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

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ABSTRACT

Only recently could it have been imagined that in less than a minute, a young person could or would create, and possess a sexually explicit photo of him or herself and then send it to hundreds of recipients throughout the country. Nor could one think of web cam chats or phone conversations that would result in spontaneous exhibitions of nudity via the computer or 4th generation cellular technology. Novel to this discussion, this article identifies a solution to the inconsistent and problematic application of individual state law to speech that can be created and globally disseminated in a matter of seconds by a ten-year old. More than half of the states have enacted or are in the process of creating new laws that exempt juveniles from traditional child porn prosecutions. Where these efforts are directed toward prohibiting the use of digital technology that is integral to criminal conduct then they will be within the reach of Supreme Court boundaries on the limit to free speech. Where they merely soften or re-state traditional child porn law criminalizing the depiction of lawful conduct, they will not address the conflict that innovation in communication has created in the application of the First Amendment.

The most recent First Amendment decisions clearly empower expression to and among juveniles, and decrease the government’s power to regulate the content of speech. Though this article exclusively identifies the types of crimes to prosecute, its primary goal is to offer a solution whereby much of this self-created, consensual imagery, currently subject to criminal prosecution, becomes protected speech unless it is proximately linked to other criminal activity. As such, many prosecutions and convictions under existing child porn statutes are doomed as exceeding the limits of constitutional regulation. New or amended statutes, which merely rename existing laws, will suffer the same fate and for the same reasons.

Technological developments have made it easier to create or disseminate this imagery and thereby expand the field of production and distribution of sexually explicit images to anyone old enough to operate a cell phone or a computer. Re-evaluation of the paradigm will enable us to realistically distinguish between child porn and child play.

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I. INTRODUCTION

Two 16 year old sweethearts in Florida have consensual sex and memorialize it in a photo that they share only with each other.

A slightly drunk 17 year old in New York has oral sex with another moderately inebriated 17 year old at a party. He takes a photo of the act with his cell phone and sends his trophy to his cousin in Ohio.

A 15 year old girl in Nebraska removes her clothes while talking to her 18 year old boyfriend on Skype, hoping it makes him “hot” for her.

A 16 year old Oregonian youth takes a picture of his erect penis next to some referential object because—well, because he can.

Only one of these scenarios depicts unlawful conduct that will subject its actor(s) to felony child pornography charges that carry mandatory sex offender registration requirements for at least ten years, and it is the first scenario, arguably the most benign. Though every state has criminalized what we consider as child pornography, the individual state proscriptions of these depictions have resulted in a dysfunctional system of law enforcement where there is uncertainty as to what and whom we are trying to regulate. As a consequence many young people are unaware that their conduct may be a crime. Nationally, legal action has been prolonged, inconsistent, and the subject of much literature.2

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Strong, Hayley S. "’Sexting” to minors in a rapidly evolving digital age: Frix v. State establishes the applicability of Georgia’s obscenity statutes to text messages. " Mercer Law Review. 61.4 (Summer 2010): 1283-1269


McBeth, Isaac A. "Prosecute the cheerleader, save the world? Asserting federal
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Typical child porn legislation forbids anyone to create, record, photograph, film, develop, reproduce, or publish any material that depicts a minor in a state of nudity or engaging in certain explicit sexual acts. Though this material has been described as “self-exploitation” or “auto” pornography, those words describe the method of production and do not create a requirement that the person creating the photo actually be the subject of the image.

Most of this literature has considered the phenomenon of sexting, a portmanteau combining sex and text, which describes the act of taking a sexually explicit or suggestive photo, most often by cell phone camera, and then transmitting the image via the text message feature that is offered as part of the service plan. Commentator Yvonne Roberts is credited with the first use of the term in an article in 2005, but that story had nothing to do with juveniles.

The scope of this article envisions a not too distant future in which sexting is only one way, and not the predominate way images will be created and shared among young people. It was not in distant past that online chats with webcams were replaced by the cell phone as the primary

jurisdiction over child pornography crimes committed through "sexting". University of Richmond Law Review. 44.4 (May 2010): 1327-1363.


See Ohio Revised Code 2907.322 which is typical of statutory language more fully discussed in Part II below. A complete list of individual state laws is at http://www.ndaa.org/pdf/Child%20Pornography%20Statutory%20Compilation%206-2010.pdf


See Humbach n2 at 437

Yvonne Roberts, The One and Only, SUNDAY TELEGRAPH, July 31, 2005, at 22
("Following a string of extramarital affairs and several lurid "sexting” episodes, Warne has found himself home alone, with Simone Warne taking their three children and flying the conjugal coop.").
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means of creation and distribution of these images. Now websites like ChatRoulette\(^7\) provide the forum for random exhibitionism with strangers. Soon applications such as FaceTime\(^8\) will replace sexting and be the standard feature to create real time streamed images from a hand held device such as the iPhone. Whereas a sexted image can easily be saved on the device, and Skyped or Webcam images can be anticipated and recorded, new technology is making it far more difficult to discover the material and prove criminal liability arising out of its existence.\(^9\) Yet all of this material, when it depicts lewd images of minors, is subject to traditional child pornography prohibitions which criminalize all aspects of the creation, possession, and transmission of material that contains sexual depictions of people under a specified age. Though celebrity sexting keeps it at the forefront of the public interest, this article addresses a greater scope of activity than sexting.

Some prosecutions for the creation and distribution of explicit images of minors have resulted in drastic punishments with enduring sexual registration requirements and thus can be expected to be litigated through state and Federal Courts in an effort to clear people’s names and restore their reputations.\(^10\) Some offenders are offered diversion programs and other non-formalized resolutions. Some writers argue this production of e-porn between consenting juveniles is not an unlawful act.\(^11\)

This article contributes an important and timely analysis of the increased tension between the First Amendment and technological innovation as recent Supreme Court decisions have re-inforced the protection against Government regulation of speech and expression. This

\(^7\) www.chatroulette.com
\(^8\) http://www.apple.com/mac/facetime/?cid=wwa-naus-seg-mac10-046&cp=wwa-seg-mac10-videochat&sr=sem
\(^9\) Live stream applications are much more spontaneous and can be unanticipated by the receiver of the call. Recording of these conversations also engages potential liability under Wiretapping Statutes. Unlike the recorded phone call, the conduct addressed throughout this article is known to every party involved and is consensual among them.
\(^10\) Philip Alpert, 18, was arrested for child pornography when he sent a photo of his naked girlfriend, 16, to others. Alpert engaged in “sexting” and got caught. Orlando police charged Alpert with child porn. Alpert pleaded no contest to the charge and was tried and convicted. Alpert was sentenced and received 5 years probation and has to register as a sex offender in Florida until age 43. Alpert’s lawyer is working to get his name removed from the list of sex offenders. articles.cnn.com/.../sexting.busts_1_phillip-alpert-offender-list-offender-registry
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analysis is imperative for our understanding of the limitations of current approaches to a phenomenon made possible by seemingly limitless methods of creation and transmission. A number of States have enacted or are considering legislation that excepts the self-made images from enforcement under the traditional child pornography statutes. Some of this legislation creates affirmative defenses to child porn prosecution where the circumstances clearly depart from exploitation and abuse. Through this examination of judicial decisions and legislation, the author advocates a new standard for considering when consensual and non-exploitative conduct poses a legitimate basis for criminalization. This measure creates a safe haven for depictions of conduct that is lawful for the engaged subject(s), even when those images contain explicit sexuality. Criminality will be predicated upon the use or intended use of the material.

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

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

Part IV considers the conception of child pornography jurisprudence in the Supreme Court of the United States and demonstrates how two recent First Amendment cases will require legislative policymakers to discern between creation and transmission of sexually explicit material that is

12 Based upon 2010 Census data of young people aged 13-18 these surveys support the claim that the number of sexters alone is near our current prison population which exceeds 1.5 million. http://bjs.ojp.usdoj.gov/content/glance/corr2.cfm
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intrinsic to a criminal act and similar material that possesses some intrinsic social value. No doubt the weightiest of these opinions is \textit{U.S. v Stevens} \textsuperscript{13} which affirms limitations on content based censorship, and has been said to be the most important First Amendment opinion in a decade.\textsuperscript{14} The most recent decision, \textit{Brown v Entertainment Merchants Association},\textsuperscript{15} amplifies the significant First Amendment protection bestowed upon minors when they create, distribute, or consume speech.

Part V will explain why consensual and non-exploitive sexting and Skyping\textsuperscript{16} do not result in the risks of harm to children that justify the pervasive use of child pornography laws to regulate the sexual expressions of juveniles. Much of the early literature is directed toward connecting sexting with traditional child porn because it causes harm to children\textsuperscript{17}. This article discounts these arguments and returns the focus on to the original intent of Supreme Court jurisprudence that established the basis to exclude child pornography from the umbrella of First Amendment protection.

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

This section adds to the solution by identifying a number of criminal offenses in which the explicit material is proximately linked to the prohibited act. The most generic prohibition against the creation, possession, or distribution of child porn would be a statute that contains a mens rea requirement that the actor subjectively believe the material to be child pornography. More specific are a number of statutes which can be engaged when someone creates, possesses, or distributes this matter with the intent to stalk, harass, menace, or injure the reputation of another. Likewise prosecutions should occur when the material is used to blackmail or extort from, when used for commercial purposes, or when used to entice

\textsuperscript{13} 559 U.S. ___, 130 S.Ct. 1577, 176 L. Ed, 2d 435 (2010)
\textsuperscript{15} 564 US___(2011)
\textsuperscript{16} Skype is a software application that allows users to make voice and video calls and chats over the Internet. Skype is a peer-to-peer system rather than a client–server system.
\textsuperscript{17} See Leary, Humbach at N.2 also, Krupa A. Shah. 2010. "Sexting: Risky or [F]risky? An Examination of the Current and Future Legal Treatment of Sexting in the United States" ExpressO Available at: http://works.bepress.com/krupa_shah/1
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another to do an unlawful act. The prosecuting attorney is in the best position to apply these nuanced laws to fact patterns so that formal prosecution is predicated upon admissible evidence that sufficiently proves the elements of the offense.

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

II. THE DYSFUNCTION OF CURRENT LAW AND POLICY

Two reasons account for the disconnect between the use of traditional child pornography prosecution and the regulation of teen behavior. Initially there is no consensus among legislatures as to what we are trying to regulate, nor is there general agreement as to who should be regulated. Secondly, as discussed in Part IV, though the compelling interest in child safety is axiomatic, those interests as defined by the Supreme Court, are not reflected in the breadth of traditional legislation.

A. The Agglomeration of Current State Law

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

1. Specific Applications of the Laws Regulating Sexual Expression

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

While there are several federal statutes related to protecting children from sexual predators, none of them imposes a minimum age limit on the sexual act. Rather, the age at which one may lawfully engage in sexual conduct is controlled by statute in each state. These state statutes determine the statutory ages over which consensual sexual conduct is lawful with anyone who is likewise of legal age, with the most common age set at sixteen. Eight states have set the age at seventeen, and 12 states have set the age at eighteen. At the other end of the spectrum, legislatures in nearly every jurisdiction have also set age limits at which a child is too young to ever consent to engage in sexual conduct or contact with anyone. A sex act with one who has not yet attained this minimum age is considered statutory rape.

Traditional age based limitations on meaningful consent have been

18. Sexual conduct includes vaginal intercourse and fellatio. A typical statutory definition can be found in Ohio R.C. 2907.01. Sexual conduct means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.


22 Black's Law Dictionary (8th ed. 2004) definition: Unlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person's will. Generally, only an adult may be convicted of this crime. “
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criticized as intransigent and out of touch with the reality of an increase in sexual activity among younger and younger people, and exposure to sex and sex education at earlier ages. 23 It is far too simplistic to suggest that adolescents are incapable of making consensual sexual choices in all instances. The sexually experienced 15 year old may be far more acutely aware of the implications of sexual intercourse than her sheltered cousin who is beyond the age of consent.24 Understanding the state by state variations in the age of consent is further complicated by a recent trend that accommodates a middle group of young people who are conditionally allowed to engage in consensual sex with others who are within a certain range of years older or younger than their partner. These statutes are often referred to as “Romeo and Juliet” laws.25 For instance, a number of statutes prohibit sex with someone who is more than 4 years younger than the older actor.26

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

The great majority of states define this age as being under 18 years.27 Three states prohibit possession of images of those under 17 years, and 7 states the age at under 16.29 Delaware alone prohibits imagery depicting

24 People v Hernandez, 61 Cal 2d 529, 39 Cal. Rptr. 361, 393 P2d 673 (1964)
25 For example Section 943.04354 of the Florida Statutes (2008) is known as the "Romeo and Juliet Law.
29 Ala. Code 13A 12-192; NY Penal Law 263.11; Maine MRSA 17-284 A (1); Md. Stat
anyone under 19 years of age. Most states are consistent in aging prohibitions against possessing, creating, and distributing child porn, but idiosyncrasies are not uncommon. In about half the states provision is made in the statute that the actor can claim he reasonably believed the subject of the image was of legal age. Typical sexters obviously know the age of the subject (themselves) but it is hardly reasonable to think successive possessors or disseminators will give the matter any thought. The issues become even more complicated when interstate digital transmissions engage routing processes through multiple jurisdictions.

Yet the macédoine is also subjected to the quality or nature of the photograph itself. Child pornography statutes, with one state exception are not conditioned upon a finding of obscenity nor is there a requirement of any active sexual conduct. Passive posing will often be enough to meet child porn prohibitions where the subject is below a certain age. The typical statute will prohibit the possession, distribution, production or creation of an image of a minor engaged in sexual conduct. The term sexual conduct is defined usually to include easily identified activities such as intercourse or masturbation, but also some rather ambiguous concepts such as nudity, or a lewd and lascivious display of genitals. Genitals are often defined with specificity, right down to the imaginary line beneath the nipple, but nudity doesn’t necessarily mean without clothes on!

Ann. 11-208 (a); Vermont VSA 2821 (1); NJ Stat Ann. 2c:24-4 (b) (1); Nevada NRS 201.259; NRS 200.730
30 Del. Code Ann. 1103 (b)
31 For example the New York statute permits possession of a photo depicting one who is 16 years old, but forbids the creation or dissemination of an image displaying a person under 17 years old. 17 NY Pen Law 263.05 Maine, likewise permits possession of an image of a16 year old, but prohibits distribution of images depicting those under 18, MRSA 17-281 (2). In Nebraska the prohibition even includes imagery of a “portrayed observer” who is under the age of 16. 16 Neb Rev Stat Ann 28-807 –(8); 28-1463-02 (1).
32 cite (?)---if half the states, do I really need to ftnt?
33 The physical transformation from boy to man is far more ambiguous than the step from underage to of age. see Haynes, Antonio Mortez, The Age of Consent: When Sexting is No Longer Speech Integral to Criminal Activity (January 21, 2011). Available at SSRN: http://ssrn.com/abstract=1744648 at n 165
34 New Mexico 3NM Stat Ann 30-6A-3 (A)
36 cite Fla Stat Ann 827.071 defines sexual conduct to include “actual lewd exhibition of the genitals”
38 The 3rd Circuit Court of Appeals affirmed the child porn conviction of Steven Knox in US v Knox, 32 F3rd __,(1994) where all the children wore bikini bathing suits, leotards,
2. Sex Offender Registration

The problem is exacerbated by the sex offender registration requirements. Since juvenile records are often confidential and will not likely expose a teen with a record, the most adverse impact of delinquency adjudication is subjection to the requirements of SORNA, which likewise vary wildly among the states and publicly stigmatize individuals well past the age of majority.

State practices are inconsistent among the jurisdictions as to who should register, the duration of the registration, and the ability of the public to access this information. Thirteen states only require registration of juveniles who have been convicted as adults for any of the qualifying crimes. Twenty one states require registration for any juvenile adjudicated delinquent for the designated offenses, and for the most part these registrations are for a period of at least ten years. A smaller number of

underwear, or other abbreviated attire while they were being filmed. The government conceded that no child in the films was nude, and that the genitalia and pubic areas of the young girls were always concealed by an abbreviated article of clothing. The Court held, “We hold that the federal child pornography statute, on its face, contains no nudity or discernibility requirement, that non-nude visual depictions, such as the ones contained in this record, can qualify as lascivious exhibitions, and that this construction does not render the statute unconstitutionally overbroad.”

39 Sexual Offender Registration and Notification Act. The Sex Offender Registration and Notification Act (SORNA) does require that certain juveniles register as sex offenders after adjudication of a sex offense. This requirement applies only to juveniles convicted as adults and juveniles adjudicated delinquent in juvenile court, so long as the juvenile is 14 years of age or older and is convicted of an offense similar to or more serious than the federal aggravated sexual assault statute, 18 U.S.C. §2241. In addition to offenses such as forcible rape, this statute covers any offense involving a sex offense with a victim under the age of 12.http://www.ojp.usdoj.gov/smart/pdfs/practitioner_guide_awa.pdf


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states, nine, actually allow a judge to make a determination as to whether the juvenile should be subject to registration requirements, while the remaining states have no registration requirements for these types of offenses. Much criticism has been levied against the mandatory nature of the laws including that so many offenders are required to register that it prevents the public from protecting itself against those who pose real threats of re-offending. Digital technology makes it likely that in the future there will be an even greater number of registered offenders so as that the registers will become exponentially more meaningless for those seeking to protect against sex offenders.

The examples at the start of this article are stark displays of the consequences of the impractical and sometimes senseless application of traditional child porn statutes to the depictions of teen sexual behavior, especially when instantaneous dissemination via cell phone or computer email, or Skype are involved. There is no rational basis to effect such disparate treatment of expressions of teen sexuality. The sexual thought processes of a 16 year old in Iowa are not different than her peer in Virginia.

This article is introduced by four examples of teen behavior, none of which stretch the bounds of credulity. It may surprise the reader that the example that is clearly in violation of state law is the most explicable of the group. The 16 year old sweethearts, though lawfully permitted to have sex, are prohibited from memorializing it, even to the exclusion of all others. They may also be required to register as sex offenders for a period of ten years. Assuming there is no claim that intoxication vitiated consent, the

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46 FLA. STAT. ANN. § 943.0435 The law does not address whether juveniles must register. However, on its face, the law is limited to those individuals who have been "convicted" of the enumerated offenses. Since juveniles are adjudicated delinquent for criminal offenses, and adjudications of delinquency or disposition are not "convictions" of crime, the law appears to be limited in scope to juveniles who have been prosecuted and
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two 17 year olds from New York may lawfully engage in the act, and take
the photo, but they run the risk of prosecution by sending it to Ohio, as
does the cousin who receives it. The young lady from Nebraska, and her
boyfriend are saved by a recent amendment to the Nebraska statute that
presumably was meant to accommodate the issue by including affirmative
defenses to the traditional child porn statutes. In her case, evidence of the
closeness in age, voluntary creation of the image, and the limited
distribution can be offered as a defense to child pornography charges.
Finally, a condition of the statute that requires the photo be possessed or
controlled for the purpose of arousing or satisfying the sexual desires of the
person or another person will probably leave the consequences for our 16
year old Oregonian in the hands of his parents.

III. COMPUTERS, CELL PHONES, AND TEEN USERS

A. Identification of the Technology

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

Depending upon one’s generation the introduction to the cell phone is
often associated with Gordon Gekko in the original “Wall Street” or Zach
Morris in “Saved By The Bell” each of whom was armed with the Motorola
DynaTAC 8000X that weighed in at two pounds, was ten inches in length,
not including the flexible whip antenna. The unit retailed for $3995 and
had a battery life of one hour which required a ten hour charge to sustain.
Nokia also developed the first cell phones to access internet service and to

sentenced as adults. Despite not expressly bringing juveniles within the purview of the law, Section 943.0435(11)(b) provides the potential for a decreased registration duration of only ten years for those individuals who were 18 or younger at the time of the offense. Inclusion of this provision is not inconsistent with finding that the statute is limited only to juvenile prosecuted and sentenced as adults.

47 17 NY Pen Law 263.05
48 Ohio R.C. 2907.322 (A) (1) (2) (3) and ORC 2907.323
49 Neb. Rev. Stat. Annot.28-813.01 See Part IV below
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feature a built-in camera in 2002. Early cell phone networks were restricted to areas served by land based cellular towers and often limited to a few contiguous states amidst the user’s point of purchase. Today, one can start an automobile across an ocean with the appropriate smart phone application.

Among teens, age is the most important variable in phone ownership. In 2009 about half of those aged 12-13 owned cell phones while surveys claimed 72% owned them by age 14; and 84% of those 17 and older, also up from 64% 5 years earlier. Of course, it is difficult to define who actually “owns” the device in a typical multi-phone family.

U.S. text messages via cell phones totaled about 2.1 trillion in 2010, nearly a 50% increase over the previous year.

B. Quantifying the Class of Affected Young People

The first articles about sexting reference a survey that arguably was of suspect methodology that includes two very important years that most state laws exclude from the legal definition of a juvenile. Unfortunately most of the early media accounts reported statistics from this poll which concluded nearly 20% of teens were sending sexually explicit images via cell phone.

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52 id
55 Plunkett Research Trends, Wireless, Cellphone and RFID Industry Trends at Plunkettresearch.com
57 Id. According to its website, the survey was conducted online between September 25 and October3, 2008 with responses from 1280 respondents, about half between ages 13-19 and half aged 20-26; respondents were selected from those who had previously volunteered in a survey conducted by the same company (TRU Online Surveys)
58 In most states the legal age of majority is 18 but two of states limit the jurisdiction of the Juvenile Courts to those under age 16 (North Carolina and New York) By including 18 and 19 year olds in this survey the pollsters consider a class of people outside the age of juvenile jurisdiction, but also include a group expected to be much more sexualized than a 12 year old, and much more likely to own cell phones.
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Since then, at least three other studies have been conducted, concluding significantly different (and lesser) numbers of sexters. The survey that exactly identifies the subject age group opines that as few as 4% of the sampled population engage in the practice.  

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

Since the number of sexters is difficult to pin down, the potential impact

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61 Pew #2 gathered the data among this age group. Subsequently, in a comprehensive study, Teens and Mobile Phones: Text Messaging Explodes as Teens Embrace it as the Centerpiece of Their Communications Strategies With Friends, April 20, 2010 http://pewinternet.org/Reports/2010/Teens-and-Mobile-Phones.aspx, sexting and many more phenomena of teen cell phone use and ownership are analyzed.
62 Notwithstanding this small percentage is still a significant number of teens. See N 1 Humbach, John A. "Sexting' and the First Amendment. " Hastings Constitutional Law Quarterly. 37.3 (Spring 2010): 433-485, where the author concludes “millions of American Teenagers are sex offenders” because of sexting.
63 In Juvenile Court, this is the equivalent of being found guilty in adult court and it represents the keystone of a distinct philosophy that the purpose of the juvenile Court was not to punish but to save. See Flexner and Oppenheimer, The Legal Aspect of the Juvenile Court (1922) (Children’s Bureau Pub. No. 99)
64 The Sex Offender Registration and Notification Act (SORNA)42 U.S.C. §16911 does require that certain juveniles register as sex offenders after adjudication of a sex offense.. This requirement applies only to juveniles convicted as adults and juveniles adjudicated delinquent in juvenile court, so long as the juvenile is 14 years of age or older and is convicted of an offense similar to or more serious than the federal aggravated sexual assault statute, 18 U.S.C. §2241. In addition to offenses such as forcible rape, this statute covers any offense involving a sex offense with a victim under the age of 12. http://www.ojp.usdoj.gov/smart/pdfs/practitioner_guide_awa.pdf
65 For instance images of sexual conduct between a 16 year old and a young child, or images taken by stealth, force or deception are excluded from this discussion since they arguably involve non-consensual activity.
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of sexting laws on the population of juveniles is presumptive in consideration of the sheer volume of cell phone users among the age group. When adding computer sexters and Skypers to the mix, by any measure, there are a substantial number of young people impacted by the uncertainty and inconsistency inherent in the application of child pornography laws.

IV. THE SUPREME COURT AND CHILD PORNOGRAPHY

A. Introduction

When one pictures the average “child pornographer,” one does not imagine the image of a seventeen-year-old student body president photographing himself after gym class. However, case law somehow places the teenage sexter in a jail cell with that very person from whom the Court has professed to protect him. The camera phone has caused the average fifteen year old that is busy playing volleyball, studying for an Algebra quiz, and sneaking a quick suggestive text to her beau, to fall unwittingly into the abyss that is child pornography. In order to fully appreciate the confusing legal issues that surround the teenage sexter, one must understand the framework of pornography law and its evolution.

Before the Court came across the likes of Paul Ferber66 or Clyde Osborne67 prosecutions of child pornographers were based upon the test for obscenity established in Miller v. California.68 Explaining that the states have an established interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles,70 the Court set out to define the applicable standard to determine whether material is obscene.71

66 Ferber is the Petitioner in Ferber v NY discussed immediately below
67 Osborne was the Petitioner in Osborne v Ohio discussed immediately below
69 Obscenity, as defined by the Supreme Court is “material which deals with sex in a manner appealing to prurient interest.” Roth v. United States, 354 U.S. 476, 487 (1957).
70 Miller, 413 U.S. 15 at 18-19, 93 S. Ct. 2607 at 2612.
71 The Court held that material is obscene and subject to state regulation where 1) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; 2) the work depicts or describes, in a patently offensive way, sexual conduct law specifically defined by the applicable state; 3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The Court went on to warn the states that no one should be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive
B. Conceptional Child Porn Law

1. New York v. Ferber

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

On appeal to the Supreme Court, a single question was presented. The Court was asked, “[t]o 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?” Answering affirmatively, The U.S. Court categorically denied child pornography safe harbor within the First Amendment without considerations of obscenity.

Ferber established that even if the images in question are not legally obscene, their production and distribution can be outlawed because of the state’s interest in preventing child exploitation and the overwhelming majority of child pornography is created in a manner that is an act of despicable child abuse.

To fit with the Ferber analysis this author

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`hard core’ sexual conduct specifically defined by the regulating state law, as written or construed.

73 Id. at 752, 102 S. Ct. at 3352.
74 Id. Citing N. Y. Penal Law, Art. 263 (McKinney 1980). Section 263.05 A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance."
75 Id N 72. at 753, 102 S. Ct. at 3352.
76 Id. at 759-762 First, a state’s interest in safeguarding the physical and psychological well-being of children is beyond compelling, and legislative judgment has determined that using children in sexual performances is physically, mentally and emotionally harmful to
suggests that a third party, perhaps the pedophile that preys on, and abuses children, must literally be in the background, having had an integral part in either its production or dissemination. The opinion clearly distinguishes the reasons child pornography is in the special class of unprotected speech, as it is proximately linked to the criminal act of child abuse.77

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

Prophetically, the Ferber Court concluded that whatever miniscule unconstitutional applications of the statute that did occur could be cured through case-by-case analysis if the fact situations to which its sanctions, assertedly, may not be applied.78 This article suggests it is essential for the Courts to step in and create a boundary between Ferber material and the sexted image. Consensual and self-produced images present one application

77 The majority court explained that content-based speech classifications have been accepted where the evil to be restricted so overwhelmingly outweighs the expressive interests they can be appropriately generalized so that no process of case-by-case adjudication is required. The Court then concluded that whatever miniscule unconstitutional applications of the statute that did occur could be cured through case-by-case analysis if the fact situations to which its sanctions, should not be applied. Ferber at 763-764

78 Id. at 748
that does not conform to the state’s compelling interests in protecting children from adult predators. The Court, arguably, has left room to decide fact situations, such as those created by our ‘tech-crazy teens, which send a significant portion of the 75 billion texts per month.\(^79\)

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

### 2. Osborne v Ohio

A few years after the Ferber Court found that production and dissemination of child pornography was unprotected and criminal, the U.S. Supreme Court was asked to extend the prohibition on child pornography to include private possession of these materials. The state of Ohio convicted Clyde Osborne for a violation of Ohio Revised Code section 2907.323\(^80\) that proscribes possession of any material that shows a minor in a state of nudity. Specifically authorities discovered, pursuant to a valid search warrant, four photographs, each of a nude adolescent male posed in a sexually explicit position.\(^81\)

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\(^80\) The 1990 version of Ohio Revised Code section 2907.323(A)(3) provides in pertinent part:

(A) No person shall do any of the following:

3. Possess or view any material or performance that shows a minor who is not the person’s child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

\(^81\) Osborne v. Ohio, 495 U.S. 103, 106, 110 S. Ct. 1691, 1695 (1990). The Supreme Court granted certiorari in Osborne’s appeal and posed the question to be answered as “whether Ohio may constitutionally proscribe the possession and viewing of child pornography or whether” Stanley v. Georgia “compels the contrary result.” In Stanley, the home of a suspected and previously convicted bookmaker was searched by police, with a warrant, to
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In Osborne the Supreme Court held the possession of this material bore a causal relationship to criminal conduct similar to Ferber in that it created a market or economic motive which was an integral part of the production of the child porn. The Court further found the statute would serve to destroy the permanent record of abuse, which once obliterated could no longer haunt its participants or be used by pedophiles to seduce other children into sexual activity. But Osborne’s impact on the creation of images by minors goes well beyond embellishing Ferber. The U.S. Supreme Court approved the state Court’s construction of the term “state of nudity” to include a lewd exhibition depicting graphic focus on the genitals of the subject. This construction of the term “state of nudity” directly impacts the legality of erotic photos that could be characterized as nothing more than posing. Every state now includes these graphic displays within the statutory definition of sexual conduct. Often these are the non-obscene, yet graphic and highly sexual poses and activities that make up the high tech flirting that sexting has come to symbolize.

The U.S. Supreme Court conceded that on its face the Ohio statute prohibited nude depictions of minors, which, standing alone constituted protected speech. As construed, however, application of the statute exempted from punishment actions that were morally innocent, only preventing sinister possession or viewing of the described material for prurient purposes. However, in its opinion, the U.S. Supreme Court did not use the term morally innocent to describe the protected images, opting instead to state, that by its construction, Ohio chose not to penalize those seize betting paraphernalia. They found no gambling equipment but they did seize three reels of pornographic film and charged him with possession of obscene materials. In Stanley, the Court rejected the state of Georgia’s assertion that it had an interest in controlling the moral contents of a person’s thoughts.

82 “Child pornography is often used as a part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having ‘fun’ participating in the activity.” Osborne, 495 U.S. at 111, 110 S. Ct. at 1697 fn. 7 (quoting Attorney General’s Commission on Pornography, Final Report 649 (1986)).

83 Cite Osborne at 115

84 Note many states amended their statutes to include lewdness, thereby expanding the amount of proscribable speech. The decision also applied the rule of construction articulated in Miller and approved the Ohio Court’s interpretation of the statutory reference to the requirement that the material shows a minor in a “state of nudity.”

who view or possess innocuous photographs of naked children. The majority wrote, “so construed, the statute's proscription is not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography.” (emphasis added) This clearly shows recognition by the Court, even in 1992, that not all pictures of unclothed minors are child pornography.

There are a number of reasons that these images are created, by both juveniles and adults, that could not be considered as immoral and can rationally be classified as artistic, humorous, or legitimate social interaction. The Court’s choice of words clearly is not an invitation to create a new standard within which to measure these images, but is used as a method of distinguishing between that which is categorically child pornography and that which is not. This distinction is helpful in classifying the voluntarily self-created image as either innocuous and protected, or exploitive and prohibited.

The child pornographer begets a product of no social value and his motivations are for no social good. Though the sexted image quite often is similar in content, it is created for completely different reasons and often reflects significant social value to its subjects. The self-produced image can be sent as an expression of affection, an attempt at humor, or a method of social interaction. It can also be appropriate enticement to engage in a relationship or a lawful sexual act. A number of surveys attempt to explain the motivations that drive young people to this level of exhibitionism. In reality, there is a wide range of circumstances under which minors engage in the production and dissemination of sexually explicit images of themselves that involves varying levels of coercion and consent. Efforts to list the reasons teens take nude photos of themselves should also likely include “because they can”. It should be no surprise that so many teens are not aware they are violating the law when they create, possess, or disseminate these images.

86 Cite Osborne at 114
87 Osborne at Footnote 10. The “proper purposes” exceptions set forth in O.R.C. 2907.323(A)(3) for the proposition that they were designed to sanction the possession or viewing of material depicting nude minors where that conduct is morally innocent.
88 A focus group in conjunction with the Pew Research poll identified three scenarios for sexting: exchange of images between two romantic partners; exchanges between partners that are shared outside the relationship; and exchanges between two people who are not yet in a relationship, but where at least one person hopes to be. See N 61 above
90 8 Ohio teens were required by Juvenile Court Judge Thomas O’Malley to poll their
Another decade would pass before the Court again addressed child pornography legislation, and by that time digital imagery revolutionized the creation and dissemination of these depictions.

3. Ashcroft v. Free Speech Coalition

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

Fearful of suppression or criminal prosecution, a trade association for the adult entertainment industry, the publisher of a book focusing on the lifestyle of nudists, a painter of nude art, and a photographer who specialized in erotic images challenged the statute in Federal District Court. The Court was asked to decide whether the federal regulation was constitutional where it forbids speech that is neither obscene under Miller nor child pornography under Ferber.

At the outset, the Court in Ashcroft made a declarative statement that the proscribed images “do not involve, let alone harm, any children in the production process.” The indirect harm, Congress asserted, was that a child reluctant to engage in on-stage sex acts may be persuaded by watching other children who were “having fun”. Another potential harm discussed was the possibility that pedophiles would whet their own sexual appetites and increase creation, distribution, sexual abuse and exploitation. Both of

91 The law was called the Child Pornography Protection Act (CPPA) Section 2256(8)(B) prohibited “any visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture” that “is, or appears to be, of a minor engaging in sexual explicit conduct.” Section 2258(8)(D) defined child pornography to include any sexually explicit image that was ‘advertised, promoted, presented, described, or distributed in such a manner that conveys the impression’ it depicts “a minor engaging in sexually explicit conduct.”
93 Id at 243.
94 Id at 240.
95 Id at 241 citing Congressional findings N3 following USC 2251
96 Id
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these arguments are still used to support the continued criminalization of the sexted image.  

In a retreat from Ferber and Osborne, the Supreme Court held that the government could not prohibit speech because of either its tendency to persuade viewers to commit illegal acts, or its utility in child enticement because The Court held that “[t]here are many things innocent in themselves . . . such as cartoons, video games, and candy that might be used for immoral purposes” and that “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.”  

The rationale of whetting of sexual appetites was similarly dismissed as being of unquantified potential for subsequent criminal acts and not proven.  

Ashcroft explained that the harm Congress spoke of flowed from the content of the images, not from the means of their production. Again referencing Ferber, Justice Kennedy re-iterated that where the images were themselves the product of child abuse . . . “the state had an interest in stamping it out without regard to any judgment about its content.”  

The Court applied the Ferber rationale to mean that the production of the work, not its content, was the target of the statute, and whether it contained serious redeeming value was of no consequence. Thus Ashcroft 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.  

Nothing in this article advocates reviewing standards of obscenity as applied to either adults or juveniles. But the Court at least recognizes that images of certain acts, even among older adolescents are not necessarily obscene. Assuming the legality of the conduct depicted, and the lack of abuse in the means of production, self-produced imagery is likewise neither obscene under Miller or child pornography under Ferber.

C. Recent Court Decisions Impacting the Traditional Child

97 N2 Leary, Calvert
98 Id N. 92 at 251 This undercuts one of Osborne’s intentions that child porn should not be utilized by pedophiles to seduce other children into sexual activity. Osborne at 111
99 Id at 253
100 Id at241
101 Id at249, citing Ferber at 761, and 775 (O’Connor concurred)
102 Id at 247 The Court famously noted that watching critically acclaimed movies such as the Academy Award winners Traffic and American Beauty as well as productions of Romeo and Juliet could create violations of this statute
103 Id at 251 quoting Ferber at 764-765
104 Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards. Ashcroft at 246
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Pornography Jurisprudence

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

1. U.S. v. Stevens

In United States v. Stevens, the Court re-iterated the value of expression even when the content depicted conduct that was unlawful.105 In Stevens the statute106 sought to criminalize the commercial creation, sale, or possession of depictions of animal cruelty. The statute only prohibited the portrayal of harmful acts, not the acts themselves, if the acts were unlawful in the jurisdiction in which the portrayal was created.107 Though this case is disposed of by a declaration that the law was overbroad, and that a substantial number of its applications were unconstitutional judged in relation to its plainly legitimate sweep,108 the opinion added value to the sexting discussion because it addressed limitations on content based censorship; it emphasized the need to link the speech to criminal conduct; and it pointed out the problematic enforcement issues from state to state.109

Only recently has the significance of Stevens entered the conversation on the Skyped or sexted image. One author calls the decision one of the term’s most doctrinally significant constitutional opinions.110 Another flatly argues that after Stevens, the First Amendment prohibits the prosecution of

105 US v Stevens, 559 U.S. ___, 130 S. Ct. 1577
106 18 USC 48
107 Mr. Stevens was convicted by a jury for creating and selling three video tapes, two of which depicted pit bulls fighting and one in which another pit bull attacked a domestic pig as part of the dog’s training to catch and kill wild hogs. The legislative background of the statute focused on the creation of “crush” videos which feature the torture and killing of helpless animals and are said to appeal to persons with a particular sex fetish. Stevens at 1583
109 The author is cognizant of the obvious distinction between cruelty to children and cruelty to animals
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minors for sexting once they have passed the state’s age of consent to have sex.\(^{111}\) In fact, by legally permitting minors to have sex in the first instance, even before Stevens, a state undermines its own rational bases for criminalizing expression of that sexual activity because it is absent a link to any crime. The rationale permitting young people to engage in sex acts while prohibiting them from taking pictures of the act creates a distinction without a difference.\(^{112}\)

The Stevens Court repeated the high value to be placed on First Amendment protection for the content of images. The 8-1 majority labeled the Government’s claim that a class of material be denied First Amendment consideration when on balance the value of the speech is outweighed by its costs to society as “startling and dangerous.” It established as a bedrock principle underlying the First Amendment, that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.\(^{113}\)

Of greater importance, the Stevens Court directly addressed prior child pornography jurisprudence and gives some context to the connection between the underlying conduct and the depiction, an intrinsic relationship that gives the speech a “proximate link to the crime from which it came.”\(^{114}\) Stevens reconciles Ferber, Osborne, and Ashcroft to the conclusion that the creation of child pornography is a criminal act and the depiction thereof is the subject of a previously recognized and long-standing category of unprotected speech. But absent this connection between the image and the crime First Amendment protection is presumed.\(^{115}\)

Intriguing is the concern expressed by the Stevens court of the problematic policy differences among the states as to what is lawful or not. In Stevens the statute did not prohibit all portrayals of animals being injured or killed, but only those pictures created in states where the method of

\(^{111}\) Cite: Haynes, Antonio Mortez, The Age of Consent: When Sexting is No Longer Speech Integral to Criminal Activity (January 21, 2011). Available at SSRN: http://ssrn.com/abstract=1744648 This is a proposition adopted in Part IV of this article.
\(^{112}\) Michael C. Dorf, All or Nothing Equality, DORF ON LAW (Dec. 13, 2010, 12:01AM), www.dorfonlaw.org; see also AH v St. of Florida, 1D06-0162 at 12 Padavano dissenting
\(^{113}\) United States v. Eichman, 496 U.S. 310, 319, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990), also see Ashcroft v. American Civil Liberties Union, 535 U. S. 564, 573 (2002) Since the Court categorized striptease dancing as a form of expression, the sexually charged ideas communicated through digital technology should not be any less considered. See Barnes v Glen Theatre 501 US 560 (1990)
\(^{114}\) Ashcroft supra at 236
\(^{115}\) Stevens at 1586 “Our decisions in Ferber and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”
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inflicting the injury was itself unlawful. Likewise discordant child porn laws create bizarre legal results for juveniles who produce or disperse images among the states. This occurs in the self-creation of cyber-porn when material created lawfully in State A is transmitted by one click to State B where the same photo is banned as child pornography, such as in the New York party example given early on in this article. The weight of these dicta cannot be minimized when considering the substantial differences among the states as to who is regulated and what conduct is proscribed in sexual expression among young people.

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

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

2. Brown v. Entertainment Merchants Association

When the state of California attempted to regulate the sale and rental of violent video games to people under age 18, the statute was struck down

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116 It applies to any visual or auditory depiction “in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,” if that conduct violates federal or state law where “the creation, sale, or possession takes place,” Stevens at 1582.
117 This would amount to a reconsideration of self-created imagery, without disturbing the notion that by default expression is protected unless otherwise excepted.
118 The statute restricted from minors games in which the range of options available to a player included killing maiming, or raping the image of a human being.
by the two lower Federal Courts, whose decisions were affirmed by the Supreme Court in Brown v Entertainment Merchants Association et al.\textsuperscript{119} The decision in Brown gives further indication of the direction the Court will take when considering whether or not the lawful, voluntary, and consensual expressions of children are intrinsic to criminal child pornography and therefore unprotected. In the majority opinion written by Justice Scalia the Court exposes California’s attempt to create a new category of content based regulation that is permissible only for speech directed at children. Calling the effort “unprecedented and mistaken,”\textsuperscript{120} the Court re-iterated the significant measure of First Amendment protection accorded to minors subject only to the state’s compelling interests and a statute’s narrowly drawn restrictions. Arguably video game technology and cell phone applications have evolved on a similar track over the past twenty years.\textsuperscript{121}

Brown underscores the importance of Stevens by declaring it as the controlling authority for its decision not to add violent video games to the category of unprotected speech.\textsuperscript{122} Like protected books, plays, and movies, video games communicate ideas through familiar literary devices and thus qualify for First Amendment protection. There is no previously recognized and long-standing category of unprotected speech associated with violence and “the basic principles of freedom of speech . . . do not vary” with a new and different communication medium.\textsuperscript{123} 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.\textsuperscript{124}

Unfortunately some will latch on to Brown as authority that a state merely needs to show expression of an idea harms children in order to regulate the content of speech. The Court did not state that proof that playing violent video games caused minors to act aggressively would satisfy the strict scrutiny a content based restriction would require, but it acknowledges that it is a good place to start the inquiry.\textsuperscript{125} In Brown the Court flatly declares that the state could not show a direct causal link

\textsuperscript{119} 564 US _____. 131 S. Ct. 2729 (2011)
\textsuperscript{120} Id at2735
\textsuperscript{121}Cite quality, applications, interactivity, and % of users of video games—for cell phones see Part III above
\textsuperscript{122} Brown at 2734
\textsuperscript{123} Id at 2733 citing Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495, 503.
\textsuperscript{124} Id at 2736 citing Ginsberg V New York,390 US 629 (1968) at 640–641; Prince v. Massachusetts, 321 U. S. 158, 165 (1944)
\textsuperscript{125} Brown at 2739
between violent video games and harm to minors. Thus a finding that speech is harmful to minors is not outcome determinative as to say whether or not such works constitute a well-defined and narrowly limited class of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.

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

Minors are entitled to a significant measure of First Amendment protection in matters of expression, even if a legislature thinks the subject is inappropriate or unsuitable for them. The section below on Current Legislative responses is illustrative of what others conduct or actions will engage new statutory prohibitions, or will satisfy current regulations. These most probably will include age grouping, surreptitious recording, and intention to harm. Looking forward, the idea that having sex is acceptable but creating images of it is not will be a tough sell for legislators in trying to identify the problem, and prove it causes harm to the welfare of minors. Something more than a generic claim that the conduct involves child pornography will be required before sexters should be subjected to traditional child porn laws.

The potential to create pornographic images has been with us since the early 1800’s when the first permanent image was burned on heliograph. The current capacity to easily, inadvertently, and uncontrollably disseminate an image around the world at the push of a button has outgrown Ferber’s legacy.

3. City of Ontario v. Quon

Though Stevens and Brown, as First Amendment cases are relevant to the premise of this article, another recent opinion, unmentioned in any of

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126 Id at 2738 The State admitted as much  
127 Id at 2733 citing Chaplinsky v. New Hampshire, 315 U. S. 568, 571–572 (1942)  
129 Brown at 2738  
130 Erznoznik v Jacksonville (1975), 422 US 205 at 214  
131 See Part VI  
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the literature on sexting, requires acknowledgement. In *Ontario v. Quon*, the Supreme Court unanimously ruled that a reasonable search of an employer provided telephone to discern whether employees were inadvertently being required to pay out-of-pocket for business expenses did not violate the Fourth Amendment. At first blush, one may ask how this Fourth Amendment claim is relevant to this topic, but the devil is in the details.

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

Not unexpectedly, Justice Scalia expressed skepticism that “… Any rule that requires evaluating whether a given gadget is a necessary instrument for self-expression, even self-identification, on top of assessing the degree to which the law’s treatment of … has evolved, is (to put it mildly) unlikely to yield objective answers.”

It is somewhat ironic that Scalia wrote the majority opinion in *Brown* and assured us that basic principles of freedom of speech do not vary with a new medium of communication.

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

We have travelled this path before. The impact that television had on society birthed a body of scholarship devoted to the proposition that “the

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133 560 U.S. ___, 130 S. Ct. 2619 (2010)  In *Quon*, a police officer brought an action against the City, its police department, and the Chief of Police alleging the department’s review of officers’ text messages violated the Fourth Amendment. Apparently in an effort to determine whether the cell phone contract with the service provider allowed for a sufficient amount of text messages to be sent, the petition’s phone records revealed he made a significant number of non-work related text messages some of which were sexually explicit.

134 Id at 2623
135 Quon at 2630
136 Scalia concurring at 2635
137 Brown at 2733
138 N. 2 Calvert at 7 citing Campbell, “Teenage Girls and Cellular Phones: Discourse of Independence, Safety, and Rebellion” 9 J. Youth Studies 195 at 199
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medium is the message.”

V. Harm: The Disputation Associated with Sexting

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

That which drives this discourse is the complete lack of agreement as to the nature and extent of the harm to the children in the means of production of the images. The traditionalist theory asserts that child pornography is harmful and thus not protected by the First Amendment, sexting is child pornography, and therefore sexting is harmful and not protected by the First Amendment. This article rejects that theory.

A. Harm: The Connection to Ferber

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

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

140 Humbach, Halloran/McGlaughlin’s Crime and Punishment: Teen Sexting in Context
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to groom, legitimize, and demonstrate for the victim what to do. Likewise Professor Calvert adds to the list of the injuries and harms from sexting: mental anguish in the form of embarrassment and humiliation when the images are disseminated without consent; harassment from others in the form of bullying; economic harm in the form of possible job loss or inability to obtain employment when the images are discovered; parental punishment; criminal punishment; in school punishment; and social stigma. Noticeably absent from both authors is any reference to the relationship between sexting and the harms inherent in the invasion that accompanies the creation of the photo in an actual case of child pornography. This damage certainly includes physical, mental, and emotional trauma occurring while the image is being made. Likewise missing is any acknowledgement that the sexted image is often created for a valid, if immature, reason.

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

B. Harm: Disconnecting From Ferber

But there is pushback from authors as sexted photos are often labeled child pornography by prosecutors while bearing little resemblance to traditional notions of child pornography. Many of the harms chronicled are also associated with other events in a juvenile’s life. Without the underlying

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141 N69 (leary) at 14, citing Silbert, The Effects on Juveniles of Being Used for Pornography and Prostitution, Pornography: Research Advances and Policy Considerations at 224-225 (Dolf Zillman& Jennings Bryant eds., 1989) Though this survey does not identify if child pornography was used in these cases. It is valid to note that child pornography traumatizes children physically and emotionally, and it is no surprise they experience feelings of moodiness, anxiety, fear, and hopelessness. Admittedly, as Professor Leary suggests this includes an eroded self-concept and often the inability to separate themselves from exploitation.

142 N. 2 Clay Calvert at ___

143 Id. 10

144 Ferber at 759-860, Osborne at 111, and N.2 Leary I article at 12
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criminal and coercive methods of production, the circulation of self-produced images does not subject the minor to the same type of continued invasion and exploitation of his or her sexual autonomy and bodily integrity that is so degrading that it can only be characterized as a continuation of the act of sexual abuse.\textsuperscript{145}

Nowhere in the news or the literature do we find physical trauma or serial sexual exploitation associated in the creation of the sexted image. Although such images surely hold unlimited potential for subsequent harm if disseminated without the minor’s consent, or even if the minor merely regrets having voluntarily distributed such images in the future, this harm is not identical or even substantially similar to the harm suffered by victims of child pornography.\textsuperscript{146} Civil law provides remedies by way of money damages and restraining orders to provide relief to one who makes the image possible, yet who later feels aggrieved when some use they deem is improper occurs.\textsuperscript{147}

The long-reaching effects of being registered as a sex offender arguably outweigh the embarrassment associated with the possession and dissemination of self-taken pornographic materials.\textsuperscript{148} Modern employment practices routinely use robotic data mining services for background checks and are likely to discover a candidate’s sexual offense history. The chance of personal identification by means of an indiscreet image in cyberspace is more random. Far from being forced or enticed into submitting to sexual acts to be recorded in some fashion—the usual, incredibly harmful means through which child pornography is created—with self-produced child pornography, it is the minor who decides to create or distribute sexually explicit images of themself.\textsuperscript{149} Who cannot look back to some regrettable conduct as an epiphany that changed their view of personal responsibility for their actions?

\textsuperscript{145} Wastler, The Harm in “Sexting?” Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers find cite

\textsuperscript{146} Wastler at 12 Harvard Journal of Law and Gender

\textsuperscript{147} Civil actions are often available contemporaneously with criminal charges based upon the same set of facts. Damages can be awarded for the Intentional Infliction of Emotional Distress in every state.

\textsuperscript{148} This is not meant to dismiss the handful of severe cases which have resulted in tragic and even deadly consequences. See Mike Celizic, Her Teen Committed Suicide Over “Sexting,” \textsc{MSNBC.COM}, March 6, 2009, http://www.msnbc.msn.com/id/29546030 (high school student committed suicide after being harassed because of a text message sent by her to her boyfriend containing a self-taken sexually explicit photo was spread throughout the school).

\textsuperscript{149} N. 2 Calvin at 11
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The claim that these images aid in the creation of juvenile sex offenders is only true because we choose to label the conduct for juveniles. Assuming the offensive photos were taken by and of a consenting 16 year old couple, how do the circumstances surrounding the act make it more criminal than the circumstances of similar images contained in any mainstream, health and reproduction guide?150

Much has been said of the tragedy of the young woman in Ohio,151 who some claim took her own life in a tragic response to the publication of explicit photos she took for and sent to her then boyfriend. Arguably it was the consequence of her inability to handle the shame at the revelation of a most intimate set of images combined with the abject cruelty at the hands of her peers. It is quite a stretch to say her death was the direct harm caused by sexting. The blame should not be so much on the images as it should be on others’ reactions to them as a more direct harm to her. Little discussion about the complexities of teen suicide accompany this sad event.

Bullying is certainly a problem that can cause harm and it has been the subject of national attention.152 The solution is to regulate the conduct of the bully, not the content of the message. Understandably the internet has expanded the reach of the bully. Enforcement of existing laws against menacing and other forms of harassment is the more logical route to holding them accountable within the criminal justice system.

The lack of consensus on the quantity, nature and degree of harm created in the production or dissemination of depictions of lawful conduct should devalue its weight in the discussion. In Brown, the Court did not hesitate to reject the conventional wisdom that exposure to violent video games causes harm to minors.153 There is hardly a consensus as to how creating and sending explicit self-created images correlates to children, or if it harms them at all.

C. Harm: Sexualization of Children

The sexualization of children is a concept that any parent knows is as

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150 McBride, Show Me!: A Picturebook of Sex for Children and Parents (1975) was controversial 35 years ago as a sex education aid for children. A recent Amazon.com search resulted in more than 1400 titles on the subject
151 news.cincinnati.com/article/20090322/.../Nude-photo-led-suicide
153 The court discusses the experts’ findings and concedes that there is a correlation between watching/playing violent video games and aggressive behavior, but the proof of the cause/effect relationship was insufficient to establish “harm” to the minor so as to fit within the state’s compelling interest. Brown v. Entertainment Merchants Association
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frustrating as it is unavoidable in our culture. 154 Whereas Professors Leary, Calvert, and others declare sexualization to be a constituent part of the harm child porn laws is meant to nullify, this article readily distinguishes the harm caused by the child pornographer from the harm associated with the sexualization of children. 155

The child pornographer causes physical, mental, and emotional damage through exploitation and abuse of a vulnerable population, and his is an affliction borne of malady or malevolence; sexualization may not cause any ill effect, and more importantly, it exists with the complicity of parents and friends; it is an inescapable component of our environment; it is a rite of passage that nearly all teens face, and even if they are somehow victimized it can hardly be compared with the acts of a pervert or pedophile. Of equal interest is the degree that sexualization of the young has impacted the jurisprudence of child pornography. As discussed below, we have gone to great lengths and strayed far from Ferber in order to prove that the images are categorically child pornography.156

154 Merriam Webster definition of sexualize is to make sexual or endow with a sexual character or cast

a. Societal Acceptance of Teen Sexuality

The intersections of the adolescent brain, our oversexed society, and digital communication have created an accident looking for a place to happen. Virtually every media form studied provides ample evidence of the sexualization [of women], including television, music videos, music lyrics, movies, magazines, sports media, video games, the Internet, and advertising.157 The scope of digital technology creates a new level of control, enabling even the most immature computer users access to unfiltered imagery and the ability to pass it on instantaneously and globally.

In study after study, findings have indicated that women more often than men are portrayed in a sexual manner (e.g., dressed in revealing clothing, with bodily postures or facial expressions that imply sexual readiness) and are objectified (e.g., used as a decorative object or as body parts rather than a whole person). In addition, a narrow (and unrealistic) standard of physical beauty is heavily emphasized. These are the models of
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femininity presented for young girls to study and emulate. 

Though the volumes on female sexuality obliterate the dearth of literature on the sexualization of boys and young men the message is equally clear that a person’s value comes only from his or her sexual appeal or sexual behavior, to the exclusion of other characteristics, and a person is held to a standard that equates physical attractiveness with being sexy. A person becomes sexually objectified—that is, made into a thing for others’ sexual use, rather than seen as a person with the capacity for independent action and decision making. Sexuality is inappropriately imposed upon a child.

One need look no further than the musical craze of “boy and girl bands,” and the likes of plainly sexualized children such as Miley Cyrus, Justin Bieber, and Jaden Smith for examples of this social trend. Abercrombie and Fitch recently advertised the sale of padded bikini bras for children under the age of ten.

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

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

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

VI. A METHOD TO RECONSTRUCT CHILD PORNOGRAPHY LAWS

As described below a number of states are actually incorporating statutory language that will separate the “morally innocent” and “innocuous” imagery from the perverse and harmful kind. Whether these laws have been effective to prevent the creation and dissemination of this imagery is beyond the focus of this article, which is directed to the constitutionality of current child pornography laws once the image is

158 id
159 id
discovered. The practical enforcement of these laws has been exponentially made more difficult because of digital technology. On the other hand, once discovered, these images leave an electronic trail that often provides a prosecutor with irrefutable evidence as to their production and dissemination.

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

A. Current Legislative Efforts to Regulate Sexually Explicit Images

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

No one gets elected to legislative office by promising to be soft on crime. Paradoxically at a recent count, more than half of state legislatures have endeavored to amend their child porn statutes to de- or re-criminalize sexting so as to reduce the level of offense, the punishment for the conduct, and even the formality of instituting criminal charges or sex offender registration requirements. Additionally the media and law enforcement

164 www.cbsnews.com/stories/2009/01/15/.../main4723161.shtml,
articles.cnn.com/.../sexting.busts_1_phillip-alpert-offender-list-offen
165 National Conference of State Legislatures Sexting Legislation Update April, 2011 http://www.google.com/search?sourceid=navclient&aq=0h&oq=sexting+le&ie=UTF-
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have gone to lengths to warn children, that under present conditions, sexting can only lead to disaster.\textsuperscript{166}

The provisions of legislation proposed or enacted indicate there is still no consensus as to any particular policy concern but the new statutes attempt to accommodate a number of issues, all directed to mitigating the perceived harshness of using traditional child porn law. Most new laws attempt to mitigate the legal consequences for the juvenile’s ribald manner of expression. Some new regulation takes a front end approach and includes subjecting the juvenile to counseling, community service, and life skills training\textsuperscript{167}; requiring school districts to disseminate on the dangers of distributing sexually explicit images via the cell phone, requiring point of sale informational brochures when a cell phone is purchased, and creating diversion programs for offenders.\textsuperscript{168} To the extent these statutes are directed toward prohibiting the use of digital technology that is integral to criminal conduct then they will be within the reach of Supreme Court boundaries on the limit to free speech. To the extent they criminalize the depiction of lawful conduct they too will lose relevance and enforceability. The lack of progress toward a unified legislative solution suggests judicial intervention is necessary to identify the class of cases that do not constitutionally qualify for prosecution as child pornography.\textsuperscript{169}

B. Proper Purposes Language

Among the reasons the Ohio statute was validated in \textit{Osborne} was the state court interpretation of “state of nudity” that created an exception to the reach of the law where the creation and possession of the images was morally innocent. Thus, one can conclude, the only conduct prohibited by the statute is conduct which is \textit{not} morally innocent, \textit{i.e.}, the possession or viewing of the described material for prurient purposes.\textsuperscript{170} This language

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{166} One of many such efforts can be found at: http://www.wkyc.com/news/news_article.aspx?storyid=111458
\item\textsuperscript{167} Arizona SB 1266 (May 2010)
\item\textsuperscript{168} New Jersey A.B. 1560-1562
\item\textsuperscript{169} For example Ohio’s HB ___ has languished for more than three years
\item\textsuperscript{170} \textit{Id} N. 59 The Ohio statute excepted conduct where “(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.
\end{itemize}
\end{footnotesize}
decriminalizes photos taken by parents of their naked babies in a bathtub, though literally the creation and possession of these images violates the statute.

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

For example, one statute, typically, declares it unlawful to knowingly possess a visual depiction of sexually explicit conduct, wherein the subject is a minor. If the possessor is over 19 years the violation is a Class III Felony, and if under 19 years of age, a Class IV Felony. However it then goes on to state:

(3) It shall be an affirmative defense to a charge made pursuant to this section that:
- (a) The visual depiction portrays no person other than the defendant; or
- (b)(i) The defendant was less than nineteen years of age; (ii) the visual depiction of sexually explicit conduct portrays a child who is fifteen years of age or older; (iii) the visual depiction was knowingly and voluntarily generated by the child depicted therein; (iv) the visual depiction was knowingly and voluntarily provided by the child depicted in the visual depiction; (v) the visual depiction contains only one child; (vi) the defendant has not provided or made available the visual depiction to another person except the child depicted who originally sent the visual.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

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171 see Connecticut HB 5533, Public Act 10-190 (May, 2010); Utah HB 14, Chapter 345 (March, 2009); Louisiana HB 1357, Act 993 (2010)
172 Neb. Rev. Stat. Ann 28-807-(8); 28-1463-02 (1);
173 A class III Felony is punishable by a minimum term of one to a maximum of twenty five years and a $25,000 fine; A Class IV Felony is punishable by up to 5 years in prison and a $10,000 fine Neb. Stat. Annot. 28-105
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depiction to the defendant; and (vii) the defendant did not coerce the child in the visual depiction to either create or send the visual depiction. The statute now protects the intended and lustful expression of the 15 year old Nebraskan woman and her boyfriend exampled in the beginning of this paper.

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

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

174 Neb Stat..Annot. 28-813.01
175 ND Century Code Section 12.1-27.1-03.3
176 Id N. 315 1 (a) and 1 (b)
177 720 ILCS 5/11-27 (March, 2010) and also authorizes the transfer from delinquency status to a “person in needs of services”
178 Anthony Stancl received 15 years in prison for his use of images that originally were voluntarily sent. See http://www.jsonline.com/news/waukesha/85252392.html
179 See N 170
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C. Circumstances Integral to Criminality

To date approximately half of the states have made efforts to redefine the boundaries between criminal behavior and that which many feel is merely inappropriate for young people.¹⁸⁰ There are a number of ways to accommodate the legitimate reach of criminal prohibition without creating conflict with core First Amendment values. Traditional statutes are available to prosecute the creation and transmission of self-created pornography when the circumstances involve conduct that has traditionally been subject to statutory regulation.

In some states recently enacted or pending legislation centers on the use of the explicit images to harass,¹⁸¹ to stalk,¹⁸² to harm the reputation of another,¹⁸³ or with the intent to cause emotional harm.¹⁸⁴ Likewise existing prohibitions against extortion¹⁸⁵ and blackmail create consequences for the unlawful use of these depictions. These types of offenses existed before technology so pervasively altered communication. Additionally, artfully worded statutes, can be enacted to regulate or ban surreptitious creation or the commercial use of these images. Statutes can be enacted that prohibit enticement for sexual purposes where the age difference vitiates any reasonable claim of consent by both parties as well as the use of the depictions to entice another into an unlawful act.¹⁸⁶

Enforceable statutes require scienter, and a list of descriptive words, or “operative verbs” that clearly describe a prohibited course of conduct that sanctions speech that accompanies it. As they are used in the statute, they must be surrounded by other words of the statute so as to define the

¹⁸¹ Cite Alaska HB 127 and SB 72 which are the equivalent of AS 11.61.120 a (6) Harassment in the Second Degree
¹⁸² Arkansas SB 741, to be codified at Ark. Rev. Stat. Annot. 5-27-307 uses the term stalking as a means to engage in sexual conduct, whereas there is no similar prohibition in the General Code. Section 5-71-209. Harassing Communications could be utilized to regulate communications that harass or annoy.
¹⁸³ Id N. 176
¹⁸⁴ North Dakota HB 1371, signed into effect in March, 2011 is similar to the prohibition in North Dakota Century Code, § 12.1-17-07 — Harassment
¹⁸⁵ Ohio ORC 2905.11 A (5) makes it a felony to “Expose or threaten to expose any matter tending to subject any person to hatred, contempt, or ridicule, or to damage any person’s personal or business repute, or to impair any person's credit.”
¹⁸⁶ Enticement per se is one of the given reasons teens engage in this behavior. See N 88 However, statutes can be enacted that prohibit enticement for sexual purposes where the age difference vitiates any reasonable claim of consent by both parties.
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determinative fact that must be proved. This fact often will be the intention of the actor and though it may be difficult to prove, the statute’s requirements are clear questions of fact. It may be difficult in some cases to determine whether the requirements have been met, but courts and juries every day pass upon the reasonable import of a defendant’s statements and upon “knowledge, belief and intent.” 187

D. A Proposed Solution

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

This result carves out a sanctuary for a significant amount of speech that does not create the risk of harm that is unforeseeable to the creator of the image. As distasteful as adults might find this prospect, it has the important consequence of imposing self-responsibility upon those who would create these circumstances. Conversely, if the creation or consumption of the material is inherent to criminal conduct, there is also a legal consequence. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable to them. 188

Most of the discussion in the literature has addressed the policy decision of whether or not to prosecute under generic statutory prohibitions and there have been few efforts to propose methods of with what to charge minors who engage the audacious act of self-creating sexually explicite material. 189

187 See N. 190 below
188 Erznoznik N. 130, see also Schad v Borough of Mt Ephraim (1981) 452 US 61, 66
189 Fradella and Sandra Schmitz and Lawrence Siry, Teenage Folly or Child Abuse? State Responses to “Sexting” by Minors in the U.S. and Germany, Volume 3 Policy and Internet Article 3 (2011)
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The most obvious remedy would be to add a mens rea element to the existing statutes—but that is easier said than done.\(^{190}\) Articulating the fact(s) which must be proven to show knowledge and a subjective belief the materials are child pornography will run a substantial risk of over inclusion as per the analysis in \textit{Brown v Entertainment Merchants}.\(^{190}\)

Professor Calvert identified distinctions between primary and secondary sexting.\(^{191}\) Others propose an exception to prosecution for images taken by those under the age of 18 by giving privilege to those who possess and exchange sexually explicit material within the relationship. Any further or secondary dissemination would be a violation of the law.\(^{192}\) This approach is not feasible for two reasons. First there would need to be consensus as to whom (what age) would be subject to the statute. This would require acceptance by all 50 states and territories of a Uniform Act.\(^{193}\) Additionally, analogous to \textit{Brown} some young people—including their parents may not object to the further distribution of these “glamour” shots, especially if they are lawfully created at the inception.

A third proposal distinguishes between traditional child pornography and juvenile pornography.\(^{194}\) If the subject is a minor, and the image was created and disseminated exclusively to minors, the offense would not be taken as seriously as if it involved an adult somewhere in the process. This method of decreasing the gravity of and penalty for the offense underlies most of the current legislative activity regarding sexting in the U.S. This effort does not solve the problem, but merely renames it. It also does not take into account that one of the actors may be an adult, but only days or weeks older than his protégé. Ultimately the issue to be addressed will be

\(^{190}\) Though not the subject of this article, such a proposal should take direction from United States \textit{v.} Williams, 553 U.S. 285 (2008), a child porn case with despicable facts that addresses Due Process requirements necessary to a statutory prohibition based upon the subjective belief of the actors.

\(^{191}\) “Primary sexting occurs when the minor who took the sexted image in question is the same person who both appears in the image and who sends it out. Secondary incidents of sexting are those in which the sender is not the same person who took and initially transmitted the image but, instead is a person who received it from someone else and then forwards it on to others. See N. 2 Calvert at 17


\(^{193}\) In light of the great diversity among the states as to ages of consent to engage in sex, and to lawfully create, possess or distribute the images, it is highly unlikely that a policymaker could find a common ground in proposing this type of legislation.

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the criminalization of depicting conduct which is lawful. It is no less lawful by changing it from a felony to a misdemeanor or to a status offense.195

Whether these new or amended statutes lower the seriousness of the crime and consequences of a violation, or whether they provide for defenses to the violation itself, clearly they address the perceived injustice in the prosecution of sexting under generic child pornography statutes. Legislatures are moving in the right direction, slowly, but without consensus on issues such as at what age to regulate and what conduct to separate from traditional notions of child pornography, technology will increase the gap between existing laws and evolving teen behavior.

E. The Prosecutor’s Role Should Be Exclusive

It is essential that legislation aimed at protecting children from allegedly harmful expression no less than legislation enacted with respect to adults be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application.196 Since someone in authority must initiate the process, the suggestion here is that it should begin with a review by law enforcement generally, with the ultimate responsibility falling upon the Prosecutor to determine whether formal charging is supported by legally sufficient evidence.197

Currently, many states utilize juvenile intake officers to screen complaints and make determinations as to whether a delinquent act was committed. They make decisions fundamental to initiating formal proceedings in Juvenile Court, and routinely with no oversight by the prosecutor. This is in conformance with the philosophy of the Juvenile Court system, but it is misplaced when considering legal accountability for the possession, creation, and dissemination of sexually explicit images. Often these people are not trained as lawyers and though they are quite

195 Status offenses are those behaviors that are illegal for minors only because of their age or “status” as minors. These include bans on smoking, drinking, and curfew and truancy laws, none of which apply to adults and all of which are associated with some notion of harm to minors who engage in them.
196 In Interstate Circuit v. Dallas, 390 U.S. 676, at 689, 88 S.Ct. 1298, at 1306, 20L.Ed.2d 225 decided together with Ginsberg, the Court quoted with approval Judge Fuld concurring in People v. Kahan, 15 N.Y.2d 311, 313, 258 N.Y.S.2d 391, 393, 206 N.E.2d 333, 335
197 In Ohio, Juvenile Rule 9 (A) states, “in all appropriate cases formal court action should be avoided and other community resources utilized to ameliorate situations brought to the attention of the Court.” I think the better course of action would be to let the elected Prosecutor, who is accountable to the public, make the initial determination that the evidence will satisfy the elements of a specific criminal offense.
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skilled in screening most crimes, the nuanced legislation initially requires legal analysis of facts from the perspective of both the law enforcement and the accused.\textsuperscript{198} In some states the young man or woman who takes the photo of themselves is subject to a higher degree of charges than the senders and receivers of the photo, even if it is then sent out to hundreds of others.\textsuperscript{199} The charging process requires early determination as to whether the facts constitute prima facie evidence that a delinquent act was committed by the accused juvenile.\textsuperscript{200} The character and quality of the image will be assessed to determine whether the image is categorically child pornography. Evidence of the subjective belief of the actor in creating or possessing the image will be determined. The relationship among the young people who created, possessed, and distributed the images will engage any statutory affirmative defenses. Issues of coercion, exploitation, or commercialization must be considered in a consistent manner that is integral to any criminal activity prosecution. This type of legal analysis is common but to few other crimes charged in the regular course of the prosecutor’s business.\textsuperscript{201}

The prosecutor should have the exclusive right to screen facts obtained from law enforcement and other sources to determine whether those facts are legally sufficient for prosecution.\textsuperscript{202} If it is determined that the facts are legally sufficient, the Prosecutor should make the decision as to what route the matter travels through the juvenile justice system.\textsuperscript{203} Ultimately there will be one authority, accountable to the community, who will make consistent decisions that contain a legally and factually sufficient basis upon which to proceed. This procedure has a beneficial impact upon the prosecutor as it provides him or her with an explanation to an irate parent as to why there will be no criminal action initiated when the facts do

\textsuperscript{198} This is not to say that intake officers are incapable of receiving adequate training from the Prosecutor, who could then integrate the process with the Court intake department—which has no accountability to the public.

\textsuperscript{199} For example, in Ohio, creating the forbidden image is a Felony of the Second Degree (R.C. 2907.322 (A) (1) punishable by up to 8 years in prison, while disseminating the same image is a Felony of the Fourth Degree (R.C. 2907.322 (A) (5) punishable by up to 2 years.

\textsuperscript{200} Evidence that is sufficient to raise a presumption of fact or to establish the fact in question unless rebutted. http://www.lectlaw.com/def2/p078.htm

\textsuperscript{201} Two common areas where this occurs are sexual assaults where consent is a defense and physical assaults where a defendant can be exonerated under a theory of self-defense. In each of these cases, there are statutory and common law defenses that allow the prosecutor to consider evidence from the accused’s point of view that could negate or rebut elements of the charge and preclude charges from being brought initially.

\textsuperscript{202} Section 4-11.4, National District Attorneys Association, “National Prosecution Standards” 3rd Edition

\textsuperscript{203} Id
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not support any charges arising out of the lawful and voluntary image their daughter has created. Likewise the public will be protected from a subjective personal judgment by a prosecutor that an image is immoral or inappropriate.

Recently the 3rd U.S.Circuit considered and granted a restraining order against a criminal prosecution that has drawn much comment in the literature on sexting and the First Amendment. Plaintiffs’ daughter was depicted in a photo, taken two years earlier when she was thirteen, which depicted her, and another, from the waste up, wearing white opaque bras. Another Plaintiff’s daughter was shown wrapped in a white, opaque towel, just below her breasts, appearing as if she had just emerged from the shower. In addition to the usual list of prohibited sexual acts, the Pennsylvania statute also banned the “lewd exhibition of genitals, or nudity, “if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.” The Prosecutor felt he had a basis for threatening these charges because in his view the images were “provocative.

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

204 Cite 18 Pa. Cons. Stat. Ann 6312 (B) (C) (D);
205 See Mary Jo Miller et al v George Skumanick Jr, No. 09-2144, USCA 3rd Circuit. Though often cited as relevant to the sexting issue because of the content of the photos, in reality very little can be applied to the discussion. In context, the decision truly stands as the poster child for why application of generic pornography laws cannot be left to the whim of law enforcement.
206 Leary I at 48-49that prosecutors consider “characteristics of the material, . . . the conduct depicted, . . . whether the target is making money from the conduct, . . . and the safety of the community,” among other factors, when deciding whether to prosecute. Additionally, the Federal Sentencing Guidelines consider the following factors in determining the gravity of a child sexual exploitation offense: age of child, character of sexual act, severity of images, distribution, use of computer, intent, distribution to a minor, and volume of images. These are policy issues, which I, too, would leave in the hands of the prosecutor.
207 See “More States Enact Measures to Deal With Teen Sexting” at online.wsj.com/article/SB10001424052748703447004575449423091552284.html
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criminal or juvenile justice are satisfied by the formal prosecution and sexual registration of sexters.

VII. CONCLUSION

This discussion is not merely an academic exercise. Recent census data shows there are 40 million people in the United States between the ages of 12 and 17. Survey data show there are millions of teens who access computers, webcams, cell phones and smart phones and there is no reason to expect our highly sexualized teen culture to reverse course either technologically or in matters of personal propriety. We have established arbitrary cut off points, solely determined by chronological age, to establish criminal liability among them, while on the other hand we acknowledge irresponsible behavior is “virtually a normative characteristic of adolescent development...and that adolescents are overrepresented statistically in virtually every category of reckless behavior.”

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

It is plain that a blanket thrown over all aspects of juvenile nudity or sexual hijinks covers too much ground, and laws that generically ban explicit images of randomly aged people are going to collide with both First

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http://plato.stanford.edu/entries/punishment/ These goals are: Deterrence, Incapacitation, Retribution, Rehabilitation, and Restoration


210 N. 62 at __ In Roper v Simmons, the Court stated “…as any parent knows, and scientific and sociological studies tend to confirm a lack of maturity and an underdeveloped sense of responsibility are found in youth….and are more understandable among the young.”
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Amendment speech and Fifth Amendment Due Process claims. Efforts to overlay constitutional doctrine from Ferber and Osborne are out of sync with the methods and motives of expression among the young in 2011. This has resulted in the operation of an internally incoherent system of child pornography laws.211

Some sexting is not consensual, is coerced and exploitative, and it requires a societal response through the juvenile or adult justice system. A number of states have attempted to specify circumstances when even the consensual creation and transfer of the imagery is unacceptable because it is integral to criminal activity. Sexual registration should still be considered after judicial evaluation, though in general the laws have come under great criticism, particularly as they have impacted juveniles. One study shows that these laws have no impact on sex offenders or their crimes. Other statutes consider a number of factors in the creation of the photos to accommodate legitimate forms of expression where the participants and the images are innocent of any real and harmful threat to the safety of children. This article suggests one metric to be the legality of the conduct depicted. Initially a statute should clearly distinguish lawful conduct from unlawful conduct. Thus, assuming the image is not obscene, it is not child pornography if it is created by or between people of lawful age to engage in the conduct it depicts. Subjective legal assessments are pernicious and have resulted in criminal charges such as those notoriously brought in Pennsylvania only because a prosecutor decided the images were “provocative.” Subjective measures of harm are distracting rhetoric likewise leading nowhere.

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

Though a number of distinguished authors have weighed in on policy considerations, those are not central to this article. This article addresses the issue of what to prosecute, not when to prosecute. Hopefully the focus has been on the need to articulate specific prohibitions, identifying an incriminating behavior, that allows the Prosecutor, rather than a judicial officer, decide whether the case presents credible evidence of all the

211 N. 156 Adler at 927
212 See N 205
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elements that constitute the offense.

It is truly ironic that a jurisprudence that has affirmed the social value of unrestrained communication about depictions of gross or unlawful subject matter is criminalizing the communication of depictions of lawful matter. Given the numbers of juvenile sexters there seems to be “something profoundly amiss when a system of laws makes serious felony offenders of such a large proportion of its young people.”213

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

213 Sexting and the First Amendment, John Humbach, Pace University School of Law Available at http:ssrn.com/abstract=1470819