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Sexting and Freedom of Expression: A Comparative Approach

Dr. JaAnne Sweeny1

INTRODUCTION

According to a recent poll, one in four American teens could be legally labeled a child pornographer.2 Nearly thirty percent of teens in this poll admitted to engaging in "sexting," which may expose them to criminal prosecution under existing child pornography laws.3 "Sexting" is the modern term given to "the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet."4 It is an increasingly popular practice in the United States and abroad5 and, according to current child pornography laws, can result in teens serving long prison sentences and having to register as sex offenders.6

When the issue of sexting first came to public attention, teens were being charged with violating child pornography statutes for possessing, distributing,
or creating sexually explicit images of themselves or their peers. Several high-profile cases in the United States in which sexting teens have been prosecuted under child pornography laws have caused commentators to react with outrage.

According to those commentators, prosecuting sexting teens under child pornography statutes goes far beyond the traditional scope of these laws because these laws were enacted to protect children from adults, not each other. Moreover, the age of consent in most states is sixteen and the age of a “child” in child pornography statutes is eighteen, so there is a mismatch in the law where some teens are legally permitted to engage in sexual activity but not photograph it.

Still, authorities wish to curb the tide of sexting, which can have severe social and emotional consequences. Teens who send sexually explicit photos to other teens risk the recipient posting those images online or forwarding the images to their peers, which can lead to embarrassment, harassment, and

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The legislative history behind the federal child pornography law, 18 U.S.C. § 2251 (2012), makes this goal abundantly clear:

The creation and proliferation of child pornography is no less than a national tragedy. Each year tens of thousands of children under the age of 18 are believed to be filmed or photographed while engaging in sexually explicit acts for the producer's own pleasure or profit. The Protection of Children Against Sexual Exploitation Act of 1977 was designed to address this inexcusable abuse of children.


For a very in-depth list of ages of consent, including “Romeo and Juliet” exceptions, see Compare Age of Consent & Statutory Rape Laws by State, FINDTHEDATA (2013), http://age-of-consent.findthedata.org. See also 18 U.S.C. § 2243(a)(1) (2007) (defining sexual abuse of a minor as "knowingly engaging in a sexual act with another person who—who(1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging.").


This bullying can have severe ramifications; some bullied teens have even committed suicide as a result of their peers' harassment. However, child pornography laws, as written, criminalize more than just the unauthorized sharing of images and do nothing to address bullying. Instead, child pornography laws criminalize the distribution, creation, and possession of sexually explicit images of teens under eighteen years old. Under these statutes, if a seventeen-year-old took a photo of herself and shared it with no one, she would still be guilty of the creation or possession of child pornography. These laws therefore criminalize behavior—taking indecent photos—that does not necessarily result in any harm to teens because, if the photos are not shared, no bullying or harassment can result.

As objections to the use of child pornography laws in sexting cases have increased, states have tried a variety of legislative responses to the sexting trend, most of which still criminalize sexting. Although these sexting laws carry lesser penalties than child pornography laws, they may still be unconstitutional restrictions on freedom of expression. For example, the ACLU recently threatened to sue the state of Pennsylvania over the filing of “sexting” charges against two middle school students who shared a naked photo with each other but never showed the photo to anyone else. Pennsylvania’s new sexting law was created to provide a lesser criminal penalty to sexting teens who had previously been charged under child pornography statutes. However, according to the ACLU, any penalty where the teens do not share photos with third parties would violate those teens’ freedom of expression.

This Pennsylvania case shows that, even with the advent of sexting statutes, the issue of how sexting teens should be treated under the law is still unresolved.


14 Brett Buckner, Boundless Consequences: With 'Sexting,' A Seemingly Innocent Decision Can Lead to a Lifetime of Regret, ANNISTON STAR, Jul. 5, 2009, available at Westlaw, 2009 WLNR 12801835 (describing a case in which a teen committed suicide after ex-boyfriend sent around her naked photos and her peers bullied her).


16 Bob Stiles, ACLU May Sue over Teens’ ‘Sexting’ Charges, PITTSBURGH TRIB.-REV., Jan. 7, 2013, available at Westlaw, 2013 WLNR 500029. The photo was seen by the girl’s mother; the girl’s boyfriend had already deleted it from his cell phone and had not shown it to anyone.

17 Id. The Pennsylvania sexting statute in question makes it a summary offense for a minor to transmit a sexually explicit picture of himself or possess a sexually explicit picture of another minor.

18 "Third parties" would include anyone who was not present when the photos were being taken or were not the initial recipient of the photo.

19 Stiles, supra note 16. The ACLU attorney interviewed stated that “[i]t is good they are not charging kids with child pornography . . . in a situation like this, it’s not a crime.” Id.
Indeed, the United States and the United Kingdom present two different approaches to the problem of teenage sexting. These differences shed light on how those countries view the harm inherent in sexting, how to apply freedom of expression, and even how the notion of “rights” should impact legislation.

Despite the press coverage of teenage sexting cases, no American court has addressed whether sexting is protected by freedom of expression under the First Amendment. Current scholarship on sexting focuses mainly on the problem of charging teens under child pornography statutes, often with recommendations for changing legislation. Scholars who do address the issue generally do so only superficially to identify the problem to be solved with new legislation. Internationally, this author was able to identify only one scholarly article that examined sexting in the United Kingdom, which leaves the international aspect of sexting largely unexplored.

To combat these gaps in existing literature, this article will consider the different ways that the United States and United Kingdom have treated both sexting prosecutions and freedom of expression as applied to child pornography laws. In Part I, this article will analyze the social and legal problems created by sexting teens in the United States and internationally. Part II will examine the United States’ reaction to teenage sexting as well as possible freedom of expression challenges sexting teenagers can bring against the application of child pornography statutes to their sexting activities.

The latter half of this article moves abroad to the United Kingdom. Part III examines British and European Court of Human Rights cases that explicate the limits of freedom of expression when children and technology are involved. Part IV of this article compares the United States and United Kingdom’s different views regarding freedom of expression, impact of technology, and the concept of “rights,” and examines how those differences may impact any criminal cases brought against sexting teens in those countries. This article

20 The Third Circuit came the closest, but explicitly did not rule on a sexting teen’s freedom of expression claim because it was not fully briefed on appeal. Miller, 598 F.3d at 147–48.


23 See Nigel Stone, The “Sexting” Quagmire: Criminal Justice Responses to Adolescents’ Electronic Transmission of Indecent Images in the UK and USA, 11 YOUTH JUST. 266 (2011).
concludes with a recommendation that the United States look to the United Kingdom to create a legislative and police-focused approach to mitigating the harsh punishments associated with child pornography prosecutions when dealing with sexting teens.

I. THE CAUSES AND CONSEQUENCES OF TEENAGE Sexting

Arrests, bullying, suicides—sexting has been big news for the past few years in the United States and abroad. Even Congressmen and professional athletes have been exposed as sexters. Sexting has also become a growing trend among teenagers who send nude or sexually explicit images to potential or current love interests. Sometimes the recipient of the image passes it on to others, which can lead to peer harassment and humiliation. The sharing of these images can also result in them being seen by authority figures who may report the teens to law enforcement officials. As shown below, sexting can have both social and legal consequences. Despite these consequences, some of which can be quite profound, sexting appears to be a growing trend among teenagers and adults alike.

A. Sexting on the Rise Internationally

Teenage sexting was an unknown phenomenon until the mid 2000s and, since then, it appears to be on the rise. The trend of sexting represents a convergence of technology and teenagers’ sexual self-expression. “Technology allows teenagers to negotiate this important task of exploring their sexual

24 See, e.g., Miles Godfrey, New Aged Get into “Sexting,” N. TERRITORY NEWS (Darwin, Aus-
teens-subject-to-child-pornography-laws; “Sexting” Explicit Images Can Ruin Youn-
l/story.html#axzz3zDyRjRDe].

scandal/.


27 See Calvert, supra note 13, at 8.

28 Bill Dwyer, Three Students Charged with Sexting Photo of Naked Girl, CHICAGO SUN-TIMES, Nov. 20, 2011, at 14; Pawloski, supra note 7; Taylor, supra note 7.

29 Godfrey, supra note 24, at 14; Keeping an Eye on “Sexting,” supra note 24, at A17.
identity while avoiding the embarrassment of doing so face-to-face.\textsuperscript{30} Because today's youth are so tech-savvy and incorporate technology into their lives so easily, they perceive sexting as a natural part of their social and sex lives.\textsuperscript{31} Sexting also satisfies this generation's need to have things—like sexual expression—"now" and with the click of a button.\textsuperscript{32}

Indeed, the numbers are quite stark. In the United States, a 2009 survey from the Pew Research Center stated that 4% of twelve- to seventeen-year-olds had sent sexually explicit photographs and 15% had received images.\textsuperscript{33} A 2012 study in Houston found a much higher number: "28 percent of both boys and girls said they had sent sexually explicit photographs of themselves with their mobile devices."\textsuperscript{34} A 2012 study published by the American Academy of Pediatrics found that 15% of teens with cell phones reported having engaged in sexting and 54% reported that they know someone who sexts.\textsuperscript{35} Also in 2012, a survey in Ottawa County, Michigan, reported that 31.3% of teens stated they had sent a sexually explicit photograph or text message.\textsuperscript{36} Another study in Texas produced similar results.\textsuperscript{37} There is no indication that these numbers will decrease as even more teens gain access to cellular phones and other digital media.\textsuperscript{38}

Moreover, sexting is not just an American phenomenon. According to a report published by the United States Department of Justice, reports of sexting


\textsuperscript{33} LENHART, supra note 31, at 2.

\textsuperscript{34} Todd Ackerman, UTMB STUDY—38% of Local Teens Admit to Sexting, HOUSTON CHRON., July 3, 2012, at 3.

\textsuperscript{35} Rice, et al., supra note 31, at 667.

\textsuperscript{36} Alex Doty, Sexting, Bullying and Drinking: Teen Survey Reveals All, GRAND HAVEN TRIB. (May 23, 2012), www.grandhaventribune.com/article/098291.

\textsuperscript{37} Reaney, supra note 2 ("21 percent of girls in our sample asked for a nude picture to be sent to them and 42 percent of guys had been asked to send a naked picture.").

\textsuperscript{38} In 2012, an American Academy of Pediatrics study found that almost 75% of teens surveyed had their own cellular phone and only 15% reported no access to a cellular phone. Rice, et al., supra note 31, at 669.
have been filed in Australia, Canada, China, and the United Kingdom.\textsuperscript{39} A national survey of teenage girls in Australia showed that 40% of those surveyed had been asked to send a naked or semi-naked picture of themselves over the Internet.\textsuperscript{40} The United Kingdom appears to have a similar sexting prevalence: the South West Grid for Learning's survey found that 40% of teens know friends who engage in sexting and 27% said that sexting happens regularly.\textsuperscript{41} A more recent survey of 150 students at South West schools found that “sexting is considered almost routine for many 13 to 14-year-olds.”\textsuperscript{42} Similarly, a researcher with Plymouth University who conducted research in conjunction with the United Kingdom Safer Internet Centre across nine different schools in the South West of England said, “the vast majority of schools in the country have sexting issues.”\textsuperscript{43}

\textbf{B. The Mismatch Between Teenage Sexting and Child Pornography Laws}

Teens have been shown to have poor impulse control and risk assessment abilities, which means that they may post or send images without thinking of the legal and social consequences, which, as shown below, can be immense.\textsuperscript{44} Digital images are easily shared and when they are shared without the subject’s permission, and can lead to teens being harassed by their peers (in extreme cases to the point of suicide).\textsuperscript{45} These images can also be posted publicly on social media websites or forwarded to authority figures such as parents, teachers, or even potential employers.\textsuperscript{46} Sexting teens may also be subject to prosecution under child pornography laws due to legislatures’ failure to keep up with new technology.\textsuperscript{47} If those teens are eighteen and over, any criminal record will stay

\textsuperscript{39} \textsc{Miranda Jolicoeur & Edwin Zedlewski}, NaT's. Inst. of Justice, Discussion Paper: Much Ado About Sexting 1 (2010).
\textsuperscript{40} \textit{Austl. Privacy Found.}, \textit{supra} note 5, at 3.
\textsuperscript{41} \textit{Phippen}, \textit{supra} note 5. The Report was particularly concerned that the surveyed teens appeared to have a “blase” attitude towards sexting and the consequences it could bring.
\textsuperscript{44} \textit{Catherine Arcabascio, Sexting and Teenagers: OMG R U Going 2 Jail????, 16 Rich. J. L. & Tech}. 10, 18–32 (2010) (discussing cases where teens were criminally prosecuted); Buckner, \textit{supra} note 14 (reporting that teen committed suicide after ex-boyfriend sent around her naked photos and her peers bullied her); Feldman, \textit{supra} note 13, at 1 (reporting that teens forward photos and videos to others and the videos even end up on YouTube).
\textsuperscript{46} \textit{Forbes, \textit{supra} note 45, at 1722–23}.
with them for the rest of their lives and they may be forced to register as sex offenders. 48

According to United States federal law, criminal charges can be brought against anyone who creates, disseminates, or possesses child pornography. 49 Child pornography includes

any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where . . . the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct. 50

"Sexually explicit conduct" includes "graphic or simulated lascivious exhibition of the genitals or pubic area of any person." 51 A "minor" is any person under eighteen years of age. 52 One of the largest problems with charging sexting teens under child pornography statutes is that the age of consent differs for sexual activity and the creation, possession, or distribution of sexually explicit images. In forty states, the age of consent is seventeen or younger, and when "Romeo and Juliet" exceptions to statutory rape law are examined, almost every state allows sexual relations between young people and teens who are close in age. 53 However, under federal (and most state) law, child pornography statutes apply to all minors under the age of eighteen. 54 Accordingly, in the United

48 A widely-publicized example is Phillip Alpert, who, when he was eighteen years old, was convicted on child pornography charges for forwarding a picture of his 16-year-old ex-girlfriend to her email contacts. Robert D. Richards & Clay Calvert, When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case, 32 HASTINGS COMM. & ENT. L.J. 1, 6 (2009). As a result of his conviction, Alpert was placed on probation and he had to register as a sex-offender, which has impacted his job prospects, ability to attend college, and even his ability to live with his father because his father lives close to a school (the very school Alpert attended). Id. at 6, 21-22; see also Williams, supra note 22, at 1030.

51 Id. § 2256(3)(B)(iii). States’ child pornography laws have varying definitions, but all include lascivious nudity.
52 Id. § 2256(i).
53 "Romeo and Juliet" exceptions to statutory rape laws allow teens who are similar in age but under the age of consent to engage in sexual activity without being guilty of statutory rape. See, e.g., Colo. Rev. Stat. § 18-7-401(1)(d) (2012) (victim less than fifteen years old with a four-year age gap between victim and perpetrator); Conn. Gen. Stat. Ann. § 53a-71a(1) (West 2012) (victim is between thirteen and fifteen years old and perpetrator is more than three years older); Haw. Rev. Stat. § 707-710(1)(c) (West Supp. 2012) (victim is between thirteen and fifteen years old and perpetrator is at least five years older); Ky. Rev. Stat. Ann. § 510.120(2)(b) (LexisNexis Supp. 2012) (victim is at least fourteen years old and perpetrator is at least five years older); S.C. Code Ann. § 16-3-655(B)(3) (Supp. 2011) (victim is at least fourteen years old and perpetrator is over eighteen).
States, criminal charges have been brought or threatened against teens for sexting even when those teens were legally permitted to engage in sexual activity.

For example, in Florida, a sixteen-year-old girl and her seventeen-year-old boyfriend were charged with producing, directing, or promoting child pornography. They took photos of themselves engaged in sexual activity, even though they did not share those photos with anyone and the sexual acts themselves were legal under Florida law. It was the existence of the photographs that caused their legal problems. Had they both been over eighteen, there would have been no possibility of prosecution.

More recently, police in Swansea, Massachusetts, investigated a complaint that Joseph Case High School students were sending sexually explicit photos and text messages to each other. The teens involved could face felony charges for disseminating child pornography, because disseminating sexually explicit photos of someone under age seventeen is treated as child pornography under Massachusetts state law. In Massachusetts, the age of consent is sixteen and the law requires an age gap of at least five years to convict for statutory rape, even if the victim is under twelve years old. Accordingly, as with the case in Florida, it was the taking and the disseminating of the photographs themselves and not subject of those photographs (the sexually explicit activity) that was criminal.

Most commentators, both domestic and international, have reported on these stories with concern that child pornography laws are being used against the very class of persons they are meant to protect. According to available legislative history, both state and federal child pornography laws were enacted

56 A.H. v. State, 949 So. 2d at 235.
57 Deborah Allard, Widespread "Sexting" by Swansea Teens Under Investigation by Police, HERALD NEWS (Fall River, Mass.) (Jan. 11, 2013, 11:24 AM), http://www.heraldnews.com/news/x192390050/Widespread-s Sexting-by-Swansea-teens-under-investigation-by-police; see Nichols, supra note 24 ("According to David E. Capeless, District Attorney for Berkshire County, sending or possessing a sexually explicit photo of a minor or encouraging a minor to 'sext' – even if both parties involved are minors and the photos are of themselves – could violate the state's child pornography laws.").
58 Allard, supra note 57.
59 MASS. GEN. LAWS ANN. ch. 265, § 23A (West 2010).
60 See, e.g., AUSTL. PRIVACY FOUND., supra note 5, at 3–4, ¶ 14; Susan Hanley Duncan, A Legal Response Is Necessary for Self-Produced Child Pornography: A Legislator's Checklist for Drafting the Bill, 89 OR. L. REV. 645, 681 (2010); Stone, supra note 23, at 267; Dan Svantesson, "Sexting" and the Law - How Australia Regulates Electronic Communication of Non-Professional Sexual Content, 22 BOND L. REV., no. 2, 2010, at 41, 42; Wood, supra note 8; Shafron-Perez, supra note 6; Nancy McKenna, Sexting – Navigating Through Muddy Waters, 6 QUINLAN, COMPUTER CRIME & TECH. IN L. ENFORCEMENT, no. 5, 2010, at 5, available at Westlaw, 6 No. 5 QNLNCCT 5. But see Leary, supra note 21, at 45–48 (arguing that sexting teens should be required to register as sex offenders).
to prevent the abuse and exploitation of children.\textsuperscript{61} More specifically, as originally conceived, these laws were meant to protect children from abusive adults.\textsuperscript{62} In addition, unlike traditional child pornography, the vast majority of sexted images seem to be taken with the consent of those depicted in the photograph, though the subsequent sharing may not be consensual.\textsuperscript{63} Most commonly, these images are discovered by adults when the adults confiscate teens' cellular phones or as a result of nonconsensual sharing of the original consensual image.\textsuperscript{64}

Although teens who share images without consent may be legitimately subject to criminal sanctions, child pornography statutes criminalize the mere possession of these images so that a teen who takes a picture of herself could be required to register as a sex offender. Likewise, a teen who receives an image without requesting it can also be convicted of possession of child pornography. Moreover, even if criminal sanctions are warranted for teenage sexting, particularly for those who distribute images without consent, the harsh penalties associated with child pornography statutes are simply too severe.

Some states have attempted to address this problem by either amending their child pornography statutes to create sexting exceptions or creating alternative sexting crimes.\textsuperscript{65} A recent Pennsylvania statute states that teens will receive only a summary citation if a sexually explicit photo is exchanged.


\textsuperscript{62} S. Rep. No. 95-438, at 7 (1977), reprinted in 1978 U.S.C.C.A.N. 40, 45 (“There have been numerous other recent examples of young persons ... being exploited for the profit of adults.”).

\textsuperscript{63} See, e.g., Brett Buckner, supra note 14 (teenager forwarded naked photo of his girlfriend to others); Amber Ellis, Bill Would Clarify ‘Sexting’ Laws, CINCINNATI ENQUIRER, Apr. 14, 2009, at B2, available at Westlaw, 2009 WLNR 16840705 (boy had an image on his phone of a girl engaging in sexual activity; his phone was confiscated); Kristen Schorsch, Sexting May Spell Court for Children, Chi. Trib., Jan. 29, 2010, at C17, available at http://articles.chicagotribune.com/2010-01-29/news/0101280853_1_sexing-cell-phones-nude (reporting that teens sent naked pictures to each other but could face charges after their phones were confiscated).

\textsuperscript{64} See sources cited supra note 63.

\textsuperscript{65} Ariz. Rev. Stat. Ann. § 8-309(F) (Supp. 2012) (providing that the offense of juveniles using an electronic communication device to possess or transmit images of minors that depict explicit sexual material is a Class 2 misdemeanor); Utah Code Ann. § 76-10-1204(a)-(c) (LexisNexis 2012) (providing that felony convictions are available only to people aged eighteen years and over for sexting–related offenses; teens aged seventeen years and younger can receive a misdemeanor at most); Vt. Stat. Ann. tit. 13, § 2512b(a)-(b)(a) (LexisNexis 2009) (providing that a minor who uses “a computer or electronic communication device to transmit an indecent visual depiction of himself or herself to another person” will be tried as a juvenile and will not face the possibility of being required to register as a sex offender).
"consensually," such as a boyfriend sending a photo to a girlfriend. The charge increases to a third-degree misdemeanor if the photo is distributed to others, and increases to a second-degree misdemeanor if it is distributed in order to harass, intimidate, or coerce someone. Most states, however, have made no attempt to change their child pornography laws and continue to arrest and charge sexting teens with child pornography offenses.

C. Teenage Sexting and Child Pornography Laws in the United Kingdom and Other Countries

The United States' application of child pornography charges to sexting teens has been internationally reported for good reason: countries like the United Kingdom, Canada, and Australia have child pornography laws with terms similar to those of American child pornography laws. In the United Kingdom, the Protection of Children Act 1978 and the Sexual Offences Act 2003 make it a crime to create, distribute, or possess sexually explicit images of children who are or appear to be under the age of eighteen. Violation of the Protection of Children Act 1978 carries a maximum prison sentence of ten years. Under Criminal Code of Canada section 163.1, "child pornography" is defined in relevant part as "a photographic, film, video or other visual representation ... that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity." Creating or distributing child pornography carries a maximum prison sentence of ten years and possession carries a maximum prison sentence of five years. In Australia, the laws vary from state to state, but most states criminalize the sexual depiction of children who are or appear to be under eighteen years old.

67 Id.
70 Protection of Children Act, 1978, c. 37, § 6 (Eng., Wales).
72 Id.
The laws of these three countries have no exceptions for sexting teens, and those teens are therefore just as vulnerable to child pornography laws as American teens are. In these countries, therefore, there is concern that the mismatch between sexting and domestic child pornography statutes could lead to harsh criminal charges such as those seen in the United States. In fact, sexting teens have recently been arrested in Canada, Australia, and the United Kingdom. For example, a teenage boy in Toronto is facing several criminal charges, including the making, possession, and distribution of child pornography, for sending nude photos of his girlfriend to her email contacts. Australia has also recently charged sexting teens with accessing and distributing child pornography, though most of the teens have merely been cautioned. In the United Kingdom, a fourteen-year-old was arrested in Cheltenham for posting a pornographic video of himself and his girlfriend having sex on Facebook.

In addition to the perceived unfairness in charging sexting teens with child pornography offenses, these charges can have a significant constitutional impact because they may violate teens' right to freedom of expression. In both the United States and United Kingdom, the issue of freedom of expression in this context has not been fully explored by the courts. In the United States, the Supreme Court has yet to comment on the issue and lower courts have given inconsistent rulings. Similarly, in the United Kingdom, no court has yet ruled upon a sexting case between two teenagers. Like the United States, the United Kingdom also protects freedom of expression. Accordingly, freedom of expression challenges to these laws in the United Kingdom may only be a matter of time.


75 Teen's Sexting, Hacking Leads to Extortion and Porn Charges, TORONTO STAR, Oct. 19, 2012, at A2. The teen also used the nude photos to try to coerce the girl into sending him a nude video of herself, which led to the extortion charges. Id.


77 Glenda Cooper, Sex, Teens and Videotape, DAILY TELEGRAPH (London) (Apr. 12, 2012), http://www.telegraph.co.uk/health/childrens-health/9167821/Sex-teens-and-videotape.html. Somewhat disturbingly, the teen seems proud of his arrest and posted a photo of himself with the newspaper headline of his arrest on Twitter. Id.

78 For instance, as noted above, in January 2013, the ACLU threatened to sue the State of Pennsylvania for First Amendment violations on behalf of two teens who were charged with Pennsylvania's new "sexting" crime. Stiles, supra note 16.
II. Sexting and Freedom of Expression Claims in the United States

American courts have dealt with freedom of expression and pornography claims for decades. The result is a robust, though not always consistent, body of law. Indeed, pornography is a tricky issue for courts. On one hand, there is social science research that shows that pornography is inherently degrading to women and encourages sexual violence towards them. On the other hand, the Supreme Court has noted that freedom of expression is triggered even by sexually explicit (but not legally obscene) images.

For that reason, criminalizing the creation, distribution, and possession of child pornography can be seen to infringe upon a person’s freedom of expression. However, the Supreme Court has repeatedly found that child pornography laws do not violate the First Amendment because of the state’s compelling interest in protecting children from exploitation. In fact, the Supreme Court has held that child pornography receives no First Amendment protection. However, recognizing the harsh punishments included in child pornography statutes, the Supreme Court has indicated its concern that an overbroad interpretation would prohibit protected expression.

Accordingly, although child pornography receives no First Amendment protection, statutes that criminalize more than traditional child pornography, such as virtual child pornography, may be vulnerable to freedom of expression challenges. However, the Supreme Court has never stated the standard by

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79 See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (saying of hard-core pornography, “I know it when I see it.”).


81 Ashcroft v. Free Speech Coal., 535 U.S. 234, 244, 251 (2002) (“[W]here the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.”).


83 See United States v. Williams, 553 U.S. 285, 288 (2008) (“Over the last 25 years, we have confronted a related and overlapping category of proscribable speech: child pornography.”).


85 Ashcroft, 535 U.S. at 244 (“With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law.”).

86 “Virtual child pornography” is pornography that appears to feature children but actually features adults that are made to look like children, usually using computer-generated effects. See Ashcroft, 535 U.S. at 239–40.

87 Offensive images that do not involve children, such as images of animal abuse, have also been given First Amendment protection. United States v. Stevens, 559 U.S. 460, 469–70 (2010).
which child pornography statutes should be examined when they are applied to anything other than traditional child pornography. In the absence of such guidance, the question courts have had to grapple with is what standard they should use to determine whether the child pornography statute impermissibly infringes upon the First Amendment.

Arguably, child pornography laws prohibit speech based on its content, and should therefore be reviewed using strict scrutiny. Child pornography statutes restrict the content of the images themselves and, as pure content restriction, may merit the highest level of judicial review. According to the Supreme Court, "[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. . . . If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." Using this enhanced standard in People v. Alexander, the Illinois Supreme Court found a virtual child pornography statute to be overbroad and in violation of the First Amendment.

However, the Supreme Court has also stated that child pornography is illegal because of the harm it causes children and not because of the content of the speech, which indicates that strict scrutiny is inappropriate. Because child pornography receives no First Amendment protection according to the Supreme Court, some courts have taken the lowest level of review when examining child pornography statutes: rational basis. The Supreme Court has previously held that if a statute does not actually infringe upon a person's freedom of expression, the government need only supply a "rational basis" for

88 Ashcroft merely held that virtual child pornography was protected speech and did not analyze under what conditions that protected speech could be criminalized or regulated. Ashcroft, 535 U.S. at 246.
89 United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000); see also Ezell v. City of Chicago, 651 F.3d 684, 707 (7th Cir. 2011) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992)) (collecting Supreme Court free speech cases and noting the general principle that content-based restrictions on speech are "presumptively invalid").
90 Playboy Entm't Grp., 529 U.S. at 813 (citations omitted).
93 United States v. Bach, 400 F.3d 624, 629 (8th Cir. 2005) (applying rational basis test in child pornography context); Pappert, 337 F. Supp.2d at 653 (quoting Ferber, 458 U.S. at 753); Humbach, supra note 84, at 475–76 (arguing that the rational basis test should be used for child pornography laws).
why that statute exists.\footnote{E.g., Ysursa v. Pocatello Educ. Ass’n, 553 U.S. 353, 359 (2009) (“Given that the State has not infringed the unions’ First Amendment rights, the State need only demonstrate a rational basis to justify the ban on political payroll deductions.”).} “Low value speech,” like obscenity, does not receive First Amendment protection\footnote{Shannon M. Hinegardner, Note, Abrogating the Supreme Court’s De Facto Rational Basis Standard for Commercial Speech: A Survey and Proposed Revision of the Third Central Hudson Prong, 43 New Eng. L. Rev. 523, 529 n.17 (2009) (noting that “low value” speech that does not receive First Amendment protection, like obscenity or fighting words, will be evaluated under rational basis scrutiny) (citing Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969); Roth v. United States, 354 U.S. 476, 502 (1957)).} and can be regulated or prohibited by the government if the law in question has a “legitimate” end and “rationally related” means.\footnote{E.g., Connection Distrib. Co. v. Holder, 557 F.3d 321, 328 (6th Cir. 2009); Free Speech Coal. v. Gonzales, 406 F.Supp.2d 1196, 1205 (D. Colo. 2005); Ctr. For Democracy & Tech. v. Pappert, 337 F. Supp. 2d 606, 655-56 (E.D. Pa. 2004).} Under such a deferential standard, in United States v. Bach, the Eighth Circuit easily upheld a child pornography statute where Bach (an adult) coerced a sixteen-year-old boy to pose for sexually explicit photos, which Bach then sent over the Internet.\footnote{E.g., Connection Distrib. Co. v. Reno, 154 F.3d 281, 291 (6th Cir. 1998) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).} The fact that the boy was above the age of consent was immaterial to the court.\footnote{E.g., New York v. Ferber, 458 U.S. 747, 757 (1982).}

Most courts have not followed Alexander or Bach but have instead split the difference and used intermediate scrutiny.\footnote{E.g., Osborne v. Ohio, 495 U.S. 103, 111 (1990).} Under intermediate scrutiny, child pornography statutes must advance an important or substantial government interest and be narrowly tailored to further that interest.\footnote{Ashcroft v. Free Speech Coal., 535 U.S. 234, 249 (2002).} When examining a child pornography statute as it applies to a sexting prosecution, a court would first analyze the government’s interest in regulating child pornography. Within the statutes themselves, the most commonly cited reason for child pornography laws is to prevent the exploitation of children.\footnote{Ferber, 458 U.S. at 756-61 & n.10.} The Supreme Court has recognized three related reasons for criminalizing child pornography: to prevent abuse of children,\footnote{New York v. Ferber, 458 U.S. 747, 757 (1982).} to prevent child victims from being “haunted” by their participation in child pornography,\footnote{Osborne v. Ohio, 495 U.S. 103, 111 (1990).} and to “dry up” the market for child pornography.\footnote{Idaho Code Ann. § 18-1507 (Supp. 2012); Minn. Stat. Ann. § 617.247 (West 2009); Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §2251 (2006)).} Although these three rationales have received some approval from the Court,\footnote{Ashcroft v. Free Speech Coal., 535 U.S. 234, 249 (2002).} in order to withstand intermediate scrutiny child pornography laws...
must also be “narrowly tailored” to advance those rationales. According to the Supreme Court in New York v. Ferber, which announced that child pornography receives no First Amendment protection, “[a]s with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed.” Therefore, in order to withstand constitutional scrutiny, child pornography statutes—as applied to sexting—must also be narrowly tailored to advance at least one of the stated goals of child pornography statutes: to prevent the abuse of children, to prevent victims from being “haunted,” or to “dry up” the market for child pornography.

A. Preventing Child Abuse and Exploitation

The first and most commonly cited reason for criminalizing child pornography is to prevent child abuse and exploitation. For example, Congress’s stated intention in passing the Child Protection Act of 1984 was to prevent the exploitation of children because “the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society.” State child pornography laws express similar concerns. The goal of preventing harm to children is particularly evident in 18 U.S.C. § 2259, which requires courts to order those convicted of creation, distribution, or possession of child pornography to pay restitution to their victims in addition to any other penalties ordered. Courts must order this restitution regardless of the economic circumstances of the defendant or the fact that the victim has been monetarily compensated from other sources (such as insurance).

Although there is evidence that the mere viewing of pornography can be damaging to teens because it makes sexual violence towards women more acceptable to them, courts have not explicitly recognized that kind of harm.

107 458 U.S. at 764.
109 See, e.g., COLO. REV. STAT. ANN. § 18-6-403(1) (2012) (providing that statute’s stated purpose is to prevent “sexual exploitation of children”); MINN. STAT. ANN. § 617.247(1) (West 2009) (“It is the policy of the legislature in enacting this section to protect minors from the physical and psychological damage caused by their being used in pornographic work depicting sexual conduct which involves minors.”).
111 Id.
112 James Check, Teenage Training: The Effects of Pornography on Adolescent Males, in The Price We Pay, supra note 80, at 89, 90–91.
Instead, according to the Supreme Court, the key inquiry into whether purported child pornography is protected by the First Amendment is whether its creation was the result of criminal activity. In other words, the Court focuses on how the image determination "was made, not on what it communicated." State courts have reached similar conclusions.

Conversely, if an image was not created through the abuse of a child, it should receive First Amendment protection. According to the Supreme Court, even if the images look like actual child pornography, they may not be criminalized unless actual children were harmed when making the images. Without a causal link to criminal activity, sexually explicit images are protected by the First Amendment unless they are legally obscene, which means they must satisfy certain criteria: whether the work (1) "taken as a whole, appeals to the prurient interest;" (2) "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and (3) "taken as a whole, lacks serious literary, artistic, political, or scientific value." Child pornography laws do not explicitly contain these criteria and states have separate obscenity laws to address the issue.

Although not yet explicitly addressed by an American court, it appears that the exploitation rationale behind child pornography laws should not apply to consensual teenage sexting. Considering that sexual activity between teens is

116 Ashcroft, 535 U.S. at 251.
117 See id. at 254. The Supreme Court went even further to say that "speech may not be prohibited because it concerns subjects offending our sensibilities." Id. at 245.
118 Kaplan v. California, 413 U.S. 115, 119–20 (1973) (holding that "pictures, films, paintings, drawings and engravings... have First Amendment protection if not obscene). See also Massachusetts v. Oakes, 471 U.S. 576, 591–92 (1985) (protecting photographs); State v. Bonner, 61 P.3d 611, 614 (Idaho App. 2002) (summarizing Supreme Court protections of various media). For a discussion as to why "sexting" may or may not be legally obscene, see Hambach, supra note 84, at 444–47. For the purposes of this article, the sexting images in question will be presumed to be not legally obscene.
legal in almost every state,\textsuperscript{121} images that are the product of those acts are, essentially, recordings of legal acts between adults. Moreover, these legal sexual acts occur between peers, which means that there is no implication of abuse or exploitation as there is between a child and adult who have an inherent power imbalance. The abuse inherent in traditional child pornography is simply not present when teens photograph themselves or each other. In addition, the act of forwarding sexting images without the subject's consent, although perhaps harmful, does not rise to the level of harm and abuse that result from child pornography. Instead, it is the harassment and bullying a teen may receive from peers who viewed the image that seems to cause the most damage to sexting teens.\textsuperscript{122} In other words, it is not the taking or even sharing of these images that is inherently harmful—it is what other teens do in response to seeing those images.\textsuperscript{123} This type of harm is not what the Supreme Court contemplated when holding that child pornography receives no First Amendment protection. The Court recently held that a federal virtual child pornography law violated freedom of expression because it proscribed "the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages."\textsuperscript{124} The Court also noted that the statute's age of consent was eighteen, which is "higher than the legal age for marriage in many States, as well as the


\textsuperscript{122} See sources cited supra note 24.


Preventing harm to children is unquestionably an important or substantial government interest, but child pornography statutes are not narrowly tailored because they criminalize speech (sexting) that does not harm children. This stated goal does not meet intermediate scrutiny and, therefore, applying child pornography statutes to sexting teens violates freedom of expression.

B. Prevent “Haunting” of Child Victims

The second type of harm produced by child pornography is an offshoot of the first; not only are children harmed by the sexual abuse that is recorded to create child pornography, but when those images are distributed to others, the child is “haunted” by the knowledge that others are viewing images of their abuse. As described by the National Center for Missing and Exploited Children, “[o]nce these images are on the Internet, they are irretrievable and can continue to circulate forever. The child is re-victimized as the images are viewed again and again.” The circulation of these images can damage the victim’s privacy every time someone views the images, particularly if the victim is identifiable in the images. Moreover, “[s]ince it is unlikely that these images will ever be completely removed from the Internet, these children are forced to live with the humiliation for the rest of their lives.”

There is at least anecdotal evidence that victims of child sexual abuse face additional and distinct harm from knowing that a visual recording of their abuse has been circulated publicly and is being viewed by others who derive sexual pleasure from the images or use them to “groom” future victims. These children often have severe and debilitating emotional problems that they must deal with for the rest of their lives. Knowing that others can see the recordings of their abuse, particularly if their faces are visible, could re-traumatize a child through adulthood.

The “haunting” rationale for child pornography laws was first articulated by the Supreme Court in Ferber, where the Court noted that child pornography

125 Ashcroft specifically noted that the age of consent in the federal maritime and territorial jurisdiction is sixteen, that forty-eight states permit sixteen-year-olds to marry with parental consent, and that in thirty-nine States and the District of Columbia, the age of consent is sixteen or younger. Id. at 247.

126 Kerry Sheldon & Dennis Howitt, Sex Offenders and the Internet 9 (2007).


129 Id. at 338 (footnote omitted).


131 Rothman, supra note 128, at 338.

132 Id. at 337–38.
images "are a permanent record of the children's participation and the harm to
the child is exacerbated by their circulation." Osborne v. Ohio echoed Ferber's
concerns: "The pornography's continued existence causes the child victims
continuing harm by haunting the children in years to come." It is this
haunting that has also prompted states to allow restitution to victims of child
pornography from those who merely possess the image but had no part in its
creation.

As with child exploitation, the "haunting" rationale for child pornography
does not apply to voluntary sexting. There is some evidence that teens who have
sexted may be more likely to have feelings of depression and a few high-profile
cases have shown that that depression can lead to suicide. Harassment by
peers and even the risk that others (like a prospective employer) may see the
images later in the teen's life are potential problems that sexting teens must face.
In a way, these teens are "haunted" by their sexually explicit images because they
are suffering emotional abuse from their peers as a result of these images being
shared without their consent. Although the creation of the sexually explicit
photo may have been consensual, knowing that others are viewing the photos
(and judging the teenager posing in them), may reinjure the victim in the same
way that abused children are haunted by knowing that images recording their
abuse are being viewed by others.

On the other hand, courts' recognition of the "haunting" rationale is
dependent on the image in question actually recording child abuse or
exploitation, an element that simply does not exist in most sexting cases. Even
for teens whose images are forwarded without their consent, any
humiliation they feel is arguably not on par with reminders of past abuse at the
hands of a trusted adult. It is not the existence of the images themselves or the
fact that these sexual acts were photographed that haunt the teens, but the
bullying they receive at the hands of their peers; a very different scenario from
traditional child pornography. Moreover, some teens voluntarily post images of
themselves on public websites, clearly wanting to be seen, and so are themselves
responsible for any regret they feel in the future. For these teens, at least, the

133 Ferber, 458 U.S. at 759.
135 Rothman, supra note 128, at 334–35 (collecting cases and tracing the evolution of statutory
restitution awards).
136 Joanna R. Lampe, Note, A Victimless Sex Crime: The Case for Decriminalizing Consensual
Teen Sexting, 46 U. MICH. J.L. REFORM 703, 706 (2013); Lisa Esposito, Teen "Sexting" Common
and Linked to Psychological Woes, USA TODAY (Nov. 4, 2011), http://usatoday30.usatoday.com/news/
health/wellness/teen-ya/story/2011-11-05/Teen-sexting-common-and-linked-to-psychological-
woes/51073214/1.
137 State v. Zidel, 940 A.2d 255, 263 (N.H. 2008) (quoting Osborne, 495 U.S. at 111) (internal
citation omitted).
138 See Amy F. Kimpel, Using Laws Designed to Protect as a Weapon: Prosecuting Minors Under
139 Id. at 323.
“haunting” rationale does not apply because child pornography laws make no mention of consensual distribution of images. For all of these reasons, child pornography laws are arguably overbroad when applied to teenage sexting. Consequently, the “haunting” rationale of child pornography laws, although a substantial government interest, is not narrowly tailored and does not withstand intermediate scrutiny when applied to sexting.

C. Drying up the Market for Child Pornography

The third rationale for criminalizing child pornography is to “dry up the market.” Under this theory, if possessing and distributing child pornography is illegal, fewer people will seek it out and, without that demand, fewer people will create it.\(^1\) This theory has some practical appeal because the possession or distribution of child pornography is easier to discover than its creation.\(^2\)

As with the prior two rationales for denying First Amendment protection to child pornography, the “drying up the market” rationale is also linked to the child abuse that creates the child pornography images. In fact, the Supreme Court rejected this rationale where children were not harmed in the making of the images.\(^3\) As noted in Ashcroft v. Free Speech Coalition, without the initial harm to children inherent in traditional child pornography, the “drying up the market” rationale will not suffice to block First Amendment protection of the images.\(^4\)

It is precisely this lack of original victims that makes the “drying up the market” rationale inapplicable to sexting. Although some sexted images may make it out into the general population and can even be co-opted by pedophiles, the vast majority of images are not shared at all or are only shared with other teens.\(^5\) Sexting images, therefore, typically do not enter the market of child pornography. Even images that may be seen by adults are closer to virtual child pornography because the subjects voluntarily participated, and thus, no victims

\(^1\) Osborne, 495 U.S. at 109–10; New York v. Ferber, 458 U.S. 747, 759–60 (1982). Commentators disagree as to whether “drying up the market” is effective in combating child pornography. Compare Philip Jenkins, Beyond Tolerance: Child Pornography on the Internet 23, 108–09 (2001) (noting that child pornography on the internet can be “a visual kind of heroin, dangerously addictive,” leading a person to seek out more images and even discover his own pedophilic tendencies), with Katherine S. Williams, Child-Pornography and Regulation of the Internet in the United Kingdom: The Impact on Fundamental Rights and International Relations, 41 Brandeis L.J. 453, 466–67 (2003) (arguing that there is little empirical evidence that child pornography causes viewers to become pedophiles; instead, there is some evidence that child pornography satisfies these desires and prevents child abuse).

\(^2\) Ferber, 458 U.S. at 760.


\(^4\) See, e.g., Richards & Calvert, supra note 48, at 6; Buckner, supra note 14; Ellis, supra note 63; Pawloski, supra note 71; Schorsch, supra note 63; Taylor, supra note 7; see also A.H. v. State, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007) (images not shared beyond couple); Miller v. Mitchell, 598 F.3d 139, 143 (3d Cir. 2010) (images passed around between male students).
Because sexting images are not part of the traditional child pornography market, the "drying up the market" rationale is overbroad when applied to sexting.

Consequently, even if any of the government’s reasons were “important” enough to justify prosecuting sexting under child pornography statutes, these prosecutions still “burden substantially more speech than necessary to further those interests.” Under child pornography laws, sexting images that are not shared with third parties are treated the same as those sent to a teen’s peers without her consent. Current child pornography laws simply do not account for the wide variety of sexting situations. Moreover, sexting was not a consideration for legislatures that passed child pornography statutes in the 1970s and 1980s, because the World Wide Web and cellular phones with cameras are a more recent phenomenon.

Moreover, because a child pornography conviction carries a substantial prison term and registration as a sex offender, even the threat of a prosecution may chill the speech of teens who wish to express themselves sexually. As the Supreme Court noted in Bantam Books, Inc. v. Sullivan and New York Times v. Sullivan, the fear of punishment for speech can intimidate people into repressing their expression, which is damaging to the First Amendment. Clearly, these prosecutions are not the least restrictive means of addressing either child pornography or sexting because the two could easily be separated. Some states have already created separate sexting statutes, and although some of these statutes still (arguably) restrict speech, they uniformly carry lesser penalties

145 See Dawn C. Nunziato, Romeo and Juliet Online and in Trouble: Criminalizing Depictions of Teen Sexuality (c u 18: g2g2 jail), 10 NORTHWESTERN J. TECH. & INTELL. PROP. 57, 72 (2012).
148 See Kimpel, supra note 138, at 318.
149 New York Times Co. v. Sullivan, 376 U.S. 254, 278 (1964) (“Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.”); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 63–64 (1963) (noting that, due to fear of prosecution for selling books that a Rhode Island Commission deemed to be inappropriate for minors, retailers and distributors ceased sales and stopped new orders of other books); see also David Cole, Playing by Pornography’s Rules: The Regulation of Sexual Expression, 143 U. Pa. L. Rev. 175 (1994) (warning of the dangers of unduly limiting sexual expression).
150 Since 2009, at least twenty states have adopted statutes specifically related to sexting.
151 See Stiles, supra note 16.
than child pornography statutes.\textsuperscript{152} Even more states have created cyberbullying laws, which address the harmful harassment teens may suffer if their images are shared via sexting.\textsuperscript{153}

For these reasons, American teens may have a viable freedom of expression defense to sexting prosecutions under child pornography statutes. Teens may also have freedom of expression claims against newly drafted sexting statutes if those statutes restrict more expression than is permitted by the First Amendment.

III. Sexting and Freedom of Expression in the United Kingdom

British child pornography laws are similar to those in the United States and have an identical age of consent: eighteen years old. However, the two countries have surprisingly different statutory rape laws. In the United Kingdom, a person aged eighteen or over commits an offense if he\textsuperscript{154} intentionally sexually touches another person and the other person is either (1) under sixteen and the offender does not reasonably believe the other person is sixteen or older, or (2) the other person is under thirteen.\textsuperscript{155} A child under eighteen can be found guilty of the same offense, but the punishment is limited to six months for a summary conviction or five years for a conviction on indictment.\textsuperscript{156} Accordingly, the United Kingdom has no "Romeo and Juliet" exceptions to its statutory rape laws but does have a mistake of age defense for teens over thirteen years old. These statutory differences mean that there is less of an obvious mismatch between the age of consent and child pornography laws. As a result, teens' ability to challenge their sexting convictions under freedom of expression may


\textsuperscript{153} See sources cited supra note 123.

\textsuperscript{154} It appears that the United Kingdom's statutory rape statute criminalizes only the conduct of males. Renée M. Landers, Sexual Activity Between Minors, Prostitution, and Prosecutorial Discretion: What Difference Should Age and Sex Make?, Boston Bar J., May-June 2009, at 8, 13 n.15.

\textsuperscript{155} Sexual Offenses Act, 2003, c. 42, § 9 (U.K.).

\textsuperscript{156} Id. § 13.
be affected. Moreover, the way both British and European courts analyze freedom of expression (and its limitations) is likely to have a large impact on whether sexting teens can bring a viable freedom of expression claim.

A. Child Pornography Laws in Europe and the United Kingdom

Several treaties require that the United Kingdom and other European nations criminalize child pornography, and their scope has expanded over time. The UN Declaration of the Rights of the Child, which was adopted in 1959, protects children from “cruelty, neglect and exploitation.”157 As early as 1996, political organizations were calling for the illegalization of possession of child pornography.158 In 2001, the Council of Europe Convention on Cybercrime required that all states that are parties to the Convention must criminalize acts of producing, distributing, and procuring child pornography.159 The Convention includes virtual child pornography in its definition of child pornography.160 In 2011, the European Parliament approved a directive requiring Member States, including the United Kingdom, to provide criminal penalties to combat child pornography.161 In 2012, the United States and the European Union joined forces with several other countries to launch a “global alliance” to combat child sexual abuse online.162 In January 2013, the European Cyber Crime Centre, a new EU unit at Europol in The Hague, will start operations, including focusing on tackling child sexual abuse online.163


160 Id.


163 Child Sex Abuse: EU and US in Web Policing Alliance, supra note 162.
The United Kingdom's prohibitions against child pornography have likewise expanded over time. Child pornography was criminalized first in 1978. The Protection of Children Act 1978 (as amended) makes it an offense for a person to take, distribute, or possess with an intent to distribute "any indecent photograph or pseudo photograph of a child." Mere possession of child pornography was made illegal in the United Kingdom in 1998 and, as of 2003, the Protection of Children Act applies to images of children under eighteen years old. Like the United States, conviction for possession or distribution of child pornography carries heavy penalties: a lengthy prison sentence, mandatory registration as a sex-offender, and disqualification from jobs that involve children.

Although the Protection of Children Act does not define "indecent," courts have used a list of categories describing images that carry increasing levels of penalties wherein "erotic posing" carries the least penalty and "sadism or bestiality" carries the highest penalty. The second lowest category applies to sexual activity between children, with sexual activity between adults and children carrying a higher penalty. The majority of teenage sexting images between teens would likely fit into categories one (erotic posing) and two (sexual activity between children).

A recent case, R v. M, shows how British courts will likely treat cases brought against sexting teens under the Protection of Children Act of 1978. In R v. M, the defendant, who was twenty-three years old, had sexual intercourse with a seventeen-year-old girl and then took photos of her naked body while she was sleeping. Issues of consent were of paramount importance in this case, but because the girl was seventeen (she was above the age of consent for statutory rape which is sixteen in the United Kingdom) none of those charges could be brought. However, the defendant was convicted of two counts of making indecent photographs of a child contrary to section 1(1)(a) of the Protection of Children Act. It is unclear how the case would have turned out if the defendant was also under eighteen years old.

The United Kingdom does not yet have a statute that directly addresses sexting, and there is no European body that requires such a statute. In fact, the UN Convention on the Rights of the Child defines "child" as someone below

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164 Protection of Children Act, 1978, c. 37, § 1 (Eng., Wales).
166 Sexual Offences Act, 2003, c. 42, § 45 (Eng., Wales).
168 Id. at [10].
169 Id.
171 Id. at [3]-[4].
172 Id. at [2]-[6].
173 Id. at [3].
the age of eighteen, and according to the Council of the European Union, also permits Member States like the United Kingdom to “exclude from criminal liability conduct relating to child pornography . . . where, in the case of production and possession, images of children having reached the age of sexual consent are produced and possessed with their consent and solely for their own private use.” Accordingly, as in the majority of states in the United States, the only criminal statute that could apply to sexting teens is the United Kingdom's child pornography statute.

B. Freedom of Expression

Like the United States, any British prosecution of sexting teens under child pornography statutes may implicate freedom of expression. However, “freedom of expression” means something different in the United Kingdom, whose laws are also impacted by the Council of Europe. As in the United States, British citizens have the right to freedom of expression, which is codified in the European Convention on Human Rights. The United Kingdom signed the European Convention on Human Rights in 1950 and was bound to its terms but did not incorporate the rights contained in the European Convention on Human Rights until 2000, under the Human Rights Act 1998. Since 2000, British citizens have been able to sue the government in British courts to have their rights, including freedom of expression, vindicated.

More specifically, Article 10 of the European Convention on Human Rights states that “[e]veryone has the right to freedom of expression” which includes the right “to receive and impart information and ideas without interference by public authority.” However, Article 10's freedom of expression is expressly subject to government interference as long as that interference is for an appropriate purpose and properly limited. Consequently, claims under the European Convention on Human Rights for violation of the freedom of

**Notes:**


175 Unsurprisingly, the concept of “freedom of expression” or “freedom of speech” varies widely from country to country, as a result of each country’s different history and culture. Douglas W. Vick, Exporting the First Amendment to Cyberspace: The Internet and State Sovereignty, in MEDIA AND GLOBALIZATION: WHY THE STATE MATTERS 33 (Nancy Morris & Silvio Waisbord eds., 2000).


178 Id. § 7().

179 European Convention on Human Rights, supra note 176, at art. 10.

180 Id.
expression are subject to judicial scrutiny that is similar to American courts’ scrutiny regarding First Amendment claims.

In contrast to the United States, however, British laws may be scrutinized by two different jurisdictions: British Courts and the European Court of Human Rights, both of which have the authority to interpret the European Convention on Human Rights. The European Court of Human Rights’ decisions are binding on Council of Europe Member States, including the United Kingdom. Because British courts have only recently been granted jurisdiction over European Convention on Human Rights claims, the majority of British case law on freedom of expression is from the European Court of Human Rights. Moreover, British courts are required under the Human Rights Act to “take into account” European Court of Human Rights case law when applying the European Convention on Human Rights, so European Court of Human Rights cases are extremely relevant even when British courts are evaluating a freedom of expression claim.

1. Freedom of Expression and the European Court of Human Rights.— When evaluating freedom of expression claims, the European Court of Human Rights (and British courts) conducts a three-step analysis: (1) Was the government interference “prescribed by law?” (2) Did the government have a “legitimate aim?” and (3) Was the government interference “necessary in a democratic society?”

First, a government interference with freedom of expression is “prescribed by law” if it is lawful under domestic law. Domestic law includes statutes, regulations, and published court decisions. The domestic law must also be “formulated with sufficient precision to enable the citizen—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.” Laws cannot be applied in an arbitrary or unreasonable way but they can be vague enough to “keep

185 Müller, 13 Eur. Ct. H.R. (ser. A) at 226; Cameron, supra note 184, at 81.
187 See Cameron, supra note 184, at 81–82.
pace with changing circumstances” and still be precise enough for the European Convention on Human Rights. In the United States, the statutes criminalizing child pornography easily satisfy this requirement because they consist of formalized legislation that is publicly available.

Second, in order for a government to have a “legitimate aim,” the aim must be one of those listed in Article 10, which includes prevention of crime, protection of morals, and the protection of the rights of others. Like the United States, the United Kingdom has stated that its primary incentive for criminalizing child pornography is to protect children. International organizations and treaties also list child exploitation and harm as the main reasons for criminalizing child pornography. Accordingly, the United Kingdom will likely assert protection of morals, protection of the rights of others, and prevention of crime as its legitimate aim for child pornography laws as applied to teenage sexting.

The European Court of Human Rights has typically treated the “legitimate aim” requirement as more of a formality than a real area for scrutiny. With regard to the aim of protecting morals, the European Court of Human Rights is very deferential to the individual Member States’ own views about morality. It has repeatedly noted that there is no “uniform conception” of morals in Europe; opinions vary “from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject.”

The European Court of Human Rights has given more deference to Member States when the “protection of morals” is at issue because “[s]tate authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements of morals as well as on

189 Id. at 225–26.
190 Protection of Children Act, 1978, c. 37 (“An Act to prevent the exploitation of children by making indecent photographs of them; and to penalise the distribution, showing and advertisement of such indecent photographs.”); Council for the Regulation of Health Care Prof’ls v. Gen. Dental Council, [2003] EWHC (Admin) 87, [57] (Eng.) (“The need for Parliament to legislate in connection with the downloading of child pornography from the internet was driven by the ease with which the material can be downloaded, the corruption and harm caused to children in the creation of the material and the need to deter and punish those who participate in the corruption and harm to children by downloading in the privacy of their home.”).
191 Directive 2011/92, supra note 161; United Nations Declaration of the Rights of the Child, supra note 157; UNESCO, supra note 158, at i (“Child pornography is the consequence of the exploitation or sexual abuse perpetrated against a child. It can be defined as any means of depicting or promoting sexual abuse of a child, including print and/or audio, centered on sex acts or the genital organs of children.”).
192 CAMERON, supra note 184, at 81.
the 'necessity' of a 'restriction' or 'penalty' intended to meet them.” As long as the government can argue that its objective is one of the listed reasons in Article 10, it is unlikely that the European Court of Human Rights will, at this stage, question the legitimacy of that objective. Instead, the European Court of Human Rights will question the asserted objective's necessity later in its analysis.

The final inquiry under Article 10, “necessary in a democratic society,” is usually the most carefully scrutinized by the European Court of Human Rights. The European Court of Human Rights has never fully defined “a democratic society” but it has said that its characteristics include “pluralism, tolerance and broadmindedness.”

Under this principle, the European Court of Human Rights typically balances the government's objective against the right at issue and requires that the interference be “proportionate to the legitimate aim pursued.” This balancing can include determining whether there were less restrictive measures the government could have taken to achieve the same result, and whether there are any safeguards that can compensate for the infringement of the right at issue. The individual's rights are therefore balanced against the rights of other individuals and society at large.

Due to the importance the European Court of Human Rights places on freedom of expression, an interference with Article 10 is “necessary in a democratic society” only if there is a "pressing social need." The European Court of Human Rights has cautioned that even information or ideas that "offend, shock or disturb the State or any sector of the population" fall under the ambit of Article 10 because “[s]uch are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'”

On the other hand, citizens are also subject to duties and responsibilities when they exercise their freedom of expression, which the European Court of Human Rights also considers when deciding if government interference was necessary. A citizen's duties may require him or her to refrain from gratuitously...
offending others with material that does not contribute to public debate. When determining the necessity of a government interference with a right, the European Court of Human Rights defers to the Member State under the doctrine of the "margin of appreciation." The margin of appreciation "generally refers to the amount of discretion the Court gives national authorities in fulfilling their obligations under the Convention. It is somewhat analogous to a standard of review." The European Court of Human Rights has justified its use of the margin of appreciation because "the initial responsibility for securing the rights and freedoms enshrined in the Convention lies with the individual Contracting States." The European Court of Human Rights' deference is not unlimited, however. That court is still "empowered to give the final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10." The scope of the margin of appreciation will vary depending on the aim pursued under Article 10(2) of the Convention.

2. Freedom of Expression and Pornography Under the European Convention on Human Rights.— The European Court of Human Rights first dealt with the issue of sexually explicit or offensive materials and freedom of expression in Handyside v. United Kingdom. Handyside examined the Little Red Schoolbook, a textbook for children twelve years old and older that gave advice, including explicit sex advice. Under the United Kingdom's Obscene Publications Act 1959, Handyside was fined and copies of the book were seized and destroyed. In Handyside, the European Court of Human Rights held that limiting the publication of pornography may be "necessary in a democratic society" for the protection of morals and that Handyside's conviction did not violate Article 10.

Since Handyside, when examining material that has been characterized as obscene or offensive, the European Court of Human Rights has repeatedly

213 Id. at [20].
214 Id. at [16]-[17].
215 Id. at [45]-[46].
looked at whether the material was available to the general public or to children. With regard to the general public, in *Scherer v. Switzerland*, the court examined whether the potentially offending material would confront someone "unintentionally or against his will." It also found that the state could prosecute a display of sexually explicit art that was part of an exhibition that was "unrestrictedly open to—and sought to attract—the public at large." In contrast, if the material does not concern the general public, then "there must be particularly compelling reasons justifying the [government] interference" or a "pressing social need" in order to prosecute on the basis of protecting public morality.

When the image is easily copied and passed on, the European Court of Human Rights is also more likely to allow Member States to restrict the image's publication so that it will not reach people who will be offended by it. Consequently, audio-visual media can be subject to higher restrictions because they have "a more immediate and powerful effect than the print media."

The European Court of Human Rights has also endorsed the protection of children as a justification for limiting expression. The court was particularly concerned in *Handyside* about the *Schoolbook's* potential encouragement for school children to "indulge in precocious activities harmful for them or even to commit certain criminal offences." According to the court, Member States have the power to regulate expression in order to prevent "pernicious effects on the morals of many of the children and adolescents." Accordingly, when a potentially offensive image is available to children, Member States have much more discretion to limit or even criminalize its publication or creation.

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217 Compare *Handyside*, 1 Eur. Ct. H.R. (ser. A) at 755 (noting that the intended readership of the *Schoolbook* was children and adolescents aged from twelve to eighteen), with *Scherer*, 18 Eur. Ct. H.R. (ser. A) at 286 (noting that the publications and entertainment in question were not aimed at or accessible by children and adolescents).


224 *Id.*
C. Freedom of Expression and Pornography in the United Kingdom

British courts have also considered the issue of pornography as it relates to freedom of expression.\(^{225}\) In the United Kingdom, as in the United States, pornography is considered low-value expression.\(^{226}\) However, Baroness Hale notes, "there is always room for debate about what constitutes pornography."\(^{227}\) According to British courts, when limiting expression under Article 10, the legislative objective must be sufficiently important to justify limiting a fundamental right, the measures designed to meet the objective rationally connected to it, and the means used to impair the right or freedom no more than necessary to accomplish the objective.\(^{228}\) Moreover, courts must "balance the interests of society against those of individuals and groups."\(^{229}\) For example, the Employment Appeal Tribunal found that a school board properly fired a teacher for downloading and sending pornography from her workplace computer because the teacher's freedom of expression had to be balanced against her duty to protect the vulnerable children in her care.\(^{230}\)

A more pertinent example is \(R \text{ v. } M\), where the defendant, who was twenty-three years old, took pictures of a seventeen-year-old's naked body and was charged with two counts of making indecent photographs of a child contrary to section (1)(1)(a) of the Protection of Children Act.\(^{231}\) On appeal, the defense raised the issue that the Protection of Children Act violates Article 10 because, under British law, "[a]n unmarried and non-cohabiting sixteen or seventeen year old has the capacity in law to consent to intercourse but not to the taking of photographs during intercourse, whereas a married or cohabiting counterpart has both."\(^{232}\) The defense argued that such differentiation was

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\(^{225}\) British courts have also considered the right to privacy under Article 8 of the European Convention on Human Rights. In \(R \text{ v. } Bowden\), [2001] QB 88, 96 (Eng.), a British court found that the Protection of Children Act legitimately interferes with the right to privacy because it is necessary "for the protection of health or morals or for the protection of the rights and freedoms of others."

\(^{226}\) See Belfast City Council v. Miss Behavin' Ltd., [2007] UKHL 19, [2007] 1 W.L.R. 1420 (H.L.), [38] (Baroness Hale).

\(^{227}\) Id. at [38].


\(^{229}\) See Huang v. Sec'y of State for the Home Dep't., [2007] UKHL 11, [2007] 2 A.C. 167 (H.L.) [174] (appeal taken from Eng.).


\(^{232}\) Id. at [12]. The defense argued that this inconsistency also violated Article 8, the right to privacy.
“irrational” because it meant that “a child as statutorily defined should be capable of consenting to sexual relations but incompetent to consent to the photographing of an equivalent act unless in a marriage, civil partnership or an enduring family relationship.”

In response, the court held that the Protection of Children Act is justified under Article 10 because it serves multiple government interests such as, “the prevention of crime, . . . the protection of morals, and in particular . . . the protection of children from being exploited, which is undoubtedly a matter which is necessary in a democratic society.”234 The court in R v. M also held that existing child pornography laws do no more than necessary to accomplish the objective.235 When applied to the facts in R v. M, the laws as drafted were appropriate because a “defence which includes a ‘brief sexual relationship’ would diminish the protection provided.”236 Because of the nature of photographs, the court was comfortable with allowing sixteen- and seventeen-year-olds to have consensual sex but not take photos of those acts.237 However, it should be noted that R v. M concerned an adult male of twenty-three years old and a seventeen-year-old girl. It is unclear how British courts would view a similar situation involving two teens.

IV. Potential Explanations for the Differences in Sexting Prosecutions Between the United States and United Kingdom

Now that sexting cases have been tried in both the United States and United Kingdom, it is only a matter of time before courts will have to deal with freedom of expression claims in both countries. It is likely that these claims will be treated quite differently in the United States and United Kingdom because of the two countries’ views on (1) the concept of “rights” themselves, (2) freedom of expression specifically, and (3) the impact of technology.

A. Different Concept of “Rights”

A fundamental reason for the difference in sexting laws between United States and the United Kingdom is how those two countries view the concept of “rights.” Each country has a different perception of the relationship between the government and its citizens as well as who should intervene if the government oversteps its role. These different role perceptions may influence each country’s willingness to prosecute sexting teens under child pornography laws.

233 Id. at [17].
234 Id. at [29] (quoting R v. Smethurst, [2008] UKHL 37, [24]).
235 Id. at [37].
236 Id. (emphasis added).
237 Id. at [12].
1. "Rights" in the United States.— After the Revolutionary War, the United States, formed from American colonies, was able to consciously design its government structures and the rights it would give to its citizens. Even before American independence, many of the New England colonies were founded upon the ideas of religious freedom, and colonial constitutions explicitly provided for rights of their citizens. When the United States created the Constitution, the Founding Fathers were heavily influenced by Enlightenment philosophers' notions of "natural rights" and protecting liberty and property, as well as a desire to escape the perceived tyranny of the British monarch. Perhaps it is only natural that the American Constitution would explicitly provide for the rights of its citizens, as the United States was reacting against a country that had no written bill of rights of its own.

The notion of "rights" was thoroughly debated while the United States Constitution was being ratified. Federalists like Alexander Hamilton saw rights as both inherent to individuals and a tool to protect personal freedoms, such as freedom of conscience. To Federalists, the people retained all rights they did not relinquish to the government. On the other hand, according to Federalists, if the government wished to encroach on rights, no "parchment barrier" such as a bill of rights could stop it. To that end, Hamilton argued that there was no need to list the rights given to the people because, unlike the British monarchy, the United States was a government created by the people and executed by the people's representatives. Indeed, the people's rights had already been guaranteed by winning the revolutionary war. Hamilton also warned that enumerating rights would potentially give more power to the government because it could argue that it could claim power over anything not


244 Finkelman, James Madison, supra note 243, at 310.


246 Lienesch, supra note 241, at 360.
explicitly listed.247

Anti-federalists, particularly those in North Carolina, saw rights as personal liberties, inherent in individuals, which should be secured by constitutions.248 Anti-federalists were not persuaded that a republic government could not infringe on people’s rights—even government rulers elected by the people could usurp power.249 Anti-federalists believed that if the constitution did not specifically preserve rights of individuals then those rights were automatically transferred to the new federal government.250 The purpose of a constitution was to limit powers and preserve rights, and the only way to do so was to specify the rights of the people that the government had to respect.251 Some Anti-federalists even refused to approve a constitution without a bill of rights.252 It was this view of rights that won the debates when the Federalists (James Madison, specifically) drafted the Bill of Rights to be added to the Constitution in order to secure its ratification.253

Now over two hundred years old, the Bill of Rights has directly impacted how American citizens view “rights.”254 To Americans, “rights” are explicitly listed, exist independently of legislation, and may not be infringed by government action (except by a constitutional amendment). Over time, the concept of “rights” has been the subject of debates in various spheres—from Critical Legal Studies, to Feminism, to Critical Race Theory. Some have argued that the American concept of “rights” can be harmful because it is used by the privileged to subvert social programs that help the needy and were adopted by the democratically elected government.255 This argument has been rejected by others who assert that, particularly for racial minorities, “rights imply a respect that places one in the referential range of self and others, that elevates one’s status from human body to social being.”256 For the historically oppressed and disenfranchised, “rights” were something to hope to attain, something that gave...

247 The Federalist No. 84, supra note 245, at 444; Finkelman, James Madison, supra note 243, at 310.
248 See Lienesch, supra note 241, at 362.
251 Lienesch, supra note 241, at 359.
252 Finkelman, James Madison, supra note 243, at 306.
253 See id. at 301; Lienesch, supra note 241, at 362–64.
254 These ideas have also been exported around the world. Jacek Kurczewski & Barry Sullivan, The Bill of Rights and the Emerging Democracies, 65 Law & Contemp. Probs. 251, 253 (2002).
people a voice where previously they had none.257

Courts in the United States, particularly the Supreme Court, are seen as protectors of these rights259 and people are willing to go to the courts to seek redress if they feel their rights are violated. Because of the courts' willingness to protect rights, there is some evidence that Congress drafts statutes with the belief that, if the statutes are unconstitutional, courts will correct the defects.259

As shown below, there is no evidence that Parliament feels it can rely on British courts in a similar way.260 Accordingly, in the United States, it is the judicial branch that the people look to as the guardian of their rights.

2. "Rights" in the United Kingdom.— In contrast to the United States Constitution, the British Constitution has evolved over centuries, with no defining moment of revolution forcing its citizens to use it to thoughtfully plan out the government structure or division of powers.261 The United Kingdom has historically not distinguished between fundamental rights, which have special protection from the political process, and ordinary rights, which are not protected.262 Since 1966, British citizens could sue the British government for infringements of the rights contained in the European Convention on Human Rights, but had to go to the European Court of Human Rights in Strasbourg, France, to do so.263 In contrast to the United States' Bill of Rights, the United Kingdom did not have a codified Bill of Rights that was enforceable by British courts until October 2000.264

The United Kingdom has historically relied on a concept of "negative liberty" as its primary protector of individual rights.265 Negative liberty is characterized as freedom from government interference, as opposed to a

257 Id. at 154, 160. This concept of rights giving people power or a voice is echoed by Canadian scholar Kathleen E. Mahoney, who praised the Canadian Charter of Rights and Freedoms as giving the "people of Canada . . . much enhanced roles" in the development of Canada's constitution. Kathleen E. Mahoney, Recognizing the Constitutional Significance of Harmful Speech: The Canadian View of Pornography and Hate Propaganda, in The Price We Pay, supra note 86, at 277, 279.

258 The Supreme Court sees itself as the protector of rights as well. Dorothy B. James, Role Theory and the Supreme Court, 30 J. Politics 160, 164, 174–76 (1968).


260 Doing so would in fact be antithetical to parliamentary sovereignty—traditionally, courts have been expected to effect the will of Parliament when interpreting statutes. Fred L. Morrison, Courts and the Political Process in England 105–06 (1973).


262 Id. at 50–51.


264 Id. Prior to the Human Rights Act 1998, British citizens who believed their rights had been violated had to bring a case before the European Court of Human Rights in Strasbourg.

positive right that gives one the right to action. Under a negative liberty system, instead of having a list of enumerated “rights,” people can do whatever they want as long as there is no law prohibiting it. Famous philosophers, such as A.V. Dicey, have defended this concept in the United Kingdom. Dicey was also the chief proponent of another essential British political doctrine: parliamentary sovereignty. Under this doctrine, Parliament is supreme over the other government branches and can advance legislation without limitation. This fundamental tenet of British politics goes hand in hand with the idea that the people’s liberty can be protected or limited in whatever way Parliament wishes. Indeed, Parliament, as a democratically elected government branch, has been seen as the protector of the people’s liberty against the tyranny of the monarch. In fact, the British people’s historic fight for “rights” was really a fight to vote so they could have their voices heard through Parliament. Similarly, British people have traditionally been suspicious of the judiciary’s ability to protect them from government intrusion because the judiciary is seen as elitist and undemocratic.

Because of this history, British people think of general “liberty” or “freedom” instead of enumerated “liberties” or “freedoms.” Some in the United Kingdom believe that by listing rights, some may be lost if not specifically enumerated. Instead of having only the rights given to them, British people had complete freedom from government interference that could be limited only in specific ways and for justifiable reasons.

267 Klug, Starmer & Weir, supra note 266, at 37.
268 Feldman, supra note 261, at 61–62.
269 Id. at 62. Under this model, the judiciary is subservient to Parliament’s will. Id.
270 Id.
271 Id.

272 The House of Lords is not democratically elected like the House of Commons but, over time, its powers have been limited and the Commons is considered the dominant house. A.W. Bradley & K.D. Ewing, Constitutional and Administrative Law 147 (13th ed. 2003).
273 Feldman, supra note 261, at 63; Mike Ashley, supra note 238, at 35 (2008).
274 Ashley, supra note 238, at 38. There were exceptions, of course. During the English Civil War, the Levellers created the Agreement of the People, which specified several fundamental rights such as freedom of worship and trial by jury. Id. at 40. The Agreement was never adopted. Id.
276 Feldman, supra note 261, at 61; see also Ashley, supra note 238, at 9.
277 Feldman, supra note 261, at 61.
278 Id. Some have argued the British people have become complacent and have allowed their liberties to be curtailed by Parliament without their notice. Id. at 63.
Since the enactment of the European Convention on Human Rights, there is evidence that British people have become more rights-conscious. The enactment of the Human Rights Act has likely added to this trend. As the British people have become more rights-conscious, they have begun to use courts more to vindicate their rights. Cases before British courts and the European Court of Human Rights have increased over time. This increased reliance on the judiciary may change the United Kingdom's treatment of statutes—prosecutors as well as ordinary citizens may become more likely to use the courts to decide whether statutes impermissibly infringe upon the people's rights instead of relying on Parliament to get the balance right.

3. "Rights" and Sexting Prosecutions.— It is this different view on the nature of "rights" that may explain the different strategies American and British legislatures have employed when confronting sexting and child pornography laws. The United States and United Kingdom criminalize the same basic kinds of images as child pornography but the United Kingdom has some legal defenses written into its legislation that do not exist in the United States. First, the United Kingdom offers a defense to statutory rape: if the defendant had a reasonable belief that the complainant was over eighteen. However, this defense does not apply to child pornography charges. Second, a person may

279 Id. at 65.
280 See Merris Amos, The Impact of the Human Rights Act on the United Kingdom's Performance Before the European Court of Human Rights, 2007 Pub. L. 655, 658, 675 (analyzing evidence that the United Kingdom has had better results before the European Court of Human Rights since the enactment of the Human Rights Act).
282 It is illegal for a youth under eighteen years old to engage in sexual activity with a child under sixteen years old but, as in the United States, sexually active teens are generally not prosecuted. In contrast to codified "Romeo and Juliet" statutes in the United States, the United Kingdom has only Crown Protection Service Guidelines that state that prosecutions of teens who engage in sexual activity are generally not appropriate absent other aggravating factors. See Legal Guidance: Child Sex Offences Committed by Children or Young Persons, CROWN PROSECUTION SERV., http://www.cps.gov.uk/legal/vc_to_z/youth_offenders/#429 (last visited Oct. 18, 2013).
have a "legitimate reason" for distributing or possessing child pornography.\textsuperscript{284} Finally, British law has built-in flexibility to its child pornography laws that does not exist in the United States and may directly influence sexting prosecutions. A Home Office Circular issued in 2006 advises that young people who post or upload self-taken indecent images should not be criminally prosecuted and should be educated instead.\textsuperscript{285} The Crown Prosecution Service has taken a similar position: it is not in the public interest to prosecute teenage sexting.\textsuperscript{286}

This approach indicates that, in the United Kingdom, the government has been proactive in anticipating possible defenses to child pornography prosecutions as well as limiting the application of child pornography laws to sexting cases. The British government has not left the matter up to courts to decide. In contrast, in the United States, there seems to be less willingness to change legislation to ensure that sexting teens are not caught by child pornography laws. Only eighteen states have directly addressed the issue\textsuperscript{287} and there have been no attempts by the federal government to create a sexting exception or otherwise limit child pornography laws so they do not unduly penalize sexting teens. Even those states that have created sexting laws may still face overbreadth problems.\textsuperscript{288}

However, the recent arrest in Cheltenham indicates that the British police's view of sexting may be changing. If so, due to how the Protection of Children Act is drafted, this change may result in sexting teens being prosecuted for the creation, distribution, or possession of child pornography just as they have been in the United States. If British teens are prosecuted, they could bring freedom of expression claims under the European Convention on Human Rights but the claims are less likely to be successful than claims brought in the United States, given the United Kingdom's more stringent views on freedom of expression and technology. Such a result may force the United Kingdom to re-examine its child pornography laws.

\textit{B. Potentially Different Views on Freedom of Expression}

Once a sexting case gets to court, British and American judges are likely to treat it very differently. As with most "rights," the United Kingdom's judiciary has not historically had a strong role in protecting freedom of speech, especially when compared to the United States Supreme Court. Freedom of expression was not recognized as a judicially enforceable right by statute until the Human

\textsuperscript{284} Protection of Children Act 1978, c. 37, § 4(a).

\textsuperscript{285} Stone, supra note 23, at 274.

\textsuperscript{286} Id. at 273.

\textsuperscript{287} See sources cited supra note 132.

Rights Act was enacted in October 2000. Even after the enactment of the Human Rights Act, scholars have criticized British courts for their failure to protect freedom of expression. The British judiciary has historically been extremely deferential to Parliament and such deference is evident even when human rights issues are involved.

Even if they wished to do more, British courts are limited by the Human Rights Act; they cannot strike acts of Parliament for being incompatible with the European Convention on Human Rights. At most, they can creatively interpret the statute so that it will comply with the European Convention on Human Rights or issue a Declaration of Incompatibility, which is a non-binding signal to Parliament that the court believes that the law should change.

The British government also has more leeway under the European Convention on Human Rights to restrict freedom of expression. Under Article 10, the British government can use protection of the rights of others as a rationale, which appears closest to the prevention of harm or exploitation of children rationale inherent in American cases. It can also assert that it is protecting morals, a rationale simply not available in the United States.

Moreover, the British legislature's decision to criminalize sexting would also receive much more deference from both British and European courts than an identical decision in the United States. The European Court of Human Rights, using the margin of appreciation doctrine, which is particularly strong in protection of morals cases, would allow the British government to criminalize behavior that would receive First Amendment protection in the United States. The European Court on Human Rights has already allowed the British government to criminalize the sale of books that simply discuss sex. It is not a far stretch to say that the European Court on Human Rights would allow British courts to criminalize the distribution of sexually explicit images between teens.

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289 Eric Barendt, *Freedom of Expression in the United Kingdom Under the Human Rights Act* 1998, 84 Ind. L.J. 851, 853 (2009). However, courts have historically protected freedom of speech in a variety of contexts such as in cases involving the right to demonstrate. See, e.g., Brutus v. Cozens, [1972] UKHL 6, [1973] A.C. 854 (appeal taken from Eng.) (holding that a peaceable demonstrator could not be prosecuted for breach of peace).


295 *Id.*

In addition to deference, British courts and the European Court on Human Rights see freedom of expression differently from American courts. British courts and the European Court of Human Rights are likely to find that offensive or sexually explicit material is not protected by the European Convention on Human Rights because the protection of children outweighs any concerns for freedom of expression in the United Kingdom and Europe. In fact, when criminalizing child pornography, European political bodies have shown some interest in protecting freedom of expression, but they have also noted that the protections afforded in the United States “can lead to certain excesses which, unfortunately, benefit, in some instances, criminals.”

The clearest difference between the two countries is seen in the United States Supreme Court’s line of cases that hold that speech may not be prohibited merely because it is offensive. Most notably, the Supreme Court has stated, “constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.” The Court is also not swayed by the argument that offensive speech may reach children, holding that “speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.” In fact, the Supreme Court has “invalidated a statute prohibiting distribution of an indecent publication because of its tendency to ‘incite minors to violent or depraved or immoral acts.’” In short, “the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.”

This line of reasoning is completely antithetical to European Court of Human Rights jurisprudence. As discussed in Scherer v. Switzerland, the fact that people could view images that might offend them was important to the court’s finding that those images could be restricted without violating freedom

297 UNESCO, supra note 158; Convention on Cybercrime, supra note 159 (recognizing a robust freedom of expression, the Member States of the Council of Europe affirmed that they were “[m]indful of the need to ensure a proper balance between the interests of law enforcement and respect for fundamental human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties, which reaffirm the right of everyone to hold opinions without interference, as well as the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers . . .”).

298 UNESCO, supra note 158.

299 See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) (citation omitted) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it.”); Carey v. Population Services Int’l, 431 U.S. 678, 701 (1977) (citation omitted) (“[T]he fact that protected speech may be offensive to some does not justify its suppression.”).


302 Id. (quoting Butler v. Michigan, 352 U.S. 380, 381 (1957)).

of expression. The European Court of Human Rights is not solely concerned with protecting children from these images; sexually explicit images that may be viewed by the public can be restricted and the distributors criminally prosecuted. Therefore, the European Court of Human Rights allows governments to ensure that only those who wish to see offensive or sexually explicit images may do so.

Fundamentally, freedom of expression is more protected in the United States than it is in the United Kingdom. As long as that is the case, sexting teens who argue that their freedom of expression has been violated will therefore be less successful in the United Kingdom.

C. Impact of Technology

The final difference between the United States and the United Kingdom is that British and European courts are much more concerned with the technology behind sexting and the ease of transmitting images to others. The United States Supreme Court has held that even speech that may lead to crime is protected under the First Amendment. Even though an image may eventually be passed on to one who will use it for an immoral purpose or to further illegal acts, that image cannot be banned. Doing so amounts to the government trying to control thoughts. In contrast, when examining child pornography cases, British courts have emphasized the portability of photographs so that even if the person who took the photograph had innocent intentions, those intentions are irrelevant if “the photograph is one which right-thinking people would regard as indecent.” According to the courts, Parliament decided that allowing someone to eschew responsibility for an indecent photograph that was taken innocently but passed on to others provided insufficient protection for children.

Views on technology are also evident in the differences between the way the United States and United Kingdom treat virtual child pornography. The Public Order Act 1994 added the words “pseudo photograph” to the Protection of Children Act so that virtual child pornography is explicitly forbidden under the
Protection of Children Act. Possession of indecent photographs or "pseudo photographs" of children is also a criminal offense under the Criminal Justice Act. The Convention on Cybercrime, which the United Kingdom has signed, likewise includes virtual images in its definition of child pornography. These instruments have focused on the fact that, "due to advances in technology, actual child pornography and virtual child pornography have become almost indistinguishable" and virtual child pornography can be used to "groom" future victims. The U.S. Supreme Court explicitly rejected this reasoning in Ashcroft.

In contrast to Ashcroft, British courts have repeatedly upheld convictions for the possession or distribution of virtual child pornography because, although these "pseudo-photographs" do not harm children in their production, the images still have a negative effect when they are shown. Moreover, although the possession or distribution of virtual child pornography may merit a lower sentence than actual child pornography, virtual child pornographers may still receive the maximum sentence, depending on other factors such as the graphic nature of the photographs. Due to the Council of Europe's stance that virtual images should be included in the definition of child pornography, the European Court of Human Rights would likely uphold the United Kingdom's criminal convictions for the possession or distribution of virtual child pornography.

With regard to sexting, R v. M specifically held that Parliament is entitled to make it illegal for people to take photographs of consensual (and legal) sexual acts involving teens between the ages of sixteen and seventeen because the photographs can be passed on. Moreover, the European Court of Human Rights has allowed Member States to restrict (and even criminalize) the publication of images that offend or are indecent if those images are likely to reach children or members of the public who are likely to be offended. Again, because of the ease of transmitting sexting images, it is likely that the European

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311 Criminal Justice and Public Order Act, 1994, c. 33, § 84(a)(a) (Eng.).
312 Criminal Justice Act, 1988, c. 33, § 160 (Eng.).
315 Ashcroft, 535 U.S. at 250.
318 See Oliver, Crim. App. at 468, 470–74.
Court of Human Rights will find that the United Kingdom is permitted, under the margin of appreciation doctrine, to criminalize the possession or distribution of sexting images. This is the case even if teens who took or possessed those images were legally permitted to engage in the sexual activities portrayed in the pictures. The ease of transmission of digital images will make it much more difficult for teens in the United Kingdom to raise a freedom of expression defense.

CONCLUSION

Despite having very similar child pornography laws, the United States and the United Kingdom have reached very different results with regard to the prosecution, sentencing, and rights of sexting teens. Although neither country has expressly addressed what freedom of expression teens have when they engage in sexting, existing case law points to vast differences in their likely treatment by the courts. The United Kingdom is more lenient when determining whether to prosecute teens and what their sentences should be, if convicted. However, the United States is more likely to find that teenagers have the right to express themselves through sexting without fear of facing child pornography charges.

Commentators, primarily in the United States, have identified the problem of a mismatch between child pornography and statutory rape laws. However, legislatures are slow to solve this problem: the states' attempts have been inconsistent, the federal government has made no effort to amend existing child pornography legislation, and the courts have yet to rule on this issue. In the United Kingdom, there has been no relevant legislation proposed or court cases decided on the issue. Therefore, the legal landscape is uncertain in both countries, but the United Kingdom arguably has the more practical solution: guidelines for local governments and police forces that advise them not to prosecute sexting teens under child pornography statutes.

The United Kingdom's focus on keeping its legislation flexible in order to deal with consensual teenage sexting presents a useful model for American legislatures. Instead of relying upon courts to figure out how to protect teens from child pornography charges that seem inappropriate, unduly harsh, and dangerous to freedom of expression, legislatures and even individual police departments can take it upon themselves to narrow the impact of child pornography laws. Courts in the United States have already explained that it is the harm to children that must be present for child pornography laws to be lawfully applied. Legislatures can take (and have taken) this explanation to create narrowly tailored sexting laws. Likewise, police can apply this explanation, even without judicial intervention, to their discretionary decisions on whether to charge sexting teens with child pornography violations.