Rethinking Traditional Conceptions of Child Pornography: An Analysis of How the U.S. Supreme Court Decision in *Stevens* Impacts the Illinois Supreme Court's Decision in *People v. Hollins*

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RETHINKING TRADITIONAL CONCEPTIONS OF CHILD PORNOGRAPHY: AN ANALYSIS OF HOW THE U.S. SUPREME COURT’S DECISION IN STEVENS IMPACTS THE ILLINOIS SUPREME COURT’S DECISION IN PEOPLE V. HOLLINS

JAMES D. KONSTANTOPOULOS*

INTRODUCTION

Federal child pornography statutes criminalize the creation, distribution or possession of sexually explicit materials featuring children (a “minor”) below the age of eighteen.1 State laws determine the age of consent for consensual sexual relations, provided that no state statute sets an age of less than the federal floor of sixteen years old.2 The federal child pornography laws, while revised in the 1980’s3, have not managed to keep up with the technological advances that have become all too customary to us. The prevalence of “smart phones” (especially the iPhone and similar Android-based devices) and the “apps”4 available for those seeking a “hook-up”5 has caused many people, minors included, to become much more comfortable taking and trading sexually-explicit images of themselves. The discrepancy between the two age classifications—the age at which an individual can consent to sex and the age at which an individual can consent to being photographed in a sexually explicit manner—has recently become a major issue and will continue to be an issue until the seemingly contradictory laws can in some way be reconciled.6

* J.D. Candidate, May 2014, Chicago-Kent College of Law, Illinois Institute of Technology. I would like to thank Professors Douglas Godfrey and Vincent Samar for their assistance in helping me develop and articulate my arguments in this paper. Finally, I would like to Illinois Supreme Court Justice Anne M. Burke, whose dissent in the Hollins case served as the inspiration for this paper

Imagine a situation in which an adult man is dating a seventeen-year-old girl (or vice versa\(^7\)). The two begin to engage in a consensual sexual relationship. During the course of one of their sexual encounters, the girl brings up the idea of taking a few nude photographs. The man agrees and does so, using his iPhone (or Blackberry or Android device). The man later, at the request of the girl, emails the pictures to her and a parent snooping in his or her daughter’s email account finds the pictures. The parent goes to the police and the police arrest the man for taking the nude pictures, pictures that the girl herself requested he take.

The situation described above is the basic premise of *People of the State of Illinois v. Marshall C. Hollins*, a case that made it all the way up to the Illinois Supreme Court in 2012. Illinois statutory law currently provides that seventeen (17) is the age at which a person can legally consent to sexual relations with another person.\(^8\) An additional eight states have statutes that provide for the same age of consent as in Illinois.\(^9\) Of the remaining forty-one jurisdictions in the union (forty states and the District of Columbia), thirty-one set sixteen (16) as the age at which a minor can consent to sexual relations and the remaining eleven states set eighteen (18) as the age of consent.\(^10\) This patchwork of state laws dictating the age of consent, against the backdrop the federal law that establishes the age of majority for pornography, makes it difficult for an adult, someone eighteen years or older to know whether the behavior they are engaging in is lawful. So long as this patchwork of largely contradictory laws exist, no matter why some states have a different set age than others, it is not hard to imagine the prosecution of an individual above the age of eighteen (a “non-minor”) for taking part in the memorialization of sexual relations via the taking of sexually explicit photographs with his or her seventeen-year-old (and in thirty-one states sixteen-year-old) significant other while engaged in otherwise legal conduct.

The United States Supreme Court in *United States v. Stevens* held that free speech cannot be interfered with when there is no specific illegal conduct to which the speech is integral in the underlying act that the free

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\(^7\) The situation would also apply with same-sex partners, whether both participants are male or female.

\(^8\) [AGE OF CONSENT BY STATE](http://www.age-of-consent.info/) (last visited January 20, 2014).

\(^9\) *Id.* (Colorado, Louisiana, Missouri, Nebraska, New Mexico, New York, Texas, Wyoming).


\(^11\) *Id.* (Arizona, California, Delaware, Florida, Idaho, North Dakota, Oregon, Tennessee, Utah, Virginia, Wisconsin).
speech depicts. The majority did not address Stevens when deciding Hollins. This Note addresses the Stevens case in the specific context of the criminalization of depictions of “child pornography,” focusing almost exclusively on the Illinois child pornography statute\(^\text{12}\) that lies at the heart of Hollins and analyzes how the Hollins case might have been decided differently if Stevens had been considered in the briefing and arguing of the case. This Note also suggests an alternative treatment for the “child pornography” at the heart of the Hollins case.

Part I of this Note will address the First Amendment of the United States Constitution, particularly the freedom of expression and speech that the First Amendment protects. This part will also discuss the expressions and speech that have been found ineligible for First Amendment protection. Part II will address the Hollins case. It will explore the history and the context in which Marshall Hollins was convicted of possession, distribution, and creation of child pornography. I will also summarize the reasoning of the Illinois Supreme Court in upholding his conviction, as well as the dissent by Justice Burke.

Part III will address the Stevens case. I will explain the situation faced by the Supreme Court in the Stevens case and the decision that the majority came to regarding the sale and distribution of videos that depicted animal cruelty. The importance of the Stevens case does not lie solely on the result for the parties in that case but rather in the implications it holds for criminal prosecutions in cases of a related situation, such as those that address the production, sale and distribution of child pornography.

Part IV of this Note will address the majority’s reasoning in Hollins, and the difference in how the case and the facts would have been analyzed under the Supreme Court’s decision in Stevens. In this section I will also determine whether a standard different than rational review should apply to the application of child pornography situations similar to those of Mr. Hollins and if so, what that standard should be.

Part V will address the challenges and stigma that people like Mr. Hollins face when convicted of a sex offense. This stigma is greater than it would be for a conviction for a non-sex related offense, such as assault, battery or theft. This section will argue that when the “minor” depicted in child pornography is old enough to consent to the underlying act of sexual relations, but not to the creation of the pornography itself, courts need to abandon their bright-line approach in deciding whether punishment should

\(^{12}\text{720 ILL. COMP. STAT. 5/11-20.1(a)(1)(i), (a)(1)(ii) and (a)(4) (2008).}\)
be meted out and should instead adopt a test that considers the totality of
the circumstances in reaching a decision.

I. THE UNPROTECTED EXCEPTIONS TO THE FIRST AMENDMENT

The First Amendment of the Constitution provides that “Congress
shall make no law respecting an establishment of religion, or prohibiting
the free exercise thereof; or abridging the freedom of speech, or of the
press; or the right of the people peaceably to assemble, and to petition the
Government for a redress of grievances.”13 The First Amendment also
applies to the States through the Due Process Clause of the Fourteenth
Amendment.14

However, the right to free speech is not absolute. Justice Oliver Wen-
dell Holmes famously said, “[y]our right to swing your arms ends just
where the other man’s nose begins.”15 No right is absolute and depending
on the nature of the right, the government must make an appropriate show-
ing to justify the abridgment of that right. There are currently three levels
of scrutiny that are applied to cases that deal with the implication of cases
presenting constitutional due process or equal protection claims issues re-
lated to the Fifth Amendment and the Fourteenth Amendment.16 The dif-
erent levels of scrutiny are discussed in Part IV below.

Furthermore, the First Amendment also protects photographs, draw-
ings, and videos, amongst other expressions. The right to free speech is also
not limited only to speech that is verbal.17 The First Amendment can be
invoked to prohibit restrictions on core political speech,18 commercial

13. U.S. Const. amend. I.
14. Gitlow v. New York, 268 U.S. 652, 666 (1925) (“For present purposes we may and do as-
sume that” the right of freedom of speech and freedom of the press are “among the fundamental person-
al rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from
impairment by the states.”).
15. Zechariah Chafee, Jr., Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 957 (1919)
(This quote is actually frequently credited to Justice Holmes but was instead written by Mr. Chafee in
his 1919 Harvard Law Review article.).
16. See generally Eric Berger, Deference Determination and Stealth Constitutional Decision
17. Texas v. Johnson, 491 U.S. 397, 406-07 (1989) (“It is, in short, not simply the verbal or
nonverbal nature of the expression, but the governmental interest at stake, that helps to determine
whether a restriction on that expression is valid.”).
has its fullest and most urgent application to speech uttered during a campaign for political office.”)
(internal quotations omitted).
speech,19 and expressive conduct.20 However, the First Amendment does not protect certain types of speech that fit into specific categories. Those categories include fighting words21, incitement to crime22, threats23, tortious speech like slander and libel24 and, notably, for the purposes of this Note, obscenity25 and child pornography26

A. The Exception for Obscenity

Justice Potter Stewart famously stated that while obscenity is hard to define, “I know it when I see it.”27 The Supreme Court has developed a working definition of the materials that are considered obscene. First, the materials must be such that “the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest.”28 Second, the materials must “depict[] or describe[], in a patently offensive way, sexual conduct specifically defined by applicable state law.”29 Third, the materials “taken as a whole,” must “lack[] serious literary, artistic, political, or scientific value.”30 All three factors must be met in order for a work to be deemed obscene and unprotected by the First Amendment.31


20. United States v. Eichman, 496 U.S. 310, 315 (1990) (“The Government concedes in these cases, as it must, that appellants’ flag burning constituted expressive conduct . . . but claim[s] that flag burning as a mode of expression, like obscenity or ‘fighting words,’ does not enjoy the full protection of the First Amendment. This we decline to do.”).

21. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”).


29. Id.

30. Id.

B. The Exception for Child Pornography

Traditionally, child pornography has been categorically exempted from First Amendment protection. The Ferber Court found that child pornography did not need to first be determined obscene to be subject to regulation using five reasons for this exception: (1) the government’s compelling interest in preventing children from being sexually exploited; (2) the intrinsic relationship between the distribution of children being visually depicted engaged in sexual activity and the sexual abuse of children; (3) the advertising and selling of child pornography provides an economic motive to those who produce child pornography; (4) there is negligible artistic value in the visual depiction of children engaged in sexual activity; and (5) withholding First Amendment protection from child pornography is consistent with stare decisis and previous holdings regarding obscenity and so child pornography does not need to first be deemed obscene before the States and Congress can regulate it.

Additionally, Congress passed the Child Pornography Prevention Act of 1996 in an attempt to restrict the creation and spread of child pornography on the Internet, including virtual child pornography. The Supreme Court struck down two provisions of the Act in the 2002 case of Ashcroft v. Free Speech Coalition. The provisions prohibited “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture” that “is, or appears to be, of a minor engaging in sexually explicit conduct,” and included any images “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” that it depicts “a minor engaging in sexually explicit conduct.” The Ashcroft Court found that the statute prohibited speech “despite its serious literary, artistic, political, or scientific value,” which would include visual depictions of teenagers having sex, a theme common to television shows and movies in the present day. The Court even gave explicit mention to the 1996 film version of William Shakespeare’s Romeo + Juliet, starring Leonardo DiCaprio, and found that the statute prohibited speech for a reason other than the pornography laws, which seek to address the

32. Ferber, 458 U.S. at 764, n. 17.
33. Id. at 751 n.2.
34. Id. at 756-64.
40. Id. at 247.
damage inflicted upon the children involved; the law was found to lack the “required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity.” The Court struck down the two provisions for being unconstitutional and overbroad.

II. THE ILLINOIS SUPREME COURT AND THE HOLLINS CASE

A. Factual Background and the Path to the Illinois Supreme Court

Defendant Marshall C. Hollins was charged with three counts of child pornography under the Illinois Compiled Statutes on March 19, 2009. The three counts all implicated subsections of the Illinois child pornography statute under 720 ILCS 5/11-20.1(a) and applied to “persons who photograph or use for photographic purposes ‘any child whom he knows or reasonably should know to be under the age of 18.’” Mr. Hollins was thirty-two years old at the time he took the photographs of his and his seventeen-year-old girlfriend’s (A.V.’s) genitals. Mr. Hollins and A.V. met when A.V. was sixteen years old “and began a consensual sexual relationship” while A.V. was seventeen years old. At the time, both A.V. and Mr. Hollins were students at Highland College. The photographs were taken using Mr. Hollins’ cellular telephone “[d]uring a sexual encounter that took place inside A.V.’s car” behind a building on the Highland College campus. At A.V.’s request, Mr. Hollins later emailed the pictures to A.V.’s email address, where her mother later found them and identified the shaved pubic area of A.V.

A.V.’s mother took the photographs to the Detective Sergeant Jim Drehoble of the Freeport police department, where Drehoble initially determined that there was “no crime for sexual assault or abuse offenses due to the age of” A.V. Upon A.V.’s mother’s subsequent complaint, Detective Drehoble and another detective visited Mr. Hollins at his home where he acknowledged A.V.’s age, his knowledge of her age at the time of the sexual relationship and that he had taken the pictures that Detective Drehoble

41. Id. at 249.
42. Id. at 258.
45. Id. at 3.
46. Id.
47. Id.
48. Id. at 4.
49. Id. at 3–4.
50. Hollins, 971 N.E.2d at 506-07.
ble had received from A.V.’s mother.51 Neither the face of A.V. or Mr. Hollins appeared “in any of the photographs and there [were] no identifying marks such as scars or tattoos.”52

Mr. Hollins filed two motions attacking the constitutional validity of the Illinois child pornography statute, however, the trial court denied both motions.53 He later elected to proceed by a stipulated bench trial wherein it was established that: (1) Detective Drehoble investigated a complaint made by A.V.’s mother regarding photographs of her daughter and Mr. Hollins; (2) A.V. was seventeen at the time the photographs were taken, her sexual relationship with Mr. Hollins occurred while she was seventeen years old, and Mr. Hollins had taken a picture(s) of her during one of their sexual encounters; and (3) A.V.’s mother found the pictures and could identify her daughter’s pubic region and that she recognized the sending email address as belonging to Mr. Hollins.54

Mr. Hollins was found guilty on all three counts and sentenced to three concurrent eight-year sentences in the Illinois Department of Corrections.55 It should be noted that at no time did Mr. Hollins deny his actual knowledge of A.V.’s age nor did he engage in any sexual relations with A.V. before she attained the age of seventeen, which is the legal age of consent for sexual relations in the State of Illinois.56 Mr. Hollins appealed his conviction, “arguing that the child pornography statute is unconstitutional as applied to him and that his convictions violated the one-act, one-crime doctrine.”57 The appellate court affirmed Mr. Hollins’ convictions and rejected his constitutional challenges to the child pornography statute.58

B. The Arguments before the Illinois Supreme Court

On appeal to the Illinois Supreme Court, Mr. Hollins challenged his convictions on two grounds: (1) “the child pornography statute, as applied to [his] case, denied defendant due process of the law under the United

51. Id. at 507.
52. Id. at 516 (Burke, J., dissenting).
53. Id. at 506.
54. Id. at 506-07.
55. Id. at 507.
56. 720 ILL. COMP. STAT. 5/11-1.60(c)(1) (2013) (“A person commits aggravated criminal sexual abuse if (i) that person is 17 years of age or over and commits an act of sexual conduct with a victim who is under 13 years of age; or (ii) commits an act of sexual conduct with a victim who is at least 13 years of age but under 17 years of age and the person uses force or threat of force to commit the act.”).
57. Hollins, 971 N.E.2d at 507.
58. Id.
States and Illinois constitutions; and (2) the child pornography statute as applied violates the equal protection clauses of the United States and Illinois constitutions.”

Specifically, Mr. Hollins argued that the application of the child pornography to him and A.V. does nothing to further the legislature’s intent to protect children from “sexual exploitation and abuse” because A.V. was seventeen at the time and could legally consent to the “private sexual activity” that he and she chose to photograph. He argued that A.V., under the definitions provided in the child pornography statute, was a seventeen-year-old “child” who had legally consented to sexual activity with him and who “was involved in a legal, consensual sexual relationship with her boyfriend.”

Further, Mr. Hollins argued that his due process rights were violated because of the “illogical inconsistency” in Illinois law that treated his seventeen-year-old girlfriend as a child for purposes of the child pornography statute but did not criminalize his consensual sexual encounters with her, backing him into a “legislative trap.”

Additionally, Mr. Hollins argued that his prosecution violated the equal protection clauses of the United States and Illinois Constitutions and his due process because the child pornography statutes criminalize his behavior but do not criminalize the behavior of other adults who have consensual sexual relations with their legal, consenting sex partners.

C. The Majority Opinion of the Illinois Supreme Court

The Illinois Supreme Court found a “rational basis for the child pornography statute under both due process and equal protection analyses” and subsequently affirmed the judgments of the lower courts. In doing so, the Court was strongly persuaded by a similar case that arose out of the Nebraska Supreme Court in State v. Senters. Mr. Hollins himself conceded that because what was involved did not implicate a fundamental right (i.e., photographing yourself and your sexual partner in intimate poses), that rational basis review was the proper test for reviewing whether or not his due process rights had not been violated.

59. Id. at 507-08.
60. Id. at 509.
61. Id.
62. Id. at 514.
63. Id. at 515.
64. Id. at 508.
66. Hollins, 971 N.E.2d at 508-09.
Under the rational basis test, a statute is upheld if the statute’s provisions reasonably implement its public purpose. 67 Child pornography statutes are meant to prevent the sexual abuse and exploitation of children. 68 Based on the Supreme Court’s findings in previous cases, the Illinois Supreme Court declared that “child pornography is intrinsically related to child sexual abuse and states have a compelling interest in safeguarding the physical and psychological health of children.” 69 “[C]hild pornography is an offense against the child and causes harm ‘to the physiological, emotional, and mental health’ of the child.” 70 “Child pornography is particularly harmful because the child’s actions are reduced to a recording which could haunt the child in future years, especially in light of the mass distribution system for child pornography.” 71 The Supreme Court had also previously found that child pornography could affect a child’s “reputational interest and emotional well-being.” 72

The Illinois Supreme Court then conducted a very detailed analysis of the Senters case, in which the defendant videotaped himself and his seventeen-year-old girlfriend having sex. 73 It should be noted that, unlike Illinois, Nebraska sets sixteen as the age of consent for sexual relations. 74 The Nebraska Supreme Court in Senters relied heavily on a federal case with a similar factual premise, outcome, and result. 75 The majority in Hollins found the reasoning in both the Senters case and the Bach case (which the Senters opinion frequently cited to) extremely persuasive and found that under rational basis review, the Illinois legislature had a legitimate government purpose in enacting its child pornography statute to protect “children from sexual abuse and exploitation” and that prohibiting photography of minors engaged in sexual acts bore a “rational relationship” to protecting them from abuse. 76 The majority found that raising the legal age of consent from seventeen to eighteen in order to aid government enforcement of the child pornography statute was also a “reasonable means of accomplishing this legitimate government purpose.” 77

67. Id. at 509.
69. Hollins, 971 N.E.2d at 509 (citing People v. Alexander, 791 N.E.2d 506 (Ill. 2003)).
71. Id. (quoting Ferber, 458 U.S. at 759).
72. Hollins, 971 N.E.2d at 509.
73. Id. at 510.
74. Id.
75. Id. (citing United States v. Bach, 400 F.3d 622 (8th Cir. 2005)).
76. Id. at 511.
77. Id.
While acknowledging that the underlying act that Mr. Hollins and his girlfriend engaged in was legal, the court found that the statute prohibited recording of the legal conduct, because of the “consequences to the child that flow” from the recording of the legal sexual activity.\textsuperscript{78} A seventeen-year-old may legally be able to consent to sexual activity but “he or she may still be unable to appreciate the subtle dangers of memorializing such activity on film or in a photograph.”\textsuperscript{79} The majority stated, “[T]he desire to aid law enforcement in the prosecution of an offense has been found to be a reasonable, rationally related way to accomplish a legitimate government purpose” and so upheld the child pornography statute, which changed the definition of child from eighteen years old to seventeen years old or younger.\textsuperscript{80} The majority denied all of Mr. Hollins’ challenges to his convictions and affirmed both his convictions and the child pornography statute.\textsuperscript{81}

\textbf{D. Justice Burke’s Dissent in the Illinois Supreme Court}

Justice Burke, joined by Judge Freeman, dissented from the majority opinion.\textsuperscript{82} Citing the U.S. Supreme Court’s 2010 decision in \textit{Stevens}, Justice Burke noted that “\textit{Stevens} is binding authority on [the Illinois Supreme Court], and the decision goes to a core issue” in the case – “the level of scrutiny to apply to defendant’s constitutional challenge.”\textsuperscript{83} Neither the appellant nor the State had argued \textit{Stevens} in their briefs, nor had the majority addressed the case in the Court’s opinion. Justice Burke’s dissent was premised on a requirement that the parties re-brief their own arguments to determine the “effect of \textit{Stevens}’ holding – that child pornography, for purposes of the first amendment, exists only if it is ‘an integral part of conduct in violation of a valid criminal statute’” on the disposition of Mr. Hollins’ case before the Illinois Supreme Court.\textsuperscript{84}

While there is no \textit{per se} exception for child pornography for first amendment purposes, child pornography “in the federal constitutional sense” applies to photographs that depict activity that are “an integral part of conduct in violation of a valid criminal statute.”\textsuperscript{85} The significance of the \textit{Stevens} case is that it changed the belief that “any sexually explicit

\textsuperscript{78} \textit{Id.} at 512.
\textsuperscript{79} \textit{Id.} at 514.
\textsuperscript{80} \textit{Id.} at 515.
\textsuperscript{81} \textit{Id.} at 516.
\textsuperscript{82} \textit{Id.} at 516 (Burke, J., dissenting).
\textsuperscript{83} \textit{Id.} at 522 (Burke, J., dissenting).
\textsuperscript{84} \textit{Id.} (Burke, J., dissenting) (quoting United States v. Stevens, 559 U.S. 460, 471 (2010)).
\textsuperscript{85} \textit{Id.} at 520 (Burke, J., dissenting)
The question of whether a photograph constituted child pornography was now whether there was “specific illegal conduct to which the speech is integral.” Stevens explained the Ferber case as not creating a new categorical exception to First Amendment free speech protection for child pornography but instead held child pornography to be a “special example of the historically unprotected category of speech integral to the commission of a crime.” The Stevens Court made it clear that “child pornography laws cannot be constitutionally applied in circumstances where no actual minor is sexually abused during the production of the material” and can only “be stripped of its constitutional protection if it records actual sexual abuse of child victims.”

Because there was nothing unlawful in the photos taken by Mr. Hollins and his seventeen-year-old girlfriend, the photographs are “not child pornography as defined by the Supreme Court for purpose of the first amendment.” Therefore, rational basis review cannot be presumed to be the appropriate standard or test for determining the constitutionality of the Illinois child pornography statute as it applies to Mr. Hollins and his girlfriend and the photographs that they took; either a different standard should apply or a different procedure should be used in determining whether the photographs taken meet the Supreme Court’s definition of child pornography.

III. THE U.S. SUPREME COURT AND THE STEVENS CASE

This section will discuss the Stevens case because an understanding of the background and the legal reasoning behind Stevens is necessary to understand the implications that it could have on cases like Hollins.

A. Background of the Stevens Case

In the early 2000s, Congress became aware of the production, distribution and sale of “crush videos,” which, according to a House Committee Report, featured the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters. “Crush videos often
depict women slowly crushing animals to death ‘with their bare feet or while wearing high heeled shoes,’ sometimes while ‘talking to the animals in a kind of dominatrix patter’ over ‘[t]he cries and squeals of the animals, obviously in great pain.’” 93 Congress enacted 18 U.S.C. § 48 in response to these “crush videos”, which criminalized the creation, selling and possession of such videos.94

B. The Path to the Supreme Court

The case arose when Robert Stevens was charged with violating the statute for selling videos that featured pit bulls engaging in dogfights and attacking other animals.95 When Stevens moved to dismiss the indictment, arguing that 18 U.S.C. § 48 was unconstitutional for being facially invalid under the First Amendment, the trial court denied his motion.96 Stevens was convicted on three counts under 18 U.S.C. § 48 and was sentenced to serve three concurrent sentences of thirty-seven (37) months.97

Stevens appealed to the Third Circuit Court of Appeals, where an en banc court reversed, on the grounds that 18 U.S.C. § 48 was facially unconstitutional.98 The Third Circuit en banc decision found that the First Amendment protected speech that 18 U.S.C. § 48 regulated, while simultaneously declining to find “a new category of unprotected speech for depictions of animal cruelty” and rejecting the government’s analogy that depictions of cruelty to animals are analogous to portrayals of child pornography.99

The Third Circuit specifically found that the statute would not survive strict scrutiny as a “content-based regulation of protected speech”100 because the statute lacked a compelling government interest. Further, the statute was “neither narrowly tailored to preventing animal cruelty nor the least restrictive means of doing so.”101 In dicta provided in an extended footnote, the Third Circuit also speculated that 18 U.S.C. § 48 might also be “unconstitutionally overbroad” because it is potentially applicable to a
wide array of constitutionally protected speech and is far too wide-sweeping to be limited only by prosecutorial discretion.\textsuperscript{102} The Supreme Court granted certiorari in 2009.\textsuperscript{103}

\textit{C. The Supreme Court Grants Certiorari in the Stevens Case}

The Supreme Court stated that, generally, the First Amendment provides a protection from the abridgement of free speech and that Congress cannot restrict speech due to “its message, its ideas, its subject matter or its content.”\textsuperscript{104} Any statute that restricts speech due to its content or subject matter is presumptively invalid and the government bears the burden of rebutting that presumption.\textsuperscript{105} However, the Supreme Court did recognize that there are certain restrictions in a “few limited areas” in which expression based on content can be regulated but was also quick to point out that the First Amendment does not allow the government freedom to “disregard these traditional limitations.”\textsuperscript{106} These limitations include obscenity,\textsuperscript{107} defamation,\textsuperscript{108} fraud,\textsuperscript{109} incitement,\textsuperscript{110} and “speech integral to criminal conduct.”\textsuperscript{111} Traditional limitations on free expression protection are “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”\textsuperscript{112}

The government argued that depictions of animal cruelty, such as the crush videos at issue for Mr. Stevens, should be added to the list of traditional limitations to First Amendment freedom of expression.\textsuperscript{113} The government rightly stated that animal cruelty has a long history of being prohibited in American law, dating back to the early settlement of the Colonies.\textsuperscript{114} However, the Supreme Court rightly pointed out that while animal cruelty might have a long history of prohibition in the United States, the same could not be said for depictions of animal cruelty.\textsuperscript{115} The government

\textsuperscript{102}. Id.
\textsuperscript{103}. Id.
\textsuperscript{106}. Stevens, 559 U.S. at 468.
\textsuperscript{107}. Roth v. United States, 354 U.S. 476, 483 (1957).
\textsuperscript{113}. United States v. Stevens, 559 U.S. 460,469 (2010).
\textsuperscript{114}. Id. at 469-70.
\textsuperscript{115}. Id.
further argued that a long-standing tradition of regulation is not a condition or requirement for prohibition. The government posited a question aimed at determining what forms of expression would fall outside the reach of the First Amendment’s protection: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”

The Court noted that such a question leaves a “startling and dangerous” statement about where First Amendment protection is applicable. While the government’s ‘test’ was derived from previous Supreme Court decisions that described the categories of traditionally limited speech in language that struck as the “evil to be restricted” or as having “such slight social value as a step to truth,” the descriptions of the traditional categories were not a test that the Court set forth and or a test the Court applied to determine what speech should be granted or denied First Amendment protection.

In fact, in upholding a child pornography law in the state of New York, the Supreme Court did not do so on the “basis of a simple cost-benefit analysis,” but because the market for child pornography was “intrinsically related” to the underlying abuse and therefore “an integral part of the production of such materials, an activity illegal throughout the Nation.”

Therefore, the Court’s decision on child pornography statutes in Ferber did not create a new category of unprotected speech. Instead, the Court found that the child pornography analysis was grounded “in a previously recognized, long-established category of unprotected speech.”

While the Court recognized that certain categories of speech have long been prohibited or unprotected but have yet to be identified or analyzed in the nation’s case law, there was no evidence that “depictions of animal cruelty” was among these unidentified or analyzed categories. The Stevens Court specifically refused to carve out a new exception to First Amendment protected speech for “depictions of animal cruelty” and reviewed the challenge under the existing doctrine.

The First Amendment allows a law to be challenged facially and invalidated as overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate

116. Id. at 470.
117. Id.
118. Id. at 470-471.
119. Id. at 471.
121. Stevens, 559 U.S. at 471.
122. Id. at 472.
123. Id.
sweep.”124 While Stevens’ argument was based on 18 U.S.C. § 48’s broad application to “common depictions of ordinary and lawful activities,” the government defended solely on the ground that it interpreted the statute narrowly to apply only to specific types of “extreme” material.125 The “first step in overbreadth analysis” requires construing the statute; “[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers.”126

The Supreme Court found that 18 U.S.C. § 48 applied to “any . . . depiction” in which “a living animal is intentionally maimed, mutilated, torture, wounded, or killed.”127 Such a definition not only did not include that the act actually be “cruel” but the statute did require that the act be illegal, which, given the “myriad federal and state laws concerning the proper treatment of animals” created a wide range and variety of which acts were illegal in which states.128 Further, because the statute dealt with depictions of illegal acts, this meant that a depiction that is not subject to 18 U.S.C. § 48 in one state (because the underlying act is legal) would become illegal if it made its way to a state where the underlying act depicted is illegal.129 The Supreme Court acknowledged that this would also apply to various hunting magazines, which were a $135 million a year industry at the time of the decision, many of which often—and perhaps necessarily—depicted the killing of animals.130

Whether or not an individual was prosecuted for a depiction depended on the mercy of the prosecutor. Although the government contended that it would only prosecute for those that depicted “extreme” cruelty, the prosecutors had discretion to decide what constituted “extreme.”131 Furthermore, an unconstitutional statute cannot be upheld “merely because the Government promise[s] to use it responsibly.”132 The Supreme Court therefore struck down 18 U.S.C. § 48 as unconstitutional, for its broad reach and its very real probability of criminalizing the depiction of many legal acts, in addition to the criminalization of illegal acts.133

125. Stevens, 559 U.S. at 473.
127. Stevens, 559 U.S. at 474.
128. Id. at 475.
129. Id. at 475-76.
130. Id. at 476.
131. Id. at 480.
132. Id.
133. Id.
As discussed in Section II.D above, the Stevens Court made it clear that “child pornography laws cannot be constitutionally applied in circumstances where no actual minor is sexually abused during the production of the material.”134 Therefore, “child pornography can only be stripped of its constitutional protection if it records actual sexual abuse of child victims”135 and, as discussed in the following section, sets a higher standard than simple rational review in determining the constitutionality of child pornography prosecutions.

IV. APPLYING STEVENS TO HOLLINS: LEGALITY OF THE UNDERLYING ACT

Having decided that rational basis review is no longer appropriate in light of Stevens, what is the appropriate test that should be used and under what standard should child pornography statutes and prosecutions be reviewed? As mentioned in Part I above, there are three levels of scrutiny that are applied to cases that deal with the implication of cases presenting constitutional due process or equal protection claims issues under the Fifth Amendment and the Fourteenth Amendment. These levels of scrutiny are applied when a legislative act, like 18 U.S.C. § 48, infringes upon the First Amendment rights of free speech.136

The lowest level of scrutiny is rational basis review. Rational basis review requires that the government action is a reasonable means that the government may legitimately pursue.137 The test requires that the governmental action be rationally related to a legitimate government interest.138 This level of scrutiny is the most deferential to the government action and does not actually require that the legitimate interest be the one that prompted the government to act; it allows the reviewing court to hypothesize and determine if any legitimate government interest exists.139

134. Walters, supra note 6, at 114.
135. Id.
136. See generally Ysursa v. Pocatello Educ. Ass’n, 555 U.S. 353 (2009) (under rational basis review, a state has a reasonable interest in in avoiding the appearance of impropriety by not allowing payroll deductions to fund partisan political activity); Davenport v. Washington Ed. Ass’n, 551 U.S. 177 (2007) (content-based restrictions on free speech are subject to strict scrutiny); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) (upheld regulation by a federal agency of broadcast media when the regulation served an important governmental interest that did not need to be narrowly tailored and the least restrictive means available; Burdick v. Takushi, 504 U.S. 428 (1992) (not all laws that regulate the right to vote are subject to strict scrutiny); Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) (in light of the importance of political speech, state laws that limit political contributions are subject to strict scrutiny and must be narrowly tailored to a compelling government interest).
139. Amy Knight Burns, Counterfactual Contradictions: Interpretive Error in the Analysis of AEDPA, 65 STAN. L. REV. 203, 211 n.23 (2013) (citing Haves v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995) (“The first step in determining whether legislation survives rational-basis scrutiny is identify-
The highest level of scrutiny is strict scrutiny. Strict scrutiny review requires that the government action be one that is justified by a compelling governmental interest that is narrowly tailored to achieve the governmental interest. Furthermore, the action undertaken must be the “least restrictive means” by which the governmental interest can be achieved. Governmental actions that are challenged under strict scrutiny are frequently and usually, but not always, found to be unconstitutional.

There is also an intermediate level of scrutiny, appropriately called intermediate scrutiny or at times, heightened scrutiny. Intermediate scrutiny requires a showing that the challenged governmental action furthers an important governmental interest in a way that is substantially related to that interest. The Supreme Court has thus far analyzed sex-based classifications, issues of illegitimacy and restrictions on speech that are content-neutral under this intermediate level of scrutiny.

There have also been indications that there exists a fourth level of scrutiny, which is nested between rational basis review and strict scrutiny and lies more or less level with intermediate scrutiny. “Heightened scrutiny” has in the past been used interchangeably with “intermediate scrutiny” but it is unclear if the two are actually one and the same. The United States Court of Appeals for the Ninth Circuit developed a three-prong test for heightened scrutiny. The test required showing: (1) that the governmental action “must advance an important governmental interest; (2) that the “intrusion must significantly further that interest”; and (3) that the “intrusion must be necessary to further that interest.” This three-prong test for heightened scrutiny differs from the two-prong test that had previously applied to the interchangeable intermediate review/heightened scrutiny. However, the federal government’s decision to repeal the popularly titled “Don’t Ask, Don’t Tell” law has left the existence, applicability, and legitimacy of the three-pronged test for heightened scrutiny in question. Taking into consideration the possibility that Mr. Hollins’ case can be decided without reaching a constitutional argument based upon the proper standard

147. Witt v. Dep’t of the Air Force, 527 F.3d 806, 819 (9th Cir. 2008).
of review, this Note will analyze Mr. Hollins’ situation using both the heightened scrutiny test developed by the Ninth Circuit and an alternative method that is fairly common in criminal prosecution.

A. The Insufficiency of Rational Basis Review

“[W]hereas before Stevens many believed—perhaps erroneously—that any sexually explicit image of a minor was child pornography, this belief is now fatally flawed.”148 The initial question in determining “whether a particular nonobscene image constitutes child pornography” should instead be “whether there is specific illegal conduct to which the speech is integral.”149

Justice Burke noted in her dissent that there “was nothing unlawful about the production of the photographs taken by [Mr. Hollins] because the sexual conduct” between the parties was entirely legal.150 The photographs are therefore “not child pornography as defined by the Supreme Court for purposes of the first amendment” and it cannot simply be presumed “that rational basis review is appropriate” in determining whether the act of photographing himself and A.V. is worthy of criminal sanctions.151 What standard of review is appropriate?

B. Applying Heightened Scrutiny to Hollins

The applicable level of scrutiny to apply to the issue faced by the Illinois Supreme Court could be the heightened scrutiny standard and the corresponding three-prong test that the United States Court of Appeals for the Ninth Circuit developed for the following reasons. The Witt case involved the ‘Don’t Ask, Don’t Tell’ (“DADT”) policy of the United States military, in which the Ninth Circuit reviewing the DADT policy following the Supreme Court’s 2003 decision in Lawrence v. Texas.152 The case was the first time that a United States Circuit Court of Appeals had directly held that “Lawrence v. Texas requires a higher level of scrutiny than mere rational review.”153 The Court found that the Lawrence case’s actual language was unhelpful in determining what level of scrutiny had been applied.

149. Id.
151. Id.
153. Id.
in *Lawrence*, “perhaps intentionally so.” 154 Focusing on what the Supreme Court did do in *Lawrence*, the *Witt* Court noted that the *Lawrence* opinion overruled *Bowers v. Hardwick*. 155 While focusing on the liberty interest at stake, the Court relied on cases that applied intermediate scrutiny in reaching its decision and focused on whether there existed a legitimate state interest, all factors inconsistent with rational basis review. 156

The Ninth Circuit also found *Sell v. United States* 157 to be instructive and adopted three of the four prongs used in *Sell*, determining that the fourth, which was exclusive to medical contexts, to be inapplicable. The three prongs required that “when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest.” 158 The Court also found that the analysis must be done as applied to *Witt* and not facially. 159

As applied to Mr. Hollins (and not facially), the Illinois child pornography statutes do advance a significant government interest—the protection of children. However, unlike in *Witt* where the record was insufficiently developed to determine the remaining prongs, there is enough in the record to analyze the same in the case of Mr. Hollins. 160 As already stated, Mr. Hollins and A.V. met while both were attending classes at a community college, indicating that A.V. was mature enough to already be making decisions about her future education and to plan for her future. In such a case, where the “child” in question might only be seventeen years old, it is difficult to find how the child pornography statutes, which were intended to protect children from feeling the future ramifications of decisions made while they were unable to appreciate the same, significantly furthers the state’s interest in protecting A.V. She was obviously not a naïve child who needed the protection of the state but rather a young woman who was already making adult decisions, at least when it came to her education and to her sexual activity. For that same reason, it is also difficult to say that the governmental intrusion is necessary to protect A.V., as she is not a ‘child’ in need of protection as the Illinois legislature likely envisioned when the

154. Witt v. Dep’t of the Air Force, 527 F.3d 806, 814 (9th Cir. 2008).
156. Beeler, supra note 152, at 369-70.
158. *Witt*, 527 F.3d at 819.
159. *Id.* at 819-20.
160. *Id.* at 821.
statute was enacted. We can then conclude that, per Witt’s heightened scrutiny analysis, the statute as applied to Mr. Hollins was unconstitutional because it could not satisfy the prongs requiring that it significantly further the state’s interest and that it be necessary in order to do so.

C. The Constitutionality of the Child Pornography Statutes as Applied to Hollins

“Child pornography is particularly harmful because the child’s actions are reduced to a recording which could haunt the child in future years, especially in light of the mass distribution system for child pornography.”\footnote{161 People v. Lamborn, 708 N.E.2d 350, 353 (Ill. 1999) (quoting New York v. Ferber, 458 U.S. 747, 759 (1982)).} Considering the emphasis on the “mass distribution system” that exists for child pornography, it is argued that child pornography statutes are enacted to protect children from exploitation when that exploitation is being done in order to produce and distribute child pornography in the commercial sense. Can such statutes even be applicable when the child pornography under consideration is being produced for private use only, especially when the child under question is seventeen years old, like A.V.?

The situation can be analogized roughly to the situation with marijuana in both the federal and state governments of the United States. Currently, possession of marijuana is a federal offense under the Controlled Substances Act.\footnote{162 21 U.S.C. §§ 812, 844 (2013).} However, some states have acted to decriminalize marijuana, either for medical purposes only\footnote{163 NORML: WORKING TO REFORM MARIJUANA LAWS, http://norml.org/states (last visited February 9, 2014) (Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, Washington, D.C. all allow medicinal marijuana use in one fashion or another.).} or have decriminalized marijuana entirely.\footnote{164 Id. (While many states have misdemeanor charges that apply to possession of minor amounts of marijuana, Colorado and Washington are the only states to have completely decriminalized the personal use of marijuana as of the present day.).} In such an instance (which has yet to reach the Supreme Court), a Colorado or Washington resident who is legally allowed under the laws of their state to possess and use marijuana could still be charged in federal court for their legal state-level activity. While possession of child pornography is not legal in any state, it isn’t hard to make the connection that someone like Mr. Hollins, who—with the consent of his partner—memorializes a sexual act in some form of media for his own personal use (like the Coloradoan who keeps a few joints around for those stressful days) would still be faced with criminal sanction despite not having any...
intention whatsoever of distributing either the pornographic photos or the after-work joints.

Both the Illinois Supreme Court in Hollins and the Nebraska Supreme Court in Senters found that “even if the intimate act is intended to remain secret, a danger exists that the recording may finds its way into the public sphere, haunting the child participant for the rest of his or her life.”165 The Hollins majority also adopted the reasoning of the Senters Court’s statement that while it “is reasonable to conclude that persons 16 or 17 years old” may be “old enough to consent to sexual relations” might not fully appreciate that “today’s recording of a private, intimate moment may be the Internet’s biggest hit next week.”166 Can such an argument be upheld in a case like Hollins, where the pictures of A.V. and Mr. Hollins showed only their genitals and did not display any identifying marks, like the faces of either participant or any scars or tattoos?

The Nebraska Supreme Court in Senters also found that “[i]f sexually explicit conduct is not record, it cannot be distributed” and that “criminalizing the making of recordings depicting persons under 18 years of age engaged in sexually explicit conduct” is a reasonable way in which to further the legislature’s goal.167 The legislature’s goal was protecting the “child” from the reputational harm that would occur if the once private recordings were later distributed and made public.168

This argument should not be persuasive nor controlling because it comes from a flawed logic in which the potential of something occurring justifies the punishment of the action that might lead to the unwanted occurrence. To analogize, we do not stop Smith & Weston or Glock from producing guns simply because the guns that they produce might be used to kill people. On the contrary, despite the high likelihood and the frequency with which unregistered guns end up in the hands of those who use them to commit violent crimes, the producers of those guns are not punished or prevented from continuing to produce the guns.169

The mere possibility that the recordings of private consensual acts might become public should not justify the criminalization of the record-

166. Id.
167. Id.
168. Id.
ings, given that there is no similar punishment for the far greater probability that guns will—and do—wind up in dangerous hands with much greater frequency. I would argue that the recording of consensual acts should be treated instead on an individual basis and not criminalized through use of a blanket rule that criminalizes all acts, even those that do not lead to mass distribution of the private recordings.

V. A POST-HOLLINS ALTERNATIVE: CHILD PORNOGRAPHY ON A CASE-BY-CASE BASIS

A case-by-case analysis of future cases that resemble Hollins is appropriate considering the grave consequences faced by those found to have violated child pornography laws. Those convicted of a sex offense that requires registration as a sex offender, whether it be for a finite period of time or for life, face not only the stigma that is faced by those who are convicted of any felony, but also a host of other issues. 170 In Illinois, a sex offender has a duty to register in the city or county in which they live. 171 He must update the registration every time he moves. 172 Additionally, he cannot live within 500-feet of a school, park or playground, and must provide a DNA sample to be placed on file with the Illinois State Police. 173 Furthermore, information regarding who is a sex offender is available to the public, as part of the Sex Offender Community Notification Law 174 and the Sheriff of all counties in Illinois except Cook County are required to send information about the registered sex offenders residing in the county to various agencies, such as schools and playgrounds in the county. 175

Having already decided that people in a situation like that of Mr. Hollins should be subject not to rational review but to the mid-level heightened scrutiny, this Note further proposes that the prosecution and criminalization of people in a situation like Mr. Hollins could alternatively be analyzed through a totality of the circumstances approach 176 and not be governed by a bright-line rule, 177 as the Illinois child pornography statute suggests. While bright-line rules are essential for police officers in deciding if and whether they have authority to act, as in the determination of the proper

171. 730 ILL. COMP. STAT. 150/3 (2013).
172. 730 ILL. COMP. STAT. 150/6 (2013).
175. 730 ILL. COMP. STAT. 152/120 (2013).
The more appropriate approach would be to consider the circumstances of the situation, the participants, and the "criminal activity" involved through the lens of the totality of the circumstances to determine whether criminal sanctions are warranted. If it is decided that criminal sanctions are warranted, then the defendant would have the opportunity to use consent as an affirmative defense, in the same way that a defendant can use self-defense in a battery prosecution. Therefore, if a subsequent defendant is in the same position as Mr. Hollins was with substantially the same circumstances (i.e., sex with a partner who meets the minimum age for the applicable age of consent law, no allegations of rape or forced intercourse and permission from the partner to photograph their intimate acts), the proper scenario would be as follows:

First, upon his arrest and charging for the creation, possession, and distribution of pornography, the burden would shift to the defendant to show that under the totality of the circumstances, criminal sanctions are not warranted. Such a showing could be made through the testimony of the "child" involved, who, like A.V., is seventeen and was legally able to consent to the sexual acts depicted in the photographs or video created. This testimony would be allowed only upon the successful examination of such a "child" to determine that not only is she capable of understanding the potential ramifications of committing her acts to reproducible media but also that she freely made the decision to film or photograph her body under no coercion by the defendant. The burden upon the defendant would be the same as in rape cases where a consent defense is used; the defendant would be required to produce some evidence that the "child" is mature enough to be capable of understanding her decision to photograph or be photographed. The showing that the "child" was mature enough (meaning

179. 730 ILL. COMP. STAT. 150 (2013).
180. 720 ILL. COMP. STAT. 5/7-1 (2013).
181. People v. Haywood, 515 N.E.2d 45, 50 (Ill. 1987) (where consent is a defense to be raised by the accused to rebut evidence of force presented by the State in a prosecution for rape; once this the defendant has raised the defense and produced some evidence of consent, the burden shifts to the prosecution to prove beyond a reasonable doubt both that force was used as well as that there was no consent).
mature enough not just to the defendant’s belief but objectively mature enough in the court’s eyes) to consent to the photography and understand the possible future ramifications would also be similar to the use of reasonable belief of age in a statutory rape prosecution.  

For someone in a position substantially similar to Mr. Hollins, the evidence could include some of the following: testimony that the sexual partner, while seventeen years old, was in college, which shows that the sexual partner has attained a certain degree of maturity and that if she can be trusted to make decisions about her future education and employment, then she can probably also be trusted to make decisions about her sexual activities; that the sexual partner knew the defendant in her case, and was not in forced into either the sexual activities or the photography. It is also worth noting that the sexual partner was of the legal age to consent to sex, especially in Mr. Hollins situation where A.V. had met him at the age of sixteen but it was not until she was seventeen and “legal” that their sexual relationship began.

Second, upon this showing, the burden would once more shift, this time to the applicable prosecuting office to show, beyond a reasonable doubt, that the criminal sanctions are still warranted despite the showing made by the defendant. The defendant’s failure to make the showing could be used to help establish this burden. This burden would also apply to the prosecutor to show that the sexual partner, as discussed above, was not mature enough to make her own decisions regarding being photographed in a sexually explicit manner or that she was not mature enough to make the decision and understand the possible ramifications of creating a record of her activities.

It is important to note that this burden shifting, totality of the circumstances approach would not apply to child pornography that is specifically produced with the purpose of it being distributed and sold for profit. This approach would only apply to those recordings that are created only for

182. People v. Lemons, 593 N.E.2d 1040, 1044 (III. App. Ct. 1992) (holding that if the issue of the defendant’s reasonable belief of the victim’s age is raised, the prosecution has the burden of providing that the defendant did not reasonably believe that the “child” was of the age of consent beyond a reasonable doubt); see also People v. Brown, 525 N.E.2d 576, 580 (III. App. Ct. 1988) (holding that, as an affirmative defense, the defense of reasonable belief of age to a charge of statutory rape operates in the same manner as other affirmative defenses and that the defendant must raise the issue and present some evidence if the prosecution’s own evidence does not do so).

183. People v. Hollins, 971 N.E.2d 504, 507 (III. 2012) (A.V. was a student at Highland College, as was Mr. Hollins.).

184. Id. A.V. had met Mr. Hollins at her home when she was 16 and there were never any allegations that Mr. Hollins either took the photographs of the two of them surreptitiously or without A.V.’s consent and against her wishes. Id.

185. Id.
personal use and enjoyment. Criminal penalties could later be imposed upon anyone who moves the recordings into the stream of commerce through distribution and sale, whether the person who does so was one of the two parties or a later third party. This provision would represent the government’s important government interest in protecting children and preventing depictions of child pornography from being commercially produced, distributed and sold within and throughout the United States.

An additional alternative would involve changing the child pornography statute. The first step in the process would be amending the child pornography statutes to reflect the age of consent in a state for participation in sexual activity. In such a case, Mr. Hollins would not be subject to criminal sanctions because A.V. would be legally allowed to consent to both sex and being photographed. Such an alternative is unlikely to pass muster in the state or federal governments because, as discussed above, setting the federal age limit for consent for pornography purposes at eighteen was done in order to make determinations as to who constitutes a minor more easily discernible. Lowering this age to reflect the age of consent for sexual relations in each individual state would be counteract the motivation and purpose behind having a uniform federal standard for what constitutes a minor. The burden shifting approach that I have laid out about is more likely to be palatable because it creates the rebuttable presumption that anyone under the age of eighteen is unable to consent to sexually explicit photography. It is only by using a case-by-case analysis of the criminal offenses faced by people like Mr. Hollins that the presumption can be rebutted. Such a situation would continue to protect children as legislatures have intended while also forgoing punishment for someone like Mr. Hollins, who creates pornography in the context of a legal, consensual relationship with a partner who—while technically a minor—has demonstrated that she is mature enough to understand the future consequences of her actions.

CONCLUSION

Preventing the creation and distribution of child pornography is and should remain an important and compelling governmental interest. However, there are enormous penalties, both criminal and social, that accompany the stigma of being punished for a sex offense. Therefore, the prosecution of those who are found to have created child pornography for purely personal use involving a “child” who is legally able to consent to the sexual

186. In Illinois, this would mean defining a minor for the purposes of the child pornography statutes to include only those below the age of seventeen, which is the age at which a person can legally consent to sexual activity.
relations captured on media and who is also shown to be mature enough to have made such a decision should not be adjudicated in the same way as those who create child pornography with a child unable to legally consent to the sexual relations involved; nor should such cases be treated the same as those situations in which the pornography is created for commercial distribution.

While the right to record one’s sexual acts is not a fundamental act, the Supreme Court has firmly established that there is a fundamental right to privacy inherent in consensual sexual relations between consenting adults\textsuperscript{187} and this fundamental right should influence the possibility that one of the parties may be punished for the recording of their exercising of this fundamental right. Considering the immense consequences and the stigma that attach to one convicted of a sex offense, especially a sex offense involving a “child”, such prosecutions should not be undertaken lightly when the “child” involved is of a certain age such as to be able to legally consent to sex but not able to consent to the recording of the consensual sex. Such an approach would also allow courts to avoid the Constitutional question of deciding what level of scrutiny would apply to such cases\textsuperscript{188}, by providing an alternative method under which certain instances of “child” pornography would be analyzed and decided on a basis consistent with the affirmative defenses already recognized by courts nationwide.


\textsuperscript{188} Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).