Pornographic Protections?
Itineraries of Childhood Innocence

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Commentary

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Abstract
Legal and queer theoretic critics charge that the myth of "childhood innocence" perverts and promotes the unwarranted expansion of child pornography law, and mischaracterizes sources of and solutions to sexual violence. This essay spells out these criticisms and synthesizes them with recent scholarship on the racialization of innocence. In thinking these literatures together, we are able to survey the complexities of "innocence" as a political idiom for the promotion of social and sexual welfare. I conclude with the reminder that no idiom—whether "innocence," "harm," or "agency"—is purified of normative judgment.

Keywords
Innocence; childhood; child pornography law; race; racial innocence

I. Introduction

> They gave their lives to protect the precious children in their care, they gave all they had for the most innocent and helpless among us.[1]
>
> We are true to our creed when a little girl born into the bleakest poverty knows that she has the same chance to succeed as anybody else, because she is an American; she is free, and she is equal, not just in the eyes of God but also in our own.[2]

Why begin a commentary essay titularly about children, pornography, and innocence, with speech excerpts from President Obama? This essay surveys recent criticisms of United States child pornography law, and draws attention to the objections

critics raise against "childhood innocence" as crux and crutch of (adult) North American consciousness. By positioning these critics alongside our President, at one end, and recent scholarship attentive to the racial dimensions of innocence, on the other, I hope to elevate some ways child pornography laws' critics forecast, but also overlook, the discursive and political prospects of innocence.

The first speech excerpt is from Obama's response to the tragic school shooting that occurred in Newtown, Connecticut, in December 2012. With the utmost sensitivity to the horrors of this event, it is this sort of invocation of innocence that most concerns the critics canvassed below: innocence is synonymized with preciousness and helplessness, and the preservation of a dominant, idealized image of *childhood* potentially supplants concern for *children*. This sort of innocence tends to a politics of the ban—ban console games, ban guns.

But what else might innocence do? What other politics might it propel? In the second speech excerpt, we, Obama's listeners, are also asked to envision an innocent child, but here innocent of her social condition, and innocent too of the institutionalized racism, deindustrialization of and disinvestment in cities, and deregulated accumulation of wealth that installs insurmountable inequality as an American way of life. This little girl, permit me to speculate, is Black, not only because of our conflations of poverty and Blackness, but also because the speaker is our first African American president, and because images of his "little girl[s]" circulate across popular culture. But this little girl is also a citizen—innocence is not a blockage to knowledge (she "knows," proleptically, of her equal opportunity) nor a preciousness requiring protection, but a condition of possibility for her equality. Her "littleness," her "born-into-ness," is an invitation to

conferrals of citizenship and opportunity. Her innocence is mobilized not simply for paternal protections, but for agentive possibilities. [3]

Part II of this essay overviews (mostly post-) millennial criticisms of child pornography law, and charts the collateral damage that critics suggest is a consequence of the cultural power of childhood innocence, an innocence that amounts to blankness, pristineness and helplessness (the innocence found in Obama speech #1). Part III explicates two texts that complicate—not simply by unequivocally valuing up—our understanding of childhood innocence and its consequences by drawing attention to some of innocence's racialized refractions (refractions that expound on, and perhaps make possible, the innocence found in Obama speech #2). I conclude by proposing a modest, strategic step we might take for a revised, progressive approach to the often toxic alchemy of children, sex and law.

II: Child Pornography Law and its (Mostly Post-) Millennial Discontents, or Innocence Indicted

In the late 1970s, child pornography emerged as a source of popular and political anxiety. Relatively non-codified before 1977, states increasingly enacted laws defining and criminalizing child pornography, and the police, FBI, and other organizations spearheaded operations over the 1980s and 1990s to squash circulation of child pornography in the United States.[4] Material deemed child pornographic is, by definition, unprotected by free speech guarantees of the First Amendment. A picture of a naked child, or even clothed child, may be prosecuted as child pornographic, whatever the use or broader context of the picture.[5] Unlike "obscenity," "child pornography" is not circumscribed by considerations of "literary, artistic, political, or scientific value."[6] Whereas "obscenity" nominally registers violation against social norms, "child

pornography" nominally registers violation against children. Succinctly, the former upholds morality, the latter prevents harm.[7]

The rationale behind *New York v. Ferber* (1982), the Supreme Court ruling holding New York's child pornography law constitutional, and the rationale behind subsequent judicial and legislative prohibitions, has been the presumptive harm to the child that the images both document and constitute. Indeed, in 2002, the Court struck down sections of the Child Pornography Prevention Act of 1996 that criminalized computer-generated images of children, and images of adult models appearing to be minors, as child pornographic.[8] There is no child harmed in the making and distributing of these images. Read from this vantage point, child pornography law appears consistent and measured. However, as the authors mentioned below argue, "harm to the child" has authorized a terrific expansion of federal and state laws: not only is the production and commercial distribution of child pornography criminal, but so too is noncommercial distribution and possession, and, in some states, online viewing.[9] But it requires some argument that viewing an online image of a naked child shot in the 1970s necessarily harms her. Is there still "a child" to be harmed? Even if the adult's privacy and reputational interests are violated, is this or should it be synonymous with "harm to the child"? So too, federal and state definitions and judicial interpretations of child pornography include terms like "sexually explicit," "sexually suggestive," "coyness," and "lascivious exhibition of the genitals."[10] The vagueness of these terms has permitted broad criminalization (or at least prosecution): professional photographers' pictures of naked children; images of naked but not sexually engaged children; images of clothed children whose genitals are "discernible"; occasionally and recently, teenagers' self-

filmed sexual activities.[11] Unraveling from *Ferber*, the scope of child pornography law metastasized under the predicative, "child pornography *is* child sexual abuse."[12] Meanwhile, visual material depicting children under the age of eighteen may be defined as child pornography, even in states where sexual activity below eighteen is legally permitted.[13]

Critics contend that "harm to the child" is not the universal truth of child pornography, so much as it is an historically situated, socially specific, ideological cover for child pornography *law*. On these accounts, "harm to the child" mystifies what sits at the unnamed center of popular and juridical anxiety: harm to childhood innocence. Critics proffer several reasons why the structuring force of innocence is so problematic for child pornography law, foremost: a) innocence sexualizes the children law purports to protect;[14] b) innocence over-ascribes sexual dangers faced by children to pornographers, pedophiles, and pictures; c) as always about-to-be-lost, innocence requires endless expansions of state power for its preservation.[15]

1. Innocence, Erotic and Eroticizing

In "The Perverse Law of Child Pornography," Amy Adler argues for two reconstructive readings of U.S. child pornography law against the popular intuition that the law summarily protects children.[16] On the first reading, by constructing childhood sexuality as *taboo*, child pornography eroticizes its own transgression. On the second reading, child pornography law is itself child pornographic, inciting a "pedophilic gaze" by its insistent sexualization of children and the imagery of children. Central to both of these unacknowledged operations, for Adler, is innocence:

> Cultural rhetoric insists … on the innocence of children … At first glance, it may appear that the discovery of child sexual abuse as a social problem has returned us to a pre-

> Freudian state where children are once again sexually pure and blank … this new vision of children may seem more palatable, but it has come at a cost.[17]

Adler is not contesting the prevalence of child sexual abuse with a counter-figure of the sexual child (as if such a child could not suffer). Rather, she is observing that the dominant rhetorical framing of child sexual abuse—as a violation of innocence—has traveled into the formation and expansion of child pornography law. For her, the "cost" of this vision—the sexual purity of the child—is the eroticization of children. Adler travels with (the now exiled) Freud to shore up the circulation and amplification of pedophilic desire elemental to U.S. child pornography law. She argues that prohibition magnifies desire, whether or not, in the final instance, prohibition is antecedent to or generative of desire. While this "dialectic" may hold true for all prohibition, and thus all legal interdiction, it carries potent force for sex law (as interdiction re-enacts incestuous desire),[18] and extant child pornography law in particular:

> As rhetoric rises about the threat of sexual abuse, as we insist more than ever on the natural innocence of children, as we expand the definition of what constitutes child sexual conduct, the seductive child beckons to us in advertising, fashion, pop culture, and art.[19]

Adler speculates that the "boundlessness"[20] of child pornography law in the 1980s and 1990s may have heightened the appeal of sexualized children in mass culture. The national popularity of photographers like Sally Mann and fashion icons like Calvin Klein may have in part resulted from their apparent transgressions: the more law sought to protect children from sexualization, the more sexualization came to seem sexy.[21]

More trenchantly, Adler proposes that U.S. child pornography law is pedophilic. As we have doctrinally and statutorily moved away from "harm to the child" in the production of pornography to "harm to the child" in the viewing and possession of the image, we are asked to "gaze" like a "pedophile," to search for the possibility of sex

("lascivious display"; "coyness") in the image, and thus to sexualize the image. When judges and jurors are called upon to determine whether genitalia are "discernible," or whether images could potentially arouse a child molester, the law "promotes one of the very dangers it purports to solve."[22] Concludes Adler, "Children and sex become inextricably linked, all while we proclaim the child's innocence. The sexuality prohibited becomes the sexuality produced."[23]

2. Pornographers, Pedophiles, Pictures and Predation

In "The Danger of Fighting Monsters: Addressing the Hidden Harms of Child Pornography Law," Robert Danay canvasses the same doctrinal history as Adler, and adds Canadian law to his analysis. Reviewing Canada's definition of child pornography and several judicial rulings, Danay posits, like Adler, that the Canadian courts and Criminal Code have sexualized images that would heretofore be considered benign—for example, a picture of a toddler in a nightgown, genitals exposed, opening Christmas presents.[24]

Danay adds another misfortune to innocence's ideological hold: the relocation of sexual danger onto a discrete person, the "salivating pedophile,"[25] and away from the less spectacular and more common threats posed by family, by corporate, mass mediated and juridical sexualization, and by gendered enculturation.[26] In this functionalist critique, innocence serves as an alibi to fortify a fictitious divide between a world of sexual safety and its constitutive outside—pathologically predatory persons. As symbolic repositories, child pornographers and pedophiles immunize the dominant culture of—because conceptually quarantined from—sexual threat:

> Perhaps in an effort to mask our secret prurient interest in sexualized children (and justify the public display of child sexual abuse in the courts), we (as a society) have also

> constructed a myth of the "salivating pedophile" – a brutal and incorrigible sexual predator of children, lurking about schoolyards, waiting to pounce.[27]

Anne Higonnet attributes a similar functionalist power to innocence, but suggests it is the photographic image that becomes a site of displacement and condensation. In a way, Danay's pedophile is Higonnet's picture: both cleanse society of culpability, and are freighted in part by the displacing power of innocence. Higonnet submits that photographic imagery has been central both to Western, contemporary understandings of childhood innocence and to its "current crisis."[28] In late modernity, innocence is a visual construction. Because "the image we have of childhood now is just that – an image,"[29] our sociolegal preoccupation with what is designated child pornography—as opposed to child sexual abuse, child abuse, or the commercialization of child sexuality—is a rearguard response to the fearful multiplication of child images, as well as to the realism viewers and law reads off the photograph: as documentation rather than representation.[30] "Child pornography law," quips Higonnet, "defends the ideal of childhood innocence against pictures."[31] The broadening definitions of child pornography, and the activity increasingly criminalized under child pornography law, symptomize the grip of the image on the contemporary imagination,[32] and to detrimental effect:

> Expanding child pornography law so that it potentially affects every image of any child only diverts precious resources from the efficient to the inefficient … surveillance of images substitutes for the care of real children.[33]

3. Preserving Childhood, Promoting State Power

Harris Mirkin argues that private possession (or what Justice Brennan called "mere possession"[34]) and viewership of child pornography does not, *ipso facto*, harm the child in the image.[35] More controversially, he posits that that not all child models are harmed in the production of pornographic images.[36] Mirkin, pressing a familiar liberal

distinction between speech and conduct, insists that child pornography law indefensibly restricts ideas and interpretations in its criminalization of possession and viewership. Mirkin disputes legislative determinations that child pornography harm children, absent more careful analysis. For Mirkin, judicial deference to legislative (but unfounded, he asserts) findings of harm is propelled by the images' assault on idealized innocence, not their assaultive force on children.[37] So too, says Mirkin, what motors criminalization of viewership and possession is the unsettling notion that someone somewhere is pleasuring himself to the picture–this suggests that our disturbance ultimately results from the shattering of a convention, sexual purity, and not from an injury to a child that never occurs—or at least does not recur.[38] While I find some of Mirkin's criticisms unconvincing,[39] his analysis illuminates that, in the child pornography cases from *Ferber*[40] to *Dost*[41] to *Osborne*[42] to *Knox*[43], when it comes to the imagery of children, the harm is the sex, so if there is sex there is harm. It is the fact of sex and not its effects that are rendered harmful in the construction and subsequent preservation of childhood (as) innocence. Through these series of equivalences, states and the federal government have broadened and then constitutionalized their power to censor and criminalize.[44]

These and likeminded authors do not have much good to say about childhood innocence. Although some gesture that innocence "needs to be understood as a metaphor that is open to diverse uses," for the most part, innocence is largely indicted.[45] It sexualizes, distracts from "real" problems, and propagates a politics of recrimination and protection.

But if this is all innocence did, then it would not be a problem that innocence has so long been the prerogative of white children.[46] If the rhetoric of innocence functions only to overregulate children, contain/expropriate their sexual agency, consolidate sexual normativity,[47] localize structural sexual violence onto individual perpetrators, etc., then the withholding of innocence from Black children might be a promising kind of deprivation.

Through innocence, argues Henry Giroux, "children are ascribed the right of protection but are, at the same time, denied a sense of agency and autonomy."[48] Under this presumption, the definitive problem with the racialized allocation of innocence would that nonwhite children are under-protected. The question I want to pose is, might innocence also serve as an idiom to imperfectly secure some degree of autonomy, too? If that is the case, then our concern is not only that Black children have not been placed on a pedestal, but that they have, historically, been denied admission to a symbolic register that holds out a possibility of less-damaged flourishing. What if innocence were not only about protections, but about possibilities?

III. Innocence, Racially Refracted: A Politics of Possibility

This Part principally focuses on two texts that make a counteroffer for innocence: Robin Bernstein's *Racial Innocence: Performing American Childhood from Slavery to Civil Rights* and Jessica Fields' *Risky Lessons: Sex Education and Social Inequality*.[49] While both texts acknowledge the racialized allocation of innocence in the United States, they also point to innocence as a political idiom mobilized for racial justice and equal citizenship.

1. Racial Innocence: Pain as a Mandate for Citizenship

This cursory consideration cannot do justice to Robin Bernstein's magisterial history of childhood innocence and its fundamental role in the configuration of racial meaning in the United States. Rather, I explore her observations on the "pluripotence" of childhood to ponder how her book productively complicates innocence's value.[50]

Starting in the middle of the 19th century, according to Bernstein, the ideal of childhood innocence served to legitimize racial subordination in large part through naturalizing that subordination as right, harmless and even preferable. "Racial innocence" refers in this instance (but not exclusively) to the childlike "performance of not-noticing"[51] adopted by whites and aesthetically iterated in and through "scriptive things;"[52] a performance that "provided cover beneath which dominant groups dominated."[53] Racial inequality and violence were neutralized through the playful aesthetics of innocence.

Crucially, demonstrates Bernstein, innocence was indexed by pain: sensation and suffering.[54] In theatrical productions, political campaigns, commercial messaging, literature, and everyday life, white children appeared as tender, sensate, and susceptible to pain. From the end of the 19th century and into the 20th emerged the iconic and "libelous" pickaninny—the insensate Black child figure (in theatrical blackface for example, or as a doll) against whom violence was comically, repeatedly administered.[55] This equation of innocence with the capacity to feel pain meant that the constitutive opposite of innocence was not evil (say, in the form of the pedophile or pornographer) but nonhuman (in the form of the pickaninny). Innocence sentimentally registers humanity as susceptibility to pain.[56] Bernstein suggests that various projects which

disqualified Blacks from the category of innocence at once disqualified them from the category of human.

This also meant, conversely, that *to vie for inclusion under the idiom of innocence was to vie for the recognition of one's humanity*, and here we witness a quite different deployment of innocence. Three prominent examples from *Racial Innocence*: 1) Harriet Beecher Stowe and other abolitionist writers imbued their Black characters with tenderness, tears, and sorrow to contravene prevailing images of insensate slaves;[57] 2) in the early 20th century, black-owned companies marketed more fragile black dolls, and instructed girls to act as caring mothers for them, thus countering the insidious history of the production of (rubber- or rag-made) black dolls for the purpose of beating, hanging, or otherwise desecrating them;[58] 3) the use of dolls in the social scientific investigations conducted by Kenneth Clark and Mammie Clark to prove the psychologically damaging effects of segregation on African American children.[59] Tracking the importance of this third example of politicized innocence in *Brown v. Board of Education* and beyond, Bernstein emphasizes: "This spectacular performance [of the doll study] helped desegregate not only public schools but also the popular imagination of childhood innocence."[60] As Bernstein points out, whatever the methodological flaws (even manipulations) of the studies, the researchers' questions produced sad, tearful Black children, therefore enlisting them into the scene of innocence from which they had been historically expelled. The very "pain" the Clarks administered through their questions was resignified as the natural pain felt by children and the historical pain experienced through racial formation:

> When the Clarks scripted, through dolls, a spectacle of black children's pain, they cast black children in the role of 'suffering child,' 'innocent child,' and therefore 'child' …

> Through this performance, the Clarks and the NAACP located civil rights on the side of childhood innocence, as Stowe had located abolition a century earlier.[61]

Might it be the coordinated efforts to humanize Black children, to make them sensate to suffering in the cultural imaginary, that makes possible the political resonance of President Obama's brief for the "little girl"? If so, or partially so, then we need to reconceive innocence not solely as a sexualized negative space demanding protections, but as a racialized device that confers humanity, one that has been and can be resignified to access citizenship. And as we will see, childhood innocence may even be invoked as a mandate for, not just against, sexual education.

2. Racial Innocence: Risk as a Mandate for Sexual Knowledge

Jessica Fields' excellent ethnography, *Risky Lessons*, analyzes the conflicts over sex education in several North Carolina schools and school districts. In one chapter, she recounts a heated debate among parents, activists and school board members over whether their multiracial yet segregated school district should adopt abstinence-only or a more comprehensive form of sex education.[62] Presciently, she observes that both camps deployed the rhetoric of childhood innocence.

For the conservative white women who advocated abstinence-only sex education, children should be protected not only from dangers of sex, but also from the dangers of already corrupted, "deviant" children. Injecting sex into the curriculum would further endanger children to the already fallen. This version of innocence was a way to talk about racial difference without talking about it: white children were imagined innocent but corruptible, while Black boys were understood to be aggressive and Black girls to be promiscuous.[63] For the multiracial group of (mostly) women backing a more comprehensive sex education program, innocence took on different meaning. Advocates

spoke of and for "children having children," and children "at-risk" whose pregnancies would derail them from life opportunities.[64] This discourse of innocence also coded race and class under a pretense of universalism. Although community members defended comprehensive education for "all" children, it was made clear through Fields' personal interviews that poorer, Black girls were of primary concern.[65] After much dispute, the school district voted in favor of the more comprehensive sex education program.

In the North Carolina school district debate, innocence became more closely synonymized with vulnerability and risk rather than sexual purity. Innocence was not an ontological fiction of the child to be protected until the age of majority, but an impoverished social condition that required interventional education. Based on Fields' account, we might be reticent to jettison innocence from our "discursive repertoire" in the promotion of young people's well-being.[66] Although Fields casts both of these innocence rhetorics (sexual purity, risk) as problematically oriented around "protection," it seems evident that the comprehensive sex-ed advocates' deployment of the term helped young people secure at least marginally better education materials to navigate pregnancy, contraception, and sexually transmitted infections. (Fields is ultimately far less sanguine about this politicization of innocence than I have led on; see Concluding Comment.)

The critics of child pornography law referenced in Part II argue that "innocence" sexualizes children, disproportionately misattributes sexual danger onto pornographers, pedophiles, and pictures, and authorizes the state to regressively expand its power. I have hoped to demonstrate, in conversation with Bernstein and Fields, how such criticisms—perhaps because responsive to a particular juridical phenomenon—may overlook the racial inflection of innocence, not only in terms of affordance but also accordance. The

story of innocence and race is not simply the story of nonwhite children not getting it. Innocence in the United States has also operated as a rhetorical posture for white people to absolve themselves of responsibility for and privileging from racial inequality.[67] More encouragingly, innocence has been and can be rhetorically harnessed to promote the social and sexual welfare, and not simply state protection, of the disadvantaged.[68]

IV. Concluding Comment

There is a tendency for some child pornography law critics to cast innocence as problematic not because it is a bad idiom for politics but because it is an idiom at all. Many appeal to notions of "actual harm," "actual abuse" and "real children" as if these were transparent categories mystified by innocence.[69] But what counts as harm?[70] Who is a child? Without awareness that "real sexual abuse" and "real harm" are themselves political rhetorics, these proposals retreat to a proprietary definition of harm as something like the physical imposition of force without consent, and feminist and child welfare activists have sought for decades to expose the impoverishment of this view, especially from the perspective of the most vulnerable.

Fields objects too that innocence detracts from policies and programs that would better attend to the sexual agency of young people and the structural disadvantages they face. In the sex education debates, argues Fields, "sexual innocence" constructs Black girls as sexual victims, casts Black boys and men as "absent fathers and sexual predators," demonizes Black mothers, neglects LGBT youth, and ignores the way poverty and teen pregnancy rates are racially skewed.[71] Fields, as I understand her, would replace "innocence" with "sexual agency" as the mobilizing idiom for youth and sexual politics.[72] On the other hand, I'm not sure she would think of "sexual agency" as a

political idiom at all, but as capturing something truer about young people. But the "sexual agency" of young people, like "actual harm," is not best thought of as a truth but rather as a political idiom.[73] Like any political idiom, it will address some conditions and concerns better than others, and it will undoubtedly produce its own set of unsavory consequences.

I propose that we would do better to think about children, law and sex as a set of questions that involve competing or complementing political idioms, rather than as a conflict between ideology on the one hand (innocence) and truth (harm to the child; sexual agency) on the other. We are therefore not misled to reify liberal valuations of harm and disregard, for example, problems of age commingled with gendered consciousness,[74] choice constraints,[75] the thinness of consent,[76] and "adaptive preferences."[77] Moreover, under these lights, we do not ask which abstraction gets to some materialist "truth" of the unjust conditions under which young people so often encounter sex. Rather, we acknowledge the "normative dimensions" of our preferences and explore their political possibilities.[78] The question is not, what idioms will produce no collateral damage for the sexual lives of young people, but what idioms will be least damaging, and most promising?

Legal Cases

Ashcroft v. Free Speech Coalition, 535 U.S. 24 (2002)
Miller v. California, 413 U.S. 15 (1973)
New York v. Ferber, 458 U.S. 747 (1982)
Osborne v. Ohio, 495 U.S. 103 (1990)
United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986)
United States v. Knox, 32 F.3d 733 (3d Cir. 1994)

References

[1]"Remarks by the President at Presentation of 2012 Presidential Citizens Medals," February 15, 2013. Electronic document: http://www.whitehouse.gov/the-press-office/2013/02/15/remarks-president-presentation-2012-presidential-citizens-medals (accessed March 13, 2013).

[2] "Inaugural Address by President Barack Obama," January 21, 2013. Electronic document: http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama (accessed March 13, 2013).

[3] However, it should be noted that this more redemptive reading of innocence would no less withstand Lee Edelman's exacting polemic against the "coercive universalization" of the Child, whose imagined future defines and delimits politics. L. Edelman, No Future: Queer Theory and the Death Drive (Durham and London, Duke University Press, 2004), p. 11.

[4] A. Adler, 'The Perverse Law of Child Pornography', Columbia Law Review 101 (2001), pp. 210, 230-31; P. Jenkins, Beyond Tolerance: Child Pornography on the Internet (New York and London, New York University Press, 2001), pp. 34,148.

[5] H. Mirkin, 'The Social, Political and Legal Construction of the Concept of Child Pornography', Journal of Homosexuality 56 (2009), p. 237.

[6] Miller v. California (1973), 24, cited in Adler, 'Perverse Law', p. 242.

[7] See C. MacKinnon, Feminism Unmodified: Discourses on Life and Law (Cambridge, Mass., Harvard University Press, 1987), p. 182.

[8] "These images do not involve, let alone harm, any children in the production process." Ashcroft v. Free Speech Coalition (2002), 415. However, Congress answered this ruling by revising the federal definition of

child pornography to include digital images "indistinguishable from" images of minors "engaging in sexually explicit conduct," which narrowed the overbroad language of CPPA. However, an affirmative defense is available if the accused can show that no actual minors are visually depicted. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, § 502(a)(1), 117 Stat. at 678 (2003); J. Kornegay, 'Protecting Our Children and the Constitution: An Analysis of the 'Virtual' Child Pornography Provisions of the Protect Act of 2003,' William and Mary Law Review 47 (2006), pp. 2149-51.

[9] Osborne v. Ohio (1990) upheld the constitutionality of a statute criminalizing both possession and viewership of child pornography. See Mirkin, 'Concept of Child Pornography', p. 243.

[10] The federal definition of child pornography includes the visual depiction of the "lascivious exhibition of the genitals or pubic area" of a minor. 18 USC § 2256 (2)(A)(v); 8(A). *Dost* enumerates six factors to determine if an image displays "lascivious exhibition" of a minor's genitals. Among such factors are whether the images are "sexually suggestive" or "suggest sexual coyness." United States v. Dost (1986), 832; Adler, 'Perverse Law', 262.

[11] United States v Knox (1994) holds that video of clothed girls fall under federal child pornography law. On overreach, see, e.g., Jenkins, Beyond Tolerance, p. 220; Mirkin, 'Concept of Child Pornography', p. 254; A. Higonnet, Pictures of Innocence: The History and Crisis of Ideal Childhood (New York, Thames and Hudson, 1998), pp. 167-91; G. Rubin, Deviations: A Gayle Rubin Reader (Durham and London, Duke University Press, 2011), p. 218; T. Lewin, 'Rethinking Sex Offender Laws for Youth Texting', *The New York Times*, March 20, 2010, p. A1.

[12] Adler, 'Perverse Law', p. 215.

[13] See, e.g., Jenkins, Beyond Tolerance, p. 36; A. Haynes, 'The Age of Consent: When is Sexting No Longer 'Speech Integral to Criminal Conduct'?', Cornell Law Review 97 (2012), pp. 370-71, 398.

[14] Critics who make this claim often reference James Kincaid's *Erotic Innocence*, which has become something of an ur-text on the historical roots, psychical dimensions, and contemporary consequences of innocence as an eroticized abstraction. J. Kincaid, Erotic Innocence: The Culture of Child Molesting

(Durham, Duke University Press, 1998); see also J. Kincaid, Child-Loving: The Erotic Child and Victorian Culture (New York, Routledge, 1992).

[15] On account of space limitations, I focus on one or two scholars in each subsection. Additional work is referenced in the notes.

[16] Adler, 'Perverse Law', p. 214.

[17] Adler, 'Perverse Law', p. 229.

[18] Adler, 'Perverse Law', pp. 249-50.

[19] Adler, 'Perverse Law', p. 254.

[20] Adler, 'Perverse Law', p. 235.

[21] Adler, 'Perverse Law', pp. 254-55.

[22] Adler, 'Perverse Law', p. 256.

[23] Adler, 'Perverse Law', p. 273. Ummni Khan applies Adler's intuitions to her discourse analysis of media and police accounts that reported on the widely publicized "Disney World Girl" case, an early 2000s, a cross-North American search for a missing and sexually exploited girl. Khan observes that police and news media tactics to locate the child—the circulation of doctored child pornographic photos, titillating headlines ("Is this Innocent Face Key to Porn Case?")—participate in a "pedophilic logic" resonant with Adler's "pedophilic gaze." U. Khan, 'Having Your Porn and Condemning it Too: A Case Study of a 'Kiddie Porn' Expose', Law, Culture and the Humanities 5 (2009), p. 401.

[24] R. Danay, 'The Dangers of Fighting Monsters: Addressing the Hidden Harms of Child Pornography Law', Review of Constitutional Studies 11 (2005), pp. 57-58.

[25] Danay, 'Dangers', p. 153.

[26] See also H. Giroux, Stealing Innocence (New York, St. Martin's Press, 2000), pp. 15-16; Khan, 'Porn', p. 424; Rubin, Deviations, p. 220.

[27] Danay, 'Dangers', p. 164.

[28] Higonnet, Pictures, p. 10.

[29] Higonnet, Pictures, p. 8.

[30] Higonnet, Pictures, pp. 175, 181.

[31] Higonnet, Pictures, p. 159.

[32] Higonnet, Pictures, pp. 11-12.

[33] Higonnet, Pictures, pp. 188-89; for a similar argument on the statutory and cultural overemphasis on the image, see C. Kleinhans, 'Virtual Child Porn: The Law and the Semiotics of the Image', Journal of Visual Culture 3 (2004), pp. 17-34.

[34] Osborne v. Ohio (1990), 141, J. Brennan, dissenting. At the time of Justice Brennan's dissent, federal child pornography law did not criminalize possession. Now it does.

[35] Mirkin, 'Concept of Child Pornography', p. 256.

[36] Mirkin, 'Concept of Child Pornography', pp. 254-55.

[37] Mirkin, 'Concept of Child Pornography', p. 242.

[38] Mirkin, 'Concept of Child Pornography', p. 256.

[39] For Mirkin, harm results from child pornography if and only if an actual child is sexually harmed in the activity being recorded. This leaves open what will qualify as harm and assumes that the meanings, effects, and affects of images are always only derivative from the phenomena they document. Data collected from studies on adult pornographers and intergenerational relations do not answer the questions he raises. Mirkin, 'Concept of Child Pornography', p. 252.

[40] See notes 5-13, and accompanying text.

[41] See note 10.

[42] See note 9.

[43] See note 11.

[44] See also Jenkins, Beyond Tolerance, pp. 211-12; Rubin, Deviations, pp. 218, 221. However, Jenkins argues that extant laws and enforcement do virtually nothing to quash the child pornography market.

[45] Giroux, Stealing, p. 61.

[46] On the racial allocation of innocence, see, e.g, D. Roberts, Race, Reproduction and the Meaning of Liberty (New York, Pantheon Books, 1997), p. 21; K. Stockton, The Queer Child, Or Growing Sideways in the Twentieth Century (Durham and London, Duke University Press, 2009), pp. 31-33, 183-218; Giroux, Stealing, p. 41; Khan, 'Porn', p. 406; Kincaid, Erotic, p. 20.

[47] See also, K. Ohi, Innocence and Rapture: The Erotic Child in Pater, Wilde, James, and Nabokov (New York, Palgrave Macmillan, 2005).

[48] Giroux, Stealing, p. 2.

[49] R. Bernstein, Racial Innocence: Performing American Childhood from Slavery to Civil Rights (New York and London, New York University Press, 2011); J. Fields, Risky Lessons: Sex Education and Social Inequality (New Brunswick and London, Rutgers University Press, 2008).

[50] Bernstein, Racial Innocence, p. 3.

[51] Bernstein, Racial Innocence, p. 6.

[52] Bernstein, Racial Innocence, p. 8.

[53] Bernstein, Racial Innocence, p. 91.

[54] Bernstein, Racial Innocence, pp. 36-48.

[55] Bernstein, Racial Innocence, pp. 34-68.

[56] Bernstein, Racial Innocence, pp. 36, 50-51.

[57] Bernstein, Racial Innocence, pp. 50-51.

[58] Bernstein, Racial Innocence, pp. 233-35.

[59] Bernstein, Racial Innocence, pp. 234-42.

[60] Bernstein, Racial Innocence, p. 22.

[61] Bernstein, Racial Innocence, p. 241.

[62] Fields, Risky Lessons, pp. 37-67.

[63] Fields, Risky Lessons, pp. 52-55.

[64] Fields, Risky Lessons, p. 57.

[65] Fields, Risky Lessons, p. 56.

[66] Fields, Risky Lessons, p. 49.

[67] See also, J. Pierce, Racing for Innocence: Whiteness, Gender, and the Backlash Against Affirmative Action (Stanford, Stanford University Press, 2012).

[68] However, Bernstein argues that the rhetoric of "childhood innocence" also facilitated an exclusionary, dichotomous understanding of race in the United States. Bernstein, Racial Innocence, p. 8.

[69] See, e.g., Danay, 'Dangers', pp. 186-87; Higonnet, Pictures, pp. 11, 188; Mirkin, 'Concept of Child Pornography', pp. 254-55; B. Ryder, 'The Harms of Child Pornography Law', University of British Columbia Law Review 36 (2003), pp. 102-103, 110. For another criticism of this work—that it

camouflages cruelty under the sign of transgression; that it disqualifies feminist reproaches of child pornography as reactionary—see A. Bray, 'Merciless Doctrines: Child Pornography, Censorship, and Late Capitalism', Signs: Journal of Women in Culture and Society 37 (2011), pp. 133-58. Bray's analysis would be more helpful were it less categorically condemnatory.

[70] For a sustained effort to reframe the harm of child pornography as exploitation (in contradistinction to sexual abuse, nonconsent, or the violation of innocence), see S. Ost, Child Pornography and Sexual Grooming: Legal and Societal Responses (Cambridge and New York, Cambridge University Press, 2009).

[71] Fields, Risky Lessons, pp. 58-67.

[72] Fields, Risky Lessons, p. 64.

[73] My preferred idiom is "sexual autonomy." See J. Fischel, 'Per Se or Power? Age and Sexual Consent', Yale Journal of Law and Feminism 22 (2010), pp. 279-341.

[74] See, e.g., C. MacKinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory', Signs 7 (1982), pp. 515-44; M. Oberman, 'Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape', Buffalo Law Review 48 (2000), pp. 703-84.

[75] See, e.g., M. Nussbaum, ''Whether from Reason or Prejudice': Taking Money for Bodily Services', Journal of Legal Studies 27 (1998), 693-723; S. Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law (Cambridge, Mass., Harvard University Press, 1998).

[76] See, e.g., L. Alcoff, 'Dangerous Pleasures: Foucault and the Politics of Pedophilia', in Susan Hekman, ed., Feminist Interpretations of Michel Foucault (University Park, Pennsylvania State University Press, 1996), pp. 99-135; Fischel, 'Per Se'.

[77] See, e.g., M. Nussbaum, Women and Human Development: The Capabilities Approach (New York, Cambridge University Press, 2000), pp. 111-66.

[78] B. Harcourt, 'The Collapse of the Harm Principle', The Journal of Criminal Law and Criminology 90 (1999), p. 185.