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Sexual Exploitation of Children: Protection From More Than the Public

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ABSTRACT

Each year, countless children fall prey to sexual predators who use, coerce, or manipulate them to produce child pornography. Child pornography can only be produced through the sexual exploitation of children. In the late 1970s, Congress began providing statutory protection against the sexual exploitation of minor children by prohibiting the production, distribution, and possession of child pornography.

This Note will generally discuss federal statute 18 U.S.C. § 2251, which prohibits the sexual exploitation of children, but specifically focus on 18 U.S.C. § 2251(d). Subsection (d) prohibits knowingly making any notice or advertisement offering to receive a visual depiction of a child or children engaged in sexually explicit activity. When interpreting 18 U.S.C. § 2251, the federal courts have focused on whether an individual's overt act constituted a notice or advertisement to receive child pornography. However, recent federal court cases have led to varying results in child pornography production cases without any changes to the apparent ambiguity of applicable statutes.

The ambiguity surrounding the meaning of notice or advertisement as written in 18 U.S.C. § 2251(d) has been addressed by federal courts but rarely in the context of private, person-to-person communication. One of the first federal cases to do so was *United States v. Caniff*. The Eleventh Circuit, sua sponte, reexamined private, person-to-person communication as it related to 18 U.S.C. § 2251 (d) and, in doing so, undercut the statute's legislative intent in a way that no other circuit court had done previously.

The ambiguity surrounding the meaning of notice or advertisement hinders the statute's effectiveness in eliminating the child pornography industry. To adequately protect children from sexual exploitation, 18 U.S.C. § 2251(d) must be interpreted broadly to include private, person-to-person text messages. If a broad interpretation is not adopted by the courts, Congress must either amend 18 U.S.C. § 2251(d) to clearly define the

meaning of both "notice" and "advertisement" or rewrite 18 U.S.C. § 2251(d) using clearer language to signal its intention to protect children from offers to participate in child pornography.

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NOTE

SEXUAL EXPLOITATION OF CHILDREN: PROTECTION FROM MORE THAN THE PUBLIC

Caitlin Lindenhovius[†]

I. INTRODUCTION

Millions of children fall prey to sexual predators each year.[1] In 2020, the National Center for Missing and Exploited Children CyberTipline received over 21.7 million reports of suspected child sexual exploitation.[2] The victims of childhood sexual exploitation live with a permanent record of their sexual abuse circulating on the internet forever,[3] frequently in the form of child pornography.[4] Many children who are victims of sexual exploitation are not

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[1] *See* Brenna O'Donnell, *Cyber Tipline 2020: Rise in Online Enticement and Other Trends from Exploitation Stats,* NAT'L CTR. FOR MISSING & EXPLOITED CHILD. BLOG (Feb. 24, 2021), https://www.missingkids.org/blog/2021/rise-in-online-enticement-and-other-trends--ncmec-releases-2020-.

[2] *Id.* Sexual exploitation is defined as "Actual or attempted abuse of a position of vulnerability, power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another." WORLD HEALTH ORG., SEXUAL EXPLOITATION & ABUSE, https://www.who.int/docs/default-source/documents/ethics/sexual-exploitation-and-abuse-pamphlet-en.pdf?sfvrsn=409b4d89_2.

[3] U.S. DEP'T OF JUST., THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION 72 (2016), https://www.justice.gov/psc/file/842411/download.

[4] Child pornography, as defined by 18 U.S.C. § 2256, includes any visual depiction, whether made or produced by electronic or other means, of sexually explicit conduct where the production involves a minor engaging in sexually explicit conduct. 18 U.S.C. § 2256. However, the term child pornography normalizes the seriousness of the offense and downplays that child pornography always involves sexual abuse and exploitation of children. "For child abuse and exploitation, precise language can help convey the particular gravity of harms against children and the seriousness with which society addresses such crimes." Mary Graw Leary, *The Language of Child Sexual Abuse and Exploitation*, *in* REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCES 109 (Carissa B. Hessick ed., 2016). *See also Child Pornography*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal-ceos/child-pornography (May 28, 2020). The term child pornography does not adequately convey the child abuse that is required to produce this sexualized material. A more appropriate term for child pornography is child sexual abuse material (CSAM). *Glossary of*

physically forced or abducted but instead manipulated into participating.[5]

The trauma associated with child pornography has long-lasting effects on child victims that go beyond the physical harm suffered. These long-lasting harms include a wide variety of psychological, emotional, and physical effects, such as feelings of hopelessness and worthlessness, which manifest in a variety of symptoms.[6] Victims of child sexual abuse describe feeling a sense of shame and guilt that was still prevalent at the time the children disclosed the abuse.[7] Moreover, many victims are targeted when they are young and are often reluctant to report their abuse because of the added feelings of shame and guilt.[8]

Congress attempted to address the problem of child pornography by passing numerous statutes with the goal of expanding the protections afforded to children.[9] Of these federal statutes, 18 U.S.C. § 2251(d) targets the production of child pornography by making it a crime to knowingly make any notice or advertisement in an effort to receive a visual depiction of

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Terms, INT'L CTR. FOR MISSING & EXPLOITED CHILDREN, https://www.icmec.org/resources/glossary/#:~:text=While%20most%20legislation%20uses%20the,form%2C%20of%20child%20sexual%20abuse (last visited Oct. 9, 2021). "Because the term 'child pornography' is used in federal statutes, it is also commonly used by lawmakers, prosecutors, investigators and the public to describe this form of sexual exploitation of children." U.S. DEP'T OF JUST., *supra*; *see also* Leary, *supra*, at 109. Because of child pornography's use in court decisions and legislation, it is easily recognized by the public. For this reason, this Note will refer to these images with the common term of child pornography.

[5] Ateret Gewirtz-Meydan et al., *The Complex Experience of Child Pornography Survivors*, 80 CHILD ABUSE & NEGLECT 238, 239 (2018). "Some offenders produce child pornography by convincing or coercing a child to take images of himself or herself. Coercion of a child to take nude images of himself or herself is production of child pornography." U.S. SENT'G COMM'N, 2012 REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES 109 (2012), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf [hereinafter U.S. SENT'G COMM'N].

[6] U.S. DEP'T OF JUST., *supra* note 3, at 72.

[7] CARL GÖRAN SVEDIN & CHRISTINA BLACK, WHY DIDN'T THEY TELL US? ON SEXUAL ABUSE IN CHILD PORNOGRAPHY 15–16 (1st ed. 2003); Gewirtz-Meydan et al., *supra* note 5, at 239.

[8] U.S. SENT'G COMM'N, *supra* note 5, at 111.

[9] Child pornography statutes are codified in 18 U.S.C. §§ 2251–2260A. Congress's primary intent in passing the line of child pornography and sexual exploitation statutes is to eliminate the exchange of child pornography. United States v. Christie, 570 F. Supp. 2d 657, 692 (D.N.J. 2008). Prior to passing this line of statutes "the Federal Government lack[ed] sufficient enforcement tools to combat concerted efforts to exploit children prescribed by Federal law, and exploitation victims lack effective remedies under Federal law." Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-591, 100 Stat. 3341-74 (1986).

sexually explicit material.[10] Congress amended 18 U.S.C. § 2251 in 1986, increasing the severity of violations involving the production of child pornography to protect children from sexual predators.[11] By choosing not to convict offenders who privately invite children to create child pornography, the courts have abandoned the children Congress intended to protect.[12]

Federal courts interpreting 18 U.S.C. § 2251(d) frequently focus on whether an act constituted an advertisement to receive child pornography.[13] Fewer federal courts evaluated the statute from the perspective of whether an individual knowingly made a notice seeking child pornography.[14] In one such case, *United States v. Caniff*, the Eleventh Circuit interpreted notice to receive child pornography to include private, person-to-person text message requests for explicit photos from a person believed to be a minor.[15]

In the 2019 opinion, the majority reasoned that Congress must have intended notice and advertisement to have independent meanings.[16] Therefore, "to make any notice," which did not have any constraints from Congress, simply meant to notify.[17] However, the dissent disagreed, stating that the majority's interpretation of notice did not comport with ordinary

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[10] 18 U.S.C. § 2251(d). Congress has not defined what types of communication constitute making a notice or advertisement under 18 U.S.C. § 2251(d).

[11] 18 U.S.C. § 2251(e). "Congress has recognized the physiological, psychological, and emotional harm caused by the production, distribution, and display of child pornography by strengthening laws prescribing such activity." Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-591, 100 Stat. 3341-74 (1986) (outlining the findings that led to the 1986 Amendment increasing the punishments in 42 U.S.C. § 2251(e)).

[12] In *United States v. Caniff* (*Caniff I*), 916 F.3d 929, 930 (11th Cir. 2019), the Eleventh Circuit held that sending private person-to-person text messages constituted making a notice to receive child pornography. However, a year later the court, sua sponte, reversed its decision. In its reconsideration, the Eleventh Circuit held that private person-to-person text messages were not sufficient to make a notice for child pornography. United States v. Caniff (*Caniff II*), 955 F.3d 1183, 1185 (11th Cir. 2020).

[13] *See generally* United States v, Pabon-Cruz, 391 F.3d 86 (2d Cir. 2004); United States v. Rowe, 414 F.3d 271 (2d Cir. 2005); United States v. Sewell, 513 F.3d 820 (8th Cir. 2008); United States v. Christie, 570 F. Supp. 2d 657 (D.N.J. 2008); United States v. Peterson, No. CR 12-228-GW, 2015 U.S. Dist. LEXIS 194065 (C.D. Cal. Mar. 20, 2015); United States v. Autry, No. A-18-M-155, 2018 U.S. Dist. LEXIS 56501 (W.D. Tex. Apr. 3, 2018).

[14] *See generally* United States v. Grovo, 826 F.3d 1207, 1218 (9th Cir. 2016); United States v. Gries, 877 F.3d 255 (7th Cir. 2017); United States v. Cox, 963 F.3d 915 (9th Cir. 2020); United States v. Orr, 819 F. App'x 756 (11th Cir. 2020); United States v. Sammons, No. 2:19-cr-107, 2020 U.S. Dist. LEXIS 191600 (S.D. Ohio Oct. 15, 2020).

[15] *Caniff I*, 916 F.3d at 930.

[16] *Id.* at 935 ("We conclude Congress must have, instead, meant that each of those terms—'notice or advertisement'—had an independent meaning. That is particularly true here because Congress separated the terms notice and advertisement by the word 'or.'").

[17] *Id.* at 934–35.

English speech and that notice, as informed by the statutory context, required a public component.[18]

In 2020, the Eleventh Circuit reviewed the case sua sponte and vacated its previous decision.[19] The court held that the term notice did not apply to private, person-to-person communication.[20] While once again reviewing the ordinary meaning of notice, the Eleventh Circuit then found that to "make . . . any notice" does not encompass the private communication meanings of notice.[21] Relying on the rule of lenity, the court interpreted notice narrowly and thus found in the defendant's favor.[22]

Although the ambiguity surrounding the meaning of notice was addressed several times by federal courts, there has never been a clear and consistent definition as to what types of communication Congress intended to criminalize by including both notice and advertisement in the statute. To adequately protect children, notice under 18 U.S.C. § 2251(d) must be interpreted broadly to include private, person-to-person text messages. If a broad interpretation is not adopted by the courts, Congress must amend the statute to define "notice" or "advertisement." Likewise, Congress should rewrite the statute using clear language to signal Congress's intent to protect children from private offers to participate in child pornography.

II. BACKGROUND

A. *Child Pornography in the United States*

The child pornography problem did not begin with the invention of computers. A cottage industry for child pornography developed after the invention of the camera.[23] However, the child pornography problem expanded once predators could hide behind a computer screen. The predator's ability to hide created numerous challenges for law enforcement trying to keep up with advancing technology.[24]

The internet created a shelter for predators—not for the child victims. Child victims live with trauma caused by child pornography for the rest of their lives.[25] The trauma experienced by child victims prompted action by

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[18] *Id.* at 944.

[19] *Caniff II*, 955 F.3d at 1185.

[20] *Id.*

[21] *Id.* at 1188–89.

[22] *Id.* at 1191.

[23] RICHARD WORTLEY & STEPHEN SMALLBONE, CHILD PORNOGRAPHY ON THE INTERNET 1 (2006), http://www.ncdsv.org/images/cops_child-pornography-on-the-internet_5-2006.pdf.

[24] MICHAEL C. SETO, *Child Pornography*, *in* INTERNET SEX OFFENDERS 37, 40 (2013).

[25] U.S. DEP'T OF JUST., *supra* note 4.

Congress. Congress took action by passing a series of bills aimed at criminalizing various aspects of the child pornography industry.[26]

1. The Rise of Child Pornography

The development of the camera in the early 1800s led to an increase in the production, trading, and collection of child pornography.[27] Even with technological advancements, most images of child pornography were expensive and difficult to obtain.[28] Although there was an increase in child pornography production and distribution, law enforcement agencies were able to curb the trafficking of these materials.[29] Because most child pornography was locally produced, it remained relatively obscure and unusual until the 1970s.[30] By 1977, "there were at least 260 different monthly magazines" circulating in the United States.[31] A 1985 Congressional report estimated that child pornography had become a highly-organized cottage industry grossing several million dollars per year, calling into question the early 1970s figures estimating a nearly billion dollar industry.[32]

The prevalence of child pornography, as we know it today, did not occur until the internet was introduced. With the rapid change in technology, the number of photos and videos that memorialized the sexual exploitation of children increased exponentially.[33] Prior to the internet era, child pornography was obtained by the interested party contacting commercial distributors or individuals to purchase or trade images.[34] Now, with the internet, interested parties not only have access to more material, but they can access it almost instantaneously with a click of a button.[35] Predators,

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[26] *See infra* Section II.B.

[27] WORTLEY & SMALLBONE, *supra* note 23, at 1.

[28] *Id.*

[29] *Id.* at 5. Child pornography produced during the 1800s, before the advent of the internet, were "locally produced, of poor quality, expensive, and difficult to obtain." *Id.* at 1. The cottage industry of child pornography remained a mostly self-restricted enterprise throughout much of the twentieth century allowing law enforcement agencies to be successful in limiting the spread of traditional hard-copy forms. *Id.*

[30] HOWARD A. DAVIDSON & GREGORY A. LOKEN, CHILD PORNOGRAPHY AND PROSTITUTION: BACKGROUND AND LEGAL ANALYSIS 1 (1987), https://www.ncjrs.gov/pdffiles1/Digitization/109927NCJRS.pdf.

[31] *Id.*

[32] *Id.* (citing S. REP. NO. 99-537 (1986)). The true extent of the industry is difficult to determine because "photographs, videotapes, and films can be taken in private homes and distributed in clandestine underground channels." *Id.*

[33] U.S. SENT'G COMM'N, *supra* note 5, at 3.

[34] SETO, *supra* note 24, at 40.

[35] *See* WORTLEY & SMALLBONE, *supra* note 23, at 9.

using the internet, are now able to find and seduce potential victims; produce, trade, or exchange pornography; and communicate with each other with little detection.[36]

The internet age expanded the ability to create and distribute child pornography into a global phenomenon.[37] The global nature of the industry, coupled with the increased anonymity of the internet, has created a vast industry that has proven difficult for law enforcement to curb.[38] North America alone hosted the most child pornography websites globally until 2016, but there was a shift and Europe host the most child pornography websites.[39] Since 2016, Europe has hosted the most child pornography websites.[40] However, the number of websites hosted in the United States is still staggering. In 2020, the United States was hosting 8,257 confirmed URLs with child pornography and child sexual abuse material.[41] Many websites hosting such material remain unknown and are constantly changing.

The exact number of images and videos appearing on these websites are difficult to determine.[42] One website alone hosted over 1.3 million images depicting more than seventy-three previously unidentified child victims.[43] Additionally, while investigating a single website over a twelve-day period, the Federal Bureau of Investigation (FBI) discovered roughly 200,000 registered users and 100,000 individuals accessing the site.[44] In 2020, the National Center for Missing and Exploited Children CyberTipline received roughly 33.6 million reports of pornographic images involving children, with

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[36] *Id.*; PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 14–15 (2001).

[37] Michael J. Henzey, *Going on the Offensive: A Comprehensive Overview of Internet Child Pornography Distribution and Aggressive Legal Action*, 11 APPALACHIAN J.L. 1, 6 (2011).

[38] SETO, *supra* note 24, at 41.

[39] *The Annual Report 2020: Geographical Hosting*, IWF, https://annualreport2020.iwf.org.uk/trends/international/geographic (last visited Feb. 23, 2022).

[40] *Id.* As of 2020, Europe hosted 138,009 URLs with child pornography and child sexual abuse material. *Id.* This was an increase from 117,359 URLs hosting these materials in 2019. *Id.*

[41] *Id.*

[42] WORTLEY & SMALLBONE, *supra* note 27, at 12–13 ("[O]ne problem in estimating the number of sites is that many exist only for a brief period before they are shut down, and much of the trade in child pornography takes place at hidden levels of the Internet.").

[43] U.S. DEP'T OF JUST., *supra* note 3, at 74; *The Scourge of Child Pornography: Working to Stop the Sexual Exploitation of Children*, FBI NEWS (Apr. 25, 2017), https://www.fbi.gov/news/stories/the-scourge-of-child-pornography.

[44] *Id.*

10.4 million unique images.[45] The CyberTipline also reviewed reports of 31.6 million videos of child pornography, with 3.7 million unique videos.[46] The same image or video circulating on different websites or being shared by different people contributes to the overall number of reports being so much greater than the unique images and videos.[47]

As technology continues to grow and develop so do the opportunities available for predators to groom and entice children. The number of smartphone users increases steadily every year. As of 2021, there were 6.64 billion smartphone users globally, or approximately 83.9% of the world population.[48] Many teenagers use smartphones to share sexually explicit photos of themselves and social networking sites to exchange sexually charged communications.[49] According to the National Center for Missing and Exploited Children, 90% of the reports received by its CyberTipline involved an offender's direct communication or attempted direct communication with children.[50] This communication is made easier with smartphones and the amount of communication that occurs through applications, social networking sites, or private text messages.

2. Children as Victims in Child Pornography

The internet now "provides positive reinforcement for [child pornographers] in their beliefs and behaviors, encouraging further exploitation of children."[51] This positive reinforcement overshadows the fact that the production, distribution, and possession of child pornography are all crimes with actual victims. The increase and normalization of child

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[45] *2019 & 2020 Total Files by Reporting Category and Type*, NAT'L CTR. OF MISSING & EXPLOITED CHILD., https://www.missingkids.org/gethelpnow/cybertipline (last visited Nov. 2, 2021).

[46] *Id.*

[47] *Id.* ("Children are revictimized by the continued circulation of the files of their abuse and the technology that is used to identify these files, is critical to their protection.").

[48] Ash Turner, *How Many Smartphones are in the World?*, BANKMYCELL.COM, https://www.bankmycell.com/blog/how-many-phones-are-in-the-world (last visited Feb. 7, 2022).

[49] Dawn C. Nunziato, *Romeo and Juliet Online and in Trouble: Criminalizing Depictions of Teen Sexuality (c u l8r: g2g 2 jail),* 10 NW. J. TECH. & INTELL. PROP. 57, 58 (2012).

[50] NAT'L CTR. FOR MISSING & EXPLOITED CHILD., THE ONLINE ENTICEMENT OF CHILDREN: AN IN-DEPTH ANALYSIS OF CYBER TIPLINE REPORTS 3 (2017), https://www.missingkids.org/content/dam/missingkids/pdfs/ncmec-analysis/Online%20Enticement%20Pre-Travel1.pdf.

[51] Debra Wong Yang & Patricia A. Donahue, *Protecting Children from Online Exploitation and Abuse: An Overview of Project Safe Childhood*, 34 PEPP. L. REV. 439, 445 (2007).

pornography and sexual exploitation of children fails to appreciate the harms caused to the children depicted in these images, children exposed to child pornography, and society overall. Child pornography produces a permanent record of a child's sexual abuse, which, when coupled with online dissemination, causes the child to be perpetually victimized.[52] A child living with "the permanency, longevity, and circulation of [the] record"[53] can "create[] lasting psychological damage to the child."[54]

The greatest harm to the young victims is the emotional and psychological damage caused when a child is forced or manipulated to engage in sexual acts.[55] The frequency and severity of the sexual abuse, along with the age at which it happened, combine to cause emotional harm that often extends throughout the life of the child.[56] This sexual abuse and exploitation can create difficulty in developing healthy and affectionate relationships[57] because victims "live in constant fear that images will surface and be viewed by people they know."[58]

For many children, the images of their victimization depict abuse that began when the child was quite young and often continues for much of the child's life.[59] According to a report by the National Center for Missing and Exploited Children, 76% of the identified victims in child pornography were prepubescent.[60] Of the prepubescent children, 10% were infants or toddlers.[61] Other studies have found that about half of the victims were younger than twelve years old.[62] Due to their young age, victims often fear people will believe they were complicit in their abuse.[63] In fact, some victims may not even understand the extent of their trauma because they were so young when the abuse occurred.[64]

Much like victims of other types of sexual abuse, victims of child

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[52] U.S. DEP'T OF JUST., *supra* note 4.

[53] *Id.*

[54] *Id.*

[55] T. Christopher Donnelly, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REFORM 295, 299 (1979).

[56] *Id.* at 299–300.

[57] *Id.* at 299.

[58] Gewirtz-Meydan et al., *supra* note 5, at 243–44.

[59] *Id.* at 241.

[60] U.S. SENT'G COMM'N, *supra* note 5, at 108.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 111–12.

[64] *Id.* at 108, 111.

pornography are often reluctant to report their abuse.[65] Some young victims are targeted because they are non-verbal and unable to report the abuse.[66] However, many victims are abused by family members who threaten the victims using parental authority or offer various forms of payment to prevent the victims from reporting.[67] Moreover, victims may be used to recruit other children, even their younger siblings.[68] Even if the victims were not targeted because of the greater chance of silence, simply knowing that images of the sexual abuse and exploitation exist prevents victims from reporting the crime due to feelings of guilt and shame.[69] Other victims worry they will be recognized by those viewing the images.[70]

For victims, the knowledge that images of their sexual abuse exist can exacerbate the trauma.[71] For instance, victims of child pornography are at greater risk of depression, poor self-esteem, interpersonal problems, delinquency, substance abuse, suicidal thoughts, and post-traumatic stress disorder.[72] The lack of control over images can be one of the most difficult aspects of the abuse to overcome.[73] Although not all child pornography depicts violent sexual abuse, it is all produced through the sexual exploitation of children. This means that the victims suffer from the knowledge that their image is being used for sexual gratification or to groom new victims.[74] Some victims have even reported they were tracked down and stalked by viewers of their images.[75]

B. *Federal Response to the Child Pornography Problem*

Until 1977, there was no federal legislation that criminalized the production of sexually explicit images of children.[76] Prosecutors had been relying on state "rape, incest and child welfare statutes to punish those who

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[65] *Id.* at 111.

[66] U.S. SENT'G COMM'N, *supra* note 5, at 108, 111.

[67] *Id.* at 109–10.

[68] *Id.* at 110 n.10 ("Sometimes these are siblings sets and sometimes an initial victim may be encouraged by the offender to 'recruit' another child."); Janis Wolak et al., *Arrests for Child Pornography Production: Data at Two Time Points from a National Sample of U.S. Law Enforcement Agencies*, 16 CHILD MALTREATMENT 184, 190 (2011).

[69] U.S. SENT'G COMM'N, *supra* note 5, at 111.

[70] Gewirtz-Meydan et al., *supra* note 5, at 241.

[71] U.S. SENT'G COMM'N, *supra* note 5, at 112.

[72] *Id.* at 113.

[73] Gewirtz-Meydan et al., *supra* note 5, at 244.

[74] U.S. SENT'G COMM'N, *supra* note 5, at 113.

[75] *Id.*

[76] WORTLEY & SMALLBONE, *supra* note 27, at 4–5; DAVIDSON & LOKEN, *supra* note 30, at 7.

sexually exploited children."[77] Congress passed the Protection of Children Against Sexual Exploitation Act of 1977 in response to the storm of media attention that put the issue of child pornography on the national agenda.[78] A Congressional investigation of the child pornography industry revealed that the production, distribution, and sale of child pornography was comprised of a loose network of clandestine operations that made a wide variety of sexually explicit material available in most parts of the country.[79] Finding the current federal statutes did not protect children or society from the "highly organized, multi-million dollar" nationwide industry of child pornography, Congress declared that more focused legislation was needed to fill the voids in current federal law.[80]

The 1977 Act prohibited the use of children under the age of sixteen in the production of pornographic materials.[81] The 1977 Act also prohibited the knowing sale of or distribution of child pornographic images used for commercial purposes.[82] The 1977 Act explicitly prohibited "any obscene material depicting a minor engaging in sexually explicit conduct."[83] For purposes of the 1977 Act, sexually explicit conduct did not include a provision for nudity but included the phrase "lewd exhibition of the genitals or pubic area."[84]

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[77] David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 537–38 (1981).

[78] Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) (current version at 18 U.S.C. §§ 2251–53, 2423); Artemus Ward, *Protection of Children Against Sexual Exploitation Act of 1977*, THE FIRST AMEND. ENCYC., https://www.mtsu.edu/first-amendment/article/1088/protection-of-children-against-sexual-exploitation-act-of-1977 (last visited Jan. 13, 2022).

[79] S. REP. NO. 95-438, at 5 (1977).

[80] S. REP. NO. 95-438, at 3, 5 (1977). Law enforcement agencies documented the presence of major production centers in many large cities including Los Angeles, Chicago, and New York City, as well as the existence of smaller independent producers around the country. S. REP. NO. 95-438, at 6 (1977).

[81] Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 99-225, 92 Stat. 7, 8 (1978) (current version at 18 U.S.C. §§ 2251–53, 2423); Annemarie J. Mazzone, Comment, United States v. Knox*: Protecting Children from Sexual Exploitation Through the Federal Child Pornography Laws*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 167, 178 (1994).

[82] Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847, 855 (2008).

[83] Mazzone, *supra* note 81, at 178–79. Although Congress believed that only obscene child pornography could be constitutionally banned, as outlined in *Miller v. California*, 413 U.S. 15 (1973), it still could not define what kind of images would be considered obscene. *Id.* at 177 n.50.

[84] *Id.* at 176.

Shortly after the 1977 Act passed, the United States Supreme Court identified child pornography as a new category of unprotected speech in *New York v. Ferber*.[85] The Court held that the production and distribution of child pornography is intrinsically related to the sexual exploitation and abuse of children and did not warrant First Amendment protection.[86] *Ferber* allowed state legislatures to regulate non-obscene child pornography.[87] However, the Court's decision in *Ferber* frustrated the purpose of the 1977 Act because the types of images that could be banned under the Act were limited only to those that were considered obscene.[88]

After the decision in *Ferber* and a review of the 1977 Act, Congress passed the Child Protection Act of 1984.[89] The 1984 Act eliminated the 1977 Act's obscenity requirement, sale requirement, and commercial purpose requirement.[90] The new Act added an offense for knowingly reproducing any visual depiction of children engaging in sexually explicit conduct through the mail.[91] The 1984 Act also redefined sexually explicit conduct by changing "lewd" to "lascivious" exhibition of the genitals, to clarify that obscenity was not necessary for these visual depictions to qualify.[92]

Although the 1984 Act produced Congress's desired result, as "federal prosecutions increased dramatically,"[93] Congress continued to "examine the seriousness of [] child pornography."[94] In 1985, President Reagan established the Attorney General's Commission on Pornography to "determine the nature, extent, and impact" of pornography on society in the United States to recommend ways to stop its spread.[95] The report found that the production and the distribution of child pornography is a form of sexual exploitation that causes serious harm to the children involved.[96] The report echoed the *Ferber*

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[85] New York v. Ferber, 458 U.S. 747, 765 (1982); Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 IND. L.J. 1437, 1443–44 (2014); Mazzone, *supra* note 81, at 180.

[86] *Ferber*, 458 U.S. at 759.

[87] Mazzone, *supra* note 81, at 182.

[88] *Id.*

[89] Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (current version at 18 U.S.C. §§ 2251–55); Mazzone, *supra* note 81, at 182, 185.

[90] Mazzone, *supra* note 81, at 185.

[91] Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (current version at 18 U.S.C. §§ 2251–55); Mazzone, *supra* note 81, at 185–86.

[92] Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204, 205 (current version at 18 U.S.C. §§ 2251–55); Mazzone, *supra* note 81, at 186.

[93] Mazzone, *supra* note 81, at 186.

[94] *Id.*

[95] Richard E. McLawhorn, *Summary of the Report by the Attorney General's Commission on Pornography*, 74 LINACRE Q. 313, 313 (2007) (internal quotation marks omitted).

[96] *Id.* at 330–31. *See supra* Section II.A.2 for a discussion of all of the harms faced by the child victims of child pornography.

Court's belief that the market for child pornography may decrease with the stringent enforcement of existing laws and impactful sanctions, which may, in turn, reduce the production of child pornography.[97] Recognizing the significant harm the production and distribution of child pornography caused, Congress passed the Child Sexual Abuse and Pornography Act of 1986.[98]

The 1986 Act added a ban on advertisements related to the sexual exploitation of children.[99] Congress further added a clarification to "visual depictions" to include undeveloped film.[100] With the increased access to computers and use of the internet, Congress continued to address emerging issues regarding child pornography. In 1988, Congress passed the Child Protection and Obscenity Enforcement Act,[101] the first statute to address the technological developments that facilitated the expansion of online child pornography.[102] The 1988 Act criminalized the transmission, distribution, or reception of child pornography using a computer.[103] The Child Protection Restoration and Penalties Enhancement Act of 1990 expanded criminal penalties for individuals who knowingly possessed child pornography.[104]

The growth of the internet and the continual advances in computer technology led to concerns that the existing legislation was out of date. The Child Pornography Prevention Act of1996 amended federal laws to address the sexual exploitation of children and the growth of new technological advances.[105] The 1996 Act expanded the breadth of child pornography law

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[97] U.S. DEP'T OF JUST., ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 416–17, 659–60 (1986) (citing New York v. Ferber, 458 U.S. 747, 760 (1982)).

[98] *See generally* Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510 (1986) (current version at 18 U.S.C. §§ 2251, 2255, 2421–24).

[99] *Id.*

[100] Mazzone, *supra* note 81, at 187.

[101] Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4485 (1988) (current version at 18 U.S.C. §§ 2251–52, 2256).

[102] *See id.* ("[A]mend[ing] by inserting 'by any means including by computer' after 'interstate or foreign commerce' both places it appears" in § 2251(c), prior to its change to § 2251(d)); Mary G. Leary, *Protecting Children from Child Pornography and the Internet*, CHILD SEXUAL EXPLOITATION PROGRAM UPDATE (Am. Prosecutors Rsch. Inst., Alexandria, Va.), Nov. 4, 2004, at 1 ("Also to follow was the Child Protection and Obscenity Enforcement Act of 1988, which addressed for the first time the relationship between computer technology and child pornography.").

[103] *Id.*

[104] Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4816 (current version at 18 U.S.C. § 2252).

[105] Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3026–27 (current version at 18 U.S.C. §§ 2251–52).

from the actual sexual abuse of children to include digitally created images of children engaged in sexually explicit activity.[106] Additionally, the 1996 Act banned the production and distribution of morphed or "virtual" child pornography.[107] Since 1996, major decisions and legislation have focused on other aspects of child pornography, like virtual pornography, while leaving § 2251(d) untouched.[108]

III. PROBLEM

A. *Statutory Definitions Regarding the Sexual Exploitation of Children*

Child pornography is not protected under the First Amendment and is subject to federal statute restrictions.[109] Chapter 110 of Title 18 of the United States Code[110] codifies prohibitions to almost all aspects of child pornography, including the production, distribution, and possession of child pornography through any means of interstate or foreign commerce.[111] Violations of these federal child pornography statutes are serious offenses and those convicted under these statutes face severe penalties. The severe punishments highlight the desire to protect children from the physical and psychological abuse of producing and distributing child pornography.[112]

To grasp the extent of these statutes it is important to know what is classified as child pornography or a visual depiction of sexually explicit conduct. 18 U.S.C. § 2256(8) defines child pornography as any "visual depiction" of a minor "engaging in sexually explicit conduct," "including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means . . . ."[113] The section goes on to define "sexually explicit conduct" as actual or simulated sexual intercourse, bestiality, or "lascivious exhibition of

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[106] *A Brief Overview of Child Pornography Laws and Key Problems*, STOBBS L. OFF., http://www.stobbslaw.com/blog/2014/05/a-brief-overview-of-child-pornography-laws-and-key-problems/ (last visited Feb. 11, 2022).

[107] *Id.*

[108] PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003); *see generally* Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002).

[109] *See generally* New York v. Ferber, 458 U.S. 747 (1982).

[110] 18 U.S.C. §§ 2251–2260A.

[111] *Citizen's Guide to U.S. Federal Law on Child Pornography*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-pornography (May 28, 2020); U.S. SENT'G COMM'N, *supra* note 5, at 21–22.

[112] New York v. Ferber, 458 U.S. 756, 756–58 (1982). *See also* Hessick, *supra* note 85, at 1444 ("The Court identified two major harms to children caused by child pornography: the harm of creation and the harm of circulation.").

[113] 18 U.S.C. § 2256(8).

the anus, genitals, or pubic area . . . ."[114] Although lascivious exhibition is not defined by statute, courts addressed it by using a six-prong standard from *United States v. Dost*.[115] The factors from *Dost* include:

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.[116]

18 U.S.C. § 2251 prohibits the persuasion, inducement, enticement, or coercion of a minor to engage in sexually explicit conduct in an effort to produce a visual depiction of that conduct.[117] More specifically, 18 U.S.C. § 2251(d)(1) provides that "[a]ny person who . . . *knowingly makes*, prints, or publishes, . . . *any notice or advertisement* seeking or offering [] *to receive* . . . any visual depiction . . . involv[ing] the use of a minor engaging in sexually explicit conduct," shall be sentenced to 15 to 30 years in prison.[118] The section also prohibits knowingly making a notice or advertisement seeking or offering participation in any act of sexual explicit conduct with a minor for the purpose of producing sexually explicit material.[119] Conviction of a production offense under 18 U.S.C. § 2251, even production solely for personal use, faces a mandatory minimum sentence of fifteen years of imprisonment with a maximum of thirty years.[120] The statutory minimums and maximums are higher for those defendants with prior sexual offenses.[121]

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[114] 18 U.S.C. § 2256(2)(A).

[115] U.S. SENT'G COMM'N, *supra* note 5, at 23, 23 n.17.

[116] *Id.* at 23 n.17 (quoting United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986)).

[117] 18 U.S.C. § 2251(a).

[118] 18 U.S.C. § 2251(d)(1)(A) (emphasis added).

[119] 18 U.S.C. § 2251(d)(1)(B).

[120] 18 U.S.C. § 2251(e); U.S. SENT'G COMM'N, *supra* note 5, at 24.

[121] The minimum for defendants with one previous sexual offense is a mandatory twenty-five-year sentence while the maximum penalty is fifty years. U.S. SENT'G COMM'N, *supra* note 5, at 24. If the defendants have more than one previous sexual offense the mandatory minimum sentence is thirty-five years with a maximum sentence of life imprisonment. *Id.*

B. *Federal Cases Involving 18 U.S.C. § 2251(d)*

Congress's goal in drafting 18 U.S.C. § 2251(d) was to craft a statute that captured all types of communication as either advertisements or notices targeting individuals interested in child pornography.[122] Although federal cases have considered both aspects of the statute, there are far more cases that address advertisements as it relates to public communications.[123] Cases focusing on advertisements involve conversations initiated through peer-to-peer file sharing, large chat rooms, and online message boards.[124] Cases that define notice occur less frequently.[125] In those cases, courts focused on whether a private, person-to-person communication or messages between users of a private website were intended to be prohibited by the statute.[126] Unfortunately, each case involving notice is dramatically different—with very few comparable facts—and have not led to a clear consistent definition.

While there have been federal cases focusing on whether a defendant's action satisfies the meaning of notice under 18 U.S.C. § 2251(d), few, if any, have held that private, person-to-person communication qualifies as a notice to receive child pornography. Many cases brought under 18 U.S.C. § 2251(d) involved a notice or advertisement between distributors and consumers of child pornography.[127] Therefore, cases involving the direct communication between an adult seeking sexually explicit photographs from a minor are subject to varying decisions.[128] The varying decisions undermine the goals of protecting children from sexual exploitation and ending the child pornography market.[129]

1. How Have Federal Courts Interpreted Notice and Advertisement?

Federal cases first considered whether public communications constituted

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[122] United States v. Franklin, 785 F.3d 1365, 1369–70 (10th Cir. 2015).

[123] *See generally* cases cited *supra* note 13.

[124] *See generally* United States v. Rowe, 414 F.3d 271, 273 (2d Cir. 2005); United States v. Autry, No. A-18-M-155, 2018 U.S. Dist. LEXIS 56501, at *2–3 (W.D. Tex. Apr. 3, 2018).

[125] *See generally* cases cited *supra* note 14.

[126] *See generally* United States v. Gries, 877 F.3d 255 (7th Cir. 2017); United States v. Cox, 963 F.3d 915 (9th Cir. 2020); United States v. Orr, 819 F. App'x 756 (11th Cir. 2020); United States v. Sammons, No. 2:19-cr-107, 2020 U.S. Dist. LEXIS 191600 (S.D. Ohio Oct. 15, 2020).

[127] *See infra* Section III.B.1.a–e.

[128] *See Caniff I*, 916 F.3d 929, 930 (11th Cir. 2019), *vacated*, 955 F.3d 1183, 1185 (2020).

[129] *Caniff II*, 955 F.3d 1183, 1192; United States v. Christie, 570 F. Supp. 2d 657, 665 (D.N.J. 2008) (discussing the primary intent of Congress in relation to 18 U.S.C. § 2251(d)).

advertisements under 18 U.S.C. § 2251(d).[130] As new technology and online platforms developed, the idea that smaller group communication—and even private communication—can satisfy an advertisement seemed to fade. Courts began treating communication between smaller groups of people as "making a notice" to receive child pornography rather than an advertisement.[131] Defendants usually challenge cases that involve large groups within the online community, or the public at large, on whether the communication in question was an advertisement to receive child pornography.[132]

In 2016, in *United States v. Grovo*, the Ninth Circuit evaluated whether an online bulletin board shared between forty to forty-five users was an advertisement under 18 U.S.C. § 2251(d).[133] This case is one of the few that has looked at a small online community to see if the posting constituted an advertisement. The Ninth Circuit ultimately held that advertising to a particular subset of the public is sufficient to sustain a conviction under 18 U.S.C. § 2251(d).[134] This holding was consistent with other circuit courts that held closed communications could be advertisements under the statute.[135] However, soon those other circuits began evaluating smaller subsections of the public as notice to receive child pornography instead of an advertisement.[136]

a. *United States v. Grovo*

In *United States v. Grovo*, Steven Grovo used an online bulletin board to exchange child pornography with forty to forty-five members.[137] The bulletin board in question was an invitation-only message board for sharing both pornographic and non-pornographic images of children.[138] New members were allowed to join only after being invited by an existing member and

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[130] *See generally* United States v, Pabon-Cruz, 391 F.3d 86 (2d Cir. 2004); United States v. Rowe, 414 F.3d 271 (2d Cir. 2005); United States v. Sewell, 513 F.3d 820 (8th Cir. 2008); *Christie*, 570 F. Supp. 2d 657; United States v. Peterson, No. CR 12-228-GW, 2015 U.S. Dist. LEXIS 194065 (C.D. Cal. Mar. 20, 2015); United States v. Autry, No. A-18-M-155, 2018 U.S. Dist. LEXIS 56501 (W.D. Tex. Apr. 3, 2018).

[131] *See generally Gries*, 877 F.3d 255; *Cox*, 963 F.3d 915; *Orr*, 819 F. App'x 756; *Sammons*, No. 2:19-cr-107, 2020 U.S. Dist. LEXIS 191600.

[132] *See Rowe*, 414 F.3d at 276; *Autry*, 2018 U.S. Dist. LEXIS 56501, at *1.

[133] United States v. Grovo, 826 F.3d 1207, 1211, 1219 (9th Cir. 2016).

[134] *Id.* at 1218.

[135] *See infra* Section III.B.1.a–e.

[136] *See id.*

[137] *Grovo*, 826 F.3d at 1211–12.

[138] *Id.* at 1211.

vetted by the site administrators to ensure that they could be trusted.[139] The online message board was divided into several different boards and included several levels of membership.[140] Grovo posted on the message board 330 times and actively engaged in the threads of other members.[141] These posts caused prosecutors to charge Grovo with conspiracy to advertise child pornography under 18 U.S.C. § 2251(d).[142]

Grovo argued that the posts made on the message board did not constitute an advertisement for child pornography as the posts were only visible to members and not to the general public.[143] The Ninth Circuit turned to various dictionary definitions to determine whether an advertisement required a public component.[144] Almost all of the dictionary definitions included a public component but did not require a public component to the communication.[145] The court did not adopt the interpretation that an advertisement must be targeted to the public as a whole.[146] Rather, the court determined that an advertisement can be made to a subset of the public.[147] If an advertisement can be made to the public at large, or a subset of the public, then to have 18 U.S.C. § 2251(d) encompass all types of communication, a

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[139] *Id.* at 1211–12. The site administrators did not outline the criteria for trusting a new member before they could begin posting in the various rooms that focused on different content areas. *Id.* at 1211.

[140] *Id.* at 1211–12.

[141] *Id.* at 1212.

[142] *Id.* at 1211.

[143] *Grovo*, 826 F.3d at 1217.

[144] *Id.* Webster's Dictionary has several definitions including, "a calling to public attention: publicity" and "a public notice; esp: a paid notice or announcement published in some public print . . . or broadcast over radio or television." *Id.* (quoting *Advertisement,* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 31 (2002)). The American Heritage Dictionary defines an advertisement as a "notice, such as a poster or a paid announcement in the print, broadcast, or electronic media, designed to attract public attention or patronage." *Id.* at 1217 (quoting *Advertisement,* AMERICAN HERITAGE DICTIONARY 25 (5th ed. 2011)). While Black's Law Dictionary had the narrowest definition of advertisement, defining it as a "commercial solicitation; an item of published or transmitted matter made with the intention of attracting clients or customers." *Id.* (quoting *Advertisement,* BLACK'S LAW DICTIONARY (10th ed. 2014)).

[145] *Grovo*, 826 F.3d at 1217–18 ("To be sure, four of the five definitions above involve some form of 'public notice' or calling 'public attention' to something. Although this supports the defendants' argument that an 'advertisement' may require some public component, it does not compel us to adopt their argument that an 'advertisement' must be targeted to the entire public as a whole.").

[146] *Id.* at 1218.

[147] *Id.* at 1217–18 ("The means of publication or broadcast are not the definitive features of an 'advertisement,' so long as the advertisement calls attention to its subject or makes a particular thing known.").

notice should include private communications.

b. *United States v. Franklin*

In *United States v. Franklin*, the Tenth Circuit did not distinguish between notice and advertisement when evaluating Franklin's communication to his "friends" on a website.[148] The prosecutor charged Franklin with advertising or providing notice of images of child pornography when he made child pornography images available to his 108 friends on a website called "Gigatribe."[149] On Gigatribe, a user could approve other users to become his "friends" who would then be allowed to view previews of pornographic images posted by other users.[150] Franklin was able to choose which pornographic images would be shared with his friends which allowed those friends access.[151] Once a friend had access, they could select images to download and share.[152]

The prosecutor argued that when the defendant shared images with his friends the defendant's act constituted an advertisement or notice of child pornography under 18 U.S.C. § 2251(d).[153] The defendant argued that the statute was "limited to impersonal and indiscriminate communications to the public" and that Gigatribe, as a closed network, did not fit that description.[154] The Tenth Circuit held that limiting the statute to impersonal and indiscriminate communication to the public was inconsistent with the ordinary meaning of notice or advertisement within the statute.[155] When the court interprets the words in a statute, it should attempt to capture all advertisements or notices targeting individuals interested in obtaining or distributing child pornography.[156]

c. *United States v. Gries*

In *United States v. Gries*, the defendant challenged the definition of notice

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[148] *See* United States v. Franklin, 785 F.3d 1365, 1369 (10th Cir. 2015).

[149] *Id.* at 1367.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Franklin*, 785 F.3d at 1367.

[155] *Id.* at 1367–68. Only two of the six definitions of advertisement provided in the opinion contained a public component. Additionally, Webster's Dictionary provided eighteen definitions of notice, none of which contained a public component. *Id.* at 1368.

[156] *Id.* at 1369–70 ("Congress surely did not intend to limit the statute's reach to pedophiles who indiscriminately advertise through traditional modes of communication like television or radio.").

under 18 U.S.C. § 2251(d).[157] The Seventh Circuit held that the messages in a password-protected online chatroom were sufficient to support a conviction under 18 U.S.C. § 2251(d).[158] John Gries was an active user in a private online chatroom where large amounts of child pornography had been traded for nearly a decade.[159] The password-protected private chatroom facilitated the private communications of users to exchange massive amounts of child pornography.[160] Altogether, thirty-five to forty users shared thousands of files depicting the violent sexual abuse of children.[161] Each user had a password that allowed access to the encrypted files.[162] When there were new files to share, the users would message other users describing the new content and offering it for distribution.[163] The prosecutor charged Gries with conspiracy to sexually exploit a child under 18 U.S.C. § 2251(d), among other conspiracy charges.[164]

While the court primarily focused on the Double Jeopardy Clause, it also discussed the sufficiency of evidence to support a charge of conspiracy to sexually exploit a child.[165] On appeal, the defendant argued that notice or advertisement included both a public component and that the use of a private, password-protected chatroom did not satisfy this requirement.[166] The court focused on the ordinary meaning of notice when it held that the messages in the password-protected online chatroom were sufficient to support a conviction under 18 U.S.C. § 2251(d).[167] Notice is a "warning or intimation of something" and does not specify that the warning need to be disseminated to the public at large.[168]

d. *United States v. Cox*

In June 2020 in *United States v. Cox*, the Ninth Circuit held that one-to-one communication is sufficient to satisfy the notice requirement in 18 U.S.C. § 2251(d).[169] Cox began using Kik Messenger, an online instant

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[157] United States v. Gries, 877 F.3d 255, 260 (7th Cir. 2017).

[158] *Id.*

[159] *Id.* at 257.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *See Gries*, 877 F.3d at 257.

[164] *Id.* at 257–58.

[165] *Id.* at 258–60.

[166] *Id.* at 258, 260.

[167] *Id.* at 260.

[168] *Id.*

[169] United States v. Cox, 963 F.3d 915, 922 (9th Cir. 2020).

messaging platform, to engage in conversations with Richard Hennis.[170] The conversations included the two discussing their mutual interest in child sexual intercourse.[171] In a later conversation, Cox asked Hennis to send her child pornography videos, a request with which Hennis complied by sending eleven files.[172] After several weeks, Cox sent two Dropbox links to Hennis via Kik Messenger containing child pornography videos and photographs.[173]

After sending the Dropbox links, the prosecutor charged Cox with five child pornography-related charges, including one count of making a notice offering child pornography.[174] At trial, the jury found Cox guilty on all counts including "'mak[ing]' a 'notice . . . *offering*' to 'display, distribute, or reproduce' child pornography."[175] Arguing that only a notice distributed to a wider audience violates 18 U.S.C. § 2251(d), Cox appealed her conviction claiming that a one-to-one communication cannot support a conviction for "making a notice offering" for child pornography under 18 U.S.C. § 2251(d).[176] Based on its review of plain statutory language, the court held "that one-to-one communications can satisfy the legal definition of 'notice' under 18 U.S.C. § 2251(d)(1)."[177]

e. *United States v. Sammons*

More recently, the United States District Court for the Southern District of Ohio questioned whether a defendant's one-on-one online chats with an FBI agent constituted making a notice for child pornography.[178] This was the first case holding that 18 U.S.C. § 2251(d)(1)(A) clearly intended to include any kind of notice.[179] Unlike the prior cases outlined above, the facts of *United*

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[170] *Id.* at 918.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 919.

[175] *Cox*, 963 F.3d at 923.

[176] *Id.* at 919–20.

[177] *Id.* at 925.

[178] *See* United States v. Sammons, No. 2:19-cr-107, 2020 U.S. Dist. LEXIS 191600, at *12 (S.D. Ohio Oct. 15, 2020).

[179] This case was decided in October of 2020, after the decision and revision of *Caniff*. The *Sammons* court criticized *Caniff II* and the court's interpretation of notice. *Id.* at *18–22. Three months after the *Caniff II* decision, the Eleventh Circuit found one-to-one text messages sufficient for a conviction under § 2251(d). *Id.* at *15–16. The court made no mention of the holding in the 2020 *Caniff* decision or tried to rationalize the differences in the holding. *Id.*

States v. Sammons are the most analogous to the private, person-to-person text messages discussed below in *United States v. Caniff*.[180]

In *Sammons*, the defendant began a conversation with FBI Special Agent Richard Hurst on a social media mobile application about their "mutual sexual interest in children."[181] Sammons admitted to abusing a six-year-old family member, and Hurst, in an effort to build a rapport, disclosed he had abused a fictitious minor in his family.[182] After sharing these details, Sammons offered to share his family member with Hurst before moving their conversation to the Kik mobile application.[183] The two began conversing about videos they each had and were willing to share.[184] This ultimately led to Sammons asking for photos of Hurst's fictitious family member and sending photos of his six-year-old family member in a bathing suit.[185] Sammons had similar conversations with another user on Kik offering to share videos of minors.[186] As a result, Sammons was indicted for making a notice for child pornography in violation of 18 U.S.C. § 2251(d), along with several other charges.[187]

The crux of Sammons's argument stemmed from the belief that notice did not "apply to non-public, one-to-one communications, and the rule of lenity should be applied in his favor."[188] The court sought to read the words of the statute while applying "straightforward and commonsense meanings."[189] The court was not convinced that notice was limited by audience size.[190] The court observed that none of the dictionary definitions of notice referenced

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[180] *Compare Sammons*, 2020 U.S. Dist. LEXIS 191600 (involving communication that began on a social media application before moving the private conversation off the application) *with Caniff I*, 916 F.3d 929, *and Caniff II*, 955 F.3d 1183, 1185 (11th Cir. 2020) (involving communication that started on an anonymous social media application before beginning private, person-to-person communication).

[181] *Sammons*, 2020 U.S. Dist. LEXIS 191600, at *2.

[182] *Id.*

[183] *Id.*

[184] *Id.* at *3–4.

[185] *Id.* at *4.

[186] *Id.* at *4–6.

[187] *Sammons*, 2020 U.S. Dist. LEXIS 191600, at *7–8.

[188] *Id.* at *13. Sammons made the same arguments that were made in the 2019 *Caniff* dissent and the 2020 *Caniff* majority. *See Caniff I*, 916 F.3d at 942–46 (Newsom, J., dissenting); *Caniff II*, 955 F.3d at 1185.

[189] *Sammons*, 2020 U.S. Dist. LEXIS 191600, at *17 (internal quotation marks omitted) (quoting Black v. Pension Benefit Guar. Corp., 973 F.3d 576, 581–82 (6th Cir. 2020)).

[190] *Id.* at *19.

audience size or required a public component to the communication.[191] Ultimately, the court held that the use of notice in 18 U.S.C. § 2251(d) was sufficiently broad to encompass one-on-one Kik chats because to make a notice was synonymous with "notify," not advertisement.[192] Notifications can be personal and so can a notice under18 U.S.C. § 2251(d).

2. Challenging the Definition of Notice: *United States v. Caniff*

United States v. Caniff, along with *Cox*, highlights the uncertainty circuit courts have in determining Congress's intent by including both advertisement and notice in 18 U.S.C. § 2251(d). In 2019, the Eleventh Circuit, in *United States v. Caniff* held that notice, as written in 18 U.S.C. § 2251(d), includes private person-to-person text message requests for child pornography to a person believed to be a minor.[193] However, in 2020, the Eleventh Circuit reviewed and reversed its decision.[194]

In March 2016, thirty-two-year-old Matthew Caniff responded to a non-suggestive photo posted by a "thirteen-year-old girl" on an app that allowed anonymous communication between users.[195] Caniff exchanged several messages with "Mandy" before moving to private text messages.[196] After a series of text messages, Caniff sent unsolicited photos of himself and asked her to do the same.[197] He was arrested and charged with three child pornography production offenses including "making a 'notice'" seeking to receive child pornography, in violation of 18 U.S.C. § 2251(d)(1)(A).[198] At trial, he was convicted on all counts.[199]

During jury deliberation, a question arose regarding the definition of

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[191] *Id.* at *18–19 ("As the *Cox* court observed, none of these definitions makes reference to an audience size, or limits the word's meaning to publicly available communications.").

[192] *Id.* at *20–22 ("The statute communicates to the reader that a 'notice' is different from an 'advertisement' by use of the disjunctive 'or.'"). Additionally, "'make a notice' is synonymous with 'notify'—a word regularly used by the average speaker of American English to describe both private and public communications." *Id.* at *21–22.

[193] *Caniff I*, 916 F.3d 929, 930.

[194] *Caniff II*, 955 F.3d at 1185.

[195] *Caniff I*, 916 F.3d at 930–31; *Caniff II*, 955 F.3d at 1185 ("As part of the operation, FBI Special Agent Abbigail Beccaccio posed as 'Mandy,' a thirteen-year-old girl, on 'Whisper.'").

[196] *Caniff I*, 916 F.3d at 930–31; *Caniff II*, 955 F.3d at 1185–86.

[197] *Caniff I*, 916 F.3d at 931; *Caniff II*, 955 F.3d at 1186.

[198] *Caniff I*, 916 F.3d at 930–31; *Caniff II*, 955 F.3d 1185–86.

[199] *Caniff I*, 916 F.3d at 930–32; *Caniff II*, 955 F.3d at 1187.

notice within the charged statute.[200] However, the trial court did not provide a definition.[201] Because Congress declined to provide a definition for the term "notice," the appellate court looked to the ordinary, everyday meaning of the word.[202] Caniff's argument centered around the belief that notice must be sent to the general public and private text messages do not fit within the meaning of notice as provided by the statute.[203] Ultimately the court disagreed and held that "notice," as provided in the statute, was broad enough to include private, person-to-person text messages.[204]

In 2020, the Eleventh Circuit reconsidered *United States v. Caniff* and vacated its prior decision.[205] In deciding that the definition of notice did not include private communication, the court used many of the same techniques used in the prior decision to determine its meaning.[206] The court's rationale was similar to its 2019 decision. However, this time it reached the exact opposite result.[207] Ultimately, the court held that "knowingly mak[ing] . . . any notice . . . seeking or offering [child pornography]" is not applicable to private, person-to-person text messages.[208]

C. *Statutory Interpretation to Clarify the Definition of Notice*

Because the text of 18 U.S.C. § 2251(d) provides little to no context for the meaning of "notice" or "advertisement," the federal courts have used cases, as discussed above, to define the terms. The courts that have interpreted the definition of notice or advertisement utilized a variety of canons of statutory interpretation.[209] Some of these canons include ordinary meaning, whole act,

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[200] *Caniff I*, 916 F.3d at 932 ("Jurors deliberated for thirty minutes before they sent the court a question, inquiring: 'What is the definition of the term "notice" in Count Two, or should we determine the definition?'").

[201] *Id.*

[202] *Id.* at 933.

[203] *Id.*

[204] *Id.* at 936.

[205] *Caniff II*, 955 F.3d at 1185.

[206] *Id.* at 1192.

[207] *Compare Caniff I*, 916 F.3d at 931 (holding that private, person-to-person communication does constitute notice under 18 U.S.C. § 2251 (d)) *with Caniff II*, 955 F.3d at 1186 (holding that holding that private, person-to-person communication does not constitute notice under 18 U.S.C. § 2251 (d)).

[208] *Caniff II*, 955 F.3d at 1192 (alterations in original).

[209] *See generally* United States v. Grovo, 826 F.3d 1207, 1218 (9th Cir. 2016); United States v. Gries, 877 F.3d 255 (7th Cir. 2017); United States v. Cox, 963 F.3d 915 (9th Cir. 2020); United States v. Orr, 819 F. App'x 756 (11th Cir. 2020); United States v. Sammons, No. 2:19-cr-107, 2020 U.S. Dist. LEXIS 191600 (S.D. Ohio Oct. 15, 2020).

and *noscitur a sociis*.[210] While courts used these canons, there are several others that could have been used to reconcile the gaps that still exist in the definition of notice. However, statutory canons are not mechanical rules that provide assurances as to the interpretation of the law.[211] They are interpretive in nature and allow judges to gain insight into statutes.[212]

1. Ordinary Meaning of Notice and Advertisement

When determining the definition of "advertisement" and "notice," the courts began by looking at the ordinary meaning.[213] The ordinary meaning is the anchor for statutory interpretation.[214] The ordinary meaning rule applies the meaning "a reasonable reader would derive from the text of the law."[215] However, there is no standardized method for how judges should go about determining a statute's meaning.

Judges and laypeople interpret the meaning of words similarly.[216] A study conducted by Professor Kevin Tobia showed that judges and laypeople, along with law students, similarly categorized certain specific terms.[217] Therefore, judges should provide a fair reading of the statute's language "as it would be understood by the audience" of the statute—the general public.[218] This process often starts by turning to the dictionary definition of the word in question.

In *United States v. Caniff*, the court sought to determine if the ordinary meaning of advertisement was broad enough to include private, person-to-person text messages.[219] The ordinary meaning of "advertisement" is "a public, and typically commercial, statement."[220] An advertisement is not limited to communications that are "published in the press or broadcast over

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[210] *Caniff II*, 955 F.3d at 1188–1190.

[211] WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 20 (2016).

[212] *Id.*

[213] *Caniff II*, 955 F.3d at 1187–88; United States v. Gries, 877 F.3d 255, 260 (7th Cir. 2017); United States v. Franklin, 785 F.3d 1365, 1367–68 (10th Cir. 2015).

[214] ESKRIDGE, *supra* note 211, at 34–35.

[215] *Id.* at 33.

[216] *See* Anita S. Krishnakumar, *Metarules for Ordinary Meaning*, 134 HARV. L. REV. F. 167 (2021).

[217] The judges, laypeople, and law students were asked to categorize specific items, like car, bus, canoe, and rollerblades, into vehicle or nonvehicle. Kevin P. Tobia, *Testing Ordinary Meaning*, 135 HARV. L. REV. 726, 766–67 (2020).

[218] ESKRIDGE, *supra* note 211, at 43.

[219] *Caniff II*, 955 F.3d at 1187–88.

[220] *Id.* at 1188.

the air."[221] As the court in *United States v. Grovo* held, an advertisement requires "some public component" but does not require that the communication target the "public as a whole."[222] When Congress passed 18 U.S.C. § 2251 in 1986, one of the definitions included in *Webster's Third New International Dictionary* was "a public notice."[223] The definitive feature of an advertisement is that the subject of the advertisement is brought to the attention of the audience.[224]

Because private text messages are not public or commercial, they do not fit under the ordinary meaning of advertisement. If courts cannot reconcile a defendant's actions under the interpretation of advertisement, then courts should determine whether the actions fall under notice. The dictionary provides many definitions of notice.[225] *Black's Law Dictionary* defined "notice" as "[a] written or printed announcement."[226] The ordinary meaning established in *Gries* stated that "notice" was a "warning or intimation of something."[227] The court reasoned that the ordinary meaning was not limited to warnings made to the general public.[228] The court in *Sammons* likened notice to "to notify" and attributed "to notify" to both public and private communication.[229]

Unlike the *Caniff* court's definition of advertisement, notice does not contain a public component. The court in *Cox* found that the definition of notice made no reference to audience size.[230] In *United States v. Franklin*, the court cited eighteen definitions of notice, none of which required a public component.[231] Yet, the *Caniff* court in 2020 stated that some definitions of notice refer solely to public communication.[232] One definition the court cited

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[221] United States v. Grovo, 826 F.3d 1207, 1217–18 (9th Cir. 2016).

[222] *Id.* at 1218.

[223] United States v. Sammons, No. 2:19-cr-107, 2020 U.S. Dist. LEXIS 191600, at *20–21 (S.D. Ohio Oct. 15, 2020) (quoting *Advertisement*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986)).

[224] *Grovo*, 826 F.3d at 1217–18.

[225] *See generally Notice*, DICTIONARY.COM, https://www.dictionary.com/browse/notice (last visited Mar. 11, 2022).

[226] *Caniff I*, 916 F.3d at 933 (alteration in original) (quoting *Notice*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

[227] United States v. Gries, 877 F.3d 255, 260 (7th Cir. 2017) (quoting *Notice*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002)).

[228] *Id.*

[229] United States v. Sammons, No. 2:19-cr-107, 2020 U.S. Dist. LEXIS 191600, at *21–22 (S.D. Ohio Oct. 15, 2020).

[230] United States v. Cox, 963 F.3d 915, 921 (9th Cir. 2020).

[231] United States v. Franklin, 785 F.3d 1365, 1368 (10th Cir. 2015).

[232] *Caniff II*, 955 F.3d at 1188.

defined notice as "[a] displayed sign or placard giving news or information."[233] Other statutes, like 18 U.S.C. app. § 2G2.2(c)(1),[234] also include the word "notice," and courts have determined that notice includes "one-on-one communication [such] as emails and instant messag[es]."[235] Some courts, like the Third Circuit, include private text messages as a form of notice when applying sentencing guidelines.[236] Therefore, it is possible for courts to adopt an ordinary meaning of notice that includes one-to-one communication.

In 2019, the *Caniff* court, like most courts interpreting the definitions in 18 U.S.C. § 2251(d), found notice to include private, person-to-person communication.[237] However, when the *Caniff* court revisited its decision in 2020, the ordinary meaning of notice was no longer persuasive. In 2019, the dissent argued that because there were multiple ordinary meanings, the best meaning came from the context of the statute.[238] Evaluating the context of the statute was not necessary as the ordinary meaning established that notice or advertisement definitely encompassed public communication but did not require the public component. Therefore, whether notice encompassed private, person-to-person communication is clarified by the term's ordinary meaning.

2. Whole Act

The 2019 dissenting judges in *Caniff* was not convinced by the majority's focus on the ordinary meaning of notice but felt the definition of notice should be determined by the context provided by 18 U.S.C. § 2251(d) as a

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[233] *Id.* at 1189 (alteration in original) (quoting *Notice*, OXFORD ENG. DICTIONARY, https://www.oed.com/view/Entry/128591 (last visited Jan. 20, 2022)).

[234] U.S. SENT'G GUIDELINES MANUAL § 2G2.2(c)(1) (U.S. SENT'G COMM'N 2021). The application note to subsection (c)(1) construes a broad application of the statute. The note to subsection (c)(1) explains the following:

> The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by *notice* or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting live any visual depiction of such conduct.

Id. § 2G2.2 cmt. n.7(A) (emphasis added).

[235] *Caniff I*, 916 F.3d at 935–36.

[236] *Id.* at 936.

[237] *Id.*

[238] *Id.* at 942 (Newsom, J., dissenting).

whole.[239] Reading one term in one sentence of a statute in isolation does not always clear the ambiguity.[240] In these cases, courts should read the term in the context of the statute as a whole. The whole act rule provides an understanding of what the ordinary meaning of the statute might be.[241]

The 2019 dissent started its wholistic analysis of 18 U.S.C. § 2251(d) by looking at the words surrounding notice or advertisement.[242] The dissent focused on "make[]" in relation to "print[] or publish[]," which appear in the same series.[243] The use of print or publish eliminated the interpretation of "make" that included to make an offer or request.[244] The phrase "make any notice" is not one that an ordinary English speaker would use to communicate notice's ordinary meanings.[245] Ordinary English speakers would say they are "giving notice" when referring to a single private communication.[246]

Interpreting the whole act also requires evaluating the use of "or" in between notice and advertisement. The use of "or" may indicate that Congress intended notice and advertisement to have different meanings.[247] The ordinary meaning of "or" is almost always used to give the words separate meanings. The definition of advertisement clearly includes public communication but the disjunctive nature of "or" creates an impression that notice does not need to have a public component. If the courts had given more weight to the use of "or" in the statute, they would have construed advertisement to include public communication and notice to include communication to smaller circles or private communication.

3. *Noscitur a Sociis*

The canon of *noscitur a sociis* gives words grouped in a list related meanings.[248] The canon allows for words to have a more specific context by

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[239] *Id.*

[240] *See* ESKRIDGE, *supra* note 211, at 85.

[241] *Id.* at 87.

[242] *Caniff I*, 916 F.3d at 943 (Newsom, J., dissenting).

[243] *Id.*; *see also* 18 U.S.C. § 2251(d)(1).

[244] *Caniff I*, 916 F.3d at 943 (Newsom, J., dissenting).

[245] *Caniff II*, 955 F.3d 1183, 1189 (11th Cir. 2020).

[246] *Id.*

[247] *Id.* at 1191; United States v. Sammons, No. 2:19-cr-107, 2020 U.S. Dist. LEXIS 191600, at *20 (S.D. Ohio Oct. 15, 2020) ("The statute communicates to the reader that a 'notice' is different from an 'advertisement' by use of the disjunctive 'or.'").

[248] *Caniff II*, 955 F.3d at 1190 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 196 (2012)).

using neighboring words.[249] The Supreme Court has held that a list of three words is not long enough to employ the canon.[250] Given this, applying the canon to "make, print or publish" and "notice or advertisement" should not act as a tie-breaker for determining the meaning of a word in 18 U.S.C. § 2251(d).[251] Additionally, the terms sought to be interpreted by *noscitur a sociis* "must be conjoined in such a way as to indicate that they have some quality in common."[252]

A court applying *noscitur a sociis* to 18 U.S.C. § 2251(d) should examine all words in the phrase "make, print or publish" together to determine a related meaning.[253] The Eleventh Circuit considered all words in the phrase "make, print or publish" when it reexamined its *Caniff* decision in 2020.[254] The application is similar to applying the whole act canon. Words that follow "make, print or publish" should be given a public communication connotation. To "print" means "[t]o publish a book, article, music or the like."[255] To "publish" means "'[t]o make public announcement of' or 'to make known to people in general.'"[256] If the meaning of these two words are also to apply to "make," then the definition would only include public communication.

However, if the court followed the Supreme Court's precedent by not applying *noscitur a sociis* to fewer than three words, the fact that "print" or "publish" deals with public communication is irrelevant. The court in *Caniff* chose to use *noscitur a sociis* as a tie-breaker to determine which ordinary meaning of notice to apply.[257] Conversely, the other courts reasoned that the use of *noscitur a sociis* was not necessary to establish the ordinary meaning

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[249] *See* ESKRIDGE, *supra* note 211, at 408.

[250] United States v. Franklin, 785 F.3d 1365, 1369 (10th Cir. 2015) (citing Graham Cnty. Soil & Water Conservation Dist. v. United States, 559 U.S. 280, 288 (2010)).

[251] *Caniff II*, 955 F.3d at 1191.

[252] *Id.* at 1191 (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 196 (2012)). Congress's use of "or" highlights that it did not intend for "notice" and "advertisement" to have qualities in common. *Sammons*, 2020 U.S. Dist. LEXIS 191600, at *20.

[253] *See, e.g.*, *Caniff II*, 955 F.3d at 1189.

[254] *Id.*

[255] *Id.* at 1190 (alteration in original) (quoting *Print*, WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY (1944)).

[256] *Id.* (alteration in original) (quoting *Publish*, WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY (1944)).

[257] *Id.* at 1189–1192.

of notice within the statute.[258] Those courts used legislative intent and other canons of statutory interpretation.

IV. PROPOSAL

When Congress added section (d) to 18 U.S.C. § 2251 in 1986, it could not have fathomed the prevalent use of smartphones and instant communication in society.[259] At the statute's drafting, Congress envisioned criminalizing new technology like online bulletin boards.[260] However, including private, person-to-person communication, like text messages within 18 U.S.C. § 2251(d) aligns with Justice Scalia's idea that statutory language should "encompass[] broad language that comes to be applied to technology unknown when the operative words t[ake] effect."[261] Congress drafted 18 U.S.C. § 2251(d) in 1986 when cell phones were not as we know them today. Text messages were not sent until 1992.[262] Therefore, Congress had no way of knowing that cell phone communications needed to be written into the statute. Nonetheless, that should not prevent courts from reading 18 U.S.C. § 2251(d) to include private text messages that occur between abusers and their intended victims.

Sexual abusers are now able to, through the use of cell phones, isolate their victims in a way that a wide-reaching online notice cannot. Sexual abusers groom many of their victims as a means of gaining trust.[263] Grooming is covert and difficult to pinpoint and quantify.[264] One study found that 74% of victims knew their abusers, and 58% of those victims were abused by a family member.[265] Cell phones make this contact easier while maintaining the covert nature of grooming. The National Center for Missing and Exploited Children found that approximately 90% of reported sexual exploitation of children involved direct communication or attempted direct communication between

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[258] United States v. Franklin, 785 F.3d 1365, 1369 (10th Cir. 2015) (citing Graham Cnty. Soil & Water Conservation Dist. v. United States, 559 U.S. 280, 288 (2010)); *Caniff II*, 955 F.3d at 1191.

[259] *Caniff I,* 916 F.3d 929, 936 (11th Cir. 2019).

[260] *See* United States v. Franklin, 785 F.3d 1365, 1369–70 (10th Cir. 2015) (citing H.R. REP. NO. 99-910, at 6 (1986)).

[261] *Caniff I*, 916 F.3d at 934 (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 86–87 (2012)).

[262] Daniel Dudley, *The Evolution of Mobile Phones: 1973 to 2019*, FLAUNT DIGIT. (Nov. 27, 2018), https://flauntdigital.com/blog/evolution-mobile-phones/.

[263] ANNE-MARIE MCALINDEN, 'GROOMING' AND THE SEXUAL ABUSE OF CHILDREN: INSTITUTIONAL, INTERNET, AND FAMILIAL DIMENSIONS 22 (2012).

[264] *Id.* at 32.

[265] *Id.* at 29.

the abuser and the victim.[266]

By failing to include private, person-to-person text messages under the definition of notice or advertisement, courts have created a loophole that Congress could not have intended when writing an otherwise comprehensive set of child pornography regulations.[267] To keep in line with the original intent of Congress to eliminate the child pornography market, Congress must respond to court decisions that deviate from this purpose. For children to be adequately protected, 18 U.S.C. § 2251(d) must be interpreted broadly to include private, person-to-person text messages. Because the courts have not adopted a broad interpretation, Congress must amend the statute to define "notice" and "advertisement" to signal Congress's intent to protect children from offers to participate in the production of child pornography.

A. *Clarity is Crucial in Child Sexual Exploitation Statutes*

Vague and ambiguous statutes create problems for all citizens. Vague statutes are less likely to warn the public of what is prohibited by the statutes.[268] Vague statutes also "delegate enforcement and statutory interpretation to individual government officials" or the courts.[269] In addition, vague statutes limit individual freedoms because citizens are often fearful of violating the law when it is unclear what the law actually is.[270] In terms of the production of child pornography, notice or advertisement as used in 18 U.S.C. § 2251(d) does not provide adequate warning for the type of communication that is prohibited.

Section 2251(d)'s use of the term "notice" is vague. As is evident through the opinions in *United States v. Caniff*, the meaning of notice is not clearly defined.[271] The 2019 court found that the boundaries of notice included private, person-to-person communications, but the 2020 court found it did not.[272] Congress has the power to review both federal and Supreme Court decisions to acquiesce the decision of the court or change the legislation.[273] Today, Congress does not respond as often to Supreme Court decisions as it

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[266] NAT'L CTR. FOR MISSING & EXPLOITED CHILD., *supra* note 50, at 4.

[267] *Caniff I*, 916 F.3d at 936.

[268] Ilya Shapiro, *Vague Laws Defy the Rule of Law*, CATO AT LIBERTY BLOG (Dec. 17, 2009, 10:07 PM), https://www.cato.org/blog/vague-laws-defy-rule-law#:~:text=Vague%20laws%20involve%20three%20basic,interpretation%20to%20individual%20government%20officials.

[269] *Id.*

[270] *Id.*

[271] *See Caniff I*, 916 F.3d at 936; *Caniff II*, 955 F.3d at 1192.

[272] *Caniff I*, 916 F.3d at 936; *Caniff II*, 955 F.3d at 1192.

[273] U.S. CONST. art. III, § 1; ESKRIDGE, *supra* note 211, at 162.

has in the past.[274] When the courts previously interpreted parts of statutes involving child pornography, to the extent that it interfered with their intended purpose, Congress responded with amendments.[275]

Throughout the legislative history of child pornography statutes, Congress responded to Supreme Court decisions that impacted the effectiveness of federal statutes.[276] After *New York v. Ferber*, Congress reevaluated the Protection of Children Against Sexual Exploitation Act of 1977 and passed the Child Protection Act of 1984.[277] The Supreme Court again impacted the effectiveness of a federal statute after 1984, which, coupled with the Court's decision in *Osborne v. Ohio*,[278] led to the passage of the Child Protection and Restoration and Penalties Enhancement Act of 1990.[279] Congress made a habit of reexamining statutes weakened by Supreme Court decisions to the point where Congress's purpose for the acts were no longer fulfilled. However, Congress has not followed this precedent of reexamination in several years.

To ensure that the federal statute is being applied in various jurisdictions in a similar manner, Congress must respond to the statutory precedent created in various circuit courts. A federal statute should not be interpreted one way in the Eleventh Circuit and another way in the Tenth Circuit. The national and international nature of the child pornography industry demands that the federal statute have a consistent definition. To achieve a consistent definition, Congress must provide standardized definitions for both notice and advertisement within 18 U.S.C. § 2251(d).

B. *Proposed Amendment to 18 U.S.C. § 2251*

Congress can adopt a method of statutory interpretation that would allow the courts to apply the ordinary meaning intended by Congress. When a statute defines a word, an interpretation of the word should follow the ordinary meaning of its statutory definition. 18 U.S.C. § 2256 is the designated statute for definitions, which currently does not include definitions for notice and advertisement.[280] Congress must add both "notice" and "advertisement" to the definitions section of the statute to ensure that federal courts are interpreting 18 U.S.C. § 2251(d) as intended. Failing to do

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[274] ESKRIDGE, *supra* note 211, at 162.

[275] *See* Mazzone, *supra* note 81, at 174–197.

[276] *Id.* at 182.

[277] *Id.* at 185.

[278] Osborne v. Ohio, 495 U.S. 103, 121–22 (1990).

[279] Mazzone, *supra* note 81, at 191 & n.140.

[280] *See* 18 U.S.C. § 2256.

so creates a loophole for sexual abusers to prey on children privately and to make new pornographic material without facing the stiff punishments associated with the statute.

Federal courts agree that "advertisement" is a public, and usually, a commercial statement.[281] The definition that should be adopted into § 2260 is:

> A public notice or announcement, especially one promoting a service. A notice is public if it is directed at society as a whole or a smaller subset therein. Public notice or announcement includes but is not limited to communications initiated through public webpages, large internet chatrooms, online message boards, and file sharing sites.

This definition highlights that advertisement focuses on public communications and that another term, one separated by a disjunctive *or*, would mean something different. When crafting the definition, the drafters must consider the statutory canon of exceptions and provisos. This canon limits the general legislative language by carving out exceptions to the general rule.[282] Depending on how the statute is drafted, this can be either an exception or a provision. Regardless of how the definition is drafted, the exclusion should be read narrowly and should not be expanded unless it is expressly stated. Looking to the definition in § 2260, "public" should be further defined to clarify that public communication does not exclusively mean the general public at large. The definition should be expanded to include, as stated above, both society as a whole and a smaller subset of society.

The definition of notice should be determined by Congress. Congress should outline what is required to achieve the goal they originally set out to achieve, eliminating the child pornography industry. Given the advances in technology that now include text messaging, social networking sites, and messaging applications that allow for encrypted messages, it would make sense for the definition to cover what "advertisement" does not. Courts interpreting the statute seem to agree that the public component of advertisement is not necessary in the definition of "notice." However, the court in *Caniff* took it too far by saying notice is not necessarily public. Certainly, "public" cannot be private, person-to-person text messaging.

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[281] *See Caniff II*, 955 F.3d at 1188; United States v. Grovo, 826 F.3d 1207, 1218 (9th Cir. 2016).

[282] Charles J. Zinn, *Provisos and Exceptions in Statutory Composition*, 44 A.B.A. J. 269, 269 (1958).

Similar to the courts' efforts to determine the definition of notice, Congress should start its drafting by using the ordinary definition. The courts in *Caniff* and *Gries* found "notice," through one of its many definitions, to be a "notification or warning of something."[283] In this context, "warning" does not make sense, but a "notification" would fit with the idea of private, person-to-person text messages. When a text message, or any type of private message, is sent, it notifies the receiver about what the sender intends to communicate. Under 18 U.S.C. § 2251(d), the sender's intention is notification that they want to receive some form of sexually explicit material, that is, child pornography from the minor they sent the message to. This communication is similar to the cases previewed above that discussed the use of private bulletin boards and message boards, where they posted a targeted notification to have child pornography sent to them.

Congress should write the definition of "notice" to be a notification "given from one individual or entity to another."[284] If Congress chooses to make the definition of notice slightly broader yet chooses to not give it the full public component, Congress could further state that notice need not be communicated to the public at large or a subset of the public. To clear up the ambiguity surrounding the meaning of notice, Congress needs to craft a definition that conveys exactly how broad or narrow the meaning of notice should encompass. Therefore, the definition Congress should add to 18 U.S.C. § 2256, concerning notice is:

> Notice means a notification given from an individual or entity to another. The notification need not be given to the society as a whole or even to a small subset of society, private communication is sufficient. A notification can be given through private, person-to-person messaging, password protected message boards, close friends lists, and private email.

Adding definitions to the statute while choosing to leave the wording of the statute intact provides Congress with an effective way of ensuring the statute will be interpreted consistently among federal courts. Because the child pornography industry has become harder to contain and eliminate, having consistent definitions of what violates 18 U.S.C. § 2251(d) is crucial to ensure that the statute serves its intended purpose. By providing definitions that encompass both public and private communication, the

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[283] *Caniff I*, 916 F.3d at 933 (quoting *Notice*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010)); United States v. Gries, 877 F.3d 255, 260 (7th Cir. 2017) (quoting *Notice*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010)).

[284] *Caniff I*, 916 F.3d at 933.

statute will be able to keep up with advancements in technology. The cottage industry of child pornography provides enough challenges to law enforcement. Eliminating an entire classification of communication will create additional challenges for law enforcement when targeting producers and distributors of child pornography.

The dissent in *Caniff* argued that there were other sections of Title 18 that criminalized private, person-to-person communication in an effort to receive child pornography.[285] However, the dissent argued 18 U.S.C. § 2251 (a), which prohibits the persuasion, inducement, enticement, or coercion of "any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct," should have been used instead.[286] This statute would not adequately solve the problem that statutory definitions were not added for notice and advertisement. Section 2251(a) focuses on soliciting a minor to produce child pornography, which does not capture those looking to receive child pornography from another individual who already possesses it. The Eleventh Circuit has created a dangerous precedent because sexual predators are now able to freely text each other privately without any consequences. This cannot be what Congress intended when drafting 18 U.S.C. § 2251(d). Therefore, Congress must redraft 18 U.S.C. § 2251(d) because courts have judicially altered Congress's intent.

V. CONCLUSION

Millions of children fall prey to sexual predators each year.[287] The unknown number of childhood sexual exploitation victims are plagued by a record of their sexual abuse circulating on the internet forever.[288] The rise of the internet gave the child pornography industry the ability to create and distribute child pornography across the globe.[289] Without a statute to convict these sexual predators, the number of children victimized will continue to rise.

Congress has addressed the child pornography problem by passing numerous statutes expanding the protections afforded to children. Of those

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[285] *Caniff I*, 916 F.3d 929, 947 (Newsom, J., dissenting).

[286] 18 U.S.C. § 2251(a).

[287] *Operation Predator—Targeting Child Exploitation and Sexual Crimes*, U.S. IMMIGR. & CUSTOMS ENF'T (June 25, 2012), https://www.ice.gov/factsheets/predator. Sexual exploitation is defined as the "actual or attempted abuse of a position of . . . power, or trust for sexual purposes." WORLD HEALTH ORG., SEXUAL EXPLOITATION AND ABUSE, https://www.who.int/docs/default-source/documents/ethics/sexual-exploitation-and-abuse-pamphlet-en.pdf?sfvrsn=409b4d89_2.

[288] U.S. DEP'T OF JUST., *supra* note 3, at 72.

[289] Henzey, *supra* note 37, at 6.

federal statutes, 18 U.S.C. § 2251(d) has increased the severity of violations involving the production of child pornography to protect children from offers to participate in child pornography. Congress previously kept an eye on judicial decisions to ensure that the intent of the statute remained unchanged. However, in recent years Congress failed to keep the same attentive eye and allowed federal courts to interpret statutes aimed at addressing child pornography without much regard for the true purpose of the statute.

Few federal courts have evaluated whether an individual knowingly made a notice to receive child pornography under 18 U.S.C. § 2251(d). In one case, the Eleventh Circuit reexamined one of its previous decisions and, in doing so, undercut the legislative intent of 18 U.S.C. § 2251(d) in a way that no other circuit court had done previously. The ambiguity surrounding the meaning of notice or advertisement hinders the statute's effectiveness in eliminating the child pornography industry. Congress must amend the statute to define notice or advertisement to signal Congress's intention of protecting children from offers to participate in child pornography.