

# Carnal Knowledge: How Viewing Child Pornography Violates Privacy Rights

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## ABSTRACT

*Can a liberal society like America ban the viewing of child pornography? Yes, although explaining why takes a surprising amount of work. U.S. Supreme Court precedent discusses child pornography in terms of harm and economics. This misses the heart of the matter, and the liberalization of the law toward sexual vices, including obscenity, has left child pornography doctrine isolated.*

*Rethinking two underdeveloped areas of law—children’s rights and privacy rights—would help make sense of banning child pornography. This article uses approaches including social and legal history, feminism, vulnerability theory, technology, secular and Christian ethics, and childism to propose that the law should recognize **children’s negative right to intimate privacy**. Doing so would help reframe the viewing of child pornography as a rights violation. While building off the work of other scholars who address sexual privacy rights and children’s privacy rights, this article’s synthesis uniquely condemns viewing child pornography as a rights violation.*

*It also addresses practical legal issues. Its rights framing would rationalize several areas of law, including the ban on possessing child pornography and anti-voyeurism measures. It would also help address emerging challenges like “revenge porn” and child pornography generated by artificial intelligence. This article closes by suggesting that ethical values should supplement legal rights.*

*The social consensus against child pornography has masked doctrinal problems that should be remedied. Failing to do so leaves child victims on the sidelines—as objects of both child pornography and the laws banning it, but not subjects in their own right.*

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\* For our godchildren and for Eliana. I am the former Robert Pool Fellow in Law and Religion at the Emory University School of Law. A former public defender, including for juveniles, I have taught and litigated First Amendment issues. My scholarship is supported by the McDonald Agape Foundation. Thanks to my wife Julie for her pure, and purifying, love. Ashley Audisho provided excellent research assistance, especially for my discussion of artificial intelligence. Helpful feedback also came from John Witte Jr., Kay Levine, Alexander “Sasha” Volokh, Anthony Dillof, Whitney Barth, M. Christian Green, Thomas Jared Farmer, Silas Allard, Ariel Liberman, John Bernau, Songfeng Li, Terri Montague, Lynne Borsuk, and Alexa Windsor. I also appreciate my First Amendment students who workshopped this article with me. Lastly, an enthusiastic thank you to the editors and staff of the *Georgetown Journal of Law & Public Policy* for their interest and hard work preparing this article for publication. © 2025, Matthew Cavedon.

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What is obvious to laypeople is a problem only for lawyers.

— Josephine Potuto (1987)<sup>1</sup>

#### INTRODUCTION

Americans are by and large liberal on some level: suspicious of government coercion, they require justifications for limitations of personal freedom.<sup>2</sup> Many Americans believe coercive force should be limited.<sup>3</sup> They think private vices should generally be tolerated, met with neighborly care and gentle persuasion instead of criminalization. They believe criminal law should generally punish rights violations.<sup>4</sup>

Is that attitude compatible with banning the possession and viewing of child pornography?<sup>5</sup> Yes, although explaining why requires a trip to liberalism’s outer limits and beyond. After all, most traditional sex crimes have been abolished or made into dead letters.<sup>6</sup> American criminal law no longer justifies offenses

1. Josephine Potuto, Stanley + Ferber = *The Constitutional Crime of At-Home Child Pornography Possession*, 76 KY. L.J. 15, 80 (1987) (capitalization altered).

2. See, e.g., *Liberalism* § 1.1, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (revised Sept. 10, 2007), <https://plato.stanford.edu/archives/spr2010/entries/liberalism> [<https://perma.cc/EZ2S-RQLF>].

3. See Matthew P. Cavedon, *The Marijuana Insurgency: Federalism and Social Reframing in Policy Reform*, 47 SEATTLE U. L. REV. 1573 (2024); John Witte, Jr., *Church, State, and Sex Crimes: What Place for Traditional Sexual Morality in Modern Liberal Societies?*, 68 EMORY L.J. 837, 859 (2019); Charles G. Koch & Mark V. Holden, *The Overcriminalization of America*, POLITICO (Jan. 7, 2015), <https://www.politico.com/magazine/story/2015/01/overcriminalization-of-america-113991> [<https://perma.cc/G3QE-P5MU>].

4. Cf. Neil M. Gorsuch, *Law’s Irony*, 37 HARV. J.L. & PUB. POL’Y 743, 748 (2014) (“[W]hat happens to individual freedom and equality—and to our very conception of law itself—when the criminal code comes to cover so many facets of daily life that prosecutors can almost choose their targets with impunity?”).

5. This article uses the term “child pornography,” rather than “image-based sexual violence” or “child sexual abuse material,” because the former is more familiar and more commonly used in law. *But see* Clare McGlynn et al., *Beyond ‘Revenge Porn’: The Continuum of Image-Based Sexual Abuse*, 25 FEMINIST LEGAL STUD. 25, 39 (2017).

6. Witte, *supra* note 3, at 840.

based on “God, morality, or nature,” but mainly in light of personal rights.<sup>7</sup>

Many of the resulting practical changes have deep historical and philosophical foundations. As William Blackstone wrote, “Let a man . . . be ever so abandoned in his principles, or vitious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws.”<sup>8</sup> Several centuries earlier, Saint Thomas Aquinas wrote that human laws “chiefly prohibit those vices that are to the hurt of others” and warned that too much coercion would “break out into yet greater evils.”<sup>9</sup> The modern trend toward liberalization reflects these longstanding distinctions between private behavior and public concerns.<sup>10</sup>

However, two key dimensions are missing from U.S. Supreme Court child pornography precedent: children’s rights and privacy rights. Both hold a tenuous position in American law. Bereft of them, the Court has explained the evil of child pornography in terms of harm and economics. Neither gets to the heart of why looking at child pornography is so wrong, even in a liberal society: it is a rights violation, inflicting a morally serious and legally significant wrong.

Courts are still developing ways to think about child pornography.<sup>11</sup> This article offers a resource for doing so better: the law should recognize children’s negative right to intimate privacy. A rights framing could have concrete effects. In assessing laws’ constitutionality, courts inquire into governmental interests, and in enacting laws, legislators pursue certain aims. Child pornography laws should be drafted, defended, and explained in terms of children’s negative right to intimate privacy.<sup>12</sup>

Part I of this article discusses the history of child pornography law. Part II articulates a rights framework. Part III details flaws in the precedent upholding possession bans. Part IV identifies a rights framework’s benefits, including rationalizing the possession ban, revisiting the U.S. Sentencing Guidelines, and combating voyeurism. Part V turns to emerging issues: a rights approach would support banning “revenge porn” and clarify that child pornography generated by artificial intelligence violates rights when it depicts an identifiable child’s nudity. Finally, Part VI notes a complementary role for ethical values. Uncovering children’s nakedness is a way of knowing them. But some knowledge should remain forbidden.

7. *Id.* at 841.

8. 1 WILLIAM BLACKSTONE, COMMENTARIES \*120.

9. THOMAS AQUINAS, SUMMA THEOLOGIAE, I-II, Q. 96, art. 2, resp. & ad. 2, trans. Fathers of the English Dominican Province (2d. ed. 1920), <https://www.newadvent.org/summa> [<https://perma.cc/R3CV-7FJC>]; see also Matthew P. Cavedon, *Early Stirrings of Modern Liberty in the Thought of St. Thomas Aquinas*, 16 POL. & RELIGION 567, 571 (2023); Jean Bethke Elshtain, “*There Oughta Be a Law*”—*Not Necessarily*, 58 EMORY L.J. 71, 73 (2008).

10. See generally Elshtain, *supra* note 9.

11. Lori J. Parker, *Validity, Construction, and Application of Federal Enactments Proscribing Obscenity and Child Pornography or Access Thereto on the Internet*, 7 A.L.R. Fed. 2d 1, 3 (2005).

12. *Cf. Carpenter v. United States*, 585 U.S. 296, 398 (2018) (Gorsuch, J., dissenting) (proposing that judges “consult what the people’s representatives have to say about their rights”).

## I. THE SUPREME COURT HAS IGNORED RIGHTS

My own academic field dismisses the subject of the child as being trivial and sentimental, good only for second-rate minds and perhaps for women.

— Anne Higonnet (1998)<sup>13</sup>

American law’s approach to child pornography is distorted by four problems: (1) a split approach to speech and privacy; (2) discomfort with children’s rights; (3) overreliance on obscenity precedent about consenting adults; and (4) instrumentalism. These issues have led the Supreme Court away from understanding child pornography as a rights violation, leaving its precedent’s logic limited.

### A. *Early Legal History*

Before modern cameras, child pornography was not a major legal concern, but early precedent about speech and children caused later doctrinal shortcomings.

#### 1. Speech Law

Modern speech law has forgotten ancient connections between sexual decency, privacy, and dignity, but these gesture toward a rights-based approach to child pornography. Legal remedies for untoward speech date back to antiquity. Greece and Rome imposed sanctions (known in Roman law as “delicts,” akin to modern torts) for dignitary harms.<sup>14</sup> The sixth-century Code of Justinian recognized a delict called *iniuria*, which included defamation.<sup>15</sup> *Iniuria* also covered sexual predation, such as “constantly following a matron, or a young boy or girl below the age of puberty, or attempting anybody’s chastity.”<sup>16</sup> Other legal wrongs included seducing a minor boy, solicitation, indecently accosting females, and indecent exposure.<sup>17</sup> *Iniuria* guarded “body, dignity, and reputation.”<sup>18</sup>

Early medieval law recognized similar interests, but defamation suits were relocated to ecclesiastical courts for jurisdictional reasons.<sup>19</sup> They returned to common law courts under Queen Elizabeth I, but by then required reputational

13. ANNE HIGONNET, PICTURES OF INNOCENCE: THE HISTORY AND CRISIS OF IDEAL CHILDHOOD 13 (1998) (discussing art history) (quoted in Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 210 n.5 (2001)); see also Adler, *supra*, at 210 n.5 (“Few law review articles have been written on the subject of child pornography and the First Amendment.”); John Wall, *Human Rights in Light of Childhood*, 16 INT’L J. CHILD.’S RTS. 523, 531 (2008) (“One of the most widely read texts on human rights theory . . . devotes exactly half a page, out of close to 300 pages, to the rights specifically of children . . .”).

14. Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65, 66 (2012); Cosimo Cascione, *Roman Delicts and Criminal Law: Theory and Practice*, in OBLIGATIONS IN ROMAN LAW: PAST, PRESENT, AND FUTURE 267–95 (Thomas A. J. McGinn ed., 2012).

15. Tilley, *supra* note 14, at 86.

16. *Id.* (citation omitted).

17. *Id.* at 87 n.87.

18. *Id.* at 86–87.

19. *Id.* at 92.

injury.<sup>20</sup> Body and dignity came to be protected by different legal doctrines than reputation.

These three interests did remain connected in legal philosophy. John Locke argued for a natural right of self-ownership.<sup>21</sup> He criticized “meddling” as a privacy violation.<sup>22</sup> Blackstone similarly recognized a natural right to “personal security” protecting a person’s “enjoyment of his life, his limbs, his body, his health, and his reputation.”<sup>23</sup> This right and Blackstone’s theory of personal liberty later undergirded the tort of invasion of privacy.<sup>24</sup>

Early American common law recognized defamation.<sup>25</sup> The colonies lacked specific actions for invasion of privacy, though some provided remedies for gossip and public disclosure of private information.<sup>26</sup> Eighteenth-century courts recognized that people could withdraw parts of their lives from public scrutiny, and defamation suits sometimes remedied privacy invasions.<sup>27</sup>

The Framers thought liberty was limited by natural law and by others’ natural rights.<sup>28</sup> Interference could include selfish acts undertaken against others’ happiness.<sup>29</sup> Thoughts enjoyed immunity, but if expressive conduct was harmful, the law could respond.<sup>30</sup> Opinions enjoyed legal immunity only if they were decent and true.<sup>31</sup> By 1792, all but one state prosecuted libel, and every one criminalized blasphemy, profanity, or both.<sup>32</sup> The first reported American obscenity conviction dates from an 1815 common law case in Pennsylvania.<sup>33</sup> In 1821, there was a Massachusetts conviction, as well as the enactment of a Vermont statute banning the distribution of “lewd or obscene” material.<sup>34</sup> Congress banned importing such material two decades later.<sup>35</sup> Enforcement was rare until around 1870, when reformer Anthony Comstock ushered in new measures.<sup>36</sup> Within thirty years, at least thirty states had banned the distribution of obscenity, and the federal government passed twenty obscenity laws between 1842 and 1956.<sup>37</sup>

20. *Id.* at 92–93.

21. *Id.* at 95.

22. *Id.* at 108.

23. *Id.* at 96.

24. *Id.* at 108.

25. *Id.* at 66.

26. *Id.* at 110.

27. *Id.*

28. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 271 (2017).

29. *Id.* (citing Vermont jurist Nathaniel Chipman (1752–1843)).

30. *Id.* at 281, 287.

31. *Id.* at 310.

32. *Roth v. United States*, 354 U.S. 476, 483 (1957).

33. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 104 (1973) (Brennan, J., dissenting) (citing *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815)).

34. *Id.* (citing *Commonwealth v. Holmes*, 17 Mass. 336 (1821); *Laws of Vermont, 1824, c. XXXII*, No. 1, § 23).

35. *Id.* (citing *Tariff Act of 1842*, § 28, 5 Stat. 566).

36. *Id.* at 104–05.

37. *Id.* at 105.

Privacy law developed as well. An 1891 U.S. Supreme Court decision held that no right is “more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person.”<sup>38</sup> This right protected bodily privacy:

The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass . . . .<sup>39</sup>

In a landmark 1890 article, Samuel Warren and Louis Brandeis articulated a right to privacy.<sup>40</sup> They connected speech regulations with bodily privacy, including against sexual exploitation: “If you may not reproduce a woman’s face photographically without her consent, how much less should be tolerated the reproduction of her face, her form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination.”<sup>41</sup> Fifteen years later, Warren and Brandeis’s doctrine was endorsed by the Georgia Supreme Court in *Pavesich v. New England Life Insurance Co.*<sup>42</sup>

*Pavesich* heralded more protection for privacy and attracted scholarly attention.<sup>43</sup> However, privacy law shifted focus from rights to harms, a change that would later affect child pornography law. In 1960, Dean William L. Prosser wrote a highly influential article entitled simply *Privacy*.<sup>44</sup> He identified four relevant torts: (1) intrusion upon seclusion; (2) public disclosure of private facts; (3) false-light publicity; and (4) appropriation of name or likeness.<sup>45</sup> His classification narrowed Warren and Brandeis’s right; he saw the tort law of privacy as remedying a few discrete injuries rather than vindicating a broad right.<sup>46</sup> Prosser’s approach dominated when modern child pornography jurisprudence developed, and his framing obscured connections between speech law and privacy rights.<sup>47</sup>

## 2. Children and the Law

Children’s rights have long carried moral weight, but also lacked legal protection and even now remain contested. Plato proposed communal childrearing as a

38. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

39. *Id.* at 252.

40. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

41. *Id.* at 214.

42. *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 206 (1905). An earlier suit found an invasion of privacy in a bodily intimacy context when a man watched a woman give birth. *De May v. Roberts*, 46 Mich. 160 (1881).

43. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 488–89 (1975) (noting *Pavesich*’s influence).

44. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

45. *Id.* at 389.

46. Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1821–22, 1825 (2010).

47. See *id.* at 1824.

way of fighting nepotism.<sup>48</sup> Aristotle responded that the natural family has priority over the state.<sup>49</sup> In medieval times, Aquinas followed Aristotle's naturalism, proposing that family law should account for the sex drive of young adults, children's vulnerability, and male tendencies to sexually exploit women and children.<sup>50</sup> He endorsed monogamy and marital fidelity.<sup>51</sup> Medieval canon law recognized several children's rights, including "the right to life and the means to sustain life; the right to care, nurture, and education; the later right to contract marriage or to enter into a religious life; and the right to" parental support and inheritance.<sup>52</sup> It made special provision for children who were illegitimate, poor, abandoned, or abused.<sup>53</sup>

In the Enlightenment era, Locke taught that children are vulnerable and so have the right to parental support.<sup>54</sup> This extended to education and social cultivation.<sup>55</sup> Early feminist Mary Wollstonecraft argued that children have a right from God not to be sold into slavery, burdened with irrational laws, or abused and exploited.<sup>56</sup> Theologian William Paley asserted that parents have a right to raise their children, but not "destroy [the] child's happiness."<sup>57</sup> Blackstone agreed.<sup>58</sup> Chancellor James Kent wrote that parents owe their children a "sacred trust" of providing for "their future usefulness and happiness."<sup>59</sup>

In spite of this moral discourse, children's rights were not part of common law. The law did not compel fathers to support their children materially until the sixteenth century. Even then, the legal remedy for a violation was apprenticeship—not for the sake of the child's vocational development, but for society's benefit.<sup>60</sup> New England Puritans believed that parents had to combat children's "natural depravity."<sup>61</sup> This included keeping them from "profane," "filthy," and "amorous" literature.<sup>62</sup> Enlightenment thinkers saw children as "blank slates," and this reinforced parental educational rights.<sup>63</sup> Many rights theorists, including Locke and Immanuel Kant, saw reason as the basis for most autonomy rights—and believed

48. JOHN WITTE, JR., *CHURCH, STATE, AND FAMILY: RECONCILING TRADITIONAL TEACHINGS AND MODERN LIBERTIES* 257 (2019).

49. *Id.*

50. *Id.* at 258.

51. *Id.*

52. *Id.* at 260.

53. *Id.*

54. *Id.* at 262.

55. *Id.* at 263.

56. *Id.* at 263–64.

57. *Id.* at 264 (quoting WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 213 (Liberty Fund 2002) (1785)).

58. *Id.* at 265.

59. *Id.* at 266.

60. John Eekelaar, *The Emergence of Children's Rights*, 6 OXFORD J. LEGAL STUD. 161, 166–67 (1986).

61. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 823 (2011) (Thomas, J., dissenting) (quoting STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS* 2 (1988)).

62. *Id.* (quoting *THE HISTORY OF GENESIS* vi–vii (3d ed. corrected 1708)).

63. *Id.* at 824.

children and women to be less reasonable than men.<sup>64</sup> Adults were supposed to shield children from immorality and preserve their minds “untainted.”<sup>65</sup>

Most parental rights did not come with legal duties. Perhaps having an un-instructed child was seen as punishment enough.<sup>66</sup> Children’s rights were collapsed into parental self-interests: the law compensated fathers of injured children because an injury to the child was an injury to the parent.<sup>67</sup> Early laws regulating child labor protected children from harm, but mainly because this hurt “the interests of their parents to profit from their labour as much as of the employers.”<sup>68</sup> John Adams thought children lacked “Judgment or Will of their own.”<sup>69</sup>

There were exceptions to children’s legal invisibility. At least theoretically, criminal law protected children against severe injuries and threats to their lives, including those caused by parents.<sup>70</sup> Children’s interests in being protected from (socially defined) immorality factored into custody decisions.<sup>71</sup> Still, not until 1889 did British legislation even implicitly recognize children’s interest in protection against cruelty generally, and not until 1893 did a court acknowledge a child’s own “ties of affection.”<sup>72</sup>

Children’s rights have advanced. Major international accords were enacted in 1924 (the Geneva Declaration of the Rights of the Child) and 1959 (the Declaration of the Rights of the Child).<sup>73</sup> Much of the 1948 Universal Declaration of Human Rights and 1966 international covenants on civil, political, economic, social, and cultural rights (ICCPR and ICESCR) was explicitly extended to children by the 1989 Convention on the Rights of the Child (CRC).<sup>74</sup> The U.S. Supreme Court has held that children have some constitutional rights.<sup>75</sup>

However, children’s rights remain precarious in America. Every nation except the United States has ratified the CRC.<sup>76</sup> Some critics think that ratification would

64. Richard P. Hiskes, *The Image of a Lesser God: Imago Dei and the Human Rights of Children*, 45 HUM. RTS. Q. 513, 519 (2023).

65. *Brown*, 564 U.S. at 827 (Thomas, J., dissenting) (quoting Noah Webster, *On the Education of Youth in America*, in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* 63 (Frederick Rudolph ed., 1965)).

66. Eekelaar, *supra* note 60, at 164.

67. *Id.*

68. *Id.* at 167.

69. *Brown*, 564 U.S. at 826 (Thomas, J., dissenting) (quoting Letter from John Adams to James Sullivan (May 26, 1776), in *4 PAPERS OF JOHN ADAMS* 210 (Robert Taylor ed., 1979)).

70. Eekelaar, *supra* note 60, at 167.

71. *Id.* at 168.

72. *Id.* at 169.

73. See WITTE, *supra* note 48, at 238; Wall, *supra* note 13, at 534 (discussing the 1924 Declaration’s emphasis on developmental interests and 1959 Declaration’s focus on protection); see also discussion *infra* Section III.C.

74. WITTE, *supra* note 48, at 238–39.

75. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976); see also *Brown*, 564 U.S. at 795 n.3; *Bellotti v. Baird*, 443 U.S. 622, 633–34 (1979) (plurality opinion).

76. WITTE, *supra* note 48, at 239.

let the United Nations interfere with family law.<sup>77</sup> Theoretical reservations about children's rights remain too, especially among conservative Evangelical Protestants concerned that such theories undermine traditional morality, social cohesion, and parental authority.<sup>78</sup> Various social forces contribute to the marginalization of children as well. The Sexual Revolution of the 1960s and other trends have prioritized adult happiness over procreation and childrearing.<sup>79</sup> Children are seen by many as “an impediment to adult fulfillment”—or as something added on after it has been achieved—“rather than an essential aspect” of it, and childlessness is becoming more common.<sup>80</sup>

### B. Supreme Court Precedent

In developing child pornography precedent from its obscenity caselaw, the Supreme Court has sidelined rights in favor of social morality, economics, and harm.

#### 1. Obscenity Cases

Early Supreme Court precedent considered obscenity a social ill and, partly because the images in question featured consenting adults, it did not discuss the privacy rights of those depicted. This left the Court without the resources to adequately assess child pornography. In 1931, the Court approved in dicta of decency laws.<sup>81</sup> In 1942's *Chaplinsky v. New Hampshire*, it declared that “the lewd and obscene” lacked constitutional protection.<sup>82</sup> Why? Such material had “slight social value” compared to “the social interest in order and morality.”<sup>83</sup>

77. See CONG. RES. SERV., R40484, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 9 (2015), <https://crsreports.congress.gov/product/pdf/R/R40484> [<https://perma.cc/KK4M-WQC9>].

78. WITTE, *supra* note 48, at 240–41, 243; see also BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE 8 (2008) (noting also left-wing concerns that children's rights could justify state intervention into the lives of vulnerable families); John Wall, *Fatherhood, Childism, and the Creation of Society*, 75 J. AM. ACAD. RELIGION 52, 53–59 (2007) (discussing Christian patriarchy).

79. Clay Routledge & Will Johnson, *The Real Story Behind America's Population Bomb: Adults Want Their Independence*, USA TODAY (Oct. 12, 2022), <https://www.usatoday.com/story/opinion/2022/10/12/why-americans-not-having-babies-low-birth-rate/8233324001> [<https://perma.cc/TA44-PFZN>] (discussing survey results); Bonnie J. Miller-McLemore, *Feminism, Children, and Mothering: Three Books and Three Children Later*, 2 J. CHILDHOOD & RELIGION 1, 10 (2011).

80. Miller-McLemore, *supra* note 79, at 10; cf. Andrew Van Dam, *Millennials Aren't Having Kids. Here's Why.*, WASH. POST (Nov. 3, 2023), <https://www.washingtonpost.com/business/2023/11/03/millennials-only-children> [<https://perma.cc/4MVQ-T9UM>] (“We have a pretty strong set of prerequisites: You absolutely should finish school, and have a decent job, and you should make a decent income, and you should be in a good partnership, and you should live on your own,” Guzzo told us. “That takes a while to accomplish, especially in this day and age. Some people may feel like they’re never going to be in a good place.”).

81. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931); see also *id.* at 737 (Butler, J., dissenting).

82. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

83. *Id.* at 572.

The modern obscenity regime was born in 1957's *Roth v. United States*.<sup>84</sup> *Roth* held that obscenity is unprotected because it lacks value.<sup>85</sup> Partially concurring, Justice Harlan wrote that pornography can inspire immoral and antisocial sexual conduct.<sup>86</sup> Obscenity degrades sex and so lowers social morality.<sup>87</sup> Justice Douglas dissented based on free speech absolutism, writing that criminal law "should be concerned with antisocial conduct, not with utterances."<sup>88</sup> The approaches taken in *Roth* set the stage for later child pornography precedent to evade rights in favor of value and extrinsic harms.

The Court soon limited the definition of obscenity in ways that would later raise questions relevant to child pornography. In 1962, a plurality of the Court held that nudity is not always obscene.<sup>89</sup> In 1964's *Jacobellis v. Ohio*, another plurality opinion held that "material dealing with sex in a manner that advocates ideas, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity."<sup>90</sup> This became a majority holding two years later.<sup>91</sup>

Concurring in the latter case, Justice Douglas again criticized leaving obscenity unprotected, suggesting that pornography may even "provide a substitute—not a stimulus—for antisocial sexual conduct."<sup>92</sup> In his dissent to *Ginzburg v. United States*, he asked why it was "unlawful to cater to the needs" of "offbeat, nonconformist, and odd" sexual groups (specifying masochists and homosexuals), as sexual diversity is no different from musical preferences.<sup>93</sup> Courts should not "probe the mysteries of the subconscious of our people and say that this is good for them and that is not," and no group should be forced to "repress its inner desires."<sup>94</sup> His stance anticipated the gay rights movement, but also child pornography apologists. However, it was rejected by a majority of the Court in *Mishkin v. New York*, which held that material can be obscene even if it appeals only to "a clearly defined sexual deviant group."<sup>95</sup>

The Court noted that it had yet to address the government's interest in protecting children.<sup>96</sup> The first case doing so was 1968's *Ginsberg v. New York*, but that case concerned the distribution of obscene materials to minors.<sup>97</sup> *Ginsberg*

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84. *Roth v. United States*, 354 U.S. 476 (1957).

85. *Id.* at 484.

86. *Id.* at 501–02 (Harlan, J., concurring in the judgment in part and dissenting in part).

87. *Id.* at 502.

88. *Id.* at 512–13 (Douglas, J., dissenting).

89. *Manual Enters., Inc. v. Day*, 370 U.S. 478, 489–90 (1962) (plurality op. of Harlan, J.).

90. *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (plurality op. of Brennan, J.) (internal citation omitted).

91. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass.*, 383 U.S. 413, 421 (1966).

92. *Id.* at 432 (Douglas, J., concurring in the judgment).

93. *Ginzburg v. United States*, 383 U.S. 463, 489 (1966) (Douglas, J., dissenting).

94. *Id.* at 491.

95. *Mishkin v. New York*, 383 U.S. 502, 505, 508 (1966).

96. *Redrup v. New York*, 386 U.S. 767, 769 (1967) (per curiam).

97. *Ginsberg v. New York*, 390 U.S. 629, 631 (1968).

recognized government interests in preventing harm to youths' development, but did not comment on children's rights.<sup>98</sup> Concurring in terms that echoed Locke and Kant, Justice Stewart noted that children have fewer rights than adults because they lack the "full capacity for individual choice."<sup>99</sup>

In 1969, the Court issued a key decision that would pose specific problems in addressing child pornography. In *Stanley v. Georgia*, the Court held that there is a constitutional right to privately possess obscene material: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."<sup>100</sup> Every person has "the right to satisfy his intellectual and emotional needs in the privacy of his own home," and the government cannot "control men's minds."<sup>101</sup> The government's interest in fighting obscenity distribution did not outweigh the individual's "right to read or observe what he pleases."<sup>102</sup>

*Stanley* cited "traditional notions of individual liberty."<sup>103</sup> However, its rhetoric stretched too far, as the Court itself soon acknowledged. The *Stanley* Court did recognize in a footnote that "compelling reasons" might exist for overriding the freedom of media consumption.<sup>104</sup> Still, in 1973, the Court largely returned to its earlier approach when it revised *Roth's* definition of obscenity in *Miller v. California*: "A state [obscenity] offense must . . . be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."<sup>105</sup> Then, in *Paris Adult Theater I v. Slaton*, the Court eschewed *Stanley's* thought-control concerns, endorsing state interests in promoting virtue by banning public and commercial obscenity.<sup>106</sup>

98. *Id.* at 639–42.

99. *Id.* at 650 (Stewart, J., concurring).

100. *Stanley v. Georgia*, 394 U.S. 557, 559 (1969). *Stanley* had a precursor in *Mapp v. Ohio*, 367 U.S. 643 (1961). That case is canonical for extending the Fourth Amendment's exclusionary rule to the states, but it arose from the private possession of alleged obscenity, which Justice Stewart argued was protected by the freedoms of thought and expression. *See id.* at 659–60 (majority opinion); *id.* at 672 (memorandum of Stewart, J.).

101. *Stanley*, 394 U.S. at 565.

102. *Id.* at 567–68.

103. *Id.* at 565; *see also* *Lawrence v. Texas*, 539 U.S. 562, 562 (2003); BLACKSTONE, *supra* note 8, at \*120 (endorsing broad tolerance for private vices); Cavedon, *supra* note 9, at 571 (arguing that Aquinas's approach to vice laws was "at least prudentially libertarian").

104. *Stanley*, 394 U.S. at 568 n.11.

105. *Miller v. California*, 413 U.S. 15, 24 (1973).

106. *Compare Slaton*, 413 U.S. at 63 ("If we accept the unprovable assumption that a complete education requires the reading of certain books, and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior?" (internal citations omitted)), *with id.* at 110 (Brennan, J., dissenting) ("[I]f a State, in an effort to maintain or create a particular moral tone, may prescribe what its citizens cannot read or cannot see, then it would seem to follow that in pursuit of that same objective a State could decree that its citizens must read certain books or must view certain films."). For a

Rounding out the early history, two years later, in *Erznoznik v. City of Jacksonville*, the Court held that not all nudity is obscene “even as to minors.”<sup>107</sup> Protected material could include “a film containing a picture of a baby’s buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigen-ous . . . [and] newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach.”<sup>108</sup> These distinctions would affect later child pornography jurisprudence.

Obscenity cases provided the tools the Court would use to analyze child pornography: value, children, privacy, and free speech absolutism. Obscenity was unprotected because it lacked value. However, sophisticated material might not be obscene. Children were of concern in some of these cases but, as shown below, always as objects at risk of being harmed and not as bearers of rights entitled to protection.

## 2. Child Pornography Cases

The Court first confronted child pornography in 1982’s *New York v. Ferber*, which concerned a distribution ban.<sup>109</sup> By then, the federal government and 47 states had passed laws against child pornography.<sup>110</sup> The Court held that a state could ban sexual images of children even if they were not obscene under *Miller*.<sup>111</sup> Its reasoning focused on harm and economics. It held that states have a compelling interest in protecting children’s physical and psychological welfare, noting the “sacred” duty of caring for children and not subjecting them to abuse.<sup>112</sup>

In just one footnote did the Court mention that the distribution of child pornography invades children’s “privacy interests”—noting this alongside future sexual and relational dysfunctions.<sup>113</sup> The Court did say that distribution “is intrinsically related to the sexual abuse of children” in that the images are “a permanent record of the children’s participation” and “the harm to the child is exacerbated by their circulation.”<sup>114</sup> However, the Court then moved on to saying that it is hard to stop exploitation by targeting producers alone.<sup>115</sup> Neither rationale straightforwardly identified viewing child pornography as intrinsically harming a child or violating

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synthesis of *Stanley* and *Slaton*, see *United States v. Reidel*, 402 U.S. 351, 359 (1971) (Harlan, J., concurring) (understanding *Stanley* as concerning means of enforcement).

107. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975).

108. *Id.*

109. *New York v. Ferber*, 458 U.S. 747, 749 (1982). For statutory changes from the mid-1970s to the late-1990s, see *Free Speech Coal. v. Reno*, 198 F.3d 1083, 1087–91 (9th Cir. 1999), *rev’d*, 535 U.S. 234 (2002).

110. *Ferber*, 458 U.S. at 749.

111. *Id.* at 753.

112. *Id.* at 756–57 (quoting N.Y. Penal Law § 263.00 (McKinney 1977)).

113. *Id.* at 758 n.9.

114. *Id.* at 759.

115. *Id.* at 759–61. For a critique of *Ferber*’s economic analysis, see Nadine Strossen, *United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2009–10 CATO SUP. CT. REV. 67, 96.

a child's rights. Besides, the Court continued, depictions of children engaged in sexual conduct lack social value.<sup>116</sup>

Justice Brennan took issue with this last point. He found it "inconceivable how a depiction of a child that is itself a serious contribution to the world of art or literature or science" could be unprotected.<sup>117</sup> For Justice Stevens, too, context was everything: "a serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device, might include a scene from one of these films."<sup>118</sup> Additionally, the state's interest in preventing sexual abuse was lessened for child pornography produced in a foreign country.<sup>119</sup> For both Justices, only the value of the end product and whether *American* children were sexually abused mattered. Justice O'Connor disagreed with them, but discussed only harm and not rights: "a 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph 'edifying' or 'tasteless.'"<sup>120</sup> Clearly, the *Ferber* Court was aware of children's privacy rights, and just as clearly, none of the Justices thought such rights deserved more than parenthetical references.

Justices followed the approaches found in *Ferber* in 1989's *Massachusetts v. Oakes*.<sup>121</sup> At issue was a law that banned "adults from posing or exhibiting nude minors."<sup>122</sup> The defendant had taken ten photographs of his 14-year-old stepdaughter, topless, lounging on a bar, "clad only in a red and white striped bikini panty and a red scarf."<sup>123</sup> A plurality of the Court held the case moot.<sup>124</sup> Justice Brennan dissented. He did describe as compelling the state's interest in preventing sexual exploitation and abuse.<sup>125</sup> However, he denied that states have *any* interest in "prohibiting adults from allowing minors to appear naked in photographs, films, and pictures with their genitals or, in the case of adolescent girls, their breasts less than opaquely covered."<sup>126</sup> There is a First Amendment right to depict adolescents in "nonexploitative" images such as "poolside shots" as well as legitimate "acting or professional modeling by teenagers."<sup>127</sup> Justice Brennan cited an amicus brief listing "nonpornographic photographs, films, and paintings" of children.<sup>128</sup> The brief celebrated the defendant's "pin-up" photographs of his teenage stepdaughter.<sup>129</sup> It praised using children for "the expression of erotic

116. *Ferber*, 458 U.S. at 762.

117. *Id.* at 777 (Brennan, J., concurring in the judgment).

118. *Id.* at 778 (Stevens, J., concurring in the judgment).

119. *Id.* at 779.

120. *Id.* at 774-75 (O'Connor, J., concurring).

121. *Massachusetts v. Oakes*, 491 U.S. 576 (1989).

122. *Id.* at 578.

123. *Id.* at 580 (plurality op. of O'Connor, J.).

124. *Id.* at 585.

125. *Id.* at 592 (Brennan, J., dissenting).

126. *Id.*

127. *Id.* at 593.

128. *Id.* at 593 n.3.

129. Brief for Law & Humanities Institute as Amicus Curiae in Support of Respondent at \*3, *Massachusetts v. Oakes*, 491 U.S. 576 (1988) (No. 87-1651).

sentiment on the part of photographer, subject, or both.”<sup>130</sup> It said that child nude art depicts “the somber beauty” of “an emerging and uncorrupted sexuality.”<sup>131</sup> Teenagers should be free to pose topless for “a modeling portfolio; or for exhibition in a commercial gallery, an art magazine, a book of photographs of the nude, or the family photo-album; or for their own use or experimental purposes, or for uses by the child.”<sup>132</sup>

Liberalism may have kept Justice Brennan and the *amicus* from seeing children as different from adults, including in terms of their ability to consent. These authorities did not even address precedent holding that a state has *parens patriae* powers to protect vulnerable people.<sup>133</sup> Such omissions disturbed Justice Scalia, who thought purportedly “artistic” imagery could easily qualify as exploitative.<sup>134</sup> He also doubted that many innocent family photographs depict genitalia.<sup>135</sup>

Justice Brennan and the *amicus* saw modeling and acting—in both family and commercial settings—as places of pure and consensual artistic eroticism. It is worth noting that the 1989 *Oakes* decision came at the tail end of a pro-pedophilia campaign. In the 1970s, prominent Francophone intellectuals protested age-of-consent laws as heteronormative, while one scholar has described that decade’s elite sexual mores as “like the casual rules of a paedophile playground.”<sup>136</sup>

Arts and entertainment are no longer seen as a setting for happy, sexually charged encounters between adults and children.<sup>137</sup> Revelations of Hollywood producer Harvey Weinstein’s abuses released a hurricane of claims of sexual predation.<sup>138</sup> A claim for \$100 million was brought by Olivia Hussey and Leonard Whiting for a teenage nude scene in the 1968 film *Romeo and Juliet*.<sup>139</sup> Their complaint said that the director lied to them twice about how they would appear,

130. *Id.* at \*5.

131. *Id.* at \*5–6.

132. *Id.* at \*23.

133. *Addington v. Texas*, 441 U.S. 418, 426 (1979); Andrea Slane, *From Scanning to Sexting: The Scope of Protection of Dignity-Based Privacy in Canadian Child Pornography Law*, 48 OSGOODE HALL L.J. 543, 564 (2010).

134. *Massachusetts v. Oakes*, 491 U.S. 576, 589 (1989) (Scalia, J., concurring in the judgment in part and dissenting in part).

135. *Id.* at 590.

136. Jean Bérard & Nicolas Sallée, *The Age(s) of Consent: Gay Activism and the Sexuality of Minors in France and Quebec (1970–1980)*, 42 CLIO 99 (2015); David Pilgrim, *The Sexual Norms of the 1970s Now Look Like the Casual Rules of a Paedophile Playground*, THE CONVERSATION (July 11, 2014), <https://theconversation.com/the-sexual-norms-of-the-1970s-now-look-like-the-casual-rules-of-a-paedophile-playground-28999> [https://perma.cc/QXT2-5QK2].

137. See Jessica N. White, Comment, *Kiddie Porn in the Gallery: Defending the Artist’s Corpus on Invading the Corporal Integrity of the Subject*, 18 VILL. SPORTS & ENT. L.J. 683, 684–85 (2011) (discussing apparent sexual exploitation in art depicting two prepubescent girls made by their father); David Isaacs & Thomas G. Isaacs, *Is Child Nudity in Art Ever Pornographic?*, 46 J. PAEDIATRICS & CHILD HEALTH 369, 370–71 (2010).

138. Sara Khorasani, *Harvey of Hollywood: The Face that Launched a Thousand Stories*, 41 HASTINGS COMM. & ENT. L.J. 103, 104–05 (2019).

139. Timothy Bella & Annabelle Timsit, *‘Romeo and Juliet’ Stars Sue for Sexual Abuse over 1968 Film’s Nude Scene*, WASH. POST (Jan. 4, 2023), <https://www.washingtonpost.com/arts-entertainment/2023/01/04/romeo-juliet-lawsuit-nude-scene-hussey-whiting> [https://perma.cc/85MC-FF7A].

then warned of career consequences if they refused.<sup>140</sup> Perhaps something of the old attitudes lingers: that scene was recently cited by Judge Easterbrook as an example of normal artistic child nudity.<sup>141</sup> By and large, though, naivety of the sort shown by Justice Brennan and the *amicus* is no longer plausible.<sup>142</sup>

Despite these cultural changes, the Supreme Court has yet to articulate a rights framing for understanding child pornography. In 1990's *Osborne v. Ohio*, the Court considered whether a state could prohibit the private possession of child pornography.<sup>143</sup> Distinguishing *Stanley*, it held that a state has much stronger interests in this context.<sup>144</sup> However, the Court again relied on harm and economics.<sup>145</sup> The Court said possession bans were “necessary” mainly because production had escaped suppression.<sup>146</sup> They would reduce harm because images of abuse “haunt[]” the children depicted and some pedophiles use child pornography to “seduce other children.”<sup>147</sup> The Court still did not see the very act of viewing as intrinsically violating a right. Justice Brennan dissented, citing *Stanley*'s holding that private possession cannot be banned in order to target production.<sup>148</sup> He also disagreed that a child could be harmed by an image the child is unaware of.<sup>149</sup> States had other options for curbing “sexual exploitation.”<sup>150</sup> He did not, then, understand viewing child pornography to be exploitation per se.

More recent decisions have not articulated a rights rationale, either. In 2002's *Ashcroft v. Free Speech Coalition*, the Court struck down as overbroad a ban on non-obscene sexual imagery that purports to depict children, but in fact features

140. See *id.* The claim was dismissed on First Amendment and procedural grounds. See *Actors Lose Romeo & Juliet Nude Lawsuit*, BBC (May 26, 2023), <https://www.bbc.com/news/entertainment-arts-65725714> [<https://perma.cc/GAF5-AAMF>]; cf. Hillel Aron, *Judge Tosses Second Lawsuit over Nude Scene in 1968 Filming of 'Romeo and Juliet'*, COURTHOUSE NEWS SERV. (Oct. 21, 2024), <https://www.courthousenews.com/judge-tosses-second-lawsuit-over-nude-scene-in-1968-filming-of-romeo-and-juliet> [<https://perma.cc/9WYM-CR5L>]. Hussey did downplay the scene in a 2018 interview. See Roxy Simons, *What 'Romeo and Juliet' Actors Said About 1968 Film Before Suing Paramount*, NEWSWEEK (Jan. 4, 2023), <https://www.newsweek.com/romeo-juliet-actors-olivia-hussey-leonard-whiting-suing-paramount-child-abuse-1771092> [<https://perma.cc/H7N9-CW9U>].

141. See *United States v. Donoho*, 76 F.4th 588, 602 (7th Cir. 2023) (Easterbrook, J., concurring).

142. For a late article with a naïve approach, see Harris Mirkin, *The Social, Political, and Legal Construction of the Concept of Child Pornography*, 56 J. HOMOSEXUALITY 233, 251, 254 (2009) (describing much child pornography as not harmful, including imagery depicting Eastern European child prostitutes and “girl models in Japan” who “are often treated like stars and have Web sites devoted to them”).

143. *Osborne v. Ohio*, 495 U.S. 103, 108 (1990). The acts of possession and viewing are often conflated, but images sometimes “exist only in cyberspace” rather than on a browser cache or a hard drive. Rebecca Michaels, Note, *The Insufficiency of Possession in Prohibition of Child Pornography Statutes: Why Viewing a Crime Scene Should Be Criminal*, 30 W. NEW ENG. L. REV. 817, 832 (2008). Viewing is the offense's heart, though possession is often circumstantial evidence, facilitates it, poses a risk of blackmail, and should also continue to be banned.

144. *Osborne*, 495 U.S. at 108.

145. *Id.* at 109–10.

146. *Id.* at 110–11.

147. *Id.* at 111.

148. *Id.* at 145 n.19 (Brennan, J., dissenting).

149. *Id.* at 144 n.18 (brackets and internal citation omitted).

150. *Id.* at 142, 144–45.

youthful-looking adult performers or digital imagery.<sup>151</sup> The Court discussed harm (real) children suffer from pornography, but not children's rights.<sup>152</sup> In 2008's *United States v. Williams*, the Court upheld a ban on pandering or soliciting child pornography, describing such imagery as valueless and harmful.<sup>153</sup> Dissenting, Justice Souter revived *Osborne*'s instrumentalism, saying that child pornography bans rest "not on the content of the picture but on the need to foil the exploitation of child subjects."<sup>154</sup> In 2010's *United States v. Stevens*, the Court apparently reduced the role of value in free-speech analysis.<sup>155</sup> However, it did say that child pornography is "integral" to criminal conduct.<sup>156</sup> This reinforced the emphasis on harm. In dissent, Justice Alito followed *Osborne* and wrote that the *underlying* sexual abuse *depicted* by child pornography causes "severe personal injury."<sup>157</sup>

Most recently, in 2014's *Paroline v. United States*, the Court addressed restitution as part of a child pornography criminal sentence.<sup>158</sup> It again focused on harm.<sup>159</sup> Its opinion noted that the victim was sexually abused as a girl, underwent therapy, and her life improved.<sup>160</sup> However, when she was seventeen, she learned that images of her abuse were circulating online.<sup>161</sup> She was afraid this could cause her fresh humiliation.<sup>162</sup> She also described the harm she suffered each time someone viewed the images: "It hurts me to know someone is looking at them—at me . . . now I am there forever in pictures that people are using to do sick things."<sup>163</sup> She felt like she was "being abused over and over and over again."<sup>164</sup> The Court recognized that "every viewing of child pornography is a repetition of the victim's abuse."<sup>165</sup> Dissenting, Justice Sotomayor did say that viewing child pornography "would amount to an intentional invasion of privacy tort—and an extreme one at that."<sup>166</sup> The Court thus came closer to articulating a right by acknowledging the abusiveness inherent in every viewing. Still, a fully elaborated rights rationale remains elusive. The Court's precedent sometimes treats child pornography as little more than an incentive for what it considers the

151. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239–40, 255–56, 258 (2002).

152. *See id.* at 244–45, 249, 256; *see also id.* at 262 (O'Connor, J., concurring in the judgment in part and dissenting in part).

153. *United States v. Williams*, 553 U.S. 285, 288, 307 (2008).

154. *Id.* at 310 (Souter, J., dissenting).

155. *United States v. Stevens*, 559 U.S. 460, 464 (2010).

156. *Id.* at 471 (in obiter dicta).

157. *Id.* at 493 (Alito, J., dissenting).

158. *Paroline v. United States*, 572 U.S. 434, 440, 448 (2014).

159. *Id.* at 440–41.

160. *Id.* at 440. This article uses "victim," as it is a familiar legal term. *But see* Rachel A. Rein, Note, *Suffering at the Margins: Applying Disability Critical Race Studies to Human Trafficking in the United States*, 42 COLUM. J. GENDER & L. 183, 184 n.4 (2022) (explaining the use of "survivor" instead).

161. *Paroline*, 572 U.S. at 440.

162. *Id.* at 440–41.

163. *Id.* at 441.

164. *Id.*

165. *Id.* at 457.

166. *Id.* at 483 (Sotomayor, J., dissenting); *see also id.* at 484 n.4.

real problem—physical child abuse—and sometimes as intrinsically harmful. It does not identify viewing child pornography as intrinsically a rights violation.

## II. IGNORING RIGHTS CAUSES PROBLEMS

The Court's child pornography jurisprudence departs so dramatically from the contours of obscenity law . . . .

Amy Adler (2001)<sup>167</sup>

The Supreme Court's decisions have left child pornography as the main functioning part of a mostly obsolete obscenity regime. They allow for government control unusual within First Amendment jurisprudence, are difficult to reconcile with liberal commitments, ignore children's subjectivity, and fail to reflect society's assessment of viewing child pornography.

### A. *The Collapsed Obscenity Regime*

The Supreme Court's treatment of child pornography as a subset of obscenity makes historical sense. As *Pavesich* noted, "wherever it was legally possible to base a judgment upon principles which had been recognized by a long course of judicial decision, this has been done."<sup>168</sup> However, that has left child pornography law in a peculiar position as obscenity restrictions have collapsed.

Obscenity law always faced implementation problems. Leading feminist scholar Catherine MacKinnon notes that prosecutions made challenged works into best-sellers; as she quipped (in the early days of the internet, no less), they helped the pornography industry quadruple in size.<sup>169</sup> In the 1990s, anti-obscenity enforcement started to decline.<sup>170</sup> A controversial trial involving photographs by Robert Mapplethorpe contributed to a cultural shift in favor of risqué material.<sup>171</sup> Pornography proliferated during the Clinton Administration.<sup>172</sup> This made it less likely that images would satisfy *Miller*, which defines obscenity in light of community standards.<sup>173</sup> The George W. Bush Administration enforced obscenity laws only against "extremely hard-core pornography," while the Obama Administration dropped even these efforts.<sup>174</sup> Obscenity laws go largely unenforced except where

167. Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 938–39 (2001).

168. *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 213 (1905).

169. CATHERINE A. MACKINNON, *ONLY WORDS* 87 (1996). MacKinnon helped draft a 1984 Indianapolis law classifying much pornography as sex discrimination; it was struck down under the First Amendment. See *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324–25, 334 (7th Cir. 1985).

170. Amy Adler, *The Shifting Law of Sexual Speech: Rethinking Robert Mapplethorpe*, 2020 U. CHI. LEGAL F. 1, 25 (2020).

171. *Id.* at 3.

172. *Id.* at 26.

173. *Id.*

174. *Id.*

minors are involved and, at the state level, against businesses not authorized to sell such material.<sup>175</sup>

Is this good? Liberals are rightly skeptical about policing thoughts and feelings.<sup>176</sup> *Stanley* is in line with traditional ideas about tolerating private vices, but the government also has an interest in maintaining “pristine and proper public spaces.”<sup>177</sup> It can be true both that “public morality does not justify invading the sphere of privacy” and that once activity becomes a public concern—in terms of location, commerce, government recognition, or the involvement of people without full autonomy—the law should be able to say, “No thank you; we don’t do that here.”<sup>178</sup>

In any event, as a practical and doctrinal matter, obscenity laws have retreated to the margins.<sup>179</sup> Deserting child pornography on an enforcement island is not necessarily a problem. It is, though, another reminder of the differences between child pornography doctrine and its origins in obscenity law. As Amy Adler has contended, the harm from viewing child pornography “seems to reside more in the realm of a privacy violation (akin to revenge porn) and less in the kind of harm on which *Ferber* was premised.”<sup>180</sup> Child pornography law is adrift.

### B. Child Pornography Exceptionalism

This doctrinal isolation has effects. Unlike obscenity, material can be child pornography regardless of its context within a work.<sup>181</sup> *Ferber*’s holding that prohibitable child pornography includes work that is not legally obscene invites “the categorization and regulation of speech based on how people might respond to it.”<sup>182</sup> Does that make sense? Adler says no, inviting readers to consider a hidden-camera video of two girls bathing taken by a voyeur who then uses the recording for sexual gratification.<sup>183</sup> The recording is clearly violative; it is also legally considered child pornography, even though the footage features innocent activity.<sup>184</sup>

175. *Id.* at 3; see also Geoffrey R. Stone, *Sexual Expression and Free Speech: How Our Values Have (D)evolved*, 43 HUM. RTS. 22, 24 (Oct. 2018), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-ongoing-challenge-to-define-free-speech](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech) [https://perma.cc/WFR6-JFT8] (“The law has simply been overwhelmed by technology and by changing social mores.”); Jennifer M. Kinsley, *The Myth of Obsolete Obscenity*, 33 CARDOZO ARTS & ENT. L.J. 607, 638–39 (2015); Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 700–01 (2007).

176. Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1639 (2005).

177. Jennifer M. Kinsley, *Sexual Privacy in the Internet Age: How Substantive Due Process Protects Online Obscenity*, 16 VAND. J. ENT. & TECH. L. 103, 118 (2013).

178. *Id.* at 120; John Witte, Jr., *Why No Polygamy*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 446, 466 (Robin Fretwell Wilson ed., 2018). Whether internet obscenity is public per se is a tricky question. See Kinsley, *supra* note 177, at 125. Of course, constitutional rights and practical considerations can limit public-morals regulation.

179. Koppelman, *supra* note 176, at 1639.

180. Adler, *supra* note 170, at 34 n.142.

181. *Id.* at 32; Adler, *supra* note 167, at 940.

182. Adler, *supra* note 167, at 926; see also discussion *supra* Part I.B.1.

183. Adler, *supra* note 167, at 959.

184. *Id.*

Child pornography law focuses on how images can be used, not how they are created. That poses a problem: *any* picture of a child might have sex appeal for a pedophile, who thus becomes “a nightmarish sort of King Midas: everything he touches turns to smut.”<sup>185</sup>

Adler wonders why material can be banned if there is no abuse in its production and the child may not even know of the image’s existence.<sup>186</sup> After all, “a picture of a piece of fruit is not the fruit itself; an image of a child is not the same thing as the real child it portrays”; child pornography law “criminalizes pictures in which there was no underlying crime.”<sup>187</sup> Adler, then, follows *Ferber* and *Osborne* in looking for some abuse extrinsic to viewing the image and, finding none, criticizes their holdings.<sup>188</sup> Similarly, Carissa Byrne Hessick has called the harm from viewing child pornography “purely derivative.”<sup>189</sup> She concludes that equating child pornography to child abuse is hyperbolic.<sup>190</sup> These critiques are onto something. As Judge Kozinski wrote (before retiring amidst allegations involving the sharing of sexual images), “obscenity precedents just don’t work in the child pornography context.”<sup>191</sup>

However, Adler also conceded that privacy rights might “be a particularly strong and independent justification” for banning child pornography.<sup>192</sup> This article aims to show how. Adler sharply distinguished harm that “happened to the child” from “the possibility of seeing a picture in a certain way, in how someone might perceive the child.”<sup>193</sup> Such a distinction is too broad, as discussed below in the next section. Still, Adler is correct that it is time to fundamentally rethink child pornography doctrine.

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185. *Id.* at 960.

186. *Id.* at 942 n.92.

187. *Id.* at 982, 987–88.

188. *See id.* at 985.

189. Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 865 (2011); *see also* John Quigley, *Child Pornography and the Right to Privacy*, 43 FLA. L. REV. 347, 370 (1991) (writing that the state’s interest in banning child pornography “is to protect children from the harm suffered from being posed in sexual conduct and from having the depictions circulated in commerce,” but “an invasion into the privacy of the home is not a narrowly tailored means of effectuating that interest.”). I recently coauthored an amicus brief with Professor Hessick on an unrelated issue.

190. Hessick, *supra* note 189, at 865.

191. *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1294 (9th Cir. 1992) (Kozinski, J., dissenting in part), *rev’d*, 513 U.S. 64 (1994); *see also* Matt Zapotosky, *Federal Appeals Judge Announces Immediate Retirement Amid Probe of Sexual Misconduct Allegations*, WASH. POST (Dec. 18, 2017), [https://www.washingtonpost.com/world/national-security/federal-appeals-judge-announces-immediate-retirement-amid-investigation-prompted-by-accusations-of-sexual-misconduct/2017/12/18/6e38ada4-e3fd-11e7-a65d-1ac0fd7f097e\\_story.html](https://www.washingtonpost.com/world/national-security/federal-appeals-judge-announces-immediate-retirement-amid-investigation-prompted-by-accusations-of-sexual-misconduct/2017/12/18/6e38ada4-e3fd-11e7-a65d-1ac0fd7f097e_story.html) [<https://perma.cc/5NRX-U292>].

192. Adler, *supra* note 167, at 989 n.309; *see also* Adler, *supra* note 170, at 34 n.142; *cf.* Adler, *supra* note 167, at 990 (noting dignitary and reputational questions left unexplored by the Supreme Court).

193. Adler, *supra* note 167, at 995.

### C. *Liberal Critiques*

A fresh start is necessary in part because Adler's liberalism-driven concerns are reasonable. *Stanley* is sound when it says:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.<sup>194</sup>

As Justice Brennan put it, Plato's vision of citizens being formed through government censorship "is a brilliant one, but it is not our own."<sup>195</sup> Justice Brennan's *Osborne* dissent, too, correctly notes that *Stanley* protected the home from efforts to fight the production and distribution of obscenity, and that the government could use more tailored means to combat physical child abuse.<sup>196</sup>

America's liberal constitution tasks government with determining "where the rights of one end and those of another begin."<sup>197</sup> By not recognizing any right held by children depicted in pornography, Supreme Court precedent fails to set the proper frame. Perusing information is normally a right. When no countervailing one appears, banning the viewing of child pornography becomes needlessly hard to justify.

### D. *Decentering Victims*

There are two other normative reasons to rethink child pornography law. Precedent does not take seriously enough either the young people depicted in child pornography or the nature of social opposition to such images. Supreme Court majorities have said that children suffer harm from being in child pornography and that viewing it incentivizes its production. Some other jurists, though, have even cast topless teenage girls as happy participants in their stepfathers' "pin-up" photographs. Either way, children are not understood as bearers of rights. Their personhood is missing, as are related ideas like dignity, autonomy, consent, equality, liberty, respect, personal worth, and privacy.<sup>198</sup>

To be sure, the Court's focus on harm is in keeping with much criminal jurisprudence. No one expects the average murder case to elaborate a theory of the right to life, or one about burglary to theorize about property rights. But is such an omission justifiable here? No. Ignoring rights has left the Court unclear as to whether the harm caused by child pornography is intrinsic to the act of viewing it or whether the real problem is some extrinsic harm, like exploitative production.

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194. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

195. *Bowen v. Gilliard*, 483 U.S. 587, 632 (1987) (Brennan, J., dissenting).

196. *Osborne v. Ohio*, 495 U.S. 103, 140 (1990) (Brennan, J., dissenting).

197. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943).

198. See Anna High, *Sexual Dignity and Rape Law*, 33 YALE J.L. & FEMINISM 1, 4, 7 (2022).

What is more, as discussed above in Part I.A.2, children have long been objects of solicitude, but not full legal persons who hold rights. Child pornography doctrine, too, has been *about* children without truly being about *them*. This is concerning. Anna High recalls that there was a time when rape victims “were objectified as sites of a harm done *to men*” (their fathers and husbands).<sup>199</sup> There was concern about harm, but women and girls were not fully recognized as rights-bearing people.<sup>200</sup> Such a status has still not arrived for child pornography’s victims. Children are treated as “objects of concern,” not subjects.<sup>201</sup> It matters little that child pornography law is “about them.”<sup>202</sup> Children still lack “the right to possess rights.”<sup>203</sup> After all, pecuniary interests and chattel can suffer legal harm, too. Only rights affirm that children are fully human.<sup>204</sup> There are even times when children are seen as vicariously suffering harm really done to society. Judge Posner argued that children are not “the victims” protected by child pornography laws because what really motivates these is society’s “sheer disgust” at pedophilia.<sup>205</sup> His statutory interpretation may well have been right: Congress can neglect children’s rights just like the Supreme Court can. But that is disturbing, too.

Part of the reason for failing to recognize rights in this context is surely the double marginalization of girls as females and as minors.<sup>206</sup> While boys and girls are both depicted in child pornography, juvenile females are magnitudes likelier to be sexually exploited than are boys.<sup>207</sup> Issues disproportionately affecting girls are often conflated with those affecting either children writ large or women.<sup>208</sup> Girls are certainly objects of sexual regulation.<sup>209</sup> But legal discourse does not speak in terms of them having rights. Upfronting rights is part of recognizing children’s, and girls’, full humanity.

199. *Id.* at 9.

200. *Id.*

201. Michael Freeman, *Why It Remains Important to Take Children’s Rights Seriously*, in CHILDREN’S RIGHTS: PROGRESS AND PERSPECTIVES 6 (Michael Freeman ed., 2011) [hereinafter Freeman 2011].

202. *Id.* at 18.

203. *Id.* at 9.

204. *Id.* at 8.

205. *United States v. Sherman*, 268 F.3d 539, 550, 552 (7th Cir. 2001) (Posner, J., dissenting from denial of rehearing en banc). The government in *Sherman* sent the defendant child pornography as part of a sting operation, and as the Seventh Circuit noted, that is incompatible with understanding the act of viewing child pornography as an inherent rights violation. *See id.* at 548–50.

206. Nura Taefi, *The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child*, in Freeman 2011, *supra* note 201, at 120.

207. David Finkelhor et al., *The Prevalence of Child Sexual Abuse with Online Sexual Abuse Added*, 149 CHILD ABUSE & NEGLECT 106634, 106637 (2024); Ateret Gewirtz-Meydan & David Finkelhor, *Sexual Abuse and Assault in a Large National Sample of Children and Adolescents*, 25 CHILD MALTREATMENT 203, 207 (2019).

208. Taefi, *supra* note 206, at 120; *cf.* Miller-McLemore, *supra* note 79, at 5 (“Even in the best feminist theological scholarship on family and mutuality, children remained mostly a tough reality with which women have had to deal.”).

209. *See* Taefi, *supra* note 206, at 133.

### *E. Disconnect from Social Morality*

Finally, Supreme Court precedent is increasingly divorced from common sense. Viewing child pornography may be seen as a mere vice when considered in terms of the lust that can motivate it rather than the perspective of the children depicted.<sup>210</sup> However, a recent study found that 72% of subjects thought of child pornography as “directly,” not “indirectly,” “responsible for creating child victims.”<sup>211</sup> Society may well recognize the nature of the evil of child pornography better than does the Supreme Court.

## III. CHILDREN’S NEGATIVE RIGHT TO INTIMATE PRIVACY

The inviolability of the person is as much invaded  
by a compulsory stripping and exposure as by a blow.  
— *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 252 (1891)

The law should recognize a negative right protecting children’s bodily and sexual privacy. This section discusses rights’ role in a liberal criminal justice system before situating this proposal among different categories of rights. Then, it turns to why intimate and bodily privacy are important. After that, it sets out the proper reach of the right proposed here. The next question is how children can be said to hold that right. This section closes by evaluating tension between paternalism and autonomy.

### *A. Liberal Criminal Law*

A liberal constitutional order limits criminal law’s reach, and “punishing consenting adults for private acts” is a policy of more recent vintage than many might suppose.<sup>212</sup> However, penal law still has important roles to fill, including safeguarding rights. There is no one list of all the possible rights a liberal criminal order could protect. Descriptively speaking, personal moral rights become legal rights “if there is some recognition of their importance by the rest of society and consequently the imposition of correlative legal duties on others.”<sup>213</sup> Constitutionally speaking, rational deliberation by citizens, lawmakers, and judges gives rights form and effect.

Normatively speaking, reality, philosophy, and history give guidance and set outer limits in identifying rights. For instance, the Declaration of Independence says governments must protect the rights to “Life, Liberty and the pursuit of Happiness.”<sup>214</sup> Similarly, in Thomas Jefferson’s preamble to the draft Virginia

210. McGlynn et al., *supra* note 5, at 25, 28.

211. Chad M. S. Steel et al., *Public Perceptions of Child Pornography and Child Pornography Consumers*, 51 ARCHIVES SEXUAL BEHAV. 1173, 1177, 1180 (2022).

212. *Lawrence v. Texas*, 539 U.S. 558, 570 (2003); *see also* Cavedon, *supra* note 3, at 1576 (“For all the (many) anachronisms in modern liberal ideology, armed government agents kicking in people’s front doors to stop them from getting high and raiding the backyard grow sites of cancer patients are historical innovations.”).

213. JANE FORTIN, *CHILDREN’S RIGHTS AND THE DEVELOPING LAW* 15 (3d ed. 2009).

214. *Declaration of Independence: A Transcription*, NAT’L ARCHIVES (accessed June 5, 2024), <https://www.archives.gov/founding-docs/declaration-transcript> [https://perma.cc/Z2ZR-EUXR]. On

criminal code of 1778, he says that penal law is necessary because of people “resigning themselves to the dominion of inordinate passions” who “commit violations on the lives, liberties and property of others.”<sup>215</sup> Looking to Jefferson and John Stuart Mill, Markus Dirk Dubber has suggested that a liberal order does not punish every sort of “pain, discomfort, or unease,” but rather, harm to personhood.<sup>216</sup>

Does viewing child pornography qualify as a rights violation? Yes. It injures core personal interests. The next section discusses the harm child pornography does to the dignity, autonomy, and development of those it depicts. It is the lustful exploitation of another person’s body, even if mediated through images.

### B. *What Sort of Right*

People have a longstanding legal interest in intimate privacy, dating back at least to Roman law.<sup>217</sup> Its recognition today is a matter of articulating how this ancient right applies to changing circumstances—especially the existence of child pornography in a digital world.<sup>218</sup> The right proposed here is not a constitutional right per se, as it is claimed against private actors.<sup>219</sup> Civil law has already begun to recognize this right and it is implicit in some criminal law as well.

Courts should not graft this right onto existing laws from nothing. If Judge Posner is right that federal child pornography statutes do not reflect this right, then they should be amended.<sup>220</sup> However, attorneys defending the constitutionality of child pornography laws should explain their importance for protecting children’s rights, thereby humanizing victims and recognizing the valid liberal justification for prohibition.

The right proposed here is narrow. Some theorists have proposed that teenagers should have rights to broad sexual autonomy.<sup>221</sup> However, as discussed below,

19th-century European syntheses of liberalism and natural law by criminal law scholars Cesare Beccaria and Francesco Carrara, see Mike C. Materni, *The 100-Plus-Year-Old Case for a Minimalist Criminal Law (Sketch of a General Theory of Substantive Criminal Law)*, 18 *NEW CRIM. L. REV.* 331, 344–46 (2015).

215. Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 *HASTINGS L.J.* 509, 537 (2004) (quoting Thomas Jefferson, A Bill for Proportioning Crimes and Punishments, in *THE COMPLETE JEFFERSON* 90, 90–91 (Saul K. Padover ed., 1943) (1779)).

216. *Id.* at 568.

217. See discussion *supra* Part I.A.1.

218. *Cf. Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 194 (1905).

219. *But see* RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND ITS SPIRIT* 319–51 (2021) (arguing that the Equal Protection Clause imposes on governments positive obligations to protect natural rights).

220. *Cf. United States v. Sherman*, 268 F.3d 539, 552 (7th Cir. 2001) (Posner, J., dissenting from denial of rehearing en banc).

221. Blaire Bayliss, Comment, *The Kids Are Alright: Teen Sexting, Child Pornography Charges, and the Criminalization of Adolescent Sexuality*, 91 *U. COLO. L. REV.* 251, 269 (2020); Moira Aikenhead, A “Reasonable” Expectation of Sexual Privacy in the Digital Age, 41 *DALHOUSIE L.J.* 273, 288–90 (2018); MacKenzie Smith, Note, *You Can Touch, But You Can’t Look: Examining the Inconsistencies in Our Age of Consent and Child Pornography Laws*, 87 *S. CAL. L. REV.* 859, 887–90 (2014).

the liberal model of the autonomous actor is the wrong way to understand children's rights. Certain rights safeguard dignity. Part VI.C below discusses that very malleable idea, but the rights framework proposed here does not depend on any one theory of it.<sup>222</sup>

The right this article articulates is protective (negative), not facilitative (positive), and is based on rights of exclusion.<sup>223</sup> Familiar in the property context, these rights reflect the "total exclusion of the right of any other" to access what is one's own.<sup>224</sup> Negative rights are old-fashioned and have even been criticized as sexist and classist.<sup>225</sup> Understood only as limits on government coercion, they have been used to immunize violence committed in private spaces.<sup>226</sup> Moira Aikenhead also notes that females' privacy rights have often been invoked to protect only a sexist notion of modesty.<sup>227</sup>

Modesty is not as hopelessly outdated as some claim.<sup>228</sup> Aikenhead notes that some critics of privacy rights do not want to imply that "disclosures related to women's bodies or sexuality . . . are inherently shameful."<sup>229</sup> Still, "[e]ven people who have nothing rationally to be ashamed of can be mortified" by bodily exposure.<sup>230</sup> To quote Judge Posner's memorable example: "Although it is well known that every human being defecates, no adult human being in our society wants a newspaper to show a picture of him defecating."<sup>231</sup>

Children's bodily privacy should be especially guarded. Notably, Aikenhead refers to *women*, not girls. Children's negative right to intimate privacy should not be downplayed for the benefit of some hoped-for sexual revolution for adults, nor should children's need for protection be sacrificed in the name of adults' autonomy. As Danielle Citron contends, part of the old patriarchy's problem was the *lack* of sexual privacy for battered women and girls.<sup>232</sup> Privacy rights should be equalized, not erased.<sup>233</sup>

222. High, *supra* note 198, at 3.

223. Aikenhead, *supra* note 221, at 282.

224. 2 WILLIAM BLACKSTONE, COMMENTARIES \*2; *see also* Heidi Reamer Anderson, *Plotting Privacy as Intimacy*, 46 IND. L. REV. 311, 315 (2013) (noting partial overlap between bodily and property privacy).

225. *See* Aikenhead, *supra* note 221, at 283.

226. *Id.*

227. *Id.*

228. *See* discussion *infra* Part VI.B.

229. Aikenhead, *supra* note 221, at 283.

230. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229 (7th Cir. 1993) (per Posner, J.); *see also* RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. LAW. INST. 1965) ("Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye . . . [s]exual relations, for example . . .").

231. *Haynes*, 8 F.3d at 1229.

232. Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1877 (2018).

233. *Id.*

Protecting old-fashioned modesty with an old-fashioned negative right would be a positive development.<sup>234</sup> This proposal should not foreclose other approaches, but there are times when saying less is enough.<sup>235</sup> Hopefully, the approach proposed here is conventional enough to garner support and so strengthen an important area of law while also nudging more consideration of privacy rights and children's rights.

### C. Carnal Knowledge

The law should protect the negative right to intimate privacy—or to adopt a familiar legal phrase, it should help people shield “carnal knowledge” of themselves.<sup>236</sup> Those words are often considered a mere euphemism for sexual intercourse.<sup>237</sup> However, they reveal deep, important connections between bodies, sexuality, and privacy. The phrase originated from the biblical Book of Genesis. Eve and Adam eat the fruit of the tree of knowledge, then Adam comes to “know” his wife Eve.<sup>238</sup> The Hebrew verb translated as “know” is “*yada*,” which means “to know and distinguish between moral categories and to be aware of one’s own and another’s physical difference (nakedness).”<sup>239</sup> Similarly, the Torah refers to certain sexual crimes as uncovering nakedness.<sup>240</sup> These passages led to the medieval legal term “carnal knowledge,” which suggests “that embodied knowledge of oneself and another human being can be attained in the intimacy of lovemaking.”<sup>241</sup> Engaging in sexual activity, Michel Foucault wrote, is a way of seeking “secret and profound truths about the individual . . . the structure of his fantasies, the roots of his ego, the forms of his relationship to reality.”<sup>242</sup>

Pornography and other forms of sexual exploitation separate this knowledge from interpersonal intimacy. Whether pornography is always immoral depends on judgments that exceed this article’s scope.<sup>243</sup> However, Wendy Doniger has

234. See Citron, *supra* note 46, at 1852 (“[I]t is fruitful to continue the project that Warren and Brandeis spearheaded and that Prosser developed.”).

235. Cf. *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 200 (1905) (“It may be said that to establish a liberty of privacy would involve in numerous cases the perplexing question to determine where this liberty ended and the rights of others and of the public began. This affords no reason for not recognizing the liberty of privacy and giving to the person aggrieved legal redress . . .”).

236. See WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 645 (1900), quoted in Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1392 n.53 (2000); 4 WILLIAM BLACKSTONE, COMMENTARIES \*210.

237. Wendy Doniger, *Carnal Knowledge*, FATHOM ARCHIVE, <https://fathom.lib.uchicago.edu/1/77777121879> [https://perma.cc/P5EB-YUAY].

238. See Genesis 2–4; Yofi Tirosh & Michael Birnhack, *Naked in Front of the Machine: Does Airport Scanning Violate Privacy?*, 74 OHIO STATE L.J. 1263, 1287 (2013).

239. Doniger, *supra* note 237.

240. See Leviticus 18:17.

241. Doniger, *supra* note 237.

242. Quoted in *id.*

243. Compare Mary Anne Franks, “Revenge Porn” Reform: A View From the Front Lines, 69 FLA. L. REV. 1251, 1260 (2017); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 385–86 (2016); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809 (2010), with Gerard V. Bradley, *Prolegomenon on Pornography*,

reasonably said that pornography “denies individuality and reduces sexuality to animality.”<sup>244</sup> Exploiters want to “know” their victims, “cut [them] open,” and “conquer [them] in [their] sexuality, in [their] hiddenness.”<sup>245</sup> Adults can consent to this, but the law forbids subjecting children to it.<sup>246</sup> Turning again to MacKinnon, child pornography lets an abuser feel “[w]hat he felt as he watched you as he used you . . . done again and lived again and felt again.”<sup>247</sup> It also lets other people “watch you and get off any time.”<sup>248</sup>

The resulting harm is not just embarrassment. It is present even if a child’s face is obscured and the image is viewed entirely in private.<sup>249</sup> Granted, a child would not experience *subjective* harm from unknown viewing.<sup>250</sup> But every viewer *objectively* exploits child victims’ intimate privacy.<sup>251</sup> Every viewing inflicts injury.<sup>252</sup> Viewings strip children of self-control.<sup>253</sup> Bodily privacy is normally the subject of social regulation reinforced through education and criminal offenses.<sup>254</sup> When nudity is exposed for cosmetic or medical reasons, “an unspoken convention renders the cosmetician or physician’s gaze functional or clinical,

41 HARV. J.L. & PUB. POL’Y 447 (2018); Elizabeth Harmer Dionne, *Pornography, Morality, and Harm: Why Miller Should Survive* Lawrence, 15 GEO. MASON L. REV. 611 (2008).

244. Doniger, *supra* note 237; cf. Tirosh & Birnhack, *supra* note 238, at 1291–92 (“[S]ubjecting [airport] passengers to a gaze that exposes our nakedness . . . has a destabilizing potential in stripping off the comforting enfolding of culture around our person and demoting us to raw, animalistic, untamed, and uncivilized creatures.”); Citron, *supra* note 46, at 236 (“[W]hen individuals’ intimate habits are publicly exposed, they may be ‘reduced’ to nothing more than those habits, their genitals, or a sexual act.” (citation omitted)).

245. Doniger, *supra* note 237.

246. United States v. Wiegand, 812 F.2d 1239, 1245 (9th Cir. 1987); see also Potuto, *supra* note 1, at 41 (distinguishing adult pornography because of consent, discussed in Part III below).

247. MACKINNON, *supra* note 169, at 4.

248. *Id.*; see also Potuto, *supra* note 1, at 32 (“Because pornography remains a present fact, the harm it causes has the capacity to recur in a way that actual sexual abuse—however injurious—does not.”); Paroline v. United States, 572 U.S. 434, 441 (2014) (quoting similar thoughts from someone depicted in child pornography).

249. *Contra* Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 IND. L.J. 1437, 1463 (2014).

250. Anthony M. Dillof, *Possession, Child Pornography, and Proportionality: Criminal Liability for Aggregate Harm Offenses*, 44 FLA. ST. U. L. REV. 1331, 1358–59 (2017).

251. See Audrey Rogers, *From Peer-to-Peer Networks to Cloud Computing: How Technology Is Redefining Child Pornography Laws*, 87 ST. JOHN’S L. REV. 1013, 1046 (2013) (“The harm that others further down the chain inflict lacks physicality, but they too inflict distinct, actual harm on the child . . .”); cf. Slane, *supra* note 133, at 576 (“By including images wherein the subject cannot be identified, the voyeurism offence views sexual objectification as a collective dignity-based privacy harm.”).

252. Cf. Potocnik v. Carlson, No. 13-CV-2093, 2016 U.S. Dist. LEXIS 92497, at \*7 (D. Minn. July 15, 2016) (describing “the viewing of private information without lawful authority” as closely related to the right to privacy); RESTATEMENT (SECOND) OF TORTS § 652A cmt. b (AM. L. INST. 1977) (describing the right to privacy as keeping people “free from the prying eyes” of others); *contra* Dillof, *supra* note 250, at 1361 (treating viewings as inflicting diminishing harm as the number increases).

253. Tirosh & Birnhack, *supra* note 238, at 1283; see also John P. Elwood, Note, *Outing, Privacy, and the First Amendment*, 102 YALE L.J. 747, 763 (1992).

254. Tirosh & Birnhack, *supra* note 238, at 1287–89; cf. 1 *Corinthians* 12:23 (“[O]ur less presentable parts are treated with greater propriety . . .”).

neutralizing any potential sexual meanings.<sup>255</sup> Safeguards exist, like medical-examination observers, dressing rooms, patient gowns, and so on.<sup>256</sup> Protections are so ubiquitous that even a leading trade association for pornographic actors advises:

You . . . don't have to change wardrobe or prep for your scene in view of any of the directors, producers, on-set PA's, camera operators, or even your own scene partner. You can get dressed in a restroom, or separate room by yourself. You can also request no behind-the-scenes personal vids or pics be taken by the crew can be shot[sic] or posted anywhere unless you give them clear consent and permission.<sup>257</sup>

Much nudity “is decidedly not a benign, everyday experience.”<sup>258</sup> *Pavesich* said the right to privacy is founded on human nature.<sup>259</sup> It distinguished between the private and the public.<sup>260</sup> The former includes bodily intimacy: without consent, “the body of a person can not be put on exhibition.”<sup>261</sup> People have the “right to withdraw from the public gaze.”<sup>262</sup> Recall the *iniuria* delict of Roman law.<sup>263</sup> The Supreme Court has even equated “compulsory stripping” with battery.<sup>264</sup> The sexual exploitation of one's naked body, whether in-person or in an image, violates the bodily intimacy at the heart of the right to privacy.<sup>265</sup>

255. Tirosh & Birnhack, *supra* note 238, at 1290; *see also* Safford United Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 375 (2009) (“Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable . . . .” (internal citation omitted)).

256. Tirosh & Birnhack, *supra* note 238, at 1290–91.

257. *Inspire: Industry Newcomer Support Program*, FREE SPEECH COAL., <https://www.freespeechcoalition.com/inspire/performer-protocols> [<https://perma.cc/3HWJ-MYKL>].

258. Tirosh & Birnhack, *supra* note 238, at 1293, 1303.

259. *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 194 (1905).

260. *Id.*

261. *Id.* at 196.

262. *Id.*; *see also* Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 722 (1996) (“The disclosure of private facts may offend the principle of autonomy because it violates the individual's right to choose who shall be privy to such information.”).

263. *Pavesich*, 122 Ga. at 197.

264. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 252 (1891); *cf.* *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 340 (2023) (Sotomayor, J., dissenting) (criticizing “intrusive physical examinations” and “photographing of unclothed students” conducted as part of racist scientific inquiries).

265. Elwood, *supra* note 253, at 757; *see also* *West v. Radtke*, 48 F.4th 836, 850 (7th Cir. 2022); *Ioane v. Hodges*, 939 F.3d 945, 953 (9th Cir. 2019). Bodily intimacy is different from thought or speech about it. Merely being the subject of another person's imagined fantasy or truthful account of shared sexual experiences does not violate the right to intimate privacy and such acts are protected by freedom of thought or, usually, by freedom of speech. *See* Campbell, *supra* note 28, at 281, 287; Diane Leenheer Zimmerman, *The “New” Privacy and the “Old”: Is Applying the Tort Law of Privacy Like Putting High-Button Shoes on the Internet?*, 17 COMM'N L. & POL'Y 107, 120–21 (2012); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1012–20 (2003); Elwood, *supra* note 253, at 776.

#### D. *The Right's Scope*

Citron gives a good definition of sexual privacy: “the concealment of naked bodies and intimate activities including, but not limited to, sexual intercourse.”<sup>266</sup> Her definition thus includes “up-skirt” photographs and depictions of bathroom activities.<sup>267</sup>

Citron’s definition is also helpful in terms of what it excludes. Although a child’s subjective consent should generally not be a factor for the reasons given in the next section, this definition does not cover depictions that do not invade bodily concealment—including where consent can be imputed objectively in light of social norms.<sup>268</sup> A pediatrician does not violate a child’s negative right to intimate privacy during a physical examination. Parents do not violate it by recording their toddlers playing naked in the backyard. Viewing prepubescent girls’ nipples depicted in a mundane way, or anthropological footage of naked children, is not a rights violation.

Exceeding such implied social licenses could violate rights. *Mens rea* would be relevant; a pediatrician surreptitiously photographing patients’ genitalia for his own later sexual gratification would violate their rights.<sup>269</sup> However, *mens rea* would not necessarily be determinative. For instance, the Sixth Circuit has upheld civil liability for a legal expert who displayed child pornography during a public trial, an outcome arguably consistent with the analysis proposed here.<sup>270</sup>

Citron’s definition may also exclude some borderline cases involving clothed children, such as a child “dressed in a sexually seductive manner” with spread legs.<sup>271</sup> Does viewing this invade the concealment of bodily privacy? Depiction of a child dressed only in underwear could conceivably be akin to an upskirt photo, in that it would reveal normally concealed parts of the child’s body. However, the same degree of bodily exposure is common in some public settings like swimming. A clearer rights violation would be a closely focused image depicting the outline of a child’s genitalia. This could be “technological enhancement of ordinary perception” undermining a child’s ability to conceal his or her

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266. Citron, *supra* note 46, at 1874; *see also id.* at 1880–81.

267. *Id.* at 1877, 1900, 1909; *see also* Adams v. Sch. Bd. of St. Johns Cnty., 3 F.4th 1299, 1328–29 (11th Cir. 2021) (Pryor, C.J., dissenting) (discussing bathroom privacy), *vacated and reh’g granted*, 9 F.4th 1369 (11th Cir. 2021).

268. *Cf.* Florida v. Jardines, 569 U.S. 1, 8 (2013) (recognizing in the Fourth Amendment context the implied social license to approach houses’ front doors).

269. *Cf. id.* at 12 (Kagan, J., concurring) (noting the possibility of exceeding an implied social license).

270. Doe v. Boland, 630 F.3d 491, 493 (6th Cir. 2011); *see also* United States v. Sherman, 268 F.3d 539, 548–50 (7th Cir. 2001) (criticizing the government for sending the defendant child pornography as part of a sting operation); Kiel Willmore, *Protecting Child Victims’ Rights as Vigorously as Criminal Defendants’ When Prosecuting Possession or Distribution of Child Pornography*, 87 WASH. L. REV. 883 (2012) (defending 18 U.S.C. § 3509 (m)’s discovery regulations in child pornography prosecutions).

271. *Compare* United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986) (in obiter dicta), *with* United States v. Blouin, 74 M.J. 247, 251 (CAAF 2015) (noting a statutory amendment arguably requiring nudity).

body.<sup>272</sup> What about a child who is clothed, but depicted alongside an adult engaging in sexual activity?<sup>273</sup> Citron’s definition includes “intimate activities.” As long as the child was involved in sexual activity with another, viewing the image would invade the child’s negative right to intimate privacy.<sup>274</sup> When interpreted to incorporate social norms, Citron’s definition describes the right this article proposes well.

### E. Children’s Rights

Much of the right proposed here applies to both adults and children. How should children be understood to hold it? Answering that question requires reconsidering people and rights, as well as embracing a “childist” perspective—“thinking in light of childhood.”<sup>275</sup> Martha Albertson Fineman has written about how liberalism assumes that people are “ideally independent, fully-functioning adults”—autonomous, rational, “liberty-seeking and capable of negotiation, bargaining, and giving informed consent.”<sup>276</sup> John Rawls defines “person” as “someone who can be a citizen, that is, a normal and fully cooperating member of society over a complete life.”<sup>277</sup> Approaches like these keep childhood out of focus.<sup>278</sup>

For Fineman, this is a reason to discard liberalism.<sup>279</sup> I am skeptical, but recognizing how children differ from the competent adult assumed by liberalism is helpful.<sup>280</sup> Childism requires recognizing children’s inequality and vulnerability.<sup>281</sup> MacKinnon argues that society’s failure to do so has hidden the evil of child pornography: “The ability to see that child pornography is harmful has everything to do with a visceral sense of the inequality in power between children and adults, yet inequality is never mentioned.”<sup>282</sup>

272. *Kyllo v. United States*, 533 U.S. 27, 33–35 (2001) (holding that a thermal scan of a home interior was a search under the Fourth Amendment); *cf.*, e.g., Fla. Stat. § 847.001 (11) (2022) (defining nudity as including “the depiction of covered male genitals in a discernibly turgid state”).

273. *See United States v. Howard*, 968 F.3d 717, 723 (7th Cir. 2020) (resolving the case on statutory grounds).

274. *Howard* concerned a man masturbating beside a child who was asleep, *see id.* at 719. In this “odd case,” it is not clear that the depiction at issue depicted the *child’s* sexual activity. *Id.* at 721.

275. Wall, *supra* note 13, at 524.

276. Martha Albertson Fineman, *Reasoning from the Body: Universal Vulnerability and Social Justice*, Emory Univ. Sch. of L. Legal Stud. Rsch. Paper Series No. 22–18, at 14 (2022).

277. JOHN RAWLS, *POLITICAL LIBERALISM* 18 (expanded ed. 2005).

278. Fineman, *supra* note 275, at 11.

279. *See id.* at 12.

280. Fineman rejects treating some categories of people, like children, as “special,” because this changes the assumed “appropriate level of state responsibility” for each individual’s well-being. Martha Albertson Fineman, *The Limits of Equality: Vulnerability and Inevitable Inequality*, in *RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE* 85 (Robin West & Cynthia G. Bowman eds., 2019). I disagree with her as to the proper role of government in the lives of autonomous adults and so am more comfortable with such distinctions.

281. *Id.* at 73; *cf.* *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (“Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”); *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988) (“[T]here are differences which must be accommodated in determining the rights and duties of children as compared with those of adults.” (citation omitted)).

282. MACKINNON, *supra* note 169, at 91.

Children's differences affect how they can hold rights. Children have protective rights in that they have interests protected "by the imposition of (legal or moral) normative constraints on the acts and activities of other people."<sup>283</sup> Children's rights can also be categorized in three ways: (1) basic rights to "physical, emotional and intellectual care"; (2) developmental rights; and (3) qualified autonomy rights.<sup>284</sup>

Basic and developmental rights easily cover children's negative right to intimate privacy. Children have a basic right to be free from sexual abuse and exploitation, and violations of that right can also gravely harm their development. The CRC proclaims children's right to be free of sexual abuse and exploitation, and it names child pornography as an example.<sup>285</sup> This is reasonable. Children depicted in pornography commonly suffer severe injury to their sense of self, control, and security, harms incompatible with their emotional and intellectual well-being.<sup>286</sup> The CRC also acknowledges the developmental harm child pornography causes by requiring states to provide exploited children rehabilitation.<sup>287</sup>

Regarding autonomy, child pornography strips children of control over their bodies. That affects their development, too. Child pornography conscripts children as participants in others' sexual activity to which they usually cannot give valid consent.<sup>288</sup> Having one's exposed body, or images of it, used "for the sake of the expression of somebody's sexual fantasies or ideas is . . . highly destructive to the child's freedom of thought."<sup>289</sup> So is what *Ferber* called child pornography's power to "haunt" its victims throughout life.<sup>290</sup>

Freedom from sexual exploitation protects children's development and autonomy rights to, in Citron's words, "figure out their *future* selves."<sup>291</sup> She is too focused on adult-style autonomy, arguing for freedom "from familial or societal censure"; surely child pornography is an autonomy violation that receives much adult censure.<sup>292</sup> Still, it is worth noting that child sexual exploitation can harm children's future ability to form relationships and even harm their future job prospects (a consequence due to the further injustice of their would-be employers).<sup>293</sup> Child

283. FORTIN, *supra* note 213, at 13 (citation and quotation marks omitted); *see also* WOODHOUSE, *supra* note 78, at 313 (characterizing children's rights as creating "a moral environment for thinking about what we owe to our children").

284. Eekelaar, *supra* note 60, at 170–71. For other classifications of children's rights, see FORTIN, *supra* note 213, at 17.

285. Convention on the Rights of the Child, arts. 19, § 1 & 34(c), Nov. 20, 1989, 1577 U.N.T.S. 3, 50, 55. While the United States has not adopted the Convention, it is still persuasive authority.

286. Andrea Slane, *Legal Conceptions of Harm Related to Sexual Images Online in the United States and Canada*, 36 CHILD & YOUTH SERVS. 288, 299–301 (2015).

287. Convention on the Rights of the Child, art. 39, 1577 U.N.T.S. 56.

288. *United States v. Hernandez*, 183 F. Supp. 2d 468, 470 (D.P.R. 2002).

289. *Id.* at 470–71.

290. *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982).

291. Citron, *supra* note 46, at 1884.

292. *Id.* at 1884–85.

293. *Id.* at 1899, 1909.

pornography is a present offense that can do long-lasting damage to development and autonomy.

Many children's rights, especially basic and developmental ones, "are simply affirmations of what were traditionally called natural rights (those rooted in human nature) and are now often called dignity rights (based on human needs)."<sup>294</sup> They should be seen as children's own rights, as they must frequently be claimed against adults, including sometimes close relatives.<sup>295</sup> Among them should be a negative right to intimate privacy.

#### F. Paternalism and Autonomy

Can people under the age of 18 *ever* consent to appearing in pornography? This question has become salient due to the proliferation of cellphone cameras.<sup>296</sup> It is separable from the rights framework proposed here—many negative rights can be consensually waived, subject to public policy,<sup>297</sup> and a reader could differ from this section's conclusions while still accepting the article's main argument. Nevertheless, this subject is related and merits discussion.

Child autonomy rights can conflict with basic and developmental rights.<sup>298</sup> Many thinkers give priority to the latter two categories.<sup>299</sup> Doing otherwise falls back into the liberal trap of assuming competent adult norms instead of children's vulnerability.<sup>300</sup> Autonomy should not be equated with atomization. Contrary to what strict individualism assumes, autonomy—for adults as well as minors—is exercised relationally and socially.<sup>301</sup> Limiting minors' autonomy teaches them that agency is inseparable from obligations, citizenship, and caution.<sup>302</sup> Gradually expanding children's autonomy can integrate them into family and community life as responsibly autonomous "husbands, wives, friends, neighbors, and citizens."<sup>303</sup> It can help them create "socially inclusive rather than exclusive worlds

294. WITTE, *supra* note 48, at 244.

295. *See id.*

296. As late as 2016, one study found that 98% of child pornography featured children under the age of 16. *See* Alisdair A. Gillespie, *Child Pornography*, 27 INFO. & COMM'NS TECH. L. 30, 33 (2018).

297. *See Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 199 (1905).

298. Eekelaar, *supra* note 60, at 171.

299. *See id.*; *see also* FORTIN, *supra* note 213, at 27 ("[W]hat if adolescents foreclose on their future opportunities by reaching decisions which adults consider unwise or even dangerous? They may truant from school, take up smoking or drinking and, more dramatically, take risks with their health by refusing life-saving medical treatment.")

300. Tom D. Campbell, *The Rights of the Minor: As Person, as Child, as Juvenile, as Future Adult*, 6 INT'L J.L. POL'Y & FAM. 1, 20 (1992).

301. Angela Campbell et al., *Child Citizenship and Agency as Shaped by Legal Obligations*, 23 CHILD & FAM. L.Q. 489, 510 (2011).

302. *Id.* at 510–11.

303. *See id.* at 511; MARCIA J. BUNGE, A MORE VIBRANT THEOLOGY OF CHILDREN 14 (2003), [https://ifl.web.baylor.edu/sites/g/files/ecbvkj771/files/2023-01/childrenarticlebunge\\_0.pdf](https://ifl.web.baylor.edu/sites/g/files/ecbvkj771/files/2023-01/childrenarticlebunge_0.pdf) [<https://perma.cc/R7L8-M794>]; *cf.* *Hodgson v. Minnesota*, 497 U.S. 417, 448–49 (1990) (upholding an abortion parental-notification law because it let parents advise their daughter about "religious or moral implications" and give "needed guidance and counsel in evaluating the impact of the decision on her future").

of meaning and practice.<sup>304</sup> Minors are more vulnerable to undue influences than are adults, and limits can also protect them from commercialized sexual exploitation.<sup>305</sup>

Limitations on some sexual activity, including child pornography, are sensible. In modern liberal societies, the legal permissibility of sex has come to depend on autonomy, with age as the main objective limit.<sup>306</sup> The one thing that can be said of all children is that they have not lived as long as adults.<sup>307</sup> There is a rational connection between age and a lack of experiential wisdom.<sup>308</sup> Experiential wisdom differs from abstract intelligence. Young math prodigies can be found from time to time, but a child who is an expert in ruling—either the self or others—cannot, as Aristotle noted.<sup>309</sup> Smarts can come from nature, but savvy depends on life experience.

Wisdom is rationally connected (and then some) with age. Experience prepares the way for full autonomy, building “capacities for belief formation, deliberation and choice, formation of plans, and adoption of commitments and projects.”<sup>310</sup> Age is a reasonable basis (and then some) for the law to treat children differently than adults.<sup>311</sup> Room for autonomy to be learned not too bitterly is key to good development.<sup>312</sup>

Neither wisdom nor autonomy arrives suddenly at the eighteenth birthday.<sup>313</sup> Children are subjects who should make meaningful decisions, including mistakes, and learn from them.<sup>314</sup> But it is reasonable to structure rights to grow with life experience and let parents help guide a child’s personal development. For example, children’s vulnerability should be taken into account when assessing informed consent to medical procedures.<sup>315</sup> After all, such procedures can have

304. Wall, *supra* note 78, at 67.

305. *Id.* at 63.

306. Sara Jahnke & Agustín Malón, *How Pedophilic Men Think About Adult-Child Sex: Effects of Child Gender and Physical Maturity*, 25 PSYCH. CRIME & L. 90, 92 (2019).

307. See Campbell, *supra* note 300, at 18–19.

308. See *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality op. of Powell, J.) (“[M]inors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”).

309. See ARISTOTLE, NICOMACHEAN ETHICS 109 (bk. VI, ch. 8, § 6) (Terence Irwin trans., Hackett Publ’g Co. 2019). John Wall’s endorsement of children receiving the right to vote whenever they have “sufficient understanding and desire to exercise it competently” conflates intelligence with wisdom. John Wall, *Democratising Democracy: The Road from Women’s to Children’s Suffrage*, 18 INT’L J. HUM. RTS. 646, 656 (2014).

310. Jules Holroyd, *Relational Autonomy and Paternalistic Interventions*, 15 RES PUBLICA 321, 325 (2009).

311. See *Miller v. Alabama*, 567 U.S. 460, 482 (2012) (“[I]t is the odd legal rule that does *not* have some form of exception for children.”).

312. See *id.* at 477 (saying that “hallmark features” of youth include “immaturity, impetuosity, and failure to appreciate risks and consequences”); *Graham v. Florida*, 560 U.S. 48, 79 (2010) (noting juveniles’ need “to achieve maturity of judgment and self-recognition of human worth and potential”).

313. Campbell, *supra* note 300, at 18–19 (noting “the significance for the growing human individual of the transitional period from paradigmatic childhood to full-blown adulthood”).

314. See Annemie Dillen, *For the Sake of Children?: Theology, Care and Children*, 15 HAPÁG 85, 94 (2021).

315. See, e.g., *L.W. v. Skrmetti*, 83 F.4th 460, 475 (6th Cir. 2023), *aff’d sub nom.* United States v. Skrmetti, 145 S. Ct. 1816 (2025); Martha Albertson Fineman, *Vulnerability in Law and Bioethics*,

lasting physical and psychological impacts.<sup>316</sup> Further, vulnerability is heightened during youth.<sup>317</sup> Sexual autonomy should follow a similar course.<sup>318</sup> Perhaps a fourteen-year-old may lawfully have sex with a seventeen-year-old, but not a forty-year-old.<sup>319</sup> A similar judgment leads to laws letting a sixteen-year-old decide to have intercourse with anyone, but not to having that activity recorded for the permanent consumption of strangers.<sup>320</sup>

Better tailoring of the law to gradually growing wisdom would itself be wise.<sup>321</sup> A Canadian Supreme Court decision offers one promising way to do so. In *R. v. Sharpe*, the Court read two limited exceptions into a child pornography statute.<sup>322</sup> Both depend on the lawfulness of the depicted acts and the consent of those depicted, as well as on the recording being kept for use only “by the creator and the persons depicted.”<sup>323</sup> Wider disclosure would violate privacy rights.<sup>324</sup> This approach accommodates autonomy without ignoring the negative right to intimate privacy, at least in theory.

30 J. HEALTH CARE POOR & UNDERSERVED 52, 53 (2019) (citing Universal Declaration on Bioethics & Human Rights art. 8, UNESCO (2005), <https://www.unesco.org/en/legal-affairs/universal-declaration-bioethics-and-human-rights?hub=66535> [<https://perma.cc/8UF2-R2ZA>]); Michelle Oberman, *Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 53 (1994).

316. *Cf.* Campbell et al., *supra* note 301, at 506 (noting Canadian jurisprudence suggesting that a minor cannot threaten her own “health or physical integrity”).

317. *See* Fineman, *supra* note 315, at 57 (discussing infancy).

318. *See* Campbell et al., *supra* note 301, at 492 (describing “law’s awareness of a teen’s developing autonomy as she bridges childhood and adult life, which would result in a wider breadth of obligations”).

319. *See, e.g.*, O.C.G.A. § 16-6-3 (c) (reducing the penalty for statutory rape based on age).

320. *See* *Thompson v. Oklahoma*, 487 U.S. 815, 824 (1988) (noting that 15-year-olds cannot serve on juries; buy pornography; or drive, marry, or gamble without parental consent); *People v. Hollins*, 971 N.E.2d 504, 511 (Ill. 2012) (“The dangers of appearing in pornographic photographs or videos are not as readily apparent . . . .”); *People v. Campbell*, 94 P.3d 1186, 1189 (Colo. Ct. App. 2004). However, the line Ohio has drawn—sexually propositioning a sixteen-year-old is illegal, but having intercourse with one is legal—seems absurd and possibly unconstitutional. Eugene Volokh, *Explicit Sexual Proposition to 16-Year-Old Can Be a Crime, Even if Sex with the 16-Year-Old Isn’t*, VOLOKH CONSPIRACY (Aug. 22, 2023), <https://reason.com/volokh/2023/08/22/explicit-sexual-proposition-to-16-year-old-can-be-a-crime-even-if-sex-with-the-16-year-old-isnt> [<https://perma.cc/3JPS-NZ6C>]. For contrary arguments that restrictions on consensual child pornography illegitimately seek to “eradicate any evidence of [an] entire demographic’s sexuality,” see Amy F. Kimpel, *Using Laws Designed to Protect as a Weapon: Prosecuting Minors Under Child Pornography Laws*, 34 N.Y.U. REV. L. & SOC. CHANGE 299, 328 (2010); Quigley, *supra* note 189, at 391.

321. *See* *A.H. v. State*, 949 So.2d 234, 237–39 (Fla. 1st Dist. Ct. App. 2007) (affirming a sixteen-year-old’s delinquency adjudication for producing private explicit images of herself with her seventeen-year-old boyfriend); *cf.* Slane, *supra* note 133, at 592 (expressing concern that expanding autonomy without careful tailoring “would lead to young people who consent to being photographed suffering a reduced expectation of privacy in the resulting images”).

322. *R. v. Sharpe*, [2001] 1 S.C.R. 45, 111 (Can.).

323. *Id.*

324. Slane, *supra* note 133, at 568. The Court “has refined the intimacy requirement by requiring proof that the minor subject of the sexual photo shares pleasure in the use of that photo,” assuming a “power differential” to be “inherent to sexual photography.” *Id.* This assumption may or may not always be reasonable. *But see* *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (noting juveniles’ susceptibility to peer pressure). I learned of the *Sharpe* decision from Slane’s article.

Children's lack of experiential wisdom and their development rights are good reasons for the law to protect them from permanent, publicly circulating images of their juvenile nakedness or sexual activity, at least to the extent *Sharpe* sets forth.<sup>325</sup> The law protects minors from decisions they make without enough information (indeed, the word "in-formation" itself suggests that experiences form wisdom and are important for exercising full autonomy). In terms of permanence and distributability, images differ from other forms of sexual exploration that may be better left to family guidance and minors' autonomy.<sup>326</sup> The ongoing regret and fear felt by those whose images forever circulate matters.<sup>327</sup> Teenagers, "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."<sup>328</sup> It is reasonable to favor children's basic and developmental rights over their choice to haphazardly consent to appearing in pornography. It is reasonable to carefully guide children's autonomy rather than unleashing it for self-destruction.<sup>329</sup>

"Children have a right to be children and not adults."<sup>330</sup> A negative right to intimate privacy is well-grounded in the realities of sexuality and children's vulnerability, and it should take precedence over autonomy.

#### IV. A RIGHTS APPROACH HELPS SOLVE PROBLEMS

I leave for another day the question of how to frame and prosecute this kind of harm as a privacy violation.

— Amy Adler (2020)<sup>331</sup>

Framing child pornography as a rights violation would help address jurisprudential problems. It would rationalize banning possession, clarify who are child pornography's victims, support restitution, justify anti-voyeurism measures, harmonize criminal and civil law, and possibly help justify continued federal action.

##### A. *Prohibiting Private Possession*

A rights-based approach would justify banning private possession of child pornography. Under *Stanley*, privately viewing obscenity is constitutionally

325. Potuto, *supra* note 1, at 35.

326. See Rogers, *supra* note 251, at 1045–46.

327. See Potuto, *supra* note 1, at 33 ("[T]he pornography victim faces a greater possibility that his or her sexual activity will not remain secret, a continuing possibility of disclosure, and certainly a decreased likelihood that, if disclosed, he or she successfully can protect his or her privacy and reputation . . . ."); Citron, *supra* note 232, at 1927 (describing a fifteen-year-old victim's suicide) ("Just before killing herself, she posted a video on YouTube explaining her devastation that the photograph is 'out there forever' and she can never get it back.").

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

329. Janet Delgado, *Re-thinking Relational Autonomy: Challenging the Triumph of Autonomy Through Vulnerability*, 5 *BIOETHICS UPDATE* 50, 59 (2019).

330. FORTIN, *supra* note 213, at 5.

331. Adler, *supra* note 170, at 34 n.142 (capitalization altered).

protected despite that material's lack of social value.<sup>332</sup> If viewing child pornography can be subject to strict bans, it should be because that act is evil. MacKinnon asks the key question: "Is it mere 'fear' of injury to children that supports the law against the use of children to make pornography?"<sup>333</sup> Adler and Hessick say yes—they want to ban only child pornography *created* abusively.<sup>334</sup> But if viewing child pornography is itself "brigaded with illegal action," if it is intrinsically evil (a *malum in se*) and a violation of children's rights, then *Osborne* reached the right result, even under a strict pro-speech rubric.<sup>335</sup>

### B. Federal Sentencing

Whether viewing child pornography qualifies as a *malum in se* or a *malum prohibitum* (evil for extrinsic reasons) affects federal criminal sentencing. Many child pornography offenses involve multiple counts, especially in the Internet era. Under the U.S. Sentencing Guidelines, counts are grouped if they are "Closely Related."<sup>336</sup> This includes offenses that "involve substantially the same harm," including by having "the same victim."<sup>337</sup> However, a Guidelines comment says "victim" does not mean "indirect or secondary victims" like "society at large."<sup>338</sup> Judge Posner thought this comment applied to child pornography distribution.<sup>339</sup> A Fourth Circuit panel that included former Justice Powell agreed.<sup>340</sup> Other jurists, though, have held that Congress's goal was protecting children from harm, so children are the relevant victims.<sup>341</sup>

Here there is precedent from lower courts for a rights-based approach to possessing child pornography. A Seventh Circuit majority held (over Judge Posner's dissent) that child pornography "directly victimizes the children portrayed by violating their right to privacy, and in particular violating their individual interest in

332. Genevieve Lakier says the Court cited value in explaining why "child pornography could be entirely prohibited," but she cites *Ferber* (which concerned distribution) and not *Osborne* (which concerned private possession). Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2211 n.209 (2015). *Osborne* mentioned *Ferber*'s value holding, but assumed "a First Amendment interest in viewing and possessing child pornography" before distinguishing *Stanley*. *Osborne v. Ohio*, 495 U.S. 103, 108 (1990).

333. MACKINNON, *supra* note 169, at 104.

334. Hessick, *supra* note 249, at 1443.

335. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass., 383 U.S. 413, 426 (1966) (Douglas, J., concurring in the judgment), *disapproved of by* Miller v. California, 413 U.S. 15, 23 (1973); *see also* Eugene Volokh, *Florida "Revenge Porn" Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013, 7:51 PM), <https://volokh.com/2013/04/10/florida-revenge-porn-bill> [<https://perma.cc/9HYV-GB8W>] (opining that a ban on "nonconsensual posting of nude pictures of another" would be constitutional).

336. U.S. SENT'G GUIDELINES MANUAL § 3D1.1(a)(1) (U.S. SENT'G COMM'N 2023); *see also* United States v. Tillmon, 195 F.3d 640, 642 (11th Cir. 1999) (per curiam).

337. U.S. SENT'G GUIDELINES MANUAL § 3D1.2(a), (b); *see also* Tillmon, 195 F.3d at 642.

338. U.S. SENT'G GUIDELINES MANUAL § 3D1.2 cmt. n.2; *see also* Tillmon, 195 F.3d at 642.

339. *See* United States v. Sherman, 268 F.3d 539, 552 (7th Cir. 2001) (Posner, J., dissenting from denial of reh'g en banc).

340. United States v. Toler, 901 F.2d 399, 403 (4th Cir. 1990).

341. Tillmon, 195 F.3d at 643; United States v. Boos, 127 F.3d 1207, 1210–11 (9th Cir. 1997); United States v. Rugh, 968 F.2d 750, 756 (8th Cir. 1992).

avoiding the disclosure of personal matters.”<sup>342</sup> The Eleventh Circuit similarly deemed child pornography distribution “a continuing invasion of privacy.”<sup>343</sup> The Fifth Circuit held that “the mere existence of child pornography represents an invasion of the privacy of the child depicted,” a “despicable intrusion on the lives of the young and the innocent.”<sup>344</sup> These are good steps. If lawmakers, courts, and prosecutors see those depicted in child pornography as sufferers of rights violations, then identifying the victim of such crimes becomes easy.

A rights-based understanding could also affect the Sentencing Guidelines themselves. The Guidelines addressing child pornography have been criticized for arbitrariness. They frequently result in longer sentences than those recommended for repeat child molesters.<sup>345</sup> Even under a rights framework, that criticism is merited: of course not every instance of viewing is a worse rights violation than a physical sexual assault. A rights framework also suggests the disproportionality of subjecting every juvenile who views child pornography to sex-offender registration—consensual, private sharing of images among teenagers, as discussed in Part III.F above, may not be a rights violation at all, and lifetime registration seems a cruel response to it.<sup>346</sup>

Turning to specific aspects of the Guidelines, they adjust the offense-severity level for child pornography possession based on factors including distribution, economic motives, the age of the child, and the number of images possessed.<sup>347</sup> An official comment recommends an upward departure where the number of images “substantially underrepresents the number of minors depicted.”<sup>348</sup> Videos count as seventy-five images each, but an upward departure may be proper if the videos are much longer than five minutes.<sup>349</sup> The Supreme Court’s focus on distribution and economics is indeed misplaced,<sup>350</sup> but understanding the viewing of child pornography as an intrinsic rights violation does not require treating these factors as altogether irrelevant—after all, if viewing is itself evil, then distributing images so that they can be viewed more is a serious offense.<sup>351</sup> Receiving

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342. *Sherman*, 268 F.3d at 547.

343. *Tillmon*, 195 F.3d at 644.

344. *United States v. Norris*, 159 F.3d 926, 930 (5th Cir. 1998).

345. Hessick, *supra* note 189, at 860–61; Dillof, *supra* note 250, at 1345–46; *but see* Audrey Rogers, *Child Pornography’s Forgotten Victims*, 28 PACE L. REV. 847 (2008) (arguing for tougher penalties for possession).

346. *See* Catherine L. Carpenter, *Against Juvenile Sex Offender Registration*, 82 U. CIN. L. REV. 747 (2014).

347. U.S. SENT’G GUIDELINES MANUAL § 2G2.2(b) (U.S. SENT’G COMM’N 2023).

348. *Id.* cmt. n.6(B)(i).

349. *Id.* cmt. n.6(B)(ii).

350. *See* discussion *supra* Parts I–II.

351. *See* *United States v. Price*, 711 F.3d 455, 460 (4th Cir. 2013) (“[H]is conduct had the effect of exponentially multiplying both the real and projected evils . . . [T]he district court was true to both the spirit and letter of Section 2G2.2(b)(7) in counting every image [the defendant] sent . . . to every person when applying the number of images enhancement.”).

payment for doing so makes it likelier that distribution will be widespread and repeated, which is also relevant.<sup>352</sup>

As for the age of the child, a rights framework points in multiple directions. A right is a right no matter who it belongs to, and older minors' right to intimate privacy should not receive less protection simply because of their age.<sup>353</sup> However, harm to younger children's developmental and autonomy rights may generally be of greater concern, as they are still in a more formative stage of life.<sup>354</sup> Then again, older juveniles may better understand the injury they suffer from being depicted.<sup>355</sup> Other considerations are relevant to age as well, including society's responsibility for those who are most vulnerable.<sup>356</sup> A right is relevant to thinking about age's role, but not in a straightforward way.

A rights framework does clearly support the Guidelines' approach to the number of images. Weighing the number of children depicted, and not just the number of images, recognizes that wrong is done to each child. A rights framework also suggests taking into account images' focus and, where determinable, the length and amount of viewing. A quick glance at a blurry or oblong photo invades bodily privacy less than slowly and methodically examining a child's private body parts and sexual acts. The degree of carnal knowledge the defendant extracts should matter. The Guidelines may already hint at this in treating videos as more serious than photos, and longer videos as more serious still. A rights framework justifies these distinctions.

### C. Justifying Restitution

People convicted of federal child pornography crimes must pay restitution to victims.<sup>357</sup> In *Paroline*, the Supreme Court decided how much any particular viewer is responsible for providing.<sup>358</sup> As described in Part I.B.2 above, the victim in that case suffered much harm. However, images of her circulated among thousands of viewers, and the defendant in the case at hand possessed just two

352. *Cf.* *State v. Jacobellis*, 179 N.E.2d 777, 781 (Ohio 1962) (describing a film as not “filth for filth’s sake. It was worse. It was filth for money’s sake.”), *rev’d*, 378 U.S. 184 (1964).

353. *See* *State v. Parker*, 147 P.3d 690, 698 (Alaska 2006) (finding no basis in state law for treating “production and use of pornographic images of sixteen- and seventeen-year-olds more leniently”).

354. Ateret Gewirtz-Meydan et al., *Psychopathology among Adult Survivors of Child Pornography*, 98 CHILD ABUSE & NEGLECT, at 2 (Dec. 2019) (“[Y]ounger age at trauma exposure is associated with increased risk for posttraumatic stress disorder (PTSD) . . .”).

355. *Id.* (“[O]lder age at sexual abuse is associated with a higher risk for psychopathology, as survivors have more awareness that these experiences are taboo and stigmatizing.” (internal citations omitted)).

356. *United States v. Cahill*, No. ACM 36769, 2007 CCA LEXIS 495, at \*4 (A.F. Ct. Crim. App. Oct. 5, 2007) (“Little in nature is so universally evident as is the desire to protect the youngest and most vulnerable members of a society.”); U.S. SENT’G GUIDELINES MANUAL § 3A1.1 cmt. n.2 (B) (U.S. SENT’G COMM’N 2023) (recommending stronger penalties for hate crimes against a victim “who is unusually vulnerable due to age, physical or mental condition”).

357. 18 U.S.C. § 2259(a), (c)(4).

358. *Paroline v. United States*, 572 U.S. 434, 439 (2014).

such images.<sup>359</sup> The issue before the Court was whether he could be ordered to pay \$3.4 million in restitution.<sup>360</sup>

A rights framework clarifies half of the problem presented by *Paroline*. Viewers do have individual moral responsibility, though how much each should pay remains a hard question. First, every viewer is meaningfully culpable. Anthony Dillof has written that while viewers contribute to the harm children suffer, individual cases of possession “are insufficient contributing causes of the production of child pornography, child sexual abuse, and privacy violations.”<sup>361</sup> The harms children suffer from viewings are inflicted in the aggregate.<sup>362</sup> Dillof writes that the culpability of any given viewer is less than that of a joint actor working with a limited number of others to inflict an injury.<sup>363</sup> He concludes that the penalties for possession are disproportionately severe.<sup>364</sup>

A rights approach complicates this argument. Culpability does not depend only on the infliction of harm. While the marginal harm from an offense like the viewing of a widely distributed image of child pornography may decrease as more people possess the image, every viewing remains equally a rights violation.<sup>365</sup> That does not resolve the issue of restitution altogether, as causation of harm is relevant. But a defendant who violates a right has committed a wrong that can be imputed to that defendant, even if many others also contributed to the resulting harm.

*Paroline* interpreted the federal restitution statute as including a proximate-cause requirement.<sup>366</sup> The defendant’s “contribution to the causal process underlying the victim’s losses was very minor,” the Court held, and federal defendants have no right to contribution from each other.<sup>367</sup> The Court therefore concluded that defendants’ restitution obligations should be assessed “in proportion to their respective causal roles and their own circumstances,” so as to educate people about the harms victims suffer.<sup>368</sup> *Paroline* accepts that every viewer can be made to give restitution, a holding compatible with a rights framework.

#### D. Fighting Voyeurism

Building child pornography doctrine from obscenity law, rather than rights theory, has made voyeurism needlessly debatable. Recall Adler’s argument that a hidden-camera recording of two girls bathing is not obscene because it is sexual only to the pedophilic gaze.<sup>369</sup> Under *Miller*, the recording itself may not be

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359. *Id.* at 440–41.

360. *Id.* at 441.

361. Dillof, *supra* note 250, at 1363.

362. *Id.*

363. *Id.* at 1366.

364. *Id.* at 1366, 1378.

365. I thank Dillof for our correspondence and his detailed suggestions for this article.

366. *Paroline v. United States*, 572 U.S. 434, 446 (2014).

367. *Id.* at 454–55.

368. *Id.* at 462.

369. See discussion *supra* Part II.B.

obscene, and it would be troubling for (most) parents to be convicted for possessing it.

But is it child pornography? The relevant federal statutes define criminal offenses with reference to “lascivious” and “graphic” displays of genitalia.<sup>370</sup> That limit makes sense in that not all minor nudity is obscene.<sup>371</sup> However, it has also led some courts to reject convictions for highly exploitative privacy invasions. In one recent D.C. Circuit case, the defendant—who also physically sexually abused his girlfriend’s daughter—hid a camera in the girl’s bedroom.<sup>372</sup> He recorded her undressing, exposing her genitalia for nine seconds and her breasts for around eleven minutes, grooming her genitalia, and walking around naked.<sup>373</sup> He also hid a camera in a bathroom vent, capturing two girls toileting and grooming their genitalia; he captured images of both girls’ buttockses (for twenty seconds each) and one’s pubic area (for sixteen seconds).<sup>374</sup> The court reversed his conviction, holding that the relevant provision covers only depictions of a child who “exhibits sexual desire or an inclination to engage in . . . sexual activity.”<sup>375</sup> As a matter of statutory interpretation, that is plausible. As the Second Circuit noted, “overreliance on the intent of the photographer, and his idiosyncratic desires, raises constitutional concerns” and the possibility of an overly subjective standard.<sup>376</sup>

The D.C. Circuit’s holding does represent a minority approach among federal appellate courts. Seven have endorsed factors more amenable to prosecutions, and at least one Eleventh Circuit opinion directed courts to consider a defendant’s intent in creating even an objectively innocent image.<sup>377</sup> As Judge Henderson wrote in dissent from the D.C. Circuit decision, if harm was Congress’s main concern, then a voyeur who planted recording devices to capture naked images should not escape punishment simply because the child was not intentionally acting in a sexual way.<sup>378</sup>

However, this is the logical outcome of an approach devoid of rights. Indeed, the D.C. Circuit noted anti-voyeurism statutes that are more rights-oriented than

370. 18 U.S.C. § 2256(2)(A)(5), (2)(B)(3). This definitions section used “lewd” instead of “lascivious” until a 1984 amendment. See 18 U.S.C.S. § 2256 (Lexis), Amend. Notes (1984).

371. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975). That is not to say that this specific limitation is the only constitutional one. See *United States v. Hillie*, 39 F.4th 674, 685 (D.C. Cir. 2022), *reh’g en banc den’d*, 38 F.4th 235 (D.C. Cir. 2022).

372. *Hillie*, 39 F.4th at 677.

373. *Id.* at 678.

374. *Id.*

375. *Id.* at 685.

376. *United States v. Spoor*, 904 F.3d 141, 151 (2d Cir. 2018).

377. *Hillie*, 39 F.4th at 696–97 (Henderson, J., dissenting); *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986) (listing the factors as “1) whether the focal point of the visual depiction is on the child’s genitalia or pubic area; 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer”); *United States v. Holmes*, 814 F.3d 1246, 1252 (11th Cir. 2016).

378. *Hillie*, 39 F.4th at 699–700 (Henderson, J., dissenting).

(its interpretation of) the child pornography statute.<sup>379</sup> As Citron has likewise summarized, the heart of voyeurism is an invasion of intimate privacy.<sup>380</sup> Understanding both voyeurism and child pornography as violations of related rights would connect these two areas of law rather than artificially divorcing them.

One well-established doctrinal starting point could be analogizing from personally identifying information (“PII”).<sup>381</sup> PII enjoys protection mostly uncurtailed by First Amendment precedent.<sup>382</sup> To be sure, not all voyeuristic images and child pornography reveal a person’s identity—close-up shots depicting only certain body parts might be effectively anonymous and thus not count as PII. However, federal law protects financial PII if it is “nonpublic.”<sup>383</sup> Possessors of most kinds of images revealing nudity certainly have “access to privileged information about the victim (hence damaging the victim’s capacity to control his or her presentation of self to others).”<sup>384</sup> That is true even if the images reveal only anonymous private body parts and not a face. Privacy rights are related to reputational concerns, but protect distinct interests.<sup>385</sup> One’s genitalia are entitled to privacy regardless of whether one’s eyes are also visible. Indeed, Brandeis and Warren connected images of “a woman’s face” to those of “her form, and her actions . . . colored to suit a gross and depraved imagination.”<sup>386</sup> Nude images, be they voyeuristic or child pornography, should be entitled to privacy protections, just like financial and medical information.<sup>387</sup>

### *E. Harmonizing Criminal and Civil Law*

A rights-based approach would also draw on the insights of civil law. Civil law already treats the viewing of child pornography as a rights violation. Civil privacy rights protect against “intrusion upon an individual’s private self-esteem and

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379. See *id.* at 685 (majority opinion); accord *United States v. Donoho*, 76 F.4th 588, 601 (7th Cir. 2023) (Easterbrook, J., concurring). The federal voyeurism statute applies only in federal enclaves and maritime jurisdictions. See 18 U.S.C. § 1801(a).

380. Citron, *supra* note 232, at 1874.

381. Kelsey Benedick, Note, *Eradicating Revenge Porn: Intimate Images as Personal Identifying Information*, 22 LEWIS & CLARK L. REV. 232, 259 (2018).

382. *Id.* at 258; see also Citron & Franks, *supra* note 243, at 345, 346–47 (noting the criminalization of “many privacy invasions”); but see *Bartnicki v. Vopper*, 532 U.S. 514, 528–30, 535 (2001) (holding that distribution of an illegally recorded conversation was constitutionally protected where its content was a matter of public concern).

383. 15 U.S.C. § 6809(4); see also Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1830 (2011).

384. Slane, *supra* note 133, at 562.

385. See Citron, *supra* note 232, at 1939; cf. Scott, *supra* note 262, at 727 (“The interest protected by privacy is not reputation.”); Anthony L. Pessino, Note, *Mistaken Identity: A Call To Strengthen Publicity Rights for Digital Personas*, 4 VA. SPORTS & ENT. L.J. 86, 99 (2004) (noting that appropriation protects a depicted person’s financial interests, but not personal privacy).

386. Warren & Brandeis, *supra* note 40, at 214.

387. Franks, *supra* note 243, at 1260, 1311, 1325; see also Paul Ohm, *Sensitive Information*, 88 S. CAL. L. REV. 1125, 1153, 1158–59 (2016) (contrasting America’s lack of protections for intimate privacy with European law and U.S. protections for children’s data).

dignity.”<sup>388</sup> Because civil law doctrines protect rights, they have mostly avoided First Amendment conflicts.<sup>389</sup> Adopting as a rationale the civil protection of “the individual’s inviolate personality by limiting unwanted disclosures of personal information” would bolster the case for criminalizing the viewing of child pornography.<sup>390</sup>

#### *F. Supporting the Federal Role?*

Lastly, centering rights could support the federal role in prohibiting child pornography, which is currently understood as an exercise of Congress’s Commerce Clause power.<sup>391</sup> Under current precedent, this is proper.<sup>392</sup> However, that caselaw may not have been rightly decided. The Constitution lets Congress “regulate Commerce . . . among the several States.”<sup>393</sup> The possession of child pornography is not inherently economic. As the Eleventh Circuit once held, it may involve “no transactions, no consumption of goods or services, and no necessary resort to the marketplace.”<sup>394</sup> The federal government lacks any general police powers over non-commercial activity.<sup>395</sup> The court therefore held that prosecution for possession was unconstitutional.<sup>396</sup> It arguably understood the Commerce Clause correctly.<sup>397</sup>

That does not mean originalists should reject federal criminalization. Randy Barnett and Evan Bernick have determined that as originally understood, the Fourteenth Amendment lets Congress affirmatively protect natural rights where states fail to do so.<sup>398</sup> Barnett and Bernick’s understanding of the Fourteenth Amendment does conflict with longstanding Supreme Court precedent requiring state action, but that precedent is itself questionable.<sup>399</sup> While Congress has found that federal prohibition “is essential to the effective control of the interstate

388. Pessino, *supra* note 385, at 99 (citation omitted).

389. See *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 202 (1905) (“The right to speak and the right of privacy have been coexistent.”); *Solove, supra* note 265, at 975 (“Privacy interests often do not conflict with the reasons for which society values free speech. In fact, privacy may serve these ends as well as or even better . . .”); *Scott, supra* note 262, at 744.

390. *Citron, supra* note 46, at 1852.

391. See, e.g., *United States v. Wehrle*, 985 F.3d 549, 556–57 (7th Cir. 2021); *United States v. McCall*, 833 F.3d 560, 564–65 (5th Cir. 2016); *United States v. Ramos*, 685 F.3d 120, 134 (2d Cir. 2012); *United States v. Smith*, 459 F.3d 1276, 1284–85 (11th Cir. 2006).

392. See *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (“Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”).

393. U.S. CONST. art. I, § 8, cl. 3.

394. *United States v. Maxwell*, 386 F.3d 1042, 1056 (11th Cir. 2004), *vacated*, 546 U.S. 801 (2005), *rev’d in relevant part*, 446 F.3d 1210 (11th Cir. 2006).

395. *Id.* at 1060.

396. *Id.* at 1069.

397. See, e.g., *United States v. Lopez*, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring).

398. BARNETT & BERNICK, *supra* note 219, at 319–51.

399. *Contra United States v. Stanley*, 109 U.S. 3, 11 (1883) (*The Civil Rights Cases*); compare *United States v. Cruikshank*, 92 U.S. 542, 554–55 (1875), with *Stanley*, 109 U.S. at 58–59 (Harlan, J., dissenting); BARNETT & BERNICK, *supra* note 219, at 319–51.

market in child pornography,” it could also assert authority to protect children’s rights when states cannot do so.<sup>400</sup> This rationale seems reasonable in the digital era.

In any event, thinking of how criminal law can help protect rights—rather than just being their opposite—is a worthwhile project for a free society.<sup>401</sup> For those concerned about the reach of federal power (including me), understanding child pornography as a rights violation could justify federal action even if Commerce Clause precedent has gone astray.

## V. A RIGHTS APPROACH HELPS ADDRESS EMERGING ISSUES

Where the case is only new in instance, and the sole question is upon the application of a recognized principle to a new case, it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago.

—*Pavesich* (1905)<sup>402</sup>

A negative right to intimate privacy offers ways to think about non-consensual adult pornography and child pornography generated by artificial intelligence.

### A. *Revenge Pornography*

Non-consensual pornography involving adults, including the subset of “revenge porn,” has become a prominent issue.<sup>403</sup> Four percent of American internet users have either had their explicit images posted online without their consent or been threatened with that.<sup>404</sup> Most of America now has laws against non-consensual pornography.<sup>405</sup>

Jurisprudence regarding it is still developing. Much like child pornography, non-consensual pornography does not fit well into conventional frameworks. The Supreme Court has not recognized it as a distinct exception to the First Amendment.<sup>406</sup> It differs from obscenity for several of the same reasons as does child pornography, including the reasons for banning it.<sup>407</sup> The scope of what counts

400. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(1)(F), 120 Stat. 587, 624 (2006).

401. See *Ex parte Metzger*, 610 S.W.3d 86, 104 (Tex. App. 2020) (“[T]he rights to personal seclusion, bodily integrity, and sexual privacy are substantial rights; and the state has a compelling interest in protecting those rights . . . .”); cf. Katherine Hunt Federle, *Rights Flow Downhill*, 2 INT’L J. CHILD.’S RTS. 343, 366 (1994) (“[R]ights tied to power create zones of mutual respect for power that limit the kinds of things we may do to one another.”).

402. *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 194 (1905) (capitalization altered, citation and quotation marks omitted).

403. See *State v. VanBuren*, 214 A.3d 791, 794 (Vt. 2018); Diane Bustamante, Comment, *Florida Joins the Fight Against Revenge Porn: Analysis of Florida’s New Anti-Revenge Porn Law*, 12 FIU L. REV. 357, 360–64 (2017) (chronicling the history of revenge porn from 1980 to 2014).

404. *VanBuren*, 214 A.3d at 795.

405. See Citron, *supra* note 232, at 1932 (counting 42 states plus the District of Columbia).

406. See *VanBuren*, 214 A.3d at 800.

407. See *id.*

as non-consensual pornography also differs from obscenity, as such imagery “need not appeal to the prurient interest or be patently offensive” and the goal is often to “shame the subject, not arouse the viewer.”<sup>408</sup> Vermont counts as non-consensual pornography non-obscene nude images.<sup>409</sup>

Nevertheless, as the Vermont Supreme Court noted, such material violates privacy rights.<sup>410</sup> That court relied on three authorities: (1) U.S. Supreme Court suggestions “that the government may regulate speech about purely private matters that implicates privacy and reputational interests”; (2) Warren and Brandeis; and (3) the tort of publicity.<sup>411</sup> It held that the law in question furthered compelling state interests and satisfied the First Amendment.<sup>412</sup> This opinion is laudable. The court shifted from obscenity to privacy, then upheld a criminal prohibition. The only thing missing was a theory of rights (which the Indiana Supreme Court and Texas Court of Appeals did gesture at in upholding similar laws).<sup>413</sup>

An important aspect of the Vermont decision is its recognition that consent waives privacy only to a specific extent. A victim may well have consented to appear in images and share them with one or more people. Indeed, much revenge porn originates from perceived betrayal—hence its name.<sup>414</sup> Disturbingly, though, consent is often overread. In a case involving the *Girls Gone Wild* video series, a judge considered a woman’s mere presence at Mardi Gras constructive consent to being videotaped.<sup>415</sup> Similarly, a Florida appellate decision held that two teenagers lacked any right to privacy in sexual photographs because a reasonably prudent person would not trust a teenager to keep them private.<sup>416</sup> New York’s highest court notoriously held that Brooke Shields could not disaffirm her mother’s consent to continued distribution of racy nude photographs of Brooke’s ten-year-old self.<sup>417</sup> Too often, courts treat any waiver of privacy as categorical.<sup>418</sup>

That is wrong. *Pavesich* observed that privacy can be “waived for one purpose and still asserted for another; it may be waived in behalf of one class and retained as against another class; it may be waived as to one individual and retained as

408. *Id.* at 801.

409. *See id.*

410. *Id.*

411. *Id.* at 802.

412. *Id.* at 808.

413. *See State v. Katz*, 179 N.E.3d 431, 447 (Ind. 2022); *see also Ex parte Metzger*, 610 S.W.3d 86, 103–04 (Tex. App. 2020).

414. *See Citron, supra* note 232, at 1899; Christian Nisttáhu, Comment, *Fifty States of Gray: A Comparative Analysis of ‘Revenge-Porn’ Legislation Throughout the United States and Texas’s Relationship Privacy Act*, 50 TEX. TECH L. REV. 333, 339 (2018).

415. Benjamin J. Cooper, Note, *Naked Before the Law: Reality Porn and the Capacity to Contract*, 11 CARDOZO WOMEN’S L.J. 353, 356 (2005) (quoting Tr. of Mar. 8, 2002, at 29, *Doe v. Mantra Films, Inc.*, No. 01-12450 (Civ. Dist. Orleans 2002)).

416. *A.H. v State*, 949 So.2d 234, 237 (Fla. Dist. Ct. App. 2007).

417. *Shields v. Gross*, 448 N.E.2d 108, 109 (N.Y. 1983).

418. *See Justin Pitcher, Comment, The State of the States: The Continuing Struggle to Criminalize Revenge Porn*, 2015 B.Y.U. L. REV. 1435, 1443 (2015).

against all other persons.<sup>419</sup> The Illinois Supreme Court, too, has held that sharing a sexual image with one person does not waive all privacy.<sup>420</sup> Still, these rules are offset by the assumption that “the right to bodily privacy—especially in photographs—can be lost or traded away by being the subject of public attention or by consenting to share information or images.”<sup>421</sup> The Brooke Shields decision even assumed that a parent alone decides whether a child’s sexualized nudity can be financially exploited through public distribution.

Recognizing a negative right to intimate privacy would strengthen the case against non-consensual pornography by connecting such imagery to other abuses.<sup>422</sup> The viewing of any of these violates privacy. Looking at non-consensual pornography probably cannot be banned without a strong *mens rea* requirement, as unlike much child pornography, the contraband nature of non-consensual pornography may not be immediately apparent.<sup>423</sup> It is also worth asking whether the viewing of non-consensual pornography, especially of celebrities, spreads so quickly that viewing it has to be tolerated as a practical matter. However, consider an anecdote from a major hack of nude photos in 2014. One of the celebrities depicted announced that she was underage when photographed.<sup>424</sup> Web moderators rushed to remove the images even from edgy sites like Reddit.<sup>425</sup> Mary Anne Franks concluded that criminal law can be “a powerful motivator.”<sup>426</sup> A negative right to intimate privacy would reinforce that waivers are not always categorical and their scope should be decided only by the person depicted (rather than, say, a parent), reinforce moral concerns about non-consensual pornography, and support criminal prohibitions on producing, distributing, and viewing it.<sup>427</sup>

### B. AI Child Pornography

A more technologically complex problem is posed by pornography generated by artificial intelligence (“AI”), but children’s negative right to intimate privacy can provide some guidance here as well. AI refers to the use of computers and

419. *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 199 (1905). Aikenhead assumes only a positive right to privacy makes this true. Aikenhead, *supra* note 221, at 289. She worries that a negative right would “require women and girls to take extraordinary measures to conceal their bodies in order to avoid being objectified and sexualized for consumption online.” *Id.* at 289–90. Our goals overlap, but I see a negative right as requiring conscious and specific waiver, too, as in *Pavesich*. Our difference here may be semantic.

420. *People v. Austin*, 155 N.E.3d 439, 452 (Ill. 2019).

421. Slane, *supra* note 133, at 545.

422. McGlynn et al., *supra* note 5, at 26 (describing a “continuum of image-based sexual abuse” (citation omitted)).

423. *Cf. United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) (interpreting scienter requirements broadly for the federal criminal prohibition on distributing child pornography).

424. Franks, *supra* note 243, at 1304.

425. *Id.* at 1304–05.

426. *Id.* at 1305.

427. *People v. Austin*, 155 N.E.3d 439, 452 (Ill. 2019) (“Consent is contextual.”); *see also Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1352, 1357 (N.D. Tex. 1985) (rejecting liability based on a pornographic magazine running nude photographs of children as part of an excerpt from an educational book they consented to being depicted in).

other technology to develop “intelligent” machines that can simulate human capabilities and even perform tasks no human can perform. These are trained to recognize essentially any data set.

If a machine is fed pornographic images, then it can generate pornographic images that are amalgamations of the originals. These are called synthetic images.<sup>428</sup> AI lets users craft nude, semi-nude, and sexual images without the direct participation of any actual people. People can use “text-to-image” technology to create images from text prompts using a massive database of existing images labeled with keywords.<sup>429</sup> The resulting new images are “remixes.”<sup>430</sup> Using AI, users can create child pornography without actually photographing, recording, or interacting with a child.

One common text-to-image model is Stable Diffusion XL.<sup>431</sup> Its “Acceptable Use Policy” requires that users not exploit or harm children, including by creating or disseminating exploitative content.<sup>432</sup> Other text-to-image AI models also have rules relevant to child pornography. OpenAI—the creator of ChatGPT and other AI programs—says that its models may not be used to sexually exploit children.<sup>433</sup> It also tells users that it reports child pornography to the National Center for Missing and Exploited Children.<sup>434</sup>

Nevertheless, there are ways to bypass these filters and “jailbreak”<sup>435</sup> AI programs so that they produce sexually explicit content.<sup>436</sup> Researchers and offenders have successfully done this.<sup>437</sup> There are three common forms of child pornography produced by AI: computer-generated, morphed, and virtual. *Computer-generated* child pornography is developed by a computer with no exploitation whatsoever of real children (i.e., it consists of a generic image of a child).<sup>438</sup> *Virtual* child pornography

428. Mark L. Schiebler & Carri Glide-Hurst, *Synthetic Images Are Here to Stay*, 308 *RADIOLOGY* 1 (2023), <https://pubs.rsna.org/doi/10.1148/radiol.231098> [<https://perma.cc/XEB4-XYM3>]; see also *What is Synthetic Imaging?*, BAE SYS., <https://www.baesystems.com/en-us/definition/what-is-synthetic-imaging> [<https://perma.cc/9YNA-5WK7>].

429. Carmen Drah, *AI Was Asked to Create Images of Black African Docs Treating White Kids. How'd It Go?*, NPR (Oct. 6, 2023), <https://www.npr.org/sections/goatsandsoda/2023/10/06/1201840678> [<https://perma.cc/7PK6-TKSJ>].

430. *Id.*

431. *Stable Fusion XL*, STABILITY.AI, <https://stability.ai/stable-diffusion> [<https://perma.cc/MA32-CE5T>].

432. *Acceptable Use Policy*, STABILITY.AI, <https://stability.ai/use-policy> [<https://perma.cc/TU3V-HNNR>].

433. *Usage Policies*, OPENAI, <https://openai.com/policies/usage-policies> [<https://perma.cc/V7BH-5CQH>].

434. *Id.*

435. *Jailbreaking*, PCMAG ENCYCLOPEDIA, <https://www.pcmag.com/encyclopedia/term/jailbreaking> [<https://perma.cc/CY8U-3P75>] (defining jailbreaking as to “remove a restricted mode of operation”; jailbreaking is also sometimes referred to as “rooting”).

436. Rhiannon Williams, *Text-to-Image AI Models Can Be Tricked into Generating Disturbing Images*, MIT TECH. REV. (Nov. 17, 2023), <https://www.technologyreview.com/2023/11/17/1083593> [<https://perma.cc/E2JA-ZG9J>].

437. *Id.*

438. Jisuk Woo, *The Concept of “Harm” in Computer-Generated Images of Child Pornography*, 22 J. MARSHALL J. COMPUT. & INFO. L. 717, 719 (2004).

appears to feature minors but instead uses images of adults who, naturally or because of digital manipulation, look young.<sup>439</sup> *Morphed* child pornography digitally manipulates innocent images of children into new, sexualized images.<sup>440</sup>

In virtual and computer-generated child pornography, no identifiable child's negative right to intimate privacy is violated. The Supreme Court has held that non-obscene sexual images of youthful-looking adult performers or digital creations are protected by the First Amendment because they "record[] no crime and create[] no victims by [their] production."<sup>441</sup> A negative right to intimate privacy does not change this analysis, regardless of whether it is right, and the Court's holding may logically extend to similar images generated entirely by AI. However, as *Ashcroft* noted: "Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not."<sup>442</sup> Obscenity laws can still ban many images of childhood nudity and sexuality, even if these feature no imagery of actual children.<sup>443</sup>

As for morphed explicit imagery, some courts have held that it can be punished, either because it qualifies as child pornography or because the government can protect children from reputational and psychological harm.<sup>444</sup> At least one court has instead held that it is constitutionally protected because the mere use of a child's face results in "no demonstrable harm," especially where the child does not know of images' existence.<sup>445</sup> Morphed images do not invade children's bodily privacy rights, though reputation is a distinct issue.<sup>446</sup>

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

440. Carliette Sierralta, *Should "Morphed" Child Pornography Fall Under the Protection of the First Amendment's Free Speech Clause?*, 46 NOVA L. REV. 305, 306 (2022). "Morphed" images may be better described as "composite." See *Ashcroft*, 535 U.S. at 242; *United States v. Rearden*, 349 F.3d 608, 613 (9th Cir. 2003).

441. *Ashcroft*, 535 U.S. at 250.

442. *Id.* at 240.

443. Justice Thomas did note that a ban on such pornography might survive scrutiny if "technological advances" made it so realistic that it interfered with child pornography prosecutions. *Id.* at 259 (Thomas, J., concurring in the judgment); *accord id.* at 263, 265 (O'Connor, J., concurring in the judgment in part and dissenting in part). That consequentialist concern is distinct from a rights-based or other ontological argument.

444. See *United States v. Mecham*, 950 F.3d 257, 267 (5th Cir. 2020); *United States v. Anderson*, 759 F.3d 891, 896 (8th Cir. 2014) (holding that morphed images are not child pornography but can still be banned); *Doe v. Boland*, 698 F.3d 877, 880–82 (6th Cir. 2012); *United States v. Hotaling*, 634 F.3d 725, 729 (2d Cir. 2011); *United States v. Bach*, 400 F.3d 622, 632 (8th Cir. 2005); Russell Spivak, "Deepfakes": *The Newest Way to Commit One of the Oldest Crimes*, 3 GEO. L. TECH. REV. 339, 373 (2019); cf. Citron, *supra* note 232, at 1921 (arguing that "deep-fake" pornography "hijack[s] people's sexual and intimate identities"). One court also held that a sadistic-conduct enhancement applied where the defendant created a virtual image that merely "made it appear" that a minor was being subjected to violence. *Hotaling*, 634 F.3d at 731–32.

445. *State v. Zidal*, 156 N.H. 684, 693–94 (2008); see also *Parker v. State*, 81 So.3d 451 (Fla. 2d Dist. Ct. App. 2011) (reaching a similar statutory result); *Stelmack v. State*, 58 So.3d 874 (Fla. 2d Dist. Ct. App. 2010) (same).

446. See Citron, *supra* note 232, at 1939; Scott, *supra* note 262, at 727.

However, pornography that either includes explicit images of “an identifiable child” or uses these as a baseline for developing a final image could violate children’s negative right to intimate privacy.<sup>447</sup> As *Pavesich* held, one’s “form and features” belong to oneself.<sup>448</sup> People have long enjoyed the right to prevent their features—“whether normal or distorted”—from being used without permission.<sup>449</sup> To the extent a child’s intimate body parts remain identifiable in morphed pornography, there is a rights violation. Identifiability may be a judgment call, and perhaps one best left to a jury’s reasonable discretion, as there is no binary point at which an image is transformed “enough.” Other people with technological and intellectual property expertise should propose ways to vindicate children’s negative right to intimate privacy without expanding it to cover, say, each and every child whose image serves as a baseline for AI together with potentially limitless others.

#### VI. ETHICS SHOULD SUPPLEMENT RIGHTS

Human dignity is offended by the pornographer. . . . Legally, an adult can consent to its diminishment. When a child is made the target of the pornographer-photographer, the statute will not suffer the insult to the human spirit, that the child should be treated as a thing.

— *United States v. Wiegand*, 812 F.2d 1239, 1245 (9th Cir. 1987)

Finally, ethics have a role in furthering rights. Much has been said about the decline of intermediary institutions between individuals and the government. Also regrettable is the loss of intermediary values between liberty and penal law. The criminalization of sexual acts has narrowed drastically, and as Andrew Koppelman wrote: “It matters what we think and feel. But it does not follow that the law should police” this.<sup>450</sup> However, policing is not all that the law does. Liberal criminal law is compatible with public roles for morals. Governments endorse ethical judgments reached through public deliberation.<sup>451</sup> They selectively fund viewpoints.<sup>452</sup> They are tasked with maintaining “the quality of life and the total community environment, the tone of commerce.”<sup>453</sup> In the context of public schooling, they are “a principal instrument in awakening the child to cultural values . . . and in helping him to adjust normally to his environment.”<sup>454</sup>

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447. 18 U.S.C. § 2256 (8)(C) (prohibiting virtual pornography where a specific child is identifiable); cf. Tirosh & Birnhack, *supra* note 238, at 1283 (“[L]inkability is the key to deanonymize identity.”).

448. *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 217 (1905).

449. *Clayman v. Bernstein*, 38 Pa. D. & C. 543, 546 (Ct. Comm. Pleas 1940).

450. Koppelman, *supra* note 176, at 1639.

451. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009) (citing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting); *NEA v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment)).

452. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

453. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58, 63 (1973).

454. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

While a liberal government does not exercise Platonist thought control,<sup>455</sup> ethics pervade its work. Three virtues are especially relevant to child pornography: chastity, modesty, and dignity.

### A. Chastity

James Madison wrote: “If men were angels, no government would be necessary.”<sup>456</sup> He knew better than to think people were this good. Still, the entire reason society needs laws against the sexual exploitation of children is people sexually exploiting children. Sexual restraint used to have a much greater purchase than it does now. Chastity has often been set aside as quaint, and some have even accused it of reinforcing male domination.<sup>457</sup> One imagines certain men, all too eager to live without restraint, nodding along.

Yes, chastity was long part of a set of patriarchal principles regulating sexuality, both male and female.<sup>458</sup> But the idea that the world would be a better place—for people of every sex, age, and variety of sexuality and gender expression—if people did not let their lustful gaze roam need not be outdated.<sup>459</sup> Chastity was once offered as an antidote to a legalistic mindset that focused only on the act of adultery.<sup>460</sup> It was meant to safeguard human beings and relationships in a more principled way; hence legend praised the townsfolk who averted their eyes from looking on Lady Godiva’s nakedness.<sup>461</sup>

Such self-restraint has become almost unimaginable, as a practice and even as an ideal. “It is no longer considered merely acceptable to look at women naked without their consent; lack of consent has increasingly become the entire point of the spectacle, the factor that provides the erotic charge.”<sup>462</sup> Legalism is back in fashion, and indulgence is celebrated with cultural enthusiasm right up until it becomes a jailable rights violation. That kind of reasoning may be adequate for criminal law, but as a guiding principle for society, it leaves much wanting. John Adams thought the liberal order he helped institute “was made only for a moral and religious people,” “wholly inadequate to the government of any other.”<sup>463</sup> A

455. *Bowen v. Gilliard*, 483 U.S. 587, 632 (1987) (Brennan, J., dissenting).

456. THE FEDERALIST NO. 51 (James Madison).

457. See Rachel Budde Patton, *Taking the Sting Out of Revenge Porn: Using Criminal Statutes to Safeguard Sexual Autonomy in the Digital Age*, 16 GEO. J. GENDER & L. 407, 419–20 (2015) (criticizing chastity as the product of “pre-sexual-revolution views of women, particularly . . . the belief that women should remain sexually ‘pure’ before marriage and that sex, for women, should be confined to the marriage bed”).

458. See *id.* (“Men are allowed, even encouraged, to have sex outside of committed relationships, but women who exercise the same sexual freedom are criticized.”).

459. *Matthew* 5:28.

460. *Id.* at 5:27.

461. Franks, *supra* note 243, at 1253.

462. *Id.* at 1254.

463. John Adams, *To the Officers of the First Brigade of the Third Division of the Militia of Massachusetts* (Oct. 11, 1798), quoted in JOHN ADAMS ON RELIGION AND THE CONSTITUTION, ONLINE LIBR. OF LIBERTY, <https://oll.libertyfund.org/quote/john-adams-religion-constitution> [https://perma.cc/36JK-LX55].

society that does not use education and neighborly influence to channel its most animalistic urges toward proper human goods may find itself needing force rather than enjoying freedom.

### B. Modesty

If chastity concerns curbing one's lust toward others, its complement is modesty—avoiding deliberately exciting others' lust. Some feminists dismiss this virtue as racist, sexist, and classist.<sup>464</sup> Aikenhead prioritizes instead the autonomy rights to “[a]ppearing in public, consenting to be photographed in a sexualized context, or sharing sexualized photographs with some limited audience.”<sup>465</sup> However, teaching people—especially children—about sexual caution can help guard them against exploitation and future regrets. Even advocates for broad sexual autonomy can agree that tech savviness should be included in sex education classes.<sup>466</sup>

Abstaining from sexual acts and the production of nude images has proven possible for many minors. Only around 40% of American teenagers have had sexual intercourse by the age of 19.<sup>467</sup> Youth sharing of self-taken sexual images has “likely plateaued” with just 20% of minors sending such images, 35% receiving them, and 14.5% forwarding them without consent.<sup>468</sup> Modesty does appeal to some minors.

Intense shame and familial exclusion are likelier to break a young person's spirit than nudge it toward healthy commitments, and victims should certainly not be blamed for sexual offenses committed against them.<sup>469</sup> However, just as chastity can help inspire respect for others, so too can modesty inform caution, self-restraint, and self-respect.<sup>470</sup>

464. Aikenhead, *supra* note 221, at 283; *see also* Citron, *supra* note 232, at 1876 (“Others warn that efforts to protect sexual privacy reinforce outmoded views of sexual modesty and shame . . .”); *cf.* High, *supra* note 198, at 10–11 (criticizing Article 27 of the Geneva Convention (IV) for referring to rape as a violation of women's “honour”).

465. Aikenhead, *supra* note 221, at 289.

466. Smith, *supra* note 221, at 882.

467. Joyce C. Abma & Gladys M. Martinez, *Teenagers in the United States: Sexual Activity, Contraceptive Use, and Childbearing, 2015–2019*, 196 NAT'L HEALTH STAT. REP. at \*5 (Dec. 14, 2023), <https://www.cdc.gov/nchs/data/nhsr/nhsr196.pdf> [<https://perma.cc/EX6X-YTBJ>].

468. Camille Mori et al., *Are Youth Sexting Rates Still on the Rise? A Meta-Analytic Update*, 70 J. ADOLESCENT HEALTH 531, 531 (2022).

469. *See* Cathren Page, *Unbelievable: How Narrative Can Help Vulnerable Narrators Overcome Perceived Unreliability in the Legal System*, 27 LEGAL WRITING 35, 101 (2023) (mentioning the prevalence of victim-blaming and “slut-shaming”); Alexa Dodge, “Try Not to Be Embarrassed”: A Sex Positive Analysis of Nonconsensual Pornography Case Law, 29 FEMINIST LEGAL STUD. 23, 23–24 (2021).

470. *See* Ardith Amon, *Rightly Remembering the Ladies*, READING WHEEL REV., <https://crcd.net/review-the-rights-of-women> [<https://perma.cc/K622-4YKX>] (reviewing ERIKA BACHIOCHI, *THE RIGHTS OF WOMEN: RECLAIMING A LOST VISION* (2021)) (writing that Wollstonecraft believed “both men and women should be expected to cultivate the virtue of chastity, using their reason to govern their sexual desires” and “[t]his fight for men to be held accountable to the same standards as women was a key pillar of first wave feminism”).

### C. Dignity

Finally, dignity abounds in legal and ethical discourse about sexual exploitation.<sup>471</sup> At the most abstract level, it is a conviction that every person has inherent worth.<sup>472</sup> It has ontological, moral, social, and existential aspects.<sup>473</sup> Some of its power comes from its identification of individual acts of violence with a rejection of “collective norms of humanity” and an assault on human personhood.<sup>474</sup> Dignity also recognizes victims as humans regardless of other characteristics like race, sexuality, or age.<sup>475</sup>

Beyond this, dignity is debated.<sup>476</sup> It is related to, but not the same as, autonomy.<sup>477</sup> For Kantians, dignity requires apex respect for each person’s autonomy.<sup>478</sup> For other approaches, dignity can reject self-devaluation.<sup>479</sup> Either way, dignity is a justification for rejecting the pornographic depiction of people with impaired autonomy, such as children.<sup>480</sup> All dignity theories condemn sexual violence and exploitation as *dehumanizing*. One Australian court called rape a denial of dignity because the offender treated the victim as “chattel,” a “thing that you could do with whatever you pleased.”<sup>481</sup> Canadian courts, too, have referred to objectification, saying child sexual exploitation offends dignity because “the child is reduced to a nameless thing.”<sup>482</sup>

Likewise, child pornography makes its victims “a mere means serving the voyeur’s purposes.”<sup>483</sup> This is often true even when images are produced with a teenager’s supposed consent.<sup>484</sup> Autonomous adults can consent to being depicted in pornography under American law.<sup>485</sup> The law even allows for children to be used

471. High, *supra* note 198, at 3, 6 (citing judicial decisions from India, Rwanda, and Canada, and constitutional provisions from Germany, Israel, and South Africa).

472. Dicastery for the Doctrine of the Faith, *Declaration “Dignitas Infinita” on Human Dignity* ¶ 1 (Apr. 2, 2024), [https://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_ddf\\_doc\\_20240402\\_dignitas-infinita\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_ddf_doc_20240402_dignitas-infinita_en.html) [<https://perma.cc/M7T8-FKRB>]; *accord* High, *supra* note 198, at 6.

473. Dicastery for the Doctrine of the Faith, *supra* note 472, at ¶ 7.

474. High, *supra* note 198, at 11; *see also id.* at 22 (describing a gang-rape and murder as showing “irreverence” toward humanity (*quoting* *Mukesh v. State for N.C.T. of Delhi*, (2017) 6 SCC 1, ¶ 356)).

475. *Id.* at 11, 18.

476. *Id.* at 6.

477. *Id.* at 4.

478. *Id.* at 7.

479. *Compare id.* at 5, 33–34 (criticizing this interpretation), *with* Dicastery for the Doctrine of the Faith, *supra* note 472, at ¶ 7 (embracing it).

480. High, *supra* note 198, at 32 (describing a permanently comatose person).

481. *Id.* at 22 (*quoting* *NPA v. Western Australia*, [2018] WASCA 131 (2 August 2018) ¶ 53 (Austl.) (citation omitted)).

482. *Id.* (*citing* *R. v. E.M.W.*, [2011] 308 N.S.R. 2d 15, ¶ 13 (Can.)).

483. *United States v. Wiegand*, 812 F.2d 1239, 1245 (9th Cir. 1987).

484. *See* LoveIsRespect, *Healthy Relationship High School Educators Toolkit*, at 3, <https://www.loveisrespect.org/wp-content/uploads/2016/08/highschool-educators-toolkit.pdf> [<https://perma.cc/JBK3-9MG6>] (“One in three adolescents in the U.S. is a victim of emotional, physical or sexual abuse from a dating partner . . .”).

485. *Wiegand*, 812 F.2d at 1245.

for entertainment and commercial purposes in ways many later find exploitative.<sup>486</sup> However, dignity teaches as a matter of ethics the importance of the line drawn by law: society “will not suffer the insult to the human spirit, that the child should be treated” as fodder for adult lust.<sup>487</sup>

#### CONCLUSION

Once abused women are heard and—this is the real hitch—become real, women’s silence can no longer be the context in which pornography and speech are analyzed.

— Catherine MacKinnon (1996)<sup>488</sup>

Children must be centered in discussions of child pornography. Making their rights real means thinking through sex and its relationship to privacy. It also means realizing how children differ from competent adults. Does that mean abandoning liberalism? Fineman thinks so; I do not.<sup>489</sup> It does require going beyond liberalism *horizontally*—accepting it for competent adults, but recognizing there are other members of the human family as well. It is also important to think beyond liberalism’s borders *vertically*. Liberalism can tell us that certain core rights should be protected, like freedom from physical violence and fraud. But what else must law revere? That depends on natural, historical, and social concerns. There is room for debate, deliberation, and decisions to fill in liberalism’s content.

A liberal society should recognize children’s negative right to intimate privacy. What children are, what intimacy is, how history has considered both, and how society understands both all demand this. Criminalizing the viewing of child pornography is no mere matter of addressing harm or curbing economic incentives. It vindicates rights.

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486. See, e.g., MiKayla B. Jayroe, Comment, *Kidfluencers: New Child Stars in Need of Protection*, 76 ARK. L. REV. 771 (2024).

487. *Wiegand*, 812 F.2d at 1245.

488. MACKINNON, *supra* note 169, at 9.

489. See Fineman, *supra* note 276, at 12.