The Age of Consent: When is Sexting No Longer Speech Integral to Criminal Conduct

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NOTE

THE AGE OF CONSENT: WHEN IS SEXTING NO LONGER “SPEECH INTEGRAL TO CRIMINAL CONDUCT”? 

Antonio M. Haynes†

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Introduction

Jane met her boyfriend Jim at a high school football game. Jane was just a few days shy of sixteen at the time, and she and Jim, seventeen, instantly connected. They began dating, and a few months later,

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but before Jim’s eighteenth birthday, the two had sex together for the first time. In this respect, Jane and Jim were like many other teens across the country. Their relationship continued, and the two fell in love. One night, Jane decided that she and Jim should record themselves having sex. They didn’t have a webcam, so Jim suggested that they use his new iPhone. The two made several videos, and Jim kept them on his phone, never showing them to anyone else. Once Jane got a new Verizon Droid, she began taking naked pictures of herself, sometimes masturbating, and sent them to Jim. Jim returned the favor, often sending Jane pictures of his covered, but discernibly turgid penis. Jane never showed the pictures to anyone either, not even her very best friend.

In most states, the sex that Jane and Jim had would be completely legal. Yet, under federal law and the law of many states, Jane and Jim could face prosecution for the creation and dissemination of child pornography. The current federal child-pornography statutes make no distinction between pornography created by minors for one another, on the one hand, and the deeply exploitative materials that result from the actual rape and molestation of children, on the other. Indeed, as more teenagers become technologically savvy, media reports of the “sexting” epidemic abound. Some older teens engaged in activity similar to Jane and Jim’s have even been prosecuted and required to register as sex offenders. Scholars have questioned the wisdom of using laws that were originally intended to protect children

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3 This behavior has also been criminalized. See, e.g., Osborne v. Ohio, 495 U.S. 103, 114 n.11 (1990) (finding petitioner’s overbreadth arguments unpersuasive as applied to a statute that defined nudity as including depictions of covered male genitals in a “discernibly turgid state”).


6 Throughout this Note I use the terms “teens” or “older teens” to refer to those minors who have passed their state’s age of consent.

7 See, e.g., State v. Canal, 773 N.W.2d 528, 529 (Iowa 2009) (affirming obscenity conviction of eighteen-year-old boy for sexting pictures to a younger female friend).

8 E.g., Welte, supra note 5.
to prosecute them.\textsuperscript{9} Other academics have said that anyone who creates child pornography should be prosecuted, even minors who take pictures of themselves.\textsuperscript{10} Almost no one\textsuperscript{11} has argued, however, that in cases such as Jane and Jim's, at least, the teens' pictures are actually constitutionally protected speech.\textsuperscript{12}

The lack of vocal support for finding that the teens' speech is constitutionally protected is rather surprising given the Supreme Court's recent decision in \textit{United States v. Stevens}\.\textsuperscript{13} In Stevens, the Government argued that a statute criminalizing the commercial creation, sale, or possession of certain depictions of animal cruelty\textsuperscript{14} was constitutional because "the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment."\textsuperscript{15} For discerning new categorical exclusions from the First Amendment, the Government proposed a "simple balancing test: 'Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.'"\textsuperscript{16} The Court emphatically rejected this approach.\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{10} See, e.g., Mary Graw Leary, \textit{Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation}, 15 \textit{VA. J. SOC. POL'y & L.} 1, 50 (2007) ("The creation of child pornography through juvenile self-exploitation is a growing phenomenon with severe social harms, similar to that of other forms of child pornography possession, production, and distribution. ... The fact of self-harm, alone, however, cannot justify a refusal to prosecute juveniles for self-exploitation.").
\item \textsuperscript{11} In \textit{Miller v. Mitchell}, 598 F.3d 139 (3d Cir. 2010), the first federal court of appeals case to address sexting, the Third Circuit noted that in the initial complaint the plaintiffs alleged that any prosecution for sexting would be retaliation in violation of the minors' First Amendment rights of free expression, "the expression being their appearing in two [sexed] photographs." \textit{Id.} at 148-49. Because the district court did not address those claims, the Third Circuit also declined to address the issue despite having requested supplemental briefing. \textit{Id.} at 148.
\item \textsuperscript{12} Indeed, some writers—while questioning whether prosecutors should use child pornography statutes in this fashion—have gone out of their way to underscore that they are in no way arguing that sexting is protected speech. See, e.g., Smith, \textit{supra} note 9, at 520 ("To be clear, I am not making any sort of argument that child pornography—'self-produced' or otherwise—either is, or should be, constitutionally protected.").
\item \textsuperscript{13} 130 S. Ct. 1577 (2010).
\item \textsuperscript{14} 18 U.S.C. § 48 (2006).
\item \textsuperscript{15} \textit{Stevens}, 130 S. Ct. at 1584.
\item \textsuperscript{16} \textit{Id.} at 1585.
\item \textsuperscript{17} \textit{Id.} ("As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits
Writing for an eight-Justice majority, Chief Justice John Roberts acknowledged that the Government’s views did not “emerge from a vacuum,” because the Court had often “described historically unprotected categories of speech as being ‘of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’” Indeed, the most relevant precedent on point seemed to be New York v. Ferber, in which the Court held that certain nonobscene sexual depictions of children could be fully proscribed without violating the First Amendment. The Court reached this conclusion, in part, on the assumption that the value of using real children in the production of sexually explicit works was probably de minimis and thus did not raise serious constitutional concerns. In Stevens, however, the Court minimized the importance of this factor. The result in Ferber, the Court explained, was actually grounded in “a previously recognized, long-established category of unprotected speech,” namely “speech or writing used as an integral part of conduct in violation of a valid criminal statute.”

Scholars have noted that this description of Ferber is surprising and may well make Stevens one of the most doctrinally significant constitutional opinions of 2010. Stevens is a pathmarking decision that makes plain that there is not a “child pornography exception,” to the
First Amendment, but instead a “speech integral to criminal conduct exception” that sometimes encompasses child pornography. The Court’s pronouncement is also socially significant since it comes just as the United States is seemingly flooded by “a crime wave of child pornography offenses perpetuated by middle- and high-schoolers.”

To begin, even that description is jarring. For years, merely mentioning child pornography conjured up images of “old men in raincoats,” brutally seducing children to appear on film to “whet their own [pedophilic] sexual appetites.” Today, some have likened teens such as Jane and Jim to these old men in raincoats. Given the increasingly draconian legislative responses to the “scourge of child pornography,” this fact is not only alarming but also underscores the near impossibility of rational discourse once the phrase child pornography is deployed.

This Note argues that prior to Stevens, many courts and scholars assumed that child pornography was simply an unprotected category of speech. In addition, courts and prosecutors in sexting cases further assumed that older teens’ sexting was child pornography. Both of the premises were dubious from the start. Following Stevens, however, these premises are untenable. First, sexting is simply not child pornography as the Supreme Court has repeatedly defined the term. Second, even if sexting could be considered child pornography under some theory, after Stevens there is no longer a “child pornography exception” to the First Amendment, but instead a “speech integral to criminal conduct exception.” After teens reach the age of consent, their sexual activity is not typically criminal conduct. Thus, the First

27 Mike Brunker, “Sexting” Surprise: Teens Face Child Porn Charges, MSNBC.COM (Jan. 15, 2009, 8:03 PM), http://www.msnbc.msn.com/id/28679588/ns/technology_and_science-tech_and_gadgets/ (quoting attorney stating that the intent of child pornography statutes was to prevent the sexual abuse of children by “dirty old men in raincoats”).
29 See Leary, supra note 10, at 50 (explaining that children who take pictures of themselves actually harm other children by doing so).
33 Implicit in this assertion is that even after teens reach the age of consent, there may be instances in which they are still not legally permitted to engage in certain sexual acts
Amendment must fully protect sexted images of completely legal sexual acts.

While neither dismissive of the potential harms that sexting may engender nor doubtful of the legitimate worries of many parents, legislators, and judges, this Note accepts that even serious harms that result from speech may be contingent and indirect, and thus beyond the power of the government to address. Older teens' maturity levels and their abilities to fully appreciate the consequences of their actions are undoubtedly sound bases for constitutional distinctions. The age of consent thus represents the solemn legislative judgment that minors are mature enough to appreciate the potential consequences of their sexual activity, including pregnancy, childbirth, abortion, and sexually transmitted disease. Accordingly, this Note expresses tremendous skepticism that sexting warrants independent legislative action beyond setting the age of consent.

The structure of this Note is as follows. Part I briefly discusses "sexting," its prevalence among today's teenagers, and how it has resulted in a surprising number of recent prosecutions of teens under various child-pornography statutes. Part II explores the growth and development of child-pornography law in the United States and explains that using child-pornography statutes to go after what may be nothing more than high-tech flirting is plainly contrary to language in several key First Amendment cases. Part III explains that after Stevens, because there is no longer a child-pornography exception to the First Amendment but instead an exception for "speech integral to criminal conduct," child-pornography statutes must necessarily be tied to another "valid criminal statute" to survive constitutional scrutiny. With respect to older teens' sexting, the most logical starting point is state statutory-rape laws, which generally set the age of consent. Because of widely varying state statutes regarding the age of consent, Part IV critically examines the potential consequences of tying First Amendment protections to these underlying state criminal statutes. Part IV then offers an alternative analytical framework that may help those states that wish to do so address the harms of sexting while respecting the


See, e.g., Ashcroft v. Free Speech Coal., 535 U.S. 234, 250 (2002) ("While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." (citation omitted)).

See, e.g., Graham v. Florida, 130 S. Ct. 2011, 2032 (2010) (noting in the context of juvenile sentencing that "[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust" those whom a juvenile views "as part of the adult world a rebellious youth rejects," can result in poorly reasoned decisions by teenagers).
strictures of the First Amendment. That approach, however, is fraught with its own set of concerns, constitutional and otherwise.

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Sexting: What Is It? Why Are Teens Doing It?

Sexting is the sending of nude photographs via text message.\textsuperscript{36} Although many adults likely sext,\textsuperscript{37} recent studies show that the practice is quite prevalent among today's teenagers.\textsuperscript{38} Since youths between the ages of thirteen and seventeen send more of the seventy-five billion text messages that are exchanged in the United States each month than any other age group,\textsuperscript{39} the fact that some of those messages are sexts is not surprising.\textsuperscript{40} Although sexting has been described as the "modern equivalent of 'streaking',"\textsuperscript{41} it is perhaps more accurate to describe the process as a "more technological approach to sending a flirtatious note."\textsuperscript{42} The majority of teens who sext report doing so in order to be "fun or flirtatious," or to perhaps send their partner a "sexy present."\textsuperscript{43}

As they generally are with youthful indiscretions, many parents are outraged by sexting.\textsuperscript{44} Teachers and school administrators have also taken note of the phenomenon, and have begun confiscating stu-

\textsuperscript{36} State v. Canal, 773 N.W.2d 528, 529 (Iowa 2009).

\textsuperscript{37} See Jessica Leshnoff, Sexting Not Just for Kids, AARP (June 2011), http://www.aarp.org/relationships/love-sex/info-11-2009/sexting_not_just_for_kids.html ("[T]he reality is that more and more of the 50-plus set, both single and married, routinely use text messaging to send tantalizing pictures and provocative words to their partner, according to relationship experts."); Anthony Wayne, Sexting: Not Just for Teens Any More, TEXT MESSAGE BLOG (Apr. 12, 2009, 10:30 AM), http://www.textmessageblog.mobi/2009/04/12/sexting-adults/ ("Middle aged men and women ... are now also getting involved in sexting").

\textsuperscript{38} At least one study puts the percentage of teens who sext as high as 20%. Sex and Tech: Results from a Survey of Teens and Young Adults, NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, 1 (2008), http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf [hereinafter NCPTUP Study]. But see Amanda Lenhart, Teens and Sexting, PEW INTERNET & AM. LIFE PROJECT, 4 (Dec. 15, 2009), http://www.pewinternet.org/-/media//Files/Reports/2009/PIP_Teens_and_Sexting.pdf (reporting that only 4% of teenagers ages twelve to seventeen who own cellular phones "report sending a sexually suggestive nude or nearly-nude photo or video of themselves to someone else").


\textsuperscript{40} Donna St. George, 6,473 Tests a Month, But at What Cost?, WASH. POST, Feb. 22, 2009, at Al.

\textsuperscript{41} Eraker, supra note 26, at 557.


\textsuperscript{43} NCPTUP Study, supra note 38, at 4 (internal quotation marks omitted).

\textsuperscript{44} See Naked Photos, E-mails Get Teens in Trouble, FOXNEWS.COM, (June 5, 2008), http://www.foxnews.com/story/0,2933,363438,00.html#ixzz16Q1mRMI ("'I just don't understand why kids would do a stupid thing like that,' said Rochelle Hoins of Castle Rock, Colorado, where 18 students in her twin sons' middle school sent around nude pictures of themselves last year. 'We did dumb things when we were kids, but not like that.'").
dents’ cell phones and giving presentations detailing the dangers associated with sexting. Reports about sexting have appeared in major newspapers. Indeed, as two scholars recently noted, to see how quickly sexting has become an important and prominent legal issue in America, one need only turn on the television. Local prosecutors, “trying to jam square pegs into round holes,” have vigorously responded, charging some minors who likely believed they were only virtually flirting with creating, possessing, and disseminating child pornography.

While some parents are outraged at the very notion of sexting, others are more alarmed at the prospect of teens like Jane and Jim being labeled as sex offenders. And like their children who may have believed that they were only flirting, some parents are legitimately confused about how many of these pictures are child pornography at all. For instance, in Miller v. Mitchell, the first federal court of appeals case to address sexting, several Pennsylvania high-school students were threatened with prosecution for child pornography because of photographs they had on their cell phones. One parent, whose daughter had appeared in a photograph wearing a bathing suit, asked the district attorney how he could charge her daughter with child pornography based on that image. The district attorney said that he could charge the girl because she was posing “provocatively.” Another set of parents—whose daughter and her friend were pictured from the waist up wearing “white, opaque bras,” while talking on the phone and holding a peace sign—protested that the girls were “merely being ‘goof balls.’” The district attorney again pointed to

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45 See, e.g., id. (describing how school administrators in Santa Fe, Texas, confiscated numerous cellular phones after nude pictures of students began circulating).
46 See, e.g., Welte, supra note 5.
48 See Robert D. Richards & Clay Calvert, When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case, 32 HASTINGS COMM. & ENT. L.J. 1, 1 (2009) (“It seems that in 2009, the definitive way one knows a legal issue in the United States is important is when it is featured on one of those ‘ripped-from-the-headlines’ episodes of Dick Wolf’s highly successful legal drama series, Law & Order: Special Victims Unit.” (footnote omitted)).
49 Id. at 3.
50 See, e.g., Miller v. Mitchell, 598 F.3d 139, 143 (3d Cir. 2010) (noting defendant district attorney’s public announcement that students found with “inappropriate images of minors” could be prosecuted for possession or distribution of child pornography under Pennsylvania law).
51 See supra Introduction. Jane and Jim’s case is a fictional account I created based on various aspects of recent cases and news events.
52 598 F.3d 139 (2010).
53 Id. at 144.
54 Id.
55 Id.
the fact that the girls “were posed provocatively.” The parents’ incredulity about these pictures being considered child pornography at all is not surprising. Yet, neither was the district attorney’s reaction. Under the generally prevailing standard for determining whether an image is child pornography, even these “goof ball” photographs might qualify.

Understanding how child-pornography statutes—once thought to be designed to protect children from sexual abuse and exploitation—are now a vehicle for suppressing and punishing teen sexual expression warrants a brief study of child-pornography legislation and judicial interpretation of those statutes. First, however, it is important to outline the factual limits of the theory that this Note advocates. Generally, teen sexual expression through photographs involves three kinds of cases. Teens have disseminated images of themselves: “(1) as a means of earning money on the sale of those images, (2) as a means of forming or keeping friendships formed over the Internet, and, most commonly, (3) as part of their own private, voluntary sexual exploits.” Sexting falls into this third category, and thus this Note proceeds on the assumption that some teens who engage in sexual activity voluntarily memorialize those acts in pictures using their cell phones in order to titillate or entice their sexual partners. This Note further assumes that sexting is intended to be private. It is, of course, into this third category that most of the recent, troubling prosecutions actually fall. This category of images also presents the most difficult constitutional questions following the holding. Indeed, if the private, voluntary sexual exploits are legal in the first instance, it is ironic that the pictures themselves are thought to cause unique harms warranting prosecution.

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56 Id. (internal quotation marks omitted).
57 See infra notes 90–115 and accompanying text.
58 States have a freer hand in regulating minors’ ability to work, even where First Amendment concerns are implicated. See Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
59 See Smith, supra note 9, at 523 (explaining that Internet “friends” may actually be adults posing as teens to coerce and entice teens to send naked pictures).
60 Id. at 522.
61 At least two recent articles have drawn a distinction between primary sexting and secondary sexting. See Calvert, supra note 9, at 30; Elizabeth M. Ryan, Note, Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults, 96 IOWA L. REV. 357, 381–82 (2010). Secondary sexting involves the recipient of a sext sending the sexted message to a third-party without the original sender’s consent. Ryan, supra, at 361 & 362 n.31. Although, there may be distinct harms, such as “revenge porn” associated with secondary sexting, see id. at 363, secondary sexting is beyond the scope of this Note. For a persuasive discussion suggesting that state tort law may be the appropriate vehicle for addressing secondary sexting, see id. at 380–82.
62 See A.H. v. State, 949 So. 2d 254, 259 (Fla. Dist. Ct. App. 2007) (“If a minor cannot be criminally prosecuted for having sex with another minor . . . it follows that a minor
II
INCENDIARY INCOHERENCE: THE DEVELOPMENT OF CHILD-PORNOGRAHY LAW

A. The Journey from Clandestine Child Abuse to Jane and Jim's Cell Phones

Legislation aimed at child pornography is of fairly recent vintage. In the 1970s concerns about child sexual abuse became a national emergency and thus "awareness [a]nd concern about child pornography escalated dramatically." Congress responded and in 1978 passed its first statute specifically targeting child pornography, the Protection of Children Against Sexual Exploitation Act. The Act outlawed the use of children in the production of obscene materials. At the time, sexually explicit speech was protected by the First Amendment unless it exceeded the bounds of the obscenity test set forth in Miller v. California. While Congress respected these constitutional limits, thinking they represented a boundary it could not cross, not all of the states reacted accordingly. Indeed, by 1982, "[t]he Federal Government and 47 [s]tates [had] sought to combat [the exploitive use of children in the production of pornography] with statutes specifically directed at the production of child pornography," with at least half of these statutes not requiring the materials to be legally obscene.

The Supreme Court responded to these enactments in 1982 in the case of New York v. Ferber. The case arose when Paul Ferber, the owner of a Manhattan bookstore, sold two films of young boys masturbating to undercover police officers. Ferber was indicted under the two New York statutes controlling the dissemination of child pornog-
A jury acquitted Ferber of the two counts of promoting an obscene sexual performance but found him guilty of two counts that did not require proof that the films were obscene.\textsuperscript{73} The New York Court of Appeals reversed Ferber’s conviction, noting that because of the explicit inclusion of an obscenity standard in the statute under which Ferber was acquitted, it could not construe the other statute to include an obscenity standard.\textsuperscript{74} Therefore, “the statute would . . . prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment.”\textsuperscript{75}

The Supreme Court granted New York’s petition for certiorari, which presented a single question: “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?”\textsuperscript{76} In a unanimous decision, the Court answered yes, stating that the \textit{Miller} test bore “no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work.”\textsuperscript{77} Thus, child pornography “joined a small and ragtag band of categories of expression that are excluded from constitutional protection by reason of their content.”\textsuperscript{78}

The Court held that states were entitled to greater leeway in the regulation of pornographic depictions of children for several reasons. First, the State had a compelling interest in protecting the physical and psychological well-being of minors that was “evident beyond the need for elaboration.”\textsuperscript{79} Second, the distribution of materials depicting sexual activities of juveniles was “intrinsically related to the sexual abuse of children” in that the materials were a “permanent record of the child’s participation” in the act and also because of the need to effectively control the distribution network for child pornography.\textsuperscript{80} Third, the “advertising and selling of child pornography provid[ed] an economic motive” for the production of materials that were illegal throughout the country.\textsuperscript{81} Indeed, the Court noted, “[i]t rarely has been suggested that the constitutional freedom for speech and press

\begin{flushleft}
\textsuperscript{72} Id. at 752.  \\
\textsuperscript{73} Id.  \\
\textsuperscript{74} Id.  \\
\textsuperscript{75} Id. (quoting People v. Ferber, 52 N.Y.2d 674, 678 (N.Y. 1981)).  \\
\textsuperscript{76} Id. at 753.  \\
\textsuperscript{77} Id. at 761.  \\
\textsuperscript{78} Adler, \textit{supra} note 32, at 990.  \\
\textsuperscript{79} \textit{Ferber}, 458 U.S. at 756–57.  \\
\textsuperscript{80} Id. at 759–60.  \\
\textsuperscript{81} Id. at 761.
\end{flushleft}
extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."82 Fourth, the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct was "exceedingly modest, if not de minimis."83 Fifth, classifying child pornography as a category of material outside the First Amendment was not incompatible with earlier decisions.84 "[I]t is not rare," the Court held, "that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."85

Given the Court's focus on child abuse and its view that New York's statute was focused on "hard core" child pornography,86 it seemed that Ferber's reach might be somewhat limited. In fact, however, any predictions of a narrow exclusion for child pornography proved false. Congress quickly reacted to Ferber, passing the Child Protection Act of 1984.87 In the Act, Congress modified the definition of sexual conduct, essentially adopting the New York statute upheld in Ferber,88 and thus for the first time at the federal level proscribed certain nonobscene depictions of children.89 The Act also increased the age of "children" for purposes of the statute from sixteen to eighteen, thus significantly expanding the universe of what could be considered child pornography in the first instance.90 This was a curious development because the age of consent in the federal maritime and territorial jurisdictions was—and remains—sixteen.91

A few years later, in United States v. Dost,92 the Southern District of California laid out what is now the prevailing standard for lascivious exhibition of the genitals, an element of the federal child-pornogra-

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82 Id. at 761–62 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)). Though this never seemed to be the Court's primary rationale, after Stevens it appears to be the only rationale the Court accepts. See infra Part III.
83 Id. at 762.
84 Id. at 763.
85 Id. at 763–64.
86 Id. at 773.
88 The Act altered the language from "lewd" to "lascivious" exhibition of the genitals. See Adler, supra note 32, at 932 n.45 (citing Child Protection Act).
90 See 18 U.S.C. § 2256 (2006); Adler, supra note 32, at 930 n.45.
phy statute. The court concluded that the following factors should inform this determination: (1) whether the focal point of the visual depiction is the child's genitals or pubic 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; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Thus, it is apparent that by 1986, the definition of child pornography was becoming unmoored from the rationale laid out in Ferber. Although none of the Dost factors were determinative, neither did Dost provide an exhaustive list of the elements of lascivious exhibition. One can easily imagine numerous pictures that could satisfy these requirements, yet not at all require the abuse of children. The Supreme Court's next foray into the field was its 1988 decision in Osborne v. Ohio. Rather than pursuing its normal course and tightly cabining legislation that curtails First Amendment freedoms, the Court itself gave the green light to expanding the universe of constitutionally proscribable material. Although Osborne is generally cited for the proposition that unlike obscenity mere possession of child pornography could be criminalized, the statute the Court sustained swept much more broadly than the statute at issue in Ferber. Specifically, whereas the New York statute criminalized depictions of minors that contained

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93 In addition to the Ninth Circuit, most of the other courts of appeals have also adopted the Dost test. See United States v. Larkin, 629 F.3d 177, 181–82 (3d Cir. 2010); United States v. Brown, 579 F.3d 672, 680 (6th Cir. 2009); United States v. Wallenfang, 568 F.3d 649, 657 (8th Cir. 2009); United States v. Rivera, 546 F.3d 245, 251 (2d Cir. 2008); United States v. Fabrizio, 459 F.3d 80, 87 (1st Cir. 2006); United States v. Soderstrand, 412 F.3d 1146, 1155 (10th Cir. 2005); United States v. Grimes, 244 F.3d 375, 382 (5th Cir. 2001). But see United States v. Noel, 581 F.3d 490, 500 (7th Cir. 2009) (“We have not yet taken a position on whether the Dost factors represent a permissible instruction . . . .”); United States v. Williams, 444 F.3d 1286, 1299 (11th Cir. 2006) (“Because lascivious is not defined under the PROTECT Act, we apply its ordinary meaning of ‘exciting sexual desires; salacious.’”).

94 Dost, 636 F. Supp. at 832.


96 Dost, 636 F. Supp. at 832 (“Of course, a visual depiction need not involve all of these factors to be a ‘lascivious exhibition of the genitals or pubic area.’”).

97 The pictures at issue in A.H. v. State, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007), immediately come to mind. See infra Part II.B.


99 See Adler, supra note 32, at 924–26 (contrasting the Supreme Court’s rulings in subversive advocacy cases with those in child pornography cases).
"lewd exhibition of the genitals,"\textsuperscript{100} the Ohio statute proscribed nude depictions of minors constituting either a "lewd exhibition" or involving a "graphic focus on the genitals."\textsuperscript{101}

\textit{Osborne} vastly expanded the amount of potentially proscribable speech.\textsuperscript{102} Under the "graphic focus on the genitals" standard, a person could be prosecuted for a picture in which a child's genitals appear at the center, regardless of whether the depiction was "lascivious."\textsuperscript{103} Further, "lewd exhibitions of nudity" was far broader than "lewd exhibitions of the genitalia"\textsuperscript{104} because Ohio law defined "nudity" to include depictions of pubic areas, buttocks, the female breast, covered male genitals "in a discernibly turgid state," as well as genitals.\textsuperscript{105} In dissent, Justice William Brennan presciently hypothesized that under this definition, pictures of fully clothed teenagers engaged in otherwise innocuous activity might well be considered child pornography.\textsuperscript{106}

His fears were prominently realized in the 1992 case of \textit{United States v. Knox}.\textsuperscript{107} Stephen Knox was a graduate student in whose possession officials found "three films of very young girls dancing around in bathing suits, leotards, and similarly 'revealing attire.'"\textsuperscript{108} Although the girls were not naked, the films had titles like "Little Girl Bottoms" and featured prominent "crotch shots."\textsuperscript{109} Because of the camera's insistent focus on the girls' clothed genital regions, the Third Circuit determined that the films included lascivious exhibitions of the genitals or pubic area.\textsuperscript{110} When Knox petitioned for certiorari arguing that the absence of nudity invalidated the lascivious

\textsuperscript{100} New York \textit{v. Ferber}, 458 U.S. 747, 751 (1982) (quoting N.Y. \textit{PENAL LAW} § 263.00(3) (McKinney 2008)).

\textsuperscript{101} \textit{Osborne}, 495 U.S. at 113 (quoting State \textit{v. Young}, 525 N.E.2d 1363, 1368 (Ohio 1988)) (providing the Ohio Supreme Court's interpretation of the Ohio statute).

\textsuperscript{102} See Adler, supra note 32, at 948-50 (discussing the breadth of the statute upheld in \textit{Osborne} and explaining how the decision "revealed the Court's thinking on how it might expand [the] definition [of child pornography] in the future").

\textsuperscript{103} Id. at 948-49.

\textsuperscript{104} \textit{Osborne}, 495 U.S. at 129 (Brennan, J., dissenting) (emphasis omitted).

\textsuperscript{105} Id. at 126-27 ("In short §§2907.323 and 2907.01(H) use simple nudity, without more, as a way of defining child pornography.").

\textsuperscript{106} Id. at 131-32 ("Furthermore, the Ohio law forbids not only depictions of nudity per se, but also depictions of the buttocks, breast, or pubic area with less than a 'full, opaque covering.' Thus, pictures of fashion models wearing semitransparent clothing might be illegal, as might a photograph depicting a \textit{fully clad} male that nevertheless captured his genitals 'in a discernibly turgid state.'" (emphasis added)).

\textsuperscript{107} \textit{United States v. Knox} (\textit{Knox I}), 977 F.2d 815 (3d Cir. 1992).


\textsuperscript{109} Id.

\textsuperscript{110} \textit{Knox I}, 977 F.2d at 817 (holding that the visual depictions at issue violated federal child pornography laws despite body parts being covered by clothing).
exhibition finding, the Justice Department agreed. Solicitor General Drew S. Days III filed a brief in support of Knox’s appeal indicating that the child-pornography statutes apply only to nudity or to genitals whose contours are evident through clothing. In response to the Solicitor General’s report, the Supreme Court remanded the case to the Third Circuit for reconsideration. The case and the Court’s remand order ignited a “political firestorm” that included a resolution by members of Congress condemning the Solicitor General’s interpretation and the unusual additional step of members of Congress filing briefs in the case.

On remand, the Third Circuit maintained its position. It considered and rejected the Solicitor General’s views, and held that the federal child-pornography statute contained no nudity or discernibility requirement. Knox again turned to the Supreme Court, but likely because of the “political firestorm,” the Justice Department abandoned its previous position. In a letter to Attorney General Janet Reno, President Bill Clinton stated that he found “all forms of child pornography offensive and harmful,” and that he wanted the federal government to “lead aggressively in the attack against the scourge of child pornography.” In the end, the Supreme Court denied certiorari, and Knox’s conviction stood.

Congress continued expanding the definition of child pornography with the Child Pornography Prevention Act of 1996 (CPPA). In response to advancing technology that aided the creation of virtual child pornography—that is, wholly computer-generated images that do not require actual children—Congress banned materials that appear to be depictions of children engaged in sexual conduct. In detailed findings, Congress stated that even though such images are made without the use of real children, virtual child pornography must be prevented because it “inflames the desires of child molesters, pedophiles, and child pornographers” and “encourag[es] a societal

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111 Abramson et al., supra note 108, at 138.
112 Id. at 138–39.
113 United States v. Knox (Knox I), 32 F.3d 733, 737 (3rd Cir. 1994); Abramson et al., supra note 108, at 139.
114 See Adler, supra note 32, at 952 n.140.
115 Knox II, 32 F.3d at 737; Abramson et al., supra note 108, at 139.
116 Abramson et al., supra note 108, at 139.
119 See 18 U.S.C. § 2256(8)(B)-(C) (“[C]hild pornography’ means any visual depiction . . . where [it appears] that an identifiable minor is engaging in sexually explicit conduct.”).
120 § 121(1)(10)(B), 110 Stat. at 3009-27 (“[I]t inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the crea-
perception of children as sexual objects."\(^{121}\) Whether or not the law was good policy, it was "a total departure from the basis of child pornography law—the abuse of children in the production of the material."\(^{122}\)

In *Ashcroft v. Free Speech Coalition*,\(^{123}\) the Court struck down the provisions of the CPPA related to virtual child pornography. The Court noted that in contrast to the speech in *Ferber*, the CPPA prohibited speech that "record[ed] no crime and create[d] no victims."\(^{124}\) Virtual child pornography was simply not "intrinsically related" to the sexual abuse of children.\(^{125}\) Rejecting the Government’s argument that virtual child pornography could lead to instances of actual abuse, an indirect harm sufficient to sustain the statute, the Court noted that "*Ferber*’s judgment about child pornography was based on how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment."\(^{126}\) The Court also pointed out the oddity of proscribing visual depictions of persons who appear to be under the age of eighteen engaged in sexual activity.\(^{127}\) Eighteen, after all, was "higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations."\(^{128}\) Further, it was "undeniable that some youths engage in sexual activity before the legal age . . . on their own inclination."\(^{129}\)

Thus stood the "internally incoherent"\(^{130}\) body of child-pornography law when local prosecutors began to use the child-pornography statutes to prosecute instances of sexting. It is unclear whether prosecutors simply ignored the language from *Free Speech Coalition* or in their zeal to respond to what they perceived as a growing problem assumed that the case only applied to virtual child pornography. At any rate, given cases like *Dost*, *Osborne*, and *Knox*, it was not an exaggeration to say that a fourteen-year-old girl who voluntarily photographs herself in a bathing suit could have been prosecuted under some

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\(^{121}\) Id. § 121(1)(11)(A) ("[T]he sexualization and eroticization of minors through any form of child pornographic images has a deleterious effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them . . . .")

\(^{122}\) Adler, *supra* note 95, at 244.


\(^{124}\) Id. at 250.

\(^{125}\) Id.

\(^{126}\) Id. at 250–51 (emphasis added).

\(^{127}\) Id. at 247.

\(^{128}\) Id.

\(^{129}\) Id.

\(^{130}\) Adler, *supra* note 32, at 927.
child-pornography statutes if she had posed provocatively.\textsuperscript{131} The journey from protecting children from "old men in raincoats" to protecting Jane and Jim from themselves sprang from this incoherence.

B. Incoherence As-Applied

\textit{A.H. v. State}\textsuperscript{132} is an illustrative example of the incoherence of child-pornography law. Sixteen-year-old A.H. and her seventeen-year-old boyfriend, J.G.W., were charged under Florida’s child-pornography statute with one count of producing, directing, or promoting a photograph or representation that they knew to include the sexual conduct of a child.\textsuperscript{133} The charges were based on digital photos the two took of themselves naked and engaged in sexual behavior.\textsuperscript{134} The State acknowledged that the photos were never shown to a third party, but highlighted that A.H. and J.G.W. e-mailed the photos to another computer from A.H.’s home.\textsuperscript{135}

A.H. filed a motion to dismiss arguing that the statute was unconstitutional as applied to her because it implicated her privacy rights under the Florida constitution.\textsuperscript{136} She further pointed out that she was actually younger than her alleged "victim," and that criminal prosecution was not the least intrusive means of furthering Florida’s interests.\textsuperscript{137} The trial court rejected these arguments and denied the motion to dismiss.\textsuperscript{138} While assuming that the statute implicated A.H.’s privacy rights, the trial court nevertheless held that the State had a compelling interest in "protecting children from sexual exploitation, particularly the form of sexual exploitation involved in this

\textsuperscript{131} See supra notes 52–57 and accompanying text; see also John A. Humbach, \textit{Sexting and the First Amendment}, 57 HASTINGS CONST. L.Q. 433, 454 n.116 (2010) (explaining that any teen who takes even a semi-nude picture of herself is in "definite legal jeopardy").

\textsuperscript{132} A.H., 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).

\textsuperscript{133} Id. at 235. See generally FLA. STAT. ANN. § 827.071(3) (West 2006) ("A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a child less than 18 years of age. Whoever violates this subsection is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084."); accord 18 U.S.C. § 2251(a) (2006). J.G.W. was also charged with one count of possession of child pornography in violation of FLA. STAT. § 827.071(5); accord 18 U.S.C. § 2252(b).

\textsuperscript{134} Id., 949 So. 2d at 235.

\textsuperscript{135} Id. Although these pictures were e-mailed from a computer, many modern cellular phones also have e-mail capabilities. Thus, sexted images can also be transmitted via e-mail by using a cellular phone.

\textsuperscript{136} Id.

\textsuperscript{137} Id.; accord United States v. Playboy Entm’t Grp., Inc., 529 U.S. 803, 813 (2000) ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest[.""] (quoting Sable Commc’ns, Inc. v. FCC, 492 U.S. 115, 126 (1989))).

\textsuperscript{138} A.H., 949 So. 2d at 235–36.
case. This compelling interest exists whether the person sexually exploiting the child is an adult or a minor and is certainly triggered by the production of 117 photographs of minors engaging in graphic sexual acts."

On appeal, A.H. further argued that given the closeness in age between her and J.G.W. and the State’s failure to allege that the pictures were shown to anyone else, the only compelling state interest that Florida could possibly assert was protecting A.H. and J.G.W. from “engaging in sexual behavior until their minds and bodies had matured.” The appellate court said that implicit in this argument was the notion that Florida’s right to privacy encompassed a minor’s right to sexual intercourse and that it further extended to situations where the minor memorializes the act through pictures or video.

The court rejected these arguments for several reasons. First, a decision to take photographs and to keep a record that may be shown in the future weighs against finding a reasonable expectation of privacy. Next, minors engaged in sexual relationships, unlike adults, have no reasonable expectation that their relationships will continue and that the photographs would not be shown to someone else intentionally or unintentionally. The photographs had “market value” and could wind up in the wrong hands because a teenager would inevitably disseminate the pictures to other members of the public for profit or bragging rights. Finally, the court noted that the child-pornography statute was “intended to protect minors like appellant and her co-defendant from their own lack of judgment.” Though apparently capable of consenting to sex, the “children are not mature enough to make rational decisions concerning all of the possible negative implications of producing these videos.”

139 Id. at 236.
140 Id.
141 Id.
142 Id. at 237. If this were a test of general applicability and not simply limited to sexual photographs, many people would no longer have any reasonable expectation of privacy at all in the manifold life activities they choose to commemorate through photographs or other recordings.
143 Id. It is unclear whether the result would have been different if A.H. and J.G.W. had been betrothed. Further, in Florida, in certain circumstances, minors are permitted to marry. See Fla. Stat. Ann. § 741.0405 (West 2006).
144 A.H., 949 So. 2d at 237.
145 Id. at 238. The court did not provide any support for this assertion.
146 Id. at 239. The court failed to address “all of the possible negative implications” that could flow from treating A.H. and J.G.W. as sex offenders. See, e.g., Eraker, supra note 26, at 588–89 (“[A] sexting teenager convicted of child pornography may be ostracized by classmates . . . . the ensuing harassment and bullying at school might exacerbate the conditions that prompted the sexting in the first instance.”); Shannon Shafron-Perez, Note, Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting, 26 J. Marshall J. Computer & Info. L. 431, 449 (2009) (“Minors who are convicted of sexting are punished criminally, in addition to being chastised by their peers and tortured by internal shame
One judge vigorously dissented from the majority's decision to use a statute that was designed to protect children from abuse in order to punish a teenager for her own mistake. The dissenting judge would have found that the prosecution violated A.H.'s right to privacy. The Florida Supreme Court had already determined that prosecuting minors for unlawful carnal intercourse violated minors' right to privacy. Thus, "[i]f a minor cannot be criminally prosecuted for having sex with another minor . . . it follows that a minor cannot be criminally prosecuted for taking a picture of herself having sex with another minor." The dissent noted that there was simply no evidence that the minors intended to show the photographs to third parties and that accordingly, the photographs were as private as the act they depicted. Somewhat strangely, the dissenting judge still went out of his way to note that he did not "condone the child's conduct."

Although A.H.'s case arose in Florida state court, she and J.G.W. likely violated federal law as well. Section 2251 of Title 18 of the U.S. Code makes it a crime for any person to engage any minor in any sexually explicit conduct for the purpose of producing visual depictions of that conduct if the person knows or has reason to know that the images will be transmitted via computer. Although the court only placed A.H. on probation, had she been prosecuted under the federal statute, she would have been fined and imprisoned between fifteen and thirty years. Such a prosecution of course would have been in direct tension with the language of Free Speech Coalition, which "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment."

and regret. Criminalizing this conduct is only compounding the pain for the minors involved.

147 A.H., 949 So. 2d at 239 (Padovano, J., dissenting).
148 See id.
149 Id. (citing B.B. v. State, 659 So. 2d 256 (Fla. 1995)).
150 A.H., 949 So. 2d at 239 (Padovano, J., dissenting); see also Salter v. State, 906 N.E.2d 212, 222–23 (Ind. Ct. App. 2009) (holding that when an age-of-consent law is inconsistent with the definition of minor in state's child-pornography law, vagueness issues prevent prosecuting persons for activities similar to sexting).
151 A.H., 949 So. 2d at 239–40 (Padovano, J., dissenting).
152 Id. at 239.
154 See id. § 2251(e).
C. What of the First Amendment Rights of Minors?

Yet, no one seemed to argue that the statute violated A.H.'s First Amendment rights. In fact, several months after A.H. was handed down, Mary Graw Leary wrote a foundational article decrying the very disturbing social behaviors resulting from increased access and exposure to child pornography. In Leary's view, people like A.H. were not engaged in sexual exploration but instead "self-exploitation" and the production of child pornography. The new frontier for the production and distribution of child pornography was the cellular camera phone. In a strange move, Leary claims that teens like A.H. are actually victims. Voluntary participation in child pornography

156 The Supreme Court has repeatedly held that minors have First Amendment rights. See, e.g., Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2735 (2011) ("[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." (alteration in original) (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 212-13 (1975))); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) ("Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect . . . ."). However, minors do not necessarily enjoy full First Amendment protection while in schools. See, e.g., Morse v. Frederick, 551 U.S. 393, 396-97 (2007) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986))); see also id. at 410-11 (Thomas, J., concurring) ("[T]he First Amendment, as originally understood, does not protect student speech in public schools."). Thus, school officials confiscating cellular phones during school hours in response to sexting that substantially and materially disrupted the school day would not necessarily raise constitutional concerns. Cf. J.S. v. Blue Mountain Sch. Dist., No. 08-4138, slip op. at 3 (3d Cir. June 13, 2011) (en banc) ("Because J.S. was suspended from school for speech that indisputably caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school, the School District's actions violated J.S.'s First Amendment free speech rights."). Although the Court has allowed restrictions on minors' rights to purchase nonobscene sexual material, Ginsberg v. New York, 390 U.S. 629 (1968), it is far from clear that this rationale extends to the creation or possession of sexual speech, see, e.g., Reno v. ACLU, 521 U.S. 844, 878 (1997) ("[F]or the purposes of our decision, we need neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all 'indecent' and 'patently offensive' messages communicated to a 17-year-old—no matter how much value the message may contain and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute." (emphasis added)). Thus, at least outside of school, the government's ability to restrict an older minor's right to "self-produced pornography" was neither settled by Ferber nor Ginsberg. See also Entm't Merchs. Ass'n, 131 S. Ct. at 2729 ("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." (internal citations omitted)).

157 See Leary, supra note 10, at 4. Although Mary Graw Leary's article does not use the term "sexting" in its discussions of "self-produced child pornography" with cellular phones, it was perhaps the first work to deal with the subject and has been cited by several other articles that explore sexting. See, e.g., Eraker, supra note 26, at 562; Ryan, supra note 61, at 377; Shafron-Perez, supra note 146, at 448.

158 Leary, supra note 10, at 5-6 ("Whatever the circumstances . . . this activity is the production of child pornography . . . .")

159 Id. at 24.
produces victims because, throughout life, as people repeatedly view the images, the child is victimized. "Indeed, to treat the possession of these images so differently than that of non-self-produced images would suggest these victims are less worthy of societal protection." Further, she says that when teens like A.H. record their own sexual activities, they actually harm other children because child molesters "use these images for their sexual gratification; as a tool to groom children to participate in sexual conduct; to affirm the notion that abusive relationships are acceptable; to lower inhibitions of potential victims, and to obtain money and profit." Leary then points to a recent study showing that of those arrested for child pornography who had molested children, 83% of the images they possessed were images of children between six and twelve years old. On these bases, then, severe criminal penalties were warranted, even for minors who produced pictures of themselves.

Curiously, Leary never cites Free Speech Coalition. Indeed, her entire argument might have collapsed if she had. Surely, she could not have meant that pictures of sixteen- and seventeen-year-olds could be used as a tool to groom young children into sexual activity. Nor is it clear that the pictures could even sexually gratify child molesters. In fact, in some states, the sixteen- and seventeen-year-olds could have sex with some adults because they are over the age of consent. The harms then that Leary posits flow from "self-exploitation" are precisely the types of contingent and indirect harms that the Court rejected in refusing to create a new First Amendment exception for virtual child pornography.

See supra notes 162−163 and accompanying text.


Free Speech Coal., 535 U.S. at 250 ("In contrast to the speech in Ferber, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in Ferber. While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends
Responding to Leary, Stephen Smith concludes that the "problem of self-produced child pornography, in most instances, is one that is best resolved through means other than prosecutions of minors." Yet even Smith takes pains to say that he is "not making any sort of argument that child pornography—'self-produced' or otherwise—either is, or should be, constitutionally protected." This must be so, he reasons because "[c]hildren should not be treated or depicted as sexual objects to be used to satisfy the illegal and immoral carnal desires of others." But in many cases, and certainly in the case of A.H., there simply was no underlying illegal carnal desire. Thus, Smith and Leary both fail to fully account for the clear doctrinal problems with classifying self-produced sexual images as child pornography under Ferber and Free Speech Coalition.

D. Pedophiles and Sexually Active Minors Are Not Functionally Equivalent

To be fair, child-pornography law has been "the least contested area of First Amendment jurisprudence." One possible reason is that the "incendiary" term "child pornography," conjures up the image of "a fidgety old man on the street corner, at the schoolhouse gate or hunched over a computer." Child-pornography laws were originally directed at stemming the activities of pedophiles. The Diagnostic and Statistical Manual of Mental Disorders (DSM IV) characterizes pedophilia as involving "intense sexually arousing fantasies, urges, or behaviors involving sexual activity with a prepubescent child (typically age thirteen or younger)." Accordingly, raising the age of

upon some unquantified potential for subsequent criminal acts." (internal citations omitted).


170 Smith, supra note 9, at 520.

171 Id. at 521 (emphasis added).

172 Adler, supra note 32, at 925.

173 See supra note 32 and accompanying text.

174 Slovic, supra note 5.

175 See, e.g., Osborne v. Ohio, 495 U.S. 103, 111 (1990) ("[E]vidence suggests that pedophiles use child pornography to seduce other children . . . .").

176 Psychiatric Disorders: Pedophilia, ALLPSYCH ONLINE, http://allpsych.com/disorders/paraphilias/pedophilia.html (last updated May 15, 2004); see also Pam Cartor et al., Differentiating Pedophilia from Ephebophilia in Cleric Offenders, 15 SEXUAL ADDICTION & COMPULSIVITY 311, 312 (2008). Whether criminal prosecutions and punishments are appropriate for those who have diagnosed mental illnesses that may cast doubt upon their actual culpability is beyond the scope of this Note. For purposes of this Note, I have simply assumed that
"child" from sixteen to eighteen for child-pornography purposes not only swept up a great deal of consensual teenage activity but also the sexual desires of many adults who do not have psychological disorders.\(^\text{177}\) Although using the term "normal" to clinically describe erotic desires is not permitted,\(^\text{178}\) the Court itself has sought to legally distinguish between prurient interests in sex, and normal, healthy sexual desires.\(^\text{179}\) Teens who sext are thus neither traditional targets of child pornography, nor do they necessarily satisfy the prurient interest prong of the obscenity test.\(^\text{180}\)

Because even Ferber itself suggested that it is permissible to treat as criminals any person who sexually abuses children, even those persons who have been clinically diagnosed as pedophiles. Cf. Kansas v. Hendricks, 521 U.S. 346, 351–55 (1997) (addressing constitutionality of indefinite civil commitment of violent sex offenders in the context of conviction for sexual molestation of children).\(^\text{177}\)

Because many late adolescents have physical characteristics that are largely indistinguishable from those of adults, some level of sexual attraction to late adolescents is common among adults of all sexual orientations. E.g., David Tuller, What to Call Foley, SLATE (Oct. 4, 2006, 5:59 PM), http://www.slate.com/id/2151018/ ("Former Rep. Foley seems to suffer from a different condition: ephebophilia, which is defined as sexual attraction to post-pubescent adolescents and older teenagers."). Indeed, although the term "ephebophilia," denotes a sexual preference for adolescents around fifteen to nineteen years of age, the DSM IV does not list the term, likely because "[f]ew would want to label erotic interest in late- or even mid-adolescents as a psychopathology . . . ." Ray Blanchard et al., Pedophilia, Hebephilia, and the DSM-V, 38 ARCHIVES SEXUAL BEHAV. 335, 336 (2009). At any rate, engaging in sexual acts with a minor who has not attained the age of consent for that particular sex act is a crime.\(^\text{178}\)

Id. at 336 (describing the general resistance or indifference to a technical vocabulary for erotic age-preference but noting that the word "normal" has been off-limits for decades). It is perhaps worth noting here as well that both Ferber and Osborne "involved apparently gay-oriented pornography, a surprising disproportion considering the relative representation of gays in the population as a whole." Humbach, supra note 131, at 448 n.79. Homosexuality was not removed from the DSM until 1974. See Shari Roan, Revising the Book on Mental Illness: Experts Call for Listing Binge Eating and Gambling As Official Disorders, but Not Sex Addiction or Obesity, L.A. TIMES, Feb. 10, 2010, at A1. Adler notes that an "anti-homosexual fervor" helped fuel legislative responses to child pornography. Adler, supra note 95, at 230 n.116 (2001). Indeed, one expert testified before the House of Representatives that "most agree that child sex and pornography is basically a boy-man phenomenon." Id.

See Brockett v. Spokane Arcades, Inc. 472 U.S. 491, 498 (1985). The Court has distinguished between material that excites "normal, healthy sexual desires" and material that excites "sexual responses over and beyond those that would be a characterized as normal," including "a shameful or morbid interest in nudity, sex, or excretion." Id.

But cf. Humbach, supra note 131, at 445 n.60 ("[T]he immediate question is whether teens' depictions of teenage sexual activity for a teenage audience are better understood as appealing to 'normal, healthy sexual desires' or as 'shameful or morbid.' I think we can agree that casual teen sexual relations probably did not fall within the 1986 heartland of 'good, old fashioned, healthy' sex."). See also State v. Canal, 773 N.W.2d 528, 528 (Iowa 2009) (holding that it could not conclude as a matter of law that the pictures a teen sent to his girlfriend of his erect penis were not obscene). It is, to say the least and as Adler put it, "internally incoherent" for a state to set the age of consent in recognition of the facts that teens do have sex, while simultaneously calling that sexual activity morbid and shameful. If anything, the age of consent necessarily means that sexual activity among teenagers is tolerable, if not suitable. Cf. Erznoznik v. Jacksonville, 422 U.S. 205, 213–14 (1975) ("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
there might be a narrow range of cases to which its rule would not apply, as-applied challenges might have cabined the rapidly sprawling application of the sex-offender label to everyday teens.

III
AFTER STEVENS, Sexting Prosecutions Are 
"Presumptively Invalid"

These theoretical inconsistencies, the utter incoherence of child-pornography jurisprudence generally, and the serious constitutional concerns raised by treating older teens' sexting as child pornography were laid bare in United States v. Stevens. In Stevens, the Court refused to create a new First Amendment exception for depictions of animal cruelty. While the Court's holding received substantial atten-
tion in both the popular press and in law reviews, the Court's distinguishing of *Ferber* and the resulting doctrinal ramifications have been less fully explored. In rejecting the Government's request to carve out a new exception for depictions of animal cruelty, the Court noted that

"[f]rom 1791 to the present . . . the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." These "historic and traditional categories long familiar to the bar"—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem."\(^\text{187}\)

Notably absent from this list, of course, is child pornography.

In discussing *Ferber*, the Court effectively "assimilated child pornography to the traditionally unprotected category of 'speech integral to criminal conduct.'" While some have described the Court's characterization of *Ferber* as novel, a close reading of the cases prior to *Stevens* shows that despite scholarly views to the contrary, the Court had never created a bright-line rule that all depictions of minors engaged in sexual acts were child pornography and thus excluded from

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\(^{186}\) At the time of this Note's publication, recent scholarship on sexting has only briefly addressed the potential impact of *Stevens* in this area. See, e.g., JoAnne Sweeny, *Do Sexting Prosecutions Violate Teenagers' Constitutional Rights?*, 48 SAN DIEGO L. REV. 951, 970 n.124–25 (2011); Lawrence G. Walters, *How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting*, 9 FIRST AMENDMENT L. REV. 98, 114 (2010). Leary, continuing to advocate for the prosecution of minors who sext, has attempted to understate the breadth of the Court's reasoning in *Stevens*. See Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues—Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL'y & L. 486, 531 (2010) ("[T]o understand *Stevens*, a non-child pornography case, as announcing a requirement of depicting illegality in all child pornography cases would produce collateral effects well beyond self-produced child pornography and 'sexting' cases. Suddenly requiring unprotected material to display illegal conduct would legalize a broad swath of material always thought to be included under child pornography."). Of course, the Court had held prior to *Stevens* that sexual speech that was neither obscene nor the product of child abuse was fully protected by the First Amendment. See supra Part II.A and notes 123–29 and accompanying text.

\(^{187}\) *Stevens*, 130 S. Ct. at 1584 (citations omitted).

\(^{188}\) Strossen, supra note 25, at 85.

\(^{189}\) See supra note 25 and accompanying text.
First Amendment protection.\textsuperscript{190} As a practical matter, though, legal scholars must have been aware that even if they read \textit{Ferber} as creating a categorical exclusion, the rule, "[I]ike many bright line rules . . . [was] only 'categorical' for a page or two in the U.S. Reports."\textsuperscript{191}

Thus, discussions about the inconsistent applications of child-pornography statutes and whether teens should mount as-applied challenges to sexting prosecutions are now somewhat academic because after \textit{Stevens} child-pornography statutes themselves must be considered content-based regulations on speech.\textsuperscript{192} Although sometimes listed in different fashions, the categories of unprotected speech before \textit{Stevens} were the following: incitement, fighting words, true threats, defamation, obscenity, child pornography, fraud, and speech integral to criminal conduct.\textsuperscript{193} After \textit{Stevens}, however, the list is limited, for the time being,\textsuperscript{194} to obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.\textsuperscript{195} Thus, whereas

\textsuperscript{190} Compare Humbach, \textit{supra} note 131, at 449 n.83 (citing cases) ("There is no real doubt that the Court in \textit{Ferber} created a categorical exclusion . . . "), \textit{with} New York v. \textit{Ferber}, 457 U.S. 747, 766 n.18 (1982) ("[W]e hold that child pornography as defined in § 263.15 is unprotected speech subject to content-based regulation." (emphasis added)), \textit{and id.} at 765 ("We hold that § 263.15 sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection.").

\textsuperscript{191} Humbach, \textit{supra} note 131, at 450 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1067 (1992) (Stevens, J., dissenting) ("No sooner does the Court state [its new category] . . . than it quickly establishes an exception . . . ").

\textsuperscript{192} See \textit{Stevens}, 130 S. Ct. at 1586-87. Content-based restrictions on speech are invalid unless they pass strict scrutiny. \textit{See Brown v. Entm't Merchs. Ass'n}, 131 S. Ct. 2729, 2738 (2011) ("The [s]tate must specifically identify an 'actual problem' in need of solving and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. 'It is rare that a regulation restricting speech because of its content will ever be permissible.'" (internal citations omitted)).

\textsuperscript{193} Rhodes, \textit{supra} note 25, at 2. But even this list may not have been complete. As recently as 2008, the Court seemingly expanded the list, or at least changed the way it described it. \textit{See, e.g.}, United States v. Williams, 553 U.S. 285, 297 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection."); Dist. of Columbia v. Heller, 554 U.S. 570, 635 (2008) ("The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and \textit{disclosure of state secrets} . . . " (emphasis added)).

\textsuperscript{194} The Court left open the possibility that there could be new categories of unprotected speech. \textit{See Stevens}, 130 S. Ct. at 1586 ("Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that 'depictions of animal cruelty' is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them."). One Justice has recently identified speech to minors and minors' access to speech as a category of historically unprotected speech that had not previously been specifically identified. \textit{See Brown}, 131 S. Ct. at 2751 ("The practices and beliefs of the founding generation establish that 'the freedom of speech,' as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians.") (Thomas, J., dissenting).

\textsuperscript{195} See Rhodes, \textit{supra} note 25, at 6.
before *Stevens* many believed—perhaps erroneously—that any sexually explicit image of a minor was child pornography, this belief is now fatally flawed. Instead, in determining whether a particular nonobscene image constitutes child pornography, the initial question must be whether there is specific illegal conduct to which the speech is integral. Because neither nudity, masturbation, nor even large amounts of teenage sex are illegal, statutory-rape laws are the most logical starting point for determining whether sexted images sent between older teens are protected speech.\(^{196}\)

A. Statutory-Rape Laws

Generally, statutory-rape laws prohibit sexual intercourse with an unmarried person under the age of consent.\(^{197}\) Statutory-rape laws were on the books in England as early as the thirteenth century.\(^{198}\) At the time of the Founding, colonial statutes basically imported this language, choosing either ten or twelve as the age of consent.\(^{199}\) Since the Founding, the actual age of consent has varied as the result of various policy initiatives by interest groups and public officials.\(^{200}\) At one point, Delaware’s age of consent was as low as seven years old, and Tennessee’s as high as twenty-one.\(^{201}\) While these variations in age of consent do not necessarily mean that the states are constitutionally free to set the age of consent wherever they would like,\(^{202}\) the Su-

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\(^{196}\) It is worth noting that while this approach would not lead to granting constitutional protection to a large amount of material that would be of interest to actual pedophiles, see *supra* notes 176–77 and accompanying text, there could be some materials that would interest pedophiles. Although most states have set the age of consent at sixteen or older, Connecticut, for example, exempts minors under the age of thirteen from criminal liability for consensual sexual activity if there is less than a two-year age difference between the minors. *See Conn. Gen. Stat. Ann.* § 53a-70(a)(2) (West 2007). Thus, if minors of this age group sext, there could be pictures that could fall into this category that would be of the type Leary identified. *See supra* note 160 and accompanying text.

\(^{197}\) Statutory rape is mostly a colloquial term as opposed to a strictly legal one. The title of the offense varies by state and includes such names as “rape in the nth degree,... sexual assault in the nth degree... sexual battery in the nth degree... statutory sexual seduction, sexual abuse of a minor, child sexual abuse, child molestation, child rape, and indecency with a child.” *Cocca, supra* note 4, at 164 n.1. Whatever the offense is called, generally, “if the victim is under that certain age and not married to the perpetrator, he or she is presumed incapable of giving informed and valid consent to sexual activity; therefore, consensuality is not permitted as a defense to the crime.” *Id.* at 9 (footnote omitted).

\(^{198}\) *Id.* at 10 (quoting the Statute of Westminster I, 1275, 3 Edw. 1, c. 13 (Eng.) (“The King prohibiteth that none do ravish... any Maiden within age.”)).

\(^{199}\) *See id.* at 10, 23 tbl.1.1 (charting ages of consent from 1885 to 1999 and age spans in the fifty states in 1999).

\(^{200}\) *Id.* at 10.

\(^{201}\) *Id.* at 14–23.

\(^{202}\) There must be some threshold beyond which states could not go. Although Tennessee once set its age of consent at twenty-one, that seems to be the high watermark. Surely criminalizing consensual sex beyond this age—aside from the fact that "such a law
In Michael M. v. Superior Court of Sonoma County, the Court sustained a California statute that criminalized sexual intercourse with an unmarried female under eighteen. The case involved a seventeen-year-old male, Michael, and a sixteen-year-old female, Sharon. Under that particular statute, only males could commit the crime, and only females could be its victims. The Court rejected petitioner's argument that the statute's gender specificity was not substantially related to an important governmental objective and instead had as its purpose the "anachronistic protection of female chastity." Because of the "profound physical, emotional, and psychological consequences of [teen] sexual activity," the Court concluded that California's punishing only males for violations of the statute did not violate the Equal Protection Clause because it would "equalize" the deterrents on the sexes when teenagers decide to engage in sexual activity. While Michael M. is "much-criticized," it stands for the proposition that a state may criminalize the sexual activity of minors. Thus, for First Amendment analytical purposes, statutory-rape laws are likely "valid criminal statute[s]" within the meaning of Stevens.

B. Tying Child-Pornography Statutes to the Age of Consent Would Reaffirm First Amendment Principles

Several scholars have recently called for more reasoned responses to the sexting epidemic. These include educational and juvenile

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204 Id. at 466.
205 Id.
206 COCCA, supra note 4, at 70.
207 Michael M., 450 U.S. at 471.
208 Id. at 473.
209 COCCA, supra note 4.
210 130 S. Ct. 1577, 1586 (2010) (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (internal quotation marks omitted)). Although the Court struck down a law against consensual homosexual sodomy in Lawrence, the Court noted that the case did not involve minors. Lawrence v. Texas, 539 U.S. 558, 578 (2003). Thus in addition to Michael M., Lawrence further supports the idea that states may criminalize the sexual activity of minors. Whether criminalizing consensual sexual activity between minors is wise policy is debatable, but under current doctrine such criminalization is likely constitutional. But see In re D.B., 950 N.E.2d 528, 533 (Ohio 2011) ("As applied to children under the age of 13 who engage in sexual conduct with other children under the age of 13, [the Ohio statutory-rape statute] is unconstitutionally vague because the statute authorizes and encourages arbitrary and discriminatory enforcement enforcement."); id. at 534 ("Application of [the Ohio statutory-rape statute] in this case also violates D.B.'s federal right to equal protection.").
211 See, e.g., Humbach, supra note 131, at 438–39 (pointing out that the current system of laws addressing sexting is overbroad and archaic).
programs, as well as statutes that specifically address sexting as a new category distinct from child pornography.\textsuperscript{212} It is unclear whether these would be \textit{valid} criminal statutes to which sexting prosecutions could be tied. Indeed, the arguments put forth are not unlike the ones advanced by the Government in \textit{Stevens}: because sexting causes “serious, and often unanticipated, psychological and reputational consequences,”\textsuperscript{213} it warrants legislative responses targeting the speech. But because sexting between teens who have reached the age of consent is neither child pornography\textsuperscript{214} nor likely obscenity,\textsuperscript{215} any statutes that seek to address sexting without tying the activity to the age of consent would problematically draw content-based distinctions.\textsuperscript{216}

Such content-based distinctions on speech are presumptively invalid and subject to strict scrutiny.\textsuperscript{217} To survive strict scrutiny, the content-based restriction must be narrowly tailored to promote a compelling governmental interest using the “least restrictive means.”\textsuperscript{218} While diversionary programs may be less restrictive than felony prosecutions, it is far from clear that they are the least restrictive means.\textsuperscript{219} In any event, at least one scholar has noted that “a majority of the Court has never sustained a regulation that was strictly scrutinized for content discrimination reasons.”\textsuperscript{220}

\textsuperscript{212} See, e.g., Smith, \textit{supra} note 9, at 541–43 (advocating various uses of criminal law to limit sexting).
\textsuperscript{213} Ryan, \textit{supra} note 61, at 357.
\textsuperscript{214} See \textit{supra} Part II.
\textsuperscript{215} See \textit{supra} note 180 and accompanying text.
\textsuperscript{216} For a discussion of whether a statutory restriction on child pornography, and therefore sexting could be considered “content-neutral,” and thus subject only to intermediate scrutiny, see Humbach, \textit{supra} note 131, at 473–82. Note, however, that had the Court treated the original restriction in \textit{Ferber} as content-neutral, the Court could not have been "readily able to justify the creation of a new content-based categorical exclusion—and thereby authorize sweeping statutory bans of all child pornography." \textit{Id.} at 475 n.233.
\textsuperscript{218} \textit{Playboy Entm’t Grp.}, 529 U.S. at 813 (quoting Sable Commcn’s, Inc. v. FCC, 492 U.S. 115, 126 (1989)).
\textsuperscript{219} Parents, for example, could choose simply not to buy their children cell phones with cameras or buy reduced text-messaging plans for cell phones that have cameras. Cf. \textit{id.} at 825. (“Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech. The Government’s argument stems from the idea that parents do not know their children are viewing the material on a scale or frequency to cause concern, or if so, that parents do not want to take affirmative steps to block it and their decisions are to be superseded. The assumptions have not been established; and in any event the assumptions apply only in a regime where the option of blocking has not been explained.”).
\textsuperscript{220} See Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2734 (2010) (Breyer, J., dissenting) ("Indeed, where, as here, a statute applies criminal penalties and at least arguably does so on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications 'strictly'—to determine whether the prohibition is justified by
Further, tying sexting statutes to validly enacted statutory-rape or age-of-consent statutes would re-invert the First Amendment, restoring basic First Amendment principles. Traditionally, “free speech jurisprudence has held that liberties in the realm of expression must remain broader than liberties in the realm of action.” For the most part, the Court’s jurisprudence on sexual speech has reversed that rule. Indeed, permitting states to impose legal sanctions on older teens for sexting only serves to perpetuate the “suggest[ion] that there is something more dangerous about the representation of sex than the act of sex itself—a most perplexing premise indeed.” Tying child-pornography statutes to age-of-consent statutes would therefore make the realm of allowable expression at least as broad as the realm of allowable action.

IV
SEXTING AS A SEX ACT?

While holding that sexting is constitutionally protected speech is fairly straightforward as a doctrinal matter, it seems problematic as a practical one. It is clear that many states will continue to try to regulate teens’ sexting. Forcing states to tie sexting prosecutions to the age of consent could cause many states perversely to increase the age of consent to eighteen. This would have the unpalatable consequence of criminalizing an even wider swath of everyday teenage activity. These difficulties suggest that for those states that insist on criminalizing sexting, a radical rethinking of the way activities like “sexting” are treated may be appropriate. In this Part, I briefly revisit Catharine MacKinnon’s view that “sex pictures [should be] legally considered sex acts.” Although many have long regarded this theory as somewhat radical, and completely contrary to current First Amendment doctrine, sexting presents an opportunity for a poten-

221 Cf. Adler, supra note 32, at 925–27.
223 David Cole, Playing by Pornography’s Rules: The Regulation of Sexual Expression, 143 U. PA. L. REV. 111, 114 (1994) (“Central to the First Amendment tradition is the notion that one has broader freedom in one’s expression than in one’s acts. When it comes to sex, however, the rule is reversed.”).
224 Tehranian, supra note 222, at 4.
225 See Dorf, supra note 180 (describing various areas of constitutional law in which similar phenomena occur).
226 The median age of first intercourse is 16.9 years for boys and 17.4 years for girls.
tially valid application of the theory. While the First Amendment may not permit the state to criminalize older teens' depictions of their sexual conduct, it seems equally clear that the First Amendment does not prohibit states from regulating minors' sex acts.

A. Old Battles in a New Medium

As Amy Adler notes, the assumption that speech is different from all other forms of action is such a basic assumption of free-speech law that it hardly needs repeating.\(^{228}\) Scholars have questioned whether the distinction is accurate or even useful, but nevertheless, the distinction serves complex functions in First Amendment law.\(^{229}\) In the 1980s, MacKinnon began to assail the speech/action dichotomy in the context of pornography. MacKinnon argued that pornographic images were inseparable from the violence that produced them.\(^{230}\) She declared that pornography institutionalized "a subhuman, victimized, second-class status for women by conditioning men's orgasm to sexual inequality."\(^{231}\) For MacKinnon, pornography was not the representation of sex but was sex itself.\(^{232}\) When the Seventh Circuit struck down the antipornography ordinance that MacKinnon had drafted, it rejected the idea that a representation is reality.\(^{233}\)

Broadly, the Seventh Circuit's rejection of the statute was sound. From even a feminist perspective, MacKinnon's theory was "radical," because it assumed that all men, particularly those who consumed pornography, were participants in a system of female subjugation.\(^{234}\) Further, it assumed that even if females did consent to pornography, their consent was inherently invalid because "all pornography [was] made under conditions of inequality based on sex, overwhelmingly by poor, desperate, homeless, pimped women who were sexually abused as children."\(^{235}\) Because the harms caused by pornography were so immediate and inevitable, MacKinnon blurred the distinction between speech and action and saw pornography as central to a process

\(^{228}\) Adler, supra note 32, at 972.

\(^{229}\) Id. at 973.


\(^{232}\) Adler, supra note 32, at 986 ("MacKinnon frequently derides critics for their failure to understand this essential basis of her theory, that pornography is sex, not the representation of sex.").

\(^{233}\) Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986) ("The description of women's sexual domination of men in Lysistrata was not real dominance. Depictions may affect slavery, war, or sexual roles, but a book about slavery is not itself slavery, or a book about death by poison a murder.").


\(^{235}\) MacKinnon, supra note 227, at 20.
of social conditioning that perpetuated gender inequality. As the Seventh Circuit aptly noted, however, “[p]eople may be conditioned in subtle ways. If the fact that speech plays a role in the process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.”236 While the notion that all pornography is the subjugation of women has been rejected, it does not necessarily follow that some sex pictures could not legally qualify as sex acts.237 Sexting is perhaps a paradigmatic example.

B. Sexting: A Bilateral Sexual Exchange

Sexting is not necessarily pure speech.238 While it is probably inaccurate to call sexted images nothing more than “masturbatory aids,”239 the fact that several authors have described sexting as the modern day equivalent of streaking240 or high-tech flirting241 underscores a general inclination to somehow treat sexting as action rather than speech. To the extent that sexting is done simply to entice or titillate sexual partners, sexting may be a new form of foreplay.242 States already restrict minors’ ability to engage in sex acts that are typically considered foreplay.243 Thus for those who support criminalization, the only real hurdle to this approach is fully distinguishing between sex acts that are speech and those that are not. The current

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236 Am. Booksellers Ass’n, 771 F.2d at 330.
237 For discussion of whether the Court had previously accepted MacKinnon’s view, see Adler, supra note 32, at 987 (“In child pornography law, at last, the Court seems to understand what MacKinnon’s critics have dismissed as metaphor: the picture is the harm. MacKinnon has been vindicated.”); see also Attorney General’s Report, supra note 64, at 406 (“Child pornography necessarily includes the sexual abuse of a real child, and there can be no understanding of the special problem of child pornography until there is understanding of the special way in which child pornography is child abuse.”).
238 See Ryan, supra note 61, at 366. This is largely beside the point. Prosecutors charging teens with child pornography have done so on the basis of their speech and not their conduct. In any event, sexting could also qualify as expressive conduct under current First Amendment doctrine. To qualify as expressive conduct, an act must be intended to convey a particularized message and there must be a great likelihood that the message would be understood by those who view it. See Spence v. Washington, 418 U.S. 405, 409–11 (1974) (per curiam). At the very least, a sexted image conveys the message “this is what I look like nude.”
239 Cass R. Sunstein, Words, Conduct, Caste, 60 U. Chi. L. Rev. 795, 807–08 (1993) (“Many forms of pornography are not an appeal to the exchange of ideas, political or otherwise; they operate as masturbatory aids . . . .”).
240 Eraker, supra note 26, at 557.
241 See supra note 42 and accompanying text.
distinction between pornography and prostitution may provide some guidance.

Sex acts are legally significant events. For First Amendment purposes, this Note proposes defining sex acts as bilateral sexual exchanges to which legal consequences may validly attach. Although the line between prostitution and pornography seems arbitrary, the distinction is instructive, and may prove useful to those states that wish to consider a different approach to regulating sexting. Traditionally, prostitution has been defined as a "bilateral [sexual] exchange" between A and B. Pornography on the other hand generally involves a nonparticipating C, who pays A to perform a sex act on B. Because the effect of pornography "occurs through the mediation of an audience" rather than from C participating in a sex act with A or B, pornography and its production are protected by the First Amendment. Another distinction is that pornography "neither precipitate[s] nor perpetuate[s] the social ills" that follow from prostitution. Taken together, these propositions could lead to the conclusion that where a sex act does not require the mediation of a

244 Sherry F. Colb, The Legal Line Between Prostitution and Porn, CNN JUSTICE (Aug. 12, 2005), http://articles.cnn.com/2005-08-12/justice/colb.pornography_l-prostitution-ringsexual-services-pornography?s=PM:LAW (last visited Nov. 23, 2011) ("The sex act is a legally significant event. If it occurs without consent, it is rape. If it takes place between a married person and a third party, it is adultery. If it occurs and leads to the birth of a child, then the man is legally responsible for that child until the age of 18. And if it happens in exchange for a fee, then it is prostitution.").

245 See, e.g., id.

246 Id. ("The distinction between pornography and prostitution is not, however, quite so straightforward . . .").

247 People v. Paulino, 2005 N.Y. Misc. LEXIS 3430, at *10 (Sup. Ct. 2005); see also People v. Freeman, 758 P.2d 1128, 1130-31 (Cal. 1988) ("[F]or a 'lewd' or 'dissolute' act to constitute "prostitution," the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other for the purpose of sexual arousal or gratification of the customer or of the prostitute." (alteration in original)). Further, "[w]hether or not prostitution must always involve a "customer," it is clear that in order to constitute prostitution, the money or other consideration must be paid for the purpose of sexual arousal or gratification." Id. (emphasis omitted).

248 Sherry Colb rightly points out the difficulty of sustaining this distinction without more. In her example, she points to the fact that an uncle who pays a prostitute to sleep with his 21-year-old nephew does not suddenly become a pornographer. See supra note 244, at 4.

249 Id.


251 This proposition is also far from clear. While the social ills the judge points to are certainly different from those described by MacKinnon, supra Part IV.A and accompanying notes, pornography can also bring with it a host of ills including "AIDS, venereal diseases, [and] drugs," Paulino, 2005 N.Y. Misc. LEXIS 3530 at *13. For a description of the STD transmissions in the adult-film industry, see, for example, Molly Hennessy-Fiske, HIV-Positive Porn Performer Speaks Out, L.A. TIMES, Dec. 8, 2010. Nevertheless, these consequences flowing from the sex act itself only potentially affect A or B and not C.
nonparticipating party, legal consequences may attach to the sex act without running afoul of the First Amendment.

Under this approach, sexting could be viewed as a bilateral sexual exchange more akin to prostitution than to pornography, the creation of which necessarily entails a nonparticipating C. Sexting, like other forms of foreplay, entails one party performing a sex act for another. To be sure, unlike prostitution, sexting is not generally associated with monetary exchanges. But a fee is not typically a necessary condition for the state to attach legal consequences to a sex act. Although the sexted image may be forwarded to a third party, this fact alone would not transform the sexted image into pornography. In pornography, A and B have zero expectation of privacy and intend for there to be a nonparticipating C. Indeed, this privacy rationale is probably the basis of tort liability when adults disseminate pictures of their sexual partners without consent. Moreover, the types of harm identified with teen sexting, including bullying, suicide, and depression, are not entirely different from the “profound physical, emotional, and psychological consequences of [teen] sexual activity” that the Court identified in Michael M. Accordingly, states that insist on regulating sexting may want to consider treating sexting as a sex act and may want to regulate it in much the same way that those states regulate other sex acts.

Acknowledging that there is probably room in the doctrine for this approach, however, is not to say that treating sexting as a sex act is normatively desirable. It is not. It is certainly not to say that this approach is not without its own potential constitutional infirmities. Although the Supreme Court has intimated that minors do not necessarily have a protected liberty interest in any particular sex act, the exercise of state police power is still subject to rational basis review. While the harms associated with sexting are somewhat similar to the harms associated with teen sexual activity in general, they are distinguishable. At the very least, sexting does not give rise to the pos-

252 See supra note 61 and accompanying text. Secondary sexting is beyond the scope of this Note.

253 See Ryan, supra note 61, at 381–82 (discussing state- and federal-court recognition of IED and invasion-of-privacy claims for adults in circumstances analogous to secondary sexting).


255 As Carolyn Cocca points out, “[s]tatutory rape laws, their meanings constructed and reconstructed to reflect contemporary economic, political, social, and cultural anxieties, help some and harm others.” COCCA, supra note 4, at 138. Present trends indicate that states are generally decriminalizing consensual sexual acts between minors close in age. There is no reason to assume that if sexting were considered a sex act that this trend in liberalization would reverse itself.

sibility of pregnancy, abortion, or sexually transmitted diseases. Thus a legislative judgment that sexting was somehow more harmful for minors as a sex act than other sex acts such as intercourse would perhaps stretch the bounds of rationality.\textsuperscript{257}

CONCLUSION

This Note has explored the sexting phenomenon and its prevalence among today’s teenagers. Parts II and III have explained why sexting among older teens is constitutionally protected speech. Even before \textit{Stevens}, sexual speech that was neither obscene nor the result of child abuse was likely constitutionally protected. In the wake of this decision, however, sexual speech involving minors that is not in violation of a valid criminal statute is definitely constitutionally protected. Accordingly, where a teen has passed his or her state’s age of consent, sexted images do not raise any First Amendment concerns. At the same time, however, it is important to recognize that sexting does have the potential to cause harm and that some states will likely desire to deter these harms in a manner consistent with the First Amendment. Treating sexting as a sex act may provide an alternative approach that allows the expression of societal disapprobation without violating minors’ First Amendment rights.\textsuperscript{258}

Adler correctly points out that it is always tempting to try to classify offensive speech as action.\textsuperscript{259} It is plausible, however, that societal reactions to teen sexual speech, or perhaps more accurately, teen sex acts, may not be based on offensiveness alone. Instead, the reactions could be part of society’s “enduring fascination with the lives and destinies of the young” and “the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach.”\textsuperscript{260} Without a doubt, this very fascination undergirds the desire to have an age of

\textsuperscript{257} See, e.g., \textit{In re D.B.}, 950 N.E.2d 528, 534 (Ohio 2011) (declaring Ohio statutory-rape law violative of federal due process and equal protection guarantees as applied to a child under the age of thirteen who engages in sexual conduct with another child under the age of thirteen); Petition for Writ of Certiorari, MacDonald \textit{v.} Johnson, No. 10-852, (2011), \textit{cert. denied}, 131 S. Ct. 1574 (2011) (challenging validity of Virginia statute that criminalizing sodomy between “minors” and “adults,” although Virginia’s age of consent is fifteen); see also Adam Liptak, \textit{A Place on the Sex-Offender Registry for a Crime that May Be Off the Books}, \textit{N.Y. Times}, Jan. 11, 2011, at A12 (describing the controversy surrounding the Virginia statute).

\textsuperscript{258} It is beyond the scope of this Note whether permitting teens who have passed the age of consent to engage in certain specified sex acts and not others would violate any other constitutional rights of minors. Cf Petition for \textit{Writ of Certiorari}, supra note 257.

\textsuperscript{259} See Adler, supra note 32, at 1002 (“The desire to erase the distinction between speech and conduct is at the core of many censorship movements.”); see also Richards \textit{v.} Wisconsin, 520 U.S. 385, 392 n.4 (1997) (“It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment.”).

consent. With these views in mind, states could perhaps conceive of sexting as a bilateral sexual exchange and regulate the activity as a sex act in light of the state's age of consent. Doing so would allow society to express its interests in a way that would help bring coherence to First Amendment law, and by avoiding erroneously calling sexting child pornography, would not necessarily equate Jane and Jim with "dirty old men in raincoats."

Surely, however, sex acts are "formative" parts of "self-fulfillment." The age of consent represents the societal determination that minors have reached an age at which they can continue on the path to self-fulfillment by legally exploring their sexuality. Perhaps once they have passed the age of consent, Jane and Jim ought to be able to reach their self-fulfillment through the use of their cell phones, free from the shadow of the criminal law.