

**OLD ENOUGH TO HAVE SEX, BUT TOO  
YOUNG TO FILM IT: ARE PROSECUTORS  
VIOLATING CONSTITUTIONAL RIGHTS  
BY PROSECUTING LEGAL SEXUAL  
ACTIVITY UNDER CHILD PORNOGRAPHY  
STATUTES?**

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## INTRODUCTION

Are state courts' analyses of child pornography statutes unconstitutional? Consider the following hypotheticals: Jay, an eighteen-year-old boy and Kay, his eighteen-year old girlfriend are sexually active. During sexual intercourse, the boy takes pictures of the sexual encounter with the camera on his phone. Upon the girl's request, the boy then sends the pictures to his girlfriend's phone. Kay's mother then stumbles upon the images on her daughter's phone. Angered, Kay's mother informs the local police precinct of the images. Since the sex is consensual, the police would most likely inform the mother that there are no criminal charges to bring against the boyfriend. Changing the scenario slightly, assume all the above facts are the same, except Kay is seventeen-years-old instead of eighteen. Under many jurisdictions,<sup>1</sup> Jay could be charged with not only possession of child pornography, but distribution as well. Additionally, Kay could be charged with the possession and/or production of child pornography, even though she is a minor.<sup>2</sup>

The Supreme Court made it clear that a state's interest in "safeguarding the physical and psychological well being of a minor' is 'compelling.'"<sup>3</sup> However, prosecuting Jay and/or Kay, arguably, does not safeguard the physical and psychological well being of a minor. While there has been a great deal of material dedicated to the constitutionality of teen sexting,<sup>4</sup> the question that remains is whether depictions of legal sexual conduct should fit the definition of child pornography?

As discussed in the 2010 case, *U.S. v. Stevens*, child pornography can arguably fall within the unprotected category of

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<sup>1</sup> See *Infra* Part I.

<sup>2</sup> See *A.H. v. State*, 949 So. 2d 234 (Fla. App. 1 Dist. 2007) (Sixteen year old, A.H., and her boyfriend were charged with possession of child pornography after they made digital photographs of themselves naked engaged in sexual behavior).

<sup>3</sup> *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

<sup>4</sup> See Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687 (2010); Amy F. Kimpel, *Using Laws Designed to Protect as a Weapon: Prosecuting Minors Under Child Pornography Laws*, 34 N.Y.U. REV. L. & SOC. CHANGE 299 (2010); Jordan J. Szymialis, *Sexting: A Response to Prosecuting Those Growing Up with a Growing Trend*, 44 IND. L. REV. 301 (2010).

“speech integral to criminal conduct.”<sup>5</sup> Can depictions of legal sexual conduct with an individual under the statutory age in child pornography statutes be considered speech integral to the sexual abuse of children? Though the Supreme Court has not specifically addressed this question, they potentially could answer the question if certiorari is granted in the Illinois case, *People v. Hollins*.<sup>6</sup>

In Part I, this comment will examine a survey of jurisdictions to determine where a depiction of legal sexual conduct could be defined as child pornography. Part II will review the history of Supreme Court cases discussing child pornography to determine how the Court held on the constitutionality of child pornography statutes. Part III discusses how *People v. Hollins* could answer the aforementioned question. Part IV deliberates potential solutions to solve the legal loophole that exists.

#### PART I: SURVEY OF STATE STATUTES

The aforementioned legal loophole<sup>7</sup> is contingent on the correlation between a state’s legal age of consent and child pornography statutes. In order for an individual to be prosecuted under child pornography statutes for the depiction of legal sexual intercourse, the jurisdiction’s age requirement for child pornography must be higher than the legal age for consent to sexual intercourse.<sup>8</sup> Conversely, if a jurisdiction’s legal age of consent were equal to the benchmark age in its child pornography statute, there would not be a time gap in which photographed legal sexual intercourse could violate child pornography statutes. This comment will now explore in which jurisdictions this legal age loophole exists.

Jurisdictions are split on what age an individual filmed in a sexually explicit manner must be to constitute child pornography.

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<sup>5</sup> U.S. v. Stevens, 130 S.Ct. 1577, 1584 (2010).

<sup>6</sup> See *People v. Hollins*, 971 N.E.2d 504 (Ill. 2012).

<sup>7</sup> See *infra* Introduction.

<sup>8</sup> For example, if the state requires an “under the age of 18” element for child pornography and the age of consent for sexual intercourse is seventeen, there is a one-year window in which sexual intercourse with persons who were under eighteen years of age at the time a visual depiction was created, adapted, or modified is legal, but the filming of which would be illegal.

The vast majority of states make it illegal to possess material that depicts a child under the age of eighteen performing in sexual representations.<sup>9</sup> Four states establish that the depiction of a

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<sup>9</sup> See ARIZ. REV. STAT. ANN. § 13-3551 (2009) (“Minor’ means a person or persons who were under eighteen years of age at the time a visual depiction was created, adapted, or modified”); ARK. CODE ANN. § 5-27-302(1) (2006) (“Child’ means any person under eighteen (18) years of age.”); CAL. PENAL CODE § 311.3(a) (West 2008) (“A person is guilty of sexual exploitation of a child if he or she knowingly develops . . . any film . . . that depicts a person under the age of 18 years engaged in an act of sexual conduct.”); COLO. REV. STAT. § 18-6-403(2)(a) (West 2010) (“Child’ means a person who is less than eighteen years of age”); D.C. CODE § 22-3101(2) (LexisNexis 2010) (“Minor’ means any person under 18 years of age”). FLA. STAT. ANN. § 847.0137(1)(a) (West 2001) (“Minor’ means any person less than 18 years of age”); GA. CODE ANN. § 16-12-100(a)(1) (2011) (“Minor’ means any person under the age of 18 years”); HAW. REV. STAT. § 707-751(2)(b) (Supp. 2007) (“Minor’ means any person less than eighteen years old.”); IDAHO CODE ANN. § 18-1507(2)(b) (2004) (“Child’ means a person who is less than eighteen (18) years of age”); ILL. COMP. STAT. ANN. § 720 ILCS 5/11-20.1(a)(1) (West 2002) (“A person commits the offense of child pornography who: films . . . any child whom he knows or reasonably should know to be under the age of 18 . . .”); IND. CODE ANN. § 35-42-4-4(b) (LexisNexis 2009) (“A person who knowingly or intentionally . . . photographs . . . sexual conduct by a child under eighteen (18) years of age . . . commits child exploitation . . . .”); IOWA CODE ANN. § 728.1 (West 2002) (“Minor’ means any person under the age of eighteen”); KAN. STAT. ANN. § 21-3516(a)(1) (2007) (“Sexual exploitation of a child is: . . . using . . . a child under 18 years of age to engage in sexually explicit conduct for the purpose of promoting any performance”); ME. REV. STAT. ANN. tit. 17, § 281(2) (2005) (“Minor’ means a person who has not attained 18 years of age”); MD. CODE ANN., CRIM. LAW § 1-101(g) (LexisNexis 2002) (“Minor’ means an individual under the age of 18 years.”); MASS GEN. LAWS ANN. ch. 272 § 29B(b) (West 2013) (“Whoever . . . disseminates any visual material that contains a representation . . . sexual conduct participated or engaged in by a child who is under eighteen years of age . . . .”); MICH. COMP. LAWS ANN. § 750.145c(1)(C)(b) (West 2004) (“Child’ means a person who is less than 18 years of age . . . .”); MINN. STAT. ANN. § 617.246(b) (West 2008) (“Minor’ means any person under the age of 18”); MISS. CODE ANN. § 97-5-31(a) (2006) (“Child’ means any individual who has not attained the age of eighteen (18) years.”); MO. ANN. STAT. § 573.010(10) (West 2011) (“Minor’, any person under the age of eighteen”); NEB. REV. STAT. § 28-1463.02(1) (1995) (“Child, in the case of a participant, shall mean any person under the age of eighteen years . . . .”); N.H. REV. STAT. ANN. § 649-A:2(I) (LexisNexis 2007) (“Child’ means any person under the age of 16 years.”); N.M. STAT. ANN. § 30-6A-3 (West 2003) (“It is unlawful for a person to intentionally possess any obscene visual . . . depicting any prohibited sexual act . . . if that person knows or has reason to know that one or more of the participants in the act is a child under eighteen years of age.”); N.C. GEN. STAT. § 14-190.13(3) (2009) (“Minor . . . [is] an individual who is less than 18 years old . . . .”); N.D. CENT. CODE § 12.1-27.2-05(1) (2013) (“The defendant in good faith believed the person appearing in the performance was eighteen years of age or older . . . .”); OHIO REV. CODE ANN. § 2907.01(M) (LexisNexis 2004) (“Minor’ means a person under the age of eighteen.”); OKLA. STAT. ANN. tit. 21, § 1021.2 (West 2002 & Supp. 2011) (“Any person who shall procure or cause the participation of any minor under the age of eighteen (18) years in child pornography . . . shall be guilty . . . .”); OR. REV. STAT. § 163.665(1) (2009) (“Child’

child under the age of seventeen constitutes child pornography.<sup>10</sup> Only two states have legislation that establishes that the depiction of a child under the age of sixteen constitutes child pornography.<sup>11</sup>

Jurisdictions are also split on the age at which an individual can legally consent to sex.<sup>12</sup> The majority of jurisdictions allow a person who is sixteen years of age to legally consent to sexual intercourse.<sup>13</sup> In six jurisdictions, an individual seventeen years of

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means a person who is less than 18 years of age . . . .”); PA. CONS. STAT. ANN. § 6312(d)(1) (West Supp. 2011) (“Any person who intentionally views or knowingly possesses or controls . . . film . . . computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.”); R.I. GEN. LAWS § 11-9-1.3(c)(3) (2002 & Supp. 2010) (“Minor’ means any person not having reached eighteen (18) years of age”); S.C. CODE ANN. § 16-15-375(3) (2003) (“Minor’ means an individual who is less than eighteen years old.”); S.D. CODIFIED LAWS § 22-24A-2(3) (2009) (“Child’ or ‘minor,’ any person under the age of eighteen years.”); TENN. CODE ANN. § 39-17-1002(3) (West 2010) (“Minor’ means any person who has not reached eighteen (18) years of age.”); TEX. PENAL CODE ANN. § 43.26(a)(1) (West 2009 & Supp. 2011) (“A person commits an offense if . . . the person knowingly or intentionally possesses visual material that visually depicts a child younger than 18 years . . . .”); UTAH CODE ANN. § 76-5a-2(5) (West 2008) (“Minor’ means a person younger than 18 years of age.”); WASH. REV. CODE ANN. § 9.68A.011(4) (West 2003) (“Minor’ means any person under the age of eighteen years of age.”); W. VA. CODE ANN. § 61-8C-1(a) (LexisNexis 2010) (“Minor’ means any child under eighteen years of age.”); WIS. STAT. ANN. § 948.05(2)(b) (West Supp. 2010) (“A person . . . is guilty of a Class F felony if the person is under 18 years of age when the offense occurs.”); WYO. STAT. ANN. § 6-4-303(a)(i) (2011) (“Child’ means a person under the age of eighteen (18) years.”).

<sup>10</sup> See ALA. CODE § 13A-12-192(b) (LexisNexis 2005 & Supp. 2012) (“Any person who knowingly possesses . . . any obscene matter that contains a visual depiction of a person under the age of 17 years engaged in . . . sexual intercourse . . . shall be guilty . . . .”); CONN. GEN. STAT. ANN. § 53a-193(2)(A) (West 2007) (“Minor’ means any person less than seventeen years old . . . .”); LA. REV. STAT. ANN. § 14:81.1(B)(5) (Supp. 2013) (“Pornography involving juveniles’ is any photograph, videotape, film, or other reproduction . . . of any sexual performance involving a child under the age of seventeen.”); N.Y. PENAL LAW § 263.10 (McKinney 2008) (“A person is guilty of promoting an obscene sexual performance by a child when . . . he . . . promotes any obscene performance which includes sexual conduct by a child less than seventeen years of age.”).

<sup>11</sup> See N.J. STAT. ANN. § 2C:24-4(b)(1) (West 2005) (“Child’ means any person under 16 years of age”); VT. STAT. ANN. tit. 13, § 2821(1) (2009) (“Child’ means any person under the age of 16 years”).

<sup>12</sup> See *Supra* notes 14-16. The age in which an individual can legally consent to sex is typically found under statutory rape statutes.

<sup>13</sup> See ALA. CODE § 13A-6-62(a)(1) (LexisNexis 2005) (“A person commits the crime of rape in the second degree if . . . he or she engages in sexual intercourse with . . . less than 16 . . . .”); ALASKA STAT. § 11.41.440(a)(2) (2010) (“An offender commits the crime

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of sexual abuse of a minor . . . if . . . being 18 years of age or older, the offender engages in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender . . . .”); ARK. CODE ANN. § 5-14-127(a) (2011) (“A person commits sexual assault . . . if . . . [b]eing twenty (20) years of age or older . . . [e]ngages in sexual intercourse . . . with another person who is . . . [l]ess than sixteen (16) years of age . . . .”); CONN. GEN. STAT. ANN. § 53a-72a (West 2007) (“A person is guilty of sexual assault . . . when such person compels another person to submit to sexual contact . . . if the victim of the offense is under sixteen years of age . . . .”); D.C. CODE § 22-3008 (LexisNexis 2010) (“Whoever, being at least 4 years older than a child ([sixteen years of age]), engages in a sexual act with that child . . . .”); GA. CODE ANN. § 16-6-3(a) (2011) (“A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years . . . .”); HAW. REV. STAT. § 707-730(1) (West 2008) (“A person commits the offense of sexual assault in the first degree if . . . [t]he person knowingly engages in sexual penetration with another person who is at least fourteen years old but less than sixteen years old . . . .”); IND. CODE ANN. § 35-42-4-9(a) (LexisNexis 2009) (“A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs . . . sexual intercourse . . . commits sexual misconduct with a minor . . . .”); IOWA CODE ANN. § 709.4 (West 2003) (“A person commits sexual abuse in the third degree when the person performs a sex act under any of the following circumstances . . . [t]he other person is fourteen or fifteen years of age . . . .”); KAN. STAT. ANN. § 21-5507(a)(1) (2011) (“Unlawful voluntary sexual relations is . . . [e]ngaging in . . . [voluntary sexual intercourse] with a child who is 14 or more years of age but less than 16 years of age . . . .”); KY. REV. STAT. ANN. § 510.020(3) (LexisNexis 2008) (“A person is deemed incapable of consent when he or she is . . . [l]ess than sixteen (16) years old . . . .”); ME. REV. STAT. tit. 17-A § 254 (2003) (“A person is guilty of sexual abuse of a minor if . . . [t]he person engages in a sexual act with another person, not the actor’s spouse, who is either 14 or 15 years of age and the actor is at least 5 years older than the other person.”); MD. CODE ANN. CRIM. LAW § 3-308(b) (West 2011) (“A person may not engage in . . . a sexual act with another if the victim is 14 or 15 years old . . . .”); MASS. GEN. LAWS ANN. ch. 265, § 23 (West 2009) (“Whoever unlawfully has sexual intercourse . . . [with] a child under 16 years of age, shall be punished by imprisonment . . . .”); MICH. COMP. LAWS ANN. § 750.520d (West 2011) (“A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person . . . [if] [t]hat other person is at least 13 years of age and under 16 years of age.”); MINN. STAT. ANN. § 609.342(1)(b) (West 2009) (“A person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if . . . the complainant is at least 13 years of age but less than 16 years of age . . . .”); MISS. CODE ANN. § 97-3-95(1)(c) (2006) (“A person is guilty of sexual battery if he or she engages in sexual penetration with . . . [a] child at least fourteen (14) but under sixteen (16) years of age . . . .”); MONT. CODE ANN. § 45-5-501(1)(ii)(D) (2011) (“[W]ithout consent means . . . the victim is incapable of consent because the victim is . . . less than 16 years old . . . .”); NEB. REV. STAT. Ann. § 28-319(1) (West 2006) (“Any person who subjects another person to sexual penetration . . . when the actor is nineteen years of age or older and the victim is at least twelve but less than sixteen years of age is guilty of sexual assault in the first degree.”); NEV. REV. STAT. ANN. § 200.364(5)(a) (LexisNexis 2009) (“‘Statutory sexual seduction’ means . . . [o]rdinary sexual intercourse . . . by a person 18 years of age or older with a person under the age of 16 years . . . .”); N.H. REV. STAT. ANN. § 632-A:3 (2013) (“A person is guilty of a class B felony if such a person . . . [e]ngages in sexual penetration with a person . . . who is

age may legally consent to sexual intercourse.<sup>14</sup> Eleven jurisdictions require that a person be eighteen years of age to legally consent to sexual intercourse.<sup>15</sup>

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13 years of age or older and under 16 years of age . . . .”); N.J. STAT. ANN. § 2C:14-2(c)(4) (West 2012) (“An actor is guilty of sexual assault if he commits an act of sexual penetration with another person . . . [who] is at least 13 but less than 16 years old . . . .”); N.M. STAT. ANN. § 30-9-11(G)(1) (West 2011) (“Criminal sexual penetration in the fourth degree consists of all criminal sexual penetration . . . perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age . . . .”); N.C. GEN. STAT. § 14-27.7A(a) (2009) (“A defendant is guilty . . . if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person . . . .”); OHIO REV. CODE ANN. § 2907.04(A) (LexisNexis 2010) (“No person who is eighteen years of age or older shall engage in sexual conduct with another . . . when the offender knows the other person is thirteen years of age or older but less than sixteen years of age . . . .”); OKLA. STAT. ANN. tit. 21, § 1111(A)(1) (West 2011) (“Rape is an act of sexual intercourse . . . [w]here the victim is under sixteen (16) years of age.”); 18 PA. CONS. STAT. § 3122.1(a) (West 2011) (“[A] person commits a felony of the second degree when that person engages in sexual intercourse with a complainant . . . who is under the age of 16 years . . . .”); R.I. GEN. LAWS § 11-37-6 (2002) (“A person is guilty of third degree sexual assault if he or she is over the age of eighteen (18) years and engaged in sexual penetration with another person . . . under the age of consent, sixteen (16) years of age.”); S.C. CODE ANN. § 16-15-655 (WEST SUPP. 2010) (“It is unlawful for a person over the age of fourteen years to willfully . . . attempt a lewd or lascivious act upon . . . a child under the age of sixteen years . . . .”); S.D. CODIFIED LAWS § 22-22-1(5) (2012) (“Rape is an act of sexual penetration accomplished . . . [i]f the victim is thirteen years of age, but less than sixteen years of age . . . .”); VT. STAT. ANN. tit. 13 § 3252(c) (2010) (“No person shall engage in a sexual act with a child who is under the age of 16 . . . .”); WASH. REV. CODE § 9A.44.079(1) (West2009) (“A person is guilty of rape of a child . . . when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old . . . .”); W. VA. CODE ANN. § 61-8B-5(a)(2) (LexisNexis 2010) (“A person is guilty of sexual assault in the third degree when . . . [t]he person being sixteen years old or more, engages in sexual intercourse . . . with another person who is less than sixteen years old and who is at least four years younger than the defendant . . . .”); WYO. STAT. ANN. § 6-2-316(a)(i) (2011) (“[A]n actor commits the crime of sexual abuse of a minor in the third degree if . . . [b]eing seventeen (17) years of age or older, the actor engages in sexual contact with a victim who is thirteen (13) through fifteen (15) years of age, and the victim is at least four (4) years younger than the actor.”).

<sup>14</sup> See COLO. REV. STAT. § 18-3-402(1)(e) (2010) (“Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if . . . the victim is at least fifteen years of age but less than seventeen years of age . . . .”); 720 ILL. COMP. STAT. ANN. 5/11-1.50(c) (West 2011) (“A person commits criminal sexual abuse if that person commits an act of sexual penetration or sexual conduct with a victim who is at least 13 years of age but under 17 years of age . . . .”); LA. REV. STAT. ANN. § 14:80(A)(1) (2012) (“Felony carnal knowledge of a juvenile is committed when . . . [a] person . . . has sexual intercourse, with consent, with a person who is thirteen years of age or older but less than seventeen years of age . . . .”); MO. ANN. STAT. § 566.034(1) (West 1999) (“A person commits the crime of statutory rape . . . if . . . he has

This comment will not examine in which jurisdictions a prosecutor potentially can charge an individual under child pornography statutes for the possession of recordings of legally consensual sexual activity. Based on a fifty state survey, sixteen jurisdictions establish the threshold age constituting child pornography as the same the age in which an individual can legally consent to sexual activities.<sup>16</sup> In these jurisdictions, there is no gap in which prosecutors can charge an individual for the possession of recordings of legally consensual sexual activity. This leaves thirty-five jurisdictions in which prosecutors can bring

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sexual intercourse with another person who is less than seventeen years of age.”); N.Y. PENAL LAW § 130.25 (McKinney 2009) (“A person is guilty of rape in the third degree when . . . [b]eing twenty-one years old or more, he or she engages in sexual intercourse with another person less than seventeen years old . . . .”); TEX. PENAL CODE ANN. § 22.011(c)(1) (West 2011) (“‘Child’ means a person younger than 17 years of age”).

<sup>15</sup> See ARIZ. REV. STAT. ANN. § 13-1405(A) (2011) (“A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse . . . with any person who is under eighteen years of age.”); CAL. PENAL CODE § 261.5(b) (West 2011) (“Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older . . . is guilty of a misdemeanor.”); DEL. CODE ANN. tit. 11, § 770(a)(2) (2010 West 2012) (“A person is guilty of rape in the fourth degree when the person . . . [i]ntentionally engages in sexual intercourse with another person, and the victim has not reached the victim’s eighteenth birthday . . . .”); FLA. STAT. ANN. § 794.05(1) (West 2007 2012) (“A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree . . . .”); IDAHO CODE ANN. § 18-6101(2) (2011 West 2012) (“Rape is defined as the penetration . . . [w]here the female is sixteen (16) or seventeen (17) years of age and the perpetrator is three (3) years or more older than the female.”); N.D. CENT. CODE § 12.1-20-07(1)(F) (2011 West 2012) (“A person who knowingly has sexual contact . . . is guilty of an offense if . . . [t]he other person is a minor . . . and the actor is an adult.”); OR. REV. STAT. ANN. § 163.315(1)(A) (2009 West 2012) (“A person is considered incapable of consenting to a sexual act if the person is . . . [u]nder 18 years of age.”); TENN. CODE ANN. § 39-13-506 (West 2012) (“Mitigated statutory rape is the unlawful sexual penetration of a victim by the defendant . . . [when] [t]he victim is at least fifteen (15) but less than eighteen (18) years of age . . . .”); UTAH CODE ANN. § 76-5-401.2 (West 2013) (“‘[M]inor’ means a person who is 16 years of age or older, but younger than 18 years of age . . . . A person commits unlawful sexual conduct with a minor . . . [he] has sexual intercourse with the minor.”); VA. CODE ANN. § 18.2-371 (2009 West 2012) (“Any person 18 years of age or older . . . engages in consensual sexual intercourse with a child 15 or older . . . shall be guilty . . . .”); WIS. STAT. ANN. § 948.09 (West 2005 2012) (“Whoever has sexual intercourse with a child . . . who has attained the age of 16 years is guilty . . . .”).

<sup>16</sup> *Supra* notes 9-16. These jurisdictions include: Arizona (18 years of age), California (18), District of Columbia (16), Florida (18), Idaho (18), Louisiana (17), Montana (16), New Jersey (16), New York (17), North Dakota (18), Oregon (18), Tennessee (18), Utah (18), Vermont (16), Virginia (18), and Wisconsin (18).

charges for the possession of recordings of legally consensual sexual activity. These jurisdictions include: Alabama, Alaska, Arkansas, Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Washington, West Virginia, and Wyoming.

## PART II: ROADMAP OF THE CONSTITUTIONALITY OF CHILD PORNOGRAPHY LAWS

### *A. Ferber through Ashcroft*

The Supreme Court has held that the First Amendment freedom of speech does not protect either obscene material or child pornography.<sup>17</sup> In *Miller v. California*, the Court established a test to determine whether speech would be considered obscene.<sup>18</sup> In the 1982 case *New York v. Ferber*, the Supreme Court addressed the question of whether the *Miller* test for obscenity applied to child pornography.<sup>19</sup>

In *Ferber*, the Court determined the constitutionality of a New York statute that prohibited persons “from knowingly promoting sexual performances by children under the age of 16 by distributing material that depicts such performances.”<sup>20</sup> The issue arose when Paul Ferber, the proprietor of a bookstore specializing in sexually oriented products, sold two films to an undercover

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<sup>17</sup> *New York v. Ferber*, 458 U.S. 747, 763 (1982) (holding that child pornography as a category of material is outside the protection of the First Amendment); *Roth v. United States*, 354 U.S. 476, 485 (1957) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include lewd and obscene . . . .”) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

<sup>18</sup> *Miller v. California*, 413 U.S. 15, 24 (1973) (“The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.”).

<sup>19</sup> *Ferber*, 458 U.S. at 760-61.

<sup>20</sup> *Id.* at 749.

police officer depicting young boys masturbating.<sup>21</sup> Subsequently, Ferber was indicted and, in a jury trial, found guilty of violating New York statutes controlling the distribution of child pornography.<sup>22</sup> Ferber appealed, claiming the New York statute violated the First Amendment.<sup>23</sup> While the New York Supreme Court upheld the convictions,<sup>24</sup> the New York Court of Appeals reversed, holding that the New York statute violated the First Amendment.<sup>25</sup>

The United States Supreme Court reversed the New York appellate court's decision, holding that the New York statute was "not substantially overbroad"<sup>26</sup> or "underinclusive,"<sup>27</sup> and therefore did not violate Ferber's First Amendment rights.<sup>28</sup> In their analysis, the Court noted that the New York Court of Appeals' holding "was not unreasonable in light of our decisions," but the case constituted the "first examination of a statute directed at and limited to depictions of sexual activity involving children."<sup>29</sup> The Court rejected Ferber's argument that the New York statute criminalized sexually explicit images of children that did not meet the *Miller* definition of obscenity and established that the test for child pornography is separate from the *Miller* test for obscene material.<sup>30</sup> The Court stated that one reason for distinguishing the State's interest in regulating child pornography from its interest in regulating obscenity was the State's

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<sup>21</sup> *Id.* at 751-52.

<sup>22</sup> *Id.* at 752.

<sup>23</sup> *Id.*

<sup>24</sup> *People v. Ferber*, 424 N.Y.S.2d 967 (N.Y. App. Div. 1980).

<sup>25</sup> *People v. Ferber*, 422 N.E.2d 523 (N.Y. 1981). The New York court held that the statute was "strikingly underinclusive", since it discriminated against visual portrayals of children engaged in sexual activity by not also prohibiting the distribution of materials of other dangerous activity. *Id.* at 526. The court also held the statute to be overbroad because it banned the distribution of materials produced outside the State, as well as materials which deal "with adolescent sex in a realistic but nonobscene manner." *Id.*

<sup>26</sup> *New York v. Ferber*, 458 U.S. 747, 774 (1982).

<sup>27</sup> *Id.* at 765.

<sup>28</sup> *Id.* at 774.

<sup>29</sup> *Id.* at 753.

<sup>30</sup> *Id.* at 764. The Court altered the *Miller* test when analyzing child pornography: "[a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." *Id.*

compelling interest in “safeguarding the physical and psychological well-being of a minor.”<sup>31</sup>

The Court in *Ferber* expressed the importance of the enforcement of the illegal distribution of child pornography;<sup>32</sup> however, they did not address mere possession of material should be classified as child pornography. In the 1990 case *Osborne v. Ohio*, the Court addressed whether a state may constitutionally proscribe the possession and viewing of child pornography.<sup>33</sup> Osborne, citing *Stanley v. Georgia*,<sup>34</sup> argued that he had a First Amendment interest in viewing and possessing child pornography.<sup>35</sup> The Court rejected Osborne’s argument, holding that Ohio had a compelling state interest in “safeguarding the physical and psychological well-being of a minor.”<sup>36</sup> Further, the Court determined that it would be “reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.”<sup>37</sup>

From the *Osborne* decision, the Court appeared to be extending to states the power to prohibit possession of child pornography. This power was somewhat limited in the 2002 case *Ashcroft v. Free Speech Coalition*.<sup>38</sup> In *Ashcroft*, the Court was asked to determine whether the Child Pornography Prevention Act of 1996 abridged the First Amendment right of free speech.<sup>39</sup> In the United States District Court for the Northern District of Northern California, Respondents, a trade association for the

<sup>31</sup> *Id.* at 756-57. (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)).

<sup>32</sup> *Id.* at 760 (“The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.”).

<sup>33</sup> *Osborne v. Ohio*, 495 U.S. 103, 108 (1990). Clyde Osborne was convicted under an Ohio statute prohibiting the possession or viewing any material or performances showing a minor in a state of nudity. *Id.* at 103.

<sup>34</sup> *Stanley v. Georgia*, 394 U.S. 557, 559 (1969) (“[W]e agree that the mere private possession of obscene matter cannot constitutionally be made a crime.”).

<sup>35</sup> *Osborne*, 495 U.S. at 108.

<sup>36</sup> *Id.* at 109 (citing *Ferber*, 458 U.S. at 756-57).

<sup>37</sup> *Id.* at 109-10. The Court also pointed out that the child pornography market had been pushed underground, and therefore, is “[d]ifficult, if not impossible, to solve the child pornography problem by only attacking production and distribution.” *Id.* at 110.

<sup>38</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

<sup>39</sup> *Id.* at 239.

adult-entertainment industry, challenged that §§ 2256(8)(B) & 2256(8)(D) were overbroad since they prohibited the distribution or possession of “virtual child pornography.”<sup>40</sup>

The Free Speech Coalition argued that the “appears to be” and “conveys the impression” provisions found in the statute were overbroad and vague, deterring them from producing works protected by the First Amendment.<sup>41</sup> The Court of Appeals for the Ninth Circuit reversed the District Court’s summary judgment in favor of the Government, holding that Child Pornography Prevention Act was substantially overbroad because it banned materials that were neither obscene nor produced by the exploitation of real children.<sup>42</sup>

In *Ashcroft*, the Government, citing *Ferber* and *Osborne*, argued Congress had an interest in stamping out images that are the product of child sexual abuse.<sup>43</sup> The Court found this unconvincing since the speech prohibited by the Child Pornography Prevention Act “records no crime and creates no victims by its production.”<sup>44</sup> The Government next asserted that the images could lead to actual instances of child abuse.<sup>45</sup> Unconvinced, the Court held the causal link between virtual child pornography and actual instances of child abuse were “contingent and indirect.”<sup>46</sup> The Court found the Government’s argument

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<sup>40</sup> *Id.* at 241-42. Section 2256(8)(B) prohibited “[a]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture . . . that is or appears to be, of a minor engaging in sexually explicit conduct.” *Id.* at 241. Section 2256(8)(D) defined child pornography to include “sexually explicit image that was ‘advertised, promoted, presented, described, or distributed in such a manner that conveys the impression’ it depicts ‘a minor engaging in sexually explicit conduct.’ *Id.* at 242. According to Black’s Law Dictionary, Virtual Child Pornography is defined as, “[m]aterial that includes a computer-generated image that appears to be a minor engaged in sexual activity but that in reality does not involve a person under the age of 18.” BLACK’S LAW DICTIONARY 1279 (9th ed. 2009).

<sup>41</sup> *Free Speech Coal.*, 535 U.S. at 243.

<sup>42</sup> *See Free Speech Coal. v. Reno*, 198 F.3d 1083, 1097 (9th Cir. 1999).

<sup>43</sup> *Free Speech Coal.*, 535 U.S. at 249. As discussed in the 2010 case, *U.S. v. Stevens*, child pornography can arguably fall within the unprotected category of speech, “speech integral to criminal conduct.”

<sup>44</sup> *Id.* at 250 (“Virtual pornography is not ‘intrinsically related’ to the sexual abuse of children, as were the materials in *Ferber*”). *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 250-51. The Court found two flaws in the Government’s rationale. *Id.* First, *Ferber*’s judgment was based upon how child pornography was made, not on

unconvincing, and, in a 7-2 decision, held that the prohibitions of §§ 2256(8)(B) and 2256(8)(D) were overbroad and unconstitutional.<sup>47</sup>

*B. U.S. v. Stevens – Does Child Pornography Fall Within  
“Speech Integral to Criminal Conduct?”*

In 1999, Congress enacted 18 U.S.C. § 48 to criminalize the commercial creation, sale or possession of depictions of animal cruelty.<sup>48</sup> Section 48 enforced a criminal penalty for anyone who knowingly “creates, sells, or possesses a depiction of animal cruelty, if done for commercial gain in interstate or foreign commerce.”<sup>49</sup> Congress enacted § 48 primarily to target the interstate market for “crush videos.”<sup>50</sup> These videos appealed to persons with a very specific fetish, and typically involved a woman intentionally crushing helpless animals with her feet.<sup>51</sup> While enacted to target crush videos, in *Stevens*, § 48 was applied to depictions of animal fighting.<sup>52</sup> Respondent, Robert Stevens, ran a business and a website, through which he sold videos of pit bulls engaging in dogfights and attacking other animals.<sup>53</sup>

In the United States District Court of Western Pennsylvania, Stevens argued that § 48 was “facially invalid” under the First Amendment.<sup>54</sup> The district court denied Stevens’ motion to dismiss the indictment, holding that depictions subject to § 48 are categorically unprotected by the First Amendment and § 48 was not substantially overbroad.<sup>55</sup> The jury subsequently convicted Stevens, and the district court sentenced him to concurrent

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what it communicated. Second, *Ferber* did not hold that child pornography is by definition without value. *Id.* at 251.

<sup>47</sup> *Id.* at 258.

<sup>48</sup> *U.S. v. Stevens*, 130 S.Ct. 1577, 1582 (2010).

<sup>49</sup> *Id.* (citing 18 U.S.C. § 48 (2010)).

<sup>50</sup> *Id.* at 1583.

<sup>51</sup> *Id.* (citing H.R. REP. NO. 106-397 p. 2-3) (“Crush videos often depict women slowly crushing animals to death ‘with their bare feet or while wearing high heeled shoes,’ sometimes while ‘talking to animals in a kind of dominatrix patter’ over ‘[t]he cries and squeals of the animals, obviously in great pain.’”) *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* Stevens sold videos that depicted pit bulls fighting in Japan and hunting wild boars. *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

sentences of thirty-seven months imprisonment.<sup>56</sup> Stevens subsequently appealed to the Third Circuit Court of Appeals, which held § 48 unconstitutional and vacated the conviction.<sup>57</sup> The Third Circuit determined that § 48 regulated speech protected by the First Amendment,<sup>58</sup> and § 48 “could not survive strict scrutiny as a content-based regulation of protected speech.”<sup>59</sup>

The Government appealed, arguing that § 48 complies with the Constitution because the banned depictions of animal cruelty, similar to child pornography, are categorically unprotected by the First Amendment.<sup>60</sup> As the Court points out, “[t]he Government’s claim is not just that Congress may regulate depictions of animal cruelty subject to the First Amendment, but that these depictions are outside the reach of that Amendment altogether . . . they fall into a ‘First Amendment Free Zone.’”<sup>61</sup>

The Government further proposed that a categorical exclusion claim should be considered under a simple balancing test: “[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”<sup>62</sup> The Court rejected the Government’s test, noting that a “free floating” test for First Amendment coverage was “startling and dangerous.”<sup>63</sup>

The Court, citing *Ferber*, discussed that the Government derived its test from the descriptions from precedent, but stressed, “such descriptions are just that—descriptive.”<sup>64</sup> The Court made clear that precedent “do[es] not set forth a test that may be applied as a general matter to permit the Government to imprison

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (citing *U.S. v. Stevens*, 533 F.3d 218 (2008)).

<sup>58</sup> *Id.* at 1583-84 (citing *Stevens*, 533 F.3d at 218). The Third Circuit declined to recognize depictions of animal cruelty as a new category of unprotected speech. *Id.*

<sup>59</sup> *Id.* at 1584 (citing *Stevens*, 533 F.3d at 232). The Court found that § 48 lacked a compelling government interest and “[w]as neither narrowly tailored to prevent animal cruelty nor the least restrictive means of doing so.” *Id.*

<sup>60</sup> *Id.* The Government argued that depictions of animal cruelty should be added to the list of speech unprotected by the First Amendment. *Id.* at 1585.

<sup>61</sup> *Id.* (citing *Board of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.* 482 U.S. 569, 574 (1987)).

<sup>62</sup> Brief for the United States at 8, *U.S. v. Stevens*, 130 S. Ct. 1577, 1582 (2010) (No. 08-769), 2009 WL 1615365, at \*8.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1586.

any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of cost benefits tilts in a statute's favor."<sup>65</sup> Finding the Government's argument unconvincing, the Court affirmed the Court of Appeals, holding that § 48 was substantially overbroad, and therefore invalid under the First Amendment.<sup>66</sup>

Applying *Stevens* to child pornography, the government argued that animal cruelty, like child pornography, was a category of speech outside the First Amendment's protection.<sup>67</sup> In the Court's analysis, they list the unprotected forms of speech:

From 1791 to present . . . the First Amendment has permitted restrictions upon content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations. These historic and traditional categories long familiar to bar . . . includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct . . . .<sup>68</sup>

It should be pointed out that child pornography was not included on this list.

Arguably, this language was mere dicta, and the exclusion of child pornography from the list is not a binding decision. However, it has been argued that this exclusion has greater significance than mere dicta.<sup>69</sup> Before *Stevens*, the categories considered to be unprotected by the First Amendment included: incitement,

<sup>65</sup> *Id.* The Court points out that in *Ferber*, the State of New York had a compelling interest in protecting children from abuse, and the value of using children in these works was nominal. *Id.* (citing *Ferber*, 458 U.S. at 756-57, 762).

<sup>66</sup> *Id.* at 1592. The Court pointed out that as pressing a problem that crush and dogfighting videos were, they were dwarfed by the market of other legal materials, such as hunting videos, that still fell within the scope of § 48. *Id.*

<sup>67</sup> See *Supra* note 61.

<sup>68</sup> *Stevens*, 130 S.Ct., at 1584 (quoting *U.S. v. Playboy Entm't Grp.*, 529 U.S. 803 (2000); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127) (citing *Roth v. U.S.*, 354 U.S. 476, 483; *Beauharnais v. Illinois*, 343 U.S. 250, 254-55 (1952); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

<sup>69</sup> See Antonio Haynes, *The Age of Consent: When is Sexting No Longer 'Speech Integral to Criminal Conduct'?*, 97 CORNELL L. REV. 369, 394-95 (2012) (citing Charles W. "Rocky" Rhodes, *The Historical Approach to Unprotected Speech and the Quantitative Analysis of Overbreadth in United States v. Stevens*, 2010 EMERGING ISSUES 5227 (LexisNexis July 30, 2010)).

fighting words, true threats, defamation, obscenity, child pornography, fraud, and speech integral to criminal conduct.<sup>70</sup>

Some legal scholars believe the change in the list of unprotected forms of speech is significant, stating:

[B]efore *Stevens* many believed—perhaps erroneously—that any sexually explicit image of a minor was child pornography, this belief is now fatally flawed. Instead, in determining whether a particular nonobscene image constitutes child pornography, the initial question must be whether there is specific illegal conduct to which the speech is integral.<sup>71</sup>

Based on this analysis, to be defined as child pornography, a depiction must be speech that is integral to the abuse of a child. This could drastically change the way courts analyze the constitutionality of child pornography convictions involving legal sexual conduct.

### PART III: *PEOPLE V. HOLLINS* – DOES FIRST AMENDMENT OFFER PROTECTION TO DEPICTIONS OF LEGAL SEXUAL ACTIVITY?

*People v. Hollins* is a significant case because it is an example of a state court failing to apply the ideas expressed in *Stevens*. The state court failed to recognize the *Stevens* concept that child pornography falls within the unprotected speech category of speech integral to criminal conduct.<sup>72</sup>

#### *A. Facts*

Marshall C. Hollins, then thirty-two years old, made a video recording of himself and his seventeen-year-old girlfriend (A.V.) having consensual sexual intercourse.<sup>73</sup> At A.V.'s request, Hollins sent the photographs to her e-mail account.<sup>74</sup> A.V.'s mother subsequently found the pictures in A.V.'s email account and made a complaint to the Freeport Police Department.<sup>75</sup> The Freeport

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<sup>70</sup> *Id.* at 394.

<sup>71</sup> *Id.* at 395.

<sup>72</sup> *Supra* notes 69-72.

<sup>73</sup> *People v. Hollins*, 971 N.E.2d 504, 507 (Ill. 2012).

<sup>74</sup> *Id.* at 516. A.V.'s mother was able to identify her daughter since "[h]er daughter's pubic area was shaved" *Id.* at 507.

<sup>75</sup> *Id.* at 507.

police determined there was no crime for sexual assault or abuse offenses due to the age of her daughter,<sup>76</sup> but eventually charged Hollins with three counts of child pornography pursuant to Illinois Criminal Code of 1961 section 20.1(a)(1).<sup>77</sup>

At the trial level, the court denied Hollins' motion that claimed portions of the child pornography statute were unconstitutional, arguing portions of the statute criminalize and punish legal activity.<sup>78</sup> The trial court found Hollins guilty of three counts of child pornography and sentenced him to concurrent terms of eight years imprisonment for each count.<sup>79</sup> Hollins appealed to the Illinois Appellate Court, arguing that the child pornography statute is unconstitutional.<sup>80</sup> The Illinois Appellate Court rejected Hollins' arguments and affirmed the trial court's holding.<sup>81</sup> Hollins appealed to the Illinois Supreme Court.<sup>82</sup>

Hollins raised two main arguments in front of the Illinois Supreme Court.<sup>83</sup> First, Hollins argued that Illinois Criminal Code section 20.1(a)(1), as applied to his case, denies him due process of law under the United States and Illinois constitutions.<sup>84</sup> To support his due process argument, Hollins contended that the application of section 20.1(a)(1) did not bear a reasonable relationship to the policy interest because it denies consenting adults the right to engage in private sexual activities of their choice. As a result, Hollins argued that the statute violated the privacy clause of the Illinois Constitution, which provides greater

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 506. Specifically, Hollins was charged with "(1) [d]efendant knowingly photographed . . . a child whom defendant knew to be under the age of 18 years, while actually engaged in an act of sexual penetration with defendant . . . (2) . . . defendant knowingly photographed . . . a child whom defendant knew to be under the age of 18 years, while actually engaged in an act of sexual penetration involving the sex organs of the child . . . and (3) . . . defendant knowingly used . . . a child whom defendant knew to be under the age of 18 years, to appear in a photograph in which [child] would be depicted as actually engaging in an act of sexual penetration with defendant . . ." *Id.*

<sup>78</sup> *Id.* Hollins also argued that the penalty for the offense was too severe, as compared to penalties for similar offenses that contain identical elements. *Id.*

<sup>79</sup> *Id.* at 507.

<sup>80</sup> *Id.* Specifically, Hollins argued that § 20.1(a)(1) "[w]as unconstitutional as applied to him and that his convictions violated the one-act, one-crime doctrine." *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 506.

<sup>83</sup> *Id.* at 508.

<sup>84</sup> *Id.*

privacy protections than does the United States Constitution. He also argued that the statute failed to give fair notice that his conduct was criminal.<sup>85</sup>

Second, Hollins argued that section 20.1(a), as applied, violated the equal protection clauses of the United States and Illinois constitutions.<sup>86</sup> Specifically, Hollins argued that he belongs to a class of people “who engage in legal sexual activities with consensual partners and choose to photograph their private interactions, thereby violating child pornography statutes that define child so as to include such otherwise legal sex partners.”<sup>87</sup> The Illinois Supreme Court held there was “[r]ational basis for the child pornography statute under both due process and equal protection analyses . . . .” and affirmed the judgments of the Illinois appellate and circuit courts.<sup>88</sup>

### *B. Supreme Court of Illinois’ Analysis*

In its analysis, the Illinois Supreme Court applied the rational basis test to determine the constitutionality of the Illinois statute.<sup>89</sup> The State contended that the statute was rationally related to the State’s “legitimate interest in protecting the psychological welfare of children.”<sup>90</sup> Hollins countered that this interest is frustrated when the individual photographed is a seventeen year old involved in a legal consensual relationship.<sup>91</sup>

In their discussion, the Court first looked at the Nebraska case *State v. Senters*.<sup>92</sup> Similar to Illinois, in Nebraska, an individual could “legally consent to having sexual relations”, but the filming of the sexual relations was illegal.<sup>93</sup> In *Senters*, the

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<sup>85</sup> *Id.* at 515. Hollins also pointed to legislative history concerning the raising of the age of consent for pornography from 16 to 18 years old in 1985, arguing the reasons behind it were to aid in the prosecution of child pornography cases. *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 515.

<sup>88</sup> *Id.* at 508.

<sup>89</sup> *Id.* at 509.

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

<sup>91</sup> *Id.* at 509-10.

<sup>92</sup> *Id.* at 510. In *Senters*, the defendant was charged with making child pornography for videotaping sex with his seventeen year old girlfriend. *Id.* at 510 (citing *State v. Senters*, 699 N.W.2d 810 (Neb. 2005)).

<sup>93</sup> *Id.* (quoting *Senters*, 699 N.W.2d at 813-14). Similarly to Hollins, *Senters* contended that the Nebraska law was not rationally related to the state’s legitimate

Nebraska Supreme Court held that while an individual may be old enough to legally consent to sex, they might not comprehend that the material could become public.<sup>94</sup>

Next, the Illinois Supreme Court looked at *United States v. Bach*.<sup>95</sup> In *Bach*, the defendant made a similar argument to Hollins, that even though the depictions were those of a minor, according to the definition of the statute, the images should be protected because they depicted noncriminal sexual conduct.<sup>96</sup> The Eighth Circuit concluded that Congress's decision to define minor "as an individual under 18 was rationally related to the government's legitimate interest in enforcing child pornography laws."<sup>97</sup>

The Illinois Supreme Court found the analysis in both *Senters* and *Bach* persuasive.<sup>98</sup> The Court contended that "while it is true the underlying conduct being recorded is legal, it is the actual recording of the conduct, and the consequences to the child that flow therefrom, that is the interest being protected by the statute as applied."<sup>99</sup> Therefore, the Court held that the Illinois statute was rationally related to the legislature's purpose to prevent harm to minors by prohibiting, not the sexual act itself, but the memorialization of that act.<sup>100</sup>

In dissent, Justice Burke argued that the majority overlooked *Stevens*.<sup>101</sup> Justice Burke argued that the majority applied the rational basis test, since child pornography photographs are not entitled to First Amendment protection.<sup>102</sup> Burke pointed out that the majority's analysis that child pornography is presumed

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interest "because it also prohibited a person from videotaping lawful sexual conduct for private, noncommercial purposes." *Id.*

<sup>94</sup> *Senters*, 699 N.W.2d at 817 ("[T]o remain secret, a danger exists that the recording may find its way into the public sphere, haunting the child participant for the rest of his or her life. It is reasonable to conclude that persons 16 and 17 years old, although old enough to consent to sexual relations, may not fully appreciate that today's recording of a private, intimate moment be the Internet's biggest hit next week.").

<sup>95</sup> *Hollins*, 971 N.E.2d at 510-11.

<sup>96</sup> *U.S. v. Bach*, 400 F.3d 622, 628 (8th Cir. 2005).

<sup>97</sup> *Hollins*, 971 N.E.2d at 511 (citing *Bach*, 400 F.3d at 629).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 512.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 516.

<sup>102</sup> *Id.* (citing *In Re D.W.*, 827 N.E.2d 466 (Ill. 2005)).

unprotected is no longer valid after *Stevens*.<sup>103</sup> Burke believes that *Stevens* established “no First Amendment exception for child pornography . . . [r]ather, child pornography is simply one example of an historical category of speech that is exempted from first amendment protection . . . .”<sup>104</sup>

#### PART IV: WHY ARE PROSECUTIONS FOR THIS MATERIAL FIRST AMENDMENT VIOLATIONS?

The dissent in *Hollins* addresses the issue of why it is relevant that prosecutors are charging individuals under child pornography law for legal sexual conduct.<sup>105</sup> As Justice Burke argues, these photographs do not meet the definition of child pornography as defined by the Supreme Court in *Stevens*.<sup>106</sup> Therefore, material that is not child pornography is being classified as unprotected by the First Amendment.

In the *Hollins* dissent, Justice Burke contends that in determining whether the state’s restriction on this material is constitutional, courts should apply a test more stringent than rational basis of review.<sup>107</sup> Classifying this material as unprotected by the First Amendment makes possible the prosecution of individuals engaged in legal sexual conduct under child pornography laws, despite the fact the material in question does not meet the definition of child pornography defined in *Ferber*.

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<sup>103</sup> *Id.* at 519.

<sup>104</sup> *Id.* at 520. Burke stated, “for a photograph to be child pornography in the federal constitutional sense, and thus exempted from first amendment protection, the photograph must be ‘an integral part of conduct in violation of a valid criminal statute.’” *Id.*

<sup>105</sup> *Id.* (Justice Burke argues that the “photographs are therefore not child pornography as defined by the Supreme Court for purposes of the first amendment”).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* Justice Burke believes that defense counsel erroneously submitted that the material in question was unprotected by the First Amendment. *Id.*

PART V: HOW THE SUPREME COURT MAY SOLVE THIS PROBLEM -  
 HOLD THAT CHILD PORNOGRAPHY MUST BE DEPICTIONS OF  
 SPEECH INTEGRAL TO THE ABUSE OF CHILDREN

In the future, the Supreme Court could address the issue Justice Burke expresses in his dissenting opinion in *Hollins*.<sup>108</sup> In *Hollins*, Justice Burke points out in his dissent that the Court in *Ferber* recognized a category of child pornography is unprotected by the First Amendment.<sup>109</sup> While the Court gave policy justifications for excluding child pornography from First Amendment protection. However, Burke argues that in *Ashcroft*,<sup>110</sup> the Supreme Court distinguished virtual child pornography from the speech in *Ferber*, speech that itself is the record of the child's abuse, since "virtual child pornography records no crime and creates no victims by its production."<sup>111</sup>

Further, Justice Burke argues that the majority's holding that any depiction of an individual under the age of eighteen equates to child pornography, an unprotected form of free speech, is now invalid after *Stevens*.<sup>112</sup> Citing Haynes' argument above,<sup>113</sup> Burke argued that in order to be defined as child pornography, the depiction must be integral to child abuse.<sup>114</sup> Meaning, unlike the photographs at issue in *Hollins*, in order to be defined as child pornography, a photograph must actually be a depiction of child abuse.<sup>115</sup>

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<sup>108</sup> *Id.* at 516-20.

<sup>109</sup> *Id.* at 517 (citing *New York v. Ferber*, 458 U.S. 747 (1982)).

<sup>110</sup> *Id.* at 517-18 (citing *Ferber*, 458 U.S. at 759-63) (First, the government had a compelling interest to prohibit the "sexual exploitation and abuse of children" that results from the creation of child pornography. Second, the distribution of child pornography is "intrinsically related to the sexual abuse of children," because the depictions are both a permanent recording of the abuse and prohibiting the distribution of the material is an effective way of stopping the production of child pornography. Thirdly, the selling of child pornography provides an "economic motive" for and are "an integral part" of "that criminal activity." Lastly, the value in permitting child pornography was exceedingly modest).

<sup>111</sup> *Id.* at 519 (citing *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002)).

<sup>112</sup> *Id.*

<sup>113</sup> *Supra* note 72.

<sup>114</sup> *Hollins*, 971 N.E.2d at 521.

<sup>115</sup> For example, in *Ferber* the depictions at issue were of adolescent males masturbating. The act of masturbation was the child abuse, and the filming was the speech integral to the child abuse. 458 U.S. 747.

The counter-argument is that the depiction itself is integral to criminal conduct; the picture or videotape is the child abuse the speech is integral to. This argument is similar to the majority's justification in *Hollins*,<sup>116</sup> while there is no child abuse occurring during the legal sexual conduct, the actual filming of the sexual conduct constitutes the child abuse. An argument could be made that this justification is illogical.

If the taking of the picture itself is "child abuse," prosecutors should charge individuals under child abuse statutes. Since most prosecutors bring charges under child pornography statutes, alone, and not also under child abuse statutes, one could assume that the images would likely not constitute child abuse under state's statutes. It is illogical that images of a seventeen can be speech integral to child abuse, but the individual who captured the image is not charged under a state's specific child abuse statute.

The Supreme Court should clarify whether child pornography falls within the unprotected category of "speech integral to criminal conduct." The decision would drastically change how lower courts analyze the constitutionality of the application of child pornography statutes. As it stands, the category of speech under which child pornography falls is not clearly defined.

## PART VI: HOW CAN STATES FIX THIS PROBLEM?

### *A. Close the Age Gap*

Another solution is to close the aforementioned age gap between the legal age of consent and the age that constitutes child pornography.<sup>117</sup> An argument can be made that if an individual is legally old enough to consent to sex, then that individual should be able to photograph those sexual acts as well.

The counter to this argument is that even though an individual is mature enough to consent to sex, they are not necessarily old enough to comprehend the damages that could result from depictions of their sexual activities. In their analyses,

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<sup>116</sup> *Hollins*, 971 N.E.2d at 509 (citing *State v. Senters*, 699 N.W.2d 810, 817 (Neb. 2005)).

<sup>117</sup> *See Supra* Part I.

courts have used this justification when the constitutionality of child pornography statutes are being challenged.<sup>118</sup> While this argument is logical, it dodges the answer to closing the age loophole between age of consent and child pornography statutes.

If courts and legislatures are worried that minors might not fully comprehend the damages that could result if these depictions became public, then they could simply raise the legal age of consent. Following some courts' logic,<sup>119</sup> it could be argued that if an individual is too young to comprehend the potential damages resulting from the filming of sexual explicit conduct, then they are not mature enough to legally consent to sexual conduct. As discussed by the court in *Hollins*, there are also potential consequences from legal sexual activity as well.<sup>120</sup> If courts and legislatures are worried about the potential damages resulting from depictions of sexual conduct, then they should also be concerned with the consequences of sexual conduct. Therefore, the legislature, by raising the legal age of consent, could set an age at which an individual is mature enough to both understand the damages that could result from both sexual conduct and filming of sexual conduct.

The Court's analysis in *Hollins* is not logical. It does not make sense that the court would hold that an individual is old enough to comprehend possible pregnancy, sexually transmitted diseases, and emotional damages, but they are not old enough to comprehend the potential harm of recording the sexual conduct. Though debatable, it would appear that possible pregnancy would

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<sup>118</sup> See *A.H. v. State*, 949 So. 2d 234, 237 (Fla. App. 1 Dist. 2007) ("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"); *Senters*, 699 N.W.2d at 817 ("It is reasonable to conclude that persons 16 or 17 years old, although old enough to consent to sexual relations, may not fully appreciate that today's recording of a private, intimate moment may be the Internet's biggest hit next week"); *Hollins*, 971 N.E.2d at 514 ("[A] 17-year-old may legally consent to sexual activity, he or she may still be unable to appreciate the subtle dangers of memorializing such activity on film or in a photograph.").

<sup>119</sup> See *Supra* note 108. *A.H.*, 949 So. 2d at 237; *Senters*, 699 N.W.2d at 818; *Hollins*, 971 N.E.2d at 514.

<sup>120</sup> *Hollins*, 971 N.E.2d at 511 ("The consequences of sexual activity are concrete . . . [and are] apparent to teenagers: possible pregnancy, sexually transmitted diseases, and emotional issues.").

be equally, if not more, damaging than a permanent record of a sexual encounter.

*B. Add a Distribution Requirement for Depictions of Legal Sexual Conduct to Violate Child Pornography Statutes*

Respondents commonly make the contention that their depictions of legal sexual activity should not violate child pornography statutes since they made the videos for personal use and have not distributed the material.<sup>121</sup> Courts have typically rejected this argument.<sup>122</sup> In *A.H. v. State*, the District Court of Appeal of Florida held that the state had a compelling interest in prohibiting the production of such material, because “[i]f these pictures are ultimately released, future damages may be done to these minors’ careers or personal lives.”<sup>123</sup> Similarly, in *State v. Senters*, the Supreme Court of Nebraska held that even for those who record intimate conduct for personal use, “[a] danger exists that the recording may find its way into the public sphere, haunting the child participant for the rest of his or her life.”<sup>124</sup> These analyses are not consistent with Supreme Court precedent.

As discussed above, the Court in *Ferber* established that there is a compelling state interest in “safeguarding the physical and psychological well-being of a minor.”<sup>125</sup> Further, the Court pointed out that the distribution of child pornography was intrinsically related to the sexual abuse, since the depiction creates a “permanent record of the child participation and the harm to the child is exacerbated by their circulation.”<sup>126</sup> In *Ashcroft*, the Court distinguished virtual child pornography from the material at issue in *Ferber*, since virtual child pornography did not depict the abuse of a real child, and therefore was not an unprotected form of free speech.<sup>127</sup>

This comment argues that courts are not justified in their analysis that the chance that depictions of legal sexual conduct

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<sup>121</sup> See *A.H.*, 949 So. 2d 234; *Senters*, 699 N.W.2d 810; *Hollins*, 971 N.E.2d 504.

<sup>122</sup> *Supra* note 118.

<sup>123</sup> *A.H.*, 949 So. 2d at 239.

<sup>124</sup> *Senters*, 699 N.W.2d at 817.

<sup>125</sup> *Supra* note 32.

<sup>126</sup> *Ferber*, 458 U.S. at 759.

<sup>127</sup> *Supra* note 45.

could find their way into the public is a compelling enough state interest to penalize the mere production of these materials. . . Penalizing the possession of material based on the chance the material could find its way into the public does not seem to be in-line with Supreme Court precedent.<sup>128</sup> If courts and legislatures are concerned with the harms that could follow if these depictions are publicized, then they should penalize individuals who make the material public.

The counterargument to penalizing only the distribution of these materials is that the Supreme Court in *Osborne* already established that states have a compelling state interest to prohibit the mere possession of child pornography.<sup>129</sup> But, as discussed above,<sup>130</sup> the depictions at issue, arguably, do not meet the *Ferber* definition of child pornography, since no children were actually abused in their production.

There is no denying that harms could result from depictions of sexually explicit conduct becoming public. However, to penalize individuals under child pornography statutes on the chance they could be made public seems excessive, especially when the material at issue does not even meet the Supreme Court's definition of child pornography. There are two ways legislatures could still penalize the distribution of depictions of minors engaged in legal sexual conduct.

First, since these depictions do not meet the *Ferber* definition of child pornography, the distribution of these materials could be prohibited if it meets the *Miller* obscenity test.<sup>131</sup> Since the depictions do not meet the definition of child pornography, states can prohibit the material as obscene. Second, legislatures could define these depictions as child pornography if they are

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<sup>128</sup> See *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (“If the First Amendment means anything, it means the State has no business telling a man, sitting alone in his own house, what . . . films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds”).

<sup>129</sup> See *supra* notes 34-38.

<sup>130</sup> See *supra* notes 69-72.

<sup>131</sup> See *Miller v. California*, 413 U.S. 15, 24 (1973) (States prohibit distribution of obscene material, that meets the three prong test: (1) whether “the average person, applying contemporary community standards would find that the work . . . appeals to the prurient interest;” . . . (2) “Whether the work depicts . . . in an . . . offensive way, sexual conduct specifically defined by . . . applicable state law;” and (3) “Whether the work . . . lacks serious literary, artistic, political, or scientific value”).

distributed, but not the mere possession of them. Regardless of which approach legislatures choose, if courts are concerned that depictions of minors engaged in legal sexual conduct could potentially harm the minor's well being, then statutes should aim at punishing the distribution of these products, not the chance that they are released into public realms.

#### CONCLUSION

Referring to the second hypothetical discussed above,<sup>132</sup> should Jay and Kay be subjected to prosecution under their jurisdiction's child pornography statutes? While there is not Supreme Court precedent that directly addresses the issue, based on the Court's holding in *Stevens*, Jay and Kay's filming of their sexual conduct may not meet the definition of child pornography that was at issue in *Ferber*.<sup>133</sup> This is a question for the Supreme Court.

By establishing a threshold age for both a jurisdiction's age of consent and the age at which an individual's sexually explicit image constitutes child pornography would close the loophole that allows Jay and Kay's depictions of legal sexual activity to violate child pornography statutes. It is difficult to rationalize that while Kay (seventeen years old) is old enough to legally consent to sex, it is illegal for her to film the sexual conduct.

Further, Jay and Kay should not be prosecuted under child pornography statutes for the mere possession of depictions of their legal sexual activity, but could be held criminally liable for the distribution of those materials. Courts have established that states have a compelling interest in protecting the well being of children, and the mere existence of the material could lead to future embarrassment to the child depicted.<sup>134</sup> However, it would be too broad to prosecute Jay and Kay under child pornography

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<sup>132</sup> See *supra* Introduction.

<sup>133</sup> See *supra* notes 21-32.

<sup>134</sup> See *supra* notes 120-22.

\* This author would like to thank Professors Jack Wade Nowlin & George Cochran, both highly respected professors in the area of Constitutional law, for their insight and guidance in preparation for this Comment.

statutes for mere possession of depictions of legal sexual conduct on the mere chance that this material might find its way into the public realm. It would make more sense that there is a distribution requirement to prosecute Jay and Kay, since there is no evidence that they intend to profit from their depictions.

Regardless of whether you agree with Jay and Kay's decision to film their sexual conduct, neither of their actions meet the definition of child pornography the Court addressed in *Ferber*, nor is their conduct in the category of conduct that child pornography statutes are aimed at preventing. The depictions of their legal sexual activity should be protected under their right to free speech provided by the First Amendment.

*Jon Still\**

