
YOU CAN TOUCH, BUT YOU CAN'T
LOOK: EXAMINING THE
INCONSISTENCIES IN OUR AGE OF
CONSENT AND CHILD PORNOGRAPHY
LAWS

MACKENZIE SMITH*

TABLE OF CONTENTS

I. INTRODUCTION.....	860
II. OVERVIEW OF AGE OF CONSENT AND CHILD PORNOGRAPHY LAWS.....	863
A. THE CURRENT STATUS OF THE LAW.....	863
B. THE CASES CAUGHT IN-BETWEEN	865
1. <i>State v. Sinters</i>	865
2. <i>United States v. Bach</i>	866
3. <i>People v. Hollins</i>	866
III. CONSTITUTIONAL ARGUMENTS.....	867
A. THE FIRST AMENDMENT AND CHILD PORNOGRAPHY	867
1. A Historical Overview.....	867
2. First Amendment Arguments	869
B. THE FOURTEENTH AMENDMENT AND SEXUAL PRIVACY	871
1. A Historical Overview.....	871
2. Substantive Due Process Arguments.....	872
3. Equal Protection Arguments.....	873
IV. POLICY ARGUMENTS.....	875
A. PASSING RATIONAL BASIS REVIEW.....	875
B. A CRITICAL ANALYSIS OF THE COURTS' LEGITIMATE BASIS ..	876
C. OTHER POLICY CONSIDERATIONS	879
1. The Adolescent "Victim"	879

* Class of 2014, University of Southern California Gould School of Law; B.A. Anthropology 2005, Pomona College.

2. The Adult “Abuser”	880
3. The Society “Protector”	881
V. A SOLUTION.....	882
A. STATE LEGISLATION	882
B. FEDERAL LEGISLATION.....	882
VI. CONCLUSION	884

I. INTRODUCTION

Thirty-two-year-old Eric Rinehart was a former police officer and member of the Indiana National Guard.¹ He was going through his second divorce, he had custody of his seven-year-old son, and he had no criminal record.² During this time, perhaps against his better judgment, he began two sexual relationships with young women, aged sixteen and seventeen.³ Although the young women were much younger in age, both of Rinehart’s sexual relationships were consensual and entirely legal. Under Indiana state law, the legal age of consent for sexual intercourse is sixteen.⁴

During the course of his relationship with one of the young women, Rinehart lent her his digital camera after she suggested, based on her past experiences with other partners, that she use it to take provocative photographs of herself.⁵ When she returned the camera, Rinehart found pictures of the young woman engaged in “sexually explicit conduct.”⁶ Following this event, Rinehart photographed the same young woman engaged in similar sexual activities.⁷ In addition, Rinehart created “short videos of himself and [the second young woman] engaged in sexual intercourse.”⁸ All the photos and videos were taken with the knowledge and consent of his sexual partners.⁹ All of the images were uploaded onto Rinehart’s home computer,¹⁰ but none were distributed to a third party, nor was there evidence that Rinehart intended to do so.¹¹

1. United States v. Rinehart, No. IP06-0129-CR-01 H/F, 2007 U.S. Dist. LEXIS 19498, at *1–2 (S.D. Ind. Feb. 2, 2007).

2. *Id.*

3. *Id.* at *2.

4. *Id.* (citing IND. CODE § 35-42-4-9 (2008)).

5. *Id.* at *3.

6. *Id.* (quoting 18 U.S.C. § 2256(2)(A) (2012)).

7. *Id.*

8. *Id.*

9. *See id.* (providing no evidence to the contrary).

10. *Id.*

11. *Id.* at *4.

After a grand jury hearing, Rinehart was charged with “two counts of producing child pornography . . . and one count of possessing child pornography,” to which he pled guilty.¹² With the agreement of the prosecution and the defense, Rinehart was sentenced to fifteen years in federal prison.¹³ In a written sentencing explanation, Judge David F. Hamilton of the United States District Court for the Southern District of Indiana explicitly expressed his discomfort with the harsh sentence he was forced to impose¹⁴ and his hope that it would be overturned through an exercise of presidential executive clemency.¹⁵ Short of such an act, Rinehart’s projected release date is February 25, 2020.¹⁶

The circumstances surrounding Rinehart’s case are not unique to the legal system; similar scenarios have made their way into both state and federal courtrooms across the country throughout the past decade.¹⁷ Further, similar inconsistencies in laws governing teenagers and their sexuality are not uncommon in our legal system.¹⁸ Adolescents have long been governed by statutes that dictate when, with whom, and under which rigid circumstances they are allowed to explore their own sexuality.

One example of an inconsistency present in our laws governing adolescent sexuality is our treatment of married versus unmarried minors. Generally speaking, minors under the age of consent do not have the ability to engage in sexual intercourse with a partner who is not their spouse, but once married, and despite still being under the age of consent, the same pair is now legally able to consummate their relationship.¹⁹ In other words, in almost all states, although two minors legally are not mature enough to engage in sexual intercourse when unmarried, with the help of judicial or parental consent, the same pair is deemed mature enough to make the lifelong decision of first getting married, and then having sex.²⁰

12. *Id.* The court was unclear as to how the photographs came to the attention of law enforcement authorities. *Id.* at *3–4.

13. *Id.* at *4.

14. *Id.* at *8–12.

15. *Id.* at *12.

16. *Find an Inmate*, FED. BUREAU PRISONS, <http://www.bop.gov/Locate> (follow “Find By Name” tab; then search for “Eric” in the “First Name” search box, and “Rinehart” in the “Last Name” search box) (last visited Feb. 22, 2014).

17. *See infra* Part II.B.

18. *See* Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 314–18 (2003) (noting that age of consent statutes are used to prosecute both adults and teenagers who engage in consensual sex with an individual under the legal age of consent).

19. CAROLYN E. COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* 9 (2004).

20. *See id.* (“In other words, sex between a married couple in which at least one party is under

Another discrepancy that further demonstrates a pattern of inconsistent laws is the difference in the age of consent for sex and the age at which a minor may obtain an abortion without parental consent. As of 2004, twenty-six states set the age of consent below the age at which a minor could independently obtain an abortion.²¹ These laws give teenagers the decisional authority to consent to sex and motherhood, but do not give them the same authority to independently terminate a resulting pregnancy.²²

These examples of inconsistent laws demonstrate our ongoing struggle with allowing teenagers to experiment sexually, while also maintaining society's morals and protecting a child's safety and innocence.²³ Through these inconsistencies we can glimpse which sexual activity is valued and accepted by our society (sexual activity between a married couple, for example), and activity which is deemed unacceptable, and therefore regulated (sexual activity between unmarried partners).²⁴ Further, inconsistencies show how state laws reflect society's values, such as protecting life over abortion.²⁵

Another problematic yet telling inconsistency in our laws is found at the intersection of our age of consent and child pornography laws. This Note examines how our current legal system handles a defendant who consensually photographs or videotapes sexual activity with a teenager above the age of consent, but below the age of child pornography laws. Part II will provide a brief overview of both sets of laws, concluding with cases that have dealt with the inconsistencies between these two doctrines. Part III will analyze the constitutional arguments made by many of the defendants charged with possession of pornographic images depicting a consenting teenager, or put forward by the courts deciding these cases. Part IV will critique the policy rationales offered by these courts. Finally, Part V

the age of consent cannot be prosecuted under the law, even if it is the same sexual activity as that taking place between an unmarried couple in which at least one party is under the age of consent.”); Sutherland, *supra* note 18, at 324 (“Over a two year period, social workers [in Orange County, California] persuaded fifteen teenage girls (some as young as 13) to marry the men who impregnated them (some as old as 30) in order to escape the legal consequences of their sexual activity. In each case, the marriage was authorized by a juvenile court judge. These girls, deemed too young to choose sex, were nevertheless judged mature enough to choose marriage.” (footnotes omitted)).

21. Nicole Phillis, *When Sixteen Ain't So Sweet: Rethinking the Regulation of Adolescent Sexuality*, 17 MICH. J. GENDER & L. 271, 274 (2011).

22. *Id.*

23. See Sutherland, *supra* note 18, at 331–34 (describing how our minor sexuality laws are social constructs).

24. See *id.* at 335–36 (describing a hierarchy of sexual values within our society).

25. Phillis, *supra* note 21, at 283.

will advocate for mirroring the laws that govern age of consent and child pornography in order to remove these inconsistencies. Further, in an attempt to address the policy concerns noted by the courts, programs to educate minors on the consequences of memorializing their sexual activities using technology should be added to the current sexual education curriculum.

II. OVERVIEW OF AGE OF CONSENT AND CHILD PORNOGRAPHY LAWS

A. THE CURRENT STATUS OF THE LAW

All fifty states, the District of Columbia, and the federal government have laws dictating when an adolescent legally can consent to sexual activity.²⁶ Before this age, the government has decided that a minor cannot understand the full significance of engaging in sexual activity, and therefore consent is not a defense to statutory rape.²⁷ Throughout history, different rationales have been cited for statutory rape laws.²⁸ In colonial America, the age of consent was either ten or twelve, depending on the state, and the rationale was to protect white females and their premarital virginity.²⁹ By 1920, the age of consent had risen in all fifty states, ranging from fourteen to eighteen.³⁰ By the 1990s, one highly debated rationale for age of consent laws was the reduction of out-of-wedlock births to adolescent mothers.³¹ Today, the common rationale is “the protection of young persons from sexual exploitation by adults.”³² Thirty-three states, the District of Columbia, and federal law set the age of consent at sixteen, six states set it at seventeen, and the remaining eleven states set it at eighteen.³³ Complicating the matter, several states have added what are

26. *Id.* at 278.

27. COCCA, *supra* note 19, at 9.

28. *Id.* at 2.

29. *Id.* at 11.

30. *Id.* at 23–24 tbl.1.1.

31. *Id.* at 25. *See also* Sutherland, *supra* note 18, at 323 (“The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 . . . , passed by Congress in 1996, emphasized the reduction of teen pregnancy as an important goal. To this end, the [a]ct required the Attorney General to establish and implement a program that ‘educates State and local criminal law enforcement officials on the prevention and prosecution of statutory rape.’” (footnotes omitted) (quoting Rigel Oliveri, Note, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 463 (2000))).

32. Sutherland, *supra* note 18, at 315.

33. *See* 18 U.S.C. § 2243 (2012) (describing the federal age minimum for consent); JoAnne Sweeny, *Do Sexting Prosecutions Violate Teenagers’ Constitutional Rights?*, 48 SAN DIEGO L. REV. 951, 954 n.14 (2011) (listing states with consent ages of seventeen or younger); *Compare Age of*

commonly known as “Romeo and Juliet” provisions to their state statutes.³⁴ These provisions allow adolescents within a close age range to engage in sexual intercourse that would otherwise be illegal.³⁵

Similarly, all fifty states, the District of Columbia, and the federal government have laws prohibiting child pornography.³⁶ Child pornography, and its exclusion from First Amendment protection, is a relatively new concept for our legal system, with the first major case reaching the Supreme Court in 1982.³⁷ Two common rationales cited for child pornography laws are the protection of children from abuse caused by the actual production of the images, and protection of children from the lasting harm caused by the image’s distribution.³⁸ Other rationales in support of widening the prohibition on child pornography include the fear that pornographic images may be used by pedophiles to seduce other children,³⁹ and that the images might whet the appetite of child molesters, inciting them to abuse more children.⁴⁰

In 1984, the federal government raised the age of a minor, as defined in the federal child pornography statute, from sixteen to eighteen.⁴¹ Congress increased the age to help “facilitate the prosecution of child pornography cases.”⁴² The lower age of sixteen made it too difficult to prove, beyond a reasonable doubt, that the child depicted in the

Consent & Statutory Rape Laws by State, FIND THE DATA, <http://age-of-consent.findthedata.org/> (last visited Feb. 22, 2014).

34. Joanna L. Barry, Note, *The Child as Victim and Perpetrator: Laws Punishing Juvenile “Sexting,”* 13 VAND. J. ENT. & TECH. L. 129, 143 (2010).

35. See Sutherland, *supra* note 18, at 314–15 (“Many states now stress the number of years that separate the parties; that is, the statutes criminalize sexual interaction between adults and adolescents that would not be criminal between adolescents of similar ages.”).

36. See generally Nat’l Dist. Att’ys Ass’n, CHILD PORNOGRAPHY STATUTES (June 2010), <http://www.ndaa.org/pdf/Child%20Pornography%20Statutory%20Compilation%206-2010.pdf> (compiling state child pornography statutes).

37. *New York v. Ferber*, 458 U.S. 747, 749 (1982). See also Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 210 (2001) (“Child pornography law is a remarkably recent invention. Not until 1982 did the Supreme Court consider the distinct problem of child pornography, create it as a special category of constitutional inquiry, and expel it from the protection of the First Amendment.”).

38. *Ferber*, 458 U.S. at 757–60.

39. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

40. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (rejecting this rationale as a basis for expanding child pornography’s exclusion from the First Amendment to include virtual images of children).

41. Child Protection Act of 1984, Pub. L. No. 98-292, § 4, 98 Stat. 204, 205 (codified as amended at 18 U.S.C. § 2252 (2012)); H.R. REP. NO. 98-536, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 492, 494.

42. H.R. REP. NO. 98-536, at 3.

pornographic image was underage, especially if the child showed any signs of puberty.⁴³ The Congressional Committee Report also explained that this age increase would “raise the effective age of protection of children from [child pornography], probably not to [eighteen] years of age, but perhaps to [sixteen].”⁴⁴

Similar to the federal government, almost all states define a minor as someone younger than eighteen for the purpose of child pornography statutes.⁴⁵ Specifically, forty-four states have set the age of child pornography at eighteen, three states and the District of Columbia have set the age at seventeen, and the remaining three states at sixteen.⁴⁶

When compared, these two sets of laws create an awkward legal inconsistency in several states and in the federal government. Currently, thirty-four states, the District of Columbia, and the federal government have a lower age of consent for sexual intercourse than for engaging in pornography. Alabama complicates the matter further because the state’s age of consent for sexual intercourse (sixteen) is lower than the state’s age for child pornography (seventeen), which is lower than the age of the federal child pornography law (eighteen).⁴⁷

The following section outlines the facts of three cases, in addition to the case of Rinehart, that have involved defendants caught between these two legal doctrines. The courts’ reasoning will be further discussed and analyzed in Parts III and IV.

B. THE CASES CAUGHT IN-BETWEEN

1. *State v. Senters*

In 2005, the Nebraska Supreme Court affirmed the sentence of Todd Senters, a twenty-eight-year-old school teacher,⁴⁸ for the making of child pornography.⁴⁹ Due to the age of consent in Nebraska, Senters’s seventeen-year-old girlfriend, a student at his school, could legally consent to sexual

43. *Id.*

44. *Id.*

45. Sweeny, *supra* note 33, at 953–54.

46. *See generally* Nat’l Dist. Att’ys Ass’n, *supra* note 36 (compiling the state statutes on child pornography).

47. *Compare* ALA. CODE § 13A-6-70 (2012) (setting the age of consent for sexual intercourse at sixteen), *with* ALA. CODE § 13A-12-192 (2012) (defining a minor, for the purposes of child pornography laws, as a child below the age of seventeen), *and* 18 U.S.C. § 2256 (2012) (defining a minor, for the purposes of child pornography laws, as a child below the age of eighteen).

48. *State v. Senters*, 699 N.W.2d 810, 813 (Neb. 2005).

49. *Id.* at 814.

intercourse.⁵⁰ On one visit to Senters's apartment, the couple jointly decided to create a videotape of themselves engaged in sexual relations.⁵¹ Senters maintained a copy of the tape at his residence solely for private purposes and never intended to disseminate it.⁵² When Senters's roommate later found the videotape, it was brought to the attention of the school, and ultimately the police.⁵³ As a result, Senters was sentenced to two years probation.⁵⁴

2. *United States v. Bach*

Also in 2005, the Eighth Circuit heard the less sympathetic case of Dale Bach, a forty-one-year-old Minnesota man,⁵⁵ convicted of multiple counts of possessing, transporting, and receiving child pornography.⁵⁶ Among the items seized at Bach's residence were seven images of a sixteen-year-old boy engaged in sexually explicit conduct.⁵⁷ During the course of the investigation, law enforcement discovered that Bach had sent one of the photographs over the Internet to another minor with whom Bach corresponded.⁵⁸ The age of consent in Minnesota and at the federal level is sixteen, and therefore, any sexual activity between Bach and this young man was entirely legal.⁵⁹ Bach was sentenced to concurrent sentences of ten years and fifteen years for the two counts brought in relation to these photographs.⁶⁰

3. *People v. Hollins*

Lastly, in June 2012, the Illinois Supreme Court affirmed the conviction of Marshall Hollins, a thirty-two-year-old male, on three counts of child pornography.⁶¹ Hollins and his seventeen-year-old girlfriend, once friends, reconnected at community college and began a sexual relationship.⁶² Because the age of consent in Illinois is seventeen, Hollins's

50. *Id.* at 813.

51. *Id.* at 814.

52. *Id.*

53. *Id.*

54. *Id.*

55. *United States v. Bach*, 400 F.3d 622, 629 (8th Cir. 2005).

56. *Id.* at 624.

57. *Id.* at 625.

58. *Id.*

59. *Id.* at 628.

60. *Id.* at 624.

61. *People v. Hollins*, 971 N.E.2d 504, 506 (Ill.), *cert. denied*, *Hollins v. Illinois*, 133 S. Ct. 581 (2012).

62. *Id.* at 507.

girlfriend was legally able to consent to the sexual intercourse.⁶³ On one occasion, the pair decided to take photographs of themselves engaged in sexually explicit conduct.⁶⁴ The photographs consisted of closeups of their genitals, and no face or other identifying marks of either Hollins or his girlfriend were present in the images.⁶⁵ Hollins subsequently emailed the photographs to his girlfriend who kept the images in her email account.⁶⁶ The girlfriend's mother discovered the photographs while logged into her daughter's computer and immediately notified the police.⁶⁷ The police, upon learning the girl's age, determined there was no sexual abuse and therefore did not initially make an arrest.⁶⁸ When the mother complained a second time about the same incident, the police and prosecutors pursued child pornography charges against Hollins.⁶⁹ After a stipulated bench trial, Hollins was sentenced to three concurrent terms of eight years in prison.⁷⁰ In November 2012, the Supreme Court of the United States denied certiorari for Hollins's case.⁷¹

III. CONSTITUTIONAL ARGUMENTS

A. THE FIRST AMENDMENT AND CHILD PORNOGRAPHY

1. A Historical Overview

“Child pornography is one of the few categories of unprotected [First Amendment] speech [consistently] carved out by the Supreme Court.”⁷² Historically, the Supreme Court has accepted statutory restrictions of child pornography as constitutional, justified on the basis of a First Amendment exemption.⁷³ Interestingly, the Court has never explicitly defined what constitutes child pornography, but has instead waited for statutory challenges to be brought in order to uphold piecemeal state statutory

63. *Id.* at 516 (Burke, J., dissenting) (citing 720 ILL. COMP. STAT. 5/12-16(d) (2008)).

64. *Id.* at 507 (majority opinion).

65. *Id.* at 516 (Burke, J., dissenting).

66. *Id.*

67. *Id.* at 507 (majority opinion).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Hollins v. Illinois*, 133 S. Ct. 581 (2012).

72. Lawrence G. Walters, *How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, 9 FIRST AMEND. L. REV. 98, 111 (2010) (citing *New York v. Ferber*, 458 U.S. 747, 764 (1982)).

73. See Adler, *supra* note 37, at 235 (“[T]he Court’s task in child pornography law has been primarily to accept legislative enactments and prosecutorial ambits, and then to justify them within the First Amendment.”).

definitions.⁷⁴

In the 1982 landmark case of *New York v. Ferber*, the Supreme Court upheld a statute banning child pornography on the basis that it does not deserve First Amendment protection because states have a compelling interest in protecting children from abuse and exploitation.⁷⁵ The Court determined that the value of permitting child pornography is “exceedingly modest, if not *de minimis*,” allowing state governments to criminalize both the production and the distribution of child pornography.⁷⁶ The Court reasoned that because the advertisement, sale, and sharing of sexually explicit photographs of minors is intrinsically related to sexual abuse, the only way to prevent production of such images is to destroy the economic motive and to close the distribution networks.⁷⁷ Eight years later in *Osborne v. Ohio*, the Supreme Court upheld a statute that banned the mere possession of child pornography,⁷⁸ in addition to its production and distribution. Similar to its reasoning in *Ferber*, the Court noted that given the gravity of the state’s interests, and in order to prevent the ongoing abuse of child victims, the market for child pornography must be dried.⁷⁹

As the Internet and technology developed, Congress enacted the Child Pornography Prevention Act of 1996 (“CPPA”).⁸⁰ The CPPA extended the definition of child pornography to include images that depicted adults appearing as minors and images of virtual children that were created using computer imaging technology.⁸¹ These sections of the act were eventually ruled unconstitutional in the 2002 Supreme Court case, *Ashcroft v. Free Speech Coalition*.⁸² The Court distinguished virtual child pornography from the speech restricted in *Ferber*—speech that was itself a record of sexual abuse—by noting that the expression prohibited by the CPPA “records no crime and creates no victims by its production,” and is therefore not exempt from First Amendment protection.⁸³

In 2010, the Supreme Court further clarified the limits of the child

74. *Id.*

75. *Ferber*, 458 U.S. at 756–58.

76. *Id.* at 762.

77. *Id.* at 759–61.

78. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

79. *Id.* at 110.

80. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009–26 (codified as amended at 18 U.S.C. §§ 2241, 2251–52 (2012)). *See also* Susan Hanley Duncan, *A Legal Response Is Necessary for Self-Produced Child Pornography: A Legislator’s Checklist for Drafting the Bill*, 89 OR. L. REV. 645, 673–74 (2010) (discussing the CPPA and its restrictions).

81. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239–40 (2002).

82. *Id.* at 258.

83. *Id.* at 250.

pornography exception from the First Amendment.⁸⁴ In *United States v. Stevens*, the Court noted that excluding categories from First Amendment protection requires more than a “simple cost-benefit analysis.”⁸⁵ Further, the Court clarified that *Ferber* did not create a new exception to First Amendment protected speech, but was instead adding child pornography to an already identified category—“speech . . . used as an integral part of conduct in violation of a valid criminal statute.”⁸⁶ In other words, child pornography is “intrinsically related” to the criminal conduct of child sexual abuse, which justifies its exemption from the First Amendment.⁸⁷ Some scholars have interpreted this to mean that “child pornography laws cannot be constitutionally applied in circumstances where no actual minor is sexually abused during the production of the material.”⁸⁸

In cases challenging a statute on First Amendment grounds, if a court finds that the speech in question is protected, it must apply strict scrutiny when determining whether the law is constitutional.⁸⁹ In order to pass strict scrutiny, the law must be narrowly tailored to a compelling state interest.⁹⁰ Conversely, if the speech is not protected by the First Amendment, the law must only pass rational basis review, a much more lenient standard that is satisfied so long as the law bears a rational relationship to a legitimate state interest.⁹¹ Further, when identifying a legitimate state interest, the court need not select the reasoning explicitly put forth by the legislature when enacting the law, and instead can use any conceivable basis it deems legitimate.⁹²

2. First Amendment Arguments

While none of the defendants in the aforementioned cases argued that their First Amendment rights were violated (perhaps acquiescing to the long history of child pornography exceptions recognized by the Supreme Court), it is not inconceivable that after *United States v. Stevens*, defendants caught between our age of consent and child pornography laws

84. *United States v. Stevens*, 559 U.S. 460, 470–71 (2010).

85. *Id.* at 471.

86. *Id.* (quoting *New York v. Ferber*, 458 U.S. 747, 762 (1982)) (internal quotation marks omitted).

87. *Id.* (quoting *Ferber*, 458 U.S. at 759) (internal quotation marks omitted).

88. Walters, *supra* note 72, at 114.

89. *See People v. Hollins*, 971 N.E.2d 504, 521–22 (Ill. 2012) (Burke, J., dissenting) (rejecting the majority’s decision to use rational basis review in deciding the defendant’s constitutional challenge).

90. *Stevens*, 559 U.S. at 471–72.

91. *Id.* at 472–73.

92. *State v. Senters*, 699 N.W.2d 810, 817 (Neb. 2005).

might argue that their First Amendment rights were violated.

The dissent in *People v. Hollins*, consisting of two Illinois Supreme Court justices, put forth a First Amendment argument on behalf of the defendant.⁹³ The justices contended that *Stevens* stands for the proposition that when there is no underlying child abuse in the production of the image, the resulting material does not constitute child pornography, and therefore is not exempt from First Amendment protection.⁹⁴ As applied to Hollins's case, the dissent argued that, since "there was nothing unlawful about the production of the photographs . . . because the sexual conduct between the defendant and [his girlfriend] was entirely legal[,] [t]he photographs are therefore not child pornography as defined by the Supreme Court for purposes of the [F]irst [A]mendment."⁹⁵ Consequently, the dissent concluded that the majority erred in using a rational basis review in its analysis.⁹⁶

It seems highly unlikely that the dissent intended their interpretation of *Stevens* to mean that only images explicitly showing a child being sexually abused are exempt from the First Amendment. Such an interpretation would exclude the images of nude children standing alone, yet provocatively posed or engaged in explicit sexual conduct. Therefore, one must assume that the criminal conduct (sexual abuse of a child) referred to in the *Stevens* discussion is the actual act of photographing the child. As the majority in *Hollins* stated, "it is the actual recording of th[e] conduct, and the consequences to the child that flow therefrom, that is the interest being protected by the statute as applied."⁹⁷ The dissent's argument is strengthened if the underlying criminal conduct—sexual abuse through the act of photographing—is assumed to be impossible once an adolescent reaches the age of consent for sexual intercourse. If videotaping an adolescent is only abuse when the adolescent is incapable of consenting to sex, then once the adolescent reaches the age of consent, no abuse exists when he or she is photographed consensually. From here, the dissent's argument logically follows—consensually photographing an adolescent legally capable of consenting to sex is not abuse; therefore, the photographs are not an integral part of any underlying criminal conduct; therefore, such images are not exempt from First Amendment protection; therefore, strict scrutiny should be applied to any law prohibiting such images.

93. *Hollins*, 971 N.E.2d at 517 (Burke, J., dissenting).

94. *Id.* at 520–21.

95. *Id.* at 521.

96. *Id.* at 522.

97. *Id.* at 512 (majority opinion).

Although logically plausible, this argument intertwines the two laws so much as to almost make them synonymous. It is unlikely, as the laws are written and viewed today, that the Supreme Court would agree that the ability to consent to sex and the ability to consent to pornography are practically one and the same. Under the current legal doctrine, the Supreme Court can likely make the strong argument that the act of taking pornographic photographs of a minor is still abusive, even if the images depict a minor legally capable of consenting to sexual intercourse. The Supreme Court has never explicitly decided at what age the act of filming a child engaged in sexual conduct is considered abuse and at what age an individual can consent. Therefore, it seems likely that the Court would allow the legislature to determine, as it always has through our child pornography laws, the age at which an individual is considered a minor for the purposes of child pornography. In other words, under our current legal doctrine, the harm caused by sexual intercourse with a minor is likely viewed as separate and different from the harm caused by the creation of child pornography, and therefore the dissent's argument in *Hollins* would likely not pass Supreme Court analysis.

B. THE FOURTEENTH AMENDMENT AND SEXUAL PRIVACY

1. A Historical Overview

Under the Due Process Clause of the Fourteenth Amendment, the Supreme Court has recognized various fundamental rights that may not be violated without a showing that the law at issue is narrowly tailored to a compelling state interest. The United States Constitution affords protection to fundamental rights in such areas as “marriage, procreation, contraception, family relationships, child rearing, and education.”⁹⁸ In a case focusing on the constitutionality of abortion restrictions, the Supreme Court noted that “[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”⁹⁹

Courts debate whether a fundamental right to sexual privacy exists.¹⁰⁰ The Supreme Court in *Lawrence v. Texas* overruled past precedent and recognized that two consenting adults engaged in sexual activity common

98. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977)).

99. *Id.*

100. *State v. Senters*, 699 N.W.2d 810, 815–16 (Neb. 2005).

to the homosexual lifestyle are entitled to freedom from governmental intervention.¹⁰¹ In its discussion, the Court explicitly noted that “[t]he present case does not involve minors,” and instead “involve[s] two adults . . . with full and mutual consent from each other.”¹⁰² Because the Court in *Lawrence* never explicitly noted what level of scrutiny it was applying in its analysis, it is unclear whether the Court’s reasoning established a fundamental right to sexual privacy.¹⁰³ What is clear, however, is that whatever rights were established in *Lawrence* only apply to consenting adults.¹⁰⁴

2. Substantive Due Process Arguments

The defendants in *Bach* and *Senters* used *Lawrence* to argue that a fundamental right to privacy was established, and that this right should be extended to protect the privacy of their sexual relationships.¹⁰⁵ Both of the defendants in *Bach* and *Senters* acknowledged that the holding in *Lawrence* only applies to consenting adults, but they argued that because their adolescent partners could legally consent to engage in intercourse, they should be considered legally consenting adults for the purposes of sexual privacy rights.¹⁰⁶ This argument becomes stronger when one considers that minors are defined differently in various legal arenas governing children—such as the right to vote, the right to enlist in the army, and the right to drink alcohol. If two twenty-year-old people engaged in sexual intercourse, it would not make sense to argue that they are not adults as required for sexual privacy rights because they are considered minors under state alcohol consumption laws. The age at which an adolescent can legally purchase alcohol is irrelevant to the age at which an adolescent gains the right to sexual privacy. Although this is an extreme example, the same could hold true for applying child pornography law to sexual privacy rights. While child pornography laws are not entirely irrelevant, the question surrounding *Lawrence* and sexual privacy rights is whether the actors are consenting adults.¹⁰⁷ As such, it might make more sense to apply the age of consent laws—which bear directly on whether an actor is considered an adult for the purposes of sexual intercourse—rather than the

101. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

102. *Id.*

103. *Senters*, 699 N.W.2d at 815–16.

104. *See id.* at 816 (reflecting on *Lawrence*’s discussion of consensual intercourse between adults separate from consensual intercourse with or between minors).

105. *Id.* at 814–15; *United States v. Bach*, 400 F.3d 622, 627–28 (8th Cir. 2005).

106. *Bach*, 400 F.3d at 628; *Senters*, 699 N.W.2d at 816.

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

age defined by child pornography laws—which are only indirectly related to sexual intercourse and consent. Assuming both that a fundamental right to sexual privacy does exist, and that such privacy is given to adolescents once they are legally capable of consenting to sex, any law infringing on their sexual privacy rights must pass strict scrutiny.

With very little discussion, the *Bach* and *Senters* courts rejected the defendants' Fourteenth Amendment arguments.¹⁰⁸ The court in *Bach* concluded that "Congress may regulate pornography involving all minors under the age of eighteen if it has a rational basis for doing so,"¹⁰⁹ and the court in *Senters* reasoned that "[i]n *Lawrence*, the Court made clear that its holding does not extend to children, but it did not . . . define a child as someone under the age of consent."¹¹⁰ The *Senters* court goes on to explain that Congress maintains the right to define a minor for the purposes of child pornography.¹¹¹ Once it was established that no fundamental right was implicated, neither court had any difficulty finding a legitimate basis for the respective law—the protection of children from abuse and exploitation—and therefore both laws passed rational basis review and both convictions were affirmed.¹¹²

While the defendants' above argument has merit, it is likely a difficult one to win as evidenced by the outcome in *Senters* and *Bach*. To be successful, a defendant must first prove that a fundamental right exists, and second that such a right should extend to the couple's visual documentation of their sexual activity.¹¹³ The defendant must convince a court to negate the legislature's power to determine the age of child pornography laws, and to instead replace this age with that of the age of consent.¹¹⁴ Because the power to define child pornography has historically been held by legislatures, and because *Lawrence* did not explicitly destroy this ability, it is unlikely the courts will rule in favor of these defendants.

3. Equal Protection Arguments

Arguments based on the Equal Protection Clause of the United States

108. *Bach*, 400 F.3d at 628–29; *Senters*, 699 N.W.2d at 818–19.

109. *Bach*, 400 F.3d at 629 (citing *United States v. Freeman*, 808 F.2d 1290, 1293 (8th Cir. 1987)).

110. *Senters*, 699 N.W.2d at 817.

111. *Id.*

112. *Id.* at 818–19; *Bach*, 400 F.3d at 629.

113. *See Senters*, 699 N.W.2d at 818 ("Senters' equal protection argument hinges on his claims that *Lawrence* recognized a fundamental right to sexual privacy and that this right protects him.").

114. *See id.* (discussing a legislature's legitimate interest in defining who is a child for pornography purposes); *Bach*, 400 F.3d at 629 (same).

Constitution are similar to the due process arguments detailed above.¹¹⁵ The Equal Protection Clause prohibits the government from treating “similarly situated people” differently.¹¹⁶ If the law at issue “involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny.”¹¹⁷ Otherwise, the law must simply pass rational basis review.¹¹⁸

The defendants in both *Senters* and *Hollins* argued that their equal protection rights were violated by the child pornography statute.¹¹⁹ Although the Supreme Court has not recognized age distinctions as a suspect classification, *Senters* argued that the age classification in the relevant statute infringed on his fundamental right to sexual privacy.¹²⁰ In other words, *Senters* argued that a fundamental right to sexual privacy begins at sixteen but, due to the Nebraska child pornography statute, sexual activity with a sixteen- or seventeen-year-old is treated differently than sexual activity with a partner eighteen or older.¹²¹ *Senters*’s argument turned on whether or not a fundamental right to sexual privacy existed, and as noted above, the court had already determined the right to sexual privacy did not extend to *Senters*’s activities.¹²²

Hollins, on the other hand, accepted that none of his fundamental rights were implicated, and instead argued that the law did not pass rational basis review.¹²³ *Hollins* contended that “he was in the same position as anyone who photographs . . . [a] consenting sex partner,” and it is, therefore, unreasonable for the legislature to prohibit such acts in his case.¹²⁴ The court rejected this argument on the grounds that the law bears a rational relationship to the legitimate state interest of “preventing the sexual abuse or exploitation of children.”¹²⁵

115. See *People v. Hollins*, 971 N.E.2d 504, 516 (Ill.) (comparing equal protection analysis to that of due process analysis), *cert. denied*, *Hollins v. Illinois*, 133 S. Ct. 581 (2012).

116. *Id.* at 515.

117. *Senters*, 699 N.W.2d at 818 (quoting *Gourley v. Neb. Methodist Health Sys.*, 663 N.W.2d 43 (Neb. 2003)).

118. *Id.*

119. See *id.* (arguing that the act imposes an age classification and infringes on a fundamental right); *Hollins*, 971 N.E.2d at 515 (arguing that “[the defendant] belongs to a class of people . . . who engage in legal sexual activities with consensual partners and choose to photograph their private interactions”).

120. *Senters*, 699 N.W.2d at 818.

121. See *id.* (“[*Senters*] contends that the age classification used in the [a]ct is overinclusive because it prohibits recording sex acts, such as the one involved here, that are legal.”).

122. *Id.*

123. *Hollins*, 971 N.E.2d at 515.

124. *Id.*

125. *Id.* at 516.

From a judicial standpoint, it seems unlikely that a defendant caught between these two laws will find any reprieve in either the First or Fourteenth Amendments. The policy arguments the courts have made when applying rational basis review are the focus of the analysis in Part IV and may provide some guidance for legislatures considering amendments to these two legal doctrines.

IV. POLICY ARGUMENTS

A. PASSING RATIONAL BASIS REVIEW

Upon determining that there were no fundamental rights at issue and that the cases could be resolved using rational basis review, the *Senters* and *Hollins* courts cited to the legislative reasoning for the age increase in child pornography laws¹²⁶ (the goal was to aid the prosecution¹²⁷), and put forward a court constructed legitimate basis.¹²⁸ The legitimate basis created by the courts helped explain why it might be rational for the legislatures—at both the state and federal level—to define minor differently in the two types of statutes.¹²⁹ The courts drew a clear distinction between an adolescent’s ability to consent to sexual intercourse and the ability to consent to pornography.¹³⁰ The court in *Senters* noted that “[i]t is reasonable to conclude that persons [sixteen] and [seventeen] years old, although old enough to consent to sexual relations, may not fully appreciate that today’s recording of a private, intimate moment may be the Internet’s biggest hit next week.”¹³¹ Likewise, the court in *Hollins* reasoned that,

The consequences of sexual activity are concrete, and for the most part, readily apparent to teenagers: possible pregnancy, sexually transmitted diseases, and emotional issues. Many, if not most, teenagers who are [sixteen] and [seventeen] will have been apprised of these consequences by parents or sexual education classes in school. The dangers of appearing in pornographic photographs or videos are not as readily

126. *Id.* at 511; *Senters*, 699 N.W.2d at 817.

127. *Hollins*, 971 N.E.2d at 509, 511.

128. *See id.* at 511 (“We find the reasoning employed by the Nebraska Supreme Court in *Senters* and the United States Court of Appeals for the Eighth Circuit in *Bach* persuasive. . . . [T]he legitimate government purpose is protecting children from sexual abuse and exploitation.”); *Senters*, 699 N.W.2d at 818 (“If sexually explicit conduct is not recorded, it cannot be distributed. So, it is reasonable to conclude that criminalizing the making of recordings depicting persons under 18 years of age engaged in sexually explicit conduct furthers the goal of protecting those persons from the reputational harm that would occur if the recordings were distributed.”).

129. *See Hollins*, 971 N.E.2d at 511 (“[T]here are rational, reasonable arguments in support of having a higher age threshold for appearance in pornography than for consent to sexual activity.”).

130. *Id.*

131. *Senters*, 699 N.W.2d at 817.

apparent and can be much more subtle. Memorialization of the sexual act makes permanent an intimate encounter that can then be distributed to third parties.¹³²

Thus, the courts held that setting the age at eighteen for child pornography, despite a lower age of consent, was a rational approach to protecting children from the sexual exploitation, abuse, and reputational harm associated with the dissemination of pornographic images.¹³³

B. A CRITICAL ANALYSIS OF THE COURTS' LEGITIMATE BASIS

The courts' rationale for the inconsistency between the two legal doctrines has merit. Courts, psychiatrists, and parents have long recognized that a child's brain is not as developed as that of an adult; therefore, managing impulses, understanding long-term consequences, and coping with emotional stress are more difficult for adolescents.¹³⁴

In their 2012 amicus brief to the Supreme Court for a case questioning the constitutionality of mandatory life without parole sentences for juvenile offenders, the American Medical Association and the American Academy of Child and Adolescent Psychiatry recognized that the prefrontal cortex—the area of the brain responsible for such tasks as assessing risks, evaluating rewards and punishments, controlling impulses, and considering future consequences—is one of the last areas of the brain to mature.¹³⁵ Due to the state of brain development, adolescents experience heightened sensitivity to immediate rewards relative to adults, skewing the child's risk-reward analysis in favor of engaging in risky behavior.¹³⁶ Further, studies indicate “that adolescents are more likely to take risks when they are in the presence of peers.”¹³⁷ This reward sensitivity is coupled with a lack of impulse control, making adolescents “less able than adults to consistently reflect before they act.”¹³⁸

These findings help support the rationale presented by the *Senters* and the *Hollins* courts. Relative to adults, adolescents are less likely to understand the consequences of taking sexually explicit photographs and to reflect before memorializing such activities, and more likely to

132. *Hollins*, 971 N.E.2d at 511.

133. *Id.*; *Senters*, 699 N.W.2d at 818.

134. Brief for Am. Med. Ass'n & Am. Acad. of Child & Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 2–3, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647) [hereinafter *Miller* Brief].

135. *Id.* at 18–19.

136. *Id.* at 7–8.

137. *Id.* at 9.

138. *Id.* at 11.

overemphasize the rewards of creating such images.

Illustrating the increased risk that the dissemination of sexually explicit photographs can have on a teenager, the amicus brief also noted that adolescents “tend to experience emotional states that are more extreme and more variable than those experienced by adults.”¹³⁹ This might be one reason that some teenagers, faced with the dissemination of their sexually explicit photographs and the subsequent bullying by their peers, have responded drastically by committing suicide.¹⁴⁰ In sum, legislatures and courts have a reasonable basis to protect teenagers by punishing those who enable them to make mature decisions before they are developmentally ready.

On the other hand, these arguments are equally true for teenagers making the decision to engage in sexual intercourse—another type of risky behavior wrought with long-term, life-changing consequences. To accept the claims of medical experts as true in the context of self-produced pornography is to accept them as true for most, if not all, of the risky decisions teenagers face on a regular basis. When teenagers weigh the costs and the benefits of having unprotected sex, sex with a complete stranger, taboo sex, sex with multiple partners, or sex with a same-sex partner, brain functions lead them to overemphasize rewards, act on impulse, and to misjudge the potential physical and reputational consequences.

Further, the choice to have sex can have profound effects on an adolescent’s reputation and may result in severe bullying by peers;¹⁴¹ consequences similar to those associated with the dissemination of self-produced pornography. Likewise, a teenager’s decision to engage in sexual intercourse can lead to emotional and reputational harm, and contribute to the decision to commit suicide.¹⁴²

139. *Id.* at 14.

140. *See, e.g.,* Walters, *supra* note 72, at 119–20 (2010) (discussing the case of a teen who was bullied after sexting a photograph of herself to her boyfriend, which eventually caused her to commit suicide); Michael Inbar, “Sexting” Bullying Cited in Teen’s Suicide, NBC NEWS (Dec. 2, 2009, 10:26 AM), http://today.msnbc.msn.com/id/34236377/ns/today-today_news/t/sexting-bullying-cited-teens-suicide (reporting the story of a thirteen-year-old who was bullied after sending a topless photograph of herself to a boy, which eventually caused her to commit suicide).

141. *See, e.g.,* Sutherland, *supra* note 18, at 347–48 (describing Debbie, an adolescent who was known as “the whore of Sheepshead High” for engaging in variant forms of sexuality); Laura Hibbard, Brandon Elizares, *Gay Teen, Commits Suicide, Writing “I Couldn’t Make It. I Love You Guys,”* HUFFPOST GAY VOICES (June 14, 2012, 8:59 PM), http://www.huffingtonpost.com/2012/06/14/brandon-elizares-gay-teen-commits-suicide-leaves-note_n_1598272.html (telling story of a sixteen-year-old homosexual boy who committed suicide after being bullied by classmates for his sexuality).

142. *See, e.g.,* Russell Goldman, *Teens Indicted After Allegedly Taunting Girl Who Hanged*

Perhaps the *Hollins* court was accurate in saying teenagers “have been apprised of the[] consequences [of engaging in sexual intercourse] by parents or sexual education classes in school,”¹⁴³ but one must consider the environment that constantly surrounds teenagers before arguing that they understand the consequences of sexual intercourse better than the consequences of taking sexually explicit photographs. A Pew Internet Project report shows that in 2009, 93 percent of adolescents, aged twelve to seventeen, used the Internet, as compared to 74 percent of adults aged eighteen and older.¹⁴⁴ Of the adolescents who used the Internet, 63 percent reported using it at least once a day.¹⁴⁵ Further, 75 percent of twelve- to seventeen-year-olds carry a cell phone.¹⁴⁶ Of these adolescents, 54 percent were daily texters in 2009, with one-third of this group sending more than one hundred text messages per day (totaling approximately 3000 text messages per month).¹⁴⁷ A similar study by the Kaiser Family Foundation found that in a population of 2000 grade school students, the average amount of time spent using a technological device—such as a smart phone, computer, or television—was over seven and a half hours per day.¹⁴⁸ This data suggests that the Internet and the power of technology are not foreign concepts to a teenager. Although it is likely that adolescents cannot grasp fully the permanency and breadth of the Internet due to their limited life experience and brain development, it seems implausible that teenagers comprehend the mysteries and hardships associated with teen pregnancy or sexually transmitted diseases better than the Internet, simply because they attend sexual education classes.

In sum, both the decision to engage in sexual intercourse and to create

Herself, ABC NEWS (Mar. 29, 2010), <http://abcnews.go.com/Technology/TheLaw/teens-charged-bullying-mass-girl-kill/story?id=10231357#.ULFTXYdqQs4> (telling story of fifteen-year-old girl who committed suicide after being bullied for her sexual relationships).

143. *People v. Hollins*, 971 N.E.2d 504, 511 (Ill.), *cert. denied*, *Hollins v. Illinois*, 133 S. Ct. 581 (2012).

144. AMANDA LENHART ET AL., PEW INTERNET & AM. LIFE PROJECT, SOCIAL MEDIA & MOBILE INTERNET USE AMONG TEENS AND YOUNG ADULTS 4 (2010), http://pewinternet.org/~media/Files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_Final_with_toplevels.pdf.

145. *Id.* at 7.

146. *Id.* at 9.

147. AMANDA LENHART ET AL., PEW INTERNET & AM. LIFE PROJECT, TEENS AND MOBILE PHONES 2, 30–31 (2010), <http://www.pewinternet.org/files/old-media/Files/Reports/2010/PIP-Teens-and-Mobile-2010-with-topline.pdf>.

148. Sarah Theodore, Note, *An Integrated Response to Sexting: Utilization of Parents and Schools in Deterrence*, 27 J. CONTEMP. HEALTH L. & POL’Y 365, 369–70 (2011) (citing Tamar Lewin, *If Your Kids Are Awake, They’re Probably Online*, N.Y. TIMES (Jan. 20, 2010), http://www.nytimes.com/2010/01/20/education/20wired.html?_r=0).

sexually explicit photographs requires a level of maturity that some teenagers may not have due to their brain development. Further, both decisions can have devastating effects on the physical and emotional wellbeing of a child. Therefore, the argument made in *Senters* and *Hollins* does not fully address why, statutorily, a child can consent to sexual intercourse, but not to taking sexually explicit photographs.

C. OTHER POLICY CONSIDERATIONS

1. The Adolescent “Victim”

Our laws currently allow adolescents to engage in most forms of sexuality, but reserve the right to restrict certain sexual behaviors, thus, giving adolescents incomplete sexual autonomy.¹⁴⁹ We tell teenagers that they are mature, but not mature enough. This lack of complete autonomy can have detrimental and unintended side effects on these teenagers, and on society as a whole.¹⁵⁰ When we allow teenagers to engage in sexual intercourse, we encourage them to make safe decisions based on information from sexual education classes, parents, and older peers. We hope that, armed with the frightening consequences and the potentially life-changing outcomes, teenagers will make responsible, mature decisions after careful reflection and consideration. As such, when teenagers reach the age of consent, we give them both a right and a responsibility.¹⁵¹

Scholars have argued that “acknowledging individual autonomy fosters self-determination and self-confidence by cultivating an important sense of responsibility and accountability, not only to oneself but [also] to others.”¹⁵² By not giving legally consenting adolescents the right to engage in all forms of adult sexual activity, including self-produced pornography, we fail to assign the associated responsibility for the consequences. By punishing the adult partner for the production of the sexual photographs, we imply that if something goes wrong, the older partner is to blame. By passing the blame, we pass the responsibility. This leaves adolescents less

149. See generally *United States v. Bach*, 400 F.3d 622 (8th Cir. 2005) (noting that a teen can sometimes legally consent to intercourse but cannot legally consent to photographing the event); *State v. Senters*, 699 N.W.2d 810 (Neb. 2005) (same).

150. See Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying and Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1268–69 (2000) (suggesting a transition from analysis of minor incapacity to one of adolescent ability).

151. See *id.* at 1268 (“This impoverished legal approach toward adolescence is especially striking because acknowledging individual autonomy fosters self-determination and self-confidence by cultivating an important sense of responsibility and accountability, not only to oneself but [also] to others.”).

152. *Id.*

likely to appropriately weigh the benefits and consequences of creating these images.

Further, by making certain activities illegal we may inadvertently increase the associated thrill and perceived reward of taking such photographs. One study published in *Archives of Sexual Behavior* found that teenagers aware of the potential legal consequences of sending sexually explicit photographs to one another “were slightly (but significantly) more likely” to engage in such activity.¹⁵³ It is possible that the extra risk increases the perceived reward, thus, skewing the cost-benefit analysis in favor of engaging in this behavior.¹⁵⁴

2. The Adult “Abuser”

In protecting teenagers from the potential harm resulting from a pornographic image’s dissemination, legislatures and courts have equated the act of photographing a partner legally capable of consenting to sexual intercourse to the act of photographing a young child incapable of consenting to any form of sexual activity.¹⁵⁵ Perpetrators are sentenced to probation, years in prison, or inclusion on the sex offender registry, thus, severely altering or destroying their lives.¹⁵⁶

The sentences of defendants like Eric Rinehart (fifteen years imprisonment)¹⁵⁷ and Marshall Hollins (eight years imprisonment)¹⁵⁸ help illustrate how disproportionate the potential sentences are compared to the act being punished. The federal court that sentenced Rinehart illustrated the discrepancy between Rinehart’s actions and the mandatory punishment by demonstrating that a defendant who pleads guilty to the hijacking of an airplane or to second degree murder would receive a lesser sentence than the federal mandatory sentence required for Rinehart’s crimes.¹⁵⁹ Likewise, in order to receive a similar sentence, a bank robber “would need to fire a gun, inflict serious bodily injury on a victim, physically restrain another victim, and . . . [steal] \$2.5 million.”¹⁶⁰ Perhaps it is time to reconsider

153. Don Strassberg et al., *Sexting by High School Students: An Exploratory and Descriptive Study*, 42 ARCHIVES SEXUAL BEHAV. 15, 19 (2013) (emphasis omitted).

154. See Miller Brief, *supra* note 134, at 7–8 (discussing adolescent cost-benefit analysis).

155. United States v. Rinehart, No. IP06-0129-CR-01-H/F, 2007 U.S. Dist. LEXIS 19498, at *5–7 (S.D. Ind. Feb. 2, 2007).

156. See, e.g., *id.* at *8–12; State v. Senters, 699 N.W.2d 810, 814 (Neb. 2005).

157. Rinehart, 2007 U.S. Dist. LEXIS 19498, at *11.

158. People v. Hollins, 971 N.E.2d 504, 517 (Ill.) (Burke, J., dissenting), *cert. denied*, Hollins v. Illinois, 133 S. Ct. 581 (2012).

159. Rinehart, 2007 U.S. Dist. LEXIS 19498, at *8.

160. *Id.* at *8–9.

whether child pornography laws should be used to punish the defendants whose actions are caught between these two legal doctrines.

3. The Society “Protector”

A 2009 Associated Press-MTV poll found that over 25 percent of the fourteen- to twenty-four-year-olds surveyed “had been involved in some type of ‘naked sexting.’”¹⁶¹ With technology use increasing among our adolescent population, digital communication has become the primary way for adolescents to comfortably communicate emotions, including love and lust.¹⁶² The nature of this communication removes adolescents from the awkwardness of face-to-face conversations and allows them to experiment with emotions and sexuality from the comfort of their own bedroom. For better or worse, it seems technology has become a new forum for adolescent sexual exploration.¹⁶³

With the prevalence of technology and the possibility of teenagers using it to send sexually explicit photographs, we must question why our society is comfortable with allowing teenagers to have sex with a partner ten or twenty years older, but uncomfortable with the same couple taking photographs of such activities. This inconsistency might be another example of our struggle to allow teenagers the right to experiment while also attempting to maintain our morals and values. As past inconsistencies in our laws have shown, there is a hierarchy of appropriate sexual behavior: heterosexual sex trumps homosexual sex,¹⁶⁴ married intercourse trumps unmarried intercourse,¹⁶⁵ procreation trumps abortion,¹⁶⁶ and private sexual expression trumps memorialized sexual expression.¹⁶⁷ Perhaps the discrepancy between our age of consent and our child pornography laws is less about protecting children and more about protecting our own values.¹⁶⁸ We have accepted teenagers having sex, as long as we are not made aware of it. When it comes to adolescent sexuality, perhaps our society has

161. Duncan, *supra* note 80, at 652.

162. Walters, *supra* note 72, at 100.

163. *Id.*

164. See *State v. Limon*, 83 P.3d 229, 240 (Kan. Ct. App. 2004) (concerning a case involving criminal sodomy).

165. See COCCA, *supra* note 19, at 9 (discussing how marriage impacts the informed consent analysis).

166. Phillis, *supra* note 21, at 283.

167. *United States v. Bach*, 400 F.3d 622, 624, 634 (8th Cir. 2005); *People v. Hollins*, 971 N.E.2d 504, 506, 516 (Ill.), *cert. denied*, *Hollins v. Illinois*, 133 S. Ct. 581 (2012); *State v. Senters*, 699 N.W.2d 810, 814, 819 (Neb. 2005).

168. See Sutherland, *supra* note 18, at 333 (examining the impact of parental values on young peoples' ability for sexual activity).

adopted an “out of sight, out of mind” mentality. However, in giving these young members of our society the right and responsibility to engage in sexual intercourse, we must accept the possibility that these teenagers will engage in sexual activities with which we are not completely comfortable.

V. A SOLUTION

With no resolution likely to be found in the Constitution or within a courtroom, a solution must stem from our state and federal legislatures. Several factors must be weighed when selecting the appropriate solution, including society’s desire to protect adolescents from exploitation and abuse, the importance of sexual autonomy for teenagers in order to encourage increased responsibility, and the reconsideration of harsh punishments levied against defendants.

A. STATE LEGISLATION

At a state level, it is important to recognize that these two legal doctrines—age of consent and child pornography—are not entirely independent and perhaps should not be treated as such. The ideal solution is to mirror state laws at whatever age the state legislature and their constituents deem appropriate. If the state decides that an adolescent is capable of consenting to sexual intercourse at the age of sixteen, then this should also be the age that the adolescent is capable of consenting to various sexual acts, including self-produced pornography. Likewise, this would hold true if the state selects the age of consent at seventeen or eighteen. While this requires states to select a single age of consent for all adult sexual activities, the states maintain their freedom to select the age at which that right is recognized. This solution allows for the continued protection of children, recognizes full sexual autonomy at the age of consent, and removes the harsh punishments imposed on the older partners.

Additionally, an educational component focused on Internet safety and the potential consequences of distributing personal images should be added to the traditional sexual education courses currently offered to students; thereby educating them on the long-term problems associated with self-produced pornography. This addition would address the problem specifically raised by both the *Hollins* and *Senters* courts that children have more information regarding pregnancy than Internet permanency.

B. FEDERAL LEGISLATION

At the federal level, the optimal solution is not quite as simple; therefore, a few possible solutions are proposed. Due to the unavoidable

variance in ages of consent selected by individual state legislatures, it is impossible to match all state laws with the laws of the federal government. Therefore, an appropriate solution is to lower the federal age of child pornography back down to sixteen (as it was in 1984), thus, mirroring it with the federal age of consent. Currently, no state has an unrestricted age of consent below the age of sixteen, meaning federal law would never be stricter than state law and no problematic inconsistency would exist between the two.

As this would preclude the federal government from determining its own age of consent, a second possible solution is to not only mirror federal age of consent and child pornography laws, but also to allow the federal government to set the age. Admittedly, this would create inconsistencies in states where federal law is stricter than state law, but such inconsistencies are not uncommon in our legal system.¹⁶⁹ This solution, implemented in conjunction with intrastate mirroring, would allow for all independent legal systems to be internally consistent while maintaining freedom at both the state and federal level to decide the age at which this right is established.

A third possible solution is to create a federal child pornography statute that maintains the federal age at eighteen, but explicitly allows for a right to sexual privacy among legally consenting partners, as defined by the federal age of consent law.¹⁷⁰ This would permit all legally consenting adults (currently sixteen under federal law) to have a reasonable expectation of privacy when it comes to their sexual activity, and only when this expectation of privacy is destroyed would prosecution occur. In essence, this law would allow consenting partners to take and keep sexually explicit photographs so long as the partners reasonably believed that these photographs would remain within the privacy of their relationship. Once one of the partners destroyed this expectation of privacy by posting the image on the Internet, sending the photograph to friends, or using the image to lure other minors, the adult would be subject to prosecution for the distribution of child pornography.

This solution is certainly not without limitations, many of which go beyond the scope of this Note, but it acknowledges and addresses several of the concerns cited by the courts. As explicitly noted by the *Senters* and *Hollins* courts, the primary fear of allowing adolescents to appear in

169. For one example, see generally *Gonzales v. Raich*, 545 U.S. 1 (2005), discussing California's law permitting the sale of medical marijuana and the federal law forbidding all such marijuana sales.

170. While this solution is specifically proposed for federal law, such a solution could be implemented at the state level as well.

pornographic images is the emotional and reputational damage caused if such images are ever disseminated. At the time of their prosecution, Todd Senters,¹⁷¹ Marshall Hollins,¹⁷² and Eric Rinehart¹⁷³ had not shared these personal photographs and videos with anyone other than their partners, nor did they have any intention of doing so. Dale Bach, on the other hand, had used the images in an attempt to communicate with other young boys on the Internet.¹⁷⁴ This proposed solution would punish Dale Bach, while exonerating Todd Senters, Marshall Hollins, and Eric Rinehart. Instead of punishing the adult before any harm occurs, this solution would allow punishment only when these adults breach their partners' expectation of privacy.

VI. CONCLUSION

This inconsistency between age of consent and child pornography laws is present in the majority of our legal systems. Defendants caught at this legal intersection receive no assistance from our courts due to the explicit language used in child pornography statutes. Not uncommonly, judges assigned to hear these cases have recognized the problem and called for legislative change. Travis Kitchen had lived in Pennsylvania with his sixteen-year-old girlfriend for eighteen months.¹⁷⁵ The age of consent under Pennsylvania law is sixteen, and therefore all sexual relations between the pair were entirely legal.¹⁷⁶ Kitchen photographed his girlfriend in sexually explicit poses "before, during[,] and after her pregnancy" with his child.¹⁷⁷ A caseworker, assigned to find placement for the couple's child and to help the girlfriend move out, discovered the photographs in photo albums and in boxes located in the couple's home.¹⁷⁸ In 2000, Kitchen was convicted of one count of sexual abuse of a child by photographing sexual acts and one count of possession of child pornography.¹⁷⁹ Kitchen received a two to five year sentence for each of the two charges to run consecutively¹⁸⁰—resulting in a minimum of four years and a maximum of ten years in prison. Constrained by statute, Judge

171. *Senters*, 699 N.W.2d at 814.

172. *Hollins*, 971 N.E.2d at 516 (Burke, J., dissenting).

173. *United States v. Rinehart*, No. IP06-0129-CR-01-H/F, 2007 U.S. Dist. LEXIS 19498, at *3-4 (S.D. Ind. Feb. 2, 2007).

174. *United States v. Bach*, 400 F.3d 622, 625 (8th Cir. 2005).

175. *Commonwealth v. Kitchen*, 814 A.2d 209, 211 (Pa. Super. Ct. 2002).

176. *Id.* at 212.

177. *Id.* at 211.

178. *Id.*

179. *Id.* at 210.

180. *Id.* at 211.

John Brosky wrote a concurring opinion and in doing so called for change: “It appears to me that there are some rather inconsistent and illogical applications of the above laws . . . [T]he time has come for considered review of this particular statute by the legislature so that situations such as this do not obtain the same incongruous result.”¹⁸¹

Armed with information on the problem’s prevalence, the detrimental effects of its inconsistencies, and the need for legislatures to be the source of the change, it is time that state and federal lawmakers heed Judge Brosky’s call and amend the current statutes to close the gap between our age of consent and child pornography laws.

181. *Id.* at 216 (Brosky, J., concurring).

