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Note

# I Wanna Sext You Up: How Statutes Prohibiting Online Sexual Communications Interact With First Amendment Rights

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## Introduction

With the rise of smartphones, tablets, and other electronic devices, children have unprecedented, and often unsupervised, access to the internet.[1] While this can be beneficial, it can also leave children exposed to harm they might not be prepared to face. Of particular concern for parents and legislators alike is the potential for a child to fall victim to an online sexual predator. As such, states have tried to prevent "grooming"—the process by which predators develop a relationship with a potential victim by befriending the child online, gaining his or her trust, and then eventually engaging in sexually explicit communications[2]—by criminalizing sexual communication between adults and children prior to the point of solicitation or physical sexual contact. Under these regulations, an adult commits a crime when, with

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1. A 2016 study demonstrated that the average child gets his or her first smartphone around age 10. Sixty-four percent of children have access to the internet via their own laptop or tablet, and while seventy-six percent are able to access the internet in a shared family room, twenty-four percent have "private" access to the internet from their bedrooms. Thirty-nine percent have a social media account by age twelve. Jay Donovan, *The Average Age for a Child Getting Their First Smartphone is Now 10.3 Years*, TECHCRUNCH, (May 19, 2016), https://techcrunch.com/2016/05/19/the-average-age-for-a-child-getting-their-first-smartphone-is-now-10-3-years/ [https://perma.cc/VGJ2-Z9YA].

2. *Ex parte* Lo, 424 S.W.3d 10, 23 (Tex. Crim. App. 2013); State v. Muccio, 890 N.W.2d 914, 924 (Minn. 2017); Powell's Books, Inc. v. Myers, 599 F. Supp. 2d 1226, 1231 (D. Or. 2008), *rev'd*, 622 F.3d 1202 (9th Cir. 2010).

the intent to arouse, he or she transmits sexual content to a minor.[3] At first blush, this might seem like a practical way to protect children—as no one likes the idea of their children receiving sexually explicit messages from adults seeking arousal. However, upon further review, it is difficult to ignore how broadly these statutes sweep.

The statutes at issue cover speech ranging from the sexually suggestive to the obscene.[4] Furthermore, the statutes do not make exceptions for sexual speech with serious literary, artistic, or scientific value.[5] Thus, many popular songs, movies, and television shows appear to be covered under the statutes. Courts upholding the laws have concluded that the specific intent element—the requirement that the material be sent with the intent to arouse—negates the possibility that the statute will be used to criminalize innocuously sharing serious works.[6] But what exactly does it mean to "intend to arouse," and is this intent really criminal? Does the advertising team behind Victoria's Secret commercials intend to arouse audiences with images of half-naked Angels? Do popstars intend to arouse their teen listeners with their often sexually explicit lyrics? Did Botticelli intend to arouse viewers with the Birth of Venus? Seemingly artists and producers often try to appeal to their audiences' sexual interests in a manner that many people find perfectly acceptable.[7]

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3. *See* TEX. PEN. CODE ANN. § 33.021(b) (Vernon 2007), *invalidated by Ex parte* Lo, 424 S.W.3d 10 (Tex. Crim. App. 2013); GA. CODE ANN. § 16-12-100.2(e)(1) (2007); MINN. STAT. ANN. § 609.352 (West 2009).

4. *See*, *e.g.*, MIN. STAT. ANN. § 609.352(2)(a)(3) (criminalizing distributing any material, language, or communication that "relates to or describes sexual conduct").

5. *See*, *e.g.*, *id.*

6. *See* Scott v. State, 788 S.E.2d 468, 476 (Ga. 2016) ("The specific intent requirement . . . eliminates the possibility that innocuous communications . . . might fall within the statute's proscriptions."); *see also Muccio*, 890 N.W.2d at 926 ("Because the communication is made with the specific intent to arouse . . . many communications falling within the statute will lack literary, artistic, political, or scientific merit.").

7. The court in *State v. Muccio* seems to conclude that artists and producers are unlikely to have the requisite intent, or the intent to arouse, to be prosecuted under the statute. *See Muccio*, 890 N.W.2d. at 927 ("Those creating and distributing the mass communications of the sort Muccio outlines would likely not act with the requisite intent."). However, publications discussing the intent of advertisers and artists suggest that "those creating and distributing mass communications" intend for their audiences to experience the emotions and feelings, including sexual arousal, conveyed in their works. *See* Jerrold Levinson, *Erotic Art and Pornographic Pictures*, *in* ARGUING ABOUT ART: CONTEMPORARY AND PHILOSOPHICAL DEBATES 381, 384 (Alex Neill & Aaron Ridley eds., 3rd ed. 2008) (characterizing the works of Picasso and Dali as erotic art and explaining that "sexually affecting the viewer" and "stimulating sexual thoughts and feelings" is a defining feature of erotic art); *see also* Beth Hill, *Creating Emotion in the Reader*, THE EDITOR'S BLOG (Feb. 8, 2011), http://theeditorsblog.net/2011/01/30/creating-emotion-in-the-reader/ [https://perma.cc/YV4K-SQDG] (instructing aspiring authors on how to induce emotions in its readers); *How to Evoke Emotions With Your Music*, SONGCAT (Mar. 19, 2017), http://songcat.biz/blog-post/how-to-evoke-emotions-with-your-music [https://perma.cc/239W-E4PK] (offering advice on how to create music that evokes specific emotions in listeners).

Courts also rationalize the statutes on the basis that the statutes are meant to cover only targeted, one-on-one communications between adults and minors,[8] but again this does not quite solve the problem. Under such a statute, an 18-year old who sends his 15-year-old brother a link to Kim Kardashian's latest photoshoot or a senior in high-school who sends his sophomore girlfriend a song by the Weeknd could be subject to prosecution. By contrast, an adult man who enters a chatroom for teenagers and begins communicating explicitly to all of the anonymous, logged-on teens would not.

In response, parties have challenged these laws, arguing that the regulations run afoul of the First Amendment. While the supreme courts of Minnesota and Georgia have upheld these statutes, the Texas Court of Criminal Appeals—the court of last resort for criminal cases in Texas—and the Ninth Circuit have struck down these laws as facially overbroad.[9] This Note will discuss applicable First Amendment law and will provide an overview of the conflict. It will then explain why these statutes are overbroad as written and will discuss the relative strengths and weaknesses of potential alternatives. Finally, it will recommend that legislatures amend these laws by utilizing affirmative defenses that exempt those who share serious works from prosecution.

## I. Background

Parties who oppose these statutes generally launch a twofold First Amendment attack on the relevant laws.[10] First, the parties challenge the statute as facially overbroad.[11] Second, the parties argue that the statute is a content-based regulation that fails to satisfy strict scrutiny.[12] This section will discuss the applicable First Amendment doctrines and will provide an overview of how the courts on either side of the conflict have addressed the issues.

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8. *Muccio*, 890 N.W.2d. at 926 (rebutting the argument that the statute encompasses literary works, paintings, and scenes from movies and televisions by pointing to the statute's requirement that the adult direct the communication at a child).

9. Powell's Books, Inc. v. Kroger, 622 F.3d 1202, 1207 (9th Cir. 2010); *Ex parte Lo*, 424 S.W.3d at 10.

10. Some of the parties have also challenged theses statutes under the dormant Commerce Clause. However, this argument has not received considerable attention in the courts' opinions and thus is outside the scope of this Note. *Ex Parte Lo*, 424 S.W.3d at 14; Scott v. State, 788 S.E.2d 468, 477 n.1 (Ga. 2016).

11. *Ex Parte Lo*, 424 S.W.3d at 14; *Powell's Books, Inc.*, 622 F.3d at 1207; *Muccio*, 890 N.W.2d at 919; *Scott*, 788 S.E.2d at 468.

12. *Ex Parte Lo*, 424 S.W.3d at 15 (explaining that content-based regulations are subject to strict scrutiny review as a part of the overbreadth analysis); *Muccio*, 890 N.W.2d at 929 n.6 (acknowledging but not reaching the strict scrutiny argument); *Scott*, 788 S.E.2d at 468 (explaining that content based regulations are subject to "exacting scrutiny").

### *A. First Amendment Overview: Overbreadth Doctrine and Content-Based Restrictions*

The first basis used to challenge the relevant statutes is the First Amendment overbreadth doctrine. Under the overbreadth doctrine, a person may facially challenge a statute if it restricts a substantial amount of constitutionally protected expression.[13] The government may regulate, or even proscribe, certain types of speech.[14] Some forms of speech, like obscenity and child pornography, are categorically excluded from First Amendment protection.[15] Other forms, like defamation, receive diminished First Amendment protection.[16] If a law encompasses both protected and unprotected expression, the court must determine if the law covers too much protected material.[17] If the law covers too much protected material, the court may invalidate the law.[18] For example, if the government passed a law prohibiting damaging the reputation of a public official, a court might invalidate the law as facially overbroad.[19] Although the law would ban some unprotected speech, like defamatory statements made with actual malice, the law would also ban protected expression, like truthful statements or opinions.[20] Thus, the court would need to determine the degree to which the regulation prohibited protected expression to determine whether it was overbroad.[21] In making this determination, the court decides whether the degree of overbreadth is "*substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[22] If the overbreadth is substantial, the court may invalidate the law.[23]

To assert a facial overbreadth challenge, a person does not need to establish that the speech for which he or she was punished was

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13. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

14. KATHLEEN ANN RUANE, CONG. RESEARCH SERV., FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 1 (2014). If the regulation covers speech that is not categorically excluded from First Amendment protection, the question of whether the government may regulate the speech hinges on whether the regulation is content based or content neutral. *Id.* at 5.

15. *Id.* at 1.

16. *Id.*

17. *See* Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 62 ("[O]verbreadth arises when a law that regulates a particular classification or category of unprotected speech sweeps in much more of that particular kind of speech than is constitutionally permissible.").

18. *See id.* at 63 (explaining that the overbreadth doctrine addresses the concern of laws prohibiting or deterring too much protected speech).

19. *Id.* at 41.

20. *Id.*

21. *Id.*

22. United States v. Williams, 553 U.S. 285, 292 (2008).

23. *See* Massachusetts v. Oaks, 491 U.S. 576, 581 (1989) ("[A] statute found to be substantially overbroad is subject to facial invalidation.").

constitutionally protected.[24] Thus, using our previous example a person who defamed a public official with actual malice could make a facial challenge to the statute.[25] In some cases, this could lead to a guilty criminal defendant going free.[26] As such, the court cautions that the overbreadth doctrine is "'strong medicine' that is not to be 'casually employed.'"[27]

The parties also challenge the statutes as content-based regulations that fail to satisfy strict scrutiny. If a government regulation is content-neutral, courts apply a series of balancing tests to determine if the law passes constitutional muster.[28] If a government regulation is content-based, the regulation is presumed to be invalid.[29] The government can rebut this presumption by showing that the law satisfies strict scrutiny.[30] In other words, the government must show that the regulation is narrowly tailored to a compelling government interest.[31] A statute is narrowly drawn when it employs the least restrictive means of achieving the government's stated interest.[32]

States defending these statutes may make several arguments to defend their laws. To address the attack that these statutes are subject to exacting scrutiny, they can argue that the regulations do not regulate speech based on its content, and thus are subject to rational basis review rather than strict scrutiny. Alternatively, they can argue that the statute is a content-based regulation but that it is narrowly tailored to a compelling government interest. To address the overbreadth challenge, the states must argue that the vast majority of material covered by the statute is categorically unprotected and therefore the statute is not substantially overbroad. Specifically, the states must show that most of the speech covered under the statute is obscene, harmful to minors, integral to criminal conduct, or child pornography. Material is obscene when it meets the standards set forth in *Miller v. California*.[33] To be obscene, material must appeal to the prurient interest,

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24. *See* Chen, *supra* note 17, at 41 ("A distinctive and controversial feature of First Amendment overbreadth doctrine is that it allows persons whose conduct is not privileged . . . to assert a facial invalidation claim . . . .").

25. *Id.*

26. *See id.* (noting that a person to whom a law could be constitutionally applied could "evade enforcement" of the regulation by asserting facial challenge).

27. *Williams*, 553 U.S. at 293 (quoting L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999)).

28. Chen, *supra* note 17, at 37.

29. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 817 (2000) ("When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. 'Content-based regulations are presumptively invalid,' and the Government bears the burden to rebut that presumption." (quoting R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992))).

30. Chen, *supra* note 17, at 39.

31. Sable Communications of Ca., Inc. v. FCC, 492 U.S. 115, 126 (1989).

32. *Id.*

33. 413 U.S. 15 (1973).

depict sex in a patently offensive way, and lack serious value.[34] Parties attacking the laws, on the other hand, must show either that the law is not narrowly tailored or that the government interest is not compelling to successfully show that this is an impermissible content-based regulation. To show that this law is substantially overbroad, the parties must show that the regulations prohibit a large swath of material that does not fall into one of these protected categories.

### *B. Approaches to Upholding the Statutes*

In *State v. Muccio*, the Minnesota Supreme Court focused exclusively on facial overbreadth and did not address the question of whether the statute satisfied strict scrutiny.[35] In its analysis, the court noted that under *Williams* speech integral to criminal conduct is not protected by the First Amendment.[36] The court then reasoned that predators "groom" children with the purpose or intent of ultimately soliciting them to engage in physical sexual conduct.[37] Because solicitation and physical sexual contact between adults and minors are both crimes, communications made as part of the grooming process, the court reasoned, are "both linked to and designed to facilitate the commission of the later crime."[38] As such, any conduct falling within the statutes reach that could be categorized as grooming would not be subject to First Amendment protection.[39] Here, however, the court distinguished between speech made with the intent merely to arouse and speech made with the intent to "groom."[40] The court acknowledged that speech made merely with the intent to arouse would be protected under the First Amendment unless it is otherwise barred from First Amendment protection.[41]

The court also examined the extent to which the statute covered obscene material, which is categorically excluded from First Amendment protection.[42] The court determined that the material covered by the statute "will often be obscene."[43] The court states that sexual desire between an adult and a child is prurient by its very nature, and therefore the first prong of

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34. *Id.* at 24.

35. State v. Muccio, 890 N.W.2d 914, 920 (Minn. 2017) ("[W]e hold that the statute's regulation of protected speech is not substantial and therefore the statute does not violate the First Amendment on its face.").

36. *Id.* at 923.

37. *Id.* at 924.

38. *Id.*

39. *Id.*

40. *Id.* at 925.

41. *See id.* ("[W]e acknowledge that the statute also covers some speech that may not be integral to criminal conduct.").

42. *Id.*

43. *Id.*

*Miller* will often be met.[44] With regards to satisfying the second and third prongs of *Miller*, however, the court offered very little support for its conclusion that the communications will often be patently offensive, at least to minors, and will often lack serious value.[45]

Having determined the range of speech that the statute rightfully proscribes—speech made with the intent to groom and obscene speech—the court determined that the statute will still cover some, but not a substantial amount, of constitutionally protected speech.[46] Because the overbreadth is not, in the court's opinion, substantial, the court upheld the law.[47]

In *Scott v. State*, the Supreme Court of Georgia discussed the two First Amendment doctrines together, treating the overbreadth doctrine as a way of ensuring that content-based regulations satisfy strict scrutiny.[48] Applying this analysis, the court determined that the statute did not prohibit a real and substantial amount of constitutionally protected expression.[49] The "key to this conclusion" was the statute's specific intent element, which the court concluded "dramatically reduces the range of expression that is subject to the statutory prohibition" and made the statute "to some degree, a proxy for elements of [*Miller*]."[50] In support of this assertion, the court stated "it is difficult to envision a scenario in which an adult's sexually explicit online communication with a child younger than 16, made with the intent to arouse or satisfy either party's sexual desire, would ever be found to have redeeming social value" and reasoned that the specific intent element also eliminated the possibility that innocuous communications would be covered under the statute.[51] Thus, the court found that the statute was not overbroad.[52]

### *C. Approaches to Striking Down the Statutes*

The Texas Court of Criminal Appeals addressed both the content neutrality and overbreadth arguments, concluding that the statute failed to satisfy strict scrutiny and was substantially overbroad.[53] The court determined that the statute covered a substantial amount of protected expression and found that while the state had a compelling government interest in protecting children, the statute was not narrowly tailored to that

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44. *Id.* at 925–26.

45. *See id.* at 926.

46. *Id.* at 928–29.

47. *Id.*

48. *See* Scott v. State, 788 S.E.2d 468, 471 (Ga. 2016) (explaining that the First Amendment prohibits the government from restricting speech based on its content and then discussing how the First Amendment overbreadth doctrine furthers First Amendment values).

49. *Id.* at 476.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Ex parte* Lo, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013).

end.[54] In reaching this conclusion, the court analyzed areas of protected expression and unprotected expression covered under the statute.[55] In discussing the areas of unprotected expression covered under the statute, the court determined that all of the unprotected expression covered by the statute was already covered by other, more narrowly drawn, statues.[56] The court then determined that the only material covered under the statute that was not already prohibited by another statute constituted protected expression.[57] The court illustrated this point by offering examples of sexually explicit art, literature, movies, and television shows that would theoretically be covered under the statute.[58]

Unlike the courts in *Muccio* and *Scott*, the Texas court remained unconvinced by the state's arguments that the specific intent requirement sufficiently narrowed the statute and the argument that the statute only covered one-on-one communications. In rejecting these arguments, the court concluded that the First Amendment protects thought, as well as speech.[59] Criminalizing speech based on the speaker's thoughts, the court concluded, was impermissible unless the speaker had the intent to commit a crime.[60] Therefore, the court noted, states can permissibly prohibit speech made with the intent to induce a minor to engage in sexual activity.[61] The court rejected the argument that the statute was meant to target one-on-one communications on the bases that this argument was unsupported by the statutory language and that even if the language did support this reasoning, it would be anomalous to conclude that one person entering a chatroom and engaging in "titillating talk" with several minors would somehow be less culpable than someone who engaged in similar conversation with one minor.[62]

In *Powell's Books*, the Ninth Circuit Court of Appeals focused solely on the overbreadth challenge and did not discuss whether the statute satisfied strict scrutiny.[63] The Oregon statute at issue in *Powell's Books* contained a few noteworthy differences from the statutes at issue in *Scott*, *Muccio*, and *Lo*. Specifically, the statute was not limited to materials furnished over the

54. *Id.* at 18–19.

55. *Id.*

56. *Id.*

57. *Id.* at 20.

58. *Id.*

59. *Id.* at 25.

60. *See id.* at 26 ("A man's thoughts are his own; he may sit in his armchair and think salacious thoughts, murderous thoughts, discriminatory thoughts, whatever thoughts he chooses, free from the 'thought police.' It is only when the man gets out of his armchair and acts upon his thoughts that the law may intervene.").

61. *See id.* at 23 ("A more narrowly drawn culpable mental state would be 'with intent to induce the child to engage in conduct with the actor or another individual that would constitute a violation of §§ 21.11, 22.011, or 22.021.'").

62. *Id.* at 26–27.

63. Powell's Books, Inc. v. Kroger, 622 F.3d 1202 (9th Cir. 2010).

internet and it contained an affirmative defense that exempted material that "forms merely an incidental part of an otherwise non-offending whole and serves some purpose other than titillation."[64] In defending the statute, the state argued that the reach of the statute was limited to hardcore pornography, and therefore was limited to categorically unprotected obscenity under *Miller*.[65] The court rejected this argument, pointing to several non-pornographic books that could be swept up in the statute.[66] Unlike the other courts that have addressed similar statutes, the court did not discuss the specific intent element as an integral element of its analysis. Instead, the court focused on the types of materials banned, concluding that the statute reached materials far beyond the confines of *Miller* and *Ginsberg*. Because the statute reached a substantial amount of materials that were not obscene or obscene as to minors, the court determined that the statute was overbroad in violation of the First Amendment.

## II. Analysis

The courts involved in this conflict have looked at virtually identical statutes and have reached different conclusions applying different First Amendment analyses. As a result, a person's First Amendment rights differ based on his or her geographic location. Conduct that is punishable by 10 years in prison in Georgia and Minnesota is considered protected by the First Amendment in Texas, Oregon, California, Washington, Nevada, Montana, Idaho, and Arizona. This is problematic because an individual's First Amendment rights should not be subject to change when he or she crosses the border from one state to another. Thus, the conflict should be resolved. This section will discuss whether these sexual-communication statutes are overbroad, will examine possible alternatives to the statutes, and will make a recommendation for how states should amend the statutes to reduce overbreadth.

### *A. The Statutes Are Overbroad.*

The statutes as written are substantially overbroad in violation of the First Amendment. In determining whether a statute is overbroad, courts look to the "statute's application to real-world conduct, not fanciful hypotheticals."[67] Courts upholding the statutes often undermine the argument that the statutes are overbroad by concluding that the examples of constitutionally protected material that the challengers raise are either "fanciful hypotheticals" dreamed up by attorneys or would arise infrequently

64. OR. REV. STAT. § 167.057(2) (2016).

65. *Powell's Books*, 622 F.3d at 1207–08.

66. *Id.* at 1210 (offering *The Joy of Sex*, *Mommy Laid an Egg*, *Where do Babies Come From*?, *Berserk*, and *The Handmaid's Tale* as examples of books that would be prohibited under the statute).

67. U.S. v. Stevens, 559 U.S. 460, 485 (2010).

enough that they should be addressed by as-applied challenges.[68] However, this conclusion erodes with every brief, opinion, and cert petition written incident to these various cases. In each filing, "creative attorneys" have provided so many scenarios in which the statute proscribes constitutionally protected material that the hypotheticals can hardly be written off as "fanciful."[69]

Furthermore, the specific intent element does not sufficiently narrow these statutes unless the "intent to arouse a minor" is inherently criminal. It is easy to look at the specific intent element and have a negative, visceral reaction to an adult furnishing sexual material to a minor with the intent to arouse. However, this conduct may not be as sleazy as it seems. Take, for example, Emmy winner Kate McKinnon's character on the Netflix original series *Friends from College*. In the series, McKinnon plays a wildly successful young adult author who accredits her success to her mastery of "bathtub moments," which she describes as "that moment of romantic longing that makes a 14-year-old girl want to shut herself in the bathroom,

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68. *See* Scott v. State, 788 S.E.2d 468, 476 (Ga. 2016) ("Though creative attorneys may dream up 'fanciful hypotheticals' under which the statute here reaches protected expression . . . we are not convinced that these scenarios are sufficiently numerous or likely to warrant the statute's wholesale invalidation."); *see also* State v. Muccio, 890 N.W.2d 914, 928 (Minn. 2017) ("In our view, there will be some, but relatively few, communications prohibited under the statute that would be entitled to First Amendment protection.").

69. *See Muccio*, 890 N.W.2d at 926 ("Muccio argues that the statute encompasses literary works like *Lolita* and *Lady Chatterly's Lover*, famous paintings like *Girl Diver and Octopi*, scenes from television series like *True Blood* and *Game of Thrones*, and music and music videos like *Raspberry Beret* by Prince and Miley Cyrus's *BB Talk* that are widely distributed on the Internet and could be seen by children."); *see also Powell's Books, Inc.*, 622 F.3d at 1210 ("Consider, for example, the well-known drawings of sex acts in *The Joy of Sex;* the cartoon depictions of sexual intercourse in the children's book, *Mommy Laid an Egg, or Where* Do *Babies Come From?* by Babette Cole; or the fantastical sex scene between Charlotte and Lord Griffin in Kentaro Miura's manga, *Berserk.*"); *Ex parte* Lo, 424 S.W.3d 10, 20 (Tex. Crim. App. 2013) ("Subsection (b) covers a whole cornucopia of 'titillating talk' or 'dirty talk.' But it also includes sexually explicit literature such as 'Lolita,' '50 Shades of Grey,' 'Lady Chatterley's Lover,'and Shakespeare's 'Troilus and Cressida.' It includes sexually explicit television shows, movies, and performances such as 'The Tudors,' 'Rome,' 'Eyes Wide Shut,' 'Basic Instinct,' Janet Jackson's 'Wardrobe Malfunction' during the 2004 Super Bowl, and Miley Cyrus's 'twerking' during the 2013 MTV Video Music Awards. It includes sexually explicit art such as 'The Rape of the Sabine Women,' 'Venus De Milo,' 'the Naked Maja,' or Japanese Shunga. Communications and materials that, in some manner, 'relate to' sexual conduct comprise much of the art, literature, and entertainment of the world from the time of the Greek myths extolling Zeus's sexual prowess, through the ribald plays of the Renaissance, to today's Hollywood movies and cable TV shows.") (footnotes omitted); Reply Brief for Petitioner at 11, Scott v. State, No. 16-523, 2017 WL 817343 (U.S. Mar. 1, 2017) ("Applying the statutory definitions, § 16-12-100.2 would prohibit electronically sharing literary works like *Lady Chatterley's Lover, The Handmaid's Tale, Lolita,* and *Fifty Shades of Grey* if the works were shared with an intent to arouse. It would similarly prohibit a just-turned-eighteen-year-old high-school senior from sharing, with intent to arouse his just-shy-of-sixteen-year-old girlfriend, the lyrics to Beyoncé's double-Grammy-winning *Drunk in Love* or 40% of the current top-ten *Billboard* songs. It would prohibit sharing dialogue featured in hit television shows like *Sex and the City, Girls,* and *Entourage*. These are hardly 'fanciful hypotheticals.'") (footnotes omitted).

light some candles, and explore in the tub."[70] In this scene, McKinnon's character states that she writes her books with an eye towards arousing 14-year-old girls, and yet, this does not seem criminal at all.

Proponents of the statutes can, and do, argue that artists like McKinnon's character are protected because some of the statutes require that the communications be directed at a specific child. Thus, because artists communicate *en masse*, they would be protected. Again, however, this argument only succeeds if the intent to arouse is inherently criminal. Even if a specific adult intends to arouse a specific child, this does not necessarily resemble a criminal act. To illustrate this idea, consider two scenes from the hit movie *American Pie*. In the opening scene, two parents catch their son masturbating, and the father notices the son has the dictionary open to a vagina diagram. In response, the father exclaims "Jesus Christ. The dictionary? Hell, son, I'll buy you some dirty magazines."[71] Later in the movie, the father does just that. In another scene, a different high-school student calls his college-aged brother for advice about sex and his brother directs him to a book known as "the bible" that has been passed down from student to student with instructional descriptions and diagrams on how to satisfy women.[72] In both of these scenes, adult men—the father in the first scene and the older brother in the second—furnish high-school students with sexually explicit material. In both scenarios, the adult men intend that the students use these materials for arousal, and in both scenarios the exchange is a direct communication between two people. Are these scenarios a little strange? Sure. But would they warrant criminal prosecution? Certainly not.[73] Even more likely than these scenarios is the possibility of a high-school senior dating a high-school freshman. In such a scenario, even if the couple were to never engage in sexual conduct, merely sharing songs, poems, or clips from hit movies or television shows could result in criminal prosecution. Because the intent to arouse does not automatically transform protected expression into criminal activity, as some courts suggest, the statutes are substantially overbroad in violation of the First Amendment.

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70. Mallory Carra*, Kate McKinnon's Cameo in 'Friends From College' Pokes Fun at the YA Book Trend*, BUSTLE (July 14, 2017), https://www.bustle.com/p/kate-mckinnons-cameo-in-friends-from-college-pokes-fun-at-the-ya-book-trend-70225 [https://perma.cc/95X8-8BJ5].

71. AMERICAN PIE (Universal Studios 1999).

72. *Id.*

73. Admittedly, the characters receiving the sexually explicit materials are high-school seniors, and therefore furnishing these materials to them would not be considered a crime. However, the example serves to show how the "intent to arouse" coupled with "a direct communication" does not necessarily result in what society would traditionally consider a predatory criminal act.

### *B. The Statutes are Content-Based Regulations that Fail to Satisfy Strict Scrutiny.*

Because the statutes do not employ the least restrictive means of achieving the government's compelling interest in protecting children, the statutes fail to satisfy strict scrutiny. The statutes at issue prohibit types of speech due to their sexually suggestive nature. As such, the statutes are content-based regulations that are subject to strict scrutiny.[74] When a statute is subject to strict scrutiny, the government must show that the law is narrowly tailored to a compelling government interest.[75] Here, the government undoubtedly has an interest in protecting children.[76] However, the statutes at issue are not narrowly tailored to achieving this goal. This is evidenced by the numerous examples in which the statutes prohibit protected speech as well as by the alternatives outlined in Part II.C that would achieve the government's interest in protecting children without chilling or prohibiting a substantial amount of constitutionally protected expression.

### *C. Alternatives to the existing statutes.*

Because the statutes are overbroad as written, legislatures should amend the statutes to narrow their reach. There are a few approaches that could be taken to limit the scope of such statutes. First, the legislatures could employ the scheme recommended by the Texas Court of Criminal Appeals. In *Lo*, the court suggested that the legislature change the specific intent element from "with the intent to arouse or gratify the sexual desire of any person" to "with intent to induce the child to engage in conduct with the actor or another individual that would constitute [sexual assault or aggravated sexual assault]."[77] However, this fails to combat the problem that legislatures and parents face. Clearly, parents and legislatures want to protect children from imminent physical sexual assault, but they also want to protect children from receiving messages from and forming online relationships with predators who may live thousands of miles away as these communications can cause lasting psychological damage.[78]

A second option would be to overhaul the statutes to parrot the language in *Miller* and *Ginsberg*. To do this, the statutes could limit the material covered by the statute to material that, taking into account its dissemination

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74. *See infra* Part III.

75. *Id.*

76. *See* Reno v. ACLU, 521 U.S. 844, 875 (1997) ("[W]e have repeatedly recognized the governmental interest in protecting children from harmful materials.").

77. *Ex parte* Lo, 424 S.W.3d 10, 23 (Tex. Crim. App. 2013).

78. *See* Amicus Curiae Brief of National Center on Sexual Exploitation and Civil Lawyers Against World Sex-Slavery at 7–8, Scott v. State, No. S16A0323, 2016 WL 1139386 (Ga. Jan. 26, 2016) ("Not only is early sexual activity linked to subsequent risky behavior, poor academic performance and mental health issues but, so is mere intense romantic or sexual involvement at a young age, such as an online sexual relationship with an adult.").

to minors,[79] (1) lacks serious literary, artistic, scientific, or political value; (2) portrays sex in a patently offensive way; and (3) appeals to a prurient interest in sex.[80] Theoretically, this would be sufficiently narrow as it would only encompass expression categorically excluded from First Amendment protection. In practice, however, this statute would give little guidance to those attempting to abide by the law. The obscenity factors are judged based on "contemporary community standards,"[81] and therefore what is "obscene" may vary widely based on time and place. Furthermore, the word "prurient" is not widely used in everyday expression.[82] The word has been defined as a "shameful or morbid interest"[83] in sex, but even given this technical definition, it is difficult to apply.[84] In the highest courts of Minnesota and Georgia, sexual communications between adults and minors are per se prurient. However, there are likely others who would hesitate to call communications "relating to sexual conduct" between seniors in high-school and freshmen in high school "shameful or morbid." As such, conforming the laws entirely to parrot *Miller* seems like it would create a vague law in an attempt to conform to the First Amendment.[85]

A third option would be for the legislatures to create affirmative defenses to address the examples raised by those challenging the laws. In each of the cases involved in the conflict, the parties challenging the laws have pointed to examples of mainstream music, literature, art, movies, and television shows that are covered under the statute.[86] To prevent these materials from being covered, legislatures could create an affirmative defense that exempts material with serious literary, artistic, scientific, or political value. While this defense would make use of some of the language in *Miller*, it would avoid the vagueness issue that arises from parroting *Miller* because it would allow states to retain their definitions of sexually explicit materials. Alternatively, legislatures could use the affirmative defenses employed by the Oregon legislature in *Powell's Books* with one minor adjustment. The Oregon statute included the defense that the material "forms merely an incidental part of an otherwise non-offending whole and serves some purpose other than titillation."[87] Because the defense contained the conjunction "and"

79. Ginsberg v. State of New York, 390 U.S. 629 (1968).

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

81. 50 Am. Jur. 2d *Lewdness, Indecency, and Obscenity* § 8 (2017).

82. GEOFFREY NUNBERG, GOING NUCLEAR: LANGUAGE, POLITICS, AND CULTURE IN CONFRONTATIONAL TIMES 34–35 (2009) (explaining that the average person does not encounter the term "prurient" often enough to get a clear picture of its meaning).

83. 50 Am. Jur. 2d *Lewdness, Indecency, and Obscenity* § 10 (2017).

84. NUNBERG, *supra* note 80, at 34 ("Even people who know the word often seem to have no clear idea of its meaning.").

85. NUNBERG, *supra* note 71, at 24–35 (explaining how including "prurient" in the obscenity standard fails to provide fair and reasonable notice of what obscenity actually means).

86. *See supra* note 64.

87. *Powell's Books, Inc.*, 622 F.3d at 1210.

rather than "or," the Ninth Circuit found that this did not sufficiently narrow the statute.[88] However, if a legislature were to make this crucial adjustment, the defense would seem to cover the majority of protected expression falling under the statute's purview.

Utilizing affirmative defenses would be the most effective way to balance the government's interests in protecting children and respecting First Amendment values. This approach allows states to specifically proscribe certain types of sexually explicit communications in such a way that people are put on fair and reasonable notice of what constitutes a violation of the law. It also allows states to criminalize adults sending sexually explicit materials with the intent to arouse to children while maintaining a safe harbor for those who share serious works. Finally, it is the best option in terms of administrative feasibility because it does not require legislatures to completely rewrite their existing laws. Rather, they can amend the laws by simply adding a subsection with these affirmative defenses.

## Conclusion

The statues at issue in *Ex parte Lo*, *Muccio*, *Scott*, and *Powell's Books* that criminalize sexual communications between adults and minors when the exchange is intended to arouse either party are impermissibly broad under the First Amendment because they prohibit a substantial amount of constitutionally protected material. Because of the conflict among the courts, the First Amendment currently has different meanings in different states. As such, the Supreme Court should intervene to resolve the conflict. However, in the meantime, states with similar statutes or states considering adopting similar statutes should seek to amend or draft their laws to avoid First Amendment challenges. To avoid First Amendment challenges, legislatures should consider the range of constitutionally protected expression that could potentially be covered by the statute. From there, states should draft affirmative defenses specifically aimed at tailoring the statute to avoid substantial overbreadth and to satisfy strict scrutiny.

88. *See id.* ("The problem, however, is that the statute does not say 'or'—it says '*and*.'").