

2014

To Catch All Predators: Toward a Uniform Interpretation of "Sexual Activity" in the Federal Child Enticement Statute

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To Catch All Predators: Toward a Uniform Interpretation of "Sexual Activity" in the Federal Child Enticement Statute

Keywords

Sex crimes -- Child sexual abuse --United States v. Taylor (Supreme Court case), Law -- Interpretation & construction -- United States, Sexual activity

TO CATCH ALL PREDATORS: TOWARD A UNIFORM INTERPRETATION OF “SEXUAL ACTIVITY” IN THE FEDERAL CHILD ENTICEMENT STATUTE

JULIE A. HERWARD*

The federal child enticement statute, codified at 18 U.S.C. § 2422(b), prohibits the use of interstate commerce to coerce a minor to engage in any illegal “sexual activity.” Congress enacted the statute in response to the rising number and forms of sexual crimes committed against children, especially crimes facilitated via the Internet. However, Congress did not explicitly define the meaning of “sexual activity” in § 2422(b).

*Recently, several defendants have appealed their § 2422(b) convictions, asserting that they did not engage in “sexual activity” within the meaning of § 2422(b) because they never physically touched a child. In response to one of these appeals, the U.S. Court of Appeals for the Seventh Circuit, in *United States v. Taylor*, adopted a narrow interpretation of “sexual activity” that requires interpersonal physical contact between a defendant and a minor for culpability under the statute. However, the following year, the U.S. Court of Appeals for the Fourth Circuit expressly declined to adopt the Seventh Circuit’s interpretation in *United States v. Fugit*. Instead, the Fourth Circuit broadly interpreted “sexual activity” as not requiring physical contact.*

*This Comment argues that the Fourth Circuit in *Fugit* correctly interpreted “sexual activity” to not require interpersonal physical contact between a defendant and a minor. However, § 2422(b), as currently written, could lead some defendants to be subjected to an overly lengthy prison sentence relative to*

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the severity of their underlying conduct. Congress should modify § 2422(b)'s penalty provision to prevent the potential for incongruous penalties. Until such amendment is made, courts should follow the Fourth Circuit's broad interpretation of "sexual activity."

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INTRODUCTION

Imagine the following scenario¹: Randall, an adult male, enters a Yahoo Internet chat room and sends a message to an individual using the screen name “daddysgrl.dc.”² The recipient, an undercover law enforcement officer, tells Randall that he is a thirteen-year-old girl named “Amanda.”³ Randall and “Amanda” communicate online for two hours, during which time Randall sends “Amanda” several electronic, pornographic images of himself; asks if he can watch her urinate; and arranges to meet her at an agreed-upon location to engage in sexual intercourse.⁴ Randall then travels to the specified location, where he is arrested; later, the government charges him with enticing a minor to engage in illegal sexual activities in violation of federal law.⁵ But has Randall violated federal law?

Prior to 2011, the answer to this question would almost certainly have been “yes.”⁶ Today, however, the answer depends on whether the jurisdiction overseeing the defendant’s case requires the defendant to engage in interpersonal physical contact with a minor to satisfy one of the elements of the federal child enticement offense.⁷

1. This scenario is based on the facts of *Casseday v. United States*, 723 F. Supp. 2d 137 (D.D.C. 2010), in which the federal government charged the defendant with sexual enticement of a minor.

2. See *id.* at 141 (citing the statement of the facts from Randall Casseday’s plea agreement).

3. *Id.*

4. *Id.* at 141–42.

5. *Id.* at 140, 142. The government also charged Randall Casseday with one count of possession of child pornography in violation of federal law and a separate count of attempted enticement of a child in violation of District of Columbia (D.C.) law. *Id.* at 140. Casseday pled guilty to federal possession of child pornography and D.C. attempted enticement; in exchange, the government dismissed his federal child enticement charge. *Id.* at 145.

6. See, e.g., *United States v. Farley*, 607 F.3d 1294, 1324 (11th Cir. 2010) (holding that a defendant who communicated online with an undercover officer posing as the parent of a fictitious child violated the federal child enticement statute). In *Farley*, the defendant never actually communicated with a person he believed or knew to be a child; rather “he made contact with the mother . . . and set out to persuade her not only to let him have sex with her daughter but also to join him in sexually violating the child.” *Id.* at 1300. The U.S. Court of Appeals for the Eleventh Circuit found “ample proof” to sustain his conviction for attempted enticement. *Id.* at 1334.

7. In 2011, the U.S. Court of Appeals for the Seventh Circuit held that individuals can violate the federal child enticement statute only if they engage or intend to engage in interpersonal physical contact with a minor and that mere communications with a child over the Internet or the phone are insufficient for culpability under the statute. *United States v. Taylor*, 640 F.3d 255, 260 (7th Cir. 2011); see also *infra* notes 80–90 and accompanying text (discussing *Taylor* and the Seventh Circuit’s reasoning). Conversely, the U.S. Court of Appeals for the Fourth Circuit does not require that a defendant engage in physical contact with a minor to violate the statute. *United States v. Fugit*, 703 F.3d 248, 254 (4th Cir. 2012), *cert. denied*, No. 12-10591, 2014 WL 210666 (U.S. Jan. 21, 2014); see also *infra* notes 91–96 (discussing *Fugit* and the Fourth Circuit’s reasoning).

The federal child enticement statute, codified at 18 U.S.C. § 2422(b), prohibits using interstate commerce to coerce people under the age of eighteen to engage in any illegal sexual activity or to attempt to arrange such an encounter.⁸ Defendants convicted of violating § 2422(b) “shall be fined . . . and imprisoned not less than 10 years or for life.”⁹

Federal prosecutors must import a state or federal statute criminalizing a “sexual activity” into § 2422(b) to establish the federal offense.¹⁰ Congress, however, has not defined “sexual activity”—one of the elements of the offense¹¹—as the term is used in § 2422(b).¹² Congress has only stated that “sexual activity” in § 2422(b) “includes the production of child pornography.”¹³

In recent years, several defendants convicted of violating § 2422(b) have argued that their conduct did not constitute “sexual activity” within the meaning of the statute because they did not touch children as part of their criminal activities but, instead, only communicated with children over the Internet or phone. For example, in *United States v. Taylor*,¹⁴ the defendant asserted that he had not attempted to entice a minor over the Internet because he never touched a child; rather, he fondled himself in front of a web camera and similarly encouraged a person he thought was a child to fondle herself for him.¹⁵ The U.S. Court of Appeals for the Seventh Circuit agreed with the defendant, reversed his conviction, and adopted a narrow construction of “sexual activity.”¹⁶ The court held that § 2422(b) only criminalizes defendants who engage or who intend to engage in interpersonal physical contact with children.¹⁷ The following year, the U.S. Court of Appeals for the Fourth Circuit in *United States v. Fugit*¹⁸ expressly declined to adopt the Seventh

8. See 18 U.S.C. § 2422(b) (2012) (constituting the federal child enticement statute).

9. *Id.*

10. See, e.g., *United States v. Cochran*, 534 F.3d 631, 634 (7th Cir. 2008) (explaining that the defendant’s “underlying criminal sexual activity” supporting his § 2422(b) conviction was his violation of a state criminal statute); see also *infra* note 46 and accompanying text (explaining the incorporation requirement of the federal child enticement offense).

11. See *infra* notes 42–43 and accompanying text (identifying the elements of the federal child enticement offense).

12. Section 2422(b) does not have a definitions section. See 18 U.S.C. § 2422(b).

13. *Id.* § 2427.

14. 640 F.3d 255 (7th Cir. 2011).

15. *Id.* at 256–57.

16. *Id.* at 259–60.

17. *Id.* at 260.

18. 703 F.3d 248 (4th Cir. 2012), *cert. denied*, No. 12-10591, 2014 WL 210666 (U.S. Jan. 21, 2014).

Circuit's interpretation of "sexual activity."¹⁹ Instead, the Fourth Circuit held that interpersonal physical contact was not a requirement of § 2422(b) because "sexual activity" "comprises conduct connected with the active pursuit of libidinal gratification."²⁰ In so doing, the Fourth Circuit brought itself into direct conflict with the Seventh Circuit and created a circuit split over the meaning of "sexual activity" in § 2422(b).

This recent circuit split over a previously uncontested element of § 2422(b) has the potential to change prosecutions under the federal child enticement statute. Several defendants have already tried, with mixed results, to use the Seventh Circuit's opinion in *Taylor* to assert that their conduct did not qualify as "sexual activity" under the statute.²¹

This Comment argues that the Fourth Circuit in *Fugit* properly interpreted § 2422(b) when it held that "sexual activity" does not require a defendant to engage in physical contact with a minor. The plain meaning of "sexual activity," the relationship of "sexual activity" to other elements of § 2422(b) and Title 18, and Congress's intent in enacting the statute support the Fourth Circuit's interpretation. However, the Fourth Circuit's interpretation of § 2422(b) may cause defendants whose underlying criminal conduct constitutes a misdemeanor offense to suffer an incongruous penalty—a mandatory prison sentence of at least ten years—relative to the severity of their actions. Accordingly, this Comment recommends that Congress modify § 2422(b)'s penalty provision to reduce the potential for incongruous penalties but also that courts follow *Fugit* until or unless Congress amends the statute.

Part I of this Comment briefly discusses the rising trend of online sexual enticement of children and the federal statutory framework for prosecuting defendants accused of enticing and attempting to entice minors to engage in illegal sexual activities. Part I also analyzes the split between the Fourth and the Seventh Circuits over the meaning of "sexual activity" in § 2422(b) and the two courts' reasons for adopting alternative interpretations. Part II uses several canons of statutory interpretation to analyze the meaning of "sexual activity" in § 2422(b). In so doing, Part II argues that the Fourth Circuit correctly interpreted "sexual activity" when it held that

19. *Id.* at 255.

20. *Id.* (internal quotation marks omitted).

21. See *infra* note 100 and accompanying text (discussing several recent cases in which defendants used the Seventh Circuit's reasoning in *Taylor* to argue, unsuccessfully, that they did not violate § 2422(b), but also pointing out that none of the other cases addressed the issue from *Taylor* regarding whether masturbating for a minor in front of a web camera is within the scope of "sexual activity").

interpersonal physical contact is not required for culpability under the statute. Finally, this Comment briefly concludes by recommending that courts follow the Fourth Circuit's reasoning from *Fugit* until Congress modifies § 2422(b) to reduce the potential for incongruous penalties.

I. AN OVERVIEW OF THE HISTORY AND TREATMENT OF 18 U.S.C. § 2422(B)

A. *The Problem: Sexual Predators Are Increasingly Using the Internet To Lure Children into Illegal Sexual Encounters*

The Internet has revolutionized the way people communicate with one another. Indeed, “[i]ts expansive nature has the ability to connect all users, virtually eliminating geographical distances and enabling individuals to connect in real-time.”²² Sexual predators, however, increasingly exploit these same beneficial capabilities for harm and use the Internet to coerce children to engage in illegal sexual activities with them.²³ The U.S. government does not know how many children are lured to engage in illegal sexual activities via the Internet each year,²⁴ but the National Center for Missing and Exploited Children (NCMEC)²⁵ received “sharp increases in the number of online enticement incidents reported” between 2004 and 2008.²⁶

22. Elana T. Jacobs, Note, *Online Sexual Solicitation of Minors: An Analysis of the Average Predator, His Victims, What Is Being Done and Can Be Done To Decrease Occurrences of Victimization*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 505, 506–07 (2012) (noting that, in the United States, Internet usage by persons ages twelve to seventeen increased from seventy-three to ninety-three percent between 2000 and 2006 and acknowledging that the online sexual solicitation of minors increased as this population increasingly used the Internet).

23. U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 30 (2010) [hereinafter DOJ REPORT TO CONGRESS], available at <http://www.justice.gov/psc/docs/natstrategyreport.pdf>; *Internet Crimes Against Children Task Force Program*, OFF. JUV. JUST. & DELINQ. PREVENTION, <http://www.ojjdp.gov/programs/progsummary.asp?pi=3> (last visited Jan. 23, 2014) [hereinafter *ICAC Program*] (explaining that the U.S. Department of Justice's (DOJ) Internet Crimes Against Children Task Force Program (ICAC) helps law enforcement respond to cyber enticement and child pornography cases and that Congress created ICAC “in response to the increasing number of children and teenagers using the Internet, the proliferation of child pornography, and heightened online activity by predators seeking unsupervised contact with potential underage victims”).

24. See DOJ REPORT TO CONGRESS, *supra* note 23, at 30 (stating that the government currently has “no actual measurement of online enticement,” but also acknowledging that public awareness of online enticement of children has resulted in increased reporting of enticement events); cf. *ICAC Program*, *supra* note 23 (“Since 1998, ICAC Task Forces have reviewed more than 280,000 complaints of alleged child sexual victimization resulting in the arrest of more than 30,000 individuals.”).

25. NCMEC is a congressionally authorized nonprofit organization that works with families, law enforcement, and the professionals who serve them to curtail the sexual exploitation of children in the United States. See NAT'L CENTER FOR MISSING &

Sexual predators manipulate children into participating in illegal sexual activities over the Internet through a process called “grooming.”²⁷ “Grooming” begins when sexual predators identify children online and initiate conversations with them.²⁸ Next, predators will often send minors pornographic images and perform explicit sexual acts for them to make the minors accustomed and desensitized to the idea of performing sexual acts with adults.²⁹ Over time, online predators gradually build trust with their victims until, for example, the children provide sexual images, pose for pornography, or agree to meet the predators for sex.³⁰ Some online predators have also abducted, raped, and killed their child victims or sold their victims into prostitution.³¹

EXPLOITED CHILD., <http://www.missingkids.com/NCMEC> (last visited Jan. 23, 2014) (describing NCMEC’s origins and purposes). Among other activities, NCMEC oversees the CyberTipline, “which provides a centralized mechanism for the public and electronic service providers to report suspected child sexual exploitation.” *Id.*

26. DOJ REPORT TO CONGRESS, *supra* note 23, at 30; *see also Child Sexual Exploitation*, NAT’L CENTER FOR MISSING & EXPLOITED CHILD., <http://www.missingkids.com/Exploitation> (last visited Jan. 23, 2014) (indicating that NCMEC had received more than 2.1 million incident reports of suspected child exploitation through October 2013); *cf.* Kimberly J. Mitchell et al., *Trends in Youth Reports of Sexual Solicitations, Harassment and Unwanted Exposure to Pornography on the Internet*, 40 J. ADOLESCENT HEALTH 116, 117 (2007), available at <http://www.unh.edu/ccrc/pdf/CV135.pdf> (reporting the results of a congressionally-commissioned study on the prevalence of sexual solicitation of minors that found a decrease from nineteen percent to thirteen percent in youth-reported solicitations between 2000 and 2005 but an increase from six percent to nine percent in the number of children reporting online harassment during the same time period).

27. *See* DOJ REPORT TO CONGRESS, *supra* note 23, at 30–31 (defining “grooming” as a “psychological process” predators use to identify child victims, build trusting relationships with them, and gradually manipulate the relationships until the children “voluntarily” engage in sexual activities).

28. *See id.* at 3, 30 (stating that predators often seek victims in Internet forums and chat rooms popular with young people and that they specifically prey on children with low self-esteem or who have problems at home because they believe such children can be easily manipulated into vulnerable situations).

29. *Id.* at 31.

30. *Id.* at 30–31.

31. *See* H.R. REP. NO. 105-557, at 11–12 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 680 (explaining, as part of a section describing the need for enacting the Child Protection and Sexual Predator Punishment Act of 1998 (“the Protection Act”), that children who have been enticed to participate in sexual activities over the Internet “have been kidnapped, photographed for child pornography, raped, beaten, robbed, and worse”); *see also* DOJ REPORT TO CONGRESS, *supra* note 23, at 29 & n.52 (describing how online enticement often results in serious and violent secondary consequences for children); Andriy Pazuniak, Comment, *A Better Way To Stop Online Predators: Encouraging a More Appealing Approach to § 2422(b)*, 40 SETON HALL L. REV. 691, 696 (2010) (noting that Congress highlighted the potential consequences of cyber-relationships between sexual predators and children while debating the Protection Act).

B. 18 U.S.C. § 2422(b) Criminalizes the Sexual Enticement of Minors

1. A history of the federal child enticement statute

The U.S. government has demonstrated an interest in protecting children from sexual predators for over a century. In 1910, the government enacted the Mann Act³² to prevent women and young girls from being prostituted against their wills.³³ Since then, the government has modified the Mann Act several times to respond to new challenges and societal changes. In 1986, for example, Congress significantly modernized the Mann Act to make the statute “gender neutral” and to criminalize the forced prostitution of any child, male or female, because “[t]he problem of the sexual exploitation of young males is equally as serious” as the sexual exploitation of young females.³⁴ In the mid-1990s, Congress updated the Mann Act again to address a rising trend of sexual enticement of children facilitated over the Internet.³⁵ Specifically, Congress created a new provision—18 U.S.C. § 2422(b)—that expressly prohibited enticing children “to engage in prostitution or any sexual act for which any person may be criminally prosecuted” via any facility of interstate commerce.³⁶

Two years later, Congress rewrote § 2422(b) in the Protection of Children From Sexual Predators Act of 1998³⁷ (“the Protection Act”). The legislative history of the Protection Act indicates that Congress passed the statute (1) to combat the sexual exploitation of children, especially crimes facilitated via the Internet; (2) to provide law enforcement with new tools to investigate and bring to justice sexual

32. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)).

33. See H.R. REP. NO. 61-47, at 9–10 (1909) (indicating that the Mann Act was intended “to put a stop to a villainous interstate and international traffic in women and girls”).

34. H.R. REP. NO. 99-910, at 3, 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952, 5953, 5957; see also Pazuniak, *supra* note 31, at 694 (describing the original purpose of the Mann Act and the 1986 amendments to the statute).

35. See H.R. REP. NO. 104-458, at 193 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 207 (declaring that Congress modified § 2422 to explicitly prohibit the online sexual enticement of children because increased instances of “online indecency, obscenity, and child endangerment . . . support[ed] the need for Congress to take effective action to protect children and families from online harm”).

36. Telecommunications Act of 1996, Pub. L. No. 104-104, § 508, 110 Stat. 56, 137 (codified as amended at 18 U.S.C. § 2422(b)). Before 1996, § 2422 prohibited “knowingly persuad[ing] . . . any individual to travel in interstate . . . commerce . . . to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense.” 18 U.S.C. § 2422 (1994) (emphasis added). The amended § 2422(b) criminalized *enticing* children to engage in illegal sexual acts. Telecommunications Act § 508.

37. Pub. L. No. 105-314, § 102, 112 Stat. 2974, 2976 (codified as amended at 18 U.S.C. § 2422(b) (2012)).

predators; and (3) to increase the penalties for predators convicted of crimes under the statute.³⁸ Under current law:

Whoever, using the mail or any facility or means of interstate . . . commerce, . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.³⁹

Thus, the Protection Act changed the preexisting “any sexual *act* for which any person may be criminally prosecuted” language⁴⁰ to “any sexual *activity* for which any person can be charged with a criminal offense.”⁴¹

Four elements comprise the federal child enticement offense under § 2422(b), and the government must prove each element beyond a reasonable doubt.⁴² Specifically, the defendant must “(1)

38. See H.R. REP. NO. 105-557, at 10–11 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 679–80 (identifying and describing the purposes of the Protection Act and indicating that it gave law enforcement a new “tool” by providing for federal jurisdiction over additional crimes committed against children, such as kidnapping); see also 144 CONG. REC. 25,761 (1998) (statement of Rep. Hastings) (acknowledging that, unlike the original bill in the House of Representatives, which criminalized contacting or attempting to contact minors, the final version of the statute did not prosecute “thought crime[s]” but rather actual and attempted efforts to entice children into sexual encounters).

Courts often review a statute’s legislative history to elucidate Congress’s intent in enacting the statute. See FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 58 (2009) (explaining that, although some scholars criticize the use of legislative history, American judges have reviewed legislative history when interpreting statutes since the early twentieth century). Some courts do not pay significant attention to floor statements when they review legislative history, but one district court has opined that “floor statements *by the sponsors* of the legislation are given considerably more weight than floor statements by other members.” *United States v. Sharp*, 463 F. Supp. 2d 556, 558–59, 561 & n.12 (E.D. Va. 2006) (emphasis added) (assessing a floor statement by the sponsor of the Federal Crime Victims’ Rights Act and determining that a woman whose ex-boyfriend abused her after he used marijuana distributed by the defendant was not a “crime victim” within the meaning of the statute). With respect to § 2422(b), Representative McCollum was one of the primary sponsors of the Protection Act. See 144 CONG. REC. at 12,035 (statement of Rep. Conyers) (noting that Mr. McCollum “primarily authored” the legislation). Employing the logic of the *Sharp* court, Representative McCollum’s floor statement that the Protection Act “respond[ed] to the horrifying threat of sex crimes against children,” *id.* at 12,034, can be reasonably inferred to constitute the consensus of House of Representatives when it passed the Protection Act.

39. 18 U.S.C. § 2422(b).

40. 18 U.S.C. § 2422(b) (Supp. II 1995–1997) (emphasis added).

41. Protection Act § 102 (codified as amended at 18 U.S.C. § 2422(b) (2012)) (emphasis added).

42. See *United States v. Cochran*, 534 F.3d 631, 633, 635 (7th Cir. 2008) (identifying four elements of the § 2422(b) offense that the government must prove beyond a reasonable doubt, indicating that several other federal courts of appeal have held that the government must prove the same four elements to convict a defendant of violating § 2422(b), and rejecting the defendant’s argument that he did not violate the second element of the offense, instead finding that his act of fondling

use interstate commerce; (2) to knowingly persuade, induce, entice, or coerce; (3) any person under 18; (4) to engage [or attempt to engage] in ‘any sexual activity for which any person can be charged with a criminal offense.’”⁴³ Courts have regarded the Internet as a “facility or means of interstate . . . commerce” in § 2422(b).⁴⁴

Section 2422(b), part of Chapter 117 of Title 18 of the U.S. Code,⁴⁵ is incomplete without reference to another federal or state statute defining “any sexual activity for which any person can be charged with a criminal offense.”⁴⁶ This phrase contains three sub-elements: (1) the minor must “engage[]” in the activity, (2) the minor’s activity must be “sexual” in nature, and (3) the minor’s activity must constitute a crime.⁴⁷ Although Congress explicitly defined terms like “sexual act”⁴⁸ and “illicit sexual conduct”⁴⁹ in other sections of Title

himself in front of a web camera for a person he subjectively thought was a minor was “coerc[ive]”); *accord* United States v. Goetzke, 494 F.3d 1231, 1234–35 (9th Cir. 2007) (per curiam) (employing a similar set of elements to reject the defendant’s argument that he did not satisfy the second element of the § 2422(b) offense because the defendant knew the victim was a minor but still made sexually explicit advances towards the victim); United States v. Brand, 467 F.3d 179, 201–03 (2d Cir. 2006) (applying these elements and determining that the defendant’s conduct satisfied the second element of § 2422(b) because he initiated contact with and made sexual advances towards two people he believed were minors).

43. *Cochran*, 534 F.3d at 633 (quoting 18 U.S.C. § 2422(b) (2006)).

44. *See, e.g.*, United States v. Berk, 652 F.3d 132, 138 (1st Cir. 2011) (stating that the indictment charging a defendant with violating § 2422(b) named the Internet as a means of interstate commerce); *Cochran*, 534 F.3d at 634 (interpreting an Internet chat room as a facility of interstate commerce); United States v. Sims, 428 F.3d 945, 949 (10th Cir. 2005) (same); United States v. Murrell, 368 F.3d 1283, 1286 (11th Cir. 2004) (exemplifying a case in which a defendant conceded that his online communications with an undercover officer satisfied the interstate commerce element of § 2422(b)); *see also* H.R. REP. NO. 105-557, at 10 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 679 (explaining that the Protection Act “target[ed] pedophiles who stalk children on the Internet”); Tyler Patrick Lovejoy, Comment, *A New Playground: Sexual Predators and Pedophiles Online: Criminalizing Cyber Sex Between Adults and Minors*, 20 ST. THOMAS L. REV. 311, 322 (2008) (suggesting that Congress intended to criminalize the act of engaging in an online sexual conversation with a child because Congress left the meaning of “any facility or means of interstate . . . commerce” open to interpretation).

45. Chapter 117, “Transportation for Illegal Sexual Activity and Related Crimes,” of Title 18 of the U.S. Code includes §§ 2421 to 2428 and criminalizes, among other acts, the sexual enticement of children and the transportation of minors to engage in illegal sexual activities. *See* 18 U.S.C. §§ 2421–2428 (2012).

46. *See generally* United States v. Taylor, 640 F.3d 255, 256 (7th Cir. 2011) (stating that most § 2422(b) prosecutions incorporate state penal statutes into the federal offense but that federal crimes are also eligible for incorporation into the statute).

47. *See* Brief of the Plaintiff-Appellee at 21, *Taylor*, 640 F.3d 255 (No. 10-2715), 2011 WL 859472, at *21.

48. *See* 18 U.S.C. § 2246(2)(D) (defining “sexual act,” as used in Chapter 109A of Title 18, as, among other things, “intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse . . . or [to] gratify the sexual desire of any person”).

49. *See id.* § 2423(f) (defining “illicit sexual conduct” as a “sexual act (as defined in section 2246),” but expressly confining the definition to § 2423).

18, Congress did not define “sexual activity” in § 2422(b).⁵⁰ Instead, elsewhere in Title 18, Congress only briefly explained that “sexual activity” includes the production of child pornography.⁵¹ Thus, crimes eligible for incorporation into the federal offense ultimately depend on the jurisdiction in which a given defendant’s case arises⁵² and the law or laws available for incorporation into § 2422(b).⁵³ Misdemeanor and felony sexual offenses can both be incorporated into § 2422(b).⁵⁴

2. *18 U.S.C. § 2422(b) criminalizes the actual and the attempted enticement of children*

Section 2422(b) prohibits two categories of crimes: (1) the sexual enticement of children and (2) the attempted sexual enticement of

50. See generally *id.* § 2422(b) (constituting the federal child enticement offense but lacking a section defining the elements of the offense).

51. See *id.* § 2427 (explaining that “sexual activity” in Chapter 117, which contains § 2422(b), “includes the production of child pornography,” but neglecting to specify what other conduct constitutes “sexual activity” in § 2422(b)).

52. See, e.g., *United States v. Fugit*, 703 F.3d 248, 250–51, 256 (4th Cir. 2012) (incorporating a Virginia statute into § 2422(b) because Fugit was indicted the U.S. District Court for the Eastern District of Virginia and not requiring the defendant to touch a minor to violate § 2422(b)), *cert. denied*, No. 12-10591, 2014 WL 210666 (U.S. Jan. 21, 2014); *Taylor*, 640 F.3d at 256, 260 (acknowledging that the government imported two Indiana state offenses into § 2422(b) because the U.S. District Court for the Northern District of Indiana oversaw Taylor’s case and requiring a defendant to touch or to intend to touch a minor to violate § 2422(b)).

53. See, e.g., *United States v. Dhingra*, 371 F.3d 557, 560 (9th Cir. 2004) (importing the law of the state where the defendant’s purported criminal activity actually occurred); *United States v. Kaye*, 451 F. Supp. 2d 775, 786 (E.D. Va. 2006) (importing the law of the state where the defendant’s attempted criminal activity would have occurred had the defendant been successful in his attempted sexual enticement of a child).

Defining criminal law has traditionally been part of the state police power. See *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting) (explaining that American constitutional law holds that the states are “laboratories” and that one of “[t]he States’ core police powers ha[s] always included authority to define [the] criminal law”); *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (same). Several states penalize enticing minors into illegal sexual encounters. See, e.g., D.C. CODE § 22-3010(b) (2013) (prohibiting enticement and attempted enticement of a child to engage in a sexual act); MD. CODE ANN., CRIM. LAW § 3-324(a)–(b) (LexisNexis 2007) (prohibiting enticement of a child to engage in several illegal sexual activities “by any means”); VA. CODE ANN. § 18.2-374.3 (2013) (prohibiting the use of computers to entice children to participate in sexual activities). Once defined as a “sexual activity,” even a “minor sex crime” is eligible for incorporation into § 2422(b). See *Taylor*, 640 F.3d at 257–58 (listing a number of hypothetical misdemeanor sexual offenses that states could enact and make eligible for incorporation into § 2422(b)).

54. For example, in *Fugit*, the government incorporated a Virginia law that criminalizes taking indecent liberties with a minor into § 2422(b), see *Fugit*, 703 F.3d at 251, and the offense is a felony, see VA. CODE ANN. § 18.2-370. Conversely, in *United States v. Shill*, the government incorporated two Oregon state misdemeanor offenses into § 2422(b). See No. 3:10-CR-493-BR, 2012 WL 529964, at *2–3 (D. Or. Feb. 17, 2012), *aff’d*, No. 13-30008, 2014 WL 259872 (9th Cir. Jan. 24, 2014). For a description of the *Shill* case, see *infra* note 146.

children.⁵⁵ Defendants commit the completed crime of sexual enticement of children when they convince an actual child to engage in a sexual activity that is prohibited under any federal or state law.⁵⁶ Conversely, defendants commit the crime of attempted sexual enticement of children when they intentionally attempt to convince a minor to engage in a criminal sexual activity.⁵⁷ To convict under the attempt provision, “the Government must establish beyond a reasonable doubt that the defendant ‘(1) acted with the culpability required to commit the underlying substantive offense, and (2) took a substantial step toward its commission.’”⁵⁸

The government can prosecute a defendant for attempted enticement of a minor even when the defendant does not interact with an “actual” child.⁵⁹ Federal prosecutors have used § 2422(b)’s attempt provision to charge predators who interact with adult intermediaries who the defendants subjectively think are minors.⁶⁰ In other cases, prosecutors have used the attempt provision to prosecute

55. 18 U.S.C. § 2422(b).

56. *See, e.g., Dhingra*, 371 F.3d at 559–60 (affirming a defendant’s conviction for sexual enticement of a minor where the defendant used the Internet to engage in explicit conversations with a girl he knew was less than eighteen years old, convinced her to meet him at a community college, and engaged in sexual activities with her).

57. *United States v. Hite*, No. 12-65 (CKK), 2013 WL 2901221, at *3 (D.D.C. June 14, 2013) (rejecting the defendant’s argument that the government must prove that a defendant charged under § 2422(b)’s attempt provision also attempted to violate the underlying, incorporated state offense); *see also United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000) (“[A] conviction under [§ 2422(b)] only requires a finding that the defendant had an intent to persuade or to attempt to persuade.”).

58. *United States v. Broussard*, 669 F.3d 537, 547 (5th Cir. 2012) (quoting *United States v. Barlow*, 568 F.3d 215, 219 (5th Cir. 2009)).

59. *See United States v. Kaye*, 451 F. Supp. 2d 775, 781 & n.5 (E.D. Va. 2006) (explaining that “every Court of Appeals to address th[e] issue has uniformly held that . . . an ‘actual minor’ is not required” to convict a person of attempted enticement and listing cases from seven circuit courts of appeal that have interpreted the statute this way); *see, e.g., United States v. Tykarsky*, 446 F.3d 458, 468–69 (3d Cir. 2006) (rejecting the defendant’s legal impossibility argument that he could not have attempted to violate § 2422(b) because he corresponded only with an undercover agent); *United States v. Blazek*, 431 F.3d 1104, 1107–08 (8th Cir. 2005) (dismissing the defendant’s argument that the evidence of his coercive communications with an undercover officer posing as a minor was “insufficient” to convict him under § 2422(b)’s attempt provision and holding that the trial court did not commit plain error when it interpreted § 2422(b) as allowing convictions for interacting exclusively with fictitious minors); *United States v. Sims*, 428 F.3d 945, 959–60 (10th Cir. 2005) (finding that factual impossibility does not apply to § 2422(b) attempt prosecutions and that it is not a defense to a child sexual enticement charge that actual minors were not involved); *United States v. Meek*, 366 F.3d 705, 717–18 (9th Cir. 2004) (same); *United States v. Root*, 296 F.3d 1222, 1227–29, 1230 n.14 (11th Cir. 2002) (same); *United States v. Farner*, 251 F.3d 510, 513 (5th Cir. 2001) (same).

60. *See, e.g., Kaye*, 451 F. Supp. 2d at 782, 784–86 (finding that the defendant’s sexually explicit online communications demonstrated that he believed he was interacting with a thirteen-year-old boy, even though he was actually interacting with an adult, and indicating the government could only charge him under § 2422(b)’s attempt provision because the defendant did not interact with an actual minor).

predators based on conversations between adults where the adult intermediary never claimed to be a minor but, for example, claimed to be the parent of a minor and agreed to allow the defendant to have sex with the minor.⁶¹ The federal courts of appeals generally agree that “[a] conviction under [the attempt provision of] § 2422(b) requires a finding only of an attempt to entice or an intent to entice, and not an intent to perform the sexual act.”⁶² These courts’ reasoning is consistent with traditional attempt liability in American criminal jurisprudence, which requires a defendant to take a “substantial step” towards completion of a criminal offense, as well as the Supreme Court’s principle that a “substantial step” is an “overt act” towards completion of the offense in question.⁶³

3. *A § 2422(b) conviction carries a minimum ten-year prison sentence*

Since enacting the Protection Act, Congress has twice amended § 2422(b)’s penalty provision to ensure that defendants convicted of violating § 2422(b) are punished relative to the severity of their conduct. The Protection Act originally penalized defendants convicted of violating § 2422(b) with a fine, imprisonment for up to fifteen years, or both.⁶⁴ In 2003, Congress changed the penalty to require convicted defendants to spend a minimum of five—and a maximum of thirty—years in prison and to pay a fine.⁶⁵ Specifically, Congress added the minimum sentence in “respons[e] to real problems of excessive leniency under [then-]existing law,”

61. See, e.g., *United States v. Murrell*, 368 F.3d 1283, 1286, 1288 (11th Cir. 2004) (holding, in a case “of first impression in the federal circuit courts,” that defendants can be convicted for violating § 2422(b)’s attempt provision when they have knowingly communicated with adults).

62. E.g., *United States v. Brand*, 467 F.3d 179, 202 (2d Cir. 2006); see, e.g., *United States v. Thomas*, 410 F.3d 1235, 1244 (10th Cir. 2005) (“Section 2422(b) requires only that the defendant intend to entice a minor, not that the defendant intend to commit the underlying sexual act.”); see also *United States v. Nitschke*, 843 F. Supp. 2d 4, 11 (D.D.C. 2011) (collecting cases finding that § 2422(b) prohibits “the intent to . . . coerce a minor, not the intent to have sex with a minor”).

63. See *United States v. Resendiz-Ponce*, 549 U.S. 102, 106–07 (2007) (explaining the common law doctrine of attempt liability and that “the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct”); see also *Nitschke*, 843 F. Supp. 2d at 9 (establishing that, to successfully convict a defendant under § 2422(b)’s attempt provision, the government must prove that the defendant intended to complete a crime and committed an act that went “beyond mere preparation” in furtherance of his or her intent (citation omitted)).

64. Pub. L. No. 105-314, § 102, 112 Stat. 2974, 2976 (1998) (codified as amended at 18 U.S.C. § 2422(b) (2012)).

65. See *Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003*, Pub. L. No. 108-21, § 103, 117 Stat. 650, 652–53 (amending § 2422(b) “by striking ‘, imprisoned’ and inserting ‘and imprisoned not less than 5 years and’” and “by striking ‘15’ and inserting ‘30’”).

particularly in cases involving undercover officers posing as minors.⁶⁶ Congress also increased the maximum sentence to thirty years because Congress considered a § 2422(b) conviction to be one of “the most serious crimes of sexual abuse and sexual exploitation of children.”⁶⁷ Three years later, Congress again increased the mandatory minimum sentence, this time to ten years, and increased the maximum sentence to life in prison.⁶⁸ The mandatory ten-year minimum sentence and the maximum life sentence for violating § 2422(b) remain in effect today.⁶⁹

The U.S. Federal Sentencing Guidelines (“the Guidelines”) provide judges with further instructions to consider when they sentence individuals convicted of federal crimes.⁷⁰ Developed in response to the Sentencing Reform Act of 1984,⁷¹ the Guidelines prescribe recommended sentencing ranges for each federal offense.⁷² For example, the Guidelines recommend that judges sentence a defendant convicted of violating § 2422(b) to between six and a half and eight years in prison if the defendant does not have a criminal history.⁷³ The Guidelines also recommend that courts increase a defendant’s sentence if the circumstances surrounding his or her case satisfy one or more aggravating factors—for instance, if the defendant knowingly misrepresented himself or herself to entice a

66. H.R. REP. NO. 108-66, at 51 (2003) (Conf. Rep.), *reprinted in* 2003 U.S.C.C.A.N. 683, 685.

67. *Id.* at 50.

68. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 203, 120 Stat. 587, 613 (requiring that convicted defendants spend time in prison and pay a fine); *see* H.R. REP. NO. 109-218, at 27 (2005) (explaining that Congress made the penalties for several child sexual offenses harsher because the “sentences imposed for sexual abuse and exploitation of children appear[ed] to be unduly lenient”).

69. *See* 18 U.S.C. § 2422(b) (stating that defendants convicted of violating § 2422(b) “shall be . . . imprisoned not less than 10 years or for life”).

70. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A1.2 (2013) (explaining that the Guidelines prescribe suggested “ranges that specify an appropriate sentence for each class of convicted persons”).

71. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.). *See generally* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A1.1–2 (noting that one of the purposes of the Sentencing Reform Act of 1984 was to “provide[] for the development of guidelines that w[ould] further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation” and that the U.S. Sentencing Commission, an independent judicial agency, developed the Guidelines).

72. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A1.2. The Guidelines contain forty-three offense “levels” that work to increase a sentence proportionally to the severity of the defendant’s conduct. *See id.* ch. 1, pt. A1.4(h). An offense level does not constitute the number of years of a recommended sentence; instead, an offense level corresponds to a recommended sentence that is reflected in a separate sentencing table in the Guidelines. *Id.*

73. Section 2422(b) has an offense level of twenty-eight, *id.* § 2G1.3(a)(3), which, in turn, corresponds to a prison sentence of between six and a half and eight years under the Guidelines’ sentencing table. *Id.* ch. 5, pt. A.

minor to engage in an illegal sexual activity or if the enticement offense involved the use of a computer.⁷⁴

Federal district courts are not required to follow the Guidelines when they sentence convicted defendants,⁷⁵ and statutory minimum and maximum sentences “trump[] the Guidelines.”⁷⁶ Thus, although the Guidelines recommend that courts sentence defendants convicted of violating § 2422(b) to between six and a half and eight years in prison if they lack criminal histories,⁷⁷ all defendants convicted of violating § 2422(b) must spend at least ten years in prison.⁷⁸ Nonetheless, district courts must refer to the Guidelines, including the aggravating factors, when they sentence defendants convicted of violating § 2422(b).⁷⁹

C. Two Federal Circuit Courts Are Split Over the Meaning of “Sexual Activity” in § 2422(b)

Congress’s failure to define “sexual activity” in § 2422(b) has led to a circuit split between the Fourth and Seventh Circuits over the meaning of the term. Further, these two courts disagree about what conduct is required for culpability under the statute.

74. *See id.* § 2G1.3(b) (defining five “specific offense characteristics” that sentencing courts may use to raise a defendant’s base offense level and sentence). If a defendant convicted of violating § 2422(b) knowingly misrepresented himself or herself to entice a minor to engage in an illegal sexual activity or if the enticement offense involved the use of a computer, the Guidelines recommend raising the offense level to thirty. *See id.* § 2G1.3(b)(2)–(3). This increase corresponds to a minimum prison sentence of between approximately eight and ten years for defendants who lack criminal histories. *See id.* ch. 5, pt. A.

75. *United States v. Booker*, 543 U.S. 220, 264 (2005). The original 1987 version of the Guidelines required federal district courts to sentence defendants according to the Guidelines’ ranges. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A1.2 (“Pursuant to the [Sentencing Reform] Act, the sentencing court must select a sentence from within the guideline range.”). Courts could only “depart from the [G]uidelines and sentence outside [of a] prescribed range” if a defendant’s case presented atypical characteristics. *Id.* In 2005, the Supreme Court struck down the two statutory provisions that made the Guidelines mandatory, holding that their mandatory nature violated defendants’ Sixth Amendment right to a jury trial. *Booker*, 543 U.S. at 226–27; *see also* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A2 (asserting that even though the Supreme Court in *Booker* “rendered the [G]uidelines advisory in nature,” the Court reaffirmed “[t]he continuing importance of the [G]uidelines in federal sentencing”).

76. *Dorsey v. United States*, 132 S. Ct. 2321, 2327 (2012) (explaining, in the context of the 1986 Drug Act, that judges cannot sentence offenders below statutory minimum sentences or above statutory maximum sentences regardless of what sentence the Guidelines advise).

77. *See supra* note 73 and accompanying text.

78. *See* 18 U.S.C. § 2422(b) (2012) (establishing a mandatory minimum ten-year sentence for violating the federal child enticement statute).

79. *Booker*, 543 U.S. at 264.

Specifically, the Seventh Circuit in *United States v. Taylor* held that “sexual activity” in § 2422(b) requires a defendant to engage in interpersonal physical contact with a minor.⁸⁰ In *Taylor*, the defendant was convicted of attempted enticement of a minor and sentenced to ten years in prison.⁸¹ He appealed, asserting that he did not commit a “sexual activity” within the meaning of the statute because he never touched a child.⁸²

After acknowledging that Congress did not define “sexual activity” in § 2422(b), the Seventh Circuit resorted to interpreting the meaning of the term.⁸³ In so doing, Judge Posner, the author of the *Taylor* decision, first argued that Congress likely intended to confine the definition of “sexual activity” to “sexual acts” involving physical contact between two or more individuals.⁸⁴ The court reasoned that an alternative, broader interpretation of the term would leave open the possibility that individuals convicted of violating § 2422(b) could be subject to an incongruent ten-year prison sentence relative to their conduct.⁸⁵ Further, Judge Posner argued that Congress must have intended to import § 2246(2)(D)’s definition of “sexual act,” which requires physical contact, into § 2422(b) and to require intentional touching of the genitalia of a minor for culpability under § 2422(b).⁸⁶ Judge Posner reasoned that Congress used “sexual act” and “sexual activity” interchangeably when debating the Protection

80. *United States v. Taylor*, 640 F.3d 255, 259 (7th Cir. 2011). In this case, the government imported two Indiana penal statutes into 18 U.S.C. § 2422(b) to establish the federal offense, one of which prohibited touching or fondling oneself in the presence of a minor with the intent to arouse the child, and the other of which prohibited solicitation of a minor. *Id.* at 256. Defendants do not need to engage in physical contact with children to violate either of the imported Indiana statutes. *Id.*

81. *Id.* at 256.

82. *Id.* at 256–57.

83. *Id.* at 256.

84. *See id.* at 256–59 (stating that one would expect Congress to define “sexual activity” if the term included offenses that do not involve physical contact because the idea that Congress would leave open the list of crimes eligible for incorporation into § 2422(b) “is a questionable practice”). One of the judges did not agree with the majority’s holding in this regard. *See id.* at 260 (Manion, J., concurring) (“I would not go so far and equate the term ‘sexual activity’ with ‘sexual act.’ Sexual activity is a broader term that includes things sexual that do not involve the actual physical encounter.”).

85. *Id.* at 258 (majority opinion) (arguing that § 2422(b)’s ten-year mandatory minimum sentence is incongruent to statutes that, hypothetically, could prohibit “flirting” with or “flashing” a child and that, under a broad interpretation of “sexual activity,” the federal government could use such minor offenses to charge defendants with violating § 2422(b)); *see also Seventh Circuit Adopts Narrow Construction of “Sexual Activity” in Child Enticement Law*, 89 Crim. L. Rep. (BNA) 65 (Apr. 13, 2011) (indicating that the Seventh Circuit’s opinion “stressed that [§ 2422(b)] already risks turning offenses treated by state law as misdemeanors into 10-year federal felonies”).

86. *See Taylor*, 640 F.3d at 257–59.

Act.⁸⁷ Third, the Seventh Circuit found that “sexual activity” must require physical contact because Congress has only defined “sexual activity” to include the production of child pornography, an activity that does not involve physical contact.⁸⁸ Ultimately, the Seventh Circuit found that the meaning of “sexual activity” was ambiguous⁸⁹ and held that the “rule of lenity,” which dictates that ambiguous criminal statutes should be interpreted in favor of defendants, required the tie go to the defendant.⁹⁰

One year after *Taylor*, the Fourth Circuit in *United States v. Fugit* addressed the same question of whether “sexual activity” in § 2422(b) requires a defendant to engage in physical contact with a minor and expressly declined to adopt the Seventh Circuit’s interpretation.⁹¹ In *Fugit*, the defendant pled guilty to one count of violating § 2422(b) for attempting to use the Internet and a phone to entice a minor to engage in sexual activities with him.⁹² After the Seventh Circuit decided *Taylor*, Fugit appealed his conviction and asserted that the district court in his case should not have interpreted “sexual activity” in § 2422(b) to include crimes that do not involve physical contact with a minor.⁹³

The Fourth Circuit disagreed and upheld Fugit’s conviction, holding that the plain meaning of “sexual activity” includes “conduct connected with the ‘active pursuit of libidinal gratification’” and does not require interpersonal physical contact with a child.⁹⁴ The opinion emphasized that a broad construction of “‘sexual activity’ . . .

87. *Id.* at 258.

88. *Id.* at 259 (“Explicitly defining sexual activity to include producing child pornography was needed only if the term ‘sexual activity’ requires contact, since the creation of pornography doesn’t involve contact between the pornographer and another person; this is further evidence that ‘sexual activity’ as used in the federal criminal code does require contact.”).

89. *See id.* (acknowledging that the court “[could] not be certain” that “sexual act” was synonymous with “sexual activity”).

90. *Id.* at 259–60; *see* *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion) (defining the “rule of lenity” and explaining that the rule “vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed”); *see also infra* notes 199–200, 203–04 and accompanying text (discussing the history and purpose of the rule of lenity).

91. *United States v. Fugit*, 703 F.3d 248, 255–56 (4th Cir. 2012) (“[T]he Seventh Circuit’s decision in *United States v. Taylor* . . . was mistaken.”), *cert. denied*, No. 12-10591, 2014 WL 210666 (U.S. Jan. 21, 2014).

92. *Id.* at 251. To establish the federal offense, the government imported a Virginia law that prohibited taking indecent liberties with children into § 2422(b). *Id.*

93. *Id.* at 253–54.

94. *Id.* at 255.

renders the statutory scheme coherent as a whole.”⁹⁵ Noting that § 2422(b) only criminalizes conduct on a federal level that is already criminally prohibited under other statutes, the Fourth Circuit rejected the defendant’s assertion that a broad construction of “sexual activity” would “become[] a trap capable of snaring all sorts of innocent behavior.”⁹⁶

The recent circuit split over a previously uncontested element of § 2422(b) has the potential to change prosecutions under the federal child enticement statute. The defendants in *Taylor* and *Fugit* committed similar crimes involving the use of the Internet in that both defendants attempted to entice a person they believed was a child to participate in an illegal “sexual activity” and neither defendant touched a child.⁹⁷ However, the Fourth Circuit upheld *Fugit*’s conviction and sentence by applying a broad interpretation of “sexual activity,”⁹⁸ while the Seventh Circuit reversed *Taylor*’s conviction by applying a narrower interpretation of “sexual activity” that requires a defendant to engage in physical contact with a minor.⁹⁹ *Fugit*, and several other defendants, have contested their convictions under § 2422(b) and asserted that their conduct does not qualify as “sexual activity” under the statute.¹⁰⁰ Although no other

95. *Id.* (arguing that Congress intended the Protection Act to combat all types of child sexual exploitation, especially “the psychological sexualization of children,” an “evil” that can occur in the absence of “interpersonal physical contact”).

96. *Id.* (suggesting that the court’s own interpretation of “sexual activity” is “narrower” than the Seventh Circuit’s interpretation in at least one sense because § 2422(b) only forbids conduct that is already prohibited under other penal statutes).

97. *See id.* at 251 (stating that *Fugit* asked an eleven-year-old girl sexually explicit questions about her body in an online chat room and over the phone but never touched her); *United States v. Taylor*, 640 F.3d 255, 257 (7th Cir. 2011) (explaining that *Taylor* fondled himself in front of a web camera for a person he thought was an underage girl and that he invited the “girl” to masturbate for him but never touched “her”).

98. *See Fugit*, 703 F.3d at 252 (affirming the defendant’s sentence of seventy-months in prison for violating § 2422(b) and the consecutive twenty-year sentence for distributing child pornography).

99. *See Taylor*, 640 F.3d at 260 (reversing the appellant’s conviction and statutory minimum ten-year prison sentence for violating § 2422(b)).

100. *See, e.g., Zahursky v. United States*, Nos. 2:12-CV-85, 2:06-CR-109, 2012 WL 5332356, at *5 (N.D. Ind. Oct. 26, 2012) (holding that *Taylor* did not apply where the defendant was not charged with masturbating in front of a web camera but, instead, with attempting to entice a person whom the defendant thought was a child to engage in physical sexual activity); *United States v. Shill*, No. 3:10-CR-493-BR, 2012 WL 529964, at *5–7 (D. Or. Feb. 17, 2012) (arguing that the Seventh Circuit’s reasoning in *Taylor* did not help the defendant’s arguments regarding the meaning of “sexual activity” because § 2422(b) should be read in its entirety, not in parts), *aff’d*, No. 13-30008, 2014 WL 259872 (9th Cir. Jan. 24, 2014); *see also United States v. Broussard*, 669 F.3d 537, 550–51 (5th Cir. 2012) (noting that the defendant alleged that a violation of a Louisiana statute imported into § 2422(b) did not constitute “sexual activity” under *Taylor* but declining to decide the issue because the government dismissed the § 2422(b) charge).

court has undertaken the precise issue from *Fugit* and *Taylor* regarding what constitutes “sexual activity” under the statute, courts have declined to extend *Taylor*’s narrow interpretation of the term to the factual circumstances of other § 2422(b) prosecutions.¹⁰¹

II. AFTER APPLYING RELEVANT CANONS OF CONSTRUCTION, COURTS SHOULD FOLLOW THE FOURTH CIRCUIT’S INTERPRETATION FROM *FUGIT* AND BROADLY INTERPRET “SEXUAL ACTIVITY” IN § 2422(B)

Historically, American judges have used tools of interpretation, often called “canons of construction,” to deduce the meaning of ambiguous statutory language.¹⁰² Proponents of the canons of construction often defend the canons because they represent “commonsense virtues” and make exercises in statutory interpretation “predictable.”¹⁰³ Conversely, critics of the canons have argued that courts should not heavily rely on the canons because some judges have used them to justify judicial policymaking—a practice that arguably violates the Constitution’s separation of powers principle.¹⁰⁴ However, various courts, including the U.S. Supreme

101. See *supra* note 100 (listing cases that declined to extend the holding in *Taylor* beyond its facts).

102. See, e.g., *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218–20, 225–28 (2008) (applying several canons of construction to resolve a dispute among several federal circuit courts of appeal regarding the meaning of “other law enforcement officer” within the sovereign immunity provisions of the Federal Tort Claims Act (FTCA)); see also James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 7 (2005) (defining the “canons of construction” as “norms and conventions” that courts use to interpret statutes and explaining that judges “regularly exercise broad discretion” in deciding whether to employ them). The canons are often organized into two categories: the linguistic canons and the substantive canons. CROSS, *supra* note 38, at 85. The linguistic canons are “akin to rules of grammar,” *id.*, and they “arguably invoke a conservative or libertarian limitation on legislation . . . [that] prevents judges from adding unmentioned things to a statute’s coverage.” *Id.* at 87. Conversely, the substantive canons enable judges to interpret the content of a statute and frequently have roots in the Constitution. *Id.* at 85–86.

103. Brudney & Ditslear, *supra* note 102, at 4–5 (articulating several arguments in favor of the use of the canons of construction while also recognizing that judges and legal scholars do not universally hold the use of the canons in high regard); see also David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992) (proposing that the canons are valuable tools because they further continuity in statutory interpretation); cf. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (revealing that the canons are “guides” designed to help courts determine legislators’ intent from the express terms of a statute but acknowledging that “other circumstances evidencing congressional intent can overcome their force”).

104. See CROSS, *supra* note 38, at 91 (discussing legal realist Karl Llewellyn’s “legendary” critique of the canons of construction and his claim that “the canons were convenient beards for ideological decision making”); James M. Landis, *A Note on “Statutory Interpretation,”* 43 HARV. L. REV. 886, 890 (1930) (advancing that some “strong judges prefer to override the intent of the legislature in order to make law according to their own views”); see also Karl N. Llewellyn, *Remarks on the Theory of*

Court, continue to rely on the canons of construction when interpreting statutes.¹⁰⁵

This Part uses three canons of statutory interpretation—the plain meaning rule, the whole act rule, and the rule of lenity—to analyze the meaning of “sexual activity” in 18 U.S.C. § 2422(b). Although multiple other canons of construction exist, courts frequently invoke these three canons to interpret penal statutes.¹⁰⁶

Courts typically begin their statutory analysis by reviewing the plain meaning of the statute’s words.¹⁰⁷ Next, courts often interpret the meaning of individual words or phrases in a statute by assessing their relationship to the statute as a whole.¹⁰⁸ Finally, if a court finds the meaning of the words in a criminal statute ambiguous, it may apply the rule of lenity, which provides that a criminal defendant is “entitled to the benefit of the more lenient” interpretation.¹⁰⁹

The Fourth Circuit in *Fugit* properly interpreted the meaning of “sexual activity” in § 2422(b) when it held that a person accused of

Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 VAND. L. REV. 395, 396 (1950) (explaining that, while judges may correctly interpret statutes using the canons of construction, judges sometimes must choose which “correct” interpretation to follow); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983) (arguing that, as a whole, the canons of construction have limited interpretive value). Although Judge Posner has critiqued use of the canons, see Posner, *supra*, at 806, he explicitly used a canon of statutory interpretation when he interpreted the meaning of “sexual activity” in *Taylor*, see *supra* notes 89–90 and accompanying text (stating that Judge Posner invoked the rule of lenity to reverse the defendant’s conviction in *Taylor*, 640 F.3d 255, because he found the meaning of “sexual activity” in § 2422(b) ambiguous).

105. See, e.g., *Chickasaw Nation*, 534 U.S. at 86, 88–89 (rejecting the Chickasaw and Choctaw Nations’ argument that the Court should use canons of construction that favor resolving ambiguous statutes in favor of Indian tribes to exempt tribes from paying gambling-related taxes under the Indian Gaming Regulatory Act and also finding that no other canon of construction supported the tribes’ interpretation of the statute); *Varity Corp. v. Howe*, 516 U.S. 489, 491–92, 511 (1996) (indicating that the canons are “‘rules of thumb’ which will sometimes ‘help courts determine the meaning of legislation’” and using the canon that the “specific governs the general” to assess the meaning of a provision in the Employee Retirement Income Security Act of 1974 (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992))); see also *supra* note 102 (describing the Supreme Court’s application of canons of construction in interpreting the FTCA in *Ali*, 552 U.S. 214).

106. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 930 (2013) (“[T]he canons most commonly employed by courts . . . [include] the whole act rule[] and the use of dictionaries”); *infra* note 196 and accompanying text (explaining that courts sometimes apply the rule of lenity and interpret ambiguous criminal statutes in favor of the more lenient approach on the grounds that criminal defendants should not be penalized for a legislature’s failure to write an unambiguous statute).

107. See *infra* notes 110–13 and accompanying text (defining the plain meaning rule).

108. See *infra* notes 141–43 and accompanying text (defining the whole act rule).

109. *Taylor*, 640 F.3d at 259–60; see *infra* notes 196–97 and accompanying text (defining the rule of lenity).

violating the federal child enticement statute does not need to physically touch a minor to violate the statute. The plain meaning and whole act rules weigh against the Seventh Circuit's narrow construction of "sexual activity." Thus, the Seventh Circuit should not have applied the rule of lenity because "sexual activity" is not significantly ambiguous. Accordingly, the Seventh Circuit erred in reversing Taylor's conviction.

A. *The Plain Meaning of "Sexual Activity" Indicates that a Defendant Does Not Need To Touch a Child To Violate § 2422(b)*

As previously mentioned, the first step in interpreting a statute, including penal statutes like § 2422(b), is to use the "plain meaning rule" to analyze the words of the statute itself.¹¹⁰ The plain meaning rule dictates that the words of a statute provide its meaning, constitute its substance and effect, and reflect the legislature's purpose.¹¹¹ The rule also requires that when a statute does not define a word or phrase, courts must use the word or phrase's ordinary meaning.¹¹² The Supreme Court has used the plain meaning approach and encouraged its use among lower courts to prevent judges from engaging in judicial policy making and, thereby, from subverting congressional intent.¹¹³

In assessing a term's plain or ordinary meaning, courts often import the term's definition from one or more dictionaries.¹¹⁴ Of

110. See, e.g., *Dean v. United States*, 556 U.S. 568, 572 (2009) ("We start, *as always*, with the language of the statute." (emphasis added) (quoting *Williams v. Taylor*, 529 U.S. 420, 431 (2000))); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (establishing that courts must first use the plain meaning rule when performing an exercise in statutory interpretation). *But see* Posner, *supra* note 104, at 807–08 (arguing "the proposition is false" that judges begin their inquiries into statutory interpretation by reviewing the words of a statute and suggesting that some judges never even look at a statute's words).

111. See *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (noting that, when using canons of construction, "courts must presume that a legislature says in a statute what it means and means in a statute what it says"); *United States v. Mo. Pac. R.R.*, 278 U.S. 269, 278 (1929) (explaining that a statute's words constitute the enacting legislature's purpose when the words are unambiguous and when construing the statute "according to its terms does not lead to absurd or impracticable consequences").

112. *United States v. Santos*, 553 U.S. 507, 511 (2008) (plurality opinion) (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)).

113. See Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 972 (2005) (explaining that the Court's application of the plain meaning approach "restrict[s] federal courts' impulses to construe statutes to serve policy goals other than the ones Congress articulated within the statute"); see also cases cited *supra* note 111 (listing two cases in which the Supreme Court used the plain meaning rule to interpret a statute).

114. See, e.g., *Santos*, 553 U.S. at 511 (plurality opinion) (using three dictionaries to assess the meaning of the term "proceeds," which was undefined in the federal

course, many common English words have multiple ordinary meanings as well as multiple dictionary definitions.¹¹⁵ In such instances, the plain meaning rule dictates that courts “assume the contextually appropriate ordinary meaning unless there is reason to [do] otherwise.”¹¹⁶

The Fourth and Seventh Circuits disagree about what defendants must do to violate § 2422(b) and, specifically, what conduct amounts to “sexual activity” for purposes of the statute.¹¹⁷ On its face, the phrase “any sexual activity for which any person can be charged with a criminal offense” plainly does not discuss, let alone require, a person accused of violating § 2422(b) to engage in interpersonal physical contact with a minor. As the Fourth Circuit has explained, the statute is not premised on—and does not even mention—physical contact.¹¹⁸

The phrase “any sexual activity for which any person can be charged with a criminal offense” contains three sub-elements: (1) the minor must be “engaged” in the activity, (2) the activity must be “sexual” in nature, and (3) the activity must be one “for which any person can be charged with a criminal offense.”¹¹⁹ When Congress amended § 2422(b), the words used in these sub-elements plainly did not individually or collectively require a defendant to touch a child to violate the statute.

money-laundering statute); *see also* *FAA v. Cooper*, 132 S. Ct. 1441, 1448–49 (2012) (using *Black’s Law Dictionary* to interpret the meaning of “actual damages” as used in the civil-remedies provision of the Privacy Act); *United States v. Gonzales*, 520 U.S. 1, 4–5 (1997) (using a dictionary to interpret the meaning of “any” in the federal statute prohibiting the use of firearms in connection with federal drug trafficking).

115. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 70 (2012). When a statute does not define a term, courts may look at what the term meant when the statute was enacted. *See, e.g.*, *Perrin v. United States*, 444 U.S. 37, 42 (1979) (interpreting the meaning of the word “bribery” in the 1961 Travel Act by evaluating what the word meant in 1961). Additionally, courts will interpret the language consistently with its “common understanding” in contemporary dictionaries. *See, e.g.*, *Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located in Maricopa Cnty.*, 627 F.3d 1268, 1269–70 (9th Cir. 2010) (consulting several historical and contemporary dictionaries to determine the ordinary meaning of “United States” in the Uniform Relocation Assistance and Real Property Acquisition Policies Act).

116. SCALIA & GARNER, *supra* note 115, at 70 (criticizing the argument, made by an opponent of the plain meaning rule, that the rule “presumes . . . that all native listeners and readers of language always understand the same thing the speakers intended” and countering that “the rule [instead] presumes . . . that a thoroughly fluent reader can reliably tell in the vast majority of instances from contextual and idiomatic clues which of several possible senses a word or phrase bears” (quoting LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 64 (2008))).

117. *See supra* Part I.C (discussing the circuit split over the meaning of “sexual activity” in § 2422(b)).

118. *United States v. Fugit*, 703 F.3d 248, 254 (4th Cir. 2012), *cert. denied*, No. 12-10591, 2014 WL 210666 (U.S. Jan. 21, 2014).

119. Brief of the Plaintiff-Appellee, *supra* note 47, at 21 (quoting 18 U.S.C. § 2422(b) (2006)).

First, when Congress enacted § 2422(b) in the 1990s, the word “engage” did not imply or require interpersonal physical contact between two or more individuals.¹²⁰ According to the 1990 edition of *Black’s Law Dictionary*, the word “engage” meant “[t]o employ or involve one’s self; to take part in; to embark on.”¹²¹ Likewise, *Merriam-Webster’s Collegiate Dictionary (Merriam Webster’s)* explained that “engage” meant “to induce to participate[;] . . . to begin and carry on an enterprise or activity[;] . . . to take part.”¹²² These definitions both emphasize that an individual “engaged” in an activity by participating in the activity. On their faces, however, neither definition discusses or requires physical contact between two or more people. Thus, whether the term “engage” involves physical contact between an adult and a child turns on the circumstances of the activity or enterprise in question.

Likewise, “sexual activity” did not require physical contact between two people when Congress enacted § 2422(b). The 1990 edition of *Black’s Law Dictionary* is not instructive in determining what “sexual activity” meant when Congress enacted § 2422(b) because, at that time, the dictionary did not define “sexual activity” or even the word “sexual.”¹²³ Rather, *Black’s Law Dictionary* only defined “activity” as “[a]n occupation or pursuit in which a person is active.”¹²⁴ Similarly, *Merriam-Webster’s* did not define “sexual activity,” but it did define “sexual” as “of, relating to, or associated with sex”¹²⁵ and explained that, among several other meanings, “sex” meant a “sexually motivated phenomena or behavior.”¹²⁶ Although *Merriam-Webster’s* also defined sex as “either of the two major forms of individuals . . . distinguished respectively as female or male” and “the structural, functional, and behavioral characteristics . . . involved in reproduction,”¹²⁷ neither of these definitions explicitly referred to physical contact between two human beings. Instead, they plainly relate to gender and human reproduction, respectively.

120. *Id.* at 22–23. Moreover, as the government noted in its brief to the Seventh Circuit in *Taylor*, “[n]o federal court of which the government is aware has specifically defined ‘engage’ as used in Section 2422(b).” *Id.* at 22.

121. BLACK’S LAW DICTIONARY 528 (6th ed. 1990) [hereinafter BLACK’S 1990 EDITION].

122. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 383 (10th ed. 1993) [hereinafter MERRIAM-WEBSTER’S 1993 EDITION].

123. See BLACK’S 1990 EDITION, *supra* note 121, at 1375 (lacking definitions of “sexual activity” and “sexual”).

124. *Id.* at 33.

125. MERRIAM-WEBSTER’S 1993 EDITION, *supra* note 122, at 1074.

126. *Id.* at 1073; see also *United States v. Fugit*, 703 F.3d 248, 254 (4th Cir. 2012) (defining “sexual” as “of or relating to the sphere of behavior associated with libidinal gratification” (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2082 (1993)) (internal quotation marks omitted)), *cert. denied*, No. 12-10591, 2014 WL 210666 (U.S. Jan. 21, 2014).

127. MERRIAM-WEBSTER’S 1993 EDITION, *supra* note 122, at 1073.

The definition of “sex” as “a sexually motivated behavior” emphasizes that “sexual activity” does not require interpersonal physical contact. Rather, “sexually motivated” behaviors are plainly associated with gratifying one’s sexual desires. As the Fourth Circuit declared in *Fugit*, “[t]he fact that such conduct need not involve interpersonal physical contact is self-evident”: sexual gratification may, but does not require, interactions with another person, much less interpersonal physical interactions.¹²⁸

Today, a “sexual activity” sometimes, but not always, involves interpersonal physical contact. The 2007 version of *Merriam-Webster’s Collegiate Dictionary*, like its 1990s counterpart, does not define “sexual activity.”¹²⁹ However, *Merriam-Webster’s* continues to define “sexual” as “of, relating, to, or associated with sex.”¹³⁰ Further, although *Merriam-Webster’s* defines “sex” as “sexual intercourse,”¹³¹ an act that decidedly involves physical contact,¹³² the dictionary also continues to define “sex” as “a sexually motivated phenomena or behavior.”¹³³ By its terms, “a sexually motivated phenomena or behavior” does not involve physical contact. Likewise, *Merriam-Webster’s* current definition of “activity” does not require physical contact. Instead, the dictionary defines “activity” as “the quality or state or being active” and “a pursuit in which a person is active.”¹³⁴

Unlike the contemporary edition of *Merriam-Webster’s*, which does not explicitly define “sexual activity,”¹³⁵ *Black’s Law Dictionary* currently defines “sexual activity” as “sexual relations.”¹³⁶ In turn, the term “sexual relations” means “[s]exual intercourse” or “[p]hysical sexual activity that does not necessarily culminate in intercourse.”¹³⁷ Admittedly, sexual intercourse and physical sexual activity by their ordinary meanings both involve physical contact between two or

128. See *Fugit*, 703 F.3d at 255 (concluding, in the context of child sexual abuse, that “sexual abuse of a minor” means the ‘perpetrator’s physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification’” (second emphasis added) (quoting *United States v. Diaz-Ibarra*, 522 F.3d 343, 351–52 (4th Cir. 2008))).

129. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1141 (11th ed. 2007) (lacking a definition of “sexual activity”).

130. *Id.*

131. *Id.* at 1140.

132. See *id.* at 1141 (defining “sexual intercourse” as “intercourse involving penetration of the vagina” or “intercourse (as anal or oral intercourse) that does not involve penetration of the vagina”).

133. *Id.* at 1140.

134. *Id.* at 13.

135. See *supra* note 129 (stating that the 2007 edition of *Merriam-Webster’s Collegiate Dictionary* does not include a definition of “sexual activity”).

136. BLACK’S LAW DICTIONARY 1498 (9th ed. 2009).

137. *Id.* at 1499.

more individuals. However, *Black's Law Dictionary* further provides that sexual relations *usually* involve physical contact.¹³⁸ By its plain meaning, the word “usually” does not mean “always,” and “sexual activity” does not always involve interpersonal physical contact.

Finally, “any sexual activity for which a person can be charged with a criminal offense” plainly requires the government to import a statute criminalizing a “sexual activity” into § 2422(b). As discussed previously, federal prosecutors have typically incorporated state criminal offenses into § 2422(b), but they may also incorporate federal statutes into the offense.¹³⁹

Under a plain meaning analysis, the Fourth Circuit was correct when it held that a defendant does not need to engage in interpersonal physical contact with a minor to satisfy the “sexual activity” element of § 2422(b).¹⁴⁰ Quite simply, none of the sub-elements of the offense explicitly or implicitly require physical contact.

B. Taken as a Whole, the Federal Child Enticement Statutory Scheme Does Not Require Interpersonal Contact for Culpability

The “whole act rule,” another canon of construction that American courts often use to interpret criminal statutes, dictates that each statutory term or provision should be assessed in the context of the statute as a whole.¹⁴¹ The rule “presum[es] that words have . . . consistent meaning throughout a statute”¹⁴² and throughout the wider substantive body of law on the subject.¹⁴³ When applying the

138. *Id.*

139. *See supra* note 46 and accompanying text (noting that the Seventh Circuit in *Taylor* explained that the incorporated “criminal offense” can be a federal or a state crime).

140. *See United States v. Fugit*, 703 F.3d 248, 255 (4th Cir. 2012) (finding that “sexual activity” plainly means “conduct connected with the ‘active pursuit of libidinal gratification’” and that such conduct does not require physical contact between the defendant and a minor), *cert. denied*, No. 12-10591, 2014 WL 210666 (U.S. Jan. 21, 2014).

141. *See Dada v. Mukasey*, 554 U.S. 1, 16 (2008) (declaring that courts must interpret statutory ambiguous terms “in connection with . . . the whole statute” (quoting *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974))). *See generally* SCALIA & GARNER, *supra* note 115, at 167 (arguing that “[c]ontext is a primary determinant of meaning” and that “[p]erhaps no interpretative fault is more common than the failure to follow the whole-text canon”).

142. Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1973 (2007); *see United States v. Santos*, 553 U.S. 507, 523 (2008) (plurality opinion) (indicating the Court has an “obligation to maintain the consistent meaning of words” in a statute and that the rule of lenity does not trump this responsibility). *But cf.* Gluck & Bressman, *supra* note 106, at 930 (indicating that, while judges frequently use the rule when interpreting statutes, drafters of legislation rarely apply the premises of the whole act rule when they write statutes).

143. *See Hernandez v. Kalinowski*, 146 F.3d 196, 200 (3d Cir. 1998) (establishing that, “[w]hen interpreting a statute, the court will not look merely to a particular

whole act rule, courts should determine whether a contested term is explicitly defined elsewhere in the statute or in the wider substantive body of law and, when appropriate, interpret the term consistently throughout the law.¹⁴⁴ The “rule against surplusage,” another tenet of the whole act rule, dictates that courts reject interpretations of statutory language that render other language in the statute unnecessary or redundant.¹⁴⁵

Pursuant to the whole act rule, the term “sexual activity” in § 2422(b) cannot be read in isolation from its surrounding language. Rather, as one federal district court has found, “sexual activity” in § 2422(b) “is modified by the language that precedes and follows it.”¹⁴⁶ The Seventh Circuit’s interpretation “takes ‘any sexual activity’ out of its statutory context”¹⁴⁷ because § 2422(b) and the Protection Act as a whole indicate “sexual activity” is broad in scope.

1. Title 18 confirms that “sexual activity” in § 2422(b) includes at least one non-contact offense

The Seventh Circuit erred when it held that “sexual activity” must require interpersonal contact because “sexual activity” expressly includes the production of child pornography, a non-contact

clause in which general words may be used but will take in connection with it the whole statute (*or statutes on the same subject*) and the objects and policy of the law . . . and give to it such a construction as will carry into execution the will of the Legislature” (emphasis added) (quoting *Kokoszka*, 417 U.S. at 650) (internal quotation marks omitted)). *But cf.* Gluck & Bressman, *supra* note 106, at 930 (suggesting that the act of construing statutory terms as though they have consistent meaning throughout the U.S. Code is not part of the “whole act rule” but of a separate canon of construction known as the “whole code rule”).

144. See Cross, *supra* note 142, at 1973 (noting that the “whole act rule” presumes that words will be interpreted uniformly throughout a statute).

145. See SCALIA & GARNER, *supra* note 115, at 168 (explaining that the rule against surplusage derives from the whole act rule); see also *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion) (arguing, in a case involving a citizenship revocation action, that Justice Stevens’s concurring opinion “violates the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant”).

146. *United States v. Shill*, No. 3:10-CR-493-BR, 2012 WL 529964, at *7 (D. Or. Feb. 17, 2012), *aff’d*, No. 13-30008, 2014 WL 259872 (9th Cir. Jan. 24, 2014). In *Shill*, the government charged the defendant, an adult male, with using the Internet to attempt to entice a minor female to engage in illegal sexual activities with him. *Id.* at *1. The defendant moved to dismiss the case, asserting that the court should follow *Taylor*, narrowly construe § 2422(b), and find that misdemeanor sexual offenses do not constitute “any sexual activity” under § 2422(b). *Id.* at *6. The court found that the Seventh Circuit incorrectly interpreted the meaning of “sexual activity” and rejected the defendant’s argument. *Id.* at *6–7. The U.S. Court of Appeals for the Ninth Circuit used the plain meaning and whole act rules to analyze the meaning of § 2422(b)’s “any sexual activity for which any person can be charged with a criminal offense” language and affirmed the defendant’s conviction. *Shill*, 2014 WL 259872, at *1–3.

147. *Shill*, 2012 WL 529964, at *7.

offense.¹⁴⁸ Congress did not define the scope of “sexual activity” in § 2422(b).¹⁴⁹ Where Congress has wanted to limit the scope of other Title 18 offenses, it has done so explicitly by defining the key terms of a given offense.¹⁵⁰ In contrast, Title 18 only declares that “sexual activity” in § 2422(b) “includes the production of child pornography, as defined in section 2256(8).”¹⁵¹

The Seventh Circuit was correct that the production of child pornography may not involve interpersonal contact between the pornographer and the child depicted in the image: the production of child pornography involves capturing the image of a child performing a sexually explicit act, not the act of physically touching a child.¹⁵² Further, certain kinds of “virtual” child pornography do not even depict actual minors and, thus, do not involve interpersonal physical contact.¹⁵³

148. *United States v. Taylor*, 640 F.3d 255, 259 (7th Cir. 2011).

149. *See* 18 U.S.C. § 2422(b) (2012) (lacking a definitions section).

150. *See, e.g., id.* § 2246(2)(D) (defining “sexual act” as “intentional touching” and expressly limiting the “sexual act” definition to Chapter 109A of Title 18); *id.* § 2423(f) (defining “illicit sexual conduct” but expressly confining the definition to § 2423); *id.* § 2427 (defining “sexual activity” to include the production of child pornography in Chapter 117 of Title 18); *see also* *United States v. Fugit*, 703 F.3d 248, 254 (4th Cir. 2012) (“[W]here similar statutory terms were meant to encompass only a specific subset of conduct, Congress took care to define them explicitly for purposes of the sections or chapters in which they are found.”), *cert. denied*, No. 12-10591, 2014 WL 210666 (U.S. Jan. 21, 2014).

151. 18 U.S.C. § 2427. Section 2256(8) defines “child pornography” as:

any visual depiction . . . of sexually explicit conduct, where—(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

Id. § 2256(8).

152. The statute criminalizing the production of child pornography prohibits, in pertinent part, “employ[ing], us[ing], persuad[ing], induc[ing], entic[ing], or coerc[ing] any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct.” *Id.* § 2251(a).

153. The production of “virtual” child pornography involves using computers to modify non-sexual images of children into pornographic images or creating pornographic images of children “imaginatively from adult pornography.” Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 440–41 (1997) (explaining that certain kinds of “virtual” child pornography can be created without the participation of actual children); *see also* Shepard Liu, Ashcroft, *Virtual Child Pornography and First Amendment Jurisprudence*, 11 U.C. DAVIS J. JUV. L. & POL’Y 1, 2–3 (2007) (indicating that “virtual child pornography” includes wholly computer-generated child pornography, morphed child pornography made by modifying non-pornographic pictures of actual children into pornographic images, and child pornography “made by using youthful-looking adults”). Conversely, the offense of production of “actual” child pornography depicts “a criminal act being perpetrated against an actual child.” Burke, *supra* note 153, at 461; *see* Jasmin J. Farhangian, Note, *A Problem of*

However, Judge Posner's reasoning in *Taylor* is only one plausible interpretation of "sexual activity." A more likely interpretation is that Congress's decision to include "the production of child pornography" in "sexual activity" was unrelated to whether "sexual activity" requires physical contact. The U.S. House of Representatives' Report on the Protection Act indicates that Congress added "the production of child pornography" language to the "sexual activity" definition in 1998 because, previously, federal law did not penalize traveling in or using interstate commerce to entice minors to produce child pornography and because Congress wanted to "allow federal prosecution in these circumstances."¹⁵⁴ The House Report language did not raise the issue of whether "sexual activity" includes contact or non-contact sexual offenses. Instead, it simply added a non-contact offense to the scope of "sexual activity."

Accordingly, the Seventh Circuit erred when it held that Congress added "the production of child pornography" to the scope of "sexual activity" to clarify that "sexual activity" requires contact. If anything, Congress has not spoken to the issue.

2. *The word "any" broadens the meaning of "sexual activity" in § 2422(b)*

The Supreme Court has adopted a broad construction of the word "any" in various federal criminal, administrative, and civil statutes since at least the 1980s.¹⁵⁵ In *United States v. Gonzales*,¹⁵⁶ for example,

"Virtual" Proportions: The Difficulties Inherent in Tailoring Virtual Child Pornography Laws to Meet Constitutional Standards, 12 J.L. & POL'Y 241, 277 n.185 (2003) (acknowledging that some sexual predators produce child pornography by personally engaging children in illegal sexual activities and simultaneously photographing their interpersonal physical interactions).

154. H.R. REP. NO. 105-557, at 21 (1998), *reprinted* in 1998 U.S.C.C.A.N. 678, 690. The House Report stated that section 110 of the House bill would include the "production of child pornography." *Id.* Furthermore, section 110 of the House bill indicated that 18 U.S.C. § 2426 would include the "production of child pornography" language. Child Protection and Sexual Predator Punishment Act of 1998, H.R. 3494, 105th Cong. § 110. As ultimately enacted, however, the Protection Act included the "production of child pornography" language in section 105 of the bill. Protection of Children From Sexual Predators Act of 1998, Pub. L. No. 105-314, § 105, 112 Stat. 2977 (codified as amended at 18 U.S.C. § 2427). Section 105 put the "production of child pornography" language in 18 U.S.C. § 2427, *id.*, rather than in § 2426 per the original House bill, *see* H.R. 3494 § 110. However, the definition language in the original House bill and the final enacted statute are effectively synonymous. *Compare* Protection Act § 105 ("In [Chapter 117], the term 'sexual activity for which any person can be charged with a criminal offense' includes the production of child pornography, as defined in section 2256(8)."), *with* H.R. 3494 § 110 ("For the purposes of [Chapter 117], sexual activity for which any person can be charged with a criminal offense includes the production of child pornography, as defined in section 2256(8).").

155. *See* *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (holding that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'" (quoting WEBSTER'S THIRD NEW INTERNATIONAL

the Supreme Court addressed the plain meaning of “any” in a criminal statute, 18 U.S.C. § 924(c)(1), and that provision’s “any other term of imprisonment” language.¹⁵⁷

In *Gonzales*, the State of New Mexico convicted and sentenced the defendants under a New Mexico state law for pulling guns on undercover police officers during a drug sting operation.¹⁵⁸ Later, the federal government charged and convicted the respondents of various federal drug offenses relating to the sting operation and of using firearms during and in relation to those crimes.¹⁵⁹ The district court ordered the respondents’ federal sentences relating to the firearms offenses to run consecutively with the New Mexico state sentences.¹⁶⁰ However, the U.S. Court of Appeals for the Tenth Circuit reversed and held that, while the “plain language [of § 924(c)(1)] prohibit[ed] sentences imposed under that statute from running concurrently with state sentences,” a “literal reading of the statutory language would produce an absurd result.”¹⁶¹

The Supreme Court vacated the Tenth Circuit’s decision.¹⁶² Citing the definition of “any” from *Webster’s Third New International Dictionary*, the Court held that, because Congress did not include language in § 924(c)(1) limiting the scope of “any” to convictions under federal law, there was “no basis” for interpreting § 924(c)(1) as representing

DICTIONARY 97 (1976)); *see also* *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 215–16, 218–19 (2008) (explaining that the Court adopted a broad interpretation of “any” in *Gonzales* and extending that interpretation to hold that the United States’ waiver of sovereign immunity under the FTCA includes an exception for torts committed by “all” law enforcement officers because the FTCA statutory phrase “any other law enforcement officer” covers “all” officers); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 579, 589 (1980) (adopting a broad interpretation of “any other final action” in a provision of the Clean Air Act and holding that the literal meaning of “any” unambiguously covers a broad range of actions).

156. 520 U.S. 1 (1997).

157. *See id.* at 4–5 (indicating that the defendants presented the issue of what is the meaning of “any” in 18 U.S.C. § 924(c)(1)’s “any other term of imprisonment language”). Section 924(c)(1) reads, in pertinent part:

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime[,] . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall . . . be sentenced to a term of imprisonment of not less than 5 years [N]o term of imprisonment imposed on a person under this subsection shall run concurrently with *any other term of imprisonment*

18 U.S.C. § 924(c)(1)(A), (c)(1)(D)(ii) (emphasis added).

158. *Gonzales*, 520 U.S. at 3.

159. *Id.*

160. *Id.*

161. *United States v. Gonzales*, 65 F.3d 814, 819 (10th Cir. 1995) (acknowledging every other circuit court that had previously analyzed the word “any” uniformly adopted the plain meaning of the word but declining to affirm because, in its view, the plain meaning interpretation was “not [the one] contemplated by Congress”), *vacated*, 520 U.S. 1.

162. *Gonzales*, 520 U.S. at 4.

only a prohibition on consecutive federal sentences.¹⁶³ The Court also compared the statute's treatment of the phrase "*any* other term of imprisonment" to its treatment of the phrase "any crime."¹⁶⁴ The latter phrase consisted of words expressly limited "to only federal crimes" and appeared two sentences before the "any term of imprisonment" language.¹⁶⁵ The majority of the Court "[found] it significant that no similar restriction [or limitation] modifie[d] the phrase 'any other term of imprisonment'" because "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."¹⁶⁶

The Supreme Court's jurisprudence suggests that the word "any" in 18 U.S.C. § 2422(b) modifies "sexual activity" to encompass all activities of a sexual nature and not simply those involving interpersonal physical contact between a defendant and a minor. The *Gonzales* opinion declared, with reference to another penal statute in Title 18, that "any" should be construed broadly unless Congress specifically limits the scope of the term in a statute.¹⁶⁷ Concerning § 2422(b), Congress did not include any statutory language that limited the scope of the word "any."¹⁶⁸ Congress only stated that "sexual activity" includes the production of child pornography.¹⁶⁹ Congress has not explicitly indicated whether certain types of conduct are excluded from the scope of "sexual activity." Under *Gonzales's* logic, the Fourth Circuit was correct when it declined to extend the Seventh Circuit's narrow interpretation of "[any] sexual activity" and instead adopted a broad interpretation to

163. *Id.* at 5. *But see id.* at 13 (Stevens, J., dissenting) (arguing that Congress probably did not intend a "purely literal" interpretation of "any" in § 924(c)(1) because it would be "irrational" to intend that the severity of a defendant's punishment turn on whether the defendant was convicted first under federal or state law and, furthermore, insisting that the Court should have interpreted the statute to mean "any other *federal* term of imprisonment" and should not have adopted a broad interpretation of "any").

164. *Id.* at 4–5 (majority opinion) (emphasis added).

165. *Id.* at 5.

166. *Id.* (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)) (internal quotation marks omitted).

167. *See supra* text accompanying notes 163–66 (discussing the Court's reasoning in *Gonzales*).

168. *United States v. Fugit*, 703 F.3d 248, 254 (4th Cir. 2012) (indicating that Congress did not limit the scope of "[any] sexual activity" in § 2422(b), even though Congress carefully limited other statutory terms "to encompass only a specific subset of conduct"), *cert. denied*, No. 12-10591, 2014 WL 210666 (U.S. Jan. 21, 2014).

169. 18 U.S.C. § 2427 (2012).

encompass “conduct connected with the active pursuit of libidinal gratification on the part of any individual.”¹⁷⁰

3. *Congress intended to use 18 U.S.C. § 2422(b) and the Protection Act to catch all faceless predators*

Section 2422(b) and the Protection Act as a whole do not support the Seventh Circuit’s assertion that Congress intended § 2246(2)(D)’s definition of “sexual act” to constitute the definition of “sexual activity” in § 2422(b). In *Taylor*, the Seventh Circuit’s opinion suggested that the omission of a fulsome definition for “sexual activity” indicated Congress intended “sexual act,” as defined in § 2246(2)(D), and “sexual activity,” in § 2422(b), to be synonymous.¹⁷¹ The court found that, from 1996 to 1998, § 2422(b) used the term “sexual act” while § 2422(a) used the term “sexual activity” “even though the two subsections were otherwise very similar.”¹⁷² Citing the legislative history of the Protection Act, which the court’s opinion said used the terms “sexual act” and “sexual activity” interchangeably, Judge Posner argued that Congress changed “sexual act” to “sexual activity” in 1998 “merely to achieve semantic uniformity of substantively identical prohibitions, rather than to broaden the offense.”¹⁷³

The Seventh Circuit erred when it determined that Congress changed “sexual act” to “sexual activity” in 1998 “merely to achieve semantic uniformity.”¹⁷⁴ First, between 1996 and 1998, at least two federal courts did not require the government to prove a defendant engaged in contact with a minor to satisfy the “sexual act” element of § 2422(b) and to overcome a motion to dismiss a § 2422(b) prosecution.¹⁷⁵ In *United States v. Powell*,¹⁷⁶ the government charged

170. *Fugit*, 703 F.3d at 255 (internal quotation marks omitted).

171. *See* *United States v. Taylor*, 640 F.3d 255, 258 (7th Cir. 2011) (inferring that “members of Congress (those who thought about the matter, at any rate) [may have] considered the terms ‘sexual act’ and ‘sexual activity’ [to be] interchangeable”).

172. *Id.*; *see supra* notes 36, 40–41 and accompanying text (detailing the statutory history of § 2422(b) during the 1990s).

173. *Taylor*, 640 F.3d at 258.

174. *Id.*

175. *See* *United States v. Powell*, 1 F. Supp. 2d 1419 (N.D. Ala. 1998) (rejecting the defendant’s motion to dismiss and not requiring the government to prove physical contact between the defendant and a minor to satisfy the “sexual act” element at that stage of the prosecution), *aff’d*, 177 F.3d 982 (11th Cir. 1999) (unpublished table decision). Limited case law exists regarding courts’ interpretations of the previous “sexual act” language. Most of the § 2422(b) case law between 1996 and 1998 concerns prosecutions for the completed crimes of enticement of a minor and of travelling in interstate commerce to engage in interpersonal sexual encounters with minors; these cases do not analyze the meaning of “sexual act.” *See, e.g.*, *United States v. Johnson*, 183 F.3d 1175, 1176 (10th Cir. 1999) (affirming a defendant’s conviction for one count of enticement of a minor to engage in a sexual act and one

the defendant with violating § 2422(b)'s attempt provision after he tried to use the Internet to entice two government agents posing as minors to engage in illegal "sexual act[s]" with him.¹⁷⁷ The U.S. District Court for the Northern District of Alabama denied the defendant's motion to dismiss, and the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's decision.¹⁷⁸ The defendant did not engage in physical contact with a minor because he did not touch or even interact with an actual minor.¹⁷⁹ Accordingly, neither the district court nor the Eleventh Circuit required the government to prove that the defendant engaged in interpersonal physical contact with a minor to defeat a motion to dismiss a § 2422(b) attempt prosecution.¹⁸⁰

In addition, the legislative history of the Protection Act emphasizes Congress's desire to broaden § 2422(b) to include the production of child pornography¹⁸¹ and to combat all crimes contributing to the sexual exploitation of children—not simply crimes that involve physical contact.¹⁸² Unlike other sections of Title 18 that narrowly define criminal acts of child sexual exploitation, Congress changed § 2422(b) in 1998 to use "distinctly broader language."¹⁸³ Congress's

count of traveling in interstate commerce to engage in sexual acts with a minor); *United States v. Byrne*, 171 F.3d 1231, 1233 (10th Cir. 1999) (same).

Other opinions did not address the meaning of "sexual act" because they focused on procedural errors at trial rather than on whether the defendants' conduct satisfied the elements of the § 2422(b) offense. *See, e.g.*, *United States v. Burgess*, 175 F.3d 1261, 1261, 1264 (11th Cir. 1999) (indicating that the defendant appealed his § 2422(b) conviction and sentencing on multiple constitutional grounds and determining that the district court committed reversible error when it failed to instruct the jury regarding the defendant's decision not to testify on his own behalf); *United States v. Sterba*, 22 F. Supp. 2d 1333, 1333, 1343 (M.D. Fla. 1998) (dismissing an indictment charging a defendant with sexual enticement of a minor because the government committed intentional misconduct).

176. 1 F. Supp. 2d 1419 (N.D. Ala. 1998), *aff'd*, 177 F.3d 982 (11th Cir. 1999) (unpublished table decision).

177. *Id.* at 1420; *see supra* notes 57–58 and accompanying text (explaining attempt liability in American criminal jurisprudence in general and in relation to § 2422(b)).

178. *Powell*, 1 F. Supp. 2d at 1420, *aff'd*, 177 F.3d 982.

179. *Powell*, 1 F. Supp. 2d at 1421–22 (rejecting the defendant's impossibility defense that he did not violate the statute because he interacted only with government agents).

180. *See generally id.* at 1420–22 (describing a superseding indictment charging the defendant with two counts of violating § 2422(b)'s attempt provision and rejecting the defendant's impossibility argument).

181. *See supra* note 154 and accompanying text (detailing the House of Representatives' purposes for adding "the production of child pornography" language to the definition of "sexual activity," as delineated in the House Report accompanying the Protection Act).

182. *See supra* note 38 and accompanying text (assessing the Protection Act's legislative history and identifying Congress's reasons for expanding § 2422(b)'s scope and penalties).

183. Michael D. Yanovsky Sukenik, *Distinct Words, Discrete Meanings: The Internet & Illicit Interstate Commerce*, 2011 U. ILL. J.L. TECH. & POL'Y 1, 32 (2011); *see also* H.R. REP.

decision to add the “production of children pornography” to the scope of “sexual activity” suggests that Congress intended to criminalize a broad range of acts involving or contributing to child sexual exploitation. During floor debates concerning the Protection Act, several members of Congress argued that the Protection Act demonstrated Congress’s intent that there should be “zero tolerance” for child sexual exploitation.¹⁸⁴ The legislative record does not define child sexual offenses according to gradations, levels of severity, or whether the predator and child engaged in physical contact. Instead, the record reflects a commitment to punish *all* offenses that contribute to the sexual exploitation of children.¹⁸⁵

The Seventh Circuit’s restrictive interpretation of “sexual activity” conflicts with Congress’s intent because it preempts a subset of potential prosecutions under § 2422(b)’s attempt provision. For example, the Seventh Circuit’s interpretation preempts prosecutions of defendants who solicit undercover law enforcement agents posing as fictitious minors, such as Randall Casseday in the example from the beginning of this Comment.¹⁸⁶ In *Taylor*, the Seventh Circuit expressly overturned the defendant’s conviction for attempted enticement because the defendant conversed with an undercover officer posing as a fictitious teenager but never touched a minor.¹⁸⁷ Under the Seventh Circuit’s holding and Judge Posner’s logic, a defendant cannot violate § 2422(b) unless the government can show the defendant physically interacted with an actual minor or intended to physically interact with an actual minor.¹⁸⁸ As previously discussed, Congress intended to use the Protection Act to punish all sexual

NO. 105-557, at 10 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 678–69 (stating the Protection Act was intended to be a “comprehensive response to the horrifying menace of sex crimes against children, particularly assaults facilitated by computers,” and noting that the House of Representatives initially intended to criminalize even the act of “contacting a minor over the Internet for the purposes of engaging in illegal sexual activity” (emphasis added)).

184. *See, e.g.*, 144 CONG. REC. 25,239 (1998) (statement of Sen. Hatch) (internal quotations omitted); *accord id.* at 12,036 (statement of Rep. Jackson-Lee) (indicating, during floor debates in the U.S. House of Representatives, that the Protection Act was intended to make clear to sexual predators that the federal government has “zero tolerance” for the sexual exploitation of children).

185. *See* H.R. REP. NO. 105-557, at 10 (revealing that the statute was intended to be a “comprehensive response” to child sex crimes).

186. *See supra* notes 1–5 and accompanying text (discussing Randall Casseday’s case, *Casseday v. United States*, 723 F. Supp. 2d 137 (D.D.C. 2010)).

187. *United States v. Taylor*, 640 F.3d 255, 257, 260 (7th Cir. 2011) (overturning the defendant’s conviction and explaining that the government charged the defendant with attempted enticement rather than the completed offense because he never conversed with an actual minor).

188. *Id.* at 260 (holding that Taylor did not violate the statute because he “neither made nor, so far as appears, attempted or intended physical contact with the victim”).

predators who lurk on the Internet and prey on children, not simply those who physically interact with children or who intend to physically interact with children.¹⁸⁹ The Seventh Circuit's restrictive interpretation of "sexual activity" does not align with congressional intent because it explicitly preempts potential prosecutions where defendants do not touch or intend to touch actual minors, even if they intend to coerce children to engage in illegal sexual activities.

Moreover, neither § 2422(b) nor any other component of Title 18 indicates that Congress intended § 2246(2)(D)'s definition of "sexual act" to constitute the definition of "sexual activity" in § 2422(b), as Judge Posner suggested in *Taylor*.¹⁹⁰ Congress explicitly stated that the definitions in § 2246 apply "[a]s used in this chapter"—that is, as used in Chapter 109A of Title 18.¹⁹¹ Because § 2422(b) is in Chapter 117 of Title 18, not Chapter 109A,¹⁹² by its terms, Congress did not intend § 2246(2)(D)'s definition of "sexual act" to constitute "sexual activity" in § 2422(b). Accordingly, the Seventh Circuit erred when it found that Congress intended to import § 2246(2)(D)'s definition of "sexual act" into § 2422(b).¹⁹³

Ultimately, a broad construction of "sexual activity" "renders the [§ 2422(b)] statutory scheme coherent as a whole."¹⁹⁴ When read as a whole and in the context of the wider body of federal law criminalizing the sexual exploitation of children, § 2422(b) does not require defendants to engage in interpersonal physical contact with minors. Thus, the Fourth Circuit was correct to reject the Seventh Circuit's narrow interpretation of "sexual activity" and, instead, to broadly interpret the language.

C. The Rule of Lenity Should Not Be Applied to § 2422(b) Because the Statute Is Not Significantly Ambiguous

Courts will often apply a third canon of construction—the canon of strict construction or rule of lenity—when interpreting ambiguous criminal statutes.¹⁹⁵ This canon dictates that courts interpret

189. See 144 CONG. REC. at 12,026 (statement of Rep. Dunn) (stating the purpose of the Protection Act was to "ensure that cyber-predators become real-life prisoners").

190. *Taylor*, 640 F.3d at 259.

191. 18 U.S.C. § 2246 (2012).

192. See *id.* §§ 2421–2428 (constituting Chapter 117 of Title 18 of the U.S. Code).

193. *Taylor*, 640 F.3d at 257.

194. *United States v. Fugit*, 703 F.3d 248, 255 (4th Cir. 2012), *cert. denied*, No. 12-10591, 2014 WL 210666 (U.S. Jan. 21, 2014); see *supra* notes 141–44 and accompanying text (explaining that the whole act rule is premised on the idea that the meaning of words must be assessed in the context of the entire statutory scheme).

195. See *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."); cf. Lawrence M. Solan, *Law, Language, and*

ambiguous statutes strictly against the government and in favor of criminal defendants.¹⁹⁶ More specifically, the rule promotes the idea that citizens should not be punished for a legislature's failure to write an unambiguous statute.¹⁹⁷ Indeed, the "touchstone of the rule of lenity is statutory ambiguity."¹⁹⁸

The rule of lenity developed out of the English common law after some judges declined to impose the death penalty on criminal defendants whose conduct did not clearly violate English law.¹⁹⁹ The U.S. Supreme Court began invoking the rule in the early 1800s.²⁰⁰ For example, in *United States v. Sheldon*,²⁰¹ the Court applied the rule of lenity when it determined that a defendant charged with "driving" oxen from the United States to Canada did not violate a federal statute prohibiting transporting war munitions to Canada because the statute in question was ambiguous.²⁰²

The rule of lenity has two constitutional purposes: (1) to further the separation of powers²⁰³ and (2) to promote due process of law.²⁰⁴ The Supreme Court has defined several standards for when courts should apply the rule of lenity, but the "crucial question" is always

Lenity, 40 WM. & MARY L. REV. 57, 58 (1998) (stating that, "[a]lthough widely accepted, the rule is by no means adhered to universally," and indicating that some state legislatures have expressly eliminated the rule).

196. See, e.g., *Santos*, 553 U.S. at 514 (plurality opinion) (adopting the "more defendant-friendly" of two plausible definitions of the word "proceeds"); Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 511–12 (2002) (defining the "venerable" rule of lenity and explaining that "federal courts [that are] reluctant to participate in the expansion of an already overzealous federal criminal regime" often employ the rule).

197. CROSS, *supra* note 38, at 88–89 ("[The rule of lenity] holds that if the criminal statute does not clearly outlaw private conduct, the private actor cannot be punished. The effect . . . is to allow certain defendants . . . to escape punishment . . . to force the legislature to clearly prescribe the perimeters of the actions that it wishes to criminalize." (citations omitted) (internal quotation marks omitted)).

198. *Moskal v. United States*, 498 U.S. 103, 107 (1990) (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)) (internal quotation marks omitted).

199. See Steven Wisotsky, *How To Interpret Statutes—Or Not: Plain Meaning and Other Phantoms*, 10 J. APP. PRAC. & PROCESS 321, 327–29 (2009) (explaining the origins and history of the rule of lenity under the English common law and its adoption in the American judicial system in the early 1800s).

200. *Id.* at 328 (indicating that the rule of lenity "found its way into early American case law through Chief Justice Marshall").

201. 15 U.S. (1 Wheat.) 119 (1817).

202. *Id.* at 120–22 (reasoning that the federal statute in question, which prohibited transporting war munitions to Canada "in any waggon, cart, sleigh, boat, or otherwise," did not clearly define "or otherwise" and, therefore, judgment must be for the defendant).

203. See *United States v. Wiltberger*, 18 U.S. (1 Wheat.) 76, 95 (1820) (observing that federal courts do not have the power to define crimes because "the power of punishment is vested in the legislat[ure]").

204. *Id.* (stating the rule of lenity is premised "on the tenderness of the law for the rights of individuals").

“how much ambiguousness constitutes an ambiguity.”²⁰⁵ The Supreme Court currently favors the following criterion: whether “a reasonable doubt persists about a statute’s intended scope even *after* resort to ‘the language and structure, legislative history, and motivating policies’ of the statute.”²⁰⁶ If a court has reasonable doubt, it should apply the rule of lenity.²⁰⁷ Courts will not find reasonable doubt when they can simply articulate more than one plausible interpretation of a statute, but they will find reasonable doubt when the other canons of construction clearly point to “significant questions” of statutory ambiguity.²⁰⁸

In *McElroy v. United States*,²⁰⁹ for example, the Supreme Court declined to apply the rule of lenity for a defendant convicted of violating a federal statute that prohibited the interstate transportation of forged securities when use of several canons of construction did not point to “significant questions of ambiguity.”²¹⁰ The defendant in *McElroy* had been convicted of two counts of transporting forged checks in interstate commerce.²¹¹ The defendant asserted that the meaning of “interstate commerce” was ambiguous in the statute and argued that the Court should apply the rule of lenity and overturn his convictions.²¹² The Court reviewed the statute’s language and legislative history but decided that the phrase “interstate commerce” did not raise “significant questions of ambiguity.”²¹³ Instead, the Court concluded that Congress intended to broadly define “interstate commerce.”²¹⁴ Although the Court acknowledged that

205. See SCALIA & GARNER, *supra* note 115, at 298–99 (quoting *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985)) (internal quotation marks omitted). In *Hansen*, the D.C. Circuit declined to apply the rule of lenity where the defendant, a former U.S. Congressman who had been convicted of making false statements to the U.S. government on financial disclosure statements, had express statutory notice that willful failure to accurately complete the disclosures carried the risk of criminal and civil penalties. *Hansen*, 772 F.2d at 942, 949.

206. *Moskal v. United States*, 498 U.S. 103, 108 (1990); *accord Bifulco v. United States*, 447 U.S. 381, 387 (1980) (stating that courts must apply the rule of lenity only when a statute is ambiguous, even after looking at its text, legislative history, and purpose).

207. *Moskal*, 498 U.S. at 108 (citing *Bifulco*, 447 U.S. at 387) (noting that lenity is reserved for those instances in which a court finds a reasonable doubt as to the meaning of the statute).

208. See *id.* at 113 (explaining when it is appropriate for courts to apply the rule of lenity (citing *McElroy v. United States*, 455 U.S. 642, 658 (1982))).

209. 455 U.S. 642 (1982).

210. *Id.* at 658.

211. *Id.* at 643.

212. *Id.* at 647–48.

213. *Id.* at 658.

214. *Id.* The Court reasoned that Congress’s use of the phrase “interstate commerce” rather than “state borders,” along with the legislative history of the phrase, showed that Congress intended “interstate commerce” to be broad in scope. *Id.* at 648, 658.

criminal statutes generally should be construed strictly, it found that “this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.”²¹⁵ Accordingly, the Court declined to apply the rule of lenity because the statute was not “significantly ambiguous.”²¹⁶

The Seventh Circuit applied the rule of lenity in *Taylor* because the court insisted “two equally plausible interpretations” of § 2422(b)’s “sexual activity” language existed.²¹⁷ More specifically, the court indicated it “[could not] be certain” that “sexual activity” in § 2422(b) is “synonymous” with “sexual act” in § 2246(2)(D),²¹⁸ as it had previously posited.²¹⁹ Subsequently, the court extended the “more lenient” interpretation to the defendant.²²⁰

The Seventh Circuit’s decision to apply the rule of lenity was erroneous because § 2422(b) does not raise “significant questions of ambiguity”²²¹ regarding the meaning of “sexual activity.” As discussed previously, the plain meaning rule and the whole act rule weigh against the Seventh Circuit’s narrow construction of “sexual activity.”²²² The term “sexual activity” has only been defined to include the production of child pornography—an offense that does not require interpersonal physical contact with a child.²²³ Even if Judge Posner was correct that the inclusion of the offense of production of child pornography created some ambiguity about whether “sexual activity” requires physical contact,²²⁴ taken as a whole and in light of Congress’s clear intent to punish all predators, the statute is not significantly ambiguous to warrant use of the rule of

215. *Id.* at 658 (citing *United States v. Bramblett*, 348 U.S. 503, 510 (1955)).

216. *Id.*

217. *United States v. Taylor*, 640 F.3d 255, 259–60 (7th Cir. 2011).

218. *Id.* at 259.

219. *Id.* at 258 (articulating the court’s reason for finding that Congress may have intended § 2246(2)(D)’s definition of “sexual act” to comprise the definition of “sexual activity” in § 2422(b)).

220. *Id.* at 260.

221. *See McElroy*, 455 U.S. at 658 (revealing that the Supreme Court looks for “significant questions of ambiguity” when deciding whether to apply the rule of lenity).

222. *See supra* Part II.A–B (using the plain meaning rule and the whole act rule to interpret “sexual activity” and arguing, on multiple grounds, that the term does not require that defendants engage in interpersonal physical contact with minors).

223. *See supra* notes 152–53 and accompanying text (describing the child pornography production process, explaining that the process may involve but does not require interpersonal contact between a pornographer and a child depicted in the pornography, and indicating that one kind of child pornography, virtual child pornography, does not even depict actual minors).

224. *See supra* text accompanying notes 217–19 (explaining Judge Posner’s reason for finding some ambiguity in the meaning of “sexual activity”).

lenity.²²⁵ The plain meaning of the statute, and Congress's intent in passing it, do not leave "reasonable doubt" about whether "sexual activity" requires interpersonal physical contact.²²⁶ Furthermore, until *Taylor*, courts had not interpreted the statute as requiring contact.²²⁷

Courts should not construe statutes to conflict with the enacting legislature's purposes.²²⁸ Accordingly, the Seventh Circuit erred when it determined it "must" interpret the statute in favor of the defendant, applied the rule of lenity to overturn the defendant's § 2422(b) conviction,²²⁹ and subverted Congress's intent.

CONCLUSION AND RECOMMENDATIONS FOR THE FUTURE

The federal government has an interest in uniform enforcement of the federal child enticement statute to protect the nation's children from sexual predators, including faceless predators who are increasingly using the Internet to induce innocent children to participate in illegal sexual activities.²³⁰ Congress enacted the federal enticement statute to catch faceless predators like Randall Casseday, who never engaged in interpersonal physical contact with a child but who nonetheless acted with intent to entice and ultimately to engage in sexual intercourse with a child.²³¹ Currently, however, a circuit split over the meaning of "sexual activity," an essential element of the federal child enticement offense, complicates the government's ability to ensure consistent enforcement of the law. Depending on the jurisdiction, defendants accused of nearly identical offenses—enticement of children

225. The Supreme Court has designated the rule of lenity as an option of last resort that the courts may only apply after they have considered a statute's "language and structure, legislative history, and motivating policies." *See Moskal v. United States*, 498 U.S. 103, 108 (1990) (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)) (internal quotation marks omitted).

226. *See supra* notes 206–08 and accompanying text (explaining that the Supreme Court's standard for whether to apply the rule of lenity to a given criminal statute is whether, after using the canons of construction, "reasonable doubt" persists about the meaning of the statute).

227. *See generally* *United States v. Taylor*, 640 F.3d 255, 256 (7th Cir. 2011) (initiating an exercise in statutory interpretation because "surprisingly[,] . . . there is very little law" that analyzes the meaning of "sexual activity").

228. *See supra* text accompanying note 215.

229. *Taylor*, 640 F.3d at 259–60 (stating that "[t]he tie *must* go to the defendant" because the court found some ambiguity in the meaning of the "sexual activity" language (emphasis added) (quoting *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion))).

230. *See supra* note 23 and accompanying text (discussing the rising trend of online sexual exploitation of children).

231. *See supra* notes 1–5 and accompanying text (discussing *Casseday v. United States*, 723 F. Supp. 2d 137 (D.D.C. 2010)).

involving no physical contact with actual minors—may be subject to a minimum of ten years in prison or no prison time at all.

The Fourth Circuit correctly interpreted “sexual activity” in 18 U.S.C. § 2422(b) as not requiring interpersonal physical contact between a defendant and a minor. However, as Judge Posner suggested in *Taylor*, a broad interpretation of “sexual activity” has the potential to subject a defendant convicted of violating § 2422(b) to a ten-year prison sentence for what some might argue is a “minor” crime.²³²

Congress should modify § 2422(b)’s penalty provision to punish defendants convicted of violating the statute relative to the severity of their underlying conduct.²³³ For example, Congress could maintain the current ten-year mandatory minimum sentence for defendants whose underlying offenses constitute felonies, but modify the statute to permit lesser sentences for defendants whose underlying offenses constitute misdemeanors. In doing so, Congress would continue to catch all predators who sexually exploit children and fulfill the purposes of § 2422(b) and the Protection Act.²³⁴ At the same time, Congress would ensure that defendants were punished relative to the severity of their offenses and, thus, reduce the potential for incongruous penalties. However, until

232. See *Taylor*, 640 F.3d at 258 (arguing that “if the government’s broad conception of ‘sexual activity’ were accepted, then by virtue of [a] misdemeanor law a flasher in the lobby of the federal courthouse in South Bend, if charged under 18 U.S.C. § 2422(b), would be courting a prison sentence of at least 10 years”). *But cf.* 144 CONG. REC. 25,239 (1998) (statement of Sen. Hatch) (emphasizing that the Protection Act demonstrated Congress’s intent that there be “zero tolerance” for the sexual exploitation of children” and not distinguishing between grades of sexual crimes against children).

233. See *Furman v. Georgia*, 408 U.S. 238, 303–04 (1972) (Brennan, J., concurring) (articulating that, in the United States, laws should assign punishments according to the gravity of the associated crimes). According to the absurdity doctrine, another canon of construction, statutes should be construed to avoid absurdity. See *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486 (1868) (declaring that “[a]ll laws” should be “sensibl[y]” interpreted to prevent “absurd consequence[s]”); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003) (defining the “absurdity doctrine,” discussing its origins, and noting that, “[f]rom the earliest days of the Republic, the Supreme Court has subscribed to the idea that judges may deviate from even the clearest statutory text when a given application would otherwise produce ‘absurd’ results”). Further, the absurdity doctrine holds that statutory provisions “may be either disregarded or judicially corrected . . . if failing to do so would result in a disposition that no reasonable person could approve.” SCALIA & GARNER, *supra* note 115, at 234. Although some might argue that subjecting a defendant to ten years in prison under § 2422(b) for committing a misdemeanor offense is absurd, a reasonable person could just as easily argue that any person who would engage in “the psychological sexualization of children” should be severely punished—just as the Fourth Circuit did in *United States v. Fugit*, 703 F.3d 248, 255 (4th Cir. 2012), *cert. denied*, No. 12-10591, 2014 WL 210666 (U.S. Jan. 21, 2014).

234. See *supra* note 38 and accompanying text (describing the purpose of the Protection Act).

such amendment is made, courts should follow the Fourth Circuit's correct interpretation and holding in *Fugit*.²³⁵

235. The Supreme Court has emphasized that courts may not simply disregard the plain meaning of a statute and imply limiting language into it, even if the punishment associated with violating the statute seems harsh to a judge, to defendants, or to society, more broadly. *United States v. Gonzales*, 520 U.S. 1, 3–4 (1997) (declining to affirm a federal circuit court's decision to ignore the plain meaning of a contentious element of a penal statute that the circuit court feared would produce "irrational" results). Instead, courts must "presume[] that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of limiting language. *Id.* at 5 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)) (internal quotation marks omitted).