"Sexting" and the First Amendment

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I.
Introduction

Two Florida teenagers took over 100 photographs of themselves naked and engaged in unspecified but lawful[1] "sexual behavior."[2] The two were subsequently charged with "promoting a sexual performance of a child" by "producing, directing or promoting a photograph or representation that they knew to include the sexual conduct of a child," a second degree felony under Florida law.[3] For her role in photographing lawful conduct, the 16 year-old defendant A.H. was adjudged delinquent on a plea of nolo contendere,[4] and the judgment was upheld on appeal.[5] In justifying the felony delinquency judgment, the court observed, among other things, that if the pictures ever got out, "future damage may be done to these minors' careers or personal lives."[6] The court did not mention "the potential impact on their lives from a child pornography conviction."[7]

In Ohio, a 15 year-old girl used her cell phone to send nude photos of herself and was charged with "illegal use of a minor in nudity-oriented material."[8] The charges were based on a statute[9] that the United States Supreme Court previously had specifically upheld.[10] Although the

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[1] B.B. v. State, 659 So. 2d 256, 260 (Fla. 1995) (holding that the state constitutional right of privacy prevented prosecution of sexual activities between minors and was critical of the fact that, under the prosecution's theory, the law was "not being utilized as a shield to protect a minor, but rather, it is being used as a weapon to adjudicate a minor delinquent").

[2] A.H. v. State, 949 So. 2d 234, 235-36 (Fla. App. 2007). At the time, the defendant A.H. was 16 years old and her boyfriend was 17. *Id.* Both were charged as juveniles. *Id. See also* Declan McCullagh, *Police blotter: Teens prosecuted for racy photos* CNET News (February 9, 2007), available at http://news.cnet.com/Police-blotter-Teens-prosecuted-for-racy-photos/2100-1030_3-6157857.html.

[3] *Id.* Fla.Stat. §827.071(3) (200_). "Sexual conduct" includes various form of sexual intercourse or contact as well as "actual lewd exhibition of the genitals" Fla.Stat. §827.071(1)(g) (200_).

[4] *A.H.*, 949 So 2d at 236

[5] *A.H.*, 949 So 2d at 239 (holding that, even assuming sexual intercourse between the two minors is legal, the state constitutional right of privacy does not protect the defendant's act of photographing their own sexual conduct in this case). It should be noted that no First Amendment issues were considered or, apparently, raised in the appeal.

[6] *Id.* at 239.

[7] Nancy Rommelmann, *Anatomy of a Child Pornographer*, REASON (July 2009), *available at* http://www.reason.com/news/show/133863.html.

[8] Russ Zimmer, *Student to admit to 1 charge in cell-phone nudity case,* Newark Advocate (Ohio) (Nov. 11. 2008); Kim Zetter, *Teen Girl Faced Child Porn Charges for E-Mailing Nude Pictures of Herself to Friends—Update* Wired Blog Network (October 22, 2008), *available at* http://www.wired.com/threatlevel/2008/10/teen-girl-faces/.

[9] Ohio Rev. Code Ann. § 2907.323(A)(3) (200__).

[10] Osborne v. Ohio, 495 U.S. 103 (1990)(concluding that the First Amendment does not prevent the states from criminalizing the private possession of child pornography). *Cf.* Stanley v. Georgia, 394 U.S. 557 (1969)(holding, by contrast, that the First Amendment does prevent prohibitions on the private possession of *obscenity*). *See infra* text

Court's earlier decision indicated that, to be constitutional, the statute would have to be limited to pictures going beyond mere nudity (for example, "involving a lewd exhibition or graphic focus on a minor's genitals"),[11] the prosecutor proceeded against the girl anyway. The girl agreed to enter a plea to a lesser felony, apparently hoping to avoid risk of conviction on charges that could have led to a 20 year registration requirement as a sex offender. However, the court refused to accept the plea and, instead, put the case over for six months on the condition that the girl comply with conditions set by the prosecutor. After she was caught violating one of the prosecutor's conditions (by using a cell phone), she was sentenced.[12]

In New Jersey, a 14 year-old girl was arrested on child pornography charges after the National Center for Missing and Exploited Children reported her to the authorities for 30 or so nude pictures of herself posted on her MySpace page.[13] She was charged with possessing and distributing child pornography. As a condition of withdrawing the charges, the prosecutor required the girl to undergo at least six months of counseling and probation and to "stay out of trouble."[14] Otherwise, if convicted, she would be required, after serving her sentence, to register as a sex offender.[15]

Factual situations like these are not isolated. A recent study shows that about 20% of U.S. teenagers (including 11% of teen girls ages 13-16) admit to producing and distributing nude or semi-nude[16] pictures of themselves.[17] Today's young people no doubt want to be popular and

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accompanying notes 95-113.

[11] *Osborne*, 495 U.S. at 107 & 112-13 and discussion *infra* note 112. Press reports of the case give no indication that any of the pictures went beyond mere nudity but, then again, the standard of "graphic focus" is not exactly self-explanatory and capable of varying interpretations.

[12] Russ Zimmer, *Court: Teen accused of texting nude photos violated deal,* Newark Advocate (Ohio) (April 21, 2009); I have found no report of what, exactly, the sentence was.

[13] Jennifer H. Cunningham, *14-year-old girl faces pornography charge* NorthJersey.com (March 25, 2009), available at http://www.northjersey.com/passaic/14-year-old_girl_faces_pornography_charge.html.

[14] Associated Press, *N.J. Teen Won't Face Child Porn Charges for Posting Nude Photos of Self on MySpace* (June 23, 2009), available at http://www.foxnews.com/story/0,2933,528602,00.html.

[15] *Id.*

[16] While the Supreme Court has said that "depictions of nudity, without more, constitute protected expression," *Osborne*, 495 U.S. at 112, lower court decisions both before and since have held that photographs can constitute child pornography (as "lascivious display of the genitals") even *without* nudity and with the genital areas covered. *See, e.g.*, United States v. Knox, 31 F.3d 733 (3d Cir. 1994); United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom.* United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987). For a discussion of these latter cases and of what "more" is required to make nudity lose its constitutional protection, *see* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 946-61 (2001).

There do not seem to be studies that would show the approximate proportion of sexually explicit teen photos that are actually illegal as opposed to those depicting only "nudity, without more," and it easy to see why. It is a serious crime to possess or view even a single picture that goes over the line. *See infra* note 71. No researchers in their right minds would want to incur the long prison terms that empirical studies could bring. As a practical matter, therefore, state and federal laws effectively prohibit independent scientific research into the various empirical questions that arise in this area. In any case, given the blurriness of the line between legal and illegal images (with even non-nude photos being potentially illegal), it may be virtually impossible to do a count and assemble reliable data. It seems a fair presumption, however, that any pictures showing teen nudity will result in a substantial legal risk for the teens who take and possess them even if the pictures might, after a trial and possible appeals, turn out to be constitutionally protected as merely nudity "without more."

[17] *See* National Campaign To Prevent Teen and Unplanned Pregnancy, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1 (2008), *available at* *http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf.* With their ubiquitous cell phones, it

interesting to their contemporaries as much as any prior generation. But the youth of today do not stay in touch with pens and scented paper. They text. They do not send each other little portraits in lockets. They snap photos on their cell phones. And, for better or worse, they do not regard sexuality as the monopoly of older generations but as a part of their lives.[18] Even if they personally abstain, they know that they are literally surrounded by classmates and friends who do not, and (as compared with recent generations) sexual encounters within their peer group are already a familiar and normal aspect of life.

Along with the burgeoning phenomenon of teenagers' taking sexually explicit pictures of themselves and sending them to friends by cell phone and other digital gadgets, a new word, "sexting," has been invented. There are reports of sexting prosecutions against teens across the country.[19] As the teenagers learned in the cases described above, taking sexually explicit pictures of persons under age 18, even of oneself, are state and federal felonies.[20] Under federal law, moreover, any person who "produces" sexually explicit images, including "lascivious exhibition of the genitals or pubic area" is required to maintain certain detailed records and to keep his or her home available for FBI inspections.[21] Failure to comply is a also felony.[22] Since it is unlikely that very many teens are keeping the required records, this law alone means that millions of American teenagers are felony sex offenders.

In addition to the prohibitions on producing child pornography, it is a felony under both federal and state laws to *possess or distribute* images showing, among other things, "lascivious exhibition of the genitals or pubic area" of persons under age 18.[23] Thus, in addition to the 20% of teens who are "producing" sexually explicit images of themselves, there is a perhaps even

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must be surpassingly easy for teens to do: Just step in front of a mirror, pop the shot and send it. In addition to pictures made and distributed using cell phones, and an estimated 5% of the child pornography images found on the internet, amounting to "hundreds of thousands of images," are self-produced, according to statistics quoted by Mary Leary. *See* Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 Va. J. Soc. Policy and L. 1, 19 (2007). Professor Leary also cites a New Zealand study that found "the largest group of child pornography offenders to be between the ages of fifteen and nineteen years old." *Id.* at 20.

For a discussion of sexting in the socio-political context, see David Rosen, *Sexting: the Latest Innovation in Porn*. COUNTERPUNCH (March 25, 2009), *available at* http://www.counterpunch.org/rosen03252009.html. For an illuminating mix of teen comments on the National Campaign's study, *see* Cosmo Girl blog (linked from the National Campaign website), *available at* http://www.cosmogirl.com/blog/sex-and-tech.

[18] Roughly half of U.S. high school students have had sexual relations, with the percentage slightly higher for boys than for girls. *See* Kaiser Family Foundation, U.S. Teen Sexual Activity 1 (2005), *available at* http://www.kff.org/youthhivstds/upload/U-S-Teen-Sexual-Activity-Fact-Sheet.pdf.

[19] Reportedly, child pornography prosecutions against sexting teens have been commenced in at least ten states. Texting Trouble; Trouble While Texting, ABC News Transcript March 13, 2009. *See* Rommelmann, *supra* note 7; Kim Zetter, *Child Porn Laws Used Against Kids Who Photograph Themselves*, Wired Blog Network (January 15, 2009), *available at* http://www.wired.com/threatlevel/2009/01/kids/; Naked Photos, E-Mail Get Teens in Trouble, FoxNews.com (June 5, 2008), available at http://www.foxnews.com/story/0,2933,363438,00.html. [add other citations from press]

[20] *See, e.g.,* 18 U.S.C.A. §2251. For a brief discussion of the applicability of state child pornography laws to minors, *see* Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary,* 15 Va. J. Soc. Policy and L. 505, 512-15 (2008), pointing out that these laws do not exempt minors.

[21] 18 USC § 2257; *see* Connection Distributing Co. v. Holder, 557 F.3d 321 (6th Cir. 2009). The law and its registration requirements also apply to persons who take explicit pictures of persons over 18, *id.* so sexting teens who are legally adults can also be felony sex offenders under this statute.

[22] *Id.*

[23] *See, e.g.,* 18 U.S.C.A. §§2252 & 2252A; Smith, *supra* note 20.

greater number of teens who are guilty of felonies for having *received* such images and retained or forwarded them to others (*i.e.,* "possession" and "distribution").[24] Receiving just one picture carries a mandatory minimum sentence of five years.[25] On the conservative assumption that, for each teen who photographs herself, an average of 2 or 3 classmates receive copies of the pictures, it is a plausible estimate that as many as 40-50% or more of otherwise law-abiding American teenagers are already felony sex offenders under current law—subject to long-term imprisonment and followed by "sex offender" registration requirements for decades or for life.[26]

Whatever else one may make of all this, there is certainly reason to suspect something is profoundly amiss when a system of laws makes serious felony offenders of such a large proportion of its young people. The fact that most of them will probably never be prosecuted is a hardly redeeming point. What kind of justice system turns a blind eye to millions of violators while selectively prosecuting a few? If the laws are sound as written, how can the authorities justify a systematic failure to uncover and prosecute the legions of young felons in our midst? If on the other hand the laws are not sound, how can they be left on the books, a kind of Sword of Damocles for youth, nominally making serious crimes out of conduct that is apparently deemed, de facto, too harmless to pursue? Arguably, at least, a self-respecting legal system should either enforce its laws or admit they are wrong and fix them.[27]

This article considers whether people, particularly teenagers, have a constitutional right to record and document their own legal activities, in particular, sexual conduct and nudity. Such "autopornography" may sometimes be considered legally obscene, a category that is not, of course, protected by the First Amendment.[28] But even pictures and videos that are not obscene may still be illegal if they fall into the broad constitutional category of "child pornography."[29] However, the constitutional questions are more complicated than simply placing pictures and videos in the correct legal category.

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[24] 31% of teens ages 13-19 say they have received a sender's nude or semi-nude picture or video of someone, and 29% say they have had such a picture or video "shared" with them (though not meant for them). National Campaign To Prevent Teen and Unplanned Pregnancy, *supra* note 17, at 11.

[25] 18 U.S.C.A. §§2252(a)(2) & -(b)(1).

[26] The Adam Walsh Child Protection and Safety Act of 2006, which includes the Sex Offender Registration and Notification Act ("SORNA"), effectively makes it mandatory for states to impose registration requirements on anyone 14 years or older who is convicted of a child pornography offense. *See* 42 USCS § 16911 (defining "sex offenders" required to register) and 18 USCS § 2250 (penalties for failure to register). *See* Britney M. Bowater, *Adam Walsh Child Protection And Safety Act Of 2006: Is There A Better Way To Tailor The Sentences Of Juvenile Sex Offenders?* 57 CATH. U.L. REV. 817 (2008).

For the view that it is not good policy to force sexting teens to register as sex offenders and to force them out of their homes under the often accompanying residency restrictions, *see* Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary,* 15 Va. J. Soc. Policy and L. 505, 535-40 (2008)

To be sure, at least some observers see the prosecution of sexting teenagers as a good thing. *See* Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 Va. J. Soc. Policy and L. 1 (2007). Others disagree. *See* Smith, *supra* (advocating handling by child protective services).

[27] Professor Amy Adler provides an eloquent review of embarrassments occurring in efforts to rein in obscenity, even before emergence of the current "sexting" phenomenon, in Amy Adler, *All Porn All the Time,* 31 N.Y.U. REV. L. & SOC. CHANGE 695 (2007).

[28] *See infra* Part II.

[29] *See infra* Part III.

Obscenity is a fraught concept whose legal definition depends significantly on the "value" of the content being expressed. It remains to be seen whether definitions devised decades ago, for a different technological context and under different social circumstances, can sustain a blanket constitutional exclusion for expressive content that evidently may now have more that "slight value"[30] to large numbers of people. Child pornography presents a different class of questions: The broad categorical exclusion established for child pornography in 1982 seems, in its verbal formulation at least, to easily include teen sexting and other autopornography. That categorical exclusion was, however, motivated by a pressing need to address a particular set of serious harms, the sexual exploitation and abuse by adults of children used in the production of sexually explicit materials.[31] It is a question, therefore, whether the categorical exclusion can be suitably understood to include materials produced under entirely different circumstances, where the originally motivating harms may be absent and the brunt of the suppression can savage the lives and future prospects of the very people whom the laws are supposed to protect.

II.
Autopornography as Obscenity

For nearly 170 years the Supreme Court never considered the question of whether there is an implicit obscenity exception to the protections for speech and press guarantied by the First Amendment.[32] Then, in *Roth v. United States,* [33] the Court discovered that such an exception exists. It held that obscenity was, like blasphemy,[34] profanity[35] and libel,[36] a kind of expression that was simply "outside the protection *intended* for speech and press."[37]

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[30] *See infra* Part II.

[31] *See infra* Part III.A.

[32] "[T]his is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment…" Roth v. United States, 354 U.S. 476, 481(1957). In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court stated in passing that "lewd and obscene" utterances (along with "the profane, the libelous and the insulting or 'fighting words'") are "no essential part of any exposition of ideas," and that their prohibition has "never been thought to raise any constitutional problem." *Id.* at 572 (upholding a conviction for uttering "fighting words"). It is not completely clear, however, what content the *Chaplinsky* court was attributing to the word "obscene," since (as Court has since admitted) the actual meaning of the word has proved to be a bit elusive in the cases. *See* Miller v. California, 413 U.S. 15, at 19 n.2 (1973) and *infra* text accompanying notes 50-51.

This is not to say, however, that there was no considerable effort to suppress books, mostly literature, in the lower courts, largely under the influence of an English case, Regina v. Hicklin, [1868] 3 Q.B. 360, 371, which condemned a religious tract as obscene citing its supposed "tendency . . . to deprave and corrupt" the minds of the vulnerable." *See* Stephen Gillers, *A Tendency To Deprave And Corrupt: The Transformation Of American Obscenity Law From Hicklin To Ulysses II*, 85 Wash. L.Q. 215 (2007). Noting the many decades of self-censorship that *Hicklin* test had induced, Professor Gillers remarked that "[n]o judicial pronouncement from an American or British court in the last 140 years has been as harmful to creative artists as Cockburn's single sentence." *Id.* at 221.

[33] 354 U.S. 476 (1957).

[34] *But cf.* Epperson v. Ark., 393 U.S. 97, 103-09 (1968), quoting Watson v. Jones, 80 U.S. 679, 728 (1872)("The law knows no heresy").

[35] *But cf.* Cohen v. California, 403 U.S. 15 (1971)(striking conviction for uttering "Fuck the Draft"). *Cf. also* FCC v. Pacifica Foundation, 438 U.S. 726, 744-48 (1978)(distinguishing broadcast speech from speech elsewhere).

[36] *But cf.* New York Times v. Sullivan, 376 U.S. 254 (1964)(severely curtailing suits for defamation in cases of public figures).

[37] *Roth*, 354 U.S. at 483 (emphasis added). "[T]here is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press." *Id.*

While the Court asserted that obscene utterances have only "slight social value," which is "clearly outweighed by the social interest in order and morality,"[38] this low value was not the rationale for recognizing an obscenity exception.[39] Indeed, the Court expressly dismissed the notion that the obscenity exception needed to be justified.[40] The stated legal basis for the obscenity exception was flatly historical. "[T]he rejection of obscenity," wrote the Court, "is "*implicit in the history* of the First Amendment.[41] At no point, moreover, did the Court make the least suggestion that it was creating the obscenity exception right then and there, in 1957. On the contrary, the *Roth* opinion clearly took the view that the scope of first-amendment protection and, hence, the scope of the exception for obscenity, "was fashioned"[42] at the time of the Bill of Rights.[43]

Thus, in reliance on history, the Court in *Roth* placed a serious constitutional cloud over not just teen sexting and autopornography[44] but over a branch of the publishing industry that is now worth billions of dollars per year,[45] denying to both the full force of the free press guaranty. It is as though somebody suddenly realized that the Framers had never intended to protect

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[38] 354 U.S. at 485, *quoting* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). The Court has also asserted the existence of competing state interests in later cases, as well, *e.g.,* in *Miller v/ California*, 413 U.S. 15, 19 (1973) ("This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles").

[39] *Id.* at 484-85 ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

[40] *Id.* at 484-87, citing dicta from Beauharnais v. Illinois, 343 U.S. 250, 266 (1952): "Certainly no one would contend that obscene speech … may be punished only upon a showing of such circumstances," *id.* at 266, *i.e.,* "a clear and present danger of a serious substantive evil." *id.* at 253.

[41] *Id.* at 484 (emphasis added).

[42] *Id.* at 484.

[43] The Court continued to insist on this "originalist" source of the obscenity exception 25 year later when it again asserted that "'rejection of obscenity … was *implicit* in the history of the First Amendment." New York v. Ferber, 458 U.S. 747, 754 (1982)(emphasis added) (without, however, citing any historical authority from the time of First Amendment's ratification). And the Court reconfirmed this view that original intent is the basis of the obscenity exception just last year in District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008)("The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets").

One consequence of this purely historical foundation for the obscenity exception is "the power of a legislative body to enact such regulatory laws [restricting obscenity] on the basis of unprovable assumptions. Kaplan v. California, 413 U.S. 115, 120 (1973), *citing* Paris Adult Theatre I v. Slaton, 413 U.S.49, 60-63 (1973).

[44] Which was then, of course, still in the future.

[45] Reliable data are not easy to find. One fairly recent industry source placed U.S. pornography revenues in 2006 at about $12.45 billion per year for "adult entertainment." Free Speech Coalition, STATE-OF-THE-INDUSTRY REPORT 2007-08 1 (2008). Another source, apparently an industry critic, put the 2006 figure at $13.33 billion. Family Safe Media, http://www.familysafemedia.com/pornography_statistics.html, and the total for 16 industrialized countries was given as $97 billion in 2006. Jerry Ropelato, *Internet Pornography Statistics*, available at http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html#anchor2. These figures represent, of course, not the value of the industry to those who run it (whose net profits are much lower) but to the consumers who buy it.

The industry's annual revenues would probably be much greater were it not for the damping effect of the obscenity laws on copyright enforcement. "Many adult businesses have been hesitant to … pursue prosecution of those pirating their materials…concerned that prosecuting for piracy will bring about unwanted government attention." Free Speech Coalition, *supra* at 13. An "estimated … 50% of online materials consists of pirated content. *Id.* By muting the effectiveness of copyright monopolies, the nation's obscenity laws apparently do much to assure the abundant supply of inexpensive pornography on the internet.

motorcycle magazines and so, from then on, the First Amendment's protection ceased to apply to motorcycling content.

The historical evidence for an early obscenity exception is, however, quite a bit more sketchy than the *Roth* Court seemed to assume when it "squarely held"[46] that "obscenity is not within the area of constitutionally protected speech or press."[47] Justice Douglas (who presumably had clerks to look into the matter) could not find any,[48] nor apparently has anyone else. The Court cited a few state cases and statutes in support of its historical claim, but these are poor evidence of the thinking at the time that the First Amendment was drafted. After all, until well into the 20th century, nobody even thought the amendment had anything to do with the states.[49] And then there is the awkward fact that neither the *Roth* definition of obscenity nor today's definition "reflect the precise meaning of 'obscene' as traditionally used in the English language."[50] So even if we had evidence that the Framers meant to deny protection to something they called "obscenity," that evidence would not mean they intended to exclude what *we* call obscenity under the "specific judicial meaning"[51] that the courts use today. The contours of a legal rule cannot both have a deep historical origin and, at the same time, be newly minted.

Thus we see that the constitutional status of a widespread form of teen communication is thrown into doubt by a reading of history that appears more inventive than accurate. As a practical matter, however, the Court since *Roth* has treated early Americans' understanding of the obscenity concept as being, in the words of Justice Scalia[52] "entirely irrelevant."[53] And this is probably just as well, for even if one's "originalist" commitments are strong, it may fairly be

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[46] *Ferber*, 458 U.S. at 754.

[47] *Id.* at 485.

[48] Paris Adult Theatre I v. Slaton, 413 U.S.49, 70 (1973). *See also* Miller v. California, 413 U.S. 15, 40 (1973); Roth, 354 U.S. at 514; United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 130-37 (1973)(Douglas, J., dissenting).

[49] *Compare* Barron v. Baltimore, 32 U.S. 243 (1833)(Bill of Rights does not apply against the states) with Gitlow v. New York, 268 U.S. 652 (1925)(freedom of speech and press, as fundamental liberties, are protected from state impairment by the fourteenth amendment).

[50] *Miller*, 413 U.S. at 19 n. 2. In ordinary English, the Court explains, the term "obscene" has a meaning generally encompassing whatever is disgusting, revolting, offensive or the like. *Miller*, 413 U.S. at 428 n. 2. The Court could not, however, embrace this meaning without also embracing as "implicit in the history of the First Amendment" a rejection of *all* disgusting, revolting and offensive speech. *Roth*, 354 U.S. at 484. Such a reading would, of course, limit the First Amendment to *in*offensive speech, making it just about nugatory.

Recognizing its earlier misapprehension of the word "obscenity," the Court observed in *Miller* that the material discussed in *Roth* was "more accurately" defined as "pornography." *Miller*, 413 U.S. at 428 n. 2. However, the Court did not adopt this term in place of "obscenity," probably because, if it did, it would risk disconnecting modern obscenity doctrine from its supposed historical foundation. The Court's way out of this conundrum was to assert that "[p]ornographic material which is [legally] obscene forms a sub-group of all 'obscene' expression," namely, "obscene material 'which deals with sex.'" *Id.*

But mysteries remain. The Court did not explain why, given the historical pretensions of *Roth,* some but not all historically "obscene" material should be denied First Amendment protection, or why the only kind of obscenity that should be denied protection is the kind that "deals with sex." The implicit reason for the distinction is that material which "deals with sex" is of such "slight value" that little or nothing is lost by banning it when it is offensive, whereas offensive materials dealing with other subjects may be worthy of protection despite being offensive. Of course, the empirical fact and/or value judgment that this distinction presupposes is that material "dealing with sex" is ipso facto of "slight value.

[51] *Miller*, 413 U.S. at 428 n. 2.

[52] In another but analogous context.

[53] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 n. 15 (1992)

questioned whether, as a historical matter, the Framers actually gave much thought at all to excluding obscenity, especially pictorial materials, from the First Amendment's protection. The First Amendment was after all drafted and ratified decades before the invention of photography, in an era when the only pictographic obscenity would have been paintings, engravings, drawings, and statuary. Works of this sort are very labor-intensive and, therefore, expensive to produce and relatively rare—never a big part of the overall communications mix. Digital photography has changed everything. If, therefore, the true foundation of the obscenity exception is, indeed, in history, then the whole basis for the exception is open to question. Perhaps for this very reason, combined with realities set in motion by technology, today's complex obscenity doctrine will one day be looked back on as a late-20th century detour, just another one of those constitutional mistakes, like *Lochner*,[54] *Chrestensen*[55] and *Bowers v. Hardwick*.[56]

In the meantime, however, it certainly is possible that at least some sexting and other teen autopornography falls within the Court's current definition of obscenity and is, therefore, outside the protection of the First Amendment. It is hard, though, to be too definitive about this, since the definition itself none to easy to apply. As is well known, the Supreme Court has had more than a little trouble deciding what obscenity is once it decided that "it" was unprotected speech.[57] Since the 1973 case of *Miller v. California,*[58] however, the Court has stabilized its definition of obscenity and, under the current version, expressive materials are deemed obscene if "the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value."[59] .

Taking these three definitional elements in order, it seems highly likely that some substantial part of sexually explicit teen communications would meet each of the *Miller* criteria. It is plausible, for example, that teens who make and send sexually explicit images and videos of themselves do so with the intention of titillating their friends and classmates. If "appeal to the prurient interest" means anything, it means something like that.[60] The *Roth* case specified that the

[54] Lochner v. New York, 198 U.S. 45 (1905)(entrenching economic due process), effectively *abrogated by e.g.,* Nebbia v. New York, 291 U.S. 502 (1934); United States v. Carolene Products Co., 304 U.S. 144 (1938).
[55] Valentine v. Chrestensen, 316 U.S. 52 (1942)(excluding "commercial speech" from First Amendment protection), *abrogated by* Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
[56] Bowers v. Hardwick, 478 U.S. 186 (1986) (citing traditional sexual values in upholding a law that banned, among other things, sexual intercourse by same-sex couples), *overruled* by Lawrence v. Texas, 539 U.S. 558 (2003).
[57] *See Ferber*, 458 U.S. at 754-55. Miller v. California, 413 U.S. 15, 20-23 (1973); Paris Adult Theatre I v. Slaton, 413 U.S.49, 78-114 (1973) (Brennan, J. dissenting).
[58] 413 U.S. at 24.
[59] *Id.*
[60] Actually, not everything that "turns on" other people is necessarily prurient. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985). The accepted distinction seems to be between material that only excites "normal, healthy sexual desires" as opposed to that which excites "sexual responses over and beyond those that would be characterized as normal," such as "a shameful or morbid interest in nudity, sex, or excretion." *Id.* The court of appeals in *Brockett* had elaborated a bit further, saying that "prurient" for constitutional purposes would not include "material that, taken as a whole, does no more than arouse 'good, old fashioned, healthy' interest in sex," *id.* at 499. apparently referring to the "healthy, wholesome, human reaction common to millions of well-adjusted persons in our society." *Id.* But what, in this day and age, would not count as 'good, old fashioned, healthy' sex and be, instead, consigned to the category of "shameful or morbid"? Necrophilia comes to mind, but what else? Back in 1985, when *Brockett* was decided, things might have been easier. *Cf.* Bowers v. Hardwick, 478 U.S. 186, 195 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003). But today's climate is a good deal more tolerant (mercifully in my view). At any rate, the immediate question is whether teens' depictions of teenage sexual activity for a teenage audience are better understood as appealing to "normal, healthy sexual desires" or as "shameful or morbid." I think

material must appeal to prurient interest of the "average" person,"[61] but not long after *Roth* the Supreme Court clarified this point by saying that, when material does not actually appeal to the average person's prurience, then it doesn't have to.[62] Under the current rule, it is apparently enough that the materials can inspire the requisite prurient thoughts in their intended audience.[63] This last qualification is fortunate, since it lets obscenity prosecutions sidestep the sticky question of whether child pornography appeals to the sexual interests of the "average" adult. To the extent that most sexting and other teen autopornography is intended to inspire classmates and friends, it would seem to readily meet the "prurient" prong of the *Miller* definition. It is likewise easily conceived that such pictures and videos would often meet the second *Miller* prong, by being "patently offensive in light of community standards." [64] Indeed, it is not inconceivable that some significant part of teen produced material may even intentionally do so.

As for third *Miller* prong, "serious literary, artistic, political, or scientific value," it must be remembered that we are talking about creative works that are made *by teens*. To be sure, teenagers may excel in some fields (*e.g.,* gymnastics), but the arts, literature, science and politics are not normally among them. Accordingly, one may fairly doubt whether teenagers' sexually explicit creations are any more likely than any other teen creations to possess the kinds of high values deemed important and "serious" by the much older individuals who would judge them.

Not that teens' communications may not have surpassing importance and value to the teenagers themselves in their everyday lives, social interactions, quest for acceptance, personal self-discovery and, in general, defining for themselves who they are and where they fit in their world. But while a young person's life is a thing of drama, her elders may see only "sound and fury, signifying nothing."[65] If the courts deprecate values that are of evident importance to large numbers of younger people, characterizing common kinds of teen communications as "no essential part of any exposition of ideas [and of] slight social value as a step to truth,"[66] then it should be easy enough for prosecutors to satisfy the "lacks serious … value" prong of the *Miller* test.

Nonetheless, in the years since *Miller*, prosecutions for obscenity of all kinds have, for whatever reason, been occurring at a declining rate.[67] In the child-pornography laws prosecutors seem to have found a much more serviceable alternative. Unlike the Court's obscenity standards, child pornography laws involve no fuzzy facts like "community standards" or "artistic value,"

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we can agree that casual teen sexual relations probably did not fall within the heartland of 1986-style "good, old fashioned, healthy" sex. Predicting today's judicial consensus is, however, another matter.

[61] Roth, 354 U.S. at 489-90. *See also Miller*, 413 U.S. at 24-25 & 33-34.

[62] Sellers who catered to non-mainstream erotic tastes nearly escaped the obscenity exception until the Court moved to fill this loophole, in 1966, by supplementing the "average person" with the members of any "clearly defined deviant sexual group" likely to receive the material in question. Mishkin v. New York, 383 U.S. 502, 509 (1966) (emphasis added).

[63] "We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group" *Id.* The *Mishkin* supplement apparently survived *Miller's* reworking of the obscenity definition. *Miller,* 413 U.S. at 33.

[64] Of course, in state juvenile proceedings, the "lay jurors" that *Miller* assumed would normally decide this issue will not ordinarily be present, so the determination of "patently offensive in light of community standards" will be left to judges.

[65] MACBETH, Act 5, sc. 5.

[66] Roth v. United States, 354 U.S. 476, 485 (1957).

[67] *See* Adler, *supra* note 27, at 700-05 (2007).

and prosecutors can make a case with little more than proof that the defendant possessed or made of a visual depiction of sexual conduct by a minor.[68] So rather than further belaboring the status of teen productions under obscenity analysis, we turn now to consider its constitutional status as child pornography.

III.
Autopornography as Child Pornography

Even when teenage sexting and other autopornography is not obscene, it can still be considered "child pornography" and, as such, outside the protection of the First Amendment.[69] That means the states and Congress can impose penalties for producing, distributing, possessing or even just viewing it.[70] And the penalties can be severe.[71] So the crucial question is, to what extent can teenage sexting and other autopornography be constitutionally treated as "child pornography" and, for that reason, unprotected by the First Amendment?

A. The Creation of the Unprotected Category. The case that paved the way for prosecuting teens who make sexually explicit pictures of themselves is *New York v. Ferber.*[72] Prior to *Ferber* such pictures would have been protected by the First Amendment unless constitutionally "obscene,"[73] However, the Supreme Court in *Ferber* carved out a new First Amendment exception that withdraws protection from "child pornography" images and films whether they are obscene or not.

Ferber originated as a prosecution against a bookseller under a statute that prohibited knowingly "promoting a sexual performance" by an underage child.[74] The statute defined the term "sexual performance" as a performance[75] that includes any of several specified kinds of "sexual conduct" by the child,[76] including masturbation and "lewd exhibition of the genitals."[77]

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[68] 458 U.S. at 764 (emphasis in original).

[69] *See* New York v. Ferber, 458 U.S. 747, 764-65 (1982), discussing the differences between the test for child pornography and the rather stricter standard for obscenity. The defendant in *Ferber*, for example, was acquitted on the obscenity charges, but convicted based on the same two films for distributing child pornography. 458 U.S. at 251-52.

[70] *Id.;* Osborne v. Ohio, 495 U.S. 103 (1990); *see generally infra* Part III.A. Child pornography prosecutions currently "account for about 2 percent of the entire federal criminal caseload.," and is "one of the fastest-growing segments of the federal court docket," amounting to "more than 2,200 [new cases] in fiscal 2008." Mark Hansen, *A Reluctant Rebellion*, 95 A.B.A. June, p. 54, 56 (June 2009).

For an excellent and informative treatment of legal and constitutional questions surrounding child pornography, *see* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921 (2001).

[71] A point stressed in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), which overturned a portion of a Federal statute under which a "first offender may be imprisoned for 15 years…. A repeat offender faces a prison sentence of not less than 5 years and not more than 30 years in prison." 535.U.S. at 244, describing the "severe punishment" for child-pornography offenses under 18 U.S.C.A. §2252A(b)(1). Currently, the maximum periods for the surviving portions of the statute have been increased to 20 and 40 years, respectively. *Id* "The [sentencing] guidelines operate like a rocket ride into the sentencing stratosphere." Hansen, *supra* note 70, at 58.

[72] 458 U.S. 747 (1982).

[73] Miller v. California, 413 U.S. 15 (1973). As noted *supra*, text accompanying note 69, not all child pornography is necessarily "obscene" under the *Miller* test.

[74] 458 U.S. at 751. The present version of the statute is N.Y. PENAL LAW §263.15 (McKinney 2008).

[75] A performance was defined as "any play, motion picture, photograph or dance" or "any other visual representation exhibited before an audience." N.Y. PENAL LAW §263.00(4) (McKinney 2008) (present version).

[76] 458 U.S. at 751. N.Y. PENAL LAW §263.00(1) (McKinney 2008)(present version).

[77] 458 U.S. at 751. N.Y. PENAL LAW §263.00(3) (McKinney 2008) (present version).

The defendant's specific conduct consisted of selling two films that showed young boys masturbating.[78]

The "single question" in *Ferber* was whether, "to prevent the abuse of children who are *made* to engage in sexual conduct for commercial purposes," the state can constitutionally prohibit the dissemination of material that shows children engaged in sexual conduct *"regardless of whether such material is obscene."*[79] The Supreme Court ruled in the affirmative, reasoning that: "When a definable class of material … bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment."[80]

The Court in *Ferber* made clear that it was not simply deciding the facts of the case before it but, rather, carving out a whole new category of expressive content that would from then on be denied constitutional protection.[81] That the *Ferber* ruling was meant to encompass not just the two films at issue but all of child pornography was confirmed in several statements in the case.[82] The Court wrote, for example, of the "the *category* of child pornography which … is

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[78] *Id.* at 752. Both *Ferber* and the Supreme Court's other landmark withdrawing protection from child pornography, Osborne v. Ohio, 495 U.S. 103 (1990), involved apparently gay-oriented pornography, perhaps a surprising disproportion considering the relative representation of gays in the population as a whole. However, it is consistent with what Professor Adler has described as the "[a]nti-homosexual fervor [that] also fueled the movement." For example, an expert testified before the House in 1977 that "most agree that child sex and pornography is basically a boy-man phenomenon." Amy Adler, *The Perverse Law of Child Pornography*, 101 Colum. L. Rev. 209, 230 n. 116 (2001).

[79] 458 U.S. at 753 (emphasis added). The defendant in *Ferber* was acquitted of promoting an "obscene" sexual performance, but found guilty under the provisions cited *supra* notes 74-77, which did not require proof that the material was obscene. 458 U.S. at 752.

[80] 458 U.S. at 764.

[81] The Court's decision to carve out a new "category" of unprotected speech and press apparently overlooked one of the two "cardinal principles of our constitutional order," namely, "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Ferber,* 458 U.S. at 767-68 and 768 n. 20, quoting United States v. Raines, 362 U.S. 17, 21 (1960), which in turn was quoting Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885). *See also* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-02 (1985); & *infra* Part III.G.

[82] There is no real doubt that the Court in *Ferber* created a categorical exclusion, but since our question now is whether sexting and autopornography are in the unprotected category, it may pay to see what the Court said it was doing at the time.

The Court has since confirmed that *Ferber* was meant to withdraw constitutional protection from a whole *category* of expression. United States v. Williams, 128 S. Ct 1830, 1836 (2008); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245-46 & 257 (2002)("the categories recognized in *Ferber* and *Miller*") . *Accord*, United States v. Bach, 400 F.3d 622, 698 (8th Cir. 2005) ("Congress may regulate pornography involving all minors under the age of eighteen if it has a rational basis for doing so"); United States v. Freeman, 808 F.2d 1290, 1292 (8th Cir. 1987) ("Recognizing that states have compelling interests in protecting children from sexual abuse, the Court held that visual depictions of sexual conduct of children are not protected by the First Amendment").

Somewhat confusingly, the Court in *Ferber* sometimes chose wording that implied it was narrowly deciding only the case before it, *viz.* "we hold that child pornography as defined in [N.Y. Penal Law] § 263.15 is unprotected speech subject to content-based regulation," 458 U.S. at 766 n. 18; "[w]e hold that § 263.15 sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection," 458 U.S. at 765; & "there is nothing unconstitutionally 'underinclusive' about a statute that singles out this category of material for proscription," 458 U.S. at 765. In the last two quotations, the Court uses the word "category" to mean that which is defined in the New York statute and not a broad "category" of constitutional dimensions. However, even if the Court meant to limit its holding the particular facts and statute before it, the

unprotected by the First Amendment."[83] And it said at another point that "[r]ecognizing and classifying child pornography as a *category* of material outside the protection of the First Amendment is not incompatible with our earlier decisions."[84] The words "not incompatible" signal, of course, that the unprotected category is a new one: No prior case had to be overruled, but the choice of words also acknowledges that there was no precedent for the category, either.

In giving its holding in *Ferber* a broad, "categorical" reach, the Court explained "it is not rare that a content-based classification of speech has been accepted because it may be *appropriately generalized* that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[85] Though a bit roundabout, this statement makes the conclusion almost inescapable that the Court regarded child pornography as one of those "not rare" categories of content for which the balance is so overwhelming that "case-by-case adjudication" is unnecessary.

To be sure, before closing its opinion the *Ferber* Court conceded that "case-by-case analysis"[86] might continue to be needed after all, a concession that seems at odds with the very concept of a "categorical" exclusion. If the Court was correct in its earlier assertion that child pornography requires "no process of case-by-case adjudication,"[87] why does it feel impelled to build in a role for case-by-case analysis?[88] One is put in the mind of Justice Stevens' remark: "Like many bright line rules, the categorical rule established in this case is only 'categorical' for a page or two in the U. S. Reports."[89]

Even with the built-in escape valve of "case-by-case analysis," however, the categorical exclusion can still have potentially devastating effects on the lives of teens who may find themselves prosecuted as child pornographers: The reason is that the existence of the exclusion effectively reverses the presumption of unconstitutionality that would normally apply to content-based regulations of speech.[90] What is more, the categorical exclusion allows the courts to bypass the case-by-case strict scrutiny that would otherwise be mandated.[91] As a result, the categorical

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Ferber case has not been so interpreted treated in later cases, *cited supra* this footnote.

[83] *Id.* at 764 (emphasis added) ("There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment").

[84] 458 U.S. 763 (emphasis added).

[85] 458 U.S. at 763-64 (emphasis added).

[86] *Id.* at 773-74.

[87] 458 U.S. at 763-64, quoted more fully *supra* text accompanying note 85.

[88] 458 U.S. at 773-74.

[89] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1067 (1992) (Stevens, J. dissenting) ("No sooner does the Court state [its new category] … than it quickly establishes an exception").

[90] United States v. Playboy Entertainment Group, 529 U.S. 803, 817 (2000) "When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed"), *citing* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid"). *Cf.* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434 & 449 (2002) (plurality opinion & Kennedy, J., concurring)(recognizing rule); Renton v. Playtime Theatres, 475 U.S. 41, 46-47 (1986) (recognizing rule). Further discussed *infra* Part III.G.

[91] *Compare Playboy*, 529 U.S. at 813(a "content-based speech restriction … can stand only if it satisfies strict scrutiny"), *citing* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989), *with. Ferber*, 458 U.S. at 763-64, *quoted supra* text accompanying note 85.

exclusion puts speakers of protected speech on the defensive.[92] Teens who are prosecuted for sexting or autopornography may, even if their speech is "protected," be nonetheless faced with a very hard choice, either mount a case-by-case "as applied" challenge to a prima facie valid law (and risk decades in jail)[93] or plead guilty to a lesser charge.[94]

Eight years after *Ferber* created the new categorical exclusion for child pornography, the Supreme Court extended the scope of the exclusion to reach mere possession and viewing of the illicit materials. The case was *Osborne v. Ohio*.[95] Although technically only dicta,[96] *Osborne's* conclusion that states are allowed to punish the possession and viewing of child pornography has no doubt acquired the status of law.[97] This means that, absent some other limiting factor, the millions of teenagers who receive and look at their friends' autopornography[98] can be constitutionally treated as felony sex offenders and prosecuted under the child pornography laws.

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[92] The extent to which the government can constitutionally place the speakers of protected speech on the defensive in the context of severe criminal penalties aimed at speech itself is an open question. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002)("The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful"). Placing the speaker on the defensive seems, first of all, to run afoul of the principle that "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *Playboy*, 529 U.S. at 816. Moreover, this shift in the burden of persuasion can be expected to have a particular chilling effect on protected speech where "[f]ailure to establish the defense can lead to a felony conviction." *Ashcroft*, 535 U.S. at 256. *See also* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)("The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded" [because] "otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation."). *Cf.* Virgina v. Hicks, 539 U.S. 113, 119 (2003) (recognizing the "the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation"); Perez v. Ledesma, 401 U.S. 82, 118 (1971)(absention case; Brennan, J. concurring in part and dissenting in part) ("the opportunity to raise constitutional defenses at a criminal trial is inadequate to protect the underlying constitutional rights").

While one would not want to endorse the teenage practice of taking and sharing naked pictures of themselves, the fact of the matter is that, if the pictures are not obscene they are a form of constitutionally protected expression, particularly if they do not go beyond nudity alone, Osborne v. Ohio, 495 U.S. 103, 112 (1990)., citing *Ferber*, 458 U.S. at 765, n. 18,. In *Ashcroft* the Court wrote that

> "this case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law."

535 U.S. at 244. Teens may be more willful, daring and ready to defy convention than movie producers and book sellers, but they are also even less in a position to defend themselves from the catastrophic punitive consequences that are threatened in the child-pornography laws. *See Ferber*, 458 U.S. at 772 ("the bookseller, with an economic incentive to sell materials that may fall within the statute's scope, may be less likely to be deterred").

[93] *See supra* note 71 and accompanying text.

[94] Which could still be a felony. *See supra* text accompanying notes 11-12.

[95] 495 U.S. 103 (1990).

[96] The Court held that the defendant's conviction could not stand even if the challenged statute were constitutional. Therefore, the Court did not need to resolve the first-amendment question in order to decide the case. In reaching out to opine on a constitutional point that the facts did not require it to decide, the Court therefore rendered what amounted, in the circumstances, to an "advisory opinion" on that subject. *Cf.* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 484 (1987). Indeed, the Court wrote, perhaps significantly, that "we *find* (rather than we *hold*) that Ohio may constitutionally proscribe the possession and viewing of child pornography." 495 U.S. at 111 (emphasis added).

[97] United States v. Williams, 128 S. Ct 1830, 1836 (2008)

[98] According to the National Campaign "25% of teen girls and 33% of teen boys say they have had nude or semi-nude images—originally meant for someone else—shared with them." National Campaign To Prevent Teen and Unplanned Pregnancy, *supra* note 17, at 3.

The central analytical point of the *Osborne* dicta was to distinguish the earlier case of *Stanley v. Georgia*.[99] The Court in *Stanley* had held that the states could not, on first-amendment grounds,[100] prohibit the mere private possession of *obscene* material. What the Court said in *Osborne* was that the *Stanley* rule for possession of obscenity did not extend also to child pornography.[101]

In distinguishing *Stanley,* the *Osborne* dicta explained that the reason for prohibiting the possession of child pornography[102] was not to control private thoughts(apparently the legislature's aim in *Stanley*)[103] but "to protect the victims of child pornography… to destroy a market for the exploitative use of children."[104] "Given the importance of the State's interest in protecting the victims of child pornography," the Court wrote, "we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain."[105]

The Court in *Osborne* also pointed out that enforcing penalties for possession would encourage possessors to destroy their child pornography, something that would advance two "other interests" of the state, namely, (a) preventing materials that "permanently record the victim's abuse" from causing "continuing harm by haunting the children in years to come,"[106] and (b) preventing pedophiles from using the material "to seduce other children into sexual activity."[107] (Never mind that such "destruction of evidence" to stave off prosecution would now be a serious federal felony.)[108] The Court has, in any case, since questioned these two "other interests," expressing doubt that either would have been constitutionally compelling enough on their own to justify a suppression of speech.[109] Indeed, the latter was explicitly declared feckless in *Ashcroft v. Free Speech Coalition.*[110]

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[99] 394 U.S. 557 (1969).

[100] [O]ur decision in Stanley was "firmly grounded in the First Amendment." *Osborne,* 495 U.S, at 108, *quoting* Bowers v. Hardwick, 478 U.S. 186, 195 (1986).

[101] 495 U.S. 108-12.

[102] Under Ohio Rev. Code Ann. § 2907.323(A)(3).

[103] 495 U.S. at 111, quoting *Stanley*, 394 U.S. at 566.

[104] 495 U.S. at 109 (emphasis added).

[105] 495 U.S. at 110 (emphasis added).

[106] 495 U.S. at 111.

[107] 495 U.S. at 111. "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." *Id.* n. 7, *quoting* 1 Attorney General's Commission on Pornography, Final Report 649 (1986) (emphasis added).

[108] *See* 18 U.S.C.A. § 1512(c)(1)("20 years"). *See also* Alison Leigh Cowan, *Lawyer Admits Destroying Evidence of Pornography*, N.Y. Times September 28, 2007, *available at* http://www.nytimes.com/2007/09/28/nyregion/28lawyer.html. Even at the time of *Osborne*, one might wonder to what the degree the states have a legitimate interest in encouraging such obstructions of justice.

Congress also apparently thought that encouraging the destruction of child pornography was a good idea before deciding to make it a serious crime. *See* 110 Stat. 3009-26, 18 USCS § 2251 (2006)(findings).

[109] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250 (2002), *discussed infra* text accompanying notes 156-222.

[110] *Id.* at 251-54. Congress has also evidently found it rather feckless as well. In enacting the PROTECT Act of 2003 (Prosecutorial Remedies And Other Tools To End The Exploitation Of Children Today Act Of 2003), it wrote "the production of child pornography is a byproduct of, and not the primary reason for, the sexual abuse of children." 117 Stat. 650, 678, 18 USCS § 2251 (2006) (findings).

Although the *Osborne* dictum talked of child pornography as a class,[111] it did not mention the *Ferber* "categorical" exclusion *in haec verba*, focusing instead on the problematically overbroad wording of the Ohio statute at issue.[112] Nevertheless, subsequent decisions leave no doubt that the categorical exclusion created by *Ferber* is recognized by the Court as an exception to the First Amendment's protection when it comes to production, distribution and possession.[113] So the question is, would teen sexting and other autopornography fall within the unprotected category?

B. Basic Content of the Unprotected Category. Although factual scenarios of teen sexting and autopornography were surely not in the Court's contemplation when it decided *Ferber*,[114] there is little doubt that its newly fashioned category could be easily read to include them.[115] Pictures of explicit conduct that teenagers take of themselves and send to their friends, classmates and others would first of all come squarely within the wording of the statutory prohibition that the *Ferber* case specifically upheld.[116] And the Court's "category of child pornography which … is unprotected by the First Amendment,"[117] is evidently larger still.[118]

At its out limits, the *Ferber* exclusion from constitutional protection could conceivably include anything that a broad reading of the words "child pornography" would connote, thus encompassing, at the least, any pornography[119] that depicts sexual conduct or lewdness by

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[111] *E.g.,* 495 U.S. at 108 ("the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in Stanley"). *See also id.* at 109, 110, 111, 114 n.9, & 115.

[112] 495 U.S. 111-14: "The Ohio statute, on its face, purports to prohibit the possession of 'nude' photographs of minors. We have stated that depictions of nudity, without more, constitute protected expression. *See Ferber*, [458 U.S.] at 765 n. 18." However, the Court concluded, the overbreadth problem was cured because the Ohio Supreme Court had limited the statute's prohibition to cases where "such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged." *Id.* at 112-13. As explained by the Court, "once a statute is authoritatively construed, there is no longer any danger that protected speech will be deterred and therefore no longer any reason to entertain the defendant's challenge to the statute on its face." *Id.* at 116 n. 12.

[113] *See, e.g.,* United States v. Williams, 128 S. Ct 1830, 1836, 1839 (2008); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245-46 (2002).

[114] The case came down long before the age of ubiquitous cell phones and cheap digital photography. If teens of the *Ferber* era wanted to share naked pictures of themselves, they had to either locate a compliant pharmacy to process their films or get a hold of a Polaroid.

[115] While the Supreme Court has said, as noted earlier, that "depictions of nudity, without more," are protected, the lower courts have held that, even *without* nudity, photographs can be deemed to show a "lascivious display of the genitals" and therefore constitute illegal child pornography. *See supra* note 16. Obviously, with all this flux and blur around the meaning of "nudity, without more," any teen who takes nude or semi-nude pictures of herself is, as a practical matter, in definite legal jeopardy.

[116] *See supra* notes 74-77 and accompanying text.

[117] *Id.* at 764 (emphasis added).

[118] For example, the statute in *Ferber* defined the prohibited material as visual representations that include certain specified kinds of "sexual conduct" (actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals). 458 U.S. at 571. But the Supreme Court nowhere indicated that it meant to limit "sexual conduct" to only those acts described in the statute before it. And, obviously, the generic term "sexual conduct" could include a wider range of actions than was specified in the *Ferber* statute, *e.g.*, fondling, voyeurism, and lascivious exhibition of female breasts, just to name a few.

[119] In *Miller*, the Court quoted a definition of "pornography" that included any "portrayal of erotic behavior designed to cause sexual excitement." 413 U.S. at 20 n. 2; *but cf.* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985) (comparing "good, old fashioned, healthy" sexual excitement with "shameful or morbid" excitement).

minors, whether in images or in words. This reading would by definition include all autopornography and sexting by teens under 18. It is clear, however, that the Court did not intend to create so broad an exception from first-amendment protection: "There are, of course, limits," it wrote, "on the category of child pornography which, like obscenity, is unprotected by the First Amendment."[120] While the Court did not undertake to fashion a comprehensive definition of child pornography, analogous to the *Miller* definition of obscenity, it did give some guidance.

For instance, the Court said that "the nature of the harm to be combated requires that the … offense be limited to works that *visually* depict sexual conduct by children below a specified age."[121] And, the Court added, "descriptions or other depictions of sexual conduct … which do not involve live performance or photographic or other visual reproduction of live performances, retain[] First Amendment protection."[122] This limitation would seem to mean that teenagers' sexual text messages, textual emails and the like, no matter how lurid or suggestive, would normally[123] not be constitutionally punishable.

On the other hand, the Court made clear that the legal definition of the child pornography is not limited by the various criteria set out in the test of legal obscenity from *Miller v. California* (prurient appeal, patently offensive, no serious value).[124] Accordingly, images and video can fall within the Court's new unprotected category even if they do have serious value, are not "patently offensive" and are totally lacking in prurient appeal.[125] The Court's reasoning was that the presence or absence of, for example, prurient appeal "bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work."[126]

Perhaps the Court's most laden specification of content for the new category came when the Court said, ambiguously, "[t]he category of 'sexual conduct' proscribed must also be *suitably* limited and described."[127] The Court did not elaborate on what kinds of limitations the word "suitably" might refer to or allow. However, the insertion of this capacious adverb left the door open, at very least, for the courts to later decide that whole classes of depictions deserve constitutional protection and need to be excised from the broad reach of the new categorical exclusion. Already for example the Court has consistently recognized that, even in the child context,

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[120] 458 U.S. at 764.

[121] 458 U.S. at 764 (emphasis in original).

[122] *Id.* at 764-65, anticipating a point that was at the core of a later case, Ashcroft v. Free Speech Coalition.535 564 (2002)(holding that Congress would not constitutionally prohibit "virtual" child pornography, made without using actual children).

[123] The word "normally" is due to United States v. Williams, 128 S. Ct 1830, 1842 (2008). The *Williams* case held that "offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment," thus upholding 18 U.S.C. § 2252A(a)(3)(B)(punishing anyone who "advertises, promotes, presents, distributes, or solicits" child pornography). So under *Williams*, a text message that says "Hey! Check my hot nude pics on Facebook! C U L8er" could put a teen in prison for 5 to 20 years. 128 S. Ct at 1837.

[124] 458 U.S. at 764-65. *See supra* text accompanying note 59.

[125] 458 U.S. at 764.

[126] *Id.* at 761. In the passage quoted from, the Court does indeed speak to the prurient interest of the "average person," but its point seems to be that the focus should be on the harm to the child, not on the excitations experienced by the media consumer. *Cf.* Adler, *supra* note 16, at 946-61.(describing how a number of lower court decisions seem to lose sight of this distinction).

[127] 458 U.S. at 764 (emphasis added).

"depictions of nudity, without more, constitute protected expression."[128] The question inevitably poses itself: Would it be constitutionally "suitable" for legislatures to make it a crime, with severe penalties,[129] for a teenager to visually record and document her own *lawful* sexuality?[130]

C. Are the Contours of the "Categorical Exclusion" Limited by the Harms to be Combated? The Answer in *Ferber.* The reason the Court carved out a categorical exclusion for child pornography in *Ferber* was, as it later put it, "the State's interest in protecting the children exploited by the production process."[131] More particularly, the *Ferber* court gave several reasons why "the States are entitled to greater leeway" in regulating the production and distribution of "pornographic depictions of children."[132] In summary, these reasons are:

> 1. The "sexual exploitation and abuse of children" that occurs in the *production* of the materials.[133]
>
> 2. The intrinsic relationship between the sexual abuse of children and the *distribution* of the materials.[134] Not only are the materials themselves a circulating "permanent record" of the child's "participation" and degradation, but drying up the market may be the only practical way to stop "the production of material which requires the sexual exploitation of children."[135]
>
> 3. The fact that it is a crime to employ children in producing child-pornography ("illegal throughout the Nation"), meaning that advertising and selling child pornography provides "an economic motive for and are … *an integral part of" an illegal activity*.[136]
>
> 4. The lack of any *countervailing need* for "visual depictions of children performing sexual acts or lewdly exhibiting their genitals" as an "important and necessary part of a literary performance or scientific or educational work."[137]

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[128] Osborne v. Ohio, 495 U.S. 103*,* 112 (1990), citing *Ferber*, 458 U.S. at 765, n. 18. *See supra* notes 16 & 115.
[129] *See supra* note 71 and accompanying text.
[130] An alternative and much less capacious reading of "suitably" is that it merely meant to require the wording of the statutory prohibitions to be appropriately precise. *See* 458 U.S. at 765.
[131] *Ashcroft*, 535 U.S. at 240. *Accord, Williams*, 128 S. Ct. at 1838 ("the child-protection rationale for speech restriction does not apply to materials produced without children"). *See* quotations from *Ferber* itself in text immediately following.
[132] *Ferber,* 458 U.S. at 756.
[133] *Id.* at 757, describing this as a "government objective of surpassing importance."
[134] *Id.* at 759.
[135] *Id.* at 760 ("The most expeditious if not the only practical method of enforcement may be to dry up the market").
[136] *Id.* at 761-62. Note that the illegal activity the Court was referring to in this third factor was the *production* of child-pornography materials, which might seem to assume the very point in issue. However, it appears clear from the opinion's subsequent discussion in the same paragraph that the crucial illegality was the "employment of children" in creating the media (which is, of course, conduct and *not* speech or expression) rather than the illegality of the recording process itself (which is essentially pure "speech").
[137] *Id.* at 762-63. The reason for the lack of need, the Court suggests, is that a "person over the statutory age could be used" or simulation could "provide an alternative."

The Court also listed a "fifth" reason, one which justifies the "categorical" character of the exclusion from first-amendment protection. It is, however, of a different order from the other four listed in the text and is discussed *supra* Part III.A.

Based on these reasons, the Court concluded that "the evil to be restricted … overwhelmingly outweighs the expressive interests, if any, at stake" and "it is permissible to consider these materials as without the protection of the First Amendment."[138]

But do these reasons for creating the categorical exclusion also serve to limit its scope? That is, did the Court intend the categorical exclusion to encompass broadly all visual "pornographic depictions of children,"[139] or did it intend the exclusion to be tailored, so it would only cover media produced in ways that caused the harms that the Court actually identified?[140] Consider this: Suppose, hypothetically, that there is *no* resulting harm when young people take non-obscene but sexually explicit pictures of themselves (say, a teen at a mirror with a camera phone), neither the kinds of harms referred to in *Ferber* nor otherwise. Would it follow that such "harm-free" autopornography would *ipso facto* fall outside of the *Ferber* categorical exclusion (and, therefore, be constitutionally protected) on the ground that it causes no harm? *Cessante ratione legis cessat ipsa legis*.[141]

There is good reason to think the answer is no. A conservative reading of *Ferber* is that its unprotected "category" would include any "visual depictions of children performing sexual acts or lewdly exhibiting their genitals,"[142] irrespective of whether the process of producing the depictions caused harm to the children involved.[143] In other words, *Ferber* seems to say that the scope of the child-pornography "category" is not limited to materials whose production would generate the harms that the categorical exclusion was based on.[144]

The *Ferber* opinion provides several reasons which, cumulatively, seem to support this conclusion. First, the Court repeatedly described the new unprotected category by reference to *content* (*e.g.,* "pornographic depictions of children"[145] or, simply, "child pornography"[146]), not by reference to the harms to be prevented, *viz.* "materials produced by exploitation" or the like. Secondly, the Court likened the "category of child pornography" to the category of obscenity,[147] which is, of course, "unabashedly"[148] content-based.[149] Finally, the Court as much as conceded

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[138] *Id.* at 763-64.
[139] *Id.* at 756.
[140] *See supra* text accompanying notes 131-38.
[141] "The reason for the law ceasing, the law also ceases." United States v. McLaughlin, 170 F.3d 889, 895 n. 1`(9th Cir. 1999). As applied here the maxim would refer to the reach of the law in coverage, not in time.
[142] *Ferber,* 458 U.S. at 762. The opinion describes the category using several different verbalizations, but this one seems to best capture all the essential ingredients.
[143] Note that all we talking about at the moment is what speech goes into the category, not whether the particular "harm-free" speech would ultimately receive constitutional protection. The Court acknowledged at the end of the *Ferber* opinion that some protected speech may be swept into the unprotected category, creating wrongs that will have to be "cured through case-by-case analysis." 458 U.S. at 773-74. But, as noted earlier, from the standpoint of the defendant (and of free speech) a process of case-by-base analysis is sharply inferior to the presumption of unconstitutionality and strict scrutiny that would normally apply. *See supra* notes 92-94 and accompanying text.
[144] It might be added here that, in the Federal appellate courts, the contours of the child-pornography "category" have *not* been limited to materials whose production generates the harms at which the categorical exclusion was aimed. *See* Adler, *supra* note 16, at 946-61.
[145] *Ferber,* 458 U.S. at 756.
[146] *E.g.,* 458 U.S. at 763, 764.
[147] 458 U.S. at 764 ("the category of child pornography which, like obscenity, is unprotected….").
[148] 458 U.S. at 756.
[149] As defined in Miller v. California*,* 413 U.S. 15, 24 (1973). *See supra* text accompanying note 59.

that a statute within the unprotected category could conceivably "forbid the distribution of material … which does not threaten the harms sought to be combated by the State."[150] Indeed, noting that the state court below "was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute,"[151] the Court specifically provided for this eventuality when it said that "whatever overbreadth may exist should be cured through case-by-case analysis."[152]

True, at one point, the Court in *Ferber* thickly implied that the constitutional contours of the child-pornography category should be limited by the Court's child-protection rationale for creating it. It wrote, as earlier noted, that "the nature of the harm to be combated requires" that the offense be limited to *visual* depictions of sexual conduct.[153] However, this statement provides at best only ambiguous support for the notion that the Court meant to tailor the categorical exclusion *overall* to cover only materials whose production threatened the harms relied on in *Ferber*. Although the statement can be read to *imply* that such a harm-based limitation exists, the last three passages quoted in the preceding paragraph[154] practically say flat-out that statutes falling within the categorical exclusion might nonetheless forbid content that "does not threaten the harms sought to be combated."[155]

In sum, reading *Ferber* as a whole one finds little reason to doubt that the new categorical exclusion was defined by content (albeit justified by harm-prevention). Accordingly, it seems fair to conclude that, even in situations where the *Ferber* harms do not apply (for example, pictures that teens take of themselves), the materials would fall within the categorical exclusion. By its terms, at least, the *Ferber* decision would seem to deny first-amendment protection just as much to the teen at the mirror as it does to the most exploitative and abusive adult producer of commercial child pornography.

D. Does *Ashcroft* Modify the Way the Categorical Exclusion is Defined? In *Ashcroft v. Free Speech Coalition*[156] the Supreme Court considered the constitutionality of a federal statute that criminalized so-called "virtual" child pornography, *i.e.,* "sexually explicit images that appear to depict minors but were produced without using any real children."[157] The Court

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[150] 458 U.S. at 766.

[151] *Id.* at 773.

[152] *Id.* at 774. Strictly speaking the Court is talking here about possible overbreadth of the state's content-based *statute*, not overbreadth of its own content-based *category*. However, if the content banned by the statute is within the Court's unprotected category, then there could be no possibility of statutory overbreadth (*i.e.,* no need for case-by-case cure) *unless* the category were defined by something other than the harm-prevention in view. Put the other way, if the Court's category were limited by harm-prevention in view, a statute falling within it could not be "overbroad." Therefore, this statement shows that the Court must have understood its new unprotected category to be potentially broader than (*i.e.,* not limited by) the harm-prevention in view.

[153] *Id.* at 764 (emphasis in original). And, as likewise noted earlier, it stipulated that the proscriptions of child-pornography statutes must relate to "sexual conduct" that is "*suitably* limited and described." 458 U.S. at 764 (emphasis added), leaving open the possibility that an exclusion whose scope exceeded the harm-prevention rationale might not be "suitable." *See supra* text accompanying notes 127-30.

[154] *Supra* text accompanying notes 150-52.

[155] 458 U.S. at 766.

[156] 535 U.S. 234 (2002).

[157] *Id.* at 239 (2002). Images generated totally by computer are an example. *Id.* at 241. The congressional enactment in question was the Child Pornography Prevention Act of 1966, specifically the portion of that act codified as 18 U.S.C.A. §§2256(8)(B) and (8)(D).The first provision expanded the definition of child pornography. The second

concluded that virtual child pornography is (unless obscene) fully protected by the First Amendment.[158] The attempt by Congress to expand the federal pornography definitions to ban virtual child pornography, wrote the Court, "finds no support in *Ferber*."[159]

Because teenage sexting and autopornography are, of course, not virtual but depict real people, the actual holding of *Ashcroft* would give no constitutional shelter to teens who make explicit pictures and videos of themselves. And in striking down the attempt to ban virtual child pornography, the Court did not need to modify the scope of the categorical exclusion or to define its content in any way that *Ferber* had not already anticipated. For *Ferber* had already made clear that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, *which do not involve live performance or photographic or other visual reproduction of live performances*, retains First Amendment protection."[160]

Nonetheless, even if the *Ashcroft* holding did not go beyond what had already been laid out in *Ferber*, the language and reasoning of *Ashcroft* were very different. Throughout the opinion the Court uses wording in which it seems to presuppose that the unprotected category is not merely justified but also shaped based on the particular harms that motivated its creation. These differences between *Ferber* and *Ashcroft* suggest that the later case represents a clarification or adjustment of the basis on which the scope the categorical exclusion is to be defined.

For example, in distinguishing virtual child pornography from material falling in the *Ferber* categorical exclusion, the Court wrote that "*Ferber's* judgment about child pornography was based upon *how it was made*, not on what it communicated."[161] At another point the Court said of *Ferber*: "The production of the work, not its content, was the target of the statute."[162] At still another point, the Court described the post-*Ferber* holding in *Osborne v. Ohio*[163] as being based on "these same interests" and as having been "anchored … in the concern for the participants [in the production], those whom it called the 'victims of child pornography.'" Finally, the Court in *Ashcroft* noted that *Osborne* "did not suggest that, absent this concern, other governmental interests would suffice."[164]

These repeated references to how the pornography is made, as opposed to what it depicts, are particularly notable in view of what the *Ashcroft* decision actually did, namely, it struck down the ban on virtual pornography saying that it "prohibits speech that records no crime and creates no victims by its production"[165]—*i.e.,* the invalidated ban did not address the concerns

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was an anti-pandering provision, which will not be separately discussed here.

[158] 535 U.S. at 256.

[159] *Id.* at 251.

[160] 458 U.S. at 764-65.

[161] *Id.* at 251 (emphasis added).

[162] *Id.* at 249.

[163] 495 U.S. 103 (1990).

[164] *Ashcroft*, 535 U.S. at 250. Other examples include: "[*Ferber*] distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process. *See id.* [458 U.S.] at 758." 535 U.S. at 240. "Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. *Id.* [458 U.S.] at 761, n. 12." *Ashcroft*, 535 U.S. at 249.

[165] 535 U.S. at 250.

underlying *Ferber* and *Osborne.* It is hard to resist the conclusion that the Court stuck down the virtual pornography ban *because* it did not address those concerns.

There are also other salient differences between *Ferber* and *Ashcroft* in their language and analysis. Whereas *Ferber* acknowledged only grudgingly that there might be value in depicting the sexual aspects of young people's lives,[166] the *Ashcroft* opinion devotes considerable space to that value, discussing the "enduring fascination" that our society has "with the lives and destinies of the young" and "the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach."[167]

Perhaps the most important difference between *Ferber* and *Ashcroft* is, however, the way in which the Court viewed the nexus between the unprotected category and *crime.* In a nutshell, the *Ashcroft* opinion seems to view crime prevention as the core reason why the Court should deny constitutional protection to child-pornography materials. The Court seemed to expect moreover that there should be a rather close connection between targeted speech and imminent criminal actions before the speech can be justifiably suppressed.[168] In *Ferber,* by contrast, although the Court mentioned illegal activity,[169] it primarily justified the suppression of speech on the basis of *preventing harm.*[170] In short, while *Ferber* stressed child sexual abuse and exploitation as *harms*, the stress in *Ashcroft* was on exploitation and abuse as *crimes*.

So what, if anything, may have changed as result of *Ashcroft's* differing approach to the categorical exclusion? In the two parts that follow. we will first consider whether *Ashcroft's* interpretation of *Ferber* has tied the legitimate reach of the categorical exclusion to the concerns that actually motivated its creation and, if so, what that might mean for the constitutional status of teen autopornography. We will then consider whether *Ashcroft's* repeated references to the objective of preventing imminent crime[171] reflect a developing view that (ordinarily, at least) the harmful acts defining the categorical exception will have to be serious enough to be crimes—

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[166] "The value … is exceedingly modest if not *de minimis.*" *Ferber,* 458 U.S. 762-63. *Cf. Osborne*, 495 U.S. at 108 n. 3 (accord on "the value of permitting child pornography," quoting *Ferber*).

[167] *Ashcroft*, 535 U.S. at 246-49. This resonant passage by Justice Kennedy must certainly qualify as the Supreme Court at its literary best.

[168] *See, e.g., id.* at 253-54, *citing* Brandenburg v. Ohio, 395 U.S. 444 (1969), and stating: "The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct." *See infra* text accompanying notes 203-06, for more quotations from *Ashcroft* indicating the importance of a "crime" connection to the unprotected category.

[169] *Ferber,* 458 U.S. at 761.

[170] The Court referred to "advertising and selling" as an "integral part" of the crime of producing child pornography, *id.* at 761-62, but the Court's decision to uphold the crime of producing was itself predicated on harms alone, *viz.* that "the use of children as subjects of pornographic materials is harmful," *id.* at 758. Therefore, mediately or immediately, the Court's ultimate justification of the categorical exclusion rested on harm-prevention. *See supra* text accompanying notes 131-38. As discussed *infra* text accompanying notes 197-202, this de-emphasis of the need for a crime nexus in *Ferber* is understandable considering that, at the time *Ferber* was decided, at least 3 states neither prohibited the use of minors in producing pornographic materials nor prohibited the distribution of materials depicting minors. 458 U.S. at 749.

[171] *See infra* text accompanying notes 203-06.

meaning that legislatures could not constitutionally prohibit minors from making non-obscene photographs of their own bodies or visual depictions of their own legal acts.

E. Limiting the Scope of the Categorical Exclusion to the Concerns Relied on in *Ferber* and *Osborne*. As noted above, the Court in *Ashcroft* struck down the federal law on virtual pornography stating that it "prohibits speech that records no crime and creates no victims by its production."[172] This statement implies a view of the legitimate reach of the categorical exclusion could dramatically affect the constitutional status of teen sexting and autopornography. No longer would sexting teenagers be confronted with the position, apparently accepted by some courts and prosecutors,[173] that the unprotected category includes any content that visually depicts sexual conduct by minors, *i.e.,* much or most of teen autopornography. Instead the categorical exclusion would have a somewhat tidier scope, one that takes in only those materials which are actually produced in ways that the categorical exclusion was intended to address.

On the other hand, if the categorical exclusion is broadly viewed to include (contrary to the implication of *Ashcroft*) even autopornography that "records no crime and creates no victims by its production,"[174] the result could be a categorical exclusion that overshoots by a wide margin the assumptions and justifications that support it. Within such a broad categorical exclusion it may well turn out that the *Ferber* balance between "the evil to be restricted"[175] and "the expressive interests … at stake"[176] can no longer be "appropriately generalized,"[177] and that would of course jeopardize the categorical exclusion's core factual predicate.

Probably the most significant difference between teenage autopornography and "traditional" child pornography, such as that in *Ferber* and *Osborne*, lies in the circumstances under which the two genres are, respectively, produced. It is highly probably, moreover, that these widely differing circumstances of production considerably affect their respective potentials for harm. The harms described in *Ferber* include various deleterious effects both immediate and long-range on the children depicted, but the common theme throughout the case is *exploitation*. Indeed, in the *Ferber* opinion the Court uses or quotes the word "exploit" and its derivatives more than 20 times[178] "[T]he State's particular and more compelling interest," it wrote, is "in prosecuting those who promote the sexual exploitation of children."[179]

The Court did not define "exploitation," but it seems clear enough from context that the Court meant the word in its more usual meaning, which connotes a significant disparity in

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[172] 535 U.S. at 250.
[173] For example, in the cases described at the beginning of this article. *See supra* text accompanying notes 1-15.
[174] 535 U.S. at 250.
[175] 458 U.S. at 763-64.
[176] *Id.*
[177] *Id.*
[178] *E.g.,* "The prevention of sexual *exploitation* and abuse of children constitutes a government objective of surpassing importance. 458 U.S. at 757. "[T]he distribution network for child pornography must be closed if the production of material which requires the sexual *exploitation* of children is to be effectively controlled." *Id.* at 760 (emphasis added). "[T]he State's particular and more compelling interest in prosecuting those who promote the sexual *exploitation* of children." *Id.* at 761 (emphasis added). Likewise, *Osborne* described the state's aim as "to destroy a market for the *exploitative* use of children." Osborne, 495 U.S. at 109 (emphasis added), and referred at least five times to the subjects of the kind of pornography at issue as "victims." *E.g.,* 495 U.S. at 109, 110 & 111,
[179] 458 U.S. at 761.

power, misuse of this disparity, a denial of another's autonomy, disregard of the victim's wishes or concerns, and a general degradation or impairment of the victim's personal dignity—all as a means to accomplish, in this case, a physical invasion. If the Court was using the word "exploitation" without the usually associated connotations of power and abuse, there is nothing in the opinion to indicate it. To say from the *Ferber* opinion that the Court meant to include teenagers taking pictures of themselves would quite a stretch.

There are several specifics in *Ferber* tending to confirm that the Court was using the word "exploitation" in it usual sense, *viz.* people taking undue advantage of *others*—in particular, adults taking advantage of children. To begin with, "single question" in the case concerned "the abuse of children who are *made* to engage in sexual conduct for commercial purposes."[180] The word "made" in this sentence obviously connotes an improper use of disproportionate power—and it certainly does not bring to mind an idea of people making photos of themselves, on their own initiative.

In addition to using the word "made," the question in the case (like the facts before the Court) notably refers to the "commercial" purposes for which the pornography at issue was created. To be sure, the opinion does not limit its reach to commercial pornography, but the Court does seem to presuppose a commercial context as a paradigmatic case—another feature implying that the Court's focus was on the situation of adults taking advantage of children*,* not just children misbehaving on their own. Finally, and perhaps most importantly, of the many studies and reports that the Court cited and relied on in reviewing the "balance of competing interests,"[181] all seem to have investigated the exploitation of children by adults. If any of these studies investigated or revealed evidence of harm from anything like teen autopornography, the Court did not mention it.[182]

By contrast, whatever may be the psychological or other harms of self-motivated and uncoerced acts of sexting or other teen autopornography, there is no reason to think they are similar in nature or degree to the outrageously exploitative and abusive harms relied on in *Ferber.* The use of children in the production of "traditional" child pornography entails by its very nature a most egregious misuse by adults of significant power disparities, coercive oppression of the child's autonomy and an assault on the child's dignity—not to mention her body. By contrast, teenagers taking pictures of themselves, on their own initiative for their own purposes, involves no power relationships, no invasion of autonomy and no attacks on dignity (not, at least, until the government intervenes).[183]

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[180] 458 U.S. at 753 (emphasis added) ("To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the *First Amendment*, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?").

[181] 458 U.S. at 764 & *id.* at 758 n. 9, 760 n. 10, 760 n. 11, & 762 n. 13.

[182] Professor Smith points out that neither the influential Final Report of the Attorney General's Commission on Pornography of 1986 nor the more recent 2001 ABA report prepared for the National Center for Missing and Exploited Children mention the phenomenon of underage persons taking sexually explicit pictures of themselves. Smith, *supra* note 20, at 517-18.

[183] It is possible, of course, to talk of "self-exploitation," *see* Leary, *supra* note 17, at 4. But when the word exploitation is deprived of its usual interpersonal context, it also loses its usual negative connotations of power disparity, coercion and assault, and becomes a mere metaphor for an unhealthy deficit of good judgment and appropriate personal discipline. Indeed, Professor Leary offers a definition of "self-exploitation" in which picture-

There is, to be sure, one *Ferber* concern that might apply, at least in some measure, to the teen sexting situation, namely, that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."[184] As explained in *Osborne*: "The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come."[185] However, the "haunting" described in both *Ferber* and *Osborne* clearly presupposes that there has been underlying "sexual abuse of [the] children"[186] Because teen autopornography lacks this major element of sexual abuse, any "haunting" that may follow from it is factually distinguishable. Of course, even people who have not been sexually abused may be "haunted" by images that show them doing things they later decide were foolish. And the government may arguably have an interest in protecting people from reminders of their own youthful silliness. Whatever one may say of this governmental interest, however, it is likely not on a par with the serious concerns that underlay *Ferber*. It hardly seems an interest "of surpassing importance."[187]

The main point for present purposes is, however, that exploitation-produced pornography and the self-produced variety are, in terms of the harms they can produce, two different genres. They have very different circumstances of production. Because the whole justification for the categorical exclusion rests on "a balance of competing interests"[188] based on certain underlying facts, the exclusion lacks its rationale in cases where the underlying facts are absent. In the case of autopornography, the *Ferber* basis for impinging on free expression is missing. Both *Ferber* and *Osborne* are, in short, factually distinguishable from cases of teens sexting and autopornography, and their rationale does not justify the suppression of materials made by teens acting on their own.

Of course, it may turn out that sexting and autopornography are, in fact, harmful to teens, possibly even harmful enough to outweigh the teens' own interests in expressing themselves as they wish. At the moment, however, this is a question that has not received much study. Whereas the Court in *Ferber* had stacks of evidence to document the harmful effects of exploitatively produced materials such as the two films there at issue, we still do not know if anything comparable will ever be presented on the wholly distinct phenomenon of sexually explicit pictures that teens take of themselves.

Until evidence is presented that harms of "surpassing" concern are caused by sexting and autopornography, the Court's analytical approach in *Ashcroft* gives good reason to doubt that the categorical exclusion can be simply extended to them. The *Ashcroft* analysis seems to say that the law should not impinge on expressive matter whose production does not implicate the concerns that the categorical exclusion was intended to address. In repeatedly stressing the way

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taking itself is the essence, with none of the negative features that are normally associated with a person taking unconscionable advantage another. *Id.* at 20.

[184] 458 U.S. at 759; *see also* Ashcroft, 353 U.S. at 249.

[185] 495 U.S. at 112.

[186] 458 U.S. at 759. *Ferber* cites this permanent record as a way that the films were "intrinsically related to the sexual abuse of children." *Id.; accord, Osborne*, 495 U.S. at 111.

[187] 458 U.S. at 757.

[188] 458 U.S. at 764.

that "traditional" child pornography is produced,[189] *Ashcroft* seemed to acknowledge that the categorical exclusion for child pornography should be tailored to address those concerns. Indeed, to reiterate, *Ashcroft* specifically noted that *Osborne* "did not suggest that, absent this concern, other governmental interests would suffice."[190] Thus, *Ashcroft* appears at very least to presuppose, if not hold, that the reach of the categorical exclusion does not extend to "speech that records no crime and creates no victims by its production"[191]—the evils that *Ferber* and *Osborne* identified and relied upon.

F. Linking the Scope of the Categorical Exclusion to Crime Prevention. "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[192] Thus, for example, in a state where sexual relations between 15 year-olds are considered to be a crime,[193] the visual recording or documenting of such relations could also be made a crime. The crime-prevention link is there. The only limitation recognized in *Ashcroft*[194] was the longstanding one which, as reformulated in *Brandenburg v. Ohio*,[195] would require that the targeted communicative acts be "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[196]

Even though there was clear prior authority for denying constitutional protection to expressive acts that are an "integral part" of crime, the Court in *Ferber* made little of it.[197] Instead of crime, the Court chose to stress *harms*, namely, the harms that the production of "traditional" child pornography inflicts on the children who are depicted.[198] It is understandable why: The Court in *Ferber* almost surely did not want the legitimacy or applicability its new categorical exclusion to depend on whether the production of the pornography involved some independent crime, such as child abuse.

For one thing, the two films at issue *Ferber* showed boys masturbating[199] and it is by no means clear that masturbation or asking others to masturbate was necessarily everywhere a crime. Even more importantly, at the time *Ferber* was decided there were at least three states that neither prohibited the use of minors in producing pornography nor restricted the distribution of pornography that had been made with minors.[200] This is not to mention the possible legal status of such production in various foreign countries from which child pornography might be

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[189] *Supra* text accompanying notes 161-64. As mentioned earlier, *Ashcroft* also seemed to identify the acts that cause these harms as crimes. *Infra* text accompanying notes 203-06.
[190] *Id.*
[191] 535 U.S. at 250.
[192] *Ferber,* 458 U.S. at 761-62, quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).
[193] *E.g.* ,in Massachusetts. *See* Commonwealth v. Bernardo B.. 900 N.E.2d 834 (Mass. 2009) (selective prosecution of one participant only under Mass. Gen. Laws c. 265, § 23).
[194] *Ashcroft*, 535 U.S. at 251-53.
[195] Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).
[196] *Id.* at 447.
[197] It mentioned the crime nexus in connection with only one of its several rationales for creating the categorical exclusion. *See supra* text accompanying note 136.
[198] In particular, sexual exploitation and abuse of children, and the continuing harms generated by ongoing circulation of the record of the abuse. *See id.*
[199] *Id.* at 752.
[200] *Id.* at 749. As the Court said "virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating 'child pornography.'" *Id.* at 758. Virtually all is, of course, not quite all.

imported.[201] Whatever the Court's reasons, however, the main point is this: The Court in *Ferber* gave no hint that it attached pivotal constitutional significance to the fact that particular child pornography was the product of a crime or not . All the Court needed to uphold the suppression of child-pornography content was the legislature's judgment that "the use of children as subjects … is harmful to the physiological, emotional, and mental health of the child"—a judgment that "easily passes muster under the First Amendment."[202]

The language used by the Court in *Ashcroft*, by contrast, repeatedly presupposed that the validity of child-pornography laws requires a sufficiently close connection between the materials being suppressed and a crime, specifically the crime of child abuse. For example, the Court practically began its first-amendment discussion by stating that "[t]he sexual abuse of a child is a most serious *crime*,"[203] effectively identifying sexual child abuse with crime. Then, *Ashcroft* distinguished "virtual" child pornography from unprotected content saying that, with unprotected content, "the creation of the speech is itself the *crime* of child abuse" whereas with virtual child pornography "there is no underlying *crime* at all."[204] And, again, in summarizing the reasoning of the "distribution" part of *Ferber*, the Court wrote: "Under either rationale, the speech had what the Court in effect held was a proximate link to the *crime* from which it came."[205] And even in situations where speech might lead to crime, the Court asserted: "The prospect of crime, however, by itself does not justify laws suppressing protected speech."[206] In sum, it looks very much as though the *Ashcroft* majority, at least in its choice of words, has replaced mere harm-prevention with *crime*-prevention as the normal constitutional requisite for suppressing speech. No concurring or dissenting opinion in *Ashcroft* objected to this re-interpretation of *Ferber*

Linking the scope of the categorical exclusion to crime, as opposed to mere harm, could of course have a major impact on the constitutional status of teen sexting and autopornography. It is not a crime to be naked at home, or even to be lewd. Nor is it even usually illegal for persons between 16 and 18 to engage in sexual relations with each other or even, depending on the state, with people who are older.[207] When sexting and autopornography are used to record and document entirely legal conduct, there is, in the words of *Ashcroft*, "no underlying crime at all."[208] So to the extent that statutes purport to ban teen autopornography depicting completely legal activities, the only behavior that the statutes end up criminalizing are the acts of recording, documenting and communicating—in effect making crimes out of essentially pure expression.

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[201] The Court specifically confirmed that "the State is not barred by the First Amendment from prohibiting the distribution of unprotected materials produced outside the State," *id.* at 765-66, partly because it is "often impossible to determine where such material is produced and partly because "maintenance of the market itself 'leaves open the financial conduit by which the production of such material is funded and materially increases the risk that [local] children will be injured,'" *id.* at 766 n. 19. The second of these two reasons is, of course, probably not germane to the casual teen autopornography context. However, the fact that the Court regarded the place of production as irrelevant seems to be a confirmation that the Court did not mean to limit *Ferber* to materials that were produced illegally. *See* United States v. Stevens, 533 F.3d 218, 247-48 (3d Cir. 2008)(dissenting opinion).

[202] *Id.* at 758.

[203] *Ashcroft,*535 U.S. at 244 (emphasis added).

[204] *Id.* at 254 (emphasis added).

[205] *Id.* at 250 (emphasis added).

[206] *Id.* at 245 (emphasis added).

[207] *See id.* at 246-47. In most states the age of consent is 16. *See* Advert, Worldwide Ages of Consent, *available at* http://www.avert.org/age-of-consent.htm.

[208] 535 U.S. at 254. "If the law considers a minor to be old enough to choose to engage in the adult act of having sex, they should also be treated as old enough to decide to record their own sexual exploits." Smith, *supra* note 20.

In fact, even when teens record their own *non*-legal sexual conduct, it is not a foregone conclusion that there is a sufficient "crime nexus" to justify a ban on the recording. The crucial *Brandenburg*[209] connection would presumably need to be shown,[210] and this may not be easy. While a purpose to produce "traditional" child pornography can give certain adults an incentive to sexually exploit and abuse children,[211] it is doubtful that that the modern teenager's interest in sex significantly depends on being able to record it. If laws against inter-teen sex do not deter teens' sexual conduct, it is not likely that their interest would "dry up"[212] if laws forbid them to document it. Conceivably there may be some underage sexual activity that is prompted by the presence of a camera, but even at that, "[t]he mere *tendency* of speech to encourage unlawful acts is not a sufficient reason for banning it."[213] In terms of the familiar *Brandenburg* requirements of imminence and likelihood,[214] the idea is risible that a "likely" factor motivating underage sex is the chance to make a recording.

In addition to *Ashcroft's* implicit presupposition that a crime nexus should normally be required to ban non-obscene pornography, there is a trend in a group of analogous cases that also supports this conclusion. The analogous group begins with a case from the *Ferber* era, *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*.[215] In *Posadas*, as in *Ferber,* the Court upheld a ban on speech that was an intrinsic part of a harmful but lawful activity. The harmful but lawful activity in *Posadas* was casino gambling, and the prohibited speech was casino advertising. The Court in *Posadas* upheld the prohibition on speech as a harm-prevention measure and, in doing so, was consistent with *Ferber*: Neither case required there to be a nexus between the prohibited speech and crime. Harm-prevention alone sufficed to ban speech.

Since 1996, however, the Court has retreated from its *Posadas* position, generally holding that truthful promotion of lawful activities is constitutionally protected—even if the activities being promoted might easily be deemed harmful.[216] While this line of cases is, as noted, only analogous, it does provide a historical perspective on *Ferber*. It shows a history in which the Court seems to have lost its onetime enthusiasm for legislative strategies that impose bans on speech as a way to regulate non-speech behavior. Whereas the Court in *Posadas* seemed to see speech regulations as a valid tool for dealing with harmful non-speech conduct, the cases since 1996 have instead been protective of free expression, requiring legislatures to address non-speech evils by means that are more direct: If a legislature wants to ban certain conduct, then it should ban it outright, and not just ban speech that is thought to promote it—in effect, a rule of "no crime, no ban.".

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[209] *See supra* note 195-96.
[210] *Ashcroft* recognized *Brandenburg* as good law in this very context. 535 U.S. at 253-54.
[211] *Ferber*, 458 U.S. at 761.
[212] *Cf. Id.* at 760 (asserting that law enforcement was constitutionally permitted to indirectly attack the problem of child-pornography production by bans of advertising and distribution that would "dry up" the market).
[213] 535 U.S. at 253 (emphasis added).
[214] *See supra* text accompanying notes 195-96.
[215] 478 U.S. 328 (1986).
[216] [Insert citations to examples: tobacco, alcohol, gambling etc.]

Indeed, apart from the short-lived *Posadas* detour, the constitutional legitimacy of content-based restrictions for pure "harm prevention" reasons, is not well developed.[217] Except for child pornography and protecting various aspects of government administration,[218] it is hard to think of examples. This is understandable. After all, the Framers were surely aware that free speech and press can have downsides. They certainly knew that competing interests would continually arise and present themselves as being more worthy than free speech and press. However, the judgment embodied in the First Amendment is that, with rare exceptions, the interest in free expression should prevail.[219] True, the Court has recognized that certain categories of content were, from the outset, never meant to go unrestricted (among those commonly mentioned are threats, incitement to crime, "fighting words" and obscenity[220]). However, the asserted interests in preventing evils from harmful-but-lawful acts are a particularly dangerous basis for restricting free expression. For if all that is needed to withdraw first-amendment protection is for the courts and legislatures to convince themselves that some non-expression interest is more worthy than speech, then the basic judgment embodied in the First Amendment is in trouble.[221]

So, with this background in mind, we return to the question: Do the Court's repeated references in *Ashcroft* to crime[222] reflect an emerging principle that visual recording, documentation and communication about *legal* activities will be normally be entitled to first-amendment protection? For millions of otherwise law-abiding teenagers the answer to this question could mean the difference between already being a felony sex offender (albeit unindicted) or, alternatively, simply Americans engaged in constitutionally protected expression. The language of *Ashcroft* and the parallel analogous trend in the post-*Posadas* line of cases, along with the very rarity of pure non-crime rationales for speech suppression, all would support an affirmative answer, namely, that statutes that suppress speech will ordinarily have to be justified by a purpose to prevent acts that are not merely harmful, but are harmful enough to be crimes.

G. Scrutiny Needed to Define the Scope of Categorical Exclusions. The Court in *Ferber* gave reasons, compelling reasons, for concluding that the particular statute in the case was constitutional as applied to the particular films at issue. However, the Court did not confine its conclusions to the particular statute or films but, instead, extended its holding to embrace a whole broad "category" of content—all visual depictions sexual conduct made using minors. The Court rejected, moreover, contentions that the statute in question was overbroad, saying "we seriously doubt" that the "arguably impermissible applications of the statute amount to more than

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[217] "One scholar notes that 'a majority of the Court has never sustained a regulation that was strictly scrutinized for content discrimination reasons.'" *See* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression,* 81 Notre Dame L. Rev. 1347, 1365 n.63 (2006), *quoted in* United States v. Stevens, 533 F.3d 218, 232 (3d Cir. 2008) (striking down a federal statute prohibiting depictions of cruelty to animals). And the Court itself has said "we readily acknowledge that a law rarely survives [strict] scrutiny." Burson v. Freeman, 504 U.S. 191, 200 (1992) (upholding a law that, indeed, withstood strict scrutiny). Of course, the reason that content discrimination has rarely survived strict scrutiny may simply be that, in any situation where there is a non-speech harm to be addressed, it should be relatively easy (and make good sense) to draw or construe the legislation to be content-neutral, so that it calls for "intermediate" rather than strict scrutiny. *See infra* note 230.

[218] *E.g.,* courts' gag rules.

[219] *See infra* text accompanying notes 228-30 & 238-39.

[220] *See* United States v. Stevens, 533 F.3d 218, 224 (3d Cir. 2008)(en banc).

[221] This point is discussed further *infra* text accompanying notes 228-40.

[222] *See supra* text accompanying notes 203-06.

a tiny fraction of the materials within the statute's reach."[223] Although the new categorical exclusion would reach even more content than the statute,[224] the Court evidently also believed that the exclusion was not "overbroad," either.[225]

But what if the reasons and factual basis for the *Ferber* categorical exclusion, so well documented and substantiated in 1982, do not necessarily apply to an extensive new class of communications—sexting and autopornography—whose current popularity and, even, existence were probably not even imagined when *Ferber* was decided? The *Ferber* Court said it was able to create a broad "categorical" exclusion because the balance of interests could be "appropriately generalized … within … the given classification."[226] But what if, since 1982, new social facts have emerged so we cannot be sure that the original balance of interests, from 1982, can still be "appropriately generalized"[227] to much of the content now falling within the categorical exclusion? This question of the balance of interests is, of course, one that goes to the very heart of the justification for creating and continuing the *Ferber* categorical exclusion. What level of scrutiny is appropriate for considering and answering such a question?

Ordinarily, when a statute imposes "content-based" restrictions on speech or press, the restrictions are presumptively unconstitutional[228] and the courts are supposed to use strict scrutiny in reviewing the legislature's determinations.[229] Strict scrutiny means that the content-based restriction "must be narrowly tailored to promote a compelling Government interest," and "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[230]

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[223] *Ferber,* 458 U.S. at 773.
[224] *See supra* note 118 & 152.
[225] *See supra* note 142-55.
[226] 458 U.S. at 763-64.
[227] *See supra* Part E.
[228] United States v. Playboy Entertainment Group, 529 U.S. 803, 816-817 (2000)("the Government bears the burden of proving the constitutionality of its actions"); R. A. V. v. City of St. Paul, 505 U.S. 377, 382 (1992). *Cf.* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434 & 449 (2002) (plurality opinion & Kennedy, J., concurring)(recognizing rule); Renton v. Playtime Theatres, 475 U.S. 41, 46-47 (1986)(recognizing rule). *See also* Carey v. Brown, 447 U.S. 455, 461-62 (1980)("When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized"), *citing* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 97-98 (1972)(explaining equal protection origins of using the strict scrutiny standard for reviewing content-based discriminations of speech).
[229] A "content-based speech restriction … can stand only if it satisfies strict scrutiny." *Playboy*, 529 U.S. at 813, *citing* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).
[230] *Playboy*, 529 U.S. at 813 (citations omitted). By contrast, a more relaxed "intermediate" level of scrutiny and greater deference applies when a legislative burden on expression is "content-neutral," *i.e.,* based not on what is communicated but on its secondary effects, *see, e.g.,* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (restrictions must be " justified without reference to the content of the regulated speech, … narrowly tailored to serve a significant governmental interest, and … leave open ample alternative channels for communication of the information"); City of Renton v. Playtime Theatres, Inc, 475 U.S. 41 (1986). *See Alameda Books*., 535 U.S. 425, 440 (2002) (plurality opinion) ("municipal ordinances receive only intermediate scrutiny if they are content neutral"), or on the harms incurred in its production. The distinction between content-based and content-neutral is delineated in some detail in Turner Broad. Sys. v. FCC, 512 U.S. 622, 641-42 (1994)(apparently the first majority-subscribed opinion to refer to "intermediate" scrutiny as the proper standard for content-neutral speech).
See infra note 251 for further discussion of the intermediate scrutiny standard in relation to *Ferber* and *Osborne.*

Due to the categorical exclusion, however, this presumption of unconstitutionality is effectively reversed for sexually explicit visual depictions of minors.[231] By placing such depictions into an unprotected "category," the Court has removed the requirement of strict scrutiny that would otherwise apply. Child pornography falling within the categorical exclusion is, in other words, essentially like any other kind of product, and statutory restrictions on it require only "rational basis" review—thus leaving legislatures effectively free under the police power to regulate or ban it as they see fit.[232] As a result, statutes that prescribe severe penalties on teen sexting and autopornography require virtually no scrutiny at all insofar as the teen-produced material is unprotected speech.

But there is an important threshold question here: How high should the bar be when Court itself creates a content-based category[233] of unprotected speech?[234] If the Court uses a standard of strict scrutiny to review content-based impingements on speech by legislatures, what level of scrutiny should the Court "require" *itself* to observe when it defines and maintains an unprotected category? Although the *Realpolitik* of the matter may be that the Court can do

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A statutory restriction on child pornography, such as that in *Ferber*, could conceivably be considered "content-neutral," rather than contend-based, inasmuch as it is aimed not at what is communicated but at the secondary effects that are caused by the manner of production. *see, e.g.,* City of Renton v. Playtime Theatres, Inc, 475 U.S. 41 (1986); United States v O'Brien, 391 US 367 (1968); *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425. There is indication in *Ferber* that the Court in fact saw the restrictions on child pornography as content-neutral. For example, the Court described the "context" of the case as "involving the harmful employment of children" to make the films at issue—clearly referring to conduct ("employment"), which is regulable under the police power, rather than "pure" expression. Likewise, it was clear that the Court saw the statute's primary aim as being to stop the "use of children as subjects of pornographic materials." *Id.* at758. And throughout the opinion there are repeated references to what could now be called the "secondary effects" of sexual exploitation and abuse of children as the concern that underlay its decision. Had the Court treated the *Ferber* restriction as content-neutral, a modern consequence would be that strict scrutiny would not be called for in reviewing the statute; the proper standard of review would, instead, be "intermediate" scrutiny—more relaxed but still probably more rigorous (on the question of alternatives) than the standard that the Court actually did employ. By openly treating the *Ferber* statute as content-neutral, however, the Court would have not been readily able to justify the creation of a new content-based categorical exclusion—and thereby authorize sweeping statutory bans of *all* child pornography..

[231] *Compare Playboy*, 529 U.S. at 817 (presumption of invalidity of content-based restrictions) *with* Roth v. United States, 354 U.S. 476, 486-87 (1957)(no justifications need be shown if a categorical exclusion applies).

It is actually not clear who has the burden of persuasion or what the standard is for the "case-by-case analysis" that the Court provided for in *Ferber.* 458 U.S. at 773-74. However, the practical effect of a categorical exclusion is to reverse the presumption in favor of free expression and to place the speaker of protected speech on the defensive, and this practical effect would be felt as a chilling effect on protected speech irrespective of the speaker's precise technical posture while later defending himself in court. Given the severe criminal penalities involved, it may even, indeed, have an unconstitutional effect on speech. *See supra* note 92.

[232] Well, perhaps not quite. As the Court said in R.A.V. v. City of St. Paul, 505 U.S. 377(1992)(racist-type "fighting words"), unprotected categories of expression are not "entirely invisible" to the Constitution. Based on *R.A.V.*, one might suppose, for example, that strict scrutiny could be invoked to strike down a child-pornography law that banned depictions of homosexual but not heterosexual conduct.

[233] It perhaps needs emphasis that a content-based categorical exclusion, such as the Court created in *Ferber*, must not be confused with a content-based regulation created by legislation. Their effects and consequences for speech are exactly opposite. The function of a *content-based regulation*, such as a statute, is to suppress the targeted speech, and, as such, it is presumptively unconstitutional and subject to strict scrutiny. *See supra* text accompanying notes 228-30. By contrast, a *content-based categorical exclusion* suppresses nothing at all in itself, but it effectively reverses the presumption of unconstitutionality that would otherwise apply, and thus relieves the government of the need to satisfy the usual tests of strict scrutiny.

[234] Not that the Supreme Court creates new categories all that often. It has not, for example, done so in the 25 years since *Ferber*, United States v. Stevens, 533 F.3d 218, 244 (3d Cir 2008)(en banc),

anything it wants, elementary principles of legality would require that, before the judicial branch withdraws constitutional protection from a whole category of expression, there needs to be a well demonstrated reason for doing so. After all, in taking the initiative to create the unprotected category, the Court is not only frankly acting as a lawmaker writing new law. It is cutting a piece out of the Constitution.

The analytical role played by categorical exclusions suggests the degree of scrutiny that would logically apply when the Court creates such an exclusion and defines its scope. Normally, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."[235] The most basic effect of a categorical exclusion is, as just stated, to reverse this presumption of invalidity for content-based regulations.[236] Operationally, the categorical exclusion allows the courts to skip the usual process of strict scrutiny (demanding a compelling interest, narrow tailoring and absence of less restrictive alternatives).[237] And this is a lot of protection to skip.

For example, when a regulation on speech has a broad reach, the government ordinarily has an "especially heavy burden … to explain why a less restrictive provision would not be as effective."[238] A categorical exclusion operates to relieve the government of this burden. And whereas a governmental body that wants to impose content-based restrictions ordinarily has to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree,"[239] a categorical exclusion allows the affected speech to be suppressed without demonstrating anything at all.

In short, a content-based categorical exclusion effectively short-circuits the strict scrutiny that otherwise normally protects expression from content-based restrictions. This being so, the only way to preserve the integrity of the presumption of unconstitutionality (*i.e.,* the presumption in favor of free speech) is to provide at the beginning what will be lost down the line. That is, in creating and shaping a categorical exclusion, the courts should use the same degree of strict scrutiny that the categorical exclusion will displace. This would mean that, in defining a categorical exclusion, a court should have a strong basis for concluding that (1) there are compelling interests that outweigh the interest in free expression across the entire the category, (2) the category is narrowly defined to serve those compelling other interests, and (3) there are no less restrictive alternatives for achieving the same purpose.[240]

If the Court in *Ferber* and *Osborne* used strict scrutiny in establishing and applying the categorical exclusion for child pornography, it did not give voice to the process.[241] In *Ferber,* for

[235] *Playboy*, 529 U.S. at 816.
[236] *See supra* text accompanying notes 231-32.
[237] *See supra* text accompanying notes 228-32.
[238] Reno v. American Civil Liberties Union, 521 U.S. 844, 879 (1997), quoted in *Playboy*, 529 U.S. at 816-17.
[239] Edenfield v. Fane, 507 U.S. 761, 770-771 (1993), quoted in *Playboy*, 529 U.S. at 817.
[240] *Cf. supra* text accompanying notes 230.
[241] *See* discussion of the Court's rather anomalously low rigor of review in Adler, *supra* note 16, 936-38, characterizing the Supreme Court as "strangely acquiescent " in *Ferber* compared with its more typical approach under which "when the Court eliminates a category of expression from constitutional protection, it carefully defines the speech that can be banned; the definition then serves as a limit on legislative enactments." *Id.* at 936. *See also.* "In such cases [of categorically unprotected speech], the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and *to confine the*

example, no standard of review was actually mentioned and the Court said simply: "We shall not second-guess this legislative judgment" and "That judgment, we think, easily passes muster under the First Amendment." Similarly in *Osborne*, the Court mentioned no level of scrutiny and concluded, deferentially: "we cannot fault" the state for making the choice that it did.[242] These rather acquiescent locutions do not, of course, capture the current constitutional rigor of strict scrutiny. Moreover, the *Osborne* opinion apparently relied significantly on the state's bald assertion that the Court's earlier *Ferber* decision had made it "difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution."—along with the fact that a minority of states had "found it necessary" to prohibit possession.[243] All in all, the analysis in neither case showed anything more than a kind of partial strict scrutiny, essentially focusing only on the element of "compelling" state interest.

Given the historical context of *Ferber* and *Osborne*, however, we should not be surprised that the Supreme Court's scrutiny in those two cases was so relaxed and deferential compared with the standards of strict scrutiny currently applied: After all, both decisions came well before the Court had definitively declared that strict scrutiny is the standard of review for content-based regulations affecting sexually themed materials.[244] In a case decided four years before *Ferber*, the

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perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." Bose Corp. v. Consumers Union, 466 U.S. 485, 505 (1984).

[242] "Given the importance of the State's interest in protecting the victims of child pornography, *we cannot fault* Ohio for attempting to stamp out this vice at all levels in the distribution chain." 495 U.S. at 110 (emphasis added).

[243] 495 U.S. at 110-11. Justice Brennan found the last point utterly unconvincing, observing that "A restriction on speech cannot be justified by such self-referential reasoning." 495 U.S. at 143 n. 17 (Brennan, J., dissenting).

[244] Despite Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989), the applicable standard of scrutiny seems to have still been up in the air until after 1996. *Compare* Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 727, 741-43 (1996) and *id.* at 781-88 (Kennedy, J. dissenting) *with* ACLU v. Reno, 521 U.S. 844, 868 (1997)(giving the challenged restriction "the most stringent review of its provisions"); *Cf. also X-Citement*., 513 U.S. at 84 (Scalia, J. dissenting). Indeed, between the time of *Ferber* and *Osborne*, the Court's focus was more on reserving strict scrutiny for content-based bans on "political speech" and settling into the idea of (as yet, unnamed) "intermediate" scrutiny for other speech restrictions. *Compare* Boos v. Barry, 485 U.S. 312 (1988)(political demonstration) *with* Ward v. Rock Against Racism, 491 U.S. 781 (1989)(time, place and manner). *See also* Riley v. Nat'l Fed'n of Blind, 487 U.S. 781 (1988)(regulations on solicitation of money by charities subject to "exacting" scrutiny). *Cf.* Justice Scalia's observation, written several years later in 1996: "We have no established criterion for 'intermediate scrutiny' either, but essentially apply it when it seems like a good idea to load the dice." United States v. Virginia, 518 U.S. 515, 568 (1996)(Scalia, J. dissenting).

Nowadays, however, it is clear that a "content-based speech restriction … can stand only if it satisfies strict scrutiny." United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000). "As we consider a content-based regulation, the … standard is strict scrutiny. This case involves speech alone; and even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *Playboy*, 529 U.S. at 814; *accord, Ashcroft*, 535 U.S. at 262-63.

Not that drive-by "strict scrutiny" seem to sometimes occur in the post-*Playboy* era. *See, e.g.*, the opinion of O'Connor, J. (concurring in part and dissenting in part) in Ashcroft v. Free Speech Coalition, 535 U.S. 234, 263-64 (2002), where the justice essentially just repeats uncritically the conclusions of the congressional findings and expresses some free-floating unease about what might occur "given the rapid pace of advances in computer-graphics technology." *Id.* at 264. Like the Chief Justice, *id.* at 268, she based her standard of scrutiny on a case that involved "content-neutral" regulations and that preceded by several years the case, United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 814 (2000), that definitively established strict scrutiny as the proper standard. *Ashcroft*, 535 U.S. 264, *citing* Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 195 (1997) (stating that it is proper to "accord substantial deference to the predictive judgment of Congress" in First Amendment cases).

The problem with "scrutiny" that in fact defers to legislative judgments is, of course, that it sets the bar so low that it amounts, in the words of Justice Scalia, "to a test of whether the legislature has a stupid staff." Lucas v.

plurality opinion of the Court expressed the view that materials of largely erotic interest are not entitled to the same degree of constitutional protection as other expression:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that *society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude* than the interest in untrammeled political debate.... Even though the First Amendment protects communication in this area from total suppression, we hold that *the State may legitimately use the content* of these materials as the basis for placing them in a different classification....[245]

This deprecatory view towards sexually themed materials, though never drawing a majority of the Court, appeared in other earlier opinions as well.[246] It appears, in other words, that *Ferber* and *Osborne* simply reflect the tenor of their times. They are, however, notably less protective of speech than the Court's more recent position, announced in *United States v. Playboy Entertainment Group, Inc.* that, for content-based restrictions on non-obscene depictions of sexual aspects of life, "the … standard is strict scrutiny."[247]

In sum, while the relatively passive scrutiny in *Ferber* and *Osborne* was fitting for their times, a substantial movement in the surrounding legal terrain has occurred since the two cases were decided. As a result, content-based restrictions, including on sexually-themed expression, are presumptively unconstitutional and strict scrutiny is the normal standard for reviewing such restrictions.[248] Given this move to align and harmonize the protection that is accorded to various expressive themes and to clarify the standards of review, the scrutiny that sufficed in 1982 to define the scope of the categorical exclusion in *Ferber* should not be expected to suffice today. Indeed, for the Court to employ its former acquiescent and deferential approach to define the scope of categorical exclusions today would build a road around the modern strict-scrutiny standard.[249]

The Court's relaxed level of review in *Ferber* and *Osborne* does not mean, of course, that the legislative judgments in those cases could not have withstood strict scrutiny. Given the exploitative factual background in both cases, they almost surely could have. It is not, however, so obvious that those judgments, if applied to genres of materials produced under completely

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South Carolina Coastal Council, 505 U.S. 1003, 1025 n. 12 (1992).

[245] Young v. American Mini Theatres, 427 U.S. 50, 70-71 (1976)(emphasis added)(plurality opinion). Also, "there is *surely a less vital interest* in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance" *Id.* at 61 (emphasis added).

[246] *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726, 743 (1978). "While some of these references [to excretory and sexual organs and activities] may be protected, they *surely lie at the periphery* of First Amendment concern." *Id.* (emphasis added).; United States v. X-Citement Video, Inc., 513 U.S. 64, 84 (1992) (Scalia, J. dissenting)("the First Amendment protection accorded to such materials is not as extensive as that accorded to other speech").

[247] 529 U.S. at 813. *See supra* note 244.

[248] *Id.; supra* notes 229-30 & 244 & text accompanying note 235.

[249] It would eviscerate the rule that "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *Playboy*, 529 U.S. at 816.

different factual circumstances, could satisfy strict scrutiny[250] or even, intermediate scrutiny[251] review.

As observed earlier, the Court in *Ferber* had abundant evidence to substantiate the exploitative and abusive harms to children that resulted from the circumstances of production of "traditional" child pornography, such as the two films there in issue.[252] But teen sexting and auto-pornography today are produced under radically different circumstances.[253] It is the difference between, on one hand, vicious exploitation and sexual abuse that virtually (or even literally) amounts to servitude versus, on the other hand, young people doing what they themselves are moved to do, acting on their own initiatives and expressing themselves as they wish in the ways they deem important. Given this wide difference in the circumstances of production, it would be extremely coincidental if the harms from teen sexting and other autopornography, whatever they may be, happened to resemble in kind or degree the harms that animated *Ferber* and *Osborne*.[254]

[250] *See supra* notes 228-30.

[251] The problem with satisfying intermediate scrutiny is that laws of the sort that were upheld in *Ferber* and *Osborne* impose a complete ban, not a mere restriction, on the speech content at which they are directed. They would not, therefore, meet the usual requirement of intermediate scrutiny that the law "leave open ample alternative channels for communication of the information." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Renton v. Playtime Theatres, 475 U.S. 41, 47 & 53-54 (1986). *See supra* note 230. There is also an alternative formulation of the intermediate scrutiny standard, which allows complete bans, but laws like those in *Ferber* and *Osborne* would not (as applied to self-produced genres) seem to satisfy it either. Under this alternative formulation, a content-neutral regulation will be sustained "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Turner Broad. Sys. v. FCC, 512 U.S. 622, 662 (1994). This requirement of "narrow tailoring" does not mean the law must adopt the least restrictive alternative, *Ward*, 491 U.S. at 799-800, but a complete ban on certain content (which leaves no "alternative channels for communication") can be considered narrowly tailored, "only if each activity within the proscription's scope is an appropriately targeted evil." Frisby v. Schultz, 487 U.S. 474, 485 (1988). That is, the law "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799-800. If, therefore, the goal of a given laws is to prevent the kinds of harms relied on in *Ferber* and *Osborne*, the application of that law to large quantities of self-produced materials, which do not involve those harms, would seem to go to far—reaching activities not demonstrated to be "appropriately targeted" evils.

[252] *See supra* note 181.

[253] *See supra* text accompanying notes 174-91.

[254] *Id.* Professor Leary cites a number of sources asserting that harms can flow from extant child pornography quite *apart from* the production processes because, for example, offenders can use pornography to "fuel" their assaults and seduce children and because the presence of the pornography in mass circulation can lead to an evolution in social attitudes and values in unwholesome directions. Leary, *supra* note 17, at 9-17. There are, however, at least three problems with these kinds of evidence of harms: First, the Supreme Court has explicitly rejected them as bases for suppressing expression, citing standard first-amendment grounds, *See supra* notes 110 and accompanying text. Second, the objective of preventing an evolution in social attitudes and values sounds like, at bottom, an effort to use censorship "to control men's minds," which is not among the legitimate objectives for restricting free speech and press. Stanley v. Georgia, 394 U.S. 557, 565 (1969). *Accord, Ashcroft*, 535 U.S. at 253. Thirdly, a court applying strict scrutiny needs to take care not to simply accept the products and publications of advocacy groups as though they are valid social science data, nor can it necessarily draw reliably balanced conclusions about social effects from the reports of psychology and medical practitioners who deal primarily with patients beset by clinical conditions.

Professor Leary identifies three kinds of harms that were caused by the career of Justin Berry, featured in a controversial series of New York Times stories by Kurt Eichenwald, Kurt Eichenwald, *Through His Webcam, a Boy Joins a Sordid Online World* (December 19, 2005), http://www.nytimes.com/2005/12/19/national/19kids.ready.html, and in congressional hearings: She says that Mr. Berry "increased the market for child pornography, validated his customers' actions, and increased the sexualization and eroticization of children." Leary, *supra* note 17, at 39. The first two harms, however, assume the conclusion, namely, that autopornography is an evil. They do not explain *why* it is an evil. What needs to be explained is what is wrong about creating a market for it or validating the actions of the "customers." It is circular to say that particular material is harmful because creating a market is for puts it out

It is, in other words, a new and undecided question whether the unprotected category initially declared by *Ferber* can be simply allowed to subsume, with further scrutiny, genres of material that were not even contemplated by the legislature or Court in the case.

Perhaps, to be sure, the Court might someday be presented with a body of research and studies, such as those relied on in *Ferber*, that will substantiate that harms can flow from non-exploitative self-production of non-obscene sexual materials. Although such research and studies may be long in coming,[255] to conjecture about such harms in the meantime, without supporting studies or research, would not be strict scrutiny.

In summary, the specific question is whether sexting and other teen autopornography should be deemed within the scope of the categorical exclusion that *Ferber* and *Osborne* created and defined for "child pornography." On one hand, teens' sexting and autopornography fall easily within *Ferber's* verbal formulations of the categorical exclusion, inasmuch as they "visually depict sexual conduct by children below a specified age."[256] On the other hand, nothing in either *Ferber* or *Osborne* even hints that the Court actually ever meant to withhold the Constitution's protection from teenagers who make non-obscene pictures that show themselves and their own legal activities. Nor was there any hint that, if such teen expression may be constitutionally protected, the Court meant to put the teens who produce it on the defensive—deprived of the presumption of unconstitutionality and benefit of strict-scrutiny review. and forced instead to risk life-shattering penalties as the price for pressing their constitutional claims.[257] It is still, therefore, an unaddressed question whether teenage autopornography can be suitably lumped together with "traditional" kinds of child-pornography materials.

IV.
Four Possibilities

At the moment the constitutional status of teen sexting and other autopornography remains uncertain. Whether the Court will apply standards of strict scrutiny to limit the scope of the categorical exclusion, or to decide what is "suitably" within it,[258] cannot be said with confidence. Based on what the Court has already said, however, four major possibilities can be identified. They are:

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there. Maybe Professor Leary means that teen autopornography creates a market for the clearly bad exploitation-produced kind of child pornography, but this argument seems dubious as well—like saying that legal CDs and DVDs should be banned because their sale increases the market for pirated CDs and DVDs. And this is not to mention the *Brandenburg* requirements of likelihood and imminence. *See supra* text accompanying notes 195-96. The third reason Leary gives, increased "sexualization and eroticization of children" is an empirical claim that does not seem possible to verify or falsify. It is an easy claim to make, but a harder one to get past strict scrutiny.

[255] As noted earlier, *supra* note 16, under current laws independent researchers have no ability to correlate or connect particular kinds of teen autopornography content with possible harmful results and, therefore, no credible research can be done on the subject of whether and to what degree the production of teen sexting and autopornography might result in harmful consequences.

[256] *Ferber,* 458 U.S. at 764 (emphasis in original).

[257] As described earlier, it is at least an open question whether the government can constitutionally place the speakers of protected speech on the defensive by this sort of massively threatening direct burden aimed at speech itself. *See supra* note 92.

[258] *See supra* text accompanying notes 127-30.

1. The categorical exclusion created in *Ferber*, now that it has been established, will be viewed as having a life of its own, no longer limited by the concerns that led to its creation. It will continue to exist as defined in *Ferber*, applying to all materials, including teen sexting and other autopornography, that "visually depict sexual conduct by children below a specified age."[259] Based on the acts of sexting and autopornography that have already occurred, millions of teens will remain subject, in principal at least, to prosecution and lifetime disability as felony sex offenders.

2. The categorical exclusion created in *Ferber* will be applied to sexting and other teen autopornography but such application will be based on new research and studies (yet to appear) showing that these activities by teens generate serious harms comparable in magnitude to the child exploitation and sexual abuse relied on in *Ferber*. Again, due to the acts of sexting and autopornography that have already occurred, millions of teens will remain subject, in principal at least, to prosecution and lifetime disability as felony sex offenders.

3. Sexting and other teen autopornography will be subsumed into the categorical exclusion established in *Ferber*, which will prima facie apply, subject however to "as applied" exceptions determined, case by case, as provided for in *Ferber.* Teens who have engaged in sexting and autopornography will remain subject to prosecution but will have the possibility of asserting "as applied" challenges in defense. Nonetheless, given the monetary and other costs of defending and the life-shattering consequences of not succeeding, most who are prosecuted will enter pleas to lesser charges, with varying negative impacts on their lives.

4. The scope of the categorical exclusion established in *Ferber* will be clarified and adjusted so that it does not impinge on teenagers' interests in free self-expression, on one of the following bases:

a. The categorical exclusion will be deemed closed, limited to the exploitative genres of child pornography that were actually before the Court in *Ferber* and *Osborne*

b. The categorical exclusion will be deemed in principal to encompass all genres of child pornography that cause harms of the magnitude of those relied on in *Ferber* but the Court will, based on strict scrutiny, declare non-obscene teen autopornography to be a protected category based on teenagers' strong interest in being able to express themselves freely.

c. The categorical exclusion will be deemed to include only those depictions of underage sexuality whose production has a relationship to crime sufficient to satisfy the standards of imminence and likelihood laid out in *Brandenburg.* The recording and documentation by teens of their own legal activities will be treated as constitutionally protected expression.

[259] *Ferber,* 458 U.S. at 764 (emphasis in original).

V.

Conclusion

"Sexting" and other teen autopornography are becoming a widespread phenomenon that is beginning to result in criminal prosecutions. Given the reality of changing social practices, mores and technology utilization, today's pornography laws are a trap for unwary teens and operate, in effect, to criminalize a large fraction of America's young people. As such, these laws and prosecutions represent a stark example of the contradictions that can occur when governmental policies and initiatives built on past truths and values collide with new and unanticipated social phenomena.

While some teen sexting and other autopornography may be technically "obscene," the focus of anti-pornography enforcement in recent years has been the child pornography laws. The landmark cases of *New York v. Ferber* and *Osborne v. Ohio* have established and defined a categorical exclusion that denies First Amendment protection to child pornography materials. Even though *Ferber* and *Osborne* may not strictly speaking require a conclusion that sexting and other autopornography are unprotected speech, at least some lower courts and prosecutors appear to regard them that way.

By contrast, the language and reasoning of the more recent case of *Ashcroft v. Free Speech Coalition* gives strong reason to believe that the scope of the categorical exclusion for child pornography should be closely aligned with the governmental objectives that *Ferber* and *Osborne* relied on—which would mean constitutional protection for teen sexting and autopornography that occur on the teens' own initiative. *Ashcroft* strongly implies, though does not quite say, that the categorical exclusion should be limited to materials that are produced by means of criminal child abuse and exploitation. Also, current standards of strict scrutiny for content-based regulations, if applied, would probably prevent (on the present state of the studies and research) self-produced teen materials from being subsumed into the *Ferber* categorical exclusion. How this issue will be decided, however, remains to be seen.

In the end, it cannot be ignored that there are also generational factors at work in the prosecutions of teens for sexting and autopornography. The prosecutorial and judicial personnel who are acting in these prosecutions are typically two or more generations removed from the teenagers whose sexual expression is condemned and whose prospects are drastically affected. Ultimately, however, efforts such as these are generally futile. The future and its values belongs to those whose lives lie mostly ahead of them.