

**ESSAY**

**THE FAILURE OF SEXTING  
CRIMINALIZATION: A PLEA FOR THE  
EXERCISE OF PROSECUTORIAL RESTRAINT**

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*Nine-tenths of the appeal of pornography is due to the indecent feelings concerning sex which moralists inculcate in the young; the other tenth is physiological, and will occur in one way or another whatever the state of the law may be.*

—Bertrand Russell<sup>1</sup>

## INTRODUCTION

For a time in early 2009, the news media was inundated with stories about the prosecution of teenagers on charges of pornography for transmitting photographs either of themselves or of other teens by cell phone or email—the practice known as “sexting.”<sup>2</sup> At one point, at least ten states had arrested teenagers on child pornography charges for sexting pictures.<sup>3</sup> These teens met differing fates at the hands of state prosecutors: some simply received warnings not to do it again, some received convictions as pornographers and now must register as sex offenders, and some defied prosecutors and took the issue to federal court.

Sexting issues come to the attention of authorities in different ways. Perhaps the most tragic case was the suicide of an eighteen-year-old Cincinnati woman, Jessica Logan.<sup>4</sup> During her last year of high school, Jessica sent nude pictures of herself to a boyfriend at his request.<sup>5</sup> After their relationship ended, the boyfriend sent the pictures to other high school girls, who began to harass Jessica, calling her a slut and a whore.<sup>6</sup> Jessica’s response to the harassment included depression and skipping school.<sup>7</sup> Eventually she hanged herself in her bedroom.<sup>8</sup>

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1. *Marriage and Morals* 115–16 (1929).

2. The only judicial definition is “the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the internet.” *Miller v. Skumanick*, 605 F. Supp. 2d 634, 634 (M.D. Pa. 2009).

3. Judith Levine, *What’s the Matter with Teen Sexting?*, THE AMERICAN PROSPECT (February 2, 2009), [http://www.prospect.org/cs/articles?article=whats\\_the\\_matter\\_with\\_teen\\_sexting](http://www.prospect.org/cs/articles?article=whats_the_matter_with_teen_sexting). By February 2009, sexting arrests had occurred in Alabama, Connecticut, Florida, New Jersey, New York, Michigan, Ohio, Pennsylvania, Texas, and Utah. *Id.*

4. Mike Celizic, *Her Teen Committed Suicide over ‘Sexting’*, MSNBC.COM, March 6, 2009, <http://www.msnbc.msn.com/id/29546030/>.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

Another example is Orlando, Florida, resident Phillip Alpert, who intermittently dated a girl he met at a church function in 2005.<sup>9</sup> The sixteen-year-old girl took nude photos of herself and sent them to him by email.<sup>10</sup> After they stopped dating, the girl told Phillip she was much happier without him.<sup>11</sup> In a fit of anger, Phillip sent the nude photos out in a mass email to her parents, grandparents, teachers, and others.<sup>12</sup> Three days later then eighteen-year-old Philip was arrested for distributing child pornography, subsequently convicted, and sentenced to five years probation.<sup>13</sup> He will be a registered sex offender until he is forty-three years old, with all the restrictions and stigma that classification entails.<sup>14</sup>

Even adults are not immune from the panic over sexting. Ting-Yi Oei, a sixty-year-old assistant principal at a Virginia high school, began an investigation of rumors of sexting at his school per the request of the principal.<sup>15</sup> His investigation led him to a sixteen-year-old boy whose cell phone contained a picture of a young girl clad only in her underpants with her arms wrapped around her breasts.<sup>16</sup> When informed of the situation, the principal told Oei to save the photograph on his work computer as evidence, and ordered the boy to delete it from his phone.<sup>17</sup> Two weeks later, the same boy was suspended for pulling down a female student's pants.<sup>18</sup> The boy's mother learned of the earlier incident involving the photo and became enraged that the school did not inform her about the incident.<sup>19</sup> When Oei refused to revoke the suspension, the mother notified police about the photo, and an investigation began, which resulted in a misdemeanor charge against Oei for failure to report suspicion of child abuse.<sup>20</sup> The prosecutor informed Oei that he must either resign from his position or face a felony charge of possession of child pornography.<sup>21</sup> Oei refused to resign, and a grand jury indicted him for possession of child pornography.<sup>22</sup> A county circuit judge eventually

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9. Bianca Prieto, 'Sexting' Teenagers Face Child-Porn Charges, ORLANDOSENTINEL.COM, March 8, 2009, <http://www.orlandosentinel.com/news/local/orl-asec-sexting-030809,0,1493554.story>.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Kim Zetter, 'Sexting' Hysteria Falsely Brands Educator as Child Pornographer, WIRED, Apr. 3, 2009, <http://www.wired.com/threatlevel/2009/04/sexting-hysteri/>.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

granted a motion to dismiss the charges on the grounds that the photo was not so sexually explicit or lewd as to rise to the level of pornography under state law.<sup>23</sup>

Whether sexting is the pervasive problem portrayed by the media remains unclear. Much of the media attention is traceable to a study commissioned by the National Campaign to Prevent Teen and Unplanned Pregnancy in partnership with Cosmogirl.com.<sup>24</sup> This survey concluded that, overall, 20% of teens between thirteen and nineteen had sent or posted nude or semi-nude pictures of themselves, including 22% of teen girls, 18% of teen boys, and 11% of young teen girls (i.e. girls between the ages of thirteen and sixteen).<sup>25</sup> The survey population included 653 teens “selected from among those who have volunteered to participate in [the marketing company’s] online surveys.”<sup>26</sup> The study does not mention any method or criteria for how these respondents were selected. In fact, the study itself observes that “[r]espondents do not constitute a probability sample.”<sup>27</sup> Therefore, although the study makes interesting reading and is imminently quotable by the media, it does not reflect an accurate or scientific reporting of the magnitude of the problem.

The purpose of this Essay is to explore the various legal approaches to the sexting phenomenon through an analysis of a decision by the United States District Court for the Middle District of Pennsylvania, which granted a temporary restraining order enjoining the prosecution of sexting teens on constitutional grounds,<sup>28</sup> and an examination of current and pending legislative attempts to deal with the sexting phenomenon.

Section I describes the facts leading up to the district court decision and its subsequent holding. Section II examines the approaches to sexting prosecution and legislation taken by other states. Section III analyzes the legal issues implicit in prosecuting teens for sexting. Section IV concludes that prosecution of teenagers for sexting is a tremendous waste of judicial resources: jail is not the place for children who have used modern technology to engage in the time-honored adolescent practice of “I’ll show you mine if you show me yours” or, as often happens in sexting, “I’ll show you mine and you show mine to everyone else in cyberspace.”

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23. *Id.*

24. The National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults* (2008), [hereinafter *Sexting Survey*].

25. *Id.* at 1.

26. *Id.* at 5.

27. *Id.*

28. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 643–44 (M.D. Pa. 2009).

## I. *MILLER V. SKUMANICK*

### A. *Background*

This case arose in October 2008, when school officials in Tunkhannock, Pennsylvania, discovered that male high school students had been trading pictures of “scantily clad, semi-nude and nude teenage girls” via their cell phones.<sup>29</sup> School officials confiscated the phones and turned them over to the local district attorney, George Skumanick, Jr., who commenced a criminal investigation.<sup>30</sup> Skumanick seized this opportunity to address the media and a high school assembly about the potential criminal charges that could arise from sexting, including prosecution for possession and distribution of child pornography and “criminal use of a communication facility.”<sup>31</sup> Further, Skumanick threatened that a

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29. *Id.* at 637.

30. *Id.*

31. *Id.* (citing 18 PA. CONS. STAT. § 6312 (2008) and 18 PA. CONS. STAT. § 7512 (2008)). Regarding the sexual abuse of children, section 6312 provides:

(a) DEFINITION.—As used in this section, ‘prohibited sexual act’ means sexual intercourse as defined in section 3101 (relating to definitions), 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.

(b) PHOTOGRAPHING, VIDEOTAPING, DEPICTING ON COMPUTER OR FILMING SEXUAL ACTS.—Any person who causes or knowingly permits a child under the age of 18 years to engage in a prohibited sexual act or in the simulation of such act is guilty of a felony of the second degree if such person knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed. Any person who knowingly photographs, videotapes, depicts on computer or films a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such an act is guilty of a felony of the second degree.

(c) DISSEMINATION OF PHOTOGRAPHS, VIDEOTAPES, COMPUTER DEPICTIONS AND FILMS.—

(1) Any person who knowingly sells, distributes, delivers, disseminates, transfers, displays or exhibits to others, or who possesses for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others, any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

(2) A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.

(d) POSSESSION OF CHILD PORNOGRAPHY.—

(1) Any person who knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

conviction would result in the teens being registered as sex offenders for at least ten years, with their names and pictures being displayed on the sex-offender website operated by the State.<sup>32</sup>

Skumanick did not stop at threatening the teenagers with long prison terms. He also sent letters to the parents of twenty high school students, informing them that their child had been “identified in a police investigation involving the possession and/or dissemination of child pornography.”<sup>33</sup> The letter further warned that the only way to avoid the charges was for the student to complete a six to nine month “education and counseling” program.<sup>34</sup> Finally, Skumanick invited both children and parents to attend a meeting on February 12, 2009, to discuss the issue.<sup>35</sup>

Skumanick met with the parents and students at the Wyoming County Courthouse, where he reiterated that the children faced prosecution if they failed to complete the program.<sup>36</sup> He also advised that participation in the program included mandatory probation and a one hundred dollar “program fee” for each student.<sup>37</sup>

During the meeting, one parent asked Skumanick how his daughter could face a charge of child pornography when the photograph in question displayed her wearing a bathing suit.<sup>38</sup> Skumanick replied that the girl had “posed ‘provocatively.’”<sup>39</sup> Skumanick refused to debate the meaning of the term and strongly encouraged the parents to sign an agreement committing them to the program by stating that his offer was a “plea deal” and that he could charge the students as early as that night.<sup>40</sup> Despite this hard-nosed approach, only one parent signed the

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(2) A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.

18 PA. CONS. STAT. § 6312 (2008).

32. *Miller*, 605 F. Supp. 2d at 638 (citing Registration of Sexual Offenders Act, 42 PA. CONS. STAT. § 9791 (2008)).

33. *Id.* Oddly, the group of students did not include the students who had actually disseminated the photographs. Instead, Skumanick only targeted the students whose pictures were taken and those who had the pictures stored on their cell phones. *Id.*

34. *Id.* Eventually, the “re-education program” was reduced to two hours per week over a five-week period and was divided by gender. In particular, the girls were to “gain an understanding of how their actions were wrong [and] what it means to be a girl in today’s society, both advantages and disadvantages.” Further, homework was to be assigned, including a writing assignment on “what you did and why it was wrong.” *Id.* (internal brackets and quotation marks omitted).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

agreement, and Skumanick grudgingly agreed to delay any charges for one week to allow the remaining parties time to consider their options.<sup>41</sup>

Approximately two weeks later, Skumanick sent another letter informing the parents that they had a February 28th appointment at the courthouse to “finalize the paperwork for the informal adjustment.”<sup>42</sup> An “informal adjustment” is a term of art in juvenile court meaning a guilty plea that allows for a period of probation before imposition of judgment.<sup>43</sup> Those parents who consented to the informal adjustment committed their children to the “re-education program” and six months of probation and drug testing.<sup>44</sup> However, the parents of three teens refused to sign and vowed to fight Skumanick in court.<sup>45</sup>

Those parents found the notion outrageous that Skumanick would consider the photographs in question of their daughters in any way pornographic.<sup>46</sup> A photograph of two of the teens, taken two years earlier, depicted the then thirteen-year-olds from the waist up wearing opaque brassieres.<sup>47</sup> In the picture, one girl was talking on the phone while the other held up her hand in a peace gesture.<sup>48</sup> In the next photo, the third teen was pictured having stepped out of the shower, with a white, opaque towel wrapped just under her breasts.<sup>49</sup> No sexual activity or genitalia were portrayed in either of the photos.<sup>50</sup>

The three girls insisted that they had not shared the photos with anyone, but that an unidentified third party sent the photos out “to a large group of people” without the girls’ permission.<sup>51</sup> Nonetheless, Skumanick remained insistent that the children choose between criminal prosecution and entering the re-education program.

### B. *The Litigation*

Faced with the prospect of their children’s prosecution, the parents of the three girls sought a temporary restraining order enjoining Skumanick from bringing criminal charges in the United States District Court for the Middle District of Pennsylvania.<sup>52</sup> On the families’ behalf, the American Civil Liberties Union filed a complaint alleging a violation

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41. *Id.* at 638–39.

42. *Id.* at 640.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 639.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 640.

of civil rights under color of state law pursuant to 42 U.S.C. § 1983, and stating three causes of action: (1) retaliation by state authorities in violation of the girls' First Amendment right to freedom of expression because the subject matter of the photographs was not obscene but constitutionally protected expression; (2) retaliation by state authorities in violation of the First Amendment because forced participation in the re-education program would constitute unconstitutionally compelled speech; and (3) retaliation by state authorities in violation of the parents' substantive due process right to direct the upbringing of their children under the Fourteenth Amendment.<sup>53</sup>

Skumanick first sought to have the action dismissed on abstention principles, arguing that the complaint was "a collateral attack on state criminal proceedings."<sup>54</sup> In rejecting this argument, the district court noted that the federal anti-injunction statute provides that federal courts should ordinarily refrain from interfering with state court proceedings except when expressly authorized by an Act of Congress.<sup>55</sup> The court then recognized Supreme Court precedent establishing that § 1983 actions fall within the scope of the exception.<sup>56</sup>

Further, the district court recognized that, although abstention usually is the proper course in ongoing state criminal cases, under the present circumstances no state court proceeding had been initiated—only threatened.<sup>57</sup> To grant the motion for dismissal on this ground would create a situation where plaintiffs must choose between intentionally violating state law to vindicate their constitutional rights or forgo a protected activity to avoid criminal prosecution.<sup>58</sup> The district court held that the lack of an ongoing prosecution made the case inappropriate for application of the abstention doctrine, and that there was a credible threat of prosecution.<sup>59</sup> Thus rejecting Skumanick's abstention argument, the court then turned to the propriety of the temporary restraining order.<sup>60</sup>

The court noted that the evaluation of a temporary restraining order motion requires the balancing of four factors: (1) whether the plaintiffs

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53. *Id.*

54. *Id.* at 641.

55. *Id.* (citing 28 U.S.C. § 2283).

56. *Id.* (citing *Mitchum v. Foster*, 407 U.S. 225, 242–43 (1972)).

57. *Id.* at 642.

58. *Id.* at (citing *Steffel v. Thompson*, 415 U.S. 452, 454 (1974)). In *Steffel*, the plaintiff was threatened with prosecution for criminal trespass after handing out anti-war fliers at a shopping center. The plaintiff sought federal review of the constitutionality of the trespass statute as applied. The Supreme Court held that the abstention doctrine did not apply in the absence of an ongoing prosecution. However, to obtain declaratory relief in federal court, the plaintiff had to satisfy Article III's case or controversy requirement with evidence of "a genuine threat of enforcement." 415 U.S. at 475.

59. *Miller*, 605 F. Supp. 2d at 642.

60. *Id.* at 642–43.



have a reasonable likelihood of success on the merits of the claim; (2) whether denial would result in irreparable injury; (3) whether issuance would result in greater harm to the defendant; and (4) whether the public interest would be served.<sup>61</sup>

Under the first prong of the balancing test, the district court determined that the plaintiffs had sufficiently established that the sexting photographs were a constitutionally protected activity and, therefore, the plaintiffs were reasonably likely to succeed on the merits of their retaliation claims.<sup>62</sup> The court initially observed that a claim for government retaliation required proof that the plaintiffs engaged in constitutionally protected activity, the government responded with retaliation, and the protected activity caused the retaliation.<sup>63</sup> The plaintiffs alleged they met the test because Skumanick attempted to force the girls to join the re-education program against their will and the wishes of their parents.

The court first examined the constitutional basis for the claims of the parents and their children. The crux of the plaintiffs' argument was that the girls had a First Amendment right to be protected from state-compelled speech, i.e., being forced to draft essays admitting to socially errant behavior. Further, the compulsory re-education program interfered with the parents' Fourteenth Amendment substantive due process right to direct the upbringing of their children and control their children's education.<sup>64</sup>

In finding that the children and parents' claim asserted constitutionally protected behavior that was reasonably likely to succeed on the merits, the court observed that the right to control the upbringing of a child and to direct his or her education is one of the central liberty interests protected by the Due Process Clause and long recognized by the Supreme Court.<sup>65</sup> One parent testified that, because her daughter herself did not send out the photo, instead falling victim to an unknown person who actually sent the photo, forced attendance at the re-education program, which included the mandatory composition of an essay admitting

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61. *Id.* at 641 (citing *Crissman v. Dover Downs Entm't, Inc.*, 239 F.3d 357, 364 (3d Cir. 2001)). Although *Crissman* dealt with the issuance of a preliminary injunction, the district court noted that the same factors should be employed for a temporary restraining order. *Id.* (citing *Bieros v. Nicola*, 857 F. Supp. 445, 446 (E.D. Pa. 1994)).

62. *Id.* at 644.

63. *Id.* at 643 (citing *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 282 (3d Cir. 2004)).

64. *Id.* at 645.

65. *Id.* at 643–44 (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (holding that a Washington statute that allowed the court to award visitation rights to the grandparents of a deceased son's child violated the substantive due process rights of the custodial mother to direct the upbringing of her child.)).

wrongdoing, violated her parental right to direct her child's education.<sup>66</sup> The court agreed.<sup>67</sup>

The court also concurred with the children's contention that the essay writing was unconstitutionally compelled speech on the grounds that the First Amendment not only shielded people from government suppression of expression, but also prevented the government from compelling people to express a particular viewpoint.<sup>68</sup> For Skumanick to compel the children to write an essay admitting wrongdoing, on threat of a felony conviction, is government action to force a private person to publish a particular message chosen by the government, which is one of the categories of impermissible compelled speech.<sup>69</sup>

With the first element of a retaliation claim satisfied, the court turned next to the issue of whether the government responded to the minors' conduct with retaliation. The district court noted that Third Circuit precedent requires the alleged adverse conduct by the government to be severe enough "to deter a person of ordinary firmness from exercising his First Amendment rights."<sup>70</sup> Further, the court observed that the First Amendment protects individuals from government retaliation such as prosecution for speaking out.<sup>71</sup> The court agreed that the threat of a felony prosecution would deter the ordinary person from exercising First Amendment rights and that the plaintiffs were reasonably likely to succeed on this portion of their claims.<sup>72</sup>

The third element of the retaliation claim, that the protected activity caused the retaliation, was also reasonably likely to be met because the photographs were likely insufficient to support a pornography charge under Pennsylvania law; and the threat of prosecution was merely a pretext for forcing the children into the re-education program.<sup>73</sup> The court examined the plaintiffs' claims that merely "provocative" photographs were not illegal pornography, even when involving minors, because the state statute only prohibited "sexual act[s]" such as sexual intercourse

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66. *Id.* at 644.

67. *Id.*

68. *Id.* (citing *Forum for Academic and Inst. Rights v. Rumsfeld*, 390 F.3d 219, 235 (3d Cir. 2004), *rev'd*, 547 U.S. 47 (2006) (holding that the Solomon Amendment, requiring law schools to provide equal access to military recruiters who abide by the "Don't Ask, Don't Tell" policy on gays in the military, violated schools' First Amendment right to be protected from compelled speech)).

69. *Id.*

70. *Id.* (quoting *Allah v. Seiverling*, 229 F.3d 220, 225 (3d Cir. 2000) (finding that the administrative segregation of a prisoner who filed complaints against prisons where he was formerly incarcerated could lead the fact-finder to conclude that "a person of ordinary firmness [was prevented] from exercising his First Amendment rights")).

71. *Id.* at 644-45 (citing *Hartman v. Moore*, 547 U.S. 250, 256 (2006)).

72. *Id.* at 645.

73. *Id.* at 645-46.

and “exhibition of the genitals or nudity if such nudity is depicted for purposes of sexual stimulation or gratification.”<sup>74</sup> The court, while careful to avoid expressing any final conclusion on the merits of the plaintiffs’ position, concluded that the plaintiffs presented a reasonable argument that the photographs were not child pornography under the statutory definition.<sup>75</sup> Further, even assuming that the photographs violated the statutory definition, the court found that the plaintiffs reasonably asserted that they were the victims of the crime because they were not involved in the dissemination of the photographs.<sup>76</sup>

After confirming that the plaintiffs met the first factor for a temporary restraining order—a reasonable likelihood of success on the merits—the court turned to the second factor: irreparable harm to the plaintiffs. The court agreed that the loss of First Amendment freedoms, even temporarily, constituted irreparable injury.<sup>77</sup>

Next, the court found for the plaintiffs on the third factor: no harm to the non-moving party would occur by delaying the girls’ prosecution.<sup>78</sup> The court noted that Skumanick had repeatedly delayed filing charges against the girls and that there was no need to “protect the public” from the alleged criminal activity.<sup>79</sup> The court also observed that the prosecutor had not even addressed this factor in his brief; if Skumanick still saw a need to prosecute at the conclusion of the litigation, the court felt “confident” that he could resolve the issue before the twelve-year statute of limitations ran.<sup>80</sup>

Finally, the court addressed the fourth factor: the public interest. The plaintiffs argued that enjoining a meritless retaliatory prosecution that effectively restricted protected liberties best served the public interest.<sup>81</sup>

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74. *Id.* at 645 (citing 18 PA. CONS. STAT. § 6312).

75. *Id.*

76. *Id.* at 645. In his brief, Skumanick apparently tried to assert that even if he couldn’t convict the girls of either child pornography or criminal use of a communications device, he could bring additional charges such as public lewdness and public indecency; however, the court would not tolerate this departure from Skumanick’s previous hearing testimony where he confirmed his intention to press the original charges if the girls would not complete the program. *Id.* at 645 n.5. The court noted that the standard for the temporary restraining order merely required a showing of a reasonable likelihood of success on the merits, not a demonstration of innocence. *Id.*

77. *Id.* at 646 (citing *Swartzwelder v. McNeilly*, 297 F.3d 228, 241 (3d Cir. 2002) (finding irreparable harm when an ordinance barred testimony by a police expert witness except with the permission of the police chief)).

78. *Id.* at 646–47.

79. *Id.* at 646.

80. *Id.* 646–47.

81. *Id.* at 647.

Given the importance of the constitutional rights at stake, the court agreed that this factor weighed in favor of the plaintiffs.<sup>82</sup>

All four factors tipped in the plaintiffs' favor. Accordingly, the district court granted the temporary restraining order and enjoined Skumanick from bringing criminal charges against the three girls until after a hearing on the plaintiffs' motion for a preliminary injunction.<sup>83</sup>

The district court's decision afforded these three teens some protection from a prosecutor evidently out to teach children the errors of their adolescent ways. Yet, this outcome is by no means the norm as other jurisdictions considering the question have taken different approaches.

## II. LEGISLATIVE AND PROSECUTORIAL APPROACHES TO SEXTING

The panic over sexting prompted a flurry of legislative initiatives, ranging from express criminalization to a complete exemption from criminal law. The National Conference of State Legislatures reports that nine states have already addressed the sexting issue by drafting statutes aimed at either the criminality of teen sexting or closing loopholes in the current law to prevent child predators from using text messaging to contact children.<sup>84</sup>

For example, Ohio took a more aggressive approach and introduced a bill prohibiting minors from sending photographs or videos depicting any minor in a state of nudity.<sup>85</sup> Under the proposed bill, it is no defense that the minor created, received, exchanged, sent, or possessed a photograph of themselves.<sup>86</sup> Conviction under the proposed bill is a first degree misdemeanor.<sup>87</sup>

Utah passed even more drastic legislation, criminalizing just the viewing of any photographs of a child under eighteen if the image includes "nudity or partial nudity for the purpose of causing sexual arousal

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82. *Id.* (citing *AT&T v. Winback & Conserve Program*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994) ("As a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff. Nonetheless, district courts should award preliminary injunctive relief only upon weighing all four factors.")).

83. *Id.* The temporary restraining order was later converted to a preliminary injunction so Skumanick could appeal the judgment of the district court, primarily on abstention principles. Telephone Interview with Witold J. Walczak, Esq., Counsel for Plaintiffs, in Pittsburgh, Pa. (July 21, 2008).

84. National Conference of State Legislatures, *2009 Legislation Related to "Sexting"*, Aug. 1, 2009, <http://www.ncsl.org/default.aspx?tabid=17756>.

85. H.B. No. 132, 128th Gen. Assem. (Ohio 2009), available at [http://www.legislature.state.oh.us/BillText128/128\\_HB\\_132\\_I\\_Y.pdf](http://www.legislature.state.oh.us/BillText128/128_HB_132_I_Y.pdf).

86. *Id.*

87. *Id.*

of any person.”<sup>88</sup> Nudity or partial nudity includes the genitals, buttocks, and female breast below the top of the areola.<sup>89</sup> Law enforcement officers or other persons acting in the scope of their employment for duties required by law or for the prevention of child pornography are exempt from criminal or civil liability.<sup>90</sup>

Colorado expanded its civil and criminal codes relating to computer and internet offenses against children to include telephone and data networks, text messaging, and instant messaging.<sup>91</sup> Now, it is a civil offense to use this technology to disseminate “indecent material” to a child with the intent to induce the child into sexual conduct.<sup>92</sup>

New Jersey is considering legislation that will amend its “luring and enticing a child” and child endangerment laws to expand the definition of “electronic means” to include not only the internet, but also any electronic device, including cell phones.<sup>93</sup> Under the current child endangerment law, it is illegal to possess or transfer a photograph of a child under sixteen in a state of nudity “if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction.”<sup>94</sup> The bill covers sexting by cell phone and creates a “permissive inference” that the defendant was attempting to engage in sexual activity with the child upon the transmission of such a photograph.<sup>95</sup>

Oregon also revised its law criminalizing “online sexual corruption” of children under sixteen by expanding the definition of “online communication” to include “text messaging . . . [or] transmission of information by wire, radio, optical cable, cellular system, electromagnetic system or other similar means.”<sup>96</sup>

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88. UTAH CODE § 76-5a-2(8)(f) (2009), available at <http://www.le.utah.gov/UtahCode/section.jsp?code=76-5a>.

89. *Id.* at § 76-5a-2(6).

90. *Id.* at § 76-5a-3(5).

91. Act Concerning the Use of Messaging Systems to Commit Unlawful Activity, H.B. 09-1132, 67th Gen. Assem., Reg. Sess. (Colo. 2009), available at [http://www.leg.state.co.us/clics/clics2009a/csl.nsf/fsbillcont3/E12D38D7ED58277D872575380063652E?open&file=1132\\_enr.pdf](http://www.leg.state.co.us/clics/clics2009a/csl.nsf/fsbillcont3/E12D38D7ED58277D872575380063652E?open&file=1132_enr.pdf) (amending Computer Dissemination of Indecent Material to a Child—Prohibition, COLO. REV. STAT. § 13-21-1002 (2003); Internet Luring of a Child, COLO. REV. STAT. § 18-3-306 (2007); and Internet Sexual Exploitation of a Child, COLO. REV. STAT. § 18-3-405.4 (2006)).

92. Computer Dissemination of Indecent Material to a Child—Prohibition, COLO. REV. STAT. § 13-21-1002 (2009).

93. S. 2701, 213th Leg., Reg. Sess. (N.J. 2009) available at [http://www.njleg.state.nj.us/2008/Bills/S3000/2701\\_I1.HTM](http://www.njleg.state.nj.us/2008/Bills/S3000/2701_I1.HTM) (intending to amend N.J. STAT. §§ 2C:13-6 (2008) and 2C:24-4 (2001)).

94. N.J. STAT. § 2C:24-4 (2001).

95. S. 2701.

96. H.R. 2641, 75th Leg., Reg. Sess. (Or. 2009) available at <http://www.leg.state.or.us/09reg/asures/hb2600.dir/hb2641.en.html>.

Vermont specifically addressed the teen sexting issue by forbidding minors from using computers or other communication devices to transmit an “indecent visual depiction” of themselves to another person.<sup>97</sup> Possession of such a visual depiction is also illegal, unless the person “took reasonable steps, whether successful or not, to destroy or eliminate.” the picture.<sup>98</sup> Interestingly, minors in violation of the sexting ban must be “adjudicated delinquent” in juvenile court but are not subject to the sex offender registry requirements.<sup>99</sup> Further, a first time offender would not face prosecution under the sex offender statutes. A repeat offender could face prosecution in district court for sexual exploitation of children; yet the sex offender registry requirements would not apply even for repeat offenders.<sup>100</sup>

Nebraska completely exempted sexting teens from the harsh results of pornography prosecution by creating affirmative defenses to its child pornography laws.<sup>101</sup> For example, the statute that criminalizes possession of sexually explicit visual images of a child provides an affirmative defense if the image is only of the defendant.<sup>102</sup> Further, if the defendant is not the child in the image, an affirmative defense still exists as long as the defendant is under nineteen, only one child is pictured, the child was fifteen or older, the child voluntarily participated, the defendant did not provide the picture to anyone else, and the defendant did not coerce the child into making the picture.<sup>103</sup> Clearly, this is a narrow exception.

Perhaps the most restrained and intelligent approach was taken by the Indiana State Senate, which simply drafted a resolution urging the legislative council to have the sentencing policy study committee consider the issue of sexting by children.<sup>104</sup> Overall, the resolution called for the committee to consider revisions of the Indiana sex offense statutes, specifically taking into account “the psychology of sexuality and sexual development[,] the psychology of sexual deviants and deviancy[,] and the mental development of children and young adults and how this affects the ability to make certain judgments.” The object of the resolution was to require that “[i]ssues such as mental and sexual development of

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97. S. 125, § 2802b(a)(1), Reg. Sess. (Vt. 2009) available at <http://www.leg.state.vt.us/DOCS/2010/ACTS/ACT058.PDF>.

98. *Id.* at § 2802b(a)(2).

99. *Id.* at § 2802b(b)(1).

100. *Id.* at § 2802b(a)(2–3).

101. See H.R. 97, § 15(3), 101st Leg., Reg. Sess. (Neb. 2009) available at <http://nebraskalegislature.gov/FloorDocs/Current/PDF/Slip/LB97.pdf>.

102. *Id.* at § 15(3)(a).

103. *Id.* at § 15(3)(b)(i–vii); see also § 18(5–6).

104. S. Res. 90, 116th Leg., 1st Reg. Sess. (Ind. 2009), available at <http://www.in.gov/legislative/bills/2009/SRESF/SR0090.html>.

individuals . . . be studied in depth to ensure that our criminal justice system remains fair and equitable.”<sup>105</sup>

At least one district attorney decided to take proactive steps in light of the national attention given to the practice of sexting. David F. Capeless, the Berkshire District Attorney for the Commonwealth of Massachusetts, held a press conference to announce that his office wanted to tackle the issue before it became a problem in his district.<sup>106</sup> After describing the type of behavior that constituted sexting, Capeless outlined the various Massachusetts laws that might apply, including statutes prohibiting posing a child in a state of nudity, dissemination of pictures of a child in a state of nudity, possession of child pornography, and dissemination of harmful material to a minor—all felonies.<sup>107</sup> Potential penalties included up to twenty years in prison and fines up to \$50,000, as well as inclusion in the sex offender registry for up to twenty years.<sup>108</sup> Other harmful consequences could include restriction of school activities, denial of college admission, and ineligibility for student loans.<sup>109</sup> Importantly, the district attorney noted that whether a person consented to being photographed or to sending or receiving such photographs was irrelevant because the law deemed persons under the age of eighteen incapable of consent.<sup>110</sup>

Capeless emphasized that he did not want to use the criminal justice system to prosecute teenagers for “making poor choices.”<sup>111</sup> To that end, his office embarked on an education initiative by providing presentations to schools and communities upon request as well as by partnering with the community television station to tape programs on topics such as bullying, cyber-bullying, internet safety, and sexting.<sup>112</sup>

The states confronting this issue have reacted with remarkably different degrees of tolerance (or intolerance) to the concepts of teenage nudity and sexuality. This is, and has long been, a politically sensitive issue.<sup>113</sup>

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105. *Id.*

106. Press Release, Berkshire County Dist. Attorney’s Office, District Attorney Holds Press Conference on Problem of “Sexting” in Berkshire County (2009), [http://www.mass.gov/?pageID=bermodulechunk&L=1&L0=Home&sid=Dber&b=terminalcontent&f=nu\\_2009\\_0303\\_sexting\\_press\\_conference&csid=Dber](http://www.mass.gov/?pageID=bermodulechunk&L=1&L0=Home&sid=Dber&b=terminalcontent&f=nu_2009_0303_sexting_press_conference&csid=Dber).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. See Donna I. Dennis, *Obscenity Law and Its Consequences in Mid-Nineteenth Century America*, 16 COLUM. J. GENDER & L. 43 (2007).

### III. DISCUSSION OF LEGAL ARGUMENTS REGARDING TEEN SEXTING

#### A. *The Impact of the Pennsylvania Litigation*

With respect to the Pennsylvania litigation, the issuance of a temporary restraining order probably has little precedential value for other sexting prosecutions due to the peculiar circumstances of that case. Unlike the majority of sexting cases reported by the media, the district attorney never brought any actual charges—merely threatened prosecution. If actual charges existed at the time of the teens' filing in federal court, the abstention doctrine would almost certainly apply, forcing the court to dismiss the plaintiffs' claims: hornbook law stipulates that when a criminal action is pending in state court, a federal court cannot intervene to grant injunctive or declaratory relief and must dismiss any action, absent some unusual circumstances.<sup>114</sup> This principle implicitly recognizes that state criminal courts provide an adequate forum for asserting constitutional claims.<sup>115</sup> The Pennsylvania case did not acknowledge a constitutional right of privacy for minors to engage in sexting. Instead, it determined that a prosecutor could not strong-arm teens into a re-education program via a threat of criminal charges. Unless Skumanick appeals from the district court's decision and the Third Circuit endorses the holding, the sole impact of the case will be to provide some legal relief to the particular minors facing retaliatory prosecution.

#### B. *Constitutional Issues and Questions of Statutory Interpretation*

For minors already facing charges for child pornography because of sexting, the courts should consider several issues. First, the legality of teenagers taking "indecent" photographs of themselves implicates several federal constitutional theories: (1) the right to sexual privacy and the right of parents to control the upbringing of their children as liberty interests under the Due Process Clause of the Fourteenth Amendment; (2) the right to freedom of expression under the First Amendment; and (3) the concept of obscenity as a type of expression undeserving of First Amendment protection. Also, courts may explore a minor's right to sexual privacy under state constitution privacy clauses. Finally, questions of statutory interpretation arise when construing the application of child pornography statutes.

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114. CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* § 52A, at 345 (5th ed. 1994) (citing *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973)).

115. *Id.*



### 1. Right to Sexual Privacy, Freedom of Expression, and Parental Rights

It has long been a cornerstone of First Amendment jurisprudence that minors hold more limited rights than adults regarding freedom of sexual expression.<sup>116</sup> For example, in *Ginsberg v. New York*, the U.S. Supreme Court held that “girlie magazines” (displaying pictures of scantily clad women with their buttocks exposed), which are not obscene in relation to adults, could nevertheless be banned from sale to minors, under the rationale that the state has an interest in protecting the morals of children from materials suitable only for adults.<sup>117</sup> Under this “variable obscenity” rationale, it is not unconstitutional to ban minors from possessing or distributing materials that fall within a state’s “obscenity for minors” statute.

However, that is not to say that minors are completely devoid of constitutional protections, which is admittedly a controversial and confusing issue in the contexts of abortion and statutory rape between consenting minors. The Supreme Court has also held that minors enjoy many of the same constitutional rights as adults in the context of freedom of expression,<sup>118</sup> equal protection,<sup>119</sup> due process,<sup>120</sup> and substantive and procedural rights in juvenile courts.<sup>121</sup> Further, courts recognize the right of minors to sexual privacy in relation to abortion and contraception.<sup>122</sup> The Supreme Court cases dealing with parental consent for abortions by minors established a “mature minor” standard, under which a minor of sufficient maturity to make reproductive health decisions enjoys the same constitutional rights as an adult.<sup>123</sup> However, the measure

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116. Kathleen Fultz, Comment, *Griswold for Kids: Should the Privacy Right of Sexual Autonomy Extend to Minors?* 21 J. Juv. L. 40 (2000) (“The courts and legislatures are consistently divided in matters of the rights of minors, particularly in the area of sexual autonomy and reproductive rights.”).

117. *Ginsberg*, 390 U.S. 629, 636 (1968).

118. *See, e.g., Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (finding that students wearing black armbands at school to protest the Vietnam war constitutes protected speech).

119. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that the segregation of African American minors in “separate but equal” schools are violative of the Equal Protection Clause of the Fourteenth Amendment).

120. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975) (construing the Due Process Clause to entitle students to minimal notice and hearing prior to school disciplinary actions).

121. *See, e.g., In re Gault*, 387 U.S. 1 (1967) (holding that juveniles in delinquency proceeding have a right to notice of charges, right to counsel, privilege against self-incrimination, and right to confront accusers).

122. *Planned Parenthood of Mo. v. Danforth*, 428 U.S. 52, 75 (1976) (holding that the state requirement of parental consent for abortions by minors under eighteen is unconstitutional).

123. *Carey v. Population Serv. Int’l*, 431 U.S. 678, 691–99 (1978) (holding that a statute limiting access to contraceptives for minors under sixteen is violative of the constitutional

of a minor's maturity is made on a case-by-case basis, irrespective of the child's chronological age.<sup>124</sup> Although the state is required to demonstrate a "compelling interest" to justify intrusion into the sexual privacy of an adult, the state need only show a "significant" governmental interest to justify intrusion into a minor's privacy rights.<sup>125</sup> This less rigorous standard persists as a result of the traditional latitude given to states in regulating the conduct of minors.<sup>126</sup>

An example of the protection of minors' sexual privacy rights from governmental intrusion occurred in California following an attorney general opinion interpreting the state child abuse reporting law to require that health, education, and other professionals report voluntary sexual conduct of minors under fourteen.<sup>127</sup> Recognizing that the purpose of the reporting law was to "bring the child abuser to justice and to protect the . . . victim," the court held that minors had a right to sexual privacy under both the federal and state constitutions and that the attorney general had not shown the requisite "significant state interest" to justify such an intrusion into the sexual relations of minors when no "abuse" was present.<sup>128</sup>

However, a California court later held that a sixteen-year-old boy, who had consensual sex with a fourteen-year-old girl, violated the statutory rape law that made intercourse by "any person" with a minor not more than three years older or three years younger a misdemeanor.<sup>129</sup> The defense argued that minors have sexual privacy rights, which are violated by the statute. However, the court ruled that the same privacy rights that attach to the decision to have an abortion do not extend to the decision to engage in consensual sexual activity, and that minors do not have "a legitimate expectation of privacy to engage in consensual sexual activity with another minor."<sup>130</sup>

A deeply divided Florida court reached the opposite result, finding that the state constitution's explicit right to privacy encompassed a sixteen-year-old consensual sexual relations with another sixteen year-old, and that the state could not impose criminal liability through its

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right to privacy); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 452 (1983) (holding that a parental consent requirement for minors under fifteen is unconstitutional).

124. *Bellotti v. Baird*, 443 U.S. 622 (1976).

125. *Carey*, 431 U.S. at 693, n.15.

126. *Id.*

127. 67 Ops. Cal. Att'y Gen. 235 (1984).

128. *Planned Parenthood Affiliates of Cal. v. Van de Kamp*, 226 Cal. Rptr. 361, 364 (Cal. Ct. App. 1986).

129. *In re T.A.J.*, 73 Cal. Rptr. 2d 331, 341 (Cal. Ct. App. 1998).

130. *Id.* at 339.

statutory rape provision under those limited circumstances.<sup>131</sup> However, the Florida court later refused to recognize an unlimited right of sexual privacy for minors when it upheld the convictions of two males, nineteen and twenty, who had consensual intercourse with fourteen-year-old females.<sup>132</sup> The court determined that the state's interest in protecting minors from "sexual activity and exploitation before their minds and bodies have sufficiently matured to make it appropriate, safe and healthy for them" outweighed the minors' right to privacy.<sup>133</sup>

Another wrinkle in the analysis of sexting prosecutions is the U.S. Supreme Court's long-recognized parental right to control the conduct and upbringing of their children as a protected liberty interest arising under the concept of substantive due process.<sup>134</sup> The Court has upheld this right in various contexts,<sup>135</sup> but has not yet considered a parent's right to permit consensual sex between minors. However, "a parent's desire for and right to the companionship, care, custody, and management of his or her children is an important interest, one that undeniably warrants deference and, absent a powerful countervailing interest, protection."<sup>136</sup> The state, therefore, carries a heavy burden when trying to interfere with parental "management" of children. The Pennsylvania court recognized this right to parental control when issuing a temporary restraining order against the district attorney's attempt to force the teens into a re-education program.<sup>137</sup>

Thus, while the right to an abortion and to contraception now extends to minors, the right to sexual privacy does not necessarily protect consensual sexual activity itself or the consensual exchange of nude photographs between minors, which seems to be the focus of the majority of law enforcement efforts. Instead, the authorities, including District Attorney Skumanick in the Pennsylvania case, have characterized such photographs as child pornography.<sup>138</sup>

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131. *B.B. v. State*, 659 So. 2d 256, 259 (Fla. 1995); *see also* Gregory R. Beck, Note and Comment, *J.A.S. v State: Striking a Balance Between a Minor's Right of Privacy and Florida's Interest in Protecting Minor's Adolescent Behavior*, 23 NOVA L. REV. 479, 487-93 (1998).

132. *Jones v. State*, 640 So. 2d 1084 (Fla. 1994).

133. *Id.* at 1087.

134. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 400-01 (1923)(state statute criminalizing the teaching of foreign languages to students before they have passed the eighth grade held unconstitutional intrusion into right of parents to control upbringing of children).

135. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78 (1987), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), and *Meyer*, 262 U.S. at 399-400 (raising children).

136. *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 (1996) (internal quotation marks omitted).

137. *See supra* Section I (B).

138. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009).

## 2. Child Pornography

What constitutes child pornography is a matter of state law, subject to federal constitutional limitations. Under the variable obscenity test of *Ginsberg*, courts will judge obscenity by a different standard for adults than for children.<sup>139</sup> Since 1982, the U.S. Supreme Court has maintained that child pornography is a category of obscenity not covered by First Amendment protection.<sup>140</sup> Accordingly, a state can assert a significant interest in preventing the dissemination of such photographs to child pornographers, which may be a sufficient justification for intrusion into teens' sexual privacy.<sup>141</sup>

Such was the case in a Florida appeals-court decision, which upheld the convictions of a sixteen-year-old girl and her seventeen-year-old boyfriend for possession of child pornography after authorities discovered digital photos of the pair engaged in sexual activity.<sup>142</sup> Although the photographs remained in the possession of the subjects and neither expressed any intent to share with a third party, the court found that the state's interest in preventing the potential dissemination of child pornography outweighed the minors' reasonable expectation of privacy.<sup>143</sup>

Taking the Pennsylvania statute as an example of the prototypical child pornography law, the definition of child pornography includes not only depictions of sexual intercourse and masturbation, but also "nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction."<sup>144</sup> Here lies the crux of the problem: the interpretation of whether the nude pictures in question were obtained or generated for illicit purposes is initially within the discretion of the prosecutor. The Pennsylvania district attorney characterized a picture of a teen in her swimsuit as child pornography because she was posed "provocatively."<sup>145</sup> Although a picture of an adult in the same pose would not be considered obscene or even indecent under Supreme Court jurisprudence, such a picture might arguably be obscene for minors under the variable obscenity test of *Ginsberg*.<sup>146</sup>

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139. *Ginsberg v. New York*, 390 U.S. 629, 673 (1968).

140. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (upholding a New York statute that criminalizes the sale of child pornography); *see also* *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (upholding an Ohio statute that criminalizes possession of child pornography).

141. *See, e.g.*, Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1 (2007).

142. *A.H. v. State of Fla.*, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007), *review denied based on lack of jurisdiction*, 959 So. 2d 715 (2007).

143. *Id.* at 238.

144. *Miller*, 605 F. Supp. 2d at 645.

145. *Id.* at 638.

146. *Ginsberg v. New York*, 390 U.S. 629, 673 (1968).

The district court judge in the Pennsylvania case appeared well aware of the ambiguity in the statutory definition as evidenced by his reservation of any final conclusion on that issue.<sup>147</sup> Instead, he offered the observation that the pictures did “not appear to qualify in any way as depictions of prohibited sexual acts.”<sup>148</sup> More graphic pictures of under-age sexual activity at issue in other prosecution cases would easily meet the litmus test for child pornography, even though pictures of the same activity by adults likely would not be obscene.

Consequently, the issue of what constitutes child pornography under an ambiguously worded statute is initially left to the prosecutor, who may construe the statute as broadly as possible in light of his or her own personal beliefs or political goals. This highlights the possibility of a potentially serious misapplication of the child pornography statutes, as has occurred in the Pennsylvania case.

### 3. Issues of Statutory Interpretation

The stance taken by Skumanick in Pennsylvania and by other district attorneys draws attention to the legislative purpose of child pornography statutes. None appear to express intent to punish the minors themselves. Rather, the avowed purpose of this type of statute is to protect children from being sexually abused during the taking of photographs and to prevent such photographs from becoming tools to coerce children into performing sexual acts.<sup>149</sup>

It is a venerable common law principle that the class of persons a statute is meant to protect should not be subject to punishment under the statute.<sup>150</sup> For example, “the acquiescence of a woman under the age of consent would [not] make her a co-conspirator with the man to commit statutory rape upon herself.”<sup>151</sup> This principle has been discussed by the courts primarily in the context of statutory rape or incest. For example, the California Supreme Court held that a sixteen-year-old girl, who had consensual sex with her father, could not be charged as an accomplice to the crime of incest because she was the victim, not the “perpetrator” of the incestuous act.<sup>152</sup>

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147. *Miller*, 605 F. Supp. 2d at 645.

148. *Id.*

149. L. Steven Grasz & Patrick J. Pfaltzgraff, *Child Pornography and Child Nudity: Why and How States May Constitutionally Regulate the Production, Possession, and Distribution of Nude Visual Depictions of Children*, 71 TEMP. L. REV. 609, 625–26 (1998).

150. *See Gebardi v. United States*, 287 U.S. 112, 123 (1932) (citing *Queen v. Tyrell*, (1894) 1 Q.B. 710 (U.K.)).

151. *Id.*

152. *People v. Tobias*, 21 P.3d 758, 764–65 (Cal. 2001); *see also In re Meagan R.*, 49 Cal. Rptr. 2d 325 (Cal. Ct. App. 1996) (holding that a victim of statutory rape cannot be charged as an accessory even though a willing participant).

A rarer expression of this principle was the Nevada Supreme Court's holding that a child under fourteen could be judged delinquent for violating a statute forbidding the commission of lewd acts with a minor under fourteen.<sup>153</sup> The court rejected the contention that the boy who fondled his four-year-old cousin could not be considered a "person" under the statute because he was in the class of persons the statute was meant to protect.<sup>154</sup> The court found that the statute was meant to protect "minors under the age of 14 from all persons, even from other minors under the age of 14."<sup>155</sup>

Under the "protected class" principle, a child who is considered the victim in the statutory scheme prohibiting child pornography should not be charged with the crime of child pornography. However, child pornography laws, like the Nevada statute prohibiting any "person" from committing lewd acts with a child, do not generally draw any distinction between the protected class of minors and adults who engage in the prohibited behavior; and, just as adults, minors can be targeted for prosecution. This has resulted in a vigorous academic debate over whether children who engage in this self-published pornography like sexting should be the subject of criminal prosecutions.

### *C. The Debate Over Self-Exploitive Images*

Following a symposium held at the University of Virginia, two academics weighed in on the appropriate societal response to sexting and self-produced child pornography. Professor Leary<sup>156</sup> submits that the growth of self-produced child pornography is a problem of epidemic proportions and that many kinds of harm are inherent in child pornography, whether self-produced or otherwise, thus justifying criminal prosecution of the producer.<sup>157</sup> Pornography causes both immediate and long-term harm: the child suffers the physical and emotional abuse contemporaneous with the making of the images; and because the images create a permanent record of the event, the child is "revictimized" every time the image surfaces.<sup>158</sup> However, child pornography poses a threat even to children not depicted in the images. Sex offenders use pornographic images to "groom, legitimize, and demonstrate for the victim

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153. *Cote H. v. Nevada*, 175 P.3d 906, 909–10 (Nev. 2008).

154. *Id.*

155. *Id.* at 909.

156. Assistant Visiting Professor of Law at Catholic University and former Director of the National Center for Missing and Exploited Children.

157. Leary, *supra* note 141, at 6.

158. Child victims of pornography report being "haunted" in later years by the continued existence of the images. *Id.* at 9–11.

what to do.”<sup>159</sup> The images, having already harmed the children depicted in them, therefore become a tool for the exploitation of additional children. Professor Leary also suggests that the ready availability of pornographic images desensitizes children exposed to them, making them more vulnerable to sexual predators.<sup>160</sup> Finally, society as a whole suffers harm because the proliferation of pornographic images “sexually objectifies children” and leads to an increase in the overall acceptance of sexual abuse of children.<sup>161</sup>

Professor Leary further asserts that the government has a duty to intervene in response to this growing problem under the doctrine of *parens patriae*, which endows the government with the right to protect citizens not capable of protecting themselves.<sup>162</sup> In addition, the government retains the authority to prosecute pornographers under its police powers, which exist to promote the general safety and welfare of society as a whole.<sup>163</sup> Thus, Professor Leary believes that the proper governmental response is to prosecute the self-exploitive child pornographer and use the juvenile justice system, including possible sex offender registration, to rehabilitate the offender in accordance with the severity of the offense.<sup>164</sup>

Another scholar, Professor Smith,<sup>165</sup> takes umbrage with the assertion that criminal prosecution is an appropriate approach to the problem of self-produced child pornography.<sup>166</sup> Smith asserts that the criminal justice response to self-produced child pornography violates the proportionality of punishment principle that is the foundation of our society.<sup>167</sup> It makes no difference under relevant child pornography statutes who produces the images: whether self-produced by the minor or produced by an adult, the punishment is the same.<sup>168</sup> However, Smith asserts that the only victim in such self-exploitation is the child who engaged in the activity and the laws were not designed with that circumstance in mind.<sup>169</sup> Rather, the

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159. *Id.* at 14.

160. *Id.*

161. *Id.* at 17–18.

162. *Id.* at 26–27.

163. *Id.* at 27.

164. *Id.* at 48–49.

165. Professor of Law at the University of Notre Dame.

166. Stephen F. Smith, Comment, *Jail for Juvenile Child Pornographers? A Reply to Professor Leary*, 15 VA. J. Soc. POL’Y & L. 505, 505 (2008).

167. *Id.* at 507–08.

168. *Id.* at 513 (citing Child Pornography Prevention Act of 1996, 18 U.S.C. § 2252(a)(1–2) (2006)). Under federal law, the conviction for a first offense of producing child pornography carries a mandatory sentence of five years in prison or a minimum of fifteen years for someone with a prior conviction. *Id.* at 514.

169. *Id.* at 521.

goal of child pornography laws was to prevent the victimization of minors by adult predators.<sup>170</sup>

Smith observes that there are three categories of minors who may fall under the harsh scope of child pornography laws: minors who produce sexual images of themselves for commercial gain, minors who are pressured into making the images to “develop or maintain friendships,” and minors who are either attempting to attract sex partners or memorialize their sexual exploits.<sup>171</sup> Smith asserts that at least the first two categories of minors fall victim to sexual exploitation.<sup>172</sup> The minors who sell these images become victims of the people who buy the material, typically adults. The minors who create the images under peer pressure or pressure from online contacts are also victims of sexual exploitation, again, usually by adults. The third category is largely composed of older, sexually active teenagers, who should arguably have some degree of sexual privacy. Smith makes the extremely lucid point that the definition of a minor for the federal child pornography statutes is a person under eighteen, while many states allow minors to marry or have consensual sex at age sixteen.<sup>173</sup> If these teenagers are old enough to have sex and marry, they should also be able to decide if they wish to memorialize their own sexual activity.<sup>174</sup>

Smith also takes issue with the classification of minors as sex offenders, which requires them under federal and state law to undergo the registration and community notification requirements imposed on adult sexual predators.<sup>175</sup> The application of sex offender registry requirements could result in teenagers being stigmatized as sexual predators, harassment at school, limited future employment opportunities, and living or visiting restrictions (within a certain radius of playgrounds and schools).<sup>176</sup> These penalties would likely hamper any effort to rehabilitate the minor who is really the victim, not the perpetrator of the crime.

Rather than prosecution, Smith advocates a therapeutic approach to educate minors of the harms that can stem from displaying erotic images of themselves on the internet, which serve as a lure for adult predators seeking sexual gratification with minors.<sup>177</sup> Smith suggests that the proper role of the criminal justice system is to protect minors by prosecuting adults who solicit such behavior, using the threat of prosecution to

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170. *Id.*

171. *Id.* at 522–24.

172. *Id.*

173. *Id.* at 524–25.

174. *Id.*

175. *Id.* at 535–36 (citing Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16911(7) (2006)).

176. *Id.* at 538–39.

177. *Id.* at 541.



encourage minors' cooperation with law enforcement in apprehending adults, using the threat of enforcement to scare minors into ceasing such activity, and only prosecuting minors as a last resort if they refuse to cooperate with authorities.<sup>178</sup> Smith would "leave the Romeos and Juliets of the world alone, even if their love happens to be in forms less appealing than iambic pentameter."<sup>179</sup>

Other academics do not see sexting as a problem at all, but merely kids playing "spin the bottle" online.<sup>180</sup> Dr. Peter Cumming<sup>181</sup> downplays the characterization of sexting as an "epidemic." Instead, he characterizes it as a "moral panic" brought on by an unreliable online survey, a handful of unjust pornography prosecutions, and a media feeding frenzy.<sup>182</sup> Dr. Cumming asserts that the sexting prosecutions confuse nudity with sexuality and pornography but are not necessarily the same;<sup>183</sup> instead, the alarm about sexting is a red herring, except as it relates to online harassment and cyber-bullying.<sup>184</sup> In his view, consensual exchanges of nude photographs between children do not constitute child pornography, but perhaps represent healthy sexual exploration and expression.<sup>185</sup> Dr. Cumming writes that nudity is not necessarily pornography and the consensual exchange of nude photographs between minors is certainly not child pornography; rather, he suggests that minors may have participatory rights as sexual beings under the United Nations Convention on the Rights of the Child, which recognizes a child's right to freedom of expression and to privacy.<sup>186</sup>

#### D. A Modest Proposal

There is nearly universal agreement that child pornography is a serious problem requiring a strong societal response. According to statistics cited by Professor Leary, child pornography is estimated to be a multi-billion dollar industry, resulting in hundreds of thousands of victimized teens, an increase of 1500% in child pornography offenses since 1988, and the proliferation of approximately fourteen million child

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178. *Id.* at 543.

179. *Id.*

180. Peter E. Cumming, *Children's Rights, Voices, Technology, Sexuality* (May 26, 2009) (unpublished paper presented at the Roundtable on Youth, Sexuality, Technology at the Congress of the Humanities and Social Sciences 2009, Carleton University, Ottawa), available at <http://www.arts.yorku.ca/huma/cummingp/research.html>.

181. Associate Professor of Humanities and Coordinator of the Children's Studies Program at York University, Toronto.

182. Cumming, *supra* note 180, at 2.

183. *Id.* at 3.

184. *Id.* at 9.

185. *Id.*

186. *Id.* at 9–11.

pornography websites.<sup>187</sup> Adult producers of child pornography deserve the very severest penalties possible under the law. However, no viable comparison exists between adults who molest children and record their monstrous exploits and adolescents who memorialize their sexual experiences with each other. To support her thesis that the criminal justice system should be used to deter self-exploitation by teens, Professor Leary uses the example of a California teenager who obtained a webcam at age thirteen and shortly thereafter began responding to adult predators who encouraged the boy to engage in sexual activities online.<sup>188</sup> By the time he turned eighteen, the boy had a highly profitable web-based child pornography business, involving the use of prostitutes and other teens, and was making thousands of dollars each month.<sup>189</sup> Professor Leary also cites a study that concluded self-production contributes 14% of juvenile pornographic images online.<sup>190</sup> Although self-produced juvenile pornography is an obvious problem, the California teenager clearly does not represent the prototypical sexting situation. Consequently, Professor Smith disagrees with Professor Leary's approach and proposes reserving prosecution for only the severest cases, such as when teenagers who produce the graphic materials do not cooperate with authorities.<sup>191</sup> Professor Smith further advocates leveraging the threat of prosecution to convince teens to assist in apprehending predators.<sup>192</sup>

Professor Smith's call for restraint is commendable. Perhaps prosecution is appropriate for flagrant cases like the California teen who sought profit and involved other minors, but the Pennsylvania decision demonstrates that mere threats of prosecution for less offensive images that do not rise to the graphic level of pornography and as a result may be considered an unconstitutional, retaliatory prosecution.<sup>193</sup> Even more commendable are the efforts by legislators in jurisdictions like Nebraska and Vermont who attempted to take the sting out of child pornography laws for minors engaged in sexting by recognizing that the practice of sexting is not akin to the production of child pornography.<sup>194</sup> However, the best approach by far is Indiana's consideration of the entire body of sex offense statutes in light of the principles of psychology and the realities of human sexual development.<sup>195</sup> The use of the internet and other

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187. Leary, *supra* note 141, at 8.

188. *Id.* at 36–37.

189. *Id.* at 37–38.

190. *Id.* at 19 (citing Anick Jesdanun, *Study: 1 in 25 Youths Asked for Sex Pics*, ASSOCIATED PRESS, July 19, 2007, available at <http://www.msnbc.msn.com/id/19857632>).

191. Smith, *supra* note 166, at 541.

192. *Id.* at 541–42.

193. *See supra* note 83 and accompanying text.

194. *See supra* notes 97–103 and accompanying text.

195. *See supra* notes 104–105 and accompanying text.

communication technology to have virtual sex is now a reality of our web-based world. Professor Leary documents that “[e]ven million youth regularly view pornography online[,] [a]dolescents regularly use the internet to solicit sex with peers [, and] [e]ighty-seven percent of university students have virtual sex using Instant Messaging, web cameras and the telephone.”<sup>196</sup> Further, as noted above, it is nonsensical that teens may marry and have consensual sex at the age of sixteen in some states, but a photographic image of their sexual exploits could send them to prison.<sup>197</sup> It is equally illogical that minors have the right to abortions and contraceptives, but the sexual activity surrounding those rights is illicit. Our laws should be revised to accommodate these realities.

A good example of such an accommodation was Judge Kennedy’s opinion in *Lawrence v. Texas*.<sup>198</sup> Recognizing the application of the liberty interest of the Due Process Clause to consensual adult sexual activity, the Supreme Court observed the following:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>199</sup>

Perhaps it is time for society to recognize at least a limited right to sexual privacy for minors under the mature minor standard, just as we have in the context of abortion and contraceptives, subject to the right of parents to control the upbringing of their children. The parameters of that right require further discussion and fleshing out. A review of Supreme Court jurisprudence concerning a minor’s right to an abortion can provide guidance in determining an individual minor’s right to sexual privacy. For example, parental consent would insulate the minor from criminal prosecution. In the absence of that consent, a judicial bypass option for the teenager would allow a judge to determine whether the minor was sufficiently well informed and mature to make decisions

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196. Leary, *supra* note 141, at 21.

197. Smith, *supra* note 166, at 524–25.

198. *Lawrence*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that there was no fundamental right for homosexuals to engage in sexual conduct)).

199. *Id.* at 578–79.

regarding sexual activity.<sup>200</sup> For now it is sufficient to say that a body of laws that severely penalizes consensual human sexual activity between adolescents is repugnant to the freedoms we cherish. Our children need to be guided not stigmatized, nourished not penalized, loved not despised.

#### CONCLUSION

A societal debate over the degree of sexual freedom given to minors is a healthy objective in a democracy, but that debate should not occur as a result of the criminal prosecution of adolescents engaging in predictably adolescent behavior. Child pornography laws typically do not recognize the enormous difference between commercial self-exploitation and flirtation. Some educators and prosecutors take a zero-tolerance approach to teenage sexuality, similar to the once-popular approach to drug use. Proponents of prosecuting sexting teens, such as Professor Leary advocate that the state should assert its power to protect children from themselves if parents abdicate that responsibility. Professor Leary's more convincing argument is that child pornography injures all children regardless of the source of the images, and that a few teens must be sacrificed through prosecution and its consequences for the good of the many. However, opponents of prosecution, such as Professor Smith, view self-exploitive child pornographers as victims who need counseling, and sexting teens as misguided adolescents who need firm rules and information about the real life consequences of sending nude pictures into cyberspace. Unfortunately, the resolution of these opposing viewpoints often requires judicial intervention.

In the case of sexting prosecutions, minors may be the victims, victimized not by themselves, but by prosecutors bringing charges under laws ironically designed for their protection. Therefore, although most child pornography laws allow prosecutors to bring child pornography charges against errant minors, the question remains whether states *should* prosecute minors for lapses in judgment while still in the throes of adolescent angst. If we value qualities of mercy and compassion in society, arguably we should not engage in such prosecutions. However, the proliferation of sexting prosecutions and the reaction of many state legislatures show that our society does not appear ready to accept the realities of adolescent sexuality. Now is the time for courts to recognize expanded privacy rights of minors and prevent overzealous prosecutors from filing criminal charges without humanity or restraint.

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200. *Bellotti v. Baird*, 443 U.S. 622, 650 (1979).