USING LAWS DESIGNED TO PROTECT AS A WEAPON: PROSECUTING MINORS UNDER CHILD PORNOGRAPHY LAWS

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ABSTRACT

Child pornography is exempt from First Amendment protection. However, in the age of "sexting," social networking websites, and digital cameras, teens are increasingly engaging in behaviors that meet the legal definition of child pornography. Some minors have even been prosecuted and convicted for images they have taken of themselves. This article takes a critical look at the justifications for regulating child pornography created or consumed by minors and raises potential constitutional and statutory challenges to some prosecutions of minors under child pornography laws.

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INTRODUCTION

A sixteen-year-old, A.H., and her seventeen-year-old boyfriend, J.G.W., engaged in consensual legal sex.[1] They took digital pictures of themselves naked and engaged in sexual conduct,[2] and afterwards, A.H. emailed the pictures to her boyfriend.[3] The couple showed the images to no one, but somehow word about the photos' existence came out, and the police obtained a warrant to search J.G.W.'s computer.[4] A.H. was convicted[5] of "producing, directing or promoting a photograph or representation that she knew included sexual conduct of a child."[6] A.H. and J.G.W. were prosecuted for a child pornography offense because they had taken photographs of themselves engaged in private sexual conduct.

Had A.H. and J.G.W. been two years older, the images they created of themselves would be completely legal. However, because they were under eighteen when the photographs were taken, their actions constituted a

1. A.H. v. State, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007) (noting that A.H. and J.G.W. engaged in "sexual behavior" and not alleging that the behavior was nonconsensual). *See also* B.B. v. State, 659 So. 2d 256 (Fla. 1995) (extending the Florida constitutional right to privacy to minor's intimate sexual conduct in the context of holding Florida's statutory rape law unconstitutional as applied to minors).

2. *A.H.*, 949 So. 2d at 235.

3. Declan McCullagh, CNET NEWS, Police Blotter: Teens Prosecuted for Racy Photos (Feb. 9, 2007), http://news.cnet.com/Police-blotter-Teens-prosecuted-for-racy-photos/2100-1030_3-6157857.html.

4. *Id.* It is not clear how the images came to the attention of law enforcement. From what is known about the case, one can assume that the police searched the computer pursuant to a warrant. There is some speculation that perhaps one of the children's parents called the police to end the relationship. *See id.*

5. Technically, the two minors were adjudicated delinquent because they were prosecuted as juveniles; the term "convicted" is used here because the nomenclature of juvenile court is unfamiliar to many readers.

6. *A.H.*, 949 So. 2d at 235.

second degree felony.[7] A.H. appealed her conviction, claiming that the state had unjustifiably violated her Fourteenth Amendment right to privacy and that her conviction was an overly intrusive way to further the state interest in protecting children from exploitation.[8] The court rejected her constitutional argument, holding that she had no reasonable expectation of privacy and that the state had a compelling interest in ensuring that material like the photographs she had taken was never produced.[9] Although adults have a right to private possession of obscene material depicting adults under the First and Fourteenth Amendments,[10] minors are being punished for possessing sexually suggestive images of themselves without any consideration of the their First and Fourteenth Amendment rights.

The prosecution of a minor[11] for a violation of a child pornography law may seem aberrational.[12] However, child pornography prosecutions of minors already occur,[13] and opportunities for prosecution are multiplying now that minors have increased access to technology, such as digital

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7. *See* FLA. STAT. § 827.071(3) (2005).

8. *A.H.*, 949 So. 2d at 235.

9. *Id.* at 237–39.

10. *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding statute criminalizing mere possession of obscene material unconstitutional). Child pornography and obscene pornography are overlapping categories, as discussed below.

11. Throughout this paper, there will be references to children, minors, teens, young people, adolescents, and juveniles. These terms describe overlapping categories of individuals, and none has a firm, fixed definition in the national context. Even those who study human development have trouble defining terms relating to youth more precisely. *See* Michael Rutter, *Psychopathological Development Across Adolescence*, 36 J. YOUTH ADOLESCENCE 101, 101–02 (2007) (listing definitions of adolescence using biological, social, legal, media, and psychological frameworks).

12. For a number of reasons, it is difficult to get a quantitative sense of how often these prosecutions arise. Usually, cases are never filed because prosecutors offer an "offender" the chance at a non-criminal punishment such as community service, and most children are willing to take it. For example, three students are suing a prosecutor who offered them a "deal" after finding photos of them in their bras: take a ten-hour course on pornography and sexual violence, or the prosecutor would file charges that carry penalties of imprisonment and registration as a sex offender. Mark Hamill, *Students Sue Prosecutor in Cellphone Photos Case*, N.Y. TIMES, Mar. 26, 2009, at A21. The seventeen other similarly-situated students to whom this prosecutor offered deals accepted. *Id.* Further complicating the ability to count these prosecutions, many of them occur in family court as a result of the age of the accused; family court proceedings are more private than criminal court proceedings. Many states' juvenile court statutes provide that the general public shall be excluded from most juvenile delinquency proceedings, *see, e.g.*, MO. REV. STAT. § 211.171(6) (2008), and many others give the court discretion to exclude the general public, *see, e.g.*, N.Y. FAM. CT. ACT § 741(b) (McKinney 2009).

13. *See, e.g.*, Russ Zimmer & Seth Roy, *Prosecutor: Girl Ignored Warning by School Officials*, NEWARKADVOCATE.COM, Oct. 8, 2008, http://www.newarkadvocate.com/article/20081008/NEWS01/81008025 (discussing a case in which a fifteen-year-old girl was charged with a child pornography crime that could require her to register as a sex offender for twenty years for sending nude cell phone photographs of herself).

cameras and cell phones with camera capabilities.[14] The consequences of these prosecutions are farreaching. In some states, young people who are considered minors under child pornography laws (and who are thus forbidden from producing sexual images of themselves) are simultaneously considered adults for purposes of prosecution and thus may be prosecuted for felonies in adult criminal court.[15] Even if minors are prosecuted through juvenile delinquency proceedings, an adjudication as delinquent for committing a sex crime could require the minor to register as a sex offender. Sex offender registration can have collateral consequences for the minor's employment, residence, future criminal sentences, and parental rights.[16] In addition, some states report juvenile delinquents to the national database for sex offenders created by the 2006 Adam Walsh Act.[17]

Child pornography is a real and very troubling epidemic, and photographs created by minors can undoubtedly fall into the hands of pedophiles. However, it is also troubling that the state can censor and prosecute adolescents' sexual expression so tenaciously. As the opinion of the dissenting judge in *A.H. v. State* highlights, child pornography law "was designed to protect children, but in this case the court has allowed

14. THE NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY & COSMOGIRL.COM, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1, 11 [hereinafter SEX AND TECH] (noting that twenty percent of teens have sent or posted nude or semi-nude pictures of themselves and thirty-one percent have received a nude or semi-nude picture or video from someone else), *available at* http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf. More generally, the survey noted that eighty-seven percent of teens have access to a cell phone and eighty percent have access to a digital camera. *Id.* at 6.

15. *See, e.g.*, N.C. GEN. STAT. ANN. § 7B-1501 (West 2008) (defining "delinquent juvenile" as "[a]ny juvenile who, while less than 16 years of age but at least 6 years of age, commits a crime or infraction under State law"); N.C. GEN. STAT. ANN. § 14-190.13 (West 2008) (defining "minor" for purposes of offenses concerning minors, including child pornography, as "[a]n individual who is less than 18 years old and is not married or judicially emancipated").

16. *See* Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 177–82 (2003) (discussing registration requirements for juvenile sex offenders). *See also In re* Z.C., 165 P.3d 1206, 1213 (Utah 2007) (noting that adjudication in juvenile court system for sexual abuse can lead to future sentencing enhancements and may affect future proceedings regarding a minor's custody of her child).

17. The Act creates financial incentives for states to include juvenile delinquents in the national registry. 42 U.S.C. § 16911(8) (2006) ("The term 'convicted' or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse . . . or was an attempt or conspiracy to commit such an offense."); 42 U.S.C. § 16925(a) (2006) ("For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under . . . the Omnibus Crime Control and Safe Streets Act of 1968.").

the state to use it against a child in a way that criminalizes conduct that is protected by [the] constitutional right of privacy."[18] When laws designed to shield and protect children are turned against them, it is time to look closely at the rationales behind these prosecutions and the countervailing interests of the young people they target. This article argues that, in some cases, prosecuting minors for child pornography violations infringes on the minors' constitutional rights. Even where constitutional rights are not violated, prosecuting minors for child pornography crimes often runs counter to the rationales underpinning the enactment of these laws. In sum, many of these prosecutions should not be pursued.[19]

Part I of this article discusses the current state of child pornography law. It describes the constitutional contours of child pornography law and details the rationales for criminalizing child pornography, including rationales explicitly stated in the case law and additional underlying rationales that might explain some of the incoherence and over-breadth of the existing law. Part II outlines the spectrum of prosecutions of minors for child pornography offenses and applies the existing rationales for child pornography law to each type of prosecution. These prosecutions range from cases where the state has a compelling interest in prosecution to those in which the state interest is weaker and the minor has strong countervailing constitutional rights. Part III considers arguments challenging the prosecution of minors under child pornography law in certain limited instances. Part III.A looks at constitutional arguments grounded in a minor's substantive due process right to privacy and First Amendment right to expression, while Part III.B examines statutory challenges using the absurdity canon, legislative intent, and the doctrine of constitutional avoidance.

I.
THE CURRENT STATE OF CHILD PORNOGRAPHY LAW

A. Constitutional Contours of Child Pornography Law

The law governing child pornography has a close relationship with the law governing obscenity. Under constitutional doctrine, the First Amendment freedoms of speech and the press do not protect either

18. A.H. v. State, 949 So. 2d 234, 241 (Fla. Dist. Ct. App. 2007) (Padovano, J., dissenting).

19. This is the first article to discuss the prosecution of minors under child pornography laws from a children's rights perspective. Two other law review articles have discussed self-produced child pornography. *See* Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1 (2007); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505 (2008).

obscenity or child pornography.[20] In the 1973 case *Miller v. California*, the Supreme Court laid out a three-pronged test for determining whether speech falls into the category of obscenity:

> (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.[21]

Almost a decade after deciding *Miller*, the Court faced a challenge to a New York State law that criminalized the knowing promotion of a sexual performance by a child under the age of sixteen by distributing material depicting such a performance in *New York v. Ferber*.[22] The challengers argued that the statute criminalized sexually explicit images of children that did not meet the *Miller* definition of obscenity and thus infringed on the First Amendment rights of Ferber, the owner of an adult bookstore.[23] The Supreme Court rejected Ferber's argument, holding, "States are entitled to greater leeway in the regulation of pornographic depictions of children" than in the regulation of obscenity and, thus, that child pornography laws did not need to conform to the *Miller* definition of obscenity.[24] The Court stated several reasons for differentiating the state's

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20. New York v. Ferber, 458 U.S. 747 (1982) (child pornography); Roth v. United States, 354 U.S. 476, 484–85 (1957) (obscenity).

21. Miller v. California, 413 U.S. 15, 24 (1973) (internal citations and quotation marks omitted).

22. *Ferber*, 458 U.S. at 749. The statute defined "sexual performance" as any performance that includes sexual conduct by the child and defined "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals." N.Y. PENAL LAW § 263 (McKinney 1980). After the case, variations on this definition were incorporated into many child pornography laws, including federal law. *See, e.g.*, 18 U.S.C. § 2256(2) (2006) (defining "sexually explicit conduct" as "actual or simulated (i) sexual intercourse . . . ; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area").

23. *Ferber*, 458 U.S. at 751–52. The New York Court of Appeals had accepted this argument and deemed the statute at issue unconstitutional despite acknowledging the legitimate interest in protecting the welfare of minors. *See* People v. Ferber, 422 N.E.2d 523, 525 (N.Y. 1981) ("It is evident from the statutory scheme that the statute at issue in this case is not directed at obscene performances which, as noted, are proscribed by the preceding section. In fact if [the statute] serves any independent purpose, its goal must be to prohibit nonobscene sexual performances involving children. Thus on its face the statute would prohibit the showing of any play or movie in which a child portrays a defined sexual act, real or simulated, in a nonobscene manner. . . . In short, the statute would in many, if not all, cases prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment." (internal citations omitted)), *rev'd*, 458 U.S. 747 (1982).

24. *Ferber*, 458 U.S. at 756.

interest in regulating child pornography from its interest in regulating obscenity—most notably, the state's compelling interest in "safeguarding the physical and psychological well-being of a minor."[25]

Unmoored from *Miller*'s obscenity standard, the contours of permissible regulation of child pornography have been interpreted expansively.[26] In contrast to obscenity law, the Court held in 1990 that prosecution for mere possession of child pornography is permissible.[27] In doing so, the Court argued that the market for the exploitative use of children could only be destroyed by penalizing those who possess child pornography as well as those who distribute it.[28] The Third Circuit read this holding as a mandate to permit the prosecution of child pornography on a broader scale, finding it permissible to interpret federal child pornography law as criminalizing "non-nude visual depictions" without rendering the statute unconstitutionally overbroad.[29]

With this mandate to aggressively regulate child pornography in hand, Congress passed the Child Pornography Prevention Act (CPPA) in 1996.[30] This new law expanded on existing laws: it included prohibitions on the creation and possession of virtual child pornography, which is made using computer-generated images or youthful-looking adults who appear to be minors.[31] Faced with the potential for prosecutions of non-obscene images in which no actual child was harmed, the Court, in *Ashcroft v. Free Speech Coalition*, struck down these expansive provisions of the CPPA as unconstitutional.[32] The *Ashcroft* Court expressed concern about the lack of alignment between the child pornography test and the *Miller* obscenity test, noting the absence of a value-based exception in the statutory definition of child pornography.[33] The Court pointed to the Oscar-winning films *American Beauty* and *Traffic*, both of which had significant artistic value and depicted the sexual conduct of minors without the use of child victims.[34] Using these examples as evidence, the Court noted that some

25. *Id.* at 756–57 (internal quotation marks and citation omitted).

26. *See, e.g.*, Osborne v. Ohio, 495 U.S. 103 (1990) (upholding Ohio statute that prohibited possession and viewing of child pornography); United States v. Knox, 32 F.3d 733 (3d Cir. 1994) (holding that federal child pornography statute permissibly criminalizes some material that does not depict any nudity).

27. *Osborne*, 495 U.S. 103. *Cf.* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that criminalizing private possession of obscene materials infringed on adult individual's constitutional rights).

28. *Osborne*, 495 U.S. at 109–10.

29. *Knox*, 32 F.3d at 737.

30. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26 (codified as amended in scattered sections of 18 U.S.C.).

31. 18 U.S.C. § 2256(8)(B), (C) (2006).

32. Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

33. *Id.* at 248–49.

34. *Id.* at 247–48.

works appearing to be child pornography might indeed have value.[35] The Court pointed out that *Ferber* had eschewed a value-based exception in part because "virtual images—the very images prohibited by the CPPA"—were available as an alternative means of expressing child sexuality in art.[36] The Court seemed to consider the virtual images as satisfying a demand in the market that would otherwise be filled through the exploitation of children, but without creating any child victims.

Ashcroft represents a stopping point (or maybe a pause) in the expansion of child pornography law. However, the fact that Congress attempted to claim the power to ban images that merely *looked like* child pornography is indicative of the greater leeway legislatures possess to regulate sexually explicit images of children under child pornography law as compared to sexually explicit images of adults under traditional obscenity law.

B. Exploring the Rationales for Regulating Child Pornography

In the existing case law, the Supreme Court offers a number of rationales for regulating child pornography, most of which are iterations of protecting the health and psychological well-being of children.[37] When analyzing regulations ostensibly enacted in the best interests of children, it is useful to search for unstated rationales and biases motivating these laws; regulations affecting children are often used to promote a particular social agenda of the state and majority culture.[38] In other words, the framework of child advocacy can be manipulated by adults to advance their own goals.[39] Mindful of the potential to abuse the children's rights framework

35. *Id.* at 251 ("*Ferber* did not hold that child pornography is by definition without value. On the contrary, the Court recognized some works in this category might have significant value . . . .").

36. *Id.*

37. *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 108 (1990); New York v. Ferber, 458 U.S. 747, 756–57 (1982).

38. *See* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, at xii–xiii (2005) ("[T]he rhetoric of children's rights works well for adults on a number of levels. Sometimes, it serves as a useful subterfuge for the adult's actual motives. It can be an effective diverter of attention, shifting the focus to a more sympathetic party than the adult. Other times, it is used to assuage guilt for the adult's bad behavior or intentions. Children's rights can be useful for masking selfishness by invoking the language of altruism. It can also provide a legal basis to achieve a result that would be difficult to achieve otherwise.").

39. For example, opponents of the gay rights movement have found it useful to cast their opposition to legal recognition of same-sex marriage in terms of advocating for the best interests of children. *See, e.g.*, Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006) (holding that limiting marriage rights to opposite-sex couples met rational basis scrutiny because there were two conceivable rationales for limitation, both of which were based on "the undisputed assumption that marriage is important to the welfare of children"). Although some of this rhetoric is no doubt genuinely believed by those who employ it, there is also potential for opponents of gay rights to cloak their homophobia in the language of child advocacy to make it more palatable to mainstream audiences, legislators,

for ulterior motives, this section will first discuss the rationales for regulating child pornography explicitly stated in the existing case law. It will then specifically analyze the unstated rationales underlying the regulation of minors who produce or possess child pornography.

1. Rationales Explicitly Stated in the Existing Case Law

The *Ferber* Court was persuaded by the argument that child pornography depicted molestation and therefore directly harmed the children depicted.[40] The Court found that child pornography harmed the children depicted in two ways. First, the Court observed that children were harmed in the initial production of such materials because "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."[41] Second, the Court found that the "materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by [the materials'] circulation,"[42] which will "haunt" the child in years to come.[43]

In addition to the two harm-based rationales, another persuasive rationale developed in *Ferber* is that aggressive prosecution of child pornography is necessary to "dry up the market" for child pornography and thus to decrease exploitation of children.[44] If prosecution could shut down the distribution network for child pornography, the Court reasoned, there would be no more economic demand for the exploitation and abuse of children.[45]

Finally, the *Ferber* Court found that there was no need for a *Miller*-like value-based exception for child pornography possessing literary, artistic, scientific, or political importance because the value of any child pornography is "exceedingly modest, if not *de minimis*."[46] The Court

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and judges.

40. *Ferber*, 458 U.S at 759 (finding that distribution of pornographic images of children is "intrinsically related to the sexual abuse of children").

41. *Id.* at 758.

42. *Id.* at 759.

43. *Id.* at 759 n.10 ("'[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.'" (quoting David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981))).

Throughout this article, I refer to this phenomenon of continual, long-term psychological damage to the children used in child pornography, caused by the continued circulation of the images depicting their victimization, as "haunting harm."

44. *Ferber*, 458 U.S. at 759–60.

45. *Id.*

46. *Id.* at 762.

concluded that, because "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake . . . no process of case-by-case adjudication is required" and the entire class of child pornography may thus be excluded from First Amendment protection.[47] In this passage, the Court seems to be rejecting the possibility that an adult image-maker, using an exploited child as her palette, should be afforded First Amendment protection, no matter how great her artistic vision.

In the 1990 case *Osborne v. Ohio*, the Court relied on a new rationale to support criminalizing possession of child pornography. In addition to the rationales stated in *Ferber*, the Court noted evidence suggesting that pedophiles use child pornography "to seduce other children into sexual activity."[48] This rationale indicates a shift in the Court's thinking. Instead of focusing on the harm to children who have already been abused in the existing images (both the harm depicted and the ongoing haunting harm), the Court indicated concern with the future behavior of possessors of child pornography and preventing the harm that existing images may cause to future victims.

In the 2002 case *Ashcroft v. Free Speech Coalition*, the Court addressed two additional rationales, offered by Congress upon the passage of the statute at issue, for the expansion of child pornography law to prohibit prosecution of images where no child was used (i.e., images created using only computer-generated children or youthful-looking adults). First, Congress had found that pedophiles might "whet their own sexual appetites" with the images, thus "increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children."[49] Second, Congress found that, unless virtual child pornography was also criminalized, it would be difficult to prove that a particular image was created using an actual child, and, therefore, prosecution of real child pornography would be hindered.[50]

Prior to *Ashcroft*, the primary rationale for exempting child pornography from First Amendment protection had been its close link to the actual victimization of children; however, the CPPA regulated in areas where *Ferber*'s rationales did not justify such broad restrictions on speech. Ultimately, the Court rejected the provisions challenged in *Ashcroft* because the CPPA censored speech "that records no crime and creates no

47. *Id.* at 763–64.

48. Osborne v. Ohio, 495 U.S. 103, 111 (1990). *See also id.* at 111 n.7 ("Child pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity." (citing ATTORNEY GEN.'S COMM'N ON PORNOGRAPHY, FINAL REPORT 649 (1986))).

49. Ashcroft v. Free Speech Coal., 535 U.S. 234, 241 (2002).

50. *Id.* at 242.

victims by its production."[51] As Justice Kennedy noted, even if there were some "unquantified potential" for subsequent harm, "'[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.'"[52] However, it is worth noting that the federal government's arguments in *Ashcroft* only slightly extended *Osborne*'s emphasis on future harms to third parties from child pornography.[53] In both situations, the harm at issue derives from the speech's potential to aid in further victimization of children, not from past harm documented in the image itself. In *Osborne*, the fear was that child pornography would be used to lure a child into abuse, whereas in *Ashcroft*, the federal government argued that the virtual images would whet abusers' appetites and incite them to victimize and exploit more children. Both arguments rest on speculative future harms to parties for which the images are merely a catalyst.

2. *Unstated or Understated Rationales for Regulating Child Pornography That Help to Explain Incoherence in the Law*

When the Court initially differentiated obscenity law from child pornography law in *Ferber*, its differential treatment was based on the linkage of child pornography to the actual sexual abuse of the child depicted. However, much of the later and proposed development of child pornography law has not been tied to these logical foundations. To more thoroughly understand the impetus to outlaw increasing numbers of images, it is useful to look beyond the case law and the rationales explicitly stated by the Court. This exploration is motivated by the understanding that the framework of children's rights is often employed by people who are motivated by factors other than the best interests of children.[54]

First, it bears mentioning that child pornography law primarily targets pedophiles. Generally, the law cannot criminalize status, only behavior.[55] Despite this general principle, laws targeting pedophiles, or adults sexually interested in children, are notably more punitive than laws targeting many other classes of criminals. Mere possession of child pornography is

51. *Id.* at 250.

52. *Id.* at 253 (quoting Bartnicki v. Vopper, 532 U.S. 514, 529 (2001)).

53. *See* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 998–99 (2001) ("Some have argued that the CPPA is unconstitutional under existing interpretations of First Amendment law. If it is, as I believe it is, then it is not a sudden unconstitutional shift in child pornography law. Rather it is the culmination of a subtle and inexorable erosion of free speech principles that has been ongoing in child pornography law since its inception.").

54. *See supra* note 38 and accompanying text.

55. *See* Robinson v. California, 370 U.S. 660, 660, 666 (1962) (striking down California law making it illegal to be "addicted to the use of narcotics" because it criminalized "status" of being addicted to narcotics).

criminalized, whereas possession of obscene material depicting adults is not.[56] Evidence of prior acts of child molestation is admissible against a criminal defendant where evidence of most other crimes would not be.[57] Convicted child abusers can be civilly committed after serving a complete prison sentence if they are determined to pose a continuing risk to society.[58] There is a general sense that pedophiles are potential criminals regardless of whether they have acted on their perverse inclinations.[59] Because the majority of people prosecuted under child pornography laws are pedophiles, these laws are broad in scope to ensnare as many pedophiles and potential child predators as possible. It is likely that minors prosecuted for child pornography are often collateral damage of the breadth of laws designed to target pedophiles. However, it is also possible that factors other than fear of pedophilia fuel these prosecutions.

American society is deeply uncomfortable with adolescent sexuality.[60] Although some parents accept that their children will engage or are already engaging in sexual activity, they do not like to be reminded.[61]

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56. Osborne v. Ohio, 495 U.S. 103, 109 (1990) (holding that it is constitutionally permissible to criminalize private possession of child pornography). *Cf.* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that criminalizing private possession of obscene materials infringed on adult individual's constitutional rights).

57. *See* FED. R. EVID. 414.

58. Kansas v. Hendricks, 521 U.S. 346 (1997).

59. *See* Survey Central, What is the Difference Between a Pedophile and a Child Molester?, http://surveycentral.org/survey/25285.html (last visited May 13, 2010) (including quotations from the public such as "there aint [sic] a difference they should both be put on a fast ride to hell" and "a pedophile is a future child molester," among others). This is despite the fact that recidivism rates for child victimizers and sex offenders are lower than the rate for non-sex offenders. *See* Bureau of Justice Statistics, Criminal Offenders Statistics, http://www.ojp.usdoj.gov/bjs/crimoff.htm (last visited May 13, 2009) (reporting that overall rearrest rate for sex offenders was 43% versus 68% for non-sex offenders; only 3.3% of child victimizers released from prison in 1994 were rearrested for another sex crime with a child within three years of release).

60. *See* STEVI JACKSON, CHILDHOOD AND SEXUALITY 49, 57, 105 (1982) ("The taboo that serves to keep sex hidden from children is one of the most powerful in modern society. . . . The desire to conceal sex from children reflects not only our ideas of what is good and bad for them, but also adult fears and anxieties about sexuality. . . . [W]e are anxious to avoid any meeting between sex and children—for us, the ultimate defilement. . . . Although adolescents are recognized as capable of and interested in sex, the possibility that they might realize their potential or act on their desires causes adults many misgivings."). *See also* FLOYD M. MARTINSON, THE SEXUAL LIFE OF CHILDREN 134–36 (1994) (discussing difference between Swedish and American attitudes towards childhood sexuality: "Beginning in the 1800s, U.S. society built a wall around children to protect their innocence and to protect them from their own sexual inclinations. Keeping children sexually innocent became firmly established and has continued to be a feature of American culture."); EMMA RENOLD, GIRLS, BOYS AND JUNIOR SEXUALITIES 1–2, 20–21 (2005) (discussing presumed innocence of children in sexual matters and unwillingness of adults to acknowledge childhood sexuality).

61. *See* Amy Schalet, *Must We Fear Adolescent Sexuality?*, 6 MEDSCAPE GEN. MED. 44 (2004) (quoting one parent as saying: "In a way it's better not to have it so blatant, to do things a little more secretively like I was raised. We were on the sly and in secret. It seems

American society is particularly troubled by physical evidence of teen or adolescent sexuality. As evidence of adult discomfort with images of adolescent sexuality, it is useful to look at the historical treatment of pregnant teens. Much like self-produced child pornography, pregnant teenagers are visual evidence of adolescent sexuality. Until as recently as the early 1970s, most school districts expelled pregnant and parenting students, or alternately put them in separate classes or schools to limit their interaction with the general student population.[62] School officials generally followed a "known or shows" rule, excluding girls when their pregnancy became visible or known in the school community.[63] Thus, girls were included and accepted until they became undeniable symbols of sexuality, indicating that the difficulty was with *images* of adolescent sexuality rather than with the fact that adolescents were sexually active. The boys who had impregnated the girls were treated much less harshly, no doubt in part because of sexist attitudes, but also in part because the "physical mark of pregnancy made girls easy targets for denouncement."[64]

School officials justified the policies of exclusion through the rationale of protection, claiming that full participation in classes might pose risks to the girls' health and safety.[65] Another rationale was the need to protect unwed pregnant teens from the harsh social judgments they would encounter in normal schools.[66] As part of this rhetoric of protection, the "pregnancy schools" where young expectant mothers were sent were initially conceived as "compassionate" alternatives for pregnant girls.[67] However, it is now generally acknowledged that these policies were based on moral condemnation of the girls for their sexuality and fear that the girls, as images of adolescent sexuality, would tempt other young people to become sexually active and other girls to become pregnant.[68] Even at the time, most people understood the exclusion of pregnant girls to be about creating stigma. As one court in 1971 explained:

> [The principal's] opinion is that the policy of the school committee might well be keyed to a desire on the part of the school committee not to appear to condone conduct on the part of unmarried students of a nature to cause pregnancy. The . . .

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a little better that way, rather than blatant in front of your parents about it.").

62. Madeline E. McNeeley, *Title IX and Equal Educational Access for Pregnant and Parenting Girls*, 22 WIS. WOMEN'S L.J. 267, 270–71 (2007).

63. *Id.* at 271. *See also* Tamara S. Ling, *Lifting Voices: Towards Equal Education for Pregnant and Parenting Students in New York City*, 29 FORDHAM URB. L.J. 2387, 2390 (2002).

64. Ling, *supra* note 63, at 2392–93.

65. *Id.* at 2391; McNeeley, *supra* note 62, at 271.

66. Ling, *supra* note 63, at 2396.

67. McNeeley, *supra* note 62, at 282.

68. Ling, *supra* note 63, at 2391; McNeeley, *supra* note 62, at 271.

> school has both junior and senior high school students in its student population; he finds the twelve-to-fourteen age group to be still flexible in their attitudes; they might be led to believe that the school authorities are condoning premarital relations if they were to allow girl students in plaintiff's situation to remain in school.[69]

Realization of the stigma caused by pregnancy schools has led many of them to be shut down.[70] Yet some bemoan the end of the stigma attached to teen pregnancy. As one writer states: "The old stigma, as difficult as it may have been for the individuals marked, was a socially efficient (not to mention inexpensive) means of preventing an outcome that virtually all agree is deeply undesirable."[71] This comment epitomizes the belief held by some adults that stigmatizing visibly sexually active children will benefit children as a whole.

A similar approach lies behind "abstinence-only" education, which teaches adolescents to abstain from sex until marriage and does not teach about condoms or other contraceptives. Such programs attempt to create a social stigma around adolescent sexuality and foster social pressure to be sexually pure and virginal. Abstinence-only education continues to be used despite its well-documented ineffectiveness at curtailing sexual activity or improving the sexual health of young people.[72] Abstinence-only education's continued use, as well as its emphasis on virginity pledges, demonstrates that adult society often prioritizes (just as in the pregnancy school context) eradicating images and references to adolescent sexuality and maintaining adult notions about the sexual purity of children.[73]

The *Ferber* Court believed that allowing child pornography to exist would enable the demand for child abuse to continue to exist.[74] However, images have been targeted for prosecution even when they do not depict actual child victimization.[75] If one acknowledges the uneasy relationship adults have with children's sexuality, it is easy to see why child

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69. Ordway v. Hargraves, 323 F. Supp. 1155, 1158 (D. Mass. 1971).

70. *See e.g.*, Julie Bosman, *Schools for Pregnant Girls, Relic of 1960s New York, Will Close*, N.Y. TIMES, May 24, 2007, at A1.

71. Mona Charen, *Pregnancy Schools*, CONSERVATIVE VOICE, May 25, 2007 (on file with author).

72. For evidence that abstinence-only programs do not improve teens' sexual health, see J. Dennis Fortenberry, Editorial, *The Limits of Abstinence-Only in Preventing Sexually Transmitted Infections*, 36 J. ADOLESCENT HEALTH 269, 269–70 (2005) (stating that abstinence-only sex education does a poor job of preventing infections and that sexually transmitted infections among young adults did not significantly differ according to whether or not a virginity pledge was made at some point during adolescence), *available at* http://www.gprhe.org/fortenberry.pdf.

73. *Id.*

74. New York v. Ferber, 458 U.S. 747, 759–60 (1982).

75. *See infra* Part II.C–D.

pornography, even when it consists of images created by the children depicted absent any adult coercion, is so often targeted by the law. Visual images of adolescent sexuality, particularly images in photographs, are problematic because they are indisputable evidence that adolescent sexuality exists. Photographs demonstrate the power of visual imagery and the extent to which viewers conflate the image depicted with its subject; to destroy the image is to destroy that which is depicted.[76] To allow the image to exist is to allow the subject to continue to exist.[77]

Photography as a medium is also threatening to those uncomfortable with adolescents expressing their sexuality insofar as photography tends to beautify and glorify its subjects and give them importance and value.[78] This makes photography particularly dangerous and also particularly vulnerable to attack by censors.[79] By capturing their sexuality or sexual conduct in photos, the minors prosecuted for child pornography have both provided evidence of their sexuality and given it beauty, or at the very least increased importance. Finally, photography has become a primary means of experiencing and participating in a phenomenon.[80] If images of adolescent sexuality are allowed, then there is a danger that the sexuality of the teen depicted will be accessible to and experienced by other teens through exposure to the image. Such exposure could arguably result in the destruction of the sexual innocence or purity of an entire class of children.

In *A.H.*, the majority held that the state of Florida had a compelling interest in ensuring that a video or photographic image depicting the sexual conduct of a child less than eighteen years of age is never produced.[81] The court did not go so far as to hold that the state could assert a compelling interest in the eradication of sexual conduct among minors. However, in rejecting A.H.'s challenge to the child pornography laws as applied to her, the court noted that it was not clear whether minors had a right to sexual intercourse.[82] Furthermore, the court denigrated the idea that A.H. could have a privacy right as it pertained to the photographs

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76. *See* SUSAN SONTAG, ON PHOTOGRAPHY 5, 16, 24 (Picador 2001) (1977).

77. *See id.*

78. *See id.* at 28 ("To photograph is to confer importance. There is probably no subject that cannot be beautified; moreover, there is no way to suppress the tendency inherent in all photographs to accord value to their subjects."). *See also id.* at 107 ("The best writing on photography has been by moralists—Marxists or would-be Marxists—hooked on photographs but troubled by the way photography inexorably beautifies.").

79. *See* Elaine Wang, *Equal Protection in the World of Art and Obscenity: The Art Photographer's Latent Struggle with Obscenity Standards in Contemporary America*, 9 VAND. J. ENT. & TECH. L. 113, 117–18 (2006).

80. *See* SONTAG, *supra* note 76, at 10 ("Photography has become one of the principal devices for experiencing something, for giving an appearance of participation.").

81. A.H. v. State, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007).

82. *Id.* at 236–37 ("Implicit in A.H.'s argument is that article I, section 23 protects a minor's right to have sexual intercourse . . . [but] the law relating to a minor's right of privacy to have sex with another minor is anything but clear.").

she and her boyfriend had taken of their intimate sexual conduct, stating:

> Neither had a reasonable expectation that the other would not show the photos to a third party. Minors who are involved in a sexual relationship, unlike adults who may be involved in a mature committed relationship, have no reasonable expectation that their relationship will continue and that the photographs will not be shared with others intentionally or unintentionally. . . . [A] number of teenagers want to let their friends know of their sexual prowess. *Pictures are excellent evidence of an individual's exploits*. . . . It is not unreasonable to assume that the immature relationship between the co-defendants would eventually end. The relationship has neither the sanctity of law nor the stability of maturity or length.[83]

The court voices a concern that these images of adolescent sexuality will be used in a way that the court is uncomfortable with: the teens might use the photos as evidence of their sexual prowess and sexual experience. This potential use of the images seems distasteful to the judges, who dismiss any autonomy interests possessed by the minors by repeatedly referring to their lack of maturity. The fact that the photos' use, as evidence of sexual prowess, could arguably be a means of self-expression is in no way acknowledged. The court's opinion evidences a desire to contain and limit adolescent sexuality, both in the court's refusal to acknowledge a minor's right to sex and in its denigration of the relationship between the two minors. Again, the subtext is that the photograph contains a dangerous power because it constitutes evidence that adolescent sexuality exists.[84]

Just like the school officials quoted in the historical accounts of pregnancy schools, the court seeks to justify its stigmatization of A.H. through a protective rationale, stating that "the statute was intended to protect minors . . . from their own lack of judgment"[85] and that "[m]ere

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83. *Id.* at 237–38 (emphasis added).

84. *See* SONTAG, *supra* note 76, at 5 ("Photographs furnish evidence. Something we hear about, but doubt, seems proven when we're shown a photograph of it. . . . A photograph passes for incontrovertible proof that a given thing happened. The picture may distort; but there is always a presumption that something exists, or did exist, which is like what's in the picture.").

85. *A.H.*, 949 So. 2d at 238. The court cited no specific legislative history indicating that child pornography laws were enacted to protect minors from their own lack of judgment. Generally speaking, child pornography laws are designed to protect minors from exploitation by adults. *See e.g.*, N.Y. Bill Jacket, 1996 S.B. 1638, Ch. 11, at 7 (justifying new law banning possession of obscene sexual performance by child: "There is a fundamental difference between pornography depicting adults, which must be proven obscene before it loses its protection, and pornography depicting a child, which is per se unprotected. Furthermore, child pornography should be treated in the same respect as other contraband which are illegal to produce, sell, purchase and possess. Permitting the possession of child

production of these videos or pictures may also result in psychological trauma to the teenagers involved."[86] In addition, the court cited potential damage the images could cause to the minors' reputations in the future.[87] However, as in the pregnancy schools context, it is clear that the prosecution was not motivated by a desire to protect the individual minors involved. A conviction for a sex crime will arguably cause more damage to A.H. and J.W.G.'s reputations than would their photos.[88] Furthermore, due to the prosecution, the images, the mere viewing of which is supposed to cause harm to the children depicted, were most likely seen by multiple law enforcement officials, lawyers, and judges.

The dissenting judge in *A.H.* notes that the statute "was designed to protect children from abuse by others, but it was used in this case to punish a child for her own mistake."[89] What the dissent fails to take into account is that the prosecution was motivated by a need not to protect A.H. herself, but to protect adolescents in general from the dangers of adolescent sexuality. According to the majority's reasoning, unless A.H.'s behavior is stigmatized and her peers are shielded from it, the evidence of A.H.'s sexuality presented in the photo might taint or corrupt the innocence of an entire class of children. The language of one Ohio prosecutor is even more direct than that of the *A.H.* court. After the prosecutor gave presentations at county middle and high schools warning about the consequences of nude self-portraits, one fifteen-year-old girl who "did not get [the] message" was charged with child pornography

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pornography is, in fact, extending permission to the sexual exploitation of children; after all, some child was indeed exploited in the production of such materials."). *See also* FLA. S. REP. NO. CS/SB 144 (2001) (noting, in approving new laws penalizing child pornography on internet: "A recent copy of *Newsweek* reported on the growing misuse of the Internet by persons sexually exploiting children . . . . According to *Newsweek*, pedophiles and child molesters have set up a number of web sites containing child pornography and invitations to exchange child pornography. Likewise, pedophiles and child molesters are using chat room and e-mail communication features of the Internet to contact and lure children into sexual exploitation . . . . In 2000, the U.S. Customs Service handled about 300 cases of child pornography transported across borders. The F.B.I. handled almost 3000 cases of 'online pedophilia' such as posting child pornography, or trying to lure minors to meet with the pedophile. The actual number of cases is likely to be much higher.") (on file with author).

86. *A.H.*, 949 So. 2d at 238.

87. *Id.*

88. In this case, A.H. technically received an adjudication as a juvenile delinquent instead of a criminal conviction because she was charged as a juvenile and not as an adult; however, the stigma of such a finding is similar to that of a criminal conviction. *See In re Gault*, 387 U.S. 1, 22–24 (1967) (discussing differences between the stigma associated with juvenile and adult criminal justice systems and stating, "[W]e are told that one of the important benefits of the special juvenile court procedures is that they avoid classifying the juvenile as a 'criminal.' The juvenile offender is now classed as a 'delinquent.' There is, of course, no reason why this should not continue. It is disconcerting, however, that this term has come to involve only slightly less stigma than the term 'criminal' applied to adults.").

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

crimes.[90] In a press release to the public about the prosecution, the prosecutor stated bluntly: "Hopefully others will learn a lesson from her situation."[91]

Both Catherine MacKinnon, arguing for censorship of pornography, and Mari Matsuda, arguing for criminalization of hate speech, have argued for restrictions on speech[92] because of its negative impact on the group it depicts.[93] Although the legal treatment of racial minorities and women is not perfectly analogous to the legal treatment of minors, the courts' treatment of these proposals is illustrative. In *American Booksellers Ass'n v. Hudnut*, the Seventh Circuit struck down as unconstitutional an Indianapolis ordinance prohibiting pornography, defined by Catherine MacKinnon as the "graphic sexually explicit subordination of women."[94] The court determined that the ordinance at issue, which prohibited pornography because it subordinated women, constituted content-based censorship and violated the First Amendment because it preferred images depicting sexual equality and regulated images showing the subordination of women.[95] The court disapproved of the ordinance's lack of an exception for works of literary, artistic, or political value.[96] In addition, the court argued that even if pornography did result in the subordination of women, that only demonstrated the power of pornography as speech.[97] The court noted that "[m]uch speech is dangerous,"[98] but reasoned that the Indianapolis City Council had no power to determine which thoughts were good for society or to limit speech with which it disagreed or found hateful.[99] Pornographic speech is protected, even if it can be demonstrated to cause great harm to women as a class; in fact, its power to harm and

90. Press Release, Kenneth Oswalt, Prosecuting Attorney of Licking County, Juvenile Charged with Illegal Use of a Minor 2 (Oct. 8, 2008), *available at* http://www.newarkadvocate.com/assets/pdf/BF119628108.PDF.

91. *Id.* at 3.

92. The word "speech" here is used in its broadest First Amendment sense to refer to all forms of expression, including photographs and other images.

93. *See generally* CATHARINE A. MACKINNON, ONLY WORDS (1993); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

94. Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324, 332 (7th Cir. 1985).

95. *Id.* at 325 ("The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way—in sexual encounters premised on equality—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. . . . The constitution forbids the state to declare one perspective right and silence opponents.").

96. *Id. Cf.* Miller v. California, 413 U.S. 15, 24 (1973) (creating exception in obscenity law for works of value).

97. *Hudnut*, 771 F.2d at 329.

98. *Id.* at 333.

99. *Id.* at 328, 330.

influence may be one of the qualities that merit the protection of adult pornography.

Child pornography law should not criminalize speech just because it arguably produces harm to a broad class of children through its ability to encourage criminal behavior.[100] As the Court stated in *Ashcroft*, "The prospect of crime . . . by itself does not justify laws suppressing protected speech. . . . Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech."[101]

II.
APPLYING EXISTING RATIONALES TO SPECIFIC PROSECUTIONS OF MINORS UNDER CHILD PORNOGRAPHY LAWS

Given the breadth of the laws regulating child pornography and the discomfort of American society with adolescent sexuality, it is not surprising that teens have been targeted for prosecution under child pornography laws.[102] However, because of the expansive list of behaviors covered by child pornography law, it is worthwhile to parse the spectrum of offenses and differentiate between cases where the rationales underlying child pornography law dictate prosecution and those where prosecution may not be justified at all.

As explained above, sexually explicit images of children are often understood by American society to harm children as a class by sexualizing them, whetting the sexual appetites of adults who view images of children, and increasing the likelihood of predatory sexual acts against children.[103]

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100. To the extent that child pornography does create harm by encouraging molestation, that harm falls almost entirely outside the scope of prosecuting minors for consensually recording themselves and their peers. Minors taking pictures of themselves are not pedophiles, nor are they significantly more likely to sexually victimize another child. *Cf.* Letter from Denise A. Cardman, Am. Bar Ass'n, to David J. Karp, Office of Legal Policy (Apr. 30, 2007) ("[S]ex offending in adolescence has limited correlation to adult sex offending (the number of false positives close to 90 percent)."), *available at* http://www.abanet.org/poladv/letters/crimlaw/2007apr30_adamwalsh_l.pdf.

101. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002) (citing Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 689 (1959) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech.")).

102. *See supra* text accompanying note 13. *See also, e.g.*, A.H. v. State, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007) (affirming delinquency adjudication of minor who photographed herself engaged in sexual conduct with her boyfriend); State v. A.R.S., 684 So. 2d 1383 (Fla. Dist. Ct. App. 1996) (affirming delinquency adjudication of minor who videotaped another minor where both were nude in sexual context).

103. *See Ashcroft*, 535 U.S. at 241–42, 244–51 (noting and rejecting Congress's rationale for regulating virtual child pornography: that child pornography "whet[s] the appetites" of pedophiles and increases sexual victimization of children). For an argument that the myriad laws prohibiting child pornography further motivate the creation of the

If one believes that sexually explicit images harm children by creating a culture in which children are increasingly sexualized and therefore increasingly sexually victimized, then it does not matter who the author of a given piece of child pornography is: it should all be censored. In such a worldview, photographs of child molestation *and* nude self-portraits of children sent on cell phones to friends both contribute to a climate that has an adverse impact on children as a class. If this is the case, then perhaps it would make sense not to differentiate, in the context of criminalization, between the two situations on the basis of how the images were produced.

However, this rationale for censorship is not one that the Supreme Court can currently consider. The Supreme Court and the Constitution have narrowed the permissible rationales for regulating sexual images of children to consist of: (1) preventing direct harm to children caused by the action depicted and capturing the image (the "direct harm rationale"), (2) preventing haunting harm caused by knowledge that an image of abuse exists (the "haunting harm rationale"), (3) drying up the market for child pornography (the "drying up the market rationale"), and (4) preventing pedophiles from using images of child pornography to lure other child victims (the "luring child victims rationale").[104] Given the spectrum of images of child sexuality, it is imperative to parse the contexts in which these images occur and apply the stated rationales to each situation with a critical eye.

A. Minors Prosecuted for Images of Their Own Criminal Acts with Child Victims

There are some contexts in which prosecution of minors is justified because it is tied directly to the first and second "harm" rationales. One of the most infamous cases in which teens were prosecuted for violating child pornography laws occurred in Werribee, Australia.[105] In that case, a group of male teens allegedly raped a female classmate, set her hair on fire, and urinated on her.[106] In addition to raping the girl, the group allegedly recorded the act on video and then distributed and sold copies of the DVD to her classmates.[107]

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pornography itself, see Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001).

104. The third and fourth rationales have been limited by *Ashcroft* to only apply to images where a child was used to make the regulated image. *See infra* Part I.A.

105. This is hardly the sole example of such horrific behavior. *See also Four Teens Charged in Taped Sex Attack on Girl*, RECORD (Ont., Can.), Mar. 7, 2007, at A3 (reporting incident where teens who videotaped their sexual assault of unconscious female classmate at her house were charged with sexual assault and manufacturing child pornography).

106. Anthony Dowsley, *Teens Charged Over DVD*, HERALD SUN (Austl.), Mar. 9, 2007, at 15.

107. *Id.*

In cases such as this one, the underlying sexual conduct depicted in the image is nonconsensual and criminal, not to mention particularly brutal, and there is a child who has clearly been victimized. Her victimization is intertwined with the creation of the images. The attack and rape of the girl was necessary to create the images that form the basis for the prosecution. Therefore, the direct harm rationale seems clearly to push for criminalization of the image and the act of its creation.

The haunting harm rationale provides further support for criminalizing such images. The image from the Werribee incident was disseminated to other teens at the victim's school, and like the sex act itself, the distribution occurred without the victim's consent. The image not only depicted an act where a child was harmed, but it was likely to harm her in the future, given its haunting effect and its potential to re-victimize her since it was released to a broad audience without her consent. Thus, both of *Ferber*'s child-protective rationales clearly support prosecution and exemption of this speech from First Amendment protection.

In terms of the rationale of drying up the market for child pornography, given the alleged distribution of the video after the attack, it seems possible that the image (and attack) were motivated in some part by the demand for this type of pornography. If that is the case, it follows that prosecuting the creators and consumers of the image might dampen the demand for these images and deter future attacks, providing another justification for prosecution.

Finally, the video could potentially be used to groom other children and lure them into subjecting themselves to the same treatment as that of the alleged victim. Given that the alleged treatment of the victim in this case was so heinous, prosecution is further supported by this rationale.

B. Minors Prosecuted for Consumption of Child Pornography That Was Produced by Someone Else

Increasingly, children are being arrested for downloading images of child pornography off the internet, often through peer-to-peer networks.[108] Ultimately, the rationales in *Ferber* support such prosecutions, but it is worthwhile to look at the differences in prosecuting a child and an adult

108. *See, e.g.*, *Kids Viewing Child Porn*, N. TERRITORY NEWS, July 8, 2005, at 11 (including statement by police that twelve percent of those charged with viewing child pornography are under eighteen; while this statistic might be particular to one precinct or to Australia more generally, it is reasonable to assume that some portion of people viewing child pornography in United States are minors as well); Mary Zahn, *Child Porn Sting Snares Children: Four Juveniles Charged This Year After Police Track Down Downloads*, MILWAUKEE J. SENTINEL ONLINE, Sept. 18, 2006, http://www.jsonline.com/story/index.aspx?id=498915 (reporting on case where four teens were arrested for downloading child pornography after police sting operation).

for consuming commercial child pornography.

Neither adults nor minors prosecuted in this context are complicit, in the traditional sense of being physically present or actively involved, in the actual harm to the child that is captured in the image. Thus, the direct harm rationale might seem not to apply in this instance. However, in one case where minors were prosecuted for downloading child pornography, a prosecutor noted: "'This is not virtual pornography . . . . These cases involve real children who have been horribly victimized. Every time someone downloads these images, it is further victimization of that child.'"[109] If the "haunting harm" rationale in *Ferber* is to be taken seriously, then the child in the image is being victimized, as the prosecutor notes, each time the image is downloaded. The idea of "haunting harm" is that so long as an image depicting the victimization still exists, the threat of future psychological re-victimization is always present. A victim suffers psychologically due to the knowledge that, at any moment, another pedophile could be looking at the image depicting her victimization. In addition, a victim could suffer if she discovers the image and is reminded of the fact of her abuse.

Arguably, there is a qualitative difference when a sexually provocative image of a child is viewed by an adult and when such an image is viewed by another child. Adolescents have a natural curiosity about the sexual activity of their peers.[110] This curiosity is easy to distinguish from the inclinations of a pedophile. Even prosecutors have noted that teen viewers might not have the same motives or present the same dangers as adults seeking child pornography.[111]

Although reminding children (or any victim) of sexually-based crimes can be re-victimizing, victims have no absolute right to bar speech that will re-victimize them.[112] In *Florida Star v. B.J.F.*, a rape victim sued a newspaper for publishing her name in connection with a story about her rape.[113] The Court held that the newspaper had a First Amendment right to publish the victim's name notwithstanding the negative consequences it would have on her.[114] If a court can deny even civil damages based on the concept of re-victimization through speech, then it seems problematic that

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109. Zahn, *supra* note 108.

110. *Id.* (noting that, according to psychologist Stephen Gilbertson, "adolescent boys are curious about sex involving their own peers"). *See also* RENOLD, *supra* note 60, at 95 (discussing adolescent girls' fascination with discussing dating dynamics of peers and "celebrity couple" status achieved by popular adolescents who were "regular participants in their local boyfriend/girlfriend network").

111. Zahn, *supra* note 108.

112. *See* Fla. Star v. B.J.F., 491 U.S. 524, 526 (1989) (holding that Florida statute prohibiting newspapers from publishing names of rape victims violated First Amendment).

113. *Id.* at 526–29.

114. *Id.*

the re-victimization rhetoric can be used to criminally prosecute minors for viewing sexual conduct of their peers, even if the images do depict criminal acts. Although *Ferber*'s rhetoric of "haunting harm" sounds compelling at first, its potency is diminished with the realization that there is no criminal prohibition on taking or possessing images of other violent crimes like adult rape, murder, or assault.[115] Normally, crimes themselves are prosecuted, not the photographic evidence of those crimes.[116]

The weakness of the "haunting harm" rationale is especially apparent in the context of the prosecution of minors. As psychologist Stephen Gilbertson explains, "[i]n the past, . . . children resolved their curiosity by looking at *Playboy* magazine," but now they look for images of their peers online, and the consequences can be felony charges. "[T]hese kids are not sex offenders in the traditional sense and should not be thrown in with groups of children who have actually performed sexual assaults."[117] Because of these qualitative differences, the haunting harm rationale should not be a legal basis for restrictions on child pornography and prosecution of minors in this context.

In contrast, the drying up the market rationale does justify the prosecution of children for consuming child pornography produced by a third party because children consuming child pornography do create an increased market demand. They add to the economic incentive for child pornographers to produce more material, potentially harming more children in that production.

According to the luring child victims rationale, images of children engaged in sexual activity can be used to entice future child victims into engaging in sexual activity or participating in the production of child pornography. As images of child pornography circulate to child consumers, these consumers can potentially be lured into future acts of sexual activity with adults or into producing child pornography. However, once there is an adult participant, it would be the adult co-participant, rather than the child accomplice, who would be prosecuted.[118] Generally, however, the luring other children rationale is concerned with the offender using images of child pornography to lure other children into involvement with the production of child pornography or sexual conduct. This concern

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115. Obviously, if the images meet the legal definition of obscenity under the *Miller* test, the production of the images could be prosecuted, but the possession of the images could not be prosecuted according to the holding in *Osborne*. *See supra* Part I.A–B.

116. *See, e.g.*, United States v. Stevens, No. 08-769, 2010 U.S. LEXIS 3478 (Apr. 20, 2010) (holding that 18 U.S.C. § 48, which criminalizes the commercial creation, sale, or possession of certain depictions of animal cruelty, was substantially overbroad and therefore invalid under the First Amendment).

117. Zahn, *supra* note 108.

118. *See, e.g.*, MODEL PENAL CODE § 2.06(6)(a) (2001) (exempting victims of crime from accomplice liability for that same crime).

might extend to a fear that teen downloaders might use the images they download to convince other teens or children to engage in the production of child pornography or other sexual conduct. Though this concern is real, it seems only tenuously related to the initial concern that sexually predatory adults would use images to lure children into participating in sex acts that victimize them.

C. Minors Prosecuted for Images Taken or Distributed Without the Consent of the Child Depicted in the Image

In some cases, minors have been prosecuted for possession of child pornography or related crimes when they take or distribute photographs of other children engaged in consensual sexual conduct without the consent of the child depicted.[119] In one case, Ryan Zylstra, a seventeen-year-old boy, was prosecuted after he photographed two peers having sex.[120] After posting the photos to his blog, he was arrested and charged with felonies carrying sentences of up to twenty years.[121] In another case, a sixteen-year-old boy shared pictures he took of his ex-girlfriend; the images had been taken with her consent but were disseminated without her consent.[122]

Nonconsensual disclosure harms the teens depicted because sharing the image on the internet is a gross violation of their privacy. However, the action depicted in the image is consensual sexual conduct regardless of where the images are displayed. As such, the primary rationales in *Ferber* are hard to apply to this situation. If there is not an initial sexual victimization, the direct harm rationale cannot apply; furthermore, the teens depicted cannot be re-victimized every time the image is displayed, as is predicted by the haunting harm rationale. Although the knowledge that sexually suggestive or private images of oneself exist on the internet is certainly troubling, and although the images may cause damage to one's reputation, no criminal recourse for this violation of privacy exists where adults are depicted.[123] In fact, the law's lack of control over an individual's

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119. *See, e.g., Fox Valley in Sixty Seconds: Teens Deny Eavesdropping*, CHI. DAILY HERALD, May 16, 2007, at 3 (reporting on incident where two seventeen-year-old boys secretly videotaped female peer engaged in sexual conduct and were charged with eavesdropping felonies); *Blog Prank Leads to Child Porn Charge*, 6ABC.COM, Mar. 29, 2006, http://abclocal.go.com/wpvi/story?section=news/technology&id=4034897.

120. Wendy Davis, *Teens' Online Postings Are New Tool for Police*, BOSTON GLOBE, May 15, 2006, at A1; *Blog Prank Leads to Child Porn Charge, supra* note 119.

121. *Blog Prank Leads to Child Porn Charge, supra* note 119.

122. State v. Vezzoni, No. 22361-2-III, 2005 Wash. App. LEXIS 864, at *1 (Wash. Ct. App. Apr. 28, 2005).

123. *See* Doug Cunningham, *Green Wants to Stop Posting of Nude Photos on Net Without Permission* (Wis. Radio Network broadcast Oct. 26, 2000) (discussing federal bill proposing to criminalize posting nude photos of people on web without their permission). The subjects of photographs, videotapes, and other representations have a right of publicity interest, but the enforcement of this right is dealt with in the civil system. *See, e.g.*, Sperry

online image has created a new industry of services that will monitor the online image of paying customers.[124] As with the adult context, civil penalties rather than juvenile delinquency adjudications or criminal convictions may provide a better way to handle the situation of one minor posting images of her consensual sexual contact with another minor.

If non-consensually disclosed images are shared or disseminated for profit, the drying up the market rationale might also apply to these images. However, the market rationale is complicated to apply. In the case of virtual pornography, there is debate over whether the images, which are produced without a child victim, fuel the market for child pornography by lessening the stigma associated with child pornography and whetting the appetites of pedophiles, or in fact decrease the demand to exploit children by creating an adequate market substitute for child pornography.[125] If non-consensually distributed images of consensual conduct serve as a market substitute for images that depict an initial victimization then, arguably, the market rationale would not necessarily dictate identical treatment of these two types of images. In addition, though these images could be used to lure other children into sexual acts, there are more narrowly tailored means to prosecute such actions, namely prosecuting the individuals who try to lure children themselves.

D. Minors Prosecuted for Producing or Possessing Images of Themselves

There are many examples of situations in which minors are charged or prosecuted for possessing or producing nude or sexually explicit images of themselves.[126] Minors have produced images or posted them online for a wide variety of reasons—from economic ends to purely self-expressive reasons—although newspaper articles and the law rarely acknowledge such fine-tuned distinctions. However, there seems to be a great deal of

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& Hutchinson Co. v. Rhodes, 220 U.S. 502 (1911) (affirming award of one thousand dollars to woman whose photograph had been used for advertising without her consent in violation of state law).

124. *See, e.g.*, Reputation Defender, MyChild, http://www.reputationdefender.com/mychild (last visited May 13, 2009) (advertising online reputation services to parents for their children).

125. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 254 (2002).

126. *See, e.g.*, *13-Year-Old Faces Child Pornography Rap*, UPI.COM, Oct. 15, 2004, http://www.upi.com/Top_News/2004/10/15/13-year-old-faces-child-pornography-rap/UPI-51111097881716 (discussing thirteen-year-old who was arrested after posting nude photos of himself and who had downloaded other child pornography over internet); *Girl Charged with Posting Nude Photos on Internet*, PITTSBURGH TRIB.-REV., Mar. 27, 2004, http://www.pittsburghlive.com/x/pittsburghtrib/s_186625.html (discussing the arrest of a fifteen-year-old girl for allegedly posting nude images of herself on the internet); *Two Teens Face Child Pornography Charges*, SOUTHCOASTTODAY.COM, Mar. 29, 2006, http://archive.southcoasttoday.com/daily/03-06/03-30-06/10state-region.htm (reporting that sixteen-year-old girl and nineteen-year-old girl were arrested for posting sexually explicit images of themselves online).

difference between the child pornography produced by Justin Berry, who for five years operated a pornographic website where he was paid by adult men to strip naked and masturbate while on camera,[127] and the unsolicited picture messaging of a minor's bare breasts to a peer on a cell phone.[128] In Justin Berry's situation, the images were created at the suggestion of adults and for economic gain. There are valid reasons for criminalizing this sort of conduct, given its close ties to the market for child pornography.[129] However, it is absurd to consider a simple picture message to a peer a felony.

To assume that all sexual self-expression among adolescents is harmful exploitation—that would therefore trigger the direct harm and haunting harm rationales—denies adolescents sexual autonomy. For example, in *United States v. Dost*, the district court judge stated: "Because of the sexual innocence of children, that which constitutes a 'lascivious exhibition' of a child's genitals will be different from that of a 'lascivious or lewd exhibition' of an adult's genitals. . . . Sexual coyness is an expression outside the young child's range of experience."[130] The court then went on to list factors relevant to whether an image met the standard for child pornography, including whether "the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child" and "whether the visual depiction is intended or designed to elicit a sexual response in the viewer."[131] Applying its own test, the court went into a detailed analysis of the images at issue in the case. After describing the poses of a subject in one of the photos, the court noted:

> What strikes the Court most strongly, however, is the unusual pose of this girl. The average 10-year-old child sitting on the beach, especially when unclothed, does not sit with her legs positioned in such a manner. This unusual pose is one that an ordinary child would not normally assume but for adult

127. *Sexual Exploitation of Children over the Internet: What Parents, Kids and Congress Need to Know About Child Predators: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 109th Cong. 68 (2006) (testimony of Justin Berry).

128. *See, e.g.*, Gary Detman, *Police Seek to Zap Porn Pictures of Girls Sent to Students*, FIRST COAST NEWS (Jacksonville, Fla.), Jan. 24, 2008, http://www.firstcoastnews.com/news/news-article.aspx?storyid=100743 (describing situation where at least forty students at one high school in Allentown, Pennsylvania, received pornographic video and photos of two girls transmitted by cell phones); *Naked Cell Phone Pics of Utah Teens Targeted by Attorneys*, CONNECT2UTAH.COM, Mar. 2, 2008, http://connect2utah.com/common/printerfriendly.php?cid=34303 (discussing junior high students in Farmington, Utah, trading nude self portraits through their cell phones).

129. However, prosecuting the adults involved and exempting the minors from prosecution seems more consistent with the rationales for exempting child pornography from First Amendment protection.

130. United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986).

131. *Id.*

coaching . . . .[132]

In assessing the pose of the girl, the court assumes that any sexuality visible in the picture must have been imposed on the girl by an adult coach. Such an assumption negates the possibility of a child or adolescent expressing her own sexuality and is premised on an idea of the sexual innocence and purity of children. Although such an assumption may be legitimate for the particular subject in the *Dost* case, it may not be valid when applied to older children or children who are taking pictures of themselves without an adult's involvement.

In *A.H.*, the subject was prosecuted for child pornography crimes after she documented a private sexual moment with her boyfriend.[133] The image therefore does not document a moment of exploitation, and thus, there was no initial harm to A.H.; there is also no initial harm to other similarly-situated children. Furthermore, no haunting harm occurs afterwards, especially if, as in the case of A.H., the images are not distributed to anyone else.[134] It is possible that an adolescent may regret a decision either to engage in sexual activity or to photograph such activity. However, the same can be said for an adult in a similar situation, and criminal sanction is an unduly harsh remedy for such a problem.

In cases of self-produced child pornography, there is always a risk that the images will get out into the market and be consumed by pedophiles.[135] Thus, the drying up the market rationale would seem to call for criminalization of the production of these images. However, once the photos are consumed by adult pedophiles, there is someone to prosecute besides the minor producing the image: the adult who now possesses it.[136] Similarly, if consumers of these images use them to lure children into consenting to sexually predatory acts, the consumers themselves can be prosecuted for their actions.[137]

Though the judicially-approved rationales for exempting child pornography do warrant prosecution in some cases, the justifications

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132. *Id.* at 833.

133. A.H. v. State, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).

134. *Id.* at 235.

135. *See id.* at 237 (noting that one motive for revealing photos is profit because the market for child pornography is flourishing).

136. Interestingly, when minors are prosecuted for self-portraits, there is often no indication that the images have traveled onto the internet to be consumed by adult pedophiles. For example, the prosecutor in Licking County, Ohio, stated that in all of the twenty child pornography cases that his office had investigated, there was no indication that the images had been posted online or consumed by adults; there was only evidence that the images had been widely disseminated amongst the school population. Telephone Interview with Kenneth Oswalt, Prosecuting Attorney of Licking County, Ohio (Jan. 6, 2009).

137. *See, e.g.*, United States v. Hofus, No. 09-10076, 2010 U.S. App. LEXIS 5700 (9th Cir. Mar. 19, 2010) (affirming conviction of adult who tried to blackmail teens who had "sexted" images of themselves into having sex with him).

supporting prosecution of minors for images depicting consensual sex acts or for producing or possessing images of themselves seem comparably weak. These justifications must be weighed against countervailing concerns to assess whether these classes of child pornography should continue to be exempt from First Amendment protection.

III.
CHALLENGES TO THE PROSECUTION OF MINORS FOR PRODUCING OR POSSESSING IMAGES OF THEMSELVES

The law of child pornography seems to grow increasingly expansive and punitive in response to escalating public demands.[138] As the net of child pornography law expands, minors are ever more likely to become ensnared. Child pornography is a serious problem that needs to be addressed. However, there are sound constitutional and statutory arguments against prosecuting minors for child pornography in certain instances, particularly in cases when minors possess or produce images of themselves.

A. Constitutional Arguments: The First Amendment and Substantive Due Process Privacy Rights

Strong privacy rights and First Amendment rights are at play when minors are prosecuted for the possession and production of images depicting adolescent sexuality. The Supreme Court has stated clearly that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[139] Although the rights of minors are not identical to the rights of adults[140] and the state has a role in the regulation of children as parens patriae that it does not have vis-à-vis adults,[141] minors still have valid constitutional rights that must be protected. In addition, most of the "children" prosecuted under child pornography statutes are older

138. *See generally* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223 (2007) ("The politics of crime are perennially perverse: the electorate demands that legislatures enact more crimes and tougher sentences, and no interest groups or countervailing political forces lobby against those preferences. The political process of criminal law legislation is, as several leading scholars have characterized it, a 'one-way ratchet.' Criminal codes expand but don't contract. The result is ever-expanding codes that have moved us 'ever closer to a world in which the law on the books makes everyone a felon.'" (quoting William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509, 511, 547 (2001))).

139. *In re* Gault, 387 U.S. 1, 13 (1967).

140. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968) (allowing differing obscenity standards for material purchased by those under seventeen versus those over seventeen years of age).

141. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("[T]he state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.").

adolescents between fourteen and eighteen years of age, a point when their liberty and privacy interests should be most akin to those of adults.[142]

1. First Amendment Arguments

The threat of child pornography prosecution chills minors' sexual self-expression and can therefore be viewed as content-based censorship.[143] The First Amendment protects speech that includes sexually explicit imagery of adults, so long as it does not constitute obscenity.[144] *Ferber* held that states have more leeway to regulate child pornography, even when it does not constitute obscenity, because of the state's interest in protecting the well-being of children.[145] But if this greater leeway due to the protective rationale is accepted unquestioningly, then *any* sexually explicit self-expression of a minor could be censored by the imposition or threat of criminal or criminal-like sanctions.[146] Such a result denies minors access to an entire area of self-expression—one that is particularly relevant as they mature into adults.[147] As Susan Sontag explains: "To photograph is to appropriate the thing photographed. It means putting oneself into a certain relation to the world that feels like knowledge—and, therefore, like power."[148] Giving a minor the right to produce images of adolescent

142. Article 5 of the Convention on the Rights of the Child references the "evolving capacities" of a child: as a child develops increased capacity, the child's rights develop and grow as well. Convention on the Rights of the Child, G.A. Res. 44/25, art. 5, U.N. Doc. A/Res/44/25 (Nov. 20, 1989). The evolving capacities approach is useful when discussing adolescent rights, especially when discussing the liberty interests of children and the rights of children relating to sexuality. However, the United States is one of only two countries that have not ratified the convention. *See* Unite for Children, UNICEF, Convention on the Rights of the Child, Path to the Convention on the Rights of the Child, http://www.unicef.org/crc/index_30197.html (last visited May 13, 2009).

143. *See* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324, 327–32 (7th Cir. 1985) (discussing content-based and viewpoint-based censorship in context of Catharine MacKinnon-inspired anti-pornography ordinance, which defined pornography as the "graphic sexually explicit subordination of women").

144. *See* Miller v. California, 413 U.S. 15 (1973).

145. New York v. Ferber, 458 U.S. 747 (1982).

146. *See supra* text accompanying note 15 (noting that in some states children could be considered minors for the purposes of child pornography laws, but could be considered adults for the purposes of criminal prosecution; juvenile delinquency proceedings, while technically civil in nature, are similar to criminal proceedings in that the minor faces a loss of liberty).

147. The Third Circuit recently declined to decide whether minors have a First Amendment right to sexual images of themselves but affirmed a district court injunction against the prosecution of two teens for possessing sexual images of themselves on other grounds. Miller v. Mitchell, No. 09-2144, 2010 U.S. App. LEXIS 5501 (3d Cir. Mar. 17, 2010) (affirming injunction based on due process right of parents to control their children's education and minors' First Amendment right against compelled speech where district attorney threatened to prosecute teens who declined to participate in an educational program counseling against sexting and other sexual expression).

148. SONTAG, *supra* note 76, at 4.

sexuality gives the minor power over her sexuality. Instead of being simply the object of the adult pedophilic gaze, a photograph can empower the minor to express and autonomously claim her sexuality on her own terms.

Given the American obsession and unease with adolescent sexuality, denying minors the ability to participate in the conversation about and construction of adolescent sexuality is especially troubling. Adult control over children's self-portraits via criminal law reinforces the view that children's sexuality is the property of adults and diminishes child agency.[149] During the beginning of the AIDS epidemic, which coincided with the Culture Wars of the late 1980s and early 1990s, David Wojnarowicz, a gay artist, spoke of the power of seeing one's self and one's sexuality in images:

> It is a standard practice to make invisible any kind of sexual imaging other than white straight male erotic fantasies . . . . So people have found it necessary to define their sexuality in images, in photographs and drawings and movies in order to not disappear. . . . Sexuality defined in images gives me comfort in a hostile world. They give me strength. . . . They need not be representations of my private experiences—they can be the experiences of and by others that merely come close to my own or else disrupt the generic representations that have come to be the norm in the various medias outside my door.[150]

The experiences of a gay man during the AIDS epidemic and that of a child in the current era are markedly different, but they share the experience of having society try to eradicate any evidence of their entire demographic's sexuality. Child pornography laws attempt to eradicate evidence of children's sexual victimization, but they also succeed in obliterating any evidence of adolescent sexual autonomy when they target works created by minors that do not depict criminal acts or victimization.

Teens receive conflicting messages about adolescent sexuality from the adult world.[151] Adults can create works that seem to portray adolescent

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149. *See, e.g.*, RENOLD, *supra* note 60, at 22 (discussing law regulating adolescent sexuality in the United Kingdom and noting that "[s]exuality is reinscribed as the property of the adult where adult power erases any notion of children's sexual agency in matters of consent and sexuality rights more widely"). For example, in the Licking County case, "the section of the law the girl . . . was charged with allows parents or guardians to take photos of their unclothed children for a list of acceptable purposes but does not provide an exemption for the child themselves." Russ Zimmer, NEWARKADVOCATE.COM, *Hottinger: Law Didn't Anticipate Cell Phone Photo Case* (Oct. 8, 2008), http://www.newarkadvocate.com/article/20081008/NEWS01/810080302.

150. David Wojnarowicz, *Post Cards from America: X-Rays from Hell*, *in* WITNESSES: AGAINST OUR VANISHING 6, 10 (Nan Goldin ed., 1989).

151. *See, e.g.*, CNN.COM, Entertainment, *Photographer Defends Miley Cyrus Photo* (Apr. 28, 2008), http://www.cnn.com/2008/SHOWBIZ/Music/04/28/cyrus.photos/index.html ?iref=nextin (discussing fifteen-year-old star Miley Cyrus's photo shoot with Annie Liebovitz for Vanity Fair, where Cyrus was "topless . . . clutching a blanket to her chest").

sexuality by using younger looking actors; in fact, doing so is within their First Amendment rights.[152] Many popular television shows and mainstream films portray teenage characters who are sexually active and even sometimes sex-obsessed.[153] Yet at the same time many school districts limit teens' sex education to the abstinence-only framework.[154] In *Ashcroft*, the Court observed that the age of consent is sixteen or younger in thirty-nine states and that sixteen-year-olds are allowed to marry with parental permission in forty-eight states.[155] However, the state laws defining child pornography or sexual performance of a child often cover images of children up to the age of eighteen.[156] Again, there is a disconnect between community standards regarding the sexual conduct of adolescents and the laws regulating child pornography. Pictures of what appear to be seventeen-year-olds engaging in sexually explicit activity do not in every case contravene community standards[157] and thus do not always fall within the category of obscenity.[158] In addition, if the standards for child pornography produced by minors were aligned with the standards for obscenity, then, even if the images offended community standards, they would merit First Amendment protection if they possessed serious literary, artistic, political, or scientific value.[159] Prosecuting minors for child pornography violations without making the fine-tuned distinctions

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The photo was attacked by critics as commercially exploitative of Cyrus's sexuality. Acknowledging that the image will garner attention and profit indicates the complex and sometimes schizophrenic nature of some adults' relationship with teen sexuality. Adults are interested enough in teen sexuality that the photo will be profitable but troubled enough that the photo will be denounced as exploitative.

152. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 251 (2002).

153. *See, e.g., id.* at 247–48 (mentioning *Traffic* and *American Beauty* and alluding to "hundreds of [other films] of lesser note that explore" lives of youth and contain graphic depictions of sexual activity).

154. *See* GUTTMACHER INST., FACTS ON SEX EDUCATION IN THE UNITED STATES (2006) ("[M]ore than one in five adolescents (21% of females and 24% of males) received abstinence education without receiving instruction about birth control . . . ."), *available at* http://www.guttmacher.org/pubs/fb_sexEd2006.html; Rob Stein, *Abstinence Programs Face Rejection: More States Opt to Turn Down the Federal Money Attached to That Kind of Sex Ed*, WASH. POST, Dec. 16, 2007, at A3 (stating that Congress spent $176 million on abstinence programs in 2007).

155. *Ashcroft*, 535 U.S. at 247.

156. *See, e.g.*, CAL. PENAL CODE § 311.1 (West 2008) (defining age of child depicted for child-pornography-related offenses as under eighteen); COLO. REV. STAT. ANN. § 18-6-403 (West 2008) (same); FLA. STAT. ANN. § 827.071 (West 2008) (same); 720 ILL. COMP. STAT. ANN. 5/11-20.1 (West 2008) (same); MASS. GEN. LAWS ANN. ch. 272, § 29A (West 2008) (same); MICH. COMP. LAWS ANN. § 750.145c (West 2008) (same); UTAH CODE ANN. § 76-5a-2 (West 2007) (same).

157. *Ashcroft*, 535 U.S. at 235.

158. *See* Miller v. California, 413 U.S. 15, 24 (1973) (listing as factor in definition of obscenity "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest" (internal quotation marks omitted)).

159. *Id.*

necessary to convict an adult of an obscenity violation infringes on the free speech rights of minors.

In recent years, the internet has become a place for teens to assemble and form communities.[160] These communities are especially valuable to teens who belong to marginalized groups, such as some lesbian, gay, bisexual, and transgender (LGBT) teens. In rural and suburban communities, LGBT teens often feel isolated and seek out information and peers online.[161] LGBT young people meet each other online and sometimes post pictures that are designed in part to be sexually attractive to other young people. These teens are exploring their sexual identities in the safer environment of internet chat rooms because expression of their sexual identities at school or at home might incite violence or harassment.[162] Given that child pornography has been interpreted to include images that do not depict nudity,[163] the over-breadth of child pornography law could have a substantial chilling effect on the right of teens to online speech. One of the goals of child pornography law is to shut down online communities of pedophiles, but when child pornography law is used bluntly and without nuance, these laws can end up shutting down communities created by children for their own benefit.

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160. *See, e.g.*, Debbie Cafazzo, *Online and on the Defensive*, NEWS TRIB. (Tacoma, Wash.), Apr. 25, 2008, at E1 (discussing how teens are increasingly communicating online, even with peers at school, and how they are able to keep in touch with classmates who have moved away by using online chat sites and swapping pictures online); Christina Pillsbury, Letter to the Editor, *Does Internet Overuse Cause Social Ineptness?*, KALAMAZOO GAZETTE, Apr. 26, 2008 (mentioning how teens are using the internet to debate political issues, such as Facebook groups that discuss topics like the genocide in Darfur and social inequality).

161. *See, e.g.*, Alissa Quart, *When Girls Will Be Boys*, N.Y. TIMES, Mar. 16, 2008, Magazine Section, at 32 (writing about young transgender man: "Then he took a typical step for someone going to high school in the first years of the century. He went home and typed 'transgender' into Google. . . . Rey spent hours online reading about transgendered people and their lives. 'The Internet is the best thing for trans people,' he said. 'Living in the suburbs, online groups were an access point.'").

162. *See, e.g.*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK & HARRIS INTERACTIVE, FROM TEASING TO TORMENT: SCHOOL CLIMATE IN AMERICA, A SURVEY OF STUDENTS AND TEACHERS 7 (2005) (finding that ninety percent of LGBT teens reported being harassed or assaulted during past year); LAMBDA LEGAL DEF. & EDUC. FUND, YOUTH IN THE MARGINS: A REPORT ON THE UNMET NEEDS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ADOLESCENTS IN FOSTER CARE 11 (2001) (reporting that thirty-three percent of gay male youths and thirty-four percent of lesbian youths reported suffering physical violence at hands of family member as result of their sexual orientation, and that twenty-six percent of gay adolescent males were forced to leave home when they disclosed their sexual identity as a result of their parents' negative reactions). Transgender teens might be interested in seeing pictures of the chest area or breasts before or after hormone treatment and surgery for informational purposes. *See, e.g.*, Quart, *supra* note 161.

163. *See* United States v. Knox, 32 F.3d 733, 737 (3d Cir. 1994).

2. Substantive Due Process Arguments

Besides raising First Amendment concerns, some prosecutions of minors for child pornography threaten to erode minors' substantive due process right to privacy. The Supreme Court first recognized a right to privacy in *Griswold v. Connecticut*, finding that the right existed in the "penumbras" of the explicit guarantees in the Bill of Rights.[164] The Court specified in *Eisenstadt v. Baird* that the right to privacy is not limited to married couples,[165] and in *Roe v. Wade*, it reaffirmed the right to privacy.[166] In *Carey v. Population Services International*, the Supreme Court struck down a New York statute prohibiting the distribution of contraceptives to minors, thereby extending the concept of privacy and sexual autonomy to minors.[167] Although minors do not have a fundamental right to engage in child pornography, Justice Kennedy's opinion for the Court in *Lawrence v. Texas* cautioned that the liberty interests at stake in substantive due process cases should not be defined too narrowly.[168] Kennedy stated, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[169] The right to be let alone, so often cited in privacy and substantive due process cases, cries out against prosecutions like that in *A.H.*, where minors were engaged in private intimate conduct that they photographed and shared with no one else.[170]

Although, concededly, *Lawrence* itself states that the case "does not involve minors," parallels exist between the statute at issue in *Lawrence* and the one in *A.H.*[171] As the *Lawrence* court explained:

> [These are] statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior . . . . The statutes do seek to

164. Griswold v. Connecticut, 381 U.S. 479, 483–85 (1965).

165. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (explaining that right to privacy belongs to individuals, not to couples as entities).

166. Roe v. Wade, 410 U.S. 113 (1973). *Roe* was reaffirmed more recently in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.").

167. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

168. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

169. *Id.* at 562.

170. *See, e.g.*, Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting) ("The right to be let alone is indeed the beginning of all freedom."); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.").

171. *Lawrence*, 539 U.S. at 578.

> control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.[172]

The Court was concerned not only about the punishment in question in *Lawrence*, which was much less severe than the punishment faced by minors prosecuted for child pornography, but about the stigmatizing effects of the law.[173] Branding sexually active minors who seek to memorialize their private intimate conduct as criminals delegitimizes the relationships and sexual autonomy of adolescents. In fact, when the court rejected A.H.'s appeal based on her right to privacy, it made a point of belittling the relationships of minors, pointing out that they were immature and necessarily unstable.[174] Similar charges of instability have also been leveled at the relationships of same-sex couples to deny them the substantive due process rights granted to opposite-sex couples.[175]

If the instability or lack of maturity of the parties were enough to abrogate an individual's right to privacy, it is difficult to see where the Court could draw a logical stopping point. The right to contraceptives for married and unmarried adults is not premised on their maturity, but on their right to be free or let alone from government interference in private and intimate matters.[176] It seems likely that *A.H.* is not a common fact

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172. *Id.* at 567.

173. *Id.* at 575 ("The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions."). *See also id.* at 581 (O'Connor, J., concurring) ("[T]he effect of Texas' sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else.").

174. A.H. v. State, 949 So. 2d 234, 237 (Fla. Dist. Ct. App. 2007) ("Neither had a reasonable expectation that the other would not show the photos to a third party. Minors who are involved in a sexual relationship, unlike adults who may be involved in a mature committed relationship, have no reasonable expectation that their relationship will continue .... It is not unreasonable to assume that the immature relationship between the co-defendants would eventually end. The relationship has neither the sanctity of law nor the stability of maturity or length.").

175. *See, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 822 (11th Cir. 2004).

176. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). Admittedly, there are some limitations on the rights of even adult married individuals. For example, in *Lovisi v. Slayton*, two married adults were convicted of sodomy because, by bringing a third person into their marital bedroom, they waived their right to privacy. 539 F.2d 349, 351–52 (4th Cir. 1976), *abrogated by* Lawrence v. Texas, 539 U.S. 558 (2003), *as recognized in, e.g.*, James Allon Garland, *Sex as a Form of Gender and Expression After* Lawrence v. Texas, 15 COLUM. J. GENDER & L. 297, 323 (2006) ("[C]ourts after *Lawrence* have no justification for treating unpopular sexual expression as having minimal value."); Christopher R. Leslie, Lawrence v. Texas *as the Perfect Storm*, 38 U.C. DAVIS L. REV. 509, 542 (2005) ("[*Lawrence*'s] privacy approach eliminated all sodomy laws."). Interestingly, in that case the couple had also taken photographs of the conduct at issue. *Id.* at 350. The existence of

pattern in child pornography cases; usually, images that form the basis of a prosecution have been distributed or shown to third parties. However, even establishing some central core of conduct that is outside the zone of governmental regulation has a symbolic significance in that it affords dignity to the intimate relationships of young people and begins to erode the stigma associated with sexually active children.

B. Statutory Arguments: The Absurdity Canon and Construing Statutes Narrowly

Although constitutional challenges to some cases of minors being prosecuted under child pornography laws are promising, the tools of statutory construction may be even more useful for attacking this practice. Recourse to constitutional analysis to strike down laws in particular circumstances is often undesirable because, if a court modifies a statute on constitutional grounds, the legislature cannot correct or refine the court's determination through legislation.[177] The argument for narrowing a statute's application is especially compelling when literal adherence results in consequences that are especially harsh or seem at odds with evolving community norms, as is often the case in prosecuting minors for violations of child pornography laws.[178]

No case has addressed the absurdity of applying child pornography laws to minors' uncoerced self-portraits. However, several courts have construed statutes relating to sexual victimization of children narrowly so as not to apply them to minors accused of sexually-based offenses involving other minors.[179] In *In re G.T.*, the Supreme Court of Vermont held that Vermont's statutory rape provision was inapplicable in cases where the alleged perpetrator is also a victim under the age of consent.[180] They noted that "[u]nder the State's theory in this case, if two persons under sixteen years of age commit consensual, mutual sexual acts with each other, they are both guilty of statutory rape" and would both have to be listed on the child abuse registry.[181] The court was concerned about issues of stigma and invasion of privacy, noting the "irony of maintaining

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the photographs was not deemed to have waived the right to privacy, only the presence of a third person in the marital bedroom waived the right. *Id.* at 351 ("Once a married couple admits strangers as onlookers, federal protection of privacy dissolves.").

177. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 88–90 (1982).

178. *See id.*

179. *See, e.g.*, *In re* Z.C., 165 P.3d 1206, 1209–10 (Utah 2007) (refusing to apply sexual abuse of child statutes to twelve- and thirteen-year-olds who engaged in consensual sex where each would be considered both victim and perpetrator, because doing so would be absurd); *In re* G.T., 758 A.2d 301 (Vt. 2000) (construing statutory rape law narrowly so as to prohibit application to teenager who was both an alleged victim and perpetrator).

180. *In re G.T.*, 758 A.2d at 302.

181. *Id.* at 305.

confidential the fact and detail of a juvenile delinquency adjudication, while placing and disseminating information about the same juvenile in the child abuse registry."[182] In addition, the court mentioned that, in practice, prosecutors largely received complaints about statutory rape cases involving two minors from parents.[183] This scenario puts parents in a tremendous position of power vis-à-vis their children's sexual autonomy. The court also noted that, in general, the law was only selectively enforced, and often only if there was evidence of coercion and force (which were not required by the statute).[184] The court expressed concern that "the selective enforcement of the underlying statute has the hallmarks . . . [of] discriminatory prosecution."[185] Both parents and prosecutors could decide what cases to pursue, selecting merely a few cases from the many that would meet the elements of the crime. Furthermore, the court stated that when "such laws purport to bring within the condemnation of the criminal statute kinds of activity whose moral neutrality, if not innocence, is widely recognized, they raise basic issues of a morally acceptable criminal code."[186] As a result, the court determined that it had to construe the statute narrowly to avoid an absurd result not intended by the legislature.[187]

In a similar case, Utah's highest court invalidated a child abuse statute as applied to a twelve-year-old and a thirteen-year-old who engaged in consensual sexual intercourse.[188] The court based its decision on the absurdity canon of statutory interpretation, concluding that "applying the statute to treat Z.C. as both a victim and a perpetrator of child sex abuse for the same act leads to an absurd result that was not intended by the legislature."[189] The court elaborated by stating that, when delinquency petitions are filed against both children for sexually touching each other,

182. *Id.*

183. *Id.* at 306.

184. *Id.*

185. *Id.*

186. *Id.* at 307.

187. *Id.*

188. *In re.* Z.C., 165 P.3d 1206, 1207 (Utah 2007).

189. *Id.* at 1208. For more on the absurdity canon of statutory interpretation, see *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) ("When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way."); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) ("This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe the legislator intended to include the particular act.").

"there is no discernible victim that the law seeks to protect."[190] The court concluded that, in situations where no true victim can be identified and there is no evidence of any coercion or force, the application of the statute would produce an absurd result and therefore cannot be condoned.[191]

There are many parallels between the criminalization of consensual sex between minors and the criminalization of self-produced images of adolescent sexuality. In both situations, the laws bring behavior often considered morally neutral into the criminal code. Both of these behaviors are widespread and victimless. Evidence indicates nearly half of American teens are sexually active,[192] and a recent survey indicates that twenty percent of teens have sent messages containing nude or semi-nude images of themselves or have posted such images to the internet.[193] Furthermore, both statutory rape laws and child pornography laws raise constitutional problems when they are used to prosecute minors. Similar to the statutory rape context, it is unlikely that the legislature intended child pornography laws to be used against minors in situations where there is no clear victim.[194]

Moreover, in both contexts, the problems of selective enforcement abound. Children will or will not be prosecuted on the whim of parents or prosecutors who disapprove of their behavior or sexual expression. For example, in Farmington, Utah, twenty-eight teens were investigated for sharing nude pictures of themselves on cell phones. The prosecutor described most of the teens as "good kids" and chose to charge most with only misdemeanor crimes rather than the felony of distributing child pornography, despite the fact that the misdemeanor was harder to prove.[195]

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190. *In re Z.C.*, 165 P.3d at 1212.

191. *Id.* at 1213.

192. *See* Ceci Connolly, *More U.S. Teens Delay Having Sex, Study Finds*, WASH. POST, Dec. 11, 2004, at A1 (noting that in study of U.S. teens, forty-six percent of males and forty-seven percent of females reported that they were sexually active in 2002).

193. SEX AND TECH, *supra* note 14, at 1.

194. *See, e.g.*, Zimmer, *supra* note 149 (discussing case in which fifteen-year-old girl was charged with felony crimes and threatened with sex offender registration when she distributed nude photos of herself to other minors using her cell phone: "State Rep. Jay Hottinger, R-Newark, wrote the [law allowing sex offender registration for minors] and said this case was not something the legislature envisioned. . . . 'Clearly it was an unacceptable act, and there needs to be consequences from that, but we need to make sure the punishment is a reasonable punishment.'").

195. Melinda Williams, *Allen: Laws Sought to Curb Teen Cellular Abuse*, DAVIS COUNTY CLIPPER, Apr. 2, 2008 (discussing prosecution of junior high students in Farmington, Utah, for trading nude self portraits through their cell phones). The district attorney involved "explained that while the actions of the teens matched felony charges more closely than misdemeanors, his office wanted to send a message to not be unduly harsh. So they used 'a bit of legal fiction' to match the acts to the crime of lewdness rather than the crime of distributing child pornography." *Id.* He also acknowledged that the twenty-eight teens charged represented only "the tip of the iceberg." *Id.* One teen had reported to the district attorney that nearly everybody with a cell phone was engaging in

As the prosecutor in the Farmington cases acknowledged, "'it appears to be a mutual decision to engage in flirtatious behavior . . . but it's raised to the level to make it a felony.'"[196]

This begs the question: what if they were not "good kids" but had engaged in exactly the same behavior? In Licking County, Ohio, a prosecutor investigated approximately twenty cases involving minors with nude pictures on their cell phones but chose to prosecute only one.[197] The prosecutor noted, among other things, that the young woman he chose to prosecute was in foster care and had gotten the cell phone at issue without her foster parents' permission.[198] These examples indicate that the breadth of these laws as applied to minor perpetrators leads to wide prosecutorial discretion and selective enforcement, with the accompanying possibility of discrimination.[199] As in statutory rape cases, it is also likely that most crimes are reported by parents who are upset about the way their children and their children's friends behave. This gives parents and law

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similar behavior. *Id.*

196. *Id.*

197. Zimmer, *supra* note 149 ("[Licking County Prosecutor Kenneth Oswalt] said in April his office had received about 20 cases involving questionable cell phone pictures. None were charged pending their adherence to a plan crafted with their families.").

198. *Id.* (noting the girl is a foster child); Telephone Interview with Kenneth Oswalt, Prosecuting Attorney of Licking County (Jan. 5, 2009) (suggesting that charges were filed, in part, because girl was not listening to either her foster parents or school officials when it came to her inappropriate use of her cell phone and mentioning that girl had gotten cell phone "behind [her] foster parents' back"). Oswalt's main differentiation between the twenty prior cases and the one he chose to prosecute was that after learning of the first cases, Oswalt visited at least twenty-two area middle and high schools giving presentations about the consequences of this behavior. The girl prosecuted attended one of these presentations and was caught with an image a mere three days later. Although these presentations solve a notice problem, they do not cure the First Amendment problem. Even if fair warning is given, the government cannot criminalize protected speech. In the telephone interview, Oswalt acknowledged that the images he prosecuted the girl for did not rise to the level of obscenity. *Id.* If the girl had been eighteen, the images would have been perfectly legal to possess, produce, and distribute. *Cf.* Osborne v. Ohio, 495 U.S. 103, 109 (1990).

199. *Cf., e.g.*, City of Chicago v. Morales, 527 U.S. 41, 60 (1999) (striking down anti-gang loitering ordinance as unconstitutionally vague, in part because vague language of ordinance gave too much discretion to police: "Recognizing that the ordinance does reach a substantial amount of innocent conduct, we turn, then, to its language to determine if it 'necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat'" and ultimately concluding that it did); Pryor v. Mun. Court, 599 P.2d 636, 644 & n.8 (Cal. 1979) (holding that phrase "lewd or dissolute conduct" in solicitation statute was unconstitutionally vague: "[V]ague statutory language . . . creates the danger that police, prosecutors, judges and juries will lack sufficient standards to reach their decisions, thus opening the door to arbitrary or discriminatory enforcement of the law. The danger of discriminatory enforcement assumes particular importance in the context of the present case [where there was evidence that enforcement was] deliberately designed to detect a disproportionate number of male homosexual offenders, and that [police] arrested male homosexuals for conduct which, if committed by two women or by a heterosexual pair, did not result in arrest.").

enforcement officials a significant amount of power over adolescents' portrayal of their sexuality.[200]

Courts may prefer to deal with as-applied challenges to child pornography law prosecutions of minors through canons of statutory construction, rather than resorting to more binding constitutional rulings. As the Supreme Court of Vermont noted when it construed the state's statutory rape provision narrowly, "[t]he Legislature has the power to specifically address the issue . . . by amendment to the statute,"[201] which it would lack the power to do if the court makes a more permanent constitutional decision.[202] Either a statutory or constitutional ruling could prevent the prosecution of a minor under child pornography laws in situations where there is no identifiable victim. Either of those strategies, or both, could be used to vindicate a minor's right to self-expression and prevent her from suffering the stigma of a child pornography conviction and potential registration as a sex offender.

CONCLUSION

Increasingly, child pornography laws designed to shield children from exploitation and victimization by adults are being used as weapons against children for photographing their own sexual conduct.[203] There are strong constitutional reasons to construe statutes narrowly or to declare them unconstitutional as applied to the prosecution of minors for child pornography violations in situations where the images targeted are self-portraits created in the absence of coercion. The Supreme Court has clearly stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[204] Prosecutions of children for violating child pornography laws raise a host of constitutional issues, especially with regard to the minor's right to privacy and the minor's First Amendment rights. The consequences of these prosecutions, which are usually for felony violations,[205] are severe and frequently include sex offender

200. This again raises the problem of the treatment of LGBT youth. It seems likely given the adverse reactions of many parents when their children come out that these children would be particularly likely to be targeted by parents when they express their sexuality through images. *See* LAMBDA LEGAL DEF. & EDUC. FUND, *supra* note 162, at 11.

201. *In re* G.T., 758 A.2d 301, 309 (Vt. 2000).

202. One possible statutory solution would be to follow the lead of the Texas legislature and include an affirmative defense when the defendant is not more than two years older than the child depicted. TEX. PENAL CODE ANN. § 43.25(f)(3) (Vernon 2009). Another possibility would be to have a sliding scale for child pornography when the perpetrator is a minor, similar to the sliding scale obscenity test for minors upheld by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968).

203. *Cf.* B.B. v. State, 659 So. 2d 256, 260 (Fla. 1995) (using similar language to describe prosecution of minors under statutory rape laws).

204. *In re* Gault, 387 U.S. 1, 13 (1967).

205. *See, e.g.*, N.C. GEN. STAT. ANN. § 7B-1501 (West 2008) (defining "delinquent

registration, among other collateral consequences.[206] Adolescents should have some limited rights to privacy surrounding sexual matters and to self-expression of their sexuality; these rights should not be chilled by the threat of serious criminal sanction. It is true that child pornography is a grave problem in our society, but by attempting to silence pedophiles and child pornographers, the law also silences the children it claims to be protecting. The law should have a fine-tuned distinction between different types of child-produced child pornography; in certain instances, we serve children better by acknowledging their rights and allowing their speech rather than silencing expressions of their sexuality.

juvenile" as "[a]ny juvenile who, while less than 16 years of age but at least 6 years of age, commits a crime or infraction under State law"); N.C. GEN. STAT. ANN. § 14-190.13 (West 2008) (defining "minor" for purposes of offenses concerning minors, including child pornography, as "[a]n individual who is less than 18 years old and is not married or judicially emancipated").

206. *See, e.g.*, State v. D.H., 9 P.3d 253, 257–58 (Wash. Ct. App. 2000) (Noting that juvenile court had waived requirement that minor register as sex offender, but that the crime, sexual exploitation of minor, was a class B felony and potentially carried serious consequences. The fifteen-year-old adjudicated delinquent had persuaded other fifteen-year-olds to flash him as he videotaped them.).