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Abridging Constitutional Rights: Sexting Legislation in Ohio

Weronika Kowalczyk

ABRIDGING CONSTITUTIONAL RIGHTS: SEXTING LEGISLATION IN OHIO

WERONIKA KOWALCZYK*

* J.D. expected, May 2011, Cleveland-Marshall College of Law; B.A. Kenyon College. The Author would like to thank Dean Phyllis Crocker, Alana Jochum, and Margaret Sweeney for their advice and guidance in refining this Note, as well as her husband Henry Costas for his constant love and support.

I. INTRODUCTION

What happens when you combine technology, raging adolescent hormones, and rash decisions? As we have seen these past few years, one outcome is "sexting"—the trend of teenagers transmitting sexually suggestive text messages or photographs through cell phones and similar communication devices. In 2009, the media was saturated with stories pertaining to sexting, from discussing the ramifications of engaging in it—including cyber bullying,[1] slashed reputations,[2] and serious criminal charges[3]—to providing guidelines for what parents and educators could do to control or prevent it.[4] Though sexting includes the transmission of messages as well as photographs, the majority of media coverage pertains to the latter, and thus, photos will be the focus of this Note.

The flurry of attention that sexting has received is mostly due to the controversy emanating from the prosecutorial discretion in various states to charge teenagers[5] engaging in sexting under laws generally reserved for producers and distributors of child pornography. Such discretion has resulted in teens facing grave consequences that affect the rest of their lives. Teenagers prosecuted for sexting have faced,

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[1] Mike Celizic, *Her Teen Committed Suicide Over 'Sexting,'* TODAY (Mar. 6, 2009), http://today.msnbc.msn.com/id/29546030/.

[2] Marcia Hall, *Sexting: A Way to Ruin Your Reputation*, REPUTATION COUNTS (Apr. 2, 2009), http://www.reputationcounts.com/blog/?p=196.

[3] Deborah Feyerick & Sheila Steffen, *'Sexting' Lands Teen On Sex Offender List*, CNN (Apr. 8, 2009), http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html; Donna St. George, *Sending of Explicit Photos Can Land Teens in Legal Fix*, WASH. POST, May 7, 2009, at A01; *Sexting Girls Facing Porn Charge Sue D.A.*, CBS NEWS (Mar. 27 2009), http://www.cbsnews.com/stories/2009/03/27/early-show/main4896577.shtml; *Teens Face Child Porn Charge in Sexting Incident*, NEWS 5-WLWT (Apr. 8, 2009), http://www.wlwt.com/news/19120685/detail.html.

[4] The Ind. Youth Inst., *Teen "Textuality" Youth Sexting: A Troubling New Trend*, 4-5 (Aug. 2009), http://www.iyi.org/resources/doc/Issue-Brief-SEXTING-Aug09.pdf.

[5] "Teenagers" and "teens" in this Note refer to minors between thirteen and seventeen years old as a twelve year old falls in the younger pre-teen category commonly known as "tweens," while a person who is eighteen is considered an adult. *See* Media Awareness Network, *Special Issues for Tweens and Teens: The "Tween Market,"* http://www.media-awareness.ca/english/parents/marketing/issues_teens_marketing.cfm (last visited March 20, 2010) (defining "tweens" as eight to twelve year olds).

among other things, the possibility of being imprisoned or being required to register as sex offenders for as many as twenty-five years for conduct that they perceived as innocent[6]—a modern form of flirting, so to speak. The punishment simply does not fit the crime.

As a result, several states have proposed legislation specific to sexting.[7] In Ohio, House Bill 132 ("H.B. 132") proposes punishing sexting as a misdemeanor.[8] This Note will explain that, considering policy reasons, taking teen sexting out of child pornography laws' scope is a step in the right direction. Nonetheless, the Bill may face opposition ahead for two reasons.

First, the Bill is an overly broad restriction on minors' sexual expression, a form of speech protected under the First Amendment. While the scope of the Bill encompasses images that could fall under Ohio's definition of child pornography, it also covers images that would not.[9] Images that are neither obscene nor child pornography are a constitutionally protected form of free speech.[10] In abridging a fundamental constitutional right, H.B. 132 should be narrowly constructed to restrict the right in the least restrictive means while furthering the intended state interest.[11] Because H.B. 132 is not narrowly constructed, in that it proposes to restrict all forms of sexting, the Bill does not pass constitutional scrutiny.

Second, the Bill may be challenged as an unconstitutional infringement on parents' due process right under the Fourteenth Amendment to raise their children free from governmental interference. Again, for such a law to be valid, it must be justified by a compelling state interest and it must be narrowly tailored to attain that interest by the least restrictive means possible.[12] Because parents may be able to prevent their children from sexting without state interference, the criminal sanctions that would be imposed on children if H.B. 132 were enacted may be an unnecessary and, therefore, unconstitutional restriction on parental rights.

To illustrate the benefits and shortcomings of the proposed legislation, Part II provides a background on sexting, including the different forms it may take, as well as prosecutors' overwhelming response of charging sexting teens under child pornography laws in the past two years. Part III discusses the policy reasons and compelling state interests that justify enacting child pornography laws. Part IV then explains how prosecuting sexting under child pornography laws is like fitting a square peg in a round hole: though some forms of sexting may fit the black-letter law

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[6] A violation under 18 PA. CONS. STAT. § 6312 (2009), for example, constitutes a felony that could result in long prison terms and a permanent record. *See* Miller v. Skumanick, 605 F. Supp. 2d 634, 638 (M.D. Pa. 2009). Furthermore, if convicted, teens would likely have to register as sex offenders for at least ten years under Pennsylvania's Registration of Sexual Offenders Act. *Id.* (citing 42 PA. CONS. STAT. § 9791).

[7] *2009 "Sexting" Legislation*, NAT'L CONF. OF STATE LEGS. (Sept. 1, 2010), http://www.ncsl.org/?tabid=17756.

[8] H.B. 132, 128th Gen. Assemb., Reg. Sess. (Ohio 2009-2010), *available at* http://www.legislature.state.oh.us/bills.cfm?ID=128_HB_132.

[9] *See infra* note 172 and accompanying text.

[10] *See infra* notes 130-31 and accompanying text.

[11] *See infra* notes 205-08 and accompanying text.

[12] *See infra* notes 208, 210 and accompanying text.

of child pornography statutes, prosecuting it under these laws is improper based on the policy reasons. Next, Part V discusses the enactment of new legislation as one solution to the sexting dilemma that is being contemplated in Ohio. Because the scope of the proposed law includes conduct that is neither child pornography nor obscenity, this Part sets out to analyze other compelling state interests that may justify the law. Finally, Part VI explains that the Bill's overly broad scope make it an unconstitutional infringement on teens' freedom of expression and an encroachment on parents' authority to control the conduct and upbringing of their children.

II. WHAT IS SEXTING AND WHAT HAS BEEN DONE ABOUT IT?

A. Prevalence

Sexting, the transmitting of sexually suggestive text messages or photographs through cell phones and similar communication devices, has emerged as a phenomenon in middle schools and high schools during the past two years.[13] Because an overwhelming majority of teens own cell phones has undoubtedly contributed to the spread of this trend.[14] Though some may argue that like all trends, sexting may "evaporate[] over time,"[15] others worry that "'[t]he technology is there, and unless the technology is going away, the behavior is not going away.'"[16]

Thus far, there has been a limited amount of research conducted on sexting. In the fall of 2008, the National Campaign to Prevent Teen and Unplanned Pregnancy,[17] together with CosmoGirl.com,[18] released its groundbreaking study, *Sex and Tech*: *Results from a Survey of Teens and Young Adults*.[19] The study reported that 19% of teens ages thirteen to nineteen who participated in the survey said they

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[13] Donna St. George, *Sexting Hasn't Reached Most Young Teens, Poll Finds; 30% of 17-Year-Olds Report Getting Nude Photos on Their Cells*, WASH. POST, Dec. 16, 2009, at A12, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/12/15/AR2009121502321.html?sub=AR.

[14] *Id.*

[15] 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, 38 (2009).

[16] St. George, *supra* note 13 (quoting Sgt. Bill Fulton, Fairfax Cnty. Police Dep't).

[17] The National Campaign to Prevent Teen and Unplanned Pregnancy is a "private, non-profit, non-partisan organization that seeks to improve the lives and future prospects of children and families." Press Release, The Nat'l Campaign to Prevent Teen & Unplanned Pregnancy & CosmoGirl.com, The National Campaign to Prevent Teen and Unplanned Pregnancy and CosmoGirl.com Reveal Results of Sex & Tech Survey: Large Percentage of Teens Posting/Sending Nude/Semi Nude Images, *available at* http://www.thenationalcampaign.org/sextech/PDF/SexTech_PressReleaseFIN.pdf (last visited Jan. 7, 2011)

[18] "CosmoGirl.com is a part of Hearst Magazines Digital Media, launched in March 2006, and a unit of Hearst Magazines." *Id.* It aspires to "empower[] and inspire[] young women to be leaders in all aspects of their lives." *Id.*

[19] *Sex and Tech: Results from a Survey of Teens and Young Adults*, THE NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY & COSMOGIRL.COM (2008), http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf [hereinafter *Sex and Tech*] (last visited Jan. 7, 2011).

had sent a sexually suggestive picture or video of themselves to someone via email, cell phone, or some other means, while 31% said that they had received a nude or semi-nude picture from someone else.[20] Not surprisingly, the study caught the public's attention, and with no other studies reported at the time, the shocking statistics about sexting spread like wild fire throughout the media in early 2009.[21]

Additional studies have been conducted since *Sex and Tech*.[22] Notably, these studies show that the vast majority of teens have never sent or received sexually suggestive photos or videos. In May of 2009, Cox Communications,[23] partnered with the National Center for Missing and Exploited Children[24] and John Walsh,[25] published a study revealing that only 9% of teens ages thirteen to eighteen had sent a sexually suggestive text message or email with nude or nearly-nude photos, while 17% had received such a text message or email.[26] In September of 2009, MTV,[27] in partnership with the Associated Press,[28] released findings from an online survey that only 10% of young adults ages fourteen to twenty-four have shared a naked image of themselves with someone else, and 18% have had someone send them naked pictures

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[20] *Id.* at 11.

[21] *See* sources cited *supra* note 3.

[22] *See infra* notes 26, 29 & 31.

[23] Cox Communications is a multi-service broadband communications and entertainment company. Press Release, Take Charge!, Cox's New Survey on Cyber-Safety Finds Many Teens Going Online Wirelessly Without Limits or Controls (May 14, 2009), *available at* http://www.cox.com/TakeCharge/pr_05_09_14.asp. In 2004, Cox Communications launched its *Take Charge!* program "to educate parents and guardians about the importance of Internet safety and to help families get the most out of mass media in the home." *Id.*

[24] The National Center for Missing & Exploited Children (NCMEC) "was established in 1984 as a private, nonprofit 501(c)(3) organization to provide services nationwide for families and professionals in the prevention of abducted, endangered, and sexually exploited children." *National Mandate and Mission*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1866 (last visited Jan. 7, 2011).

[25] John Walsh is *America's Most Wanted* host and a children's safety advocate. Press Release, Take Charge!, *supra* note 23.

[26] *Teen Online & Wireless Safety Survey: Cyberbullying, Sexting, and Parental Controls*, COX COMMC'NS TEEN ONLINE & WIRELESS SAFETY SURVEY, IN P'SHIP WITH THE NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN (NCMEC) & JOHN WALSH (May 2009), http://www.cox.com/takecharge/safe_teens_2009/media/2009_teen_survey_internet_and_wireless_safety.pdf [hereinafter *Cox Teen Online & Wireless Safety Survey*].

[27] MTV—the American cable television network whose original purpose was to air music videos but now primarily broadcasts a variety of popular culture and reality television shows targeted at adolescents and young adults—has a long history of promoting social, political, and environmental activism in young people. *About*, THINK MTV: ACTIVISM, COMMUNITY, POLITICS, EDUCATION, SEXUAL HEALTH, AND OTHER ISSUES, http://think.mtv.com/Info/About.aspx (last visited Jan. 7, 2011).

[28] Associated Press is a non-profit news cooperative, owned by its American newspaper and broadcast members, whose mission is to deliver "unbiased news from every corner of the world to all media platforms and formats." *About Us, Facts & Figures*, ASSOCIATED PRESS, http://www.ap.org/pages/about/about.html (last visited Jan. 7, 2011).

or videos of themselves.[29] The Pew Research Center[30] study, in turn, shows that only 4% of teens ages twelve to seventeen who own cell phones reported sending a sexually suggestive nude or nearly-nude photo or video of themselves to someone else via text message, while 15% say they have received such images via text.[31]

The variance in the results of these studies reveals that sexting is not as rampant as initially believed. A minority of teens engage in sexting, and an even smaller percentage actually send photos of themselves to others. Furthermore, in reporting the prevalence of sexting, studies have merely reported how many teens admit to having *ever* sent or received sexts, without inquiring into the frequency of such conduct.[32] Even if nearly 20% of teens admit to having sent or posted a provocative photo of themselves, this does not mean that 20% of teens continue to engage in the conduct. Rather, sending a provocative photo to a boyfriend or girlfriend may have been a one-time occurrence.

The limited number of studies conducted, their varying results, and their failure to inquire into the frequency of teens' sexting make it difficult to ascertain whether sexting is widespread enough to warrant the attention it has received. If not, then enacting new legislation specifically addressing sexting would be an excessive reaction to this conduct.[33]

B. Two Forms: Consensual vs. Nonconsensual

As studies demonstrate, on average, teens are two times more likely to receive nude or semi-nude photos through texts than actually send photos of themselves.[34] The discrepancy in the numbers indicates that there are two distinct forms of sexting:

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[29] *The Associated Press-MTV Poll Digital Abuse Survey*, KNOWLEDGE NETWORKS (Sept. 23, 2009), http://surveys.ap.org/data%5CKnowledgeNetworks%5CAP_Digital_Abuse_Topline_ 09 2209.pdf [hereinafter *MTV-AP Digital Abuse Survey*].

[30] The Pew Research Center is "a nonpartisan 'fact tank' that provides information on the issues, attitudes and trends shaping America and the world . . . by conducting public opinion polling and social science research; by analyzing news coverage; and by holding forums and briefings." *About the Center*, PEW RESEARCH CTR., http://pewresearch.org/about/ (last visited Jan. 7, 2011). "It does not take positions on policy issues." *Id.*

[31] Amanda Lenhart, *Teens and Sexting: How and Why Minor Teens are Sending Sexually Suggestive Nude or Nearly Nude Images Via Text Messaging*, PEW RESEARCH CTR. 4-5 (Dec. 15, 2009), http://www.pewinternet.org/~/media//Files/Reports/2009/PIP_Teens_and_Sexting.pdf [hereinafter *Pew Teens and Sexting Survey*].

[32] *See Cox Teen Online & Wireless Safety Survey*, *supra* note 26, at 34-43; *MTV-AP Digital Abuse Survey*, *supra* note 29, at 14-18; *Pew Teens and Sexting Survey*, *supra* note 31, at 4-6; *Sex and Tech*, *supra* note 19, at 11-14.

[33] 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, 8 (2009) (stating that "[i]f sexting is rare, then its scarcity would seem to mitigate the need to create new laws specifically designed to handle and address" it).

[34] *Cox Teen Online & Wireless Safety Survey*, *supra* note 26, at 34 (showing that the ratio of teens sending sexts versus receiving them is about 1 to 2); *MTV-AP Digital Abuse Survey*, *supra* note 29, at 14 (showing that the ratio of teens sending sexts versus receiving them is about 1 to 2); *Pew Teens and Sexting Survey*, *supra* note 31, at 2 (showing that the ratio of teens sending sexts versus receiving them is about 1 to 3); *Sex and Tech*, *supra* note 19, at 11 (showing that the ratio of teens sending sexts versus receiving them is about 2 to 3).

consensual, usually occurring between two teens involved in a romantic relationship, and nonconsensual, when one of those teens forwards the other teen's image to people without the other teen's consent.

1. Consensual Sexting

Among the top reasons reported for sexting between teens is what appears to be a form of high-tech flirting. Indeed, 71% of teen girls and 67% of teen boys who have sent or posted sexually suggestive content say they have done so to a boyfriend or girlfriend;[35] 66% of teen girls and 60% of teen boys say they sent sexually suggestive content to be fun or flirtatious;[36] and 52% of teen girls did so as a "sexy present" for their boyfriend.[37] Additionally, 34% of teen girls say they did it to "feel sexy."[38]

As a voluntary and private exchange, sexting between two teens in and of itself does not harm its participants. However, a frequent objection is that it leads teens to overstep sexual boundaries.[39] Compared to other forms of sexual conduct in which teens engage, including actual sexual intercourse, sexting is much tamer. The only tangible harm that comes from private, consensual sexting is the possibility of being convicted under child pornography laws. The consequences of such a conviction, such as being labeled a sex offender, are indeed harmful to the teens involved.[40]

2. Nonconsensual Sexting

Though one may argue that consensual sexting in and of itself is not harmful, the problem is that sexting easily and often morphs from the consensual to nonconsensual form. Among teens, this situation often occurs after a fight or a break-up.[41] For example, one person from a dissolved relationship forwards photos of his or her former love interest to other people as a form of retaliation or blackmail.[42] Studies show that a majority of teens recognize the significant risk of sexting going from private flirting to mass-forwarding and humiliation.[43]

Indeed, statistics show that the risk of a private image sent via cell phone or email going viral in the community is not only possible, but also quite likely. *Sex*

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[35] *Sex and Tech*, *supra* note 19, at 2.

[36] *Id.* at 4.

[37] *Id.*

[38] *Id.*

[39] *See Help Kids Evaluate the Latest High-Tech Trends*, THE PARENT-LINK (Aug. 2008), http://studentfire.org/online/wp-content/uploads/2008/08/parentlinkaugust2008.pdf (stating that sexting "has contributed to the obliteration of sexual boundaries").

[40] *See supra* note 6 and *infra* note 156.

[41] *Pew Teens and Sexting Survey*, *supra* note 31, at 7.

[42] *Id.*

[43] *MTV-AP Digital Abuse Survey*, *supra* note 29, at 4 (reporting that 76% of those surveyed have thought about the fact that it is hard to know where pictures shared on the Internet or a cell phone might end up); *Sex and Tech*, *supra* note 19, at 3 (reporting that 44% of teens say it is common for sexually suggestive text messages to get shared with people other than the intended recipient).

and Tech reports that 40% of teens and young adults have had a sexually suggestive message that was meant to be private shown to them.[44] The study further reports that 25% of teen girls and 33% percent of teen boys say they have had nude or semi-nude images originally meant for someone else shared with them,[45] while 20% of all teens admit to having shared such messages with someone other than the person for whom it was originally intended.[46] The MTV-AP Digital Abuse Survey reports that 8% of teens and young adults said someone sent them naked pictures or videos of someone else via cell phone or on the Internet,[47] and 11% said they have been shown naked pictures of someone without that person's permission.[48]

Unlike consensual sexting, forwarding nude or semi-nude images of a person without that person's consent causes substantial harm. Because of the fragile emotional state of some adolescents, the embarrassment and mental anguish of having their nude photos distributed to other people can be devastating, even deadly. Jessica Logan, a high school teen from Cincinnati, Ohio, took her own life after enduring months of harassment and taunting for sending nude photos of herself to her boyfriend via text message.[49] After they broke up, Jessica's boyfriend sent the photos to fellow high school students.[50] The harassment that followed turned out to be too much for Jessica to handle; in July 2008, just months after the harassment began, she hanged herself in her bedroom.[51]

The impact of nonconsensual sexting can go well beyond the emotional state of the victim. Once an image is sent into the digital world, it can exist forever after being uploaded onto the Internet or sent through emails. As the National Crime Prevention Counsel has stated, a provocative or nude photograph may be "an electronic fingerprint that can damage [teens'] college careers, future employment opportunities, and reputation with friends, family, and neighbors."[52]

Nonconsensual sexting may also be harmful to society in general. Once an image of a nude teen is posted on the Internet, it is possible for sexual predators to obtain a copy of it and use it for their own deplorable purposes. The risk of commercial exploitation of sexts is illustrated by the case in Syracuse, New York, in which a teenage boy collected from the Internet images of teen girls who had "sexted" revealing photos of themselves to their boyfriends.[53] The boy was

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[44] *Sex and Tech*, *supra* note 19, at 2.

[45] *Id.* at 3.

[46] *Id.* at 2.

[47] *MTV-AP Digital Abuse Survey*, *supra* note 29, at 14.

[48] *Id.*

[49] Celizic, *supra* note 1.

[50] *Id.*

[51] *Id.*

[52] *Sexting: How Parents Can Keep Their Kids Safe*, NAT'L CRIME PREVENTION COUNCIL, http://www.ncpc.org/resources/files/pdf/internet-safety/NCPC-FactSheet2.pdf (last visited Jan. 7, 2011).

[53] Calvert, *supra* note 33, at 4.

compiling the provocative images onto a DVD that he intended to sell.[54] The repercussions of teens' nude photos going viral in the community or being made accessible to the public are no laughing matter.

C. It's Criminal: A Response to Sexting

Adolescents taking and sharing nude or semi-nude photos of themselves as a risqué form of flirting or a way to "feel sexy" is not a new concept. One may argue that sexting today is what Polaroid cameras were in the late 1970s and '80s.[55] The notable difference, however, is that the digital era has made it possible for almost instantaneous and widespread sharing of such images via cell phones and the Internet.[56] It seems this difference has been the driving force behind prosecutors across the nation bringing charges against teens in order to chill what they believe to be dangerous behavior. Yet prosecutors have been puzzled as to what laws befit the act of sexting.[57] With no laws specifically addressing this conduct, many have hesitated to charge teens at all, especially because the statutes that can be read to apply to sexting often carry grave penalties, including a felony record, sex-registry requirements, and even imprisonment.[58] Other prosecutors, embracing a hard-handed approach in order to set an example and quickly chill the sexting fad, have chosen to charge teens that have been caught sexting under existing child pornography laws.[59]

In Greensburg, Pennsylvania, for example, child pornography charges were brought against six teens after three girls sent nude photographs of themselves to three male classmates.[60] In New Jersey, a fourteen-year-old girl was charged with possession and distribution of child pornography after posting naked pictures of

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[54] *Id.*

[55] Camille Webb, *'Sexting:' Strike a Pose. Press Send. Regret It Forever.*, HEALTH LEADER, http://www.uthealthleader.org/archive/Children_Teens/2009/sexting-0514.htm (last visited Jan. 7, 2011).

[56] *Id.*

[57] OHIO LEGIS. SERV. COMM'N, FISCAL NOTE & LOCAL IMPACT STATEMENT, H.B. 132, 128th Gen. Assemb., at 3 (2009), *available at* http://www.lbo.state.oh.us/fiscal/fiscalnotes/128ga/pdfs/hb0132in.pdf.

[58] For instance, under federal law a first-time offender who knowingly disseminates or distributes child pornography will be fined and imprisoned between five and twenty years. 18 U.S.C.A. § 2252(b)(1) (West 2008).

[59] One prosecutor in Virginia explained that even though he did not want to give offenders felony records, because sexting "seems to be growing in numbers and growing out of control" he "decided to charge someone to send a message and slow it down or stop it." Donna St. George, *Sending of Explicit Photos Can Land Teens in Legal Fix*, WASH. POST (May 7, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/05/06/AR2009050604088.html (quoting William F. Neely, Attorney for the Commonwealth of Va.).

[60] Ed Pilkington, *Sexting Craze Leads to Child Pornography Charges: Pennsylvania Youngsters Who Circulated Nude Pictures Becomes Latest 'Sexters' to Face Prosecution*, GUARDIAN NEWS AND MEDIA (Jan. 14, 2009), http://www.guardian.co.uk/world/2009/jan/14/child-pornography-sexting.

herself on her MySpace account.[61] In Ohio, felony charges were brought against a fifteen-year-old girl for taking nude photos of herself with her cell phone and sending them to some of her high school classmates.[62] In Virginia, a fifteen-year-old and an eighteen-year-old were charged with possession of child pornography and electronic solicitation for having nude and semi-nude images on their cell phones.[63] And in Tunkhannock, Pennsylvania, approximately twenty teens were threatened with child pornography charges for having and receiving nude or semi-nude photographs of other teens on their cell phones.[64]

Though prosecuting teens for sexting under child pornography laws is a nationwide occurrence, the focus of this Note is on its implications and justification in the state of Ohio. With that in mind, this Note will address the prevalent criticism that child pornography laws are inapposite to the situation of teens sexting. To illustrate this point, it is first necessary to discuss why such laws—which clearly place restrictions on forms of free speech—have been justified in the first place.

III. ABRIDGING CONSTITUTIONAL RIGHTS TO PROTECT CHILDREN

The First Amendment commands, "Congress shall make no law . . . abridging the freedom of speech."[65] Enacting laws that criminalize protected speech is one of the most obvious and harshest ways that the government may violate this provision.[66] It is well established that speech may not be prohibited merely because its content may be offensive to some. Indeed, the U.S. Supreme Court has held that "the fact that society may find speech offensive is not a sufficient reason for suppressing it."[67] This First Amendment protection extends not only to speech, but to expression as well,[68] including simple, non-obscene nudity in photographs or films.[69]

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[61] Associated Press, *Girl Posts Nude Pics, Is Charged with Kid Porn: New Jersey Teen May Have to Register as a Sex Offender*, MSNBC (March 27, 2009), http://www.msnbc.msn.com/id/29912729/.

[62] Associated Press, *Girl, 15, Faces Child Porn Charges for Nude Cell Phone Pictures of Herself*, FOX NEWS (Oct. 9, 2008), http://www.foxnews.com/story/0,2933,434645,00.html.

[63] Ellen Biltz, *'Sexting' Charges Faced by Two Teens, Tips for Parents: Two Spotsylvania Students Charged in Sexting Case*, THE FREE LANCE-STAR (Mar. 11, 2009), *available at* 2009 WLNR 4629127 (Westlaw).

[64] Miller v. Skumanick, 605 F. Supp. 2d 634, 637-38 (M.D. Pa. 2009).

[65] U.S. CONST. amend. I.

[66] Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002) ("The government may violate this [First Amendment] mandate in many ways, but a law imposing criminal penalties on protected speech is a stark example of speech suppression." (citations omitted)).

[67] FCC v. Pacifica Found., 438 U.S. 726, 745 (1978).

[68] FRED H. CATE, THE INTERNET AND THE FIRST AMENDMENT: SCHOOLS AND SEXUALLY EXPLICIT EXPRESSION 35 (1998).

[69] New York v. Ferber, 458 U.S. 747, 765 n.18 (1982); *see also* Reno v. ACLU, 521 U.S. 844, 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'" (alteration in original) (quoting Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989))).

A. Obscenity

Notwithstanding the First Amendment protections, Congress may pass valid laws inhibiting certain forms of speech or expression for a compelling interest.[70] In finding that the state has a compelling interest in guarding society from obscenity, the United States Supreme Court in *Roth v. United States* declared obscene material unprotected under the First Amendment.[71] The Court, distinguishing mere sexual material from that which is obscene, defined obscene material as that "which deals with sex in a manner appealing to the prurient interest."[72] The Court went on to say that its definition of obscene material was no different than that in the American Law Institute's Model Penal Code: material "is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and it goes substantially beyond customary limits of candor in description or representation of such matters."[73] A line of cases following *Roth* led to *Miller v. California*, which established the current test for obscenity.[74] In determining whether material is obscene, this test requires a court to ask:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[75]

Although the *Miller* test requires that a statute delineate which specific sexual activities constitute obscenity, it leaves the issue of whether depictions of those activities go beyond community standards to be determined on a case-by-case basis.[76]

B. Child Pornography

The United States Supreme Court further restricted of freedom of expression in *New York v. Ferber* by holding that pornography involving minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller v. California*.[77] The Court's distinction between child pornography and other sexually explicit speech was justified by its finding of a compelling interest in "'safeguarding the physical and psychological well-being of . . . minor[s]'"[78] by protecting them

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[70] *See* 16A AM. JUR. 2D *Constitutional Law* § 514 (2010).

[71] KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 124-25 (2003) (citing Roth v. United States, 354 U.S. 476 (1957)).

[72] *Id.* at 125.

[73] *Id.*

[74] *Id.*

[75] Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted).

[76] SAUNDERS, *supra* note 71, at 125.

[77] New York v. Ferber, 458 U.S. 747 (1982).

[78] *Id.* at 756-57 (quoting Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 607 (1982)).

from being exploited and abused by "perverts" and "pedophiles" in the production process and use of child pornography.[79]

In *Osborne v. Ohio*, the Court went a step further, holding that private possession of child pornography in the home should be criminalized even though precedent defended the private possession of obscene material.[80] Again, the Court's justification for its decision was "to protect 'the victims of child pornography' and to destroy 'a market for the exploitative use of children.'"[81] This decision solidified the compelling governmental interest in protecting children from abuse and exploitation inherent in the production and use of child pornography.

C. Variable Obscenity and Sexual Conduct of Minors

Though children "'are entitled to a significant measure of First Amendment protection,'"[82] in many instances they "have more limited First Amendment rights than do adults."[83] Consequently, when it comes to sexually explicit expression, courts have permitted greater regulation and even prohibition when the audience or participants include minors.[84] As discussed above, states may prohibit the depiction of minors in sexually explicit photographs and films, as well as the distribution and mere possession of such material, "in an effort to eliminate the market for child pornography."[85] In addition, the United States Supreme Court has upheld laws that restrict minors' access to sexually explicit material even when such material is not obscene by adult standards.[86]

In *Ginsburg v. New York*, a storeowner was convicted for selling an adult magazine that contained female nudity to a sixteen-year-old boy.[87] The United States Supreme Court upheld the conviction under a New York statute that made it a crime to "knowingly . . . sell . . . to a minor . . . any picture . . . which depicts nudity, sexual conduct or sadomasochistic abuse and which is harmful to minors."[88] In

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[79] *Id.* at 758; *see also Stopping Child Pornography: Protecting our Children and the Constitution*: *Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 5 (2002) (statement of Rep. Earl Pomeroy, N.D.) (stating that child pornography is damaging because "[p]erverts and pedophiles not only use this smut to whet their sick desires, but also to lure defenseless children into unspeakable acts of sexual exploitation").

[80] PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 37-38 (2001) (citing Osborne v. Ohio, 495 U.S. 103 (1990)).

[81] *Id.* at 38.

[82] Video Software Dealers Assoc. v. Schwarzenegger, 401 F. Supp. 2d 1034, 1044 (N.D. Cal. 2007) (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975)); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (stating that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

[83] Russo v. Cent. Sch. Dist. No. 1, 469 F.2d 623, 631 (2d Cir. 1972).

[84] CATE, *supra* note 68, at 46.

[85] *Id.*

[86] *See* Ginsberg v. New York, 390 U.S. 629, 638 (1968).

[87] *Id.* at 631.

[88] *See id.* at 647, app. A (quoting N.Y. PENAL LAW § 484-h(2)).

arriving at its decision, the Court recognized that the "potential harm to children's ethical and psychological development" that may be caused by exposure to sexually explicit material is a legitimate reason for "trying to shield them from forms of sexual expression that fall short of obscenity."[89] Thus, the Court upheld the doctrine of "variable obscenity,"[90] the idea that material that is not obscene when distributed to adults may nevertheless be harmful and obscene when provided to minors.[91]

Courts have not sought to identify the specific harms that sexually explicit material pose to minors, and instead "simply have deferred to legislative determinations that accessing sexually explicit material does in fact harm children."[92] Nonetheless, research reveals that pornography indeed has many negative effects on children and adolescents who are directly exposed to it.[93]

D. Current Laws Reflecting the Compelling Governmental Interests

Based on the aforementioned policy considerations, Congress has enacted a handful of laws specifically aimed at eradicating the production and use of child pornography and at preventing minors' exposure to obscene materials and adult pornography. Section 2252A of Title 18 of the United States Code explicitly prohibits certain activities relating to material constituting or containing child pornography. "Child pornography" is defined as any visual depiction of sexually explicit conduct involving a minor,[94] while "sexually explicit conduct" is defined as actual or simulated sexual intercourse, bestiality, masturbation, or the lascivious exhibition of genitals or pubic area.[95] Other related federal prohibitions include

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[89] Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 576 (7th Cir. 2001) (citing *Ginsberg*, 390 U.S. at 639-43).

[90] CATE, *supra* note 68, at 46.

[91] SAUNDERS, *supra* note 71, at 133; *see also* FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978) (finding that even though regulations on radio broadcasts of adult material—in this case, comedian George Carlin's monologue about the "seven dirty words"—place a restriction on adults' access to sexually explicit expression, such regulations are constitutional when necessary to protect children); Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1053 n.18 (2d Cir. 1979) ("[S]tate[s] can appropriately legislate a state-wide 'variable' standard of obscenity with respect to children, [and], in some circumstances, expression that is suitable for adults can be suppressed because of its potential effect on children." (citations omitted)).

[92] CATE, *supra* note 68, at 47.

[93] Jill Manning, a practicing marriage and family therapist, explains that the negative effects of pornography on children include: traumatic emotional responses, earlier onset of first sexual intercourse, reinforcement of the commoditization of sex and the objectification of humans, the belief that being married or having a family are unattractive prospects, increased risk of developing sexual compulsions and addictive behavior, increased risk of exposure to incorrect information about human sexuality, and overestimating the prevalence of less common practices like group sex, bestiality, and sadomasochistic activity. *Why the Government Should Care About Pornography: The State Interest in Protecting Children and Families: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 12-13 (2005) (statement of Jill Manning).

[94] 18 U.S.C.A. § 2256(8).

[95] *Id.* § 2256(2)(A).

obscene visual representations of the sexual abuse of children,[96] the transfer of obscene material to minors,[97] sexual exploitation of children,[98] and certain activities relating to material involving the sexual exploitation of minors.[99]

Under current Ohio law, which makes no distinction as to the age of the perpetrator, sending or creating erotic photos of a minor may be a felony.[100] The prohibitions include disseminating obscene material that is harmful to juveniles,[101] pandering obscenity involving a minor,[102] and pandering sexually oriented matter involving a minor.[103] The illegal use of a minor in nudity-oriented material or performance is also a felony,[104] as is endangering children by making them participate in, or be photographed for material or performance that is obscene, sexually oriented, or nudity-oriented.[105]

Material is considered "obscene" under Ohio law if "[i]ts dominant appeal is to prurient interest" or if "[i]ts dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that

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[96] *Id.* § 1466A (prohibiting representations depicting a minor engaging in sexually explicit conduct, or that which is obscene).

[97] *Id.* § 1470.

[98] *Id.* § 2251.

[99] *Id.* § 2252.

[100] Press Release, Montgomery Cnty. Prosecutor's Office, Prosecutor's Juvenile Diversion Program Announced: "Sexting" Will Be Targeted (Mar. 4, 2009), http://www.mcohio.org/Prosecutor/docs/03042009_Juvenile_Diversion_Program.pdf.

[101] OHIO REV. CODE ANN. § 2907.31 (West 2010) (stating that no person shall "[d]irectly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile [or] group of juveniles . . . any material or performance that is obscene or harmful to juveniles"). A violation of this statute is a misdemeanor of the first degree if the material involved is harmful to juveniles and a felony if the material involved is obscene. *Id.*

[102] *Id.* § 2907.321 (stating that no person shall "[c]reate, reproduce, or publish any obscene material that has a minor as one of its participants or portrayed observers" or "[b]uy, procure, possess, or control any obscene material, that has a minor as one of its participants").

[103] *Id.* § 2907.322 (stating that no person shall "[c]reate, record, photograph, film, develop, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality" or "[k]nowingly solicit, receive, purchase, exchange, possess, or control" such material).

[104] *Id.* § 2907.323 (stating that no person shall "[p]hotograph any minor who is not the person's child or ward in a state of nudity, or create, direct, produce, . . . transfer" or "[p]ossess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity," unless the minor's parents, guardians, or custodians consent in writing and the material is to be used for a "bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose").

[105] *Id.* § 2919.22(B) (5) (stating that no person shall "[e]ntice, coerce, permit, encourage, compel, hire, employ, use, or allow [a] child to act, model, or in any other way participate in, or be photographed for, the production, presentation, dissemination, or advertisement of any material or performance that the offender knows or reasonably should know is obscene, is sexually oriented matter, or is nudity-oriented matter").

tends to represent human beings as mere objects of sexual appetite."[106] In determining whether it is obscene, material is "judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group."[107] Thus, in the context of sexting between teens, whether images are obscene ought to be judged with reference to the minors involved.

Notably, mere depictions of nude minors are not illegal under Ohio law. First, the "nudity-oriented material" included under the endangering children statute (O.R.C. § 2919.22) is defined as material or performance showing a minor in a state of nudity that, "taken as a whole by the average person applying contemporary community standards, *appeals to prurient interest*."[108] Second, under the Ohio Supreme Court's holding in *State v. Young*, the prohibition on the illegal use of a minor in nudity-oriented material (O.R.C. § 2907.323) only applies to depictions of nudity involving "a lewd exhibition or . . . a graphic focus on the [minor's] genitals."[109] The *Young* court reached its conclusion because "[t]he clear purpose of these exceptions [relating to material that is to be used for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose] is to sanction the possession or viewing of material depicting nude minors where that conduct is morally innocent."[110] Thus, according to the court, only conduct that is *not* morally innocent—the possession or viewing of the material for prurient purposes—is prohibited by the statute. [111]

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[106] *Id.* § 2907.01(F). Though not pertinent to our discussion, the statute also deems material obscene if:

> (3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
> (4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;
> (5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

Id.

[107] *Id.*

[108] *Id.* § 2919.22(D)(4)(b) (emphasis added).

[109] State v. Young, 525 N.E.2d 1363, 1368 (Ohio 1988). "Lewd" is defined as "[o]bscene or indecent; tending to moral impurity or wantonness." BLACK'S LAW DICTIONARY (8th ed. 2004).

[110] *Young*, 525 N.E.2d at 1367.

[111] *Id.* at 1367-68 (emphasis in original). This aspect of the *Young* decision was affirmed by the United States Supreme Court in *Osborne v. Ohio*. *See* Osborne v. Ohio, 495 U.S. 103 (1990). *Osborne* reversed *Young* on other grounds that are not relevant for purposes of this note. *Id.* at 122-26.

IV. SEXTING AND CHILD PORNOGRAPHY LAWS: FITTING A SQUARE PEG IN A ROUND HOLE[112]

A. Sexting That Falls Outside the Statutory Language of Child Pornography

Not all sexting fits the plain language of current child pornography laws. As outlined above, in order to fall under federal child pornography laws, sexting must be obscene, a lascivious exhibition of the genitals or pubic area of a minor, a depiction of sexually explicit conduct involving a minor, or constitute child exploitation or abuse.[113] A teen voluntarily taking and sending to someone else a photo of himself or herself is not a victim of abuse or exploitation. Arguably, if the photo becomes public it may reach the hands of sexual predators and pedophiles who may then use it as a tool for child abuse or exploitation. However, this situation is contingent on the images being sent to third parties in the form of nonconsensual sexting, which is distinct from the consensual, private form.

Sexting also often fails to fit under child pornography laws that proscribe obscene materials. As stated above, determining whether material is obscene is a fact-specific analysis made in light of contemporary community standards.[114] If the contemporary community standard applied is today's overly sexualized society, it is unlikely that sexting would pass the obscenity threshold. Moreover, images of minors from the waist up, as is common among teen girls who sext, do not satisfy the definition of child pornography under federal law as these neither depict sexual conduct nor the genitals or pubic area of a minor.[115]

Turning to Ohio's child pornography laws, a teen who sexts may be charged with a felony if the images of a minor are obscene, depict a minor engaging in sexual conduct, or depict nudity of a minor that appeals to a prurient interest.[116] The touchstone of Ohio's statutes relating to obscene and nudity-oriented material involving a minor is that the material in question is "obscene" because both the obscenity and nudity-oriented statutes include this language.[117] Material, in turn, is considered "obscene" under Ohio law if "[i]ts dominant appeal is to prurient interest."[118] Black's Law Dictionary defines prurient interest as one "[c]haracterized by or arousing *inordinate* or *unusual* sexual desire."[119]

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[112] Don Corbett, *Let's Talk About Sext: The Challenge of Finding the Right Legal Response to the Teenage Practice of "Sexting,"* 13-6 J. INTERNET L. 3, 6 (2009) ("Sexting cases represent a microcosm of the larger complication of fitting the proverbial square peg of technology into the round hole of existing laws, most of which were drafted long before today's scientific feats were even conceivable.").

[113] *See supra* Part III.D.

[114] *See supra* Part III.A.

[115] *See* 18 U.S.C.A. § 2256(2)(A), (8) (West 2010).

[116] *See supra* Part III.D.

[117] *See supra* notes 101, 102 & 105 and accompanying text.

[118] *See supra* note 105 and accompanying text.

[119] BLACK'S LAW DICTIONARY (8th ed. 2004) (emphasis added).

Whether material exchanged via sexting appeals to a prurient interest should be judged with reference to the participants, i.e., teenagers.[120] With this in mind, an argument may be made that there is nothing inordinate or unusual about teens' sexual interest in their peers.[121] Indeed, Ohio's laws permit sexual conduct between teens who are between thirteen and seventeen years old.[122] Thus, Ohio law implies that it is not immoral or unusual for such minors to engage in sexual conduct. It would be illogical to hold that while teens engaging in sexual conduct with each other is lawful, teens creating and viewing photos depicting teen nudity—not even sexual conduct—is not. Yet, this is exactly what prosecuting sexting teens under Ohio's child pornography laws asserts.

B. Sexting Falls Outside the Scope of Child Pornography Laws for Policy Reasons

Though many instances of sexting do not fit under the statutory language of child pornography and related statutes,[123] there are cases where it undoubtedly does. For example, in Florida two teens took and exchanged with each other photos of themselves engaging in unspecified sexual behavior.[124] The fact that the images depicted the minors engaging in sexual activity, and not mere nudity, placed the conduct under the federal definition of child pornography, which includes any visual depiction of minors engaging in actual or simulated sexual intercourse.[125] Such images also fall under the ambit of Ohio's laws, which prohibit any person from creating material that shows a minor participating or engaging in sexual activity.[126]

Even when sexting falls under the black-letter-law of child pornography, however, it should not be prosecuted as such for policy reasons. Two recent cases emphasize that the purpose of child pornography laws is to protect children from child abuse and exploitation. Because sexting—at least in its consensual form—constitutes neither child abuse nor child exploitation and prosecuting teens under child pornography laws is more harmful to teens than the underlying conduct, child pornography laws should not be used to prosecute teen sexting.

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[120] *See supra* note 106 and accompanying text.

[121] The proximity in age is important to this argument. The status of being a minor does not automatically immunize a person from child pornography charges. For example, judging from community standards, a seventeen-year-old's sexual interest in a twelve-year-old is likely to be found inordinate. Thus, nude photos of the twelve year old would appeal to a "prurient" (inordinate and unusual) interest of the seventeen-year-old, thereby falling under Ohio's child pornography laws.

[122] OHIO REV. CODE ANN. § 2907.04 (West 2010).

[123] In this Author's opinion, most instances of sexting do not fit under child pornography statutes. The fact that teens *have* been charged under child pornography laws indicates that the statutory interpretation proposed here has not always been applied.

[124] A.H. v. Florida, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007) (allowing the government to go forward with the prosecution of a sixteen-year-old girl under a child pornography statute based on photos that she and her seventeen-year-old boyfriend took which depicted them naked and engaged in sexual behavior).

[125] *See* 18 U.S.C.A. § 2256(8) (West 2010).

[126] *See* OHIO REV. CODE ANN. § 2907.322.

1. *Miller v. Skumanick* and *Ashcroft v. Free Speech Coalition*

The argument that child pornography laws are inapposite to sexting was recently argued before a federal court of appeals for the first time. On January 19, 2010, a case involving criminal prosecutions of teenagers for sexting made its way to the Third Circuit Court of Appeals.[127] The case stemmed from three teenage girls and their parents bringing suit in Pennsylvania under 42 U.S.C. § 1983 against former Wyoming County District Attorney George Skumanick Jr., claiming that his threats to prosecute the girls under child pornography laws if they refused to participate in a program he designed to educate teens about the dangers of sexting violated their First Amendment rights.[128] They also moved for a temporary restraining order (TRO) to enjoin Skumanick from initiating criminal charges against the girls.[129]

Because plaintiffs made a reasonable argument that the images of the girls did not qualify as the type of images prohibited under Pennsylvania's child pornography statute, the District Court granted the TRO and stated that there was "a reasonable likelihood that the plaintiffs could prevail" on their claim that a protected activity—freedom of expression—caused the retaliation.[130] Thus, the court implied that if a minor takes nude or semi-nude photos of himself or herself and the image falls outside the scope of child pornography laws, then the minor is exercising his or her right of freedom of expression protected under the First Amendment.[131]

On appeal, Skumanick's attorney insisted that the re-education program was an appropriate response to "girls . . . transmit[ing] nude photos of themselves for no other purpose than sexual gratification"[132] because children are immature and vulnerable and the juvenile criminal system is designed "to protect children from themselves."[133] Notably, Judge Ambro, one of the presiding appellate judges, responded: "If that's your goal—to protect them—then why threaten, by prosecuting them, putting a permanent blot on their escutcheon, for life?"[134] Judge Ambro's

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[127] Shannon P. Duffy, *3rd Circuit Panel Mulls if Teen 'Sexting' Is Child Pornography*, THE LEGAL INTELLIGENCER (Jan. 19, 2010), *available at* http://www.law.com/jsp/article.jsp?id=1202439023330.

[128] Miller v. Skumanick, 605 F. Supp. 2d 634, 640 (M.D. Pa. 2009).

[129] *Id.*

[130] *Id.* at 645-46. Skumanick threatened to prosecute the girls under 18 PA. CONS. STAT. § 6312, which prohibits the distribution of images depicting a prohibited sexual act, and defines "prohibited sexual act" to mean "[s]exual intercourse, . . . masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction." 18 PA. CONS. STAT. § 6312(g) (2009). The photographs at issue depicted two of the girls from the waist up wearing opaque bras. The photo of the third girl showed her topless with a towel around her waist. None of the photos depicted sexual acts or an exhibition of the genitals.

[131] Additionally, the court held that threatening to prosecute the girls was "an attempt to compel [the parents] to abandon their Fourteenth Amendment right to control their child's upbringing." *Miller*, 605 F. Supp. 2d at 645.

[132] Duffy, *supra* note 127.

[133] *Id.*

[134] *Id.*

remark pinpoints the principal criticism against prosecuting teens who are caught sexting under child pornography laws: it is simply unreasonable to punish minors under laws intended to protect them, especially because the conduct for which they are being punished does not constitute sexual abuse or exploitation of children, which the laws in question are meant to address.

A recent United States Supreme Court decision supports this criticism. In *Ashcroft v. Free Speech Coalition*, the Court held that a federal law banning "virtual" child pornography was unconstitutional because the speech being regulated did not involve the use of real children and was not otherwise obscene.[135] In arriving at its decision, the Court noted that "*Ferber*'s judgment about child pornography was based upon *how it was made*, not on what it communicated . . . [and] reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the *First Amendment*."[136] Thus, the *Ashcroft* decision suggests that the scope of the child pornography exception to First Amendment protection should be limited to the governmental objectives outlined in *Ferber* and *Osborne*.[137] In other words, its scope "should be limited to materials that are produced by means of criminal child abuse and exploitation."[138]

2. Consensual Sexting Does Not Constitute Child Abuse or Exploitation

A widely accepted definition of "child sexual abuse" is the "involvement of dependent, developmentally immature children and adolescents in sexual activities they do not fully comprehend, to which they are unable to give informed consent, or that violate the social taboos of family roles."[139] Although there are variations of this definition, they all encompass at least two factors: (1) sexual activities involving minors, and (2) "an abusive condition, such as coercion or lack of consent."[140]

Sexual abuse and exploitation of children are inextricably connected. The National Coalition to Prevent Child Sexual Exploitation defines child exploitation as "[p]ractices by which a person, usually an adult, achieves sexual gratification, financial gain, or advancement *through the sexual abuse or sexual exploitation of a child*."[141] Indeed, sexual exploitation has been defined as a form of child

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[135] United States v. Williams, 553 U.S. 285, 289 (2008) (citing Ashcroft v. Free Speech Coal., 535 U.S. 234, 249-51 (2002)) ("[T]he child-protection rationale for speech restriction does not apply to materials produced without children.").

[136] Ashcroft v. Free Speech Coal., 535 U.S. 234, 250-51 (emphasis added).

[137] John A. Humbach, *'Sexting' and the First Amendment*, 37 HASTINGS CONST. L.Q. 433, 484 (2010).

[138] *Id.*

[139] C. Henry Kempe, *Incest and Other Forms of Sexual Abuse*, *in* THE BATTERED CHILD 198 (C. Henry Kempe & Ray E. Helfer eds., 3d ed. 1980).

[140] *See* ROGER J.R. LEVESQUE, SEXUAL ABUSE OF CHILDREN: A HUMAN RIGHTS PERSPECTIVE 151-52 (1999).

[141] THE NAT'L COAL. TO PREVENT CHILD SEXUAL EXPLOITATION, THE NATIONAL PLAN TO PREVENT THE SEXUAL EXPLOITATION OF CHILDREN 17 (2008), http://www.missingkids.com/en_US/documents/NCPCSE_NationalPlan.pdf (emphasis added).

maltreatment.[142] What distinguishes sexual exploitation from other forms of child abuse is that it constitutes conduct in which children are "exploited as exchangeable commodities" usually through "child pornography, child prostitution, and child sex-trafficking."[143]

Traditional child pornography is created when an adult manipulates a minor to pose nude or semi-nude for photographs and/or engage in unlawful sexual conduct.[144] Thus, it is a form of child abuse because there is a lack of consent on the part of the child. Furthermore, the commercialization of traditional child pornography and the purposes that it serves makes it inherently exploitative.[145]

Not all child abuse requires that the perpetrator be an adult. Minors can commit sexually abusive acts similar to those perpetrated by adults against children.[146] Juveniles constitute more than one in four sex offenders and perpetrate more than one in three sex offenses against other youths.[147] The United States Department of Justice classifies sex offenses committed by juveniles as either forcible (rape, sodomy, fondling, etc.) or nonforcible (incest, statutory rape).[148] It defines a forcible sex offense as "any sexual act directed against another person, forcibly and/or against that person's will," and a nonforcible sex offense as one "against the person's will where the victim is incapable of giving consent."[149] Therefore, sexual abuse between two adolescents requires that there be coercion and/or actual lack of consent, or a statutory presumption of lack of consent.

There is no child sexual abuse or exploitation when it comes to consensual sexting between teens. First, the unequal power dynamic inherent in the creation of traditional child-pornography, in which adults "lure children into pornographic settings for the purpose of exploiting them," is nonexistent in consensual sexting.[150]

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[142] LEVESQUE, *supra* note 140, at 60 (discussing how child pornography, which is exploitative in nature, is a form of child maltreatment).

[143] *Id.*; *see also* BLACK'S LAW DICTIONARY (8th ed. 2004), (defining "sexual exploitation" as "[t]he use of a person, esp[ecially] a child, in prostitution, pornography, or other sexually manipulative activity that has caused or could cause serious emotional injury").

[144] LEVESQUE, *supra* note 140, at 63.

[145] *Id.* at 63-64 ("The sexual abuse of children during pornographic production is only part of the exploitation. Much of child pornography's utility derives from its use to lower children's inhibitions and encourage children to engage in activities similar to those depicted in pictures and magazines.").

[146] *Id.* at 193. There are generally three types of sexually abusive offenses committed by minors: (1) passive or noncontact offenses (e.g., voyeurism, exhibitionism, obscene phone calls), (2) contact offenses involving some degree of force, aggression, or coercion (e.g., rape, fondling), and (3) pedophiliac offenses which involve sexual acts perpetrated against younger victims. *Id.*

[147] David Finkelhor, Richard Ormrod & Mark Chaffin, *Juveniles Who Commit Sex Offenses Against Minors*, JUV. JUST. BULL., U.S. DEP'T OF JUST. 1 (Dec. 2009), http://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf.

[148] *Id.* at 4.

[149] *Id.*

[150] Corbett, *supra* note 112, at 6.

The balanced power dynamic between teens makes it possible for non-coerced consent to be present.

Second, unlike traditional child pornography, images of teenagers engaging in mutual and consensual sexual conduct do not depict unlawful conduct, at least in jurisdictions like Ohio where mutual teen sex is lawful.[151] The reasoning behind statutory rape laws is that minors are deemed incapable of giving consent until they reach a certain age.[152] In Ohio, where thirteen is the age of consent,[153] the issue of statutorily-constructed lack of consent does not exist when both individuals engaged the sexual relationship are teens.

Because sexual abuse requires coercion or lack of consent, voluntary sexual conduct and sexting between two teens does not constitute child abuse in Ohio. Furthermore, so long as the images remain private between the original participants, consensual sexting does not constitute sexual exploitation as the teens involved are not "exploited as exchangeable commodities,"[154] but rather are engaged in a private exchange. Child pornography statutes were enacted to eradicate the underlying child abuse and exploitation that occurs in its creation. It is inappropriate to apply these statutes to consensual sexting between teens, which lacks these two elements.

3. Prosecuting Under Child Pornography Laws Harms Teens

Aside from the fact that sexting does not constitute child abuse or exploitation, prosecuting teens for sexting under child pornography laws fails to protect children because the punishment under these laws is much more harmful than the underlying conduct. For example, a conviction under a child pornography statute may require a teen to register as a sex offender.[155] The stigma that this punishment carries will follow the teen throughout much, if not all, of his or her life. While a provocative photo of a teen *may* have negative effects on his or her future, for example if a college admissions staff discovers it on the Internet, being registered as a sex offender undoubtedly will negatively effect the teen's future.[156]

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[151] While some states set forth that minors do not have any right to engage in consensual sexual intercourse, other states, including Ohio, have established ages at which minors are deemed capable to consent to sexual intercourse. Donald T. Kramer, *Adolescent Rights*, *in* 1 LEGAL RIGHTS OF CHILDREN § 14:12, at 1041 (Donald T. Kramer ed., rev. 2d ed. 2005). Though the age of consent varies from state to state and ranges from nine to seventeen years old, the most common age of consent is thirteen and fourteen years old. *Id.* (Supp. 2009). Under Ohio law, a thirteen-year-old may legally consent to having sex with someone under the age of eighteen. *See* OHIO REV. CODE ANN. § 2907.02 (West 2010) ("No person shall engage in sexual conduct with another . . . when . . . [t]he other person is less than thirteen years of age."); *id.* § 2907.04 ("No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age.").

[152] 65 AM. JUR. 2D *Rape* § 11 (2010).

[153] OHIO REV. CODE ANN. § 2907.02 (West 2010).

[154] LEVESQUE, *supra* note 140 and accompanying text.

[155] OHIO REV. CODE ANN. § 2950.04, .041.

[156] The case of Phillip Alpert illustrates the severe repercussions that come with being labeled a sex offender for sexting. After impulsively emailing nude photos of his sixteen-year-old girlfriend to some seventy individuals as revenge for a fight he was having with her, Phillip was convicted of transmitting child pornography and is now required to register as a

Prosecuting minors for sexting under child pornography laws is also harmful to teens because all parties involved are penalized. A child in a traditional adult-child pornography situation would not be prosecuted for "creating child pornography" when coerced into doing so by an adult. This is because the child in such a situation is a victim of child abuse and sexual exploitation. Conversely, in the majority of sexting cases, both sides of the exchange are prosecuted, including the teens who are victimized by nonconsensual sexting. Through a cold application of the law, prosecutors may charge the teens who distribute the images without consent with mere possession of child pornography, while the victimized teens may be charged with a more severe criminal violation of the production of child pornography.

Certainly, some forms of sexting may fit the black-letter-law of some child pornography statutes. But when the underlying purpose of these laws is considered, using them to prosecute teens for sexting is absurd. Even Maureen Kanka, the mother of the New Jersey girl whose rape and murder inspired Megan's Law,[157] has criticized prosecutors for charging teenagers who sext under child pornography statutes.[158] Kanka observes, "the prosecutors are harming the children more than helping them."[159] An alternative to using child pornography laws against sexting would be enacting more appropriate laws that specifically address this conduct. Cynthia Logan, mother of Jessica Logan, the teenager who committed suicide after falling victim to nonconsensual sexting, supports Ohio's efforts in addressing sexting with new legislation.[160]

V. OHIO'S PROPOSED SOLUTION: H.B. 132

A. A Move Toward Sexting Legislation

The unsuitability of child pornography laws in the context of sexting has led to states considering alternate approaches in addressing this "problem." Among these are diversion programs,[161] school education programs,[162] and legislation aimed

sex offender until the age of forty-three. Richards & Calvert, *supra* note 15, at 8-9, 21. Because he was labeled as a sex offender, Phillip was forced out of the college he attended, is unable to live with his father as his father's home is too close to a high school, and has found it impossible to find employment. *Id.* at 9, 21-22.

[157] *See* 42 PA. CONS. STAT. §§ 9791-9799.99 (2010) (requiring that sex offenders who reside, work, or attend school in Pennsylvania register on public registries maintained by the State Police and that certain information of these sex offenders be available to the public through an Internet website).

[158] Jennifer Millman, *Megan's Law Mom OK with Nude MySpace Teen*, NBC N.Y. (Mar. 27, 2009), http://www.nbcnewyork.com/news/local-beat/Girl-Charged-With-Child-Porn-for-Posting-Nude-Pics-of-Self.html.

[159] *Id.* A related criticism is that making teen sexters register as sex offenders dilutes the entire purpose of sex offender registries, making it difficult to decipher who on the registry poses a serious risk to children. Richards & Calvert, *supra* note 15, at 23.

[160] Justin McClelland, *'Sexting' Legislation Proposed to Protect Teens*, THE WESTERN STAR (Apr. 14, 2009), http://www.western-star.com/news/lebanon-oh-news/sexting-legislation-proposed-to-protect-teens-76510.html?imw=Y.

[161] For example, recognizing sexting as a "widespread problem" but unwilling to charge teens caught doing it with a felony, the Prosecuting Attorney's Juvenile Division in Montgomery County, Ohio introduced a diversion program for teens accused of sexting.

specifically at sexting. Whether because of a genuine belief that it is the right means by which sexting is to be eliminated or because the "[m]edia hysteria about [sexting] . . . fan[ned] the flames of legislation,"[163] this last approach has gained great momentum with new "sexting laws" being introduced in at least eleven states.[164] Six states enacted such laws in 2009.[165] The general goals of sexting legislation are to deter teens from sexting, to apply appropriate penalties to teens who engage in sexting, or to eliminate loopholes in existing criminal laws so that sexual predators are prohibited from contacting children via text messages.[166]

In Ohio, State Representative Ron Maag and State Senator Bob Schuler introduced House Bill 132.[167] The Bill proposes to enact section 2907.324 of the Ohio Revised Code to "prohibit a minor, by use of a telecommunications device, from recklessly creating, receiving exchanging, sending, or possessing a photograph or other material showing a minor in a state of nudity."[168] The Bill provides that "[i]t is no defense . . . that the minor creates, receives, exchanges, sends, or possesses"[169] the prohibited material. A violator of the statute would be guilty of a misdemeanor.[170]

The scope of the Bill is broader than child pornography statutes in that it criminalizes photos depicting nudity of minors without requiring that such photos be obscene or that they appeal to a prurient interest. Rather, H.B. 132 proposes to criminalize the mere depiction of a minor in a "state of nudity," with "nudity" defined as:

Press Release, Montgomery Cnty. Prosecutor's Office, *supra* note 100. Montgomery County Prosecuting Attorney Mathias Heck, Jr. stated:

> Certainly, we all want to keep our teens safe from sexual predators . . . [h]owever, in some cases, charging a juvenile with a felony and labeling [him or her] a sexual offender when [his or her] actions were clearly a result of poor judgment and ignorance of the law seems harsh for first time offenders.

Id.

[162] *School Takes Aim at 'Sexting:' IPS Considers District-Wide Ban*, THEINDYCHANNEL.COM (Aug. 19, 2009), http://www.theindychannel.com/education/20468953/detail.html.

[163] Calvert, *supra* note 33, at 22.

[164] *2009 "Sexting" Legislation*, *supra* note 7 (listing Colo. H.B. 1132; Ind. S.R. 90; Neb. L.B. 97; N.J. A.B. 3754, A.B. 4068, A.B. 4069 & A.B. 4070; N.Y. A.B. 8622; N.D. H.B. 1186; Ohio H.B. 132/S.B. 103; Or. H.B. 2641; Pa. S.B. 1121; Utah H.B. 14; and Vt. S.B. 125).

[165] *Id.*

[166] *Id.*

[167] McClelland, *supra* note 160.

[168] H.B. 132, 128th Gen. Assemb., Reg. Sess. (Ohio 2009-10), *available at* http://www.legislature.state.oh.us/bills.cfm?ID=128_HB_132.

[169] *Id.*

[170] *Id.*

> [T]he showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.[171]

Categorically speaking, even though this prohibition encompasses photographs or images that could fall under the scope of child pornography (i.e., images of an exhibition of genitalia or focus on pubic area), it also extends to ones that do not (i.e., images of nude buttocks).[172]

Furthermore, photographs of nude teens that are created and viewed by teens fall short of obscenity when teenagers are considered as the reference point. Rather, such images constitute reverse "variable obscenity": while the images are not obscene when the audience is minors, they are obscene when the audience is adults because their sexual interest in a minor is deemed inordinate under contemporary community standards.

As the court in *Miller v. Skumanick* implied, photos that are neither obscene nor child pornography are a protected form of expression under the First Amendment.[173] The question remains whether legislators may enact laws restricting this non-obscene, constitutionally protected freedom of expression of minors and, if so, under what circumstances.

B. Parens Patriae*: Protecting Teens from Themselves*

While sexting may not pass the obscenity threshold, the state may nonetheless have a legitimate interest in restricting it based on the doctrine of *parens patriae*: the state's interest in the well-being of its youth.[174] Because minors have more limited rights than adults, the state interest required to infringe on their rights need not be as compelling as that required to abridge adults' rights.[175]

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[171] OHIO LEGIS. SERV. COMM'N, BILL ANALYSIS, H.B. 132, 128th Gen. Assemb., at 5 (2009), *available at* http://www.lsc.state.oh.us/analyses128/h0132-i-128.pdf.

[172] Indeed, it would seem that the scope of the bill would extend to a photo of a teenager "mooning" the camera. Rarely is mooning sexual in nature. Rather, it is usually a form of expression exercised to be funny, for shock value, to taunt, or to make a political statement. *See Cheeky Anarchists in Palace Protest*, BBC NEWS (June 3, 2000), http://news.bbc.co.uk/2/hi/uk_news/775725.stm (stating that the protestors in the "Moon Against the Monarchy" mooned the Buckingham Palace in 2000 to express their anti-monarchy opinion); Tyler Kula, *'Moon the Balloon' Protest Grows, Mayor Writes PM*, THE OBSERVER, http://www.theobserver.ca/ArticleDisplay.aspx?e=1680060 (last visited Aug. 24, 2010) (reporting that protestors in 2009 bared their buttocks to protest a high-tech surveillance balloon and camera monitoring the international border at Sarnia, Michigan).

[173] *See supra* notes 130-31 and accompanying text.

[174] Stacey Hiller, *The Problem with Juvenile Sex Offender Registration: The Detrimental Effects of Public Disclosure*, 7 B.U. PUB. INT. L.J. 271, 284 (1998) (discussing that the philosophy behind *parens patriae* is "for the state to act in the best interest of the child").

[175] *See* Gere v. Stanley, 320 F. Supp. 852, 855 (M.D. Pa. 1970), *aff'd*, 453 F.2d 205 (3d Cir. 1971) ("[T]he [s]tate has an independent interest in the well-being of its youth, and its power to control the conduct of children reaches beyond the scope of its authority over adults." (citation omitted)).

1. Sexual Conduct

Though not addressed in the H.B. 132 proposal, one of the driving forces behind the legislation may be the state's attempt to rein in teen sexuality, or more precisely, teens' impetuous digital exhibition of their sexuality. In announcing the implementation of a diversion program aimed to address the "widespread problem" of teens sexting,[176] prosecutor Mathias Heck, Jr., of Montgomery County, Ohio, stated that sexting "in some cases [is] a result of our teens not understanding appropriate sexual boundaries."[177] Similarly, the aim of H.B. 132 may be to prevent harm to children's ethical and psychological development by trying to shield them from forms of sexual expression that fall short of obscenity. Such restrictions with regard to sexual conduct of teens have been upheld in courts before.[178]

Curbing teen sexual activity in Ohio, however, simply does not pass muster under a compelling state interest standard. If sexual conduct were the issue, would it not make more sense to directly restrict the actual sexual intercourse between teens? Yet, teenagers in Ohio are legally entitled to engage in sexual conduct.[179] Ohio prohibits sexual conduct with a minor younger than thirteen,[180] and prohibits adults from having sexual conduct with a minor who is between thirteen and fifteen years old.[181] These statutes reinforce the belief that the power dynamic in a relationship where there is a large age difference between an adult and a minor facilitates child exploitation and abuse.[182] On the other hand, these laws create a "Romeo and Juliet" exception to the statutory rape law, permitting sexual conduct between teens ages thirteen to seventeen.[183] Because Ohio does not prohibit mutual teen sexual intercourse, it is difficult to justify a prohibition on sexually-charged conduct that is less severe, like taking nude photos, as a compelling state interest.

2. Harmful Nonconsensual Sexting

A more plausible compelling interest for justifying H.B. 132 is that Ohio is invoking its authority under *parens patriae* to regulate sexting in order to protect minors from the harms that result from nonconsensual sexting. As discussed above,

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[176] Press Release, Montgomery Cnty. Prosecutor's Office, *supra* note 100.

[177] *Id.*

[178] In Florida, for example, minors do not have any right to engage in consensual sexual intercourse under the privacy amendment of the state constitution. State v. B.B., 637 So. 2d 936, 936 (Fla. Dist. Ct. App. 1994); *see also* Jones v. State, 640 So. 2d 1084, 1086 (Fla. 1994) (holding that the right to be alone in matters relating to adults' marriage, contraception, and abortion does not apply to the state's right to regulate the sexual conduct of children).

[179] *See supra* note 151 and accompanying text.

[180] OHIO REV. CODE ANN. § 2907.02 (West 2010).

[181] *Id.* § 2907.04.

[182] *See* discussion *supra* Part IV.B.1.

[183] Most states have created statutory rape exceptions commonly known as "Romeo and Juliet" laws that cover consensual adolescent sexual activity involving an adolescent below the age of consent when the sexual partner is another adolescent close in age. Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 198 (2008).

though consensual sexting in and of itself might not be harmful, its nonconsensual counterpart leads to substantial harm.[184] In one sexting case, the court expressed that "the reasonable expectation that the material will ultimately be disseminated is by itself a compelling state interest for preventing the production of this material."[185] The court went on to say that the state has a compelling interest "to protect minors . . . from their own lack of judgment. . . . Appellant was simply too young to make an intelligent decision about engaging in sexual conduct and memorializing it."[186] In other words, the high probability that images created and exchanged privately between two teens will be later dispersed throughout the community via nonconsensual sexting may, in and of itself, be reason enough to prohibit sexting in an attempt to protect minors from their lack of foresight.

3. Restricting Speech Disruptive to Education System

Another justification for restricting non-obscene, non-child pornographic expression of teens is that the state has a compelling interest in maintaining order and discipline in its educational institutions.[187] It is well settled that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[188] However, students' free speech rights are not unfettered. In the school context, courts conduct a balancing test between students' interest in free speech and the state's interest in preserving control, order, and an educational environment conducive to learning.[189] In *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that a student's conduct or speech, whether in class or out, may be restricted when it either causes a substantial disruption of or material interference with school activities, or causes a disturbance or disorder on the school premises.[190]

It is unclear whether the *Tinker* standard can extend beyond school boundaries.[191] The United States Supreme Court cases upholding *Tinker* have all involved conduct that occurs on school grounds or during school-sponsored events.[192] Such an

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[184] *See* discussion *supra* Part II.B.

[185] A.H. v. State, 949 So. 2d 234, 238 (Fla. Dist. Ct. App. 2007).

[186] *Id.* at 238-39.

[187] New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (stating that in determining whether a search of a student by a school administrator was reasonable, "[a]gainst the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds").

[188] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[189] *Id.* at 507.

[190] *Id.* at 512-13. In *Tinker*, the school prohibited student activists from wearing armbands as an expression of their opposition against American involvement in the Vietnam War. *Id.* at 504-05. The Court held that this prohibition was an unjustified infringement on the students' First Amendment rights because the speech did not cause a material disruption or interference with school activities, nor did it cause a disturbance in school. *Id.* at 514.

[191] Kevin Turbert, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 671 (2009).

[192] *Id.* (discussing how the U.S. Supreme cases following *Tinker* all involved conduct and/or speech that occurred on school grounds or during school-sponsored events); *see, e.g.*,

expansion, which would allow schools and courts to regulate minors' speech that is completely unrelated to and occurs beyond school grounds, is at the heart of the cyberbullying debate.[193] Though the Supreme Court has not yet laid out a clear guideline, a look at how lower courts have handled off-campus speech, including Internet speech, provides insight as to how this issue may be resolved.[194]

The Second Circuit, for example, found that a school's restriction on students' off-campus newspaper violated their right to free speech because the speech occurred in "the general public where freedom of speech is at its 'zenith.'"[195] On the other hand, the court in *J.S. v. Bethlehem Area School District* held that a school's restriction on a student's speech on a website was justified.[196] The court found that the website constituted on-campus speech because the student used school computers to access it and show it to his friends, and that it substantially disrupted school activities by forcing a math teacher to take a leave of absence.[197]

The courts in both of these cases stated in dicta that they would not rule out that purely off-campus speech could be regulated if the *Tinker* standard was met.[198] Purely off-campus speech *did* meet the *Tinker* standard in *Wisniewski v. Board of Education of the Weedsport Central School District*.[199] In that case, a student was suspended from school for one semester because his AOL Instant Messaging icon depicted a gun shooting at a person's head, with the words "Kill Mr. VanderMolen," beneath, which was the name of his English teacher, beneath.[200] Even though the student's use of the icon was entirely off-campus, the court concluded that it was not protected speech because it was reasonably foreseeable that it "would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and

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Morse v. Frederick, 551 U.S. 393, 403, 410 (2007) (holding that a principal did not violate a student's right to free speech by confiscating a banner she reasonably viewed as promoting illegal drug use that the student was waving at an off-campus, school-approved activity); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 269 (1988) (holding that school officials retained right to impose reasonable restrictions on a school paper that was published by students in journalism class because the paper did not qualify as a "public forum" but was speech made on school grounds); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (finding that a school's restriction on a student's sexually explicit monologue was appropriate because the conduct occurred during a high school assembly and was disruptive of the educational process).

[193] Turbert, *supra* note 191, at 671.

[194] *Id.*

[195] *Id.* at 672 (citing Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1050-51 (2d Cir. 1979)).

[196] J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 850 (Pa. 2002).

[197] *Id.* at 865.

[198] Turbert, *supra* note 191, at 672-73.

[199] *Id.* at 674.

[200] Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34, 36 (2d Cir. 2007).

discipline of the school.'"[201]

Based on the application of the *Tinker* standard in lower courts, it appears that even completely off-campus Internet speech may be restricted if it causes a substantial disruption in schools. This standard logically may be extended to expression in the form of sexting. Jessica Logan's story is a prime example of how sexting that occurred off-campus, in the privacy of Jessica's home, had repercussions that spilled over into the school realm. The taunting, name-calling, and harassment that Jessica endured in the wake of her ex-boyfriend's decision to forward her nude photos to classmates occurred on school grounds.[202] As a result, Jessica started skipping school.[203] By directly causing the harassment in school, which in turn prevented Jessica from going to school, sexting resulted in an "*a la* Tinker" substantial disruption of school activities.[204] Because much of sexting-related bullying (whether cyber or face-to-face) carries over onto school grounds, it is foreseeable that sexting may substantively disrupt the educational environment.

Though *Tinker* and its progeny all deal with the authority of *schools* to impose restrictions on students' speech, it seems that a similar compelling state interest may be used to justify a legislative limitation on minors' free speech. Thus, a justification for enacting H.B. 132 may be that it will be in furtherance of a legitimate state interest in preventing a substantive disruption in schools.

VI. POSSIBLE CHALLENGES TO H.B. 132

Though taking sexting out of the felony realm is a step in the right direction, and prohibiting sexting may be justified by several compelling state interests, H.B. 132 may nonetheless face challenges ahead. One possible criticism is that the bill's overly broad scope is an unconstitutional restriction on teens' freedom of expression. Another is that it is an unconstitutional infringement on parents' Fourteenth Amendment right to raise their children.

A. Unconstitutional Restriction on Teens' First Amendment Rights

The well-established standard with regard to the government regulating the content of constitutionally protected speech is that it may do so "in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[205] In determining whether such regulation is constitutional, the United States Supreme Court sometimes requires that the law be "'narrowly tailored' to serve the government's interest."[206] Both the "narrowly tailored" and "least

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[201] *Id.* at 38-39 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

[202] Celizic, *supra* note 1.

[203] *Id.*

[204] Turbert, *supra* note 191, at 672 (discussing the applicability of the *Tinker* standard to students' off-campus First Amendment rights).

[205] Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 577 n.45 (2005) (quoting Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).

[206] *Id.* (citing RODNEY A. SMOLLA, 1 SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 4:2 (2004)).

restrictive means" requirements ensure that government regulations do not restrict speech more than is necessary to attain the intended government interest.[207]

As a censor on teens' constitutionally protected freedom of expression, H.B. 132 should be analyzed under the strict scrutiny analysis outlined above, which "invalidates a law unless it serves a 'compelling' governmental interest and uses the 'least speech-restrictive means' to further that interest."[208] As discussed above, there is a compelling state interest in protecting minors by curtailing conduct that will likely cause them harm. There is also a legitimate government interest in preventing the disruption in schools that are likely to result when nude images of students are forwarded to other students without the consent of the persons depicted in the images. However, it is unclear whether these interests can justify a prohibition on all forms of sexting, as the harm that gives rise to the compelling interests only occurs in the context of nonconsensual sexting.

A teen taking a nude photo of herself and sending it to a significant other as sexual expression is harmless if kept private between the original participants. Indeed, the only articulable harm that arises from this form of sexting occurs when the participants are caught and subsequently charged with criminal violations. On the other hand, nonconsensual sexting creates substantive harm to both the minors involved as well as to society as a whole. The two forms of sexting are distinguishable with exponentially different consequences. Nonetheless, H.B. 132 fails to make this distinction, and instead proposes to criminalize all forms of sexting. Based on the high probability that consensual sexting will turn into nonconsensual sexting, the bill aims to stop the former so that the latter never comes into being.

Preventing the nonconsensual form of sexting and its harms from occurring may very well constitute a legitimate state interest. However, doing so with H.B. 132 would be unconstitutional because its restriction on minors' First Amendment rights is not narrowly tailored. The compelling state interest of protecting minors from the harms associated with sexting may be successfully reached by prosecuting only those teens who forward nude images *without* consent. Systematic prosecution limited to this scenario would deter this harmful form of sexting to no lesser degree than would prosecuting all forms of sexting. At the same time, by limiting the prohibition to nonconsensual sexting, teens' right to private, non-obscene, and harmless expression would be left unscathed. Because H.B. 132 is not narrowly constructed to meet the compelling state interest in the least restrictive means, it does not survive constitutional scrutiny.

B. Unconstitutional Infringement on Parental Right to Raise Children

A second challenge to H.B. 132 is that it infringes on parents' due process rights under the Fourteenth Amendment to raise their children free from governmental interference.[209] Indeed, "'the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized

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[207] *Id.*

[208] *Id.* at 577 (citing Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).

[209] Miller v. Skumanick, 605 F. Supp. 2d 634, 643 (M.D. Pa. 2009) (citing Gruenke v. Seip, 225 F.3d 290, 303 (3d Cir. 2000)).

by' the Supreme Court."[210] The "liberty" protected by the Due Process Clause includes the right of parents to "'establish a home and bring up children'" and "'to control the education of their own.'"[211]

A state's interest in maintaining order by criminal law sanctions may conflict with the parental right to control the upbringing of their children.[212] As illustrated in *Miller v. Skumanick*, some parents will adamantly fight against the state imposing criminal sanctions against their children for conduct that falls outside of child pornography.[213] Undoubtedly, no parent would be pleased to find out that his or her child was sexting, but such a parent could choose to deal with this problem outside of criminal proceedings, perhaps by educating the child on why the conduct was improper or by punishing the child in a way that the parent finds appropriate. On occasion, "legislators, responding to a strident minority . . . , enact laws that go beyond what most parents want."[214] H.B. 132 may be an example of this. Imposing a law that in essence circumvents parental rights will likely be challenged as unconstitutional.

Early United States Supreme Court cases did not protect parental rights with strict scrutiny. Rather, the Court upheld restrictions on these rights if they satisfied the rational basis test.[215] Recently, some courts have applied a strict scrutiny analysis to parental rights cases, though it is still unclear which standard is to be applied to these cases.[216] Because the parental right to raise children is deemed a fundamental constitutional right,[217] applying a strict scrutiny analysis is appropriate.[218] Under this analysis, a restriction on a constitutional right is only

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[210] *Id.* at 643-44 (omission in original) (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)); *see also* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("[The] primary role of the parents in the upbringing of their children is now established . . . as an enduring American tradition.").

[211] *Miller*, 605 F. Supp. 2d at 644 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[212] Press Release, Federal Const. Ct., Father's Exclusion from Son's Trial in Juvenile Court Proceedings (Jan. 16, 2003), *available at* http://archiv.jura.uni-saarland.de/lawweb/press releases/exclusionfromtrial.html.

[213] *See Miller*, 605 F. Supp. 2d at 640.

[214] Garfield, *supra* note 205, at 618.

[215] Michael P. Farris, The Confused Character of Parental Rights in the Aftermath of *Troxel*, presentation at a Patrick Henry College conference: Parental Rights in the 21st Century—Where We Are Now, and Where We Are Headed (Feb. 20, 2009) (citing Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1928); Meyer v. Nebraska, 262 U.S. 390 (1923)), *available at* http://parentalrights.org (search "parentalrights.org" for "aftermath of Troxel"; then follow "The Confused Character of Parental Rights in the Aftermath of *Troxel*" hyperlink).

[216] *Id.* (discussing results of a review of every reported state and federal decision on the topic to "illustrate the confusion that currently prevails in parental rights cases").

[217] *See supra* note 210 and accompanying text.

[218] Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring); *see also* 16A AM. JUR. 2D *Constitutional Law* § 403 (2010).

justified if it serves a compelling state interest and if it is narrowly tailored to attain that interest in the least restrictive means possible.[219]

If H.B. 132 is challenged under the Fourteenth Amendment, the state may point to its compelling interest of protecting minors from the harms of sexting. In considering the well-being of minors, courts may find the new law justifiable as a form of "parental support" in protecting children.[220] In determining whether this legislative support is valid, however, courts would have to consider whether parents actually need it.[221] As one author recently wrote, "the state should not be permitted to censor [the sexually expressive] speech [of minors] if parents, without state censorship, could protect their children by monitoring them [adequately]."[222]

Though the argument often proceeds that teens today are too tech-savvy for their parents to know what they are doing,[223] the truth of the matter is that, when it comes to sexting, parents have many tools at their disposal to prevent their children from participating in it. For example, parents may limit the number of text messages allowed per month on their child's cell phone.[224] They may also set up features inhibiting the use of the child's cell phone during set time periods, such as late at night or on weekends.[225] Parents may even have their cell phone service providers completely block the transmission of images onto their children's phones.[226] Thus, it appears that parents are capable of significantly, if not totally, preventing their children from engaging in cell phone sexting.

The ability of parents to thwart sexting without legislative interference means that H.B. 132 is an unnecessary restriction on parents' constitutional right to control the upbringing and control of their children. Because the state interest justifying H.B. 132 can be achieved with less restrictive means, the bill does not survive the strict scrutiny test.

VII. CONCLUSION

Although felony charges under child pornography laws may be appropriate when applied to sexual predators and pedophiles who attempt to contact children via cell phones, they are inapposite to sexting between adolescents. Based on the language of the statutes and their current interpretations, most sexting incidents fall outside of the scope of federal and Ohio child pornography laws. Those that do not should not to be prosecuted under such harsh laws for policy reasons. The key purpose of

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[219] 16A AM. JUR. 2D *Constitutional Law* § 403 (2010).

[220] Garfield, *supra* note 205, at 618.

[221] *Id.* ("If parents could themselves protect their children, there would be little reason for overriding the First Amendment's anticensorship principle.").

[222] *Id.*; *see also* SAUNDERS, *supra* note 71, at 84 ("[T]he [paternalistic] role of the state, so long as the parents are not unfit, is secondary to the parents . . . .").

[223] Corbett, *supra* note 112, at 7.

[224] *Id.*

[225] *Id.*

[226] Nancy Shute, *Sexting and Your Kids: Strategies for Parents to Reduce the Risk*, U.S. NEWS & WORLD REPORT (Dec. 17, 2009), http://www.usnews.com/health/blogs/on-parenting/2009/12/17/sexting-and-your-kids-strategies-for-parents-to-reduce-the-risk.

enacting child pornography laws was to protect children from the abuse and exploitation that is an inherent part of the child pornography market. So long as sexting between teens is consensual and private, it constitutes neither child exploitation nor child abuse, as the sexual conduct depicted is voluntary and lawful in Ohio and the teens involved are not commercially exploited.

Under Ohio's proposed legislation, prosecutors would have a non-felony option for punishing sexting. As a misdemeanor offense, sexting would likely be prosecuted more systematically, thereby creating a strong deterrent for teens to impulsively engage in this conduct.[227] Certainly, if the criminal system is to be used to eradicate the practice of sexting, doing so under the parameters of H.B. 132 is a step in the right direction. Nevertheless, in determining whether to pass the bill, Ohio's legislature will have to establish what the state's interests are in enacting the sexting statute.

Even if sufficient state interests are established, the proposed legislation is likely to be challenged because of its broad scope. The language of the bill encompasses simple nudity of teens; it does not require that the nudity "appeal to a prurient interest" or that the images depict the genitals or pubic area. By prohibiting non-obscene and non-child pornographic images, H.B. 132 proposes to restrict a constitutionally protected form of teens' freedom of expression. As freedom of expression is a fundamental right, the bill should be narrowly constructed to restrict this right in the least possible way while furthering the intended state interest.[228] Thus, the scope of H.B.132 should be limited to encompass only nonconsensual sexting, as this limitation would still successfully deter the form of sexting that causes harm to its participants and society, while allowing teens to maintain their freedom of expression with regard to non-harmful consensual sexting.

Moreover, H.B. 132 will likely be challenged under the Fourteenth Amendment for infringing upon parental rights to raise children. Because parental right cases implicate a fundamental constitutional right, a strict scrutiny analysis should be applied in determining the validity of the law. Because parents may be able to successfully hinder the practice of sexting without legislative interference, imposing criminal sanctions on teens for sexting may be an unnecessary government intrusion into parental rights. Seeing that the compelling state interests justifying H.B. 132 may be achieved without imposing legislative restrictions on parents' right to raise their children, the bill fails to meet the strict scrutiny test.

Ohio's proposed legislation attempts to take the bite out of prosecuting teenagers for sexting by giving prosecutors a non-felony option for punishing it. While this is a step in the right direction—as most sexting instances do not fit into the parameters of child pornography statutes, and those that do should not be prosecuted under those laws for policy reasons—the bill veers off-course with its overly broad scope. As this Note illustrates, the substantial harms that are associated with sexting result from situations in which the images are distributed without the consent of the

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[227] OHIO LEGIS. SERV. COMM'N, FISCAL NOTE & LOCAL IMPACT STATEMENT, H.B. 132, 128th Gen. Assemb., at 3-4 (2009), *available at* http://www.lbo.state.oh.us/fiscal/fiscalnotes/128ga/pdfs/hb0132in.pdf (stating that prosecutors who were previously hesitant about charging teens with felony violations for sexting may be more likely to prosecute teens under the more appropriate misdemeanor charges, and that an aggressive enforcement of this prohibition could have a chilling effect on sexting).

[228] *See* discussion *supra* Part VI.A.

individuals depicted. Accordingly, Ohio's legislature should focus on addressing and criminalizing this harmful, nonconsensual sexting, rather than grouping all sexting into one category, thereby infringing on the First Amendment rights of teens and the Fourteenth Amendment rights of their parents.