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FIRST AMENDMENT SEXUAL PRIVACY: ADULT SEXTING AND FEDERAL AGE-VERIFICATION LEGISLATION

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INTRODUCTION

The modern sexting phenomenon amongst adults raises important questions at the intersection of relational privacy, free expression, and federal criminal law. A little-known but long-standing federal statutory scheme—18 USC 2257, 2257A, and the accompanying Attorney General regulations ("Section 2257")—threatens to criminalize the private exchange of sexual communication between consenting adults. While there has been relatively frequent litigation involving Section 2257 initiated by the commercial adult entertainment industry, courts and scholars alike have been all but silent as to Section 2257's impact on private, not-for-profit sexual speech. So too has the literature on the legality of sexting focused almost exclusively on adolescents, whose erotic exchanges raise concerns about child pornography and human trafficking not triggered by adult communication. Even when the debate has turned to private adult sexual expression, it has typically focused on the dangers related to non-consensual disclosure, commonly known as "revenge porn." As a result, Section 2257's application to a broad range of otherwise lawful adult expression remains virtually unchallenged and largely ignored by judges, academics, and the American public.

And yet the exchange of private sexual communication between consenting adults has widely increased in frequency and quantity during the digital age. To be sure, sexting amongst celebrities, politicians, and

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other public figures has become so commonplace that is it almost ubiquitous. For example, on May 27, 2011, then-Congressman Anthony Weiner, D-New York, infamously used his public Twitter account to send an image of his erect penis concealed by boxer briefs to a twenty-one-year old college student in Seattle.[1] Although the link was quickly deleted, one of Weiner's Twitter followers maintained a screencapture of the picture and circulated it to a conservative blogger, who published it on the Internet the following day.[2] Weiner initially denied he had posted the image and suggested the photo had been planted and doctored. He later admitted to sending not only the Twitter link, but additional sexually explicit communication to the student and other women during his marriage.[3] The scandal, aptly dubbed "Weinergate," sparked instant and widespread controversy over Weiner's truthfulness, judgment, and ability to serve in Congress.[4] He resigned elected office less than four weeks later.[5]

Weiner is not the only political figure to lose his career over a cybersex scandal. In late 2012, General David Petraeus resigned as director of the Central Intelligence Agency after it was discovered that he had a lengthy extra-marital affair with his biographer, Paula Broadwell.[6] News of the affair broke when the FBI leaked details of its investigation into Gen. Petraeus' private emails with Ms. Broadwell. As the FBI discovered, the General and his mistress used a shared gmail account accessed to exchange sexually explicit messages with each other.[7] Gen. Petraeus and Ms. Broadwell would access the same gmail account and save their

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1. Chris Cuomo et al., *Rep. Anthony Weiner: 'The Picture Was of Me and I Sent It*,' ABC NEWS (June 6, 2011), http://abcnews.go.com/Politics/rep-anthony-weiner-picture/story?id=13774605#.UczH1vnU-So.

2. *Timeline of Weiner Sexting Scandal*, FOX NEWS (June 16, 2011), http://www.foxnews.com/politics/2011/06/16/timeline-weiner-sexting-scandal/.

3. Raymond Hernandez, *Weiner Resigns in Chaotic Final Scene*, NEW YORK TIMES (June 16, 2011), http://www.nytimes.com/2011/06/17/nyregion/anthony-d-weiner-tells-friends-he-will-resign.html?pagewanted=all&_r=0.

4. *Sydney Leathers Films Porn: The Women Behind the Anthony Weiner Scandals*, NEW YORK DAILY NEWS (June 16, 2011), http://www.nydailynews.com/news/politics/weiner-gate-women-behind-sexting-politician-gallery-1.21415.

5. Following a two-year absence from politics, Weiner later sought and lost the Democratic nomination for New York City mayor. WEINER FOR MAYOR, www.anthonyweiner.com (last viewed June 27, 2013).

6. Mark Thompson, *The Rise And Fall of General Peaches*, TIME (Nov. 14, 2012), http://nation.time.com/2012/11/14/the-rise-and-fall-of-general-peaches/.

7. Max Fisher, *Here's the E-mail Trick Petraeus and Broadwell Used to Communicate*, THE WALL STREET JOURNAL (Nov. 12, 2012), http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/12/heres-the-e-mail-trick-petraeus-and-broadwell-used-to-communicate/

emails as drafts, so that the emails were never actually sent and would presumably avoid detection by Google and others.[8]

Indeed, stories of celebrity sexting are commonplace in today's digital age.[9] Yet the phenomenon is not limited to public figures. Indeed, the private (and not-so-private) exchange of homemade, amateur sexually explicit content is at an all-time high. From sexting[10] to snapchat,[11] from secret gmail accounts to YouPorn,[12] and from sex tapes to swinging sites, celebrities and ordinary adults alike are making use of modern technological advances to express their sexuality to one another.

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8. *Id.*

9. From Brett Favre allegedly texting pictures of his penis to a female sideline reporter to the now-infamous R. Kelly underage sex video, one can conjure up an extensive list of celebrity sex scandals within minutes. The gossip website www.deadspin.com reported in 2010 that Jenn Sterger, a former Florida State University Cowgirl and sideline reporter for the New York Jets, claimed to have received sexually explicit text messages, including images of genitalia, from then-Jets quarterback Brett Favre. Barry Petchesky, *Farve To Be Fined For Texts*, DEADSPIN (Dec. 29, 2010, 10:20 AM), http://deadspin.com/5720448/favre-to-be-fined-for-texts; *Brett Farve To Be Fined $50,000, Not Suspended, Over Jenn Sterger Texts*, NEW YORK POST (Dec. 29, 2010, 3:03 PM), http://nypost.com/2010/12/29/brett-favre-to-be-fined-50000-not-suspended-over-jenn-sterger-texts/. Favre denied sending the images, but was fined $50,000 by the National Football League when he refused to participate in an investigation of his conduct. Jay Glazer, *Favre Fined $50K in Sterger Mess*, FOX SPORTS (June 2, 2014), http://msn.foxsports.com/nfl/story/brett-favre-faces-fine-in-jenn-sterger-scandal-122910. On the author's top-of-mind short list: the leaked Pamela Anderson and Tommy Lee sex tape, David Duchovny's reported treatment for pornography addiction, the Paris Hilton sex video, and nude images found by a reporter in Scarlett Johansson's cell phone. Lola Ogunnaike, *Sex, Lawsuits, and Celebrities Caught on Tape*, NEW YORK TIMES (Mar, 19, 2006), http://www.nytimes.com/2006/03/19/fashion/sundaystyles/19tapes.html?_r=0; Sheila Marikar, *Can David Duchovny Recover From Sex Addiction?*, ABC NEWS (July 1, 2011), http://abcnews.go.com/Entertainment/david-duchovny-tea-leoni-sex-addiction-blame-strife/story?id=13970246#.Uc3ncPnU-So; *Scarlet Johansson on Those Nude Photos She Sent To Ryan Reynolds: 'I Know My Best Angles'*, VANITY FAIR (Nov. 1, 2011), http://www.vanityfair.com/online/daily/2011/11/scarlett-johansson-december-cover-nude-pictures-sean-penn.

10. "Sexting" is a term used to describe the exchange of sexually explicit text messages, often involving nude photographs of the users and other images of sexual activity. MERRIAN-WEBSTER ONLINE: DICTIONARY AND THESAURUS, http://www.merriam-webster.com/dictionary/sexting (last visited July 1, 2013).

11. Snapchat is a cell phone app that allows users to exchange photos and text messages that disappear from both phones within seconds. Evan Spiegel, *Let's Chat*, SNAPCHAT BLOG (May 9, 2014, 7:11 PM), http://www.snapchat.com; *infra* Part III(A)(2).

12. YouPorn operates a popular pornographic website that offers free downloads of commercial pornography, as well as an amateur platform similar to YouTube where users can upload and share homemade sexually explicit videos and images. *See* YOUPORN, http://www.youporn.com (last visited July 1, 2013).

Those individuals whose cybersex activity has been exposed have suffered a broad range of consequences, ranging from public humiliation to financial penalties, loss of employment, and even criminal charges. But little attention has been paid to a federal regulatory scheme that, although adopted to combat child pornography, threatens to transform each and every exchange of private adult sexually explicit material into a serious federal crime. On their face, these laws—18 USC Sections 2257 and 2257A and the accompanying Attorney General Regulations (28 CFR Part 75)—impose burdensome record-keeping and labeling requirements on almost all sexually explicit communication, and the penalties for non-compliance are steep. The laws also vest federal prosecutors with broad discretion to prosecute, creating the distinct risk that a high-profile federal official, a well-known celebrity, or even an ordinary citizen could face federal felony charges for the consensual, private exchange of personal sexual material.

Since its enactment in 1988, the Section 2257 record-keeping and labeling scheme has been the subject of numerous legal challenges by the adult entertainment industry and other free speech advocates, as well as multiple amendments by Congress.[13] None of these efforts, however, have measurably lessened the scope and severity of the statutory framework. As a result, Section 2257 places the free speech and privacy rights of millions of adult Americans—including celebrities and ordinary adults alike—potentially at risk. In light of this danger, First Amendment jurisprudence should be expanded to include aspects of privacy derived from the substantive due process clause.

This Article examines the history of the Section 2257 record-keeping and labeling scheme and its implications on private adult sexual communication. Part I traces the history of the statute and its accompanying regulations and provides a comprehensive analysis of the scheme's requirements and penalties for non-compliance. This section also includes a discussion of the FBI's spotty enforcement activity and the lack of demonstrated data as to the efficacy of Sections 2257 and 2257A in preventing the creation and dissemination of child pornography. Part II discusses prior and current legal challenges to the record-keeping and labeling scheme and the impact of those legal challenges on the existing statutes and regulations. As this section observes, the vast majority of lawsuits challenging the constitutionality of Sections 2257 and 2257A have been brought by the commercial adult entertainment industry. As a

13. *E.g.*, Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub.L. No. 108–21, §§ 502, 511, 117 Stat. 650 (2003); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109–248, §§ 502(a)(1), 502(a)(4), 120 Stat 587 (2006).

result, little attention has been paid, by both the courts and by scholars, to the detrimental impact of federal age-verification on individual privacy and expression. Part III discusses the various platforms by which adults exchange private sexual communication and the extent to which they are likely regulated by Section 2257. Part III also argues that Section 2257 and the adult sexting phenomenon challenge traditional First Amendment concepts regarding chilling effects and prior restraint. The fact that private sexual communication has increased in frequency in the face of criminal regulations distorts the role of the chilling effect doctrine in free speech law. As the Article concludes, because the record-keeping statutes place affirmative duties on speakers, even those who desire to communicate privately and consensually, the mere existence of the statutory scheme potentially burdens a broad range of constitutionally protected expression. As a detailed analysis of Section 2257 demonstrates, First Amendment law should expand to include a privacy component related to the consensual exchange of private sexual communication.

I. THE STATUTORY RECORD-KEEPING AND LABELING SCHEME AND ACCOMPANYING ATTORNEY GENERAL REGULATIONS

A. Overview of Sections 2257and 2275A and the Accompanying Attorney General Regulations

As they presently exist, Sections 2257 and 2257A, and the Attorney General Regulations implementing them, mandate sweeping record-keeping and labeling requirements for any producer of sexually explicit material. The statutes impose a general requirement that producers document and maintain age-verification records for all persons depicted in certain types of graphic material, as well as mandate that the targeted material contain a label identifying where the age-verification records are maintained.[14] The statutes then vest the Attorney General with the responsibility of implementing regulations that more precisely explain the scope of the age-verification and labeling requirements.[15]

The breadth of the statutory scheme is startling. On its face, Section 2257 imposes significant, costly, and time-consuming record-keeping requirements on even the most innocuous producers of private, consensual sexually explicit content unintended for sale or even modest distribu-

14. *See* 18 U.S.C. § 2257 (2012); 18 U.S.C. 2257A (2012).
15. 18 U.S.C. § 2257(g).

tion.[16] As written, the statute requires married couples, those in committed relationships, and even individuals documenting their own bodies strictly for their own private and legitimate uses to comply with the record-keeping, labeling, and inspection provisions.

1. Who is Covered?

Sections 2257 and 2257A both apply to anyone who produces certain sexually explicit material.[17] Under Section 2257, production includes not only actually filming or creating the material, but also digitizing or reproducing existing content and inserting digital material onto a website.[18] Section 2257A adopts an identical definition of the term "produces."[19] Thus, in broad terms, the statutes apply to anyone who creates sexually explicit material in the first instance by photographing, videotaping, or otherwise recording sexual activity and to anyone who digitizes or manages the computerized content of sexually explicit websites in the second instance. Only the acts of assembling, duplicating, or reproducing certain forms of erotica require that the material be intended for commercial distribution to constitute production.[20] The statutes otherwise apply without regard to whether the images were produced for pecuniary gain or for private pleasure.

The statutes do exclude certain activities from the scope of what constitutes production.[21] Yet none of these exemptions serve to limit the statute to commercial pornography. In fact, by excluding certain business functions from the regulatory scheme—web hosting and photo processing, for example—this provision ensures that Sections 2257 and 2257A will apply to the non-commercial production of sexually explicit imagery.

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16. To date, with the exception of one brief student note (M. Eric Christensen, Note, *Ensuring that Only Adults "Go Wild" on the Web: The Internet and Section 2257's Age-Verification and Record-Keeping Requirements*, 23 BYU J. PUB. L. 143 (2008)), there is scant literature on the topic. As such, the Section 2257 statutory scheme may be relatively unknown to those who study privacy and expression. Thus, a detailed description of the statute and its regulations may benefit scholars, courts, and attorneys.

17. 18 U.S.C. § 2257(a). *See infra* § I(A)(2) (discussing the types of sexually explicit material that are covered by the statutory scheme).

18. 18 U.S.C. § 2257(h).

19. 18 U.S.C. § 2257A(g).

20. 18 U.S.C. § 2257(h)(2)(A)(ii).

21. Under these exceptions, production does not include photo processing, mere distribution, Internet hosting activity, and "any activity, other than those activities identified [in the definition above], that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers." 18 U.S.C § 2257(h)(1)(B).

The Attorney General Regulations elaborate on the statutory definition of "produces" by classifying certain types of producers as "primary producers" and "secondary producers."[22] Under 28 CFR § 75.1(c)(1), a "primary producer" is "any person who actually films, videotapes, photographs, or creates a digitally- or computer-manipulated image," while 28 CFR § 75.1(c)(2) defines a "secondary producer" as "any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues" such matter.[23] The same person may be both a primary and a secondary producer.[24] As later sections of this Article examine, the classification of a producer as a "primary producer" or "secondary producer" under the Regulations dictates the manner of acquisition and the record-keeping obligations a producer is required to follow.

In sum, Sections 2257 and 2257A, along with their regulatory counterparts, target the activity of producing sexually explicit material. The definition of "produces" is not limited to commercial activity or other actions undertaken for pecuniary gain, but instead covers the creation of private material created solely for the pleasure of the participants. From the outset, then, the federal record-keeping scheme applies to any person who engages in the modern sexting phenomenon.

2. What Type of Sexually Explicit Material is Covered?

Sections 2257 and 2257A apply to different types of sexually explicit material. Section 2257 covers depictions of "actual sexually explicit conduct," while Section 2257A covers depictions of "simulated sexually explicit conduct."[25] Both statutes apply to a wide range of digital and print media.[26]

Section 2257 adopts the statutory definition of "sexually explicit conduct" found elsewhere in the criminal code.[27] Under that definition, "sexually explicit conduct" is broadly construed to include not only activities commonly understood to constitute sex, but masturbation and the focus on a single person's genitalia as well.[28]

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22. 28 C.F.R. § 75.1(c) (2013).
23. *Id.*
24. 28 C.F.R. § 75.1(c)(3).
25. *See* 18 U.S.C. § 2257(a)(1); 18 USC § 2257A(a)(1) (2012).
26. *See* 18 U.S.C. § 2257(a); 18 USC § 2257A(a).
27. *See* 18 U.S.C. 2257(h)(1) (explaining "the term 'actual sexually explicit conduct' means actual but not simulated conduct as defined in clauses (i) through (v) of section 2256(2)(A) of this title").
28. *See* 18 U.S.C. § 2256(2)(A) (2012). *See also* 28 C.F.R. § 75.1(n) (showing the Attorney General Regulations also explicitly adopt this definition of "sexually explicit conduct" by reference to Section 2256).

In contrast, Section 2257A leaves the term "simulated sexually explicit conduct" undefined. The most recent version of the Attorney General Regulations, however, supplies a definition of what constitutes simulated activity sufficient to trigger the record-keeping scheme.[29]

Merging these definitions, it becomes clear that the record-keeping statutes apply to any material that depicts sexual intercourse, masturbation, sadism, masochism, bestiality, or the lascivious exhibition of the genitals or pubic region *and* any material that merely simulates these activities. Notably, some of these activities do not require two participants (i.e. masturbation, lascivious exhibition). As such, a single person can be a producer subject to the Sections 2257 and 2257A statutory scheme merely by documenting his or her own body, regardless of whether the depiction is ever shared with anyone else.

3. What Does Section 2257 Require?

a. Age-Verification Records

Once a person becomes either a primary or a secondary producer of depictions of actual or simulated sexually explicit conduct, Sections 2257 and 2257A impose strict record-keeping requirements to ensure that the individuals depicted in the material are not minors. The burdens placed on producers of sexually explicit speech are significant, time-consuming, and act as potential deterrents to the speech itself, particularly when the producers of the material are not creating it for pecuniary gain.

First, the producer must ascertain that the performers are over the age of majority prior to beginning production by personally inspecting a government-issued picture identification card.[30] In the process, the producer is also required to determine if the performer has used any other name besides the one listed on the performer's picture identification card (i.e. aliases, stage names, maiden or married names).[31] Second, as required by Section 2257(b)(3), the producer must then record and main-

29. Under that definition, "[s]imulated 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) (emphasis omitted).

30. *See* 18 U.S.C. § 2257(b)(1) (requiring inspection of an identification document to ascertain the performer's name and date of birth); *see also* 28 C.F.R. § 75.2(a)(1) (2013) (interpreting Section 2257(b)(1) to require inspection of performer's "picture identification card"); 28 C.F.R. § 75.1(b) (defining "picture identification card" to include photo identification issued by the United States government or a subsidiary for American citizens and equivalent government-issued identification for foreign citizens).

31. 18 U.S.C. § 2257(b)(2).

tain records documenting the performer's name, date of birth, and aliases.

The Attorney General Regulations contain highly specific and complex requirements for how the records required by the statute must be collected, documented, and maintained. The applicability of the Regulations to various producers and various types of material is complicated even more by the fact that Section 2257 has been expanded and amended over the years to include different depictions at different times.[32] In other words, the type of documentation a producer is required to collect and maintain varies based upon when the material was created and which version of the statute applied at the time. To simplify, producers must collect the following identification from performers: 1) for any depiction of actual sexually explicit conduct except the lascivious exhibition of the genitals or pubic area produced after July 3, 1995, a legible hard copy or legible digital image of a hard copy of the performer's picture identification card; and 2) for depictions of the lascivious exhibition of the genitals or pubic area of an actual human being or depictions of simulated sexually explicit conduct produced after March 18, 2009, a legible hard copy or legible digital image of a hard copy of the performer's picture identification card.[33] In addition, in certain circumstances, a producer's Section 2257 records must also include the depictions themselves.[34]

After a producer has collected the performers' picture identification documents and has created copies of the depictions, the Regulations mandate a complex method of storage of the producer's records.[35] The

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32. *See infra* Section I(B) (containing a detailed discussion of the history of Section 2257 and its expansion, below).

33. 28 C.F.R. § 75.2(a)(1).

34. Section 75.2(a)(1) of the Attorney General's Regulations require copies of the following depictions to be maintained by producers: 1) depictions of actual sexually explicit conduct except the lascivious exhibition of the genitals or pubic area produced after June 23, 2005; and 2) depictions of the lascivious exhibition of the genitals or pubic area and depictions of simulated sexually explicit activity produced after March 18, 2009. Where the depiction has been published on the Internet, a copy of any URL associated with the image must also be included, or, if no URL is associated with the depiction, the records must include a uniquely identifying reference to locate the material on the Internet. If web-based material involves live streaming or other non-recorded digital depictions, the records must contain a copy of some portion of the depiction of sufficient length to identify the performer and to associate the performer with his or her age-verification records. *Id.* Because the record-keeping requirements vary based on when the material was created, the primary producer of the material must also record the date of production for all depictions. 28 C.F.R § 75.2(a)(4).

35. Records must include identification documents, copies of the depictions, and names of the performers including any aliases, stage names, and married or maiden

record-keeping requirements are lessened somewhat for producers who are merely secondary producers as defined in 28 C.F.R. § 75.1(c)(2).[36]

Both primary and secondary producers are also permitted to contract with third-party record-keepers for the purpose of complying with the statue and Regulations.[37] The records must be maintained at either the producer's place of business or at the office of a third-party records custodian.[38] Records created in compliance with Section 2257 must be maintained by the producer for seven years from the date the records were created or last amended.[39] If the producer is a corporation that goes out of business, the records must be maintained by a designated records custodian for a period of five years from the date of closure.[40] The Regulations do not address how the location of the records or the required maintenance period is altered, if at all, for non-commercial producers of sexually explicit material who may not have a place of business but instead maintain records in their homes.[41]

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names provided by the performers themselves. These records must be organized alphabetically, or numerically where appropriate, by the legal name of the performer with the last name first and further shall be indexed or cross-referenced to every alias, stage name, or other name used by the performer. In addition, the records must be indexed or cross-referenced to the title or identifying number of the depiction, including its URL or other uniquely associating identifier for digitized or web-based material. The records may be maintained in either hard copy or digital form and must be segregated from all other records that may be kept by the producer (such as performer contracts, payment records, copyright releases, and other commercial documents). 28 C.F.R. § 75.2(a)(2)-(3), (e), (f).

36. Secondary producers may satisfy their record-keeping obligations by accepting copies of the indexed and cross-referenced records maintained by the primary producer. In such instances, secondary producers must also create a record of the name and address of the primary producer who supplied the records. In addition, primary producers providing age-verification records to secondary producers may redact non-essential information, including performers' addresses, phone numbers, social security numbers, and other information not necessary to ascertaining the name and age of the performer. As such, the Regulations explicitly contemplate the need to protect certain aspects of the performers' privacy, despite the fact that their names, aliases, and dates of birth remain subject to disclosure. 28 C.F.R. § 75.2(b).

37. 28 C.F.R § 75.2(h). It should be noted, however, that use of a third-party record-keeper does not alleviate a producer's record-keeping liability. *Id.*

38. 28 C.F.R. § 75.4 (2013).

39. *Id.*

40. *Id.*

41. *Id.*

b. Records Inspection

The records required by Section 2257 and the Attorney General Regulations are subject to inspection by the government.[42] To this end, federal agents are expressly authorized to enter the premises where the records are maintained at all reasonable times, within all reasonable limits, and in any reasonable manner.[43] Similar to the record maintenance requirements, the inspection provisions expose producers to considerable invasion into their homes and daily lives.[44] During an inspection, investigators must notify the producer of the records they wish to inspect and may copy those records at no expense to the producer.[45] Investigators are not restricted to searching a producer's Section 2257 records, but have full lawful investigatory powers during an inspection.[46] Presumably, then, agents could seize evidence of a crime or contraband in their plain view, interview witnesses on site without providing *Miranda* warnings, and investigate exigent circumstances or other criminal activity as permitted by the Fourth Amendment.[47] In fact, the Regulations specifically permit the seizure of evidence of a felony observed by agents during an inspection.[48]

c. Self-Certification

Certain producers may opt out of the record-keeping and inspection scheme under Section 2257A. While this statute, which applies to depictions of simulated sexually explicit conduct, essentially tracks Section 2257's record-keeping and inspection requirements for depictions of actual sexually explicit conduct, it also provides an exemption procedure for commercial producers of simulated material. These producers may avoid

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42. 18 U.S.C. § 2257(c) (2012).

43. 28 C.F.R. § 75.5(a) (2013).

44. For example, the Regulations specify that inspections may occur, with no advanced notice, from 9:00am to 5:00pm Monday through Friday and any other time when a producer is engaged in the creation of depictions of actual sexually explicit conduct. 28 C.F.R. § 75.5(b)-(c)(1). To the extent a producer does not maintain normal business hours at the location where the records are stored, the producer must notify the Attorney General of 20 hours per week when the records may be inspected. 28 C.F.R § 75.5(c)(1). Inspections may occur every four months, except when a violation of Section 2257 is suspected, in which case multiple inspections can occur before the four-month period has elapsed. 28 C.F.R § 75.5(d).

45. 28 C.F.R. § 75.5(c)(2)(iii), (e).

46. 28 C.F.R. § 75.5(f).

47. *See, e.g.*, Beckwith v. United States, 425 U.S. 341 (1976) (holding that *Miranda* warnings were not required because defendant was not in custody during IRS interview); Missouri v. McNeely, 133 S. Ct. 1552, 1570 (2013) (discussing exigent circumstances exception to Fourth Amendment warrant requirement).

48. 28 C.F.R. § 75.5(g).

the Section 2257 regime by certifying to the Attorney General that the material is intended for commercial distribution and does not appear to be child pornography and that the producer has collected and maintained some form of age-verification.[49] On its face, the self-certification exemption applies solely to material created as part of a commercial enterprise or distributed by way of broadcast media, and only then in instances where the material contains simulated sexual activity and not actual sexual conduct. The provision therefore provides little protection to individuals who create sexually explicit material for their own private use and enjoyment.

d. Labeling Requirements Under Section 2257

In addition to the complex record-keeping requirements imposed by Sections 2257 and 2257A, the statute also requires that producers label their material with information designed to disclose the location of the required records.[50] The size, location, and other attributes of the label vary based upon the medium to which it is attached, requiring producers to re-label content each time it is altered from one medium to another.[51] Even if they do not participate in the production, all distributors of depictions of actual or simulated sexually explicit conduct are required to as-

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49. 18 U.S.C. § 2257A(h)(1) (2012).

50. 18 U.S.C. § 2257(e)(1) (2012). The label must contain: 1) the title of the work or, for untitled images or videos, a unique identification number; 2) a physical street address, not a post office box, where the age-verification records are maintained; and 3) for commercial producers, the name of the person who serves as custodian of the age-verification records. 28 C.F.R. § 75.6(b)(1)–(3), (c) (2013).

51. The label must be displayed in typeface that is no less than 12-point type for print material or no smaller than the second-largest typeface on the material for web-based or computerized material. 28 C.F.R. § 75.6(e). For material in motion, the statement must be displayed for a sufficient time in a sufficiently large manner that the average viewer can read it. *Id.* Labels for print media must appear either on the first page after the front cover or the page on which the copyright information appears. For films or videos which contain end credits, the label must appear at the end of the end credits and must be displayed for a sufficient duration to permit the average viewer to read it. If a film or video does not contain end credits, the label must instead appear within the first minute of the movie and before the opening scene. If the material is hosted on a website or other computer site, the label must appear on every webpage containing depictions of actual or simulated sexually explicit conduct. Producers can fulfill this requirement by including a hyperlink stating "18 U.S.C. 2257 [and/or 2257A, as appropriate] Record-Keeping Requirements Compliance Statement" which, when opened, generates a separate window containing the required label. 28 C.F.R. § 75.8(a)-(d) (2013).

certain that the labeling statement exists in proper format before circulating the material.[52]

e. Penalties for Non-Compliance

The penalties for failing to comply with Sections 2257, 2257A, and the Attorney General Regulations are daunting and severe. Violations of Section 2257, which include failing to properly maintain age-verification records, failing to permit inspections, and failing to affix the required labeling statement, are punishable by a prison sentence of up to five years and a sizeable fine.[53] Subsequent violations are subject to a mandatory prison sentence of at least two and not more than ten years in addition to high fines.[54] Violations of Section 2257A are treated slightly less harshly, but still result in a prison sentence of up to one year and a fine.[55] As such, the federal record-keeping and labeling scheme treats non-compliance as a serious criminal offense, even in the absence of commercial gain and where the material being produced or distributed is itself wholly lawful.[56]

B. The History of the Record-Keeping and Labeling Requirement

While it is imperative at the outset to understand the scope and application of the Sections 2257 and 2257A record-keeping and labeling scheme as it currently exists, a history of the enactments and their legislative purpose is instructive as well. By tracing the statutes back to their origins, it becomes clear that Congress never intended to limit the legislation to commercial pornography or even illegally-exchanged child pornography.[57] In fact, from the outset, the statutes applied broadly without regard to any pecuniary gain by the producers of the targeted material.

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52. 18 U.S.C. § 2257(f)(4).

53. 18 U.S.C. § 2257(i). Fines may be as high as $250,000 for an individual and $500,000 for a corporation. 18 U.S.C. § 3571(b)-(c) (2012); *see also* U.S. SENTENCING GUIDELINES MANUAL § 2G2.5 (2007) (containing relevant sentencing guidelines for Section 2257 violations).

54. 18 U.S.C. § 2257(i).

55. 18 U.S.C. § 2257A(i)(1) (2012).

56. It is only unlawful to disseminate sexually explicit material depicting adults if that material is obscene. The private possession of obscenity and the creation of pornography are otherwise constitutionally protected by the First Amendment. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969) (invalidating criminal charges for the private possession of obscenity); People v. Freeman, 46 Cal.3d 419, 758 P.2d 1128 (Cal. 1988) (finding the creation of pornographic video by hiring actors and actresses to be First Amendment-protected expression).

57. In fact, the original version of the statute did not limit its scope to material sold for a profit or even to actual or suspected use of a minor in explicit media. *See* Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, sec. 7513(a), § 2257(a), 102 Stat. 4181 (1988).

The fact that Congress has amended the statutes numerous times—sometimes in response to constitutional litigation—without altering their scope only solidifies the conclusion that Congress intended to cover private, non-commercial sexual communication in its regulations. Moreover, some jurists may argue that the statute can be narrowly interpreted to avoid privacy concerns by applying the record-keeping requirement only to the mainstream pornography industry. By examining the historical roots of the statute and its subsequent iterations, however, it becomes clear that Congress never intended to exclude private sexual communication from Section 2257's mandates.

1. The Origins of Section 2257: The Meese Commission Report, the 1988 Statute, and the 1992 Attorney General Regulations

Congress enacted the Child Protection and Obscenity Enforcement Act in 1988, which included the original version of 18 USC § 2257.[58] Following the federal criminalization of child pornography a decade earlier,[59] there existed mounting concerns that the current criminal laws were insufficient to quell the stream of sexually explicit material involving minors. Shortly before the passage of the Act, the Attorney General's Commission on Pornography (also known as "the Meese Commission") issued a report finding that producers of adult sexually explicit material often catered to the child pornography market by using very young-looking adult performers.[60] Only in the most obvious instances—where the performers were visibly advanced in age—could law enforcement be sure that pornography contained adult actors and not children.[61] This conundrum not only hindered the identification and prosecution of child pornography offenses, but also allowed downstream distributors to profess ignorance as to the illegality of the material where more mature-looking adolescents were involved.[62] As a result, the Meese Commission recommended that Congress "enact a statute requiring the producers, retailers or distributors of sexually explicit visual depictions to maintain record containing . . . proof of performers' ages."[63] The Commission also suggested a labeling requirement to ensure that law enforcement could easily

58. *Id.*

59. Protection of Children Against Sexual Exploitation Act of 1977, Pub.L. No. 95-225, 92 Stat. 7 (1978).

60. ATT'Y GEN.'S COMM'N ON PORNOGRAPHY, FINAL REP., 1, 618 (1986) [hereinafter MEESE REPORT].

61. *Id.* at 618, 620.

62. *See id.*; *see also* Am. Library Assoc. v. Barr, 956 F.2d 1178, 1182 (D.C. Cir. 1992).

63. MEESE REPORT at 618.

locate and inspect the age-verification records maintained by producers of sexually explicit expression.[64]

Codifying the Meese Commission recommendations, the original version of 18 USC § 2257 required producers of material containing visual depictions of performers engaging in actual sexually explicit conduct to ascertain, maintain, and disclose personal information concerning the performers, including their ages.[65] In addition, the enactment required producers to label sexually explicit material with a statement disclosing where the age-verification records could be located.[66] The statute also created presumptions in child pornography cases arising from the failure to maintain records required by the statute and extended the scope of forfeiture laws in obscenity and child pornography cases, but these presumptions were later repealed from the statute.[67]

On April 24, 1992, the Attorney General issued the initial regulations governing the implementation of Section 2257.[68] The 1992 Attorney General Regulations specified the precise type of documentation a producer was required to obtain and keep copies of in order to prove a performer's age and identity.[69] The regulations further mandated that records maintained pursuant to Section 2257 be indexed according to each performer's names, aliases, and the works in which he or she performed, and prescribed a label that was required to be placed on all regulated material describing where the records could be found.[70]

The 1992 Attorney General's regulations also distinguished between primary and secondary producers.[71] Neither definition exempted private speakers or material that was not for sale or widespread public distribution from the scope of the statute.[72]

2. Subsequent Amendments

After enacting the initial version of Section 2257 in 1988, Congress amended the statute three separate times: first in 1990 to eliminate the

64. *Id.* at 619-620.

65. Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, sec. 7513(a), § 2257(a), 102 Stat. 4181 (1988).

66. *Id.*

67. *Id.*; Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101–647, sec. 301, 311, § 2257(f), 104 Stat. 4789 (1990).

68. 28 C.F.R. Part 75 (1992).

69. 28 C.F.R. § 75.2(a)(1).

70. 28 C.F.R. § 75.2(a)(1)–(3).

71. 28 C.F.R. § 75.1(c)(1)–(2).

72. *Id.*

presumption that non-compliant communication was child pornography,[73] and later in 2003 and 2006 to extend the record-keeping requirement to the Internet and to alter other technical aspects of the regime.[74] In none of these amendments did Congress clarify that the record-keeping and labeling requirements were intended to apply only to for-profit peddlers of pornography. Rather, in each subsequent iteration of the statute, Congress actually expanded the scope of the statutory scheme to include increasingly more content created by a broader range of producers.[75]

C. Enforcement Activity

Following the passage of the Adam Walsh Act in 2006, the Federal Bureau of Investigation created a special unit based in Los Angeles to oversee and conduct Section 2257 inspections of producers of sexually explicit content.[76] Between July 2006 and September 2007, the unit conducted inspections at twenty-nine separate producers' businesses and, in six instances, residences.[77] Twenty-five of the twenty-nine producers were determined to be in violation of the Section 2257 record-keeping obligations, although all but one of the producers at least maintained some records or in some way attempted to comply with the statutes.[78] These violations were referred to the Attorney General for prosecution, but no criminal charges were ever filed against the inspected producers.[79]

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73. This law was entitled the "Child Protection Restoration and Penalties Enhancement Act of 1990." Child Protection Restoration and Penalties Enhancement Act of 1990, § 301, 311.

74. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, sec. 502, 511, §§ 2256(8), 2257, 117 Stat. 650 (applying the record-keeping provisions of the statute to speech on the Internet, amending the definition of "sexually explicit conduct" referred to in 18 U.S.C. 2257(h)(1) to include the lascivious exhibition of the genitals and pubic area, and increasing the criminal penalty for a violation of the statute to a maximum of five years in prison and a fine for a first offense and no less than two years and no more than ten years imprisonment and a fine for a second offense); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, sec. 502(a)(1), 502(a)(4), § 2257, 120 Stat. 587 (adopting a new version of the record-keeping requirement applicable to depictions of simulated sexually explicit conduct and providing a self-certification and opt-out provision for producers who sell sexually explicit content).

75. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 §§ 502, 511; Adam Walsh Child Protection and Safety Act of 2006 sec. 502(a)(1), 502(a)(4).

76. Free Speech Coal., Inc. v. Holder, 957 F. Supp. 2d 564, 579 (E.D. Pa. 2013).

77. *Id.* at 579-80.

78. *Id.* at 582.

79. *See id.* at 581-83.

Although the Adam Walsh Act-era inspections resulted in no criminal prosecutions, at least one individual not subject to inspection by the FBI has pleaded guilty to a violation of Section 2257 for failing to maintain age-verification records.[80] He received a twenty-four-month prison sentence.[81] In addition, a military officer was convicted of Section 2257 violations by court martial and was sentenced to twenty-four-months confinement and a $240,000.00 fine, payable at a rate of $1,000 per month for 240 months.[82] The Section 2257 record-keeping scheme has therefore been applied both to permit the warrantless inspection of businesses and residences and to criminalize producers who fail to comply with its requirements.

II. LEGAL CHALLENGES TO THE RECORD-KEEPING AND LABELING SCHEME

The Section 2257 record-keeping scheme has been the subject of frequent litigation by the adult entertainment industry and other free speech advocates over the course of its twenty-five-year existence. Much of the litigation has focused on the scope of the record-keeping requirement, the burden it imposes on commercial producers of sexually explicit material, and the chilling effect such a complex regulatory scheme has on smaller or more budget-conscious producers and distributors of pornography. Until recently, courts have been silent as to the application of the statutes to the private production and exchange of erotic material between consenting adults. And even then, the privacy implications of the statute have received scant attention from the courts, particularly because the litigants in the major Section 2257 cases have been commercial enterprises and not individual citizens. Nevertheless, the application of the record-keeping and labeling scheme to all depictions of actual or simulated sexually explicit conduct endangers the expressive freedoms of any adult who elects to engage in private sexual communication without adhering to the statute's rigid requirements.

A. The American Library Association Cases

1. *American Library Assoc. v. Thornburgh* ("*ALA I*")

The first legal challenge to the validity of Section 2257's record-keeping and labeling scheme occurred in 1989, when the American Li-

80. United States v. Arnold, No. 98-40406, 1999 WL 236158, at *1 (5th Cir. Apr. 9, 1999).

81. *Id.*

82. United States v. Smith, 61 M.J. 696, 697 (N.M. Ct. Crim. App. 2005).

brary Association and others filed suit in the United States District Court for the District of Columbia.[83] The district court initially invalidated the statute on First Amendment and due process grounds, but the D.C. Circuit vacated the Court's order based on mootness.[84] Adopted in response to the district court's opinion and before the appeal was heard, the 1990 Restoration Act eliminated the presumption of illegality in the absence of age-verification records that the district court found objectionable.[85] The 1990 Restoration Act also narrowed the scope and applicability of the record-keeping requirement, which mitigated the First Amendment free speech concerns buttressing the district court's decision.[86] As a result, the district court's decision in *ALA I* precipitated Congressional revision of the original Section 2257 record-keeping scheme.

2. American Library Assoc. v. Reno ("*ALA II*")

Despite finding the appeal in *ALA I* to be moot, the D.C. Circuit nevertheless considered the constitutionality of the revised Section 2257 record-keeping scheme and the 1992 Attorney General Regulations in *ALA II*.[87] The plaintiffs in the second appeal consisted not only of the American Library Association, but a host of professional pornographers and other associations whose members profited from the sale of depictions of sexually explicit conduct.[88] Unlike the district court in *ALA I*, the circuit court in *ALA II* found the revised, narrower version of Section 2257 to comport with the First Amendment.[89] Construing the statute as a content-neutral time, place, and manner restriction on speech, the court applied intermediate scrutiny rather than the strict scrutiny analysis urged by the plaintiffs.[90] Because the enactment furthered the government's substantial interest in prohibiting the proliferation of child pornography and because it imposed no greater burden than necessary on the speech of pornographers who profited from their work, it survived constitutional attack.[91] The court also specifically endorsed the requirement that secondary producers maintain age-verification records, noting that magazines and other commercial production companies are "apt to remain in busi-

83. Am. Library Ass'n v. Thornburgh, 713 F. Supp. 469 (D.D.C. 1989).
84. Am. Library Ass'n v. Barr, 956 F.2d 1178, 1186 (D.C. Cir. 1992).
85. *Id.*
86. *Id.*
87. Am. Library Ass'n v. Reno, 33 F.3d 78, 81 (D.C. Cir. 1994).
88. *Id.* at 81, 83.
89. *Id.* at 81.
90. *Id.* at 87–88.
91. *Id.*

ness . . . [while t]he photographer who sells a picture to a magazine may disappear three months later, and his records with him."[92]

The circuit court's decision in *ALA II* was specific to the speech of for-profit producers. Although the *ALA I* district court opinion contemplated the facial validity of the statute, it too was grounded in the application of Section 2257 and its Regulations to sexually explicit material created and exchanged for pecuniary gain.[93] It is unclear whether either *ALA* court contemplated that Section 2257 applies, by its very terms, to privately-created, non-commercial,[94] amateur pornography. As such, because the federal circuit ultimately upheld the constitutionality of Section 2257 as applied only to the for-profit adult entertainment industry, the decision did not foreclose a challenge based on the application of Section 2257 to private adult sexual communication.

B. Sundance Assocs., Inc. v. Reno

In 1998, the Tenth Circuit Court of Appeals considered an administrative law challenge by a commercial production company to the scope of the 1992 Regulations. At issue in *Sundance Assocs., Inc. v. Reno*[95] was whether the Attorney General's definition of "secondary producer" in 28 C.F.R. § 75.1(c)(2) improperly expanded the statutory definition of "produces" found in 18 U.S.C. § 2257(h)(3).[96] The original version of the statute excluded persons engaged in "mere distribution or any other activity which does not involve hiring, contracting for, managing, or otherwise arranging for the participation of the performers," but the 1992 Attorney General Regulations failed to exempt these activities from the definition of "primary producer" and "secondary producer."[97] Sundance Associates published a number of magazines containing sexually explicit want ads and other postings generated solely by the magazine's subscribers.[98] Sundance neither contracted with nor managed the individuals depicted in the ads, nor did Sundance control or alter the content of the ads in any way.[99] Sundance therefore potentially fell within the exemption contained

92. *Id.* at 91.

93. Am. Library Ass'n v. Thornburgh, 713 F. Supp. 469, 479 (D.D.C. 1989) (discussing the impact of section 2257 on "'mainstream' producers" who do not create child pornography).

94. Use of the term "commercial" here and elsewhere in this article is intended to reference the for-profit production of pornography and not the commercial speech doctrine under the First Amendment.

95. 139 F.3d 804 (10th Cir. 1998).

96. *Id.* at 806.

97. *Id.* at 808.

98. *Id.* at 806.

99. *Id.*

in the statute for individuals not involved in the "hiring, contracting for [,] managing, or otherwise arranging for the participation of the performers depicted."[100]

The district court awarded summary judgment to Sundance on the basis that the application of the statute to secondary producers was *ultra vires*.[101] On appeal, the Tenth Circuit found that by expanding the regulation to govern "any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues" material containing visual depictions of actual sexually explicit conduct, the Attorney General had acted without legal authority in restricting the scope of Congress's exclusion of certain persons from the class of producers regulated by Section 2257.[102] The court accordingly invalidated that portion of the 1992 Regulations that defined "secondary producer" and severed that section from the remainder of C.F.R § 75.[103]

Like its *ALA* predecessors, *Sundance* addressed solely the application of Section 2257 and its Regulations to commercial producers. While the court's holding striking the "secondary producer" definition from the Attorney General Regulations no doubt protected both for-profit and private individual secondary producers, the opinion failed to speak to the application of Section 2257 to private sexual communication. Thus, although the *Sundance* decision narrowed the application of the statute to certain producers, it left the applicability of the statute to private communication wholly in tact.

C. The Connection *Cases*

In a series of cases beginning in the mid-2000s, Connection Distributing Company ("Connection"), the producer of a "swingers" lifestyle magazine, challenged the application of Section 2257 to user-generated content placed in its publication, as well as the facial validity of the statutory scheme as a whole.[104] In the first round of trial and appellate court opinions, Connection's as applied challenge was denied based on rulings that Section 2257 survived intermediate scrutiny.[105] In the second round of litigation, Connection's facial challenge to Section 2257 was initially denied by the district court, but later overturned by a three-judge panel

100. *Id.* at 808 (citing 18 U.S.C. § 2257(h)(3) (1990)).

101. *Id.* at 805.

102. *Id.* at 808, 810.

103. *Id.* at 811.

104. Connection Distrib. Co. v. Holder, 557 F.3d 321, 326–28 (6th Cir. 2009). For a complete history of the *Connection* litigation, see Free Speech Coal., Inc. v. Attorney Gen. of the U.S., 677 F.3d 519, 531–33 (3d Cir. 2012).

105. *Free Speech Coal.*, 677 F.3d at 531.

of the Sixth Circuit.[106] The case was then reviewed *en banc*, resulting in a decision that Section 2257 did not violate the First Amendment either facially or as applied to Connection and the members of its "swinging" publications.[107] The *en banc* decision rested upon the conclusions that Section 2257 was not an outright ban on expression that must be viewed with strict scrutiny, that it did not impose unreasonable burdens on secondary producers to obtain records prior to publishing sexually explicit images, and that there was no credible evidence that Section 2257 would ever be applied to criminalize purely private expression.[108] As a result, the Sixth Circuit fully upheld the statute on its face.[109]

D. Free Speech Coalition et al. v. Gonzales *("*FSC I*")*

In 2007, the Free Speech Coalition ("FSC"), a California trade association representing more than 600 businesses and individuals involved in the production and distribution of adult-oriented materials, along with several others, challenged the constitutional validity of the PROTECT Act and the 2005 Attorney General Regulations.[110] The FSC raised a number of claims, including an argument that the government-issued identification requirement was vague as to foreign performers and that the record-keeping requirement itself violated the Fifth Amendment.[111] The FSC also challenged the law on the ground that it violated performers' right of privacy by requiring them to reveal their actual identities, rather than a stage or screen name, as well as their residential addresses to producers.[112] The privacy claim was therefore limited to the disclosure of personal information about performers who engaged in sexually explicit expression for a profit and did not address the application of Section 2257 to purely private communication.[113]

The district court granted summary judgment to the government on all but four of the FSC's thirty-two claims.[114] The four claims that remained for trial involved narrow applications of technical provisions of the record-keeping requirement to websites that operate live streaming chat rooms or are otherwise outside the control of the record-keeper.[115]

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106. *Id.*
107. *Id.*
108. *Connection Distrib. Co.*, 557 F.3d 321.
109. *Id.* at 343.
110. Free Speech Coal. v. Gonzales, 483 F.Supp.2d 1069, 1073 n.1 (D. Colo. 2007) [hereinafter *FSC I*].
111. *Id.* at 1075-81.
112. *Id.* at 1081.
113. *Id.*
114. *Id.* at 1082.
115. *Id.*

The court denied the FSC's privacy claims in full.[116] The case was ultimately resolved when the FSC dismissed voluntarily dismissed the case in its entirety and the matter was administratively closed.[117]

E. Free Speech Coalition v. Attorney General ("FSC II, III, and IV")

After the conclusion of *FSC I*, the Free Speech Coalition yet again challenged Section 2257, this time in a separate federal court.[118] In its new lawsuit, *Free Speech Coalition, Inc. v. Holder*[119] ("*FSC II*"), the FSC raised sweeping First Amendment arguments regarding the facial validity of Section 2257 and the burdens it exacts on producers of otherwise lawful expression.[120] Declining to dismiss the entire suit on collateral estoppel grounds because of the abandoned *FSC I* litigation, the district court nevertheless dismissed FSC's complaint for failing to state any claim upon which relief could be granted.[121] In so doing, the court held that Section 2257 was content-neutral, narrowly tailored to the significant government interest in combatting child pornography, and left open alternative avenues of communication because it did not impose an outright ban on expression.[122] The court also rejected FSC's overbreadth claim, reasoning the statute would never be applied outside of the commercial pornography arena.[123]

FSC appealed the district court's ruling to the Third Circuit.[124] The Third Circuit agreed with the district court that Section 2257 is content-neutral and passes intermediate scrutiny, but disagreed with the lower court's conclusion that FSC's overbreadth claim should be dismissed.[125] The appellate court remanded the case for development of a factual record surrounding the application of Section 2257 to private, not-for-profit

116. *Id.* at 1081.

117. *See generally*, Free Speech Coal., Inc. v. Holder, 729 F.Supp. 2d 691, 715-16 (E.D. Pa. 2010) [hereinafter *FSC II*] (providing a summary of the procedural history of *FSC I*).

118. *See FSC II*, 729 F.Supp. 2d 691.

119. *Id.*

120. *Id.* at 708.

121. *Id.* at 757. The court dismissed certain plaintiffs from the case on the basis that they were bound by the court's ruling in *FSC I*, but permitted other plaintiffs who were not parties to that case to raise constitutional challenges to Section 2257. *Id.* at 718.

122. *Id.* at 721–31.

123. *Id.* at 731–35.

124. Free Speech Coal., Inc. v. Attorney General of the United States, 677 F.3d 519 (3d Cir. 2012) [hereinafter *FSC III*].

125. *Id.*

expression, as well as for FSC's claims attacking the reasonableness and legality of Section 2257's inspection and enforcement provisions.[126]

On remand from the Third Circuit, the FSC amended its complaint to include a privacy claim related to the inspection of private residences and presented evidence at trial regarding the frequency of sexting among young adults. At trial, FSC presented the testimony of two professors, Dr. Michelle Drouin of Indiana University and Dr. Marc Zimmerman of the University of Michigan.[127] Dr. Drouin reported on the results of surveys she conducted, as well as six other surveys conducted by others that she reviewed.[128] Based on these surveys, she estimated that approximately thirty-three percent of American eighteen to twenty-four year-olds, or approximately 10.2 million young adults, participate in private consensual sexting.[129] Dr. Zimmerman similarly testified that thirty percent of adults aged eighteen to twenty-four have sent a sexually explicit message and forty-one percent have received one.[130] He cited his own online Facebook survey as evidence of these statistics.[131] This evidence was significant to FSC's claim that the record-keeping scheme burdened substantially more speech than necessary to achieve the government's objective in ferreting out illegal child pornography.[132]

The district court began its analysis of Section 2257's impact on private communication by noting "[t]he question of whether the Statutes are overbroad in their burdening of purely private, noncommercial communications is more difficult, given the high protection afforded such communications under the First Amendment and the Fifth and Fourteenth Amendments' Due Process Clauses."[133] Despite these heightened protections, the court quickly dismissed FSC's privacy concerns. Emphasizing that neither Dr. Drouin nor Dr. Zimmerman could relay the content of the sexually explicit images addressed in their surveys, the court was unable to assess the quantum of private speech directly impacted by Section 2257.[134] The court also observed that no individual plaintiff in the case produced private, non-commercial expression, such that there was no evi-

126. *Id.* at 545–46.

127. Free Speech Coal., Inc. v. Holder, 957 F.Supp. 2d 564, 576–577 (E.D. Pa. 2013) [hereinafter *FSC IV*).

128. *Id.* at 576.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 587.

133. *Id.* at 596.

134. *Id.* at 576–577. ("Dr. Drouin did not provide a definition of 'sexually explicit images,' nor could she estimate how many of the images being exchanged are of intercourse, masturbation, breasts, cleavage, or anything else Dr. Zimmerman could not

dence in the record regarding a chilling effect or other negative impact on consensual sexting.[135] Based on the evidence before it at trial, the court denied FSC's overbreadth claim vis-à-vis private sexual communication.[136] It suggested, however, that "a hypothetical private couple-who does in fact feel their First Amendment rights are being unreasonably curbed by the Statutes' record-keeping requirements- . . . could bring an as-applied challenge" down the road.[137] Thus, even though the court rejected a facial challenge, it left open the possibility of a more specific attack supported by additional and stronger proof that Section 2257 burdens consensual adult sexting.[138] The district court therefore implicitly called on the legal and scholarly community to develop additional empirical evidence about the frequency, nature, and significance of private adult sexual communication in modern digital society.

III. SECTION 2257'S IMPACT ON PRIVATE ADULT SEXUAL COMMUNICATION

Given that Congressional amendments have failed to narrow the scope of Section 2257 and judicial challenges have either ignored or summarily dismissed the application of the statute to private adult expression, further examination of the record-keeping scheme and its impact on consensual sexting is warranted. Much in the way that federal electronic surveillance programs endanger the privacy rights of countless Americans, so too does Section 2257 place the sexual privacy interests of millions of adults at risk.[139] To more fully understand the implications of the statute on private communication, it is important to analyze the ways in which adults exchange sexually explicit expression and how those exchanges

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estimate how many of the images being exchanged are of intercourse, masturbation, breasts, cleavage, or anything else.").

135. *Id.* at 596.

136. *Id.* at 594.

137. *Id.* at 601 (citing Connection Distrib. Co. v. Holder, 557 F.3d 321, 339-40 (6th Cir. 2009) ("[W]e do not mean to suggest that a couple potentially affected by this hypothetical application of the law could not bring a declaratory-judgment action or an as applied challenge to the law today, whether in their own names or as an anonymous John and Jane Doe [E]ven if this track record does not suffice to give the hypothetical couple peace of mind, they have a remedy—a John and Jane Doe as-applied challenge to the law, together with attorney fees if they win.").

138. The Free Speech Coalition has appealed the district court's decision to the Third Circuit. The appeal is pending.

139. *E.g.,* Klayman v. Obama, 2013 WL 6571596 (D.D.C. Dec. 16, 2013) (enjoining National Security Administration from collecting cell phone metadata in bulk, but staying injunction pending appeal).

give rise to a protectable expectation of privacy. Only then can the contours of First Amendment free speech protection and more traditional notions of privacy be properly applied to Section 2257 and its requirements.

A. The Technology of Private Adult Sexting

Much of the attention focused by scholars, courts, prosecutors, and the mainstream media to date has focused on the problem of teen sexting.[140] While the exchange of sexually explicit images and text messages by juveniles is certainly of legal and moral concern, the reality is that many more adults participate in sexting behaviors than youth. Studies by psychology scholars confirm that, among young adults ages eighteen to twenty-five in committed romantic relationships, eighty percent have exchanged sexually explicit photographs with their partners and sixty percent have exchanged sexually explicit videos.[141] Moreover, even outside of monogamous relationships, more than thirty percent of young adults report sending sexually explicit images of themselves via text message, and more than forty percent report receiving such sexually explicit messages from others.[142] This data has left at least one renowned researcher to conclude that sexting is an integral part of modern romantic relationships between consenting adults.[143]

Adults use numerous and varied media applications to both record and exchange "selfies:" images of oneself taken by the depicted individual which can be either sexually explicit or totally innocuous.[144] These

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140. Teen sexting raises its own serious legal concerns related to child pornography and free speech, and these issues have been frequently studied and analyzed by legal and social science scholars. *See, e.g.,* Dr. JoAnne Sweeny, *Do Sexting Prosecutions Violate Teenagers' Constitutional Rights?*, 48 SAN DIEGO L. REV. 951 (2011); John A. Humbach, *"Sexting" and the First Amendment*, 37 HASTINGS CONST. L.Q. 433 (2010) (discussing whether self-generated teen sexual communication constitutes illegal child pornography or constitutionally protected expression); Dena Sacco et al., *Sexting: Youth Practices and Legal Implications*, Berkman Ctr. Research Publ'n No. 2010-8 (summarizing research related to teen sexting and its legal consequences).

141. The research of Prof. Michelle Drouin, Indiana University-Purdue University Fort Wayne, confirms this conclusion. *See* Michele Drouin, *More Common Than You Think*, N.Y. TIMES, (June 9, 2011), http://www.nytimes.com/roomfordebate/2011/06/09/whats-wrong-with-adult-sexting/sexting-is-more-common-than-you-think. *See also* Testimony of Dr. Michele Drouin, *FSC IV* (on file with author).

142. Deborah Gordon-Messer et al., *Sexting Among Young Adults*, 52 JOURNAL OF ADOLESCENT HEALTH 301, 302 (2013).

143. *See* Testimony of Dr. Marc Zimmerman, University of Michigan, Chair, Department of Health Behavior and Health Education, *FSC IV* (on file with author).

144. *Definition of "Selfie"*, OXFORD DICTIONARIES, *available* at http://oxforddictionaries.com/definition/english/selfie?q=selfie.

platforms largely exist to store and send pictures, videos, and text messages in a private fashion. In other words, sexting by definition involves the private dissemination of erotic material to another specific person and not to the general public.[145] Indeed, many married couples and those in committed relationships use sexting to enhance their private sex lives.[146]

1. Text Messaging (MMS/SMS)

Text messaging—a technology which allows written text, digital images, and digital video to be sent from one cell phone to another—is the most popular manner in which sexts are exchanged by adults.[147] Text messages are directed to a particular cell phone user, or in some instances users, creating an expectation of privacy on behalf of the sender that only the recipients will see, possess, and maintain the content.[148] While certain cell phone providers generate records pertaining to text messages and text usage, most do not retain the actual text or images exchanged via text for more than a matter of days.[149] Instead, cell phone providers typically only create a record that a text was exchanged between two cell phone numbers.[150]

Text messaging nevertheless creates risks that sexually explicit communication intended for a particular user can be shared with others who were not the subject of the original message. For example, the Internet is replete with examples of scorned lovers who shared sexually explicit

145. *See Definition of "Selfie"*, DICTIONARY.COM, *available at* http://dictionary.reference.com/browse/ (defining "sexting" as sending sexually explicit messages between cell phones).

146. *See e.g.*, Ariel Nagi, *Sexting 101: How to Send Dirty Messages without Ugly Consequences*, COSMOPOLITAN http://www.cosmopolitan.com/cosmo-latina/how-to-sext (last visited June 26, 2014) (noting that many married couples use sexting to "keep their marriages spicy"); Francesca De Meglio, *Guide to Sexting Your Spouse*, http://newlyweds.about.com/od/lovesex/a/Guide-To-Sexting-Your-Spouse.htm (last visited June 26, 2014).

147. *Sexting*, WIKIPEDIA, http://en.wikipedia.org/wiki/Sexting (last updated Aug. 1, 2014).

148. *See* Riley v. California, 134 S.Ct. 2473, 2474 (2014) (finding that cell phone users retain a constitutionally protected privacy right in the information and data contained in their cell phones).

149. *See* Lorenzo Francheschi-Bicchierai, *Cops Want Wireless Providers to Record and Store Your Text Messages*, MASHABLE (last visited June 26, 2014), http://mashable.com/2013/03/19/cops-want-text-messages-logs/ ("providing that as of 2010, AT&T, T-Mobile and Sprint didn't store the contents of text messages, while Verizon kept them for just 3 to 5 days, and Virgin Mobile for 90 days").

150. *Id.*

images texted to them by their former partners as an act of revenge.[151] Similarly, numerous websites serve as platforms for the posting of explicit sexts, without regard to whether the original producer gave consent for the images to be made public.[152] As a result, legislatures and scholars have begun discussing the legal implications of these "revenge porn" exchanges.[153] None of this work, however, has touched on the Section 2257 record-keeping requirement or how it might be applied to text messages leaked by recipients against the senders' will.

2. Snapchat

Snapchat is the latest craze in teen and young adult digital communication.[154] Available for free download as a smartphone app, Snapchat allows users with an authorized account to create and send visual images along with a sixty-character text description to other authorized users. The images and the text automatically delete from both the sender's and the recipient's cell phones within a matter of seconds and can no longer be accessed by either party.[155]

By December 2012, Snapchat had attracted more than 3.4 million users; it is now the most downloaded free phone app on iTunes and the twelfth most downloaded free app across all categories.[156] More than 60 million "snaps," or vanishing photos with short captions, are sent via Snapchat every day.[157] Although exact statistics are unknown, it is reasonable to assume that some portion of these communications would be sub-

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151. *E.g.*, *Voices of Victims: Speak Out and End Revenge Porn*, END REVENGE PORN (last viewed June 26, 2014) http://www.endrevengeporn.org/voices-victims-speak-out-end-revenge-porn/ (cataloging stories of individuals whose sexually explicit images have been shared without consent by former lovers).

152. *E.g.*, THE DIRTY, www.thedirty.com/cincinnati (last visited June 26, 2014) (making available a website platform allowing users to post images and documents to expose the dirty secrets of individuals in their city).

153. *See generally*, Derek Bambauer, *Exposed*, 98 MINN. L. REV. 2011, 2026 (2014) (arguing for copyright protection for explicit personal media as way of addressing revenge porn issue).

154. Jenna Wortham, *A Growing App Lets You See It, Then You Don't*, N.Y. TIMES, (Feb. 8, 2013), http://www.nytimes.com/2013/02/09/technology/snapchat-a-growing-app-lets-you-see-it-then-you-dont.html?_r=0.

155. Some reports show that images sent via Snapchat may be retrieved using forensic software. *See Snapchat's expired snaps are not deleted, just hidden*, THE GUARDIAN, http://www.theguardian.com/media-network/partner-zone-infosecurity/snapchat-photos-not-deleted-hidden (last visited Oct. 17, 2014) (explaining that Snapchat does not delete photos on Android phones but signals to the operating system that the photos should be ignored).

156. Wortham, *supra* note 154.

157. *Id.*

ject to Section 2257 or 2257A. Yet Snapchat lacks the capability to include an appropriate Section 2257 label. Users are permitted to type a maximum of forty-five letters across the image and may also use a limited digital drawing feature to create additional truncated text. In addition, Snapchat limits users' ability to maintain and store a digital copy of the image or a unique identifying URL, because the images are rendered inaccessible within seconds of their distribution. Given these technological limitations, even users who wished to comply with Section 2257 for their Snapchat exchanges would nevertheless be prohibited from doing so.

3. Teleconferencing

A number of new and expanding technologies exist that facilitate face-to-face visual digital communication. Including the popular iPhone feature FaceTime as well as the Internet-based computer program Skype, these communication platforms permit a registered user on one end to participate in real-time audio and visual calls with a registered user on the other end.[158] These communications are not typically stored on the host platform's servers and do not generally record on either user's computer or cell phone, absent a separate program designed to do so.[159] The lack of permanence in these exchanges creates an expectation of privacy for both users.

Like Snapchat, FaceTime and Skype also lack the technological capability to appropriately label sexually explicit exchanges with the required Section 2257 record-keeping language. Individuals using text messaging, Snapchat, FaceTime, and Skype are also unlikely to inspect and create records documenting their age. They are equally unlikely to store and cross-index copies of their private communications as required by the record-keeping scheme. As a result, the millions of adults who use these technologies to engage in private sexual communication are unwittingly violating Section 2257 and committing a serious federal felony in the process.

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158. *See* FACETIME, https://www.apple.com/ios/facetime/ (last visited June 26, 2014) (describing function of iPhone facetime feature); SKYPE, http://www.skype.com/en/what-is-skype/ (last visited June 26, 2014) (describing Skype functions and capabilities).

159. *See, e.g*, *How can I record my skype calls?, Support*, SKYPE (August 22, 2014), https://support.skype.com/en/faq/FA12395/how-can-i-record-my-skype-calls?frompage=search&q=does+skype+record+my+calls&fromSearchFirstPage=false (noting that "Skype doesn't natively support call recording" and that third-party software is required to record Skype video exchanges).

B. Section 2257's Impact on First Amendment Sexual Privacy

Regardless of whether adults use text messaging, Snapchat or similar cell phone apps, or a teleconferencing platform to exchange sexually explicit communication, these messages are no doubt covered by Section 2257's record-keeping requirement. Given the fact that the communication was created at the outset for a non-commercial purpose and that both parties maintain an expectation of privacy in the expression, Section 2257 threatens a vast amount of constitutionally protected speech. In this way, Section 2257 touches on various aspects of First Amendment doctrine, including the right of privacy, commercial speech protection, and the chilling effect placed on speech.

1. The Right of Privacy in Personal Digital Information

In *Riley v. California*, the Supreme Court affirmed that individuals have a protected right of privacy in their cell phones.[160] Addressing the question of whether police must obtain a warrant to search data contained on a cell phone confiscated during an arrest, the Court described the unique and highly personal nature of modern digital devices:

> Cell phones [ ] place vast quantities of personal information literally in the hands of individuals . . . [M]any of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone . . . [A] cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record . . . The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions.[161]

The Court in *Riley* also acknowledged that cell phones may contain "intimate" and "romantic" details of a person's private sexual activities and proclivities.[162] Indeed, "[w]ith all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'"[163] For this reason, police act unreasonably in searching cell phones incident to arrest without first obtaining a search warrant.[164]

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160. 134 S.Ct. 2473, 2474 (2014) ("Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.").

161. *Id.* at 2485.

162. *Id.* at 2491.

163. *Id.* at 2494-95 (citing Boyd v. United States, 116 U.S. 616, 630 (1886)).

164. *Id.*

Riley therefore confirms there is a constitutionally cognizable Fourth Amendment right of privacy in one's digital communication. But what happens when the information maintained on a cell phone is of an expressive, and thus a heightened constitutional, quality? How does the First Amendment apply to expressive materials contained on a cell phone? And what if the government action in question is not the physical search of a cell phone, but, as with Section 2257, a regulation of its contents subject to warrantless inspection at virtually any time?

To date, First Amendment jurisprudence has tangentially incorporated aspects of substantive due process privacy law without explicitly recognizing a privacy component of the right to free expression. From *Stanley v. Georgia*,[165] which recognized a right to possess and view illegal obscenity in the confines of one's own home, to *McIntyre v. Ohio Elections Commission*,[166] which acknowledged a right to distribute campaign literature anonymously, the Supreme Court's speech analysis has on some level embraced the notion some expression can be protected precisely because of its private nature. Yet the Court has never expressly endorsed a First Amendment right to keep certain speech private away from the public, or more importantly the government's, view. In the context of sexually explicit communication, the sole source of constitutional protection has been the relational privacy guarantee derived from the Fourteenth Amendment substantive due process clause.[167] This is precisely why First Amendment doctrine should expand to incorporate an expressive privacy component. The free speech guarantee is primarily a sword, but it can and should serve as a shield as well.[168]

Indeed, the notions of privacy and free expression may at first blush seem mutually exclusive. The right of privacy protects the ability to hide certain information from public dissemination, and the right of free expression protects the ability to disseminate information to a wide public audience. Yet Section 2257 illustrates why these rights, at least in the context of sexual privacy, are corollary and not exclusionary. If there exists a right to create and possess illegal obscenity in the home for one's private enjoyment, and if there exists a right to engage in private sexual conduct with a person of one's own choosing, there must also exist a right to form

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165. 394 U.S. 557, 559 (1969).

166. 514 U.S. 334 (1995).

167. *See, e.g*, Lawrence v. Texas, 539 U.S. 558 (2003) (striking down prohibition on homosexual sodomy on grounds that it violated substantive due process); Thomas Crocker, *From Privacy to Liberty: The Fourth Amendment after Lawrence*, 57 UCLA L. REV. 1, 16-19 (2009) (discussing various aspects of privacy that arise from interpersonal and intimate relationships).

168. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 251 (1974).

intimate personal bonds with another human being through the creation and exchange of sexually explicit expression. Section 2257 burdens this aspect of relational privacy by criminalizing the production and distribution of otherwise lawful private communication and thereby impedes the First Amendment right to private expression. First Amendment concepts of privacy and anonymity should therefore expand to acknowledge the unconstitutionality of Section 2257 as applied to consensual adult sexting.

2. Commercial vs. Private Expression

In addition to implicitly embodying aspects of substantive due process privacy protection, traditional First Amendment jurisprudence also recognizes a distinction between core protected expression on the one hand and commercial speech on the other hand.[169] Although both types of expression deserve constitutional protection, the First Amendment places a premium on speech that communicates ideas other than the suggestion that the speaker and the audience engage in trade.[170] Under this two-tiered system, expression that is undertaken for purposes other than promoting a commercial transaction—for example, a painting of the Empire State Building that may garner the artist a modest fee but nonetheless maintain an innate artistic quality–receives heightened protection, while expression whose sole purpose is to promote a commercial transaction–for example, a print advertisement in a magazine encouraging visitors to buy tickets to the Empire State Building—receives less First Amendment protection. The key distinction is not whether the speaker receives remuneration for his speech, but whether the purpose of the speech is to promote commerce or some other more significant ideal.[171]

Section 2257 and the judicial opinions that have construed it turn this dichotomy on its head. To be clear, Sections 2257 and 2257A creates a separate divide between for-profit and not-for-profit speech than historical First Amendment jurisprudence. Rather than looking at the message of the speech and its relationship to commerce, the statutes instead differentiate between speech that was created for a profit and speech that is exchanged absent a profit.[172] For example, cases like *FSC I*, *Sundance*, and *FSC II* have judicially construed Section 2257 and its accompanying regulations to narrow the burdens placed on certain producers who cre-

169. David F. McGowan, *A Critical Analysis of Commercial Speech*, 78 CALIF. L. REV. 359, 360 (1990).

170. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1974).

171. *Id.*

172. *See* 18 U.S.C. 2257A(h)(1)(A) (2012).

ate and distribute sexually explicit content in order to make money.[173] Yet courts to date have failed to strike any portion of Section 2257 as applied to private individuals, who lack the financial resources necessary to compile and maintain the required records.[174] In addition, courts have expressed some willingness to strictly construe Section 2257 such that secondary producers who merely distribute expressive material for a profit, but do not engage in the actual production of the content, are exempt from the record-keeping obligations.[175]

But perhaps the most glaring disparity between for-profit and private expression in the Section 2257 record-keeping scheme lies in the Section 2257A opt-out provision. Retailers who create depictions of simulated sexually explicit conduct are able to self-certify their compliance with the age-verification process and avoid maintaining Section 2257 records altogether, but no similar procedure exists for private, non-commercial speakers.[176] As such, Section 2257 actually favors commercial speakers over non-profit ones, contrary to what the First Amendment requires. Section 2257 therefore challenges the way the First Amendment applies to non-commercial expression.

3. Chilling Effect

Although the precise quantum of adult sexting is unknown, the existing social science evidence, coupled with the expansion of technologies designed to facilitate private communication, suggests that large numbers of adults participate in the exchange of private sexual expression.[177] This proliferation of sexually explicit speech in the face of Section 2257, which arguably prohibits it, distorts the role of a chilling effect in First Amendment jurisprudence. To be sure, speech is less likely to be chilled when, as with adult sexting, a large volume of speakers is producing it. In this vein, Section 2257's burdensome record-keeping scheme appears not to have

173. *See supra* Part II.

174. Although the Third Circuit acknowledged that Section 2257 imposes unique and disparate burdens on private producers of not-for-profit sexual expression, it did not go so far as to strike down the application of the law to those individuals. *See* Free Speech Coal., Inc. v. Attorney General of the United States, 677 F.3d 519, 539–40 (3d Cir. 2012).

175. *See, e.g.*, Am. Library Ass'n. v. Thornburgh, 713 F.Supp. 469, 476 (D.D.C. 1989); Sundance Assoc., Inc. v. Reno, 139 F.3d 804, 805 (10th Cir. 1998).

176. 18 U.S.C. § 2257 (2012); 18 U.S.C. § 2257A(h)(1)(A).

177. In fact, marriage counselors and self-help gurus often suggest sexting within the confines of a committed, monogamous relationship as a way to strengthen the connection between the partners. *See, e.g.,* Francesca Di Meglio*, Guide to Sexting Your Spouse*, ABOUT.COM, http://newlyweds.about.com/od/lovesex/a/Guide-To-Sexting-Your-Spouse.htm (Feb. 20, 2014).

diminished the quantity of speech exchange by consenting adults. As a result, Section 2257's chilling effect has been reduced to a matter of simple probability: as the quantum of a particular type of speech and accordingly the volume of speakers producing the speech increases, the relative likelihood that the speech or the speaker will be targeted for prosecution decreases. Because literally millions of adults are engaged in the exchange of sexually explicit private communication, the statistical likelihood that any one of them will be prosecuted for failing to create and maintain Section 2257 records is admittedly minimal.

Yet this does not mean that Section 2257 fails to burden protected expression. In fact, it is precisely because Section 2257 has failed to generate a widespread chilling effect on private adult erotica that its breadth is so concerning. Because the statute prohibits producing and distributing sexually explicit depictions absent compliance with complicated record-keeping and labeling requirements, Section 2257 literally makes criminals out of millions of adults.[178] With the statute and regulations in place and strict penalties for non-compliance, federal prosecutors are empowered with the ability to force lengthy prison sentences for adults engaged in consensual private sexual expression. Although enforcement of the law has been spotty at best, individuals have been convicted and imprisoned for violating Section 2257.[179] Thus, there exists the risk at any moment that the Attorney General could seek to enforce his or other's moral code against adults who exchange private consensual sexts.[180]

It is insufficient to argue, as the government has in the *FSC II* litigation, that the statutes would never be enforced in this way. First, as the Third Circuit noted, the statutes do not delineate between commercial pornography that is created for a profit and self-generated erotica that is merely exchanged between two loving partners. Second, the burden of creating and maintaining Section 2257 records falls equally on producers of both for-profit and not-for-profit erotica. The Attorney General lacks the discretion to remove the record-keeping requirement from the statutory scheme, but may only choose whether to bring criminal charges

178. *See* Free Speech Coalition, Inc. v. Holder, 957 F.Supp.2d 564, 576-577 (E.D. Pa. 2013).

179. *See, e.g.*, United States v. Arnold, 178 F.3d 1291 (5th Cir. 1999).

180. It is not such a stretch to envision a federal prosecutor seeking to rise in the ranks or gain political stature by enforcing Section 2257. During the George W. Bush administration, at least one federal prosecutor, Mary Beth Buchanan in the Western District of Pennsylvania, gained notoriety by initiating several high-profile obscenity cases, the first of their kind in decades. *See* Neil A. Lewis, *A Prosecution Tests The Definition of Obscenity*, N.Y. TIMES (Sept. 28, 2007), http://www.nytimes.com/2007/09/28/us/28obscene.html?pagewanted=all&_r=0.

against those who fail to comport with the law. Assuming *arguendo* that there are some private individuals who are aware of the Section 2257 record-keeping scheme and attempt to comply with respect to their private communications, they are already bearing the burden of compliance. Lastly, the government's argument rests on the false assumption that federal law enforcement lacks the capacity to obtain and monitor citizens' private digital communication.[181] As the recent whistleblowing efforts of Edward Snowden and others have demonstrated, the National Security Agency is in presently in the possession of email, instant messaging, and cell phone data for millions of Americans and foreigners not suspected of terrorism or treason.[182] In light of this disclosure, it is not beyond reason to believe that the FBI has access to private sexual communications as well. Section 2257 may therefore realistically be applied against private, non-commercial communication, both by requiring those who create self-generated private pornography to maintain age-verification records and by criminalizing the exchange of adult sexts that are non-compliant with the record-keeping and labeling requirements. If Section 2257 has failed to chill the vast majority of adult sexual communication, it is likely due to lack of knowledge and not because the law exempts ordinary Americans from compliance.

The undeterred presence of cell phones in individuals' daily lives, despite the potential for unwanted intrusions by policymakers and others into a cell phone's contents, provides a relevant analogy. From newly-discovered mass governmental electronic surveillance programs to recent breaches of credit payment data at popular retailers, the risks that our personal digital information will be exposed to others are at an all-time high.[183] Yet, despite these dangers, more than 90 percent of American

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181. The heads of the FBI's Section 2257 enforcement unit testified as such in *FSC IV*. *See* Free Speech Coalition, Inc. v. Holder, 957 F.Supp.2d 564, 599-600 (E.D. Pa. 2013) ("Agents Joyner and Lawrence reiterated the position taken by the government in this litigation and in other cases that it has no interest in enforcing the Statutes as to purely private communications and that it would have no conceivable way of even doing this—because it would have no knowledge of those private communications in the first place.").

182. *See, e.g.*, Barton Gellman and Ashkan Soltani, *NSA Collects Millions of Email Address Books Globally*, WASH. POST (Oct. 14, 2014), http://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-bookFs-globally/2013/10/14/8e58b5be-34f9-11e3-80c6-7e6dd8d22d8f_story.html; Klayman v. Obama, 957 F.Supp.2d 1 (D.D.C. 2013).

183. In late 2013, big box retailer Target experienced a massive breach of its consumer credit data, impacting literally millions of Americans. Michael Riley et al., *Missed Alarms and 40 Million Stolen Credit Card Numbers: How Target Blew It*, BUSINEES WEEK, http://www.businessweek.com/articles/2014-03-13/target-missed-alarms-in-epic-hack-of-credit-card-data (last visited June 26, 2014).

adults own a cell phone, nearly three-quarters of whom are within five feet of their phones most of the time.[184] And even though there exists the possibility of hacks, leaks, and searches, reasonable people still expect that the contents of their cell phone will remain private.[185] So too do private speakers unchilled by Section 2257's burdensome requirements maintain a First Amendment right in their sexually explicit expression, and First Amendment jurisprudence should directly acknowledge that right.

CONCLUSION

The modern adult sexting phenomenon raises important constitutional questions regarding privacy and free expression. Although the exact magnitude and frequency of sexually explicit communication between consenting adults has not been measured, all available evidence suggests that millions of individuals create sexually explicit depictions of themselves and exchange those depictions with those they trust. These individuals are—likely unknowingly—repeatedly violating federal criminal law by failing to create and maintain the age-verification records required by 18 USC § 2257 and by failing to label their depictions with information about where the Section 2257 records are located.

This application of Section 2257 is of serious First Amendment concern. Because ordinary citizens and scholars alike are unaware of Section 2257 and its vast reach, the record-keeping scheme has failed to chill the volume of expression it clearly targets. As a result, Section 2257 imposes significant burdens on the exchange of private adult sexual communication. In the hands of an aggressive United States Attorney, the cell phone or email data of ordinary Americans could become fodder for an example-setting criminal prosecution. In the wake of this possibility, First Amendment law must expand in an analogous way to substantive due process law to incorporate the protection of private adult sexual communication.

184. Riley v. California, 134 S.Ct. 2490 (2014).
185. *Id*. at 2491.