CONSTITUTIONAL LAW — FIRST AMENDMENT — WASHINGTON SUPREME COURT AFFIRMS CHILD PORNOGRAPHY CONVICTION OF TEENAGER. — *State v. Gray*, 402 P.3d 254 (Wash. 2017).

Millions of American teenagers are sexting.[1] Like physical sex, "sexts" range from consensual and romantic[2] to illegal and predatory[3] — with plenty of gray area in between.[4] The legal categorization of these messages often hinges on the interpretation of laws created before sexting existed.[5] Recently, in *State v. Gray*,[6] the Supreme Court of Washington affirmed the child pornography conviction of a seventeen-year-old boy who sent a nude photo of himself to an adult woman.[7] While it would be a stretch to say teenage sexts are protected speech under the First Amendment, the court's conclusory designation of these images as unprotected child pornography arguably misconstrues the relevant doctrine, and does a disservice to thousands of Washington teenagers coming of age in a confusing legal landscape.

In 2013, the Spokane County Sheriff's Office received a complaint from "T.R.," a twenty-two-year-old woman.[8] T.R. had been receiving phone calls from an unknown number for nearly a year, and had recently received a picture message of an erect penis captioned "Do u like it babe? It's for you [T.R.]."[9] She suspected it was from Eric Gray.[10] Gray, who was seventeen at the time, has Asperger's syndrome.[11] When

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1 *See* Donald S. Strassberg et al., *Sexting by High School Students*, 46 ARCHIVES SEXUAL BEHAV. 1667, 1667 (2017) (surveying existing literature suggesting that up to twenty-eight percent of adolescents have sent a sext). Sexting is defined as "the sending of sexually explicit messages or images by cell phone." *Sexting*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/sexting [https://perma.cc/8LGJ-SZLW].

2 *See* Michelle Drouin et al., *Is Sexting Good for Your Relationship? It Depends . . .* , 75 COMPUTERS HUM. BEHAV. 749, 752 (2017) (providing evidence that most young adults have sexted, and that most of those who had reported positive effects on their relationships).

3 *See, e.g.*, Benjamin Weiser, *Anthony Weiner Gets 21 Months in Prison for Sexting with Teenager*, N.Y. TIMES (Sept. 25, 2017), https://nyti.ms/2jYtCRt [https://perma.cc/4UNX-2YED].

4 *See, e.g.*, Hayley Gleeson, *Why Do Men Send Unsolicited Dick Pics?*, ABC NEWS (July 8, 2016, 7:48 PM), http://www.abc.net.au/news/2016-07-09/why-men-send-unsolicited-dick-pics/7540904 [https://perma.cc/56ZZ-AWZT].

5 *See* Melissa R. Lorang et al., *Minors and Sexting: Legal Implications*, 44 J. AM. ACAD. PSYCHIATRY & L. ONLINE 73, 74–78 (2016).

6 402 P.3d 254 (Wash. 2017).

7 *See id.* at 256.

8 *Id.*

9 *Id.* (alteration in original). This type of sext is so common it has its own (crude) name. *Dick Pic*, OXFORD LIVING DICTIONARIES: ENGLISH, https://en.oxforddictionaries.com/definition/dick_pic [https://perma.cc/SKS6-SHKA] ("A photograph that a man has taken of his penis."); *see also* Eva Glick, *Ladies of UW-Madison Tell Their Funniest Dick Pic Stories*, THE TAB (Feb. 27, 2017), https://thetab.com/us/wisconsin/2017/02/27/ladies-uw-madison-tell-funniest-dick-pick-stories-5536 [https://perma.cc/MW63-QCDK].

10 *Gray*, 402 P.3d at 256.

11 *Id.*

confronted by a deputy about the harassment, Gray confessed to sending the picture.[12] He was charged under state law with one count of "dealing in depictions of a minor engaged in sexually explicit conduct," and one count of telephone harassment.[13]

At trial, the court found Gray guilty of dealing in depictions of a minor under section 9.68A.050.[14] The State agreed to dismiss the harassment charge.[15] The court sentenced Gray to 150 hours of community service, 30 days confinement, and reregistration as a sex offender.[16]

On appeal, Gray challenged the trial court's interpretation of section 9.68A.050 and, in the alternative, the statute's constitutionality.[17] Affirming Gray's conviction, the court held that the legislature could "protect children from themselves" through a definition of child pornography that included "self-produced images."[18] It found that this definition was not unconstitutional and that Gray's conduct was distinguishable from "innocent sharing of sexual images between teenagers."[19] Gray petitioned the Supreme Court of Washington for review.

The Supreme Court affirmed.[20] Writing for the majority, Justice Owens[21] first dispensed with the statutory interpretation issue.[22] Interpreting the statute de novo, the court held that the "plain reading" of the statute unambiguously prohibits "any person" — "including a juvenile" — from knowingly developing or disseminating "a visual depiction of any minor engaged in sexual conduct."[23] In Gray's case, the combination of the photograph with the "Do u like it babe?" message evinced a purpose to arouse the recipient, thereby bringing it conclusively under the purview of the statute.[24]

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[12] *Id.*

[13] *Id.*; *see also* WASH. REV. CODE § 9.68A.050 (2010). Gray's prosecution is not unique. *See, e.g.*, Michael E. Miller, *N.C. Just Prosecuted a Teenage Couple for Making Child Porn — of Themselves*, WASH. POST (Sept. 21, 2015), http://wapo.st/1WcZFWR [https://perma.cc/6PEH-B97V]; *see also* JANIS WOLAK ET AL., CRIMES AGAINST CHILDREN RESEARCH CTR., TRENDS IN ARRESTS FOR CHILD PORNOGRAPHY PRODUCTION 2 (2012) (claiming that seven percent of child pornography arrests in 2009 were the result of youth sexting).

[14] *Gray*, 402 P.3d at 256.

[15] *Id.*

[16] *Id.* Gray had previously been adjudicated delinquent of a sex offense and required to register as a sex offender. *Id.*

[17] State v. E.G., 377 P.3d 272, 275 (Wash. Ct. App. 2016). Gray argued that the statute was overbroad in violation of the First Amendment and impermissibly vague in violation of the Fourteenth Amendment and Washington's equivalent constitutional protections. *Id.* at 275–76.

[18] *Id.* at 278.

[19] *Id.*

[20] *Gray*, 402 P.3d at 256.

[21] Justice Owens was joined by Chief Justice Fairhurst and Justices Johnson, Madsen, Stephens, and Wiggins.

[22] *Gray*, 402 P.3d at 257–59.

[23] *Id.* at 258.

[24] *Id.* Under Washington law, an image must be created with an intent to arouse the viewer if it is to be deemed sexually explicit. WASH. REV. CODE § 9.68A.011(4)(f) (Supp. 2017).

The court also rejected Gray's argument that the legislature's intent contradicted the plain reading of the statute.[25] Though it acknowledged that the court "will diverge from a plain reading [when] a 'contrary legislative intent is indicated,'"[26] and that the "statute was undoubtedly intended to address the sexual abuse and exploitation of children by adults," the court interpreted the statute's scope to be "larger than what Gray presents."[27] Diving into the legislative history, the court noted that the State's interest in protecting children led it to prohibit "the vice of child pornography at all levels in the distribution chain,"[28] including "at its inception."[29]

Similarly, the court rejected the proposition that criminal statutes designed to protect a certain class cannot be used to prosecute that class absent explicit authorization.[30] Acknowledging that an exception may apply where a child pornography victim is charged as an accomplice or co-conspirator,[31] it rejected the idea of a blanket waiver for members of a class charged under a law enacted for their protection.[32] While the statute may shield child victims who pose for adult predators, it has no general immunity for minors.[33]

Having established that the statute applied to Gray's conduct, the majority moved to Gray's constitutional claims.[34] Starting with the First Amendment, the court noted that the U.S. Supreme Court has explicitly held child pornography outside First Amendment protection.[35] Because section 9.68A.050 only bans child pornography, and because child pornography is not protected speech, the statute was not overbroad, and Gray's freedom of expression was not infringed.[36]

Finally, the court dismissed Gray's vagueness challenge under the Due Process Clause of the Fourteenth Amendment.[37] First, the court held that there was no evidence that the choice to charge Gray was ar-

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[25] *Gray*, 402 P.3d at 258–59.

[26] *Id.* at 258 (quoting State v. Jones, 257 P.3d 616, 619 (Wash. 2011)).

[27] *Id.* at 259.

[28] *Id.* (quoting WASH. REV. CODE § 9.68A.001(2) (Supp. 2017)). This language is lifted from *Osborne v. Ohio*, 495 U.S. 103, 110 (1990).

[29] *Gray*, 402 P.3d at 259.

[30] *Id.* ("[T]he dissent [relies] on cases that deal with coconspirator/accomplice/aider and abettor liability and factual scenarios entirely different from this one.").

[31] For example, where a child poses for an adult predator. *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 260.

[35] *Id.* (citing New York v. Ferber, 458 U.S. 747, 764 (1982)).

[36] *Id.*

[37] *Id.* at 260–61 (citing State v. Jordan, 325 P.3d 181, 184 (Wash. 2014) (holding Washington and federal due process protections to be identical)). A statute is vague in violation of the Due Process Clause if it (1) invites "arbitrary and discriminatory enforcement," or (2) fails to give adequate notice such that ordinary people would be unable to understand what conduct is prohibited. City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (plurality opinion).

bitrary or discriminatory.[38] Second, it held that an ordinary person would understand the statute to prohibit all persons — minors included — from sending sexually explicit images.[39] Because the statute covered his behavior, because child pornography was not protected under the First Amendment, and because the statute was not impermissibly vague, the court affirmed the conviction.[40]

Justice McCloud dissented.[41] Without addressing the constitutional issues, the dissent argued that the plain reading of the statute — read in context — precluded Gray's conviction.[42] While admitting that the statute lacked an explicit textual limit on the class of potential perpetrators, the dissent pointed to legislative history showing that section 9.68A.050 was enacted to protect children from sexual exploitation.[43] Its focus is on "prosecuting those who gain from exploit[ation],"[44] and it is designed "to hold those who pay to engage in the sexual abuse of children accountable for the trauma they inflict on children."[45] In addition to the legislative context, the dissent maintained that a longstanding common law rule prohibits "a criminal statute designed for the protection of a particular class [to] be used to prosecute a member of that protected class for his or her own victimization" absent explicit authorization.[46]

The dissent also appealed to the court's duty to avoid absurd results.[47] It noted that the court's application of the statute would punish child sexters more harshly than adult sexters, and that in this case, the court's application of the statute to a child struggling with Asperger's surely contradicted the legislature's purpose.[48] It further highlighted the hollow nature of the court's suggestion that the statute might not apply to more benign teenage sexters by demonstrating that the court's logic would in fact criminalize that behavior.[49]

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38 *Gray*, 402 P.3d at 261.

39 *Id.* The court acknowledged the concern posed by teens consensually sharing images of themselves, but noted that Gray could only bring a vagueness claim on his own behalf, not on behalf of others. *Id.* (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982)).

40 *Id.*

41 Justice McCloud was joined by Justices González and Yu.

42 *Gray*, 402 P.3d at 263 (McCloud, J., dissenting).

43 *Id.* at 262–63.

44 *Id.* at 263.

45 *Id.* (quoting WASH. REV. CODE. § 9.68A.001 (Supp. 2017)).

46 *Id.* at 264; *see also* Gebardi v. United States, 287 U.S. 112, 119 (1932); City of Auburn v. Hedlund, 201 P.3d 315 (Wash. 2009).

47 *Gray*, 402 P.3d at 265 (McCloud, J., dissenting) (citing Columbia Riverkeeper v. Port of Vancouver USA, 395 P.3d 1031, 1042 (Wash. 2017)).

48 *Id.*

49 *Id.* at 266. Though not discussed, it seems absurd that by the majority's logic, teenagers who can legally consent to sex at sixteen, WASH. REV. CODE § 9A.44.096 (2015), and marry at seventeen, WASH. REV. CODE § 26.04.210 (2016), could be required to register as sex offenders for sexting their partners.

Gray's First Amendment challenge should have forced the court to consider the scope of the child pornography exception to free speech. Instead, the court dismissed the argument with little more than a sentence.[50] This conclusory analysis was arguably wrong,[51] and at the very least incomplete. By concluding that all sexually explicit images of minors are unprotected by the First Amendment, the court ignored multiple passages in *Ashcroft v. Free Speech Coalition*[52] that suggest the child pornography exception is conduct-based, not content-based. Without declaring all teenage sexts protected speech, the court might have instead articulated a more defensible rationale for why they may be regulated.

Speech is presumptively free,[53] and by and large, this freedom extends to minors.[54] Nonetheless, there are exceptions to this general rule, including the "child pornography exception."[55] The *Gray* court upheld the constitutionality of the Washington statute by noting that child pornography is not protected speech.[56] This begs the question. If one assumes the Washington statute bans only child pornography, it is obviously permissible. A more relevant question asks: in the context of this doctrine, what exactly is child pornography? In its statutory analysis, the *Gray* court had a definition of child pornography provided by a specific text. But to answer the question in the constitutional sense, there is no textual analog;[57] one must examine the First Amendment challenges to child pornography laws considered by the Supreme Court.

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[50] *Gray*, 402 P.3d at 260 ("We do not find this argument persuasive.").

[51] *See* Sarah Wastler, Student Article, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J.L. & GENDER 687, 698–701 (2010). *But see* Mary Graw Leary, *Sexting or Self-Produced Child-Pornography? The Dialog Continues — Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL'Y & L. 486, 526–29 (2010).

[52] 535 U.S. 234 (2002). *Free Speech Coalition* is the most recent and relevant Supreme Court case to consider the child pornography exception. In 2008, the Court upheld a statute criminalizing the *solicitation* of child pornography. United States v. Williams, 553 U.S. 285, 299 (2008). While arguably an extension of the free speech exception, *Williams* said little about the *definition* of child pornography considered in this comment.

[53] *See* U.S. CONST. amend. I; *see also* United States v. Stevens, 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."); Dennis v. United States, 341 U.S. 494, 585 (1951) (Douglas, J., dissenting) ("[F]ree speech is the rule, not the exception.").

[54] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) ("Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect . . . .").

[55] *See, e.g.*, Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 IND. L.J. 1437, 1440 (2014).

[56] *Gray*, 402 P.3d at 260.

[57] Theoretically, the First Amendment is the textual analog to the statute, but in this case, it is of little help. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

The constitutionalized child pornography exception dates back to *New York v. Ferber*,[58] where the Court acknowledged the "serious national problem" posed by the "exploitive use of children,"[59] and announced that states were entitled to restrict "pornographic depictions of children."[60] *Ferber* stands for the proposition that child pornography is unprotected, but it was in *Ashcroft v. Free Speech Coalition* where a more precise definition of child pornography emerged. Writing for the Court, Justice Kennedy explained that *Ferber* merely gave states the right to limit speech "[w]here the images are themselves the product of child sexual abuse."[61] In striking down portions of the federal Child Pornography Prevention Act of 1996 (CPPA), he made clear that the child pornography exception does not apply to speech that "creates no victims by its production."[62]

The *Gray* court dismissed this language by noting that while the Court struck down a ban on computer-generated child pornography, it upheld the CPPA's prohibition on images of real children.[63] This superficial analysis misses the fundamental nature of the child pornography exception: it is *not* a content-based restriction.[64] It exists only insofar as it reflects the state's "compelling interest in prosecuting those who promote the sexual exploitation of children."[65]

The *Gray* court interpreted *Free Speech Coalition* to permit a statute that prohibits all sexually explicit depictions of real minors.[66] This is a dubious interpretation.[67] On the contrary, Justice Kennedy actually gave multiple examples why a prohibition on "[a]ny depiction of sexually explicit activity" would be too broad.[68] The child pornography exception is somewhat of a misnomer: it does not extend to all content that

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58 458 U.S. 747 (1982).

59 *Id.* at 749.

60 *Id.* at 756.

61 Ashcroft v. Free Speech Coalition, 535 U.S. 234, 249 (2002).

62 *Id.* at 250.

63 *Gray*, 402 P.3d at 260.

64 *See Free Speech Coalition*, 535 U.S. at 249 ("The production of the work, not its content, was the target of the statute [in *Ferber*]."); *see also* United States v. Stevens, 559 U.S. 460, 493 (2010) (Alito, J., dissenting) ("In *Ferber*, an important factor — I would say the most important factor — was that child pornography involves the commission of a crime that inflicts severe personal injury to the 'children who are made to engage in sexual conduct for commercial purposes.'" (quoting *Ferber*, 458 U.S. at 753)).

65 *Free Speech Coalition*, 535 U.S. at 240 (quoting *Ferber*, 458 U.S. at 761).

66 *See Gray*, 402 P.3d at 260.

67 *See* Antonio M. Haynes, Note, *The Age of Consent: When Is Sexting No Longer "Speech Integral to Criminal Conduct"?*, 97 CORNELL L. REV. 369, 395 (2012) ("[M]any believed — perhaps erroneously — that any sexually explicit image of a minor was child pornography, [but] this belief is now fatally flawed.").

68 *Free Speech Coalition*, 535 U.S. at 246. This language is virtually identical to the language in section 9.68A.050 that *Gray* held was not overbroad. WASH. REV. CODE § 9.68A.050 (2010)

might fit a dictionary definition of child pornography.[69] Rather, the Court applies an alternative definition that necessarily includes an element of sexual abuse.[70] As Justice Kennedy plainly stated, where speech is "no[t] the product of sexual abuse, it does not fall outside the protection of the First Amendment."[71]

Any speech restriction justified by the existing child pornography exception must be limited to material that is the product of sexual abuse. According to *Free Speech Coalition*, child pornography is "intrinsically related" to the sexual abuse of minors in two ways.[72] First, "as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated."[73] Second, the distribution of child pornography contributes to demand for its production.[74]

It is unclear that statutes criminalizing uncoerced, self-produced content sent via private message fit either rationale. Perhaps an analogous "permanent record" justification could apply to Gray or other teenage sexters who lack the foresight to appreciate the permanence of the internet. But the lack of abuse makes this argument a stretch, and further, some applications used for sexting automatically delete images seconds after they are viewed by the recipient, casting doubt on the existence of a permanent record.[75] A sexting prohibition justified under the second prong — that private sexts might someday turn into public pornography — would face a similar uphill battle. *Free Speech Coalition* struck down prohibitions justified by "some unquantified potential for subsequent criminal acts."[76] The child pornography exception is for speech that is *necessarily exploitative*, not potentially so.[77]

(prohibiting "any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct").

[69] *See, e.g.*, *Child Pornography*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Material depicting a person under the age of 18 engaged in sexual activity.").

[70] *See Child Pornography*, DEP'T JUST., https://www.justice.gov/criminal-ceos/child-pornography [https://perma.cc/P6B4-25JW] ("Child pornography is a form of child sexual exploitation."). The DOJ emphasizes that "[i]t is important to distinguish child pornography from the more conventional understanding of the term pornography. Child pornography is a form of child sexual exploitation, and . . . [e]ach child involved in the production of an image is a victim of sexual abuse." *Id.*

[71] *Free Speech Coalition*, 535 U.S. at 251.

[72] *Id.* at 249 (quoting New York v. Ferber, 458 U.S. 747, 759 (1982)).

[73] *Id.*

[74] *Id.*

[75] *See* Doug Gross, *Snapchat: Sexting Tool, or the Next Instagram?*, CNN (Jan. 10, 2013, 11:03 AM), http://www.cnn.com/2013/01/03/tech/mobile/snapchat/index.html [https://perma.cc/56QE-KQ3C]. *But see* Alyson Shontell, *Actually, Snapchat Doesn't Delete Your Private Pictures and Someone Found a Way to Resurface Them*, BUS. INSIDER (May 9, 2013, 11:48 AM), http://read.bi/12iWO22 [https://perma.cc/U2YZ-F6FQ].

[76] *Free Speech Coalition*, 535 U.S. at 250.

[77] Justice Kennedy rejected the "contingent and indirect" justification for child pornography laws entertained in *Osborne v. Ohio*, 495 U.S. 103, 111 (1990). *See Free Speech Coalition*, 535 U.S. at 250. For more on this rejection, see Shepard Liu, Ashcroft*, Virtual Child Pornography and First Amendment Jurisprudence*, 11 U.C. DAVIS J. JUV. L. & POL'Y 1, 38 (2007).

None of this is to say that minors' sexts are necessarily, or even probably, protected speech. They might be permissibly restricted by other state interests significant enough to abridge the right of sexual expression.[78] Indeed, several states have enacted legislation differentiating underage sexting from child pornography, but still criminalizing both.[79] Given the lack of valuable speech contained in a teenage sext,[80] speech restrictions might be better justified as protection from the danger posed by the combination of youth's improvidence[81] and a permanent internet.[82] Without an explanation from the court, however, there is little way to understand the logic behind the line that must inevitably be drawn between protected expression and criminal behavior.[83]

Gray's conclusory First Amendment analysis hastily assumed the existence of child pornography, and arguably expanded the exception to circumstances it was never intended for. While a more thoughtful constitutional analysis may not have changed the result of Gray's conviction, the court nonetheless failed thousands of Washington teenagers by inadequately delimiting and justifying a definition of child pornography. Lawmakers may come to the rescue, but for now, teenagers — even those whose sexting is far more benign than Gray's — will be taking the ageless pastime of "forbidden love" to a whole new level.

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[78] For more on the rights of teenager sexters see Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context*, 115 PENN ST. L. REV 135 (2010).

[79] *See, e.g.*, VT. STAT. ANN. tit. 13, § 2802b(a)(1) (2009) ("No minor shall knowingly and voluntarily and without threat or coercion use a computer or electronic communication device to transmit an indecent visual depiction of himself or herself to another person.").

[80] New York v. Ferber, 458 U.S. 747, 762 (1982) ("The value of . . . photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."). But on the other hand, criticizing the romantic habits of a younger generation is a timeless tradition — one that doesn't always wear well with age. *E.g.*, MOIRA WEIGEL, LABOR OF LOVE: THE INVENTION OF DATING 11–12 (2016) (describing how young women at the turn of the twentieth century were criticized as whores and arrested for going on dates); *see also* David Brooks, Opinion, *Cell Phones, Texts and Lovers*, N.Y. TIMES (Nov. 2, 2009), https://nyti.ms/2kUMe5d [https://perma.cc/2ESY-QNA7] (describing the interplay of technology and millennial dating habits as a "roadblock in the country's social evolution").

[81] *Cf.* Bellotti v. Baird, 443 U.S. 622, 635 (1979) (plurality opinion) ("States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. . . . [D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.").

[82] *See* Shontell, *supra* note 75.

[83] The court suggested it might rule differently in a consensual sexting case, but given its understanding that all sexually explicit images of minors are unprotected, it is difficult to see how. *Gray*, 402 P.3d at 258 ("[T]hose are not the facts before us. We understand the concern over teenagers being prosecuted for consensually sending sexually explicit pictures to each other."). Isn't *Gray* (a case about a teenager who voluntarily made and sent a self-produced image) a consensual sexting case? If the court is correct in holding that child pornography is defined by the content of the image, not the manner of its production, why is the recipient's consent dispositive?