

NOTE

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

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INTRODUCTION	369
I. SEXTING: WHAT IS IT? WHY ARE TEENS DOING IT?	375
II. INCENDIARY INCOHERENCE: THE DEVELOPMENT OF CHILD-PORNOGRAPHY LAW.....	378
A. The Journey from Clandestine Child Abuse to Jane and Jim’s Cell Phones	378
B. Incoherence As-Applied	385
C. What of the First Amendment Rights of Minors?....	388
D. Pedophiles and Sexually Active Minors Are Not Functionally Equivalent.....	390
III. AFTER <i>STEVENS</i> , SEXTING PROSECUTIONS ARE “PRESUMPTIVELY INVALID”.....	392
A. Statutory-Rape Laws	395
B. Tying Child-Pornography Statutes to the Age of Consent Would Reaffirm First Amendment Principles.....	396
IV. SEXTING AS A SEX ACT?	398
A. Old Battles in a New Medium	399
B. Sexting: A Bilateral Sexual Exchange	400
CONCLUSION	403

INTRODUCTION

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

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but before Jim's eighteenth birthday, the two had sex together for the first time. In this respect, Jane and Jim were like many other teens across the country.¹ Their relationship continued, and the two fell in love. One night, Jane decided that she and Jim should record themselves having sex. They didn't have a webcam, so Jim suggested that they use his new iPhone. The two made several videos, and Jim kept them on his phone, never showing them to anyone else. Once Jane got a new Verizon Droid, she began taking naked pictures of herself, sometimes masturbating, and sent them to Jim.² Jim returned the favor, often sending Jane pictures of his covered, but discernibly turgid penis.³ Jane never showed the pictures to anyone either, not even her very best friend.

In most states, the sex that Jane and Jim had would be completely legal.⁴ Yet, under federal law and the law of many states, Jane and Jim could face prosecution for the creation and dissemination of child pornography. The current federal child-pornography statutes make no distinction between pornography created by minors for one another, on the one hand, and the deeply exploitative materials that result from the actual rape and molestation of children, on the other. Indeed, as more teenagers become technologically savvy, media reports of the "sexting" epidemic abound.⁵ Some older teens⁶ engaged in activity similar to Jane and Jim's have even been prosecuted⁷ and required to register as sex offenders.⁸ Scholars have questioned the wisdom of using laws that were originally intended to protect children

¹ The median age of first intercourse is 16.9 years for boys and 17.4 years for girls. HENRY J. KAISER FAMILY FOUNDATION, U.S. TEEN SEXUAL ACTIVITY (2005) [hereinafter KAISER FOUNDATION], <http://www.kff.org/youthhivstds/upload/U-S-Teen-Sexual-Activity-Fact-Sheet.pdf>.

² This behavior is prohibited by 18 U.S.C. §§ 1466A, 2256(2)(A)(iii) (2006) (proscribing obscene depictions of minors masturbating).

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

⁴ The majority of states set the age of consent between sixteen and eighteen. CAROLYN E. COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES, 23-24 (2004); Ruth Jones, *Inequality from Gender-Neutral Laws: Why Must Male Victims of Statutory Rape Pay Child Support for Children Resulting from Their Victimization?*, 36 GA. L. REV. 411, 420 (2002).

⁵ See, e.g., Jan Hoffman, *A Girl's Nude Photo, and Altered Lives*, N.Y. TIMES, Mar. 27, 2011, at A1; Beth Slovic, *Sext Crimes*, WILLAMETTE WEEK, Dec. 1, 2010, <http://wwweek.com/editorial/3704/14839/>; Melanie S. Welte, *Iowa Prosecutors and Principals Warn Students that Sexting Is Dangerous, Can Lead to Prison*, ASSOCIATED PRESS, Dec. 13, 2010.

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

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

⁸ E.g., Welte, *supra* note 5.

to prosecute them.⁹ Other academics have said that anyone who creates child pornography should be prosecuted, even minors who take pictures of themselves.¹⁰ Almost no one¹¹ has argued, however, that in cases such as Jane and Jim's, at least, the teens' pictures are actually constitutionally protected speech.¹²

The lack of vocal support for finding that the teens' speech is constitutionally protected is rather surprising given the Supreme Court's recent decision in *United States v. Stevens*.¹³ In *Stevens*, the Government argued that a statute criminalizing the commercial creation, sale, or possession of certain depictions of animal cruelty¹⁴ was constitutional because "the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment."¹⁵ For discerning new categorical exclusions from the First Amendment, the Government proposed a "simple balancing test: 'Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.'"¹⁶ The Court emphatically rejected this approach.¹⁷

⁹ See Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMM'LAW CONSP'CTUS 1, 58–60 (2009) (projecting that the difficulties of enforcing antisexting statutes combined with foreseeable costs would outweigh potential benefits); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 506–07 (2008) (arguing that a prosecution-based response to minors producing pornographic images of themselves would "create far more problems than it would solve").

¹⁰ See, e.g., Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 50 (2007) ("The creation of child pornography through juvenile self-exploitation is a growing phenomenon with severe social harms, similar to that of other forms of child pornography possession, production, and distribution. . . . The fact of self-harm, alone, however, cannot justify a refusal to prosecute juveniles for self-exploitation.").

¹¹ In *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010), the first federal court of appeals case to address sexting, the Third Circuit noted that in the initial complaint the plaintiffs alleged that any prosecution for sexting would be retaliation in violation of the minors' First Amendment rights of free expression, "the expression being their appearing in two [sexted] photographs." *Id.* at 148–49. Because the district court did not address those claims, the Third Circuit also declined to address the issue despite having requested supplemental briefing. *Id.* at 148.

¹² Indeed, some writers—while questioning whether prosecutors should use child pornography statutes in this fashion—have gone out of their way to underscore that they are in no way arguing that sexting is protected speech. See, e.g., Smith, *supra* note 9, at 520 ("To be clear, I am not making any sort of argument that child pornography—'self-produced' or otherwise—either is, or should be, constitutionally protected.").

¹³ 130 S. Ct. 1577 (2010).

¹⁴ 18 U.S.C. § 48 (2006).

¹⁵ *Stevens*, 130 S. Ct. at 1584.

¹⁶ *Id.* at 1585.

¹⁷ *Id.* ("As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits

Writing for an eight-Justice majority, Chief Justice John Roberts acknowledged that the Government's views did not "emerge from a vacuum,"¹⁸ because the Court had often "*described* historically unprotected categories of speech as being 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"¹⁹ Indeed, the most relevant precedent on point seemed to be *New York v. Ferber*,²⁰ in which the Court held that certain nonobscene sexual depictions of children could be fully proscribed without violating the First Amendment.²¹ The Court reached this conclusion, in part, on the assumption that the value of using real children in the production of sexually explicit works was probably *de minimis* and thus did not raise serious constitutional concerns.²² In *Stevens*, however, the Court minimized the importance of this factor. The result in *Ferber*, the Court explained, was actually grounded in "a previously recognized, long-established category of unprotected speech,"²³ namely "speech or writing used as an integral part of conduct in violation of a valid criminal statute."²⁴

Scholars have noted that this description of *Ferber* is surprising and may well make *Stevens* one of the most doctrinally significant constitutional opinions of 2010.²⁵ *Stevens* is a pathmarking decision that makes plain that there is not a "child pornography exception," to the

of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.").

¹⁸ *Id.*

¹⁹ *Id.* (internal citations and quotation marks omitted).

²⁰ 458 U.S. 747 (1982).

²¹ See *infra* Part II.A.

²² *Ferber*, 458 U.S. at 762–63.

²³ *Stevens*, 130 S. Ct. at 1586.

²⁴ *Id.* (quoting *Ferber*, 458 U.S. at 761–62).

²⁵ See, e.g., Nadine Strossen, *United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2010 CATO SUP. CT. REV. 67, 84–85 ("The Court's effort in *Stevens* to limit categories of unprotected expression to the finite set that it has historically recognized is underscored by *Stevens*'s novel characterization of the child pornography exception to First Amendment protection. . . . [T]he Supreme Court's *Stevens* opinion did not acknowledge that the Court had recognized child pornography as a new category of unprotected expression. To the contrary, the *Stevens* Court treated child pornography as a specific example of a longstanding more general category of unprotected expression, citing a case that had recognized this broader excluded category just five years after *Chaplinsky*."); Charles W. "Rocky" Rhodes, *The Historical Approach to Unprotected Speech and the Quantitative Analysis of Overbreadth in United States v. Stevens*, 2010 Emerging Issues 5227 (LexisNexis July 30, 2010) ("*Stevens* announced a sea change in the Court's approach to identifying categories of unprotected speech. The commonly accepted view before *Stevens* comported with the government's position—that unprotected categories of speech were identifiable through a cost-benefit analysis, allowing for the expansion of such classes to new modes of expression and communication. Assuming the Court continues to adhere to the *Stevens* approach, no additional classes of unprotected speech will be recognized unless the classification is supported by a longstanding historical tradition, or unless it can be creatively shoehorned into a pre-existing unprotected category.").

First Amendment, but instead a “speech integral to criminal conduct exception” that sometimes encompasses child pornography. The Court’s pronouncement is also socially significant since it comes just as the United States is seemingly flooded by “a crime wave of child pornography offenses perpetuated by middle- and high-schoolers.”²⁶ To begin, even that description is jarring. For years, merely mentioning child pornography conjured up images of “old men in raincoats,”²⁷ brutally seducing children to appear on film to “whet their own [pedophilic] sexual appetites.”²⁸ Today, some have likened teens such as Jane and Jim to these old men in raincoats.²⁹ Given the increasingly draconian legislative responses³⁰ to the “scourge of child pornography,”³¹ this fact is not only alarming but also underscores the near impossibility of rational discourse once the phrase child pornography is deployed.³²

This Note argues that prior to *Stevens*, many courts and scholars assumed that child pornography was simply an unprotected category of speech. In addition, courts and prosecutors in sexting cases further assumed that older teens’ sexting was child pornography. Both of the premises were dubious from the start. Following *Stevens*, however, these premises are untenable. First, sexting is simply not child pornography as the Supreme Court has repeatedly defined the term. Second, even if sexting could be considered child pornography under some theory, after *Stevens* there is no longer a “child pornography exception” to the First Amendment, but instead a “speech integral to criminal conduct exception.” After teens reach the age of consent, their sexual activity is not typically criminal conduct.³³ Thus, the First

²⁶ Elizabeth C. Eraker, *Stemming Sexting: Sensible Legal Approaches to Teenagers’ Exchange of Self-Produced Pornography*, 25 BERKELEY TECH. L.J. 555, 555 (2010).

²⁷ Mike Bruner, “Sexting” Surprise: Teens Face Child Porn Charges, MSNbc.COM (Jan. 15, 2009, 8:03 PM), http://www.msnbc.msn.com/id/28679588/ns/technology_and_science-tech_and_gadgets/ (quoting attorney stating that the intent of child pornography statutes was to prevent the sexual abuse of children by “dirty old men in raincoats”).

²⁸ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 241 (2002) (internal quotation marks omitted).

²⁹ See Leary, *supra* note 10, at 50 (explaining that children who take pictures of themselves actually harm other children by doing so).

³⁰ See Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 3 (2010) (discussing “legislative epidemics fueled by high-profile cases, emotion-laden rhetoric, and inaccurate, but embedded, assumptions about crime and criminals”). See also Erica Goode, *Life Sentence for Possession of Child Pornography Spurs Debate over Severity*, N.Y. TIMES, Nov. 5, 2011, at A9.

³¹ Audrey Rogers, *Protecting Children on the Internet: Mission Impossible?*, 61 BAYLOR L. REV. 323, 326 (2009).

³² See Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 935 (2001) (“The former Solicitor General of the United States concluded that ‘the issue of children and pornography’ is so ‘incendiary’ that people cannot discuss it rationally.” (quoting former Solicitor General Drew S. Days III)).

³³ Implicit in this assertion is that even after teens reach the age of consent, there may be instances in which they are still not legally permitted to engage in certain sexual acts

Amendment must fully protect sexted images of completely legal sexual acts.

While neither dismissive of the potential harms that sexting may engender nor doubtful of the legitimate worries of many parents, legislators, and judges, this Note accepts that even serious harms that result from speech may be contingent and indirect, and thus beyond the power of the government to address.³⁴ Older teens' maturity levels and their abilities to fully appreciate the consequences of their actions are undoubtedly sound bases for constitutional distinctions.³⁵ The age of consent thus represents the solemn legislative judgment that minors are mature enough to appreciate the potential consequences of their sexual activity, including pregnancy, childbirth, abortion, and sexually transmitted disease. Accordingly, this Note expresses tremendous skepticism that sexting warrants independent legislative action beyond setting the age of consent.

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

with certain persons. *See, e.g.*, GA. CODE ANN., § 16-6-4 (2008) (addressing aggravated child molestation).

³⁴ *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002) ("While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." (citation omitted)).

³⁵ *See, e.g.*, *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010) (noting in the context of juvenile sentencing that "[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust" those whom a juvenile views "as part of the adult world a rebellious youth rejects," can result in poorly reasoned decisions by teenagers).

strictures of the First Amendment. That approach, however, is fraught with its own set of concerns, constitutional and otherwise.

I

SEXTING: WHAT IS IT? WHY ARE TEENS DOING IT?

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

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

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

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

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

³⁹ *U.S. Teen Mobile Report: Calling Yesterday, Texting Today, Using Apps Tomorrow*, NIELSENWIRE (Oct. 14, 2010), http://blog.nielsen.com/nielsenwire/online_mobile/u-s-teen-mobile-report-calling-yesterday-texting-today-using-apps-tomorrow/.

⁴⁰ Donna St. George, *6,473 Texts a Month, But at What Cost?*, WASH. POST, Feb. 22, 2009, at A1.

⁴¹ Eraker, *supra* note 26, at 557.

⁴² Bryn Ostrager, Note, *SMS. OMG! LOL! TTYL: Translating the Law to Accommodate Today's Teens and the Evolution from Texting to Sexting*, 48 FAM. CT. REV. 712, 713 (2010).

⁴³ NCPTUP Study, *supra* note 38, at 4 (internal quotation marks omitted).

⁴⁴ See *Naked Photos, E-mails Get Teens in Trouble*, FOXNEWS.COM, (June 5, 2008), <http://www.foxnews.com/story/0,2933,363438,00.html#ixzz16QjImRMI> ("I just don't understand why kids would do a stupid thing like that," said Rochelle Hoins of Castle Rock, Colorado, where 18 students in her twin sons' middle school sent around nude pictures of themselves last year. "We did dumb things when we were kids, but not like that.").

dents' cell phones⁴⁵ and giving presentations detailing the dangers associated with sexting.⁴⁶ Reports about sexting have appeared in major newspapers.⁴⁷ Indeed, as two scholars recently noted, to see how quickly sexting has become an important and prominent legal issue in America, one need only turn on the television.⁴⁸ Local prosecutors, "trying to jam square pegs into round holes,"⁴⁹ have vigorously responded, charging some minors who likely believed they were only virtually flirting with creating, possessing, and disseminating child pornography.⁵⁰

While some parents are outraged at the very notion of sexting, others are more alarmed at the prospect of teens like Jane and Jim⁵¹ being labeled as sex offenders. And like their children who may have believed that they were only flirting, some parents are legitimately confused about how many of these pictures are child pornography at all. For instance, in *Miller v. Mitchell*,⁵² the first federal court of appeals case to address sexting, several Pennsylvania high-school students were threatened with prosecution for child pornography because of photographs they had on their cell phones. One parent, whose daughter had appeared in a photograph wearing a bathing suit, asked the district attorney how he could charge her daughter with child pornography based on that image.⁵³ The district attorney said that he could charge the girl because she was posing "provocatively."⁵⁴ Another set of parents—whose daughter and her friend were pictured from the waist up wearing "white, opaque bras," while talking on the phone and holding a peace sign—protested that the girls were "merely being 'goof balls.'"⁵⁵ The district attorney again pointed to

⁴⁵ See, e.g., *id.* (describing how school administrators in Santa Fe, Texas, confiscated numerous cellular phones after nude pictures of students began circulating).

⁴⁶ See, e.g., Welte, *supra* note 5.

⁴⁷ E.g., Sean D. Hamill, *Pennsylvania: Judge Blocks Charges in Cell Phone Case*, N.Y. TIMES, Mar. 31, 2009, at A15, available at http://www.nytimes.com/2009/03/31/us/31brfs-JUDGEBLOCKSC_BRF.html; Stephanie Steinberg, *Sexting Surges Nationwide, and It's Not Just Teens Doing It; Young People Must Be Careful, Experts Say*, USA TODAY, July 21, 2010, at D8.

⁴⁸ See Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 1 (2009) ("It seems that in 2009, the definitive way one knows a legal issue in the United States is important is when it is featured on one of those 'ripped-from-the-headlines' episodes of Dick Wolf's highly successful legal drama series, *Law & Order: Special Victims Unit*." (footnote omitted)).

⁴⁹ *Id.* at 3.

⁵⁰ See, e.g., *Miller v. Mitchell*, 598 F.3d 139, 143 (3d Cir. 2010) (noting defendant district attorney's public announcement that students found with "inappropriate images of minors" could be prosecuted for possession or distribution of child pornography under Pennsylvania law).

⁵¹ See *supra* Introduction. Jane and Jim's case is a fictional account I created based on various aspects of recent cases and news events.

⁵² 598 F.3d 139 (2010).

⁵³ *Id.* at 144.

⁵⁴ *Id.*

⁵⁵ *Id.*

the fact that the girls “were posed provocatively.”⁵⁶ The parents’ incredulity about these pictures being considered child pornography at all is not surprising. Yet, neither was the district attorney’s reaction. Under the generally prevailing standard for determining whether an image is child pornography, even these “goof ball” photographs might qualify.⁵⁷

Understanding how child-pornography statutes—once thought to be designed to protect children from sexual abuse and exploitation—are now a vehicle for suppressing and punishing teen sexual expression warrants a brief study of child-pornography legislation and judicial interpretation of those statutes. First, however, it is important to outline the factual limits of the theory that this Note advocates. Generally, teen sexual expression through photographs involves three kinds of cases. Teens have disseminated images of themselves: “(1) as a means of earning money on the sale of those images,⁵⁸ (2) as a means of forming or keeping friendships formed over the Internet,⁵⁹ and, most commonly, (3) as part of their own private, voluntary sexual exploits.”⁶⁰ Sexting falls into this third category, and thus this Note proceeds on the assumption that some teens who engage in sexual activity voluntarily memorialize those acts in pictures using their cell phones in order to titillate or entice their sexual partners.⁶¹ This Note further assumes that sexting is intended to be private. It is, of course, into this third category that most of the recent, troubling prosecutions actually fall. This category of images also presents the most difficult constitutional questions following the *Stevens* holding. Indeed, if the private, voluntary sexual exploits are legal in the first instance, it is ironic that the pictures themselves are thought to cause unique harms warranting prosecution.⁶²

⁵⁶ *Id.* (internal quotation marks omitted).

⁵⁷ See *infra* notes 90–115 and accompanying text.

⁵⁸ States have a freer hand in regulating minors’ ability to work, even where First Amendment concerns are implicated. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

⁵⁹ See Smith, *supra* note 9, at 523 (explaining that Internet “friends” may actually be adults posing as teens to coerce and entice teens to send naked pictures).

⁶⁰ *Id.* at 522.

⁶¹ At least two recent articles have drawn a distinction between primary sexting and secondary sexting. See Calvert, *supra* note 9, at 30; Elizabeth M. Ryan, Note, *Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 381–82 (2010). Secondary sexting involves the recipient of a sext sending the sexted message to a third-party without the original sender’s consent. Ryan, *supra*, at 361 & 362 n.31. Although, there may be distinct harms, such as “revenge porn” associated with secondary sexting, see *id.* at 363, secondary sexting is beyond the scope of this Note. For a persuasive discussion suggesting that state tort law may be the appropriate vehicle for addressing secondary sexting, see *id.* at 380–82.

⁶² See *A.H. v. State*, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007) (“If a minor cannot be criminally prosecuted for having sex with another minor . . . it follows that a minor

II

INCENDIARY INCOHERENCE: THE DEVELOPMENT OF CHILD-
PORNOGRAPHY LAWA. The Journey from Clandestine Child Abuse to Jane and Jim's
Cell Phones

Legislation aimed at child pornography is of fairly recent vintage. In the 1970s concerns about child sexual abuse became a national emergency⁶³ and thus "awareness [a]nd concern about child pornography escalated dramatically."⁶⁴ Congress responded and in 1978 passed its first statute specifically targeting child pornography, the Protection of Children Against Sexual Exploitation Act.⁶⁵ The Act outlawed the use of children in the production of obscene materials.⁶⁶ At the time, sexually explicit speech was protected by the First Amendment unless it exceeded the bounds of the obscenity test set forth in *Miller v. California*.⁶⁷ While Congress respected these constitutional limits, thinking they represented a boundary it could not cross,⁶⁸ not all of the states reacted accordingly. Indeed, by 1982, "[t]he Federal Government and 47 [s]tates [had] sought to combat [the exploitive use of children in the production of pornography] with statutes specifically directed at the production of child pornography," with at least half of these statutes not requiring the materials to be legally obscene.⁶⁹

The Supreme Court responded to these enactments in 1982 in the case of *New York v. Ferber*.⁷⁰ The case arose when Paul Ferber, the owner of a Manhattan bookstore, sold two films of young boys masturbating to undercover police officers.⁷¹ Ferber was indicted under the two New York statutes controlling the dissemination of child pornog-

cannot be criminally prosecuted for taking a picture of herself having sex with another minor.") (Padovano, J., dissenting).

⁶³ Adler, *supra* note 32, at 928.

⁶⁴ U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT 408 (1986) [hereinafter ATTORNEY GENERAL'S REPORT].

⁶⁵ Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. § 2251 (2006)).

⁶⁶ *See id.*; Adler, *supra* note 32, at 929-30.

⁶⁷ *See* 413 U.S. 15, 24 (1973). In *Miller*, for the first time a majority of the Court agreed on a definition of obscenity. According to *Miller*, the "basic guidelines for the trier of fact must be: (a) whether 'the average person applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* (internal citations omitted).

⁶⁸ *See* Adler, *supra* note 32, at 930 n.33 (citing articles discussing congressional debates on whether Congress could ban nonobscene child pornography).

⁶⁹ *New York v. Ferber*, 458 U.S. 747, 749-50 n.2 (1982) (collecting such statutes).

⁷⁰ 458 U.S. 747 (1982).

⁷¹ *Id.* at 751-52.

raphy.⁷² A jury acquitted Ferber of the two counts of promoting an obscene sexual performance but found him guilty of two counts that did not require proof that the films were obscene.⁷³ The New York Court of Appeals reversed Ferber's conviction, noting that because of the explicit inclusion of an obscenity standard in the statute under which Ferber was acquitted, it could not construe the other statute to include an obscenity standard.⁷⁴ Therefore, "the statute would . . . prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment."⁷⁵

The Supreme Court granted New York's petition for certiorari, which presented a single question: "To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?"⁷⁶ In a unanimous decision, the Court answered yes, stating that the *Miller* test bore "no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work."⁷⁷ Thus, child pornography "joined a small and ragtag band of categories of expression that are excluded from constitutional protection by reason of their content."⁷⁸

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

⁷² *Id.* at 752.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* (quoting *People v. Ferber*, 52 N.Y.2d 674, 678 (N.Y. 1981)).

⁷⁶ *Id.* at 753.

⁷⁷ *Id.* at 761.

⁷⁸ Adler, *supra* note 32, at 930.

⁷⁹ *Ferber*, 458 U.S. at 756–57.

⁸⁰ *Id.* at 759–60.

⁸¹ *Id.* at 761.

extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”⁸² Fourth, the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct was “exceedingly modest, if not *de minimis*.”⁸³ Fifth, classifying child pornography as a category of material outside the First Amendment was not incompatible with earlier decisions.⁸⁴ “[I]t is not rare,” the Court held, “that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.”⁸⁵

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

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

⁸² *Id.* at 761–62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). Though this never seemed to be the Court’s primary rationale, after *Stevens* it appears to be the only rationale the Court accepts. See *infra* Part III.

⁸³ *Id.* at 762.

⁸⁴ *Id.* at 763.

⁸⁵ *Id.* at 763–64.

⁸⁶ *Id.* at 773.

⁸⁷ Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2516, 2251–2254, 2256 (2006)).

⁸⁸ The Act altered the language from “lewd” to “lascivious” exhibition of the genitals. See Adler, *supra* note 32, at 932 n.45 (citing Child Protection Act).

⁸⁹ Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984).

⁹⁰ See 18 U.S.C. § 2256 (2006); Adler, *supra* note 32, at 930 n.45.

⁹¹ See 18 U.S.C. § 2243(a).

⁹² 636 F. Supp. 828 (S.D. Cal. 1986), *aff’d sub. nom.* *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987).

phy statute.⁹³ The court concluded that the following factors should inform this determination: (1) whether the focal point of the visual depiction is the child's genitals or pubic area; (2) whether the setting of the visual depiction is sexually suggestive (i.e., in a place or pose generally associated with sexual activity); (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.⁹⁴

Thus, it is apparent that by 1986, the definition of child pornography was becoming unmoored from the rationale laid out in *Ferber*.⁹⁵ Although none of the *Dost* factors were determinative, neither did *Dost* provide an exhaustive list of the elements of lascivious exhibition.⁹⁶ One can easily imagine numerous pictures that could satisfy these requirements, yet not at all require the abuse of children.⁹⁷ The Supreme Court's next foray into the field was its 1988 decision in *Osborne v. Ohio*.⁹⁸ Rather than pursuing its normal course and tightly cabining legislation that curtails First Amendment freedoms,⁹⁹ the Court itself gave the green light to expanding the universe of constitutionally proscribable material. Although *Osborne* is generally cited for the proposition that unlike obscenity mere possession of child pornography could be criminalized, the statute the Court sustained swept much more broadly than the statute at issue in *Ferber*. Specifically, whereas the New York statute criminalized depictions of minors that contained

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

⁹⁴ *Dost*, 636 F. Supp. at 832.

⁹⁵ See Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 238–41 (2001) (reviewing changes in the definition of “child pornography” since *Ferber*).

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

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

⁹⁸ 495 U.S. 103 (1990).

⁹⁹ See Adler, *supra* note 32, at 924–26 (contrasting the Supreme Court's rulings in subversive advocacy cases with those in child pornography cases).

“lewd exhibition of the genitals,”¹⁰⁰ the Ohio statute proscribed nude depictions of minors constituting either a “lewd exhibition” or involving a “graphic focus on the genitals.”¹⁰¹

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

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

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

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

¹⁰² See Adler, *supra* note 32, at 948–50 (discussing the breadth of the statute upheld in *Osborne* and explaining how the decision “revealed the Court’s thinking on how it might expand [the] definition [of child pornography] in the future”).

¹⁰³ *Id.* at 948–49.

¹⁰⁴ *Osborne*, 495 U.S. at 129 (Brennan, J., dissenting) (emphasis omitted).

¹⁰⁵ *Id.* at 126–27 (“In short §§2907.323 and 2907.01(H) use simple nudity, without more, as a way of defining child pornography.”).

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

¹⁰⁷ *United States v. Knox (Knox I)*, 977 F.2d 815 (3d Cir. 1992).

¹⁰⁸ PAUL R. ABRAMSON ET AL., *SEXUAL RIGHTS IN AMERICA: THE NINTH AMENDMENT AND THE PURSUIT OF HAPPINESS* 138 (2003).

¹⁰⁹ *Id.*

¹¹⁰ *Knox I*, 977 F.2d at 817 (holding that the visual depictions at issue violated federal child pornography laws despite body parts being covered by clothing).

exhibition finding, the Justice Department agreed.¹¹¹ Solicitor General Drew S. Days III filed a brief in support of Knox's appeal indicating that the child-pornography statutes apply only to nudity or to genitals whose contours are evident through clothing.¹¹² In response to the Solicitor General's report, the Supreme Court remanded the case to the Third Circuit for reconsideration.¹¹³ The case and the Court's remand order ignited a "political firestorm" that included a resolution by members of Congress condemning the Solicitor General's interpretation and the unusual additional step of members of Congress filing briefs in the case.¹¹⁴

On remand, the Third Circuit maintained its position. It considered and rejected the Solicitor General's views, and held that the federal child-pornography statute contained no nudity or discernibility requirement.¹¹⁵ Knox again turned to the Supreme Court, but likely because of the "political firestorm," the Justice Department abandoned its previous position. In a letter to Attorney General Janet Reno, President Bill Clinton stated that he found "all forms of child pornography offensive and harmful," and that he wanted the federal government to "lead aggressively in the attack against the scourge of child pornography."¹¹⁶ In the end, the Supreme Court denied certiorari, and Knox's conviction stood.¹¹⁷

Congress continued expanding the definition of child pornography with the Child Pornography Prevention Act of 1996 (CPPA).¹¹⁸ In response to advancing technology that aided the creation of virtual child pornography—that is, wholly computer-generated images that do not require actual children—Congress banned materials that appear to be depictions of children engaged in sexual conduct.¹¹⁹ In detailed findings, Congress stated that even though such images are made without the use of real children, virtual child pornography must be prevented because it "inflames the desires of child molesters, pedophiles, and child pornographers"¹²⁰ and "encourag[es] a societal

¹¹¹ ABRAMSON ET AL., *supra* note 108, at 138.

¹¹² *Id.* at 138–39.

¹¹³ United States v. Knox (*Knox II*), 32 F.3d 733, 737 (3rd Cir. 1994); ABRAMSON ET AL., *supra* note 108, at 139.

¹¹⁴ See Adler, *supra* note 32, at 952 n.140.

¹¹⁵ *Knox II*, 32 F.3d at 737; ABRAMSON ET AL., *supra* note 108, at 139.

¹¹⁶ ABRAMSON ET AL., *supra* note 108, at 139.

¹¹⁷ 513 U.S. 1109 (1995).

¹¹⁸ Pub. L. No. 104-208, 110 Stat. 3009-26 (1996) (codified at 18 U.S.C. §§ 2251, 2256 (2006)).

¹¹⁹ See 18 U.S.C. § 2256(8)(B)-(C) ("'[C]hild pornography' means any visual depiction . . . where [it appears] that an identifiable minor is engaging in sexually explicit conduct.").

¹²⁰ § 121(1)(10)(B), 110 Stat. at 3009-27 ("[I]t inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the crea-

perception of children as sexual objects.”¹²¹ Whether or not the law was good policy, it was “a total departure from the basis of child pornography law—the abuse of children in the production of the material.”¹²²

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

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

tion and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials . . .”).

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

¹²² Adler, *supra* note 95, at 244.

¹²³ 535 U.S. 234 (2002).

¹²⁴ *Id.* at 250.

¹²⁵ *Id.*

¹²⁶ *Id.* at 250–51 (emphasis added).

¹²⁷ *Id.* at 247.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Adler, *supra* note 32, at 927.

child-pornography statutes if she had posed provocatively.¹³¹ The journey from protecting children from “old men in raincoats” to protecting Jane and Jim from themselves sprang from this incoherence.

B. Incoherence As-Applied

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

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

¹³¹ See *supra* notes 52–57 and accompanying text; see also John A. Humbach, *Sexting and the First Amendment*, 37 HASTINGS CONST. L.Q. 433, 454 n.116 (2010) (explaining that any teen who takes even a semi-nude picture of herself is in “definite legal jeopardy”).

¹³² 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).

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

¹³⁴ *A.H.*, 949 So. 2d at 235.

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

¹³⁶ *Id.*

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

¹³⁸ *A.H.*, 949 So. 2d at 235–36.

case. This compelling interest exists whether the person sexually exploiting the child is an adult or a minor and is certainly triggered by the production of 117 photographs of minors engaging in graphic sexual acts.”¹³⁹

On appeal, A.H. further argued that given the closeness in age between her and J.G.W. and the State’s failure to allege that the pictures were shown to anyone else, the only compelling state interest that Florida could possibly assert was protecting A.H. and J.G.W. from “engaging in sexual behavior until their minds and bodies had matured.”¹⁴⁰ The appellate court said that implicit in this argument was the notion that Florida’s right to privacy encompassed a minor’s right to sexual intercourse and that it further extended to situations where the minor memorializes the act through pictures or video.¹⁴¹

The court rejected these arguments for several reasons. First, a decision to take photographs and to keep a record that may be shown in the future weighs against finding a reasonable expectation of privacy.¹⁴² Next, minors engaged in sexual relationships, unlike adults, have no reasonable expectation that their relationships will continue and that the photographs would not be shown to someone else intentionally or unintentionally.¹⁴³ The photographs had “market value” and could wind up in the wrong hands because a teenager would inevitably disseminate the pictures to other members of the public for profit or bragging rights.¹⁴⁴ Finally, the court noted that the child-pornography statute was “intended to protect minors like appellant and her co-defendant from their own lack of judgment.”¹⁴⁵ Though apparently capable of consenting to sex, the “children are not mature enough to make rational decisions concerning all of the possible negative implications of producing these videos.”¹⁴⁶

¹³⁹ *Id.* at 236.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 237. If this were a test of general applicability and not simply limited to sexual photographs, many people would no longer have any reasonable expectation of privacy at all in the manifold life activities they choose to commemorate through photographs or other recordings.

¹⁴³ *Id.* It is unclear whether the result would have been different if A.H. and J.G.W. had been betrothed. Further, in Florida, in certain circumstances, minors are permitted to marry. See FLA. STAT. ANN. § 741.0405 (West 2006).

¹⁴⁴ A.H., 949 So. 2d at 237.

¹⁴⁵ *Id.* at 238. The court did not provide any support for this assertion.

¹⁴⁶ *Id.* at 239. The court failed to address “all of the possible negative implications” that could flow from treating A.H. and J.G.W. as sex offenders. See, e.g., Eraker, *supra* note 26, at 588–89 (“[A] sexting teenager convicted of child pornography may be ostracized by classmates . . . the ensuing harassment and bullying at school might exacerbate the conditions that prompted the sexting in the first instance.”); Shannon Shafron-Perez, Note, *Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting*, 26 J. MARSHALL J. COMPUTER & INFO. L. 431, 449 (2009) (“Minors who are convicted of sexting are punished criminally, in addition to being chastised by their peers and tortured by internal shame

One judge vigorously dissented from the majority's decision to use a statute that was designed to protect children from abuse in order to punish a teenager for her own mistake.¹⁴⁷ The dissenting judge would have found that the prosecution violated A.H.'s right to privacy.¹⁴⁸ The Florida Supreme Court had already determined that prosecuting minors for unlawful carnal intercourse violated minors' right to privacy.¹⁴⁹ Thus, "[i]f a minor cannot be criminally prosecuted for having sex with another minor . . . it follows that a minor cannot be criminally prosecuted for taking a picture of herself having sex with another minor."¹⁵⁰ The dissent noted that there was simply no evidence that the minors intended to show the photographs to third parties and that accordingly, the photographs were as private as the act they depicted.¹⁵¹ Somewhat strangely, the dissenting judge still went out of his way to note that he did not "condone the child's conduct."¹⁵²

Although A.H.'s case arose in Florida state court, she and J.G.W. likely violated federal law as well. Section 2251 of Title 18 of the U.S. Code makes it a crime for any person to engage any minor in any sexually explicit conduct for the purpose of producing visual depictions of that conduct if the person knows or has reason to know that the images will be transmitted via computer.¹⁵³ Although the court only placed A.H. on probation, had she been prosecuted under the federal statute, she would have been fined and imprisoned between fifteen and thirty years.¹⁵⁴ Such a prosecution of course would have been in direct tension with the language of *Free Speech Coalition*, which "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment."¹⁵⁵

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

¹⁴⁷ *A.H.*, 949 So. 2d at 239 (Padovano, J., dissenting).

¹⁴⁸ *See id.*

¹⁴⁹ *Id.* (citing *B.B. v. State*, 659 So. 2d 256 (Fla. 1995)).

¹⁵⁰ *A.H.*, 949 So. 2d at 239 (Padovano, J., dissenting); *see also* *Salter v. State*, 906 N.E.2d 212, 222–23 (Ind. Ct. App. 2009) (holding that when an age-of-consent law is inconsistent with the definition of minor in state's child-pornography law, vagueness issues prevent prosecuting persons for activities similar to sexting).

¹⁵¹ *A.H.*, 949 So. 2d at 239–40 (Padovano, J., dissenting).

¹⁵² *Id.* at 239.

¹⁵³ *See* 18 U.S.C. § 2251(a) (2006).

¹⁵⁴ *See id.* § 2251(e).

¹⁵⁵ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 251 (2002) (citing *New York v. Ferber*, 458 U.S. 747, 764–65 (1982)).

C. What of the First Amendment Rights of Minors?

Yet, no one seemed to argue that the statute violated A.H.'s First Amendment rights.¹⁵⁶ In fact, several months after *A.H.* was handed down, Mary Graw Leary wrote a foundational article decrying the very disturbing social behaviors resulting from increased access and exposure to child pornography.¹⁵⁷ In Leary's view, people like A.H. were not engaged in sexual exploration but instead "self-exploitation" and the production of child pornography.¹⁵⁸ The new frontier for the production and distribution of child pornography was the cellular camera phone.¹⁵⁹ In a strange move, Leary claims that teens like A.H. are actually victims. Voluntary participation in child pornography

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

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

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

¹⁵⁹ *Id.* at 24.

produces victims because, throughout life, as people repeatedly view the images, the child is victimized.¹⁶⁰ “Indeed, to treat the possession of these images so differently than that of non-self-produced images would suggest these victims are less worthy of societal protection.”¹⁶¹ Further, she says that when teens like A.H. record their own sexual activities, they actually harm other children because child molesters “use these images for their sexual gratification; as a tool to groom children to participate in sexual conduct; to affirm the notion that abusive relationships are acceptable; to lower inhibitions of potential victims, and to obtain money and profit.”¹⁶² Leary then points to a recent study showing that of those arrested for child pornography who had molested children, 83% of the images they possessed were images of children between six and twelve years old.¹⁶³ On these bases, then, severe criminal penalties were warranted, even for minors who produced pictures of themselves.¹⁶⁴

Curiously, Leary never cites *Free Speech Coalition*.¹⁶⁵ Indeed, her entire argument might have collapsed if she had. Surely, she could not have meant that pictures of sixteen- and seventeen-year-olds could be used as a tool to groom *young children* into sexual activity. Nor is it clear that the pictures could even sexually gratify *child* molesters.¹⁶⁶ In fact, in some states, the sixteen- and seventeen-year-olds could have sex with some adults because they are over the age of consent.¹⁶⁷ The harms then that Leary posits flow from “self-exploitation” are precisely the types of contingent and indirect harms that the Court rejected in refusing to create a new First Amendment exception for virtual child pornography.¹⁶⁸

¹⁶⁰ *Id.* at 40.

¹⁶¹ *Id.*

¹⁶² *Id.* at 40–41.

¹⁶³ *Id.* at 41 (citing JANIS WOLAK ET AL., CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE *National Juvenile Online Victimization Study* vii (2005)).

¹⁶⁴ Leary, *supra* note 10, at 36.

¹⁶⁵ 535 U.S. 234 (2002). For that matter, aside from *Ginsberg*, she never cites any cases dealing with minors’ First Amendment rights.

¹⁶⁶ See *supra* notes 162–163 and accompanying text.

¹⁶⁷ See *Worldwide Ages of Consent*, AVERT, <http://www.avert.org/age-of-consent.htm> (last visited Nov. 23, 2011) (collecting ages of consent throughout the world and for all fifty states); see also Siji A. Moore, Note, *Out of the Fire and into the Frying Pan: Georgia Legislature’s Attempt to Regulate Teen Sex Through the Criminal Justice System*, 52 How. L.J. 197, 222–23 nn.217–18 (2008) (collecting recent statutory provisions regarding ages of consent throughout the United States).

¹⁶⁸ *Free Speech Coal.*, 535 U.S. at 250 (“In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not ‘intrinsically related’ to the sexual abuse of children, as were the materials in *Ferber*. While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends

Responding to Leary, Stephen Smith concludes that the “problem of self-produced child pornography, in most instances, is one that is best resolved through means other than prosecutions of minors.”¹⁶⁹ Yet even Smith takes pains to say that he is “not making any sort of argument that child pornography—‘self-produced’ or otherwise—either is, or should be, constitutionally protected.”¹⁷⁰ This must be so, he reasons because “[c]hildren should not be treated or depicted as sexual objects to be used to satisfy the *illegal* and immoral carnal desires of others.”¹⁷¹ But in many cases, and certainly in the case of A.H., there simply was no underlying *illegal* carnal desire. Thus, Smith and Leary both fail to fully account for the clear doctrinal problems with classifying self-produced sexual images as child pornography under *Ferber* and *Free Speech Coalition*.

D. Pedophiles and Sexually Active Minors Are Not Functionally Equivalent

To be fair, child-pornography law has been “the least contested area of First Amendment jurisprudence.”¹⁷² One possible reason is that the “incendiary”¹⁷³ term “child pornography,” conjures up the image of “a fidgety old man on the street corner, at the schoolhouse gate or hunched over a computer.”¹⁷⁴ Child-pornography laws were originally directed at stemming the activities of pedophiles.¹⁷⁵ The Diagnostic and Statistical Manual of Mental Disorders (DSM IV) characterizes pedophilia as involving “intense sexually arousing fantasies, urges, or behaviors involving sexual activity with a prepubescent child (typically age thirteen or younger).”¹⁷⁶ Accordingly, raising the age of

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

¹⁶⁹ Smith, *supra* note 9, at 516. Smith’s article is cited nearly as often as Leary’s. See, e.g., John M. Krattiger, Comment, *Sex-Cells: Evaluating Punishments for Teen “Sexting” in Oklahoma and Beyond*, 63 OKLA. L. REV. 317, 349 (2011); Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context*, 115 PENN ST. L. REV. 135, 172 (2010); Robert H. Wood, *The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint*, 16 MICH. TELECOMM. & TECH. L. REV. 151, 173 (2009). Thus, together, these two early articles seem to establish the typical framework for the sexting debate.

¹⁷⁰ Smith, *supra* note 9, at 520.

¹⁷¹ *Id.* at 521 (emphasis added).

¹⁷² Adler, *supra* note 32, at 925.

¹⁷³ See *supra* note 32 and accompanying text.

¹⁷⁴ Slovic, *supra* note 5.

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

¹⁷⁶ *Psychiatric Disorders: Pedophilia*, ALLPSYCH ONLINE, <http://allpsych.com/disorders/paraphilias/pedophilia.html> (last updated May 15, 2004); see also Pam Cartor et al., *Differentiating Pedophilia from Ephebophilia in Cleric Offenders*, 15 SEXUAL ADDICTION & COMPULSIVITY 311, 312 (2008). Whether criminal prosecutions and punishments are appropriate for those who have diagnosed mental illnesses that may cast doubt upon their actual culpability is beyond the scope of this Note. For purposes of this Note, I have simply assumed that

“child” from sixteen to eighteen for child-pornography purposes not only swept up a great deal of consensual teenage activity but also the sexual desires of many adults who do not have psychological disorders.¹⁷⁷ Although using the term “normal” to clinically describe erotic desires is not permitted,¹⁷⁸ the Court itself has sought to legally distinguish between prurient interests in sex, and normal, healthy sexual desires.¹⁷⁹ Teens who sext are thus neither traditional targets of child pornography, nor do they necessarily satisfy the prurient interest prong of the obscenity test.¹⁸⁰ Because even *Ferber* itself suggested that

it is permissible to treat as criminals any person who sexually abuses children, even those persons who have been clinically diagnosed as pedophiles. *Cf.* *Kansas v. Hendricks*, 521 U.S. 346, 351–53 (1997) (addressing constitutionality of indefinite *civil* commitment of violent sex offenders in the context of conviction for sexual molestation of children).

¹⁷⁷ Because many late adolescents have physical characteristics that are largely indistinguishable from those of adults, some level of sexual attraction to late adolescents is common among adults of all sexual orientations. *E.g.*, David Tuller, *What to Call Foley*, SLATE (Oct. 4, 2006, 5:59 PM), <http://www.slate.com/id/2151018/> (“Former Rep. Foley seems to suffer from a different condition: ephebophilia, which is defined as sexual attraction to post-pubescent adolescents and older teenagers.”). Indeed, although the term “ephebophilia,” denotes a sexual preference for adolescents around fifteen to nineteen years of age, the DSM IV does not list the term, likely because “[f]ew would want to label erotic interest in late- or even mid-adolescents as a psychopathology” Ray Blanchard et al., *Pedophilia, Hebephilia, and the DSM-V*, 38 ARCHIVES SEXUAL BEHAV. 335, 336 (2009). At any rate, engaging in sexual acts with a minor who has not attained the age of consent for that particular sex act is a crime.

¹⁷⁸ *Id.* at 336 (describing the general resistance or indifference to a technical vocabulary for erotic age-preference but noting that the word “normal” has been off-limits for decades). It is perhaps worth noting here as well that both *Ferber* and *Osborne* “involved apparently gay-oriented pornography, a surprising disproportion considering the relative representation of gays in the population as a whole.” Humbach, *supra* note 131, at 448 n.79. Homosexuality was not removed from the DSM until 1974. *See* Shari Roan, *Revising the Book on Mental Illness: Experts Call for Listing Binge Eating and Gambling As Official Disorders, but Not Sex Addiction or Obesity*, L.A. TIMES, Feb. 10, 2010, at A1. Adler notes that an “anti-homosexual fervor” helped fuel legislative responses to child pornography. Adler, *supra* note 95, at 230 n.116 (2001). Indeed, one expert testified before the House of Representatives that “most agree that child sex and pornography is basically a boy-man phenomenon.” *Id.*

¹⁷⁹ *See* *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 498 (1985). The Court has distinguished between material that excites “normal, healthy sexual desires” and material that excites “sexual responses over and beyond those that would be characterized as normal,” including “a shameful or morbid interest in nudity, sex, or excretion.” *Id.*

¹⁸⁰ *But cf.* Humbach, *supra* note 131, at 445 n.60 (“[T]he immediate question is whether teens’ depictions of teenage sexual activity for a teenage audience are better understood as appealing to ‘normal, healthy sexual desires’ or as ‘shameful or morbid.’ I think we can agree that casual teen sexual relations probably did not fall within the 1986 heartland of ‘good, old fashioned, healthy’ sex.”). *See also* *State v. Canal*, 773 N.W.2d 528, 528 (Iowa 2009) (holding that it could not conclude as a matter of law that the pictures a teen sent to his girlfriend of his erect penis were not obscene). It is, to say the least and as Adler put it, “internally incoherent” for a state to set the age of consent in recognition of the facts that teens do have sex, while simultaneously calling that sexual activity morbid and shameful. If anything, the age of consent necessarily means that sexual activity among teenagers is tolerable, if not suitable. *Cf.* *Erznoznik v. Jacksonville*, 422 U.S. 205, 213–14 (1975) (“Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a

there might be a narrow range of cases to which its rule would not apply,¹⁸¹ as-applied challenges might have cabined the rapidly sprawling application of the sex-offender label to everyday teens.¹⁸²

III

AFTER *STEVENS*, SEXTING PROSECUTIONS ARE “PRESUMPTIVELY INVALID”

These theoretical inconsistencies, the utter incoherence of child-pornography jurisprudence generally, and the serious constitutional concerns raised by treating older teens’ sexting as child pornography were laid bare in *United States v. Stevens*.¹⁸³ In *Stevens*, the Court refused to create a new First Amendment exception for depictions of animal cruelty. While the Court’s holding received substantial atten-

legislative body thinks *unsuitable* for them.” (emphasis added)). Moreover, even if the majority of Americans believe that sex among older teenagers is morally wrong, it is unclear whether these majoritarian sexual preferences without more may be expressed through the criminal law. See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))). In fact, by legally permitting minors to have sex in the first instance, even before *Stevens*, States might well have undermined their own rational bases for criminalizing expression of that sexual activity. Cf. Michael C. Dorf, *All or Nothing Equality*, DORF ON LAW (Dec. 13, 2010, 12:01 AM), <http://www.dorfonlaw.org/2010/12/all-or-nothing-equality.html> (suggesting that same-sex marriage restrictions in California might lack a rational basis because California unlike other states has already extended a great degree of equality to gay people, making the restriction on marriage in particular arbitrary and irrational).

¹⁸¹ It is worth noting again what *Ferber* actually held. “[W]e hold that child pornography as defined in § 263.15 is unprotected speech subject to content-based regulation.” 458 U.S. 747, 766 n.18 (1982). “We hold that § 263.15 sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection.” *Id.* at 765. Of course, even the Court itself does not always seem to have read *Ferber* this narrowly. See, e.g., *United States v. Williams*, 553 U.S. 285, 288 (2008) (“Over the last 25 years, we have confronted a related and overlapping category of proscribable speech: child pornography. This consists of sexually explicit visual portrayals that feature children.” (internal quotations and citations omitted)). Even here, though, Justice Scalia, writing for the majority, left open the possibility of as-applied challenges. *Id.* (“We have held that a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not *on its face* violate the First Amendment.” (emphasis added)).

¹⁸² Although as-applied challenges seem inevitable, such challenges merely mean that “[t]eens who find themselves prosecuted as child pornographers may or may not ultimately receive constitutional protection.” Humbach, *supra* note 131, at 450 (“[T]he existence of the [child pornography] exclusion effectively reverses the presumption of unconstitutionality that normally applies to content-based regulations of speech.”) Thus, teens seeking to challenge their prosecutions before *Stevens* generally faced the choice of either mounting a “case-by-case ‘as applied’ challenge to a prima facie valid law (and risk[ing] decades in jail) or plead[ing] guilty to a lesser charge.” *Id.* at 451 (footnote omitted). So far, as-applied challenges based upon similar reasoning have not fared well in state courts. See, e.g., *A.H. v. State*, 949 So. 2d 234, 238–39 (Fla. Dist. Ct. App. 2007) (rejecting as-applied challenge under Florida state constitution)

¹⁸³ 130 S. Ct. 1577 (2010).

tion in both the popular press¹⁸⁴ and in law reviews,¹⁸⁵ the Court's distinguishing of *Ferber* and the resulting doctrinal ramifications have been less fully explored.¹⁸⁶ In rejecting the Government's request to carve out a new exception for depictions of animal cruelty, the Court noted that

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

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

In discussing *Ferber*, the Court effectively "assimilated child pornography to the traditionally unprotected category of 'speech integral to criminal conduct.'"¹⁸⁸ While some have described the Court's characterization of *Ferber* as novel,¹⁸⁹ a close reading of the cases prior to *Stevens* shows that despite scholarly views to the contrary, the Court had never created a bright-line rule that *all* depictions of minors engaged in sexual acts were child pornography and thus excluded from

¹⁸⁴ See, e.g., Robert Barnes, *Justices Overturn Anti-Animal-Cruelty Law in Free Speech Case*, WASH. POST, Apr. 21, 2010 at A3; Joan Biskupic, *Major Rulings of the 2009–10 Term*, USA TODAY, June 28, 2010, at A5; Linda Greenhouse, Op-Ed., *The Court as Mr. Fix-It?*, N.Y. TIMES, May 1, 2010, at A19.

¹⁸⁵ See, e.g., Patricia Millet et al., *Mixed Signals: The Roberts Court and Free Speech in the 2009 Term*, 5 CHARLESTON L. REV. 1 (2010); Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1 (2011).

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

¹⁸⁷ *Stevens*, 130 S. Ct. at 1584 (citations omitted).

¹⁸⁸ Strossen, *supra* note 25, at 85.

¹⁸⁹ See *supra* note 25 and accompanying text.

First Amendment protection.¹⁹⁰ As a practical matter, though, legal scholars must have been aware that even if they read *Ferber* as creating a categorical exclusion, the rule, “[l]ike many bright line rules . . . [was] only ‘categorical’ for a page or two in the U.S. Reports.”¹⁹¹

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

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

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

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

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

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

¹⁹⁵ See Rhodes, *supra* note 25, at 6.

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

A. Statutory-Rape Laws

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

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

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

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

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

²⁰⁰ *Id.* at 10.

²⁰¹ *Id.* at 14–23.

²⁰² There must be some threshold beyond which states could not go. Although Tennessee once set its age of consent at twenty-one, that seems to be the high watermark. Surely criminalizing consensual sex beyond this age—aside from the fact that “such a law

preme Court has previously rejected a constitutional challenge to a statutory-rape law.

In *Michael M. v. Superior Court of Sonoma County*,²⁰³ the Court sustained a California statute that criminalized sexual intercourse with an unmarried female under eighteen. The case involved a seventeen-year-old male, Michael, and a sixteen-year-old female, Sharon.²⁰⁴ Under that particular statute, only males could commit the crime, and only females could be its victims.²⁰⁵ The Court rejected petitioner's argument that the statute's gender specificity was not substantially related to an important governmental objective and instead had as its purpose the "anachronistic protection of female chastity."²⁰⁶ Because of the "profound physical, emotional, and psychological consequences of [teen] sexual activity,"²⁰⁷ the Court concluded that California's punishing only males for violations of the statute did not violate the Equal Protection Clause because it would "'equalize' the deterrents on the sexes"²⁰⁸ when teenagers decide to engage in sexual activity. While *Michael M.* is "much-criticized,"²⁰⁹ it stands for the proposition that a state may criminalize the sexual activity of minors. Thus, for First Amendment analytical purposes, statutory-rape laws are likely "valid criminal statute[s]" within the meaning of *Stevens*.²¹⁰

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

Several scholars have recently called for more reasoned responses to the sexting epidemic.²¹¹ These include educational and juvenile

would not long stand in our democratic society"—would raise constitutional concerns. *See Lawrence v. Texas*, 539 U.S. 558, 584–85 (2003) (O'Connor, J., concurring).

²⁰³ 450 U.S. 464 (1981).

²⁰⁴ *Id.* at 466.

²⁰⁵ *Id.*

²⁰⁶ COCCA, *supra* note 4, at 70.

²⁰⁷ *Michael M.*, 450 U.S. at 471.

²⁰⁸ *Id.* at 473.

²⁰⁹ COCCA, *supra* note 4.

²¹⁰ 130 S. Ct. 1577, 1586 (2010) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (internal quotation marks omitted)). Although the Court struck down a law against consensual homosexual sodomy in *Lawrence*, the Court noted that the case did not involve minors. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Thus in addition to *Michael M.*, *Lawrence* further supports the idea that states may criminalize the sexual activity of minors. Whether criminalizing consensual sexual activity between minors is wise policy is debatable, but under current doctrine such criminalization is likely constitutional. *But see In re D.B.*, 950 N.E.2d 528, 533 (Ohio 2011) ("As applied to children under the age of 13 who engage in sexual conduct with other children under the age of 13, [the Ohio statutory-rape statute] is unconstitutionally vague because the statute authorizes and encourages arbitrary and discriminatory enforcement enforcement."); *id.* at 534 ("Application of [the Ohio statutory-rape statute] in this case also violates D.B.'s federal right to equal protection.")

²¹¹ *See, e.g.,* Humbach, *supra* note 131, at 438–39 (pointing out that the current system of laws addressing sexting is overbroad and archaic).

programs, as well as statutes that specifically address sexting as a new category distinct from child pornography.²¹² It is unclear whether these would be *valid* criminal statutes to which sexting prosecutions could be tied. Indeed, the arguments put forth are not unlike the ones advanced by the Government in *Stevens*: because sexting causes “serious, and often unanticipated, psychological and reputational consequences,”²¹³ it warrants legislative responses targeting the speech. But because sexting between teens who have reached the age of consent is neither child pornography²¹⁴ nor likely obscenity,²¹⁵ any statutes that seek to address sexting without tying the activity to the age of consent would problematically draw content-based distinctions.²¹⁶

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

²¹² See, e.g., Smith, *supra* note 9, at 541–43 (advocating various uses of criminal law to limit sexting).

²¹³ Ryan, *supra* note 61, at 357.

²¹⁴ See *supra* Part II.

²¹⁵ See *supra* note 180 and accompanying text.

²¹⁶ For a discussion of whether a statutory restriction on child pornography, and therefore sexting could be considered “content-neutral,” and thus subject only to intermediate scrutiny, see Humbach, *supra* note 131, at 473–82. Note, however, that had the Court treated the original restriction in *Ferber* as content-neutral, the Court could not have been “readily able to justify the creation of a new content-based categorical exclusion—and thereby authorize sweeping statutory bans of *all* child pornography.” *Id.* at 475 n.233.

²¹⁷ See *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (content-based distinctions presumptively invalid); *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000) (strict scrutiny for content-based restrictions).

²¹⁸ *Playboy Entm’t Grp.*, 529 U.S. at 813 (quoting *Sable Commcn’s, Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

²¹⁹ Parents, for example, could choose simply not to buy their children cell phones with cameras or buy reduced text-messaging plans for cell phones that have cameras. *Cf. id.* at 825. (“Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech. The Government’s argument stems from the idea that parents do not know their children are viewing the material on a scale or frequency to cause concern, or if so, that parents do not want to take affirmative steps to block it and their decisions are to be superseded. The assumptions have not been established; and in any event the assumptions apply only in a regime where the option of blocking has not been explained.”).

²²⁰ See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2734 (2010) (Breyer, J., dissenting) (“Indeed, where, as here, a statute applies criminal penalties and at least arguably does so on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications ‘strictly’—to determine whether the prohibition is justified by

Further, tying sexting statutes to validly enacted statutory-rape or age-of-consent statutes would re-invent²²¹ the First Amendment, restoring basic First Amendment principles. Traditionally, “free speech jurisprudence has held that liberties in the realm of expression must remain broader than liberties in the realm of action.”²²² For the most part, the Court’s jurisprudence on sexual speech has reversed that rule.²²³ Indeed, permitting states to impose legal sanctions on older teens for sexting only serves to perpetuate the “suggest[ion] that there is something more dangerous about the representation of sex than the act of sex itself—a most perplexing premise indeed.”²²⁴ Tying child-pornography statutes to age-of-consent statutes would therefore make the realm of allowable expression at least as broad as the realm of allowable action.

IV

SEXTING AS A SEX ACT?

While holding that sexting is constitutionally protected speech is fairly straightforward as a doctrinal matter, it seems problematic as a practical one. It is clear that many states will continue to try to regulate teens’ sexting. Forcing states to tie sexting prosecutions to the age of consent could cause many states perversely to increase the age of consent to eighteen.²²⁵ This would have the unpalatable consequence of criminalizing an even wider swath of everyday teenage activity.²²⁶ These difficulties suggest that for those states that insist on criminalizing sexting, a radical rethinking of the way activities like “sexting” are treated may be appropriate. In this Part, I briefly revisit Catharine MacKinnon’s view that “sex pictures [should be] legally considered sex acts.”²²⁷ Although many have long regarded this theory as somewhat radical, and completely contrary to current First Amendment doctrine, sexting presents an opportunity for a poten-

a ‘compelling’ need that cannot be ‘less restrictively’ accommodated.”); Humbach, *supra* note 131, at 470 n.220 (citing Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1365 n.63 (2006)).

²²¹ Cf. Adler, *supra* note 32, at 925–27.

²²² John Tehranian, *Sanitizing Cyberspace: Obscenity, Miller, and the Future of Public Discourse on the Internet*, 11 J. INTELL. PROP. L. 1, 4 (2003).

²²³ David Cole, *Playing by Pornography’s Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 114 (1994) (“Central to the First Amendment tradition is the notion that one has broader freedom in one’s expression than in one’s acts. When it comes to sex, however, the rule is reversed.”).

²²⁴ Tehranian, *supra* note 222, at 4.

²²⁵ See Dorf, *supra* note 180 (describing various areas of constitutional law in which similar phenomena occur).

²²⁶ The median age of first intercourse is 16.9 years for boys and 17.4 years for girls. KAISER FOUNDATION, *supra* note 1.

²²⁷ CATHARINE A. MACKINNON, *ONLY WORDS* 36 (1993).

tially valid application of the theory. While the First Amendment may not permit the state to criminalize older teens' depictions of their sexual conduct, it seems equally clear that the First Amendment does not prohibit states from regulating minors' sex acts.

A. Old Battles in a New Medium

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

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

²²⁸ Adler, *supra* note 32, at 972.

²²⁹ *Id.* at 973.

²³⁰ See ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 46 (1988) (describing how women and children are violently exploited during the making of pornography).

²³¹ CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 316 (2005).

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

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

²³⁴ See HUGH POTTER, PORNOGRAPHY: GROUP PRESSURES AND INDIVIDUAL RIGHTS, 27-28 (1996).

²³⁵ MACKINNON, *supra* note 227, at 20.

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

B. Sexting: A Bilateral Sexual Exchange

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

²³⁶ *Am. Booksellers Ass’n*, 771 F.2d at 330.

²³⁷ For discussion of whether the Court had previously accepted MacKinnon’s view, see Adler, *supra* note 32, at 987 (“In child pornography law, at last, the Court seems to understand what MacKinnon’s critics have dismissed as metaphor: the picture *is* the harm. MacKinnon has been vindicated.”); see also ATTORNEY GENERAL’S REPORT, *supra* note 64, at 406 (“Child pornography necessarily includes the sexual abuse of a real child, and there can be no understanding of the special problem of child pornography until there is understanding of the special way in which child pornography *is* child abuse.”).

²³⁸ See Ryan, *supra* note 61, at 366. This is largely beside the point. Prosecutors charging teens with child pornography have done so on the basis of their speech and not their conduct. In any event, sexting could also qualify as expressive conduct under current First Amendment doctrine. To qualify as expressive conduct, an act must be intended to convey a particularized message and there must be a great likelihood that the message would be understood by those who view it. See *Spence v. Washington*, 418 U.S. 405, 409–11 (1974) (per curiam). At the very least, a sexted image conveys the message “this is what I look like nude.”

²³⁹ Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 807–08 (1993) (“Many forms of pornography are not an appeal to the exchange of ideas, political or otherwise; they operate as masturbatory aids . . .”).

²⁴⁰ Eraker, *supra* note 26, at 557.

²⁴¹ See *supra* note 42 and accompanying text.

²⁴² Foreplay is “[s]exual stimulation preceding intercourse.” THE AMERICAN HERITAGE COLLEGE DICTIONARY 533 (3d ed. 2003).

²⁴³ See, e.g., GA. CODE ANN. § 16-6-4(a)(2) (2011) (criminalizing a minor from acting “with the intent to arouse or satisfy the sexual desires” of another minor); accord *United States v. Stocks*, 35 M.J. 366, 367 (C.M.A. 1992) (noting that oral sex is “mere oral foreplay”).

distinction between pornography and prostitution may provide some guidance.

Sex acts are legally significant events.²⁴⁴ For First Amendment purposes, this Note proposes defining sex acts as bilateral sexual exchanges to which legal consequences may validly attach.²⁴⁵ Although the line between prostitution and pornography seems arbitrary,²⁴⁶ the distinction is instructive, and may prove useful to those states that wish to consider a different approach to regulating sexting. Traditionally, prostitution has been defined as a “bilateral [sexual] exchange”²⁴⁷ between A and B. Pornography on the other hand generally involves a nonparticipating C, who pays A to perform a sex act on B.²⁴⁸ Because the effect of pornography “occurs through the mediation of an audience” rather than from C participating in a sex act with A or B, pornography and its production are protected by the First Amendment.²⁴⁹ Another distinction is that pornography “neither precipitate[s] nor perpetuate[s] the social ills”²⁵⁰ that follow from prostitution.²⁵¹ Taken together, these propositions could lead to the conclusion that where a sex act does not require the mediation of a

²⁴⁴ Sherry F. Colb, *The Legal Line Between Prostitution and Porn*, CNN JUSTICE (Aug. 12, 2005), http://articles.cnn.com/2005-08-12/justice/colb.pornography_1_prostitution-ring-sexual-services-pornography?_s=PM:LAW (last visited Nov. 23, 2011) (“The sex act is a legally significant event. If it occurs without consent, it is rape. If it takes place between a married person and a third party, it is adultery. If it occurs and leads to the birth of a child, then the man is legally responsible for that child until the age of 18. And if it happens in exchange for a fee, then it is prostitution.”).

²⁴⁵ See, e.g., *id.*

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

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

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

²⁴⁹ *Id.*

²⁵⁰ *Paulino*, 2005 N.Y. Misc. LEXIS 3530, at *14.

²⁵¹ This proposition is also far from clear. While the social ills the judge points to are certainly different from those described by MacKinnon, *supra* Part IV.A and accompanying notes, pornography can also bring with it a host of ills including “AIDS, venereal diseases, [and] drugs,” *Paulino*, 2005 N.Y. Misc. LEXIS 3530 at *13. For a description of the STD transmissions in the adult-film industry, see, for example, Molly Hennessy-Fiske, *HIV-Positive Porn Performer Speaks Out*, L.A. TIMES, Dec. 8, 2010. Nevertheless, these consequences flowing from the sex act itself only potentially affect A or B and not C.

nonparticipating party, legal consequences may attach to the sex act without running afoul of the First Amendment.

Under this approach, sexting could be viewed as a bilateral sexual exchange more akin to prostitution than to pornography, the creation of which necessarily entails a nonparticipating C. Sexting, like other forms of foreplay, entails one party performing a sex act for another. To be sure, unlike prostitution, sexting is not generally associated with monetary exchanges. But a fee is not typically a necessary condition for the state to attach legal consequences to a sex act. Although the sexted image may be forwarded to a third party, this fact alone would not transform the sexted image into pornography. In pornography, A and B have *zero* expectation of privacy and intend for there to be a nonparticipating C.²⁵² Indeed, this privacy rationale is probably the basis of tort liability when adults disseminate pictures of their sexual partners without consent.²⁵³ Moreover, the types of harm identified with teen sexting, including bullying, suicide, and depression, are not entirely different from the “profound physical, emotional, and psychological consequences of [teen] sexual activity” that the Court identified in *Michael M.*²⁵⁴ Accordingly, states that insist on regulating sexting may want to consider treating sexting as a sex act and may want to regulate it in much the same way that those states regulate other sex acts.²⁵⁵

Acknowledging that there is probably room in the doctrine for this approach, however, is not to say that treating sexting as a sex act is normatively desirable. It is not. It is certainly not to say that this approach is not without its own potential constitutional infirmities. Although the Supreme Court has intimated that minors do not necessarily have a protected liberty interest in any particular sex act,²⁵⁶ the exercise of state police power is still subject to rational basis review. While the harms associated with sexting are somewhat similar to the harms associated with teen sexual activity in general, they are distinguishable. At the very least, sexting does not give rise to the pos-

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

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

²⁵⁴ 450 U.S. 464, 471 (1981).

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

²⁵⁶ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (noting that “[t]he present case does not involve minors”).

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

CONCLUSION

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

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

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

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

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

²⁶⁰ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 248 (2002).

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

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