

# Child Pornography, the First Amendment, and Mistakes of Age: An Age-Old Debate\*

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## I. Introduction

For over three decades, legislatures and courts have commented on the evils that sexual exploitation inflicts upon children. The Supreme Court of the United States summarized its concerns about the creation of child pornography in *New York v. Ferber*.<sup>1</sup> It opined that sexually exploited children tend to be unable to establish healthy romantic relationships; have sexual dysfunctions; abuse drugs and alcohol; engage in prostitution; and sexually abuse children during their adulthoods.<sup>2</sup> It also acknowledged the close relationship between child pornography and sexual molestation of child subjects and that where “such performances are recorded . . . the child’s privacy interests are also invaded.”<sup>3</sup> The existence of visual recordings and the likelihood that they have been distributed primarily for the predilections

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1. 458 U.S. 747 (1982).

2. *Id.* at 758 n.9.

3. *Id.*

of pedophiles, the Court explained, psychologically harms a child well into his or her adult life.<sup>4</sup> Despite the stiff penalties for producing child pornography, these offenses are the fastest growing type of crime prosecuted by U.S. Attorneys.<sup>5</sup>

In response to charges of producing child pornography, defendants have invoked the First Amendment to ward off conviction.<sup>6</sup> They have argued that state and federal statutes that require no knowledge as to the age of the child subject in a pornographic production are overly broad because they substantially chill protected speech.<sup>7</sup> Though at least one court—the Ninth Circuit Court of Appeals—was sympathetic to defendants’ First Amendment challenges,<sup>8</sup> others that have subsequently evaluated the merits of these arguments have repeatedly rejected them.<sup>9</sup> In 2009, for example, the Fourth and Eighth Circuit Courts of Appeals rejected similar assertions that the First Amendment requires a mistake of age defense to a charge of producing child pornography.<sup>10</sup>

Because courts have continually cast off First Amendment defenses to these charges, the resultant strict-liability standard as to a defendant’s knowledge of a child subject’s age has some chilling effects on constitutionally protected speech.<sup>11</sup> Conversely, the Ninth Circuit’s reasonable mistake of age defense fails to adequately protect the interests of children against the long-lasting physical and psychological effects of being photographed or filmed while engaging in sexually explicit acts.<sup>12</sup> As a compromise between these two approaches, this Note proposes an intermediate standard that would require defendants claiming a mistake of age defense to show that they verified child subjects’ ages with government documents or officials. By establishing a clearer standard than the Ninth Circuit’s reasonableness test and by providing some defense to defendants, this intermediate standard would protect children from the harms of child pornography and quell First Amendment concerns.<sup>13</sup>

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4. *Id.* at 759 n.10.

5. MARK MOTIVANS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS, 2006, at 2 (2007), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=886>.

6. *See infra* subpart IV(B).

7. *See infra* subpart IV(B).

8. *See, e.g.*, *United States v. U.S. Dist. Court*, 858 F.2d 534, 547 (9th Cir. 1988) (agreeing with the defendant that the First Amendment required a reading of a reasonable mistake of age defense into a federal statute criminalizing the production of child pornography).

9. *See, e.g.*, *United States v. Malloy*, 568 F.3d 166, 177 (4th Cir. 2009) (holding that excluding a reasonable mistake of age defense does not infringe upon a defendant’s rights); *Gilmour v. Rogerson*, 117 F.3d 368, 373 (8th Cir. 1997) (disagreeing with the defendant that the First Amendment requires a mistake of age defense to charges of producing child pornography).

10. *Malloy*, 568 F.3d at 177; *United States v. Wilson*, 565 F.3d 1059, 1069 (8th Cir. 2009).

11. *See infra* subpart V(B).

12. *See infra* subpart V(A).

13. *See infra* subpart V(C).

Part II of this Note surveys state and federal statutes that criminalize the creation of child pornography. After Part III outlines the overbreadth doctrine with regard to obscenity and child pornography, Part IV describes the strict-liability and reasonableness approaches to the crimes of producing child pornography, looking primarily at decisions from the Fourth, Eighth, and Ninth Circuit Courts of Appeals and the Courts of Appeals of Maryland and Minnesota. Part V then compares the arguments made by both sides of the mistake of age debate, and it offers and defends an intermediate standard that strikes a better balance of free speech and child-protection concerns. Part VI concludes this Note with a few summarizing remarks.

## II. Child Pornography

### A. State Statutes on the Sexual Exploitation of Children

Some states have criminalized the use of minors as pornographic subjects,<sup>14</sup> and since the mid-1990s, all states have prohibited visually depicting actual children engaged in sexual activity.<sup>15</sup> Statutes regarding this form of sexual exploitation of minors vary in three primary respects. First, they impose different levels of mental culpability that the state must prove when prosecuting violators.<sup>16</sup> Some states require proof that producers

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14. Charles L. Simmons, Jr., Note, *Maryland's Child Pornography Statute Holds Photographers Strictly Liable for the Use of Under-Age Subjects but Leaves Open the Possibility of the Mistake of Age Defense*, 25 U. BALT. L. REV. 109, 109–10 (1995).

15. *See id.* at 109 n.1 (citing each state's particular statute governing the sexual exploitation of children via visual depictions).

16. ALA. CODE § 13A-12-197 (Supp. 2008); ALASKA STAT. § 11.41.455 (2008); ARIZ. REV. STAT. ANN. § 13-3552 (2009); ARK. CODE ANN. § 5-27-303 (2006); CAL. PENAL CODE § 311.3 (West 2008); COLO. REV. STAT. ANN. § 18-6-403 (West Supp. 2009); CONN. GEN. STAT. ANN. § 53a-196a (West 2007); DEL. CODE ANN. tit. 11, § 1108 (2007); D.C. CODE § 22-2012 (2001); FLA. STAT. ANN. § 827.071 (West Supp. 2010); GA. CODE ANN. § 16-12-100 (2007); HAW. REV. STAT. ANN. § 707-750 (LexisNexis 2007); IDAHO CODE ANN. § 18-1506 (Supp. 2009); 720 ILL. COMP. STAT. ANN. 5/11-20.1 (West Supp. 2009); IND. CODE § 35-49-3-2 (2004); IOWA CODE ANN. § 728.12 (West Supp. 2009); KAN. STAT. ANN. § 21-3516 (2007); KY. REV. STAT. ANN. §§ 531.320–.370 (LexisNexis 2008); LA. REV. STAT. ANN. § 14:81.1 (Supp. 2010); ME. REV. STAT. ANN. tit. 17-A, § 282 (Supp. 2007); MD. CODE ANN., CRIM. LAW § 11-207 (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 272, § 29A (West 2000); MICH. COMP. LAWS ANN. § 750.145c (West Supp. 2009); MINN. STAT. ANN. § 617.246 (West 2009); MISS. CODE ANN. § 97-5-33 (Supp. 2009); MO. ANN. STAT. § 568.060 (West 1999); MONT. CODE ANN. § 45-5-625 (2008); NEB. REV. STAT. §§ 28-1463.01 to .05 (2008); NEV. REV. STAT. §§ 200.700–.760 (2007); N.H. REV. STAT. ANN. § 650:2 (2007); N.J. STAT. ANN. § 2C:24-4(b) (West 2005); N.M. STAT. ANN. § 30-6A-3 (LexisNexis Supp. 2009); N.Y. PENAL LAW § 263.05 (McKinney 2008); N.C. GEN. STAT. § 14-190.6 (2007); N.D. CENT. CODE §§ 12.1-27.2-02 to 04 (1997); OHIO REV. CODE ANN. § 2907.321 (West 2006); OKLA. STAT. ANN. tit. 21, § 1021.2 (West Supp. 2010); OR. REV. STAT. § 163.670 (2007); 18 PA. CONS. STAT. ANN. § 6312 (West Supp. 2009); R.I. GEN. LAWS § 11-9-1.3 (Supp. 2009); S.C. CODE ANN. § 16-15-335 (Supp. 2009); S.D. CODIFIED LAWS § 22-22-24.3 (2006); TENN. CODE ANN. § 39-17-902 (2006); TEX. PENAL CODE ANN. § 43.25 (Vernon Supp. 2009); UTAH CODE ANN. § 76-5a-3 (Supp. 2009); VT. STAT. ANN. tit. 13, § 2822 (Supp. 2009); VA. CODE ANN. § 18.2-374.1 (2009); WASH. REV. CODE ANN. § 9.68A.040 (West 2003); W. VA. CODE ANN. §§ 61-8C-2 to 3 (LexisNexis 2005); WIS. STAT. § 948.05 (Supp. 2009); WYO. STAT. ANN. § 6-4-303 (Supp. 2009).

intended to visually depict minors engaged in sexual acts or knew, or should have known, the age of the child involved.<sup>17</sup> Others impose strict liability on defendants if prosecutors merely prove the child was a minor.<sup>18</sup> Second, they vary in what age ranges constitute “children” or “minors.”<sup>19</sup> And third, states disagree on whether a defendant’s mistake of a child’s age amounts to a defensible position to prosecutions.<sup>20</sup> In perceiving a dearth of effective deterrents to the use of children in pornography,<sup>21</sup> Congress also prohibited the production of child pornography in the 1970s.<sup>22</sup>

### B. Federal Criminalization of the Production of Child Pornography

In 1977, Congress enacted the Protection of Children Against Sexual Exploitation Act,<sup>23</sup> which provided a federal mechanism for the prosecution of child exploitation through sexually exploitative live performances and visual depictions of children engaged or engaging in sexual conduct.<sup>24</sup> Senators sponsored the bill to protect children against the negative mental health consequences of being used in live shows and paraded around in the nude.<sup>25</sup> The sponsors also argued that sexual exploitation through visual materials increased the risk that children, still in their formative stages of development,

17. *E.g.*, ALA. CODE § 13A-12-197(a) (Supp. 2006); IND. CODE § 35-49-3-2.

18. *E.g.*, CONN. GEN. STAT. § 53a-196a(a).

19. *Compare, e.g.*, ALASKA STAT. § 11.41.455 (requiring the child subject to be under the age of eighteen), *with, e.g.*, IND. CODE § 35-49-3-2 (requiring the child subject to be under the age of sixteen).

20. *Compare* ALA. CODE § 13A-12-197(a) (providing a reasonable mistake of age defense as interpreted by the Court of Criminal Appeals of Alabama in *Sherman v. State*, 778 So. 2d 859, 861 (Ala. Crim. App. 2000)), MD. CODE ANN., CRIM. LAW § 11-207 (allowing a reasonable mistake of age defense after the Court of Appeals of Maryland’s interpretation of the predecessor statute in *Outmezguine v. State*, 641 A.2d 870 (Md. 1994)), *and* VT. STAT. ANN. tit. 13, § 2822(b) (Supp. 2009) (providing explicitly that a reasonable mistake of age constitutes an affirmative defense to criminal prosecution under the statute), *with* OHIO REV. CODE ANN. § 2907.321(B)(2) (providing expressly that mistake of age is not a defense).

21. Sponsors of federal legislation on child pornography thought the current laws were insufficient to curb production of child pornography. 123 CONG. REC. 33,045 (1977).

22. Audrey Rogers, *Protecting Children on the Internet: Mission Impossible?*, 61 BAYLOR L. REV. 323, 326 (2009).

23. Pub. L. No. 95-225, sec. 2(a), 92 Stat. 7 (1978). As of 1982, only twelve states prohibited the use of minors to make pornography. *New York v. Ferber*, 458 U.S. 747, 749 n.2 (1982).

24. 123 CONG. REC. 33,045. The constitutionality of the Act was a primary concern of the sponsors:

[M]ost importantly, [this legislation] is clearly constitutional. S. 1585 can be upheld by the courts and serve as the basis of successful prosecutions resulting in the reduction of sexual exploitation of children.

....

... We must be ever watchful that in our efforts to control the most offensive pornography we do not infringe on these important constitutional rights. . . .

....

I do not want to get into an area that is unconstitutional.

*Id.* at 33,045–46 (Statement of Sen. Bayh).

25. *Id.* at 33,046.

would be more likely to engage in prostitution and less likely to form “healthy, affectionate relationships” as adults.<sup>26</sup> They sought to deter exploitation by criminalizing the production of certain visual representations of nude children and “arous[ing] [a] collective conscience” that would foster policies more protective of children.<sup>27</sup>

Congress amended the statute with the Child Protection Act of 1984.<sup>28</sup> With that legislation, it found that the child pornography industry “had developed into a highly-organized, multi-million-dollar industry which operates on a nationwide scale” and that thousands of children were used in productions.<sup>29</sup> Consistent with the contentions of the supporters of the Protection of Children Against Sexual Exploitation Act,<sup>30</sup> Congress also found that “the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society.”<sup>31</sup> In conjunction with these declarations, Congress enhanced the penalties for violations and—with potential First Amendment implications in mind—confined the statute’s coverage from “visual or print medium” depicting children engaging in sexually explicit conduct<sup>32</sup> to “visual depiction[s]” of such activity.<sup>33</sup>

In its current form, the federal child pornography statute proscribes persuading or pressuring a minor to partake in sexually explicit activities for the purpose of producing a visual recording of that conduct.<sup>34</sup> Those convicted of producing visual depictions of actual children engaged in sexually

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26. *Id.* at 33,047.

27. *Id.* at 33,046–47; 33,050; 33,057.

28. Pub. L. No. 98-292, 98 Stat. 204.

29. *Id.* sec. 2(1)–(2).

30. *See supra* text accompanying notes 25–27.

31. Sec. 2(3), 98 Stat. at 204.

32. *Id.* sec. 3(1)–(2).

33. *Compare* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) (“Any person who violates this section shall be fined not more than \$10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than \$15,000, or imprisoned not less than two years nor more than 15 years, or both.”), *with* § 3(4)–(5), 98 Stat. at 204 (“Section 2251 of Title 18 of the United States Code is amended by striking out ‘\$10,000’ and inserting ‘\$100,000’ in lieu thereof; [and] by striking out ‘\$15,000’ and inserting ‘\$200,000’ in lieu thereof.”). Since 1984, the amendments to the federal statute have either been minor changes in the wording of the statute for clarity or in anticipation of Commerce Clause challenges to the statute. *See Timeline of Significant Events in Child Pornography Legislation*, THIRD BRANCH, Dec. 2009, <http://www.uscourts.gov/ttb/2009-12/article06a.cfm> (displaying the relevant child pornography legislation enacted since 1977); *see also* Mitchell P. Goldstein, *Congress and the Courts Battle over the First Amendment: Can the Law Really Protect Children from Pornography on the Internet?*, 21 J. MARSHALL J. COMPUTER & INFO. L. 141, 151–55 (2003) (chronicling the developments in federal child pornography laws). In 1986, Congress further amended the statute to criminalize the transportation of minors in interstate or foreign commerce for the purpose of having the child appear in pornography. Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, sec. 3, 100 Stat. 3510, 3510 (codified at 18 U.S.C. § 2251 (2006)).

34. 18 U.S.C. § 2251(a).

explicit conduct face at least fifteen years in prison for a first offense and could serve a life sentence if they have two prior convictions.<sup>35</sup> Though it requires proof that defendants must have “know[ledge] or . . . reason to know that such visual depiction will be transported or transmitted”<sup>36</sup> in interstate commerce, the statute does not require that a defendant have knowledge—or even reason to believe—that a child subject has yet to turn eighteen years of age.<sup>37</sup> Thus, the statute facially imposes strict liability on producers of visual depictions of children engaging in sexually explicit conduct.

In responding to federal charges of producing child pornography, defendants have voiced a variety of constitutional objections to federal prosecution of the sexual exploitation of children. They have claimed that Congress lacked constitutional authorization to enact the statute,<sup>38</sup> and that such charges violated the First Amendment,<sup>39</sup> the Equal Protection Clause,<sup>40</sup> the substantive due process guarantees of the Fifth Amendment,<sup>41</sup> and constitutional requirements that a *mens rea* element be proven in criminal cases.<sup>42</sup> Though case law has developed relatively uniformly with regard to most of these constitutional challenges,<sup>43</sup> federal circuits and states have split on whether the Free Speech Clause of the First Amendment requires a mistake of age defense to federal and state crimes of producing child pornography.<sup>44</sup> Last year’s decisions by the Fourth<sup>45</sup> and Eighth<sup>46</sup> Circuits considering the First Amendment’s application to the federal child pornography statute invite a reexamination of this split among federal and state courts.

### III. The First Amendment

In the two centuries following the adoption of the First Amendment, the Supreme Court significantly stretched the scope of constitutionally protected

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35. *Id.* § 2251(e).

36. *Id.* § 2251(a).

37. *United States v. U.S. Dist. Court*, 858 F.2d 534, 536 (9th Cir. 1988); *see also* 18 U.S.C. § 2256(1) (defining “minor” for the purposes of § 2251(a) as a person under the age of eighteen years).

38. *E.g.*, *United States v. Malloy*, 568 F.3d 166, 171 (4th Cir. 2009).

39. *E.g.*, *United States v. Kantor*, 677 F. Supp. 1421, 1423 (C.D. Cal. 1987).

40. *E.g.*, *United States v. Freeman*, 808 F.2d 1290, 1292–93 (8th Cir. 1987).

41. *E.g.*, *United States v. Bach*, 400 F.3d 622, 628 (8th Cir. 2005).

42. *E.g.*, *United States v. Esch*, 832 F.2d 531, 536 (10th Cir. 1987).

43. For example, on the Commerce Clause issue circuits have agreed that Congress had the constitutional authority to pass the Protection of Children Against Sexual Abuse Act of 1977. *United States v. McCalla*, 545 F.3d 750, 753–56 (9th Cir. 2008); *United States v. Blum*, 534 F.3d 608, 609–10 (7th Cir. 2008); *United States v. Griffith*, 284 F.3d 338, 345–48 (2d Cir. 2002); *United States v. Buculei*, 262 F.3d 322, 328–30 (4th Cir. 2001); *United States v. Hampton*, 260 F.3d 832, 834–35 (8th Cir. 2001); *United States v. Galo*, 239 F.3d 572, 575–76 (3d Cir. 2001).

44. *See infra* subpart IV(B).

45. *United States v. Malloy*, 568 F.3d 166 (4th Cir. 2009).

46. *United States v. Wilson*, 565 F.3d 1059 (8th Cir. 2009).

speech. The First Amendment stipulates that “Congress shall make no law . . . abridging the freedom of speech.”<sup>47</sup> The framers of the Free Speech Clause supported the amendment as an essential element of promoting the free exchange of ideas in public debate—which lay at the heart of a democratic system of government<sup>48</sup>—emphasizing the protection of minority views.<sup>49</sup> To further facilitate the exchange of political ideas, the Supreme Court has expansively interpreted the word “speech” to include other expressive modes of communication, such as conduct that can be understood as conveying ideas.<sup>50</sup> In tandem with this recognition, the Court also acknowledged additional societal benefits of protecting the free flow of speech and speech-like conduct, including artistic activity.<sup>51</sup> It eventually recognized that the First Amendment protected artistic expressions including photography and film.<sup>52</sup>

#### A. *Obscenity as Unprotected “Speech”*

Consistent with its expansion of expressive conduct protected by the First Amendment, the Court has also narrowed categories of unprotected speech, such as obscenity. Courts in the United States originally used the *Hicklin*<sup>53</sup> rule from English common law as the obscenity test.<sup>54</sup> Under this rule, a legislature could prohibit materials that it found to “deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.”<sup>55</sup> The Supreme Court explicitly rejected this rule in *Roth v. United States* as inconsistent with the First Amendment,<sup>56</sup> and offered a more specific test in *Miller v. California*.<sup>57</sup>

47. U.S. CONST. amend. I. The Supreme Court has incorporated the free speech protections of the First Amendment against the states. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

48. See DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS, 1870–1920*, at 190 (1999) (stating that the American framers intended to overturn what they saw as “antirepublican” English speech laws).

49. See *id.* (asserting that the framers wanted greater speech rights than the “antirepublican” English common law provided).

50. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (holding burning the American flag to be expressive conduct); *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that wearing a jacket with the words “Fuck the Draft” on it was constitutionally protected speech); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–07 (1969) (holding that wearing of black armbands to protest the Vietnam War was protected speech).

51. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“Music, as a form of expression and communication, is protected under the First Amendment.”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (“For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.”).

52. *Burnstyn*, 343 U.S. at 502.

53. *Regina v. Hicklin*, [1868] 3 L.R.Q.B. 360, 371.

54. *Roth v. United States*, 354 U.S. 476, 488–89 (1957).

55. *Hicklin*, 3 L.R.Q.B. at 371.

56. *Roth*, 354 U.S. at 489.

57. 413 U.S. 15, 24 (1973).

In addition to limiting the definition of obscenity to material that specifically depicts or describes sexual conduct, the *Miller* Court required a finding that the work as a whole appeals to prurient interest in sex (applying contemporary community standards), that the conduct is depicted in a patently offensive way, and that the “work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>58</sup> By providing a clearer standard, the *Miller* rule provided greater First Amendment protection to sexually explicit materials than did the *Hicklin* rule.

Even though some pornography may be considered not obscene under *Miller*, the Supreme Court has declared that sexually graphic depictions involving minors are constitutionally more permissible subjects of regulation than other genres of pornography.<sup>59</sup> In *New York v. Ferber*, the Court declared depictions of actual children engaged in sexual acts to be outside of the scope of the First Amendment<sup>60</sup> because they have de minimis social value,<sup>61</sup> are intrinsically related to child abuse,<sup>62</sup> and psychologically and emotionally harm children.<sup>63</sup> In clarifying the parameters of “child pornography,” the *Ferber* Court explicitly separated such material from obscenity as defined by the *Miller* requirements.<sup>64</sup> The Court compared the two tests and held that, unlike obscenity, the test for child pornography did not require the material be considered as a whole, appeal to prurient interests, or portray sexual conduct in a “patently offensive manner.”<sup>65</sup> Furthermore, the Court held that whether a work contains “serious literary, artistic, political, or scientific value” is irrelevant as to whether the material is considered child pornography.<sup>66</sup> The *Ferber* standard considers material to be child pornography—and outside the scope of the First Amendment—if it merely portrays, even in part, minors engaged in sexually explicit conduct, so long as prohibitory statutes specifically identify the acts that may not be depicted.<sup>67</sup>

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58. *Id.*

59. *New York v. Ferber*, 458 U.S. 747, 756 (1982).

60. *Id.* at 763.

61. *Id.* at 762.

62. *Id.* at 759.

63. *Id.* at 759 n.10. The Court also noted that holding child pornography to be outside the scope of the First Amendment was consistent with its previous decisions. *Id.* at 763.

64. *Id.* at 764.

65. *Id.*

66. *Id.* at 761. *Ferber*'s standard is much more akin to the *Hicklin* rule because it merely requires depiction of sexually explicit conduct. However, the *Hicklin* rule and the *Ferber* rule may be distinguished because *Ferber* requires that “sexual conduct” be statutorily limited and described. *Id.* at 764. *Hicklin* provided no guidance in making content-based distinctions. *See supra* note 55 and accompanying text.

67. *Ferber*, 458 U.S. at 764.

### B. *The Overbreadth Doctrine*

On top of precluding laws proscribing protected speech, the First Amendment also forbids laws that are overly broad in their application so as to inhibit speakers from engaging in protected speech activities. In deciding an overbreadth challenge to a criminal statute, a court must balance the challenged statute's statutory aims with free speech interests.<sup>68</sup> As the Supreme Court declared in *Broadrick v. Oklahoma*,<sup>69</sup> "the First Amendment needs breathing space,"<sup>70</sup> and legislation deterring individuals from engaging in constitutionally protected speech may consequently be considered unconstitutionally overbroad.<sup>71</sup> Overbreadth challenges to statutes criminalizing expressive conduct—as opposed to speech—must show that the statute's chilling of protected speech "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."<sup>72</sup> Thus, courts considering overbreadth challenges to legislation criminalizing conduct must balance the "plainly legitimate sweep" of the legislation against the harms caused by inhibiting protected speech.<sup>73</sup>

Because *Miller* considers a broad class of adult pornography to be constitutionally protected speech,<sup>74</sup> and because *Ferber* considers production of any pornography employing child subjects to be unprotected speech,<sup>75</sup> the age of a subject participating in sexually explicit conduct for the purpose of producing pornography can determine whether the First Amendment offers full protection to those visual depictions or provides none whatsoever.<sup>76</sup> The fine line drawn by the Court in its *Miller* and *Ferber* decisions raises overbreadth concerns for laws prohibiting the production of child pornography,<sup>77</sup> as they might discourage individuals from engaging in constitutionally protected speech activities.<sup>78</sup> Given this fine line, defendants have challenged strict liability imposed by child pornography statutes as violating

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68. See *Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003) (describing the point at which the chilling effect on the First Amendment might outweigh the otherwise legitimate statutory aims of an anti-trespass law); see also Gideon Newmark, Comment, *The Strong Medicine of Overbreadth as Applied to Criminal Libel*, 59 CASE W. RES. L. REV. 553, 560–61 (2009) (explaining the Supreme Court's overbreadth doctrine and applying it to criminal libel statutes).

69. 413 U.S. 601 (1973).

70. *Id.* at 611.

71. *Id.* at 612–15.

72. *Id.* at 615.

73. *Id.*

74. See *supra* text accompanying notes 56–58.

75. See *supra* notes 59–67 and accompanying text.

76. *United States v. U.S. Dist. Court*, 858 F.2d 534, 538–39 (9th Cir. 1988).

77. Cf. *id.* ("[N]o one claims that [the material here] is obscene; the film would therefore enjoy the protection of the first amendment were it not for its depiction of a minor. . . . The age of the subject thus defines the boundary between speech that is constitutionally protected and speech that is not.")

78. *Id.* at 545. However, as the court goes on to note, current jurisprudence places a great deal of weight on the side of the state's interest in protecting children from exploitation, which diminishes the effect of overbreadth concerns. *Id.*

the First Amendment because it fails to provide “breathing space” for mistakes of a child subject’s age.<sup>79</sup>

#### IV. Mistakes of Age

##### A. *The Production-Versus-Distribution Distinction*

The Supreme Court has not directly addressed whether the First Amendment requires a reasonable mistake of age defense to crimes of producing child pornography. In *United States v. X-Citement Video*,<sup>80</sup> it held that the federal child pornography statute requires prosecutors to show that distributors and retailers of child pornography had knowledge that material they sold contained sexually explicit images of minors.<sup>81</sup> In *X-Citement Video*, a defendant was indicted for selling and shipping multiple pornographic videotapes that contained a subject who was under the age of eighteen.<sup>82</sup> The defendant appealed, arguing that because the statute lacked a knowledge of age requirement, it was unconstitutionally overbroad.<sup>83</sup> The Supreme Court agreed that the statute would have free speech implications if it lacked such a requirement but construed the statute to include a knowledge of age requirement to avoid a constitutional collision with the First Amendment.<sup>84</sup> Because it did not specifically address the reasonable mistake of age defense for *producers* of child pornography, the Court left this issue open for lower courts to decide.<sup>85</sup>

To date, the Courts of Appeals of the Fourth, Eighth, and Ninth Circuits, and the Courts of Appeals of Maryland and Minnesota have addressed this exact issue.<sup>86</sup> Only the Ninth Circuit has resolved that the First Amendment requires a reasonable mistake of age defense.<sup>87</sup> Others have opted for a strict-liability standard. This Part argues that because strict-liability jurisdictions lack strong precedential support for the proposition that chilled speech is insubstantial, their position pits free speech rights against the interests of protecting the welfare of children. However, it also contends that the

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79. *See infra* subpart IV(B).

80. 513 U.S. 64 (1994).

81. *Id.* at 65–66.

82. *Id.* at 66.

83. *Id.* at 67.

84. *Id.* at 71–73. The Court found that for distributors—unlike producers—“[t]he opportunity for reasonable mistake as to age increases significantly once the victim is reduced to a visual depiction, unavailable for questioning by the distributor or receiver.” *Id.* at 72 n.2.

85. *See Gilmour v. Rogerson*, 117 F.3d 368, 372 (8th Cir. 1997) (accusing the Supreme Court of intentionally sidestepping the issue of whether the Constitution *requires* a knowledge of age element).

86. *United States v. Malloy*, 568 F.3d 166, 174–76 (4th Cir. 2009); *United States v. Wilson*, 565 F.3d 1059, 1067–69 (8th Cir. 2009); *United States v. U.S. Dist. Court*, 858 F.2d 534, 540–41 (9th Cir. 1988); *Outmezguine v. State*, 641 A.2d 870, 875–77 (Md. 1994); *State v. Fan*, 445 N.W.2d 243, 245–48 (Minn. Ct. App. 1989).

87. *See infra* subpart IV(B).

Ninth Circuit's approach may protect too much free speech at the expense of child-protection goals. After analyzing both sides' arguments, this Part proposes an intermediate standard that helps resolve the tension between strict liability and the reasonableness test, which requires that a defendant show "by clear and convincing evidence, that he did not know, and could not reasonably have learned, that the actor or actress was under 18 years of age."<sup>88</sup>

*B. The Split in Authority*

1. *The Ninth Circuit.*—The Ninth Circuit Court of Appeals was the first federal appellate court to address this issue<sup>89</sup> in its decision in *United States v. United States District Court for the Central District of California*.<sup>90</sup> In the underlying case, *United States v. Kantor*,<sup>91</sup> producers were charged under the federal child pornography statute for creating a film showing a sixteen-year-old girl engaging in sexually explicit conduct.<sup>92</sup> The defendants argued only that they reasonably mistook the child for an adult because of her fraudulent representations of her age.<sup>93</sup> They contended that the statute was overly broad because it failed to include a reasonable mistake of age defense.<sup>94</sup> When the District Court of Central California sided with the defendants, the government petitioned the Ninth Circuit for a writ of mandamus.<sup>95</sup>

The Ninth Circuit initially noted that the pornographic material at issue in the case was not obscene and that but for its employment of a minor, it would have been constitutionally protected speech.<sup>96</sup> In its review of relevant Supreme Court decisions, the Ninth Circuit deduced that a "speaker may not be put at complete peril in distinguishing between protected and unprotected speech. Otherwise, he could only be certain of avoiding liability by holding his tongue . . . ."<sup>97</sup> The court agreed with the defendant that a minor can look like an adult and vice versa,<sup>98</sup> and that no source of identifying a potential subject's age is infallible.<sup>99</sup> Instead of invalidating the entirety of

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88. *Dist. Court*, 858 F.2d at 543.

89. *See supra* note 86.

90. 858 F.2d 534 (9th Cir. 1988).

91. 677 F. Supp. 1421 (C.D. Cal. 1987). The facts of this case are the same as the *Central District of California* case; the style of the case changed upon the government's petition for writ of mandamus. *Id.* at 1426–29.

92. *Dist. Court*, 858 F.2d at 536.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 538.

97. *Id.* at 539 (internal citations and quotation marks omitted).

98. *Id.* at 539–40.

99. *Id.* at 540.

the statute, the court read a reasonable mistake of age defense into the statute “to avoid [its] constitutional infirmity.”<sup>100</sup>

In his dissent, Judge Beezer disagreed that the First Amendment required a mistake of age defense because society’s interest in protecting children outweighed a minimal intrusion on free speech.<sup>101</sup> He contended that the federal child pornography statute was intended to protect children—even those who fraudulently convinced others that they were adults—from their own immaturity.<sup>102</sup> Judge Beezer would have imposed the burden on pornographers to take all steps “necessary to establish the age of the subjects they depict—or [to] employ different subjects.”<sup>103</sup> He continued to rebut the majority’s arguments by contending that pornographers can conduct accurate investigations “based on reputation, first-hand testimony, and especially, documents”—even if this investigation required viewing the original documents in person.<sup>104</sup> He also reiterated the point from *X-Citement Video* that producers are in a much better position than distributors to ascertain the age of the subjects of pornography.<sup>105</sup>

2. *The Eighth Circuit.*—After *District Court*, the Eighth Circuit was the next federal appellate court to address the issue,<sup>106</sup> which it took up in *Gilmour v. Rogerson*.<sup>107</sup> In *Gilmour*, the defendant took sexually explicit photographs of a seventeen-year-old girl after being informed by both the girl’s boyfriend and driver’s license that she was twenty-two years old.<sup>108</sup> The defendant appealed his jury conviction under an Iowa statute criminalizing the creation of child pornography<sup>109</sup> on the grounds that it violated the First Amendment.<sup>110</sup> In finding a mistake of age defense to be wholly inconsistent with child-protection principles—particularly that a child should be protected even from his or her own deceitful conduct<sup>111</sup>—the Eighth Circuit rejected the defendant’s contention on at least three grounds.<sup>112</sup> First, the concern for chilling speech of distributors did not apply because the Iowa statute only imposed strict liability on producers, who were akin to statutory

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100. *Id.* at 542.

101. *Id.* at 544 (Beezer, J., dissenting).

102. *Id.*

103. *Id.*

104. *Id.* at 546.

105. *United States v. X-Citement Video*, 513 U.S. 64, 76 n.5 (1994); *Dist. Court*, 858 F.2d at 547.

106. *See supra* note 86 and accompanying text.

107. 117 F.3d 368 (8th Cir. 1997).

108. *Id.* at 369.

109. *Id.* at 370.

110. *Id.* at 370–72.

111. *Id.* at 372.

112. *Id.*

rapists who received no mistake of age defense.<sup>113</sup> Second, the speech that would be chilled—adult pornography—was not highly valuable speech under the First Amendment.<sup>114</sup> Finally, the statute was not substantially overbroad under *Broadrick*, according to the court, since it targeted only speech plus conduct rather than pure speech.<sup>115</sup>

Judge Arnold dissented. He pointed out that there was no support for a conclusion that a mistake of age defense would encourage a minor to be increasingly deceitful about his or her age and thereby result in more production of child pornography.<sup>116</sup> He also argued that the analogy of a child pornography producer to a statutory rapist was inapposite because the latter had no constitutional right to engage in sex with anyone except his or her spouse, whereas the former had a right to take erotic photographs.<sup>117</sup> Judge Arnold concluded that strict liability substantially burdens protected speech because of the severity of the penalties for the crime.<sup>118</sup>

In 2009, the Eighth Circuit Court of Appeals reaffirmed its position in *Gilmour*. In *United States v. Wilson*,<sup>119</sup> the court applied its rationale about the First Amendment's application from *Gilmour* to the federal child pornography statute. In *Wilson*, Devin Wilson was convicted under the federal child pornography statute<sup>120</sup> for videotaping his casual sexual encounters with a sixteen-year-old girl.<sup>121</sup> The court restated its position in *Gilmour* in holding that a mistake of age was no defense to producing child pornography.<sup>122</sup> It incorporated the *X-Citement Video* logic, which Justice Beezer emphasized in his *District Court* dissent,<sup>123</sup> that a producer of child pornography was less deserving of First Amendment protection than a distributor because a producer is in a better position to verify an actor's age.<sup>124</sup> To support this proposition, the court also reiterated *Gilmour*'s analogy that a producer is like a statutory rapist, for whom a mistake of age

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113. *Id.* at 372–73. The Eighth Circuit analogized a producer of child pornography to a statutory rapist, who may be held strictly liable as to the age of a minor with whom the statutory rapist has sexual intercourse, because a child photographer and a statutory rapist both have personal contact with the minor. “In this information age, a prudent photographer or movie producer may readily and independently confirm the age of virtually every young-looking model.” *Id.* (citing *Outmezguine v. State*, 641 A.2d 870 (Md. 1994)). In the Eighth Circuit's view, this similarity supported the denial of a reasonable mistake of age defense.

114. *Id.* at 373.

115. *Id.* at 372.

116. *Id.* at 374 (Arnold, J., dissenting).

117. *Id.*

118. *Id.* at 375.

119. 565 F.3d 1059 (8th Cir. 2009).

120. *Id.* at 1062.

121. *Id.* at 1063.

122. *Id.* at 1069.

123. See *United States v. U.S. Dist. Court*, 858 F.2d 534, 547 (9th Cir. 1988) (Beezer, J., dissenting) (“A producer is in the perfect position to establish the age of his subject; he may ask the subject directly where to obtain documents verifying the subject's age.”).

124. *Wilson*, 565 F.3d at 1067.

defense is unavailable.<sup>125</sup> The court held that concerns of fraud perpetrated by a minor would only deter an insubstantial amount of protected speech, which did not outweigh the child-protection goals of the statute.<sup>126</sup>

3. *The Fourth Circuit.*—In *United States v. Malloy*,<sup>127</sup> Michael Malloy, a police officer who had sex with a fourteen-year-old student and videotaped the encounter, was charged under the federal child pornography statute.<sup>128</sup> Like the defendants in *District Court* and *Gilmour*, Malloy argued that the First Amendment required a mistake of age defense.<sup>129</sup> The court disagreed, holding that the government's interest in preventing the sexual exploitation of minors was significant and that there was no substantial chilling of protected speech.<sup>130</sup> The Fourth Circuit adopted *Gilmour*'s child-protection rationale—that proscriptions on child pornography aim to protect even those children that make self-destructive decisions, such as lying about their ages.<sup>131</sup> It reinforced this reasoning by highlighting the long-term physical and psychological harms to children described in *Ferber* and in congressional debate over the child pornography statute.<sup>132</sup>

The court also held that strict liability as to a child subject's age would not result in substantial self-censorship for four reasons.<sup>133</sup> First, it cited federal law that requires pornographers to verify an actor's age<sup>134</sup> by examining "an identification document" that "contain[s] . . . the performer's name and date of birth."<sup>135</sup> Second, the only type of pornography that would be chilled would be a small subset of pornography that depicted a "youthful-looking" actor.<sup>136</sup> Third, prosecution under the statute would be rare where the subjects were not unmistakably children because prosecutors must frequently prove a child's age by only showing the video or photos since they cannot always locate the actor.<sup>137</sup> Fourth, in light of a slight chance of prosecution, the significant profits from selling pornography would not inhibit much speech.<sup>138</sup> Considering these four points, the Fourth Circuit held that the

125. *Id.* at 1067–68; *see also supra* note 113.

126. *Wilson*, 565 F.3d at 1069. The Court of Appeals ruled on essentially the same grounds in *United States v. Pliago*, 578 F.3d 938 (8th Cir. 2009). The lower courts of the Eighth Circuit have consistently followed this ruling. *E.g.*, *United States v. Heath*, No. CR09-2003-LRR, 2009 U.S. Dist. LEXIS 37994, at \*6–11 (N.D. Iowa May 1, 2009).

127. 568 F.3d 166 (4th Cir. 2009).

128. *Id.* at 169.

129. *Id.* at 171.

130. *Id.* at 176.

131. *Id.* at 175.

132. *Id.* at 175–76.

133. *Id.*

134. *Id.* at 175.

135. *Id.* (citing 18 U.S.C. § 2257(b)(1) (2006)).

136. *Id.* at 175–76.

137. *Id.* at 176.

138. *Id.*

First Amendment required no mistake of age defense and upheld Malloy's conviction.<sup>139</sup>

4. *Minnesota and Maryland.*—In addition to these federal courts, two states' courts of appeals have also considered whether the First Amendment requires a mistake of age defense to their own laws prohibiting the production of child pornography. In *State v. Fan*,<sup>140</sup> the Court of Appeals of Minnesota confronted a First Amendment overbreadth challenge after a jury convicted David Fan—who had hired a thirteen-year-old girl to dance nude on stage—under a state statute outlawing the use of minors in live sexual performances.<sup>141</sup> This statute expressly precluded a reasonable mistake of age defense.<sup>142</sup> After noting that an overbreadth challenge must show that a substantial amount of protected speech would be inhibited,<sup>143</sup> the court rejected Fan's defense, stating, "Although it is marginally possible that the statute could reach a valid first amendment application, the statute does not substantially prohibit constitutionally protected expression."<sup>144</sup>

The Court of Appeals of Maryland followed *Fan* in its 1994 decision in *Outmezguine v. State*.<sup>145</sup> Elan Outmezguine was convicted under a Maryland statute of taking nude photographs of a fifteen-year-old, Jessica H.<sup>146</sup> Though Outmezguine was in the home-cleaning-and-improvement business, he made money on the side by photographing nude dancers and models.<sup>147</sup> Outmezguine gave Jessica H. and her boyfriend some of his cleaning and home-improvement work so they could make some money.<sup>148</sup> After they asked to see Outmezguine's photography, Outmezguine offered Jessica H. (and she accepted) money for him to take nude photos of her.<sup>149</sup> Jessica H. later revealed this to a counselor who reported it to the police, who in turn charged Outmezguine under the Maryland child pornography statute.<sup>150</sup> Though Outmezguine claimed that he did not know Jessica H.'s age, she testified that she told him she was fifteen and in high school.<sup>151</sup> After the lower courts rejected Outmezguine's First Amendment challenge,<sup>152</sup> the Court of Appeals of Maryland affirmed.<sup>153</sup>

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139. *Id.*

140. 445 N.W.2d 243 (Minn. Ct. App. 1989).

141. *Id.* at 244–45.

142. *Id.* at 245–46.

143. *Id.*

144. *Id.* at 246.

145. 641 A.2d 870 (Md. 1994).

146. *Id.* at 872.

147. *Id.*

148. *Id.*

149. *Id.* at 872–73.

150. *Id.* at 873.

151. *Id.* at 873–74.

152. *Id.* at 874–75.

153. *Id.* at 880.

The *Outmezguine* court sought to strike the proper *Broadrick* balance between preventing the chilling of protected speech and achieving the statutory goals of protecting children.<sup>154</sup> It determined that because a photographer can require subjects “to produce a birth certificate, driver’s license, or similar governmental identification card,”<sup>155</sup> protected speech would not be chilled when “[a] reasonable bona fide attempt to verify the authenticity of such documents will thus ensure that the subject being used is not a child.”<sup>156</sup> It further noted that the value of the chilled speech was marginal in light of the strong historical protection the First Amendment contemplated for political speech.<sup>157</sup> In addressing the substantiality of the chilled speech, the court stated in a conclusory manner, “Certainly, the chilling effect would not be considered ‘substantial’ as is required under an overbreadth analysis.”<sup>158</sup>

## V. The Age-Old Debate

While strict liability for producing child pornography provides insufficient breathing space for speech protected by the First Amendment, the Ninth Circuit’s leniency provides too much space, which compromises child-protection goals. With an intermediate standard for a reasonable mistake of age defense that requires producers of child pornography to establish that they verified actors’ proof of age with original government documents, the First Amendment concerns of strict liability for child pornography would be avoided while still providing robust protection for the interests of children.

### A. *Interests of Child Pornography Statutes*

Though the government’s interest in protecting children from the harms of child pornography is quite compelling, a mistake of age defense would still facilitate this interest. Those arguing that the First Amendment requires no such defense have determined that the statutory aims of protecting children—even from their own deceitful behavior—outweigh the protected speech that would be chilled by strict liability.<sup>159</sup> They have relied on legislative debate and *Ferber*’s articulation of the harms produced by child pornography, particularly those relating to difficulties forming relationships, more incidents of sexual molestation, and increased risks of drug and alcohol

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154. *See id.* at 878 (recognizing that a statute that regulates speech “could possibly have a chilling effect on protected expression if criminality is imposed without a requirement that the defendant have knowledge of the child’s minority” and balancing the right to freedom of expression against the government’s right to protect children from sexual exploitation).

155. *Id.*

156. *Id.*

157. *Id.* at 878–79.

158. *Id.* at 879.

159. *See supra* subpart IV(B).

abuse.<sup>160</sup> Neither the Ninth Circuit in *District Court* nor Judge Arnold in his dissent in *Gilmour* attempted to rebut the harmfulness of child pornography.<sup>161</sup> Instead, Judge Arnold argued that engrafting a mistake of age defense into the federal child pornography statute would not result in an increase in the production of child pornography.<sup>162</sup> The court's ruling against a mistake of age defense similarly did not contend that this defense would deter child pornography production.<sup>163</sup>

The prosecutions under state and federal child pornography statutes have suggested that those charged with child pornography would not be benefited in many circumstances by a mistake of age defense.<sup>164</sup> Indeed, the Ninth Circuit's test is a difficult standard to meet. First, defendants must establish the defense by clear and convincing evidence.<sup>165</sup> Second, they must show that they not only lacked actual knowledge of the child's age but also could not have reasonably learned of the child's age.<sup>166</sup> Thus, as Judge Arnold argued in *Gilmour*, a mistake of age defense would not necessarily result in increased production of child pornography,<sup>167</sup> particularly because the stiffness of the penalties under the federal statute would still act as a sizeable deterrent.

Moreover, many defendants in the previously discussed cases would not have been able to effectively satisfy these requirements. For example, the defendants in *Wilson*, *Malloy*, *Fan*, and *Outmezguine*, who did not request to see government-issued proof of the photographed or video-recorded child's age,<sup>168</sup> probably could not have proven that their failures to do so constituted a reasonable attempt to learn of the child's age. The only case in which a defendant has benefited from a reasonable mistake of age defense was *District Court*, where the defendants relied on government documents provided by the child subject.<sup>169</sup> Even though the Ninth Circuit's reasonable mistake of age defense would not address the concern articulated by the *Gilmour* and *Malloy* courts that children be protected from their own deceit,<sup>170</sup> the case for excluding the defense is weaker than courts have purported because the other child-protection interests of child pornography statutes can still be actualized with the defense.

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160. *New York v. Ferber*, 458 U.S. 747, 758 n.9 (1982).

161. *See supra* sections IV(B)(1)–(2).

162. *Gilmour v. Rogerson*, 117 F.3d 368, 374 (8th Cir. 1997) (Arnold, J., dissenting).

163. *See supra* subpart IV(B).

164. *See supra* subpart IV(B).

165. *United States v. U.S. Dist. Court*, 858 F.2d 534, 543 (9th Cir. 1988).

166. *Id.*

167. *Gilmour*, 117 F.3d at 374 (Arnold, J., dissenting).

168. *See supra* sections IV(B)(2)–(4).

169. The defendant in *Gilmour* who had allegedly seen a driver's license presented by a seventeen-year-old girl may have also benefited from a reasonable mistake of age defense, *Gilmour*, 117 F.3d at 369, but this would have turned on whether the jury found *Gilmour's* testimony to be clear and convincing, *Dist. Court*, 858 F.2d at 543–44.

170. *See supra* section IV(B)(2).

### B. *Substantial Chilling of Protected Speech*

In recognizing a reasonable mistake of age defense, the *District Court* argued that some protected speech would inevitably be chilled.<sup>171</sup> Since the defendant's guilt necessarily turns on the age of a child, those contemplating photographing or videotaping others engaged in sexual conduct would decide against it both because children can look older than their age and no type of record or proof of age is completely infallible.<sup>172</sup> The massive penalties under child pornography statutes would substantially inhibit protected speech when adult subjects look younger than their age, and when adult subjects look their actual age but the pornographer fears the adult subject looked young enough to be a minor.<sup>173</sup> Though some of the arguments responding to *District Court* have provided significant counterweights to the Ninth Circuit's reasoning, many others have missed the mark.

For example, the *Malloy* court held that strict liability as to knowledge of the child's age for the crime of producing child pornography would not inhibit a substantial amount of protected speech because strict liability would only apply to a subset of pornography where a producer sought to employ "youthful-looking" actors.<sup>174</sup> *Malloy*'s reasoning is problematic because it relies on no authority that chilled speech is insubstantial because it merely comprises a subcategory of a type of speech. Moreover, this argument fails to grapple with *District Court*'s position that children can look more adult-like than some adults and vice versa, which implies that strict liability chills speech in other categories where the producers of the pornography are *not* employing particular actors *because* they look of barely legal age.<sup>175</sup> Consequently, strict liability may inhibit protected speech in multiple genres of adult pornography.

The Fourth Circuit also reasoned that where the actor in question looked like an adult, producers of pornography would not be deterred by the small risk of prosecution because of the potential profitability of the pornographic material and the fungibility of pornographic actors.<sup>176</sup> This reasoning is also troublesome because it contemplates only commercial, mass producers of pornography who hire actors and sell their productions where many non-

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171. *Dist. Court*, 858 F.2d at 540.

172. *Id.*

173. *See supra* text accompanying notes 96–98.

174. *See supra* text accompanying note 136.

175. Although "barely legal" is a subcategory of adult pornography, M. Eric Christensen, Note, *Ensuring that Only Adults "Go Wild" on the Web: The Internet and Section 2257's Age-Verification and Record-Keeping Requirements*, 23 *BYU J. PUB. L.* 143, 155–56 (2008), there are many other different categories of adult pornography that may use youthful-looking actors. *See, e.g.*, Michael Flood, *Child Porn Indicative of Culture's Teen Fetish*, *CANBERRA TIMES* (Austl.), Oct. 14, 2004, at A19 (listing types of pornography that often portray women as children, including "barely legal," "teenerama," "seventeen," "schoolgirls," and "teeny vision").

176. *United States v. Malloy*, 568 F.3d 166, 176 (4th Cir. 2009).

commercial producers of child pornography have been charged.<sup>177</sup> It also under assesses the risk of prosecution by failing to take into account the prosecutorial provinces of both state and federal officials, and by assuming that prosecutors will not have access to the child in question a vast majority of the time.<sup>178</sup> However, this is not always the case. Given Judge Arnold's observation about the stiffness of the penalties under federal and state child pornography statutes,<sup>179</sup> noncommercial production might be significantly inhibited because there is little to no financial incentive for production or readily-accessible substitutes.

Because consensual sex is not constitutionally protected speech,<sup>180</sup> the statutory-rape analogy<sup>181</sup> does not translate to the First Amendment context. Opponents of the defense argue that producers of child pornography are in a better position than distributors to take reasonable steps to validate the age of their photographed or videotaped subjects, as could a statutory rapist.<sup>182</sup> Producers, as the Eighth Circuit noted in *Gilmour* and *Wilson*, are thus more akin to statutory rapists, who receive no reasonable mistake of age defense. Because documents are never infallible,<sup>183</sup> though, producers may not be in a much better position than distributors to verify child actors' ages. Moreover, the statutory-rape analogy makes little sense for overbreadth purposes because this doctrine has never been applied outside of the First Amendment.<sup>184</sup>

Finally, overbreadth jurisprudence obfuscates whether strict liability chills a sufficiently substantial amount of protected speech to require the defense. Courts have argued that the value of the chilled speech is marginal because adult pornography is not pure speech.<sup>185</sup> However, the first warrant to this argument is conclusory because *Broadrick's* balancing test is implicated when the allegedly chilled "speech" is actually chilled "expressive conduct."<sup>186</sup> Thus, the argument that the speech of adult pornography lacks value under the overbreadth test *because it is expressive conduct* is circular. Courts have also argued that the chilled speech is not substantial because it does not hit the political heart of the First Amendment.<sup>187</sup> This argument

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177. See *supra* subpart IV(B).

178. See *supra* subpart IV(B).

179. *Gilmour v. Rogerson*, 117 F.3d 368, 375 (8th Cir. 1997) (Arnold, J., dissenting).

180. *But cf.* *Lawrence v. Texas*, 539 U.S. 558, 584–85 (2003) (holding that there is a fundamental right to privacy that extends to consensual adult sexual relations and thereby undermining Judge Arnold's contention that there is no constitutional right to sexual relations with anyone).

181. See *supra* note 113.

182. See *Outmezguine v. State*, 641 A.2d 870, 876 (Md. 1994) (summarizing the state's argument for strict liability—that producers and photographers are in a better position to discover the ages of their subjects).

183. *United States v. U.S. Dist. Court*, 858 F.2d 534, 540 (9th Cir. 1988).

184. *Newmark*, *supra* note 68, at 560.

185. *Gilmour v. Rogerson*, 117 F.3d 368, 373 (8th Cir. 1997).

186. See *supra* text accompanying note 72.

187. *Outmezguine*, 641 A.2d at 878–79.

carries more precedential weight, as the Supreme Court has noted that different types of speech have different values.<sup>188</sup> This contention is also consistent with the history of the First Amendment, which was framed to protect unpopular political views.<sup>189</sup> However, it remains unclear whether strict liability chills enough speech to be considered substantial under *Broadrick*.

### C. *An Intermediate Standard*

On one hand, the Ninth Circuit's reasonable mistake of age defense hardly protects children who are deceitful about their age—arguably those children that need to be protected the most. On the other, strict-liability jurisdictions have not persuasively justified leaving no breathing space for a distinct category of protected speech—though marginally valuable—given that the mistake of age defense can still facilitate child-protection interests. In the absence of proposals for a middle ground,<sup>190</sup> this Note proposes an intermediate mistake of age defense, which would provide more protection to deceitful children than the Ninth Circuit's test and chill less protected speech than the strict-liability standard. More specifically, state and federal courts<sup>191</sup> should consider permitting defendants to claim a mistake of age defense if they show by clear and convincing evidence that they (1) had no actual knowledge of the child's age; (2) requested and reviewed the child's proof-of-age documentation; and (3) verified the validity of the presented documents with government records or government officials, which happened to be defective or misleading.

These elements could be met in circumstances very similar to the facts of *District Court*. In *District Court*, the defendants had no actual knowledge of the child's age and requested and received the child's identification, which was fraudulent.<sup>192</sup> However, a defendant would not be able to succeed under the proposed intermediate standard for the mistake of age defense unless the defendant also showed by clear and convincing evidence that this inaccuracy

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188. *Gilmour*, 117 F.3d at 373 (citing *United States v. X-Citement Video*, 513 U.S. 64, 84 (1994)).

189. See *supra* text accompanying notes 48–49.

190. See generally Jorn Axel Holl, Comment, *Judges, Congress, and the Sixteen-Year-Old Porn Star: Questions on the Proper Role of the First Amendment*, 75 IOWA L. REV. 1355, 1357 (1990) (arguing that the Ninth Circuit decided *District Court* incorrectly when it determined to add a reasonable mistake of age requirement based on First Amendment concerns); Simmons, *supra* note 14, at 121–25 (disagreeing with the *Outmezguine* court's analysis and concluding that it should have followed the Ninth Circuit's *District Court* opinion and permitted a reasonable mistake of age defense); Robert R. Strang, Note, “*She Was Just Seventeen . . . and the Way She Looked Was Way Beyond [Her Years]*”: *Child Pornography and Overbreadth*, 90 COLUM. L. REV. 1779, 1803 (1990) (concluding that courts should recognize a mistake of age defense for distributors of child pornography, but not for producers).

191. State or congressional legislation that statutorily provides this defense should be considered, but whether judicial or legislative action is preferable is outside the scope of this Note.

192. *United States v. U.S. Dist. Court*, 858 F.2d 534, 536 (9th Cir. 1989).

was also confirmed by an original government document (or by a government employee that had access to those documents), including those on file with local government agencies such as an original birth certificate, passport, or driver's license.<sup>193</sup>

In lieu of the Ninth Circuit's current reasonableness rule, this intermediate standard would increase the general protection of children against sexual exploitation by specifying the particular instances under which defendants could claim the defense, as it would presumably include only the very rare circumstances where the original official government records were wrong with regard to a birth date or where government officials miscommunicated information from an accurate birth record. The intermediate standard would also offer more protection to those particular children who were deceitful about their age in at least two ways. First, by putting the risk of fraud or deceit on the pornographer, it would further encourage age verification with government documents, which are more likely to be accurate. Second, it would discourage children from lying about their age because vigorous age-verification practices would likely catch this fraud.

An intermediate standard would also be more palatable to the First Amendment. As the *District Court* court elucidated, strict liability would inevitably chill some constitutionally protected speech because of the fallibility of the sources of evidence that Judge Beezer argued could be used to verify age, such as "reputation, first-hand testimony, and . . . documents."<sup>194</sup> Under the strict-liability standard, defendants assume the risk of faulty or misleading documents and information provided by the government. By lifting this risk off of potential producers of child pornography, they might be more likely to seek out the proper verification if they know that it might shield them from criminal liability.

This intermediate standard would sit well with those who have rejected the defense because they have explained that a defendant's burden should be to do exactly what this immediate standard proposes. However, the strict-liability principle would not permit a defendant to raise a mistake of age defense even where the defendant met these burdens as these courts have

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193. Such factual circumstances would indeed be very rare, but official government records are not infallible. *Id.* at 540; *see also, e.g.*, Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 309 (1999) (suggesting that errors with regard to the sex of a baby can be made on birth certificates by medical assistants at the time of birth). The potential for errors also exists, for example, any time a change is made to an official document. Revisions to a birth certificate, for example, may be granted for a number of reasons, including correcting a factual mistake on a birth certificate, and sometimes when a person or child changes name or sex. *Id.* at 309–11. In addition, revisions could be made to a birth certificate when a child changes parents. Michael J. Ritter, Note, *Adoption by Same-Sex Couples: Public Policy Issues in Texas Law and Practice*, 15 TEX. J. C.L. & C.R. (forthcoming 2010) (manuscript at 12 & n.63, on file with author) (discussing state laws on the issuance of supplementary birth certificates after an adoption). Under a strict-liability scheme, the risk for errors in official government records could also serve as an additional chilling factor.

194. *Dist. Court*, 858 F.2d at 546–47 (Beezer, J., dissenting).

described them. For example, Judge Beezer articulated a comparable standard in his *District Court* dissent:

Documents establish age. While documents may be counterfeited, the originals exist somewhere. It would be simple for a pornographer to write his subject's birthplace for a certified copy of the subject's birth certificate. A pornographer might even go see the original himself. By obtaining proof in this fashion, a pornographer could eliminate all doubt about the subject's age.<sup>195</sup>

The *Outmezguine* court similarly stated:

A photographer or filmmaker is in a position to ascertain the true age of the individual being photographed or filmed by requiring that individual to produce a birth certificate, driver's license, or similar governmental identification card. A reasonable bona fide attempt to verify the authenticity of such documents will thus ensure that the subject being used is not a child.<sup>196</sup>

While what Judge Beezer and the *Outmezguine* court described might almost always be true, they do not sufficiently rebut the *District Court* majority's point that documents are *never infallible*.<sup>197</sup> The risk of miscommunication by a subject's birthplace or a problem with birth records would still fall on a defendant under the strict-liability rule and protected speech would still be chilled. By permitting defendants to raise a defense if they can show by clear and convincing evidence that they checked a child subject's government-issued identification for a child's age and subsequently verified the age with the original government document or with a government official, courts could provide the breathing space for protected speech that the First Amendment would prefer while protecting the interests of children at the same time.

## VI. Conclusion

Though the federal and state governments have criminalized the production of child pornography, producers continue to sexually exploit children by visually recording their sexual acts. This criminalization is problematic because these statutes generally omit mistake of age defenses. This omission raises First Amendment free speech concerns because strict liability would inevitably chill some constitutionally protected speech—the production of adult pornography. As defendants have challenged criminal statutes without mistake of age defenses as unconstitutionally overbroad, different courts have ended up on different sides of the debate. The Ninth Circuit has held that the First Amendment requires a reasonable mistake of

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195. *Id.* at 546.

196. *Outmezguine v. State*, 641 A.2d 870, 878 (Md. 1994).

197. Under the court's interpretation of the statute, a photographer who diligently checks identification could still violate the regulation if the identification provided is forged or inaccurate.

age defense under child pornography statutes; all other courts have opted for strict liability. Because neither side of this debate has sufficiently addressed opposing arguments, the current approaches have not satisfactorily achieved both child-protection and free speech goals. An intermediate standard that requires defendants to show by clear and convincing evidence that they had no actual knowledge of a child's age; requested and reviewed documents falsely stating that the child was an adult; and verified this false information with a government record or official, which happened to be incorrect, would check the inadequacies of both standards by boosting protection of deceitful children and providing breathing space for protected speech.

—*Michael J. Ritter*