FOR THE KIDS: HOW CONGRESS STRIPPED PORN PRODUCERS OF THEIR FOURTH AMENDMENT RIGHTS

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> "[T]he fact that someone's deeds may be objectively immoral—or that a governing majority in the community might regard the person's deeds as immoral—does not strip that person of inherent human dignity, nor of the responsible freedom that inherently flows from that dignity. Legal restrictions on that person's freedom, therefore, constitute an injury . . ."[2]

I. INTRODUCTION

When FBI agents arrived at the offices of Diabolic Video on July 24, 2006, "[i]t was just like in the movies: six agents in unmarked vehicles . . . each had different tasks—one manned the printer, one checked off names from a list, then he passed the records on to another agent who looked at the IDs and birth dates."[3]

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1. Law Clerk to the Honorable Anne E. Lazarus, Superior Court of Pennsylvania; J.D./M.B.A (2013) Rutgers School of Law; BA (2009) Trinity College. A very heartfelt thank you to those who have supported my study of pornography over the years and to the Rutgers Journal of Law and Religion for recognizing that no topic is taboo when approached with dignity and respect.

2. Gregory A. Kalscheur, *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 11 (2006). Kalscheur's article aims to explain both the holding in *Lawrence v. Texas* and the holding's limitations by applying the analytical framework of the moral concept of public order provided by the Second Vatican Council's *Declaration on Religious Freedom*. *Id.* at 1.

3. Matt O'Conner, *Diabolic Investigation Centered on Specific Performers*, XBIZ (July 26, 2006), http://www.xbiz.com/news/web/16195.

Diabolic Video, a pornographic[4] movie studio located in Chatsworth, California, was the first adult entertainment company to undergo an inspection of its age-verification records pursuant to 18 U.S.C. § 2257 since the law was passed in 1988.[5] Enacted as part of the ongoing effort to stanch child pornography,[6] 18 U.S.C. §§ 2257 and 2257A (the Statutes) are criminal laws imposing record-keeping, labeling, and inspection requirements on producers of sexually explicit content. In theory, the Statutes and their implementing regulations are intended to ensure that no minors appear in sexually explicit adult content. The eradication of child pornography is a laudable and worthy objective, however, the Statutes and implementing regulations impose a slew of onerous requirements on the adult entertainment industry. Failure to comply can result in jail time.[7]

With inspections underway, the Free Speech Coalition, the trade association for the adult entertainment industry, took its constituents' fight to the courts. The Statutes survived First Amendment[8] challenges in the District of Columbia Circuit[9] and

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4. "Pornography is material (such as writings, photographs, or movies) depicting sexual activity or erotic behavior in a way that is designed to arouse sexual excitement. Pornography is protected speech under the First Amendment . . ." BLACK'S LAW DICTIONARY 1279 (9th ed. 2009). *Contra*, "obscenity," which is not protected by the First Amendment, is defined as having the characteristic or state of being morally abhorrent or socially taboo, especially as a result of, referring to, or depicting sexual or excretory functions. *Id.* at 1182. Materials are deemed obscene if they appeal "to a prurient interest," show "patently offensive sexual conduct" that is specifically defined by a state obscenity law, and "lack serious artistic, literary, political, or scientific value." Miller v. California, 413 U.S. 15, 21 (1973). Decisions regarding whether material is obscene should be based on local, not national, standards. *Id.* at 32.

5. O'Conner, *supra* note 3.

6. Child pornography refers to "[m]aterials depicting a person under the age of eighteen engaged in sexual activity. Child pornography is not protected by the First Amendment -- even if it falls short of the legal standard for obscenity -- and those directly involved in its [production and] distribution can be criminally punished." BLACK'S LAW DICTIONARY 1279 (9th ed. 2009).

7. 18 U.S.C. § 2257(f)(1)-(5).

8. This note will not address the First Amendment challenges to 18 U.S.C. §§ 2257, 2257A.

9. Am. Library Ass'n v. Reno, 33 F.3d 78 (D.C. Cir. 1994) (determining that § 2257 was content neutral because it was clear Congress enacted the Act not to regulate the content of sexually explicit materials, but to protect children by deterring the production and distribution of child pornography).

the Sixth Circuit.[10] However, almost six years after the inaugural § 2257 inspection, the Philadelphia-based U.S. Court of Appeals for the Third Circuit resurrected the "intractable obscenity problem"[11] when it held that portions of the Statutes may violate the First and Fourth Amendments.[12]

The Fourth Amendment challenge advanced by the Plaintiffs in *Free Speech Coalition v. Attorney General of the United States*[13] will be the focus of this note. The Plaintiffs, a collection of individuals and entities involved with various aspects of the adult entertainment industry led by the Free Speech Coalition, allege that the inspection program set forth by the Statutes and implementing regulations are unconstitutional under the Fourth Amendment because they authorize unreasonable, warrantless searches and seizures. Specifically, the Plaintiffs allege that they are subjected to repeated, warrantless searches of their premises by government investigators, who are empowered to appear without advance notice and demand entrance to the premises—whether office, studio, or private home—to inspect and copy the records required by the Statutes and anything on the premises believed to be related to the commission of a felony.[14]

Part II will examine the legislative background of the Statutes through the lens of religious moralism. Part III will discuss the Statutes and their implementation. Part IV will analyze the validity of the Plaintiffs' Fourth Amendment claim. In Part V, I will offer my opinion on how the Third Circuit might rule regarding the Fourth Amendment claim. In Part VI, I will present potential solutions to the constitutional issues inherent to 18 U.S.C. §§ 2257 and 2257A.

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10. Connection Distrib. Co. v. Holder, 557 F.3d 321 (6th Cir. 2009) (stating that plaintiff could not demonstrate a likelihood of success because § 2257 was a content-neutral regulation that most likely satisfied intermediate scrutiny).

11. Justice John Marshall Harlan coined the term "the intractable obscenity problem" in his dissent to *Interstate Cir. v. Dallas*, 390 U.S. 676, 704 (1968) (holding that a city has the right to regulate dissemination of objectionable materials to young persons, but must do so with narrowly drawn, reasonable, and definite standards for the officials to follow in classifying films).

12. Free Speech Coal., Inc. v. Att'y Gen. of the U.S, 677 F.3d 519, 533-45 (3d Cir. 2012).

13. *Id*. at 541-45.

14. Free Speech Coal., Inc. v. Holder, 729 F. Supp. 2d 691, 743 (E.D. Pa. 2010), *vacated in part*, *aff'd in part*, 677 F.3d 519 (3d Cir. 2012).

II. LEGISLATIVE BACKGROUND

A. Religious Moralism and the American Narrative of the Child

From the beginning of Western thought, religion and morality have been inextricably intertwined,[15] and it is only more recently that we are able to untangle the two. However, secularization has not so much meant the *retreat* of religion from the public sphere as its *reinvention*.[16] The United States is not immune from this.[17] In fact, it can be said that all state and federal laws regulating adults' consensual sexual practices are religious in origin.[18] If the secular state's interest in regulating sexuality is an interest in maintaining religious—specifically Christian[19]—authority, then we must be willing to ask ourselves, "Can government, which may not establish religion, or interfere with the free exercise of religion and non-religion, enforce a morality rooted in religion?"[20] Justice Benjamin Cardozo might have answered this question as follows: "Law accepts as the pattern of its justice the morality of the community whose conduct it assumes to regulate."[21] This notion of community standards is fundamental to obscenity law,[22] and one standard every community can agree upon is the need to protect "the child."

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15. John Hare, *Religion and Morality*, STAN. ENCYCLOPEDIA PHIL. (Oct. 1, 2010), http://plato.stanford.edu/archives/win2010/entries/religion-morality.

16. JANET R. JAKOBSEN & ANN PELLEGRINI, LOVE THE SIN: SEXUAL REGULATION AND THE LIMITS OF RELIGIOUS TOLERANCE 21 (2003) ("This reinvention is accomplished through a conflation of religion and morality, in which morality is assumed to be the essence of religion and, conversely, moral proclamation can be a means of invoking religion without directly naming it.").

17. *Id*. at 22 ("In the particular case of the United States, the dominant framework for morality is not simply 'religious' or even 'Christian,' but is specifically Protestant … the *unstated* religious assumptions of U.S. secularism are specifically Protestant … In the United States, religion - Protestantism, that is - works to supply the moral foundation all the more thoroughly because its specific religious lineage is often forgotten.").

18. Anti-sodomy statutes, civil laws regulating marriage, and obscenity law are all examples of secular laws enforcing specifically religious ideas about the "proper" form of human intimacies and predilections.

19. JAKOBSEN & PELLEGRINI, *supra* note 16, at 4.

20. Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 407 (1963).

21. BENJAMIN N. CARDOZO, PARADOXES OF LEGAL SCIENCE 37 (1928).

22. Miller v. California, 413 U.S. 15, 21 (1973) (holding that obscenity is to be determined by applying contemporary community standards).

The national need to protect the child resulted from a shift in the conceptualization of the American family.[23] In the mid-nineteenth century, the child emerged at the forefront of a national dialogue concerning the future of the young nation, and communities grew preoccupied with forming and protecting the child's (moral) character.[24] Sometime during the late twentieth century, innocence grew to be equated with sexual purity and a child's lack of sexual knowledge/experience denoted that purity. Communities across the country, united in their need to protect the child, insisted that innocence was an inherent state vulnerable to corruption by encounters with adults or life experience itself.[25] Thus, adults were enjoined to "protect our children," and often reminded that the child is the future of the nation. When taken together, these statements position the child as deserving of any and all protections that can be afforded to them, even to the detriment of the rights of others. This phenomenon is referred to as the "social consensus" that public appeals on behalf of America's children are impossible to refuse.[26] Using this logic as a platform, certain public interest groups have sought to inflame the nation's sensibilities by suggesting that modern technology and media pose a threat to the child's sexual innocence, and thus to their essential, sacred state.[27]

To return to the question of whether government can enforce a morality rooted in religion, we must acknowledge that, "Moral

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23. PAULA S. FASS & MARY ANN MASON, CHILDHOOD IN AMERICA 535 (2000).

24. LEE EDELMAN, NO FUTURE: QUEER THEORY AND THE DEATH DRIVE 11-12 (2004) ("The Child has come to embody for us the *telos* of the social order and come to be seen as the one for whom that order is held in perpetual trust," therefore, the country bears a great responsibility to its children.).

25. Drawing upon the work of French philosopher Jean-Jacques Rousseau, the Romantic discourse claimed that children embody a state of innocence, purity, and natural goodness that is only contaminated on contact with the corrupt outside world. The Romantic vision of the child ascribed children a spirituality that placed them close to God, nature, and all things good. Subsequently, the term "the child" came to conjure notions of potential, innocence, and vulnerability in the United States' national imaginary. JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 33 (2001).

26. EDELMAN, *supra* note 24, at 2.

27. DAVID BUCKINGHAM, AFTER THE DEATH OF CHILDHOOD: GROWING UP IN THE AGE OF ELECTRONIC MEDIA 3 (2000). "The claim that childhood has been lost has been one of the most popular laments of the closing years of the twentieth century . . . . [It] has echoed across a whole range of social domains – in the family, in the school, in politics, and perhaps above all in the media . . ." The figure of the child is often mobilized in an effort to ameliorate such anxieties. *Id.*

judgments are inextricably bound up in our lawmaking and, as a result, inevitably present in our adjudication."[28] While some scholars suggest that the Supreme Court has put an end to morals-based justifications for law,[29] moral judgments continue to inform how judges and lawmakers define legal concepts such as "harm." The Statutes were drafted to prohibit the harm of child sexual exploitation; however, as you will read, judges and lawmakers continue to struggle in distinguishing legitimate moral sentiment from impermissible bias. Specifically, personal and public biases against the adult entertainment industry informed lawmakers' definition of harm when drafting the Statutes. As 18 U.S.C §§ 2257 and 2257A enter yet another round of litigation, it is up to the courts to exclude moral disapproval from the range of legitimate purposes that the Statutes claim to promote. The fact that someone's deeds may be objectively immoral does not strip that person of their constitutional rights.

B. How Religious Moralism Shaped Child Pornography Legislation

In 1969, the Supreme Court ruled that people could view whatever they wished in the privacy of their own homes, including por-

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28. Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1304 (2004). Goldberg's article "aims to reinforce the urgent need to facilitate meaningful review of majoritarian invocations of morality without demanding the complete eradication of morals-based interests from lawmaking." *Id*. at 1301. She proposes a fact-based rationale requirement as "one potential approach to resolving this tension." *Id*. Her approach would limit governments to "adopting laws and policies that can be justified by reference to observable or otherwise demonstrable harms." *Id*. at 1305. This article proposes an alternative approach for evaluating the use of morals-based interests in lawmaking and adjudication.

29. *See, e.g.,* Keith Burgess-Jackson, *Our Millian Constitution: The Supreme Court's Repudiation of Immorality as a Ground of Criminal Punishment*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 407, 415 (2004) ("Thus ends legal moralism as a constitutional principle. In effect, Justice Kennedy and his colleagues in the majority read the United States Constitution as rejecting legal moralism and embracing, or at least moving toward, Millian liberalism."); Lino A. Graglia, Lawrence v. Texas*: Our Philosopher-Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139 (2004); *but see* Williams v. King, 420 F. Supp. 2d 1224, 1254 (N.D. Ala. 2006) (holding that "public morality" provides a rational basis for an Alabama statute prohibiting the commercial distribution of sexual devices. "[T]his court's holding illustrates that Justice Scalia's ominous prediction - that the majority's opinion in *Lawrence* 'effectively decrees the end of all morals legislation' - will not be realized.").

nography.[30] Such an affirmation of the permissiveness of the 1960s prompted a "deeply concerned" Congress to authorize a Presidential Commission to study pornography in the United States.[31] The following year, the President's Commission on Obscenity and Pornography concluded, "There was insufficient evidence that exposure to explicit sexual materials played a significant role in the causation of delinquent or criminal behavior."[32] President Nixon found the Commission's conclusions morally bankrupt and rejected its recommendations.[33] Beyond Washington, the President's Commission was met with similar consternation,[34] especially among conservative groups that believed pornography offended public decency and promoted moral decline.[35]

Such groups found a voice in Dr. Judianne Densen-Gerber,[36] who, among others,[37] strongly believed that pornography led to

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30. Stanley v. Georgia, 394 U.S. 557, 560-68 (1969) (holding the First Amendment as made applicable to the states by the Fourteenth Amendment prohibits making mere private possession of obscene material a crime).

31. David M. Edwards, *Politics and Pornography: A Comparison of the Findings of the President's Commission and the Meese Commission and the Resulting Response*, DMECREATIVE.COM, http://home.earthlink.net/~durangodave/html/writing/Censorship.htm (last visited Dec. 29, 2013).

32. PRESIDENT'S COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970).

33. President Richard Nixon, Statement About the Report of the Commission on Obscenity and Pornography (Oct. 24, 1970), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=2759.

34. ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, FINAL REPORT, 6 (1986) [hereinafter MEESE COMMISSION REPORT] ("Although the work of the 1970 Commission has provided much important information for us, all of us have taken issue with at least some aspects of the earlier Commission's approach, and all of us have taken issue with at least some of the Commission's earlier conclusions.").

35. PHILIP NOBILE & ERIC NADLER, UNITED STATES OF AMERICA VS. SEX: HOW THE MEESE COMMISSION LIED ABOUT PORNOGRAPHY 14 (1986) ("Conservative activists from conservative churches kept porn . . . on the agenda . . . Reverend Jerry Falwell of the Moral Majority urged born-again citizens to march upon the gates of distributors…The anti-porn movement cheered the election of Ronald Reagan and took their case directly to him.").

36. Dr. Judianne Densen-Gerber, a lawyer and psychiatrist who founded the drug treatment program Odyssey House, began touring the country in 1977 making inflammatory speeches about the "huge" child pornography industry and warning Americans of the danger it posed to their children. Douglas Martin, *Dr. Judianne Densen-Gerber Is Dead at 68; Founded Odyssey House Group Drug Program*, N.Y. TIMES, May 14, 2003, *available at* http://www.nytimes.com/2003/05/14/nyregion/dr-judianne-densen-gerber-is-dead-at-68-founded-odyssey-house-group-drug-program.html.

child sexual abuse, and that both were "our" problems. With fiery rhetoric[38] and hyperbolic statistics,[39] Densen-Gerber convinced Congress that millions of people were purchasing child pornography with the intent to enact the depicted abuse on their own children. Her claims, among others, served to instill a connection between pornography and child sexual abuse within the national imaginary.

In response to the subsequent "kiddy porn" panic unleashed by Densen-Gerber, Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977 (1977 Act), which proscribed the sale and commercial exchange of child pornography.[40] The Congressional hearings associated with the 1977 Act were laden with unsubstantiated claims and inflationary statistics.[41] This is not to say that a genuine concern for the well-being of our children was lacking. Rather, the debates surrounding the 1977 Act marked the beginning of contemporary awareness of the horrors of widespread sexual abuse of children.[42]

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37. Following several well publicized raids on a handful of distributors and adult booksellers who handled child pornography in 1975 and 1977, Sergeant Lloyd Martin of the Los Angeles Police Department (LAPD) began touring the country as a self-proclaimed expert in child pornography. Sgt. Martin testified before Congress that child pornography was "worse than homicide." Lawrence A. Stanley, *The Child Porn Myth*, 7 CARDOZO ARTS & ENT. L.J. 295, 312 (1988). Sgt. Martin resigned from the LAPD in 1982 amid criticism for "failing to back up his claims with verifiable figures, for acting in an overzealous manner, and for harassing members of the gay community without cause." *Id*. at 311.

38. *Id*. at 312.

39. Martin, *supra* note 36 ("The Institute for Psychological Therapy, reported in 1992 that later government investigations proved Dr. Densen-Gerber's estimates to be exaggerated by several orders of magnitude.").

40. Protection of Children Against Sexual Exploitation Act, 18 U.S.C. §§ 2251, 2252, 2256 (1978) (In essence, the 1977 Act made it a federal crime, punishable by up to ten years imprisonment and a $10,000 fine for a first offense, to produce or distribute obscene depictions of children for commercial consideration, if such production or distribution involved the use of the mail or had some other connection with interstate commerce sufficient to invoke federal law).

41. Stanley, *supra* note 37, at 313.

42. The publication of five books from 1978 to 1984 had a significant impact on raising modern awareness and stimulating interest in documenting the prevalence and effects of child sexual abuse. To a considerable degree, current interest can be traced to these pioneering works: SANDRA BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST (1978); ANN WOLBERT BURGESS, ET AL., SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS (1978); DAVID FINKELHOR, SEXUALLY VICTIMIZED CHILDREN (1979); FLORENCE RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN (1980); and DIANNA E.H. RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, SEXUAL HARASSMENT (1984). These landmark documents were

After the 1977 Act went into effect, much of the child pornography industry went underground and became noncommercial.[43] In fact, after two years of searching, the FBI never discovered any commercial child pornography.[44] Despite this apparent success, the moral-political firestorm surrounding child pornography raged on. In the early 1980s, the panic over child pornography merged with the "missing children" scare,[45] and public hysteria reached new heights.[46]

Once again, America was whipped into frenzy with divisive rhetoric and exaggerated statistics espoused on behalf of "the child." As previously noted, public appeals on behalf of America's children are impossible to refuse. Accordingly, skepticism of the statistics, and particularly of specific anecdotes, is socially unacceptable once the concept of "the child" has been mobilized in the discourse of any social issue.[47] As a consequence, the aforementioned puffery became imbedded in the national dialogue on child pornography.

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followed by countless stories about sexual abuse in the print and electronic media, by an explosion in research and other scholarship in the social and behavioral sciences, and by increased attention from health, mental health, social service, and legal professionals. Jon R. Conte, *Child Sexual Abuse: Awareness and Backlash*, 4 FUTURE CHILD. J. 224, 224-25 (1994).

43. MEESE COMMISSION REPORT, *supra* note 34, at 408, 604; *see also* ILLINOIS LEGISLATIVE INVESTIGATING COMMISSION, REPORT TO THE ILLINOIS GENERAL ASSEMBLY OF 1978, 6-64 (1979).

44. Furthermore, none of the sixty raids resulted in any seizures of child pornography, even though the raids were comprehensive and nationwide. ILLINOIS LEGISLATIVE INVESTIGATING COMMISSION, REPORT TO THE ILLINOIS GENERAL ASSEMBLY OF 1978, 6-64 (1979).

45. In the late 1970s and early 1980s, more and more mothers were working outside of the home, resulting in the opening of large numbers of day-care centers. Anxiety and guilt over leaving young children with strangers is believed to have created a climate of fear and readiness to believe false accusations. *See*, Margaret Talbot, *The Devil in the Nursery*, N.Y. TIMES, Jan. 7, 2001, *available at* http://www.newamerica.net/publications/articles/2001/the_devil_in_the_nursery.

46. Child pornography and the activities of "pedophiles" were claimed to be directly responsible for the disappearance of hundreds of thousands, if not millions of children per year. Stanley, *supra* note 37, at 316.

47. There was little public dissent when outrageous claims such as "pedophiles actually wait for babies to be born so that, just minutes after birth, they can grab the post-fetuses and sexually victimize them" were advanced in support of stricter child pornography legislation. Sgt. Martin advanced this particular claim (*see supra* text accompanying note 37) while appearing on a Christian television show. JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 33 (2001).

During this time, the second New Right, under the guidance of President Ronald Reagan, emerged as a bastion of anti-pornography, moral conservatism. Ironically, the New Right found an unlikely bedfellow in feminism, further broadening the movement's appeal.[48] America, according to the New Right, could protect its children best by restricting, even prohibiting, pornography.

In the wake of the Supreme Court's decision in *New York v. Ferber*,[49] Congress enacted the Child Protection Act of 1984 (1984 Act).[50] During the signing ceremony, President Reagan took the opportunity to announce the establishment of the Attorney General's Commission on Pornography[51] adding, "[W]e consider pornography to be a public problem, and we feel it is an issue that demands a second look."[52]

Shortly thereafter, Attorney General Edwin Meese appointed a panel of eleven members, the majority of whom had established

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48. Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 12 AM. B. FOUND. RES. J. 681, 685 (1987).

49. New York v. Ferber, 458 U.S. 747 (1982) (holding that the First Amendment right to free speech did not forbid states from banning the sale of material depicting children engaged in sexual activity).

50. 18 U.S.C. §§ 2251-55 (1984). The 1984 Act amended the federal criminal code to: (1) increase the penalties for the sexual exploitation of children from $10,000 to $100,000 and, on a subsequent conviction, from $15,000 to $200,000; (2) set a fine of $250,000 for organizations; (3) prohibit the distribution of materials involving the sexual exploitation of minors even if the material is not found to be "obscene"; (4) eliminate the requirement that persons distributing such material in interstate commerce do so for purposes of sale; (5) raise the age of a minor to include any person under the age of eighteen; (6) redefine "sexually explicit conduct"; (7) permit authorization for the interception of wire or oral communications in the investigation of such offenses; and (8) require the Attorney General to report annually to Congress on the prosecutions, convictions and forfeitures under this Act. *Id.*

51. *See* President Ronald Reagan, Remarks on Signing the Child Protection Act of 1984 (May 21, 1984), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=39953; *see also* MEESE COMMISSION REPORT, *supra* note 34, at 215. The mandate of the Commission as expressed in its charter was to "determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees." MEESE COMMISSION REPORT, *supra* note 34, at 215.

52. President Ronald Reagan, Remarks on Signing the Child Protection Act of 1984 (May 21, 1984), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=39953.

records as anti-pornography crusaders to study pornography.[53] In 1986, the Attorney General's Commission on Pornography, often called the Meese Commission, released its final report.[54] The Meese Commission concluded that although the 1977 and 1984 Acts "drastically curtailed [child pornography's] public presence," they did not end the problem. Further, "no evidence…suggest[ed] that children [were] any less at risk than before."[55] Importantly, the recommendations of the Meese Commission articulated the logic for restrictions in terms of popular anxieties about children. For example, the Meese Commission states, "For children to be taught by these materials that sex is public, that sex is commercial, and that sex can be divorced from any degree of affection, love, commitment, or marriage… is for us the wrong message at the wrong time."[56]

In addition to its findings, the Meese Commission also made several recommendations including, "Congress should enact a statute requiring the producers, retailers, or distributors of sexually explicit visual depictions to maintain records containing consent forms and proof of performer's age."[57] In response, Congress passed the Child Protection and Obscenity Enforcement Act of 1988 (1988 Act).[58] The 1988 Act amended the United States Code to require producers of sexually explicit material to maintain certain records about the performers who appeared in their materials.[59]

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53. Brian L. Wilcox, *Pornography, Social Science, and Politics: When Research and Ideology Collide*, 42 AM. PSYCHOLOGIST 941-43 (1987).

54. Ironically, in news reports, Meese is shown holding the Commission's two-volume, 1960-page report, standing in front of the statue Spirit of Justice, a half-clothed female figure with one bare breast. *See* Edwards, *supra* note 31.

55. MEESE COMMISSION REPORT, *supra* note 34 at 608-09.

56. *Id*. at 344.

57. *Id*. at 618, 620-21. (The Meese Commission further recommended that the location of this information be identified "in the opening or closing footage of a film, the inside cover of the magazine, or standard locations in or on other material containing visual depictions," and that the information be "available for inspection by an duly authorized law enforcement officer upon demand as a regulatory function for the limited purposes of determining consent and proof of age."). *Id.* at 620-21.

58. 18 U.S.C. § 2257 (1988) (amended 1990, 1994, 2003, 2006).

59. *Id*.

By the mid-1980s, trafficking of child pornography within the United States was almost completely eradicated.[60] Production and reproduction of child pornography had grown too difficult and expensive.[61] The aforementioned laws made anonymous distribution and receipt impossible, and it was difficult for pedophiles to interact with one another.[62] Unfortunately, this success was short-lived as the rise of the Internet breathed new life into the child pornography panic.

Once again, the rhetoric of "the child" was mobilized as a catalyst to action. Perhaps the most notable voices of this push were Revé and John Walsh, the parents of Adam Walsh, a seven-year-old boy abducted and later murdered in Hollywood, Florida on July 27, 1981.[63] In the aftermath of the tragedy, Adam's parents "dedicated themselves to protecting children from child predators, preventing attacks on *our* children, and bringing child predators to justice."[64] Twenty-five years later, Congress enacted the Adam Walsh Child Protection and Safety Act (Walsh Act), which focused primarily on sex offenders.[65] Not surprisingly, Title V of the Walsh Act, entitled "Child Pornography Prevention," restated many of the "facts" set forth by the Meese Commission twenty years earlier. This recitation of facts, though, included the addition of one very important mode of interstate commerce—the Internet.[66]

The Internet forced Congress to rethink the ways in which individuals were sharing child pornography.[67] An influx of inexpen-

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60. *Child Exploitation and Obscenity Section*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/ceos/subjectareas/childporn.html (last visited Jan. 1. 2014).

61. *Id*.

62. *Id*.

63. *Our History*, NAT'L CENTER FOR MISSING & EXPLOITED CHILD, http://www.missingkids.com/History (last visited Jan. 1, 2014).

64. H.R. Con. Res. 4472, 109th Cong. (2006) (enacted) (emphasis added), *available at* http://www.govtrack.us/congress/bills/109/hr4472/text.

65. Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, §§ 501-07, 120 Stat. 587 (2006) [hereinafter *The Walsh Act*]. The Walsh Act asserted that interstate commerce aspects of the child pornography market rely substantially on mail and Internet; established definitions, procedures, and penalties under federal law; and included provisions governing simulated sexual conduct. *Id.* at Title V Sec. 501(1)(C).

66. *Id*. at Title V Sec. 501(1)(B).

67. *Id*. at Title V Sec. 501(1)(C). This is the first instance in which Congress recognized the role of technology in the production and distribution of child pornography. It is generally agreed upon that pornography drives technology. *See*

sive computing technology and software greatly increased a pornographer's ability to circumvent what had traditionally been thought of as child pornography.[68] Title VII of the Walsh Act, the "Internet Safety Act," illustrates America's growing concern for the safety of its children with regard to the Internet.[69]

Child pornography will never be eradicated, [70] nor will "our" children ever be completely out of harm's way. There will always be another incident to spark a panic resulting in congressional action; the cycle is endless. This is not to say, however, that the protection of children from sexual exploitation is a worthless cause. Rather, we must ask ourselves whether protecting children from sexual exploitation in the production of pornography is worth infringing on our individual rights guaranteed to us by the Constitution.

III. THE STATUTES AND RELEVANT IMPLEMENTING REGULATIONS

A. 18 U.S.C. § 2257

Section 2257, as amended,[71] provides that producers of certain visual depictions of actual[72] sexually explicit conduct shall "create

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FREDERICK S. LANE III, OBSCENE PROFITS: THE ENTREPRENEURS OF PORNOGRAPHY IN THE CYBER AGE (2001); *see also* PATCHEN BARSS, THE EROTIC ENGINE (2010).

68. *See* 18 U.S.C. § 2257A.

69. *The Walsh Act*, *supra* note 65. Title VII of the Walsh Act creates federal offenses and penalties for child exploitation via the Internet and for knowingly embedding words and digital images into web source code for the purpose of deceiving minors into accessing material constituting obscenity. It also instructs the attorney general to increase the number of computer forensic examiners to be dedicated to investigating crimes involving the sexual exploitation of children, and form additional Internet Crimes Against Children Task Forces. *Id*. at Title VII.

70. Currently, the Child Protection Act of 2012 awaits President Barack Obama's signature. H.R. Con. Res. 6063, 112th Cong. (2012). The Child Protection Act of 2012 is an enrolled bill as of January 3, 2012. The Child Protection Act of 2012 makes several amendments to the United States Code with respect to possession of child pornography, child witnesses, and various child exploitation offenses.

71. *See* Pub. L. No. 100-690, § 7513(a), 102 Stat. 4487 (1988); Pub. L. No. 101-647, § 311, 104 Stat. 4816, 4817 (1990); Pub. L. No. 103-322, § 330004(14), 108 Stat. 2142 (1994); Pub. L. No. 108-21, § 511(a), 117 Stat. 684 (2003); Pub. L. No. 109-248, § 502(a), 120 Stat. 625 (2006).

72. Actual "sexually explicit conduct" comprises actual "(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv)

and maintain individually identifiable records pertaining to every performer portrayed."[73] To ensure the reliability of these records, a producer subject to § 2257 must review each performer's photo identification and ascertain the performer's name and date of birth,[74] as well as any other name used by the performer in previous depictions.[75] The producer must maintain records of this identifying information at his/her place of business and shall make such records available to the Attorney General for inspection at all reasonable times.[76] "No information or evidence obtained from the records . . . shall . . . be used as evidence against any person with respect to any violation of law," except such information or evidence may be used in a prosecution or other action for a violation of the recordkeeping requirements, obscenity law, or "any applicable provision of law with respect to the furnishing of false information."[77] Additionally, a producer subject to § 2257 must affix a copy of a statement describing where the records required by § 2257 with respect to all performers depicted therein may be located.[78]

Producers will be subject to criminal liability if he/she "fail[s] to create or maintain the records as required," knowingly makes a "false entry in or knowingly fails to make an appropriate entry in the required records," knowingly fails "to comply with the labeling provisions," or refuses to "permit the Attorney General or his or her designee entry for an inspection."[79] It is also unlawful for an individual to knowingly sell any book, magazine, or film containing sexually explicit conduct that does not have the requisite label affixed.[80]

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sadistic or masochistic abuse; and (v) lascivious exhibition of the genitals or pubic area of any person." *See* 18 U.S.C. § 2256(2)(A)(i)-(v) (incorporated by reference in § 2257(h)(1)).

73. 18 U.S.C. § 2257(a)(2).
74. 18 U.S.C. § 2257(b)(1).
75. 18 U.S.C. § 2257(b)(2).
76. 18 U.S.C. § 2257(c).
77. 18 U.S.C, § 2257(d).
78. 18 U.S.C. §2257(e)(1).
79. 18 U.S.C. §2257(f)(1)-(5).
80. 18 U.S.C. § 2257(f)(4).

B. 18 U.S.C. § 2257A

Section 2257A pertains to depictions of simulated[81] sexually explicit conduct and imposes the same recordkeeping, inspection, and labeling requirements on producers of these depictions as § 2257.[82] Simulated sexually explicit conduct includes depictions of mere nudity.[83] The same criminal offenses for noncompliance also apply.[84] Interestingly, § 2257A also contains a provision requiring the Attorney General to annually submit a report to Congress concerning the enforcement of §§ 2257 and 2257A.[85]

C. Regulations Implementing §§ 2257 and 2257A

In enacting § 2257, Congress provided that the Attorney General should issue any regulations regarding the maintenance and availability of such records.[86] These regulations provide definitions of various statutory terms, such as "producer" and "sexually explicit conduct,"[87] and flesh out the recordkeeping, labeling, and inspection requirements set forth in the statutes.[88]

Of particular relevance to this discussion are the regulations concerning the maintenance, location, and inspection of the age-

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81. "Simulated sexually explicit conduct means conduct engaged in by performers that is depicted in a manner that would cause a reasonable viewer to believe that the performers engaged in actual sexually explicit conduct, even if they did not in fact do so. It does not mean not sexually explicit conduct that is merely suggested." 28 C.F.R. § 75.1(o) (1992) (amended 2005 and 2008).

82. 18 U.S.C. § 2257A(a)-(f).

83. 18 U.S.C. § 2256(2)(v) prohibits "lascivious depictions of genitals or the pubic area." As a consequence, many major media operators did not consider the fact that the now infamous photographs of Britney Spears sans underwear are depictions subject to the § 2257 regulations.

84. 18 U.S.C. § 2257A(f).

85. A provision requiring the Attorney General to issue appropriate regulations to carry out this section was enacted as part of the original version of § 2257. *See* 18 U.S.C. § 2257(g) (1988). The provision was later deleted by a 1994 amendment. *See* 18 U.S.C. § 2257 (1988) (amended 1994). However, other provisions were enacted authorizing the Attorney General to establish regulations. *See* Act of Nov. 29, 1990, Pub. L. No. 101-647, § 312, 104 Stat. 4817 (1990); Act of Apr. 30, 2003, Pub. L. No. 108-21, § 511(b), 117 Stat. 685 (2003). Finally, a provision concerning the preparation and submission of a report on the enforcement of § 2257 was included in § 2257A. *See* 18 U.S.C. § 2257A(k). No report has been filed to date.

86. 18 U.S.C. § 2257(g).

87. 28 C.F.R. § 75.1(c), (n).

88. 28 C.F.R. §§ 75.2-75.9.

verification records. With regard to maintenance, producers are required to create records according to a complicated cross-indexing system[89] and keep the records separate and apart from all other business records.[90] Additionally, producers may contract with a non-employee custodian to retain copies of the required records.[91] With regard to location, producers must maintain and make available the required records at the producer's place of business or at the place of business of a non-employee custodian of records for seven years from the creation of or last amendment to the record.[92] As to inspection, advance notice of the inspection shall not be given,[93] but inspections shall take place during normal business hours and be conducted so as not to unreasonably disrupt the operations of the establishment.[94] Upon commencing an inspection, the investigator shall present his or her credentials . . .; explain the purpose and limited nature of the inspection, and indicate the scope of the specific inspection.[95] Inspections may only occur once every four months, unless there is a reasonable suspicion to believe a violation has occurred, in which case an inspection "may be conducted before the four-month period has expired."[96] Lastly, an investigator may copy, at no expense to the producer or the non-employee custodian of records, during the inspection, any record that is subject to inspection.[97]

D. The 2257 Program

The Federal Bureau of Investigation (FBI) is charged with enforcing §§ 2257 and 2257A.[98] Their primary means of enforcement

89. 28 C.F.R. § 75.2(d) ("[A]ll such records shall be organized alphabetically, or numerically where appropriate, by the legal name of the performer (by last or family name, then first or given name), and shall be indexed or cross-referenced to each alias or other name used and to each title or identifying number of the book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to an Internet computer site or service . . .)").

90. 28 C.F.R. § 75.2(e).

91. 28 C.F.R. § 75.2(h).

92. 28 C.F.R. § 75.4.

93. 28 C.F.R. § 75.5(b).

94. 28 C.F.R. § 75.5(c)(1), (3).

95. 28 C.F.R. § 75.5(c) (2)(i)-(iii).

96. 28 C.F.R. § 75.5(d).

97. 28 C.F.R. § 75.5(e).

98. Interestingly, the FBI has never been involved in performing regulatory inspections before. *See* Clay Calvert & Robert D. Richards, *Inside the FBI Inspec-*

is random inspections.[99] These inspections are known as the "2257 Program."[100]

The first inspection occurred in 2006; nearly two decades after the law went into effect.[101] The FBI conducted twenty-nine inspections between July 24, 2006 and September 19, 2007.[102] Not a single company was found to be using underage performers.[103]

The inspections initially stunned the adult entertainment community, creating a level of anxiety within the industry not seen for some time.[104] While the industry agreed that the FBI conducted itself in a professional manner,[105] industry insiders felt the inspections and the strictures of §§ 2257 and 2257A were "designed to harass people who make this kind of movie so the FBI can snoop around and learn about them. It's an end run around obscenity laws."[106]

It must be acknowledged that since producers are required to create and maintain age-verification records that are separate and distinct from all other records pertaining to the business and only the FBI may inspect said records, 18 U.S.C. §§ 2257 and 2257A do

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tions of Adult Movie Company Age-Verification Records: A Dialogue with Special Agent Chuck Joyner, 15 UCLA ENT. L. REV. 55, 74-75 (2008).

99. *Id*. at 61 ("[Special Agent Chuck Joyner] strenuously objects to them being labeled 'raids' or 'searches.'").

100. MARGARET C. JASPER, *FBI 2257 Age Verification Program*, *in* THE LAW OF OBSCENITY AND PORNOGRAPHY 61 (2d ed. 2009).

101. Calvert & Richards, *supra* note 98, at 58-59.

102. Declaration of Special Agent Alan S. Nanavaty at 3, Free Speech Coal., Inc. v. Att'y Gen. of the U.S., 677 F.3d 519 (2012) (No. 2:09-4607), *available at* http://www.xxxlaw.com/news/nanavaty.pdf.

103. On two occasions, the FBI identified records indicating that companies were using underage performers. On the first occasion, a foreign performer used her native ID, which calculated age based on a different calendar. On the second occasion, the wrong ID was put on record for a performer. In both instances the productions companies were given the opportunity to cure the defect, and the companies were able to do so in an efficient and transparent manner. Calvert & Richards, *supra* note 98, at 71-72.

104. The § 2257 inspections are a stark reminder to an industry that has never curried favor with law enforcement that the government's reach into its day-to-day operations is not more than a surprise knock-on-the-door away. Responding to a question about the fear expressed by attorneys to adult film companies, Joyner states, "Again, it's the paranoia that this is all a scam and that they're going to be arrested as soon as we [FBI] walk in the door." *Id*. at 66-67; *see also* Robert D. Richards & Clay Calvert, *The Legacy of Lords: The New Federal Crackdown on the Adult Industry's Age-Verification and Recordkeeping Requirements*, 14 UCLA ENT. L. REV. 155, 174 (2007).

105. Calvert & Richards, *supra* note 98, at 84.

106. *Id*. at 60.

not and cannot serve any legitimate purpose other than deterring and detecting the production of child pornography. For example, the Occupational Safety and Health Administration (OSHA) cannot use the age-verification records to track down individuals exposed to STIs because it is not authorized to access the records. Rather, producers are required to enforce their respective state's occupational safety and health regulations.[107]

The federal government's sudden enforcement of 18 U.S.C. §§ 2257 and 2257A raises two fundamental questions: why now, and is there really even a problem?

i. WHY NOW?

During George W. Bush's second term, the United States saw a rise in enforcement of federal obscenity law after a virtual dormancy of prosecutorial activity during the Clinton administration.[108] Ironically, the government's ramped up search for underage performers began at a time when the mature-woman[109] genre was

107. The California Occupational Safety and Health Act of 1973 requires employers to provide a safe and healthful workplace for employees. This same act gives Cal/OSHA jurisdiction over virtually all private employers in California, including employers in the adult film industry. Employers must follow all safety standards found in the California Code of Regulations applicable to their industry. They must also report the name and location of any employee seriously injured or who becomes seriously ill, the nature of the injury or illness, a description of the incident including its time and date, the employer's name, address and telephone number, and other relevant information to the nearest Cal/OSHA office by phone or fax within eight hours. *Vital Information for Workers and Employers in the Adult Film Industry*, ST. CAL. DEP'T INDUS. REL., *available at* http://www.dir.ca.gov/dosh/AdultFilmIndustry.html (last visited Jan. 1, 2014).

108. "As Hustler publisher Larry Flynt recently put it, 'We didn't have any federal obscenity prosecutions when Clinton was president. Clinton was smart - he knew that it was an uphill battle, and there were other things that he should be spending his time on.'" Robert D. Richards & Clay Calvert, *Obscenity Prosecutions and the Bush Administration: The Inside Perspective of the Adult Entertainment Industry & Defense Attorney Louis Sirkin*, 14 VILL. SPORTS & ENT. L.J. 233, 275 (2007). *See* Mark Kernes, *The War Against Porn Continues*, PLAYBOY, Dec. 1, 2002, at 57 (writing that "Clinton took a hands-off approach (when asked why the administration did not go after pornographers, former Attorney General Janet Reno said that it had more important things to do")); *see also* Cheryl Wetzstein, *Clinton Told He Broke Promise to Give Anti-Porn Fight Priority*, WASH. TIMES, Oct. 28, 1997, at A9 (reporting "Justice Department figures that show obscenity prosecutions under Attorney General Janet Reno have dropped by half or more compared with the Reagan or Bush administrations.").

109. More commonly known as "MILF," the mature-women genre capitalizes on the concept of the "sexy-mom mystique" (i.e., Mrs. Robinson from the 1967

one of the fastest-growing areas of video pornography.[110] One theory for the increase posits that the Bush Administration and Attorney General Alberto R. Gonzales placed a tremendous amount of pressure on United States Attorneys to go after adult content.[111] This was made clear by revelations regarding the firing of a select group of eight U.S. attorneys by the Department of Justice.[112] In a remarkably revealing article about the firings of U.S. Attorneys Paul Charlton and Daniel G. Bogden, the Los Angeles Times reported:

> In September, Brent Ward, head of the Justice Department's obscenity task force, complained to Deputy Chief of Staff and Counselor to the Attorney General D. Kyle Sampson about Charlton and Bogden. 'We have two U.S. attorneys who are unwilling to take good cases we have presented to them,' Ward told Sampson. Ward added that he found this particularly troubling in light of the AG's [Gonzales'] comment … to 'kick butt and take names' in prosecuting obscenity cases.[113]

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classic, THE GRADUATE (Embassy Pictures and United Artists 1967)) and features mature women, presented as mothers, who have sex with younger partners. The term MILF and the subsequent pornographic subgenre were introduced to a large audience by the highly popular movie AMERICAN PIE (Universal Studios 1999); *see* Tristan Taormino, *The Rise of MILFs and Mommies in Sexual-Fantasy Material*, VILLAGE VOICE, Oct. 30, 2007, http://www.villagevoice.com/2007-10-30/columns/the-rise-of-milfs-and-mommies-in-sexual-fantasy-material/.

110. *See* Sharon Waxman, *The Graying of Naughty*, N.Y. TIMES, Dec. 31, 2006, http://www.nytimes.com/2006/12/31/fashion/31porn.html?pagewanted=all&_r=0.

111. *Cf.* Michael McGough*, U.S. Appeals Pittsburgh Judge's Obscenity Ruling*, PITT. POST-GAZETTE, Feb. 17, 2005, at A1 ("At his confirmation hearings, Gonzales told the Senate Judiciary Committee that enforcement of laws against obscenity would be a priority for him. 'I think obscenity is something else that very much concerns me . . .'").

112. *See, e.g.*, Dan Eggen & Michael Abramowitz, *Bush Reaffirms Confidence in Gonzales Amid New Disclosures*, WASH. POST, Mar. 25, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/03/24/AR2007032401196.html (describing the firings and writing that, "Seven U.S. attorneys were fired on Dec. 7. Another was dismissed months earlier. The Justice Department's shifting explanations for the firings have sparked an uproar in Congress.").

113. Richard A. Serrano, *Ouster of U.S. Attorneys: Memos Raise Questions; E-mails Detail Goals in Firing U.S. Attorneys*, L.A. TIMES, Mar. 14, 2007, http://articles.latimes.com/2007/mar/14/nation/na-emails14.

When asked specifically why the inspections began when they did, FBI Special Agent Chuck Joyner[114] explained the sudden activation of the 2257 Program as a direct command from Attorney General Gonzales.[115] Moreover, funding for the 2257 Program continued to increase during 2000-2008 under the guidance of a Republican controlled Congress.[116] The message was clear: it was time to enforce §§ 2257 and 2257A.

ii. IS CHILD EXPLOITATION IN THE PRODUCTION OF PORNOGRAPHY A PROBLEM?

Over the course of twenty-nine inspections, not one search revealed underage performers. In fact, the only instance of a lawsuit being filed under the Statutes occurred when two seventeen-year-old girls accused Joe Francis, the founder of Girls Gone Wild, of filming them while engaged in sexual conduct. No inspection of Francis's records occurred; rather, Francis pleaded guilty for failure to comply with § 2257.[117]

Contrary to popular belief,[118] producers of adult content have zero interest in underage performers. As Mark Kulkis, president of Kick Ass Pictures, bluntly puts it, "Everyone is making too much

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114. Special Agent Chuck Joyner was employed by the CIA from 1983 to 1987 and was a Special Agent with the FBI from 1987 until his retirement in October 2011. During his tenure as a Special Agent, Joyner was charged with managing the contract inspectors, acting as lead inspector, and researching the companies. *Survival Skills with Chuck Joyner,* POLICEONE.COM, http://www.policeone.com/columnists/chuck-joyner/ (last visited Jan. 1, 2014).

115. "Special Agent Chuck Joyner stated, 'My understanding is that the Attorney General had placed a call to the Director of the FBI saying, 'start this program. The FBI will run it, and start it now.' It was a very quick-hitting program - we got it up and starting within two months, which is unheard of.'" Calvert & Richards, *supra* note 98, at 64. Furthermore, Gregory Picconelli Esq. stated, "Congress, in the PROTECT Act, pretty much told the executive branch and the Attorney General that 'Section 2257 has been on the books and effective since 1995, and there hasn't been one inspection or one prosecution. You have a year to do this.' When Gonzales came in, there was a fresh push by members of Congress to help get Gonzales approved so that something would be done with Section 2257." Calvert & Richards, s*upra* note 98, at 80.

116. Richards & Calvert, *supra* note 104, at 176.

117. M. Eric Christense, *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, 152-53 (2008).

118. "[The] producers are looking for models that look as young as possible." MEESE COMMISSION REPORT, *supra* note 34, at 855.

money to want to mess with it - it's poison."[119] Kevin Beechum, the owner of adult movie company K-Beech, Inc. echoed this fiscal-minded perspective when he told a reporter, "Why would I jeopardize $10 million a year to shoot an underage girl? We're not stupid."[120] There appears to be a universal agreement among those in the adult entertainment industry that there is no problem with underage performers in the adult movie industry. Moreover, the mainstream adult entertainment industry zealously advocates against child pornography as evidenced by industry-wide support of the Association of Sites Advocating Child Protection.[121] The reality is, child pornography does not exist in mainstream adult entertainment despite continued attempts to link the two.[122]

IV. FOURTH AMENDMENT CHALLENGE

A. Summary of Arguments

The Plaintiffs allege that the inspection program set forth by the Statutes and implementing regulations authorize warrantless searches and seizures in violation of the Fourth Amendment. Specifically, the inspection of records constitutes a search and—if the records are copied or taken—a seizure. The Statutes do not require a warrant or probable cause for the search and potential seizure to occur, which directly contravenes the Fourth Amendment.

In response, the Government made three primary arguments: (1) Plaintiffs' claims are not ripe for review; (2) even if the challenge is addressed, the inspections conducted pursuant to the Statutes do not fall within the scope of the Fourth Amendment

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119. Richards & Calvert, *supra* note 104, at 170.

120. Claire Hoffman, *Porn Studios Raided to Ensure Adult-Only Casts*, L.A. TIMES, Jan. 12, 2007, at C1. K-Beech Inc. was inspected by the FBI in December, 2006. *Id*.

121. The Association of Sites Advocating Child Protection is "a non-profit organization dedicated to online child protection" that "battles child pornography through its Child Protection reporting hotline." *Mission Statement*, ASS'N SITES ADVOCATING CHILD PROTECTION, http://www.asacp.org (last visited Jan. 1, 2014).

122. Janet M. LaRue, former chief counsel for Concerned Women for America, the nation's largest public policy women's organization with a rich twenty-eight-year history of helping members across the country bring Biblical principles into all levels of public policy, "testified before the California state legislature about ten years ago that the modern adult entertainment industry has no connection with child pornography. This is someone who has spent her lifetime attacking the adult industry for every perceived ill. Even she acknowledged that that's just not the case." Richards & Calvert, *supra* note 104, at 171.

since the records are created and maintained solely for the purpose of compliance with the Statutes, and since the Statutes authorize an inspection of the age-verification records only, the producers of the records cannot be said to have a reasonable expectation of privacy in them; and (3) even if analyzed under the Fourth Amendment, an inspection conducted pursuant to the Statutes would meet the requirements of a valid warrantless administrative search.

B. Do Plaintiffs Possess Sufficient Standing and a Ripe Claim?

The issue of whether Plaintiffs possess sufficient standing and a ripe claim was recently resolved on remand by the district court.[123] In the initial proceeding, the district court determined that the Plaintiffs failed to state a viable Fourth Amendment claim.[124] After the court of appeals vacated the district court's order with respect to the Plaintiffs' Fourth Amendment claim, the Government filed a motion to dismiss based on lack of subject matter jurisdiction.

On remand, the district court sang a very different, if not sympathetic, tune. The district court determined that the Plaintiffs satisfied the requirements[125] for constitutional standing pursuant to Article III of the Constitution. The court felt that Plaintiffs faced a substantial possibility of injury as a result of the plain operation of the statute. Despite the fact that no searches had been conducted since 2007,[126] the district court felt that as long as §§

123. Free Speech Coal., Inc. v. Holder, 2012 U.S. Dist. LEXIS 173158 (E.D. Pa. 2012) (denying Government's motion to dismiss Plaintiffs' Fourth Amendment claim for lack of subject matter jurisdiction, contending that the Plaintiffs lacked standing and that the claim was not ripe).

124. Free Speech Coal., Inc. v. Holder, 729 F. Supp. 2d 691, 745-46 (E.D. Pa. 2010).

125. For a plaintiff to have standing under Article III, three requirements must be met: (1) she must show she has suffered an "injury in fact"; (2) the injury must be "fairly traceable" to the defendant; and (3) the injury must be capable of being redressed by the relief plaintiff seeks. *See* Common Cause of Pa v. Pennsylvania, 558 F.3d 249, 258 (3d Cir. 2009). When the relief sought is an injunction, the "redressability" prong of the standing test demands that the plaintiff be able to demonstrate an ongoing or imminent injury —otherwise, the remedy requested would not redress the harm being suffered. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992).

126. The Government relies on an affidavit filed by FBI Special Agent Nanavaty, attached to the Motion to Dismiss, to make this argument. *See* Declaration of Special Agent Alan S. Nanavaty, Free Speech Coal., Inc. v. Att'y Gen. of

2257 and 2257A remained on the books, the searches could resume at any moment, thus establishing an ongoing and imminent threat of injury.

The district court also cited the cost of compliance -- both past and present -- on behalf of the Plaintiffs as providing the requisite standing to bring a pre-enforcement suit for equitable relief.[127] Ironically, the district court supported its finding of significant costs by citing the same regulations the court used to determine the reasonableness of the searches in the initial proceedings. [128] With regard to the Government's contention that Plaintiffs' Fourth Amendment claim should be dismissed due to lack of ripeness, the district court once again showed preference to the Plaintiffs.[129]

C. Does a Reasonable Expectation of Privacy Exist in Records Required by Statute?

The United States Supreme Court has uniformly held the application of the Fourth Amendment[130] to depend on "whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action."[131] Therefore, whether a search is reasonable "depends on all of the circumstances," and involves balancing "on the one hand, the degree to which the search intrudes upon an

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the U.S., 677 F.3d 519 (2012) (No. 2:09-4607), *available at,* http://www.xxxlaw.com/news/nanavaty.pdf (last visited Mar. 8, 2013).

127. *See, e.g.*, Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 392 (1988) (holding the injury "requirement is met here, as the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures [by declining to sell certain materials] or risk criminal prosecution.").

128. The court specifically identified 28 C.F.R. §§ 75.4 (records must be maintained for seven years), 75.5(a) (records must be available during normal business hours), and 75.5(c)(1) (if the producer keeps abnormal business hours, he/she must provide notice to the government of "hours during which records will be available for inspection, which in no case may be less than 20 hours per week.") *Free Speech Coal., Inc.*, 2012 U.S. Dist. LEXIS, at *14-16.

129. *Id*. at *23-26.

130. The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. Amend. IV.

131. Smith v. Maryland, 442 U.S. 735, 740 (1979) (holding the installation and use of the pen register was not a "search" within the meaning of the Fourth Amendment, and hence no warrant was required).

individual's privacy and, on the other hand, the degree to which the search is needed for the promotion of legitimate governmental interests."[132] Determining whether a reasonable expectation of privacy exists is a two-part inquiry: first, whether a person in fact demonstrated an actual or subjective expectation of privacy in the subject of the search or seizure; and second, whether a person's expectation is "one that society is prepared to recognize as reasonable," that is, an expectation that is objectively justifiable under the circumstances.[133]

The Government argues that Plaintiffs do not have a reasonable expectation of privacy in the age-verification records because the records are created and maintained for the very purpose of fulfilling the statutory obligation set forth by §§ 2257 and 2257A. Conversely, Plaintiffs believe the required records are comprised of private papers[134] in which the owners of the records have a legitimate expectation of privacy.

In making its determination, the district court relied on the following reasoning: "the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established.'"[135] However, the age-verification records are not information regarding transactions; rather, they are personal papers describing the very private information of employees. With regard to private information, it is crucial to note that due to the stigma long associated with the adult entertainment industry, industry members are extremely hesitant to reveal identifying information such as real names and actual addresses, both of which are required by the Statutes.

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132. United States v. Sczubelek, 402 F.3d 175, 182 (3d Cir. 2005).

133. *Smith*, 442 U.S. at 735.

134. To reiterate, the Statutes require producers to maintain: (1) copies of a government issued photo identification card, such as a driver's license or passport, of each person depicted in expression created by the producer that contains sexual imagery; (2) a copy of the producer's expression itself, containing the sexual imagery; (3) a list created by the producer of any other names or aliases used by the person depicted in the producer's expression; and (4) the producer's required indices of the records. *See* 28 C.F.R. §§ 75.2, 75.3.

135. Shapiro v. United States, 335 U.S. 1, 33 (1948) (upholding that Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the licensing and record-keeping requirements of the Price Control Act represent a legitimate exercise of that power).

The court of appeals found fault with the district court's reasoning and was quick to highlight the Supreme Court's recent decision in *United States v. Jones*, which made clear that that a Fourth Amendment search also occurs where the government unlawfully, physically occupies private property for the purpose of obtaining information.[136] In the opinion of the court of appeals, the district court erred in dismissing Plaintiffs' Fourth Amendment claim, as sought to be amended,[137] since the factual context provided by the amendment would prove necessary for determining whether the Government's conduct was a "search" under the Fourth Amendment pursuant to either the reasonable-expectation-of-privacy test[138] set forth in *Katz v. United States* or the common-

136. In *United States v. Jones*, the defendant came under suspicion of trafficking in narcotics. FBI agents installed a GPS tracking device on the undercarriage of a vehicle registered to defendant's wife while it was parked in a public parking lot. Over the next twenty-eight days, the Government used the device to track the vehicle's movements. The defendant was charged with drug conspiracy under 21 U.S.C. §§ 841 and 846. A district court denied in part defendant's motion to suppress evidence obtained through a global-positioning-system (GPS) device under the Fourth Amendment. A jury returned a guilty verdict. On appeal, the Government conceded noncompliance with a warrant that had been obtained. The appellate court found that admission of the evidence obtained by warrantless use of the GPS device violated the Fourth Amendment. *See e.g.*, United States v. Jones, 132 S.Ct. 945 (2012). The U.S. Supreme Court determined that the Government's installation of the GPS device on [defendant's] vehicle, and its use of that device to monitor the vehicle's movements, constituted a "search." *Id.* at 949. Under the common-law trespassory test, "[t]he Government physically occupied private property for the purpose of obtaining information." *Id.* "[S]uch a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted." *Id.*

137. *See* Plaintiff's Amended Complaint, Free Speech Coal., Inc. v. Att'y Gen. of the U.S., 677 F.3d 519 (3d Cir. 2012) (No. 2:09-4607). Plaintiffs' complaint, as amended, would allege that government officials searched and/or seized without a warrant—and in violation of the Fourth Amendment—the premises and effects of certain FSC members and others. The record, however, is not clear as to: which specific members of FSC were searched; when and where the searches of the FSC members and others occurred (i.e., offices or homes); and the conduct of the government during the search (e.g., what specific information the government reviewed and whether the government exceeded its authority under the applicable regulations). Free Speech Coal., Inc. v. Att'y Gen. of the U.S., 677 F.3d 519, 543-44.

138. *See* Katz v. United States, 389 U.S. 347, 353 (1967) (holding even in a public place, a person may have a reasonable expectation of privacy in his person).

law trespass test[139] described in *United States v. Jones*. Ultimately, whether a search is reasonable "must find resolution in the facts and circumstances of each case."[140]

D. Do the Inspections Conducted Pursuant to §§ 2257 and 2257A Meet the Requirements for a Valid Warrantless Administrative Search?

Although the district court found that the Statutes and their regulations establish constitutionally valid administrative searches.[141] The court of appeals held that further development of the record was necessary. The appellate court reasoned that the nature and manner of the search are critical factors in determining whether an industry is closely regulated and the reasonableness of the particular search.[142]

It is well established under the Fourth Amendment that a person's reasonable expectation of privacy in his or her home or business exists "not only with respect to traditional police searches conducted for the gathering of criminal evidence, but also with respect to administrative searches designed to enforce regulatory statutes."[143] This expectation is particularly attenuated in commercial property employed in "closely regulated"[144] industries. Furthermore, "Certain industries have such a history of government oversight that no reasonable expectation of privacy [can] exist for a

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139. *See Jones*, 132 S. Ct. at 951 (holding, "when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment").

140. United States v. Rabinowitz, 339 U.S. 56, 63-66 (1950) (holding the search of an arrestee may take place at the time of the arrest or later at the place of detention).

141. Free Speech Coal., Inc. v. Holder, 729 F. Supp. 2d 691, 751-757 (E.D. Pa. 2010).

142. Free Speech Coal., Inc. v. Att'y Gen. of the U.S., 677 F.3d 519, 544-45 (3d Cir. 2012) ("For example, the record is unclear as to: the frequency and extensiveness of the alleged searches; whether the alleged searches occurred exclusively on commercial premises; and whether the Plaintiffs who were subjected to the alleged searches were engaged in commercial activities within a particular industry.").

143. New York v. Burger, 482 U.S. 691, 699-700 (1987) (citing Marshall v. Barlow's, Inc., 436 U.S. 307, 312-13 (1978) ("An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home.").

144. *Id*.

proprietor over the stock of such an enterprise."[145] The doctrine of a "pervasively regulated industry" is "essentially defined by the 'pervasiveness and regularity of the federal regulation' and the effect of such regulation upon an owner's expectation of privacy."[146]

Whether the adult entertainment industry is "closely regulated" is open to interpretation. The district court concluded it was. "For over three decades the creation, production, and distribution of sexually explicit expression has been the subject of extensive federal regulation aimed at protecting children from sexual exploitation."[147] Due to this "strengthening web of initiatives…producers of sexually explicit expression have been on notice for some time that, when it comes to ensuring the performers in their expression are adults, they will be subject to various forms of government oversight, including inspection of age-verification records."[148]

Conversely, industry insiders strongly believe that the adult entertainment industry is not closely regulated. Adult entertainment attorney Gregory Piccionelli offers the following explanation:

> The steps the FBI has taken to create a reasonable, mature, practical, professional, and business-like method of having these inspections occur have, indeed, sort of created a normalized relationship on that very, very, very narrow topic. The industry still stands - ready, willing and able - to allow itself to be regulated as the big business that it is, professionally and within the law. Unfortunately, as long as there are folks out there that just refuse to see it beyond the big S-E-X word, we're going to have a problem here.[149]

Instead of trying to determine whether the adult entertainment industry is closely regulated, the court of appeals viewed the Statutes and their associated regulations as failing to be specifically directed at any industry. Rather, "they govern purely private conduct and sexually explicit images that are traded clandestinely and over the Internet, as well as commercially produced pornogra-

145. *Id*. (quoting *Marshall*, 436 U.S. at 313).
146. *Burger*, 482 U.S. at 701 (quoting *Donovan*, 452 U.S. at 606).
147. Free Speech Coal., Inc. v. Holder, 729 F. Supp. 2d 691, 753 (E.D. Pa. 2010).
148. *Id*.
149. Calvert & Richards, *supra* note 98, at 81.

phy."[150] Judge Rendell, who supports this assertion, wrote in her concurrence:

> The District Court relied on the 'steadily strengthening web' of statutes enacted over the last thirty years to 'protect[] children from sexual exploitation' to conclude that the adult-entertainment industry is 'pervasively regulated.' But the statutes to which it refers are general criminal prohibitions on the creation and distribution of child pornography; they are not specific regulations governing the way that commercial, adult pornographers conduct their business. Moreover, as general criminal statutes, they do not imply any diminution in an adult-entertainment producer's expectations of privacy. At the very least, the government has not shown, and it seems to me that it would be difficult for it to show, that the adult entertainment industry is governed by the type of specific, extensive, and intrusive safety or health regulations that exist in other industries…that courts have deemed pervasively regulated for purposes of the administrative-search exception.[151]

The other industries Judge Rendell refers to are liquor distribution, gun sales, stone quarrying and mining, automobile junkyards, veterinary drugs, and transportation of hazardous materials.[152] The adult entertainment industry does not appear on that list.[153] In the event that it were to be added to that list, the Supreme Court has promulgated a three-prong test to determine whether a warrantless inspection of such industries survives constitutional scrutiny.[154]

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150. Free Speech Coal., Inc. v. Att'y Gen. of the U.S., 677 F.3d 519, 544-45 (3d Cir. 2012)

151. *Id*. at 548-49 (citations omitted).

152. *See* United States v. 4,432 Mastercases of Cigarettes, 448 F.3d 1168, 1176 (9th Cir. 2006) (listing "closely regulated" industries subject to administrative-search exception).

153. *Id*. at 1176.

154. "First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made. . . . Second, the warrantless inspections must be 'necessary to further [the] regulatory scheme" . . . Third, the "inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant," meaning that it "must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." New York v. Burger, 482 U.S. 691, 702 (1987). Regarding the first part of the final requirement, the inspection program must be "sufficiently comprehensive and defined that the owner of commercial property

i. DOES A SUBSTANTIAL GOVERNMENT INTEREST INFORM THE REGULATORY SCHEME PURSUANT TO WHICH THE INSPECTION IS MADE?

In the initial proceedings, the district court concluded that the Statutes provide a critical tool in the ongoing battle against the sexual exploitation of children. The court based its conclusion on Congressional testimony[155] and the extensive statutory scheme aimed at child pornography already in place. Undoubtedly, there is a substantial government interest in preventing child sexual exploitation, but the regulatory scheme established by §§ 2257 and 2257A misses the mark and targets anti-child porn advocates rather than perpetrators of child sexual exploitation.

It has been shown repeatedly in this Note that the type of child sexual exploitation §§ 2257 and 2257A try to prohibit is separate and distinct from the adult entertainment industry.[156] Even Congress recognized that the adult entertainment industry was not the chief culprit in creating child pornography.[157] Yet whenever a public appeal to protect "the children" enters the national discourse, Congress cannot refrain from pointing its finger at the adult entertainment industry. Congress cannot allow personal objections to a particular industry to serve as a justification for violating producers' Fourth Amendment rights.

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cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." Regarding the second part of the final requirement, in restricting the discretion of inspectors, the inspection program must be "carefully limited in time, place, and scope." *Id.*

155. "The history of efforts to eliminate the scourge of child pornography is replete with examples of child pornographers finding ways around legislation intended to eliminate child pornography." S. Rep. No. 104-358, at 26 (1996) (testimony of Senator Charles Grassley).

156. *See, e.g.,* MEESE COMMISSION REPORT, *supra* note 34, at 406 (". . . the 'industry' of child pornography is largely distinct from any aspect of the industry of producing and making available sexually explicit materials involving adults."); *id.* at 410 ("The greatest bulk of child pornography is produced by child abusers themselves in largely 'cottage industry' fashion, and thus child pornography must be considered as substantially inseparable from the problem of sexual abuse of children."); *id.* at 610 ("Wholly commercial operations appear to be extremely unusual . . . ."); *see also* Child Protection and Obscenity Enforcement Act and Pornography Victims Protection Act of 1987: Hearing on S. 2033 and S. 703 Before the S. Comm. on the Judiciary, 100th Cong. 110 (1988) (statement of Senator Hatch) ("The supply of these materials for an ever increasing market has shifted to a well-organized network of child molesters who simply make their own recordings or photographs and share them between themselves.").

157. *Id.*

ii. ARE WARRANTLESS INSPECTIONS NECESSARY TO FURTHER THE REGULATORY SCHEME?

In the initial proceedings, the district court determined that warrantless entrance onto a producer's premises to inspect the required records was necessary to further the regulatory scheme because unannounced visits would keep producers honest.[158] This reasoning highlights an incorrect assumption on the part of the district court. If forgoing advance notice encourages producers to adhere to the age-verification procedures, then it follows that producers must not follow the procedures because they have something to hide. While some producers are more diligent about maintaining the statutorily required records that others,[159] there has yet to be a single instance of §§ 2257 or 2257A successfully revealing the appearance of a minor in sexually explicit material. Furthermore, the amount and nature of the information the Statutes require producers to record, not to mention the complicated indexing requirements, make it exceedingly unlikely that producers could fabricate and compile such records after receiving notice of an impending inspection.

The warrantless inspection regime created by §§ 2257 and 2257A is not necessary to further the Statutes' purpose. As Judge Rendell notes in her concurrence, "This is not a case where the government must conduct random, unannounced inspections of a business premises to ensure health and safety."[160] In fact, members of the adult entertainment industry universally resist the use of minors in sexually explicit materials regardless of their compliance with the Statutes.

158. Free Speech Coal., Inc. v. Holder, 729 F. Supp. 2d 691, 754 (E.D. Pa. 2010) ("By not requiring advance notice or a warrant, the inspection program encourages producers to follow the age-verification procedures regularly and in advance of the production of the depictions, and deters the possibility of fabrication or after-the-fact compilation of such information.").

159. Calvert & Richards, *supra* note 98, at 77.

160. As, for example, in the case of mine inspections, *see* Donovan v. Dewey, 452 U.S. 594, 603 (1981) (noting the "notorious history of serious accidents and unhealthful working conditions" in the mining industry).

iii. DOES THE INSPECTION PROGRAM, IN TERMS OF THE CERTAINTY AND REGULARITY OF ITS APPLICATION, PROVIDE A CONSTITUTIONALLY ADEQUATE SUBSTITUTE FOR A WARRANT?

A warrantless inspection of commercial property may be constitutionally objectionable if the occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his/her property will be inspected by government officials.[161] The district court initially felt that the inspection program set forth by §§ 2257 and 2257A provided a constitutionally adequate substitute for a warrant because it advised producers that the inspection was being made pursuant to law, and both adequately defined the scope of the inspection and properly limited the discretion of the inspecting officers.[162] On remand, the district court changed its opinion regarding the randomness, infrequency, and unpredictability of the inspections.[163]

The district court's initial, and rather loose interpretation of the administrative-search exception's "necessity"[164] requirement is

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161. *Donovan*, 452 U.S. at 599 (holding warrantless searches of mines as authorized by statute not violative of the Fourth Amendment prohibition against unreasonable searches and seizures).

162. The district court argues that since inspections may not occur more than once every four months and that "before commencing an inspection, the inspector must display his or her credentials and explain the nature and purpose of the inspection . . . the producers know that the inspections to which they are subject 'do not constitute discretionary acts by a government official, but are conducted pursuant to the statute. Further, the 'time, place, and scope' of the inspections are sufficiently limited so as to place 'appropriate restraints upon the discretion of the inspecting officers' . . . . Inspectors are only authorized to enter a producer's premises to inspect records 'at reasonable times and 'during normal business hours'-- between 9 a.m. and 5 p.m. – 'for the purpose of determining compliance with the recordkeeping requirements.' The inspector must explain the 'limited nature of the records inspection' and indicate 'the scope of the specific inspection and the records that [the investigator] wishes to inspect.' The regulations also detail where the records to be inspected should be located, and how they should be maintained and categorized." *Free Speech Coal., Inc.*, 729 F. Supp. 2d at 754.

163. Free Speech Coal., Inc. v. Holder, 2012 U.S. Dist. LEXIS 173158, at *11 (E.D. Pa. 2012).

164. Exceptions to the warrant requirement have multiplied, tending to confine application of the requirement to cases that are exclusively "criminal" in nature. And even within that core area of criminal cases, some exceptions have been broadened. The most important category of exception is that of administrative searches justified by special needs beyond the normal need for law enforcement. Under this general rubric the Court has upheld warrantless searches by administrative authorities in public schools, government offices, and prisons, and has upheld drug testing of public and transportation employees. *Fourth Amend-*

disarming, as is the ease with which the court brushed aside the warrant requirement. Requiring the government to establish probable cause for a search, whether based on suspected violations or as part of an overall administrative inspection plan, does not require anything over what the Fourth Amendment requires. Doing away with warrants in this instance creates a slippery slope whereby the government is permitted to test compliance with a law without the need for probable cause. [165] Tellingly, neither the Government nor the district court has explained why the government's goal of ensuring compliance and deterring the fabrication of records would not be served by warrants issued on short notice as part of a regular, administrative enforcement scheme.

V. HOW WILL THE THIRD CIRCUIT RULE?

The circuit court will likely find §§ 2257 and 2257A in violation of the Fourth Amendment. Plaintiffs' strongest arguments are: a reasonable expectation of privacy does exist and the warrantless administrative search exception does not apply. I will not attempt to extrapolate the court's application of the common law trespass rule set forth by *Jones* as this inquiry is fact intensive and the record, as it currently stands, is rather light regarding the specific details of the inspections.

With regard to whether a reasonable expectation of privacy exists, Plaintiffs will successfully demonstrate a legitimate expectation of privacy. The primary factors will be the nature of the private information contained within the records and the longstanding tradition of anonymity in the adult entertainment industry. Plaintiffs will also demonstrate that their expectation of privacy is one that society is prepared to recognize as reasonable. On

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ment: Search and Seizure, GOV'T PRINTING OFF., *available at* http://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-5.pdf.

165. Judge Rendell writes in her concurrence, "If the simple goal of ensuring compliance with recordkeeping requirements and deterring fabrication of those records is enough to justify warrantless inspections of businesses and homes in this case, then I see no legal barrier to also permitting federal authorities to enter businesses and homes without a warrant to inspect tax records and supporting documentation. As the absurdity of this example illustrates, the government's justification for the administrative-search exception does not meet the criteria for the narrow exception the Supreme Court, and we, have carved out in our jurisprudence." Free Speech Coal., Inc. v. Att'y Gen. of the U.S., 677 F.3d 519, 550 (3d Cir. 2012).

this point, Plaintiffs would do well to reference Justice Sonya Sotomayor's concurrence in *Jones*, in which she suggests it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.[166] When balancing the degree to which the inspections intrude on the individual's privacy against the degree to which the inspections are needed to child sexual exploitation, the balance will likely fall in favor of the Plaintiffs. The inspections do not contribute to preventing the sexual exploitation of children in any way. Rather, they reinforce an invalid premise that pornography causes child sexual exploitation.

With regard to whether the warrantless administrative search exception does apply, Plaintiffs will likely demonstrate that the adult entertainment industry is not closely regulated in the manner defined by case law and therefore the warrantless administrative search exception does not apply. As the court of appeals deftly pointed out, §§ 2257 and 2257A are criminal sanctions governing purely private conduct and sexually explicit images, and are not specifically directed at any industry at all. If the Statutes do not apply to an industry, then the Government will have difficulty showing that an exception limited to regulated industries applies. If it is determined that the Statutes are directed at the adult entertainment industry, Plaintiffs will still likely succeed in demonstrating that their industry is not closely regulated by distinguishing it from the industries enumerated by case law.

VI. POSSIBLE SOLUTIONS

In finding any solution to the constitutional violations inherent to §§ 2257 and 2257A, it is important to note that child pornogra-

166. "This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks . . . I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection." United States v. Jones, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

phy is not constitutionally protected.[167] Therefore, no matter what the solution, it will not change the status of child pornography. To that end, concerns about §§ 2257 and 2257A leave the fiercest child advocates with a choice: they can either continue to fight for an impractical law that has potential constitutional issues, or they can work with representatives from the adult entertainment industry and draft new statutes.

The simplest solution would be to require warrants in order to conduct inspections. Warrants could issue on cause to believe that the producer is using child subjects in violation of the law based on appearance, as is always the case, or as part of "an administrative plan containing specific neutral criteria."[168] As Judge Rendell eloquently stated in her concurrence, "Doing away with warrants in this instance creates a slippery slope whereby the government is permitted to test compliance with a law without the need for probable cause . . ."[169] There really is no good reason for implementing warrantless searches in this context other than as a scare tactic. This begs the question, why are we trying to scare the adult entertainment industry into compliance with a rule they already follow in theory?

Another solution is to redraft the Statutes so the law is simple. A common lament among producers is that the law is too complex.[170] Jeffrey Douglas, an attorney for the industry, suggests, "Make it as simple as possible so that it's not economically burdensome and then everyone can comply no matter what their education level, and they don't need to consult with a lawyer. I hear that all the time."[171]

Should Congress rewrite §§ 2257 and 2257A, it must make it simple for producers to create and maintain age-verification records. Creating the record should be as simple as check the ID and make a copy of the ID. The requirement to cross-reference every name ever used by a performer should disappear, and instead the

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167. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 765 (1982) (holding that a statute that singled out child pornography was valid because child pornography is not entitled to First Amendment protection).

168. Marshall v. Barlow's, Inc. 436 U.S. 307, 323 (1978); *see also* Martin v. Int'l Matex Tank Terminals—Bayonne, 928 F.2d 614, 619-22 (3d Cir. 1991) (explaining that probable cause for an administrative warrant may arise out of either "specific evidence of a violation" or "an administrative plan containing specific neutral criteria.").

169. *Free Speech Coal., Inc.,* 677 F.3d at 550.

170. Richards & Calvert, *supra* note 104, at 181.

171. *Id*.

producers should simply be required to verify and keep the record for that specific work.

VI. CONCLUSION

Over time, a narrative blaming pornography for child sexual exploitation was constructed. This narrative has prompted and informed subsequent legislation aimed at eradicating child pornography. While child pornography is, without question, abhorrent, Congress must refocus its legislative efforts and stop targeting an industry that is united against child pornography.

Potential solutions to the constitutional issues inherent to §§ 2257 and 2257A are straightforward. Congress can implement warrants and the recordkeeping requirements are easily simplified. Either solution, but particularly the implementation of warrants, would ease the burden currently shouldered by pornography producers and bring the Statutes within constitutional bounds.

Litigation in *Free Speech Coalition v. Attorney General of the United States* is ongoing. Most recently, the presiding district court judge granted a protection agreement ordering all information regarding the twenty-nine inspections propounded during discovery to be kept confidential. This deferential move indicates a nuanced understanding on behalf of the court of the privacy issues at stake. Subtle gestures such as this, coupled with the enlightened and pragmatic opinion authored by the Third Circuit Court of Appeals, bode well for the Plaintiffs.

As the Statutes currently stand, the recordkeeping requirements have little to do with the enforcement of child pornography laws and more to do with overstepping the constitutional rights of a stigmatized industry. Religious moralism went a long way in creating the conundrum that currently confronts the courts. Going forward, the Third Circuit must critically examine the issue, free from the biases of religious moralism, if it is to uphold the Fourth Amendment rights of adult entertainers and producers.