during its production process as described by *Ferber*." (citing *Free Speech Coal.*, 535 U.S. at 246, 250)); State v. Martin, 2003 SD 153, ¶ 21, 674 N.W.2d 291, 298–99 ("Because *Ferber*'s rationale of classifying child pornography as unprotected speech relied upon the government's interest in protecting children harmed in the production process, the [federal statute's] criminalization of pornography that did not involve the exploitation of actual children was unconstitutionally overbroad." (citing *Free Speech Coal.*, 535 U.S. at 250–52)); State v. Pickett, 211 S.W.3d 696, 702 (Tenn. 2007) ("[T]he Court concluded that the statutory provision at issue was overbroad because it criminalized even those images that were not obscene and that did not involve the exploitation of actual children, such as computer-generated images or the use of adults that appear to be minors." (citing *Free Speech Coal.*, 535 U.S. at 250–56)); *see also* State v. Dalton, 153 Ohio App. 3d 286, 2003-Ohio-3813, 793 N.E.2d 509, at ¶¶ 22–24 (noting that child pornography laws "help[] protect the victims of child pornography" and child sexual abuse (citing *Osborne*, 495 U.S. at 109)).

> in a manner that could inflict physical or psychological injury on the child. Such an undifferentiating ban is inconsistent with the First Amendment.[127]

Similarly, in *State v. Zidel*, the New Hampshire Supreme Court held that photos of minor girls that were combined with nude adult female bodies were protected by the First Amendment because "when no part of the image is 'the product of sexual abuse,' and a person merely possesses the image, no demonstrable harm results to the child whose face is depicted in the image."[128]

No court has examined a First Amendment challenge to a child pornography statute as it relates to sexting teens.[129] However, it appears that the exploitation rationale behind child pornography laws could not apply to consensual teenage sexting. The consensual sexual acts between the teens considered in this Article would be legal under statutory rape laws with Romeo and Juliet exceptions, and the images would therefore be recording a legal act between, essentially, adults. Similarly, due to the consensual nature of the sexual acts and the photographing of these acts, which took place between peers, there is no implication of abuse or exploitation. Instead, teens may feel sexually empowered when they photograph themselves or their partners.[130] When an adult is involved with the creation of sexually explicit images of minors, there is an inherent power imbalance, and money is more likely to be offered. Moreover, even if the consensual images were distributed without a party's consent, the images themselves do not record an abusive or criminal act and therefore do not satisfy this child pornography law rationale.

Even when the images are sent to others without a party's consent, the intent of the sender and the harm involved is not the same. Traditional child pornography is created and distributed with the intent to sexually arouse the recipient or possessor.[131] When sexually explicit messages are sent to a teen's peers without his or her consent, the sender usually intends for the images to humiliate or harass the victim, not to arouse the

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127. *Bonner*, 61 P.3d at 616.

128. State v. Zidel, 940 A.2d 255, 263 (N.H. 2008) (citation omitted) (citing *Free Speech Coal.*, 535 U.S. at 249).

129. The Third Circuit explicitly did not rule on a sexting teen's freedom of expression claim because it was not fully briefed on appeal. Miller v. Mitchell, 598 F.3d 139, 147–48 (3d Cir. 2010). Instead, the court dealt with a related First Amendment claim by the parents of a teen who was threatened with criminal prosecution for sexting unless she attended an "education" class. The Third Circuit found that the threat of prosecution was retaliatory for the teen's refusing to take the class, which violated her First Amendment right to be free from compelled speech. *Id.* at 155.

130. Kimpel, *supra* note 16, at 327–28.

131. United States v. Williams, 553 U.S. 285, 308 ("Congress' aim was to target materials advertised, promoted, presented, distributed, or solicited with a lascivious purpose—that is, with the intention of inciting sexual arousal.").

recipients of the image. Often, the images are sent as retaliation for a breakup or other perceived injustice.[132] The only harm sexting teens complain of is being harassed and teased by their peers after an image is sent to them, and prosecutors seem to be interested in preventing these negative effects.[133]

Nonconsensual sharing of sexually explicit photos can be considered cyberbullying, which can be addressed as a separate problem from the original consensual sexting. *Cyberbullying* is defined as "when a child, preteen, or teen is tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted by another child, preteen, or teen using the Internet, interactive and digital technologies or mobile phones."[134] According to independent studies, cyberbullying is much more common than sexting and can cause similarly harmful results such as social ostracism and even suicide.[135] Cyberbullying has already been considered by several state legislatures because of its harmful effects. Several states have statutes requiring schools to educate students about and punish cyberbullying,[136] and others include cyberbullying in criminal harassment statutes.[137] In short, even though bullying by peers as the result of sexting can be perceived as "harm," it is not the harm envisioned by child pornography statutes.

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132. Richards & Calvert, *supra* note 48, at 7–8; Pawloski, *supra* note 12.

133. Buckner, *supra* note 24; Ellis, *supra* note 6; Feldman, *supra* note 24; *More Sexting Charges Highlight Problem Among Teens*, *supra* note 67.

134. Colleen Barnett, *Cyberbullying: A New Frontier and a New Standard—A Survey of and Proposed Changes to State Cyberbullying Statutes*, 27 QUINNIPIAC L. REV. 579, 580 (2009) (quoting *What Is Cyberbullying Exactly?*, STOP CYBERBULLYING, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited Aug. 8, 2011)) (internal quotation marks omitted).

135. *See id.* at 582–83; *see also* Cara J. Ottenweller, *Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act*, 41 VAL. U. L. REV. 1285, 1289, 1290 & n.30, 1291 (2007) (discussing types of cyberbullying).

136. *See, e.g.*, DEL. CODE ANN. tit. 14, § 4112D(f)(1) (2007); FLA. STAT. ANN. § 1006.147(7)(a) (West 2009); IDAHO CODE ANN. § 18-917A(2)(b) (West 2010); IOWA CODE ANN. § 280.28(2)(a)–(b) (West Supp. 2010); MD. CODE ANN., EDUC. § 7-424.1(2)(i) (LEXIS through 2010 Reg. Sess.); N.J. STAT. ANN. § 18A:37-14 (West Supp. 2010); WASH. REV. CODE ANN. § 28A.300.285 (West Supp. 2011); Barnett, *supra* note 134, at 579. Some scholars have argued that these measures are insufficient because they do not affect behavior that occurs off school property. *See* Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction To Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 284–85 (2008).

137. N.Y. PENAL LAW § 240.30(1)(b) (McKinney 2008).

b. Haunting

The second rationale to be considered is the "haunting" rationale. Child pornography is exempt from the First Amendment in part because the images of the pornography reinjure the subjects every time they are viewed.[138] For sexting teens, this rationale is questionable because, as discussed above, the image is not of abuse so they cannot be haunted by the painful memory of when the image was taken.[139] According to *Zidel*, "[t]he mere possession of morphed images depicting no victims of child pornography cannot 'haunt[] the children in years to come,' since the children do not know of their existence and did not participate in their production."[140]

Even if other teens see the images without the poser's consent, it is unlikely that they will be "haunted" in the way *Ferber* imagined.[141] Research has shown that teens who look at pornography involving other teens do not see the images the same way a child predator would see them.[142] They are simply looking at their peers.[143] As noted above, if the image is passed to other teens, this may cause some embarrassment or even humiliation, but this kind of embarrassment is not on par with being reminded of past sexual abuse. Therefore, the government has less of an interest in preventing it or can prevent it by attacking the bullying directly.[144] The haunting rationale is even more questionable for teens who voluntarily post images of themselves on public websites and clearly want their images to be seen.[145] In short, regret for a foolish act is not on par with being haunted with reminders of past abuse at the hands of a trusted adult.[146]

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138. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 102(3), 122 Stat. 4001, 4001 (2008); Osborne v. Ohio, 495 U.S. 103, 111 (1990); United States v. Norris, 159 F.3d 926, 929 (5th Cir. 1998).

139. Humbach, *supra* note 21, at 466.

140. State v. Zidel, 940 A.2d 255, 263 (N.H. 2008) (second alteration in original) (citation omitted) (quoting *Osborne*, 495 U.S. at 111).

141. *See* New York v. Ferber, 458 U.S. 747, 760 (1982).

142. Kimpel, *supra* note 16, at 320.

143. *Id.* at 314–16. Ms. Kimpel casts doubt on the "haunting harm" rationale by noting that we do not protect victims of other crimes, even sexual assault crimes, from the images of their victimization. *Id.* at 320–21. As noted by Ms. Kimpel, "[n]ormally crimes themselves are prosecuted, not the photographic evidence of those crimes." *Id.* at 321.

144. Humbach, *supra* note 21, at 466. *But see* Buckner, *supra* note 24 (noting that a girl hanged herself after being taunted by classmates when an ex-boyfriend showed naked photos she had sent to him).

145. *See* Kimpel, *supra* note 16, at 323.

146. *See* A.H. v. State, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007) (holding that the court was protecting the defendant from her own lack of good judgment by affirming her conviction).

c. Drying Up the Market

The final rationale behind child pornography laws is the government's desire to dry up the market for child pornography. There is some evidence for an overlap between sexting and the traditional child pornography market. Not only can teens forward photos that were meant to be kept private—and there are many instances of that—but some sexting behavior involves teens posting nude pictures of themselves on social networking sites.[147] These images can be co-opted by pedophiles, and according to the National Center for Missing and Exploited Children, "5.4% of the images of child pornography observed on the Internet appear to be self-produced."[148]

Although some sexting cases involve teens who post images of themselves on public websites, the vast majority of cases involve the sharing of images between teens alone.[149] Even images that are distributed without the other party's consent generally go to other teens or to people the distributing or nonconsenting party knows, not to the general public.[150] Moreover, even publicly posted images are different from traditional child pornography images because, as shown above, they do not portray a victim. Because these images do not record instances of sexual abuse or exploitation, they may be more akin to virtual child pornography, particularly for teens who are above the age of consent but below the child pornography age. In those instances, it is as if two adults who happen to look like children are in the images, exactly the kind of images that *Free Speech Coalition* stated was protected by the First Amendment.[151]

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147. Alan Wagmeister, *Two Teen Girls Face Child Porn Charges . . . for Their Own Pictures*, ASSOCIATED PRESS, Mar. 29, 2006, *available at* http://www.digtriad.com/news/story.aspx?storyid=60478; *Teen Girl Charged with Posting Nude Photos on Internet*, USA TODAY, Mar. 29, 2004, http://www.usatoday.com/tech/webguide/internetlife/2004-03-29-child-self-porn_x.htm.

148. Leary, *supra* note 2, at 19. There is also a group of teenagers who apparently create pornography for money using themselves as subjects. *Id.* at 24–25.

149. *See, e.g.*, Buckner, *supra* note 24; Ellis, *supra* note 6; Pawloski, *supra* note 12; Schorsch, *supra* note 38; Taylor, *supra* note 12.

150. Buckner, *supra* note 24; Richards & Calvert, *supra* note 48, at 6; Simmons, *supra* note 59; Taylor, *supra* note 12; *see also* Miller v. Mitchell, 598 F.3d 139, 143 (3d Cir. 2010) (stating that images were passed around between male students); *A.H.*, 949 So. 2d at 237 (stating that images were not shared beyond couple).

151. Ashcroft v. Free Speech Coal., 535 U.S. 234, 270–71 (2002) (Rehnquist, C.J., dissenting).

d. Chilling Speech

Even if the government's reason for prosecuting sexting was "important" enough to justify prosecuting sexting teens under child pornography statutes, these prosecutions may still "burden substantially more speech than necessary to further those interests."[152] Sexting prosecutions under child pornography laws carry sufficient penalties to effectively chill the speech of teens who wish to express themselves sexually.[153] Considering the differences in harm and consent in sexting cases compared with traditional child pornography, it would be relatively easy for the government to carve out an exception for sexting teens, as quite a few states have done already. For that reason, teens may have a viable First Amendment defense to sexting prosecutions.

B. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment is concerned with differential treatment of citizens based on arbitrary or suspect characteristics. According to the Supreme Court, "the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws that affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective."[154] If a law does not create a suspect classification or impinge upon constitutionally protected rights, it need only satisfy a rational basis test.[155] This test is the most relaxed and deferential of the equal protection standards and allows some inequality as long as there is no "invidious discrimination" or "wholly arbitrary" conduct.[156]

The Supreme Court has held that age is not a suspect classification due to the lack of a "history of purposeful unequal treatment" and the fact that age can be relevant to a legitimate state interest.[157] For that reason, "[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."[158] The Supreme Court has also approved of state regulation of the acts of teenagers so that they

152. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723 (2010).
153. *See* Kimpel, *supra* note 16, at 323.
154. McGowan v. Maryland, 366 U.S. 420, 424–25 (1961).
155. City of Dallas v. Stanglin, 490 U.S. 19, 23 (1989) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40, 44 (1973)).
156. *Id.* at 26–27.
157. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83–84 (2000) (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam)).
158. *Id.*

are not corrupted by older adults and has held that such a regulation does not violate equal protection.[159]

With regard to sexting cases, equal protection claims have centered on claims of disparate treatment because of age. It is indisputable that adults are permitted to possess sexually explicit, and even obscene, photos of adults and that these photos are protected under the First Amendment.[160] In fact, there are no criminal penalties for posting sexually explicit photos of adults on the Internet without their permission.[161] Minors are clearly treated differently because of age. There is also some evidence of arbitrariness in the legislative age restrictions for sexual activity and recording that activity. For example, Colorado's child pornography statute states "that a child below the age of eighteen years is incapable of giving informed consent to the use of his or her body for a sexual purpose,"[162] but its age of consent is seventeen.[163]

Despite these inconsistencies, equal protection claims in sexting cases have failed repeatedly because they do not implicate a fundamental right or a suspect class. One court found that child pornography is not protected by the Constitution, so any age restrictions must only satisfy the rational basis test.[164] Congress's stated reason for raising the age of consent was to assist with the prosecution of child pornography.[165] In 1984, well before sexting was even possible, the federal government raised the maximum age of § 2251 from sixteen to eighteen in order to assist prosecutors in proving that the child in the disputed pornographic photos is a minor.[166] Because teens reach puberty at different ages, the legislative committee found that it was difficult to prove that the child in the picture was under sixteen but that it would be easier to prove that the child was under eighteen.[167] This reason was found to be rationally related to the enforcement of the statute.[168] In another case, the defendant's equal protection argument failed because the court held that there is no

159. *Stanglin*, 490 U.S. at 24–25.
160. Kimpel, *supra* note 16, at 301 (citing Stanley v. Georgia, 394 U.S. 557, 568 (1969)).
161. *Id.* at 322–23.
162. COLO. REV. STAT. § 18-6-403(1) (2010).
163. *Id.* § 18-3-402(1)(e).
164. United States v. Freeman, 808 F.2d 1290, 1293 (8th Cir. 1987).
165. *See* H.R. REP. NO. 98-536, at 3 (1984), *reprinted in* U.S.C.C.A.N. 492, 494.
166. *Id.*; United States v. Bach, 400 F.3d 622, 629 (8th Cir. 2005).
167. *Freeman*, 808 F.2d at 1293.
168. *Id.*

fundamental right to sexual privacy for minors, so the child pornography statute needed only to pass a rational basis test, which it easily passed.[169]

These decisions show that teens are unlikely to succeed using an equal protection claim. It is unlikely that courts will find that their sexual expression is a fundamental right, so the child pornography statutes will only have to satisfy a rational basis test based on age classifications. States' stated goals of protecting children from sexual exploitation are likely to satisfy this deferential test.

C. Right to Privacy

The Supreme Court has held that the right to privacy applies to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.[170] In *Lawrence v. Texas*, this right was extended to sexual intimacy between consenting adults.[171] Although the right to privacy applies to minors, statutes that affect a minor's right to privacy receive less scrutiny "because of the States' greater latitude to regulate the conduct of children" and because the law has generally regarded minors as having a lesser capability for making important decisions.[172] For that reason, according to *Carey v. Population Services*, a state can inhibit the privacy rights of minors if the legislation serves "any significant state interest . . . that is not present in the case of an adult."[173]

The right of privacy has been successfully used by teens to protect their sexual rights in the past. Most notably, the Vermont Supreme Court held its state's statutory rape law to be inapplicable where both sexual partners are below the age of consent because a person within the

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169. State v. Senters, 699 N.W.2d 810, 818 (Neb. 2005). The mistake of age defense has also been raised under equal protection grounds where the defense is available for children between twelve and sixteen but not available for children under twelve. Because age is not a suspect classification, courts have upheld these age distinctions. United States v. Juvenile Male, 211 F.3d 1169, 1171–72 (9th Cir. 2000) ("We agree that Congress could rationally conclude that minors under the age of twelve need different, and greater, protection from sexual abuse than those over the age of twelve."); Gilmour v. Rogerson, 117 F.3d 368, 372 (8th Cir. 1997) (holding that even "sexually sophisticated seventeen-year-olds" are entitled to protection because "[t]he State's interest in discouraging minors from posing as adults by eliminating the mistake-of-age defense is entitled to great weight").

170. Roe v. Wade, 410 U.S. 113, 152–53 (1973); *see also* Wilson v. Collins, 517 F.3d 421, 429 (6th Cir. 2008) (describing these rights as "fundamental"); Catsouras v. Dep't of Cal. Highway Patrol, 104 Cal. Rptr. 3d 352, 385 (Ct. App. 2010).

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

172. Carey v. Population Servs. Int'l, 431 U.S. 678, 693 n.15 (1977).

173. *Id.* at 693 (internal quotation marks omitted); *see also* Daniel Allender, Note, *Applying* Lawrence*: Teenagers and the Crime Against Nature*, 58 DUKE L.J. 1825, 1844–45 (2009) (discussing cases that have addressed privacy rights of minors).

protection of the statutory rape law cannot be charged with violating the statute.[174] The court based this holding in part on minors' privacy rights.[175] The court ultimately held that the statutory rape statute is "inapplicable in cases where the alleged perpetrator is also a victim under the age of consent" because "the statute is intended as a shield for minors and not a sword against them."[176] This reasoning could easily be applied to sexting cases because teens are both perpetrators and victims of child pornography.

Despite these similarities, however, defendants have been unsuccessful in asserting their privacy rights in consensual child pornography cases. In two cases, a defendant has made a claim that federal child pornography statutes, which set the age of consent at eighteen, violate minors' privacy rights because in some states, minors at the age of sixteen or seventeen may marry and engage in legally sanctioned sexual intercourse.[177] However, neither of these challenges has been brought by teenagers. Instead, older adults charged with child pornography have brought these claims on behalf of their underage sexual partners, which were dismissed in large part for lack of standing.[178]

In two other cases, adults brought right of privacy claims on their own behalf. In *United States v. Bach*, the defendant argued that the images he took of a sixteen-year-old boy were protected by the liberty and privacy components of the Fifth Amendment.[179] The defendant relied on *Lawrence* for the proposition that private and consensual conduct between same-sex partners is protected under the Due Process Clause of the Fourteenth Amendment.[180] The court in *Bach* factually distinguished *Lawrence* on the grounds that that case involved two adults and the case at bar involved a forty-one-year-old man taking photos of a sixteen-year-old boy.[181] The court found that Bach's right to privacy argument failed because the "Constitution offers less protection when sexually explicit

174. *In re* G.T., 758 A.2d 301, 302 (Vt. 2000).
175. *Id.* at 307.
176. *Id.* at 309.
177. United States v. Shreck, No. 03-CR-0043-CVE, 2006 WL 2945368, at *2 (N.D. Okla. Oct. 13, 2006); United States v. Sherr, 400 F. Supp. 2d 843, 850 (D. Md. 2005).
178. *Shreck*, 2006 WL 2945368, at *1; *Sherr*, 400 F. Supp. at 849.
179. United States v. Bach, 400 F.3d 622, 628 (8th Cir. 2005).
180. *Id.*
181. *Id.* at 628–29.

material depicts minors rather than adults."[182] *Bach* also contained many elements of coercion that were relied upon by the court, such as the age disparity between the parties and the fact that the victim testified that he was coerced with an offer of money after he had repeatedly refused to participate.[183] The court noted that *Lawrence* specifically did not address cases of minors or cases where there was coercion.[184] Under a rational basis test, the statutes at issue were easily found to be constitutional.

In *State v. Senters*, the defendant was a twenty-eight-year-old high school teacher who videotaped himself and a seventeen-year-old female student having consensual sex.[185] In Nebraska, the age of consent is sixteen, but its child pornography laws apply to minors under eighteen.[186] The defendant, Senters, argued that this inconsistency violated his constitutional right to privacy and equal protection under the law.[187] The court applied the rational basis test to Senters's right of privacy argument by limiting *Lawrence* to sexual relations between adults.[188] The statute satisfied a rational basis test due to the potential dangers of recording sexual acts:

> Even for those who record an intimate act and intend for it to remain secret, a danger exists that the recording may find its way into the public sphere, haunting the child participant for the rest of his or her life. It is reasonable to conclude that persons 16 and 17 years old, although old enough to consent to sexual relations, may not fully appreciate that today's recording of a private, intimate moment may be the Internet's biggest hit next week.[189]

The significant state interest standard enunciated in *Carey v. Population Services* was not mentioned.

Both *Bach* and *Senters* are distinguishable from teenage sexting cases because they involved adults who took photos or video recordings of teenagers, which more closely resembles the harm *Free Speech Coalition*, *Osborne*, and *Ferber* were trying to eliminate.[190] *Bach* is distinguishable because of the large age difference between the parties and the efforts of the defendant to coerce the victim into participating through promises of monetary payment.[191] *Senters* is also distinguishable because of the age

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182. *Id.* at 629 (quoting United States v. Vincent, 167 F.3d 428, 431 (8th Cir. 1999)) (internal quotation marks omitted).
183. *Id.* at 628–29.
184. *Id.* at 629.
185. State v. Senters, 699 N.W.2d 810, 813 (Neb. 2005).
186. NEB. REV. STAT. §§ 28-1463.02(1) to .03 (2008 & Supp. 2010).
187. *Senters*, 699 N.W.2d at 813–14.
188. *Id.* at 817.
189. *Id.*
190. Ashcroft v. Free Speech Coal., 535 U.S. 234, 249 (2002); Osborne v. Ohio, 495 U.S. 103, 109–11 (1990); New York v. Ferber, 458 U.S. 747, 756–57 (1982).
191. United States v. Bach, 400 F.3d 622, 628–29 (8th Cir. 2005).

disparity and the defendant's position of authority as a teacher.[192] This position of authority may have created an element of coercion with which the courts were particularly concerned.[193] Accordingly, these cases contain elements of sexual exploitation of minors and more closely resemble traditional child pornography.

Only one Florida court of appeal case has dealt with sexting between two teens, and it too found that the right to privacy did not bar criminal prosecution. The court handled the matter in a different way from the two courts above; it held that the teens involved in the sexting had no expectation of privacy and therefore no right to privacy.[194] The teens in *A.H.* had taken photos of themselves involved in sexual activities and had not shared the photos with anyone, although they had transmitted them to another computer.[195] However, the court held that, despite the fact that the teens had not shared the photos with anyone else, "[n]either had a reasonable expectation that the other would not show the photos to a third party."[196] The court based its findings on the teens' relative immaturity, which meant that they could "have no reasonable expectation that their relationship will continue and that the photographs will not be shared with others intentionally or unintentionally."[197] The court even hypothesized that one of the teens could sell the photos for profit in the child pornography market or share them with peers to show off his or her sexual prowess.[198] The teens' subjective belief that they would not share the photographs was held to be less persuasive than the court's own predictions of their future behavior.[199]

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192. *Senters*, 699 N.W.2d at 813.

193. In many states, special rules apply if the defendant is in a position of authority or is a teacher. *See, e.g.*, CAL. PENAL CODE § 11165.1(c) (West 2000 & Supp. 2011); DEL. CODE ANN. tit. 11, § 771(c) (2007); FLA. STAT. ANN. § 907.041(4)(a) (West 2001 & Supp. 2011); GA. CODE ANN. § 16-6-5.1(a)–(b) (Supp. 2010); IOWA CODE ANN. §§ 709.14 to .15 (West 2003 & Supp. 2010); VT. STAT. ANN. tit. 13, § 3252(d)–(f) (2009).

194. A.H. v. State, 949 So. 2d 234, 237 (Fla. Dist. Ct. App. 2007).

195. *Id.*

196. *Id.* The court later described this distribution as "likely" and seemed to take the future breakup as a given. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 237–38 ("The right to privacy has not made each person a solipsistic island of self-determination."). The court did note that one of the teens expressed concern to law enforcement that the other might "do something disagreeable with the photographs." *Id.* at 238.

The court concluded that even if a right to privacy did exist, the statute served a compelling state interest in preventing the creation of sexually explicit images of minors, no matter who created them.[200] Couched in terms of protecting the teens, the court held that they were "not mature enough to make rational decisions concerning all the possible negative implications of producing these videos."[201] Ostensibly to protect the teens "from their own lack of judgment" and the "future damage" that may be done to their careers or personal lives, the court found that the state had a compelling interest in criminalizing their behavior.[202] The Supreme Court of Florida declined to review the appellate court's decision on appeal.[203] This paradoxical decision has been met with criticism[204] but seems to echo the beliefs of many of the judges, school administrators, and prosecutors who seek to "protect" teens by arresting them and punishing them. These judges and prosecutors have apparently ignored the Supreme Court's concern in *Lawrence* that criminalizing the behavior of teens can stigmatize them as criminals.[205] These holdings indicate that sexting teens' right to privacy claims are unlikely to be successful, especially if courts use the highly deferential rational basis standard.

D. Due Process

The Due Process Clause of the Fourteenth Amendment can be invoked when an otherwise valid law is "so overbroad that it encroaches on protected expression or so vague that prosecuting a person under the statute would effectively deprive that person of due process of law."[206] Due process claims could be brought in three different ways to

200. *Id.* at 239; *accord* State v. Vezzoni, No. 22361-2-III, 2005 WL 980588, at *1 (Wash. Ct. App. Apr. 28, 2005) (holding that a teenager's right to privacy was not violated because of the state's compelling interest in preventing child pornography).

201. *A.H.*, 949 So. 2d at 239.

202. *Id.* at 238–39.

203. A.H. v. State, 959 So. 2d 715 (Fla. 2007).

204. *See, e.g.*, Terri Day, *The New Digital Dating Behavior—Sexting: Teens' Explicit Love Letters: Criminal Justice or Civil Liability*, 33 HASTINGS COMM. & ENT. L.J. 69, 86–87 (2010).

205. *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003). In addition, courts have shown themselves to be unsympathetic to claims by teenagers that the laws were not meant to apply to them. Two Washington appellate courts have addressed claims that Washington's child pornography laws should not apply to teens because the legislature intended that these laws apply only to adults. *Vezzoni*, 2005 WL 980588, at *2; State v. D.H., 9 P.3d 253, 256 (Wash. Ct. App. 2000). Both courts found that because the legislature did not make such a distinction in the statute, it intended that the law apply to minors as well. *Vezzoni*, 2005 WL 980588, at *2; *D.H.*, 9 P.3d at 256.

206. United States v. Hilton, 167 F.3d 61, 68 (1st Cir. 1999) (citing Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)), *overruled in part by* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

invalidate child pornography prosecutions of sexting teens. First, the statute may be declared to be overbroad because it criminalizes constitutionally protected behavior. Second, the statute may not give fair notice of what is criminal because of different age standards. Third, the statute may be prone to discriminatory enforcement by prosecutors who are given too much leeway due to the mismatch between child pornography laws and sexting.

1. Overbroad Statute

The Due Process Clause of the Fourteenth Amendment protects people from statutes that are overly broad in that they prohibit constitutionally protected freedoms.[207] If a statute is "substantial[ly]" overbroad, it cannot be enforced against anyone until it is properly limited either through judicial interpretation or legislative intervention.[208] The statute is not substantially overbroad if it has only "some possibly impermissible application" but the statute generally "covers a whole range of easily identifiable and constitutionally proscribable . . . conduct."[209]

Claims of overbreadth have been successfully applied to child pornography statutes. Recently, an Idaho court of appeals invalidated Idaho's child pornography statute because the statute barred "the creation of photographs or electronic recordings without regard to whether those materials are obscene or constitute child pornography."[210] Because the statute also prohibited innocuous photographs of children that were never distributed or used in a way that could harm children, it was declared overbroad as chilling protected speech.[211]

Child pornography statutes may also be overbroad because they apply to teens who can legally have consensual sex. A federal district court held that § 2251 was overbroad but did not ultimately violate the First

207. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940); Schwartzmiller v. Gardner, 752 F.2d 1341, 1346 (9th Cir. 1984).

208. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503–04 (1985) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615–16 (1973)) (internal quotation marks omitted).

209. Sec'y of Md. v. J.H. Munson Co., 467 U.S. 947, 964–65 (1984) (quoting U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 580–81 (1973)).

210. State v. Bonner, 61 P.3d 611, 615 (Idaho Ct. App. 2002).

211. *Id.* at 615–16. The statute's limitation to photographs made with the intent of arousing lust was held to be an invalid prohibition on thoughts. *Id.* at 616.

Amendment when Congress raised the age from sixteen to eighteen.[212] The court found that sixteen- and seventeen-year-olds "are sufficiently 'adult' so as to be no longer the legitimate subjects of protection of 'children' . . . . At age 18, society would allow these persons to vote and to volunteer for a wholly foreign war."[213] The court also noted that sixteen- and seventeen-year-olds were far more likely to be sexually active, and the acts to be portrayed on film would therefore be more natural to the performers.[214] The court also found that teenagers aged sixteen and seventeen could be part of serious artistic work or simulated sexual activity whereas sexually explicit material involving children aged fifteen and younger would be unlikely to have any other purpose than pornography.[215] For that reason, "[a] blanket prohibition which requires that no one under the age of 18 be permitted to perform even the most innocuous physical acts, in simulation, goes well beyond Congress' legitimate interest of protecting children."[216] Despite these findings, because the statutes considered in *Ferber* were upheld by the Supreme Court even though one had an age limit of eighteen, the court was forced to conclude that § 2251 could not be struck down facially on First Amendment grounds, "at least until such time as a case is presented in which the alleged overbreadth of the statute is urged by someone affected by it."[217]

It is unclear what courts would make of overbreadth challenges to child pornography statutes as applied to sexting teens. The one case that accepted an overbreadth challenge was vacated on appeal, and the issue was not addressed by the Ninth Circuit. Another state court has shown that it is prepared to strike a child pornography statute on overbreadth grounds no matter how good the legislature's intent was. The fact that

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212. United States v. Kantor, 677 F. Supp. 1421, 1429–30 (C.D. Cal. 1987), *vacated*, United States v. U.S. Dist. Court, 858 F.2d 534 (9th Cir. 1988).

213. *Id.* The court also noted that Congress's intent when raising the age was to protect younger children aged thirteen or fourteen who might appear to look older. *Id.* at 1429 n.42; *see also* Sharilyn E. Christiansen, *The Child Protection Act: A Blanket Prohibition Smothering Constitutionally Protected Expression*, 9 LOY. ENT. L.J. 301, 311–12 (1989).

214. *Kantor*, 677 F. Supp. at 1431.

215. *Id.*

216. *Id.*; *see also* Robert R. Strang, *"She Was Just Seventeen . . . and the Way She Looked Was Way Beyond [Her Years]": Child Pornography and Overbreadth*, 90 COLUM. L. REV. 1779, 1790 (1990).

217. *Kantor*, 677 F. Supp. at 1432 (citing New York v. Ferber, 458 U.S. 747, 780–81 (1982) (Stevens, J., concurring)). *Kantor* was vacated on appeal by the Ninth Circuit, which held that the First Amendment requires § 2251 defendants be entitled to a mistake of age defense and did not reach the First Amendment issues involved with § 2251's age of consent. *U.S. Dist. Court*, 858 F.2d at 540–41 ("[I]mposition of major criminal sanctions on these defendants without allowing them to interpose a reasonable mistake of age defense would choke off protected speech.").

sexting behavior may be protected by the First Amendment may also make courts more willing to limit child pornography statutes so that they do not impinge upon this protected behavior. However, despite media attention to sexting prosecutions, these prosecutions are still relatively rare and may be considered to be infrequent enough that courts will see child pornography statutes as still mainly applicable to conduct that is properly criminalized.[218]

2. Void for Vagueness

The "void for vagueness" doctrine of the Due Process Clause addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions.[219]

a. Lack of Fair Notice

The Supreme Court has held that a "conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited."[220] "A citizen may be presumed to know the content of the law so long as the relevant statute is not 'so technical or obscure that it threatens to ensnare individuals engaged in apparently innocent conduct.'"[221] Moreover, when a statute "interferes with the right of free speech or of association, a more stringent vagueness test should apply."[222] This stringent test applies to legislation banning child pornography because the legislation regulates speech. Therefore, according to an Idaho court,

218. Indeed, despite the voluminous media reports about sexting teens being arrested, there are very few that report actual sentencing. This Author's research has indicated that most sexting teens are not criminally indicted and are probably punished, if at all, through their schools or the juvenile justice system. It should be noted that this lack of enforcement does not ameliorate the need for states to correct the constitutional deficiencies in their child pornography laws. One zealous prosecutor is all it would take to force the issue in court.

219. Skilling v. United States, 130 S. Ct. 2896, 2933 (2010).

220. United States v. Williams, 553 U.S. 285, 304 (2008); *see also* Salter v. State, 906 N.E.2d 212, 221 (Ind. Ct. App. 2009); State v. Nail, 743 N.W.2d 535, 539 (Iowa 2007).

221. United States v. Anderson, 605 F.3d 404, 412–13 (6th Cir. 2010) (quoting United States v. Baker, 197 F.3d 211, 219 (6th Cir. 1999)).

222. Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982); *see also* Strang, *supra* note 216, at 1790 ("[W]hen first amendment rights are implicated, the decision to abstain from an activity becomes problematic. In fact, the overbreadth doctrine exists to prevent that very abstention." (footnote omitted)).

the terms of child pornography statutes must be adequately defined, and the statutes must be "limited to works that visually depict sexual conduct by children below a specified age."[223]

In *United States v. Williams*, the Supreme Court recently limited vagueness claims against the federal child pornography statute by holding that vagueness does not exist just because it will sometimes be difficult to determine whether the elements of the crime have been proven.[224] Instead, vagueness exists when it is difficult to understand exactly what is illegal.[225] Consequently, the Court held that a statute that criminalized the distribution of photographs with the belief that they were a visual depiction of an actual minor engaging in sexually explicit conduct was not overly broad or vague.[226]

Two defendants have brought lack of fair notice challenges to child pornography statutes. In the first case, the defendant's procedural due process argument was summarily rejected by the court.[227] The defendant argued that because Nebraska statutes had multiple age definitions for what constituted a "child," these statutes did not provide sufficient notice.[228] However, the court held that vagueness applies only when the defendant does not have fair notice of exactly what conduct is forbidden.[229] Because the statute at issue clearly defined the term *children* as people under eighteen years old, it was clear enough to satisfy due process.[230]

Recently, in *Salter v. State*, a state court held that an Indiana child pornography statute was void for vagueness when the "victim" was sixteen, over the state's age of consent.[231] The Indiana Court of Appeals used the void for vagueness doctrine to hold that a defendant could not be held criminally liable for sending pictures of his genitals to a sixteen-year-old girl even though Indiana's child pornography laws criminalized such a transmission to any person under eighteen years old.[232] The statute in question made it a criminal offense when a person "knowingly or intentionally . . . disseminates matter to minors that is harmful to minors."[233] The crux of Salter's argument was that he could not know that sending a picture of his genitals to the victim was "harmful" when showing them in person would not be harmful and would be perfectly

223. State v. Bonner, 61 P.3d 611, 614–15 (Idaho Ct. App. 2002).
224. *Williams*, 553 U.S. at 306.
225. *Id.*
226. *Id.*
227. State v. Senters, 699 N.W.2d 810 (Neb. 2005).
228. *Id.* at 819.
229. *Id.*
230. *Id.*
231. Salter v. State, 906 N.E.2d 212, 221, 223 (Ind. Ct. App. 2009).
232. *Id.* at 221–23; IND. CODE ANN. § 35-49-3-3 (West 2004 & Supp. 2010).
233. *Salter*, 906 N.E.2d at 222 (quoting IND. CODE ANN. § 35-49-3-3).

legal.[234] The court agreed with Salter and held that the disparity between Indiana's age of consent, sixteen, and the maximum age of its child pornography statutes, eighteen, was void for vagueness because it did not "clearly define its prohibitions."[235]

Salter's holding was premised on the fact that the age of consent means that sixteen- and seventeen-year-olds can engage in sexual activity and "sexual activity could involve varying degrees of nudity and necessarily involves some exposure of the genitals."[236] For that reason, the court held that

> [b]y setting the legal age of consent at sixteen, the Indiana legislature has made an implied policy choice that in-person viewing of another person's genitals is "suitable matter" for a sixteen- or seventeen-year-old child. That being so, how could Salter have known that a picture of his genitals would be "harmful," that is, not "suitable," for M.B.? Asked another way, if such images are harmful to sixteen- and seventeen-year-old children, then why would our legislature allow those children to view the same matter in-person, in the course of sexual activity? These questions reveal the flaw in Indiana Code section 35-49-3-3 as applied to Salter: when read in light of well-established Indiana law setting the age of consent to sexual relations, it did not provide him with fair notice that the State would consider pictures of his genitals harmful to or unsuitable for a sixteen-year-old girl.[237]

Salter is unique because the statute in question contained a requirement that the material "harm" the minor, whereas most child pornography statutes only require that the images be sexual or contain nudity. However, *Ferber*, *Osborne*, and *Free Speech Coalition* all premise their holdings on whether the images in question are harmful to minors. Due to this necessary causal link, it is possible to extend *Salter*'s holding to other child pornography statutes, particularly in sexting cases.[238] However, even though *Salter* was decided after *Williams*, it remains unclear whether courts will accept uncertainty challenges like the one accepted by the *Salter* court.

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234. *Id.*
235. *Id.* at 221 (citing Brown v. State, 868 N.E.2d 464, 467 (Ind. 2007)).
236. *Id.* at 223.
237. *Id.* (footnote omitted).
238. One commentator has argued that "contributing to the delinquency of a minor" statutes are similarly vague when applied to sexting teens. Julie Hilden, *Why Sexting Should Not Be Prosecuted as "Contributing to the Delinquency of a Minor,"* FINDLAW (May 13, 2009), http://writ.news.findlaw.com/hilden/20090513.html.

b. Discriminatory Enforcement

The second part of the void for vagueness doctrine is discriminatory enforcement. "A conviction fails to comport with due process if the statute . . . is so standardless that it authorizes or encourages seriously discriminatory enforcement."[239] Discriminatory enforcement can be found when a statute "necessarily 'entrust[s] lawmaking to the moment-to-moment judgment of the policeman on his beat'" instead of to the legislature.[240] There have not been any discriminatory enforcement claims brought in sexting cases. However, discriminatory enforcement has caused one court to invalidate a statutory rape law as applied to two minors.[241] The Vermont Supreme Court took issue with the fact that the prosecutor's office would prosecute cases of statutory rape only when it believed that there was also lack of consent or evidence of coercion.[242] However, because those two additional elements are more difficult to prove, the juvenile would be charged with statutory rape because it is a strict liability crime.[243] This inconsistent prosecution was found to be discriminatory enforcement of Vermont's statutory rape law.[244]

Inconsistent prosecutions are rampant in sexting cases. Although all child pornography laws have harsh jail sentences, most sexting teens do not receive those sentences, and some may not be penalized at all. States often charge sexting teens with lesser offenses such as distributing obscene material to a minor[245] or contributing to the delinquency of a minor.[246] In other instances, the teens have been required to go to counseling to escape criminal prosecution.[247] For example, in Seattle, a prosecutor allowed three teens to apologize to the victim, attend a counseling program, and work with their school to create an awareness program about sexting instead of going to jail and registering as sex

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239. United States v. Williams, 553 U.S. 285, 304 (2008). Discriminatory enforcement is also a concern for regulations on speech. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1051 (1991).

240. Kolender v. Lawson, 461 U.S. 352, 360 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)) (internal quotation marks omitted); *see also In re* G.T., 758 A.2d 301, 306 (Vt. 2000) ("It is one thing to give discretion in enforcing a legislatively defined crime; it is quite another to give to prosecutors the power to define the crime.").

241. *G.T.*, 758 A.2d at 309.

242. *Id.* at 306.

243. *Id.*

244. *Id.* ("Thus, the prosecutor determines what crime the juvenile has committed, but charges in such a way as to ensure that the juvenile never has the opportunity to show that he or she did not commit the crime found by the prosecutor.").

245. *More Sexting Charges Highlight Problem Among Teens*, *supra* note 67.

246. Buckner, *supra* note 24; Curran, *supra* note 64; Ellis, *supra* note 6; Morse, *supra* note 69.

247. Shafron-Perez, *supra* note 2, at 440.

offenders.[248] In Ohio, a judge required sexting teens "to do community service and to ask peers if they knew sexting was a crime."[249] In Pennsylvania, three sexting girls were at first cited with disorderly conduct but later "sent to the county probation office's Youth Aid Panel, which devises community service programs for juvenile offenders."[250] In still other states, prosecutors and police have expressed confusion as to how to handle the matter.[251] Others have not been so lucky. For forwarding pictures of his ex-girlfriend to her e-mail contact list, Phillip Alpert became a registered sex offender at the age of eighteen.[252] Isaac Owusu was sentenced to up to two years in prison and will serve ninety days for convincing two teenage girls to send him sexually explicit photographs of themselves.[253]

Different results can even happen within the same prosecutor's office. In one case, the prosecutor investigated about twenty instances of teens' having inappropriate images on their cell phones but arrested and charged only one girl.[254] Another district attorney stated that she would have charged teens with child pornography if there had been a repeat pattern or cyberbullying, but instead she charged them with the misdemeanor offense of contributing to the delinquency of a minor.[255] Another teen was not charged because "she was reluctant to have [her] picture taken" and therefore seemed more like a victim to prosecutors.[256]

The enormous range of punishments between what a teen could receive—decades in prison and registering as a sex offender—and the punishment many actually do—counseling or juvenile probation—highlights the inconsistency between what teens are technically doing (child pornography) and the perceived innocence of their actions.[257] The

248. *Teens Avoid Detention in Sexting Case*, *supra* note 65.
249. Koch, *supra* note 59.
250. Courogen et al., *supra* note 65.
251. Simmons, *supra* note 59.
252. Richards & Calvert, *supra* note 48, at 6.
253. Curran, *supra* note 64.
254. Russ Zimmer, *Hottinger: Law Didn't Anticipate Cell Phone Photo Case*, NEWARK ADVOC., Oct. 8, 2008, at A1, *available at* 2008 WLNR 27354928. There is evidence that the prosecutor singled the girl out because she was caught with the image after he gave a speech against sexting at her school. Kimpel, *supra* note 16, at 336 n.198.
255. Morse, *supra* note 69.
256. *Id.*
257. *See* Miller v. Mitchell, 598 F.3d 139, 143 (3d Cir. 2010). *Miller* presents an excellent example of the disparity in punishment. The teens in that case were required by the district attorney to either go to a counseling program, which would result in no charges or criminal record, or face felony charges. *Id.*

inconsistency of these prosecutions looks very similar to the inconsistencies that existed in statutory rape prosecutions before the enactment of Romeo and Juliet exceptions. As with statutory rape prosecutions, these inconsistencies have resulted from some prosecutors' attempts to make the application of child pornography laws to sexting teens fairer.

Statutes that directly address sexting may do something to even out prosecutions, but existing sexting statutes also address the problems inconsistently. Until a consensus is reached regarding if and how sexting teens should be punished, inconsistent prosecutions will be open to constitutional challenges. The Supreme Court has yet to receive a writ of certiorari on this issue, and the only circuit court case involving sexting did not address a direct constitutional challenge to the application of child pornography laws. Accordingly, the issue is still very much undecided, and it would behoove state legislatures to address their child pornography laws' constitutional infirmities before the Supreme Court addresses the issue.

V. A PROPOSED SOLUTION—ROMEO AND JULIET PLUS CYBERBULLYING

Instead of waiting for a successful constitutional challenge, legislatures would be wise to craft sexting statutes now. Although some of these issues could be resolved with reduced sentencing, the possibility of being required to register as a sex offender makes the creation of a separate criminal offense a more appropriate solution. A Romeo and Juliet exception that matches the state's statutory rape laws would go a long way to removing the discrepancies inherent in a multiple age of consent system. Most importantly, an identical Romeo and Juliet exception would match illegal sexual activity to illegal photographing activity. Such an exception would not prevent prosecutors from pursuing traditional child pornographers because those defendants would be adults and the age of consent for those cases could remain eighteen.

However, a Romeo and Juliet exception alone would not remove the harm that nonconsensual transmission of photos causes. For that reason, states should either include a consent element into their statutes or create or tailor an existing cyberbullying statute.[258] A cyberbullying statute should capture teenagers' harassing and bullying behavior both on and

258. States could also add additional penalties for transmission or creation of images for commercial gain to discourage situations where teens contract with unscrupulous adults to create sexually explicit images. *See* Leary, *supra* note 2, at 4–5 (listing examples of juvenile self-pornography and prostitution); Weins & Hiestand, *supra* note 4, at 51–52 (regarding model language).

off school grounds if this behavior interferes with the victim's ability to perform in school. The penalties for such cyberbullying could be punishment through the school or even minor criminal penalties such as the ones being used in current sexting statutes. By adding these two elements to sexting or child pornography legislation, legislatures would be addressing the actual harms inherent in sexting while leaving teens free to pursue their consensual sexual expression.

VI. CONCLUSION

A bare reading of child pornography statutes and the reasons behind them, as articulated by the Supreme Court and those statutes themselves, clearly show that these statutes were not meant to apply to teenage peers sharing images of themselves with each other. Child pornography statutes have not kept up with technology or the trend of teenagers who actively share very personal information. Because prosecutors wish to discourage this behavior, they threaten teens with statutes that can technically apply to them, but in so doing, these statutes lose the protective rationale articulated by the Supreme Court.

Statutory rape laws and Romeo and Juliet exceptions further complicate the issue. Teens are now being prosecuted for having and sharing images of sexual activities in which they are legally allowed to participate. The resulting mismatch between the permission given to teens to engage in sex but not photograph it has led to outcries of unfairness, changes in legislation, and constitutional challenges. Although there have been no freedom of expression claims and most other constitutional law claims have failed, the increasing number of sexting prosecutions is likely to lead to an upswing of constitutional challenges. The fact that some teens are now fighting back—usually through their parents—instead of taking plea agreements increases this likelihood even further. The application of child pornography laws to sexting teens is vulnerable to several constitutional challenges, particularly through freedom of expression and discriminatory enforcement. Given enough time, courts may come to find that this mismatch of ages of consent cannot constitutionally stand. State legislators should be aware of this potential future and alter their laws accordingly. The creation of a matching Romeo and Juliet exception and cyberbullying statutes would be a good start.