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# Sext Appeals: Re-Assessing the Exclusion of Self-Created Images from First Amendment Protection

BY: CARMEN NASO\*

## I. INTRODUCTION

Two sixteen-year-old sweethearts in Florida have consensual sex and memorialize it in a photo that they share only with each other.

A slightly drunk seventeen-year-old in New York has oral sex with another moderately inebriated seventeen-year-old at a party. He takes a photo of the act with his cell phone and sends his trophy to his cousin in Ohio.

A fifteen-year-old girl in Nebraska removes her clothes while talking to her eighteen-year-old boyfriend on Skype, hoping it makes him “hot” for her.

A sixteen-year-old Oregonian youth takes a picture of his erect penis next to some referential object because, well, he can.

Only one of these scenarios depicts unlawful conduct that will subject its actor(s) to felony child pornography charges that carry mandatory sex offender registration requirements for at least ten years; it is the first scenario, which is arguably the most benign. Though every state has criminalized what we consider as child pornography, the individual state proscriptions of these depictions have resulted in a dysfunctional system of law enforcement where there is uncertainty as to what and whom we are trying to regulate.

As a consequence, many young people are unaware that their conduct may be a crime. Nationally, legal action has been prolonged, inconsistent, and the subject of much literature.<sup>1</sup>

Typical child porn legislation forbids anyone to create, record, photograph, film, develop, reproduce, or publish any material that depicts a minor in a state of nudity or engaging in certain explicit sexual acts.<sup>2</sup> Though this material has been described as “self-exploitation,”<sup>3</sup> or “autopornography,”<sup>4</sup> those words describe the method of production and do not create a requirement that the person creating the photo actually be the subject of the image.

Most of this literature has considered the phenomenon of “sexting,” a portmanteau combining “sex” and “text,” which

describes the act of taking a sexually explicit or suggestive photo, most often by cell phone camera, and then transmitting the image via the text message feature that is offered as part of the service plan. Commentator Yvonne Roberts is credited with the first use of the term in an article in 2005, though that story had nothing to do with juveniles.<sup>5</sup>

The scope of this Article envisions a not too distant future in which sexting is only one method, and not the predominate method, of how images will be created and shared among young people. It was until recently that online chats with webcams were replaced by the cell phone as the primary means of creation and distribution of these images. Now websites like ChatRoulette<sup>6</sup> provide the forum for random exhibitionism with strangers. Soon applications such as FaceTime<sup>7</sup> will replace sexting and be the standard feature to create real time streamed images from a hand held device such as the iPhone. Whereas a

sexted image can easily be saved on the device, and Skyped or Webcam images can be anticipated and recorded, new technology is making it far more difficult to discover the material and prove criminal liability arising out of its existence.<sup>8</sup> Yet all of this material, when it depicts lewd images of minors, is subject to traditional child pornography prohibitions that criminalize all aspects of the creation, possession, and transmission of material

that contains sexual depictions of people under a specified age.<sup>9</sup> Though celebrity sexting keeps it at the forefront of the public interest, this Article addresses a greater scope of activity than sexting.

Prosecutions for the creation and distribution of explicit images of minors have often resulted in drastic punishments with enduring sexual registration requirements, and thus are often litigated through state and federal courts in an effort to clear names and restore reputations.<sup>10</sup> Some offenders are offered diversion programs and other non-formalized resolutions.<sup>11</sup> Several writers argue this production of e-porn between consenting juveniles is not an unlawful act.<sup>12</sup>



This Article contributes an important and timely analysis of the increased tension between the First Amendment and technological innovation, especially as recent Supreme Court decisions have reinforced the protection against Government regulation of speech and expression. This analysis is imperative for our understanding of the limitations of current approaches to a phenomenon made possible by seemingly limitless methods of creation and transmission. A number of States have enacted, or are considering, legislation that accepts the self-made images from enforcement under the traditional child pornography statutes.<sup>13</sup> Some legislation creates affirmative defenses to child porn prosecution where the circumstances clearly depart from exploitation and abuse.<sup>14</sup> Through examining judicial decisions and legislation, a new standard should be considered when consensual and non-exploitative conduct poses a legitimate basis for criminalization. This measure creates a safe haven for depictions of conduct that is lawful for the engaged subject, even when those images contain explicit sexuality; criminality will instead be predicated upon the *use* or *intended use* of the material.

Parts I and II of this Article introduce the reader to the nature of the problem and why it matters that we address the First Amendment implications upon the status quo which allows for severe sanctions to be imposed upon immature people who often have no idea that they are breaking any laws, and who are showing no inclination to abandon this mode of communication. A consideration of existing statutes reveal a pastiche of laws that often criminalize the depiction of lawful conduct, and are anchored by the chronological age of the actors, making distinctions often where there are no differences in the behavior of the actors, but are of enormous consequences to the participants. The examples at the beginning of this section are but four of many fact patterns that can result in the discordant application of law when any one of the numerous methods of creation and transmission depict erotica involving teens.

Part III of this Article will attempt to quantify the numbers of young people who are impacted by this discussion. It will identify the significant number of teens who use cell phones and send sexually explicit texts. When added to the number of computer users overall, it becomes obvious that child pornography laws or new legislation focused on texting already impacts a great deal of young people.<sup>15</sup> This section will conclude with a survey of the “legal age” to have sex in each state, since that is the definitive metric in the proposals made in this Article.

Part IV considers the conception of child pornography jurisprudence in the Supreme Court of the United States and demonstrates how two recent First Amendment cases will require legislative policymakers to discern between creation and transmission of sexually explicit material that is intrinsic to a criminal act and similar material that possesses some intrinsic social value. No doubt the weightiest of these opinions is *United*

*States v. Stevens*,<sup>16</sup> which affirms limitations on content-based censorship, and has been said to be the most important First Amendment opinion in a decade.<sup>17</sup> More recently, *Brown v Entertainment Merchants Association*<sup>18</sup> amplified the significant First Amendment protection bestowed upon minors when they create, distribute, or consume speech.<sup>19</sup>

Part V will explain why consensual and non-exploitative sexting and Skyping<sup>20</sup> do not result in the risks of harm to children that justify the pervasive use of child pornography laws to regulate the sexual expressions of juveniles. Much of the early literature is directed toward connecting sexting with traditional child porn because both harm children.<sup>21</sup> This Article discounts these arguments and returns the focus to the original intent of Supreme Court jurisprudence, which established the basis for excluding child pornography from the umbrella of First Amendment protection.

Part VI creates a boundary within which a significant amount of sexually oriented speech and expression would be shielded from prosecution. This portion argues that lawfully created, explicit imagery should not be criminalized unless it is used in violation of existing law or is itself integral to criminal conduct. The fact that in many states it is lawful to engage in sexual conduct with someone while the possession of a nude photograph of that person is unlawful reflects societal confusion in sexual matters.

This section identifies a number of criminal offenses in which the explicit material is proximately linked to the prohibited act. The most generic prohibition against the creation, possession, or distribution of child porn would be a statute that contains a *mens rea* requirement that the actor subjectively believe the material to be child pornography. More specific are a number of statutes that can be engaged when someone creates, possesses, or distributes this matter with the intent to stalk, harass, menace, or injure the reputation of another. Likewise, prosecutions should occur when the material is used to blackmail or extort from, when used for commercial purposes, or when used to entice another to do an unlawful act. The prosecuting attorney is in the best position to apply these nuanced laws to fact patterns so that formal prosecution is predicated upon admissible evidence that sufficiently proves the elements of the offense.

Part VII concludes that technology has outgrown conceptual child pornography jurisprudence, but not traditional First Amendment values. A number of statutes contain conditions that provide young people with affirmative defenses to charges, or which reduce potential penalties for those who do sext.<sup>22</sup> Whether *sui generis* or the amendment of existing laws, or through evolving jurisprudence, these efforts are laying the groundwork for a legislative or a judicial distinction between creating porn and sexting.

## II. THE DYSFUNCTION OF CURRENT LAW AND POLICY

Two factors account for the disconnect between the use of traditional child pornography prosecution and the regulation of teen behavior. First, there is no consensus among legislatures as to what or who should be regulated. Second, as discussed in Part IV, though the compelling interest in child safety is axiomatic, those interests, as defined by the Supreme Court, are not reflected in the breadth of traditional legislation.

### A. THE AGGLOMERATION OF CURRENT STATE LAW

At what age is a person lawfully allowed to engage in sexual intercourse or any of the acts that comprise sexual conduct? One of the most troubling consequences of current child porn laws is the unmitigated criminalization of depicting something that is perfectly legal. The notion of criminalizing conduct—and by extension criminalizing the depiction of that conduct—is much easier to swallow than the dilemma presented to sexters. Assuming that a participant is doing something legal, the next question to consider is how old either or both of the participants must be in order to lawfully memorialize any explicit sexual image?

#### 1. Specific Applications of the Laws Regulating Sexual Expression

There are substantial differences among the states with respect to what age consensual sexual activity is lawful, and there is similar variety in the definitions of the age which the subject of the image must be to avoid prosecution by one who creates, possesses, or distributes the image. When does the creation of a sexually explicit image violate the law; when does the transmission of a sexually explicit image violate one of these laws; and when does possession of a sexted image violate the law? These are all open questions among the states.

While there are several federal statutes protecting children from sexual predators, none impose a minimum age limit on the sexual act.<sup>23</sup> Rather, the age at which one may lawfully engage in sexual conduct<sup>24</sup> is controlled by an individual state's statute. Such statutes determine the statutory age over which consensual sexual conduct is lawful with anyone who is likewise of legal age, with the most common age set at sixteen.<sup>25</sup> Eight states have set the age at seventeen,<sup>26</sup> and twelve states have set the age at eighteen.<sup>27</sup> At the other end of the spectrum, legislatures

in nearly every jurisdiction have set age limits at which a child is too young to ever consent to engage in sexual conduct.<sup>28</sup> A sex act with one who has not yet attained this minimum age is considered statutory rape.<sup>29</sup>

Traditional age based limitations on meaningful consent have been criticized as intransigent and out of touch with the reality of an increase in sexual activity among younger people, who are exposed to sex and sex education at earlier ages than generations past.<sup>30</sup> It is far too simplistic to suggest that adolescents are incapable of making consensual sexual choices in all instances. The sexually experienced fifteen-year-old may be far more acutely aware of the implications of sexual intercourse than her sheltered cousin who is beyond the age of consent.<sup>31</sup>

Understanding the state-by-state variations in the age of consent is further complicated by a recent trend that accommodates a middle group of young people who are conditionally allowed to engage in consensual sex with others who are within a certain range of years older or younger than their partner.<sup>32</sup> These statutes are often referred to as “Romeo and Juliet” laws.<sup>33</sup> For instance, a number of statutes prohibit sex with someone who is more than four years younger than the older actor.<sup>34</sup>

Every state sets a minimum age under which the subject of the image, whether referred to as a minor, a child or a juvenile, becomes illicit, irrespective of the degree of explicitness depicted in the image. It is this element of the statutes that most directly creates the legal trap used to capture sexters.

The great majority of states define this age as being under eighteen years of age.<sup>35</sup> Three states prohibit possession of images of those under seventeen,<sup>36</sup> and seven set the age at under sixteen.<sup>37</sup> Delaware alone prohibits imagery depicting anyone under eighteen years of age.<sup>38</sup> Most states are consistent with respect to prohibitions against possessing, creating, and distributing child porn, but idiosyncrasies are not uncommon.<sup>39</sup> The legislature in some states made a provision for an affirmative defense that the actor can claim he reasonably believed the subject of the image was of legal age.<sup>40</sup> Typical sexters obviously know the age of the subject, but it is hardly reasonable to think successive possessors or disseminators will give the matter any thought.<sup>41</sup> The issues become even more complicated when interstate digital transmissions are routed through multiple jurisdictions.

Yet the macédoine is also subjected to the quality or nature of the photograph itself. With one exception,<sup>42</sup> child pornogra-

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phy statutes are not conditioned upon a finding of obscenity, nor are there requirements of any active sexual conduct. Passive posing will often be enough to meet child porn prohibitions where the subject is below a certain age, so long as it is explicit.<sup>43</sup> The typical statute will prohibit the possession, distribution, production or creation of an image of a minor engaged in sexual conduct.<sup>44</sup> The term sexual conduct is usually defined to include easily identified activities such as intercourse or masturbation, but also some rather ambiguous concepts such as nudity,<sup>45</sup> or a lewd and lascivious display of genitals.<sup>46</sup> Genitals are often defined with specificity, right down to the imaginary line above the nipple,<sup>47</sup> but nudity does not necessarily mean without clothes on!<sup>48</sup>

## 2. Sex Offender Registration

Sex offender registration requirements exacerbate the problem. Since juvenile records are often confidential and will not likely expose a teen with a record, the most adverse impact of delinquency adjudication is subjection to the requirements of the Sexual Offender Registration and Notification Act (“SORNA”),<sup>49</sup> whose application varies wildly among the states.<sup>50</sup> SORNA publicly stigmatizes individuals well past the age of majority.

State practice is inconsistent among the jurisdictions with respect to who should register, the duration of the registration, and the ability of the public to access this information. Thirteen states only require registration of juveniles who have been convicted as adults for any of the qualifying crimes.<sup>51</sup> More states require registration for any juvenile adjudicated delinquent for the designated offenses, and for the most part these registrations are for a period of at least ten years.<sup>52</sup> A smaller number of states actually allow a judge to make a determination as to whether the juvenile should be subject to registration requirements,<sup>53</sup> while the remaining states have no registration requirements for these types of offenses.<sup>54</sup> Critics argue that the mandatory nature of the laws is over inclusive; that so many offenders are required to register that it ironically prevents the public from protecting itself against those who pose a real recidivist threat.<sup>55</sup> Digital technology makes it likely that in the future there will be an even greater number of registered offenders, so that the registers’ efficacy will diminish exponentially for those seeking to protect against sex offenders.

The examples at the start of this Article are stark depictions of the consequences of the impractical, and sometimes senseless, application of traditional child porn statutes to the displays of teen sexual behavior, especially when instantaneous dissemination via modern technology is involved. There is no rational basis to effect such disparate treatment of expressions of teen sexuality; the sexual thought processes of a sixteen-year-old in Iowa are no different than her peer in Virginia.

Four examples of teen behavior introduced in this Article, none of which stretch the bounds of credulity. It may surprise the reader to know the example that is clearly in violation of state law is the most explicable of the group. The sixteen-year-old sweethearts, though lawfully permitted to have sex, are prohibited from memorializing it, even to the exclusion of all others.<sup>56</sup> They may also be required to register as sex offenders for a period of ten years.<sup>57</sup> Assuming there is no claim that intoxication vitiated consent, the two seventeen-year-olds from New York may lawfully engage in the act, and take a photo,<sup>58</sup> but they run the risk of prosecution by sending it to Ohio, as does the cousin who receives it.<sup>59</sup> The young lady from Nebraska and her boyfriend are saved by a recent amendment to the Nebraska statute that presumably was meant to accommodate the issue by including affirmative defenses to the traditional child porn statutes.<sup>60</sup> In her case, evidence of the closeness in age, voluntary creation of the image, and the limited distribution can be offered as a defense to child pornography charges.<sup>61</sup> Finally, a condition of the statute that requires the photo be possessed or controlled for the purpose of arousing or satisfying the sexual desires of the person or another person<sup>62</sup> will probably leave the consequences for our sixteen-year-old Oregonian in the hands of his parents.

## III. COMPUTERS, CELL PHONES, AND TEEN USERS

### A. IDENTIFICATION OF THE TECHNOLOGY

The primary vehicle of communication referenced in this Article is the cell phone which, for all relevant purposes, functions similarly to any computer, though the facts and conclusions herein could apply to all transmissions of the subject material, by whatever means developed. Still, the ubiquitous cell phone best symbolizes the potential for the creation of explicit imagery.

Depending upon one’s generation, the introduction to the cell phone is associated with Gordon Gekko in the 1980s film *Wall Street*<sup>63</sup> or Zach Morris in the 1990s television show *Saved By The Bell*,<sup>64</sup> each of whom was armed with the Motorola DynaTAC 8000X.<sup>65</sup> The unit weighed two pounds, and was ten inches in length, not including the flexible whip antenna, retailed for \$3,995, and had a battery life of one hour which required a ten hour charge to sustain.<sup>66</sup>

Among teens, age is the most important variable in phone ownership. In 2009, about half of those aged twelve to thirteen owned cell phones, while surveys claimed seventy-two percent owned them by age fourteen.<sup>67</sup> Of course, it is difficult to define who actually “owns” the device in a typical multi-phone family. United States cell phone users sent about 2.1 trillion text messages in 2010, a nearly fifty percent increase over the previous year.<sup>68</sup>



## B. QUANTIFYING THE CLASS OF AFFECTED YOUNG PEOPLE

The first articles about sexting<sup>69</sup> reference a survey that was of arguably suspect methodology,<sup>70</sup> which addressed two very important years that most state laws exclude from the legal definition of a juvenile.<sup>71</sup> Unfortunately, most of the early media accounts reported statistics from this poll which concluded nearly twenty percent of teens were sending sexually explicit images via cell phone.<sup>72</sup>

Since then, at least three other studies have been conducted,<sup>73</sup> finding significantly different (and less) amount of sexters.<sup>74</sup> The survey that exactly identifies the subject age group<sup>75</sup> opines that as few as four percent of the sampled population engage in the practice.<sup>76</sup>

A valuable statistic in understanding the breadth of the issue would be the calculation of juveniles who have been adjudicated delinquent<sup>77</sup> for production, distribution, or possession of child pornography. The difficulty with obtaining this data is two-fold. First, there is the problem of confidentiality of juvenile records of such adjudications. Most jurisdictions shield any juvenile records from public access, and there is no consensus about the nature and degree of sex offenses that are subject to reporting under the SORNA.<sup>78</sup> Second, not all states require youth convicted of certain sex offenses that would fall within the subject of this Article to register, and not all registries are accessible by the public.<sup>79</sup> Further, some of these offenders are being held accountable for the harmful and exploitive conduct that traditional child pornography laws are meant to punish.<sup>80</sup> To the observer, the statutory violation reads the same.

Since the number of sexters is difficult to pin down, the potential impact of sexting laws on the population of juveniles is presumptive in consideration of the sheer volume of cell phone users among the age group. When adding computer sexters and “Skypers” to the mix, by any measure, there are a substantial number of young people impacted by the uncertainty and inconsistency inherent in the application of child pornography laws.

## IV. THE SUPREME COURT AND CHILD PORNOGRAPHY

### A. INTRODUCTION

When one pictures the average “child pornographer,” one does not imagine a seventeen-year-old student body president photographing himself after gym class. However, case law somehow places the teenage sexter in a jail cell with the very people from whom the Court has professed to protect him. The camera phone has caused the average fifteen-year-old studying for an Algebra quiz, and sneaking a quick suggestive text to her

beau, to fall unwittingly into the abyss that is child pornography. In order to fully appreciate the confusing legal issues that surround the teenage sexter, one must understand the framework of pornography law and its evolution.

Before the Court came across the likes of Paul Ferber<sup>81</sup> or Clyde Osborne,<sup>82</sup> prosecutions of child pornographers were based upon the test for obscenity established in *Miller v. California*.<sup>83</sup> Explaining that the states have an established interest in prohibiting dissemination or exhibition of obscene<sup>84</sup> material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles,<sup>85</sup> the Court set out to define the applicable standard to determine whether material is obscene.<sup>86</sup>

### B. CONCEPTUAL CHILD PORN LAW

#### 1. *New York v. Ferber*<sup>87</sup>

In 1982, the Supreme Court was asked to decide whether the criminality of distributing videos depicting underage children engaging in acts of a pornographic nature should be analyzed under the test for obscenity or under a different standard.<sup>88</sup> Paul Ferber co-owned an adult bookstore and sold two videos depicting young boys in various acts of masturbation to undercover police officers.<sup>89</sup> The state of New York indicted him on two counts of promoting an obscene sexual performance and two counts of promoting a sexual performance of a child; the jury convicted him on both counts of promoting a sexual performance of a child, which did not require proof of obscenity.<sup>90</sup>

On appeal, a single question was presented: “To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?”<sup>91</sup> Answering affirmatively, the Court categorically denied child pornography safe harbor within the First Amendment without considerations of obscenity.<sup>92</sup>

*Ferber* established that even if the images in question are not legally obscene, their production and distribution can be outlawed because of the state’s interest in preventing child exploitation and the overwhelming majority of child pornography is created in a manner that is an act of despicable child abuse.<sup>93</sup> To fit with the *Ferber* analysis, this author suggests that a third party, perhaps the pedophile that preys on and abuses children, must literally be in the background, having had an integral part in either its production or dissemination. The opinion clearly distinguishes the reasons child pornography is in the special class of unprotected speech, as it is proximately linked to the criminal act of child abuse.<sup>94</sup>

Thus, one can conclude that if there is no abuse, if the children are not 1) *made to engage* in the sexual conduct and 2) the

materials are not used for commercial purposes, the case is not controlled by *Ferber*. In *Ferber*, the Court addressed one issue, because a single question was presented. The acts occurring in the teenage sexter's photos are not intrinsically related to the sexual abuse of children in any of the ways the Court in *Ferber* proffered.<sup>95</sup> There is no coercion, exploitation, or abuse, and there is no third party behind the camera preying on the sexual acts of a child. The scope of this conduct rarely includes the sale for money or other commercialization of the images. There is no selling, advertising, or promoting of these photographs that could implicate the state's interests as per *Ferber*. The iniquitous motivation that should be required to impose criminal liability on the creator is absent. Thus, there is no record of child abuse to destroy. Further, the dissemination is generally done with the foolhardy and youthful indifference for modesty and consequence, unlike that same teen who flashes a passing car, wears a scanty bathing suit, or gets labeled with loose morals.

Prophetically, the *Ferber* Court noted that whatever miniscule unconstitutional applications of the statute that did occur could be cured through case-by-case analysis if the fact situations to which its sanctions, asserted, may not be applied.<sup>96</sup> It is essential for the Courts to step in and create a boundary between *Ferber* material and the sexted image. Consensual and self-produced images present one application that does not conform to the state's compelling interests in protecting children from adult predators. The Court, arguably, has left room to decide fact situations, such as those created by our "tech-crazy teens," which send a significant portion of the 75 billion texts per month.<sup>97</sup>

Finally, there is a huge difference between the means of production and distribution in 1982 and those means existing in 2011. A person who chose to create, format, and distribute forbidden material in *Ferber*'s era would make a far greater commitment in time and energy than a similar actor today who could take a picture and send it to hundreds of people around the world in the time it takes to read this sentence aloud. For these reasons, *Ferber*'s continued relevance can be debated.

## 2. *Osborne v Ohio*<sup>98</sup>

A few years after the *Ferber* Court found that production and dissemination of child pornography was unprotected and criminal, the Court was asked to extend the prohibition on child

pornography to include private possession of these materials.<sup>99</sup> The state of Ohio convicted Clyde Osborne for a violation of its Revised Code Section 2907.323, which proscribes possession of any material that shows a minor in a state of nudity.<sup>100</sup> Specifically, authorities discovered four photographs, each of a nude adolescent male posed in a sexually explicit position.<sup>101</sup>

Here, the Court held the possession of this material bore a causal relationship to criminal conduct similar to *Ferber* in that it created a market or economic motive which was an integral part of the production of the child porn.<sup>102</sup> It further found the statute would serve to destroy the permanent record of abuse, which once obliterated could no longer haunt its participants or be used by pedophiles to seduce other children into sexual activity.<sup>103</sup> However, *Osborne*'s impact on the creation of images by minors goes well beyond embellishing *Ferber*. The Court approved the State's construction of the term "state of nudity" to include a lewd exhibition depicting graphic focus on the genitals of the subject.<sup>104</sup> This construction directly impacts the legality of erotic photos that could be characterized as nothing more than posing.<sup>105</sup> Every state now includes these graphic displays within the statutory definition of sexual conduct.<sup>106</sup> Often these are the non-obscene, yet graphic and highly sexual poses and activities that make up the high tech flirting that sexting has come to represent.<sup>107</sup>

The Court conceded that on its face, the Ohio statute prohibited nude depictions of minors, which, standing alone constituted protected speech.<sup>108</sup> As construed, however, application of the statute exempted from punishment actions that were morally innocent, only preventing sinister possession or viewing of the described material for prurient purposes.<sup>109</sup> However, in its opinion, the Court did not use the term "*morally innocent*" to describe the protected images, opting instead to state, that by its construction, Ohio chose not to penalize those who view or possess *innocuous* photographs of naked children.<sup>110</sup> The majority wrote, "*so construed, the statute's proscription is not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography.*"<sup>111</sup> This shows that the Court recognized, even in 1992, that not all pictures of unclothed minors are child pornography.

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The Court's language clearly is not an invitation to create a new standard to measure these images, but is used as a method of distinguishing between that which *is* categorically child pornography and that which is not. This distinction is helpful in classifying the voluntarily self-created image as either innocuous and protected, or exploitive and prohibited.

The child pornographer begets a product of no social value and his motivations are for no social good. Though the sexted image quite often is similar in content to child pornography, it is created for completely different reasons and often reflects significant social value to its subjects. The self-produced image can be sent as an expression of affection, an attempt at humor, or a method of social interaction. It can also be appropriate enticement to engage in a relationship or a lawful sexual act. A number of surveys attempt to explain the motivations that drive young people to this level of exhibitionism.<sup>112</sup> In reality, there are many circumstances under which minors engage in the production and dissemination of sexually explicit images of themselves that involves varying levels of coercion and consent.<sup>113</sup> Efforts to list the reasons teens take nude photos of themselves should also likely include "because they can." It should be no surprise that so many teens are unaware they are violating the law when they create, possess, or disseminate these images.<sup>114</sup>

Another decade would pass before the Court again addressed child pornography legislation; by that time digital imagery revolutionized the creation and dissemination of these depictions.

### 3. *Ashcroft v. Free Speech Coalition*<sup>115</sup>

In 1996, Congress extended the definition of child pornography to include visual depictions, including computer generated images that were or appeared to be of minors engaging in sexually explicit conduct.<sup>116</sup> In *Ashcroft v. Free Speech Coalition*, the Court considered whether the government could extend the child pornography laws to sexually explicit images that appear to depict minors but were produced without using any real children.<sup>117</sup> This could occur in two distinct ways: by using adults who look like minors or by using computer imaging.

Fearful of suppression or criminal prosecution, a trade association for the adult entertainment industry, the publisher of a book focusing on the lifestyle of nudists, a painter of nude art, and a photographer who specialized in erotic images challenged the statute in Federal District Court.<sup>118</sup> On appeal, the question presented was whether the federal regulation was constitutional where it forbids speech that is neither obscene under *Miller* nor child pornography under *Ferber*.<sup>119</sup>

At the outset, the Court declared that the proscribed images "do not involve, let alone harm, any children in the production process."<sup>120</sup> The indirect harm, Congress asserted, was that a child reluctant to engage in on-stage sex acts may be persuaded by watching other children who were "having fun."<sup>121</sup> Another

potential harm discussed was the possibility that pedophiles would whet their own sexual appetites and increase creation, distribution, sexual abuse and exploitation.<sup>122</sup> Both of these arguments are used today to support the continued criminalization of the sexted image.<sup>123</sup>

In a retreat from *Ferber* and *Osborne*, the Court held that the government could not prohibit speech due to either its tendency to persuade viewers to commit illegal acts, or its utility in child enticement because "[t]here are many things innocent in themselves . . . such as cartoons, video games, and candy that might be used for immoral purposes," and that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."<sup>124</sup> The rationale of whetting of sexual appetites was similarly dismissed as being of unquantified potential for subsequent criminal acts and not proven.<sup>125</sup>

*Free Speech Coalition* explained that the harm Congress spoke of flowed from the content of the images, not from the means of their production.<sup>126</sup> Again referencing *Ferber*, Justice Kennedy reiterated that where the images were themselves the product of child abuse, "the state had an interest in stamping it out without regard to any judgment about its content."<sup>127</sup> The Court applied the *Ferber* rationale to mean that the production of the work, not its content, was the target of the statute, and whether it contained serious redeeming value was of no consequence.<sup>128</sup>

Thus, *Free Speech Coalition* reaffirmed that the First Amendment protects speech where the content is neither obscene nor the product of sexual abuse.<sup>129</sup> Nothing in this Article advocates reviewing standards of obscenity as applied to either adults or juveniles. But the Court at least recognizes that images of certain acts, even among older adolescents are not necessarily obscene.<sup>130</sup> Assuming the legality of the conduct depicted, and the lack of abuse in the means of production, self-produced imagery is likewise categorized as neither obscene under *Miller* or child pornography under *Ferber*.

## C. RECENT COURT DECISIONS IMPACTING THE TRADITIONAL CHILD PORNOGRAPHY JURISPRUDENCE

Over the past two terms, the Supreme Court has issued opinions in three cases that should influence the course of events when juveniles express themselves in sexual matters using evolving technologies. Though none of these opinions deal directly with self-created imagery, they restate that whatever the challenges of applying the Constitution to ever-advancing technology the core First Amendment values of speech and expression maintain their preeminence and are applicable to minors.

### 1. *United States v. Stevens*<sup>131</sup>

In *United States v. Stevens*, the Court reiterated the value of expression even when the content depicted conduct that was unlawful.<sup>132</sup> The statute at issue before the Court sought



to criminalize the commercial creation, sale, or possession of depictions of animal cruelty.<sup>133</sup> However, it only prohibited the portrayal of harmful acts, not the acts themselves, if the acts were unlawful in the jurisdiction in which the portrayal was created.<sup>134</sup> Although the Court disposed of this case by declaring that the law was overbroad and that a substantial number of its applications were unconstitutional judged in relation to its plainly legitimate sweep,<sup>135</sup> the opinion added value to the sexting discussion because it addressed limitations on content based censorship. It emphasized the need to link the speech to criminal conduct, and also pointed out the problematic enforcement issues from state to state.<sup>136</sup>

Only recently has the significance of *Stevens* entered the sexting conversation. One author calls the decision possibly one of the term's most doctrinally significant constitutional opinions.<sup>137</sup> Another flatly argues that after *Stevens*, the First Amendment prohibits the prosecution of minors for sexting once they have passed the state's age of consent to have sex.<sup>138</sup> In fact, by legally permitting minors to have sex in the first instance, even prior to *Stevens*, a state undermines its own rational bases for criminalizing expression of that sexual activity because it is absent a link to any crime. The rationale permitting young people to engage in sex acts while prohibiting them from taking pictures of the act creates a distinction without a difference.

The *Stevens* Court repeated the high value to be placed on First Amendment protection for the content of images.<sup>139</sup> The eight to one majority labeled the Government's claim that a class of material be denied First Amendment consideration when on balance the value of the speech is outweighed by its costs to society as "startling and dangerous."<sup>140</sup> It reaffirmed a bedrock principle underlying the First Amendment: the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.<sup>141</sup>

Of greater importance, the *Stevens* Court directly addressed prior child pornography jurisprudence and gave some context to the connection between the underlying conduct and the depiction.<sup>142</sup> This intrinsic relationship gives the speech a "proximate link to the crime from which it came."<sup>143</sup> The *Stevens* Court reconciles *Ferber*, *Osborne*, and *Free Speech Coalition* to the conclusion that the creation of child pornography is a criminal act and the depiction thereof is the subject of a previously recognized and long-standing category of unprotected speech.<sup>144</sup> Absent this connection between the image and the crime, First Amendment protection is presumed.<sup>145</sup>

Intriguing is the concern expressed by the *Stevens* Court of the problematic policy differences among the states as to what is lawful or not.<sup>146</sup> This was problematic because the relevant statute did not prohibit all portrayals of animals being injured or killed, but only those pictures created in states where the method of inflicting the injury was itself unlawful.<sup>147</sup> Likewise

discordant child porn laws create bizarre legal results for juveniles who produce or disseminate images among the states.<sup>148</sup> This occurs in the self-creation of cyber-porn when material created lawfully in State A is transmitted by one click to State B where the same photo is banned as child pornography, such as in the New York party example given early on in this Article. The weight of such dicta cannot be minimized when considering the substantial differences among the states as to who is regulated and what conduct is proscribed in sexual expression among young people.

The Court recognized that expression is not static, and it indicated a willingness to consider other categories of speech in relation to the Amendment's protection, once they are identified.<sup>149</sup> The Court has not had the opportunity to address images created with the ubiquitous cell phone and the digital technology available today. Importantly, this evolution undermines the method of production rationale upon which *Ferber* is based. Though this calculus could change in the aftermarket, at least at its inception, when young people voluntarily and consensually produce imagery of lawful conduct, there is no victim and there is no crime. This is the premise upon which a solution to the problem, discussed in Part VI, is based.

Since the Court has made room for the exclusion of, as yet unidentified, categories of speech from First Amendment protection, there is equal reason to believe it will make room for the inclusion of a subset of expression that was previously categorically banned.<sup>150</sup> After all, the Court has also shown some sensitivity to the emerging behavior of those who choose to utilize these gadgets to supplement or replace how they communicate.<sup>151</sup> As the rapidly developing methods of producing these images has evolved, so too has the expressive behavior of the end users.

## 2. *Brown v. Entertainment Merchants Association*<sup>152</sup>

When California attempted to regulate the sale and rental of violent video games to people under eighteen,<sup>153</sup> its statute was struck down by two lower federal courts,<sup>154</sup> and the Supreme Court affirmed in *Brown v. Entertainment Merchants Association*.<sup>155</sup> The Court's *Brown* decision indicates the direction the Court will take when considering whether the lawful, voluntary, and consensual expressions of children are intrinsic to criminal child pornography, and therefore unprotected. In Justice Scalia's majority opinion, the Court noted California's attempt to create a new category of content-based regulation that is permissible only for speech directed at children;<sup>156</sup> calling the effort "unprecedented and mistaken," the Court reiterated the significant measure of First Amendment protection accorded to minors subject only to the state's compelling interests and a statute's narrowly drawn restrictions.<sup>157</sup> Arguably, video game technology and cell phone applications have evolved on a similar track over the past twenty years.<sup>158</sup>

*Brown* underscores *Stevens*' importance by declaring it as the controlling authority for its decision.<sup>159</sup> The Court recognized that "[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas [and social messages] . . . and that suffices to confer First Amendment protection."<sup>160</sup> There is no previously recognized and long-standing category of unprotected speech associated with violence and "the basic principles of freedom of speech . . . do not vary" with a new and different communication medium.<sup>161</sup> In short, while a State may protect children from harm, that does not confer unbound power to restrict the speech to which children may be exposed.<sup>162</sup>

Unfortunately, some will probably latch on to *Brown* as authority that a state merely needs to show how expression of an idea harms children to regulate the content of that speech. Yet, the Court did not hold that proof of a causal link between violent video games and minors' aggressive behavior would satisfy the strict scrutiny a content-based restriction requires; it acknowledged that it is a good place to start the inquiry.<sup>163</sup> However, in *Brown*, the Court flatly declared that California could not show such a direct causal link between violent video games and harm to minors.<sup>164</sup> Thus, an argument that speech is harmful to minors is not persuasive, as it prevents the Court from recognizing a new "well-defined and narrowly limited class of speech."<sup>165</sup>

It is axiomatic that every aspect of traditional child pornography is harmful, but the same cannot be attributed to the consensual creation of pornography by all minors. The State must specifically identify an actual problem in need of solving and the curtailment of speech must be actually necessary to the solution.<sup>166</sup> The values of the First Amendment are impugned when the real reason for governmental proscription is the idea expressed, rather than its objective effects.<sup>167</sup>

Minors are entitled to a significant measure of First Amendment protection in matters of expression, even if a legislature thinks the subject is inappropriate or unsuitable for them.<sup>168</sup> The section below on current legislative responses is illustrative of what other conduct or actions will engage new statutory prohibitions, or will satisfy current regulations. These most probably will include age grouping, surreptitious recording, and intention to harm.<sup>169</sup> Looking forward, the idea that having sex is acceptable, yet memorializing it is not, will be a tough sell for legislators in trying to identify the problem, and will prove it

causes harm to the welfare of minors. Something more than a generic claim that the conduct involves child pornography will be required before sexters should be subjected to traditional child porn laws.

The potential to create pornographic images has been available since the 1820s when the first permanent image was burned on heliograph.<sup>170</sup> Now, the ability to disseminate an image around the world at the push of a button—easily, inadvertently, and uncontrollably—has outgrown *Ferber*'s legacy.

### 3. *City of Ontario v. Quon*<sup>171</sup>

Though *Stevens* and *Brown* are relevant to the premise of this Article as First Amendment cases, another recent opinion, unmentioned in any of the literature on sexting, requires acknowledgement. In *Ontario v. Quon*, the Supreme Court unanimously ruled that a reasonable search of an employer

provided telephone to discern whether employees were inadvertently being required to pay out-of-pocket for business expenses did not violate the Fourth Amendment.<sup>172</sup> At first blush, one may ask how this Fourth Amendment claim is relevant to this topic, but the devil is in the details.

While the Court kept its ruling narrow and cautioned that these issues must be decided on a case-by-case basis, it acknowledged that "[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior."<sup>173</sup> Of particular importance, the Court noted that "cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even

self-identification."<sup>174</sup>

Not unexpectedly, Justice Scalia expressed skepticism that "[a]ny rule that requires evaluating whether a given gadget is a 'necessary instrument for self-expression, even self-identification,' on top of assessing the degree to which the 'law's treatment of [workplace norms has] has evolve[d],' is (to put it mildly) unlikely to yield objective answers."<sup>175</sup>

This language adds substance to the argument that in these transmissions, the content or use of the innovation is not as important as the change in interpersonal dynamics the innovation brings with it. Cell phones and other technology empower teenagers to assert their independence from adults. These advances have been referred to as the "technology of the self."<sup>176</sup>

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We have traveled this path before. Television had an impact on society that birthed a body of scholarship devoted to the proposition that “the medium is the message.”<sup>177</sup>

## V. HARM: THE DISPUTATION ASSOCIATED WITH SEXTING

No one can claim the Government lacks compelling motivation to regulate the creation of child porn because of the harms of sexual abuse and sexual exploitation. Yet a body of work attempts to dislodge self-created images from the category of child pornography because the creation is consensual, non-exploitative, and absent of any *sui generis* risk of physical harm in their creation.<sup>178</sup>

This discourse is driven by the complete lack of agreement as to the nature and extent of the harm to the children in the means of production of the images.<sup>179</sup> The traditionalist theory asserts that child pornography is harmful and thus not protected by the First Amendment; that sexting is child pornography, and therefore sexting is harmful and not protected by the First Amendment.<sup>180</sup> This Article rejects that theory.

### A. HARM: THE CONNECTION TO *FERBER*

Few of us would risk disapprobation by suggesting that sexting by minors is a good thing. But the ongoing debate seems to characterize harm based on paternalistic, perhaps even religious, ideas that explicit display of the human body equates with the harm sought to be repelled by the states and for which the Supreme Court has created an exception to First Amendment protections.<sup>181</sup>

While attempting to compare and equate differing concepts of harm, some authors seem to ignore that *Ferber* is directed to the context within which the image is produced, not the content, of the image.<sup>182</sup> That case does not permit suppression of speech merely because it is harmful, it does so because the speech is a criminal act. As *Brown* points out, determination of a causal relation between the idea expressed and some harmful consequence is a good place to begin the discussion of the government’s right to regulate the content of speech.<sup>183</sup> Professor Leary and others contend that once the images are created they produce “vast” social harm since they are used by offenders to sexually assault children; they aid in the creation of juvenile sex offenders; and they further support the sexualization and eroticization of children.<sup>184</sup> Leary notes a study that found nearly a quarter of juvenile sexual abuse cases, the abuser used pornography to groom, legitimize, and demonstrate for the victim what to do.<sup>185</sup>

Likewise Professor Calvert adds to the list of the injuries and harms from sexting: mental anguish in the form of embarrassment and humiliation when the images are disseminated

without consent; harassment from others in the form of bullying; economic harm in the form of possible job loss or inability to obtain employment when the images are discovered; parental punishment; criminal punishment; in school punishment; and social stigma.<sup>186</sup> Noticeably absent from both authors is any reference to the relationship between sexting and the harms inherent in the invasion that accompanies the creation of the photo in an actual case of child pornography. This damage certainly includes physical, mental, and emotional trauma occurring while the image is being made. Likewise missing is any acknowledgement that the sexted image is often created for a valid, if immature, reason.

Authors have also latched onto the harm associated with traditional child porn creation in that it creates a permanent record of the abuse of the child, which the states rightfully have a compelling interest to eradicate.<sup>187</sup> The future of any image disseminated is out of control of the subject, and when the subject had no say in its creation, or the image is the product of abuse, the permanent record argument is justified. But when the subject image contains imagery that was made knowingly and voluntarily by young people of lawful age to engage in the act or conduct, this argument loses persuasiveness. In these circumstances, the lessons learned from self-created explicit images are the equivalent to an imprudently placed tattoo.

### B. HARM: DISCONNECTING FROM *FERBER*

There is pushback from authors where sexted photos are often labeled child pornography by prosecutors while bearing little resemblance to traditional notions of child pornography.<sup>188</sup> Many of the harms chronicled are also associated with other events in a juvenile’s life. As one author states,

Without the underlying criminal and coercive methods of production, the circulation of self-produced images does not subject the minor to the same type of continued invasion and exploitation of his or her sexual autonomy and bodily integrity that is *so* degrading that it can only be characterized as a *continuation* of the act of sexual abuse.<sup>189</sup>

Nowhere in the news or the literature do we find physical trauma or serial sexual exploitation associated in the creation of the sexted image. “Although such images surely hold unlimited potential for subsequent harm if disseminated without the minor’s consent, or even if the minor merely regrets having voluntarily distributed such images in the future, this harm is not *identical* or even substantially similar to the harm suffered by victims of child pornography.”<sup>190</sup> Civil law provides remedies by way of money damages and restraining orders to provide relief to one who makes the image possible, yet who later feels aggrieved when she feels it is improperly used.<sup>191</sup>

The far-reaching effects of being registered as a sex offender arguably outweigh the embarrassment associated with the possession and dissemination of self-taken pornographic materials.<sup>192</sup> Employers routinely use the Internet for background checks and are likely to discover a candidate's sexual offense history;<sup>193</sup> the chance of personal identification by means of an indiscreet image in cyberspace is more random. Far from being forced or enticed into submitting to sexual acts to be recorded in some fashion, with self-produced child pornography, it is the minor who decides to create or distribute sexually explicit images.<sup>194</sup> Who cannot look back to some regrettable conduct as an epiphany that changed their view of personal responsibility for their actions?

The claim that these images aid in the creation of juvenile sex offenders is only true because we choose to label the conduct for juveniles. Assuming the offensive photos were taken by, and of, a consenting pair of sixteen-year-olds, how do the circumstances surrounding the act make it more criminal than the circumstances of similar images contained in any mainstream, health and reproduction guide?<sup>195</sup>

Much has been said of the tragedy of the young woman in Ohio, who some claim took her own life in a tragic response to the publication of explicit photos she took for and sent to her then boyfriend.<sup>196</sup> Arguably, it was the consequence of her inability to handle the shame at the revelation of a most intimate set of images combined with the abject cruelty at the hands of her peers. It is quite a stretch to say her death was the direct harm caused by sexting. The blame should not be so much on the images as it should be on others' reactions to them as a more direct harm to her. Little discussion about the complexities of teen suicide accompanies this tragic event.

Bullying is certainly a problem that can cause harm and it has been the subject of national attention.<sup>197</sup> The solution is to regulate the conduct of the bully, however, *not* the content of the message. Understandably, the Internet has expanded the reach of the bully. Enforcement of existing laws against menacing and other forms of harassment is the more logical route to holding them accountable within the criminal justice system.

The lack of consensus on the quantity, nature, and degree of harm created in the production or dissemination of depictions of lawful conduct should devalue its weight in the discussion. In *Brown*, the Court did not hesitate to reject the conventional wisdom that exposure to violent video games *causes* harm to minors.<sup>198</sup> There is hardly a consensus as to how creating and sending explicit self-created images correlates to children, or if it harms them at all.

## C. HARM: SEXUALIZATION OF CHILDREN

The sexualization of children is a concept that, as any parent knows, is as frustrating as it is unavoidable in our culture. Whereas Professors Leary, Calvert, and others declare sexual-

ization to be a constituent part of the harm child porn laws is meant to nullify, this Article distinguishes the harm caused by the child pornographer from the harm associated with the sexualization of children.

The child pornographer causes physical, mental, and emotional damage through exploitation and abuse of a vulnerable population, and his is an affliction borne of malady or malevolence. Sexualization may not cause any ill effect, and more importantly, it exists with the complicity of parents and friends; it is an inescapable component of our environment, a rite of passage that nearly all teens face. Even if they are somehow victimized it can hardly be compared with the acts of a pervert or pedophile. Of equal interest is the degree that sexualization of the young has impacted the jurisprudence of child pornography. As discussed below, we have gone to great lengths and strayed far from *Ferber* in order to prove that the images are categorically child pornography.<sup>199</sup>

### 1. Societal Acceptance of Teen Sexuality

The intersections of the adolescent brain, our oversexed society, and digital communication have created an accident looking for a place to happen. The American Psychological Association found, "[v]irtually every media form studied provides ample evidence of the sexualization [of women], including television, music videos, music lyrics, movies, magazines, sports media, video games, the Internet, and advertising."<sup>200</sup> The scope of digital technology creates a new level of control, enabling even the most immature computer users access to unfiltered imagery and the ability to pass it on instantaneously and globally.

Findings in studies have shown "that women more often than men are portrayed in a sexual manner (e.g., dressed in revealing clothing, with bodily postures or facial expressions that imply sexual readiness) and are objectified (e.g., used as a decorative object or as body parts rather than a whole person)."<sup>201</sup> Additionally, "a narrow (and unrealistic) standard of physical beauty is heavily emphasized . . . [and] these are the models of femininity presented for young girls to study and emulate."<sup>202</sup> Though the volumes on female sexuality obliterate the dearth of literature on the sexualization of boys and young men, the message is equally clear that a person's value comes only from his or her sexual appeal or sexual behavior, and a person is held to a standard that equates physical attractiveness with being sexy. "[A] person becomes sexually objectified—that is, made into a thing for others' sexual use, rather than seen as a person with the capacity for independent action and decision making [and] sexuality is inappropriately imposed upon a [child]."<sup>203</sup>

One need look no further than the musical craze of "boy and girl bands," and the likes of plainly sexualized children such as Miley Cyrus, Justin Bieber, and Jaden Smith for examples of this social trend. Only recently, Abercrombie & Fitch drew



attention when it advertised the sale of padded bikini bras for children under the age of ten.<sup>204</sup>

According to Judith Levine, author of *Harmful to Minors: The Perils of Protecting Children from Sex*:

[W]e have arrived at a global capitalist economy that, despite all our tsk-tsking, finds sex exceedingly marketable and in which children and teens served as both sexual commodities (JonBenét Ramsey, Thai child prostitutes) and consumers of sexual commodities (Barbie dolls, Britney Spears).<sup>205</sup>

It seems hypocritical that adults permit access to magazines, movies, and cable television, web cams, computers, and cell phones and yet are unwilling to take some responsibility for the impact it has on children.

## VI. A METHOD TO RECONSTRUCT CHILD PORNOGRAPHY LAWS

As described below, a number of states are actually incorporating statutory language that will separate the “morally innocent” and “innocuous” imagery from the perverse and harmful kind. Whether these laws have been effective in preventing the creation and dissemination of this imagery is beyond the focus of this Article, which is directed to the constitutionality of current child pornography laws once the image is discovered. The practical enforcement of these laws has been made exponentially more difficult because of digital technology. On the other hand, once discovered, these images leave an electronic trail that often provides a prosecutor with irrefutable evidence as to their production and dissemination.

The ability to articulate circumstances that will determine what conduct is legal and what is not is at the root of American lawmaking. One authority, the prosecutor, is best suited to engage these statutes, not only on a policy level, but in the determination that the evidence is sufficient to meet the elements of these new and hopefully improved statutes. The conventional child pornography laws cover a great deal of expression that is routine for today’s youth and bears little resemblance contextually to the material in *Ferber* and *Osborne*.

## A. CURRENT LEGISLATIVE EFFORTS TO REGULATE SEXUALLY EXPLICIT IMAGES

Along with the conclusion that juveniles require different treatment for their criminal activities is the concession that juveniles are “more vulnerable or susceptible to negative influences and outside pressure,”<sup>206</sup> and “[o]nly a relatively small portion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.”<sup>207</sup> The central importance of these factors is the underlying assumption of the juvenile court movement. A major influence in public opinion on sexting was law enforcement’s response to the conduct. The response was to use existing child pornography law to formally prosecute juveniles and register them as sex offenders for periods that went well beyond their majority.<sup>208</sup>

No one gets elected to legislative office by promising to be soft on crime. Paradoxically, by a recent count, more than half of state legislatures have endeavored to amend their child porn statutes to decriminalize or recriminalize sexting so as to reduce the level of offense, the punishment for the conduct, and even the formality of instituting criminal charges or sex offender registration requirements.<sup>209</sup> Additionally the media and law enforcement have gone to lengths to warn children that, under present conditions, sexting can only lead to disaster.<sup>210</sup>

The provisions of legislation proposed or enacted indicate there is still no consensus as to any particular policy concern, but

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*It seems hypocritical that adults permit access to magazines, movies, and cable television, web cams, computers, and cell phones and yet are unwilling to take some responsibility for the impact it has on children.*

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the new statutes attempt to accommodate a number of issues—all directed to mitigating the perceived harshness of using traditional child porn law. Most new laws attempt to mitigate the legal consequences for the juvenile’s ribald manner of expression. Some new regulation takes a front-end approach and includes: subjecting the juvenile to counseling, community service, and life skills training;<sup>211</sup> requiring school districts to disseminate on the dangers of distributing sexually explicit images via the cell phone; requiring point of sale informational brochures when a cell phone is purchased; and creating diversion programs for offenders.<sup>212</sup> To the extent these statutes are directed toward prohibiting the

use of digital technology that is integral to criminal conduct, they will be within the reach of Supreme Court boundaries on the limit to free speech. To the extent the statutes criminalize



the depiction of lawful conduct, they too will lose relevance and enforceability. The lack of progress toward a unified legislative solution suggests judicial intervention is necessary to identify the class of cases that do not constitutionally qualify for prosecution as child pornography.<sup>213</sup>

## B. PROPER PURPOSES LANGUAGE

Among the reasons the Ohio statute was validated in *Osborne* was the state court's interpretation of "state of nudity" that created an exception to the reach of the law where the creation and possession of the images was morally innocent.<sup>214</sup> Thus, one can conclude, the only conduct prohibited by the statute is conduct that is *not* morally innocent, i.e., the possession or viewing of the described material for prurient purposes.<sup>215</sup> This language decriminalizes photos taken by parents of their naked babies in a bathtub, though literally the creation and possession of these images violates the statute.

To that end new statutes, or amendments to existing statutes, have carved out criteria where the creation, possession, or dissemination is not for prurient purposes, is not coerced or exploitive, or commercialized, and thus is outside the ambit of *Ferber* and *Osborne*. These enactments might not be artfully worded but certainly they are headed in the right direction. Judicial construction obviously will impact their efficacy and constitutionality. One common thread appears to be found in the addition of language to the statutory prohibitions that clearly intends to accommodate actions that are consequences of youthful indiscretion rather than perverse exploitation or some other criminal act.<sup>216</sup> They create exceptions to traditional proscriptions that track pattern behavior common to sexting and Skyping.

For example, one statute, typically, declares it unlawful to knowingly possess a visual depiction of sexually explicit conduct, wherein the subject is a minor.<sup>217</sup> If the possessor is over nineteen years of age, the violation is a Class III Felony, and if under nineteen years of age, a Class IV Felony.<sup>218</sup> However, it then goes on to state:

- (3) It shall be an affirmative defense to a charge made pursuant to this section that:
  - (a) The visual depiction portrays no person other than the defendant; or
  - (b)
    - (i) The defendant was less than nineteen years of age;
    - (ii) the visual depiction of sexually explicit conduct portrays a child who is fifteen years of age or older;
    - (iii) the visual depiction was knowingly and voluntarily generated by the child depicted therein;

- (iv) the visual depiction was knowingly and voluntarily provided by the child depicted in the visual depiction;
- (v) the visual depiction contains only one child;
- (vi) the defendant has not provided or made available the visual depiction to another person except the child depicted who originally sent the visual depiction to the defendant; and
- (vii) the defendant did not coerce the child in the visual depiction to either create or send the visual depiction.<sup>219</sup>

This statute now protects the intended and lustful expression of the fifteen-year-old Nebraska woman and her boyfriend described in the beginning of this paper.

North Dakota prohibits the surreptitious creation and possession of an image without written consent from each individual depicted in the image as well as the publication or distribution of the sexually explicit image with the intent to cause emotional harm or humiliation.<sup>220</sup> It further makes it an offense to publish the image, electronically or otherwise, after the individual depicted in the image, or the parent or guardian of that individual, expressly notifies the actor that they do not give consent to having the image disseminated.<sup>221</sup> Thus, under this statute, though the underage sexters may assent to the creation and distribution of the image initially, a parent or guardian can revoke that consent and further transmission will become unlawful.<sup>222</sup> This statute cleverly covers covert methods to obtain the images from unsuspecting subjects' public displays of sexual conduct at parties and sleepovers.<sup>223</sup>

If proper purposes can be articulated to rescue sexters from punishment, then it follows that legislators can include improper purposes for which a juvenile sexter can be sanctioned. Thus, interdiction has been directed toward the malevolent use of the imagery in the form of increasing the level of crime to a felony offense for those who post the image with the intent to harm or injure the reputation of the subject.<sup>224</sup> One of the most outrageous misuses of sexted images occurred among teens in Wisconsin and resulted in extortion charges and a significant jail sentence for the offender.<sup>225</sup> Of questionable validity is the Louisiana statute, exempting passive posing, but not active conduct, from the statute's reach.<sup>226</sup> On the one hand, *Osborne* authorizes prohibitions of passive posing when the statute's construction encompasses the graphic focus on the genitalia, and on the other sexual activity between the subjects might be completely lawful and thus meriting the same legal treatment as posing.<sup>227</sup>

## C. CIRCUMSTANCES INTEGRAL TO CRIMINALITY

To date, approximately half of the states have made efforts to redefine the boundaries between criminal behavior and behavior which many feel is merely inappropriate for young people.<sup>228</sup> There are a number of ways to accommodate the

legitimate reach of criminal prohibition without contradicting core First Amendment values. One example is the use of traditional statutes, which are available to prosecute the creation and transmission of self-created pornography when the circumstances involve conduct that has traditionally been subject to statutory regulation.

In some states, recently enacted or pending legislation centers on the use of the explicit images to harass,<sup>229</sup> to stalk,<sup>230</sup> to harm the reputation of another,<sup>231</sup> or with the intent to cause emotional harm.<sup>232</sup> Likewise, existing prohibitions against extortion and blackmail create consequences for the unlawful use of these depictions.<sup>233</sup> These types of offenses existed before technology so pervasively altered communication. Additionally, artfully worded statutes can be enacted to regulate or ban surreptitious creation or the commercial use of these images. Statutes can be enacted that prohibit enticement for sexual purposes where the age difference vitiates any reasonable claim of consent by both parties, as well as the use of the depictions to entice another into an unlawful act.<sup>234</sup>

Statutes require scienter, and a list of descriptive words, or “operative verbs” that clearly describe a proscribed course of conduct that sanctions speech that accompanies it. As used in the statute, they must be surrounded by other words of the statute so as to define the determinative fact that must be proven. This fact often will be the intention of the actor and, though it may be difficult to prove, the statute’s requirements are clear questions of fact. It may be difficult in some cases to determine whether the requirements have been met, but courts and juries every day pass upon the reasonable import of a defendant’s statements and upon “knowledge, belief and intent.”<sup>235</sup>

#### D. A PROPOSED SOLUTION

One of the boundaries suggested here is a judicially created standard of whether the image was lawfully created at the time and in the jurisdiction of its origin. If the image depicts conduct that is lawful, then possession or transmission of the image would be lawful, unless that possession or dissemination was integral to an articulated criminal act. The prosecution would have the burden of proving the image was not lawfully created, and the alleged delinquent could escape liability by asserting the affirmative defense of its legitimacy. Subsequent to that determination, the prosecution would be required to allege and prove that the creation, possession, or distribution of the image was integral to other criminal conduct. This requires statutory language that identifies the prohibited conduct and the remaining determinations of questions of fact that are clearly inherent to the adjudicatory process and the subjects of juries’ deliberations every day.

This result carves out a sanctuary for a significant amount of speech that does not create the risk of harm that is unforeseeable to the creator of the image. As distasteful as adults might

find this prospect, it has the important consequence of imposing self-responsibility upon those who would create these circumstances. Conversely, if the creation or consumption of the material is inherent to criminal conduct, there is also a legal consequence. “Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable to them.”<sup>236</sup>

Most of the discussion in the literature has addressed the policy decision of whether or not to prosecute under generic statutory prohibitions, and there have been few efforts to propose what charges should be brought against minors who self-create sexually explicit material.<sup>237</sup> The most obvious remedy would be to add a *mens rea* element to the existing statutes<sup>238</sup>—but that is easier said than done. Articulating the fact(s) which must be proven to show knowledge and a subjective belief the materials are child pornography will run a substantial risk of over-inclusion as per the analysis in *Brown*.<sup>239</sup>

Professor Calvert identified distinctions between primary and secondary sexting.<sup>240</sup> Any further or secondary dissemination would be a violation of the law.<sup>241</sup> This approach is not feasible for two reasons. First, there would need to be consensus as to whom (what age) would be subject to the statute, requiring acceptance by all fifty states and territories of a Uniform Act.<sup>242</sup> Additionally, analogous to *Brown*, some young people—as well as their parents—may not object to the further distribution of these “glamour” shots, especially if they are lawfully created at the inception.

A third proposal distinguishes between traditional child pornography and juvenile pornography.<sup>243</sup> If the subject is a minor, and the image was created and disseminated exclusively to minors, the offense would not be taken as seriously as if it involved an adult somewhere in the process.<sup>244</sup> This method of decreasing the gravity of and penalty for the offense underlies most of the current legislative activity regarding sexting in the United States.<sup>245</sup> This effort does not solve the problem, but merely renames it. It also does not take into account that one of the actors may be an adult, but only days or weeks older than his protégé.<sup>246</sup> Ultimately, the issue to be addressed will be the criminalization of depicting conduct which is lawful. It is no less lawful by changing it from a felony to a misdemeanor or to a status offense.<sup>247</sup>

Regardless of whether these new or amended statutes lower the seriousness of the crime and consequences of a violation, or whether they provide for defenses to the violation itself, clearly they address the perceived injustice in the prosecution of sexting under generic child pornography statutes. Legislatures are slowly moving in the right direction, but without consensus on issues—such as at what age to regulate and what conduct to separate from traditional notions of child pornography—tech-

nology will increase the gap between existing laws and evolving teen behavior.

## E. THE PROSECUTOR'S ROLE SHOULD BE EXCLUSIVE

It is essential that legislation aimed at protecting children from allegedly harmful expression, no less than legislation enacted with respect to adults, be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application.<sup>248</sup> Since someone in authority must initiate the process, the suggestion here is that the process should begin with a review by law enforcement generally, with the ultimate responsibility falling on the prosecutor to determine whether formal charging is supported by legally sufficient evidence.<sup>249</sup>

Currently, many states utilize juvenile intake officers to screen complaints and make determinations as to whether a delinquent act was committed. They make decisions that are fundamental to initiating formal proceedings in Juvenile Court, and routinely with no oversight by the prosecutor. This is in conformance with the philosophy of the Juvenile Court system, but it is misplaced when considering legal accountability for the possession, creation, and dissemination of sexually explicit images. Often these people are not trained as lawyers, and though they are quite skilled in screening most crimes, the nuanced legislation initially requires legal analysis of facts from the perspective of both the law enforcement and the accused.<sup>250</sup> In some states the young person who takes the photo of herself is subject to a higher degree of charges than the senders and receivers of the photo, even if it is then distributed to hundreds of others.<sup>251</sup> The charging process requires early determination as to whether the facts constitute prima facie evidence that a delinquent act was committed by the accused juvenile.<sup>252</sup> The character and quality of the image will be assessed to determine whether the image is categorically child pornography. Evidence of the subjective belief of the actor in creating or possessing the image will be determined. The relationship among the young people who created, possessed, and distributed the images will engage any statutory affirmative defenses. Issues of coercion, exploitation, or commercialization must be considered in a consistent manner that is integral to any criminal activity prosecution. This type of legal analysis is com-

mon, but too few other crimes are charged in the regular course of the prosecutor's business.<sup>253</sup>

The prosecutor should have the exclusive right to screen facts obtained from law enforcement and other sources to determine whether those facts are legally sufficient for prosecution.<sup>254</sup> If it is determined that the facts are legally sufficient, the prosecutor should make the decision as to what route the matter will travel through the juvenile justice system.<sup>255</sup> Ultimately there will be one authority, accountable to the community, who will make consistent decisions that contain a legally and factually sufficient basis upon which to proceed. This procedure has a beneficial impact upon the prosecutor as it provides him or her with an explanation to an irate parent as to why there will be no criminal action initiated when the facts do not support any charges arising out of the lawful and voluntary image their

daughter has created. Likewise, the public will be protected from a subjective personal judgment by a prosecutor that an image is immoral or inappropriate.

Recently the Third Circuit considered and granted a restraining order against a criminal prosecution that has drawn much comment in the literature on sexting and the First Amendment.<sup>256</sup> Plaintiffs' daughter was depicted in a photo, taken two years earlier when she was thirteen, which depicted her and another from the "waist up wearing white, opaque bras."<sup>257</sup> Another Plaintiff's daughter was shown wrapped in a white, opaque towel, just below her breasts, appearing as if she had just emerged from the shower.<sup>258</sup> In addition to the usual list of prohibited sexual acts, the Pennsylvania statute also banned the "lewd exhibition of genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of

any person who might view such depiction."<sup>259</sup> The prosecutor felt he had a basis for threatening these charges because, in his view, the images were "provocative."<sup>260</sup>

Among the suggestions offered by Professor Leary in her original article is a protocol for prosecutors to utilize in determining the best course of action in deciding whether to prosecute sexters or not.<sup>261</sup> However, the idea expressed in this Article is not on the discretion of the prosecutor to bring charges, but rather the constitutional sufficiency of the charges brought.<sup>262</sup> It should satisfy those who believe the government has either the right or the duty<sup>263</sup> to intervene when children engage in foolish conduct that arguably causes them harm. Given the lack of capacity universally associated with adolescence, it is important

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to address whether the goals<sup>264</sup> of criminal or juvenile justice are satisfied by the formal prosecution and sexual registration of sexters.

## VII. CONCLUSION

This discussion is not merely an academic exercise. Recent census data shows there are roughly forty million people in the United States between the ages of twelve and seventeen.<sup>265</sup> Survey data show millions of those within this age group access computers, webcams, cell phones, and smart phones. There is no reason to expect our highly sexualized teen culture to reverse course either technologically or in matters of personal propriety. We have established arbitrary cut-off points, determined solely by chronological age, to establish criminal liability among them, while on the other hand we acknowledge irresponsible behavior is *“virtually a normative characteristic of adolescent development...and that adolescents are overrepresented statistically in virtually every category of reckless behavior.”*<sup>266</sup>

The Supreme Court has never clearly defined “child pornography” and has not disturbed state statutes that regulate any and every aspect associated with minors and sexual activity or nudity. Clearly though, it has created the legal authority for states to legislate upon their compelling interests. For reasons expressed in this Article, ambiguity in the definitions of those interests is blocking a consensus on the conduct which can be regulated. We continue to rely on chronological age to regulate the propriety of sexual expression. Sexting, Webcamming, Flickr, Facebook, Skyping, FaceTime and their counterparts have enabled a form of expression that bears little relation to the subject of *Ferber* and *Osborn*. The Supreme Court has clearly identified sexual abuse and child exploitation as evils to be targeted, while also indicating that room needs to be made for imagery that does not fall within these malevolent purposes. In this tug of war, the army of juveniles and the sophistication of their weaponry have nullified traditional rules of engagement.

It is plain that a blanket thrown over all aspects of juvenile nudity or sexual hijinks covers too much ground, and laws that generically ban explicit images of randomly aged people are going to collide with both First Amendment speech and Fifth Amendment Due Process claims. Efforts to overlay constitutional doctrine from *Ferber* and *Osborne* are out of sync with the methods and motives of expression among the young in 2011. This has resulted in the operation of an internally incoherent system of child pornography laws.<sup>267</sup>

Some sexting is not consensual; it is coerced and exploitative, and requires a societal response through the juvenile or adult justice system. A number of states have attempted to specify circumstances when even the consensual creation and transfer of the imagery is unacceptable because it is integral

to criminal activity. Sexual registration should still be considered after judicial evaluation, though in general the laws have come under great criticism, particularly as they have impacted juveniles. Some research shows that these laws have no impact on sex offenders or their crimes.<sup>268</sup> Other statutes consider a number of factors in the creation of the photos to accommodate legitimate forms of expression where the participants and the images are innocent of any real and harmful threat to the safety of children. This Article suggests one metric to be the legality of the conduct depicted. Initially, a statute should clearly distinguish lawful conduct from unlawful conduct. Thus, assuming the image is not obscene, it is not child pornography if it is created by or between people of lawful age to engage in the conduct it depicts. Subjective legal assessments are pernicious and have resulted in criminal charges such as those notoriously brought in Pennsylvania only because a prosecutor decided the images were “provocative.”<sup>269</sup> Subjective measures of harm are distracting rhetoric likewise leading nowhere.

Is sexting empowering or exploitative? When reasonable people can differ as to whether it is exploitative, and it is unclear as to who is being manipulated, entry into the criminal justice process hardly seems productive in light of the current penalties. This is especially true when considering the public branding result, which lasts well beyond the act giving rise to the offense. Child pornography laws were created to combat perverse exploitation and abuse of children *by adults*.

Though a number of distinguished authors have weighed in on policy considerations, such factors are not central to this Article. This Article addresses the issue of *what* to prosecute, not *when* to prosecute. The focus has been on the need to articulate specific prohibitions, identifying an incriminating behavior that allows the prosecutor, rather than a judicial officer, to decide whether the case presents credible evidence of all the elements that constitute the offense.

It is truly ironic that a jurisprudence that has affirmed the social value of unrestrained communication about depictions of gross or unlawful subject matter is criminalizing the communication of depictions of lawful matter. Given the numbers of juvenile sexters there seems to be “something profoundly amiss when a system of laws makes serious felony offenders of such a large proportion of its young people.”<sup>270</sup>

Though few could have predicted the phenomena of sexual Skyping or sexting, existing jurisprudence inadequately identifies who is to be protected and from what action protection is needed. If these methods of expression create matters of compelling state interest then they need to be identified and articulated in statutes that combat the harm caused, protect the public interest, and accommodate the special status of juvenile offenders who are likely to be rehabilitated. The Prosecuting Attorney is in the best position to administer these laws at the policy level and in the courtroom.



\* I would like to express my deep gratitude to my colleagues at Case Western Reserve University who were so generous with their time and counsel.

<sup>1</sup> See e.g., Don Corbett, *Let's Talk About Sext: The Challenge of Finding the Right Legal Response to the Teenage Practice of Sexting*, J. INTERNET L. Dec. 2009, at 6 (noting the increase in laws related to sexting); Mary G. Leary, *Sexting or Self-Produced Child Pornography? The Dialogue Continues – Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL'Y & L. 486 (2010) (demonstrating the prevalence of literature on the topic).

<sup>2</sup> See OHIO REV. CODE ANN. § 2907.322 (West 2000) (exemplifying of the type of statutory language more fully discussed in Part II below). A complete list of individual state laws is at <http://www.ndaa.org/pdf/Child%20Pornography%20Statutory%20Compilation%206-2010.pdf>.

<sup>3</sup> See Mary Leary, *Self Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 4 (2008).

<sup>4</sup> See John A. Humbach, "Sexting" and the First Amendment, 37 HASTINGS CONST. L.Q. 433, 438 (2010).

<sup>5</sup> Yvonne Roberts, *The One and Only*, SUNDAY TELEGRAPH, (July 31, 2005), at 22 ("Following a string of extramarital affairs and several lurid 'sexting' episodes, Warne has found himself home alone, with Simone Warne taking their three children and flying the conjugal coop.").

<sup>6</sup> CHATROULETTE, [www.chatroulette.com](http://www.chatroulette.com) (last visited Oct. 10, 2011).

<sup>7</sup> Apple, <http://www.apple.com/mac/facetime/?cid=wwa-naus-seg-mac10-046&cp=wwa-segmac10-videochat&sr=sem> (last visited October 10, 2011).

<sup>8</sup> Live stream applications are much more spontaneous and can be unanticipated by the receiver of the call. Recording of these conversations also engages potential liability under Wiretapping Statutes. Unlike the recorded phone call, the conduct addressed throughout this article is known to every party involved and is consensual among them.

<sup>9</sup> See, e.g., OHIO REV. CODE ANN. § 2907.322 (West 2000) (declaring it illegal to "[c]reate, record, photograph, film, develop, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality . . .").

<sup>10</sup> For instance, Philip Alpert, eighteen, was arrested for child pornography when he sent a photo of his naked girlfriend, sixteen, to others. Alpert engaged in "sexting" and got caught. Orlando police charged Alpert with child porn. He pleaded no contest to the charge and was tried and convicted. Alpert was sentenced and received five years probation and must register as a sex offender in Florida until age forty-three. Alpert's lawyer is working to get his name removed from the list of sex offenders. Deborah Feyerick and Sheila Steffen, 'Sexting' Lands Teen on Sex Offender List, TIME (Apr. 7, 2009), [http://articles.cnn.com/2009-04-07/justice/sexting.busts\\_1\\_phillip-alpert-offender-list-offender-registry?\\_s=PM:CRIME](http://articles.cnn.com/2009-04-07/justice/sexting.busts_1_phillip-alpert-offender-list-offender-registry?_s=PM:CRIME).

<sup>11</sup> Jan Hoffman, *States Struggle With Minors' Sexting*, N.Y. TIMES (Mar. 26, 2011), <http://www.nytimes.com/2011/03/27/us/27sextinglaw.html>.

<sup>12</sup> See, e.g., Humbach, *supra* note 4, at 463-66 (noting the inherent differences between adult-produced child pornography and autopornography exchanged among teenagers); Stephen F. Smith, *Jail for Juvenile Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 515 (2008) (arguing that minors engaged in the production and exchange of autopornography are either victims or, alternatively, deserving of at least some form of punishment that is considerably less harsh than adults engaged in the trade of child pornography).

<sup>13</sup> See, e.g., NEB. REV. STAT. ANN. 28-1463.03(5) (West 2010) ("It shall be an affirmative defense . . . if the defendant was less than eighteen

years of age at the time the visual depiction was created and the visual depiction of sexually explicit conduct includes no person other than the defendant.").

<sup>14</sup> *Id.* § 28-1463.03(6) (establishing an affirmative defense where the creator and sender of underage autopornography had a reasonable belief that the recipient of such content was a willing recipient).

<sup>15</sup> Based upon 2010 Census data of young people aged thirteen through eighteen, these surveys support the claim that the number of sexters alone may be near our current prison population which exceeds 1.5 million. See Key Facts at a Glance, BUREAU OF JUSTICE, <http://bjs.ojp.usdoj.gov/content/glance/corr2.cfm> (last visited Oct. 10, 2011).

<sup>16</sup> *United States v. Stevens*, 130 S. Ct. 1577 (2010).

<sup>17</sup> See, e.g., Antonio M. Haynes, Note, *The Age of Consent: When is Sexting No Longer Speech Incident to Criminal Activity?*, 97 CORNELL L. REV. (forthcoming 2012), draft available at <http://ssrn.com/abstract=1744648>.

<sup>18</sup> *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011).

<sup>19</sup> See *id.* at 2738-39 (noting that California failed to establish a "causal link between violent video games and harm to minors").

<sup>20</sup> Skype is a software application that allows users to make voice and video calls and chats over the Internet. Skype is a peer-to-peer system rather than a client-server system. See Skype Features, SKYPE, <http://www.skype.com/intl/en-us/features/> (last visited Oct. 21, 2011).

<sup>21</sup> See, e.g., Humbach, *supra* note 4 at 439 (acknowledging that sexting and child autopornography has been deemed to be equally criminal as adult-produced pornography for some time).

<sup>22</sup> See, e.g., NEB. REV. STAT. ANN. § 28-1463.03(6) (West 2010).

<sup>23</sup> See, e.g., 18 U.S.C. § 2242 (West 2011); 18 U.S.C. § 2243 (West 2011); 18 U.S.C. § 2251 (West 2011).

<sup>24</sup> A typical statutory definition of sexual conduct can be found in Ohio, where "'Sexual conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." OHIO REV. CODE ANN. § 2907.01 (West 2002).

<sup>25</sup> See ALA. CODE § 13A-6-70(c)(1) (2010) ("A person is deemed incapable of consent if he is: (1) [l]ess than 16 years old . . ."); ALASKA STAT. § 11.41.434(a)(1)-(2) (2010) (establishing different sexual abuse standards for sixteen and eighteen year olds); ARK. CODE ANN. § 5-14-127 (West 2010) (criminalizing sexual activity between those aged twenty years or older, and those less than sixteen years of age); CONN. GEN. STAT. § 53a-71(a)(1) (2010) (declaring sexual intercourse illegal where it occurs between a person between the ages of thirteen and sixteen, and a person more than three years older); D.C. CODE § 22-3001(3) (2001) ("'Child' means a person who has not yet attained the age of 16 years."); IOWA CODE § 709.4 (2010); KAN. STAT. ANN. § 21-3505 (2009); KY. REV. STAT. ANN. tit. 17-A, § 510.020 (West 2010); ME. REV. STAT. ANN. § 254 (2009); MD. CODE ANN., CRIM. LAW § 3-307 (West 2010); MASS. ANN. LAWS ch. 265, § 23 (2008); MICH. COMP. LAWS SERV. § 750.520d (West 2010); MINN. STAT. § 609.345 (2009); MISS. CODE ANN. § 97-3-64 (West 2010); MONT. CODE ANN. § 45-5-501 (West 2010); NEV. REV. STAT. ANN. § 200.366 (West 2009); N.J. STAT. ANN. § 2C:14-2 (West 2010); N.C. GEN. STAT. § 14-27.7A (2010); OHIO REV. CODE ANN. § 297.04 (West 2010); OKLA. STAT. ANN. tit. 21, § 1111 (West 2010); 18 PA. CONS. STAT. ANN. § 3122.1 (2010); R.I. GEN. LAWS § 11-37-6 (1956); S.C. CODE ANN. § 16-3-655 (2009); S.D. CODIFIED LAWS § 22-22-1 (2009); VT. STAT. ANN. tit. 13, § 3252 (2007); WASH. REV. CODE ANN. § 9A.44.079 (2008); W. VA. CODE ANN. § 61-8B-5 (2008).

<sup>26</sup> See, e.g., COLO. REV. STAT. § 18-3-402(1)(3) (2009) (criminalizing sexual activity where "[a]t the time of the commission of the act, the



victim is at least fifteen years of age but less than seventeen years of age and the actor is at least ten years older than the victim and is not the spouse of the victim . . .”); 720 ILL. COMP. STAT. 11-1.60 (2010); LA. REV. STAT. § 14:80.1(A) (2010) (“A person commits aggravated criminal sexual abuse if that person commits an act of sexual penetration or sexual conduct with a victim who is at least 13 years of age but under 17 years of age and the person is at least 5 years older than the victim.”); MO. REV. STAT. § 566.068 (West 2010); N.M. STAT. ANN. § 30-9-11 (West 2010); N.Y. PENAL LAW § 130.25 (McKinney 2010); TEX. PENAL CODE ANN. § 21.11 (Vernon 2009).

<sup>27</sup> See ARIZ. REV. STAT. ANN. § 13-1405(A) (West 2010) (“A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.”); CAL. PENAL CODE § 261.5(a)-(b) (West 2010) (“[For purposes of defining] [u]nlawful sexual intercourse . . . a ‘minor’ is a person under the age of 18 years and an ‘adult’ is a person who is at least 18 years of age.”); DEL. CODE ANN. tit. 11, § 770(a)(2) (2010) (prohibiting those “thirty years of age or older” from engaging in sexual activity with those younger than eighteen); FLA. STAT. ANN. § 794.011 (2002); IDAHO CODE ANN. § 18-1507 (2010); N.D. CENT. CODE § 12.1-20-05 (2007); OHIO. REV. STAT. § 163.315 (West 2001) (“incapable of consenting”); TENN. CODE ANN. § 39-13-506 (West 2010); UTAH CODE ANN. § 76-5-401.2 (West 2010); VA. CODE ANN. § 18.2-371 (West 2008); WIS. STAT. § 948.02 (2008); WYO. STAT. ANN. § 6-2-316 (2007).

<sup>28</sup> See, e.g., N.H. REV. STAT. ANN. § 632-A:3(III) (2011) (stating that a person is guilty of a felony if such person has sexual contact with another person under the age of thirteen, without exception); N.J. STAT. ANN. § 2C:14-2(a)(1) (2011) (providing that a person is guilty of aggravated sexual assault if that person commits an act of “sexual penetration” with another person under the age of thirteen).

<sup>29</sup> See BLACK’S LAW DICTIONARY 1288 (8th ed. 1999) (defining “statutory rape” as “unlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person’s will. Generally, only an adult may be convicted of this crime.”).

<sup>30</sup> See Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL’Y & L. 287, 322 (1997) (noting that about sixty percent of U.S. eighteen-year-olds are sexually active, and that scholarly writing on the subject even suggests that “sex can play a positive role in young people’s lives . . .”).

<sup>31</sup> See *People v. Hernandez*, 393 P.2d 673, 674 (Cal. 1964).

<sup>32</sup> See, e.g., CAL. PENAL CODE § 261.5(b) (2011) (declaring that “[a]ny person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is [only] guilty of a *misdemeanor*.”) (emphasis added); TENN. CODE ANN. § 39-13-506(b) (2011) (establishing that persons aged thirteen to fifteen, and fifteen to eighteen, may not be statutory “victims” depending on the age of their sexual partner).

<sup>33</sup> ‘*Romeo and Juliet*’ Law Changes Statutory Rape Definition, CBS DFW (June 4, 2011) <http://dfw.cbslocal.com/2011/06/04/romeo-and-juliet-law-changes-statutory-rape-definition/>.

<sup>34</sup> See, e.g., FLA. STAT. § 943.04354(1)(c) (West 2010).

<sup>35</sup> See, e.g., ALASKA STAT. § 11.61.127 (2010) (declaring that a person is guilty of the crime of possession of child pornography for knowingly possessing or accessing material that visually depicts a child under the age of eighteen engaged in sexual conduct or, alternatively, through manipulation *appears* to depict a child engaged in such activity); CAL. PENAL CODE § 313(2)(g) (West 2008) (defining minor as “any natural person under 18 years of age” for purposes of explicit materials); FLA. STAT. ANN. § 847.001 (West 2008) (declaring that an adult is a person eighteen or older).

<sup>36</sup> See ARK. CODE ANN. § 5-27-302(1) (2011) (“‘Child’ means any person under seventeen (17) years of age”); CONN. GEN. STAT. § 53a-

196(2) (2011) (establishing that on charges of possession of child pornography, a defendant may assert an affirmative defense that he made (1) “a reasonable mistake as to age,” and (2) a reasonable good faith effort to ascertain that such minor was seventeen years of age or older through official documentation); LA. REV. STAT. ANN. § 14:81.1(B)(5) (2011) (“‘Pornography involving juveniles’ is any photograph, videotape, film, or other reproduction, whether electronic or otherwise, of any sexual performance involving a child under the age of seventeen”).

<sup>37</sup> See, e.g., MD. CODE ANN. CRIM. LAW § 11-208(a) (West 2011); ME. REV. STAT. ANN. tit. 17-A, § 284(a)(1) (2011) (criminalizing the possession, transport, access, purchase, and transport of sexually explicit material when (1) it depicts a person under the age of sixteen, and (2) the actor knows or had reason to know the person is not sixteen); N.J. STAT. ANN. § 2c:24-4 (West 2011); N.Y. PENAL LAW § 263.11 (McKinney 2011) (“A person is guilty of possessing an obscene sexual performance by a child when, knowing the character and content thereof, [it] includes sexual conduct by a child less than sixteen years of age.”).

<sup>38</sup> DEL. CODE ANN. tit. 11, § 1103(b) (West 2009).

<sup>39</sup> For example, the New York statute permits possession of a photo depicting a sixteen-year-old, but forbids the creation or dissemination of an image displaying a person under seventeen. N.Y. PENAL LAW § 263.05 (McKinney 2001). Maine, likewise permits possession of an image of a sixteen-year-old, but prohibits distribution of images depicting those under eighteen. ME. REV. STAT. ANN. tit. 17-281(2) (2009).

<sup>40</sup> See, e.g., CONN. GEN. STAT. § 53a-196(2) (2011).

<sup>41</sup> After all, the physical transformation from boy to man is far more ambiguous than the step from underage to of age.

<sup>42</sup> N.M. STAT. ANN. § 30-6a-3(a) (West 2007).

<sup>43</sup> See, e.g., CAL. PENAL CODE § 313(a) (West 2008) (“‘Harmful matter’ means matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.”).

<sup>44</sup> See, e.g., *id.* at (d).

<sup>45</sup> See, e.g., FLA. STAT. ANN. § 847.012(3)(a) (West 2008) (“A person may not [possess] . . . [a]ny picture . . . which depicts nudity or sexual conduct . . .”); MASS. ANN. LAWS ch. 272 § 29A (LexisNexis 2010).

<sup>46</sup> FLA. STAT. ANN. § 827.071(1)(h) (LexisNexis 2011) (defining sexual conduct to include “actual lewd exhibition of the genitals”).

<sup>47</sup> See ARIZ. REV. STAT. ANN. § 13-3501(4) (2001).

<sup>48</sup> The Third Circuit Court of Appeals affirmed the child porn conviction of Steven Knox in *United States v. Knox*, where all the children wore “bikini bathing suits, leotards, underwear, or other abbreviated attire while they were being filmed.” 32 F.3d 733, 737 (3d Cir., 1994). “The government conceded that no child in the films was nude, and that the genitalia and pubic areas of the young girls were always concealed by an abbreviated article of clothing.” *Id.* The Court held “that the federal child pornography statute, on its face, contains no nudity or discernibility requirement, that non-nude visual depictions, such as the ones contained in this record, can qualify as lascivious exhibitions, and that this construction does not render the statute unconstitutionally overbroad.” *Id.*

<sup>49</sup> SORNA requires certain to juveniles register as sex offenders after adjudication of a sex offense. 42 U.S.C. §§ 16911-29 (2006). This requirement applies only to juveniles convicted as adults and juveniles adjudicated delinquent in juvenile court, so long as the juvenile is fourteen years of age or older and is convicted of an offense similar to or more serious than the federal aggravated sexual assault statute. See *id.* at § 16911(8).

<sup>50</sup> In addition to offenses such as forcible rape, this statute covers any offense involving a sex offense with a victim under the age of 12.

<sup>51</sup> Lori McPherson, *Practitioner’s Guide to the Adam Walsh Act*,

20 NAT'L CENTER FOR PROSECUTION OF CHILD ABUSE UPDATE 2 (2007), available at [http://www.ojp.usdoj.gov/smart/pdfs/practitioner\\_guide\\_awa.pdf](http://www.ojp.usdoj.gov/smart/pdfs/practitioner_guide_awa.pdf). See, e.g., ALASKA STAT. ANN. § 12.63.100(3) (West 2010) (stating explicitly that the requirements cover juvenile criminals); GA. CODE ANN. § 42-1-12 (West 2011) (stating implicitly that the requirements include juvenile criminals); HAW. REV. STAT. § 846E-1 (West 2011); NEB. REV. STAT. ANN. § 29-4003 (West 2011); N.M. STAT. ANN. § 29-11A-4 (West 2005); N.Y. CORRECT. § 168-a (McKinney 2011); 42 PA. CONS. STAT. ANN. § 9795.2 (West 2007); TENN. CODE ANN. § 49-39-202 (West 2007); VT. STAT. ANN. tit. 13 § 5401 (West 2011); W. VA. CODE ANN. § 15-12-2 (West 2006); WYO. STAT. ANN. § 7-19-301 (West 2011).

<sup>52</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-3821(E) (2011) (permitting the court to end any duty to register upon successful completion of probation if the actor was under eighteen when the crime was committed); CAL. PENAL CODE § 290.001 (West 2007); COLO. REV. STAT. ANN. § 16-22-103(4) (West 2011) (applying registration requirements to juveniles convicted for unlawful sexual behavior); DEL. CODE ANN. 11 § 4121(a) (4)(a) (West 2010) (requesting notification to community if convicted of being a "sex offender"); 730 ILL. COMP. STAT. § 150-2 (A)(5) (West 2011) (describing adjudicated to mean conviction for juvenile sex offenders); KAN. STAT. ANN. § 22-4902(B) (West 2011); MICH. COMP. LAWS SERV. § 28.723(b) (2011); MO. REV. STAT. § 211.425 (2008); N.H. REV. STAT. ANN. § 651-B-1 (2011); N.J. STAT. ANN. § 2C:7-2 (2008); N.D. CENT. CODE § 12.1-32-15 (West 2011); S.D. CODIFIED LAWS § 22-24B-2 (2010); UTAH CODE ANN. § 77-27-21.5 (n)(i)(o) (West 2008); WASH. REV. CODE ANN. § 9A.44.130 (West 2011); WISC. STAT. ANN. § 301.45 (West 2010).

<sup>53</sup> See, e.g., ARK. CODE ANN. § 9-27-356(e)-(f) (West 2009) (requiring courts to conduct a hearing within ninety days of a registration motion, at which a juvenile defendant shall be represented by counsel, where the court will consider a number of factors related to the offense and the defendant's situation prior to deciding whether to order registration); IND. CODE ANN. § 11-8-8-5 (West 2004); VA. CODE ANN. § 9.1-902(G) (West 2011).

<sup>54</sup> See *Juvenile Sex Offender Registration and SORNA*, NAT'L CONF. OF ST. LEGIS., <http://www.ncsl.org/?Tabid=23045> (last visited Oct. 22, 2011) (stating that a total of fifteen jurisdictions do not require adjudicated juveniles to comply with sex offender registration requirements).

<sup>55</sup> See Brittany Enniss, Note, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, UTAH L. REV. 697, 712 (2008) (noting that registration laws only tend to note the name of the crime for which a person was convicted, without describing the "danger the offender really poses" to the community); see also Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community Notification Laws to Juveniles*, 91 CALIF. L. REV. 163, 164 (2003) (observing that empirical data supports a claim that recidivism rates for juvenile sex offenders are lower than for their adult counterparts).

<sup>56</sup> See *A.H. v. Florida*, 949 So. 2d 234, 237-39 (Fla. Dist. Ct. App. 2007) (holding there is no reasonable expectation of privacy that would permit such activity).

<sup>57</sup> FLA. STAT. ANN. § 943.0435 (West 2010). The law does not address whether juveniles must register. However, on its face, the law is limited to those individuals who have been "convicted" of the enumerated offenses. *Id.* at (1)(a)(I). Since juveniles are adjudicated delinquent for criminal offenses, and adjudications of delinquency or disposition are not "convictions" of crime, the law appears to be limited in scope to juveniles who have been prosecuted and sentenced as adults. Despite not expressly bringing juveniles within the purview of the law, Section 943.0435(11) provides the potential for a decreased registration duration of only ten years for those individuals who were eighteen or younger at the time of the offense. *Id.* at (11); see also § 943.04354. Inclusion of this provision is not inconsistent with finding that the statute is limited only to juvenile

prosecuted and sentenced as adults.

<sup>58</sup> See N.Y. PENAL LAW § 263.05 (McKinney 2001).

<sup>59</sup> OHIO REV. CODE. § 2907.322(A)(1)-(3) (West 2011); § 2907.323 (West 2011).

<sup>60</sup> NEB. REV. STAT. § 28-813.01(3) (West 2009); see also Part IV, *infra*.

<sup>61</sup> *Id.* at (3)(b).

<sup>62</sup> OR. REV. STAT. ANN. § 163.6869(1) (West 2003).

<sup>63</sup> See Ross Cantanzariti, *The Mobile Phone: A History in Pictures*, PCWORLD (Sept. 29, 2009, 6:10 pm), [http://www.peworld.com/article/172837/the\\_mobile\\_phone\\_a\\_history\\_in\\_pictures.html](http://www.peworld.com/article/172837/the_mobile_phone_a_history_in_pictures.html) (demonstrating a baseline for cell phone technology by profiling one of the earliest models from the 1980s).

<sup>64</sup> Julius Motal, *Infographic Charts the Evolution of the Mobile Phone*, GEEK.COM (Aug. 30, 2011, 12:17 pm) <http://www.geek.com/articles/mobile/infographic-charts-the-evolution-of-the-mobile-phone-20110830/> (noting that phones of this generation are colloquially referred to as "Zack Morris" phones).

<sup>65</sup> See, e.g., W. Michael Cox & Richard Alm, *Federal Reserve Bank of Dallas, Time Well Spent: The Declining Real Cost of Living in America*, Fed. Reserve Bank of Dallas Annual Report, 17 (2007) available at [http://www.minneapolisfed.org/research/prescott/quant\\_macro/readings/arpt97.pdf](http://www.minneapolisfed.org/research/prescott/quant_macro/readings/arpt97.pdf) (citing the DynaTAC 8000X as an example of an early, expensive cell phone).

<sup>66</sup> See *id.*

<sup>67</sup> Amanda Lenhart, *Teens and Mobile Phones Over the Past Five Years: Pew Internet Looks Back*, PEW INTERNET & AM. LIFE PROJECT (Aug. 2009) 3, 5, <http://www.pewinternet.org/~media/Files/Reports/2009/PIP%20Teens%20and%20Mobile%20Phones%20Data%20Memo.pdf>.

<sup>68</sup> *Wireless Industry Overview*, CTIA: THE WIRELESS ASSOCIATION 56 (July 28, 2011), [http://daily.ctia.org/files/CTIAEA2011/showsite/doc/072811\\_-\\_Wireless\\_Industry\\_Overview.pdf](http://daily.ctia.org/files/CTIAEA2011/showsite/doc/072811_-_Wireless_Industry_Overview.pdf).

<sup>69</sup> See generally Lenhart, *Teens and Mobile Phones*, *supra* note 67, at 3.

<sup>70</sup> *Id.* According to its website, the survey was conducted online between September 25 and October 3, 2008 with responses from 1,280 respondents, about half between ages thirteen and nineteen and half aged twenty through twenty-six; respondents were selected from those who had previously volunteered in a survey conducted by the same company (TRU Online Surveys).

<sup>71</sup> In most states, the legal age of majority is eighteen, but North Carolina and New York limit the jurisdiction of the Juvenile Courts to those under age sixteen. By including eighteen and nineteen-year-olds in this survey the pollsters consider a class of people outside the age of juvenile jurisdiction, but also include a group expected to be much more sexualized than a twelve-year-old, and much more likely to own cell phones.

<sup>72</sup> See, e.g., Tamar Lewin, *Rethinking Sex Offender Laws for Youth Texting*, N.Y. TIMES (Mar. 20, 2010), <http://www.nytimes.com/2010/03/21/us/21sexting.html> (referring readers to the Pew survey as related reading); see also Ronell Grier, *Teen sexting: Technological trend can lead to tragic consequences*, DAILY TRIB. (Jan. 27, 2010), <http://www.dailytribune.com/articles/2010/01/27/news/srv0000007438542.txt>; Bill Hewitt, *The Dangers of 'Sexting'*, PEOPLE (March 30, 2009), <http://www.people.com/people/archive/article/0,,20271181,00.html>.

<sup>73</sup> See Amanda Lenhart, *Teens and Sexting*, PEW INTERNET & AM. LIFE PROJECT, (Dec. 15, 2009), [http://www.pewinternet.org/~media/Files/Reports/2009/PIP\\_Teens\\_and\\_Sexting.pdf](http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf); see also KNOWLEDGE NETWORKS, *The MTV-Associated Press Poll Digital Abuse Survey*, (Sept. 23, 2009), [http://www.athinline.org/MTV-AP\\_Digital\\_Abuse\\_Study\\_Full.pdf](http://www.athinline.org/MTV-AP_Digital_Abuse_Study_Full.pdf); COX COMM., (June 24, 2009), [http://www.cox.com/takecharge/safe\\_teens\\_2009/media/2009\\_teen\\_survey\\_internet\\_and\\_wireless\\_safety.pdf](http://www.cox.com/takecharge/safe_teens_2009/media/2009_teen_survey_internet_and_wireless_safety.pdf).

<sup>74</sup> Lenhart, *Teens and Sexting*, *supra* note 73, at 2.

<sup>75</sup> See *id.* (including data among this age group); see also Amy Lenhart,

Rick Ling, Scott Campbell & Kristen Percell, *Teens and Mobile Phones: Text Messaging Explodes as Teens Embrace it as the Centerpiece of Their Communications Strategies With Friends*, PEW INTERNET & AM. LIFE PROJECT (Apr. 20, 2010), <http://www.pewinternet.org/~media/Files/Reports/2010/PIP-Teens-and-Mobile-2010-with-topline.pdf> (a comprehensive study analyzing sexting and many more phenomena of teen cell phone use and ownership).

<sup>76</sup> Notwithstanding this small percentage, it is still a significant number of teens. See Humbach, *supra* note 4, at 435-87 (asserting that “millions of American teenagers are felony sex offenders” because of sexting).

<sup>77</sup> In Juvenile Court, this is the equivalent of being found guilty in adult court and it represents the keystone of a distinct philosophy that the purpose of the juvenile Court was not to punish but to save. See BERNARD FLEXNER & REUBEN OPPENHEIMER, *THE LEGAL ASPECT OF THE JUVENILE COURT* 18 (Children’s Bureau Pub. No. 99, 1922).

<sup>78</sup> See *infra* note 49.

<sup>79</sup> See *infra* Part I(A)(2) (describing inconsistent state practice, including some jurisdictions where some juvenile offenders are not necessarily required to register).

<sup>80</sup> For instance, images of sexual conduct between a sixteen-year-old and a young child, or images taken by stealth, force, or deception are excluded from this discussion since they arguably involve non-consensual activity.

<sup>81</sup> Ferber is the Petitioner in *New York v. Ferber*, 458 U.S. 747 (1982), discussed immediately below.

<sup>82</sup> Osborne was the Petitioner in *Osborne v. Ohio*, 495 U.S. 103 (1990), discussed immediately below.

<sup>83</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>84</sup> “Obscenity,” as defined by the Supreme Court is “material which deals with sex in a manner appealing to prurient interest.” *Roth v. United States*, 354 U.S. 476, 487 (1957).

<sup>85</sup> *Miller*, 413 U.S. at 18-19.

<sup>86</sup> *Id.* The Court held that material is obscene and subject to state regulation where: (1) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct law specifically defined by the applicable state; (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. See *id.* at 27. The Court went on to warn the states that no one should be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law, as written or construed. See *id.* at 27.

<sup>87</sup> *New York v. Ferber*, 458 U.S. 747 (1982).

<sup>88</sup> See *Ferber*, 458 U.S. 747, 749-53.

<sup>89</sup> See *id.* at 751-52.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 753.

<sup>92</sup> See *id.* at 756-74.

<sup>93</sup> *New York v. Ferber*, 458 U.S. 747, 757-62 (1982). First, a state’s interest in safeguarding the physical and psychological well-being of children is beyond compelling, and legislative judgment has determined that using children in sexual performances is physically, mentally and emotionally harmful to those children. Second, distribution of child pornography is intrinsically related to sexual abuse because those videos are a permanent record of the participation of and harm to the child. The only practical way to stop the villains that actually produce these acts of child abuse is to stamp out the market for the finished product. Additionally the advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the nation. Further, the value of this speech is “exceedingly modest, if not *de minimus*.” See *id.*

<sup>94</sup> The majority court explained that content-based speech classifications have been accepted where the evil to be restricted so overwhelmingly outweighs the expressive interests and they can be appropriately generalized so that no process of case-by-case adjudication is required. *Id.* The Court then concluded that whatever miniscule unconstitutional applications of the statute that did occur could be cured through case-by-case analysis if the fact situations to which its sanctions, should not be applied. See *id.* at 763-64.

<sup>95</sup> *New York v. Ferber*, 458 U.S. 747, 757-62 (1982).

<sup>96</sup> See *id.* at 773-74 (doubting that the Court’s interpretation of the New York statute was overbroad, but noting that it was made with respect to the “hard core of child pornography,” hinted that it hoped New York courts would not “widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on ‘lewd exhibition[s] of the genitals.’”).

<sup>97</sup> Donna St. George, *6,473 Texts a Month, But at What Cost?*, WASH. POST (Feb. 22, 2009), [http://www.washingtonpost.com/wp-dyn/content/article/2009/02/21/AR2009022101863\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/02/21/AR2009022101863_pf.html) (stating that teen cell phone users send an average of 2,272 text messages per month).

<sup>98</sup> *Osborne v. Ohio*, 495 U.S. 103 (1990).

<sup>99</sup> See *id.* at 109-11.

<sup>100</sup> *Id.* The 1990 version of Ohio Revised Code section 2907.323(A)(3) provided in pertinent part: “(A) No person shall do any of the following: (3) Possess or view any material or performance that shows a minor who is not the person’s child or ward in a state of nudity, unless one of the following applies: (a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance. (b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.” OHIO REV. CODE ANN. § 2907.322 (West 2000).

<sup>101</sup> See *Osborne v. Ohio*, 495 U.S. 103, 106 (1990). The Supreme Court granted certiorari in Osborne’s appeal and stated the issue as “whether Ohio may constitutionally proscribe the possession and viewing of child pornography or whether . . . *Stanley v. Georgia*, 394 U.S. 557 (1969) compels the contrary result.” *Id.* at 107. In *Stanley*, the Court rejected the state of Georgia’s assertion that it had an interest in controlling the moral contents of a person’s thoughts, after the home of a suspected bookmaker was searched by police, with a warrant, to seize betting paraphernalia but instead seized three reels of pornographic film. See generally *Stanley v. Georgia*, 394 U.S. 557 (1969).

<sup>102</sup> See *Osborne*, 495 U.S. at 109-10 (1990) (“It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.”).

<sup>103</sup> See *id.* at 111 n. 7 (“Child pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having ‘fun’ participating in the activity.”) (quoting ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY, FINAL REPORT 649 (1986)).

<sup>104</sup> See *id.* at 113-14.

<sup>105</sup> *Id.*

<sup>106</sup> See *infra* Part II(A)(1) (describing the type of conduct that usually falls within the prohibitions of state law).

<sup>107</sup> Note that many states amended their statutes to include lewdness, thereby expanding the amount of proscribable speech. The decision also



applied the rule of construction articulated in *Miller* and approved the Ohio Court's interpretation of the statutory reference to the requirement that the material shows a minor in a "state of nudity." *See Osborne v. Ohio*, 495 U.S. 103, 113-14 (1990).

<sup>108</sup> *See id.* at 112 ("We have state that depictions of nudity, without more, constitute protected expression.").

<sup>109</sup> *See id.* at 112-14.

<sup>110</sup> *See id.* at 114.

<sup>111</sup> *Id.* at 133, n. 10 (emphasis added). The "proper purposes" exceptions are set forth in O.R.C. 2907.323(A)(3) with the proposition that they were designed to sanction the possession or viewing of material depicting nude minors where that conduct is morally innocent.

<sup>112</sup> A focus group in conjunction with the Pew Research poll identified three scenarios for sexting: exchange of images between two romantic partners; exchanges between partners that are shared outside the relationship; and exchanges between two people who are not yet in a relationship, but where at least one person hopes to be. *See infra* note 72.

<sup>113</sup> Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONCEPTS 1, 26-27 (2009). (describing several such levels as "the initial sexter," "the unwilling recipient," and "girls in general").

<sup>114</sup> Juvenile Court Judge Thomas O'Malley required eight Ohio teens to poll their contemporaries and ask if they knew sexting was against the law; of 225 teens polled, only thirty-one knew it was illegal. Wendy Koch, *Teens Caught Sexting Face Porn Charges*, USA TODAY (Mar. 11, 2009, 11:09 pm), [www.usatoday.com/tech/wireless/2009-03-11-sexting\\_N.htm](http://www.usatoday.com/tech/wireless/2009-03-11-sexting_N.htm).

<sup>115</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

<sup>116</sup> Child Pornography Protection Act § 2256(8)(B) (1996). The law prohibited "any visual depiction, including any photograph, film, video, picture, computer, or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexual explicit conduct." *Id.* at (2). Section 2258(8)(D) defined child pornography to include any sexually explicit image that was "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct." *Id.* at § 2258(8)(D).

<sup>117</sup> *See Free Speech Coalition*, 535 U.S. at 239.

<sup>118</sup> *See id.* at 243.

<sup>119</sup> *See id.* at 240.

<sup>120</sup> *Id.* at 241.

<sup>121</sup> *See id.* (citing Congressional findings, n. 3, following USC § 2251).

<sup>122</sup> *Id.*

<sup>123</sup> *See, e.g., Leary, supra* note 1; Calvert, *supra* note 113.

<sup>124</sup> *Free Speech Coalition*, 535 U.S. 234, 251-53 (2002).

<sup>125</sup> *See id.* at 253 (disregarding this rationale and noting the paramount value of First Amendment rights).

<sup>126</sup> *See id.* at 241 ("These images do not involve, let alone harm, any children in the production process; but Congress decided the materials threaten children in other, less direct, ways.").

<sup>127</sup> *Id.* at 249.

<sup>128</sup> *Id.* at 247 (noting that watching critically acclaimed movies such as Academy Award-winners *Traffic* and *American Beauty*, as well as productions of *Romeo and Juliet*, could create violations of this statute).

<sup>129</sup> *Free Speech Coalition*, 535 U.S. at 251 (quoting *Ferber*, 458 U.S. at 764-65).

<sup>130</sup> *See id.* at 246 ("Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards.").

<sup>131</sup> *United States v. Stevens*, 130 S. Ct. 1577 (2010).

<sup>132</sup> *See id.* at 1592 (declaring invalid as substantially overbroad a statute related to animal cruelty videos).

<sup>133</sup> *See* 18 U.S.C. § 48 (West 2010) (prohibiting "animal crush videos").

<sup>134</sup> Stevens was convicted by a jury for creating and selling three video tapes, two of which depicted pit bulls fighting and one in which another pit bull attacked a domestic pig as part of the dog's training to catch and kill wild hogs. The legislative background of the statute focused on the creation of "crush" videos which feature the torture and killing of helpless animals and are said to appeal to persons with a particular sex fetish. *Stevens*, 130 S. Ct. at 1583.

<sup>135</sup> *Washington State Grange v. Washington State Republican Party*, 55 U.S. 442, 449 (2008).

<sup>136</sup> Of course, the author is cognizant of the obvious distinction between cruelty to children and cruelty to animals.

<sup>137</sup> Charles W. Rhodes, *The Historical Approach to Unprotected Speech and the Qualitative Analysis of Overbreadth in United States v. Stevens*, 2010 Emerging Issues 5393 (LexisNexis July 2010).

<sup>138</sup> Antonio Morteiz Haynes, Note, *The Age of Consent: When is Sexting No Longer Speech Incident to Criminal Activity?*, 97 CORNELL L. REV. (forthcoming Jan. 2012).

<sup>139</sup> *See United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) ("[A] s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

<sup>140</sup> *Id.* at 1585.

<sup>141</sup> *See id.* at 1584 (noting that the statute at issue was presumptively invalid because it restricts expression based on content).

<sup>142</sup> *Free Speech Coalition*, 535 U.S. at 235-36.

<sup>143</sup> *Id.*

<sup>144</sup> *See Stevens*, 130 S. Ct. at 1586 (acknowledging that child pornography jurisprudence provides an example of content-based limitations on expression upheld based on their causal connection to crime, yet recognizing that such cases "cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.").

<sup>145</sup> *See id.*

<sup>146</sup> *See id.* at 1588-90 (describing the varied regulations among the states).

<sup>147</sup> *See id.* at 1582 (recognizing the prohibition applied to any visual or auditory depiction "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place . . .").

<sup>148</sup> *See infra* Part II (A) (calling attention to the discordant situation with respect to the states' regulation of child pornography).

<sup>149</sup> *See Stevens*, 130 S. Ct. at 1591-92 (acknowledging that the Court may only impose a "limiting construction" on a regulation if it is susceptible to such an interpretation).

<sup>150</sup> This would amount to a reconsideration of self-created imagery, without disturbing the notion that by default expression is protected unless otherwise excluded.

<sup>151</sup> *See, e.g., Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011) (recognizing the emergence of video game entertainment as a legitimate form of expression).

<sup>152</sup> *Id.*

<sup>153</sup> The statute restricted from minors games in which the range of options available to a player included killing maiming, or raping the image of a human being. *See CAL. CIV. CODE ANN.* § 1746 (West 2009).

<sup>154</sup> *Brown*, 131 S. Ct. at 2733.

<sup>155</sup> *Id.* at 1742.

<sup>156</sup> *See id.*

<sup>157</sup> *Id.* at 2735-36 ("No doubt a State possesses legitimate power to protect children from harm . . . but that does not include a free-floating power to restrict the ideas to which children may be exposed.").

<sup>158</sup> *See History of Video Games*, GAMESPOT, <http://www.gamespot.com/>

gamespot/features/video/hov/index.html (last visited Oct. 22, 2011) (discussing the evolution of video games, emphasizing the “Video Games Are Back” era from 1985-88); *infra*, Part III (A) (summarizing the recent history of cell phone technology).

<sup>159</sup> *Brown*, 131 S. Ct. at 2734.

<sup>160</sup> *Id.* at 2733.

<sup>161</sup> *Id.* (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503).

<sup>162</sup> *See id.* at 2736.

<sup>163</sup> *See id.* at 2739 (stating that if there existed legitimate studies demonstrating that “violent video games *cause* minors to *act* aggressively,” emphasizing the need for evidence of a causal link, that “would at least be a beginning.”).

<sup>164</sup> *Brown*, 131 S. Ct. at 2738-39 (noting that California admitted as much).

<sup>165</sup> *Id.* at 2733 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

<sup>166</sup> *See, e.g., United States v. Playboy Entertainment Group*, 529 U.S. 803, 822-23 (2000) (“We agree that the Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban.”).

<sup>167</sup> *See Brown*, 131 S. Ct. at 2738.

<sup>168</sup> *See id.* at 2735-36 (noting that minors are also entitled to significant First Amendment rights).

<sup>169</sup> *See supra* Part VI.

<sup>170</sup> *History of Photography*, NATIONAL GEOGRAPHIC, <http://photography.nationalgeographic.com/photography/photographers/photography-timeline.html>.

<sup>171</sup> *Ontario v. Quon*, 130 S. Ct. 2619 (2010).

<sup>172</sup> *See id.* at 2633. In *Quon*, a police officer brought an action against the City, its police department, and the Chief of Police alleging the department’s review of officers’ text messages violated the Fourth Amendment. Apparently in an effort to determine whether the cell phone contract with the service provider allowed for a sufficient amount of text messages to be sent, the petitioner’s phone records revealed he made a significant number of non-work related text messages some of which were sexually explicit. *See Quon*, 130 S. Ct. 2619.

<sup>173</sup> *Id.* at 2623.

<sup>174</sup> *Id.* at 2630. It is somewhat ironic that Scalia wrote the majority opinion in *Brown*, where he reminded us that “basic principles of freedom of speech . . . do not vary” with a new medium of communication. *Id.* at 2635 (Scalia, J. concurring).

<sup>175</sup> *Id.* at 2635 (Scalia, J. concurring).

<sup>176</sup> Calvert, *supra* note 113, at 16 (citing Rachel Campbell, *Teenage Girls and Cellular Phones: Discourse of Independence, Safety, and Rebellion*, 9 J. YOUTH STUDIES 195, 199 (2006)).

<sup>177</sup> *See, e.g., Marshall McLuhan, Understanding Media: The Extensions of Man*, MIT Press (1964).

<sup>178</sup> *See, e.g., Humbach, supra* note 4; Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context*, 115 PENN ST. L. REV. 135 (2010).

<sup>179</sup> Compare Humbach, *supra* note 4, at 4 (citing examples of minors that experienced tragic situations after sending their nude photos to an intimate), with McLaughlin, *supra* note 178, at 29 (tacitly recognizing that legislatures ought to take note of the fact that different age groups may be better able to handle the effects of sexting, and indeed may be indifferent to them).

<sup>180</sup> *See, e.g., Liz Bey, Sexting: Freedom of Speech or Child Pornography?*, PointParkGlobe, <http://www.pointparkglobe.com/opinions/sexting-freedom-of-speech-or-child-pornography-1.1825510> (last visited Oct. 22, 2011) (“[Sexting is] very dangerous,” said Capt. George Seranko of the Greensburg Police Department . . . “[y]ou don’t realize what you are doing until it’s already done.”).

<sup>181</sup> *C.f. id.*

<sup>182</sup> *See Ferber*, 458 U.S. at 757-62.

<sup>183</sup> *See Brown*, 131 S. Ct. at 2739.

<sup>184</sup> *See generally* Leary, *Sexting or Self-Produced Child Pornography?*, *supra* note 1.

<sup>185</sup> Leary, *Self Produced Child Pornography*, *supra* note 3, at 13-14 (citing Mimi Halper Silbert, *The Effects on Juveniles of Being Used for Pornography and Prostitution*, in PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS 224-25 (Dolf Zillman & Jennings Bryant eds., 1989)). Though this survey does not identify if *child* pornography was used in these cases, it is valid to note that child pornography traumatizes children physically and emotionally, and it is no surprise they experience feelings of moodiness, anxiety, fear, and hopelessness. Admittedly, as Professor Leary suggests this includes an eroded self-concept and often the inability to separate themselves from exploitation.

<sup>186</sup> Calvert, *supra* note 113, at 23-25 (2009).

<sup>187</sup> *See, e.g., Ferber*, 458 U.S. at 759-60 (“[T]he materials produced are a permanent record of the children’s participation [in child pornography] . . .”); Leary, *Self Produced Child Pornography*, *supra* note 3 at 12 (noting that the Adam Walsh Act proclaims that “[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.”).

<sup>188</sup> *See, e.g., Calvert, supra* note 113, at 5 (“If convicted, these children could be legally labeled as sex offenders . . . all for what one might consider a youthful, sophomoric indiscretion.”).

<sup>189</sup> Sarah Wastler, *The Harm in “Sexting?”: Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J.L. & GENDER 687, 698 (2010).

<sup>190</sup> *Id.*

<sup>191</sup> Civil actions are often available contemporaneously with criminal charges based upon the same set of facts. Damages can be awarded for the Intentional Infliction of Emotional Distress in every state.

<sup>192</sup> This is not meant to dismiss the handful of severe cases which have resulted in tragic and even deadly consequences. *See* Mike Celizic, *Her Teen Committed Suicide Over ‘Sexting’*, MSNBC (Mar. 6, 2009, 9:26 am), <http://www.msnbc.msn.com/id/29546030> (high school student committed suicide after being harassed because of a text message sent by her to her boyfriend containing a self-taken sexually explicit photo was spread throughout the school).

<sup>193</sup> *See* Dave Marcus & Patricia Kitchen, *Employers Scour Web for Details on Applicants*, NEWSDAY, <http://www.newsday.com/classifieds/jobs/employers-scour-web-for-details-on-applicants-1.2133284> (last visited Oct. 22, 2011).

<sup>194</sup> *See* Calvert, *supra* note 113, at 12-13 (describing the concept of “self-sexualization”).

<sup>195</sup> *See generally* WILL McBRIDE & DR. HELGA FLEISHHAUER-HARDT, SHOW ME!: A PICTUREBOOK OF SEX FOR CHILDREN AND PARENTS (1975). This publication was controversial thirty-five years ago as a sex education aid for children; there are hundreds of similar books on modern shelves.

<sup>196</sup> Cindy Kranz, *Nude Photo Led to Suicide: Family Wants to Educate Teens About Dangers of Sexting* (Mar. 22, 2009, 3:13 am), <http://news.cincinnati.com/article/20090322/NEWS01/903220312/Nude-photo-led-suicide>.

<sup>197</sup> *Bullying*, 80 FACTS FOR FAMILIES 1 (May 2008), [http://www.aacap.org/galleries/FactsForFamilies/80\\_bullying.pdf](http://www.aacap.org/galleries/FactsForFamilies/80_bullying.pdf).

<sup>198</sup> The Court discussed the experts’ findings and concedes that there is a correlation between watching/playing violent video games and aggressive behavior, but the proof of the cause/effect relationship was insufficient to establish “harm” to the minor so as to fit within the state’s compelling interest. *See Brown*, 131 S. Ct. at 2738-39.

<sup>199</sup> *See* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV.



921, 953 (2001) (describing the “so-called ‘Dost test’” that identifies six factors relevant to whether a picture is lewd: ‘1) whether the focal point of the visual depiction is on the child’s genitalia or public area; 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.’”) (quoting *United States v. Dost*, 636 F.Supp. 828, 832 (S.D.Ca. 1986)).

<sup>200</sup> AMERICAN PSYCHOLOGICAL ASSOCIATION, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS 1 (2007), available at <http://www.apa.org/pi/women/programs/girls/report-summary.pdf>.

<sup>201</sup> *Id.* at 2.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 1.

<sup>204</sup> Tim Feran, *Abercrombie’s Padded Bikini for Preteens Stirs Up Fuss*, COLUMBUS DISPATCH (Mar. 29, 2011), <http://www.dispatch.com/live/content/business/stories/2011/03/29/abercrombies-padded-bikini-for-prenees-stirs-up-fuss.html>.

<sup>205</sup> Robert J. Danay, *The Danger of Fighting Monsters: Addressing the Hidden Harms of Child Pornography Law*, 11 REV. CONST. STUD. 151, 160-61 (2005).

<sup>206</sup> *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citing *Eddings v. Oklahoma*, 455 U.S. 104 (1982)).

<sup>207</sup> *Id.* (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty* 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

<sup>208</sup> See, e.g., “*Sexing*” *Shockingly Common Among Teens*, CBS NEWS (Feb. 11, 2009, 1:45 pm), [http://www.cbsnews.com/stories/2009/01/15/main4723161.shtml,%20articles.cnn.com/sexting.busts\\_1\\_phillip-alpert-offender-list-offen](http://www.cbsnews.com/stories/2009/01/15/main4723161.shtml,%20articles.cnn.com/sexting.busts_1_phillip-alpert-offender-list-offen) (providing example of police getting involved with sexting at a high school).

<sup>209</sup> See National Conference of State Legislatures, *2011 Legislation Related to “Sexing”*, <http://www.ncsl.org/default.aspx?tabid=22127> (last visited Oct. 22, 2011).

<sup>210</sup> See “*Sexing*” *Shockingly Common*, *supra* note 208 (“[Sexing] is a serious felony. They could be facing many years in prison . . .”).

<sup>211</sup> S.B. 1266, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

<sup>212</sup> Assemb. B. 1560-62, 214th Leg., 1st Ann. Sess. (N.J. 2010).

<sup>213</sup> For example Ohio’s H.B. 473 has languished for more than three years. See H.B. 473, 128th Gen. Assemb., 2009-2010 Sess. (Ohio 2010).

<sup>214</sup> See *Osborne v. Ohio*, 495 U.S. 103, 112-14 (1990).

<sup>215</sup> See *id.*

<sup>216</sup> See, e.g., H.B. 5533, Gen. Assemb., Feb. Sess. (Conn. 2010) (providing a series of affirmative defenses for defendants that may have been caught up in sexting during their early teenage years); see also H.B. 14, 58th Leg., Gen. Sess. (Utah 2008) (establishing that possession of explicit materials is a felony for those over eighteen, while it remains a misdemeanor for younger offenders); H.B. 1357, 36th, Reg. Sess. (La. 2010).

<sup>217</sup> NEB. REV. STAT. ANN. §§ 28-807(8), 28-1463-02(1) (LexisNexis 2011).

<sup>218</sup> NEB. REV. STAT. ANN. § 28-105 (LexisNexis 2011). A class III Felony is punishable by a minimum term of one to a maximum of twenty five years and a \$25,000 fine; A Class IV Felony is punishable by up to 5 years in prison and a \$10,000 fine. *Id.*

<sup>219</sup> NEB. REV. STAT. ANN. § 28-813.01 (LexisNexis 2011).

<sup>220</sup> N.D. CENT. CODE ANN. § 12.1-27.1-03.3(1) (West 2011).

<sup>221</sup> *Id.* at (1)(b) (“A person is guilty of a class A misdemeanor [if he] . . . [d]istributes or publishes, electronically or otherwise, a sexually

expressive image . . . after being given notice by an individual *or a parent or guardian* of the individual who is depicted [in the image] . . . that the individual, parent, *or guardian* does not consent to the distribution or publication of the sexually expressive image.”) (emphasis added).

<sup>222</sup> See *id.*

<sup>223</sup> See *id.* at (1)(a).

<sup>224</sup> 720 ILL. COMP. STAT. 5/11-27 (2010) was amended out of existence, however it would have also authorize the transfer from delinquency status to a “person in needs of services”).

<sup>225</sup> See Laurel Walker, *Stancl Gets 15 Years in Prison in Facebook Coercion Case*, MILWAUKEE J. SENTINEL ONLINE (Feb. 24, 2010), <http://www.jsonline.com/news/waukesha/85252392.html>.

<sup>226</sup> H.B. 1357, 36th, Reg. Sess. (La. 2010) (“‘Indecent visual depiction’ means any photograph . . . of a person under the age of seventeen years *engaging in sexually explicit conduct*.”) (emphasis added).

<sup>227</sup> See *infra* Part IV(B)(2) (explaining the *Osborne* Court’s apparently balancing analysis of what constitutes explicit material that may be proscribed).

<sup>228</sup> National Conference of State Legislatures, *2011 Legislation Related to “Sexing”*, <http://www.ncsl.org/default.aspx?tabid=22127> (last visited Oct. 22, 2011).

<sup>229</sup> ALASKA STAT. ANN. § 11.61.120 (a) (6) (West 2011).

<sup>230</sup> S.B. 741, 88th Gen. Assemb., Reg. Sess. (Ark. 2011).

<sup>231</sup> *Id.* N. 176.

<sup>232</sup> H.B. 1371, 72nd Leg. Assemb., Reg. Sess. (N.D. 2011).

<sup>233</sup> OHIO REV. CODE ANN. § 2905.11(A)(5) (West 1996) (“No person, with purpose to obtain any valuable thing or valuable benefit or to induce another to do an unlawful act, shall . . . [e]xpose or threaten to expose any matter tending to subject any person to hatred, contempt, or ridicule, or to damage any person’s personal or business reput[e], or to impair any person’s credit.”).

<sup>234</sup> Enticement per se is one of the given reasons teens engage in this behavior. However, statutes could be enacted that prohibit enticement for sexual purposes where the age difference vitiates any reasonable claim of consent by both parties.

<sup>235</sup> Though not the subject of this article, such a proposal should take direction from *United States v. Williams*, 553 U.S. 285 (2008), a child porn case with despicable facts that addresses Due Process requirements necessary to a statutory prohibition based upon the subjective belief of the actors.

<sup>236</sup> *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975).

<sup>237</sup> See, e.g., Sandra Schmitz & Lawrence Siry, *Teenage Folly or Child Abuse? State Responses to “Sexing” by Minors in the U.S. and Germany* 3 POL’Y & INTERNET 3, 19-23 (2011).

<sup>238</sup> Though not the subject of this article, such a proposal should take direction from *United States v. Williams*, 553 U.S. 285 (2008), a child porn case with despicable facts that addresses Due Process requirements necessary to a statutory prohibition based upon the subjective belief of the actors.

<sup>239</sup> See *supra* Part IV(C)(2) (analyzing the *Brown* Court’s reasons for invalidating the statute in question there).

<sup>240</sup> “Primary sexting occurs when the minor who took the sexted image in question is the same person who both appears in the image and who sends it out. Secondary incidents of sexting are those in which the sender is not the same person who took and initially transmitted the image but, instead is a person who received it from someone else and then forwards it on to others.” See Calvert, *supra* note 113 at 30.

<sup>241</sup> <sup>241</sup> See, e.g., Schmitz & Siry, *supra* note 237, at 21 (noting that Germany employs such an exemption, and that it might be argued this is rooted in a right to privacy).

<sup>242</sup> In light of the great diversity among the states as to ages of consent

to engage in sex, and to lawfully create, possess or distribute the images, it is highly unlikely that a policymaker could find a common ground in proposing this type of legislation.

<sup>243</sup> See, e.g., Jordan J. Szymialis, Note, *Sexting: A Repsonse to Prosecuting Those Growing Up With a Growing Trend*, 44 IND. L. REV. 301, 322-25 (2010); Meghaan C. McElroy, *Sexual Frustrations Why the Law Needs to Catch up to Teenagers' Texts*, 48 HOUS. L. REV. 10 (2010).

<sup>244</sup> See Schmitz & Siry, *supra* note 237, at 20 (stating that research suggests some teenagers view sexting as a substitute for sexual activity which, at least amongst themselves, is often not criminal).

<sup>245</sup> See, e.g., National Conference of State Legislatures, *2011 Legislation Related to "Sexting"*, <http://www.ncsl.org/default.aspx?tabid=22127> (last visited Oct. 22, 2011).

<sup>246</sup> Cf. *supra* Part II(A) (explaining the varied state and federal approaches to underage sexual activity, wherein the criminalization is often demarcated by specific ages).

<sup>247</sup> Status offenses are those behaviors that are illegal for minors only because of their age or "status" as minors. These include bans on smoking, drinking, and curfew and truancy laws, none of which apply to adults and all of which are associated with some notion of harm to minors who engage in them.

<sup>248</sup> In *Interstate Circuit v. Dallas*, the Court quoted with approval Judge Fuld's concurring opinion in *People v. Kahan*. See *Interstate Circuit Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968) ("It is . . . essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise . . .") (quoting *People v. Kahan*, 15 N.Y.2d 311, 313 (1965)).

<sup>249</sup> For example, in Ohio, Juvenile Rule 9 (A) states that "[i]n all appropriate cases formal court action should be avoided and other community resources utilized to ameliorate situations brought to the attention of the court." OHIO REV. CODE ANN. R 9(A) (West 1972) (emphasis added). The better course of action would be to let the elected Prosecutor, who is accountable to the public, make the initial determination that the evidence will satisfy the elements of a specific criminal offense.

<sup>250</sup> This is not to say that intake officers are incapable of receiving adequate training from the prosecutor, who could then integrate the process with the Court intake department—which has no accountability to the public.

<sup>251</sup> For example, in Ohio, creating the forbidden image is a second-degree felony, punishable by up to eight years in prison, while disseminating the same image is a fourth-degree felony, punishable by up to two years. OHIO REV. CODE ANN. § 2907.322(A), (C) (West 2001).

<sup>252</sup> See *Prima-Facie, Evidence, Case*, THE LECTRIC LAW LIBRARY, <http://www.lectlaw.com/def2/p078.htm> (last visited Oct. 22, 2011) ("Evidence that is sufficient to raise a presumption of fact or to establish the fact in question unless rebutted").

<sup>253</sup> Two common areas where this occurs are sexual assaults where consent is a defense and physical assaults where a defendant can be exonerated under a theory of self-defense. In each of these cases, there are statutory and common law defenses that allow the prosecutor to consider evidence from the defendant's point of view that could negate or rebut elements of the charge and preclude charges from being brought initially.

<sup>254</sup> See National District Attorneys Association, *National Prosecution Standards*, § 4-11.4 (2009), <http://www.ndaa.org/pdf/NDAAP%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.

<sup>255</sup> *Id.*

<sup>256</sup> See *Miller v. Mitchell*, 598 F.3d 139 (3d Cir., 2010).

<sup>257</sup> *Id.* at 144.

<sup>258</sup> *Id.*

<sup>259</sup> 18 PA. CONS. STAT. ANN. §§ 6312 (West 2010) (emphasis added).

<sup>260</sup> *Miller*, 598 F.3d at 144. Though often cited as relevant to the sexting issue because of the content of the photos, in reality very little can be applied to the discussion. In context, the decision truly stands as the poster child for why application of generic pornography laws cannot be left to the whim of law enforcement.

<sup>261</sup> See Leary, *Self Produced Child Pornography*, *supra* note 3, at 48-49.

<sup>262</sup> See *supra* Part V (discussing the disparate arguments on child pornography and sexting, and how they relate to constitutional protections).

<sup>263</sup> See Nathan Koppel & Ashby Jones, *Are 'Sext' Messages a Teenage Felony or Folly?*, WALL ST. J. (Aug. 25, 2010), [online.wsj.com/article/SB10001424052748703447004575449423091552284.html](http://online.wsj.com/article/SB10001424052748703447004575449423091552284.html) ("States will have to continue to tweak their criminal laws to cope with changing technologies, lawyers and legislators say").

<sup>264</sup> See generally Hugo Adam Bedau & Erin Kelly, *Punishment*, Stanford Encyclopedia of Philosophy (Feb. 19, 2010), <http://plato.stanford.edu/entries/punishment/> (noting the goals of deterrence, incapacitation, retribution, rehabilitation, and restoration).

<sup>265</sup> See Lindsay M. Howden & Julie A. Meyer, *Age and Sex Composition: 2010*. U.S. Census Bureau (May 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

<sup>266</sup> *Roper v. Simmons*, 543 U.S. 551, 569 ("[A]s any parent knows, and scientific and sociological studies . . . tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth . . . and are more understandable among the young.'").

<sup>267</sup> See Adler, *supra* note 199, at 927.

<sup>268</sup> Kristen M. Zgoba & Karen Bachar, *Sex Offender Registration and Notification: Limited Effects in New Jersey*, NAT'L INST. OF PEACE (Apr. 2009), <https://www.ncjrs.gov/pdffiles1/nij/225402.pdf>.

<sup>269</sup> *Miller v. Mitchell*, 598 F.3d 139, 144 (3d Cir., 2010).

<sup>270</sup> *Humbach*, *supra* note 4, at 438.

## ABOUT THE AUTHOR

**Carmen Naso** has served as the Supervising Attorney for the Juvenile Justice Unit of the Cuyahoga County Prosecuting Attorney for the past seven years, where he trained a staff of young lawyers before transferring to prosecute adult felony cases. Additionally, he has been an Instructor of Trial Advocacy at Cleveland-Marshall and an adjunct Professor at John Carroll University where he taught Criminal Justice, Corrections, and Sociology of Law. Currently he teaches in the Criminal Law Clinic and is an Instructor at the Stephanie Tubbs Jones Legal Academy at Case Western Reserve. He has presented on issues of Juvenile Delinquency to the Ohio Judicial College, Ohio Department of Youth Services, and will present on this article at the American Bar Association Convention in Washington D.C. in April, 2012